

RACIALLY DISCRIMINATORY TRUSTS AND THE CY PRES DOCTRINE IN VIRGINIA

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INTRODUCTION

The recent Virginia Supreme Court decision, *Hermitage Methodist Homes of Virginia v. Dominion Trust Company*,¹ has again focused attention on the cy pres doctrine and its ability to reform charitable trusts that discriminate. Charitable trusts, like all trusts, are "administered according to the trustor's intent as expressed in the trust instrument or will."² One danger that exists in charitable trusts, however, which does not exist in private trusts, is that charitable trusts have a potentially infinite life because they are exempt from the Rule Against Perpetuities.³ Because society and laws can change over a period of years, a formally "non-discriminatory" charitable trust can lose its specific purpose or become obsolete.⁴ Cy pres, which literally means "as near," allows a court to revise a charitable trust, as long as the settlor has a general charitable

¹ *Hermitage Methodist Homes of Virginia v. Dominion Trust Co.*, 239 Va. 46, 387 S.E.2d 740 (1990), *cert. denied sub nom. Prince Edward School Foundation v. Hermitage Methodist Homes of Virginia*, ___ U.S. ___, 111 S. Ct. 277 (1990).

² Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635 (1988) [hereinafter *Charitable Efficiency*].

³ *Id.* at 635.

⁴ See *Campbell v. Board of Trustees of the James Barry-Robinson Home for Boys*, 220 Va. 516, 260 S.E.2d 204 (1979) (testamentary trust creating a "Home and School of Arts and Trades for Orphan Boys" was altered to allow the school to become a private preparatory school and later a residential treatment center because, among other reasons, so few boys could meet the orphan, religious, and residency requirements).

intent, in order to "meet unforeseen emergencies or changed circumstances that threaten the trust's existence."⁵

This article will examine how the cy pres doctrine is applied to Virginia trusts that contain racially-discriminatory provisions. First, it gives a brief account of the cy pres doctrine's history and then focuses on how cy pres generally works. The article then examines the application of cy pres to Virginia trusts containing racially-discriminatory provisions.⁶ Finally, it concludes with the general formalities to be observed when using the cy pres doctrine.

BRIEF HISTORY OF THE CY PRES DOCTRINE

The English common law provided for prerogative and judicial cy pres doctrines.⁷ Under the judicial doctrine of cy pres, the courts attempt to fulfill the settlor's intentions "as nearly" as practicable.⁸ The judicial cy pres doctrine is generally accepted, though

⁵ *In Re Estate of Wilson: Judicial Reformation of Discriminatory Charitable Trusts*, 5 PACE L. REV. 433, 442 (1985) [hereinafter *Judicial Reformation*]; see also RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impractical 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.

Id.

⁶ Courts are more reluctant to use the cy pres doctrine to reform gender and religious discrimination in charitable trusts. In these instances, the courts may refuse to find state action though the state has some involvement in the trust, or the courts will reform the trust by removing the state action instead of excising the discriminatory restriction. See generally Luria, *Prying Loose the Dead Hand of the Past: How Courts Apply Cy Pres to Race, Gender, and Religiously Restricted Trusts*, 21 U.S.F. L. REV. 41, 54 (1986).

⁷ SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS § 399.1 (1960).

⁸ *Id.*

sometimes reluctantly, in the United States.⁹ Conflicting with the desire to fulfill the testator's wishes, the prerogative doctrine of cy pres enabled the king, in his role as *parens patriae*, to deliver, in certain cases, the "property for any charitable purpose" he desired.¹⁰ In exercising his prerogative, the king had no duty to consider the testator's wishes;¹¹ he would merely indicate to the Chancellor how he desired the property to be disposed.¹² The king's prerogative powers under the cy pres doctrine could sometimes lead to grave abuses of the testator's intentions.¹³ Because of such abuses, the prerogative cy pres doctrine is not recognized in the United States.¹⁴ Despite American courts' disapproval of the prerogative cy pres doctrine, as American philanthropy increased at the end of the 1800's, the courts were less reluctant to use the judicial cy pres doctrine, especially as some "charitable donors" left their gifts to select groups in society.¹⁵

⁹ Luria, *supra* note 6, at 45.

¹⁰ SCOTT, *supra* note 7, at 714.

¹¹ *Id.* at 715.

¹² *Id.*

¹³ *Da Costa v. De Pas*, 1 Amb. 228 (1754) (Jewish testator left sum of money in trust for the establishment of an assembly "for reading the Jewish law and instructing people in the Jewish religion." The trust was held unlawful) (*cited in* SCOTT, *supra* note 7, at 715). During this period in England, such a gift was illegal because it promoted a religion contrary to the established religion. The king, using his prerogative powers, directed the fund be used to support a preacher in the Foundling Hospital and to "instruct the children in that institution in the Christian religion." SCOTT, *supra*, at 715.

¹⁴ SCOTT, *supra* note 7, at 715.

¹⁵ Luria, *supra* note 6, at 45.

GENERAL APPLICATION OF THE CY PRES DOCTRINE

The cy pres doctrine cannot be used to change the settlor's bequest merely to suit the "desires or convenience of the trustee."¹⁶ Under the cy pres doctrine, courts can revise charitable trusts when social or legal changes threaten the trust with nullification.¹⁷ Courts will delete the offending provisions of the threatened trust, however, only when they can find a general charitable intent within the trust, showing that the settlor's "primary purpose was to aid humanity as a whole."¹⁸ If the settlor depicts no general charitable intent and the trust's original purpose becomes illegal, impossible, or impracticable, then the trust will fail.¹⁹

In applying the cy pres doctrine, most courts use a "standard three-part analysis."²⁰ First, the trust must be a valid charitable trust,²¹ meaning that it has met the formalities for creating a charitable trust. Second, the court must find that the intent of the trustor is hindered to such an extent that cy pres modification is justified.²² Finally, the court must find a manifestation of the settlor's general charitable intent

¹⁶ *Judicial Reformation*, *supra* note 5, at 444.

¹⁷ *Luria*, *supra* note 6, at 41. *See also* *Smith v. Moore* 225 F. Supp. 434 (E.D. Va. 1963) (The court concluded that because there was no forfeiture provision for non-compliance with the directions of the trust then the settlor did not intend explicit directions), *modified*, 343 F.2d 594 (4th Cir. 1965).

¹⁸ *Luria*, *supra* note 6, at 41.

¹⁹ *Id.*

²⁰ *See Charitable Efficiency*, *supra* note 2, at 642.

²¹ *See id.*; *see also* RESTATEMENT (SECOND) OF TRUSTS § 399 comment a (1959).

²² *See Charitable Efficiency*, *supra* note 2, at 642.

within the trust.²³ The court in *Smith v. Moore*²⁴ interpreted Virginia's cy pres statute, enacted in 1946, as adopting this three-part analysis.

Before invoking the cy pres doctrine, whether by statute or through the medium known as judicial power, it is necessary that there be (1) a *valid charitable trust* without a gift over, (2) an existing *general charitable intent*, and (3) the beneficiaries must be indefinite or uncertain, or (4) the purpose of the trust must be *indefinite, impossible to perform, or so impracticable of performance as to characterize the fulfillment of the purpose as "impossible."*²⁵

Section § 55-31 of the Virginia Code²⁶ is designed to enforce charitable trusts and to prevent their failure if specific performance is impossible.²⁷

"General charitable intent" is the element in this three-part analysis that creates the most cy pres litigation.²⁸ In Virginia, charitable gifts are "viewed with peculiar favor by the courts, and every presumption consistent with the language contained in the instruments of gift will be employed in order to sustain them."²⁹ In determining

²³ *Id.*; see also RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

²⁴ 225 F. Supp. 434 (E.D. Va. 1963) (The sum of money provided in the trust was inadequate to fulfill the specific intention of the trust, the construction of a free hospital. The cy pres doctrine was used to fulfill the testators' intentions "as nearly as" possible by using the trust to build a wing onto an existing hospital and using this wing as a free clinic), *modified*, 343 F.2d 594 (4th Cir. 1965).

²⁵ *Id.* at 441 (emphasis added).

²⁶ VA. CODE ANN. § 55-31 (1950):

When any . . . person gives . . . any real or personal property in trust to or for any educational, charitable, or eleemosynary purpose, the indefiniteness . . . of the beneficiaries named . . . or the indefiniteness of the purpose of the trust itself, shall not defeat any such trust and, if the trust is in other respects valid under the laws of this State, it shall be administered to conform as near as may be to the purpose for which created or, if impossible of performance for this purpose, for some other educational, charitable, benevolent or eleemosynary purpose.

²⁷ *Smith*, 224 F. Supp. at 447.

²⁸ *Charitable Efficiency*, *supra* note 2, at 642.

²⁹ *Thomas v. Bryant*, 185 Va. 845, 852, 40 S.E.2d 487, 490 (1946), (citing *Hinsdale v. Chicago City Missionary Society*, 375 Ill. 220, ___, 30 N.E.2d 657, 663 (1940)).

whether the settlor has a general charitable intent, Virginia law has accepted many of the positions in Section 399 of the Second Restatement of Trusts.³⁰ *Smith*³¹ embraces the Restatement's position that terms like "property shall be devoted 'forever' to a particular purpose, or . . . shall be devoted to that purpose 'and no other purpose,' or that the property is given 'upon condition' that it be applied to that purpose, does not necessarily indicate the absence of a more general charitable intention of the settlor . . ."³² Such terms can act merely as an emphasis that the settlor wants the property to be applied for no other purposes "as long as it is possible and practicable and legal to apply it to the specified purpose"³³ These terms do not necessarily indicate that the trust should end if it becomes impossible, impracticable, or illegal to achieve the trust's particular purpose.³⁴

*Smith*³⁵ also accepts the Restatement's position that it is easier to establish a general charitable intention when the trust is possible and legal at the outset and becomes impossible or illegal at a later date, than it is when the trust fails at the outset.³⁶ With this former circumstance, the courts can fairly infer that the settlor must have expected circumstances to change over a period of time and that his particular purpose may not be achieved.³⁷ The courts presume that a settlor would want his trust

³⁰ *Smith*, 225 F. Supp. at 441-42.

³¹ *Id.* at 441.

³² RESTATEMENT (SECOND) OF TRUSTS § 399 comment c (1959).

³³ *Id.*

³⁴ *Id.*

³⁵ 225 F. Supp. at 442.

³⁶ RESTATEMENT (SECOND) OF TRUSTS § 399 comment i (1959).

³⁷ *Id.*

to be modified, rather than fail and possibly be distributed among heirs he may not know.³⁸

Finally, *Smith*³⁹ accepts the Restatement's position that the trust will be modified to achieve its purpose, as nearly as possible, when the amount provided for the charitable purpose is too small, making it impossible for the trust to accomplish its goal.⁴⁰ The court will do this only if there is first a general charitable intent in the trust. In *Smith*, the court, in determining whether the settlor had a general charitable intent, stated that "the background of the testator, his interest and spirit in community projects, his education and business acumen, may all be considered," unless forbidden by the explicit terms in the trust.⁴¹

THE CY PRES DOCTRINE AND RACIALLY-DISCRIMINATORY TRUSTS

State Action

In order to apply the cy pres doctrine, a court must determine that the following conditions have been met: (1) the settlor has made a valid charitable trust, (2) the terms of the charitable trust are not "impossible to perform" or so impracticable as to make the trust impossible to perform or illegal, and (3) the settlor had a general charitable intent.⁴² The Fourteenth Amendment of the United States Constitution provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States; nor shall any State . . . deny

³⁸ *Id.*

³⁹ 225 F. Supp. at 442.

⁴⁰ RESTATEMENT (SECOND) OF TRUSTS § 399 comment j (1959).

⁴¹ *Smith*, 225 F. Supp. at 442.

⁴² *Smith v. Moore*, 225 F. Supp. 434, 441 (E.D. Va. 1963), *modified*, 343 F.2d 594 (4th Cir. 1965).

to any person within its jurisdiction the equal protection of the laws."⁴³ A private trust is illegal when it violates the equal protection clause of the Fourteenth Amendment because either "the institution administering the trust is itself a state agency,"⁴⁴ or because the trust is intertwined with the state."⁴⁵

In *Shelley v. Kraemer*,⁴⁶ the Court held that section one of the Fourteenth Amendment does not apply to private conduct even if the conduct is discriminatory or wrongful.⁴⁷ Thus, restrictive agreements between private parties do not violate any rights guaranteed under the Fourteenth Amendment.⁴⁸ The Fourteenth Amendment applies solely to actions taken by a state.⁴⁹ However, the Court in *Shelley* found that actions taken by a state court and its judicial officers, in their official capacities, are state actions within the scope of the Fourteenth Amendment.⁵⁰ Therefore, any acts performed by a state's legislative, judicial, or executive branches will be considered state actions governed by the Fourteenth Amendment. "It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] amendment extend to all actions of

⁴³ U.S. Const. amend. XIV, § 1.

⁴⁴ Luria, *supra* note 6, at 51.

⁴⁵ *Id.* at 52.

⁴⁶ 334 U.S. 1, 8-23 (1948) (Private agreements, based on race, to exclude persons from use or occupancy of real estate for residential purposes do not violate the Fourteenth Amendment. However, the equal protection clause of the Fourteenth Amendment is violated if state courts enforce these agreements).

⁴⁷ *Id.* at 13.

⁴⁸ *Id.*

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* at 14.

the State denying equal protection of the laws, whether it be action by one of these agencies or by another."⁵¹

In *Evans v. Newton*,⁵² a tract of land was bequeathed to the city of Macon, Georgia, as a park for white persons only. When the city desegregated the park, the all-white Board of Managers for the park brought suit against the city, asking for the removal of the city as trustee. The Georgia trial court accepted the city's resignation as trustee for the park and appointed three "private" trustees, who contended that they could enforce the racial restrictions of the trust. On appeal, the United States Supreme Court decided, however, that services which are "municipal in nature," such as those rendered by a park, are subject to the Fourteenth Amendment's equal protection clause.⁵³ The key factor in this case was the fact that "municipal control and maintenance" had been provided for so long that merely replacing the city as trustee was insufficient to rid the park of its public character.⁵⁴ In its decision, the court recognized that "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."⁵⁵

Racially Discriminatory Trusts

The cy pres doctrine allows courts to modify trusts that have become illegal, unless the settlor intended that the trust property be used solely towards that illegal purpose.⁵⁶ In *Hermitage Methodist Homes of Virginia v. Dominion Trust Company*,⁵⁷

⁵¹ *Virginia v. Rives*, 100 U.S. 313, 318 (1880).

⁵² 382 U.S. 296 (1966).

⁵³ *Id.* at 301-02.

⁵⁴ *Id.* at 301.

⁵⁵ *Id.* at 299.

⁵⁶ RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

the settlor had provided in his will that his estate would be held in trust and that the income from his estate would go to a private school, as long as the school admitted white students only.⁵⁸ The trust contained successive "gift overs," so that if the first school admitted any non-white students, the trust's income would go to a second private school. If the second private school admitted any non-white students, the trust income would go to a third private school.⁵⁹ The final beneficiary of the trust was a nursing home, and no racial restriction was attached to that gift provision.⁶⁰

In *Hermitage Homes*, the court found without discussion that the racial restriction was unenforceable because state courts, under the Fourteenth Amendment, cannot enforce racial restrictions.⁶¹ The court, however, did not use the cy pres doctrine to revise the trust, which would have allowed the first school designated to take the income, because-^{*} due to the "gift over" provision, there was no uncertainty in deciding who benefitted, and the need to find a general charitable intent was thus eliminated.⁶² Furthermore, because the offending language could not be excised from the trust without changing its essential nature and quality, the gift to the educational charities failed completely.⁶³ The "gift over" to the nursing home, which did not contain a racial

⁵⁷ 239 Va. 46, 387 S.E.2d 740 (1990), *cert denied sub nom.*, Prince Edward School Foundation v. Hermitage Methodist Homes of Virginia, ___ U.S. ___, 111 S. Ct. 277 (1990).

⁵⁸ *Id.* at 49-50, 387 S.E.2d at 741-42.

⁵⁹ *Id.* at 50, 387 S.E.2d at 742.

⁶⁰ *Id.*

⁶¹ *Id.* at 54-55, 387 S.E.2d at 744. The court found that the purpose of the trust was to educate white children only and not children generally.

⁶² *Id.* at 58, 387 S.E.2d at 747.

⁶³ *Id.* at 57, 387 S.E.2d at 746.

restriction, was valid and ensured that there was no indefiniteness as to the trust's purpose.⁶⁴

In *United States v. Hughes Memorial Home*,⁶⁵ the cy pres doctrine was applied to revise a trust. The Hughes Memorial Home was a private non-sectarian home for children. The home was established by a trust which provided that the home was for white children in Virginia and North Carolina. The district court found that the home, due to its discrimination against black children, violated the Fair Housing Act.⁶⁶ The court further held that the racial restriction was merely incidental to the main purpose of the trust, which was to provide shelter for orphaned children.⁶⁷ Finding that Virginia state law favored the use of cy pres "to permit continuation of charitable trusts in the face of changed conditions . . . ," the court decided that the home was entitled to continue its operation, as long as it ignored the racial restrictions in the trust.⁶⁸

GENERAL FORMALITIES FOR USING THE CY PRES DOCTRINE

There is a general procedure for employing the cy pres doctrine when it has been determined that a settlor has a general charitable intent but that some of the trust's provisions are illegal, impracticable, or impossible.⁶⁹ First, the party seeking to amend the trust should ask the court to determine whether the settlor had a general charitable intent.⁷⁰ The court may then "refer the matter to a master," who will devise a scheme

⁶⁴ *Id.* at 58, 387 S.E.2d at 747.

⁶⁵ 396 F. Supp. 544 (W.D. Va. 1975).

⁶⁶ *Id.* at 549.

⁶⁷ *Id.* at 552.

⁶⁸ *Id.* at 552-53.

⁶⁹ SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS § 399 (1960).

⁷⁰ *Id.* at 714.

for applying the property, which the court can accept, reject, or modify.⁷¹ If the problem is relatively simple, the court may devise its own scheme or adopt one of the trustee's suggested schemes.⁷² A trustee should not try to apply the cy pres doctrine without first seeking the court's instructions.⁷³ If, however, the trustee does employ his own scheme before asking the court for directions, the court may let it stand if the court approves of the scheme as implemented.⁷⁴ Additionally, the state's attorney-general is required to be a party to any determination on how cy pres will be applied; the court, however, will always determine the proper scheme to be employed.⁷⁵

CONCLUSION

Section 55-31 of the Virginia Code⁷⁶ provides that when a charitable trust has an uncertain beneficiary or purpose, or is impossible, the cy pres doctrine can be employed to make the trust conform "as near as may be to the purpose for which it was created."⁷⁷ Generally, when a charitable trust contains a racial restriction, the court will determine that the trust is invalid because enforcing such a restriction would violate the Fourteenth Amendment of the United States Constitution. If, however, the court finds that the testator had a general charitable intent, which is not limited by the racial restriction, the court will revise the charitable trust by removing the racial restriction. This will ensure that the testator's general charitable intentions will be carried out.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ VA. CODE ANN. § 55-31 (1950).

⁷⁷ *Id.*; see *supra* note 26.

However, if the settlor does not have a general charitable intent and includes a racial restriction in a charitable trust, the trust will fail.