A missed opportunity

Joshua Winfield looks at the lessons of Re Longman

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Section 75F of the Charities Act 1993 (now s311 of the Charities Act 2011) (s75F) provides that, where a charity engages in a merger that results in the transfer of its assets to another charity (subject to certain exceptions that do not apply here):

> (2) Any gift which–
>
> (a) is expressed as a gift to the transferor, and
>
> (b) takes effect on or after the date of registration of the merger,
>
> takes effect as a gift to the transferee.

After the section was inserted into the 1993 Act by the Charities Act 2006 (in an attempt to simplify an area previously governed by a complicated patchwork of case law), there had been controversy among practitioners as to whether it took effect in respect of a gift in a will that made express contrary provision in the event of a merger.

The facts of *Re Longman, deceased, Berry v IBS-STL (UK) Ltd (in liquidation)* [2012] provided the perfect opportunity to resolve this problem. However, the decision represents something of a missed opportunity.

'*Re Longman* is a salutary reminder of the need to consider carefully every word used when drafting gifts in wills, even (or perhaps especially) when using well-established precedents.'

Background to the case

Elizabeth Longman (the testatrix) made her last will on 13 May 2002. It contained the following clauses:

> 6.1 I GIVE the residue of my estate... to my TRUSTEES upon trust to divide in equal shares between such of the following charities as shall to the satisfaction of my Trustees be in existence at the date of my death namely:
>
> ...
>
> 6.1.6 INTERNATIONAL BIBLE SOCIETY (U.K.) of 3 Howard Buildings, 69-71 Burpham Lane, Guildford, Surrey GU4 7LX (RCN 285319) ['the Unincorporated Charity']
>
> ...
>
> 6.3 IF any charity or charitable organisation which I have named as a beneficiary in this Will is found never to have existed or to have ceased to exist or to have become amalgamated with another organisation or to have changed its name before my death then the gift contained in this Will for such charity or charitable organisation shall be transferred to whatever charitable institution or institutions and if more than one in whatever proportions as my Trustees shall in their absolute discretion think fit and
>
> I EXPRESS THE WISH but without imposing any obligation on my Trustees that the gift be given to such charitable institution or institutions whose purpose is as close as possible to those of the charity or charitable organisation named by me in this Will.

Clause 6.3 appears to have been taken verbatim from the *Encyclopaedia of Forms and Precedents* (EFP), vol 6(2) 5th ed (2001 reissue) p461, Part 3 Forms & Precedents Section A Form 90.

With effect from 31 May 2007, the unincorporated charity transferred all of its assets to IBS-STL (UK) Ltd, a charitable company (registered charity number 270162) (the company). The merger was registered in the register

of charity mergers (pursuant to s75C(3) of the 1993 Act, replaced by s305(2) of the 2011 Act) on 22 January 2008; the unincorporated charity ceased to exist on 5 February 2008.

The testatrix died on 18 April 2008. Her executors, the claimants, obtained a grant of probate on 1 October 2008.

The executors were unclear whether in the circumstances of the case s75F applied to require them to pay the one-sixth share of residue given to the unincorporated charity by the will (the share) to the company or clause 6.3 overrode the section and allowed them to exercise their discretion. After careful consideration, the executors made an interim distribution to the company on 16 April 2009, on the basis that even if s75F of the 1993 Act did not apply, the company was a suitable object of their discretion under clause 6.3.

The executors no longer wished to exercise their discretion in favour of the company. They therefore issued a Part 8 claim under Part 64 of the Civil Procedure Rules 1998.

However, on 18 Dec 2009, the company went into administration and on 1 December 2010 into creditors' voluntary liquidation, before the administration of the estate had been completed. The balance of the relevant one-sixth share of the residuary estate was calculated at £214,000.

Since the company's liquidation meant that any further payment to the company would go to its creditors rather than in fulfilment of its charitable objects (in light of *Re ARMS (Multiple Sclerosis Research) Ltd* [1997], the executors no longer wished to exercise their discretion in favour of the company. They therefore issued a Part 8 claim under Part 64 of the Civil Procedure Rules 1998 for:

- A direction as to whether s75F or clause 6.3 of the will took effect in respect of the balance of the share.
- If clause 6.3 took effect, the approval of executors' proposed exercise of their discretion in favour of the five other charities named in clause 6.1 and two new charities. The company and the Attorney-General were the defendants.

Submissions

The Attorney-General was not represented at the hearing but his counsel made detailed written submissions in support of clause 6.3 of the will taking effect. She submitted that:

- s75F is a deeming provision, so that the correct approach (following *Marshall (Inspector of Taxes) v Kerr* [1995] per Lord Browne-Wilkinson at 164) is to give the words their ordinary and natural meaning;
- s75F applies only to gifts that 'take effect';
- a conditional gift will only take effect if the condition is fulfilled;
- the gift in this case could only have taken effect at the date of the testatrix's death;
- the effect of s75F is not to replace all references in the will to the unincorporated charity with references to the company;
- the absence from s75F of words such as 'unless a contrary intention shall appear by the will' (which are found in several sections of the Wills Act 1837) is irrelevant;
- para 183 of the explanatory notes to the 2006 Act supports this construction; and
- the words 'in existence at the date of my death' in clause 6.1 and 'become amalgamated... before my death', in clause 6.3, impose conditions that, by reason of the merger, are not fulfilled, so that the gift does not 'take effect' for the purposes of s75F.

The executors took a neutral stance and their counsel included, in his oral submissions at the hearing and later written submissions for the assistance of the court, the counter-arguments to those of the Attorney-General. He submitted that:

- clause 6.1.6 clearly makes a gift expressed as a gift to the unincorporated charity;
- in this case 'takes effect' in s75F is simply a reference to the death of the testator;
- para 183 of the explanatory notes suggests that for a gift in a will, the effect of s75F is to substitute the name of the transferee charity for that of the transferor charity, so that in this case the balance of the share would pass to the company and clause 6.3 would not take effect;
- the will predated s75F, so it could not be said that the testatrix intended to give her executors discretion notwithstanding the section;
- the application of s75F would not cause an obvious injustice in this case, to the extent that it would direct the gift to a charity that would probably fall within the proviso to clause 6.3;
- on the other hand, prior to the enactment of s75F, clause 6.3 might have applied to gifts that were valid under the common-law rules, in which case the application of s75F would frustrate the testatrix's intentions;
- the words 'as shall to the satisfaction of my trustees be in existence at the date of my death' do not cause the gift to the unincorporated charity to fail since clause 6.3 makes it clear that 'ceased to exist' is an alternative to 'become amalgamated with another organisation';
- the words 'unless a contrary intention shall appear by the will' are used in sections of the Wills Act 1837 analogous to s75F, such as s25; and
- in answer to a query raised by the deputy judge during oral submissions, a gift of a share of residue on trust for a charity must be a gift 'expressed as a gift to that charity' within s75F(2)(a).

The company took no part in the claim.

Judgment

David Donaldson QC (sitting as a deputy judge of the Chancery Division) held that the matter could be disposed of simply, on the basis that:

- clause 6.1 only applied to such charities as should to the satisfaction of the executors be in existence at the date of the testator's death;
- by reason of the merger, the unincorporated charity was not in existence at that date;
- therefore there was no gift in the will 'expressed as a gift to' the unincorporated charity;
- therefore s75F did not take effect;
- but for clause 6.3, the share would have fallen to be distributed between the other five residuary beneficiaries; and
- in the circumstances the balance of the share fell to be distributed at the executors' discretion. The deputy judge then approved the executors' proposed exercise of that discretion.

Criticisms

Two criticisms can be levelled at this decision. First, the deputy judge found that the words 'such of the following charities as shall to the satisfaction of my trustees be in existence at the date of my death' (which I shall refer to as 'the qualification') in clause 6.1 of the will meant that there was no gift to the unincorporated charity that took effect for the purposes of s75F. This failed to take into account the following points. The words are otiose, since the requirement for the beneficiary to be in existence at the date of death for any gift by will to take effect is implied, in the absence of a strong contra-indication; it can be seen that their removal makes no material difference to the sense of the clause. In effect, the inclusion of the qualification does not truly make the gift conditional.

The finding becomes even more difficult to support if one imagines that clause 6.3 had not been included. In that case, by the deputy judge's reasoning in para 9 of the judgment, if the qualification had been omitted, s75F would have taken effect to ensure that the gift in 6.1.6 was 'transmuted by the statutory fiat into a gift to [the company]', whereas the inclusion of the qualification would have caused it to fail. The deputy judge held, obiter, at para 10 of the judgment that in the latter event the testator's residuary estate would 'have fallen to be applied by the trustees in five equal shares', which would not be inconvenient. However, he heard no submissions on this question and, with respect, it is by no means certain that his analysis is correct. The words 'to divide in equal shares between' in clause 6.1 almost certainly create a tenancy in common (see See *Williams on Wills*, 9th ed (Butterworths 2008) vol 1 para [86.5]); the executors would then have had to hack their way through a dense thicket of authority to ascertain whether the gift had lapsed, creating a partial intestacy, or fell to be applied *cy-près*.

Further, if the qualification is read with clause 6.3 – as it must be to collect the testatrix's intention from the whole will – it is clear that for the purposes of the will 'become amalgamated' falls within 'be in existence'; which, at the risk of straying into metaphysics, must encompass any and all alternatives to 'never to have existed' and 'ceased to exist'.

Secondly, it is regrettable, particularly in light of these problems, that the deputy judge did not go on to consider the question of whether, if he was wrong about the effect of those words and the gift did 'take effect' on the testatrix's death, clause 6.3 rather than s75F would apply. As such, the point must be considered to remain open.

Lessons for practitioners

The case is a salutary reminder of the need to consider carefully every word used when drafting gifts in wills, even (or perhaps especially) when using well-established precedents. The crucial words in clause 6.1 are appropriate for a gift of property that will be divided into different number of shares depending on how many beneficiaries are in existence at the date of the testator's death; they make little sense in a case where the testatrix's residuary estate would be divided into six shares in any event.

The decision also highlights the importance of ensuring that wills are kept up to date to reflect the current state of the law. It should be noted that there is an updated version of clause 6.3 in the EFP which has in place of 'or to have become amalgamated with another organisation' the words '[other than by a merger which has been entered on the register of charity mergers (or) or to have become merged with another charity]', the first alternative of which obviously indicates that the statutory provision is intended to take effect. Draftsman would be advised to use this sort of formula to make the testator's intention clear on the face of the will.

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Conclusion

The decision is of limited application, since it will only apply to gifts to a charity that are stated to be conditional on it being in existence at the date of the will. There is no indication of any doubt that s75F applied to standard gifts of residue expressed as bare trusts. The wider issue of whether the section overrides a gift over in a will where the gift is held to 'take effect' on the testator's death remains undetermined. In light of the unsatisfactory aspects of the case, it is perhaps appropriate that a judgment that took away a legacy from a charity for the distribution of Christian literature should have the neutral citation [2012] EWHC 666 (Ch). ■

Re ARMS (Multiple Sclerosis Research) Ltd
[1997] 1 WLR 877 (Ch)
Re Longman (dec'd)
[2012] WTLR 1421
Marshall (Inspector of Taxes) v Kerr
[1995] 1 AC 148 (HL)