The Problem of Surpluses in Funds Raised By Public Appeal

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Public appeals for funds are a frequent part of our lives. Such subscription funds tend to be established for one of two purposes: either they represent a response to some natural or human disaster, or they derive from the many and diverse efforts of organizations or communities to provide some particular service—a new building for a youth group, support for a volunteer fire brigade in a rural area, money to send an amateur sports team to a distant tournament. There is no indication that the use of such public appeals is likely to abate. Indeed, we have recently witnessed a series of domestic and international disasters which have touched a great many Canadians, for example, the earthquakes in Armenia and San Francisco, the Montreal massacre, and a number of airplane crashes. In addition, given the current climate of fiscal restraint, there is likely to be less government money available for many community and other organizations.

Invariably these funds are comprised of numerous small, individual donations. Many will also be anonymous, contributed, for example, through such methods as collection boxes and fund-raising events. This essay examines the thorny problem of the fate of these moneys when for some reason there is a failure of the purpose and the whole or part of the money is not disbursed. Such failure can occur for one of two reasons: the particular purpose may be fulfilled with some part of the fund remaining, or the converse may occur, the fund is never used for the stated purpose either because it proved unnecessary or because not enough money was raised to achieve the objective. Whatever the cause of failure, there will be a question about where the subscribed funds, especially those contributed by anonymous donors, should go. Relatively few English and Canadian cases and statutory provisions deal with this problem, and a comprehensive review of them reveals that the law is both to some extent confused and, where it is clear, arguably unsatisfactory.

The fate of surplus funds depends, first, on whether the court will consider the purpose of the appeal to be charitable. If not, then trustees will not usually be permitted to apply the funds to any other purpose and the search for donors to take back their contributions will begin. Second, if

the purposes are considered to be charitable the law of *cy-près* becomes involved and, provided certain requirements are met, the funds can be applied to a similar purpose. If the court decides that the case is not one for *cy-près*, the money would have to be returned to donors as in the case of a non-charitable purpose. I will deal with each of these situations, beginning with the problems posed by public appeals for purposes not deemed to be charitable.

Non-Charitable Purposes

If the purpose of the appeal fund is not charitable[1] then it will be treated in the same way as any other trust where the entire beneficial interest is not disposed of. It is trite law that in such cases there must be a resulting trust to the settlor(s). The rule is illustrated by *Re The Trusts of the Abbott Fund*[2], in which a subscription was taken up for the support of two deaf-mute women after a trust fund established for them by their father was lost through the defalcations of the trustee. After the death of the beneficiaries a question arose as to whether the surplus should go to their estates. In holding that it should be returned to the subscribers Stirling J. concluded that as the money had been raised in response to a circular which adverted to the need to support the women during their lifetimes, they never became the owners of the money and therefore "there must be a declaration that there is a resulting trust of the moneys remaining unapplied for the benefit of the subscribers of the Abbott fund".[3]

Strictly speaking there are no exceptions to this rule, even though cases relying on *Re Sanderson's Trust*[4] are sometimes considered to be so. *Sanderson* was a case factually similar to *Abbott* in which the court held that the trust fund was a gift to the beneficiaries, the stated purpose merely providing the motive for the gift. While the judicial discovery of such an intention to confer an unconditional benefit is often fictional and geared to avoid the *Abbott* result, the fact remains that as a matter of trust theory such cases are not exceptions to the rule because they do not involve a failure to dispose of the entirety of the beneficial interest.[5]

Re Abbott concerned a fund in which the donors were few in number and known. Despite the practical difficulties involved, the rule is the same if the donors are numerous and anonymous. The leading case is *Re Gillingham Bus Disaster Fund*.[6] After a bus ploughed into a column of cadets and killed a number of them, the mayors of Gillingham, Rochester, and Chatham issued a media appeal for a fund. First to provide for the funeral expenses of the dead and for the care of the disabled and, second, to be used for "such worthy cause in memory of the boys who lost their lives as the mayors may determine". Most of the £9,000 contributed was

raised anonymously through street corner collections, whist drives, soccer games, etc. When the bus company admitted liability in negligence most of the funeral and other direct costs were paid, and only £2,000 was needed from the fund for those primary purposes. On an application to determine what should be done with the remaining £7,000, Harman J. held that the secondary purposes—worthy cause or causes—were not charitable and therefore the trust failed as a non-charitable purpose trust. He then stated unequivocally the "general principle" that "where money is held upon trusts and the trusts declared do not exhaust the fund it will revert to the donor or settlor under... a resulting trust".[7]

Harman J. was not impressed by the insuperable administrative difficulties that would attend attempts to return the money, nor by the Crown's contention that the money should go to it *bona vacantia*,[8] which was based on the argument that the donors had given up all rights in the property settled on the trust and supported by two cases in which money had been subscribed to a fund by contract.[9] He found that a resulting trust analysis has nothing to do with the settlor's intention, since in this and almost all other cases, subscribers have no thought of seeing their money again. Rather, it "is an inference of law based on after-knowledge of the event".[10] Nor did the Crown's authorities assist their position, for they involved contracts to subscribe to a fund, and "no interest could possibly be held to remain in the contributor who had parted with his money once and for all under contract... When this contract had been carried into effect the contributor had received all that he had contracted to get for his money and could not ask for any more". The case before him was not based on any contract, and the Crown's argument amounted to an assertion that "this case should not follow the ordinary rule merely because there was a number of donors who, I will assume, are unascertainable". He saw no reason why "the small giver who is anonymous has any wider intention [to part with the money absolutely] than the large giver who can be named".[11] A resulting trust was thus declared, the money paid into court, and the search for subscribers begun.

There are two problems with the decision in *Re Gillingham*. The first concerns the intention of the donors. Harman J. tells us both that intention does not matter and that *Re Gillingham* is distinguishable from cases decided on the basis of intention to part absolutely with the money as demonstrated by a contract. This contradiction is made the more striking because Harman J. also states explicitly elsewhere that the intention of all donors, large and small, known and anonymous, was to part with the money absolutely: "in the vast majority of cases no doubt he does not expect to see his money back: he has created a trust which so far as he

can see will absorb the whole of it".[12] Either a resulting trust is applied by operation of law, whether or not a contract is involved, or it is possible to refute the presumption of resulting trust by evidence demonstrating that there was a clear intention to part absolutely with the money. A contract would be one type of such evidence, the circumstance of a trust being constituted by public subscription possibly another.[13]

The second problem is a practical one. Not surprisingly it proved impossible to find the anonymous subscribers, and most of the money still sits in court.[14] The absurdity of this result was noted by Goff J. in *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund*,[15] which involved a fund for the benefit of dependants of policemen. Part of it had been donated by named donors, the remainder through collection boxes, fund-raising events, etc. The fund had to be wound up when the force was amalgamated with another, and it was held that the anonymous donors had parted with their money absolutely. Goff J. said this with regard to *Re Gillingham* and money from fund raisers:

> I must respectfully decline to follow his judgment in that regard ... It appears to me to be impossible to apply the doctrine of resulting trust to the proceeds of entertainments and sweepstakes and such like money-raising operations for two reasons: first, the relationship is one of contract and not of trust; the purchaser of a ticket may have the motive of aiding the cause or he may not; he may purchase a ticket merely because he wishes to attend the particular entertainment or try for the prize, but whichever it be, he pays his money as the price of what is offered and what he receives: secondly, there is in such cases no direct contribution to the fund at all; it is only the profit, if any, which is ultimately received and there may be none.[16]

In the case of persons who placed money in collection boxes Goff J. thought it obvious that they should "all be regarded as intending to part with their money out and out absolutely in all circumstances". Any other interpretation would be "inconceivable and absurd".[17] In the event the property was held to be *bona vacantia*, which seems a more sensible result.

Despite the refutation offered in *Re West Sussex*, *Re Gillingham* appears to stand as the leading case in this area, according to the major Canadian text writers.[18] The practical difficulties with it are highlighted when one considers the statutory procedures governing the disposition of money held by trustees for, *inter alia*, unknown beneficiaries, which all provinces have enacted. These usually include a duty to pay such money into court and an obligation on the Public Trustee to discover who is entitled to it. The precise scope of this latter obligation, however, is unclear. Under the Ontario Rules of Civil Procedure, for example, the referee must merely

advertise for claimants and then receive, examine, and adjudicate claims. Nothing is said about how detailed this process need be, how much effort must be made to discover donors' identities, or how long the process must take.[19] There would also likely be substantial evidentiary problems in deciding whether a claim was valid in itself as well as regarding the amounts contributed by claiming donors. These problems aside, which might well prove insurmountable, once the investigative process is complete there will surely be money left over, and it is likely that that surplus would be *bona vacantia* anyway. All that would be achieved in the case of anonymous donors would be delay, inconvenience, and expense before the Crown could take it.

Charitable Purposes: The General Approach

Surplus funds raised by public subscription for purposes which the courts consider charitable do not generally pose the same difficulties as trusts for non-charitable purposes. The doctrine of *cy-près* partly avoids the problem. Briefly state, the doctrine can be broken down into two parts.[20] First, if a charitable purpose is impossible or impracticable to carry out then the property may be applied to an analogous object. Second, whether or not the money can be applied *cy-près* may well depend on whether or not the impossibility or impracticability is initial or subsequent, that is, whether it occurs before the gift takes effect or after it has taken effect and operated for a period of time. In the case of initial impossibility or impracticability the court must be satisfied that the donor(s) had a general charitable intention, not a charitable intention limited to the specific objects named in the gift. Professor Donovan Waters defines this intention as "a paramount or overriding intention to give for the charitable purpose of which the particular object set out... is merely one mode of furtherance".[21] If, however, there occurs a subsequent failure, the property can be applied *cy-près* without the need for a finding of general charitable intention, because when funds are "dedicated to charity in perpetuity" the "testator's next of kin or residuary legatees are forever excluded and no question of subsequent failure can affect the matters so far as they are concerned".[22]

These rules suggest that many, if not most, charitable funds raised by public subscription can be applied *cy-près*: those that have a surplus when the purpose is completed will be instances of subsequent failure, and those inadequate to begin the stated purpose may well be saved if general charitable intention is discovered. The *Re Gillingham* result should occur only in cases of initial failure and not general intent. The situation is nonetheless not as straightforward as that, for two reasons. First, there is authority, both explicit and implicit, for the need for general charitable

intention before a *cy-près* can be ordered even if the failure is subsequent. The next section deals with those cases. Second, even where there is initial failure and no general charitable intent and the resulting trust analysis is therefore jurisprudentially correct, one can question the wisdom of that result in these circumstances. The ensuing section will look at such cases, demonstrate that they are inconsistent, and argue that the law should concentrate on actual intention to part with contributions and not on the fictional general charitable intention. The final section will examine some current but partial legislative reforms and offer proposals for a more comprehensive solution to the problem.

Subsequent Failure and General Charitable Intention

Discussion of the public appeal cases usually begins with *Re Welsh Hospital (Netley) Fund*,[23] in which a hospital had been built from public subscriptions to provide for Welsh soldiers. It was abandoned and sold to the War Office in 1919, some £9,000 remaining with the trustees. The court ascribed a general charitable intention to all donors, known and unknown: the anonymity of the latter showed that they had "parted with their money out-and-out",[24] while the former's intention was evidenced by their knowledge that some anonymous contributions were also being made to a general fund. This reasoning poses three problems. In the first place, it is hard to understand why general charitable intent was discussed at all, since this was surely a case of subsequent failure. The explanation for this probably lies in the tendency of some judges and authors to view public appeal surplus cases as belonging in a special category, not being merely examples of impossibility or impracticability.[25] It is not necessary to do this. All charitable trusts found to be impossible or impracticable must by definition have a "surplus", and "impossibility or impracticability" already covers a variety of circumstances in which the courts accept that the original purposes cannot be any longer pursued; the fulfilment of the stated purposes or an inability to carry them out at all will surely constitute "impossibility or impracticability".

The second problem is that it is surely artificial to argue that the anonymity of a contributor conclusively demonstrates general charitable intention. As Professor Waters has noted, "if the public respond to an appeal for a specific charitable purpose, for instance to provide clothing, food and shelter for flood or fire victims, it is only by a long stretch of the imagination that one can infer an intention on the part of anonymous donors to contribute for other purposes".[26]

The third problem is perhaps the most significant. The willingness to ascribe general charitable intent to the known donors on the ground that

they were aware that there were also anonymous donors and that the various contributions would be mixed together is entirely fictional. It confuses the issue of whether there should be a resulting trust with that of whether a *cy-près* can be ordered. The fact that the donors gave their money absolutely, with no intention of seeing it returned under any circumstances, should prevent a finding of resulting trust. If it does, then general charitable intention and *cy-près* is not the only alternative result; the money might have been *bona vacantia*. Presumably it was to avoid this problem that the court construed an intention to part with the money absolutely as a paramount intention to favour charity.

I will return later to the distinction between the two intentions; suffice it to note for now that the reasoning in *Re Welsh Hospital* contradicts the assertion in *Re Gillingham* that intention is irrelevant. Despite these problems *Re Welsh Hospital* was followed in *Re North Devon and Somerset Relief Fund Trusts*[27], where a surplus remained from a flood disaster fund raised through both known and anonymous donations. Although this was also a case of subsequent impossibility, the court accepted *Re Welsh Hospital* as a binding precedent and ordered a *cy-près* on the ground of general charitable intention.[28]

The assumption of a need to find general charitable intention has been overturned in other public appeal cases involving a subsequent failure, most notably in *Re Wokingham Fire Brigade Trusts*,[29] and in the only Canadian case dealing with surplus funds, *Re Northern Ontario Fire Relief Trusts*.[30] In the latter case Middleton J.'s short judgment merely weighed the merits of alternative purposes. It did not discuss general charitable intention, presumably because he thought it unnecessary in a case of subsequent impossibility.[31] This is clearly correct by the general law of *cy-près*, and one must conclude that *Re Welsh Hospital* is simply wrong in this respect. The issue of what constitutes general charitable intention in public appeal cases, however, is central to the cases involving an initial impossibility or impracticability.

Initial Impossibility or Impracticability, General Charitable Intention, and Intention to Part With Contributions

There are three principal charitable purpose cases in which it is clear that there was initial, not subsequent, failure. On two occasions the courts refused to find general charitable intention, with the consequences being a resulting trust to donors as in *Re Gillingham*. On another occasion the court split as to whether such general intent was necessary, although in the result the *cy-près* application was successful. It will be useful to review these cases in chronological order.

In *Re Y.W.C.A. Extension Campaign Fund*[32] the court refused to accept the presumption of general intent coming from anonymous donations. An appeal had been launched for money to fund an extension to the Association's building in Regina. Not enough money was raised, and in any event, by the time of trial the existing building was not filled. The YMCA wanted to divert the money to other purposes, including repairing the swimming pool and paying off its operating deficit. MacDonald J. held that this was a case of initial impracticability, and that no general charitable intention could be discerned because the objects of the appeal had been very particularly stated. Any alternative use would have to be concerned with "the enlargement or extension of the building or its facilities".[33]

A subsequent English case, *Re Hillier*[34], raised squarely the distinction noted above between general charitable intention and intention to give up all rights in a contribution. An appeal had been launched in 1938 to enhance hospital services in Slough and its surrounding districts. Donors could choose among three principal purposes stated on pledge cards—the building of a new hospital, an extension to the existing one, and general assistance to other smaller hospitals in the area at the discretion of the organizing committee. Nothing was done during the war, and after it the introduction of the National Health Service made such private projects impracticable. Two judges of the Court of Appeal, Evershed M.R. and Denning L.J., allowed the *cy-près* application, with Romer L.J. dissenting.

The main argument in the case concerned those donors who had scratched out on the card all the purposes except the building of a new hospital in Slough. Evershed M.R. canvassed the evidence from the pledge process and concluded that these donors probably had had a general charitable intention. The anonymity of other donors provided some support for this finding, per the *Re Welsh Hospital* reasoning, although this fact was not conclusive because "if the particular circumstances in which one donor has made his donation—including his own written statement at the time of making it—lead to a clear conclusion on the question of his intention, that conclusion cannot be changed because other persons giving to the same cause in different circumstances must be taken to have had a different intention". But where the evidence as to general charitable intention was, as in the present case, "at best, equivocal", then it becomes a "relevant and admissible fact" in determining intention that "when he contributed to the fund he must be taken to have known that his contribution would be mingled with thousands of others, substantial numbers of whom were contributing in circumstances which negatived any right or expectation on their part to any return of their money".[35] For

Evershed M.R., therefore, the search for general charitable intention was still necessary, even in the case of anonymous donors, although anonymity provides nearly conclusive indications of that intention and, in a doubtful case, is strong evidence of its presence for the known donors who knew about the other contributions. One author, correctly I think, has approvingly referred to Evershed M.R.'s judgment as paying "only scant regard" to the need for general charitable intention.[36]

Denning L.J.'s concurring judgment forthrightly rejected any need to find a general charitable intention among anonymous donors; rather the law could presume such an intention from the more obvious and significant intention to part absolutely with the contributions. He put the argument this way:

> Let me first state the law as I understand it in regard to money collected for a specific charity by means of a church collection, a flag day, a whist drive, a dance, or some such activity. When a man gives money on such an occasion, he gives it, I think, beyond recall. He parts with his money out and out.
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> The question is: what is to happen when the trustees cannot apply the money in the way intended?... It is, I think, well settled that if the money received by the trustees is more than is needed for the main purpose, they do not have to return the surplus to the givers. They must apply it under the directions of the court for a purpose as near as may be to the original purpose. The reason is not solely on the ground of inconvenience. It is not merely because it is practically impossible to find out who gave the money or to check the claimants. It is because they all gave their money without reserve, and no reserve will be imputed to them. It is useless to ask what was their intention, for a situation has arisen which they did not contemplate, and for which they did not provide. They had formed no relevant intention. So the law must provide. The law must say what is to happen to the money. It does it by making presumptions in favour of charity. It presumes that those who gave their money would wish that any surplus should be devoted to a charitable purpose as near as may be to the original purpose.[37]

The situation was not different when a fund was not used at all; not one of the anonymous contributors "ever intended that it should be returned".

Denning L.J. then turned his attention to the known donors, arguing that there should be the same presumption in favour of charity. He argued that "those who give of their abundance are just as charitably minded as the poor widows who give the mites, and all should be treated alike". This is because "all know that their moneys are given for the same purpose... whatever the form in which they are given,... The law in all cases... should impose on the trustees the same trust for all the money they receive, viz.,

to apply the money for the same purpose or, that failing, to apply it for a charitable purpose as near as may be to the original purpose".[38] In support of this argument Denning noted, and was presumably impressed by, the fact that although the trustees had issued numerous advertisements inviting people to reclaim their money, no one had come forward.

There is no difference in result between the judgments of Evershed M.R. and Denning L.J., and only a small distinction in the analysis. The former looked for general charitable intention and found it easily, for both anonymous and known donors, through the existence of the first group. The latter concentrated, not on general charitable intention as it is usually understood, but on intention to part with the money, from which one could presume an intention to benefit charity. As a final point, it should be noted that both judges allowed for the possibility that a particular donor could specify at the time of contributing that he or she wanted the money back in the event of failure of the specified purpose.

Before proceeding to the final case of initial failure it is worth examining *Re British School of Egyptian Archaeology*[39], a case of subsequent failure which provides some support for placing the emphasis on whether the donor could reasonably expect to have the money returned. Contributions of many different sizes had been made to the school between 1905 and 1929, each entitling the donor to some perquisite, be it membership in the school, free publications of the school, or the right to designate which public museum should receive the school's exhibits. The school was wound up and a fund remained unexpended. Harman J. allowed a *cy-près* application, holding that the donors "must be taken to have parted with their money once for all". He then referred in this way to the *Re Welsh Hospital* reasoning on general charitable intent:

> It is submitted that, if the court decides that a contributor did not intend to have his money returned in any event, then he must be taken to have had a general charitable intent. I am not sure that the two things are the same. I think that a contributor might well say: "I have parted with my money to the school and did not reserve any right to have it back", without having any positive intention that his contribution should go to an analogous body or, indeed, to some institution to which the court may think proper to devote the money. But I do not think that that matters. In my judgment, *it is only necessary to be able to draw the inference that the contributor or donor cannot be supposed to have expected or to have contracted impliedly to have his money returned.*[40] [emphasis added]

It is interesting that Harman J. could have adopted this analysis in a charity case but failed to apply it in *Re Gillingham* some four years later. In the latter case he specifically rejected a contention that charity cases

should influence his decision in a case dealing with a non-charitable purpose trust.[41] Had he not done so his suggestion in *Re British School* that there is an important distinction between general charitable intent and intent to part absolutely with the contributions would have been contradicted by his judgment in *Re Gillingham*, which refused to accept that intention to part with the money was relevant.

The judgments of Harman J. in *Re British School* and of Denning L.J. in *Re Hillier* offered a distinct method of dealing with a distinct type of failed charity—the fund raised by public appeal. But in the leading case which followed *Re Hillier*, *Re Ulverston Hospital Fund*,[42] this approach was decisively rejected and the English courts reasserted the traditional general charitable intention test. In *Re Ulverston* it proved impracticable to operate a fund for the building of a new hospital because not enough money had been raised and because the National Health Service brought all hospitals under public control. The Court of Appeal dealt only with what was to happen to the contributions by known donors. Jenkins L.J. looked first at general charitable intention, and concluded that there was no evidence to support the suggestion that contributions to a particular hospital should be seen as representing an intention either to improve medical facilities in the district or to benefit the district generally. He then dealt with the argument from *Re Welsh Hospital* and *Re Hillier* that the existence of anonymous contributors meant that general charitable intention could be imputed to others. He "appreciate[d] that anonymous contributors cannot expect their contributions back in any circumstances, at all events as long as they remain anonymous... [they] must be regarded as having parted with their money out and out".[43] But he refused to extend this to the known donors:

> I entirely fail to see why the imputation of a general charitable intention to anonymous contributors... should afford any ground for imputing a general charitable intention to subscribers who gave their names... Prima facie, the subscriber who gives his name intends to subscribe for the particular and exclusive purpose for which this subscription has been solicited and none other, and there will be a resulting trust in his favour if that purpose fails. Even if a general charitable intention is rightly to be attributed to the anonymous contributors to collection boxes, neither the fact that they have chosen to contribute in that way, nor the named subscriber's knowledge that anonymous contributions have been made in that way, seems to me to have any bearing on the intention of the named subscriber.[44]

Jenkins L.J. distinguished *Re Hillier* on the grounds that that was a case in which the evidence of charitable intention was equivocal, and faced with this uncertainty it was acceptable for Evershed M.R. to have taken

into account the fact that anonymous donors had contributed. But here there was no uncertainty, there was simply no evidence in favour of general charitable intention. Jenkins L.J.'s response to Denning L.J.'s assertion that contributors had parted with their money absolutely and that there should therefore be a general presumption in favour of it vesting in charity was dismissed with the comment that it had not been necessary for deciding *Re Hillier*, and could not be regarded as representing the opinion of the court.[45]

Evershed M.R. was a member of the court in *Re Ulverston* and agreed with the result. He did not, however, entirely accept Jenkins L.J.'s reasoning. He stressed that his decision in *Re Hillier* had been made in the context of equivocal evidence as to general charitable intention on the part of the known subscribers. He "did not intend to lay it down ... that the fact of anonymous donations being made and sought contemporaneously would control in favour of a general charitable intention gifts made by name in response to an appeal". But the fact of anonymous contributions was always relevant to determining "the intention, general or particular, of named subscribers".[46]

Summary and Some Existing and Proposed Solutions

The case law relating to publicly-subscribed funds which fail in one way or another is confused and unsatisfactory. One can draw from it four propositions:

1) If the purpose is deemed to be non-charitable there must be a resulting trust to donors, known and anonymous.
2) If the purpose is deemed to be charitable, a *cy-près* should be available without reference to general charitable intention in all cases in which the impossibility or impracticability is subsequent, that is, it follows some expenditure of the funds in pursuit of the charitable purpose.
3) But, in partial contradiction of the proposition above, there remains authority to the effect that the search for general charitable intention in such cases must nevertheless take place.
4) If the purpose is deemed to be charitable and there is an initial failure, that is, one that occurs before any expenditure of the funds on the purpose, a *cy-près* is only available if general charitable intention can be found. There are four differing views on the effect of anonymous contributions on the search for such intention: that they stand as proof of a general charitable intention among all donors; that they do not do this; that they may be evidence of such general intention in cases where the evidence is otherwise equivocal; that they show an intention to part

absolutely with the money contributed, and this is controlling with the issue of general charitable intention irrelevant. The first and the last of these will yield effectively the same result.[47]

I do not propose to deal further with the second and third of these propositions. It is now well established that in the event of subsequent failure of a charitable trust there is no need to find a general charitable intention before *cy-près* can occur, and the cases that say otherwise in the public subscription context must simply be regarded as outdated or as wrong. But that still leaves us with the spectre of anonymous contributions being tied up in court on a resulting trust where the purpose is non-charitable or charitable but suffering initial impossibility or impracticability. What, if anything, should be done about this?

Various partial legislative solutions have been enacted in England, in other common law jurisdictions, and in one Canadian province. The English *Charities Act*,[48] s. 14, lays down that funds given for "specific charitable purposes" which fail may be applied *cy-près* if money belongs to "a donor who, after such advertisements and inquiries as are reasonable, cannot be identified or cannot be found". Ss. 14 (2) provides further that property "shall be conclusively presumed (without any advertisement or inquiry) to belong to donors who cannot be identified" if it consists of "the proceeds of cash collections made by means of collecting boxes or by other means not adapted for distinguishing one gift from another", or "the proceeds of any lottery, competition, entertainment, sale or similar money-raising activity". This statutory reform solves the resulting trust problem as far as cases involving anonymous donors and initial failure are concerned by removing the need to prove a general charitable intent. It does not, however, deal with non-charitable-purpose trusts which fail,[49] nor does it deal with known contributors to public appeals. Indeed it confirms that unused property should be returned to known and traceable donors unless a general charitable intention can be established.

The other Commonwealth jurisdictions that have provided for special disposition of publicly subscribed charitable trusts are Western Australia, Victoria, Queensland, and New Zealand.[50] The first three have legislation similar to England's, but the New Zealand reforms are quite distinctive.[51] They abolish the need to demonstrate general charitable intent while also providing that a donor who can prove that he or she has contributed can recover a pro-rated portion. They require the purpose of the fund to be charitable, but add to the list of what is considered charitable for these purposes by enumerating 11 types of public appeal. Most innovatively, there are elaborate procedures by which the donors make proposals and cast votes for how the fund should be applied, subject to the approval of

the Attorney-General. Finally, it should also be noted that Northern Ireland has not only adopted legislation identical to that of England, but gone further in allowing for the *cy-près* application of non-charitable purpose trust funds raised by public subscription.

Among Canadian provinces only Nova Scotia has enacted significant reform. An amendment to the *Trustee Act* passed in 1968 permits the trustees of any fund gathered by public appeal to apply for approval of a scheme for distribution.[52] The provision applies to both charitable and non-charitable purposes, so the problem raised by *Re Gillingham* is resolved. There is some doubt as to whether some general charitable intent is required in cases of the initial failure of charitable trusts: the statute does not state in terms that *cy-près* will always be available without such intent needing to be proved. There has been as yet no judicial consideration of this point.

Two authors have offered Canadian jurisdictions different solutions to the problem. Professor R. Thompson, concerned only with charitable funds, argued nearly two decades ago that the difficulties arising in the *Re Hillier* and *Re Ulverston* line of cases could be resolved by regarding all subscription cases as involving subsequent failure.[53] He argues that since the time for deciding whether there is an initial impossibility or impracticability is when the gift takes effect (death in the case of a will, date of execution in the case of an *inter vivos* trust deed), *inter vivos* gifts should also be considered as of the time when they take effect, the date of delivery. If it cannot be said that the carrying out of the gift is impossible or impracticable at that stage, there can be no finding of initial failure. By this analysis almost all cases would involve subsequent failure and *cy-près* would be readily available.

This argument, which assumes that "in the interest of consistency the courts should treat cases arising out of public appeals in the same way as they treat bequests and settlements for charitable purposes",[54] and which has received support in other quarters,[55] has an attractive simplicity about it. It also has the advantage that if accepted it will obviate the need to wait for legislative action. But it does run up against three problems.

First, like it or not, the courts have not so far taken this view. There is no evidence, it is true, that the argument has ever been made in a case, but it has certainly not been accepted. While all the cases pre-date Thompson's article, nothing in the jurisprudence indicates that the courts might adopt this posture.

Second, there is a difference between publicly subscribed appeals and bequests and settlements in that the latter two consist of a one-time

transaction and provide a date on which one can state that the property left the settlor and was vested in the trust fund. Public appeals, in contrast, involve many different dates and often continuing fund raising, making it very likely that some contributions were made before the failure, some after. It is presumably for this reason that the courts have implicitly accepted that the relevant date for deciding initial or subsequent failure is the point at which the trustees have had to either begin spending the money collected or conclude that for some reason the fund cannot be used in the announced way.

Third, and this is perhaps the most serious drawback, the argument ignores the juridical basis of the decisions in *Re Gillingham* and the charity cases which involve initial failure—that contributions made may be conditional on purposes being carried out. What the court did in cases like *Re Hillier* was to decide that the condition was only that the money be appropriated for charity. Thompson's argument is effectively merely a proposal to bring in by the back door a presumption of general charitable intention among all who subscribe to public appeals. The courts would thus create the fiction of presumed general charitable intent in order to avoid the unfortunate results that can be produced by the existing fiction that they can sensibly search for that intent at all. A legislative solution, deeming most publicly subscribed funds to be available for *cy-près*, would achieve the same result while simplifying the law.

This alternative has been suggested by Professor Waters, who advocates legislation combining the best attributes of the English and Nova Scotia acts, making *cy-près* available for publicly subscribed funds, whether or not the original purpose is charitable, and without regard for any need to find general charitable intent in cases of initial failure. In the non-charitable context, the "cases will be very few, and the importance of the utilization of publicly subscribed funds would seem to justify" this departure from principle, given that the alternatives are tying up the money in court or giving it to the Crown with no purpose attached.[56]

This legislative solution seems the best answer to an area of law beset by judicial fictions utilized to avoid absurd outcomes. It is in effect an acceptance of the notion, propounded by both Denning L.J. in *Re Hillier* and by Harman J. in *Re British School*, that the only "intention" that matters is the intention of donors to part absolutely with their property. In accepting that general charitable intention is a judicially invented chimera in these cases, the legislature would establish a regime for failed publicly subscribed trusts, charitable or non-charitable, that is different from that for purpose trusts constituted in other ways. A requirement that non-charitable purpose trusts be applied to charitable purposes would

provide a check on unbridled judicial discretion, ensure that there is sufficient public benefit in the alternative purpose and, given the broad scope of the fourth head of charity,[57] not unduly restrict the trustees or the court in their choice of purposes.

Overall this is surely a suitable and functional approach. The usual run of *cy-près* applications involves single *inter vivos* gifts or, more usually, testamentary dispositions. When dealing with these it is reasonable to search for general intention, but it is entirely fictional to do so, or perhaps to pretend to do so as Evershed M.R. did in *Re Hillier*, in the case of public appeals. The law of *cy-près*, with its emphasis on initial and subsequent failure and general charitable intent, evolved in response to individual bequests or gifts which fail, not in response to public appeals. A jurisprudential framework has been imposed on these cases which is arguably quite unsuitable for them.[58] It would be better to consider only the issue of whether donors have parted with the money absolutely. A resulting trust analysis should never be possible for anonymous donations.

Is this analysis also suitable for known donors? I believe it is. An option might be to adopt the New Zealand approach of allowing donors to decide on the alternative purpose, but there are two problems with this. The first, noted by the Ontario Law Reform Commission, is that the New Zealand system effectively excludes all anonymous donors and all those who cannot prove that they contributed, "and such persons may have contributed the greater part of the fund".[59]

The second problem is more fundamental, and relates to the reason why such legislative reform is needed in the first place. It is that the contention that the method of contributing—a cheque rather than cash in the mail, for example—should lead to a different legal analysis, is not convincing. The fact is that people who respond to such appeals, anonymously or otherwise, do so out of a general desire to help victims of disasters or community organizations. Few donors probably know the full and precise terms of the appeal, which may not even be published. Donations are spontaneous expressions of humanity and generosity, the legal characteristics of the contributions being irrelevant. Contributors in such cases pay in their money and move on. Reference to discerning intent is as inapplicable to known as it is to anonymous donors and both groups are acting very differently, much less deliberately, than the person who makes a will leaving property to a particular charitable purpose, or the large corporate donor which makes a one-time contribution to a carefully selected object of its bounty. The latter could be safeguarded, if it did act in response to a public appeal, by provisions permitting proof of particular intention. But the general presumption for all should be that the money

is abandoned. Otherwise much of it will be "dissipated in costly litigation and costly and time-consuming inquiries into the vast number of donations which goes to make up such funds".[60]

The comprehensive solution proposed here is in part the one recommended by the Ontario Law Reform Commission in its 1984 *Report on the Law of Trusts*. Its review of the existing law led it to the conclusion that if a general charitable intent needs to be established before a charitable trust raised by public subscription can be the subject of a *cy-près* order, "insuperable problems" will arise in returning the money as it "cannot be returned to persons who cannot establish that they were donors, which will be the case where there was anonymity in giving".[61] It proposed in consequence "that all [charitable] funds raised as the result of a public appeal... should be capable of being applied to alternative purposes or in other ways. We would merely require that the alternative... terms be charitable... the distinction between particular and general charitable intent in the context of public appeals would be abolished".[62]

This eminently sensible reform, like many others in the proposed act, has not yet been brought into being, and there do not appear to be any plans to enact similar provisions elsewhere in the country. One must assume at this stage that the Ontario Government will not enact this aspect of the Commission's recommendations until the latter delivers its further reports on the law of charities and on the administration of estates. Yet given the absurd results that can occur with funds raised by public appeal which fail, and the artificiality of trying to discern the intent of both known and anonymous donors, it is high time that such legislative measures were brought forward in all provinces, accompanied by the measures outlined above for dealing in the same way with public appeals for non-charitable purposes.

FOOTNOTES

1. A purpose trust is one not for named beneficiaries but directed towards the fulfilment of a certain purpose. They are generally void *ab initio* either because of uncertainty as to the meaning of the purpose or because without beneficiaries the court cannot compel the trust obligation to be carried out or carry it out itself. (See *Re Astor's Settlement Trusts*, [1952] Ch. 354; *Morice* v. *Bishop of Durham* (1804), 9 Ves. Jun. 399, 32 E.R. 656.) The principal exception to this rule comes if the purpose is charitable, but there are other exceptions. This is not the place for a detailed discussion of either the distinction between a charitable and a non-charitable purpose, or of the circumstances in which non-charitable purpose trusts are valid despite the general rule. I am assuming here either that the purported trust fund is void *ab initio* for want of beneficiaries, or that it can operate for a period of time before fulfilling its purpose because it is valid as one of the exceptions to the general rule. This

may be because it falls under one of the *sui generis* exceptional categories, or because it is a purpose trust in which there are individually ascertainable beneficiaries to at least prevent misfeasance by trustees, or because it survives by virtue of the kind of statutory exception that operates in some provinces. (See in addition to the cases cited above: *Re Denley's Trusts*, [1969] 1 Ch. 373; *Perpetuities Act*, R.S.O. 1980, c. 374, s. 16; *Perpetuities Act*, R.S.A. 1980, c. P-4, s. 20; *Perpetuity Act*, R.S.B.C. 1979, c. 321, s. 21.)

2. [1900] 2 Ch. 326.
3. *Ibid.*, pp. 330–331.
4. (1857), 3 K & J 497, 69 E.R. 1206.
5. See also *Re Andrews Trust*, [1905] 2 Ch. 48.
6. [1958] Ch. 300; affd. [1959] Ch. 62 (C.A.).
7. *Ibid.*, at p. 310.
8. Literally vacant (unclaimed) property. Generally means personal property which escheats to the Crown for want of owners or heirs, although it can include real property.
9. They were *Cunnack* v. *Edwards*, [1896] 2 Ch. 679 (C.A.), and *Braithwaite* v. *Attorney-General*, [1909] 1 Ch. 510. In *Cunnack* a society was formed to raise subscriptions from which widows of deceased members would be assisted. A surplus remained on the death of the last widow of a member, and at trial Chitty J. held that it should go by resulting trust to the representatives of the subscribers. On appeal this was reversed on the grounds that the subscribers had contracted to pay money in and when they did so they gave up all rights in it. *Braithwaite* was a similar case, in which the two surviving annuitants of a fund, to which they and many others had contributed, applied for the surplus. The court held that they were getting all that the contract provided for, and the surplus should be *bona vacantia*.
10. *Supra*, footnote 6, at p. 310.
11. *Ibid.*, at pp. 312 and 314.
12. *Ibid.*, at p. 310.
13. It should also be noted that not all cases of this nature involving contracts have ended with a finding of *bona vacantia*. For example, the jurisprudence on the fate of funds of non-charitable unincorporated associations which are wound up provides examples of resulting trust *bona vacantia* outcomes. (See M.A. Hackling, "The Destination of Funds of Defunct Voluntary Associations", (1966), 30 *Conveyancer and Property Lawyer* 117.)
14. According to Donovan Waters, *Law of Trusts in Canada* (2nd edn., Toronto, 1984), p. 367.
15. [1971] Ch. 1.
16. *Ibid.*, at p. 11.
17. *Ibid.*, at p. 13.
18. See Waters, *supra*, footnote 14, at p. 631, and A. Oosterhoff and E. Gillese, *Text, Commentary and Cases on Trusts* (3rd edn., Toronto, 1987), at p. 293.

19. See *Public Trustee Act*, R.S.O. 1980, c. 512, s. 36; *Rules of Civil Procedure* (Ont.), R. 55.03. It may be that in Ontario the recent *Unclaimed Intangible Property Act*, S.O. 1989, c. 83, will affect the position of the Public Trustee in relation to such surplus funds. The *Act* lays out a variety of time limits within which property must be claimed and defines the duties of the Public Trustee in assisting in the recovery process. It does not, however, refer in terms to anonymous donations to trust funds, and while it is possible that a situation like *Re Gillingham* would come under the *Act*, a charitable trust surely would not be considered subject to it without express mention. For one thing, it must still be the preserve of the courts to decide whether or not the funds are claimed, that is, whether the purpose is impossible or impracticable and, if so, whether a *cy-près* should be ordered. This is nonetheless an issue which merits closer attention elsewhere.
20. See *Re Wilson*, [1913] 1 Ch. 314; Waters, *supra*, footnote 14, at pp. 611–632; L.H. Sheridan and G.W. Keeton, *The Law of Trusts* (11th edn., London, 1983), pp. 177–181; P.H. Pettit, *Equity and the Law of Trusts* (4th edn., London, 1979), pp. 221–231. The principal study is, of course, L.A. Sheridan and V.T.H. Delany, *The Cy-Près Doctrine* (London, 1959).
21. Waters, *supra*, footnote 14, p. 624.
22. Pettit, *supra*, footnote 20, at p. 226.
23. [1921] 1 Ch. 655.
24. *Ibid.*, p. 660.
25. See, for example, the comment by the authors of the Ontario Law Reform Commission, *Report on the Law of Trusts* (Ministry of Attorney General, 1984) vol. 2, at pp. 457–458: "Aside from impossibility or impracticability, *cy-près* application of the trust property is also possible where the funds or income of an established trust become surplus to its needs. This situation arises most particularly in the case of public appeals."
26. Waters, *supra*, footnote 14, at p. 630.
27. [1953] 2 All E.R. 1032 (Ch.).
28. Although it involved an initial impossibility, and therefore one can make no objection to the search for general charitable intention, it should be noted that the second aspect of *Re Welsh Hospital*, the presumption of paramount intention arising from anonymous donations, was followed in *Halifax School for the Blind* v. *A.G. Nova Scotia*, [1935] 2 D.L.R. 347 (N.S.S.C.). An appeal was launched to build a home for blind children, particularly those blinded by the Halifax explosion of 1917. Nothing like enough money was raised. On an application by the existing School for the Blind to use the funds for other objects, particularly for the provision of clothing for children attending the school, Doull J. held, at p. 348 and citing *Re Welsh Hospital*, that the anonymity of some donors, and the fact that many small contributions were involved, demonstrated that it was "clearly given by the donors for the purpose of charity and with the intention of it being wholly applied for such a purpose".
29. [1951] 1 All E.R. 454 (Ch.). This case involved a fund for a voluntary fire brigade which had become defunct after operating from 1876 to c. 1942. Danckwerts J., at p. 456, held that "the funds were subject to public charitable

trusts which have been in operation for a number of years...That purpose being no longer practicable...the charitable trusts do not fail...It is not necessary to consider whether there was any general charitable intention and the trusts must be modified by means of a *cy-près* application".

30. (1913), 11 D.L.R. 15 (Ont. S.C.).
31. Per Waters, *supra*, footnote 14, at p. 631: "In this case the judicial silence is golden."
32. [1934] 3 W.W.R. 49 (Sask. Q.B.).
33. *Ibid.*, at p. 52.
34. [1954] 2 All E.R. 59 (C.A.).
35. *Ibid.*, at p. 68.
36. J.C. Hall, "Recent Developments in the Cy-Près Doctrine", [1957] *Cambridge Law Journal*, 87 at 93.
37. *Supra*, footnote 34, at 70.
38. *Ibid.*, at pp. 70–71.
39. [1954] 1 All E.R. 887 (Ch.).
40. *Ibid.*, at p. 892.
41. *Supra*, footnote 6, at p. 314.
42. [1956] 3 All E.R. 164 (C.A.).
43. *Ibid.*, at p. 170.
44. *Ibid.*
45. *Ibid.*, at pp. 174–175.
46. *Ibid.*, at p. 175.
47. One difference might result from the fact that it does not necessarily follow that those who part with their money absolutely should be presumed to have a general charitable intention, a point noted by Sheridan and Delany, *supra*, footnote 20, at pp. 123–124. With a resulting trust analysis excluded, and *cy-près* not available, the property could in such cases be declared *bona vacantia*. The High Court of Victoria reached precisely this conclusion in *Beggs* v. *Kirkpatrick*, [1961] V.R. 674, but no English or Canadian court has done so.
48. 1960 (Eng), 8 & 9 Eliz. 2, c. 58.
49. See *Re Jenkins's Will Trusts*, [1966] Ch. 249.
50. See generally L.A. Sheridan, "Cy-Près in the Sixties: Judicial Activity", (1967-68), 6 *Alberta Law Review* 16 at p. 16; B.J. Doyle, "Reform in the Law of Cy-Près", (1964), 1 *University of Tasmania Law Review* 41 at p. 43; OLRC, *Report on Trusts*, *supra*, footnote 25, at vol. 2, pp. 463–467.
51. *Charitable Trusts Act, 1957*, Repr. Stat. N.Z., 1908-1957, No. 18, ss. 38-50.
52. *Trustee Act*, R.S.N.S. 1967, c. 317, s. 50A, as amended.
53. R. Thompson, "Public Charitable Trusts Which Fail: An Appeal for Judicial Consistency", (1971), 36 *Saskatchewan Law Review* 110.
54. *Ibid.*, at p. 122.

55. Sheridan argues that all public subscription trusts which fail must be seen as cases of subsequent impossibility or impracticability because to do otherwise would be "to necessitate regarding all subscriptions as conditional on it being possible on some further date to carry out the purpose", and this would, if carried to its logical conclusion, make all such charitable collections void for perpetuity in jurisdictions with no "wait-and-see" rule. See *supra*, footnote 50, at p. 24.

56. Waters, *supra*, footnote 14, at p. 631.

57. The first three categories are: the relief of poverty, the advancement of education, and the advancement of religion. The fourth is "trusts for other purposes beneficial to the community, not falling under any of the preceding heads", per Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel*, [1891] A.C. 531 (H.L.) at 581, the relevant source for most common law jurisdictions, or trusts for "any purpose beneficial to the community, not falling under subclause (i), (ii) or (iii)", per the relevant source for Ontario, the *Charities Accounting Act*, R.S.O. 1980, c. 65, s. 6A(a)(iv). For the numerous and highly diverse types of trust that qualify under these definitions, and for an assertion that Ontario law is even more liberal than that of England or other Commonwealth jurisdictions see, respectively, Oosterhoof and Gillese, *supra*, footnote 18, at pp. 870–880; *Re Laidlaw Foundation* (1984), 48 O.R. (2d) 549 (Div. Ct.).

58. See the comment by Hall, "Recent Developments", *supra*, footnote 36, at p. 90, referring to the *Re North Devon* case. He notes that Wynn-Parry J. asserted, without serious inquiry, that a general charitable intention could be found, a dubious conclusion on the facts. Nevertheless the result was correct, for "the money was certainly given out-and-out, and few would have objected to the surplus being applied *cy-près*". What was unfortunate, in Hall's opinion, was that the court "could only reach what was clearly the right decision by paying lip service to an unnecessary and misleading rule".

59. OLRC, *Report on Trusts*, *supra*, footnote 25, at p. 467.

60. Doyle, *supra*, footnote 50, at p. 43.

61. OLRC, *Report on Trusts*, *supra*, footnote 25, pp. 458-459.

62. *Ibid.*, pp. 472–473. The proposed legislation is at pp. 519–520. I have no hesitation in agreeing with this recommendation despite my divergence with the Commission on the question of whether these cases should be seen as comprising a special category of failure. (See *supra*, footnote 25.) One can treat these cases simply as instances of impossibility or impracticability, and still argue that a special regime is required for the disposition of the surplus funds.