

**IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY**

CIV 2007-441-628

BETWEEN ST JOHN OF GOD HEALTH & ELDER
 CARE SERVICES TRUST BOARD
 Applicant

AND LITTLE SISTERS OF THE POOR (NZ)
 TRUST BOARD
 Respondent

Hearing: 6 May 2008
 (Heard at Napier)

Appearances: AC Hughes-Johnson QC and CM Gray for Applicant
 ES Scorgie and AAH Low for Respondent

Judgment: 11 August 2008 at 2:30 pm

JUDGMENT OF ASHER J

*This judgment was delivered by me on 11 August 2008 at 2:30 pm
pursuant to Rule 540(4) of the High Court Rules*

.....
Registrar/Deputy Registrar

.....
Date

Solicitors:
Saunders Robinson, PO Box 39 Christchurch
Chapman Tripp, PO Box 2206 Auckland 1140
Copy:
AC Hughes-Johnson QC, PO Box 286, Christchurch

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Introduction

[1] Sean Vincent Higgins died on 12 August 1985. In his will he made a number of bequests before directing his trustees to hold the remainder of the estate and pay the income from it to his wife, Eileen Josephine Higgins, during her lifetime. On her death the trustees were to pay the balance of his residuary estate as follows:

- (ii) As to the balance of my residuary estate to the CONVENT OF THE LITTLE SISTERS OF THE POOR at Hastings for the charitable purpose of the said convent.

[2] The Little Sisters of the Poor no longer have a presence in Hastings. The St John of God Health and Elder Care Services Trust Board (“the St John Trust”) submits that it has therefore become “impossible or impracticable or inexpedient” to carry out the charitable purpose of the bequest and has filed an originating application under s 32 of the Charitable Trusts Act 1957 (“the Act”) seeking to vary the purpose of the charitable trust established by the bequest. The respondent, the Little Sisters of the Poor (NZ) Trust Board (“the Little Sisters Trust”) opposes the application.

Background

[3] Both parties are venerable and respected Catholic institutions. The Hospitaller Institute St John of God is a world-wide Catholic religious institute that was founded in the sixteenth century to care for the sick and infirm. Its mission is broadly based and is essentially to provide care and support to those most in need. It was first established in New Zealand in 1955 by the incorporation of the Hospitaller Brothers of St John of God (NZ) Society under the Religious and Charitable Trusts Act 1908. The St John Trust is one of three sub-trusts of the Hospitaller Brothers of St John of God Aotearoa Society Trust Board.

[4] The origins of the Little Sisters Trust are in France. The Congregation of the Little Sisters of the Poor was founded in Brittany in 1839 by the nun Jeanne Jugan. She developed a community of Sisters who received into their homes elderly men and women who were unable to care for themselves, primarily because of frailty and

financial need, and had no other shelter. The Congregation was first established in New Zealand on 17 February 1949 by the incorporation of the Little Sisters Trust.

[5] Elaine Patricia Lawson (“Sister Patricia”) is a former Mother Superior of the Hastings Holy Family Home who has sworn an affidavit on behalf of the Little Sisters Trust. She gave evidence that the stated mission of the Little Sisters Trust is:

... to extend hospitality towards the Aged suffering from financial need, loneliness or other difficulties. We do this recalling the words of the Lord “... I was a stranger and you welcomed me”: Matthew 25:35.

[6] Sister Patricia deposed that “each home is a family, and this is the whole way that care is delivered”. The Little Sisters Trust has three criteria for eligibility for admission into the homes: candidates must be frail, they must be elderly and they must be in need. Need can be either financial or social, or some other serious need. Services are extended to those who have no one else to support them. There are no geographical or religious criteria for admission.

[7] The Little Sisters Trust previously operated three homes in New Zealand: in Auckland, Dunedin and Hastings. The homes at Auckland and Dunedin continue to run. They are known as the “Holy Family Homes”. At the time Mr Higgins signed his will, the Little Sisters Trust also operated a home in Hastings along with the Auckland and Dunedin homes. The Hastings home was known in Hastings as the “Holy Family Home”.

[8] The Hastings Holy Family Home was a licensed facility, variously described as having 56 or 80 beds, providing rest home hospital and day care services for the elderly. Ten to 12 resident Sisters lived in the top floor of the Home in what was described by Sister Patricia in her affidavit as a “convent”. It is clear from the affidavits that lay nurses were also employed at the Home. The Home was operated and administered along Catholic principles, but elderly men and women of all denominations were cared for. Sister Patricia explained that the Little Sisters cared for the elderly but were also heavily involved in all aspects of caring for the residents, including daily Mass, pastoral care, helping with meals, providing companionship to the residents, supervising the nursing care, and sitting with the

dying. The Sisters were also active in the community, collecting goods and money and other donations.

[9] Mr Higgins was a farmer in the Hastings area. The affidavits indicate that Mr Higgins was very familiar with the work of the Little Sisters Trust at the Hastings Holy Family Home. There is evidence that Sisters from the home used to visit the Higgins farm regularly from about 1967 up until Mr Higgins' death in 1985. A niece of Mr Higgins, Gillian Cotton, deposed that visiting Sisters would come to visit every three months. The Sisters would discuss the work that they were doing and what they needed to keep it going. Mr and Mrs Higgins would often give the Sisters vegetables from the farm garden and meat to help them with their work.

[10] The Sisters' visits to the farm continued after Mr Higgins' death until about 1994, at which point Mrs Higgins had become infirm. She moved into the Hastings Holy Family Home and resided there until her death in 2002. She did not pay any fees for the period of her residence. This was presumably because of the awareness of the bequest and the help that the Higgins had given the Little Sisters.

[11] By 1994 it was becoming increasingly difficult for the Sisters to operate the Hastings Holy Family Home. There were insufficient Sisters available with the appropriate skills, and the home was deteriorating and needed substantial maintenance and renovation. When it became clear that the Home could not continue to operate, the Sisters endeavoured to find an institution that could take over operation of the home and run it in the same way as the Sisters had done. The sequence is not clear, but they approached or were approached by the Brothers of St John of God, who were willing to take over and operate the home applying the Little Sisters' philosophy. The Brothers of St John had in fact had a strong association with the Little Sisters over many years. On 23 August 1995 the Little Sisters Trust transferred the business of the Hastings Holy Family Home to the St John Trust, and the land and buildings to another St John's Trust Board, the Hospitaller Brothers of St John of God Aotearoa Society Trust Board.

[12] On 3 April 2002, having lived in the Home for approximately eight years, Mrs Higgins died. The remainder of Mr Higgins' estate was worth \$1,066,812.70 in

July 2003. On 25 June 2002 the Little Sisters Trust assigned its interest in Mr Higgins' residuary estate to the St John Trust by a formal deed of assignment. The residuary estate was then distributed to the St John Trust.

[13] By 2004 the St John Trust found that the Home was no longer a financially viable operation. It decided it could no longer operate the Home. On 4 August 2004 the Home's land, buildings and business were sold to Terranova Properties Limited, a private company operating private rest home and hospital facilities throughout the country. Settlement took place on 8 September 2004. Terranova is not a charitable entity. On that date both charitable organisations ceased to have any connection with the Home.

[14] After the sale the Little Sisters Trust through their solicitors wrote to the chairman of the St John Trust. They noted the recent sale of the Hastings Holy Family Home, and advised that the interests in Mr Higgins' residuary estate had been assigned on the basis that the Home would continue to be owned, operated and maintained along the same Catholic principles as those administered by the Little Sisters of the Poor. The Little Sisters Trust sought the return of the funds remaining from the remainder of the estate still held by the St John Trust.

[15] The St John Trust through its solicitors declined to return the bequest moneys to the Little Sisters Trust. The impasse that developed has led to this hearing. The amount of the bequest fund now stands at approximately \$1,900,000.

[16] The St John Trust seeks an order under s 32 varying the purpose of the charitable trust established by the bequest. The Trust seeks approval for an alternative scheme under Parts 3 and 5 of the Act, which proposes establishing a new trust to be named The Higgins Bequest Trust. No issue has been taken as to the St John Trust's status to file the application. The application involved the presentation of a draft deed, setting out the terms of the new trust. As required by s 35, the scheme was submitted to the Attorney-General. The Deputy Solicitor-General issued a report on behalf of the Attorney-General dated 11 June 2007 concluding that the closure of the Hastings Holy Family Home indeed invoked the

jurisdiction to vary the purposes under s 32. She further concluded that the proposed new trust satisfied the charitable purposes of the original bequest.

[17] The Little Sisters Trust opposes the application, and asks the Court not to approve the scheme and grant the orders sought.

[18] There are in essence, then, two issues to be determined. The first is whether it is impossible or impracticable or inexpedient to carry out the charitable purpose of the bequest, which requires identifying that purpose by interpreting the terms of the will. The second issue is, assuming that the purpose of the charitable bequest is impracticable, impossible or inexpedient to perform, whether the proposed scheme adheres as closely as possible to the original charitable purpose of the testator.

[19] Because of the passage of time, there is understandably only limited evidence of how the Home operated and its connection with Mr and Mrs Higgins. I record that both parties have filed affidavits in which deponents give their view on what Mr Higgins intended in his will. Putting to one side questions of admissibility, none of the affidavits is based on direct knowledge of what Mr Higgins said or what he instructed his lawyers to do. The affidavits at best provide only limited evidence of what Mr Higgins did. I have not found this evidence helpful, and indeed, neither counsel sought to rely on it.

The operation of s 32

[20] Section 32 and Parts 3 and 5 of the Act together achieve in New Zealand what was previously achieved by the doctrine of *cy-près*. The equitable doctrine of *cy-près* permitted funds in a charitable trust, where the intended purpose of the trust had become impossible or impracticable, to be applied by the Court to objects that were as near as possible to the original intention of the donor. *Cy-près* literally means “as close as possible”. In *Re McElroy Trust* [2002] 3 NZLR 99 (HC) at 103 (affirmed in [2003] 2 NZLR 289 (CA)) it was confirmed that the Charitable Trusts Act supersedes the common law doctrine of *cy-près*.

[21] Section 32(1) governs applications for orders to vary the purpose of charitable trusts. It provides:

32 Property may be disposed of for other charitable purposes

- (1) Subject to the provisions of subsection (3) of this section, in any case where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and *it is impossible or impracticable or inexpedient to carry out that purpose*, or the amount available is inadequate to carry out that purpose, or that purpose has been effected already, or that purpose is illegal or useless or uncertain, then (whether or not there is any general charitable intention) the property and income or any part or residue thereof or the proceeds of sale thereof shall be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereafter contained in this Part of this Act.

[emphasis added]

[22] The Court must evaluate the scheme and the applicant's proposed draft trust deed to determine whether it is consistent with Part III of the Act and that it can be approved under s 53.

[23] A scheme under s 32 cannot be approved unless it is established that it is impossible, impracticable or inexpedient to carry out the purposes of the trust. "Impossible" and "impracticable" have a plain meaning. "Inexpedient" was added as a criterion by the Religious, Charitable, and Educational Trusts Amendment Act 1928 to cover situations where, although neither impossible nor impracticable, to carry out the purpose would be obviously inexpedient by virtue of its having become unsuitable, inadvisable or inapt: *Re McElroy Trust (CA)* at [13].

[24] If any of the three criteria in s 32 are satisfied, the Court has jurisdiction under ss 32 and 53 of the Act to approve a scheme in substitution for the bequest provided for in the will.

Is the bequest impossible or impracticable?

[25] It is the essential submission of the St John Trust that the charitable purpose of the bequest has become impossible to achieve, as the charitable purpose was to benefit and support the charitable services of the Hastings Holy Family Home which

no longer exists. It was the essential submission of the Little Sisters Trust that the bequest was not directed specifically to the Hastings Holy Family Home, but rather to the charitable purposes and work carried on generally by the Little Sisters of the Poor. The Little Sisters Trust submits that those purposes are ongoing in other parts of the country and that the bequest should be used for the wider charitable purposes of that body throughout New Zealand.

[26] It is common ground that the purpose of the bequest was charitable. I am satisfied that this is so given the nature of the work carried out at the Hastings Holy Family Home and the reference in the will to the bequest being for the Home's "charitable purpose". It is necessary therefore to turn to the bequest and to interpret precisely what was its charitable purpose.

Submissions in relation to interpretation of the bequest

[27] Mr Scorgie for the Little Sisters Trust broadly submitted that the purpose of the bequest was, quoting from a general purpose of the Little Sisters, to "extend hospitality towards the aged suffering from financial need, loneliness and other difficulties" by offering care in the manner characteristic of the Little Sisters' mission. He emphasised the unique personal nature of the care provided by the Little Sisters of the Poor, which turns on the participation of the Sisters themselves. He submitted that the geographical location of that care was irrelevant. He focused on the deliberate use of the word "convent" as opposed to the name Hastings Holy Family Home, which he said made it clear that Mr Higgins intended to benefit the charitable purposes generally of the Little Sisters of the Poor.

[28] Mr Hughes-Johnson QC for the St John Trust submitted that the purpose of the bequest was to benefit the Hastings Home rather than any other Home run by the Little Sisters. He relied on the evidence of Timothy Graham ("Brother Timothy"), a Brother of the St John of God Order in Sydney, to submit that the reference to the convent was a reference to the Home. He relied on the evidence of a long-term association between Mr and Mrs Higgins and the Home as supporting his interpretation.

Approach to interpretation

[29] The issue whether the object of the gift was a particular institution or rather the broader charitable services provided by that institution has arisen in various forms on a number of occasions. It is stated in *Tudor on Charities* (9 ed 2003) at para 11-014:

In the case of a gift to a charitable institution two questions have to be asked in order to ascertain whether failure has occurred. First, was the object of the gift the institution or the charitable purposes associated with it? Secondly, has the institution in fact ceased to exist?

[30] A case frequently cited in this area is *Rymer v Stanfield* [1895] 1 Ch 19, where the testator bequeathed a legacy “to the Rector for the time being of St Thomas’ Seminary for the education of priests in the Diocese of Westminster for the purpose of such Seminary”. At the date of the will the Seminary existed, but shortly before the testator’s death the Seminary closed and the students were removed to a different institution. It was held that the bequests had been for the benefit of the particular institution and had therefore lapsed. Lord Herschell LC stated at 34:

I do not think it would be in accordance with sound principle to hold or that any prior decisions necessitate our holding, where the conclusion is once arrived at that the main object of the testator or testatrix was to benefit a particular institution, that that was not of the essence of the bequest and that if that institution has ceased to exist the charitable legacy ought still to be held as effectual, and the money to be applied by the Court on a *cy-près* principle.

[31] A similar conclusion was reached in relation to a legacy to a particular charitable institution in *Re Goldney* (1946) 115 LJ Ch 337.

[32] The position is different where an institution changes its name or identity but its essential work continues. In *Re Withall* [1932] 2 Ch 236 the testatrix directed her executors to pay the proceeds of the estate to the Margate Cottage Hospital. At the time she made her will a hospital of that name existed but at the time of her death the work formerly carried out by that hospital was carried on by a new hospital with a different name. It was held that the real intention of the testatrix was to benefit the purposes generally of the former hospital, and since those purposes could still be

fulfilled by giving the funds to the new institution, there was a valid charitable bequest. That is not the situation here, however. There is now no Little Sisters institution, or indeed any Catholic institution, carrying out work for the elderly in the Hastings or Hawkes Bay area.

[33] The meaning of a will is not a question of what the testator might have subjectively meant but rather of what intention can be objectively ascertained from the words of the document. In this exercise, the words are to be given as far as possible their natural and ordinary meaning, gathered in the light of the circumstances in which the will was made: *Perrin v Morgan* [1943] AC 399 (HL) at 420; *Re Thompson* [1993] 1 NZLR 21 (CA) at 23. To this extent, the court can take account of the way in which words are used in the relevant community: *Perrin v Morgan* at 418. The Court may also refer to extrinsic evidence to resolve an ambiguity: *Perrin v Morgan* at 420. Such evidence helps to establish the facts known to the testator at the time of the will: *Charter v Charter* (1874) LR 7 HL 364 at 377.

[34] For example, the meaning of words relating to a trade or location with which the testator was acquainted can be ascertained by the evidence of persons familiar with those words: *Re Rayner v Rayner* [1904] 1 Ch 176 (CA). As Lord Romer put it in *Perrin v Morgan* at 420: “In order to understand the language employed the Court is entitled, to use a familiar expression, to sit in the testator’s armchair.” In other words, while the starting point will be the ordinary and natural meaning of the words, it is often necessary to have regard to the background circumstances in order to make complete sense of the will.

Interpretation of the plain meaning of the words

[35] The bequest in Mr Higgins’ will is directed to an institution, stated in capitals and underlined, named as the “Convent of the Little Sisters of the Poor”. I have been referred to several cases dealing with the meaning of “convent” but they are not of particular assistance. In *Cocks v Manners* (1871) LR 12 Eq 574 and *Bradshaw v Jackman* (1889) 21 LR IR 12, a “convent” was considered to be a community of nuns so that a bequest to a convent was a bequest to the nuns themselves. Neither

counsel urged that interpretation, nor can it logically apply in this case given the reference to the place of the convent and to carrying on its charitable purpose. It applies to the institution, not the persons in it.

[36] Brother Timothy gave evidence that “convent” has two meanings to a religious Brother: first, a physical location where religious Sisters live; and second, the general apostolic work that occurs in a place where religious Sisters live. While Brother Timothy’s observations are helpful background, I have not found them of particular assistance in the task of interpretation. I also doubt whether Mr Higgins would have appreciated the second meaning, which Brother Timothy described as “conservative and old fashioned”.

[37] Counsel also placed emphasis on the dictionary definition of “convent”. The *New Zealand Oxford Dictionary* refers to both “1 religious community. esp. of nuns, under vows 2 the premises occupied by this”.

[38] I consider that both meanings are embraced in ordinary New Zealand parlance. The word “convent” in the will means a place where a body of nuns, or possibly monks or friars, live and work together. This interpretation is strongly reinforced by the words “at Hastings” following the reference to “convent”. I do not consider that “convent” normally encompasses, as Mr Scorgie suggested, the type of work that the nuns carry out.

[39] If Mr Higgins had intended to leave the balance of the estate to the Little Sisters Trust for general charitable work throughout New Zealand, there would have been no need to have added the qualification “at Hastings”. There would also have been no need to refer back in the last phrase to the charitable purposes of the “said Convent”. The final phrase “for the charitable purposes of the said Convent” makes it clear that the furtherance of the convent’s particular charitable services, rather than any other broader service or activity, is the charitable purpose of the bequest.

[40] The words of the bequest therefore disclose a plain meaning, without any need for knowledge of whether there is a convent at Hastings. The plain meaning is

that the bequest is made to a convent operated by the Little Sisters of the Poor at Hastings for the purpose of furthering the charitable services at the convent.

Background circumstances

[41] Mr Scorgie argued that the word “convent” was deliberately used instead of the name “Holy Family Home” to make it clear that the intention of the bequest was to benefit the charitable purpose generally of the Little Sisters of the Poor, and not the Hastings Holy Family Home specifically. However, it is not surprising, given Mr Higgins’ ongoing contact with the nuns, that he considered the Home first and foremost a convent: a place where nuns lived in a community and carried out community work. The fact that the nuns lived on the top floor, and the service to the elderly was carried on elsewhere in the Home, does not derogate from this interpretation. I do not consider that the background circumstances or the use of the word “convent” demonstrate any intention not to benefit the Hastings Home.

[42] Earlier cases can only be of limited assistance in the interpretation of a particular will, but they do reinforce that a bequest made to those who carry out a particular charitable purpose at a particular geographical location often means that the trust is created to ensure that the charitable work being carried on in that area would continue to be advanced, rather than to benefit the institution or individuals who are carrying on the work. Whether it is for the benefit of the institution or the individuals who worked there, either approach leads to a conclusion that the trust is impossible or impracticable to perform, as both the Sisters and the Home have since left Hastings.

[43] I am satisfied therefore that the words of the bequest reflect Mr Higgins’ intention to benefit the Hastings Holy Family Home so that it could advance its charitable function of providing care to the elderly. That care was of the type offered by the Little Sisters at the Home at the time of the will. The Little Sisters no longer provide that sort of care, or indeed any care at all, in the Hastings or Hawkes Bay area. It may have been possible to fulfil the purpose if there was still a residential presence of the Little Sisters of the Poor in the Hawkes Bay, but there is now no

such presence. It is therefore impossible to carry out the charitable purpose of the charitable trust established by the bequest and s 32 is therefore engaged.

[44] The St John Trust has therefore succeeded in establishing that it may propose a scheme under Part 3 of the Act. It has prepared such a scheme and has had it approved by the Attorney-General as it is obliged to do under s 35. It now seeks the Court's approval of that scheme.

Estoppel

[45] The issue of estoppel was raised by the St John Trust. It observed that the Sisters had assigned all of their "right, title and interest in the beneficial interest in the bequest" to the St John Trust by deed of assignment on 25 June 2002, which it submitted was a representation that the Brothers were entitled to do what they liked with the bequest funds.

[46] I do not consider that this follows. The assignment of Mr Higgins' bequest gave the St John Trust no better right to use the funds than that of the Little Sisters Trust. The Little Sisters were bound to administer the bequest in accordance with the bequest and the St John Trust was under the same obligation. The deed of assignment could not affect that obligation, and cannot affect the ability of the Little Sisters Trust to contest the actions of the St John Trust as trustee.

[47] Further, the assignment expressly recorded in the recitals that the St John Trust would "continue to operate and maintain the home along the same Catholic principles [as] those administered by [the Little Sisters Trust]". The assignment was therefore made on the premise that the Hastings Holy Family Home would continue to operate according to charitable Catholic principles. That premise ceased to exist when the form of operation ceased in 2004 when the St John Trust sold the Home to a non-charitable institution. There is nothing unfair in the Little Sisters Trust, now that that premise has ceased to exist, contesting the actions of the St John Trust.

[48] I would also observe that the private law concept of estoppel is not well suited to an application such as the present, where the Court has a role in the public

interest to decide whether s 32 applies in respect of an undoubtedly charitable bequest. However, it is not necessary to express any final view on this matter.

[49] I therefore conclude that the Little Sisters Trust is not estopped from opposing this application.

The scheme

The approach to approving the scheme

[50] Under s 53 of the Act the Court has jurisdiction in respect of the approval of any proposed substituted schemes. Section 53 provides:

53 Jurisdiction of Court in respect of schemes

Where application for approval of any scheme is made to the Court under Part 3 or Part 4 of this Act—

- (a) The Court may decide what persons shall be heard before it in support of or in opposition to the scheme:
- (b) The Court shall have jurisdiction and authority to hear and determine all matters relating to the scheme:
- (c) The Court may make an order approving the scheme with or without modification, as it thinks fit.

[51] Section 56(1)(a) of the Act provides that the Court must not approve a scheme unless it is satisfied that it is a proper one, and should carry out the desired purpose or proposal, and is not contrary to law or public policy or good morals, and that the proposal can be carried out. The approach of the Court to approving a proposed scheme was summarised by Tipping J in *Re Twigger* [1989] 3 NZLR 329 at 342:

Part III does not make a cy-pres approach mandatory. However, this Court has held in the series of decisions, which I have traversed, that those promoting a scheme under Part III should seek to substitute beneficiaries or purposes resembling as closely as possible in the changed circumstances those which originally commended themselves to the person who established the trust. That is simply another way of saying, as did Holland J in *Erskine's* case, that the wishes of the testator must be followed as far as possible by the scheme.

To achieve that objective it is obviously necessary as a first step to identify those wishes as exemplified by the original trust which ex hypothesi has failed or become inexpedient or impracticable. Trusts of a charitable nature will be expressed or established with differing degrees of detail or specificity. In seeking to derive the settlor's intention, one should in my view endeavour to establish what one might call the essential elements of the original trust.

[52] This approach is derived from earlier New Zealand cases such as *Re Palmer* [1939] NZLR 189 (SC) at 193 and *Public Trustee v Attorney-General* [1923] NZLR 433 (SC). The same approach was adopted in *Re Erskine* M292/86 17 June 1987 (CP7) and *Re Twigger* was followed in *Re Tennant* [1996] 2 NZLR 633 at 637. The same approach was approved by the Court of Appeal in *Re McElroy Trust* [2003] NZLR 289 (CA) where Tipping J stated at 293:

...a scheme of variation may be approved so long as it keeps as close as reasonably possible in the new circumstances to the original intention of whoever established the trust.

[53] In *Public Trustee v Attorney General* at 442, Hosking J stated that he did not consider that approval of a scheme was hampered by the traditional limitation in the doctrine of *cy-près* in that the new purpose or combination of purposes did not need to be of the same nature as that intended by the testator. The property could be applied to a charitable purpose without regard to its resemblance to the original purpose. However, it is clear from *Re Twigger* that the scheme of variation to be approved must keep as close as reasonably possible in the new circumstances to the original intention of the testator, even though there is no such limitation in the words of the Act.

[54] To adopt an entirely discretionary approach would risk the courts imposing their own perception of what is an appropriate charitable purpose. This sort of approach might not be in the public interest. The reference to the intentions of the testator envisaged in *Re Twigger* provides a touchstone to ensure that the courts apply a principled approach to the approval of replacement schemes. Mr Scorgie submitted that in exercising its discretion it is legitimate for the Court to take into account the views of the testator's surviving family, referring to *Re Wilson Home Trust* [2000] 2 NZLR 222 at [13]. I do not accept that *Re Wilson* stands for that proposition. The Judge only noted the family's support. Such support or indeed

opposition cannot be a factor of substantive relevance in the Court's consideration process. The intentions of the testator should be used to fashion the new trust, and not any later opinions.

[55] Despite the emphasis on original intention, there must always be a degree of departure from the original trust, as impossibility, impracticality or inexpedience in relation to the original trust are a prerequisite to the jurisdiction. In *Gallagher v Attorney-General* HC WN CP7/90, 4 October 1990, for example, Neazor J approved a scheme that departed substantially from the original trusts. Therefore, despite the need to adhere to the testator's intention as far as possible, the Court must recognise that something of the original intention will be lost, and strive to approve a practical way forward that appears to follow that intention as closely as possible in the circumstances.

[56] It is necessary to set out the purposes of the proposed scheme and compare these to the identified purpose of the original bequest.

The proposed scheme

[57] The key paragraph of the proposed scheme is paragraph 5.1 of the draft deed of trust, which states the purposes as follows:

- 5.1 The purposes and objectives of the Trust are to use or employ the capital and accrued interest of the Trust Fund for the furtherance of the objectives of the Trust in accordance with the provisions of this Deed. Without limiting this in any way, such charitable purposes and objectives shall include:
- (a) Alignment in so far as is possible with the original charitable purpose of the trust under the will of the late Shaun Vincent Higgins.
 - (b) The provision of funds for the spiritual, pastoral, emotional and social needs of Elderly persons in the Hawkes Bay area.
 - (c) The provision of funds for the development, maintenance and implementation of services for the health care of the Elderly in Hawkes Bay, where services are either unmet or at risk of not being able to be sustained. Such services to include but not be limited to community services, hospital care including rehabilitation and psychogeriatric services and pastoral care.

- (d) The provisions of funds for other areas associated with the charitable care or support of all Elderly persons in the Hawkes Bay area, including without limitation the provisions of:
 - (i) funding in the form of grants or remuneration for those persons working with Elderly persons;
 - (ii) funding in the form of scholarships for particular identified Elderly needs;
 - (iii) funding for recreation, events and social amenities for Elderly persons and the co-ordination of Elderly services;
 - (iv) funding for the co-ordination of services for the Elderly;
 - (v) information and advice about Elderly persons and whether to Elderly persons or members of the public generally;
 - (vi) funding for the maintenance of provision of equipment to assist the mobility and function of the Elderly; and
 - (vii) funding for any other such related needs.
- (e) Failing the above, for the furtherance of the interests of Elderly persons in the Hawkes Bay area (generally and individually) as the Board shall in its absolute discretion see fit.
- (f) Failing all of the above, for the furtherance of the interests of Elderly persons in New Zealand (generally and individually) as the Board shall in its absolute discretion see fit.

[58] These elements must now be compared to the essential elements of the original trust.

The purpose of the bequest

[59] The first step in comparing the proposed scheme with the original trust is to identify the charitable purpose or purposes which have become impossible and impracticable to carry: *Re Twigger* at 342. I have carried out such an exercise generally in the first part of the judgment. The purpose generally was to benefit the charitable services of the Hastings Holy Family Home so that it could provide care to

the elderly of the type offered by the Little Sisters at that Home at the time of the will.

[60] It is the key submission of the Little Sisters Trust that the proposed scheme fails to meet the charitable purpose of the bequest. In contrast, the St John Trust submits that the scheme is a fair reflection of the original purpose given the present situation. The parties have made different submissions as to what are the elements of the testator's purpose which should be reflected in the scheme, and those differences in turn reflect the different interpretations of the bequest as put forward in submissions. The Little Sisters Trust submits that the essential elements of the original charitable trust are:

- a) care of the frail elderly most in need;
- b) regardless of where those elderly might come from;
- c) carried out in the Hawkes Bay;
- d) provided in a primarily residential manner;
- e) by a Catholic organisation;
- f) delivered in a primarily hands-on and personal manner;
- g) delivered in a manner which actively demonstrates the Catholic faith, including in particular witnessing the compassionate love and mercy of God through service to the elderly; and
- h) which includes support, and in particular residential care for the dying.

[61] The Little Sisters Trust submits that the proposed scheme falls far short of incorporating all these elements. While accepting that not all these elements could be workably included in a new scheme, it submits that the proposed scheme fails to

reflect the intentions as closely as is practically possible. Its criticisms are lengthy. To summarise them, the Little Sisters Trust submits that:

- a) There is no reference to “frailty” or being “most in need” as criteria for the application of trust funds for supportive care of the elderly;
- b) The scheme does not provide for a particular type of care to the elderly who are most in need, but rather to the elderly generally where healthcare needs are unmet or at the risk of not being able to be sustained;
- c) There is no requirement or even preference in favour of residential care;
- d) The scheme errs in providing substantial preference in favour of residents of the Hawkes Bay;
- e) The scheme goes beyond the object of caring for the elderly who are frail and in need in providing for:
 - i) scholarships in relation to identified elderly needs;
 - ii) funding for the co-ordination of services for the elderly; and
 - iii) information and advice about elderly persons.

[62] The proposed Trust is not especially Catholic in flavour. The Little Sisters Trust submits that the power of appointment will not permit the Institute of the Brothers of St John of God to dictate the conduct of the trustees. None of the trustees is required to be religious in the sense of being members of a Catholic order having taken vows, or even necessarily Catholic. The Little Sisters trust submits that there is no requirement that the services provided be carried out in a way which actively demonstrates the Catholic or even the Christian faith.

[63] The Little Sisters Trust also makes the general criticism that the purposes of the proposed scheme are so broad that the funds can be applied in almost any manner for the benefit of any elderly in the Hawkes Bay. It is submitted that this is substantially broader than the purposes of the original bequest. The Little Sisters Trust made detailed suggestions as to ways in which the scheme could be improved. Included in the proposals is an amendment to provide that as long as the Little Sisters have an active presence in New Zealand, the nominees must have an understanding of the Little Sisters' mission or spend sufficient time with them so that they can achieve this. It is submitted that the role of the Little Sisters should be "entrenched and carried forward". The Little Sisters Trust proposes an alternative scheme in which the bequest funds are applied to the works of the Little Sisters of the Poor in Auckland and Dunedin.

[64] The St John Trust agrees that certain elements identified by the Little Sisters Trust are indeed elements of the original trust. They agree with the following purposes:

- a) care of the frail elderly most in need;
- b) carried out in Hawkes Bay;
- c) providing a primarily residential manner;
- d) by a Catholic organisation;
- e) delivered in a manner which actively demonstrates the Catholic faith, including in particular witnessing the compassionate love and mercy of God through service to the elderly; and
- f) which includes in support and in particular residential care for the dying.

[65] They argue that the proposed scheme meets these objectives.

Discussion

[66] As is often the case with charitable bequests in a will, the purposes of the trust must in this case be elicited from a relatively short sentence. The testator's intention is to be inferred by the court examining the words used and the background circumstances at the time the will was executed to extract the key elements that the testator would have seen as essential.

[67] I consider that the following key elements derived from the nature of the work done at the Home at the time of the will constitute the more detailed purposes of the bequest:

- a) The care of elderly persons who are in need, which includes support for and residential care for the dying;
- b) The care should be given in the Hawkes Bay;
- c) The care should if possible be given at least in part by the Sisters in the Hastings home.
- d) It should be provided if possible in a residential manner;
- e) It should be administered by a Catholic organisation, which recognises the principles of the Little Sisters of the Poor in providing personal and compassionate love and care.

[68] The proposed scheme contains no specific reference to frailty or being in need, yet it is clear that the Hastings Holy Family Home provided support to elderly people who were actually in need rather than solely elderly. However, the proposed scheme at paragraph 5.1(b) refers to providing for the spiritual, pastoral, emotional and social needs of elderly persons in the Hawkes Bay area. "Elderly" is defined at paragraph 4.1 in the proposed deed as "persons over the age of 65 years who are socially and/or economically in need of care and support."

[69] I am satisfied that despite the prosaic nature of the language of the new proposed trust, the concept of providing for the frail and needy is encapsulated by the definition of “elderly” and the reference to social and/or economic need. I consider that any further changes referring to frailty or age would be tinkering.

[70] The Little Sisters Trust criticised the proposed scheme for giving a substantial preference to residents of the Hawkes Bay. The general limitation to the Hawkes Bay can be seen as an acknowledgement that the majority of residents of the Hastings home as a matter of practicality would have come from the immediate environment so that they could be close to family and friends in a familiar location. It is now simply impracticable to run a Catholic residential service in the Hawkes Bay. If the service is no longer residential then it makes more sense for it to be limited to a geographical area. To open the trust to the whole of New Zealand or even to the whole of the North Island or an area broader than the Hawkes Bay is likely to take away the locational quality of the original trust entirely, especially in the absence of a residential base. I also note that there is also a default clause for the furtherance of the interests of elderly persons in New Zealand generally and not just in Hawkes Bay in the Board’s absolute discretion. I therefore consider that the wording of the proposed trust deed is adequate to meet the intention of the trust in this respect given the practical realities of the present time.

[71] The Little Sisters Trust also criticised the lack of focus on residential care. However, this is inevitable given that there is now no Catholic home in the Hawkes Bay area and indeed only one other home with a religious philosophy. Given that there is no Home in which to provide residential services, non-residential services are the next best alternative for helping the elderly in need. It is not possible to ignore the realities of the present time, namely that there is no Catholic home in the Hawkes Bay capable of providing residential care. Nor is the bequest sufficient to create such a Home. The Little Sisters Trust submission in essence seeks a return to some sort of residential service, which is simply not practicable. There appears to be only one religious institution left providing care to the elderly. This is Waiapu House in Havelock North, which is owned and managed by Anglican Care (Waiapu) Limited. It is not realistic, therefore, to limit the powers of the trust to the personal provision of residential services. The general purposes of providing for the spiritual,

pastoral, emotional and social needs of elderly persons who are socially and economically in need of care and support will be met under the scheme. I consider, given those realities, that the trust deed goes as far as it can to meet the purpose of the bequest.

[72] I do think, however, that the scheme should include a provision emphasising the need for the provision of personal and compassionate care. Specific recognition of this goal would be in accordance with the original purpose.

[73] It is also difficult to see how the provision of funds in the form of scholarships for particular identified elderly needs at clause 5.1(d)(ii), which will presumably benefit a non-elderly person who wished to study the care of the elderly, adheres to the original purposes. It certainly does not reflect the personal nature of the way in which the Hastings Holy Family Home worked with elderly people. The same criticism can be made of clause 5.1(d)(iv), which relates to funding for the co-ordination of services for the elderly, and 5.1(d)(v), which relates to the provision of information and advice about elderly people, whether to elderly people or members of the public generally. These three purposes in 5.1(d) go beyond the personal and relational nature of the services envisaged in the original bequest and are not necessary to make the re-constituted bequest function. They should be deleted.

[74] It is also a fair criticism that the proposed trust is not sufficiently Catholic in character. Despite the fact that the power of appointment of trustees is vested in the Institute of the Brothers of St John of God, and that there is a distinct likelihood that at least some of the trustees will be appointed because they are Catholics, Catholic identity is not guaranteed. The use of the word “Convent” and the inherent Catholic nature of the Home when it functioned make it clear that there was an essential Catholic identity envisaged in the original bequest. This appears to be still achievable. The scheme requires an amendment that provides for the services to be carried out with regard to Catholic principles. I note that the St John Trust is prepared to accept the possibility of such an amendment, and in particular an amendment which refers to the vow of hospitality which is common to both the Little Sisters and the Brothers of St John. That would be a useful addition. I do not

consider that the structure of the proposed trust and procedures for appointing trustees need alteration in this regard.

[75] I have concluded that the broader purpose of the bequest was to provide Catholic care for elderly persons in need. With the reservations mentioned, the scheme meets this purpose.

[76] I therefore reject an alternative scheme sought by the Little Sisters Trust, which would see the bequest funds applied to the Little Sisters in Auckland and Dunedin or for the Little Sisters Trust purposes more generally. To modify the scheme in such a way would be to defeat the testator's intention and to fail to achieve the purposes of the charitable trust established by the bequest.

The power to modify

[77] Under s 53(c) a Court expressly has the power to modify a proposed replacement scheme. However, I accept that the Court cannot simply substitute a new scheme for that which is proposed. As Tipping J stated in *Re Twigger* at 347:

My power to approve the scheme of modifications is limited. It does not, I think, include the power to approve substantive changes in beneficial interests from those propounded by the scheme ... In this case I am not satisfied with the scheme in so far as it attempts to substitute beneficiaries for either the Canterbury Orphanage or for the Christchurch Female Refuge.

However, while it would not be appropriate for the Court to make substantial modifications to the scheme, I have no doubt that minor modifications of the type proposed are permissible under s 53.

[78] I do not consider that the proposed scheme is sufficiently deficient to warrant a refusal of the originating application, as with some relatively minor modification, the scheme does accord as closely as is reasonably possible in the modern context with the intentions of Mr Higgins.

Conclusion as to scheme

[79] I consider that the scheme with some modifications should be approved. The amendments required are not major. The provision of personal and compassionate care should be emphasised. The purposes 5.1(d)(ii), (iv) and (v) should be deleted. As far as practicable, the need to provide a distinctively Catholic type of care should be emphasised.

[80] The parties are agreed that if the Court requires modifications, the application should be referred back to them so that a modified scheme can, if possible, be prepared and re-submitted.

Result

[81] I find that the bequest falls within s 32.

[82] The Court, with some modifications as set out in this judgment, will approve the proposed scheme.

[83] This is an interim judgment. The parties are to confer to see if they can agree to modifications to the scheme on the basis outlined in this judgment. The scheme is then to be submitted back to the Court. If the parties cannot agree, the proceeding can be brought for a further hearing in which the necessary modifications will be determined.

Costs

[84] At the request of the parties the issue of costs is reserved. It is to be hoped that this matter can be resolved by consent. It would be premature to make timetable orders in relation to costs at this point given that a further stage in the proceedings remains. If at any stage the parties seek a determination on issues as to costs, they should file preliminary memoranda seeking procedural directions.

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Asher J