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

D E C I S I O N

Judge: The Honourable Justice Gerald R P Moir

Heard: 17 and 18 November 2008 at Halifax

Counsel: Mr. Brian P Casey for the plaintiffs, Courtney Nicole Day and Joshua James Day
Mr. John Di Costanzo for the defendant, Marilyn Day
Mr. William L MacInnes, QC for the third party Troy Day
Ms. Betty Laverne Day, third party, acting on her own behalf

Moir J:

Introduction

[1] Unfortunately, the death of the plaintiffs' father, and the defendant's brother, led to disagreements among his children, sister, and former wife.

[2] Mr. Frank Day was obligated, under a 1998 corollary relief judgment, to maintain life insurance for the younger two of his three children, Courtney Day and Joshua Day.

[3] Mr. Day died in January of 2001. His oldest son, Troy Day, became his administrator. However, his sister, Marilyn Day now Marilyn Conrad, had control of the life insurance proceeds because she was the named beneficiary. She distributed the proceeds mainly to, or for the benefit of, Courtney and Joshua Day, but she also paid a substantial sum to Troy Day and used substantial sums for herself.

[4] Courtney and Joshua claim an accounting from their aunt. Ms. Conrad defends that claim and, alternatively, she claims reimbursement from her nephew, Troy Day, and former sister-in-law, Betty Laverne Day.

Life Insurance

[5] Mr. Frank Day and Ms. Betty Laverne Day were divorced by order made in December of 1998.

[6] Courtney and Joshua Day were twelve and ten when the divorce order was made. Custody was granted to Mr. Day. Mr. Troy Day was not a child of Laverne Day. He was a young adult in 1998 and was not a "child of the marriage" under the *Divorce Act*.

[7] The corollary relief judgment was granted on consent. So, in addition to being an order of the court, paragraph 5 is a term of an underlying agreement between Frank Day and Laverne Day. It reads:

> Each of the parties shall maintain their existing life insurance policies and name the children as beneficiaries with a designated trustee for as long as the children

> are children of the marriage within the meaning of the *Divorce Act*, it being intended that life insurance will be used by the trustee to maintain the children.

[8] As will be seen, this provision, in the circumstances, creates an actual trust of the insurance proceeds; a trust that is created by the policy holder, Frank Day or Laverne Day, in favour of Courtney and Joshua Day, to be administered by "a designated trustee" and used for maintenance of the children.

[9] When the divorce was granted, Mr. Day had two life insurance policies under which he had designated his sister, the defendant, as beneficiary. He had a group accidental death policy with CUMIS Life Insurance Company for $200,000 and a term policy with Primerica Life Insurance Company of Canada for $50,000 plus a maximum of another $10,000 for inflation.

[10] Mr. Day died in an accident just two years after the divorce, in January 2001. Courtney Day had just turned fifteen and Joshua Day was almost thirteen. The two policies that concern us had not been changed since 1996.

[11] The insurers paid $261,656.88 to Marilyn Conrad.

Distribution and Use of Proceeds

[12] Ms. Conrad had a very close relationship with her brother. She was much involved in his finances. Mr. Day's work as an equipment operator in pipeline construction often took him away from the Halifax area. Ms. Conrad had signing authority over Mr. Day's bank accounts, and she paid bills and made deposits for him when he was away.

[13] Ms. Laverne Day found the $60,000 Primerica policy when her ex-husband died. Although Ms. Conrad was named as beneficiary, Mr. Day explained that the policy was supposed to be used as maintenance for her children.

[14] Not long after Mr. Day's death, Ms. Laverne Day's lawyer, Mr. Raymond Riddell QC, advised Ms. Conrad by letter that "Under the terms of the Divorce Order, Frank was to have kept his life insurance policies in force and appointed the children as beneficiaries."

Shortly afterwards, Ms. Conrad's own lawyer, Mr. Di Costanzo, advised her to keep the life insurance proceeds separate in order to account "if the children were ultimately intended to be the beneficiaries".

[15] According to her evidence on cross-examination, Ms. Conrad did not receive the money for herself. "I was doing what Frankie wanted me to do with it." Although she was not specifically aware of the policies, she was in a good position to understand what her brother would have wanted. The money was to be used for the younger children, but Ms. Conrad felt she might also benefit herself and Troy Day.

[16] The $60,000 Primerica policy was found long before the $200,000 CUMIS policy, and the CUMIS policy came as a surprise. Ms. Conrad now felt justified in benefiting herself and Troy Day. She took slightly over $30,000 for herself on May 15, 2001 and she paid $30,000 to Troy Day on May 29, 2001. She seems to relate this to the proceeds being $60,000 more than originally expected. There was $10,000 of inflation protection from Primerica that was not noticed when the policy was first inspected, and the original CUMIS policy had been for $150,000.

[17] Also, Ms. Conrad kept the proceeds in a separate account but felt she could use the account to make loans to herself. She views payments made from that account for her personal purposes as loans, and deposits as repayments. In any case, the deposits are substantially less than the payments.

[18] There is no dispute about the deposits. By the end of the trial the parties seemed to be in agreement on most payments. There were, I believe, only three payments seriously in issue besides the two $30,000 payments. On those three, I make these findings:

(a) I am satisfied that $1,100 was paid on January 14, 2002 to Ms. Laverne Day and is not duplicated in accounts owed to counsel for representing her as guardian.

(b) I am satisfied that the $2,166.75 for installation of a septic tank is not duplicated.

(c) Ms. Conrad seeks credit for two payments she attributes to her brother's income tax liabilities. The administrator, Troy Day, and his

> wife, who also provided financial services, dispute that. In my assessment, Ms. Conrad has not established, on a balance of probabilities, that the money was paid for the benefit of the estate.

I am also satisfied that payments made for the benefit of the estate, such as to pay funeral expenses, are properly credited at two-thirds their value. That is the value the two younger children received as a result of those payments.

[19] Based on these findings, I calculate the unaccounted balance to be $11,722 aside from the issue of the $60,000 Ms. Conrad felt justified in distributing to herself and Troy Day. Counsel are free to provide further submissions if they detect an error in my calculations or if there is a seriously disputed payment I have overlooked.

The Two $30,000 Payments

[20] Ms. Laverne Day moved in with her children after their father died. The home had belonged solely to Mr. Day. He had not made a will and, so, title passed to his three children equally.

[21] Eventually, Mr. Troy Day was appointed administrator but, in the meantime, Ms. Conrad looked after her brother's bills and accounts, just as she had done when he was alive.

[22] It was Ms. Conrad who found the CUMIS policy. On her behalf, Mr. Di Costanzo made a proposal to Mr. Riddell and Ms. Foote, for Ms. Laverne Day and Mr. Troy Day. The $50,000 expected from Primerica (later $60,000 plus interest) would be used to fund investments of $25,000 each, to be paid to Ms. Courtney Day or Mr. Joshua Day on their twenty-fifth birthdays. The terms offered for the $150,000 expected from CUMIS (later $200,000 plus interest) read:

> The $150,000.00 insurance policy would be divided in the following manner:
>
> (a) An amount of $25,000.00 would be set aside for "Josh", to be used for his education or he would obtain the funds outright at the age of 25 years;
>
> (b) $25,000.00 would be set aside for "Courtney" to be used for her education or she would receive the funds outright at 25 years,

> (c) an approximate amount of $25,000.00 (depending on the value of the property) would be given to Josh and Courtney to be used to buy out Troy's share of the property;
>
> (d) an approximate amount of $25,000 would be retained by Marilyn [Conrad] for her own benefit;
>
> (e) an approximate amount of $30,000.00 would be required to pay funeral expenses and other Estate debts (since the assets may not be sufficient to cover these debts);
>
> (f) The balance of $20,000.00 would be set aside to be used on an ongoing bases for Josh and Courtney's maintenance (it would appear that financial support would be required for the next 3 to 4 years), after which time the children would either be employed or have access to the funds set aside for education.
>
> (g) It is my client's understanding that the minor children are entitled to CPP benefits and would obtain rental income for the upstairs unit. As well, there will be no need to obtain a Mortgage on the property, or sell the premises since funds from the policy are being used to payout "Troy's" share of the property;
>
> (h) The parties would renounce their rights to act as administrator of the Estate in favor of Marilyn [Conrad] (the Public Trustee would have to renounce on behalf of the infant children).

This proposal was prepared in February, a little over a month after Mr. Day died.

[23] The proposal went to Mr. Riddell first. He commented on it for Ms. Day, and then it was sent to Ms. Foote. Her client, Mr. Troy Day, was about to be appointed administrator. At the end of February, Ms. Foote advised that Mr. Day rejected the proposal.

[24] A similar agreement was in negotiation between Ms. Conrad and Ms. Day, through their lawyers, in the fall of 2001 after Mr. Troy Day's interests had been satisfied and released. However, a mysterious document emerged in the meantime.

[25] The insurance proceeds were paid to Ms. Conrad in April, 2001. With interest, they totalled $261,656. Ms. Conrad says she decided on a new proposal. Circumstances had changed. The proceeds were more than previously expected,

and Mr. Troy Day had advised that he did not want to sell his interest in his father's home at that time.

[26] According to Ms. Conrad, she discussed her proposal with Ms. Day who found it acceptable. Then Ms. Conrad drafted a document. It reads:

> I Marilyn [Conrad] feel being beneficiary of the following policies for my brother, Frank Day he would want me to do what was best for his children. Now that the Insurance Policy is an additional $60000 more than intended I feel that this extra money should be split amongst his 3 children. Please take the time to review my new proposal.
>
> | | |
> |---|---|
> | Troy Day- | $30,000.00 |
> | Josh Day- | $60000.00 (To be invested until the age of 25) |
> | Cortney Day- | $60000.00 (To be invested until the age of 25) |
> | Cortney Day- | $15000.00 (To be invested for college fund) |
> | Josh Day- | $15,000.00 (To be invested for college fund) |
> | Cortney & Josh- | $25000.00 ($400 maintenance payment per month until they are 18 Years of age) |
> | Cortney & Josh- | $25000.00 (This will be put aside for maintenance on the home for as Long as the children are living there) |
> | Marilyn [Conrad]- | $30,000.00 |

[27] According to Ms. Conrad, Ms. Day stopped by the stationary store where Ms. Conrad worked at the time to get reimbursed for some expenses of maintaining the two younger children. Ms. Conrad presented the draft, and she asked whether Ms. Day was "still alright with this". Ms. Day replied affirmatively and signed it. (It is not dated.)

[28] According to Ms. Conrad, signature by Ms. Day was essential to her paying $30,000 to Mr. Troy Day. She purchased a banker's cheque in late May 2001, Mr. Day signed a release shortly afterward, and Ms. Conrad made a record of the

payment later still. We do not know the exact date, but it must have been in the later half of May.

[29] Ms. Laverne Day disagrees with Ms. Conrad's testimony. She says she signed the document, but its importance is in handwriting on it. The document is on one page. There is a lot of space between the end of the text and Ms. Day's signature at the lower right corner. In that space four lines are written concerning payments made by Ms. Conrad to Ms. Day for a land survey, a four-wheeler for the children, school clothes, and, after Troy Day's position changed, money required to purchase his interest in the home.

[30] According to Ms. Day, she only signed the document to acknowledge the payments. She said Ms. Day required the signature for "accounting". According to Ms. Conrad she added the notes later and then sent the document to her lawyer for a proper trust agreement to be prepared.

[31] One cannot comfortably accept either account. Ms. Conrad's involves her own assertion that she created a false acknowledgement. Ms. Day's leaves one baffled that she would pay attention to the handwritten portion of the document and ignore the printed text. When the picture becomes complete, through an examination of the effort to provide a more sophisticated trust agreement in the fall of 2001, I am satisfied that Ms. Conrad's account is closer to what really happened.

[32] In August of 2001, Ms. Conrad signed a trust agreement prepared by Mr. Di Costanzo. Under this agreement Ms. Conrad would transfer $145,000 from the life insurance proceeds to herself and Ms. Laverne Day as trustees for the two younger children.

[33] The balance of the life insurance proceeds in Ms. Conrad's account was about $155,000 when she signed the trust agreement. She had made the $30,000 payments to herself and Troy Day and, otherwise, expenditures of about $47,000 appear to have been made for the benefit of the children. Implementation of the trust would have left $10,000 in Ms. Conrad's bank account. (There were outstanding funeral expenses approaching that sum.)

[34] In October of 2001, Mr. Riddell wrote to Mr. Di Costanzo providing some minor comments on the trust agreement and stating that he had sent it to Ms. Day for her comments. A revised agreement was prepared. Mr. Riddell then wrote, "I

have reviewed it with Laverne and have the following comments." The comments had only to do with providing Courtney Day's middle name, her date of birth, and a preferred way of referring to her in the agreement. Mr. Riddell concludes "The remainder of the Agreement is fine and ready to be signed by Laverne when appropriate."

[35] Despite her lawyer's communication, Ms. Day never signed the agreement. At discovery, she said the reasons for not signing were that she did not like the wording of it and she was getting along fine with Ms. Conrad anyway. There was no need for an agreement. At trial, she had a different recollection. She says she was awaiting confirmation of the date of the CUMIS policy. She thought Ms. Conrad claimed to be entitled to the insurance proceeds, and knowing the date of the policy would settle that.

[36] It is difficult to credit an assertion that a signature on a page with pertinent, printed text does not affirm the text. Ms. Day's assertion is made the less credible by her various explanations for her failure to execute the sophisticated trust agreement in the fall of 2001 and by her improbable assertion that she wanted information about the timing of the policies.

[37] I prefer the evidence of Ms. Conrad to that of Ms. Day on the subject of agreements about use of the insurance proceeds. I find Ms. Day agreed to the two $30,000 payments and signed the document prepared by Ms. Conrad to show her agreement with those payments and the payments for the children.

[38] Throughout, Ms. Laverne Day acted as, and was treated as, the representative of the children. She even signed a release of Troy Day on behalf of his brother and sister. I find Ms. Day knew of Ms. Conrad's proposals for dividing the insurance proceeds in February 2001 and May 2001, that Ms. Laverne Day spoke for the children often, and that Ms. Conrad thought Ms. Day had authority to do so. I also find that Ms. Day knew since February of 2001 that Ms. Conrad proposed to pay estate expenses from the insurance proceeds, and did so.

Implied Trust

[39] Ms. Conrad concedes that she accepted the insurance proceeds in circumstances under which they were subject to an implied trust. She says there is some uncertainty as to how much of the proceeds was subject to a trust because

there is some evidence that Mr. Day and Ms. Laverne Day may have considered the CUMIS policy to be worth $150,000 rather than the $200,000 to which it was increased at the time the divorce settlement was negotiated, and it appears they ignored the $10,000 inflation increase in the Primerica policy

[40] In my assessment, the trust is not tied to amounts of coverage. The parties were required to "maintain their existing life insurance policies". That obligation was not limited to specific amounts. They had to maintain their policies, no matter what the limits might be. At the time that obligation was imposed, the limits on Mr. Day's policies were $200,000, and $50,000 plus a maximum of $10,000 for inflation.

[41] I am satisfied that Ms. Conrad received all the insurance proceeds as trustee for Courtney and Joshua Day.

Does Laverne Day's Consent Bind Courtney and Joshua Day?

[42] The proceeds were received by Ms. Conrad in 2001, and she obtained Ms. Laverne Day's consent to the two $30,000 payments in that same year. The new *Guardianship Act* came into effect in the next year as S.N.S. 2002, c. 30. Ms. Conrad relies on section 8 of the old *Guardianship Act*, R.S.N.S. 1989, c. 189:

> Every guardian appointed under this Act, other than a guardian *ad litem*,
>
> (a) shall have authority to act for and on behalf of his ward;
>
> (b) may appear in any court and prosecute or defend any action in his name; and
>
> (c) shall have the charge and management of his property, real and personal, and the care of his person and education.

Although Laverne Day was never appointed under the *Act*, Ms. Conrad takes the position that the former section 5 has the same effect: "On the death of a parent of an infant the surviving parent shall be the guardian of the infant unless the court of probate appoints a guardian of the infant."

[43] Two questions arise:

1. Does s. 8 apply to a s. 5 guardian?, and

2. If so, is Ms. Day's consent to the $30,000 payments within her s. 8 authority?

[44] Section 5 is a curious provision. It seems that a child whose parents are alive has no guardian automatically under the statute, but a child who loses one parent automatically has a guardian. I think the legislative history helps us to interpret s. 5.

[45] The legislative history begins in 1758 against a complex of common law on various kinds of guardianship. This is explained in Murdock's chapter on the applicable legislation and common law about "Guardianship and Infants": Beamish Murdock, *Epitome of the Laws of Nova Scotia* (Halifax, 1832), v. 2, p. 37 to p. 39. An oversimplification will do for present purposes. A father, and by 1832 both parents, had a natural guardianship over the person of his, later their, unmarried children under fourteen, but common law guardianship over a child's property did not necessarily go to a parent. This appears to have been altered by the 1758 statute.

[46] "An Act directing the *Guardianship* of *Minors*", S.N.S. 1758, c. 26 permitted fathers, by deed or will, to

> dispose of the Custody and Tuition of such Children [children who were married and under twenty one] . . . to any Persons in Possession or Remainder, other than Persons not Protestants. ...[s. 1]

(The Elizabeathian penal laws that, among other things, restricted the ability of Catholics to hold property were repealed in 1786. The exclusion in s. 1 was removed by "An Act in addition to, and in amendment of, . . . An Act directing the Guardianship of Minors", S.N.S. 1826, c. 8.)

[47] Section 2 of the statute permitted a guardian appointed by a father to take ", to the Use of such Children, the Profits of all Lands . . . and also the Management of the Goods and Personal Estate of such Children". That is to say, that, in addition to being guardian of the person of the child ("Custody and Tuition"), the

guardian was to hold the child's income from lands and the child's personal property "to the Use of such Children".

[48] Completing a scheme that would remain for over two hundred years, s. 3 to s. 5 permitted state appointment of guardians who, unlike those appointed by the father, were required to put up bonds with sureties. Section 3 empowers "the Governor, Lieutenant Governor, or Commander in Chief" to appoint guardians of some children and their property. Section 4 allows the same officials to permit a child over fourteen to appoint his or her own guardian. The 1826 amendment extended these powers to the probate judges.

[49] These provisions were put into more modern language in the Revised Statutes of 1851. One substantive change had been made since 1826. The governor, lieutenant-governor, and commander-in-chief were removed and the alternate power to appoint, or permit a child to appoint, a guardian could only be exercised by the probate judges: "Of Guardians and Words", R.S.N.S. 1859 (second series), c. 124. Also the explicit suggestion of a trust in the use phase was removed, which left fiduciary obligations to implication. The statute continued unaltered until 1894, when the first of two statutes that replaced the old one was enacted.

[50] "Of Guardians and Wards", R.S.N.S. 1900, c. 17 continued the power of a father to appoint guardians, but extended the power to "the mother of any infant whose father is dead": s. 3. The court of probate was given power to appoint a father: s. 2. No bond was required from these guardians.

[51] Section 3 was amended to give both parents powers of appointment. The general powers of the court of probate to appoint guardians underwent some changes but the bonding requirements remained.

[52] I believe that s. 4 of the 1900 statute is the origin of s. 5 in the 1989 statute. Section 4 reads as follows:

> On the death of the father of an infant the mother it surviving shall be the guardian of the infant, either alone, when no guardian has bee appointed, or jointly with any guardian appointed by the father.

The mother was not required to post a bond.

[53] Section 7 of the 1900 statute is the origin s. 8 of the 1989 statute.

[54] In 1977, the Legislative Assembly began reforming the statutes for the equality of women: Statute Law Amendment Act, S.N.S. 1977, c. 18. Section 2 of the *Guardianship Act*, R.S.N.S. 1967, c. 121, which was identical to s. 2 of the 1900 statute, was changed to provide for the court of probate to appoint "the father or the mother of an infant, or both". Section 2 was also extended to appointments of a person standing in the position of a parent and to appointment of the Public Trustee.

[55] With those amendments in 1977, we have the *Guardianship Act* in the 1989 Revised Statutes, except a new s. 1 was added to prescribe the citation.

[56] At no turn in its history does the *Guardianship Act* suggest an assumption, a false one as I see it, that a parent is automatically guardian of a child's property. Rather, the scheme of the statute in 1900 had fathers being appointed, by probate court or themselves, as the most likely source of guardianship. So, s. 4 provided that when the likely guardian, the father, died the mother becomes the guardian, or a joint guardian.

[57] The basic scheme was not changed in 1977. A parent is assumed to be the likely guardian, and when the likely guardian is dead the surviving parent is automatically the guardian.

[58] This leads to the anomaly that children with two parents have no automatic guardian of their property but a child who loses a parent automatically gets one. However, one sees how this came about and we are not left with misconceptions about guardianship at common law.

[59] The powers in s. 8 apply to "Every guardian appointed under this Act". The surviving parent referred to in s. 5 is not "appointed" by anyone. The parent becomes guardian by operation of law. Does the surviving parent have s. 8 powers, or does a person in Ms. Day's position only become guardian of the person? There is a conflict in case law on this question.

[60] A similar provision to our s. 5 was found in the Saskatchewan statute. Section 24 of the *Infants Act*, R.S.S. 1920, c. 155 as amended by s.s. 1925-26, c. 42

included “On the death of either parent, the surviving parent shall be the guardian of their infant children... .” Section 28 provided for a guardian “appointed or constituted by virtue of this Act” to have power over the child’s property.

[61] In *Re Nakauchi Estate*, [1927] 3 D.L.R. 1087 (SKB) Justice Taylor held that a s. 24 guardian did not have s. 28 powers because she was not appointed or constituted by virtue of the statute. The opposite result was reached by Justice Beglow in *Re. Sherrer*, [1930] 4 D.L.R. 1011 (SKB).

[62] In our time, *Re. Nakauchi Estate* could be faulted for taking too literal an approach. We are required to interpret s. 5 and s. 8 contextually, giving full meaning to the text read in light of scheme, purpose, and surrounding text.

[63] Unlike our statutes about guardianship of adults, this legislation has not provided explicitly for guardianship of the person of a child without guardianship the child’s estate. Even in the beginning, in 1758, the father’s disposition of the child’s “Custody and Tuition” gave rise automatically to a guardianship of the income from the child’s real estate and his or her personalty. The point becomes more striking in later legislation. The 1989 statute does not expressly mention guardianship of the person of a child.

[64] It makes sense that child guardianship legislation would be focussed on guardianship of the child’s estate. Guardianship of the person of a child, unlike that of an adult, usually goes without saying and, when law needs to intervene, guardianship of the person of a child is the subject of the laws of custody and access.

[65] I would say that the original purposes of the statute in 1758 were to simplify, for a colonial application, the common law about guardianship of a child’s estate and to provide a mechanism by which the government could put someone in charge of a child colonist’s property. That had not changed much in 250 years.

[66] Since 1758 we have seen the paternalistic mechanism removed in two stages, in the 1890's and 1977. We have seen the government replaced by the judiciary. And, we have seen the express references to personal guardianship discarded. The purpose and scheme remain basically the same: to provide for control of a child’s property by the simple means of an appointment of a guardian by a parent or the court.

[67] To interpret “appointed under this Act” in s. 8 to exclude a person who becomes a guardian by operation of s. 5 does not allow for the context supplied by the surrounding text. Section 5 emerged as a substitute for an appointment by a parent or the court. If s. 8 does not apply to a guardian under s. 5, then a s. 5 guardian is almost meaningless in light of the laws of custody and access. It becomes disconnected from the text of s. 3 and s. 4, as well as from the scheme and purpose of the Act.

[68] Therefore, “Every guardian appointed under this Act” in s. 8 of the *Guardianship Act* of 1989 refers to an appointment of a parent as guardian by the court under s. 3, an appointment of a guardian by a parent under s. 4, an appointment by the court with a bond under s. 6, and the automatic appointment by operation of s. 5.

[69] Does s. 8 authorize a guardian to consent, on behalf of the children, to a breach of a trust for the children?

[70] In *Ryan v. Sleigh*, [2007] N.S.J. 452 (SC), guardians were appointed in a proceeding under the *Probate Act* and in exercise of the power of the probate court under the *Guardianship Act*. The guardians received life insurance proceeds as a result of a policy under which the child was a beneficiary. Despite the terms of the guardianship order, they were only able to account, to the satisfaction of the court, for a small portion of the insurance proceeds after the child turned nineteen.

[71] Justice Robertson held that the guardians were trustees. The guardianship order supplied the terms of the trust, especially the requirement that the guardians account for the proceeds when the child turns nineteen. Although there is no source for express terms of a trust imposed on a person who becomes guardian by operation of s. 5, the person is as much a trustee. The person appointed guardian by order and the person constituted guardian by operation of s. 5 receive the same fundamental power under s. 8 to “have the charge and management of his property”.

[72] As Ms. Day and Ms. Conrad owed the same trust obligation to the children, one could not consent on behalf of the children to a breach of the obligation by the other.

Are Courtney and Joshua Day Estopped?

[73] Mr. Di Costanzo also argues that promissory estoppel prevents the younger children of Mr. Day from making claims against Ms. Conrad for the two $30,000 payments and for expenses of the estate covered by Ms. Conrad from the insurance proceeds.

[74] I agree that Ms. Laverne Day's consent is an unambiguous representation that caused Ms. Conrad to act to her detriment by making the payment to Mr. Troy Day. That payment would be protected under *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] K.B. 130 (CA) and *Combe* v. *Combe*, [1951] 2 K.B. 215 (CA), as between Ms. Conrad and Ms. Laverne Day. I do not agree that the $30,000 payment by Ms. Conrad to herself is within the detrimental reliance required for promissory estoppel.

[75] However, the representation was made by Ms. Laverne Day and not by anyone who had authority to bind the beneficiaries of the trust. In my assessment, promissory estoppel cannot assist Ms. Conrad.

[76] As Mr. Di Costanzo points out, there is authority for a broader approach to promissory estoppel. He referred me to *Robertson* v. *McCarron*, [1985] N.S.J. 457 (Hallet, J.), which was reversed by [1986] N.S.J. 278 (CA). It may be appropriate, in some cases, for the court to launch into a broad inquiry of whether it is unconscionable for a party to rely on his or her legal right after adopting a position contrary to it. However, this will not avoid the need to inquire whether the position was advanced by someone who had authority to bind the beneficiary.

[77] In my assessment, no one with authority to bind Courtney and Joshua Day consented to the $30,000 payments or the expenditures on behalf of Mr. Day's estate. (The insurance proceeds that were expended to the benefit of the estate are accounted at two-thirds their value to recognize that the beneficiaries received two-thirds the value of those expenditures through their inheritance. Mr. Troy Day received the other one-third.)

Discretion to Excuse Breach

[78] Mr. Di Costanzo argues that Ms. Conrad should receive the benefit of the court's discretion under s. 64 of the *Trustee Act*, R.S.N.S. 1989, c. 479:

> If it appears to the Court that a trustee is or may be personally liable for any breach of trust whether the transaction alleged to be a breach of trust occurred before, on or after the twenty-seventh day of March, 1902, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

[79] In *Legge Estate*, [2007] N.S.J. 75 (SC), Justice Warner said at para. 92 that this section gives the court "discretion to excuse any breach of trust arising from acting honestly and reasonably." He referred to the common law standard of care owed by a trustee, which was applied by the Supreme Court of Canada to a similar discretion: *Fales* v. *Wohllenben Estate*, [1976] S.C.J. 72.

[80] In *Scott Estate*, [2005] N.S.J. 427 (CA), Justice Roscoe said, at para. 20,

> The effect of s. 64 of the *Trustee Act* is that personal representatives of estates are only liable to do their best, and if they honestly do their best in the circumstances, they are not liable for errors in judgment.

Section 64 also applies to trustees under an implied trust: s. 2(r).

[81] It may be helpful to bear in mind factors the court will usually consider before exercising the s. 64 discretion. The Supreme Court of British Columbia did so in *Langley* v. *Brownjohn*, [2007] B.C.J. 2776 (SC) at para. 66. Justice Ballance provided references to authorities for these factors:

- whether the trustee sought or relied upon professional advice before the breach
- whether the professional opinion was correct
- the relationship between the trustee and the beneficiaries, and particularly the presence or absence of communications
- the significance of the breach
- whether the trustee is a professional

- whether the trustee received remuneration
- the loss caused by the breach.

[82] While it is helpful to have the standard in mind, and to consider factors that have influenced judges in the past, one must not put greater limits on the discretion than those the Legislature itself has chosen: reasonableness and honesty. And so, Mr. Di Costanzo also referred me to the simple point made by Justice Hogg in *Lamport* v. *Thompson*, [1940] O.J. 374 (OSC) at para. 42:

> One must approach this question, however, upon the basis that it is impossible to lay down general rules which will be absolute, and each case must depend on its own circumstances.

[83] I am satisfied of Ms. Conrad's honesty in making the two $30,000 payments and in covering estate expenses.

[84] In my assessment, Ms. Conrad's paying $30,000 of the insurance proceeds to herself may have had some basis in reason, but it does not justify an exercise of the discretion under Section 64 of the *Trustee Act*. At best, it was a mistake that saw the trustee gain at the expense of those entitled to the money. In the circumstances, preventing Ms. Conrad from gaining from her own default overshadows, even eclipses, all of the considerations that are in her favour.

[85] The payment of $30,000 to Troy Day was, like the payment to herself, made honestly. Although it was an error in judgment for Ms. Conrad to make the payment, the breach was reasonable. She believed that, with the insurance proceeds turning out to be over a quarter million dollars, her brother, whom she knew well, would want to benefit his first child as well as the younger two. Wrongly but reasonably, Ms. Conrad believed there were good reasons to question the existence or extent of the trust.

[86] So, the breach meets the threshold of honesty and reasonableness. In addition to Ms. Conrad's beliefs about her brother's wishes and the extent of the trust, other factors support the exercise of the discretion under s. 64 of the *Trustee Act*.

[87] First, and most importantly, all parties and their counsel took Ms. Laverne Day to speak for the two younger children. She agreed to the payment. Through her lawyer, she took part in the negotiations towards a proposed $25,000 payment. She actually consented to the $30,000 payment. Through her lawyer, she reached agreement on treatment of the balance but she withheld her signature. Ms. Conrad had good reason to believe that the younger children were bound by their mother's consent.

[88] It would be unfair to require Ms. Conrad to pay Courtney and Joshua Day for money given to their half-brother with the consent of their mother, who appeared to Ms. Conrad to have authority.

[89] Secondly, Troy Day signed a release in exchange for the payment. This ended whatever claim he may have had for a share of the insurance proceeds and effectively put an end to whatever claim he may have had under the *Testator's Family Maintenance Act* to a disproportionate share of the estate in view of the other two children of Mr. Day receiving all the insurance proceeds.

[90] Thirdly, I do not believe Ms. Conrad can recover the payment from Troy Day and I would have dismissed the third party claim against him even if the discretion was not exercised. I agree with Mr. MacInness' submission. There were juristic reasons for the payment, such that it is not recoverable under the law of unjust enrichment. Further, this payment is not, in my view, of a kind to be recovered as a mistake: *Nepean Hydro Electric Commission* v. *Ontario Hydro*, [1982] S.C.J. 15, *Air Canada* v. *British Columbia*, [1989] S.C.J. 44 at para. 55.

[91] Finally, the factors identified in *Langley* v. *Brownjohn* tend to favour Ms. Conrad's position. She was under professional advice, in fact she acted through her lawyer, when the payment was first proposed in February, 2001. Through Laverne Day, she was in communication with the beneficiaries on the subject of the payment to Troy Day. She is not a professional. She did not receive remuneration. The loss to the children is significant but it only represents a fraction of the funds to be paid to them or that were paid for their benefit.

Recovery from Laverne Day

[92] Mr. Di Costanzo argues that indemnity is possible under subsection 49(1) of the *Trustee Act*, which gives the court power to indemnify a trustee out of a trust

estate for “a breach of trust at the instigation or request or with the consent in writing of a beneficiary”. In my view, this provision is inapplicable because Laverne Day could not bind either beneficiary of the implied trust.

[93] For the same reasons, I do not agree that this is a case for ordering indemnity at common law.

Conclusion

[94] The plaintiff will have judgment against the defendant for $41,722 less the adjustments for one-third of the value of payments made for the benefit of Mr. Day’s estate plus prejudgment interest on that sum from May 31, 2001 until the date of the order.

[95] The defendant may have an order relieving her from liability in connection with the $30,000 paid to Troy Day and the payments she made for the benefit of the estate.

[96] I will dismiss the third party claims.

[97] Ms. Laverne Day and counsel may provide written submissions on my calculation of the unaccounted balance of insurance proceeds, costs, and a rate for prejudgment interest.

J.