

***COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION***

O. C. NO. 584 of 1966

Trust Estate of MAURICE W. HEINRITZ, Settlor

Before: TUCKER, ADM. J., and PAWELEC, J.

OPINION SUR EXCEPTIONS

PAWELEC, J.

Settlor executed a revocable deed of trust on July 2, 1946. After executing a number of amendments thereto, the settlor essentially restated the trust, in its entirety, on October 18, 1962. Settlor died on February 8, 1963, at which time the trust became irrevocable.

Article Seventeenth of the deed of trust, as restated, reads as follows:

“After the death of Settlor, Trustees shall pay out of principal such portion of the death taxes assessed by reason of Settlor’s death as Settlor’s Executors may determine. Such payments may be made directly or to the said Executors. Taxes may be prepaid. All legacies herein provided shall be tax free.”

After the death of Settlor, the bulk of the trust assets were held in further trust for the benefit of his wife, Jean Scott Heinritz. Mrs. Heinritz died on July 3, 1996. The trust has terminated and the remainder is now distributable in the following manner, pursuant to Paragraph Eighth of the deed of trust:

Worcester Polytechnic Institute	35%
Prospect Street Presbyterian Church	30%
St. Francis Hospital	10%
Graduate Hospital of the University of Pennsylvania	10%
Massachusetts Delta Chapter of Sigma Alpha Epsilon	15%

The auditing judge, in his adjudication, adopted the position of the accountant that the Massachusetts Delta Chapter of Sigma Alpha Epsilon (the Fraternity) was not a qualified charity at the time of settlor's death and should bear the burden of its own tax. The executors had prepaid the taxes after the death of settlor. The net result of the allocation of death taxes against the share of remainder passing to the Fraternity was a reduction in the award to the Fraternity from 15% to 8.05%.

The Fraternity filed exceptions to this determination, which exceptions are presently before us for decision.

At the argument on this issue, counsel for the accountant advised the court that accountant had changed its position and did not oppose the exceptions filed by Sigma Alpha Epsilon. None of the other residuary beneficiaries appeared to oppose the position of the Fraternity, nor did the Attorney General as *parens patriae*. No briefs were filed by anyone to contest the exceptions nor was any argument presented contra to said exceptions.

Since no party presently objects to the position of exceptant, the exceptions filed by the Massachusetts Delta Chapter of Sigma Alpha Epsilon are sustained and the Massachusetts Delta Chapter of Sigma Alpha Epsilon is awarded 15% of the trust principal and income available for distribution. The shares of the other four remaindermen are adjusted to reflect this award. The adjudication dated August 20, 1999 is amended accordingly.

Exceptions filed by the Worcester Polytechnic Institute are also before us for disposition.

At the audit, Worcester Polytechnic Institute (the Institute) filed objections concerning the proposed distribution of the share of the remainder which is given to Prospect Street Presbyterian Church, and, to an allegedly improper payment of capital gain taxes by the accountant.

The Prospect Street Presbyterian Church (the Church), one of five remaindermen, was dissolved on August 1, 1993. At the time of its dissolution, the Church was a constituent congregation of the Presbytery of New Brunswick (the Presbytery) and of the Presbyterian Church.

The accountant, in its audit papers, noted that the Church was no longer in existence, and, proposed that its share of the remainder be awarded to the Presbytery of New Brunswick. Worcester Polytechnic Institute objected and took the position that the doctrine of *cy pres* should be applied to award the Church's share of the remainder to the other

charitable remaindermen. Briefs were submitted on the issue. No hearing was held.

In his adjudication of August 20, 1999, the auditing judge held that, "Accountant's request that the trust share otherwise passing to Prospect Street Presbyterian Church should be distributed to the Presbytery of New Brunswick of the Presbyterian Church (U.S.A.) is approved." He then awarded the Church's share of the remainder to the Presbytery of New Brunswick. The adjudication does not address the tax issue.

The Institute filed exceptions to the award to the Presbytery of New Brunswick, and, to the failure of the auditing judge to address the question of the payment of capital gains taxes. The Institute has since withdrawn its exception to the failure to determine the tax issue.

In support of its exception to the award to the Presbytery of New Brunswick, the Institute contends that the doctrine of *cy pres* should be applied, and, that the share in question should be awarded to the other charitable remaindermen. The Institute cites many cases in support of its argument that distribution should not be made to the Presbytery.

The Presbytery of New Brunswick argues that it should receive the funds because it is a successor in interest to the Church in law and pursuant to the "Book of Order", which, it is stated, controls the form of government of a Presbyterian Church. The Presbytery further argues that even if *cy pres* is applicable, it is still the proper recipient of this fund.

We cannot determine the basis on which the award to the Presbytery of New Brunswick was made. The adjudication is silent on this issue. No hearings were held so we cannot review a record. The briefs of counsel make references to documents and facts that are clearly not in the record.

This court en banc having no basis upon which it can determine the validity of the exception of Worcester Polytechnic Institute to the award to the Presbytery of New Brunswick, the Institute's exception is sustained *pro forma*, and, this issue is referred back to the auditing judge.

BY THE COURT:

PAWELEC, J.

Thomas O. Hiscott, Esquire
Heckscher, Teillon, Terrill & Sager, P.C.
for Exceptant, Massachusetts Delta
Chapter of Sigma Alpha Epsilon

Lawrence C. Norford, Esquire
Saul, Ewing, Remick & Saul, LLP
for Exceptant, Worcester Polytechnic Institute

George S. Forde, Jr., Esquire
Stradley, Ronon, Stevens & Young, LLP
for Accountant, CoreStates Bank, NA
(now First Union National Bank),
Surviving Trustee

C. Scott Meyer, Esquire
Montgomery, McCracken, Walker and Rhoads, LLP
for Presbytery of New Brunswick

