

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Peach Estate (Re), 2009 NSSC 383

Date: 20091209

Docket: Probate No. 21051

Registry: Sydney

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE ESTATE OF THOMAS ALLAN PEACH, DECEASED

LIBRARY HEADING

Judge: The Honourable Justice A. David MacAdam

Heard: November 26, 2009, in Sydney, Nova Scotia

Written Decision: January 19, 2010

Subject: Wills - Interpretation - Religious Restriction on Direction to Sell Real Property - *falsa demonstratio* - Public Policy - Nova Scotia *Human Rights Act*

Summary: The testator made a will in which he directed that his property be sold to an Anglican or Presbyterian. The executor sought directions as to the validity of this provision.

Issue: Was the provision directing the sale of the property, but restricting the potential class of purchasers on religious

grounds, void on the basis of *falsa demonstratio*, uncertainty or public policy?

Result:

The testator's intentions were clear. The doctrine of *falsa demonstratio* did not support reading the provision without the restriction. Although there might be some difficulty in ascertaining whether a purchaser was an "Anglican" or "Presbyterian", such difficulty did not preclude giving effect, if possible, to the testator's obvious intention. Nor did any difficulty in ascertaining whether a person was an Anglican or Presbyterian render the provision uncertain.

As to public policy, religious stipulations such as this one could be upheld in some circumstances. However, the Nova Scotia *Human Rights Act* prohibited discrimination in respect of the "purchase or sale of real property" on account of religion. The executor, in carrying out the intentions of the testator, would necessarily have to violate the *Human Rights Act*. The provision restricting the sale to "Anglicans" or "Presbyterians" was therefore void.

The *cy-pres* doctrine had no application. To give effect to the intention of the testator would be to give effect to a condition or restriction that was prohibited under the law of Nova Scotia.

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Counsel: Frank G. Gillis, Q.C., for the Estate of Thomas Allan Peach

By the Court:

[1] This is an application by the executor and personal representative for interpretation of the will of the late Thomas Allan Peach of Glace Bay, Nova Scotia. Mr. Peach died on or about April 28, 2009. Some years previously he gave an envelope to a friend, John Touchings. The envelope contained Mr. Peach's will. The will named Mr. Touchings as a co-executor, along with another co-executor who has renounced the appointment, leaving Mr. Touchings as the sole executor.

[2] In an affidavit filed on this application, Mr. Touchings deposed that Mr. Peach never married and had no children. He further deposed:

THAT Mr. Peach was a well read individual and a teacher and the Will that was prepared was prepared by himself and would have been in my possession for more than a quarter century after he had prepared the same.

THAT I know Mr. Peach as a friend and he was an adherent and a supporter of St. Mary's Anglican Church in Glace Bay during his lifetime and he had advised me that he had at one time studied for the Ministry.

[3] Clause 4 of the will reads:

My property at 89 Brookland St., Glace Bay is to be sold, to an Anglican of Presbyterian and the amount placed in the balance of my estate.

[4] The Executor seeks clarification as to the validity and effect of the provision restricting the sale of the property to "an Anglican of Presbyterian".

ISSUES

[5] The executor raises three issues: (1) *falsa demonstratio*; (2) voidness for uncertainty; and (3) voidness as against Public Policy.

DISCUSSION

[6] In interpreting the will, I take note of the following comments by Moir J. in *Skerrett v. Bigelow Estate*, 2001 NSSC 116, [2001] N.S.J. No. 304, at para. 13:

All counsel agree that I should apply the general principles for interpreting wills. As Mr. Quigley says, this is because "the application of the doctrine of acceleration is largely dependent upon the intention of the testator". Counsel referred me to passages in MacKenzie, *Feeney's Canadian Law of Wills* (Toronto, 2000, 4th Ed.), including para. 10.1 and 10.14, which include:

In interpreting a will, the objective of the court of construction should be to determine the precise disposition of the property intended by the testator. The court should attempt to ascertain, if possible, the testator's actual or subjective intent as opposed to an objective intent presumed by law. The court should be concerned with the meaning that the particular testator attached to the words used in his or her will rather than with a hypothetical standard that might be that of an average or reasonable person. This approach requires the court to consider the testator's peculiar and unique language, all the circumstances surrounding his or her life and all the things known to him or her at the time he or she made his or her will which might bear on the type of dispositions he or she actually intended to make by the will.

The Court puts itself in the position of the testator at the point when he or she made his or her will, and, from that vantage point, reads the will, and construes it, in the light of the surrounding facts and circumstances. This approach is commonly referred to as the "armchair rule".

[7] The Reverend Vernon William Reid, the Minister at St. Mary's Anglican Church in Glace Bay, filed an affidavit addressing the question of whether there was any uncertainty arising from the words "Anglican or Presbyterian". He stated that "the definitions would require clarification as to whether the party must be an active member of their church or whether they merely need to believe themselves to be a supporter of the Anglican or Presbyterian faith". His affidavit continues:

THAT I know many people who support their churches financially, attend regularly, and follow a lifestyle that would be consistent with the teachings of their church and I would clearly feel that I could identify them as being an Anglican.

THAT there are others that may believe themselves to be an Anglican but neither contribute to their church on any regular basis or attend on any regular basis. Such persons would be much more difficult to define as adherents to the Anglican faith.

THAT without further clarification as to what was intended, I am not able to form any opinion as to someone would draw the line to exclude one person or another from either or these categories.

[8] Counsel for the Executor, after referencing the affidavit of Rev. Reid, states that "the determination as to who may fall within the category of an "Anglican" or "Presbyterian" is something that may be the subject matter of a great deal of interpretation and most importantly potentially [varied] and inconsistent results".

[9] Counsel has assumed that the "of" in the phrase "Anglican of Presbyterian" should be read as if it were the word "or". The presumption has merit. In *Williams on Wills*, 8th ed. (Butterworths, 2002), the authors discuss the general principles of construction, stating, at para. 50.1:

Intention collected from whole will. It has already been stated that the first principle of construction is to give effect to the intention of the testator as expressed in the words of the will. The intention is collected from the whole will with such evidence as the rules already stated allow and the meaning of the will and every part of it is determined according to that intention. A will is construed in the same way as any other document subject to this, that, if the intention is shown, the mode of expression of that intention and the form and language of the will are unimportant. The want of technical words which are necessary in some instruments for the purpose of giving expression to the intention, or any inaccuracy in grammar or any want or inaccuracy in punctuation marks is immaterial so long as the intention is clear. In all such cases a benevolent construction is adopted. Consideration is given to the fact whether the will is drafted by a skilled lawyer or by the testator himself.

[10] It would appear that the testator intended to limit the persons to whom the property could be sold to "Anglicans" or "Presbyterians". In the circumstances I am prepared, if permitted by law, to give effect to what would appear to have been the intended meaning of the testator.

(1) *Falsa Demonstratio*

[11] The doctrine of *falsa demonstratio* is described in *Feeney's Canadian Law of Wills*, 4th ed. (Looseleaf), where the author writes, at §12.2:

... This doctrine provides that if surplus or inessential parts of a description are inaccurate, they may be ignored or rejected as being false if the remaining description is sufficiently certain to give the bequests a definite meaning. The doctrine is expressed or embodied in the maxim *falsa demonstratio non nocet*, which may be taken to mean that if a will describes a certain person or thing with sufficient certainty to enable a court to recognize the person or thing intended by the testator, then the court will overlook any inaccuracy in the rest of the description.

[12] In respect to the use of "of" rather than "or", the doctrine of *falsa demonstratio* may have application. *Feeney's Canadian Law of Wills*, states, at §12.6:

The doctrine may be used to address situations where the testator has actually made a mistake. Under very special circumstances a probate court may be able to rectify an error made by a testator. Usually, however, the will is probated in the form in which it was executed so that mistakes in description will stand, at least in probate court, because of the very limited jurisdiction of that court in the matter of correcting errors. There is jurisdiction in a court of construction to rectify an error in a will, so to speak, by reading words in a secondary sense. Also, in endeavoring to give effect to the testator's true intention the court may be able to utilize the doctrine of *falsa demonstratio* by simply ignoring a mistake in the description of a person or property.

[13] Whether by applying the doctrine of *falsa demonstratio* or by recognizing that, although there are "Anglicans" and "Presbyterians", there is no evidence of an "Anglican or Presbyterian", and therefore the use of the conjunctive "of" was in error, I am satisfied the provision should read "Anglican or Presbyterian".

[14] The testator's intention appears to be clear. He intended to limit the potential purchasers of his real property to persons who are Anglican or Presbyterian. Difficulty in ascertaining who would constitute an Anglican or Presbyterian is not a basis upon which to ignore the testator's stated intention. Counsel suggests there is no evidence of the surrounding circumstances of the drafting and execution of the will, and suggests that the executor be authorized to go forward without reference to the restriction on who may purchase the property.

[15] The doctrine of *falsa demonstratio* does not support reading the provision without any restriction. Although there may be some difficulty in ascertaining

whether a purchaser is an "Anglican" or "Presbyterian", such difficulty should not preclude giving effect, if possible, to the testator's obvious intention.

(2) Uncertainty

[16] In his submission, counsel references *Feeney's Canadian Law of Wills*, op. cit., at §16.47 as illustrative of this principle:

... In order for a court to decide whether a condition has or has not been fulfilled, it must be reasonably clear and certain. A will may leave it to the executors or trustees to decide if a condition has been broken, in which case the words setting forth the condition must be such that the trustees can see at any particular time if the condition has or has not been fulfilled....

[17] As I have noted, difficulty in ascertaining exactly what was meant by the testator is not a ground for ignoring his stated intention. The testator intended to restrict the sale of his property. He prescribed no limitation other than "Anglican" or "Presbyterian". The concerns expressed by the Rev. Reid are not, in my view, a barrier to carrying out the testator's intentions. There is no stipulation that the purchaser be an active or regular financial contributor to a church. The only requirement is that they be an adherent to the "Anglican" or "Presbyterian" faiths. Although there may be circumstances where, in a particular case, it may be difficult to determine whether a person satisfies the definition, such difficulty should not prevent giving effect, if possible, to the testator's expressed intention.

(3) Voidness on the basis of Public Policy

[18] Paragraph 4 of the will is clearly discriminatory on the basis of religion. It seeks to limit the potential purchasers of the property to persons of the "Anglican" or "Presbyterian" faiths and no one else. Counsel for the executor cites *Feeney's Canadian Law of Wills* at §16.58, where the following appears:

It seems safe to treat conditions attached to gifts in wills in which require the beneficiary to discriminate against persons on the basis of race, creed or nationality as void as contrary to public policy. Apart from legislation prohibiting restrictive covenants concerning land, which is found in most provinces, or a situation where the impugned condition is too uncertain to be enforced, the effect of discriminatory conditions on the basis of provincial human rights legislation is that they are generally contrary to public policy.

[19] Gifts restricted to persons of certain faiths or religions have been upheld. In *Re Ramsden Estate*, [1996] P.E.I.J. No. 96 (S.C.T.D.), for instance, the testator left funds to the University of Prince Edward Island to establish a scholarship or bursary for Protestant students. The University was non-denominational by law, and the *University Act* prevented acceptance of gifts that prejudiced its non-denominational character. Chief Justice MacDonald held that the gift, therefore, failed by virtue of the Act; however, applying the *cy-pres* doctrine, the Chief Justice ordered the executors to find a person or organization other than the university to administer the trust. There was no ground of public policy preventing the trust from taking effect if that issue was dealt with.

[20] The Chief Justice distinguished *Re Leonard Foundation Trust* (1990), 37 O.A.C. 191 (Ont. C.A.). In that case, a trust document created a scholarship that excluded:

... all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate ... (*Leonard* para. 32)

Because the settlor believed that:

... the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines ... (*Leonard*, para. 12).

and that:

... the progress of the World depends ... on the maintenance of the Christian religion ..." (*Leonard*, para. 12).

[21] The majority held that the provisions of the trust which confined management, judicial advice, schools, universities and colleges and benefits on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy and struck out the discriminatory provisions (paras. 46-50). The Chief Justice said, in *Ramsden Estate* at para. 13:

In *Re: Leonard Foundation Trust*, *supra*, a general educational trust with discriminatory conditions attached was held to fail on a ground of public policy.

In my view, that case is distinguishable from the present one, in that the trust in that case was based on blatant religious supremacy and racism. There is no such basis for the trust in this case. Therefore, I can see no ground of public policy which would serve as an impediment to the trust proceeding if it were administered by a body other than the University itself.

[22] A similar conclusion was reached by Maczko J. in *University of Victoria v. British Columbia (Attorney General)*, [2000] B.C.J. No. 520 (B.C.S.C.). In that case the University sought directions with respect to the construction of a will creating bursaries for Roman Catholic students, in order to determine whether the religious qualification violated the B.C. *Human Rights Code* or public policy. The Court held that the bursaries did not violate the *Code*, nor were they contrary to public policy. The relevant relationship was a private one between the testator and potential beneficiaries, not the university and its students. Being a private relationship, the *Human Rights Code* did not apply. The terms of the bursaries were not offensive to public policy merely because they restricted the class of potential recipients to members of a particular religious faith. As in the present case, the application for directions was unopposed. Maczko J. commented on *Re Leonard* as follows, at paras. 15-17:

... if I am wrong and it is determined that the relevant relationship to consider is the relationship between the petitioner and its students and that on the facts of this case the relationship between them is a "public" relationship, before finding a statutory violation, I must first examine whether there is a bona fide and reasonable justification for the discrimination. I find there is a bona fide and reasonable justification in this case.

First, the "discriminatory" language in the Bursaries is relatively innocuous, especially in comparison to the offending provisions at issue in *The Canada Trust Company v. Ontario Human Rights Commission* (1990), 69 D.L.R. (4th) 321 (Ont. C.A.) ("*Re Leonard*") where the terms of the trust were based on blatant religious supremacy, racism and sexism. In determining if there is a *bona fide* and reasonable justification, one must balance the interest of avoiding a relatively inoffensive breach of the *Human Rights Code* against the interest of upholding the freedom of testamentary disposition which is an important social interest that has long been recognized in our society and is firmly rooted in our law (*Blathwayt v. Lord Crawley*, [1976] A.C. 397, [1975] 3 All E.R. 625, [1975] 3 W.L.R. 684, 119 Sol. Jo. 795 (H.L.)).

In my view, it is not offensive in and of itself for an individual to establish a charitable trust to benefit adherents to one's faith and were a court to find that

this constituted discrimination, it would seem to follow that charitable gifts preferring anyone, other than those who have historically suffered systemic discrimination (e.g. women, disabled people, people of colour), would be discriminatory if administered by public bodies. In my view, such a far reaching prohibition could not have been the intention of the legislature in enacting the *Human Rights Code*. If the court were to invalidate charitable giving in this manner, the freedom of testamentary disposition would be severely circumscribed and the social utility of enabling students of individual faiths to obtain a post-secondary education correspondingly compromised.

[23] Maczko J. also commented on *Re Ramsden*, stating, at paras. 24-25:

Ramsden Estate, (1996), 139 D.L.R. (4th) 746, ("Re Ramsden") a decision of the Prince Edward Island Trial Division, is similar on its facts to the present case. In *Re Ramsden*, the deceased by her will gave a gift to the University of Prince Edward Island for the purpose of founding scholarships or bursaries to be awarded to Protestant students. McDonald J., having distinguished *Re Leonard* on the basis that the scholarships created therein were based on blatant religious supremacy and racism, declined to rely on *Re Leonard* as authority for invalidating a trust virtually identical to the one before me:

In my view, that case is distinguishable from the present one, in that the trust in that case was based on blatant religious, supremacy and racism. There is no such basis for the trust in this case. Therefore, I can see no ground of public policy which is considered an impediment to the trust proceeding...(at para. 13)

I find that the Bursaries do not violate public policy. The terms of the scholarship in *Re Leonard* are clearly offensive and distinguishable from those before me. In my view, I have no hesitation in concluding that a scholarship or bursary that simply restricts the class of recipients members of a particular religious faith does not offend public policy. Accordingly, I find that the Bursaries may be administered by the petitioner in accordance with their terms. While I would have come to the same result in the absence of *Re Ramsden*, that decision supports my finding in the present case.

[24] The *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 214, defines discrimination at s. 4:

For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that

has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

[25] Section 5 of the *Act* is entitled "Prohibition of discrimination". It provides, in part:

5 (1) No person shall in respect of

...

(c) the purchase or sale of property:

...

discriminate against an individual or class of individuals on account of

...

(k) religion ...

[26] Certain exceptions, set out in ss. 6 and 6(a), are not applicable here.

[27] The *Nova Scotia Human Rights Act*, therefore, prohibits discrimination in respect of the "purchase or sale of real property" on account of religion. The executor, in carrying out the intentions of the testator, would necessarily have to violate the *Human Rights Act*. The provision restricting the sale to "Anglicans" or "Presbyterians" is therefore void under the *Act*. The *cy-pres* doctrine has no application in this instance. To give effect to the intention of the testator would be to give effect to a condition or restriction that is prohibited under the law of Nova Scotia.

[28] As a result, in the sale of the subject property, the executor is not restricted to purchasers who are "Anglican" or "Presbyterian".