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Charitable Trust—Termination by Judicial Decree

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lem usually arises where the general guardian and the minor or incompetent person are adversely interested in the outcome of the litigation. In such cases it is both proper and essential that a guardian *ad litem* be appointed. *Ponti v. Hoffman,* 87 Wash. 137, 151 Pac. 249 (1915) (partition proceedings); *Rupe v. Robison,* 139 Wash. 592, 247 Pac. 954 (1926) (divorce).

A third group of Washington cases questions whether, after such appointment, the party was properly represented. The trial court's answer to this question is usually conclusive, as that court has plenary power to revoke the appointment and substitute another if, in its judgment, the guardian *ad litem* is not fulfilling his duty to the party. See *State* ex rel. *Bernard v. Superior Court,* 74 Wash. 559, 134 Pac. 172 (1913); *Crockett v. Crockett,* 27 Wn. 2d 877, 181 P. 2d 180 (1947). In *Koloff v. Chicago Milwaukee and Puget Sound Railway,* 71 Wash. 543, 129 Pac. 398 (1913) it was held that minor children under the age of fourteen were properly represented in an action for wrongful death of their father when the widow authorized the personal representative to bring the action. In *Shannon v. Consolidated Tiger and Poorman Mining Co.,* 24 Wash. 119, 64 Pac. 169 (1901) the court held that a guardian *ad litem* need not fulfill the qualification of a general guardian; hence it is not necessary for him to be a property holder in the state, and need not post a bond, as required of general guardians.

Guardians *ad litem* are appointed for the benefit of and to protect the best interests of minors and incompetent persons. An adjudication against a person so represented who has had his day in court is valid and enforceable. *Mood v. Mader,* 162 Wash. 83, 298 Pac. 329 (1931).

The principal case rounds out the case law in this state. The former cases have brought out when a guardian *ad litem* is necessary for a minor or for an insane person. Those cases have illustrated the breadth of the trial court's discretion in the appointment and revocation of appointment, because of the court's determination of whether the guardian *ad litem* properly represents such a party in an action. The principal case brings out the rule that a party who objects to an appointment, on grounds that he is not incompetent, is entitled to a full hearing on that issue before the appointment can be made operative.

It is submitted that the result of the principal case is sound and is in accordance with the few jurisdictions that have been confronted with the same problem. In re *Haynes Will,* 82 Misc. 228, 143 N.Y.S. 570 (1913); *Borough of East Patterson v. Karkus,* 136 N.J. Eq. 286, 41 A. 2d 332 (1945).

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Charitable Trust—Termination by Judicial Decree. *P,* as administrator of settlor's estate, brought an action to terminate a trust. Trial court dismissed the action. *Held:* Reversed. The failure of the trustees to administer the trust according to the provisions of the will and the failure to meet the deadline set by the court in a prior hearing of the same case justified termination of the trust. *McLaren v. Schalkenbach Home for Boys,* 141 Wash. Dec. 111, 206 P. 2d 345 (1952).

The subject matter of the appeal in the principal case originated in a prior action brought by the administrator to terminate the trust establishing a home for orphaned or abandoned boys between the ages of twelve and sixteen years who were trying to make their own living. Prior to World War II, the trustees had established and operated a home meeting the requirements of the settlor's will, but with the court's permission had closed the home during the war period. The trial court decided adversely to appellant. Upon appeal, the Supreme Court in *Townsend v. Schalkenbach Home for Boys,* 33 Wn. 2d 255, 205 P. 2d 345 (1949) found that there was sufficient evidence for

the trial court's finding *inter alia* that the trust was not impossible of performance or against the public policy of the state; but remanded the cause to the superior court with the directions to dismiss if the trust was being administered according to the trust provisions by January 1, 1950, and, if not, to declare the trust terminated.

The rule is clear that a trust should not be terminated by mere delay in executing it, or by a temporary inability to fulfill its purpose. This rule was expressed in *Scott-Lees Collegiate Institute v. Charles,* 283 Ky. 234, 140 S.W. 2d 1060 (1940) where the court said, ". . . charitable trusts are universally favored in law, and a mere delay in carrying out their objectives or temporary suspensions will never be allowed to defeat them." See also *Fitzgerald v. East Lawn Cemetery,* 126 Conn. 286, 10 A. 2d 683 (1940); BOGERT ON TRUSTS 586 (3rd Ed. 1952).

The result in the principal case would seem to conflict with the universally accepted rule that charitable trusts are favored by courts of equity and will be liberally construed in order to accomplish the intent of the donor. In re *Mar's Estate,* 20 Cal. App. 2d 514, 67 P. 2d 374 (1937). Under this view the court will not terminate when means are available to operate the trust, and before termination will be ordered it must be clearly shown that the trust cannot be performed. *Scott-Lees Collegiate Institute v. Charles, supra.* Forfeiture will not be declared in a doubtful case. In re *Jordan's Estate,* 310 Pa. 401, 165 A. 652 (1933).

The position reached by the court might possibly be sustained upon two theories. The first of these is that the trust was conditional upon the continuance of the home, and that the failure to operate by the date set by the court, in effect, established a breach of the condition which worked a forfeiture in favor of the heirs of the settlor. But since the law frowns upon a forfeiture, the courts will be reluctant to construe directions as imposing conditions, unless such construction is manifestly appropriate. *Pennebaker v. Pennebaker Home for Girls,* 291 Ky. 12, 163 S.W. 2d 53 (1942). It is suggested that the trust in question would not be subject to this construction, i.e., a conditional trust, because, in the absence of specific words manifesting an intention to create a condition, the instrument whereby property is conveyed upon a charitable trust will not ordinarily be interpreted as imposing a condition. *City of Newport v. Sisson,* 51 R.I. 481, 155 A. 576 (1931); Restatement, Trusts § 401 (1935).

The second possible theory for reaching the result attained in the principal case is that the trust failed because of impossibility of performance. This theory does not apply where the court can find a general charitable intention indicated by the terms of the instrument creating the trust, for the courts will then normally give effect to the general intent of the donor by modifying the terms of the trust under the *cy pres* doctrine. *Quinn v. People's Trust and Savings Co.,* 223 Ind. 317, 60 N.E. 2d 281 (1945); 3 SCOTT, TRUSTS § 399 (1939). But the court held in *Townsend v. Schalkenbach, supra,* that the present trust did not evidence a general charitable intention so as to make the *cy pres* doctrine applicable. Therefore, the question remained whether the trust failed for impossibility of performance. The general rule is that where a trust is established for the benefit of a particular charity or organization, and it is impossible to distinguish any general charitable intent, the fund or property will revert to the donor where it becomes impossible to carry out the purpose of the trust, even in the absence of an express provision for reverter. *Garner v. Home Bank & Trust Co.,* 171 Tenn. 652, 107 S.W. 2d 223 (1937). See 38 A.L.R. 44; BOGERT ON TRUSTS § 150 (3rd Ed. 1952).

It seems questionable whether the principal case comes within the general rule allowing termination where the trust is impossible to perform unless it is conceded that the failure to have the trust operating within the period set by the court established that the trust was in fact impossible to perform. This does not seem

to be an adequate test for the validity of a charitable trust, especially in view of the liberal construction normally given to such trusts in order to sustain the settlor's intention. Perhaps the final result of termination was necessary by the circumstances of this particular case, but the result in future cases may bring grave injustice if the court does not strictly limit the power to terminate announced by the principal case.

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