IN THE PROBATE COURT OF NOVA SCOTIA
Citation: Cite as: Peach Estate (Re), 2011 NSSC 230

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 ON COSTS

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:	June 10, 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:

[1] This is a decision on costs in relation to my ruling on March 29, 2011. On that date I interpreted the will of Thomas Peach to name the District Health Authority (DHA) as the intended Beneficiary of the residue of Mr. Peach's estate (the Estate).

[2] Following my decision, the parties were asked to make submissions on costs. At the initial hearing one of the parties, the Glace Bay General Hospital Foundation (the Foundation) made it clear it believed that costs should be awarded on a solicitor client basis, to all parties. In support of that position the Foundation submitted the case of **Fort Sackville Foundation v Darby Estate,** 2010 NSSC 45. The parties were therefore aware of the Foundation's position prior to my decision.

[3] Following my written decision I requested further and final submissions on the matter of costs from all three parties, the DHA, the Foundation and the Salvation Army (the S.A.). In their submission, the DHA as the proper recipient of the residue of the Estate agreed with the submission of the Foundation that this was

an appropriate case for the awarding of solicitor client costs. In their submission the DHA said:

> "While it is unfortunate that a dispute arose among the charitable organizations involved in this proceeding as to who should be entitled to the residuary of the Peach Estate, in light of the relationships among and mutual social goals of the parties, the DHA has no objection to this Honourable Court issuing an order for payment out of the Estate of each parties' costs on a solicitor-client basis."

[4] The general rule in estate matters is that the estate's legal costs are reimbursed on a solicitor client basis. The Executor in requesting an interpretation is doing so not in his own right but in his capacity as representative of the estate. Normally the remaining parties costs are awarded on a party, party basis assuming that there is a legitimate reason for their involvement in the matter. Otherwise they may be required to absorb their own costs, without an award.

[5] There are exceptions to this rule and clearly, the DHA and the Foundation are of the opinion that this case is one such exception. The S.A. concurs. Indeed where the successful party agrees that it should in effect pay the costs of the unsuccessful litigants, that in itself is a compelling reason for awarding same.

[6] *C.P. Rule* 77 deals with the issue of costs and in particular *Rule* 77.03(2) and *Rule* 77.01(b) and *Rule* 77.02(1). Read together these rules allow a Court to award costs in estate matters on a solicitor client basis, in exceptional circumstances. The presiding judge has a discretion to make any order that "will do justice" between the parties.

[7] What then are the exceptional circumstances in this case and what is just as between the parties? In **Fort Sackville Foundation**, Moir J. discussed several factors in determining what constitutes exceptional circumstances. Those were, whether the Testator's wording caused or contributed to the application, whether the Party's involvement could be credibly argued, and whether the Party's positions was reasonable, having regard to the outcome of the matter.

[8] The **Fort Sackville Foundation** case is generally cited for the proposition that where the Testator's wording "fuelled" the litigation, then the involvement of the parties is a necessary consequence, unless it is obvious their involvement would be frivolous and would have no merit.

[9] In the present case, the pivotal issue stemmed from the wording in the will as to whether the Glace Bay General Hospital (GBGH) had ceased to exist. If it did, then the residue would have gone to the S.A. The S.A. then had a definite stake in the interpretation of the will in respect of Mr. Peach's substantial estate.

[10] The facts, as established, were that between 1986 and 2009 the GBGH had ceased to exist as a separate legal entity, but not as a hospital. There was therefore merit in the S.A.'s involvement, as well as the Foundation's. The Court in these matters, because the gift is charitable looks to save the gift from failing. Indeed this was the case in **Fort Sackville Foundation** where the cy-pres doctrine was argued.

[11] Consequently in this case the Foundation was a logical and relevant entity to participate as a potential recipient of the funds. Apart from that, both S.A. who are named in the will, and the Foundation provided vital information and perspective to the Court, to enable the Court to make it's decision. This is more or less acknowledged by the DHA in the position it has taken as to costs. As well, the Foundation's role throughout the Court proceedings and with respect to the final Order was instructive, even though it was not successful.

[12] Accordingly, I find that the circumstances surrounding Mr. Peach's will did present exceptional circumstances which made it reasonable for all three parties to intervene in the application for interpretation. One can see the connection between each of them and the language contained in the will. All were potential recipients (although the Foundation was not mentioned in the will), depending on the interpretation, which was not obvious. I find therefore that the wording in Mr. Peach's will clearly contributed to the necessity of the application involving all three parties.

[13] In addition, having regard to these circumstances I believe the wording of solicitor client costs will do justice as between the parties for the reasons given.

[14] In summary such costs are permitted by the rules, and that coupled with the agreement by all parties, in particular the recipient of the estate, persuades me that costs on a solicitor client basis should be awarded in this matter to all three parties, such costs to be taxed.

J.