

SUPREME COURT OF QUEENSLAND

CITATION: *Re The Public Trustee of as Executor of the Will of John Venerly Cox* [2002] QSC 299

PARTIES: **RE THE PUBLIC TRUSTEE OF QUEENSLAND as executor of the Will of JOHN VENERY COX**

FILE NO/S: SC No. 8889 of 2002

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 1 October 2002

DELIVERED AT: Brisbane

HEARING DATE: 30 September 2002

JUDGE: White J

ORDER:

1. **Direct the Public Trustee of Queensland as executor of the Will of John Venerly Cox, late of 33 Hampstead Road, Highgate Hill, Brisbane in the State of Queensland, distribute the balance of funds held by the Public Trustee to the National Heart Foundation of Australia, Queensland Division, being the only charity willing and able to use the funds for the purpose intended by the deceased.**
2. **The Public Trustee's costs of and incidental to the application be assessed on an indemnity basis and be paid out of the estate.**

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – MISTAKE OR MISDESCRIPTION – IN GENERAL – application by Public Trustee for direction to distribute gift to charitable organisation not correctly named in will

The Public Trustee Act 1975
Re Fowles deceased [1968] QLR 49
Re Quesnel deceased [1959] SASR 106
Re Songest deceased [1956] 1 WLR 897

COUNSEL: Mr B Nickel for the Public Trustee

SOLICITORS: Official Solicitor to the Public Trustee

- [1] The Public Trustee has applied to the Court pursuant to s 134 of the *Public Trustee Act* 1975 to obtain a direction arising in the course of the Public Trustee's duties as executor of the estate of the late John Venery Cox to distribute the balance of funds held by the Public Trustee to the National Heart Foundation of Australia, Queensland Division.
- [2] John Venery Cox died on 2 July 1983. By his will he appointed his wife, Barbara Eleanor Janet Cox, a solicitor, Garry Raymond De Vere and a real estate agent, Arthur Bernard Pickham as executors and trustees of his estate. Under his will he gave legacies in modest amounts to friends and to Saint Andrews' Meals on Wheels. By cl 3(c)(ii) of the will the residue was left to charity.
 "AS TO the residue then remaining to divide the same into four equal shares upon the following trusts:-
- (a) TO PAY or transfer one quarter share thereof to THE AUSTRALIAN HEART FOUNDATION for the general purposes of the said Foundation
 - (b) TO DIVIDE a one quarter share equally between THE NORTH BRISBANE HOSPITALS BOARD for the purposes of the Royal Brisbane Hospital and THE SOUTH BRISBANE HOSPITALS BOARD for the purposes of the Princess Alexandra Hospital in each case for the charitable purposes of the said hospitals for the relief of the sufferers of cancer or of research into that disease
 - (c) TO PAY or transfer a one quarter share to THE SALVATION ARMY QUEENSLAND for the charitable purposes of the said organization for the relief of aged persons
 - (d) TO PAY or transfer the remaining one quarter share to THE QUEENSLAND SOCIETY FOR CRIPPLED CHILDREN for its general charitable purposes".
- [3] The estate had not been administered when his wife, Barbara Eleanor Janet Cox, died on 23 April 1986. By her will she appointed Gary Raymond De Vere and Arthur Bernard Pickham as her trustees and executors. Those surviving executors of John Venery Cox's estate administered both estates.
- [4] The Public Trustee has estimated that in 1992 Mr Cox's estate was worth approximately \$1,600,000 consisting principally of cash and shares. Mrs Cox's estate was worth about \$500,000.
- [5] Partial distributions were made in 1991 under the will of John Venery Cox. The executors paid income tax, costs and commission and held \$214,228 to cover the distribution to the Australian Heart Foundation and costs. The executors were removed from office on 5 May 1995 by order of Thomas J and replaced with the

Public Trustee. The poor management of the previous executors meant that by then the residue of the estate was worth considerably less. The Public Trustee received the funds held by the original surviving executors on 13 October 1995. Since then investigations have been made to ascertain the wishes of the residuary beneficiaries as to action against the former executors and to complete the administration of the estate. The beneficiaries do not wish to take action against the former executors to recover any shortfall. The remaining matter about which the Public Trustee seeks the direction of the court before the administration is concluded relates to the distribution of the balance of the estate of about \$180,000 to the beneficiary described in cl 3(c)(ii)(a) of the will as “the Australian Heart Foundation”. After search the Public Trustee has concluded that such an entity does not exist. The Public Trustee seeks approval to pay the funds out to the Queensland Division of the National Heart Foundation of Australia.

- [6] The National Heart Foundation of Australia is incorporated as a public company limited by guarantee with its registered office in Sydney in New South Wales. It co-ordinates the work of State and Territory Divisions of the National Heart Foundation in the field of cardiovascular health for the population of Australia. The Queensland Division is incorporated as a public company limited by guarantee with its headquarters in Brisbane. It supervises and promotes cardiovascular health in the State of Queensland. There are similar Divisions of the National Heart Foundation of Australia with the same aims and objectives as the Queensland Division in New South Wales, Victoria, Tasmania and Australian Capital Territory which are incorporated as companies limited by guarantee. The Divisions in South Australia, Western Australia and Northern Territory are incorporated associations under the provisions of their respective State or Territory legislation. Each division is a non-profit organisation which raises funds within their respective jurisdiction and pools their surplus funds to finance cardiovascular initiatives of the National Heart Foundation of Australia which are primarily its national research medical and scientific programs. The National Heart Foundation of Australia is not a fund raising body in its own right. Under the constitution of the National Heart Foundation of Australia each of the State and Territory Divisions provides one director to this organisation. Each of the State and Territory Divisions are affiliated with the National Heart Foundation of Australia.
- [7] The National Heart Foundation was incorporated in 1959 in response to high rates of premature deaths from heart stroke and blood vessel disease in Australia. It is an independent Australia-wide non-profit health organisation funded almost entirely by donations by Australians. The mission of the National Heart Foundation of Australia and its Divisions is to reduce suffering and death from heart stroke and blood vessel disease by promoting and conducting research and promoting and influencing behaviour that improves heart and blood vessel health.
- [8] It has not been possible to ascertain if John Venery Cox had a relationship with the Queensland Division of the National Heart Foundation because there are no records in existence to indicate if he was a financial supporter of the Division. Furthermore, it was not notified that it was a potential beneficiary under the will until 1991 and having moved premises in 1986 it would have disposed of any records that might have indicated any support from him.
- [9] Mr Cameron Richard Prout, the executive director of the National Heart Foundation of Australia, Queensland Division, deposes that there is no other organisation that

could claim to be the “Australian Heart Foundation” other than the National Heart Foundation of Australia and its Divisions at the date of the last will of John Venerly Cox which was made on 26 July 1977.

- [10] The only heart foundation in Australia is the National Heart Foundation of Australia. Plainly, John Venerly Cox had a general charitable intention which can be ascertained from the name of the intended charity and its position amongst other gifts to charity in cl 3 of the will. Each of the Divisions of the States and Territories have consented to the distribution of the remaining share in the residuary estate to the Queensland Division of the National Heart Foundation. There is no institution apart from the National Heart Foundation of Australia which answers the description found in the will. There is no need for a cy-près scheme, see *Re Quesnel deceased* [1959] SASR 106; *Re Songest deceased* [1956] 1 WLR 897 and *Re Fowles deceased* [1968] QLR 49.
- [11] The direction sought by the Public Trustee should be given that:
1. The Public Trustee of Queensland as executor of the Will of John Venerly Cox, late of 33 Hampstead Road, Highgate Hill, Brisbane in the State of Queensland, distribute the balance of funds held by the Public Trustee to the National Heart Foundation of Australia, Queensland Division, being the only charity willing and able to use the funds for the purpose intended by the deceased.
 2. The Public Trustee’s costs of and incidental to the application be assessed on an indemnity basis and be paid out of the estate.