

EXAMINERS' ANALYSIS OF QUESTION 8

(1) Validity of the Trust: In order to establish a valid trust, the trust must comply with the requirements contained in the Michigan Trust Code, MCL 700.7101, et seq. Michigan recognizes four methods of creating a trust: (1) the transfer of property to another person as trustee during the settlor's lifetime or by disposition taking effect upon the settlor's death; (2) a declaration by the owner of the property that the owner holds identifiable property as trustee; (3) the exercise of a power of appointment in favor of a trustee; and (4) a promise by 1 person to another person whose rights under the promise are to be held in trust for a third person. See MCL 700.7401(1)(a)-(d). No matter which method of creating a trust is chosen, a valid trust is created only if five statutory requirements are met: (1) the settlor has the capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust either has a definite beneficiary, is a charitable trust, is a trust for a noncharitable purpose, or is a pet care trust; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary. See MCL 700.7402(1)(a)-(e).

In this case, it appears that a valid trust was created. May transferred the two million dollars to Big Bank as trustee during May's lifetime, satisfying MCL 700.7401(a). Additionally, May exercised a power of appointment in favor of Big Bank as trustee, satisfying MCL 700.7401(c). The requisite requirements for the creation of a trust also appear to be satisfied. (1) Nothing in the facts calls into question May Moffman's capacity to create a trust. Courts presume capacity, and the burden is on a challenger to prove otherwise; here, no one is challenging May's original capacity. *Vollbrecht's Estate v Pace*, 26 Mich App 430 (1970). (2) May clearly indicated her intent to create a trust. (3) The trust is a charitable trust. Pursuant to MCL 700.7405(1), "[a] charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes, any purpose described in section 501(c)(3) of the internal revenue code, 26 USC 501, or other purposes the achievement of which is beneficial to the community." See also *Scudder v Security Trust Co*, 238 Mich 318 (1927) (trust providing for welfare and comfort of the needy elderly is enforceable). (4) The trustee (Big Bank) has duties to perform: the duty to manage the trust assets in good faith and issue the yearly disbursement. (5) Lastly, the same person was not the sole trustee and sole

beneficiary. Therefore, MCL 700.7402(1)(a)-(e) appears to be satisfied, and a valid charitable trust with a possibility of reverter was created.

(2) **St. Mary's Entitlement to the Stipend:** Generally speaking, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become impossible to achieve or are found by a court to be unlawful or contrary to public policy." MCL 700.7410(1). For charitable trusts, a trust may fail if "a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve." MCL 700.7413(1).

Thus, in the absence of the application of the doctrine of cy pres (discussed below), St. Mary is legally entitled to the continuation of the trust unless the particular charitable purpose articulated in the trust document has become "unlawful, impracticable, or impossible to achieve."

The particular charitable purpose expressed in the trust provides for the "Health, welfare and comfort of the Sisters of the Order of the Immaculate Heart at the St. Mary's Orphanage." Because the last sister died and the Order dissolved upon her death, the trustee would have a strong argument that the specific charitable purpose of the trust fails, and the trust is subject to termination, because the class specifically intended to receive the benefits has become nonexistent. See Bogert's Trusts and Trustees, Chapter 22, § 438.

(3) **Options Available to the Judge:** The cy pres doctrine is a saving device applied to charitable trusts when the specific purpose of the settlor cannot be carried out. Application of the cy pres doctrine permits a court to substitute another charity or modify the trust in a manner which is believed to approach the settlor's original purpose as closely as possible. *In re Rood's Estate*, 41 Mich App 405 (1972).

Although cy pres originated as a common law doctrine, it is now codified at MCL 700.7413. The statute provides that, if a particular charitable purpose has become unlawful, impracticable, or impossible to achieve, no alternative charity is named in the trust, and the court finds the settlor had a general, rather than a specific, charitable intent, then (1) the trust does not fail; (2) the trust property does not revert to the settlor or the settlor's successors in interest; and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's general charitable intent.

Thus, a court may only apply cy pres if the court finds that the settlor had a general rather than specific charitable intent. Charitable trusts should be read in a manner most favorable to upholding the trust, if at all possible. *In re Rood's Estate, supra*. There must be some manifestation of a general charitable intent that extends beyond the specific purpose which has now become impractical or impossible, such as intent to aid charity in general or some particular type of charity in general. *Id.* The absence of a reverter clause or gift over in the event that the particular purpose fails is evidence of a general charitable intent. Similarly, a general charitable intent will be implied where the bulk of the donor's property is given for charitable purposes. *Id.*

Even if the specific charitable purpose of the trust fails, and there is no finding that the settlor had a general charitable intent, cy pres may still be used to save the charitable trust. MCL 700.7413(3) states that a provision in a charitable trust that would result in the "distribution of trust property to a noncharitable beneficiary" prevails over the power of cy pres "only if" (1) the trust property reverts to the settlor, who is still living or (2) less than 50 years have elapsed since the trust was created.

The trust language above does not provide any indication that May Moffman had a general charitable intent. There was no indication that she wanted to aid nuns generally or promote health and comfort generally. May made her gift to the specific orphanage that had raised her as a child. The fact that the trust contained a reverter clause, as well as the fact that the bulk of May's fortune went to family and friends rather than charitable purposes, militates against the court finding that May had a general charitable intent. Additionally, while May is no longer living, it has been less than 3 years since the trust was created. Because it has been less than 50 years since the trust was created, the court cannot apply cy pres to modify the terms of the trust, and the four million dollars should be distributed to Amanda Avers according to the terms of the trust.