

# 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.



## Application of Paul James Edwards: Estate of the Late John McGregor Edwards [2023] NSWSC 714

Supreme Court of New South Wales, Slattery J, 27 June 2023

Whether a gift in a will to a non-existent charity should be applied *cy-près*.

**Key words:** Will, New South Wales, Gift in Will, Non-existent Charity, General Charitable Intention, *Cy-près*

1. John McGregor Edwards (the deceased) made a will on 9 July 2019 (the will) and died on 26 June 2020.
2. The will contained several gifts to charity. One of these charities was named in the will as the 'Aboriginal Children's Medical Research Trust, c/o Noel Pearson, Cape York'.
3. It was common ground that no such trust existed.
4. This application was as to the proper disposition of the gift to the non-existent charity *cy-près*.
5. The plaintiffs submitted that the gift of residue under the will to the Aboriginal Children's Medical Research Trust should be applied *cy-près* 'for the purpose of Aboriginal children's medical research'. An alternative scheme, advanced by the second defendant, Good to Great Schools Australia, was that the gift should be applied in its favour 'for the purposes of research with respect to medical issues that relate to Aboriginal Children'.
6. Good to Great Schools Australia, the second defendant, submitted that the address contained within the will, 'c/- Noel Pearson, Cape York', supported its contention that Good to Great Schools Australia was the entity being referred to when the will used the expression Aboriginal Children's Medical Research Trust.
7. This was because Mr Noel Pearson is a co-founder and a director of Good to Great Schools Australia, a company limited by guarantee and a registered charity with the Australian Charities and Not-for-Profits Commission. Good to Great Schools Australia was established in 1990 as Cape York Aboriginal Australian Academy Limited. On 4 October 2010, the organisation's name was changed to Cape York Aboriginal Australia Academy, and, on 21 October 2014, to Good to Great Schools Australia.
8. In addition, at about the time of the making of the will, in July 2019, Mr Pearson said that he regularly spoke on radio and at community events about the need for more medical research into Aboriginal children's health, and the need to address specific health problems such as rheumatic heart disease. Whether the deceased heard these broadcasts was unclear.

9. An alternative proposed recipient was the Murdoch Children's Research Institute. The Murdoch Children's Research Institute was incorporated on 16 June 1998 and is a registered charity with the Australian Charities and Not-for-Profits Commission.
10. The Institute has conducted many research projects in the area of aboriginal children's health and is currently engaged in several large-scale research projects relating to indigenous health and well-being entitled as follows: the Aboriginal Family Study, Healing for Survivors of Child Sexual Abuse in Aboriginal Communities, Corca – Bubs, Deadly Mums and Strong Families – connecting pregnant women with support for stress, yarndi and alcohol, and a Childhood Resilience Study to develop a better understanding of how trauma and stress impact on children's health and well-being.
11. Where a bequest made in a will is made in favour of an organisation that has never existed, the gift will lapse unless it can be inferred that the donor intended to benefit a charitable purpose, in which case it is open to the Court to find a general charitable intention and to apply the gift cy-près. If, however, the donor intended to benefit a specific or particular charitable purpose, the gift cannot be applied cy-près as this would be inconsistent with the donor's intention.
12. In this case, there was a general charitable intention found (at [57]). On this point, the Court said (at [60]):

As cl 9(c)(iii) of the will fails as a gift to an identifiable organisation but exhibits a general charitable intention, the [Charitable Trusts Act s 11](#) places the plaintiffs under a duty to have the trust property applied cy-près and attracts the Court's jurisdiction to order a scheme cy-près, to secure its effective use for charitable purposes, due to the inability to locate an entity with a name identical, or like, the Aboriginal Children's Medical Research Trust.

13. The Court was satisfied that both the proposed recipient charities reflected important elements of the deceased's charitable purpose. There was no need to search for other possible recipients.
14. The Court was of the view that the mention of Mr Pearson's name in the gift in the will was important to the outcome (at [69]):

To the extent that the deceased wished to give effect to his charitable intention of aiding Aboriginal children's medical research he wished to do so through Mr Pearson and through an organisation that would be based in and focus upon Cape York indigenous children. This interpretation of the testator's words is also consistent with the evidence of what the deceased said to his son about Aboriginal children "sick and dying in far North Queensland". The testator's gift can be seen as recognising that the specific medical and health needs of indigenous children in remote areas of Australia, such as far North Queensland, may be different from those in more urban areas.

15. The Good to Great Schools Australia proposal was weighted towards research addressing the medical health needs of indigenous children in the Cape York area. The Murdoch Children's Research Institute proposal was more directed towards general medical research in relation to indigenous children throughout Australia.
16. The Court therefore concluded that the proposal of Good to Great Schools Australia more adequately reflected the intentions of the testator (at [77]). The gift in the will was ordered to be paid to Good to Great Schools Australia accordingly.

## COMMENT



This is once again an example of a will which contained misdescriptions of all its charitable recipients, and one non-existent recipient. The Court identified two factors that pointed to the likelihood of misdescription of organisations in the will:

- a) Firstly, the deceased was unlikely to have been able to check the exact name of organisations that he wished to benefit in his will because he was not computer literate and was unable to use the internet or a smart telephone.
- b) Secondly, the will was prepared by a friend of the deceased, who the Court understood did not claim any specialised legal training.

Despite this, the Court commented that the will was nevertheless a remarkably well-crafted instrument from the hand of a non-lawyer author.

The will was based on the deceased's hand-written and oral instructions. However, the will did not accurately identify the business names of several intended recipients of the gifts of residue.

There are three recommendations that can avoid this situation:

- a) A will should be prepared by a qualified solicitor who is given clear instructions;
- b) All charitable gift recipient's names should be checked by consulting their websites to find the correct wording for bequests to them;
- c) All charitable gift recipients should be identified not just by their precise names, but also by their Australian Company Number (ACN).

## VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/714.html>

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

**Email:** [acpns@qut.edu.au](mailto:acpns@qut.edu.au)

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