

# Crowle Foundation v New South Wales Trustee and Guardian

## Crowle Foundation v New South Wales Trustee and Guardian [2010] NSWSC 647 (Supreme Court of New South Wales, Ball J, 25 June 2010)

This case concerned the construction of charitable bequests made in the will of the testatrix, Kathleen Mary Waugh. The testatrix died in 1994 leaving the bulk of her estate to the Public Trustee to be held on trust for the provision of care for her daughter, Michele. Michele had Down Syndrome, and lived in the care of the Crowle Home for 59 of her 69 years.

The Crowle Home (Crowle) was set up by the Challenge Foundation Ltd (Challenge) which was originally established as the Subnormal Children's Welfare Association in 1951. Challenge is a company limited by guarantee, and has as its principal object the provision of support services to the intellectually disabled. Before 1992, Challenge ran its operations through local volunteer branches. All property used by the branches was owned by Challenge.

The Crowle Home was obtained by bequest in 1952, and in 1955 it became the Ryde branch of the Challenge Foundation. For the first three years, Challenge ran the site as a school for the intellectually disabled. Over the next 20 years, the site was considerably developed with the completion of extra accommodation, a swimming pool and oval, a workshop and an administrative building (referred to as Lacey House). In 1978, the school was taken over by the government, and relocated elsewhere.

In 1992-93, a major reorganisation of Challenge was undertaken. The branches were encouraged to incorporate, and all property they were using was made over to them. Crowle accordingly incorporated with the main object being 'to succeed to and carry on all the activities hitherto carried on by Ryde Branch of the Challenge Foundation of New South Wales'. The Challenge Foundation transferred the land on which the Crowle Home stood to Crowle by Deed on 1 July 1993. This part of the land on which Lacey House stood was then leased back to Challenge for a period of 99 years. Challenge used Lacey House as its head office.

In 1997, Challenge commenced action against Crowle concerning the transfer of the land as a whole, but these proceedings were dismissed: Challenge Foundation of New South Wales Ltd v Windgap Foundation Ltd [2002] NSWSC 1292.

In 2008, Crowle merged its operations with the former Hornsby branch of the Challenge Foundation, which was called the Achieve Foundation Ltd. The merger entity was called ACNewCo Ltd. The reasons for approval of the two schemes of arrangement involved can be read in the case note for Achieve Foundation Ltd v ACNewCo Ltd; in the matter of Achieve Foundation Ltd and the Crowle Foundation Ltd [2010] FCA 382, available at <https://wik.i.qut.edu.au/display/CPNS/Dissolution%2C+winding+up+and+insolvency+cases>

The merger arose in the following circumstances. During 2005 to 2008, both companies experienced financial difficulties, with those of Achieve being more severe than those of Crowle. However, both companies had total assets in excess of total liabilities. The boards of both companies decided that it would be desirable to merge their activities. All board members of both companies supported the merger.

The merger was effected by two schemes of arrangement. Under the schemes, all the assets and liabilities of the two companies were to be transferred to a new company limited by guarantee (Newco). The principal characteristics of the schemes included:

- Newco would be a not-for-profit company with deductible gift recipient status.
  - Crowle and Achieve were to be preserved as entities, and not wound up, in order to function as vehicles for receiving bequests, which would be passed on to Newco immediately.
  - A special trust fund of Crowle, the Crowle Foundation Personal Fund Trust, which had been treated as a separate fund by Crowle, was to be retained by Newco as an independent fund directed to the same users as had used it when Crowle was an entity.
- The Scheme Booklet described the benefits of the merger, particularly those which were financial, and contained other detailed information about the merger. None of this was controversial under Part 5.1 of the Corporations Act, and the scheme was approved by Foster J.

The only issue arising in the published reasons for approval of the scheme was the nature of the transfer of the assets and liabilities of each of Achieve and Crowle to Newco. At the time of the merger, Achieve had \$2,231,595 in liabilities, and Crowle had \$3,572,259 in liabilities. Achieve was running operational losses, and Crowle, although running a surplus, had difficulty with cash flow. Section 413 of the Corporations Act applied in that case.

The schemes required that both Achieve and Crowle continue in existence after the merger, in order to receive any bequests which might flow to them. Was this appropriate in the circumstance where both companies were in financial difficulty before the merger? Usually companies in this situation would be wound up. His Honour could see no difficulty:

*The work done by the pre-merger Foundations and expected to be done by Newco is vital beneficial community work. The merged entity should not, if at all possible, be deprived of the benefit of the bequests which might fall in at some time in the future simply because those bequests were made to one or other of the pre-merger Foundations.*

The fact that there were 'future proceedings' was not a bar to the merger going ahead as structured. Case law had previously considered the situation when there were future liabilities involved, but in this case, there were potential future assets. These were bequests made by testators who might have left money or other assets to the pre-merger Foundations in wills already made, or yet to be made in the future, naming the pre-merger entities as beneficiaries. His Honour described these bequests as 'contingent property', and held that they could not be seen as the property of Achieve or Crowle pre-merger, but would be the property of Newco.

Section 413(4) of the Corporations Act defines property as 'rights and powers of any description, including rights and powers that are of a personal character and are incapable under the general law of being assigned or performed vicariously'. Future property was held to fall within the definition of property in section 413(4) of the Corporations Act, even if, at the merger date, it is nothing more than potential or contingent. This interpretation is also supported by the definition of property in section 9 of the Corporations Act, which includes future property or contingent property: 'property means any legal or equitable estate or interest (whether present or future or whether vested or contingent) in real or personal property of any description and includes a thing in action'. His Honour held that the definition of property is meant to be expansive.

Since 3 December 2009, ACNewCo Ltd has been renamed Achieve Australia Ltd (Achieve). Challenge has continued to exist, but in a diminished form since the devolution to its branches. Challenge has no paid employees or staff. Its principal activities are to provide a number of holiday homes and buses for use by people with disabilities. With two exceptions, the land litigation in 1997 and the lease of Lacey House, it has not maintained any contact with Crowle since devolution.

His Honour referred to the changes at Crowle since devolution in the following terms:

*There have also been significant changes in the activities of Crowle since devolution. Those changes appear to have been driven by two main factors. The first is the change in policy which was introduced by the Disability Services & Guardianship Act 1987 and which was reinforced by the passing of the Disability Services Act 1993. That change in policy involved the adoption as a primary principle of the principle that people with disabilities should, so far as possible, live in and be part of the community rather than live in institutional care. That change in policy has inevitably meant that Crowle has had to change the focus of the services it provides. In addition to residential care, it now provides community based accommodation, employment training and services and community access day services. The second factor that has caused Crowle to change its activities is the fact that many of the residents of Crowle Home have been there for most of their lives. When they arrived as children and as they developed into young adults, an important focus of the Home's activities was to provide them with an education and activities that were suitable for persons of their age. Now, the average age of residents at the Home is 58 years. As a result, the care that they require is quite different. In a number of respects the buildings in which they are housed and the services that can be provided to them are no longer suitable for their needs. As a result of these two factors, the number of residents at the Home has gradually reduced so that there are now only 36 residents. In view of those changes, Achieve has begun examining the possibility of redeveloping the site at Ryde. Any redevelopment, however, is a number of years away.*

In relation to the will of the testatrix, clauses 5.00 and 5.02 stated:

While my daughter Michele is in the day to day care of an institution other than a hospital, I give 40% of the trust income from time to time as a donation to that institution...to use as it sees fit in carrying out its charitable activities.

The remainder of the trust income was to be applied for the benefit of Michele. If any amount was not used for that purpose, it was to be accumulated and added to the capital (clause 6.0). The trust was expressed to end on Michele's death (clause 8.0). Michele died in 2008.

The final distribution amount was approximately \$1.4 million. Clauses 9.0 to 9.22 of the will made provision for the final distribution in the following terms:

*9.00 When the Trust ends I direct the Public Trustee to divide any remaining trust funds into enough parts to pay those of the following gifts which take effect. All parts are of equal value. (No parts are to be set aside for any gifts which do not take effect).*

*9.10 I give 1 part to The CHALLENGE FOUNDATION OF NEW SOUTH WALES if it still exists when the Trust ends.*

*9.11 This gift is made on trust for the charitable activities of the Crowle Home, (that is the Ryde Branch of the Foundation), whenever it is still in existence. Otherwise the Foundation may use it as it sees fit in carrying on its other charitable activities.*

*9.12 I direct my Trustee to pay this gift to the person authorised to receive money on the Foundation's behalf. The responsibility to see that it is properly applied will then belong to the Foundation and not to my Trustee.*

*9.20 I give 1 part to the last institution, (other than a hospital), which cares for Michele before her death if it still exists when the trust ends. By "institution" I mean a home like the Crowle Home in which Michele is living now.*

*9.21 If that institution is the Crowle Home, this gift is made to the Challenge Foundation on the same terms as set out in 9.11.*

*9.22 If Michele was last in another institution this gift is made to that other institution on trust to use as it sees fit in carrying on its charitable activities and I direct my Trustee to pay it to the person authorised to receive money on its behalf. The responsibility to see that the gift is properly applied will then belong to that institution and not to my Trustee.*

The will was made in 1991. At that time, the Ryde Branch of Challenge was not a separate legal entity, as it later became. His Honour took the view that as Challenge still exists, the gift in clause 9.0 is to it as trustees of the charitable trust established by clause 9.11. As to the purposes for which the gift can be used, His Honour held that as the Crowle Home still exists and carries out residential care and ancillary services for the intellectually disabled, then it is for its purposes that the gift in clause 9.11 must be used.

In addition, the Crowle Home was the last institution to care for Michele before her death. Therefore, His Honour found that clause 9.21 should be interpreted to mean that a second gift to Challenge should operate on the same terms as the first.

His Honour identified a subsidiary question. What precisely was meant by 'the charitable activities of the Crowle Home'? His Honour held that those activities included all the activities that benefit the residents of the Crowle Home, whether or not they benefit others, but not all the activities of the entity running Crowle generally.

Another subsidiary question in this case was whether Challenge should be removed as a trustee of the trust created by the will. One power to remove and replace a trustee is found in sections 7 and 8 of the Charitable Trusts Act 1993 (NSW), but His Honour found that these sections had no bearing on the case. A second power to remove a trustee is conferred by section 70 of the Trustee Act 1925 (NSW). In this case, section 70(4) was held to apply: 'In the case of any trust for a charity the Court may make an order for the appointment of a new trustee on such evidence of the trust as the Court deems sufficient'.

Alternatively, the substitution of a trustee could be under the inherent jurisdiction of the court. However, these powers are expressed in different terms:

*The legislative test and the test the court applies in exercising its inherent jurisdiction are expressed in different terms. Section 70 applies wherever it is expedient to appoint a new trustee or new trustees and it is inexpedient, difficult or impracticable to do so without the assistance of the court: subs 70(2). On the other hand, the question that must be asked when the court exercises its inherent jurisdiction is what is in the best interests of the beneficiaries and the administration of the trust.*

His Honour held that Challenge should be removed as a trustee and replaced by Achieve, which now owns and operates the Crowle Home, regardless of the legal basis for the decision. He offered two broad reasons:

*First, in my opinion, it would be conducive to the efficient administration of the trusts if Achieve were the trustee. It appears from the evidence that Challenge Foundation itself has not considered how it would administer the trusts.... Secondly, if Challenge Foundation were to remain as the trustee, I think there is a significant risk of conflicts in the future. Those potential conflicts are of two main types. First, there appears to be a significant degree of friction between the management of Crowle Home and Challenge Foundation. That friction has arisen as a consequence of the litigation and the differences of opinion in relation to Lacey House. It is likely to have its genesis in the fact that a number of the current directors of Challenge Foundation were opposed to the devolution of its branches. At best, that friction is likely to affect the efficient administration of the trust. At worst, it may lead to serious disagreements that may result in further litigation and a consequent diminution of the trust assets. The second source of potential conflict arises from the possibility, albeit small, that some time in the foreseeable future Crowle Home will cease to exist. In that case, it seems likely that the gift would revert to Challenge Foundation. That possibility may affect Challenge Foundation's attitude to the administration of the trust. It may be reluctant to agree to the expenditure of money in the hope that, some time in the future, that money will become available for its own purposes. The conflict in this case is not between the management of the two organisations but between Challenge Foundation's duties as trustee and its own interests.*

Thus the gifts in the will went to the Crowle Home, with Achieve as the trustee of the trust created by the will.

**The case may be viewed at: <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/647.html>**