Montana Law Review

Volume 11
Issue 1 *Spring 1950*

Article 3

January 1950

The Charitable Trust Doctrine in Montana

J. W. Burnett

This rule is the great weight of authority in the American jurisdictions.[21] In a small minority of jurisdictions it is specifically provided by statute that color of title must be recorded to be effective in adverse possession.[22]

Whether a claimant holds under color of title, or claim of title without color, there must be an adverse possession. There must still be an actual, visible, exclusive, hostile, open and notorious possession of such a character as to raise a presumption of notice, and so brought home to the owner as to enable the latter to institute an action for possession during the running of the statute of limitations. Though a recording may prove very useful in evidence to establish these requirements, the recording adds nothing that is not already required.

The American common law does not require the color of title be recorded before it may be used in adverse possession, and until it is specifically required, there is no basis for assuming that color of title must be recorded in Montana.

DONALD OLSSON.

[21]2 C.J. *Adverse Possession* §§348, 349, 350.
[22]*Supra* note 22.

THE CHARITABLE TRUST DOCTRINE IN MONTANA

I. INTRODUCTION AND BACKGROUND

Trusts, from an early time, have been administered exclusively as a part of equity jurisprudence. They are classified in two general categories—private trusts and charitable trusts. Closely related to, and treated in most classifications with, charitable trusts are unconditional gifts to charitable corporations and gifts to charitable corporations for specific purposes. Gifts to unincorporated charitable associations are also included under the general heading of charitable trusts.

Chancery courts in England enforced charitable trusts before 1601 as a part of their inherent jurisdiction of equitable suits. Due to neglect in their enforcement, the Statute of Charitable Uses was passed in that year.[1] This statute provided new methods for the enforcement of charities and also named some of the more common charities of the day.

An early U.S. Supreme Court case had much to do with the development of the doctrine in this country. This case was

[1]43 ELIZ. c. 4.

The Trustees of the Philadelphia Baptist Association v. *Hart's Executors.*[2] A testator bequeathed money to the Baptist association for youths of the Baptist denomination "who appear promising for the ministry." Chief Justice Marshall wrote the opinion in the above case dealing with this bequest, in which the court held that the trust failed because of a lack of definite beneficiaries. Recognizing that a different result would be reached in England under its statute, the court pointed out that the English Statute of Charitable Uses had been repealed by the Virginia legislature. It was argued that equity courts had inherent jurisdiction over charitable trusts but the court held, due to a lack of historical material and law reports on the subject, that enforcement of charitable trusts was dependent on the Statute of Charitable Uses.

The requirements necessary to constitute a valid charitable trust came before the U.S. Supreme Court again in 1844. This time, in the case of *Vidal* v. *Girard's Executors,*[3] the court upheld a charitable trust in which the beneficiaries were very indefinite. In the interval between the two decisions, English reports of early chancery cases were published and received in this country. These reports disclosed that charitable trusts were enforced in England long before the Statute of Charitable Uses was passed. Because of this information, the court in the *Vidal* case upheld the trust, relying on the inherent jurisdiction of equity courts to deal with charitable trusts.

Though the U.S. Supreme Court corrected its view in the *Vidal* case, the holding of the *Baptist Association* case already had led to many varied views by state courts. Some held that the Statute of Charitable Uses was a part of their common law and thus recognized the doctrine. Others held that the English statute was not a part of their common law, and charities were recognized only by express statutes to that effect. Still other jurisdictions upheld these trusts, regardless of whether or not the English statute was a part of their law, on the grounds of inherent equity jurisdiction over charitable trusts.[4]

While Montana has a constitutional provision[5] recognizing the possibility of charitable trusts, there are no statutory provisions directly providing for, or prohibiting, charitable trusts.

[2](1819) 4 Wheat. 1, 4 L. ed. 499.
[3](1844) 2 How. 127, 11 L. ed. 205.
[4]2 BOGERT, TRUSTS & TRUSTEES §322.
[5]MONT. CONST. Art. XIX, §5: "No perpetuities shall be allowed, except for charitable purposes."

Section 91-142 (7015)[6] indicates the possibility of the doctrine. However, Section 86-207 (7884)[7] provides:

> ". . . a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:
> 1. An intention on the part of the trustor to create a trust; and,
> 2. The subject, purpose and *beneficiary* of the trust."

Since the beneficiaries of a charitable trust must be indefinite, does this mean there can be no charitable trusts in Montana? Section 91-104 (6977)[8] states who may take by will, but unincorporated charitable associations are not included in that statute. Are bequests and devises to charitable unincorporated associations invalid because they are not expressly included in this code section?

II. MONTANA CASES

The first Montana case dealing with charitable trusts is *In Re Beck's Estate*,[9] decided in 1912. A testator left the residue of his estate to the Montana State Orphans' Home, an unincorporated state institution. The Montana Supreme Court held that the residuary bequest to the Orphans' Home was void. The grounds were that the right to make testamentary disposition of property depends entirely upon the will of the legislature and a necessary postulate of this proposition is that the legislature has the exclusive power to designate those whom the testator may make the objects of his bounty. The court said that the Orphans'

[6]R.C.M. 1947: "Restriction to devise for charitable purposes—No estate, real or personal shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by *letters* duly executed at least thirty days before the decease of the testator, and if so made at least thirty days prior to such death, such devise or legacy, and each of them, shall be valid; provided, that the prohibition contained in this section shall not apply to cases where not more than one-third of the estate of the testator shall be bequeathed or devised for charitable or benevolent purposes."
This section was amended in Ch. 93, LAWS OF MONTANA 1945. The word *will* was substituted for the word *letters*. Also the following clause was added at the end of the statute: *"and provided further, that if any such devise or bequest be made in a will executed within thirty (30) days prior to such death and be for more than one-third (⅓) of the estate of the decendent, the same shall be void as to the excess over one-third (⅓), but as to that only."*
[7]R.C.M. 1947.
[8]R.C.M. 1947.
[9]44 Mont. 561, 121 P. 784.

Home did not fall within the definition of a person or of a public or private corporation within the meaning of R.C.M. 1947 Section 91-104 (6977) which provides:

> "*Who may take by will*—A testamentary disposition may be made to any person capable of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, cannot take under a will, unless expressly authorized by statute."

It was contended that the Orphans' Home could take as an educational, charitable, or benevolent society under R.C.M. 1947 Section 91-142 (7015).[10] The court stated that the purpose intended to be accomplished by this statute was not to establish charitable uses as they were known at common law, even though the statute recognizes them, nor to enable any particular character of persons to accept a trust or bequest. The court concluded that Section 91-142 (7015) was enacted to prevent improvident alienations to the detriment of lawful heirs and that the statute goes no further than to impose upon the right of disposition by the testator the limitation therein prescribed.

It does not appear from a careful reading of the *Beck* case whether the court would have sustained a bequest to trustees on trust for charitable purposes or not. If so, it should have upheld the gift to the Orphans' Home under the *cy pres* doctrine.[11]

[10] *Supra*, Note 6.

[11] "The doctrine of *cy pres* with reference to charitable trusts is that where a definite duty is to be performed, which cannot be done in exact conformity with the plan of the person who has provided therefor, such function or duty will be performed with as close approximation to the original plan as is reasonably practical." Vol. I BOUVIER'S LAW DICTIONARY p. 745.
RESTATEMENT, TRUSTS §397 *comment g*: "Direct gift to unincorporated charitable association—If the owner of property devises or bequeaths it to an unincorporated charitable association, a charitable trust may be created although the purposes of the trust are not mentioned in the will. If the association is incapable of taking title to the property and administering the trust, the court will appoint a trustee to take the title and administer the trust for the purposes of the association. 3 SCOTT ON TRUSTS §397.2: "Gift to an unincorporated charitable association—If a devise or bequest is made in trust for a particular charitable purpose and the testator names as trustee an unincorporated charitable association which has no capacity to take title to the property, the trust does not fail, but the court will appoint a trustee to administer the trust. By the great weight of authority the result is the same where a devise or bequest is made to the association directly without mention of the purposes for which the property is given to it. A bequest to such an association is a bequest to be applied to the purposes for which the association is created and is in substance if not

While the *Beck* case has been to a large extent ignored in later Montana cases, it has left the law in confusion.

Soon after this case the Montana legislature enacted a statute[12] which partially corrected the situation created by the *Beck* decision by providing that unincorporated state institutions could take by will. Still later, in 1927, a statute was enacted providing that certain public institutions could take and hold property[13] However, neither of these statutes included all unincorporated charitable associations. It is to be noted that the California court, under the same statutory provision as our Section 91-104 (6977), upheld a gift by will to an unincorporated charitable association.[14] In 1931, the California legislature expanded their statute to expressly include unincorporated charitable associations.[15] Due to the uncertainty created by the *Beck* decision, it is suggested that Section 91-104 (6977) be amended to include unincorporated charitable associations.

In a 1932 case[16] a testator left the residue of his estate to a Minnesota charitable corporation. The question in the case was whether or not a testator, domiciled in Montana, could make a valid bequest of personalty to a benevolent, charitable, and religious corporation organized under the laws of Minnesota. The court cited the Montana statute[17] on who may take by will and said that this statute contained no special prohibition against foreign corporations. The court said that testators in some states are prohibited from giving any part of their property by will to religious or benevolent corporations, but that in this state the only prohibition of that nature is contained in Section 91-142

form a bequest in trust for the purpose of the association. It is immaterial that the bequest is in the form of a direct gift to the association and that the association has no capacity to take title to the property given to it." Professor Scott criticizes cases which distinguish between a direct gift to an unincorporated charitable association and those in which property is given to trustees upon trust for the purposes of the association. The result is that a disposition for charitable purposes fails because of the form in which the disposition is made. He states that it seems absurd to defeat the lawful intention of the testator upon a ground which is purely technical. It is not clear, in the Beck case, whether the will provision failed because of this technical distinction which Professor Scott criticizes, or whether it failed because the court was actually opposed to the charitable trust doctrine.

[12]R.C.M. 1947 §91-105 (6978).

[13]R.C.M. 1947 §11-1006 (5668.17).

[14]Estate of Winchester (1901) 133 Cal. 271, 54 L.R.A. 281, 65 P. 475, 5 CAL. JUR. §24. However the court failed to refer to their statute in this case.

[15]CAL. PROBATE CODE §27 (Deering 1937).

[16]In Re Hauge's Estate 92 Mont. 36, 9 P(2d) 1065.

[17]*Supra*, Note 8.

(7015).[18] That statute was not applicable to the fact situation in this case as the will had been in existence more than three years prior to the death of the testator.

The court then applied the statute[19] providing for the incorporation of religious, charitable, and benevolent societies which may take and hold by purchase, gift, devise, or bequest, either real or personal property or both, or carry out the obligations or provisions of any trust imposed by will or deed of trust, or otherwise, where the trust is created for any charitable purpose. The court stated that if the legatee in this case was incorporated under Montana laws there would be no question respecting the power of the testator to bequeath, nor the power of the legatee to receive the bequest. Since the laws of Minnesota were found to be similar to the Montana statutes on charitable corporations, the bequest to the Minnesota charitable corporation was upheld.

In *Town of Cascade* v. *County of Cascade*[20] the testator had bequeathed a certain sum to three trustees for the purpose of establishing a library and gymnasium in the town of Cascade, an unincorporated community, for the benefit of the town and its inhabitants in perpetuity. The trust had been set up and later the town was incorporated. The question in this case was whether or not the trustees were liable for taxes on the property, and the court held against the county on this issue. Further, the court refused to consider the county's contention that the trust was invalid, stating that, as no appeal had been taken from the decree of final distribution, the decree was now conclusive. Here a true charitable trust had been created and was in operation, although there were no Montana cases or statutes stating that such trusts were valid. The case would seem to be some authority for the charitable trust doctrine.

Another Montana case on this subject is *Conley* v. *Johnson*.[21] One Clark and the Larable Brothers, Inc., a banking corporation, entered into an agreement which stated that Clark had given *in trust* to the bank, the sum of $25,000 to the end that the bank was to pay four percent interest on that amount to two named trustees. These two trustees were to apply such interest moneys for the repairing, replenishing, or supplying of musical instruments to the band of the state prison at Deer Lodge, Montana, so long as the prison should have and maintain a band.

[18] *Supra*, Note 6.
[19] R.C.M. 1947 §§15-1401 (6453), 15-1402 (6454), 15-1403 (6455).
[20] (1926) 75 Mont. 304, 243 P. 806.
[21] (1936) 101 Mont. 376, 54 P (2d) 585.

The main question argued on appeal was whether that part of the agreement concerning the $25,000 deposit created a trust, or whether a debtor-creditor relationship was established. The bank contended that the payment of interest on the deposit was a clear indication that the bank was to use the money as its own, and therefore no trust was created. Further, the bank argued that the use of the term *"in trust"* in the agreement did not necessarily show an intention to create a trust. Though both of these were strong contentions, the court, relying on the construction of the agreement, found that a trust was created.

No mention of the charitable trust doctrine was made in the opinion. Although the court cited the statute which requires a definite beneficiary,[22] no mention was made of the indefinite nature of the beneficiaries here. Apparently the only point raised and argued by counsel was whether this argreement created a trust relationship or debtor-creditor relationship, and so the court confined itself to that point. This was not a private trust, but there was no language of charitable trust in the opinion. Apparently the court *assumed* that the charitable trust doctrine was operating in Montana.

The foregoing cases comprise the Montana authority on charitable trust up until 1948. There were no adjudicated cases in the state reports which *expressly* held whether or not the charitable trust doctrine was operating in Montana prior to the recent case of *In Re Swayze's Estate*[23] decided in 1948.

The will of Mary Swayze contained the following provision:

> "I direct my executor to reduce sufficient of my estate to cash, such cash to be utilized for the erection and maintenance of a modern hotel at Virginia City, Montana, where no intoxicating liquors are to be sold at any time, said hotel to be maintained as a memorial to me, and I direct my executor to cause the formation of a *corporation* (Italics mine) to be known as the Mary Swayze Memorial Hotel Company, to which corporation said hotel is to be conveyed, and by which it is to be maintained and operated."

The majority opinion stated the general rule to be that when a trust is created by will it is essential to its creation and validity that it be materially certain in its material terms and parts. Also that the subject matter and beneficiary of the trust

[22] *Supra*, Note 7.
[23] (1948) .....Mont....., 191 P (2d) 322.

be designated with reasonable certainty, citing R.C.M. 1947 Section 86-207 (7884).[24] The court then went on to say:

> "However, special consideration is given to gifts for charitable purposes and in such cases the courts have recognized that it is open to the testator to leave to trustees to select the way in which the charitable purpose is to be applied. And where a charitable purpose is established, the lack of certainty in the method of carrying out the trust will be remedied by the court by some scheme to accomplish the charitable intent of the testator. Also, a charitable trust is valid although its execution extends beyond the period allowed by the rule against perpetuities or results in a suspension of alienation for a period of time greater than that permitted a private trust. Art. XIX, sec. 5, Mont. Const. But in order to establish the application of these two rules to the instant case, it must be first demonstrated that the trust to which they are applied is a charitable one. Section 374 of the Restatement on Trusts, says: 'A charitable trust is created if it includes a purpose the accomplishment of which is beneficial to the community'."

The three judges in the majority concluded that a hotel is a private business enterprise and not a charity. Therefore, as a private trust, it failed for lack of certainty and because it would suspend the power of alienation for a period longer than lives in being.[25]

The provision in the will in this case related to the formation of a corporation. However, by dicta, the majority opinion recognized the charitable trust doctrine of transferring property to trustees for charitable purposes as well as transferring property to charitable corporations. The above quotation contains language to that effect. Further the court stated that they agreed that the modern trend should be to encourage the establishment of charitable trusts and they named hospitals, colleges, research laboratories, art museums, churches, historical monuments, libraries, homes for the aged and indigent, and even public utilities as possible beneficiaries of charitable trusts. The definitions which the court used included the complete charitable trust doctrine.[26]

Both of the dissenting judges wrote opinions. Tracing the historical background of Virginia City and noting that the only

[24] *Supra*, Note 7.
[25] See R.C.M. 1947 §§67-406 (6705), 67-407 (6706).
[26] The court cited Lord Machaghten's (in Income Tax Commissioners v.

hotel there had burned down in 1937, both judges held that the will provision in question was for a charitable purpose. Numerous cases were cited which upheld *inter vivos* transfers of property to trustees for charitable purposes, charitable trusts established by wills, and also gifts to charitable corporations.

III. CONCLUSIONS

Although the gift in the *Swayze* case failed for the lack of a charitable purpose, all of the judges recognized the validity of charitable trusts and that the Montana statute[27] which requires definite beneficiaries is not applicable to charitable trusts. A California case,[28] under a similar statute, reached the same result.

This case indicates that the general law of charitable trusts is in force in Montana. There are, however, two statutes which might be held to put limitations on these trusts. One of these, not previously mentioned in this article, is R.C.M. 1947 Section 86-105 (6787).[29] It lists only four purposes for which express trusts may be created in real property, and if this statute were held to apply to charitable trusts, many conceivable charitable trusts would fail. The California statute, from which ours was taken, was held not to be applicable to charitable trusts in real

Pemsel (1891) A.C. 531 at 583) definition of a charity: "Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads."

The court also quoted the definition of Justice Gray in Jackson v. Phillips, 14 Allen, Mass., 539, 556: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described to show that it is charitable in its nature."

The court further cited the RESTATEMENT OF TRUSTS, §368 which enumerates six charitable purposes: relief of poverty, advancement of religion, promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community.

[27] *Supra*, Note 7.

[28] Estate of Hinckley (1881) 58 Cal. 457.

[29] "For what purposes express trusts may be created—Express trusts may be created for any of the following purposes:

1. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust;
2. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

property,[30] but there are no Montana cases on this point. Just as the Montana court in the *Swayze* case implied that the statute requiring a definite beneficiary[31] was not applicable to charitable trusts, it seems reasonable that the court would hold that this code section was not intended to apply to charitable trusts.

The other Montana statute which possibly places limitations on the charitable trust doctrine is Section 91-104 (6977).[32] As we have seen it interpreted in the *Beck* case, this statute was used to prevent an unincorporated state institution from taking by will. The *Swayze* case did not directly overrule the *Beck* decision as the fact situations are distinguishable, and further, neither the *Beck* case nor Section 91-104 (6977) was discussed in the *Swayze* opinion.

As there seems to be no public policy in opposition to allowing charitable unincorporated associations from taking by will, they should be allowed to do so. This could be accomplished by the adoption of the *cy pres* doctrine previously discussed,[33] or by amending Section 91-104 (6977), as California has done,[34] to expressly include unincorporated charitable associations.

J. W. BURNETT.

3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of sections 67-502 to 67-611 of this code; or,
4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the sections above enumerated."

[30] *Supra*, Note 28.
[31] *Supra*, Note 7.
[32] *Supra*, Note 8.
[33] *Supra*, Note 11.
[34] *Supra*, Note 15.

RELIEF IN EQUITY AGAINST PROBATE OF A WILL PROCURED BY FRAUD

Although Section 91-1101 (10042)[1] of the 1947 Revised Codes of Montana has been held to be in effect a statute of limitations, the running of which commences with the admission of a will to probate,[2] and further held to be a bar to either direct

[1] R.C.M. 1947, §91-1101 (10042). "When a will has been admitted to probate, any interested person may, at any time within one year after such probate, contest the same or validity of the will."
[2] In Re Murphy's Estate (1920) 57 Mont. 273, 188 P. 146.