Docket No.: CA 162086
CA163291
CA163292
Date: 20000620

NOVA SCOTIA COURT OF APPEAL

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

Freeman, Bateman and Hallett, JJ.A.

BETWEEN:

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

Appellants

- and -

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

Respondents

REASONS FOR JUDGMENT

Counsel:	Hugh Wright and Peter Bryson for the appellants John MacDonell for the respondents
Appeal Heard:	June 1, 2000
Judgment Delivered:	June 20, 2000
THE COURT:	Appeals allowed with costs per reasons for judgment of Freeman, J.A.; Bateman and Hallett, JJ.A. concurring.

FREEMAN, J.A.:

[1] The appellant, Vera Audrey Schwartz, began proceedings for a divorce from William Edwin Schwartz, her husband of 13 years, together with a claim respecting collateral issues, in December, 1993.

[2] Proceedings were still pending when Mr. Schwartz died on February 24, 1997, leaving a will executed in December, 1993, after divorce proceedings began. In it he stated that he was making no provision for his wife or their minor son, James Schwartz, "on the assumption that they will, as a result of the aforesaid proceedings, receive their fair share of my assets". After small bequests he left the residue of his substantial estate to the three children he had by former relationships.

[3] Mrs. Schwartz continued her claim under the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275, as amended, against the estate and beneficiaries. She brought a claim under the **Testators' Family Maintenance Act**, R.S.N.S. 1989, c. 465 on behalf of herself and James Schwartz, who was born February 25, 1983, as his guardian *ad litem*. She and James Schwartz were both represented by Hugh Wright as solicitor in the proceedings involving the estate.

[4] The matter has been set for trial of the various competing claims in August, 2000. Three interlocutory applications have resulted in appeals which were heard

together on June 1, 2000:

1. Justice Robertson dismissed an application by Mrs. Schwartz for disclosure of financial documents relating to the value of the estate. It is alleged that she erred in invoking the “implied undertaking rule” to refuse to allow production of the chartered accountant’s report and source documents explaining a substantial decrease in the value of Mr. Schwartz’s main investment account from January 1, 1987 to December 31, 1993. The respondent estate filed a notice of contention submitting that she should also have disallowed production of the documents because they were prepared in contemplation of legal proceedings and submitted without prejudice to promote a settlement.

2. Mrs. Schwartz applied to be removed as guardian *ad litem* for James because of conflicts in their interests had become apparent. It was alleged that Justice Moir erred in refusing to remove her until a replacement was available.

3. Mr. Wright’s application to be removed as solicitor for James, acting through Mrs. Schwartz, as a result of the same conflicts was dismissed by Justice LeBlanc. It was alleged that he erred in refusing to do so while Mrs. Schwartz remained guardian.

1. The Documents

[5] Justice Robertson denied Mrs. Schwartz access to (1) an accountant's report which had been provided to her during the divorce proceedings, and (2) the supporting documents on which the accountant had relied in preparing the report.

[6] Apart from real estate, Mr. Schwartz's assets included an investment account with a brokerage firm, Nesbitt Burns, which totaled $3,784,046 on January 1, 1987 but which had shrunk to $2,035,036 by December 31, 1993. Part of the difference in value reflected a $555,000 withdrawal from the fund to make a mortgage investment, which remained an asset.

[7] Mr. Barry F. Travers, C.A, a partner with KPMG Peat Marwick Thorne Chartered Accountants, analyzed the operation of the account and prepared a report at the request of Mr. Schwartz's counsel in the divorce proceedings. In the report, dated March 20, 1995, Mr. Travers noted that there appeared to be some confusion or doubt on the part of Mrs. Schwartz or her solicitors as to the accuracy of the financial disclosure by Mr. Schwartz. He reported a decline in the market value of the investments of $262,546. The rest of the reduction in worth:

> . . . indicates an excess of cash outflow over inflow for the seven-year period under review. Based on the detailed information provided by Mr. Schwartz and our understanding of the properties which Mr. Schwartz was maintaining during those years (2 Lodge properties, Black Point and a Florida condo), it would appear that the living expenses and capital expenditures as summarized on Schedule II are within reason and are supportable.
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> . . .
>
> We have concluded that the detailed reconciliation of liquid assets, which we performed, does support the net difference in the fair market value of assets as reported by Mr. Schwartz within a reasonable margin of error.

[8] The appellants seek disclosure of the documents reviewed by Mr. Travers in preparing the report to support their argument that the Nesbitt Burns account was used for household and living expenses and was therefore not a business asset, as the estate contends. While the status of the account under the **Matrimonial Property Act** remains undecided the evidence is clearly relevant. The report was provided to Mrs. Schwartz and David Green, the solicitor then representing her during the divorce proceedings.

[9] In refusing to order disclosure of the documents Justice Robertson found that

> . . . this report falls under the implied undertaking rule. Mr. Travers' report was a document that cannot be used from one proceeding for the purposes of another proceeding. Mr. Travers' report was prepared for counsel in a divorce action at counsel's request. It was divulged in the course of the trial to negotiate a reasonable settlement in that divorce action. And, it should not now be used for the purposes of this proceeding which is a wholly different action or proceeding.

[10] The implied undertaking rule was stated by John Laskin, now of the Ontario Court of Appeal, in *The Implied Undertaking in Ontario* (1989-1990), 11 The Advocates' Quarterly at p. 298 as follows:

> 1.There is an implied undertaking by a party to whom documents are produced that he or she will not use them for collateral or ulterior purposes; any such use of the documents is a contempt of court.
>
> 2.There is an implied undertaking by a party conducting an oral examination for discovery that the information so obtained will not be used for collateral or ulterior purposes; any such use is a contempt of court.

[11] This statement was adopted by Justice Chipman in **Sezerman v. Youle** (1996), 150 N.S.R. (2d) 161 (N.S.C.A.) The rule applies to "documents and information required to be disclosed" (Laskin) or "compelled in the discovery process" (Chipman,

J.A.) See also **Riddick v. Thames Board Mills**, [1977] 3 All E.R. 677 (C.A.).

[12] In the Laskin article **Derby & Co. v. Weldon** (unreported), The Times, London, October 20, 1988, was cited for authority that the rule does not apply in the case of voluntary disclosure of documents:

> The court stated:
>
> The voluntary disclosure of documents in the course of interlocutory proceedings by a party does not come within the rationale which is the basis of the implied undertaking relating to documents disclosed on discovery. In relation to documents voluntarily disclosed the Court has not invaded the privacy of the party. The party has, for his own purposes in defending a case, decided himself to use the documents rather than maintain his privacy. It is the party who has destroyed the privacy of the document, not the Plaintiff or the Court.

[13] The appellant cites **Crest Homes plc v. Marks,** [1987] 2 All E.R. 1074 in support of her submission that the implied undertaking does not apply when material divulged in one case is sought to be produced in a closely related case. In that case it was held that where it was “adventitious” or a “pure technicality” that there happened to be two actions rather than one, it would cause no injustice to the appellants to release or modify the implied undertaking.

[14] In my view Justice Robertson erred in applying the implied undertaking rule to the present facts. The report was not compelled by the discovery process but created at the direction of the husband’s counsel and voluntarily delivered to advance his purposes. In my view Mrs. Schwartz’s claims against the estate for a division of matrimonial property are a continuation of the claims she began for a share of matrimonial assets collateral to the divorce action. The same investment fund was

central to both matters and Mrs. Schwartz has been seeking her entitlement under the same statute, the **Matrimonial Property Act**, continuously since December, 1993; the balance of justice between the parties favours full disclosure of the facts. I would allow the appeal on this issue.

[15] I would dismiss the notice of contention. The respondent submits that the Travers' report and the supporting documentation were submitted on a "without prejudice" basis, although it was not so marked, and invokes the privilege arising out of settlement negotiations.

[16] The respondent cites **The Law of Evidence in Canada**, Sopinka, Lederman and Bryant, 1st ed., 1992 at p. 722 for the conditions which must be met for recognition of privilege arising out of settlement negotiations:

> There are a number of conditions that must be present for the privilege to be recognized:
>
> (a) a litigious dispute must be in existence or within contemplation;
>
> (b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and,
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

[17] These conditions were invoked to defeat a claim of privilege in **Costello v. Calgary (City)** (1998), 152 D.L.R. (4th) 453 (Alta C.A.) at p. 489.

[18] The second and third conditions were not met. The primary purpose of the communications from Mr. Ryan to Mr. Green forwarding the Travers' report was further

disclosure for the purpose of corroborating the disclosure made by Mr. Schwartz as to the value of his assets as of December 31, 1993, and why they had decreased in value from January 1, 1987. A reduction resulting from encroachments in capital on the order of a million dollars during that period gives rise to concerns. The purpose of the disclosure was to respond to legitimate inquiries. The covering letter to Mrs. Schwartz's counsel was not marked "without prejudice", and I would be reluctant to read in that caveat in the present circumstances. There is no basis for inferring an intention that the report was forwarded with the intention that it would not be disclosed to the court in the event negotiations failed. Nor is it at all clear that the communication was made in an attempt to effect a settlement. The estate has not met the burden of showing that this was a privileged communication.

[19] Vouchers and other documents in a party's possession related to expenditures from an account alleged to be matrimonial property would not be privileged in proceedings under the **Matrimonial Property Act**. Delivery of those documents by the party to his solicitor, to be further delivered to a chartered accountant to be summarized and explained, does not make them privileged. If it did, discovery could be frustrated in almost every case.

[20] I would therefore allow the appeal on this issue and order the production of (1) the Travers' report dated March 20, 1995, and (2) the documents relied upon by Mr. Travers in the preparation of the report. I would fix costs of the first issue on appeal and the notice of contention payable forthwith by the estate to the appellant in the amount of

$1,000.

2. Conflicting Interests of Guardian and Ward

[21] The conflict between Vera Schwartz and James results from the differences in approach between the two statutes under which they are claiming, Mrs. Schwartz under the **Matrimonial Property Act** and the **Testators' Family Maintenance Act** and James under the **Testators' Family Maintenance Act** alone. Mr. Wright summarizes the nature of the conflict in the appellants' factum:

> There is therefore an actual conflict between the interests of Vera and James. Vera is entitled to claim that all Estate assets are matrimonial assets and therefore subject to division. James is entitled to take the position that some or all of the Estate assets are not matrimonial assets. Vera and the Defendants have taken the position that any matrimonial assets shall be divided evenly. James may choose to take a different position. Vera may argue that certain estate assets are overvalued or undervalued. James may choose to take a different position. The theory of the case advanced by the Estate is that the Will should be upheld and James is only entitled to receive through his mother. Requiring James to act through Vera supports the Estate's theory of the case and deprives James of an ability to make a truly independent claim.

[22] On a chambers application for a change of guardian brought in Supreme Court by Mr. Wright, Justice Moir agreed on February 29, 2000 that a conflict existed but he made no order. At that time Ms. Carol Dodds, a teacher and family friend, had agreed to act as litigation guardian provided she was protected from personal liability for costs and her expenses were paid. The public trustee considered acting on a similar basis.

[23] When the matter next came before Justice Moir on April 18 it was clear that the solicitors for the estate refused to give an undertaking not to claim costs in a personal capacity against a new guardian, and objected to assuming the guardian's expenses on

behalf of the estate. The estate's position was that Mrs. Schwartz should assume the guardian's expenses from funds previously advanced to her. The potential guardians ceased to be available. Justice Moir stated:

> In my opinion, if the choice is between a guardian ad litem, with a conflicting interest of the kind demonstrated and having no guardian ad litem at all the former is in the interest of the young Mr. Schwartz.
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> . . .
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> It appears that Ms. Schwartz has effectively represented interests of the son in the Testator Family Maintenance Act application for a number of years, despite the conflict.
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> . . .
>
> [I]t appears to me that steps can be taken to keep the conflict in check. Consequently, the only appropriate order is one which dismisses the application.

[24] With respect, I disagree. It has been long established that the guardian *ad litem* has a duty to "take all due steps to further the interests of the infant". See **Re Whittal,** [1973] 3 All E.R. 35 at 37. (Ch D). The Supreme Court of Nova Scotia held in **Legere v. Hamilton et al.** (1992), 111 N.S.R. (2d) 411 that a guardian *ad litem* has a responsibility of securing the best possible result in the litigation for the infant.

[25] Despite the confidence in Mrs. Schwartz expressed by the chambers judge, it leaves both her and James in an impossible position if she can only advance his interests at the expense of her own. James has filed an affidavit expressing a divergence of interests with his mother and indicating that he wishes to have independent representation. The conflicts outlined by the appellants' factum are substantial ones; it is not in the best interests of James as an infant - or his mother - to refuse to remove her as guardian so an independent guardian may be appointed. In the exercise of its *parens patriae* jurisdiction, the court must ensure that James' interests

are effectively protected or promoted.

[26] Rule 6 of the ***Civil Procedure Rules*** requires that a person under a disability must commence or defend a proceeding by his litigation guardian. Any person may act as a litigation guardian, unless the court orders otherwise, and the guardian must act by a solicitor. The court's jurisdiction to make appropriate orders for payment of the guardian's costs includes ***Civil Procedure Rule*** 63.11, which provides:

> 63.11 Where the court appoints a solicitor to be guardian ad litem of a person under disability, the court may direct that the costs incurred in the performance of the duties of the guardian are to be borne and paid by the parties or some one or more of the parties, or out of any fund in court in which the person under disability has an interest, and may give directions for the payment or allowance of costs as are just.

[27] While it may be possible to craft an order under which Ms. Dodds or the Public Trustee might be willing to act, or to appoint a solicitor to act in that capacity, that is not a matter for this court, which must consider only the removal of Mrs. Schwartz in the context of this appeal issue.

3. Removal of Mr. Wright

[28] Once the conflict of interest between Mrs. Schwartz and James was recognized, Mr. Wright was left in an ethically untenable position. It was an error on the part of Justice LeBlanc to require him to continue to act for both of them when their interests were known to be in conflict. He should have been removed as he requested to be.

[29] I would allow the appeals and order the removal of Mrs. Schwartz as litigation

guardian and Mr. Wright as solicitor for James. This leaves James Schwartz, an infant party to an action in which the trial date is fast approaching, without a guardian *ad litem* and without counsel. His interests must be protected. I would therefore order that all proceedings with respect to the estate of William Schwartz be stayed, with the exception of applications necessary to the appointment of a guardian *ad litem* and solicitor for James Schwartz and related orders for the payment of costs. The stay shall remain in effect until further order of the Supreme Court of Nova Scotia or a judge thereof following the appointment of a guardian *ad litem* for James Schwartz, or until after James Schwartz's nineteenth birthday.

[30] Costs, payable forthwith by the estate to Mrs. Schwartz, are fixed at $500 with respect to the removal of Mr. Schwartz and $500 with respect to the removal of Mr. Wright.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Hallett, J.A.