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 REPLY BRIEF

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ARGUMENT

I. THE COLLEGE CANNOT REJECT THE GIFT AS SUGGESTED BECAUSE SUCH REJECTION WOULD OFFEND THE INTENT OF THE DONOR

In his Brief, the Attorney General argues that, if Coe College ("the College") determined that the gift of Grant Wood Paintings ("Paintings") offended its mission, it should have rejected the gift when the Eppley Foundation wrote the February 16, 1976 letter ("Gift Letter") and gave the gift in 1976. (Attorney General's Brief, at pp.13-14). The Attorney General goes onto suggest that, if the College believes now that the gift offends its mission, then it should decline the gift. (Attorney General's Brief, at p.14). The Court should disregard his suggestion for the College to reject the gift if it is contrary to the College's mission. This circular solution surely was not intended to actually resolve the issue of this declaratory judgment action.

The parties agree that the Eppley Foundation intended to make a gift to the College. (*See* Appendix ("App.") 20 (Trial Ex. 1 ("The Eppley Foundation Board of Directors have approved that the Grant Wood paintings *be given* to the Coe College . . . .") (emphasis added))). It is also undisputed that the Paintings have been in the College's possession since 1957, and the College has held the Paintings since the time of the gifting. (App. 28-29 (SOF, at ¶¶ 6, 15)). The crux of the dispute is whether such a gift was

outright or restricted. Therefore, rejecting the gift after four decades of ownership and six decades of care by the College will solve nothing.

As a practical matter, if the College rejects the gift of the Paintings now, the Court will be left to determine an owner and home for the Paintings. In doing so, the Court will be required to look at the intent of the donor, which it can only do by examining the facts that make up the stipulated facts in this case. *See In re Trust Known as Spencer Mem'l Fund*, 641 N.W.2d 771, 774-75 (Iowa 2002) (providing that the intent of the grantor of a trust or gift governs). When looking at such facts, including the language of the Gift Letter, the Attorney General would say that the intent of the donor is clear—that the Eppley Foundation intended for the Paintings to hang on the walls of the College's library in perpetuity.

The Attorney General cannot have it both ways. On one hand, the Attorney General suggests the College should reject the gift. On the other, he argues that the donor intended that the gift remain in the College's library in perpetuity. In other words, the Attorney General's argument that the College should now reject the gift of the Paintings cuts against his argument regarding the intent of the donor. Taking the action of rejecting the gift as the Attorney General suggests would offend the intent of the donor if the Court agrees with the Attorney General's interpretation of donor intent. The

suggestion that the College now reject the gift entirely should be disregarded as it solves nothing.

II. IOWA CODE § 540A.102 (UPMIFA) OR THE *CY PRES* DOCTRINE CAN BE APPLIED TO REMOVE ANY RESTRICTION ON THE PAINTINGS BECAUSE THEY ARE NOT A "PROGRAM-RELATED ASSET"

The Attorney General argues that the Iowa statute which is based on the Uniform Prudent Management of Institutional Funds Act (UPMIFA) cannot be applied to the Paintings, because they are a "program-related asset" and thus the statutory remedy is not available. (Attorney General's Brief, at pp.20-22). It further argues that the Court should decline to apply *cy pres* here because the College brought the current problem on itself and application of the doctrine would have a chilling effect on other would-be donors. (Attorney General's Brief, at pp.14-19). Each of these arguments is without merit.

A. The Paintings are an Asset Held by the College for Mixed Purposes—Investment and Charity

The Attorney General argues that Iowa's version of the UPMIFA defines "institutional fund" to exclude a "program-related asset" and the Paintings are a "program-related asset." (Attorney General's Brief, at p.20). It argues that, because the Paintings are a program-related asset, the provisions of UPMIFA do not apply to the asset. (*Id.* at p.21). It relies

exclusively on an example contained in the Uniform Law Commission's web page on program-related assets, likely because there appears to be a dearth of case law from any state where the term "program-related asset" has been analyzed. (*Id.*).

Although the Attorney General states it as fact that the Paintings are a program-related asset, it is not automatic that they fit the definition of "an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment." Iowa Code § 540A.102(7). Because the Paintings have both charitable and investment purposes, further examination is warranted.

"Program-related assets" are most often buildings, equipment, and other tangible tools. One UPMIFA commentator explains that "program-related assets" includes buildings a university owns "to use for offices, classrooms, laboratories, and dormitories." Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 Ga. L. Rev. 1277, 1293 (2007). She further explains that "[t]he buildings are assets that have monetary value, but the reasons behind acquiring and maintaining the buildings relate to the purposes of the organization and not to their potential as investments." *Id.* The Uniform Law Commission's ("ULC") article on UPMIFA cited by the

Attorney General provides the reasons that UPMIFA excludes program-related assets. *See* Uniform Law Commission, *UPMIFA Program-Related Assets*, https://uniformlaws.org/ committees/community-home/library documents?LibraryKey=5cc3d03e-f596-4ba4-8b27-d8595b51f173, at p.1 (last visited June 12, 2019). It explains: "The Drafting Committee decided that applying the prudent investor rules of UPMIFA to the buildings a charity uses to carry out its charitable purposes might be confusing, and for that reason decided to exclude a category of assets called "program-related assets." *Id.* The ULC goes on to give the example that "a university may own classrooms, laboratories, and dormitories" that would be program-related assets because they are needed by the university for use by faculty and students. *Id.* It further explains that the exclusion is for "tangible or real assets held by a charity for direct use in its charitable activities" and gives further examples of laboratory equipment owned by a university, a house owned by a homeless shelter, and food preparation equipment owned by a soup kitchen. *Id.* In each case, although the items have monetary value, the charity uses the items primarily to carry out its charitable activities. *Id.* Finally, the ULC states that a charity may hold an asset that has both a charitable and an investment purpose. *Id.* at p.2.

The example from the ULC article cited by the Attorney General is distinct from our situation. The example states, "assume that a donor gave a painting to a museum organized as a nonprofit corporation and not as a trust" and there were explicit stipulations on the gift of the painting, including that it could not travel, be sold, and must always be on display. *Id.* at p.3. Here, there were no *explicit* restrictions on the gift of the Paintings and the question of whether there were *any* restrictions on it is the very question at the crux of this case.

In a sense, the question of whether the Paintings are a "program-related asset" is the very question that this Court must wrangle with in determining the ultimate question in this case of whether the gift of the Paintings was unrestricted. If the Court determines by examining the language of the Gift Letter the gift was an outright gift and is unrestricted, then it is "artwork held for investment" and would not be a program-related asset. (*See* App. 27 (Trial Ex. 4, at p.5 (previously classifying the Paintings as "artwork held for investment and unrestricted net assets"))). In that case, though, a determination of whether the Paintings were a program-related asset would be unnecessary because the Court will never get to the UPMIFA analysis if it rules in the College's favor in the first instance.

The most appropriate finding here is that the Paintings have a mixed charitable and investment purpose. The College's financial statements show that, even if they are designated for accounting purposes as part of an artwork collection rather than "artwork held for investment," they are still highly valued at $3,450,000. (*See* App. 27 (Trial Ex. 4, at p.5)). Moreover, the stipulated facts include that, in 1976, the value of the Paintings totaled 1% of the value of the College's endowment and, today, they are valued at approximately 7% of the College's total endowment. (App. 30 (SOF, at ¶¶ 18-19)). It would be an error to conclude that such a valuable asset is without investment value and solely used for the College's charitable purposes. Another fact that weighs in favor of a determination that the Paintings are held for a mixed purpose is the fact that there is nothing in the record that shows the Paintings have been used by the College to any material degree for teaching. Unlike the examples given by the ULC of program-related assets, the Paintings are not "used" by the College in the same way that buildings or laboratory equipment is used. Because of the mixed charitable and investment purpose, the Court should find that the Paintings are not a program-related asset, are an "institutional fund" as defined in Iowa Code section 540A.102(5), and it should apply UPMIFA or the *cy pres* doctrine to remove any restriction it finds.

B. The Attorney General's Focus on the Source of the College's "Trouble" is Misplaced

In arguing that the doctrine of *cy pres* and Iowa Code section 540A.106 should not be used to remove the restriction found by the district court, the Attorney General focuses incorrectly on the reason the College filed this declaratory judgment action. (Attorney General's Brief, at pp.15-16). He argues that the "source of Coe's trouble is not the restriction the Eppley Foundation" placed upon the gift of the Paintings, but, rather, the accounting methods used by the College's auditors and their original determination that the Paintings were an unrestricted asset. (Attorney General's Brief, at p.15). This focus on the origin of the "trouble" is misplaced.

Under Iowa Code section 540A.106 and the *cy pres* doctrine, the Court need not look at the root of the impracticality or impossibility. In other words, the *source* or *origin* of the College's so-called trouble is irrelevant. It is neither a necessary element for the application of the *cy pres* doctrine nor a requirement for application of the statutory provisions. *See Kolb v. City of Storm Lake*, 736 N.W.2d 546, 555 (Iowa 2007) (setting out the three essential elements for application of the *cy pres* doctrine, including that there is "(1) a charitable trust; (2) a specific trust purpose that is illegal, impractical, or impossible; and (3) a general charitable intention by the

donor"); Iowa Code § 540A.106(2) (setting forth the requirements that a restriction "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(3) (setting forth the requirement that the restriction be unlawful, impracticable, or impossible to fulfill).

Contrary to the Attorney General's suggestion, to remove any restriction, the Court does not need to determine whether the impracticality or impossibility exists due to a mistake or through intentional conduct on the part of the College. Such analysis is not required. Instead, these facts support application of the cy pres doctrine and either Iowa Code subsection 540A.106(2) or (3). (*See generally* Appellant's Opening Brief, at pp.37-44). The Court should reject the Attorney General's invitation to look at the source or origin of the College's trouble.

Neither the Eppley Foundation nor the College anticipated that forty years after the gift was made, the College's ownership of the Paintings would be the cause of a $5.4 million decrease in the College's unrestricted net assets, a $3.45 million increase in its restricted net assets, and a $3.45 million increase in its artwork collection. (*See* App. 27 (Trial Ex. 4, at p.5)). Even if the Eppley Foundation had intended to restrict the gift so that the College could never transfer or move the gift, there is no evidence in the

record that the Eppley Foundation anticipated or intended that the restriction on the gift of Paintings would negatively impact the College's endowment fund or its financial position. (*See* App. 30 (SOF, at ¶ 22 (providing that "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"))). Both parties can likely agree that the gift was given with the intention that it place the College in a better position, not a worse one.

Therefore, now that the College's long-standing interpretation of the Paintings as an unrestricted asset has been questioned—even if only internally by its own auditors—the question in applying *cy pres* and the statute is whether the restriction now defeats or substantially impairs the accomplishment of the purposes of the gift. Indeed, it does. At best, a restriction on the gift makes it impracticable to fulfill the Eppley Foundation's stated purpose to "promote the well-being of mankind and to assist the needy and unfortunate, by religious, charitable, scientific, literary, or educational activities[.]" (App. 29 (SOF, at ¶ 8)). Regardless of how the situation arose, if the Court finds (a) a restriction on the gift and (b) 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)) that makes it impracticable or impossible for the Eppley Foundation's gift to the College to continue to promote the well-being of mankind, then the Court can and should grant the College relief pursuant to the statute or the *cy pres* doctrine.

This Court should reject any suggestion that the College did something wrong and, as such, is not entitled to the relief afforded by the *cy pres* doctrine. Due to the changing circumstance of the Paintings' increase in value, the College would have likely still have sought this relief even if the Paintings had always been treated as a restricted gift. Prudent non-profit entities like the College should be encouraged to take a fresh look at their assets when there is unexpected, material growth in the value of an asset like there was here. It is of no consequence that the current state arose because of the accounting error, and the Court should decline the Attorney General's invitation to consider the "source of the trouble" or the fact that it is a "self-created problem."

The focus must be on carrying out the donor's intent given the current state of affairs. *See also Simmons v. Parsons College*, 256 N.W.2d 225, 227 (Iowa 1977) (noting that *cy pres* is used to carry out, not defeat, the testator's intent). The intention of the donor cannot be disregarded in

situations where the donee makes a mistake—whether it is shortly after the gift is made or forty years after the gift is made.

C. Application of the *Cy Pres* Doctrine Here Will Not Have a Chilling Effect on Charity in Iowa

The Attorney General argues that application of *cy pres* here will have a chilling effect on philanthropy and charity in Iowa. (Attorney General's Brief, at p. 19). The case cited by the Attorney General in support of the argument is inapposite. In the New Jersey case cited by the Attorney General, *Adler v. SAVE*, 74 A.3d 41, 57 (N.J. Super. Ct. App. Div. 2013), the court examined living donors' demands for return of a conditional inter vivos gift when the conditions of the gift were not met by the charity. *Id.* at 55. There, the donor made a $50,000 donation to a non-profit animal shelter for the specific purpose of constructing two rooms at a certain facility that would be designated exclusively for the care of large dogs and older cats. *Id.* at 47. The donation was made after the shelter solicited donations and promised naming rights to anyone who made a "major gift." *Id.* at 54. After the plaintiffs made the donation, the non-profit shelter announced that it was merging with another charitable foundation and the facility would not be built. *Id.* at 49. Instead, a smaller shelter would be built in a different location than promised, there would be no name recognition for major donors, and the facility would not have the special rooms for large dogs and

older cats. *Id.* at 54. The donors requested return of the donation and the non-profit declined to return the money. *Id.* at 49. The court found that, by opting to disregard the donors' conditions, the shelter breached its fiduciary duty to the donors. *Id.* at 55. The *Adler* Court held "a charity that solicits and accepts a gift from a donor, knowing that the donor's expressed purpose for making the gift was to fund a particular aspect of the charity's eleemosynary mission, is bound to return the gift when the charity unilaterally decides not to honor the donor's originally expressed purpose." *Id.* at 43.

Here, unlike the shelter in *Adler*, the College has taken no action to disregard the donor's purpose. Rather, the very point of the instant suit is that it is seeking a determination of the Eppley Foundation's purpose. The Paintings remain in the Stewart Memorial Library where they have hung since 1957. (App. 28-29 (SOF, at ¶¶ 6-7); App. 22 (Trial Ex. 3)).

The other differences between the *Adler* case and our case are particularly apparent when one examines the New Jersey court's statement regarding the shelter's argument to apply the doctrine of *cy pres*:

> Under the facts presented here, it would be a perversion of these equitable principles to permit a modern charity like SAVE to aggressively solicit funds from plaintiffs, accept plaintiffs' unequivocally expressed conditional gift, and thereafter disregard those conditions and rededicate the gift to a purpose materially unrelated to plaintiffs' original purpose, without even attempting to ascertain from plaintiffs what, in their view,

> would be "a charitable purpose as nearly possible" to their particular original purpose.

Id. at 56-57. The facts here are distinct. The Eppley Foundation is not a "modern charity." It dissolved in 1977. (App. 29 (SOF, at ¶ 16)). There is no evidence that the College "aggressively solicited funds" from the Eppley Foundation. The gift of the Paintings was not an "unequivocally expressed conditional gift." As stated above, unlike the non-profit shelter in *Adler*, the College here did not disregard any known condition placed on the gift or rededicate the gift to a purpose materially unrelated to the Eppley Foundation's original purpose. The College cannot ascertain anything from the Eppley Foundation, because, unlike the live donors in *Adler*, the Eppley Foundation no longer exists. For these reasons, although the *Adler* decision may have been welcomed by responsible New Jersey charities when it was written in 2013, it does not support a conclusion that Iowa donors will no longer give and donate if the Court invokes the *cy pres* doctrine in this case.

Application of the doctrine of *cy pres* is, by its very nature, a fact-specific endeavor. If a court invokes the liberal rule of construction, it must examine the donor's intent and "direct the application of the property to some charitable purpose which falls within the general charitable intention of the [donor]." *Matter of Trust of Rothrock*, 452 N.W.2d 403, 405 (Iowa 1990). Thus, the current situation with the College and the Eppley

Foundation almost certainly will never arise again. In other words, the Court's application of the *cy pres* doctrine here will have limited usefulness to other situations or cases because removing the restriction here would be a fact-driven determination. Just as there are no duplicates of the Paintings in existence, there can be no duplicate of this fact scenario. In short, the removal of any restriction found to have been placed on the gift of Paintings by the Eppley Foundation in the instant situation is unlikely to have a chilling effect on philanthropy and charity by modern donors in Iowa.

CONCLUSION

For the foregoing reasons, 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.

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/s/ *Teresa K. Baumann* July 2, 2019

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