

BANNOCHIE, RE IRIS

[HIGH COURT - CIVIL SUIT NO. 893 OF 1991

(Chase, J., March 11, 1994]

(1994) 30 Barb. L.R. 111

Will - Construction - Testator bequeathed life interest in property to her husband with remainder and power to apportion same between her daughters and a charity - Gift referred to "my property called Andromeda being a dwellinghouse and lands thereto attached and enjoyed herewith" - Whether gift included plants not attached to the ground, tools, implements and garden furniture - Remainder over to the charity contained conditions precedent and subsequent to vesting gift - Whether conditions void for uncertainty - Whether will created trust - Whether testatrix intended gift to create a charitable trust.

Facts: The testatrix was the owner of the Andromeda gardens. She was also an active member of the Barbados National Trust. In her will she made a number of bequests including the following

"...to my said husband...all my household furniture for his use during his lifetime or as long as he desires to remain at Andromeda. After his death or at his desire no longer to live at Andromeda, to my trustees with power in their absolute discretion to apportion the same between my daughters and the National Trust."

As regards the disposition of "Andromeda" the terms of the will are as follows:[111]

"I give my property called "Andromeda" being a dwellinghouse and the lands thereto attached and enjoyed therewith ... unto my trustees in trust for my husband ... during his lifetime, and upon his death or upon any intimation from him during his lifetime that he no longer desires to live at Andromeda upon trust to offer the same to the Barbados National Trust..."

A declaration was sought as to whether the gift of "my property called Andromeda being a dwellinghouse and the lands thereto attached and enjoyed herewith" included plants hanging or in pots and not attached to the ground, plant pots, garden tools and implements and garden furniture. It was further contended that conditions referred to in the will re the gift to the Barbados National Trust were void for uncertainty.

Held: (i) The plants kept and used for viewing as part of the gardens, the 800 plants in pots on stands kept on display and the several hundred potted plants in the covered fernery would be excluded from the gift of "household furniture and effects." The potted plants in and about the dwellinghouse as well as the remaining plants referred to in the affidavit evidence of the testatrix's husband would seem to be part of the gift to the husband;

(ii) the terms of paragraph (c) to (f) as they relate to the gift to the National Trust are vague, too wide and uncertain and do not create binding obligations on the National Trust;

(iii) in the circumstances of the will, a charitable trust is created in favour of the Barbados National Trust for the benefit of the public.

Cases referred to:

Re Baron Wavertree of Delamere (Deceased); Rutherford v. Hall-Walker [1933] 1 Ch. 837.

Re Howe Ferniehough v. Wilkinson (1908) W.N. 223.

Re Seton-Smith v. Waite [1900] 3 All E.R. 144.

Re Verrall. National Trust for Places of Historic Interest or Natural Beauty v. A.G. [1914] All E.R. 546.

Statutes and statutory instrument referred to:

Barbados National Trust Act, 1961 (58/1961).

Charities Act, Cap. 243, sections 2-4.

National Trust Act, 1907, section 4 (U.K.).

Rules of the Supreme Court, 1982, O. 9.

Trustee Act, Cap. 250, section 74.

Mr. J. Hanschell for the petitioner.

Dr. T. Carmichael with Mrs. M.J. Mahabir for the respondent. [112]

CHASE, J.: This is an application by way of petition for an order for declarations with respect to the construction or interpretation of certain provisions of the will of the late Iris Bannochie.

The petitioners, John Mackie Bannochie and John David Straughn McKenzie, are the executors and trustees of the testatrix, and they have brought these proceedings under section 74 of the Trustee Act, Cap. 250, and in accordance with Order 9 of the Rules of the Supreme Court.

Section 74(1) of the Act are in these terms:

"A trustee or personal representative may without commencing an action apply by petition to the court or by summons upon a written statement to a Judge in Chambers for the opinion, advice or direction of the court or Judge in Chambers on any question respecting the management or administration of the trust property or the assets of any testator or testate."

The petitioners as trustees of the will have filed a joint affidavit in support of the application seeking the court's guidance as regards the construction of certain clauses of the will.

The Barbados National Trust, as one of the principal beneficiaries under the will, as the respondent to this application, has filed a cross-petition seeking the declarations set out in their petition which is supported by the affidavit of the President of the Trust, Dr. Henry Stuart Fraser.

The undisputed facts disclosed by the affidavit evidence as a whole are as follows:

During her lifetime, the testatrix was the owner of the property called "Andromeda", consisting of a dwellinghouse with lands containing 8 1/2 acres. She and her husband, John Mackie Bannochie, occupied the dwellinghouse and part of the surrounding lands as their matrimonial home.

Over the years, the testatrix developed part of her property into a tropical or botanical garden which was opened at stated times for viewing by members of the public. The garden became known as "Andromeda Gardens" and was managed by the testatrix with the assistance of her husband.

I might add that it is a matter of common knowledge that since the establishment of "Andromeda Gardens" the beauty of the gardens has attracted viewing not only from members of the Barbadian public, but also from overseas visitors.

Apart from her involvement with running the gardens, the testatrix was an active member of the Barbados National Trust upwards of 25 years, until her death in 1988. During her association with the Trust, she served as a member of its governing council, and, as such, would have been aware, not only of the objectives of the Trust, but also of the methods employed by the trust to attain its objectives.

The documentary evidence (Exhibit A) before the court discloses that on June 18, 1985, Mrs. Bannochie made her last will and testament as the widow of Harold Haynes Bayley and as the wife of John Mackie Bannochie to whom she was married on April 13, 1964. [113]

From a consideration of the provisions of the will as a whole, the court finds that the testatrix adopted a scheme for the disposition of her assets in a manner which would seem to be significant in ascertaining her intention as regards the bequests which she made primarily to the following:

- (1) her husband
- (2) her 4 daughters
- (3) her granddaughters
- (4) her daughters' nurse, and
- (5) the Barbados National Trust.

In relation to her husband, the bequests are in these terms"

"(a) to my said husband, John Mackie Bannochie, a legacy of twenty-eight thousand dollars Barbados currency and my shares in Andromeda Nursery Gardens Ltd. (Page 1).

....

(1) all my household furniture and effects to my husband for his use during his lifetime or as long as he desires to remain at Andromeda. After his death or at his desire no longer to live at Andromeda, to my trustees with power in their absolute discretion to apportion the same between my daughters and the National Trust." (Pages 2 and 3).

Specific legacies were also made by the will to each of her daughters and granddaughters and to the nurse who cared for her daughters during their infancy. It is unnecessary, however, for the purposes of the court's opinion to refer more particularly to those legacies.

As regards the disposition of "Andromeda", the terms of the will are as follows:

"I give my property called "Andromeda" being a dwellinghouse and the lands thereto attached and enjoyed therewith situate in the parish of St. Joseph on Beachmont Hill, Bathsheba, in this Island containing by estimation eight and a half acres, unto my trustees in trust for my husband, John Mackie Bannochie, during his lifetime, and upon his death or upon any intimation from him during his lifetime that he no longer desires to live at Andromeda UPON TRUST to offer the same to the Barbados National Trust provided that the said National Trust has not become an arm of the Barbados Government and is not controlled by the Barbados Government upon and subject to the following terms and conditions..." (Page 3). [114]

The terms and conditions as described by the will appear at pages 4 and 5 and reference will be made to each of them later in this opinion as they relate to the gift to the Barbados National Trust.

The petitioners are concerned as to the full scope and effect of the foregoing clause of the will and are asking the court for:

(1) A declaration as to whether on a true construction of the will, the gift referred to on page 3 of the will of "my property called Andromeda being a dwellinghouse and the lands thereto attached and enjoyed herewith" includes any plants hanging or in pots and not attached to the ground, plants pots, garden tools and implements and garden furniture.

It is the contention of the petitioners that the testatrix in her will dealt with the major assets which comprised her estate, namely, the dwellinghouse, garden, items of jewellery and her collection of horticultural and orchid books, and that the will was silent on the question of the moveable items, such as plants hanging or in pots and not attached to the ground and plant pots, etc.

It is therefore submitted on behalf of the petitioners that the moveable items of property not specifically disposed of by the will should be included in the testatrix's disposition to her husband of "all my household furniture and effects to my husband for his use during his lifetime."

The Barbados National Trust opposes the interpretation contended for by the petitioners and argues that the gift by the will of "my property called 'Andromeda'" being a dwellinghouse and the lands thereto attached and enjoyed therewith includes the moveable property and that such property would therefore form part of the gift to the Trust.

What does the evidence disclose in relation to these items of property?

In his affidavit filed in support, the petitioner John Bannochie deposes as follows:

"(a) (1) At the time of my wife's death, the entire back area of our house in and/or about the foot of the kitchen steps contained several hundred potted plants including hybrid ixora, cacti and succulents.... In addition, there used to be approximately 50 varieties of bougainvillea in large concrete pots in the same area ...

(2) At the time of my wife's death there were about 100 to 150 large palms in concrete pots almost covering the steps going down to the house....

(3) At the time of my wife's death the covered fernery outside of the spare bedroom affectionately referred to by my wife and me as the "holy of holies" contained several hundred potted plants there for special care. [115]

(4) At the time of my wife's death there were several hundred of large empty plant pots, both clay and concrete, in our locked garage.

(5) At the time of my wife's death the "Rare Plant House" in the garden was full of rare plants in pots....

(6) At the time of my wife's death, there was an area outside of the "Rare Plant House" where about 800 plants in pots on stands were kept on display...."

The submission on behalf of the Trust with regard to the foregoing evidence is that the Trust is not contending that the plants in pots hanging or otherwise that were in and about the house should be removed from the property which is to be enjoyed by the testatrix's husband during his lifetime.

What is contended for by the Trust is that any plants, whether in pots hanging or otherwise which were in the gardens proper and constituting part of the commercial enterprise run by the testatrix during her lifetime for the benefit of visitors to Andromeda Gardens formed part of the property described by the testatrix as "Andromeda" and, as such, would pass to the Trust.

Several cases and other authorities were cited by counsel to support their submissions.

In *Re Baron Wavertree of Delamere* (deceased); *Rutherford v. Hall-Walker* [1933] 1 Ch. 837, the testator gave to a legatee:

"such of the furniture and household effects which, at the time of my death shall be in or about either of my residences, Harsley Hall or Sussex Lodge, as she may select for the purpose of furnishing a residence..."

The questions submitted for the judgment of the court were:

(i) whether the legatee was entitled to select furniture and household effects from both residences mentioned, or must she select from which of them she would have made her choice, and thereupon be precluded from making any selection from the other?

(ii) did the bequest include motor cars, consumable stores, garden implements and tools?

It was held that the legatee was entitled to the whole of the furniture and household effects in both residences and that the words "in and about" included the motor cars and the other moveable property.

In *Re Seton-Smith v. Waite* [1900] 3 All E.R. 144 the testator, who carried on a hotel business and resided on the premises, bequeathed "all the furniture and other [116] personal effects belonging to me and which at the date of my death are at the R Hotel" to W.

It was held that all the furniture and personal effects at R Hotel, whether used in connection with the business or not, passed to W.

In the course of his judgment, Buckley, J. commented as follows:

"In *Pratt v. Jackson*, a man named Jackson had a house in which he lived in London, and he also had a house in Gosport which was used as a hospital for invalid seamen, and was provided with beds, sheets, and other articles for use of patients who were received there and taken care of. The question arose under articles executed by Jackson and his wife before marriage by which it was agreed that in consideration of a provision made for the wife by the intended husband, the wife should have no claim out of his real or personal estate

'provided this should not extend to what he, the said intended husband, should or might leave her by will, nor to all or any of the household goods, or utensils or household stuff, etc. of him the said Nathaniel Jackson at the time of his death, all of which she was to receive and enjoy.'

The husband having died, the wife claimed the beds, sheets, and other things in the house at Gosport, and the question was whether she was entitled to them as household goods or utensils or household stuff within the intent of the marriage articles. It was held that they were not. The material word in that case was "household". Whose household was referred to? The answer was, the testator's. The beds and sheets in the house at Gosport were not his household goods or stuff in that sense. That case was followed in *Le farrant v. Spencer* where a bequest of "household furniture, linen, plant and apparel whatsoever" was held not to include goods which the testator had for trade and merchandise as distinguished from his own domestic use. In *Manning v. Purcell* the testator bequeathed to his wife "all my moneys, household furniture, plate, books, linen, wearing apparel, etc." He had a tavern as a house of business and also a private residence, both containing furniture, and he lived at the latter, but sometimes slept at the former. The decision of that case was grounded on the word "my" and it was held that the bequest did not include furniture used at the tavern, but that it meant furniture which was used in "my" household."

In *Re Howe Ferniehough v. Wilkinson* [1908] W.N. 223, the question arose as to whether the words "my household furniture and effects in Thornleigh (just as it now stands)" were sufficiently wide - qualified as they were by the word "household" - to include three motor cars kept in a motor house built by the testator in the yard of Thornleigh and used in the ordinary way as private carriages [117] in connection with his occupation of Thornleigh and in which he was in the habit of taking the plaintiff for drives, shopping and touring.

Eve, J., in his judgment considered that it was clear on the will that the testator wanted the plaintiff to have the house just as they were living in it at the time, and having regard to the evidence, he could not say that the motor cars did not form a very important part of the house as they were living in it down to and at the time of the testator's death. In the circumstances, the phrase "household furniture and effects" included the motor cars.

It is clear from the terms of the will in the instant case that the testatrix intended that her husband should only have the use and enjoyment of the dwellinghouse, its furniture and effects during his lifetime. It therefore seems not unreasonable to infer that she also intended that his use and enjoyment was to be no less than when they both occupied the dwellinghouse and derived pleasure from its effects.

The evidence shows that at the time of her death there were potted plants in and about the dwellinghouse, and it is my view that the gift to her husband of "all my household furniture and effects for his use during his lifetime" extends to those potted plants and other moveable items which were used by the testatrix for the purposes of her household as distinct from those plants and plant pots, etc. used for and in connection with her commercial enterprise, that is, *Andromeda Gardens*.

In determining what moveable plants comprise the gift to Mr. Bannochie, the test to apply would be to establish what plants etc. were used by the testatrix in and about her "household" before her death. Clearly, the plants kept and used for viewing as part of the gardens would be excluded by the use of the word "household".

Apart from the test that I find applicable to determine the question raised as to the moveable plants, it would seem on the affidavit evidence of Mr. Bannochie, that the 800 plants in pots on stands kept on display would be excluded from the "household furniture and effect", also the rare plants in pots in the "Rare Plant House" in the garden would be excluded.

As regards the several hundred large empty plant pots, both clay and concrete, in the locked garage, and the "several hundred potted plants in the covered fernery" there is no evidence before me that these empty plant pots and potted plants were used by the testatrix for her "household" and would therefore in my view be excluded from the gift of "household furniture and effects."

The remaining plants referred to in the affidavit evidence of Mr. Bannochie would seem to be part of the "household" effects and would pass as part of the gift to him. To hold otherwise would seem to lead to the absurd result of the hanging plants, plants in plant pots, etc. used for the purposes of the "gardens" being withdrawn from the gardens and used as household effects.

I turn now to the gift of the property called "Andromeda". It is contended on behalf of the petitioners that: [118]

(i) the conditions referred to in the will at (a) to (f) are all conditions precedent to the gift to the Barbados National Trust and as such, must be satisfied or fulfilled prior to vesting of the gift in the Trust;

(ii) all the conditions are uncertain, unclear or incomplete and consequently all the conditions are void for uncertainty.

Counsel for the petitioners therefore submits that since all of the conditions are void for uncertainty, the gift to the Trust fails in its entirety and reverts to the trustees of the will to be held on trust for the other beneficiaries, being the four daughters of the testatrix.

Counsel for the National Trust, on the other hand, contends that conditions (a) and (b) are capable of being ascertained and complied with prior to the vesting of the gift in the Trust. Counsel further contends that conditions (c) to (f) are all conditions subsequent which can only be carried out after the property has been vested in the National Trust.

I find that there is merit in the contentions of counsel for the National Trust. Condition (a) stipulates:

"(a) The property is to be accepted by the Barbados National Trust within sixty days of it being offered by the Trustees to the said Barbados National Trust."

Within the context of the will as a whole, it is clear that the trustees would not be in a position to offer the property to the National Trust until the death of the testatrix's husband or upon some indication from him during his lifetime that he no longer wishes to live at "Andromeda".

When the offer is made by the trustees upon the occurrence of either of these two events, the National Trust would have to signify its acceptance of the gift within 60 days of the offer, failing which the trustees are to hold the property in trust for her 4 daughters.

I therefore find that condition (a) is undoubtedly a condition precedent which is not uncertain to the vesting of the gift in the National Trust. Similarly, condition (b) is a condition precedent in that it is clear that it was the testatrix's desire that the gift to the National Trust should be free from taxes on its transfer to the National Trust.

As regards the remaining terms attached to the gift, that is, (c) to (f), except for the concluding clause of paragraph (f) on page 4 of the will, I find them to be conditions subsequent and for the purpose of this opinion. I consider it necessary only to refer particularly to condition (c), the terms of which are these:

"(c) That the Barbados National Trust employs a horticulturalist of at least ten years experience and with a horticultural degree from a recognised university to manage the gardens of Andromeda which I have made [19] there, to organise and supervise the projects listed below in (d) and (e) and to maintain the high standard of horticulture which has made these gardens famous."

Clearly, the employment by the National Trust of a horticulturalist with the qualifications envisaged by the testatrix is a matter that must abide the offer of the property to, and its acceptance by, the National Trust, that is, the employment of a horticulturalist would be subsequent to the vesting of the property in the National Trust. ...

Having found that the terms of (c) to (e) and (f) to a limited extent are conditions subsequent, I must now consider whether these terms are sufficiently certain as to create binding obligation on the National Trust.

Having examined the cases and authorities cited, I am satisfied and therefore hold, that the terms of paragraphs (c) to (f) as they relate to the gift to the National Trust are vague, too wide and uncertain, and as such, do not create binding obligations on the National Trust.

The question that remains for determination is whether it was the testatrix's intention that the gift to the Barbados National Trust was for the purpose of creating a charitable trust.

Counsel for the petitioners contends that the wording of the will does not create a trust, and submits that the gift to the National Trust is an absolute gift free of a trust; alternatively, that even if the Court finds that the will does create a trust, that is a charitable trust, the gift would none-the-less fail for uncertainty of intention.

The Barbados National Trust was incorporated in 1961 by the Barbados National Trust Act, as a body interested in the preservation of places of historic and

architectural interest or natural beauty, and having as its object:

- (a) the listing of buildings and monuments of historic and architectural interest and places of natural beauty with their animal or plant life;
- (b) the compilation of photographic and architectural record of the above;
- (c) the preservation of chattels of historic or artistic interest;
- (d) making the public aware of the value and beauty of the island's heritage, as set out above;
- (e) the pursuance of a policy of preservation and acting in an advisory capacity;
- (f) the acquisition of property for the benefit of the island;
- (g) the attraction of funds by means of subscriptions, donations, bequests and grants for the effective carrying out of the objects. [120]

The Charities Act, Cap. 243 provides in section 2 that a charity means any institution, corporate or not, which is established for charitable objects or purposes, is intended to and does operate for the public benefit, and is subject to the control of the Court in the exercise of its jurisdiction with respect to charities.

"Charitable objects" is defined by section 3 of the Act, and includes "The promotion and improvement of the national heritage, whether physical, environmental, artistic, cultural or otherwise".

"Public benefit" is defined by section 4 of the Act as including "benefit of a fund comprised within the scope of charitable purposes which is available to members of the public at large, or to a section of the public ascertained by reference to some specified geographical area, but does not include such a benefit if the persons for whom it is intended to be available are to be ascertained by reference to their relationship with some

body or other person. whether that relationship is one of blood, status, contract or otherwise."

In *Re Verrall National Trust for Places of Historic Interest or Natural Beauty v. A.G.* [1914] All E.R. 546, the question for decision was whether the objects as set out in section 4 of the National Trust Act, 1907 (U.K.) were charitable. The section provided that the National Trust was established:

for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest, and as regards lands for the preservation (so far as practicable) of their natural aspect, features, and animals and plant life.

The objects were held by the court to be charitable in that they were for the benefit of the nation.

On my examination of the purposes for which the Barbados National Trust was established, I am satisfied that their cumulative effect is one with a public purpose for the benefit of the public at large, and as such, the purposes of the Trust are charitable purposes within the spirit of, and analogous to the purposes set out in section 3 of the Charities Act.

I therefore hold that as an institution, the Barbados National Trust is a charity.

A further question for determination is whether the testatrix intended to make an absolute or charitable gift to the National Trust. As stated earlier in this opinion, the testatrix was an active member of the Barbados National Trust for a number of years and, as such, would have been aware of the objectives of the Trust.

In view of this association with the Trust, it is my view that in the context of the will as a whole, the words "It is my earnest desire that these gardens should survive to give pleasure to those who walk and work in them", appearing immediately before the proviso relating to the non-acceptance of the gift by the National Trust, are expressive of the testatrix's intention as to the purpose for which the gift was made to the National Trust, and as such, those words evince an intention on the part of the testatrix to create a charitable trust for the benefit of members of the public. [121]

I might add that the submission is made by counsel for the petitioners that there is no evidence before the Court indicating that the Barbados National Trust is registered under the Charities Act, Cap 243.

With respect to this submission, it is to be observed that the relevant provisions of the Act impose a duty on charity trustees of a charity to apply to be registered under the Act; failure to register would constitute a bar to any tax exemptions so long as the charity remains unregistered. Non-registration of an institution with charitable objects does not necessarily mean that the institution is not a charity within the meaning of the Act.

In the result, there will be an order declaring:

1. that the gift referred to on page 3 of the will of the late Iris Branch Bannochie of "my property called Andromeda being a dwellinghouse and the lands thereto attached and enjoyed therewith, includes all those hanging plants, potted plants, plant pots, garden tools and implements and garden furniture kept and used for the purposes of Andromeda Gardens;

2. that the gift referred to on page 2 of the will of the testatrix of

"(1) All my household furniture and effects to my husband for his use during his lifetime" etc. includes all those potted plants covering the steps leading to the house and the other potted plants in and about the house as part of the testatrix's household;

3. that the gift of the property called "Andromeda" by the testatrix to the Barbados National Trust is conditional on the terms at paragraphs (a) and (b) on page 4 of the will being satisfied;

4. that the terms of paragraphs (a) and (b) as conditions precedent to the vesting of the property are not uncertain;

5. that the terms of paragraphs (c) to (f), except the last clause of (f), are terms subsequent to the gift but are not binding obligations on the Barbados National Trust on the grounds of uncertainty;

6. that in the circumstances of the will, the words "It is my earnest desire that these gardens should survive to give pleasure to those who walk and work in them" create a charitable trust in favour of the Barbados National Trust for the benefit of the public at large;

7. that the gift to the Barbados National Trust will only fail on non-acceptance by the Trust within the time stipulated by the will; [122]

8. that non-acceptance of the gift by the Trust would result in the property being held by the Trustees upon the death of the testatrix's husband upon trust for her 4 daughters absolutely in equal shares;

9. On acceptance by the Trust of the gift, the responsibilities of the Petitioners, qua trustees, in respect of the management and administration of the trust property would be discharged.

The costs incurred by the trustees in this application shall be borne by the estate. The Barbados National Trust will bear its own costs. [123]