Donor Intention and Dialectic Legal Policy Frames

John Picton[[1]](#footnote-2)\*

While there is a widely held view that the *cy-près* process has fidelity to the donor’s intention at its heart, policy concerns are in fact the main priority of the courts. This was true during the development of the doctrine, and it remains true in the present day. Linking historic precedent to the contemporary law, this chapter identifies shifting legal policy treatments of intention in relation to *cy-près* as it evolves over time. It uses two theoretical tools — dialectics and framing — in order to make the critical claim that where courts pay attention to donor intention in the *cy-près* reform process, they do so in a manner which is both coloured by and secondary to wider policy concerns.

*Cy-près* regulates charitable trust reform. It is widely recognised as a single doctrine,[[2]](#footnote-3) governing two circumstances of trust alteration. Reform inevitably occurs where circumstances affecting the gift have altered since it was devised. In a first instance, an established charitable trust might be modified after it has been in existence for a period of time.[[3]](#footnote-4) It might be that it can no longer continue upon its past course for practical reasons, such as lack of funds.[[4]](#footnote-5) Or in modern times, it might simply be that the trustees wish to update the trust for reasons of efficiency.[[5]](#footnote-6) In a second instance, a testamentary gift might be altered even before it has been applied to any trust purposes. This almost exclusively occurs in circumstances where the donor’s stated plans are impossible.[[6]](#footnote-7) In the contemporary cases, the bulk of precedents concern gifts to organisations which, upon the death of the testamentary donor, are discovered to have closed down in the years prior to death.[[7]](#footnote-8) Faced with impossibility, a judge might perform a testmentary rescue, reforming the gift and preventing lapse – an occurrence which would normally benefit the next-of-kin.[[8]](#footnote-9) In applying the *cy-près* doctrine, the judge rewrites the will. The legacy will be applied to alternative trust purposes of the court’s choosing, so keeping the gift out of private hands.[[9]](#footnote-10)

In academic treatments of the topic, reform *cy-près* is almost exclusively understood as having the effectuation of the donor’s intention,[[10]](#footnote-11) despite the altered circumstances facing the gift, at its core. It is presented as a process to divine the donor’s wishes from available written evidence, such as the constitution of the charity, or the wording of a donor’s will, [[11]](#footnote-12) and then a carrying through of that intention as near as it may be possible in the new circumstances.[[12]](#footnote-13) In consequence, it is conceptualised as a type of factual intention discovery, and demarcated as such from policy questions concerning the manner in which public funds ought to be applied. In this vein, Peter Luxton claims that the doctrine is, ‘rooted firmly in the notion of fidelity to the settlor’s intention.’[[13]](#footnote-14) Hubert Picarda states explicitly that the doctrine of *cy-près* is one of approximation and that, ‘the court must search out and ascertain the intention of the testator.’[[14]](#footnote-15) For these leading authors, *cy-près* is thought to be limited, as a matter of precedent, to revealing and then carrying through the donor’s wishes in altered circumstances.

Being understood as tightly linked to the donor’s wishes, reform *cy-près* is rarely analysed in terms of legal policy. On the occasions that it is contextualised as a part of a wider picture, it is normally presented as an element in a type of bargain with donors.[[15]](#footnote-16) So, in return for voluntary donation to charitable purposes, the law is said to strive to carry through the donor’s wishes as a *quid pro quo*. Alex Johnson puts the point that, ‘under this normative theory, the settlor who establishes a charitable trust is viewed as entering in to a contract with the public…’[[16]](#footnote-17) The logic of this view connects with an idea that were it not for the faithful effectuation of the donor’s intention in altered circumstances, that donor might be prevented from giving.[[17]](#footnote-18) So Peter Luxton takes the position that, ‘if settlors suspect that their gifts may be applied to purposes other than those intended the number and value of charitable gifts may diminish.’[[18]](#footnote-19) While, on this explanation of the doctrine, *cy-près* reform is in fact placed within a wider policy picture — being a reward for and perhaps an encouragement of voluntary donation — the reform process *per se* is necessarily understood as bound tightly by the donor’s wishes. According to the view, the law’s side of the bargain is to do as the donor would want.

This chapter departs from the view that *cy-près* reform has fidelity to the donor’s intention at its core. It develops and presents a fresh understanding the doctrine as being subject to dialectical policy frames shifting over time. This critical view of *cy-près* shows the doctrine to be primarily a method of effecting legal policy in the altered circumstances facing the gift. Framing relies upon a picture metaphor, or a crop.[[19]](#footnote-20) Applied in this legal context,[[20]](#footnote-21) the key idea is that legal policy shapes and selects the law’s understanding of the donor’s intention. In more general terms, framing determines what, in any given fact-pattern, appears legally relevant to a court. Thus, ‘the frame describes how features in a particular problem or case are understood, placed and accorded relevance.’[[21]](#footnote-22) It is legal policy which creates frames, and they are ‘a structure of knowledge, experience, values and meanings that legal decision-makers bring to a decision’.[[22]](#footnote-23) Indeed, another way of understanding the same concept might be as a judicial policy trade-off, or a process of policy prioritisation.[[23]](#footnote-24) The key point is that the court will always put policy first in the reform process. Where there is a clash between intention and policy, then intention is the secondary concern.

The concept of frames is tied to dialectics. Historic shifts in legal frame are interpreted as an evolutionary process of thesis-antithesis-synthesis.[[24]](#footnote-25) They are fuelled by a critical reaction to the legal policy *status quo*.[[25]](#footnote-26) In this manner, policy critique, found both within the courtroom and without, eventually generates a new legal policy synthesis, or a legal policy compromise. Then, the process repeats itself. Or put another way, the law can be ‘understood as a dialectical process of judicial action and reaction, evolving over time into a synthesis of new legal thought.’[[26]](#footnote-27) Such a concept of legal evolution is conceptually linked to legal policy framing.[[27]](#footnote-28) Each emergent new legal policy synthesis, generated by antithetical policy critique, also leads to a new way of framing intention. Through this prism, it is possible to chart shifting legal policy frames over time.

Precedent and legal policy are presented here as being very deeply enmeshed.[[28]](#footnote-29) Thus, the decisions of courts are understood as fuelled by the contemporary state of legal policy rather than the wishes of the donor. Being a process dependent on critique, the law must also be understood as in flux over long periods. Judges will sometimes pioneer a new frame, and sometimes look back to the frames of the past. The frames have unclear edges. But legal evolution does have direction over time, and so it possible to chart a route of policy travel, leading to the contemporary law.

The dialectic analysis will reveal substantial policy change over a long historical period. In the context of established trust reform, it will be seen that an early common law policy thesis, focussed upon the preservation of the original charitable constitution has undergone a number of policy shifts. The original legal thesis, focussed on preservation of established trusts, became subject to antithetical policy critique concerned to permit the reform of charities perceived as socially detrimental —­ notably dole charities. In turn, a new synthetic frame developed, permitting the limited alteration of harmful trusts. Finally, in a fresh wave of antithetical critique, an effectiveness-focussed pressure developed hostile to the perceived waste of charitable funds inherent to the existing precedential structure, which continued to inhibit reform in many circumstances. This brought with it the contemporary legislative approach, which is a new synthetic frame where ready reform has become permissible.

In the context of testamentary rescue from lapse, a similar policy-driven process will be shown. There, an early policy thesis focussed upon keeping funds out of those charities with purposes contrary to the established church. This met with antithetical criticism concerned to place restrictions on the power of judges. In turn, a new synthetic frame emerged, limiting the courts by requring the discovery of a general charitable intention prior to the reform of a gift by will. In our own time, antithetical critique has developed hostile to the possibility of the lapse of charitable funds into private hands. In consequence, a new synthetic frame is emerging in which lapse is presumptively abolished.

As policy changes, so does the law of *cy-près.* The linked theoretical concepts of framing and dialectics show that the doctrine is driven by policy over time, and so in turn, it cannot be said that the law faithfully effects the donor’s intention in altered circumstances. Instead, the courts are seen to effect policy in priority to intention.

# Evidencing the Intention-Fidelity View

To argue that donor intention is always framed by policy is to say that a widely held alternative understanding — here called the intention-fidelity view —­ is wrong. This section evidences the view of *cy-près* from judicial opinion, administrative reports and academic writing, showing it to be the position that courts effect intention rather than carry through through policy in the reform process. Then, the remainder of the analysis, through proposing an alternative perspective, will demonstrate that the intention-fidelity view is incorrect.

In ‘An Untheory of the Law of Trusts’,[[29]](#footnote-30) James Penner writes with regard to ordinary non-charitable trusts that, ‘bridges and the law of trusts are primarily facilitative things, ways of allowing us to achieve goals…’[[30]](#footnote-31) This memorable description presents the ordinary trust as a technical, or architectural, device to carry through the goals of the settlor. In the charitable context, the intentition-fidelity view follows much the same logic. It represents a claim that the role of a charitable trust is straightforwardly to carry through the wishes of the donor.[[31]](#footnote-32) It is an understanding of charity as a vehicle for the donor’s wishes, and in turn, a view that the law’s *cy-près* function must have intention at its heart.

It is undeniable that certain *cy-près* judges and administrators in the Charity Commission for England and Wales have presented their role as a pulling up of the sleeves and a delving into the intention of the donor in the manner suggested by the intention-fidelity view. So in the South Australian testamentary rescue case, *Executor Trustee v Warbey*,[[32]](#footnote-33) Bray CJ stated directly with reference to the wishes of three deceased sisters, ‘…what would each of the testatrices have intended if she had known what I now know?’[[33]](#footnote-34) And in *Re Weir Hospital*,[[34]](#footnote-35) Farwell LJ put the view, with some force, that the court was, ‘bound to carry … intention into effect, and has no right and is not at liberty to speculate upon whether it would have been more expedient or beneficial for the community that a different mode of application of the funds in charity should have occurred to the mind of the testator.’[[35]](#footnote-36)

A fidelity-based view is also found in high level administrative reports. So immediately after contemporary *cy-près* legislation was enacted, the Charity Commission stated in its annual report, which provides guidance to trustees as well as the general public in relation to its interpretation of the doctrine, that the law, ‘[is] concerned to secure that the intentions of the donors at the time of the gift are carried out as nearly as may be in altered conditions.’[[36]](#footnote-37) And in a later report it stated, ‘we are constrained by the legal doctrine of cy-près to ensure that the new purposes are in keeping with the spirit of the donor’s gift and as near as practicable to his intention.’[[37]](#footnote-38) Recently, although proposing reforms, the Law Commission for England and Wales has taken the same view of intention in the doctrine, stating that, ‘the law had evolved over time to reflect, and protect, donor autonomy.’[[38]](#footnote-39)

Reflecting this judicial and administrative understanding of the *cy-près* process, the same fidelity-based view of donor intention is found, implicitly at least, in doctrinal academic exegis,[[39]](#footnote-40) so that judgments which unambiguously distort intention are subject to normative criticism. This line of scholarship rests upon an understanding that the non-prioritisation of intention is aberrational. In this vein, Jill Martin analyses rules of testamentary construction in the context of failed charitable wills in order to highlight those cases that do not ‘carry out the testator’s precise intentions’.[[40]](#footnote-41) And Susan Gary urges that legal drafters might better strive to record the donor’s intention in the will writing process, so avoiding hard cases, and helping courts to carry out the donor’s intent.[[41]](#footnote-42)

According to the intention-fidelity view, circumstances where courts effect policy rather than intention are doctrinally problematic or unusual. They represent an overstepping of the mark. In an intention-fidelity model of *cy-près*, the intention of the donor might be thought of as a golden thread running through the case-law and its development. It is seen as guiding and grounding the process. The following sections will show the intention-fidelity view to be inaccurate. Policy is the weave that binds the law. The decisions of judges are made within a frame which circumscribes the faithful effectuation of intent. Such legal policy frames emerge dialectically and drive the precedents over time.

# Established Trusts: Intention as a Policy-Framed and Dialectical Concept

In the context of established trust reform, three historical dialectical shifts in legal policy are identified, and the policy framing of intention is analysed within each. It is seen that no frame is a model of intention-fidelity. The three frames are: the preservation of established trusts; the reform of socially harmful trusts; and maximising the effectiveness of established charities.

## A *Thesis* — *An Early Preservation Frame for Intention*

It is possible to identify a common law policy frame — an original thesis — fully in place by the middle of the nineteenth century,[[42]](#footnote-43) which was underpinned by a legal policy principle of preserving established trusts from any reform at all. Such an approach cannot be understood as fidelity to the donor in altered circumstances impacting upon the trust. The legal policy frame, being based in the conservation of trusts, inevitably tends to obsolescence. It is the product of a bygone world of ancient and unchanging charity.[[43]](#footnote-44) Within the frame, courts will insist upon adherence to the strict letter of an original trust, even in circumstances where that literal reading might, on any reasonable view, subvert the donor’s intention.

Prior to the emergence of later policy frames, the reform of trusts was only permitted in tightly limited circumstances, involving a complete failure of the donor’s plan. One example of a case within the frame, *Attorney General v The Earl of Craven*,[[44]](#footnote-45) illustrates starkly the inflexibility in the judicial approach. In that decision, even 191 years after there had last been a plague in England, Sir John Romilly MR refused to reform a trust to establish a cemetery for the plague-dead.[[45]](#footnote-46) For the judge, working within a legal policy frame of trust preservation, even the slight possibility that the terms of the original charity might again become workable was sufficient cause to deny a reform.

This marks a framing of the donor’s wishes. Steadfast resistance to established trust modification, even in the face of an obsolescence which strains the donors stated plan, is alien to the intention-fidelity view. Yet it must be conceded that the relationship between preservation and effectuation is a complex one. After all, it is the objectively expressed wishes of the donor that are being preserved. In the frame, the donor creates the trust and then the courts conserve it in perpetuity. In order to appreciate the nature of the policy in play, it is necessary to draw a distinction between the preservation and the effectuation of intention.

The distinction between preservation and effectuation falls into sharp relief in the context of anachronistic trusts. Conservation of an established trust is not likely to give rise to a faithful carrying through of a donor’s wishes in circumstances where the strict letter of the charity leads to contemporary absurdity. So for example, in the contemporary case *Re Lepton’s Charity*,[[46]](#footnote-47) a trust had been established to maintain a church and pay a clergyman £3 a year. At the time the trust was established, this was a reasonable rate of pay, but by the time of the case, it was not. To preserve such a trust is not to effect the donors wishes. So as Pennycuick VC put it, allowing an increase in the clergyman’s pay, ‘intention is plainly defeated when in the conditions of today the minister takes a derisory £3.’[[47]](#footnote-48) The judge’s reasoning is correct on the point. To assume that the donor intended to fix her particular vision onto the world in perpetuity without any sense of flexibility is, in fact, to assume that she is was unreasonable, or to defeat her intention.

If the preservation frame was based primarily in intention effectuation, it would be peculiar to build it around an assumption that donors are unreasonable. It is true that examples of bizarre intention can be found, such as the bequest of Thomas Nash, who ordered muffled bells to be rung on the anniversary of his wedding day, and, ‘merry mirthful peals’,[[48]](#footnote-49) on the day of his death. That day would mark his release from marriage. Similarly striking is *M’Caig v University of Glasgow (No 2)*,[[49]](#footnote-50) where a landowner attempted to establish a trust with the purpose of perpetually erecting numberless statues in his image. But such deliberately obtuse motivations are remarkable because they are extraordinary.

Outside those exceptional cases where a donor truly does wish to solidify unreasonable wishes in perpetuity, the preservation frame trades-off policy against intention. It prioritises the conservation of an established charity above effectuation of the donor’s reasonable wishes. It seeks to preserve the form rather than the spirit of a trust. And so, while the courts can, in refusing alteration, be said — in a sense — to be preserving the donor’s charity, the process cannot be described as having her wishes at heart. Or put another way, no reasonable donor, genuinely concerned with the management of death from disease, would expect a plague trust to be maintained 191 years after its last outbreak. Dogged resistance of reform prioritises policy — a policy of preservation — over the donor’s wishes. In this manner, the early law marked a policy framing, rather than a faithful effectuation of donor intention in altered circumstances.

## B *Antithetical Critique and a Synthetic ‘Social Harm Frame’*

Despite the peculiar effect of the preservation frame upon the donor’s wishes, concern with the subversion of the donor’s intention did not give rise to antithetical critique. The antithetical engine for reform can instead be seen to draw power from a specific social policy claim that trusts causing positive social harm should be modifiable. Over the course of the nineteenth century,[[50]](#footnote-51) the law’s preservation of harmful established trusts became an issue of public debate. The discourse of the time focussed upon those trusts perceived to be socially detrimental — notably dole charities — which were left without any mechanism for reform under the preservation frame.[[51]](#footnote-52)

Dole charities were thought to encourage vagrancy.[[52]](#footnote-53) In an influential survey, Arthur Hobhouse, a Charity Commissioner, produced in *The Dead Hand*[[53]](#footnote-54) a critique of the preservation frame, claiming that some preserved charities caused more harm than good.[[54]](#footnote-55) Charitable doles are a notable theme, expressly described as a source of social ill.[[55]](#footnote-56) Drinking from the same policy cup as Hobhouse, judges can also be seen to balk at their existence.[[56]](#footnote-57) So in *Attorney General v Marchant*, [[57]](#footnote-58) a case concerning the reform of a dole charity, Kindersely VC put forward the social policy view that, ‘the only effect of such gifts is to pauperize the parish; that is, to bring into the parish a numerous class of poor persons.’[[58]](#footnote-59)

Thus, the original preservation frame faced directly an antithetical policy concern in the alleviation of harmful trusts. The issue was a salient one. John Stuart Mill presented a case for a new *status* *quo* in charitable modification, pointing to a changed way of thinking about trusts.[[59]](#footnote-60) For Mill, charitable trusts, being so often the creature of a single donor, manifested a type of individual freedom in property he thought generally beneficial.[[60]](#footnote-61) But despite his enthusiasm for individualism in charity and its protection, Mill conceded trusts causing ‘clear and positive public mischief’[[61]](#footnote-62) were still to be guarded against. Mill’s position, with its fresh attention to social harm, represents a new critical way of thinking in which preservation was no longer the sole priority.

Using a dialectic approach, it can be seen that the preservation frame was replaced by a circumscribed willingness to reform socially detrimental trusts — here called the social harm frame. There was no clear or absolute moment of replacement, but an alternative can be seen to emerge throughout the nineteenth century. In contrast to the preservation frame of the past, which in essence disregarded the reasonable wishes of the donor in altered circumstances, in social harm cases, the donor’s intention was more closely assessed by judges. In cases where intention was a focus, the logic of the frame was that no donor could reasonably be thought to desire a social detriment, and so her permissive intention could be used to license the reform of the trust.

The synthesis maintains an element of the past structure; like the preservation frame before it, the social harm frame, as it existed in the precedents, still did not allow the ready reform of most trusts. In the absence of a perceived social detriment caused by the charity, the courts still refused to reform. So as late as 1917, in *Re Weir Hospital*,[[62]](#footnote-63) where it was proposed to transfer funds from a local to a general hospital, Farwell LJ rejected the scheme. The judge drew upon a concept of preservation in perpetuity stating that, ‘one of the strongest inducements to gifts of this nature is that desire for posthumous remembrance which has inspired similar gifts for centuries.’[[63]](#footnote-64) In the absence of a social detriment, preservation remained the policy priority.

Yet where there was an apparent social harm,[[64]](#footnote-65) reform became available and the courts developed a fresh focus on donor intention in order to permit it. So in *Re Campden Charities*,[[65]](#footnote-66) a dole charity was reformed by direct reference to the perceived ills that it caused. In the case, Jessell MR’s decision to reform was based in an understanding of harm. He stated directly, ‘we know that extension of doles is simply the extension of mischief.’[[66]](#footnote-67) In contrast to the preservation frame, which held out against reform at all costs, this new approach used intention in order to license and guide the reform of socially harmful trusts. And so when reforming the dole charity in *Re Campden Charities*, the judge found that any refusal to alter would be in, ‘truth defeating the spirit of Lady Campden's gift by following strictly the letter’.[[67]](#footnote-68) This marked a far-reaching departure from the approach of the past. In place of a preservation of the donor’s plans, the Court of Appeal was prepared to look to the spirit rather than the letter of the gift in order to permit a change.

Were such a process available in every case, it would not be possible to argue that policy was prioritised over intention within the social harm frame. Courts might be described as seamlessly employing the wishes of the donor in order to reform harmful trusts. Intention might be understood as permitting the alteration in every instance. However, the intention of the donor will not always be permissive. It is inevitable that, on occasion, the intention of the donor will directly jar with the courts’ policy view of social detriment. In such a circumstance, the judge is equipped to force an alteration. The point where the intention of the donor is to be directly and unambiguously overridden marks an important conceptual line. Where this happens, the court’s own view of social harm trumped the donor’s view. Or as Lord Simonds held in *National Anti-Vivisection Society v IRC*, [[68]](#footnote-69) if:

…it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply … and ask that a cy-près scheme may be established.[[69]](#footnote-70)

This type of willingness to override intention can be seen in *Dominion Student* *Hall Trust v Attorney General*.[[70]](#footnote-71) In that case, a race restriction was removed from charitable student residences. In his decision, Evershed J explicitly pointed to social harm, finding that the restriction would antagonise students of all races.[[71]](#footnote-72) In coming to that conclusion, the judge did refer to what he thought to be the primary intention of the charity, which he understood as being to promote community amongst commonwealth subjects. He took the view that this was undermined by the race restriction. Yet there was no evidence that the donor did not support segregation, or that he might wish that his trust move with changing values. The charity was workable and functioning in accordance with the vision of the donor. Reforming such a trust, must inevitably involve setting the donor’s intention to one side.

More broadly, *Dominion* can be understood as containing a type of cost-benefit analysis, casting it as a very different type of decision from the preservation frame before it. In the analysis, the donor’s intention is only a very limited focus. So beyond the harm that the race restriction might have caused, the judge further noted that the funds of the charity might increase if the restriction was lifted, alongside contemplating the views of subscribers to the charity.[[72]](#footnote-73) The decision was squarely focussed upon the social impact of the original donor’s stipulation.

The social harm legal policy frame balanced, in synthesis, a continuing policy of preservation against the concern that harmful trusts should be modified. The process also acknowledged the intention of the donor. Where possible, it used the donor’s wishes to permit reform, employing her intention as a license. However, where there is no such license to be found, intention was subject to a trade-off. If the courts found it necessary, the intention of the donor could be directly overridden in order to reform a trust perceived to be harmful. In this manner, the frame prioritised policy over fidelity to intention.

## C *Antithetical Critique and a Synthetic ‘Effectiveness-Focussed Frame’*

The social harm frame only permitted reform of a narrow class of trusts, but it had nothing to say on the broader effectiveness of charitable funds. As such, it was not able to assess general impact. It jars with a contemporary understanding of charity hostile to ineffectively spent resources. It is from that new understanding of charitable funds as a resource that should be applied impactfully, that a new frame — here called, the effectiveness-focussed frame — emerged.

Crucially, much executive policy, both now and over past decades, is focussed upon the impactful use of charitable resources,[[73]](#footnote-74) and so as it has emerged, the frame’s critical antithesis focuses squarely on charitable usefulness. This is directly apparent from the Nathan Report,[[74]](#footnote-75) later broadly adopted by government in relation to *cy-près*. That report stated that its call for legislative reform was based upon the, ‘vast number of trusts which may broadly be called “social welfare trusts” which are by no means useless but are not serving the community as they might if some relaxing of the *cy-près* doctrine was introduced’.[[75]](#footnote-76) And the report continued to propose a relaxation of the common law rules directed at those charitable trusts which are ‘not substantially beneficial to the mass of persons for whom the endowment was originally intended.’[[76]](#footnote-77)

Being the product of a major policy shift through statute,[[77]](#footnote-78) the effectiveness-focussed frame marks the current state of legal policy. The legislation was designed as an unlocking key for well-established trusts. It was intended to prevent obsolescence.[[78]](#footnote-79) In contrast to the previous social harm frame, reform is available in a wide range of circumstances. Within the frame, effectiveness is best understood as having a ‘thin’ rather than a ‘thick’ policy basis. The statute is silent on how the funds ought to be spent, or what an effective charity might look like. It does not direct funds to be applied where they are most needed in welfare terms, or according to any other moral or theoretical criterion. The legislation simply requires trustees to seek a reform of their trust ‘to secure its effective use for charity.’[[79]](#footnote-80) Despite the fact that the statute might permit a redistribution of funds within the organisation, it cannot be understood as being based in a policy of redistributive justice. It might be that in a given case, *cy-près* benefits individuals in need of scant resources, but this is not an outcome compelled by the law. The logic of the statute is based in a much more conceptually limited case-by-case calculation of how the purposes of a given charity might be most impactfully served by the trustees.

The contemporary effectiveness-focussed frame maintains a structure of the past as a synthetic element. That is, in common with the previous social harm frame, the law might analyse the wishes of the donor in search of a permissive license to modify a trust.[[80]](#footnote-81) Again, in common with the social harm frame of the past, where the donor’s intention does not permit reform, it is possible to override it.[[81]](#footnote-82) Yet in contrast to the social harm frame, the overriding of intention is not a parsimoniously circumscribed event. The new statutory scheme explicitly permits the setting aside of intention on effectiveness grounds.[[82]](#footnote-83) Established charities can now be altered simply to increase their individual impact.[[83]](#footnote-84)

Intention, as it is understood in statute, appears as borrowed from *Re Campden Charities*,[[84]](#footnote-85) and so the language of the case can also be understood as a direct synthetic element. The statute, insofar as it accounts for intention, refers to ‘the spirit of the gift’, using the same phrase as the earlier authority.[[85]](#footnote-86) It directs that in the process of reform, intention is to be balanced against other factors as a part of a discretionary process. However, the donor’s spirit is not a trump card. The scheme-maker has discretion to prioritise effectiveness-driven reform and so set aside the donor’s wishes.[[86]](#footnote-87)

The crucial importance of an effectiveness calculation in the new frame can be seen from the broad circumstances in which alteration is now possible. In a further synthetic echo of the past, the statute expressly permits the reform of trusts which have become harmful,[[87]](#footnote-88) but the statutory menu is now far broader than that. When deciding upon whether or not reform should be permitted, the scheme-maker is simultaneously directed to effectiveness considerations. *Inter alia*, the statute focuses attention to: whether or not the trust has ceased to be suitable and effective,[[88]](#footnote-89) and new social and economic circumstances since the time the trust was established.[[89]](#footnote-90)

Within this frame, intention is a factor to be accounted for, but it can now be readily set aside. So for example, the Commission’s report on *Royal Holloway and Bedford College*,[[90]](#footnote-91) reveals an administrative de-prioritisation of intention in favour of charitable impact. There, it was noted that valuable parts of an art collection, held on a separate trust and donated by the founder, were sold and made available for, *inter alia*, the upkeep of the University, which had become short of funds. An artistic asset was sold in order to make a greater educational impact. Charitable effectiveness, as understood by the scheme-maker, was prioritised over the clear plan of the donor.

This contemporary policy synthesis is far from a model of intention-fidelity. The legal policy frame has regard for intention, but does not treat it as a priority. The policy function of the legislation is to ensure that funds might be spent impactfully. In contrast to the past, reform is now readily available. Within the contemporary legal policy frame, the intention of the donor is unambiguously traded-off against policy.

# Testamentary Rescue: Intention as a Policy-Framed and Dialectic Concept

Alongside the reform of established trusts, testamentary *cy-près* can also be understood as subject to a dialectic framing process. Where gifts by will fail, a court may be called upon to save the bequest. That court will decide whether the bequest should be rescued for charity, or allowed to lapse into residue so that, in the normal course, the next-of-kin receives a windfall.[[91]](#footnote-92) This circumstance of testamentary failure is a major generator of charitable case law, rivalling discrete branches in terms of doctrinal complexity and, when a historical view is taken, the sheer amount of litigation produced.[[92]](#footnote-93) Less seldom acknowledged is that it is also a site for policy-driven law.

All cases of testamentary failure turn upon a particular feature of charity law — that gifts to charity are generalisable. That is, a gift for a specific failed purpose can always be abstracted into a broader and workable form. So for example, a gift to a school might be said to be a gift for the advancement of education,[[93]](#footnote-94) a gift for a soup kitchen might be said to be for the relief of poverty,[[94]](#footnote-95) or a gift to a church might be abstracted to the level of general religion.[[95]](#footnote-96) This feature — or quirk — of charity law dominates the law of testamentary rescue. Gifts are rescued and reformed only in the circumstance where a court is prepared to generalise a specific gift and so modify it. Thus, if a court is not prepared to find a general gift, and not prepared to modify, then the bequest will lapse.

This striking judicial process is conceptually important in its own right.[[96]](#footnote-97) But here, the focus is upon the interface of generalisation — or testamentary rescue — with the courts’ framing of intention. Legal policy frames for intention are identified as a part of a dialectic process of legal evolution. And so, with regard to the first frame, it is once more necessary to turn the clock back. It is seen, in the context of testamentary rescue, that no frame is a model of intention-fidelity. Three dialectic legal policy frames for intention are identified: a religious policy frame; a formal restraint frame; and an anti-lapse frame.

## A *Thesis — An Early Religious Policy Frame*

Even before the beginning of the nineteenth century a religious policy frame — named the doctrine of superstitious uses — dominated the *cy-près* case-law.[[97]](#footnote-98) This original legal thesis, was far from a model of intention-fidelity. It was unambiguously a creature of the policy priorities of the time, flowing from a prohibition on gifts made to those religious purposes beyond the orbit of the established church. Religion informed a bulk of the early cases,[[98]](#footnote-99) and so this illiberal branch of the law is of great historic and developmental significance.

All gifts to charity are generalisable and the process of generalisation is used to rescue from lapse. For a long period, that legal logic was put to a stark policy use. It was used to transform specific testamentary gifts for Catholic, Jewish and Non-Conformist purposes into general gifts for the Anglican cause. The logic of this subversion of intention rested in the formal legal claim that the superstitious donor had still made a gift for religious purposes.[[99]](#footnote-100) In consequence, upon the failure of the superstitious plan, the gift might be rescued for general established religious charity.

Excercising a great discretionary power, judges would redirect non-Anglican gifts away from the chosen object of the donor, and apply them to purposes within the acceptable orthodoxy of the established church. So for example, in the early case of *Attorney General v Combe*,[[100]](#footnote-101) an illegal gift for religious instruction by locally chosen preachers was converted into a general gift for a catechist approved by the Archbishop of the Diocese. The gift was generalised and so saved from lapse. It is clear that this process happened at a cost to the donor’s intention. Diversion of a gift from local preachers to someone chosen by the Archbishop defeats the religious plan the donor had in mind.

Being the product of the policy priorities of a distant period, it is beyond doubt that this first legal policy frame does not represent a faithful effectuation of intention. Or, as Lord Buckmaster stated in *Bourne v Keane*,[[101]](#footnote-102) ‘property has frequently been devoted to something which was the exact opposite of what the testator desired.’[[102]](#footnote-103) However, the doctrine of superstitious uses was not a simple confiscation of property. It was a powerful legal process, carried through by judges. In this manner, the generalisation of gifts and the rescue from lapse were put to heavy political work. They were employed to keep resources out of the hands of non-established faiths. In this regard, the donor’s intention was framed entirely by policy.

## B *Antithetical Critique and a Synthetic ‘Judicial Restraint Frame’*

Dialectic analysis points to the emergence of a critical policy antithesis put forward by the judiciary themselves. Courts balked at the subversive and discretionary process found in the religious policy frame.[[103]](#footnote-104) Over the course of time, this developed into a new precedential approach, which restrained the courts — here called the judicial restraint frame.

In the English Court of Chancery, direct evidence can be found of antithetical critique. Drawing rhetorically on *Costa v De Paz*,[[104]](#footnote-105) in which a gift for a Jewish yeshiva had been altered and applied to Anglican purposes, Lord Parker declared in *Bowman v Secular Society*[[105]](#footnote-106) that the doctrine ‘has, I think, gone further than any other rule or canon of construction in defeating the real intention of testators.’[[106]](#footnote-107) Starkly expressed judicial dissatisfaction appears in very early courts.[[107]](#footnote-108) So for example, in *Mills v Farmer*,[[108]](#footnote-109) Lord Eldon stated it strange that ‘you can find a purpose within a purpose,’[[109]](#footnote-110) and he appealed for a higher court to abolish the doctrine altogether.

Antithetical critique of the religious policy frame is also found in the contemporaneous American context, where judges rejected the English doctrine of *cy-près* in the light of its perceived illiberal political effect. Charting the history of the American doctrine, Edith Fisch notes a long-lasting judicial reticence in relation to the doctrine on the basis of *inter alia* its unrestrained interference with the wishes of donor.[[110]](#footnote-111) Or, in the picturesque language of one judge, United States lawyers were unclear of, ‘the extent to which the *cy-près* doctrine may have booked passage on the Mayflower.’[[111]](#footnote-112)

The replacement frame — here called the restraint frame — can be theorised as a synthetic reponse to this antithetical critique, so limiting the power of the court. As a structural synthetic element, it maintains the process of generalisation present in the religious policy frame, but by way of innovation, it strictly binds the hands of judges through a system of precedents, which greatly reduces their discretionary power. At the heart of the frame is a rule that gifts will not be saved for charity, unless the donor can be said have had a general charitable intention, ie, an intention to make a gift for general purposes.[[112]](#footnote-113) Thus, the concept of generalisation, albeit newly linked to a more systematic acknowledgement of the donor’s intention, survived the dialectic shift.

The need to find a general charitable intention before the gift is rescued from lapse was both the innovation of the frame and also the requirement which restrained the judiciary. It limited the power of the court because gifts would not be rescued from lapse unless the donor was found, at law, to have an intention broad enough to license the court’s generalisation of her gift.

It must then be conceded that the formal restraint frame is a significant challenge to the claim that the law frames rather than faithfully effects intention. The entire frame is ostensibly built around the wishes of the donor. Indeed, it is through the legal requirement that judges must pay regard to the intention of the donor, that the courts found themselves restrained. However, the restraint frame still had policy at its core – a policy of judicial restraint in the construction of gifts.

In order to understand the role of policy in framing intention, it is also necessary to appreciate the highly artificial method of precedential intention construction within the frame. A judge searching for a general charitable intention in a will looks to past precedents for guidance. These precedents direct the court as to whether or not a general charitable intention exists in any given circumstance. So if a past judge, in a historic interpretation, found some indication of a general intention to be present in a will, then other judges are bound to take the same view in future cases. In this system, historic wills cast long shadows. In the foundational early decision, *Mills v Farmer*,[[113]](#footnote-114) Lord Eldon set out both the method and the restraining rationale with some precision:

[T]he Court has not the power to make a will for the testator, but only to carry into execution that which he has made himself; and this it can do only by giving to it such a construction as former precedents have established to be the right construction in every particular instance.[[114]](#footnote-115)

This method creates an extremely formal and restrained system of general intention construction.[[115]](#footnote-116) That is its point. A large body of precedent has built up over time. So for example, a very detailed will has been said to indicate the absence of a general charitable intention.[[116]](#footnote-117) The same was true of a gift to an organisation which has closed down.[[117]](#footnote-118) By contrast, a gift nestled amongst a list of similar bequests has been said to indicate the presence of general intention.[[118]](#footnote-119)

The price of this precedential system is a very high degree of artificiality because past precedents, while binding the hands of the judge, are a poor guide to the interpretation of a fresh will. This that has been acknowledged by the courts. So in *Re Woodhams*, the search for general intention was described by Vinelott J as looking for a, ‘will-o’ the-wisp’,[[119]](#footnote-120) and in *Re Lawton*, Simonds J said that there, ‘is no branch of the law so artificial or in which it is so difficult to reconcile conflicting authorities as this question of general charitable intention.’[[120]](#footnote-121)

Artificiality is an indication that the restraint frame is underpinned by policy rather than fidelity to intention. The precedential approach to intention construction can easily fall into strained reasoning. For example, in *Re Harwood*,[[121]](#footnote-122) a testamentary donor had made three bequests. Two were to non-existent Irish Peace Societies, and the third to the Wisbech Peace Society, which had closed down. It seems clear on any intuitive reading of her will that the donor intended to benefit peace societies in the British Isles. The application of past precedent denied any natural reading. Applying past cases distinguishing between ‘never existing’ and ‘closed’ organisations,[[122]](#footnote-123) the judge construed different types of intention and permitted the Wisbech gift — alone — to lapse. Here, the restraint frame came with a cost to the effectuation of intent. While it is intuitive that the donor had a single type of pro-peace intention running throughout the gifts, the court was prevented from any natural reading by precedent. Her intention was framed rather than effected.

Working within this often artificial frame, courts have little discretion in the process of constructing general charitable intention. It could not be otherwise. The purpose of the frame is to restrain the judge. So even in this context, where the thrust of the law is clearly focussed on the discovery of a general charitable intention, there is no model of intention-fidelity. There is still policy in play. The frame emerged to prevent the ready generalisation of gifts seen in the religious policy frame. That policy in turn necessitates the removal of discretionary power from the courts, leaving the construction of general charitable intention as a highly formalised, and highly artificial, precedential process. In this regard, insofar as the law tolerates unrealistic case results, there is a framing rather than a faithful effectuation of intent. The policy of judicial restraint, best understood as a synthetic reaction to the policy of the past, is achieved through highly formal decision-making. A policy of restraint is prioritised over the effectuation of the donor’s true wishes.

## C *Antithetical Critique and a Synthetic ‘Anti-Lapse Frame’*

The formal restraint frame has persisted for a long period, but in the contemporary law, dialectical analysis permits the claim that it is now beginning to fray. It is an antithetical policy critique in relation to lapse to private hands, rather than the deeper legal-conceptual critique of the frame’s formal artificiality in relation to intention, which has caused a critical pressure to build. In turn a new frame is starting to emerge — here called the anti-lapse frame.

Increasing the total amount of testamentary funds in charity has, in modern times, been understood as an important public policy goal.[[123]](#footnote-124) The restraint frame had regular lapse built into it. In every case where a general intention could not be found, gifts were allowed to fall out of charity. Antithetical thinking in relation to lapse, and the loss of funds it causes to charity, can again be evidenced from within the courtroom.

The change in policy was directly recognised in the New Zealand case, *Re Collier*,[[124]](#footnote-125) where Hammond J stated that there should be a presumption against lapse in all cases. He put the point with direct reference to legal policy:

[T]here are strong policy reasons favouring that general approach, in its own right, with respect to charity. It is in the public interest there should be an open recognition of a presumption [against lapse].[[125]](#footnote-126)

Evidence of an antithetical critique of lapse can also be found in the courts’ attitudes to the rights of the next-of-kin, who in many circumstances, benefit directly where a gift falls out of charity. So in an early case, Lord Eldon directly termed the rights of the next-of-kin as: ‘natural expectations.’[[126]](#footnote-127) But in more recent times, their claim has begun to be understood as far less natural, so that for example, in a South Australian case, *Executor Trustee v Warbey*,[[127]](#footnote-128) Bray CJ saved the gift for charity, excluding the next-of-kin, stating, ‘there is not the slightest reason to suppose that [the testamentary donor] would have intended the money to go to her next of kin’.[[128]](#footnote-129) As attitudes to the rights of the next-of-kin shift, lapse has begun to seem less appropriate.[[129]](#footnote-130) In turn, antithetical critical pressure builds.

In modern times, the bulk of cases has concerned gifts to closed organisations,[[130]](#footnote-131) and in relation to that common instance, an anti-lapse frame is currently developing at law. Modern judges are reluctant to let gifts fall out of charity at all.[[131]](#footnote-132) Here, intention is unambiguously traded-off against policy. The policy purpose of the frame is to keep gifts in charity. This was acknowledged in plain language in *Re Roberts*,[[132]](#footnote-133) where Wilberforce J stated that, ‘the courts have gone very far in the decided cases to resist the conclusion that a legacy to a charitable institution lapses.’ [[133]](#footnote-134)

Part of the past legal structure is maintained in the emergent synthesis. The concept of generalisable gifts survives the shift. However, in contrast to the past, courts now only pay residual attention to intention. In a surprising repeat of the religious policy frame’s old structure, generalisation once more occurs without sustained attention to the donor’s plans. Gifts to closed charitable trusts are presumed to be created as trusts for general purposes,[[134]](#footnote-135) and only a clearly evinced intention otherwise will cause such a gift to fall out of charity.[[135]](#footnote-136) The legal spotlight has once again shifted away from the donor’s intention.

The change in frame has not yet entirely worked itself through. This is because, as a matter of precedent, the general purpose trust construction only applies to unincorporated charities.[[136]](#footnote-137) As the law currently stands, this leaves the formal restraint frame to cover gifts to incorporated bodies. It seems unlikely that this precedential distinction between gifts to unincorporated as opposed to incorporated charities would survive a case in the Court of Appeal. It is a best understood as a hangover from the restraint frame. Indeed, a line of Australian cases have taken a different approach. There, certain courts have been prepared to presume that a gift to an incorporated charity was intended to be a trust for purposes. [[137]](#footnote-138) So, in *Sir Moses Montefiore Jewish Home v Howell (No 7)*,[[138]](#footnote-139) Kearney J directly doubted the English method, stating that, ‘a disposition to a charitable corporation is to be treated as having presumptively the necessary elements creating a trust’.[[139]](#footnote-140)

This contemporary and emerging synthesis marks a clear policy framing of intent. The wishes of the donor are outside the core focus of the judicial approach. Testamentary rescue is achieved by presumptively generalising the gift. The prevention of lapse is the priority of the courts, and attention to intention is only a residuary concern. In consequence, there is no claim to faithfully effectuate the wishes of the donor within the emergent frame.

1. Conclusion

The *cy-près process* is not based in fidelity to the donor’s intention. It has been seen through the course of sustained legal analysis, and taking a long period in view, that policy and precedent are deeply enmeshed. While the law directs courts to look to intention in circumstances of established trust reform and of testamentary rescue, it is always through policy-tinted spectacles. The wishes of the donor are a secondary priority in an often complex trade-off.

There is no *quid pro quo* at law for donors; no generous treatment of intention in exchange for their voluntary donation. Policy always comes first. Although there is a widely held view that the *cy-près* reform process is primarily concerned with fidelity to the intention of the donor, that view has been shown to be wrong, both in history and in the present state of the law. As policy changes, so does the law of *cy-près*. And so it is policy and not intention-fidelity which drives the evolution of the precedents over time.

The identification of policy frames has provided an unlocking key, contextualising otherwise neutral precedents. It has given an analytical tool through which the law can be understood. It has set the decisions of judges against policy back-drops, and in turn, has provided a way to link the two. Joined with dialectic analysis, these frames can also be understood as the motor of legal evolution. Policy is in a shifting dialogue with intention in legal history.

Thus, it has been seen that policy has caused the law to make two discreet but remarkable U-turns. In the context of established trust modification, a policy of preservation has morphed, over time, into an embrace of effectiveness-driven reform. This process has been driven by antithetical critique. So, the preservation frame prompted critique in relation to the maintenance of socially harmful trusts. A new synthesis, while still hostile to ready reform, emerged so as to permit the modification of socially detrimental charity. But in turn, antithetical critical argument, focussed upon the limited circumstances in which reform was possible, led to a contemporary frame in which effectiveness-driven reform is possible.

A dialectic view reveals that the course of policy-driven travel is even greater in the context of testamentary *cy-près*, which has moved from narrow religious concerns to a focus upon keeping gifts in charitable coffers. There, an initial religious policy frame, concerned with the interests of established faith and operating in clear subversion of intent, gave rise to antithetical critique directed at the restraint of judicial power. In turn, a new synthetic frame emerged, based upon the precedential limitation of the judicial process, which itself produced antithetical criticism on the basis that it readily permitted gifts to lapse, in many cases, to the next-of-kin. Finally, a new synthetic frame can now be seen in the process of development, in which gifts are routinely kept in charity.

A combined theoretical use of dialectics and framing shows that intention is a passenger in the process of legal evolution. It is not the main driver of the case-law, or the main concern of the court. There is no faithful effectuation of intention at law. Instead, there is effectuation of intention as it is framed by shifting policy over time.

1. \* University of Liverpool. [↑](#footnote-ref-2)
2. See eg Lionel Astor Sheridan and Vincent Thomas Hyginus Delaney, *The Cy-près Doctrine* (London, Sweet & Maxwell 1959) 1; Hubert Picarda, *The Law and Practice Relating to Charities* (London, Butterworths 1977) 219; Rachael P Mulheron, *The Modern Cy-près Doctrine*: *Applications and Implications* (UCL 2006) 19. [↑](#footnote-ref-3)
3. *Re Slevin* [1891] 2 Ch 236 (CA); *Kings v Bultitude* [2010] EWHC 1795 (Ch), [2010] WTLR 1571. [↑](#footnote-ref-4)
4. *Re Burton’s Charity* [1938] 3 All ER 90 (Ch); *Re Whitworth Art Gallery Trusts* [1958] Ch 461 (Ch). [↑](#footnote-ref-5)
5. See eg Charities Act 2011, s 62(1)(e)(iii). [↑](#footnote-ref-6)
6. *Re Wilson* [1913] 1 Ch 314 (Ch); *Re Rymer* [1895] 1 Ch 19 (CA). [↑](#footnote-ref-7)
7. See eg *Re Finger’s Will Trusts* [1972] Ch 286 (Ch); *Re Broadbent (Deceased)* [2001] EWCA Civ 714, [2001] WTLR 967; *Re Spence* [1979] Ch 483 (Ch). [↑](#footnote-ref-8)
8. See generally John Picton, ‘Reconstructing Charitable Intention’ (2013) 15 CLPR 125. [↑](#footnote-ref-9)
9. See generally Picarda, *The Law and Practice Relating to Charities* (n 1) 304. [↑](#footnote-ref-10)
10. But see Jonathan Garton, ‘Justifying the Cy-Pres Doctrine’ (2007) 21 Trust Law International 134, where it is argued that the doctrine is a response to uneven distributions of charitable funds; Rob Atkinson, ‘Reforming Cy Pres Reform’ (1992) 44 Hastings LJ 1111, where with regard to United States law, it is argued that trustees should enjoy autonomy to reform their own trusts. [↑](#footnote-ref-11)
11. For this approach see J B E Hutton, ‘The Lapse of Charitable Bequests’ (1969) 32 MLR288; J Martin, ‘The Construction of Charitable Gifts’ (1974) 38 Conv 187; W Winder, ‘*Cy-près* Application of Surplus Charitable Funds’ (1941) 5 Conv 198. [↑](#footnote-ref-12)
12. See eg Picarda, *The Law and Practice Relating to Charities* (n 1) 303; Sheridan and Delaney, *The Cy-près Doctrine* (n 1) 3; Peter Luxton, *The Law of Charities* (OUP 2001) 550. [↑](#footnote-ref-13)
13. Peter Luxton, ‘*Cy-près* and the Ghost of things that might have been’ (1983) 47 Conv 107, 116. A donor-fidelity focused view is also found in Peter Luxton, ‘In Pursuit of “Purpose” Through Section 13 of the Charities Act 1960’ (1985) Conv313. [↑](#footnote-ref-14)
14. Picarda, *The Law and Practice Relating to Charities* (n 1) 304. [↑](#footnote-ref-15)
15. Jonathan Garton, ‘Justifying the Cy-Pres Doctrine’ (n 9) 148; John K Eason, ‘Motive, Duty, and the Management of Restricted Charitable Gifts’ (2010) 45 Wake Forest L Rev 123, 125. [↑](#footnote-ref-16)
16. Alex M Johnson Jr, ‘Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine’ (1999) 21 U Haw L Rev 353, 357. [↑](#footnote-ref-17)
17. This view is found in Jonathan Garton, ‘Justifying the Cy-Pres Doctrine’ (n 9) 148. [↑](#footnote-ref-18)
18. Luxton, ‘*Cy-près* and the Ghost of things that might have been’ (n 12) 116. [↑](#footnote-ref-19)
19. This point is made in Gregory Bateson, ‘A Theory of Play and Fantasy’ in Gregory Bateson (ed), *Steps to an Ecology of Mind* (Ballantine Books 1972) 14. See also Daniel Callahan and Bruce Jennings (ed), *The Social Sciences, and Policy Analysis* (Plenum Press 1983) 96–111; Marshall Scott Poole and Andrew H Van de Ven, ‘Theories of Organisational Change and Innovation Processes’ in Marshall Scott Poole and Andrew H Van de Ven (eds), *Handbook of Organizational Change and Innovation* (OUP 2004) 376–80. [↑](#footnote-ref-20)
20. Framing has been productively deployed elsewhere in legal scholarship. See eg Peter K Manning and Keith Hawkins, ‘Legal Decisions: A Frame Analytic Perspective’ in Stephen Harold Riggins (ed), *Beyond Goffman: Studies on Communication, Institution, and Social Interaction* (Berlin, Mouton de Gruyter Berlin 1990); Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 51–9. [↑](#footnote-ref-21)
21. Hawkins, *Law as Last Resort* (n 19) 52. [↑](#footnote-ref-22)
22. Manning and Hawkins, ‘Legal Decisions’ (n 19) 208. [↑](#footnote-ref-23)
23. For judicial recognition of policy prioritisation in this context, see *Re Collier (Deceased)* [1998] 1 NZLR 81, 96. [↑](#footnote-ref-24)
24. The tripartite understanding of historical development often attributed to G W F Hegel, *The Phenomenology of Spirit* (OUP 1977). But see Gustav E Mueller, ‘The Hegel Legend of “Thesis-Antithesis-Synthesis”’ (1958) 19 Journal of the History of Ideas 411; Karl R Popper, ‘What is Dialectic?’ (1940) 49 Mind 403. [↑](#footnote-ref-25)
25. A dialectic, policy rich, understanding of legal evolution is also found in Kimberly D Richman, *Courting Change: Queer Parents, Judges, and the Transformation of American Family Law* (New York University Press 2009) 149; Rob Atkinson, ‘Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Syntheses’ (1997) 27 Stetson Law Review 395. [↑](#footnote-ref-26)
26. Richman, *Courting Change* (n 24) 149. [↑](#footnote-ref-27)
27. Although pre-dating the modern understanding of framing, a related concept is found in pioneering work by Edith L Fisch, ‘The Cy Pres Doctrine and Changing Philosophies’ (1952) 51 Michigan Law Review375. [↑](#footnote-ref-28)
28. See in a similar policy-focused vein, Michael R Chesterman, *Charities, Trusts, and Social Welfare* (Weidenfeld and Nicolson 1979). Throughout that textbook, which also takes a historical approach, policy is presented as underpinning the development of Charity Law. [↑](#footnote-ref-29)
29. J E Penner, ‘An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine’ (2010) 63 Current Legal Problems 653. [↑](#footnote-ref-30)
30. ibid 668. [↑](#footnote-ref-31)
31. See eg ‘Picarda, *The Law and Practice Relating to Charities* (n 1). [↑](#footnote-ref-32)
32. *Executor Trustee v Warbey (No 2)* (1973) 6 SASR 336. See also *Broadbent* (n 6); *Re Weir Hospital* [1910] 2 Ch 124 (CA) 136. [↑](#footnote-ref-33)
33. *Warbey* (n 31) 345. [↑](#footnote-ref-34)
34. *Weir* (n 31). [↑](#footnote-ref-35)
35. ibid 135. [↑](#footnote-ref-36)
36. ‘Report of the Charity Commission for England and Wales’ (1961) 8. [↑](#footnote-ref-37)
37. See also ‘Report of the Charity Commission for England and Wales’ (1984) 12. [↑](#footnote-ref-38)
38. Law Commission, ‘Technical issues in Charity Law’ (Law Com No 375, 2017) [6.32]. [↑](#footnote-ref-39)
39. Sheridan and Delaney, *The Cy-près Doctrine* (n 1); Picarda, *The Law and Practice Relating to Charities* (n 1); Martin, ‘The Construction of Charitable Gifts’ (n 10); Winder, ‘*Cy-près* Application of Surplus Charitable Funds’ (n 10). [↑](#footnote-ref-40)
40. Martin, ‘The Construction of Charitable Gifts’ (n 10) 194. [↑](#footnote-ref-41)
41. Susan N Gary, ‘The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing’ (2010) 85 Chicago-Kent Law Review 977, 978. [↑](#footnote-ref-42)
42. For preservation-based cases see *Philpott v St George’s Hospital* (1859)27Beav107, 112; 54 ER 42; *Attorney General v The Governors of Sherborne Grammar School* (1854) 18 Beav 256; *Re Prison Charities* (1873) LR 16 Eq 129; *Re Avenon’s Charity* [1913] 2 Ch 261 (Ch); *Weir* (n 31). [↑](#footnote-ref-43)
43. See eg David Owen, *English Philanthropy: 1660–1960* (OUP 1965) 247–76. [↑](#footnote-ref-44)
44. *Attorney General v The Earl of Craven* (1856) 21 Beav 392. [↑](#footnote-ref-45)
45. ibid 409. [↑](#footnote-ref-46)
46. *Re Lepton’s Charity* [1972] Ch 276 (Ch). [↑](#footnote-ref-47)
47. ibid 285. [↑](#footnote-ref-48)
48. Noted in William H Beveridge, *Voluntary Action: A Report on Methods of Social Advance* (Routledge 2015) 375. [↑](#footnote-ref-49)
49. *M’Caig v University of Glasgow (No 2)* 1907 SC 231. [↑](#footnote-ref-50)
50. Discussion of the debate can be found in Beveridge, *Voluntary Action* (n 47) 199. [↑](#footnote-ref-51)
51. See eg J Mill, ‘Endowments’ in John M Robson (ed), *The Collected Works of John Stuart Mill Volume IV: Essays on Economics and Society Part II* (Liberty Fund 1824) 615. For analysis of the reform of endowed schools, see Owen, *English Philanthropy: 1660–1960* (n 42) 247. [↑](#footnote-ref-52)
52. See eg *Marchant* (n 51) 431. [↑](#footnote-ref-53)
53. Arthur Hobhouse, *The Dead Hand: Addresses on the Subject of Endowments and Settlements of Property* (Chatto & Windus 1880). [↑](#footnote-ref-54)
54. ibid 48. [↑](#footnote-ref-55)
55. Inter alia catalogued in Beveridge (n 47) 364. [↑](#footnote-ref-56)
56. Cases containing a negative judicial view of dole charities: *Marchant* (n 51); *Re Campden Charities (No 1)* (1881) 18 Ch D 310; *Re Stane’s Will* (1853) 21 LTOS 261. [↑](#footnote-ref-57)
57. *Marchant* (n 51). [↑](#footnote-ref-58)
58. ibid 431 [↑](#footnote-ref-59)
59. Mill, ‘Endowments’ (n 52). [↑](#footnote-ref-60)
60. ibid 618. [↑](#footnote-ref-61)
61. ibid 620. Beyond the context of actually harmful trusts, Mill proposed that all trusts should be reformable after a period of experimentation. [↑](#footnote-ref-62)
62. *Weir* (n 31) [↑](#footnote-ref-63)
63. ibid 138. [↑](#footnote-ref-64)
64. Cases in which social harm is connected with modification include *Campden* (n 55); *In Re Dominion Students’* *Hall Trust v Attorney General* [1947] Ch 183 (Ch); *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) 70. [↑](#footnote-ref-65)
65. *Campden* (n 55). [↑](#footnote-ref-66)
66. ibid 327. [↑](#footnote-ref-67)
67. ibid 333. [↑](#footnote-ref-68)
68. *National Anti-Vivisection Society* (n 63). [↑](#footnote-ref-69)
69. ibid 74. [↑](#footnote-ref-70)
70. *Dominion* (n 63). [↑](#footnote-ref-71)
71. ibid 186. [↑](#footnote-ref-72)
72. ibid 187. [↑](#footnote-ref-73)
73. See eg Cabinet Office Strategy Unit, ‘Private Action, Public Benefit: A Review of the Charities and Wider Not-for-Profit Sector’ [4.9]; ‘Report of the Charity Commissioners for England and Wales’ (1988) 12. [↑](#footnote-ref-74)
74. Committee on the Law and Practice Relating to Charitable Trusts, *Report of the Committee on the Law and Practice Relating to Charitable Trusts (cmd 8710)* (London, HMSO 1952) (Nathan Report). [↑](#footnote-ref-75)
75. ibid27. [↑](#footnote-ref-76)
76. ibid77. [↑](#footnote-ref-77)
77. Charities Act 1960, s 13; re-enacted as Charities Act 1993, s 13; re-enacted subject to modification as Charities Act 2011, s 62. [↑](#footnote-ref-78)
78. Nathan Report (n 58) 77. [↑](#footnote-ref-79)
79. Charities Act 2011, s 61. [↑](#footnote-ref-80)
80. Referred to as ‘the spirit of the gift’ in Charities Act 2011, ss 62(1) and 67(2)(a). [↑](#footnote-ref-81)
81. See eg Charities Act 2011, s 67(1)(e)(iii). [↑](#footnote-ref-82)
82. ibid. [↑](#footnote-ref-83)
83. This has also been the experience in the USA. For critical analysis, see Atkinson, ‘Reforming Cy Pres Reform’ (n 9). [↑](#footnote-ref-84)
84. *Campden* (n 55) 333. [↑](#footnote-ref-85)
85. Charities Act 2011, ss 62(1) and s 67(2)(a). [↑](#footnote-ref-86)
86. See especially Charities Act 2011, s 62(1)(e)(iii). [↑](#footnote-ref-87)
87. Charities Act 2011, s 62(1)(e)(ii). [↑](#footnote-ref-88)
88. ibid s 62(1)(e)(iii). [↑](#footnote-ref-89)
89. ibid s 62(2)(b). [↑](#footnote-ref-90)
90. ‘Report of the Charity Commissioners for England and Wales’(1992) 12. For criticism of the application see Lee Sheridan, ‘*Cy-près*Application of Three Holloway Pictures’ (1993) 2 Charity Law and Practice Review181. [↑](#footnote-ref-91)
91. Some gifts that have fallen out of charity: *Wilson* (n 5); *Rymer* (n 5); *Kings* (n 2). [↑](#footnote-ref-92)
92. See eg Picarda, *The Law and Practice Relating to Charities* (n 1) 249–63. [↑](#footnote-ref-93)
93. *Wilson* (n 5). [↑](#footnote-ref-94)
94. *Biscoe v Jackson* (1887) 35 Ch D 460 (CA). [↑](#footnote-ref-95)
95. *Re Royce* [1940] Ch 514 (Ch) 521. [↑](#footnote-ref-96)
96. See Picton, ‘Reconstructing Charitable Intention’ (n 7). [↑](#footnote-ref-97)
97. See Fisch, ‘The Cy Pres Doctrine and Changing Philosophies’ (n 26). [↑](#footnote-ref-98)
98. For analysis of the early religious cases, see Sheridan and Delaney (n 1), 79–80. [↑](#footnote-ref-99)
99. Sheridan and Delaney (n 1) 79–80; *Bowman v Secular Society* [1917] AC 406 (HL); *Bourne v Keane* [1919] AC 815 (HL); *Mills v Farmer* (1815)1 Merivale 55; 35 ER 597. [↑](#footnote-ref-100)
100. *Attorney General v Combe* (1679) 2 Ch Cas 18. [↑](#footnote-ref-101)
101. *Bourne* (n 98). [↑](#footnote-ref-102)
102. ibid 862. [↑](#footnote-ref-103)
103. See eg *Bowman* (n 98); 442; *Bourne* (n 98); 862; *Mills* (n 98). [↑](#footnote-ref-104)
104. *Da Costa v De Pas* (1754) Amb 228. [↑](#footnote-ref-105)
105. *Bowman* (n 98) 406. [↑](#footnote-ref-106)
106. ibid 442. [↑](#footnote-ref-107)
107. *Bourne* (n 98); *Mills* (n 98). [↑](#footnote-ref-108)
108. *Mills* (n 98). [↑](#footnote-ref-109)
109. ibid 615. [↑](#footnote-ref-110)
110. Fisch (n 26) 381. [↑](#footnote-ref-111)
111. *Estate of Bunch v Heirs of Bunch* 485 So 2d 284, 285 (Miss 1986) (Robertson, J). [↑](#footnote-ref-112)
112. *Wilson* (n 5); *Rymer* (n 5); *Biscoe* (n 93). [↑](#footnote-ref-113)
113. *Mills* (n 98). [↑](#footnote-ref-114)
114. ibid612. [↑](#footnote-ref-115)
115. For a detailed presentation of the process, see Mulheron, *The Modern Cy-près Doctrine* (n 1) 114. [↑](#footnote-ref-116)
116. *Wilson* (n 5); *Re Packe* [1918] 1 Ch 437 (Ch); *Re Blaxland* [1964-5] NSWR 124. [↑](#footnote-ref-117)
117. *Rymer* (n 5); *Fisk v Attorney General* (1867) LR 4 Eq 521; *Re Ovey (No 1)* (1885) 29 Ch D 560 (Ch). [↑](#footnote-ref-118)
118. *Re Jenkins’ Will Trusts* [1966] Ch 249 (Ch); *Spence* (n 6). [↑](#footnote-ref-119)
119. *Re Woodhams (Deceased)* [1981] 1 WLR 493 (Ch) 502. [↑](#footnote-ref-120)
120. *Re Lawton* [1940] Ch 984(Ch) 987 [↑](#footnote-ref-121)
121. *Re Harwood* [1936] Ch 285 (Ch). Cf the discretionary approach in *Woodhams* (n 118); *Re Lysaght (Deceased)* [1966] Ch 191 (Ch). However, these 1960s cases are best understood in the context of the later anti-lapse frame. [↑](#footnote-ref-122)
122. *Harwood* (n 120) 287. [↑](#footnote-ref-123)
123. Notably, Schedule 33 para 1 of the Finance Act 2012, which added schedule 1A to the Inheritance Tax Act 1984, reduces the inheritance tax of those liable from 40% to 36%, so long as they leave 10% of their estate to charity. [↑](#footnote-ref-124)
124. *Collier* (n 22). [↑](#footnote-ref-125)
125. ibid 84. [↑](#footnote-ref-126)
126. *Moggridge v Thackwell* (1802) 7 Ves Jr 36, [87]; 32 ER 15, 34. [↑](#footnote-ref-127)
127. *Warbey* (n 31). [↑](#footnote-ref-128)
128. ibid 345. [↑](#footnote-ref-129)
129. See also *Collier* (n 22) 86; *Finger’s* (n 6) for evidence of a negative judicial view of the claim of the next-of-kin. [↑](#footnote-ref-130)
130. *Broadbent* (n 6); *Kings* (n 2); *Finger’s* (n 6); *Phillips v Royal Society for the Protection of Birds* [2012] EWHC 618 (Ch), [2012] WTLR 89. [↑](#footnote-ref-131)
131. For cases in which the formal restraint frame does not directly apply, see: *Kings* (n 2); *Finger’s* (n 6); *Broadbent* (n 6);. See generally Mulheron (n 1) 82. [↑](#footnote-ref-132)
132. *Re Roberts* (1958) 1 WLR 406 (Ch) [↑](#footnote-ref-133)
133. ibid 402. [↑](#footnote-ref-134)
134. *Kings* (n 2); *Broadbent* (n 6); *Finger’s* (n 6). [↑](#footnote-ref-135)
135. *Kings* (n 2) [23]. [↑](#footnote-ref-136)
136. See eg *Finger’s* (n 6) 292; *Phillips* (n 129). [↑](#footnote-ref-137)
137. *Sydney Homoeopathic Hospital v Turner* (1959) 102 CLR 188; *Sir Moses Montefiore Jewish Home v Howell (No 7)* [1984] 2 NSWLR 406; *Australian Executor Trustees v Attorney General* [2010] SASC 348 (20 December 2010). [↑](#footnote-ref-138)
138. [1984] 2 NSWLR 406. [↑](#footnote-ref-139)
139. ibid 416. [↑](#footnote-ref-140)