The Charity Law & Practice Review

CHARITABLE TRUSTS (VALIDATION) ACT 1954: A CASE FOR REFORM

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The burden of this article is that we should have legislation validating imperfect trusts. England and Wales is a jurisdiction which is becoming increasingly lonely amongst common-law countries in having no statutory provision to cure the invalidity of a gift for mixed charitable and (invalid) non-charitable purposes. Recent charity legislation and its consolidation concentrates on supervision, but some modest reform of the law on charitable purposes could precede a grander consolidation.

Examples of "Mixed" Purposes

Examples are legion in the law reports of philanthropic gifts which have failed for no reason of public policy, only because the machinery of Chancery cannot cope with them. A bequest for such objects of benevolence and liberality as the Bishop of Durham in his own discretion should most approve of failed in *Morice v Bishop of Durham* (1805) 10 Ves 522 and would fail again if the testator died today. Caleb Diplock's estate, left for such charitable institution or institutions or other charitable or benevolent object or objects as his executors might select, was held to pass on intestacy to the next of kin in *Chichester Diocesan Fund and Board of Finance v Simpson* [1944] AC 341 and the result would be the same if Mr Diplock had died now. A gift for worthy causes came to grief in *Re Atkinson's Will Trusts* [1978] 1 WLR 586 and a gift of that kind is still ineffective. In most countries where the English law of charities holds sway, the power of the court to make schemes has been extended to making mixed gifts of that kind applicable to charity. In England and Wales they are saved for charity only if they fall within the Charitable Trusts (Validation) Act 1954, which is moribund because it is confined to instruments which took effect during a fairly short period before 16th December 1952. Yet what is good for the benighted donors in the dark ages before 16th December 1952 is good for misguided or unguided donors of today and the future.

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Nathan Committee Recommendations

The Charities Act 1960 had no provision on the matter because the Nathan Committee recommended against it. They were wrong. The majority of the members considered (Report, pages 132-133, paragraphs 533-535) that remedial legislation would be a dangerous incursion into the principle that everybody is presumed to know the law, would place an intolerable burden on the courts of determining what a testator, who has signed something else, intended to bring about, and would raise uncertainty in the minds of testators and their legal advisers as to the meaning which might be read into their words. Each of those three points flies in the face of reason. Outside the criminal courts, there is no presumption that people know the law. Many, including Lords Justices of Appeal reversed in the House of Lords and including donors to whose abortive efforts remedial legislation would be directed, do not. There is no danger in recognising that. The burden of making a remedial scheme has not been found intolerable by judges who have had to do it and the Supreme Court of Victoria, where that kind of legislation was pioneered, is soldiering on nearly 80 years later. As for testators who make gifts which fail because of the artless words they use, a little uncertainty as to the meaning of those words might concentrate the mind on doing better; and if their legal advisers have told them to use inartistic words of that kind they should join the dole queue.

Newark Report and Charities Act NI 1964

The Charities Act 1964 of Northern Ireland has a section on the matter because the Newark Report was in favour (page 12, paragraph 20). Section 24 of that Act provides:

"(1) Where -

(a) property is given for purposes so described that, consistently with the terms of the gift the property could all be used for charitable purposes but could equally well be used wholly or partly for purposes which are not charitable; and

(b) the gift would, but for this section, be invalid;

the gift shall have effect as a gift for such charitable purposes as may be determined by a scheme made in accordance with subsection (2) by the Court or, if the value of the property comprised in the gift does not exceed fifty thousand pounds, by the Ministry.

(2) Where the terms of a gift and the surrounding circumstances appear to the Court or, as the case may be, the Ministry to show a predominant intention on the part of the donor to further a particular charitable purpose the Court or, as the case may be, the Ministry shall in making the scheme under subsection (1), have regard, so far as practicable, to that intention.

(3) Where -

(a) property is disposed of by way of successive gifts so that a gift is dependent upon a prior gift; and

(b) the prior gift has been made the subject of a scheme under this section;

any gift dependent upon the prior gift shall have the like effect as it would have had if the prior gift had at all times been for the purposes determined by that scheme.

(4) Section 13 [cy-près powers of the Ministry, now the Department of Finance and Personnel] shall, subject to any necessary modifications, apply to any scheme made by the Ministry under subsection (1) as it applies to a cy-près scheme made by the Ministry."

England and Wales should follow suit. For various reasons, a different formulation will be proposed; but to copy Northern Ireland (substituting the Charity Commissioners for the Department) would be better than nothing.

Policy Considerations

In the three examples of the gift at the discretion of the Bishop of Durham and the Diplock and Atkinson wills, the invalidity was due to uncertainty. Who can tell what is benevolent, liberal or worthy? All we know for sure is that, while not malevolent, illiberal or unworthy, they are not synonyms for charitable (unless the user of the words makes clear that they are). Besides vagueness or ambiguity of terminology, a gift on trust to carry out a purpose may be void for perpetuity or simply because the purpose is not charitable. That last principle, that trusts can be valid only if established for the benefit of identifiable persons, for charitable purposes, for the payment of the settlor's debts, for the maintenance of the testator's animals or for the construction or upkeep of family graves, may itself require attention. A mechanism for validating and enforcing trusts expressed with certainty for abstract non-charitable purposes, such as the restoration of the environment after an industrial enterprise has concluded or the publication of books opposing vivisection, was suggested by the Manitoba Law Reform

Commission (*Non-charitable Purpose Trusts* 1992). In discussing the validation of mixed gifts, though, it is assumed that the grounds on which trusts for non-charitable purposes fail in England and Wales will remain as they are and that legislation saving mixed gifts for charity should operate regardless of the cause of the invalidity.

If it be objected that devoting the whole of a mixed gift to charity may not be what the donor wanted, it can be answered that holding the property on a resulting trust is certainly not what he had in mind. A scheme for the application of the property to charitable purposes is likely to achieve at least some of the donor's aspirations, if not all of them, which is better than frustrating the lot. Had Mr Diplock been asked when executing his will whether he wanted his estate to go to charity, he would probably have said: "Yes." That is what his executors understood, for they had distributed the property to charities before the validity of the disposition was challenged. Mr Diplock might have been pressed in cross-examination: "But you refer to *benevolent* as well as *charitable* objects, so do you want some of your estate to be used for benevolent objects which are not charitable?" He might have been puzzled by that and referred the questioner to his solicitors; or he might have pointed out that his will was so framed that the executors could select one charitable institution, two or more charitable institutions, one charitable object other than an institution, several such objects or a mixture of those, without giving anything to further any other kind of benevolent object. If he had been asked whether he would prefer to have his estate to go wholly to charity or to a remote relative in Australia, there is no doubt what his answer would have been if his breath had not been taken away by the absurdity of the question. There is no need to be concerned about disinherited dependants either, as there is no need in cases of a clearly valid disposition of the entire estate to charity, for the necessitous are taken care of by the Inheritance (Provision for Family and Dependants) Act 1975. If the argument based on what a dead person's attitude is likely to have been had he been asked questions at the time he made his will be demurred to on the ground that it is unwarrantable to expand an unproved likelihood into an irrebuttable presumption, the statute could contain a provision allowing for its own exclusion by express stipulation in the will or by the testator making alternative dispositions in the event of his primary gift not being effectual as written.

Flavour of Charity

Apart from that variation from the Northern Ireland section 24, legislation for England and Wales should avoid the antipodean search for a flavour of charity by making clear that it applies whether any explicit or implicit reference to charity appears in the disposition or not. The most striking example of a disposition which would then be caught is one in which no quality of purpose at all is expressed, as: "I leave all my property to John and Mary for such purposes as they think fit." As it does not create a general power of appointment, that attempted gift is now void as a purported delegation of the will-making power. The only effect of the will is that John and Mary hold the property on a resulting trust for the testator's intestate successors. Courts in Victoria and New Zealand have held that that is still the outcome after the enactment of their imperfect trust validation legislation because there is no flavour of charity in the testator's words (*Re Hollole* [1945] VLR 295; *Re White* [1963] NZLR 788). There is even less flavour of next of kin. Such a disposition might be regarded as being within the Northern Ireland section 24, though there is no decision that it is, because purposes which John and Mary think fit is a description of purposes and it is such a description that the property could, consistently with the terms of the gift, all be used for charitable purposes. That kind of gift should be destined for charity by the legislation because, if the testator did not care about anything except that he did not want to die intestate, the claims of charity are stronger than those of the next of kin. Dependants can share in the bounty if they bring themselves within the Inheritance (Provision for Family and Dependants) Act 1975. The main point, though, is that the legislation should settle one way or the other whether it applies in cases like that. If it were to settle the matter in favour of application, no problems of charitable flavour would occur. If the question were settled the other way, all sorts of examples of doubt could be conjured up. It might be easy enough to attribute a flavour of charity to purposes described as benevolent (*a fortiori* charitable or benevolent), liberal, worthy, public, philanthropic, educational or religious; but what of "nice purposes", "useful purposes", "industrial purposes" or other adjectival teasers donors may dream up? It is better that charity should benefit, even when one is not sure the donor had charity in mind, than that the result of his attempted disposition should be the one thing, a resulting trust, that the donor clearly did not want.

Gifts to Institutions

The legislation should also make clear that it applies to gifts to institutions. If an incorporated or unincorporated association has both charitable and non-charitable purposes or activities, a gift on trust for its purposes should be validated by confining it to the charitable purposes or charitable ways of carrying out its purposes. It may be that such a gift is not covered by the Northern Ireland section 24 because the purposes are not described in the instrument of disposition. Therefore the legislation should be drafted so as not to require a description.

None of the statutes in force anywhere in the Commonwealth or the Republic of Ireland would save for charity a gift for a single purpose which necessarily has non-charitable (invalid) features; nor should that kind of gift be so treated. A gift to establish a daily newspaper, although charitable newspapers like the *Northern Ireland Legal Quarterly* and *The Law Reports* exist, should not be diverted to

charity when it is clear that the donor had in mind, as "daily" would suggest, something more like *The Independent* or *The Sun*. A gift of that kind should stand or fall according to the law governing trusts for non-charitable purposes. That was the conclusion of the Supreme Court of Victoria (affirmed by the High Court of Australia dividing equally) in *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1. The purpose of the gift in that case was "to establish a Catholic daily newspaper" (whatever that may be). Rich J remarked in the High Court that to confine the publication to purposes of religion which are charitable would be to change the whole character of the newspaper intended by the testator.

Application to Inter Vivos Trusts

Most invalid mixed gifts are to be found in wills, but the remedial legislation should extend to trusts set up inter vivos, as is the case in the majority of Commonwealth jurisdictions (Alberta being an exception). One variety of donors whose gifts need validation are those who respond to well-meant but ill-framed disaster relief appeals. The Gillingham bus disaster is, even if not in terms of the amount of money involved, as big a blot on equity as the case of Mr Diplock's will. In *Re Gillingham Bus Disaster Fund* [1959] Ch 62, the Court of Appeal held that there was a resulting trust of donations subscribed in response to a public appeal to raise a fund to be devoted to such worthy cause or causes in memory of the boys who lost their lives as the mayors of the Medway towns might determine. That was a largely impractical resulting trust because it was difficult to find the subscribers. On 6th February 1992, speaking in the House of Lords during the report stage of the Charities Bill, Lord Morris of Castle Morris said that the undistributed funds still held on that resulting trust amounted to £7,202.70. People's compassionate bounty should not be frittered away on the cost of finding out what to do with it. Carelessly framed appeals may diminish in number as the guidance of the Attorney-General (printed in the report of the Charity Commissioners for 1981, pages 40-43) sinks in, but their total disappearance is unlikely.

Finally, there is no need to have a scheme in every case. If persons have been appointed by the donor to choose how the property is to be divided, all that is needed in the case of an otherwise invalid mixed gift is that they should be confined to distribution for charitable purposes. The expense of preparing and applying for the effectuation of a scheme could be confined to those cases in which it is impracticable to carry the gift into operation without one.

Proposed Statutory Provision

This is the enactment proposed for England and Wales:

(1) This section applies to a disposition of property -

(a) made after this section comes into force; and

(b) of which the terms are such that it would be consistent with them to apply the whole of the property for charitable purposes and also consistent with them to apply

the whole or part of the property for purposes which are not charitable; and

(c) which would not be valid apart from this section.

(2) This section -

(a) applies whether or not the disponer had an intention that the property or any part of it should be applied for charitable purposes; but

(b) does not apply to a disposition -

(i) the terms of which exclude the application to it of this section; or

(ii) which is contained in an instrument which excludes the application of this section to the disposition.

(3) A disposition to which this section applies is valid and takes effect as a disposition of the property for charitable purposes in accordance with subsections (4) and (5).

(4) The charitable purposes to which property is to be applied under this section are -

(a) in the case of a disposition which nominates a person or persons to choose the purposes, those chosen by that person or those persons; or

(b) in the case of a disposition for the purposes of an institution, those chosen by that institution; or

(c) in any case where the purposes are not chosen under (a) or (b), those settled by scheme made under subsection (6) or (7).

(5) Where the terms of a disposition to which this section applies and the surrounding circumstances show an intention on the part of the donor to further a particular charitable purpose, that intention shall be taken into account, so far as practicable, in making any decision under subsection (4); and if the disponer is alive when any such decision is to be made, his views shall, so far as practicable, be sought and taken into account.

(6) On the application of -

(a) a person mentioned in subsection (8); or

(b) the Charity Commissioners;

the court may make a scheme to give effect to a disposition in accordance with this section.

(7) On the application of a person mentioned in subsection (8), a scheme which could be made by the court under this section may be made by the Charity Commissioners; but subsections (3), (11) and (12) of section 16 of the Charities Act 1993 (limits on the jurisdiction of the Commissioners and appeals against orders of the Commissioners) shall apply to orders under this subsection as they apply to orders under the said section 16.

(8) The following persons may make an application under subsection (6) or (7)

(a) the Attorney-General;

(b) a person in whom property disposed of by a disposition to which this section applies is vested;

(c) a person who, but for this section, would be entitled to property by virtue of the invalidity of a disposition to which this section applies;

(d) the maker of a disposition to which this section applies;

(e) the personal representative of the maker of a disposition to which this section applies;

(f) any charity, charity trustees or trustees for a charity.

(9) Where -

(a) property is disposed of by way of successive gifts so that a gift is dependent on a prior gift; and

(b) the prior gift is a disposition to which this section applies;

any gift dependent on the prior gift shall have the like effect as it would have had if the prior gift had at all times had the effect given to it by subsection (3).

(10) Expressions used in this section which are also used in the Charities Act 1993 have the meaning in this section that they have in that Act.