

SUPREME COURT OF QUEENSLAND

CITATION: *Hicks v Mater Misericordiae Ltd* [2017] QSC 38

PARTIES: **DIMPHIENA MARIA HICKS AND DAVID MAXWELL
HICKS AS EXECUTORS AND TRUSTEES OF THE
ESTATE OF ELVA JEAN HOOPER**
(applicants)
v
MATER MISERICORDIAE LIMITED
(first respondent)
**CHILDREN'S HEALTH QUEENSLAND HOSPITAL
AND HEALTH SERVICE**
(second respondent)
**ATTORNEY-GENERAL FOR THE STATE OF
QUEENSLAND**
(third respondent)

FILE NO/S: BS No 3636 of 2016

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 March 2017

DELIVERED AT: Brisbane

HEARING DATE: 28 June 2016

JUDGE: Douglas J

ORDER: **A *cy-près* order is to be made in favour of the second respondent.**

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ADMISSIBILITY AND USE OF EXTRINSIC EVIDENCE IN AID OF CONSTRUCTION – TO IDENTIFY PERSON OR OBJECT OF DISPOSITION – where testator's will left residuary estate to public hospital for certain charitable purposes – where hospital operated by first respondent – whether gift actually intended for first respondent – where section 33C Succession Act 1991 sets out what extrinsic evidence is admissible in interpreting a will – where rules of construction continue to allow admission of extrinsic evidence – whether extrinsic evidence could be admitted to aid in construction of this will

CHARITIES – CHARITABLE GIFTS AND TRUSTS – VALIDITY AND PRACTICABILITY – NON-EXISTENCE

OF OBJECTS – GIFT TO CHARITABLE INSTITUTION:
 INSTITUTION CEASING TO EXIST – PARTICULAR
 CASES – where testator’s will named hospital as residuary
 beneficiary under will for identified charitable purposes –
 where first respondent operated public hospital – where
 beneficiary hospital ceased to exist after testator’s death –
 where functions of beneficiary were ceded to different
 institution operated by second respondent – whether cy-près
 order should be made in favour of second respondent

Hospital and Health Boards Act 2011, s 275

Succession Act 1981, s 33C(1)

Trusts Act 1973 s 105(1)

G E dal Pont, *Law of Charity* (LexisNexis Butterworths,
 2010)

Tudor on Charities (Sweet & Maxwell, 9th ed, 2003)

Beggs v Kirkpatrick [1961] VR 764, cited

*Free Serbian Orthodox Church Diocese for Australia and
 New Zealand Property Trust v Dobrijevic* [2017] NSWCA
 28, cited

Mayor of Manchester v McAdam [1896] AC 500, cited

*Public Trustee of Queensland v Attorney-General for the
 State of Queensland* [2009] QSC 353, distinguished

Public Trustee of Queensland v State of Queensland [2009] 2
 Qd R 327, distinguished

Re Tyrie (deceased) (No 1) [1972] VR 168, cited

Stratton v Simpson (1970) 125 CLR 138; [1970] HCA 45,
 cited

The Public Trustee v Smith [2009] 1 Qd R 26; [2008] QSC
 339, cited

COUNSEL: M E Pope for the applicants
 C G C Curtis for the first respondent
 No appearance for the second respondent
 H Blattman for the third respondent

SOLICITORS: Derek Legal for the applicants
 HWL Ebsworth for the first respondent
 No appearance for the second respondent
 Crown Law for the third respondent

[1] Elva Jean Hooper died on 31 December 2013 leaving the residue of her estate to the “Medical Superintendent for the time being of the Mater Children’s Hospital in Brisbane for the purchase of medical equipment for the treatment of seriously ill children” in memory of her and her late husband. She also directed her trustees “to see to the proper expenditure of this money for this purpose”.

- [2] This admirable intention has been thwarted, in part because, when she executed her will on 6 July 2010, there was no position properly described as the Medical Superintendent of the Mater Children's Hospital. That issue may not have been such a problem had the Mater Children's Hospital continued to exist.
- [3] There was a hospital commonly known as the Mater Children's Hospital in existence when the will was executed and when Mrs Hooper died. It was more accurately described as the Mater Misericordiae Children's Hospital. It was operated by the first respondent, Mater Misericordiae Limited, and was a public hospital whose functions as a public hospital ceased on 29 November 2014. Its public hospital functions were then taken over by the Lady Cilento Children's Hospital, operated by a Queensland government instrumentality known as Children's Health Queensland Hospital and Health Service, which is the second respondent. It does not have a medical superintendent but an Executive Director of Medical Services.
- [4] The first respondent, Mater Misericordiae Limited, continues to operate private and public hospital services in Brisbane that provide medical services for seriously ill children but it no longer operates a facility that is designated solely to be a children's hospital.
- [5] The question on this application is how the bequest should be applied, for the benefit of the first or the second respondent? Should I do so by making a direction or by applying the bequest *cy-près*? The value of the residue of the estate is approximately \$1.04 million.

Evidence

- [6] The evidence led on behalf of Mater Misericordiae Limited established that it was a public company limited by guarantee whose constitution sets out charitable corporate objects primarily relating to health care services, including compassionate and non-discriminatory service and care to the sick and needy. Its constitution has terms prohibiting any distributions to its members so it is in that sense a "not for profit" entity. It is also registered as a charity and can accurately be described as a charitable institution. It operates hospitals in Queensland which have been operating through predecessor institutions and arrangements since 1906.
- [7] It was established as a corporate entity to operate the Mater Hospitals from 2001. The main source of funding for its public hospitals, including the Mater Children's Hospital, was initially the fundraising efforts of the Sisters of Mercy until about the 1970s. Since then most funding has been provided by the Queensland Government.
- [8] The Mater Hospitals have not been, and are not, operated by separate individual legal entities or ownership structures for each hospital. They are all operated by the first respondent. When the will was executed and when the deceased died, there was no separate legal entity operating the Mater Children's Hospital or any separate ownership structure for that hospital.

- [9] The Mater Children's Hospital operated from 1931. Its activities were originally conducted by the Corporation of the Trustees of the Order of the Sisters of Mercy in Queensland. When the will was executed on 6 July 2010 and also when the deceased died on 31 December 2013 the first respondent was continuing to operate the Mater Children's Hospital. It did so until that hospital closed on 29 November 2014.
- [10] There is a separate company proposed by the first respondent as a possible trustee if it is necessary to appoint a specified trustee instead of the non-existent "Medical Superintendent for the time being of the Mater Children's Hospital in Brisbane" or to establish a *cy-près* scheme. It is known as Mater Hospitals' Appeal Limited, is the trustee of a charitable trust named the "Mater Foundation" and a subsidiary of the first respondent. It has a general fund which it applies for the charitable purposes set out in its trust deed which include medical care, education in hospitals and medical research generally. It also administers about 20 other trusts for charitable purposes resulting from *inter vivos* and testamentary gifts.
- [11] Mater Misericordiae Limited continues to provide medical services to seriously ill children of all ages from birth to 18. It operates the Mater Mother's Hospital which has a fundamental service of treating newborn children. It is the busiest maternity unit in Australia and has a specialised neonatal nursery and critical care unit at the Mater Mother's Hospital. That service relies on advanced equipment which can be expensive. Evidence was led of examples of medical equipment which could be purchased in the near term which would greatly benefit the treatment of seriously ill children in Mater Hospitals. The neonatal facilities are one of the largest and most advanced such units in Australia. The Lady Cilento Children's Hospital does not provide a similar facility so that when newborn children are operated on there the Mater Mother's Hospital provides the post-operative care. More generally, in its hospitals, the first respondent continues to provide a broad range of services to children across a number of specialties.
- [12] The Lady Cilento Children's Hospital opened on 29 November 2014, the same date as the Mater Children's Hospital closed. It operates from a different although nearby site and facility and provides services formerly carried out by the Mater Children's Hospital and the Royal Children's Hospital. Clause 16 of the Mater Service Agreement dated 19 December 2013 provided that "Mater Misericordiae Health Services" agreed to continue to work collaboratively with the second respondent to ensure the smooth transition of paediatric services from the Mater Children's Hospital to what was to become the Lady Cilento Children's Hospital.
- [13] The second respondent is controlled by a board appointed by the Governor-in-Council and has a chief executive appointed by the board who must be approved by the Minister. The Governor-in-Council on the advice of the Minister can dismiss all members of a board.¹ The Chief Executive is subject to directions of the Minister, the only limitation being that the Chief Executive must act independently when making decisions about particular individuals.
- [14] Funding of the second respondent is arranged through a fund named the "State Managed Fund" into which must be paid the block funding provided by government sources for

¹ *Hospital and Health Boards Act* 2011, s 275.

the provision of hospital and health services and also teaching, training and research relating to health services. The first respondent's submissions were that, therefore, the second respondent can be described accurately as a State Government body.

[15] The Attorney-General for the State of Queensland was joined as the third respondent in her capacity as protector of charities and submitted that the funds should be given by direction or *cy-près* to the second respondent for the purchase of medical equipment for the treatment of seriously ill children at the Lady Cilento Children's Hospital.

[16] Those submissions depended to some extent on extrinsic evidence about the intentions of the testatrix in establishing the testamentary trust. That evidence was relied on to argue that the testatrix's primary intention was that the funds be applied for the benefit of seriously ill children at a public children's hospital. The extrinsic evidence relied on by the Attorney-General was set out in summary in the written submissions for her:

“13. However, the terms of the Will and the extrinsic evidence indicate a more specific charitable purpose, that is, that the funds should be used for the benefit of seriously ill children at a public children's hospital. Specifically:

- a. The Mater Children's Hospital was a public children's hospital.
- b. The naming of the Mater Children's Hospital can only be construed as an intention that the funds would be applied at that hospital. Otherwise the nomination has no utility.
- c. The executor Dimphiena Hicks was a long time neighbour and friend of the testatrix. She testifies to numerous conversations with the testatrix in which she was 'always adamant that it should go to a public children's hospital for the purchases (sic) of medical equipment to treat seriously ill children.'
- d. Ms Hicks was present when the testatrix made her 2007 Will. The 2010 Will replaced that without relevant changes. Ms Hicks recalls that the nomination of the Mater Children's Hospital came from the junior solicitor at Johnson's Property Lawyers who was taking the testatrix's instructions. The testatrix wanted the funds to go to a public children's hospital for the purchase of medical equipment to treat seriously ill children. The testatrix agreed with the solicitor's suggestion of the Mater Children's Hospital.

14. The extrinsic evidence indicates that the testatrix did not regard the specific recipient institution as integral to the gift so long as it was a public children's hospital. The choice of the Mater Children's Hospital was subsidiary. The testatrix had no particular relationship with or trust and confidence in the First Respondent.”

[17] Other evidence relied on by the Attorney-General was that the treatment which Mater Misericordiae Limited provides to ill children is now restricted to treatment at the Mater Children's Private Hospital, the Mater Private Hospital emergency section and in the neonatal intensive care nursery at the Mater Mothers' Hospital which operates both as a

public and private hospital.² Counsel for her submitted there was no evidence that any of the services of the Mater Children's Hospital had been transferred to those hospitals operated by Mater Misericordiae Limited with the exception that post-surgical care for neo-nates had been transferred from the Mater Children's Hospital to the Mater Mothers' Hospital. Neonatal surgery previously carried out at the Mater Children's Hospital is now carried out at the Lady Cilento Children's Hospital.³

Submissions and consideration of the issues

- [18] It was common ground that the bequest in the will evidenced a purpose gift of a charitable nature. There was a significant issue, however, as to whether the purpose had failed because of the closure of the Mater Children's Hospital.
- [19] The first respondent submitted that there were three issues to be determined. The first was whether the will should be interpreted as conferring a gift to Mater Misericordiae Limited or its Chief Medical Officer for the charitable purpose set out in the will. The second point was whether the testator had failed to appoint a trustee effectively while the third was whether a *cy-près* order should be made.
- [20] The first issue raises as a preliminary question, however, the nature of the charitable purpose set out in the will. The argument urged by Mater Misericordiae Limited was that the purpose was simply "the purchase of medical equipment for the treatment of seriously ill children", which could readily be performed by Mater Misericordiae Limited as the body which actually ran the institution known as the Mater Children's Hospital. The submission was that Mater Misericordiae Limited has simply been misdescribed in the will.
- [21] The submissions for the Attorney-General were, however, that "on the four corners of the will" the funds were given for the purchase of medical equipment for the treatment of seriously ill children *at the Mater Children's Hospital*, where the naming of the institution "demonstrated an intention that the charitable work or purposes which the testator wishes to benefit are to be benefited through the instrumentality of the named institution and in no other manner".⁴ In that context, Ms Blattman submitted that the Mater Children's Hospital was an institution even if it was not a legal entity, an institution including an undertaking formed to promote some defined purpose such as a hospital.⁵ That submission seems to me to be correct.
- [22] The words in the bequest "in memory of myself and my late husband" also lend some support to the view that there would have been an expectation in the testatrix that the Mater Children's Hospital would continue its institutional existence to assist in memorialising them.

² See the affidavit of Dr John James O'Donnell filed 11 May 2016 at paras 20-21.

³ Affidavit of Professor David Tudehope filed 11 May 2016 at para 11.

⁴ See *Re Tyrie (deceased) (No 1)* [1972] VR 168, 177 and *Stratton v Simpson* (1970) 125 CLR 138, 144-146, 163.

⁵ *Mayor of Manchester v McAdam* [1896] AC 500, 507; *Stratton v Simpson* (1970) 125 CLR 138, 158.

- [23] It is relevant, therefore, to consider the extrinsic evidence of the testatrix's intention. It is admissible pursuant to s 33C(1) of the *Succession Act* 1981, either because the words "Medical Superintendent for the time being" are meaningless, there being no such position, or because the words "Medical Superintendent for the time being of the Mater Children's Hospital" are now ambiguous in the light of surrounding circumstances since the Mater Children's Hospital ceased its institutional existence.⁶ It is also relevant to any *cy-près* application in helping to establish what was the "spirit of the trust" for the purposes of s 105(1)(a)(iii) of the *Trusts Act* 1973.⁷
- [24] The evidence of the executrix, Dimphiena Hicks, was unchallenged in stating that the testatrix wanted the bequest of the residue of her estate to go to a public hospital, as the Mater Children's Hospital then was, and that the solicitor drafting the will suggested the Mater Children's Hospital, to which the testatrix agreed. That evidence assists me in reaching the conclusion that the charitable work or purpose which she wished to benefit was the purchase of medical equipment for the treatment of seriously ill children at the Mater Children's Hospital at least partly because of that institution's status as a public hospital.
- [25] The evidence does not support the proposition that the reference to the "Medical Superintendent for the time being of the Mater Children's Hospital" should be construed as a misdescribed reference to Mater Misericordiae Limited. Rather, it is consistent with the bequest having been made to the Mater Children's Hospital as an institution where that institution has ceased to exist since her death so that it is now impossible to complete the bequest. In those circumstances, it is then relevant to consider when it became impossible to perfect the bequest.
- [26] When the testatrix died in December 2013 it would have been still possible for the executors to identify a potential trustee other than the non-existent medical superintendent and to achieve the testatrix's purpose of making a charitable bequest to a nominated trustee for the Mater Children's Hospital as a public hospital. That possibility extended, at least theoretically, until the Mater Children's Hospital closed, to be replaced by the Lady Cilento Children's Hospital on 29 November 2014. The bequest not having been perfected by then, however, it becomes a case of supervening impossibility.
- [27] Some of the submissions made to me dealt with the events that had occurred as raising an issue whether the gift had lapsed because the entity had ceased to exist by reference to decisions such as *Public Trustee of Queensland v Attorney-General for the State of Queensland*⁸ and *The Public Trustee of Queensland v State of Queensland*.⁹ Those cases, however, deal with the situation that applies where the relevant institution ceased to exist in the testator's lifetime.¹⁰

⁶ See the helpful discussion of the section in the context of the appropriate rules of construction applying to wills in *The Public Trustee v Smith* [2009] 1 Qd R 26, 31-33 at [20]-[26].

⁷ See *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Dobrijevic* [2017] NSWCA 28 at [196]-[209].

⁸ *Public Trustee of Queensland v Attorney-General for the State of Queensland* [2009] QSC 353.

⁹ *Public Trustee of Queensland v State of Queensland* [2009] 2 Qd R 327.

¹⁰ See the discussion in G E dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) at [15.4]-[15.5] and in *Tudor on Charities* (Sweet & Maxwell, 9th ed, 2003) at [11.017].

[28] As Professor dal Pont says about supervening impossibility, however:¹¹

“If a gift is made to a charitable institution that, once the gift has taken effect, ceases to exist, the court will apply that property to objects as near as possible (*cy-près*) to objects of the extinct institution. The same is the case for bequests for charitable purposes that, subsequent to the testator’s death, become impractical or impossible. The foregoing reflects the general principle that, once devoted to charity, a fund or property cannot be applied for any other purpose or person; there is no lapse and the next of kin are excluded. The gift or fund is applied *cy-près* because it has taken effect for a charitable object even if it has yet to become payable, or has otherwise not yet been paid over, to the charity. For this reason, subsequent impossibility cases, unlike those of initial impossibility, require no proof of general charitable intention as a precondition to *cy-près* application. There is sense in this outcome, for it avoids the difficult and expensive process of identifying those who would otherwise take upon the failure of a trust that may have been operative for many years; any such difficulty is far less acute in cases of initial impossibility.”

[29] When one considers the evidence in this case, the conclusion that seems logical to me is that the fund has “vested in charity”¹² so there is no lapse and the gift should be applied *cy-près*. In any event, the language of the bequest established a wider charitable purpose permitting its application *cy-près* pursuant to the jurisdiction given by s 105(1)(a) of the *Trusts Act 1973* on the bases that the original purposes can no longer be carried out or cannot be carried out according to the directions given and to the spirit of the trust.

[30] The institution having objects as near as possible to the objects of the extinct Mater Children’s Hospital must be the Lady Cilento Children’s Hospital. It was consciously built to take over the functions of the Mater Children’s Hospital as well as those of the Royal Children’s Hospital. The Mater interests had agreed to ensure the smooth transition of paediatric services from the Mater Children’s Hospital to the Lady Cilento Children’s Hospital. Significantly, from the testatrix’s point of view, it is a public hospital, and so falls within the spirit of the trust. Although Mater Misericordiae Limited continues to provide public hospital services to children, those objects of its continuing operation are not as near as possible to those of the Mater Children’s Hospital when compared to the operations of the Lady Cilento Children’s Hospital.

Conclusion

[31] In my view, therefore, I should make a *cy-près* order in favour of the second respondent. I shall hear the parties further as to the form of any orders, including as to the identity of a proposed trustee and any continuing role for the executors having regard to the direction in the will that they “see to the proper expenditure of this money for this purpose”.

¹¹ G E dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) at [15.16] (footnotes omitted). See also paras [15.18]-[15.19] concerning the date at which impossibility is to be assessed.

¹² *Beggs v Kirkpatrick* [1961] VR 764, 767.