

**ALVIN STJERNHOLM AND ELSIE I. STJERNHOLM v. COMMISSIONER**

Respondent-Appellee. (T.C. No. 4726-85) (10th Cir.)

Before Seymour and Tacha, Circuit Judges, and Van Bebber, District Judge. \*\*

The Tax Court properly determined taxpayers were not entitled to a charitable contribution deduction for the value of a mobile educational unit (MEU) they purportedly gave to the Colorado State Chiropractic Society (CSCS) because taxpayers failed to make a completed gift of the property to the organization. We affirm.

Section 170(a) of the Internal Revenue Code allows a deduction for charitable contributions. A charitable contribution is synonymous with the term "gift." **A deduction pursuant to section 170(a) will be allowed only if it satisfies the six essential elements of a gift:**

- (1) A donor competent to make a gift;**
- (2) A qualifying donee capable of taking the gift;**
- (3) A clear and unmistakable intention on the part of the donor to absolutely and irrevocably divest himself of title, dominion, and control of the property;**
- (4) The irrevocable transfer of the present legal title and dominion and control of the entire gift to the donee, so that the donor can exercise no further act of dominion and control over it;**
- (5) A delivery by the donor to the donee of the subject of the gift or of the most effective means of commanding dominion over it; and**
- (6) The acceptance of the gift by the donee.**

A contribution will not qualify as a gift unless the taxpayer places the property beyond his dominion and control. A donor retains dominion and control if he has "the power to direct the disposition or manner of enjoyment of the subject of the gift."

The record in this case supports the Tax Court's finding that taxpayers did not make a completed gift of the MEU to CSCS because they did not part with legal ownership or the right to exercise dominion and control. Taxpayers never transferred the MEU's certificate of title to CSCS. As noted above, there can be no gift under federal tax law unless the taxpayer irrevocably transfers present legal title. Moreover, under Colorado law, failure to transfer legal title, particularly in the case of a motor vehicle, demonstrates a lack of donative intent. We find no support for taxpayer's argument that CSCS was vested with ownership of the vehicle despite taxpayer's failure to transfer the certificate of title.

Nor did taxpayers relinquish dominion and control over the MEU. First, they retained physical possession of the vehicle. The symbolic presentation of the keys to the president of CSCS did

not effect a meaningful transfer of possession of the MEU. Second, all scheduling for use of the vehicle continued to be done by taxpayers after the alleged gift was made. Third, taxpayers reduced some of the component parts of the MEU to personal use. Fourth, taxpayers used the MEU for personal purposes, including hanging a banner from the vehicle advertising a candidate for Governor of Colorado. Fifth, taxpayers were the named insureds on the policy covering the MEU and would have received any proceeds paid if the vehicle had been damaged, destroyed, or stolen. Finally, taxpayers continued to deduct the expenses incurred in relation to the MEU's use as personal trade or business expenses.

The facts of this case do not support taxpayers' contention that they retained dominion and control over the MEU as trustees for CSCS. There is no evidence of any trust relationship between taxpayers and CSCS. Moreover, taxpayers' actions were contrary to those of a trustee. Taxpayers used component parts of the MEU for their personal purposes, retained themselves as beneficiaries on the MEU's insurance policy, and refused to transfer legal title to CSCS.

At most, the record indicates taxpayers gave CSCS a portion of their entire interest in the MEU by allowing the organization to have limited use of the vehicle. Certain types of contributions of the right to use property owned by the donor are deductible. Taxpayers' contribution of the use of the MEU, however, does not fall into any of the categories of deductible contributions of partial interests listed in the relevant provision, Treas. Reg. section 1.170A-7(b). The Tax Court properly concluded taxpayers were not entitled to a deduction for a charitable contribution pursuant to section 170(a).

The Tax Court did not err in finding taxpayers liable for an addition to tax under 26 U.S.C. section 6661. Section 6661 provides for an addition to tax equal to twenty-five percent of the amount of any underpayment of tax attributable to a substantial understatement of income. The Secretary of the Treasury or his designee has the authority to waive this addition to tax if the taxpayer shows there was "reasonable cause for the understatement (or part thereof) and that the taxpayer acted in good faith." The Secretary's refusal to waive an addition to tax is reviewable only for an abuse of discretion.

The relevant regulations indicate a taxpayer must show there was a reasonable cause for his understatement and he acted in good faith to obtain a waiver. Taxpayers admit they never requested a waiver of the penalty by the Commissioner. Because the Commissioner was never presented with the information needed to justify a waiver, the decision not to grant a waiver in this case was not an abuse of discretion. We AFFIRM the rulings of the Tax Court.

ENTERED FOR THE COURT Deanell Reece Tacha Circuit Judge

**FOOTNOTES \* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3. \*\***  
The Honorable C. Thomas Van Bebber, United States District Judge for the District of Kansas, sitting by designation. (MOST CITATIONS DELETED)

**HAROLD DAVIS, ET UX. v. UNITED STATES** United States Supreme Court (On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit; Argued March 26, 1990; Decided May 21, 1990)

**SYLLABUS:** Section 170 of the Internal Revenue Code of 1954 permits a taxpayer to claim a charitable contribution deduction only if the contribution is made "to or for the use of" a qualified organization. Petitioner husband and wife, who are members of the Church of Jesus Christ of Latter-day Saints, claimed such deductions for funds transferred to their sons while they were serving as full-time, unpaid missionaries for the Church. The church requested the payments, set their amounts, and, through written guidelines, instructed that they be used exclusively for missionary work. In accordance with the guidelines, petitioners' sons used the money primarily to pay for rent, food, transportation, and personal needs while on their missions. When the Internal Revenue Service denied petitioners' claim, they filed suit in the District Court. The court ruled in favor of the Government, holding that the payments were not "for the use of" the Church under section 170 because the Church lacked sufficient possession and control of the funds. The court also rejected petitioners' alternative claim that the payments were deductible under Reg. 1.170A-1(g) -- which allows the deduction of "unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible" -- on the ground that petitioners were not themselves performing donated services. The Court of Appeals affirmed.

**Held:** (1) The funds transferred by petitioners to their sons were **not donated "for the use of" the Church** within the meaning of section 170. Pp. 5-13.

(a) In choosing the phrase "for the use of," Congress was most likely referring to donations made to a legally enforceable trust or similar legal arrangement. Although, on its face, the quoted phrase could support any number of meanings, the history of the statute indicates that Congress added the phrase to section 170 in 1921 for the purpose of overruling the Government's prior interpretation that a gift to a trust for charitable purpose was not deductible. Construing the phrase as referring to a trust or similar arrangement comports with the accepted meaning in 1921 of "use" as synonymous with the term "trust." Pp. 6-9.

(b) Thus, the Service's contemporaneous and longstanding interpretation that the phrase "for the use of" is intended to convey a similar meaning as "in trust for" is consistent with the statutory language, fully implements Congress' apparent purpose in adopting it, and must be accepted. Pp. 9-12.

(c) There is no evidence to support petitioners' contentions that Congress intended the phrase "for the use of" to be interpreted as referring to fiduciary relationships in general or as referring to a type of relationship that gives a qualified organization a responsible ability to supervise the use of contributed funds. Pp. 12-13.

(d) The record does not support a finding that petitioners transferred the funds to their sons "in trust for," or through a similarly enforceable legal arrangement for the benefit of, the Church.

There is no evidence that petitioners took any steps normally associated with creating a trust or similar legal arrangement; that the sons had any legal obligation to comply with their promise to use the money in accordance with the Church's guidelines; or that the Church might have a legal entitlement to the money or to a civil cause of action against missionaries using such money for purposes not approved by the Church. P. 13.

(2) The transfer of funds by petitioners to their sons **was not a contribution "to" the Church** under Reg. 1.170 A-1(g). The regulation's plain language indicates that taxpayers may claim deductions only for "unreimbursed expenditures" incurred in connection with their own "rendition of services to [a qualified] organization. " Pp. 14-16. 861 F. 2d 558, affirmed. O'CONNOR, J. , delivered the opinion for a unanimous Court.

**ESTATE OF MARINE v. COMMISSIONER** (990 F.2d 136, 4th Cir 1992)

This appeal, by the estate of David N. Marine, from a decision by the United States Tax Court, raises the issue of whether the discretion vested in Marine's personal representatives by a codicil to Marine's will, which allowed the representatives to make posthumous gifts to certain individuals who contributed to Marine's well-being or were helpful to him, made the charitable remainder unascertainable and not deductible as a charitable gift.

We agree that there was discretion to divert the remainder to non-charitable beneficiaries, and we affirm.

**I.** On August 21, 1982 Marine executed a codicil to the will which . . . read as follows:

EIGHTH: I empower my Personal Representatives, in their sole and absolute discretion, to compensate persons who have contributed to my well-being or who have been otherwise helpful to me during my lifetime by allocating to each of them such items of tangible personal property, or by transferring securities, or by giving them cash, or any combination of tangible personal property, securities or cash, as my Personal Representatives determine is a fair bequest for services rendered. My Personal Representatives shall take into account the length and nature of such services and the spirit with which such services were rendered on my behalf throughout the period of such contribution to my well-being. No single bequest, however, shall exceed one percent (1%) of my gross probate estate, but may be considerably less. The decision of my Personal Representatives as to both the amount of a bequest and what it shall consist of shall be final.

The will and the codicil were filed for probate with the Orphans' Court for Talbot County, Maryland. William H. Price, II and Alice B. Nily, a longtime friend of Marine, were appointed personal representatives. **In accordance with Marine's will and codicil, they made bequests to the housekeeper, Ms. Whitby, and Bartels, Marine's friend and guardian. Whitby received \$ 10,000 and Bartels received \$ 15,000. These were the only bequests made under the discretion provided in paragraph Eighth of the codicil.**

On July 23, 1985 Price and Nily filed the federal estate tax return. **It listed a gross estate of \$ 2,594,455.49 and a deduction of \$ 2,105,081.12 for the residue bequeathed to Princeton and Johns Hopkins.**

In a letter dated July 19, 1988 the Commissioner of Internal Revenue ("the Commissioner") notified the estate that it was disallowing the deduction for the charitable bequest to the schools. The notice stated: It is determined that on the date of death the value of any beneficial interest in property transferred to charity was not then presently ascertainable, and even if such interest had been ascertainable, the legatee, devisee, donee or trustee was empowered to divert the entire property to a use which would have rendered it not deductible had it been directly so bequeathed, devised, or given by decedent. Therefore, the indicated charitable deductions are not allowable.

**II.** Any testamentary gift to "any corporation organized and operated exclusively for . . . scientific . .

. or educational purposes" may be deducted from the gross taxable estate. Sec. 2055(a)(2).

There is no dispute that Princeton University and the Johns Hopkins University are both legitimate recipients of Sec. 2055(a)(2) gifts. **To be deductible as a charitable gift, the value of a testamentary remainder interest must be "presently ascertainable, and hence severable from the non-charitable interest."** Treas. Reg. Sec. 20.2055-2(a) (as amended in 1986).

The Supreme Court addressed the question of ascertainability in *Ithaca Trust Co. v. United States*, 279 U.S. 151, 73 L. Ed. 647, 49 S. Ct. 291 (1929), and upheld a deduction for the remainder of a trust dedicated to charity even though the trustees were authorized to invade the corpus if necessary to "maintain [the widow] in as much comfort as she now enjoys."

Justice Holmes writing for the Court stated: The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator, and even after debts and specific legacies had been paid, was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs. *Id.* at 154. Because there was a fixed standard, the Court found that the remainder was ascertainable at the date of death and the charitable remainder was deductible.

Ascertainability at the date of death of the amount going to charity is the test. To be "presently ascertainable" the power of the trustee to divert the corpus from the charities must be restricted by a fixed standard. In *Merchants Bank of Boston, Executor v. Commission of Internal Revenue*, 320 U.S. 256 (1943), the Court was faced with a will which created a trust, with the income going to the widow for her life, and upon her death all but \$ 100,000 of the principal was to pass to certain charities. The trustee was authorized to invade the corpus, at such time or times as my trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

The Court held that the extent to which the principal might be used was not restricted by a fixed standard, and Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. We conclude that the Commissioner properly disallowed the deduction for estate tax purposes.

There is no fixed standard that can be applied to the discretion given to Marine's personal representatives. They had "sole and absolute discretion, to compensate persons who have contributed to my well-being or who have been otherwise helpful to me during my lifetime." There is no limit as to the number of persons who may be compensated, and there are no standards for determining and measuring such imprecise elements as "contribution," "my well-being" and "have been otherwise helpful to me during my lifetime." What would be considered a "contribution" to Marine's "well-being?" How large must the contribution be, and over what period of time must it have been made? How would the personal representatives define "helpful?" Would helpfulness during his last illness be rewarded at a higher rate than helpfulness during his infancy or childhood? Dr. Marine lived 60 years and there must have been many persons "helpful" to him in different degrees throughout his life. The number of such individuals has no limit and a standard for measuring "contribution," "well-being" and "helpful" does not exist. This is similar to the problem created by the "widow's happiness" in *Merchant's Bank*, supra. These elements are uncertain and cannot be measured with any precision, and therefore they make the amount going to charity unascertainable at the time of death. The fact that only two persons received payments under Paragraph Eighth is of no moment, because this could not be determined at the time of death so as to affect ascertainability.

Our court has considered the question of ascertainability in *Commissioner v. Robertson's Estate*, 141 F.2d 855 (4th Cir. 1944), and *Greer v. United States*, 448 F.2d 937 (4th Cir. 1971). Marine's estate argues that the powers given to the personal representatives in the present case are no broader than the powers given to the Greer and Robertson trustees, which we found were ascertainable. These opinions are distinguishable. The discretion of the Greer and Robertson trustees was limited to the needs and prior life-styles of the beneficiaries and followed the reasoning of *Ithaca Trust Co.*, supra. In *Robertson*, we gave deference to the factual finding of the tax court that "the possibility that the charitable bequests would fail or be diminished was so remote as to be nil." 141 F.2d at 858. In *Greer*, the government conceded: that the trustees' power to pay principal to the plaintiff is limited by an ascertainable standard--plaintiff's previous living standard--and hence there is no argument that the deductibility of the charitable remainder is destroyed by the power of invasion. It is the lack of a definite standard that makes the amount of the charitable bequest under the Marine will uncertain and unascertainable.

- III.** We hold that the language of the codicil, giving the personal representatives "sole and absolute discretion" to reward those who had been helpful to Marine during his life, established no real standards. The personal representatives had virtually unlimited authority as to the number of gifts, although the amount of each bequest was limited to one percent of the corpus. Since the number of such bequests was unlimited and a standard for determining the amount of a bequest was uncertain, the amount of the charitable bequest could not be ascertained at the time of death and the deduction is not available. The tax court was correct in its determinations.

AFFIRMED

**CHARLES H. ADDIS AND CINDI ADDIS v. COMMISSIONER**

UNITED STATES TAX COURT    Filed June 10, 2002

Plaintiffs ("Ps") claimed charitable contribution deductions for their payments to the National Heritage Foundation ("NHF") of \$36,285 in 1987 and \$ 36,000 in 1998. NHF, in turn, paid those amounts as premiums on a so-called *charitable split-dollar life insurance* policy on the life of Ps (husband and wife). NHF was entitled to receive 56 percent and Ps' family trust was entitled to receive 44 percent of the death benefit provided by the policy.

NHF was not required to pay the premiums for that policy. However, Ps reasonably expected NHF to do so because Ps' continued payments to NHF, and NHF's receipt of a death benefit, depended on NHF's paying the premiums.

NHF provided Ps with receipts for their payments which stated that NHF did not provide any goods or services to Ps in return for the payments. Ps claimed charitable contribution deductions for the entire amount of their payments to NHF.

**Held:** No part of Ps' payments to NHF is deductible as a charitable contribution to NHF because Ps did not meet the substantiation requirements of Sec. 170(f)(8), I.R.C., and Reg. Sec. 1.170A-13(f)(6), Income Tax Regs.

## **RUSSELL, ET AL. v. YALE UNIVERSITY ET AL.**

Appellate Court Of Connecticut 54 Conn. App. 573; 737 A.2d 941 (August 24, 1999) JUDGES: Lavery, Sullivan and Daly, Js. In this opinion the other judges concurred. Opinion by: LAVERY

The plaintiffs, an heir of the settlor of a charitable trust,<sup>1</sup> alumni donors and students of the named defendant, Yale University (Yale), appeal from the judgment of dismissal rendered by the trial court in granting the Yale's motion to dismiss, which asserted that the trial court lacked subject matter jurisdiction on the ground that the plaintiffs lacked standing. On appeal, the plaintiffs claim that the trial court improperly granted Yale's motion to dismiss because, where the attorney general elects not to participate in a proceeding involving a charitable trust, a person with a "special interest" may appear on behalf of the trust to protect the interests of the beneficiaries and that the plaintiff heir, alumni donors and students have the special interest necessary to confer standing on them. We affirm the judgment of the trial court.

The following facts are necessary for our resolution of this appeal. Yale is a nonprofit corporation ... **The settlor, John W. Sterling, died in 1918. At that time, he left, in trust, money for the erection of a building or buildings that would constitute a fitting memorial reflecting his gratitude and affection for his alma mater, Yale. The trustees were given broad discretion in the disposition of these funds and directed, if their discretion made it advisable, to consult with Sterling's sisters with regard to the use of the funds. The will directed that the money not be used for the purchase of land or as part of Yale's general fund. In 1930, the Sterling trustees voted to contribute money for the erection and maintenance of the divinity school quadrangle that bears Sterling's name.** No other restrictions existed in the will and no property rights were reserved for Sterling's heirs by the will.

The divinity school is one of Yale's graduate professional schools, which educates men and women for the Christian ministry and provides theological education for persons engaged in other professions. Prior to the commencement of this action, the president of Yale appointed a committee to undertake a comprehensive study of the divinity school and its future. In late 1996, the Fellows of the Yale Corporation approved certain recommendations, as made to them by the president and dean of the divinity school, calling for **the reorganization of the divinity school, including the demolition of large portions of the Sterling Divinity Quadrangle.**

The plaintiffs took exception to the reorganization and instituted this action seeking a temporary and permanent injunction enjoining Yale from carrying out the reorganization, a declaratory judgment that Yale's reorganization plan constitutes an abuse of discretion as a trustee of a public charitable trust, and an accounting of all gifts and donations Yale received for the benefit of the divinity school and of charges against the divinity school's endowment. **Yale**

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<sup>1</sup> Cynthia Sterling Russell, is an heir and claimed successor in interest to John W. Sterling, benefactor of the named defendant, Yale University.

**moved to dismiss the complaint on the ground that the plaintiffs lack standing to bring suit.**

"It is a basic principle of our law . . . that the plaintiffs must have standing in order for a court to have jurisdiction to render a declaratory judgment. . . . A party pursuing declaratory relief must . . . demonstrate, as in ordinary actions, a justiciable right in the controversy sought to be resolved, that is, contract, property or personal rights . . . as such will be affected by the [court's] decision. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . The determination of aggrievement presents a question of fact for the trial court and a plaintiff has the burden of proving that fact. . . . The conclusions reached by the trial court cannot be disturbed on appeal unless the subordinate facts do not support them. . . . Where a plaintiff lacks standing to sue, the court is without subject matter jurisdiction." *Steeneck v. University of Bridgeport*, 235 Conn. 572, 578-80, 668 A.2d 688 (1995). \*\*\*

Although **Carl J. Herzog Foundation, Inc. v. University of Bridgeport**, 243 Conn. 1, 699 A.2d 995 (1997), concerns the interpretation of a statute, n5 in that case, our Supreme Court set out, at length, the common-law rule with regard to standing to bring suit against a charitable entity, which controls the issues here. **"At common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so. 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 the suit of the attorney general, to devote the property to that purpose.** . . . At common law, it was established that equity will afford protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation. . . . The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are [enforceable] at the instance of the attorney general. . . . It matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift." (Citations omitted)

**"The donor himself has no standing to enforce the terms of his gift when he has not retained a specific right to control the property, such as a right of reverter, after relinquishing physical possession of it. . . . As a matter of common law, when a settlor of a trust or a donor of property to a charity fails specifically to provide for a reservation of rights in the trust or gift instrument, neither the donor nor his heirs have any standing in**

**court in a proceeding to compel the proper execution of the trust, except as relators. . . .**

There is no such thing as a resulting trust with respect to a charity. . . . Where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him have any standing in a court of equity as to its disposition and control."

(Citations omitted)

**The trial court found the facts noted previously in this opinion and concluded that if Sterling were alive today, he would have no right to enforce conditions of his gift, and that, therefore, *his heir and successor* lacks standing to bring this suit, as well. We agree.**

For the same reasons, the trial court also concluded that the **plaintiff alumni donors also lack standing** as contributors of unrestricted charitable gifts to their alma mater and nothing about the fact that they are graduates of the divinity school gives them standing. We agree with that conclusion as well. See *id.*

**With regard to the third group of plaintiffs, the students, the trial court determined that they also lack standing. We agree** with the trial court and hold that, absent special injury to a student or his or her fundamental rights, students do not have standing to challenge the manner in which the administration manages an institution of higher education. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 641, 4 L. Ed. 629 (1819); The plaintiff students lack standing because they alleged no injuries to themselves or to any of their fundamental rights, collectively or individually.

We hold, therefore, that the trial court properly concluded that, although the plaintiffs are sincere in their efforts to maintain the divinity school as a leader in theological education and preparation for the Christian ministry and they acted in good faith based on motives that are beyond question, the plaintiffs, as a matter of law, lack standing to adjudicate the equitable remedies they seek.

The judgment is affirmed.

In this opinion the other judges concurred.

*Louise Obermeyer, et. Al. vs. Bank of America, N.A., Washington University, Jeremiah W. (Jay) Nixon, and Washington University Dental Alumni Association, Respondents.*

**No. ED81603 COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT, DIVISION ONE**

**August 26, 2003, Filed**

**CASE SUMMARY**

**PROCEDURAL POSTURE:** The trial court held the decedent established the trust with a general charitable intent and applied the cy pres doctrine ruling in favor of respondent university. The heirs appealed the trial court's application of the cy pres doctrine to the trust.

**OVERVIEW:** The decedent was a practicing dentist and served on the faculty of the university dental school. After the death of the last named relative, the trust provided that the property then constituting the trust would be paid over and distributed free from trust unto the university, for the exclusive use and benefit of its dental alumni. In 1991, the university closed its dental school. In 2000, the last living named beneficiary under the trust passed away.

The heirs then sued, seeking a declaration that the trust failed and, as heirs, that they be granted the trust proceeds. The trial court found that the decedent had a general charitable intent to further dental medicine at the university. The heirs, on appeal, alleged that the trial court erred in holding the trust was established with a general rather than a specific charitable intent. The appellate court agreed. The trust devise was drawn narrowly providing that the corpus use would be exclusively for the dental alumni development fund which was created to support the continuation of the university's dental school. Unambiguous and binding language that excluded all other educational opportunities at the university was used. **Y.** Dentist donated to Washington University education in his lifetime and could have donated the corpus to Washington University's general development fund. However, he used unambiguous and binding language that excluded all other educational opportunities at Washington University; he only wanted to benefit the continuation of the Dental School.

*Thus, we conclude Dentist established the Trust with a specific charitable intent. The corpus must revert to his heirs because the cy pres doctrine is not applicable. The judgment of the trial court is reversed.*

\* \* \* \* \*

**SUPREME COURT OF MISSOURI**

**November 25, 2003, Decided**

**PRIOR HISTORY: Obermeyer v. Bank of Am., N.A., 2003 Mo. App. LEXIS 1349 (Mo. Ct. App., Aug. 26, 2003) Respondent Washington University's application for *transfer* from the Missouri Court of Appeals, No. ED81603, sustained and cause ordered transferred.**

**\* \* \* \* \***

## **SUPREME COURT OF MISSOURI**

**2004 Mo. LEXIS 84**

**June 28, 2004, Filed**

**OVERVIEW:** The testator's estate included a trust to provide benefits for his niece and nephews. The trust provided that, upon the death of the survivor of the niece or nephews, the trust estate would be paid over and distributed free of trust unto the university for the exclusive benefit of its dental alumni fund. After the testator died, the university discontinued the dental alumni fund and closed the dental school. The trust paid benefits to the niece and nephews until the last of the three died. The great nieces of the testator brought an action for declaratory judgment and construction of the inter vivos trust. The trial court ruled in favor of the university. On appeal, the court found that the trial court's disposition of the gift attempted to fulfill the testator's intent as near as possible, because it required the university to use the money for dental-related education. The fact that the dental alumni fund and the dental school no longer existed did not frustrate the objective, as the medical school at the university continued to teach and practice dental medicine. There was no evidence that the testator ever contemplated that the money would go to his great nieces.

**OUTCOME:** The court affirmed the order of the *trial court* *[[reverse the Appeals Court]]*.

### **OPINION: Introduction**

When the late Dr. Joseph Kimbrough established his estate plan in 1955, Washington University had a dental school and a Dental Alumni Development Fund that existed to benefit the school. His 1955 estate plan included a trust to provide benefits for his niece and nephews during their lifetimes after Dr. Kimbrough's death. The trust provided that, upon the death of the survivor of the niece and nephews, the trust estate would be "paid over and distributed free of trust unto Washington University ... for the exclusive use and benefit of its Dental Alumni Development Fund."

Dr. Kimbrough died in 1963. Washington University discontinued the Dental Alumni Development Fund in 1965, and the university closed its dental school in 1991. The fund no longer exists. The trust paid benefits to the niece and nephews until 2000, when the last of the three died. The death of the last survivor in 2000 was the event that triggered the clause that the trust estate be paid to Washington University for the exclusive use and benefit of the Dental Alumni Development Fund.

Louise Obermeyer and Elizabeth Salmon, the great, great-nieces of Dr. Kimbrough, brought this action for declaratory judgment and construction of Dr. Kimbrough's inter vivos trust, which was valued at approximately \$ 2.8 million in 2000. The circuit court held that Dr. Kimbrough established the trust with a general charitable intent and applied the cy pres doctrine, ruling in favor of Washington University, and directing that the university use the funds to support two dental-related professorships in the name of Dr. Kimbrough.

The gift "free from trust" was an absolute gift to Washington University. The circuit court appropriately provided for the disposition of the trust estate. The judgment of the circuit court is affirmed.

\* \* \* Washington University and the Attorney General agreed with the heirs that there was a charitable trust and that it was impossible or impracticable to carry out the charitable purpose in the trust because the Dental Alumni Development Fund no longer exists. They, however, claim the trust was created with general charitable intent and that, under the cy pres doctrine, the funds should be applied to Washington University for dental-related endeavors to most nearly carry out Dr. Kimbrough's charitable intent.

The circuit court held that Dr. Kimbrough established the trust with a general charitable intent and ruled in favor of Washington University. *The circuit court then applied the doctrine of cy pres and ordered the assets be used to establish and maintain one or two chairs in Dr. Kimbrough's name for research and practice in cleft palate/craniofacial deformities, or for maxillofacial surgery and prosthodontics, or both. After opinion by the Court of Appeals, Eastern District, this Court granted transfer. Jurisdiction is proper in this Court.*

*Standard of Review* \* \* \*

*Missouri courts apply the cy pres doctrine based on all of the relevant facts and circumstances, not simply the language of the instrument making the grant. First Nat'l Bank of Kansas City v. Jacques, 470 S.W.2d 557, 560 (Mo. 1971). Because this Court considers all relevant facts and circumstances, which may include evidence outside of the trust document, this case is not confined to the construction of the trust document. Upon review, the judgment of the trial court will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The reviewing court defers to the trial court's factual findings and credibility determinations, but examines questions of law de novo. Missouri Soybean Ass'n v. Missouri Clean Water Com'n, 102 S.W.3d 10, 22 (Mo. banc 2003). Where the circuit court applies the cy pres doctrine, this Court gives deference to that court's application of the doctrine and disposition of the funds.*

\* \* \*

*Application of the Cy Pres Doctrine*

*The cy pres doctrine is based on the concern of equity to protect and preserve charitable bequests.* Levings v. Danforth, 512 S.W.2d 207, 209 (Mo. App. 1974). The original French phrase was "cy pres comme possible," meaning "as near as possible." GEORGE T. BOGERT, TRUSTS 520 (6th ed. 1987). The doctrine of cy pres exists "to permit the main purpose of the donor of a charitable trust to be carried out as nearly as possible where it cannot be done to the letter." Thatcher v. Lewis, 335 Mo. 1130, 76 S.W.2d 677, 682 (Mo. 1934).

It was the policy of courts of equity "to declare valid, if possible, gifts to charity." Burrier v. Jones, 338 Mo. 679, 92 S.W.2d 885, 889 (Mo. banc 1936). Charitable trusts are favorites of equity, and they are "given effect wherever possible, by applying the most liberal rules of which the nature of the case will permit." First Nat'l Bank of Kansas City v. Stevenson, 293 S.W.2d at 367. Courts have the power and duty to apply the cy pres doctrine to seek to determine "as nearly as may be" the general purpose and intent of the settlor and adopt a plan or carry the general intent into fruition, thus preventing a failure of the charitable trust. Restatement (Second) of Trusts, sec. 399, p. 298 (1959).

The cy pres power is generally confined to charitable trusts. BOGERT, TRUSTS at 520. Missouri courts have previously applied the cy pres doctrine only to charitable trusts; this Court has held that "absent the creation of a trust, there is no room for the application of the doctrine of cy pres." Burrier, 92 S.W.2d at 889.

While acknowledging the historical limitation of the cy pres doctrine to trusts, the doctrine is appropriate in certain cases involving gifts to charitable corporations. At issue here is a gift with direction from the grantor indicating the intended use of the trust assets. *While the cy pres power is applied to gifts in trust, other jurisdictions have applied cy pres "to absolute gifts to charitable corporations or other organizations."* GEORGE T. BOGERT, TRUSTS AND TRUSTEES, sec. 431, p. 105 (2d ed. 1991). That view is consistent with analogous Missouri cases. This Court has held that a person may devote property to a charitable purpose by transferring it to a charitable corporation, in which case the principles applicable to charitable trusts are applicable to charitable corporations. Voelker v. Saint Louis Mercantile Library Ass'n, 359 S.W.2d 689, 694 (Mo. 1962). Courts have applied the cy pres doctrine when a charitable institution that is an absolute donee has a deficiency. BOGERT, TRUSTS AND TRUSTEES, sec. 440 at 179. Such instances include: when a charitable institution cannot be identified by the name used; when impossibility arises in carrying out the intention of the donor charitable corporation, as the absolute donee ceased to exist before the gift was made, went out of existence after it received the gift, merged, or dissolved; and when the charitable corporation declines the gift, does not meet a condition precedent to the vesting of a gift, or is incompetent to take title. *Id.* at 179-195.

Although the trust itself has ceased to exist, the gift comes from a trust. Moreover, most cy pres cases involve situations where many years have passed since the creation of a trust or other origination of the gift and the time the gift is to be given effect. Cy pres exists to conform the terms of the gift to current conditions. The money in the trust was to be "distributed free from trust unto Washington University, St. Louis, Missouri, for the exclusive use and benefit of its Dental Alumni Development Fund." Were Dr. Kimbrough's gift a charitable trust, the Court would readily apply the cy pres doctrine as the parties suggest. Dr. Kimbrough's gift from the trust is an

absolute gift to Washington University with an instruction that can no longer be observed because the fund ceased to exist in 1965. Although courts typically reserve application of the cy pres doctrine for charitable trusts, and the absolute gift to the university may not fall under the categories listed above, the cy pres analysis is adopted to carry out Dr. Kimbrough's intent.

### *Cy Pres Analysis*

*Missouri courts hold that to apply the doctrine of cy pres, three requirements must be met. First, the trust in question must be a valid charitable trust. Second, it is or becomes impossible, impracticable, or illegal to carry out the specific terms of the trust. Finally, the settlor must have established the trust with a general charitable intent. Comfort, 576 S.W.2d at 336, holds that "unless and until it is determined that a trust has failed, the question of general or specific charitable intent is irrelevant." If the settlor's intent was specific, the cy pres doctrine cannot be applied. The result would be a reversion for the settlor or the settlor's heirs.*

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.

The parties agree that a trust was created with a charitable intent and that the trust has failed because the dental school was closed and the Dental Alumni Development Fund no longer exists. The parties maintain that the issue is whether the trust was created with general or specific charitable intent.

A general charitable intent exists where there is an intent to assist a certain general type or kind of charity. *Ramsey v. City of Brookfield*, 361 Mo. 857, 237 S.W.2d 143, 145 (Mo. 1951). General charitable intent "is an intent that a gift be continued within the limits of its general purpose and that shall not cease when a particular thing is accomplished. Unquestionably, when the intent is to apply the gift to a continuing problem, there is a general charitable intent." *Thatcher*, 76 S.W.2d at 683. Gifts made to aid "education, science, literature, the poor, the sick, and so on" demonstrate general charitable intent. *Comfort*, 576 S.W.2d at 338. Because most charitable gifts are made to ameliorate a continuing problem, it must be determined whether the donor "intended to benefit all those affected by the continuing problem, or only certain of those persons." *Id.* The grantor's intent is specific when the grantor intended to "aid that kind of charity only in a particular way or by a particular method or means" and further intended that, "if the particular means failed, the gift failed." *Id.*

Dr. Kimbrough's gift to Washington University for the Dental Alumni Development Fund was not for a particular task to be accomplished, but to support dental medicine at Washington University, a profession of which he was deeply proud. The trust document contained no suggestion that the gift should fail if the particular fund ceased to exist.

**In determining whether the charitable intent of the grantor is specific or general, the Court in *Comfort v. Higgins* set forth additional factors courts should consider.**

**First, *Comfort* distinguished between gifts of money and land, finding that courts have viewed gifts of land as "strong evidence of an absence of general charitable intent," while monetary gifts suggest general intent. *Id.* at 338. Dr. Kimbrough gave a gift of money, not real property, thus indicating general charitable intent.**

**The second factor is the existence of a reverter clause associated with the gift. Use of a direction for a reversion to the settlor in the case of failure indicates specific charitable intent, while the absence of a reverter clause supports general charitable intent. *Id.* Dr. Kimbrough's estate plan included reverter clauses as to the bequests for all of the individuals, which instructed the gifts to go to Washington University; however, it did not include a reverter clause as to the gift to Washington University in the will or trust.**

**The conclusion that a general charitable intent exists is typically reached where the heirs were either specifically excluded or had received other gifts in the will, indicating that no further gifts were included. *Id.* In his last will and testament, Dr. Kimbrough granted to Washington University the rest and remainder of his estate. In his will, Dr. Kimbrough left Louise Obermeyer \$ 5,000 and did not provide for Elizabeth Salmon in his estate plan. The lack of a reverter clause for the charitable gift and the provision for one of his great, great-nieces are indicative of Dr. Kimbrough's general charitable intent.**

**The third relevant factor is whether the charitable gift was made in trust or outright. A gift in trust is indicative of specific charitable intent, while a gift made outright indicates general intent. *Id.* at 339. The trust provides that at the death of the survivor of the life beneficiaries, the trust is to be paid to Washington University "free from trust." Dr. Kimbrough's gift "free from trust" suggests general charitable intent.**

**The heirs argue that the use of the language, "for the exclusive use and benefit," requires a finding of specific charitable intent. HN21 Where the terms of a charitable trust direct a means of execution or dedicate the fund to a type of charity "forever" or "for no other purpose," or upon condition that it be applied "to no other purpose," these provisions do not necessarily demonstrate absence of a general charitable intent. *Ramsey*, 237 S.W.2d at 146. In *Ramsey*, a grant for the "sole purpose of building and equipping and maintaining a City hospital" and "no other" did "not necessarily show absence of a general charitable intent." *Id.* "Such provisions do not, ipso facto, show an intent that the trust should cease in the event of impossibility or impracticability of using the specified means." *Id.***

***Dr. Kimbrough's Charitable Intent***

**The question remains what Dr. Kimbrough would desire if he knew that his gift could not be used by the Dental Alumni Development Fund for the continued operation and prestige of the dental school.**

**"The accomplishment of the ultimate purpose of the testator is the matter of paramount importance and its achievement must be the object of any judicial permission to alter or deviate from the trust terms." Reed v. Eagleton, 384 S.W.2d 578, 586 (Mo. 1964). The Court considers whether unforeseen circumstances have arisen that threaten the fulfillment of the charity and whether or not such circumstances warrant a court's exercise of its jurisdiction to enforce and protect charitable trusts. Id. at 585-86. In discerning the intent of the grantor, the basic equitable issue is what the settlor would desire if he or she knew that the trust could not be carried out. Levings, 512 S.W.2d at 211. A court is required to consider all the surrounding circumstances evidencing the grantor's intent. See First Nat'l Bank of Kansas City v. Jacques, 470 S.W.2d at 560. To adhere too strictly to the words of the testator may result in the defeat of the testator's ultimate purpose. IVA SCOTT ON TRUSTS, sec. 399.4, p. 535 (4th ed. 1989). If the testator intended to make the property useful for charitable purposes, to render it useless for such purposes defeats the testator's intention. Id. "Under the guise of fulfilling a bequest, this is making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow." John Stuart Mill, quoted in IVA SCOTT ON TRUSTS, sec. 399 at 535.**

**The record repeatedly shows that Dr. Kimbrough loved dentistry and was very proud of his profession. Dr. Kimbrough graduated from the Washington University Dental School, taught at the Washington University Dental School, gave unrestricted gifts to Washington University, and left the remainder of his trust to Washington University, not to the dental school.**

**This Court agrees with the circuit court's conclusion that Dr. Kimbrough's charitable intent was to further education and dental medicine at Washington University. There is no evidence that Dr. Kimbrough wanted his gift so narrowly drawn and so inflexible that if it could not be used in a specifically named fund, it should lapse. The circuit court's decision to establish one or two chairs in Dr. Kimbrough's name for research and practice in dental fields is consistent with Dr. Kimbrough's charitable intent.**

**From 1954 to 1963, Dr. Kimbrough made 11 gifts to Washington University, including gifts to the Dental Alumni Development Fund, the Washington University School of Medicine, the Second Century Development Program, the Alumni Fund, and the Century Club. The gift in question was made to Washington University, not to the dental school. The only limitation on the gift was that it be used in the fund. The fact that Dr. Kimbrough made multiple other inter vivos gifts to Washington University that were unrelated to the dental school suggests that he had a general charitable intent to support dental education at Washington University, not only through the Dental Alumni Development Fund.**

**This Court also recognizes that under the tax law in effect before 1969, virtually all charitable remainder trusts provided substantial tax savings to the grantor's estate. See Ellis First Nat'l Bank**

v. United States, 213 Ct. Cl. 44, 550 F.2d 9, 11-12 (Ct. Claims 1977). Dr. Kimbrough's 1955 amendment to the trust, giving the remainder interest to Washington University as opposed to his heirs, was essential to the tax savings and may be evidence of his general charitable intent.

*Dental Medicine Continues at Washington University*                      The basic aspects of dental education at Washington University Dental School were the treatment of patients, education of dental students, and research of the faculty. Applying the funds to Washington University for dental-related endeavors most nearly carries out Dr. Kimbrough's intent because treatment of patients, post-graduate dental education, and research are ongoing at Washington University. Although the dental school has been closed and the university no longer grants the basic degree in dental medicine, some dentistry continues through the medical school. \* \* \* Neither the closing of the dental school nor the change in the Dental Alumni Development Fund make Dr. Kimbrough's gift useless. The trust estate can be used to continue treatment of dental patients, research, and post-graduate education in dental medicine.

### *Conclusion*

Cy pres literally means "as near as." Dr. Kimbrough's objective was to further dental education at Washington University. The circuit court's disposition of the gift attempts to fulfill Dr. Kimbrough's intent as near as possible because it requires Washington University to use the money for dental-related education. The fact that the Dental Alumni Development Fund and the dental school no longer exist does not frustrate that objective, as the medical school at Washington University continues to teach and practice dental medicine.

*There is no evidence that Dr. Kimbrough ever contemplated that the money would go to his great, great-nieces, and he did not include a provision for the reversion of the property to his heirs in the event that the fund or dental school would cease to exist.*

*The general purpose of Dr. Kimbrough's gift to support educational programs and projects in dental fields at Washington University can be accomplished. While the specific fund designated by the grantor to carry out this purpose no longer exists, the circuit court's disposition of the trust assets carries out Dr. Kimbrough's intent.*

The judgment of the circuit court is affirmed.

Michael A. Wolff, Judge

All concur.

## ESTATE OF EVELYN AFTON MAHERAS, DECEASED V. DR. WILLIAM H. COOK

Supreme Court Of Oklahoma 1995 OK 406; 897 P.2d 268 (April 18, 1995)

OPALA, J. -- **The dispositive issue presented on certiorari is whether a third party, who receives no personal benefit from a decedent's will, may be regarded in law as capable of unduly influencing a will's procurement or its making? We answer in the affirmative.**

### I. THE ANATOMY OF LITIGATION

Evelyn Afton Maheras [Maheras or decedent] died testate on January 16, 1991 at the age of 96. **She left the bulk of her estate to the First Baptist Church of Bartlesville [First Baptist], whose pastor, William H. Cook [appellant or Cook], is named co-executor of the will. The decedent's sole heir is her nephew, Richard H. Suagee [appellee or Suagee].** Suagee, as contestant in this proceeding to admit the will to probate, urged at nisi prius that (1) Maheras did not have testamentary capacity, (2) her will's procurement and making had been unduly influenced by Cook, and (3) the subscribing witnesses were interested parties. *The district court found that, although the decedent had testamentary capacity and the subscribing witnesses were disinterested, she had been unduly influenced by Cook.*

The record documents a history of interaction among Maheras, Cook and First Baptist dating back to 1970. Maheras suffered from alcoholism and during the 1970's her health and living conditions deteriorated. From 1980 to 1983 Cook became closely acquainted with Maheras and visited in her home several times. By 1984 all of Maheras' friends were First Baptist members. Cook arranged for several of them to regularly assist Maheras by cleaning her home. Through this process the decedent became very dependent upon Cook and reposed great trust in him.

Although in 1983 Maheras attended several sessions of an estate planning seminar at First Baptist,<sup>1</sup> she failed to make the last session where a "Will Information Guide" was distributed. In January 1984 Cook brought her a copy of the missed "Will Information Guide" and spent several hours assisting Maheras in cataloging her assets. Later Cook requested Jesse J. Worten, III [Worten] -- a lawyer and First Baptist member -- to contact Maheras and discuss her will's preparation. Worten had not represented Maheras in any other legal matters. He was recommended by Thomas Preston after Preston declined Maheras' request to prepare her will, stating he no longer practiced law. Before Worten drafted Maheras' will he had one fifteen-minute telephone conversation with her in which he discussed the contents of her estate using the "Will Information Guide" provided him by Cook. After the will was drafted, it was sent to Cook. He then delivered it to Maheras and discussed its terms with her. Worten subsequently discussed the will's provisions in a second ten to fifteen-minute telephone conversation with her.

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<sup>1</sup> These sessions were conducted by Thomas B. Preston, a lawyer and member of First Baptist. Although later named as a co-executor in Maheras' will, he declined to serve.

On February 4, 1984 Maheras was taken to Worten's office by a First Baptist member where after reviewing the will's terms a second time she executed her will. All of the subscribing witnesses were First Baptist members chosen by Cook. They testified at trial that Maheras understood the provisions of her will, appeared normal, and was aware of her nephew's [Suagee] existence. Worten sent to Cook his bill for the preparation of Maheras' will, which was presented to and paid by Maheras.

After the trial court ruled that Cook's actions had overborne Maheras' free agency, Cook appealed and Suagee counter-appealed for review of the nisi prius testamentary-capacity finding. The Court of Appeals concluded (1) that the decedent had testamentary capacity and (2) that because Cook personally received nothing by the will's terms, he was in contemplation of law incapable of unduly influencing Maheras. On certiorari previously granted, the Court of Appeals' opinion is now vacated and the trial court's probate order affirmed. \* \* \*

**II. IN THE ABSENCE OF MITIGATING CIRCUMSTANCES, UNDUE INFLUENCE IS PRESENT IF (1) A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN THE WILL'S MAKER AND ANOTHER PARTY AND (2) THAT OTHER PARTY ASSISTED IN THE PREPARATION OR PROCUREMENT OF THE WILL**

If a will is found to have been affected by undue influence, the district court may declare it void in whole or in part.<sup>2</sup> The burden of persuasion in a will contest based on undue influence rests on the contestant.<sup>3</sup> **A two-prong test is used to determine whether undue influence**

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<sup>2</sup> The pertinent terms of 84 O.S.1991 43 are: "A will or part of a will procured to be made by duress, menace, fraud or undue influence, may be denied probate, and a revocation procured by the same means, may be declared void."

<sup>3</sup> See in regard to will contests the provisions of 58 O.S.1991 Sec. 41(2) to the effect that ". . . on the trial the contestant is the plaintiff, and the petitioner [proponent] is defendant." In re Wah-Kon-Tah-He-Um-Pah's Estate, 109 Okla. 126, 234 P. 210, 215 (1925); see also Brown v. Thomason, Okl., 354 P.2d 451, 455 (1960).

The common law accords with this statutory authority. See GEO. P. COSTIGAN, JR., WILLS, DESCENT, AND

**taints the procurement or preparation of a will. First, the court must search for the presence of a relationship which would induce a reasonably prudent person to repose confidence and trust in another -- i.e., a confidential relationship.<sup>4</sup> Second, the court must decide that the stronger party in the relationship assisted in the preparation or procurement of the weaker person's testamentary instrument.** Factors to be considered in applying this two-prong test include:

1. Whether the person charged with undue influence was not a natural object of the maker's bounty; 2. Whether the stronger person was a trusted or confidential advisor or agent of the will's maker; 3. Whether he/she was present and/or active in the procurement or preparation of the will; 4. Whether the will's maker was of advanced age or impaired faculties; 5. Whether independent and disinterested advice regarding the testamentary disposition was given to its maker.

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ADMINISTRATION 308 (3d ed. 1941), which states that ". . . most courts put the burden of establishing undue influence on the contestant." See also the UNIFORM PROBATE CODE 3-407 (11th ed. 1993) which states:

"Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof."

<sup>4</sup> A confidential relationship is a fiduciary relationship and exists whenever trust and confidence are placed by one person in the integrity and fidelity of another.

When assaying the nature of a relationship to determine if it was confidential, the court's probe is not confined to instances where there was an interaction of persons who stand vis-a-vis one another in certain limited classes -- e.g., familial relationships -- since dependent relations may occur in any number of different settings. **Upon finding that a confidential relationship existed between the will's maker and another and ascertaining that the stronger party actively assisted in the preparation or procurement of the will, a rebuttable presumption of undue influence will at once arise. The person who desires to overcome this presumption must then go forward to produce evidence showing either that (a) the confidential relationship had been severed before the critical events in controversy or (b) the will's maker actually received independent and competent advice about the disposition of his/her estate.**<sup>5</sup>

**The existence of a confidential relationship between Maheras and Cook is clearly shown by the record. Cook was Maheras' spiritual advisor and a close personal friend for more than the last fourteen (14) years of her life. First Baptist, the recipient of the bulk of Maheras' estate under her will, was not a natural object of her bounty.**<sup>6</sup> She obviously placed great trust in Cook. It is unquestionable that he actively participated in securing the will which was economically beneficial to First Baptist. Maheras had suffered from alcoholism and was of advanced age at the time she executed her will. The record does not disclose that she ever received from any person independent and disinterested advice regarding her will. Upon finding that Cook stood in a confidential relationship with Maheras and that he had unduly influenced her in the procurement and making of the will in contest, the district court properly shifted to Cook the burden of producing evidence which would rebut the presumption of undue influence.

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<sup>5</sup> When a will's maker consults fully and privately about his/her will with a person so dissociated from the stronger party that the advice may be treated as having been given impartially and confidentially, the advice could be deemed independent.

<sup>6</sup> **The natural object of a will-maker's bounty is one related to him/her by consanguinity.**

### III

#### **A PERSON WHO IS NOT A BENEFICIARY UNDER A WILL'S TERMS MAY BE REGARDED AS LEGALLY CAPABLE OF OVERBEARING THE WILL-MAKER'S FREE AGENCY**

At common law as well as under our statutory law a will which is the product of an influence brought to bear against the maker in any manner which overcomes his/her free agency cannot be sustained. Whether the person exerting the overbearing influence actually benefits personally under the will's terms is immaterial.<sup>7</sup> A person's lack of beneficiary status under the will's terms does not render one legally incapable of, or excuse him/her from, exerting undue influence.

When a decedent's spiritual advisor procures a will that benefits his/her church, a court may find the will-maker's free agency overborne by the advisor's act if the law's criteria for establishing undue influence are met.<sup>8</sup> While religious institutions are not factually capable of unduly influencing one's will, individuals acting on their behalf can. The gravamen of undue influence is legal harm from the wrongful exertion of power over the will's maker rather than the receipt of personal benefit from the offending act of influence. \* \* \*

**IV SUMMARY -- Where a will-maker and another are shown to have stood in a confidential relationship and the stronger person, who actively participated in the procurement and preparation of the testamentary document, overbore the maker's free agency, a nisi prius order denying a will's admission because of the presence of undue influence will be sustained in the absence of proof that either (1) the confidential relationship had been severed before the critical events in question or (2) independent advice was given to the will-maker.** Cook's receipt of some personal benefit (or interest) under Maheras' will is not a sine qua non for a judicial finding of undue influence. Upon showing that the will-maker's free agency was overborne by anyone standing in a confidential (or fiducial) relationship, a presumption of undue influence arises. The will's proponent must then come forward with evidence to overcome this presumption. When that burden is not met, a nisi prius order based

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<sup>7</sup> See W.D. ROLLISON, THE LAW OF WILLS (1939), which states: "As a general rule, it is immaterial by whom undue influence is exercised, if the free agency of the testator in making his will was destroyed by undue influence."

<sup>8</sup> Hegney v. Head, 126 Mo. 619, 29 S.W. 587, 590 (Mo. 1895); Muller v. St. Louis Hosp. Ass'n., 5 Mo. App. 390, 399 (1878). The common law also voids inter vivos gifts to churches, which were secured by spiritual advisors' undue influence....

upon a finding of undue influence is sustainable. The trial court's decision that denies the Maheras will admission to probate is neither clearly contrary to the weight of the evidence nor to the applicable principles of equity jurisprudence. **Today's holding makes Maheras' testamentary capacity a moot issue.** *on certiorari previously granted, the court of appeals' opinion is vacated; the district court's probate order is reinstated and affirmed.*

**REV. RUL. 78-197; 1978-1 C.B. 83** (January, 1978)

**Redemption; charitable contribution followed by prearranged redemption.** A taxpayer with voting control of a corporation and an exempt private foundation who donates shares of the corporation's stock to the foundation and, pursuant to a prearranged plan, causes the corporation to redeem the shares from the foundation does not realize income as a result of the redemption. *The Service will treat the proceeds as income to the donor under facts similar to those in the Palmer decision only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption.*

In *Palmer v. Commissioner*, 62 T.C. 684 (1974), aff'd on another issue, 523 F.2d 1308 (8th Cir. 1975), the United States Tax Court held that the Internal Revenue Service incorrectly treated a gift of stock to an organization exempt from income taxation pursuant to section 511(c)(3) of the Internal Revenue Code of 1954, followed by a prearranged redemption of the stock, as a redemption of the stock from the donor followed by a gift of the redemption proceeds to the donee. The Service will follow *Palmer* on this issue, acq., page 6, this Bulletin.

In *Palmer*, the taxpayer had voting control of both a corporation and a tax-exempt private foundation. Pursuant to a single plan, the taxpayer donated shares of the corporation's stock to the foundation and then caused the corporation to redeem the stock from the foundation. It was the position of the Service that the substance of the transaction was a redemption of the stock from the taxpayer, taxable under section 301 of the Code, followed by a gift of the redemption proceeds by the taxpayer to the foundation. The United States Tax Court rejected this argument and treated the transaction according to its form because the foundation was not a sham, the transfer of stock to the foundation was a valid gift, and the foundation was not bound to go through with the redemption at the time it received title to the shares. Also see, *Grove v. Commissioner*, 490 F.2d 241 (2nd Cir. 1973); *Behrend v. United States*, No. 72-1153, 72-1156 (4th Cir. 1972); and *Carrington v. Commissioner*, 467 F.2d 704 (5th Cir. 1973).

The Service will treat the proceeds of a redemption of stock under facts similar to those in *Palmer* as income to the donor only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption.