

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the BESSIE E. GRAY LIVING
TRUST.

HELEN RICHTER CICHANSKI,

Plaintiff-Appellant,

v

OLD KENT BANK & TRUST COMPANY
OCEANA COMMUNITY FOUNDATION,
LAKESHORE COMMUNITY HOSPITAL,
and MICHIGAN ATTORNEY GENERAL,

Respondents-Appellees.

UNPUBLISHED
October 29, 1996

No. 183401
LC No. 94-038-TI

Before: Gribbs, P.J., and Markey and T. G. Kavanagh,* JJ.

PER CURIAM.

Petitioner Helen Richter Cichanski appeals the probate court order permitting application of the cy pres doctrine to decedent's trust. We affirm.

At issue is the probate court's application of the common-law cy pres doctrine, and equitable "saving device applied to charitable trusts so that when the specific purpose of the settlor cannot be carried out, his charitable intention can be fulfilled as nearly as possible. *In re Rood Estate*, 41 Mich App 405,415; 200 NW2d 728 (1972). This Court reviews findings of fact by a probate court sitting without a jury for clear error. MCR 2.613(C). A finding is clear error when, although there is evidence

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994).

Before a court invokes the cy pres doctrine, the court must determine (1) whether the gift creates a valid charitable trust, (2) whether it is impossible or impracticable to carry out the specific purpose of the trust, and (3) whether the settlor had a general (rather than a specific) charitable intent in creating the trust. *Id* at 205. At issue in this case is the nature of the settlor's charitable intent. In determining whether a charitable intent is general or specific, "the absence of a reverter clause or gift over in the event that the particular purpose fails is evidence of a general charitable intent. Similarly, a general charitable intent will be implied where the bulk of donor's property is given for charitable purposes." *Rood, supra*, at 423. Charitable trusts are construed liberally and given effect whenever possible. *Id* at 422. The question is whether the attempt to convey a charitable gift "clearly and unequivocally indicate[s] a specific charitable intent *to the exclusion of* a general charitable intent. *Id* at 426, emphasis added.

In its written opinion, the trial court in this case stated:

It is the opinion of this Court that there was a "general charitable intent" on the part of Bessie Gray in establishing her trust...Bessie Gray intended to provide a memorial for herself and her late husband for the medical benefit of patients using Oceana Hospital. She assumed that Oceana Hospital would continue in perpetuity or be succeeded by another institution that would be able to continue the memorial and bestow medical benefits to the people served by Oceana Hospital. There is no reverter or gift over clause in either the trust documents or in her correspondence and Bessie Gray gave no specific direction as to what the trustee should do with the trust assets if Oceana Hospital ceased to exist.

As the trial court noted, there is no reverter or gift over clause here, and the bulk of the settlor's property was given to charitable purposes. In addition, there is evidence to support the finding that she did not intend to distribute the bulk of her property to her heirs. Each of these factors supports the trial court's finding that the settlor had a general charitable intent. We find no clear error.

There is no merit to petitioner's claim that this action was precluded by collateral estoppel. Petitioner contends that a previous circuit court judgment, in which a default judgment was entered on the bank's petition to reform the trust, when read in light of certain IRS rulings and revenue rulings, contains the implicit ruling that the settlor had a specific charitable intent. We do not agree. In any case, the two cases lack a common identical issue, and collateral estoppel does not apply. *City of Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990).

Finally, the trial court did not improperly shift the burden of proof. Although the burden of proof always remains on the petitioner or plaintiff, the burden of persuasion shifts between the parties depending on the pleadings. *Kar v Hogan*, 399 Mich 529, 537-540; 251 NW2d 77 (1976). The trial

court did not err in noting that petitioner, who was respondent below to the motion to apply the doctrine of cy pres, had the burden “to go forward” after the bank had produced its evidence.

Affirmed.

/s/ Roman S. Gibbs

/s/ Jane E. Markey

/s/ Thomas Giles Kavanagh