SUPREME COURT OF QUEENSLAND

CITATION:	*Public Trustee of Queensland v Rutledge & Ors* [2010] QSC 379
PARTIES:	**PUBLIC TRUSTEE OF QUEENSLAND (AS EXECUTOR OF THE WILL OF MARGARET McNAB MUSSON, DECEASED)** (Applicant) and **RICHARD RUTLEDGE** (First Respondent) and **ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS QUEENSLAND INCORPORATED** (Second Respondent) and **ANIMAL WELFARE LEAGUE OF QUEENSLAND INCORPORATED** (Third Respondent) and **FRASER COAST PET WARRIORS INCORPORATED** (Fourth Respondent) and **BRAVE COMPANION DOG RESCUE INCORPORATED** (Fifth Respondent)
FILE NO/S:	No 13403 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	20 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2010
JUDGE:	Philippides J
ORDER:	**1. It is declared that in making the gift to Francis' Independent Dog Orphanage for Homeless Dogs in her will dated 17 May 2002, Margaret Musson, deceased, had a general charitable intention;** **2. It is directed that:** **(a) Subject to any Order made in proceedings BS10296 of 2006, the property the subject of that**

gift be applied *cy pres* by paying the same to the Fifth Respondent, Brave Companion Dog Rescue Incorporated;

(b) The receipt of the Treasurer or other proper officer of the Fifth Respondent, is a sufficient discharge to the Public Trustee;

3. The Applicant's, the First Respondent's, Second Respondent's, Fourth Respondent's and Fifth Respondent's costs of and incidental to this Application be assessed on an indemnity basis and paid out of the deceased's estate.

CATCHWORDS: Charities – Charitable gifts and trusts – validity and practicality – gift to charitable institution – institution ceasing to exist – whether gift lapsing – whether general charitable intent

Attorney-General (NSW) v Barr [1991] NSWCA 4
Attorney-General (NSW) v Perpetual Trustee Co Ltd (1940) 63 CLR 209
Australian Executor Trustees Ltd v Ceduna District Health Services Inc & Ors [2006] SASC 286
In re Douglas, Obert v Barrow (1887) 35 Ch D 472
In re Pitt Cobbett, deceased (1921) 17 Tas LR 139
McCormack v Stevens (1978) 2 NSWLR 517
Montefiore Home v Howell & Co (1984) 2 NSWLR 406
Perpetual Trustees Limited v State of Tasmania (2000) TASSC 68
Phillips v Roberts [1975] 2 NSWLR 207
Public Trustee v Attorney-General (Qld) [2009] QSC 353
Public Trustee v Attorney-General (NSW) (1997) 42 NSWLR 600
Public Trustee v Cerebral Palsy Association of Western Australia Ltd [2004] WASC 36
Re Goodson, deceased [1971] VR 801
Re Inman, deceased [1965] VR 238
Re Tyrie, deceased (No 1) (1972) VR 168
Re Weaver: Trumble v Animal Welfare League of Victoria [1963] VR 257

COUNSEL: R Whiteford for the applicant
D Topp for the first respondent
P Goodwin for the second respondent
C Hodgins for the fourth respondent
K Parrott for the Attorney-General of Queensland

SOLICITORS: Official Solicitor for the Public Trustee of Queensland for the applicant
Quinn and Scattini for the first respondent
Wheldon Solicitors for the second respondent
Fraser Coast Pet Warriors for the fourth respondent
Crown Law for the Attorney-General of Queensland

PHILIPPIDES J:

Background

[1] This is an application by the Public Trustee, as executor of the estate of Margaret McNab Musson, deceased, for directions as to how to apply the property which is the subject of a gift in the deceased's will to a charity which has ceased to exist.

[2] The deceased was born on 9 February 1942 and died on 31 March 2006. On 14 June 2006, the Public Trustee obtained an order to administer the estate, which is valued at about $378,000. The deceased's last will made on 17 May 2002:

(a) left pecuniary legacies to relatives in New Zealand, one of whom is the deceased's brother;
(b) left to the first respondent a right to reside in her house;
(c) on termination of that right to reside, directs the Public Trustee to "hold the property ON TRUST for the FRANCIS' INDEPENDENT DOG ORPHANAGE FOR HOMELESS DOGS presently of Lockyer Valley in the State of Queensland for the general charitable purposes thereof";
(d) left the residuary estate to her brother.

[3] The first respondent has commenced family provision proceedings against her estate on the basis of his claim as de facto of the deceased, which await the outcome of this application.

The Francis' Independent Dog Orphanage

[4] A business name search has revealed that the business name "Francis' Independent Dog Orphanage" ("FIDO") was registered on 6 February 2000, with its principal place of business as Lot 15, Wotan Road, Atkinson Dam and the nature of its "business" specified as "finding homes for homeless dogs". The person carrying on the business was stated as Gwendoline May Peden. The business name was deregistered on 31 May 2001.

[5] Further inquiries revealed that in 2001, Ludelle Milne (the President of the fifth respondent, Brave Companion Dog Rescue Inc) established the fifth respondent in Laidley to re-house homeless dogs. Shortly thereafter, Ms Peden contacted Ms Milne as a result of the latter's weekly newspaper advertisements. Ms Milne learned that Ms Peden was the coordinator of FIDO, which, like the fifth respondent, provided shelter for unwanted dogs until they could be re-housed. She and Ms Peden supported each other's work, referred enquiries to each other and "discussed issues in relation to our work with dogs". Ms Milne last saw Ms Peden in 2004, at which time Ms Peden was confined to a wheelchair. Ms Peden died on 17 September 2004.

[6] The evidence indicates that FIDO operated on a not-for-profit basis and accepted donations to help meet its running costs. Both FIDO and the fifth respondent operated on a strict "no kill" policy, in that they cared for dogs in their possession for as long as it took for them to be rehoused; the dogs were never euthanized.

[7] I am satisfied on the basis of the material before the court that FIDO continued to operate after its business name was deregistered in 2001, but ceased to operate by

2004, that is, prior to the deceased's death. I am also satisfied that FIDO was a not-for-profit, as opposed to a commercial, operation and had purposes similar to those of the fifth respondent, that is, rescuing and rehousing homeless dogs in the Laidley/Lockyer Valley area and operating in a non-euthanize policy.

[8] On 2 September 2009, the Public Trustee advertised in The Courier-Mail and The Australian newspapers, asking charities with objects similar to FIDO to make contact. In response, the Public Trustee was contacted by the following entities, seeking to be considered in this application:

(a) the second respondent, the RSPCA;
(b) the fourth respondent, Fraser Coast Pet Warriors Incorporated;
(c) the fifth respondent, Brave Companion Dog Rescue Incorporated;
(d) the third respondent, Animal Welfare League of Queensland Incorporated (which subsequently advised that it no longer wished to participate in the application).

Was the gift charitable?

[9] There is a long line of authorities finding specific trusts to be valid as disclosing charitable purposes benefiting animals (see *In re Pitt Cobbett, deceased* (1921) 17 Tas LR 139; *In re Douglas, Obert v Barrow* (1887) 35 Ch D 472; *Re Weaver: Trumble v Animal Welfare League of Victoria* [1963] VR 257, *Re Inman deceased* [1965] VR 238; *Re Goodson, deceased* [1971] VR 801). And as Slicer J noted in *Perpetual Trustees Limited v State of Tasmania* (2000) TASSC 68 at [14], "the protection of homeless or unwanted animals, the suppression of cruelty to animals and the provision of veterinary treatment for stray animals have been held to be ones of charitable purpose". I accept that FIDO's purpose was charitable.

[10] The general approach of the courts, subject to certain exceptions, is that 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 deceased's lifetime (*Re Tyrie, deceased (No 1)* (1972) VR 168 at 177- 178). The exceptions were succinctly summarised by Ann Lyons J in *Public Trustee v Attorney-General (Qld)* [2009] QSC 353 (7 October 2009) at [10] to [13] as follows:

> "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.
>
> 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.
>
> 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.
>
> 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).*"

[11] The applicant submitted that the property the subject of the gift should (subject to any order in the family provisions proceedings), be paid to the fifth respondent under either the third or fourth exceptions to the lapse rule. That position was supported by the submissions made on behalf of the Attorney-General. The first respondent, however, contended that the gift lapsed and none of the exceptions applied.

General charitable intention

[12] The classic formulation concerning a general charitable intent was stated in *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1940) 63 CLR 209 at 225 (the "Milly Milly" case) in the following terms:

> "If a wider purpose forms [the testator's] substantial object and the directions or desires which cannot be fulfilled are but a means chosen by him for the attainment of that object, the court will execute the trust by decreeing some other application of the trust property to the furtherance of the substantial purpose, some application which departs from the original plan in particulars held not essential and, otherwise, keeps as near thereto as may be. The question is often stated to be whether the trust instrument discloses a general intention of charity or a particular intention only. 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 the 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."

[13] While there is no common law presumption in favour of a general charitable intention, little is required to find a wider charitable purpose (*Public Trustee v*

Attorney-General (NSW) (1997) 42 NSWLR 600 at 609 per Santow J). As Kirby P observed in *Attorney-General (NSW) v Barr* [1991] NSWCA 4 at 3:

> "As a general principle, courts will lean in favour of charity. Upon the failure of the specific gift, courts will be ready to infer a general intention on the part of the will-maker to provide a gift to charity … Little is required in the language of a will for the court to treat a wider purpose as the object of the trust. This attitude is adopted out of respect for the wishes of the will-maker, out of recognition of the considerations of change set out above and bearing in mind the fact that, if the will fails, those who benefit, in most circumstances, are relatives who have inferentially been considered by the will-maker but rejected in favour of charity. The fact that other legal provision is now made to permit certain family members to disturb a will is a further consideration which favours construing the will to achieve, so far as possible, the will-maker's charitable purpose …"

[14] It was contended by the applicant that it is open to the court to infer a general charitable intention in this case, because a gift to an unincorporated charitable body ought to be construed, not as a gift to the body itself, but as a gift for its purposes being more general than a gift to the particular institution itself (*Montefiore Home v Howell & Co* (1984) 2 NSWLR 406 at 416 - 417; *Re Tyrie, deceased (No 1)* (1972) VR 168 at 177). In making that submission, reliance was placed on *Re Goodson* [1971] VR 801 and the following statement in *The Law of Charitable Trusts in Australia*, Bradshaw (1983) at 83:

> "Once we have regard to the fact that these gifts are gifts for purposes, and that the named recipients are merely the chosen means for effecting such purposes, indicating where, how, or by whom, the purposes are to be carried out, it will be seen that the nature of the designated recipient of the gift is not necessarily of basic importance."

[15] It was thus submitted that importantly, in the present case, the wording of clause 8, "on trust for (FIDO) for the general charitable purposes thereof", provides a clear indication that what was uppermost in the deceased's mind was not FIDO itself, but FIDO's purposes (the welfare of dogs). It was further submitted that if the gift failed, the property falls into residue and passes to the deceased's brother, Duncan. The subject property (the house) was the deceased's major asset and Duncan also receives a pecuniary legacy in clause 5 of the will. It was submitted by the applicant that, given the deceased's longstanding interest in animal welfare, it was unlikely that she intended him to take such a sizeable "double portion" at the expense of charity. (I note that the deceased's brother does not appear seeking to claim a gift on lapse).

[16] In contending that the gift did not display a general charitable intent, the first respondent sought to rely on affidavit material which it was said revealed that, in selecting FIDO, the deceased wished to benefit a particular charity, whose existence was of the essence and which was selected because both the deceased and the first respondent were concerned to ensure that their dogs would upon their death be looked after. Objection was taken to certain paragraphs of the affidavit material thereby relied upon by the first respondent. I uphold those objections. However, in any event, I do not consider that the objected material in truth advanced the first respondent's case; I observe that the will did not qualify the gift to FIDO, by

requiring that the deceased's own dogs be cared for. Moreover, it is apparent that the deceased became acquainted with the existence and purpose of FIDO purely by a chance and that the deceased did not develop or pursue any particular relationship with those operating the charity. I note that the first respondent also relied upon the decisions of *The Public Trustee As Administrator of the Estate of Herbert Sebastian Hodge v Cerebral Palsy Association of Western Australia Ltd & Anor* [2004] WASC 36 and *Australian Executor Trustees Ltd v Ceduna District Health Services Inc & Ors* [2006] SASC 286, in submitting that there was no general charitable intent in the present case. However, reliance on *Hodge* and *Ceduna* is misplaced, as in those cases the gift was to a named charity simpliciter, whereas in the present case the deceased has expressly provided that the gift be for the general charitable purposes of FIDO. Those cases are therefore clearly distinguishable.

[17] For the reasons advanced by the applicant, I am satisfied that there was a general charitable intention to benefit the charitable purposes of FIDO.

Cy pres application

[18] The question then arises as to how the gift can be applied so as to give effect to the intention of the testator "as near as possible". While acknowledging that all the respondent charities are worthy, the applicant submitted that the fifth respondent is the closest in nature and purpose to FIDO. Its purposes are:

(a) to provide shelter for abandoned and unwanted dogs;
(b) to provide a boarding program for dogs access to which is available to any resident of Laidley Shire;
(c) to make available to the community dogs that have been health checked and temperament analysed as appropriate.

Like FIDO, it is particularly concerned with the welfare of *dogs* and additionally it is based in the *Lockyer Valley* and thus operates in the same geographical area as FIDO did. Furthermore, like FIDO it operates on a strict no-kill policy.

[19] The applicant submitted that by comparison the second respondent, the RSPCA, had a much wider geographical area of operation and was not exclusively concerned with the welfare of dogs. Its activities include "provision of first class animal welfare to domestic, farmed and wild animals throughout the state of Queensland". It is also the prosecuting authority for animal cruelty offences. Similarly, the fourth respondent, Fraser Coast Pet Warriors Incorporated, is based on the Fraser Coast and also is not exclusively concerned with the welfare of dogs. I note that an alternative submission was made by the applicant that, if the court were of the view that more than one charity equally corresponded with the deceased's intention, it would be open to the court to divide the fund equally between them (*McCormack v Stevens* (1978) 2 NSWLR 517 at 519).

[20] I accept the submissions made by the applicant that it is of no particular relevance that the RSPCA is a much larger charity which may be able to apply the funds in a fashion which is of greater reach to the community at large. Moreover, the function of the court is not to apply the fund to what is considered best for what may be assumed to be the testator's intention, nor to the most deserving object but to the object nearest the original. As Hutley JA said in *Phillips v Roberts* [1975] 2 NSWLR 207 at 211-3:

> "The fundamental responsibility of a court administering charitable trusts is to give effect to the trusts as laid down by the testator or settler … The Court does not generally consider whether those directions are wise or whether a more generally beneficial application of the testator's property might not be found … (It) is not wrong … to give priority in choosing between schemes to that which is closest to the intention of the testatrix, even though it may be less beneficial to the community at large than another scheme."

[21] Since the purpose of intention of the testator is the court's guide, it is not unimportant that, the material reveals that, although the deceased had previously made gifts to the RSPCA, in her last will she favoured a smaller, locally operating charity concerned with one type of animal.

[22] On the material before the court it is clear that the fifth respondent is the closest in nature and purpose to FIDO. I note that in oral submissions both the second and fourth respondents conceded as much.

Orders

[23] Accordingly, the orders of the court are as follows:

1. It is declared that in making the gift to Francis' Independent Dog Orphanage for Homeless Dogs in her will dated 17 May 2002, Margaret Musson, deceased, had a general charitable intention;

2. It is directed that:

   (a) subject to any Order made in proceedings BS10296 of 2006, the property the subject of that gift be applied *cy pres* by paying the same to the Fifth Respondent, Brave Companion Dog Rescue Incorporated;

   (b) the receipt of the Treasurer or other proper officer of the Fifth Respondent, is a sufficient discharge to the Public Trustee;

3. It is ordered that the Applicant's, the First Respondent's, Second Respondent's, Fourth Respondent's and Fifth Respondent's costs of and incidental to this Application be assessed on an indemnity basis and paid out of the deceased's estate.