Collections for individuals generating surpluses – presumed gift; resulting trust; or bona vacantia?

Article

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Collections for individuals generating surpluses – presumed gift; resulting trust; or bona vacantia?

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Abstract

This article argues that where collections for individuals, to benefit them in a particular way (e.g. paying for surgery), leave a surplus, there is a presumption the surplus is theirs by way of gift. It examines the interaction between this presumption and the law of resulting trusts and bona vacantia.

Introduction

Long-standing problems arise from fundraising appeals where trustees solicit donations on behalf of a beneficiary, or several beneficiaries, to benefit them in a stipulated way – for example paying for medical treatment – but there is surplus money when that specified purpose is completed or proves impossible. How do the trustees hold such surpluses? The difficulties are usually illustrated by contrasting in particular the outcomes in two well-known cases, considered below: *Re The Abbott Fund*,[1] and *Re Andrew's Trust*.[2] This article will seek to suggest a framework for analysing and resolving the issues.[3]

Presumed gift of surplus conferring an outright beneficial interest on the beneficiary

The starting point should be to recognise the existence of a legal presumption that might be called 'the presumed gift of surplus'. The leading case on this presumption is outside the field of fundraising appeals altogether, but its principle seems applicable: *Re Osoba*.[4] This presumption of gift operates to forestall an apparent automatic resulting trust where a settlor vests property in a trustee for a beneficiary, or beneficiaries, declaring that the whole of the property (not merely such part as might be required)[5] is to be used to benefit them in a specified way, but that ultimately proves impossible, leaving a surplus. The law presumes, in the absence of contrary indications of intent, that insofar as the settlor's specified means of benefiting the beneficiary proves impossible, the settlor was giving an outright beneficial interest in the trust

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[1] [1900] 2 Ch 326 (Ch): collection for the maintenance of two deaf and mute women held at their deaths to lead to a resulting trust for subscribers.

[2] [1905] 2 Ch 48 (Ch): collection for the education of seven children interpreted on completion of their formal education as an outright beneficial gift to them.

[3] The focus on fundraising for individuals excludes charitable fundraising, that is for the public; the law there seems tolerably clear (cf David Wilde, 'Property Not Required for its Trust Purpose – and the Concept of "General Charitable Intent"' (2025) 31 T&T forthcoming). Not everyone would agree with the description here of funds collected for individuals as 'beneficiary trusts': on this point see David Wilde, 'Trusts and Purposes – Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141. And see there, 149-50, for how principles outlined here might apply to gifts to non-charitable unincorporated associations for a stipulated purpose.

[4] [1979] 1 WLR 247 (CA). Also, *Barlow v Grant* (1684) 1 Vern 255, 23 ER 451; *Barton v Cooke* (1800) 5 Ves Jun 461, 31 ER 682; *Webb v Kelly* (1839) 9 Sim 469, 59 ER 439; *Lewes v Lewes* (1848) 16 Sim 266, 60 ER 876; *Presant v Goodwin* (1860) 1 Sw & Tr 544, 164 ER 852; *Davies v Hardwick* [1999] CLY 4954 (Ch).

[5] cf *Re Sanderson's Trust* (1857) 3 K&J 497, 69 ER 1206.

property to the beneficiary regardless – making a gift. The declared trust therefore does not fail: the property is now held on an outright trust for the beneficiary.[6] In *Re Osoba*, a testator made a will when his daughter was five years old, leaving the residue of his estate on trust 'for [my wife's] maintenance and for the training of my daughter … up to university grade and for the maintenance of my aged mother …' After his death, this was held to be a trust for the wife, daughter, and mother absolutely as joint tenants. Mention of their maintenance or education was held to be merely an expression of 'motives' for a gift of all of the trust property, not a limitation on the benefits they could receive: the property was wholly theirs. Both the wife and the mother being dead, and assuming there had been no severance of the joint tenancy, all the trust property went to the daughter, despite the fact that her university education had been completed several years previously. After reviewing earlier cases, Buckley LJ made the clearest statement of principle:[7]

> 'If a testator has given the whole of a fund, whether of capital or income, to a beneficiary, whether directly or through the medium of a trustee, he is regarded, in the absence of any contra indication, as having manifested an intention to benefit that person to the full extent of the subject matter, notwithstanding that he may have expressly stated that the gift is made for a particular purpose, which may prove to be impossible of performance or which may not exhaust the subject matter. This is because the testator has given the whole fund; he has not given so much of the fund as will suffice or be required to achieve the purpose, nor so much of the fund as a trustee or anyone else should determine, but the whole fund. This must be reconciled with the testator's having specified the purpose for which the gift is made. This reconciliation is achieved by treating the reference to the purpose as merely a statement of the testator's motive in making the gift. Any other interpretation of the gift would frustrate the testator's expressed intention that the whole subject matter shall be applied for the benefit of the beneficiary. These considerations have, I think, added force where the subject matter is the testator's residue, so that any failure of the gift would result in intestacy. The specified purpose is regarded as of less significance than the dispositive act of the testator, which sets the measure of the extent to which the testator intends to benefit the beneficiary.'

Although Buckley LJ spoke about testamentary trusts, the principle has been applied equally to inter vivos trusts. In particular, it was applied in the context of fundraising appeals in the important *Re Andrew's* case.[8]

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[6] The precise content of the presumption is disputed. It is usually said that the full beneficial interest in the property is treated as given to the beneficiary *unrestricted from the outset*. And this enjoys support from some statements in the cases, to the effect that the settlor's stipulated method of benefiting the beneficiary is treated as merely the 'motive' for an outright gift. However, it is submitted that the better view of the case law overall is that *there is initially a restriction*. That is, the trustee must apply the property to the settlor's stipulated method of benefiting the beneficiary *so long as that is possible*. Only if the stipulated method of benefit is impossible from the outset, or once it has become impossible later – that is, after it has been identified that there is a surplus – is the beneficiary entitled to the surplus property unreservedly, to make use of for other purposes. See David Wilde, 'Trusts and Purposes – Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141, 145-47. The distinction is not material for present purposes, since we are discussing issues arising at the stage when there is already identified to be a surplus.

[7] [1979] 1 WLR 247 (CA), 257.

[8] *Re Andrew's Trust* [1905] 2 Ch 48 (Ch). See also *Davies v Hardwick* [1999] CLY 4954 (Ch), discussed below. (Given the presumption applies to inter vivos trusts, there is therefore no reason why this presumption of gift should not equally be applied to settlors making self-declarations of trust – that is where the settlors act as the trustee themselves.)

In *Re Andrew's*, money was collected from friends of a dead clergyman to pay for the 'education' of his infant children. Once they were grown up and their formal educations complete, the children were held entitled to what remained in the fund in equal shares. There was not a resulting trust for the fund subscribers instead. In reaching this decision, Kekewich J said first:[9]

> 'Here the only specified object was the education of the children. But I deem myself entitled to construe "education" in the broadest possible sense, and not to consider the purpose exhausted because the children have attained such ages that education in the vulgar sense is no longer necessary.'

This was doubtless a convenient understanding of 'education'; but an unconvincing one.[10] Kekewich J then added:[11]

> 'Even if ["education"] be construed in the narrower sense it is, in Wood V.-C.'s language, merely the motive of the gift, and the intention must be taken to have been to provide for the children in the manner (they all being then infants) most useful.'

This was a reference to Page Wood V-C's statement of principle in *Re Sanderson's Trust*:[12]

> 'If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be.'

This proposition, that the law 'always' interprets the gift in this way, has since been modified to the law *presuming* that this is the correct interpretation, as explained in *Re Osoba*, above.[13] The *Re Andrew's* case is therefore best viewed as having been resolved by applying to the donors the presumption of a gift of surplus.

The presumed gift of surplus as an 'imputed' intention

It is helpful for the purposes of later analysis to be clear that the presumed gift of surplus involves an intention being 'imputed' to donors (rather than an 'inferred' intention), adopting the terminology of Lord Neuberger in *Stack v Dowden*:[14]

> 'An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.'

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[9] [1905] 2 Ch 48 (Ch), 53.

[10] Particularly given the only evidence available as to the terms of the appeal (albeit this was non-contemporaneous evidence [1905] 2 Ch 48 (Ch), 49). This was to the effect that the fund was 'by no means intended for the exclusive use of any one of [the beneficiaries] in particular, nor for equal division among them, but as deemed necessary to defray the expenses of all, and that solely in the matter of education.'

[11] [1905] 2 Ch 48 (Ch), 53.

[12] (1857) 3 K&J 497, 69 ER 1206, 503.

[13] [1979] 1 WLR 247 (CA).

[14] [2007] UKHL 17, [2007] 2 AC 432, [126].

The presumption of gift operates in situations where, in all probability, the donor simply did not foresee the possibility of a surplus, and therefore could have no actual intention regarding it. The law engages the presumption to resolve matters: by attributing to donors *the intention the typical donor would probably have formed had they thought about the matter*.

Resulting trust for the donors

The decision in *Re Andrew's* is frequently contrasted with the decision in *Re Abbott*.[15] There a trust fund was raised from subscribers to maintain two impoverished deaf and mute women. Stirling J inferred that it was intended the women should be entitled only to expenditure from the fund on their maintenance: the fund was not absolutely theirs, forming part of their estates at their deaths. When they died what remained went back on resulting trust to the subscribers. He said:[16]

> 'The ladies are both dead, and the question is whether, so far as this fund has not been applied for their benefit, there is a resulting trust of it for the subscribers. I cannot believe that it was ever intended to become the absolute property of the ladies so that they should be in a position to demand a transfer of it to themselves, or so that if they became bankrupt the trustee in the bankruptcy should be able to claim it. I believe it was intended that it should be administered by … the trustee or trustees [who] were intended to have a wide discretion as to whether any, and if any what, part of the fund should be applied for the benefit of the ladies and how the application should be made.'

There was no reference to the presumed gift of surplus in the case. The judgment was therefore, it is suggested, not correctly reasoned. However, the decision may still nevertheless be correct. Were there factors to rebut the presumption of gift, had it been considered?

The trust in *Re Abbott* has been understood as for the 'maintenance' of the beneficiaries.[17] Assuming 'maintenance' to be a correct lawyerly statement of the substance of the trust, this was a trust for lifelong provision, which would only end, leaving a possible surplus, at the beneficiary's death. In other words, this is not like 'education', which can end while the beneficiary is still alive, potentially with many wants and needs to be experienced during the rest of the beneficiary's life, which any remainder in the trust fund could help to satisfy. Putting things another way, in a trust for the 'maintenance' of beneficiaries, any surplus in the fund can only enure to the benefit of others, if it is treated as beneficially belonging to the beneficiaries outright – in particular, it will enure to the benefit of those who may inherit under their wills or intestacies at their deaths. This is not *in itself* an obstacle to applying the presumption of gift, and finding that any surplus in the fund belongs to the beneficiaries outright. Indeed, the presumption of gift *has* been applied to just such situations, with the surplus therefore going to the beneficiaries' estates.[18] But, importantly, in those cases the

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[15] *Re The Abbott Fund* [1900] 2 Ch 326 (Ch).

[16] [1900] 2 Ch 326 (Ch), 330-31.

[17] This seems a fair statement of the purport of the trust, although the word 'maintenance' only appears in the headnote summary in the Law Reports. Other words appear in the fuller statement of the facts there: 'assistance', 'support', 'enable … to reside in lodgings in Cambridge', 'to provide for the very moderate wants', 'benefit'. And in the judgment the word 'relief' appears: indeed Stirling J began his judgment by saying ([1900] 2 Ch 326 (Ch), 330): 'The difficulty in this case arises from the fact that there is no declaration of trust … We have no information as to the terms on which this fund was handed over …'

[18] *Webb v Kelly* (1839) 9 Sim 469, 59 ER 439; *Lewes v Lewes* (1848) 16 Sim 266, 60 ER 876. See also the decision in *Re Osoba* [1979] 1 WLR 247 (CA) arguably applying the presumption of gift to the provision for the 'maintenance' of the settlor's wife and mother, despite both being dead – although the right of survivorship within the trust fund's joint tenancy meant nothing went to their estates. (However, 'maintenance' is not always given its literal, limited meaning. Lord Macnaghten, delivering the judgment of the Privy Council, said in *Williams v*

settlors were *relatives* of the beneficiaries; and therefore the settlors had every reason to wish to see the property enure to the beneficiaries' estates – either because those liable to inherit it from the estate would be other relatives, given the general tendency for property to stay within the family at death; or, even if left outside the family, because the property would at least be going in furtherance of the final wishes of a departed loved one. By contrast, the donors in *Re Abbott* were the public, not specifically relatives of the beneficiaries: those donors had no particular reason to wish to benefit those liable to later inherit from those beneficiaries. It is submitted that this is what distinguishes *Re Abbott* from *Re Andrew's* and explains why the presumption of gift could have been rebutted in *Re Abbott*: there, a surplus in the fund could only enure to the benefit of persons the donors had no evident reason to wish to benefit in preference to themselves receiving the property back under a resulting trust.

If this analysis is correct, *Re Abbott* can be interpreted as showing that the presumption of gift will be rebutted where two circumstances are present: (1) the trust's stipulated provision for the beneficiary is lifelong, so that there can only be a surplus at the beneficiary's death; and (2) if any surplus were then to go to the beneficiary's estate, it would be enuring to the benefit of persons the donors would have had no evident reason to wish to benefit in preference to themselves. By contrast, *Re Andrew's* shows it is *not* enough to rebut the presumption of gift that the trust's terms mean a surplus merely *might* enure to the benefit of persons the donors would have had no evident reason to wish to benefit. In the case of a trust for 'education' of a beneficiary, like *Re Andrew's*, that purpose of education *might* terminate through the death of the beneficiary, leaving the surplus to go to their estate, benefiting persons donors to a collection appeal *from the public* would have had no evident reason to wish to benefit. But the purpose of education is (usually) more likely to terminate through the beneficiary completing their education, with the trust beneficiary still alive and able to benefit in other ways from any remaining surplus – the very person the donors have, of course, evinced a desire to benefit.[19]

At least one case might *appear* inconsistent with this proposed identification of circumstances guaranteed to rebut the presumed gift of surplus. However, upon examination it appears not to be a surplus case at all. In *Re Johnson*,[20] a fund was collected by appeal for a mother whose son had drowned attempting to rescue a child, leaving her unprovided for. Most of the fund was raised through a newspaper letter saying, 'a subscription list had been opened … to provide for the immediate needs of the widowed mother'. A smaller part was raised by a letter to private individuals saying, 'you will realise that a sum of at least £500 is necessary to be of any use for investment purposes, to provide … a small weekly pension'. Simonds J held that the mother – still alive – was absolutely entitled to the fund and ordered it should be paid to her. If we view this as a (potential) surplus case, (1) the trust's stipulated provision for the beneficiary was lifelong, so that there could only be a surplus at the beneficiary's death; and (2) if any surplus were then to go to the beneficiary's estate, it would be enuring to the benefit of persons the donors would have had no evident reason to wish to benefit in preference to themselves. On the analysis presented here, this should have been enough to rebut the presumed gift of surplus, and the mother should not have been held absolutely entitled to the fund. However, viewing this as a (potential) surplus case does not seem correct. Simonds J appears to have treated this as a collection of money on terms that it was for the mother, *simpliciter*. In

Papworth [1900] AC 563 (PC), 567: 'Nor is a provision for the maintenance of adults anything more than a provision for their benefit.')

[19] Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 25.17, tends in the direction of the analysis here: '[T]he distinction between the two cases is fine and seems to consist only in the fact the [*Abbott*] fund was subscribed for the personal support of living women *and not for the benefit of their next of kin*, whereas in the [*Andrew's*] case the money was given for the benefit of living children generally with special reference to their education.' (Emphasis added.)

[20] [1938] 2 All ER 173 (Ch).

particular, he emphasised that the only reference to possible investment and payment of a pension was in the private letter. This was, therefore, on the facts, the only implication that the trustees might hold the fund into the future; and it was in truth a weak one, given that investment and a pension was merely presented as one option and was in any case quite consistent with the fund being handed to the mother to invest herself. In other words, this was not the collection of a fund explicitly, or by clear implication, to be held and administered by trustees for the limited purpose of maintaining someone not capable of managing their own financial affairs during their lifetime, which might leave a surplus at their death. This was instead, on its terms, simply a collection of money *for the mother*. Simons J concluded:[21]

> 'In the present case, there is a trust for the benefit of Mrs Johnson. It is unqualified and absolute. The money was collected for Mrs Johnson, and she is entitled to it. I can find nothing in the expression of the trust as to the mode of application.'

Death of the beneficiary as the point of distinction

When *Re Osoba* was at first instance, Megarry V-C sought to explain the distinction between *Re Abbott* and *Re Andrew's* on different grounds. His explanation began in terms consistent with the reconciliation attempted here:[22]

> 'On the contrast between the two authorities I should say this. In *In re Abbott* every possible purpose for which the trust existed was at an end. The trust was for the benefit of the two ladies, and once they were dead it became impossible to use the funds for their benefit. No subscriber, touched by their plight, could very well be expected to have intended any surplus to pass under the wills or intestacies of the ladies to people who might well be totally unknown to the subscribers. In *In re Andrew's Trust*, on the other hand, the objects of the benefaction were still living. The immediate need had been to provide for their education, and that is what had prompted the subscriptions. But quite apart from "education" having an extended meaning, it seems improbable that any subscriber would have recoiled from the thought of any of the money being used for the benefit of the children after their formal education had ceased. I think that you have to look at the persons intended to benefit, and be ready, if they still can benefit, to treat the stated method of benefit as merely indicating purpose, and, no doubt, as indicating the means of benefit which are to be in the forefront.'

But then, with respect, Megarry V-C drew an overly-simplistic and incorrect conclusion – that the presumption of gift only applies when beneficiaries are alive at the date of the hearing not when they are dead:[23]

> 'In short, if a trust is constituted for the assistance of certain persons by certain stated means there is a sharp distinction between cases where the beneficiaries have died and cases where they are still living. If they are dead, the court is ready to hold that there is a resulting trust for the donors; for the major purpose of the trust, that of providing help and benefit for the beneficiaries, comes to an end when the beneficiaries are all dead and so are beyond earthly help, whether by the stated means or otherwise. But if the beneficiaries are still living, the major purpose of providing help and benefit for the

[21] [1938] 2 All ER 173 (Ch), 176.
[22] *Re Osoba* [1978] 1 WLR 791 (Ch), 795; varied [1979] 1 WLR 247 (CA).
[23] [1978] 1 WLR 791 (Ch), 795-96. To similar effect, see also Philip H Pettit, *Equity and the Law of Trusts* (12th edn, Oxford 2012), 176.

> beneficiaries can still be carried out even after the stated means have all been accomplished, and so the court will be ready to treat the stated means as being merely indicative and not restrictive.'

But as Penner observes, it is wrong in principle to interpret trusts in this ex post facto manner:[24]

> 'Megarry V-C appears to take a dangerously ex-post view of the interpretation of these gifts. Surely any interpretive strategy should be primarily devoted to figuring out the settlors' intentions from the outset, when the trustees who are to administer the trust receive the funds. It is then that they must be certain whether the trust is a gift of the whole …'

Moreover, Megarry V-C's approach is inconsistent with the authorities. Indeed, the foundational case first establishing the presumed gift of surplus involved provision by a father for the education of his child, where the impossibility of carrying out that stipulated purpose arose from the child dying before their education could be completed.[25] Despite the child being dead, the property was nevertheless held to have been an outright gift to them, and therefore passed to the dead child's estate. Note again the close family relationship of the parties. It appears, therefore, that the material distinction is not whether the beneficiary is alive or dead, but whether under the terms of the trust a surplus could only go to persons the donors had no evident reason to wish to benefit, rather than have their property back.

Disability of the beneficiary significantly affecting competence as the point of distinction

Gardner also rejects Megarry V-C's ground of distinction and suggests for consideration instead the possibility that the presumption of gift only applies to trusts declared for beneficiaries of normal competence not those declared for beneficiaries suffering from a disability significantly affecting competence:[26]

> 'The difference between the two decisions has been explained [by Megarry V-C, above] on the ground that while it is reasonable to recognize an absolute entitlement for the named objects of a fund when they are still alive (as in *Re Andrew' s Trust),* it is going too far to deprive the donors of the surplus in favour of whoever is entitled to the objects' estate when they have died (as in *Re Trusts of the Abbott Fund).* This idea is crude. Does the "true construction" change, for example, if the objects are alive at the time of the hearing at first instance, but then die pending an appeal? There is a better analysis. The effect of the usual rule is that people have full dominion over the money in question, rather than that it is spent on the designated purpose on their behalf.[27] This is attractive in terms both of the rights thesis and of economic utility, as explained above.[28] The attraction holds good, however, only where the people in question are of

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[24] JE Penner, *The Law of Trusts* (12th edn, OUP 2022), para 7.50.
[25] *Barlow v Grant* (1684) 1 Vern 255, 23 ER 451.
[26] Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011), 61-62 (notes omitted).
[27] The present author is on record as not agreeing with the view of the law taken by Gardner here – and adopted also by many others – and taken, it must be admitted, on the basis of supportive statements in the case law. It is submitted that the better view of the law is that the property in such trusts *is* restricted to spending on the purpose designated by the settlor *until that is no longer possible* – see above note XXX.
[28] This is a reference to Gardner's earlier statement that (60, note omitted): 'It [makes] sense in terms of rights (regarding the beneficiary as in principle entitled to an absolute interest, from which the settlor would derogate in stipulating the purpose on which the money must be spent) and of economic utility (the way the money is ultimately spent is opened to the market, rather than constrained by the limitations of the settlor's purpose).'

> normal capability. If people of reduced capability are given full dominion over the money, their infirmity may lead to their being exploited. So it is appropriate that the rule should be disapplied, and the purpose trust allowed to stand, in these circumstances. The decision in *Re Trusts of the Abbott Fund* makes good sense in these terms. At first sight, it might seem right to seek the same treatment of trusts for children, such as that in *Re Andrew' s Trust:* children too lack full capability and so merit the protection of a trust. But children will eventually become fully capable adults (those in that case had done so by the time it came to court), and in the meantime it is safe to hold them absolutely entitled to the money, since they will still not be able to get their hands on the capital until they reach majority.'[29]

But would this approach to the presumed gift of surplus lead to attractive results? Suppose a case similar to *Re Osoba*, where a father makes a will when his daughter is a young child. She suffers a disability significantly affecting her competence. Her special educational needs are in his mind, and he declares a trust in his will to pay for her 'education'. He dies years later, with the will unchanged, at a point when his daughter has transitioned from education to care. On Gardner's suggested approach, the outcome would apparently be the opposite of that in *Re Osoba* – the trust fund would *not* be available for the daughter's future post-education care, because the presumption of gift would not apply. (On the other hand, if the presumption of gift did apply, Gardner could point in turn to the unattractive possibility of the daughter being cheated out of her trust fund – but how substantial is that possibility?)

It is suggested that the better view of the case law, instead, is that what may rebut the presumption of gift, leading to a resulting trust for donors, is that under the terms of the trust a surplus could only go to persons the donors had no evident reason to wish to benefit, rather than have their property back.

Anonymous donations such as money put into collection boxes

Historically there has been a particular problem over surpluses arising from funds raised through anonymous donations, such as donations into collection boxes – although it is probably of diminishing importance today, due to the declining use of cash in society generally combined with the emergence of other forms of giving. However, insofar as anonymous donations to beneficiary appeals are still a live issue, there is no reason why the presumed gift of surplus should not apply to them. It might appear from the textbooks that it would not apply – that the authorities show other outcomes follow from donations into collection boxes.[30] But the peculiar contexts of the relevant authorities cited in the books need to be noted: they are unusual cases

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[29] Gardner adds in a footnote that the children could get their hands on the capital on attaining majority, '[u]nder the rule in *Saunders v Vautier* (1841) 4 Beav 115, Cr & Ph 240'. But, quaere: why would the children need to invoke that rule – which a sui juris beneficiary wholly entitled to the beneficial interest can use to *override* trust terms – if, as Gardner has maintained to this point (59-62), in line with much orthodox thinking, the correct interpretation of the trust has been throughout that the children have been wholly entitled to the trust property, with no *binding* term of the trust restricting the property to use by the trustees for their education? The explanation is doubtless that Gardner is not using 'the rule in *Saunders v Vautier*' in its technical sense, but in a generalised sense that is commonly found: as *guarantor* that a sui juris beneficiary wholly entitled to the beneficial interest can *always* demand the trust property – whether that demand is consistent with the terms of the trust or involves overriding the terms of the trust, because they stipulate a particular use of the property to the contrary. (cf JE Penner, *The Law of Trusts* (12th edn, OUP 2022), para 11.6.) It is suggested that the children *would* indeed need to resort to the rule in *Saunders v Vautier*, in its strict sense, if their education was still ongoing at majority, *because it would be a binding term of the trust that the money only be used by the trustees for each child's education until that had reached its end* – as argued in XXX above.

[30] For example, Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (23rd edn, Sweet & Maxwell 2024), paras 11.007 and 11.013.

where the presumption of gift could not have applied. The books tend to posit two possibilities.[31]

Resulting trust?

The first possibility suggested in the books is the approach of Harman J in *Re Gillingham Bus Disaster Fund*,[32] finding a resulting trust for unidentifiable donors, leaving the money to be paid into court and left languishing there.[33] Harman J said:[34]

> 'In my judgment the Crown has failed to show that this case should not follow the ordinary rule [of an automatic resulting trust] merely because there was a number of donors who, I will assume, are unascertainable. I see no reason myself to suppose that the small giver who is anonymous has any wider intention than the large giver who can be named. They all give for the one object. If they can be found by inquiry the resulting trust can be executed in their favour. If they cannot I do not see how the money could then … change its destination and become bona vacantia. It will be merely money held upon a trust for which no beneficiary can be found. Such cases are common and where it is known that there are beneficiaries the fact that they cannot be ascertained does not entitle the Crown to come in and claim. The trustees must pay the money into court like any other trustee who cannot find his beneficiary. I conclude, therefore, that there must be an inquiry for the subscribers to this fund.'

But the context was a declaration of trust with disparate objects to which the presumption of gift could not have applied: an appeal following a road accident that killed and injured Royal Marine cadets for donations to 'a Royal Marine Cadet Corps Memorial Fund to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives as the mayors may determine'.[35]

Bona vacantia?

The alternative found in the books is the approach of Goff J in *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts*,[36] where, after reviewing inconsistent past cases, he held there is no resulting trust for those paying into collection boxes: they intend

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[31] For example, saying that the choice is between these two options, see AJ Oakley (ed), *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008), paras 9.080 and 9.090. To similar effect is Jonathan Garton, Rebecca Probert, and Gerry Bean (eds) *Moffat's Trusts Law: Text and Materials* (7th edn, CUP 2020), 860-61; Michael Haley and Lara McMurtry, *Equity and Trusts* (7th edn, Sweet & Maxwell 2023), 9.039-9.042; and Warren Barr and John Picton (eds), *Pearce & Stevens' Trusts and Equitable Obligations* (8th edn, OUP 2022), 228-29. cf Gary Watt, *Trusts & Equity* (10th edn, OUP 2023), sect 561, where the possibility of a beneficial gift of surplus is at least contemplated, as a third option.

[32] [1958] Ch 300 (Ch); affd [1959] Ch 62 (CA).

[33] JE Penner, *The Law of Trusts* (11th edn, OUP 2019), para 9.84, commented: '… the resulting trust doctrine in appeal cases of this kind seems somewhat pointless for those who anonymously gave small amounts in collection boxes, because it means the trustees must pay the money into court, where it will be held, essentially in perpetuity, on the off-chance that one of the anonymous subscribers of small amounts to the fund cares enough to come forward and prove that he made a donation, hence the suggestion to treat the property as *bona vacantia*.' The passage does not appear in the current 12th edition.

[34] [1958] Ch 300 (Ch), 314.

[35] Although this is widely assumed, it is not clear that case involved any valid trust at all, as opposed to merely a purported trust. Only the dissenting judgment of Ormerod LJ, when the case reached the Court of Appeal, is unequivocal that he viewed the declared trust as – partly – valid: [1959] Ch 62 (CA), 79.

[36] [1971] Ch 1 (Ch).

to part with the money outright leaving surplus money as bona vacantia for the Crown.[37] Goff J said:[38]

> 'I agree that all who put their money into collecting-boxes should be taken to have the same intention, but why should they not all be regarded as intending to part with their money out and out absolutely in all circumstances?'

This view was cited with approval by Lord Browne-Wilkinson, delivering the leading judgment in the House of Lords, obiter, in *Westdeutsche Landesbank Girozentrale v Islington LBC*.[39] But the context of Goff J's decision was his ruling that surplus assets on termination of a non-charitable unincorporated association should not go to the members. This ruling has since been rejected.[40] Again the context left no scope for application of the presumption of gift.

Presumed gift of surplus?

Further undermining the two options identified above, it should be noted that the prior cases reviewed and reasoned from in formulating these two approaches were all charity collections – also, of course, a context in which the presumption of gift for beneficiaries would not apply. That is a situation now regulated by statute under Charities Act 2011, s 63A, adopting an approach securing an outcome similar to the presumption of gift, modified for the charity context, treating such donations as always applicable cy-près.

In the context of a beneficiary trust, the presumption of gift *could* be applied to funds raised through anonymous donations, such as donations into collection boxes. And it may already have been, in *Davies v Hardwick*.[41] However, the facts are not sufficiently reported to be certain. A fund was raised 'through an enormous number of modest donations' to pay for a child, who was liable to suffer lifelong medical difficulties, to have a life-extending transplant operation, which was completed leaving a surplus. Blackburne J applied the presumption of gift, ruling the child had an outright beneficial interest in the fund, following *Re Osoba*.

If the case involved anonymous donations, such as into collection boxes, this decision is consistent with the general argument made here. Given the trust was for the purpose of paying for the operation, it was possible at the date of the appeal that the intended beneficiary, the child, could still benefit in other ways from a surplus – as indeed happened (although it was also possible that a surplus could have resulted from the child's death, with any surplus then enuring to the benefit of others the donors had no evident reason to wish to benefit). But suppose instead a case of anonymous donations, such as into collection boxes, where both of the circumstances, identified previously, that may rebut the presumption of advancement *are* present: (1) the trust's stipulated provision for the beneficiary is lifelong, so that there can only

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[37] For objections to an abandonment analysis, see Robert Chambers, *Resulting Trusts* (OUP 1997), 65-66.

[38] [1971] Ch 1 (Ch), 13.

[39] [1996] AC 669 (HL), 708. JE Penner, *The Law of Trusts* (11th edn, OUP 2019), para 9.94, regarded the approach as correct but not for the reasons given, saying: '[In *Re West Sussex*] Goff J reasoned that the contributors of small anonymous donations must be assumed to have intended to part with their money absolutely in all circumstances. Again, distinguishing between large, identifiable contributors and small contributors … on the basis of their likely intentions is difficult to sustain. The better basis for the result is simply that the [automatic resulting trust] solution, although, theoretically correct, is so patently pointless in the case of small contributors … none of whom will ever try to prove a valid claim to the money, that the *bona vacantia* solution is simply imposed as the most practical result in the circumstances. As Harman J points out in *Gillingham*, surely the only thing that distinguishes these classes of contributors is the possibility that they might actually be able to claim their money – there is no reason to believe that they were more or less likely to entertain any "secondary" intentions governing the proper direction of their money if the primary trust failed.' The passage does not appear in the current 12th edition.

[40] *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 WLR 936 (Ch) and subsequent cases.

[41] [1999] CLY 4954 (Ch).

be a surplus at the beneficiary's death; and (2) if any surplus were then to go to the beneficiary's estate, it would be enuring to the benefit of persons the donors would have had no evident reason to wish to benefit in preference to themselves. Are we then faced again with the options of an ineffectual resulting trust or bona vacantia?

Perhaps not. The unappealing options of an ineffectual resulting trust or bona vacantia have been reasoned towards in large part based on the absence of any discernible intention held by donors into collection boxes to dispose of the beneficial interest in a surplus: the donors did not foresee a surplus and therefore could not form any intention about one. The judges have suggested it is not legitimate to *fabricate* an intention we know the donors did not have. *But that is precisely what the law does under the presumed gift of surplus* – analysed above as involving an 'imputed' intention. The presumption of gift demonstrates that it *is* acceptable, *sometimes*, for the courts to attribute intentions they know a donor did not have, to fill an inconvenient legal gap: based on what the typical donor would probably have wanted had they contemplated the issue. Given that, we could legitimately extend the effect of the presumed gift of surplus, by adding a third factor to our list of matters needed to be certain of rebutting the presumption of gift: (3) the circumstances of the initial provision of the property must allow for the effectual return of any surplus under a resulting trust. The consequence of this addition would be that, if a resulting trust of any surplus was not practicable from the outset, as in the case of donations into collection boxes, the presumption of gift would operate (at least prima facie): the surplus would enure to the estate of the beneficiary. We would then have expanded our range of unappealing options from two to three: an ineffectual resulting trust; or bona vacantia; or going to the estate of the beneficiary, likely ending up with the beneficiary's family. Perusing that list of bad options, one suspects the typical anonymous donor to an appeal would select the latter. Given the impossibility of the donor getting their property back, they would probably, in that situation, then prefer it to go to the estate of the beneficiary – likely ending up with the family of the beneficiary, who are liable to have suffered along with the beneficiary in respect of any needs the appeal was designed to relieve.[42]

Further considerations

Two additional points should be highlighted.

Fragmentation of the declaratory role leading to the creation of more than one trust

One consequence of the suggestions made here, if accepted, is that they would sometimes potentially put donors *to the same appeal* into two different categories: one category of identified donors benefiting from a resulting trust (repayment being practicable, and with the presumption of gift rebutted) and another category of anonymous donors not benefiting from a resulting trust (repayment not being practicable, with the presumption of gift therefore applying).

This means that, within a single appeal fund, there would in truth be two different trusts – operating on different terms. Because the only way we could explain a resulting trust in respect of a surplus for *some* (anonymous) donors is to say that the terms of the appeal stated by the appeal founders were limited to a trust for the stated appeal purpose *only* – for example paying for specific surgery for the beneficiary. Those initial appeal terms did *not* extend to providing any other benefit for the beneficiary. But in light of that, the only way we could then explain the remaining part of the surplus, contributed by *other* (identifiable) donors, being held instead on an outright trust for the beneficiary is to say that those donors made an implied supplementary declaration of trust, beyond the initially stated appeal terms, identified by the presumed gift of surplus. In other words, there were multiple declarations of trust made: one by the appeal initiators, a limited one; and then numerous additional declarations going beyond

[42] Although note that not appeal collections are to relieve need.

that – but all on identical terms with each other – by the identifiable donors. That is to say, the declaratory role we habitually attribute to 'the settlor' in a trust was fragmented between multiple persons within the appeal overall. And it follows that we cannot always talk simply about identifying the terms of *the trust* in appeal cases like *Re Abbott* and *Re Andrew's*: we have to recognise that there may be more than one single trust holding and one set of trust terms to identify, within the overall collected fund. This is counter-intuitive and therefore initially disconcerting. But that does not seem to be a sufficient ground for rejecting the approach suggested, if it achieves better justice. And in any case, it is submitted that the identified phenomenon of 'fragmentation' of the settlor's role, and its possible consequence that there may be more than one single trust holding within an overall collected fund, are both – regardless of the argument made here about the presumed gift of surplus – *already present and unavoidable* within the wider law.[43]

Online appeal terms and conditions

One final qualification should be made to everything said here. Many appeal collections today are launched via online platforms. And these may have detailed terms and conditions dealing comprehensively with the destination of surplus funds.[44]

Conclusions

The law sometimes operates a presumption of gift – 'the presumed gift of surplus'. When applied in the context of fundraising appeals, this means that where a trustee issues such an appeal, to help a beneficiary in a stipulated way, but there is a surplus when that specified purpose is completed or proves impossible, the surplus is presumed to be held on an outright trust for the beneficiary – as a gift. This is the best explanation of the decision in *Re Andrew's Trust*.[45]

And the best understanding of the differing outcome in *Re The Abbott Fund*[46] – assuming it to be a correct decision, despite the presumption of gift not being addressed in the judgment – is that, one thing we know will rebut the presumption, leading to an automatic resulting trust for donors, is for three circumstances to all be present together. That is: (1) the trust's stipulated provision for the beneficiary is lifelong, so that there can only be a surplus at the beneficiary's death; and (2) any surplus then going to the beneficiary's estate would be enuring to the benefit of persons the donors would have had no evident reason to wish to benefit in preference to themselves; and (3) the circumstances of the donor's gift allow for the practicable return of any surplus to them under a resulting trust.

We should not shy away from the fact that the presumed gift of surplus involves an 'imputed' intent, not a real one. To fill a gap, the law attributes to donors the intention the typical donor would probably have formed had they thought about the possibility of a surplus.

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[43] For discussion, see David Wilde, 'Fragmentation of the Settlor's Role – Identifying Whose Intention Matters in Fundraising Appeal Collection Trusts' (2024) 38 TLI 64.

[44] For example, for an account of online terms and conditions in one significant field – appeals to pay a beneficiary's litigation costs – see David Wilde, 'Trusts of Crowdfunded Litigation Costs – Purpose Trusts or Beneficiary Trusts?' (2024) 30 T&T 94.

[45] [1905] 2 Ch 48 (Ch).

[46] [1900] 2 Ch 326 (Ch).