Washington Law Review

Volume 36
Number 2 *Washington Case Law—1960*

7-1-1961

Trusts

Paul A. Webber

free of termites. The Florida court took the position that an independent examination should have been made by the purchaser despite these representations, even to the extent of breaking into stucco walls.

In the cases above referred to, the proposition reflected in the *Obde* case, that concealed defects dangerous to health, life or property impose a duty of disclosure upon a vendor of real property, was not discussed. However, the argument has been pursued successfully in a line of Kentucky cases, culminating in *Kaze v. Compton.*[20]

The holding in the *Obde* case appears to emphasize a willingness on the part of the court to transcend the traditional limitations on liability for nondisclosure in arm's length transactions. The case, if viewed as being limited to its facts, stands only for imposition of a duty on the part of a vendor to disclose to a prospective purchaser of real property the presence of non-apparent termite infestations, such infestations constituting per se defects which are dangerous to life, health or property. The case might be viewed, however, as a concrete manifestation of the court's ability to place liability where considerations of fair dealing indicate it should lie, by the mechanism of labeling specific factual patterns arising in the vendor-purchaser interchange as constituting conditions dangerous to life, health or property. The practitioner confronted with a purchaser-client who has been defrauded through silence might well investigate the possibility of utilizing the danger-to-property route to recovery.

VIRGINIA LYNESS

TRUSTS

Doctrine of Cy Pres—General Charitable Intent. In the recent case of *Puget Sound Nat'l Bank v. Easterday*[1] the Washington Supreme Court, for the first time, applied the doctrine of judicial cy pres. The doctrine provides that

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[2]

In the *Puget Sound* case, the testator provided in his will that a cer-

[20] 283 S.W.2d 204 (Ky. Ct. App. 1955).

[1] 155 Wash. Dec. 898, 350 P.2d 444 (1960).

[2] RESTATEMENT (SECOND), TRUSTS § 399 (1959).

tain portion of his estate be given in trust to the plaintiff for the following use:

> To each patient that is discharged from the White Shield Home of Tacoma, after my death, I desire to give a sum not to exceed $150.00, the amount to be given to be determined by the Management of said Home and approved by my executors. In the event that the said Home should be discontinued or for any other reason the Trust can not be literally carried out I direct that the French rule and doctrine of Cy-Pris [*sic*] be invoked.[3]

Commencing in 1940, patients of the home (unwed mothers in their first pregnancy) began receiving assistance. In 1956, the home ceased operation. Thereafter, the plaintiff instituted a declaratory judgment action against all of the heirs of the testator, the home and the attorney general[4] for the purpose of having the will construed. The trial court invoked the doctrine of cy pres and declared that the trust funds be used for the benefit of patients of three particular homes in King County which were of a similar nature to the home which was discontinued. The trial court further declared that only patients of the three homes who were unwed, in their first pregnancy and residents of Pierce County would be eligible to receive the benefits of the trust fund. Affirming, the supreme court stated:

> The doctrine applies in situations where a testator has evidenced a dominant intent to devote his property to some charitable use but the circumstances are such that it becomes impossible to follow the *particular method* he directs, and the courts then sanction its use in some other way which will, as nearly as may be, approximate his general intent. . . . and that doctrine will be applied only where the court finds in the terms of the will, read in light of surrounding circumstances, a *general intent* to devote the property to a charitable use, to which the intent that it go to the particular organizaion named is secondary.[5] (Emphasis in original.)

On two previous occasions[6] the court mentioned the doctrine of judicial cy pres but refused to apply it. Since this is a case of first impres-

---

[3] Puget Sound Nat'l Bank v. Easterday, 155 Wash. Dec. 898, 901, 350 P.2d 444, 445 (1960).

[4] Since the community is interested in the enforcement of charitable trusts, the attorney general can enforce such a trust and is a necessary party to suits involving failure of a charitable trust. Kenney Presbyterian Home v. State, 174 Wash. 19, 24 P.2d 403 (1933); RESTATEMENT (SECOND), TRUSTS § 391 (1959).

[5] Puget Sound Nat'l Bank v. Easterday, 155 Wash. Dec. 898, 909, 350 P.2d 444, 450 (1960), quoting from Duncan v. Higgins, 129 Conn. 136, 26 A.2d 849 (1942).

[6] Townsend v. Charles Schalkenbach Home for Boys, Inc., 33 Wn.2d 255, 205 P.2d 345 (1949); Horton v. Board of Educ. of Methodist Protestant Church, 32 Wn.2d 99, 201 P.2d 163 (1948).

sion, some consideration of the background of the doctrine will be helpful.

The words "cy pres" are of French origin and mean "as near as."[7] The origin of the doctrine of cy pres is not entirely clear, but a form of cy pres apparently existed in Rome prior to the time that Christianity became the official religion of the Roman Empire.[8] In England, the basis for development of the doctrine seems to have been the religious beliefs in vogue in the 15th century. It was believed that charitable donations were almost a necessary prerequisite to a peaceful hereafter. The purpose of such donations was to cleanse the soul.[9] If it was impossible to uphold the particular charitable donation, the donation could be used for another charitable purpose. A person's soul could be cleansed just as readily by applying the fund to one charity as another and the settlor's eternal welfare should not be impaired by allowing the donation to fail.[10]

The English courts recognized two types of cy pres: prerogative and judicial. Under the doctrine of prerogative cy pres, the King, as *parens patriae,* was permitted to apply the property to any charitable purpose he might select if the object of the intended gift was illegal[11] or if a gift was made to charity generally without the interposition of a trustee.[12] There was no duty resting upon the sovereign to consider the intent of the settlor and the property might be devoted to a purpose entirely contrary to the settlor's purpose. This type of cy pres has been expressly rejected in Washington[13] and according to the leading authorities in the field does not exist in this country. However, there is some language in case authority to the contrary.[14]

In the *Puget Sound* case, the defendant contended that the trial court had applied prerogative cy pres, in that the recipients of the

[7] BLACK, LAW DICTIONARY 464 (4th ed. 1951).

[8] Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1889), citing DIGEST OF JUSTINIAN, lib. 33, tit. 2, law 16.

[9] Willard, *Illustrations of the Origin of Cy Pres,* 8 HARV. L REV. 69, 79, 91 (1894).

[10] FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 1.03 (1950); Comment, 49 YALE L.J. 303, 309 (1939).

[11] Da Costa v. De Pas, 1 Amb. 228 (Ch. 1754).

[12] FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 2.03 at 57 (1950).

[13] Reagh v. Dickey, 183 Wash. 564, 48 P.2d 941 (1935); *In re* Chellew's Estate, 127 Wash. 382, 221 Pac. 3 (1923).

[14] *E.g.,* "If it should be conceded that a case like the present one transcends the ordinary jurisdiction of the court of chancery, and requires for its determination the interposition of the *parens patriae* of the state, it may then be contended that, in this country, there is no royal person to act as *parens patriae,* and to give direction for the application of charities which cannot be administered by the court. It is true we have no such chief magistrate. But here the legislature is the *parents patriae,* and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England." Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56 (1889).

benefits of the trust were three *King County* homes, whereas the original recipient had been a *Pierce County* home.[15] But as the court properly pointed out:

> The *patients* of the institutions are the beneficiaries and not the *institutions* themselves. . . . Under the judgment of the trial court, the beneficiaries will continue to be unwed mothers pregnant with their first child. . . . The *purpose* of the trust remains the same.[16] (Emphasis in original.)

Recognizing then that only judicial cy pres exists in this jurisdiction, the prerequisites necessary to permit its application must be considered. One of the problems encountered is searching out a manifestation of general charitable intent. If the particular purpose for which the trust was created cannot be carried out, the trust will fail unless it appears that the intent of the settlor was more general than the original particular purpose. The settlor's particular purpose should be found to be a means to an end, rather than the end itself. However, general charitable intent does not mean an intent to generally aid charity. For purposes of application of the doctrine, it is sufficient that a settlor wants to aid a general type or kind of charity.[17]

Although most cases dealing with the problem of manifestation of general charitable intent are decided upon their own facts, there are some general rules which have been applied in the search for this intent. A discussion of these rules should be prefaced with the observation that many courts today have taken a liberal attitude toward the doctrine and seem to have had less difficulty than has the Washington court in finding a general charitable intent.[18]

If the settlor has specifically provided in the will that his intent is general, or that in case of difficulty or impossibility in applying the fund or property to the particular purpose set forth in the will, his trustee shall have the power to apply the property in a manner approximating the particular purpose, then the court should have no trouble in finding a manifestation of general charitable intent.[19] Such a test was used in the *Puget Sound* case.[20]

---

[15] Brief for Appellants, pp. 54-65, Puget Sound Nat'l Bank v. Easterday, 155 Wash. Dec. 898, 350 P.2d 444 (1960).

[16] Puget Sound Nat'l Bank v. Easterday, *supra* note 15, at 911, 350 P.2d at 451.

[17] Ramsey v. City of Brook Field, 361 Mo. 857, 237 S.W.2d 143 (1951).

[18] FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 4.02 (1950). See also note 28 *infra* and accompanying text.

[19] Gardner v. Sisson, 49 R.I. 504, 144 Atl. 669 (1929).

[20] The *Puget Sound* case seems to be one of the few cases in which the settlor set forth an express provision for the application of the cy pres doctrine.

The fact that the testator has failed to provide for a gift over in the event that the particular purpose cannot be carried out is an additional indication of general charitable intent.[21] However, this is merely evidence of such intent and is not conclusive. For example, in *Townsend v. Charles Schalkenbach Home for Boys, Inc.*,[22] one of the two Washington cases in which the doctrine has been considered, the court refused to apply cy pres even though there was no gift over.

The fact that the testator has left the bulk of his estate to various charities, including the one which has failed, is also evidence of a general charitable intent.[23] Had the settlor intended to aid only the particular charity which failed he would not have disposed of the bulk of the remainder of his estate in a charitable manner. Therefore such a settlor must have had a general charitable intent.

Another factor to be considered is whether the failure of the particular purpose occurred at the outset or at some later time. This might be described as a policy consideration rather than evidence of general charitable intent. If the failure occurs after the trust corpus has been used for the particular purpose for a period of time and a resulting trust were to arise upon failure of the particular charitable purpose, there is the necessity of locating all of the persons entitled to the settlor's estate. Finding such successors is an expensive, and in many cases impossible task. This consideration has been suggested by writers in the field[24] and has been recognized by at least one court.[25] However, on two previous occasions in this jurisdiction when the court had to consider the application of the cy pres doctrine,[26] the particular purposes had failed subsequent to the bequest, but no mention was made of the difficulty of locating the beneficiaries of the resulting trusts.

The preceding discussion has centered around the problem of ascertaining the existence of general charitable intent in light of the instrument creating the trust and the circumstances surrounding the creation

[21] *In re* Hendrick's Will, 1 Misc. 2d 904, 148 N.Y.S.2d 245 (Sup. Ct. 1955), *aff'd*, 3 App. Div. 2d 890, 161 N.Y.S.2d 855 (1957), *aff'd*, 4 N.Y.2d 744, 171 N.Y.S.2d 863, 148 N.E.2d 911 (1958). The rationale behind attaching significance to such a fact is that the testator must have considered the possibility that the trust at some future time might fail. Since he provided for no gift over, he must have intended that it be used for other charitable purposes.

[22] 33 Wn.2d 255, 205 P.2d 345 (1949).

[23] Union Methodist Episcopal Church v. Equitable Trust Co., 32 Del. Ch. 197, 83 A.2d 111 (1951); Hardy v. Davis, 16 Ill. App. 2d 516, 148 N.E.2d 805 (1958); Rhode Island Hospital Trust Co. v. Williams, 50 R.I. 385, 148 Atl. 189 (1929).

[24] FISCH, THE DOCTRINE OF CY PRES IN THE UNITED STATES § 5.03 at 153 (1950); 4 SCOTT, TRUSTS § 399.3 (2d ed. 1956).

[25] Christian Herald Ass'n Inc. v. First Nat'l Bank, 40 So. 2d 563 (Fla. 1949).

[26] See cases cited in note 6, *supra*.

of the trust. Perhaps the most obvious answer to the problem is to prevent it from arising.[27] If draftsmen had been more articulate in drafting the particular instruments, there would not be such a wealth of litigation concerning general charitable intent.

When attempting to provide in a will that the settlor has manifested a general charitable intent, the attorney should consider that the Washington position on the manifestation of general charitable intent calls for rather concrete evidence of such intent. For example, in *Townsend v. Charles Schalkenbach Home for Boys, Inc.*,[28] the settlor provided that a portion of his property should be used to establish a home for orphaned or abandoned working boys between the ages of 12 and 16. The project started off well, but later seemed to disintegrate. In 1943, after having been in operation for five years, the home was temporarily closed with the permission of the court. The court, when petitioned to terminate the trust, refused to apply the doctrine of cy pres, holding that the testator had not evinced a broad charitable intent, but had intended to aid the particular kind of home. The court failed to consider a proposition that it later recognized in the *Puget Sound* case, namely that the *persons* in the home were the beneficiaries, not the *home*. Some other jurisdictions are not as strict in their demands.[29]

The cy pres doctrine can be a valuable tool in providing for the perpetuation of a charitable trust if the draftsman is apprised of the legal criteria for the invocation of the doctrine. A poorly prepared instrument not clearly manifesting a general charitable intent can bring about wasteful litigation, and in some cases can result in a disposition which the testator might never have considered. Sound draftsmanship requires that the settlor's intent be precisely indicated in the creating instrument.

PAUL A. WEBBER

---

[27] The following might be set forth in the will if the client does not desire to have the fund applied to another similar charitable purpose:

> In the event that the particular purpose for which the trust has been created can no longer be continued for any reason whatsoever, it is my desire that a resulting trust arise in favor of the successors to my estate.

Such a provision does not violate the rule against perpetuities for that rule does not apply to a resulting trust. 4 SCOTT, TRUSTS § 401.2 at 2867 (2d ed. 1956).

If the client does desire to have the fund applied for other charitable purposes in the event that the particular purpose should fail, the following is suggested:

> In the event that the particular purpose for which the trust has been created can no longer be continued for any reason whatsoever, then it is my desire that the fund/property be applied to another charitable purpose of a similar nature, such charitable purpose to be determined by the trustees designated to administer the trust, or their successors.

The rule against perpetuities doesn't preclude such a provision for the rule does not