

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

**IN THE MATTER OF THE** )  
**ESTATE OF BERNARD A. WEST,** )  
 )  
**Deceased.** )

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**SX-98-PB-055**

**MEMORANDUM OF LAW**

By accompanying Order, this Court denies the request by Richard W. West and David W. West (the “the Wests”) to deem as lapsed a legacy contained in the duly executed will of the above-captioned decedent. The question before the Court is whether the residuary bequest to recipient “Antioch College in Yellow Springs, Ohio” should fail on the basis of the cessation of operations at said College on June 30, 2008. For reasons enumerated below, this Court finds that with certain precautions, the testator’s intent for his residuary bequest can and should be honored.

On July 24, 2009, the Wests’ filed a Petition to Declare Legacies Lapsed (the, “Petition”<sup>1</sup>) that asked this Court to declare as lapsed the residual bequest of the decedent’s will. The relevant will provision, Paragraph 6(B), reads as follows:

“I give, devise and bequeath one-half (1/2) of my residuary estate to ANTIOCH COLLEGE in Yellow Springs, Ohio, with the direction that one-half of said share be used for research in general semantics, group dynamics and/or psychodrama and that the balance thereof be used for the establishment of a scholarship fund for students who are residents of St. Croix, U. S. Virgin Islands.”

The Wests aver in paragraph 9 of their Petition that “ANTIOCH COLLEGE closed on June 30, 2008,” and in paragraph 10, that “Due to the closure of ANTIOCH COLLEGE, the Decedent’s bequest to the now-defunct college has lapsed.” As a result, the Wests conclude that the entire

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<sup>1</sup> In the Memorandum accompanying the Order on Motion to Strike Response to Nephews’ Memorandum, this Court acknowledged that the “Petition” would more properly have been titled as a “Motion,” and, in fact, the parties proceeded as though the July 24, 2009 filing was filed as a motion, and not as a petition, to this Court as governed by LRCi 7.1a.

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residuary estate has lapsed, which means that the residue of the estate must pass to the Wests, the heirs under the laws of intestacy.

On September 23, 2009, the Antioch College Continuation Corporation (the "ACCC") made its appearance in the probate proceedings, and subsequent to the Court's granting an extension of time to respond to the Wests' Petition, filed its Opposition to Motion to Deem Charitable Bequests Lapsed (the "Opposition to the Motion") on October 28, 2009. ACCC argues in its Opposition to Motion that Antioch College does in fact still exist, and that ACCC is the steward of that institution given that: 1) ACCC purchased from the Antioch University system substantial assets associated with the operations of the Yellow Springs campus of Antioch College (including real estate, a library, a nature preserve, as well as a literary review and other intangible/intellectual properties); and 2) ACCC has a stated mission to re-launch the college with a class entering in Autumn of 2011.

From supporting documents included with ACCC's Opposition to the Motion, this Court takes notice of some basic facts. Namely, that Antioch College at Yellow Springs, OH, was founded by Horace Mann in 1852 and has remained in continuous operation until classes were suspended in the Spring 2009; that this same campus in 1978 became renamed "Antioch University" to reflect the offering of graduate degrees; and that 5 other affiliated campuses now bear the name "Antioch University,"<sup>2</sup> (including another one in Yellow Springs, called Antioch University MacGregor). There is no question that the decedent, Bernard A. West, attended the original, historic Yellow Springs, OH campus.

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<sup>2</sup> For clarity, this Court refers to the historic campus in Yellow Springs, OH, as Antioch College (one and the same college to which the decedent made a bequest in his will); and will refer to as Antioch University, that University system, which comprises the five remaining liberal arts colleges that grew out of the same tradition, but operate as separate entities from the original Yellow Springs campus.

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The supporting documents accompanying ACCC's Opposition to the Motion offer some persuasive support for the view that ACCC is the proper beneficiary to fulfill the testator's intent to bequest his estate to the historic Antioch College of Yellow Springs, OH. Such documents *inter alia* include:

- An August 12, 2009, entry of the Court of Common Pleas, Greene County, Ohio, Probate Division (the "Greene County Entry"): "Decision and Entry for Release of Restriction on Use of Institutional Funds," which ordered release of restrictions on various funds which comprised the Antioch College Endowment Fund to be transferred from Antioch University, to the Continuation Fund, Inc., an IRC §509(a)(3) supporting organization of ACCC.
- Resolutions by the last acting Board of Antioch College regarding financial exigencies and the decision to suspend operations of Antioch College on July 1, 2008. These also document unsuccessful efforts by the Board and the ACCC to transfer Antioch College as a going concern prior to the suspension of classes.
- An affidavit by Tullisse A. Murdock, the Chancellor of Antioch University, averring that on June 30, 2009, Antioch University and ACCC entered into an Asset Purchase Agreement (the "APA"), "pursuant to which Antioch University agreed to sell ACCC, and ACCC agreed to purchase from Antioch University, substantially all of the assets used in connection with the operation of Antioch College in Yellow Springs, OH." Chancellor Murdock also states that the APA transfers "all of Antioch University's interest in any and all bequests and other gifts of which Antioch College is the beneficiary, regardless of whether such gifts were known or unknown as of September 4, 2009."
- An Autumn 2008 "Concept Paper and Business Plan" compiled by the Board Pro Tempore, as well as a detailed "Proposal" issued in June, 2009 by the same body detailing the resumption of operations at Antioch College, which includes a "Basic Timeline," which benchmarks the steps to be taken to facilitate a forecasted entrance of a "Re-Founding Class" in Autumn, 2011.
- Two letters from Richard Detweiler, President of the Great Lakes Colleges Association, assessing the likelihood of accreditation and viability for survival of a re-launched Antioch College as outlined in the Board Pro Tempore's Plan and Proposal.

On November 9, 2009, the Wests filed their Reply to Opposition to Motion to Deem Charitable Bequest Lapsed (the "Wests' Reply"). In it, the Wests vigorously contest the idea that ACCC is the beneficiary of the decedent's residuary bequest. The Wests characterize ACCC as a mere "purchaser of assets which were associated with or used in connection with the former operation of Antioch College." Further, the Wests characterize ACCC's purchase of assets of

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Antioch College as a liquidation of the assets of the college, and thus that Antioch College no longer exists.

In opposing ACCC's recommendation that this Court apply the doctrine of *cy pres* in this instance, the Wests point to the specific character of their uncle's bequest which they claim falls short of the "general charitable purpose" that is prerequisite to the Court's application of *cy pres*. Finally, the Wests ask this Court to find analogy to *In re Estate of Beck*, 649 N.E. 2d 1011 (Ill. App. 5 Dist. 1995) in which a bequest to a closed orphanage was denied to the entity that purchased the assets of the orphanage and alleged to be the successor in interest to the bequest.

**Law and Analysis**

While Virgin Islands statutory law<sup>3</sup> does not provide guidance on how to determine when a charitable bequest in a will fails because the purpose for which the bequest was made cannot be fulfilled, analogous situations involving charitable trusts<sup>4</sup> can provide such guidance. Where there is a charitable trust whose original purpose cannot be fulfilled, the *cy pres* doctrine will be applied. This doctrine provides that "when the exact intention of the settlor is not to be carried out, the intention will be given effect 'as nearly' as may be." Restatement (Third) of Trusts § 67. However, in determining what constitutes a legitimate substitution "courts have recognized . . . that the substitute or supplementary purpose need not be the nearest possible but one reasonably similar or close to the settlor's designated purpose, or "falling within the general charitable purpose" of the settlor." *Id.*, at comment d.

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<sup>3</sup> In the absence of local laws to the contrary, the Restatements apply. 1 VIC §4.

<sup>4</sup> It should be noted that there is support for the same liberality in facilitating a charitable bequest that is not a trust: "[T]he law (a) attempts to avoid an intestacy and (b) will attempt, if at all possible, to support a bequest to a charity. The cases support the proposition that the intent of the testator is paramount and should be followed unless there is some glaring inequity in doing so. *Matter of Estate of O'Brien*, 165 Misc.2d 459, 464, 627 N.Y.S.2d 544, 547 (N.Y.Sur., 1995) (issue here whether bequest to charitable foundation valid despite fact that trust instrument improperly executed—held to be valid)

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As to the applicability of *cy pres* to charitable gifts made to Antioch College of Yellow Springs, OH, and as to the aptness of ACCC as a substitute beneficiary of those gifts, this Court regards the findings of the Greene County Entry (Exhibit No. 4 to the Opposition to the Motion) to be particularly persuasive. On August 12, 2009, when asked by both Antioch University and ACCC, the Probate Division of the Court of Common Pleas of Greene County, OH, agreed to lift restrictions on various endowment funds then held by Antioch University in order to facilitate the transfer of those funds to Continuation Fund, an IRC §509(a)(3) supporting organization of ACCC.

In making its determination as to whether to remove restrictions on the endowments funds which limited those funds only to benefit Antioch College in Yellow Springs, OH, the Greene County Probate Division found *inter alia* that:

- “the restricted gifts ... were each made ... under circumstances which suggest a donative intent that the gifts be used to benefit the Antioch College campus in Yellow Springs, Ohio;”
- that the charitable purposes of those gifts were made impracticable or impossible to achieve by Antioch University (because it no longer operates the branch at the Yellow Springs facility);
- that “the purposes of ACCC as stated in its Articles of Incorporation are to receive the assets of Antioch College and to operate Antioch college as an educational institution in Yellow Springs, Ohio;”
- that Continuation Fund, Inc. has been established as a supporting organization under the IRC to support ACCC in its operations of Antioch College; and
- that the modification of restrictions of the Antioch College Endowment Fund represents a deviation most closely satisfying the intent of the donors.

This Court notes that the Greene County Probate Division *and* Antioch University both had sufficient confidence in ACCC’s bona fides<sup>5</sup>, to issue an order releasing restrictions, on not one fund or one gift, such as this Court is asked to decide in the instant case, but on the totality of

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<sup>5</sup> Footnote 3 of ACCC’s opposition brief suggests that the Greene County court may have had access to review the Asset Purchase Agreement, which is otherwise subject to a confidentiality provision. This Court does not seek in camera review of the APA at this time, but reserves the option if prior to the adjudication of this estate, a matter arises that would best be resolved by examination of said agreement.

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the individual funds that made up the Antioch College Endowment Fund. In effect, the Greene County Court already decided for a whole class of givers of charitable bequests to Antioch College: individuals who, like the decedent, intended to make a gift to Antioch College, but who could not have anticipated and accounted for in their testamentary instruments the current state of transition at the college. Furthermore, this Court notes that the Greene County Probate Division did not take this decision without precaution, but made the explicit provision of a reversion of funds to Antioch University pending "any future failure by ACCC to achieve its purpose in operating [Antioch] College." *Greene County Entry* ¶11.

The Wests see a similarity to the *Estate of Beck*, where a bequest was denied to an entity that purchased the assets of a defunct orphanage and alleged to be the successor in interest to the bequest. In that case, the orphanage, as named in the trust, was nonexistent, and the charity the trial court determined was the intended legatee was an orphanage that had closed eight years before the testator executed the trust. Further, that court determined the petitioning organization was operating as a different type of charitable organization.

The Wests' characterize their Uncle's intent as clearly to benefit "the Antioch College that Decedent was familiar with and that was open and operating when he executed the will in 1986." *Wests' Reply* p3. They distinguish the enterprise of ACCC as having nothing to do with the historic college, and point to language from the Concept Paper & Business Plan for the new Antioch College (Exhibit No. 11 to the Opposition to the Motion), such as "reinvented," "a new Antioch College" as suggestive that ACCC seeks to create an entirely new institution.

This Court reads those same words as mere marketing language that does not undermine an overall impression that ACCC is indeed attempting to resume operations of an historic and beloved institution. Indeed, that ACCC purchased Antioch in its entirety, including Glen Helen, The Antioch Review, and substantially all properties, tangible and intangible associated with the

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operation of the Antioch College, is strongly suggestive of an intent to operate the college consistent with the historic campus's distinctive qualities and traditions.

Finally, "In framing a scheme for the application of *cy pres*, the court will consider evidence suggesting what the wishes of the settlor probably would have been if the circumstances had been anticipated." Restatement (Third) of Trusts § 67, at comment d. For example, in the case of a charitable trust to an educational institution, the court will determine whether the trust was designed to primarily benefit the institution or to support a particular field of research, and if the former, the funds may be applied to another department at the institution, and if the latter, to a suitable program at a comparable institution. *Id.*

To determine what the testator would have wanted in the current circumstances, this Court looks again to the wording of the bequest. The will provides one half of the residuary estate to "Antioch College in Yellow Springs, Ohio, with the direction that one-half of said share be used for research in general semantics, group dynamics and/or psychodrama and that the balance thereof be used for the establishment of a scholarship fund for students who are residents of St. Croix, U. S. Virgin Islands."

A plain reading of the provision suggests that the testator intended to make a general bequest to the institution Antioch College, while providing special directions as to how the money should be applied. The provision for a scholarship fund further supports the reading that the bequest was specifically intended to benefit the institution of Antioch College. However, present day Antioch College offers no classes in any subject, and has enrolled no students from the Virgin Islands (or anywhere) who could benefit from the scholarship fund.

This Court agrees with the Greene County Court that currently ACCC is the proper recipient for gifts made to the institution of Antioch College, given their holding of substantially all of the tangible and intangible properties associated with the historic campus in Yellow Springs,

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OH, coupled with their mission to revive school operations. However, the Court sees uncertainty that ACCC will succeed in reinstating a student enrollment on the historic campus. This Court agrees with Richard Detweiler of the Great Lakes Colleges Association who cited two principal concerns with the ACCC's plan, namely, 1) the ambitiousness of the fundraising goal, and 2) the competitiveness of the admissions marketplace for a college of its type. GLCA letter of December 15, 2008 (Exhibit No. 14 to the Opposition to the Motion). If ACCC fails, then again, the testator's wishes become impracticable.

The Court sees two possible approaches for curing this impracticable condition. First, knowing that under common law, courts wield great discretion in applying the equitable principal of *cy pres*, the Court could exercise its discretion, and find that the closest possible expression of the testator's intent would be simply to allow the ACCC to take the money free of the testator's special directions, and thus give the decedent's money to the ACCC with "no strings attached."

The second approach would be for this Court to order the Executor of the estate to create and submit to this Court for approval, a trust instrument<sup>6</sup>, as a pre-condition to the final adjudication of this estate. Such a trust instrument would preserve the decedent's funds, until such time as Antioch College of Yellow Springs, OH again functions as an educational institution with class offerings and attending students. Further, such a trust would include a remainder interest in the next closest charitable subject, namely Antioch University<sup>7</sup>.

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<sup>6</sup> The Court finds that 15 VIC §42 provides an analogous authority whereby the court may create a trust to preserve a will bequest for an inchoate interest, rather than let the gift fail for impracticability.

<sup>7</sup> This Court has already noted that the Greene County Probate Division's order contains the explicit provision of a reversion of funds to Antioch University pending "any future failure by ACCC to achieve its purpose in operating [Antioch] College." Greene County Entry ¶11. Nevertheless, a summary review of the websites of the other Antioch University branches tends to demonstrate a thread of a commonly held philosophy of liberal studies. Furthermore, Antioch University Midwest (Yellow Springs, OH) currently offers such courses as Group Process and Community Change; Building Partnerships: Issues of Power in Relationships; Communicating for Change; which, in the lay opinion of this Court, nearly resemble the subject areas that the testator directs his fund to promote.

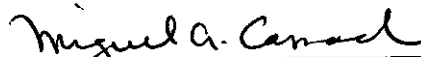


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In trying to address the question as to what the wishes of the testator would have been if the circumstances had been anticipated, this Court prefers the second approach. First, by allowing the testator's funds to be held in trust for the benefit of the students and classes should ACCC succeed in reinstating at Antioch College, the testator's bequest succeeds entirely. Second, because the trust instrument preserves the testator's charitable gift through a reversionary interest to Antioch University, the testator's general charitable intent survives to enrich students learning in the tradition of Antioch College regardless of the success or failure of ACCC to revive the historic campus. An appropriate Order of even date follows.

DATED this 9 day of July, 2010.



Miguel A. Camacho, Magistrate of the  
Superior Court of the Virgin Islands

**ATTEST:**

VENETIA H. VELAZQUEZ, ESQ.

Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 7/12/2010