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COUNTY COMMISSIONERS—HOLDING REALTY AS TRUSTEE OF “CHARITABLE TRUST”—COURT ORDER NECESSARY FOR SALE OF SUCH REALTY.

SYLLABUS:

1. A deed conveying real property for a valuable consideration to the county commissioners and their successors in office forever and prescribing in the granting clause “in trust for the use and benefit of the Childrens Orphan Home,” with quite similar phrasing in the habendum clause, creates a charitable trust for the purpose indicated so that a sale of a part of the property may not be made without prior court approval.

2. When a board of county commissioners which holds title to real property as trustee of a charitable trust under a deed with a covenant, “in trust for the use and benefit of the Childrens Orphan Home,” desires to sell part of the property, such board should apply to the proper court for a decree ordering sale with a conveyance free of such covenant.

Columbus, Ohio, March 2, 1960

Hon. Elmer Spencer, Prosecuting Attorney
Adams County, West Union, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I have been requested by the Adams County Child Welfare Board for your opinion concerning whether or not certain lots could be sold off of the children's home land situated here in Adams County for the preservation of the present building which is situated on such land containing approximately 25 acres and a great portion of this acreage is not used nor is the same necessary for the proper use and enjoyment of the Children's Orphan Home. The deed on which such building was erected was given by one Franklin and Susan Seaman to the Adams County Commissioners and in the granting clause of the deed it specifies that such land is to be 'in trust for the use and benefit of the Children's Orphans Home' and I might also add that in the habendum clause of the deed the following language is used 'and all the rents, issues and profits thereof to have and to hold the same to the only proper use of said W. S. Bottleman, J. R. Ziel and William McGoveny as County Commissioners of Adams County in trust for the use and benefit of the Children's Orphans Home.'

"Such deed was recorded June 1, 1883 and after such date a man by the name of John T. Wilson erected the present building on such land although his Will does not restrict the usage of the building on the land. However, the present building is very old and desperately in need of repairs and they have requested me to secure your opinion concerning whether or not a part of the land which is not used by the home within the 25 acre tract could be sold for the purposes of preserving the present building wherein the orphans reside."

Subsequently, upon request, you forwarded a copy of the deed in question. Pertinent parts of the deed are quoted herewith:

"Know all men by these presents that Franklin Seaman and Susanna Seaman, his wife, of Adams County, Ohio, in consideration of One Thousand Dollars to them paid by W. S. Bottleman, J. R. Zile and William McGovney, County Commissioners of Adams County, Ohio, the receipt whereof is hereby acknowledged do hereby grant, bargain, sell and convey to said W. S. Bottleman, J. R. Zile and William McGovney, County Commissioners of Adams County, Ohio, *in trust for the use and benefit of the Childrens Orphans Home*; and their successors in office forever the following described real estate situated in Adams County and bounded as follows: * * *." (Emphasis added)

The phrase in the quotation from the granting clause of the deed as reads "in trust for the use and benefit of the Childrens Orphan Home," clearly signifies an intent of the grantor to bind the grantees with a covenant to hold this real estate in trust for the named purpose.

The county commissioners are authorized to hold real estate in trust. The authority is set forth in Revised Code Section 9.20, from which a pertinent extract is quoted herewith:

“* * *, a county, * * * or the commissioners * * * may receive by * * * devise * * * lands * * * for their benefit or the benefit of any of those under their charge, and hold and apply the same according to the terms of the * * * devise * * *. Such * * * devises of real estate may be in fee simple or of any lesser estate and *may* be subject to any reasonable reservation. * * *.” (Emphasis added)

Also pertinent to this situation is the statement below quoted from 15 Ohio Jurisprudence, 8 and 9:

“The settled rule in this state is that the acceptance by a grantee of a deed poll, containing covenants to be performed by grantee, signed and sealed by the grantor only, binds the grantee to the performance of those covenants as effectually as if he had signed and sealed the instrument, it binds also his heirs and assigns, provided, of course, it relates to the premises conveyed; that is, runs with the land. * * *.”

That the county commissioners of Adams county hold the real estate in trust for the use and benefit of the Childrens Orphan Home is established without any doubt. Even though the deed recites a consideration of one thousand dollars, a review of the law indicates that such a recital will not be a factor to change the situation of a trust which otherwise qualifies as a “charitable trust.” A “charitable trust” has been defined in American Jurisprudence, Volume 10, page 587, 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.”

In 9 Ohio Jurisprudence, 2d, 83, under a discussion of charitable trusts, appears this statement:

“Though no particular form is necessary for its creation, the words or acts relied upon to effect the object should plainly imply that the party creating the charitable trust intended to divest himself of his interest in the property and that it be held for the interest and benefit of another.”

Hence, it is determined that this trust should be further identified as a “charitable trust.”

In view of the determination already reached, the basic question requiring an answer is this—may the commissioners of Adams county who hold a certain twenty-five acre tract of realty under a charitable trust for the use and benefit of the Childrens Orphan Home sell a portion of such tract not used by the home in order to secure funds for the preservation of the present building wherein the orphans reside?

The answer to this question is that such sale may not be made without prior court approval. Such a sale without prior court approval would be a violation by the county commissioners of their obligation as trustees of a charitable trust. It would also be impractical due to the question of marketability of title that would undoubtedly be raised by title examiners of prospective purchases. See the quotation *supra* from 15 Ohio Jurisprudence, 8 and 9.

The above answer is so, irrespective of the fact that there is no stated restriction in the deed in regard to resale. The existence of the charitable trust with the purpose as stated is in itself sufficient to prevent a legal sale without court action. However, the fact that there is no stated restriction against sale naturally becomes a factor for favorable contemplation by the court when considering authorization for a sale of the property.

This opinion would not be complete without further discussion of the possibility of favorable consideration upon presentation to the court. It is noted that the deed does not contain any reference to a possibility of reversion of the property to the heirs of the grantors under any situation. Therefore, whether the county commissioners are in possession as trustees of a charitable trust with fee-simple title absolute, will depend upon the significance of the phrase "in trust for the use and benefit of the Childrens Orphan Home." This phrase represents a covenant rather than a condition. Hence, there is no basis for any possibility of title reverting to the heirs of the grantors. That this is the well settled law of Ohio is set forth in 15 Ohio Jurisprudence, 2d, 8, as quoted thus:

"* * *, and where there are doubts whether a clause is a covenant or a condition, the courts incline against the latter construction; in fact, they will always construe clauses as covenants, rather than as conditions, if it is possible to do so. The rule is that the intention of the parties, as ascertained from the instrument itself and from the surrounding circumstances, is to control, and not the technical language used. * * * On the other hand, the omission of words of forfeiture or re-entry shows that the parties

did not intend to create a condition subsequent, for the law of Ohio clearly is that such words must be placed in the instrument in order to work a defeasance."

When the entire area of real property becomes unnecessary for trust purposes a court may authorize sale of a part of such property as may, in its judgment, be for the best interests of the trust; the funds obtained from such sale would still be trust funds that could not be devoted to any purpose other than the purpose of the trust. This conclusion is to be found in the opinion of *O'Brien v. Hospital Association*, 96 Ohio St., 1, 8. The principle applied is known in trust law as the doctrine of deviation.

In 2 Restatement of the Law of Trusts, 2d, 273, Section 381 on the doctrine of deviation reads:

"The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settler and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust."

The doctrine of deviation is recognized in Ohio. Section 381 of the Restatement, *supra*, has either been quoted or cited in support in the following Ohio cases: *Findley v. City of Conneaut*, 145 Ohio St., 480; *First National Bank of Akron v. Unknown Heirs of Donnelly, Jr.*, 96 Ohio App., 509; and *Craft v. Shroyer*, 81 Ohio App., 253.

Therefore a petition to the court requesting authority to sell part of the twenty-five acre tract for the purpose of applying the proceeds to the repair of the existing building would in all probability be recognized as a proper request in furtherance of the charitable intentions of the grantors. Such a petition, naming as defendants the known and unknown heirs of Franklin and Susanna Seaman and also as a defendant the Attorney General of Ohio, would afford an opportunity for authorization of sale of the real estate with clear title.

In conclusion, it is my opinion and you are advised:

1. A deed conveying real property for a valuable consideration to the county commissioners and their successors in office forever and prescribing in the granting clause "in trust for the use and benefit of the Childrens Orphan Home," with quite similar phrasing in the habendum clause, creates a charitable trust for the purpose indicated so that a sale of a part of the property may not be made without prior court approval.

2. When a board of county commissioners which holds title to real property as trustee of a charitable trust under a deed with a covenant, "in trust for the use and benefit of the Childrens Orphan Home," desires to sell part of the property, such board should apply to the proper court for a decree ordering sale with a conveyance free of such covenant.

Respectfully,

MARK McELROY
Attorney General