CASES AND COMMENTS

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RE METCALFE

It is not uncommon for an educational institution to be offered gifts subject to conditions, which, if not technically in conflict with the objects of the institution are, in the opinion of those controlling the body, repugnant to its ethos. In such situations the alternatives open to the institution are either to disclaim the gift or to seek to obtain a variation of its terms. The effect of the first alternative was considered by Cromarty J. in *Re Metcalfe*, (1972) 3 O.R. 598.

The testator had left the residue of his estate for the establishment of scholarships in the Medical Faculty of McGill University. The terms of the bequest required that the recipients should be in need of financial assistance, that they should be Protestants of good moral character who had received their secondary education in the Province of Ontario and that they should have shown some athletic ability. Because of the discriminatory conditions attached to the bequest the University disclaimed. It was argued on behalf of the public trustee that, although the disclaimer was effective to divest the University of its power to select the recipients of the scholarship, it was not effective to destroy the trust. For reasons which are not altogether satisfactory this argument was rejected and it was held that the disclaimer avoided the bequest *ab initio*. In part the learned judge relied on general statements of the law relating to the effect of disclaimers and, for the rest, on the decision of Buckley J. in *Re Lysaght*, (1965) 2 ALL E.R. 888.

The part of the opinion which deals with the general law relating to disclaimers is, at the best, very misleading. Taken literally it would suggest that a trust cannot arise if the trustee disclaims - - a proposition which is as fundamently incorrect for charitable trusts as it is for private trusts. If the decision can be justified it must be on the basis of the principle stated in *Re Lysaght*. That case concerned a bequest to the Royal College of Surgeons for the creation of studentships from which persons of the Jewish or Roman Catholic faith were to be ineligible. Buckley J. held that the general principle that the court will appoint a trustee to replace one who has disclaimed could not be applied if acceptance by the named trustee was of the essence of the testator's intention. On that ground he held that the purposes of the trust were impracticable and proceeded to enquire whether the testator had indicated a general charitable intention so that the discriminatory requirements could be removed by an application of the *ct cy pres* doctrine. As McGill University had disclaimed the bequest absolutely and was, presumably, not prepared to accept the bequest under any conditions, this further enquiry was not made in *Re Metcalfe*.

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Could the University have obtained the bequest shorn of its discriminatory conditions if it had so desired? The answer would seem to depend upon whether the court would have been able to discern a paramount and overriding intention to create scholarships for needy students and could characterize the other qualifications set out in the will as not being essential parts of that intention. This was the test applied in *Re Lysaght* and, presumably, what it implies is that the court can strike out an impracticable condition or restriction if it is of the opinion that the instrument indicates that the donor would have preferred this to the invalidity of the entire gift. In *Re Lysaght* the test was held to have been satisfied. From the brief recital of facts in the report of *Re Metcalfe* it is not possible to judge whether a similar conclusion could have been reached. The most one can say is that there appears to be nothing in the facts which are disclosed to distinguish them significantly from those in *Re Lysaght*.

Finally, it might be of some interest to note that recent reports in the press suggest that discriminatory conditions of this kind may be removed by an order of the court under the *Variation of Trusts Act*. A review of the files available in the Weekly Court office in Toronto has revealed that the Act has been applied to charitable trusts. The discovery is startling because it suggests that the legislation has to a very large extent superseded the requirements of the *cy pres* doctrine insofar as that doctrine applies to charitable trusts which have not failed *ab initio*. To say the least, it is very questionable whether the *Variation of Trusts Act* was intended to have this effect. That Act permits the court to consent to a variation on behalf of beneficiaries who for any one of a number of reasons are unable to do so. As the order of the court does no more than this the legislation seems to be based on the assumption that if all the beneficiaries had been *sui juris* and ascertained they might have varied the trust without any need to apply to the court. Such an assumption can hardly be applied to charitable trusts which have, in any event, traditionally been characterized as trusts for purposes rather than trusts for individual beneficiaries.

RE BETHEL
AND
RE RYAN ESTATE

In recent years there has been more than one indication that Canadian judges are becoming increasingly reluctant to apply an excessively legalistic approach towards the definition of charity. Two further illustrations can be found in the decision of the Supreme Court of Canada in *Re Bethel* (Reasons, February 28, 1973) and that of the British Columbia Court of Appeal in *Re Ryan Estate* (1972), 4 W.W.R. 593.

In the first of these cases a testator had made a bequest in the following terms:

> To the Executive Officers of the T. Eaton Company Limited, Toronto, to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said Executive Officers in their absolute discretion may decide, the sum of $50,000.

At first instance, in the Supreme Court of Ontario, Grant J. held that the word "or", as used in the phrase "needy" or deserving". was used in its disjunctive sense, that a trust for deserving employees could not be regarded as confined to the relief of poverty and that therefore the purposes of the bequest were not exclusively charitable and the bequest was invalid. In the Court of Appeal, Gale C.J.O. relied on English authorities and came to a similar conclusion. In his view a person could be deserving not only because of need but also because of merit, industry, ingeniousness, imagination, honesty, sobriety, for a multitude of other virtues.

The majority of the Court of Appeal were not convinced by this reasoning. In their opinion, to give the word "deserving" its full dictionary meaning would be to attribute to the testator a capricious or whimsical intention. It would, for example, allow the trustees to reward qualities such as sobriety, chastity or fecundity. By reading the word in its context in a clause which contained a number of charitable bequests, the majority held that the purpose of the testator was to benefit not only the necessitous as indicated by the word "needy" but also those of moderate means who might require financial assistance in the exigencies from time to time arising. The trust was therefore created exclusively for the relief of poverty among a class.

An appeal to the Supreme Court of Canada has since been dismissed for reasons substantially similar to those of the majority of the Court of Appeal. The fact that the class to be benefited was defined by reference to employment by a particular company was, on the basis of English decisions including the recent decision of the House of Lords in *Dingle v. Turner*, (1972) 1 ALL E.R.878, expressly held not to detract from the public nature of the bequest.

What is perhaps most noteworthy in the Opinion written for the Supreme Court by Spence J., is the resurrection of the principle that the court leans in favour of charitable gifts and will construe a vague or ambiguous bequest as being exclusively charitable if, by so doing, the bequest can be upheld. No doubt because of the fiscal concessions granted to charitable bequests in England it has become very uncommon for the courts of that jurisdiction to give even lip service to this principle.

While one must applaud the revival of the principle of a benign construction and the decision of the court, it cannot be said that the outcome of the litigation will provide much assistance to those drafting wills or administering bequests made in broadly similar terms. The final decision in the case turned on inferences from context which are not only difficult to evaluate but which, one

suspects, might not have found favour in English courts. It is surely in the interests of no one other than members of the legal profession that the validity of such bequests should remain in doubt until appeals have been taken to the highest court in the land. In the case in question, where a bequest of $50,000 was at stake, seven counsel appeared before Grant J., five before the Court of Appeal and six before the Supreme Court of Canada. Costs presumably were substantial and in the event they were awarded out of the estate and were not limited to the fund. The time wasted and the expense of litigation in cases of this kind would seem to be inevitable not simply because of human fallibility but because of the uncertainty inherent in the legal definition of charity. The Provinces of British Columbia, Alberta, New Brunswick and Manitoba have legislation which attempts to deal to some extent with problems of the kind that arose in *Re Bethel*. The course of the litigation in that case underlines the need for similar, although, one would hope, broader, legislation in Ontario.

The decision of the Court of Appeal of British Columbia in *Re Ryan Estate* involved a similarly benevolent construction of the terms of a will. In issue was the validity of a residuary bequest for "such Protestant homes or institutions for the care and welfare of children of (sic) my trustee in its absolute and uncontrolled discretion shall select to share therein". Despite the absence of any words restricting the gift to those instituions whose purposes were concerned exclusively with the relief of poverty, the Court held unanimously that such a restriction was to implied. Davey C.J.B.C. stated that institutions of the kind mentioned in the will were popularly understood to provide for the care and maintenance of needy or destitute children and that the testator should be regarded as having had that popular understanding in mind.

As an illustration of the gap which appears to be widening between the respective approaches of English and Canadian courts the case should be contrasted with *Re Cole*, (1958) Ch.877, in which the English Court of Appeal held that a bequest for the "general benefit and general welfare" of the inmates of a public institution for deprived, endangered or delinquent children was not charitable. Whereas the Court in British Columbia, like the Supreme Court of Canada in *Re Bethel*, was prepared to take a broad view of the intention of the testator in the light of popular understanding and inferences from the surrounding circumstances, the English court focused its attention narrowly on the purposes for which, in conformity with the precise words of the will, the money might be spent. As the court was unable to discern anything in those words which would prevent the trustees from using the money to buy a television set or gramophone records for the benefit of the children in the institution, it held that the bequest was invalid. While, in the present uncertain state of the law, it is not possible to make a confident prediction, there is at least some justification for thinking that a Canadian court would not regard such an approach as consistent with the principle which calls for a benign construction.