IN THE SUPREME COURT OF IOWA

Supreme Court No. 19-0155

IN THE MATTER OF THE APPLICATION OF COE COLLEGE FOR INTERPRETATION OF PURPORTED GIFT RESTRICTION,

COE COLLEGE,
Applicant-Appellant,

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY CVCV089616
HONORABLE FAE HOOVER GRINDE

APPLICANT-APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This case should be retained by the Supreme Court of Iowa as it involves a substantial issue of first impression. *See* Iowa R. App. P. 6.1101(2)(c). This case presents such an issue because of Coe College's ("the College") alternative argument regarding release or modification of any restriction that is found to be present on its 1976 gift.

In the district court, the College argued that a charitable organization gave it an outright, unrestricted gift. The district court disagreed and found a restriction on the alienability of the gift. Therefore, the College asked that the district court apply Iowa Code section 540A.106, which is part of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") and is titled "Release or modification of restrictions on management, investment, or purpose," to release the restriction. The district court examined the scope of the statute and found section 540A.106 did not relieve the College of the restrictions on the gift. (*See* Appendix ("App.") 69-70 (Ruling, at pp.4-5)). Iowa Code section 540A.106 has not been examined by this Court.

STATEMENT OF THE CASE

Nature of the case

This case involves an appeal from a declaratory judgment decision regarding the alienability of seven Grant Wood paintings that were donated to the College over forty years ago. (App. 66-72 (Ruling); App. 12-13

(Second Amended Petition, at ¶¶ 2-6)). The College sought confirmation from the district court that the collection of paintings called "The Fruits of Iowa" (hereinafter "Paintings"), which have hung on the walls of its library since 1957, was an unrestricted gift. (App. 66-72 (Ruling); App. 12 (Second Amended Petition, at ¶ 2); App. 28-29 (Stipulated Facts (hereinafter "SOF"), at ¶¶ 6-7)). The district court found the Paintings are a restricted gift, and the College now seeks review in this Court. (App. 66-72 (Ruling); App. 73-75 (Notice of Appeal)).

Course of the proceedings

The College filed a petition on February 5, 2018, seeking a declaratory ruling. (App. 5-10 (Petition)). The College served the Petition on the Iowa Attorney General's Office and the Iowa Attorney General participated in the district court proceedings, pursuant to Iowa Code sections 540A.106 and 633A.5108. (App. 5-10 (Petition); App. 11(Acceptance of Service)). On August 16, 2018, the College filed a Second Amended Petition after receiving consent from the State to do so. (App. 12-17 (Second Amended Petition (hereinafter "Petition")); App. 18 (Consent to Second Amended Petition)).

In the Petition, the College asked for a determination that the Paintings were an unrestricted gift. (App. 12-15 (Petition, at ¶¶ 2, 6, 7, &

10)). It alternatively argued that, if the district court found an alienability restriction, then it should permit the removal of the restriction under the Iowa Uniform Prudent Management of Institutional Funds Act at Iowa Code section 540A.106 or under the common law doctrine of *cy pres*. (App. 15-16 (Petition, at ¶ 11)). The College also argued that, if a restriction were found, Iowa Code section 633A.5102 supported a finding that the Paintings could be treated as an unrestricted gift. (App. 16 (Petition, at ¶ 12)).

In September 2018, the College and the State agreed to the admission of four exhibits (App. 19 (List of Trial Exhibits)) and submitted Stipulated Facts to the district court (App. 28-30 (SOF)). Both parties submitted briefs on October 11, 2018. (App. 31-46 (Brief of Coe College); App. 47-59 (Iowa Attorney General's Brief in Support of Denial of Application for Declaratory Judgment)). On October 18, 2018, the district court held a short hearing. (App. 76-94 (Transcript)). The court gave both parties permission to file additional briefs. (App. 92-93 (Transcript, at pp.19-20)). On November 8, 2018, the College filed a supplemental brief. (App. 60-65 (Supplemental Brief of Coe College)). The State did not file an additional brief.

Disposition of the case in the district court

On January 2, 2019, the district court entered its ruling that is the subject of this appeal. (App. 66-72 (Ruling)). The district court found that the Paintings were a restricted gift and that the College is restricted from selling, transferring, or otherwise alienating the Paintings. (App. 68 (Ruling, at p.3)). The district court found it is permissible for the College to continue its practice of removing the Paintings from Stewart Memorial Library temporarily for the purpose of loaning them out to other educational or charitable institutions. (App. 68 (Ruling, at p.3)). It declined to apply UPMIFA or Iowa Code section 540A.106 (App. 69 (Ruling, at p.4)), and the doctrine of *cy pres* (App. 70 (Ruling, at p.5)).

STATEMENT OF THE FACTS[1]

Background of Coe College

The College is a private, liberal arts four-year residential college, located in Cedar Rapids, Iowa. (App. 28 (SOF, at ¶ 1)). The College's core mission is to provide a liberal arts education for its students. (App. 28 (SOF, at ¶ 2)). The College's purpose is affirmed in its Restated Articles of Incorporation, which states as follows:

[1] The parties jointly submitted Stipulated Facts and four exhibits to the court. (App. 28-30 (SOF); App. 19 (List of Trial Exhibits); App. 20-27 (Trial Exhibits 1-4); App. 77-78 (Transcript, at pp. 2-3)).

> The purpose of this corporation shall be to establish, endow, conduct and maintain an institution for the promotion of sound learning and education, such as is usually contemplated in colleges and universities with a religious heritage, provided the objects and purposes of the corporation are and shall remain exclusively, educational, literary, scientific, and charitable, and its income and assets shall be exclusively devoted to such usages, and no part thereof shall inure to the benefit of any natural person or any entity not qualified under Section 501(c)(3) of the Internal Revenue Code of 1986, as now or hereafter amended (the "Code").

(App. 28 (SOF, at ¶ 3)). This statement of the College's purpose has not been changed in any material way since its founding in 1851 or since its incorporation as a nonprofit corporation in 1926. (App. 28 (SOF, at ¶ 4)).

Background of The Eppley Foundation

In 1932, Eugene C. Eppley was the owner of what was then known as the Montrose Hotel in Cedar Rapids, Iowa. (App. 28 (SOF, at ¶ 5); App. 22 (Trial Ex. 3)). One of the stated purposes of the Eppley Foundation was to

> promote the well-being of mankind and to assist the needy and unfortunate, by religious, charitable, scientific, literary or educational activities; and for such purposes to make grants, donations, and contributions to corporations … organized and operated exclusively for religious, charitable, scientific, literary or educational purposes.

(App. 29 (SOF, at ¶ 8)). The Eppley Foundation was dissolved on May 2, 1977, by the Nebraska Secretary of State for nonpayment of biennial fees in compliance with the laws of the State of Nebraska and nothing has been filed to revive the Eppley Foundation. (App. 29 (SOF, at ¶ 16)). The Articles

of Incorporation of the Eppley Foundation provided that the assets of the Eppley Foundation were to be distributed "for one or more of the authorized purposes and objects of the corporation" in the event of its dissolution. (App. 30 (SOF, at ¶ 17)).

The Grant Wood Paintings

In 1932, Mr. Eppley commissioned well-known artist Grant Wood to create a mural that was mounted on the walls in the Coffee Shop at the Montrose Hotel. (App. 28 (SOF, at ¶ 5); App. 22 (Trial Ex. 3)). Following the sale of the Montrose Hotel in 1957, Mr. Eppley had the mural separated into seven scenes (the "Paintings"). (App. 28-29 (SOF, at ¶ 6); App. 22 (Trial Ex. 3)). Mr. Eppley removed the Paintings defined earlier from the Montrose Hotel and loaned the Paintings to the College for an indeterminate term, with the understanding that the Paintings could be taken back at any time after one year from the date of their original loan to the College. (App. 28-29 (SOF, at ¶ 6); App. 22 (Trial Ex. 3)). The Paintings thereafter were displayed at the College for nearly two decades. (App. 29 (SOF, at ¶ 7)).

The donation, the Gift Letter, and the mural

The Eppley Foundation approved termination of the previous loan arrangement and transferred ownership of the Paintings to the College, pursuant to a letter to the College from the Eppley Foundation dated

February 16, 1976 (the "Gift Letter"). (App. 29 (SOF, at ¶ 9); App. 20 (Trial Ex. 1)). The Gift Letter contains the following provision: "The Eppley Foundation Board of Directors have [sic] approved that the Grant Wood paintings be given to [the College] and that this would be their permanent home, hanging on the walls of Stewart Memorial Library." (App. 29 (SOF, at ¶ 10); App. 20 (Trial Ex. 1)).

The gift of the Paintings was not accompanied by a gift of funds necessary to maintain and preserve the Paintings. (App. 29 (SOF, at ¶ 11)). The College has held the Paintings since the time of the gifting by the Eppley Foundation and has occasionally loaned them to other institutions for display as well as changing their display location on campus. (App. 29 (SOF, at ¶ 15)).

At the same time that the Paintings were donated, the Eppley Foundation dictated wording for a memorial plaque that was placed at the College in recognition of the gift of the Paintings. (App. 29 (SOF, at ¶ 13); App. 21 (Trial Ex. 2)). The plaque states in relevant part: "In his [Eugene C. Eppley] memory, the Grant Wood Paintings the Fruits of Iowa were given to [the] College by the Eugene C. Eppley Foundation." (App. 29 (SOF, at ¶ 14); App. 21 (Trial Ex. 2)). The Eppley Foundation made no provision to

have the Paintings returned or re-directed if they were no longer able to be hung on the walls of Stewart Memorial Library. (App. 29 (SOF, at ¶ 12)).

The value and accounting of the Paintings as an unrestricted gift

At the time the Paintings were gifted to the College in 1976, the value of the paintings was less than 1% of the value of the College's endowment. (App. 30 (SOF, at ¶ 18)). The value of the Paintings today is approximately 7% of the College's total endowment. (App. 30 (SOF, at ¶ 19)). Since the time of the gift in 1976, the College consistently reported and accounted for the Paintings as an "unrestricted asset" for financial statement purposes, reflecting the College's position that it held the Paintings for investment purposes and without restriction as to the use, placement, or sale of the Paintings. (App. 30 (SOF, at ¶ 20)).

In the course of a regular annual audit of the financial statements of the College as of June 30, 2016, the College's outside auditing firm changed its prior position as to the classification of the Paintings as "unrestricted assets" and required the College to reclassify the Paintings as part of the College's "artwork collection" and as "permanently restricted net assets." (App. 30 (SOF, at ¶ 21); App. 27 (Trial Ex. 4)). Reclassification of the Paintings as "permanently restricted assets" results in an adverse impact on the value of the College's endowment fund, which, in turn, adversely

impacts the College's financial position for Federal educational institution reporting requirements. (App. 30 (SOF, at ¶ 22)).

ARGUMENT

The district court erred in interpreting the intent of the Eppley Foundation when it gifted the Paintings to the College in 1976 after the Paintings had been loaned to the college for nearly twenty years. This Court should find that the Gift Letter and plaque reflect an intent of an unrestricted gift by the Eppley Foundation to the College. Alternatively, if this Court finds an opposite intent, then it should find Iowa Code section 540A.106 and the statutory and common law doctrine of *cy pres* applicable to overcome any impracticable and impossible restrictions and allow the College to sell, transfer, or otherwise alienate the Paintings. This Court should find the Paintings should be treated as an unrestricted gift.

I. THE LANGUAGE OF THE GIFT LETTER AND SURROUNDING CIRCUMSTANCES SHOW THAT THE EPPLEY FOUNDATION INTENDED TO DONATE THE PAINTINGS TO THE COLLEGE WITHOUT ANY RESTRICTIONS ON THE ALIENATION OR USE OF THE PAINTINGS

A. Preservation of Error

The district court's Ruling was filed on January 2, 2019. (App. 66-72 (Ruling)). On January 24, 2019, the College filed its Notice of Appeal seeking review of the Ruling "and all adverse rulings and orders inhering

therein." (App. 73-75 (Notice of Appeal)). In the district court, the College made each of the arguments it makes in this appeal in its October 11, 2018 brief, at the October 18, 2018 hearing, and in its November 8, 2018 supplemental brief. (App. 78-87, 90-91 (Transcript at pp.3-12, 17-18); App. 34-39 (Brief of Coe College, at pp.4-9); App. 60-63 (Supplemental Brief of Coe College, at pp.1-4)). Therefore, the College has preserved error on the court's determination of the issue of whether the Paintings were a restricted or unrestricted gift.

B. Standard of Review

The standard of review in declaratory judgment actions depends on how the action was tried to the district court. *See Sutton v. Iowa Trenchless, L.C.*, 808 N.W.2d 744, 748 (Iowa 2011) (citing *Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006)). Cases in equity are reviewed de novo. *Citizens Sav. Bank v. Sac City State Bank*, 315 N.W.2d 20, 24 (Iowa 1982). Cases tried as law actions are reviewed for correction of errors at law. *Sutton*, 808 N.W.2d at 748-49 (citing *Harrington v. Univ. of N. Iowa*, 726 N.W.2d 363, 365 (Iowa 2007)).

This Court "consider[s] the pleadings, relief sought, and nature of the case [to] determine whether a declaratory judgment action is legal or equitable." *Id.* (quotations and citations omitted; second modification in

Sutton). It "consider[s] and review[s] a case on appeal in the manner it was treated below." *Citizens Sav. Bank*, 315 N.W.2d at 24 (citations omitted). Declaratory relief is an equitable remedy. *See Master Builders of Iowa, Inc. v. Polk Cty.*, 653 N.W.2d 382, 388 (Iowa 2002) (finding the case was "fully tried in equity" where the plaintiff sought declaratory and injunctive relief rather than monetary relief). "[A] trial court generally issues a 'decree' in an equitable action and a 'judgment' in a legal action." *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 178 (Iowa 2010) (citing *Citizens Sav. Bank*, 315 N.W.2d at 24).

This Court has explained, "Where there is uncertainty about the nature of a case, a litmus test we use in making this determination is whether the trial court ruled on evidentiary objections." *Ernst v. Johnson Cty.*, 522 N.W.2d 599, 602 (Iowa 1994). If there are rulings on evidentiary objections, it is more likely a case at law. *See Sutton*, 808 N.W.2d at 748. If "[n]one of the trial motions ordinarily made in a law action appear in the transcript[,]" the case is more likely to be found to be in equity. *Citizen Sav. Bank*, 315 N.W.2d at 24.

This should be considered a case at equity for purposes of determining the applicable standard of review. This case was filed as a case at law, but the initial label a litigant gives an action is not determinative of whether the

case is at law or in equity. *See Sutton*, 808 N.W.2d at 748-49 (noting that the plaintiff initially captioned the case in equity but finding the case was tried at law). Here, the court's decision was labeled a "Ruling." (App. 66-72 (Ruling)). The district court did not, however, make any rulings on evidentiary objections since there were no objections and the parties agreed on all facts. (*See* App. 28-30 (SOF); App. 76-94 (Transcript)). Importantly, the College sought only a declaratory ruling and no monetary relief or other legal remedies. *See Master Builders*, 653 N.W.2d at 388.

This Court should find this action is one in equity and review the issues de novo. Even if the Court finds this case is a legal matter that should be reviewed for correction of errors at law, though, the Court should find the district court erred in interpreting the Gift Letter.

C. The district court should have found that the Gift Letter does not restrict the College's outright ownership and use of the Paintings

The question for this Court is whether or not the Gift Letter was an outright gift of the Paintings to the College. It is a question, in essence, of contract interpretation. What do the words in the Gift Letter mean and did the Eppley Foundation intend for the Paintings to be an unrestricted, outright gift to the College, as they were consistently treated for forty years? Under Iowa law, the intent of the grantor of a trust or gift governs. *See In re Trust*

Known as Spencer Mem'l Fund, 641 N.W.2d 771, 774-75 (Iowa 2002); *First Nat'l Bank v. Mackey*, 338 N.W.2d 361, 363 (Iowa 1983); *In re Work Family Trust*, 151 N.W.2d 490, 492 (Iowa 1967); *Hilliard v. Hilliard*, 39 N.W.2d 624 (Iowa 1948). The language used is to be accorded its usual and ordinary meaning. *In re Manahan's Estate*, 125 N.W.2d 135, 138 (Iowa 1963); *Raim v. Stancel*, 339 N.W.2d 621, 623-24 (Iowa Ct. App. 1983).

Here, the words used convey that the transfer was an outright gift. Other contemporaneous evidence supports this interpretation. Further, the Articles of Incorporation of the Eppley Foundation as well as its stated purposes support this interpretation.

1. The plain language of the Gift Letter conveys an outright gift to the College

The 1976 Gift Letter provides, in part:

> The Eppley Foundation Board of Directors have approved that the Grant Wood paintings be given to the Coe College and that this would be their permanent home, hanging on the walls of Stewart Memorial Library.

(App. 29 (SOF, at ¶ 10); App. 20 (Trial Ex. 1)).

The operative language in the Gift Letter states that "the Grant Wood paintings *be given* to [the College]." (App. 20 (Trial Ex. 1) (emphasis added)). Those words are clear and unambiguous words of "sale" and "transfer." They contain the verb "be given." There are no limitations or

restrictions stated in connection with the "be given" language. If the Eppley Foundation wanted to restrict or limit the College's absolute rights to the Paintings, this is the part of the sentence in which such a limitation or restriction should appear.

The clause in the Gift Letter following the outright gift language – "and that this would be their permanent home, hanging on the walls of Stewart Memorial Library" – must be read in the context of the previously existing situation. "Permanent" is an adjective modifying the noun "home." Prior to 1976, the Paintings were on loan to the College for an indefinite period. The Eppley Foundation could demand their return at any time, regardless of how long they had been at the College. At that time, the College was the *temporary* home of the Paintings. By virtue of the Eppley Foundation giving the Paintings to the College, the College became their *permanent* home. The Gift Letter did not restrict or impose limitations on the transfer.

Perhaps as important as the language contained in the Gift Letter is the language that is missing from the letter. The Gift Letter does not state that the Paintings were to be held by the College in "perpetuity," and, it did not use the words "inalienable," "not to be sold," or words of similar import. As the district court found, with regard to the mention of the library in the

Gift Letter, the Eppley Foundation did not use the restrictive words like "perpetual locus," "eternal resting place," or "shall never under any circumstances be removed from." (App. 68 (Ruling, at p.3)). The words "restrict" and "limit" do not appear in the Gift Letter. There was no statement or requirement that the Paintings could only be used for teaching or for display to students or the public only while hanging on the walls of Stewart Memorial Library.

At least one court addressing the meaning of the term "permanent" in the context of donative intent has interpreted the word consistent with the College's position. In *Southwestern Presbyterian University v. City of Clarksville*, 259 S.W. 550 (Tenn. 1924), the Tennessee Supreme Court addressed the issue of whether the university could relocate gifts "made upon the condition, either expressed or implied, of its permanent, or even perpetual location and operation in the city of Clarksville" to the campus in Atlanta. *Id.* at 551-52. The court held that it could relocate the gifts, stating:

> "Permanent" is not synonymous with "perpetual." It is used in contrast with temporary—as a permanent residence, rather than a transient, or a permanent road, rather than a makeshift—but in ordinary acceptation it does not convey the idea of never changing. One adopts a permanent location, or occupation, meaning only that the adoption is made without present contemplation of change, but subject always to exigencies or inducements of circumstances which may arise. The words "permanently located" used in a conveyance of land to an

> incorporated institution were construed by the Supreme Court of the United States in an early case not to mean perpetually.

Id. at 553 (citing *Mead v. Ballard*, 74 U.S. 290 (1868)).

The rationale behind the Tennessee court's decision was a recognition that the primary purpose of the university and of its donors was a broad charitable purpose, any alleged restrictions should be interpreted consistent with that purpose, and the location was only incidental to the accomplishment of that purpose. *Id.* at 554. Here, construing the Gift Letter as an outright gift is consistent with the purposes of the Eppley Foundation and the College. (App. 28-29 (SOF, at ¶¶ 2-4, 8)). Based on the stated purposes of the Eppley Foundation and the College, the only logical reason for the outright gift of the Paintings from the Eppley Foundation to the College was to advance the educational mission of the College and not to create a perpetual repository for art works.

The Eppley Foundation drafted the Gift Letter. It was a sophisticated entity and surely knew how to impose limitations or conditions on a transaction if it so desired. (*See* App. 68 (Ruling, at p.3 ("If the Eppley Foundation intended that the Paintings remain in the library forever, for all time, never to be removed, it could have said as much.")). Any ambiguities, as a matter of contract interpretation, therefore must be resolved against the Eppley Foundation. *Peak v. Adams*, 799 N.W.2d 535, 548 (Iowa 2011);

Dickson v. Hubbell Realty Co., 567 N.W.2d 427, 430 (Iowa 1997); *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862-63 (Iowa 1991).

Further, if the Eppley Foundation intended to place restrictions on the College regarding the use or location of the Paintings, it would effectively be creating a trust, with the College as the trustee of the Paintings. But there is no language in the Gift Letter suggesting that a trust was being created. There is no language in the Gift Letter that states, for example, that the Painting "are to be held in trust by the College, and displayed forever on the walls of Stewart Memorial Library." The gift of the Paintings was not accompanied by any funds to maintain and preserve them. (App. 29 (SOF, at ¶ 11)); *cf. Kolb v. City of Storm Lake*, 736 N.W.2d 546, 553 (Iowa 2007) (noting that the gift of gardens to the city was accompanied by the creation of a trust to provide funds to maintain the gardens); *Museum of Fine Arts v. Beland*, 735 N.E.2d 1248 (Mass. 2000) (finding trustees of a collection of art on loan to Boston's Museum of Fine Arts not permitted to sell the collection where the testator's will provided that "ownership and control of the pictures shall be vested permanently *and inalienably* in trust" (emphasis added)). Here, the Eppley Foundation made no provision and established no requirement that the Paintings be returned or re-directed if they were no

longer able to be hung on the walls of Stewart Memorial Library (App. 29 (SOF, at ¶ 12)), as would inevitably be the case, because no building stands for eternity. Absent some clear evidence of intent on the part of the Eppley Foundation to create a trust or impose some restriction, the Gift Letter should be construed as an outright, unrestricted gift.

2. The circumstances surrounding the Gift Letter leave no question that the Paintings were an outright gift

The use of the word "permanent" in the Gift Letter must be considered in the context of the facts and circumstances that existed when the Gift Letter was written. The Iowa Supreme Court "recognize[s] the rule in the Restatement (Second) of Contracts that the meaning of a contract 'can almost never be plain except in a context.'" *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008) (quoting *Restatement (Second) of Contracts* § 212 cmt. b (1981)). Consequently,

> [a]ny determination of meaning or ambiguity should only be made in the light of relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. *But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.*

Id. (quoting *Fausel v. JRJ Enterprises, Inc.*, 603 N.W.2d 612, 618 (Iowa 1999); *Restatement (Second) of Contracts* § 212 cmt. b (1981)) (emphasis in

original). The Restatement provides, "'Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable[,] it is given great weight.'" *Fausel*, 603 N.W.2d at 618 (quoting *Restatement (Second) of Contracts* § 202 (1979)). Moreover, this rule "'do[es] not depend upon any determination that there is an ambiguity, but [is] used in determining what meanings are reasonably possible as well as in choosing among possible meanings.'" *Id.* (quoting *Restatement (Second) of Contracts* § 202 cmt. a (1979)).

Contemporary evidence from the time of the transfer supports interpreting the Gift Letter as an outright transfer. The Eppley Foundation dictated wording for a memorial plaque placed at the College. (App. 20-21 (Trial Exs. 1 & 2)). The plaque states in relevant part that the Paintings "were given" to the College by the Eppley Foundation in memory of Eugene C. Eppley. (App. 29 (SOF, ¶¶ 13-14); App. 21 (Trial Ex. 2)). Indeed, the plaque focused on paying tribute to Mr. Eppley, his Foundation, and *twice* stated that the Paintings "were *given*" to the College. (App. 21 (Trial Ex. 2)).

The plaque was, indeed, an integral part of the gift. Four of the five paragraphs of the Gift Letter pertained to the plaque. It provided:

A Plaque to be installed, per attached proposal, was discussed with you when you were here, with a piece of marble and attaching the bust and the letters to the marble, including the two bronze plaques which were outlined on the sketches.

We are again enclosing a picture of how this plaque will look like when it is completed but it will be done in bronze instead of aluminum.

Mr. Christian gave you the name of the Company in Omaha that made this plaque, The J. P. Cooke Co., 1311 Howard Street, Omaha, Nebraska, 68102.

Before this plaque is installed, we want to approve the full scale drawing. Please return the picture of the plaque and also the sketch which is attached when you are through with same.

(App. 20 (Trial Ex. 1)). Similarly, a contemporaneous news article states that the Paintings were "donated" and "have been given" to the College. (App. 22 (Trial Ex. 3)).[2] Presumably, if these statements were contrary to the

[2] Trial Exhibit 3 is a March 5, 1976 news article from the Cedar Rapids Gazette. (App. 22 (Trial Ex. 3)). The district court did "not include this evidence" because it did "not address any restrictions on alienation, or lack thereof" and because it "evidences only a journalist's understanding of the transaction rather than the Eppley Foundation's intent in delivering the gift, which is controlling." (App. 68 (Ruling, at p.3, n.1)). This Court should consider this news article which was contemporaneous to the Gift Letter. First, the Court should consider Trial Exhibit 3 because the parties agree it is admissible—the State agreed with Coe College and stipulated to the admission of Trial Exhibit 3. (App. 19 (List of Trial Exhibits)). Second, in determining the meaning of the words of a document like the Gift Letter, it is appropriate to examine the words in light of the surrounding circumstances. *See Fausel*, 603 N.W.2d at 618 (citing *Restatement (Second) of Contracts* § 202 (1979)). Regardless of whether this Court finds ambiguity in the words of the Gift Letter, the journalist's story about the gift to the College is a circumstance that can be considered to give the words of the Gift Letter flavor. *Id.* ("[T]he rule that words and other conduct are

Eppley Foundation's intent, changes would have been made to the language of the Gift Letter or the plaque, or a correction made to the news article.

Just like the Gift Letter itself, the carefully crafted plaque makes no mention regarding where or how long the paintings might be displayed at the College. (App. 21 (Trial Ex. 2)). The plaque does not include an arrow pointing to the Paintings and it does not says words like, "these" Grant Wood Paintings, "these paintings hanging above this plaque," or "the Grant Wood Paintings hanging here." It defies common sense to conclude that the Eppley Foundation was lax with the creation and placement of the words on the plaque when the Gift Letter shows that it paid close attention to detail with regard to every other aspect of the plaque. The Gift Letter shows that it fussed over materials and chose bronze and marble, it insured the plaque was created by a certain company in Omaha, it provided a photo of a plaque design to the College in advance of the plaque's creation, it insisted on approving the "full scale drawing" before the plaque's creation, and it even sought return of photo and sketch when the College was through reviewing them. The Gift Letter and finished plaque evidence the fact the Eppley Foundation wanted to ensure that a beautiful memorial existed of Mr. Eppley, the Eppley Foundation, and the fact it donated the Paintings to the

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interpreted in light of all the circumstances is not limited to cases when ambiguity in the [writing] exists.").

College. The Court must conclude that the plaque shows the Paintings were given to the College as an unrestricted, outright gift.

Additionally, the articles of incorporation of the Eppley Foundation provided that its assets were to be distributed "for one or more of the authorized purposes and objects of the corporation" in the event of its dissolution. (App. 30 (SOF, at ¶ 17)). The stated purposes of the Eppley Foundation were to

> promote the well-being of mankind and to assist the needy and unfortunate, by religious, charitable, scientific, literary or educational activities; and for such purposes to make grants, donations, and contributions to corporations … organized and operated exclusively for religious, charitable, scientific, literary or educational purposes.

(App. 29 (SOF, at ¶ 8)). These purposes do not include creating trusts or restrictions on "grants, donations, and contributions." When the Eppley Foundation was dissolved (App. 29 (SOF, at ¶ 16)), the outright, unrestricted gift of the Paintings to the College was entirely consistent with the Eppley Foundation's stated purposes. The memorial plaque that the Eppley Foundation dictated states that Eugene Eppley's "great wealth which he left" was "to be *distributed* for the benefit of youth and for the lasting good of mankind." (App. 21 (Trial Ex. 2) (emphasis added)). The district court correctly found that imposing restrictions mandating the maintenance in perpetuity of the Paintings in a specific location, without any funding for

maintenance or preservation, would be *contrary* to the purposes of the Eppley Foundation. (App. 69 (Ruling at p.4); App. 28-30 (*see* SOF, at ¶¶ 3, 8, 22)). The Eppley Foundation could not reasonably have intended to adversely impact the College financially by the gift of the Paintings.

In the Gift Letter, the Eppley Foundation did not identify the gift as inalienable, did not retain any rights, did not designate a successor or alternate beneficiary, and did not include a right of reversion. There is nothing in the Gift Letter that restricts the College's rights in the Paintings. As a long-standing foundation, the Eppley Foundation presumably had the expertise and experience to impose these types of restrictions if it truly had the intent to limit the College in any way as to its use and ownership of the Paintings. In winding up its existence, the Eppley Foundation distributed its assets by gifts to the College and to other institutions, and it ceased to exist. There is no evidence anywhere in the record that the Eppley Foundation intended to retain any control of anything as it wrapped up its affairs. Given that that the Eppley Foundation ceased to exist shortly after making the gift to the College, common sense instructs that it certainly was not trying to retain any reversionary rights in the Paintings.

This Court should find that the Gift Letter does not restrict the College's outright ownership and use of the Paintings. This Court should

reverse the district court's Ruling and instruct the district court to enter a decree that the Paintings are an unrestricted gift.

II. IF THE COURT DETERMINES THE PAINTINGS WERE A RESTRICTED GIFT, THEN THE COURT SHOULD APPLY IOWA CODE CHAPTER 540A OR THE DOCTRINE OF *CY PRES* TO ELIMINATE ANY RESTRICTIONS ON THE COLLEGE'S USE AND OWNERSHIP OF THE PAINTINGS

A. Preservation of Error

The College argued before the district court that, if restrictions were found, it should apply the equitable remedies of *cy pres* and Iowa Code Chapter 540A, which is also known as UPMFIA, to eliminate such restrictions. (App. 39-45 (Brief of Coe College, at pp.9-15); App. 63-64 Supplemental Brief of Coe College, at pp.4-5); App. 83 (Transcript, at p.8)). The State argued the doctrine and UPMFIA are inapplicable. (App. 53-58 (Iowa Attorney General's Brief in Support of Denial of Application for Declaratory Judgment, at pp.7-12); App. 88-89 (Transcript, at pp.13-14)). The district court's filed its Ruling on January 2, 2019, which included analysis of these issues. (App. 69-70 (Ruling, at pp.4-5)).

On January 24, 2019, the College filed its Notice of Appeal seeking review of the Ruling "and all adverse rulings and orders inhering therein." (App. 73-75 (Notice of Appeal)). Therefore, the College has preserved error on the court's determination of the issue of whether the College should be

relieved of restrictions on the Paintings through the doctrines of *cy pres* or application of UPMIFA.

B. Standard of Review

As stated above, the standard of review in this declaratory judgment action should be de novo because this action proceeded in the district court as a matter in equity. *See Sutton*, 808 N.W.2d at 748-49; *Van Sloun*, 778 N.W.2d at 178; *Master Builders of Iowa*, 653 N.W.2d at 388; *Ernst*, 522 N.W.2d at 602; *Citizens Sav. Bank*, 315 N.W.2d at 24. Moreover, this Court has previously determined that de novo review was appropriate after analyzing what standard of review should apply when the sole question before it was "whether the cy pres doctrine applies." *Kolb v. City of Storm Lake*, 736 N.W.2d 546, 552-53 (Iowa 2007); *see also id.* (noting that an abuse of discretion standard "may be proper when the question is whether the court's modification under cy pres is appropriate").

C. The Court Should Apply Iowa Code Chapter 540A, or UPMFIA, and the Doctrine of *Cy Pres* to Remove any Restrictions on the College's Ownership Rights of the Paintings

If the Court were to conclude that the district court properly determined that the Gift Letter imposed restrictions on the College's ownership rights in the Paintings, it should remove any such restrictions in light of UPMFIA (Iowa Code section 540A.106), and the doctrine of *cy*

pres. Because any restrictions on the College's ownership rights adversely impact the College's financial position for Federal educational institution reporting requirements, the removal of any such restrictions is necessary under these principles. Indeed, maintenance of any restrictions is inconsistent with the purposes of the Eppley Foundation and the College.

1. This Court should utilize the tool the legislature put in place, UPMIFA, to remove all impracticable and impossible restrictions found to be on the gift of the Paintings

One of the primary purposes of UPMIFA was to permit charitable institutions such as the College to address and cure obsolete or impracticable restrictions. As the drafters stated in the prior version of the model law:

> It is established law that the donor may place restrictions on his largesse which the donee institution must honor. Too often, the restrictions on use or investment become outmoded or wasteful or unworkable. There is a need for review of obsolete restrictions and a way of modifying or adjusting them. The Act authorizes the governing board to obtain the acquiescence of the donor to a release of restrictions and, in the absence of the donor, to petition the appropriate court for relief in appropriate cases.

Unif. Mgmt. of Institutional Funds Act, prefatory note (Unif. Law Comm'n 1972). While related in scope to the common law doctrine of *cy pres*, the drafters of the Act recognized the importance of a comprehensive statutory scheme that would augment the doctrine. *Id.* § 7 cmt. at 12-13. Indeed, Iowa Code section 540A.106, which contains the amended language of section 7

of the Model Act, states that "[t]his section does not limit the application of the judicial power of *cy pres* or the right of an institution to modify a restriction on the management, investment, purpose, or use of a fund as may be permitted under the gift instrument or by law." Iowa Code § 540A.106(7).

a. UPMIFA is applicable to a restricted gift of personal property such as the gift at issue here

UPMIFA is applicable to the Eppley Foundation's gift of the Paintings. As an initial matter, UPMIFA provides guidance for the "appropriation for expenditure or accumulation of *endowment fund*." Iowa Code § 540A.104 (emphasis added). Section 540A.102(2) defines "endowment fund" to mean "an *institutional fund* or any part of an institutional fund, not wholly expendable by the institution on a current basis under the terms of the applicable *gift instrument*." *Id.* § 540A.102(2) (emphasis added). In turn, "gift instrument" is defined to mean "a record … under which *property* is granted to, transferred to, or held by an institution as an institutional fund." *Id.* § 540A.102(3) (emphasis added). Based on these

provisions, UPMIFA is applicable to a gift of property that is held by an institution.[3]

Additionally, the term "institutional fund" is defined to mean "a fund held by an institution exclusively for charitable purposes." *Id.* 540A.102(5). The term "fund" is not limited solely to financial instruments or money. The Iowa Supreme Court has interpreted the term "funds." In *Miller v. Bradish*, 28 N.W. 594 (Iowa 1886), the Court held that "funds" means "all the resources" of an entity and not merely "cash on hand" in the context of a provision of Iowa law at that time which made stockholders liable when corporate funds were diverted to payment of dividends, leaving insufficient funds to meet the liabilities of the corporation. *Id.* at 595. Accordingly, the Eppley Foundation's gift fits within the scope of Chapter 540A.

b. UPMIFA's provision permitting release of restrictions is applicable here

Iowa Code § 540A.106 permits the release of restrictions on use or investment under three circumstances. The first is the situation in which the written consent of the donor is provided. Iowa Code § 540A.106(1). Here, the Eppley Foundation was dissolved in 1977 and its assets were distributed under the terms of its articles of incorporation consistent with the general

[3] The district court seemingly agreed that the UPMIFA provisions can be applied to gifts of property like the Paintings. (App. 69-70 (Ruling, at pp.4-5)).

purposes of the Eppley Foundation. Because the Eppley Foundation was a charitable foundation, it had no individual members or stockholders who would be successors in interest and who could provide any type of consent to release any purported restrictions in the Gift Letter. Therefore, the first circumstance cannot be met.

Second, section 540A.106 permits the release of a restriction imposed by a gift instrument when the restriction is found by the Court to "defeat or substantially impair the accomplishment of the purposes of the institutional fund" due to "circumstances not anticipated by the donor." Iowa Code § 540A.106(2). Here, any purported restriction on the College's outright ownership to the Paintings results in an adverse impact on the College's endowment fund and its financial position for Federal educational institution reporting requirements (App. 30 (SOF, at ¶¶ 21-22)), and will "defeat[s] or substantially impair[s] the accomplishment of the purposes of the institutional fund" and is "impracticable[] or impossible to fulfill" within the meaning of § 540A.106.

Finally, a court may release a restriction when it finds the restriction to be "unlawful, impracticable, or impossible to fulfill." *Id.* § 540A.106(3). Here, although the purported restrictions are not "unlawful" within the meaning of Iowa Code § 540A.108, they are "impracticable or impossible to

fulfill." The Gift Letter should not be interpreted to restrict the ability of the College to exercise its rights of ownership in the Paintings in the same manner as its rights in other assets of the College. It does not make sense to expect the College to take steps to ensure that a building—the Stewart Memorial Library—exists forever and that the Paintings remain there in perpetuity. The reality is that buildings do not exist forever; they burn down, they are torn down, and they are remodeled, repurposed, and replaced. In the College's 150 years' of existence, it has experienced the transitory nature of buildings—especially when its chapel was destroyed by arson and its iconic Old Main building was no longer structurally sound and had to be demolished. Indeed, any restriction requiring the Paintings hang in the Stewart Memorial Library forever are neither practicable nor possible.

The district court declined to apply Iowa Code section 540A.106(2) or (3) because the College "is free to continue its prior practice of hanging the Paintings in the Stewart Memorial Library and loaning them upon occasion." (App. 70 (Ruling, at p.5)). Although the loaning-out of the Paintings allows the College to raise some funds that are necessary for maintenance of the Paintings, the change in label from "unrestricted" to "restricted" is what is detrimental to the College's ability to carry out the intent of the donor. There is no evidence that the charitable Eppley Foundation intended to harm the

College or put it in a worse financial condition by giving it the Paintings, yet that will be the effect if the district court's Ruling is affirmed. A near $2 million decrease in value of the unrestricted endowment will result if the Paintings are considered a restricted gift. (App. 27 (Trial Ex. 4, at p.5)).

For these reasons, the College respectfully requests that this Court invoke subsection 540A.106(2) or (3) and remove any restriction on the use of the Paintings, as that is consistent with the charitable purpose expressed by the Eppley Foundation at the time of the donation.

2. Alternatively, this Court should invoke the doctrine of *cy pres* to ensure the Eppley Foundation's intent is carried out

The general principles of the common law doctrine of *cy pres* are embodied in § 5102 of the Iowa Trust Code. Iowa Code § 633A.5102. Any doubt as to the co-extensive nature of § 5102 of the Iowa Trust Code and the common law doctrine of *cy pres* were dispelled by the Iowa Supreme Court in *Kolb v. City of Storm Lake*, 736 N.W.2d 546 (Iowa 2007). In *Kolb*, the Court stated:

> Now the doctrine is not only widely accepted by our courts, *see, e.g.*, [*Matter of Trust of*] *Rothrock*, 452 N.W.2d [403,] 406 [(Iowa 1990)] (holding the trial court properly applied the common law doctrine of *cy pres*), but our legislature has codified the doctrine into law, *see* 1999 Iowa Acts ch. 125, § 86 (codified at Iowa Code § 633.5102 (2001), and creating new section entitled "Application of cy-pres")[.]

736 N.W.2d at 553 (citations omitted).

The doctrine of *cy pres* was described in *Matter of Trust of Rothrock*, 452 N.W.2d 403, 405 (Iowa 1990), as follows:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impractical or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

See also Restatement (Second) of Trusts § 399 (1959). *Cy pres* is a liberal rule of construction used to carry out, not defeat, the testator's intent and, "literally means 'as near as may be.'" *Simmons v. Parsons College*, 256 N.W.2d 225, 227 (Iowa 1977) (quoting *Hodge v. Wellman*, 179 N.W.2d 534, 536 (Iowa 1920)).

The essential elements for the application of the doctrine of *cy pres* were articulated in *Kolb* as: "(1) a charitable trust; (2) a specific trust purpose that is illegal, impractical, or impossible; and (3) a general charitable intention by the donor." *Kolb*, 736 N.W.2d at 555 (citing *Restatement (Second) of Trusts* § 399 (1959)). All three criteria are met here and the College, therefore, should be found to be the outright owner of the Paintings, free of any purported limitations on its ownership and use.

First, the charitable trust requirement of *Kolb* is met. If the Gift Letter is construed to impose any restrictions on the College's ownership rights in the Paintings, then the Gift Letter may be deemed to establish a charitable trust even though there is no trust language in the Gift Letter. *See Restatement (Second) of Trusts* § 397 cmt. e (1959). Also, the doctrine of *cy pres*, as codified, may be applied in situations in which there is an outright gift to a charitable corporation. In other words, there is not an explicit requirement that a gift literally be made "in trust" for the doctrine of *cy pres* to be applicable. *See* Iowa Code § 633A.5102; *see also Charities – Cy Pres Doctrine – Legacies to Organizations that have Ceased to Exist or that have Never Existed*, 50 Harv. L. Rev. 128 (Nov. 1936) ("While the English courts exercise cy pres jurisdiction over outright gifts, the American cases construe them as trusts before applying the cy pres doctrine, which gives effect as nearly as possible to the donor's intention[.]"). The Gift Letter makes no alternative disposition of the Paintings and the purpose of the gift—to enhance the educational mission of the College—will fail in its intended purpose if any purported restrictions on ownership are applied and which thereby require detrimental changes to the College's financial statements. (App. 30 (SOF, at ¶ 22); App. 23-27 (Trial Ex. 4)).

The second *Kolb* factor is met because compliance with any purported restriction on the gift of the Paintings would be "impossible, impracticable, or unlawful." *Kolb*, 736 N.W.2d at 555. As with application of UPMIFA, the focus here must be on whether it is "impossible" or "impracticable" for the College to be limited in its use and ownership of the Paintings. The phrase in the Gift Letter – "their permanent home, hanging on the walls of Stewart Memorial Library" (App. 20 (Trial Ex. 1)) – if applied literally and interpreted as imposing restrictions, would be beyond the ability of any person or institution to meet. Stewart Memorial Library surely will not *always* exist. The College cannot be expected to perpetually operate and maintain Stewart Memorial Library in order to comply with any purported restrictions the Gift Letter. Moreover, the College should not be expected to seek court approval every time it wants to change the location where the Paintings are displayed or if it desires to loan them to another institution for temporary display. Allowing the College to be the outright and unrestricted owner of the Paintings fulfills the intent of the Eppley Foundation to support the educational mission of the College.

The final prong of the *Kolb* analysis is to determine whether the donor (the Eppley Foundation) had a general charitable intent. *Kolb*, 736 N.W.2d at 555. The Court noted that there are no "hard and fast rules" for

determining this and the Court "will make an effort to find a general charitable intent when possible[.]" *Id.* at 558. By definition, as a tax-exempt, nonprofit corporation, any distribution of assets by the Eppley Foundation was made with a general charitable intent. *See* 26 C.F.R. § 1.501(c)(3)-1(b)(4) (providing that an organization meets the IRS's organizational test if, in the organization's articles provide that, in the event of dissolution of the organization, its charitable assets must be distributed in furtherance of an exempt purposes). Moreover, the Gift Letter included no forfeiture or reversion clause (App. 20 (Trial Ex. 1)) and "the lack of a forfeiture or reversion clause supports a finding of general charitable intent." *Kolb*, 736 N.W.2d at 558 (citing *Mary Franklin Home for Aged Women v. Edson*, 187 N.W. 546, 549 (1922) as an example of one of the "several cases" where the Court recognized that the lack of such a clause supports a finding of charitable intent). The corporate purposes of both the College and the Eppley Foundation demonstrate that each was formed for and exist or existed for charitable purposes, and the relevant facts and circumstances surrounding the Gift Letter and donation buttress a finding of charitable intent here.

3. UPMIFA and *Cy Pres* are applicable and should be applied to remove all restrictions from the gift of the paintings

Thus, the purposes of UPMIFA at Chapter 540A and the doctrine of *cy pres* ensure that a gift of property will fulfill the charitable purpose for which it was originally intended. As the Iowa Supreme Court has recognized, "gifts to charitable uses and purposes are highly favored in law and will be most liberally construed to make effectual the intended purpose of the donor." *In re Small's Estate*, 58 N.W.2d 477, 485 (Iowa 1953). Here, if the Gift Letter is construed to impose restrictions on the College's ownership and use of the Paintings, Iowa Code Chapter 540A and the doctrine of *cy pres* should be applied to remove any such restrictions.

CONCLUSION

The College respectfully requests that this Court effectuate the charitable intentions of the Eppley Foundation and deem the Paintings an unrestricted gift that the College can choose to use in any charitable manner it deems appropriate. This Court should reverse the district court's Ruling and direct the district court to enter a decree that the Paintings were an outright, unrestricted gift to the College from the Eppley Foundation.

REQUEST FOR ORAL ARGUMENT

The College requests oral argument.

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