# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Re Graham (deceased)* [2020] QSC 27 |
| 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: | 5 March 2020 |
| DELIVERED AT: | Supreme Court at Brisbane |
| HEARING DATE: | 13 February 2020 |
| JUDGE: | Bowskill J |
| ORDER: | **1. The application for an order that the gift in clause 4.3(2) of the will be read and construed as being a gift to Synapse Australia Ltd, on the basis that it is the successor of the Stroke Association of Queensland Inc, is refused.**<br><br>**2. The further hearing of the application is adjourned.** |
| CATCHWORDS: | CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESTATOR'S INTENTION – OTHER PARTICULAR CASES – 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 its registration as an incorporated association was cancelled, making it impossible to distribute the gift according to the express terms of the will – Whether the Stroke Association of Queensland Inc continued to exist, notwithstanding the cancellation of its registration, in the form of another entity, Synapse Australia Ltd, as its successor – Whether it is appropriate to construe the gift under the will as being a gift to Synapse Australia Inc, on the basis it is the successor to the Stroke Association of Queensland Inc – Whether the gift should be applied cy-près pursuant to s 105 of the *Trusts Act* 1973 (Qld).<br><br>*Associations Incorporation Act* 1981 (Qld) ss 89, 91-93, 94A<br><br>*Australian Executor Trustees Ltd v Ceduna District Health Services* [2006] SASC 286 |

*Cram Foundation v Corbett-Jones & Anor* [2006] NSWSC 495
*Hicks v Mater Misericordiae Ltd* [2017] QSC 38
*Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12
*Public Trustee v Cerebral Palsy Association of Western Australia Ltd* (2004) 28 WAR 496
*Re Coulson* [2014] VSC 353
*Re Tyrie (deceased) (No 1)* [1972] VR 168
*In re Rowell, deceased* (1982) 31 SASR 361
*The Estate of Dulcie Edna Rand (deceased)* [2009] NSWSC 48
*The Public Trustee of Queensland v State of Queensland* [2009] 2 Qd R 327

G W Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2nd ed, 2017)

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 & Philip 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 issue in this case concerns the gift to the Stroke Association of Queensland Inc (**SAQ**) under clause 4.3(2). Although the SAQ existed at the time of the will, and at the time of Mr Graham's death, it ceased to exist subsequently when its registration as an incorporated association was cancelled on 23 September 2016. The question now is, how should the gift be dealt with? The applicant has applied to the Court for an order that the gift in clause 4.3(2) be read and construed as being a gift to **Synapse** Australia Ltd, on the basis that it is the successor of the SAQ. When that application first came on for hearing, before Douglas J on 18 September 2019,

Synapse appeared and made submissions in support of that order. The Attorney-General appeared to assist the court[1] and submitted that there was insufficient evidence to establish that Synapse was the successor of the SAQ, but that the court may apply the gift cy-près under s 105 of the *Trusts Act* 1973 (Qld).

[3] Justice Douglas adjourned the hearing of the application, and made directions for service of the application and supporting material on four other charities.

[4] At the further hearing of the application before me on 13 February 2020, two of those charities, Stroke Recovery Trial Fund Ltd and the National Stroke Foundation, appeared and made submissions consistent with those of the Attorney-General, putting themselves forward as appropriate objects of a cy-près scheme. The other two declined to take any active part in the proceedings.

[5] The will provides, in clause 4.4, for the gifts in clause 4.3 to be given to Baker IDI Heart and Diabetes Institute, in the event either or both of the gifts should fail. It was common ground at the hearing that this clause does not operate, because the gift in clause 4.3(2) did not fail, it took effect upon the death of Mr Graham. The difficulty has arisen subsequently.[2]

[6] For the reasons outlined below, I am unable to conclude that Synapse is the successor of SAQ, in the relevant sense. It is, however, appropriate that the gift under clause 4.3(2) be applied cy-près. All parties agreed that, in the event that was the conclusion reached by the court, the further hearing of the matter should be adjourned.

[7] The relevant factual circumstances are as follows.

[8] 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 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.[3] According to a file note, Mr Graham's instructions were to "leave it to the Qld organisation – that will do".[4]

[9] 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:

---

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

2 Baker IDI Heart and Diabetes Institute was one of the entities served with the application, after the hearing on 18 September 2019. It responded that, with legal advice, it did not lay claim to any entitlement under the will. See exhibit KLG-15 to Ms Gaston's affidavit, filed 13 February 2020. The other entity served was the Northside Stroke Club, which also advised the applicant that it did not wish to be heard further. See exhibit KLG-16 to Ms Gaston's affidavit.

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

4 Exhibit KLG-03 to Ms Gaston's affidavit.

> "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;
>
> 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."

[10] Clause 32 of the SAQ's constitution provided for the "distribution of surplus assets to another entity" as follows:

> "32. (a) This section applies if the Stroke Association of Qld Inc is wound up under part 10 of the Act and there are surplus assets.
>
> (b) the surplus assets must not be distributed among the members but must be given to another entity:
>
> (1) that has objects similar to the Stroke Association of Qld Inc objects; and
>
> (2) The rules of which prohibit the distribution of the entities income and assets to its members.
>
> (c) In this section –
>
> 'surplus assets' has the meaning given by section 92(3) of the Act."

[11] The Act referred to is the *Associations Incorporation Act* 1981 (Qld).

[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.[5] The objects of the company, Synapse, as set out in clause 5 of its constitution, reflect the objects of the BIA.[6]

[16] The relationship between SAQ and (what is now called) Synapse began in about 2012. Synapse's premises were then (and still are) in Montague Road, West End. According to minutes of the SAQ's management committee meeting on 12 March 2013, SAQ agreed to enter into an agreement with BIA for a nominal monthly payment for use of an "operational area" at BIA's premises. These minutes also record that the operation of SAQ's services was "now greatly reduced" with "[s]ervices limited to mainly two days per week".[7]

[17] These arrangements appear to coincide with a decision said to have been made by the State government in 2012, that by mid-2013 it would cease funding numerous non-government organisations, including SAQ.[8] According to Ms Hunt, the national director of business systems for Synapse, at around this time "SAQ ran on donations only and was unsuccessful in obtaining more government funding" and "SAQ's operations eventually reduced to approximately 4 volunteers working on Thursdays".[9]

---

5 See, for example, exhibit KLG-10 to Ms Gaston's affidavit.
6 See exhibit KLG-11 to Ms Gaston's affidavit.
7 See exhibit JH-1 to Ms Hunt's affidavit, p 2.
8 Ms Hunt's affidavit at [6] and [7].
9 Ms Hunt's affidavit at [10] and [11].

[18] An affidavit of Ms Aslett, the Executive Director of Stroke Services for the National Stroke Foundation, explains that in 2011 Queensland Health terminated its service agreement with SAQ for the "chronic disease self-management capacity building project". In November 2011, Queensland Health informed the National Stroke Foundation that it had approved funding to that organisation to maintain provision of services for that project until the end of September 2013. Part of the services provided by the National Stroke Foundation was support for "Stroke Support Groups" that had previously been supported by the SAQ.[10]

[19] The minutes of a meeting of the SAQ management committee on 17 March 2015 record that there was discussion about a "Shared Services Proposal" with Synapse.[11] After referring to this, Ms Hunt says that "SAQ's financial position did not improve and later in the year it initiated discussions with Synapse Inc for SAQ to wind itself up and gift whatever assets it had to Synapse Inc. Synapse Inc was prepared to accept the gift and continue SAQ's work".[12]

[20] The notice sent to SAQ's members of the annual general meeting to be held in December 2015 included the following:

> "Notice is given that a motion will be placed at the meeting:-
>
> 'For the assets and liabilities of the Stroke Association of Qld Inc to be transferred to Synapse (The Brain injury Association of Qld Inc).'
>
> This move will enable the work of SAQ to continue under the organisational systems and management of Synapse."[13]

[21] The President's report for the annual general meeting included the following:

> "2015 has been another busy year for volunteers at SAQ. The team at the office … continued to run the day-to-day operation of the organisation and provide the support for stroke survivors.
>
> We all continue to work closely with Synapse staff to provide the best available information to stroke survivors, their families and carers. SAQ Information Kits now also include Synapse's quarterly peer-reviewed full-colour magazine *Bridge* which keeps its readers up-to-date with information relating to the various aspects of acquired brain injury and ensuing rehabilitation.
>
> …
>
> SAQ continues to provide much needed peer support to the growing number of stroke survivors and their families. This year saw a number of stroke survivors benefit from exercise physiology with the ICARE Machine which was based at the offices of Synapse and SAQ for a number of months. This therapy programme has now moved to other suitable service locations. Two machines are now in operation on the Gold Coast and one in the Redcliffe area. All

---

10 Ms Aslett's affidavit at [23]-[25].
11 See exhibit JH-2 to Ms Hunt's affidavit, p 5.
12 Ms Hunt's affidavit at [13].
13 See exhibit JH-3 to Ms Hunt's affidavit, p 7.

> stroke survivors who participated in the ICARE programme have greatly improved in their mobility and functioning post-stroke.
>
> We would like to thank all board members for their efforts in a difficult year … We also thank the Synapse organisation for their continued generous support with facilities and services to enable the Association to continue to operate and service our stroke survivors.
>
> SAQ operation needs a most urgent review of our current operational structure given our limited funds, dwindling volunteer base, ageing office equipment and the future requirements for running a viable not-for-profit organisation. As such a proposal for the future of SAQ will be submitted to the members for approval."[14]

[22] At the annual general meeting of the SAQ on 7 December 2015, the following motions were passed, as recorded in the minutes:[15]

> 8. Motion on Notice:
>
> "That the Stroke Association of Qld Inc be wound up and the assets and liabilities of the Stroke Association be transferred to Synapse (The Brain Injury Association of Qld Inc)"
>
> Discussion on the future limited finance forecast, ageing computer systems, limited number of volunteers for peer support administration and office facilities, management systems association and government requirements and insurance costs. The meeting noted that it would be desirable for some acknowledgment/indication of the association's name be included/referenced in the Synapse Operation.
>
> Motion:
>
> '**That the Stroke Association of Qld Inc be wound up during the next months while the association still has surplus funds**.
>
> …
>
> Motion:
>
> '**That the assets and liabilities of the Stroke Association be transferred to Synapse. (The Brain Injury Association of Qld Inc.)** …"[16]

[23] There is no evidence before the court of any steps taken, "during the next months" subsequent to the passing of the first motion, to in fact wind up the SAQ. However, in relation to the second motion, on 30 June 2016 the SAQ and the BIA entered into a Deed of Gift. The recitals to the Deed of Gift record that:

---

14 See exhibit JH-4 to Ms Hunt's affidavit, pp 8-9.
15 See exhibit KLG-07 to Ms Gaston's affidavit.
16 Bold emphasis added.

> "A. The donor [SAQ] wishes to gift to Brain Injury Association of Queensland Inc. All its assets and liabilities outlined in attached Schedule A as at the date of execution of this Deed.
>
> B. Brain Injury Association of Queensland Inc. agrees to accept the gift upon the terms and conditions contained in this Deed."

[24] Schedule A to the Deed contains a list of items, including a Sharp Copier, office chairs and desks, as well as a bank account with "balance to be finalised at hand over. Approx $3000".

[25] The operative provisions of the Deed of Gift include clause 3.1 which provides that the "Donor [SAQ] assigns absolutely and transfers all interest in and title to the gift to Brain Injury Association of Queensland Inc at the date of the signing of this Deed". Whilst "the gift" is not defined, construing the document objectively, by reference to its terms as a whole, in my view, the gift should be read as the assets and liabilities outlined in the attached Schedule A (having regard to recital A). Although the applicant and Synapse submitted the Deed could be construed as a gift from SAQ to Synapse of *all* its assets, even potential future assets SAQ was not then aware of (such as the bequest under the will), that submission was not pressed with any vigour, and rightly so. The terms of the Deed of Gift do not support such a construction.

[26] In further submissions filed after the hearing, the applicant submitted the second resolution passed on 7 December 2015 should be construed as having the effect of transferring SAQ's entitlement under clause 4.3(2) of the will to Synapse; and on that basis the applicant submits the court should make a declaration that Synapse is entitled to receive the gift under clause 4.3(2) of the will. I reject that submission. As at 7 December 2015, SAQ had no such entitlement; it did not come into existence until Mr Graham's death on 21 June 2016.[17] I accept the submission for the National Stroke Foundation that it is a legal impossibility that the second resolution could have the effect of transferring a non-existent chose in action from SAQ to Synapse.

[27] Notwithstanding the motion which was passed at the December 2015 meeting, there is no evidence before the Court that the SAQ was in fact "wound up" (for example under ss 89, 91 and 92 of the *Associations Incorporation Act*). However, on 23 September 2016 the registration of the SAQ as an incorporated association was cancelled, pursuant to s 93 of the *Associations Incorporation Act*.[18] It is apparent, both from the provisions in part 10 of the Act and also from the definition of "deregistration" in s 94A, that winding up (which involves application of provisions of the *Corporations Act* 2001 (Cth)) is a distinct procedure from cancellation.

[28] I reject the further submission on behalf of Synapse, which is premised on an acknowledgment that SAQ was not in fact wound up, that the Court should make an order under s 133 of the *Associations Incorporation Act* remedying that "deficiency", "to prevent any substantial injustice that might occur in respect of the entity which now carries on SAQ's undertaking, Synapse". I do not accept there is

---

17 As a chose in action, being a right to seek the due and proper administration of the estate: *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12 at 27.

18 See exhibit KLG-09 to Ms Gaston's affidavit.

any deficiency (as opposed to an event that did not happen, namely, winding up under the *Associations Incorporation Act*); and I do not accept, for the reasons discussed below, that there is any such risk of injustice.

[29] The applicant and Synapse rely upon the material set out above, including what appears in the President's report, the minutes and the Deed of Gift, as supporting a conclusion that Synapse is the successor to the SAQ, such that it is appropriate for the court to order that the gift to SAQ under the will be paid to Synapse.

[30] The applicant and Synapse also rely on other material annexed to an affidavit of Ms Hunt as supporting their argument that Synapse is the successor of SAQ. For example:

(a) In the 2018 Annual Report for Synapse, on a page headed our history", there is a note for 2016 that:

> "Synapse **merged** with the Stroke Association of Queensland which started in 1983 by a 46-year-old mother of four who had a stroke. Synapse ensures the legacy of the Queensland Stroke Association by providing information and support to people impacted by strokes."[19]

(b) In the March 2017 edition of Synapse's magazine, Bridge, the CEO records that "In 2016, we welcomed the joining of the Stroke Association of Queensland with Synapse" and also an article referring to the "merger" of SAQ and Synapse.[20]

[31] The issue is whether it is right to conclude that, after the death of Mr Graham, the SAQ ceased to exist; or whether as a result of the events from late-2015 to mid-2016, the work and operations of SAQ could properly be said to have merged into, or amalgamated with, Synapse, such that SAQ continues to exist, for the purposes of the bequest, albeit in the form, and under the name, of Synapse.[21]

[32] In their arguments, the parties focussed their attention on the exceptions to the "lapse rule", in particular the second exception. But in my respectful view, upon analysis, this focus is inapt, and leads to asking slightly the wrong question. The so-called "lapse rule" is that a bequest to a charitable institution that ceased to exist prior to the testator's death, whether before or after the date of the will, ordinarily lapses.[22] As the parties agreed, the exceptions to the lapse rule are helpfully summarised in *Public Trustee of Queensland v Attorney-General for the State of Queensland* [2009] QSC 353 at [9]-[13]. As Lyons J (as her Honour then was) said at [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

---

19 See exhibit JH-8 to Ms Hunt's affidavit, at p 25. Bold emphasis added.
20 See exhibit JH-9 to Ms Hunt's affidavit, at pp 65 and 80.
21 *In re Watt; Hicks v Hill* [1930] 2 Ch 243 at 245.
22 See, for example, G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2nd ed, 2017) at [15.4].

> in favour of that successor institution, then the gift would take effect in favour of the successor institution."[23]

[33] In relation to this exception, as Newton LJ in *Re Tyrie* goes on to explain, quoting from Halsburys, "there is no lapse where an institution which has ceased to exist was named merely as the channel for carrying out a charitable intention, or for carrying on a particular charitable work which is still being carried on although by different persons or a different institution".[24]

[34] As it was further articulated, by Brereton J in *Cram Foundation v Corbett-Jones & Anor* [2006] NSWSC 495 at [27]:

> "The gift in the Will was to a particular charitable institution named in the Will. Such a gift *prima facie* lapses if the institution has ceased to exist at the testator's death, but not if it is a gift for the purposes of the particular charitable institution and those purposes have been taken over by another institution which may be regarded as the successor of the first [*Re Wright, Pillgrem v Attorney-General* [1951] Tas SR 13; *Re Tyrie (No 1)* [1972] VR 168,177; *Re Flynn* [1975] VR 633, 637]. No question of lapse arises in this case, because the institution named in the will had not ceased to exist at the date of death; the same institution continued in existence under a different name [*Re Flynn* [1975] VR 633, 638-639]. And even if the unincorporated Illawarra Society were considered to be a different institution from that named in the Will, **it had plainly taken over the work and purposes of the original Society**, and should properly be regarded as its successor [*Re Tyrie,* 177-178; *Re Flynn,* 639]. Accordingly, the gift did not lapse."[25]

[35] But as Douglas J pointed out in *Hicks v Mater Misericordiae Ltd* [2017] QSC 38 at [27] and [28], there is a distinction to be drawn between the situation that applies where the relevant institution ceased to exist in the testator's lifetime, and what is described as a supervening impossibility, where the institution ceases to exist after the gift has taken effect. At [28], his Honour quotes from [15.16] of *Dal Pont* (1st ed), which in the 2nd edition reads as follows:

> "If a gift is made to a charitable institution that, <u>once the gift has taken effect</u>, ceases to exist, the court will apply that property to objects as near as possible (cy-près) to those of the extinct institution. The same ensues for bequests for charitable purposes that, subsequent to the testator's death, become impracticable or impossible. The foregoing reflects the general principle that, once devoted to charity, a fund or property cannot be applied for any other purpose or person; there is no lapse and the next-of-kin are

---

23 See also *Re Tyrie (deceased) (No 1)* [1972] VR 168 at 177.

24 *The Public Trustee of Queensland v State of Queensland* [2009] 2 Qd R 327 is an example of this, where Byrne SJA found that the identity of the designated donee of a gift under a will, which had ceased to exist at the date of death of the testator, was not of the essence of the gift; the declared charitable purpose is what mattered to the testator.

25 Bold emphasis added. In this case, the testator devised particular property to "the trustees of the Wollongong and District Society for Crippled Children". That unincorporated society changed its name to the Illawarra Society for Crippled Children, prior to the death of the deceased.

> excluded. The gift or fund is applied cy-près because it has taken effect for a charitable object, even if it has yet to become payable, or has otherwise not yet been paid over, to the charity. For this reason, subsequent impossibility cases, unlike those of initial impossibility, require no proof of general charitable intention as a precondition to cy-près application…"[26]

[36] So the question is, has the charitable institution which was named in the will, the SAQ, ceased to exist? If it has, the gift, which has taken effect, will need to be dealt with cy-près under s 105 of the *Trusts Act*. If it has not, then there is no need for a cy-près scheme, because effect can be given to the gift under the will.

[37] An example of a case in which the court found an institution continued to exist, despite a change in form is *Public Trustee v Cerebral Palsy Association of Western Australia Ltd* (2004) 28 WAR 496. The deceased's will left the whole of his estate to the "Spastic Welfare Association of Western Australia Inc". That incorporated association existed at the date of the will. However, prior to the death of the deceased it was dissolved, the property of the association became the property of the Cerebral Palsy Association of Western Australia Ltd, a company limited by guarantee, and the rights and liabilities of the incorporated association became the rights and liabilities of the company. As recorded by Barker J at [5], since the date of dissolution of the incorporated association, the Cerebral Palsy Association "has carried on, in all material respects, the same undertaking and operations as were carried on by the Spastic Welfare Association prior thereto". The objects of both organisations were essentially the same, and in fact the main object for which the company was established was to take over the undertaking, property, rights and liabilities of the association (see at [7]). In addition, the office bearers of the company included most of the persons who were the office bearers of the association at the time of its dissolution. The transfer of the undertaking and operations of the association to the company occurred under relevant provisions of the *Associations Incorporation Act* (WA) which provided for that process (see at [10]-[18]). As Barker J found, at [21], "for all practical intents and purposes, the undertaking and operations of the Spastic Welfare Association have been continued without change by the Cerebral Palsy Association since the Spastic Welfare Association was dissolved and the Cerebral Palsy Association has succeeded the Spastic Welfare Association in every practical way".

[38] Another example is *Re Coulson* [2014] VSC 353, in which it was held that the conversion of a donee charity from an incorporated association to a company limited by guarantee (with identical objects) did not mean the charity had ceased to exist, simply that it "metamorphosed" into a different form; accordingly the gift to it under the will had not lapsed. The transformation of the BIA into Synapse is a similar example. McMillan J undertook an analysis of various cases, on the question of whether, and when, a charitable institution may be said to have ceased to exist, and said this at [43]:

> "From the abovementioned cases it is seen that, when it comes to charities, a simple dissolution and reincorporation may not result in the charity ceasing to exist. Incorporation in a particular jurisdiction or in a particular manner is merely the machinery by which the

---

26 References omitted.

> charity operates. If the charity organisation continues its work through a new body corporate, it may not have ceased to exist. This will depend on the objects and purposes, and arrangements upon dissolution, of the two organisations. This principle recognises that a charitable organisation may have conducted its charitable work continuously, yet made changes to its legal form depending on the vicissitudes of government regulatory policy or the benefits of incorporation in different jurisdictions. In such situations the charity organisation has not truly ceased to exist."

[39] The principle was summarised as follows by Harrison J in *The Estate of Dulcie Edna Rand (deceased)* [2009] NSWSC 48 at [38]:

> "The fact that the name and address of an institution have changed does not mean that it ceases to exist… Where for all practical purposes the activity and operations of an institution have been continued without change notwithstanding that the institution may even have been dissolved and succeeded by another, the institution will be regarded as not having ceased to exist..."[27]

[40] On the other hand, in *Australian Executor Trustees Ltd v Ceduna District Health Services* [2006] SASC 286, Vanstone J held that the entity named in the will (the Far West Senior Citizens Village Incorporated) had ceased to exist (in that case, prior to the death of the testator), in circumstances where that entity, and two others (the Ceduna Hospital Inc and the Ceduna & District Health & Aged Service Inc) were dissolved by proclamation and, in the same proclamation, a new incorporated entity, Ceduna District Health Services Incorporated, was established, which took over the functions, operations and assets of the previous three dissolved entities. She rejected an argument that the gift under the will should take effect in favour of the new Health Services entity, as the successor of the original Village entity. In determining the question whether the Village entity continued to exist, after the dissolution, Her Honour considered it relevant to examine the objects of the two organisations. She found that "the objectives of the newly formed Health Services are significantly different from those of the Village. For one thing, they extend beyond the conduct of a home for aged persons, to include such matters as the establishment of other health services and the instruction of health workers. For another, they relate to a different geographical area than did those of the Village. In addition, they are not directed to benefit primarily aged persons who are indigent, or who are pensioners. The operations of Health Services are likewise considerably broader than those of the Village." For those reasons, her Honour found it could not be said the Village continued to exist in the form of Health Services; it had ceased to exist (at [20] and [21]).

[41] As that was a case in which the Village entity had ceased to exist prior to the death of the testator, the lapse rule did apply, and so it was necessary for her Honour also to consider the exceptions to it. In that context, Vanstone J went on to consider whether Health Services could be seen as a successor of the Village, for the purposes of the second exception, described above. She was not satisfied of that, noting that "[a]lthough its operations coincide with those of the Village to an extent, its objects are both broader and significantly different. It serves a different

---

27 References omitted.

geographical area… and lacks the focus on aged and indigent persons that characterised the Village's charitable purposes…" (at [28]). At [27] Vanstone J cited with approval an observation from *In re Rowell, deceased* (1982) 31 SASR 361 at 373 doubting that "charities which simply perform 'some of the charitable work' of an earlier charity, 'consistent with the dominant intention' of the earlier charity, could be successors in the relevant sense".

[42] 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.

[43] This is not a case of a charitable institution (SAQ) continuing to conduct its charitable work continuously, and only making changes as to its legal form. Nor is it a case where the activity and operations of an institution (SAQ) have been continued without change, under the control of a successor entity (Synapse) following deregistration of SAQ. SAQ ceased to exist in September 2016. Whilst some of its charitable work is now performed by Synapse, the latter is not the successor of SAQ, in the sense that it could be concluded SAQ continues to exist, simply in a different legal form.

[44] As cases such as *Australian Executor Trustees Ltd v Ceduna District Health Services*, and the author of *Law of Charity,* make clear, there is a distinction, albeit subtle, between the question whether a later entity is the successor of an earlier one, for the purposes of determining whether the earlier entity continues to exist; and the question whether the later entity is the successor of an earlier one, for the purposes of either the application of the exceptions to the lapse rule, or the question of how a vested gift, affected by a supervening impossibility (as in this case) should be applied cy-près.

[45] As Dal Pont observes, at [15.9] of *Law of Charity* (2nd ed), "[a] successor institution is, by definition, a different institution to the now non-existent institution named in the will". In some cases it may be possible to conclude the previous institution has not ceased to exist, but morphed into the putative successor institution. But in others, such as this case, it will not; and the question is how to apply the gift cy-près. In this regard, I refer to what is said in [15.7] and [15.10] of Dal Pont:

> "15.7 In assessing whether or not an institution is a successor institution, it is relevant to compare its objects and activities with those of the named institution. Where there is complete identity between the institutions in question, the cy-près doctrine is readily applied (or the court may, as noted above, conclude that there has in fact been no ceasing of the named institution). The same is so if there is 'practical identity' between the two institutions. But a cy-près application is not precluded by an absence of practical identity between the institutions. In these scenarios the testator's purpose in making the gift is the central inquiry. The broader that purpose can be construed, the greater the prospect that an institution can take as a successor even if it differs from the named institution. …
>
> 15.10 In any event, even if an institution fails to convince the court that it is a successor institution to the named institution, the court may nonetheless apply the gift cy-près (which may include the alleged successor as an object) if it finds that the donor evinced a general charitable intention."

[46] I mention this because, although I am not persuaded Synapse is the successor of SAQ in the sense that it could be said SAQ continues to exist, albeit in the form of Synapse, it remains to be determined how the gift to SAQ, which is now impossible to pay, should be applied. Each of the National Stroke Foundation and Stroke Recovery Trial Fund Ltd have filed material in support of those entities, respectively, being considered an appropriate recipient of the funds under a cy-près scheme. Synapse likewise presses for a finding that it is the appropriate recipient. As I have already noted, all parties agreed that, in the event the court was not satisfied that it was appropriate to construe clause 4.3(2) of the will as a gift to Synapse, the court should adjourn the further hearing of the proceeding, for the purpose of determining how the gift under clause 4.3(2) of the will should be applied cy-près. That is an appropriate course to take.

[47] I will hear from the parties as to whether directions should be made to facilitate the timely and efficient further hearing of the matter in this respect, and also in relation to costs.