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ACPNS Legal Case Notes Series: 2021-40 In the Estate of Brine (Deceased).

[Working Paper]

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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.



IN THE ESTATE OF BRINE (DECEASED) [2021] SASC 54

Supreme Court of South Australia, Parker J, 13 May 2021

Whether a gift in a will to a named incorporated association charity that had ceased to exist, could be redirected to its new corporate entity

Key words: Will, South Australia, Charity Beneficiary, Non-existent Charity, Charity Incorporation as a Company, Charity Name Change

1. The last will of the deceased gifted 75 percent of her residual estate to “Animals Australia Inc (registered charity no. A00 200 712) of 37 O’Connell Street, North Melbourne, in the State of Victoria, for the general purposes of the Association”. The value of the gift was in excess of \$4 million.
2. However, as at the date of Ms Brine’s death, on 5 July 2020, there was no association in existence that matched the name of Animals Australia Inc because Animals Australia Inc, an incorporated association, was restructured as a company limited by guarantee on 13 February 2017. The legal name of the organisation was changed to Animals Australia Federation as a result of the restructure.
3. The applicant executor, in seeking the Court’s direction, submitted that Animals Australia Federation was the proper recipient of the gift. The Court agreed and held that the combined effect of s 115(2) of the *Associations Incorporation Reform Act 2012* (Vic) and s 601BM of the *Corporations Act 2001* (Cth) was that Animals Australia Federation continued to be the same legal entity as Animals Australia Inc.
4. Section 115(1) of the Victorian Act provides that section 115 applies subject to the law applicable to a prescribed body corporate formed by the transfer of incorporation of an incorporated association. Section 115(2) provides that the transfer of incorporation by an incorporated association does not affect the identity of the association, which is taken to be the same body before and after the transfer. Subsections (3), (4) and (5) of s 115 provide that all rights and liabilities held by or against an incorporated association immediately before its transfer of an incorporation continue to apply under the new name of the body, as if the entity had not ceased to be incorporated under the Victorian Act.
5. Part 5B.1 of the Corporations Act governs the registration of existing bodies corporate as companies. Section 601BA(1)(d) authorises a “body corporate that is not a company or corporation sole” to register as a company limited by guarantee. Section 601BM provides that registration under Part 5B.1 does not create a new legal entity

nor does it affect the existing property, rights or obligations of the body except as against the members of the body in their capacity as members.

6. The Court also considered the position at common law, and held in the alternative that, pursuant to the first exception identified by Newton J in *Re Tyrie (No 1)* [1972] VR 168, Animals Australia Federation could properly be regarded as the successor to Animals Australia Inc., the entity named in the last will of the deceased. The objects of the successor entities were charitable, and there had been no change in purpose after incorporation as a company limited by guarantee. Moreover, Ms Brine had made many *inter vivos* gifts to the charity both before and after incorporation as a company.
7. Therefore, the Court directed that the gift be paid to Animals Australia Federation.

IMPLICATIONS



The continued activity in the sector generally to merge organisations or alter their legal structure continues to prove problematic for those seeking to leave a gift to the organisations in their will. In this case the will drafter included that the Australian Business Number (ABN) which continued to be used by the new legal form. The business address was also the same.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/sa/SASC/2021/54.html>

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