

CANADA / JUDGMENT

Weir Estate (Re)

2023 BCSC 2278

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Supreme Court of British Columbia

DECIDED

27 December 2023

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2023 BCSC 2278 Weir Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weir Estate (Re),

2023 BCSC 2278

Date: 20231227

Docket: S228874

Registry: Vancouver

In the Matter of the Estate of Jesse Weir, Deceased

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Public Guardian and Trustee of British Columbia:

K.M. Vinall

Counsel for the Attorney General of B.C.:

C. Page

Place and Date of Hearing:

Vancouver, B.C.

May 17, 2023

Place and Date of Judgment:

Vancouver, B.C.

December 27, 2023

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Introduction

- [1] This proceeding was commenced by the Public Guardian and Trustee of British Columbia ("PGT") as petitioner, on notice to the Attorney General of British Columbia, Adelaide All Breed Dog Rescue Incorporated ("AABDR"), Animal Welfare League of South Australia Inc. ("AWL SA"), Hahndorf Interim Animal Shelter Inc. ("HIASA"), Humane Research Australia Inc. ("HRA"), South Australian Humane Animal Rescue Association Incorporated ("SAHARA"), Royal Society for the Prevention of Cruelty to Animals (South Australia) Incorporated ("RSPCA SA"), South Ozz Shelter ("SOS"), and the Estate of Jack Weir, c/o Stephen Weir, executor.
- [2] The PGT appears as administrator with will annexed of the estate of Jessie Weir, deceased. The executor originally named in the will of Ms. Jessie Weir dated January 28, 1983 (the "Will") declined to act as executor.
- [3] Two named beneficiaries in the Will, Sandy Creek Dog Sanctuary ("SCDS") and Anti-Vivisection Union of South Australia Inc. ("AVUSA"), ceased to exist prior to Ms. Weir's death. SCDS was an unincorporated private entity providing temporary shelter for and rehoming of dogs in an area northeast of Adelaide, Australia. SCDS closed in 2004. AVUSA's charitable status was voluntarily revoked effective November 12, 2016. As described below, as a result of their ceasing to exist, the gifts to SCDS and AVUSA fail: *Re Eberwein Estate*, 2012 BCSC 250 at para. 45. This matter concerns what will become of the failed gifts.

Issues to Be Determined

- [4] The petitioner applied for the construction of the Will and for the opinion, advice, and direction of the Court as to the proper administration of the estate of Ms. Weir and, in particular, for an order determining the following questions:
1. Do the failed gifts of residue in the Will to SCDS and to AVUSA disclose a general charitable intent and therefore become subject to distribution under a cy-près scheme?
 2. If the gifts become subject to distribution under a cy-près scheme, to which organization(s) are those gifts payable?
 3. If the gifts do not become the subject to distribution under a cy-près scheme, do the gifts pass to Jack Weir, being the sole intestate heir?
- [5] The petitioner also seeks costs of these proceedings, payable from Ms. Weir's estate as special costs.

Background Facts

- [6] Ms. Weir died on November 30, 2016 at the age of 91. She was domiciled in British Columbia and lived in Nanaimo.
- [7] A grant of administration with order and the Will annexed was issued by this Court to the petitioner on January 9, 2019.
- [8] At the time of her death, the gross value of Ms. Weir's estate was approximately \$577,450. Currently, the gross value of the estate is approximately \$359,400, of which \$120,000 is held on account of interim distributions that would have passed to AVUSA and SCDS under the Will. There are anticipated further expenses of legal fees and costs in connection with these proceedings to account for fees and other miscellaneous expenses.
- [9] Paragraph 4 of the Will provides for the residue of Ms. Weir's estate to be divided in equal shares among four animal welfare organizations in South Australia:
- a) the Anti-Vivisection Union (SA) Inc. of Clarendon (named in the Will as the Anti-Vivisection Union (South Australia) Incorporated and defined above as "AVUSA");
 - b) the Animal Welfare League of South Australian Inc. of Wingfield (named in the Will as the Animal Welfare League Incorporated and defined above as "AWL SA");
 - c) the Royal Society for the Prevention of Cruelty to Animals (South Australia) Incorporated of Adelaide (defined above as "RSPCA SA"); and
 - d) the Sandy Creek Dog Sanctuary of Lyndoch (defined above as "SCDS").

Clarendon, Wingfield, Adelaide and Lyndoch are all situated in South Australia, either in or within 60 kilometres of Adelaide.

- [10] It was apparent from the Will that the testator had a strong interest in animal welfare generally, and was opposed to experimentation on animals for research purposes. At the date the Will was executed, the deceased was resident in Lynton, a southern suburb of Adelaide. She subsequently emigrated to Canada, where she died.
- [11] Following the payment of debts, expenses and the legacy referred to in the Will, \$60,000 was distributed to each of the RSPCA SA and AWL SA.
- [12] The petitioner has no extrinsic evidence concerning Ms. Weir's intentions regarding the contents of the Will.
- [13] It was also noted in the evidence that the PGT, after some significant inquiry, has not found in South Australia any organization which has as its primary purpose the opposition of vivisection. The petitioner extensively researched whether there were other entities which might be appropriate recipients of the failed gifts in the Will, and reference is made to potential recipients below.
- [14] The purposes of SCDS, an unincorporated private organization, appeared to have been to provide dogs with temporary shelter and care and to assist in their rehoming in the northeast of Adelaide. However, there are few records of SCDS's existence. There appear to be no records in official charitable listings of the organization, it ceased all operations in 2004, and a 2021 Australian decision calls into question its charitable status. In *Dobbins Estate (Re)* (17 August 2021), Adelaide (Supreme Court of South Australia), Justice Bochner considered a judicial advice book application under that court's testamentary causes jurisdiction concerning the Estate of Pauline Barbara Dobbins (Deceased). Justice Bochner, after a review of available records and in light of the evidence heard in that Court, concluded that, in light of the statement that SCDS was a "commercial venture", and "with no evidence to the contrary", he was "unable to conclude that [SCDS] was a charitable institution". Therefore, the Court concluded that the object of that gift to SCDS was not charitable, and it was not open to the executor to apply the cy-près doctrine to that bequest.
- [15] Research performed by the PGT provided several potential parties to include in the cy-près distribution of the bequest to AVUSA. These entities include (a) HRA; and (b) the RSPCA SA (a named beneficiary under the Will).
- [16] The HRA is an organization not based the state of South Australia but in the neighbouring state of Victoria. HRA provides education on and brings awareness to animal experimentation, and promotes anti-vivisection campaigns. HRA did not exist when the Will was made
- [17] The RSPCA SA, a registered charity under Australian legislation, has as its primary purpose the prevention of suffering and cruelty to animals, including certain animal experimentation and usage. Both the HRA and the RSPCA SA have objectives which include opposition to vivisection.

- [18] A number of other organizations identified by the PGT include animal welfare charities located in South Australia whose purposes include temporary shelter, care and rehousing of dogs and cats. Such organizations include: AABDR, AWL SA (a named beneficiary under the Will), HIASI; SAHARA; SOS; and South East Animal Welfare League of South Australia Inc. ("SEAWL").
- [19] Both the AWL SA and RSPCA SA have purposes apart from anti-vivisection, which include the rescuing, shelter and rehousing of dogs and other domestic animals. According to the AWL SA website, it assumed responsibility for some of the dogs which were formerly cared for by SCDS.
- [20] AABDR does not have a current charities licence listed with the Australian Government's Charities and Not-for Profits.
- [21] SAHARA, operating as South Australian Dog Rescue, has purposes that include the rescuing, rehabilitation and rehousing of dogs and other animals and provides temporary shelter and care for dogs and assistance in their rehoming. However, the RSPCA SA has reported complaints of animal cruelty against SAHARA. Based on incidents in 2019, SAHARA was prosecuted on animal cruelty charges. In the affidavit of Maria Joanne Jubb, the Public Officer of SAHARA, dated December 23, 2022, Ms. Jubb confirmed that charges were laid against SAHARA and its operators. The charges against the organization itself were withdrawn when the operators of SAHARA agreed to plead guilty to six offences. Ms. Jubb asserted that SAHARA relies entirely on volunteers and the cruelty was based on a lack of resources rather than any deliberate actions.
- [22] SEAWL provides temporary shelter and care for dogs and assistance in their rehoming. However, no direct evidence was presented by this organization as to its work.
- [23] SOS provides temporary shelter and care for dogs and assistance in their rehoming.
- [24] AVUSA's purposes were the prevention of all experimentation using animals and the exploitation of animals in the area of human commerce or activity, and the dissemination of information concerning vivisection and its alternatives.
- [25] HRA's purposes include increasing awareness of animal experimentation and the pursuit of all reasonable channels to eliminate such experimentation and to champion the benefits of realistic, scientifically effective alternatives to all forms of animal usage in research and training as well as the reduction of animal testing. HRA is not situated in South Australia, but in the neighbouring state of Victoria, and did not exist at the time of the will. HRA operates throughout Australia, and formerly worked in close cooperation with AVUSA. According to the affidavit of Rachel Smith affirmed November 25, 2022, upon the dissolution of AVUSA, its existing members were referred to HRA membership, and AVUSA transferred \$50,000 of unspent financial reserves to HRA as noted in Exhibit "C" to that affidavit.

- [26] According to the Affidavit of Paul Stevenson, the chief executive officer of RSPCA SA, dated August 16, 2022, RSPCA SA, a charitable organization, has purposes that include the prevention and alleviation of suffering of animals and has advocated for the reduction of animal experimentation and elimination of cosmetic testing on animals. Mr. Stevenson also notes that the RSPCA SA operates throughout South Australia with offices located in a suburb of Adelaide. Mr. Stevenson states, at para. 17 of his affidavit, that he is aware of the work of HRA, a reputable organization which he accepts has similar objects, in particular anti-vivisection promotion, to those carried out by the AVUSA and would support HRA as a recipient of the share of the estate of Ms. Weir intended to pass to AVUSA. Mr. Stevenson submits that if the Court finds that a South Australian organization should benefit under a cy-près scheme, then the RSPCA SA is the most closely aligned organization to AVUSA. He says that, should the RSPCA SA receive funds from the estate, those funds will be used for the purpose of advocacy work in reducing animal testing in South Australia.
- [27] Ms. Weir's sole heir-at-law, who would be entitled to take on an intestacy is her brother, Jack Weir. As Mr. Weir died in September 2021, the position of the executor of his Will--his son, Stephen John Weir--is that the failed gifts should pass upon intestacy to the estate of Jack Weir.
- [28] The PGT takes no position as to whether or not cy-près distribution should apply to the failed gifts. The Attorney General of B.C. takes no position on the orders sought by the PGT.

Legal Basis

- [29] The law is clear that the Court will uphold a gift for charitable purposes where at all possible, in favour of charity and away from intestacy. See *McGregor Estate (Re)*, 2014 BCSC 896.
- [30] Where it is impossible to carry out a gift, such as where a beneficiary no longer exists, but it can be shown that the donor had a general charitable intent, the Court has an inherent jurisdiction to make an order for a cy-près distribution. Under a cy-près distribution, the intended gift is applied in a manner as close as possible to the expressed intention of the donor. See *Galloway Estate v. British Columbia*, 2021 BCSC 413; and *McGregor* at paras 19-23.
- [31] Some cases stand for the proposition that where a testator shows an intention to make a gift to a particular institution and that institution no longer exists at the time of death, the gift will fail: see *Re Eberwein Estate*. However, the Court may also infer general charitable intention where a gift of residue to a charitable organization does not provide for a gift over in the event of failure. In these situations, as the testator did not address what would happen in the event the gift lapsed, the Court is entitled to infer that the testator planned that the gift would go forward for its general charitable purpose. See *Buchanan Estate (Re)* (1996), 11 E.T.R. (2d) 8, 1996 CanLII 3583 (B.C.S.C.) at paras. 21-25, *aff'd* *McMinn v. Watson* (1997), 44 B.C.L.R. (3d) 283, 1997 CanLII 2620 (B.C.C.A.).

Discussion

[32] This Court finds that it is clear that the Will demonstrated the testator's general intention to benefit a charitable purpose. Following that finding, this Court has a discretionary jurisdiction to distribute the gift in the Will, which has otherwise failed, based on the cy-près doctrine. Case law supports the proposition that gifts which provide for the protection and benefit of animals are charitable, being of "general public utility": see e.g., *Bodner Estate (Re)*, 2019 BCSC 237 at para. 24.

[33] Canadian courts have recognized that gifts to charities outside of Canada may be valid. Where this is the circumstance, the Court will conduct an inquiry to determine the appropriate charitable beneficiary consistent with the Will.

[34] As noted above, there were a number of organizations brought to the attention of the Court by counsel in response to a potential cy-près scheme. Given the testator's expressed intention to contribute to a charitable organization and this Court's finding of a general charitable purpose, the Court is satisfied that under a cy-près distribution, any potential beneficiary must be a charity.

[35] Counsel noted that it is difficult to reconcile some of the caselaw in this area. There are cases which say that if the gift is intended for a named institution, and that institution does not exist at the time of death then the gift fails. See *Re Eberwein Estate* at para. 45, and *Re Ogilvy and Ogilvy* (1952), [1953] 1 D.L.R. 44, 1952 CanLII 310 (O.N.S.C.), where the Court made the following comment at p. 45:

There is no general charitable intention here. The gift is to a particular institution. Nor is the institution named merely as the instrument for carrying out a general charitable intention. In these circumstances, the law is clear that the gift is subject to the ordinary doctrine of lapse and, since it is part of the residue, it goes to the next-of-kin.

[36] However, there are also cases that hold where the testator expressed a clear intention to benefit a charity and that charity had ceased to exist at death, the Court has a discretion to allocate the bequest on the cy-près basis, that is, close in kind to the original legatee.

[37] In *McGregor*, the Court found that a testamentary gift of the residue of the deceased's estate to the Auxiliary to Woodlands (the "Auxiliary"), a charitable organization that no longer existed, disclosed a general charitable intent and could therefore be distributed under a cy-près scheme. The testator provided in her will for a number of specific gifts, which had been administered. Thereafter the residue of the estate was to be placed in trust for the lifetime of her son who was mentally challenged. At the time of the will, the testator's son was living at the Woodlands institution. On his death, the residue of her estate was to then be given to the Auxiliary. The Auxiliary was an unincorporated association, run by volunteers, which provided services of a varied nature to the residents of Woodlands, "including funding's for outings or personal goods, or other services that were not provided to the residents by the Woodlands facility" at para. 9. In that case, the Court found it was "clear that the aim of the

charity was to enrich the lives of Woodland's residents": at para. 9.

- [38] In 1993, the Auxiliary ceased to operate and, in 1996, the Woodlands facility was closed. The Court found at para. 10 that "Although the charity had a possible successor group called the New Beginnings Rehabilitation Society, that society was dissolved in 2003." After Woodlands closed, the testator's son was moved to a group home operated by the Healthy Opportunities for Meaningful Experience Society, or "HOMES", a registered society under the laws of British Columbia. The son continued to reside in a facility operated by HOMES until his death on March 31, 2013.
- [39] The Court made the following comments on the application of the cy-près doctrine in that case:
- [19] It sometimes happens, as in this case, that testators leave a legacy to an institution which later ceases to exist. When that happens, the gift either lapses and falls to be distributed on an intestacy, or comes under the cy-près doctrine. The doctrine of cy-près applies to save the gift where the court can infer that the testator intended to devote that property to a general charitable purpose: see *Re Estate of Robert Hugh Buchanan* (1996), 1997 CanLII 2620 (BC CA), 11 E.T.R. (2d) 8 (B.C.S.C.), affirmed (1997), 44 B.C.L.R. (3d) 283 (C.A.).
- [20] Cy-près means "as near as" possible; according to the Court of Appeal in *Buchanan Estate*, in cases where a charitable gift or bequest has become impossible or impracticable, it allows the court to apply the property to some other charitable purpose as nearly as possible resembling the original purpose.
- [40] Further, at para. 29, the Court quoted from *Buchanan* stating:

A general charitable intention will be evidenced in part when the gift consists of the residue of the estate and there is no obvious consideration of what happens to the gift should it lapse. The underlying assumption is that the testator did not make preparations in the event of a lapse, because he had planned that the money would go forward to his general charitable purpose.

- [41] In *McGregor*, the Court ultimately concluded that the residual gift was a residuary bequest to a charitable institution with no gift over in the case of a lapse. The Court inferred that the testator planned for the money to go towards a general charitable purpose. Ultimately, the Court concluded that HOMES was an appropriate recipient under the cy-près scheme as it provided similar services, notwithstanding it was not a direct successor of Woodlands or the Auxiliary. The Court made the order with the restriction that the gift could only be used to provide additional or extra services to improve the lives of mentally-challenged persons, and not for funding towards the operational needs of any facility operated by HOMES.

Conclusions

- [42] The answers to the questions posed in this petition by the petitioner are as follows:

Do the failed gifts of residue in the Will to SCDS and to AVUSA disclose a general charitable intent and therefore become subject to distribution under a cy-près scheme?

[43] Given that both AVUSA and SCDS no longer existed at the time of Ms. Weir's death, the appropriateness of the application of the cy-pres doctrine must be determined. I find that, given the charitable nature of AVUSA and its work protecting animals, by naming AVUSA as a beneficiary the testator provided a clear indication of her intention to provide funds for an organization or organizations of a similar purpose. It was also clear that the testator intended to make a substantial bequest to provide for such assistance to animal welfare. Given this general charitable purpose, the failed gift to AVUSA is subject to distribution under a cy-près scheme.

[44] As for SCDS, as noted above, the status of SCDS as a charitable institution was considered in Australia, and Judge Bochner, on the evidence presented to that Court including an unchallenged statement that SCDS was a "commercial venture", concluded that SCDS was not a charitable entity, and therefore the gift in that case could not be included in a distribution under a cy-près scheme. While a finding of an Australian court is not binding on this Court, judicial comity suggests that this Court should accept its finding unless there is a strong evidentiary basis to disregard it. There has been no such evidentiary basis provided. As a result, the gift to SCDS fails, and lacks a clear charitable intention. The failed gift therefore passes to the Estate of John Weir on an intestacy, for the benefit of his legatees.

If the gifts become subject to distribution under a cy-près scheme, to which organization(s) are those gifts payable?

[45] As a cy-près distribution applies to the failed gift to AVUSA, it is necessary for the Court to determine which organization or organizations should be paid the funds instead. The Court has a wide discretion to provide funds under the cy-près doctrine to charities which closely fit the apparent intention of the testator--in this case, the anti-vivisection campaigning of AVUSA. Having reviewed the descriptions of the organizations contained in the seven affidavits filed, I conclude that the failed bequest shall be divided equally between the Royal Society for the Prevention of Cruelty to Animals (South Australia) and Humane Research Australia Inc. (collectively the "cy-près legatees"). Any interest earned on the failed bequest which is properly payable to the cy-près legatees shall be included with their respective shares of the failed gift.

If the gifts do not become the subject to distribution under a cy-près scheme, do the gifts pass to Jack Weir, being the sole intestate heir?

[45] I have made this finding above in my discussion of whether the failed gifts become subject to a cy-près distribution but I will repeat them for clarity. Again, based on the findings noted above: (1) the gift to SCDS failed due to the organization no longer existing at the time of the testator's death; (2) SCDS was not a charity and the gift therefore did not demonstrate general charitable intent; and ultimately, (3) the gift to SCDS must fail and be added to the residual bequest to the Estate of Jack Weir.

Costs

[46] The petitioner is awarded the costs of these proceedings payable from the estate of Jessie Weir as special costs.

"Ball J."

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Prepared on 27 October 2026 · Esheria