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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE ESTATE OF JOHN MARCUS STRATFORD
DECEASED

BETWEEN:

PATRICK WILSON AS PERSONAL REPRESENTATIVE OF
JOHN MARCUS STRATFORD (DECEASED)

Plaintiff;

and

SAMUEL STANLEY McFARLANE AS REPRESENTATIVE OF THE
MASONIC ORPHANS WELFARE COMMITTEE

and

ATTORNEY GENERAL FOR NORTHERN IRELAND

Defendants.

Sheena Grattan of counsel (instructed by Johnsons Solicitors) for the Plaintiff
William Gowdy QC (instructed by Hewitt & Gilpin Solicitors) for the First-named
Defendant

McBRIDE J

Ex tempore Judgment

Introduction

[1] This is an application by the plaintiff seeking court directions in respect of the distribution of the estate of John Marcus Stratford Deceased (“the deceased”) who died on 11 March 2019. By clause 4.1 of his will dated 1 September 2016 the deceased left three eighths of half of his residuary estate as follows:

“... for the Masonic Orphans Welfare Committee of 115 The Mount, Belfast (Charity No XN 45446) to be used for its general purposes.”

[2] No difficulty would have arisen in respect of this gift save that on 8 February 2018 the Charity Commission for Northern Ireland (“CCNI”) refused the Masonic Orphans Welfare Committee’s (“the Masonic Committee”) application to be registered as a charity. Subsequently, in April 2019, HMRC notified the Masonic Committee of its loss of charitable tax status.

[3] In light of these events, the plaintiff being alert to the legal uncertainties now surrounding the gift applied to the court for the following:

- (i) Directions as to the persons who ought to be parties to the application.
- (ii) A determination as to the correct recipient of the bequest at clause 4.1 of the deceased’s will.
- (iii) Further directions to bring the administration of the estate to finality including the basis of any Inheritance Tax liability.
- (iv) Costs.

[4] The value of the deceased’s estate as of the date of Grant of Probate on 1 October 2019 was £10.2M. The value of the bequest to the Masonic Committee amounts to the sum of £650,000 approximately.

[5] Depending on the determinations the court makes, it may then be necessary for the plaintiff to complete certain paperwork to ameliorate the tax position given the size of the estate. Such paperwork needs to be completed before 11 March 2021. In light of the time constraints, the court agreed to hear the matter urgently and gave its judgment on an *extempore* basis.

[6] The court wishes to express its gratitude to Ms Grattan who appeared on behalf of the plaintiff and to Mr Gowdy QC who appeared on behalf of the Masonic Committee for their comprehensively researched skeleton arguments and their clear and concise oral submissions. The Attorney General did not appear at the hearing but advised the parties that she accepted the submission that the Masonic Committee was a charity and was the correct recipient of the bequest.

Background

[7] By his will dated 1 September 2016 the deceased, after making a number of pecuniary legacies left the residue of his estate to various bodies which he understood to be charitable. One such body was the Masonic Committee and the

deceased bequeathed three-eighths of half of his residuary estate to the Masonic Committee.

[7] The deceased's father was a Free Mason. He died when the deceased was completing his education, leaving his widow and family in financially straightened circumstances. Funding was provided by the Masonic Committee and this enabled the deceased to pursue his dental studies at Queen's University Belfast.

[8] Even though the deceased was not a Free Mason, throughout his life he took an active interest in the activities of the Masonic Committee and provided it with financial support.

Issues which arise for determination

- [9] (a) Who ought to be joined as defendants?
- (b) Is the gift to the Masonic Committee a valid charitable gift?
- (c) If not, is the gift to the Masonic Committee conditional on it being charitable?
- (d) If the gift is so conditional, is the share of residue subject to the executor's powers under Clause 7 of the will or does it pass to the next of kin on a partial intestacy?

Consideration

Question 1 - Who ought to be joined as defendants?

[10] At a review hearing before the Master on 4 February 2021, the Master expressed concern that the other residuary beneficiaries may have an entitlement to the share purportedly given to the Masonic Committee and accordingly referred the case to the Chancery Judge to consider whether the other residuary beneficiaries ought to be joined as parties.

[11] When I reviewed the case on 19 February 2021, after hearing submissions from the parties, I ruled that it was not necessary to join any of the residuary beneficiaries. I directed, however, that the Attorney General should be joined as a defendant to protect the charitable interests. Accordingly, the case proceeded to trial on the basis that the only defendants were the Masonic Committee and the Attorney General with Ms Stratford as a Notice Party.

[12] I now set out my reasons for not joining the other residuary beneficiaries as parties to the application.

[13] I am satisfied that the other residuary beneficiaries do not have any interest in the disputed gift on any of the possible outcomes. If the court finds that the Masonic Committee is not charitable, the gift either goes to the Masonic Committee as a non-charity or in the alternative it either goes to the deceased's next of kin on a partial intestacy or to some like-minded charity as the plaintiff as executor appoints on foot of Clause 7 of the Will. Clause 7 provides that:

“None of the legacies in this will shall fail if at my death the charities have ceased to exist or have amalgamated with another charity or have changed their name and my trustees shall pay the legacy to the charitable organisation which they consider most nearly fulfils the objects I intended to benefit”.

[14] The present gift being a non equal share of residue is held by the parties as tenants in common. It does not therefore lapse into residue. Rather it falls to a partial intestacy. The deceased's sole statutory next of kin is Nora Stratford, his sister. She has already agreed to redirect any benefit she may derive from this gift to the Masonic Committee.

[15] In the event Clause 7 does apply, the executor then has a fiduciary duty to benefit a similar charity. In practice, this is most likely to be another Masonic charity.

[16] Therefore in all the possible scenarios which could arise in the event the Masonic Committee is deemed not to be charitable, there is no possibility of any of the other residuary beneficiaries benefiting and therefore I considered that there was no need to join them as parties to the present action.

[17] Arguably, there may be some potential prejudice to the other residuary beneficiaries in the event that the court holds that the Masonic Committee is not charitable but further holds that the gift to the Masonic Committee shall take effect. In those circumstances, depending on the approach taken by HMRC, it may be that the other residuary beneficiaries could have to bear some of the Inheritance Tax liability. It may also be that their share could be reduced should the court order costs to be borne by the estate as a whole.

[18] I consider that these potential prejudicial outcomes do not justify the joinder of the other residuary beneficiaries at this stage. After determination of the substantive issues, the court will reconsider the issue of whether the other residuary beneficiaries need to be joined for any reason whether it be in respect of who bears the burden of inheritance tax or how costs should be awarded.

Question 2 - Has the court jurisdiction to determine whether the Masonic Committee is charitable?

Background regarding the Masonic Committee

[19] Mr McFarlane, Committee Member, Honorary Secretary and Treasurer of the Masonic Committee swore an affidavit filed on 23 February 2021. In this affidavit, he sets out the history of the Masonic Committee which was already formed in or around October 1917.

[20] The Masonic Committee has three extant constitutions. The 1948 constitution (reprinted in 1953), its revised constitution adopted on 9 November 2013 and the new constitution adopted on 4 December 2019.

[21] Clause 2 of the 1948 constitution sets out its objects as follows:

“The objects of the committee shall be to advise, encourage, assist and promote the welfare of necessitous children and orphans of Free Masons including necessitous children educated at the Masonic schools.”

[22] In the revised constitution the object clause is set out at Clause 2 as follows:

“The object of the committee shall be to advise, encourage, assist and promote the welfare of necessitous children and orphans of Free Masons.”

[23] The only difference therefore between the object clause in the 2013 constitution and the 1948 constitution is that the object is singular rather than plural and the reference to Masonic school is deleted.

[24] In this affidavit, Mr McFarlane sets out the purpose of the Masonic Committee and gives a flavour of its work as follows:

“6. The purpose of the [Masonic Committee] was and is to provide support to necessitous orphans of deceased Free Masons along with necessitous children and grandchildren of Free Masons.

Before the introduction of the Welfare State this support included providing financial support to parents and guardians, placing orphans into private homes ... and financially supporting their upbringing. ... Since the introduction of the Welfare State and with the State taking on a greater role in relation to, for example, adoption and fostering services, the support of the

[Masonic Committee] is now primarily by way grants of money and/or services deemed necessary to applicants or to their authenticated legal guardians. Such grants are provided to children who are in financial need.

7. Any grant of money or services is based upon an appraisal of personal circumstances and financial need. It is both designed to alleviate short-term deprivation and poverty and to provide for long-term financial stability and independence. Examples include financial grants to cover costs of heating, food and medical costs, and support an advisory service. Procedures are in place for determining whether or not support is to be given in individual cases. At present, applicants must submit an application form, which includes a detailed family financial assessment."

[25] Prior to the coming into existence of the Charity Commission for Northern Ireland, the Masonic Committee was recognised as a charity for tax purposes by HMRC.

[26] On 4 January 2017, the Masonic Committee applied to the CCNI for registration as a charity. By letter dated 8 February 2018, the CCNI refused to register the Masonic Committee as a charity on the basis that it was not satisfied the legal requirements to be registered as a charity were met. The reasons for the decision were set out in an appendix attached to the letter. The appendix states that the CCNI were of the view that the public benefit requirement was not met. It stated:-

"Based on the evidence before the Commission, the purposes of Masonic Orphan Welfare Committee do not fall under the prevention or relief of poverty. The organisation cannot therefore rely on the poverty exception in relation to its restricted class of beneficiaries."

[27] The Masonic Committee sought a review of this decision by letter dated 1 May 2018. By letter dated 5 June 2018, the CCNI refused to change its original decision. Attached to this letter was an appendix setting out the reasons for upholding the original decision. It refers to the Masonic Committee's argument that their primary aim was to give children who are necessitous and/or orphans some help to take up the opportunity to better themselves as they start their journey into adulthood. The caseworker dealing with the review on behalf of the Commission stated:

“Such arguments are insufficient to reason how the organisation’s purposes fit within the poverty exception. The purpose of the organisation is not to relieve poverty but rather it is to enable your beneficiaries to develop through education, and assist young people who have financial difficulties to continue with their studies as they move onto further and higher education.”

The appendix further concludes:

“I determine that the fact remains that the organisation’s purposes do not meet the public benefit requirement.”

[28] In light of the refusal by the CCNI to register the Masonic Committee as a charity, HMRC notified the Masonic Committee in April 2019 that it no longer recognised it as a charity for tax purposes.

[29] In light of the refusal of registration the Masonic Committee, rather than appealing the decision of the CCNI to the Charity Committee adopted a new constitution on 4 December 2019. Its object clause now makes express reference to the relief of poverty as a charitable purpose. A decision regarding registration of this body is presently pending before the CCNI.

[30] Before dealing with the question whether the Masonic Committee is a charity as of the date of the death of the deceased, it is necessary to answer an anterior question namely whether this court has jurisdiction to make such a determination in light of the jurisdiction of the CCNI to register or not to register a body as a charity.

Jurisdiction of the court to determine charitable status

[31] Mr Gowdy submitted that no valid decision had in fact been made by the CCNI to refuse registration as both the decision to refuse registration and the decision to refuse the review were both made by caseworkers rather than by the Commission itself. In light of the decision in *McKee v the Charity Commission* [2020] NICA 13, he submitted that such decisions were therefore null, void and of no effect.

[32] Whilst it is clear from the documentation provided that both decisions were in fact made by caseworkers who are employees of the Commission rather than the Commission itself, I do not accept that this thereby renders the decisions null and void. The decision in *McKee & Ors* dealt specifically with the actual cases which came before the court. Whilst it is open to any body or person to now challenge a decision made by the CCNI on the basis that the decision was made by an employee rather than the Commission itself, it appears that the extant decisions already made by the CCNI are voidable rather than void and therefore stand until such times as they are successfully challenged and set aside by a court or tribunal. Given that the

decision to refuse to register has not been challenged, I consider that it remains a voidable rather than a void decision.

[33] Mr Gowdy further submitted that the court retained jurisdiction to determine whether the Masonic Committee was charitable as of the date of the deceased's death, notwithstanding that the CCNI had determined it was not charitable. He specifically relied on the provisions of the Charities Act (Northern Ireland) 2008 ("the Charity Act") and jurisprudence in which the court exercised jurisdiction to determine charitable status notwithstanding the fact the charity was either not registered or registration had been refused.

[34] In determining whether the court has jurisdiction, it is necessary to consider the impact of the Charity Act on the traditional inherent jurisdiction of the Chancery Court in respect of charity matters.

[35] Under the Charity Act, the court has been granted an appellate jurisdiction over certain decisions taken by the CCNI. In addition, the court retains a concurrent jurisdiction with the CCNI in respect of matters set out in section 31. The court also retains its non-appellate jurisdiction in respect of matters arising in the course of administration of charitable trusts although much of this jurisdiction has now in practice been transferred to the CCNI as under Section 54 "Charity Proceedings" as defined by the Charity Act only come to the court with the consent of the CCNI or with leave of the Chancery Judge when the CCNI refuses to give such consent.

[36] The present proceedings do not fall within section 54, section 31 or the appellate jurisdiction of the court. Nonetheless, in my judgment, the decision of the CCNI does not conclusively determine the question of the charitable status of the Masonic Committee as I consider the court retains jurisdiction to deal with this question. This is because, in addition to the jurisdiction of the court under sections 54 and 31 and its appellate jurisdiction, I consider that the court retains a non-appellate jurisdiction to determine the validity of charitable dispositions in certain circumstances including the present circumstances.

[37] There is support for this proposition in the academic texts; from the language used in the Charity Act; and from the jurisprudence.

[38] Picarda, *The Law and Practice Relating to Charities*, 4th Edition (Bloomsbury Professional) at page 731 states as follows:

"Non-appellate jurisdiction - Validity of charitable dispositions

Many of the cases in the books, and particularly those concerned with the definition of charity, turn on the validity of particular dispositions. Sometimes the question is whether a gift (testamentary or *inter vivos*) is,

on the true construction of the relevant Will or Deed, a gift for a charitable purpose or charitable purposes or whether an existing body to whom a gift has been made is, in fact, charitable ... In all of the above mentioned places the court as part of its inherent jurisdiction to construe and interpret instruments has jurisdiction to determine the point in question.”

[39] Section 18(5) of the Charity Act provides:

“Effect of, and claims and objections to, registration

(5) Any question affecting the registration or removal from the registrar of an institution may, notwithstanding that it has been determined by a decision on appeal under Schedule 3, be considered afresh by the Commission and shall not be concluded by the decision, if it appears to the Commission that there has been a change of circumstances or that the decision is inconsistent with a later judicial decision.”

[40] I consider the language of Section 18(5) of the Charity Act supports the proposition that the court retains jurisdiction to deal with the present application. The language suggests that the Northern Ireland Assembly when enacting the Charity Act anticipated that there would be circumstances where the matter could come before the court and therefore recognises that the court retains jurisdiction to consider the question of the charitable status of an institution.

[41] There is also jurisprudence which supports the view that the court has jurisdiction to consider the charitable status of a body notwithstanding the fact that it is either not registered or registration has been refused by the Charity Commission. In *Over 70's Housing Association v Westminster City Council* [1974] RA 247, the Charity Commission revoked the Association's registration as a charity. Notwithstanding this, the Association still sought to avail of the rating regime for charities and brought an application to the court to determine the question whether it was a charity for rating purposes. After applying its own independent assessment of the facts and application of the relevant law, the court held that it was not a charity. In carrying out such an assessment, the court clearly accepted that it had jurisdiction to consider the question of the association's charitable status notwithstanding the fact that the Charity Commission had revoked the Association's registration as a charity.

[42] Further in *Helena Partnership Ltd v HMRC* [2012] 4 All ER 111 Lloyd LJ at paragraph 14 noted “the fact [the body] was not registered is neutral as to whether it was or was not established for charitable purposes.”

[43] In light of these authorities, I consider that the court retains jurisdiction to determine the question whether the Masonic Committee was a charitable association as of the date of the deceased's death. Accordingly, I consider that this court is free to make its own independent assessment in respect of that question notwithstanding the fact the CCNI has refused to register it as a charity. I now turn to consider the question whether the Masonic Committee is a charity.

Question 3 – Is the Masonic Committee a charity?

[44] The well-established principle is that where a fund is set aside to provide for a specific class of persons the fund will only be charitable if expressly or by necessary implication the fund is only to be paid to those who are poor. This principle was set out in *Attorney General v Ford* [1932] NI 1. Moore LJ at page 22 stated as follows:

“Outside the statute of Elizabeth, to make mere benevolence into a legal charity there must either be in the document creating the trust and obvious desire to relieve poverty, expressed in terms, or the document must contain material for a necessary inference – not a possible one merely – from its terms that the relief of *necessitous* persons and none other was intended.”

Further, Andrews LJ at page 25 stated:

“The authorities have further established beyond all question that it is not essential in such cases that the relief of poverty or distress should be expressed in the terms as the object of the gift. Such intention on the part of the donor may be implied for the nature of the gift looked at as a whole. ... It is not absolutely necessary to find poverty expressed in so many words, but that the court will look at the whole gift, and if it comes to the conclusion that the relief of poverty was meant, will effect to it, although the word poverty is not to be found in it.”

[45] To determine whether or not the Masonic Committee is a charity it is necessary to look at its constitution and, in particular, its objects clause. The 2013 constitution defined the Masonic Committee's object “as the provision of assistance to *necessitous* children and orphans of Free Masons.” The word *necessitous* has a long history as a synonym for poor and, indeed, it was used as such by Moore LCJ in *AG v Ford*. Further, it appears that there is a long history of using the word *necessitous* as a synonym for poor in this context. For example, in *Grand Lodge &c, of Scotland v Commissioners of Inland Revenue* [1912] 6 TC116, a fund for *necessitous* Free Masons was held to be charitable. Similarly, in *Commissioners of Inland Revenue v Widows and Orphans of Medical Men* [1926] 11 TC1, the court construed the word *necessitous* as meaning poor. Again, in *Joseph Rowntree Memorial Housing Association*

v Attorney General [1983] Chancery 159, an association which provided housing for “elderly persons in necessitous circumstances” was held to be charitable. In *Gibson v South American Stores Ltd* [1950] Ch 177, the court concluded that a fund for necessitous former employees was for the relief of poverty and held it to be charitable.

[46] The 2013 constitution of the Masonic Committee was a professionally drawn document and I consider that the word necessitous was used having regard to its historical legal and dictionary meaning. I therefore consider that the use of the word necessitous in its constitution was a synonym for poor and accordingly I find the constitution fulfils the public benefit test. I therefore conclude that the Masonic Committee is, and always was, charitable.

[47] In circumstances where the charitable status of a body has already been considered by the CCNI and that question comes before the court, the court, no doubt, will consider carefully the decision of the CCNI and the reasons given for its decision. The weight to be given to the decision of the CCNI will depend on whether it was right in law and took into account all the relevant facts.

[48] I have carefully considered the decision made by the case worker to refuse registration of the Masonic Committee and the reasons for that decision. I have also carefully considered the decision rejecting the review and the reasons given for that refusal. I also take into account the fact the decision to refuse registration was not appealed to the Charity Tribunal as the Masonic Committee decided to adopt a new constitution which expressly stated that its objective was the relief of poverty. Having carefully considered the decisions made by the case workers and the reasons for those decisions I am satisfied that the decisions of the caseworkers were plainly wrong. In particular, I consider the caseworkers mis-applied the law as they failed to give proper regard to the use of the word “necessitous” used in the objects clause of the Masonic Committee. I also have no doubt that if the CCNI decision had been appealed by the Masonic Committee to the Charity Tribunal, its appeal would have been successful for the reasons set out above.

Conclusion

[49] Having concluded that the Masonic Committee is charitable, the gift in the deceased’s will passes to the Masonic Committee. The court therefore does not have to consider the other very interesting questions relating to the construction of the will and inheritance tax questions which may have arisen.

[50] I have heard the submissions of counsel in respect of costs. It is agreed that the first-named defendant will bear its own costs and accordingly I make no order in this regard. In relation to the plaintiff’s costs, I order that these are paid from the estate on an indemnity basis. I am satisfied that there is no need to join the other beneficiaries to the proceedings in relation to the issue of costs. Costs are routinely

ordered to be paid out of the estate without the need to join other beneficiaries even as notice parties.