Trusts & Equity
Fall Term 2018

Lecture Notes – No. 8

Cy-près

Like all doctrines of a certain vintage, the development of cy-près in equity has some interesting moments. One particular case is a favourite of mine, and serves to prove two principles directly relevant to the law of charities.

In 1717, Sir George Downing made a Will which set up a complex settlement including a wish to give land and make an endowment gift of £100,000 to create a college in the name of the Downing family. Sir George died in 1749 and, after a number of other relatives had the good manners to die, the estate then passed to Sir Jacob Downing. Sir Jacob died in 1764. Although technically only having an income interest in the estate, Sir Jacob willed his interest to his widow, Lady Margaret Downing. There began almost 40 years of court cases regarding the disposition of the estate. Along the way, the matter involved consideration of the cy-près doctrine as there was insufficient funds in the estate to found the college which Sir George had desired to establish. In *Attorney- General v Lady Downing* (1769), Amb 571, Wilmot CJ considered the matter and set out what he perceived to the primary reason why equity had the power to restructure failed settlements such as the one before the court. A resettlement scheme was necessary not for the benefit of the public, but to aid in the expiation of late donor's sins - 'the merits of the charity ought not to be lost to the testator.' Eventually the litigation was resolved and Downing College, Cambridge was established in 1800. Instead of the new college beginning with the Downing estates and a £100,000 initial endowment, Downing College began with a capital legacy of a £9,780.18s. 6d.

The first lesson one can take from the case is that charitable giving is a considered a benefit to all, even the donor.

The second lesson is that primary beneficiaries of any trust, even a charitable one, are always the lawyers.

Cy-près: The Concept

Gifts are often made to charities during the lives of donors, and quite often such gifts are made through a will to take effect on the testator's death. However, circumstances may have changed during the period from when the donor decided to make the gift and the time that the gift was to take place. The designated charity may have ceased to exist. The purpose of the charity might have been accomplished already, or the functions taken over by the government rendering it without any role. The original purpose might now not fit contemporary morals or public policy, or might even be contrary to law. Even if the gift did take place, the same considerations may intervene at a later stage. In all these cases, the law has developed doctrines to allow courts to rescue the funds and re- apply them for new charitable purposes.

The term cy-près is itself a source of some confusion. It is traditionally translated as 'near-to' and thought to derive from an Anglo-Norman corruption of the Middle French terms *si-pres ('as* near') or *ici-pres* (near here). One contemporary definition reads:

If property is given on trust to be applied for a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and is the settlor manifested a paramount intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the paramount charitable intention of the settlor.

However defined, cy-près is a rather simple concept: **a court of suitable jurisdiction has the power to keep in existence gifts made for charitable purposes so that the public might continue to benefit into the future where the original terms of the gift are impossible or impracticable or unlawful to be carried out.** In other words, the gift was one given for charitable purposes and should remain dedicated to charitable purposes – it should not be diverted to other uses.

While the rationale for the court's power may have been one which had ecclesiastical overtones in earlier times, it is now decidedly secular. The gift is saved to benefit the public, and the court here acts consistent with one of equity's long-standing maxims – *Charity is Always Favoured by Equity.*

At the same time, one must take care not to regard the power of the court for more than it is - **the doctrine fills a preservative function only, and cy-près is not available merely to structure the settlement in some better way;** *Re Baker* (1984), 47 O.R. (2d) 415 (Ont HCJ).; *Weninger Estate v Canadian Diabetes Association* (1993), 2 E.T.R. (2d) 24 (Ont Gen Div).

It is not an aid to resolving problems with the gift, it is an aid to preventing failure of charitable gifts. In other words, expediency is not enough to allow the court to invoke its powers under the cy-près doctrine; *Re St George's Hospital* (1859), 27 Beav 107; *Re Baker* (1984), 47 O.R. (2d) 415 (Ont HC).

The *cy-près* doctrine is within the general equitable jurisdiction of the court to supervise trusts. Thus, whether the application has been made by the Public Guardian and Trustee or another trustee under the Trustee Act RSO 1990, s.60(1) or by any two people under the Charities Accounting Act RSO 1990, s.10(1) or by any other procedure contemplated by the Rules of Civil Procedure, a court of superior jurisdiction may exercise its equitable jurisdiction and invoke the cy-près doctrine where circumstances so permit.

Re Stillman Estate
(2003), 68 OR (3d) 777 (Ont. S.C.J.)

Here the testatrix's will set out charitable gifts of a certain minimum amount but the trustee's powers to invest were limited and the trust did not yield sufficient income to fund these minimum disbursements. The trustee applied to the court for directions and an order that would, in essence, allow for an encroachment on capital; the Public Guardian and Trustee opposed. The application was allowed and the court invoked its cy-pres jurisidiction by recognizing that there was 'impracticability' (see below) in how the trust was to be administered. An issue arose as to the nature of the cy-pres jurisdiction of the court.

Cullity J held:

> **Jurisdiction**
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> 3. It is not disputed that the court has an inherent jurisdiction in matters relating to charities. Although it has sometimes been attributed to the jurisdiction of the Chancellor over trusts, a line of authorities stretching back at least to the 16th century has recognized its links with the prerogative of the Crown and, in particular, the *parens patriae* jurisdiction that the sovereign is said to have exercised, also, with respect to minors and the mentally disabled.
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> 4. In *Attorney-General v. Lady Downing* (1767), Wilm. 1 (Eng. Ch. Div.), for example... Wilmot C.J. stated (at page 24):
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> The individuals named as trustees are only the nominal instruments to execute that intention. And, if they fail either by death, or being under disability to act, or refusing to act, the constitution has provided a trustee. **The King, as *parens patriae,* has the superintending power over all charities, abstracted from the statute of 43 Eliz., and antecedent to it. ... In perpetual charities, where the persons, upon whom the trust may devolve, do not exist, the personal confidence can only be in the court; and if the trust cannot be executed through the medium which was the primary view of the testator, it must be executed through the medium which the constitution has substituted in its place.**
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> 5. As, by virtue of section 11(2) of the *Courts of Justice Act,* R.S.O. 1990, c. C-43 this court possesses all of the jurisdiction historically exercised by courts of equity in Ontario and in England, it has inherited as part of its inherent jurisdiction the power to superintend the establishment and the administration of charities. Since the creation of the offices of the Public Trustee and that of the Official Guardian in the early 20th century, the special responsibilities of the Attorney-General with respect to the three heads of the *parens patriae* jurisdiction have been divided between these officials. Whether or not the Attorney General might still have, in some circumstances, a residual role to play, the powers and responsibilities traditionally attached to that office are now, for most, if not all, practical purposes exercised in matters of charity by the Public Guardian and Trustee pursuant to the provisions of the *Public Guardian and Trustee Act,* R.S.O. 1990, c. P-51 and the *Charities Accounting Act,* R.S.O. 1990, C-10.

6. Traditionally, the role of the Attorney General was limited to making inquiries with respect to particular charities, instituting legal proceedings where this was considered to be warranted, and aiding and assisting the court in their determination. I do not believe the Attorney General ever had any formal authority to decide legal issues relating to charities, other than those which might be considered to arise in practice from a measure of control over the institution of proceedings relating to charity and the deference that the court will ordinarily show to the advice it receives from that source. This *de facto* power can be seen in the requirement that settlements of charity proceedings to which the Attorney General was a party, and disclaimers by charitable Trustees, ordinarily required the consent of the Attorney-General...

13. (1) A draft order or judgment that could have been made by the Superior Court of Justice under this Act, under any other statute dealing with charitable matters, or in the exercise of its inherent jurisdiction in charitable matters, shall be deemed to be an order or judgment of that court if the following persons give a written consent to its terms:

1. The Public Guardian and Trustee.

2. Every other person who would have been required to be served in a proceeding to obtain the order or judgment.

The above general comments with respect to the nature of the inherent jurisdiction of the court and the functions and powers of the Attorney General, and the Public Guardian and Trustee, have some relevance to the issues that arise in the application.

...

The Inherent Jurisdiction: Regulating the Administration of the Trust

31. In arriving at the above conclusion on the basis of the *cy pres* jurisdiction, I am aware of the views of some learned authors that *cy pres* orders are strictly to be confined to cases where there has been a failure of the objects or purposes of a charitable trust as distinct from a failure or breakdown of the mode or manner of benefiting them that was designated by the donor.

32. Although a meaningful distinction between ends, or objects, and means is often difficult to draw - and, superficially, might seem to involve only an exercise in semantics - it is important in several areas of the law governing charitable trusts. Characterization of a direction as a means to an end may determine whether a trust that, apart from statute, would fail as one for a non-charitable purpose can be upheld notwithstanding the existence of a direction that, if construed as a purpose would be non-charitable... whether an instrument discloses a general charitable intention when the direction is impracticable from the outset... and whether the direction is to be considered as merely administrative machinery that, in the absence of impracticability, can still be varied or overridden in an exercise either of the court's general jurisdiction to regulate the administration of trusts... or, perhaps, a wider jurisdiction to superintend charities.

33. Where the directions of the donor have become impracticable, as here, I do not think it matters whether they are to be characterized as relating to the purposes of the Trust or merely to the mode by which they are to be achieved. The jurisdiction to substitute other directions will exist in either case and in each case the court will fashion a scheme that will as nearly as possible reflect the intentions of the donor. The distinction is important where it cannot be said to be sufficiently impracticable to satisfy the requirements of the *cy pres* jurisdiction. In such cases, while there may be no power to vary the charitable purposes of the trust, there may be such a power if the directions of the donor are to be characterized as merely administrative machinery. Apart from the variation of investment powers, examples of cases where the courts treated directions expressed in mandatory terms to be mere administrative machinery that may be dispensed with, or varied, in the absence of impracticability, do not appear to be numerous. Where particular directions are found to have been from the outset, or to have become, impracticable - or where necessary powers or directions have not been provided - the court has often intervened. **The old case of *Attorney- General v. Lady Downing* , to which I referred above, is a clear example and there were many similar decisions in England in the 19th century. Where it cannot be said to be impracticable to carry out the donor's directions that are expressed in mandatory terms, the guiding principle has always been that stated by Sir John Romilly M.R. in *Philpott v. St. George's Hospital* (1859), 27 Beav. 107 (Eng. Ch. Div.) , at page 111:**

If the testator has, by his will, pointed out clearly what he intends to be done, and his directions are not contrary to the law, this court is bound to carry that intention into effect, and has no right, and is not at liberty to speculate upon whether it would have been more expedient or beneficial for the community that a different mode of application of the funds in charity should have occurred to the mind of the testator, or that he should have directed some different scheme for carrying his charitable intentions into effect.

Re Sprott Estate
2011 NSSC 327

Per Kennedy CJSC:

Inherent Jurisdiction

[14] The University submits that this Court has an inherent jurisdiction to approve a variation in the administrative terms or machinery of charitable trusts. It cites *Re Killam Estate* (1999), 38 E.T.R. (2d) 50 as authority for this proposition. I wrote that decision.

[15] In *Re Killam Estate,* the deceased had established trusts for the benefit of institutions including several universities. Under the terms of the will, only the income derived from the trust property was to be distributed and the trusts were to continue in perpetuity. However, economic and other factors led to a request by the trustees and beneficiaries to encroach on the capital gains of the fund to

supplement the income. Consequently, the trustees and beneficiaries brought an application for implementation of a new administrative scheme on the basis that the Court had an inherent jurisdiction broad enough to allow the variation, although the result would be contrary to the explicit directions of the deceased. It was submitted that the new scheme would be in accord with the spirit of the gift and would ultimately better accomplish the deceased's purposes.

[16] I concluded that the Nova Scotia Supreme Court had the inherent jurisdiction to alter the administration or the "machinery" of the trusts in the way that was requested and emphasized that the new scheme was reasonable, prudent and in accordance with the purposes of the trusts. I stated at paras. 78-82:

[78] I am satisfied that I do have the inherent jurisdiction to alter the administration, “the machinery” of these charitable trusts, and that it is so extensive as to allow the specific changes that “the agreement” accomplishes.

[79] I conclude that the use of this Court’s inherent jurisdiction to allow the distribution of both income and capital growth is a progression that comes rationally and naturally from the use of jurisdiction by the English and Commonwealth Courts.

[80] Having concluded that both the method of investment and the distribution level sought to be maintained by the applicants are reasonable and prudent, I conclude that this Court should use its inherent jurisdiction to approve and enable “the agreement” to be accomplished.

[81] Although the result will be contrary to the expressed, unequivocal direction of Mrs. Killam to distribute “income only”, I am influenced by the cases cited, such as: re J. W. Laing Trust, [1984] 1 Ch. 143, re Dominion Students' Hall Trust, [1947] 1 Ch. 183 and re Lysaght, decd. Hill and Another v. The Royal College of Surgeons and Others, [1966] 1 Ch. 191 in which the courts have varied trusts and thereby contradicted the original intentions of the makers when they determined that the alterations were in the best interests of the beneficiaries and for the better administration of the trust.

[82] I am convinced that the variations accomplished by “the agreement” are in accord with the “spirit of the gift”.

...

[24] *Re Killam Estate* has been considered by an Ontario case, *Re Stillman Estate* (2003), 5 ETR (3d) 260. *Re Stillman Estate* involved an issue similar to the one raised in *Re Killam Estate.* The issue addressed by the Court was whether to allow encroachment on the capital of an endowment fund in contravention of the specific terms of the trust. The terms of the trust did not include a power to encroach on capital and, as a result, the trust had been unable to meet its quota. The Applicants requested the approval of an administrative scheme that would allow for a total return investment policy.

[25] The Ontario Superior Court found that such a variation went beyond the merely mechanical or administrative terms and that to approve such a departure from the Testator's intention under the administrative scheme-making power of the Court would require "a leap of some magnitude". However, that Court recognized the value of this proposed scheme in that it would permit the trustee to increase the overall return on the trust investments and allow the trustee to better realize on the intentions of the Testatrix. Recognizing the benefits of this proposed scheme, the Court opted to apply the cy-près doctrine in order to approve the proposed scheme.

[26] Although the courts in *Re Killam Estate* and *Re Stillman Estate* applied a different approach, each case had the same end result. In both cases, the Court approved a scheme in order to alter the terms of the trust to allow for the better administration of the trust.

[27] Having found in *Re Killam Estate* a broad inherent jurisdiction to amend the administrative terms of a charitable trust, I am prepared to consider the use of that power therein.

The Basic Operation of the Doctrine

In general terms, there are three stages of the process: qualification of the gift, failure of the gift, and resettlement of the gift via a judicial cy-près scheme. To be more precise:

1. *There must be a gift for a charitable purpose.* The cy-près doctrine cannot convert an invalid private purpose trust into a valid charitable trust. The original objects of the gift must fall within the traditional definitions of charity or any statute that deems such objects to be charitable.

2. *There must be a 'cy-près occasion'.* There must be an event that the court recognizes as sufficient for it to invoke its jurisdiction and resettle the gift. There are two main categories:

i. The charitable purpose designated is *impossible* to carry out;
ii. It is *impracticable* to carry out the charitable purpose.

3. In some cases, the donor must have had a 'general charitable intent' when making the gift to allow the court to act. Where the cy-près occasion prevents the gift vesting in the charity at all ('initial failure'), it must be shown that the donor had a 'general' or 'paramount' charitable intention' in making the gift. Where the gift fails *after* the gift has vested ('subsequent failure'), a general charitable intention need not be shown.

4. The new objects should be close to the failed objects of the gift. The terms of the resettlement – the new charitable purposes substituted by the court – should be as near as possible to the original purposes of the trust so as to respect the will of the testator; see *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2001) 8 C.P.C. (5th) 329 (Ont Sup Ct).

'Cy-Près Occasions'

A word of caution: One should note that care is required as not all situations that would appear to be failures are really failures at all. Sometimes, a careful inquiry will reveal that a charity thought to be no longer in existence has just hidden itself under a different name or that a defect in the trust instrument can be cured to reveal the identity of the donee as was intended by the donor.

For example, where a charity is consolidated with other charities with similar purposes, it may be that the charity has not ceased to exist at all but that it remains in existence – only the 'machinery of the institution' has changed; *Re Faraker* [1912] 2 Ch 488. The matter is not always quite so simple in practice though. In one case, amalgamation was held to be a cy-près occasion; see *Avalon Consolidated School Board v. United Church* (1984), 47 Nfld. & P.E.I.R. 261 (Nfld CA). In such a case, the change was not sufficient to constitute failure. It might be that the charity is mis-named rather than never having existed – this is not properly cy-près but more a matter of discerning the true intent of the donor; *Re Buchanan* (1995), 11 ETR (2d) 8 (BCSC).

Traditionally, a court of equity would have jurisdiction to invoke its jurisdiction where there was a sufficient 'cy-près occasion'. Usually this meant that the gift was *impossible* to perfect (for example, the donee had ceased to exist or the money left was insufficient for the purpose) or the gift was *impracticable* (for example, the a scholarship with discriminatory provisions unacceptable to the donee).

Impossibility

It would be impossible to define with precision those occasions in which it would be impossible for the gift to be made. A few of examples will suffice:

- ***Re Spence's Will Trusts* [1979] Ch. 483:** The testatrix gave a gift for the benefit of residents at a retirement home that existed when the Will was executed but had ceased to exist when she died; there was a specific charitable intention so the gift failed.
- *AG v London Corporation* (1790), 3 Bro CC 171: A religious trust to propagate 'the Christian religion amongst the infidels of Virginia' was impossible as the Court determined that there were no infidels in Virginia.
- *Re Rymer* [1895] 1 Ch 19: A specific seminary was left a gift, but the seminary did not exist anymore (although it once had). The gift failed, as the testator had a specific and not a general charitable intent, there was a resulting trust.
- *Re Harwood* [1936] Ch 285: This was a gift to the "Peace Society" in Belfast. The charity never existed but there was a general charitable intent so that the gift could be applied cy-près.
- *Re McSweeney* (1982), 41 NBR (2d) 419 (NBQB): The Will contained a residuary bequest for the establishment and maintenance of a home for aged men and women. After the distribution there was approximately $176,000 in the estate. The executor felt that the money was not sufficient to establish a home for the aged, but it was held that the gift was not impossible to carry out in view of financing options open to the donee.
- *Johnston Estate v. Ganaraska Woods Retreat Centre* [2002] O.J. No. 1079 (Ont Sup Ct): Testator left gifts to two schools for retarded children which were no longer in existence; gifts resettled on cy-près for similar purposes.

Discriminatory Provisions:

Aside from the simple situation where the donee has ceased to exist, it might also be the case that carrying out the gift would contravene the law in some way. A simple illustration is gifts made with discriminatory provisions that limit the class of beneficiaries in a manner which would violate human rights or other equal access provisions. For example, in *Re Ramsden Estate* (1996), 139 DLR (4th) 746 (PEI SC), a gift to a university was made for scholarships to go to Protestant students only. Such a gift violated the provincial statute respecting universities and was thus impossible to carry out as stipulated by the settlor. In ***Canada Trust Co. v. Ontario Human Rights Commission*** **(1990), 74 OR (2d) 481 (Sup Ct),** the Will provided for a scholarship fund to exclude 'all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual' (amongst other restrictions). The Court struck out the provisions which ought not be enforced on policy terms and ordered a scheme accordingly.

Impracticability

Like impossibility, impracticability covers a wide field. Courts in the past have used this ground narrowly and broadly. In the narrow use, it is the circumstances of the case which dominate the analysis- for example, a gift to establish a church is impracticable where a similar church was already established in a small locale; *Re Schneckenburger* (1931) 40 OWN 210 (Ont SC). More broadly, courts sometimes can use this ground to determine the issue on public policy grounds, in effect allowing the gift to be saved from a condition which might otherwise cause it to fail; *Re Dominion Students' Hall Trust* [1947] Ch 183.

Initial and Subsequent Failure

An *initial failure* occurs where the property fails to vest in a donee; for example, where the charity ceases to exist before the testator/donee dies. The gift is then never effective. **For the court to invoke its jurisdiction, it must be satisfied that the donor wished to give to charity as a paramount intent (and secondarily to this charity)** rather than giving a gift to the institution specified and only that institution.

A *subsequent failure* takes place after the original gift has vested in the original donee; for example, the terms of the donee's existence are satisfied and the institution is wound up accordingly. In such cases, the money has already been used for charitable purposes and **the court will not require the showing of a general charitable intent – the presumption is that the gift, once dedicated to charity, is fully and forever dedicated to charity from the moment it vests.** If, however, the donor had provided conditions (a gift-over in such circumstances as caused the failure), it is of course the donor's intent which prevails absent any statutory authority to the contrary. One should note that the court will not entertain the cy-près application before the actual failure – so, for example, the fact that the institution still exists even though its future might be precarious makes the application premature.

Re Fitzpatrick **(1984), 4 DLR (4th) 644 (Man QB),** is an example of subsequent failure. The testatrix left the residue of her residue of her estate to her executors on the following terms:

> I DIRECT my Executors to hold the balance of the monies in my estate in a fund to be known as 'The Kathleen Fitzpatrick Fund', and to invest such monies in such

> investments as in its sole discretion shall be appropriate and from the principal and interest of such fund to pay for the musical education of any boy or boys who are under the care of St. Joseph's Vocational School of Winnipeg, and resident there, and who shall show musical talent, the selection of such boy or boys to be made by a committee consisting of the Rev. Sister Superior of St. Joseph's Vocational School, the President of the Manitoba Registered Music Teachers Association Incorporated, and the head of the music department of St. Mary's Academy, of Winnipeg.

The school was closed ten years after the death of the testatrix. No one had received benefit from the fund. The executors applied for an order for advice and directions concerning the legacy. Simonsen J held:

> The principles were expressed by the author Donovan Waters in an article [Case comment: *Re Hunter; Genn v. A.G.B.C.]* (1974), 52 Can. Bar Rev. 598, at pp. 598-99:
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> The law in this area is not easy, but it is fairly well laid down. Before the court can approve a cy-près scheme, it must be shown that the testator's charitable purpose was impossible to carry out or impracticable, and that he did not have only that particular charitable purpose in mind, but a general intent to give to charitable work of that kind. It is because the testator had this so- called general charitable intent that the court will assist his intention by seeing that the property is applied to some similar purpose. If he only wanted to further the particular named charitable purpose, but impossibility or impracticability has occurred, the court will not intervene, and the property in question will revert to his estate.
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> However, these rules only apply when the expressed charitable purpose is impossible or impractical on the instrument of gift taking effect, and in the case of a will, of course, this is the moment of the testator's death. It does not matter whether the charitable gift is to take place immediately or only after the completion of a prior interest. If there is a so-called initial impossibility or impracticability, the rules mentioned apply.
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> These rules do not apply when impossibility or impracticability occurs *after* the instrument of gift has taken effect. It does not matter whether the purpose is being carried out when the impossibility or impracticability subsequently occurs, or if either of those events occurs during the time of a prior interest, while the purpose or charity is awaiting the end of that interest. When impossibility or impracticability occurs after the instrument has taken effect, a so-called supervening impossibility or impracticability has occurred.
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> In these circumstances the court now looks to see whether the instrument of gift has given the property in question exclusively to the charitable purpose. That is to say, if there is a gift over of any kind, then there is no so-called exclusive dedication to the charitable purpose. However, if there is an exclusive dedication, and the purpose can no longer be carried out because of impossi bility or impracticability, the property is regarded as dedicated to charity, and passes to the Crown in right of the province as the ultimate protector of charity and charities. By

> long custom the Crown will now agree to the drawing up of a cy-près scheme for the approval of the court.
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> In the circumstances of supervening impossibility or impracticability no general charitable intent is required. This is because the purpose or charity was possible and practicable when the instrument of gift took effect, and whatever the scope of the donor's intent he has dedicated his property to charity. All that is required, as I have said, is an exclusive dedication.
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> ...
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> In the present case, St. Joseph's Vocational School was in existence at the time of the testatrix' death and there were potential candidates in existence at that time. In my view, that was the critical date because the objects of the charity were in existence at the time of death. It can therefore be said the charity vested in perpetuity for the stated charitable purpose. This was not a case of initial failure but rather of supervening impossibility. In the circumstances, it is not necessary to find a general charitable intent in the legacy to permit the ordering of a cy-près scheme.

'Paramount Charitable Intent'

This is really a matter of fact and impression; the court must determine whether the donor intended, primarily, to give to charity or whether she gave to *this* charity and *only* this charity. Thus, in *Re Taylor* (1888), 58 LT 538, Kay J said that:

> ... if upon the whole scope and intent of the will you discern the paramount intention of the testator was to benefit not a particular institution, but to effect a particular form of charity independently of any special institution or mode, then, although he may have indicated the mode in which he desires that to be carried out, you are to regard the paramount intention chiefly...
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> [See Cartwright J (in dissent) in *Re Cox* [1953] 1 SCR 94]
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> Because the issue is essentially one of fact, it is difficult to come up with precise guidelines as to whether such a paramount intention exists in any one case. It is usually a matter of inference from the scheme settled in the trust instrument rather than a matter of direct evidence, and the court must consider whether "the specific formulation of the purpose of the bequest is not exhaustive of the intention of the testator" - so, for example, a gift for the paying of a church debt where matching funds are made available is not indicative of a general charitable intent [Re *Harding* (1904), 4 O.W.R. 316 (Ont H.C.)], nor was a gift to a particular orphanage [Re *Allendorf,* [1963] 2 O.R. 68 (Ont H.C.)]. These were more consistent with a specific charitable intent for the named institution and only the named institution.