

STATE OF INDIANA ) IN THE SUPERIOR COURT, PROBATE  
 )SS:  
COUNTY OF MARION ) TRUST DOCKET T-62, Page 11

IN THE MATTER OF THE PUBLIC BENEVOLENT TRUST )  
U/W MARY POWELL CRUME, DECEASED )

**AMICUS BRIEF**

Come now, Home for Friendless Animals, Inc., Spay-Neuter Services of Indiana, Inc., and Southside Animal Shelter, Inc. and, since they currently are non-parties in this matter, submit their brief of amicus curae on this matter of first impression in the State of Indiana. The issue is whether a current income beneficiary of a public charitable trust may pledge the principal of such trust for collateral for a personal loan to such beneficiary. In addition, this brief addresses some clear defects in the analysis by the court-appointed consultant.

In short, no U.S. court has ever allowed the principal of a public benevolent trust to be pledged, mortgaged, or otherwise encumbered without a corresponding exchange of value (as in re-investment) or without adequate security back to the trust. The Humane Society is not capable of providing any exchange of value or any security back to the Crume Trust. If no lending institution will provide an unsecured loan to the Humane society due to insufficient cash flow, then such unsecured loan cannot be a prudent action for the Crume Trust or this Court to take.

Further, those few jurisdictions that have approved of loaning principal of a public charitable trust have done so via the equitable doctrine of deviation when the charitable purpose of the trust is endangered. However, the equitable doctrine of deviation does not apply in this matter because the fulfillment of the Crume Trust's purpose is not endangered in any way. Rather, Indiana law, as set forth nearly 90 years ago in Richards v. Wilson, *infra*, will require the related equitable doctrine of *cy pres* be applied if and when this trustee/conduit fails. The homeless animals of Indianapolis still will be cared for, but by other service organizations established in the 80 years since Mrs. Crume wrote her will, and without any change in the purpose of the public charitable trust, and without risk of loss.

**I. NO STATE COURT HAS ALLOWED PRINCIPAL OF PUBLIC CHARITABLE TRUST TO BE ENCUMBERED WITHOUT ADEQUATE SECURITY, INVESTMENT RETURN.**

There are no reported cases in Indiana on the issue of whether a current income beneficiary of a public charitable trust can pledge, hypothecate or otherwise encumber the principal of such trust as collateral for a cash loan that benefits the beneficiary personally. Many jurisdictions forbid trustees from selling, transferring or mortgaging the principal donated to a public charitable trust. This is true where the donated asset is land or other items of very particular use. See

Newton v. Newton Burial Park, 34 S.W.2d 118, 121 (Missouri) (general rule is that “when lands have been donated to charity and the title is vested absolutely in trustees for charitable uses . . . they are inalienable for other purposes”); and see Richards v. Wilson, *infra*.<sup>1</sup>

However, a court can exercise its equitable power of deviation to direct the sale, transfer, or re-investment of charitable trust assets, even land. The court’s equitable powers can even be exercised notwithstanding the donor’s express restrictions on alienation of trust corpus or even the express restriction to use of income only. Foust v. William E. English Foundation, 80 N.E.2d 303 (Ind. App. 1948) (expense and operation of home for charities on the donated site would be highly disadvantageous, and purpose of charitable trust would be defeated); Henshaw v. Flenniken, 191 S.W.2d 541 (Tenn., 1945); and see Bogert’s Trusts and Trustees, Section 392, *Powers of Sale, Lease and Mortgage*.

The Henshaw court held that the trustees’ sale of land, having little or no rental value, in favor of purchasing other land on which to build a church did not convert the character of the trust estate. Rather, this exercise of equitable deviation was simply directing the trustees to re-invest the trust corpus in more productive assets. That trust retained its value because of the exchange for equal cash value for the land. Henshaw at 245. However, in the present case, the Humane Society’s proposed collateralization of public charitable trust principal is not a re-investment or conversion of non-productive to productive assets. Rather, the Crume Trust principal is being offered up in sacrifice, subject to nearly total loss, without any item of equivalent value or security given in return to protect the Trust.

Of the few reported cases in this country where pledging or mortgaging of public charitable trust principal or income was judicially authorized, significant security or collateral was required in order to protect the trust principal and reduce the financial risk to the public charitable trust. In Trustees of Alexander Linn Hospital Association v. Richman, 135 A.2d 221 (N.J. Chancery 1957), the decedent created a charitable trust, the income of which only was to be paid to a hospital “to be used for hospital purposes.” At the time of the trust’s creation, construction had begun on a new main building, but additional funds were needed to complete it. In addition, a 10-year mortgage with considerable interest charges had been necessary to undertake the major project. The trustees requested equitable deviation from the trust’s express income-only restriction for a mortgage loan from the trust’s corpus to complete the build-out and pay down the first mortgage. The court directed that, in exchange for a second mortgage, the trust corpus could be loaned to the hospital.

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<sup>1</sup> Bd. Of Trustees of York College v. Cheney, 63 N.W.2d 177 (Neb. 1954); In re Griffith, 66 N.Y.S.2d 72 (court upheld restriction on trustee to reinvest principal in railroad bonds absent showing that such investment would harm charitable purpose); Brandis v. Trustees of Davidson College, 41 S.E.2d 833 (N.C. 1947).

Mrs. Crume's trust, written 50 years prior to enactment of I.C. 30-4-3-2, does not contain an express spendthrift or anti-alienation clause. However, she did restrict the Humane Society's use of the Crume Trust to net income only. See Mrs. Crume's Will at Item VI. She further directed that the Humane Society, as Trustee, "shall have no power or authority to use either the principal or income of said trust estate and property to pay for buildings, equipment, salaries or any expenses other than relief of said [homeless] animals [of Indianapolis]." *Id.* In this regard, Mrs. Crume's charitable bequest is similar to the charitable trust in Alexander Linn.

However, there are several important factors that distinguish the Alexander Linn case from the current matter. First, the Alexander Linn trustees were seeking to add to their delivery of community services by erecting the new building. Whereas in its request to pledge Crume Trust assets, the Humane Society is not presently seeking to invest the corpus in any new program, additional service or new building. Rather, the Humane Society is merely trying to bail itself out of its own financial crisis.

Second, no exchange of value is presented here. The Alexander Linn invasion of corpus for a second mortgage is more similar to that which this Court previously directed; that is, equitable deviation from Mrs. Crume's express income-only restriction for withdrawal of principal to purchase and improve real property in order to carry out the charitable purpose of the Crume Trust. However, like the Alexander Linn court, this Court directed such withdrawal of principal only when the Crume Trust received in exchange something of equal value. In 1962, 1967 and 1971, the Humane Society was allowed to withdraw principal for purchase and improvement of the 7929 N. Michigan Road property and facility. The 1967 and 1971 transactions were structured so that, in exchange for its loss of liquid corpus, the Crume Trust would retain ownership of the real property (leasing it back to the Humane Society for a nominal fee); furthermore, the Crume Trust also retained a reversionary interest in all improvements to that real property. See 1967 Lease Agreement, a copy of which is attached as Exhibit 1. In contrast, in its current petition to pledge public charitable assets, the Humane Society provides no collateral, security or exchange of value to protect the Crume Trust from loss.

Third, re-payment of the mortgage in the Alexander Linn case was based on assumptions that past levels of charitable contributions merely would be maintained, without having to assume substantial increases. Indeed, periodic payments on the second mortgage would be less than those for the first mortgage since no interest would be charged. However, the Humane Society cannot promise re-payment of the loan from the Crume Trust or even a balanced budget without assuming substantial increases in annual charitable contributions, at rates it has never experienced and over which the organization has little control. See III., below.

Finally, the Alexander Linn court applied the judicial doctrine of equitable deviation because it opined that the public charitable purpose of that trust was endangered. The decedent had made a general gift of the income stream to the trustees of the hospital "to be used for hospital

purposes.” The Alexander Linn court determined that the donor’s intent to generally keep the hospital going would be endangered if the new main building was not completed. Compare that donor’s more general intent to Mrs. Crume’s, who restricted the Humane Society’s use to net income only, to provide exclusively for the “care and relief” of homeless animals, and not for payment of salary, building expense and other operating costs. It is clear that Mrs. Crume’s charitable *intention was not to support the daily operations of the Humane* Society, but to pay for the direct costs of the care and relief of animals. Thus, even in the face of financial failure of the Humane Society, Mrs. Crume’s charitable purpose is not endangered so long as the homeless animals of Indianapolis still could be cared for with her Trust’s funds by other modes.

## II. **THIS COURT NEED NOT DIRECT DEVIATION FROM EXPRESS TERMS WHEN CHARITABLE PURPOSE NOT JEOPARDIZED.**

This Court’s exercise of equitable deviation in those limited instances of 1967 and 1971 are not apposite of the Humane Society’s Petition to Pledge Charitable Trust Assets as collateral for its personal loan. I.C. 30-4-3-26 sets forth this Court’s equitable power to direct deviation from the express terms of the public charitable trust “if, owing to circumstances not known to the settlor and not anticipated by him, compliance *would defeat or substantially impair the accomplishment of the purposes of the trust*. In that case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust, or may prohibit the trustee from performing acts required by the terms of the trust.” (emphasis added)

True, Mrs. Crume likely did not anticipate that the Humane Society, as her designated “instrumentality” (the only such organization existing when she wrote her will in 1921), would fail financially. However, the charitable purpose of the Crume Trust and accomplishment of its service to the Indianapolis community will not fail so long as other charitable organizations can be designated to provide those services.

Several on-point cases involve the failure of the designated trustee or the organization that was appointed as the “conduit” or “instrumentality” to carry out the charitable service. In Richards v. Wilson, 112 N.E. 780 (Ind. 1916), the Indiana Supreme Court held that the decedent’s gift was not made to the charitable organization designated by the donor to use the funds to create a school. Rather, “[t]he gift was not to that corporation, but to those whom its use of the property was designed to benefit.” *Id.* at 796-797. Similarly, “[t]he public or the community is the ‘real beneficiary of every charitable trust,’ while ‘particular [persons] who are the mere conduits of the social benefits to the public’ are not.” In re Trust of Brooke, 697 N.E.2d 191, 197 (Ohio 1998) (quoting Bogert on Trusts, Section 363). Likewise, the principal of the Crume Trust was not given to the Humane Society, but was given to the Indianapolis community to ensure that

homeless animals and lost pets were properly cared for; the Humane Society was merely the instrumentality designated at that time to carry out the trust purpose.

The Richards case further stated the overarching rule that gifts for charitable uses are favored by law and “where a charitable purpose . . . is the very essence of what the donors intended, a court of equity will see to it that such purpose shall prevail rather than be destroyed.” Richards at 799. And in many cases if the trustee, income recipient or other conduit failed to exist or failed another condition on the gift, “nevertheless the trust did not fail, but only the machinery for carrying [the trust] into effect, and that in such cases the court would supply not only the [substitute or successor] trustee, but devise a mode of administration akin to that intended,” (citing numerous other cases across the country). *Id.* at 798.

Instead of the doctrine of equitable deviation, the Indiana Supreme Court applied the doctrine of *cy pres* where the trustee in the Richards case, Winona Technical Institute at Indianapolis failed financially: “in appropriate circumstances the court is required to ***look beyond the institution or trustee particularly designated to administer the property given*** and the specific manner in which it is to be administered to those for whose benefit it is to be administered. If it appears that the latter were the real objects of the bounty of the donor[,] ***the trust will survive the failure of the particular trustee*** and the specified method of administering the trust if the court can carry into effect as near as may be the dominant purpose of the donor” (emphasis added). Cited in Hobbs v. Board of Education, 126 Neb. 416, 253 N.W. 627 (Neb. 1934).<sup>2</sup>

In Hobbs, an endowment fund, “to be invested and preserved inviolable as such,” for Grand Island College was determined to be a public charitable trust. Upon the subsequent insolvency of Grand Island College, the court held that the public charitable trust was not an asset of the college and, therefore, could not be attached by its creditors: “It seems perfectly clear to us that ***the intention of the [donor] was to create a fund which should not be subject to the exigencies or peril of mismanagement of the institution***” designated to receive the income therefrom (*Id.* at 631); that the intent of the donors was to “preserve it from the mistakes and mismanagement of the trustees, and to provide a permanent fund, the income of which should be used” for the designated charitable purpose. *Id.* at 634. Upon failure of Grand Island College, the Hobbs court re-applied the income to a different trustee/instrumentality “to be held by it upon the same trusts and conditions as it was theretofore held by Grand Island College.” *Id.* at 640.

Just as the Richards, Brooke and Hobbs courts decided, so this Court must find that the public charitable Crume Trust does not belong to the Humane Society. Indeed, the Humane Society, designated by Mrs. Crume as trustee (but not as beneficiary), admits in its pleadings that

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<sup>2</sup> See also School District v. Wood, 13 N.W.2d 153 (Neb. 1944) (gift designated for a new school building; however, since a new building already had been constructed at time of gift, court exercised *cy pres* to re-apply funds to a different “mode” to effect dominant charitable intent).

the beneficiary of the Crume Trust is the general public. Thus, the Humane Society is merely the instrumentality for administering the charitable benefit to the public. As in Richards, Brooke and Hobbs, the financial failure of the instrumentality or conduit cannot cause the public charitable Crume Trust to fail. Instead, if and when the current conduit/organization fails due to insolvency, the trust must be retained in its totality for the future use of other instrumentalities appointed to provide the public benefit intended by Mrs. Crume. Seamlessly, the Crume Trust's income and real property interests can be applied to those successor conduit organizations in furtherance of the Crume Trust's specific charitable purpose and without risk of loss.

### **III. CONSULTANT'S REPORT IS FLAWED DUE TO RELIANCE ON INCOMPLETE AND SELF-INTERESTED INFORMATION, LACK OF LEGAL ANALYSIS.**

Not until after First Trust filed its report with this Court was it clear that First Trust relied entirely on information and pleadings that the Humane Society itself prepared, including unaudited financial statements. This independent consultant did not review any then-existing adversary pleadings filed by either the Attorney General of the State of Indiana, such as its Objection to Collateralization; nor the filed objections of several community organizations. Thus, the "independent consultant" based its report only on selective information provided by the self-interested beneficiary/borrower;<sup>3</sup> precluding the Attorney General and then-existing adverse parties the opportunity to correct the deficiency of information.

Given that the Humane Society has run through more than \$12,000,000 in the past four and one-half years,<sup>4</sup> and given that it is in such dire financial straits prompting this loan request, it is imperative to have independent scrutiny of all information, both financial and otherwise. Instead, neither the independent consultant nor this Court has been provided the opportunity for such a complete, fair, detailed analysis.

Further, the Humane Society's numbers call for total revenue to increase 83.25% from 2003 to 2004; 37.44% from 2004 to 2005; and 31.75% from 2005 to 2006.<sup>5</sup> How can any

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<sup>3</sup> Attached as **Exhibits 2 and 3** are two versions of the Strategic Plan known to amicus petitioners. Which version did First Trust review? Further, why aren't the Humane Society's financial statements audited by an independent firm; particularly given the highly-publicized financial and managerial turmoil at this organization since 2000?

<sup>4</sup> The Humane Society's 2000 Form 990, attached as **Exhibit 4**, states that its "net" assets as of 12/31/1999 totaled \$11,398,190 (see Line 74). According to its 2003 Form 990, attached as **Exhibit 7**, annual contributions to the Humane Society for 1999 through 2002 totaled \$3,199,863; see Schedule A, Part IV-A, page 3. However, comment by executive director, Martha Boden, recently published in the Indianapolis Star indicates the Humane Society's current balance sheet (except for real property interests), would read "NEGATIVE \$720,000."

<sup>5</sup> See page 5 of **Exhibit 2**: 2003 \$782,000; 2004 \$1,433,070; 2005 \$1,969,613; 2006 \$2,595,008. It is crucial to note that, according to recent Forms 990 Schedule A, part IV-A (see **Exhibits 4**

business project such aggressive increases in revenues – an average increase of more than 50% per year? These lofty goals are even less likely because the Humane Society does not have any long-term contracts that ensure its revenue stream; no “continuing customer base.” Rather, it relies solely on charitable contributions. In 2003, the Humane Society spent nearly \$400,000 on fundraising efforts; yet those events and efforts yielded only \$651,105.

To illustrate the importance of scrutinizing Humane Society’s projected numbers, it is important to briefly review recent history. Since 1999 the Humane Society has depleted more than \$12,000,000 in liquid assets and donations. Part of the Humane Society’s explanation for such extensive losses is that the events of September 11, 2001 diverted significant donations away from it in favor of charities devoted to that national tragedy. Further, due to the national recession that followed the tragedy, the Humane Society’s investments lost market value. Due to circumstances entirely out of its control, so the Humane Society argues, charitable contributions declined producing the crisis it finds itself in.

Based on these same premises, how can the Humane Society project an average of more than 50%-per-year-increase in charitable contributions? Even if the new Board has the skill, effort and energy to ramp up its fundraising efforts, the Humane Society has no control over national or even local economic conditions, nor can it foresee catastrophic events that tend to divert charitable contributions away from it. For example, the Humane Society could not control or predict that at least four major hurricanes have hammered the Southeast U.S. in the past two months; or when a market rebound might free up more discretionary funds for its potential donors.

Finally, First Trust indicates its approval of the proposed collateralization even though the Humane Society has offered no security back to the Crume Trust to protect it in the event of the beneficiary’s default. The First Trust personnel who reviewed this transaction are attorneys and trust officers, yet they undertook no legal analysis of current law on this issue. Had First Trust’s attorneys/trust officers done so, they would see that no case law or statute in this country would allow a beneficiary to mortgage or assign the principal of a public charitable trust without adequate security. Further, the First Trust report cites no legal authority or analysis supporting its conclusion that Mrs. Crume’s intent would be fulfilled by risking up to 90% of trust principal in order to bail out the recipient organization currently designated to serve Indianapolis’ homeless animals, particularly where there are now several local providers with the capacity and experience to assume all or part of that “instrumentality’s” workload.

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**through 7)**, the Society has never generated more than \$1,150,000 in charitable contributions. This is true even though the Humane Society paid professional fundraisers \$120,418 in 2003 (990 Line 30), and 2003 costs for all fundraising activities totaled nearly \$400,000 (990 Line 15).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 12<sup>th</sup> day of October, 2004, a true and complete copy of the foregoing was made by personal delivery to the following:

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