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GIFTS TO CHARITIES WHICH DO NOT EXIST

Re Conroy and Re Hunter

A problem which is illustrated by two recent cases arises where a testator makes a gift to a charity which does not exist. The error may be the result of misdescription by the testator, or he may have described the charity correctly but not known that it had ceased to exist, or the charity may be a figment of the testator's imagination.

The general rule for such cases is of course provided by the doctrine of lapse: a gift by will to a person or institution which does not exist at the date of the testator's death lapses. The gift falls into residue; if there is no residuary disposition, or if the gift to the charity is itself residuary, then the property comprised in the gift passes on intestacy. The doctrine of lapse applies to all testamentary gifts, including those in favour of a charitable organization. However, the law of charity does make one important exception to the doctrine of lapse. Where the testator's will shows a "general charitable intention", then a gift to a non-existent charitable organization will not lapse, but will be applied *cy-près* to another charitable object as near as possible to that indicated by the testator. The crucial point in a case where a testator has made a gift to a charity which does not exist at the date of death is whether the testator's will indicates a "general charitable intention". A general charitable intention may be defined as an intention to benefit charity in any event even if the particular form of benefit indicated by the will should prove to be impossible.

In *Re Conroy* (1973) 35 D.L.R. (3d) 752 (B.C.S.C.) the testator, after making a number of specific bequests, purported to dispose of the residue of his estate in these terms:

> All the rest of my residue I bequeath to the Cancer Fund of B.C.

Now the problem with this bequest was that there was no fund called the "Cancer Fund of B.C.". There were however two organizations which did administer cancer funds in British Columbia, namely, the "Canadian Cancer Society, British Columbia and Yukon Division" and the "British Columbia Cancer Treatment and Research Foundation". Macfarlane J. of the British Columbia Supreme Court decided to apply the bequest *cy-près* by dividing it between these two organizations in equal shares.

Few would cavil at such a happy compromise of the problem, especially as the two charities concerned and the Attorney-General of B.C. all concurred in the result—a point which the court emphasized. The next-of-kin

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of the testator, who seems to have been a sister (a sister was represented in the proceedings), did not, however, concur in the arrangement, and she may have some ground to be unhappy. In order to defeat her claim as next-of-kin, it was necessary to show that the testator's will indicated a "general charitable intention". And yet Macfarlane J. never actually stated that the will did disclose a general charitable intention. Moreover, he did not refer to any language or circumstances which would suggest that a "general charitable intention" could properly have been held to exist. For example, there appear to have been no other gifts to charity in the same will; that is a circumstance which has sometimes been held to show a general charitable intention. There were, according to the court, "a number of specific bequests", but these were not described: they could have been to charity but were more likely to have been to friends or relations.

Nor did the *Conroy* court address itself to another matter of importance in determining whether or not a will discloses a general charitable intention; and that is the distinction between a gift to a charity which has never existed, and a gift to a charity which once existed but has come to an end. If the Cancer Fund of B.C. had once existed, but had come to an end before the death of the testator, then it would be very difficult indeed to establish a "general charitable intention". The cases suggest that in this situation there is a strong presumption that the testator intended to benefit the named institution and no other; this would be inconsistent with a general charitable intention, and the disappearance of the institution would cause a lapse. (For numerous authorities, see Keeton and Sheridan, *The Modern Law of Charities* (2nd ed., 1971), 141.) If on the other hand the Cancer Fund of B.C. had never existed, then the testator's gift to it could much more easily be interpreted as intended for the more general purpose of fighting cancer; that wider purpose would suffice as a general charitable intention justifying a *cy-près* application of the fund. As Buckley J. said in *Re Davis* [1902] 1 Ch. 876, at p. 882, in the case of a gift to an organization which has never existed it is "more probable that what the testator had in view was not the person but the purpose". But even in this kind of case the court will usually look for some small further indication of general charitable intent. In *Re Davis* the court found it in the fact that there were other charitable gifts in the will.

In *Conroy* the reasons for judgment do not tell us whether or not a finding of general charitable intention was made, and if so upon what grounds. No facts which would be even remotely suggestive of a general charitable intention are mentioned; and we are not told whether the case is one of a charity which had never existed, or a charity which had once existed but subsequently came to an end. In these circumstances the case must be regarded as a strong example of the benevolence and non-technical approach to charity which Professor Cullity in the last issue of this journal ((1973) Vol. 1, no. 2, pp. 48-50) described as characteristic of recent Canadian cases.

In *Re Hunter* (1973) 34 D.L.R. (3d) 602 (B.C.S.C.) the testatrix disposed of half of the residue of her estate upon trust for her son for life, and after his death for:

> the following charities, namely, Queen Alexandra Solarium for Crippled Children at Mill Bay, Vancouver Island; the Government of the Province of British Columbia for the Anti-Tuberculosis Sanitarium at Tranquille, British Columbia; and the Anglican Synod of the Diocese of British Columbia for the building fund or maintenance fund of Christ Church Cathedral at Victoria, British Columbia.

The testatrix died in 1944. The life tenant survived her and died in 1970. On his death the shares of residue payable to the Queen Alexandra Solarium and Anglican Synod were paid out. But the trustees of the estate applied to the court for directions with respect to the gift to the Government of the Province of British Columbia for the Anti-Tuberculosis Sanitarium at Tranquille, British Columbia.

At the testatrix's death in 1944 the government of British Columbia was operating an anti-tuberculosis sanitarium at Tranquille, British Columbia. It continued to do so until 1958 when the sanitarium was closed. At the death of the life tenant in 1970 the sanitarium no longer existed. What was to happen to the share of residue which was given for the sanitarium?

At first blush it would seem that a *cy-près* application is justified on the simple ground that the sanitarium was in existence at the death of the testatrix. Therefore there is no lapse. Therefore the case is one of subsequent failure. Where a gift to charity fails *after* the date of the gift it is settled law that the property must be applied *cy-près* even if no general charitable intention is disclosed. It is only where a gift to charity fails initially (as it did in *Re Conroy*) that a general charitable intention must be disclosed in order to avoid failure.

Nevertheless, in *Re Hunter* McIntyre J. of the British Columbia Supreme Court held that the share of residue given for the sanitarium failed, and that the share was accordingly held on a resulting trust for the testatrix's next-of-kin. The court reached this result by characterizing the failure of the gift as initial rather than subsequent, and by finding that there was no general charitable intention. As to whether the failure of the gift was initial or subsequent, the court admitted (at p. 604) that "there is no lapse of the gift vested in the charity, even though actual receipt of the gift may have been deferred, as here, to a life interest". But the court reasoned that this was not the situation here, because "at the date of the testatrix's death, no legal entity existed to receive the gift and there can therefore be no vesting of the trust property at the date of her death" (p. 605). The position would have been different if at the date of the testatrix's death the sanitarium was being operated by a legal entity such as an incorporated society. The court pointed out that this was in fact the situation until 1921, when the sanitarium was taken over by the government of British Columbia.

The government of British Columbia was of course still operating the sanitarium in 1944, when the testatrix died. Since the government of British Columbia was the donee named in the will, why did it not qualify as a "legal entity which could receive the gift" (p. 605)? Because, said the court, the gift to the government "is clearly a gift in trust and one which the government of British Columbia cannot, upon the failure of the trust, claim to take beneficially. . . . The purposes for which the sanitarium had been created were being carried out by the government of British Columbia but there could be no vesting of the trust property in a mere purpose" (p. 605). With respect, this reasoning appears to me to be unsatisfactory. We do of course commonly speak of various organizations or institutions as "charities". But this language, while sanctioned by common usage, can be misleading. A "charity" is simply a legal entity which carries out purposes which the law defines as charitable. It never receives property "beneficially" (as McIntyre J. implies), but solely for the charitable purposes. Once this is accepted, it is clear that the government of British Columbia, or, more accurately, the Crown in right of British Columbia, is a charity to the extent that it holds property which it is obliged to apply exclusively for charitable purposes. With respect to such property, it is in precisely the same legal situation as the Anti-Tuberculosis Society, or any other organization which holds its property for charitable purposes. The court should therefore have applied the well-settled doctrine that a gift for a charitable purpose which fails after the testator's death but before the termination of a prior life interest does not fail and must be applied *cy-près* whether or not there is a general charitable intention. (If I am right in my reasoning *Re Fitzgibbon* (1922) 69 D.L.R. 524 (Ont. S.C.) is probably also wrongly decided.)

Having determined (wrongly as I believe) that this was a case of initial failure, the court had to decide whether or not the will expressed a general charitable intention in respect of the gift. The court held that there was no such general charitable intention. It did not give any reason for this conclusion other than saying that the conclusion had been reached "despite the forceful argument of counsel for the Attorney-General" (p. 604). We are not informed of the points which were pressed by the Attorney-General, but one which invites attention is the fact that the gift for the sanitarium is associated with gifts to two other undoubted charities, and all three "donees" are described in the will as "charities". As has been mentioned in the earlier discussion of *Re Conroy,* in some contexts this would suffice to indicate a general charitable intention. It has often been held sufficient where the donee charity has never existed at all. Where, as here, the donee charity did exist but subsequently disappeared, the fact that the testator has carefully identified an actual institution as the object of his bounty does seem inconsistent with a wider intention to benefit other institutions of the same kind. In order to overcome the accurate particularity of the testator's disposition, and infer a general charitable intention, the court is probably correct in holding that

more is required than the naming of other charities in association with the non-existent one.

Re Conroy and *Re Hunter* are only decisions at first instance. But they do emphasize the doubt, and therefore judicial discretion, which surrounds the application of the *cy-près* doctrine. I would draw two practical conclusions from the cases: (1) the absolute necessity in every case of accuracy in the identification of a charitable beneficiary, and (2) the desirability in many cases of a substitutional gift or gift over to deal with the possibility of the charitable beneficiary having ceased to exist by the time the gift takes effect. The first prescription would have kept *Re Conroy* out of the courts, and the second would have kept *Re Hunter* out.