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| Will Cases: Redirecting Failed charitable Legacies |
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| OG505 |
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# OG505 Will Cases: Redirecting Failed Charitable Legacies

# Policy Statement/Overview

A will is a legal document explaining what a person wants to happen to their possessions after their death. The instructions within the will for distributing those possessions are known as legacies.  Many charities benefit from legacies in wills. Usually a legacy will pass to the charity with very little difficulty. However, where a will is not clearly written doubts may arise about who the beneficiaries might be and what must happen to the legacy.

Our general approach towards wills and legacies for charities is not to be involved in finding potential beneficiaries or directing how the possessions should be distributed. These are tasks for the executors named in the will. Where executors have doubts or difficulties about whether or not particular legacies should go to charitable beneficiaries they need to seek their own advice and then approach us with proposals for action where appropriate.  If they consider that the legacy has failed (cannot be distributed as written or intended) we may be required to provide a Scheme or Order. We will not provide Schemes or Orders simply for avoidance of doubt on the part of the executors.

We follow the court's view that where a charitable legacy has failed it should be 'saved' for charity wherever possible. This guidance explains how we should assess the executors' view that a legacy has failed where they approach us requesting a Scheme or an Order. Executors might find it helpful to look at our approach before coming to us to help them decide whether the Commission needs to be involved.

# Summary of the guidance

Will cases are complex and will always require legal input. Our legal and policy framework sets out our level of involvement according to the circumstances of the case and the legal basis for any action we take. It also contains information about the specialised terms used in wills.

The casework guidance helps us to consider whether the legacy has been correctly described as failed, how we decide the type of failure and the action we need to take.

The flowchart at section C1 considers first approaches and and actions for both initial and subsequent failure.

The case studies tab contains some examples of how we reach a view on the contents of wills in identifying charitable recipients.

# Casework Guidance

## B1 First steps in considering failed legacies

Where we are approached to make a scheme or Order for the distribution of a legacy that may have failed we need to be clear on whether or not it is appropriate for us to be involved (see also B3 below). In considering whether our involvement is necessary we will need to work through what we have been told by the executors to ensure that we do not take action for a failed gift unnecessarily. The starting point will be why the executors consider the legacy has failed and what they think should happen to it.

**IMPORTANT NOTE:** The legal basis for dealing with failed legacies is set out in section E1. Legal advice should always be taken when considering the nature of what is contained in a will and the action required.

### B1.1 Preliminary checks

To ensure that the executors have correctly identified a failed legacy (with which we need to become involved) we need to examine the will, any codicils and any other documents relating to the bequest. In some circumstances we may need to see a certified copy of the grant of representation/probate.

We look to see if the will contains any devices that prevent failure (and thereby allows the executors to distribute the contents of the will without our intervention). For instance:

* Is there any provision in the will that deals with failed gifts?
* Does the will contain a 'gift over' provision that diverts the legacy to another charity if the first intention fails?
* Has the charity named in the will been subject to a charity merger with the details of transferor and transferee charities identified in the Register of Mergers?

Where the bequest involves a NHS hospital you should also look at the [NHS Guidance](http://www.charitycommission.gov.uk/detailed-guidance/specialist-guidance/nhs-charities-guidance/) on our web site as different rules may apply.

### B1.2 Considering the failed legacy

The main question for us to ask when looking at the will contents is:

* are we dealing with a failed bequest that is capable of being charitable?

This means charitable in a general sense and not necessarily for a particular charity. If we cannot find any indication that the failed legacy is for charity we cannot play any part in directing how the legacy should be distributed. We should inform the executors that our view is that the failed legacy is not for charity and they must seek their own advice on this matter.

### B1.3 Misdescription of charities or charitable purposes

Failure can be caused by lack of clarity by the testator or testatrix when making their will which creates a mis-description of the intended charity. The inability to recognise the charity described may also arise where a charity ceases to exist after the will is made. Misdescription may not always lead to failure of the legacy and we expect the executors to make efforts to identify the charitable beneficiary. We can refer them to the Register of Charities to help them identify potential recipient charities but we must not seek to influence their selection. If the executors cannot find a charity that corresponds to the charity described or named in the will the legacy will be dealt with as though the charity never existed.

When establishing whether a misdescription gives rise to failure it is useful to ask:

* Is the misdescription a minor error which can be ignored?
* What can be done to identify the charity according to the description given?
* Are there instructions contained in the will that could help with identification?
* Is there any evidence of supporting the charity during the testator/testatrix's lifetime?
* Is the recipient charity one that has changed its name?
* Is the recipient charity known by more than one name?
* Can the recipient charity be found by location/purpose, for example "the cats' home in Cardiff"?
* Can the name provided be read as a description, for example, "Trust for Preservation of Our Ancient Churches" may mean The Historic Churches Preservation Trust?

If the executors are satisfied that they can identify the charity intended by the testator/testatrix it is for them to distribute the bequest without the Commission's involvement. Where the executor is unable to identify the charity intended the bequest will have failed.

## B2 Casework process and considerations

Even where failure has occurred it does not mean that we must be involved. We need to consider the nature of the legacy and the circumstances of the failure in order to decide what action should be taken.

### B2.1 Is it a gift on trust or an outright gift

The Commission's jurisdiction to deal with gifts by will depends upon the existence of a trust. In asking if the gift is held on trust we mean whether the terms of the will create a trust not whether the recipient is a charity.

A trust in this context can arise where:

* the gift is expressed to be on trust for the purposes of a charity, for instance, "for the trustees to hold funds on trust for the vicar and churchwardens", referred to as a substantive trust

or

where the will provides that the executors hold the residuary estate on trust for sale to pay the debts and expenses of the estate before distribution amongst beneficiaries, which may include a charity, referred to as an administrative trust.

Gifts which are not expressed to be on trust but are 'direct' or 'outright' gifts will be for the Attorney General's Office under the Royal Sign Manual procedure - see [section E3](http://ogs.charitycommission.gov.uk/g505a001.aspx#tab6#heading_toc_58_32). A direct or outright legacy in its most straightforward form will have no trusts or conditions attached to it.

A direct/outright gift may take the form of:

* "...to the Poor Charity £xxx"

but beware of administrative trusts that may at first look like direct gifts. These might take the form of:

* "My executors shall take the residue of my estate and hold it on trust for the following - to the Poor Charity £xxx".

The first example is self standing and not attached to any trust, whereas the second example is included as part of a trust held by the executors for distribution.

We play no part in directing what should happen to unconditional direct/outright gifts that have failed, irrespective of when that failure occurs. The executors should be directed to the Treasury Solicitor's Office for action under the Royal Sign Manual Procedure. The address is:

The Treasury Solicitor   
Attorney General and Private law Team   
One Kemble Street   
London   
WC2B 4TS

Conditions attached to legacies can be many and varied but usually indicate that the legacy is to be used in a certain way or by another party before coming into the possession of the charity. Exceptionally we may uncover a conditional direct/outright gift, in which case legal advice must be taken about next steps as much will depend on the conditions set out in the will, which may direct the gift elsewhere or may mean that it returns to the estate. See section B2.3 that explains conditional interests.

### B2.2 Is the gift a purpose gift or a gift to a particular institution?

It is not always obvious whether a gift is a gift for particular purposes (a purpose gift) or whether it is a gift to a particular institution. Where a gift is a purpose gift, the executors can decide for themselves how best to dispose of the legacy so as to further the relevant charitable purposes. In the case of a gift to an unincorporated charity, this can often be regarded as a gift for the particular charitable purposes of that charity rather than a gift to the particular charity. This may be important where the particular charity has ceased to exist.

Where a gift is clearly a purpose gift, there is no need to establish general charitable intention. The gift can be allocated by the executors to a charity for those purposes. Where there is some doubt as to whether the gift is a purpose gift or a gift to a particular charity, difficulty is only likely to arise if the particular charity has ceased to exist or has never existed. If it appears to never to have existed, that may be an indication that the gift is a purpose gift rather than a gift to a particular charity.

Where the gift appears to be a gift to a particular charity which no longer exists, we will need to establish whether this is a case of initial failure or subsequent failure. This is dealt with below.

### B2.3 Is the legacy conditional or unconditional?

See section E1.3 which defines conditional interests.

Conditional legacies need careful examination as to whether the legacy has been devoted absolutely (once and for all) to charity.

A conditional legacy can be given:

* for a limited period of time

or

* on terms that mean it will cease to be held for charity in certain circumstances

Examples of conditional legacies that are **not** once and for all for charity are:

* a conditional gift, for example, a legacy given on condition that it receives matched funding
* a determinable gift, for example, a legacy for a mixed residential home given on the basis that the home will provide for women only

Where there is doubt about whether the intention was to make a once and for all gift to charity we should be careful about treating these cases as failed gifts and trying to save them for charity. Where the conditions cannot be met preventing the legacy going to charity once and for all then the legacy should be returned to the estate of the testator/testatrix and distributed in line with the remainder or residue of the estate.

In cases where any time limited charity interest has come to an end it will be for the executors to decide on the outcome for that legacy and it is not for us to advise or resolve.

Some legacies involve a gift over to charity - see [section E1.3](http://ogs.charitycommission.gov.uk/g505a001.aspx#tab6#heading_toc_T7_40) for a definition of this term. In these cases the legacy takes effect in accordance with the testator/testatrix's wishes and there is no role for us.

In some instances conditional gifts can be applied cy près by Scheme. This may occur where we take a view that any intention to benefit charity has not been exhausted - where clearly a charitable gift remains in some sense but there is a failure that prevents the executors distributing it. For instance, where a legacy to charity is subject to a gift over but the gift over fails for remoteness.

### B2.4 Initial or Subsequent Failure (including General Charitable Intention)

Once we know the type of legacy we are dealing with we look at when the failure occurred which confirms whether we are dealing with an initial or subsequent failure..

### What is initial failure and what action do we take?

**Initial failure** is where a legacy cannot be put into effect because at the date of death of the testator/testatrix the terms of the charitable bequest were impractical or impossible. In initial failure the main point to establish is whether or not:

* there was a general charitable intention (see below).

Possible circumstances that might indicate an initial failure may be where a legacy is to:

* a charity that never existed
* a charity where that charity ceases to exist between the making of the will and the testator/testatrix's death
* a charity that ceases to exist before the will is made
* a charity that is described in a way that is vague, incomplete or ambiguous so that it is difficult to know which particular charity the testator/testatrix had in mind.

### Initial failure and unincorporated charities

Even where we are told by the executors that the legacy has failed we need to be mindful of whether they have considered whether the legacy may still be saved for charity without our involvement by making a Scheme. They must consider whether there is a way that the 'failed' legacy can be treated as being held for charitable purposes rather than for a particular charity. If they can, and the charity is unincorporated, then they should take appropriate action. We would not expect to be involved further leaving them to apply the saved legacy for the purposes using their own powers. (In effect this approach means that technically there has been no failure and in theory should have been identified in earlier stages of looking at the case.)

Examples of situations where this approach might be used include, where:

* the legacy is to a recipient charity which wound up and transferred its assets to a successor charity (incorporated or not) with the same purposes
* the executors can identify an unconnected charity established for the same purposes
* the gift is to a non-existent institution but it is possible to infer the charitable purpose for which the legacy was intended and the executors can identify another charity with those same purposes
* there has been a mis-description of the recipient charity but it is possible to infer the charitable purpose for which the legacy was intended and the executors can identify another charity

Where a bequest is made to a charity that never existed it may be possible to  consider it as a gift for charitable purposes. These may be deduced from the name given. Finding a general charitable intention is more likely; it is easier to take the view that the bequest was meant for a charitable purpose rather than an organisation that never existed. In such cases a purpose can be deduced from the name given.

A Scheme will be needed only where there is real doubt about whether the executors can legitimately apply the saved legacy in furtherance of the purposes of that legacy. Examples might include where:

* the recipient charity has ceased to exist or never existed and the terms of the legacy were so narrow that we cannot take a view that it could be applied generally for the purposes of another charity, for instance, where the gift is for a particular care home that has closed
* the continued existence of the recipient charity was considered essential to fulfil the terms of the legacy and so prevent us from taking a view to apply it generally for a similar charity
* we cannot identify the charitable purposes of any misdescribed recipient charity because their description is so vague

**IMPORTANT NOTE:** Before we offer to make a Scheme we should ask the executors to confirm that they have canvassed the views of any third parties who might otherwise benefit if the legacy were to lapse and become part of the estate. We should not take forward any Scheme unless we have reliable assurances that a Scheme is acceptable to these individuals.This action is distinct from any subsequent consideration about publication of a Scheme under s.88 of the 2011 Act].

Model Schemes for redirection of gifts in appropriate cases can be found in drafting guidance.

### General charitable intention

Legacies to unincorporated charities that cannot be regarded as purpose gifts and that appear to be subject to initial failure can only be saved by way of a cy-près Scheme if a general charitable intention can be found to exist. The courts have not provided a clear definition of general charitable intention. In general terms it means that  the testator/testatrix has shown an overriding intention to give for a charitable purpose and, in doing so, has provided a particular direction on how the gift is to be carried into effect.

We will follow the view of the courts in that where a general charitable intention exists the legacy should be saved for charity.

In deciding general charitable intention we ask the questions:

* Is the intention of the legacy to benefit charity and that it is only the mechanics of delivering the gift that have failed?

Was it more important to the testator/testatrix that the bequest went to:

* a general charitable cause which the named charity supports?

rather than

* to the specific charity to the exclusion of all others?

This approach is the same as the court in that where it is possible to find a general charitable intention the legacy should be saved for charity.

In looking for a general charitable intention we will look for evidence in the will, this may be shown by:

* the description of the gift - is it one specific legacy for charity amongst many?
* the specific nature of the gift, for instance, do the name, location etc point towards a recipient rather than a purpose?
* the directions for the residue from the will; for instance, will it be divided between several charities? (if the answer here is yes and the failed legacy in question is a specific gift there is no need to look for general charitable intention because the gift will, in any event, go to charity).

Other evidence may also be of importance, for instance:

* the link with or support by the testator/testatrix of a particular charity in their lifetime
* having a relative of friend who benefited from the services of a particular charity

This may suggest a gift to a particular institution which will fail if the the institution no longer exists.

### Initial failure and incorporated charities

A legacy to an incorporated charity is considered to be a gift to that institution rather than a gift for charity generally **unless** there is something positive in the legacy indicating that the testator/testatrix intended the gift to extend beyond the institution to its purposes. A legacy for an incorporated charity cannot usually be saved on the basis of a general charitable intention.

Where it appears the legacy cannot be saved for charity we are limited to giving a view about the construction of the gift and it will be for the executors to resolve with the benefit of their own legal advice.

### What is subsequent failure and what action do we take?

**Subsequent failure** arises where the legacy takes effect at the date of death but then something happens to prevent the distribution of the legacy as stated in the will. Subsequent failure cases are about correctly identifying legacies as being for charity even where the legacy may not be distributed as envisaged by the will.

A subsequent failure arises where, at any time after the date of death:

* it was possible to identify the charity, even where there was an inaccurate reference in the will

and

* the charity still existed at the date of death but has since ceased to exist

and

* the legacy was unconditional - there are no conditions on how or when the gift can be applied

The presence or otherwise of a general charitable intention is not relevant to subsequent failure because the legacy was considered charitable at the date of death. Therefore, in **all** cases of subsequent failure the legacy will be saved for charity and redistributed to another charity or charities.

Once a bequest is identified as a subsequent failure the options for distribution may be for:

* the executors to distribute the gift without any action by us (see blow)
* us (or exceptionally the court) to give effect to the redistribution by making a Scheme
* the Attorney General to make a direction under the Royal Sign Manual where it is a direct gift.

Occasionally there might be a life interest in a will where the gift to the recipient charity is postponed. A charity would not receive the legacy until the life interest has run its course, an example would be a property to be used by an individual for their lifetime which is then bequeathed to the charity. In these cases the relevant date in assessing initial or subsequent failure remains the date of death not the point at which the legacy becomes eligible to pass to the charity.

### Subsequent failure - unincorporated and incorporated charities

Subsequent failure legacies become part of the property of the recipient charity at the date of death irrespective of whether it is an unincorporated or corporate charity (Whilst the right to receive the legacy will exist it will not be recorded in the charity's accounts until the estate administration is complete and the legacy distributed in accordance with the will.)

Where the executors can identify and apply the legacy this action can be left to them; this applies to both an outright gift or one subject to a trust.

Our starting point for a legacy to a recipient charity that has ceased to exist after the date of death is that the legacy should be saved for charity and redistributed provided that it is unconditional. As set out in [B2.1](http://ogs.charitycommission.gov.uk/g505a001.aspx#tab3#heading_toc_08_10) above this only applies in cases where the legacy is on trust. Where the failure involves an outright gift (and not a trust), the executors must contact the Attorney General and proceed (if necessary) using the Royal Sign Manual procedure.

We take the view that a Scheme will not be needed for a legacy held on trust where:

* there is a provision in the recipient charity's governing document for the application of its assets in the event of it ceasing to exist (eg a dissolution provision identifies a charity to receive assets)
* the destination of assets from the recipient charity can be traced from charity paperwork (eg accounts identify receiving charity in a transfer under s.267 of the 2011 Act )
* there is a successor body to the recipient charity (eg because of incorporation, amalgamation or merger)

Where the legacy is unconditional and held on trust and the executors have no way of applying it then we may need to make a cy près scheme. This might include:

* where it is not possible to trace any form of successor charity to receive the legacy
* where a legacy was identified for a particular charitable purpose that has ceased to exist in a successor charity.

**IMPORTANT NOTE:** Before we offer to make a Scheme we should ask the executors to confirm that they have canvassed the views of any third parties who might otherwise benefit if the legacy were to lapse and become part of the estate. We should not take forward any Scheme unless we have reliable assurances that a Scheme is acceptable to these individuals.This action is distinct from any subsequent consideration about publication of a Scheme under s.88 of the 2011 Act.

See the chart and tables under section C1 setting out the processes involved in identifying initial and subsequent failures.

## B3 Our level of involvement

Our level of involvement will vary according to the circumstances in line with the guidance set out above and in the Commission's Risk Framework for our case work.

We will need to be clear with executors about the level of our involvement. Provided a legacy can be applied for charitable purposes there is no risk of loss of assets for charity. Bearing this in mind, it is not a proportionate use of our resources to provide comfort Orders to executors in the exercise of their powers, and therefore:

* We will **not** offer to make Schemes to redirect a legacy where it can be regarded as a legacy for charitable purposes.
* We will **not** make s.105 Orders to sanction the payment of such a legacy for charitable purposes.
* We will **not** offer to make Schemes where there has been a subsequent failure of an (outright) gift and it is possible to identify the destination of the assets of the recipient charity.

Other issues that will **not** come within our jurisdiction are:

* Determining what is meant by the terms of a will - s.70(1)(b) of the 2011 Act prevents us from determining the existence or extent of a trust, which means we are not able to provide a executors or their solicitors with a definite answer of what any will provisions mean (this can be done only by the court).
* Advising executors or their solicitors on the process required for seeking court action about a will.
* Advising executors about the steps they should take about their role.
* Identifying the correct recipient of a bequest, this is the executors' responsibility. This could involve us in determining competing claims if there is more than one potential charity.
* Applying a failed gift in a will where that gift is not held on trust: if it is a direct gift its application belongs to the Crown, represented by the Attorney General.

We **can** become involved to:

* Express a view about the construction of a bequest in a will. We need to do this to consider whether our jurisdiction arises at all in dealing with a bequest to charity.
* Suggest that executors take independent professional advice if they are in any doubt about their functions or duties.
* Highlight the need for the executors or their solicitors to seek advice from the Attorney General in appropriate cases.
* Make a Scheme to apply failed bequests for charitable purposes where it is not possible for the executors to distribute the gift (ie it has failed).

## Charts

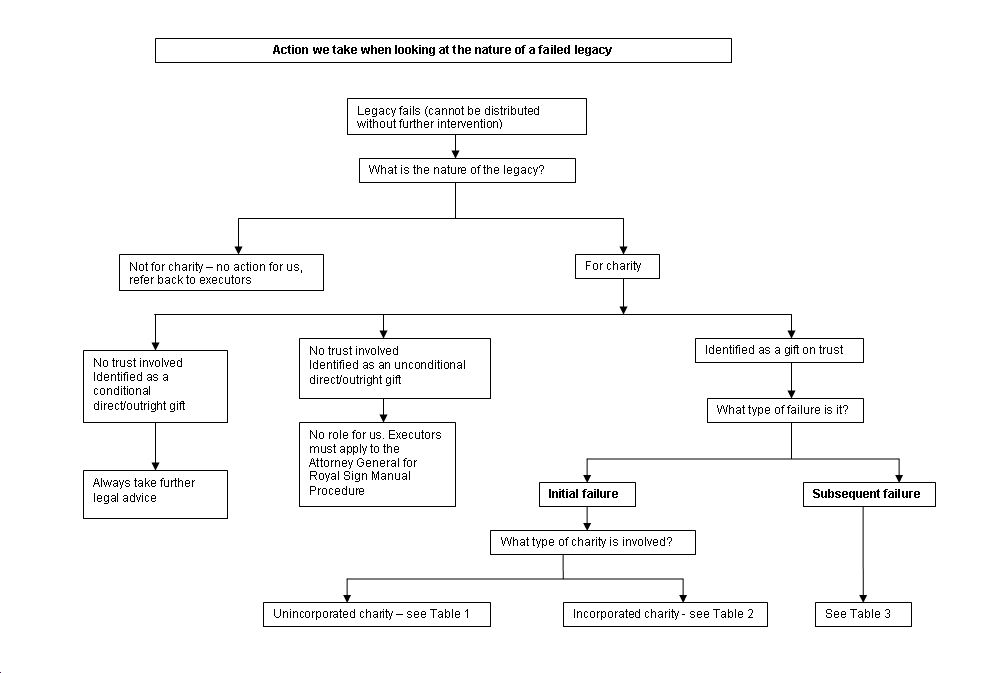
### C1 Assessing cases where the bequest has failed

This section concerns cases where we consider that a legacy has failed and is about how we decide:

* the nature of the legacy
* the type of failure that has occurred
* what action we (or others) can take

This process can be complex and the flowchart and tables below provide an overview of the steps we take where we have decided that the bequest has failed.

Section B1 looks at the casework process and considerations in more detail.



**Table 1 Initial Failure (Unincorporated Charity)**

|  |  |  |  |
| --- | --- | --- | --- |
| **Identifying cases and deciding action for unincorporated charity recipients** | | | |
| **Situation** | **What issues do we need to consider** | **What can be done?** | **By whom?** |
| Recipient charity is unincorporated and the legacy is not capable of being distributed by the executors at the date of death. See B2.4 | Did the recipient charity cease to exist prior to the date of death? | If yes, the legacy goes back to the estate unless a general charitable intention can be found - see next question. | Non charitable legacies will be dealt with by the executors. |
| Is there a general charitable intention? | If yes, the legacy can be saved for charity.    If no, the legacy goes back to the estate. | We will seek views from the executors on how a saved legacy can best be distributed.  The executors will be wholly responsible for legacies returned to the estate. |
|  |

**Table 2 Initial Failure (Incorporated Charity)**

|  |  |  |  |
| --- | --- | --- | --- |
| **Action we take where the recipient is an incorporated charity** | | | |
| **Situation** | **What issues do we need to consider?** | **What can be done?** | **By whom** |
| The intended recipient is an incorporated charity and the legacy is not capable of being distributed by the executors at the date of death. | The incorporated status of the charity means that we generally view the legacy as being for the institution rather than for charity. Only where there is a clear indication the the gift goes beyond the institution to the charitable purposes do we consider that it could be saved for charity. [See B2.4](http://ogs.charitycommission.gov.uk/g505a001.aspx#tab3#heading_toc_WV_13) **Initial failure and incorporated charities**. | We limit our involvement to a view about the construction of the legacy contained in the will. | It will be for the executors to take their own legal advice about the distribution of the legacy. |

**Table 3 Subsequent failure (All Charities)**

|  |  |  |  |
| --- | --- | --- | --- |
| **Identifying cases and determining action both unincorporated and corporate charities** | | | |
| **Situation** | **What issues do we need to consider?** | **What can be done?** | **By whom?** |
| The legacy was capable of being put into effect at the date of death but something changed which prevented the executors ability to distribute the legacy as intended. See B2.4 | We need to know what has altered, the type of legacy involved and whether there are any conditions attached to it. | Further action depend on circumstances as identified by the following questions. | This will depend on circumstances. |
| Did the recipient charity cease to exist after the date of death? | If yes, it may be possible to identify a successor charity, providing that it is not a conditional gift. | This will depend on circumstances.  If a successor charity is identified and there are no other conditions attached; then the executors can distribute the legacy and we do not need to be involved. |
| Is it a conditional gift? See B2.3 | If yes, we need to know whether the legacy is a once and for all gift to charity and to understand the implications of any conditions stated.  If no, we will see if there are means for the executors to distribute the gift without our intervention or if this is not possible to see if a trust has been created. | The executors will be responsible for:   * a legacy that is not once and for all for charity; * a legacy where the conditions cannot be met which prevent the gift going to charity once and for all; * a legacy where the charitable interest has come to an end; * a legacy that involves a gift over to charity where it can take effect in accordance with the testator/testatrix's wishes;   Exceptionally we may need to make a Scheme for conditional gifts where a clear charitable element remains that cannot be distributed. |
|  |

## Case Studies

This section contains examples of how we interpret the content of wills when trying to identify the intended recipient charity.

### D1 A charity that has never existed

This is where the testator/testatrix settled a legacy on an organisation which he or she may have thought existed as a charity but never has. It is important to distinguish this from cases where a testator/testatrix has a particular charity in mind but misnames or misdescribes it. The existence or otherwise of a charity influences the action we take.

There is a potential overlap between these two categories as they both concern legacies for which there is no recipient charity. The deciding factor may be about whether the charity ever existed. This means that the testator/testatrix knew of an existing charity but wrongly named it in the will (ie the testator/testatrix thought they knew the correct name but got it wrong), rather than a vague presumption that such a charity existed when it didn't.

We consider whether the name:

* sufficiently resembles a charity named on the Register; or
* bears no resemblance to the name of any charity on the Register and there is no evidence it ever existed or that the testator/testatrix had in mind a particular charity.

Trivial errors and mis-descriptions will not be taken as the charity never existing and should be ignored.

Non existent charities are a case of initial failure. The court is more ready to infer a general charitable intention, on the basis that the likely intention of the testator/testatrix was to benefit charitable purposes identified by the name or description in the will, even where a particular charity cannot be identified.

However, we cannot exclude the possibility that the testator/testatrix wished only to benefit the charity he or she named. If it can be proved that this was the case then there is no general charitable intention and the legacy lapses.

An additional complication arises with non-existent charity cases which involve a contingent residuary interest (see E1.3 for a definition of residuary). If a legacy is made to a charity which never existed and that gift is followed by the residue being left for charitable purposes, the court may be unable to infer a general charitable intention (as shown above). This is because the testator/testatrix intended to benefit a specific charity before any residuary estate could be passed for charity generally. Because the named charity never existed it prevents us from saying that there was a general charitable intention in the first instance.

### D2 A charity that ceases to exist between making the will and the date of death

Legacies for recipient charities that are not in existence at the date of death will be initial failures. In this case, unlike the cases described at D1, the charity did once exist. Initial failures mean that we need to look for a general charitable intention unless a gift can be construed as a gift for charitable purposes rather than a gift to the particular institution. The cases described here set out particular situations and the way they should be treated.

Case 1 - A legacy intended for a particular named charity at a named location usually lapses because it is difficult to regard it as a purpose gift or to find a general charitable intention. We infer that the intention was to benefit that organisation specifically rather than charity generally, particularly where the will shows that the existence of the charity was essential to the gift. The result of this approach is that the legacy will be returned to the estate for distribution in accordance with the terms of the will. However, where it is possible on close inspection of the will to find evidence of a wider charitable intention than simply that particular charity then we may be able to make a scheme for application of the legacy cy- près.

Case 2 - Where a recipient charity was a corporate body the court takes the view that there will not be a general charitable intention unless there is evidence in the will of a positive intention by the testator/testatrix for the legacy to be applied for the charitable purposes of that charity rather than simply naming the charity. There may be occasions where an unincorporated charity named in a will has become a charitable company, with or without a shell company to receive bequests. In both cases the legacy can be passed to the newly formed charity.

Case 3 -The court has determined that, where a gift can be construed as a gift for the general purposes of the charity which no longer exists and identical purposes are being carried out by another charity, the gift will not lapse and a legacy can be paid to that charity for those purposes.

### D3 A charity which ceases to exist after the date of death

Where a recipient charity existing at date of death then ceases to exist it will be a case of subsequent failure. These are more straightforward because a charity that once existed now doesn't so there is no real doubt that at the date of death the legacy was a charitable one. The executors need to look for a successor charity to that particular charity, for instance through mergers, use of section 267 powers in the Act to transfer or wind up or to pass assets to another charity using governing document powers. Where the executors can find no successor charity to receive the legacy the gift will be saved for charity in the following circumstances:

* Where that legacy is subject to a trust we will be able to make a scheme to apply the legacy cy près.
* Where there is no trust and the legacy is not subject to further conditions the executors must apply to the Attorney General's Office for a direction under the Royal Sign Manual.

Legacies subject to conditions are many and varied and legal advice will need to be sought to see if we have jurisdiction or whether the legacy is returned to the estate.

### D4 A charity so vaguely, incompletely or ambiguously described making it difficult to know which one was intended

These cases can involve either a purpose gift or an initial or a subsequent failure as, even though a charity has not been described accurately, a recognisable charitable purpose or a charity or charities can be identified (unlike the above examples where it can be shown that the charities never existed or ceased to exist). Careful consideration is needed to pinpoint when the failure occurred and take appropriate action for initial or subsequent failure.

We need to examine the will to see if we can work out what was intended by the testator/testatrix. Some wills would appear to have a particular charity in mind and to have named or described it incorrectly. Such legacies are, where possible, paid to the charity which the donor appears to have intended. Using this principle, a legacy to "The Guernsey Hospital" was divided equally between the two hospitals which existed in Guernsey. The clear intention was for the legacy to go to a hospital in Guernsey and, as there were two and no indication which one was intended, the executors considered the gift was a gift for a charitable purpose rather than a particular named charity.

The category of mis-described charities includes charities that have changed in some respect, such as name, address and constitution. If the will indicates that the testator/testatrix intended to benefit the purposes of the charity, rather than the organisation only, then where a successor charity exists to carry out those same purposes the legacy can be paid to that charity.

Where a legacy is for a charity rather than a charitable purpose, the gift is not held on trust and the name or description applies to more than one charity (and there is no other information for a clear determination to be made) the executors will need to apply to the Attorney General for a direction to be made under the Royal Sign Manual Procedure on their proposals. If this is not possible such a case can only be resolved by the court. We do not have the power to resolve this sort of case ourselves.

Where the gift is held on trust but the name or description applies to more than one charity and it is not possible to identify from other evidence which charity was intended, a Scheme will be required to share the gift between the charities who may be entitled.

# Legal/ Policy and Accountancy Framework

## E1 The legal basis for our action and some specialised terms in connection with wills

### E1.1 The law

Our view is that personal representatives dealing with the testator/testatrix's estate are not charity trustees (see for example, section E3.5 of [OG 548](http://ogs.charitycommission.gov.uk/g548a001.aspx)). Upon death the testator/testatrix's property passes to personal representatives who are in a fiduciary position in relation to the assets that come to them and are, for certain limited purposes, treated as trustees. The personal representatives become full trustees when the will directs and,in relation to the residue, become trustees of the net residue for those beneficially interested when the administration of the estate is complete. Where property is specifically bequeathed to an executor on trust he becomes a trustee once he has assented, at which point, the property in question ceases to be part of the testator/testatrix's assets.

It is possible to take the view that, at this point, the part of the estate bequeathed to charity can be held on trust by executors for exclusively charitable purposes. The Commission therefore has jurisdiction over such trusts and can exercise its powers, including the making of Schemes and Orders, in relation to them.

The distinction between the capacity for the personal representatives and the trustee explains why it is possible to have a direct gift from the estate, not held in trust at all, falling outside the scope of our jurisdiction. Legacies to charity which are direct gifts (ie not subject to any trusts) are for the Attorney General to deal with under the Royal Sign manual jurisdiction - see E3 below.

Our view is that where a gift to charity has failed and the executors are able to construe the purposes for which the property is held, a cy-près Scheme will not be required and the executors can choose another charity carrying out those purposes. In addition, if a trustee is present, it is unlikely that an administrative Scheme will be needed to remedy any defect in the trust machinery as in most cases the trustee will be able to make any necessary changes to administrative provisions. However, the case law relating to charitable gifts by will is anomalous and it is not always clear why the court has considered a Scheme necessary to deal with a failed gift.

**Initial failure**

Case which support the view that where the executors are able to construe a gift as held for charitable purposes a cy-prèan initial failure of a gift to an unincorporated recipient is a gift for purposes include **Re Mann** [1903] 1 Ch 232 and **Re Davis** [1902] 1 Ch 876, both of which concerned gifts to non-existent institutions, and **Re Vernon's Trust** [1972] Ch 300 which held that a gift to an unincorporated body is per se a purpose trust. It follows from these cases that if the gift can be construed as a gift for purposes, a cy-près Scheme will not be necessary.

In **Finger's Will Trusts** [1972] Ch 286, it was held that share a 'failed' gift was for the purposes of an unincorporated association, which has ceased to exist, there was no need for a Scheme and the gift could be paid to the only other institution carrying out the work.

However, there are other cases where the court has directed Schemes to be made. Picarda (The Law and Practice relating to Charities, Hubert Picarda QC 4th edition) gives **Re Songest** [1956] 1 WLR 897 as an example of a case where there was a cy-près application by the court. But the circumstances of that case involved two organisations each contending to be entitled to the gift, requiring the court to determine the destination of the gift and directing equal distribution between the two.

In other cases, Schemes have been directed to complete the trusts or where there is a failure in the trust machinery (see Picarda at page 518), but these are administrative rather than cy-près Schemes.

There is a risk that our approach is perceived by executors to put them in difficulties in terms of complaints from disappointed beneficiaries (those entitled to the residue or entitled on partial intestacy) or other disgruntled charities.  The case of **Re Hay's Settlement Trusts** [1982] 1 WLR 202 provides provides some reassurance to trustees in terms of protection from challenge provided they exercise some discretion having considered  the range of potential recipients of the failed gift.Megarry VC said the trustee "must not simply proceed to exercise the power in favour of such of the objects as happen to be at hand or claim his attention. He must first consider what persons or class of persons are objects of the power... In doing this, there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field." (p209-210).

**Subsequent failure**

Where there is a subsequent failure (see section B2.4) the case of **Re Slevin** [1891] 2 Ch 236 is authority for the principle that the gift becomes the property of the recipient charity upon the death of the testator. In that case action was required (by the Crown) to apply the property of the charity which had ceased to exist since the death of the testator because there was no successor body to receive it.

Our view is that we are only required to make a Scheme in cases of subsequent failure where the gift is not able to follow the assets of the recipient charity. For more detail on the situation where the executors are likely to be able to pass the assets to another charity and those where a Scheme may be required see [section B2.4](http://ogs.charitycommission.gov.uk/g505a001.aspx#tab3#heading_toc_WV_13).

### E1.2 Jurisdiction

Section 70(1) of the 2011 Act provides that the Commission does not have jurisdiction to determine title to any property or determine any question as to the existence or extent of any trust; section 70(8) of the 2011 Act provides the Commission shall not exercise its jurisdiction in a case which by reason of its contentious character, or for other reasons, is more fit to be adjudicated by the court. Section 20(2) of the 2011 Act forbids the Commission from acting in the administration of a charity.

Therefore, we consider that it is the function of the executors (not the Commission) in the first instance to identify a potential charity recipient in cases where the intended charity beneficiary of a will has been mis-described.

This guidance covers the law of England and Wales. Wills drawn up under other systems of law (including those of Scotland and Northern Ireland) are outside the scope of this guidance and it is not within our jurisdiction to exercise our powers in relation to them.

Occasionally we are asked to assist in relation to a gift to a charity registered in England and Wales made under a foreign will. In these circumstance seek legal advice.

We may also be approached where there are disputes about release of assets. This might arise where the administration is completed and the executors hold charitable assets awaiting distribution, which for some reason they refuse to release. Charities expecting to benefit as a result of these charitable bequests come to us asking for help in getting those assets released.

We would not usually get involved in directing the distribution. These cases are often based around a dispute in determining the terms of the will and/or title to property rather than a case that we would view as a failure. Whilst we might have a view on the construction of the will we cannot give a definitive legal interpretation; this can be given only by the court. We would therefore advise charities to seek their own advice about court action to secure the assets, sections 70(1) & 70(8) of the 2011 Act support this approach.

### E1.3 Specialised terms used in connection with wills

The person making a will is called the **testator** if male and **testatrix** if female.

Wills can be made with or without legal assistance, and subject to certain formalities can be made in any form (almost invariably they must be in writing, signed by or on behalf of the testator/ testatrix and be witnessed). A will has no effect until the death of the testator/ testatrix.

The will normally names **executors** who are people who deal with the **administration** of the estate, ie collecting in all the money, paying any debts and sharing out the estate between people and organisations who are entitled to it (the beneficiaries). Executors must get legal authority to deal with the estate. This process is called **obtaining probate** and it is granted in the form of a **Grant of Representation** which comes from the **Probate Registry**.

More specialised terms in relation to wills include:

**Codicil**: This is a device to update the provisions of a will. The codicil must comply with the same formalities as a will and may be drawn up to amend the provision of a will, for example, if the testator/testatrix changes his or her mind about how property is to be divided, who should receive particular property or wants to add new beneficiaries.

**Direct/outright gifts are** legacies set out in wills that have no trusts attached to them and consequently we have no jurisdiction in deciding how they should be distributed in cases of failure - see section B2.3 about identifying such legacies and what happens to them.

**Conditional interest**: This is a legacy which is dependent on an event happening or not happening, or specific criteria being met in order to for the legacy to take effect.  It may be a **vested** **interest** where the interest will arise once the preceding interest interest has ended, for example, "to A for life, then to B".  Even where B fails to receive the interest because of death, that interest will go on to form part of B's own estate.

**Contingent interest:** This is a legacy dependent upon an event happening. It is possible that event may never occur. The interest may never come into the possession of the person or organisation named and there is no vested interest. This might come into effect where the legacy which went first to a non existent charity with a contingent interest for another charity. Because the first gift failed it cannot then be passed to the second charity, see case example D1.

A term that we might hear used to describe conditions in a will is **gift over**, which we take to mean an alternative provision if something doesn't happen. Usually a gift over would be a contingent interest.

**Fiduciary** duties are those duties taken on for another person under a relationship based on trust and confidence. An executor will manage the fiduciary duties of the property entrusted to him in a will without putting personal interests ahead of those duties.

**Intestacy**: Where a person dies without having made a will or where a previous will has been revoked. A **partial intestacy** occurs where a person dies having made a will which does not cover all of his/her estate.

**Legacy**: A gift which can be:

* specific - a definite object or property
* pecuniary - a gift of a specific sum of money
* residuary - a gift of money or assets left when other legacies and expenses have been paid, ie a gift of part or all of the remainder of the estate

**Life interest**: The beneficiary is entitled to use the income/property during his or her lifetime and the capital remains untouched. An example would be "to my wife in her lifetime, then to charity".

**Failure** of the legacy arises where the executors are not able to distribute the gift according to the testator's or testatrix's wishes. It is sometimes possible for a legacy to be **saved** enabling it to be used for a charitable purpose.

## E2 Third party rights and competing claims for a legacy

In dealing with failed legacies and saving gifts for charity we need to be aware of third parties who might benefit if the gift fails or there is more than one potential charity to which the legacy could be applied.

Third parties might include:

* next of kin where the gift in question is a gift of residue and failure would produce partial intestacy
* residuary beneficiaries (charitable or not) who might benefit from failure of specific legacy

Where we give a view on the content of the will to the executors we need to ensure that they manage the risk of challenge by informing and seeking comment from interested third parties who might have benefited had a different view been taken. Any view we give is not something that can be challenged at Tribunal. However, any subsequent action to make a Scheme may be challenged at Tribunal so it is important to understand any potential objections.

Where executors have concerns about the potential for a dispute between charities with competing claims to the legacy they have a number of options open to them:

* the competing charities may agree to share the legacy by way of compromise of any claim they might have (including life interests), relying on their own powers to compromise (for example those contained in section 15(f) of the Trustee Act 1925)
* the executors may apply to the Attorney General to sanction a course of action (in place of the following option)
* the executors may apply to court to seek directions that authoritatively determine the identity of the recipient charity

We expect the executors to use the options above and will not usually sanction any compromise agreement under s.105 of the 2011 Act.

## E3 The Attorney General and the Royal Sign Manual

The presence of a trust within a will is central to the question of who is able to exercise jurisdiction over a failed legacy. If the legacy is held on trust by the executors the application of a failed legacy falls within the court's jurisdiction and can therefore be dealt with by our Scheme. Without the presence of a trust jurisdiction for failed legacies rests with the Crown alone (represented by the Attorney General). The Attorney General's Office exercises jurisdiction by the issue of a direction under the Royal Sign Manual. See section B2.1 for the address of the Attorney General's Office in these cases.

## Question and Answer

### F1 Where will I find general information about wills and probate?

Section E1 sets out the legal basis for our involvement in will cases as well as specialised terms used when looking at wills.

### F2 What is the first step when looking at a will case?

It is important to know what types of issues we do and do not deal with, this is considered in detail at the Casework Guidance Section. Section B1 looks at whether we should be involved and Section B2 and the Chart and tables contained at Section C1 take caseworkers through the process of considering the case.

### F3 What are initial and subsequent failure?

Initial and subsequent failure are explained at Section B2.4 and includes the action to be taken.

### F4 What do I do if I have a will case where the legacy may have failed?

The Overview to this guidance sets out our general approach and clarifies what we expect of the executors. The chart at Section C1 sets out the relevant considerations as a flowchart supported by tables showing action in different circumstances. In depth explanations of the process are set out at Section B2.

### F5 What is a general charitable intention and when do we consider it?

General charitable intention is relevant in cases of initial failure and is about whether the testator/testatrix intended the legacy to be used for a charitable purposes. The way we consider this is set out at section B2.4.

### F6 What is the Royal Sign Manual and when is it used?

The Royal Sign Manual is administered by the Attorney General's Office on behalf of the Crown. Directions under the Manual may be issued where there is a failed legacy that is not subject to a trust and where we or the executors have no jurisdiction. The legal position of the Manual is explained Section E3 with Section B2.1 setting out the type of cases that would come under this procedure.

## Model Letters and Orders

### G1 Example of text used in correspondence with executors and their legal representatives

The following text is an example of a letter used in a particular case where initial failure had occurred. It may not be appropriate in all cases but it nevertheless sets out some of the main issues when considering legacies that may have failed and the role of the executors.  Correspondence with executors and their legal representatives should always be tailored to meet the needs of the case.

**Estate of [Name} Deceased (Case Number)**

Thank you for your letter of [date] and enclosures.

With respect to the bequest left by [name of deceased] to the [charity name], we are unable to give a view on which charity may have been intended by the testator as it is not within the Commission's remit to interpret whether a particular charity is or is not a beneficiary under a will.

If the executors interpret that the gift was intended for the charitable purposes rather than a specific institution it would be open to them to pay the gift to a charity with those purposes without further involvement of the Commission.

Alternatively, if the executors are of the view that a specific institution was intended (but was misdescribed), and consider that they can identify that institution through their interpretation  of the will or extraneous evidence, then it would be open to them to make the decision to pay the gift to that charity.

The extraneous evidence that may be helpful could include:

* the [testator/testatrix's] link with a charity that fits the description during his/her lifetime;  for instance
  + lifetime giving to a particular charity
  + voluntary work for a particular charity
  + a relative or friend who benefited from the services of a particular charity
* the charity has changed its name
* the charity has more than one name by which it is known
* the charity has informally amalgamated with another body and has adopted a working name that reflects this.

However, where the gift is interpreted as an institutional gift but the misdescription is so great it is unrecognisable or the institution is non-existent the executors will require some form of legal direction so that they can distribute the gift. A scheme made by the Commission will be available where the gift is subject to a trust and the will shows there is a general charitable intention. A scheme gives legal authority for the gift to be applied in a particular way. The executors will need to present their application for a scheme to be made together with the reasons for the application. It is for the executors and their legal representatives and not the Commission to choose which charity(ies) will benefit from the gift.

Where a gift is interpreted as an outright gift to an institution without any trusts attached, the executors should approach the Attorney General's Office to arrange for a direction under the Royal Sign Manual for disposal of the gift. The Attorney may also be able to sanction a course of action where there are competing claims from more than one charity for a single gift.

For ease of reference I have assigned a number to the correspondence about the estate of [name]. I would be grateful if you could use this number on any future correspondence.