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.

THE ESTATE OF THE LATE BETTY CROSBY [2019] SASC 189

Supreme Court South Australia, Bochner J, 13 November 2019

The testator left a gift of legacies and the residue of her estate to a number of charitable organisations which had ceased to exist either at the time of her death or after her death - whether deceased had demonstrated a general charitable intention to allow the gift to be applied cy-près.

Key words: Bequest, South Australia, Cy-près, Ceased To Exist, General Charitable Intent

1. The deceased died on 7 August 2009, leaving her last will dated 6 February 1962. Her husband predeceased her by some 39 years. There were no children or other relatives, and the estate was worth $414,507.89

2. Clause 3 of the will provided for three small pecuniary legacies.

    1. The first was to the Little Company of Mary Hospital. At the time of the making of the will, there existed a Little Company of Mary Hospital at New Town in Tasmania, but it no longer exists. A subsidiary company of the Little Company of Mary Health Care Limited operated a hospital as part of Calvary Health Care Tasmania Limited. The finding was that the entity was in existence at the time that the will was made, and remains in existence to this day, albeit under a different corporate structure. The legacy was paid to Calvary Health Care Tasmania Ltd.

    2. A legacy to the Good Samaritan Fund at the Royal Hobart Hospital also had issues. It appeared that no fund of this name had ever existed. However, at the time that the will was made, there existed a special purpose trust fund entitled the "Samaritan Fund for Patients" at the Royal Hobart Hospital. The finding was that the gift had not failed, but rather a mistake was made with the name, and the legacy was paid to the "Samaritan Fund for Patients".

    3. A legacy was left to "The Rosicrucian AMORC Lodge", but at the date that the will as made, no legal entity of that name existed in Australia, although there was an unincorporated Lodge in Hobart at the time of the will. There is no longer a Lodge in existence in Hobart. The purpose of the bequest to the Lodge was to build or procure "the ownership of premises in Hobart". However, since 1996, there has existed in Australia a company called "Rosicrucian Order, AMORC Grand Lodge for Australia, Asia and New Zealand Limited ACN 072 728 968", a registered charity that exists for educative purposes. The finding was that the gift to the Lodge should be applied *cy-près*. The Rosicrucian Order would be a suitable trustee for the charitable purposes disclosed by the will, in that it exists for the same educative purposes as the Lodge.

3. The residue of the deceased's estate was divided amongst several charitable organisations. The findings were based on the principles set out in *Re Tyrie deceased (No 1)* [1972] VR 168 being:

   - A gift by will to a particular charitable institution *simpliciter* must be treated as a gift for the advancement of the charitable work or purpose of that institution.

   - Nevertheless, a gift by will to a particular charitable institution which at some time existed, but had ceased to do so in the testator's lifetime, whether before or after the date of his will, ordinarily lapses. The reason for this general rule appears to be that by designating the named institution as the donee the testator has prima facie at least demonstrated an intention that the charitable work or purposes which she wishes to benefit are to be benefited through the instrumentality of the named institution and in no other manner (the lapse rule).

4. There are three exceptions to the lapse rule:

   1. If at the testator's death there is in existence another institution which has taken over the work previously carried on by the named institution and which can properly be regarded as the successor of the named institution, and if the dominant charitable intention of the testator was wide enough to allow the gift to take effect in favour of the successor institution, then the gift will take effect in favour of the successor institution

   2. If upon the true interpretation of the will the testator intended that the gift should operate simply as an accretion to the assets of the named institution so as to become subject to whatever charitable trusts were from time to time applicable to those assets, and if after the named institution itself ceased to exist its assets remained subject to charitable trusts which were still on foot at the testator's death, then the gift will be treated as taking effect as an accretion to any property which was at his death subject to those trusts.

   3. If in cases not falling within exception (1) or (2), the testator is nevertheless found upon the proper interpretation of the will to have had a dominant intention to benefit work or purposes of the kind which the named institution carried out, notwithstanding that the named institution itself might no longer exist at her death, and if it is practicable as at the death of the testator to apply the gift for the benefit of work or purposes of that kind, and in a way which is in all respects consistent with any other elements of the dominant intention of the testator, then the gift will be so applied by means of a *cy-près* scheme

5. These rules were then applied to each of the charitable institutions mentioned in the will.

IMPLICATIONS

This case illustrates the issues that arise in a will that has bequests to charitable entities that do not exist or are misnamed. It is wise to review wills for such issues on a regular basis. Further, it is becoming common in wills to identify the charity by reference to their Australian Business Number.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/au/cases/sa/SASC/2019/189.html

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Date of creation: January 2020

Number of case: 2019-80