

THE HIGH COURT

[2013 No. 409 S.P.]

**IN THE MATTER OF THE ESTATE OF PATRICK JORDAN DECEASED LATE OF 11 SAINT PATRICK'S ROAD CLONDALKIN DUBLIN
RETIRED CLERK.**

IN THE MATTER OF THE CHARITIES ACT 1961 AND

IN THE MATTER OF AN APPLICATION BY CHRISTOPHER CAROLAN EXECUTOR OF THE DECEASED'S WILL

APPLICANT

AND

GERALD JORDAN, DOROTHY KEEGAN AND JAMES JORDAN

RESPONDENTS

JUDGMENT delivered by White Michael J on the 6th day of March, 2014

1. This matter come before the court by way of motion originally returnable for 11th November, 2013, seeking the following reliefs:-

(a) An order applying the doctrine of *cy-près* to the last Will and Testament of Patrick Jordan dated 5th May, 1999, so as to give effect to the charitable bequest of the residue of his estate.

(c) in the alternative an order that the bequest of the residue of the Deceased's estate is to be applied in favour of the Federation of London Youth Clubs Company No. 258577.

2. The application was heard by the Court on 14th January, 2014 and judgement was reserved.

3. By his last Will and Testament of 5th May 1999, Patrick Jordan devised and bequeathed all of his property both real and personal whatsoever to his wife, Mary Josephine Jordan.

4. She predeceased him having died on 7th December, 2011.

5. By his last Will he made the following residuary bequest:-

"I give, devise and bequeath, all the rest and residue of my property both real and personal whatsoever and wheresoever situate of which I may die seized possessed of or become entitled to including any property over which I may have a general power of appointment to be divided as to a four fifths share to the Derek Jordan Memorial Fund C/o London Federation of Boys Clubs 121 Kennington Park Road, London, SC 114JN for their own absolute use and a one fifth share to the London Federation of Boys Clubs to be held in trust and applied for the benefit of Cameron Athan Boys Club, Athan House, 119/121 Grove Road, London E 17. If the said Cameron Athan Boys Club should cease to exist then the said one fifth share shall revert to and become part of the Derek Jordan Memorial Fund aforesaid."

6. Patrick Jordan died on 11th January, 2012.

7. A grant of probate was issued on 1st October, 2012 to Christopher Carolan, the named executor therein and the applicant in these proceedings.

8. Derek Jordan, the son of Patrick John Jordan and Mary Josephine Jordan tragically died at a young age and had been involved in a charitable organisation in England known as the London Federation of Boys Clubs. It is now known as the Federation of London Youth Clubs and has a company No. 258577. It is a registered charity, registration No. 303324. It was originally registered as a charity in 1962.

9. Mr. and Mrs. Jordan wrote to the London Federation of Boys Clubs including copies of their Wills and a reply was received on 22nd May, 1980 from the Federation stating:-

"I return herewith copies of your Wills. They have been seen by our solicitors and they confirm that they are perfectly in order and meet your wishes.

Again thank you for your interest in the Federation and it may be many many years before the Federation benefits under these generous arrangements."

10. Unfortunately no memorial fund known as "the Derek Jordan Memorial Fund" was set up nor was it in existence at the date of death of Mr. Jordan.

11. Cameron Athan Boys Club was wound up. The last meeting of the trustees took place on 15th July, 2009, when its remaining assets were passed over to the Jimmy Dixon Charitable Trust. Therefore, this specific bequest of one fifth of the residue reverted to the Derek Jordan Memorial Fund.

12. The solicitors for the estate wrote to the Commissioners of Charitable Donations and Bequests for Ireland, who replied on 13th February, 2013. The letter confirmed that the matter had come before the Commissioners and they had ruled:-

"That it is not clear to the Commissioners that they have the power to settle a *Cy-près* scheme in respect of a charity which never existed and they suggested that perhaps a court application would be more appropriate."

13. In applying the doctrine of *cy-près*, the court is not at large but must apply same in accordance with precedent and established principles. The court does not have a general jurisdiction to apply the gift as close as possible to the original intention of the testator.

14. There must be proof of a general charitable intention. If there is the court can be flexible.

15. The task facing this Court was succinctly summarised in an English case in *Re Wilson Twentyman v. Simpson* [1913] 1 Ch. 314 at p. 320, where Parker J. stated:-

"For the purposes of this case I think the authorities must be divided into two classes. First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. In fact the will will be read as though the particular direction had not been in the will at all, but there had been simply a general direction as to the application of the fund for the general charitable purpose in question.

Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift,—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument.

I have to determine whether the gift in this will, which is in form a particular gift, is a gift really for a particular charitable purpose, and for that purpose only, or whether there is a paramount intention to be gathered from the will that the money shall in any event be applied for some more general charitable purpose even if the particular mode of application which is prescribed cannot be carried into effect."

16. The principles which this Court must apply are summarised in the Irish case of *In Re Royal Kilmainham Hospital* [1966] I.R. 451 at p. 469 when Budd J. stated:-

"The law requires that if a charity can be administered according to the directions of the founder it should be so administered. When it is established that a gift has been made with a general intention of charity and a failure of purposes ensues it is not allowed to fail but will be carried out *cy-près*. Likewise, where there is an absolute perpetual gift to a charity, even though the trusts be only for the accomplishment of a particular charitable purpose, the same results ensue. The principle is applied where the method indicated by the donor of carrying out his charitable intention becomes impracticable, or his intentions cannot be executed literally, most frequently owing to altered circumstances.

Trusts for charitable purposes in the legal sense include trusts for the relief of aged, impotent and poor persons and such objects as are analogous thereto, and there can be little doubt that a trust for the relief of poor, aged, maimed and infirm officers and soldiers would ordinarily be regarded as a valid charitable gift. The *cy-près* principle is confined, however, to cases where property is given with a general intention to charity with this exception, that where property is given absolutely and perpetually to charity for a particular purpose and has vested in the charity the fund can be applied *cy-près* irrespective of the donor's particular intention. As to what is to be regarded as a general charitable intention, no hard and fast rule can be laid down. Courts have differed much as to what is sufficient to indicate such an intention. The test suggested by Kay J. in *Re Taylor; Martin v. Freeman*, at p. 543, [1888] 58 L.T. (N.S.) 538 is one that carries great weight: ". . . if upon the whole scope and intent of the will you discern the paramount intention of the testator was to benefit not a particular institution, but to effect a particular form of charity independently of any special institution or mode, then . . . if the particular mode for any reason fails, the Court, if it sees a sufficient expression of a general intention of charity, will, to use the phrase familiar to us, execute that *cy-près* . . ." The question as to whether the form of a gift indicates a general intention of charity depends upon the construction of the document by which the gift is given."

17. When one examines the specific bequest in the deceased's will, no general charitable intention is discernable. The purpose of the bequest is to honour the memory of Derek Jordan by having a memorial fund in his name. The bequest states "to the Derek Jordan Memorial Fund C/o London Federation of Boys Clubs".

18. Even if the court leans in favour of a flexible attitude, as applied in *Re Lysaght* [1966] 1 Ch 191 and in *Re Stewart's Will Trusts* [1983] NI 283, where in both cases discriminatory additions to a charitable bequest were ignored in order to implement a *cy-près* scheme, that would still not be sufficient in this case as no general charitable intention has been expressed in the will.

19. The court cannot go beyond the will in its construction. In considering the construction of the will by examining the whole will and the words "to The Derek Jordan Memorial Fund C/o London Federation of Boys Clubs" the will and these words are not sufficient to infer general charitable intention and unfortunately, the court is unable to apply the doctrine of *cy-près* therefore the residuary estate must be distributed in accordance with the provisions of the Succession Act 1965.