

SUPREME COURT OF QUEENSLAND

CITATION: *Royal Brisbane and Women's Hospital Foundation v Attorney-General for the State of Queensland & Anor* [2020] QSC 222

PARTIES: **ROYAL BRISBANE AND WOMEN'S HOSPITAL FOUNDATION**
(applicant)
v
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first respondent)
QUEENSLAND INSTITUTE OF MEDICAL RESEARCH
(second respondent)

FILE NO/S: BS6648 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 23 July 2020

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2020

JUDGE: Boddice J

ORDER: **The Court declares that:**

(1) on the proper construction of the will dated 21 May 2008 of Miriam Norah Lawrence, deceased:

(a) the reference in clause 4.7(a) thereof to "The Royal Brisbane Hospital Research Foundation" is a reference to the applicant;

(b) the gift in clause 4.7(a) thereof is a gift of:

(i) the residue of the estate of Miriam Norah Lawrence, deceased, to the applicant on trust in perpetuity or until the applicant ceases to exist, with such trust to be known as "The Len and Miriam Lawrence Charitable Trust" (trust fund);

(ii) the net income of the trust fund in perpetuity or until the applicant ceases to exist, to be applied for the general

**charitable purpose of the applicant,
and in the event that the applicant ceases to
exist, a gift of:**

- (iii) the trust fund to the second respondent on trust in perpetuity;**
- (iv) the net income of the trust fund in perpetuity for the general charitable purposes of the second respondent.**

The Court orders that:

- (2) pursuant to r 375(3) of the *Uniform Civil Procedure Rules 1999* (Qld), the name of the second respondent be amended to “The Council of the Queensland Institute of Medical Research”;**
- (3) the applicant’s costs of the proceeding be paid out of The Len and Miriam Lawrence Charitable Trust on an indemnity basis.**

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – GENERALLY – where the applicant applies for a declaration as to whether, under a proper construction of the deceased’s Will, the applicant is entitled to both the income and capital of the funds held on trust in perpetuity – whether a proper construction of the deceased’s Will supports a conclusion that the deceased did not intend the applicant to take anything more than income

Congregational Union of New South Wales v Thistlethwayte (1952) 87 CLR 375

Jewish Orphan and Children’s Aid Society Inc v ANZ Executors and Trustee Company Ltd [2007] VSC 26

Re Williams [1955] VLR 65

Sir Moses Montefiore Jewish Home v Perpetual Trustee Company Limited [2012] NSWSC 210

COUNSEL: J Otto for the applicant
A Lossberg for the respondent

SOLICITORS: de Groot Wills and Estate Lawyers for the applicant
Crown Law for the respondent

[1] The applicant, as the statutory successor of the Royal Brisbane Hospital Research Foundation (“the Foundation”), is the beneficiary under the Will of Miriam Norah Lawrence, deceased.

- [2] The applicant applies for a declaration as to whether, under a proper construction of the deceased's Will, the applicant is entitled to both the income and capital of the funds held on trust in perpetuity.

Background

- [3] The applicant is a body corporate with perpetual succession. It was and is capable of holding and managing property, including income generated by the holding of property. Its objects are charitable.
- [4] The testatrix's estate was substantial. After administration, there was left a residue constituted by a share portfolio with a market value of \$1,382,368.84 and real property with an estimated value of \$3,325,000. Those assets were transferred by the estate's executors to the applicant.
- [5] Subsequent to that transfer, the applicant converted the share portfolio into cash. It continues to hold the real property. Since coming into possession of the fund, the applicant has received interest and rental income of \$296,530.98.

Will

- [6] By the deceased's last Will, which was dated 21 May 2008, and for which probate was granted to its executors and trustees on 9 January 2015, the deceased gave her estate to her trustees on trust to give certain specific bequests and pecuniary legacies and then to give the rest and residue of the estate to the Foundation to hold on trust in perpetuity on specified bases.
- [7] The residue clause provided:

“To give the residue of my estate to **THE ROYAL BRISBANE HOSPITAL RESEARCH FOUNDATION** (‘the Foundation’) to hold on trust in perpetuity as ‘The Len and Miriam Lawrence Charitable Trust’ (‘the Charitable Trust’). The net income of the Charitable Trust is to be applied for the general charitable purposes of the Foundation.

I express the wish that the Charitable Trust be administered by the Chairman of the Foundation, Director of the Foundation and the Superintendent of the Royal Brisbane Hospital.

I express the wish that when the Foundation is investing the funds in the Charitable Trust, it not make investments of a speculative nature.

If after my death and during the lifetime of the Charitable Trust the Foundation ceases to exist then the assets of the Charitable Trust are to be transferred to the **QUEENSLAND INSTITUTE OF MEDICAL RESEARCH** ('the Institute') which shall act in place of the Foundation and apply the net income of the Charitable Trust for the general charitable purposes of the Institute."

Applicable principles

- [8] There is a rule of construction that an indefinite or perpetual gift of income from property to a person carries with it an absolute interest in the capital of the fund to which the person is entitled to call, unless there has been manifested an intention to the contrary.
- [9] In *Congregational Union of New South Wales v Thistlethwayte*¹, the High Court held that this rule of construction applied whether the gift of income is to an individual or to a charity.
- [10] Whilst the rule of construction is applicable to a gift of income to a charity, the fact that the gift of income is to a charity is a factor which will incline a Court to find a contrary intention on the part of the testatrix. As Gillard J observed in *Melbourne Jewish Orphan and Children's Aid Society Inc v ANZ Executors and Trustee Company Ltd*:²

"Although the rule applies equally to a charity as well as to an individual, the proof of a contrary intention is usually more readily found where the beneficiary is a charity. This comes about because of the very nature of a charity as a beneficiary. A charity is formed to perform charitable acts, usually for an indefinite period into the future, and the types of demands on the charitable purposes often change with the passage of time. The rule against perpetuities which gives effect to the common law's policy to encourage alienation of property does not apply to charitable trusts. This means that charitable trusts can last indefinitely. Indeed, it is in the public interest that there be trusts lasting indefinitely."

Consideration

- [11] A proper construction of clause 4.7(a) of the deceased's Will supports a conclusion that the deceased did not intend the applicant to take anything more than the income.

¹ (1952) 87 CLR 375.

² [2007] VSC 26 [55]; *Re Williams* [1955] VLR 65 at 67, 69; *Sir Moses Montefiore Jewish Home v Perpetual Trustee Company Limited* [2012] NSWSC 210 at [14].

- [12] First, had the testatrix intended to make an absolute gift to the applicant, she would have done so.
- [13] Second, the deceased did not give the residue of her estate to the applicant directly. It was given to it “to hold on trust in perpetuity”. The words “in perpetuity” have meaning in the context of the establishment of a trust, the income of which is to be paid to the charity.
- [14] Third, the deceased named the Charitable Trust. Such naming is consistent with an intention for the trust to be perpetually maintained as a memorial.
- [15] Fourth, what is to be applied for the applicant’s general charitable purposes, is the net income, that is, after deductions, and on a periodical basis. This stipulation is inconsistent with an intention that the capital be also so applied.
- [16] Fifth, the deceased dealt with the ongoing administration of the Charitable Trust, nominating specified persons and included a wish in relation to the investment of those funds. Such measures are inconsistent with an intention that the capital also be applied.
- [17] Sixth, the clause provides for any cessation of the existence of the applicant during the lifetime of the Charitable Trust, consistent with the Charitable Trust having an existence separate from the applicant as its trustee.
- [18] Finally, the application of net income of the gift towards the applicant’s general purposes is itself consistent with the criteria of a Charitable Trust in perpetuity. In that respect, the observations of Dean J in *Re Williams*³ are apposite:

“... The permanent endowment of charitable institutions is a recognized method of providing for their maintenance. Provisions of this kind have always been respected by those who administer them. It would be disturbing to testators and to governing bodies of such institutions to be told that such a provision as that before me is really a gift of corpus, and that testators who desire their benefactions to be held as a permanent endowment must use some additional expressions to make such intention clear ...”

³ [1955] VLR 65 at 67.

Conclusion

- [19] Upon a proper construction of clause 4.7 of the Will, the deceased gifted the residue of her estate on trust in perpetuity with the net income of the trust fund to be applied for general charitable purposes.

Orders

- [20] I make declaration and orders in the terms of the draft, which I initial and place with the papers.