

CASE NO.

VOL. NO.

PAGE

VERA AUDREY SCHWARTZ
and JAMES EDWARD SCHWARTZ,
by his litigation guardian, Vera
Audrey Schwartz

- and -

WILLIAM L. RYAN, Q.C., and
WILLIAM SCHWARTZ,
EXECUTORS OF WILLIAM
EDWIN SCHWARTZ,
DECEASED, WILLIAM
SCHWARTZ, JULIE SCHWARTZ
and KENNETH SCHWARTZ

(Appellants)

(Respondents)

CA162086
CA 163291
CA 163292

Halifax, N.S.

Freeman, J.A.

[Cite as: Schwartz v. Ryan, 2000 NSCA 82]

APPEAL HEARD:

June 1, 2000

JUDGMENT DELIVERED:

June 20, 2000

SUBJECT:

1. Discovery of Documents; Implied Undertaking; Negotiation Privilege; 2. Removal of Litigation Guardian; 3. Removal of Solicitor of Infant Litigant.

SUMMARY:

Husband died while divorce proceedings were pending, leaving residue after settlement of wife's matrimonial property claim to three children of earlier relationships and expressing intention that child of last marriage would receive his fair share from his mother's share. The widow Vera Schwartz continued proceedings under **Matrimonial Property Act** and **Testators' Family Maintenance Act** on her own behalf and under **Testators' Family Maintenance Act** on behalf of her son, who was born in 1983. A conflict was perceived between Mrs. Schwartz's interests and her son's and she applied to be replaced or removed as guardian; her lawyer, who had acted for both, applied to be released as solicitor for the son. Before the husband's death a chartered accountant prepared a report from materials provided by the husband explaining a reduction of about a million dollars in the value of the assets during the seven years preceding the divorce. The report was provided by the husband's solicitor to the wife's. Mrs. Schwartz applied for production of the report and the supporting documents in the proceedings involving the estate. Appeals from interlocutory judgments involving three separate issues were heard together.

ISSUES:

1(a) Did the chambers judge err in holding that the accountant's report

and supporting documents were subject to an implied undertaking that it would not be used in proceedings other than the divorce matters;

1(b) Were the report and documents subject to a privilege attaching to materials supplied in settlement negotiations, as the respondents asserted under a notice of contention?

2. Did the chambers judge err in refusing to remove the appellant widow as litigation guardian when plans collapsed to replace her with a friend or alternately by the Public Trustee?

3. Did the chambers judge err in refusing the application of the appellants' counsel to be removed as solicitor for the infant son because of the conflict between the son and the mother?

RESULT:

1(a) The appeal was allowed with costs; the implied undertaking did not apply to materials which were not compelled by discovery but were divulged, or when they were for use in a second matter closely related to the first;

1(b) The notice of contention was dismissed. The respondent did not discharge the onus of proving an intention that the materials would not be disclosed to the court, or that the purpose of the communication was to effect a settlement.

2. The appeal was allowed with costs and it was ordered that Vera Schwartz be removed as her son's litigation guardian. The son was under the protection of the court and it was inappropriate to require him to proceed to trial in a conflict situation.

3. The appeal was allowed with costs. It was not ethically tenable for the same lawyer to represent Mrs. Schwartz and her son when their interests were in conflict.

It was ordered that proceedings be stayed between Mrs. Schwartz and the Estate until a litigation guardian was appointed or her son had his nineteenth birthday.

This information sheet does not form part of the court's decision. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 11 pages.