

SUPREME COURT OF QUEENSLAND

CITATION: *Banwell v Attorney-General (Qld)* [2020] QSC 239

PARTIES: **FIONA BANWELL AS ADMINISTRATOR OF THE
ESTATE OF MARIE ALICE CRUICE**
(applicant)
v
**ATTORNEY-GENERAL FOR THE STATE OF
QUEENSLAND**
(respondent)

FILE NO/S: BS No 5383 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 13 August 2020

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Bradley J

ORDER: **The Order of the Court is that:**

- 1. The Court declares that, on the proper construction of the will of Marie Alice Cruice dated 13 July 2012 (the “Will”), each of the gifts referred to in paragraphs 3(b)(i), (ii), (iii), (vi) and (vii) is a gift of general charitable intention.**
- 2. The Court directs that:**
 - (a) The applicant pay the gift referred to in paragraph 3(b)(i) of the Will to the National Heart Foundation of Australia ABN 98 008 419 761, to be applied for research in this foundation;**
 - (b) The applicant pay the gift referred to in paragraph 3(b)(ii) of the Will to Metro South Hospital and Health Service ABN 86 834 068 616, for the benefit of the Princess Alexandra Hospital’s fund for research purposes;**
 - (c) The applicant pay the gift referred to in paragraph 3(b)(iii) of the Will to St Vincent’s Private Hospitals Ltd ABN 61 083 645 505, for such purposes as may be determined by its**

Chief Executive Officer;

- (d) The applicant pay the gift referred to in paragraph 3(b)(iv) of the Will to Yourtown ACN 102 379 386, for such purposes as may be determined by its Chairman or Board;**
- (e) The applicant pay the gift referred to in paragraph 3(b)(v) of the Will to The Council of the Queensland Institute of Medical Research ABN 31 411 813 344, for research purposes;**
- (f) The applicant pay the gift referred to in paragraph 3(b)(vi) of the Will to the Caboolture local ambulance committee (the “Committee”) or, failing that, to the State on trust for the Committee, for such purposes as may be determined by the Committee;**
- (g) The applicant pay the gift referred to in paragraph 3(b)(vii) of the Will to Metro North Hospital and Health Service ABN 18 496 277 942, for the benefit of Caboolture Hospital, for such purposes as may be determined by its Chairman or Board; and**
- (h) The applicant pay the gift referred to in paragraph 3(b)(viii) of the Will to Cancer Council Queensland ACN 009 784 356, for research purposes.**

3. The applicant’s costs of the proceeding be paid out of the estate of Marie Alice Cruise on an indemnity basis.

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – TESTAMENTARY DISPOSITIONS GENERALLY – LAPSE – where a deceased left gifts in her Will to eight “charitable organisations” – where each of the donees was either misdescribed, never existed as a legal entity or is now known by a different name than that used by the deceased in her Will – whether each of the donees was in existence at the date of the deceased’s death – whether any gift to a donee which did not exist at the date of the deceased’s death falls within an exception to the lapse rule

Attorney-General (NSW) v Perpetual Trustee Co Ltd (1940) 63 CLR 209, cited

Public Trustee (Qld) v Attorney-General (Qld) [2009] QSC 353, cited

Public Trustee (Qld) v Queensland [2004] QSC 360, applied
Public Trustee (Qld) v Queensland [2009] 2 Qd R 327, applied
Re Blaxland; Perpetual Trustee Co Ltd v Committee of the Church of England Homes [1964-5] NSW 124, applied

Re Broadbent; Imperial Cancer Research Fund v Bradley
 [2001] EWCA Civ 714, cited
Re Kilvert's Trusts (1871) 7 Ch App 170, cited
Re Schultz; Playford v University of Adelaide [1961] SASR 377,
 applied
Re Slevin [1891] 2 Ch 236, applied
Salvation Army (Vic) Property Trust v Fern Tree Gully Corp
 (1952) 85 CLR 159, applied

SOLICITORS: McInnes Wilson Lawyers for the applicant
 Crown Law for the respondent

- [1] This is a decision on the papers on an originating application filed 21 May 2019 and an application filed in that proceeding on 12 June 2020. The orders sought in the application supersede those sought in the originating application.

Parties

- [2] The applicant is the administrator of the estate of Marie Alice Cruice (the **deceased**). The relief sought comprises a declaration as to the proper construction of the Will of the deceased dated 13 July 2012 (the **Will**) and directions to the applicant about the payment of certain gifts provided for in the Will.
- [3] The respondent has specific statutory powers to enforce charitable trusts.¹ She also has common law rights, including the general supervision of charitable trusts and enforcement of charitable gifts.²

Background

- [4] The deceased died on 8 January 2015. The deceased's husband and son predeceased her.
- [5] A grant of letters of administration with the Will was issued to the applicant by the Court on 28 September 2018. The applicant has largely completed the administration of the deceased's estate and is contemplating making an interim distribution to the beneficiaries. The net value of the estate is approximately \$450,000. These funds are currently invested in the trust account of the solicitors for the applicant.
- [6] By clause 3 of the Will, the deceased relevantly provided:

"I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal whatsoever and wheresoever situate or over which I may have power of appointment disposition or control to my trustees upon the following trusts:-

- (a) ...
- (b) to give the rest and residue of my estate equally between the following various charitable organisations:-

¹ *Attorney-General Act 1999* (Qld), s 7(e); *Trusts Act 1973* (Qld), s 106(2)(a).

² *Attorney-General Act 1999* (Qld), s 8; *Re Royal Society's Charitable Trusts* [1956] 1 Ch 87 at 91-93 (Vaisey J).

- (i) to the National Heart Foundation to be applied for research in this foundation;
- (ii) to the Princess Alexandra Hospital for research purposes;
- (iii) to Mount Olivet Hospital in Brisbane for such purposes as may be determined by the Chairman and/or Board of that Hospital;
- (iv) to Boystown at Beaudesert for such purposes as may be determined by the Chairman and/or the Board;
- (v) to Queensland Institute of Medical Research for research purposes;
- (vi) to Caboolture Ambulance, King Street, Caboolture for such purposes as may be determined by the Chairman, Manager and/or Board;
- (vii) to Caboolture Hospital for such purposes as may be determined by the Chairman and/or Board of the Hospital;
- (viii) to The Queensland Cancer Fund for the purposes of research.”

[7] It appears that some of the named “various charitable organisations” were not legal entities in existence at the date of the deceased’s death and the others had changed their names before or after the Will was executed or the death of the deceased. The ultimate purpose of the originating application is to provide directions to the applicant about the manner and extent to which she should give effect to the clause 3(b) gifts.

[8] The Court’s duty is to ascertain and give effect to the testamentary wishes of the deceased. Those wishes are expressed in the language of the Will. Ascertaining them is an exercise in construction.³ The words in the Will must be interpreted by reference to the meaning they would convey to a reasonable person, having regard to the circumstances surrounding the Will, including the genesis of the Will and its objective aim.

[9] In the present case, the only extrinsic evidence is that the deceased’s husband had passed away at the date of the Will (and her son had predeceased her, after the date of the Will). Within the Will, the deceased had expressly made no further provision for her son “because he has already been adequately cared for”, so the clause 3(b) gifts were the only gifts, devises or bequests under the Will. It may be relevant that the deceased’s address in the Will is at King Street, Caboolture.

Lapsing and saving of gifts

[10] A gift to a person or an entity under a Will lapses if the person or entity is no longer in existence at the date of death. The so-called lapse rule is subject to common law exceptions. These include some exceptions about gifts for charitable purposes. Broadly, such a gift will not lapse where it is clear the deceased had a general

³ *Re Broadbent; Imperial Cancer Research Fund v Bradley* [2001] EWCA Civ 714 at [20] (Mummery LJ).

charitable intention in making the gift, such that the mode of performance designated by the deceased is merely a means to give effect to a wider dominant charitable purpose and not an indispensable condition of the gift.⁴ This may turn upon the nature of the discretionary power the deceased conferred on the named donee; in particular, whether the deceased intended that power to be exercised by the named donee alone.⁵

- [11] In *Public Trustee (Qld) v Attorney-General (Qld)*,⁶ Ann Lyons J identified circumstances in which a gift for a charitable purpose may not lapse even if the named donee entity has ceased to exist during the testator's lifetime, whether before or after the date of the Will. Her Honour noted four exceptions. Two are of present relevance:

“The second exception is if, at a testator's death, there is in existence another institution which has taken over the work previously carried on by the named institution and which can properly be regarded as the successor of the named institution and the dominant charitable intention of the testator was wide enough to allow the gift to take effect in favour of a successor institution, then the gift would take effect in favour of the successor institution. That is not an instance of *cy-pres* but merely requires an order by way of administrative scheme that the money is paid to the successor institution. ...

Recently the courts have developed a fourth exception which is a way of extending the second exception, which is if, upon the proper interpretation of the Will, the gift is not made to a particular named charitable institution but is a gift to a particular charitable purpose, it may be upheld if that purpose remains capable of fulfilment. This does not require that there be a true successor institution, nor does it require a *cy-pres* scheme. If this exception applies, the money may be paid to a suitable person or entity to apply the funds to that purpose.”⁷

- [12] For some of these gifts, the Court must ascertain whether the deceased's intention, as expressed in the Will, was to benefit a charitable purpose promoted in the work of the named donee or to benefit only the named donee in carrying out its charitable purpose.
- [13] Indications of a general charitable intention include that a gift is to a named entity for a specified charitable purpose. None of the gifts in clause 3(b) of the Will is an unqualified disposition in favour of a named recipient. Each is to be applied for a specific charitable purpose. The gifts under paragraphs 3(b)(i), (ii), (v) and (viii) are for research purposes. Such gifts are charitable because they are for the advancement of education.⁸ The gifts under paragraphs 3(b)(iii) and (vii) to hospitals are charitable because they are gifts for hospital purposes and so beneficial

⁴ *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1940) 63 CLR 209 at 225 (Dixon and Evatt JJ); *Re Tyrie (No 1)* [1972] VR 168 at 177-178 (Newton J).

⁵ *Russell's Executor v Balden* 1989 SLT 177 at 180 (Lord Jauncey).

⁶ [2009] QSC 353.

⁷ [2009] QSC 353 at [11] and [13].

⁸ *Re Schultz; Playford v University of Adelaide* [1961] SASR 377 at 384 (Mayo J).

to the community.⁹ The gift in paragraph 3(b)(vi) for the purpose of an ambulance service is similarly charitable.¹⁰ The gift under paragraph 3(b)(iv) is for the purposes of an entity that operated a boys home, which is a charitable purpose.¹¹

- [14] The making of eight gifts in equal shares, with four for the purpose of research (and the others for purposes to be determined by the controllers of the named entities) is an indication of the deceased's general charitable intention.¹² The broad discretion about the application of the gifted funds also indicates such an intention.¹³
- [15] No other provision in the Will suggests and there is no extrinsic evidence that the deceased had a special confidence or personal connection with any named recipient, such that a payment to the named recipient would be essential to give effect to the deceased's intention.

The clause 3(b) gifts

- [16] It is convenient to consider each gift separately to determine whether the donee is in existence and, if not, whether the gift falls within an exception to the lapse rule.

National Heart Foundation

- [17] There are nine presently registered entities with names including "National Heart Foundation". Eight are divisions of the National Heart Foundation of Australia, one for each State and Territory; and the other is a national body, The National Heart Foundation of Australia ACN 008 419 761 (**NHFA**).
- [18] When the deceased made the Will, it is likely she intended to refer to NHFA and merely misdescribed the donee of the gift. If so, there has been no lapse of the gift.¹⁴ However, it is possible the deceased intended to refer to the National Heart Foundation of Australia (Q'ld. Division).
- [19] I am satisfied the deceased had a general charitable intention in making the gift and the mode of performance, a gift to the National Heart Foundation, was simply a means to give effect to the purpose and not an indispensable condition of the gift.
- [20] In 2018, after the deceased's death, the nine separate entities merged their staff and assets into NHFA as a single operating entity. So, although the National Heart Foundation of Australia (Q'ld. Division) continues to exist, it no longer carries on research.
- [21] The respondent does not oppose a direction that the applicant pay the gift in paragraph 3(b)(i) to NHFA to be applied for research in this foundation. This would appropriately deal with the misdescription.

⁹ *Public Trustee (Qld) v Queensland* [2009] 2 Qd R 327 at 328 [6] (Byrne SJA). The gift under paragraph 3(b)(ii) is also charitable on this ground.

¹⁰ *Public Trustee (Qld) v Queensland* [2004] QSC 360 at [9] (Margaret Wilson J).

¹¹ *Salvation Army (Vic) Property Trust v Fern Tree Gully Corp* (1952) 85 CLR 159.

¹² *Executor Trustee & Agency Co of South Australia Ltd v Warbey (No 2)* (1973) 6 SASR 336 at 342 (Bray CJ).

¹³ *Re Blaxland; Perpetual Trustee Co Ltd v Committee of the Church of England Homes* [1964-5] NSW 124 at 127 (Hardie J).

¹⁴ *Re Kilvert's Trusts* (1871) 7 Ch App 170.

[22] If the gift were to be construed as to the Queensland division rather than NHFA, I am satisfied that NHFA is the readily identifiable successor institution to the Queensland division which has taken over the work previously carried on by the Queensland division. The gift is for a particular charitable purpose. That purpose remains capable of fulfilment by directing the gift to NHFA. As the purpose of the gift is unchanged, there is no need for a *cy-pres* scheme.

[23] It follows that the direction sought should be made.

Princess Alexandra Hospital

[24] The Princess Alexandra Hospital is a public hospital in Brisbane, commonly referred to by that name. It is not a legal entity.

[25] Since 8 March 2012, “Princess Alexandra Hospital” has been a trading name of the Metro South Hospital and Health Service (**Metro South**), which operates the hospital. Metro South is a statutory entity established by regulations made under the *Hospitals and Health Boards Act 2011* (Qld).

[26] The deceased may have been unaware of the legal entity operating the Hospital. As Byrne SJA observed in *Public Trustee (Qld) v Queensland* about a testamentary gift naming a public hospital entity that had ceased to exist:¹⁵

“[R]eorganisations of utilities following dissolutions, through amalgamations and in other ways have characterised public administration in Queensland since the War. Against this notorious background, in 1987, a rational donor must have anticipated that an entity chosen to effect a gift for the Hospital might not be able to do so when eventually the will took effect. And it is scarcely to be inferred that Mrs Ball wished that sick children should be deprived of her benefaction if the politics of another day merely put a different administrator in place of the Board.”

[27] I am satisfied the deceased had a general charitable intention in making the gift and the mode of performance, a gift to Princess Alexandra Hospital, was simply a means to give effect to the purpose and not an indispensable condition of the gift.

[28] The respondent does not oppose a direction that the applicant pay the gift in paragraph 3(b)(ii) to Metro South for the benefit of the Princess Alexandra Hospital’s fund for research purposes.

[29] I agree with the respondent’s submission that by paragraph 3(b)(ii) the deceased intended to benefit the research carried out at the Princess Alexandra Hospital and merely inaccurately described Metro South by that name in the Will. The reference in the Will to the Princess Alexandra Hospital should be construed as meaning Metro South.

[30] It follows that the declaration should be made about the deceased’s general charitable intention with respect to this gift and the direction sought should be made.

¹⁵ [2009] 2 Qd R 327 at 329 [11], referring to Richard Posner, *Economic Analysis of Law* (Aspen Publishers, 7th ed, 2007) at 546.

Mount Olivet Hospital

- [31] The Mount Olivet Hospital was for many years the name of a hospital located at Kangaroo Point. It is not a legal entity.
- [32] The hospital was founded by the Congregation of the Religious Sisters of Charity of Australia (**CRSCA**), who founded and operated other hospitals in Australia. The Mary Aikenhead Ministries of the Roman Catholic Church (**MAM**) is the successor to CRSCA.
- [33] The hospital is now styled as St Vincent's Private Hospital, but has continued to be commonly known as Mount Olivet Hospital. It is operated by St Vincent's Private Hospitals Ltd (**SVPH**). SVPH is a subsidiary of St Vincent's Health Australia Ltd, which is controlled by MAM.
- [34] I am satisfied the deceased had a general charitable intention in making the gift and the mode of performance, a gift to Mount Olivet Hospital, was simply a means to give effect to the purpose and not an indispensable condition of the gift. The reorganisation of religious charitable bodies has been no less common than in the public sector. The deceased likely anticipated that the legal entity conducting the charitable works at the Hospital would change from time to time; the Will should not be construed to prevent her gift being deployed for those charitable purposes.
- [35] The respondent does not oppose a direction that the applicant pay the gift in paragraph 3(b)(iii) to SVPH for such purposes as may be determined by its Chairman or the Board.
- [36] I agree with the respondent's submission that by paragraph 3(b)(iii) the deceased intended to benefit the charitable works carried out at the St Vincent's Private Hospital. The gift is for a particular charitable purpose. That purpose remains capable of fulfilment. All that is required is for the applicant to pay the money to a suitable entity to apply it for those charitable works at the Hospital.¹⁶ By directing the gift to SVPH, the Court may provide the machinery to give effect to the general charitable purpose of the deceased made plain in the Will.
- [37] The declaration should be made about the deceased's general charitable intention with respect to this gift. The direction sought should also be made.

Boystown

- [38] When the deceased made her Will and at the time of her death, Boystown was a public company limited by guarantee. In the circumstances, there was no error in the Will in describing the gift recipient in paragraph 3(b)(iii). The deceased's gift to Boystown took effect upon her death.¹⁷
- [39] On 3 February 2016, Boystown changed its name to YourTown. It remained the same legal entity with the same Australian Company Number. There is no successor to Boystown. There has simply been a change of name.

¹⁶ [2009] 2 Qd R 327 at [13].

¹⁷ *Re Slevin* [1891] 2 Ch 236 at 241 (Kay LJ for the Court).

- [40] To avoid any confusion on the part of the applicant, the direction sought should be made. It is not necessary to make any declaration about the deceased's intention with respect to this gift.

Queensland Institute of Medical Research

- [41] The Queensland Institute of Medical Research was established in about 1945. Although an institute, it is not a legal entity.
- [42] The legal entity which conducted the Queensland Institute of Medical Research under that name is The Council of the Queensland Institute of Medical Research (the **QIMR Council**), established pursuant to s 3(5) of the *Queensland Institute of Medical Research Act 1945* (Qld). The QIMR Council has perpetual succession.
- [43] The QIMR Council traded under the name "Queensland Institute of Medical Research" until 17 October 2013, when it changed its trading name to "QIMR Berghofer Medical Research Institute". When the deceased made her Will, she referred to the then trading name of the QIMR Council.
- [44] In the application, the applicant sought a direction that the gift in paragraph 3(b)(v) be paid by the applicant to QIMR Berghofer Medical Research Institute. This would identify the current trading name of the QIMR Council. In her most recent submissions, the applicant has agreed with the respondent that the direction should refer to the QIMR Council.
- [45] It is clear that deceased intended to benefit the research carried out by the QIMR Council at the QIMR Berghofer Medical Research Institute, but inaccurately described the legal entity in in paragraph 3(b)(iv) of the Will.
- [46] The direction now sought should be made. It is not necessary to make any declaration about the deceased's intention with respect to this gift.

Caboolture Ambulance

- [47] An ambulance service has operated in the Caboolture area for more than a century. Its origins lie in a voluntary community committee. For many years it has been run, and it continues to be run, from premises in King Street, Caboolture. However, the "Caboolture Ambulance" is not a legal entity.
- [48] The ambulance service in the Caboolture area is a facility operated by the Queensland Ambulance Service, established under s 3A of the *Ambulance Service Act 1991* (Qld) (the **ASA**). "Queensland Ambulance Service" is a trading name of the business registered as operated by "Department of Health (Queensland Ambulance Service)". However, that operator is not a separate legal entity, but a department of the State of Queensland.
- [49] Section 26 of the ASA provides for the Minister to authorise the establishment of local ambulance committees. A local ambulance committee may sue or be sued in its committee name.¹⁸ It may acquire property by gift, devise or bequest for any purpose connected with the provisions of ambulance services or any of the committee's functions and may agree to carry out the conditions of the gift, devise

¹⁸ ASA, s 26(3).

or bequest, as may the State.¹⁹ If any such property is other than money, it vests in the State on trust for the local committee.²⁰

- [50] In the application, the applicant sought a direction that the gift in paragraph 3(b)(vi) be paid by the applicant to Department of Health (Queensland Ambulance Service) ABN 89 519 542 578 for the benefit of the Caboolture local ambulance committee for such purposes as may be determined by the committee. In her most recent submissions, the applicant has sought a direction that the gift be paid for the benefit of the Caboolture locality for such purposes as may be determined by the Commissioner of the Queensland Ambulance Service. The respondent does not oppose such a direction.
- [51] The respondent has identified evidence from the Department of Health records that the Caboolture local ambulance committee (the **Committee**) was established and forms part of the Metro North Local Ambulance Service Network. The date of establishment is not known, but it is more likely than not the Committee was in existence when the deceased made the Will and at the date of her death.
- [52] I am satisfied the deceased had a general charitable intention in making the gift and the mode of performance, a gift to “Caboolture Ambulance, King Street, Caboolture,” was simply a means to give effect to the purpose and not an indispensable condition of the gift. That purpose remains capable of fulfilment. All that is required is for the applicant to pay the money to the entity suitable to apply it for those charitable works.
- [53] It is clear the deceased intended to benefit the provision of ambulance services and any other functions under the general oversight of the Committee. I draw that inference from the fact that the deceased resided in King Street, Caboolture at the date she made the Will. She would have known the local ambulance service and the premises from which it operated.
- [54] The gift in paragraph 3(b)(vi) is a monetary gift, so there is no requirement that it vest in the State.
- [55] The declaration should be made about the deceased’s general charitable intention with respect to this gift. However, the direction now sought should not be made. Instead, by directing the gift to the Committee, the Court may provide the machinery to give effect to the general charitable purpose of the deceased made plain in the Will. In the event that the Committee is unable to accept the gift for any reason, the court should direct the applicant to pay the gift to the State on trust for the Committee, for such purposes as may be determined by the Committee.

Caboolture Hospital

- [56] The Caboolture Hospital is a public hospital at Caboolture. It is not a legal entity.
- [57] Since March 2012, “Caboolture Hospital” has been a trading name for Metro North Hospital and Health Service (**Metro North**), which operates the hospital. Metro North is a statutory entity established by regulations made under the *Hospitals and Health Boards Act 2011* (Qld).

¹⁹ ASA, s 40(1).

²⁰ ASA, s 40(2).

[58] The respondent does not oppose the direction sought that the gift in paragraph 3(b)(vii) be paid by the applicant to Metro North for such purposes as may be determined by its Chairman or Board.

[59] I am satisfied the deceased had a general charitable intention in making this gift. The mode of performance was simply a means to give effect to the purpose and not an indispensable condition of the gift. A declaration to that effect should be made.

[60] I agree with the respondent's submission that it is clear the deceased intended to benefit the charitable purposes carried out at the Caboolture Hospital. That purpose remains capable of fulfilment. All that is required is for the applicant to pay the money to the entity suitable to apply it for those charitable works, which is Metro North as the operator of the Hospital.

[61] The direction sought should be made.

Queensland Cancer Fund

[62] The Queensland Cancer Fund is a company limited by guarantee taken to be registered in Queensland as a company under the *Corporations Act*. It operated under that name from about 1961 until 21 March 2007, when it changed its name to "The Cancer Council Queensland". On 1 July 2008, it changed its name to "Cancer Council Queensland".

[63] The respondent does not oppose the direction sought that the gift in paragraph 3(b)(viii) be paid by the applicant to Cancer Council Queensland for the purposes of research.

[64] I agree with the respondent's submission that the Cancer Council Queensland is the same legal entity as the Queensland Cancer Fund. There is no successor to the Queensland Cancer Council. There has simply been a change of name.

[65] To avoid any confusion on the part of the applicant, the direction sought should be made. It is not necessary to make any declaration about the deceased's intention with respect to this gift.

Costs

[66] The applicant also seeks an order that her costs of and incidental to the application be paid out of the estate of the deceased on an indemnity basis.

[67] The respondent does not seek recovery of her costs in the proceeding.

[68] It was appropriate for the applicant to seek relief. The applicant's costs of the proceeding should be paid out of the estate on an indemnity basis.