

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.



PUBLIC TRUSTEE (THE COMMUNITY FOUNDATION OF SOUTH AUSTRALIA) V ATTORNEY-GENERAL (SA) [2019] SASC 172

South Australia Supreme Court, Hinton J, 4 October 2019

An Order sought to wind up a public fund that had difficulties migrating to a public ancillary fund.

Key words: Public Ancillary Fund, South Australia, Winding Up, Trust Income and Capital

1. In 2001 the Public Trustee created a public charitable trust which became known as the Community Foundation of South Australia (the Foundation). The Public Trustee, as trustee for the Foundation, would receive gifts from people and organisations who wished to contribute to the charitable work that the Foundation supported. Gifts received were of two kinds: those not tied to any particular charity, and those that were tied. Originally, all gifts were deposited into the one general fund. However, where a gift was made for the benefit of a particular charity, which created a distinct trust, whilst the gift was deposited into the general fund, separate accounts were maintained.

2. The Public Trustee determined that the Foundation be wound up. As the court explained (at [35]):

In January 2015 the Public Trustee resolved to terminate the Foundation as an administrative entity. The reasons for doing so were threefold; first, it was not possible to comply with the Commonwealth Guidelines because, as trustee of the Foundation, the Public Trustee had differing trust obligations in relation to the various funds comprising the Foundation. Second, and related to the first, it was not possible to maintain deductible gift recipient endorsement for the Foundation as a whole. Third, and in any event, donations from the public had not been significant and the Public Trustee did not regard the administration of a public fund as a core function of her Office.

3. To achieve winding-up the Trust Deed was amended to abolish the Board of Advice, the ATO was advised that the Foundation would not continue as a separate entity and the ATO was requested to revoke the Foundation's deductible gift recipient endorsement. Existing funds, other than testamentary funds, were dispersed in full where the trusts on which they were held permitted this.

4. The ATO expressed the tentative view that after its tax status was revoked, the Foundation was comprised of a number of separate trusts and where the trustee had an obligation to comply with requests made by a donor, a separate trust fund arose. However, the Public Trustee was unable to distribute the funds of 10 trust funds as the

trust deed prevented the distribution of trust capital. None of the donors of the ten funds objected to the capital being distributed.

5. The court considered the return of the capital as expedient given that in each of the 10 trusts the settlor was an established charity that, in effect, invested a portion of its funds held for charitable purposes with the Public Trustee. The court granted the application with the 10 specific charitable trusts being administered as if each trust contained a clause vesting a discretion in the Public Trustee to apply the trust fund, comprised of both capital and income, to the charitable purposes of the particular trust.

IMPLICATIONS



This community foundation is partly a casualty of alterations to federal taxation law with the rolling of public funds into the category of public ancillary funds, and some existing arrangements had difficulty in complying with the new commonwealth provisions.

VIEW THE CASE



This case may be viewed at https://www-westlaw-com-au.ezp01.library.qut.edu.au/maf/wlau/ext/app/document?docguid=1378f2cd0ebec11e9a18be9fe4d8c34f5&tocDs=A_UNZ_CASES_TOC&isTocNav=true&startChunk=1&endChunk=1

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