IN THE COURT OF APPEALS OF IOWA

9-272 / 88-886

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CLERK SUPREME COURT

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**IN THE MATTER OF THE TRUST OF ALBERT ROTHROCK,** DECEASED;

**EDNA J. FISHER** and **ELVA V. DAY,**

Appellants.

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Appeal from the Iowa District Court for Hamilton County, Timothy J. Finn, Judge.

Respondents appeal from a district court order construing the will of Albert Rothrock to provide for the distribution of trust assets to the First Congregational Church. **AFFIRMED AS MODIFIED.**

Edna J. Fisher of Cedar Rapids and Elva V. Day of Webster City, pro se, for appellants.

Whitley M. Hemingway of Hemingway and Myers, Webster City, for the trustee, Farmers National Bank.

Gary J. Groves of Webster City for appellee First Congregational CHurch, United Church of Christ of Webster City, Iowa.

Considered en banc.

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**SACKETT, J.**

This action concerns the construction of the second paragraph of the will of decedent Albert Rothrock to determine the disposition of approximately $200,000 remaining in the estate after the death of his sisters. Paragraph two provides in applicable part:

> . . . B. Upon the death of the survivor of my sisters, . . . the balance, if any, of my property shall first be paid $10,000.00 to the Congregational United Church of Christ at Blairsburg, Iowa. If after the payment of said $10,000 any funds remain, such balance shall be paid to the First Congregational Church, United Church of Christ at Webster City, Iowa, to be used, however, solely for building a new church. (emphasis added)

The First Congregational Church, United Church of Christ at Webster City, Iowa requested the will be construed and the provisions stating, "to be used, however, solely for building a new Church," be construed to mean the church can receive the funds and use the funds not only for the construction of a new church but also for remodeling, improving, or expanding the existing church facilities, including the parsonage, and for the acquisition of any real estate required for the construction or improvement of the church facilities.

This construction was resisted by appellants Edna J. Fisher and Elva V. Day, heirs at law of decedent who contend the language of the will is limiting and, absent strict compliance by building a new church, the will should be construed to find the bequest has failed and

should revert to the estate. They contend because the will does not provide for disposition if the bequest fails, the money should be distributed, pursuant to intestate distribution, to decedent's heirs at law.

The trial court determined

> the bequest may be used by said church not only for the construction of a new and separate church facility, but also to be used for the remodeling, the improvement, and/or the expansion and extension of the existing church facilities, including the parsonage, and for the acquisition of any real estate required for the construction or improvement of the foregoing said church facilities.

I.

First we must decide if the trial court was correct in finding the bequest did not fail. We find the trial court was correct on this issue. The church was clearly named and the gift to them is specific. There are no words of limitation on vesting or contingency for vesting. The language of the will was a limitation on the use of the money. It provided a condition only for the use of the gift. See Miles v. Miles, 168 Iowa 153, 161, 150 N.W. 21, 24 (1914). The will provides no alternative disposition if the church fails to build a new church. It was not a requirement for vesting.

The law favors construing wills so as to vest an interest at the earliest possible time. Houts v. Jameson, 201 N.W.2d 466, 470 (Iowa 1972). Any doubts as to whether a legacy is vested or contingent are to be resolved in

favor of vesting. Houts, 201 N.W.2d at 470; Johnston v. Boothe, 234 Iowa 201, 206, 12 N.W.2d 176, 178 (1943). Charitable gifts are favored and where possible should be saved. A charitable gift cannot be avoided simply because it cannot take effect as fully as the donor intended, but will be given effect as far as it can. Wilson v. First Nat'l Bank, 164 Iowa 402, 415, 145 N.W. 948, 953 (1914); Miller v. Chittenden, 4 Iowa 252, 270 (1856). The bequest was vested. We affirm the trial court on this issue.

II.

The next, and more difficult, issue is whether the trial court erred in imposing the cy pres doctrine to allow the church to use the funds for purposes as specified in its decree. Appellants contend the cy pres doctrine cannot be applied and if applied, it has been applied incorrectly. We agree with the trial court's decision that the doctrine is applicable. We do, however, modify its application. Cy press is applicable where the particular charitable purpose of a testator becomes impossible, impractical, or illegal to carry out. See Simmons v. Parsons College, 256 N.W.2d 225, 227 (Iowa 1977) (citing Restatement (Second) of Trusts § 399 (1957)).

It is argued the doctrine cannot be invoked because the money went to the church rather than a trust. "[A] gift to charitable uses will be sustained whenever it is possible, and . . . 'where a literal execution may become impractical or inexpedient, in part or even in whole, it will be

carried into effect so as to accomplish the general purpose of the donor, as nearly as circumstances will permit, and as such general charitable intent can be ascertained.'" Wilson v. First Nat'l Bank, 164 Iowa 402, 415, 145 N.W. 948, 953 (1914).

In essence, a charity always receives a gift in trust for its purposes. In re Estate of Bletsch, 25 Wis. 2d 40, 48, 130 N.W.2d 275, 278 (1964). Cy pres is as applicable to an absolute bequest to a charity as it is to a bequest in trust for a charity. 25 Wis. 2d at 47-48, 130 N.W.2d at 278. We do not reject the doctrine because the funds do not go to a trust.

III.

The next question is whether the fact that a new church was not to be built, and the fact that a new church to meet the congregation's needs could not be built for $200,000, allowed the application of the doctrine. The difficulty need only be reasonable and not a difficulty such as would make the donor's plan impossible. See In re Estate of Gatlen, 16 Cal. App. 3d 644, 648, 94 Cal. Rptr. 295, 297 (1971); see also Lackland v. Walker, 151 Mo. 210, 265-66, 52 S.W. 414, 431 (1899).

Each case must be determined on its own facts. Hodge v. Wellman, 191 Iowa 877, 886, 179 N.W. 534, 538 (1920). Courts have not evinced a tendency, in arriving at the intention of a testator, to require a narrow construction,

but rather have given effect, if consistent with the law, to the dominate purpose and desire of the testator. To allow the adoption of some other mode than that provided by will is permissible if it does not defeat the essence of the bequest. See Hodge v. Wellman, 191 Iowa at 887, 179 N.W. at 538.

Changed conditions and circumstances do not always allow exact conformity with the scheme. Therefore, an effort should be made to approximate the original scheme as reasonably as practical. See Johnson & Taylor, Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation, 74 Iowa L. Rev. 545, 566 (1989). There is support for allowing substitution by the court of another object of the same charitable nature when the original object fails. Tincher v. Arnold, 147 F. 665, 672-73 (7th Cir. 1906) (court allowed portion of trust income to be used for maintenance of school when trust provided income was to be used for teachers' salaries; court found educational purpose dominate and determined result reached would prevent failure of purpose); Lockwood v. Killian, 425 A.2d 909, 911-12 (Conn. 1979) (court employed doctrine of approximation to seek a method to remove certain restrictions on persons qualified for scholarship under charitable trust when all restrictions could not

practically be exercised); Village of Hinsdale v. Chicago City Missionary Soc'y, 375 Ill. 220, 232-36, 30 N.E.2d 657, 664-65 (1940) (court held fact that donor directed funds were to be used for construction of new library building did not prevent applying funds to an existing library); Mfg. Nat'l Bank v. Woodward, 38 A.2d 657, 659 (Me. 1944) (when no money obtainable for running expenses of library, court varied method prescribed for carrying out testamentary trust and provided a portion of trust income could be used for general maintenance of building); see also Mars v. Gibert, 93 S.C. 455, 466-67, 77 S.E. 131, 135 (1913) (when additional facilities of a similar nature are available, a lateral execution would be wasteful); In re Neher, 279 N.Y. 370, 374, 18 N.E.2d 625, 626 (1939) (allowed trust intended for memorial hospital to be used to build an administration building).

We find ensuring the existence of an adequate church building was settler's intent and the dominate purpose of the charity. The church building is available and adequate. The trial court decision to allow remodeling of the church building is reasonable and prudent, as is the decision to allow for the acquisition of additional land for church purposes. It is expedient and practical, and while not the mode prescribed by the donor, it is a feasible mode and one that allows the general intention of the trust to prevail.

We do not, however, agree with the decision to allow remodeling of the parsonage. We modify the trial court's decision to strike that portion of the trial court's decree.

Costs on appeal are taxed one-half to the First Congregational Church of Webster City and one-half to appellants Edna J. Fisher and Elva V. Day.

We affirm as modified.

**AFFIRMED AS MODIFIED.**

All judges concur except Oxberger, C.J., and Hayden, J., who dissent.

**OXBERGER, C.J.** (dissenting)

I respectfully dissent. I concur with Judge Hayden's dissent and I write further to say I do not find the cy pres doctrine to be applicable in this case. The wishes of the testator are not impossible, impractical or illegal to carry out. See Simons v. Parsons College, 256 N.W.2d 225, 227 (Iowa 1977). The church may decide to build a new church next year, five years from now, etc.

I would hold that the $200,000 bequest is vested in the church. I would enforce the condition the testator made in granting the bequest, i.e., the funds may be used only for building a new church.

Hayden, J., joins this dissent.

**HAYDEN, J.** (dissenting)

The majority has invoked the cy pres doctrine to be applicable to charitable bequests. Heretofor, in Iowa, this doctrine has been applied only to testamentary charitable trusts and then only when the trust established by a testator fails, no alternative disposition of the property has been made, and the general trust purposes may be accomplished by permitting it to be administered in a way different from, but closely related to, the testator's plan. Simmons v. Parsons College, 256 N.W.2d 225, 227 (Iowa 1977).

The majority implies the church, as a charity, always receives a gift in trust for its purposes and, therefore, the cy pres doctrine is applicable. The majority relies upon a 1964 Wisconsin case, In re Blestsch's Estate, 25 Wis.2d 40, 48, 130 N.W.2d 275, 278 (1964). In that case the Wisconsin Supreme Court held:

> Instead of saying that gifts to charities are necessarily in trust, we deem it better to rule that the doctrine of judicial cy pres is available when there is a gift to a charity--without requiring that there be a formal trust.

Id. I interpret Bletsch to show the Wisconsin court abandoned the rule "cy pres" was available only in cases of charitable trusts and extended this judicial doctrine to be applicable to any gift to a charity. Our supreme court has not done so. We should not attempt to abandon the rule of law laid down in Simmons. Furthermore, we should not attempt, directly or indirectly, expressly or impliedly, to

overrule Simmons. Also, we should not attempt to extend the judicial "cy pres" doctrine, that has been established in Iowa's common law, beyond its present limitation.

Here, the testator did not create a trust in his will. We should not liken the remainder bequest to the church to a trust. We should not, by implication, create a trust provision for this bequest. Also, we should not refer to the testator as "the settlor."

For the above reasons, I respectfully disagree with the majority.

I agree with Judge Oxberger. The judicial doctrine of cy pres need not be invoked here to uphold the testator's remainder bequest to the church.

Oxberger, C.J., joins this dissent.