

SUPREME COURT OF QUEENSLAND

CITATION: *Re Graham (deceased) (No 2)* [2020] QSC 168

PARTIES: **ANN LORRAINE PEACEY AS EXECUTOR OF THE ESTATE OF RICHARD JOHN GRAHAM**

FILE NO: BS No 8275 of 2019

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 11 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 18 May 2020

JUDGE: Bowskill J

ORDER: **In relation to the gift under clause 4.3(2) of the will of the deceased, an order will be made permitting the gift to be applied cy pres and distributed to Synapse Australia Ltd (as to 45%), the National Stroke Foundation Ltd (as to 45%) and the Stroke Trial Recovery Fund Ltd (as to 10%). I will hear the parties as to the proper form of the order, and also as to costs.**

CATCHWORDS: CHARITIES – CHARITABLE GIFTS AND TRUSTS – WHEN APPLIED CY-PRES – FAILURE OR EXTINCTION OF OBJECT – WHERE GIFT APPLIED CY-PRES – INSTITUTION CEASING TO EXIST BETWEEN TESTATOR’S DEATH AND PAYMENT OF LEGACY – where the will of the testator provided for the residue of his estate to be distributed, as to one half, to the Stroke Association of Queensland Inc for its general purposes – where the Stroke Association of Queensland Inc existed at the time of the will, and at the time of the testator’s death, but subsequently ceased to exist, making it impossible to distribute the gift according to the express terms of the will – where the Court has previously determined that the gift under the will is not to be read and construed as a gift to another entity, Synapse Australia Ltd, as the successor of the Stroke Association of Queensland Inc – determination of how the gift should be applied, cy pres, pursuant to s 105 of the *Trusts Act 1973 (Qld)*

Trusts Act 1973 (Qld), s 105

Hicks v Mater Misericordiae Ltd [2017] QSC 38; (2017) 16 ASTLR 441

McCormack v Stevens [1978] 2 NSWLR 517

Public Trustee of Queensland v Rutledge & Ors [2010] QSC

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

COUNSEL: G R Dickson for the applicant
 A Lossberg (*sol*) for the Attorney-General for the State of Queensland
 L Nevison for Synapse Australia Ltd
 A Rae for National Stroke Association
 S Macdonald for Stroke Recovery Trial Fund Ltd

SOLICITORS: Thynne & Macartney for the applicant
 Crown Law for the Attorney-General for the State of Queensland
 Bennett & Philp Lawyers for Synapse Australia Ltd
 Arnold Bloch Leibler for National Stroke Association
 Macdonald Law for Stroke Recovery Trial Fund Ltd

- [1] Mr Graham passed away on 21 June 2016, leaving a will dated 2 May 2015. Probate of the will was granted to the applicant on 9 August 2017. After legacies and gifts of chattels, clause 4.3 of the will provides for the residue of the estate to be distributed as follows:
- “(1) one half to the National Heart Foundation of Australia (Queensland Division) ... for its general purposes ...; and
 (2) one half to the Stroke Association of Queensland Inc ... for its general purposes ...”
- [2] The gift to the Stroke Association of Queensland Inc (**SAQ**) under clause 4.3(2) cannot be applied according to its terms because the SAQ ceased to exist after the death of Mr Graham, when its incorporation was cancelled in September 2016.
- [3] On 5 March 2020 I refused an application for an order that the gift under clause 4.3(2) of the will be read and construed as being a gift to **Synapse** Australia Ltd, as the successor of the SAQ: *Re Graham (deceased)* [2020] QSC 27.
- [4] There is now before me an application pursuant to s 105(1)(a)(ii) of the *Trusts Act* 1973 (Qld) for orders permitting the gift in clause 4.3(2) of the will to “be applied *cy pres* and distributed to those organisations having purposes as nearly as possible the same as the [SAQ] as determined by the Court”.¹
- [5] The gift is valuable, being estimated at about \$897,190 (before taking into account taxation liabilities and the impact of any costs orders).²
- [6] The organisations who contend they are the appropriate recipients of the gift, either in whole or part, are Synapse, the National Stroke Foundation Ltd (**NSF**) and the Stroke Recovery Trial Fund Ltd (**SRTF**). The Attorney-General for the State of Queensland also appeared and made submissions in relation to the application, for the assistance of the Court.³

¹ Amended originating application filed 17 April 2020.

² Affidavit of Ms Gaston (CFI44) at [9].

³ See ss 7 and 8 of the *Attorney-General Act* 1999 and s 106 of the *Trusts Act* 1973.

Relevant principles

- [7] Under s 105(1)(a)(ii) of the *Trusts Act* 1973, one of the circumstances in which the original purpose of a charitable trust can be altered to allow the property given to be applied cy pres is where the original purpose cannot be carried out. That subsection does not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy pres (s 105(2)).
- [8] The main condition which must be satisfied in that regard (apart from the failure of the original purpose) is the need to give effect to the intention of the testator “as nearly as possible”.⁴
- [9] A gift by will to a particular charitable institution is treated as a gift for the advancement of the charitable work or purpose of that institution.⁵ Accordingly, the task in endeavouring to give effect to the testator’s intention as nearly as possible is to consider the work or purpose (or the objects) of the proposed beneficiary(ies) of the cy pres scheme.
- [10] As Philippides J (as her Honour then was) said in *Public Trustee of Queensland v Rutledge & Ors* [2010] QSC 379 at [20]:
- “... 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.’”⁶
- [11] Since the SAQ existed at the time of the testator’s death, but ceased to exist before the gift was paid, the gift did not fail and has taken effect for a charitable object. It may be applied cy pres, irrespective of whether the will otherwise discloses a general charitable intention.⁷

The testator’s intention

- [12] At [8] of my earlier decision I found that:

“According to the evidence, Mr Graham gave instructions that, in his will, he wanted to give 50% of his residue estate to a stroke charity. His solicitor, Mr Kenny, subsequently identified that there were at least

⁴ See, for example, *McCormack v Stevens* [1978] 2 NSWLR 517 at 519.

⁵ See *Re Tyrie deceased (No 1)* [1972] VR 168 at 177, and the authorities there referred to.

⁶ Underlining added.

⁷ See *Hicks v Mater Misericordiae Ltd* [2017] QSC 38; (2017) 16 ASTLR 441 at [28] and [29].

two charities answering that description: the SAQ and the National Stroke Foundation. Mr Kenny prepared a draft will, on the basis of Mr Graham's instructions, which provided for one half of his residuary estate to be left to the SAQ. When he sent that draft will to Mr Graham, he explained that he had done this, but noted that there was also another organisation, the National Stroke Foundation, which had its headquarters in Melbourne, as well as a Queensland state office. Mr Kenny asked Mr Graham to indicate which of these organisations he wanted to leave half his residuary estate to.⁸ According to a file note, Mr Graham's instructions were to "leave it to the Qld organisation – that will do".⁹

- [13] It is clear from this that the testator wished to benefit a "stroke charity". Having regard to the terms of clause 4.3(1) (providing for a gift to the National Heart Foundation of Australia (Queensland Division)), and the evidence above, I infer that the testator intended that the gift be for the benefit the Queensland community. However, I do not infer that it was the testator's intention that the recipient organisation was necessarily a (solely) Queensland based organisation.
- [14] Contrary to the argument on behalf of Synapse, I also do not consider it reasonable to infer from the testator's choice of SAQ as the beneficiary, that the testator should be taken to have expressly denounced an intention to confer any benefit on the NSF. Rather, I find that he was presented with a choice of two stroke charities, an apparently national organisation and an apparently Queensland organisation; and he was content to leave the gift to the Queensland organisation. I do not consider it reasonable to infer that, had the testator known, for example, that the SAQ no longer existed, he would not have chosen the NSF instead; on the contrary, it seems reasonable to infer he may well have done that (consistently with his choice of the National Heart Foundation, in clause 4.3(1) of the will).

Stroke Association of Queensland

- [15] The SAQ was registered as an incorporated association on 30 May 1995. According to clause 2 of its constitution, the objects of the SAQ were:
- "a) To foster the well being of people with stroke and their families in Queensland through the Stroke Association of Qld Inc initiatives;
 - b) To provide a forum for issues relating to stroke;
 - c) To act as advocate to Government policy makers on quality of life issues relating to stroke and the care givers of people with stroke;
 - d) To maintain liaison with Government agencies, health care institutions and medical, nursing and allied health professions;
 - e) To provide resources and education on issues relating to stroke to the community;

⁸ Exhibit KLG-02 to Ms Gaston's affidavit.

⁹ Underlining added.

- f) To initiate and maintain self-help groups in strategic locations to meet the changing needs of people with stroke and their families;
- g) To seek funding for the development and maintenance of Association initiatives.”

[16] The relationship between the SAQ and (what is now called) Synapse (but which was formerly the Brain Injury Association of Queensland Inc) was addressed in [16]-[30] of my earlier decision. At [42] of my earlier decision, I found:

“On the evidence before the Court, it cannot be said that the SAQ continues to exist, in the form of Synapse. I find that the SAQ ceased to exist, from the date of cancellation of its incorporation in September 2016. It is clear that administrative arrangements were made between SAQ and Synapse, from about 2013, for rental of space for SAQ at Synapse’s (then, BIA’s) premises, and some shared services (although what those services were is not a matter of evidence). By that time, SAQ’s operations were already greatly reduced, among other reasons, because it had lost the benefit of government funding in 2011. It is apparent there was some overlap between the work that was being done by SAQ (with its focus on people with stroke and their families) and the work of BIA (Synapse), since one of the causes of acquired brain injuries is stroke; although the operations of BIA (Synapse) were and are far broader than that, as is clear from its objects. The practical arrangements between SAQ and Synapse are also reflected in the Deed of Gift, by which SAQ gifted to Synapse its remaining office furniture and equipment, and the money in its bank account, at a time when it knew it could no longer operate. This Deed did not involve the transfer of the entire undertaking or work of the SAQ, only particular identified assets. Although it is not entirely clear what work SAQ was doing by late 2015, from the President’s report it appears SAQ was continuing, by its volunteers to provide support and information to stroke survivors and their families. It may be accepted that some of this work has been taken over by Synapse, for example the provision of information kits. But the evidence shows that other aspects of SAQ’s previous work, in particular the Stroke Support Groups, had already been taken over by another entity, the National Stroke Foundation, after the State government funding to SAQ was cut.”¹⁰

[17] It followed from the findings that the SAQ had ceased to exist after the death of Mr Graham, and that Synapse was not the successor of SAQ such that the gift under the will could appropriately be construed as a gift to Synapse, that there would need to be further consideration given to the application of the gift under a cy pres scheme.

[18] The question now is which (one or more) of the institutions vying for the gift has objects as near as possible to the objects of the now extinct SAQ?¹¹

¹⁰ Underlining added.

¹¹ *Hicks v Mater Misericordiae Ltd* [2017] QSC 38; (2017) 16 ASTLR 441 at [28].

Synapse

[19] At [12]-[15] of my earlier decision I addressed the objects of Synapse:

“[12] The Brain Injury Association of Queensland Inc (**BIA**) was registered as an incorporated association in 2006.

[13] The term “ABI” is defined in the constitution of the BIA to mean “acquired brain injury” being “a neurocognitive disorder with a range of conditions where the main feature is a decline in cognitive ability from a previous level of functioning due to changes in brain structure or functioning”. Counsel for Synapse emphasised that this would include stroke.

[14] The objectives of the BIA are described in clause 4(1) of the constitution as “to assist people with an ABI, their families and stakeholders by implementing the following:

- (i) to be at the forefront of responding to the needs of the population who are affected by ABI and people who exhibit behaviours that challenge our understanding;
- (ii) to establish and maintain support systems throughout Queensland;
- (iii) to increase awareness through education and information sharing to clients, professionals and the greater community;
- (iv) to assist through advice, information and discussion during medical, rehabilitation and community support phases;
- (v) to liaise, and develop, alliances with other state, national and international associations, bodies or organisations that will assist the Association achieve its objectives;
- (vi) to facilitate and protect the rights of people with ABI and their families by:
 - (A) lobbying all levels of governments;
 - (B) seeking and maintaining representation of the Association with appropriate government departments and agencies;
- (vii) to raise funds in order to assist the achievement of these objectives.”

[15] The BIA changed its status (from an incorporated association to a company limited by guarantee) and name (to Synapse) in January 2017.¹² The objects of the company, Synapse, as set out in clause 5 of its constitution, reflect the objects of the BIA.¹³”

¹² See, for example, exhibit KLG-10 to Ms Gaston’s affidavit.

¹³ See exhibit KLG-11 to Ms Gaston’s affidavit.

[20] The objects of Synapse, as set out in clause 5 of its constitution, refer to “neurocognitive disorder and/or complex disability” (rather than ABI) and, in addition to the objectives of the BIA, set out above (which are reflected in clause 5(a) to (f)), include:

- “(g) provide education and training to people affected by a neurocognitive disorder and/or complex disability, their families and stakeholders;
- (h) provide support and financial service intermediary activities to people affected by a neurocognitive disorder and/or complex disability, their families and stakeholders;
- (i) make arrangements with any persons engaged in any trade, business or profession for the provision of any special benefits, privileges and advantages (in particular in relation to goods and services) to people affected by a neurocognitive disorder and/or complex disability, their families and stakeholders; and
- (j) do things incidental, or conducive, to carrying out any of the objects that are considered necessary, convenient, expedient, desirable or advisable.”

[21] Synapse now provides its services to people affected by brain injury in Queensland, New South Wales and Western Australia, having merged with the Brain Injury Association of NSW Inc and, more recently, the Brain Injury Association of WA. As an example of its work in Queensland, Synapse has ten supported accommodation sites which provide 24/7 support to people with brain injuries and complex disabilities.¹⁴ Other examples of the “stroke-related work” undertaken by Synapse are provided in the affidavits of Ms Hunt (CFI 30 at [3] and CFI 34 at [16]-[18]), including education, support and advocacy work for stroke sufferers and their families.

[22] In submissions made on its behalf Synapse placed considerable emphasis on the fact that SAQ intended, upon its winding up, to transfer its remaining assets and liabilities to Synapse. Counsel for Synapse went so far as to submit that “[i]t would be a travesty if the Deceased’s intention to benefit SAQ, and SAQ’s intention for Synapse to continue its work ... was not honoured”. Synapse submits substantial weight ought to be placed on the fact that SAQ “obviously” held the view that Synapse was the entity considered to have objects as close, or as near, as possible to its own to continue its undertaking.

[23] As a matter of principle, I do not accept that SAQ’s intentions are determinative; the guiding factor is the testator’s intention. As a matter of fact, I do not accept that the evidence supports a finding that, subjectively, SAQ considered the objects of Synapse were as close as possible to its own, as opposed to SAQ being motivated by other, pragmatic, factors when it decided to transfer its remaining assets and liabilities to Synapse (including the fact that Synapse was providing office space and administrative support to SAQ, and had taken over some of SAQ’s work, such as the provision of information kits).

¹⁴ Ms Hunt’s affidavit filed 9 April 2020 at [12]-[13].

- [24] However, I do accept that, on the evidence, some of the work of SAQ continued to be carried on by Synapse after SAQ ceased to exist, in particular the provision of information and support to people impacted by strokes, which is an important consideration.
- [25] It is otherwise submitted on Synapse's behalf that the evidence "overwhelmingly demonstrates that a substantial part of its services are delivered for the benefit of stroke victims, their families and the community". Counsel for the NSF submits that, on the evidence, stroke appears to form only a minority of Synapse's current services. As to this, the evidence of Ms Hunt, of Synapse, includes that about 20% of the phone calls received by Synapse's phone information service are from a stroke patient or family member;¹⁵ "stroke services" is the third most frequently searched topic by users of Synapse's website;¹⁶ but about 40% of Synapse's advocacy team's clients through the government National Disability Advocacy Program have been stroke sufferers and their families. The description of Synapse's education, support and advocacy work for stroke sufferers and their families is not otherwise specifically quantified. Without dwelling on the semantics (in terms of what proportion of Synapse's work relates to stroke) on the evidence it is clear that the work of Synapse includes support, education and advocacy in relation to, inter alia, people who suffer neurocognitive disorder caused by stroke and their families, which can be seen to reflect the work and purpose of the SAQ.

National Stroke Foundation

- [26] The NSF was established in 1983. The NSF's objects are described in clause 5 of its constitution:¹⁷

"The Foundation shall pursue charitable purposes and for the public benefit only, its objects being:

- (a) to promote, foster, develop and assist the study of and the acquisition, dissemination and application of knowledge and information concerning the causes, diagnosis, prevention and treatment of stroke and diseases and other disorders of the nervous system;
- (b) to encourage, stimulate and aid research in branches of health and medical science pertaining to stroke and diseases and other disorders of the nervous system;
- (c) to stimulate public interest in and enhance public knowledge of the prevention and treatment of stroke;
- (d) to assist in keeping the health profession in Australia conversant with the latest developments in the field of medical and scientific research and the diagnosis, prevention and treatment of stroke;

¹⁵ Ms Hunt's affidavit filed 13 February 2020 at [3(c)] and her affidavit filed 9 April 2020 at [16].

¹⁶ Ms Hunt's affidavit filed 13 February 2020 at [3(e)].

¹⁷ Exhibit TMA-5 to Ms Aslett's affidavit, at p 59.

- (e) to assist in the development and provision of support and information for stroke survivors and their families and carers; and
- (f) to encourage and assist an international interchange of health professionals, researchers, students and others to exchange ideas for purposes of teaching, research, study and training relating to the above objects.”¹⁸

[27] As explained by Ms Aslett, the executive director of NSF, the organisation runs projects falling within the following categories, to meet its objectives:

- (a) support programs that assist stroke survivors and their families affected by stroke;
- (b) treatment programs to assist health professionals to improve the treatment of stroke patients;
- (c) prevention programs including educational campaigns to encourage positive lifestyle changes that reduce the risk of stroke;
- (d) research programs that provide funding and networks to promote research into stroke knowledge; and
- (e) advocacy, drawing on evidence from researchers and the experience of people directly impacted by stroke to influence public and political opinion and policy regarding stroke treatment and care.

[28] Although it is a national organisation, the NSF is said to have a well-established presence in Queensland, including the provision of services associated with its largest support program, “StrokeConnect”, as well as other educational, awareness, advocacy and research projects. Ms Aslett says that, having regard to the wishes of the deceased, any bequest received by the NSF would go towards its work in Queensland.

[29] As discussed in [18] and [42] of my earlier decision, some of the work previously undertaken by the SAQ was taken over by the NSF, even before SAQ’s demise.

[30] On behalf of the NSF it is submitted that it is the only one of the three contending organisations which can aptly be described as a “stroke charity”, having stroke as its sole focus, and carrying out a range of activities similar to those which SAQ offered (support for people with stroke and their caregivers, advocacy and education); as opposed to a charity such as Synapse which has much broader purposes, which include stroke; or SRTF (next discussed), which has a breadth of purpose as described, but in practice a very narrow focus.

[31] I accept that the NSF is also an organisation which can be described as doing work and having a purpose very closely related to that of the SAQ. Although it also, like Synapse appears to have a somewhat broader purpose (noting the reference to “stroke and diseases and other disorders of the nervous system” and the focus on research, which was not expressly included as part of the objects of the SAQ).

¹⁸ Underlining added.

Stroke Recovery Trial Fund

[32] The SRTF was initially formed by Dr Graham, whose young son suffered a cerebral edema (said to be “in the nature of, and part of the family of brain injuries similar to a stroke”) as a result of complications associated with gastroenteritis. She learned about a possible new treatment for stroke victims, called Perispinal Ethanercept, and took her son to the USA to try the treatment. She set up the SRTF to raise funds for clinical trials of this treatment to be undertaken in Australia. Dr Graham says she quickly realised there was a need for wider education about stroke and assistance to people that suffered strokes and their families, and so it was decided the SRTF “would do much more than just raise funds for the clinical trials”.

[33] The objects of the SRTF are described in its constitution as follows:¹⁹

“The Charity: Stroke Recovery Trial Fund (SRTF) LTD exists to prevent and/or control conditions in humans which affect the brain including stroke and brain injury (traumatic and acquired) to which the elderly population are particularly vulnerable ...

‘The Stroke Recovery Trial Fund Ltd’s (‘the SRTF’) activities will be, amongst other things, to educate the community about how to protect the brain from avoidable injury, and to educate people who experience brain injury and their families on how to ease suffering and distress from the symptoms of the brain tissue injury. In addition to providing online information about prevention, symptom management, and carer support, the SRTF will, amongst other things, provide community education programs in person or in the media, and will engage in raising funds to support fully pre-approved medical clinical trials of medication including but not limited to Etanercept administered by Perispinal route to treat brain inflammation as a result of stroke and brain injury (traumatic or acquired injury) including but not limited to adults adolescents (13 years and over).

Although individuals and their families will be a focus, ultimately the public stands to gain from increased public awareness, but also potentially a reduction in the financial implications of the provision of care and services for this group of people.’”

[34] In a further affidavit of Dr Graham filed on 22 April 2020, she refers to research undertaken which indicates the Perispinal Ethanercept treatment could assist Covid-19 patients, although it is not clear from her affidavit what the relevance of this is to the present application (for example, whether STRF intends to include this within its objects).

[35] SRTF submits that it has “very similar objects and activities” to SAQ, and emphasises that it is the only organisation (of the three vying for the gift) that is Queensland based.

¹⁹ Dr Graham’s affidavit (CFI 16), at pp 29-30.

- [36] All parties, and the Attorney-General, accept that it is open to the Court to divide the gift between one or more of the organisations.²⁰

Determining the application

- [37] In the face of the competing and, in some respects, adversarial positions adopted by the three charities which contend they are the most appropriate beneficiary of the gift under the will, this has not been an easy matter to determine.
- [38] The fundamental responsibility of the court is to endeavour to give effect to the testator's intention; to apply the fund to a scheme which is closest to the intention of the testator.
- [39] In the end, I have found the approach of Kearney J in *McCormack v Stevens* [1978] 2 NSWLR 517 at 519 to be a useful one in this case. I am not persuaded that applying the gift solely to Synapse would fulfil the testator's intention as nearly as possible; but nor am I persuaded that applying the gift solely to the NSF would do so. It does not seem to me that either of these charitable bodies can assert that they more closely correspond with the testator's intention to the exclusion of the other, particularly when each of them have continued to carry out aspects of the work previously carried out by SAQ; but each of them have, albeit in differing ways, broader purposes. On the other hand, given the very specific focus of the STRF, I do not consider that the work and purpose of the STRF is sufficiently similar to that of the SAQ for it to be the successful contender to any substantial extent (although given the broader description of its purposes in its constitution, it is not unreasonable to include STRF in a scheme to a small extent).
- [40] In the end, I have determined that the most appropriate way to give effect to the gift under clause 4.3(2) of the will is to make orders that the gift in clause 4.3(2) of the will be applied cy pres and distributed:
- (a) as to 45% to Synapse;
 - (b) as to 45% to the NSF; and
 - (c) as to 10% to the STRF,
- in each case on the basis that the gift is for their work and purposes in relation to people with stroke and their families, in Queensland. I will hear from the parties as to the appropriate form of order.
- [41] As to costs, I am inclined to the view that the appropriate orders in this regard are that the applicant recover her costs from the estate on the indemnity basis; but that each of Synapse, the NSF and the STRF recover their costs from the proportion of the gift which is paid to them. The Attorney-General has indicated she does not seek any order for her costs. However, I will give the parties the opportunity to be heard about this also.

²⁰ Referring, for example, to *Re Anzac Cottages Trust* [2000] QSC 175 and *McCormack v Stevens* [1978] 2 NSWLR 517.