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JUDICIAL CONSTRUCTION OF CHARITABLE BEQUESTS: THEORY VS. PRACTICE

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State and federal legislatures have long declared that private, charitable causes and organizations are to be favored over publicly financed welfare programs and that charitable gifts should be encouraged. This general policy is reflected in a number of statutory provisions, including the allowance of corporate charitable donations,[1] the deduction of charitable gifts for federal income tax purposes,[2] and the exemption of charitable and educational institutions from real estate taxes.[3] In addition, the courts of Illinois and other states have not hesitated to express the strong judicial policy favoring charities by the adoption of liberal rules of construction and the exercise of presumptions to uphold charitable gifts.[4]

It would seem that this policy should result in a lessened burden for charitable organizations which become parties to will contests or similar litigation challenging the legality or effectiveness of particular charitable gifts or bequests. All too often, however, this supposedly predictable result does not occur. As a result, charities often face the prospect of lengthy and expensive litigation, forced settlements with contestants, and loss of substantial donations. The evolution of judicial decisions in Illinois demonstrates the contrast between theory and practice concerning the general governmental policy favoring charities and suggests some solutions. This article will discuss the distinction between theory and practice and analyze the Illinois Supreme Court's most recent attempt to resolve the problem which this distinction creates in *In re Estate of Tomlinson*.[5]

HISTORICAL OVERVIEW

In this country, numerous charitable organizations perform many services which could be performed solely by government.[6] These charities

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1. ILL. REV. STAT. ch. 32 § 157.5(m) (1975).
2. I.R.C. § 170.
3. ILL. REV. STAT. ch. 120 §§ 500.1, 500.7 (1975).
4. *See* cases cited in note 13 *infra*.
5. 65 Ill. 2d 382, 359 N.E.2d 109 (1976).
6. 15 AM. JUR. 2d *Charities* § 59 (1976).

discharge many social, welfare, medical research, educational and cultural functions assumed by government in socialist or totalitarian countries. In the Soviet Union, for example, all functions mentioned above are performed solely by the state. That country has but one charity, the Soviet Peace Fund, whose sole function is to propagandize in foreign countries.[7]

The Internal Revenue Service's Cumulative List of Organizations to which gifts may be deducted for income tax purposes, discloses that over 160,000 charitable organizations operate in the United States, covering virtually every aspect of our society.[8] The great majority of these are specialized according to objective and locale. In particular, a large number are private foundations created for estate planning purposes.[9] This latter category primarily serves to channel funds to other charitable organizations similar to the way larger organizations channel funds to their smaller "umbrella" affiliates. The many United Funds, Community Chests, and religious fund-raising groups shoulder major responsibility for supporting small organizations involved in activities such as legal services, youth counseling, crime prevention, day care centers, family counseling and other direct services to individuals.

Large, specialized organizations such as the American Cancer Society, the American Heart Association, the American Mental Health Association, the American Red Cross, and the state affiliates of such organizations, solicit millions of dollars through mass media advertising as well as personal contacts with corporations, individuals and foundations. These funds are channeled to finance broad research efforts, local treatment facilities, and specialized grants to individual recipients. Other limited purpose organizations, such as the Urban League, Americans for Democratic Action, Americans for Effective Law Enforcement, and the Roger Baldwin Foundation of the American Civil Liberties Union, seek to influence social change and governmental policy, and have recently been allowed to increase their legislative lobbying activities without losing their tax-exempt status.[10] Institutions of higher education depend heavily on private contributions, and similar to the organizations mentioned above, bear a responsibility which would otherwise be assumed solely by the state.

Indeed, the failure or inability of government to deal effectively with social problems constituted the direct cause of the formation of many charitable organizations. For example, the John Howard Association was formed in England in 1790 as the result of the British government's neglect

7. Chicago Sun Times, May 22, 1977, at 76, cols. 1-2.
8. *See* INTERNAL REVENUE SERVICE, CUMULATIVE LIST OF ORGANIZATIONS (1977).
9. *Id.*
10. I.R.C. §§ 501(c)(3), 501(h)(1).

of its prison system.[11] Similar organizations emerged in this country in response to the prohibition and civil rights problems as they erupted.[12]

State and federal legislatures have favored private charitable causes, often at a cost represented by the indirect loss of tax revenues or direct government grants. Not only do charities perform tasks which would otherwise be performed by government, but the large number of charitable organizations create a diversity and ingenuity which might well be lost in the maze of government bureaucracy. As a direct result of governmental favoritism for charities, each citizen becomes an indirect contributor to all charitable, tax-exempt organizations.

Although this forced contribution is caused mostly by favored tax treatment, other non-tax policies (both legislative and judicial) result in an additional indirect burden to consumers. For example, the allowance of corporate charitable contributions increases the prices charged by corporate businesses while decreasing profitability and, as a result, shareholder dividends.

A more controversial example of forced consumer support of charity is found in the inclusion of charitable contributions as a cost when utility companies are computing their rates. The courts of the several states have decided differently on this practice. The courts of ten states have upheld the inclusion of charitable gifts by utilities for rate-making purposes.[13] By contrast, four states have disallowed the inclusion of charitable donations as operating expenses.[14] These jurisdictions justify this holding on the theory that to allow such inclusion would amount to "an involuntary levy on the rate payers."[15] In 1973, the Illinois Supreme Court followed the latter trend by holding that utilities could not include charitable contributions as operat-

11. E. STOCKDALE, A STUDY OF BEDFORD PRISON 1 (1977).

12. I. FISHER, PROHIBITION AT ITS WORST 1 (1926); B. HABENSTREIT, ETERNAL VIGILANCE: THE AMERICAN CIVIL LIBERTIES UNION IN ACTION 1 (1971).

13. *In re* Diamond State Tel. Co., 51 Del. 525, 536-37, 149 A.2d 324, 331 (1959); Miami v. Florida Pub. Serv. Comm'n, 208 So. 2d 249, 259 (Fla. 1968); Southwestern Bell Tel. Co. v. State Corp. Comm'n, 192 Kan. 39, 73, 386 P.2d 515, 545 (1963); New England Tel. & Tel. v. Department of Pub. Util., 360 Mass. 443, 484-85, 275 N.E.2d 493, 521 (1971); United Gas Corp. v. Mississippi Pub. Serv. Comm'n, 240 Miss. 405, 434, 127 So. 2d 404, 416 (1961); Northern States Power Co. v. Board of R.R. Comm'rs, 71 N.D. 1, 22, 298 N.W. 423, 434 (1941); Public Serv. Co. v. State, 102 N.H. 150, 161, 153 A.2d 801, 809 (1959); New Jersey Bell Tel. Co. v. Department of Pub. Util., 12 N.J. 568, 569, 97 A.2d 602, 618 (1953); United Transit Co. v. Nunes, 99 R.I. 501, 513-14, 209 A.2d 215, 222 (1965); Board of Supervisors v. Virginia Elec. & Power Co., 196 Va. 1102, 1118, 87 S.E.2d 139, 149 (1955).

14. Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 62 Cal. 2d 634, 669, 401 P.2d 353, 375, 44 Cal. Rptr. 1, 22-23 (1965); Central Me. Power Co. v. Public Util. Comm'n, 153 Me. 228, 234, 136 A.2d 726, 731 (1957); Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n, 230 Md. 395, 414-15, 187 A.2d 475, 485 (1963); Carey v. Corporation Comm'n, 168 Okla. 487, 492, 33 P.2d 788, 794 (1934).

15. 230 Md. at 414, 187 A.2d at 485.

ing expenses.[16] However, the legislature, in effect, overruled that decision in its next session.[17]

Thus, even when the favorable treatment of charitable organizations results in forced contributions by consumers and lost tax revenues, government shows little reluctance in carrying out the general policy. However, it has been left to the courts to determine the specific judicial rules which will govern the legal construction of charitable bequests.

THE ALTERNATIVES OF JUDICIAL CONSTRUCTION

A common source of litigation involving charities occurs when a will or trust instrument provides a gift to a particular organization under an incorrect or non-existent name.[18] This may result in competing claims by various charities as to which organization was intended to receive the funding, or by the residuary takers or heirs on the theory of lapsed legacy or intestacy.

In deciding such questions, a court may employ a variety of rules of construction favorable to charities. Perhaps most prominent among such rules is the doctrine of cy pres. Simply expressed, the rule states that: If the specific object of a charitable gift is impossible to accomplish and the donor had a general charitable intent broader than the specific beneficiary or object named, the court will apply the gift as nearly as possible to the impossible object.[19]

Perhaps because it embodies significant common sense, this principle has apparently existed in western civilization at least since the time of Rome.[20] In the context of testamentary gifts, the doctrine appears to be founded upon two principles: (1) testamentary intent should be protected and discharged regardless of whether the bequest is charitable or non-charitable;[21] and (2) charities should receive special favor under the law because of the benefits they generate for society as a whole.[22] The potential

16. Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 55 Ill. 2d 461, 481, 303 N.E.2d 364, 375 (1973).

17. ILL. REV. STAT. ch. 111 2/3, § 41 (1975).

18. *See* Note, *A Revaluation of Cy Pres*, 49 YALE L.J. 303, 310 (1939) [hereinafter cited as *Revaluation*].

19. *See generally* G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES §§ 431-442 (2d ed. 1960) [hereinafter cited as BOGERT & BOGERT]; IV A. SCOTT, SCOTT ON TRUSTS §§ 395-401 (3d ed. 1967) [hereinafter cited as SCOTT].

20. Late Corp. of Latter-Day Saints v. United States, 136 U.S. 1, 56 (1889); *see generally* Fisch, *The Cy Pres and Changing Philosphies*, 51 MICH. L. REV. 375 (1953) [hereinafter cited as *Changing Philosophies*].

21. *See* Bergendahl v. Stiers, 8 Ill. 2d 257, 133 N.E.2d 280 (1956). In *Bergendahl*, the court stated: "of course the paramount rule of testamentary construction is that the intention of the testator, as expressed in his will, governs the distribution of his estate . . . ." *Id.* at 263, 133 N.E.2d at 283.

22. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L.Q. 382 (1959) [hereinafter cited

for conflict between these two principles is demonstrated by one of the derivatives of the intent rule, a derivative sometimes woodenly stated by the courts as follows: "[T]he power to make wills is vested in testators and not courts."[23] The definition and interpretation of one of the prerequisites of cy pres application, general charitable intent, determine which of these principles governs.

In Roman and Medieval times, charitable gifts were furnished special protection because of the benefits which the donor derived from them, such as preserving one's memory[24] or saving one from the unpleasant rigors of eternal damnation.[25] The foundation of the cy pres doctrine in England was the King's prerogative power to ensure justice to his subjects.[26] Apparently, this power was gradually shifted to the Chancellor except where a gift was void because it was devoted to an illegal purpose, contrary to public policy or made to charity generally.[27] As administered by the Chancellor, judicial cy pres became an intent-enforcing device, whereas prerogative cy pres, exercised by the Crown, was not so limited.[28] Prerogative cy pres was often employed in connection with religious persecution. One of the best examples of this was the case of *Decosta v. DePas*[29] in which prerogative cy pres was exercised to divert a gift intended to be used to educate Jews in their religion to a gift to educate Christians in their religion.

The distinction between judicial and prerogative cy pres was apparently confused in early American cases.[30] Because of this confusion and the threat which prerogative cy pres posed to the institution of private property, the cy pres doctrine did not enjoy immediate acceptance in the United States.[31] However, the doctrine now appears to be well accepted and is based upon the theories of intent and social benefit.[32]

As originally applied in the United States, cy pres application required three conditions: (1) a charitable trust, (2) a general charitable intent, and (3) the impossibility, impracticality, or illegality of following the testator's express directions.[33] The courts still give lip service to the right of individu-

as *Changing Concepts*]; Willard, *Illustrations of the Origin of Cy Pres*, 8 HARV. L. REV. 69 (1894) [hereinafter cited as Willard].

23. *In re* Estate of Tomlinson, 30 Ill. App. 3d 502, 505-06, 333 N.E.2d 663, 665, *rev'd*, 65 Ill. 2d 382, 359 N.E.2d 109 (1976).

24. Late Corp. of Latter-Day Saints v. United States, 136 U.S. 1, 52 (1889); *Revaluation*, *supra* note 18, at 309.

25. *See* Willard, *supra* note 28, at 72-79.

26. *Revaluation*, *supra* note 18, at 303-04.

27. *Id.* at 304.

28. *Id.* at 305.

29. 228 Eng. Rep. 150 (Ch. 1754).

30. *Revaluation*, *supra* note 18, at 306.

31. *Id.* at 307-08.

32. *Changing Concepts*, *supra* note 22, at 382.

33. BOGERT & BOGERT, *supra* note 19, at §§ 431-442; SCOTT, *supra* note 19, at §§ 395-401.

als to dispose of private property (which is often suggested by reference to the "dead hand" of the testator).[34] However, the virtual elimination of the trust requirement and the relaxation of qualifications standards for general charitable intent have significantly broadened the powers of the courts in many states to save charitable bequests against non-charitable claimants.[35] The requirement of a trust has been abandoned to the extent that the courts have applied cy pres to outright bequests by stating that such gifts are "subject to a trust" or by implying a trust.[36] In addition, in Illinois[37] as in other jurisdictions,[38] the definition of general charitable intent has been substantially broadened.

In re Estate of Tomlinson:[39] The Illinois Approach

The tension between these possibly conflicting theoretical bases, the one emphasizing the individual's right to dispose of private property and the other emphasizing the collective needs of society, has been judicially resolved, in recent years, increasingly in favor of the collective good.[40] A recent example is found in the decision of the Illinois Supreme Court in *In re Estate of Tomlinson*.[41] In that case, the testator left her residuary estate to the "Cancer Research Fund absolutely and forever." It was stipulated at trial that no organization was ever known by that name, but the trial court was persuaded that Cancer Research Fund was a misdesignation for the American Cancer Society and awarded the residue to that charity.[42] The appellate court reversed in favor of the heirs at law and held that the legacy lapsed for lack of evidence of whom the testator actually meant by the misdesignation.[43] However, the Illinois Supreme Court upheld the trial court's decision in favor of the American Cancer Society by application of cy pres. In so doing, the supreme court has clearly brought Illinois within the group of jurisdictions which employs a liberal definition of general charitable intent. The rule adopted by the court is found in the following excerpt from the *Tomlinson* decision: "[A]lthough the bequest to the Cancer Research Fund cannot be carried out, we find in the Will evidence that the testator *did not intend* that the bequest should completely fail under

34. *Changing Philosophies*, *supra* note 20, at 383-84.
35. *Changing Concepts*, *supra* note 22, at 383.
36. *Id.*
37. *In re* Estate of Tomlinson, 65 Ill. 2d 382, 359 N.E.2d 109 (1976).
38. *See* Howard Savings Inst. v. Peep, 34 N.J. 494, 170 A.2d 39 (1960).
39. 65 Ill. 2d 382, 359 N.E.2d 109 (1976).
40. *Changing Philosophies*, *supra* note 20, at 384-85.
41. 65 Ill. 2d 382, 359 N.E.2d 109 (1976).
42. *Id.* at 389-90, 359 N.E.2d at 112 (reviewing 30 Ill. App. 3d 502, 503, 333 N.E.2d 663, 665 (1976)).
43. 30 Ill. App. 3d 502, 503, 333 N.E.2d 663, 665.

such circumstances."[44] As evidence for this finding, the court cited two principle facts. First, the will contained no provision for disposition in the event of failure of the charitable bequest. Second, if the bequest had failed it would have passed to the testatrix's heirs, contrary to the express intention of the testatrix to disinherit her heirs.[45]

Although it does not appear that the Illinois Supreme Court has gone so far as to place the burden of proving an absence of general charitable intent on the heirs at law, it has gone a long way toward that result. Presumably, the question of cy pres would not ordinarily arise if a will contained specific directions in the event of failure or impossibility.[46] Moreover, the fact that the Tomlinson will also contained a disinheritance clause does not significantly lessen the impact of the decision in this regard because any bequest to a charity results in at least a partial, and obviously intentional, disinheritance of the testatrix's heirs. Clearly, the Illinois Supeme Court did not require or suggest any evidence other than that which implied that the testatrix would have preferred that the bequest remain in charitable channels. This decision is far more liberal than previous Illinois cases.[47]

44. 65 Ill. 2d at 389, 359 N.E.2d at 112.

45. The testator's will provided the following: "All of my heirs at law *which I have omitted in my Last Will* . . . , I have done so intentionally and I, therefore, hereby generally and specifically disinherit each, any and all persons whomsoever claiming to be or may be determined to be my heirs at law." 30 Ill. App. 3d at 504, 333 N.E.2d at 665.

46. Admittedly, most professionally drawn wills direct that lapsed legacies pass under the residuary clause in the will. However, such clauses are included in wills to prevent the application of the laws of intestacy and are not probative of the question of the testator's intent had he anticipated the impossibility of accomplishing the charitable gift.

47. For example, in Chicago Daily News Fresh Air Fund v. Kerner, 305 Ill. App. 237, 27 N.E.2d 310 (1940), the charitable legatee declined to take the legacy because it had determined to cease its operations. The court refused to apply the gift cy pres because the principle claimant to the bequest was not organized until after the testator died and had a charitable purpose expressed in its charter "welfare of infants and children," which the court characterized as "much narrower" than the objects of the named legatee, to provide charitable aid to the poor. 305 Ill. App. at 245, 27 N.E.2d at 314. The legacy passed to the testator's heirs in spite of the fact that the trustee of the testator's residuary estate had supplied to the testator, at the testator's request, a list of charities from which the testator selected one, the clear implication being that the testator had no specific charitable legatee in mind and that the one named was not the essence of the gift. Moreover, the entire residue of the testator's will was directed to charity and there were no directions for other disposition in the event of impossibility of the specific object.

Similarly, in Quimby v. Quimby, 175 Ill. App. 367 (1912), cy pres application was denied in connection with the following bequest:

> I further direct by said executor to give and convey all the remainder of my estate, goods and chattels to my beloved grandson Walter Reynolds Quimby, whenever he may appear and make claim to or for the same. If, however, at the expiration of five years from the date of my decease, my said grandson does not so appear and at the end of such period of five years it is not known that my grandson is living, I hereby direct that all that may remain of the money and amounts due me which may be collected by my said executor or trustee, with the accumulated interest, shall be paid to the Chicago Waif's Mission and Training School.

175 Ill. App. at 368. Clearly, the testator intended to disinherit her heirs at law from the residue of her estate if the contingency described did not occur (which it did not). Further, it was

Analysis of Tomlinson

Although this liberalization of the cy pres doctrine will undoubtedly have a profound effect on Illinois charities and, thus, Illinois society in general, the decision in *Tomlinson* also raises many questions. In the past, the law of Illinois has required lesser certainty to sustain charitable bequests than non-charitable ones.[48] Nonetheless, in spite of substantial evidence which would have supported an award based upon the trial court's theory of misdesignation, the Illinois Supreme Court rejected the trial court's theory and relied upon cy pres.[49] The testatrix in *Tomlinson* had no record of past contributions to the American Cancer Society or any other form of support for or participation in its activities.[50] However, the record established that there was an office of the American Cancer Society in the city of Peoria where the testator had lived. In addition, it was shown that many other courts had construed similar misdesignations to have been intended for the American Cancer Society.[51] This fact established that the American Cancer Society was commonly associated with cancer research in the minds of many and, thus, was indirect evidence of the intent of the testator. Further, the record included an exhaustive list of cancer research organizations located in the United States and elsewhere, which strongly implied that the American Cancer Society was the only cancer society of which there was any probability that the testator had any knowledge.[52] Moreover, the American Cancer Society urged the Illinois Supreme Court in its briefs to take judicial notice of the extensive operations of the American Cancer Society as further evidence that it was the only probable intended legatee.[53]

In short, sufficient evidence was present in the record before the Illinois Supreme Court to have supported a holding that Cancer Research

equally clear that there were no directions for a gift over or a reverter in the event that the specific object became impossible. Yet, the court concluded that the residue must pass according to the laws of intestacy. In so doing, the court also concluded that a general charitable intent could not be implied from the sole fact that the stated purpose of the named beneficiary was to aid needy boys and girls. That statement clearly indicates that the test for general charitable intent employed by the *Quimby* court was narrower by far than that employed by the *Tomlinson* court. Notably, the *Quimby* court supported its ruling by stating:

> To hold otherwise would so extend the application of the rule of cy pres as to compel courts to administer charitable bequests in every case where the particular object named in the will is incapable of taking, unless apt words negativing such a course should be used in the will.

175 Ill. App. at 373.

48. Woman's Union Missionary Soc. v. Mead, 131 Ill. 338, 23 N.E. 603 (1890); Hitchcock v. Board of Home Missions, 259 Ill. 288, 293, 102 N.E. 741, 743-44 (1913).

49. 65 Ill. 2d at 389, 359 N.E.2d at 112.

50. 30 Ill. App. at 506, 333 N.E.2d at 666.

51. 65 Ill. 2d at 386, 390, 359 N.E.2d at 111, 113.

52. *Id.* at 390, 359 N.E.2d at 113.

53. Petitioner's Brief for Leave to Appeal at 5, *In re* Tomlinson, 65 Ill. 2d 382, 359 N.E.2d 109 (1976).

Fund was a misdesignation for the American Cancer Society. Instead, the court chose to decide the case on the basis of cy pres, a result based upon reasons of policy rather than traditional rules of construction. If the court had chosen to uphold the trial court's theory of misdesignation, however, charities would have been forced in the future to attempt to prove that they were the intended legatee whenever a misdesignation occurred. In light of the growing complexity of our society and the beneficial, but nonetheless astounding, multiplicity of charitable organizations, the cost of determining the most probable intended legatee would be enormous.[54]

Modern charities engage in a variety of fund-raising activities, including mass advertising and the utilization of willing but inexperienced volunteers, neither of which produces accurate evidence helpful in determining intended legatees in cases of misdesignation. Such communications frequently fix in the listener's mind the need for charitable donations with respect to a particular social concern but fail to imprint the exact technical name of the organization which inspired his interest. This growing potential for cause-oriented misdesignations is evidenced by the fact that at least one major charity, the American Heart Association, has filed a registered trademark in the name of a commonly used misdesignation, the "Heart Fund."[55] As a consequence, it should be expected that there will be increasing numbers of bequests to unknown organizations, such as the Cancer Research Fund, to which cy pres will be applied in the future.

In many cases, identification of the intended legatee would be impossible or prohibitively expensive when the size of many bequests is compared to the cost of research into the life and specific organizational interests of the testator. The rule set forth by the Illinois Supreme Court in *Tomlinson* is clearly the most socially advantageous and further demonstrates the continued trend away from the concept of private property toward a recognition of society's own interest in upholding and preserving private charitable bequests.

However, applying the cy pres doctrine in *Tomlinson* was easy because the American Cancer Society is a very large and well-known organization which distributes funds throughout the United States and supports a variety of diverse research and educational efforts. The courts should fully recog-

54. *In re* Estate of Samuels, No. 76 P 5007 (Ill. Cir. Ct., filed Dec. 30, 1976). In *Samuels* the testator left her residuary estate, expected to be approximately $100,000, to four entities: "CANCER FUND, Chicago, Illinois," "BLIND FUND, Chicago, Illinois," "HEART FUND, Chicago, Illinois," and "MULTIPLE SCLEROSIS, Chicago, Illinois," Four charities claimed the bequest to the "CANCER FUND," four claimed the bequest to the "BLIND FUND" and three claimed the bequest to the "HEART FUND."

55. U.S. Trade Mark Reg. No. 594645, Registered August 31, 1954, Renewed August 31, 1974.

nize that difficult choices may have to be made in subsequent cases involving smaller, lesser known charities with similar names and objectives.

Most of the services supported by charitable gifts are not controversial. However, charitable giving also supports a variety of private organizations which generate diverse academic, professional, sociological and artistic views and expressions. These organizations are controversial and cannot be funded easily by governmental organizations directly dependent upon public appropriations and controlled by publicly elected or appointed officials. Such organizations and officials are vulnerable to popular pressure and majority whim. Private institutions, to the contrary, are "designed to produce a babble of intellectual and artistic claims in the name of truth . . . [and] challenges to authority . . ."[56] and, as such, are vitally important to a system such as ours which places enormous value on freedom of speech and the marketplace of ideas approach to social change.

The effect of the shift away from a theory of misdesignation (which places primary emphasis on respect for the "dead hand" of the testator) to cy pres application results in a new system of allocation of charitable bequests administered by the courts, often with participation by the state attorney general.[57] Although private charitable organizations would certainly have the right to intervene in such proceedings, it seems likely that only the larger institutions would do so since smaller ones usually would be unable to afford the costs and expenses involved. As in *Tomlinson*, the predictable result is a cy pres award to the large charity.

This result finds logic in the realities of our times. Many charitable causes, especially those dealing with medical research, are dominated by large, highly visible umberella-type organizations which are established to provide and channel sufficient resources to meet the technological challenges involved. Not only are such organizations properly presumed to be the most likely intended donee, but such organizations are usually more knowledgeable and efficient than the courts in allocating funds where they are most needed. A presumption favoring large charitable organizations in fields dominated by such groups is further supported by the fact that mass media communications have created millions of potential donors who have had no previous contact with individual charities. This makes it impossible to prove who the specifically intended donee was.

CONCLUSION

Although such an application of cy pres will effectuate the intention of the testator and serve the interests of society in most circumstances, the

56. Pifer, *The Jeopardy of Private Institutions*, *reprinted from* CARNEGIE CORPORATION OF NEW YORI, ANNUAL REPORT 7 (1970).

57. 65 Ill. 2d at 387-88, 359 N.E.2d at 111.

court should not overlook the advisability of applying the rules of construction for misdesignated bequests in appropriate cases. The cardinal rule of construction, giving effect to the testator's intent, should not be ignored in cases in which sufficient evidence is presented to the court to demonstrate a reasonable probability that the testator intended to make a gift to an identifiable specific charity. By resisting the temptation to apply the doctrine of cy pres universally in such cases, the courthouse doors will remain open to a smaller organization which can demonstrate that it was the intended beneficiary, the likelihood of expensive litigation would be minimized, and the desired diversity of effort would be preserved.

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