SUPREME COURT OF QUEENSLAND

CITATION:	*McKay v Queensland Ballet Company* [2026] QSC 137
PARTIES:	**JUDITH MARILYN MCKAY AS EXECUTOR OF THE ESTATE OF GLENN RYCEN COOKE, DECEASED** (applicant) **v** **QUEENSLAND BALLET COMPANY** ABN 26 009 717 079 (first respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (second respondent) **AUSTRALASIAN DANCE COLLECTIVE LIMITED** ABN 12 010 545 187 (third respondent)
FILE NO/S:	BS 5109 of 2025
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	6 May 2026
JUDGE:	Hindman J
ORDERS:	**1. The applicant is justified in donating the residuary estate of Glenn Rycen Cooke (deceased) to the first respondent to be applied by the first respondent for the purposes set out in clause 10(iv) of the will of the deceased dated 22 June 1993.** **2. The receipt of the proper officer of the first respondent is a sufficient discharge to the applicant for payments made pursuant to order 1.** **3. The applicant's costs of the proceeding be paid from the residuary estate of the deceased on a solicitor-own client basis.** **4. The third respondent's application filed 15 April 2026 is dismissed.** **5. There otherwise is no order as to costs.** **6. Liberty to apply in respect of order 5.**

CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESATATOR'S INTENTION – GENERALLY – where testator left residuary estate on trust to be donated to "a significant Queensland contemporary dance company" to form a scholarship – where applicant executor has chosen to donate the residuary estate to first respondent and applies to court for advice on appropriateness of that decision – where first respondent does a mix of ballet, including classical ballet, and contemporary dance – where the proper construction of the will is in dispute – where third respondent contends executor has failed to give real and genuine consideration to applying the gift to third respondent – where third respondent applies for court to donate residuary estate to it instead – whether the court can objectively determine if the first respondent falls within the meaning of "contemporary dance company" in the will – whether that question should be left to executor – whether executor has failed to give real and genuine consideration to applying the gift to third respondent *Succession Act 1981* (Qld), s. 6 *Trusts Act 1973* (Qld), s. 106(1)(a) *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83; [1999] HCA 28, applied *Attorney-General v Trustees of National Art Gallery of New South Wales* (1944) 62 WN (NSW) 212, approved *ANZ Executors & Trustee Co Ltd v McNab* [1999] VR 666, applied *Di Trapani v Di Trapani* [2026] QSC 20, cited *Edington v Board of the State Public Service Superannuation Scheme* [2015] QSC 245, cited *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577, approved *Karger v Paul* [1984] VR 161, cited *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469, applied
COUNSEL:	R T Whiteford with S J Doblo for the applicant J Otto KC for the first respondent L Kruger for the second respondent J Horton KC with W Isdale for the third respondent (pro bono direct brief)
SOLICITORS:	HopgoodGanim for the applicant McCullough Robertson for the first respondent Crown Solicitor for the second respondent None instructed for the third respondent

Synopsis

[1] This proceeding is about the proper interpretation of the will of Glenn Rycen Cooke, deceased. The will leaves the residuary of the testator's estate (approximately $2 million) to form a charitable purpose trust. The applicant (**Dr McKay**) is the executor of the will and applies for a direction that she (as trustee) is justified in donating the residuary to the first respondent, Queensland Ballet (**QB**).[1] Clause 10(iv) of the will left the residuary:

> … to my Trustee upon trust to be donated to a significant Queensland contemporary dance company in the discretion of the Trustee to form a scholarship for a young dancer or choreographer to assist in the development of such persons' professional skills.

[2] The third respondent (**ADC**) is a company focussed on contemporary dance and was joined to the proceeding before the hearing. Dr McKay had considered donating the residuary to QB or ADC (amongst other dance companies) but has ultimately preferred QB. ADC submits that QB is not a "contemporary dance company". ADC also applies for the court to direct Dr McKay to donate the residuary to ADC.[2]

[3] The second respondent, the Attorney-General for the State of Queensland (**A-G**) has an interest in the proceeding as it involves a charitable purpose trust. The A-G made submissions but did not lead evidence or cross-examine any witness.

[4] The proceeding has focussed on the following issues:

(a) what is the meaning of the words "a significant Queensland contemporary dance company" in clause 10(iv) of the will;

(b) under the terms of the will is it for Dr McKay (who it is not alleged has relevantly acted *mala fides*) to ascertain whether QB falls within the meaning in the will of "a significant Queensland contemporary dance company" or is that an objective fact that ought be determined by the court;

(c) if it is appropriate for the court to decide, as a matter of objective fact is QB "a significant Queensland contemporary dance company" within the meaning of the will;

(d) if as a matter of objective fact QB is not "a significant Queensland contemporary dance company" within the meaning of the will, should the court direct Dr McKay to donate the residuary to ADC, either because:

(i) ADC is the only remaining potential recipient; or

(ii) Dr McKay has failed to give real and genuine consideration to donating to ADC,

(e) did Dr McKay fail to give real and genuine consideration to the exercise of her powers.

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1 Pursuant to s. 6 of the *Succession Act 1981* (Qld); s. 106(1)(a) of the *Trusts Act 1973* (Qld). The court's role in that respect is summarised in *Edington v Board of the State Public Service Superannuation Scheme* [2015] QSC 245 per Bond J at [44].

2 Pursuant to s. 6 of the *Succession Act 1981* (Qld); s. 106(1)(a) of the *Trusts Act 1973* (Qld).

[5] In the result, in respect of issues (a) and (b) above, after having regard to the proper construction of the words "a significant Queensland contemporary dance company" in the will, I find that it is not possible to conclude on any objective basis that QB is not "a significant Queensland contemporary dance company" and so that issue is properly left to Dr McKay in the circumstances it cannot be concluded that Dr McKay's proposed exercise of power (donating the residuary to QB) is wrong. It is therefore unnecessary to go on to consider issues (c) and (d). In relation to issue (e) I find that Dr McKay has given real and genuine consideration to the exercise of her powers. The relief sought by Dr McKay's originating application will be granted. It is noted that Dr McKay's application is for a direction that she is justified in donating the residuary to QB and does not extend to exercising her discretion for her;[3] what is sought is merely a permissible advisory opinion. The relief sought by ADC's interlocutory application will be dismissed.

The evidence in the proceeding

[6] The evidence in the proceeding relied upon by Dr McKay comprised affidavits of Dr McKay and her oral evidence (having been required for cross-examination).

[7] The evidence in the proceeding relied upon by QB comprised an affidavit of Maryanne Weerasinghe (executive director of QB) and her oral evidence (having been required for cross-examination), and an expert report and joint expert report of Elizabeth Gibbs and her oral evidence (having been required for cross-examination).

[8] The evidence in the proceeding relied upon by ADC comprised affidavits of Amy Hollingsworth (artistic director and CEO of ADC) and her oral evidence (having been required for cross-examination), and an expert report and joint expert report of Angela Conquet.

The expert evidence in the proceeding

[9] The expert reports were directed to the experts expressing their opinions as to:

(a) the nature of contemporary dance – in summary, Dr Gibbs considers that "contemporary dance is hybrid and relational, often incorporating ballet into its practice"; whilst Dr Conquet considers that contemporary dance is "distinct", "contrasting" and largely a "separate art form" from ballet;

(b) the nature of the programme and works of QB – in summary, Dr Gibbs considers that QB would be "more accurately described as a dance company whose repertoire includes ballet, rather than as a ballet company in the strict historical or institutional sense"; whilst Dr Conquet considers that QB is "a ballet company with a repertoire composed of both classical and contemporary works";

(c) the nature of a contemporary dance company (in particular as compared to a ballet company) – in summary, Dr Gibbs argues that the distinction has become "increasingly complex and that the boundaries between the two are porous"; Dr Conquet considers that there are "clear institutional and aesthetic distinctions between the two".

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3 J D Heydon and M J Leeming, *Jacobs' Law of Trust* (LexisNexis, 8th ed, 2016) at 534 [21-34].

[10] The experts disagree as to whether QB is properly classified as a contemporary dance company – Dr Conquet says no, Dr Gibbs says yes and further describes QB as a hybrid dance company. The disagreement is unsurprising given the experts do not even agree on the definition of contemporary dance or a contemporary dance company.

[11] The opinion evidence proffered by the experts and by both Ms Weerasinghe (for QB) and Ms Hollingsworth (for ADC) (both of whom are highly experienced in the dance world) is doubtfully strictly admissible in the context of this case and has been given no weight by me. That is because the evidence does not reveal that the testator in writing his will used any of the relevant words in clause 10(iv) in any special or technical sense. To make good that proposition, it is helpful to consider the evidence adduced relating to the testator, as set out below.

The testator

[12] The testator, Mr Cooke, died in early January 2025 aged 78, leaving his will dated 22 June 1993. He was never married and did not have children.

[13] Mr Cooke grew up in regional Queensland and throughout his adult life was a strong supporter of the arts, and particularly of Queensland culture. He studied arts at the University of Melbourne and completed a master's degree at the George Washington University in Washington DC in the late 1970s with a thesis on digital cataloguing of collections. He worked as a curator of decorative arts at the Queensland Art Gallery/Gallery of Modern Art (**Gallery**) for nearly 32 years from 1981 to 2013 when he retired. He had been heavily involved in the establishment of the Australian and international decorative arts collections at the Gallery and assisted with many of the Gallery's exhibitions, particularly decorative arts exhibitions.

[14] He was a frequent contributor to publications such as Australiana – Researching, Preserving and Collecting Australia's Heritage (over 20 articles, mostly on Queensland subjects) and the journal of the Australian Garden History Society. He also published at least one arts-related book (Glenn R Cooke, *A Time Remembered: Art in Brisbane 1950 to 1975* (South Brisbane Queensland Art Gallery, 1995)).

[15] Mr Cooke was himself an avid collector. His collection of 1300 Queensland tea towels formed the basis of an exhibition at the Queensland State Library in 2022. He had what was described as a huge collection of bright Hawaiian shirts (which he often wore). His collections (many of which he donated to institutions in Queensland) included art works, souvenir tourist objects and homewares with indigenised motifs, textiles, Story Bridge memorabilia, ceramics, folk art, papers, and Queensland badges.

[16] Mr Cooke was also a keen gardener, with a notable garden at his West End home which included installations of decorative arts, many of his own making.

[17] Mr Cooke's known interests that related to dancing in any way can be described as follows.

[18] First, he had a keen interest in Zumba dancing. It might be somewhat of a misnomer to call Zumba a form of dancing. Rather it is a high-energy, dance-based fitness

program, a type of dance aerobics, combining Latin and other styles of usually upbeat music and dancing – a fun way to disguise what is otherwise exercise.

[19] Second, he participated in social dancing. After formal lessons, he joined the Brisbane Sunday Social Dance Club where he participated in social sequence ballroom dancing (which includes dances such as waltzes, quick step, foxtrot, tango, salsa, cha cha and jive).

[20] Third, one of his personal collections was of social dance ephemera. The majority of this collection was donated to the Queensland State Library in 2018. As above, social dancing is dancing that occurs at social occasions where the dance skills required are learned. An example would be a community night of ballroom dancing or Latin dancing put on by a social club. Mr Cooke's collection included material in respect of dancing schools and clubs, instructors, and venues.

[21] There is no evidence that Mr Cooke otherwise took any particular interest in the world of dance – either in a professional way or socially. There is no evidence that he attended dance performances or supported any particular dance company or preferred any particular dance style (other than as he participated in as above). There is no evidence he kept up in trends in the world of dance.

[22] However, Mr Cooke was a person well-versed in the arts world. He plainly understood in the context of visual and decorative arts that there is a distinction (albeit sometimes hard to divine) between traditional or classical art (as might be displayed in the Queensland Art Gallery) and contemporary or modern art (as might be displayed in the Gallery of Modern Art). By logical extension, so too I find Mr Cooke had an appreciation at the time of signing his will that there is a distinction between traditional or classical dance styles and contemporary or modern dance styles. I find that at the time of signing his will he had an appreciation that "contemporary dance" is a particular dance style. In fact, I consider that any average adult member of the community has an appreciation that "contemporary dance" is a particular dance style, amongst the many dance styles that exist in the world of dance. And Mr Cooke was better informed about the arts (which includes dance) than most.

[23] That is not to conclude that, in using the words "a significant Queensland contemporary dance company" in his will, Mr Cooke was using those words in any special or technical sense. I reject any submission that he used those words in any special or technical sense (as might be used by the experts who have given evidence in the proceeding). The use of the words "contemporary dance" as identifying a particular dance style is nothing more than accepted and common usage of the words. But it will be relevant to the construction of those six words in the will that I have found that Mr Cooke appreciated that "contemporary dance" was a particular dance style and that it could be contrasted to other dance styles, but particularly contrasted to traditional or classical dance styles (which include classical ballet).

The proper construction of the will

[24] The will provides for a donation to "a significant Queensland contemporary dance company". Within that string of six words, the parties have focussed particularly on the word "contemporary", but the proper focus should be on the phrase "contemporary dance company" as a whole for the reasons that follow.

Summary of the relevant principles

[25] Deciding the proper construction of a will requires the court to determine what was the testator's intention. The search of testamentary intention involves considering the words used (*prima facie* being given their ordinary meanings) in the context of the will as a whole and having regard to any relevant and admissible evidence of surrounding circumstances.[4] In that way, the court sits in the testator's armchair and adopts what is the most probable interpretation of the will.

Clause 10(iv) of the will

[26] QB's primary and secondary submissions advance constructions of the will, in particular in relation to the use of the word "contemporary" in the string of six words, that I readily reject:

(a) first, QB submits that the word contemporary bears its ordinary meaning of being in existence at the time – meaning what is required is that the dance company to whom the monies are to be donated exists at the time of the donation;

(b) second, QB submits that the word contemporary bears its ordinary meaning of being something of its time or modern or ultra-modern or up-to-date – meaning what is required is that the dance company to whom the monies are to be donated is a modern dance company.

[27] Those constructions of the will effectively seek to read the six words as comprising the compound noun "dance company" with three adjectives describing the type of dance company – "significant", "Queensland" and "contemporary".

[28] However, the proper construction of the will is to read the six words as comprising the compound noun "contemporary dance company" (as one vocabulary item) with two adjectives describing the type of contemporary dance company – "significant" and "Queensland". I consider that is the natural or ordinary reading of the will, consistent with the inferred intention of the testator. As above, I consider any average adult member of the community has an appreciation that "contemporary dance" is a particular dance style, amongst the many dance styles that exist in the world of dance, even if the person may not fully appreciate in a technical way what contemporary dance *is*.

[29] The testator, a person experienced in the arts generally, can readily be taken to have understood, just as contemporary art is a specific visual art style, that contemporary dance is a specific dance style. He was, by the use of the words "contemporary dance company", identifying a dance company that engaged in the dance style of contemporary dance. Whilst the words "contemporary dance" together do not appear in the dictionaries I have consulted, that is the same for other dance styles like tap dance, ballroom dancing, line dancing, square dancing, hip hop and so on. If the phrase used in the will had been "significant Queensland tap dance company" one would not have been concerned to look to the dictionary definition of "tap" to work out the ordinary meaning of that word in the string of words used.

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4 *ANZ Executors & Trustee Co Ltd v McNab* [1999] VR 666 at 667 per Fullagar J. See also *Di Trapani v Di Trapani* [2026] QSC 20 at [19]-[22] per McCafferty J.

[30] If what had been intended by the testator by the use of the word "contemporary" was either existing or modern, one of those other words would have been readily used (to avoid any confusion) or the word contemporary would not have been placed immediately before the words dance company – instead, for example, the phrase might have read "a significant contemporary Queensland dance company".

[31] Thus, in seeking an entity to donate the monies to, what the executor has to locate is an entity that meets the requirement of being a contemporary dance company with the characteristics of being significant and Queensland. That task of locating eligible entities has been left to the executor personally, which will become relevant below when I consider whether QB is such an eligible entity.

[32] There is no allegation in this case that either QB or ADC insofar as they are both dance companies are not both significant and Queensland. The focus of the proceeding has been upon whether QB is properly described as a "contemporary dance company". There is no dispute that ADC plainly is a contemporary dance company.

When is a dance company a contemporary dance company

[33] What then might make a dance company properly described as a contemporary dance company?

[34] The first part of the compound noun to consider is what is "contemporary dance". That is to be determined by what it can be inferred the testator considered to be "contemporary dance" rather than what the *experts* consider is "contemporary dance".

[35] I proceed on the basis that the testator (like most ordinary adults in the community who gave the matter some thought) would have understood that contemporary dance:

(a) is more readily defined by what it is not – contemporary dance is not (non-exhaustively) traditional/classical ballet, tap dance, social dance (including ballroom dancing, square/bush dancing, line dancing, etc), country dancing (eg Indian belly dancing or Scotland highland dancing), disco dancing, hip hop, or jazz – but can incorporate elements of any of those genres of dancing and more, and is often a blend of various genres of dancing;

(b) often has the feature of using all of the space available as performance space, including the floor (particularly) and walls (which is not commonly seen in classical ballet which focusses on uprightness);

(c) can challenge norms of dancing, may not look like dancing and can include stillness;

(d) often does not involve traditional narrative story-telling, or elaborate costuming, or classical music scores, or particular forms of footwear – but *may* do so;

(e) does not have to be performed by classically trained (ballet) dancers but contemporary dancers will often have at least some classical dance training;

(f) is a modern form of dancing that is not bound by rules or customs associated with more traditional or classical forms of dance.

[36] It would also be understood that the line between contemporary dance and other forms of dance (particularly contemporary ballet) can be very murky. That there may be significant overlap between contemporary dance and other forms of dance.

[37] What then might make a dance company properly described as a contemporary dance company?

[38] One possibility is that a dance company is a contemporary dance company only if it has a singular focus (or main focus as put by ADC) on the genre of contemporary dance. ADC submits that construction is supported by the use of the word "significant" in the string of six words – meaning the dance company must be significant in contemporary dance (that construction somewhat downplays the placement of the word Queensland between significant and contemporary though). That is unlikely to have been the testator's intention. That intention would have been obvious if the will had instead said something like "a dance company that only performs contemporary dance". Even a dance company with a focus on contemporary dance might from time-to-time stray outside of "contemporary dance" (whatever that means precisely) and perform a work that others might properly classify as some other style of dance.

[39] At the other end of the spectrum might sit a dance company with a strong focus on some other dance style that from time-to-time performs a contemporary dance work.

[40] Many dance companies might fall in between and be described simply as dance companies or perhaps hybrid dance companies, performing a mix of dance styles. Even a properly described contemporary dance company might be "significant in contemporary dance" to different levels – significance in that context does not require a sole or main focus on contemporary dance.

[41] There are a potentially endless number of factors that might influence where on that contemporary dance company spectrum a dance company sits. Such factors may include:

(a) how the dance company is described and how it presents itself to the community;

(b) the objects of the dance company, including in its constitution;

(c) what works the dance company presents; what percentage of its works are contemporary works;

(d) who it employs in terms of company dancers, what type of dancers are brought in for works from time-to-time;

(e) if it offers training or classes, in what dance style does it offer training or classes;

(f) what commitment the dance company has to the advancement of the dance style of contemporary dance.

Is QB a contemporary dance company?

[42] The question then for the court is can it objectively determine whether QB meets the requirement of the will of being a contemporary dance company, or is that in this

particular case a subjective assessment that ought be left to the executor's discretion? There will plainly be some companies that a court could objectively conclude do not meet the requirement of being a contemporary dance company and therefore the court could advise as such. For example, a ballet company that is directed to nothing bar classical ballet would not come within the scope of being a contemporary dance company within the meaning of the will. But this case is not of that type.

The relevant Archibald Prize cases

[43] This type of issue has arisen in two cases dealing with the Archibald Prize. The Archibald Prize is perhaps Australia's most famous visual art competition. It is a competition that exists because of a trust established under the will of John Feltham Archibald dated 15 March 1916. Mr Archibald died in 1919. The will required a certain portion of his estate be held on trust, the income from which was to be paid to the Trustee of the New South Wales National Gallery to:

> provide an annual prize to be styled "The Archibald Prize" for the best portrait preferentially of some man or woman distinguished in Art Letters Science or Politics painted by any Artist resident in Australasia …

[44] The first relevant case is *Attorney-General v Trustees of National Art Gallery of New South Wales* (1944) 62 WN (NSW) 212 (**Dobell's case**).

[45] In that case, the issue was whether the winning painting was in fact a "portrait". The artist, Joshua Smith, had painted William Dobell in what can best be described as a caricature or fantasy because of exaggerated elements.

[46] The position of Roper J was:

(a) to acknowledge that the trustees of the art gallery were charged with a number of duties involving the exercise of their discretion and judgement;

(b) the awarding of the prize, including to the "best" portrait, obviously involved the exercise of a great delicacy of judgement, and unanimity of opinion could not be expected – it would be safer to expect differences in opinion;

(c) a challenge to the trustees' decision could not succeed without showing *mala fides* on the part of the trustees because, as a matter of construction of the will, the ultimate right of choice was given to the trustees:[5]

> and as a matter of law where the manner of execution of a trust depends upon the formation by the trustee of an opinion or the exercise of judgment this Court will not interfere with its execution unless it is shown that no *bona fides* opinion was formed nor *bona fides* judgment exercised.

(d) just as the decision as to which is the best portrait is a matter for the judgement of the trustees, so too whether a painting is a portrait. The testator, by the will, requires the trustees to make those decisions;

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5 At 214.

(e) to find that the trustees' decision about whether a painting was a portrait was only open to attack on the grounds that the decision was not *bona fides*, with the onus of establishing it was not *bona fides* resting on the party alleging so;

(f) otherwise, the court would not interfere with the trustees' decision unless satisfied as a matter of objective fact, and not mere opinion, that the painting was not a portrait, such that the opinion of the trustees to the contrary was based on a wrong basis in fact and was not truly an opinion;

(g) in this case, no *mala fides* having been alleged, his Honour concluded that the evidence was overwhelming that there was a proper basis for forming an intelligent opinion that the painting in question was a portrait and so the court would not interfere.

[47] Roper J could have concluded his judgment there, but did go on to consider for himself whether the painting in question was a portrait within the meaning of that term in the will. He found as a matter of fact that the painting was a portrait. Insofar as parties had submitted it was not a portrait but properly classified as some other visual art form, his Honour said this:[6]

> Finally I think that it is necessary to state my opinion on the claim that the picture cannot be included as a portrait because it is proper to classify it in another realm of art of work – as caricature according to the information or as fantasy according to a witness for the informant. It is, I think, unnecessary to consider whether the picture could properly be classed as a caricature or fantasy. It is could be so classed that would only establish to my mind that the fields are not mutually exclusive, because in my opinion it is in any event properly classed as a portrait.

[48] The second relevant case is *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577.

[49] In that case, the issue was whether the winning portrait was in fact painted or a painting. The case advanced by the plaintiff was that the winning portrait was a drawing.

[50] The position of Hamilton J was:

(a) insofar as the ordinary meanings of painting, painted, draw and drawing were concerned:

> I think is flows from the above that the terms are not matters of strict denotation, their boundaries are uncertain and that there are overlaps between them. It is clear that the techniques of each are at times employed in the other. Some works may fall into both categories, as was contemplated by Roper J in the case of portrait and caricature.

(b) to adopt the law as propounded in Dobell's case; it not having been the subject of any criticism in cases subsequent;

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6 At 215.

(c) there was no allegation of the trustees acting *mala fides*;

(d) accordingly, unless the plaintiff could establish that on an objective basis the portrait was not within the category of a "painting", then the plaintiff could not succeed;

(e) to conclude at [29]-[31] that:

> I have taken into account the impression the portrait creates on the viewer; the dictionary definitions which I have discussed above and the evidence as to the creation of the work, particularly the use of what may be regarded as techniques of painting as opposed to drawing … I have reached the conclusion that minds may well differ as to whether, if the picture must be placed in a single category, that category should be "painting" or "drawing". But, in view of those matters, I find it impossible on any objective basis to exclude the portrait from the category of a work which has been "painted", which is the real issue here.
>
> I reach this conclusion without reference to the expert evidence given in this case. But to any extent to which I could properly advert to it, that evidence would but fortify my conclusion. It was plain that two highly qualified experts firmly held opposite views as to whether the work could or could not be characterised as "painted". Each made a spirited and reasoned defence of the view put forward. There could be no clearer demonstration that the picture could be characterised in either way and that, whichever characterisation was made, it was a matter of judgment or opinion.
>
> Because of my conclusion that the portrait cannot be excluded from the category of a work which has been "painted", it cannot be said that the trustee's exercise of judgment or opinion was wrong or that it is established that it was a breach of trust for the trustee to proceed in accordance with that judgment or opinion. This means that, as in the *Dobell* case, the Court is not required to interfere with the trustee's determination. As in that case, that is sufficient to doom the plaintiff's case to failure.

Why it is contended for the executor and QB that QB meets the "contemporary dance company" requirement of the will

[51] Undoubtedly QB can be properly described as a ballet company. Ballet (both classical/traditional ballet and contemporary ballet) is a core part of its offerings and identity. But it does also operate in the field of contemporary dance. In that respect (in summary):

(a) QB has regularly featured in its program, since inception, contemporary dance works – including currently in its Bespoke program which features newly made contemporary dance works;

(b) in terms of its ballet repertoire, QB performs both classical and contemporary works;

(c) QB's employed dancers (all classically trained ballet dancers) engage in other dance style training including contemporary;

(d) QB engages, from time-to-time, dancers with other types of specialities (although the evidence does not make plain that any dancers who might properly be described as contemporary dancers have been engaged) and contemporary dance choreographers and stagers;

(e) the constitution of QB, whilst making particular reference to classical ballet, does refer to the development and promotion of dance, dancers and choreographers more generally.

Consideration

[52] I consider that the proceeding is properly resolved in the same way as was undertaken in the Archibald Prize cases referred to above.

[53] In this case, there is no allegation that Dr McKay has acted *mala fides* in deciding that QB is a contemporary dance company. In addition, there is no sufficient evidence to impugn Dr McKay's decision on the basis that it was exercised "arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the settlor, or without giving a real or genuine consideration to the exercise of the discretion".[7] I deal further with, and dismiss, what may be an argument advanced by ADC that Dr McKay did not give real and genuine consideration to the exercise of the discretion in a section later in these reasons.

[54] Only then if the court can conclude as a matter of objective fact that QB is not a contemporary dance company should the court intervene.

[55] I find myself unable to conclude as a matter of objective fact that QB is not a contemporary dance company within the meaning in the will. QB is certainly able to be described in a number of different ways including as a ballet company, a modern ballet company, a dance company, and a hybrid dance company, to name a few. It also spends a significant (not *de minimus*) amount of its time devoted to contemporary dance. That QB might be described in the ways mentioned does not mean it is also not properly described as a contemporary dance company.

[56] The analysis at [33] to [41] above demonstrates the difficulties the court faces for itself in determining whether QB falls within or without the requirement of being a "contemporary dance company" for the purpose of the will. Difficulty is of course no reason for the court not to reach a conclusion, even in matters concerning the arts, but what the cases demonstrate is that if there is not an objective standard that can be applied to resolve the difficulty, then the court should not proceed and the question will be left to the executor who has been given the power to decide under the will.

[57] Like in the *Johansen* case, whilst I have reached that decision without reference to the expert evidence, if I had had regard to it, it would have supported my conclusion because the highly qualified experts do not agree whether QB is or is not a contemporary dance company – it involves a matter of judgement or opinion.

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[7] *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469 at 480, approved in *Attorney-General for the Commonwealth v Breckler* (1999) 197 CLR 83 at 99-100.

[58] Accordingly, I conclude that Dr McKay's proposed exercise of power is within the terms of the power and is in accordance with the purposes for which the discretion was conferred.

Real and genuine consideration

[59] Although not a ground advanced in its primary written outline of submissions, by the end of the hearing it appeared that ADC may be advancing a further ground as to why the court would not grant Dr McKay's application – namely because Dr McKay did not in the exercise of her discretion give real and genuine consideration to donating the monies to ADC. The ground arose in ADC's written reply submissions and was a matter tested in the cross-examination of Dr McKay.

[60] However, it is not entirely clear if the ground was one being advanced as a separate reason why the court would not grant the relief sought in Dr McKay's application or was only advanced for the purpose of demonstrating why in respect of ADC's application the court would be inclined to act to exercise for itself the discretion given to Dr McKay.

[61] Out of an abundance of caution, I deal with it here as if it were being advanced as a separate reason why the court would not grant the relief sought in Dr McKay's application.

[62] First, it is relevant to note that the allegation that Dr McKay did not in the exercise of her discretion give real and genuine consideration to donating the monies to ADC falls short of an allegation of *mala fides*. But it remains a proper ground for intervention by a court.[8]

[63] The factual basis for the ground was said by ADC, in oral submissions, to be:

(a) the executor decided on the recipient of the donation being QB at an early stage;

(b) ADC had sent correspondence inviting further engagement with Dr McKay that was not responded to;

(c) that is in contradistinction to how Dr McKay dealt with QB, which was afforded opportunities for further engagement and refinement of proposals;

(d) had Dr McKay engaged with ADC, her concerns could have been allayed and her decision may have been different;

(e) the cross-examination disclosed Dr McKay to be close-minded to the possibility of ADC receiving the donation;

(f) the current form of the proposal put by QB showed Dr McKay not to be attentive to the terms of the will because the proposal did not achieve the purpose of the trust (namely, the proposal did not specify the scholarship must go towards a *young* person or training in *contemporary* dance);

8 See [53] above, citing *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469 at 480, approved in *Attorney-General for the Commonwealth v Breckler* (1999) 197 CLR 83 at 99-100.

(g) Dr McKay was not attentive to the proposal made by ADC, was not attentive to responding to ADC, and did not give ADC a fair opportunity to pitch for the donation;

(h) Dr McKay was not attentive to even Ms Hollingsworth's evidence in the proceeding which answered concerns Dr McKay had about ADC being the recipient of the donation;

(i) Dr McKay's close-mindedness to ADC's proposal could be inferred from her refusal to consent to ADC's joinder to the proceeding (and an adjournment of the hearing to allow that to occur) and her intention to seek Dancenorth's further participation in the process if the court did not grant her application (thereby showing a "real set against" ADC).

[64] There is no doubt that in acting under clause 10(iv) of the will Dr McKay was and is required to act in good faith, on real and genuine consideration, and in accordance with the purpose for which the power is conferred. Both parties accept that Dr McKay (as trustee) was not required to give natural justice, was not required to seek out all possibility recipients of the monies, and did not have to take into account all relevant information.

[65] In respect of the latter, *Lewin on Trusts* says at [29-042] (citations omitted):

> The duty to take relevant matters in consideration is in our view best regarded as an element in the duty to act responsibly, so that the trustees must have a rationale basis for a decision but will be in breach of duty only if a given matter is so significant that a failure to take it into account would be irrational.

[66] I do not consider that ADC has established that Dr McKay did not undertake a real and genuine consideration of the exercise of her power. In that respect she:

(a) made reasonable enquiries to identify potential recipients of the donation;

(b) wrote to those potential recipients seeking information to help her consider their ability to fulfil the charitable purpose;

(c) reviewed all the information received and engaged to an appropriate degree with the question of which entity she would donate the monies to;

(d) made the further enquiries she considered necessary with her preferred recipient;

(e) made a decision about the exercise of her power.

[67] A rational basis for Dr McKay's decision has been disclosed – amongst other matters, she considered (rightly or wrongly) QB's financial future to be more secure. That was relevant to the ability of the chosen entity to manage the monies donated in the long term. I generally accept the evidence of Dr McKay that demonstrates the steps she took towards the making of her decision, and I conclude that she gave real and genuine consideration to the exercise of her powers. I do not accept that she was close-minded to donating the monies to ADC. In so concluding, I am cautious about taking into account any matters that have arisen after Dr McKay's decision was taken because the attitude of persons post-decision may be impacted by the fact of the litigation.

[68] It could often be said that trustees, including Dr McKay, could make more enquiries, could engage more with interested persons, could engage more equally with interested persons, could take a different view of information provided, could give different weight to certain considerations, could take more time in making a decision, and so forth. But that is not the test for intervention by the court.

[69] This ground to refuse the applicant's sought relief is not made out.

Miscellaneous matters

The requirement of significance

[70] Whilst in this case, as previously alluded to, the parties do not particularly focus on the requirement of significance of the entity to receive the donation, that is a further requirement of the entity that seems to be something that ought be left to the executor to decide. The exception is only in respect of clear cases where significance is not evident because there is again no objective standard against which "significance", in the context of that word in the will, could otherwise be assessed.

[71] I agree with the parties that the use of the adjective "significant" in the context of a charitable purpose trust which is intended to operate indefinitely must bring with it some consideration of the financial stability of the entity in the sense that the testator must have wanted the entity administering the trust to be one in respect of which there could be confidence that it would be able to carry out administration duties well into the future. But "significant" could mean more than that. For example, the testator is likely to have intended that the entity must have some cultural significance and profile significance within the State of Queensland so as to attract worthy applicants for the scholarship to be established. A small family-type contemporary dance company in the suburbs is unlikely to meet that requirement no matter how financially secure or long running. But apart from that type of case, whether a particular contemporary dance company is "significant" is not a requirement that an objective test is readily applicable to and is also best left to the executor to decide for herself.

[72] That is also the position insofar as "significant", in the context of the string of six words, is intended to convey where in the spectrum of contemporary dance companies a particular dance company sits. There is no mathematical precision possible. If a company is properly within the will's meaning of contemporary dance company, it is for the executor to decide whether it is a significant [..] contemporary dance company (which might include how focussed on contemporary dance the company actually is).

The purpose of the trust

[73] It remains to note that all parties to the proceeding eventually properly proceeded on the basis that the purpose of the trust is to fund a scholarship for a young dancer or choreographer to assist in the development of such persons' professional skills *in contemporary dance*. Whilst the words italicised do not appear in the terms of the will, having regard to the identification of the chosen vehicle to administer the scholarship trust, those words are implicit in the purpose of the trust. No party at the hearing contended otherwise.

[74] Thus, insofar as Dr McKay may act to donate the residuary to QB, she should be careful to ensure that QB, who as above employs only classically trained ballet

dancers and only brings in dancers and choreographers of other dance styles from time-to-time, establishes the scholarship for the intended purposes. To that end, QB had produced an updated proposal as at September 2025 for the use of the donated monies. Although it appears from the oral evidence of both Dr McKay and Ms Weerasinghe that both properly understand the purpose of the trust, the updated proposal produced by QB to record the terms upon which the donation will be applied is somewhat lacking. It does not make it sufficiently clear that the scholarship is for a *young* dancer or choreographer to assist in the development of such persons' professional skills *in contemporary dance*. As presently drafted, in particular referring to the page headed "Glenn Cooke Memorial Fellowship", the implemented proposal would permit the scholarship to be granted to any dance artist or dance choreographer regardless of dance style or age. That would be contrary to the purpose of the trust intended by the will.

Conclusion

[75] The relief sought by the Dr McKay's originating application, orders 1 to 3, will be granted; the relief sought by ADC's interlocutory application, order 1, will be dismissed. In respect of any other costs of the proceeding, there does seem to me, in the circumstances of the case, to be merit to the position that otherwise there be no order as to costs. I make that order. However, if any party wishes to contend for a different costs order, I will give liberty to apply such that that order can be vacated and I will then hear from the parties in respect of any other costs orders sought.