

# SUPREME COURT OF QUEENSLAND

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

PARTIES: **PUBLIC TRUSTEE OF QUEENSLAND (AS EXECUTOR OF THE ESTATE OF BRIAN EDMUND MONCKTON, ALSO KNOWN AS BRYANT EDWARD MONCKTON, DECEASED)**  
Applicant

v

**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**  
First Respondent

and

**THE ROYAL CHILDRENS HOSPITAL FOUNDATION**  
Second Respondent

FILE NO/S: 7583 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 7 October 2009

DELIVERED AT: Brisbane

HEARING DATE: 7 October 2009

JUDGE: A Lyons J

ORDER: **1. Pursuant to s 134 of the *Public Trustee Act 1978* I direct that this application be heard without the necessity of any other person being served with the proceedings;**

**2. I declare that the gift in clause 5.02 of the will of Brian Edmund Monckton, deceased, dated 15 October 1997, was a charitable gift;**

**3. I direct that the property the subject of that gift be paid to the second respondent, and that the receipt of the treasurer or proper officer of the second respondent be a sufficient discharge to the Public Trustee;**

**4. I order that the second respondent's costs of and incidental to this application be assessed on an indemnity basis and paid out of the deceased's estate.**

CATCHWORDS: *Hospital Foundations Act 1982 (Qld)*  
*Public Trustee Act 1978 (Qld) s 134*

*The Public Trustee of Queensland as Executor of the Estate of Mary Agnes Ball, Deceased v State of Queensland and Ors* [2009] QSC 174, followed

*Montefiore Home v Howell & Co* (1984) 2 NSWLR 406,  
followed

COUNSEL: Mr R Whiteford for the applicant  
Mr P Scott for the first respondent  
Ms R Treston for the second respondent

SOLICITORS: Official Solicitor to the Public Trustee (Qld) for the applicant  
Crown Law for the first respondent  
McInnes Wilson Lawyers for the second respondent

- [1] **A LYONS J:** This is an application by the Public Trustee pursuant to s 134 of the *Public Trustee Act* for the direction of the court as to how to apply a gift made in the deceased's will to a charitable entity which ceased to exist before the deceased died.
- [2] By way of background, the deceased, Mr Brian Monckton, died on 19 September 2006, without issue, and his last will is dated 15 October 1997. It appoints the Public Trustee as administrator. The Public Trustee obtained an order to administer on 6 November 2006.
- [3] Mr Monckton's wife pre-deceased him, and accordingly, cl 5.02 and cl 6 of his will took effect. Clause 5.02 provided:  
"I give all of my estate to the Queensland Children's Research Foundation for the charitable purposes of the foundation."
- Clause 6 then provided:  
"The receipt of the person authorised to receive money on behalf of the Queensland Children's Research Foundation shall be a full and sufficient discharge, and will absolve my trustee from seeing to the application of the gift."
- [4] It is clear that the deceased's estate is currently worth around \$424,000. The Queensland Children's Research Foundation (QCRF) was incorporated on 4 May 1973 and its objectives were to promote research into and treatment of illnesses and diseases affecting children. The memorandum of association does not mention the Royal Children's Hospital. There is evidence in the affidavit of Colin Gregory Ryan, who is the current Chairman of the Royal Children's Hospital Foundation and was previously the Chairman of the Royal Children's Hospital Board, that QCRF was concerned only with fundraising for the Royal Children's Hospital.
- [5] It would seem that the QCRF was not very active and some time between 1 April 1993 and 31 December 1993 it donated all of its funds to the Brisbane Children's Hospital for research work. On the basis of the affidavit of Timothy Feely, the Deputy Director of Client Services at the Public Trustee, it is clear that until 1968 the Royal Children's Hospital was called the Brisbane Children's Hospital.

- [6] Mr Ryan states however, that the QCRF's money was not in fact paid to the hospital but was paid to the Royal Children's Hospital Foundation. That is a body which was incorporated on 18 July 1985, under the *Hospitals Foundations Act* of 1982. It is an entity separate from the Royal Children's Hospital.
- [7] The QCRF applied for de-registration on 17 January 1994 and was de-registered on 6 July 1994.

**Was the gift charitable?**

- [8] I am satisfied that the gift in cl 5.02 was a charitable gift.

**Lapse**

- [9] The traditional approach of the courts is that, except in three circumstances, or possibly four, a testamentary gift to a charitable entity lapses if, either before or after the date of the will, that entity ceases to exist during the testator's lifetime.
- [10] The first exception is that if upon the true interpretation of the will, the testator intended that the gift should operate as an accretion to assets of the named institution so as to become subject to whatever chargeable trusts were from time to time applicable to those trusts and, after the named institution ceased to exist, its assets remained subject to the charitable trusts which were still on foot on the testator's death, then the gift will be treated as taking effect as an accretion to any property which at his death was subject to those trusts.
- [11] The second exception is if, at the 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 chargeable intention of the testator was wide enough to allow the gift to take effect in favour of that 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.
- [12] The third exception is if, upon the proper construction of the will, it is found that the testator had a general charitable intention to benefit work or purposes of the kind which the named institution carried out, then the property the subject of the trust can be applied cy-pres.
- [13] 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. (*The Public Trustee of Queensland as Executor of the Estate of Mary Agnes Ball, Deceased v State of Queensland and Ors*)<sup>1</sup>

- [14] In this application the Public Trustee's position is that the property the subject of the gift should be paid to the Royal Children's Hospital Foundation under the second, third or fourth exceptions.
- [15] The approach of the second respondent is essentially in the same terms, and the submission of the Attorney-General is that it essentially supports the position of the Public Trustee.
- [16] In relation to the first exception, I am satisfied that that exception clearly does not apply.
- [17] In relation to the second exception, I will make no specific findings because I am satisfied that, in essence, the fourth exception does apply.
- [18] I consider that the gift should be construed as a purpose gift. In Australia a gift to a charitable institution is prima facie a gift for charitable purposes.<sup>2</sup> I am satisfied that the bequest was not an unqualified disposition in favour of the QCRF but was a gift to be applied exclusively for charitable purposes. The continuing existence of the QCRF was not seen by the testator as indispensable to the efficacy of the gift. There is nothing to indicate that the deceased reposed special trust or confidence in the QCRF because he had some association with it. Indeed, the fact the testator chose an organisation which had not operated for some years at the date of his death indicates he did not have a personal connection with it.
- [19] In particular, I place reliance on the 2009 decision of *Ball v State of Queensland*, where there the will made a gift to the North Brisbane Hospitals Board for the purpose of buying equipment for the Royal Children's Hospital. The North Brisbane Hospitals Board had ceased to exist before the will was made. In that decision Byrne SJA stated:<sup>3</sup>

“...nothing in the will nor in any extrinsic evidence suggests that Mrs Ball reposed special confidence in Board members or staff because of some association with the organisation. To the contrary, she chose a board that had not operated the Hospital for about five years by the time the will was made, which shows that she had neither a connection of a personal nature with the members of the

<sup>1</sup> [2009] QSC 174.

<sup>2</sup> *Montefiore Home v Howell & Co* (1984) 2 NSWLR 406.

<sup>3</sup> *The Public Trustee of Queensland as Executor of the Estate of Mary Agnes Ball, Deceased v State of Queensland and Ors* [2009] QSC 174 at [10].

board nor an informed appreciation of its undertaking.”

- [20] His Honour continued:<sup>4</sup>  
 “The identity of the designated donee was not of the essence of the gift. The declared charitable purpose is which mattered to Mrs Ball. There has been a failure of particular means by which the charitable purpose was to be effected. But there is no failure of that purpose as such. The gift has not lapsed.”
- [21] In the circumstances of the current case, I am satisfied that similarly the gift has not lapsed. There is no failure of the general purpose as such, which was declared in the will. I think the gift is correctly characterised and I am satisfied the court can order that it be paid to the Royal Children’s Hospital Foundation without the need to resort to cy-pres.
- [22] In the circumstances, given the investigations which have been conducted by the Public Trustee as to the next of kin, I am satisfied that there should be an order in the draft which has been submitted by the Public Trustee. Pursuant to s 134 of the *Public Trustee Act* 1978 I direct that this application be heard without the necessity of any other person being served with the proceedings. Whilst I note that the preferred option of the Attorney-General is that there be advertising, in the circumstances, given the size of the estate and my clear view as to the charitable intention, I consider that such an order is not required, and that there will be an order as per the draft which has been initialled by me and placed with the file. I consider that will clearly specifies that the gift in cl 5.02 was a charitable gift.
- [23] I direct that the property the subject of that gift be paid to the second respondent, and that the receipt of the treasurer or proper officer of the second respondent be a sufficient discharge to the Public Trustee.
- [24] I also order that the second respondent’s costs of and incidental to this application be assessed on an indemnity basis and paid out of the deceased’s estate.

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<sup>4</sup> *The Public Trustee of Queensland as Executor of the Estate of Mary Agnes Ball, Deceased v State of Queensland and Ors* [2009] QSC 174 at [12].