**DECISION DATE: 200008011**
**2000** **COURT NO: S.H. No. 163273**

**IN THE SUPREME COURT OF NOVA SCOTIA**
**Cite as: Murray Estate (Re), 2000 NSSC 166**

| | |
|---|---|
| **IN THE MATTER OF:** | **The Estate of John Douglas Murray who died on November 9, 1997** |
| | **- and -** |
| **IN THE MATTER OF:** | **The Application of John Darrell Murray Executor and Beneficiary, Eunice Murray, Beneficiary, Helen Sherry, Beneficiary and Christine Mack, Beneficiary of the Estate of John Douglas Murray for the interpretation of the Will of John Douglas Murray pursuant to *Section 153 (2)* of the *Probate Act*, *RSNS*** |

# DECISION

| | |
|---|---|
| **HEARD BEFORE:** | **The Honourable Justice Walter R.E. Goodfellow, at Halifax, Nova Scotia** |
| **DATE:** | **July 20, 2000** |
| **DECISION:** | **July 20, 2000 (Orally)** |
| **WRITTEN RELEASE OF DECISION:** | **August 11, 2000 *(Costs)*** |
| **COUNSEL:** | **Paul Thomas and Steven Martin, A/C** |

**Colin M. Campbell, for Myrna Robinson, Carolyn Innes and James Innes and the Estate of Vera D. Lynch**

GOODFELLOW, J:

[1] I heard an application for interpretation of the Will of John Douglas Murray on July 20, 2000, at the conclusion of which I rendered an oral decision.

[2] John Douglas Murray was born in 1900 and executed his Will August the 8th, 1994. He had prepared the Will by his own hand and attended at a lawyer's office solely for the purpose of having it typed and properly executed. John Douglas Murray died November the 9th, 1997, and his Will was admitted to probate March the 5th, 1998, appointing his housekeeper, Vera D. Lynch, his son, John Darrell Murray and his daughter, Mrs. Frank (Helen) Sherry, as Executors. Vera D. Lynch passed away shortly after the Testator and Mrs. Frank (Helen) Sherry relinquished her role as Executrix in favour of her brother, John Darrell Murray. The late John Douglas Murray had four children from his marriage; John Darrell Murray, Mrs. Frank (Helen) Sherry, Mrs. Christine Mack, and a son who has passed away, but whose widow survives, Mrs. Eunice Murray.

[3] The Will contained a number of bequests and directions and then stated:

> The balance to be divided equally as follows:
>
> My son's Widow - Mrs. Eunice Murray
>
> Daughter - Mrs. Helen Sherry
>
> Daughter - Mrs. Christine Mack
>
> Son - John Darrell Mack
>
> My present housekeeper - Vera D. Lynch
>
> To my friends Mrs. David Robinson, James D. Innes and their sisters Roberta, Marilyn & Caroline (their married names and address can be obtained from Mrs. Robinson or James Innes).

[4] The issue of interpretation was whether or not there would be ten shares or six shares. Two of the named parties were his children from a relationship and the other two were children of the lady with whom he had a relationship. I pointed out to counsel that another possible interpretation would be for seven shares.

[5] In my oral decision, I concluded that the language was clear and that

the Testator chose to indicate individuals and, therefore, wished to divide equally his estate between the ten named parties.

[6] This left only the issue of costs outstanding, which is being addressed herein.

[7] *COSTS*

(1) The applicant seeks costs on a solicitor/client basis payable out of the Estate.

(2) Legal counsel for Myrna Robinson, Carolyn Innes and James Innes seeks costs on a solicitor/client basis payable out of the Estate or, alternatively, party and party costs based on the amount involved "being $100,000.00 and either Scale 1 or Scale II of Tariff A, $4,425.00 or $5,900.00."

[8] I will deal with the applicants' costs first. I see no reason why Mr. Thomas effectively acting in the capacity as Proctor should not have solicitor/ client costs payable out of the Estate. While he was not the official Proctor, that resulted only because counsel for the other parties objected, necessitating the additional costs of engaging Roberta Clarke as the official Proctor,

however, she played no part in these proceedings.

[9] The Bill of Costs submitted in preparation of the application required the attendances of witnesses from out of province and I tax the Bill of Costs and disbursements as advanced; namely, solicitor/client fees, $7,078.25 and, disbursements, $10,008.43.

[10] With respect to the request for solicitor/client fees advanced by Mr. Campbell, I repeat what I said in *Veinot v. Veinot Estate et al* (1998), 167 N.S.R. (2d) 101 at p. 106:

> [14] It is noted that the guidance of *C.P.R. 63.12(1)* is contained in Part I of the *Rules* dealing with party and party costs. The court has long recognized the representative in an estate/fund has a duty to such estate or fund and the duty often requires the engagement of a solicitor. The representative should upon acting reasonably, have such solicitor's fees recovered on a solicitor/client basis from the fund. The practice has been to grant solicitor and client fees payable out of the estate/fund. Such should be taxed *(C.P.R. 63.24).*
>
> [15] No such solicitor/client relationship exists with the estate by claimants who have entered into their own solicitor/client relationship which places them initially at least in no different position than any other party to litigation who engages his/her own solicitor and is responsible for such solicitor's fees in accordance with the individual terms of their retainer. At one time there was a tendency to look to the estate for all fees on a solicitor/client basis but no such automatic policy has been mandated by the *Civil Procedure Rules*. There is a clear trend to allow only the solicitor for the representative party solicitor/client fees, unless the claimants can establish circumstances warranting the exercise of discretion for granting them solicitor and client costs.
>
> [16] In my view, there is no justification for starting at any other point than a possible discretionary award of party and party costs to a claimant

> for which payment may be directed out of the estate/fund.
>
> [17] If solicitor and client costs are warranted then such must be justified. There must be exceptional circumstances to warrant the exercise of discretion in any proceeding by awarding a claimant solicitor and client costs.

[11] An appeal from this decision was dismissed; *Veinot v. Veinot Estate et al* (1999), 172 N.S.R. (2d) 111.

[12] I conclude that this was not an unusual or exceptional application and the appropriate exercise of discretion is to provide the claimants with party and party costs, payable out of the Estate.

[13] The claim is for party and party costs utilizing Tariff “A” and setting the “amount involved” at $100,000.00. The use of Tariff “A” for chambers matters can be appropriate; *Hi-Fi Novelty Co. Ltd. v. Attorney General of Nova Scotia* (1993), 121 N.S.R. (2d) 63 and *Keating v. Bragg,* [1996] N.S.J. No. 554, December 27, 1996 which was confirmed on appeal (1997) 160 N.S.R. (2d) 363. It is only to be used when the chambers application

is complex , lengthy and approximates a trial. This application was a special time chambers application set to commence at 11:00 a.m. and it completed within the day, including the granting of an oral decision. It is not a matter that should be equated to a trial and is in line with a heavy chambers application and I award party and party costs of $1,500.00, plus the requested disbursements of $633.00.

J.