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## Constitutional Law: Administration of Private School by Municipal Trustee Constitutes State Action—*Cy Pres, Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957)

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# COMMENTS

## CONSTITUTIONAL LAW: ADMINISTRATION OF PRIVATE SCHOOL BY MUNICIPAL TRUSTEE CONSTITUTES STATE ACTION—CY PRES

*Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957)*

Stephen Girard died testate in 1831. The residue of his vast estate was bequeathed to the mayor, aldermen, and citizens of Philadelphia,<sup>1</sup> their successors and assigns in trust, to erect and maintain a college for the education and support of poor, white, male, orphan children, between the ages of six and ten years. The college was built according to the elaborate instructions of the testator,<sup>2</sup> opened in 1848,<sup>3</sup> and since 1869 has operated continuously under the administration of the Board of Directors of City Trusts.<sup>4</sup> In 1955 a petition was brought in behalf of two negro orphan boys, whose applications admittedly had been denied solely on grounds of color, to compel the Board to grant them admission to the college. The action of the Orphans' Court of Philadelphia in refusing to order the requested relief was affirmed by the Pennsylvania Supreme Court.<sup>5</sup> The United States Supreme Court, however, reversed the decree of the Pennsylvania court on the ground that the Board's action as trustee of Girard College constituted discrimination by the state, proscribed by the Fourteenth Amendment.<sup>6</sup>

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1. This was the corporate name of the city under the act of March 11, 1789. PA. STAT. ANN. tit. 53, § 16252 (1957). This name was subsequently changed on Feb. 2, 1854, to "The City of Philadelphia." PA. STAT. ANN. tit. 53, § 16251 (1957).

2. The testator had carefully planned the construction and furnishing of the college to the most minute detail, including descriptions of the proposed location of the school, dimensions of the main building, materials to be used in construction, the manner in which the building was to be erected, the type of instructors to be employed, the general curriculum to be taught,<sup>6</sup> the method of selecting applicants according to geographical location, and the dress and diet to be observed by the orphans who were admitted. See *Vidal v. Girard's Executors*, 43 U.S. 127, 130-32 (1844).

3. The statement in the orphans' court opinion (4 Pa. D. & C.2d 671, 677, 5 Fid. Rep. 449, 455) to the effect that the college opened in 1858 is in error. See 10 ENC. BRIT. 366 (14th ed. 1937).

4. The Board of Directors of City Trusts was established in 1869 by the state legislature to take charge of and administer all property dedicated to charitable trusts, that was previously, or might thereafter become, vested in the City of Philadelphia. See PA. STAT. ANN. tit. 53, §§ 16365-70 (1957). (The Supreme Court, in referring to the Board of Trusts, cited Purdon's Pa. Stat. Ann., 1957, Tit. 53, § 1365 (now § 1340) 353 U.S. 230, 231 (1957). This citation, however, does not deal with the subject matter, and it is believed that the Supreme Court intended reference to the former citation *supra*.)

5. *Girard Will Case*, 386 Pa. 548, 127 A.2d 287 (1956).

6. *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957).

Whether charitable trusts are by nature vulnerable to charges of state action, due to the responsibility of the attorney general to supervise their administration, is beyond the scope of this comment. For discussion of this point, and other problems raised by the *Girard* case, see Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957). (This article arrived too late for use in preparation of this comment.)

The prohibitions of the Fourteenth Amendment apply only to action by a state, not to action by an individual.<sup>7</sup> The state can act through the exercise of its legislative, executive, or judicial powers,<sup>8</sup> or through the medium of an individual acting wilfully under color of state authority.<sup>9</sup> The state also can act when it allows groups of private individuals to conduct activities or perform services that promote (or hinder) purposes deemed to be a function or responsibility of government.<sup>10</sup> And lastly, if the state attempts to sponsor or finance private activities, or undertakes supervision of private organizations, this may be deemed sufficient to constitute state action.<sup>11</sup>

The issue squarely presented to the Supreme Court in the principal case was whether the action of the Board, as trustee of the orphan asylum, amounted to state denial of equal protection of the laws to negro orphan boys.<sup>12</sup> If the Board as trustee acted strictly in a functional capacity, administering the college in accordance with the terms of the trust, any discrimination exhibited by the testator in selecting beneficiaries of his generosity would not of itself raise a constitutional question.<sup>13</sup> If, however, the Board's legal position became that of actively assisting the testator to perpetuate discriminatory dispositions, this supervisory control would be unlawful under the Fourteenth Amendment, even though the Board was acting only as a fiduciary.<sup>14</sup> In other words, the liberty of an individual to dispose

7. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Virginia v. Rives*, 100 U.S. 313, 318 (1879).

8. *Ex parte Virginia*, 100 U.S. 339, 347 (1879); *Virginia v. Rives*, 100 U.S. 313, 318 (1879).

9. *Williams v. United States*, 341 U.S. 97 (1951); *Screws v. United States*, 325 U.S. 91 (1945); cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *But see* Note, 96 U. PA. L. REV. 402, 406 (1948).

10. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Nicholson, The Legal Standing of the South's School Resistance Proposals*, 7 S.C.L.Q. 1, 42 (1954); accord, *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

11. See *Nicholson*, *supra* note 10, at 27, 35.

12. See 386 Pa. at 558, 127 A.2d at 289-90.

13. This was the argument accepted by the Pennsylvania courts in upholding the validity of the trust. It was emphasized that defendant Board of City Trusts was an entity separate and apart from the city, which, acting through the mayor and the Commission on Human Relations, was a party plaintiff to the suit. The position of the Board was likened to a private individual or trust company, exercising no sovereign powers, whose sole and exclusive function as a fiduciary was faithfully to execute the directions of the testator. See 386 Pa. at 560-61, 585-87 (concurring opinion), 599-602 (concurring opinion), 127 A.2d at 293, 304-05, 311-12; 4 Pa. D. & C.2d at 701, 717-19, 5 Fid. Rep. at 483. See also text at note 7 *supra*.

It appears from the Supreme Court opinion, however, that the city, represented by the Board, is unable to serve merely in a fiduciary capacity unless it totally abstains from action, due to the fact that it is a municipality—an instrumentality of the state. Whenever it acts, the state also is acting.

14. "Certainly a testator is entitled to choose the beneficiaries of his bounty, but if he asks the government to administer his estate he cannot expect the government to ignore the very law it symbolizes." 386 Pa. at 628, 127 A.2d at 324 (dissenting opinion). "[N]o testator has the right to ask the government to do something which is prohibited by the Constitution." *Id.* at 640, 127 A.2d at 330 (dissenting opinion). See also text at note 11 *supra*.

freely of his property does not include the unrestricted privilege of calling upon the government to administer his gift.<sup>15</sup>

Supporting the view that administration of the college by the Board constituted state action are the facts that: the creation of the college required the assistance of the state legislature to pass necessary enabling provisions;<sup>16</sup> the Board of Directors of City Trusts was itself a creature of the state, formed to act as agents for the City of Philadelphia;<sup>17</sup> periodical reports on the operation of the college must be submitted to the Pennsylvania legislature and to the city councils;<sup>18</sup> the accounts of the college are subject to the state's power of visitation;<sup>19</sup> and the college enjoys a tax exemption amounting to \$550,700 annually.<sup>20</sup> Furthermore, the bequest made to the city, while effectuating the private desires of the testator, simultaneously fulfills a public charitable purpose<sup>21</sup> of providing education and support for

15. "If a testator should today leave his property in trust to the State for the training of destructive atom bomb engineers, and then later on the destructive atom bomb should be proscribed, the government could not be compelled to go on instructing students in a sphere of education beyond the pale of the law." 386 Pa. at 628, 127 A.2d at 324 (dissenting opinion).

But see *id.* at 613, 127 A.2d at 318 (concurring opinion), where it is stated: "It follows logically and necessarily that if an individual cannot constitutionally leave his money to an orphanage or to a private home and college for poor white male orphans, he cannot constitutionally leave his money to a Catholic, or Episcopal, or Baptist, or Methodist, or Lutheran or Presbyterian Church; or to a Synagogue for Orthodox Jews; or to a named Catholic Church or to a named Catholic priest for masses for the repose of his soul, or for other religious or charitable purposes."

16. By an act of March 24, 1832, P.L. 176, the legislature authorized the city "to exercise all such jurisdiction, enact all such ordinances, and do and execute all such acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution, and prosecution of any and all the devises and bequests, trusts and provisions contained in the said [Girard] will . . ." A second act of April 4, 1832, P.L. 275, authorized the city councils (common and select) "to provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by will of the late Stephen Girard." Various other provisions relating to the college were subsequently enacted, both by the state legislature and the city councils, for promoting its successful operation. See 386 Pa. at 621-22, 127 A.2d at 321-22 (dissenting opinion).

17. The Board, when it was created in 1869, consisted of fifteen members, including the mayor, the presidents of the select and common councils, and twelve other citizens. The twelve citizens are now appointed by the board of judges of the Court of Common Pleas of Philadelphia County. See PA. STAT. ANN. tit 53, §§ 16365-66, 16370 (1957); note 4, *supra*. For the present composition of the Board, see 386 Pa. at 585, 127 A.2d at 304 (concurring opinion).

18. See PA. STAT. ANN. tit. 53, § 16368 (1957).

19. See 386 Pa. at 623-25, 127 A.2d at 322-23 (dissenting opinion).

20. See *id.* at 644, 127 A.2d at 333. Financial support through tax exemption can be one factor in favor of a finding that a state has aided a private school to continue discriminatory practices. Nicholson, *supra* note 10, at 35. However, no rigid rule of equality has yet been imposed upon states in selecting subjects of tax exemption, and hence tax exemption alone may be insufficient to constitute state action. *Id.* at 37-39.

21. The public character of the trust was pointed out in *Vidal v. Girard's Executors*, 43 U.S. 127, 186-90 (1844), and was used by the Court as a basis for allowing the city to hold and administer the trust estate. See also *Franklin's Estate*, 150 Pa. 437, 449, 24 Atl. 626, 627 (1892); *Philadelphia v. Fox*, 64 Pa. 169, 181-82 (1870); 4 SCOTT, TRUSTS § 348, at 2551 (2d ed. 1956).

orphan children who otherwise are potential wards of the state. Considering this last fact together with a recent statement of the Supreme Court that education in a democratic society is possibly the most important function of state and local government,<sup>22</sup> the decision in the principal case is neither surprising nor unprecedented.<sup>23</sup>

Now that the case has been remanded for further proceedings, proper authorities must decide whether a new trustee should be selected to administer the college, and whether the word "white" should be deleted from the testator's will. The orphans' court considered these problems in the reverse order, and intimated that *if the word "white" were deleted*, the court should appoint a new trustee.<sup>24</sup> The Pennsylvania Supreme Court, in dictum, took the view that *if the Board's activities constituted state action*, a new trustee should be appointed.<sup>25</sup> If the opinion of the latter court prevails, it will be unnecessary to consider whether negroes must be admitted to the college, particularly since the testator's intent can be effectuated by a private trustee<sup>26</sup> without enlarging the class of beneficiaries—that is, without resorting to the doctrine of *cy pres*.<sup>27</sup> This, however, circumvents the serious question whether the present trustee can be replaced without vitalizing the limitation of the trust res over to the Commonwealth of Pennsylvania, should the city ever knowingly and wilfully violate the terms of the trust.<sup>28</sup> It also skirts the further question whether the commonwealth, which as remainderman joined in the petition against the Board, has aided and promoted such knowing and

22. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). See also *Malone v. Hayden*, 329 Pa. 213, 223-24, 197 Atl. 344, 352 (1938).

23. As might be expected, however, there is contrary opinion on this matter. See, e.g., Lawrence, *Girard College Case*, *St. Louis Globe-Democrat*, May 4, 1957, p. 6A, col. 6.

24. 4 Pa. D. & C.2d at 701-02, 5 Fid. Rep. at 483-84. It would seem, however, that removing "white" from the will would eliminate any necessity for appointing a new trustee, since there would no longer be any discriminatory action. Only if the trust became repugnant to the purposes of the public corporation administering it, e.g., required unconstitutional discrimination, would a new trustee be needed. See authorities in note 21 *supra*.

25. 386 Pa. at 566, 127 A.2d at 295.

26. This is, of course, assuming that the appointment of a private trustee would be valid. See text at notes 23, 31 *infra*.

27. The doctrine of *cy pres* is a "salvaging device," by which a court can apply assets devoted to a specific charitable purpose to another similar purpose, when the first trust cannot further be executed according to the intent of the settlor. Before this doctrine can be used, however, there must be: (1) a valid charitable trust, (2) an impossibility or impracticality of continuing the trust expressly in accordance with its initial terms, and (3) an expression by the settlor of a general charitable intent sufficiently broad to permit a court to divert the trust assets to the proposed new use. See 4 POWELL, REAL PROPERTY § 587 (1954).

28. If the city ever wilfully and knowingly violates any conditions included in the will, the testator directed that the remainder and accumulations, excepting rents, issues, and profits from certain real estate, go to the state for purposes of internal navigation. See *Vidal v. Girard's Executors*, 43 U.S. 127, 135 (1884). Whether disability of the city to act as trustee, and appointment of a substitute trustee, would constitute a wilful and knowing violation is not known. 4 Pa. D. & C.2d at 702, 5 Fid. Rep. at 484.

wilful violation, thereby possibly causing the second forfeiture, over to the United States, to operate.<sup>29</sup>

From the foregoing, it seems that the orphans' court must choose one of two basic alternatives in disposing of the case: it must either order the word "white" deleted from the will and retain the Board as trustee of the college, or leave the will unchanged except for appointment of a new trustee.<sup>30</sup> If the latter course is adopted there is danger that a higher court will hold (1) that the trust is still sufficiently public, notwithstanding appointment of a private trustee, to constitute state action,<sup>31</sup> or (2) that discontinuance of the city as trustee of the college actuates the forfeiture provision, regardless of the reason for such discontinuance.<sup>32</sup> The first choice, although in a narrow sense it more radically departs from the express intent of the testator, provides greater assurance of continuing the college free from further attack, and also enables the city to retain its supervisory control over an institution that unquestionably performs a vital public service. The difficulty with this choice, however, is finding a charitable intent sufficiently broad to justify a court in placing the testator's specific

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29. The testator directed that should the commonwealth fail to apply his bequests to the purposes mentioned in his will, the remainder and accumulations of the estate, with certain exceptions, were to accrue to the United States for purposes of internal navigation. See *Vidal v. Girard's Executors*, 43 U.S. 127, 135 (1884); note 28 *supra*.

30. Of course, there also is the third possibility of forfeiting the \$98,000,000 trust res to the Commonwealth of Pennsylvania.

31. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *cf. Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946); *Munn v. Illinois*, 94 U.S. 113, 133-34 (1877). See also text at notes 16-23 *supra*. *But cf. Sweeney v. City of Louisville*, 309 Ky. 465, 218 S.W.2d 30 (1949).

32. See note 28 *supra*. There is opportunity for argument, moreover, that the testator expressly did not want a private trustee to administer his college. This conclusion could be drawn from the methodical care with which the testator had drafted his will (see note 2 *supra*) plus the fact that all potential recipients of the remainder and accumulations of the estate were governmental bodies (see notes 28-29 *supra*). See also 386 Pa. at 639, 127 A.2d at 330 (dissenting opinion).

Various collateral issues would be presented by an attempted transfer of the property into the hands of a private trustee. Some of them are: (1) Under what legal proceedings would a new trustee be appointed? (a) Could the orphans' court appoint a new trustee *sua sponte*? (b) If not, would anyone other than the commonwealth have legal standing to request such action? (c) Could the commonwealth litigate such a motion without prejudicing its interests as remainderman? (2) Who could contest a transfer of the property by the city? (a) Would a negro orphan have legal standing to upset a voidable, as contrasted to an entirely void, transfer of assets? (b) Would a local taxpayer be deemed to have sufficient interest in this privately endowed trust to question the transfer of city-owned assets? (c) Would surviving heirs or relatives of the testator have standing to test the validity of any transfer? (d) Would the commonwealth, through its attorney general, question the transfer either as a matter of a civic duty or for purposes of promoting a forfeiture of the trust res? (3) Would appointment by a court of a new trustee be *res judicata* in a subsequent suit contesting such appointment? (a) Could the city represent all orphan children who might subsequently bring suit? (b) Would representation of such orphans by the city raise a problem of conflict-of-interests?

desire to assist "white" orphans subordinate to a general desire to help indigent orphans regardless of race.<sup>33</sup>

It is submitted that, of the two available alternatives, selection of the one deleting the word "white" from the will and retaining the present trustee as administrator of the college would be the better choice. First of all, there is language in the testator's will that easily could be interpreted as expressing a general intent to educate poor people, irrespective of their race or color,<sup>34</sup> thus making the doctrine of cy pres available to the court.<sup>35</sup> Further, given the changing political and social conditions realized under the Thirteenth and Fourteenth Amendments,<sup>36</sup> there is some reason to suppose that deletion of "white" from the will would not be *contrary* to the intent of the testator.<sup>37</sup> Finally, since administration of the college can no longer lawfully continue as in the past, there is much reason to believe that the primary intent of the testator would be to keep the school operating, free from further obstructions, as nearly in accordance with the previous mode of operation as possible.<sup>38</sup>

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#### CRIMINAL LAW: PROOF OF INTENT UNDER BURGLARY TOOL STATUTES

*Benton v. United States, 232 F.2d 341 (D.C. Cir. 1956)*

Following a search of defendant's car which yielded a burlap bag containing an axe, a sledge hammer, a chisel, a brace and bit, a hacksaw and four blades, twenty-five feet of rope, and two wrecking bars, defendant was convicted of possessing implements which "may reasonably be employed in the commission of any crime."<sup>1</sup> The pertinent part of the applicable statute provides that "no one shall have in his possession in the District any instrument, tool or other implement for picking locks or pockets, or that is usually employed or reasonably

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33. See note 27 *supra*.

34. "I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed . . . I have sincerely at heart the welfare of the city of Philadelphia . . ." *Vidal v. Girard's Executors*, 43 U.S. 127, 129 (1884). See also *Attorney-General v. Price*, [1912] 1 Ch. 667 (C.A.). *But see* *Craft v. Shroyer*, 81 Ohio App. 253, 74 N.E.2d 539 (1947).

35. *But see* 386 Pa. at 569, 127 A.2d at 297.

36. The Thirteenth Amendment was ratified in 1865 and the Fourteenth Amendment in 1868, respectively thirty-five and thirty-eight years after the testator's will was drawn.

37. There is reason to believe that a man of such philanthropy and truly human generosity as was Stephen Girard, who devoted almost his entire fortune to promoting public works and alleviating human suffering, would place himself beyond any barriers of color. See 386 Pa. at 617-18, 127 A.2d at 319-20 (dissenting opinion). See also note 34 *supra*. *But see* 386 Pa. at 577-78, 127 A.2d at 300-01 (concurring opinion).

38. See 386 Pa. at 568, 127 A.2d at 296.

1. D.C. CODE ANN. § 22-3601 (Supp. 1951).