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Gifts to Charitable Corporations - In Trust or Not in Trust

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LAW NOTE

GIFTS TO CHARITABLE CORPORATIONS— IN TRUST OR NOT IN TRUST

Earl E. Berry, a resident of Rock County, Wisconsin, by his will transferred his residuary estate to his wife for specified private purposes. The will provided that, upon the termination of the private trust, the corpus was to be distributed to the Beloit Foundation, Inc., a Wisconsin charitable corporation.

Two-thirds of the corpus was to be allocated to the "Earl E. Berry Student Loan Fund," from which income and such portions of the principal as the Foundation from time to time determined, were to be loaned to worthy persons, "preferably residents of Beloit, Wisconsin or Rock County, Wisconsin, to assist them in obtaining an education especially at Beloit College and the Engineering School of the University of Cincinnati." The will contained the alternative provision that if the Foundation refused to accept the student loan fund, it was to:

> ". . . be turned over one-half (½) to Beloit College, Beloit, Wisconsin, and the other one-half (½) to the University of Cincinnati, Cincinnati, Ohio, to be used by each of said institutions as a loan fund for the assistance of their respective students, preferably students from Beloit, Wisconsin, and Rock County, Wisconsin."

Income from the remaining one-third of the corpus was to be used by the Foundation in its discretion for such charitable purposes as it should determine. If the Foundation refused to accept this one-third of the corpus, the County Judge of Rock County was designated to distribute this portion to various charitable organizations or trusts in the city of Beloit.

Mrs. Berry died in January of 1963, terminating the original private trust of the residuary estate. The Beloit Foundation then filed a petition declaring that it would not accept the two-thirds portion of the corpus designated as the "Earl E. Berry Student Loan Fund" but would accept the remaining one-third which was to be used for such charitable purposes as the Foundation should determine. A special trustee, appointed by the county court of Rock County, petitioned the county court, alleging that the will of Earl E. Berry was ambiguous and failed to clearly express the testator's intention. The county court held that the effect of the will was to create a charitable trust for the advancement of education, the dominant purpose being benefit to the young people of Rock County in obtaining an education at the college of their choice without being limited to attendance at either Beloit College or the University of Cincinnati. In addition, the lower court imaginatively

found that the remaining one-third of the corpus, which according to the terms of the will was to be used in the Foundation's discretion, was also affected with the dominant purpose of the testator and was to be included within the new charitable trust which was established by the court. The court further speculated that the system of making loans to students as directed by the testator had become impractical and inexpedient. In order to fulfill the testator's intent, the court, utilizing the doctrine of *cy pres,* substituted an "expanded scheme" of granting scholarships to the young people of Rock County. This decision by the county court was reversed by the Wisconsin Supreme Court on appeal by the Beloit Foundation, Beloit College and the University of Cincinnati in *Estate of Berry.*[1]

The Supreme Court, recognizing the distinct alternative nature of the provisions of Berry's will, held that the doctrine of *cy pres* was inapplicable since it was perfectly possible and practical to effect the wishes of the testator in the manner he clearly, plainly and unambiguously intended.[2] Consequently, the Beloit Foundation received one-third of the trust fund to distribute for charitable purposes.

The court then treated the key question of whether the alternative provision created a gift or transferred two-thirds of the Fund to Beloit College and the University of Cincinnati in trust. The court in holding that the former was true noted that the wishes and directions of the testator could be fulfilled without the imposition of a technical trust. This note evaluates the enforcement and other aspects of either possibility.

The basic distinction between a gift in trust and a gift not in trust is the initial consideration. If a gift is made in trust, the property is held by the corporation, not as its own, but in the capacity of a trustee, or an instrumentality of the settlor in carrying out his directions. However, if the gift is not in trust, the charitable corporation may use such property in any manner it deems best, providing, of course, that this usage falls within the scope of its corporate purpose.[3] The resolution of this distinction in a particular fact situation determines the administrative treatment of the gift as well as appropriate enforcement possibilities.

THE GENERAL RULE

The general rule relating to gifts to charitable corporations is basically a question of the intention of the testator. "A trust is created only if the settlor properly manifests an intention to create a trust."[4] Con-

[1] 29 Wis.2d 506, 139 N.W.2d 72 (1966).
[2] *Id.* at 515, 139 N.W.2d at 77. For an extensive discussion of the doctrine of *cy pres* in Wisconsin, see 49 MARQ. L. REV. 387 (1965).
[3] Stockton v. Northwestern Branch of Women's Foreign Missionaries Society, 127 Ind. App. 193, 133 N.E.2d 875 (1956). See also 4 SCOTT, TRUSTS 2553-60 §348.1 (2d ed. 1963).
[4] RESTATEMENT (SECOND), TRUSTS §23 (1959).

versely, no trust is created where the owner of property manifests an intention to make an outright gift of the property rather than to declare himself or another as trustee of it.[5] Thus, absent the testator's intent to give a gift in trust, the property given by will to a charitable or eleemonsynary corporation, is not held by such corporation as a testamentary trustee. This remains true whether the gift is given for general purposes or whether it is subject to restrictions as to its use.[6]

Gifts Not in Trust

Traditionally, some courts have argued that a gift to a corporation for corporate purposes creates no trust since the beneficial interest and the legal title were merged in the corporate entity, which could not act as trustee for itself.[7] This conceptual problem has been one apparent source of judicial recognition of gifts not in trust to charitable corporations.

St. Joseph's Hospital v. Bennett,[8] the hallmark case in the area of charitable gifts, asserted that the attorney general may bring suit to compel the charitable corporation to hold the property for the purpose for which it was given, thus dispelling the theory that all gifts to charitable corporations need be held in trust to insure sufficient enforceability.

Wisconsin seems to have been similarly affected with this conceptual difficulty of assuming a merger of trustee and beneficiary when a gift to a corporation is involved, and thereby gave tacit recognition to the theory of gifts not in trust. Evidence of this is found, historically, in *Danforth v. Oshkosh*[9] where the will's sole declaration was that the property was to be conveyed to the city absolutely for use in constructing and maintaining a library building and public library upon specified lots. The will did not declare that the land was to be held in trust by the city. The court noting that all the citizens of Oshkosh were both members of the benefited corporation, the city of Oshkosh, and also were interested parties to the bequest, and hence would receive benefit from such bequest, held that the right of individuals interested in the use of the property was, as members, to compel the corporation to perform its duties as a corporation, and not as a beneficiary to regulate its conduct as a trustee.

> We can see no escape from the conclusion that this homestead is directed to be conveyed to the city of Oshkosh for its own

[5] 1 SCOTT, TRUSTS 182 §24 (1963).
[6] RESTATEMENT (SECOND), TRUSTS §23 (1959); 4 SCOTT TRUSTS 2553-60 §348.1 (2d ed. 1963).
[7] Whitmore v. Church of Holy Cross, 121 Me. 391, 117 A. 469 (1922); Doan v. Parish of Ascension, 103 Md. 662, 64 A. 314 (1906); Watkins v. Bigelow, 93 Minn. 210, 100 N.W. 1104 (1904); Wetmore v. Parker, 52 N.Y. 450 (1873).
[8] 281 N.Y. 115, 22 N.E.2d 305 (1939).
[9] 119 Wis. 262, 97 N.W. 258 (1903). Portions of this case have been subsequently overruled by Williams v. Oconomowoc, 167 Wis. 281, 166 N.W. 322 (1918).

> corporate use as a municipal corporation; that both legal title and beneficial interest are held by it in the same, to wit, its corporate capacity. Hence no trust is created or imposed upon it.[10]

Thus, even though the court held that no trust in the technical sense was created, the Wisconsin court struggled with the problem of the merged title.

The question becomes, assuming a gift not in trust to a charitable corporation, what are the enforcement possibilities? The *Restatement of Trusts, Second,* indicates that:

> Ordinarily, the principles and rules applicable to charitable trusts are applicable to charitable corporations. Where property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty enforceable at the suit of the Attorney General, not to divest the property to other purposes but to apply it to one or more of the charitable purposes for which it was organized. Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at suit of the Attorney General, to devote the property to that purpose. Where property is given to a charitable corporation and it is provided by the terms of the gift that it shall retain the principal and devote the income only to the accomplishment of its purposes or one of its purposes, the corporation is under a duty, enforceable at the suit of the Attorney General, to retain the principal and use the income for the designated purposes.[11]

It is this *Restatement* section which the New York court relied upon to decide *St. Joseph's Hospital* as guaranteeing sufficient enforcement possibilities. However, this theoretical extension of the applicability of the law of charitable trusts to charitable corporations seems to obliterate the distinction between gifts in trust and those not in trust and leaves unanswered the question of the source of the attorney general's power and whether trust, charitable corporation or both statutes shall apply in other administrative areas, such as bonding.

In *Estate of Berry,* the Wisconsin court, without specifying a particular Wisconsin statute as to the enforceability of a gift to a charitable corporation, speculated that there was "no reason to assume that the testator's direction will not be respected and enforced in Ohio as well as in Wisconsin even though a trust in the technical sense is not created."[12] The only statute cited by the court was section 231.34[13]

[10] Danforth v. Oshkosh, 119 Wis. 262, 278, 97 N.W. 258, 264 (1903).

[11] RESTATEMENT (SECOND), TRUSTS §348 (1959).

[12] 29 Wis.2d 506, 520, 139 N.W.2d 72, 80 (1966).

[13] WIS. STAT. §231.34 (1965). Enforcement of public trust:
(1) An action may be brought by the attorney-general in the name of the state, upon his own information or upon the complaint of any interested party for the enforcement of a public charitable trust.
(2) Such action may be brought in the name of the state by any 10 or more

which by its own declaration relates to the enforcement of public trusts and is of questionable application to the issue of gifts not in trust.

The court did not explore the possibilities of enforcement under Chapter 181 regulating nonstock corporations. Section 181.05,[14] pertaining to the defense of *ultra vires,* provides the attorney general with certain enforcement power. Apparently, however, under section 181.05(3), the attorney general may enjoin such charitable corporation only when the corporation is about to perform an unauthorized act. It is questionable whether this corporation can be compelled to comply with the attorney general's wishes if the corporation has been guilty of mere nonaction with respect to a gift not in trust. Section 181.56,[15] concerned with involuntary dissolutions, is another potential enforcement device and is somewhat more potent than section 181.05; however the resultant consequence of dissolution of the charitable corporation is somewhat drastic and thus makes recourse under section 181.05 more realistic and preferable.

In evaluating possible enforcement provisions concerning gifts to charitable corporations, Chapter 286, relating to actions against corporations, should be considered. Section 286.32[16] indicates that

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interested parties on their own complaint, when the attorney-general refuses to act.
(3) The term "interested party" herein shall comprise a donor to the trust or a member or prospective member of the class for the benefit of which the trust was established.

[14] WIS. STAT. §181.05 (1965). Defense of ultra vires:
No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:
(3) In a proceeding by the attorney general, as provided in this chapter, to dissolve the corporation, or in a proceeding by the attorney general to enjoin the corporation from performing unauthorized acts.

[15] WIS. STAT. §181.56 (1965). Involuntary dissolution:
(1) A corporation may be dissolved involuntarily by a decree of any circuit court in an action commenced by the attorney general when it is established that
(d) The corporation has solicited or accepted money or property and failed to use the money or property for the purpose for which it was solicited or accepted, or has fraudulently solicited money or fraudulently used the money solicited; or
(f) The corporation does or omits any act which amounts to a surrender of its corporate rights, privileges or franchises.
(lm) In case the attorney general on application refuses to bring action based on sub. (1) (f), leave to bring the same by a private party shall be granted only on notice to the attorney general and the proposed defendant; and the court on granting leave in such case may require the prosecutor to give adequate security to the state to indemnity it and the defendant against all taxable costs therein.

[16] WIS. STAT. §286.32 (1965). Jurisdiction.
Courts shall have jurisdiction over directors, managers, trustees and other officers of corporations:
(1) To compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge.
(2) To order and compel payment by them to the corporation whom they represent and to its creditors of all sums of money and of the value of all

courts have jurisdiction over directors, managers, trustees and other officers of corporations to: (1) demand account of such officials, (2) compel repayment of money or property lost or wasted, and (3) suspend any official for abuse of his trust. Section 286.325[17] indicates that the attorney general may bring actions in the name of the state through any of the broad jurisdictional provisions of section 268.32. Section 286.46[18] specifies the corporations which are not affected by this chapter. In *State v. Milwaukee and Electric Railway & Light Co.*,[19] the Wisconsin court held that section 3239 of the Statutes of 1898,[20] the predecessor section to section 286.32, did not extend its jurisdiction to the attorney general in a suit to reclaim misapplied assets of a *private* corporation. The court indicated that the right of action in such cases was in the corporation itself, which right could be exercised only by such private corporation. The court then noted that such section would apply in the case of charitable, eleemosynary and possibly corporations charged with a duty to the public where enforcement may be necessary to prevent dissipation of its assets.[21] Neither this original or its successor statutes have been applied thus far to an enforcement situation involving gifts to charitable corporations.

Thus, despite the sweeping implications of the *Restatement* and the optimism of the Wisconsin court displayed in *Estate of Berry*, it is apparent that the powers of the attorney general to enforce gifts not in trust are somewhat less than clear.

Gifts in Trust

As has been previously noted, the general rule indicates that property given by will to a charitable corporation is generally not

property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such directors, managers, trustees or other officers.

[17] WIS. STAT. §286.325 (1965). Action to exercise jurisdiction:
The jurisdiction conferred by section 286.32 shall be exercised in an action prosecuted by the attorney general in the name of the state, or by any creditor or stockholder of the corporation, or by any director, trustee or officer thereof having a general superintendence of its concerns.

[18] WIS. STAT. §286.46 (1965). What corporations not affected:
The provisions of this chapter shall not extend to any incorporated library or lyceum society, to any religious corporation or any incorporated academy or select school, nor to the proprietors of any burying ground incorporated under the laws of this state.

[19] State v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 179, 116 N.W. 900 (1908).

[20] WIS. STAT. §3239 (1898). Jurisdiction, how exercised:
The jurisdiction conferred by section 3237 shall be exercised in any action prosecuted by the attorney-general in the name of the state, or by any creditor of such corporation, or by any director, trustee, or officer thereof having a general superintendence of its concerns, as the case may require or as the court may direct.
Section 3237 of the Wisconsin Statutes of 1898 was entitled "Jurisdiction of circuit court" and was identical to the first eight subsections of section 286.32 of the Wisconsin Statutes of 1965.

[21] 136 Wis. 179, 186, 116 N.W. 900, 903 (1908).

held in trust by said corporation. The primary exception to this principle occurs whenever the will manifests an intention, expressly or through judicial interpretation, that the decedent wished to create a charitable trust in the technical sense.

> In respect to the dignity of a trust created by will, the supreme test is, What did the testator intend? That being discovered it is the law of the trust. Courts have no power to frustrate it and substitute another scheme—there can be no substitute method.[22]

The will, however, may not be explicit and the court may have to construe the provisions thereof to determine the intention of the testator. Then, "the cardinal rule the court must subscribe to when construing a will is to ascertain the intent of the testatrix from the language of the will itself and in the light of the circumstances at the time she executed her will."[23]

But, when does the testator intend to create a charitable trust in the technical sense? As indicated previously, some courts have held that concerning gifts to corporations, no charitable trust was or could have been created because the corporation would have been both the beneficiary as well as the trustee.[24] This reasoning could have been rebutted by an analysis which, for example, would have realized a hospital corporation's position as trustee but which would have claimed that the real beneficiaries were those who received ultimate benefit from the corporate hospital's services, *i.e.,* the patients. An example of such a construction was given in *Ministers and Missionaries Benefit Board of American Baptist Convention v. Meriden Trust and Safe Deposit Co.*[25] The testator named a charitable corporation as legatee of a fund to be used for the "general purposes" of said corporation and impressed the bequest with a permanent trust. The court of Connecticut held that the corporation was merely a trustee of the fund and not its beneficiary, the beneficiaries being the persons whom the corporation's charter showed it to be the "general purpose" of the corporation to help.[26]

The Wisconsin Supreme Court has held that a charitable trust in the technical sense was intended in *Will of Hill.*[27] In that will, one provision merely directed the trustees holding for the benefit of the testator's widow to deliver the property to a named charitable corporation on the death of the widow, but later provisions of the will provided that the property so delivered was to be held by the

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[22] Upham v. Plankinton, 152 Wis. 275, 284, 140 N.W. 5, 8 (1913).
[23] Estate of Budd, 11 Wis.2d 248, 255; 105 N.W.2d 358, 361, 362 (1960).
[24] See note 7 *supra.*
[25] 139 Conn. 435, 94 A.2d 917 (1953).
[26] *Id.* at 440, 94 A.2d at 921, 922.
[27] 261 Wis. 290, 52 N.W.2d 867 (1952).

corporation "in trust" for specified uses and purposes, and designated the corporation as "corporate trustee" and called the property the "trust fund." It was held that the property was to be received by the corporation as trustee.

The *Hill* case can be distinguished from *Estate of Berry* for in the former, the express terms and language of the instrument made it clear that the testator intended the charitable corporation to be a testamentary trustee in the technical sense whereas in the latter, the

> . . . will provided that the "Earl E. Berry Student Loan Fund . . . shall be turned over "to the colleges." The expression "turned over" is clearly indicative of the relinquishment of any control by the executor and the vesting of ownership and control in the colleges. The clause expresses a donative intent, and we conclude that a gift results.[28]

If the court decides that the testator intended to transfer the gift to the corporation "in trust," utilizing the technical sense of the term, the question becomes one of determining the appropriate enforcement statutes. Sections 181.05 and 181.56,[29] cited in relation to the enforcement of gifts not in trust, appear to be general enough to apply to the enforcement of gifts in trust to charitable corporations. However, the drastic nature of section 181.56 and the negative generality of 181.05(3) make these statutes as undesirable in a trust situation as they are in a situation involving gifts not in trust. The sections cited from Chapter 286, pertaining to actions against corporations, would also apply.[30] Problems might arise however in conjunction with the exclusionary character of section 286.46 as well as the historical hesitancy of the court to apply this chapter to the enforcement of gifts in trust.

This hesitancy may be due to the fact that there are several statutes which seem to bear more relevance to the problem at hand. It is to be noted that the following statutes are more specific and stringent in their requirements than those cited from Chapters 181 and 286, thus raising a possible conflict in application.

Section 231.34,[31] cited by the court in *Estate of Berry,* as applying to the enforcement of gifts not in trust, specifically refers to enforcement by the attorney-general or by 10 interested parties should the attorney general refuse to act. It might be argued that section 231.34 also applies to gifts not in trust since all gifts to charitable corporations are imposed with a "public trust" in the non-technical sense for the benefit of the objects of the charities. This loose construction is complicated by the fact that chapter 231

[28] 29 Wis.2d 506, 517, 139 N.W.2d 72, 78, 79 (1966).
[29] See notes 14, 15 *supra.*
[30] See notes 16, 17, 18 *supra.*
[31] See note 13 *supra.*

related to technical trusts as well as the problem of factually determining who are "interested parties" under section 231.34(3).

Section 317.06[32] provides that each trustee of a testamentary trust for charitable purposes is required to submit an annual account to the court having jurisdiction. If this account is not satisfactory, the court will issue such orders as are necessary to carry out the provisions of the trust. In addition, the court may remove said trustee for failure to comply with these provisions and may appoint another trustee in compliance with the law and the terms of the will creating the trust.

Section 323.01(4)[33] exempts religious, charitable and educational corporations from the bonding requirement where devises or bequests are given to such corporations in trust for any of the purposes of such corporation. This section does not discuss exemption possibilities of a gift not held in trust.

It would seem that the *fact* that a trust in the technical sense exists, when coupled with the "interested parties" concept of section 231.34, the mandatory provisions of section 317.06 and the bonding safeguard of 323.01(4), would take precedence over the *fact* that the trustee is a nonprofit corporation and hence, the statutes dealing with charitable trust would be preferred to those contained in corporate chapters 181 and 286.

CONCLUSION

In conclusion, it appears that the Wisconsin statutes are of questionable adequacy and clarity concerning the administration and enforcement of gifts not in trust when a charitable corporation is involved. Furthermore, when gifts in trust are involved, there may

[32] WIS. STAT. §317.06 (1965). Charitable trusts; trustee's annual account; removal.
(1) Every trustee of a testamentary trust for charitable purposes shall, prior to March of each year, account to the court having jurisdiction thereof for the preceding calendar year and shall further account from time to time as required by the court; and he may be examined by the court upon any matter relating to his account and his conduct of such trust.
(2) The court shall promptly examine such account, and if it be not satisfactory it shall be examined on notice and the court shall make such order as may be necessary to carry out the provisions of the trust.
(3) The court may remove the trustee for failure to comply with this section, or with the order of the court, and appoint another trustee as provided by law or the terms of the will creating such trust.
(4) No action of the court upon such account shall be final except it be upon notice mailed to the attorney general and published under section 324.20.

[33] WIS. STAT. §323.01 (1965). Testamentary trusts; trustee's bond; conditions. Every trustee . . . shall give bond to the county judge having jurisdiction of the probate of the will in such sum and with such sureties as the court may order, conditioned as follows:
(4) . . . The cost of procuring a bond may be allowed the trustee, as provided in section 271.14; provided, however, that no bond shall be required from any religious, charitable, or educational corporations or societies, where devises or bequests are given to such corporations or societies in trust for any of the purposes of such corporations or societies.

be a conflict between the statutes regulating charitable corporations and the trust statutes.

Perhaps one method of establishing uniformity in this area would be to raise a presumption that gifts to charitable corporations are not to be held in trust. This presumption could be overcome by clear indication of the testator's contrary intention. This presumption should be bolstered with judicial indication of the applicable statutes regulating gifts not in trust to charitable corporations. Finally, where it is determined that a gift in trust exists, the more specific requirements enumerated in the statutes pertaining to trusts should take preference over those applying to charitable corporations.

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