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—and the concept of ‘general charitable  
intent’*

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## Article

# Property not required for its trust purpose—and the concept of ‘general charitable intent’

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### ABSTRACT

This article compares the treatment of various types of trust where the settlor stipulates that trust property is to be used to pursue a particular purpose, but that purpose proves abortive, leaving the relevant property not now needed for the purpose and not otherwise disposed of. It argues that charitable trusts, and in particular the doctrine of ‘general charitable intent’ leading to cy-près application, could perhaps draw a lesson from beneficiary trusts.

### INTRODUCTION

The basic question asked in this brief note is whether the courts have adopted a coherent approach to a pervasive question, which arises in several scenarios; and in particular, whether the law is treating like cases sufficiently alike. The focus here is trusts—of various kinds—that stipulate that the trust property is to be used to pursue a particular purpose; but that purpose is completed, or its pursuit proves impossible, consequently leaving property that was dedicated to the purpose not in fact required for it. If the terms of the trust expressly provide what is to happen to the unrequired property, that resolves matters. But if not, the courts have to decide its destination.

The main conclusion will be that, where the trust is charitable, and it suffers an initial failure, the courts’ conventional description of the ‘general charitable intent’ required to permit cy-près application of the trust property to another charitable purpose is—as usually formulated—both logically incoherent and lacking in credibility. A possible reformulation of the law on ‘general charitable intent’ is suggested, drawing on the

law’s treatment of equivalent circumstances within beneficiary trusts.

### TRUST PURPOSES

Trust terms may require trustees to pursue a purpose in two types of situation. First, pursuit of the purpose may be the ‘object’ of the trust. Such ‘purpose trusts’ will almost always be charitable trusts.<sup>1</sup> But, by way of exception to the ‘beneficiary principle’, which generally dictates that a non-charitable trust can only be for a beneficiary, the law occasionally permits trusts for non-charitable purposes: the so-called ‘trusts of imperfect obligation’, for monuments, animals, and (probably) religious ceremonies.<sup>2</sup> Secondly, even where the trust ‘object’ is a beneficiary, the trust may stipulate that they are to be benefited by the trustees pursuing a particular purpose—for example, paying for the beneficiary’s education.<sup>3</sup> These two situations will be referred to collectively here as cases where there is a ‘trust purpose’—meaning the trust terms require the trustees to pursue a purpose (of some sort).<sup>4</sup>

<sup>1</sup> The object of a charitable trust can only be a purpose. By Charities Act 2011, s 1, a charitable trust must be ‘for charitable purposes only’, and by s 2 a charitable purpose must be ‘for the public benefit’ – as opposed to being of private benefit, which would be the case if there was a beneficiary. (Of course, people in general benefit from the execution of trusts for charitable purposes; but they are not ‘beneficiaries’ in the private trust sense of the word, with the range of associated rights.)

<sup>2</sup> *Re Endacott* [1960] Ch 232 (CA). For the exceptional cases, see David Wilde, ‘Trusts of Imperfect Obligation’ (2022) 28 T&T 298. Some add that there is another exception, where non-charitable purpose trusts can be valid, established by *Re Denley’s Trust Deed* [1969] 1 Ch 373 (Ch). But this seems not to be the best view of the law: see David Wilde, ‘*Re Denley*: Re-evaluating its Significance for Non-Charitable Purpose Trusts’ (2023) 139 LQR 243.

<sup>3</sup> Not everyone would classify these trusts as ‘beneficiary trusts’: on this point, see David Wilde, ‘Trusts and Purposes—Settlors Assigning Purposes to Beneficiary Trusts’ (2023) 36 TLI 141.

<sup>4</sup> For how far a binding requirement under trust terms to pursue a trust purpose may be overridden using the rule in *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282, see David Wilde, ‘The Nature of *Saunders v Vautier* Applications: Does the Court have a Discretion to Refuse?’ (2023) 37 TLI 67; and in the case of charitable trusts, David Wilde, ‘How Far Does the Rule in *Saunders v Vautier* Apply to Charitable Trusts?’ [2023] Conv 236.

## BENEFICIARY TRUSTS SUBJECT TO A TRUST PURPOSE—TREATMENT OF PROPERTY NOT REQUIRED

It is illuminating to start with beneficiary trusts.<sup>5</sup> The leading case is *Re Osoba*.<sup>6</sup> It establishes that where a trust declares that the whole of property (not merely such part as might be required)<sup>7</sup> is to be used to benefit a beneficiary by pursuing a particular purpose, but that ultimately proves impossible, the law presumes, in the absence of contrary indications of intent, that the settlor was giving an outright beneficial interest in any unrequired property to the beneficiary. That is, the unrequired property is now held on an outright trust for the beneficiary.<sup>8</sup> In that case, a testator's will left property on trust 'for the training of my daughter ... up to university grade ...'. Although her university education had been completed several years previously, the daughter was nevertheless held fully entitled to the trust property. Mention of her education was held to be merely an expression of 'motive' for an outright beneficial gift of the property. Buckley LJ made the clearest statement of the principles to be derived from earlier case law<sup>9</sup>:

'If a testator has given the whole of a fund, whether of capital or income, to a beneficiary, whether directly or through the medium of a trustee, he is regarded, in the absence of any contra indication, as having manifested an intention to benefit that person to the full extent of the subject matter, notwithstanding that he may have expressly stated that the gift is made for a particular purpose, which may prove to be impossible of performance or which may not exhaust the subject matter. This is because the testator has given the whole fund; he has not given so much of the fund as will suffice or be required to achieve the purpose, nor so much of the fund as a trustee or anyone else should determine, but the whole fund. This must be reconciled with the testator's having specified the purpose for which the gift is made. This reconciliation is achieved by treating the reference to the purpose as merely a statement of the testator's motive in making the gift. Any other interpretation of the gift would frustrate the testator's expressed intention that the whole subject matter shall be applied for the benefit of the beneficiary. These considerations have, I think, added force where the subject matter is the testator's residue, so that any failure of the gift would result in intestacy. The specified purpose is regarded as of less significance than the dispositive act of the testator, which sets the measure of the extent to which the testator intends to benefit the beneficiary.'

Although Buckley LJ spoke about testamentary trusts, the principle is applicable equally to inter vivos trusts.<sup>10</sup>

<sup>5</sup> For an analysis of the relevant case law, in the particular context of appeal collections, see David Wilde, 'Collections for Individuals Generating Surpluses—Presumed Gift, Resulting Trust, or Bona Vacantia?' [2024] Conv (forthcoming).

<sup>6</sup> [1979] 1 WLR 247 (CA).

<sup>7</sup> cf *Re Sanderson's Trust* (1857) 3 K&J 497, 69 ER 1206.

<sup>8</sup> It should be noted that the content of this presumption is disputed. It is usually said that a full beneficial interest in the trust property is treated as given to the beneficiary *outright from the very creation of the trust*. And this enjoys support from some statements in the cases, to the effect that the settlor's stipulated method of benefiting the beneficiary is treated as merely the 'motive' for an outright gift. However, it is submitted that the better view of the case law overall is that *there is initially a limitation affecting the property*. That is, the trustee must apply the property to the settlor's stipulated method of benefiting the beneficiary *so long as that is possible*. Only if the stipulated method of benefit is impossible from the outset, or once it has become impossible later, is the beneficiary entitled to the (now unrequired) property, to make use of for other purposes. See David Wilde, 'Trusts and Purposes—Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141, 145–47.

<sup>9</sup> [1979] 1 WLR 247 (CA), 257.

<sup>10</sup> *Re Andrew's Trust* [1905] 2 Ch 48 (Ch); *Davies v Hardwick* [1999] CLY 4954 (Ch).

<sup>11</sup> [1900] 2 Ch 326 (Ch) – see above n 5 for discussion.

<sup>12</sup> [2007] UKHL 17, [2007] 2 AC 432, [126].

From *Re The Abbott Fund*,<sup>11</sup> one thing we can infer will rebut the presumption, leading to an automatic resulting trust of any unrequired property instead, is for three circumstances to all be present together. That is: (1) the trust's stipulated provision for the beneficiary is lifelong, so that there can only be unrequired property at the beneficiary's death; and (2) any unrequired property then going to the beneficiary's estate would be enuring to the benefit of persons the settlor would have had no evident reason to wish to benefit in preference to herself; and (3) the circumstances of the settlor's gift allow for the practicable return of any unrequired property under a resulting trust. In that case, a trust fund was raised from subscribers to maintain two impoverished deaf and mute women. Stirling J inferred that it was intended that the women should be entitled only to expenditure from the fund on their maintenance: the fund was not absolutely theirs, forming part of their estates at their deaths. When they died, what remained went back on resulting trust to the subscribers.

### The presumed gift of unrequired property as an 'imputed' intention

It is helpful to note that a 'presumed' intention is an 'imputed' intention (rather than an 'inferred' intention), adopting the terminology of Lord Neuberger in *Stack v Dowden*<sup>12</sup>:

'An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.'

The presumption of gift operates in situations where, in all probability, the donor simply did not foresee the possibility of unrequired property, and therefore had no actual intention regarding it. The law engages the presumption to resolve matters: by attributing to donors in presumptive form *the intention the typical donor would probably have formed had they thought about the matter*.

## DONATIONS SUBJECT TO A TRUST PURPOSE MADE TO NON-CHARITABLE UNINCORPORATED ASSOCIATIONS—TREATMENT OF PROPERTY NOT REQUIRED

Turning to gifts to non-charitable unincorporated associations. A simple donation to a non-charitable unincorporated

association is generally received by its property-holding officers on trust for the members, as beneficiaries, subject to the contract formed by the association's rules.<sup>13</sup> That is, the property is held on a beneficiary trust. However, there is a tendency to think that if a donor to such an association stipulates their donation be used for a particular binding purpose, this means a 'purpose trust' has now been declared—for the stipulated purpose—liable to be a non-charitable purpose trust invalidated by the 'beneficiary principle'. And that, to forestall the possibility of an invalid non-charitable purpose trust, the law will interpret the settlor's stipulation of a purpose as merely a non-binding indication of the settlor's wishes, rather than as a binding trust purpose.<sup>14</sup> The classic illustration is *Re Lipinski's Will Trusts*,<sup>15</sup> where a testator left property to the Hull Judeans (Maccabi) Association, a small non-charitable unincorporated association operating a Jewish youth club, 'to be used solely in the work of constructing the new buildings for the association and/or improvements to the said buildings'. Oliver J held the donor's specific direction for the use of the gift to be only a non-binding indication of the donor's wishes: the association was entirely free to use it as they wished.<sup>16</sup>

However, given that outright, unqualified donations to non-charitable unincorporated associations create beneficiary trusts, then just as with any other beneficiary trust, the addition by the settlor of a stipulation for use for a particular purpose—*provided that purpose benefits the association membership, the trust beneficiaries*—should simply create a valid beneficiary trust to pursue an assigned purpose for their benefit, as with a trust for an individual beneficiary. Authority apparently supporting this analysis is *Re Price*.<sup>17</sup> A testatrix left property to the Anthroposophical Society in Great Britain 'to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder, Dr Rudolf Steiner'. Cohen J held this was a valid gift: he said the association was bound by the restriction on how the property could be expended—it could not be used for any wider activities of the association—and apparently treated it as a beneficiary trust for the association membership.<sup>18</sup>

Accordingly, the presumption that a gift is intended of any unrequired property is capable of application to a donation to a non-charitable unincorporated association that stipulates it be used for a particular binding purpose that benefits the members, in just the same way as in the case of a trust for an individual beneficiary.

## NON-CHARITABLE PURPOSE TRUSTS— TREATMENT OF PROPERTY NOT REQUIRED

Considering next, briefly, non-charitable purpose trusts. As noted above, valid non-charitable purpose trusts appear to be limited to the testamentary trusts of imperfect obligation—for monuments, animals, and religious ceremonies. In the case of property not ultimately required, this is held on resulting trust for the settlor's estate.<sup>19</sup> This seems inevitable and uncontroversial. There is no beneficiary to whom the law could presume a gift of the unrequired property. And there is no question of *cy-près* application to some other non-charitable purpose—especially given the anomalous status of the trusts of imperfect obligation.<sup>20</sup>

## CHARITABLE TRUSTS—TREATMENT OF PROPERTY NOT REQUIRED

Finally, we examine charitable trusts. As explained in *Tudor on Charities*<sup>21</sup>:

'If the specified purpose of a [charitable] gift is initially impracticable, impossible, contrary to public policy or illegal, but as a matter of construction or statutory deeming under s.63A of the Charities Act 2011 there is a general or paramount charitable intention, the gift will not wholly fail, but will be applicable [to another charitable purpose] under the *cy-près* principle ...'

Of course, the *subsequent* failure of a charitable gift (rather than *initial* failure) is treated differently: any surplus property not otherwise disposed of is *automatically* applied *cy-près*, without the need for any general charitable intent. This rule about subsequent failures appears settled<sup>22</sup>—even if questions might reasonably be asked about it.<sup>23</sup> The rule is accordingly taken as a given here. The focus will therefore instead be on the meaning of 'general charitable intent', where intention is relevant, in the case of an initial failure. This concept may be more legally malleable. And it may be that lessons can be drawn in relation to 'general charitable intent' from the treatment of 'intention' in beneficiary trusts, outlined above.

### 'General charitable intent'—the usual explanation

Perhaps the most widely cited description of what is meant by a 'general charitable intent' is that by Parker J in *Re Wilson*<sup>24</sup>:

<sup>13</sup> *Re Recher's Will Trusts* [1972] Ch 526 (Ch); *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 WLR 936 (Ch).

<sup>14</sup> For example, a clear statement of this general view is Charlie Webb and Tim Akkouch, *Trusts Law* (5th edn, Palgrave 2017), para 4.11.

<sup>15</sup> [1976] Ch 235 (Ch). Similarly, *Re Turkington* [1937] 4 All ER 501 (Ch), where Luxmoore J said (504): 'The whole question is whether this is a trust or whether it is simply an indication by the testator of the purposes for which he would like the money to be expended, without imposing any trust on the beneficiary.'

<sup>16</sup> [1976] Ch 235 (Ch), 243–50. This looks difficult to justify on the wording of the will—which said the gift was given 'solely' for the stated purpose. However, for a possible practical justification of the decision, see David Wilde, 'Trusts and Purposes—Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141, 143–44.

<sup>17</sup> [1943] Ch 422 (Ch).

<sup>18</sup> [1943] Ch 422 (Ch), 427–8. For fuller analysis of the case, see David Wilde, 'Re Denley: Re-evaluating its Significance for Non-Charitable Purpose Trusts' (2023) 139 LQR 243, 259–60.

<sup>19</sup> *Mellick v President and Guardians of the Asylum* (1821) Jac 180, 37 ER 818.

<sup>20</sup> *Re Endacott* [1960] Ch 232 (CA) made clear the categories of recognised trusts of imperfect obligation are 'anomalous' and the anomaly should not grow.

<sup>21</sup> William Henderson, Jonathan Fowles, Gregor Hogan, Julian Smith, and Laetitia Ransley (eds), *Tudor on Charities* (11th edn, Sweet & Maxwell 2022), para 9.004 (note omitted).

<sup>22</sup> Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (23rd edn, Sweet & Maxwell 2024), para 15.074 (note omitted): 'The rule is now firmly established, but it was not always so, and it is not possible to reconcile some earlier cases on the subject ...'

<sup>23</sup> Peter Luxton, 'Cy-près and the Ghost of Things that Might have Been' [1983] Conv 107.

<sup>24</sup> [1913] 1 Ch 314 (Ch), 320–21.

‘I think the authorities must be divided into two classes. First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, 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. In fact the will will be read as though the particular direction had not been in the will at all, but there had been simply a general direction as to the application of the fund for the general charitable purpose in question. Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift,—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument.’

This description of a process of ‘construction’ appears to mean, on the face of things, that discerning a ‘general charitable intent’ involves finding the terms of the donor’s gift to (impliedly) say, ‘to be used for my specified charitable purpose *or, if necessary, some other analogous charitable purpose*’.<sup>25</sup>

There are at least two significant problems with accepting this ‘constructional’ approach. One is that it creates a logical inconsistency; the other is that it fails to reflect reality.

#### Logical incoherence

First, the logical inconsistency. The terms of the donor’s gift are being treated as (impliedly) meaning, ‘to be used for my specified charitable purpose *or, if necessary, some other analogous charitable purpose*’. And, if this is what the gift means, when correctly interpreted, then it is not a case of *cy-près* application at all. On the understood terms of the gift, if the first half of the gift fails—the specified charitable purpose—then the second half of the gift takes effect—the alternative, analogous application. There may well be a need for a scheme to determine a suitable form for carrying out this second half of the gift. But it is not a *cy-près* scheme: we are carrying out part of—the second half of—the terms of the original gift, not varying the original gift *cy-près*. In other words, the conventional definition of a ‘general charitable intent’ permitting *cy-près* application is one that logically makes redundant the

search for a ‘general charitable intent’ to permit a *cy-près* application.

#### Lack of realism

Secondly, this supposed ‘constructional’ approach does not reflect the reality of what the courts do in *cy-près* cases. In cases where a general charitable intent is found, there is invariably no language in the gift close to ‘*or, if necessary, to some other analogous charitable purpose*’. And ordinary cannons of constructions are not applied to any such passage in discerning that meaning. No such process of interpretation is undertaken. The truth is acknowledged at one point in *Tudor on Charities*<sup>26</sup>:

‘[I]n the great majority of reported cases in which the donor or testator indicates or directs the mode of application of his gift he does not express any intention at all as to the mode of application of his gift if it cannot be applied precisely in accordance with his expressed indication or direction. When a man gives property for a specific purpose to be applied in a specific manner, he usually does so in the belief and expectation that his gift will be applied in that way and not in some other similar way approved by the court. Therefore, the responsibility of the court is the somewhat peculiar one of inferring what the intention of the donor was in an event which, in reality, he probably did not anticipate and, if he did, did not expressly provide for.’

In other words, the courts are seemingly concerned with ‘imputing’ an intention—that is, attributing to donors *the intention they would, on the evidence available, probably have formed had they thought about the matter*—rather than ‘inferring’ some actual intention.

#### Alternative formulations of ‘general charitable intent’

Other explanations—often somewhat nebulous—of how a ‘general charitable intent’ is discerned have been proffered in the case law. These can be found surveyed in *Tudor on Charities*.<sup>27</sup> The textbook observes that all the descriptions ultimately seem to be different ways of expressing the same idea. The underlying idea appears to be as follows. The donor of a gift has a general charitable intent if it can be demonstrated from any admissible evidence—not limited to construction of the terms of the gift—that they had a two-stage thought process at the time of the gift (although not necessarily in this order): (1) they had a settled wish to give the relevant property to charity in general, or to a particular category of charities in general, such as the range of medical charities; and (2) they also had a settled wish to give the relevant property as specified and detailed by the terms of their gift, for example to a particular hospital—the specific charitable gift which proves to fail. On the failure of the donor’s second (specific) intention, there was nevertheless present in their mind the first (wider) intention. This is a ‘general charitable

<sup>25</sup> William Henderson, Jonathan Fowles, Gregor Hogan, Julian Smith, and Laetitia Ransley (eds), *Tudor on Charities* (11th edn, Sweet & Maxwell 2022), para 9.007 agrees, in effect, that this is what the judgment appears to say ‘[o]n a literal reading’; but adds ‘[i]t is suggested that such a literal reading would be incorrect’. For present purposes, it will be assumed that the judgment means what it says ...

<sup>26</sup> William Henderson, Jonathan Fowles, Gregor Hogan, Julian Smith, and Laetitia Ransley (eds), *Tudor on Charities* (11th edn, Sweet & Maxwell 2022), para 9.028.

<sup>27</sup> William Henderson, Jonathan Fowles, Gregor Hogan, Julian Smith, and Laetitia Ransley (eds), *Tudor on Charities* (11th edn, Sweet & Maxwell 2022), paras 9.018–9.026.

intent'; and it was an *actual real intent* provably present in their mind.

This conception of a 'general charitable intent' avoids the logical incoherence of the purely 'constructional' approach. But it is submitted that it suffers from a similar lack of realism. It is, of course, perfectly plausible for any given donor to go through this two-stage process: for example, to decide they wish to make a charitable gift in general terms; and then refine that initial idea by deciding on the specific charitable gift they prefer to give. But it is equally plausible for a donor not to go through the two-stage process at all: for example, to simply decide on a specific charitable gift in response to a direct appeal, or a sense of gratitude to a particular institution, without any further thought. In the abstract, either type of thought process seems equally plausible. In rare cases there might be clear proof the two-stage process did indeed take place. But in the vast majority of cases there will be no evidence capable of proving it on a balance of probabilities. And reading the judgments, it is suggested, one regularly finds judges fixing on the most tenuous of points—all that is available to them—to find a donor had a general charitable intent; or lacked one.<sup>28</sup> In reality, one is left with the impression that the judges are invariably 'imputing' an intention to the donor in the absence of any reliable evidence. Lord Parker went so far as to say in *Bowman v Secular Society Ltd*<sup>29</sup>:

'The rule of equity [regarding general charitable intent] 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.'

#### A presumption regarding 'general charitable intent'?

If the law is, in practice, invariably looking for an imputed intention, a question then arises. Could the law relating to charitable trusts be improved by reframing it to mirror the equivalent position in relation to unrequired property in beneficiary trusts? That is, should *cy-près* law adopt a *presumption* regarding 'general charitable intent': a presumptive starting point reflecting *the intention the typical donor would probably have formed had they thought about the matter*. For consistency with the presumption of gift in the case of beneficiary trusts, this would seem to lead to a presumption in favour of a general charitable intent.<sup>30</sup>

At the moment, there is no clearly formulated presumptive position in relation to 'general charitable intent'. See for example Megarry V-C emphasising that a resulting trust is the default position on initial failure of a charitable trust, and that there is a need to positively demonstrate any 'general charitable intent' displacing this resulting trust, in *Re Spence*.<sup>31</sup> In contrast, consider the not uncommon rhetoric that the courts 'lean in favour of finding a general charitable intent, an approach applied for example by Lord Hanworth MR delivering the leading judgment in the Court of Appeal in *Re Monk*.<sup>32</sup> The consequent uncertainty of outcome must inevitably tend toward generating unnecessary litigation. Indeed, the unpredictability is such that Vinelott J concluded, in an oft-quoted remark, that (particularly if approached on the classic 'constructional' basis), 'To search for such a paramount or dominant charitable purpose or intention is in many cases to follow a will-o'-the-wisp.'<sup>33</sup>

If a presumption of general charitable intent does seem a promising idea, a further question then arises, however. Would recognising a presumptive starting point, in an attempt to clarify and improve the law, conflict with any existing case-law rules or principles regarding 'general charitable intent'? It is hard to see that it would. The past case law tends merely to recognise relevant factors when looking for a general charitable intent, rather than formulating concrete rules or principles.<sup>34</sup> It would appear, therefore, that the law has something to gain, and nothing to lose, from recognising a presumptive starting point.

## CONCLUSION

Where a beneficiary trust stipulates the beneficiary is to be benefited through the trustee pursuing a particular purpose—for example paying for their education—but that purpose proves impossible, the law *presumes* that the settlor intended any property provided for the (now impossible) purpose should thereupon be held for the beneficiary outright: a presumption of gift to the beneficiary. But where a charitable trust suffers an initial failure, for the property to be applicable to another charitable purpose *cy-près*, the law requires a 'general charitable intent' on the part of the settlor to be identified. However, there is invariably no reliable evidence as to whether or not the settlor had any wider intent. The judges, therefore, in reality appear to resort to imputing a fictional intention, based on any meagre clues they have. This makes the outcome of cases unpredictable

<sup>28</sup> See for example Rachel P Mulheron, *The Modern Cy-près Doctrine* (UCL Press, 2006), 75–86, listing the tenuous and oblique factors typically considered in the search for a general charitable intent—but pointing out the inconsistency with which they have been attended to. Mulheron prefaces her list with robust comments about the special difficulty and unpredictability of the search for a general charitable intent.

<sup>29</sup> [1917] AC 406 (HL), 442.

<sup>30</sup> Derwent Coshott, 'The Limits of Cy-près: Reconciling the Language and Practice of the Cy-près Doctrine' (2022) 36 TLI 48 argues that by historical inheritance there is already as a matter of substance—if not as a matter of judicial formulation—a presumption of 'general charitable intent'.

<sup>31</sup> [1979] Ch 483 (Ch), 491–92: 'The gift was a gift for a charitable purpose which at the date of the will was capable of accomplishment and at the date of death was not. Prima facie, therefore, the gift fails unless a general charitable intention has been manifested so that the property can be applied cy-près ... [I]t is very difficult to find a general charitable intention where the testator has selected a particular [charitable institution or purpose], taking some care to identify it, and the charity then ceases to exist before the testator's death.'

<sup>32</sup> [1927] 2 Ch 197 (CA), 207: '... remembering that the Court leans in favour of a charitable purpose, there appears to me to be a general intention ...' (See also *Children's Investment Fund Foundation (UK) v Attorney General* [2020] UKSC 33, [2022] AC 155, [53]–[54] (Lady Arden JSC).) cf *Re Goldschmidt* [1957] 1 WLR 524 (Ch) dealing with the situation where, in the absence of a finding that a general charitable intent underlies a particular failed gift so permitting *cy-près* application, the property will pass under *some other* express charitable gift.

<sup>33</sup> *Re Woodhams* [1981] 1 WLR 493 (Ch), 502.

<sup>34</sup> See above n 28.

and undesirably encourages litigation. Arguably, the uncertainty could be lessened, and the law improved, by copying across to charitable trusts the presumption of gift applied to beneficiary trusts, so as to say there is a *presumption* of a 'general charitable intent' in the case of charitable trusts.

#### AUTHOR BIOGRAPHY

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 <b>11</b> <b>NOV</b> Welcome drinks	 <b>12</b> <b>NOV</b> Networking dinner	 <b>13</b> <b>NOV</b> Farewell reception
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