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## Charitable Trusts--Definitions and History-- Purpose--Beneficiaries--Cy Pres Doctrine

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would strike at the very roots of Anglo-Saxon common law. However, when new phases of knowledge are established, the law should respond to the internal pressure of the thing it seeks to control. It is possible, and even probable, that in the *Beuschel* and *Taylor* cases, the non-paternity tests would have been of no conclusive value; but this carries no weight as to the general materiality, relevancy and competency of such evidence. The writer respectfully submits that the Appellate Division, perhaps bound by the tradition and custom of an intermediate appellate tribunal, erred in the sweeping generalization of its reversal. There is urgent necessity for the Court of Appeals to pass on the matter under discussion; it is to be hoped that an early opportunity arises for the progressive and enlightened court as it exists today to consider the question. Should the Court of Appeals find it impossible to reconcile the situation with adverse but unsound precedents, it might be urged that the finest ingots of common law justice are poured from the crucible in which *form and fact*<sup>64</sup> are melted indissolubly into the substance that constitutes law. If, then, the ruling is adverse to the admission of non-paternity tests in evidence, the remedy lies with the legislature. The established phenomena of the heredity of blood groups, their interpretation and application, as recognized in many civilized nations today, should be made available to the state and to litigants before its courts in criminal<sup>65</sup> and civil cases.

EMIL F. KOCH.

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CHARITABLE TRUSTS—DEFINITIONS AND HISTORY—PURPOSE—  
BENEFICIARIES—CY PRES DOCTRINE.

What is a charitable trust? The term is synonymous with the terms public trust and charity.<sup>1</sup> The definition formulated in a Massachusetts case has been extensively quoted:

“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 bring-

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confidence that sometimes goes with ignorance of the law.” Mr. Justice Holmes, *In re Sacco and Vanzetti*, N. Y. Times, Aug. 21, 1927; FINKELSTEIN, *CASES ON CONSTITUTIONAL LAW* (1927) 511.

<sup>64</sup> Cardozo, *supra* note 23, at 5: “Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity.” It may be said that form without substance is a mere and ugly protuberance in the legal scheme of things.

<sup>65</sup> (1932) 3 AMERICAN JR. OF POLICE SCIENCE 157 discusses the application of blood groups in forensic medicine; see also (1932) 87 N. Y. L. J. 810.

<sup>1</sup> BOGERT, *TRUSTS* (1921) 189.

ing 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 creating and maintaining public buildings or works, or otherwise lessening the burdens of government.”<sup>2</sup>

The definition of Lord Camden, that a charity is a gift to a general public use which extends to the poor as well as to the rich, has been adopted by the Supreme Court of the United States.<sup>3</sup> Another court has said that “any gift not inconsistent with existing laws, which is promotive of science or tends to the education, enlightening, benefit or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for the public convenience, is a charity.”<sup>4</sup> Definitions throughout the various jurisdictions are substantially similar to those quoted above.<sup>5</sup>

The origin of the charitable trust is obscure. Though some early courts<sup>6</sup> seemed to be of the view that the Statute of Charitable Uses<sup>7</sup> created them, carefully considered authorities agree that the charitable use operated under the guidance of chancery prior to that time and that its development was under Roman-Christian influence.<sup>8</sup> In 1601,

<sup>2</sup> Gray, J., in *Jackson v. Phillips*, 14 Allen 539, 556, 96 Mass. 539 (1867), quoted in *People v. Fitch*, 154 N. Y. 14, 32, 47 N. E. 983 (1897); 11 C. J. 300, n. 3.

<sup>3</sup> *Perin v. Carey*, 24 How. 456, 506, 65 U. S. 456 (1860).

<sup>4</sup> *Wilson v. First Nat. Bank of Independence*, 164 Iowa 402, 145 N. W. 948, 952 (1914).

<sup>5</sup> Mr. Binney in *Vidal v. Girard's Ex'rs*, 2 How. 127, 15 U. S. 61 (1844): “Whatever is given for the Love of God, or for the love of our neighbor, in the catholic and universal sense,—given from these motives and to those ends, free from the stain of everything that is personal, private, or selfish,—is a gift for charitable uses.” Quoted in *Ford v. Ford's Ex'r*, 91 Ky. 572, 16 S. W. 451 (1891).

*In re Lennon's Estate*, 152 Cal. 327, 92 Pac. 870 (1907): “A ‘charitable trust’ is a gift to a general public use.”

*Carter v. Whitcomb*, 74 N. H. 482, 69 Atl. 779 (1908): “Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied. 2 PERRY, TRUSTS (6th ed. 1911) §687.”

*Johnson v. Bowen*, 85 N. J. Eq. 76, 69 Atl. 779 (1915): “The essential idea of a charitable trust is that the benefit of the trust is to be for the whole public or some large class of the public as distinguished from private persons.”

*Kelly v. Nichols*, 18 R. I. 62, 25 Atl. 840 (1892) (adopting the definition laid down in *Jackson v. Phillips*, *supra* note 2).

*Maxey v. City of Oshkosh*, 144 Wis. 238, 128 N. W. 899 (1910): “In order to create a public charitable trust, there must be some public benefit open to a vague and indefinite number of persons until they are selected or appointed to be the particular beneficiaries of the trust for the time being.”

<sup>6</sup> *Philadelphia Baptist Ass'n v. Hart*, 4 Wheat. 1, 17 U. S. 1 (1819); Zollman, *Law of Charities in the United States* (1919) 19 COL. L. REV. 91, 286.

<sup>7</sup> *Infra* note 9.

<sup>8</sup> *Vidal v. Girard's Ex'rs*, *supra* note 5; O'TOOLE, LAW OF TRUSTS (1933) 48; Zollman, *supra* note 6.

the English Parliament enacted the Statute of Charitable Uses.<sup>9</sup> The Statute recognized the existence of certain uses<sup>10</sup> and provided for their enforcement.

In New York, charitable trusts have had a checkered career. The New York Legislature repealed the Statute of Charitable Uses in 1788.<sup>11</sup> The Revised Statutes of 1830 provided for only four classes of express trusts in land<sup>12</sup> and said nothing of charitable trusts. Did the revised statutes abrogate the charitable trust because they failed to mention it? At first it was believed not. In *Williams v. Williams*,<sup>13</sup> the conclusion arrived at was that "the law of charities was, at an indefinite but early period in English judicial history, engrafted upon the common law; that its general maxims were derived from the civil law, as modified, in the later periods of the Empire, by the ecclesiastical element introduced by Christianity; and that the Statute of Charitable Uses was not introductory of any new principles, but was only a new and less dilatory and expensive method of establishing charitable donations, which were understood to be valid by the laws antecedently in force;"<sup>14</sup> that therefore the original jurisdiction of courts of chancery ought to enable the courts to support charitable trusts, irrespective of the Statute of Charitable Uses.

As time went on, the courts of this state leaned toward the opposite view and in a series of successive cases<sup>15</sup> repudiated the doctrines of *Williams v. Williams*. It was pointed out "that the Revised Statutes as far as the abolition of Trusts was concerned must be construed strictly; that it had unqualifiedly abolished all trusts except those specifically authorized; that charitable trusts, especially where the trustee named was an individual, were not authorized; and that general charitable gifts could still be made to corporations expressly organized under the statutes to dispense charity."<sup>16</sup> But in 1893, the widespread discussion caused by the failure of Samuel J. Tilden's munificent gift in trust of five million dollars, because it was invalid under the New York law in relation to charitable trusts,<sup>17</sup> bore fruit when the legislature passed the so-called Tilden Act,<sup>18</sup> the intent of

<sup>9</sup> 43 Eliz. c. 4 (1601).

<sup>10</sup> See BOGERT, TRUSTS 195, n. 26, for an enumeration of the purposes contained in the Statute.

<sup>11</sup> N. Y. Laws 1788, c. 46; *Beekman v. Bonsor*, 23 N. Y. 298, 307 (1861).

<sup>12</sup> Now contained in N. Y. REAL PROP. LAW (1909) §96.

<sup>13</sup> 8 N. Y. 525 (1853); *Beekman v. Bonsor*, *supra* note 11 (the principles asserted in *Williams v. Williams* found decisive in this case).

<sup>14</sup> *Id.* at 542.

<sup>15</sup> *Levy v. Levy*, 33 N. Y. 97 (1865); *Bascom v. Albertson*, 34 N. Y. 584 (1866); *Burrill v. Boardman*, 43 N. Y. 254 (1871); *Holmes v. Mead*, 52 N. Y. 332 (1873); *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305 (1888); *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880 (1891).

<sup>16</sup> O'TOOLE, LAW OF TRUSTS (1933) 50.

<sup>17</sup> *Tilden v. Green*, *supra* note 15.

<sup>18</sup> N. Y. Laws 1893, c. 701, §1, now found in N. Y. PERS. PROP. LAW (1909) §12, subd. 1 and in N. Y. REAL PROP. LAW (1909) §113, subd. 1: "No gift, grant, or devise to religious, educational, charitable or benevolent uses,

which was to restore to the courts the power formerly exercised through the court of chancery to sustain and enforce trusts for charitable uses.<sup>19</sup> The effect of the Act has been to restore the law as it was declared in *Williams v. Williams*.<sup>20</sup>

An analysis of the various definitions given of a charitable trust reveals certain elements that are characteristic of such a trust and necessary to its validity:

(1) Every such trust carries the implication of public utility in its purpose.<sup>21</sup>

(2) The purpose admits of a four-fold classification:<sup>22</sup>

- (a) Religious—trusts for the advancement of religion.
- (b) Educational—trusts for the advancement of education.
- (c) Eleemosynary—trusts for the relief of poverty and distress.
- (d) Public—trusts for other purposes beneficial to the community and not falling under any of the preceding heads.

(3) The beneficiaries must be indefinite, unascertained individuals, whether private persons or otherwise.<sup>23</sup>

This last element, from the very nature of charitable trusts, is all-important. The very indefiniteness of the beneficiaries was the reason why the New York courts before the passage of the Tilden Act were opposed to charitable trusts. They could only be saved by a special statute enacting that the indefiniteness of the beneficiaries could be no bar to the validity of the trust.<sup>24</sup> No matter how public-minded the purpose of the proposed trust, no matter how great the probable benefit to mankind, if the trust does not contemplate as beneficiaries an indefinite portion of mankind or an indefinite portion of a certain class, the trust must fail,<sup>25</sup> because its purpose is no

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which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. \* \* \*

<sup>19</sup> *Morgan v. Durand*, 51 Misc. 523, 101 N. Y. Supp. 1002 (1906).

<sup>20</sup> *Supra* note 13; *People v. Powers*, 147 N. Y. 104, 41 N. E. 432 (1895); *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568 (1899); *Matter of Griffin*, 167 N. Y. 71, 60 N. E. 284 (1901); *Matter of Graves*, 171 N. Y. 40, 63 N. E. 787 (1902); *Sailors' Snug Harbor v. Carmody*, 211 N. Y. 286, 105 N. E. 543 (1914); *Ames, The Failure of the Tilden Trust* (1892) 5 HARV. L. REV. 389; *Zollman, supra* note 6.

<sup>21</sup> *Matter of McDowell*, 217 N. Y. 454, 112 N. E. 177 (1916).

<sup>22</sup> 11 C. J. 314, n. 97; O'TOOLE, LAW OF TRUSTS (1933) 48.

<sup>23</sup> BOGERT, TRUSTS 192 and cases cited in n. 14; Note (1934) 8 ST. JOHN'S L. REV. 308.

<sup>24</sup> *Supra* note 18.

<sup>25</sup> 11 C. J., *Charities*, §59.

longer a public one, but a "selfish or private purpose in the guise of charity."<sup>26</sup> "When the purpose accomplished is that of public usefulness unstained by personal, private, or selfish considerations, its charitable character insures its validity."<sup>27</sup> Although it is evident that every charitable trust must in the last analysis benefit private individuals, that does not militate against the validity of the trust, for the reasons that those persons who do benefit are unascertained at the inception of the trust and the benefit they enjoy is a direct derivative of some one of the above enumerated charitable purposes. In other words, they are the proper recipients of charity, in the legal sense of the word.<sup>28</sup>

Testatrix in a recent case<sup>29</sup> left a will in the fourth paragraph of which she bequeathed the sum of \$30,000 in trust to a hospital. She directed that out of the income of this trust \$1,000 was to be paid each year to the person making, in the judgment of the trustees of the hospital, the greatest advancement toward the discovery of a cure for cancer. The net income remaining was to be paid to the hospital for the relief of cancer patients. Lastly, whenever the trustees were satisfied that a cure for cancer had been discovered, then one-half of the principal was to be paid to the discoverer of the cure and one-half to the hospital for use in research work or in the relief of cancer patients. The hospital trustees, because of the difficulty which they believed they would encounter in carrying out this trust, renounced all claim and right to this fund and declined the appointment as trustee.

The attorney general was made a party by issuance of supplemental citation, pursuant to the provisions of the Statute.<sup>30</sup> It is his contention that the trust being a charitable one, the court should designate a new trustee to carry out the provisions of the will.<sup>31</sup>

Here is a trust imbued with the highest of ideals, the alleviation of human suffering. Throughout the ages, from the first prehistoric medicine-man to the modern heroic figures of Pasteur, Lister and a host of others, there has been a ceaseless striving to make this planet a healthier abode for mankind and, correlatively, to make the human body a healthier abode for the soul. One of the greatest obstacles in the path of this two-fold goal is cancer. What nobler aim in life,

<sup>26</sup> Note (1934) 8 ST. JOHN'S L. REV. 308, n. 4.

<sup>27</sup> Matter of McDowell, *supra* note 21.

<sup>28</sup> New England Sanitarium v. Inhabitants of Stoneham, 205 Mass. 335, 342, 91 N. E. 385 (1910): "A charitable trust is not confined to mere almsgiving, or the relief of poverty and distress, but has a wider signification, which embraces the improvement of the happiness of man."

<sup>29</sup> Matter of Judd, 151 Misc. 857, 272 N. Y. Supp. 674 (1934).

<sup>30</sup> N. Y. PERS. PROP. LAW (1909) §12, subs. 2, 3; N. Y. REAL PROP. LAW (1909) §113, subs. 2, 3; Rothchild v. Goldenburg, 58 App. Div. 499, 69 N. Y. Supp. 523 (1st Dept. 1901). Where an action is brought for the construction of a will which necessarily involves a determination of the validity of provisions in the will disposing of property for charitable purposes, the attorney-general is a proper party.

<sup>31</sup> N. Y. PERS. PROP. LAW (1909) §12, subd. 2.

what greater service to the public weal could one imagine than the discovery of a cure for cancer? This testatrix had the definite object in mind of providing a method of stimulating the minds of medical men to active research in this field. Certainly, the motive was charitable enough, the benefit to public welfare self-evident.

But because the means adopted did not come within the true confines of a charitable trust, the court was constrained to frustrate testatrix's benevolent purpose. *Held*, a trust which has a benevolent motive or a purpose to confer a general benefit, but which provides for a gift to an individual or individuals for his or their own benefit, cannot be sustained as a charitable trust and hence the trust principal falls into the residuary estate as undisposed-of property. "There is no authority for holding a charitable tendency to be a charitable use; in other words, a gift to a person for his own benefit, whereby consequential charity may arise, is not a charitable use."<sup>32</sup> The individuals are unascertained, yes, but they are not indefinite and they are not "the proper recipients of charity."<sup>33</sup> They were to receive the gift, not in furtherance of research, but for their own benefit and use. The authorities are clear on the point that a gift to a private individual for his own benefit is not proper under a charitable trust.<sup>34</sup>

In passing, it might be interesting to examine into the *cy pres* doctrine and the reasons why, perhaps, the court did not apply it in the *Matter of Judd*.<sup>35</sup> The doctrine has two branches, usually denominated: first, the judicial *cy pres* power and second, the prerogative *cy pres* power. The first is the authority of equity to apply property given to a charity to as nearly similar a purpose as possible, when the carrying out of the original trust becomes impossible or

<sup>32</sup> *Matter of Frasch*, 245 N. Y. 174, 182, 156 N. E. 656, 658 (1927).

<sup>33</sup> *Supra* note 28.

<sup>34</sup> *Sutro's Estate*, 155 Cal. 727, 102 Pac. 920 (1909). A trust to apply funds to the benefit of such charities, institutions of learning and science and to the promotion of such inventions and discoveries as the trustees shall select is a trust for mixed private and public purposes and will be held invalid.

*Stratton v. Physio-Medical College*, 149 Mass. 505, 21 N. E. 874 (1889). The will gave one-fourth of the net income of the residue of the testator's estate to the defendant to be used for the promotion of the medical art and support of the institution. It appeared that defendant was neither free nor a public school, but a private pecuniary enterprise. *Held*, that such an enterprise is not a public charity, even if indirectly it serves charitable ends.

*Matter of Shattuck's Will*, 193 N. Y. 446, 86 N. E. 455 (1908) (gifts for the benefit of private institutions or individuals were not intended to be included in the provisions of the Tilden Act); *Matter of McDowell's Will*, *supra* note 21; *Matter of Frasch*, *supra* note 32; *Matter of De Forest*, 147 Misc. 82, 263 N. Y. Supp. 135 (1933). A trust under which the income of a fund is directed to be paid to the "Adirondack Mountain Reserve," a business corporation, "for the maintenance and improvement of the Reserve," is not a valid charitable trust, where it appears that the corporation is privately operated for the private enjoyment of its stockholders and others associated with them in the conduct of a country club of restricted membership.

<sup>35</sup> *Supra* note 29.

inexpedient, due to changes in conditions, or when the settlor has imperfectly outlined the scheme for his charity.<sup>36</sup> This power is possessed by the New York courts by virtue of statute.<sup>37</sup> The prerogative *cy pres* power is the authority of the crown in England, in consequence of its position as *parens patriae*, to dispose of property to such charitable uses as it sees fit in two cases:<sup>38</sup>

(1) where bequests are to particular uses charitable in their nature, but illegal, and

(2) where the original charity is too vague to be enforced and there are no trustees to make it certain. This prerogative *cy pres* power is not possessed by any courts in America, but is vested in the several legislatures.<sup>39</sup> The courts of this country cannot take it upon themselves to exercise this prerogative *cy pres* power unless the legislature has expressly given them authority so to do.<sup>40</sup>

The trust in the *Matter of Judd* failed because the testatrix had not *imperfectly* outlined her scheme, but *invalidly* done so. The statute from which the courts derive their judicial *cy pres* power, states that they may exercise it "whenever it shall appear that circumstances have so changed since the execution of an instrument containing a gift, grant or bequest to religious, educational, charitable or benevolent uses as to render impracticable or impossible compliance with the terms of such instrument."<sup>41</sup> The conclusion is inescapable that if the trust is invalid in its inception, then the court may not exercise this power.

The prerogative *cy pres* power does not exist in New York. It was found necessary by special enactment to bring back into the law of New York the judicial power.<sup>42</sup> As yet, the legislature has not seen fit to exercise its power as *parens patriae* and enact a law delegating to the courts authority to exercise the prerogative *cy pres* power. Had the bequest in the *Matter of Judd*, a mere \$30,000, been of the same magnificent proportions as the bequest in the *Tilden* case, the attention of the legislature would be drawn to its failure and perhaps legislative action would follow. As it is, the case may

<sup>36</sup> BOGERT, TRUSTS 225.

<sup>37</sup> N. Y. PERS. PROP. LAW (1909) §12, subd. 2; N. Y. REAL PROP. LAW (1909) §113, subd. 2.

<sup>38</sup> 11 C. J., *Charities*, §75.

<sup>39</sup> *Church of Jesus Christ v. United States*, 136 U. S. 1, 10 Sup. Ct. 792 (1890). "Here the legislature is the *parens patriae* and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England." At 56.

<sup>40</sup> *Ibid.*; *Klumpert v. Vrieland*, 142 Iowa 434, 121 N. W. 34 (1909).

<sup>41</sup> *Supra* note 37.

<sup>42</sup> N. Y. Laws 1893, c. 701, §2; see 11 C. J. 360, n. 56 (d) for a compact and inclusive history of the development of the judicial *cy pres* doctrine in New York.



serve as a warning to future testators to so frame their charitable intent as to fall within the confines of charitable trusts recognized to-day.

ANTHONY CURRERI.

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EFFECT OF EXTRINSIC ACCELERATION AGREEMENT UPON  
ACCOMMODATION INDORSER'S OBLIGATION.

In a recent New York case,<sup>1</sup> the plaintiff was the payee-holder of a series of four promissory notes, payable at monthly intervals. The defendant was an accommodation indorser of the second and third notes in the series. These had been signed before delivery and plaintiff took with knowledge as to the nature of defendant's liability. Contemporaneously with the delivery of the notes to plaintiff by the maker, an acceleration agreement, providing that all four notes would be due and payable immediately upon default in payment of any one, was made and entered into without the knowledge or consent of the defendant herein. Default in payment of the first note occurred, whereupon demand and protest was made on all four notes against all parties liable thereon other than defendant. Upon the due date of each of the respective notes that defendant had endorsed, demand and protest were again made, this time as against defendant as well as the maker. There was a refusal to pay, whereupon action was commenced.

Upon such state of facts, the Court of Appeals absolved defendant from liability, holding that the acceleration agreement constituted a material alteration of the note, consequently voiding it as against the non-assenting party. While it is submitted that the decision reaches a correct conclusion, it is urged that the court's reasons therefor are entirely fallacious from a legal viewpoint.

At the outset, it must be distinctly borne in mind that the acceleration agreement was an extrinsic agreement, not being incorporated in the note by any physical means whatsoever.<sup>2</sup> Equally well must it be remembered that no question of fraud is involved herein; indeed it has been the common practice of the banks, and other lenders, to enter into just such an acceleration agreement as was involved herein whenever there exists a series of notes.<sup>3</sup>

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<sup>1</sup> *Manufacturers Trust Co. v. Steinhardt*, 265 N. Y. 145, 191 N. E. 867 (1934), *reargument denied*, 265 N. Y. —, 191 N. E. — (1934).

<sup>2</sup> *Cf. BRANNAN, NEGOTIABLE INSTRUMENTS LAW* (5th ed.) 143, 912, 913.

<sup>3</sup> *Chafee, Acceleration Provisions in Time Paper* (1919) 32 HARV. L. REV. 747. As a practical matter, the acceleration agreement is in form a physically separate instrument inasmuch as there exists some conflict in the cases as to whether or not the inclusion of such acceleration, or extension, provision in the instrument itself has any effect upon negotiability. *BRANNAN, NEGOTIABLE INSTRUMENTS LAW* (5th ed.) 139 *et seq.*