IN THE PROBATE COURT OF NOVA SCOTIA

Cite as: Peach Estate (Re), 2011 NSSC 74

Date: 20110328
Docket: SYD 333360;
Probate No. 21051
Registry: Sydney

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE ESTATE OF THOMAS ALLAN PEACH, DECEASED

DECISION

Revised Decision:	The docket number SYD 20151 has been corrected to read SYD 333360; Probate No. 21051. This decision released on January 19, 2012 replaces the previously released decision.
Judge:	The Honourable Justice Patrick J. Murray
Heard:	October 5, 2010, in Sydney, Nova Scotia
Written Decision:	March 31, 2011
Counsel:	G.Wayne Beaton Q.C. and Paul Chaission for the Estate Eric Durnford, Q.C, for the Glace Bay General Hospital Charitable Foundation Gary Corsano and Robert Risk for the Cape Breton District Health Authority Kimberly A. McCurdy, for the Salvation Army in Canada

By the Court:

INTRODUCTION:

[1] This is an interpretation of a clause in a will. In his will, executed in 1980, the Testator gifted the residue of his estate to the Glace Bay General Hospital (GBGH). He specified that interest on the principal could be used to buy equipment for the existing facility. He also specified what would happen to the money in the event a new hospital was built. Further, he specified that, if the GBGH "ceased to exist", the residue was to go to the Salvation Army (SA).

[2] In 1986, the existing GBGH was replaced by a new building (also called the GBGH) at a different location in Glace Bay. The Testator died in 2009. By that time, the GBGH had been dissolved as a separate legal entity. The GBGH was then owned and operated by the Cape Breton District Health Authority (DHA). The hospital known as the GBGH continued to function.

[3] There are three claimants; the DHA, the GBGH Charitable Foundation (Foundation), and the S.A. I have determined that the Testator intended to benefit the GBGH in its present form. I have therefore determined that, as far as the will is

concerned, the GBGH did not cease to exist. The SA is therefore not entitled to receive the residue under the will. As between the DHA and the Foundation, I have decided that the DHA is the rightful beneficiary.

FACTS

[4] Thomas Allan Peach died on April the 28th, 2009 and left a will which he drafted himself in 1980. Mr. Peach was a former school teacher, having taught physics at Morrison High School in Glace Bay for many years. He was unmarried, and was predeceased by his parents and his only siblings, a brother and sister. He had no children, no nieces or nephews, and no immediate family.

[5] In his will Mr. Peach left the balance of his estate in clause 6 as follows:

> 6. The balance of my estate is bequeathed to the Glace Bay General Hospital, Brookside St., Glace Bay. This amount is to be invested and the interest used to buy equipment for this hospital. In the event of a new hospital is constructed the capital is to be used toward the establishment of Kidney Care Unit dedicated to the memory of Mr. & Mrs. John W. Peach. In the event that this hospital ceases to exist the balance of the estate is to be donated to the Salvation Army.

The Will , in its entirety is attached hereto as Appendix “A”.

[6] Mr. John Touchings, has asked the Court for an interpretation of clause 6. Mr.Touchings has advised the Court that there are three parties who claim the balance of Mr. Peach's estate. They are:

(1) The Cape Breton District Health Authority. ("The DHA")

(2) The Glace Bay General Hospital Charitable Foundation. ("The Foundation")

(3) The Salvation Army In Canada. ("The SA")

Mr. Touchings takes no position with respect to the three claims made to the residue of the estate.

[7] Mr. Peach was known as a frugal yet generous man. He lived into his nineties and still cut wood to heat his home. He kept a garden and grew his own vegetables. He kept bees and produced his own honey. His will was drafted when he was in his sixties, almost 30 years before he died.

[8] Mr. Peach was an intelligent man who was very much aware of his surroundings. Except for his final days in hospital Mr. Peach was fully competent. It is apparent from reading his will that he was particular and purposeful. It is also

evident that he held strong opinions. He wanted things a certain way. Mr. Peach was proud of his home, his parents, and his community of Glace Bay. He was generous to charities including the Church of England and the SA.

[9] He was a patient at the GBGH, more frequently in his later years. He was aware of current affairs and consumed newspapers.

[10] Twenty-five years before his death Mr. Peach entrusted his original will to the possession of his friend, Mr. John L. Touchings. There have been no changes or codicils.

ISSUES

[11] In order to determine which Claimant is entitled under clause 6, I have to resolve two factual issues:

(i) **Whether a "new hospital" was constructed**?

(ii) **Whether "this hospital" ceased to exist**?

These are the issues - their resolution determines who is entitled as between the SA and the other two claimants. If a new hospital was constructed then according to clause 6 the capital is to be used to establish a kidney care unit dedicated to the memory of Mr. Peach's parents. If this hospital ceased to exist then the Salvation Army would be the recipient. If this hospital did not cease to exist , then there is a third issue:

(iii) Who is entitled to the balance or residue of Mr. Peach's estate?

[12] I turn now to present the positions of the three parties with respect to each of their claims.

POSITIONS OF THE CLAIMANTS

THE DHA'S POSITION

[13] The GBGH located on South Street falls under the ownership and management of the DHA. It says that while ownership and management has been restructured, the GBGH has not ceased to exist and is entitled to and capable of

receiving the legacy Mr. Peach provided in his last will and testament through the DHA.

[14] The DHA's position is that Mr. Peach intended to benefit the GBGH, regardless of the management structure in place at any time or the location of the facility. The bequest was clearly to benefit the GBGH as it existed in 1980 or at some future time in a new building.

[15] The DHA argues that Mr. Peach clearly turned his mind to the possibility of construction of a new hospital to replace the Brookside Street facility. It further argues he did not qualify his bequest by stating it was conditional upon the hospital remaining at the Brookside Street location. It is also clear that Mr. Peach's intention was to benefit the GBGH through either the purchase of equipment for the old building or the establishment of a kidney care unit in a new building. Further it is the DHA's position that the common law supports the GBGH as the intended beneficiary of the balance of Mr. Peach's estate.

[16] The DHA states that the gift to the SA is conditional upon the GBGH ceasing to exist. It says that in order for the bequest to SA to take effect, the

intended primary beneficiary, the GBGH must have ceased to exist. The DHA's position is that the GBGH did not cease to exist and therefore the SA is not entitled to the funds.

[17] The DHA says that the Foundation is not entitled to receive the balance of the estate. At the time Mr. Peach prepared his will there was no charitable foundation in place to support the hospital. The DHA argues that had Mr. Peach died prior to the reorganization which occurred throughout the 1990's, the funds would have gone directly to the GBGH. The DHA further states that there is no presumption in law that bequests and gifts to a particular institution somehow vest with the charitable foundation supporting the institution.

[18] In fact the DHA states otherwise. In its brief it states that certain legislation in respect of other hospitals legislate that a gift or bequest to the hospital vests in their foundation. The DHA cites as an example, Section 12 of the *Victoria General Hospital Foundation Act* which states: "a gift or devise to the hospital made on or after the 15th day of July 1983 vests in the foundation". Further the *Nova Scotia Hospital Foundation Act* states in Section 12 that : "a gift or devise to the hospital made on or after the 8th day of July, 1986 vests in the foundation".

These are examples of legislation which the DHA argues would have presented the legislators with an opportunity to stipulate whether a gift to a hospital vests in a foundation. It argues that, while Section 77 of the *Health Authorities Act* stipulates that Foundation funds must be used for the hospital it supports, it does not go so far as to vest any gift to a hospital in its foundation.

[19] The DHA argues that Mr. Peach was a frequent visitor to the GBGH. He was generally a very well informed person . He would thus have been aware of the existence of the Foundation. He could have changed his will to name the Foundation as a beneficiary but he did not.

[20] In conclusion the DHA states that while donations to the foundations of the hospitals within the DHA are encouraged, there are times when donations are made to the DHA. The DHA is a registered charity with the Canada Revenue Agency and issues receipts for gifts, bequests, donations it receives. The DHA has internal policies in place to deal with gifts and bequests in support of a specific purpose or institution. The DHA manages funds made in accordance with donors wishes including some which are specifically for the benefit of the GBGH.

THE FOUNDATION'S POSITION

[21] The Foundation position is that although the it did not exist at the time of the execution of Mr. Peach's will, it did exist at the time of his death. Why Mr. Peach did not change his will to name the Foundation as beneficiary of his gift to the GBGH, it says must be looked at from Mr. Peach's point of view.

[22] One plausible explanation is that he simply was not aware of the Foundation's existence. Another equally plausible explanation is that, even if he was aware of the Foundation's existence, as a lay person, he saw the Foundation as simply an extension of the GBGH , being its the fund-raising arm . Thus he did not find it necessary to rename the beneficiary since a gifting to the GBGH would be akin to gifting the Foundation and vice versa.

[23] The Foundation further submits that whether Mr. Peach was or was not aware of the Foundation's existence before his death, the crux of the matter is that Mr. Peach intended to benefit the physical premises of the GBGH . It says the Foundation is the legal body that receives gifts directed to the GBGH. The

Foundation has received gifts on behalf of the GBGH for specific purposes since its inception and continues to do so. The Foundation submits therefore that in order to give effect to Mr. Peach's intent to benefit the GBGH, the gift must be directed to the Foundation.

[24] The Foundation outlined numerous gifts which it has received on the hospital's behalf since its incorporation. All of these gifts have been used for specific purposes for the benefit of the GBGH. In 1993 for example , $1,800,000 was used for various construction projects and in 1998/1999, $300,000 was used to establish it's retinal eye clinic.

[25] The Foundation argues that the interpretation of "this hospital" would be the physical and operational premises as opposed to its legal operator. The Foundation argues that the intended recipient of the second gift provision in clause 6 is the physical hospital itself not its legal operator. As the GBGH is unable to accept the monetary gift on its own behalf, the Foundation says the only way to honour Mr. Peach's intention is to direct that the Foundation, the legal body created specifically for the purpose of receiving gifts for the GBGH, receive the gift on GBGH's behalf.

[26] The Foundation says that the SA is simply not entitled because the GBGH continues to exist. Therefore they state that “this hospital’ has not ceased to exist and as a result, the condition precedent triggering the gift over (to the SA) in clause 6 of Mr. Peach's will has not come to pass.

[27] As to whether the DHA should receive the bequest of the residue of Mr. Peach’s will, the Foundation argues that Mr. Peach’s gift is clearly of a charitable nature and the Foundation, not the DHA is the charitable organization with proper charitable status to receive a charitable gift intended for the benefit of the GBGH. The Foundation submits that the function of the various charitable foundations established for the benefit of their hospital is confirmed by Section 77 of the *Health Authorities Act.* The Foundation argues that the objects of the DHA’s are much broader than both the GBGH’s and the Foundation’s.

[28] The Foundation argues that “of great significance” is the fact that the DHA has broader responsibilities across a much larger jurisdiction - the DHA encompasses all health facilities in Cape Breton, Northern and Central Inverness and Victoria Counties. Mr. Peach was most closely connected to the Glace Bay

community and primarily concerned with benefiting that community in particular, specifically by building a kidney care unit in the GBGH at South Street, Glace Bay. For these reasons the Foundation argues that if the gift is directed to the DHA, Mr. Peach's intention may not be realized, as the DHA is obligated to weigh the needs of various health facilities in it's jurisdiction before disbursing the gift. However, if the gift is directed to the Foundation itself, Mr. Peach's intent will be honoured.

[29] Finally, the Foundation argues that the Court must first and foremost derive Mr. Peach's intent from his own words, from the clause as a whole, from the entire will, and from the circumstances surrounding the execution of the will itself. It states that, if that framework is applied, the inevitable conclusion is that Mr. Peach did not intend the funds in the residue to go to the legal operator of the newly constructed hospital. He intended to benefit the actual physical operating hospital itself. Consequently, changes in the legal governance of the hospital on South Street still known as the GBGH should not affect the clearly intended recipient of Mr. Peach's gift. When one asks the simple question, who is the recipient of the bequest intended to benefit the physical entity known as the GBGH? The Foundation says the answer is clear - it's Foundation.

THE SALVATION ARMY IN CANADA'S POSITION

[30] The Salvation Army in their brief identified no less than six issues in respect of Mr. Peach's will. They have also made numerous legal arguments as to why the SA should receive the residue of his estate. In advancing these arguments they have described themselves as the "alternative beneficiary".

A summary of the SA's submissions is as follows:

1. That the GBGH does not currently exist in the eyes of the Testator because of its amalgamation with other hospitals and services. Mr. Peach named his own successor, the SA.

2. Neither the Foundation or the DHA would have been in the mind of the Testator at the time he drafted his will. Further they argue that neither is clearly identifiable as the GBGH and that they, themselves cannot agree on the identity as such , despite their commonly stated goal of honouring the bequest of Mr. Peach.

3. That it was Mr. Peach's intention to immediately distribute the principal upon the establishment of a kidney care unit at the time of construction and therefore since the time of construction has passed, this

condition would be unable to be fulfilled. Alternatively it was the testator's intention that the capital be held in trust and invested if and when a kidney care unit is established in memorial, and this would offend the Rule against Perpetuities.

4. The words and actions of the Testator after the execution of his will, as contained in the affidavit of Cathy Lundrigan serve as extrinsic evidence of the Testator's testamentary beliefs and intentions that SA would eventually benefit upon his death.

5. The SA states that there are a number of possible interpretations of clause 6 in the last will and testament of Thomas Peach and that these include the following:

a. The SA state that as long as there is a hospital that can be deemed to stand in place of the Glace Bay General as it existed in 1980 and provided a kidney care unit is built and memorialized, there would be no residue for the SA.

b. The SA state that logically if there were no hospital in Glace Bay at the time of the Testator's death that the SA would be his alternate residual beneficiary.

c. The SA further argues that once a charitable trust is established the gift will not fail for uncertainty and that extrinsic evidence will be heard in an effort to identify the beneficiary, should doubt exist. This is commonly known as the Cy Pres doctrine.

d. The SA state in their brief that Mr. Peach's will "signified the creation of a trust with only the interest being used for the existing facility and the principal either (a) being used to establish a kidney care unit named after Mr. Peach's parents in the event a new hospital was constructed or (b) donated to the Salvation Army."
The SA argues it is apparent that the testator knew there was a new hospital pending at the time of his will and that the Brookside Street facility would likely cease to exist.

e. The SA argues that any interpretation placed on clause 6 must include not only the condition that a new hospital be constructed but also that the funds be used toward the kidney care unit. They state the creation of this unit is the very reason for the bequest. They argue

> that in order for a Court to decide whether a condition has or has not been fulfilled, it must be reasonably clear and certain.

The SA therefore argues that an inquiry into existence or nonexistence of a particular entity is not necessary where the Testator has clearly and specifically named the "successor" to the GBGH by specifying the SA as the residual heir.

The SA have set out two additional possible interpretations. These are similar in nature and are as follows:

> (i) if the GBGH builds a new facility that the whole account would be used to establish a kidney care unit in the name of Mr. Peach's parents. However if the kidney care unit did not come to fruition in the new hospital and the GBGH has ceased to exist, all money goes to the SA.

> (ii) the residue of the estate shall be invested and the income used by the hospital for equipment. If a new hospital is built the principal is to

> be used for a kidney care unit in the memory of his parents. If such kidney care unit is not constructed and Glace Bay no longer has a hospital, the principal shall be donated to the SA.

THE LAW

Jurisdiction

[31] The court's jurisdiction to deal with the interpretation of Mr. Peaches's will is set out in s. 8(1)(c) of the *Probate Act*, S.N.S. 2000, c. 31, which permits the court to "effect and carry out the judicial administration of the estates of deceased persons through their personal representatives, and hear and determine all questions, matters and things in relation thereto necessary for such administration."

The Wills Act

[32] Section 23 of the Act states the time from which a will speaks is as follows:

> 23 Every will shall be construed, with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

This section states that assets of the estate will be determined at the time of

death, which in this case is 2009. In the case of the Testator's intention, it would be the time the will was drafted, which in this case is 1980.

[33] All parties are in agreement as to the approach I should apply in determining Mr. Peach's will, and in particular Clause six (6). They have stated , consistent with the case law ,that the subjective intent of the Testator at the time he drafted his will should be determined. They say that in doing so regard must be had to Mr. Peach's circumstances and that extrinsic evidence shall be considered to determine these circumstances. I hasten to add here that direct evidence of the Testator's intention should not be admitted save in exceptional circumstances. Extrinsic evidence of surrounding circumstances is admitted only to give meaning to the words the Testator used. In other words, the primary evidence of his intention is the will itself.

[34] In *Skerrett v. Bigelow Estate,* 2001 NSSC 116 [*Skerrett]* Moir, J adopted the following as an accurate summary of the law that I should apply in this case, the so-called "Armchair Rule "

> " Counsel referred me to passages in MacKenzie, *Feeney's Canadian Law of Wills* (Toronto, 2000, 4th Ed.) ["Feeney's"], 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". [**Emphasis added**]**

[35] The following quote from **Feeney on Wills** (4th edition) is another statement of the "armchair rule":

> "...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 use of 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 .”

[36] All counsel agree that this is an accurate statement of the law I should apply. Beyond this, there is an aspect of law which addresses when to apply this rule of construction, meaning that if I can derive Mr. Peach’s intention from the will itself, I may not need to to apply the “armchair rule”.

[37] In the case of **In Re: Mitchell Estate** [2003] N.S.J. No. 425, Edwards, J. concluded as follows with respect when to apply the “Armchair Rule” at paragraph 30:

> “J.D.'s intention is apparent from the Will itself. There is no need to resort to the rules of construction and assess the words of the Will in light of the surrounding circumstances. I would note that, even if I had done so, the result would be the same. Jane's estate is entitled to Jane's share under J.D.'s Will.”

[38] On appeal, the Nova Scotia Court of Appeal affirmed this approach. At paragraphs 18 to 19 Chipman, J.A. states as follows:

> “17. I am satisfied Edwards,J. applied the correct law.
>
> 18. The principles governing interpretation of wills have been stated and restated many times.

> 19. The first duty of the court is to ascertain the intention of the testator from the language used in the will. Regard must be had, not only to the whole of any clause in question, but to the will as a whole, which forms the context of the clause. Effect must be given, if at all possible, to all parts of the will. A fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates. The context may well include "surrounding circumstances". Only after the language employed by the testator has been approached in this fashion need resort be had to case law and legal rules to see if any modification is required. These principles were referred to with references to relevant authorities by Davison, J. in **Carter Estate Re**: (1991), 109 N.S.R. (2d) 384 (T.D.). The role of "surrounding circumstances" in this exercise was discussed by this Court in **Re: Murray Estate** (2001), 191 N.S.R. (2d) 63, at paras. 20-25."

[39] In **Mitchell,** Chipman J.A. in discussing the role of surrounding circumstances "in this exercise", referred to **RE: Murray Estate**, where he referenced the decision of Bayda, J.A. in **Haidl et al v Sacher et al** [1981] WWR 293 (CA) at paragraphs 21 - 23 as follows:

> "21 The Court of Appeal of Saskatchewan in dismissing the appeal addressed the question of surrounding circumstances. Bayda J.A., (as he then was) speaking for the court, asked at p. 296 whether the so-called "ordinary meaning" rule of construction should first be applied without admitting and taking into account surrounding circumstances unless it is found that its application produces a meaning which is unclear and ambiguous, or **whether the law required the surrounding circumstances to be admitted at the start,** and that the "ordinary meaning" rule of construction should be applied in light of them. The former approach was referred to as procedure A **and the latter as procedure B.**

> 22 Bayda J.A. then embarked upon an examination of authorities in England and Canada and concluded at p. 302 that **the Canadian authorities tended to put forward procedure B as the proper approach.** In his view, it was the approach most likely to elicit the testator's intention and thus more desirable. (cited in part only)
>
> 23 In my opinion, this is as good a statement as any as to how we should perform our function. It is not strictly necessary here to determine which procedure is preferable because, as I have said, we are driven to examine surrounding circumstances in any event. **Obiter, I would express a preference to the view taken by Bayda J.A. See also Feeney, supra, [paragraph] 10.53-10.57." (**Emphasis added**)**

[40] Surrounding circumstances may therefore be examined or “admitted at the start”, meaning that the “armchair rule” can be applied at the outset. Whereas this is consistent with what is being suggested by counsel for the parties, it is what I intend to follow. I would note that in **Re Saunders Estate** [2005] 236 N.S.R (2nd)(T.D.) 16, McDougall, J. followed the approach in **Mitchell** (C.A.) .

[41] Finally in **Re Murray Estate**, the Appeal Court gave further insight as to what is considered evidence of surrounding circumstances when Chipman J.A. stated at para. 19:

> “Whatever approach is favoured, there is sufficient uncertainty here to require us to examine surrounding circumstances, **such as the testator’s lifestyle, means and assets, and relatives and associations in construing the words of the will.”**

(Emphasis added**)**

[42] The evidence of Mr. Peach's circumstances is limited. I will however attempt to use that evidence to gain some insight into Mr. Peach's circumstances as they existed in 1980.

ANALYSIS

[43] The DHA argues that it is the rightful successor to the GBGH. As such they are the proper body to receive his bequest. The DHA relies essentially on the case of in **Re: Morgan's Trust (1949) M. 2612** ,to support their position. This case, which I shall later refer to, illustrates the so called "English hospital cases"approach to successorship where there has been a series of amalgamations in respect of a hospital named as the intended donee in a will. The issue in **Morgan's Trust** , as here, was whether a particular hospital ceased to exist.

[44] The Foundation agrees with the DHA that the hospital did not cease to exist. Both physically and legally it says "this hospital" continued. Physically the DHA says that the new hospital was constructed on South Street in Glace Bay in 1986. Legally, the DHA says the GBGH has continued through a succession or series of

amalgamations beginning in 1993 and ending in 2000. Throughout this time the same building continued to serve the same community. There is no dispute that a new facility was constructed in 1986 to replace the old (original) hospital on Brookside Street which was torn down.

[45] The Foundation parts company with the DHA when it states that Mr. Peach did not intend to benefit the owner and operator. It says he intended to benefit the physical premises of the hospital itself. The objects of the Foundation are concerned only with the GBGH. The Foundation says therefore that the only way to honour Mr. Peach's bequest is for the Foundation to receive the gift of his residue.

(i) Whether a new hospital was constructed?

[46] The Foundation filed an affidavit of Catherine Power of 22 School Street in Glace Bay. She has been a member of the Glace Bay General Hospital Charitable

Foundation Board since 1997 and has held the position of Treasurer since 2001. Ms. Power was born in Glace Bay and employed exclusively from 1966 to 1997 at the GBGH, except for four years while she was employed at the Glace Bay Community Hospital and from 1977 - 79, when she was employed jointly at both hospitals. During her employment, she held various positions including Registered Nurse, Operating Room and various management positions, including Director of Patient Services from 1992 to 1997. Ms. Power was also a member of the Board of Directors of the Glace Bay District Health Authority for six years from 2000 - 2006.

[47] Ms. Power says in her affidavit that the GBGH is a hospital in accordance with the definition of "hospital" under the *Hospitals Act*, R.S.N.S 1989, c. 208 s. 2(f). She also states in paragraph 6 of her affidavit as follows:

> "6. As appears from the legislation incorporating the Hospital, it was originally constructed on or about the year 1914, on Brookside Street, Glace Bay. **By the year 1980, it was an outdated facility, leading to its being demolished and a new Glace Bay General Hospital being constructed on South Street, Glace Bay, which new hospital officially opened May 23, 1986.** Attached hereto as Exhibit "A" is a photograph containing a true representation of the Hospital, which photograph was taken on April 14, 2010." (Emphasis added)

The DHA filed an affidavit by Mr. John Malcolm, CEO . In paragraphs 10 and 11 he states:

> " 10. The General Hospital was originally located on Brookside Street in Glace Bay. The facility served the community for over 70 years.
>
> 11. **In or about 1986, the Glace Bay General Hospital on Brookside Street was replaced with a newer, modern facility located on South Street in Glace Bay**. This new facility was operated under the existing Glace Bay General Hospital legislation and completely replaced the Brookside Street facility, which was eventually torn down." (Emphasis added)

[48] The SA filed the affidavit of Ms. Cathy Lundrigan , in support of the Salvation Army's position . Her affidavit does not specifically mention the new hospital constructed in 1986 on South Street except to say the that SA vehicles have transported scores of people to events and appointments "including hospitals."

[49] However the SA in their brief filed by Ms. McCurdy, acknowledged in paragraph 5 of the stated "Facts" that:

> "5. The Glace Bay General Hospital, Brookside Street, Glace Bay, was demolished. **A new facility, in fact built in 1986."** (wording is exactly as it appears). (Emphasis added)

[50] Although the SA described the new building as a “new facilty”, and not a hospital , there can be little doubt that this “new facility” was in fact a hospital. The SA acknowledged in oral argument that this building was “a hospital” but argued it wasn’t “this hospital” referred to by Mr. Peach in his will.

[51] This new facility continued to operate as the GBGH until it merged with the Glace Bay Community Hospital in 1993. Even then it continued to be identified under that statute as one of two hospitals administered by the Glace Bay Healthcare System Corporation under the *Glace Bay Healthcare System Act*, passed in 1993.

[52] The new building with the name , “Glace Bay General Hospital” affixed to the front of it stands today serving the residents of Glace Bay and surrounding districts. What I have to decide is whether this was the “new hospital” to which Mr. Peach was referring in his will.

[53] In 1980 there were two hospitals in Glace Bay. By “new hospital” Mr. Peach could have meant one that would replace the former Community Hospital (known as St. Joseph’s). However in the wording of clause six of his will he had only just referred to the GBGH on Brookside St. in the first sentence of clause six. Two

sentences later he mentioned what would occur if a “new hospital” was constructed.

[54] I find that Mr. Peach in drafting his will believed no further particulars or words were necessary to describe what he meant by a “new hospital” being constructed and that the ordinary meaning of his words were sufficient to convey that he meant a new hospital in place of the old one. I find this to be the GBGH constructed on South Street in 1986. This is the reasonable inference to be taken from Mr. Peach’s knowledge , awareness, and from the wording of clause six drafted in 1980.

[55] It must also be inferred that this new hospital was indeed “constructed”. For this one need only view the picture attached as “Exhibit A” to Catherine Powers’ affidavit to see it, as it still stands today.

[56] Although this is not the main issue in the case, it is nevertheless an important issue. One of the key issues is whether “this hospital” ceased to exist? I turn now to address that issue and ultimately the issue of to whom the gift of the residue of Mr. Peach’s estate should be paid?

(ii) Whether "this hospital" ceased to exist?

[57] Both the DHA and the Foundation agree that "this hospital" continued to exist as a physical structure and a legal entity.

[58] The SA argues that "this hospital" ceased to exist in the eyes of the Testator. They say the physical structure known to the Testator was demolished and further that following the repeal of the 1914 Legislation, what is left is a hospital operating within an amalgamation of other hospitals.

[59] They say the Testator's will had "rigidity" and given his strong faith and convictions , he would not have desired this amalgamation. The SA states that the amalgamation of the GBGH and the St. Joseph's Hospital effectively extinguished the GBGH "from the perspective of Mr. Peach".

[60] At the outset it is important to look at the definition of “hospital” as contained in the *Hospital’s Act of Nova Scotia*, R.S.N.S. 1989, c 208. There it is defined as follows:

> “(f) "hospital" means a building, premise or place approved by the Minister and established and operated for the treatment of persons with sickness, disease or injury and the prevention of sickness or disease, and includes a facility, a maternity hospital, a nurses' residence and all buildings, land and equipment used for the purposes of the hospital, **or means, where the context requires, a body corporate established to own or operate a hospital, or a program approved by the Minister as a hospital pursuant to this Act or any other Act of the Legislature. (**Emphasis added)

[61] From this definition it can be seen that a “hospital” is not only the physical structure, providing care for the sick and injured but also includes the legal or corporate entity that owns and operates it from time to time. This definition would allows for “successorship” when it states that a hospital also means,

> “a body corporate established to own or operate a hospital or a program approved by the Minister pursuant to this Act or any other Act of the Legislature”.

[62] This in fact occurred through various *Acts* of the Legislature establishing new owners of the hospital as body corporates from time to time . This series of statutory amalgamations throughout the Province in the 1990"s included the GBGH.

[63] It is also important to recognize that Mr. Peach's bequest was intended to be "charitable". A gift for purposes either general or specific, to a hospital are clearly charitable. Simply because a hospital has become a hospital within an amalgamated group by legislation, does not mean it ceases to be a charitable object. (**Re: Butler Estate N.B. -(2007) N.J. No. 194)**.

[64] The SA submits that the GBGH was effectively extinguished in 1993 when the *Glace Bay Health Care System Act S.N.S. 1993, c 6* was passed. That Act stated however in s.3 that the Glace Bay Community Hospital (Corp.) and the Glace Bay General Hospital were "amalgamated **and continued**" as one body corporate under the name "Glace Bay Healthcare System Corporation". (emphasis added).

[65] In 1996, by Order in Council, these two hospitals (as one Corporation) were amalgamated with 7 other hospitals, all in Cape Breton, to form the Cape Breton Health Care Complex. In the same year, by Order in Council, the Glace Bay Community Hospital, formerly known as St. Joseph's, was shut down leaving the (former) GBGH located on South Street as the only hospital operating in Glace Bay. (Exhibit "C" to Mr. Malcolm's affidavit.) This Order also placed all powers of the

Board of Directors in the Glace Bay facility in the interim board of the Glace Bay Healthcare Complex. The Order, in identifying the hospital by it's corporate entity, stated that the Board had power to manage and administer the hospital(s) known as "the Glace Bay Healthcare System Corporation." The only hospital owned by the Corporation at that time was the former GBGH . It was the only hospital that remained in Glace Bay.

[66] The final step in the legislative reorganization of the hospitals in the province came in the year 2000 when the *Health Authorities Act of Nova Scotia S.NS., 2000, c. 6* was passed. The Glace Bay Healthcare System Corporation was designated as a hospital for the purpose of this *Act* (Exhibit E ,Malcolm).This hospital was and is the same hospital constructed in 1986.

[67] The *Health Authorities Act*, by virtue of section 74 (1)(a), effectively dissolved the Glace Bay Health Care System Corporation. In section 6(1), it established that the health authority would "govern and manage" all health services in each district. Further, in section 6(2) it states , "Each district health authority is a body corporate under the name determined by the Governor in Council in the regulations."

It is also relevant that in section 74(1)(a) of the *Act* , the assets and liabilities of each hospital became those of the Authority for the "health district in which those hospitals are located".

[68] The DHA, relies on two cases in support of it's proposition that "this hospital", did not cease to exist. They are, **Re: Morgan's Trust**, **(1949) M. 2612**, and **Charlotte County Hospital v. St. Andrews (Town) 1980 Carswell NB 6 .** In **Morgan's Trust** , the Minister of Health argued that:

> "A gift to an unincorporated charity, such as the [Hospital], **is a gift for a particular purpose rather than to particular persons, and, consequently, administrative changes are immaterial: they cannot destroy the charity, for that exists so long as the purpose continues.** Here the purpose of the charity is, as stated in its rules, to provide medical aid and nursing services in Liskeard and the surrounding district. That purpose is still being carried out, and the work continues on the same premises as at the date of the will. **Even if the hospital had been moved to another locality, the gift would not fail if it could be shown that the activity continued...**" (Emphasis added)

The Court agreed and found that the hospital did not cease to exist (see reference to Roxburg, J. at para.106 herein).

In **Charlotte County Hospital** the Court discussed whether there was a lapse of the gift due to a legislative change in the hospital causing it to merge. At paragraph 14 the Court stated:

> "When Mr. and Mrs. Ross died in 1945, the Chipman Hospital was in existence and able to receive legacies. And it was at the date of their deaths that the trusts created by cl. 4(c) of the Ross wills vested in the Chipman Hospital...
>
> There can thus be no question of lapse. Moreover, the Chipman Hospital did not cease to exist as the result of the legislation in 1950. It has a continuing identity in the Charlotte County Hospital with which it was merged and through which it continues by that name."

[69] The SA maintains that neither the Foundation nor the DHA were recognizable entities in Mr. Peach's mind in 1980.

[70] It is true that the Foundation did not exist in Mr. Peach's mind in 1980 as it was not in existence until 1992 when it was incorporated as a Society. As to what constituted "this hospital", that is another matter. Clearly Mr. Peach contemplated some form of successorship to the GBGH when he mentioned in his will , the possibility of a new hospital being constructed. While he did not use the words "successor", neither did he place any condition or qualification (except for the gift over) on his bequest as he did in in other bequests in his will. The GBGH continued to be called ,the GBGH by his closest relative, Helen Stuart (see paragraph 10 of her affidavit), and by others including Catherine Power (see affidavit, paragraphs 4, 5, 6.)

[71] The reorganization of the hospital occurred over a 7 year period. Mr. Peach being aware of matters concerning Glace Bay and of current affairs in general , was in all probability, aware of it. He did not see fit to alter or make changes to his will. He appears to have had plenty of time to contemplate and make any such changes . It was up to him.

[72] In fact, up until the year 2000, a period of 20 years after Mr. Peach drafted his will in 1980, the GBGH (as the only hospital left under the *Glace Bay Healtcare System Corporation Act*) was still being mentioned in the various amalgamations, as one of the hospitals involved.

[73] In **Fort Sackville v Darby Estate**, 287 N.S.R. (2d) 158 (NSSC) Moir J. stated the following with respect to the attitude of the Courts toward successorship:

> "The Courts avoid disturbing a gift just because the Testator got the name wrong, the courts take a broad approach to legal successorship, that approach is not so broad as to allow the Courts to find a successor, for an entity that has ceased to exist."

In paragraph 11, Moir J. further stated:

> "We can find (an) "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."

[74] From 1986 to the date of Mr. Peach's death in 2009 the GBGH , (the one he knew for those 23 years), still existed. What he had contemplated in his will, had in fact occurred. A new hospital was constructed. A new GBGH replaced the old GBGH. Being a lay person , I find when Mr. Peach drafted his will he was not concerned with the legal ownership or about which corporate entity owned the hospital from time to time, even though he may have been aware of the changes that were occurring.

[75] I further find that he was a forward looking, knowledgeable person with a purpose. His purpose was to have a kidney unit constructed in memory of his parents if a new hospital was constructed. To defeat that purpose by finding that "this hospital" ceased to exist is not in keeping with what I have determined to be his intention. I find also it would not be in keeping with the trend of the Courts to take a broad approach to successorship.

[76] I am satisfied that in Mr. Peach's mind "this hospital" continued to exist as the new GBGH on South Street, constructed in 1986. It was a new hospital at that time. Mr. Peach did not place any condition as to ownership, location, who its operator was to be, or any other condition that would render it, the GBGH to be extinguished .Had location been an issue for example, I am satisfied that Mr. Peach would have specified that the new hospital had to be built on Brookside St. Given his attachment to Glace Bay , I am satisfied also that anywhere in that community would have met with his approval .

[77] The objects of the DHA state, among other things, that the Authority shall "endeavour to maintain and improve the health of the residents of the health district". The residents of Glace Bay are included in that district. The original objects of the General Hospital as stated in 1914 include "maintaining a hospital or hospitals for ", "treatment of the sick and injured, and "and "carrying out such other acts and works of charity", "in connection with such hospital or hospitals". These objects are not so far removed from the original objects of the GBGH. Mr. Peach may well have been generally aware of this as well, as a result of the various amalgamations that were occurring.

[78] I turn now consider to whom the bequest of the residue in clause six of Mr. Peach's will should be payable? Before doing so I find for the reasons given that the DHA is the successor entity to the GBGH as referred to in Mr. Peach's will. I find that the term "this hospital" in Mr. Peach's mind meant the continuing entity known formerly as GBGH, the hospital serving the Glace Bay community previously at its former location on Brookside Street and after that at its new location on South Street. Therefore I find that "this hospital" did not cease to exist.

(iii) Who is the proper recipient of the bequest of the residue of Mr. Peach's estate as set forth in Clause 6 of his last will and testament?

[79] The Foundation puts forward as one of it's main arguments that the Court must separate the physical structure known as the GBGH from its legal owner and operator. They say this is significant because Mr. Peach intended to benefit the hospital itself and not the operator, which is the DHA.

[80] In its brief, the Foundation's counsel Mr. Durnford states at paragraph 51:

> "...the crux of the matter is the key fact that Mr. Peach intended to benefit the physical premises of the GBGH at South Street, Glace Bay.

> The Foundation is the legal body that receives gifts directed to the GBGH."

[81] The Foundation cites a number of legislative provisions to support this position. First they say that the definition of hospital under the *Hospitals Act* has a specialized meaning in that it focuses on the "physical premises" rather than the legal operator.

[82] With respect to the hospital definition I agree that there is a component to that definition which identifies the institution itself (building, premise or place), approved by a Minister. There is , as previously noted , also a second important component to that definition which is that a hospital also "**means where the context requires, a body corporate established to own or operate a hospital**". There can be therefore ,a separation between the physical premises and legal ownership, but it depends on the context. It could be that the physical premises are irrelevant in a given situation , when the context calls for legal ownership or the operator to be identified as the hospital. It depends on the situation. If Mr. Peach for example wanted to benefit the premises by benefiting the owner/ operator, then it could mean both, referring to the physical premises and also entity which owns and/or operates the hospital.

[83] Secondly the Foundation cites s. 77 of the *Health Authorities Act* to show that the hospital foundations were preserved at the time of amalgamation, and to demonstrate their importance in receiving gifts on behalf of the respective hospitals.

> "77.Notwithstanding any enactment, trust or agreement by which a foundation is established with respect to a hospital, the foundation shall, as the foundation considers appropriate,
>
> a) continue to use its funds to benefit the hospital or for other charitable purpose for which the foundation is established; or
>
> b) where the hospital is no longer operated as a hospital or no longer exists, use it's funds to benefit the health services of the district health authority responsible for the area formerly served by the hospital subject to the terms of any trusts relating to use of those funds." (emphasis added)

[84] In paragraph 49 of their brief the Foundation confirmed that it has "received numerous gifts on the hospital's behalf since it's incorporation, all of which have been used for specific purposes for the benefit of the GBGH .".

[85] In terms of s. 77 of the *Health Authorities Act*, the key word there appears to be "its", in that the Foundation shall continue to use "its" funds to benefit the hospital" (s.77(a)). This is what I must determine in this case, whether the balance

of Mr. Peach's estate should be given to the Foundation. If so the balance would become part of (its) the Foundation's funds to be used to benefit the hospital in the way that Mr. Peach described in clause six.

[86] There is no dispute that the Foundation has in the past received bequests for and on behalf of the GBGH. Mr. Malcolm states in his affidavit that the Foundation has provided support to the DHA over the years. He has also said the DHA encourages donors or those planning to make bequests to do so through the various foundations supporting the DHA (paras. 23-26 of Mr. Malcolm's affidavit).

[87] The Foundation submitted the case of **Leer Estate (re)** 2005 SKQB 276 for the proposition that there can be a separation between the physical facility and its legal operator. It says that this is applicable to Mr. Peach's will.

[88] In **Leer,** the Testatrix left her remaining estate to the Paradise Hill Union Hospital on the condition that it be operating at the time of her death and required a written assurance that it would remain open for two (2) years following her death. The hospital had been operated as part of the Twin Rivers Health District at the date of the will. By the time the Testatrix died, it no longer operated as such and

responsibility for that entity and facility had passed to the Prairie North Health Region. No written assurance could be given that the hospital would remain open for two years. Without that assurance there was to be a gift over dividing the estate between the Saskatchewan Wildlife Federation and the Prairie North Health Region for the Twin Rivers Home Care Facility purposes.

[89] The **Leer** case does bear some similarity to this matter, as will be noted by the following quote at paragraph 21:

> "In making her bequest in clause 11 and the gift-over in clause 12 the testatrix had a definite purpose in mind. She wanted to benefit the hospital, but only if it continued to operate. She was not anxious that money designated specifically for the purchase/maintenance of diagnostic equipment and for physician relief locums be wasted on a facility that would soon cease to operate."

As well the Court made the following finding in paragraph 13 in its analysis which was cited in the Foundation's brief:

> "The Twin Rivers Health District became the Prairie North Health Region after Doris Leer made her Last Will and Testament in 1998, but before she died in 2003. Had she been concerned with benefiting the actual operator rather than the facility she could have changed her will. I am satisfied that the testatrix intended her health care bequests to be used at designated facilities for specific purposes."

[90] Contrary to what was stated in the Foundation's brief however, the entire analysis does appear to be relevant in that the Court's ruling in paragraph 23 was to the effect that the bequest could be best accomplished "by paying the residue to the Prairie North Health Region for the designated purposes". It appears therefore that the owner and operator in **Leer** did ultimately receive the bequest of the Testator. The Court stated as follows:

> "23. The bequest in clause 11 read as above becomes contingent upon the hospital continuing to operate until July 28, 2005. If and when that condition is fulfilled, the bequest must be paid according to clause 11. **That can be accomplished by paying the residue of the estate to Prairie North Health Region for the designated purposes in the stated percentages.** In the event that the hospital ceases to operate prior to July 28, 2005, the bequest lapses and must be paid pursuant to clause 12. Should clause 12 become effective, the bequest shall be paid one half to each of Saskatchewan Wildlife Federation for general purposes and to Prairie North Health Region for the Twin Rivers Home Care facility purposes." (Emphasis added)

[91] The second point made by the Foundation in submitting **Leer,** was to show that, if Mr. Peach had been concerned with benefiting the actual operator rather than the facility, he could have changed his will. The Foundation says that he had 16 years from 1993 to change his will after the amalgamation and merger with other entities. They note he was also a patient at the GBGH at South Street . As to why he did not change his will, the Foundation says the answer is plain. Mr. Peach was

not concerned with benefiting the actual operator, but was focussed on making a specific gift for the physical facility itself.

[92] As previously stated, inference and imputed knowledge of Mr. Peach should come from the will itself and evidence of surrounding circumstances. It is most difficult to make findings in competing circumstances. It has been said by the DHA that Mr. Peach had 17 years from the date the foundation was formed in 1992 to change his will directing the Foundation as the beneficiary. The DHA state in its brief "Mr. Peach was a frequent visitor to the General Hospital and as such would have been aware of the existence of the Foundation. He didn't do this."

[93] It is most likely that Mr. Peach was aware of the existence of the Foundation as he has an interest in charities and in the hospital. This can be taken from the will itself. Beyond that , we know that he did not see fit to make changes to his will.

[94] In terms of Legislative provisions, the DHA cites its own legislation to show that the Foundation has no entitlement to the balance of the estate. It cites three pieces of legislation concerning other hospitals which specifically provide that gifts, devises, bequests, of which the "hospital" would be the beneficiary, shall vest in the

foundation. These are the *All Saints Springhill Hospital Gifts Act*, SNS 1994, c.2 (repealed), *The Victoria General Hospital Foundation Act*, RSNS 1989, c.492 (repealed) and *The Nova Scotia Hospital Foundation Act*, RSNS, 1989, c. 314 (repealed). An example taken from the latter act is as follows:

> "s. 12 - A gift, bequest or devise to the hospital, made on or after the 8th day of July, 1986 vests in the Foundation."

[95] The DHA submits that there is no such provision related to the Foundation despite numerous opportunities to do so throughout the amalgamation process. In fact the DHA says in 1993 the *Glace Bay Health Care System Act* vested some funds which had been transferred to the Foundation, in the Glace Bay Health Care System Corporation ("the Corporation").

[96] As well, there was further legislative provision (s.12 of the *Glace Bay Healthcare System Act*) which allowed real property only to be vested in the Foundation, if the Corporation is dissolved. Specific steps were taken by Order in Council when the hospitals were amalgamated in 1996 to exclude this provision to ensure that the Corporation remained the owner (Exhibit C to John Malcolm's affidavit). The DHA further submits that the *Health Authority Act* passed in 2000 provided a further opportunity for legislators to stipulate whether a gift to a hospital

vests in its foundation. It states that ,while s. 77 of the *Health Authority Act* states that foundation funds must be used for the hospital it supports, it does not go so far as to vest any gift to a hospital in its foundation. I agree that, without such expressed legislative intent, there can be no presumption that a gift to the GBGH vests in the Foundation.

[97] The Foundation relies on further case law in support of its position. In it's brief and in oral argument the Foundation relied on the case of **Van Den Hurk (Administrator) v British Columbia Rehabilitation Foundation**, 2006 BCSC 978 . There the Testatrix directed that a portion of the residue of her estate be gifted to the G.F. Strong Rehabilitation Centre, its successors and assigns. Through a series of name changes, the G.F. Strong Rehabilitation Centre became the BCR Society. The Court directed that the bequest go to the BCR Society.

[98] The Foundation cited **Van Den Hurk** as an example of a case where a gift to a hospital was awarded to its foundation, describing the situation in Peach as parallel in that the GBGH "is unable to accept a monetary gift on its own behalf."(Paragraph 55 of Foundation's brief).

[99] I have reviewed **Van Den Hurk,** I find that it does not entirely support the position as advanced by the Foundation for the following reasons.

[100] First, it is distinguishable in that there was an arrangement between the Society and the Foundation that all gifts and bequests would be deposited into the Foundation's account. A portion of paragraph 5 reads as follows:

> "According to the affidavits of a former director and the current director, it was the intention of the BCR Society and the Rehabilitation Foundation, although not specifically stated, to transfer all assets donated for charitable purposes to the Rehabilitation Foundation. After May 8, 1996, all gifts and bequests received by the BCR Society were deposited into the Rehabilitation Foundation's accounts."

There is no such arrangement here between the DHA and the Foundation.

[101] Second, in **Van Den Hurk,** Warren J. relied on the case of **Re: Machin** (1979) 9 Alta LR (2d) 296 SC. His ruling favoured the BCR Society , which was the body operating the institution. In making his decision, Warren J. stated at paragraph 25:

> "In my view, the facts of this case are on all fours with the facts in Re: Machin. At the time of the execution of the will the BCR Society existed, albeit under its former name of G.F. Strong Rehabilitation Centre, and operated the facilities at the described location on Laurel Street. Further, the BCR Society was operating the Strong Facility at the time of the testatrix' death. **Accordingly, the bequest was a gift to**

> **the existing charity operating the Strong Facility, namely the BCR Society, and it is entitled to apply the legacy in accordance with its charter."** (emphasis mine)

[102] Referring to Stevenson,J. in **Machin**, the Court stated in para. 24 :

> "**It is my view that the legatee is the body operating the institution.** It is a charitable body, still in existence and entitled to take the gift which vested on death." (emphasis added)

The rationale for the decision in **Van Den Hurk** was based upon the operator of the facility receiving the funds . In the case of the GBGH , the operator is the DHA , not the Foundation.

[103] What I suggest can be taken from **Van Den Hurk,** is the proposition that when a gift is made to an existing charity, the charity is entitled to apply the legacy in accordance with its Charter. Section 29 of the *Health Authority Act* reads in part as follows:

> S. 29 A district health authority may,
>
> (a) execute and carry out any trusts respecting real or personal property that is donated, devised, bequeathed, granted, conveyed or given to the authority;

> (e) retain any investment, bequest, devise or gift in the form in which it comes into its hands for as long as it considers proper and may invest the proceeds;
>
> (f) subject to this Act, hold any real or personal property subject to and upon any trusts, terms or conditions imposed in the acquisition of it.

Similarly the objects of the Foundation found in s. 2(a) allow it to,

> 2. (a) "To generally support and promote the quality of health care within the Town of Glace Bay and its surrounding area of the County of Cape Breton, and in particular, to assist by gift, donation, loan or otherwise the aims and objectives of the Glace Bay General Hospital as incorporated under Chapter 156 of the Acts of 1914 and amendments thereto
>
> And further in 2(c),
>
> 2.(c) To acquire by way of grant, gift, purchase, bequest, devise, or otherwise, real and personal property and to use and apply such property to the realization of the objects of the Society;

[104] Once again I find that **Van Den Hurk** is of limited value in supporting the Foundation's position. The "charter", being the objects or legislative authority of both the Foundation and the DHA would enable either body to accept Mr. Peach's bequest.

[105] The Foundation further advanced the argument that the objects of the DHA are much broader than the GBGH's .The Foundation's objects unlike the DHA's, focuses exclusively on the GBGH itself. It says that Mr. Peach was most closely connected to the Glace Bay Community and primarily concerned with benefiting that community in particular.

[106] On this point I believe it would be helpful to refer once again to **In Re: Morgan's Wills Trust,** relied upon by the DHA. In that case between the date of Emma Morgan's will in 1944 and her date of death (1948), the *National Health Services Act* of 1946 came in to operation. The result was that the hospital at Liskheard, (the Passmore Edwards Cottage Hospital) was divested from the Trustees and placed in the Minister of Health. A hospital management committee was created to manage and control a group of hospitals which included "this particular hospital", referring to the Passmore Hospital. Roxburg J. commented on the "objects" of the Passmore Edwards Cottage Hospital as at the date of the will.

> " The testatrix, Rosina Emma Morgan, died on Sept. 28, 1948, having made a will dated August 9, 1944. Between the date of her will and the date of her death, namely, on July 5, 1948, the National Health Service Act, 1946, came into operation. By her will she gave, devised and bequeathed her residuary estate on trust for sale, and, after making certain payments thereout, on trust to stand possessed thereof for the benefit of the Liskeard Cottage Hospital. At the date of her will there was at Liskeard a hospital called the Passmore Edwards Cottage

> Hospital, which had properties and investments, trustees, a committee of management, and some rules and regulations, and that hospital was, at the date of the will, carrying on its objects which were primarily to provide nursing accommodation and medical and surgical aid for Liskeard and district. **There is not the least doubt that that was the institution to which the testatrix referred when she made her will."** (Emphasis added).

[107] Mr. Durnford on behalf of the Foundation argued that in the **Morgan's Trust** case the gift was for general purposes , and therefore the logical recipient was the committee as it would need to decide how the gift would be used . Here he argues Mr. Peach made a specific bequest and the Foundation is better suited to deal with the bequest for the specific purpose.

[108] Notwithstanding the bequest in **Morgan's Trust** was for general purposes, the law is clear that the Court must attempt to identify the institution the Testator intended to benefit in his will. I find the case aligns itself with Mr. Peach's situation in that:

(i) The work of the hospital continued.

(ii) The old governing body had been dissolved. **(**s. 74, *Health Authorities Act*)

(iii) It became part of a group of hospitals under one hospital management committee.

[109] Like the DHA , the committee in **Morgan's Trust** had been created to manage and control a group of hospitals. The Court directed payment to that committee to apply the money for the purposes of the particular hospital, which was the "object of the Testator's bounty". This is consistent with the DHA's position.

[110] The objects of the DHA, in summary form, include among others:

1. The delivery of health care services,
2. Avoidance of duplication.
3. To govern, plan, manage, monitor and evaluate health services in accordance with established policies and directives.

See (s. 19 *Health Authorities Act,* SNS 2000, c. 6)

[111] The DHA has said that it will accept the gift in Mr. Peach's will and carry out the bequest as directed by him. There are policies and directives established for these purposes, which have been followed in the past. There is a recognition of the DHA's fiduciary duties in this regard. There is no evidence to suggest they are

incapable of obtaining any necessary approvals including any approval required under the *Health Authorities Act*. There appears to be a demand and a need identified for a second renal dialysis and kidney care unit in the district.

[112] Once again, I consider the objects of the DHA to be in accord with those of Mr. Peach in terms of his will. They certainly do not prohibit it from being able to receive his bequest or prevent it from being the "object of his bounty."

THE SALVATION ARMY

[113] The Salvation Army advanced a number of additional arguments as to how Mr. Peach's will should be interpreted.

[114] First they submit that the affidavit of Cathy Lundrigan is evidence that establishes Mr. Peach's intention to benefit The Salvation Army. They refer to a number of paragraphs in her affidavit to show that he intended that The Salvation Army would be the eventual recipient of his estate (see paragraph , 9, 19, 22 and 31).

[115] The law is clear that direct evidence of intention should not be considered where there is a reasonable interpretation of the words that were actually used in the will. Feeney on Wills (4th Edition) states:

> "The one exception to this rule is the case of an equivocation such that there are two equally reasonable interpretations for such matters as the identities of the beneficiaries. Therefore only where an interpretation produces two possible beneficiaries should direct evidence of intention of the testator be used to resolve the question."

[116] I do not find that to be the case here. Here it is clear that Mr. Peach intended that the SA would be the alternative beneficiary, if the hospital ceased to exist. Having concluded that it did not cease to exist, there would be no gift over to them. Therefore the affidavit of Cathy Lundrigan sworn to on the 28th day of September, 2010 is not required to resolve this difficulty. Even if it were to be considered, the weight to be accorded is questionable ,as it is to a some extent self serving. However for the reasons stated, I find it is not necessary or appropriate to apply that evidence to determine the Testator's intention.

[117] The SA also argues that clause 6 of Mr. Peach's will offends the Rule against Perpetuities. This Rule can be summarized as follows:

> " ...a future interest which, by any possibility, may not vest within 21 years after lives in being at the time of it's creation is void in it's

> inception. (Text, Cornelius J. Moynihan, Introduction of Real Property, (West Publishing Co., 1977) p. 204)"

[118] Much has been written about this rule and whether it should be continued to be applied. Some provinces have abolished it, and the Law Reform Commission of Nova Scotia in its Report of 2010 has recommended that it be abolished.

[119] It is a rule intended to prevent remoteness of giving. If there is a probability or even a possibly that the gift will not take effect within the time period, then the rule is offended and can operate to nullify or void the intended bequest.

[120] The SA argues that it is possible that the kidney care unit may not be constructed within 21 years from Mr. Peach's death and therefore offends the rule. They are of the view that Mr. Peach intended the funds to be held in trust and invested and used if and when a kidney care unit was established.

[121] The SA cited **Re: The Estate of Elsie Purola** 2004 SKQB 138 to illustrate that Mr. Peach's bequest offends the rule against perpetuities. Paragraph 16 of the **Purola** case stated :

> "A mere possibility or even probability that the estate or interest may vest within the time is not enough."

[122] It was also stated in **Purola** referencing the **Re: The Olderberg Estate** 1972, WWR 567 at paragraph 15 in part with respect to a bequest:

> " If it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio."

[123] In the **Purola** case the gift failed because the condition in the will was that the Trustee was required seek out and find deserving charities. Those charities would then apply for the trust monies.

[124] That is not the case here. The wording in Mr. Peach's bequest states that:

> "In the event a new hospital is constructed the capital is to be used towards the establishment of a kidney care unit dedicated to the memory of Mr. and Mrs. Peach."

[125] A more modern statement of the Rule can be found in the case of **Silver v Fulton** 2011 NSCC 127 at paragraph 19:

> "[A]n interest is valid if it must vest, if it is going to vest at all, within the perpetuity period. That period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years (Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 276.

[126] The question of whether a disposition offends the rule is decided at the time the instrument takes effect, in the case of a will upon the death of a testator.

[127] The **Purola** case dealt with a condition precedent and clearly was a future gift with uncertainty. The construction of a kidney care unit was not stated by Mr. Peach as either a condition precedent or condition subsequent. In **Purola,** the "clock began to run" once the trust had to be established and was clearly conditional upon a future and uncertain event. In this matter the "clock stopped" upon the death of Mr. Peach. At that point the new hospital had been constructed and therefore the capital vested in the hospital subject only to the direction as to the how the funds would be used. Once the new hospital was constructed the only condition was if it ceased to exist. At that point the gift had vested in the hospital. This is quite different from **Purola** case.

[128] Ms. McCurdy on behalf of the SA herself indicated that what was required was "twisted" application of the rule and the Cy Pres doctrine to "save" the gift. By this she meant that it would not fail because the Salvation Army was named by Mr. Peach as the successor.

[129] While I agree with the rational that charitable gift should be honoured if possible, in my view the gift does not require to be saved. The only condition placed by Mr. Peach was that the hospital continue to exist and having made that finding I do not believe it offends this rule. There are no words used by Mr. Peach that would suggest a delay or postponement of the gift, except if the hospital ceased to exist and in that event there was an immediate gift over. Once again the time for that determination is at his death and would have resulted in a vesting in the SA, had the hospital ceased to exist. I have ruled that it did not.

[130] In addition it is generally accepted that a charitable gift does not breach the rule and is exempt in that property may be donated to be held in trust indefinitely for a charitable purpose.

[131] In the text **Tudor on Charities 6th edition** it states (at page 148)

> "The rule against perpetuities does not apply to charities. A charitable trust may be made to endure for any period which the author of the trust may desire. He may therefore be created for the application of the income in perpetuity to the charitable purpose, or it may be so framed as to require the immediate distribution of the capital, or the exhaustion of capital and income, during a limited or indefinite period." (By McMullen, Maurice & Parker, Sweet & Maxwell, London, 1967)

[132] Mr. Peach, if the hospital remained on Brookside Street, left his capital to the hospital to be invested and the income paid to purchase equipment for the hospital at that location. This did not require an immediate distribution of the capital but the exhaustion of income for an indefinite period as per the above statement. In addition payment of the income was not conditional upon a future or uncertain event as stated in **Purola** para. 15. At the time of his death, of course, this provision was no longer applicable.

[133] In summary, Mr. Peach, in clause 6 made provision for the foreseeable contingencies that would transpire during his lifetime. Which one of these would be applicable, would be determined at his death. A reading of the clause as a whole has that as the inescapable conclusion.

[134] I find therefore that clause six of Mr. Peach's will does not offend the Rule against Perpetuities. The evidence is that the Testator's intention will be carried out as directed. Apart from the evidence , the wording in Mr. Peach's will suggests an immediate vesting.

[135] I have considered the remaining arguments of The SA in the brief filed on by behalf by Ms. McCurdy. Included in these is the argument that the condition of the kidney care unit has not been fulfilled and as a result there is no need to enquire further as to the existence or non-existence of a particular entity. They say this is because the Testator has specifically named the successor by specifying the SA as the residual heir following the prima face extinction of “this hospital”.

[136] Without detailing every interpretation advanced by the SA, I have considered all submissions made by them and find that they are not persuasive so as to warrant an interpretation of clause six in their favour. Some of the case law they have cited **Gray Estate** (Re) 1999 CanLII 6045(BCSC) is predicated upon a trust for a particular purpose failing during the lifetime of the Testator and that the trust will fail even if charitable. Even if a trust is created by the will, I do not find it has yet failed in that the purpose has yet to be carried out . That purpose is what has led to this application for an interpretation.

[137] The numerous interpretations put forth by the SA are very legalistic and at times difficult to follow. They tend to complicate further the wording in clause six. It appears on the face that the only conditions Mr. Peach imposed were that a new

hospital be constructed and that the GBGH still be in existence . Having found that the GBGH did not cease to exist , the Salvation Army in Canada is not entitled to receive the funds.

CONCLUSION:

[138] I am satisfied after a full review of Mr. Peach's will and the surrounding circumstances that the following inferences can be drawn:

1. Mr. Peach was a careful man and he approached the drafting of his will in that manner.
2. He had definite ideas about what he wanted done and to whom he would leave his assets.
3. He was attempting to be clear and precise . As a lay person he was using plain language to obtain that end.
4. Some examples of his attempts to avoid ambiguity are the inclusion of another spelling of his last name (Peech) out of an abundance of caution (in the opening paragraph and on the signature line).

   A second example of his attempt at precision is his description of Anthony Eastman in clause 2 as "brother of Wesley".

Also in clause 3, he cited an example of his "proviso" that the clergy "strive to re-establish the traditions" of the church when he stated (eg. "eliminations of Vestments and Candles as part of the services").

6. Mr. Peach turned his mind to contingencies by using the word "provided" and used this word consistently to impose a condition as well as the word "Otherwise" to set out what would happen in the alternative. For example "provided he is alive when my will comes into effect. Otherwise the amounts will remain in the balance of my estate". (Clauses 2 and 3).

7. Mr. Peach was consistent with the use of "this hospital" in clause 6 to describe the intended beneficiary of his gift. He contemplated his gift to a new hospital, if constructed and as well as how it would come about by using the term "toward the establishment" of a kidney care unit .

8. With respect to clause 6, in the end he tried to be as thorough as possible, addressing what he viewed as reasonably forseeable contingencies .

9. Instead of using words like "provided " or "otherwise" clause 6 suggests that it would be up the hospital's governing body to use the

funds carry out his intention by his use of the term “toward” in describing how the funds would be applied. He meant by this that it would be up to whomever at the hospital was responsible to make such decisions and with the authority to get it done.

10. Mr. Peach had little doubt it could be done and his main expressed condition was if the hospital ceased to exist. If it did, then the SA would then stand to benefit.

11. I find that Mr. Peach was not so concerned with the legal meaning of hospital but rather whether this same facility (the GBGH) continued to exist and serve the residents of Glace Bay and surrounding areas.

12. I find that Mr. Peach was indeed very closely connected to the people of Glace Bay. That said, Mr. Peach would not want that to be the overriding factor in respect of whom would carry out his intention. His overriding concern would have been to make sure that the money be paid to the entity that would administer the funds for his intended and specific purpose.

13. He continued to visit the hospital as a patient in his later years. Whether or not he was familiar with the reorganizations, he still considered the facility on South Street to be the Glace Bay General Hospital.

14. The hospitals which form part of the DHA are still referred at times by their former names. Indeed the former “Glace Bay General Hospital”is still identified by that name in the “Objects” of the Foundation.

[139] I do not believe this to be a situation where Mr. Peach gave his will to his Executor and then forgot about it. I find he had three things in mind in his when he drafted clause 6.

[140] First, he knew the hospital on Brookside Street was becoming obsolete and would likely be torn down and have to be rebuilt. He wanted therefore to help it (at the Brookside St. location) by allowing it to purchase new equipment with the income from his capital, but not the capital itself which was to be invested.

[141] Secondly, should it come to pass that a new hospital was constructed, (either at Brookside St. or at a new location) then the capital would be used “toward” the establishment of a kidney care unit in memory of his parents, for whom he cared so much.

[142] Thirdly, if a new hospital was not constructed ,then the original or old hospital on Brookside Street would eventually close or be demolished. When he said “In the event that this hospital ceases to exist” he meant when there was no longer a Glace Bay General Hospital. In other words, if the old one was closed down without a new replacement hospital being constructed .Then and only then would the Salvation Army become the recipient of the balance of Mr. Peach’s estate.

[143] Keeping in mind that his will was made in 1980, the new hospital was built 6 years later. Once that happened he would recognize that the SA was out of contention. Mr. Peach would see no need to do a new will as he had provided for the contingency that did occur.

[144] Therefore I find that this was the logic employed in the mind of Mr. Peach. I find that “ceases to exist” means a Glace Bay General Hospital no longer operating, accepting patients and providing care. With the new hospital on South Street being constructed, “this hospital” did not cease to exist.

[145] As stated Mr. Peach was astute and would have known that the amount in his estate, while substantial, may not be enough to pay in full for the establishment of a

kidney care unit. This would be due to the widely recognized significant cost of commercial construction. He was careful therefore to use words indicating that the balance of his estate was to be used **" toward"** the establishment of a kidney care unit", knowing that the GBGH would have to accept the terms of his will and if required, fund the balance required to complete the project.

[146] I am satisfied on a full reading of Mr. Peach's will that it was not his intention to have his bequest in clause 6 given to the Foundation. The Foundation has an important but limited role in the operation of the hospital. I am satisfied that, on a true construction of Mr. Peach's will ,the bequest in clause 6 should be given to the successor of the GBGH as it existed on Brookside Street and as it now exists on South Street. Further I find that successor to be the DHA. It is the DHA that continues to carry on the programs and services delivered at this health care facility on South Street, Glace Bay. It is the one with the ability and decision making power to accept Mr. Peach's bequest and carry out his intention. The DHA has stated their willingness and agreement to use the funds as directed by him. (See Malcolm affidavit para. 33 and **Re: Burton Estate, supra.**

[147] I confirm my interpretation of Mr. Peach's will so as to find the DHA as the intended recipient of the residue of Mr. Peach's estate in accordance with clause 6. To do otherwise would amount to rewording Mr. Peach's will, which would have been the last thing he would have wanted or intended , at the time he drafted his will in 1980.

[148] Accordingly I direct that an order will issue to that effect and will include the provision that the funds are to be used solely as directed by Mr. Peach in his will, toward the construction of a kidney care unit dedicated to the memory of his parents, Mr. and Mrs. John W. Peach at the Glace Bay Health Care facility currently located at South Street, Glace Bay and also known as the Glace Bay General Hospital.

[149] On the matter of costs, counsel for the Foundation made a brief submission to the Court however I have not heard from remaining counsel. I am now inviting submissions from all counsel on the matter of costs including any supplementary submissions the Foundation wishes to make. I would ask that these be submitted in writing to me within 20 days from this decision.

Murray, J.

APPENDIX "A"

THE WILL

[150] The will of Thomas Allan Peach as a whole reads as follows:

CANADA

PROVINCE OF NOVA SCOTIA
COUNTY OF CAPE BRETON
TOWN OF GLACE BAY

I, THOMAS ALLAN PEACH (PEECH) of 89 Brookland St., of Glace Bay in the County of Cape Breton, being of sound mind, do make, publish and declare, THESE PRESENTS, as and for my Last Will and Testament.

DATED, at Glace Bay in the County of Cape Breton, this 19th day of November, A.D. 1980.

1. I DO NOMINATE, CONSTITUTE AND APPOINT Mr. John Touchings of 11 Brookland St., Glace Bay and Mr. Lawrence Dowe of 52 Blackett St., Glace Bay to be Executors of this my Last Will and Testament.

2. I hereby bequeath to Wesley Eastman of North Sydney $10,000.00 provided he is alive when this will comes into effect. Also $10,000 to Anthony Eastman of Pictou, (brother of Wesley) provided he is alive when this Will comes into effect. Otherwise these amounts will remain in the balance of my estate.

3. I hereby bequeath my property at 36 Brookland St. Glace Bay to St. Mary's Anglican Church provided the clergy, wardens and vestry strive to re-establish the traditional evangelical Church of England. (e.g. the elimination of Vestments and Candles as part of the services.) Otherwise the property is to be sold and the amount included in the balance of my estate.

4. 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.

5. I hereby bequeath $1000.00 to St. Mary's Cementary Fund. This amount is to be invested and the interest used for the up keep of the cementary.

6. The balance of my estate is bequeathed to the Glace Bay General Hospital, Brookside St., Glace Bay. This amount is to be invested and the interest used to buy equipment for this hospital. In the event of a new hospital is constructed the capital is to be used toward the establishment of Kidney Care Unit dedicated to the memory of Mr. & Mrs. John W. Peach. In the event that this hospital ceases to exist the balance of the estate is to be donated to the Salvation Army.

Included in the estate
89 Brookland St.
36 Brookland St.

Deposit in B of N.S.
Deposit in B of Montreal
Deposit in B of N.S. Covenants
Cen. And East Trust
Can Permanent
Principal Growth
N.S. Teachers' Pension Fund
etc.

IN WITNESS WHEREOF I have hereunto set my hand this day of November 1980.

Signed: Thomas Allan Peach (Peech)

Witness: Signed by the above named Thomas Allan Peach in the presence of us this Day of November 1980

Signed: Mr. J. Santos, Witness Francis Acker, Witness