Executors beware

Christopher Buckley looks at how the construction of a Will can influence a court's decision-making process

Earlier this year two cases were decided which illustrate the particular difficulties which can confront Personal Representatives when a legacy has been left to a charity which no longer exists: first, in February 2012, *Berry* v *IBS-STL (UK) Limited* [2012] EWHC 666 (Ch); and, secondly, in March 2012, *Phillips* v *The Royal Society for the Protection of Birds* [2012] EWHC 618 (Ch); [2012] WTLR 891.

In both cases the executor(s) were unsure as to how they should distribute the share of the estate that had been left to a charity which no longer existed, with the result that an application for directions was made to court. The making of such an application is clearly in a Personal Representative's interests and avoids the potential personal liability which could arise upon a mistaken distribution.

Phillips v *RSPB* [2012] EWHC 618 (Ch); [2012] WTLR 891

The facts

The deceased, Vera Gwendoline Spear, died on 5 January 2007 and left her entire estate, save for a gift of her parrot, on trust as follows:

> *"...to divide the same between Royal Society for the Protection of Birds ... People's Dispensary for Sick Animals ... Monkey World Limited ... and The Owl Sanctuary of Crow Ringwood Hampshire for their respective general purposes in equal shares absolutely."*

All four organisations were concerned with animal welfare/conservation and, as at the date of execution of the Will, 29 August 1997, all, save for Monkey World Ltd, were registered charities.

It was accepted that "The Owl Sanctuary" was a reference to the registered charity the New Forest Owl Sanctuary Ltd (NFOS). NFOS was removed from the register of charities by the Charity Commission on 17 August 2006; however, subsequent investigations by the Attorney General disclosed that the limited company was not dissolved until 6 February 2007.

The executor obtained a grant of probate of Mrs Spear's estate on 27 June 2007, by which time NFOS no longer existed and could not take the gift.

The question for the court was what should happen to NFOS's share of the residuary estate: should it go to another charity or was there a partial intestacy?

An initial question for the court was one of construction of the Will in that it provided:

> *"...if before my death ... any charitable or other body to which a gift is made by this Will ... has changed its name or amalgamated with any other body or transferred all its assets to any other body then my Trustees shall give effect to the gift as if it were a gift to the body in its changed name or to the body which results from the amalgamation or to the body to which the assets have been transferred."*

Another registered charity, the North Wales Bird Trust (NWBT), sought to argue that all of the assets of NFOS (primarily the birds owned by NFOS) had been transferred to it, with the result that the gift should be given effect to as if it were a gift to it. On the facts, the judge, HHJ David Cooke, rejected such contention as he was unable to find that all of the assets of NFOS had been transferred to NWBT.

In such circumstances, a non-charitable legacy would have failed and a partial intestacy would have resulted. The further enquiries the court was required to engage in, as a result of the legacy being to a charity, demonstrate the benevolent treatment charitable legacies receive from the court. The court potentially had to consider a further three questions:

- Was the gift for the purposes of NFOS, rather than to it absolutely?
- If the gift was to NFOS absolutely, was there a supervening or initial failure of the gift? and
- If there was an initial failure, could one ascertain a paramount charitable intent from the Will?

If the gift was for the purposes of NFOS rather than to it absolutely, in the words of the judge: "the property would be impressed with a charitable purpose trust which the court could give effect to by way of a scheme", relying on *Re Finger's Will Trusts* [1972] Ch 286. In such circumstances, the gift would not have failed as the purpose trust could still be given effect to, simply with a new trustee.

The judge concluded that the gift had

been to NFOS absolutely, a conclusion that is difficult to escape when the gift is to an incorporated charity. In essence, where there is a gift to an incorporated charity the default position is that it will be to the charity absolutely. To displace such default position, there must be context in the Will to show that it was intended to be on trust for a charitable purpose and not an absolute gift to the corporation (*Re Finger's Will Trusts*). The default position is reversed in the case of an unincorporated charity, it having no separate legal person and therefore being unable to take the gift beneficially.

Relying on the decision of Neuberger J, as he was, in *Re ARMS (Multiple Sclerosis Research) Ltd* [1997] 1 WLR 877, the judge concluded that there was no indication in the Will that Mrs Spear intended a separate trust.

As a result the gift to NFOS failed and the court was required to consider whether it could be applied *cy-près* (i.e. the establishment of a scheme by the court to apply the gift in a manner as close as possible to that which the deceased intended, for instance by directing that the gift should go to a charity with similar purposes).

If the failure of the gift is supervening (i.e. post, in this case, the date of death) the gift can be applied *cy-près* without more. If the failure is an initial failure (i.e. the failure was before the gift could take effect – in the case of a gift by Will, before the date of death), the gift can only be applied *cy-près* if the court can ascertain a general charitable intent (sometimes referred to as a paramount charitable intent). In the case of an initial failure, in the absence of a finding of general charitable intent, the gift cannot be saved for charity and a partial intestacy will follow.

The decision

In the current case NFOS was removed from the register of charities prior to the date of death, but the registered company remained in existence until it was removed from the register of companies, and dissolved, on 6 February 2007. In such circumstances the judge concluded that the failure was supervening, in his words:

> *"that is to say one where the gift was effective at the date of death to impress the funds with the charitable purpose intended to be given effect to through NFOS..."*

The judge held that notwithstanding the removal of NFOS from the register of charities, there was still an effective gift to charity. Key to such decision was that NFOS had been removed from the register because it was no longer active, not because the Charity Commission considered that it was no longer a charity (deregistration simply removes the statutory presumption, now set out in Section 37 of the Charities Act 2011, that the relevant body is a charity, it does not necessarily remove such body's status as a charity).

The judge therefore did not need to consider the question of whether the Will exhibited a general charitable intent. He directed that the gift be applied *cy-près* and, on the facts of the case, it was agreed that the gift should go to the NWBT.

One point of note is that after he had concluded that there had been a supervening failure, the judge stated, in paragraph 27:

> *"In those circumstances there is no doubt that unless the court finds that the particular method specified is the only possible way of giving effect to the donor's charitable intentions, it may direct the funds be applied cy-près..."*

It is suggested that the accepted view is that in the case of a supervening failure the gift can be applied *cy-près* without more and the court is not required to consider whether "the particular method specified is the only possible way of giving effect to the donor's charitable intentions." Such test is more akin to the considerations that apply when there is an initial failure of the gift, and the court is considering whether a general charitable intent can be ascertained: see for instance *Re Woodhams* [1981] 1 WLR 493, in particular at 502H-503D.

Berry v *IBS-STL* (UK) Limited [2012] EWHC 666 (Ch)

The facts

This case, at least as it was decided, dealt with a much shorter point and was largely confined to construction of the particular Will.

The deceased, Elizabeth Longman, died on 18 April 2008 and left her residuary estate as follows:

> *"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:*
> *6.1.1. [first charity]*
> *6.1.2. [second charity]*
> *6.1.3. [third charity]*
> *6.1.4. [fourth charity]*
> *6.1.5. [fifth charity]*
> *6.1.6. INTERNATIONAL BIBLE SOCIETY (UK)...*
>
> *6.2. ... ...*
>
> *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."*

At the date of execution of the Will, 13 May 2002, International Bible Society (UK) (IBS) was an unincorporated registered charity. With effect from 31 May 2007, IBS transferred all of its assets to an incorporated registered charity, IBS-STL (UK) Ltd. The merger was registered on 2 January 2008 and IBS was deregistered on 5 February 2008.

After Mrs Longman's death and the making of a substantial interim payment to IBS-STL (UK) Ltd, the incorporated charity went into insolvent liquidation. In such circumstances the executors, unsurprisingly, wanted to exercise their discretion under Clause 6.3 of the Will to pay the balance of the gift to other charities, rather than pay the moneys to the liquidators of IBS-STL (UK) Ltd.

The question for the court was whether the executors were compelled by Section 75F of the Charities Act 1993 to pay the moneys to IBS-STL (UK) Ltd or whether they were free to rely on Clause 6.3.

Section 75F of the Charities Act 1993 was in the following terms (it has since been replaced by Section 311 of the Charities Act 2011):

> *"1. This section applies where a ... charity merger is registered in the register of charity mergers.*

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 ...*"

The decision

An initial question for the court was whether Section 75F applied to a residuary gift, where a trust is interposed between the testator and the beneficiary, so the gift is not necessarily to the transferor as required by sub-section 2a. The judge, David Donaldson QC sitting as a Deputy High Court Judge, stated that he could see no sensible reason to adopt such a narrow interpretation and held, in paragraph 8, that the section applied regardless of whether a trust was interposed.

It should be noted that such principle is the extent to which this case can be cited, as the application was only attended by one party: see *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 and paragraph 12 of the judgment.

Having decided that Section 75F could apply to the gift in question, the judge went on to decide that it did not apply on the facts of the case. He decided as a matter of construction of the Will that there was no gift to IBS because it had ceased to exist by the date of death. He did not, however, decide that the residuary estate was therefore to be divided between the five remaining charities; instead he held that Clause 6.3 avoided such result and the share which would have gone to IBS fell to be disposed of as the executors thought fit.

The case did not therefore address the question whether the terms of a Will take priority over Section 75F (now Section 311 of the Charities Act 2011). It is suggested that the operation of Section 75F should be subject to the terms of the Will and such considerations appear to have underpinned the judge's reasoning.

What is clear is that both cases illustrate the level of care that needs to be taken when considering potentially failed charitable legacies. ■

Christopher Buckley is a barrister at Radcliffe Chambers