

PROBATE COURT OF NOVA SCOTIA

Citation: Pictou County Genealogy & Heritage Society v. Darby Estate, 2011 NSSC 271

Date: 20110615

Docket: Hfx No. 337157

Probate No. 56651

Registry: Halifax

IN THE ESTATE OF JOHN DARBY, deceased

Between:

Pictou County Genealogy & Heritage Society

Applicant

v.

Ross E. Hallett, in his capacity as Personal Representative
and Trustee of the Estate of John Darby, Deceased

Respondent

Judge: The Honourable Justice C. Richard Coughlan

Heard: June 15, 2011 (in Chambers), in Halifax, Nova Scotia

Decision: June 15, 2011 (Orally)

**Written Release
of Decision:**

July 14, 2011

Counsel:

Tim Hill, for the Applicant
Daniel Wallace, for the Respondent Estate
Jeffrey R. Hunt, for Surviving Relative, L. Zane Fraser

Coughlan, J.: (Orally)

[1] John Darby was a descendant of a settler who came to Nova Scotia on the Hector. Dying on May 1, 2008, he was the last surviving member of his immediate family. In his will he left one fourth of the residue of his estate to the “Heritage Society for Pictou County, Nova Scotia”. There was no Heritage Society for Pictou County, Nova Scotia. There was a Pictou Heritage Society which was struck by the Registrar of Joint Stock Companies prior to the execution of Mr. Darby’s will. At the time of the execution of the will, the Pictou County Genealogy & Heritage Society was in existence. The Pictou County Genealogy & Heritage Society applies for an order declaring it to be a residual beneficiary of Mr. Darby’s estate.

[2] L. Shane Fraser, first cousin once removed of Mr. Darby, one of the persons entitled to Mr. Darby’s estate on an intestacy, opposes the application.

[3] John Leonard Darby made a last will and testament on July 18, 2007. The residue clause provided:

(N) To divide the rest and residue of my Estate into Four (4) equal shares, and to pay over and/or transfer One (1) equal share to each of the following Institutions/Charities/Societies upon the following Terms:

....

(3) To Heritage Society for Pictou County, Nova Scotia, to be acknowledged by said Society as a gift made in the names of my parents, Marion Louise Fraser Darby and Joseph Edwin Darby, to be used for the preservation of Scottish heritage in said County;

[4] There is no Heritage Society for Pictou County, Nova Scotia. There was a Pictou Heritage Society which was incorporated pursuant to the *Societies Act of Nova Scotia* on May 16, 1973. Its memorandum of association provided:

1. The name of the Society is Pictou Heritage Society.
2. The object of the Society is to establish a centre of local history and culture in the Town of Pictou and to promote study and the restoration and

preservation of buildings and all things ancient and modern influencing and forming part of the heritage of the citizens of the Shiretown.

3. The activities of the Society are to be carried on in the Town of Pictou and surrounding district.

4. The registered office of the Society is the Town Office, Pictou, County of Pictou and Province of Nova Scotia.

[5] There is no evidence before me as to the activities of the Pictou Heritage Society or when it ceased to be active. The records of the Registrar of Joint Stock Companies show it defaulted in filing necessary documents with the Registrar in 1995 and was struck from the register on January 6, 2007.

[6] The Pictou County Genealogy & Heritage Society was incorporated pursuant to the *Nova Scotia Societies Act* on December 17, 1996 and has been in continuous existence since that date. Its memorandum of association provides:

1. The name of the Society is the Pictou County Genealogy & Heritage Society.

2. The goal of the Society is to be a centre for the pride, traditions, and achievements of Pictou County people, past, present and future.

3. The objectives of the Society are:

a) To administer and operate the McCulloch House Museum as a local exhibit centre for the enlightenment, education and benefit of the public at large, at regular hours on a seasonal basis.

Further, to maintain therein on public display, objects, documents and exhibits relating to historical themes agreed upon by the Society, in consultation with the Nova Scotia Museums, which owns the property of the McCulloch House Museum.

The Society shall see to collect and preserve objects relating strictly to the above mentioned themes.

An overall objective for McCulloch House is to return it to its original appearance.

b) To maintain for the education and benefit of the public at large, a research and heritage centre, known as the Hector Centre. To house within this Centre, the genealogical collection and to provide assistance to persons interested in any aspect of genealogy; to add to the genealogical collections and to maintain the proper preservation of such collection.

Also, to research and record the lives and contributions of noted Pictonians, to preserve and maintain historical artifacts. And to select and display exhibits illustrating and informing the public about the heritage and culture of Pictou County and its people.

c) To co-operate with other groups or societies of like aims, in the promotion and preservation of the cultural heritage of the region.

d) To achieve financial independence for the Hector Research and Heritage Centre.

e) The Society shall operate as a non-profit in order to be supported by and receive grants from the Nova Scotia Government via the Nova Scotia Museums. All monies received and dispersed shall be recorded by the treasurer and audited annually by a certified auditor. The Society charges membership fees, entrance fees and conducts fund raising activities, which are matched to a limit by the Nova Scotia Government, via the Nova Scotia Museum.

[7] The Pictou County Genealogy & Heritage Society submits the gift to the Heritage Society for Pictou County is a misdescription of it, and it is the intended beneficiary. Alternately, if the bequest is not a misdescription, the *cy-près* doctrine can be applied to prevent the gift from lapsing.

[8] L. Zane Fraser submits the organization which most clearly resembles the Heritage Society for Pictou County, Nova Scotia is the Pictou Heritage Society, not the Pictou County Genealogy & Heritage Society, and the Pictou Heritage Society should be found to be the intended beneficiary. Mr. Fraser goes on to submit this is not an appropriate situation for the application of the *cy-près* doctrine.

[9] If there was a lapse of the residual gift to the Heritage Society for Pictou County, Nova Scotia, the lapsed gift passes on an intestacy. In *Feeney's Canadian Law of Wills* (4th ed.), at s. 13.2, the author states:

Today when the devisee or legatee dies before the testator the usual result is that the failed gift, be it land or personal property, falls into the residue of the

testator's estate. The matter is now governed by statute. Section 23 of the Ontario Act seems to indicate that it can have no application if there is no residuary clause, nor can it apply when the gift is a residuary one that fails in whole or in part. In such cases, jurisprudence has established that the lapsed gift usually passes on an intestacy, *i.e.* as if the testator had died intestate with respect to the property in question. So, too, if a will simply makes a general gift of all property, the failure of such a gift would normally result in an intestacy as regards the property comprising the gift.

[10] Is the gift to Heritage Society for Pictou County, Nova Scotia a misdescription, and if so, of what organization?

[11] The name Heritage Society for Pictou County, Nova Scotia is a misdescription, as no such organization exists.

[12] In *Waters' Law of Trusts in Canada* (3rd ed.), it states at pages 765-766:

... Difficulties can arise when the donor, as a testator, names a charitable institution. If he has named it correctly, then there is no problem, of course, but he may have referred to the intended institution by a shortened name used in casual speech or simply not have remembered the name correctly. There are numerous Canadian cases concerned with this difficulty. As a general practice the courts make every effort to discover which beneficiary was intended by the testator, and do not allow misdescription - either an imperfect or inaccurate description - to defeat the testator's intent. The same is true when the beneficiary is an institution, but in the case of charitable gifts the courts often seem to lean over backwards to avoid the finding that the intended institution cannot be discovered. The reason for this is that, if the institution cannot be discovered, and the court also reaches the conclusion that the testator intended to benefit the misnamed institution and that institution only, then the gift would have to fail. Whereupon the trust property would fall back into the estate.

Consequently the courts take the view that, if the description is insufficient with reasonable certainty to designate the intended beneficiary, the institution in that position is the intended recipient. In *Edwards v. Smith*, where the testator made a bequest to the "Wesleyan Methodist Superannuated Ministers Funds," Spragge C. drew attention to the fact that there was no such fund, and then observed that the Connexional Society of the Wesleyan Methodist Church maintained a fund known as "the Superannuated or Worn-out Preachers Fund." This is not precisely the term used in the will, he said, but there was no other fund more appropriate to the testator's language, and he scarcely found room to doubt

that the fund mentioned was the one intended. He then found that the latter fund was the one intended.

As is the normal rule in the interpretation of wills, not only intrinsic but extrinsic evidence may be admitted to prove identity between the institution before the court and that intended. In *Re Weldon*, the executor's affidavit thus identified the two named beneficiaries.

If the beneficiary intended by the testator is thus discoverable, the courts have said on several occasions that there is no need to invoke the *cy-près* doctrine. A *cy-près* scheme is only needed when it is impossible to say which institution is intended to benefit. ...

[13] Both Pictou Heritage Society and Pictou Genealogy & Heritage Society have the words Pictou, Heritage and Society in their names. The Pictou Heritage Society had ceased to exist prior to Mr. Darby executing his will. The object of the Pictou Heritage Society was to deal with the local history and culture in the Town of Pictou and promote study, restoration and preservation of buildings and all things ancient and modern influencing the Town of Pictou.

[14] The Pictou County Genealogy & Heritage Society was incorporated in 1996. It was in existence at the time Mr. Darby made his last will and testament. The goal of the Society is to be a centre for the pride, traditions and achievements of Pictou County people, past, present and future.

[15] John Darby was born in New Glasgow. His mother was said to be a direct descendent of New Glasgow's first settler. Mr. Darby's mother and father lived in New Glasgow. The gift was to be acknowledged by the Society as a gift made in the names of his parents, to be used for the preservation of Scottish heritage in Pictou County. Mr. Darby intended the gift to go to the Heritage Society for Pictou County.

[16] I find the words "Heritage Society for Pictou County, Nova Scotia" is a misdescription of the Pictou County Genealogy & Heritage Society. It was the Society existing at the time Mr. Darby executed his will, whose objects dealt with the heritage of Pictou County, Nova Scotia.

[17] Having found the gift was to the Pictou County Genealogy & Heritage Society, it is not necessary to determine if the *cy-près* doctrine may be applied to

prevent the gift from lapsing. However, in the event I erred in determining the gift was to the Pictou County Genealogy & Heritage Society, I will deal with the *cy-près* issue.

[18] The circumstances in which a court will have reference to the *cy-près* doctrine was described in *Waters' Law of Trusts in Canada* at p. 773:

It sometimes happens that when the donor's instrument of gift takes effect, the charitable object or the required mode of achieving the object cannot be carried out. The court will then by order approve a scheme, or require a scheme to be drawn up, for the trust property to be applied to an object or mode of achieving the object which is as close as possible to that set out by the donor. For the court to have this jurisdiction two things must be established: first, that it is impossible to carry out the object or mode of attainment, or, if it is indeed possible, that to carry out the object or mode would in the circumstances be impracticable. Second, it must be shown that the donor in making the gift had a general or overriding charitable intent. If both tests are satisfied, then the court as part of its inherent jurisdiction will, in its discretion, make the appropriate order for a *cy-près* scheme.

[19] Here it is impossible to carry out the gift as the Heritage Society for Pictou County, Nova Scotia does not exist, nor did it exist at the time Mr. Darby executed his will. I find the gift expressed Mr. Darby had a general or overriding charitable intent, in that, the gift was for the preservation of Scottish heritage in Pictou County.

[20] In dealing with what is charitable, Smith, J. in *Re Kunze Estate*, 2005 SKQB 212 stated at para. 18:

In order to be considered "charitable" at law, an activity or purpose must fall within one of the heads of charity identified by Lord Macnaghten in *Pemsel v. Special Commissioners of Income Tax*, [1891] A.C. 531 (U.K. H.L.), the relief of poverty, the advancement of education, the advancement of religion, and miscellaneous activities beneficial to the community. In addition, it has to be concerned with the benefit of the public, or some significantly large section of the public. The latter requirement serves, in general, to exclude "private" charities, for the employees of a certain employer, for example, or relatives of the settlor.

[21] The preservation of Scottish heritage in Pictou County is a charitable intent or purpose, in that, it is an activity beneficial to the community and the advancement of education.

[22] I find it is appropriate to apply the *cy-près* doctrine, and the gift should go to the Pictou County Genealogy & Heritage Society on the terms as set out in the will.

[23] Any submissions the parties wish to make on costs should be provided to me by June 30, 2011.

Coughlan, J.