

SUPREME COURT OF QUEENSLAND

CITATION: *The Public Trustee of Queensland & Anor v State of Queensland* [2004] QSC 360

PARTIES: **THE PUBLIC TRUSTEE OF QUEENSLAND**
and
DIANA ADRIENNE MARGARET GOLDEN (as personal representatives of the Estate of LEWES JOHN GOLDEN deceased)
(applicants)
v
STATE OF QUEENSLAND
(respondent)

FILE NO: BS7324 of 2004

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 19 October 2004

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 12 October 2004

JUDGE: Wilson J

ORDER: **1. a declaration that on the true construction of clause 7.01 of the last will of Lewes John Golden made on 11 June 2004 the gift of 33 1/3% share of the estate to The Redcliffe Local Ambulance Committee for the charitable purposes thereof is a good and valid gift;**

2. that the gift in paragraph 7.01 of the said will of Lewis John Golden deceased that is exhibit B to the affidavit of Kelly Mae Maller filed 24 August 2004 (“the Will”) be applied cy près in the following way:

(a) that the executors of the Will pay the gift in paragraph 7.01 of the Will to the State of Queensland, care of the Assistant Commissioner, Greater Brisbane Region, Queensland Ambulance Service;

(b) that the receipt of the said Assistant Commissioner be a complete discharge to the executors and trustees of the Will;

(c) that upon receipt of the gift, the State of Queensland shall hold it in trust for the purpose of providing ambulance services in the city of Redcliffe. This purpose shall

include, but not be limited to, the financing, or assisting the financing, of the acquisition and/or operation of a fully equipped ambulance with paramedic equipment;

- 3. that the applicant Public Trustee of Queensland pay the respondents' costs of and incidental to the application.**

CATCHWORDS: CHARITIES – CHARITABLE GIFTS AND TRUSTS – VALIDITY AND PRACTICABILITY – NON-EXISTENCE OF OBJECTS – GIFT TO NON-EXISTENT INSTITUTION – where gift left to non-existent local ambulance committee – whether gift is valid and to whom it should be transferred

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – MISTAKE OR MISDESCRIPTION – IN RESPECT OF OBJECT OF GIFT

Ambulance Service Act 1991

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

Re Forgan (1961) 29 DLR (2d) 585, cited

Re Leitch [1965] VR 204, cited

COUNSEL: R D Cumming (solicitor) for the applicants
A E Lyons for the respondent
V M Bonesch (solicitor) for the Attorney-General

SOLICITORS: Official Solicitor to The Public Trustee for the applicants
The Crown Solicitor for the respondent

- [2] **WILSON J:** The Public Trustee of Queensland and Diana Adrienne Margaret Golden are the personal representatives of the estate of Lewes John Golden deceased. They have asked the Court to determine

“1. Whether on the true construction of clause 7.01 of the last Will of the said LEWES JOHN GOLDEN the gift of a 33 1/3% share of the estate to the THE REDCLIFFE LOCAL AMBULANCE COMMITTEE for the charitable purposes thereof is a good and valid gift.

2. If the answer to one is yes, to what person, persons, organisation or organisations should the Public Trustee of Queensland and Diana Adrienne Margaret Golden pay or transfer the said gift.”

- [3] On 12 October 2004 I heard the application and determined that the moneys should be applied *cy près*. These are my reasons for doing so.

- [4] Lewes John Golden died on 14 May 2001 leaving a will dated 11 June 1999. He appointed the applicants as his executors and trustees. This court granted them an Order to Administer with the Will on 16 November 2001.
- [5] The testator disposed of his estate as follows –

“7. ***Disposal of my Estate***

My Trustee shall distribute the whole of my estate as follows:-

- 01 As to a 33 1/3% share to THE REDCLIFFE LOCAL AMBULANCE COMMITTEE for the charitable purposes thereof.
- 02 As to a 33 1/3% share to THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (Q) for the charitable purposes of the Blue Nursing Service Centre at Redcliffe.
- 03 As to a 33 1/3% share to THE SALVATION ARMY (QUEENSLAND) PROPERTY TRUST for the charitable purposes of the Salvation Army in Queensland South Queensland Division.

This was followed by the following precatory statement -

“8. ***Expression of Wishes***

I EXPRESS a wish without creating any binding trust or legal obligation that The Redcliffe Local Ambulance purchase a new fully equipped ambulance with paramedic equipment. I ALSO EXPRESS a wish without creating any binding trust or legal obligation that the Redcliffe Centre of the Blue Nursing Service purchase a new motor vehicle.”

- [6] Local ambulance committees may be formed under s 26 of the *Ambulance Service Act* 1991. The primary function of such a committee is to manage moneys held on trust for the benefit of ambulance services in the community it represents. However, there has never been a local ambulance committee formed under the *Act* known as “The Redcliffe Local Ambulance Committee” or such a committee under some other name undertaking that function for the benefit of people living in the City of Redcliffe.
- [7] Thus the gift will lapse and fall into residue unless it shows a general charitable intention.
- [8] The trustees of the two charitable trusts who would take this gift if it fell into residue, The Uniting Church in Australia Property Trust (Q) and The Salvation Army (Queensland) Property Trust, were served with the application, but chose not to appear.
- [9] The purpose of assisting the operation of ambulances is charitable because it furthers the protection of human life. In *Attorney-General (NSW) v Perpetual*

Trustee Co (Ltd) (1940) 63 CLR 209 at 225 Dixon and Evatt JJ said of the question whether a trust instrument discloses a general charitable intention or only a particular intention -

“But, in its application to cases where some particular direction or directions have proved impracticable, the doctrine requires no more than a purpose wider than the execution of a specific plan involving the particular direction that has failed. In other words ‘general intention of charity’ means only an intention which, while not going beyond the bounds of the legal conception of charity, is more general than a bare intention that the impracticable direction be carried into execution as an indispensable part of the trust declared.”

- [10] In this case, the disposition in issue is in the same clause as two other charitable dispositions. That the nominated committee never existed is consistent with a concern for the purposes which such a committee would advance rather than with the financing of the committee itself. Moreover there is no express statement that those purposes were to be advanced only through the committee rather than in some other way. The precatory statement in clause 8 is also consistent with a general intention to provide for ambulance services in the district. These factors have led me to conclude that the testator had a general charitable intention to assist in the provision of ambulance services in the Redcliffe area, that he created a trust for that purpose, and that the nomination of the Redcliffe Local Ambulance Committee was merely a means for the fulfilment of that purpose. The funds ought to be applied *cy pres*.
- [11] I have reached this conclusion without recourse to the affidavit of the person who drew the will. Her evidence would support this conclusion, but I very much doubt that it is admissible (other than with respect to costs). No objection was taken to it at the hearing.
- [12] It was proposed that the fund be paid to the State of Queensland to be held on trust for the purpose of providing ambulance services in the City of Redcliffe. The Attorney-General supported the proposal.
- [13] A *cy près* scheme is one by which the testator's general charitable intention can be fulfilled. There is no legal impediment to the payment of the fund to a government institution so long as it is capable of fulfilling that intention. See, for example, *Re Forgan* (1961) 29 DLR (2d) 585 at 588 and *Re Leitch* [1965] VR 204.
- [14] The Queensland Ambulance Service is the only provider of ambulance services in the Redcliffe area. It was established under the *Ambulance Service Act* 1991. It is not a separate legal entity but an arm of the State of Queensland whose members are appointed under the *Act* and paid out of consolidated revenue. It is part of the Department of Emergency Services. The financial management system utilised by the Department allows moneys received by way of donation or bequest to be recorded independently of the Service's operating budget. The Service has stringent procedures in place to ensure that a bequest is used for its intended purpose.
- [15] The applicant Diana Golden (a niece of the testator) and Donald George Golden (a brother of the testator) would like the fund to pass to St John Ambulance Queensland. However, that organisation does not provide an ambulance transport

service in the Redcliffe area, its activities in the area being limited to providing first aid, including "standbys" at sporting events. Although served with the application, it did not appear at the hearing. I held those paragraphs of Mr Golden's affidavit in which he speculated that the testator would not have wanted to benefit a government instrumentality inadmissible.

- [16] In all the circumstances I am satisfied that the proposed scheme would be a valid and practicable mode of carrying out the testator's intention to provide for ambulance services in the Redcliffe area.
- [17] The Public Trustee has admitted that one of his officers drew the will, and that in doing so she erred in not checking whether there was a Redcliffe Local Ambulance Committee. In these circumstances the Public Trustee should pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.
- [18] The orders of the Court are –
1. a declaration that on the true construction of clause 7.01 of the last will of Lewes John Golden made on 11 June 2004, the gift of 33 1/3% share of the estate to The Redcliffe Local Ambulance Committee for the charitable purposes thereof is a good and valid gift;
 2. that the gift in paragraph 7.01 of the said will of Lewis John Golden deceased that is exhibit B to the affidavit of Kelly Mae Maller filed 24 August 2004 ("the Will") be applied *cy prè*s in the following way:
 - (a) that the executors of the Will pay the gift in paragraph 7.01 of the Will to the State of Queensland, care of the Assistant Commissioner, Greater Brisbane Region, Queensland Ambulance Service;
 - (b) that the receipt of the said Assistant Commissioner be a complete discharge to the executors and trustees of the Will;
 - (c) that upon receipt of the gift, the State of Queensland shall hold it in trust for the purpose of providing ambulance services in the city of Redcliffe. This purpose shall include, but not be limited to, the financing, or assisting the financing, of the acquisition and/or operation of a fully equipped ambulance with paramedic equipment;
 3. that the applicant Public Trustee of Queensland pay the respondents' costs of and incidental to the application.