Land & Water Law Review

Volume 3 | Issue 2 Article 13

1968

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Charles R. Hallam

THE VALIDITY OF THE DISCRIMINATORY CHARITABLE TRUST -- STATE ACTION AND THE FOURTEENTH AMENDMENT

The charitable trust abounds in great numbers; it constitutes a favorite vehicle for philanthropic giving. The wealth of philanthropy, in charitable trusts and related forms, "can only be measured in the tens of billions of dollars."[1]

The charitable trust should, of course, be drafted to effectuate the intentions of the settlor. If the settlor desires to limit his bounty to a particular race, religion or nationality, the draftsman is faced with an obvious problem. He must determine whether or not it is possible to effectuate the settlor's intentions without running afoul of the United States Constitution.

The fourteenth amendment to the United States Constitution[2] states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the Laws."

The purpose of this comment will be to examine the validity of the discriminatory charitable trust and the restrictive scholarship in light of the above constitutional provision. As will become evident, the application of this constitutional limitation will depend upon the ascertainment of "state action" as that concept has been defined and broadened throughout the years. Finally, the effect of appointing private successor trustees in a discriminatory charitable trust will be discussed.

Throughout this comment, it will be assumed that a valid charitable trust has been created by the settlor. The comment will be basically concerned with the uncertain future of such trust in view of its discriminatory or restrictive provisions.

THE WILL OF STEPHEN GIRARD

The trust which brought the issue of the validity of the discriminatory charitable trust to the fore in this country was the landmark trust dealing with alleged discrimination

1. Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1010 (1955).
2. U.S. CONST. amend XIV, § 1.

at Girard College. By will probated in 1831, Stephen Girard left a fund to the City of Philadelphia in trust for the erection, maintenance and operation of a "college," providing that it was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain."

The will named as trustee the City of Philadelphia. From 1869 until 1954, by virtue of an act of the Pennsylvania legislature, the trust was administered and the college operated by the "Board of Directors of City Trusts of the City of Philadelphia." In 1954, two Negro boys by the names of Foust and Felder, applied for admission to the college, but were denied admission by the "Board" because they were Negroes. They petitioned the Orphan's Court of Philadelphia County for an order directing the "Board" to admit them, alleging that their exclusion because of race violated the fourteenth amendment to the United States Constitution. The court's rejection of this constitutional contention and refusal to order the applicants' admission was affirmed by the Supreme Court of Pennsylvania in *In re Estate of Stephen Girard.*[3] The United States Supreme Court, however, reversed and remanded, stating:

> The Board which operated Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment.[4]

On remand, the Orphan's Court construed the Supreme Court's opinion to mean no more than that the Board of City Trusts was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of its founder. The Orphan's Court, therefore, removed the "Board" as trustee, and substituted thirteen private citizens, none of whom held any public office or otherwise exercised any governmental power. On appeal to the Pennsylvania Supreme Court,[5] the question became one of whether

3. 386 Pa. 548, 127 A.2d 287 (1956).
4. Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U.S. 230, 231 (1957).
5. *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958).

or not the action taken by the Orphan's Court in appointing private trustees was inconsistent with the directive of the United States Supreme Court. In answering this question in the negative, the court relied upon three basic propositions: that a testamentary benefactor may impose certain limitations upon the use to be made of the trust property; that as a matter of acceptable trust law a trustee may be removed and replaced if he is incapable of complying with the terms of the trust;[6] and that the opinion of the United States Supreme Court contained no directive to admit Foust and Felder to Girard College. The court stated:

> [T]he Supreme Court did not say that there is any Constitutional or other barrier to the removal of the Board of City Trusts as trustee of Girard College in order that the Orphanage can be administered in accordance with all of the testator's express directions including the qualifications for admission to the student body.[7]

In addition, the court mentioned that the Orphan's Court did not act to *exclude* Negroes from the College. None had ever been admitted. What the Orphan's Court did was to refuse to admit the Negro applicants because they did not qualify for admission under the terms of Girard's will. The United States Supreme Court denied certiorari.[8]

The denial of certiorari by the United States Supreme Court laid to rest the Girard College trust versus the fourteenth amendment for a period of time. However, the cause for Negro applicants was not to be denied. In two companion federal court cases,[9] the State of Pennsylvania, the Attorney General, and seven Negro applicants took a different approach to their problem. They sought to apply to the trust the Pennsylvania Public Accommodations Act,[10] which prohibited racial discrimination in places of public accommodation, resort or amusement. All educational institutions are

6. *See* RESTATEMENT (SECOND) OF TRUSTS, § 387 (1957), which states: "A court may remove a trustee of a charitable trust if his continuing to act as trustee would be detrimental to the accomplishment of the purposes of the trust."
7. *In re* Girard College Trusteeship, *supra* note 5, at 847.
8. Pennsylvania v. Board of Directors of City Trustees of Philadelphia, 357 U.S. 570 (1958).
9. Commonwealth v. Brown, 260 F. Supp. 323 (E. D. Pa. 1966); Commonwealth v. Brown, 260 F. Supp. 358 (E. D. Pa. 1966).
10. PA. STAT. ANN. tit. 18, § 4654 (1963).

covered if they are "under the supervision of this Commonwealth."[11] The Federal District Court for the Eastern District of Pennsylvania, in finding the Act applicable, reasoned as follows:

1. Girard College is an educational institution under the supervision of this Commonwealth; therefore, the Public Accommodations Act is applicable;

2. The Act prohibits defendants from refusing plaintiffs admission to Girard College on the ground that they are not white, if they are otherwise qualified;

3. Plaintiffs are entitled to a permanent and final injunction, enjoining defendants from excluding them from Girard College solely on the basis of their race.

However, the Negro applicants' success was short lived. One year later, the Third Circuit Court of Appeals held that previous state court proceedings[12] which had held the Pennsylvania Public Accommodations Act inapplicable to Girard College were binding upon the federal courts.[13] Accordingly, the federal district court was precluded from construing the statute as barring continued denial of admission to Negroes.

The fire of hope for the Negro applicants was re-kindled with the rendition of the United States Supreme Court's opinion in *Evans v. Newton.*[14] Since they had been denied relief under the Pennsylvania Public Accommodations Act,[15] they looked to *Evans* as a mandate for a renewed argument based on the fourteenth amendment. In *Evans,* the testator devised to the Mayor and City Council of Macon, Georgia, a tract of land to be used as a park and pleasure ground for "white people only." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years, but in time let Negroes use it, taking the position that the park was a public facility which

11. *Id.* §§ (c).
12. Girard's Estate, 4 Pa. D. & C. 2d 671, 702-03 (1955); Girard's Estate, 4 Pa. D. & C. 2d 708, 721 (1956); *In re* Estate of Stephen Girard, *supra* note 3; *In re* Girard College Trusteeship, *supra* note 5.
13. Commonwealth v. Brown, 373 F.2d 771 (3d Cir. 1967).
14. 382 U.S. 296 (1966).
15. PA. STAT. ANN. tit. 18, § 4654 (1963).

it could not constitutionally manage and maintain on a segregated basis. The Board of Managers of the park sought to have the City removed as trustee. Negro interveners asked that the court refuse to appoint private trustees. The lower court accepted the resignation of the City as trustee and appointed three individual trustees. The Supreme Court of Georgia affirmed.[16] In reversing, the United States Supreme Court seemed to take the position that "once a public facility, always a public facility."[17] The Court stated: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[18] The Court in *Evans* applied a type of "momentum concept" and considered the public character of the discriminating enterprise. It reasoned that the momentum that the park had acquired as a public facility could not be dissipated merely by the appointment of private trustees: "Where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of private trustees instantly transferred this park from the public to the private sector."[19]

Although the *Evans* decision must be restricted to a reversal of the state court's appointment of private trustees, a reasonable implication from the holding is that if the discriminating facility is public in nature it is subject to the mandate of the fourteenth amendment even in the hands of private successor trustees.[20]

Considering this decision as a mandate in their favor, the Negro applicants to Girard College once again returned to the federal district court. This court, in *Commonwealth v. Brown*,[21] after finding *Evans* controlling, held that the fourteenth amendment prohibited Girard College from refusing admission to qualified Negro male orphans solely because

16. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).
17. Evans v. Newton, *supra* note 14.
18. *Id.* at 299.
19. Evans v. Newton, *supra* note 14, at 301.
20. Since, as a general rule, the corpus of a charitable trust reverts to the heirs and next of kin of the settlor upon the failure of the charitable purpose, the heirs and next of kin of Evans are in a position (in the absence of the application of the doctrine of *cy pres*) to insist that the trust property revert to them in the form of a resulting trust. RESTATEMENT (SECOND) OF TRUSTS § 413 (1956).
21. 270 F. Supp. 782 (E.D. Pa. 1967).

of their color, even though non-public trustees had been substituted for public trustees since Pennsylvania had not purged itself of the discriminatory connection. In so holding the court stated:

> Recognizing the unavailability of an "infallible test," we nevertheless find it logically and legally impossible to escape the conclusion that racial exclusion at Girard College is so afflicted with State action, in its widened concept, that it cannot constitutionally endure. Since the strictures of the Fourteenth Amendment apply to the administration of the institution, it may no longer deny admission to applicants simply because they are not "white."[22]

Brown has very recently been affirmed on appeal to the Third Circuit Court of Appeals.[23] This court affirmed the District Court basically upon the authority of *Evans*. However, both the majority and concurring opinions stated, by way of dictum, that the District Court could also be affirmed on the basis of *Shelley v. Kraemer*.[24] Therefore, as a consequence of *Evans* and *Brown*, the private trustees of Girard College must now admit the Negro applicants.

THE RESTRICTED SCHOLARSHIP AND STATE ACTION UNDER THE FOURTEENTH AMENDMENT

The previous discussion of Girard College and the discriminatory charitable trust will definitely have an effect in other areas. The presence of *Evans* and *Brown* will be felt in similar, but differing, fact situations. For example, in a majority of states, the state universities and their boards of regents are subject to virtually absolute control by the state legislatures, though in practice the extent and degree of such control varies widely among the states. If, as appears to be true in most states, the state universities and their boards of regents are controlled by the state legislatures, his control would seem to bring the *state action* doctrine into

22. *Id.* at 792.

23. Commonwealth v. Brown, 36 U.S.L.W. 2570 (3d Cir. Mar. 19, 1968), *cert. denied*, 36 U.S.L.W. 3439 (U.S. May 21, 1968).

24. 334 U.S. 1 (1948). *See* text accompanying note 33 *infra*. *See also* Hackett v. Hackett, 150 N.E.2d 431 (Ohio App. 1958), where the Ohio Supreme Court refused to enforce a separation agreement under which the parties had agreed that the children would be reared in a certain religious faith. The court held that to do so would be state action, and violative of the religious liberty provided for in the first amendment.

full swing, preventing the state or its agent from restricting the use of scholarship funds on the basis of race, religion, or nationality, for the legislature of a state cannot permit any agency within its control to discriminate on an unreasonable basis.

It would seem obvious that if a state university used public funds for a restricted scholarship, this violates the fourteenth amendment. It has been argued that a different question is raised if private funds are donated to a state university to provide for a scholarship which is restricted on the basis of race, religion or nationality. This did not appear, however, to give the *Girard* court or the *Evans* court any particular difficulty. It was immaterial that the discriminatory practice was privately created, so long as the state or its agency performed the discriminatory act.

The crucial factor, then, is in determining what constitutes "state action" within the fourteenth amendment.

It must be remembered at the outset that private discrimination is not forbidden by the fourteenth amendment.[25] Thus, in the *Civil Rights Cases*,[26] the United States Supreme Court, in holding the Civil Rights Act of 1875[27] unconstitutional as it applied to compelling privately owned and operated facilities to be made available without racial discrimination, stated: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment."[28]

The traditional definition of "state action" is that set forth in *Ex parte Virginia*: "Whenever one acts in the name and for the state, and is clothed with the State's power, his act is that of the State."[29] However, since 1879 the concept of "state action" has been developed and broadened to a very great extent.

Two leading cases dealing with "state action" under the fourteenth amendment are *Marsh v. Alabama*[30] and *Terry*

25. This comment makes no attempt to deal with the possible application of the Civil Rights Act of 1964.
26. 109 U.S. 3 (1883).
27. Act of March 1, 1875, 18 Stat. 335 (1875).
28. Civil Rights Cases, *supra* note 24, at 11.
29. *Ex parte* Virginia, 100 U.S. 339, 347 (1879).
30. 326 U.S. 501 (1946).

v. Adams.[31] *Marsh* involved a company owned town. The town and its shopping district were accessible to and freely used by the public in general and there was nothing to distinguish them from any other town and shopping center except for the fact that the title to the property belonged to a private corporation. Defendant, a Jehovah's Witness, who distributed religious literature on the sidewalks of the town, was charged under a state statute which made it a crime to enter or remain on the premises of another after having been warned not to do so. Defendant contended that her freedom of religion had been abridged. The Supreme Court of the United States held that even though this town was privately owned, it had the same facilities and performed the same functions as a municipal corporation. Therefore, the town must afford the citizens the protection of the first and fourteenth amendments. In finding sufficient "state action," the Court seemed to prophesy the reasoning of *Evans,* decided 23 years later, *i.e.,* if the discriminating facility is public in nature and performs public functions, it is subject to the commands of the first and fourteenth amendments.

In *Terry,* plaintiffs, qualified Negro voters of a Texas County, sued to determine the legality of their being excluded, solely because of their race, from voting in elections held by the Jaybird Primary, an association consisting of all qualified voters in the County. The association held an election in each election year to select candidates for county offices to run for nomination in the official county offices to run for nomination in the official Democratic primary. The association's elections were not governed by state laws and did not utilize state elective machinery or funds. The defendants contended that the fifteenth amendment applied only to elections or primaries held under state regulation, that their association was not regulated by the state at all, and that it was not a political party but a self-governing voluntary club. The court again looked to the public character of the discriminating enterprise in finding the requisite "state action." The Court stated:

> For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those

31. 345 U.S. 461 (1953).

> processes to defeat the purposes of the fifteenth amendment . . . . It is immaterial that the state does not control that part of the elective process which it leaves for the Jaybirds to manage. The Jaybird Primary has become an *integral part* . . . of the elective process that determines who shall rule and govern in the County. The effect of the whole procedure . . . is to do precisely that which the Fifteenth Amendment forbids . . . .[32]

From both *Marsh* and *Terry,* it seems safe to conclude that when a private person or group performs a function which is essentially public in nature and normally performed by the government, the private activity is subject to the same constitutional requirements as it would be if it were in fact carried on by a governmental agency.

The landmark case of *Shelley v. Kraemer,*[33] found sufficient "state action" in another context. In *Shelley,* certain property was subject to a restrictive covenant whereby the land was not to be sold to members of the Negro race. Defendants were Negroes who bought a parcel of the land. Plaintiffs were owners of other property subject to the terms of the restrictive covenant, and they sought to enjoin defendants from taking possession of the property. The Supreme Court of Missouri granted the relief requested.[34] In reversing, the United States Supreme Court held that the state court's enforcement of the racially restrictive covenant constituted sufficient "state action" to bring the equal protection clause of the fourteenth amendment into play. The Court stated:

> That the action of the state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the fourteenth amendment, is a proposition which has long been established by decisions of this court.[35]

For the purpose of convenience, state court enforcement of a racially restrictive provision will be referred to as "Shelley-type state action" throughout the remainder of this comment.

In the companion case of *Barrows v. Jackson,*[36] the court was again faced with a racially restrictive covenant.

32. Terry v. Adams, *supra* note 31, at 469-70.
33. Shelley v. Kraemer, *supra* note 24.
34. Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946).
35. Shelley v. Kraemer, *supra* note 24, at 14.
36. 346 U.S. 249 (1953).

In *Barrows,* the court was asked to award plaintiff damages for defendant's alleged breach of the restrictive covenant by selling the land to a Negro. *Barrows* differs from *Shelley* in that in the latter the trial court enforced the restrictive covenant. Here, one covenantor was suing a co-covenantor for damages. Unlike *Shelley,* there was no Negro before the court in *Barrows.* Nevertheless, the court had no problem in finding the requisite "state action." The Court stated: "The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in Shelley . . . ."[37] The Court would have been inconsistent with *Shelley* if it had awarded damages for the breach of a restrictive covenant which it had previously held unenforceable by way of an injunction.

If "state action" is in fact the only prerequisite for the application of the constitutional limitation, then it is clear that "Shelley-type state action" was present in both the first *Girard College* case[38] and in *Evans.*[39] In the first *Girard College* case, there was clearly state action as a result of the Orphan Court's appointment of private successor trustees. The only purpose of such appointment was to carry forward the racially restrictive provisions of Girard's will. Yet, for what it may be worth, the United States Supreme Court denied certiorari. In *Evans,* the court did not even mention *Shelley,* even though *Shelley* would seem directly applicable, since the state court enforced the racial restriction by appointing private successor trustees. Further, although the court in *Commonwealth v. Brown*[40] mentioned *Shelley* by way of dictum, the case was clearly decided on other grounds. Although this treatment may seem inconsistent, in both *Brown* and *Evans,* the court was able to take another route in finding sufficient state action, *i.e.,* by looking to the public character of the discriminating enterprise. Consequently, it was not necessary that it rely on either *Shelley* or *Barrows.*

Therefore, one of three rationales may be deduced with respect to *Shelley*: It must be limited to its facts; the concept of "state action" does not provide the complete answer

37. *Id.* at 254.
38. *In re* Girard College Trusteeship, *supra* note 5.
39. Evans v. Newton, *supra* note 14.
40. Commonwealth v. Brown, *supra* note 23.

with respect to the application of the fourteenth amendment to the restrictive or discriminatory charitable trust; or the Court is avoiding the far-reaching consequences of applying the *Shelley* holding to the typical private discriminatory or restrictive charitable trust.

It may be wise to note, however, that a "perfect case" for the application of *Shelley* has not yet been presented to the Supreme Court of the United States, *i.e.,* the state court enforcement of a privately created and administered discriminatory charitable trust, such discriminating facility being purely private in nature rather than public. One can only hypothesize as to the outcome of such a case.

Even in the "perfect case" there are factors in addition to "Shelley-type state action" which may aid a court in finding "state action" if the charitable trust happens to contain discriminatory provisions. These factors include certain benefits afforded to the charitable trust, both by state statute and by state case law.[41]

The most recent word on the concept of "state action" has been spoken in *Reitman v. Mulkey,*[42] where the Court stated that there was no infallible test for determining the bounds of "state action" under the fourteenth amendment, and that each case must be decided according to the facts and circumstances presented therein.

CONCLUSION

At present, the discriminatory charitable trust or the restricted scholarship will only be invalidated if the following conditions exist:

41. The charitable trust is normally enforced at the suit of the state attorney general. RESTATEMENT (SECOND) OF TRUSTS § 391 (1957). The charitable trust property is generally immune from tort liability. 4 SCOTT, TRUSTS § 402.2 (2d ed. 1956). The charitable trust is exempt from the provisions of the Rule against Perpetuities. 10 AM. JUR. 2D *Charities* § 17 (1964). *See also* RESTATEMENT (SECOND) OF TRUSTS § 365 (1957). The charitable donor and the charitable corporation are accorded substantial benefits under the federal income tax laws. INT. REV. CODE OF 1954, §§ 170 and 501. *Cf.* Rev. Rul. 67-325, where the Commissioner denied the charitable deduction under § 170 and the exemption under § 501 where the contributions were to be used to provide recreational facilities without charge to *white residents* only. Since many charitable trusts are created primarily for tax reasons, this Ruling raises the advisability of creating a charitable trust which contains discriminatory or restrictive provisions.

42. Reitman v. Mulkey, 387 U.S. 369 (1967).

1. If the discriminating facility is public in nature and performs functions comparable to those performed by the government;[43]

2. If the state or a state agency administers the discriminatory or restrictive provisions;[44] or

3. If private trustees succeed the public trustees after the trust has taken on a public character.[45]

Therefore, unless the Supreme Court decides to apply *Shelley* to privately created and administered discrimination, it would seem that the charitable trust could discriminate at will so long as it is administered by private trustees and is not of such a public character as to draw into application the *Marsh* and *Terry* cases. This would constitute private discrimination which is clearly not within the purview of the fourteenth amendment.

However, it must be concluded that the discriminatory charitable trust and the restrictive scholarship are on very tenuous ground. Those who are most concerned with the creation and administration of charitable trusts and restrictive scholarships must be aware of the acute problems that could arise if the validity of such a trust was attacked in a court of law because of certain discriminatory provisions contained therein. From a planning and drafting standpoint, the practitioner cannot ignore the fourteenth amendment and the broad and far-reaching implications of the decisions construing that amendment.

Finally, if a presently existing charitable trust is contested in a court of law and found by the court to contain discriminatory or restrictive provisions which violate the fourteenth amendment, the court may apply the doctrine of *cy pres* to the trust corpus. In order to apply this doctrine, the court may be able to conclude that the settlor possessed a general charitable intent in the event that it became impossible, impracticable or illegal to carry out the particular

43. Marsh v. Alabama, *supra* note 30; Terry v. Adams, *supra* note 31; Evans v. Newton, *supra* note 14.
44. Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, *supra* note 4.
45. Commonwealth v. Brown, *supra* note 21; Evans v. Newton, *supra* note 14.

charitable purpose.[46] If the court is able to so conclude, then it will direct the application of the trust property to a similar charitable purpose that falls within this general charitable intent. As a result of this application of the property, a reversion to the heirs or next of kin of the settlor is prevented.[47]

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46. RESTATEMENT (SECOND) OF TRUSTS § 399 (1957):
> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, *and* if the settlor manifested a more general charitable 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 4 SCOTT, TRUSTS § 399.2 (2d ed. 1956).

47. For cases applying the doctrine of *cy pres* in order to prevent a failure of the trust and a reversion of the trust corpus, *see In re* Hawley, 223 N.Y.S.2d 803 (1961); Lafond v. City of Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959); Howard Savings Inst. v. Peep, 34 N.J. 494, 170 A.2d 39 (1961); Smith v. Moore, 225 F. Supp. 434 (E.D. Va. 1963), *aff'd with slight modification*, 343 F.2d 594 (4th Cir. 1965).