Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

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6. Charitable Trusts

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Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on charitable trusts.

Keywords: charitable trusts, cy-près doctrine, dispositions, gifts, public benefit, certainty of objects, private trusts, perpetuity rules, charity, Charities Act 2006

Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Public benefit
- The heads of charities
- Cy-près
- Failure of charitable gifts

Key Debates

Debate: should public benefit ever be assumed in a charity?

The **Charities Act 2006** (now 2011) changed the old law in stating that public benefit can never be assumed. This led to some litigation around the charitable status of public schools and the guidance given by the Charity Commission.

Debate: should 'poor-relation' charities be allowed?

This permitted connection in poverty cases is an exception to the rule that there must be a public benefit so no connection between the recipients of charity is allowed. There is some rationale in a number of the cases for this anomaly although not all the cases deal with it.

Question 1

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↲ Geoffrey, who died earlier this year, left a will directing his executors and trustees to constitute his residuary estate a trust fund and to hold one-third thereof upon trust for each of the following purposes:

a To provide snooker tables and prizes for snooker tournaments for university students.

b To assist the vicar and churchwardens of St Peter's, Faversham, in parish work.

c To encourage the preservation of the world's rainforests.

Consider whether these dispositions are of a charitable nature.

Caution!

■ Remember that you will need to know the previous law as well in order to understand how it has been affected by the changes introduced to public benefit by the **Charities Act 2006** (now **Charities Act 2011**).

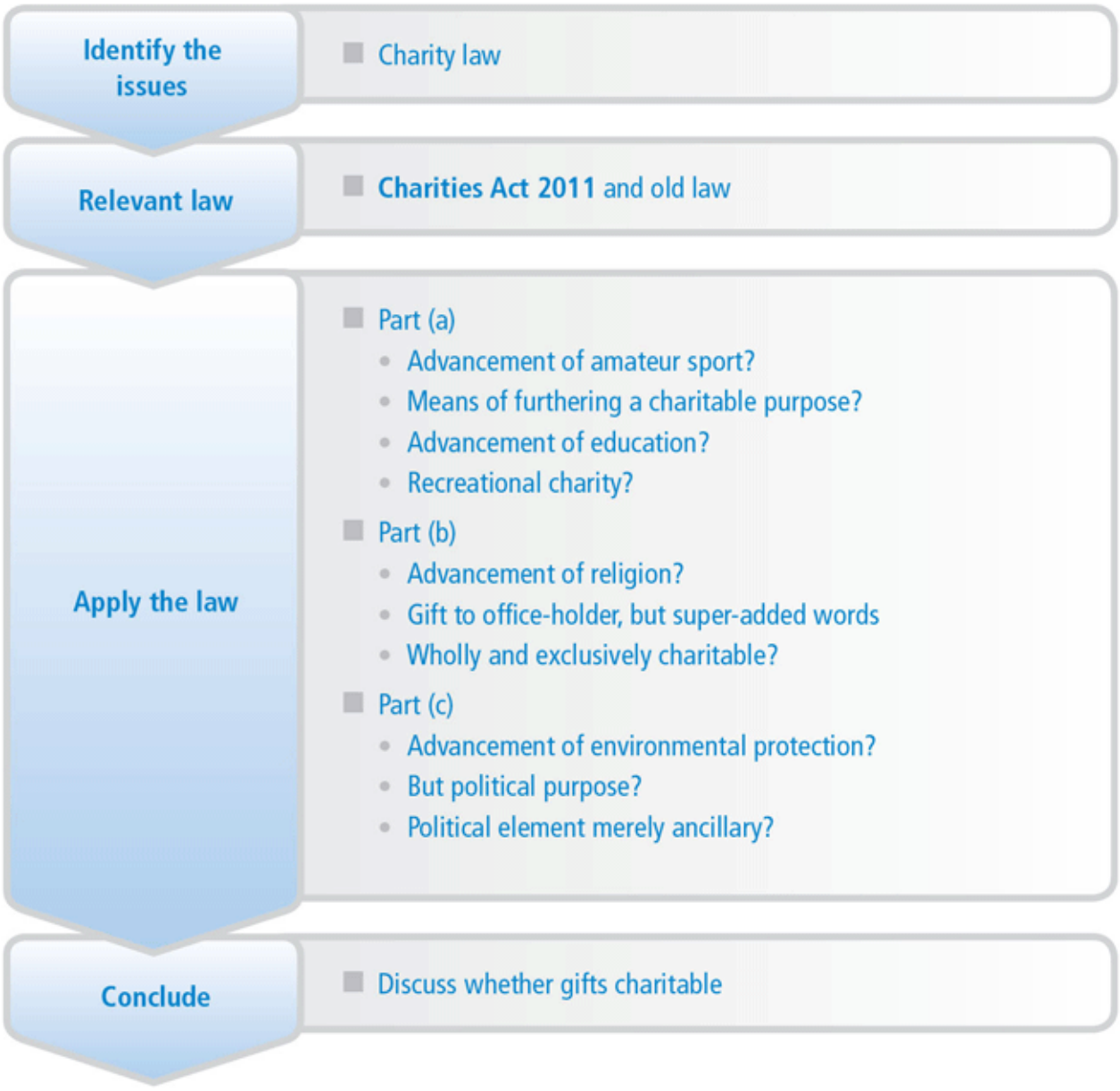
■ You are asked to advise as to the *charitable nature* of each disposition which means it is unnecessary to consider whether any of them might be otherwise valid (e.g. as a trust of imperfect obligation). This is a good example of the importance of reading the question. A different question might have demanded that you 'advise as to the validity' of the dispositions, in which case a discussion of other means of upholding them would have been appropriate.

■ Do not waste time dealing with points which do not cause problems. There is no need, for instance, in part (b) of the present question, to write at length about whether the advancement of various esoteric beliefs might nevertheless be charitable.

■ If you are permitted to take statutes into the examination, you will not gain many marks for merely reciting what they contain. Reference to recreational charities within the **Charities Act 2011** should refer to the relevant section and paragraphs, but quotations should be limited to the key words: e.g. in the answer to part (a) of the present question, to the issue of 'need'.

■ The answer does not conclude definitely whether any of the dispositions are charitable—that is a mixed question of law and fact. As a law student you are expected to know the law; but you cannot be decisive about matters of construction. For this reason, it is best merely to indicate what you consider the more likely construction and state the law relevant to it. You might, however, go on to consider the consequences which would flow from any other reasonable constructions.

Diagram Answer Plan



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Suggested Answer

To be charitable, each of the dispositions must promote a charitable purpose, it must contain a public benefit, and the purpose must be wholly and exclusively charitable. It is necessary to consider each disposition separately.[1]

[1] This short introduction sets the scene.

Part (a)

Under the **Charities Act 2011**, to be charitable a purpose must both fall within the list of purposes that are set out, and also be for the public benefit: **s. 2(1)**.[2]

[2] Each sub-section is self-contained and sets out the issue, the rule, and the conclusion.

The list of purposes in **s. 3(1)** includes the advancement of amateur sport (**para. (g)**), thereby reversing the pre-Act decision in ***Re Nottage [1895] 2 Ch 649, CA***.[3] The provision of equipment for sport can be regarded as promoting sport. However, the Act states that 'sport' means sports or games that promote health by involving ↵ physical or mental skill or exertion: **s. 2(3)(d)**. Snooker is a game, but whilst the playing of it involves both physical and mental skills, it is less clear that snooker promotes health. However, in ***Hitchin Bridge Club (28 Feb 2011)***[4] the Charity Commission held the club charitable for the promotion of amateur sport because it was satisfied that bridge is a game involving high mental skill and there was evidence that playing bridge reduced dementia and mental illness in later life. Snooker might therefore qualify if similar evidence of health-giving effects can be adduced.

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[3] An 'extra marks' point showing knowledge of previous law and effect of changes brought about by the **Charities Acts 2006** and **2011**.

[4] Decisions of the Charity Commission are useful to include (unless there is higher authority) and can be found on the webpages of the Commission.

Alternatively, it might be argued that the purpose can be regarded as a means of furthering the education of the university students, the advancement of education being itself a purpose within the statutory list (**para. (b)**). In ***Re Mariette [1915] 2 Ch 284***, for instance, the judge regarded the playing of sport as an integral part of the boys' education, and so held charitable a gift to provide squash courts and prizes for sport in the particular school. It is clear that this principle is not limited to sports but can extend to games. In ***Re Dupree's Deed Trusts [1945] Ch 16***, a trust for an annual chess tournament in Portsmouth for boys and young men up to the age of 21 was held charitable, the court accepting expert evidence that chess was educational. In each of these cases it seems that the court was willing to treat the purpose of the trust as the advancement of education because it was limited to young

persons. In ***IRC v McMullen [1981] AC 1***, the House of Lords held that a trust to provide facilities for pupils at schools and universities to play football was charitable for the advancement of education, even though some university students are well above school age: the fact that the majority are young persons was apparently sufficient. It is, however, a matter of construction in each case whether the expressed purpose can be treated as a means of furthering a charitable purpose: ***IRC v City of Glasgow Police Athletic Association [1953] AC 380***. In the ***McMullen*** case, the trust deed expressly stated that the facilities were a means of improving the students' minds. Since no such words are expressed here, the provision of snooker tables can fall within **para. (b)** only if the court is satisfied that the playing of snooker is a means of advancing the university students' education. This is not certain: snooker is not as intellectual a game as chess, and (unlike football or squash) it does not involve significant physical exercise.

To be charitable a purpose must also be for the public benefit: **Charities Act 2011, s. 2(1)(b)**, and it is not presumed that a purpose of a particular description is for the public benefit: **s. 4(2)**. Public benefit under the 2011 Act has the same meaning as it had in the law of charities before April 2008: **s. 4(3)**. University students are therefore a sufficient section of the community to benefit for the purposes of **paras (b)** and **(g)** within the list of statutory purposes.

p. 77 ↵ This is not, however, the end of the matter. Under the **Charities Act 2011, s. 5** it is charitable to provide facilities for recreation or other leisure time occupation in the interests of social welfare. The requirement of social welfare is satisfied if the facilities are provided to improve the conditions of life for the persons for whom they are primarily intended, and either the persons have need of such facilities (for the reasons there specified, including youth) or the facilities are to be available to members of the public at large, or male, or female, members of the public at large. As university students are clearly not the public at large, the element of 'need' would have to be satisfied. Although the majority of the Court of Appeal in ***IRC v McMullen [1979] 1 WLR 130*** took the view that 'need' imported some element of deprivation, the House of Lords in ***Guild v IRC [1992] 2 AC 310*** held that this is not so, and that 'need' merely indicates that the facilities themselves are needed, as would be the case if there were evidence that they were in short supply. Assuming, therefore, that there is evidence of a need for snooker tables at universities, the specified purpose is likely to fall within **s. 5**. To be charitable under **s. 5**, the trust must also be for the public benefit (**s. 5(5)**), and (as has been discussed)[5] this requirement would be satisfied.

[5] No need to repeat the discussion—just refer back to it.

Part (b)

As office-holders, the vicar and churchwardens promote a charitable purpose, regarding the advancement of religion, which is a purpose listed in **s. 3(1) of the Charities Act 2011** (**para. (c)**).[6] Therefore[7] a gift to these persons described as such, without more, would be regarded as a good

charitable gift for the advancement of religion. The problem here, however, is that a purpose is specified: namely, parish work. This means that the persons specified hold the property for such a purpose, and the charitable status of the gift depends upon whether a trust for parish work is wholly and exclusively charitable. In ***Re Simson [1946] Ch 299***, a gift to a vicar 'for his work in the parish' was held charitable; whereas in ***Farley v Westminster Bank Ltd [1939] AC 430, HL***, a gift to a vicar 'for parish work' was not. The difference was that in ***Farley*** the parish work was not limited to work which fell within the charitable scope of the vicar's office. It could, for example, include a civic reception for a footballer. In ***Derby Teaching Hospitals NHS Foundation Trust & Ors v Derby City Council & Ors [2019] EWHC 3436 (Ch)*** similarly NHS Trusts were held not to be exclusively charitable. It is, in each case, a matter of construction; but, unless the court can put a different construction on the present gift from that of the House of Lords in ***Farley***, it will fail as not being wholly and exclusively charitable.[8]

[6] Key issue and rule for this part.

[7] Now start applying it to the problem.

[8] This is a small caveat to show that each case is determined on fact and law (see note in 'Caution!').

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Part (c)

The advancement of environmental protection or improvement is a purpose listed in **s. 3(1) of the Charities Act 2011** (**para. (i)**). The public benefit means a benefit to the public in the United Kingdom; but scientific evidence has revealed the importance of the rainforests to the world's climate, and suggests that they contain as yet undiscovered species of plants which may assist in the development of cures for human diseases. The preservation of the animals in the forests may also tend to moral improvement of the human race: ***Re Wedgwood [1915] 1 Ch 113***. Thus, subject to the possible qualification which follows, even though no rainforests are in the United Kingdom, this trust would appear to satisfy the public-benefit requirement of **s. 4 of the Charities Act 2011**, and, therefore, to be charitable.[9]

[9] This is how you deal with the first part of the argument, i.e. the public-benefit discussion.

The qualification is that a trust will be denied charitable status if its purpose is considered to be political.[10] Although the High Court of Australia has held that in Australia political objects are not excluded from charitable purposes (***Aid/Watch Inc. v Commissioner of Taxation [2010] HCA 42***), such prohibition is well established in English law.[11] A trust which aims to change the law is political because the court has no means of judging whether a proposed change in the law is or is not for the benefit of the public in the United Kingdom: ***McGovern v A-G [1982] Ch 321***; ***Hanchett-Stamford v AG [2008] EWHC 330 (Ch)***. It is therefore impossible for the public-benefit test in **s. 4** to be satisfied by such a trust. In the ***McGovern*** case it was thought that there was a risk that the aims of the trust established by Amnesty International might prejudice this country's relations with countries overseas. An additional reason for the denial of charitable status to political trusts is that the Attorney General might be required to enforce trusts whose purposes are against the interests of the state: ***Bowman v Secular Society Ltd [1917] AC 406***; ***National Anti-Vivisection Society v IRC [1948] AC 31, HL***. It might therefore be argued that the purpose specified in the problem could be carried out by seeking to change the law of the United Kingdom or of other countries, and this would make it a political purpose and so vitiate charitable status. It is, perhaps, the word 'encourage' which causes anxiety on this point.

[10] This then takes up the next point: political purposes.

[11] An 'extra marks' point. If you know of the position in another jurisdiction then it is well worthwhile adding it in even though it may not be binding precedent.

Nevertheless, given the scientific evidence mentioned, the court might well consider that any potential political element is merely ancillary to the charitable purpose: ***IRC v Temperance Council (1926) 136 LT 27***. If this is the case, the trust will still be wholly and exclusively charitable. Charities are, after all, permitted a limited amount of political activity, provided there is a reasonable expectation that such activity will further their stated purposes. Since the late 1990s, the Charity Commission has taken an increasingly ↵ relaxed attitude to the extent to which charities may engage in political activity: see its guidance, CC9 (March 2008). The borderline, indeed, between education and propaganda is sometimes narrow (see ***Re Koeppler Will Trusts [1986] Ch 423***) and the courts will deny charitable status to political propaganda disguised as education (***Southwood v A-G [2000] 3 ITELR 94, CA***). The court might save the gift for charity if it can construe the encouragement as limited to means that are not political.

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Looking For Extra Marks?

■ Don’t hesitate to cite an authority from another jurisdiction where it is relevant even if not binding (see earlier comment).

Question 2

Gina, who died last year, by her will bequeathed:

a £100,000 in trust for such of her poor relations as her trustees should select; and

b £200,000 in trust to publish her (Gina’s) typescript entitled ‘Pagan Plenty’.

Expert evidence has indicated that Gina’s typescript has no literary merit, that it is solely about advancing Pagan beliefs, and that it encourages Pagans to live separately, so far as practicable, from non-Pagans.

Advise Gina’s executors whether these dispositions are in law charitable.

Caution!

■ Although the first part of the question involves the relief of poverty and the second the advancement of religion, a common theme in both parts is the controversial impact of the public-benefit provisions introduced in the **Charities Act 2006** (and now contained in the **Charities Act 2011**). In order to answer each part, therefore, it is necessary to describe what the law was before these provisions took effect.

Diagram Answer Plan

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Suggested Answer

Part (a)

The relief of poverty has long been recognised as a charitable purpose; it was mentioned in the **Preamble to the Statute of Elizabeth 1601**, and was the third of the four heads of charity described by Lord Macnaghen in ***Pemsel's Case [1891] AC 531***.[1] Even a restriction (as in Gina's will)[2] in favour of a testator's poor relations as the trustees may select may be charitable. The charitable status of the 'poor-relations' cases has long been recognised (***Isaac v de Friez (1754) Amb 595***). The restriction of the persons to benefit to such a group looks like a restriction to a private class of persons—not normally recognised as a sufficient section of the community in charity law. The charitable status of the 'poor-relations' cases was particularly put in doubt when it was held in ***Re Compton [1945] Ch 123***,

CA and ***Oppenheim v Tobacco Securities Trust Ltd [1951] AC 297, HL***, both concerning the advancement of education, that a group of persons, however numerous, can never be a section of the community in the law of charities if they are defined by reference to a personal relationship or nexus.

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[1] A brief resumé of the origins of charity law works well to kick it all off.

[2] An early application of the law to the problem is excellent. It shows focus and understanding of the issues in the problem question.

In ***Re Compton*** and ***Oppenheim*** (and ***Re Scarisbrick [1951] Ch 622***) various explanations were offered for their exceptional status:[3] that such cases are anomalous and exceptions to the public-benefit requirement (in the sense of the section of the community to benefit), or that it is always for the public benefit to relieve the poor. In ***Dingle v Turner [1972] AC 601***, a poor-employee case, it held that they remained charitable despite ***Oppenheim***. However, the majority of their Lordships dissociated themselves from Lord Cross's view[4] in that case that tax consequences should be taken into account in determining charitable status, and it is not clear from ***Dingle v Turner***[5] what the explanation for the exceptional status of the poor-relations cases is.

[3] Don't just state that they are exceptional—give some rationale as to why they are exceptions to the general rule.

[4] An 'extra marks' point—it shows you have read and understood the case including the dissenting opinion. You are showing the skills of a lawyer.

[5] If it is not clear then say so.

The **Charities Act 2011** states that a charitable purpose must satisfy two requirements (**s. 2(1)(a)** and **(b)**): first, it has to fall within a specified statutory list of 'descriptions of purposes' (which includes the relief of poverty: **s. 3(1)(a)**); and, secondly, it has to be for the public benefit. It appeared that, if the charitable status of the 'poor-relations' cases was based on their being an exception to the public-benefit requirement, such status would be lost; whereas if it was based on their providing an indirect benefit to the community, such status would be retained.

Following a reference by the Attorney General, the charitable status of the poor-relations cases, as well as those relating to poor employees and poor members of a club, was considered in ***A-G v Charity Commission (2012) 15 ITELR 521 (UT) (TCC)***. The Upper Tribunal considered these lines of cases to be anomalous, but nevertheless upheld their status as charities on the basis that they satisfied the requirement of 'public benefit' in the sense of the purpose itself being for the public benefit.

This is consistent with the earlier decision in ***R (ISC) v Charity Commission [2012] Ch 214***, where public benefit in the first sense (the purpose itself) was distinguished from public benefit in the second sense (the community to benefit).

These decisions can be criticised on the ground that the 'descriptions of purposes' specified in the **Charities Act 2011, s. 3(1)**, are necessarily for the public benefit in the first sense, so that the additional requirement of public benefit in **s. 2(1)(b)** refers only to the class to benefit (Jeffrey Hackney, 'Charities and public benefit' (2008) 124 LQR 347; Mary Synge, 'Poverty: an essential element in charity after all?' (2011) 70 CLJ 649).[6] Even if this criticism of the Upper Tribunal in ***A-G v Charity Commission*** is sound, however, the poor-relations cases might still be charitable as being for the 'indirect benefit' of the public, as earlier cases have suggested. It might therefore be that the Upper Tribunal arrived at the correct result but for the wrong reason.

[6] Public benefit is a key topic so investing time in some in-depth reading for the exam can be profitable.

p. 82 ↵ It can be concluded that Gina's trust for her poor relations is charitable.[7]

[7] Your conclusion appears correctly here at the end of part (a) rather than at the end of the whole answer.

Part (b)

As Gina's typescript has no literary merit, it is unlikely to be charitable for the advancement of education under the **Charities Act 2011, s. 3(1)(b)**, because under this category of charity the court will assess the merits of what is proposed: ***Re Pinion [1965] Ch 85, CA***. It might, however, be argued that the purpose is for the advancement of religion under **s. 3(1)(c)**. Publication of religious writings can be for the advancement of religion: ***Thornton v Howe (1862) 31 Beav 14*** and ***Re Watson [1973] 1 WLR 1472***.

In charity law, a religion can involve belief in one god (***Re South Place Ethical Society [1980] 1 WLR 1565***), in more than one god, or in no god at all: **Charities Act 2011, s. 3(2)(a)**. It must, however, still rank as a 'religion', which seems to involve more than a philosophical or ethical belief system and to require a belief in something transcendental. There are varieties of Pagan beliefs, so it would be necessary for Gina's typescript to be read to determine what beliefs it promotes. The Commission has also said that religion requires, as under the previous law (***Re South Place Ethical Society***), an element of 'worship'; so again this would need to be sought in the Pagan beliefs that Gina's typescript promotes. The purpose must not be immoral or adverse to the foundation of religion (***Thornton v Howe***) and must advance religion: ***Re Hetherington [1990] Ch 1***.

The public-benefit requirement under the **Charities Act 2011, s. 4**, would also have to be satisfied. This means that the persons to benefit must be a sufficient section of the community. Gina's bequest might not satisfy this, as her typescript advocates that Pagans should live apart, where practicable, from non-Pagans. In ***Gilmour v Coats [1949] AC 426***, a gift for the benefit of Carmelite nuns was held not charitable, because, as the nuns did not leave the convent, there was no public benefit. The House of Lords considered that the benefits to the public that the Catholic Church claimed—the value of intercessory prayer and spiritual edification—were not susceptible to judicial proof. But the public-benefit requirement is satisfied if masses for the soul of a deceased can be said in public (***Re Hetherington***), and even if the religious services are open only to members of the particular religion, the court recognises the indirect benefit to the public where the members mix with their fellow citizens in the world (***Neville Estates v Madden [1962] Ch 832*** at p. 853).

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↵ Apart from this, there could be a problem with Gina's bequest because the Charity Commission does not accept, merely because a purpose satisfies the criterion of being for 'the advancement of religion', that it is itself necessarily for the public benefit. Pointing to the **Charities Act 2011, s. 4(2)**, the Commission claims that the sub-section has reversed a previous presumption that the purposes listed in the first three heads of ***Pemsel's Case***, including the advancement of religion, were for the public benefit. The Commission considers that the statute has thereby reversed the effect of ***Thornton v Howe***, so that the Commission now requires evidence that the purpose will be carried out for the public benefit even if it falls within one of the 'descriptions of purposes' in **s. 3(1)**. Thus, the Charity Commission has said that, to be a religion for charity law, there has to be 'an identifiable positive beneficial, moral or ethical framework', and this was a reason for its declining to register the Gnostic Centre as a charity (***Gnostic Centre (2009)***, Charity Commission, paras 43–48); whereas it was satisfied that the Druid Network met this criterion: ***Druid Network (2010)*** (Charity Commission, paras 49–53). There is, however, no clear authority for the Commission's statement.

Nevertheless, the Upper Tribunal in ***A-G v Charity Commission (2012) 15 ITELR 521***, considering the charitable status of poor-employee cases and the like, stated that there is no longer any presumption that any religion, even an established religion such as the Church of England, is for the public benefit. These dicta, which were made in a case which did not itself involve religion, could undermine equity's traditionally tolerant attitude to religion (***Thornton v Howe***), and seem open to challenge. It is also

possible[8] that an attempt to assess the public benefit of different religions in order to determine charitable status could breach various articles of the **European Convention on Human Rights**, including **article 9** (freedom of religion).

[8] This last point in the answer is an 'extra marks' point. It adds to the word length of this exam answer but has been included to give you a practical demonstration of what an examiner would reward with a very high mark indeed.

More therefore needs to be known of Gina's writings to determine if they are charitable.

Looking For Extra Marks?

■ This answer in its discussion on public benefit and the public school litigation achieves a very high mark—knowledge of the debate on this issue gets you there.

■ The inclusion of a possible yet untested challenge (i.e. the reference in the last part to the **European Convention on Human Rights**) is an example of 'extra marks'. You would be doing fine without that section (it adds over 100 words to what would be a standard answer) but its inclusion in this context would guarantee you a first class mark for this answer.

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Question 3

a Consider how the cy-près doctrine has been extended by statute.

AND

b By his will made in 1975, Tommy gave his entire estate to his executors and trustees upon trust to use the same to build a hostel for the working people of Walkley. Tommy died last year. The value of his estate is insufficient to enable the hostel to be built. Tommy's next-of-kin are claiming his estate.

Discuss.

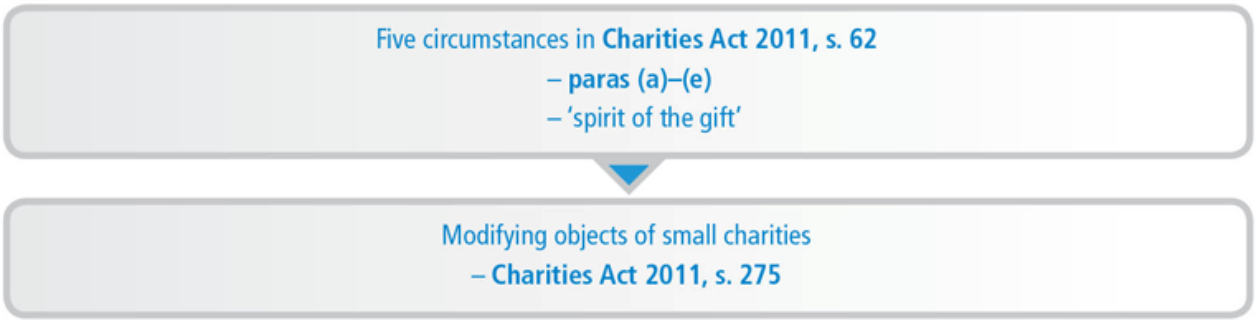
Caution!

■ Note that part (a) asks you to consider, not to describe. If you have the statutes in the examination room with you, there should be no problem with mere description, and clearly some description of the scope of the provisions is needed. The examiners, however, will be looking for more than a recitation of the statutory provisions. Avoid copying out the statutory provisions—that will not achieve many marks and is not to be recommended.

■ Part (b) demands that you consider the charitable status of the gift before going on to consider a possible application cy-près. Take each part in turn.

Diagram Answer Plan

Part (a)



Part (b)

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Suggested Answer

Part (a)

Section 62 of the Charities Act 2011 re-enacts a provision originally contained in the **Charities Act 1960** which extended the scope of the cy-près doctrine beyond cases of failure and surplus. The section specifies five circumstances in which the original purposes of a charitable gift can be altered. **Paragraphs 1(a)** and **(b)**[1] apply where the purposes have been fulfilled, or cannot be carried out, or where they provide a use for part only of the gift. **Paragraphs (e)(i)** and **(ii)** apply where the purposes have, since being laid down, been adequately provided for by other means, or have ceased to be charitable in law. This last provision might, for instance, be applicable if the courts were to hold the purposes of gun clubs (which can be charities under the principle in ***Re Stephens (1892) 8 TLR 792***) no longer charitable. Essentially, however, these paragraphs merely put pre-existing cy-près circumstances onto a statutory basis.

[1] Avoid copying out the statute beyond what is necessary to explain and consider it.

Paragraph (c), however, was an important extension of the doctrine. It enables property to be applied cy-près where it, and other property applicable for similar purposes, can be more effectively used in conjunction and made applicable to common purposes. Before the **Charities Act 1960,**[2] in the absence of failure or a surplus, neither the court nor the Charity Commissioners had power to alter the purposes ↵ of charities. Thus, whilst a scheme might facilitate the administration of several trusts for broadly similar charitable purposes, such scheme could not make any alteration to the specific purposes of each charitable trust: ***Re Faraker [1912] 2 Ch 488***. This would now be possible.

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[2] An 'extra marks' point showing your knowledge of how the statutes changed the old law.

Under **para. (d)**, cy-près is permissible where the original purposes were laid down by reference to an area which has since ceased to be a unit for some other purposes, or by reference to a class of persons or to an area which has since ceased to be suitable or practical. ***Peggs v Lamb [1994] Ch 172*** concerned a charitable trust for the freemen of Huntingdon, whose numbers had seriously declined. The court applied **para. (d)** in order to extend the class of persons who could benefit to everyone living in that borough.

Paragraph (e)(iii) applies where the original purposes have ceased 'in any other way' to provide a suitable and effective method of using the property. It was used in ***Varsani v Jesani [1999] 2 Ch 219, CA***, where there was a split over doctrinal matters amongst adherents of a charitable trust which had been set up to promote the faith of a particular Hindu sect. The Court of Appeal directed that the property be applied cy-près between the majority and minority groups.

All the paragraphs except **(b)** require reference to 'the spirit of the gift'. In ***Re Lepton's Charity [1972] Ch 276*** it was stated that this means the basic intention underlying the gift. In that case the court used **paras (a)(ii)** and **(e)(iii)** to authorise an increase, to allow for inflation, in the stipend payable to a minister out of the income of an eighteenth-century charitable trust. **Paragraphs (c)**, **(d)**, and **(e)(iii)** also require consideration to be given to the social and economic circumstance at the time of the proposed alteration: **Charities Act 2011, s. 62(2)(b)** (originally inserted by the **Charities Act 2006**).[3] It should also be noted that **s. 62(3)** apparently preserves the need for a general charitable intention where that was required before the Act, i.e. in cases of initial failure only. A general charitable intention is not therefore needed in any other cy-près circumstances in **s. 62**.

[3] Again an 'extra marks' point—as above.

Powers of trustees of small charities to modify their objects were first introduced in the Charities Act 1985 (since repealed) and were re-enacted and simplified in later Charities Acts.[4] **Section 275 of the Charities Act 2011** applies to an unincorporated charity if its gross income does not exceed £10,000, and if it does not hold any land held on trusts that state that it is to be used for the purposes of the charity: **s. 275(1)**. The trustees of such a charity may resolve to modify the trusts by replacing all or any of the charity's purposes with other charitable purposes: **s. 275(2)**, **(3)**. The trustees can do this only if it is expedient in the interests of the charity, and only, so far as reasonably practical, if the new purposes are similar to those ↵ replaced: **s. 275(4)**. The resolution must have at least a two-thirds majority, and the trustees must notify the Charity Commission, which can require public notice to be given and can request additional information or explanations: **s. 275(5)**, **(6)** and **s. 276**. Unless public notice is required or the Commission objects, the resolution takes effect after 60 days: **s. 277**.

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[4] More extra marks. This is detailed knowledge. Don't worry if you think you wouldn't have included it. You will still score well without it.

Part (b)

The specified purpose, a hostel for the working people,[5] may be a charitable purpose within category **(a)** of the statutory list in **s. 3(1) of the Charities Act 2011**, namely the prevention or relief of poverty. Poverty is not confined to destitution but includes simply going short. The trust may still be charitable for the relief of poverty if a poverty requirement can be inferred from the instrument—as occurred in ***Re Cottam [1955] 1 WLR 1299***—but not from extrinsic evidence alone: ***Re Drummond [1914] 2 Ch 90***. In ***Re Sanders' Will Trusts [1954] Ch 265***, a trust to provide dwellings for the working classes in Pembroke Dock was held not to be charitable: the judge did not consider the working classes were necessarily poor. By contrast, in ***Re Niyazi's Will Trusts [1978] 1 WLR 910***, Megarry V-C held that a trust to build a working men's hostel in Cyprus was charitable: the case was near the borderline, but the two expressions together contained just enough indication that the purpose was to relieve poverty. On this basis, the present trust is likely to be held charitable.

[5] Go straight into the application to the problem. You have only a small number of words (and time) to play with after the longish discussion in part (a).

If the trust is held to be charitable, the next issue is the insufficiency of the estate.[6] This ranks as a failure of the purpose, which is a cy-près circumstance within the **Charities Act 1993, s. 13**. Since the trust fails *ab initio*, however, the court must be satisfied that the testator had a general charitable intention, i.e. an intention to benefit a wider purpose than that specified: ***Biscoe v Jackson (1887) 35 ChD 460***. The issue is whether the testator intended the avowed purpose to be merely a means of

effecting a wider purpose: see ***Re Wilson [1913] 1 Ch 314*** and ***Re Lysaght [1966] 1 Ch 191***. Whether a general charitable intention is present is ascertained by construing the words used in the context of the instrument as a whole and in the light of admissible extrinsic evidence: ***Re Woodhams [1981] 1 WLR 493***. Generally, the more detailed the specified purpose, the more difficult it becomes to find the requisite intention: ***Re Good's Will Trusts [1950] 2 All ER 653***. On the other hand, the fact that a gift is one of residue (or of the testator's entire estate) may indicate a general charitable intention, since no specified amount is provided: cf. ***Re Goldschmidt [1957] 1 WLR 524***.

6 And here I start the second part of (b). You could use a sub-heading, e.g. 'the failure of purpose' or 'the application of cy-près'.

p. 88 ↵ If a general charitable intention is found, the property will be applied cy-près; if not, it will pass to Tommy's next-of-kin.

Looking For Extra Marks?

■ Detailed knowledge of the Act gets you extra marks (as demonstrated in the suggested answer to part (a)).

Question 4

a By his will made in 1990, Boris, who died last month, gave one-third of his residuary estate to each of the following institutions: the Rotherham Rabbit Sanctuary; the Dronfield Donkey Home; and the Broomhill Animal Hospital.

The Rotherham Rabbit Sanctuary was an incorporated charity, which closed last week. In accordance with a provision in its constitution, its members have decided to apply its assets to another charity, the South Yorkshire Rabbit Fund. The Dronfield Donkey Home was an unincorporated charitable association which ceased to exist a year before Boris's death because of lack of funds. No institution called the Broomhill Animal Hospital has ever existed.

Advise Boris's executors how they should deal with Boris's residuary estate.

AND

b

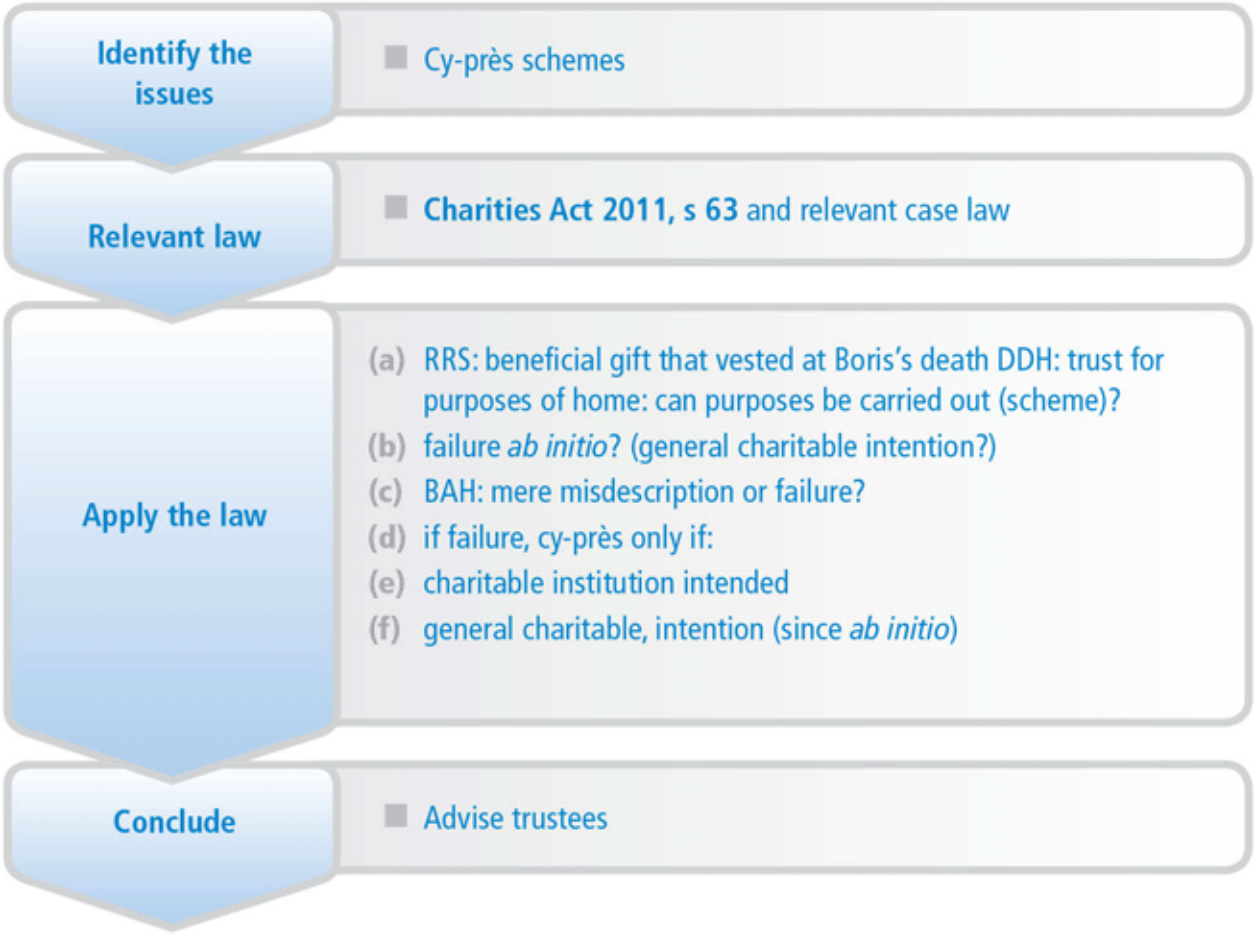
Earlier this year, the residents of the village of Eastwick decided to raise funds to build a cottage hospital. Money was raised for this purpose by means of street collections and the sale of raffle tickets. The appeal fund trustees also received a large number of cheques for various amounts. Unfortunately, the total sums raised proved insufficient to enable the hospital to be built.

Advise the trustees how they should deal with the funds raised.

Caution!

■ Note that in part (a), you are told that the first two named institutions were charities. So, don't waste time discussing whether these institutions are charitable—there will be no marks for that.

Diagram Answer Plan



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Suggested Answer

Part (a)

Rotherham Rabbit Sanctuary[1]

[1] Separate the gifts to each institution either by sub-headings or clearly spaced paragraphs.

A gift to an incorporated charity, such as the Rotherham Rabbit Sanctuary, will be construed as a gift to the particular institution beneficially, unless (which does not appear to be the case here) the words of the will indicate otherwise:[2] ***Re Vernon's Will Trusts [1972] Ch 300n***, applied ***Re ARMS (Multiple Sclerosis Research) Ltd [1997] 1 WLR 877***. Therefore, as the Sanctuary was in existence at Boris's death, the gift to it would have vested on his death, and will be applied in the same way as its existing assets: ***Re Slevin [1891] 2 Ch 230***. In ***Re Slevin*** itself, the court held that the legacy passed, with the charity's other assets, to the Crown, but this might be explained on the basis that the members of the charity had not made provision for the application of its assets to another similar charitable institution before its dissolution. In the problem, therefore, this share of Boris's residuary estate will pass to the Rotherham Rabbit Sanctuary.[3]

[2] This is an 'extra marks' point. Although it doesn't apply, it neatly combines a statement of law with an application to the problem thus showing knowledge and ability.

[3] Say where it will go.

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Dronfield Donkey Home

As the Dronfield Donkey Home ceased to exist before Boris's death, it might appear that the gift would lapse, in the same way that a gift by will to an individual generally lapses if the legatee predeceases the testator. The Home was, however, an unincorporated charitable association, and it has been held that a gift to such an institution is treated as being made upon trust for its purposes: ***Re Vernon's Will Trusts***. If, therefore, those purposes are still capable of being carried out, the gift will be applied to them. The failure of the particular institution, the Home, is regarded as a mere failure of the particular

machinery by which those purposes were to be carried into effect, not a failure of the purposes themselves. A scheme will therefore be needed; but as the purposes are the same, this is not a cy-près scheme, so no general charitable intention need be sought.

If the purposes of the Dronfield Donkey Home can no longer be carried out after its closure, however, there will be a failure of the purposes of the gift. As the institution closed before Boris's death, the failure will be failure *ab initio*. This share of residue can therefore be applied cy-près only if a general charitable intention can be found on Boris's part. A general charitable intention means an intention to benefit charity in a broader way than merely benefiting the particular named institution: ***Re Finger's Will Trusts [1972] Ch 286***. Where (as here) a specific institution has been named, the finding of a general charitable intention might be difficult (***Re Rymer [1895] 1 Ch 19***; ***Re Spence [1979] Ch 483***); but it is not impossible (***Re Finger's Will Trusts***). It is a matter of construction of Boris's will whether a general charitable intention can be found. The fact that the gift is one of residue is slight evidence that a general charitable intention might be present: ***Re Goldschmidt [1957] 1 WLR 524***; but contrast ***Kings v Bultitude [2010] 13 ITELR 391***. The fact that a gift is one of several to charity in the same will might also suggest a general charitable intention (***Re Satterthwaite's Will Trusts [1966] 1 WLR 277***); but whether this principle can be applied here depends upon whether the gift to the Broomhill Animal Hospital is charitable. If no general charitable intention can be found, this second share of residue will go (in the absence of any gift over) on resulting trust for Boris's next-of-kin.[4]

[4] And again.

Broomhill Animal Hospital

As no such institution by the name of the Broomhill Animal Hospital has ever existed, the court will first need to determine if Boris has merely misdescribed an existing institution which does exist: ***Bunting v Marriott (1854) 19 Beav 163***. If he has, that share of residue will simply pass to that institution (regardless of whether it is a charity or not). In the absence of mere misdescription, the gift will fail *ab initio* unless it can be applied cy-près. The cy-près doctrine is, however, available only to charitable gifts, and it is unclear whether Boris had a charitable institution in mind, or a non-charitable institution, such as an anti-vivisection society. In ***Re Jenkins's Will Trust [1966] Ch 249***, it was held that a gift to a non-existent anti-vivisection society was clearly not a charitable gift and so not applicable cy-près.

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In the problem, however, the name of the legatee does not necessarily suggest a non-charitable body, and is consistent with a charitable institution. In ***Re Satterthwaite's Will Trusts***, the court considered that the fact that the gift to a non-existent animal hospital was one of several made to charity in the will, indicated both that a charitable institution was intended and that the testator had a general charitable intention. In that case, therefore, the court applied the gift to the non-existent institution cy-près. If the court were able to take the same approach to the gift to the Broomhill Animal Hospital,

it too would be applicable cy-près. It has also been pointed out that if a gift is made to a non-existent charitable institution, it is easier to find a general charitable intention than if the gift is made to an institution which formerly existed but has closed down: ***Re Harwood [1936] Ch 285***. If the gift is found not to be to a charitable institution, or not to be made with a general charitable intention, this share of residue will pass (in the absence of a gift over) to Boris's next-of-kin.

Part (b)

The provision of a cottage hospital[5] is clearly a charitable purpose under **para. (d) of s. 3(1) of the Charities Act 2011**, namely the advancement of health.

[5] Sometimes examiners use terms which they are very familiar with but which you may not be. If in doubt—say what you think it is. E.g. 'as a hospital this would be charitable etc., etc.'

The insufficiency of the funds raised means that the charitable purpose has failed *ab initio*.[6] In such circumstances, equity itself does not permit an application cy-près unless the donors had a general charitable intention. Donors putting money in collecting boxes, however, might be presumed to be giving for a specific purpose and not with a general charitable intention. Thus, in ***Re Gillingham Bus Disaster Fund [1959] Ch 62*** anonymous contributions to a non-charitable fund were ordered to be held for such contributors on a resulting trust.

[6] Latin again—use it if you are comfortable with it—otherwise state it in English (no marks will be lost).

To avoid a similar outcome with failed charitable collections, the **Charities Act 2011, s. 63** (which re-enacts with amendments provisions originally contained in the Charities Act 1960) provides that, in certain circumstances, funds given to charity are applicable cy-près, i.e. to other charitable purposes similar to those for which the funds were raised. **Section 63** can apply only where (*inter alia*) the property belongs to donors who gave for specific charitable purposes which fail. It has been argued that the section has little impact on anonymous contributions, since these never belong to the donors: Wilson ↵ [1983] Conv 40. First, anonymous contributions may be treated as abandoned and so pass as *bona vacantia* to the Crown, which results in an application cy-près: see dicta in ***Re Ulverston [1956] Ch 622***. Secondly, they may be treated as having been given out and out: see dicta of Denning LJ in ***Re Hillier [1954] 1 WLR 700***. Out-and-out gifts might be considered to be made with the widest possible general charitable intention: see Sheridan and Delany, *The Cy-près Doctrine*, Sweet & Maxwell, 1959.[7]

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[7] An erudite reference! But then, there aren't many texts just on cy-près.

If, however, **s. 63** applies, some donations made by cheque may be applicable cy-près under **s. 63(1)**: first, where, after prescribed advertisements and inquiries, a donor cannot be identified or found; and, secondly, where a donor has executed a disclaimer in the prescribed form: **s. 63(1)**. Some of the remaining donors by cheque may have given such small amounts that it would be unreasonable to incur expense in returning their money. This is dealt with by **s. 64(2)**, which enables the court or the Charity Commission to treat property as belonging to unidentifiable donors where it would be unreasonable either:

(i) having regard to the amounts likely to be returned to the donors, to incur the expense of returning it; or

(ii) having regard to the nature, circumstances, and amount of the gifts, and the lapse of time since they were made, for the donors to expect them to be returned.

A donor who cannot be identified, but whose donation is applied cy-près other than by virtue of **s. 64**, must claim within six months of the making of the scheme, and the charity trustees are permitted to deduct properly incurred expenses from any repayment: **s. 63(4)**, **(5)**. This might enable the trustees to deal, for instance, with a large donation made by a donor who cannot be identified or found.

Under **s. 65**, special provision is made for the situation where a solicitation for funds was accompanied by a statement that the property given would, in the event of failure of purposes, be applicable cy-près as if given for charitable purposes generally, unless the donor made a declaration that he wished to be given the opportunity to request its return. If the donor made such a declaration at the time of making the gift, then, in the event of failure, the trustees must notify him and inquire whether he wishes it to be returned; and they must return it to him if he so requests within the prescribed period. If the trustees cannot find him, or if he does not request the return of the property, or if he did not make a declaration at the time he made the gift, then the property is applicable cy-près as if it belonged to a donor who had executed a disclaimer within **s. 64(1)**.

The street collections and the money raised by raffles will be dealt with by **s. 64(1)**. Thus the proceeds of cash collections made by means ↵ of collecting boxes and (*inter alia*) of any lottery (after allowing for prizes) are deemed (without advertisement or inquiry) to belong to unidentifiable donors. Such money will therefore be applicable cy-près.

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Looking For Extra Marks?

■ You could consider including an analysis of the statutory predecessor to the **Charities Act 2011, s. 63**. A good source for this would be the valuable article by Wilson [1983] Conv 40. There is also a general discussion of the impact of the section in Luxton, *The Law of Charities*, Oxford University Press, 2001, at pp. 583–594. Note that other sources of fundraising which a question such as this might require you to deal with are membership subscriptions and deeds of covenant.

Taking Things Further

■ Hackney, J., 'Charities and public benefit' (2008) 124 LQR 347.

An article that gives a broad discussion of the public-benefit agenda post ***Charities Act 2006***.

■ Luxton, P. and Evans, N., 'Cogent and cohesive? Two Charity Commission decisions on the advancement of religion' [2011] Conv 144.

This article discusses two key cases decided by the Charity Commission on the controversial area of charities for religious purposes.

■ Luxton, P., 'Opening Pandora's box' (2012) 15 Charity Law & Practice Review 27 (comment on ***ISC* v *Charity Commission* (2011)**).

A comment on the Independent Schools Case.

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