

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mulgrave School Foundation (Re)*,
2014 BCSC 1900

Date: 20141009

Docket: S142825

Registry: Vancouver

**In the Matter of the
Mulgrave School Foundation**

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

In Chambers

Counsel for the Petition, Mulgrave School
Foundation:

Kimberly A. Kuntz

Counsel for the Respondent, The Attorney General
of British Columbia:

Shirley P. Kay

Place and Date of Hearing:

Vancouver, B.C.

September 18, 2014

Place and Date of Judgment:

Vancouver, B.C.

October 9, 2014

Introduction

[1] Mulgrave School Foundation seeks an order permitting it to apply two generous gifts made by Bjorn and Rochelle Moller of \$250,000 between 2008 and 2010 and D. Kirwood and P. Levitt of \$861,217.50 in 2008 toward the construction of the Mulgrave School's Senior School Building project. The donations were made specifically to support of the Mulgrave School's scholarship program.

[2] The respondents, B. Moller, R. Moller, D. Kirkwood, P. Levitt and Mulgrave Independent School Society support the application.

[3] The respondent, Attorney General of British Columbia, on behalf of the Crown, however, opposes the application. It does so based on its responsibility over charity and its view of the *Charitable Purposes Preservation Act*, S.B.C. 2004, c. 59, s. 3(4) (the "Act").

[4] The essence of the Crown's argument is that the gifts of the aforementioned donors were for a discrete purpose; namely, scholarships and bursaries, not for the school's capital campaign for the construction of new buildings.

Background

[5] Mulgrave School is a co-educational, independent, non-denominational school founded in 1994.

[6] Mulgrave School Foundation (the "Foundation") was incorporated under the *Society Act* on September 27, 2007, and its application for charitable status as a registered private foundation was granted on March 12, 2008. The Foundation subsequently was designated as a public foundation in or about 2009.

[7] The objective of the Foundation is the advancement of education through scholarships and bursary assistance as well as providing operative grants to the Mulgrave School for the purpose of supporting the school in a variety of initiatives.

[8] Mulgrave School moved to its present location at 2330 Cypress Bowl Lane, West Vancouver, British Columbia, in September 2001. In 1999, construction began on a 100,000 square foot school building to house classrooms, science labs, gymnasiums, a library and theatre. The construction of the main school was completed in or about 2001.

[9] In 2008, Mulgrave School expanded its programme to include an Early Learning Centre. A facility to house the Early Learning Centre broke ground in the summer of 2009 and was completed in the summer of 2010.

[10] On December 22, 2008, Bjorn Moller, the current Vice Chairman of the Foundation, and his wife Rochelle Moller (the “Mollers”) pledged a gift of \$250,000 to the Foundation to create an endowment supporting scholarships at Mulgrave School. Over the next two years the pledge was fulfilled.

[11] In June 2008, Donald Kirkwood and Penny Levitt gifted the sum of \$861,217.50 towards the same endowment supporting scholarships at Mulgrave School.

[12] In 2011, Mulgrave School launched a fundraising effort (the “Capital Campaign”) to acquire land around the existing school premises and to build a Senior School to house facilities including a University Guidance and Counselling Centre for Mulgrave School students in Grades 10 through 12 (the “Senior School Construction”).

[13] The total cost of the Senior School Construction is estimated to be \$23,000,000. The Senior School Construction is intended to be fully funded by donations raised through the Capital Campaign, although Mulgrave School has taken out a loan to cover the initial construction costs (the “Loan”). The estimated borrowing cost and interest for the Loan will range from 4% to 5% depending on the prime rate.

[14] The Loan was designed to be a bridging loan until the pledges made towards the Capital Campaign are realized into cash. Although the Senior School Construction is intended to complete in 2015, Mulgrave School does not expect to receive sufficient donations to pay back the Loan until 2017.

[15] After the launch of the Capital Campaign to fund the Senior School Construction, the Mollers, Mr. Kirkwood and Ms. Levitt were approached with the option of applying their earlier gifts (the “Donated Funds”) towards the Senior School Construction, rather than to the existing endowment for scholarships and bursaries.

[16] The four donors have consented to the repurposing of the Donated Funds and the application of the Donated Funds to the Senior School Construction.

[17] However, when the Mollers, Mr. Kirkwood and Ms. Levitt gave the Donated Funds to the Foundation, they placed two conditions on their gifts: that the funds be used to create an endowment (the “Endowment Condition”) and that the endowment be used to support scholarships at Mulgrave School (the “Purpose Condition”).

[18] The donors did not retain or reserve any legal rights in the Donated Funds, nor did they indicate any reservation of a right to suggest an alternative or additional use of the Donated Funds by the Foundation at a later date.

[19] According to the existing Endowment Condition and Purpose Condition, only the income of the Donated Funds is available for distribution for the purpose of the endowment. In particular, the language used in the letters from the Mollers outlining the purpose of the Donated Funds would not permit realized capital gains to be distributed for scholarships or for any other purpose, including investment management fees, and application towards the Senior School

Construction. The Foundation acknowledges it has a fiduciary obligation to comply with the Endowment Condition and the Purpose Condition, unless the Court otherwise directs.

[20] By applying the \$1,111,217.50 in Donated Funds towards the Senior School Construction, the Donated Funds will help substantially to reduce the amount of loaned funds required to complete the construction. Mulgrave School estimates that applying the Donated Funds to the Senior School Construction will save Mulgrave School about \$200,000 in borrowing costs.

[21] By resolution passed in March 2014, the Foundation's Board approved the proposed repurposing of the Donated Funds.

[22] Although the four donors have expressly consented to the repurposing of the Donated Funds to help fund the Senior School Construction, the Foundation cannot take direction from them or to ignore the earlier Endowment Condition or the Purpose Condition. There is no legal mechanism by which they can release the Foundation from these conditions. Hence this application.

Discussion

[23] The petitioner submits that the court has inherent jurisdiction over charitable matters and can alter the Endowment Condition on the expenditure of capital and the Purpose Condition to apply the income of the fund elusively for scholarships to provide the Mulgrave School with access to the capital of the donations.

[24] The petitioner also relies upon s. 3(4) of the Act, which states:

3(4) Without limiting subsection (3), if a charity holding discrete purpose charitable property is unwilling or unable to continue to keep, administer and use the property to advance the discrete purpose, the court may make whatever orders, including arrangements, it considers appropriate, including transferring the property to a new charity, so that the property is kept, administered and used to

- (a) advance the discrete purpose, or
- (b) advance another charitable purpose that the court considers is consistent with the discrete purpose.

[25] At common law the court has the ability to direct a scheme or mechanism under the doctrine of the *cy-pres* when a charitable purpose becomes impossible or impracticable to perform.

[26] There is no question that the Donated Funds have a charitable purpose, the advancement of education with the discrete purpose to fund scholarships.

[27] The petitioner acknowledges that it has not adduced evidence that the Foundation is unwillingly or unable to continue to keep, administer and use the property to advance the discrete purpose.

[28] Petitioner's counsel, however, urges this court to adopt an expansive interpretation of the aforementioned section sufficient to allow a court to intervene and put in place a scheme which differs from the identified discrete purpose even when there is an absence of a charity being unable or unwilling to perform the discrete purpose.

[29] I note as well that the petitioner has not adduced any evidence which indicates that there is impossibility or impracticability in carrying out the discrete purpose.

[30] Petitioner's counsel did not provide any authority which supported the expansive interpretation of the subject section; nor was any authority or principle that would allow the court to depart from the conditions set out under the doctrine of the *cy-pres*.

[31] For the relief sought, an applicant must meet the aforementioned specified necessary conditions.

[32] Unfortunately, as laudable as the Foundation's initiative and intent is, the petitioner has not met the necessary conditions to obtain the relief sought.

Conclusion

[33] Accordingly, the application to repurpose the Donated Funds is denied.

“The Honourable Mr. Justice Masuhara”