

PROBATE COURT OF NOVA SCOTIA

Citation: Fort Sackville Foundation v. Darby Estate, 2010 NSSC 27

Date: 20100122

Docket: Hfx No. 315095 and
Probate No. 56651

Registry: Halifax

Between:

The Fort Sackville Foundation

Applicant

and

Ross E. Hallett, in his capacity as personal representative
of the Estate of John Darby

Respondent

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Judge: The Honourable Justice Gerald R. P. Moir

Heard: December 17, 2009 in Halifax

Subject: Wills, gift to defunct society, possible successor, *cy-près*

Summary: Testator left his home and contents to a society that had been dissolved by transfer of its assets to Fort Sackville Foundation and surrender of its certificate of incorporation. The gift was subject to several conditions.

Issues: (1) Whether Foundation was successor?
(2) Whether a *cy-près* scheme could be applied?

Result: Foundation could not be regarded as successor because the society had ceased to exist before the gift was made. *Cy-près* cannot apply because the gift to the society is conditional and it goes to residual beneficiaries when a condition is not fulfilled, such that it is not "impossible to effect". Further, the primary purpose of the gift is narrow, negating "a general charitable intent".

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DECISION

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Counsel: Ms. Lyndsay Jardine for the applicant
Mr. Kevin Gibson for the respondent
Mr. Timothy C. Matthews, Q.C. for the Canadian
National Institute for the Blind, the Canadian
Cancer Research Society, and the Board of
Governors of McGill University

Moir, J.:

Introduction

[1] Mr. John Darby made a will in July of 2007 and he died less than a year later. He made a gift of his residence and the contents to the “Heritage Society of Bedford”, the correct name of which was “Bedford Heritage Society”. That society disposed of its assets and surrendered its certificate of incorporation some years before the will was made.

[2] The Fort Sackville Foundation claims to be the successor of the Bedford Heritage Society and it lays claim to the gift. Mr. Ross Hallett is the personal representative and trustee of the estate, and he opposes the claim. He says that the gift did not pass, and cannot be passed, to the Foundation. He also says that the gift was conditional and the condition failed. Beneficiaries support the position taken by the estate.

Issues

[3] The foundation applies for an order declaring it to be the beneficiary of the residence and contents gift. The estate applies for an order declaring that the gift lapsed and the residence and contents fell into the residue. There are two ways for the gift to pass to the Foundation. It may be the successor to the Bedford Heritage Society, which I find is the society intended by Mr. Darby. Or, the *cy-près* doctrine may apply in its favour. So the issues raised by Fort Sackville Foundation are:

1. Is the Fort Sackville Foundation the successor of the Bedford Heritage Society?
2. If not, can *cy-près* be applied to allow the foundation to make a similar use of the gift?

And, the representative's application adds this overlapping issue:

3. Has the gift lapsed into the residue?

Whether Foundation is Successor

[4] The Bedford Heritage Society was incorporated in 1980 as Bedford Heritage '80. The name was changed in 1996. It wound up in 2005.

[5] The society began as a project for finding and preserving photographs that show the history and development of Bedford. Its work broadened to include gathering other materials on Bedford's history and making public presentations on that subject.

[6] In June of 1988, some members of the society took steps to incorporate the Fort Sackville Foundation. The main purpose of this new society was to lease and maintain a historical site in Bedford called the Scott Manor House. At first, the Bedford Heritage Society took steps to convince the Town of Bedford to fund it to preserve the site, but it was later determined that the property should be leased by a legally distinct corporation.

[7] The Foundation leased the Scott Manor House site, but it also began work similar to that of the Bedford Heritage Society. It began to accumulate artifacts

related to the site, then it developed its own archival collections. The foundation became more and more active, and the society became less and less so.

[8] In 2005, the Bedford Heritage Society decided to wind-up, including to transfer its property to the Fort Sackville Foundation.

[9] The evidence makes it clear that the society and the foundation were closely related and their development led to one giving way to the other. They could have grown together by amalgamation. However, the society chose to do that by dissolution and transfer of assets.

[10] Ms. Jardine refers me to passages at pp. 765 to 768 of Donovan W. M. Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005). This discussion leads me to conclude that the courts avoid disturbing a gift just because the testator got the name wrong, the courts take a broad approach to legal successorship, but that approach is not so broad as to allow the court to find a successor for an entity that has ceased to exist.

[11] We can find "apparently defunct institution...in an existing institution" through "amalgamations, schemes, absorptions, or change of name, organization or its work", but we cannot do that if the apparently defunct institution "has indeed ceased to exist" (p. 768). The caselaw to which Ms. Jardine referred is consistent with this view of the law.

[12] The Bedford Heritage Society ceased to exist. It and the Fort Sackville Foundation did not choose amalgamation, or some similar scheme. The society chose unequivocally to terminate itself. That is, it dissolved under s. 26 of the *Societies Act*, R.S.N.S. 1989, c. 435.

[13] Therefore, Fort Sackville Foundation is not the successor of the Bedford Heritage Society.

Whether Cy-Près Applies

[14] The gift is a complicated one. Clause 4(L) of Mr. Darby's will reads:

To convey and transfer my residence and contents in Bedford, Halifax Regional Municipality aforementioned, to the Heritage Society of Bedford, to commemorate the merchant marine who sailed out of Bedford Basin during

World War II, upon the condition that they commit themselves in writing to my Personal Representative to retain my aforesaid residence and contents as a heritage property and use the building to house a museum, an art centre, or, an architectural centre, for the use and viewing of the public, and further commit said Society to so designate my residence and open and operate my residence for one or all of the aforementioned stated purposes within three (3) years from the date of my demise. If after One (1) year from the date of my demise the Heritage Society of Bedford has not made said written commitment to the Personal Representative, then I cancel this gift, and direct the Personal Representative to sell my residence and contents for the best prices obtainable, and the net sale proceeds shall form part of the rest and residue of my Estate and be disposed of according to a later clause or clauses of this my Last Will and Testament dealing with residue.

I find it helpful to make a précis out of this.

[15] The residence and contents are transferred to the Bedford Heritage Society "to commemorate the merchant marine who sailed out of Bedford Basin during World War II", but the transfer is conditional.

[16] There are several conditions. The Bedford Heritage Society must commit "to retain my aforesaid residence and contents as a heritage property". It must also commit to "use the building to house a museum, an art centre, or, an architectural centre, for the use and viewing of the public". Thirdly, the society must make both commitments within a year of Mr. Darby's death. Fourthly, it must designate the

building as heritage and "open and operate [it]...for [one of the] stated purposes within three (3) years from the date of my demise".

[17] The gift provides expressly for what happens if the commitments are not made within a year. The gift to the society is cancelled, the residue and contents are to be sold, and the proceeds form part of the residue.

[18] The Fort Sackville Foundation cannot make the required commitments. The home needs extensive repairs, and the foundation already has suitable premises at Scott Manor House. It can commit to sell the property and use the proceeds to commemorate the merchant marine particularly and to provide displays showing the presence of ships in Bedford Basin generally, an important fact of the Basin's history.

[19] Ms. Jardine refers me to p. 773 of *Waters'* for the two conditions that form the threshold of *cy-près*:

- 1 The gift as it stands is either impossible or impracticable to effect; and
- 2 The donor expressed a general charitable intent in making the gift.

In those circumstances the court can fashion a scheme that is *cy-près*, as nearly as possible to that which has failed.

[20] Ms. Jardine also refers me to the decision of Jones, J., as he was then was, in *Re. Chisholm*, [1977] N.S.J. 713 (S.C., T.D.) with its extensive quotation from the unreported decision of Ilsley, C.J. in *Re. Smith*, (1963) N.S.S.C. 7807. Ms. Jardine accurately summarizes the authorities in her brief:

The principle behind the development of the doctrine is that once a property is devoted to a charity, it will remain devoted to charity notwithstanding any failure of the particular objects of the gift at issue. If the gift is made to a charitable organization that either does not exist, or has ceased to exist by the time of death, the Court can direct that the gift be bestowed on the nearest possible charitable organization to that which the donor intended. If the recipient charitable organization is ascertainable, but it is impossible or impractical to effect the object of the gift, the *cy pres* doctrine may also be invoked to save the gift and have it applied as near as possible to the donor's intention.

[21] Mr. Matthews emphasizes this passage from *Waters'* at p. 768:

When the institution named by the testator did once exist, however, but ceased to operate before the testator's death, upon which event the institution's interest vests, the chances of the charitable gift lapsing are much greater. Because the institution named has been discovered, there is no question of finding an existing institution which could have been the one intended and, as the defunct institution has been correctly named, it is obviously more difficult to find the general charitable intent which is vital if there is to be a *cy-près* application.

As a consequence, the Courts have put two questions ahead of the stage at which *cy-près* application would naturally arise. The first queries whether the institution

has indeed ceased to exist. Despite amalgamations, schemes, absorptions, or change of name, organization or its work, can be the apparently defunct institution be identified in an existing institution? If that test fails to produce a positive answer, the question can then be put as to whether the testator in his gift was naming a specific beneficiary or was in fact referring to the *purposes* to which that institution exists.

[22] Mr. Gibson referred to further authorities showing that the more specific the gift, the more difficult it is to apply *cy-près*. I find the concept of the "width of charitable intent" to be helpful, as it is put forward in R. H. Maudsley, J. E. Martin, and Harold Greville *Hanbury and Maudsley Modern Equity* 13th ed. (London: Stevens & Sons, 1989) quoted in *Re. Fraser*, [2000] P.E.I.J. 35 (S.C.) at para. 6:

Where a charitable trust fails as being ineffective at the date of the gift, the gift will either lapse and fall into residue, or the property will be applied *cy-pres*. The decision depends on the width of charitable intent manifested by the donor. If the intention was that the property should be applied for a specified purpose, which cannot be carried out, or for one specific charitable institution which no longer exists, the gift will lapse. But if the court finds a wider intent, a paramount or general charitable intention, the property may be applied *cy-pres*.

[23] *Cy-près* cannot be applied to Mr. Darby's gift in clause 4(L) of his will. It does not meet either of the fundamental conditions for *cy-près*. It is not "impossible or impracticable to effect", and the clause does not express a "general charitable intent".

[24] The gift very specifically imposes a condition that something be done, and it provides for what will happen if it is not done: the subject of the gift goes to others. Effect can easily be given to clause 4(L) by enforcing the alternative gift to residual beneficiaries.

[25] Secondly, the gift has too narrow a focus to be taken for a general charitable intention. Public museums, art centres, and, possibly, architectural centres may put the gift in a charitable light. Less traditionally, but arguably, commemorating the merchant marine could do the same. But, that light is eclipsed by Mr. Darby's express desire to preserve his home.

[26] The entire gift is conditional on the home being maintained as a heritage property. This narrowness of purpose is made bright and clear by the consequence of failure. If the property cannot be preserved it is to be sold and the proceeds are to go, not to the Bedford Heritage Society, not to any museum, art centre, or architectural centre, not for preserving other heritage properties, not for commemorating the merchant marine, but to the residue.

[27] Therefore, this is not a case for a *cy-près* scheme.

Whether Gift Lapsed

[28] Perhaps there are ways of extending the one and three year deadlines in light of the history of the Fort Sackville Foundation's claim. I do not have to decide that.

[29] Whatever may be said of the deadlines, it remains that the conditions and the consequences of their not being fulfilled are express in clause 4(L) of Mr. Darby's will. The conditions, as I have interpreted them, have not been and cannot be fulfilled.

[30] Therefore, the gift in clause 4(L) is lapsed, and the residence and contents are part of the residue.

Conclusion

[31] The application of Fort Sackville Foundation for an order recognizing that it is a beneficiary under clause 4(L) is to be dismissed. The estate will have an order

declaring that the gift under clause 4(L) has lapsed and the residence and contents are part of the residue.

[32] I am inclined to order that parties recover their costs from the estate on a solicitor and client basis, but I shall keep an open mind for submissions otherwise. They could be made in writing.

J.