
TABLE OF CONTENTS

TABLE OF CONTENTS	1	
TABLE OF AUTHORITIES	2	
STATEMENT OF FACTS	3	
ARGUMENT.....	8	
A. Standard of Review	8	
B. The court relied on appropriate Missouri case law in applying the cy		pre:
.....		
C. The court properly considered all relevant evidence (Responds		to F
.....		
CONCLUSION	16	
CERTIFICATE OF COMPLIANCE AND SERVICE.....	17	
APPENDIX.....	A1-A9	

TABLE OF AUTHORITIES

Comfort v. Higgins, 576 S.W.2d 331 (Mo. 1978) 9, 10, 11, 12, 13

First National Bank of Kansas City v. Jacques, 470 S.W.2d 557 (Mo. 1971) 8

Lehr v. Collier, 909 S.W.2d 717 (Mo. App. 1995)..... 14

Levings v. Danforth, 512 S.W.2d 207 (Mo. App. K.C.D. 1974).....9, 11, 12, 13

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) 8

Reardon, et al. v. Newell, et al., 77 S.W.3d 758 (Mo. App. S.D. 2002)..... 8

Thatcher v. Lewis, 76 S.W.2d 677 (Mo. 1934)..... 9, 10, 12, 13, 14

Vollmann v. Rosenberg, 972 S.W.2d 490 (Mo. E.D. 1998).....12, 13

STATEMENT OF FACTS

Dr. Joseph Kimbrough was born in Clinton, Missouri in 1870 (TR 48). He enrolled at the Missouri Dental College in 1890 (TR 5). During his education at the Missouri Dental College, it was acquired by Washington University (TR 5). Dr. Kimbrough graduated from Washington University College of Dental Medicine in 1894 (TR 5). Following his graduation, Dr. Kimbrough served on the faculty of the College of Dental Medicine at Washington University, as well as having a successful private practice (TR 5).

During his lifetime, Dr. Kimbrough made numerous gifts to Washington University (TR 8). Nearly one-half of the gifts went to no specific college within the Washington University system and to unrestricted funds (TR 8). Dr. Kimbrough also named Washington University in his estate plan (TR 24). This estate plan consisted of a will and trust (TR 21, 24).

Dr. Kimbrough's will stated that the rest and residue of his estate was to go to his great-niece Margaret Derrick, plaintiff/appellant Louise Obermeyer's mother (LF 119, TR 21). However, if Ms. Derrick was not living at the time of distribution, the rest and residue of the estate was to go to Washington University, for the exclusive use and

benefit of the Dental Alumni Development Fund¹ (LF 119). The will contained no reverter clause in the event Washington University was unable to take the bequest (LF 119). The will also provided for numerous gifts to other family members, including plaintiff/appellant Louise Obermeyer, and for an outright charitable gift to the League of Hard of Hearing (LF 118-119).

Under Dr. Kimbrough's trust, family members, including Margaret Derrick, were lifetime beneficiaries (LF 117). Upon the death of the survivor of the lifetime beneficiaries, the trust was to be "paid over and distributed *free from trust* unto Washington University, St. Louis, Missouri, for the exclusive use and benefit of its Dental Alumni Development Fund." (LF 117). The trust contains no reverter clause for this bequest (LF 117).

Dr. Kimbrough died in 1963 (TR 5). Following his death, the life beneficiaries continued to receive income until their respective deaths (TR 39). Margaret Derrick was the last surviving life beneficiary (TR 27). She died in 2000 (TR 27).

¹ The Dental Alumni Development Fund was formed by alumni of the School of Dental Medicine at Washington University in 1953 (TR 66). It was an unrestricted general fund as opposed to a fund or endowment established and maintained for specific activities such as scholarships or research at Washington University (TR 233).

At the date of Ms. Derrick's death, neither the Dental School nor the Dental Alumni Development Fund existed (TR 40). The Dental School was forced to close its doors in 1991 (TR 210).

The plaintiffs filed suit in circuit court claiming that Dr. Kimbrough's trust was created with specific charitable intent and therefore the cy pres doctrine was not applicable, and the approximately \$2,000,000.00 in the trust should revert to them as his heirs (LF 101-109).

Defendants Washington University and the Attorney General agreed that it was impossible or impracticable to carry out the charitable purpose in Dr. Kimbrough's trust because the Dental Alumni Development Fund no longer exists (LF 143-47, 165-70). But defendants asserted that the trust was created with general charitable intent and therefore the doctrine of cy pres should be applied. Thus, the trust should be applied to Washington University for dental-related endeavors because that most nearly carries out Dr. Kimbrough's intent in creating the trust (*Id.*).

Applying the trust to Washington University for dental-related endeavors most nearly carries out Dr. Kimbrough's intent because two of the three basic aspects to dental education are ongoing at Washington University (TR 242-246). The first basic aspect of dentistry is the treatment of patients (TR 242). Second is the education of dental students (TR 242). Third is the research of the faculty (TR 242).

Dental-related education and research continues in the Department of Anthropology at Washington University (TR 243, 244). Professors in the Department of Anthropology provide education to students in dental-related topics and do research in the area of dental genetics and the biomechanics of the face (TR 243-244).

Dental-related education continues at Washington University through two dental book collections at the library at the College of Medicine at Washington University (TR 269). The first is the Harriet Sternagel collection, which contains dental journals and current periodicals (269-70). It is used today on-line and at the library by students and faculty of Washington University and other practitioners (TR 270-71). The other is the McKellops rare book collection, which contains many rare books related to dentistry including one of the first books published on dentistry in the 1500s (TR 272).

Finally, dentistry continues through the School of Medicine and the work of Drs. Huebener and Gay (TR 11). Both were faculty members at the School of Dental Medicine before it closed in 1991 (TR 168, 286). When the school closed they were given positions at the School of Medicine (TR 168-69, 286). Dr. Huebener spends a majority of his time as a member of a team of physicians, dentists, and orthodontists at the Cleft Palate Cranial Facial Deformity Institute of which he is a founding member (TR 169). Dr. Hubener sees 20 to 22 children at the dental clinic every day where he provides them routine dental care (TR 171-72). He also provides dental care to children

with special health care needs and serves on the cleft palate team (TR 170-71). He is one of only two pediatric dentists within the City of St. Louis (TR 171).

Dr. Gay is a dentist and, more specifically, a maxillofacial prosthodontist (TR 284). He serves as the Director of the Division of Maxillofacial Prosthetics of the Otolaryngology Department at the School of Medicine at Washington University (TR 286). Dr. Gay does primarily the same work at the School of Medicine as he did as a faculty member at the School of Dental Medicine (TR 286). Dr. Gay fits dental prostheses for people with birth defects, such as no teeth, and people who have suffered some sort of trauma, such as accident or cancer (TR 284-85). Dr. Gay is the only dentist in his department and treats all patients irrespective of their ability to pay (TR 287, 297). Because of limited financial resources he is unable to completely treat all the patients he sees (TR 287). He does provide all patients a minimum of care (TR 287).

Intervenor agreed that it was impossible or impracticable to carry out the terms of the trust. They asserted that the trust should go to Washington University Dental Alumni Association rather than Washington University (LF 152-55).

The case was tried March 12 and 13, 2002. The court entered its order May 13, 2002, stating that the trust was created with general charitable intent, and cy pres should be applied to save the charitable bequest (LF 252-59). Accordingly, the trust should be distributed to Washington University to further dental medicine through the creation of the Dr. Joseph B. Kimbrough Chair in the Cleft Palate/Craniofacial Deformities

Institute, or the Dr. Joseph B. Kimbrough Chair in Maxillofacial Surgery and Prosthodontics, or both (LF 259).

Plaintiffs appealed to the Missouri Court of Appeals, Eastern District. The court of appeals reversed the decision of the trial court, finding that Dr. Kimbrough had specific intent in creating the gift. Thereafter, Respondent Washington University sought transfer to this Court. This Court ordered transfer November 25, 2003.

ARGUMENT

The trial court correctly found that it was impossible or impracticable to carry out the terms of Dr. Kimbrough's trust because the Dental Alumni Development Fund did not exist at the time of distribution. The court correctly found that Dr. Kimbrough created the trust with general charitable intent and thus appropriately applied the cy pres doctrine. The court's order furthers Dr. Kimbrough's intent in creating the trust by giving the funds to Washington University for dental-related purposes.

A. Standard of Review

In reviewing a court-tried civil case, this Court must uphold the decision of the trial court unless there is no substantial evidence to support the decision, the decision is against the weight of the evidence, or the trial court has erroneously declared or applied the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). This Court must accept all evidence and reasonable inferences favorable to the winning party and must

disregard any contrary evidence. *Reardon, et al. v. Newell, et al.*, 77 S.W.3d 758, 760 (Mo. App. S.D. 2002).

B. The court relied on appropriate Missouri case law in applying the cy pres doctrine (Responds to Point I).

“Charitable trusts are the favorites of equity and courts will strive to uphold the general intent of the donor,” *First National Bank of Kansas City v. Jacques*, 470 S.W.2d 557, 561 (Mo. 1971). When a charitable trust cannot be carried out as it is written, the cy pres doctrine permits a court to carry out the wishes of a donor as nearly as possible. *Thatcher v. Lewis*, 76 S.W.2d 677 (Mo. 1934). The cy pres doctrine applies when three requirements are met. *Levings v. Danforth*, 512 S.W.2d 207, 211 (Mo. App. 1974). First, the gift must be charitable in nature. *Id.* Second, it must be impossible or impracticable to carry out the intent of the testator. *Id.* Third, the testator must have created the gift with general, rather than specific, charitable intent. *Id.* There is no dispute that the gift was charitable and no dispute that it is impossible for the gift to benefit the Dental Alumni Development Fund. Thus, the only issue appropriately before the court of appeals was whether Dr. Kimbrough created the gift to Washington University with general or specific charitable intent.

A court, in determining whether the charitable intent of the testator is specific or general, should look at several factors. *Comfort v. Higgins*, 576 S.W.2d 331 (Mo 1978); *see also, Thatcher*, 76 S.W.2d 677. The first is the nature of the trust property.

Trust property consisting of land or other real property is indicative of specific charitable intent. *Comfort*, 576 S.W.2d at 339; *Thatcher*, 76 S.W.2d at 678. Trust property consisting of money is indicative of general charitable intent. *Comfort*, 576 S.W.2d at 339. The nature of Dr. Kimbrough's trust property was money, not real property, thus indicating general charitable intent.

The second factor is the existence of a reverter clause associated with the gift. *Comfort*, 576 S.W.2d at 339; *Thatcher*, 76 S.W.2d at 683. Use of a reverter clause is indicative of specific charitable intent. *Id.* The absence of a reverter clause supports general charitable intent. *Id.* Dr. Kimbrough's estate plan included reverter clauses as to the bequests for all the individuals. However, it did not include a reverter clause as to the gift to Washington University in the will or trust or the other charitable gift to the League of Hard of Hearing. Moreover, the reverter clauses for the individual gifts provided that if the beneficiary was not living at the time of distribution, the gifts would go to Washington University. The lack of reverter clauses for the charitable gifts is indicative of Dr. Kimbrough's general charitable intent.

The third relevant factor is whether the charitable gift was made in trust or outright. *Comfort*, 576 S.W.2d at 339. A gift in trust is indicative of specific charitable intent while a gift made outright indicates general charitable intent. *Id.* Dr. Kimbrough's trust provides that at the death of the survivor of the life beneficiaries, the

trust is to be paid to Washington University, “free from trust.” (LF 117). Therefore this factor, too, is indicative of general charitable intent.

Additionally, Dr. Kimbrough stated no purpose for which the gift to Washington University should be used, such as scholarships or research. Nor did Dr. Kimbrough create an endowment fund. An endowment fund is a permanent fund and the specific use is designated by the donor (TR 231). In creating the fund, the donor uses language to restrict the fund’s use to that which the donor has selected (TR 231-32). In this case, Dr. Kimbrough had a pattern of giving to Washington University throughout his lifetime (TR 8). Nearly one-half of the gifts made over his lifetime went to unrestricted funds and to no particular school at Washington University (TR 8). All of these factors support the conclusion that Dr. Kimbrough had general charitable intent when he created the trust. Therefore, the court was correct in applying the cy pres doctrine.

Appellants conveniently avoid a discussion of the factors set out in *Comfort*, 576 S.W.2d 331, and instead argue that the use of the term “exclusive” in the trust should be controlling (App. Br. at 51, 54, 65, 66). While the use of the term “exclusive” is relevant, it is only one of many factors in determining Dr. Kimbrough’s intent. Although Appellants argue that this is strong language, in similar cases the use of strong language has not precluded a court from finding general charitable intent. *See e.g.*, *Levings*, 512 S.W.2d 207. Moreover, while the trust contained the term “exclusive,” it

was for the “exclusive use” of an unrestricted fund at Washington University (SUPP LF 23).

While Appellants vociferously urge this Court to pay heed to the specific language “exclusive,” they patently ignore other specific language in the trust. The trust unambiguously states that upon the death of the life beneficiaries of the trust, it “shall be paid over and distributed *free from trust* unto Washington University.” As stated above, distribution free from trust supports general intent. Appellants’ failure to discuss that specific language does nothing to lessen its value as a factor in determining Dr. Kimbrough’s intent.

Appellants also contend that the trial court improperly relied on Missouri cases *Thatcher*, 76 S.W.2d 677, and *Levings*, 512 S.W.2d 207, in its holding (App. Br. at 41). The trial court’s reliance on *Thatcher* and *Levings* was proper for two reasons. First, the court in *Comfort* distinguished, but did not overrule, *Thatcher*. The court in *Thatcher* found that a gift to benefit a “continuing problem” was indicative of general charitable intent. *Thatcher*, 76 S.W.2d at 683. The court in *Comfort* held that the question should really be, did the settlor intend to benefit everyone affected by a “continuing problem” or only certain of those persons. *Comfort*, 576 S.W.2d at 338. The decision in *Comfort* did nothing to distinguish or modify *Levings*. The court did nothing in *Vollmann*, 972 S.W.2d 490, to distinguish *Thatcher* and *Levings*. The *Vollmann* court relied on *Comfort* but did not even reference the portion of *Comfort* that narrowly distinguished

Thatcher and *Levings*. *Vollmann*, 972 S.W.2d at 492. Moreover, the factors relied on by the court in *Comfort* and *Vollmann* are the same factors relied upon by the courts in *Thatcher* and *Levings*.

Second, the trial court's reliance on *Thatcher* and *Levings* is proper because they are more factually on point than *Comfort* and *Vollmann*. In both *Comfort* and *Vollmann*, the settlor left real property. *Comfort*, 576 S.W.2d at 333-34; *Vollmann*, 972 S.W.2d at 491. Dr. Kimbrough left money. The language of the trusts in both *Comfort* and *Vollmann* was very restrictive and provided great detail as to how the land should be used. *Comfort*, 576 S.W.2d at 333-334; *Vollmann*, 972 S.W.2d at 491. Dr. Kimbrough included no detail in the language of the gift to Washington University. Finally the gift in *Comfort* was in trust, *Comfort*, 576 S.W.2d at 334, while Dr. Kimbrough's gift was outright. *Comfort* and *Vollmann* are factually dissimilar to the case at hand.

In *Levings* and *Thatcher* the settlor's estates included money, *Levings*, 512 S.W.2d at 209; *Thatcher*, 76 S.W.2d at 678, there were no reverter clauses, *Levings*, 512 S.W.2d at 209-210; *Thatcher*, 76 S.W.2d at 678. These cases are far more factually similar to the case at hand than *Comfort* and *Vollmann*. The trial court appropriately relied on *Levings* and *Thatcher* in its analysis and its holding that Dr. Kimbrough had general charitable intent (App at A6-A7). While the Appellants can attempt to avoid a

discussion of the factors in *Comfort*, they cannot escape that the factors support Dr. Kimbrough's general charitable intent.

Appellants also cite case law from numerous other jurisdictions. Case law from the states of Kansas, Colorado, New York, and eighteenth century England is, of course, not controlling authority here. Nor is there any need to look to law outside the state of Missouri. There is abundant case law from this jurisdiction. The court appropriately relied on relevant Missouri authority in finding that Dr. Kimbrough had general charitable intent when creating the trust. The decision of the trial court to apply the cy pres doctrine to the Kimbrough trust and give the trust estate to Washington University for dental-related purposes should be upheld.

C. **The court properly considered all relevant evidence (Responds to Point II).**

When, as here, the intent of the settlor is in issue, it is appropriate to consider the entire instrument along with all the facts and circumstances to determine the intent of the settlor. *Thatcher*, 76 S.W.2d at 682. As discussed above, the language of the trust and the extrinsic evidence support the court's finding that Dr. Kimbrough had general charitable intent.

Appellants' reliance on the notion of a constructive reverter is misguided (App. Br. at 67-70). It appears Appellants have confused construing the estate plan as a whole, for the purpose of resolving an ambiguity, with considering all evidence,

including the estate plan documents, to determine the general charitable purpose of a settlor. They rely on *Lehr v. Collier*, 909 S.W.2d 717 (Mo. App. 1995), which stands for the premise that when there is ambiguity in one portion of an estate plan, the court is free to rely on another document and construe them together to alleviate the ambiguity. While *Lehr* allows the court to construe both documents together, it does not allow the court to construe the two separate documents as one. Rather, the will and other estate planning documents are relevant only as extrinsic evidence, not a joint estate plan.

Dr. Kimbrough's trust document is not ambiguous. It unequivocally states that at the death of the remaining life beneficiary, the trust is to be distributed, free from trust, to Washington University for the exclusive use and benefit of the Dental Alumni Development Fund. There is no need to rely on the will in construing the trust.

But looking to the will only confirms the conclusion. As does the trust, the will leaves the remainder of Dr. Kimbrough's estate to Washington University (LF 290). The will, as extrinsic evidence, thus confirms his general charitable intent.

Appellants' additional argument that the trial court relied on the wrong will is also misguided (App. Br. at 690). As previously stated, because the trust document was unambiguous, there was no need to rely on any version of the will. Therefore, the court's reference to the wrong version of the will was harmless error.

Also harmless error was the court's statement that both the appellants here received a \$5,000.00 bequest. While Appellants correctly point out that only Appellant

Louise Obermeyer received the bequest, the court's misstatement is irrelevant because what is at issue is the language of the trust. There is no need to look to the language of the will which provides the bequest to Appellant Obermeyer. However, even considering that language, the misstatement is still harmless error because it demonstrates that Dr. Kimbrough provided for certain family members and charities in the will, leaving the trust residue to go to further the profession that he was so proud of – dentistry.

CONCLUSION

In view of the foregoing, the decision of the circuit court should be affirmed.

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 3,440 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

Assistant Attorney General

APPENDIX

Findings of Fact, Conclusions of Law, Judgment, and UkaseA1-A9