The Construction of Charitable Gifts*

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The purpose of this article is to compare the construction by the court in *Re Faraker*[1] of a testamentary gift to a charitable body which has apparently ceased to exist with that of *Re Finger's W.T.*,[2] and to consider which interpretation carries out the testator's intentions most effectively.

Where a charitable institution named in a will has ceased to exist before the death of the testator, the questions to be considered are whether the gift has failed at all, and if it has, whether it can be saved from lapse by the *cy-près* doctrine if the testator had a "general charitable intention." *Re Faraker*[1] and *Re Finger's W.T.*[2] concern the first of these two questions.
The decision in *Re Faraker*[1] appears to be that if a disposition can be construed as a gift in augmentation of the funds of a charitable institution, then if those funds are transferred elsewhere, for example as a result of an amalgamation, the gift will not lapse but will take effect in favour of the charitable body presently administering those funds. Thus where there was a gift to a named charity for widows in Rotherhithe, which before the death of the testatrix had been amalgamated with other Rotherhithe charities by a scheme of the Charity Commissioners, the gift took effect in favour of the new consolidated charity, notwithstanding that its objects included no express mention of widows.

This can be compared with *Re Finger's W.T.*,[2] where a distinction was drawn between incorporated and unincorporated charitable bodies which have ceased to exist. In the case of the latter, the gift will be construed as a gift for purposes, for if the association is charitable, it cannot be construed as a beneficial gift to the members. Therefore, so long as the purposes still exist, the gift does not fail, even if the machinery has disappeared. The result, then, is that a scheme will be settled, applying the gift to those purposes. In other words, the charitable institution is merely a trustee for its purposes, and a trust will not fail for lack of a trustee, unless it is a rare case where the testator has attached special significance to the character of the trustees, as in *Re Lysaght*.[3]

However, if the institution was incorporated, a gift to it will be construed as an absolute gift to a named legal person, and cannot be regarded as a purpose trust unless this was clearly the testator's intention. Therefore, if the corporation has dissolved, the gift fails, and can only be rescued from lapse by a *cy-près* scheme if there was a general charitable intention, which was fortunately present in *Re Finger's W.T.*[2]

It must be emphasised that the scheme which will give effect to a gift to an unincorporated charity which has wound up is not a *cy-près* scheme. It is stated in Maudsley and Burn's *Trusts and Trustees: Cases and Materials* that in *Re Finger's W.T.*,[2] Goff J. pointed out that where there was a gift to a charitable institution, and that institution failed before the death of the testator, it was

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easier to find a general charitable intention if the gift was to an unincorporated charitable organisation than if it was a gift to a charitable corporation. This, with respect, is rather misleading, as the decision was that the gift to the unincorporated body *has not failed,* and it was therefore necessary to invoke the *cy-près* doctrine and look for a general charitable intention. This was only required in the case of the corporation, as only that gift could be said to have failed.

A gift cannot be saved by either the *Re Faraker*[1] or the *Re Finger's W.T.*[2] interpretation if it was clearly confined to the purposes of a particular institution at a particular place, as *Re Rymer,*[4] although such a construction will not readily be adopted.

It is now proposed to examine the cases based on *Re Faraker*[1] and those which have adopted the "purpose trust" construction, and to consider how much emphasis has been placed on the question whether a charity is incorporated or unincorporated, terminable or perpetual, and whether or not it has any funds. It would be helpful to bear in mind that "the question, strictly speaking, is not whether a 'charity' exists, but whether the trusts on which property is held are trusts for charitable purposes," as stated in Snell's *Principles of Equity* (27th ed.) in a slightly different context. It appears that much confusion has arisen as a result of regarding a "charity" as an entity apart from its objects, a confusion illustrated by the judgment in *Re Ovey.*[5]

The question that will be considered first is whether the construction of a gift should differ depending on whether the "charity" is perpetual or terminable. It is submitted that the distinction between perpetual and terminable charitable bodies is only relevant in the rare case where the charitable body must be regarded as beneficiary rather than trustee. If the body is merely a trustee for its charitable purposes, it can hardly matter whether or not it is terminable. therefore the distinction becomes irrelevant if the "purpose trust" construction can be adopted. The fact that an institution is terminable and has terminated should only cause a lapse if the body was the essence of the gift, or in other words, if it was a charitable corporation (or a *Re Rymer*[4] situation). Even in the case of the corporation, the gift can of course be saved by a *cy-près* scheme if there was a general charitable intention. It is thought that a closer examination of *Re Finger's W.T.*[2] and *Re Stemson's W.T.*[6] supports this conclusion.

In *Re Finger's W.T.,*[2] the unincorporated charity was terminable, but no significance was attached to this, as it was regarded as a gift for charitable purposes. The corporate charity was also terminable, but it was not because it was terminable that the "purpose trust" construction could not apply, but because it was incorporated. In *Re Stemson's W.T.,*[6] there was a gift to an incorporated charity which before the will came into operation had wound up and transferred its assets to a different charity. As there was no general charitable intention, the gift was held to lapse, on the grounds that the charity was not perpetual but terminable, and if the body ceased to exist and its funds were disposed of, the charity itself ceased to exist. It was stated that the *Re Faraker*[1] construction applied to perpetual charities, whereas the gift here was to a body inherently liable to dissolution. This reasoning, with respect, may be criticised on the

ground that the real issue is whether the charitable purposes have come to an end rather than the machinery administering them. However, the decision clearly does not conflict with *Re Finger's W.T.*,[2] and if the ratio of that case is applied to the facts of *Re Stemson's W.T.*,[6] it will be seen that the "purpose trust" construction was inapplicable simply because it was a gift to a corporation absolutely, and not because the corporation was terminable.

A similar misplaced emphasis was put upon the fact that nobody had power to terminate the organisation in *Re Roberts*,[7] involving a gift to the "Sheffield Boys Working Home." Much was made of this fact, but as the gift was construed as for the purposes to which the Home was dedicated, it would seem that the question of whether or not the machinery was terminable was without significance. The only question should have been whether the purposes still existed.

It next falls to be considered whether the *Re Faraker*[1] construction can be invoked to save a gift to a charitable corporation which has dissolved. In *Re Vernon's W.T.*,[8] decided in 1962, there was a gift to a corporate charity which dissolved before the testator's death. It was held that, unlike a gift to an unincorporated charity, this could not be construed as a purpose trust. It was a gift to the corporation beneficially. The testator's motive was no doubt to assist its work, but that was insufficient to create a trust. But it was further held that the charity could not cease to exist because the corporation's assets were all dedicated to charity and could never be applied to anything else. (It might be suggested here that the fact that the assets could not lawfully be applied to any non-charitable object merely meant that on dissolution, the company's assets would be applied *cy-près*. It could not mean that the company still existed for the purpose of attracting to it gifts made by a testator who died after its dissolution.) Buckley J. held that a change in its mechanical aspect could not involve the charity ceasing to exist, and that *Re Faraker*[1] applied equally to incorporated charities. In such cases, the law regarded the charity as a conception distinct from the institutional mechanism administering it, and therefore the bequest would not lapse. But, with respect, the point is that where a corporation is the legatee, the "institutional mechanism" is the essence of the gift, as explained in *Re Finger's W.T.*[2] Buckley J. stated that the application of *Re Faraker*[1] to the gift was not a consequence of construing it as a purpose trust, but it is indeed difficult to understand what distinction was previously drawn in the judgment between gifts to incorporated and unincorporated charities, if the gift is thus effective in both cases. Buckley J. construed the gift as being "in augmentation of funds," following *Re Lucas*,[9] but that case did not involve a corporate charity. Surely if a gift to a corporation is not a purpose trust, it cannot be construed as a gift to the charitable object as opposed to the mechanism. It is therefore suggested that the doubts expressed in *Re Stemson's W.T.*[6] and *Re Finger's W.T.*[2] are well-founded, and that a gift to a corporate charity which has dissolved can only be saved from lapse, either if it was clearly expressed as a purpose trust, or if there was a general charitable intention allowing a *cy-près* application, as in *Re Finger's W.T.*[2]

The next consideration is the importance, if any, of funds to the continued existence of the charity. It will be remembered that the decision in *Re Faraker*[1]

is that if a gift is construed as in augmentation of the charity's funds, then, notwithstanding a lawful change in name or objects, the gift takes effect in favour of the body as so altered. Kennedy L. J. pointed out that the funds of the original charity still existed, "metamorphosed under the scheme," and that the administration of those funds had not ceased. His Lordship went on to say that an endowed charity remains existent so long as its funds are devoted to some charitable purpose under some duly authorised scheme.

Is it then the consequence of this reasoning that the charity "dies" if it has exhausted its funds? This seems again to be placing undue emphasis on the mechanism as opposed to the charitable purpose to which the funds were devoted, yet this view seems to have gained a firm foothold, both in subsequent cases and in the textbooks. The continued existence of funds was regarded as essential in *Re Lucas,*[9] *Re Stemson's W.T.*[6] and *Re Withall.*[10] It is submitted that while the gift can be saved from lapse by the *Re Faraker*[1] construction if the original funds are presently being applied to some charitable purpose, but it can hardly be that the gift must lapse if there are no funds. The dubiousness of such a view is illustrated by the facts of *Re Slatter,*[11] a case involving a gift to a tuberculosis hospital which had never had any endowments, and which closed down in the lifetime of the testatrix when its work became reduntant, the disease having been controlled in its locality. Plowman J. held that if an institution closed down because the need for it had gone *or for lack of funds,* the charity ceased to exist and therefore the gift lapsed, it being conceded that there was no general charitable intention. It lapsed because "there were no endowments through which the charity could sustain its existence."

It was seen, however, that if the approach of *Re Finger's W.T.*[2] is adopted, the question of funds rightly pales into insignificance. All that is necessary is that the purposes to which the funds used to be devoted still exist. If the facts of *Re Slatter*[11] arose today for decision, it could be held, following *Re Finger's W.T.,*[2] that the gift was a purpose trust. It did not appear that the hospital was a corporation, and assuming it was not a gift confined to a particular institution at a particular place (as in *Re Rymer*[4]), then there need not have been a lapse. While the disease had diminished considerably, it is unlikely that it had been completely eradicated. Therefore, if the purposes still existed, a scheme could have been settled to apply the gift to those purposes.

While the *Re Finger's W.T.*[2] and *Re Faraker*[1] constructions are clearly different, a closer examination of the relevant cases seems to reveal a certain fusion of the two principles, in that *Re Faraker*[1] seems to be invoked without any finding that the gift was intended to be in augmentation of the charity's funds. It may be suggested that the explanation for this might be that the two constructions are superficially different but essentially the same. The point of *Re Faraker*[1] is that a distinction is being drawn between the institutional mechanism and the objects of the charity, and is this not the very same distinction which is being drawn in *Re Finger's W.T.*[2] in the case of unincorporated charities? If a testator intends to augment the funds of an institution in such a manner that his gift is not dependent on the continued existence of the paritcular institution, then is this not the same as a gift for the purposes of the institution? Money given to augment

the funds of a charity must be intended to be applied to the purposes to which those funds are dedicated at the time the testator makes his will. It seems that *Re Finger's W.T.*[2] allows the gift to be devoted to those purposes, while *Re Faraker*[1] allows the gift to go to whatever purposes the original funds are devoted to at the testator's death, whether or not these are the same as the original purposes. It might further be added that there is usually no hint in the will as to which of these constructions should be adopted. In *Re Meyers,*[12] it was expressly declared in the will that the legacies were to be added to the funds of the specified charities, but in other cases, it could be said that the view that the gift is in augmentation of the funds of the named institution as opposed to a gift for the purposes of the named institution is an arbitrary assumption.

To take *Re Faraker*[1] itself, there appeared to be nothing in the will to indicate whether the "augmentation of funds" construction or the "purpose trust" construction was appropriate. Cozens-Hardy M.R. and Kennedy L.J. clearly regarded the gift as being in augmentation of the named charity's funds and hence applicable to the wider purposes to which those funds were being devoted at the death of the testatrix. On the other hand, Farwell L.J. did not emphasise the funds and appeared to construe the gift as a purpose trust, saying:

> "One has to consider not so much the means to the end but the charitable end which is in view, and so long as that charitable end is well established, the means are only machinery, and no alteration of the machinery can destroy the charitable trust for the benefit of which the machinery is provided."

This reasoning seems identical to that of *Re Finger's W.T.*[2] regarding unincorporated charities; yet it was not suggested that there should be a scheme to apply the gift for the benefit of poor widows. It was agreed that the new consolidated charity could claim the money, which would thus become applicable to wider purposes than those envisaged by the testatrix, poor widows not even being expressly included. Even if the scheme of the Charity Commissioners should have been amended to include poor widows, this would only be one of several purposes to which the gift would now be applicable. The named charity did not appear to be a corporation, so the gift could have been construed as a purpose trust, requiring a scheme to apply the money to the purpose, namely poor widows.

In *Re Lucas,*[9] a case involving a gift to a home for crippled children which had closed down, Roxburgh J. remarked that if a bequest were to be construed as in augmentation of the named charity's funds, then if the charity was altered by a scheme, any augmentation should be held on the trusts so altered. The Court of Appeal held that as the testator intended to contribute to the endowment, then the gift was valid in favour of the charity now administering the funds. While this construction saves the gift from lapse, it will be appreciated that it does not carry out the testator's intention if the purposes of the new charity are not identical to those of the original charity. There seemed no reason for preferring the "augmentation of funds" construction in *Re Lucas.*[9] In *Re Finger's W.T.,*[2] Goff J. remarked that in the case of a gift to a home, the conclusion that it was a purpose trust was "almost, if not absolutely, inescapable." Why, then, should

the gift in *Re Lucas*[9] not be construed simply as a gift for crippled children? As this purpose continues to exist, there should be a scheme to apply the gift to the purpose. This is exactly what the testator intended, and is therefore a preferable construction in cases where the body now administering the funds is not confined to the same purposes as the original charity, which may or may not be the case.

A striking example is *Re Bagshaw,*[13] involving a gift to the Bakewell War Memorial Cottage Hospital, an unincorporated charity providing hospital treatment for poor persons of the district. After the National Health Service legislation, the trustees, pursuant to a power in the trust deed, changed the charity to the Bakewell 1914 - 1918 War Memorial Charity, whose objects were hospital benefits and also provision for needy ex-service men or women of the district and their dependents. The original hospital was now vested in the Minister of Health and was carried on by the usual management committee. It was held, applying *Re Faraker,*[1] that the original charity still existed in spite of the alteration in name and objects: therefore the gift was for the general purposes of the War Memorial Charity. It was nowhere stated in the judgment that the gift was construed as in augmentation of the funds of the original charity. The result seems inconsistent with the testator's intention, in that he intended to benefit the sick, and his gift took effect in favour of a charity whose objects extended to the relief of poverty. As the hospital was unincorporated, it could have been construed as a gift for the work of the hospital, which still existed: therefore a scheme could have given the money to the present management committee for the purposes of the hospital. It cannot be suggested that the purpose of providing hospital benefits for the needy sick did not survive the National Health legislation. It would also be unrealistic to suggest that the result was consistent with the testator's intentions in that the trust deed allowed an alteration of the original purposes. This decision should be compared with *Re Morgan's W.T.*[14] and *Re Meyers,*[12] where the "purpose trust" construction enabled gifts to hospitals which were later taken over by the Minister of Health to take effect as gifts to the new management committees for the purposes of the original hospitals.

If the *Re Faraker*[1] reasoning then fails to carry out the testator's precise intentions, it is now proposed to consider the "purpose trust" cases, to see if this construction is preferable.

It would be difficult to disagree with the comment of Goff J. in *Re Finger's W.T.*[2] that there is much to be said for the view that the status of the donee, whether incorporated or unincorporated, can make no difference to the question whether, as a matter of construction, a gift is absolute or on trust for charitable purposes. But even if this distinction would not impress the testator, the objection of artificiality should not prevail if the construction can prevent a gift from failing.

An examination of the cases reveals that the court has often construed a gift to an unincorporated charity as a purpose trust which does not fail if the institution ceases to exist, but usually without emphasis on the fact that the specified charity was unincorporated — see *Re Wedgwood,*[15] *Re Morgan*[14] and *Re Glass' W.T.*[16] Indeed in *Re Roberts,*[7] Wilberforce J. said that the mere fact that the charity was unincorporated was not enough *per se* to support the purpose trust construction. But as Goff J. explained in *Re Finger's W.T.,*[2] this remark was

made in the context of deciding whether the gift was for the general purposes of the home or was so tied up with the particular institution at the particular place that it must fail when the institution closed down. Thus, Wilberforce J. held that a gift to a boys' home which no longer existed did not fail, but was a gift for orphan and destitute boys, so that a scheme should be settled to give effect to it. The trustees had handed over assets to the Sheffield Town Trust pursuant to a provision in the trust deed, but Wilberforce J. considered that it would be an undesirable extension of *Re Faraker*[1] to uphold the claim of the Sheffield Town Trust, presumably because its objects were different from those of the named charity. If this was the objection, it was one which did not prevail in *Re Faraker*[1] itself.

An unincorporated charity was also considered in *Re Dawson's W.T.*,[17] where there was a gift "for the general purposes of the Church Association," a body which had since amalgamated with a similar charity to form the Church Society, which carried on its work. The Church Society was held entitled to the gift, either because it was simply a change of name, or because it was a purpose gift, and as the purposes remained, the gift should be applied to those purposes by the Church Society, by scheme or otherwise. This is therefore similar to *Re Finger's W.T.*,[2] but it is interesting to note that Vaisey J. said, "If this had been a gift *to* the Church Association and not a gift *'for its general purposes,'* I might have been compelled to hold that the gift failed altogether." Now, after *Re Finger's W.T.*,[2] the fact that the charity was unincorporated will allow the gift to be construed as a purpose trust whether or not the testator states that it is for the charity's general purposes.

A more formidable obsacle to the *Re Finger's W.T.*[2] construction seems at first sight to be present in *Re Meyers*.[12] This decision was not binding on Goff J., but he remarked that there was no serious conflict, a view which seems perhaps optimistic. *Re Meyers*[12] involved legacies to several hospitals, some incorporated and some not, which in 1948 were taken over by the National Health Service. It was held that the gifts to the unincorporated hospitals must be construed as for the furtherance of their work, therefore the legacies were payable to the bodies now administering the hospitals. Harman J. explained that such a gift was not "given to the mere bricks and mortar or to the beds or the carpets, but for the purpose for which the work is carried out." The difficulty was that the incorporated hospitals were for the most part correctly named and the old corporations still existed. Harman J. held that the gifts to the corporation *ought to be construed in the same way,* as their work was also being continued, thus the money was payable not to the old corporations but to the bodies administering the hospitals under the 1946 Act. Now it might be said that if the legatee is an existing corporation, correctly named, the court has no power to give the legacy elsewhere. Harman J. got over this problem by citing comments made in an entirely different context in *N.S.P.C.C.* v. *Scottish N.S.P.C.C.*,[18] comments to the effect that a named legatee does not take if there is compelling proof that the testator intended someone else, which in no way supports the view that if the testator intended the named legatee, the court has power to give the legacy to a different body if such a result would be more convenient. His Lordship said that it would be contrary to common sense not to give the same construction to all the

gifts, and it would be extraordinary if the gifts were to go to the old corporations, some of which included non-hospital purposes. Now while this result was reasonable on the peculiar facts of the case, the reasoning, with respect, is difficult. If there is a gift to a corporation including non-hospital purposes, then there is nothing extraordinary in the fact that the gift might be applied to the non-hospital purposes. Instead of suggesting that the court has power to divert a legacy from a named and existing legatee, the real explanation seems to be that the emhpasis throughout the will on hospital charities supplied a context (lacking in *Re Finger's W.T.*[2]), enabling the gifts to the corporate hospitals to be construed as purpose trusts. The corporations are merely trustees, and if, as on the facts of the case, the corporations are no longer capable of acting, being "mere shadows of their former selves," this will not prejudice the gift. New trustees can be appointed under a scheme, and these could of course be the present management committees. Thus it will be seen that any conflict between *Re Meyers*[12] and *Re Finger's W.T.*[2] is more apparent than real.

A final word might be said about the construction of gifts to apparently charitable bodies which have *never* existed. It is usually held that the gift fails, but as the body has never existed, there is a general charitable intention to support a *cy-près* application. This was the situation in *Re Harwood,*[19] concerning gifts to three peace societies. One hand never existed, so the gift was applied *cy-près.* Two others had existed; one correctly and one incorrectly described. It was held that these gifts also failed, but there was only a general charitable intention in the case of the incorrectly described body, thus the other gift lapsed. The arguments seemed confined to whether there was a general charitable intention or whether the gifts lapsed. It was not suggested that the gifts had not failed at all, but as the various peace societies did not appear to have been corporations, could the gifts not have been construed as purpose trusts? As the purposes still existed, a scheme could have applied the gifts to the purposes without requiring a general charitable intention, thus avoiding lapse. Even where an institution has never existed, so long as the purposes are clearly charitable, it is difficult to see why these gifts are always held to fail. If it is a gift on trust (bearing in mind that only the Crown has jurisdiction if it is a direct gift), then an inquiry as to the identity of the trustee seems again to be attaching more importance to the trustee than to the trusts. However, no harm is done while the court is content to infer a general charitable intention from the fact that the institution never existed. But, as is evident from *Re Goldschmidt,*[20] this is not always inferred.

The conclusion which may be drawn from an analysis of the cases is that *Re Finger's W.T.*[2] carries out the testator's wishes more effectively than *Re Faraker.*[1] So long as the purposes still exist, the gift should be applied to those purposes. Kennedy L.J., in *Re Faraker,*[1] was clearly reluctant in his conclusion that the bequest should go to persons who were "not bound to give one penny to a widow." He went on to say that if the testatrix had stated in the will that the gift was "for widows," it would have been impossible to get over that. According to *Re Finger's W.T.,*[2] the gift would be taken to be "for widows" whether or not expressly stated in the will, so long as the institution was not incorporated. It is suggested that the "purpose trust" construction would have been more acceptable to Kennedy L.J.

Charitable purposes rarely fail. Even if the purposes have failed, or if the institution was a corporation, *cy-près* is still a possibility. It is accordingly suggested that if the objects of a charity have been lawfully changed, the *Re Finger's W.T.*[2] construction should be preferred to that of *Re Faraker,*[1] in order to carry out the testator's intentions as nearly as possible.

[1] [1912] 2 Ch. 488.
[2] [1972] Ch. 286; [1971] 3 W.L.R. 775; [1971] 3 All E.R. 1050.
[3] [1966] Ch. 191; [1965] 3 W.L.R. 391; [1965] 2 All E.R. 888
[4] [1895] 1 Ch. 19.
[5] [1885] 29 Ch.D. 560.
[6] [1970] Ch. 16; [1969] 3 W.L.R. 21; [1969] 2 All E.R. 517.
[7] [1963] 1 W.L.R. 406: [1963] 1 All E.R. 674.
[8] [1972] Ch. 300; [1971] 3 W.L.R. 786; [1971] 3 All E.R. 1061.
[9] [1948] Ch. 175, 424.
[10] [1932] 2 Ch. 236.
[11] [1964] Ch. 512; [1964] 3 W.L.R. 18; [1964] 2 All E.R. 469.
[12] [1951] Ch. 534; [1951] 1 All E.R. 538.
[13] [1954] 1 All E.R. 227.
[14] [1950] 1 All E.R. 1097.
[15] [1914] 2 Ch. 245.
[16] [1950] Ch. 643; [1950] 2 All E.R. 953.
[17] [1957] 1 All E.R. 177.
[18] [1915] A.C. 207.
[19] [1936] 1 Ch. 285.
[20] [1957] 1 W.L.R. 524; [1957] 1 All E.R. 513.