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IN THE SUPREME COURT OF IOWA

No. 19–0155

IN THE MATTER OF THE APPLICATION OF COE COLLEGE FOR INTERPRETATION OF PURPORTED GIFT RESTRICTION,

COE COLLEGE,
Applicant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
HONORABLE FAE HOOVER-GRINDE, JUDGE

APPELLEE'S FINAL BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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<u>**STATEMENT OF ISSUES PRESENTED FOR REVIEW**</u>

I. THE GIFT LETTER CREATES A RESTRICTION ON THE PAINTINGS.

<u>Authorities</u>

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ROUTING STATEMENT

This case involves the application of existing legal principles and should be transferred to the court of appeals. Iowa R. App. P. 6.1101(3)(*a*). Here, utilizing existing legal principles, the district court interpreted a gift letter setting forth the terms and conditions of a gift of artwork made to Coe College. The alternative relief Coe College sought via the common law doctrine of *cy pres* has also been examined by this Court on a number of occasions. *See, e.g.*, *Kolb v. City of Storm Lake*, 736 N.W.2d 546 (Iowa 2007); *Curtis & Barker v. Central University of Iowa*, 176 N.W. 330 (Iowa 1920); *Lepage v. McNamara*, 5 Iowa 124, 1857 WL 140 (Iowa 1857). Lastly, though the Uniform Prudent Management of Institutional Funds Act (UPMIFA), Iowa Code chapter 540A, under which Coe College also sought alternative relief from the district court, has not been examined by this Court, it is a uniform law that has been adopted thus far in 49 states, including Iowa, the District of Columbia, and Puerto Rico and examined and applied by the courts of other jurisdictions. *See Guide to Uniform and Model Acts 2018-2019*,

Uniform Law Commission, https://www.uniformlaws.org/viewdocument/guide-to-uniform-model-acts-2017 (last accessed May 29, 2019); *see, e.g.*, *Siebach v. Brigham Young University*, 361 P.3d 130 (Utah Ct. App. 2015); *Carl J. Herzog Found., Inc. v. University of Bridgeport*, 243 Conn. 1 (Conn. 1997); *Pearson v. Garrett-Evangelical Theological Seminary*, *Inc.*, 790 F.Supp.2d 759 (N.D. Ill. 2011); *Russell v. Yale University*, 54 Conn. App. 573 (Conn. App. Ct. 1999).

STATEMENT OF THE CASE

The Attorney General agrees with Coe College's statement of the case.

STATEMENT OF THE FACTS

The Attorney General agrees with Coe College's statement of the facts.

ARGUMENT

I. THE GIFT LETTER CREATES A RESTRICTION ON THE PAINTINGS.

Error Preservation

The Attorney General agrees that Coe College preserved error for the reasons it provides.

Standard of Review

This case involves a dispute over the meaning of a restriction in a gift instrument. This case was filed as a law action and tried as one and should be reviewed for correction of errors at law. Coe College disagrees and contends

that though it initially filed its declaratory judgment action in law, a review of the case shows it was tried in equity, and as such, should be reviewed de novo.

Declaratory judgment actions are reviewed "depending on how the action was tried to the district court." *Sutton v. Iowa Trenchless, L.C.*, 808 N.W.2d 744, 748 (Iowa Ct. App. 2011) (citing *Passehl Estate v. Passehl,* 712 N.W.2d 408, 414 (Iowa 2006)). The Court "consider[s] the 'pleadings, relief sought, and nature of the case [to] determine whether a declaratory judgment action is legal or equitable.'" *Sutton*, 808 N.W.2d at 748 (citations omitted). The Court will consider whether evidentiary objections were ruled upon as an "important consideration," but not a "dispositive one." *Sutton*, 808 N.W.2d at 748. If it is tried below at law or in equity without objection, it will be treated on review as it was treated in the trial court. *Citizens Sav. Bank v. Sac City State Bank*, 315 N.W.2d 20, 24 (Iowa 1982) (citations omitted).

Coe's "Application [] for Interpretation of a Purported Gift Restriction" was filed as a law action, and Coe asked in its pleading for a declaration of law. (Amended Petition, pp. 1, 4; App. 12, 15.) This case concerns an alleged ambiguity in the provisions of a contract (in this case a gift instrument), a matter generally resolved as a matter of law. *Walsh v. Nelson*, 622 N.W.2d 499, 502 (Iowa 2001) (citation omitted). The applicability of the equitable doctrine of *cy pres* is also raised, but is raised by Coe as an argument in the

alternative and is not the primary thrust of its case. *See Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 179 (Iowa 2010) ("If . . . both legal relief and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its controlling issue.") (quoting *Mosebach v. Blythe,* 282 N.W.2d 755, 758 (Iowa Ct. App. 1979)).

Further, the matter was tried on argument to the district court with stipulated facts and stipulated exhibits. There were no rulings on evidentiary objections as there were no objections to be ruled upon. Though a lack of rulings on evidentiary objections may typically indicate a case tried in equity, here it reflects only the agreement of the parties as to the relevant facts and evidence. *Van Sloun,* 778 N.W.2d at 178 (citation omitted). Lastly, the district court's decision was captioned as "Ruling," and not "decree," signaling its treatment of the matter as a law action. *Id.*

The matter before the district court was one of law and tried as such. Even if, however, this Court determines this is an equitable matter that should be reviewed de novo by it, the Court should affirm the district court.

<u>Discussion</u>

There is no dispute that Coe College owns the seven pieces of Grant Wood art ("the Paintings" or "artwork") at issue here, and the district court found accordingly. The Paintings were gifted to Coe by the Eppley

Foundation in 1976, at the urging of Coe and other "interested art lovers," after nearly twenty years of being displayed at Coe pursuant to a loan agreement. (Stipulated Facts, ¶¶ 9-12; Trial Ex. 1-3; App. 29, 20-22.)[1] Initially, the Eppley Foundation—Mr. Eppley being the commissioner and original owner of the artwork—loaned the Paintings to Coe for an indeterminate term upon the agreement that their return could be sought by the Eppley Foundation after one year. (Stipulated Facts, ¶¶ 5-6; Trial Ex. 3; App. 28-29, 22.) When word came of the pending dissolution of the Eppley Foundation, Coe and others interested in retaining the art at the College launched a campaign to ensure that the Paintings would stay in Cedar Rapids—the home of Grant Wood—and remain available for study by the art students at Coe along with the "thousands" who every year viewed the art there. (Trial Ex. 3; App. 22.) Perhaps as a direct result of the efforts of Coe and concerned community members, the Paintings were gifted to Coe and potentially saved from finding their way out of Iowa and, perhaps more importantly, leaving their seemingly rightful home in Cedar Rapids.

[1] The Attorney General acknowledges that the district court accorded Trial Exhibit 3 no weight in determining the Eppley Foundation's intent in gifting the Paintings. The Attorney General relies upon Trial Exhibit 3 only as a recount of the history of the artwork and the community's role in it. The Attorney General accepts the article as an accurate account of Coe's position and actions relative to the artwork given that Coe stipulated to its admission.

There is also no dispute that the letter gifting the artwork ("the Gift Letter") provides that Coe is to be the "permanent home" for the artwork, "hanging on the walls of [the College's] Stewart Memorial Library." (Stipulated Facts, ¶¶ 9-10; Trial Ex. 1; App. 29, 20.) As the district court found, this language "prohibit[s] Coe from selling, transferring, or otherwise alienating the Paintings." (Ruling, p. 3; App. 68.) Coe, though, contends that this language is not a restriction at all. Finding itself in a pickle as to its financial statements and in need of a solution, it argues that the language setting forth the restriction is, basically, superfluous. According to Coe, we are to read the restriction away by putting it in "context" and believing that the directors of the Eppley Foundation did not care what happened to or was done with the Paintings. Coe takes the language imposing the use restriction and perverts it into a clumsy attempt by the Eppley Foundation to make it apparently doubly clear to us that it—the entity whose pending dissolution started the gifting campaign and that was dissolved shortly after the gift—would not ask for the return of the artwork. (Stipulated Facts, ¶¶ 8-12; Trial Ex. 1, 3; App. 29, 20, 22.)

The Eppley Foundation left no doubt that it was giving up ownership rights in the artwork when, facing its own pending dissolution, it gifted the Paintings to Coe without any provision for reversion. (Stipulated Facts, ¶¶ 11-

14; Trial Ex. 1-2; App. 29, 20-21.) However, "ownership," as much as it is touted by Coe as the crucial issue, is not the issue here. Ironically, one might say that Coe's problem here is that it *so* owns the artwork it cannot be rid of it, thus the burden, or, perhaps, privilege, of one who elects to hold property in trust for the benefit of the public. *See* Restatement (Second) of Trusts, § 348 cmt. f (1959) ("Ordinarily the principles and rules applicable to charitable trusts are applicable to charitable corporations. Where property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty, enforceable at the suit of the Attorney General, not to divert the property to other purposes but to apply it to one or more of the charitable purposes for which it is organized. Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose. Where property is given to a charitable corporation and it is provided by the terms of the gift that it shall retain the principal and devote the income only to the accomplishment of its purposes or one of its purposes, the corporation is under a duty, enforceable at the suit of the Attorney General, to retain the principal and to use the income for the designated purposes.").

What is relevant here is that the Eppley Foundation made clear in the Gift Letter that it cared very much what happened to and was done with the Paintings and that it was entrusting the artwork and the Foundation's continuing responsibility to that artwork to Coe, a nonprofit educational institution that demonstrated its interest in and care for the art for two decades prior. It conveyed this not only by requiring installation at the Library of a large marble and bronze memorial plaque and recognizing the gift of the artwork and its giver and memorializing the man who first made them available to the community, but also by the imposition of an express restriction on its gift as was the Foundation's right. That despite this restriction Coe accounted for the Paintings as "unrestricted asset[s]" viewing them as an "investment…without restriction as to [their] use, placement, or sale" for approximately forty years before its auditors discovered and mandated correction of the error is the basis for this case but it is not a basis for the requested relief. (Stipulated Facts, ¶¶ 20-21; Trial Ex. 4; App. 30, 23-27.) It is disingenuous, at best, for Coe to now argue that owning and possessing the artwork for any reason other than investment is contrary to its mission as a liberal arts college and that the donor-imposed restriction therefore makes no sense. If after twenty years of displaying the art on its campus for the benefit of students and the community the College came to the conclusion that doing

so offended its very mission as a non-profit educational institution, it should have spoken its truth at that time and declined the gift on the terms on which it was offered. If it in fact believes that to be the case today, it should do so now.

The accounting issue Coe currently faces as a result of its earlier error is no doubt real, but so is the restriction on the gift and Coe is under these circumstances, just as the district court found, required to honor it. As aptly directed by its auditors, Coe College's financial statements must change to reflect the terms of the gift, not vice versa.

II. THE DISTRICT COURT CORRECTLY REFUSED TO APPLY *CY PRES* AND UPMIFA TO RELEASE THE DONOR-IMPOSED GIFT RESTRICTION.

Error Preservation

The Attorney General agrees that Coe College preserved error for the reasons it provides.

Standard of Review

For the reasons stated in the Standard of Review section above, the Attorney General believes this matter should be reviewed for correction of errors at law.

Discussion

Coe College contends that the district court erred in refusing to apply the doctrine of *cy pres* or the provisions of UPMIFA to remove the gift restriction on the Paintings. Coe argues that there is no restriction on its ownership rights in the Paintings but that if, as the district court found, one exists, it should be removed in its entirety. Essentially, Coe argues that this Court should throw out donor intent because it made an error in accounting for the Paintings as an unrestricted asset on its books. This is not the purpose of *cy pres* or the release and modification provisions of UPMIFA, and the district court was correct in upholding the gift restriction.

A. The donor-imposed restriction on the Paintings is not impossible, unlawful, or impracticable to fulfill and therefore cannot be released using the doctrine of *cy pres*.

Coe seeks release of the restriction on the Eppley Foundation gift based on an argument that the restriction "adversely impacts the College's financial position for Federal educational institution reporting requirements..." (Coe College Appeal Brief, p. 34.) As the district court found, the source of Coe's trouble is not the restriction the Eppley Foundation lawfully and plainly placed upon the gift of the Paintings; rather, Coe's trouble stems from its staff and auditors erroneously accounting for the Paintings as an *unrestricted* asset for financial statement purposes, a classification that allows Coe, amongst

other things, to report the artwork as an alienable—and $1.95M more valuable—asset. (Ruling, pp. 3-5; Stipulated Facts, ¶¶ 20-22; Trial Ex. 4 at fn. 13; App. 68-70, 30, 27.) Whether the accounting error was committed forty years ago, two weeks ago, or one hundred years ago, the restriction on the gift is, as the district court found, unscathed. (Ruling, pp. 3-6; App. 68-71.) Coe College has the ability to honor the terms of the gift as written.

To get around this self-created problem, Coe theorizes it is "impossible" or "impracticable" for it to comply with the restriction because the Library *could* one day no longer stand and therefore *cy pres* applies.[2] In so arguing, Coe nails the exact purpose behind the doctrine of *cy pres*—ensuring donor intent is honored while recognizing that donors do not have the benefit of a crystal ball—but does nothing to advance its own case. *See Museum of Fine Arts v. Beland*, 735 N.E.2d 1248, 1251 (Mass. 2000) (Rejecting a request to apply *cy pres* based on impossibility or impracticability and finding that "[a]n effort to determine [the settlor's] intent by extrinsic evidence is unnecessary because the provisions of the bequest are not ambiguous…The judge properly concluded that 'the phrase "permanently and inalienably"' in the will means exactly what it says—the Trustees are to have *permanent* possession and control of the paintings.") (emphasis in original);

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[2] Coe College has never contended that the restriction is unlawful.

Kolb, 736 N.W.2d at 558 (Finding application of *cy pres* did not defeat settlors' intent when movement of a memorial garden and fountain by a city was "the result of 'natural and unavoidable' changes" resulting from "respond[ing] to the inevitable changes in [the city's] economic and societal needs."). Coe provides no evidence that the artwork cannot hang in the Library today or even in the near future, a scenario that could necessitate a modification or release of the restriction based on impracticability or impossibility. (Ruling, pp. 4-5; App. 69-70.) Coe College identifies an issue for another day, if that day ever comes.

With no valid basis for releasing the restriction, Coe continues to try to save itself from the work of dealing with and remedying its accounting error itself by now urging this Court, as it did the district court, to completely ignore plainly-stated donor intent and a binding gift restriction. In rebuffing the district court's finding that Coe may loan out the Paintings thereby temporarily removing them from the walls of the Library, Coe stresses to this Court that it is "the change in label from 'unrestricted' to 'restricted' [that] is detrimental to the College's ability to carry out the intent of the donor." (Coe College Appeal Brief, p. 39.) Coe is off the mark. The *cy pres* doctrine is not a legally-based tool for correcting an organization's failure to properly account for a gift; rather, it exists to uphold donor intent as nearly as possible

for the purpose of saving charitable gifts from failure. *Kolb*, 736 N.W.2d at 553. The Eppley Foundation gift has not failed nor is it at risk for failure.

Rather than owning its error and taking the necessary internal steps to address it, Coe opts to obliterate the trust placed in it by the Eppley Foundation and to misuse the doctrine of *cy pres* to sidestep an express condition of a gift for its own benefit. *See Connecticut College v. United States*, 276 F.2d 491, 497 (D.C. Cir. 1960) ("[T]he *cy pres* doctrine does not authorize or permit a court to vary the terms of a bequest and to that extent defeat the intention of the testator merely because the variation will meet the desire and suit the convenience of the trustee.") While it is true that no "trust" is created in the legal and technical sense of the word, contrary to Coe's position society's *deal* with those who give is that a duty is imposed and donor intent honored to the extent possible. *See St. Joseph's Hospital v. Bennet,* 22 N.E.2d 305, 308 (N.Y. App. Div. 1939) ("The gift was absolute for a corporate purpose. It was not a trust in a technical sense. None the less the court held that the corporation could not divert the fund from its purpose. No authority has been brought to our attention that a gift to a charitable corporation with the express direction that it be applied to a specific corporate purpose in a specific manner may be accepted by the corporation, and then used for a different corporate purpose in a different manner. No trust arises, it is true, in a technical sense, from such

a gift for trustee and beneficiary are one. The charitable corporation is not bound by all the limitations and rules which apply to a technical trustee. It may not, however, receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands.") (citation omitted); *see also In re Brundrett's Estate*, 87 N.Y.S.2d 851, 852 (Sur. Ct. 1940) ("The *cy pres* doctrine is applicable even where a trust in a technical sense is not created, but where a gift is made for a charitable purpose. Every gift to a charitable corporation for a charitable purpose involves a trust in the real sense of the word.") (citations omitted). Coe's attempted use of *cy pres* would no doubt have a chilling effect on philanthropy and charity in Iowa and is inappropriate. *See Adler v. Save*, 74 A.3d 41, 57 (N.J. Super. Ct. App. Div. 2013) ("Plaintiffs did not demand the return of their $50,000 donation because SAVE'S . . . animal welfare facility . . . took longer to build than anticipated, or because SAVE decided to start a new initiative. Plaintiffs demanded the return of their money because SAVE *unilaterally decided to violate the expressed conditions of their gift*. We believe that responsible charities will welcome this decision because it will assure prospective donors that the expressed conditions of their gift will be legally enforceable.") (emphasis added).

B. The paintings are “program-related assets” to which UPMIFA does not apply and even if UPMIFA applies the restriction does not defeat or substantially impair the accomplishment of the purpose of the gift nor is it unlawful, impracticable, or impossible to fulfill.

In its Ruling, the district court correctly found the three UPMIFA-based methods for the release or modification of the Eppley Foundation’s restriction on the Paintings to be unavailable to Coe College. (Ruling, pp. 4-5; App. 69-70.) That is: (1) given that the Eppley Foundation is no longer, it cannot provide consent to release of the restriction; (2) the restriction imposed upon the Paintings by the Eppley Foundation did not “defeat or substantially impair Coe from carrying out its duty as caretaker and custodian of the Paintings;” and (3) “the restriction is not unlawful, impracticable, or impossible to fulfill.” *Id.* Though the findings of the district court in this regard are ultimately correct and should be upheld if this Court determines UPMIFA is applicable, the analysis was not necessary.

Pursuant to Iowa Code section 540A.102(5), an “[i]nstitutional fund” is defined as “a fund held by an institution exclusively for charitable purposes.” Notably, in addition to two types of funds involving trustees and beneficiaries that are not relevant here, an “[i]nstitutional fund” does *not* include a “[p]rogram-related asset.” Iowa Code § 540A.102(5)(a). A “[p]rogram-related asset” is defined as “an asset held by an institution

primarily to accomplish a charitable purpose of the institution and not primarily for investment." Iowa Code § 540A.102(7). Classification of an asset as "program related" under UPMIFA does not affect a nonprofit corporation's responsibility to prudently manage the asset; rather, it means only that UPMIFA does not apply to the asset and that other state laws, including law applicable to nonprofit corporations like *cy pres*, will govern its treatment. *See*, *UPMIFA Program-Related Assets,* Uniform Law Commission, https://www.uniformlaws.org/viewdocument/upmifa-program-related-assets-artic?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3&tab=librarydocuments, p. 3 (last accessed May 29, 2019) ("For example, assume that a donor gave a painting to a museum organized as a nonprofit corporation and not as a trust. The donor stipulates that the museum must always display the painting as part of its collection, that the painting cannot travel to other museums, and that the museum cannot sell the painting. The painting is a program-related asset, so UPMIFA does not apply to the painting. If the museum needs to modify the restriction, perhaps to permit the painting to be exhibited by other museums as a way to raise money to care for the painting, the museum may be able to use the common law doctrine of *cy pres* to request the modification. The museum will not be able to rely on the statutory authority for judicial modification provided under UPMIFA. The

fact that the painting is a program-related asset does not affect the donor restriction, but it may affect the availability of court-ordered modification.”).

As discussed above, the Paintings were gifted to Coe College—pursuant to the restriction set forth in the Gift Letter—not as an asset to improve the financial position of Coe College or to assist it in meeting its federal financial reporting requirements, but, rather, to promote learning and education in keeping with Coe College’s “educational, literary, scientific, and charitable. . .” corporate purposes. (Stipulated Facts, ¶¶ 2-3, 8; App. 28, 29.) The Foundation’s gift of the artwork for display on the walls of the Stewart Memorial Library alongside the plaque and bust not only keeps the art in its home city but also keeps Mr. Eppley’s penchant for sharing the artwork with the community alive. Coe’s primary purpose for holding the Grant Wood paintings—as determined by the donor at the time of the gift, not by Coe College at the time of discovering its accounting problem—is the same today as it was the day the Eppley Foundation gave the gift to Coe; that is, to allow the community the continued ability to study, learn from, and appreciate it. Here, like the artwork gifted to the non-profit museum to remain a part of its permanent collection for the purpose of accomplishing its charitable purpose, the Paintings serve to further Coe College’s charitable purpose and are program-related assets. Accordingly, UPMIFA does not apply.

CONCLUSION

For all the reasons argued above, the Attorney General respectfully requests that this Court affirm the district court's conclusions that the Gift Letter placed a permanent restriction on the alienation of the Paintings and that neither the doctrine of *cy pres* nor the provisions of Iowa Code chapter 540A applies to release the restriction.

REQUEST FOR ORAL ARGUMENT

The Attorney General requests oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 4,081 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Chantelle Smith
Chantelle Smith
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CERTIFICATE OF SERVICE

I, Chantelle Smith, hereby certify that on the 25th day of June, 2019, I, or a person acting on my behalf, served Appellee's Final Brief and Conditional Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, Chantelle Smith, hereby certify that on the 25th day of June, 2019, I, or a person acting on my behalf, filed Appellee's Final Brief and Conditional Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

/s/ Chantelle Smith
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