



1997 CarswellBC 724

Royal Trust Corp. of Canada v. Hospital for Sick Children  
 Royal Trust Corporation of Canada, Plaintiff and The Hospital for Sick  
 Children, The Ontario Society for Crippled Children, Bloorview Children's  
 Hospital Hugh Macmillan Rehabilitation Centre, British Columbia Children's  
 Hospital The Crippled Children's Committee of Rameses Shrine Temple Toronto The  
 Attorney-General for British Columbia, and The Public Trustee for Ontario,  
 Defendant  
 British Columbia Supreme Court [In Chambers]  
 Boyd J.  
 Oral reasons: January 22, 1997  
 Docket: Vancouver A963946

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Counsel: D. Jane Dardi, Counsel for the Plaintiff.

Gordon Fulton, Counsel for the Defendant, Ontario Charities.

Andrew MacKay, Counsel for the Defendant, B.C. Children's Hospital.

Hugh McLellan, Counsel for the Defendant, Unascertained potential beneficiaries.

Subject: Estates and Trusts; Civil Practice and Procedure

Charities --- Doctrine of cy-près -- When cy-près doctrine applicable -- Non-existent beneficiary

Will provided that upon death of income beneficiaries residue of estate to be divided among two named charitable organizations in equal shares -- One of the named organizations, the "Crippled Children's Hospital" in Toronto, never existed -- Upon death of income beneficiaries, executor applied to court to determine beneficiary of portion of residue allocated to that organization -- Cy-près doctrine applied to save gift as will expressed general charitable intention, specific charitable intention to benefit crippled children, and extant charitable organizations came within general description of named organization.

Estates --- Construction of wills -- Practice and procedure on application for construction of will -- Costs

In context of application by executor to determine beneficiary cy-près doctrine applied to save gift made to non-existent charitable organization -- Correctly-named and existing beneficiary contended cost of proceedings and negotiations to determine beneficiary and relative shares should come out of share of estate allocated to beneficiaries by virtue of application of doctrine -- Costs of all parties on solicitor-client basis to be borne by estate as a whole as cost of administration -- Interpretation of will in issue, executor had no choice but to litigate, and all parties had to be joined.

The deceased, a bachelor with no issue, executed his will in 1933 and died in 1942. His will provided for specific legacies to charitable institutions and for monthly payments to named individual beneficiaries from the residue of his estate. It further provided that upon the death of all of the named income beneficiaries the residue of his estate should go upon trust as to both the capital and income of his trust fund to the "Crippled Children's Hospital" in Toronto and to the Crippled Children's Hospital in Vancouver in equal shares. The former institution never existed. Upon the death of the income beneficiaries, the executor petitioned the court to interpret the will to determine the beneficiary of the half-share allotted to it. The issues before the court were whether the gift ought to fail by virtue of the fact that the named institution did not exist, or whether the *cy-près* doctrine applied, and whether the costs of the application should be borne by the estate. Counsel for the B.C. Children's hospital contended that the costs of the proceedings should come out of the share allocated to the proposed beneficiaries by virtue of the *cy-près* doctrine.

Held: The *cy-près* doctrine applied; half of the residue of the estate should be paid to certain Ontario charities in proportionate shares as agreed amongst them.; the estate as a whole should bear the costs of settling the issue as a cost of administration.

The will expressed a clear charitable intention. While it provided for a specific gift to a named individual, and for income payments to the deceased's brother, nephews and niece, its overwhelming thrust was to divide the estate amongst various institutions for charitable purposes.

At the time the will was executed, there were in existence a number of charities whose purposes were to treat or assist in the treatment of crippled children. Those charities or their successors were the Hospital for Sick Children, the Ontario Society for Crippled Children, Bloorview Children's Hospital, Hugh Macmillan Rehabilitation Centre, and the Crippled Children's Committee of the Rameses Shrine Temple Toronto.

Given that there was a definite general charitable intention expressed by the testator in the will, that there was a specific expressed charitable intention to benefit crippled children, and that these charities came within the general description of "Crippled Children's Hospital", the court ought to apply the *cy-près* doctrine. It was unnecessary to determine the particular charities' proportionate shares as they had come to a satisfactory and appropriate agreement on that issue.

While costs to date were relatively high - some \$19 000 on a solicitor-client basis - considerable effort had been devoted to negotiations resulting in a distribution satisfactory to all of the charities, thus negating the need for the court's involvement on that issue.

The general rule with respect to costs is that all parties' costs ought to be paid out of the estate. Here, the construction or interpretation of a particular clause in the will was in issue. There was no choice for the executor but to litigate the issue and all interested parties had to be joined. In these circumstances, the estate must bear the costs of settling the dispute simply as a cost of administration. All parties' costs were to be paid out of the estate on a solicitor-client basis.

In the context of an application to interpret a will to determine a beneficiary, the *cy-près* doctrine was applied with the result that half the residue of the deceased's estate was distributed among a number of Ontario charities in proportionate shares as agreed amongst them. The one beneficiary which had been properly named in the will contended that the costs of the proceedings and negotiations to determine the beneficiaries should come out of the share of the estate allocated to the Ontario charities.

Held: The estate as a whole should bear the costs of settling the issue as a cost of administration.

While costs to date were relatively high - some \$19 000 on a solicitor-client basis - considerable effort had been devoted to negotiations resulting in a distribution satisfactory to all of the charities, thus negating the need for the court's involvement on that issue.

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Cases considered by Boyd J.:

Lee v. Lee Estate (1993), 84 B.C.L.R. (2d) 341, 50 E.T.R. 297 (B.C. Master) -- applied

National Trust v. Northside United Church (1994), 5 E.T.R. (2d) 193 (Ont. Gen. Div.) -- considered

Rules considered:

British Columbia, Rules of Court, B.C. Reg. 221/90

R. 10 -- pursuant to

R. 57(16) -- considered

APPLICATION to interpret will to determine beneficiary of half-residue of remainder of deceased's estate.

**Boyd J.:**

1 The petitioner applies to this court pursuant to Rule 10 and the inherent jurisdiction of the court to interpret the Last Will and Testament of Frederick William Warren and to determine the beneficiary of one-half of the remainder of the residue of his estate.

2 Very briefly, the facts are these: The deceased executed his will on December 29, 1933 and died on January 31, 1942. The will provides for specific legacies to the Canadian Institute for the Blind, the Muskoga Hospital for Consumptives, Tranquille Hospital for Consumptives, the Sunday School of St. Andrew's Church in Trail, and the Sunday School of St. George's Church in Oshawa.

3 The will further provides for the payment of the sum of \$100.00 per month from the income of the residue of the deceased's estate to his brother, Henry Heard Warren, during his life and the remaining income to be distributed in equal shares to the deceased's nephews, Charles Warren Irwin and John D. Irwin, and his niece, Kathleen Poll Irwin. Upon their deaths, clause 6(c) of the will provides:

And when all of the said brother, nephews and niece have died, then upon trust as to both the capital and income of my trust fund for the Crippled Children's Hospital in Toronto, Ontario and the Crippled Children's Hospital in Vancouver, B.C., in equal shares absolutely.

4 The difficulty here is that there has never been an institution known as the Crippled Children's Hospital in

Toronto. However, at the time the deceased made the will and at the time of his death, the following institutions existed in Toronto: first, the Home for Incurable Children; second, the Hospital for Sick Children; third, the Crippled Children's Committee of Rameses Shrine Temple Toronto; and fourth, the Ontario Society for Crippled Children.

5 The deceased was a bachelor and had no issue. His brother Henry Heard Warren died November 9, 1942; his nephew Charles Warren Irwin died October 16, 1978; his nephew John D. Irwin died November 2, 1972; and his niece Kathleen Poll Irwin Wells died February 16, 1990.

6 The issue here is whether or not, by virtue of the fact the particular institution named does not exist, this gift ought to fail, resulting in an intestacy of half of the residue, or whether the Cypres doctrine applies.

7 On a review of the will, I am satisfied firstly that a clear charitable intention is expressed in the will. While it is true, as Mr. McLellan has submitted, that the will does provide for a certain specific gift to an Andrew Waldy (phonetic), and does provide for income from the estate to be paid out to his brother and to his nephews and niece. I find that the overwhelming thrust of the will is to divide his estate amongst various institutions in what could only be described as for charitable purposes.

8 Turning specifically to paragraph 6(c) of the will, it is clear that the institution referred to, that is the Crippled Children's Hospital in Toronto, Ontario, has never existed. I am satisfied, however, that in the instant case, at the time the will was executed, there were in existence a number of charities whose purposes were to treat or to assist in the treatment of crippled children. Those charities, or their successors, are the Hospital for Sick Children, the Ontario Society for Crippled Children, Bloorview Children's Hospital, Hugh Macmillan Rehabilitation Centre, and the Crippled Children's Committee of Rameses Shrine Temple Toronto.

9 I have therefore made three findings: first, that there was a definite general charitable intention expressed by the testator in the will; secondly, that there was a specific charitable intention expressed by the testator to benefit crippled children; and thirdly, that there are these charities which do come within the general description of "Crippled Children's Hospital".

10 In these circumstances, I am satisfied that the court ought to apply the Cypres doctrine in order that the gift not fail. Here, fortunately, I am not required to determine the particular charities' proportionate shares of half the residue since the charities, whom I will roughly describe as "the Ontario charities", have amongst themselves reached an agreement or settlement concerning what that distribution ought to be. To the extent I am required to review that agreement and determine whether it is appropriate, I have and I am satisfied with it.

11 The only remaining issue is that of costs. The B.C. Children's Hospital counsel has submitted that the costs which would be awarded to the Ontario charities in this case ought to be paid out of those charities' half share of the residue.

12 Mr. Mackay relies on Rule 57(16) which allows the court to direct out of what portion of the estate the costs shall be paid. More specifically, he relies on the decision of Justice Donnelly of the Ontario Court of Justice General Division in *National Trust v. Northside United Church* (1994), 5 E.T.R. (2d) 193 (Ont. Gen. Div.). There, the costs of the competing charities in an almost identical case, including both the successful claimant and the two unsuccessful claimants, were all paid out of the particular disputed fund. Justice Donnelly's reasoning appears in the last sentence of the decision in which he notes:

Any enthusiasm for litigation at the expense of others ought to be tempered with a view to preserving the disputed fund for the benefit of the beneficiary.

I infer the court would have preferred that all of the disputing claimant charities had agreed amongst themselves what the appropriate division ought to be, thus preserving as much of the fund as possible for its intended purpose, that is, payment for support of crippled children.

13 In the case at bar, there was no dispute amongst the Ontario charities concerning their respective shares of the disputed fund, that is, their half of the residue, at least at this juncture of the proceedings. As I have already noted, those charities have reached an agreement amongst themselves concerning an appropriate division of the fund. Their costs to date, calculated on a solicitor-client basis, total some \$19,000.00. While these costs are relatively high, I appreciate the fact that considerable efforts has been involved to this date in negotiations and that it is those efforts which have resulted in a distribution satisfactory to all of the charities, thus negating the need for the court's involvement in that part of the exercise.

14 In these circumstances, the question is should I require payment of the Ontario charities' costs from their share of the residue?

15 While at first blush I do indeed sympathize with the B.C. Children's Hospital's position, the general rule is, at least in this province, that all parties' costs ought to be paid out of the estate. Here the construction or the interpretation of the particular clause in the will was in issue. There was no choice for the executor except to litigate this issue. All of the interested parties had to be joined.

16 In these circumstances, in my view the estate must bear the costs of settling the dispute simply as a cost of administration. I refer here to Master Horn's decision in *Lee v. Lee Estate* (1993), 84 B.C.L.R. (2d) 341 (B.C. Master)(phonetic) which comprehensively reviews the authorities and the principles governing costs.

17 There will be an order that all parties' costs, that is the costs of the executor, the Ontario charities, the B.C. Children's Hospital, and Mr. McLellan's own costs as solicitor for the beneficiaries on intestacy, be paid out of the estate on a solicitor-client basis.

*Order accordingly.*

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