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“Where There’s A Gift, There’s A Way: The Application of the Cy-Pres Doctrine”

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There are a number of reasons why a charitable gift may fail. The testator may leave a gift to a charity which cannot be identified or cannot be found. Similarly, the charitable beneficiary, while in existence at the time a will was made may have ceased to exist at the death of the testator. In other occasions, the charitable gift may be impossible to carry out because of the conditions attached to it or because the testator may have directed funds towards a specific purpose, but left insufficient funds for the purpose to be achieved.

While the usual rule when a gift cannot be given effect is that it fails, this is not the case when the gift in question is directed to a charity. In cases where it is apparent from a will that the testator had an overriding intention to benefit charity in general, the court will attempt to give effect to the gift by invoking the cy-près doctrine.

The cy-près doctrine, in effect, gives the court the authority to read a will as if the particular gift has not been given, but rather as though the testator simply provided a general direction that a fund be applied for a charitable purpose.

The court, in *Re Wilson Twentyman v. Simpson* described the cy-près doctrine as being appropriately applied in circumstances where,

...the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the trust construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out¹

The court's role is ultimately to determine whether, given the nature of the testator's intention, it is possible to give effect to the general nature of the gift or whether the purpose of the gift was

¹ [1913] 1 Ch. 314 (Ch. Div.) at p. 5(e-carswell-westlaw)

so specific that if the particular gift intended cannot be made, the gift must fail. In *Re Lysaght*, the manner of enquiry that should be made was described thusly:

Whether a donor has or has not evinced [a general charitable intent] is relevant in any case in which the donor has made a charitable gift in terms which cannot be carried out exactly. In such a case the court has to discover whether the donor's true intention can be carried out notwithstanding that it is impracticable to give effect to some part of his particular directions²

The policy behind the doctrine is that in cases where it is clear that the testator had an overriding charitable intention, that intention should not fail because, by reason of ambiguity, impossibility, or impracticability, the particular gift cannot be made.

Before resorting to the cy-près doctrine, an estate trustee should consider the following questions:

- A. Is it unclear who the appropriate beneficiary is?
- B. Is the named beneficiary not in existence, either because it no longer exists or never did exist?
- C. Would it be impracticable or impossible to give effect to the gift?
- D. Does the testator's will evidence a general charitable intent?

A. Is It Unclear Who the Appropriate Beneficiary Is?

The first consideration when determining whether resort may be had to the cy-près doctrine is whether there is uncertainty as to whom the intended beneficiary of a charitable gift is. The key concern is whether there is any reasonable doubt as to the identity of the intended beneficiary.

² [1966] CH. 191 (Chan Div.) at 201.

Not every ambiguity relating to a charitable gift will give rise to the necessity of a cy-près application. In situations where a charitable beneficiary is misdescribed or inaccurately described, but the description is sufficient to make it clear to which charity the gift was intended and the beneficiary is discoverable, the application of the cy-près doctrine is unnecessary and the gift or devise to that charity will not fail.³

In determining whether the beneficiary intended by the testator is discoverable, extrinsic evidence is admissible. Pertinent evidence might include the notes of the solicitor who drafted the will, prior wills the testator did, and a prior relationship with the charity, such as by way of donations or volunteerism.

In *Re McIntyre Estate*⁴, the testator, who lived in Manitoba, left a bequest and a share of the residue of the estate to the "Children's Aid Society" ["CAS"]. The executors applied for the court's direction as to which charity the bequest and share of the residue should be given. Both the CAS of Winnipeg and the CAS of Central Manitoba responded to the application so as to claim the gift. The court examined both the testator's history with the CAS as well as the surrounding circumstances at the time the will was made.

The court found that in the eighteen years preceding the execution of the testator's will, the testator had made annual donations to the CAS in Winnipeg, while his donation history with the CAS of Central Manitoba was extremely minimal and only occurred in years after the will had been drafted. At the time the will was made, the testator's cousin was the president of the CAS in Winnipeg and his niece had, over the years, taken in a number of wards from the Winnipeg CAS, with some of whom the testator had developed a warm, familial relationship. Finally, the solicitor who drafted the will had no knowledge of the CAS of Central Manitoba and was only aware of the CAS of Winnipeg.

³ Waters, Donovan W.M., *Waters' Law of Trusts in Canada* (3ed) (Thomson Carswell Canada, 2005) at 766.

⁴ [1950] 2 W.W.R. 682 (Man. K.B.)

The court found that as a result of the foregoing there was no doubt that the testator intended to benefit the CAS of Winnipeg. On this basis, there was no uncertainty as to the identity of the charitable beneficiary and, as such, the application of the cy-près doctrine was not necessary.

Where a charity has been misdescribed and it appears that there are multiple charities who might fit the description given, the court will still make some effort to identify the intended charity and ensure the gift does not fail. In *Re Wardle*⁵ the testator left her estate to a number of charities. On her death, two of them, the Catholic Federated Charities and the Protestant Federated Charities, did not exist. However, there were two charities in existence, which were designed mainly for Roman Catholics and for Protestants respectively. On an application by the executors, the court held that the Federation of Catholic Charities Inc. should receive the funds earmarked for Catholic Federated Charities on the basis of similarity of names. It also held that the United Red Feather Services should receive the gift left to the Protestant Federated Charities on the basis that it was considered the Protestant counterpart to the Federation of Catholic Charities Inc.

B. Is the Intended Beneficiary Still in Existence?

If the institution can still be identified, although its form might have changed, then the court often will not treat the organization as not existing and will be willing to give effect to the gift without reliance on the cy-près doctrine. The key is to determine whether the charity has maintained a “continuing identity” – that is, whether an apparently extinct institution can be identified within another and existing organization.⁶

⁵ [1974] 49 D.L.R. (3d) 507 (Ont. HCJ)

⁶ Waters, *supra* note 3 at 769.

In Canada, the issue of “continuing identity” frequently arises in relation to the unification of churches. The common situation is whether the testator has left a gift to a church, which later amalgamated into a unified church.

In *Re Kappele Estate*⁷, the testator left a gift to the “Methodist Church of Canada for Home and Foreign Missions.” With the *United Church of Canada Act*, the Methodist Church was unified with two other churches under the name the “United Church of Canada.” The court found that the Methodist Church had not ceased to exist, *per se* but rather had merged into a larger organization and that its work regarding home and foreign missions continued in the larger organization.

In *Re Edwards Estate*⁸, the testator bequeathed the remainder of a life interest in property for his grandson to the “Wesleyan Methodist Foreign Mission”. At the testator’s death, the organization was no longer operational under that name. It had changed its name to the Missionary Society of the Methodist Church of Canada, which later unified with other entities and became the Methodist Church. The court found that the Wesleyan Methodist Foreign Mission had never ceased to exist, *per se*, but instead, through the various unifications, had changed its management structure. The intention of the testator was to benefit the foreign missions of the Methodist Church and the court gave effect to the gift accordingly.

Note, however, that if there are factors that make it apparent the testator did not want to benefit a successor organization, the court will give effect to that desire. In *Fraser v. McLellan*,⁹ the testatrix left her estate to the Tatamagouche Presbyterian Church. While the testatrix was a member of the congregation when she made her will, the church later unified and became part of the United Church of Canada upon which it appeared the testatrix stopped attending and

⁷ [1954] O.R. 456 (Ont. HCJ)

⁸ (1911), 18 O.W.R. 678 (Ont. HCJ)

⁹ [1930] S.C.R. 344

switched churches. The court found that the United Church of Canada at Tatamagouche was not the same organization as was contemplated by the testatrix when she was making her will.

C. Is it Impossible or Impracticable to Give Effect to the Gift?

There are situations where, when it comes time to make the gift, it is impossible or impracticable to carry it out.

It is difficult to find a definition of "impossible" which is used with any consistency. Broadly speaking, it appears that a court will find a gift has been rendered impossible to make in situations where:

1. Circumstances have intervened between the time a will was made and when a gift is to be given effect which prevent the gift from being made;¹⁰
2. The testator did not have sufficient information about the object of the gift for the gift to take effect;¹¹ and
3. The testator was not aware of the funds which would be required to give effect to the gift he wished to give.¹²

As with "impossible", it is difficult to find any useful definition of "impracticable". Generally, courts will find that a gift is impracticable where, it is difficult to implement, although not necessarily impossible.¹³

¹⁰ See *Re Buchanan Estate* (1996), 11 E.T.R. (2d) 8 (BCSC), affirmed (1997), 20 ETR (2d) 100 (BCCA) where the testator left funds to a charity, albeit misnamed, which at the time the will was made provided residence to underprivileged children. By the time of the testator's death, the home had been closed and the organization dispensed funds for the general benefit of children, but not for those with any special financial need

¹¹ See *Re Robbins*, [1974] 6 W.W.R. 635 (Sask. QB) where testator left gift to the "Crippled Children's Hospital, Toronto, Ontario". There was no hospital by that name, nor had there ever been. There were several hospitals which devoted their services exclusively to sick or crippled children.

¹² Warburton, J. (ed.), *Tudor on Charities*, 9 ed. (London, Sweet & Maxwell; 2003) at 11-06

*Waters' Law of Trusts in Canada*¹⁴ lists a number of examples of cases where a gift was impossible or impracticable:

- The testator incorrectly named a charity and it cannot be determined, which of numerous institutions was intended;¹⁵
- The named institution ceased to exist in the testator's life time;¹⁶
- The intended institution is still in existence but has ceased to carry on the activity for which the gift was intended;¹⁷
- The gift was intended to fund a specific need, but the particular need is met by the testator's death;¹⁸ and
- An asset (such as real property) which was left to charity was sold by the testator prior to death.¹⁹

D. Does the Will Show a General Charitable Intent?

Where there is no identifiable charitable beneficiary in existence or where it is impracticable or impossible to give effect to the charitable gift, the court will consider whether resort can be had to the cy-près doctrine. The paramount concern for the court in determining whether the cy-

¹³ See, for example *Weninger Estate v. Canadian Diabetes Association* (1993), 2 E.T.R. (2d) 24 (O.C.J. Gen. Div.), where the testator left the residue of his estate to the Canadian Diabetes Association ["CDA"] for the purpose of providing insulin to the needy. The gift was impracticable because the CDA did not provide direct health services such as providing insulin to patients. It was primarily a research organization. In *Re Harding* (1904), 4 O.W.R. 316 (Ont. Chambers) the testatrix left the residue of her estate to her church for the purpose of paying down its debt. While the church had a sizeable debt at the time the will was made, by the testatrix' death the debt was minimal and the value of the residue of her estate was in excess of what was necessary to pay off the remainder.

¹⁴ *Waters on Trusts*, *supra* note 3 at 774.

¹⁵ *Re Robbins*, *supra* note 11.

¹⁶ *Re Ogilvy Estate*, *infra* note 25.

¹⁷ *Re Buchanan Estate*, *supra* note 10.

¹⁸ *Re Young Women's Christian Assn. Extension Campaign Fund* (1923), 56 N.S.R. 364 (N.S.C.A.)

¹⁹ *Re Trenhaile Estate* (1911), 20 O.W.R. 610 (Ont. H.C.)

près doctrine can be applied is whether the testator, in making the gift, exhibited a general charitable intent.²⁰

A general charitable intent (which is a paramount, overriding intent to benefit a charitable purpose) is to be contrasted with a specific charitable intent (where the intention is confined to benefiting a particular charity).

The court in *Re Lysaght*²¹ described the difference between a general charitable intent and a specific charitable intent as follows:

A general charitable intention...may be said to be a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation, notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his true intention...

In contrast a particular charitable intention exists where the donor means his charitable disposition to take effect if, but only if, it can be carried into effect in a particular specified way...

Determining whether a charitable intent is general or specific can be tricky. The direction emerging from case law does not lend itself well to any hard and fast rules mainly because the enquiry is so fact specific. Moreover, it is worthwhile to keep in mind that someone making a will does not expect the will to fail so frequently does not include an explanation as to the motivation behind the will's provisions or direction as to what should occur in the event a gift cannot be given effect.

Broadly, for a charitable intent to be general, the donor must have had a paramount or overriding desire to benefit not so much a specific institution but rather a general charitable purpose. In other words, in looking at a gift that cannot be effected, the question is whether the impossible direction is a necessary element of the testator's intent, or whether the testator had a

²⁰ *Tudor on Charities*, *supra* note 12 at 11-001

²¹ *Supra* note 2 at 202

broader charitable intent in mind and merely made the direction in the will as a mode of carrying out the charitable intent.²² Overlying this approach is the rule that wherever possible, attempts should be made to give effect to charitable bequests: when a bequest can be interpreted in multiple ways, one of which could void the bequest, the interpretation that would give effect to the bequest is to be preferred.²³

Whereas in the past, the court has focused on whether the manner in which a gift is made indicates an intention to move beyond the specific mode/institution employed in determining whether the testator has evidenced a general charitable intent, a more recent approach has been for the court to determine whether by modifying the scheme set down by the testator to achieve a charitable goal would frustrate his intention.²⁴

In cases where the intended charity was in existence at the time the testator made his will but came to an end prior to the testator's death it can be more difficult to establish that the charitable intention was a general one the theory being that the fact the charity existed when the testator made the gift indicates a *specific* intention to benefit the particular charity.

In *Re Ogilvy*,²⁵ the testator left a portion of his estate to the Home for Friendless Women in Ottawa. Subsequent to his death, the charity sold the property where it carried out its work and transferred its assets to the Salvation Army, who held the assets to further its own work with unmarried mothers in Ottawa. On the testator's death, the Salvation Army argued that it should receive the portion of the residue left to the Home for Friendless Women. The court found that no general charitable intention existed. The gift was to a particular institution and nothing indicated that the institution was named merely as the vehicle by which the testator wished to exercise some general charitable intention. The court further found that it made no difference

²² *Waters*, *supra* note at 767.

²³ *Jones v. The T. Eaton Company*, [1973] S.C.R. 635.

²⁴ *Tudor on Charities*, *supra* note 12 at 11-027.

²⁵ [1953] 1 D.L.R. 44

that the charity's assets had been received by the Salvation Army with the intention of applying them for similar purposes. In the absence of a general charitable intention, it was clear that the testator had a specific intent to benefit the named charity and as that named charity was no longer in existence the gift failed.

If, on the other hand, the charity never existed, it can be easier to establish that the testator's intent to benefit a charity was more general in nature.

In *McCauley Estate v. Stevens*,²⁶ the testatrix left a portion of her estate to the "Kinsmen School for Retarded Children." As it turned out, there was not, nor had there ever been, an organization that operated under that name. However, in London (where the testatrix was from) there was a Kinsmen School which was operated by the London and District Association for the Mentally Retarded about 20 years prior to when the testatrix had made her will. The testatrix's executors sought the court's direction as to whether the gift failed on the basis that the Kinsmen School for Retarded Children never existed or whether the cy-près doctrine applied.

The court found that the doctrine of cy-près did apply on the basis that there was a general charitable intention evidenced in the testatrix's will. The clause in the will disposing of the residue was directed towards the handicapped and indicated a general charitable intention to benefit the disabled. The court further found that the London and District Association for the Mentally Retarded was a charitable institution and was the one most closely connected with the testatrix's intended recipient.

As noted above, determining whether there is a general charitable intent can be difficult because it is so fact specific; however, the following are some factors the court has considered in concluding a general charitable intent existed:

²⁶ (1990), 37 E.T.R. 155

- The thrust of the will is to benefit charitable institutions;²⁷
- The testator has not taken steps to confirm the correct name of the charitable institution;²⁸
- The purposes of a charity which has ceased to exist can continue to be carried out by another organization;²⁹
- The gift is to an organization that never existed;³⁰
- The testator has made provision for immediate family elsewhere in the will;³¹
- The testator directs that funds left to a charity are used for a particular purpose;³²
- There are multiple charities with similar names;³³
- The testator has a history of making donations to causes similar to the charity named in the will;³⁴
- The gift is of residue and there is no gift-over if it fails;³⁵
- The gift is made in commemoration of an individual;³⁶ and
- The gift is made as a result of a public appeal for funds for a general purpose.³⁷

Applications for the Court's Opinion, Advice, and Direction

²⁷ (1997), 17 E.T.R. (2d) 57 (BC SC)

²⁸ *Ibid.*

²⁹ *Montreal Trust Co. v. Trinity Parish*, [1950] 1 D.L.R. 777 (NS TD)

³⁰ *McCauley Estate*, *supra* note

³¹ *Re Jacobsen* (1977), 80 D.L.R. (3d) (BC SC)

³² *Re Roberts Estate* (1958), 26 W.W.R. 196 (Alta. SC – App Div.)

³³ *Re Leer Estate* (2005), 16 E.T.R. (3d) 251 (Sask QB)

³⁴ *Re Bruce Estate* (2004), 9 E.T.R. (3d) 290

³⁵ *Weninger*, *supra* note

³⁶ *Ibid.*

³⁷ *Halifax School for the Blind v. Nova Scotia (Attorney General)*, [1935] 2 D.L.R. 347 (N.S. T.D.)

Once it has become clear that there is an ambiguity in a will which calls into question whether a gift can be given and/or to whom it should be given, an executor and trustee should apply to the court (in Ontario, to the Superior Court of Justice) for its opinion, advice, and direction.

If the reason behind the ambiguity is because a charity cannot be located, prior to applying to the court the estate trustee should take all reasonable steps to locate the charity. A good place to start is the Charities Directorate at the Canada Revenue Agency³⁸, which maintains an online directory of registered charities (although, keep in mind that not all charities are registered with the CRA.) It is also advisable to try doing a corporate search for the charity. The Canadian Donor's Guide, which is a list of the names and addresses of many charitable organizations is also useful.

The internet is also a good resource, as are telephone directories (especially older directories if it appears the charity might have been discontinued some time ago).

The testator's personal papers might also be helpful in identifying and locating the charity, such as old correspondence or previous tax returns. Additionally, family members, particularly those in contact with the testator around the time the will was drafted might be helpful.

If the testator's will was professionally prepared, the drafting solicitor might also be of assistance in locating the charity.

In some cases, it might be prudent to retain a professional who has experience researching archival and historic information to determine whether the charity was previously in existence; if so, when; and what might have happened to it.

³⁸ <http://www.cra-arc.gc.ca/charities/>

If it does become necessary to apply to the court for its direction, the role of the executor is to, in a neutral manner, frame questions for the court to respond so it can determine whether the charitable gift can succeed and to whom it should be given.

Subsection 5(4) of the *Charities Accounting Act*³⁹ requires that the Public Guardian and Trustee always be served with a cy-près application. In addition, any charity who has a potential interest should also be served.

Who else should be served depends on the type of gift which is in question. If the gift is a legacy, then the residual beneficiaries should also be served (because if the legacy lapses, it will fall into the residue of the estate). If the gift is of residue, then the testator's intestate heirs must also be served (because if a gift of residue lapses, it is distributed on intestacy) – in the case of a testator with no close relatives, finding the intestate heirs can be a time consuming and costly process.

In cases where it is clear that all parties who have an interest have been identified and they all consent to the terms of an order, it might be possible to obtain a cy-près order without having to commence a court application. Section 13 of the *Charities Accounting Act* provides a mechanism for obtaining an order without having to go to court or commence a formal court proceeding.

In order to have recourse to section 13, the estate trustee must obtain the consent of the Public Guardian and Trustee as well as anyone who would be required to be served with an application to obtain the order.

³⁹ R.S.O. 1990, c. C-10

In the usual course, once the Public Guardian and Trustee and all the parties have provided consent, the order and consents are provided to the Public Guardian and Trustee, who then files the order with the court.

If the circumstances are such that section 13 is applicable and the estate trustee wishes to obtain the Public Guardian and Trustee's consent, the estate trustee should contact the Charitable Properties Division of the Office of the Public Guardian and Trustee in writing, and include the following:

- The applicant's contact details (i.e. address, telephone number, etc.);
- An affidavit setting out the basis for the order as well as any other affidavits on which the applicant wishes to rely;
- Four copies of the draft order sought;
- Two original copies of consents signed by the applicant and anyone else who would be required to be served with application materials; and
- A cheque in the amount of \$500.00 made payable to the Public Guardian and Trustee.

The Ministry of the Attorney General website (attorneygeneral.jus.gov.on.ca) provides a very helpful guide for seeking orders under section 13.

However, in cases where the parties do not consent or where there is concern as to whether everyone with an interest has been identified and received notice, it is necessary for a hearing to occur and to obtain the court's decision. In this case, materials traditionally filed with the court on an application will be required.

Avoiding Problems in the First Place

While it is clear that the law provides a mechanism to save a charitable gift from failing in certain circumstances, the prudent estate planning professional would be well advised to try to draft a will where failure never becomes an issue.

The first thing a drafting solicitor should do is to take all possible steps to ensure that the names of charities listed in a will are accurate. As noted above, the search engine on the Charities Directorate section on the Canada Revenue Agency website and the Canada Donor's Guide are both good resources.

Another excellent (and obvious) way of ensuring that the charity is named properly is to call the charity itself. They may be the best resource of all!

When drafting the will, it is also worthwhile to include a provision that declares that in the event that a charitable gift fails, the testator's intent is a general one and gives the executors the discretion to transfer the funds in question to such charities as they in their discretion determine most closely match the charitable objects the testator intended to benefit.

By taking the above steps, not only will the drafting solicitor help a testator avoid a situation where funds he intended to benefit a charity end up falling into the hands of another beneficiary (or an intestate heir), but the solicitor will also help the estate save the professional fees that would be involved in a *cy-près* application.