

TRUST AND TRUSTEES: The income from the Elias and
STATE SCHOOL NO. 2 Amelia C. Perry Memorial fund
AT CARROLLTON, MO.: should be paid to the Board of
Managers of the State Eleemosynary
Institution.

July 31, 1942

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Hon. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of July 16th, 1942, in which you request an opinion, as follows:

"Enclosed please find copy of an endowment gift to the Children's Home, Carrollton, Missouri. As you undoubtedly know, this Children's Home was first under the State Board of Charities and Corrections; it was then placed under the Board of Managers of the Eleemosynary Institutions; it was next placed under Social Security, and at the last session of the Legislature abandoned by Social Security and designated as School No. 2 of the Feebleminded and Epileptic School at Marshall, as part of that School, and again placed under the Board of Managers of the Eleemosynary Institutions.

"These buildings are now occupied by girls and boys who are feebleminded, and are sent to the No. 2 School at Carrollton from the feebleminded school at Marshall.

"Under the terms of this endowment gift are the children at Carrollton entitled to the benefits of this gift? We understand that the original of this instrument is with the Trustee of the fund, and it is our understanding that he would like to have an opinion, and the Board of Managers would like to have an opinion, as to whether they can accept the interest for the benefit of the children now at the Carrollton School."

By the Laws of 1921, page 89, the General Assembly of Missouri established an institution to be known as the State Home for Children. The stated purpose of the institution is set forth in Section 1 of the Act as follows:

"There is hereby established an institution to be known as the state home for children. The purpose of said home shall be to provide for neglected and dependent children a temporary home that will furnish for them, pending placement in permanent family homes, proper care and instruction. Said care and instruction shall be such as to develop the children while in said home mentally, morally and physically and train them in the industrial arts."

It was provided by the act that the home be under the management and control of the State Board of Charities and Correction and it was further provided that the Board provide a suitable location and the necessary buildings to take care of the children sent to such home under the provisions of the statute. It was also provided that only children under seventeen years of age who were dependent on the public for support, abandoned, neglected or ill

treated and who were of sound mind should be received into the home. It was provided that all commitments to said home should be made by the juvenile courts of the child's residence.

All of the provisions of the Act of 1921 were carried into the revision of 1929 as Article 4, Chapter 125, Sections 14095 to 14110, inclusive, without any changes. The home provided for therein was located at Carrollton, Missouri.

Section 14096, R. S. Mo. 1929, was repealed by the Laws of 1933, page 189, and the control and management of the home was placed in the hands of the Board of Managers of the State Eleemosynary Institutions, and all the powers and duties that were possessed by the State Board of Charities and Corrections were given to the Board of Managers of the State Eleemosynary Institutions, as provided in a new section, 14096a.

By the Laws of 1937, page 468, Sections 14096 and 14096a, as enacted by the Laws of 1933, were repealed and the State Social Security Commission was given the power to supervise and manage the State Home for Children. Thereafter, by the Session Acts of 1939, page 272, Section 14097, R. S. Mo. 1929, empowering the State Board of Charities and Corrections to select a proper location for the State Home for Children, was repealed. Finally, the whole of Article 5, Chapter 56, R. S. Mo. 1939, relating to the State Home for Children at Carrollton, was repealed by Laws of Missouri 1941, page 320, and there was enacted in lieu thereof two new sections to be known as Sections 9634 and 9635, establishing an institution to be known as the Missouri State School No. 2, and to be used in connection with the Missouri State School at Marshall, Missouri, as a colony for feebleminded and epileptic children, and the management and control of all the grounds and properties now used by the "State Home for Children" at Carrollton, Missouri, was to be transferred to the Board of Managers of the State Eleemosynary Institutions for the use of said Missouri State School No. 2.

With this brief history of the State Home for Children, we come now to the question requested in your letter. Accom-

panying your letter of request is a copy of the instrument creating the "Elias and Amelia C. Perry Memorial Fund." We will not set forth the trust agreement in its entirety but only such portions as we deem pertinent to the question. The instrument is designated as "Endowment Gift" and was executed December 26, 1923, at the height of the Christmas season, and created a trust with the First National Bank at Carrollton as trustee, placing in the hands of the trustee a three thousand dollar note, which has, at this time, been changed to cash and other securities, for the following purpose:

"To establish a permanent endowment fund to be known and designated as the 'Elias and Amelia C. Perry Memorial Fund', to be held perpetually in trust as an endowment for the benefit of the children that are now or may hereafter be in the Childrens Home, (Established by the State of Missouri) at Carrollton, Missouri, or under its care, control or custody.

"Said fund to be loaned or securely invested by said Trustee so as to yield a fair return thereon, always keeping foremost in mind the security of the corpus of said Trust Fund.

"The income (and the income alone) from said Trust Fund shall be used and expended by said Trustee for the benefit of the children who are now, or may hereafter be in the said Childrens' Home, or under its care, control or custody, and for the Home itself. Such expenditures of said income shall be made at the sole discretion of the said trustee. However, I know that the said Trustee will consult with the State Board of Charities and Corrections, now in control of said Home, or with the authorities that may hereafter be in charge and control thereof, as successor or successors to said State Board of Charities and Corrections."

We think, without doubt, by the terms of this instrument that it creates a charitable trust. In 10 Am. Jur., Section 4, page 587, a charitable trust is defined as follows:

"* * * Any trust coming within the definition of a legal charity for the benefit of an indefinite class of persons sufficiently designated to indicate the intention of the donor and constituting some portion or class of the public is a charitable trust. It has been said that a charitable trust, in a legal sense, is one which originates from the gift and which limits property to any public use to which it is lawful to devote property forever. * * * * *"

At the time the trust was created by the donor in 1923, the Home at Carrollton, Missouri, was used as a temporary home for neglected and dependent children and was under the supervision of the State Board of Charities and Corrections. At the present time the lands and property formerly used as a home for children are used as a colony for feebleminded and epileptic children from the Missouri State School, and is designated as Missouri State School No. 2. It is under the control of the Board of Managers of the State Eleemosynary Institutions. We understand from the inquiry from the Board of Managers of the Eleemosynary Institutions that the children now at the home are children who heretofore had been sent to the Missouri State School at Marshall, Missouri. Both the original Home for Children at Carrollton, Missouri and the present State School No. 2 are operated and supported by the State.

Your question, as we understand it, is whether there has been such a failure of purposes of the charitable trust created by Mr. Perry that there is a reverter to the donor or his heirs, or, what now becomes of the corpus of the trust fund and the income derived therefrom. Without a

general discussion of the cy pres doctrine, we think that it should be applied in this case and the income be used for the benefit of the children now in the Missouri State School No. 2 at Carrollton. Briefly, cy pres means:

"Cy pres means 'as near to,' and the doctrine is one of construction, the reason or basis thereof being to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be where it cannot be done to the letter."

14 C. J. S., Sec.
52, page 512.

The meaning of the doctrine of cy pres is further stated in the same section as follows:

"* * * The meaning of the doctrine of cy pres is that when a definite function or duty to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; and so, of course, it must be enforced, and the reason or basis for the doctrine is to permit the main purpose of the donor of a charitable trust to be carried out as nearly as possible where it cannot be done to the letter."

Our opinion is based somewhat on one of the leading cases in Missouri on charitable trusts, Thatcher v. Lewis, 335 Mo. 1130, 76 S. W. (2d) 677, which pertains to the Bryan Mullanphy Trust in St. Louis, which trust has been the source of much litigation in Missouri and furnishes a great deal of law on the subject of charitable trusts and the cy pres doctrine in Missouri.

CONCLUSION

It is, therefore, our opinion that the trustee is empowered under the terms of the "Endowment Gift" to continue to act as such trustee and to pay the income from said trust fund to the Board of Managers of the State Eleemosynary Institutions for the benefit of children now in or who may hereafter be placed in said Missouri State School No. 2.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

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