

SUPREME COURT OF QUEENSLAND

CITATION: *Public Trustee of Queensland v Neale & Ors* [2008] QSC 343

PARTIES: **PUBLIC TRUSTEE OF QUEENSLAND as personal representative of the estate of CHRISTOPHER JOHN NEALE, deceased (applicant)**
v
HAZEL NEALE (first respondent)
ROBYN JUNE NEALE AND CHRISTOPHER CHARLES NEALE (second respondents)
INTERNATIONAL GOSPEL CENTRE INCORPORATED (third respondent)
ATTORNEY-GENERAL FOR QUEENSLAND (fourth respondent)

FILE NO: BS5906 of 2008

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 23 December 2008

DELIVERED AT: Brisbane

HEARING DATE: 2 October 2008

JUDGE: Mullins J

ORDER: **It is declared that, upon the proper construction of the will of Christopher John Neale deceased, dated 12 August 1994:**

(a) The gifts contained in cl 3(e) of the will are charitable gifts;

(b) In making the gifts contained in cl 3(e) of the will, the deceased had a general charitable intent;

(c) The reference in cl 3(e) of the will to “World Action International Gospel Centre Incorporated” is a reference to the third respondent, International Gospel Centre Incorporated

CATCHWORDS: SUCCESSION – WILLS – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – LEGACIES AND DEVICES – where reference made in will to a named entity that provides for disadvantaged and underprivileged children in third world countries – where no entity with that name existed – where incorporated association with a similar name to the entity referred to in the

will exists – where evidence adduced of contact between testator and founder of incorporated association and knowledge of the testator of the activities of the incorporated association – where reference to the entity in the will construed as a reference to the incorporated association known to the testator

Trusts Act 1973, s 103

Allgood v Blake (1873) LR 8 Ex 160, followed

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

Charter v Charter (1874) LR 7 HL 364, considered

Lucas-Tooth v Lucas-Tooth [1921] 1 AC 595, considered

COUNSEL: RT Whiteford for the applicant
S Farrell for the executor of the estate of the first respondent
DB Fraser QC and KT Magee for the second respondents
G Coveney for the third respondent
KA Parrott for the fourth respondent

SOLICITORS: Official Solicitor to the Public Trustee for the applicant
Short Punch and Greatorix for the executor of the estate of the first respondent
Haney Lawyers for the second respondents
HW Litigation for the third respondent
Conrad Lohe, Crown Solicitor for the fourth respondent

- [1] **MULLINS J:** Mr Christopher John Neale (the deceased) died on 20 July 2005. He was 91 years old. His last will was dated 12 August 1994. Letters of administration with the will were granted in respect of that will to the Public Trustee on 9 January 2006.
- [2] Clause 3 of the will provides:
- “3. I GIVE DEVISE AND BEQUEATH all my estate both real and personal of whatsoever kind and wheresoever situate of over which I may have any power of appointment disposition or control UNTO and to the use of my Trustee upon the following trusts:
- (a) To pay all my just debts funeral and testamentary expenses and all duties payable on my death in respect of the whole of my estate.
- (b) As to my unit situated at 1904 Golden Gate, 3422 Gold Coast Highway, Surfers Paradise, for my Trustee JAMES GLYN BATSTONE and his wife MABEL BATSTONE as Joint Tenants for their sole use and benefit absolutely.
- (c) For my wife HAZEL NEALE for her sole use and benefit Absolutely a weekly allowance of \$350.00 (THREE HUNDRED AND FIFTY DOLLARS) to be increased annually by the annual increase of the Consumer Price Index, Brisbane, or 5% (five percent) whichever increase is the greater, together with any such further allowance or payment that my Trustees deem necessary for her continued benefit and well being during her lifetime.

(d) For my children ROBYN JUNE NEALE and CHRISTOPHER CHARLES NEALE the sum of \$150,000.00 (ONE HUNDRED AND FIFTY THOUSAND DOLLARS) each for their sole use and benefit absolutely. I have made these two specific bequests understanding full well the value and extent of my estate but through no ill feeling or spite towards my children believing that I have more than adequately provided for them during their lifetime but with my fervent desire to benefit the disadvantaged and under privileged (*sic*) children of third world countries.

(e) As to the rest and residue of my estate, the nett income derived therefrom for the express benefit and care of such children throughout the world as may be being cared or provided for by the charity or organization known as WORLD ACTION INTERNATIONAL GOSPEL CENTRE INCORPORATED for a period of 20 (twenty) years from the date of my death whereupon such property, investments or the like which still form part of my estate, shall be distributed to such organization or organizations of a similar type as may be directed by and at the discretion of my said Trustees.”

- [3] The deceased’s third wife, Mrs Hazel Neale, died on 8 September 2005. They had married in 1987. Probate of the first respondent’s last will was granted on 19 January 2006 to her executor Mr Allan Batstone. No party had any objection to the participation of the executor of the first respondent’s estate in the hearing of this application.
- [4] The second respondents are the children of the deceased from his marriage to his second wife.
- [5] It is common ground that there was and is no entity named “World Action International Gospel Centre Incorporated”, as referred to in cl 3(e) of the will. There is an entity named “International Gospel Centre Incorporated” which has been joined as the third respondent to the application. The third respondent was incorporated on 15 June 1989 under the *Associations Incorporation Act 1985* (SA). The applicant for incorporation was Mrs Helen Beard, a minister of religion. Mr Clifford Beard, a minister of religion, consented to act as the first public officer of the third respondent. Mr Beard was born in 1930.
- [6] The estimated value of the deceased’s estate at the date of his death was almost \$6 million. At the date of hearing this application, the residuary estate was worth about \$9 million.

Questions for determination on the application

- [7] By paragraph 1 of the originating application the Public Trustee seeks the determination, upon the proper construction of the deceased’s will, as to whether:
- “(a) the gift contained in paragraph 3(e) of that will is a charitable gift;
 - (b) if ‘yes’ in answer to paragraph 1(a) hereof, in making that gift the deceased had:-
 - i. a general charitable intent; or
 - ii. a particular charitable intent;

- (c) the reference in paragraph 3(e) of the will to ‘World Action International Gospel Centre Incorporated’ is a reference to the Third Respondent, International Gospel Centre Incorporated.”

- [8] Despite posing these questions, the approach the Public Trustee took on the hearing of the application was that if the reference to World Action International Gospel Centre Incorporated in cl 3(e) of the will were construed as a reference to the third respondent, no further orders or declarations were required by the Public Trustee at this stage of the administration of the deceased’s estate. That approach was supported by the executor of the first respondent. Notwithstanding that approach, the Public Trustee made submissions addressing the questions set out in paragraph 1 of the originating application, as did the second and third respondents. Although it is convenient to address first the question in paragraph 1(c) of the originating application, in view of the fact that the proceeding was initiated by the Public Trustee seeking responses to all the questions posed in paragraph 1 of the originating application and that attracted responses from some of the parties, it is appropriate to answer all those questions.
- [9] The focus of this application was on the construction of the will. Because of the need to ascertain whether the third respondent was the entity referred to in cl 3(e) of the will, some evidence addressed the operation and activities of the third respondent. As Mr Whiteford of counsel on behalf of the Public Trustee made clear in his submissions, and I accept, the application was not concerned with the practicability of the gifts under cl 3(e), because the Public Trustee had not tried to implement the gift of income under cl 3(e), pending the construction of cl 3(e). It was therefore not necessary to address all the issues raised in the extensive written submissions of the second respondents.

Relevant background facts

- [10] The deceased met Mr James Batstone at the Gold Coast in 1986 and they became close friends. Mr Haydn Batstone and Mr Allan Batstone are the sons of Mr James Batstone. Mr Allan Batstone met the deceased in 1986 and Mr Haydn Batstone met him in about 1988. They both considered that they became friends of the deceased. When the deceased and the first respondent moved to Queensland some years after Mr Allan Batstone had first met them, he saw them on a regular basis, usually once or twice each week.
- [11] Mr Clifford Beard first met the deceased in about 1992 when he preached at a church in Strathfield, New South Wales. The deceased and the first respondent invited Mr Beard to their home for lunch. He spoke to them about the work that he and others were doing in Uganda with orphaned and destitute children. Subsequently, Mr Beard stayed at the deceased’s home in Sydney on about six occasions. On one of these occasions, Mr Beard showed the deceased the publication “Uganda Action” which was later changed to “World Action”.
- [12] The deceased was on the mailing list for the third respondent’s newsletter from about 1992. Mr Clifford Beard recalled that the deceased had sponsored a child through the third respondent, as it was as a result of sponsoring a child that persons received the third respondent’s newsletter.

- [13] In or about 1992 the deceased introduced Mr James Batstone to Mr Clifford Beard and Mrs Helen Beard. Mr Haydn Batstone recalls having a number of conversations with the deceased from about the early 1990's when he mentioned Mr Clifford Beard and the organisation with which Mr Beard was associated and that the deceased spoke about his admiration for Mr Beard's work and helping the poor. Mr Haydn Batstone can also recall a number of occasions from the early 1990's on which the deceased showed him newsletters he had received from the third respondent that were called "World Action". Mr James Batstone can recall that the deceased allowed Mr and Mrs Beard to stay in his unit at the Gold Coast and there was one occasion where the deceased invited Mr Batstone and his family to his unit to meet Mr Beard and a group of African missionaries and to hear about the work they were doing to assist the poor in Africa. Mr Haydn Batstone recalls a similar occasion and that Mr Beard showed a video of the work that the third respondent was doing to assist the poor in Africa. Mr Allan Batstone also recalls watching a video that Mr Beard had brought with him to the Gold Coast about the work of the third respondent. Mr Beard recalls an occasion at which he showed a video about the work of the third respondent to the deceased and his friends at a barbecue at the Gold Coast and another occasion when he had African missionaries who were working for the third respondent in Uganda staying with him at the deceased's Gold Coast unit.
- [14] Mr Bruce Greenland who is a solicitor commenced acting as the solicitor for one of the deceased's companies, Neale Industries Pty Ltd, in early 1994. Mr Haydn Batstone commenced working for the deceased as his manager in 1994.
- [15] Mr Haydn Batstone deposed to driving the deceased to Mr Greenland's office to make his will in 1994. Mr Batstone could recall that on the way to Mr Greenland's office, the deceased showed him a "World Action" newsletter. Although Mr Batstone also deposed to the deceased taking that newsletter with him into Mr Greenland's office, he conceded in cross-examination that the newsletter could have been among a number of papers that the deceased took into Mr Greenland's office on that day.
- [16] Although Mr Greenland swore an affidavit for the purpose of the application, most of that affidavit was objectionable and struck out. At the hearing of the application, I reserved my ruling on paragraph 8 and the first four sentences of paragraph 9 of Mr Greenland's affidavit filed on 30 September 2008. The substance of that part of the affidavit was directed at the instructions given by the deceased to Mr Greenland in relation to the gifts that are the subject of cl 3(e) of the will. That evidence could not be admissible on the construction of cl 3(e) of the will, as the problem with the gift is not equivocation: *Charter v Charter* (1874) LR 7 HL 364, 376, 377.
- [17] It appears that after Mr Neale made the will, his capacity deteriorated, as he was suffering from Alzheimer's disease and by the end of 1995 was incapable of attending to his own business affairs. These matters were referred to in *Greenland v Intellectually Disabled Citizens Council of Queensland* [2000] QSC 84.

The activities of the third respondent

- [18] Rule 3 of the rules of the third respondent provides:

“The objects and purposes of the association are to promote and preach the Gospel of the Lord Jesus Christ through:

- (a) the conducting of seminars.
- (b) caring for orphans in and (*sic*) environment of Christian teaching and development.
- (c) the holding of conventions and crusades.
- (d) the ‘planting’ of churches.
- (e) the training of ministers.”

The rules of the third respondent have remained the same, since its incorporation.

- [19] Mr Beard described himself as suffering “burnout” in 1995 and that he handed over the work of the third respondent to his son Mr John Beard (John Beard) and his daughter-in-law, Mrs Julie Beard. John Beard became the president of the third respondent.
- [20] In 1995 John Beard moved the headquarters of the third respondent from Adelaide to Queensland where he was then residing. The third respondent was endorsed by the Commissioner of Taxation as an income tax exempt charity with effect from 1 July 2000 and that endorsement remains in effect. The third respondent is not, however, an organisation to which tax deductible donations may be made.
- [21] John Beard remained president until June 2007, when he assumed the position that is called “overseer”. As overseer, John Beard describes his role as providing spiritual and practical advice to the third respondent and the management committee. The management committee since June 2007 has comprised Mr Fergus Butterworth as the president, Mr Henry Hirsimaki as the secretary, Mr Luke Houghton as the treasurer, Mr Grant Sergeant as a committee member and Mr Stephen Buck as the public officer.
- [22] Up until 2006, the third respondent did not have its financial statements and accounts audited. John Beard claimed that when the first respondent was incorporated, advice had been given that it was not necessary to do so. John Beard said that he realised in 2006 that there was a requirement for the accounts of the third respondent to be audited, if the income was greater than \$200,000. As that was the case by 2006, John Beard arranged for the third respondent’s accounts to be audited. For each of the years ended 30 June 2000 to 2006 the third respondent’s accounts, auditor’s report and report of the committee were lodged with the South Australian Office of Consumer and Business Affairs on 25 February 2008. It was not until the third respondent’s annual general meeting held on 2 November 2007 that the accounts for each of the years ended 30 June 2000 to 2006 were adopted.
- [23] All the work that the third respondent currently does overseas is by partnering other organisations. John Beard described the third respondent’s partnership with Global Development Group which is an approved organisation under the Overseas Aid Gift Deduction Scheme. That means that donors to the third respondent for the humanitarian projects undertaken by Global Development Group can receive a tax deduction. John Beard also described the child sponsorship program offered by the third respondent which he said was similar to that offered by World Vision. Sponsors contribute between \$30 and \$40 per month to the third respondent and 30% of those funds are deducted for administration and the balance used directly for the sponsored children. John Beard stated that the third respondent had

approximately 750 children in the sponsorship program. The third respondent's operations are presently focused in the Philippines, Uganda and Zambia. The third respondent's partner in the Philippines is the Cebu Missionary Foundation, it is ABC Children's Aid International in Uganda and it is Grace Ministries Mission International in Zambia.

Does cl 3(e) refer to the third respondent?

- [24] As the deceased died before 1 April 2006, s 33C of the *Succession Act* 1981 (the Act) has no application in the interpretation of this will.
- [25] As there is no entity named World Action International Gospel Centre Incorporated, it is necessary to consider whether any effect can otherwise be given to the use of that name in cl 3(e) of the will. It is relevant in construing cl 3(e) that the deceased associated the entity named in that clause with the benefit and care of disadvantaged and underprivileged children of third world countries. This follows from reading cl 3(e) in context. In cl 3(d) of the will the deceased set out in express terms that his desire was to benefit the disadvantaged and underprivileged children of third world countries, by way of explanation for not conferring greater benefits under the will on his children. That expression of desire by the deceased in cl 3(d) is immediately followed by cl 3(e) in which the reference to "the express benefit and care of such children throughout the world" must be a reference to that class of children identified in the preceding sub-clause. An alternative construction was advanced on behalf of the second respondents that the use of the word "such" to qualify the word "children" in cl 3(e) of the will could be a reference to such children who were being cared or provided for by the charity or organisation that was then named in cl 3(e). I consider that is a strained reading of the phrase "such children throughout the world" and that the natural reading of the words in context is that which I have suggested.
- [26] Evidence of surrounding circumstances at the time the deceased made the will can be relied on for the purpose of ascertaining what entity was intended by the deceased's incorrect reference to World Action International Gospel Centre Incorporated: *Allgood v Blake* (1873) LR 8 Ex 160, 162.
- [27] In view of the enthusiasm that the deceased had for Mr Clifford Beard and the organisation with which his good works with disadvantaged children in third world countries were associated between 1992 and 1994 which was the third respondent, that the deceased was on the mailing list for the newsletters of the third respondent and that the deceased had in his possession at the time he attended on his solicitor to make his will a copy of the newsletter of the third respondent entitled "World Action", the deceased must have intended to refer to the third respondent, when using the name World Action International Gospel Centre Incorporated in cl 3(e) of the will. The answer to the question posed by the Public Trustee is that the reference in cl 3(e) of the will to "World Action International Gospel Centre Incorporated" is a reference to the third respondent.

Is the gift contained in cl 3(e) charitable?

- [28] Under cl 3(e) there is a gift of income for a period of 20 years from the date of the deceased's death to be followed by a gift of the capital. The question posed by the Public Trustee as to whether the gift contained in cl 3(e) is charitable must be answered in relation to each gift made under that provision.

- [29] Clause 3(e) must be construed in the context of the whole of the deceased's will: *Lucas-Tooth v Lucas-Tooth* [1921] 1 AC 595, 601.
- [30] The submission is made by the Public Trustee that, upon reading cl 3(d) with cl 3(e) of the will, it is evident that the purpose of the gift of income was to benefit "disadvantaged" and "underprivileged" children of third world countries. It is therefore submitted that this gift of income is charitable. On behalf of the second defendants, it is contended that the expression "benefit and care" used by the deceased is not limited to a charitable purpose and that the trust of income for a charitable purpose must fail, because of the width of the expression used and the absence of any limits on the application of the income to charitable purposes.
- [31] Consistent with my conclusion that cl 3(e), when read with cl 3(d), refers to disadvantaged and underprivileged children of third world countries, the gift of income under cl 3(e) must be for the express benefit and care of such disadvantaged and underprivileged children of third world countries. The fact that the deceased also stipulated in cl 3(e) in relation to such children that they are children being cared or provided for by the third respondent does not alter the purpose for which the deceased made the gift. It may be that the deceased contemplated that the mode of carrying out the charitable purpose was through the third respondent's work with disadvantaged and underprivileged children in third world countries. The deceased did not, however, make a gift of the income to the third respondent for that purpose. The stipulation of the mode of giving effect to the carrying out of the deceased's purpose has not displaced the gift of the income for that wider and substantial purpose.
- [32] A charitable trust is a trust for a purpose, not a person: *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, 222 (*Milly Milly case*). A gift of income for the benefit and care of disadvantaged and underprivileged children in third world countries is for the relief of poverty and is therefore a gift for a charitable purpose within the spirit and intendment of the preamble of the statute 43 Elizabeth chapter 4: s 103(1) *Trust Act 1973*.
- [33] The gift of income in cl 3(e) is charitable.
- [34] It is apparent from cl 3(d) and cl 3(e) of the will that the deceased was positive about the good works he attributed to the third respondent in providing for disadvantaged and underprivileged children in third world countries and the mode in which he understood that work was carried out by the third respondent was specified by him for carrying out the charitable purpose of the relief of those children from poverty that applies to the gift of income under cl 3(e).
- [35] The role of the third respondent is again relevant to the manner in which the deceased has sought to dispose of the capital of his residuary estate, after allowing for the distribution of the net income from the residuary estate for the period of 20 years after his death. It is consistent, however, with the deceased's approach to giving the income from the residuary estate for a charitable purpose, and not as a gift direct to the third respondent, and that the deceased did not name the beneficiary for the gift of corpus, but left it to his trustees to distribute the corpus to or amongst organisations of a similar type to the third respondent.
- [36] In the context of the whole will, but particularly cl 3(d) and cl 3(e), the gift of corpus in cl 3(e) must be construed in the light of the charitable purpose set out in cl

3(d) which is unequivocally reflected in the gift of income in cl 3(e) and, by juxtaposition in the same sub-clause, also applied to the gift of corpus in cl 3(e). Again, notwithstanding the use made by the deceased of the third respondent's works in third world countries amongst disadvantaged and underprivileged children in fixing the class of beneficiaries for the corpus, that has not displaced the gift of the corpus for the wider and substantial purpose of providing for the benefit of disadvantaged and underprivileged children in third world countries. The gift of corpus is also for the relief of poverty and is therefore a gift for a charitable purpose.

Is there a general charitable intent?

- [37] Arguably it is not necessary to embark on this inquiry about whether there is a general or particular charitable intent, because the Public Trustee has not yet had an opportunity to implement the terms of the deceased's will, after having the issue of whether or not the third respondent was the entity referred to in cl 3(e) determined by the court. The issue of whether or not there is a general charitable intent in cl 3(e) of the will was incidental, however, to the other issues that were argued on the application.
- [38] The test for determining whether a charitable intent is general or particular is found in the *Milly Milly case* (at 225). Although it was acknowledged in that case (at 228) that there was no definite presumption in favour of a general charitable intention, it was recognised that the court leans in favour of charity and is ready to infer a general charitable intention.
- [39] The construction of cl 3(e) of the will, in light of the express statement of intention of the deceased set out in cl 3(d), and in the context that the gift of income was made by reference to the activities of the third respondent but not to the third respondent and the gift of corpus contemplates that the third respondent may not be a beneficiary of all or part of the corpus, discloses that the deceased's purpose in making the gifts in cl 3(e) of the will was wider than a plan for disposition of the residuary estate that was limited to the activities of the third respondent. In making the gifts contained in cl 3(e) of the will, the deceased had a general charitable intent to benefit the disadvantaged and underprivileged children of third world countries.

Conclusion

- [40] The questions set out in paragraph 1 of the originating application must be answered as follows:
- “It is declared that, upon the proper construction of the will of Christopher John Neale deceased, dated 12 August 1994:
- (a) The gifts contained in cl 3(e) of the will are charitable gifts;
 - (b) In making the gifts contained in cl 3(e) of the will, the deceased had a general charitable intent;
 - (c) The reference in cl 3(e) of the will to ‘World Action International Gospel Centre Incorporated’ is a reference to the third respondent, International Gospel Centre Incorporated.”
- [41] I will give the parties an opportunity to consider these reasons, before dealing with the question of costs of the originating application. I note that the Public Trustee

proposed at the time the application was filed that the costs of all parties be paid out of the deceased's estate on the indemnity basis.