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 COGHLAN; MERRIMAN V ATTORNEY-GENERAL FOR THE STATE OF VICTORIA [2020] VSC 392

Victorian Supreme Court, McMillan J, 26 June 2020

The deceased left a bequest to an organisation with the address of another organisation, and the Court declared the bequest void for uncertainty.

Key words: Bequest, Victoria, Diabetes, Non-existent Organisation, Void for Uncertainty

1. The deceased was a retired farmer and grazier who lived his entire life in or around Ballarat. The deceased was widowed and had no children. His estate is valued at approximately $23,702,495.

2. In the late 1980s or early 1990s, the deceased was diagnosed with diabetes. Around that time he became a member of Diabetes Victoria and later a registered member of the National Diabetes Service Scheme (NDSS). The NDSS is administrated by Diabetes Australia. There was evidence that he received various services and education from unspecified Victorian diabetes organisations and purchased fundraising raffle tickets from such organisations.

3. Clause 6(c) of the will bequeaths one-third of the residue of the estate to 'Diabetes Australia of 26 Arundal Street Glebe New South Wales'. There is no entity that fits that name and address. Three entities that exist may have been the intended recipient, being Diabetes Australia, Diabetes NSW and Diabetes Australia-Victoria. The latter entity was one with which the deceased had substantial contact throughout his life.

4. The solicitor who prepared the will had retired and had no recollection of the deceased's instructions, and there were no meaningful file notes. The executor asked the court to decide which, if any, of these organisations should receive the bequest.

5. The executor suggested the bequest be paid to Diabetes Australia, but the consensus among the three charities was that the funds be paid to Diabetes Victoria. The court informed the parties that it could not determine the proper construction of the deceased's will on the basis of an agreement between the three defendant charities and requested further evidence. Despite the request of the court, there were no further meaningful submissions made by the parties.

6. The executor's suggestion that Diabetes Australia be the recipient was based on two cases: *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* (National Society) [1915] AC 207 and *Parkinson v Diabetes Australia* (Parkinson) [2011] NSWSC 1530.

7. In National Society, the House of Lords considered a testamentary gift to the 'National Society for the Prevention of Cruelty to Children'. The deceased was a Scotsman and had no connection with the London based National Society for the Prevention of Cruelty to Children. The deceased did, however, have some connection with the similarly named Scottish National Society for the Prevention of Cruelty to Children. Their Lordships held that notwithstanding extrinsic evidence of the deceased's connection to Scotland, it was insufficient to displace the primary meaning of the terms used in the will.

8. In Parkinson, the testator left one-third of the residue of his estate to 'Diabetes Australia'. However, during his lifetime, the testator had been a member of, and donor to, Diabetes NSW. He had had little involvement with Diabetes Australia beyond his participation in the NDSS. In that case, the Court considered that the extrinsic evidence was not sufficient to form any conclusion as to the deceased's use of the language contained in the will and the proper recipient was Diabetes Australia.

9. In this case, there was evidence that the deceased knew of Diabetes Victoria, but it was not referred to in the will, as the will referred to the name of one entity and the address of another. This gave rise to ambiguity on the face of the will.

10. The court explained (at]37]) that:

> Neither *National Society* nor *Parkinson* involved an alternative recipient named or referred to in the will itself; in both cases the alternative was merely an entity with which the testator had some connection during his lifetime. It follows that the 'presumption' is of more limited assistance in circumstances where the will itself refers to one entity by name and a different entity by address, and otherwise provides no indication as to which of those entities the deceased intended to benefit. The 'presumption' in favour of a named entity is therefore not determinative of the proper construction of clause 6(c) of the will.

11. In the absence of any certainty as to which entity referred to in the will was the proper recipient, the gift was rendered void.

IMPLICATIONS

If it were established that the gift was a gift for charitable purposes and that the mechanism for administering the gift was deficient, the court could consider approving a scheme for the administration of the gift. A further proceeding might be brought before the court on this basis.

The importance of lawyers taking and keeping good notes of instructions as well as charities knowing their donors is also demonstrated by this case.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/au/cases/vic/VSC/2020/392.html

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Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

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