

# WILLS

## The *Cy-Près* Doctrine: When Good Intentions Count For Something

### The *cy-près* doctrine

It is common practice to leave a gift to a charity in your will. However, the charity that the testator wished to support may not have been named properly in the will (leading to confusion about who was supposed to benefit from the funds), or may have ceased to exist by the time the testator died.

Where a testator intended to benefit a charity, the courts have special powers to correct the errors in the will and ensure the funds are used for a charitable purpose.

In most cases, where a gift in the will cannot be paid to the intended recipient, the gift lapses and falls into the residue of the estate. However, the Superior Court has the inherent jurisdiction to apply the *cy-près* power, an equitable remedy relating to charitable trusts, to save the gift and carry out the testator's charitable and philanthropic intentions. This power, sometimes referred to as a "scheme-making" power, allows the Court to order the estate trustee to distribute the funds to a charity that has a similar purpose to the charity originally contemplated by the testator in the will.

Before the court will invoke this power, it must find that the testator: (i) set out a clear "general charitable intention" in the will and (ii) that it is impossible or impractical to carry out the testator's intentions. Further, the alternate charity selected must have the same or simi-

lar charitable aims as the charitable organization or purpose originally contemplated by the testator. In this way, the court ensures that the testator's general charitable intention is carried out, even though the testator's specific instructions could not be.

### Dors et al. v. the PGT

The court was asked to apply the *cy-près* doctrine in *Dors et al. v. The Public Guardian and Trustee*. In that case, the testator chose to continue her lifelong philanthropic efforts by gifting 95% of the residue of her estate to no fewer than 20 charities. The recipient of one of the largest shares of the residue (20%, which equated to approximately \$120,000) was the Pan American Mission in Canada, a Christian charity based in Calgary that cared for orphans in South America. Unbeknownst to the testator, this charity had been dissolved in Canada and the USA in 2012 or 2013, nearly a decade after she signed her will in 2006.

Faced with the fact that the Pan American Mission in Canada no longer existed, the estate trustee commenced a court application asking a judge to declare that the gift to that charity lapsed and its 20% share should be distributed between the other 19 charitable beneficiaries according to their entitlement. The Public Guardian and Trustee opposed the estate trustee's



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request, arguing instead that the court should apply the *cy-près* doctrine to "save" the gift by choosing a different charity with a similar purpose as the Pan American Mission in Canada.

The Court agreed with the Public Guardian and Trustee. Citing *Romanic et al v La Fabrique de la Paroisse Sainte-Sophie et al.*, 2020 ONSC 3534 and *Re Jacobsen 1977*, CanLII 1733 (BC SC) the Court held that this was an appropriate instance to apply the *cy-près* doctrine: Justice Gilmore held that the general charitable intent of the testator in the will was clear, but it was impossible to carry out due the dissolution of the Pan American Mission in Canada. Furthermore, the court held that while the other 19 charities named in the will had a variety of charitable purposes, none were involved in the care for orphans in South America. As a result, the testator's charitable purpose would be defeated those charities received the funds originally allocated to the Pan American Mission in Canada. Instead, the Court ordered the estate trustees to find another charity with a similar goal to the Pan American Mission in Canada and distribute the funds to that organization.

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