

**Judgment 35/2003**

**In re The Foster Will Trust  
Royal Court  
(Civil action file)  
22<sup>nd</sup> July, 2003**

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**Trust (Guernsey) Law, 1989 – bequest to Rector and Churchwardens of the Town Church – application to vary terms of trust under s. 55**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 22<sup>nd</sup> day of July, 2003 before Sir de Vic Carey, Bailiff, alone

**IN THE MATTER OF THE FOSTER WILL TRUST**

Whereas on 25<sup>th</sup> March 2003 before Sir de Vic Carey, Bailiff and Laurence Lenfestey Guille, David Michael Jory and Michael Henry De La Mare, Esquires, Jurats on the application of THE RECTOR AND CHURCHWARDENS OF THE TOWN CHURCH (“the Applicants”) in the terms attached hereto;

THE COURT, having heard Advocate R. Clark, Counsel for the Applicants thereon, GRANTED the application and ORDERED that the amount of assets to be applied towards the repair, maintenance and improvement of the Rectory of the Town Church of St. Peter Port be limited to not exceeding one half of the monies held by the Rector and Churchwardens of the Town Church representing the bequest to them under the Will of the late Anne Dieffenbach Foster and in the event that additional funds are required an appropriate application should be made to the Royal Court;

AND THE COURT ORDERED that the costs of this application be met from the Will Trust.

The Bailiff THIS DAY handed down written reasons for the said decision of the Court in the terms of the judgment attached hereto.

S. M. D. ROSS  
Her Majesty’s Deputy Greffier.

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

**ORDINARY COURT**

**In the matter of an application by the Churchwardens of St. Peter Port  
and in the matter of the Will Trust of Mrs. A. D. Foster**

**Before the Bailiff and Jurats Guille, Jory and De La Mare**

**25<sup>th</sup> March, 2003**

**Advocate for the Applicants: Russell Clark**

**Judgment of the Court handed down by the Bailiff**

1. At the end of Mr. Clark's successful application to the Court for relief under section 55 of the Trust (Guernsey) Law, 1989, I indicated that as this was a novel application I would prepare a short judgment recording the Court's views as to why it should be granted.

2. The background to the matter is that Mrs. Foster originally bequeathed her residuary estate after certain life interests had been extinguished to the Rector and Churchwardens of the Town Church. Some time ago the Court agreed to an application from the Applicants as reversioner and the life tenants that the trust should be brought to an end. As a result the Rector and Church Wardens are now in possession of a sum in excess of £400,000 representing the value of the reversion after the interests of the life tenants had been satisfied.

3. The original bequest was in the following terms:-

"(b) Subject as aforesaid, UPON TRUST to pay:-

(i) (i) .....

(ii) the residue to the Rector and Churchwardens, as trustees of the Town Church, St. Peter Port, Guernsey, to be used by them in their absolute discretion for the repair, maintenance and improvement of the Town Church giving priority when necessary if they shall so think fit, to the bell tower and bells when and if they shall be in need of attention."

4. The Will was made in the early 1980's. Unfortunately Mrs. Foster did not have the benefit of legal advice. Instead as tended to be the case in those days the deputy manager of the local trust subsidiary of a well known joint stock bank went to see her and took her instructions as to the terms

of the Will. Those were relayed on to Advocate Atkinson who never saw the lady and so cannot give us any assistance on what was in her mind when she made the Will. It is common knowledge that the issue of bells was resolved by the installation of bells for the 50<sup>th</sup> Anniversary of the Liberation in the days of Dean Fenwick. It is also clear that much of what was to be included in the proposed use to be made of the bequest was already covered by the parochial rate. However, it has to be accepted that improvements to the church including internal re-ordering would not normally fall on the rate payers so there can be no question of the gift to the church failing and the cy-près rule applying. That is why Mr. Clark wisely amended his application to bring it under section 55 rather than section 54 of the Law.

5. Section 55 reads:-

"55.(1) Where trust property is held for a charitable or public purpose, the court, on the application of Her Majesty's Procureur or the trustees, may approve any arrangement which varies or revokes the purposes or terms of the trust or enlarges or modifies the powers of management or administration of the trustees, if it is satisfied that the arrangement –

- (a) (a) is now suitable or expedient; and
- (b) (b) is consistent with the original intention of the settlor and the spirit of the gift.

(2) The court shall not approve an arrangement under subsection (1) unless satisfied that any person with a material interest in the trust has had an opportunity of being heard."

6. H.M. Procureur who appeared at the original directions hearing is content that the Court should deal with this matter as it thinks fit.

7. The matter first came before me for directions and I was concerned as to the provisions of subsection (2). Two matters troubled me. The first was the assertion by the then Rector in his affidavit that his successor would be Dean of Guernsey and that as a consequence he would need a larger parsonage house than the ordinary incumbent. That seemed to me to bring in issues outside the direct ambit of the Town Church. The other issue was that the persons who currently use the Town Church, namely the congregation had not been consulted. Whilst fully accepting that the Church of England is not a congregational church, I took the view that it might have been regarded as high handed if the Rector and Churchwardens went and proposed a change to the purposes of a

bequest, which was apparently for the benefit of the whole congregation, without any attempt to ascertain formally the views of the latter.. This was particularly the case when the matter in issue was one about which ordinary members of the congregation could have a sensible view. These two points were addressed, firstly, by the Churchwardens calling for a congregational meeting on two occasions at which there was clear support for the application and secondly, through the involvement of the present Dean of Guernsey who has confirmed that it is the intention that his successor will indeed be the Rector of the Town Church as was the position with Deans Foster and Fenwick.

8. Mr. Clark therefore has been able to bring the matter forward for the Court to rule on definitively. The Dean, Canon Trickey, has suggested in his affidavit that the terms of the bequest could be interpreted more widely than just being for the upkeep or improvement of the fabric of the Church itself, but I do not agree. In my view the bequest is clearly restricted to being one in regard to repair maintenance and improvement of the church building. However, we have had a further affidavit lodged since the original application was made. That affidavit is made by Mrs. Elsie May Patterson who describes herself as a friend of both Mrs. Foster and Mr. Foster. Interestingly she recalls a conversation she had had with Mr. Foster who apparently had no particular attachment to the church concerning leaving the house to the Town Church for use as a Rectory. This might not be surprising as the inadequacies identified in the documentation before us questioning the suitability of the present dwelling for use as a Rectory or indeed as a Deanery have been apparent for some time. We know not precisely why the intention may have changed. It could be that there were problems because the Fosters' house was owned by a company and the shares were part of their personal estates in any event. Clearly Mrs. Foster wished to benefit those who had helped her so much in her latter years namely, Mrs. Masterton and Mrs. Brassell (the life tenants) and their interests could not have been met had the house been given to the church outright. Whatever was the intention and we cannot learn any more because the officer of the bank who took Mrs. Foster's instructions has in any event died. Mrs. Foster still left a substantial bequest to the church which receipt of which was accelerated by the breaking of the Trust to which I have already referred.

9. The power given to the Court by section 55 of the Law of 1989, which has not previously been exercised as far as we are aware is a wide one. Clearly the Court should approach applications

under that section with care. It is important that the original wishes of testators and givers of funds for charitable and other purposes do not find that their original intentions are set aside capriciously or without due cause. The unfortunate part about this whole matter is the way in which this Will was drafted and the instruction collected by the bank official. Giving a substantial part of one's estate to a purpose such as this was a matter upon which professional advice was required if the kind of situation as has arisen here is to be avoided. At the very least Mrs. Foster should have had the benefit of discussing the matter with an experienced advocate. Preferably he would have had the good sense to advise her to take the then representatives of the Town Church into her confidence and discuss the appropriate wording for any bequest, which would have probably been far wider than the narrow one drafted on instructions by Mr. Atkinson. In the view of this Court dealing with the matter now, there can be no serious question but that Mrs. Foster would have wanted her bequest to come to the Town Church's rescue in its hour of need, which as the Dean points out graphically in his affidavit points to the bequest being diverted to pay for improvements to the parsonage house. Happily the sum of money involved is such that we need not give approval for the whole of the bequest being applied to improvements to the parsonage house. The estimates that the Churchwardens have produced to date are in our view somewhat modest and accordingly we suggested at the end of the hearing that provision be made that up to one-half of the trust funds, which fortuitously appear to have been held in cash throughout the recent stock market decline, should be capable of being applied to improvements to the parsonage house. The remainder will remain for the time being usable for purposes within the original terms of the bequest, namely for the maintenance and improvement of the parish church. If no obvious user for the funds appears within say the next five to ten years then it may be appropriate for the Rector and Churchwardens for the day to come back for further directions under section 55 of the Law to meet any other need that may arise. It would, however, be somewhat premature in view of the fact that Mrs. Foster only died in January 1996 to free the whole of the bequest from the restrictions she imposed.

10. We order that the costs of this application be borne out of the trust funds.