

IN RE ESTATE OF WILLIAM O. WHITEMAN, Deceased  
Court of Common Pleas of the 39th Judicial District of Pennsylvania  
Franklin County Branch, Orphans' Court Division  
No. 12 of 2007

*Cy pres; Creditor's standing*

1. If a particular charitable purpose becomes unlawful, impracticable of performance or wasteful, the court shall fulfill as nearly as possible the benefactor's or settlor's charitable intention in making a gift or establishing a trust; the purpose of a *cy pres* proceeding is to discern the benefactor's donative intent in making a particular gift and to determine whether that intent can be carried out.
2. Where the intended recipient of a gift under a will has no governing body, no office, no address and has ceased providing the services which the benefactor had in mind when he executed the will, the benefactor's donative intention cannot be carried out because there is no longer an entity capable of receiving the gift.
3. A creditor of the intended recipient of a gift under a will has no standing to participate in a *cy pres* proceeding in an effort to compel the recipient to resume operations simply to facilitate the creditor's collection of the debt; the benefactor's donative intent was to provide funds for a charitable purpose, not to make funds available for the satisfaction of a debt owed to a third party by that charitable entity.

Appearances:

Jerrold A. Sulcove, Esq.

Michael T. Foster, Esq.

Michael J. Connor, Esq.

Kandice J. Giurintano, Esq.

ADJUDICATION

Herman, J., September 6, 2007

Procedural Background

Before the court is a petition for *cy pres* filed by Manufacturers and Traders Trust Company (M&T), executor of the estate of William O. Whiteman, a resident of Franklin County who died on February 26, 2005. Mr. Whiteman's Will gave one-half of the residue of his estate to the Chambersburg Transit Authority ("CTA") or to its successor. ¶2(A). The other half of the residue was to be given to the Cumberland Valley Animal Shelter, Inc. ("the Shelter"). ¶2(B). The Shelter is a non-profit organization which operates a shelter and programs for the benefit of animals located in Franklin County.

CTA was a Pennsylvania municipal authority with a registered office address of 437 Wolf Avenue, Suite 4, Chambersburg, Franklin County, Pennsylvania. According to its Articles of Incorporation, its purpose was "to provide municipal transportation services in the Borough of Chambersburg and surrounding areas..." CTA became inactive as of July 16, 2004 pursuant to a resolution passed by its board

of directors. All of the board members resigned as of August 23, 2004 and it currently has no board. CTA no longer maintains an office and mail addressed to it at the 437 Wolf Avenue address has been returned to sender as undeliverable.

The court issued a preliminary Order on January 29, 2007 setting a hearing on the petition for February 28, 2007. M&T served a copy of the petition on the Pennsylvania Attorney General and attempted, though unsuccessfully, to serve a copy on CTA at the Wolf Avenue address. M&T also published notice of the petition and Order in the Public Opinion Newspaper on three separate dates.

The court convened the hearing as scheduled. Present were Allen Rhinehart, a representative of M&T Bank and its counsel Jerrold Sulcove, Esquire; Joanne Book Coles, Esquire, from the Attorney General's Office; Michael Connor, Esquire, representing the Shelter; and Kandice Giurintano, Esquire, counsel for M.A. Brightbill Body Works, Inc. ("Brightbill"), an apparent creditor of CTA. The court issued an Order after taking evidence which directed the parties to enter their formal appearances and to file additional pleadings and written argument. These were received by the court on or about April 25, 2007. This matter is ready for decision.

### Legal Background

M&T filed this petition pursuant to section 6110(a) of the Probate, Estates and Fiduciaries Code, 20 Pa.C.S.A. §101 et seq. which codified the common law doctrine of *cy pres*. That particular section of the Code has been repealed but the doctrine is now contained in the Uniform Trust Act, 20 Pa.C.S.A. §7740.3 effective November 6, 2006 pertaining to charitable trusts: "...If a particular charitable purpose becomes unlawful, impracticable or wasteful...the court shall apply *cy pres* to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific..." §7740.3(a)(3).

In order to determine whether a particular entity is an appropriate choice to receive the corpus of a trust, the court must inquire into the purpose and subject of the original, now-defunct charity, the geographical area which the charity was intended to serve and the nature of the population which was the intended object of the original gift. In re Farrow, 602 A.2d 1346 (Pa.Super. 1992). The court discovers the settlor's intent by examining the entire Will. Id. The court may not substitute its judgment for that of the testator nor may it supply a fictional testamentary intent. Instead the court must ascertain and carry out the testator's intent as nearly as possible. Estate of Elkins, 888 A.2d 815 (Pa.Super. 2005); In re Women's Homeopathic Hospital of Philadelphia, 142 A.2d 292 (Pa. 1958).

The Pennsylvania Nonprofit Code defines "charitable purposes" as "[t]he relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes, the accomplishment of which is beneficial to the community." 15 Pa.C.S.A. §5103; Pennsylvania Rule of Administration 2156(a) – Orphans' Court Division. Our Supreme Court has described the concept as follows:

The word "charitable" in a legal sense includes every gift for a general public use, to be applied consistent with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint. In its broadest meaning, it is understood "to refer to something done or given for the benefit of our fellows or the public."

Voegtly Estate, 151 A.2d 593, 595 (Pa. 1959)(citations omitted). All participants at the February 28, 2007 hearing agree Mr. Whiteman's bequest to CTA is properly considered a charitable gift because its purpose was to benefit the public.

### Evidence of Record

CTA was first registered with the Pennsylvania Department of State in 1990. Amended Articles of Incorporation were filed in 1999. CTA's principal office was then located at 437 Wolf Avenue, Suite 4, Chambersburg. (Hearing exhibit #2.)

Mr. Whiteman executed his Will on September 26, 2000. Item 2(A) gave one-half of the residue of his estate to the Chambersburg Transit Authority, 437 Wolf Avenue, Chambersburg, Pennsylvania, "if it is still in existence at the time of my death and if not, then to its successor." (Hearing exhibit #1.)

Chambersburg Borough Council which is the governing body of the Borough of Chambersburg and

originally created CTA, passed a resolution on July 26, 2004 rendering CTA inactive as of July 16, 2004 due to a lack of operating funds. CTA was acknowledged to have significant outstanding debt for which local municipalities would not be responsible. Those municipalities were the Borough of Chambersburg, the Borough of Waynesboro, and the Townships of Greene, Hamilton and Washington. All of CTA's seven board members' resignations were effective as of July 23, 2004. (Hearing exhibit #3.)

Mr. Whiteman died on February 26, 2005. Executor M&T attempted to serve notice of the death by mailing a letter addressed to CTA at 437 Wolf Avenue in Chambersburg. The letter was returned because the addressee had moved and left no forwarding address. (Hearing exhibit #4.) M&T attempted to serve CTA with a copy of the petition for *cy pres* by sheriff at 437 Wolf Avenue, Suite 4, Chambersburg on February 2, 2007 but the sheriff was unable to make service because "the business is defunct." (Hearing exhibit #6 dated February 6, 2007.) M&T then published legal notice of the hearing in the newspaper on February 8th, 15th and 22nd, 2007. The notice indicated the purpose of the hearing. (Hearing exhibit #5.)

Counsel for M.A. Brightbill Body Works, Inc. appeared at the hearing and alerted the court to two civil actions filed in Franklin County by Brightbill against CTA. The first was filed October 15, 2003 and made claims of breach of contract and unjust enrichment. Brightbill, which is in the business of outfitting and selling municipal and commercial buses, alleged in the complaint that it did work on 26 buses for CTA in 2002 pursuant to a written contract and submitted an invoice to CTA for \$177,106 but was never paid. The complaint was served on CTA through its office staffer on October 23, 2003. Brightbill obtained a default judgment against CTA for \$177,106 plus interest and costs on January 22, 2004 after CTA failed to answer the complaint. (Docket No. 2003-2524.)

The second action was filed on September 27, 2006 by Brightbill against the Borough of Chambersburg, Chambersburg Borough Council and CTA. In that mandamus action, Brightbill alleged in the complaint that it learned since obtaining judgment against CTA in No. 2003-2524 that CTA had ceased doing business and is apparently insolvent. Brightbill asked the court to compel the Borough (the municipality which created CTA) and the Council (the Borough's governing body) to appoint members to CTA's board for the purpose of ensuring there is a mechanism whereby CTA's debts can be satisfied. Thomas Finucane, Esquire, accepted service of the complaint on behalf of the Borough and the Borough Council on November 20, 2006. No answer to the complaint has been filed. Counsel for Brightbill represented to the court at the *cy pres* hearing that settlement negotiations were underway. (Docket No. 2006-2974).<sup>[1]</sup>

It was the court's position that as a preliminary matter we would have to decide whether Brightbill has standing to participate in this *cy pres* proceeding. We directed counsel to address this issue in their written arguments.

## Discussion

### **I. Standing**

The first question in a *cy pres* proceeding is: what was the decedent's intention in making a particular gift? As noted above, there is no dispute Mr. Whiteman's intention was to benefit members of the public in the Borough of Chambersburg and the surrounding areas who need transportation services. The second question is whether Mr. Whiteman's charitable intention is "impractical of performance," in other words, can it be carried out? Key to answering this question is determining whether CTA exists as an entity which is capable of receiving the gift. As noted above, there is no dispute CTA was not providing transportation services at the time of Mr. Whiteman's death and even one year before that.

Brightbill nevertheless contends CTA continues to exist as a legal entity capable of receiving the gift under Mr. Whiteman's Will because no formal articles of dissolution were filed with the Department of State and the minutes of the July 16, 2004 Borough Council meeting do not show CTA was otherwise formally "dissolved." Brightbill goes on to contend that even if CTA was dissolved, the Borough of Chambersburg and Chambersburg Borough Council have an obligation under the Municipality Authorities Act to appoint a governing board for CTA so as to maintain CTA's existence as a legal entity. This obligation is triggered by the fact that CTA owes a debt to Brightbill pursuant to the default judgment in No. 2003-2524 which must be satisfied before it can be dissolved or terminated. Clearly, Brightbill desires that CTA either continue to exist or be resurrected as a legal entity so that CTA can receive the estate monies, monies which could then be potentially available to pay Brightbill.

Brightbill cites section 5610(d) of the Act which states: "If a vacancy [on the board of an authority] shall occur by reason of the...resignation...of a member, the municipal authorities shall appoint a successor to fill his unexpired term." This section imposes on the Borough of Chambersburg a continuing obligation to

appoint members to CTA's governing board. Brightbill also cites section 5619(b) which states: "When an authority has finally paid and discharged all bonds issued and outstanding and the interest due on them and settled all other outstanding claims against it, the authority may convey all its property to the municipality or municipalities...and terminate its existence." In other words, a municipal authority cannot dissolve, become inactive or terminate its existence until it has satisfied its debts, and these two sections operate in tandem to ensure that CTA remains in existence for the purpose of receiving funds from any source, including Mr. Whiteman's estate, and using those funds to satisfy its debts.

We do not dispute Brightbill obtained a default judgment against CTA and is CTA's creditor in No. 2003-2524. Furthermore, we take no position with regard to whether Brightbill should prevail in the mandamus action since that action is not currently before this court for decision. What we do conclude is Brightbill has failed to show its status as CTA's creditor gives it standing to participate in this matter. As discussed above, the purpose of a *cy pres* proceeding is to discern the decedent's donative intent in making a particular gift and to determine whether that intent can be carried out. As to donative intent, it is clear from the plain language of Mr. Whiteman's Will that his goal was not to satisfy CTA's debts but rather to benefit people in the community who need public transportation services. Also, Mr. Whiteman's charitable purpose cannot be carried out. This is because CTA does not exist in the sense contemplated by the Will insofar as it has no board, maintains no offices, receives no mail and, most importantly, does not currently provide transportation services and provided no such services at the time of Mr. Whiteman's death and even before then. Even assuming CTA was never formally dissolved and/or should be resurrected pursuant to the Municipality Authorities Act, Brightbill's position as a judgment creditor of CTA, while perhaps key to the pending mandamus action, is simply not relevant to the inquiry now before this court.

## **II. Successor Beneficiary**

Having found CTA is no longer available in the manner anticipated by the Will, the next question is whether a successor beneficiary exists which can carry out Mr. Whiteman's intention. The Shelter argues there is no successor entity or organization to CTA performing the same particular charitable purpose and therefore the funds should be given to the Shelter, the only other charity which Mr. Whiteman named in his Will. The Shelter did advise the court about the Franklin County Integrated Transportation System which offers shared-ride transportation by appointment to the public but stated that Integrated does not provide services which are similar to those services once provided by CTA. We also note that no representative from Integrated or any other transportation service appeared at the hearing despite the published notices in three editions of the newspaper. Despite the foregoing, the court will direct M&T to conduct an additional search for a transportation-related candidate to receive the estate monies and this search should include Integrated. The search should be conducted by any means deemed appropriate by the executor with due regard to the expense to the estate.

### DECREE

Now this 6th day of September 2007, the court hereby finds M.A. Brightbill Body Works, Inc. has no standing to participate further in this *cy pres* matter. The court's final decision on the petition is hereby deferred and the executor is directed to conduct further investigation into possible candidates in the Franklin County area which might be suitable recipients of the estate funds at issue. The executor is directed to report the results of its investigation to the court no later than November 1, 2007.

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[1] The Honorable John R. Walker, President Judge of this Judicial District, is the judge assigned to handle both No. 2003-2524 and No. 2006-2974.