

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



LEVER V ATTORNEY GENERAL OF NSW [2018] NSWSC 838

Supreme Court of New South Wales, Ward CJ in Eq, 29 May 2018

Whether deceased who died in NSW can give 60% of residue of estate as gift by establishing charitable trust under for benefit of children and women in foreign country.

Key words: Succession, Supreme Court of New South Wales, Wills and Codicils, Charitable Trust in Foreign Country

1. This case concerned the proper manner of dealing with a charitable gift in a will. The deceased, Elsie (Ellie) Hunt, left a gift in her will as follows:

[Clause 4.4(a)]

I give 60% of the residue of my estate to my nephew Stuart Welton and his wife Amy Welton, provided that they use these funds to establish a trust in my name to benefit women and children in the United Kingdom.

2. The 60% residue had a value of \$4,513,462.
3. The two principal questions for determination in these proceedings were:
 - a) upon the proper construction of the will, whether the testamentary gift in cl 4.4(a) was a valid gift for a charitable purpose; and
 - b) if so, what was the appropriate form of order to remit the funds the subject of the gift overseas.
4. The court held that the gift was a valid charitable gift, and that the assets which were the subject of the gift should be paid and transferred to the trustees of a trust to be known as The Ellie Trust, once The Ellie Trust had been registered with the Charity Commission for England and Wales, and subject to the provision of a receipt by the trustees of The Ellie Trust for such funds.
5. The objects of The Ellie Trust, as set out in cl 2.2 of the Trust Deed, were established as follows:
 - 2.2 The Objects are the preservation and protection of the mental and physical health of women and children who have suffered domestic violence, and the prevention of hardship and distress caused to women and children by domestic violence, through the provision of refuges and safe accommodation in Liverpool and the surrounding area.

6. These objects were in line with the deceased's expressed wishes while alive, as she was involved in the establishment of a similar women's shelter in Manly, New South Wales.
7. The case involved the issue of the applicable law, which was the law of New South Wales, or more specifically, the law of the testator's domicile at the time of her death. Both case law and commentary on private international law supported this view, as this was a question as to the essential validity of a testamentary gift of movable property. Therefore, New South Wales law was applied.
8. There was no doubt that a gift for the welfare of women and children was charitable, but the relevant community was that of the United Kingdom. This gave rise to the issue as to whether a trust for a purpose that is to take effect in a foreign jurisdiction can be a valid charitable trust in this jurisdiction. The Attorney General noted in his submission that there was no rule of law that a trust for a purpose that takes effect in a foreign jurisdiction (for the benefit of the public of that jurisdiction) cannot be a valid charitable trust. His submission was that the lack of a direct or indirect benefit to the public of the domestic jurisdiction did not prevent the charitable gift from being valid. On this point, the court said (at [69]):

...cl 4.4(a) establishes a valid charitable trust notwithstanding the fact that it will solely benefit (in a direct or tangible sense) a foreign community, being women and children in the United Kingdom. Were it necessary to discern a benefit to the local community of a trust for such purposes (as Jacobs' Law of Trusts in Australia suggests), my view would be that the example of philanthropy which is set to the local community by such a gift (and, by analogy with the illustration given by the authors in that text, the fulfilment by the establishment of such a trust of a local sense of moral obligation to enhance the welfare of women and children) would suffice.

9. The gift fell within the fourth head of charitable purpose in *Pemsel's* case, and fulfilled the other requirements of the common law of charity, within the spirit and intendment of the Preamble to the Statute of Charitable Uses.
10. The court ordered that the funds be forwarded to the English trustees (at [78]):

It is appropriate that the scrutiny of the validity of the charitable trust formed under the Ellie Trust Deed be left to the Charity Commission of England and Wales and the jurisdiction of the Supreme Court of England and Wales, in circumstances where the trust assets will be in England, and the trustees personally present there; and it would not be appropriate for this Court to make orders for the administration of an institution established in another country.

IMPLICATIONS



The English common law of charity has had relatively little difficulty in finding public benefit in charitable objects achieved outside the supervising jurisdiction. Garton notes that Australian judicial authority seems to have gone further than that in England, not requiring any connection with home jurisdiction benefits¹ for example in finding public benefit in the relief of distress in Europe,² advancement of education in Germany,³ healthcare in Greece,⁴ settlement of Jews in Israel,⁵ and a musical competition in Austria.⁶

VIEW THE CASE



This case may be viewed at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2018/838.html>

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¹ Garton, Jonathan. 2013. *Public benefit in charity law*. Oxford: Oxford University Press, p. 71.

² *Re Piper (deceased)* [1951] VLR 42.

³ *Estate of Schultz* [1961] SASR 377.

⁴ *Kytherian Association of Queensland v Sklavos* (1958) 101 CLR 56.

⁵ *Re Stone (deceased)* (1970) 91 WN (NSW) 704.

⁶ *Re Lowin (deceased)* [1976] 2 NSW 140.

Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

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