TRUSTS—FAILURE OF CHARITABLE TRUST—REVERSION IN LIEU OF CY PRES

Evans v. Abney[1] draws to a close some seven years of litigation concerning "Baconsfield Park", created in the 1911 will of the late Senator A.O. Bacon. Litigation commenced in May, 1963, and has been taken twice before the Supreme Court of the United States. In the first case, the Supreme Court was asked to rule on whether the municipal park could be operated on a segregated basis as provided in the trust. The Supreme Court held in *Evans v. Newton*[2] that the municipality could not operate the park on a discriminatory basis, and furthermore, private successor trustees could not be appointed to carry out the discriminatory provisions of the trust as long as the park was essentially public in character. In the instant case, the Supreme Court was asked to rule on the applicability of *cy pres* and other trust saving devices to prevent the trust's failure. The Georgia Supreme Court and the Supreme Court of the United States upheld the trial court's holding that the trust failed since the purpose of the trust was impossible to accomplish in the face of the ruling in *Evans v. Newton.*

"Baconsfield Park" was established by a testamentary trust which provided that a tract of land and certain other holdings be used to establish a park within the City of Macon, Georgia, for the exclusive use of "white women, white girls, white boys and white children of the City of Macon . . . ."[3] The trust was administered by the City of Macon, as trustee, and the park was utilized by the City without any difficulty until the advent of civil rights legislation resulting in litigation directed at racial discrimination in the South. Confronted with the changing times, the City of Macon began to allow the park to be used by both races. In 1963, members of the Board of Managers (the body established by the will to manage the trust) brought suit to have the City removed as trustee and to have new trustees appointed, alleging that the City had violated the trust in allowing Negroes to use the park. With the intervention of certain Negro citizens of the City of Macon and of the heirs at law of Senator Bacon, the City resigned as trustee. The trial court then approved the resignation of the City as trustee and granted the petition appointing private successor trustees. The trial court's judgment was upheld by the Georgia Supreme Court,[4] but was reversed by the United

1. 396 U.S. 435 (1970); for lower court decision, *see* Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).
2. 382 U.S. 296 (1966).
3. 396 U.S. at ____, 90 S. Ct. at 632.
4. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160.

States Supreme Court,[5] because the dominant public character of the park would not allow it to be operated on a segregated basis. The nature of the park did not change as a result of the City's disassociation from the park. The clear recreational purpose of the park placing it in the public domain "requires that it be treated as a public institution"[6] and neither the government nor the courts could aid the operation of the park on a segregated basis. On remand to the state court, it was held that "The will has become impossible of performance, and the trust failed and is terminated."[7]

The intervenors, again, sought to overturn the trial court's determination, but this time they were unsuccessful, for the judgment that the trust had failed and a resulting trust created was upheld. Although the petitioners presented four basic arguments,[8] Mr. Justice Black, in delivering the opinion of the Court, placed emphasis on the application of state law as it applied to the will, stating:

> [O]ur holding today reaffirms the traditional role of the States in determining whether or not to apply their *cy pres* doctrines to particular trusts . . . . [T]he loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death . . . . The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.[9]

The Georgia courts, in making their decision, applied Georgia trust laws to a Georgia will establishing a trust in Georgia. As a matter of Georgia law, property devised in trust for a charitable use cannot be diverted from a use to one not intended or authorized by the testator or donor and *a fortiori*, it could not be devoted to a use expressly disapproved of.[10] The petitioners, on the other hand, proffered that the park could be used on an integrated basis and therefore not lost to the

5. Evans v. Abney, 396 U.S. 435 (1970).

6. *Id.* at __, 90 S. Ct. at 630, *citing* Evans v. Newton.

7. Evans v. Newton, 221 Ga. 870, 871; 148 S.E.2d 329, 330 (1966).

8. They denied that any area of state law was free from the supervening control of the United States Constitution. They questioned the ruling that the trust must fail and that the doctrine of *cy pres* could not be applied to save the trust. They offered that the will, which established the trust, was incurably tainted by its connection to GA. CODE ANN. § 69-504 (Rev. 1967) which was racially discriminatory. As a final argument, they proffered that the provisions of Senator Bacon's will that were racially discriminatory should be treated as "a nullity", *pro non scripto*. *See* Brief for Petitioners at 33-35, Evans v. Abney, 396 U.S. 435 (1970).

9. 396 U.S. at ____, 90 S. Ct. at 635.

10. *See* A. SCOTT, LAW OF TRUSTS, § 399.2, at 3094 (3rd ed. 1967).

public by the application of *cy pres*.[11] It was contended that Senator Bacon's desire in this matter could not be determined since he never foresaw the possibility of the trust's failing. The Georgia court stressed the terms and the language of the will and they felt that it left little doubt as to Senator Bacon's feelings.[12] It is a cardinal rule in the law of wills that the intent of the testator controls.[13] And in determining the testator's intent, the will controls and the will must be considered as a whole.[14] Once the intent of the testator is determined, the court may take great liberality in effectuating the testator's purpose.[15] As in this case, if a charitable trust fails, the court may then prevent its loss to society through the doctrine of *cy pres*. However, in order to apply *cy pres*, the testator must have had a general or broad charitable intent rather than some particular or narrow purpose in the creation of the trust.[16] If there is a general charitable intention manifested by the testator and the charitable trust cannot be effectuated in the exact manner indicated or if the trust should become impossible of performance, then equity will carry out the testator's general purpose by approximation through the doctrine of *cy pres*.[17]

In this case, the Georgia courts held that there was no general charitable intent and the trust was established to benefit a certain class, white women and children. Therefore, the trust must fail since the court decided that the continuation of the park on an integrated basis would be repugnant to the testator's intentions.

If *cy pres* is to apply in future cases, it will be determined on the basis

11. *Cy pres* is the equitable doctrine developed in English common law whereby the law attempted to achieve a just result whenever a charitable trust was frustrated. The term, borrowed from the Norman-French, means "as near" or "as near as possible". It was intended to give effect to the general purpose of the testator's intent. Since the testator or donor had established a charitable trust, it was felt that he would rather see the trust diverted to a similar use than to see it fail. *See* IV A. SCOTT, LAW OF TRUSTS, § 399 at 3084 (3rd ed. 1969); 1 REDFEARN, WILLS AND ADMINISTRATION IN GEORGIA, § 223 at 631 (3rd ed. J. Jackson 1965).

12. 224 Ga. at 830, 165 S.E.2d at 164.

13. Chamblee v. Guy, 218 Ga. 56, 126 S.E.2d 205 (1962); Love v. Fulton Nat'l Bank of Atlanta, 213 Ga. 887, 102 S.E.2d 488 (1958); Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947); Cook v. Weaver, 12 Ga. 47 (1852).

14. Arnold v. Richardson, 224 Ga. 181, 160 S.E.2d 809 (1968); Love v. Fulton Nat'l Bank of Atlanta, 213 Ga. 887, 102 S.E.2d 488 (1958); Felton v. Hill, 41 Ga. 554 (1871).

15. Freeman v. Scheer, 223 Ga. 705, 157 S.E.2d 875 (1967); Ford v. Thomas, 111 Ga. 493, 36 S.E. 841 (1900).

16. Love v. Fulton Nat'l Bank of Atlanta, 213 Ga. 887, 102 S.E.2d 488 (1958); Kelly v. Welborn, 110 Ga. 540, 35 S.E. 636 (1900); Bruce v. Maxwell, 311 Ill. 479, 143 N.E. 82 (1924). *See* IV A. SCOTT, LAW OF TRUSTS, 3084-3189 (3rd ed. 1967).

17. Creech v. Scottish Rites Hosp. for Crippled Children, 211 Ga. 195, 84 S.E.2d 563 (1954); Goree v. Georgia Indus. Homes, 187 Ga. 368, 200 S.E. 684 (1938); Ford v. Thomas, 111 Ga. 493, 36 S.E. 841 (1900).

of whether a general charitable intent is present. Mr. Justice Black stated:

> The courts can only apply the law to the particular case at hand and nothing prevents the court from applying the doctrine of *cy pres* in another situation.[18]

Therefore, in Mr. Justice Black's opinion, a general charitable intent is a prerequisite to the use of *cy pres*. If the court finds that the facts of a particular case show only a narrow intent on the part of the testator, with a particular purpose as his objective (as the court did in the principal case), then *cy pres* cannot be applied to prevent the trust from failing. However, there is nothing in this decision to prevent a court, in Georgia or in another state, from applying *cy pres* as long as the application carried forth the general intent of the testator. There is no absolute rule of law to prevent a trust from failing. The courts will, however, strain the meaning of the will in order to find a supposed general intent. Since the courts favor upholding a trust, they will not allow a trust to be lost to society if they can find the necessary intent.

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18. 396 U.S. at ___, 90 S. Ct. at 635.