

**TASMANIA**

VARIATION OF TRUSTS ACT 1994

No. 52 of 1994

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VARIATION OF TRUSTS ACT 1994

No. 52 of 1994

AN ACT to provide for the variation of charitable and private trusts

[Royal Assent 25 August 1994]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

PART 1 PRELIMINARY

Short title

1—This Act may be cited as the *Variation of Trusts Act 1994*.

Commencement

2—This Act commences on a day to be proclaimed.

Interpretation

3—In this Act, “Court” means the Supreme Court of Tasmania.

PART 2**CHARITABLE TRUSTS****Effect of certain gifts and trusts**

4—(1) A gift of property to provide opportunities or facilities for sport, recreation or other activities associated with leisure is taken to be, and to have always been, a gift for charitable purposes.

(2) A charitable trust is not invalid by reason only that a non-charitable purpose is, or could be taken to be, included in any of the purposes to, or for which, an application of any of the trust funds is directed or allowed by the trust.

(3) A trust of a type referred to in subsection (2) is to be construed and has effect as if no application of any of the trust funds to or for any such non-charitable purpose were directed or allowed by the trust.

Application for variation of trust

5—(1) In this section, a reference to the original purposes of a charitable trust, if the purposes for which the trust property is required or permitted to be applied have been varied or regulated under this Part by a scheme or otherwise, is a reference to the purposes for which the property is for the time being required or permitted to be applied.

(2) If it has become impossible, impracticable or inexpedient to carry out the original purposes of a trust for charitable purposes in whole or in part, an application may be made for a variation of those purposes by a scheme approved under this Part.

(3) Without limiting the generality of subsection (2), an application for a variation of trust may be made in the following circumstances:—

- (a) if the original purposes, in whole or in part—
 - (i) have been as far as possible fulfilled; or
 - (ii) cannot be carried out, either at all or according to the directions given or to the spirit of the gift;
- (b) if the original purposes provide a use for a part only of the trust property;
- (c) if the trust property could be used more effectively if combined with other property applicable for similar purposes and administered jointly with that property;
- (d) if it is not reasonably practicable to apply the trust property in accordance with the original purposes having regard to—
 - (i) the value of the trust property; or
 - (ii) changes in circumstances; or
 - (iii) any other relevant factor;
- (e) if the original purposes, in whole or in part—
 - (i) have been adequately provided for by other means; or
 - (ii) have ceased to be charitable purposes; or
 - (iii) have ceased to provide a suitable and effective method of using the trust property.

(4) This section does not affect the requirement for a general charitable intention in any case where such an intention is a condition before the purposes of a charitable trust may be varied.

Power of Supreme Court to vary charitable trusts

6—(1) If, on application by the trustees, the Court is satisfied that circumstances exist justifying the variation of the purposes for which property may be applied under a charitable trust, the Court may approve of a scheme varying the purposes for which the property is required or permitted to be applied under the trust.

(2) On approval of a scheme varying the purposes for which the trust property is required or permitted to be applied under a charitable trust, those purposes are taken to be varied in accordance with the approved scheme.

(3) The Court must not approve of a scheme under this section unless of opinion that the scheme accords as far as reasonably practicable with the spirit of the original gift.

Power of Attorney-General to vary charitable trusts

7—(1) In this section, “**prescribed amount**” means—

- (a) if the trust property consists of or includes real property, the sum of \$100 000; or
- (b) if the trust property consists of personal property only, the sum of \$50 000—

or, if in either case some other amount is prescribed by the regulations for the purposes of this section, that other amount.

(2) The Attorney-General may approve of a scheme varying the purposes for which property is required or permitted to be applied under a charitable trust if—

- (a) satisfied that the value of the property subject to the trust does not exceed the prescribed amount; and
- (b) on application by the trustees in the prescribed form, satisfied that circumstances exist justifying the varying of the purposes for which the property may be applied under the trust.

(3) The Attorney-General may—

- (a) approve of a scheme with any alterations that he or she thinks fit; or
- (b) disapprove of the scheme; or
- (c) refer the scheme back to the trustees for further consideration.

(4) Before approving a scheme with alterations, the Attorney-General—

- (a) by notice in writing, is to notify the trustees of the proposed alterations; and
- (b) is to give the trustees an opportunity to make submissions in relation to those alterations.

(5) The Attorney-General must not exercise any powers under this section—

- (a) unless of opinion that as far as reasonably practicable the scheme accords with the spirit of the original gift; or
- (b) in the case of a failure of the original purposes of the trust, unless any person who has, or may acquire, a claim to any of the trust property consents to the exercise of those powers.

(6) If the Attorney-General disapproves of the scheme, the trustees may formulate a further scheme and forward a copy of it to the Attorney-General.

(7) If the Attorney-General has approved of a scheme, the Attorney-General must grant and forward to the trustees a certificate of approval of that scheme.

(8) A certificate granted under subsection (7) has effect as if it were an order made by the Court.

Power of Attorney-General to reject scheme

8—The Attorney-General, instead of exercising the powers conferred by section 7, may refuse the application and request the trustees to apply to the Court under section 6 (1).

Register of certificates

9—(1) The Attorney-General is to keep a register of all certificates of approval granted under section 7.

(2) The register is to be available for inspection by any person during ordinary business hours.

Duty of trustees

10—The trustees of a trust for charitable purposes have a duty, if the case permits and requires the trust property or a part of it to be applied *cy-près*, to secure its effective use for charity by taking steps to enable it to be so applied either by an application to the Court under section 6 or to the Attorney-General under section 7.

Application cy-près of gifts of donors unknown or disclaiming

11—(1) Property given for specific charitable purposes which fail is subject to this Part as if given for charitable purposes generally, if the property belongs to—

- (a) a donor who, after such advertisements and inquiries as are reasonable, cannot be found; or
- (b) a donor who has executed a written disclaimer of any right to have the property returned.

(2) For the purposes of this section, property is to be taken (without any advertisement or inquiry) as belonging to donors who cannot be found, in so far as the property consists of—

- (a) the proceeds of cash collections made by means of collecting boxes or by other means not adapted for distinguishing one gift from another; or
- (b) the proceeds of any lottery, competition, entertainment, sale or similar money-raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken.

(3) The Court, by order, may direct that property not referred to in subsection (2) is, for the purposes of this section, to be taken (without any advertisement or inquiry) as belonging to donors who cannot be found, if it appears to the Court—

- (a) that it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property; or
- (b) that it would be unreasonable, having regard to the nature, circumstances and amount of the gifts, and to the lapse of time since the gifts were made, for the donors to expect the property to be returned.

(4) If property is applied cy-près by virtue of this section, the donor is taken to have parted with all interest in the property at the time when the gift was made.

(5) If property is so applied as belonging to donors who cannot be found, and is not so applied by virtue of subsection (2) or (3)—

- (a) the scheme is to specify the total amount of that property; and

- (b) the donor of any part of that amount is entitled, if making a claim within 6 months after the date on which the scheme is made, to recover from the charity for which the property is applied an amount equal to that part, less any expenses properly incurred by the charity trustees after that date in connection with claims relating to the gift; and
- (c) the scheme may include directions as to the provision to be made for meeting any such claim.

(6) For the purposes of this section, charitable purposes are taken to fail if, by reason of any difficulty in applying property for those purposes, that property is available to be returned to the donor.

(7) In this section—

- (a) a reference to a donor includes a reference to any person claiming through or under the original donor; and
- (b) a reference to property given includes a reference to the property for the time being representing the property originally given or property derived from it.

(8) This section applies to property given for charitable purposes notwithstanding that it was so given before the commencement of this Act.

PART 3

PRIVATE TRUSTS

Application of Part 3

12—(1) This Part does not apply to—

- (a) a trust affecting property settled by an Act other than the *Administration and Probate Act 1935*; or
- (b) a charitable trust.

(2) This Part does not derogate from any other power of the Court to vary or revoke a trust or to enlarge or otherwise vary the power of trustees.

Power of Supreme Court to vary or revoke trusts

13—(1) If property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under a will, settlement or other disposition or on the intestacy or partial intestacy of a person or under an order of a court exercising jurisdiction in Tasmania, the Court, subject to subsection (4), may by order approve on behalf of a person specified in subsection (3) an arrangement—

- (a) varying or revoking all or any of the trusts; or
- (b) resettling an interest under the trusts; or
- (c) enlarging the powers of the trustees of managing or administering any property subject to the trusts.

(2) The powers conferred by subsection (1) may be exercised whether or not—

- (a) the person proposing the arrangement has any benefit or duty under the trusts; and
- (b) there is any other person beneficially interested who is capable of consenting to the arrangement.

(3) For the purposes of subsection (1), a person on whose behalf the Court may approve a proposed arrangement is to be—

- (a) a person who has, directly or indirectly, an interest, whether vested or contingent, under the trusts and who by reason of minority or other incapacity is incapable of consenting to the arrangement; or
- (b) a person, whether ascertained or not, who may become entitled to an interest under the trusts on being, at a future date or on the happening of a future event, a person of any specified description or a member of a specified class of persons; or
- (c) a person who is unborn or unknown or whose whereabouts are unknown; or
- (d) a person in respect of any interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the Court.

(4) Before a proposed arrangement is submitted to the Court for approval, it must have the consent in writing of any person, other than a person on whose behalf the Court may approve an arrangement, who is beneficially interested under the trusts and who is capable of consenting to the arrangement.

(5) In any proceedings under this section, the interests of all actual and potential beneficiaries of the trusts are to be represented.

Matters to be considered by Supreme Court

14—Before exercising its powers under section 13, the Court must be satisfied that the proposed exercise of its powers would be in the interests of each person on behalf of whom the Court may approve the proposed arrangement and, in determining whether or not any proposed arrangement would be in the interests of that person or persons, the Court must have regard to—

- (a) any financial benefit to that person; and
- (b) the absence of any financial disadvantage to that person; and
- (c) any non-financial benefit to that person; and
- (d) the welfare of the family of that person; and
- (e) any other circumstances that are advanced for or against the proposed arrangement.

Effect of order

15—An order made by the Court under this Act is binding on all present and future trustees and beneficiaries of the trusts and by force of this section—

- (a) the trusts are varied or revoked by the order; and
 - (b) the variation or revocation takes effect on the order being made.
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PART 4**SUPPLEMENTAL****Rules of Court**

16—(1) The judges of the Court or a majority of them may make Rules of Court for the purposes of this Act except with respect to any matter which is prescribed by regulations made under section 17.

(2) Without limiting the generality of subsection (1), the rules may make provision for, or with respect to, the appointment of counsel to represent the interests of a class of beneficiaries who are at the date of the proceedings unborn or unascertained.

Regulations

17—(1) The Governor may make regulations for the purposes of this Act.

(2) Regulations may be made prescribing—

- (a) any fees or charges payable for any services or costs relating to the approval of schemes under section 7; and
- (b) any fees payable for certificates of approval under section 7; and
- (c) fees payable for inspection of the register kept under section 9; and
- (d) the manner in which the register kept under section 9 is to be maintained and made available for inspection.

(3) The regulations may—

- (a) provide that a contravention of, or a failure to comply with, any of the regulations is an offence; and
- (b) in respect of such an offence, provide for the imposition of a fine not exceeding 10 penalty units and, in the case of a continuing offence, a further fine not exceeding 2 penalty units for each day during which the offence continues.

(4) Regulations may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the regulations.

Administration of Act

18—Until provision is made in relation to this Act by order made under section 4 of the *Administrative Arrangements Act 1990*—

- (a) the administration of this Act is assigned to the Minister for Justice; and
- (b) the Department responsible to the Minister for Justice in relation to the administration of this Act is the Department of Justice.

*[Second reading presentation speech made in:—
House of Assembly on 4 May 1994
Legislative Council on 4 August 1994]*

