**CY-PRÈS SCHEMES**

By John Stinson, Partner

**INTRODUCTION**

This paper provides a brief overview of the law and procedures in New South Wales relating to variation “cy-près” of the provisions of a charitable trust where the charitable purpose has failed.

Where the charitable purposes for which a charitable trust has been established cannot be carried out, The Supreme Court has the power to vary those charitable provisions. The Court will settle a scheme for the purpose of modifying the charitable purposes and to give effect to the charitable purposes. Such a scheme is known as a “Cy- Près Scheme”.

According to Dal Pont, the term “cy-près” is an English translation of the Norman French term “cy-pre comme possible”, meaning “as near as possible”. In other words, the variation must be made as closely as possible to the original intention of the testator or settlor.

**WHAT IS A CHARITABLE TRUST**

It is not possible in the short space provided by this paper to attempt to define nor even explain what constitutes a charitable trust for the purposes of trust law.

Suffice it to say that a charitable trust is one of which there are no beneficiaries as such. Rather the trust has been established for purposes which the law recognises as being charitable. “Charitable” does not have the wide meaning which it might have in popular usage where it may mean “benevolent”. Nor does it have the same meaning as “charitable” for the purposes of Australian income tax legislation. It must satisfy the somewhat narrow (in modern times) tests recognised in Equity. Simply put, the charitable purpose must be to benefit the public and fall into one or more of the following categories:

- Trusts for the relief of poverty;
- Trusts for the advancement of education;
- Trusts for the advancement of religion; and
- Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

**THE CIRCUMSTANCES IN WHICH A CY-PRÈS SCHEME WILL BE DIRECTED**

For the Court to order a cy-près scheme, one of the following has to occur:

1. There is
   (a) a case of initial impracticability or impossibility and
   (b) either an out-and-out intention to benefit charity or a general charitable intention plus a possible mode of effectuating that intention; or

2. There is a case of supervening impracticability or impossibility (whether the intention be general or merely particular); or

---

1 See Note 1 to paragraph 15.1 “Law of Charity” G E Dal Pont
3. There is a case where a trust has exhausted its original purpose (whether the original purpose be particular or general in intent) and a surplus remains. A comprehensive treatment of the principles above is to be found in Jacobs’ *Law of Trusts in Australia*.  

**Initial Impracticability or Impossibility**

The time at which to assess the impracticability or impossibility for a trust established pursuant to a Will is the date of the testator’s death. A gift to a named or identified charitable institution which ceased to exist prior to the testator’s death will normally lapse where the Will makes no provision for such an event. However, the Court may then order a cy-près scheme where the Will displays a general charitable intention and there is an appropriate successor. This often occurs where some charitable entity has taken over the one named or identified in the Will so that the assets of both have been merged. The Court would need to examine the objects and activities of the successful institution to ascertain whether or not it was virtually identical to the one taken over. The situation may be a little more difficult however, where the gift, although given to a named or identified institution, is expressed for the purpose of carrying on a particular charitable work. In that instance, the issue is whether or not the successful institution carries on the particular work for which the gift was made. In *Re Wright [1951] Tas SR 13* at 15 Green J construed a request to the Director of Education to be used for the benefit of the since closed “teachers’ training college”, as a gift for the work of the college. As that work was now being carried on by the University of Tasmania, the gift, in effect, passed to that University.

**Supervening Impracticability or Impossibility**

If a gift is made to a charitable institution that, once the gift has taken effect, ceases to exist, the Court will apply that property to objects as near as possible (cy-près) to the objects of the extinct institution.

Where the gift is made for charitable purposes which subsequently to the testator’s death become impracticable or impossible to carry out, the Court will apply the trust fund cy-près.

The case of the Kyle Williams Trust dealt with later on in this paper is an example of a supervening impossibility. In the case of supervening impossibility, whether the intention of the creator of the Trust be out-and-out charitable, or for some lesser form of general charitable intention, or any particular charitable intention exists once the trust has taken effect, it can never fail. If the designated purpose becomes impossible, a purpose which is cy-près will be nominated by the Court.

**The original purpose has been exhausted**

In the event that the initial purpose for which the charitable trust has been set up has been achieved and there is a surplus remaining in the trust fund, that surplus will either be applied cy-près or revert to the testator’s Estate. The issue, which would appear to be unresolved, is whether a cy-près application requires proof of a general (as distinct from a particular) charitable intention on the testator’s behalf.

**THE KYLE WILLIAMS HOME TRUST**

An interesting case demonstrating the application of these principles, and the procedure to obtain orders cy-près is The Trust Company (Australia) Limited att the Kyle Williams Home Trust ats Attorney General of NSW (concluded in *The Trust Company (Australia) Ltd v Attorney General of New South Wales (2)*).

---

1 Jacobs’ paragraph 1070 to 1074  
2 Jacobs’ *Law of Trusts in Australia* 3rd Edition (JD Heydon and MJ Leeming)  
3 Dal Pont paragraph 15.40 – 15.43  
4 The Trust Company (Australia) Limited as Trustee for Kyle Williams Home Trust vs Attorney General of New South Wales (2) [2012] NSW SC 1505 (7 December 2012)
Caroline Milne Williams ("the Deceased") died on 5 January 1939. In her will she had directed that her trustee should hold her property, situated at Kyle Bay, Georges River, together with 5 acres or thereabouts of land attached thereto and known as The Retreat, on trust to convert the same to a convalescent home for children. That home was to be known as the Kyle Williams Home.

The Kyle Williams Home was a substantial private residence with extensive grounds. It had never been used for the purposes specified in the will. Due to the intervention of the Second World War it was not opened as a children's home until 1947.

Between 1947 and 1984 the property was leased for no rent to an organisation known as Legacy House which operated it as a children’s home as distinct from a home for convalescent children.

From 1985 the property was let at no rent to a department of the Presbyterian Church of Australia, NSW, known as Presbyterian Social Services, which used it as a family group home for children and young people who were unable to live at their own homes. Presbyterian Social Services used the property for that purpose until about 2003. That use ceased because Presbyterian Social Services was dependant on funding from the NSW Department of Community Services for the operation of the facility. That department refused to continue funding because the use of such a property in that way was no longer consistent with the department’s philosophy for providing homes for children in need of care.

Since then the property ceased to be used by the Presbyterian Social Services and was, in effect, unoccupied by anyone other than the caretaker. The costs of maintaining and insuring it were substantial.

The trustee’s attempts to find an organisation to use the property as a convalescent home for children were unsuccessful, although it did receive some expressions of interest.

Accordingly, the trustee applied to the Supreme Court for orders cy-près.

In his first decision White J held that it was clear that as the deceased had a general charitable intention, the trust property could be applied cy-près, given that, as the circumstances existed, the use of the property as envisaged by the will would no longer be a suitable or effective method of using the property to give effect to the spirit of the trust. He held that it was, accordingly, appropriate to order that the trust property be applied cy-près and that a scheme be settled for the purpose. His Honour directed that the trustee advertise for further expressions of interest in using the property on the assumption that the purposes were altered to "providing care, support and rehabilitation for children suffering from any illness or from any physical or intellectual disability (including any psychiatric or psychological condition)".

Following the publication of those advertisements, the trustee received 22 submissions from entities interested in using the property. Most involved the construction of additional buildings and renovations to the existing ones. In the second stage of the cy-près application, the court had to consider which, if any, of the submissions should be accepted and accordingly if any, how to structure the changed trust terms.

As a result of screening of the proposals made by the trustee in conjunction with the Attorney General only four of the submissions were put to the court. Two very complex and costly proposals were contended for by the Estia Foundation and by the Wesley Mission. They both appeared. Senior Counsel appeared for those entities at the hearing. The trustee played, in effect, a submitting role, although it took the position that if the court was not minded to make any order in effect to provide the property to the Estia Foundation or Wesley Mission for the purposes propounded by the successful one of them, the property should be sold and appropriate orders made in respect of the proceeds of the sale.

The court determined that it would make orders in favour of Estia Foundation having the use of the property and directed it, in conjunction with the Attorney General and trustee, to settle a draft cy-près scheme.

That scheme which ran into 17 double spaced pages was subsequently adopted by the court and orders made in accordance with it. It stated that the purpose of the trust was:
The Trust Purpose

1. Statement of the Trust Purpose

The Trust Purpose is the provision of accommodation on the Trust Real Property to children and young adults suffering from any illness or from any physical or intellectual disability including any psychiatric or psychological condition.

2. Activities within the Trust Purpose

Without limiting the generality of clause 3.1, the Trust Purpose includes:

(a) the provision of accommodation and support to disabled children, including the provision of respite care, support and rehabilitation;

(b) the provision of accommodation and support to disabled young adults whether or not that accommodation is provided on a group home basis, including the provision of long term care, support and rehabilitation until practical alternate accommodation is found;

(c) In addition to the provision of accommodation, the provision of respite and associated care, education programs and the provision of life skills tutoring and mentoring of disabled children and disabled young adults;

(d) in addition to the provision of accommodation, the provision of support services necessary or incidental to the provision of the services listed in subparagraphs (a) to (c) above; and

(e) the construction and maintenance of appropriate accommodation, recreational, sporting and other facilities on the Trust Real Property for disabled children and disabled young adults.

3. Non-discrimination

The Trust Purpose shall be performed in respect of the class of persons identified in clause 3.1 with no preference to be given to any person within that class on the basis of race, ethnicity, sex, gender, religion or belief.

GENERAL LAW AND STATUTE

The principles briefly outlined above come from the general law.

The Charitable Trusts Act 1993 broadens the circumstances in which the original purposes of the trust or gift can be varied. For example, whereas these circumstances are at general law limited to the ‘impossibility’ or ‘impracticality’ of the original purposes, the statutory circumstances include where ‘the original purposes have ceased to provide a suitable and effective method of using the trust property’.

Nevertheless the practical operation of the statutory provisions must still be utilised having regard to the general law principles except, where there is some inconsistency.

---

3 Dal Pont paragraph 15.2
THE CHARITABLE TRUSTS ACT 1993 (NSW)


The Act applies to charitable trust proceedings.

‘Charitable trust proceedings’ are widely described in sections 3 and 5.

Certain charitable trust proceedings must be authorised by the Attorney General, or require leave of the court (Section 6).

Sections 9 and 10 widen the common law circumstances relating to cy-près applications.

Section 9 (1) provides that the circumstances in which the original purposes of a charitable trust can be altered to allow the trust property or any part of it to be applied cy-près include circumstances in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust.

Section 10 provides that part 3 of the Act (in which section 10 appears) does not affect the requirement that trust property cannot be applied cy-près unless it is given with a general charitable intention. However, a general charitable intention is to be presumed unless there is evidence to the contrary in the instrument establishing the charitable trust.

Section 23 of the Act provides that a trust is not invalid merely because some non-charitable and invalid purpose as well as some charitable purpose is or could be taken to be included in any of the purposes to or for which an application of the trust property or of any part of it is directed or allowed by the trust. Any such trust is to be construed and given effect to in the same manner as if no application of the trust property or of any part of it to or for any such non-charitable and invalid purpose had been or could be taken to have been so directed or allowed. Note, however that the section does not apply to any trust established under the will of a testator who died before 1 January 1939.

Part 4 provides for the possibility of a cy-près scheme being established by the Attorney General, rather than an application having to be brought to the Supreme Court. This however is restricted to trust funds the value of which is $500,000 or less. Obviously this part of the Act is intended to avoid the potentially large costs involved in an application to the Supreme Court.

CY-PRÈS SCHEMES ESTABLISHED FOR LOW VALUE CHARITABLE TRUSTS

Part 4 of the Charitable Trusts Act enables the Attorney General to establish schemes.

Section 12 is in the following terms:

12. Attorney General may establish schemes

(1) The Attorney General may by order establish a scheme for the administration of any charitable trust. In particular, the Attorney General may by such an order:

(a) establish a scheme for the alteration of the original purposes of a charitable trust so as to enable the trust property or any part of it to be applied cy-près if it appears to the Attorney General that the trust property or any part of it may be so applied, or

(b) establish a scheme to extend or vary the powers of trustees of a charitable trust or prescribe or vary the manner or mode of administration of any charitable trust, either generally or in a particular case, if it appears to the Attorney General that it is expedient to do so in the interests of the administration of the charitable trust, or

(c) in the case of 2 or more charitable trusts, establish a scheme to authorise the trustees to use common premises or employ common staff in the administration of the trusts, to pool the trust property for the purpose of investment, or otherwise to combine for any purpose of administration of the trusts.
(2) Without limiting the generality of any provision of this Part, a scheme under this Part may vest in any trustees of a charitable trust who desire to sell, mortgage or lease the trust property or any part of it, but who cannot do so for lack of power vested in them by the instrument (if any) creating the trust or by law, the necessary power for such a sale, mortgage or lease.

(3) If there are no trustees of a charitable trust, a scheme under this Part may appoint trustees for the purposes of the scheme.

(4) A scheme for the administration of a charitable trust established by the Attorney General under this Part has the same effect as it would have if it had been established by the Court.

Section 13 permits the Attorney General to establish a scheme on the application of all or any of the trustees, and in a special case, on the Attorney General’s own initiative or in accordance with a referral from the court.

Section 14 restricts the power of the Attorney General to establish schemes and is in the following terms:

14. Restrictions on power of Attorney General to establish schemes

(1) The Attorney General is not to establish a scheme under this Part if:

   a) the value of the trust property affected by the scheme exceeds $500,000 or, if another amount is prescribed by the regulations, that other amount, or

   b) the Attorney General is satisfied that the subject matter is, because of its contentious character or any special question of law or fact or for other reasons, more fit to be dealt with by the Court.

(2) This section does not apply to the establishment of a scheme in accordance with a referral from the Court.

Sections 15 to 22 largely deal with procedural matters with applications to the Attorney General to establish a scheme, including appeals from orders made by the Attorney General.

PROCEDURE

The first step in any cy-près application is to seek the Attorney General’s authority to bring the cy-près proceedings in the Supreme Court (unless, of course, it is an application to the Attorney General for a scheme to be established by the Attorney General).

In my experience, it is usual to provide the Attorney General with a copy of the proposed summons, orders sought (if not set out in the summons) and supporting affidavit.

The application to the court is commenced by summons, naming the Attorney General as defendant. It is supported by an affidavit which must annex or exhibit the Will, set out details of the history of the trust’s establishment and then the facts giving rise to the application.

In some cases the Attorney General might consent to the proposed orders being sought and the Court might make all of the required orders either on the first return date of the summons or shortly afterwards. That, however, has not been my experience.

In many cases it may be necessary to give proper notice of the proceedings to other parties who might be affected. The Court may, of course, make directions to that effect. Such parties would then have the right to appear and themselves become parties to the proceedings.

Often the application will proceed in a two stage process.

The first stage will involve the Court determining that the trust is a charitable one and, if so, making an order to the effect that a cy-près scheme should be settled. It will usually leave that to the plaintiff and the Attorney General to draft and present to the Court.

The second stage involves the Court then determining the particular order to make. At the second stage other parties may become involved and promote a particular variation. An example of this is set out later in this paper.

When an application is to be made to the Attorney General for the Attorney General to settle the cy-près scheme, the Attorney would normally require:
a. all of the same material as I have mentioned above for the initial application to the Court except, of course, for the summons itself;

b. full details of any other parties that might be involved or have an interest in the application;

c. information as to whether or not the application might be contested and if so, by whom.

The Attorney may, of course, require additional information. You will find a list of guidelines for charitable trust applications under section 13 of the Charitable Trusts Act 1993 set out in Mason & Handler.⁷ A copy is attached to this paper.

**BIBLIOGRAPHY**

- Law of Charity by G E Dal Pont;
- Jacobs' Law of Trusts in Australia (seventh edition) by J.D. Heydon and M.J. Leeming;
- Succession Law and Practice NSW by Mason & Handler
- The Trust Company Australia (Limited) as Trustee of the Kyle Williams Home Trust vs Attorney General of New South Wales [2011] NSW SC 323 (18 March 2011);
- The Trust Company (Australia) Limited as Trustee for Kyle Williams Home Trust vs Attorney General of New South Wales (2) [2012] NSW SC 1505 (7 December 2012)

John Stinson
2 May 2016

---

⁷ Succession Law and Practice NSW, Mason & Handler
GUIDELINES FOR CHARITABLE APPLICATIONS UNDER SECTION 13 OF THE CHARITABLE TRUSTS ACT 1993

1. In support of an application under s 13 of the Act an applicant is to supply the following information:
   (1) copy of the will, instrument, order or other document establishing the trust;
   (2) if the trust has been established other than in writing, details of the creation and nature of the trust;
   (3) the reasons for the application by reference to evidence that the objects of the trust have failed necessitating consideration of a cy pres scheme;
   (4) details of the proposed scheme with reasons for its selection as the most suitable and effective within the cy pres principle. Details of any viable options considered should also be provided;
   (5) copies of any previous schemes or orders relating to the trust;
   (6) names and addresses of the current trustees;
   (7) names and addresses of any residual or default beneficiaries together with details of their potential interest in the trust property;
   (8) information as to the value of the trust property;
   (9) address for service within New South Wales;
   (10) if the proposed scheme involves other charitable trust, the application should furnish details of that trust’s activities together with the trustee’s consent to the proposed scheme;
   (11) details of the nature, structure and operations of the administrator/trustee proposed for the scheme should be provided including any constitution and rules of the organisation, if relevant; and
   (12) the consent of the proposed administrator/trustee to the scheme should be provided together with details (if not otherwise provided) of its intended implementation of the scheme.

2. The application is to be signed by all current trustees. If this is not possible, then details are to be given as to why it has not been possible to obtain signatures of such trustees.

3. If there are no trustees, or the current trustees are unavailable, interested parties may lodge an application and request that the Attorney General exercise his powers pursuant to s 13(1)(b) of the Act to establish a scheme. The information required under paragraph 1 should be provided in support of such an application together with details of the nature of the interest held by the applicant and the reasons for the unavailability of trustees.

4. The Attorney General may require such additional information and in such form as he may consider necessary to assist his consideration of the Application.
   Applications should be directed to:
   The Director General
   Attorney General's Department
   Goodsell Building

Disclaimer
This document was prepared by Diamond Conway Lawyers. It contains information of a general nature only and is not intended to be used as advice on specific issues. Opinions expressed are subject to change. Although Diamond Conway gathered the information contained in this document from sources deemed reliable, and has taken every care in preparing the document, it does not guarantee the document’s accuracy or completeness. Diamond Conway disclaims responsibility for any errors or omissions.