RECONSTRUCTING CHARITABLE INTENTION

John Picton[1]

A large number of testamentary gifts are made to charitable organisations. The executor can normally straightforwardly follow the testator's directions and apply the gift to the nominated charity. But the task is not always so simple. Sometimes, the charitable organisation named in the will has closed before the testator dies. Over a long period, the courts have confronted a difficult question of construction: if the charity no longer exists, how should the property be distributed?

Any general explanation of why testators do not simply change their wills is speculative. But in many cases, it might be assumed that by the time the organisation closes, the testator is no longer in a position to alter the terms of his legacy. He might be in the last years or months of life, and unaware of the changed circumstances affecting the will.[2]

This legal problem has repeatedly recurred in the case law, and a system of equitable rules has developed to guide the court in its distribution of testamentary property. The various methods of construction are commonly treated as distinct alternatives,[3] but beneath the surface, they share key similarities. Each rule views the testator's gift through the same prism of 'particular' and 'general' intention. The court might find that the testator merely intended a particular gift, and a lapse will be triggered. On this construction, the bequest to the organisation is treated as the sum-total of the testator's wishes. He is said to have desired the benefit of nothing other than the expired charity.

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2 See for example, *Phillips v Royal Society for the Protection of Birds* [2012] EWHC 618 (Ch).

3 *Finger's Will Trusts, Re* [1972] Ch 286 (Ch); *Kings v Bultitude* [2010] EWHC 1795 (Ch); *Vernon's Will Trusts*, Re [1972] Ch 300 (Ch).

Alternatively, the court might find that the particular charitable organisation was not in fact important to the testator. The expired charity might be treated as a proxy for a general charitable purpose served by the closed organisation. On this view, the gift can be treated as being for the abstract work of a charity, rather than the body itself. And so the bequest will be kept in charity by the judge, just as if the testator had expressly left a gift to 'general charitable purposes' in his will. Kindersley VC put the test succinctly in *Clarke v Taylor*:[4]

> The question is whether the gift in this will is to be considered as a gift intended for charitable purposes generally, or whether it was simply intended for the benefit of a particular private charity.

This article systematises each judicially developed method of construction around this division between 'general' and 'particular' intention, and it argues that in each approach, that prism provides only an artificial picture of testamentary intention. The 'general'/'particular' division only serves to squeeze the testator's wishes into an unrealistic framework.

But within this rich body of decisions, the case law already contains a conceptual remedy. In related contexts, the courts have constructed gifts without reliance on a distinction between 'general' and 'particular' intention. And so this article expands upon that judicial method, showing that in place of constructing 'general' and 'particular' gifts, the court could ask whether or not the expired organisation nominated in the will was *essential* to the testator's bequest.

The Function of Testamentary Construction

In all cases, the function of intention construction is to ascertain the testator's genuine motives when he wrote the will. The court will then attempt to dispose of his property in accordance with his wishes. Lord Denning noted in *Re Rowland*:[5]

> ...in point of principle the whole object of construing a will is to find out the testator's intentions, so as to see that his property is disposed of in the way he wished.

Similarly in *Lucas-Tooth v Lucas-Tooth*,[6] Lord Birkenhead LC held:

> ...in approaching a problem of this kind it is important never to lose sight of the true principle of construction in such cases -- that it is the duty of the Court to discover the meaning of the words used by the testator...

4 *Clarke v Taylor* (1853) 1 Drewry 642 (Ch) at 644.

5 [1963] Ch 1 (CA) at 10.

6 [1921] 1 AC 594 (HL) at 506.

There are some clearly drafted wills that do not need construction. The testator, perhaps with the aid of good legal advice, might expressly say that he has a general intention in the preface to the will.[7] But the judge's task is unlikely to be so straightforward. Wills are normally written simply, leaving the court with little material for the court to interpret. In expired organisation cases, the will often states only the size of the bequest and the name of the expired organisation, for example, 'a gift of £1,000 on trust to organisation X'.

The court's construction of the gift determines title to the testamentary property. The interpretation that the judge gives to the will decides whether or not there will be a lapse. It is therefore unsurprising that cases normally come before the court in the context of a dispute over ownership. In the most common scenario, the next-of-kin will argue that there is a particular gift and so the gift should pass to them. Against their position, a charity (or the Attorney General acting in the interests of charity) will argue that the testator had made a general purpose gift, and so there is no lapse. The construction of the gift determines how testamentary property is allocated between the litigating parties.

The importance of determinate construction has long been recognised. For example in *Mills v Farmer*,[8] counsel submitted to Lord Eldon:

> Nothing can be more undeniable than that it is extremely important to adhere to principles which have been long established and have stood through a series of concurrent decisions; nor than that, in the course of justice, property is not secure if the law is floating and uncertain in its determinations respecting it.

In the context of disputes over title, the construction must be realistic. Otherwise the courts cannot correctly allocate the disputed property. Unreliable rules of construction are of little use to the court, or as HHJ Weeks (sitting as a High Court Judge) noted in one testamentary construction case:[9]

> Divination and intuition are not skills on the curriculum at the Judicial Studies Board.

Artificiality in the Rules of Construction

There are three rules of construction in the judicial toolkit: (i) The *cy-près*

7 This possibility is noted in *Woodhams, Re* [1981] 1 WLR 493 (Ch) at 502.

8 (1815) 1 Merivale 55 (Ch) at 605.

9 *Harwood v Harwood* [2005] EWCH 3019 (Ch) at [25].

doctrine, (ii) *Re Faraker*[10] construction and (iii) the construction of a general purpose trust. It will be seen that while the rules are formally different, each relies on the same distinction between particular and general gifts.

i. The *Cy-près* Doctrine

The *cy-près* doctrine developed as an element of the Chancery Court's inherent jurisdiction over trusts.[11] The doctrine now also exists in a statutory form,[12] but in testamentary construction cases, judges have continued to develop and apply the general law, largely reserving the use of statute for other contexts.[13] *Cy-près* is a historically well established method of construction, containing a rich body of precedent, but in recent times judges have tended to use the newer methods of construction in expired organisation cases, deploying *cy-près* as a 'back-stop' when the other rules do not apply.[14]

a. Elements of the Construction

Testamentary *cy-près* is a 'multi-layered' method of construction. The judge must take account of two other rules alongside the construction of intention. First, the testator's gift must be impossible in order for *cy-près* to apply at all. In expired gift cases, finding impossibility is clear-cut. The gift will have failed as a result of the physical closure of the named charitable organisation, it will be a gift for the benefit of a 'particular institution at a particular place'.[15]

In *Re Ovey*,[16] for example, a testator bequeathed £500 'to the Ophthalmic Hospital, near Hanover Square, London'. The intended institution had ceased to exist even at the time the will was written. The testator's object had disappeared, and there was no way that the executor could carry out the gift. Similarly, in *Fisk v Attorney General*,[17] *cy-près* construction was considered when a gift was left to a 'The Ladies Benevolent Society' in Liverpool. The Society had expired at the time the will was read.

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10 *Faraker, Re* [1912] 2 Ch 488 (Ch).

11 See generally Gareth Jones, *History of the Law of Charity* (Cambridge University Press 1969) at 72.

12 Charities Act 201, s 62.

13 The statute is primarily used for the reform of established charities. See generally Rachael Mulheron, *The Modern Cy-pres Doctrine: Applications and Implications* (UCL 2006) at 91.

14 See *Finger's* above n 3; *Kings* above at n 3.

15 *Roberts, Re* [1963] 1 WLR 406 (Ch) at 416 per Wilberforce J.

16 (1885) LR 29 Ch D 560 (Ch).

17 (1867) LR 4 Eq 521 (Ch).

Second, the court must apply the gift to a new purpose 'as near as possible' (or *cy-près*) to the failed gift. The principle focuses the attention of the court on the intention behind the bequest. By applying the testator's property to an alternative charity with very similar objects, the court can claim to be effecting something similar to what was truly intended. Parker J said in *Re Wilson*:[18]

> 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 out.

The 'as near as possible' principle is subject to certain limitations. It will not always be possible to find an object that is 'near' to the testator's original gift. A celebrated example is *Attorney General v Iron-Monger's Company*,[19] where a gift was left 'for the redemption of British slaves in Turkey or Barbary'. In view of the fact that slavery had been abolished, the gift proved impossible to effect. The House of Lords applied the gift to supporting charity schools in England and Wales. The unusual facts of the case led Lord Cottenham to say, 'a charity may be *cy-près* to the original object, which seems to have no trace of resemblance to it'.[20]

The principle is also tempered by practical concerns. Often one or more of the parties to the case is a charity arguing that it should receive the testator's gift. In these circumstances, the court is likely to award the testator's gift to the litigating organisation. So in *Re Finger's Will Trusts*,[21] a gift to the expired 'National Council for Maternity and Child Welfare' was applied *cy-près* to the 'National Association for Maternal and Child Welfare', which had been a party to the case. And in *Phillips v Royal Society for Birds*,[22] a gift to the 'New Forest Owl Sanctuary', was applied to the 'North Wales Bird Trust', which was also a charity which had been involved in the litigation.

b. An Artificial Presumption

The construction of the testator's charitable intention is the crucial point at which the court decides whether or not the testator's gift will be kept in charity, preventing the gift from being paid to the next-of-kin. Where a general gift is found, it will be saved. The court must attempt to construct which type of

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18 *Wilson, Re* [1913] 1 Ch 314 (Ch) at 321.

19 (1884) 10 Cl & Fin 908 (Ch) at 991.

20 Ibid at 991.

21 *Fingers* above n 3.

22 *Phillips* above n 2.

intention the testator had when he wrote the will. Kindersley VC explained the distinction in *Clarke v Taylor*:[23]

> There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally…

In the specialist language of the *cy-près* doctrine, a particular gift is found where there is a 'particular charitable intention', and general gifts occur where there is a 'general charitable intention'. Over a long period, the courts have developed and applied a strong rule in relation to these types of testamentary intention. So where an expired organisation is nominated in the testator's will, a particular charitable intention is presumed.

The Court of Appeal's decision in *Re Rymer*[24] is the leading judgement on the presumption of particular intention. A testator had left £5,000 to the rector of St Thomas' Seminary in Westminster for the education of priests in the diocese, explicitly stating that the gift was 'for the purposes of such seminary'. The running costs of the Westminster seminary had proved to be more expensive than expected and so it closed, transferring some of its students to Birmingham. The physical expiry of the organisation clearly meant that the executor could not follow the direction in the will. Lindley LJ held:[25]

> Once you arrive at the conclusion that a gift to a particular seminary or institution, or whatever you may call it, is 'for the purposes thereof', and for no other purpose — if you once get to that, and it is proved that that institution or seminary, or whatever it is, has ceased to exist in the lifetime of the testator, you are driven to arrive at the conclusion that there is a lapse, and then the doctrine of *cy-près* is inapplicable.

The key to the presumption of particular intention lies in the fact that where an expired organisation is nominated, the gift is treated as being limited to the very specific purposes of the expired charity. This is the reason that the gift in *Re Rymer* was construed as being for the training of priests at the Westminster seminary, not the training of priests in general.

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23 *Clarke v Taylor* above n 4 at 644.

24 [1895] 1 Ch 19 (CA).

25 Ibid at 35.

This presumption is very strong, and has only been rebutted in isolated cases. An example is *Marsh v Attorney General*,[26] where a testator left a gift to the trustees and president of the Deal Nautical School, and the school had closed before the date of the will. In a short treatment of the issue, Sir W Page-Wood VC held that the gift was for the general purpose of instructing youth. It was not exclusively for application in the particular school. The judge found, 'this therefore, is the case of a failure of the trustee, but the trust remains'.[27]

Outside of such isolated cases, the strength of the rule is problematic. *Re Harwood*,[28] puts the law's artificiality into sharp relief. A testatrix made three bequests to 'the Wisbech Peace Society, Cambridge', to 'the Peace Society of Belfast', and to the 'Peace Society of Dublin'. The Wisbech society had once existed, but the Peace Society of Belfast had never existed and 'the Peace Society of Dublin' appeared to be a misdescription of an expired institution. Despite their similarity, varying approaches were taken in relation to the different bequests. The gift to the non-existent Belfast society was construed as gift for the general purpose of promoting a peace society connected with Belfast. The gift to the misdescribed Dublin society was construed as being for the intention of any peace society connected with Dublin. But, strikingly, no general charitable intention was found for the gift to the Wisbech society because the organisation had expired.

Farwell J's finding of a particular charitable intention in relation to the Wisbech society was a consequence of the *cy-près* presumption of particular charitable intention where an expired organisation is nominated. The judge directly noted that, 'the difficulty of finding any general charitable intent in such case if the named society once existed, but ceased to exist before the death of the testator, is very great'.[29]

The variance in the constructions applied in *Re Harwood* illustrates the artificiality entailed in the presumption. While two of the three gifts were saved for charity, the bequest to an expired organisation was left to lapse. This was the case, even though the judge acknowledged that the context of the will showed a concern for peace.[30] As a consequence of the presumption, the Court was unable to find anything other than a particular charitable intention.

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26 (1860) 70 ER 971. See also *Finger's* above n 3.

27 Ibid at 973.

28 [1936] Ch 285.

29 Ibid at 287.

30 Ibid at 288.

Given that by its nature, a gift for peace implies concern for intra-community, or international issues, to restrict the testator's intention entirely to a specific institution in Wisbech mischaracterises the essence of the bequest. A strong presumptive rule in favour of lapse prevents the court from assessing the facts on a case by case basis.

In recent times, while the doctrine continues to be applied in testamentary cases,[31] alternative frameworks of construction have been developed. It will be seen that the newer rules share conceptual similarities with *cy-près* and that they also suffer from artificiality.

ii. *Re Faraker*[32] Construction

Charitable organisations sometimes restructure. Often, the process leads to the physical expiry of the organisation. For example, two charities might merge in order to deliver services more effectively, or because there has been a fall in local demand. Alternatively, trustees might take the view that the purposes served by their charity are in need of updating and establish a new charity by way of a scheme from the Charity Commission.

It has been seen that, under the *cy-près* doctrine, the physical expiry of a charitable organisation will occasion a failure of the gift. The *Re Faraker* construction takes a contrasting approach. Where a charity has closed, physical expiry will not necessarily occasion failure. Under the rule, it might be possible to construe the bequest as a successful disposition for the post-reform organisation. That new charity will be treated as a 'successor' to the expired organisation and it will be able to receive the gift as if it were the nominated legatee.

The rationale behind the construction is derived from the perpetual nature of charitable trusts. Where a charity undergoes reform, although it might expire in 'bricks and mortar' form, the funds it holds will not expire with it. They will continue to exist, perpetually dedicated to charity.[33] Providing that a successor body holds the funds of the expired charity, the gift will not fail. In contrast to *cy-près* there is no 'failure' and the testator's problematic gift is held to be possible to effect.

The best illustration of the construction is *Re Faraker*[34] itself. In the case, a testatrix left a sum to a body identified as 'Hannah Bayly's Charity', which was an

31 *Kings* above n 3; *Phillips* above n 2.

32 *Faraker* above n 10.

33 Ibid.

34 Ibid.

institution for the benefit of poor widows living in a Rotherhithe parish. Before the will took effect, the Charity Commissioners had radically altered the legal position of the charity by a scheme. It had been merged with thirteen others to create a new charitable trust for the benefit of the poor. Yet owing to what Farwell LJ called a 'pardonable slip' on behalf of the draftsman, the new organisation was in fact under no constitutional obligation to apply its funds to widows.

In a landmark judgement, the Court of Appeal reversed Neville J's first instance finding that the gift had failed. It was held instead that the mere change of form had not destroyed the charity; the trust continued to exist and the testatrix's gift could be augmented to its funds.

a. Exclusion of Non-Perpetual Charities from the Rule of Construction

While *Re Faraker* marked the development of a far-reaching new tool of construction, later cases have imposed a significant restriction on the principle. The rule will not be applied where the original expired charity was terminable. The first case to impose the limitation was *Re Roberts*,[35] where a testatrix made a gift to an institution named the Sheffield Boys' Working Home. By a clause in the institution's trust deed, the charity could be wound up, and its funds applied to alternative charities in the city. By the date of the testatrix's death, that clause had been exercised and the funds applied to the general purposes of an organisation named the Sheffield Town Trust; a body with markedly different purposes from the Home.

The Sheffield Town Trust argued that it should be paid the bequest, but Wilberforce J held himself unable to apply the rule to the terminable organisation on the basis that the testatrix would not have foreseen the termination of the working home.[36]

The restriction of the rule to non-terminable charities was developed in *Re Stemson's Will Trusts*,[37] where a testator left a gift to an expired charitable company named the 'Rationalist Endowment Fund'. The body had terminated voluntarily by a power in its constitution and transferred its assets to another charity. After consideration of *Re Roberts*,[38] Plowman J found that the *Re Faraker*

35 *Roberts* above n 15.

36 Ibid at 414.

37 [1970] Ch 16 (Ch).

38 *Roberts* above n 15.

construction could not be applied because the charitable company was not a perpetual body:[39]

> Where funds come to the hands of a charitable organisation, such as REF, which is founded, not as a perpetual charity but as one liable to termination, and its constitution provides for the disposal of its funds in that event, then if the organisation ceases to exist and its funds are disposed of, the charity or charitable trust itself ceases to exist and there is nothing to prevent the operation of the doctrine of lapse.

Excluding terminable organisations from the construction prevents its application to the large majority of incorporated charities. In contrast to charitable trusts, incorporated charities are normally non-perpetual bodies, terminable by a dissolution clause in their constitution. And so the consequence of the restriction is that *Re Faraker* construction is limited largely to charitable trusts.[40]

b. Artificial Treatment of Intention

The fact that the successor body holds the expired organisation's funds on trust allows the court to say that the new charity has 'stepped into the shoes' of the legatee. The principle is technical; the gift is construed as being made in augmentation to the funds of the expired organisation, which the successor body now holds. In *Re Withall*,[41] Clauson J explained in relation to a gift to the expired Margate Cottage Hospital:

> What is the operation of the will? The proceeds are to be paid to the Margate Cottage Hospital. That does not mean, as has been picturesquely said, the bricks and mortar; that means that they are to be paid to the persons administering the trusts to which the funds of the Margate Cottage Hospital are dedicated, as an accretion to those funds, to be used for those purposes.

And so the construction fixes the testator with a general intention. There is no question of a gift to the particular organisation. The bequest is construed as being for the general purposes of the expired charity. As Wilberforce J directly noted in *Re Roberts*:[42]

> …where there is a gift to a charity which can be interpreted as a gift for the purposes of the charity, that gift can take effect although the form of the charity has been altered…

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39 Ibid at 26.

40 *cf Vernon's* above at n 3.

41 *Withall, Re* [1932] 2 Ch 236 (Ch) at 242

42 *Roberts* above n 15 at 413.

This approach is artificial because the successor organisation may serve different purposes to those of the original expired charity, and so the gift could be applied to a radically altered 'legatee'. In *Re Lucas*,[43] for example, a testatrix had left gifts to an institution identified as the Huddersfield Home for Crippled Children.[44] Before the date of the will the institution had closed, and in light of the closure, the Charity Commissioners had provided a *cy-près* scheme to alter the organisation's purposes. Under a new constitution, in place of providing holidays at the Huddersfield Home, the new charity provided holidays in homes at various locations around the country.

The shift from provision of respite care in a local institution, to the delivery of care in various locations is a substantial change of purpose, and at first instance Roxburgh J found that the gift was for the upkeep of the particular home, rather than for, 'homes scattered up and down the country'.[45] Consequently, he held that the gift lapsed.

Yet the Court of Appeal overruled Roxburgh J's decision and applied the *Re Faraker* construction. It was held that it was possible to augment the gift to the funds of the successor charity, and the bequest was treated as a general purpose gift, just as if the original legatee still existed. Lord Greene found:[46]

> [The gifts] took effect as gifts to that same charity in the reconstituted form in which it was continued under the scheme, that is to say as gifts in augmentation of the funds held by the trustees appointed by the scheme for the modified objects thereby prescribed.

And so the Court of Appeal in *Re Lucas* applied the gift to the successor charity, even though it served markedly different purposes from the original expired Home.

A similar disparity between the original and the successor charities is evident in *Re Bagshaw*.[47] In the case, a testatrix left a gift to a charity which at the date of the will had operated a cottage hospital in Bakewell. By her death, its buildings and site had vested in the Minister of Health under the National Health Service Act 1946. Not all the funds were transferred. By a power in the trust deed, the

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43 [1948] Ch 424 (CA).

44 In fact at the time the testatrix made the will, the institution was named the Huddersfield Charity for Crippled Children (see *Spence, Re* [1979] Ch 483 at 488).

45 *Lucas, Re* [1948] Ch 175 (Ch) at 182.

46 *Lucas, Re* [1948] Ch (CA) 424 at 427.

47 *Bagshaw, Re* [1954] 1 WLR 238.

trustees had renamed the charity and extended its purposes to cover the relief of necessitous ex-servicemen and women.

Applying the *Re Faraker* construction, Danckwerts J augmented the gift to the reformed organisation. This construction was applied to the will even though the focus of the charity had switched from the advancement of health, to the relief of poverty.[48] The legatee organisation had radically changed purposes.

The courts are alive to the problem, and in some cases, they have suggested measures to protect the testator's intention. In *Re Withall*,[49] a testatrix made a gift to a cottage hospital which had merged with a larger general hospital, but Clauson J found that the Attorney General might intervene to protect the testator's gift from inappropriate use.[50]

Similarly, in *Re Faraker* itself, Cozens-Hardy MR urged that the objects of the successor charity should be amended so as to explicitly provide for purposes of the original charity; the relief of widows.[51]

However it will not always be possible to ensure that the successor body applies the gift in sympathy with the original expired charity's purposes. In *Re Bagshaw*, while the successor charity remained constitutionally capable of spending funds on local health care, it appears from the case report that those purposes were no longer the real focus of the charity. The original cottage hospital had vested in the Minister of Health. In such circumstances, the successor charity may not have been institutionally capable of applying the funds to anything other than its reformed purposes.

iii. Construction of a General Purpose Trust

Under the newest method of construction, the court might take the testator's gift as establishing a general charitable trust for the purposes of the expired organisation.

If the will is construed as containing a general trust, the gift will not fail. The court will order a scheme providing for the bequest to be applied to an alternative charity. That body will take the gift as trustee, bound to carry out the testator's purpose gift.

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48 This point is also made by Jill Martin, 'The Construction of Charitable Gifts' (1974) 38 Conv 187.

49 *Withall* above n 41.

50 Ibid at 242.

51 *Faraker* above n 10 at 494.

Like the testamentary *cy-près* doctrine, the general purpose trust construction can be triggered by the physical expiry of the charitable organisation. For example, in *Re Broadbent*,[52] a gift was left to 'St Mathew's Church', an iron framed building in Stalybridge. The testatrix expressly left the gift to the general purposes of the church, but requested that her gift be spent on the upkeep of the building. St Mathew's had suffered from a dwindling congregation and had closed before the testatrix's death. However, the gift was saved for charity. The Court of Appeal held that the testatrix had established a trust for the general purposes of the charity, not a trust for the church 'premises'.[53] It was therefore able to prevent the lapse of the gift.

The rule is complex. It will be seen that the testator's intention is derived from the constitutional nature of the expired charity. Where an unincorporated charity is nominated, the court will presume a gift for the general work of the charity, although it is possible to rebut the presumption, and find a gift only for its very specific purposes. On the other hand, where an incorporated charity is nominated, it is presumed that the testator did not intend a general trust. Instead, he is fixed with intending a particular gift to the incorporated body absolutely. It is only in exceptional circumstances that the presumption can be rebutted.

a. Unincorporated Charities: Construction of Particular and General Gifts

Where an expired unincorporated charity is nominated in the will, the testator is presumed to have attempted to establish a trust for the general work of the charity. In *Re Meyers*,[54] Harman J explained:

> Where there is a gift to an unincorporated body of that sort it is not given to the mere bricks and mortar or to the beds or the carpets but for the purpose for which the work is carried on.

The rationale for this principle is derived from the manner in which unincorporated charities hold property. They are unable to hold beneficially, and it is for that reason that the testator is fixed with having intended a trust. Buckley J explained in *Re Vernon's Will Trusts*:[55]

> Every bequest to an unincorporated charity by name without more must take effect as a gift for a charitable purpose. No individual or aggregate of individuals could claim to take such a bequest beneficially. If the gift is to

52 *Broadbent, Re* [2001] EWCA Civ 714 (CA).

53 Ibid at [15].

54 *Meyers, Re* [1951] Ch 543 (Ch) at 549.

55 *Vernon's* above n 3 at 303.

> be permitted to take effect at all, it must be as a bequest for a purpose, viz., that charitable purpose which the named charity exists to serve.

On this logic, in the absence of contrary evidence, a general purpose trust will be found wherever an expired unincorporated charity is nominated in the will. This was apparently the case in *Re Wedgwood*,[56] where a gift to 'St Mary's Home for Women and Children of 15 Wellington Street Chelsea' was impossible to effect. The organisation had moved addresses, changed names, and had a new management, but the mere gift to an unincorporated charity was sufficient for Joyce J to hold that, 'the legacy in question is not given to any person or association, but really for a charitable purpose or object, namely, the carrying on of the work of St Mary's Home'.[57]

However if there is evidence that the gift was intended only for the very specific purposes served by the charity, the court will find a particular gift. It will hold that the 'instrumentality' of the nominated organisation was essential to the testator, and that the general purpose trust construction does not apply. In this circumstance, the testator is fixed with intending a gift that only the specifically nominated organisation could carry out. Buckley J continued in *Re Vernon's Will Trusts*:[58]

> A bequest to a named unincorporated charity, however, may on its true interpretation show that the testator's intention to make the gift at all was dependent upon the named charitable organisation being available at the time when the gift takes effect to serve as the instrument for applying the subject matter of the gift to the charitable purpose for which it is by inference given. If so and the named charity ceases to exist in the lifetime of the testator, the gift fails...

It is possible to rebut the presumption. This happened in *Kings v Bultitude*,[59] although the exceptional nature of the facts suggests future courts will be unlikely to follow suit. The testatrix was the only minister of 'The Church of the Good Shepherd', a schismatic Catholic church in London. She had left her testamentary estate to her own Church. Upon her death, its small congregation had dispersed, leaving the Church without a congregation or a minister.

Counsel for the Attorney General submitted that there was a general gift for a 'reasonably traditional' form of Christianity. Proudman J disagreed. Under the

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56 *Wedgewood, Re* [1914] 2 Ch 245 (Ch).

57 Ibid at 249.

58 *Vernon's* above n 3 at 303.

59 *Kings* above n 3.

testatrix's ministry, the judge found that the church had been 'particularly dogged' in pursuing a separate path from other schismatic Catholic churches. The charity had strayed from its constitution, and the church building had been used for idiosyncratic purposes, such as animal blessings and spiritualist evenings. So in view of these unusual facts, Proudman J held that the testatrix had no intention to benefit broad purposes.[60] The gift was restricted to the particular church.

b. Incorporated Charities: Construction of Particular and General Gifts

Where an expired incorporated charity is nominated, an opposite rule applies; there is a strong presumption of a particular gift. The testator is taken to have intended a beneficial gift in augmentation of the incorporated charity's assets, and therefore no trust for purposes. It is treated as an absolute gift for the incorporated body *per se*.

The logic behind the presumption of a particular gift is derived from the manner in which incorporated charities hold property as (in contrast to unincorporated charities) they are able to hold property beneficially, free from any trusts. HHJ David Cooke (sitting as a High Court judge) stated in, *Phillips v Royal Society for the Protection of Birds*:[61]

> …*prima facie* a gift to a body that is in fact incorporated is a gift to that body…

The case provides the most recent example of the rule in operation.[62] A testatrix had made a gift to the incorporated 'New Forest Owl Sanctuary', but at the time of her death, the charity was in the process of dissolution under what was then section 652 of the Companies Act 1985.[63] The gates to the Sanctuary had long been closed to the public, but although it had been removed from the register of charities, it had not yet been removed from the register of companies.

Counsel for the Attorney General submitted that the gift was on trust for the purposes of the Sanctuary, not an absolute gift for the company *per se*. But HHJ David Cooke rejected the submission, holding that there was, 'no indication in the will that [the testatrix] intended anything other than that the bodies to which she

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60 See John Picton, '*Kings v Bultitude* – A Gift Lost to Charity' [2011] 1 Conv 69.

61 [2012] EWHC 618 (Ch) at [19].

62 See John Picton '*Phillips v The Royal Society for the Protection of Birds;* Construction of a Gift to a Charitable Company' [2012-13] 15.2 CLPR 19.

63 Now Companies Act 2006, s 1003.

made her gifts would be entitled to use the funds as they thought fit for their purposes'.[64]

It has been judicially acknowledged that furtherance of the objects served by the charity will be a part of the real-world motivation behind the gift to the corporation. Buckley J noted in *Re Vernon's Will Trusts*,[65] '…the testator's motive in making the bequest may have undoubtedly been to assist the work of the incorporated body…' Nevertheless, the motive is taken to be satisfied by a particular gift to the charity. This amounts to saying that while the testator might *hope* that the incorporated charity will carry out the intended work, he is presumed not to have established a general purpose trust to ensure that it does.

The presumption is rebuttable, 'where the terms of the bequest indicate that the company is to hold it on a separate trust'.[66] Essentially, the court must find that the testator intended a separation of legal and equitable title. He will then be taken to have attempted to make the corporate body trustee for his purposes.

This sets the bar high. The courts have been very reluctant to find a general purpose trust where an incorporated body is nominated. Even a gift expressly made 'for the general purposes' of an incorporated charity is not enough to establish a general trust. The expression was used in *Re Arms (Multiple Sclerosis Research) Ltd*,[67] where a series of gifts were left to a multiple sclerosis charity. The charity was in insolvent liquidation. If it had been possible to construct a trust, the testatrix's gift would have been kept from the company's creditors. Despite the sympathetic facts, Neuberger J took the view that the expression 'general purposes' in the will did not have a special meaning.[68] The gift was made beneficially in augmentation of the company's assets, and no trust could be constructed.

The sole case where a general trust intention has been found is *Re Meyers*.[69] A testator made a gift to a large number of unincorporated and incorporated hospitals in the same will. It directed that the gifts should be added to the invested funds of the charities, but that direction could not be carried out. Pursuant to vesting provisions in the National Health Service Act 1946, the nominated hospitals had been reformed into larger groupings, and their funds had vested elsewhere. In

64 *Phillips* above n 2 at [22].

65 *Vernon's* above n 3 at 303.

66 *Phillips* above n 2 at [19].

67 [1997] 1 WLR 877 (Ch).

68 Ibid at 883.

69 *Meyers* above n 54.

these circumstances, Harman J presumed valid trusts for the purposes of the unincorporated hospitals, and he then continued to give an identical construction to the incorporated hospitals.[70]

The approach in *Re Meyers* is isolated, and in *Re Finger's Will Trust*, Goff J restricted the judgement to its facts. The judge found that *Re Meyers* had been driven by the context of the particular will, stating:[71]

> The mere fact that residue is given to a number of charities, some of which are incorporated and others not, is not of itself a sufficient context to fasten a purpose trust on the corporation.

c. Artificiality: Over-Emphasis on the Constitutional Form of the Expired Charity

Like *cy-près* and *Re Faraker*, this newer construction also suffers from artificiality. The strength of the presumptions directs the court towards unrealistic decision-making, a fact impliedly acknowledged by Goff J in *Re Finger's Will Trusts*.[72] The judge noted:[73]

> If the matter were *res integra* I would have thought that there would be much to be said for the view that the status of the donee, whether corporate or unincorporate, can make no difference to the question whether as a matter of construction a gift is absolute or on trust for purposes. Certainly drawing such a distinction produces anomalous results.

The multi-layered decision in *Re Finger's Will Trusts* provides a 'testing-ground' for the robustness of the construction because in the case the presumptions led Goff J to two opposite conclusions, despite similar facts. The testatrix had left shares of residue to eleven named charities. Amongst the list were two expired organisations. 'The Radium Commission' was an unincorporated medical supply charity, which prior to the establishment of the National Health Service, had overseen the distribution and use of medical radio-active substances. Following the National Health Service Act 1946, there was no longer any need for the charity, and so the radium and other assets were transferred to the Minister of Health.

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70 Ibid at 541.

71 Ibid at 299.

72 *Finger's* above n 3.

73 Ibid at 294.

In relation to this unincorporated charity, Goff J straightforwardly presumed a general purpose trust. The purposes of the Commission remained possible (being carried out initially by the Minister of Health, and then the Secretary of State for Social Services). There was nothing in the will to suggest that the gift was restricted to the expired charity, and so the judge directed a scheme.

A diametrically opposite approach was taken in relation to the other gift. 'The National Council for Maternity and Child Welfare' was an expired incorporated organisation. It had been a co-ordinating body for various welfare and training organisations, but the charity had terminated voluntarily before the testatrix's death and transferred its surplus assets to another charity. With regards to this incorporated body, Goff J held that the purpose gift construction could not apply, there being no context in the will to imply a purpose trust. And so the result of the construction was to fix the testatrix with having established a general purpose trust for the work of the Radium Commission, but a particular gift to the National Council for Maternity and Child Welfare. The construction was able to save one gift for one charity, but not the other.

In the event, Goff J did not allow the gift to incorporated National Council for Maternity and Child Welfare to lapse. He saved the gift through an alternative method: the *cy-près* doctrine. But in light of the strong presumption of a *cy-près* particular charitable intention where an expired charitable organisation is nominated, he did so only as a result of what he described as 'very special' circumstances. He constructed a *cy-près* general charitable intention on three grounds. First, the Council was a co-ordinating body, rather than a charity with its own distinct identity. Second, the testatrix had left a gift of her entire estate to charity. And third, the judge was able to ascertain that the testatrix considered herself as having no relatives. While the judge was unable to deploy the general purpose trust construction, Goff J found a *cy-près* general charitable intention in its place.

Despite this *cy-près* 'escape route', the effect of the general purpose trust construction in the case is open to criticism. Its applicability in *Re Finger's Will Trusts* was dependent on the constitutional form of the expired charity, but it must be doubted whether the testatrix genuinely took account of the difference between incorporated and unincorporated charities when the will was written. This position has some academic support; Roger Cotterrell takes the view that testators are rarely aware of the legal difference between incorporated and unincorporated charities, stating that:[74]

74 Roger Cotterell, 'Gifts to Charitable Institutions: A Note on Recent Developments' (1972) 36 Conv 198 at 203.

> The average donor probably neither knows nor cares whether the donee charity has corporate status or not, and, if he does know, there is in general, no reason why this should influence his intention either to make his gift to the institution itself or to benefit the particular purposes of which it is the instrument.

The presumptions are based on the legal nature of charitable property holding, and so they are unlikely to relate to real-world knowledge held by the testator. In *Re Finger's Will Trusts*, while it is possible that the differing constructions placed upon her bequests genuinely reflected the testatrix's real-world intention, it must also be unlikely. In order for the opposing constructions to have been accurate, the testatrix would have had to be fixed with an unusually detailed level of legal knowledge. She would have known the legal difference between incorporated and unincorporated charities and the manner in which they hold property. In light of the complexity of the rules, she would not have been typical.

Reconstructing Intention: Towards A More Realistic Method

None of the available methods of construction is free from artificiality. Where a judge applies the rules, they will not determinatively guide him to a realistic understanding of the testator's wishes, and so they fail in their function. They cannot realistically allocate property.

In this final section, the underlying cause of the law's artificiality will be unpicked, and a more realistic method of construction will be proposed.

i. The Underlying Artificiality

While each rule constructs the testator's gift according to a different formal logic, the underlying principle is always the same. The gift will be saved where the testator intended, '...according to the true construction of the will... to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose...'[75]

The *cy-près* construction permits the court to save the gift where there is a general charitable intention. Under the *Re Faraker* construction, the testator is automatically fixed with a general purpose gift in augmentation of the funds of the expired charity. And under the general purpose trust construction, the gift will be saved where the testator intended a trust for the general work of the expired organisation.

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75 *Wilson* above n 18 at 321 per Parker J.

If, despite a large number of decided cases, no reliable system of precedential construction has emerged, then the law's artificiality must have a deep-rooted cause.

a. Judicial Scepticism regarding General Intention

Two cases unearth the problem. In *Re Spence*[76] and in *Bowman v Secular Society*,[77] the premise underlying each method of construction - that a gift to a charitable organisation can be made with a truly general intention - was rejected as being counterintuitive.

In *Re Spence*,[78] a gift had been left for the benefit of the patients of an Old Folks' Home, but the charity had closed before the death of the testatrix. It was argued both that there was a general purpose trust, and in the alternative, that there was a *cy-près* general charitable intention. Sir Robert Megarry VC rejected both legal arguments and allowed the gift to lapse. In making the decision, the judge cast doubt on the usefulness of the law in this area. First he noted:[79]

> The facts of this case lie in a narrow compass. But for the authorities, my judgment would have been correspondingly short. However, this is a case about charities; and those words almost of necessity expel brevity.

And the judge continued to find:[80]

> Now without looking at the authorities, I would have said that this was a fairly plain case of a will which made a gift for a particular purpose in fairly specific terms. The gift was for the benefit of the patients at a particular home...

A similar brand of sceptical criticism lies beneath Lord Parker's judgement in *Bowman v Secular Society*.[81] Though the case was decided as long ago as 1917, it remains the most recent House of Lords decision to address the construction of charitable intention. A testator had left a gift to a corporation established with anti-Christian objects, principally the rejection of supernatural belief as a basis for human conduct. The next-of-kin argued that the objects of the corporation were unlawful, causing a lapse and payment of the gift to them.

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76 *Spence* above n 44.

77 *Bowman v Secular Society* [1917] AC 406.

78 *Spence* above n 44.

79 Ibid at 486.

80 Ibid at 491.

81 *Bowman* above n 77.

In a landmark case, a majority in the House of Lords found that the objects of the corporation were lawful, and that the body was capable of receiving the gift. Nevertheless, Lord Parker took the opportunity to consider the legal treatment of gifts to unlawful charitable objects. He found that in such circumstances, the bequest could only be saved by finding a general charitable intention. Yet, with striking candidness, the judge doubted that such general intention could genuinely exist in the mind of the testator. He stated:[82]

> The rule of equity in this respect is well known, and, however admirable in the interest of the public, has, I think, gone further than any other rule or canon of construction in defeating the real intention of testators.

Where a charitable organisation is nominated, such scepticism is well placed. It must be very unlikely that a testator who has nominated a particular charitable organisation, in fact desired to make a truly general gift for an abstract charitable purpose. In the large majority of cases, the identity of the expired charity will have at least been important to the testator, otherwise he would not have nominated it in his will. Or, as Sir Robert Megarry VC noted in *Re Spence*:[83]

> It is difficult to envisage a testator as being suffused with a general glow of broad charity when he is labouring, and labouring successfully, to identify some particular specified institution or purpose as the object of his bounty.

b. Evidencing Artificiality in the Construction of General Intention

Dig beneath the surface, and the artificiality inherent in the construction of general intention is unearthed. Despite the differing rules of construction applied in each case, the reports contain key themes, each suggesting that the identity of the nominated organisation must have been important to the testator.

First, there are numerous examples of gifts motivated by a personal connection with the expired organisation, suggesting that the testator was personally invested in the charity. The testatrix in *Re Broadbent*[84] had left funds to 'St Mathew's Church' in Stalybridge; the report shows that her husband had been the chairman of the trustees and a Sunday school teacher. Another family connection is evident in *Re Slatter's Will Trust*,[85] where the testatrix made a gift to a tuberculosis hospital. It was the location where her only daughter had received treatment.

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82 Ibid at 442.

83 Ibid at 493.

84 *Broadbent* above n 52.

85 [1964] Ch 512 (Ch).

A testatrix apparently had a long-standing connection with the nominated hospital in *Re Withall*.[86] She left money to the 'Margate Cottage Hospital', but before her death, she had also subscribed to various funds for the establishment of the charity. Early on, in *Clarke v Taylor*,[87] it was remarked that a gift left to a school for female orphans might have been a result of the testator personally knowing, and approving, of the school.

Second, testators very often choose to give to organisations from their local areas, suggesting a personal awareness of the charity. The case reports do not always detail from where the testator originates, but there are some unambiguous examples. In *Re Spence*,[88] the testatrix left gifts to a Blind Home and an Old Folks Home; both organisations were in Keighley, the town where she lived. In *Re Lucas*,[89] a testatrix left a gift for the 'The Crippled Children's Home, Lindley Moor, Yorkshire'; she had lived locally, in Huddersfield. And in *Re Currie*,[90] a testator left a gift to 'Victoria Memorial Hall', on May Street, Belfast. The case report shows that he had lived in the same city.

Third, testators tend to make gifts of large sums. The size of the donation suggests that they will have thought carefully about which bodies to nominate. Again, this can be seen in the case reports. In *Re Bagshaw*,[91] the testatrix gave her entire real and personal estate (after funeral expenses) to 'The Bakewell and District Cottage Hospital'. In *Kings v Bultitude*,[92] the testatrix left a gift of her entire residuary estate to 'The Church of the Good Shepherd' in Hackney. And in *Phillips v Royal Society for the Protection of Birds*,[93] the testatrix made one specific bequest, to her pet parrot. She divided the rest of her estate between animal welfare charities.

In light of these themes, it is unsurprising that the courts have struggled to develop a realistic method of construction. Rather than treating the nominated charitable organisation as a proxy for an abstract charitable purpose, testators will be concerned about the character of their legatee. The rules of construction are artificial because they envisage a type of intention which does not exist. Or as one

86 *Withall* above n 41.

87 *Clarke* above n 4.

88 *Spence* above n 44.

89 *Lucas* above n 46.

90 [1985] NI 299 (Ch).

91 *Bagshaw* above n 47.

92 *Kings* above n 3.

93 *Phillips* above n 2.

judge graphically noted, the law places the court in the position of constructing, 'a will-o'-the-wisp'.[94]

ii. Construction Without Reliance on General Intention

There is another way. The testamentary case law contains the core of an existing method which is free from dependency on a discovery of general intention. In place of looking for a general gift, the court might ask whether it is possible to modify the testator's bequest without defeating his *essential* intention.

The approach is rare,[95] but a clear judicial expression belongs to Vinelott J in *Re Woodhams*:[96]

> One way of approaching the question whether a prescribed scheme or project which has proved impracticable is the only way of furthering a charitable purpose that the testator or settlor contemplated or intended, is to ask whether a modification of that scheme or project, which would enable it to be carried into effect at the relevant time, is one which would frustrate the intention of the testator or settlor as disclosed by the will or trust instrument interpreted in the light of any admissable [sic] evidence of surrounding circumstances.

Adoption of this model has the potential to transform the way that judges decide expired organisation cases. In place of the current rules, the question for the court would be whether the testator made a truly particular gift, or a gift that it is possible to modify. A truly particular gift would be found where the identity of the expired organisation was essential to the testator, and in such circumstances, the gift would lapse. A modifiable gift would be found where it is possible to apply the gift to another charity without destroying its underlying essence, and so the gift could be saved for charity.

There are three parts to Vinelott J's formulation, (i) identification of the essential elements of the gift, (ii) modifying the gift, and (iii) the role of admissible evidence.

a. Identifying the Essence of the Gift

Under the model, the court will divide the gift into 'essential' and 'inessential' elements. One method of doing so is to ask what the testator would wish to

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94 *Woodhams* above n 7 at 503.

95 See *Lysaght, Re* [1966] Ch 191 (Ch), *Robinson, Re* 2 Ch 332 (Ch).

96 *Woodhams* above n 7.

happen if they had known about the failure of their gift. This approach was taken by Bray CJ in the South Australian case *Warbey v Executor Trustee*.[97] Three sisters had left funds for the establishment of a Church of England hospital in the Diocese of Adelaide, with surgical and midwifery sections. The sisters had left sufficient funds, but in view of the very weak demand for such a service, the synod refused to accept the gift. The judge held:[98]

> …what would each of the testatrices have intended if she had known what I now know… Would she have abandoned the whole idea of benefiting the care of the sick under the auspices of the Church of England? Or would she have acquiesced in some other method of doing so?

Bray CJ went on to find that the testatrices would have preferred to abandon the general hospital with surgical and midwifery sections than to abandon the gift entirely. While it was acknowledged that the specific project was important to the testatrices, it was not essential. The judge was able to save the gift for charity.

A more direct way of putting the question is simply to ask which elements of the gift were most important to the testator. In *Re Lysaght*[99] a testatrix had attempted to establish studentships at the Royal College of Surgeons. Unfortunately, her will contained a specific restriction on the scholarships, attempting to exclude people of Jewish or Roman Catholic faith from the benefit of the gift. The College took the view that the discriminatory provision was 'invidious and so alien to the spirit of the college's work as to make the gift inoperable in its present form', and so it was unable to accept the gift unless the discriminatory provision was deleted.

Buckley J held that the provision of the scholarship at the College was the testatrix's essential purpose, and saved the gift for charity by omitting the discriminatory restriction. He found that it was possible to detach the inessential purpose (the provision excluding Jews and Roman Catholics) from the essential one (the scholarships). The judge held:[100]

> The impracticability of giving effect to some inessential part of the testatrix's intention cannot, in my judgment, be allowed to defeat her paramount charitable intention.

However invidious the testatrix's gift, it was not suggested in the case that discriminatory provision was unimportant to her. Nor does it seem likely that she included it in her will without consideration of its effect. It was possible to delete

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97 (1973) 6 SASR 336.

98 Ibid at 345.

99 *Lysaght* above n 95.

100 Ibid at 207.

the provision from the gift because it was not the testatrix's paramount – or essential – purpose.

In the context of gifts to expired organisations, adoption of the approach would enable the court to construct more realistically. It would not be necessary to find a general intention in order to the save the gift. Instead, the court would have to decide whether the expired organisation was an essential, or inessential element of the gift. The court could say that while the identity of the nominated organisation was important to the testator, it was not the most essential element of his intention.

b. Modification of the Gift

The logic behind 'modification' in Vinelott J's test flows from the fact that the court is no longer claiming to 'effect' the testator's general intention. Under the model, the court is proactively altering the testator's gift.

Vinelott J developed the concept in *Re Woodhams*.[101] A testator gave his residuary estate to two music colleges in order that they should establish scholarships in commemoration of his name. The testator had restricted the gift to male absolute orphans, but in view of the contemporary decline in their number, the colleges were unwilling to accept the funds. The judge was able to delete the restriction to absolute orphans. He held that it was not essential to the scheme that the scholarships should be restricted and that the, 'the scheme or mode of achieving a charitable purpose can be modified without frustrating his intention'.[102] The gift could be modified by the court.

The concept of 'modification' anchors the construction to the testator's original gift. This can be illustrated by *Re Crowe*,[103] where a testatrix had left a gift for a scholarship to the Royal Naval School. She had attached three conditions to her gift: it was to be given to a naval officer's daughter; it was to be given to the best pupils; and the scholarships were to be in the Russian and Spanish languages. Unfortunately the college did not provide Russian classes.

Slade J considered the different ways in which the gift could be modified. First, it could be altered so that the scholarship was in Spanish alone; second, it could be altered so that it would be for Russian and 'some other' language; and third, it could be altered so that it was for Russian and Spanish at a different institution. The judge found that none of these modifications were possible without frustrating the testatrix's intention. The gift was allowed to lapse.

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101 *Woodhams* above n 7.

102 Ibid at 505.

103 *Crowe, Re* (unreported), October 3, 1979.

It is implicit in this reasoning that the alteration was restrained by the testatrix's essential intention. All the testatrix's terms were vital to the gift. It was not open to the judge to transform the bequest into a 'gift for the advancement of education', or any other highly abstract purpose. The decision in favour of lapse was rooted in a realistic appraisal of the testatrix's intention.

c. The Role of Admissible Evidence

The third limb of Vinelott J's test directs the court to take account of evidence extrinsic to the will. Traditionally judges have not considered evidence of intention beyond the words contained in actual document. The historic rule being that, 'in a court of construction … the enquiry is pretty closely restricted to the contents of the instrument itself to ascertain the intentions of the testator'.[104]

In *Mannai Investment Co Ltd v Eagle Star Assurance*,[105] Lord Hoffmann explained the rationale behind the established position. He said that courts were suspicious of background evidence on the basis that it may be adduced in favour of interested parties, such as members of the testator's family. Judges had also been concerned to promote certainty of construction, taking the view that background evidence might lead to arguments about what the new evidence means, and what impact that meaning might have upon the outcome of the case.[106]

In expired organisation cases, the established approach meant that the court would not look beyond an often very simply phrased will. Yet more recent decisions have shifted away from the historic principle. In *Re Finger's Will Trusts*,[107] Goff J saved the gift for the 'National Council for Maternity and Child Welfare' after finding, 'I am entitled to place myself in the armchair of the testatrix and I have evidence that she regarded herself as having no relatives'.[108] Circumstantial evidence was also adduced in *Kings v Bultitude*,[109] where a gift had been left to an expired church. The court considered *inter alia*, pictures of the church notice board and a witness statement from a former member of the congregation.

The court may adduce direct evidence of the testator's intention (for example, materials written by the testator himself). Section 21 of the Administration of Justice Act 1982 permits the court to adduce direct evidence where the will is

104 *Greenough v Martin* 162 ER 281 at 243 per Sir John Nicholl.

105 [1997] AC 749 HL.

106 Ibid at 779.

107 *Finger's* above n 3.

108 Ibid at 299.

109 *Kings* above n 3.

either meaningless or ambiguous. In *Re Broadbent*,[110] the section led Arden LJ to state that direct evidence of the testator's intention was admissible in the case before her. However, she did not in fact rely on direct evidence in her own judgement.[111]

Inevitably, extrinsic evidence will not be of help in every case. For example in the New Zealand case *Alacoque v Roache*,[112] Somers J noted, 'it is hardly possible to assume the testatrix's armchair for apart from the fact that she was a spinster… we know nothing of her'.[113] But in others, extrinsic evidence might shine light on the testator's underlying motivation in making the gift. It could for example, reveal a strong personal connection with a nominated institution,[114] thereby suggesting that the identity of the organisation was essential to the testator. Or it could uncover strongly held ethical beliefs suggesting that the nominated institution was a vehicle for a more essential purpose.[115]

Under Vinelott J's test, extrinsic evidence has an extra role to play. The judge might use evidence to see if modification of the gift is a *practical possibility*, permitting the court to look beyond the will and enquire whether an alternative plan could realistically be followed through. In *Woodhams*, Vinelott J provided *Re Mitchell's Will Trust*[116] as an example of the principle. A testator had given property to provide four hospital beds reserved for injured workmen from particular collieries. The hospital, fearing that the beds would be under-used, disclaimed the gift. Cross J looked beyond the words of the will and assessed the practical implications of modifying the gift. It might have been possible to prevent lapse if the hospital were prepared to guarantee that some beds would always be *available* for workmen from the collieries. But the evidence was that the hospital was unable to make that promise. The adduction of extrinsic evidence showed that, while there might be some flexibility in the testator's essential intention, modification of his gift was not a practical possibility.

Conclusion

The function of intention construction is to accurately and realistically determine the testator's wishes. This allows the court to allocate the testamentary property

110 *Broadbent* above n 52.

111 Ibid at [44].

112 [1998] 2 NZLR 250.

113 Ibid at 252.

114 See *Satterthwaite's Will Trusts, Re* [1966] 1 WLR 277.

115 See *Kings* above n 3.

116 *Mitchell's Will Trust, Re* (1966) 110 SJ 291.

correctly. Even though a charitable organisation has expired, the next-of-kin may be denied the value of their relative's bequest because he intended his property to be applied to charitable purposes.

This area of law has long been in flux. Although cases are relatively infrequent, three separate methods of construction have emerged, each of which directs the court to view the testator's intention within a different framework. Yet, despite judicial innovation, none of the available rules of construction allows the court to realistically construct charitable intention. For that reason, the law fails in its primary purpose. It creates an artificial construct of the testator's wishes and allocates property on that basis.

The problem is fundamental. Each rule of construction takes as its starting point an understanding of intention that does not exist in the real world. The law assumes that charitable intention takes the form of a dichotomy between 'particular' and 'general' intention, and then allocates property depending on which side of the line that the testator falls. Where there is a particular intention to benefit only the expired organisation, the gift is paid to the next-of-kin. Where there is a general intention to benefit abstract charitable purposes, the gift is kept in charity.

But if an expired charitable organisation is nominated, such a concept of intention is unrealistic. An individual who chooses to leave a gift to a named charitable organisation is very unlikely to have made the gift with the sole intention of benefiting an abstract charitable purpose. The identity of the organisation will have been important to him, otherwise he would not have named it in his will.

Dig a little, and an alternative method of construction is possible. In place of viewing intention through a 'general' and 'particular' prism, the judge might ask whether the expired organisation was 'essential' to the testator. This alternative framework paves the way for a less 'all or nothing', and more realistic understanding of the testator's motivation. It accepts that while the expired organisation may have been an important element of the gift, it might not have been absolutely essential to it. And so the court would be able to save the gift for charity without fixing the testator with an artificial frame of mind.

In a field that has already seen considerable judicial creativity a change of course is possible; a workable legal solution can be adapted from existing doctrine. The reward would be significant, placing the distribution of testamentary property on a realistic and conceptually coherent footing.