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Marchewka (Litigation guardian of) v. Machtinger

Between

**Tola Marchewka, by her Litigation guardian, Dorit Najgoldberg,
applicant/plaintiff, and
Marek Machtinger and Dora Machtinger, respondents/defendants**

[1991] O.J. No. 3447

9 C.P.C. (3d) 317

Doc. 59766/90Q

Ontario Court of Justice (General Division)

Master Sandler

Oral judgment: February 4, 1991.

Guardian and ward -- Public trustee or guardian -- Appointment -- Adult in need of protection -- Considerations -- Procedural issues.

These were motions by guardian to strike out Machtinger's statement of defence as being irrelevant, embarrassing and scandalous and also a motion to strike out paragraphs of Machtinger's affidavit wherein Machtinger argued that the guardian should be removed from her position. The motions occurred in the context of an action by the litigation guardian of Marchewka to obtain repayment of a loan given by Marchewka to her son Machtinger of \$100,000.

HELD: Motions adjourned. Machtinger's motion to remove the litigation guardian and the guardian's motion to strike portions of the defence of Machtinger were adjourned to permit the court to examine the report of the Public Trustee regarding the estate of Marchewka. The court was required to determine first whether the Public Trustee should assume the guardianship before addressing these other issues.

Statutes, Regulations and Rules Cited:

Mental Incompetency Act, R.S.O. 1980, c. 264.

Rules of Civil Procedure, Rule 7.02(1), 7.02(2).

Counsel:

T.P. Charney, for the plaintiff.

H.J. Feldman, for the defendants.

1 MASTER SANDLER (orally):-- The plaintiff is a 65-year-old woman, who, according to her psychiatrist, Dr. Shulman, in his report of January 21, 1991, is incapable of managing her affairs, especially financial, nor of deciding whether she wants repayment now of the loan to her son of \$100,000 that was made in 1988 and 1989, at that time, with her agreement. She has a daughter and a son and they are in intense conflict with one another over their mother's financial affairs, and especially the loan by mother to her son.

2 The daughter, relying on r. 7.02(1) and (2), started an action as litigation guardian on November 21, 1990 suing to recover the \$100,000 loan from mother to son. She also added a fraudulent conveyance claim as to the son's residence which he recently transferred to his own wife, and obtained a certificate of pending litigation against that property.

3 The defendant son moved, in late December 1990, to remove his sister as litigation guardian of his mother, and also moved to set aside the certificate of pending litigation registered against his former home, now registered solely in the name of his wife. That motion stands adjourned sine die.

4 The defendant delivered his statement of defence at the end of December 1990. Then, the plaintiff moves today for certain relief: firstly, to strike out certain paragraphs of defendants' statement of defence as irrelevant, embarrassing and scandalous. Secondly, a similar request is made to strike out paragraphs of the affidavits of each defendant filed in support of defendants' motion to remove the sister as litigation guardian and to discharge the certificate of pending litigation. Thirdly, the plaintiff seeks an order that the defendants deliver an affidavit of documents and that they make production now of specific documents, being all kinds of financial records. Fourthly, the plaintiff seeks to add EMEM Investments Inc., a company owned by the defendant son, as a party defendant.

5 The defendants wanted today's motion adjourned so the defendants' counsel could cross-examine Arnold Recht on his affidavit sworn January 29, 1991 in support of plaintiff's motion. This was opposed and argued and I concluded that the cross-examination could have no bearing on the plaintiff's motion and decided to proceed with it.

6 Over lunch, having read the entire file, I became concerned as to whether the sister had the

right to run this lawsuit, and this question should, in my mind, be decided, before other issues such as the form of the pleadings or the question of the certificate of pending litigation against the defendants' home.

7 I have read Szwydky v. Magiera (1988), 30 C.P.C. (2d) 137 and the facts there are surprisingly similar to the facts here.

8 The sister, as litigation guardian, wants to move as quickly as possible so as to try and get summary judgment against the defendant brother on the loan claim.

9 In my view, the best procedure is to deal with the question of whether the sister/daughter is to be the litigation guardian or not, first. If she is not, then all these other issues of pleadings and production and the motion to discharge the plaintiff's certificate of pending litigation would have to be reviewed by the counsel authorized to run this lawsuit.

10 Dr. Shulman confirms the "high level of conflict" between the sister and brother, i.e., plaintiff and defendant.

11 I think the best solution is to stay the action under s. 119 of the Courts of Justice Act, 1984, S.O. 1984, c. 11, leaving the certificate of pending litigation in place, and leaving in abeyance the plaintiff's motion re: pleadings, affidavits and production, until the litigation guardian issue has been decided. On that issue, I would like the assistance of the Public Trustee to review all the material in this file and attend before me to give me assistance as to whether the Public Trustee should become litigation guardian or whether the sister should remain or whether a committee should be appointed under the Mental Incompetency Act, R.S.O. 1980, c. 264, or any other solution that may be appropriate.

12 I thus adjourn these motions, i.e., both the defendants' motion to remove the sister as litigation guardian and the other relief, and the plaintiff's motion for today, and put these over until Friday, February 15, 1991 to hear the report and position of the Public Trustee, and if necessary, to deal further with all aspects of the motions and the stay, including, if necessary, further adjournments if such seems appropriate. In the meantime, the plaintiff's action is stayed, and I ask counsel for the plaintiff to forward a copy of these reasons to the Public Trustee forthwith together with a copy of the motion material before me today i.e., plaintiff's motion record to obtain certificate of pending litigation, defendants' motion record to remove sister as litigation guardian, and plaintiff's motion record for today re: pleadings. etc. Plaintiff's counsel may send Public Trustee any other material so long as copies and any covering letter are copied to defendants' counsel.

13 The defendants' counsel may do likewise, if so advised.

MASTER SANDLER

qp/s/mii