Testamentary Gift: Case Study

1. For all of the clauses in Jane's will to be valid, we need the 3 certainties as identified by Lord Longdale in Knight v Knight. Only discussing the ones that merit discussion, we must be able to tell it is her intention to create a trust, the property that is the subject of the trust and also who the beneficiaries are. All clauses will be automatically be fully constituted as long as the will is made in accordance with s9 of the Wills Act 1837.

Clause B

It is clear that the subject of £50,000 is to be 'held on trust'. The issue here relates to certainty of object. As identified by the House of Lords in McPhail v Doulton and applied in Re Baden (No2), the test for a discretionary trust is the any given postulant test. Taking the approach from prior case of Re Allen, Megaw LJ's judgement in Baden appears is relevant here, is saying that providing there is a distinct number of beneficiaries who satisfied the terms, and conceptual and administrative workability, the trust would be valid. It would be possible to identify a core number of people who satisfy the criteria of being her backing vocalist. It is administratively workable as it is possible to identify her past backing vocalists, especially if the burden of proof is put on the beneficiaries to prove such (as per Sachs LJ in Baden). However, is it not conceptually certain due to its subjectivity of 'favourite' and 'most supportive' –we need precise boundaries of meanings of words here (Emery [1982]). Therefore, the £50,000 would go to Queenie as residue.

Clause C

Regarding certainty of intention, this appears to be a testamentary gift in certain favour of the objects, Susan, and Bev. Part of property would go to Susan and the remainder to Bev. The key issue here is with certainty of subject. Even as a gift, the property still needs to be segregated as in Re London Wines – Gloria must know what she is supposed to be giving to the beneficiaries. The 'most show stopping ball gowns' is quite subjective – to one it could be the most expensive, but to another it may be the biggest, or glitteriest. Following Boyce v Boyce, one beneficiary could not benefit as the other was dead, and thus lacked certainty of subject. However, there is contextual different as unlike Boyce, the choice is not afforded to the donee. Subsequently, we can look at Re Golay's WT, where 'enjoyment one of his flats during her lifetime and receiving a reasonable income from my properties was viewed by the Judge sympathetically and he let her pick a flat and Courts determined reasonable income. Susan could be given a choice like (Re Golay's) and let Bev have the remainder. It would be logical to follow Re Golay's due to the aforementioned contextual differences. This clause appears valid.

Clause D

Clause D appears to be a testamentary gift in favour of Reuben. Regarding the subject matter, it appears that the is gifting the entirety of her shareholding – which can be contrasted with the uncertainty in Palmer v Simmonds. We know the disposition is in favour of Reuben, and thus appears to be valid in relation to the 3 certainties.

As per the law above, testamentary gifts will be validly constituted if contained in a will. For constitution of a share, the formality of a completed share transfer form and registration of the new shareholder's name on the company's register is required. Title will not be vested in the transferee until Itchy Feet Travel register Wendy as the new shareholder (Stock Transfer Act 1962 s1; Companies Act 2006 s771 and part 21). Before Jane died, she may have made a fully constituted gift in favour of Wendy.

The general rule of constitution of an inter vivos gift is that the donor must transfer the property in question to the donee and the donor must do this with the intention of making a gift. If there is no transfer, then there is no gift (Milroy v Lord) – this is all in the name of the equitable maxim that 'there is no equity to perfect an imperfect gift'. As Itchy Feet Travel did not register Wendy, we lack a perfect transfer. We instead have an imperfect transfer where equity will intervene as the transaction is invalid in the eyes of law – here equity will look on the transaction as complete. Under this area of equity, we can look at the principle from Re Rose, where the gift is effective if the settlor has done all that they can. Jane has done all that she can in her power by signing and thus completing the form (Zeital v Kaye), and therefore equity will regard as done what ought to be done. Can also look at the unconscionability rule that stemmed from Pennington v Waine, where one can suggest that it would perhaps be unconscionable to recall the gift to Wendy and the gift would be effective when the share form was executed. This however calls on scope for criticism – as surely the unconscionability rule goes against the equitable maxim that equity will not assist a volunteer. This raises questions of reliability of the maxims – and as said by Margaret Halliwell [2003], if we are left with a maxim that equity will not assist a volunteer unless it is unconscionable to do so, the we are left with an unruly beast.

Although containing the 3 certainties, clause D is not fully constituted, thus making it a gift in favour of Wendy.

Clause E

It is clear that the subject matter of £50,000 is to be 'held on trust here. As this is a fixed trust, i.e. the extent of the beneficial interest is fixed, it is possible to draw up a complete list of beneficiaries (IRC V Broadway Cottages). In Broadway Cottages, Jenkin LJ based such rationale on Lord Eldon's judgement in Morice v Bishop of Durham, in saying that the beneficiaries must be certain enough for courts to execute and control the trust. For a fixed trust we need conceptual certainty – where we can ascertain that the cousins are Pam, Jean, and Jeffrey. Evidential certainty is also required, and in this instance the most scientifically certain thing to do in order to prove relation is a DNA test, as cousins share a percentage of similar DNA. However, this would be quite expensive, basic family tree research and certificates will prove whether Gloria has cousins of such names. Appears to be a valid trust here in favour of Gloria's named cousins.

Clause F

The issue here is in relation to the certainty of intention / wording. Although Jane is 'confident' that Ishmael will 'do the right thing', it has to be clear that the testator intended to create a trust and not merely a gift or power, and as said by Sir Andrew Morritt VC in Tanna v Tanna, this is in many ways the most important certainty. There are two diametrically opposed judgements in this area – with Re Adams and Kensington Vestry holding precatory wording to hold moral

obligations, yet Comiskey v Bowring holding the same wording to hold legal obligations. Despite having counter-intuitive cases in this area, on balance it would probably follow a family analysis in saying that as Ishmael feels an obligation to look after Elton. Thus, trust obligations probably will not be imposed. (Re Adams). ‘Do the right thing’ also indicates mortality, as opposed to legality.

This essay shall discuss public benefit as a requirement of charities, and thus whether such requirement is absolute. I will thus critically assess whether there are any exceptions to such rule, even in morally construed situations such as those that regard poverty. By looking at the Charities Acts 2006 and 2011, and case-law where appropriate, I will see how there is argument against the statement in saying there shall be no exceptions to the absolute requirement of public benefit.

Before 2006, there was little statutory guidance for charitable purpose trusts. Common law derived from the preamble of the Statute of Charitable Uses 1601 was responsible for governing laws in this area and therefore providing us with workable definitions. Lord Macnaghten later classified four heads of poverty in the 1891 case Commissioner of Income v Pemsel ; namely the relief of poverty, advancement of religion, advancement of education, and other purposes beneficial to the community. It was widely considered that under the first three Pemsel heads that public benefit was assumed. Mills [2016] argued this requirement of public benefit was needed as a result of the birth of state education and regular income taxation. The presumption meant that organisations did not have to convince the judge that they were publicly beneficial (National Anti-Vivisection v IRC). Parliament then introduced the Charities Act in 2006, which was later re-enacted by its successor - the Charities Act 2011, which clarified the common law in this area. S2 provided us with charitable purpose examples, which included the four aforementioned Pemsel heads, and that the purpose must also be publicly beneficial (s4).

Although some saw the law as being ‘relatively clear’ before the introduction of such an ‘ill-scripted Act’ (Picarda [2014]), the reform of charity law from common law into legislation saw changes to the presumption of public benefit. Under s4 of the 2011 Act, we see the ‘public benefit test’, where subsection 2 tells us that the previous presumption of public benefit is no longer. Having a system that no longer presumes public benefit and requires the need to exemplify it, we can say that the requirement is more absolute than it used to be. However, exasperatingly for legal practitioners, the Charities Act 2011 does not define that is meant by ‘public benefit’ – instead, it places an obligation on the Charity Commission to produce public benefit guidance, as in the words of Lord Hodgson - public benefit was too broad to be considered as part of the review. However, the Public Administration Select Committee (PASC) have criticised this in saying that it should be to Parliament ‘to determine such criteria for charitable status’ rather than delegate it to the Commission and the courts (PASC, 2013). However, regardless of whether one agrees with the lack of statutory definition of public benefit, it is fair to say that the there is an authentic, and absolute requirement for public benefit to be shown, as opposed to the previous assumption under the common law.

In relation to charitable trusts for religious purposes, there is little contention in relation to the public benefit aspect. Case law is generally in support of the statement by holding that there must be a connection with the public. Gilmour v Coates held that organisations removed from the world were not publicly beneficial, whereas Neville Estates v Madden held a nexus with the community holds a public benefit.

During Parliament's passage of the 2006 Act it is clear from the Hansard that Members of Parliament (MP's) thought that the demonstration of public benefit for independent schools was going to be 'substantial'. However, it is now clear that all schools are expected to do is go beyond a de minimis 'token effort. This was demonstrated by IRC v Charity Commission, where the tribunal agreed that providing scholarships for poorer children was enough to show that they are charitable. Dunn [2009] saw that ensuring a public benefit is provided in circumstances like this is a useful tool as it ensures that fee charging schools widen accessibility to their services. Although not required in the substantial way that MP's perhaps thought it should, or would be required, we see that the requirement for the charity to be publicly beneficially to some degree is arguably absolute. With regard to schools, we do not see an exception to public benefit as the statement suggested, but we do perhaps see a lower threshold. With respect to education as a head of charity, we could be in agreement with Jones [1974], in saying that although the 'measure of public benefit varies with the trust purpose', 'public benefit must always be present'.

In relation to charitable purpose trusts for the relief or prevention of poverty, we see a slight difference in rules. Guidance from the Charity Commission (2013) said in cases of relief, and sometimes prevention of poverty, the public benefit requirement can be met by satisfying the 'benefit aspect only'. This is despite it being commonly understood that public benefit means its purpose must satisfy both the 'public' and beneficial' aspects. Looking at Lord Greene's judgement in Re Compton, we see reasoning as to why there is a broadening of the public benefit requirement in relation to poverty. His Lordship claimed that there may be perhaps 'some special quality' in gifts for relief of poverty that places them in 'classes by themselves'. Whilst poverty can be very subjective, many individuals sympathise in relation to poverty situations and would be in favour of charitable purpose trusts that help people with reduced sources enjoy benefits of a charitable status such as no tax obligations.

With Attorney General v Charity Commission for England and Wales still holding the following cases to be good law despite the abolition of the presumption of public benefit, we can look at how charities for the relief and prevention of poverty have a broader reading by the courts. In Re Segelman, it was held the gift of relief of poverty to a donor's own family would be valid and in Re Buck, a charity for the benefit of only three people would also be valid – despite either charity being publicly available to anyone in aa substandard position. This leaves us with high levels of ambiguity today – with legal practitioners and academics asking whether poverty cases have a different test of public benefit. Although we have no specific section telling us the answer to this question, one could argue the abolition of the presumption means a requirement to exemplify a public benefit is needed. However, it is equally as fair to say that the case-law is still valid, and an abolition of the presumption does not necessarily mean this is substituted for a requirement to show it. The public benefit requirement cannot be absolute due to the flexibility it has when dealing with instances of charitable purpose trusts for the relief or prevention of poverty.

In conclusion to the above points, it seems fair to say that the public benefit requirement has been complicated by the statute by failing to provide a concise definition of what this actually is. Leaving the definition in the hands of the Charity Commission insinuates that the requirement is malleable on a case basis. Despite the requirement being required, and illustrated, in most instances of charitable purpose trusts, we can conclude that the requirement for charities to show public benefit is not in fact absolute, and there are exceptions regarding poverty.