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TRUSTS — CHARITABLE TRUSTS — ASCERTAINMENT OF DOMINANT INTENT IN APPLICATION OF CY PRES — Testator made a residuary bequest to the city of Detroit "for a playfield for white children." The city agreed to accept this bequest if the racial restriction were removed under the doctrine of cy pres. In an action by the heirs to recover the bequest, the circuit court refused the application of the doctrine of cy pres although the city could

not accept the gift unless it was permitted to establish a playfield for children of all races.[1] On appeal, *held,* affirmed, by an evenly-divided court. Cy pres will not be applied in the absence of phrases in the will or evidence in the record indicating a purpose broader than the literal terms of the gift. *La Fond v. City of Detroit,* 357 Mich. 362, 98 N.W.2d 530 (1959).

In another case, another testator bequeathed $30,000 plus his residual estate to Amherst College "to be held in trust to be used as a scholarship loan fund for deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking or similar acts." Amherst offered to accept the money in trust free from the "Protestant" and "Gentile" restrictions.[2] On the executor's petition for construction of the will, *held,* Amherst can administer the trust free from these restrictions. The testator's primary intent was the education of boys at his alma mater and the other restrictions were not paramount. This conclusion is "inescapable" in light of the absence of a gift-over, the lack of an alternative charitable disposition in the will, the testator's want of a particular religious tenet, and his distant relationship with his next of kin. *Howard Savings Institution v. Trustees of Amherst College,* 61 N.J. Super. 119, 160 A.2d 177 (1960).

The doctrine of cy pres is invoked under proper circumstances when the named object of a charitable gift is unable to receive the gift. Rather than passing by intestacy or by a residuary devise, the gift is applied to the broad purposes which would have been achieved by the use of the particular means named in the will. The basic tenet of cy pres is that the testator's dominant intent was to effectuate the broad objective rather than to employ the particular means.[3] This doctrine applies only to charitable gifts, probably because a broad intent is more likely to be present than in a gift to a private party and because the courts tend to favor charities.[4] However, a court may be restrained by the fear that application of cy pres where there is both a lack of evidence of broad intent and a suggestion of specific intent amounts to confiscation of private property.[5]

A significant issue in these cases is the treatment of religious and racial restrictions as part of dominant intent. By refusing the application of cy pres to purposes broader than the racial restrictions, the court in the *La*

1 Girard Will Case, 353 U.S. 230 (1957). *Cf.* Mich. Comp. Laws § 750.146 (1948).

2 Amherst declined the bequest on these terms on the grounds that the school was prohibited from discriminating by N.J. REV. STAT. § 18:251-1 (Supp. 1940). Actually, there was no failure here because the court held this statute inapplicable to a private school. Therefore, the only defect was the want of a trustee due to Amherst's declination. See note 7 *infra.*

3 4 SCOTT, TRUSTS § 399 (2d ed. 1956); RESTATEMENT (SECOND), TRUSTS § 399 (1959).

4 Noel v. Olds, 138 F.2d 581 (D.C. Cir. 1943); Rhode Island Hospital Trust Co. v. Williams, 50 R.I. 385, 148 Atl. 189 (1929); *In re* Mills' Will, 121 Misc. 147, 200 N.Y. Supp. 701 (Surr. Ct. 1923).

5 Fisch, *The Cy Press Doctrine and Changing Philosophies,* 51 MICH. L. REV. 375, 381 (1953); Scott, *Education and the Dead Hand,* 34 HARV. L. REV. 1, 16 (1920); Quimby v. Quimby, 175 Ill. App. 367 (1912); Gladding v. Saint Matthew's Church, 25 R.I. 628, 57 Atl. 860 (1904).

Fond case defers to the sensitive nature of such restrictions.[6] In sharp contrast is the cavalier treatment of racial and religious restrictions by the court in the *Howard* case which neglects an alternative plan that would have corrected the defect while retaining the testator's literal intent.[7] Because of the personal and sometimes violent opinions on religion and race which a person often has, it is probable that such restrictions are a manifestation of the testator's dominant intent. Thus, a court should be very hesitant to declare that a testator had an intent broader than these restrictions. The American courts more frequently take this position, while English and Canadian courts in some cases have appeared less reluctant to transcend these restrictions.[8]

The contrasting attitude of the courts in the two principal cases toward racial and religious restrictions perhaps reflects basically different approaches to finding a general charitable intent. The court in the *La Fond* case rigidly requires positive clues of a general intent from the will and record.[9] On the other hand, in the *Howard* case additional reliance is placed on the failure to prove a specific intent.[10] These cases may also reflect the widespread confusion caused by the contradictory decisions and thin distinctions which have characterized the effort by courts to ascertain the dominant intent.[11]

One reaction to this confusion has been enactment of legislation which would channel property originally bequeathed to charity to other charitable purposes unless the testator has "otherwise expressly provided."[12] Moreover, the statute expressly places the obligation to find in the will a specific

[6] However, the *La Fond* court indicated a desire to apply cy pres in aid of charities. 357 Mich. at 366, 98 N.W.2d at 532.

[7] Actually, this case involved not a failure of the gift but rather the absence of a trustee to carry out the terms of the gift since Amherst had declined. It seems clear now that a court will not let a trust fail for want of a trustee. 4 SCOTT, TRUSTS § 397 (2d ed. 1956); St. Peter's Church v. Brown, 21 R.I. 367, 43 Atl. 642 (1899). The court might have relied upon the *Girard* will cases to appoint a private trustee who, using testator's standards, would award scholarships to students attending or about to attend Amherst. Girard Will Case, 386 Pa. 548, 127 A.2d 287 (1956), *rev'd*, 353 U.S. 230 (1957); Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958). Of course, Amherst might then have refused to participate in this discriminatory scheme by refusing to admit the recipients of the awards.

[8] Religious restrictions held part of the dominant intent: Craft v. Shroyer, 81 Ohio App. 253, 74 N.E.2d 589 (1947); Petition of Rochester Trust Co., 94 N.H. 207, 49 A.2d 922 (1946); State v. Van Buren School Dist. No. 42, 191 Ark. 1096, 89 S.W.2d 605 (1936); Matter of MacDowell, 217 N.Y. 454, 112 N.E. 177 (1916) (dictum). *Contra*, Trustee of Pittsfield Academy v. Attorney General, 95 N.H. 51, 57 A.2d 161 (1948); *Re* Hogle, [1939] Ont. 425, [1939] 4 D.L.R. 817; *In re* Queen's School, Chester, [1910] 1 Ch. 796. See generally Annot., 3 A.L.R.2d 78. Racial restrictions held part of dominant intent: Moore v. City & County of Denver, 133 Colo., 190, 292 P.2d 986 (1956) (dictum); Grimke v. Attorney General, 206 Mass. 49, 91 N.E. 899 (1910); *Girard* will cases, *supra* note 7.

[9] 357 Mich. at 367-68, 98 N.W.2d at 533.

[10] 61 N.J. Super. at 128, 160 A.2d at 182.

[11] 2A BOGERT, TRUSTS §§ 436, 437 (2d ed. 1953). Comment, 49 YALE L.J. 303, 323 (1939).

[12] FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 3.02(b) (1950). Such legislation has been enacted in this form by Pennsylvania. PA. STAT. ANN. tit. 20, § 301.10 (1950). See generally 4 POWELL, REAL PROPERTY § 587 (1st ed. 1954).

intent on the heirs and residuary legatees, who unknowingly may have this burden at the present time.[13] On the other hand, the statute would obstruct the testator's intent when there are meaningful clues negating a broad charitable intent but the testator has not "otherwise expressly provided." Furthermore, a testator who expressly provides for a gift-over may desire to serve a broad charitable purpose but does not intend the gift-over to take effect until the broad objective fails.[14] This intent would be defeated by a literal application of the statute if the gift-over were construed as a clear expression "otherwise," just as strict adherence to the literal terms of the will under present rules may defeat the intention of the testator who clearly had the broad intent.[15]

Perhaps the advantages of the statute could be realized while avoiding its defects by presuming the existence of a general intent unless the contrary is shown. This more flexible approach is less likely to defeat the testator's intent because a court would be free to consider all clues to dominant intent, which is the touchstone of cy pres.

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[13] *In re* Butnick's Will, 99 N.Y.S.2d 101 (Surr. Ct. 1950); Matter of Dillenback, 189 Misc. 538, 74 N.Y.S.2d 473 (Surr. Ct. 1947); Fairbanks v. Appleton, 249 Wis. 476, 24 N.W.2d 893 (1946); Matter of Neher, 279 N.Y. 370, 18 N.E.2d 625 (1939); Matter of Dean, 167 Misc. 238, 3 N.Y.S.2d 711 (Surr. Ct. 1938); Rhode Island Hospital Trust Co. v. Williams, *supra* note 4.

[14] A broad intent can exist although there are residual gifts to catch the specific bequests which fail. Shannon v. Eno, 120 Conn. 77, 179 Atl. 479 (1935); Bridgeport-City Trust Co. v. Bridgeport Hospital, 120 Conn. 27, 179 Atl. 92 (1935). It is not impossible to say that a broad intent exists although there is a direct gift-over after a specific bequest to a charity. Hartford Nat'l Bank & Trust Co. v. Oak Bluffs First Baptist Church, 116 Conn. 347, 164 Atl. 910 (1933).

[15] Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1, 14 (1920); Citizens & Manufacturer's Nat'l Bank v. Guilbert, 121 Conn. 520, 526, 186 Atl. 564, 567 (1936); Keene v. Eastman, 75 N.H. 191, 72 Atl. 213 (1909).