

settlement assumes importance as the sole remaining remedy.<sup>12</sup> However, in the absence of a liberal construction of Rule 23, the probability that other shareholders will not hear of private settlements can only be partially offset by making the penalty more severe if they should find out. Although the results in the instant case were the most practical possible at that late stage in the litigation,<sup>13</sup> it would seem that the more urgent need is not for increasing the severity of the penalty if the settlement should come to light, but rather for increasing the probability that it will come to light by extending mandatory notice provisions.

### GIFT FOR "BENEFICIAL" MUNICIPAL PURPOSES AS CHARITABLE TRUST

The testatrix, a Colorado resident, left real and personal property situated in Arizona to "trustees for any purpose deemed by them beneficial to the Town of Paonia, Colorado, or the Paonia Schools." A proceeding was brought to determine heirship in connection with the ancillary probate of the will in Arizona.<sup>1</sup> It was held that the trust was unenforceable as a valid charitable trust because there was no restriction limiting use of the trust funds to a charitable purpose, and the plan of execution was not sufficiently clear. *In re Hayward's Estate*.<sup>2</sup>

Trusts for the benefit of a particular community,<sup>3</sup> and trusts for the benefit

<sup>12</sup> Restitution to the corporation or other shareholders of the money from the private settlement raises an interesting collateral question. If the statute of limitations has not run, are the other shareholders nevertheless barred by this action from bringing another derivative suit on the original cause of action? If not, shall the fruits of the settlement be set off against a later judgment in favor of the corporation?

<sup>13</sup> The decision of the Supreme Court in the instant case might support the contention that shareholders and their attorneys in derivative actions should also be considered fiduciaries when they act in good faith, and thus should be entitled to fees measured against the total class recovery if they are successful. Such an extension of the fiduciary concept would encourage legitimate derivative suits by those who might otherwise be deterred by the risk of the personal loss of attorneys' fees and costs in the events of failure. It should also be noted that the decision in the instant case does not create any additional penalty for a shareholder who dismisses a derivative suit for a valid reason. He is only deterred from making a private settlement at the expense of the other shareholders.

<sup>1</sup> Ariz. Code Ann. (1939) § 38-1506.

<sup>2</sup> 178 P. 2d 547 (Ariz., 1947).

<sup>3</sup> *Peirce v. Attorney General*, 234 Mass. 389, 125 N.E. 609 (1920) (to trustees "... to be paid . . . in the discretion of said trustees to the use and benefit of the Town of Middleborough, in such manner as said trustees or their successors shall determine"); *Rotch v. Emerson*, 105 Mass. 431 (1870) (agricultural and other philanthropic purposes at trustees' discretion); *Corporation of Wrexham v. Tamplin*, 28 L.T.N.S. 761 (1873) (for the use and benefit of a town); *Nixon v. Brown*, 46 Nev. 439, 214 Pac. 524 (1923) (gift of a theater for the use of the inhabitants of a town). There appears to be little doubt that a direct devise to a city even without specifying its use is a valid gift to charity. *Dickenson v. City of Anna*, 310 Ill. 222, 141 N.E. 754 (1923); *Estate of Boyles*, 4 T.C. 1092 (1945); *In re Smith*, [1932] 1 Ch. 153 ("unto my country England—"); *Mayor of Faversham v. Ryder*, 18 Beav. 318 (1854) (for the benefit and ornament of a town); Rest., Trusts § 373 comm. (c) (1935). For a pertinent categorization of valid charitable purposes, see statement of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531, at 583.

of schools<sup>4</sup> are generally recognized as valid in that their purposes are to lessen the burdens of government and advance education.<sup>5</sup> The court in the instant case, however, stated that "there is a long line of decisions holding that where a trust is for a 'benevolent' purpose it fails because 'benevolent' includes matters which are not necessarily charitable."<sup>6</sup> But in the *Hayward* case, the purposes were not less charitable because the word "beneficial" was employed in the will rather than the magic word "charitable."<sup>7</sup> The court failed to distinguish between those cases in which the intent to benefit a community is clear, and those in which the testamentary language takes a much more general form, such as trusts for "benevolent,"<sup>8</sup> "deserving,"<sup>9</sup> or "philanthropic"<sup>10</sup> purposes or institutions. Trusts of the latter type are frequently held void,<sup>11</sup> though by no means always.<sup>12</sup>

In declaring the trust invalid, the court cited a number of authorities following the majority rule that no discretion can be given to trustees to apply or not to apply the gift to charitable purposes.<sup>13</sup> The court feared that "the trustees under this authority might well deem it to be beneficial to the Town of Paonia to build and operate a race track, department store, or any other commercial venture."<sup>14</sup> But this objection, if applicable, is not confined to the particular word "beneficial." Whenever trustees have discretion, that discretion is open to

<sup>4</sup> The Statute of Charitable Uses, 43 Eliz. c. 4 (1601), includes as valid charitable purposes the maintenance of schools of learning, free schools, and the maintenance of scholars in universities. There is only one school in the town of Paonia and it is a free, public school. Cf. *Russell v. Allen*, 107 U.S. 163 (1882); *Bell County v. Alexander*, 22 Tex. 351 (1858).

<sup>5</sup> 2 Bogert, *Trusts and Trustees* § 378 (1935).

<sup>6</sup> 178 P. 2d 547, 553 (Ariz., 1947).

<sup>7</sup> See *Peirce v. Attorney General*, 234 Mass. 389, 125 N.E. 609 (1920); *Corporation of Wrexham v. Tamplin*, 28 L.T.N.S. 761 (1873).

<sup>8</sup> *Read v. McLean*, 240 Ala. 501, 200 So. 109 (1941); *In re Johnson's Estate*, 100 Ore. 142, 106 Pac. 385 (1921).

<sup>9</sup> *Nichols v. Allen*, 130 Mass. 211 (1881).

<sup>10</sup> *In re Eades*, [1920] 2 Ch. 353.

<sup>11</sup> *Chichester Diocesan Fund and Board of Finance v. Simpson*, [1944] A.C. 341 ("For such charitable or benevolent objects . . . as my executors may select"). For an excellent discussion of this and related cases, see *Scott, Trusts for Charitable and Benevolent Purposes*, 58 *Harv. L. Rev.* 548 (1945).

<sup>12</sup> *Funk Estate*, 353 Pa. 321, 45 A. 2d 67 (1946) ("worthy"); *Baptist Home of Monroe County v. Gardner*, 145 N.Y. Supp. 275 (1914) ("worthy institutions and worthy persons"); *Thorp v. Lund*, 227 Mass. 474, 116 N.E. 946 (1917) ("national or philanthropic"); *St. Louis Union Trust Co. v. Burnet*, 59 F. 2d 922 (C.C.A. 8th, 1932) ("benevolent").

<sup>13</sup> *In re Sutro's Estate*, 155 Cal. 727, 102 Pac. 920 (1909); *Zollman*, *American Law of Charities* 264 (1924); *Tudor, Charities* 64 (5th ed., 1929); 3 *Page, Wills* 593 (1941); *Rest., Trusts* §§ 123, 398 (1935); 10 *Am. Jur., Charities* § 100 (1937). But see *ibid.*, at § 101 for a more pertinent discussion.

<sup>14</sup> *In re Hayward's Estate*, 178 P. 2d 547, 551 (Ariz., 1947). But contrast the position of the Colorado court in *Haggin v. International Trust Co.*, 69 Colo. 135, 146, 169 Pac. 138, 142 (1917): "It is generally held that courts look upon charitable bequests with great favor and will not speculate as to possible happenings in order to defeat them."

abuse. Normally, courts will not interfere with the exercise of discretion unless the trustees act "unreasonably."<sup>15</sup> Where trustees in similar circumstances have attempted to abuse their discretion, the attorney-general,<sup>16</sup> the mayor,<sup>17</sup> and even the head of the school system<sup>18</sup> have brought suits to enjoin a breach of the trust.

While the general purposes of a charitable trust must be sufficiently clear to be capable of judicial enforcement,<sup>19</sup> if the trust is otherwise valid it will not fail for uncertainty if the trustees are invested with discretion to select particular purposes and beneficiaries.<sup>20</sup> As far as the scope of a trustee's discretion is concerned, the better rule is that it may be without specific limit.<sup>21</sup> However, in the principal case the attempted trust might have been upheld even under the narrower rule that a trustee's discretion must be limited to a defined class.<sup>22</sup>

The Arizona court declared that the clause in question would also fail if Colorado law were applied, and thus dismissed the conflict of laws problem.<sup>23</sup> While it is questionable whether Colorado law should apply to the entire estate,<sup>24</sup> there is little doubt that Colorado precedents support the validity of the trust in the instant case.<sup>25</sup>

<sup>15</sup> *Davis v. Inhabitants of Barnstable*, 154 Mass. 224, 28 N.E. 165 (1891).

<sup>16</sup> *Longcor v. City of Red Wing*, 206 Minn. 627, 289 N.W. 570 (1940); *State ex rel. Carmichael v. Bibb*, 234 Ala. 46, 173 So. 74 (1937); *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 45 Pac. 270 (1896).

<sup>17</sup> *Clarion v. Central Savings Bank & Trust Co.*, 71 Colo. 482, 208 Pac. 251 (1922). *Contra: Waterbury Trust Co. v. Porter*, 130 Conn. 494, 35 A. 2d 837 (1944).

<sup>18</sup> *Reed v. School District of Pittsfield*, 91 N.H. 209, 16 A. 2d 704 (1940).

<sup>19</sup> *In re Evenson's Will*, 161 Wis. 627, 155 N.W. 145 (1915).

<sup>20</sup> *Chicago Bank of Commerce v. McPherson*, 62 F. 2d 393 (C.C.A. 4th, 1932) *Mitchell v. Reeves*, 123 Conn. 549, 196 Atl. 785 (1938); *Porcher v. Cappelmann*, 187 S.C. 491, 198 S.E. 8 (1938). *Contra: Woodcock v. Wachovia Bank & Trust Co.*, 214 N.C. 224, 199 S.E. 20 (1938), noted in 6 Univ. Chi. L. Rev. 332 (1939). Many state legislatures have fixed this rule by statute. See Ala. Code Ann. (Michie, 1940) tit. 47, § 145; Conn. Gen. Stat. (1930) §§ 4825, 4826; Mich. Stat. Ann. (Henderson, 1937) § 26-1191; Minn. Stat. (1945) § 501.12; N.Y. Personal Property Law (McKinney, 1936) § 12; N.Y. Real Property Law (McKinney, 1945) § 113 N.C. Gen. Stat. (Michie, 1943) § 36-21. *Contra: Ky. Gen. Stat. Ann. (Cullen, 1946) § 381.260 (grant for charitable or humane purposes valid "if it points out with reasonable certainty the purposes of the charity and the beneficiaries thereof").*

<sup>21</sup> *Galiger v. Armstrong*, 114 Colo. 397, 165 P. 2d 1019 (1946); *Woodstown Nat. Bank & Trust Co. v. Snelbaker*, 136 N.J. Eq. 62, 40 A. 2d 222 (1944); *In re Olmstead's Will*, 131 N.Y. Misc. 238, 226 N.Y. Supp. 637 (1928); *In re Planck's Estate*, 150 Wash. 301, 272 Pac. 972 (1928); *King v. Rockwell*, 93 N.J. Eq. 46, 115 Atl. 40 (1921); *Minot v. Baker*, 147 Mass. 348, 17 N.E. 839 (1888). *Contra: Tilden v. Green*, 130 N.Y. 29, 28 N.E. 880 (1891); *Bush's Ex'r v. Mackoy*, 267 Ky. 614, 103 S.W. 2d 95 (1937); *Wentura v. Kinnerk*, 319 Mo. 1068, 5 S.W. 2d 66 (1928).

<sup>22</sup> *Zollman*, *American Law of Charities* §§ 413-15 (1924).

<sup>23</sup> 178 P. 2d 547, 551 (Ariz., 1947).

<sup>24</sup> As far as the personality is concerned, the law of the domicile of the testator at the time of his death controls. *Jones v. Habersham*, 107 U.S. 174 (1882); *In re Pence's Estate*, 96 Colo. 270, 42 P. 2d 199 (1935).

<sup>25</sup> *Estate of Schleier*, 91 Colo. 172, 13 P. 2d 273 (1932); *Estate of Burnham*, 97 Colo. 188, 48 P. 2d 1019 (1935); *Haggin v. International Trust Co.*, 69 Colo. 135, 169 Pac. 138 (1917):

There has been a curious reluctance on the part of some courts to effectuate the intent of the testator,<sup>26</sup> as in the instant case, contrary to the well-recognized rule favoring charitable trusts.<sup>27</sup> Some recent decisions, in contradistinction to the principal case, indicate an encouraging trend toward the carrying out of the intent of the testator, even in the absence of apt words,<sup>28</sup> and even when the purpose had not theretofore been deemed charitable.<sup>29</sup> The Arizona court said that it would attempt to carry out the intent of the testatrix, but not to the extent of writing a new will for her. However, by defeating the clear intent of the testatrix, the court did write a new will, contrary both to good law and good sense.

### LIMITATIONS ON POWERS OF SUCCESSOR TRUSTEE

An original testamentary trustee, a brother of the testator, was vested with discretionary powers to rent, sell, or lease any property without court order, to choose any investment without being restricted to "legals,"<sup>31</sup> to provide by will for a successor trustee, and generally to "do any and all things that he may deem necessary, or that I might do were I living." The trustee was to pay a stated monthly income to the testator's wife for life, and the balance of the income was to be used by him for personal purposes. At the death of the testator's wife, the entire property was to pass to the original trustee's children. Suit was brought under the Georgia Declaratory Judgment Act<sup>2</sup> to determine what powers the plaintiff, as successor trustee named in the original trustee's will, could exercise in the management and control of the estate. The court held that the successor trustee may not exercise the same powers conferred by will upon the original trustee, because the powers in question were personal and discretionary. *Gilmore v. Gilmore*.<sup>3</sup>

The Supreme Court of Georgia, although recognizing that the intention of the testator must be the controlling factor in determining the powers of a successor trustee,<sup>4</sup> refused to go beyond the "plain and unambiguous" language of

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Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429 (1902). As to definiteness of beneficiaries, see Colo. Stat. Ann. (Michie, 1935) c. 41, § 184.

<sup>26</sup> Woodcock v. Wachovia Bank & Trust Co., 214 N.C. 224, 199 S.E. 20 (1938). See also 14 Univ. Chi. L. Rev. 686 (1947), noting Porter v. Baynard, 28 So. 2d 890 (Fla., 1946).

<sup>27</sup> Gossett v. Swinney, 53 F. 2d 772 (C.C.A. 8th, 1931); Walker v. Central Tr. & Sav. Bank, 318 Ill. 253, 149 N.E. 234 (1925). But see In re Kline's Estate, 138 Cal. App. 514, 32 P. 2d 677 (1934).

<sup>28</sup> Funk Estate, 353 Pa. 321, 45 A. 2d 67 (1946); Mitchell v. Reeves, 123 Conn. 549, 196 Atl. 785 (1938).

<sup>29</sup> Cochran v. McLaughlin, 128 Conn. 638, 24 A. 2d 836 (1942); Nixon v. Brown, 46 Nev. 439, 214 Pac. 524 (1923); Dulles's Estate, 218 Pa. 162, 67 Atl. 49 (1907).

<sup>31</sup> Ga. Code (1933) § 108-417. <sup>2</sup> Ga. L. (1945) 137-39. <sup>3</sup> 41 S.E. 2d 229 (Ga., 1947).

<sup>4</sup> 3 Bogert, Trusts and Trustees § 553 (1935); 2 Scott, Trusts § 196 (1939).