

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 GRAHAM (DECEASED) [2020] QSC 27

Supreme Court of Queensland, Bowskill J, 5 March 2020

A bequest to an incorporated association that had had its registration cancelled by the Office of Fair Trading

Key words: Bequest, Queensland, Incorporated Association, Winding up, Deed of Gift, Lapse Rule, Cy-près

1. Mr Graham died in 2016, leaving a will providing for the residue of the estate to be distributed equally between the National Heart Foundation of Australia (Queensland Division) and the Stroke Association of Queensland Inc (SAQ), both for their general purposes.
2. SAQ existed at the time of the will, and at the time of Mr Graham's death, but ceased to exist when its registration as an incorporated association was cancelled shortly thereafter. It is important to note that the association was not wound up, but rather the Office of Fair Trading chief executive cancelled the registration after deciding that there was reasonable cause to believe that the organisation had ceased to exist. The court found that winding up (which involves the application of provisions of the *Corporations Act 2001* (Cth)) is a distinct procedure from cancellation.
3. SAQ was defunded by the Queensland Government in 2013, and the National Stroke Foundation was supported to deliver the same services. SAQ declined financially after this decision and in 2016 decided to wind itself up, gifting its remaining assets to Synapse Australia Ltd (Synapse). Synapse (formerly The Brian Injury Association of Qld Inc that migrated to a company limited by guarantee) had a relationship with SAQ, being an occupant for a nominal sum of its premises and having taken over some of its activities.
4. Synapse, on the basis that it was the successor of the SAQ, applied to the court for orders to receive the bequest. Two charities, the Stroke Recovery Trial Fund Ltd and the National Stroke Foundation, appeared and put themselves forward as appropriate objects of a cy-près scheme. The Attorney General appeared as the protector of charities. The court held that the Deed of Gift between SAQ and Synapse could not be construed as a gift from SAQ to Synapse of all its assets or its future assets, nor could a resolution of SAQ have the effect of transferring a non-existent chose in action from SAQ to Synapse. Further, the Deed did not involve the transfer of the entire undertaking or work of the SAQ, but rather only particular identified assets.
5. The court then considered the application of the lapse rule. The "lapse rule" is that a bequest to a charitable institution that ceased to exist prior to the testator's death, whether before or after the date of the will, ordinarily lapses, but there are exceptions as discussed in *Re Tyrie (deceased) (No 1)* [1972] VR 168. The second exception to the rule is that 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, then the gift can take effect in favour of the successor institution. It must be properly regarded as the successor of the named institution, and the dominant charitable intention of the testator must be wide enough to allow the gift to take effect in favour of that successor institution.

6. On the evidence before it, the court could not find that SAQ continued to exist, in the form of Synapse. It was not a case of a charitable institution (SAQ) continuing to conduct its charitable work and only making changes as to its legal form. Nor was it a case where the activity and operations of an institution (SAQ) had been continued without change under the control of a successor entity (Synapse) following deregistration of SAQ.
7. The court declared that SAQ ceased to exist from the date of the cancellation of its incorporation and that this was a supervening impossibility. Thus, the gift should be applied cy-près. The court adjourned to hear further submissions as to how the gift should be applied.

IMPLICATIONS



When an incorporated association that is charitable wishes to cease its operations, consideration should be given as to how it effects this intention. If it may receive bequests in the future, then making clear a successor charitable institution may avoid the situation that arose in this particular case.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/qld/QSC/2020/27.html>

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