NZLR. 30/10

FW 7 (3) X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. 8/83

1328

IN THE MATTER of The Declaratory Judgments Act 1908 and its Amendments

A N D

IN THE MATTER of the Will of ALFRED CHARLES HOOK late of Auckland, Schoolteacher

Deceased

BETWEEN PRESBYTERIAN SOCIAL SERVICE ASSOCIATION (AUCKLAND) INCORPORATED, THE AUCKLAND BRANCH OF THE NEW ZEALAND CRIPPLED CHILDREN SOCIETY (INCORPORATED) and AUCKLAND METHODIST CENTRAL MISSION

Plaintiffs

A N D THE PUBLIC TRUSTEE

Defendant

Hearing: 16 August 1984

Counsel: R.O. Parmenter for Plaintiffs
G.P. Barton for Defendant

Judgment: 25 October 1984

JUDGMENT OF ONGLEY J.

The plaintiffs in these proceedings are beneficiaries under the will of Alfred Charles Hook who died at Auckland on

or about 28 February 1939. His will bears the date 8 February 1939 and probate thereof was granted to the abovenamed defendant as sole executor on 20 March 1939.

By his will the testator bequeathed his personal effects to one friend and gave four small pecuniary legacies to others. He then disposed of the residue of his estate upon the following trusts:

> "3. I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and description and wheresoever situate not hereinbefore otherwise disposed of unto my trustee UPON TRUST to pay thereout my just debts funeral and testamentary expenses and all estate and succession duty payable in respect of my dutiable estate and to divide the residue into five (5) equal parts and to hold such parts upon the trusts following namely:-
>
> (a) UPON TRUST to pay the income arising from one (1) of such parts to the AUCKLAND METHODIST CHURCH CHILDREN'S HOME AND ORPHANAGE at Mount Albert and Epsom for ever for the general charitable purposes of the said Home and Orphanage.
> (b) UPON TRUST to pay the income arising from one (1) of such parts to the LESLIE PRESBYTERIAN ORPHANAGE, Meadowbank, Remuera, Auckland for ever for the general charitable purposes of the said Orphanage.
> (c) UPON TRUST to pay the income arising from one (1) of such parts to the MANUREWA BAPTIST CHILDREN'S HOME for ever for the general charitable purposes of the said Home.
> (d) UPON TRUST to pay the income arising from one (1) of such parts to the NEW ZEALAND INSTITUTE FOR THE BLIND, Auckland for ever for the general charitable purposes of such Institute.
> (e) UPON TRUST to pay the income from the remaining one of such parts to the NEW ZEALAND CRIPPLED CHILDREN SOCIETY Auckland Branch Incorporated (The Secretary of which

at the date hereof ie Mr. G.J. Park of the Seddon Memorial Technical College Auckland) for the general charitable purposes of the said Branch.

4. I DIRECT that the receipts of the persons from time to time appearing to my trustee to be entitled to receive moneys on behalf of the said Children's Home and Orphanage, the said Orphanage, the said Home, the said Institute and the said Branch respectively shall be a complete discharge to my trustee in respect of income payable under this my Will to the said Children's Home and Orphanage, the said Orphanage, the said Home, the said Institute and the said Branch respectively and my trustee shall not be liable to see to the application of such income."

There was no express disposition of the corpus of the estate. The affidavit of James David Milne filed herein sets out the status of the several plaintiffs and their relationships respectively to the charities referred to in the will. The relevant portion of the affidavit is contained in the following clauses:

"4 THE first named Plaintiff is a charitable trust incorporated under the provisions of the Charitable Trusts Act 1957 and manages "the Leslie Presbyterian Orphanage, Meadowbank, Remuera, Auckland" named in Clause 3(b) of the said Will.

5. THE second named Plaintiff is a charitable trust incorporated under the provisions of the Charitable Trusts Act 1957 and is the same entity as "the New Zealand Crippled Children Society Auckland Branch Incorporated" named in Clause 3(e) of the said Will.

6. THE third named Defendant is a charitable trust incorporated under the provisions of the Charitable Trusts Act 1957 and was formerly the manager of "Children's Home(s) and Orphanage(s) at Mount Albert and Epsom" referred to in Clause 3(a) of the said Will. Those two named Homes have been closed and replaced by four homes in Takapuna, Manurewa,

Takanini and Mount Eden, which Homes the third named Plaintiff still manages.

7. THE fourth named Plaintiff is a body corporate by virtue of the Baptist Union Incorporation Act 1923. Section 4(c) of that Act grants the fourth named Plaintiff the power to govern, manage, control and maintain the Manurewa Children's Home referred to in Clause 3(c) of the said Will as "the Manurewa Baptist Children's Home".

8. THE last named Plaintiff is a body corporate by virtue of the Royal New Zealand Foundation for the Blind Act 1963 and is the same entity as "The New Zealand Institute for the Blind" referred to in Clause 3(d) of the said Will."

Each of the gifts under clause 3 of the will has a charitable purpose as its object. The residuary estate available to fulfil those purposes consists of approximately $26,000.00 at present invested in the Common Fund of the Public Trustee. All five plaintiffs desire that the capital of the estate be distributed equally among them. They have called upon the defendant to so distribute the capital but the defendant has declined to do so. The purpose of these proceedings is to obtain an order determining the question set out in the Originating Summons as follows:

"Whether the five Plaintiffs are entitled to call for the capital of the residuary estate of the said (Alfred Charles Hook) Deceased."

In support of the plaintiffs' claim to be paid the capital of the estate Counsel for the plaintiff sought to rely on the well-established proposition that an indefinite gift of

income to an individual carries the right to the corpus of the fund and contended that in a proper case that rule, whether it be a rule of law or construction, is applicable as well where the beneficiary is a charity. Mr Parmenter conceded that there is considerable authority in England and in New Zealand to the contrary effect. The major obstacle to the success of his argument is the decision of the Court of Appeal in England in In re Levy, Deceased [1959] CH.D. 346 which has been followed in New Zealand in In re Clark, Horwell & Ors v. Dent & Ors [1961] N.Z.L.R. 635; In re Flannagan (Deceased), Beatty & Anor v. Attorney-General & Anor [1962] N.Z.L.R. 480; In re Bell (unreported decision of Jeffries J. Wellington A.176/78 October 1978).

The rationale of the rule as it relates to gifts to individuals and the contrasting position of perpetual gifts of income to charities is explained by Lord Evershed M.R. at p.355-356 of his judgment in Levy in this passage:

> "Mr. Buckley was able to produce authority clearly supporting the first part, at any rate, of his proposition as regards individuals, namely, the absence of any other right in anybody but the named individual to the fund - for example, Philipps v. Chamberlaine. But it seems true to say that there is no judicial statement in the books supporting the reasoning that an individual, not being perpetual, can only enjoy perpetual income by anticipation, that is, by calling for capital. Yet I think this second part of Mr. Buckley's proposition must follow as a matter of logic from the first part. If I give the income of a fund without qualification to A, then A is not, as a matter of construction of the gift, limited to the income accruing during the period of

> his own life. Equally, there is no limitation as to the way in which he disposes of the income, either when he receives it or in advance. It follows that if true effect is to be given to my intention, as a matter of construction, A must have the right to command the corpus. But these considerations may not apply to a charity. As I have indicated, a charity can effectively enjoy income as such in perpetuity and will, in the natural course of things, apply it for a varying class of beneficiaries. It is clear that if a testator so desires, he can effectively impose trusts limiting the way in which the income is applied, for example, by saying that such income is to be applied for some special purpose of the charity, and effect will be given to such direction. I think it also clear (although those appearing for the charities were not prepared so to concede) that a testator can impose an effective trust of income in perpetuity for the general purposes of a charity, a view which is, in my judgment, supported by the authorities to which I shall refer."

As was noted by Haslam J. in In re Flannagan (supra) the Court of Appeal in Levy was not referred to the judgment of the High Court in the earlier Australian case of Congregational Union of New South Wales v. Thistlethwaite [1952] 87 C.L.R. 375 where a different view was taken which is expressed in the judgment of the majority of the Court thus:

> "In our opinion, the rule is the same whether the gift is to an individual or to a charity consisting of a body capable of holding property. The beneficiary is entitled to the capital unless there is a clear intention expressed or implied from the will that the beneficiary is not to take more than the income" (ibid 440)

Mr Parmenter has endeavoured to reconcile the two approaches in his submission that in a case such as the present the Court will first use the Congregational case to ascertain

the testator's intention and will then use the Levy case to give effect to that intention if necessary. The cases are reconcilable in my view only to the extent that the approach adopted in each has as its object the ascertainment of the testator's true intention. The Australian approach however recognises a presumption in favour of gifting the corpus whether the object of the gift be a charity or an individual. On that view the beneficiary will be restricted to receipt of income indefinitely only where a clear intention is discernible in the will that the gift should not include corpus. No such leaning towards a gift of corpus to a charity is apparent in the judgment of Lord Evershed. With reference to the case before him he posed simply the question which I believe is to be answered in all such cases in these words:

> "It seems to me, therefore, that the first question which must be answered is: What did the testator intend? More specifically did he here intend to impose perpetual trusts of the income of his trust estate for the general purposes of the six charities which he named?" (ibid 357)

The Judges in the three New Zealand cases to which I have referred have all expressly followed Levy's case and it is the approach to be found there that I must adopt. Here the residue is divided into five equal parts which the trustee is directed to hold upon the trusts of the will which follow. No provision is made in respect of the corpus other than that it be held by the trustee. The obligation imposed upon the

trustee is to pay income, which he can do only if he is possessed of the capital. It is not only that there is no positive temporal limitation placed upon the fulfilment of the obligation; on the contrary, except in the case of the New Zealand Crippled Children's Society, he is expressly directed to carry it out "for ever". It was suggested in argument that those words do not have the same force as "in perpetuity" or "perpetually" but, for myself, I see no material difference. They may, perhaps, have a less technical flavour but their meaning is nonetheless clear. The purpose of the payments of income is the furtherance of the "general charitable purposes" of the named institutions. In each case those purposes are such as may be expected to continue indefinitely and to continue to require financial support. The testator contemplated continuing periodic payments being made to "persons from time to time appearing to my trustee to be entitled to receive moneys on behalf of" the said institutions. All those factors combine to persuade me to the view that the testator intended the trustee to remain possessed of the corpus indefinitely.

As against that view I see nothing in the will either express or implied which indicates that the cestuis que trust were intended to receive capital and I have no difficulty in reaching the conclusion on this aspect of the case that the answer to the question in the originating summons should be "No".

The plaintiffs advanced an alternative submission founded upon the rule in Saunders v. Vautier [1841] Cr. & Ph. 240, 41 E.R. which as relied upon by Mr Parmenter is stated in Garrow and Kelly's Law of Trusts and Trustees 5th Ed. at p.405 as follows:

> Where a sole beneficiary's interest in the trust property is vested and he is sui juris, he may put an end to the trust by directing the trustees to transfer the trust property to him or his nominee, notwithstanding any directions to the contrary in the trust instrument. The same rule applies where there is more than one beneficiary, ..."

A similar proposition was put forward in argument in Levy's case and while it is referred to in Lord Evershed's judgment it was dismissed without full consideration because not all the beneficiaries in that case were in fact in accord in pursuing such a claim.

The text of Garrow and Kelly continues as follows:

> The rule also applies to charities, though an important distinction has at times to be drawn where there is an indefinite gift of income to a charity and it is apparent that the testator or settlor intended that the charity should be entitled to the income only and not to the capital of the subject-matter of the gift, e.g., where a fund is settled on trust to pay the income, in perpetuity, to a charity for its charitable purposes. In such a case the charity will not be entitled to extinguish the trust by calling for payment of the capital of the fund."

There then follows reference to the extract from p.357 of the judgment in Levy's case quoted above. Mr Parmenter submits that the distinction drawn by the author is based upon

a misinterpretation of Levy's case and he seeks to treat the statement of Lord Evershed, in which reference was made to this argument without dealing with it, as an indication that had all the beneficiaries been at one in that case they well may have succeeded upon this ground. I do not think it was intended to have that meaning.

With respect to the author of Garrow and Kelly I think that the distinction he draws is perfectly correct. If, as I have found to be so in this case, and was so in Levy's case, the intention of the testator was to pass income only and not capital, the beneficiary, being a charity, cannot achieve a vested interest in the corpus of the trust held by the trustee in accordance with the terms of the will, and so is never in a position to call for the transfer of it. The position may possibly be different with an individual but I am not called upon to decide that.

In my view the plaintiff cannot succeed upon this alternative ground and so the answer to his question must remain "No".

Counsel may submit a memorandum on the question of costs if an award of costs is to be sought.

Solicitors

Towle & Cooper, P.O. Box 240, Auckland for Plaintiff

G.P. Barton, P.O. Box 5007, Wellington for Defendant