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## CHARITABLE TRUSTS IN TEXAS

A DISTINGUISHING characteristic of a charitable trust is its immunity from the operation of the constitutional prohibition against perpetual existence.<sup>1</sup> Before this exception to the ban on perpetuities is applicable, the trust must be declared to have been created for a charitable purpose. What is a charitable purpose, and the related problems of benefits, administration, and enforcement of charitable trusts in Texas, will be the subject matter of this comment. The *cy pres* doctrine<sup>2</sup> will be discussed as a corollary to charitable purposes.

For a general classification of charitable purposes reference is made to the *Restatement of the Law of Trusts*<sup>3</sup> where charitable purposes are said to include the following:

“... the relief of poverty, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community.”

The Supreme Court of Texas quotes the above excerpt in the case of *Boyd v. Frost National Bank*<sup>4</sup> as the “current legal concepts of what are charitable purposes.”<sup>5</sup> Another general test of charitable purposes is stated as follows:

“When a trust will, in the opinion of a court, bring about a reasonable amount of advantage to society, according to the then existing

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<sup>1</sup> TEX. CONST. ART. I, § 26. “Perpetuities... are contrary to the genius of a free government, and shall never be allowed, ...”; *Powers v. First Nat. Bank of Corsicana*, 138 Tex. 604, 161 S. W. (2d) 273 (1942); *Paschal v. Acklin*, 27 Tex. 174 (1863).

<sup>2</sup> A general definition of this doctrine is found in 2 BOGERT, TRUSTS AND TRUSTEES, § 431 (1935). “It is the principle that equity will make specific a general charitable intent of a settlor, and will, when an original specific intent becomes impossible or impracticable of fulfillment, substitute another plan of administration which is believed to approach the original scheme as closely as possible.”

<sup>3</sup> 1 RESTATEMENT, TRUSTS § 368 (1935).

<sup>4</sup> 145 Tex. 206, 214, 196 S. W. (2d) 497, 502 (1946).

<sup>5</sup> For another case adopting the same definition, see *Moore v. Sellers*, 201 S. W. (2d) 249, 251 (Tex. Civ. App. 1947) *writ of error refused*.

standards in the community in question, the trust will be declared to be charitable."<sup>6</sup>

The Supreme Court of Texas has been called upon to construe instruments which were intended to create charitable trusts in several comparatively recent cases. The first of such cases was *Allred v. Beggs*<sup>7</sup> in which the testator directed that his executor sell property and distribute the proceeds, with the advice of testator's sister, "to such charities and worthy objects as they . . . shall determine."<sup>8</sup> The Attorney General sought to enjoin the executor from violating the terms of the will on the theory that the will created a charitable trust subject to enforcement by the State. In affirming the dissolution of an injunction granted by the trial court, the Court said:

"When a fund or property is so given that it may or may not be used for charity, or may or may not be used for a charitable object of a public character, without violating the directions of the will, the case is not one for enforcing the gift as a charity in a suit by the Attorney General."<sup>9</sup>

This statement of the rule is in accord with the well established general rule found in *Morice v. The Bishop of Durham*.<sup>10</sup> If the holding in the case had been based solely on the above premise, then it would seem to have a sound basis since "worthy objects" could be interpreted to mean inclusion of non-charitable purposes. However, the Court went further and stated the following rule:

"If a testator leaves his estate to charity generally, but authorizes his executor to determine for what charitable purposes it shall be used, and the will contains no other definite manner of selection, the trust is a personal one, and a court of equity does not have jurisdiction to determine the purpose or select beneficiaries."<sup>11</sup>

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<sup>6</sup> BOGERT, *op. cit. supra* note 2, § 369 (1935).

<sup>7</sup> 125 Tex. 584, 84 S. W. (2d) 223 (1935), comment 14 TEX. L. REV. 124 (1936).

<sup>8</sup> *Id.* at 224.

<sup>9</sup> *Id.* at 228.

<sup>10</sup> 10 Ves. 521 (1805).

<sup>11</sup> 125 Tex. 584, 84 S. W. (2d) 223, 228 (1935).

The fact situation of the case was such that the trust could have been held invalid as allowing a private trust on the theory that the trustee was free to devote the entire benefits to private purposes or on the theory that the discretion of the trustee was not limited to any particular charity but only by charity in general.

A subsequent case<sup>12</sup> involving several purposes specified in a will creating a charitable trust partially clarifies the holding in *Allred v. Beggs*. The testatrix directed that the trustee expend the income from a trust fund "for worthy objects of charity, including the support of the Christian religion as hereinafter indicated."<sup>13</sup> Among the enumerated recipients of the benefits were the indigent, a specific Presbyterian church and orphanage, and worthy boys and girls who wanted to borrow from the fund for educational purposes. Contestants of the will contended that under the principle set forth in *Allred v. Beggs*, the trustee was authorized to select the beneficiaries of a general charity and that therefore the trust failed. This contention was overruled by the court by striking the comma from the above quoted clause and holding that a definite manner of selection by the trustee was outlined in the will. By way of explanation the court admitted that the trustee would have absolute discretion in selecting the worthy students and the impoverished who were to receive benefits, but it was held that classes of beneficiaries were designated, and the only discretion resting in the trustee was the power to select the individual beneficiaries within these classes. At this point the court distinguished between a public and private trust by stating that "an essential element of a charitable trust is that the individual beneficiaries be indefinite."<sup>14</sup> After the court disposed of the issue of discretion in the trustee, it held that "a gift for the relief of poverty generally is a gift to a purely public charity because it relieves the whole citizenship of its burden to the extent of the gift."<sup>15</sup> Further,

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<sup>12</sup> *Powers v. First Nat. Bank of Corsicana*, 138 Tex. 604, 161 S. W. (2d) 273 (1942).

<sup>13</sup> *Id.* at 277.

<sup>14</sup> *Id.* at 283.

<sup>15</sup> *Id.* at 278. *Accord: Bell County v. Alexander*, 22 Tex. 350 (1858).

the fact that the application of the benefits was not confined within any geographical limits did not alter the character of the charitable gift. The gift to a specific Presbyterian church was held to be charitable although only a small portion of the community would derive benefits therefrom. The gift to the Presbyterian orphanage, which admitted orphans of all religious beliefs, was held a valid charity. It was indicated that the same result would have been reached if the orphanage restricted its good works to Presbyterian orphans.<sup>16</sup>

A different proposition was presented in a more recent case<sup>17</sup> where the testatrix left the residue of her property to a trustee to be distributed to such charitable association or associations as the trustee in his discretion might select. The trust was attacked on the ground that the association or associations selected by the trustee might expend the benefits for non-charitable purposes. This contention was overruled for the reason that it is presumed that gifts received from the trustees of a charitable trust will be used exclusively by these associations for charitable purposes, and there was dictum to the effect that the courts stood ready to check any misappropriation of benefits.

A 1947 case<sup>18</sup> decided by the San Antonio Court of Civil Appeals is indicative of the trend toward the crystalization of the law of charitable trusts. Here the testatrix directed that the benefits of the trust be used for Protestant orphanages, for playgrounds, for equipment for YWCA and YMCA work, both local and national, for Red Cross Work, for general charity work through organized and well established societies or associations, and for scholarships. With a minimum of discussion, the court made a sweeping decision that all of the named purposes could be classi-

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<sup>16</sup> For a case holding that a gift to the "Swedish Evangelical Lutheran Church for the benefit and support of the poor helpless and dependent members and orphan children of said church, ..." was a charitable purpose, see *Banner v. Rolf*, 43 Tex. Civ. App. 88, 94 S. W. 1125 (1906) *writ of error refused*.

<sup>17</sup> *Boyd v. Frost Nat. Bank*, 145 Tex. 206, 196 S. W. (2d) 497 (1946).

<sup>18</sup> *Moore v. Sellers*, 201 S. W. (2d) 248 (Tex. Civ. App. 1947) *writ of error refused*.

fied as charitable. Another notable point in this case was that the Court rejected the view adopted by the majority in a Kansas Supreme Court decision<sup>19</sup> that a charitable purpose or object "is one of such character that it might be established by government itself, and be supported by taxation."<sup>20</sup>

Upon determining that a trust is for a charitable purpose and therefore entitled to perpetual existence, the court becomes interested in its administration. Such trusts are commonly administered by trustees, but failure to name a trustee,<sup>21</sup> incapacity of the trustee named to take,<sup>22</sup> or appointment of a trustee not in esse such as a corporation to be,<sup>23</sup> will not defeat the trust. In all of these instances the court will interpose and appoint a trustee to administer the trust.<sup>24</sup> Where the testator or settlor has failed to provide for successors to the original trustee, courts of equity will appoint them.<sup>25</sup> Nor does the trust fail because of a refractory trustee.<sup>26</sup> Where the trustee selected by the settlor or testator is given discretion in selecting charitable objects within a particular class, the Texas Supreme Court has consistently upheld this power of selection.<sup>27</sup> However, it should be noted that such discretion is subject to review by the court for the purpose of determining

<sup>19</sup> Troutman v. De Boissier, 66 Kans. 1, 71 Pac. 286 (1903).

<sup>20</sup> 71 Pac. at 288.

<sup>21</sup> Lake v. Hood, 35 Tex. Civ. App. 32, 79 S. W. 323 (1904); 9 TEX. JUR., *Charities* § 8 (1948). See Carleton v. Roberts, 1 Posey Unrep. 587 (1880).

<sup>22</sup> Lightfoot v. Poindexter, 199 S. W. 1152 (Tex. Civ. App. 1917) writ of error refused; Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 79 S. W. 831 (1904) writ of error refused; Willis v. Alvey, 30 Tex. Civ. App. 96, 69 S. W. 1035 (1902) writ of error refused; 9 TEX. JUR. § 8 (1948).

<sup>23</sup> English v. Johnson, 42 Tex. Civ. App. 118, 95 S. W. 558 (1906).

<sup>24</sup> For a discussion of appointment of trustees and a general collection of cases in point see 2 BOCERT, *op. cit. supra* note 2, § 328 (1935); 3 SCOTT ON TRUSTS § 397 (1939). On the same subject see RESTATEMENT, TRUSTS § 101 (1939).

<sup>25</sup> Pierce v. Weaver, 65 Tex. 44 (1885); Wells v. Richardson, 280 S. W. 608 (Tex. Civ. App. 1926); 9 TEX. JUR., *Charities* § 8 (1948).

<sup>26</sup> Boyd v. Frost Nat. Bank, 145 Tex. 206, 196 S. W. (2d) 497 (1946); Tunstall v. Wormley, 54 Tex. 476 (1881); 9 TEX. JUR., *Charities* § 8 (1948).

<sup>27</sup> Boyd v. Frost Nat. Bank, 145 Tex. 206, 196 S. W. (2d) 497 (1946); Powers v. First Nat. Bank of Corsicana, 138 Tex. 604, 161 S. W. (2d) 273 (1942). For general authorities on the subject see 10 AM. JUR., *Charities*, § 83 (1937); 14 C. J. S. § 39-40 (1939); RESTATEMENT, TRUSTS § 396 (1935); 3 SCOTT ON TRUSTS § 396 (1939).

whether the beneficiary is a proper charitable purpose.<sup>28</sup> The appointment of a compensated corporation as trustee of a charitable trust does not render the trust invalid.<sup>29</sup>

Primarily, the administration of a charitable trust is the duty of the trustee. In contrast to a private trust, however, the beneficiaries of a charitable trust are usually too indefinite to invoke the jurisdiction of a court of equity to enforce the trust if the trustee refuses to act or abuses his control over the trust. It is now well settled in Texas that the interest of society in charitable trusts is sufficient to empower the Attorney General to bring suit in equity to enforce such trusts.<sup>30</sup> However, it would seem that where a beneficiary has a special interest in the performance of a charitable trust, such as an educational corporation created for non-profit purposes, then such beneficiary can bring suit in its own name.<sup>31</sup>

The cases indicate a recurring argument on the part of contestants of charitable trusts that a court of equity does not have power to enforce such trusts unless the Statute of Charitable Uses<sup>32</sup> is a part of Texas common law. This argument was declared to be untenable as early as 1857, when the Supreme Court of Texas held that courts of equity have inherent powers over charitable trusts,<sup>33</sup> and subsequent cases<sup>34</sup> have manifested a disposition to uphold this view. The doctrine of inherent powers as announced by the

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<sup>28</sup> *Boyd v. Frost Nat. Bank*, 145 Tex. 206, 196 S. W. (2d) 497 (1946).

<sup>29</sup> *Ibid.*; *Powers v. First Nat. Bank of Corsicana*, 138 Tex. 604, 161 S. W. (2d) 273 (1942); 2 BOCERT, TRUSTS AND TRUSTEES § 365 (1935).

<sup>30</sup> *Boyd v. Frost Nat. Bank*, 145 Tex. 206, 196 S. W. (2d) 497 (1946); *Powers v. First Nat. Bank of Corsicana*, 138 Tex. 604, 161 S. W. (2d) 273 (1942); *Allred v. Beggs*, 125 Tex. 584, 84 S. W. (2d) 223 (1935); *Carroll v. City of Beaumont*, 18 S. W. (2d) 813 (Tex. Civ. App. 1929) *writ of error refused*.

<sup>31</sup> 3 SCOTT ON TRUSTS § 391 (1939); 2 BOCERT, TRUSTS AND TRUSTEES § 412 (1935); RESTATEMENT, TRUSTS § 391 (1935).

<sup>32</sup> 43 Eliz. C.4 (1601).

<sup>33</sup> *Hopkins v. Upshur*, 20 Tex. 89 (1857).

<sup>34</sup> *Bell County v. Alexander*, 22 Tex. 350 (1858); *Paschal v. Acklin*, 27 Tex. 173 (1863); *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203, 79 S. W. 831 (1904) *writ of error refused*; *City of Houston v. Scottish Rite Benevolent Ass'n*, 111 Tex. 191, 230 S. W. 978 (1921); *Powers v. First Nat. Bank of Corsicana*, 138 Tex. 604, 161 S. W. (2d) 273 (1942); *Boyd v. Frost Nat. Bank*, 145 Tex. 206, 196 S. W. (2d) 497 (1946).

highest court of Texas is in accord with the holding of the United States Supreme Court in *Vidal v. Girard*,<sup>35</sup> where it was concluded that chancery courts in England enforced charitable trusts prior to 1601, the date of enactment of the Statute of Charitable Uses.

Occasionally the courts have been confronted with the problem of enforcing a charitable trust when the purpose for which the trust was created has failed. Is the *cy pres* doctrine<sup>36</sup> applicable in Texas under these conditions? The answer seems to hinge on whether the testator or settlor had a general charitable intent at the time the trust was created. If a general charitable intent can be found and a specific charitable purpose mentioned in the same instrument has failed, then the doctrine will be applied. The opposite result will be reached if no general charitable intent can be established. Thus in *English v. Johnson*,<sup>37</sup> the court found a general charitable intent and directed that benefits of a charitable trust be used for a purpose that "would most nearly conform to the particular specified intention of the donor, to the end that a total failure of the trust should not ensue."<sup>38</sup> On the other hand the court refused to apply the *cy pres* doctrine where the trust had been established to bring about prohibition, and this purpose was accomplished by adoption of the Eighteenth Amendment to the Constitution of the United States before testatrix's death.<sup>39</sup>

In summary, the law is well settled that a charitable trust will not be subjected to the Constitutional ban on perpetuities if it is for a charitable purpose, and the courts have evidenced liberality in finding such a purpose. However, the question seems to be open as to the validity of a trust created for charity in general *without further directions* as to distribution of benefits by the trustee. According to *Allred v. Beggs* such a gift would be void. *Powers*

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<sup>35</sup> 2 How. 127, 11 L. Ed. 205 (1844). This decision overruled *Philadelphia Baptist Ass'n v. Hart*, 4 Wheat 1 (1819).

<sup>36</sup> See note 2, *supra*, for definition.

<sup>37</sup> 42 Tex. Civ. App. 118, 95 S. W. 558 (1906) *writ of error refused*.

<sup>38</sup> *Id.* at 561.

<sup>39</sup> *Women's Christian Temperance Union of El Paso v. Cooley*, 25 S. W. (2d) 171 (Tex. Civ. App. 1930) *writ of error refused*.