

SUPREME COURT OF NOVA SCOTIA

Citation: Day v. Day, 2009 NSSC 98

Date: 20090608

Docket: Hfx No. 225867

Registry: Halifax

Between:

Courtney Nicole Day and Joshua James Day

Plaintiffs

and

Marilyn Day

Defendant

and

Troy Day and Betty Laverne Day

Third Parties

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Judge: The Honourable Justice Gerald R P Moir

Heard: 17 and 18 November 2008 at Halifax

Subject: Trusts, implied, breach; Consent by beneficiaries' guardian; Discretion to forgive breach.

Summary: Defendant was the designated beneficiary under her brother's life policies, but she knew that her brother had been ordered to cause the proceeds to be used for two of his children, who were minors. The defendant paid most of the money for the two children, but she; 1) gave \$30,000 to their half-brother, 2) took \$30,000 for herself, and 3) lent some to herself. The mother of the children consented to the \$30,000 payments.

Issue: Whether the consent of the mother bound the children? Whether the discretion to excuse breach should be exercised?

Result: It was not disputed that the loaned money had to be paid back, but some details remained in issue. These were resolved. The mother was a guardian under s. 5 of the old *Guardianship Act*. A s. 5 guardian receives s. 8 power over property of the child. She, too, is a trustee. She does not have power to authorize a breach of trust. The payment to the half brother ought to be excused under s. 64 of the *Trustee Act*, but not the payment to the defendant.

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