

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1993 Term

NO. 21150

THOMAS L. STOCKERT, JR., EXECUTOR
OF THE ESTATE OF NELIA ZIMMERMAN,
Plaintiff Below, Appellee

v.

COUNCIL ON WORLD SERVICE AND FINANCE OF
THE METHODIST CHURCH, aka GENERAL COMMISSION
ON WORLD SERVICE AND FINANCE, NOW KNOWN AS
GENERAL COUNCIL ON FINANCE AND ADMINISTRATION;
FIRST UNITED METHODIST CHURCH OF BUCKHANNON;
ELIZABETH COPLIN LEONARD MEMORIAL HOSPITAL, INC.,
Defendants Below, Appellees

ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.,
Defendant Below, Appellant

ROSE SECRIST, ET AL.,
Defendants Below

Appeal from the Circuit Court of Upshur County, West Virginia
The Honorable Thomas Keadle, Judge
Civil Action No. 90-P-38

REVERSED AND REMANDED
WITH DIRECTIONS

Submitted: January 26, 1993
Filed: February 11, 1993

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Neila Zimmerman, deceased

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Methodist Church

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Hospital of Buckhannon, Inc.

JUSTICE NEELY delivered the Opinion of the Court.

SYLLABUS

When a charitable institution to which a bequest has been made for charitable purposes loses its character or otherwise ceases to exist after the death of the testator, and when the testator has manifested a general charitable intent in her will, a court of equity, under the doctrine of cy pres, will direct the application of the bequeathed property in question to another charity of the same general character so that the charitable purpose of the testator will not fail.

Neely, J.:

Neila Zimmerman wrote her will in 1971 and bequeathed one-third of the residue of her estate to the three following charities in equal shares: (1) the Council on World Service and Finance of the Methodist Church; (2) the Elizabeth Coplin Leonard Memorial Hospital of Buckhannon; and, (3) the St. Joseph's Hospital of Buckhannon. Mrs. Zimmerman died in 1983 and her 1971 will was duly admitted to probate.

At the time Neila Zimmerman executed her will, hospital services were provided in Upshur County by two non-profit, charitable institutions, Leonard Memorial Hospital and St. Joseph's Hospital.

However, Leonard Memorial ceased operating as a hospital on 31 December 1988 and exists now only as a shell to receive accounts payable, conserve assets and pay debts. All employees, except for a skeleton staff, have been discharged. Leonard Memorial will never again provide hospital services to patients.

The executor of Mrs. Zimmerman's estate, Thomas L. Stockert, Jr., sought direction from the circuit court concerning whether to pay the non-operating shell of the former Leonard Memorial Hospital the money bequeathed to Leonard Memorial in Mrs. Zimmerman's will, or to pay Leonard Memorial's share to the only operating hospital in Upshur County, St. Joseph's. The circuit court ruled that

notwithstanding Leonard Memorial's closure as a functioning hospital, the bequest should nevertheless be paid to it. We reverse.

If ever there were a case that cries out for application of the doctrine of cy pres, it is the case before us. The doctrine of cy pres is an equitable device employed when the terms of a charitable trust become illegal, impossible or impractical to fulfill and, under the cy pres doctrine, a court may direct trust funds be expended in a charitable manner as near (cy pres) to the donor's intent as possible. Union National Bank of Clarksburg v. Nuzum, 167 W.Va. 340, 280 S.E.2d 87 (1981); W.Va. Code 35-2-2 [1931]. There are thousands of cases throughout the United States applying cy pres; however, the doctrine is amazingly straight-forward and precisely summarized in 15 Am. Jur.2d Charities §§ 157 to 165.

If a testator bequeathed \$100,000 to his nephew, but the nephew died after the testator expired but before the testator's executor had distributed the proceeds of the estate, no one would argue that the nephew's \$100,000 should be buried in a shoe box next to the nephew's remains. Obviously, the bequest to the nephew would pass to the nephew's living heirs either by will or intestacy, subject to any of the nephew's outstanding debts that were still unpaid. In the case before us, the existing assets in the shell of Leonard Memorial, including the real estate, are adequate to satisfy the hospital's debts. Therefore, instructing the executor to give money

to Leonard Memorial Hospital would be like burying the nephew's bequest in a shoe box next to the nephew's corpse.

The weight of judicial opinion in the United States is that when a charitable institution to which a bequest has been made loses its character or otherwise ceases to exist after the death of the testator, and when the testator has manifested a general charitable intent in her will, a court of equity will direct the application of the bequeathed property in question to another charity of the same general character so that the charitable purpose of the testator will not fail. In re Stouffer's Trust, 188 Or. 218, 215 P.2d 374 (1950). See also, Wesley Home v. Mercantile Safe Deposit and P. Company, 265 Md. 185, 289 A.2d 337 (1972).

It is apparent to us that the testatrix sought to benefit the residents of Upshur County by supporting the two institutions that provided hospital services to that county. The cardinal rule in construction of testamentary instruments is that a court should give effect to the intent of the testator. Syllabus point 1, Reedy v. Propst, 169 W.Va. 473, 288 S.E.2d 526 (1982). Now that Leonard Memorial Hospital has closed its doors, it is only appropriate, lest the testatrix's charitable intent be frustrated, that St. Joseph's hospital receive both the share bequeathed to it in Mrs. Zimmerman's will and the share bequeathed to Leonard Memorial. Accordingly, the judgment of the Circuit Court of Upshur County is reversed, and this

case is remanded with directions to enter a judgment consistent with this opinion.

Reversed and remanded
with directions.