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1. CHILDREN'S HOME-COUNTY—WILL, GIVING PROPERTY, REAL OR PERSONAL TO BOARD OF TRUSTEES—"TO BE USED FOR THE BENEFIT OF SAID CHILDREN'S HOME AT THE DISCRETION OF THE SAID BOARD OF TRUSTEES"—TRUST CREATED IN NATURE OF CHARITABLE TRUST.
2. REAL PROPERTY MAY NOT BE SOLD BY COUNTY COMMISSIONERS WHERE GIFT IS FOR A CHARITABLE TRUST—SECTIONS 2447, 2447-1 GC—NOT REAL ESTATE BELONGING TO COUNTY AND NOT NEEDED FOR PUBLIC USE.
3. TRUSTEES OF COUNTY CHILDREN'S HOME—POWERS AND DUTIES TRANSFERRED TO COUNTY DEPARTMENT OF WELFARE—DEPARTMENT SUCCEEDS TO TRUSTEESHIP OF REAL PROPERTY HELD IN TRUST—IF NO RESTRICTION IN INSTRUMENT CREATING TRUST, DIRECTOR TO SELL PROPERTY UNDER INSTRUCTIONS AND APPROVAL OF COURT OF EQUITY, MUST HAVE CONSENT AND APPROVAL OF COUNTY COMMISSIONERS—SECTION 3070-8 GC.

SYLLABUS:

1. A will giving property, real or personal to the board of trustees of a county children's home, and prescribing that it is "to be used for the benefit of said county children's home, at the direction of the said board of trustees," creates a trust in the nature of a charitable trust for the purpose indicated.
2. Real property given to an agency of a county for the purpose of a charitable trust may not be sold by the county commissioners pursuant to the provisions of Sections 2447 and 2447-1, General Code, as "real estate belonging to the county and not needed for public use."
3. Where real property is held in trust by the trustees of a county children's home and such trustees under the provisions of Section 3070-8, of the General Code, have transferred their powers and duties to a county department of welfare, said department succeeds to such trusteeship, and if there is no restriction in the instrument creating such trust, the director of such department, with the consent and approval of the county commissioners, may sell such real property under instructions and approval of a court of equity.

Columbus, Ohio, March 19, 1953

Hon. Bernard W. Freeman, Prosecuting Attorney
Huron County, Norwalk, Ohio

Dear Sir:

I have before me your communication requesting my opinion, and reading as follows:

"May I have your opinion, formal or informal, with respect to the following situation: The will of one O. C. M. was admitted to probate January 27, 1949, in the Probate Court of Huron County, Ohio; the will contained the following provision:

'ITEM V. All the remainder and residue of my estate, real and personal, wheresoever situated, which I may own or have the right to dispose of at the time of my decease, I give, devise, and bequeath to the Board of Trustees of the Children's Home of Huron County, Ohio, to be used for the benefit of said Huron County Children's Home at the direction of the said Board of Trustees.'

"A portion of the residuary estate was real property which was after a time conveyed by the County Commissioners, under the terms of General Code Sections 2447 and 2447-1. At that time, under the provisions of Section 3070-8 of the General Code the Board of Trustees of the Children's Home had entered into an agreement with the Board of County Commissioners to transfer their powers and duties to a County Department of Welfare.

"Under the terms and provisions of Section 18 of the General Code of Ohio and 3080 as it formerly existed, construed in conjunction with the terms and provisions of the present Section 3070-31, this office reached the conclusion that title to the real estate vested in the Board of County Commissioners; and that they, therefore, were empowered and authorized to sell this real estate under the terms and provisions of the statutes above cited.

"This office is also familiar with the terms and provisions of Section 3070-30 and the Opinion Number 2617, at page 841, of the 1950 Opinions of the Attorney General; however, we can find no definite statutory authority under the new statutes which is the exact substitute for Section 3080.

"If this office is in error in its conclusion that the power to sell vested in the Board of County Commissioners, may I please have your opinion as to the proper procedure for the sale of this real estate?"

At the time of the probate of the will giving certain real and personal property to the Trustees of the Children's Home, all of the statutes formerly in existence relating to the establishment and government of children's homes to wit, Sections 3077 to 3108 of the General Code, had been repealed by an Act which became effective January 1, 1946, 121 v. 538. This Act was a codification of the statutes relating to child welfare.

Sections 3070-1 to 3070-36 of the General Code, being a part of this Act, relate to the establishment of a county child welfare board and its powers and duties. The purpose of these provisions as stated in the opening section of the law, was "to supplement, expand, modernize and integrate child welfare services and the care and placement of children in the several counties of the State."

Section 3070-6 of the General Code, provides as follows:

"In any county where a county children's home exists at the time of the effective date of this act, and in which the board of trustees of said home have not transferred their powers and duties to a county department of welfare, such board of trustees shall hereafter be known as the 'child welfare board,' and shall have all the powers and duties vested by this act in such boards. The custody of all wards of such board of trustees shall be deemed transferred to the child welfare board."

Section 3070-8 of the General Code, provides in part, as follows:

"In any county in which the child welfare board or the board of trustees of the children's home have entered or shall hereafter enter into an agreement with the board of county commissioners to transfer their powers and duties to a county department of welfare such agreement shall be irrevocable *and said child welfare board or the board of trustees of such home shall cease to exist*, any provisions of section 2511-5 of the General Code to the contrary notwithstanding, * * *." (Emphasis added.)

Your letter states that prior to the sale of the real estate by the county commissioners the board of trustees of the Children's Home pursuant to the provisions of Section 3070-8, had entered into an agreement with the board of county commissioners to transfer their powers and duties to a department of welfare. From this I am justified in assuming that the board of county commissioners had prior thereto established a county department of public welfare under Section 2511-1 of the General Code, which provides in part, as follows:

"The county commissioners of any county may by a resolution which has been unanimously adopted, establish a county department of welfare which, when so established, shall be governed by the provisions of this act. Such department shall function from and after the date fixed in such resolution, which date shall be not less than thirty days nor more than ninety days after the adoption of such resolution, but not before the first day of January, 1944. The county department of welfare shall consist of a county director of welfare appointed by the board of county commissioners, and such assistants and other employees as may be deemed necessary for the efficient performance of the welfare service of the county. * * *."

Section 2511-1 above quoted, is a part of an Act which became effective September 9, 1943, (120 O.L., 430), and which comprises Sections 2511-1 to 2511-12 of the General Code. It will be noted that this department, if established by the commissioners, is to consist of a county director of welfare, appointed by the county commissioners, and such assistants as the commissioners see fit to give him, and according to the succeeding sections, is at all times under the complete control and direction of the commissioners, who are authorized by Section 2511-12, General Code, to abolish the department at any time.

Under the old law relative to children's homes, the trustees of a county children's home were authorized by Section 3083 of the General Code, to receive gifts or bequests for the benefit of a children's home, and Section 3080 of the General Code, also repealed, provided that the county commissioners might receive and hold in trust for the benefit of the home any bequest or devise of land or other property. I shall later refer to Section 18 of the General Code, which grants abundant power to the county commissioners to receive bequests or other gifts for such purpose.

It will be noted that under the provisions of Section 3070-8 to which I have referred, when the trustees of the children's home transferred their "powers and duties" to the county department of welfare, such board of trustees, now known as the "child welfare board," ceased to exist, and inasmuch as the Director of Welfare is merely an agent of the county commissioners, it appears that the transfer was virtually to the county commissioners. Nothing is said in that section or elsewhere, authorizing the trustees of a children's home to convey title to any land which may have been acquired by them, to the department of public welfare or to anyone else,

and the department of public welfare is not expressly authorized by any law to receive, hold or convey real estate.

I note, however, the provisions of other sections of the law, which throw some light upon the status of the Director of Public Welfare, as to property, including trust estates, which may have been held by other public agencies whose powers and duties are transferred to the county department of welfare. Section 2511-5, General Code, reads in part :

“The county department of welfare shall also have authority to administer or assist in administering any other state or local public welfare activity supported wholly or in part by public funds from any source if and to the extent so provided by agreement between the county commissioners and the officer, department, board or agency in which the administration of such activity is vested by law.”

Section 2511-11, General Code, provides in part :

“All the property, records, files and other documents and papers *used in and necessary for the performance of the functions transferred pursuant to this act* and belonging to or in the possession of any board, agency or department, the powers and duties of which are transferred to the county department of welfare, and the proceeds of all tax levies in process of collection for the use of such boards, agencies or departments shall be transferred to the county department of welfare, when established.” (Emphasis added.)

In the light of the above noted provisions of the statutes, I am bound to conclude that whatever title a board of trustees of a county children's home had in real estate which had come to them by the devise mentioned in your letter, must have passed to some extent at least, to the county department of welfare. It must be recognized that the department although under control of the commissioners, is recognized by the law as having certain powers and functions and therefore in determining the main problem posed by your letter to wit, the sale of land bequeathed for a public charitable purpose, which has come into the control of said department, we must consider that both the county commissioners and the director of this department have some part in the procedure.

It does not follow, however, that the county commissioners either with or without the co-operation of the director had authority to proceed under the provisions of Section 2447, General Code, to find and declare that

this real estate is not needed for any public purpose, and having so declared, proceed to sell it. Section 2447, in so far as pertinent, reads as follows:

“If, in their opinion, the interests of the county so require, the commissioners may sell *any real estate belonging to the county, and not needed for public use*, or may lease the same, * * * and in case of the sale of such real estate not used for county purpose, and in case of such a grant of lease, right or easement to a municipality or other governmental subdivision, or to corporations not for profit for hospital or charitable purposes, all or such part of the proceeds thereof as the board of commissioners may designate may be placed by the commissioners in a separate fund to be used only for construction, equipment, furnishing, maintenance or repair of the county buildings and for the acquisition of sites therefor.” (Emphasis added.)

If the property in question had been purchased by the county commissioners, even for the direct purpose of establishing a children’s home, there would be no question of the right of the commissioners to take the course indicated by that section and their discretion would not be questioned or controlled. In the case of *Seran v. Biddle*, 39 O. O., 295, it was held:

“When the county commissioners have exercised their discretion and determined that a sale of portions of the county home farm not needed for public use is advisable, a court will not interfere in the exercise of their sound judgment.”

But the court made quite clear the justification for that holding, by saying:

“Title was acquired to this land by separate deeds, the earliest of which dates back to 1836; and the county has been in exclusive possession and control of the same ever since.”

That case was affirmed by the Court of Appeals and the Supreme Court overruled a motion to certify on May 4, 1949.

In Opinion No. 2617, Opinions of the Attorney General for 1950, page 841, my immediate predecessor applied the same ruling to the sale of a portion of a children’s home which had been purchased. The property referred to in your letter was not purchased by the county but came to it by will, which definitely limited its use, as stated therein, “to be used for the benefit of said Huron County Children’s Home, at the direction of the said board of trustees.” This language had the effect of creating a trust in the nature of 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 the same work, at page 588, it is said :

“A public charity is one in which there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons.”

Section 18 of the General Code, gives express authority to public bodies, including counties, to receive gifts and bequests which may be either unconditional and absolute or limited to a certain purpose. In so far as pertinent, this section reads :

“The state, a county, a township or cemetery association, the commissioners or trustees thereof, * * * may receive by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge, and *hold and apply the same according to the terms and conditions of the gift, devise or bequest.* Such gifts or 'devises of real estate *may be in fee simple or of any lesser estate, and may be subject to any reasonable reservation.* This section shall not affect the statutory provisions as to devises or bequests for such purposes.” (Emphasis added).

At page 618 of 10 American Jurisprudence, it is said :

“A county may act as the trustee of a charitable trust if the purposes of the trust are germane to the objects of the incorporation. If they relate to matters which will promote, aid, and perfect those subjects, there can be no legal impediment to the corporation taking a devise upon trust. Thus, a county may act as the trustee of a charitable trust created for educational purposes, for the establishment of a home for orphans, or for the erection of a courthouse for public use.”

To like effect see 7 Ohio Jurisprudence, page 172.

It will be noted by reference to Section 18 supra, that in receiving such gifts the commissioners are to “hold and apply the same according to the terms and conditions of the grant, devise or bequest.” Where, as in the present case, the gift is to be used for a specific charitable purpose, that, in my opinion constitutes a trust in the hands of the county and the proceeds of the gift must be used only for such purposes.

It is well settled that courts of chancery or equity have always had jurisdiction of the administration of charitable trusts. 7 Ohio Jurisprudence, page 166; 10 American Jurisprudence, page 665; *Landis v. Wooden*, 1 Ohio St., 160; *Sowers v. Cyrenius*, 39 Ohio St., 29; *Thompson v. Hospital*, 24 O. O., 322. And trustees, if in doubt as to their powers or as to the intent of the donor, may apply to the court for instructions.

I do not find any statute which controls the circumstances under which and the manner in which property constituting a charitable trust may be sold by the trustees. It is stated in 10 American Jurisprudence, page 620:

“In the absence of express authorization by the donor of the trust, the power to make sale depends upon circumstances. The power to sell personal property will be more readily implied than in the case of real property.

“The American Law Institute takes the position that the trustee of a charitable trust can properly sell trust property if a power of sale is conferred in specific words, or such sale is necessary or appropriate to enable the trustee to carry out the purposes of the trust, unless such sale is forbidden in specific words by the terms of the trust or it appears from the terms of the trust that the property was to be retained in specie, even a prohibition against sale will not prevent the court from authorizing the trustee to make sale, in case of necessity arising from unforeseen change of circumstances, and to apply the proceeds to the purposes of the trust. Thus, where the circumstances existing at the time of the creation of a charitable trust have changed to such an extent that in order to carry out properly the charitable intention of the donor, it is necessary to dispose of the trust property and devote the funds to the acquisition of a more suitable location, a court of equity will authorize the sale of the property.”

Under the terms of the devise in question there was certainly no express restriction as to the right to sell the property given to the trustees of the children's home. On the contrary, it appears to me that the words, “at the direction of the said board of trustees”, were intended to give the trustees broad authority to use both the real and personal property in such manner as they saw fit, so long as such use was confined to the purpose expressed, to wit, “for the benefit of said Huron County Children's Home.” And I so hold.

However, when it comes to the procedure for the sale of the real estate of such trust, we encounter a measure of uncertainty. In the first

place, it is not perfectly clear who should make the conveyance. I am inclined to the view that the director of the county department of public welfare, with the advice and consent of the county commissioners, should do so. Furthermore, there is no statute which sets out the procedure by which the sale should be made; whether with or without advertising, etc. I do not consider that it lies within my province to decide these questions. They are peculiarly within the proper jurisdiction of a court of equity, and in order that the purchaser at a sale may receive a safe and merchantable title, your county authorities should make application to the court for instructions, and act in pursuance of the same.

It is therefore my opinion and you are advised :

1. A will giving property, real or personal to the board of trustees of a county children's home and prescribing that it is "to be used for the benefit of said county children's home at the direction of the said board of trustees," creates a trust in the nature of a charitable trust for the purpose indicated.

2. Real property given to an agency of a county for the purpose of a charitable trust may not be sold by the county commissioners pursuant to the provisions of Sections 2447 and 2447-1, General Code, as "real estate belonging to the county and not needed for public use."

3. Where real property is held in trust by the trustees of a county children's home, and such trustees under the provisions of Section 3070-8, of the General Code, have transferred their powers and duties to a county department of welfare, said department succeeds to such trusteeship, and if there is no restriction in the instrument creating such trust, the director of such department, with the consent and approval of the county commissioners, may sell such real property under instructions and approval of a court of equity.

Respectfully,

C. WILLIAM O'NEILL
Attorney General