

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 ESTATE OF THE LATE STASHA BERGER [2020] NSWSC 750

Supreme Court of New South Wales, Ward J, 18 June 2020

Whether a gift in a will to a religious shrine was capable of wider interpretation to embrace the purposes of the religious Order who owned it.

Key words: Wills, New South Wales, Residue Of Will, Gift To Religious Shrine, Shrine Not Legal Entity, Shrine The Correct Recipient Of The Gift

1. The executors of the estate of the late Stasha Berger (the deceased) applied for judicial advice pursuant to [s 63](#) of the [Trustee Act 1925](#) (NSW) (the Act) as to whether they would be justified in paying 80% of the residue of the deceased's estate to the Trustees of the Order of the Capuchin Friars Minor (the Capuchin Friars).
2. The deceased, a widow, died leaving no children, spouse or partner, but with a number of surviving second cousins. The estate consisted of real estate in Australia and Prague, money on deposit with Westpac and bank accounts held in Switzerland, together with pension funds and superannuation. The net value of the estate was estimated by the executors at approximately \$10,000,000
3. The deceased's will, after providing for various pecuniary legacies, directed in clause 8(a) that 80% of the residue of the deceased's estate be given on trust for the "Shrine of Saint Anthony of Padua Capuchin Friars Minor Hawthorn – Melbourne Victoria" (the Shrine). The net value of the residuary gift to the Shrine was estimated at \$7,500,000.
4. The Shrine is situated at 182 Power Street, Hawthorn, Victoria. The registered proprietors on the title of that property are the "Trustees of the Order of the Capuchin Franciscan Fathers of 98 Catherine Street Leichardt [New South Wales]." The Trustees of the Order of Capuchin Friars Minor are constituted as a body corporate pursuant to the [Roman Catholic Church Communities' Lands Act 1942](#) (NSW).
5. The present canonical name of the Order is "The Order of the Capuchin Friars Minor" and the corporate name is "Trustees of the Order of the Capuchin Friars Minor", having been amended from the name mentioned in the will pursuant to a proclamation published in the New South Wales Government Gazette on 28 March 2002, which amended the Second Schedule to the Roman Catholic Church Communities' Lands Act. The Order is also known commonly as the "Capuchin Franciscans".

6. There was evidence that through the ministry of a Capuchin Friar as chaplain to the Czech community, many gifts have been received over the years addressed to the “Shrine of Saint Anthony of Padua Capuchin Friars Minor Hawthorn – Melbourne Victoria” and that this was the name he would provide to people wishing to make gifts to the Capuchin Friars. The deceased knew the chaplain.
7. However, the Shrine itself is not a legal entity. Rather, it is an existing religious shrine in Victoria dedicated to St Anthony of Padua, which is administered by a religious order that is associated with or forms part of the Roman Catholic Church within the Diocese of Melbourne. Since it was not clear whether the gift was intended to be for the Shrine of St Anthony (that is, being a gift for the upkeep, maintenance and purposes of the Shrine) or a gift to the Capuchin Friars Minor (that is, being a gift to that Order), the executors sought the guidance of the court.
8. The court said that nothing turned on the fact that no charitable purpose, or even any specific purpose at all, was disclosed by the language of the bequest. It was merely a question of whether the gift was to the Shrine (and its upkeep) or to the Capuchin Order for its wider purposes. The court found that the gift was to the Shrine (at [46]-[47]):

...the fact that the bequest is expressed to be upon trust for the “Shrine” leads me to conclude that the gift was to be for the purpose of the preservation, upkeep and maintenance of the Shrine (and activities directly associated with the Shrine) but not for the activities of the Capuchin Friars Minor more generally (such as community and pastoral work not associated with or relating to the Shrine – for example, activities associated with the church and school at the head office address in Leichhardt). To my mind, that broader interpretation would render otiose the word “Shrine” in the bequest and, thereby, do impermissible violence to the words used.
9. Since there was no direct evidence from the will and no extrinsic evidence cogent enough to support a wider interpretation of the deceased’s will, the court ordered that the gift was to the Shrine via a receipt from the relevant Capuchin Order which maintained it.

IMPLICATIONS



1. Those soliciting bequests need to communicate to the donor the importance of using the appropriate legally approved wording in their will in order to avoid confusion. In particular, religious charities often go under various names depending on the context such as legal name, canonical, common names and in this case, amended legal names.
2. In this case, the executor offered no evidence as to the possible intention of the donor to assist the court, and fundraisers may be able to assist the court if good records are made of their dealings with the donor.
3. Drafters of wills should carefully make enquiries and notes as to the intended charitable purpose and to provided mechanisms for alternative arrangements (such as if the object ceases to exist) or consider widening the discretion to apply to such charitable purpose as the executor(s) deem fit.

4. The gift to the Shrine was estimated at \$7,500,000, a considerable amount for the maintenance of any shrine/church. Should consideration be given by the Trustees to dealing with any surplus that would not be needed for maintenance via a cy prè application? Enter the provisions of s. 17 of the Roman Catholic Church Community Land's Act:

17 Variation of trusts

(1) If, after the creation of the trusts to which any real or personal property vested in or held by a body corporate constituted by this Act is for the time being subject, it has, in the opinion of the body corporate, become **impossible or inexpedient to carry out or observe those trusts**, the body corporate may by resolution declare that opinion, and by the same or a later resolution declare other trusts subject to which such property may be held, being trusts for the use, benefit or purposes of the community to which the body corporate relates.

(2) A resolution declaring other trusts causes the replaced trusts to cease and determine and the property which was subject to those trusts shall be held subject to the other trusts.

(3) The property shall be dealt with as nearly as may be possible for the purposes for which the property was, immediately before the resolution, held unless the body corporate by resolution declares that by reason of circumstances arising after the creation of the replaced trusts it is, in the opinion of the body corporate, impossible or inexpedient to deal with or apply the property or some part of the property for the same or like purposes.

(4) If a resolution is passed under subsection (3) in relation to property or some part of property, the property or part of the property may be dealt with and applied for the use, benefit or purposes of the community subject to the trusts declared by resolution of the body corporate.

(5) This section applies to trusts created before or after the commencement of the [Roman Catholic Church Communities' Lands \(Amendment\) Act 1986](#).

(6) In subsection (1), the reference to trusts which have been created includes a reference to trusts declared by a resolution passed under this section. **(emphasis added)**

5. St Anthony is one of the most popular Catholic saints and is the Patron Saint of "Lost Things". Legend has it that one day St Anthony found a lone child, took him in his arms and tried to find his home. When they approached a church, the child said I live here and promptly disappeared. It was an apparition of the baby Jesus. In addition to being the Patron of stolen and lost items, St. Anthony of Padua is considered the Patron Saint of sailors and fishermen (especially in Spain, France, and Italy), elderly people, harvests, and the mail.
6. For charity law 'tragics' some jurisdictions have considered that shrines and idols do have their own legal persona. The Privy Council in *Pramatha Nath Mullick vs Pradyumna Kumar Mullick* (1925) L.R. Ind. App.

245 dealt with a case that was commented upon in The Times and other outlets around the world. Lord Shaw¹ in that case stated [at 8]:

A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established.

Could an extension of such a legal doctrine be used to protect the natural wonders of the environmental world, such as giving iconic trees, barrier reefs, rivers or mountains and ecosystems their own persona with the right to sue and be sued?² For example, *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ): <http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html> where the river is declared a legal person with its rights and responsibilities exercised by its Maori trustees.

The judge in the present case noted (at [37]) that Australian law was summarised by K S Jacobs QC (as his Honour then was) in *Joyce v Ashfield Municipal Council* (1959) 4 LGRA 195 (at 196) where he submitted that:

To speak of institutions or entities as public charities is to introduce a concept which is not only confusing, but inaccurate. Unless an institution or entity, which is loosely called a charity, is bound as trustee to carry out a public charitable purpose, there is no public charity. If it is bound the public charity is not the institution itself, but the institution as an organisation subject to an established trust for charitable purposes.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2020/750.html>

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¹ Duff, P. (1927), "The Personality of an Idol", *The Cambridge Law Journal* 3(1): 42-48. doi:10.1017/S0008197300103940; 41 *Calcutta law Journal*, p11n; *Am. Bar Ass. Journal* Vol 11 (1925) 431.

² Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior*, Waveland Press, 1991.

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Date of creation: June 2020

Number of case: 2020-73

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