SUPREME COURT OF NOVA SCOTIA
Citation: Das Estate (Re), 2012 NSSC 441

Date: (20121218)
Docket: Hfx. No. 391994
Hfx. Probate No. 58523
Registry: Halifax

In the Estate of Hari Das, Deceased

Between:

Mallika Das, as Personal Representative, Executrix and Trustee of and under the Last Will and Testament of Hari Das, deceased

Applicant

and

Niya Deepa Das Acevedo

Respondent

Judge: The Honourable JusticeArthur LeBlanc.

Heard: September 26, 2012, in Halifax, Nova Scotia

Written Decision: December 18, 2012

Counsel: Paula L. Condran, Counsel for Estate of Hari Das

BY THE COURT

[1] This is a motion for directions and interpretation of the Last Will and Testament of Hari Das.

[2] The applicant, Mallika Das, is the widow of the testator and was named executrix and trustee under the terms of his will. She seeks directions and interpretation of the contents and construction of her husband's will, particularly with regard to the disposition of his investment account.

[3] No other party appeared at this motion for directions. The Blind People's Association of India, an organization named as a beneficiary in the will, has filed an Affidavit.

FACTS

[4] The testator, Hari Das, was a resident of Bedford, Nova Scotia. He was, at the time of his death, a Professor of Management at Saint Mary's University. He is

survived by his wife, Mallika Das (“ Ms. Das”), and his daughter, Nitya Das (Acevedo), who is currently resident in the United States.

[5] On December 2, 2009, Mr. and Ms. Das met with their lawyer in Bedford to revise their wills before a trip to India. During this trip, their marital relationship broke down and they separated. Although they remained legally married, both Mr. and Ms. Das stopped living together and were not able to reconcile.

[6] In April 2010, Mr. Das instructed Ms. Rusk to further revise his will and to revoke all previous wills and testamentary dispositions. The new will was executed on both April 21 and April 23, 2010, as Mr. Das noticed an error in the April 21 version. The version we are now concerned with was executed on April 23, 2010.

[7] In the will, the testator provided that his wife, Ms. Das, would continue to be executrix and trustee of his will. He also appointed two alternative executors, including his daughter, Nitya Das, in the event that his wife was unable or unwilling to act as executrix. In each instance, the executor(s) was also the trustee.

[8] All of the testator's property, both real and personal, were vested in his trustee to pay and satisfy all just debts and funeral and testamentary expenses, and subject to the provisions appearing in his will, his trustee was given the power to settle in and convert into cash all of his estate in such a manner and upon such terms as she deems appropriate. He also indicated that he would give direction to the disposition by a possible forthcoming memorandum of certain items of his clothing, jewelry, personal effects, and household furnishings.

[9] In clause 3(d) of his will, Mr. Das stated that the rest and residue of his estate— with the exception of his RBC Direct Action Investment Account—was to be given in trust for his wife, and that she could use such sums of income and capital of his estate.

[10] Mr. Das'investment account, which was valued at almost $1 million at the time of his death, was specifically exempted from the trusts created by clause 3 of the will. On the face of the will, the only provision made to distribute the investment account is triggered by his wife failing to survive him by ten (10) days. This event did not come to pass, and the provision was not triggered.

[11] The relevant provisions of the will are laid out as follows:

3. I GIVE, DEVISE AND BEQUEATH all of my property, both real and personal, of every nature and kind and wheresoever situate to my Trustee on the following trusts:

> ….
> (d) To pay or transfer over all the rest and residue of my Estate to my Wife, MALLIKA DAS, in trust, except my RBC Direct Action Investment Account 68101605. The terms of the trust being that she may use such sums from the income and capital of my Estate as she wishes, in her sole and unfettered discretion, and on her decease, any residue remaining shall be distributed in accordance with paragraph 3(e)(ii) hereof.
>
> (e) Should my Wife fail to survive my death by TEN (10) days, I direct my Trustee AS FOLLOWS;
>
> > (i) To pay a sum equal to FIFTY (50%) per cent of my Estate (EXCEPT NOT INCLUDING MY RBC DIRECT ACTION INVESTMENT ACCOUNT 68101605) to my daughter, NITYA DEEPA DAS (ACEVEDO), for her own use absolutely; and,
> >
> > (ii) To distribute the balance of my Estate to the following persons, organizations or institutions:
> >
> > 1. To donate an amount not exceeding 7.5% of the total value of my RBC Investment Account Number 68101505 on the date of my death to the following schools for the construction/redesign or improvement of their libraries/multi-media centres:
> >
> > > Elementary School, Nayyoor, Chekkode, Palghat District, Kerala, India; and
> > >
> > > Government High School, Kumaranellur, Palghat District, Kerala, India.

> 2. To donate a maximum of 12.5% of the total value of my said investment account on the date of my death to the following organizations for specific projects considered useful by my Trustees. The funds are to be allocated on a needs basis and not necessarily equally among the organizations. The beneficial outcomes and their measurability of specific projects should be the guiding criterion on allocating funds:
>
> > Uthavum Karangal, 460 NSK Nagar, Arumbakkam, Chennai-106 Tamil Nadu, India (91)(44) 26216321
> >
> > Blind People Association of India, Vastrapur, Ahmedabad-15, Gujarat, India 380 015
> >
> > The Banyan Adaikalam, 6th Main Road, Mugappair Eri Scheme. Mugappair West, Chennai-37 Tamil Nadu, India, 6000037.
>
> 3. The remaining 80% of my said Investment account and the balance of my Estate, and interest and returns accumulating thereon is to be disbursed over a period no longer than ten years for charitable or socially useful activities in any poor or underdeveloped country or countries…
>
> ….

[12] Mr. Das then proceeds to suggest a “priority issue” as to what those charitable or socially useful activities might be, and empowers his trustee to decide in her unfettered discretion.

[13] On July 12, 2010 Mr. Das committed suicide at his home in Bedford. Six typed documents were found in his residence. These included: (1) a signed note,

dated July 5, 2010 and addressed “To Whomever it May Concern”; and (2) an untitled numbered list containing directions concerning gifts of cash and personal effects. Both documents were in a sealed envelope addressed to Ms. Das.

[14] Probate was granted to Ms. Das as executrix on October 15, 2010. At the time of his death, Mr. Das’ estate was comprised of personal assets worth $968,542.40, and no real property. His most significant asset was the RBC Direct Investment Account in the amount of $944,940.09. Ms. Das was also the beneficiary of several of her husband’s assets that passed outside his estate, including house and life insurance proceeds, RRSPs, and pension proceeds. She also received the proceeds of a joint bank account held with her husband in India, as well proceeds from several Rural Electrification bonds also based in India.

ISSUES

[15] The estate of Hari Das seeks clarification of the following issues:

> (a) What constitutes the testamentary writing(s) of Mr. Das under s. 8A of the Wills Act?
>
> (b) Did Mr. Das have testamentary capacity at the time of the April 2010 will or immediately prior to his death?

(c) Can an erroneous account number listed in Mr. Das's will identifying his RBC Investment Account be dismissed as falsa demonstration?

(d) How should Mr. Das's RBC Direct Action Investment Account be disposed of?

(e) What is the true meaning, intent, and effect of the language in the residue clause, at clause 3(e)(ii) of the will?

(f) If there are fatal flaws in the charitable purpose trust, who becomes entitled to the estate residue?

Issue (a): What constitutes the testamentary writing(s) of Mr. Das?

[16] I am asked by the applicant to determine which, if any, of the six typed documents found with Mr. Das' body constitute testamentary writings, and whether these documents may supplement, supplant or alter the contents of the April 2010 will.

[17] The starting point for this inquiry is s. 8A of the *Wills Act*, R.S.N.S. 1989, c. 505, as amended by S.N.S. 2006, c. 49, s. 2. Section 8A states:

> 8A Where a court of competent jurisdiction is satisfied that a writing embodies
>
> (a) the testamentary intentions of the deceased; or
> (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,
>
> the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

[18] I considered s. 8A of the *Wills Act* in *Robitaille v. Robitaille Estate*, 2011 NSSC 203, citing, at para. 18 *George v. Daily*, (1997), 143 D.L.R. (4th) 273 (Man. C.A.), where Philp J.A. discussed (at 291) the effects of analogous language in the Manitoba *Wills Act*:

> The term “testamentary intention” means much more than a person’s expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that **there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death** [emphasis added in *Robitaille*].

[19] This discussion of “testamentary intention” was also adopted by Smith, A.C.J. in *Komonen v. Fong*, 2011 NSSC 315 (Prob. Ct.) at para 22.

[20] I am prepared to accept the “To Whomever it May Concern ” note and the untitled numbered list as evidence of the testamentary intentions of Mr. Das.

[21] In particular, the “To Whomever it May Concern” note, in my view, satisfies the requirements of s. 8A. It is signed and dated, the testator invites the

reader to verify his signature against the signature on his passport, copies were made, and the testator acknowledges that the document is of a nature that usually requires witnessing. The numbered list is less authoritative: it is untitled, unsigned and undated.

[22] However, I view these two documents as persuasive, rather than binding, evidence of the testator's intentions as to the distribution of his property at his time of death. Neither piece of writing purports to alter the gifts in his will. Both provide some guidance to the executrix in the distribution of the estate, but she is not legally bound to follow these directions.

Issue (b): Did Mr. Das have testamentary capacity at the time of the April 2010 will or immediately prior to his death?

[23] No contention was raised by the estate that the testator did not possess the requisite mental capacity at the time he executed the April 2010 will or immediately prior to his death.

[24] Suicide may be taken into consideration when determining capacity, but it does not in and of itself show testamentary incapacity: *Quirk v. Wernicke Estate*, 25 Sask. R. 120, [1983] S.J. No. 586 at para 13, citing *Hollingsworth v. Boyle* (1926), 3 O.W.N. 413 and *Re Pommerehnke's Estate*, 16 A.R. 442.

[25] Ms. Das states in her affidavit that although her husband became highly emotional after their separation, he did not display any indication of mental illness. I am satisfied by the evidence that the testator was possessed of the requisite mental capacity at all material times.

Issue (c): Can the erroneous account number in the testator's will identifying his RBC Investment Account be dismissed as *falsa demonstratio*?

[26] The executrix asks the Court to overlook an error in the identification of the testator's RBC Direct Action Investing Account. In clauses 3(d), 3(e)(i) and 3(e)(ii) of the April 2010 Will, references are made to "My RBC Direct Action Investment Account" where the number for that account is listed as 68101605, 68101605, and 68101505 respectively.

[27] I am prepared to accept that there was simply a typographical error, and that the real identity of the investment account (# 68101605) is not in doubt.

[28] In making this determination I am guided by the doctrine of *falsa demonstratio*, which is explained in *Feeney's Canadian Law of Wills*, 4th ed. (Looseleaf) at § 12.2:

> The doctrine is expressed or embodied in the maxim *falsa demonstratio non nocet*, which may be taken to mean that if a will describes a certain person or thing with sufficient certainty to enable a court to recognize the person or thing intended by the testator, then the court will overlook any inaccuracy in the rest of the description.

And again at § 12.6:

> [I]n endeavouring to give effect to the testator's true intention the court may be able to utilize the doctrine of *falsa demonstratio* by simply ignoring a mistake in the description of a person or property.

[29] I agree with the executrix that the clause should be read as if the erroneous number ("5") was not there and instead as if the correct number ("6") was there in its place.

Issue (d): How should Mr. Das's RBC Direct Action Investment Account be disposed of?

[30] It appears that the will of Mr. Das gives everything in trust to his executrix, gives his wife a life estate in the residue of his estate other than the investment account, and gifts over that portion of the residue after the determination of her life estate; however, it fails utterly to provide for that portion of the residue which consists of the funds in the investment account.

[31] The issue is how to interpret the gap in the will. Specifically, I must provide direction on to how to dispose of Mr. Das' RBC Direct Action Investment Account in the unprovided-for situation where his wife survived him by more than ten (10) days, which is the contingency that came to pass.

[32] When interpreting a will, a judge should place himself or herself in the position of the testator to try to discern the intention in the testator's mind at the time the will was executed: see *Re Murray Estate*, 2001 NSCA 25. This is the so-called "armchair rule" of interpretation. Once an intention is ascertained, then the court may give effect to it.

[33] In *Re Follett Estate*, [1955] 1 W.L.R 429, cited with approval in *Laws et. al. v. Rabbitt et. al.*, 2006 BCSC 1519 at para 56, the English Court of Appeal laid out a two-part test to determine when a court may supply words to remedy an alleged omission:

> The rule as so expressed has two limbs. The first is that the court must be satisfied that there has been an inaccurate expression by the testator of his intention, and the second is that it must be clear what words the testator had in mind at the time when he made the apparent error which appears in the will. It is the second part of the rule that, I think, presents the greatest obstacle to the respondents in case. Unless one can be reasonably certain from the context of the will itself what are the words which have been omitted, then one cannot apply the principle at all, and one has to take the language as one finds it.

[34] In my view, to ascertain what Mr. Das intended to do with his investment account in the event that his wife survived him would be wholly within the realm of speculation. Indeed, this Court would be making a quantum leap to assume that Mr. Das intended to do one thing or another on the basis of the evidence presented.

[35] One possibility is that the testator actually intended the account to pass on intestacy to his wife and daughter, meaning that perhaps there was not an omission at all. Another possibility is that he intended to give his account to his wife absolutely and up front rather than in trust. A third possibility is that he intended

to freeze the money in time for his charities. Taking into consideration the language of the will and the evidence at hand, I do not find myself in a position to prefer one possibility over another.

[36] There is a proposition that, in the absence of any indication regarding an alternative to the expressed words—either from the language of the will itself or the from the surrounding circumstances—courts will tend to apply a more literal rule of interpretation and refrain from speculating about what the testator intended: see Wills and Estates, *Halsbury's Laws of Canada* (Markham, ON: LexisNexis, 2008) at para HWE-62.

[37] Support for taking a literal approach in the face of such an omission is found in *Stork Estate v. Stork* (1990), 72 O.R. (2d) 625,[1990] O.J. No. 617 (H.C.J.), where McKeown J. stated, at para. 9:

> There is no clear suggestion in the will that the testator intended to provide for the event of his wife surviving or whom the testator wished to benefit from the residue in the latter event. It was possible that the testator at the time of the execution of his will intended to provide only for the contingency of his wife predeceasing him. It could not be said with certainty that anything had been omitted. Any conclusion that there was omission can be reached only by speculations and conjectures. Further, there is nothing in the language of the will which would clearly suggest what the words which the testator may have omitted

> would be. It is not for the courts to make speculations as to what the testator intended.

[38] In *Stork Estate*, the testator clearly disposed of the capital of the residue of his estate in the event that his wife predeceased him; as in the present case, the testator laid out the percentage of the residue that should be divided amongst his children and several charitable organizations in the event that his wife failed to survive him. However, the testator did not provide for the disposition of the capital in the event that his wife did survive him, which is precisely what happened.

[39] In *Re Vaughan Estate* (1990), 39 E.T.R. 305, 1990 CarswellBC 556 (S.C.), the Court reached a conclusion contrary to that reached in *Stork*. In *Re Vaughan Estate*, the Court was faced with an ambiguous will and had to determine whether the residue of the estate would pass on intestacy or as part of specific trusts otherwise referred to in the will.

[40] McColl J. considered the family circumstances of the testator at the time the will was executed and noted that he had no living relatives in Canada and no close

relations with family members outside of the country. The testator had one distant cousin living in England, and he gifted her $5,000 under the terms of his will. The Court found that to allow the estate to pass on intestacy would turn the cousin into a major beneficiary, which would be an absurd result. Instead, it was held that the testator must have intended the real beneficiaries of his estate to be the charities he named, notwithstanding the "so-called plain meaning of the words employed": *Re Vaughan Estate, supra*, at para 24.

[41] *Re Vaughan Estate* can be distinguished from the present case by looking at the results that would flow if the estate passed on intestacy. Under ss. 4(2) and 4(5)(a) of the *Intestate Succession Act*, R.S.N.S. 1989, c. 236, as amended by S.N.S. 1999, c. 8, s. 7, Ms. Das would be entitled to $50,000 up front. Additionally, half the value of the estate in excess of the first $50,000, including the value of most of the investment account, would pass to her as the surviving spouse and to Nitya Das as the only child. Although the testator specifically carved out the investment account from the terms of the trusts passing to his wife and daughter, I am uncertain that his intention was to block them completely from receiving the proceeds of the account. Even though Mr. Das was estranged from

his wife and daughter at the time of his death, he nonetheless provided for them in his will and named them as trustee and alternate trustee respectively.

[42] In *Myhill Estate v. Office of the Children's Lawyer*, [2001] O.T.C. 303, [2001] O.J. No. 1570 (S.C.J.), the Court acknowledged that although some judges will reach quite far to ascertain a testator's intention, the need for a higher level of certainty is evident and supported by case law, stating, at para. 13:

> The Ontario courts have insisted on these certainties over the years with some dissenting judgments. But the need for a clear indication of what the testator intended without recourse to speculation is stressed in *Re Craig* (1976), 14 O.R. (2d) 589 (Krever J.) *Re Williams* (1985), 18 E.T.R. 188 (Anderson J.) and *Re Stork* (1990), 72 O.R. (2d) 625 (McKeown J.)

[43] In *Myhill*, the will in question was drafted by a layperson, and the intention of the testator to pass on his estate to his niece was evident on the facts.

[44] In the present case, Mr. Das's actual intention and meaning can be ascertained neither from the will nor from extrinsic evidence.

[45] In *Marks v. Marks*, [1908] 40 S.C.R. 210, the Supreme Court of Canada endorsed the use of extrinsic evidence in wills construction in the event of a patent ambiguity. This subjective approach has expanded in Canadian jurisprudence to the point that extrinsic evidence will generally be considered admissible to help determine the intention of the testator, even absent such a patent ambiguity: see *Haidl v. Sacher* (1980), 2 Sask. R. 93, 106 D.L.R. (3d) 360, adopted in *Re Murray Estate, supra*.

[46] In such an exercise I must be careful to balance any extrinsic evidence with the express meaning of the words within the four corners of the will as drafted. This conflict is considered by Haley J. in *Myhill, supra* at para 11, where he refers to Stan J. Sokol, *Mistakes in Wills in Canada* (Carswell 1995), at. 93:

> Without a doubt, the most difficult cases for a court of construction are those in which a contention is raised that there has been an inadvertent omission of words in a will which could be cured, only if the court were willing to infer or add certain words to the document. In the majority of these cases, direct extrinsic evidence is usually available to explain how the mistake occurred and what particular words have been omitted. Armed with such knowledge and placed in the dilemma of possibly knowing by inadmissible external evidence the probable true intentions of the testator, judges are torn between their duty to apply the strict principles governing the interpretation of wills, and their sincere personal commitment to act justly, equitably and in accord with the testator's real intentions.

[47] I reviewed the Affidavit of Execution of Will signed by Ms. Constance Rusk, the drafter of the April 2010 will, which was filed with the Probate Court. In her Affidavit, Ms. Rusk states that she does not remember the nature of the error that was contained in the will which necessitated the correction between April 21 and April 23, 2010. In her submissions, Ms. Condran, counsel for the Estate, informed the court that she had contacted Ms. Rusk to seek more information on the testator's possible intentions, but that Ms. Rusk had no notes or specific recollection of her discussion with Mr. Das concerning the revisions made to his will in April 2010.

[48] The other relevant pieces of evidence to consider under the head of extrinsic evidence are the documents found with the testator upon his death. The "To Whomever it May Concern" note expresses an intention that Ms. Das act as the "executrix of his charitable donations". This presents an inconsistency: the only way the charitable donations can be distributed, according to the will, is contingent on the death of Ms. Das. Although this may show an intention to have the funds go to the charities instead of to his wife (on an intestacy), it provides no mechanism with which to allow this to happen.

[49] There is no other evidence on the record concerning any attachment or prior dealings the testator may have had to the named charitable organizations in India; on the contrary, it does not appear that Mr. Das supported any of these charities during his lifetime.

[50] There is a presumption against intestacy in the construction of wills. In *Re Moiny*, 2001 BCCA 100, at para. 13, the Court noted the trial judge's quotation from *Re Harrison* (1885), 30 Ch. D. 390 at pp. 393–94, where the English Court of Appeal stated:

> There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.

[51] However, this does not permit the courts to engage in speculation about the will-maker's intention or ignore the possibility that the testator intended a partial intestacy: *Kilby v Harmer Estate*, [1965] S.C.R. 24, at 28-29 per Ritchie J., concurring:

> The inclination of courts to lean against a construction which will result in intestacy is far from being a rule of universal application and is not to be followed

> in the circumstances of the case and the language of the will are such as to clearly indicate the testator's intention to leave his property or some part of it undisposed of upon the happening of certain events.
>
> It appears to me, however, that when an individual has purported to make final disposition of all his "property both real and personal of every nature and kind and wheresoever situate", he is not to be taken to have intended to leave all that property undisposed of on the happening of certain events, unless there are some very exceptional and compelling reasons for so holding. As was said by Lord Shaw in *Lightfoot v. Maybery* [[1914] A.C. 782.], at p. 802, a construction resulting in an intestacy "is a dernier ressort in the construction of wills".

[52] The Court may refuse to add provisions to a will in order to prevent a partial intestacy when doing so would over-step the bounds of construction and attribute uncertain or unclear intentions to the testator.

[53] Although there is evidence on the record to suggest that the testator’s relationship with his wife and daughter was estranged, this finding of fact should not prevent the court from finding a partial intestacy. According to *Feeney’s Canadian Law of Wills*, 4th ed. (Looseleaf) at § 10.82:

> If a testator specifically provides in his or her will that certain heirs are not to receive any part of his or her estate, such a provision cannot prevent property which he or she does not dispose of by his or her will from passing under the relevant statute providing for the disposition of property on an intestacythough the matter is not free from doubt.

[54] A final possibility that would avoid a finding of intestacy is to find that the investment account passed to the executrix as part of a second and separate trust. The testator states in clause 3 that his property is to be passed to the executrix in trust, except for the RBC Direct Action Investment Account. The question that I must therefore ask is: did the testator intend to create a separate trust for this investment account? If the answer is "yes", then Ms. Das would have the authority to dispose of the entirety of the investment account in her capacity as executrix.

[55] In order to give effect to a testamentary trust, three parties must be present: the donor, the trustee, and the beneficiary.

[56] In this case, the court can identify the donor (the testator) and the trustee (the executrix), but it cannot identify the beneficiary(ies) with sufficient certainty. A reading of the will in its entirety can lead to the conclusion that the testator intended to create a trust for the named charities, but he fails to use the language necessary to do so. This is because the charities would only be triggered in the event that Ms. Das died within ten days of her husband's death.

[57] If this court is (1) unable or unwilling to supply omitted words to the will of the testator, and (2) cannot find a valid trust in which to distribute the investment account, then the investment account will pass on a partial intestacy. In light of these factors and the language of the will, I find that the investment account must pass on a partial intestacy.

Issue (e): What is the true meaning, intent, and effect of the language in residue clause 3(e)(ii) of the will?

[58] The residue clause 3(e)(ii) can only apply if its triggering event—the death of Ms. Das—takes place before or within ten days of the testator's death. Because this triggering event did not take place, it is apparent to me that clause 3(e)(ii) does not apply at all and that the residuary gift must fail.

[59] In *Re Butler Estate*, 2007 NLTD 105, aff'd on this issue, 2008 NLCA 39, Adams J. stated at paras 67–68:

> The law is clear that if a residuary gift fails and there is no gift over by the testator, then an intestacy is created: *Halsbury's Laws of England*, 3d ed., pp. 946, 949; *Feeney's Canadian Law of Wills*, 4th ed., para 13.32.
>
> Where the will is silent as to the intention of the testator in the event of a failed residuary gift, the Court cannot invent it. I am mindful of the presumption against

> intestacy but the primary source to determine the intention of the testator is the clear and plain language used in his will. I feel confident in saying that, based on the apparent careful thought which the testator put into his Will, he did not intend to die intestate or even partially intestate. Unfortunately, the testator failed to create a valid testamentary trust in respect of clause 6(3)(C) and, unlike in clauses 6(3)(A) and (B), failed to make provision in his will for the final disposition of the proceeds of clause 6(3)(C) in the event of a failure of the attempted trust. In this case, I have no alternative but to declare a partial intestacy in respect of the 20% of the residue of the testator's estate referred to in clause 6(3)(C).

[60] The situation of the testator in *Butler* is similar to the situation of Mr. Das. Both parties, while perhaps not intending to die intestate, failed to create a valid testamentary trust and as a result, the undistributed estate will pass on an intestacy.

Issue (f): If there are fatal flaws in the charitable purpose trust, who becomes entitled to the estate residue?

[61] In light of my findings, it is unnecessary to consider the uncertainty of the objects of the charitable purpose clauses in the will.

CONCLUSION

[62] I find that the Last Will and Testament of Hari Das does not properly dispose of his RBC Direct Action Investment Account, and that I do not have sufficient evidence of his intention to supply any words, otherwise omitted, that would allow his investment account to pass to his charities in the manner he provided for should his wife fail to survive him by ten days. Therefore, this account will pass to his wife and daughter on a partial intestacy.

[63] Similarly, Mr. Das's will failed to use the language necessary to properly dispose of the residue of his estate in accordance with clause 3(e)(ii). As a result, the balance of the estate will also pass to his wife and daughter on a partial intestacy, in accordance with the provisions of the *Intestate Succession Act*.

[64] Further, I am requesting that counsel on behalf of the applicant provide certified copies of these reasons and the Order for Judgment to the respondent and to the beneficiaries, namely the following:

Udavum Karangal (noted at Uthavum Karangal in will);

Blind People's Association (India);

Banyan Adaikalam;

Government High School; and

Elementary School, Nayyoor via head mistresses V.S. Sujatha and K.B. Leela

[65] The applicant is entitled to costs on a solicitor-client basis.

LeBlanc, J.