

Court Provides Guidance on Testamentary Gifts Made to Defunct Organizations

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When an individual leaves a gift in their will to a charity that does not exist at the time of their death, the executor will often be required to apply to the courts for guidance about what should happen to the gift. The courts in common law jurisdictions in Canada (being all provinces and territories except for Quebec) can exercise their powers to propose an alternative for the gift that is as close as possible to the original intent of the testator – this is referred to as *acy-près* scheme. In order to exercise its inherent jurisdiction to make a *cy-près* order, the court must be satisfied that the donor had a general charitable intention. Alternatively, the court may decide not to exercise its *cy-près* powers and may instead declare the gift to be void or for the gift to lapse.

In the case of *Re Weir Estate*,^[1] the Supreme Court of British Columbia was asked for its advice and direction about what should be done about gifts made in the will of Ms. Jessie Weir to two Australian organizations concerned with animal welfare, both of which had ceased to exist prior to Ms. Weir's death on 30 November 2016. The first organization, Sandy Creek Dog Sanctuary ("SCDS") was an unincorporated organization which did not have recorded charitable status in Australia, while the second organization, Anti-Vivisection Union of South Australia Inc. ("AVUSA") had voluntarily revoked its Australian charitable status effective 12 November 2016.

The court reiterated that the law in Canada is clear that "the Court will uphold a gift for charitable purposes where at all possible, in favour of charity and away from intestacy".^[2] While there is some inconsistency in the caselaw about what should happen when a gift is made to a charity that no longer existed when the testator passed away, in the circumstances of this case, the court found that Ms. Weir clearly demonstrated a general intention to benefit a charitable purpose. In particular, the charitable nature of AVUSA and its work protecting animals was a clear indication of Ms. Weir's intention to make a substantial gift to provide assistance to animal welfare organizations. Because gifts to charities outside of Canada can be valid, the court decided to exercise its *cy-près* powers to direct the gift that was intended for AVUSA to two Australian animal welfare charities.

However, because SCDS was not a charity in Australia, there was no demonstrated charitable intent associated with Ms. Weir's gift to it. Therefore, the court concluded that the gift could not be distributed under *cy-près* to a similar organization, as it did not have the authority to exercise its *cy-près* powers where no charitable intent was demonstrated. As a result, the gift failed and was added to the estate of Ms. Weir's brother, who was her sole intestate heir.

The case of *Re Weir Estate* is an example of the types of circumstances in which the court will and will not find that a testator has a general charitable intention when they made gifts in their will. Individuals considering making a gift in their will, or revising their existing wills, are encouraged to speak with a lawyer to ensure that their charitable intentions are clear, as well as to review their wills periodically to make sure that the charities named continue to exist and have maintained their registered charitable status.

If you have any questions about the above information, please contact a member of Gardiner Roberts LLP's experienced Tax and Estates Planning and/or Non-Profit and Charities Groups. A PDF version is available to download [here](#).

[1] 2023 BCSC 2278.

[2] *Re Weir Estate* at para 29.

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