

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.



RE SIR COLIN AND LADY MACKENZIE TRUST [2019] VSC 834

Victorian Supreme Court, McMillan J, 17 December 2019

Testamentary Trust contained a condition that the charity name is not to be changed and cy près scheme is to appoint distribution committee members.

Key words: Testamentary Trust, Victoria, Condition Subsequent Prohibiting Change of Name of Institution, Lapse, Cy Près

1. Lady Winifred Iris Evelyn MacKenzie (the deceased) died with a will dated 1966. The will established a charitable trust known as the Sir Colin and Lady MacKenzie Trust Fund (the trust) with a present value of approximately \$2.4 million. According to the will, the income of the trust was to be applied one third in favour of the committee administering the Sir Colin MacKenzie Sanctuary, also known colloquially as the Healesville Sanctuary (the gift to the sanctuary), and two thirds for the provision of prizes and grants for studies in comparative anatomy (the gift for anatomical studies). The gift to the sanctuary was made upon the condition that its name never be altered from the 'Sir Colin MacKenzie Sanctuary'.
2. The sole remaining trustee brought the following questions to the court (at [4]):
 1. whether the name of the Sir Colin MacKenzie Sanctuary has been altered from the 'Sir Colin MacKenzie Sanctuary';
 2. whether the result of any such alteration is that the gift has lapsed; and
 3. if so, how funds gifted to the sanctuary ought to be applied.
3. The court found that between June 2002 and February 2014 the name of the sanctuary was altered from the 'Sir Colin MacKenzie Sanctuary' to the 'Sir Colin MacKenzie Zoological Park'. The terms of the will were clear and unambiguous, imposing a condition subsequent upon the gift, which requires that the name of the sanctuary never be altered from the 'Sir Colin MacKenzie Sanctuary.'
4. The Court was not of the view that the use of the colloquial name 'Healesville Sanctuary' was contrary to the condition attached to the gift. The mere fact that a colloquial name had emerged and had been capitalised upon by the sanctuary was not fatal to the gift, provided that the Board had not altered the sanctuary's actual name. The court noted that the Board registered the name 'Sir Colin MacKenzie Zoological Park' as a deductible gift recipient under its ABN in July 2000, but no such registration was made for the name 'Sir Colin MacKenzie Sanctuary'.

Further, in 2014 a trademark and the business name 'Sir Colin MacKenzie Zoological Park' was registered. Accordingly, the condition attached to the gift to the sanctuary had not been met and the gift had lapsed.

5. The will directed that, in the event that the name of the sanctuary was altered, the funds which comprised the gift to the sanctuary be 'applied in accordance with the provisions for the application of the remaining two-thirds of such income'. The presence of a gift over provision in the will precluded the possibility of applying the gift to the sanctuary cy prè under the Charities Act 1978. Accordingly, the consequence of the lapse of the gift to the sanctuary is that those funds became a part of the gift for anatomical studies.
6. The National Health and Medical Research Council (NHMRC) informed the trustee that they did not intend to provide a representative to sit on the committee to consider the distribution of anatomical studies grants and scholarships, due to a perceived conflict of interest. The sole trustee proposed a scheme to replace the NHMRC as a member of the committee and introduce a mechanism for the substitution of committee members without the need for further judicial intervention. The scheme was approved by the court.

IMPLICATIONS



The trustee's legal costs associated with a previous cy-près application, including counsel's fees, were approximately \$60,000. Further, the costs of this application were approximately \$41,000. The proposed substitution clause would avoid further costs and potential erosion of trust capital if another committee member was unwilling or unable to provide a representative in the future.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/vic/VSC/2019/834.html>

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