

## ORDER OR COURT

NOW, May 8, 1979, the exceptions to the Order of the hearing judge striking the Incorporation of the Borough of Valley-Hi dated October 24, 1978, are overruled and the Order is affirmed.

ESTATE OF CREAGER, C.P. Franklin County Branch, O.D.  
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*Charitable Trusts - Purpose Becoming Indefinite, Impossible or Impracticable of Fulfillment - Distribution for Charitable Purpose Similar to that Intended by Testamentary Settlor - Trust Devoted to Theological Education of Worthy and Needy Young Men at Lutheran Seminary - Lack of Qualifying Applicants - Trust Created When Women Not Permitted in Ministry - Change in Church Policy Permitting Women to Enter Ministry - Broadening of Scope of Trust Purpose to Include Women Applicants Appropriate*

1. Sect. 6110 of the Probate, Estates and Fiduciaries Code provides for Court Ordered distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether the charitable intent was general or specific, when a charitable purpose becomes indefinite, impossible or impracticable of fulfillment.

2. In determining whether a charitable trust should be executed *cy pres*, the Court does not arbitrarily substitute its own judgment for that of the testator, but seeks to ascertain and carry out as nearly as may be the testator's true intention.

3. In so doing, the Court assumes that where a particular purpose which has failed is not an essential feature of the testator's general plan, the testator would prefer that his property be applied to a purpose as similar as possible to that stated by him rather than that the trust should fail altogether.

4. If a trust is limited to benefit qualified male ministerial student applicants, and experience shows there have been no such applicants, but the trust was created at a time when only males could enter the ministry, and the will expresses an intention to provide for human betterment, through the use of the testatrix's possessions as gifts from God, the Court will not infer a prejudicial intention in the testatrix to prefer men for the ministry, but will conclude it is more likely she would have included women in the class of beneficiaries had they been permitted to enter the ministry when she died, as they are now.

*John N. Keller, Esq., Attorney for Applicant*

\*Editor's Note = Not reported in this Journal.

## OPINION AND ORDER

EPPINGER, P.J., June 26, 1979:

Atha Creager died March 10, 1967 and in her will bequeathed Five thousand dollars to the First National Bank & Trust Company of Waynesboro in a trust, the purpose of which was to assist worthy and needy young men of Waynesboro in obtaining a theological education at Gettysburg Theological Seminary. We have been asked by the trustee to amend the provisions of the trust to include worthy and needy young women.

Since the death of the testatrix, no young man has ever applied for the funds. So the fund has remained untouched for over twelve years, growing from \$5,000 to approximately \$8,600.00.

Under Sect. 6110 of the Probate, Estates and Fiduciary Code, Act of June 30, 1972, P.L. 508, No. 164, 20 P.S. Sect. 6110, if a charitable purpose becomes indefinite, impossible or impracticable of fulfillment, a Court may order distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether the charitable intent was general or specific.

Experience since the trust was created teaches us that it has become impracticable and indefinite of fulfillment. There have been no qualified applicants. The chances of fulfilling the charitable purpose would at least increase if women were allowed to apply for and receive the trust benefits.

In *Wilkey's Estate*, 337 Pa. 129, 10 A.2d 425 (1940), it was stated:

In order judicially to determine whether a charitable trust, which for some reason cannot be carried out in accordance with the prescribed plan of the testator, should be executed *cy pres*, it must be decided whether the testator's general intention was that his property should be applied to charity in any event, or only if such application can be made in the particular manner or form specified in his will. In applying the principle of *cy pres* the court does not arbitrarily substitute its own judgment for the desire of the testator, or supply a fictional testamentary intent, but, on the contrary, it seeks to ascertain and carry out as nearly as may be the testator's true intention; in so doing it assumes that where a particular purpose is apparently not an essential feature of his plan, the testator would prefer that his property should be applied to a

purpose as similar as possible to that stated by him rather than that the trust which he attempted to create should fail altogether.

In the fourth item of her will, the testatrix stated that she looked upon her possessions as gifts from God to provide for her old age and to be used for human betterment. She selected the education of young men for the ministry as the vehicle for providing human betterment. We do not believe that these intentions had anything to do with a continuing preference for men in the ministry. We discern no such prejudice in the will. But when she died women were not permitted in the ministry in the Lutheran Church. So she labeled her funds for young men's theological education. However, since 1970, women have been permitted to enter the Lutheran ministry.

In *City of Philadelphia v. Heirs of Stephen Girard*, 45 Pa. 9, 27-28 (1863), the Court said:

"When a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention."

Since we believe that it was the intention of the testatrix to thank God and benefit humans generally, and not to benefit one particular person by her generosity, we find that this intention does not depend upon the fund's being used to educate just young men, for a young woman trained in the ministry is equally capable, by her life and service, of benefitting humans generally. To render her charitable purpose less indefinite or impractical of fulfillment, we will order that the fund may be applied to the theological education of a needy young person of Waynesboro at the Gettysburg Theological Seminary.

#### ORDER OF COURT

AND NOW, this 26th day of June, 1979, it is ordered pursuant to Section 6110 of the Probate, Estates and Fiduciaries Code, that the First National Bank and Trust Company of Waynesboro, Pennsylvania, trustee of a testamentary charitable trust created in Item IV of the Last Will and Testament of Atha Creager, a/k/a Athalinda Belle Creager, distribute funds from the said charitable trust to a worthy and needy young person of Waynesboro, Pennsylvania, without regard to the sex of that person but otherwise pursuant to the terms of the said trust.

BUMBAUGH v. KISSNER, C.P. Franklin County Branch, No. A.D. 1977-586

*Trespass - Motion for New Trial - Inconsistent Verdict - Loss of Consortium Awarded to Spouse but Victim Denied Damages for Pain and Suffering, Inconvenience, Physical Impairment and Loss of Life's Pleasures - New Trial Awarded*

1. Once a jury places liability on a responsible party, they may not willfully or capriciously withhold payment of an item which is inextricably interwoven in the pattern of the liability.

*J. Dennis Guyer, Esq., Attorney for Plaintiff*

*George F. Douglas, Esq., Attorney for Defendant*

#### OPINION AND ORDER

EPPINGER, P.J., July 12, 1979:

Is it possible for a man to become disabled as a result of an accident so that his wife is entitled to a sum of money for loss of consortium but he is not entitled to a sum of money for pain and suffering, inconvenience, physical impairment and the loss of life's pleasures? That is the question that is presented in this motion for a new trial.

Delmer Bumbaugh, husband, was injured in an accident. He appeared in court wearing a cervical collar and claimed to have suffered a great deal as a result of the accident. Without objection, prior to the closing arguments, the jury was told in this No-Fault case that they were not to concern themselves with Delmer's medical bills or lost income, as he was compensated for them by another source. They were only to concern themselves with what amount, if any, they were going to award to the husband for his alleged pain, suffering, inconvenience, physical impairment, loss of life's pleasures and property damage. They were told that they were to consider an award to Delmer's wife, Sarah, for her alleged loss of consortium.

The jury returned a verdict awarding the husband the previously stipulated sum of \$407.20 for property damages and \$500.00 to his wife for her loss of consortium.

We believe the answer to the question posed in the first paragraph is no. In *Thompson v. Iannuzzi*, 403 Pa. 329, 169 A.2d 777 (1961), a husband and wife sued for injuries the wife received in a car collision. The jury's verdict was that the