



Equity and Trusts Concentrate: Law Revision and Study Guide (8th edn)

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p. 75 6. Charitable trusts

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses charitable trusts. Charitable trusts differ from private trusts in a number of ways. A charitable trust must be: for a recognized charitable purpose; for the 'public benefit'; and for exclusively charitable purposes. The public benefit requirement raises different issues under each head of charity. Legislation related to charities and their regulation has recently been consolidated by the Charities Act 2011. *Cy-près* is a power which allows failing charitable trusts to be applied to other related charities.

Keywords: private trusts, charitable trusts, Charities Act 2011, *cy-près*, Charity Commission, public benefit requirement

Key facts

- Charitable trusts differ from private trusts in a number of ways.
- A charitable trust must be:
 1. for a recognized charitable purpose;
 2. for the 'public benefit'; and
 3. for exclusively charitable purposes.
- The public benefit requirement raises different issues under each head of charity.
- The **Charities Act 2006** reformed the law in this area.
- Legislation related to charities and their regulation was consolidated by the **Charities Act 2011**.

- *Cy-près* is a power which allows failing charitable trusts to be applied to other related charities.

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How is a charitable trust different from other types of trust?

The beneficiaries of the trust

In a private express trust, the beneficiaries hold the equitable interest in the property and can enforce the terms of the trusts against the trustees. Whereas a private trust will benefit certain *individuals*, a charitable trust is said to benefit the *public*, or some part of it. This is significant for two reasons:

- *Enforcement of the trust*: as there are no specific named beneficiaries in a charitable trust, who can enforce the terms of the trust? In general, if there is no one to enforce a trust, it will be void (see chapter 7). However, in the case of charitable trusts, this role is ultimately performed by the **Attorney-General**.
- *Certainty of objects*: generally, all trusts must satisfy the three certainties (see chapter 3). However, charitable trusts are exempt from the certainty of objects requirement: *Morice v Bishop of Durham* (1805).

The advantages of charitable status

The work of charities is highly valued in our society and, as a result, charitable trusts are accorded a number of advantages:

- *Tax advantages*: charitable trusts are exempt from a number of taxes, including income tax, corporation tax, and capital gains tax. This enables charities to retain more of their assets.
- *The rule against perpetuities*: in contrast to other trusts, property can be dedicated indefinitely to a charitable purpose (contrast this with the rule against inalienability in relation to private purpose trusts in chapter 7). By allowing charitable trusts to exist indefinitely, they can develop greater expertise and resources.

The role of the Charity Commission

The legal rules in relation to charitable trusts have been developed over the years primarily through the courts. However, our understanding of what is 'charitable' is constantly evolving and the courts are ill-suited to keep pace with these changes. For many years, therefore, charitable trusts have been regulated by the **Charity Commission**.

The Charity Commission does not create new legal rules: its decisions remain subject to the final say of the courts. However, the role of the Commission has become increasingly significant:

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- The Commission has over time recognized 'new' purposes which it considers analogous to existing legal principles. Many of these were given statutory recognition by the **Charities Act (CA) 2011**, for example the advancement of amateur sport.

- The Commission has a duty to provide guidance on the meaning of the public benefit requirement for charitable trusts (s 17 CA 2011) and trustees ‘must have regard’ to that advice (s 17(5)), meaning that the Commission’s view of the law has taken on an increased importance. (See, eg, the challenge to the Charity Commission guidance on the public benefit requirement for private schools in *Independent Schools Council and others v Charity Commission for England and Wales* [2011].)
- The Commission has a number of objectives, including to ensure public confidence in, and the accountability of, the charitable sector (s 14 CA 2011). While the Commission has regulatory powers to instigate inquiries into the activities of charities (s 46) and powers to both suspend (s 76) and remove trustees (s 79), there has been ongoing criticism of its effectiveness. See, for example, the report by the National Audit Office, *The Regulatory Effectiveness of the Charity Commission* (2013).

Revision tip

Problems with the charitable sector are increasingly in the news (eg KidsCompany, Oxfam, and the WWF). You can use the Charity Commission website (<http://www.gov.uk/government/organisations/charity-commission> <<http://www.gov.uk/government/organisations/charity-commission>>) to better understand the legal issues behind current events and bring a contemporary context to your understanding of this area.

What are the legal requirements of a valid charitable trust?

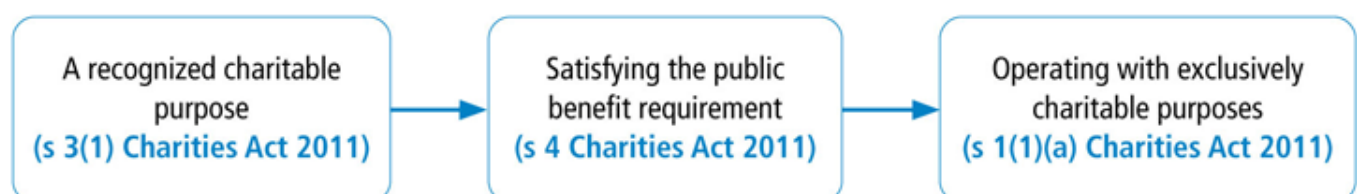


Figure 6.1 The requirements of a valid charitable trust

What are the recognized charitable purposes?

All charitable trusts must be for a recognized charitable purpose (see Figure 6.1). Charitable purposes were first defined in the Preamble to the **Statute of Charitable Uses 1601**. While this Act has long since been repealed, the Preamble was for many years retained as a foundation from which the definition of charitable purposes could be extended.

p. 78 ***The Pemsel heads of charity***

In *Commissioners for Special Purposes of Income Tax v Pemsel* [1891], four general heads of charity were identified: (i) the relief of poverty; (ii) the advancement of education; (iii) the advancement of religion; and (iv) other purposes beneficial to the community. The fourth category was designed to include analogous charitable purposes which did not fit easily into the other headings, for example:

***Scottish Burial Reform and Cremation Society Ltd v Glasgow Corp*
[1968] AC 138**

A trust supporting the maintenance of crematoria was upheld as charitable under the fourth heading because the maintenance of crematoria was analogous to the ‘repair of churches’, which is expressly mentioned in the 1601 Preamble.

Section 3 of the Charities Act 2011

The **Charities Act 2006** updated the *Pemsel* categories to reflect both advances in the law and current Charity Commission practice.

Legislation relating to charities and their administration was consolidated by the **Charities Act 2011** and the new heads of charity can now be found in s 3 **Charities Act 2011**. **Section 3(1)(a)–(c) CA 2011** preserve the first three *Pemsel* categories. The remaining categories (d)–(m) mainly comprise purposes previously recognized as ‘other purposes beneficial to the community’ and analogous purposes recognized over the years by the Charity Commission. These heads are discussed in detail in the following sections.

Note: all statutory references in this chapter are to the **Charities Act 2011**, unless specified otherwise.

The trust must be for the public benefit

The general rule is that the charitable trust must be of benefit to the public or to some section of the public: *Re Scarisbrick* [1951]. The public benefit requirement plays an important role in ensuring that only genuinely charitable trusts are recognized.

The public benefit requirement was carefully considered in *Independent Schools Council and others v Charity Commission for England and Wales* [2011] and *Attorney-General v Charity Commission for England and Wales and others* [2012]:

- Public benefit must be understood in two senses:
 - public benefit in the first sense: the *nature* of the purpose addressed by the charity must be a benefit to the community;

- public benefit in the second sense: those to benefit from the charity's work must be sufficiently numerous to constitute a section of the public rather than a private class of individuals.

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↩ As an aspect of this understanding of public benefit, any institution which entirely excludes the poor from its activities will not be of public benefit in the second sense. For example, a cancer hospice for millionaires may be of public benefit in the first sense as it helps care for the ill, but it will not satisfy the public benefit requirement in its second sense as it excludes the poor from its activities.

- What constitutes public benefit will vary for each charitable purpose and will depend on the context of each case.

This point is important as it relates to changes to the public benefit requirement brought about by the **Charities Act 2011**. Prior to this reform, it was said that charities for the relief of poverty, advancement of education, and advancement of religion (the first three heads of charity identified in *Pemsel [1891]*) were 'presumed' to be of public benefit. However, s 4(2) CA 2011 removes this presumption with the effect that all purposes must be capable of demonstrating that they are of public benefit.

Looking for extra marks?

The effect of the **Charities Act 2011** on the public benefit requirement has been hotly debated, making it an interesting topic for analysis and critique. The judgments in *Independent Schools Council and others v Charity Commission for England and Wales [2011]* and *Attorney-General v Charity Commission for England and Wales and others [2012]* are lengthy but thorough in their analysis of the public benefit requirement, and there is much to be gained from reading these cases in full.

The trust must have exclusively charitable purposes

If a trust is to benefit from the advantages of charitable status, it must operate for exclusively charitable purposes.

The construction of the gift

The wording must make it clear that a gift or trust is made for charitable purposes (see Table 6.1).

Table 6.1 Examples of wording indicating that a trust is or is not for exclusively charitable purposes

| CASE | WORDING | EXCLUSIVELY CHARITABLE? |
|--|---------------------------|--|
| <i>Re Atkinson's Will Trust [1978]</i> | A gift to 'worthy causes' | No: 'worthy causes' could not be said to be limited to exclusively charitable purposes |

| CASE | WORDING | EXCLUSIVELY CHARITABLE? |
|--------------------------|--|--|
| <i>Re Best [1904]</i> | A gift for 'charitable <i>and</i> benevolent' purposes | Yes: the word 'and' allows the court to interpret the second word as being included within the meaning of 'charitable' |
| <i>Re Macduff [1896]</i> | A gift for 'charitable <i>or</i> other' purposes | No: the use of 'or' implies that the other purposes will be something <i>other than</i> charitable |

p. 80 Ancillary non-charitable purposes

Section 1(1)(a) Charities Act 2011 defines a 'charity' as one which 'is established for charitable purposes *only*' (emphasis added). However, it will not be fatal if the trust also carries out *incidental* non-charitable purposes. Whether a non-charitable purpose is ancillary to the main purpose of the trust is a question of fact and a matter of degree, depending on the circumstances of each case: *Attorney-General v Ross [1986]*. A non-charitable purpose which is linked to the overall charitable aims of a trust will be more likely to be acceptable: *Re Coxen [1948]*. However, the more resources or time a charitable trust spends on non-charitable purposes, the less likely it will be held to be merely ancillary.

Revision tip

Examiners often include this issue in problem questions as it is a good way to test whether students are paying attention to the facts of the question. Remember to think about all three requirements when answering a question on charitable trusts.

The heads of charity under the Charities Act 2011

This section considers how the basic principles discussed earlier have been applied under the different heads of charity.

Section 3(1)(a): charities for the relief or prevention of poverty

Defining 'poverty'

Poverty is defined relatively and has a wider meaning than destitution—it includes those who might be said to 'go short': *Re Coulthurst [1951]*. It is important to analyse each situation carefully to determine whether the trust is truly aimed at the relief of poverty. Compare the following cases.

***Re Sanders* [1954] Ch 265**

A gift to provide housing for the 'working classes' of Pembroke Dock was held not to be for the relief of poverty. Although the 'working classes' may have relatively low incomes, this did not mean that they could not afford housing. The use of the phrase 'working classes' did not sufficiently restrict the gift to a class of the poor.

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***Re Niyazi's Will Trusts* [1973] 3 All ER 785**

A gift to build a working men's hostel in Cyprus was upheld as a trust for the relief of poverty. This case is different from *Re Sanders* because it involved building a hostel. The court believed that such temporary accommodation would only be used by those whose income meant that they could not afford more permanent housing, thus sufficiently restricting the gift to poor working men.

The prevention of poverty

Section 3(1)(a) Charities Act 2011 expanded the *Pemsel* definition to include the 'prevention and relief of poverty'. This addition would include, for example, charities providing financial or debt management advice.

The public benefit requirement

The public benefit requirement for such charities is more relaxed than for the other heads. This is because of the value the courts have traditionally attached to the relief of poverty.

This viewpoint is confirmed in the following case:

***Attorney-General v Charity Commission for England and Wales and others* [2012] WTLR 977**

The Attorney-General asked the Upper Tribunal to provide guidance on whether the **Charities Act 2006** had impacted upon the public benefit requirement for charities which seek to relieve the poverty of a narrow class of potential objects, such as relatives or those employed by the same employer. The Upper Tribunal confirmed that the existing generous approach to public benefit in respect of this head of charity was correct. Such charities *need only satisfy the requirement of public benefit in its first sense*, ie that the purpose pursued by the organization is beneficial in nature to the community (see **paras 63–8**). As relieving poverty is clearly beneficial to the entire community, the

public benefit requirement will still be satisfied even if the purpose might otherwise fail to satisfy public benefit *in the second sense* by being focused upon a narrow class of objects, such as relatives or those connected by a common employment relationship.

An example of one such charitable purpose can be seen in *Re Scarisbrick [1951]*, in which a charity for ‘needy relations’ of the settlor’s children was upheld.

Dingle v Turner [1972] AC 601

A charity to pay pensions to poor *employees* was upheld. The House of Lords emphasized the distinction between a charitable trust and a private trust. The key issue is the primary intention of the settlor. If the gift aims to relieve poverty among a particular *description* of poor people, it will be charitable. However, if it was merely a gift to particular poor people with the intention of relieving poverty, it will be a private trust.

However, this generous approach to public benefit has resulted in some dubious decisions.

Re Segelman [1996] Ch 171

A trust for ‘poor and needy’ relations was upheld as valid even though the class to benefit comprised only 26 people. The trust was upheld only because the trust also included the relatives’ future children.

p. 82 ↩ While the narrow class in *Re Segelman [1996]* has often been thought of as borderline, the reasoning in *Attorney-General v Charity Commission for England and Wales and others [2012]* confirms the continuing acceptability of such targeted purposes. It now seems clear that as long as a purpose to relieve poverty can be shown to benefit the community in the first sense, it will not matter if the class of potential objects is poor relatives or employees.

Exclusively charitable purposes

Charities that relieve poverty must still have exclusively charitable purposes. In *Re Gwyon [1930]*, a trust to provide knickers for boys who lived in Fareham was held not to be charitable because it did not exclude boys who were not poor.

Section 3(1)(b): charities for the advancement of education

Defining ‘education’

In *IRC v McMullen* [1981], Lord Hailsham defined education as ‘the picture of a balanced and systematic process of instruction, training and practice containing ... spiritual, moral, mental and physical elements’. It is clear that education can encompass schools, universities, and a wide variety of other purposes (see Table 6.2).

Research

Research can be a valid educational purpose. However, the research must be of benefit to the public in some way.

Re Besterman’s Will Trusts, 21 January 1980, unreported

Slade J argued that a trust for research will be charitable if:

- the subject matter of the proposed research is a useful subject of study; and
- it is contemplated that knowledge acquired as a result of the research will be disseminated to others.

Table 6.2 Case examples of educational charitable purposes

| CASE | EDUCATIONAL PURPOSE |
|---|--|
| <i>Re British School of Egyptology</i> [1954] | Promoting the study of Egyptology |
| <i>Re Lopes</i> [1931] | London Zoo |
| <i>Re Dupree</i> [1945] | A chess tournament for young people |
| <i>Incorporated Council for Law Reporting v Attorney-General</i> [1972] | Production of the Law Reports |
| <i>Re Hopkins</i> [1965] | Research into the contested authorship of some of Shakespeare’s plays |
| <i>IRC v McMullen</i> [1981] | The promotion of football for <i>young people</i> in schools and universities. |

↩ The court will also assess the merit of the research. For example, in *Re Shaw’s WT* [1957], a trust to create a new 40-letter alphabet was rejected because it did not add anything useful to the sum of knowledge.

Note: research may also be a valid charitable purpose under s 3(1)(d), and s 3(1)(f) CA 2011 (discussed later).

The public benefit requirement

The case of *Independent Schools Council and others v Charity Commission for England and Wales [2011]* set out the two senses of public benefit that educational purposes must satisfy:

- Public benefit in the first sense: the *nature* of the purpose addressed by the charity must be a benefit to the community. It was observed that this will be readily satisfied as improving education is beneficial to the community as a whole, regardless of which group benefits. However, the clever example given of a school for pickpockets demonstrates how education may not always benefit the community!
- Public benefit in the second sense: those to benefit from the charity's work must be sufficiently numerous to constitute a section of the public or community rather than a private class of individuals.

Section of the community?

Oppenheim v Tobacco Securities Trust Co [1951] AC 297

A trust to help pay for the education of the children of employees and ex-employees of British-American Tobacco was held *not* to be charitable. Even though the company employed more than 110,000 people, the majority of the House of Lords confirmed that there are two sections of the community which are not wide enough to satisfy the public benefit requirement:

- where membership is determined by a *personal nexus* with the donor—for example, family or other relations; and
- where membership is based on contract—for example, a contract of employment.

As this benefit was supplied by virtue of their employment, the trust did not benefit either the community or a section of it.

In *Oppenheim*, Lord MacDermott delivered a strong dissent in which he argued that the majority's approach takes no account of how much public benefit will be generated by a trust. While a trust which could benefit thousands is rendered invalid because of the group's nexus with the settlor, a trust for the education of children living in a village of 100 would satisfy the public benefit requirement.

A 'section of the community' is often contrasted with a 'private class of fluctuating individuals'. The former implies an impersonal connection suggesting a benefit to the public, while the latter group of persons are personally connected, indicating a private benefit only. However, in *Dingle v Turner [1972]*, Lord Cross (*obiter*)

argued that while the employees of a small firm might rightly be identified as a private class of fluctuating individuals, it is difficult to say the same of a company employing thousands of workers, many of whom will be entirely unknown to one another.

The main thrust of these arguments is that the current approach is artificial and may exclude trusts which ought to be recognized as charitable. Lord Cross argued that while the number which would benefit was significant, ultimately the court should examine the purpose of the trust to assess whether, on its true construction, it is intended to advance education or whether it is a 'fringe benefit' that the taxpayer should not be expected to subsidize.

Looking for extra marks?

While the majority approach in *Oppenheim* helps to distinguish charitable and private trusts, it remains open to criticism. Read the judgments in *Oppenheim* and Lord Cross's judgment in *Dingle v Turner*. These will help you to assess the strengths and weaknesses of the majority approach in *Oppenheim* and demonstrate a more critical appreciation of the law.

Exclusively charitable purposes

Preferences

Despite the strong line taken in *Oppenheim* against personal connections, there is some authority that a preference for a private class may be allowed. It is not permitted to give an absolute priority to a private class (*Caffoor v Income Tax Commissioner [1961]*)—for example, 'claims by members of my family must be satisfied first'—as this puts the public in second place to a private class and therefore cannot be said to be charitable. However, a *preference* for a private class may be acceptable.

Re Koettgen [1954] Ch 252

A trust for the education of British-born people with a preference for a private class (employees of a company and their families) succeeded. In this case, the testatrix stated that no more than 75 per cent of the trust income was to be applied in any given year to the private class. Upjohn J upheld this trust because it was open to everyone; it was only at the selection stage that the preference took effect. The fact that the trustees did not always apply the full 75 per cent to the private class was also significant.

This decision was criticized in *IRC v Educational Grants Association Ltd [1967]*, where it was argued that a trust cannot be charitable merely because it is *potentially* for the public benefit. Instead, it can only be said to be charitable when it is operated for the public benefit. It could be argued that as long as a trust operates for primarily charitable purposes, an ancillary non-charitable purpose should be permissible. However, there are two objections to this argument:

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- Ancillary non-charitable purposes are generally more acceptable where they help to further legitimate charitable purposes; allowing a preference for a private class can only be said to accomplish this if one argues that without allowing the preference, there would be no charitable trust in the first place. However, this argument makes charity hostage to a testator's more selfish impulses.
- Is a preference which allows up to *three-quarters* of its income to be used for the benefit of a private class truly an *ancillary* purpose, merely because the trustees had not used the preference to its full extent? A charitable trust should be defined by its operation for the public benefit and not merely its *potential* to do so.

Section 3(1)(c): charities for the advancement of religion

Defining 'religion'

Originally the courts were quicker to recognize different forms of Christianity as religions. However, the modern approach has been more open, and all the major world religions have now been recognized:

- The law adopts a *neutral stance* between different religions but assumes that some religion is better than none: *Neville Estates v Madden [1962]*.

Thornton v Howe (1862) 31 Beav 14

A gift to promote the religious beliefs of Joanna Southcote, who claimed that she would give birth to the new Messiah, was upheld as charitable—it did not matter if the court believed the religion to be foolish or even devoid of foundation. However, the court will not recognize a religion whose tenets are subversive of all morality.

- The court will not discriminate against religions with only a small number of followers: *Funnell v Stewart [1996]*.

While these cases discuss what will *not* be taken into account when deciding what constitutes a religion, the question of what characterizes a religion has been less satisfactorily answered.

***Re South Place Ethical Society* [1980] 1 WLR 1565**

The court had to decide whether an organization whose aims were the study and dissemination of ethical principles and the cultivation of a rational religious sentiment was charitable. Its members were agnostics—ie they neither affirmed nor denied the existence of a higher power.

Dillon J distinguished ethical and religious beliefs: the former concerned man's relationship to man while the latter concerned man's relationship to God. He commented (*obiter*) that religion involved two elements:

- faith in a god; and
- worship of that god.

While the court accepted that this was a charity for the advancement of *education*, it rejected the idea that it was a religion as it lacked these two elements.

p. 86 ↩ The problem with this definition is that not all faiths, recognized as religions, meet these requirements. Some religions, such as Buddhism, are atheistic—ie they do not require belief in any higher being. Other religions may not involve any form of deity worship at all.

A statutory definition of 'religion'

However, this problem has been addressed by s 3(2)(a) **Charities Act 2011**, which provides:

'religion' includes—

- (i) a religion which involves belief in more than one god, and
- (ii) a religion which does not involve belief in a god.

This section confirms that both *polytheistic* religions—ie religions involving the worship of many gods, such as many forms of Hinduism—and *non-theistic* religions—ie those which do not believe in any deity, such as Buddhism—are included within the definition of religion. By dispensing with the need for a godlike figure, the range of beliefs which may qualify as religious is likely to be broadened. However, in order to be charitable, a 'religion' must still involve some form of worship.

The meaning of worship was considered, albeit in a different context, by the Supreme Court in *R (on the application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2014]. In accepting that a church of the Church of Scientology was a place of religious worship in which marriage ceremonies could be performed, Lord Toulson argued that 'worship' must include religious rites and services broader than the more traditional theistic notions of worshipping a particular deity or god-like figure.

Looking for extra marks?

It can be confusing to understand when a non-theistic order would be considered a religion. As the Charity Commission determines whether an organization can be registered as a charity for the advancement of religion, it often has to engage with this question and the current law. Read and contrast the Charity Commission decisions on why the Druid Network could be registered as a charity for the advancement of religion while the Temple of the Jedi Order could not.

See: <http://www.gov.uk/government/publications/druid-network> <<http://www.gov.uk/government/publications/druid-network>> and <http://www.gov.uk/government/publications/the-temple-of-the-jedi-order> <<http://www.gov.uk/government/publications/the-temple-of-the-jedi-order>>.

The public benefit requirement

The public benefit is satisfied if the public has access to the benefits of the religion.

***Gilmour v Coats* [1949] AC 426**

A trust for an order of cloistered nuns was held *not* to be charitable because the public had no access to the nuns and therefore could not be said to benefit. An argument that the public would benefit from the nuns' prayers on their behalf was rejected as too vague and intangible.

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***Re Hetherington* [1990] Ch 1**

A trust for the saying of masses for *family members* was held to have public benefit because they were performed in *public* and would have an 'edifying and improving effect' upon those in attendance.

Note: trusts for the performance of purely *private* masses or ceremonies will not be charitable. However, they may be valid as a private purpose trust: *Re Caus* [1934] (see chapter 7 for more detail).

Looking for extra marks?

In January 2014, following a very public dispute, the Charity Commission finally agreed to register the Preston Down Trust (PDT) as a charity. The PDT represents a Plymouth Brethren Christian Church Meeting Hall in Devon. The Charity Commission had been concerned that the practices of the Plymouth Brethren did not satisfy the public benefit requirement, in particular because of the limited extent to which they engaged with wider society. However, after discussions with the Charity Commission, the PDT revised its trust deed in order to address those concerns and its new application was accepted. This decision illustrates the important role the Charity Commission plays in working with organizations to enable them to register as charities. However, the reasoning also questions the status of longstanding decisions, such as *Thornton v Howe* (1862), suggesting that the non-judgmental attitude to religions set out in that case was founded on the presumption of public benefit that has since been removed by s 4(2) CA 2011. As trustees are obliged to have regard to Charity Commission guidance, its view can have a significant impact on how the law develops. Reading the full decision will provide insight into how the Charity Commission applies the public benefit requirement, how it balances benefits and detriments in that process, and its own views on the impact of s 4(2).

See www.gov.uk/government/publications/preston-down-trust <<http://www.gov.uk/government/publications/preston-down-trust>>.

Section 3(1)(d)–(m): the other heads of charity

This section will examine a sample of charitable purposes under s 3(1)(d)–(m) in order to highlight some of the interesting issues that can arise when considering whether a trust is charitable.

Note: each purpose under these heads must be of public benefit in its first sense. In addition, the test for public benefit in its second sense is that set out in *Oppenheim*, ie the class of potential objects should not be restricted by family relationship or a common employer.

Revision tip

Examiners often come up with unusual purposes to test students' ability to identify which head of charity will be relevant. Read the Charity Commission Guidance on Charitable Purposes, which provides practical examples of the sorts of activities covered by each head (see <http://www.gov.uk/government/publications/charitable-purposes/charitable-purposes> <<http://www.gov.uk/government/publications/charitable-purposes/charitable-purposes>>).

Section 3(1)(d): the advancement of health or the saving of lives

A wide variety of purposes is included under this head, including hospitals, medical research, the provision of housing for medical staff, and the creation of cycle paths.

Private medical care

Charities are allowed to charge for their services. However, the charity should not be profit-making, ie any profits should be used to further the charity's purposes. Therefore, a trust to support a private hospital can be charitable.

***Re Resch* [1969] 1 AC 514**

A bequest to a private hospital was upheld as charitable. It was not fatal that the beneficiaries were not poor—even though it might be difficult for the poor to afford treatment, they were not excluded.

The public benefit requirement was satisfied as there was clearly a need for such facilities and medical treatment within the community. Lord Wilberforce also argued that the court could take into account indirect benefits. In this case, private medical care freed up hospital beds in the public sector.

Looking for extra marks?

The continuing charitable status of private education and hospitals was hotly contested during the passage of the Charity Bill 2004 through Parliament. While the decisions of *Independent Schools Council and others v Charity Commission for England and Wales* [2011] and *Attorney-General v Charity Commission for England and Wales and others* [2012] confirm that the Charities Act 2006 does not invalidate trusts for such organizations, private education, and hospitals raise significant questions about the acceptable levels of public benefit required for charitable status. A useful discussion of these issues can be found in Peter Luxton, 'Public Benefit and Charities: The Impact of the Charities Act 2006' in Dixon and Griffiths (eds), *Contemporary Perspectives on Property, Equity and Trust Law* (2007), p 181.

Section 3(1)(f): the advancement of the arts, culture, heritage, or science

Examples of purposes under this head include a trust to promote the performance of choral works (*Royal Choral Society v IRC* [1943]), the preservation of sites of historical interest, and scientific research. Charitable purposes must have merit and the courts will often use expert evidence to help determine this. In *Re Pinion* [1965], a trust to preserve the settlor's collection of *objets d'art* was rejected on the basis that it was a 'mass of

p. 89 junk! This purpose may be analysed as satisfying public benefit in its *second sense* (as it would be open to the public as a whole) but failing to satisfy public benefit in its *first sense* (as the court doubted that the collection would benefit the community).

Section 3(1)(g): the advancement of amateur sport

This head of charity gives statutory recognition to the decisions of the Charity Commission, which, for some time, had permitted such charities on the basis of the physical and mental benefits to the community:

- This head relates to *amateur* sports; the support of professional sports is not charitable.
- Sport is defined widely to include both physical activities (eg netball) or those involving mental exertion (eg chess): s 3(2)(d).
- Such trusts do not have to address some lack among the intended beneficiaries (contrast recreational charities under s 5 CA 2011, discussed later).

Section 3(1)(h): the promotion of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony, or equality and diversity

While the wording clearly indicates the types of purposes intended here, it is important that you understand the law's approach to 'political trusts'—a political trust cannot be a valid charitable trust: *McGovern v Attorney-General [1982]*. Note: this restriction applies to *all* heads of charity. There are two reasons for this:

- It is difficult for the courts to ascertain whether a political objective will be for the public benefit.
- As the ultimate administrator of trusts, it would be inappropriate for the courts or the Attorney-General to advocate political changes which may conflict with government policy.

Defining 'political purposes'

McGovern v Attorney-General [1982] sets out a non-exhaustive list of political purposes:

- purposes supporting the interests of a particular political party (eg *Re Hopkinson [1949]*);
- purposes which seek to change the law of this or foreign countries (eg *National Anti-Vivisection Society v IRC [1948]*) (cf *Human Dignity Trust v Charity Commission for England and Wales [2014]* which held that the financial support of litigation that asked whether legislation offended against recognized human rights was not political as it did not seek change, only clarification of the status of particular laws);
- purposes which seek to change government policy or the decisions of governmental authorities, in the United Kingdom or elsewhere.

p. 90 ↪ Compare the following cases:

***Southwood v Attorney-General* [2000] WL 877698**

PRODEM, an organization which aimed to educate the public on the evils of war and advocated disarmament, was held not to be charitable. While the court did not object to the promotion of peace as an object, PRODEM was denied charitable status because its central purpose was not to encourage discussion of how peace might be achieved, but to act directly to bring about a specific change in government policy.

***Attorney-General v Ross* [1986] 1 WLR 252**

It was held that the funds of a student union were held on charitable trust. The payment of money to the NUS, a non-charitable organization, was merely ancillary to the acceptable aim of representing the student body.

The Charity Commission provides further guidance on the extent to which charities can engage in political activities in 'CC9: Campaigning and Political Activities by Charities' (see <https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9> <<https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9>>) (see Figure 6.2):

- A trust with directly political purposes cannot be charitable.
- However, a trust which engages in political activities as a way of furthering its charitable purposes is more likely to be acceptable.

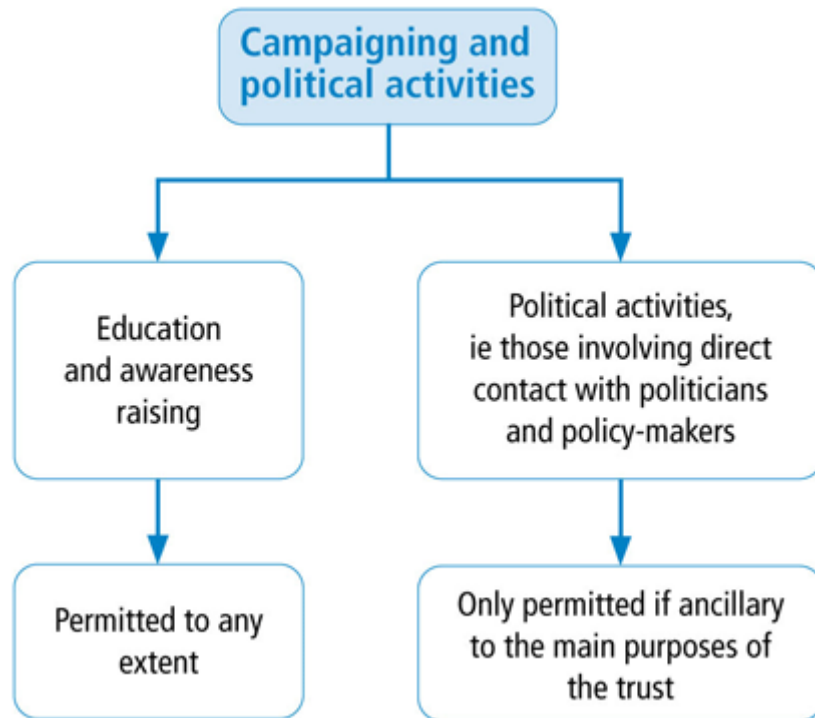


Figure 6.2 Acceptable political activities

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Section 3(1)(i): the advancement of environmental protection or improvement

This heading includes purposes such as the promotion of recycling, conservation efforts, or the preservation of land of particular scientific interest. Supporting expert evidence may be required to help decide whether such trusts are in the public benefit; for example, in deciding whether a trust to preserve badger habitats is charitable, the public benefit in preservation will have to be weighed against the argument that badgers are responsible for spreading disease to livestock.

Section 3(1)(j): the relief of those in need by reason of youth, age, ill-health, disability, financial hardship, or other disadvantage

Examples of valid purposes under this head include charities providing meals on wheels for the elderly, and homeless shelters.

- The trust must address a need of the identified beneficiaries and not just provide a benefit: *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983].
- Providing for non-essential or luxury items is not permitted: *Re Cole* [1958].

EXAMPLE 1

Compare the following two purposes:

1. £100,000 to improve the range of books in Braille for the blind.
2. £100,000 to provide housing for the blind.

The first purpose would be valid as it addresses a need of the blind. The second purpose would be unlikely to be valid as housing does not address a need of this group *as blind people*. If the second purpose provided the money to help provide housing specially adapted for the blind, this *would* have addressed a need. However, the blind cannot be said to *need* the provision of housing *because* they are blind.

Section 3(1)(k): the advancement of animal welfare

Animal welfare charities provide a good example of *indirect* public benefit. *Re Wedgewood [1915]* emphasized their value in *enhancing public morality and making us better people*. There is some authority which supports the idea that the public must have access to charities for animal welfare: *Re Grove-Grady [1929]*. However, it is arguable that the public can benefit by more restricted access, remote viewing, educational facilities, or contribution to science.

Revision tip

It is important to remember that charities under this head are for the welfare of animals or certain types of animals *generally*. If you are presented with a scenario involving a gift for the welfare of *specific* animals, such as the settlor's pet cat, this will not be charitable, but may be a private purpose trust, subject to the usual perpetuity rules—see chapter 7.

Section 3(1)(m) includes 'any other purposes ...'

Section 3(1)(m):

- acts as a residual head of charity and contains purposes which do not fit neatly into the other heads and charitable purposes under s 5 (s 3(1)(m)(i)); and
- performs the same role as the fourth head of *Pemsel*—'other purposes beneficial to the community'—by allowing new purposes to be developed by way of analogy with other existing or new purposes (s 3(1)(m)(ii)–(iii)).

Section 5: recreational and similar trusts

Section 5 CA 2011 incorporates the provisions of the **Recreational Charities Act 1958**. This Act had been passed in order to preserve the charitable status of a number of bodies long-recognized as charitable, such as the Women's Institute and village halls, following the House of Lords' decision in *IRC v Baddeley [1955]* that recreational purposes were not charitable.

Section 5 sets out the conditions under which bodies that provide or support the provision of recreational or leisure activities may be considered charitable (see Figure 6.3).

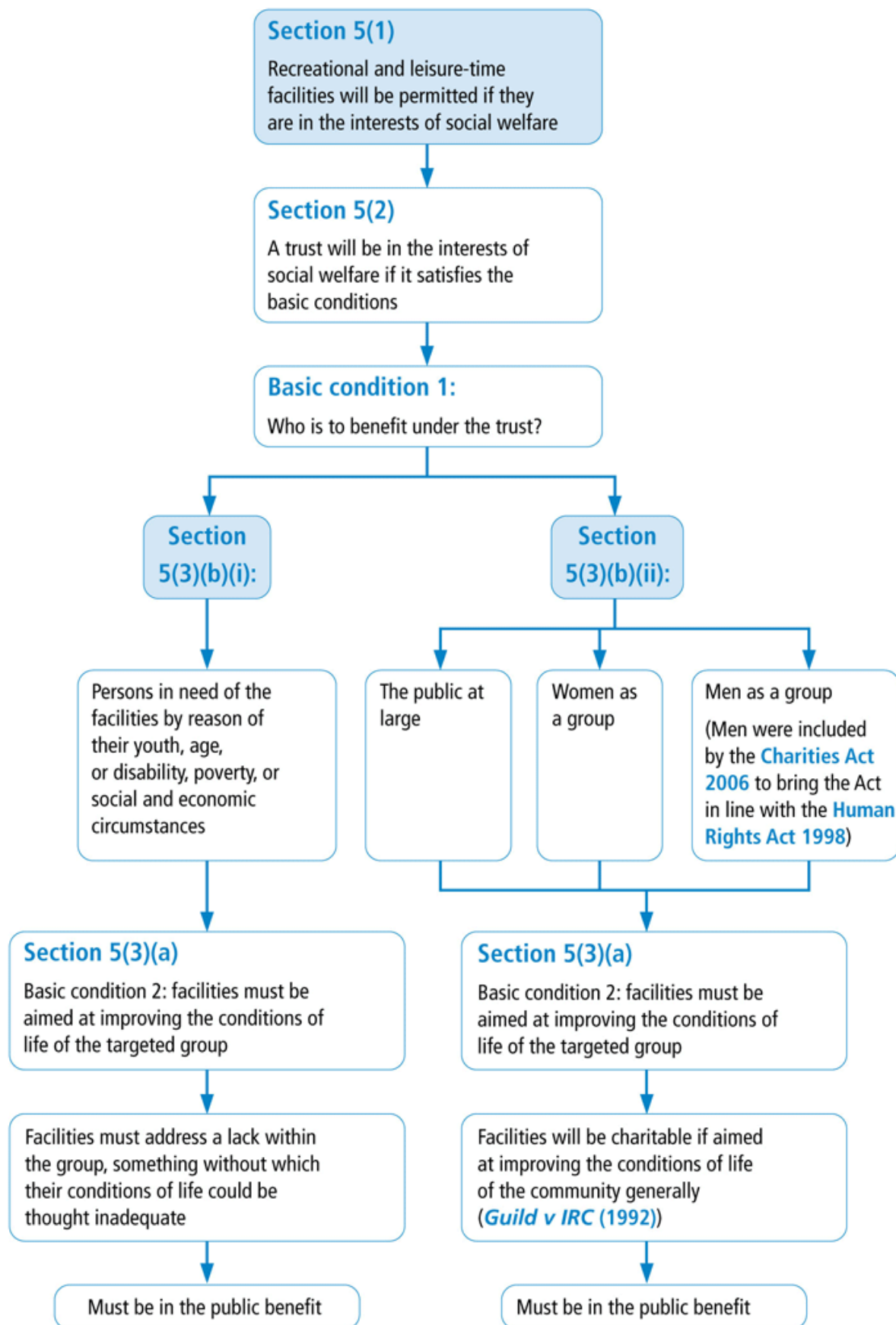


Figure 6.3 The operation of s 5 Charities Act 2011 (recreational charities)

Cy-près

Cy-près literally means ‘near there’. It is a doctrine which deals with the situation where a charitable gift cannot be applied to the purposes intended by the settlor. It works by allowing the purposes of the gift to be *varied* so that the property can be applied to a related charitable purpose. In effect, *cy-près* saves the gift from failing and returning on resulting trust to the testator’s estate or being given to the Crown.

Section 62 CA 2011 lists the circumstances in which *cy-près* can be used. These include situations where it is impossible, impracticable, illegal, or inefficient to carry out the purposes of the trust.

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Revision tip

In an exam, you are most likely to encounter *cy-près* in a context where it has become impossible to carry out the purposes of the trust. This is usually quite easy to spot: look for facts mentioning the closure of a charity or its facilities. But remember, *cy-près* can only be used in respect of charitable trusts. It cannot be used to ‘save’ a gift that is not charitable in the first place.

Types of failure

Cy-près can intervene when a charitable trust is failing. There are two different types of failure:

- initial failure;
- subsequent failure.

Initial failure

Initial failure occurs when the purposes of the gift fail *before* the gift has taken effect (see Figure 6.4).

In cases of initial failure, the gift will lapse and return on resulting trust to the testator’s estate unless it can be saved by *cy-près*. *Cy-près* can only be used if the court can find a general charitable intention on the part of the testator. The court, in effect, has to determine whether the testator would have wished the gift to be applied to another related purpose.

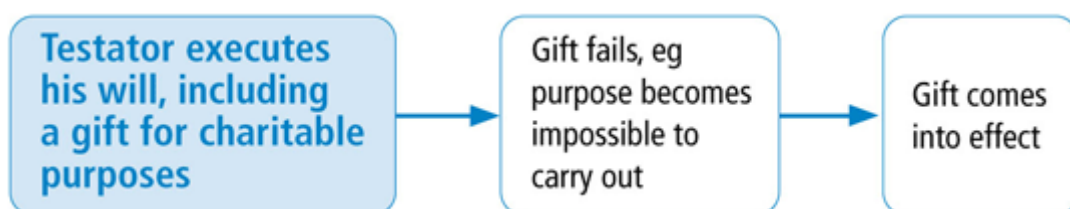


Figure 6.4 An initial failure timeline

Factors indicating a general charitable intention

- Where the rest of the will is charitable in nature: *Re Satterthwaite's WT [1966]*. In *Knipe v British Racing Drivers' Motor Sport Charity & Others [2020]*, a testamentary gift was left for the 'Cancer Research Fund'. However, no such institution existed at the time of the testator's death. The court concluded that the gift was intended for the general purpose of cancer research rather than for a particular institution so the monies could be given to cancer research charities. However, the court also noted that even if a particular institution had been intended, this was not a critical aspect of the gift and the generally charitable nature of the will would have been sufficient to infer a general charitable intention.
- Where the charity to benefit never existed: if a gift is left to a charity which, in fact, *never existed*, the court will construe the testator's intention as generally charitable: *Re Harwood [1936]*.
- Where the gift is to an **unincorporated association**: unincorporated associations do not have legal personality and consequently cannot own property in their own right (see chapter 7). Therefore, if a charitable gift is made to an unincorporated association which has been dissolved, the courts are more likely to construe the gift as being for the *charitable purposes* of the association and apply the money *cy-près* to another body carrying out these purposes: *Re Finger's WT [1972]*.

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Factors indicating no general charitable intention

- Where the terms of the gift are precise or specific: the more specific the terms of a testator's gift, the less likely it can be said to demonstrate a general charitable intention: *Re Rymer [1895]*.

EXAMPLE 2

£100,000 to help patients of the Cranford Physical Spinal Injuries Centre purchase equipment that can assist in their continued recovery.

Should the Centre cease to exist prior to the testator's death, *cy-près* would not be used in this case. The terms of this gift are very specific—as there are no longer any patients, the gift will lapse. A general gift to help the Centre would have allowed the court to consider whether there were other factors demonstrating a general charitable intention.

- Where the gift is to a corporation: in contrast to gifts to unincorporated associations, corporations have legal personality. This suggests that the gift is to a specific body to carry out charitable purposes, rather than a general gift for charitable purposes: *Re Finger's WT [1972]*.

A number of these considerations are illustrated in this recent decision:

Attorney-General v Zedra Fiduciary Services (UK) Ltd [2020] EWHC 2988

In 1928, an anonymous donation of £500,000 was made to establish a 'National Fund' to discharge the National Debt (then, £7.6 billion). By 2020, the Fund had increased in value to £512.2 million but the National Debt had also increased to £2,004 billion.

When the identity of the donor was discovered, his descendants argued that the money should pass to them by way of resulting trust as the purpose of the gift was impossible to achieve and, because it had always been impossible to achieve, that this was a case of initial failure with no evidence of a general charitable intention that would enable the money to be applied *cy-près*.

The court held that this was not a case of initial failure. When the Fund was established, it had been a possibility that the National Debt could have been discharged and our knowledge of current conditions could not be applied in hindsight to conclude that this purpose had been impossible from the start. Therefore, this was an example of subsequent failure (see below), where the purpose had become impossible *after* the gift had come into effect.

Finally, the court argued *obiter* that, even though it was unnecessary in the circumstances, a general charitable intention could be inferred. Adopting the approach taken in *Re Woodhams [1981]*, the court considered whether any proposed modification of the gift's purpose would frustrate the intentions of the testator. As the donor had compared the Fund to gifts made for the betterment of the nation, such as gifts of historical buildings or art, it was clear that his intention was to benefit the nation generally, as opposed to the specific purpose of discharging the National Debt.

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Removing restrictions on the purposes of a charitable gift

Sometimes the recipient of a charitable gift will be unwilling to accept the gift because of the testator's restrictions upon its use. In these circumstances, the court may construe the gift as being for general charitable purposes and remove the restrictions.

Re Lysaght [1966] Ch 191

The Royal College of Surgeons threatened to disclaim a gift to provide medical scholarships because it excluded women, Jews, and Roman Catholics. The court held that there was a general charitable intention to further medical education and applied the money *cy-près* to the Royal College without the settlor's restrictions.

Subsequent failure

Subsequent failure occurs when there is a failure in carrying out the purposes of the gift *after* the gift has taken effect (see Figure 6.5).

In cases of subsequent failure, *cy-près* operates *automatically*. In effect, as the gift has already been dedicated to charitable purposes, the court can vary the purposes and apply the money to another related charity. To identify cases of subsequent failure, you must be able to identify *when* the charitable gift takes effect:

- A charitable gift takes effect at the time of the death of the testator, ie when the will comes into effect.
- It does not matter if the will has not yet been administered: *Re Slevin [1891]*.

It also does not matter if the gift is a remainder interest which only takes effect after the death of a life tenant: *Re Wright [1954]*.

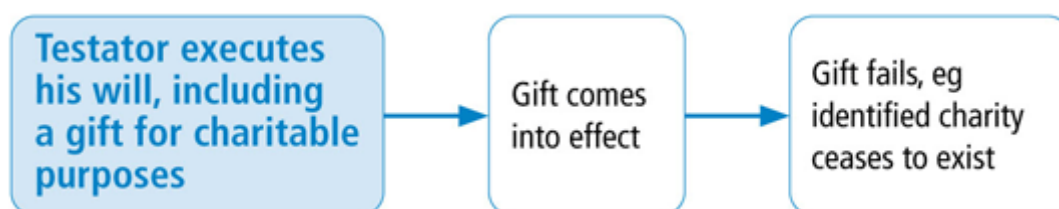


Figure 6.5 A subsequent failure timeline

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Key cases

| CASES | FACTS | PRINCIPLE |
|---|---|---|
| <i>Attorney- General v Charity Commission for England and Wales and others [2012] WTLR 977</i> | Concerned a reference from the Attorney-General seeking clarification on the validity of charities that sought to relieve the poverty of a narrow class of potential objects, such as relatives or employees. | The Charities Act 2006 does not affect the charitable status of trusts for the relief of poor relatives or employees. Public benefit has two senses (the first concerning the beneficial nature of activities and the second regarding who is to benefit), but charities for the relief of poverty only have to be of public benefit in the first sense. |
| <i>Dingle v Turner [1972] AC 601</i> | Upheld a gift to provide pensions for poor ex-employees. | Trusts for poor employees are charitable. Lord Cross's dissent critiques the Oppenheim approach to public benefit as artificial. |
| <i>Gilmour v Coats [1949] AC 426</i> | Trust for the benefit of cloistered nuns not for the public benefit. | Charities for the advancement of religion require the public to be able to access the religion. |

6. Charitable trusts

| CASES | FACTS | PRINCIPLE |
|--|--|--|
| <i>Independent Schools Council v Charity Commission</i> [2011] All ER (D) 198 (Oct) | The ISC successfully challenged Commission guidance on the public benefit requirement for private schools. | The Commission had misinterpreted the existing law: as long as there is some level of financial support possible for poor students, the public benefit requirement should be evaluated on a case-by-case basis, taking into account both direct and indirect benefits. |
| <i>McGovern v Attorney-General</i> [1982] Ch 321 | Concerned the validity of Amnesty International as a charitable organization. | Political purposes are not allowed in charitable trusts but engaging in political activities to further a charitable purpose may be acceptable as ancillary non-charitable purposes. |
| <i>Oppenheim v Tobacco Securities Trust Co</i> [1951] AC 297 | A trust for the education of employees of British-American Tobacco held not to be charitable. | Apart from charities for the relief of poverty, a charitable trust will not be for the public benefit if it only benefits relatives or employees. |
| <i>Re Scarisbrick</i> [1951] Ch 622 | A trust for poor relations upheld as charitable. | Public benefit means for the benefit of the community or some section of it. |
| <i>Re South Place Ethical Society</i> [1980] 1 WLR 1565 | An Ethical Society was held not to be a charity for the advancement of religion. | ‘Religion’ involves faith in a god and worship of a god (see also s 3(2)(a) CA 2011). |

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Key debates

| | |
|------------------------|---|
| Topic | How are charitable trusts different from other types of trust? |
| Academic/author | Warburton |
| Viewpoint | The distinctive treatment of charitable trusts requires them to be treated separately from the main body of rules on trusts. |
| Source | Warburton, ‘Charitable Trusts—Unique?’ (1999) Conveyancer 20. |
| Topic | What is the effect of the Charities Act 2006 (now consolidated in the Charities Act 2011) on the public benefit requirement? |
| Academic/author | Charity Commission |

| | |
|------------------------|---|
| Topic | How are charitable trusts different from other types of trust? |
| Viewpoint | Section 17 Charities Act 2011 charges the Charity Commission with issuing guidance on the public benefit requirement in order to improve the accountability and good working practices of the charitable sector. In light of the decisions in <i>Independent Schools Council and others v Charity Commission for England and Wales [2011]</i> and <i>Attorney-General v Charity Commission for England and Wales and others [2012]</i> , the Charity Commission describes how it has revised its initial guidance to reflect these decisions and provides a clear and helpful analysis of the issues raised. |
| Source | Public Benefit: The Public Benefit Requirement (PB1) (2013) (www.gov.uk/government/publications/public-benefit-the-public-benefit-requirement-pb1) and Legal Analysis: Public Benefit (2013) (www.gov.uk/government/publications/legal-analysis-public-benefit) |
| Topic | The Charity Commission's modern approach to decision-making |
| Academic/author | Luxton and Evans |
| Viewpoint | Using two recent decisions by the Charity Commission on the advancement of religion, the authors analyse its approach and argue that the Charity Commission needs to justify its decision-making more clearly within the framework of existing legal principles. |
| Source | Luxton and Evans, 'Cogent and Cohesive? Two Recent Charity Commission Decisions on the Advancement of Religion' (2011) 75 Conveyancer and Property Lawyer 144. |
| Topic | How satisfactory is the law's approach to charities with political purposes? |
| Academic/author | Santow |
| Viewpoint | Even with the further guidance issued by the Charity Commission, the current approach to political purposes is uncertain and may restrict the ability of charities to contribute fully to the development of democratic society. |
| Source | Santow, 'Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?' in M Freeman (ed), <i>Current Legal Problems</i> (1999) p 255. |

Exam questions

Problem question

Oliver James executes his will in 2005, which contains the following provisions:

6. Charitable trusts

1. £1,000,000 to build a Recreation Centre for the elderly in Lincoln;
2. £100,000 to Broadfield University to provide scholarships to law students, in the hope that they will challenge the increasing attacks by successive governments on our civil liberties;
3. £500,000 to further the good work of the Mountcastle Cancer Hospice.

Oliver dies in 2008. In December 2007, the Mountcastle Cancer Hospice closes. Discuss the validity of these trusts.

See the Outline answers section in the end matter for help with this question.

Essay question

Critically discuss the impact of the **Charities Act 2011** on the public benefit requirement.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer [_<https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-outline-answers-to-essay-questions?options=showName>](https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-outline-answers-to-essay-questions?options=showName) to the essay question
- Further reading [_<https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-further-reading?options=showName>](https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-further-reading?options=showName)
- Interactive key cases [_<https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-interactive-key-cases?options=showName>](https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-interactive-key-cases?options=showName)
- Looking for extra marks quiz [_<https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-looking-for-extra-marks?options=showName>](https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-looking-for-extra-marks?options=showName)
- Multiple choice questions [_<https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-multiple-choice-questions?options=showName>](https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-6-multiple-choice-questions?options=showName)

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