Michigan Law Review

Volume 35 | Issue 4

1937

CHARITIES - CAPACITY OF AN UNINCORPORATED ASSOCIATION TO ACT AS TRUSTEE OF A CHARITABLE TRUST

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CHARITIES — CAPACITY OF AN UNINCORPORATED ASSOCIATION TO ACT AS TRUSTEE OF A CHARITABLE TRUST — The residuary clause of testatrix's will directed that the remainder of the estate "after the rest and remainder has been converted into money by my executor . . . I give, devise and bequeath to the Old Order Church, . . . to be invested and reinvested among the members of the said church, and the income derived therefrom to be used for the bene-

fit of the said Church." The church named was an unincorporated association and the heirs claimed that as such it had no capacity to take the bequest, either in its own right or as trustee. The court interpreted the residuary clause as a gift to the association as trustee for a charitable purpose and *held*, though an unincorporated association is not a competent trustee, the appointment of the subsequently incorporated church was valid. *Barnhart v. Bowers*, 143 Kan. 866, 57 P. (2d) 60 (1936).

The capacity of an unincorporated association to act as trustee of a charitable trust sought to be created by a will is an issue upon which the decisions conflict. The older attitude toward the capacity of such associations, at least where the Statute of Charitable Uses was held not to be in force,[1] was that since they are not legal entities, they are incompetent to take any property, and attempted devises or legacies to them as trustees are void.[2] Equity's maxim that a trust will not be allowed to fail for want of a trustee [3] is held by these courts to apply only to a gift to a trustee in the first instance capable of being vested with the legal estate so that a valid use is raised and the case thus brought within equity's jurisdiction.[4] This is applying the same rule of definiteness as

[1]Doubt long existed whether charitable uses might be enforced in chancery upon the general jurisdiction of the court, independent of the statute of charitable uses. 43 Eliz., c. 4 (1601). In Fontain v. Ravenel, 17 How. (58 U. S.) 369 at 394, 15 L. Ed. 80 (1855), Taney, J., summarizes this confusion:

> "there has been a good deal of discussion upon the question, whether the power of the chancery court of England was derived from 43 Elizabeth, or was exercised by the court before that act was passed. And there has been a diversity of opinion upon this subject in England, as well as in this country. In the case of the *Baptist Association v. Hart's Executors*, Chief Justice Marshall, who delivered the opinion of the court . . . and Mr. Justice Story, who wrote out his own opinion, and afterward published it in the appendix to 3 Pet. [p. 487], were both at that time of opinion, that it was derived from the statute. But in *Vidal v. Girard's Executors*, 2 How. 127, Mr. Justice Story changed his opinion, chiefly upon the authority of cases found in the old English records, which had been printed a short time before by the commissioners on public records in England. It appeared from these records that the power had been exercised in many cases long before the statute was passed."

Baptist Assn. v. Hart's Exrs., 4 Wheat. (17 U. S.) 1, 4 L. Ed. 499 (1819), applying 43 Eliz., defeated such devises as in the principal case. Under its influence were decided White v. Hale, 42 Tenn. 77 (1865); Daniel v. Fain, 73 Tenn. 319 (1880); Sherwood v. American Bible Soc., 1 Keyes (N. Y.) 561 (1864); Downing v. Marshall, 23 N. Y. 366 (1861).

In Greene v. Dennis, 6 Conn. 293 (1826), even the presence of 43 Eliz. fails to effectuate a trust to an unincorporated association. Vidal v. Girard's Exrs., 2 How. (43 U. S.) 127, 11 L. Ed. 205 (1844), leads to recognition that the rule in Baptist Assn. v. Hart's Exrs. "is now known to have been erroneously stated." Kain v. Gibboney, 101 U. S. 362 at 366, 25 L. Ed. 813 (1879).

[2] Green v. Allen, 24 Tenn. 169 (1844); Grimes' Exr. v. Harmon, 35 Ind. 198 (1871); Janey's Exr. v. Latane, 31 Va. 327 (1833); Craig v. Lilly, 6 Sadler (Pa.) 183, 9 A. 171 (1887). For a discussion, with authority, of a voluntary association's power to take property in general, see 5 C. J. 1342 (1916).

[3] As discussed, with authority cited, in 11 C. J. 332 (1917).

[4] Announcing a policy of leniency toward charities, but requiring legal title to

is applied to private trusts,[5] and such severity, frustrating as it does the testator's intent, seems to have nothing to recommend it. The modern tendency is to effectuate that intent by applying the legacy or bequest to the benefit of the charity stipulated.[6] The methods adopted to attain this are varied. Some courts regard an unincorporated association as possessing the capacity to take title and be a trustee, considering such an association as possessing a de facto legal existence.[7] As yet, the majority of courts do not regard an unincorporated association as competent to act as trustee, but in opposition to the older authority, will seek to effectuate the charitable intent in some other fashion. Some of these courts announce that the association named as legatee is only entrusted with the duty of transmitting it to the ultimate beneficiary, and, the incompetency of the association being immaterial, a new trustee is appointed.[8] Other courts incline to hold that the gift is to the members in common, but charged with a trust in favor of the association's purposes.[9] Still other courts, considering an unincorporated association as subject to the common-law disability, regard the legal title as descending to the heirs or next of kin, charged with a trust for the benefit of the intended beneficiary, a new trustee being appointed.[10] Simplicity,

vest by virtue of the will, Owens v. The Missionary Society, 14 N. Y. 380 (1856). "it is not in this case the failure of a validly created trust for want of a trustee, but the failure is to create the trust at all, . . . because of want of capacity of the donee to receive. . . ." Reeves v. Reeves, 73 Tenn. 644 at 649 (1880). 11 C. J. 337 (1917) has collected such authority.

[5] 2 PERRY, TRUSTS AND TRUSTEES, 7th ed., 1248 (1929). In 2 BOGERT, TRUSTS AND TRUSTEES, § 328 (1935), it is said that the qualifications for trustee of a charitable trust are but slightly different than for a private trust.

[6] Such cases subscribe to the traditional policy of courts in looking with favor up charitable gifts. Schmidt v. Hess, 60 Mo. 592 (1875); cf. 5 AM. & ENG. ENC. LAW, 2d ed., 903 (1897). The tendency is approved in 2 BOGERT, TRUSTS AND TRUSTEES, § 328 (1935).

[7] An unincorporated association is competent to take a bequest of realty. American Bible Soc. v. American Tract Soc., 62 N. J. Eq. 219, 50 A. 67 (1901); In re Estate of Winchester, 133 Cal. 271, 65 P. 475 (1901); Snider v. Snider, 70 S. C. 555, 50 S. E. 504 (1905), bequest to a charitable institution between expiration and renewal of its charter, not invalid because it was unincorporated during that time.

Statutes have resulted in similar decisions: First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 778 (1906), where an unincorporated association acquired title by adverse possession. See the present Massachusetts statute set out in note 14, infra.

[8] Guild v. Allen, 28 R. I. 430, 67 A. 855 (1907); Schneider v. Kloepple, 270 Mo. 389, 193 S. W. 834 (1917), validity of charitable devise is not dependent upon devisee's possession of a corporate charter, and a new trustee will be appointed; Fountain v. Ravenel, 17 How. (58 U. S.) 382, 15 L. Ed. 80 (1855), unless of course the testator's intent would fail if other than the named trustee were to act. 2 TRUSTS RESTATEMENT, § 353 e (1935).

[9] Carter v. Balfour's Admr., 19 Ala. 814 (1851); Dye v. Beaver Creek Church, 48 S. C. 444, 26 S. E. 717 (1897). But some are unwilling to conjecture from an association's charitable purposes that the testator intended the gift to be used for the promotion of those purposes, and hold it an outright gift to the members: Guild v. Allen, 28 R. I. 430, 67 A. 855 (1907). And see note, 37 YALE L. J. 258 (1927).

[10] American Bible Soc. v. American Tract Soc., 62 N. J. Eq. 219, 50 A. 67 (1901); American Bible Society v. Wetmore, 17 Conn. 181 (1845). And see Washburn v. Sewall, 50 Mass. 280 (1845).

directness, and precise fulfilment of the testator's intent result when the association is itself considered competent.[11] Nor is any violence done to the intent by viewing the gift as one to the members in trust. Prevention of unjust enrichment would appear to be the basis for enforcement against the heirs or next of kin, which though rarely expressed is justification for all cases of this nature.[12] The principal case, interpreting the will as creating a charitable trust, but the unincorporated association incompetent to act as trustee, and approving the appointment of a new trustee, follows the now regular formula. As the probable intent is obscured by the wording of the residuary clause, the court is to be commended for having avoided interpretations earlier courts have indulged, [13] and in directing the benefits to the intended religious purpose.[14]

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[11] But it is also necessary that they be considered so under an equity court's control that they can be made to execute the trust duties. See Hubbard v. German Catholic Congregation, 34 Iowa 31 (1871), and Worrell v. First Presbyterian Church, 23 N. J. Eq. 96 (1872). Also, 2 PERRY, TRUSTS AND TRUSTEES, 7th ed., 1249 (1929).

[12] 1 BOGERT, TRUSTS AND TRUSTEES, § 123 (1935); 2 TRUSTS RESTATEMENT, § 353 (1935): "At common law the legal title to property passes to the heir or personal representative of the testator, who is under a duty to transfer it to a new trustee. . . ."

[13] It is altogether unlikely that testatrix intended it to be an outright gift to the members of the association, yet the interpretation in Guild v. Allen, 28 R. I. 430, 67 A. 855 (1907), is illustrative of what has been done. And it is more satisfactory than avoiding the gift for lack of legal entity, as in Reeves v. Reeves, 73 Tenn. 644 (1880).

[14] 1 SCHOULER, WILLS, 6th ed., § 46 (1923); 2 PERRY, TRUSTS AND TRUSTEES, 7th ed., § 721 (1929); 2 BOGERT, TRUSTS AND TRUSTEES, § 328 (1935).

Believing that the designated association, with its specialized training, could best administer trusts of this type, it would seem that the various legislatures would be acting wisely were they to render a voluntary association competent for this purpose. By so doing contests such as the principal case typifies would be avoided, and exact fulfilment given to the intent of the testator. Consider the Massachusetts Statute, Mass. Gen. Laws (1932), c. 68, § 12:

> "Unincorporated religious societies shall have like power as incorporated societies to manage, use, and employ, according to its terms and conditions, any gift or grant made to them; they may elect trustees, agents or other officers therefor, and may sue for any right which may vest in them in consequence of such gift or grant; for which purposes they shall be corporations."