NOT
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND 28/5
CHRISTCHURCH REGISTRY M 424/92

IN THE MATTER of the Judicature Act 1908

AND

736

IN THE MATTER of the Charitable Trusts Act 1957

AND

IN THE MATTER of "The Eliza White Trusts" created under the will of ELIZA WHITE, deceased

AND

IN THE MATTER of an application by THE ELIZA WHITE BOARD OF MANAGEMENT as Trustee of the said will for the approval of a scheme under Part III of the said Act

Applicant

Hearing: 7 May 1993

Counsel: N G Hampton Q.C.for Applicant
R E Neave for Attorney-General
D J Boyle for the Roman Catholic Bishop of Christchurch
C M Ruane for Objector R Gibbons
Patricia M Coffey and Eliza J Quinn - Objectors in person

Judgment: 7 May 1993

ORAL JUDGMENT OF HOLLAND, J.

There is before the Court an application for approval of a scheme brought by the trustees of the Eliza White Trusts under the provisions of the Charitable Trusts Act 1957.

A number of objections have been filed to the scheme. When the matter was called before me Mr Boyle

for the Roman Catholic Bishop of Christchurch sought an adjournment of the application. He said to me that the Bishop was not aware of the scheme until the newspaper advertisements of the hearing for today, that the Bishop had sought counsel's opinion and advice from others and that although counsel's opinion had been received he had not had an opportunity of discussing the opinion with counsel or with others whose advice he sought.

The Bishop is a member of the Board of the trusts. It is obvious that for many years the Board has been considering a scheme to vary the trusts of the will. That fact must have been known to the Bishop. This present scheme was approved by the Board in December last year. It is not appropriate without evidence to make any findings as to the Bishop's knowledge but I assume he was either at the meeting or would have received minutes of the meeting.

It may well be that counsel has mistaken his instructions and what was meant to be said on behalf of the Bishop was that the Bishop was not aware of this date of hearing until he saw the advertisements. The first advertisement appeared on 27 February 1993.

The adjournment was supported by Mr Ruane, who appeared for one objector, and by two objectors who appeared in person, although all indicated that they were willing for the matter to be heard today. The application for adjournment was opposed by the Board. I decided that I would hear argument as to the merits of the objections before ruling on the adjournment.

It is obvious to me that there has been a difference of opinion between the Board as such and the Bishop. That is unfortunate.

The trust is now controlled by the Eliza White Orphanage Trust Act 1951 which varied the original trusts created by the will of the late Mrs White who died in 1909.

The Act provides that the trust shall be administered by a board of management and that the Board should comprise five members, one of whom shall be the Roman Catholic Bishop of Christchurch for the time being. The Act also provides that one other member of the Board shall be a lineal descendant of the founder of the trust provided that such a person is able and willing to serve. The Act introduced an ecumenical aspect to its constitution by requiring that one member of the Board shall be a person who has not been baptised as a member of the Roman Catholic Church. Subject to that, vacancies on the Board are filled by the Board on a majority vote which must include the Bishop. Likewise a Board member may be removed from the Board on a majority vote which must include the Bishop.

I have set out those terms of the Act because it is obvious that under the Act the Bishop is expected to play a material role in the administration of the trust. If he has not done so that is unfortunate.

I propose to deal with the submissions that were made to me. I have no doubt that my decision not immediately to grant an adjournment placed Mr Boyle in an

embarrassing situation but he must have anticipated such a possibility because he was able to present to me carefully prepared submissions contained in an eight page synopsis.

I also heard from Mr Ruane, who appeared for one of the objectors, and from Miss Coffey. The other objector, who appeared in person today, associated herself with Miss Coffey and did not wish to address me.

The appropriate principles to be applied by the Court on considering an application for approval of a scheme under the Charitable Trusts Act are re-stated by Tipping J. in re Twigger (1989) 3 NZLR 329. I had on an earlier occasion restated those principles in re Erskine (M292/86, Christchurch Registry, judgment 17 June 1987).

I adopt what was said by both Tipping J. and myself from an earlier unreported decision approved by T A Gresson J. in re Goldwater deceased (1967) NZLR 754:-

> "in deciding whether to approve a scheme the Court owes a duty to the settlor of the trust property to dispose of it as early as possible, in accordance with the intentions of the settlor. It also owes a duty to those proposed to be benefitted by the trust and to the public generally to dispose of the fund or property, as nearly as possible in accordance with the charitable purposes of the trust and in such a way as will best serve the interests of those intended to be benefitted."

Perhaps the issue was stated more directly by T A Gresson J. in re Goldwater supra at p.755:-

> "the substituted trust under any scheme should, in my view, accord as closely as is reasonably possible in the changed circumstances to the terms of the original trust."

Mr Ruane submitted that there should be a provision in the scheme requiring the trustees to obtain and

consider advice from Catholic Social Services and the Department of Social Welfare Children and Young Persons Services as to the appropriate steps to be taken for the care of children and their parents.

In very brief form the original trust required the trustees to provide orphanage facilities for children of either deceased parents or children whose parents had neglected them. It is common ground by all persons present today that in modern day thinking orphanage facilities are not appropriate and I am satisfied accordingly within the meaning of the Act that a scheme is required and an appropriate scheme should be approved. The present scheme has the approval of the Attorney-General.

Again, in a very abbreviated form, the scheme proposes to provide residential and other facilities for children who may be described as in need of care because of the lack of skill of their parents or the lack of some available parental guidance.

The general purpose of the scheme is that those children and their parents will receive in the course of some residential care and otherwise, counselling and provisions to enable them better to fulfil their role as parents and to enable the children to be able to live in the community with their parents. There can be no doubt that such a scheme is a desirable scheme in general and no submission was made to the contrary.

It is apparent from Mr Ruane's submission and the submissions of Miss Coffey that some concern is held as

to whether the Board has sought enough advice or is seeking advice as to the appropriate needs of children of this kind and the best way of dealing with them.

I do not doubt the integrity of the objectors. There are a number of other objectors who have not recorded their appearance today. They are all lineal descendants of the founder and as such have a natural interest in the administration of the trust. I have no doubt that the Board would listen to representatives from descendants of the founder and indeed one member of the Board is specifically appointed from that class. Likewise, the Board must listen to representations from others. I am not persuaded from the history of the Board and in particular the nature of this application, that there is any requirement to specify those whom they should consult beyond the present provisions of the Act. It is not without significance that the Board has presented in support of its scheme an affidavit from the Director of Catholic Social Services of the Diocese of Christchurch.

Every individual will have a different individual way of running any organisation or administering any trust. In the end it must be left to the Board and unless there are good grounds to doubt the integrity and industry of the Board they should not be fettered by nominating organisations from whom they are required to take advice when those organisations themselves will change from time to time and the Board and the trust will go on forever.

I am quite sympathetic to what the objectors have said but they have not persuaded me that any ground exists to change the scheme in the light of their objections.

The Bishop's objections are somewhat different. He submits that the scheme does not sufficiently accord with the original trust as to the purpose for which the children are to be cared for in the residential facilities proposed.

The trust was created in the will. That will indicated a preference for the reception into orphanages of children of Roman Catholics but specifically provided that no children of any religious denomination should for that reason alone be refused admission.

The will also provided that the trustees would associate themselves with the Roman Catholic Bishop in all matters connected with the number and admission of children and the general policy of management. The will provided that the orphanages would be placed under the immediate management of a religious order in the Roman Catholic church and the orphanages should be primarily for the reception and education of children of the Catholic faith in the Catholic religion.

The proposed scheme contains no specific instructions for religious education or counselling. That may well not be surprising because the obligations of an orphanage were much more akin to those of parents than is contemplated under the new scheme which involves

counselling and care of children and parents. The scheme contains in it an obligation on the Board to:-

> "consider any proposals made to it from time to time by the Roman Catholic Bishop for the time being of the Diocese of Christchurch relating to the said residential facilities, the management thereof and the care of the said children (and the religious education of those children in care who have a connection with the Roman Catholic Religion) and the counselling and training in parenting skills of their families and the decision of the Board to accept or reject the said proposals in whole or in part shall be final."

The Bishop's objection, as I understand it, is that while the Board would be bound to consider proposals that he might make for the religious education of children in care who have a connection with the Roman Catholic religion, the Board may reject such proposals in whole or in part.

I do not find any difficulty with that proposal in the Scheme as such. It is quite obvious that the responsibility of the administration of the trust is in the Board of which the Bishop is a member. There is no suggestion in the will of the testatrix or in the authorising Act in 1951 to indicate that the Board shall merely be advisers and consultants with the Bishop. The Bishop has certain rights over the appointment and removal of members of the Board but as a member of the Board he is clearly a member and no more and no less. In the end the decisions must be for the Board.

What concerns me, however, is that it was implicit in the terms of the testatrix that the children in the orphanages who had a Roman Catholic connection should be "educated in the Catholic religion".

Attitudes to different branches of the Christian church and the role of the church in the community have changed substantially in the 80 years that have gone by since the death of the testatrix. There is also a greater recognition of the difficulty of forcing religion on people who do not wish to accept it. That, however, does not mean that it should not be offered until it is specifically rejected.

I am concerned, as is the Bishop, that these funds were provided by a woman who clearly regarded religious education as an important factor in bringing up children. One would like to hope that that was still an important factor in 1993.

I do not wish to decide the matter at this stage because I may not have had the benefit of the full argument that the Bishop might have wished to present had he been able fully to instruct counsel on the matter today. I repeat, that in my view it is a pity that he had not taken steps to ensure that that was done but I am satisfied that it is in the interests of the trustees and the future administration of this trust that all attempts be made to achieve some accord between the trustees and the Bishop. It may be that everything has been done in that regard. I simply do not know.

I have decided that the application for approval of the trust should be adjourned to enable further submissions to be made on behalf of the Bishop as to the desirability of including in the scheme some general requirement or purpose of the Board that in providing the

services which they propose for these children and their parents and others in whose care they may be, Christian values and principles should be applied and that those values and principles should be related where appropriate to the denomination of those children in which they were born and in which they may be being brought up.

That is not a very elegant way of stating what is required by way of amendment, nor am I saying necessarily that any amendment is required. I should hope that the matter may be able to be resolved by agreement. It will be necessary to obtain the agreement of the Attorney-General to any proposed amendment to the scheme. An amendment of the type I propose would not in my view require re-advertising or reference to any of the other people who have placed their objections today.

I also am of the view that it is time these funds were spent for a charitable purpose and there is some urgency about the situation. I propose to adjourn the matter until 30 June. I am doing that in the view that that gives sufficient time to the parties to endeavour to resolve the matter by mutual agreement. Obviously if those steps are to be taken they must be taken quickly because other people have to have time to consider the proposals. If they are unable to agree then I shall rule on the matter when the Bishop has had an opportunity of presenting whatever submissions he wishes to make further to those that have already been made before me. Any decision to amend or not amend the scheme in this regard is left open.

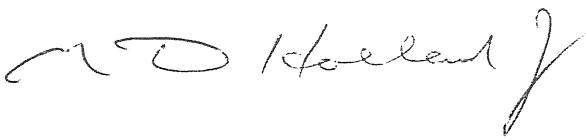
For the purposes of clarification and in an endeavour to save time I have considered the second ground objected to by the Bishop and that is that he apparently considers that this scheme lessens his role in relation to the trust. I am not persuaded that there is any validity in that objection. The will did not provide for the Bishop to be a trustee. The trustees of the fund were the trustees of the will of the testatrix. They were bound in the terms of the will to "associate with the Bishop". I do not read from that that they were bound to do anything more than to confer with him and I do not read that his view was to prevail over their view in any respect because of the obligation to associate with him. The trustees clearly had an obligation, when he was not a trustee, to keep him informed and to consider his views but that was all.

That situation has been changed by the 1951 Act which makes the Bishop a member of the Board. As stated earlier, he has rights in relation to appointment and removal of trustees but is otherwise a member of the Board. His role in relation to the trust was increased by the provisions of the Act.

There is no need accordingly to include in the trust an obligation for the trust Board to associate with the Roman Catholic Bishop over any matter because quite clearly the Bishop is a Board member and has every right to participate in every discussion of the Board.

It is on one ground only that I require further argument if agreement cannot be achieved. The

application is adjourned to 10am on Wednesday, 30 June 1993.



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