

Trevor Todd and Judith Milliken QC

The Cy-pres Doctrine



Those of us living in Vancouver know Children’s Hospital—surely that goes without saying.

Check a little closer, however, and you may be surprised to learn that no such legal entity exists.

In estate law it is relatively common to discover that a charitable institution, named in a given Will, does *not* actually exist. There may be various underlying reasons—the charity may have been misdescribed, the charity may have ceased to exist, or the charity may never have legally existed.

Such an unpleasant discovery will be particularly common in cases where the person who drafted the Will failed to confirm the correct legal name of the charitable institution. Other cases arise where a charitable institution changes its name or merges with another institution.

In estate law, as a general rule, where a beneficiary under a Will predeceases the testator, the gift usually lapses. Where the testator leaves a specific bequest, for example \$10,000, and the beneficiary predeceases the testator, then this gift will lapse and become part of the residue of the estate.

Where, however, the gift is part of the residue of the estate, then such a lapsed gift will pass on an intestacy (to the next of kin). It will thus be as if the testator had died intestate with respect to that property.

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Most of the cases involving the cy-pres doctrine¹ [pronounced see-pray] involve gifts of the residue of the estate. This is because the testator usually believes the charity will always exist and thus does not provide for any gift over to an alternative beneficiary. As a result, most cy-pres cases involve actions between the next-of-kin who argue there is an intestacy and the charity that seeks to uphold the gift and applies to the court for relief under the cy-pres doctrine.

Unless a general charitable intention is found to exist, a

charitable gift will lapse in the following circumstances:

- a) if the intended recipient of the gift cannot be identified with reasonable certainty;
- b) if the gift is to a charity that has never existed; or
- c) where the court concludes that the gift was for the purpose of a charity but those purposes are no longer capable of being effected.

Where, however, the court finds a general charitable intention, then it may approve or design a scheme “cy-pres.” This cy-pres doctrine allows the court to apply the gift to some other charitable purpose “as nearly as possible” to resemble the original trusts of the gift. Under such a scheme, the court will direct to whom and in what proportions the gift shall be distributed.

Halsbury’s Laws of England, 3rd ed., Vol. 4, page 317, para. 645, expresses the doctrine as follows.

Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode cy-pres, that is, as near as possible to the mode specified by the donor.

¹ French for “as near as possible” The courts of equity in the construction of instruments in equity ordered that the intention of the party is to be carried out as near as may be when it would be impossible or illegal to give it literal effect. *Blacks Law Dictionary*

Generally speaking, our courts will make every effort to save a charitable bequest and prevent an intestacy of the intended gift.

The cy-pres doctrine is said to reside in the court's inherent jurisdiction to compose a scheme to make charitable trusts operative. This doctrine is ancient and can be traced back to Roman law. Under Roman law, donations for public purposes, when not made to a legal purpose, were nevertheless sustained and applied cy-pres to other similar purposes.

Procedure

The cy-pres doctrine is usually invoked before the court in proceedings commenced by a petition brought by the executor/trustee under of the Rules of Court. Pursuant to Rule 10, the petitioner requests the court to interpret the Will and to give directions.

Before issuing such a petition, it is essential the petitioner conduct a thorough investigation and serve every interested party who may possibly be affected by the proceedings. The court must be satisfied that the proceedings name all of the parties who may possibly be entitled to share in the estate, should the charitable bequest fail. The provincial Attorney General must also be served in his or her capacity as the protector of charities.

What is a Charity?

The leading case of *Pemsel v. Special Commissioners of Income Tax* (1891) All E.R. Rep.28 (U.K.H.L.) held that

charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

Admissibility of Extrinsic Evidence

In *Re Smith*, (1953) 3 D.L.R. 510, the British Columbia Court of Appeal dealt with a bequest of the

testator's entire residuary estate to the "Vancouver Humane Society." It was common ground that no such society or institution had ever existed in Vancouver or elsewhere, up to and including the date of the Will or for that matter at any time during the testator's lifetime.

The litigation, however, involved two institutions that were concerned with the protection and care of animals in the City of Vancouver. These two institutions applied to court, each claiming to be the intended beneficiary. At the hearing they sought to introduce evidence of the testator's four previous Wills. The trial judge refused to allow this extrinsic evidence and ultimately held that the gift failed for uncertainty and there was thus an intestacy of the residue of the estate.

It is always a matter of interpretation of the individual Will whether or not the testator has demonstrated a general charitable intention.

An appeal of this decision was allowed. The appeal court found that the testatrix had intended to give the residue of her estate to a charitable organization in Vancouver concerned with the relief of suffering of pets and animals. The appeal court found that a gift for the benefit of animals was indeed charitable.

In the appellate decision, the court ruled admissible the evidence of the testatrix's four prior Wills. These Wills included various bequests to the Toronto Humane Society and the Vancouver Humane Society in equal shares. The court found these four Wills clearly evidenced the testatrix's intention to benefit a society engaged, in Vancouver, in the work of prevention of cruelty to animals. Thus applying the cy-pres doctrine, the court awarded the bequest to the British Columbia Society for the Prevention of Cruelty to Animals, Vancouver Branch.

General Charitable Intent

It is always a matter of interpretation of the individual Will whether or not the testator has demonstrated a general charitable intention.

Generally speaking, the courts have little difficulty in finding the testator had a general charitable intent. Thus the courts are often willing to apply the cy-pres doctrine to prevent the lapse of bequests to charities.

Such a willingness was demonstrated by the British Columbia Court of Appeal in *Re Buchanan Estate* 20 E.T.R. (2d) 100. In this case, the testator left his estate to the Loyal Protestant Home for Children, New Westminster British Columbia.

There had never been a legal entity by that name; an association had, however, operated a home with that name. Nine cousins of the deceased, who stood to inherit on intestacy, argued that this gift had lapsed because there was no such legal entity.

Both the trial court and the appellate court found that the testator's intention was clearly charitable. Although the home had ceased to exist, the association that once operated the home had continued to carry on work for the benefit of children. The court found that the purpose of the gift was *not* to benefit the specific home, but rather was to alleviate the condition of orphaned and underprivileged children in general. Thus, the courts ruled, the intended gift did *not* lapse.

Misdescription

In the *Law of Trusts in Canada*, 2nd ed., at page 613, author Donovan Waters writes:

the courts will make every effort to discover which beneficiary was intended by the deceased and to not allow misdescription, either imperfect or inaccurate, to defeat the deceased's intent. This is especially so when the gift is to a charitable institution. If the description is sufficient to identify the intended beneficiary with reasonable certainty, that person should be the recipient.

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According to Professor Waters, there is thus a general rule that the courts will be unwilling to hold a gift void for uncertainty and will use every endeavour to ascertain who is meant to benefit by the Will.

A good example of this is found in *Re Robson Estate*, 2006 B.C.S.C. 673. In this case, the deceased left the residue of her estate to the First Presbyterian Church in the City of White Rock. There was another Presbyterian church in White Rock; it had not, however, been in existence at the time the deceased made her Will.

The court held that it would look to surrounding circumstances in a case where there existed no organization with a name identical to that institution named to the Will. The court ruled the judge should try to place himself or herself in the position of the deceased at the time the Will was made, focusing on the circumstances that existed that might reasonably have influenced the deceased.

In this case, evidence showed that the deceased regularly attended St. John's Presbyterian Church in White Rock. Further it showed that she had made formal affirmation of her membership at that church. Accordingly the court awarded the bequest to St. John's.

In *Re Conroy Estate* (1973) 4 W.W.R. 537, the deceased's Will contained a provision that read "all the rest of my residue I bequeath to the Cancer Fund of B.C."

There was no such fund. There were, however, two organizations in British Columbia that administered cancer funds. In these circumstances,

the court held that the cy-pres doctrine applied and divided the residue equally between these two organizations. The court held that it had jurisdiction to make such a direction, subject to the approval of the Attorney General as the chief law officer of the Crown.

In this decision, the court quoted 4 Hals. (3rd) at page 282, para. 585, as follows:

Where it is impossible to determine which of several charities the testator meant to benefit, the legacy may be applied cy-pres by dividing the funds between them in equal shares or otherwise.

A review of the law makes it clear that it is essential, when drafting a Will, to contact each charity named to confirm its correct legal name.

No General Charitable Intent Found

In *Canada Trust Company v. Psenickova* (1992) B.C.J.No.555, the court declined to apply the cy-pres doctrine. In this case, the deceased's Will left a gift of one sixth of the residue to the Czechoslovakian Senior Citizens Home, Vancouver, British Columbia.

Although there had been talk among the local Czechoslovakian community of constructing such a home, no such establishment had ever actually existed.

The court adopted the reasoning of *Montréal Trust Co. v. Matthews* (1979) 11 B.C.L.R. 276 at page 283 and stated "where a testator selects a particular charity and takes care to identify the charity, it is very difficult for the court to construe a general charitable intent."

The court stated that for a general charitable intent to be effective, there must be in existence some object reasonably like in nature to that

specified by the testator in his or her Will, an object that could carry out his or her intention in a general way. A vague proposal is *not* enough to satisfy this requirement.

In this case, the court held that the testator had no general charitable intent and the gift to the Czechoslovakian Senior Citizens Home thus lapsed and the gift passed on an intestacy to his next of kin.

Conclusion

A review of the law makes it clear that it is essential, when drafting a Will, to contact each charity named to confirm its correct legal name. Careful attention to such details will go a long way in preventing a possible lapse of an intended gift.

From a review of the case law, it appears that, insofar as possible, the courts are disposed to infer a general charitable intention to prevent the lapse of a charitable gift. This ancient doctrine of cy-pres has existed for over 2000 years. It has undoubtedly been applied in countless cases to prevent the lapsing of charitable bequests. ▲

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