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formity in the federal law. More stringent environmental standards should be mandated, as in the past, by Congress, thereby providing clear notice to the states of their roles and responsibilities in cleaning up the environment.

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Estate Tax — Charitable Deduction: Cemetery not a Charitable Organization — *Child v. United States*¹—Elizabeth M. Haas died in January, 1969 leaving a sizeable estate which was disposed of by will. Among the will's provisions were bequests to two non-profit cemetery associations — the Watertown Cemetery Association and the Grove Cemetery Association² — which offered burial services to any person able to pay the standard fees. The executor of the estate³ claimed that both bequests were deductible under section 2055(a)(2) of the Internal Revenue Code (Code)⁴ for purposes of assessing the federal estate tax.⁵ This section permits deduction of bequests to organizations which "are organized and operated exclusively for . . . charitable purposes."⁶ The Internal Revenue Service, however, did not allow either bequest as a deduction. The executor paid the assessed tax under pro-

¹ 540 F.2d 579 (2d Cir. 1976), *cert. denied* 97 S. Ct. 1104 (1977).

² One bequest of \$25,000 was made to the Grove Cemetery Association, and another bequest, of half of the residual estate was made to the Watertown Cemetery Association. The latter bequest was valued at approximately 2.5 million dollars. Both cemetery associations are non-profit organizations, governed by the N.Y. NOT-FOR-PROFIT CORP. LAW, § 1401 (McKinney 1970), *as amended* (McKinney Supp. 1976-77). Since the Grove Cemetery Association did not join in the appeal, the Second Circuit limited its discussion to the issues raised by the Watertown Cemetery Association. 540 F.2d at 582-84. This note refers primarily to the Watertown Cemetery Association, but the principles discussed are applicable to both Associations.

³ Ruth Child was co-executor of the Haas estate and was co-plaintiff, along with the National Bank of Northern New York. Mrs. Child died during the pendency of the suit, leaving the bank as sole executor. The Watertown Cemetery Association also joined as co-plaintiff in the suit. 540 F.2d at 580-81 & n.1. An unsuccessful petition for certiorari was filed with the Supreme Court, under the name National Bank of Northern New York v. United States, 97 S. Ct. 1104 (1977).

⁴ I.R.C. § 2055(a)(2) provides, in its relevant parts, for deductions from the value of the gross estate for bequests:

to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in . . . any political campaign on behalf of any candidate for public office . . .

⁵ 540 F.2d at 581.

⁶ I.R.C. § 2055(a)(2). The executor also claimed that the cemetery associations qualified as religious organizations. 540 F.2d at 581. The claim was based on the fact that religious services were conducted in the burial process, and that burial itself is a religious activity. The district court dismissed this claim, and the court of appeals affirmed. *Id.* at 584. A claim that conducting religious services in a cemetery makes the cemetery corporation one organized for religious purposes has no support in authority,

test and brought an action in the District Court of Northern New York for recovery of the contested payments.⁷

The district court, in a trial without jury, held that bequests to non-profit cemetery associations were not bequests to an organization organized and operated exclusively for charitable purposes, where such cemetery associations sold their plots and services while making no provision for special treatment of the poor.⁸ The district court assumed that sale of cemetery plots was not ordinarily a charitable activity.⁹ Since the statute requires that organizations seeking tax benefits as charitable organizations must be operated exclusively for charitable purposes,¹⁰ the court reasoned that tax benefits could attach only where the sale of cemetery plots was conducted in such a way as to constitute a charitable activity, and concluded that in order to constitute a charitable activity the sale of cemetery plots must be conducted so as to benefit the poor.¹¹ Because the cemetery associations did not sell their plots so as to benefit the poor, the court concluded that they were not organized and operated exclusively for charitable purposes, and thus were not eligible under applicable estate tax provisions as deductible bequests.¹²

The executor's appeal to the Second Circuit was principally grounded on the assertion that the cemetery associations assumed a substantial governmental burden, and that this assumption qualified as a "charitable purpose" which should be given favored tax status under section 2055(a) of the Internal Revenue Code.¹³ The circuit court rejected the appellant's assertion and, in a 2-1 decision, HELD: A non-profit cemetery association, which sells burial plots and offers perpetual care to the general public, but which does not provide services either for free or for reduced rates to the poor, is not operated for an exclusively charitable purpose within the meaning of the statute

and is, on its face, difficult to sustain. Even proprietary cemeteries and funeral chapels which are operated for profit conduct such services, but could scarcely be regarded as tax-exempt organizations. The executors' argument that burial is of itself religious is a "claim better addressed to Congress than the courts." *Id.* at 584 n.9.

⁷ The asserted deficiency was \$935,096.60. 540 F.2d at 581. For reasons not stated in the case, \$19,010.88 was refunded without contest by the Commissioner. *Id.* A \$2,000 bequest to the Grove Cemetery Association, for perpetual care of a cemetery plot (not that of testator), was allowed as a deduction. *Id.* at n.2.

⁸ *Id.* at 580-81. The district court opinion was not reported. Consequently all references to that opinion will be based on the court of appeals statement of the lower court's disposition.

⁹ *Id.* at 580-81.

¹⁰ I.R.C. § 2055(a)(2).

¹¹ 540 F.2d at 580-81.

¹² *Id.*

¹³ *Id.* at 583. N.Y. TOWN LAW § 291.1 (McKinney) requires that towns maintain any abandoned public cemeteries within their confines. The Attorney General of New York has expressed the opinion that all cemeteries not presently endowed or controlled by an existing board or corporate body, whether public or private, must be cared for by the town. 1974 OP. ATTY. GEN. OF N.Y. 100. See also 23 OP. STATE COMPT. OF N.Y. 629 (1967).

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governing estate tax deductions.¹⁴

The court based its holding on three conclusions of law. First, the court concluded that cemetery associations are not charitable organizations *per se*.¹⁵ The court based this conclusion on the fact that elsewhere in the Code, certain non-profit cemeteries are given favored tax status independently of charitable organizations.¹⁶ Thus, the court reasoned that Congress did not view cemeteries as ordinarily qualifying as charitable organizations. Second, the court concluded that relief of governmental burdens in and of itself does not constitute an exclusively charitable purpose.¹⁷ The court regarded such a standard as unduly broad and concluded that while relief of governmental burdens was not a non-charitable activity, it was not a sufficient purpose in and of itself to qualify the organization as one being operated for an exclusively charitable purpose.¹⁸ Finally, the court concluded that the cemetery's sale of burial plots must be done so as to provide a benefit to the poor in order to constitute a valid charitable purpose.¹⁹ Since there was no showing that the cemetery associations in question provided any direct benefit to the poor by way of sale of plots or services at reduced rates, the court of appeals upheld the district court's reasoning and determined that the bequests were not deductible as bequests to organizations organized and operated exclusively for charitable purposes.²⁰

The dissent found three reasons for arguing that the cemetery should be regarded as organized and operated exclusively for charitable purposes. First, the dissent accepted the appellant's contention that the relief of governmental burdens is an exclusively charitable purpose, and further found that the appellant had shown a substantial relief of the government's burden.²¹ Accordingly, the cemetery should be considered to be organized and operated exclusively for charitable purposes.²² Second, the dissent noted that under the law of charitable trusts, a cemetery such as the Watertown Cemetery Association would have been viewed as a legitimate object of a valid charitable trust.²³ The dissent argued that since the law of charitable trust offers

¹⁴ 540 F.2d at 582-84.

¹⁵ *Id.* at 582.

¹⁶ *Id.* I.R.C. § 170(c)(5) provides that cemetery associations may receive income tax deductible bequests, and § 501(c)(13) exempts such cemetery associations from income tax.

¹⁷ 540 F.2d at 583.

¹⁸ *Id.*

¹⁹ *Id.* It is, of course, true that the fact that an organization engages in any substantial non-charitable activity precludes a finding of "charitable purpose." See *Better Business Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279, 283 (1945); *United States v. La Societe de Bienfaisance Mutuelle*, 152 F.2d 243, 245 (9th Cir. 1945), *cert. denied*, 327 U.S. 793 (1946).

²⁰ 540 F.2d at 583.

²¹ 540 F.2d at 585 (Anderson, J., dissenting).

²² *Id.* at 586 (Anderson, J., dissenting).

²³ *Id.* at 588 (Anderson, J., dissenting). See *Storr Burying Ground Assn. v. North Lane Cemetery Assn.*, 77 Conn. 83, 95, 58 A. 467, 469 (1904).

a strong analogy when ascertaining whether a particular activity is "charitable" for tax purposes, the cemetery organization should be found to be charitable. Finally, the dissent noted that a cemetery which performed exactly the same services as the Watertown Cemetery Association, but which was owned by a church, would be eligible for tax-deductible bequests,²⁴ and that denial of that privilege to the Watertown Cemetery Association constituted a denial of equal protection.²⁵

The significance of the Second Circuit's decision in *Child* rests primarily in the court's refusal to regard relief of the burdens of government alone, at least where cemeteries are concerned, as a sufficient charitable purpose to qualify for favored tax treatment. The decision indicates that cemetery organizations seeking to establish charitable organization status within the meaning of the Code because they relieve governmental burdens, must also demonstrate that they offer other substantial services of a more traditionally charitable nature. In reaching this result, the *Child* court seems to go against a number of related lines of cases, and to misinterpret others which seem clear on their face.

This note will initially focus on the reading given the Code provisions by the *Child* court, and suggest an alternative construction to that advanced by the court. The note will then examine the *Child* court's analysis of the appropriate requirements to be imposed on a cemetery seeking tax benefits as a charitable organization by considering the validity of the court's conclusion that relief of poverty is demanded of a charitable cemetery, and its rejection of the relief of governmental burdens theory. The note will then suggest a more flexible standard indicated by recent case law, which standard both rejects the relief of poverty requirement, and accepts the relief of governmental burdens theory. Finally, the note will examine the validity of the theory that cemeteries should, by analogy to the law of charitable trusts, be viewed as charitable organizations. It will consider the relationship between the analogizing process urged by the dissent, and the more flexible view of charity taken by other courts.²⁶

²⁴ 540 F.2d at 588 (Anderson, J., dissenting). See *Estate of Elizabeth Audenried*, 26 T.C. 120 (1956).

²⁵ 540 F.2d at 588 (Anderson, J., dissenting). See note 29 *infra*.

²⁶ The note does not deal with several issues which, while involved in the case, are not central to its disposition. First, the district court ruled that only the taxpayer (i.e. the executor) had standing under 28 U.S.C. § 1346(a)(1) (1970) (granting jurisdiction to the district courts to hear claims for refunds of taxes alleged to have been erroneously, illegally, or improperly collected) and accordingly the cemetery association lacked standing to challenge the commissioner. 540 F.2d at 581 n.5. The *Child* court affirmed the district court decision on the merits, but did not reach the standing issue. *Id.* Second, the dissent raised the issue that granting exempt status to cemeteries owned by religious organizations, see *Estate of Elizabeth Auden*, 26 T.C. 120, 124-26 (1956), while denying favored status to non-sectarian cemeteries of substantially identical descriptions, is a violation of equal protection. 540 F.2d 588-90. The claim was not raised by appellants. On the general issue of the constitutionality of tax advantages accorded religious entities, see *Walz v. Tax Comm.*, 397 U.S. 664, 672-80 (1970).

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I. THE *CHILD* COURT'S ANALYSIS OF THE STATUTORY SCHEME

The *Child* court construed the Code so as to preclude any claim that cemeteries are *per se* charitable organizations.²⁷ The court reached this conclusion by means of independent statutory construction.²⁸ The court's statutory analysis focused on three sections which provide tax benefits to charitable organizations:²⁹ (1) section 170, which specifies those organizations to which taxpayers may make income-tax de-

Finally, the note does not deal with appellant's claim that I.R.C. § 2055(a)(3) should govern the disposition of the bequest. 540 F.2d at 581 n.4. That section provides that a bequest may be deductible if it is "to a trustee or trustees . . . if such contributions or gifts are to be used by such trustee or trustees . . . exclusively for religious, charitable, scientific, literary, or educational purposes" Appellant claimed and the dissent agreed that if bequests were used exclusively for charitable purposes, it would not matter that the cemetery association itself was not exclusively charitable. 540 F.2d at 590. The *Child* court disposed of this claim by noting that "the upkeep of a cemetery which does not have an exclusively charitable purpose cannot be said to be an exclusively charitable function." *Id.* It appears that the purpose of the statute is to allow a non-charitable organization (e.g. a business corporation) to serve as a trustee of a charitable trust fund without endangering the deductible nature of any bequest made to the fund. In fact, the original language of this provision, dating from the Revenue Act of 1918, 40 Stat. 1057, provides for deductibility of bequests for exclusively charitable purposes, or to trustees, if such bequests were used "exclusively for such . . . charitable . . . purposes." 40 Stat. 1098. The presence of the word "such" suggests that the initial purpose of the provision was to require that the same "charitable purposes" be pursued regardless of whether the recipient of the bequest took the gift outright or took only legal title. Thus, the Cemetery Association could serve as trustee of a fund designed to pay for, e.g., the burial of poor people. The fact that the cemetery association was not deemed to be exclusively charitable in its purposes would not affect the deductibility of the bequest in trust. On the other hand, a bequest to a cemetery association which was not deemed charitable, to be used for the maintenance of the non-charitable cemetery, would not be a deductible bequest. It is submitted, therefore, that this issue was correctly determined by the *Child* court, if one accepts the conclusion that the cemetery was not itself operated for an "exclusively charitable purpose."

²⁷ 540 F.2d at 582.

²⁸ *Id.*

²⁹ The three sections discussed in this note (sections 501(c)(3), 170(c)(2)(B) and 2055(a)(2)) all contain substantially identical formulations in granting favored status to "charitable organizations." It does not appear to have been squarely held that the word charitable is to be given the same effect in all three sections, so it cannot be firmly stated that this is the law. Several factors, however, strongly urge such an assumption. First, the Treasury Regulations contain only one section construing the words "charitable purpose." Treas. Reg. 1-501 (c)(3)-1(d)(2) (1960) (applies specifically to section 501). There are no separate regulations construing "charitable" in the other pertinent Code sections. Further, no court has ever, to this writer's knowledge, attempted to assert that the meaning of the word charitable varies from section to section of the Code. Courts routinely cite to cases construing "charitable" in connection with provisions not at issue in the case at hand. See, e.g., *United States v. Proprietors of Social Law Library*, 102 F.2d 481, 481 (2d Cir. 1938) (a capital stock tax case), citing the definition of "charitable" found in *St. Louis Union Trust Co. v. Burnet*, 59 F.2d 922, 927 (3d Cir. 1932) (an estate tax case). Finally, to impose a different standard on various sections would create a wholly unnecessary administrative problem.

For purposes of this article, it will be assumed that the word "charitable" has a consistent meaning within the three relevant sections. It is worth noting that with respect to the *Child* case this proposition appears to have been acknowledged by the Treasury Department in its brief. 540 F.2d at 586.

ductible contributions;³⁰ (2) section 501(c) which specifies those organizations which are themselves exempt from income tax liability;³¹ and, (3) section 2055(a)(2), which allows for deductions from the gross estate of bequests to certain organizations for estate tax purposes.³² All three sections contain a general exemption, phrased in virtually identical language, for organizations "organized and operated exclusively for . . . charitable . . . purposes,"³³ and which pass certain organizational tests.

Both sections 170(c) and 501(c) contain specific provisions for cemeteries operated for the benefit of their members, and not operated for profit.³⁴ These provisions were viewed on their face by the *Child* court as indicating a congressional view that such cemeteries could not qualify as charitable cemeteries on a *per se* basis.³⁵ The court noted that when the Code was revised in 1954, Congress added section 170(c)(5), which allowed *contributions* to non-profit cemeteries to be deductible for income tax purposes, but did not extend this benefit to *bequests* to non-profit cemeteries.³⁶ Since special treatment was needed in order to assure that non-profit cemeteries receive tax benefits, the court reasoned that the Code thus clearly indicates that Congress did not regard such cemeteries as charitable organizations. Consequently, the court concluded that non-profit cemeteries are not charitable organizations under the Code, on a *per se* basis.³⁷

³⁰ I.R.C. § 170(a) and (b) provide that, within certain limits, taxpayers may deduct from gross income the amount of any transfers to charity.

³¹ I.R.C. § 501(c)(3). The section recites the same organizational restrictions with respect to lobbying and political activity named in section 2055(a)(2), *supra* note 4.

³² I.R.C. § 2055(a)(2), *supra* note 4.

³³ I.R.C. §§ 170(c)(2), 501(c)(3) and 2055(a)(2).

³⁴ I.R.C. § 170(c)(5) provides that contributions to non-profit cemetery associations "operated exclusively for the benefit of their members" are deductible from gross income. I.R.C. § 501(c)(13), which grants such cemeteries exempt status, is identical, except that it further provides that cremation societies are tax exempt.

³⁵ 540 F.2d at 582.

³⁶ *Id.*

³⁷ *Id.* The history of sections 170(c), 501(c), and 2055(a) is somewhat complex. The Revenue Act of 1916, ch. 403, 39 Stat. 756, made no provision for deductions of charitable contributions for income tax purposes, but did exempt certain organizations, including charitable ones, from income tax liability. *Id.* § 11, 39 Stat. 756. The Act did not allow for the deduction of charitable bequests for estate tax purposes. *Id.* § 203, 39 Stat. 77.

In the Revenue Act of 1917, ch. 63, 40 Stat. 300, Congress revised the Code to allow for deductions for income tax purposes for contributions made to "... corporations or associations organized exclusively for religious, charitable, scientific, or educational purposes . . ." *Id.*, § 1201, 40 Stat. 330. In the Revenue Act of 1918, ch. 18, 40 Stat. 1057, a similar provision was passed favoring charitable bequests, which became deductible for estate tax purposes. *Id.*, § 403(b)(c), 40 Stat. 1099.

From an early date, cemeteries have received special treatment in the income tax sections of the Code. The Revenue Act of 1916, ch. 464, 39 Stat. 750, specified that "cemetery compan[ies] owned and operated exclusively for the benefit of [their] members" are not liable for income tax. *Id.* at § 11(a) Fifth. Thus, even though the 1916 Act provided an exemption from income tax liability for "charitable organizations," Revenue Act of 1916, ch. 136, 39 Stat. 227, Congress also included a specific exemption for

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While the *Child* court viewed the specific statutory treatment of a certain class of cemeteries as indicative of their exclusion from the charitable organization category, the court did not face the question of what cemeteries in fact are described by sections 501(c)(13) and 170(c)(5). If Congress made special provision for such cemeteries because it did not regard them as otherwise eligible for favored status as "charitable organizations," it follows that such provisions describe accurately Congress' concept of a non-charitable cemetery. Thus the first step in a proper analysis of the Code provisions should be a consideration of what kinds of cemeteries Congress described as being non-charitable.

Section 170(c)(5) which makes contributions to cemetery organizations deductible for income tax purposes was added to the Code in 1954. It was modeled word for word after section 501(c)(13). Sections 501(c)(13) and 170(c)(5) were identical until 1970 when section 501(c)(13) was expanded to provide exempt status for cremation and burial societies.³⁸ It can safely be assumed that in applying identical language to income tax deductions for contributions to cemeteries as is used to exempt those cemeteries from income taxation, Congress meant to give special treatment to the same class of cemeteries that it

cemeteries. The Revenue Act of 1921, ch. 136, 42 Stat. 227, expanded the exemption to include non-profit cemeteries, and added certain organizational requirements, giving the exemption the language it retained in the present Code in § 501(c)(13) until 1970:

Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private stockholder or individual . . .

42 Stat. 254. The *Child* court indicates that the exemption from income tax for cemeteries dates from 1954. 540 F.2d at 581. This is erroneous. An exemption from income tax for certain cemeteries has been in the Code since 1916, and a provision substantially identical to section 501(c)(13) has been in the Code since 1921.

The most perplexing part of the Code treatment accorded to cemeteries, however, is the 1954 amendment of section 170(c)(5). The amendment included a provision allowing deductions from income tax of transfers to cemetery associations in language virtually identical to that in section 501(c)(13). There was, however, no amendment to section 2055(a). Thus, the anomalous result in that inter vivos transfers made to cemetery associations are specifically favored over testamentary bequests. As a result of this peculiar arrangement, a bequest to maintain a non-profit, but non-charitable cemetery would not be deductible for estate tax purposes. On the other hand, a trust set up to pay income to the same cemetery would be able to deduct, subject to other limits in section 170, the income paid to the cemetery, for purposes of computing the income tax due on the trust.

³⁸ Pub. L. 91-618, 84 Stat. 1855. It is interesting to speculate whether the *Child* court would attach a similar significance to the amendment of section 501(c)(13) so as to allow cremation societies to be tax exempt, without similarly amending section 170(c)(5). Does such a legislative action indicate a congressional judgment that cremation societies are not, in the ordinary course, subsumed by the term "any corporation chartered solely for burial purposes . . ." It is at least as likely that special mention by Congress reflects a congressional desire to preclude any doubt as to the treatment to be accorded an organization, as it is that such special and separate mention reflects a congressional judgment that the specially mentioned class is not subsumed in some broader term.

had already exempted from income tax. Thus the relevant inquiry becomes what kinds of cemeteries does section 501(c)(13) describe which must presumptively be non-charitable.

The first step of an analysis of section 501(c)(13) is to examine the purpose served by that section in its statutory context. Section 501(c)(13) appears as part of a series of provisions exempting certain organizations from taxation which are generally of a cooperative and mutual nature,³⁹ local in character, and characterized by the fact that their members are the beneficiaries of the organizations' efforts.⁴⁰ These organizations include, *inter alia*, mutual ditch or irrigation companies,⁴¹ local teacher retirement funds,⁴² and small credit unions.⁴³ The tax policy underlying these provisions appears to be to encourage self-help through mutual or cooperative effort in several areas.⁴⁴ They are not "charitable" *per se* because the members are the beneficiaries of their activities.⁴⁵ Similarly, a small, private, family cemetery,⁴⁶ which is non-profit would be exempt under section 501(c)(13) but apparently would not be charitable since there is no benefit to the general public.⁴⁷ The essential characteristic of the non-charitable cemetery, then, is that it is not organized to benefit the general public, but rather is organized to benefit its members.

The next point of inquiry focuses on Congress' decision to extend favored status to this same class of cemeteries with respect to income tax deductible contributions, but not with respect to bequests. The most logical explanation for this different treatment is that Congress wished to encourage disinterested support of cooperative cemetery associations, which primarily benefited their members, but was concerned that bequests to such cemeteries, especially small family cemeteries, could be disguised bequests for self-memorialization.⁴⁸ Clearly, it is extremely difficult to determine the disinterestedness of a

³⁹ *New Jersey Automobile Club v. United States*, 181 F. Supp. 259, 261 (1960).

⁴⁰ *John D. Rockefeller Family Cemetery Corp. v. Commissioner*, 63 T.C. 355, 363 (1974).

⁴¹ I.R.C. § 501(c)(12).

⁴² I.R.C. § 501(c)(11).

⁴³ I.R.C. § 501(c)(14). Other organizations exempted are certain mutual insurance companies, § 501(c)(15); mutual crop financing corporations, § 501(c)(16); and professional football leagues, § 501(c)(6).

⁴⁴ *John D. Rockefeller Family Cemetery Corp. v. Commissioner*, 63 T.C. 355, 363 (1974).

⁴⁵ *Id.* The *Rockefeller* court stressed that while these organizations may "do much to enhance the public good," they are private organizations concerned with serving the good of the members. *Id.*

⁴⁶ *Id.* at 363.

⁴⁷ *Id.* The court specifically rejected the Commissioner's claim that the organizations in sections 501(c)(9)-(13) were "quasi-charitable" or concerned with the public welfare. *Id.*

⁴⁸ It should be noted that a transfer in the form of a gift, for which favored status is claimed under section 170(c)(5), is considered a payment for consideration, and hence not deductible, if the gift is in return for a promise of perpetual care. *Wood v. Commissioner*, 39 T.C. 1, 7 (1962).

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bequest to a cemetery in which testator is to be buried. If, however, questions concerning the purity of the donor's motive arise where a deduction from income tax is claimed, the taxpayer is still available to be examined on this subject. Thus, it is not unreasonable to assume that Congress intended to exclude from section 2055(a) those cemeteries which, because they are small and often family run, would be likely to abuse gifts for general cemetery maintenance by erecting individual monuments with the funds.

The third question posed by the statutes is whether the fact that sections 501(c)(13) and 170(c)(5) describe many large, public, non-profit cemeteries, means that such cemeteries could not otherwise qualify as charitable organizations. The *Child* court found that such cemeteries could be charitable only if they provided free or low cost burial space to indigents.⁴⁹ It appears, however, that the position of section 501(c)(13) in the Code, and its explicit language, limit its effect to those companies operated for "the benefit of [their] members,"⁵⁰ and which, of necessity could not be charitable. Section 501(c)(13) says nothing more, in effect, than that cemetery companies whose beneficiaries are not the public at large are tax-exempt even though they are not charitable. In sum, Congress appears to have viewed only those cemeteries whose members are the primary beneficiaries of the cemetery association as requiring special mention in order to receive certain tax benefits.

The logical inference to be drawn from this is that Congress did view cemeteries which provide benefits primarily to the public as being charitable. Where the public, not the individual cemetery association members, is the beneficiary of the cemetery's efforts, the statutes indicate, by negative inference, that there is no need for special statutory attention in order to make the cemetery eligible for tax benefits as a charitable organization. For this reason, it appears that the *Child* court's summary assumption that cemeteries are not charitable *per se* represents an inadequate analysis of the tax treatment of cemeteries, and that a correct reading of the statutes would have led to the conclusion that cemeteries offering substantial benefits to the public are charitable for tax purposes.⁵¹

⁴⁹ 540 F.2d at 583.

⁵⁰ I.R.C. § 501(c)(13).

⁵¹ The *Child* court was not alone in concluding that tax favors specifically accorded cemeteries reflects a legislative judgment that they are not ordinarily charitable organizations. Many state courts have come to the same conclusion. In *Hill's Estate*, 131 Me. 211, 160 A. 946 (1932), the court regarded a statute authorizing organization of cemetery corporations in the same manner governing charitable corporations as reflecting a legislative decision not to regard cemeteries as charities under the tax statutes. 131 Me. at 213-14, 160 A. at 947. In *Christgaun v. Woodlawn Cemetery Ass'n*, 208 Minn. 263, 268, 293 N.W. 619, 621 (1940), the court specifically rejected the contention that the common law of charitable trusts, which regarded cemetery trusts generally as charitable, was applicable. It concluded that a cemetery association was not exempt from unemployment compensation tax as a charitable organization, 208 Minn. at 267, 133 N.W. at 621. In *Milford v. Commissioner*, 213 Mass. 162, 100 N.E. 60 (1912), the court acknowledged that cemeteries afford a general public benefit, but argued that

II. THE REQUIREMENTS FOR A CHARITABLE CEMETERY

A. *Relief of Poverty Theory*

The *Child* court, having concluded that the statutes do not regard cemeteries as charitable organizations *per se*, then turned to a consideration of what requirements were imposed upon cemeteries seeking to qualify as charitable organizations for tax purposes.

The court framed its analysis by assuming that a cemetery could be organized so as to qualify as a charitable organization.⁵² The court then relied on the case of *Gund's Estate v. Commissioner*⁵³ to determine what standards applied. In *Gund*, an executor claimed that under the predecessor to section 2055⁵⁴ a bequest to a cemetery was deductible from the gross estate as a bequest to a charitable organization. The *Gund* court pointed out that while "[a] cemetery association doubtless could be so organized and operated as to be a charitable organization,"⁵⁵ the failure of the cemetery to provide free or low cost burial services to the poor precluded the taxpayer from deducting the bequest to the cemetery association.⁵⁶ The *Child* court found this requirement to be sound, and quoted with approval *Schuster v. Nichols*,⁵⁷ upon which *Gund* relied, and from which *Gund* quoted extensively.⁵⁸ In *Schuster*, the court rejected a claim that a cemetery was a charitable institution and expressly concluded that the tax codes use the word "charitable" in its "more narrow and restricted sense, as signifying those corporations which were organized and maintained exclusively for eleemosynary purposes."⁵⁹

In addition to concluding that both *Gund* and *Schuster* require that a charitable cemetery carry a rate structure related to ability to pay, the *Child* court further cited *Bank of Carthage v. United States*⁶⁰ in

where cemeteries were specifically exempted from one kind of taxation, they could not be exempted as charitable organizations for other taxes. The court indicated that no cemetery, no matter how charitably organized, could qualify as a charitable organization unless specifically mentioned, if it were singled out elsewhere. *Id.* at 165, 100 N.E. at 62. See also *Cloverleaf Memorial Park, Inc. v. Lawlor*, 56 N.J. 326, 332, 266 A.2d 569, 572 (1970).

⁵² 540 F.2d at 582.

⁵³ 113 F.2d 61 (6th Cir.), *cert. denied*, 311 U.S. 696 (1940).

⁵⁴ Int. Rev. Code of 1939, § 812, 53 Stat. 123 (now I.R.C. § 2055).

⁵⁵ 113 F.2d at 62.

⁵⁶ *Id.* The *Gund* court also stressed the special statutory treatment accorded cemeteries. *Id.* The court quoted with approval the Board of Tax Appeals' observation in *Craig v. Commissioner*, 11 B.T.A. 193, 200 (1928), that "from the first revenue act to the last, Congress has consistently and persistently placed charitable . . . institutions in one class and cemeteries not operated for gain in a distinct and separate class We should not join together classes which Congress has seen fit to put asunder." *Id.*, quoted at 113 F.2d at 63.

⁵⁷ 20 F.2d 179 (D.C. Mass. 1927).

⁵⁸ Well over one third of the opinion in *Gund* is simply a direct quote from *Schuster*, 113 F.2d at 62-63.

⁵⁹ 20 F.2d at 180, quoted in *Child*, 540 F.2d at 583 n.7.

⁶⁰ 304 F. Supp. 77 (W.D. Mo. 1969).

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support of the proposition that a charitable cemetery must accord a direct benefit only to the poor. In *Bank of Carthage*, a cemetery which had been created to offer burial service at a lower price than that charged by the other cemetery in town, was nevertheless denied charitable status, because "the rich the poor and the inbetween" paid the same fees for burial in the cemetery.⁶¹ The *Child* court viewed *Gund*, *Schuster*, and *Bank of Carthage* together as mandating that cemeteries claiming charitable status benefit the poor directly. With little independent analysis of the reasoning of these cases, the court accepted this conclusion as applicable to the facts in *Child*.

The *Child* court's application of the *Gund* "relief of poverty standard" is not a satisfactory approach to the problem raised by the case. First, the case law cited by the court is neither persuasive nor apposite to the facts of *Child*. In *Bank of Carthage*, the executor sought to establish that the cemetery was charitable on the grounds that it did relieve poverty. The cemetery had been organized to provide burials at a rate lower than those charged by the other cemetery in town.⁶² The question in *Bank of Carthage* was limited to whether or not lower burial rates constituted relief of poverty. Unlike *Child*, *Bank of Carthage* did not pose the question whether relief of poverty was the sole grounds upon which a cemetery could be found to be charitable. Thus, the *Child* court's use of the case to support the proposition that a charitable cemetery must relieve poverty was inappropriate.

Similarly, the court's reliance on *Gund* and *Schuster* for its narrow definition of "charitable" as applied to cemeteries is misplaced. *Schuster*, upon which *Gund*'s conclusion relies almost in whole, was decided before the courts generally adopted the policy of giving exempting statutes a liberal construction.⁶³ Indeed *Schuster* explicitly adopted

⁶¹ *Id.* at 80.

⁶² *Id.*

⁶³ The federal courts, as a matter of judicial policy, generally favor a liberal construction of the exempting statutes. The policy applies, most frequently, where technical problems might otherwise prevent a gift from being deductible, or an organization from being accorded exempt status. See, e.g., *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379, 384 (1937) (charitable contributions paid from trust fund authorized, but not expressly directed by trust instrument, held deductible for income tax purposes); *Helvering v. Bliss*, 293 U.S. 144, 150-51 (1934) (taxpayer allowed to deduct charitable contributions based on percentage of net income, rather than "ordinary net income"); *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581 (1924) (incidental non-charitable activities engaged in in pursuit of charitable goals did not violate the "exclusivity" requirement of the exemption for charitable organizations); *St. Louis Union Trust Co. v. Burnet*, 59 F.2d 922, 927 (3d Cir. 1932) (bequest in trust to a church which would revert if the church failed to collect double the trust income from its own sources for two consecutive years during the trust's 10 year life was deductible, though contingent); *Beggs v. United States*, 27 F. Supp. 599, 606 (1939) (bequest in trust for the benefit of such charities as executor in consultation with testator's sister deemed worthy, held deductible although specific charitable purposes not specified). The courts' desire to prevent technical matters from frustrating charitable activity is expressed by Judge Hand in *Slocum v. Bowers*, 15 F.2d 400 (S.D.N.Y. 1926): "The policy of exempting these [i.e. charitable] corporations is firmly established The statute should be read, if possible, in such a way as to carry out this policy and not to make the result turn on acciden-

a narrow construction policy in reaching its conclusion.⁶⁴ Thus, while *Gund* may have been precisely on point factually, its age, its reliance on *Schuster*, and its lack of careful analysis of the statutes or the tax policy issues involved make its value as authority questionable. Since neither *Gund* nor *Bank of Carthage* represent substantial authority on the issues presented in *Child*, the *Child* court's acceptance of the cases as controlling precedent is unsound.

B. Relief of Governmental Burden Theory

By accepting the *Gund* relief of poverty test, the *Child* court implicitly rejected an alternative analytical framework offered by a number of pertinent cases.⁶⁵ This alternative analytical framework, the relief of governmental burdens theory, focuses on the degree of general public benefit provided by the organization and seeks to determine whether such benefit is substantial enough to warrant according tax benefits to the organization. This standard was urged on the *Child* court by appellants,⁶⁶ who pointed out that burial of the dead was an activity which would fall to the government as a public health matter were there no private agencies willing to undertake the task.⁶⁷ They further argued that the duty to maintain existing cemetery grounds, whether or not presently used for burial, would fall to the county and local government, if there were no functioning board of trustees or governors which could accept responsibility for care of the cemetery.⁶⁸ Appellants urged that such relief of governmental burdens had been recognized by the courts as a "charitable purpose," and that exclusive dedication to such purposes had been held to be grounds for granting charitable status.⁶⁹ Appellants noted that the Treasury Regulation interpreting section 501(c)(3) specifically recognized that lessening the burdens of government was a purpose to which an "exclusively charitable" organization could be dedicated.⁷⁰

In advancing the relief of governmental burdens theory, appellants relied heavily on the Second Circuit decision in *Dulles v. Johnson*,⁷¹ which involved allegedly deductible bequests for the benefit of various bar associations in New York.⁷² In *Dulles*, the court of ap-

tal circumstances or legal technicalities." *Id.* at 403. The policy is consistent with judicial recognition that the statutes should be administered so as to encourage the type of charitable giving which relieves Congress of certain burdens.

⁶⁴ 20 F.2d at 180.

⁶⁵ See text and notes at notes 87-100 *infra*.

⁶⁶ Brief for Appellant at 9.

⁶⁷ *Id.* at 10.

⁶⁸ *Id.* at 10. See note 16 *supra*.

⁶⁹ Brief for Appellant at 11.

⁷⁰ Treas. Reg. § 1.501(c)(3)-1(d)(2) (1960) provides in part "(2) Charitable defined: . . . such term includes . . . lessening the burdens of Government . . ."

⁷¹ 273 F.2d 362 (2d Cir. 1959), *cert. denied*, 364 U.S. 834 (1960).

⁷² *Id.* at 363. The beneficiaries under the will were The New York County Lawyers Association, The New York State Bar Association, the Association of the Bar of the City of New York, The William Nelson Cromwell Foundation for Research of the

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peals noted that "[i]f [the regulation of the unauthorized practice of law was] not undertaken by the Associations, the cost of this necessary regulation would descend upon the public. Hence, we conclude as to regulation of the unauthorized practice of law, the associations must be deemed 'charitable.'"⁷³ Applying this rationale to cemeteries, appellant argued, mandates the result that those cemeteries which assume burdens which would otherwise devolve upon the public must be regarded as charitable organizations for tax purposes.⁷⁴

The *Child* court rejected the appellants' argument by asserting that *Dulles* did not stand for the proposition that relief of governmental burdens will always constitute a sufficient charitable purpose to enable the organizations to qualify under the tax codes.⁷⁵ Instead, the *Child* court reasoned that *Dulles* held that "public dedication of services by an organization may be colored by a history of that organization's performance of more traditional charitable activities to such an extent that the entire enterprise, or the 'total operations' of the association assume the aspect of charitable services to the community."⁷⁶ The *Child* court thus appears to have read *Dulles* as allowing an organization which performs substantial "traditional" charitable activities to qualify for favored status where otherwise non-charitable activity relieves the burdens of government.⁷⁷ This treatment, in effect, regards relief of governmental burdens as an exception to the rule that any substantial performance of non-charitable activity causes an organization to forfeit any claim to exempt status.⁷⁸ In other words, according to this reading of *Dulles*, relief of the burdens of government is an acceptable quasi-charitable activity but this activity, in and of itself, does not enable an organization to qualify *per se* as an exclusively charitable organization.⁷⁹ The court then distinguished *Dulles* by noting that the cemetery association in *Child* conducted no such "traditional" charitable activities to entitle it to qualify as an exclusively charitable organization.

It is submitted that the *Child* court's reading of *Dulles* is contrary to the explicit language of that case. The *Dulles* court's conclusion is

Law and Legal History of the Colonial Period of the United States, and the Alumni Association of the School of Law of Columbia University. The appeal concerned the charitable status of the three bar associations.

⁷³ *Id.* at 366.

⁷⁴ Brief for Appellant at 11.

⁷⁵ 540 F.2d at 583.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See note 21 *supra*.

⁷⁹ In this respect, it is worth noting that the *Child* court believed that relief of the public fisc was:

more symptomatic than evidentiary regarding whether an activity is charitable: charity often results in an absorption of a burden otherwise falling upon the state, particularly where the social welfare is a principle purpose of the state. But this does not mean that activities in any of a myriad of areas of public interest are perforce charitable.

Id.

unambiguous. Recognizing the fact that regulation of the unauthorized practice of law would of necessity be undertaken by the government in the absence of the Bar Association's activities, the court declared accordingly that "the Association must be deemed 'charitable.'" ⁸⁰ There is no basis in the opinion for the *Child* court's view that public service is not in itself a "charitable purpose" within the Code. Rather, the *Dulles* court recognized what the appellant in *Child* contended: that relief of the burdens of government in and of itself may constitute a "charitable purpose" under the Code.

The *Child* court offered no justification for its reading of *Dulles*, beyond noting that many organizations provide some relief of government burdens as a consequence of their activities, and that all such organizations could not be regarded as charitable organizations.⁸¹ The court appeared concerned that following *Dulles* would result in a "myriad" of claims by organizations arguing that their activities in some way relieve a governmental burden. Under *Dulles*, however, an organization must still show that such relief is, in effect, its *raison d'être* in order to obtain the tax benefits flowing to a charitable institution. The fact that relief flows incidentally from its activities would not have been sufficient under *Dulles* to warrant granting tax relief. The *Child* court, then, appears to have confused the fact that many organizations can no doubt show some absorption of a burden otherwise belonging to the state with the fact that such organizations would not qualify for tax relief without a showing that such relief is the organization's exclusive purpose. The *Child* court's conclusion that relief of the public fisc is often a "symptom" of charitable activity, rather than evidence of such activity⁸² assumes erroneously that it cannot be both. Clearly, a private social welfare agency reduces the burden on the state welfare mechanism, but such an agency would qualify as a charitable organization on the basis of its relief of the burdens of poverty. This is no reason to conclude that in other cases where an organization's activity cannot be described as relieving poverty, that the relief thereby afforded the public does not in and of itself constitute a charitable purpose. On the contrary, the clear holding of *Dulles* is that such public service is a charitable purpose thus qualifying the organization for favored tax status under the Code. Thus, the *Child* court mistakenly interpreted *Dulles* and accordingly mistakenly concluded that relief of governmental burdens did not qualify as an exclusively charitable purpose under the Code.

III. PROPOSED ANALYTICAL FRAMEWORK

By accepting the *Gund* relief of poverty test for determining whether an organization is operated for an exclusively charitable pur-

⁸⁰ 273 F.2d at 366.

⁸¹ 540 F.2d at 583.

⁸² *Id.*

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pose, the *Child* court, as noted previously, implicitly rejected a consistent line of cases which has taken a much broader view of the scope of charitable purpose. This broader view treats as "charitable" all organizations whose primary purpose is to benefit the public or relieve governmental burdens.⁸³ It is submitted that this broader view of "charitable purpose," recognizing both public benefit and relief of governmental burdens, is sound and should be adopted by courts in the future in preference to the more restrictive relief of poverty standard espoused by the *Child* court.

The rationale underlying tax favors for charities which adopts the relief of public burdens standard is widely accepted in case law. Some cases adopting this standard specifically recognize a shifting of burdens from the government to the charitable organizations as the rationale for charitable deductions. Typical of these cases is *Duffy v. Birmingham*,⁸⁴ where the Eighth Circuit, in construing "charitable purpose" in connection with an allegedly charitable bequest, observed:

the common element of charitable purposes within the meaning of the section [predecessor to 2055(a)] is the relief of the public of a burden which would otherwise belong to it. Charitable purposes are those which benefit the community by relieving it pro tanto from an obligation which it owes to the objects of charity as members of the community.⁸⁵

Similarly, Judge Bazelon, in *McGlotten v. Connally*,⁸⁶ a District of Columbia district court case which held that certain tax-benefits accorded racially exclusive organizations were unconstitutional and in violation of the 1964 Civil Rights Act, wrote that the rationale for allowing the deduction of charitable contributions is that "by doing so, the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the government."⁸⁷

The view that charitable contribution deductions are based on Congress' desire to encourage private absorption of public burdens was also recognized by the Court of Claims in *Founding Church of Scientology v. United States*.⁸⁸ In denying tax-exempt status to the taxpayer on the grounds that significant amounts of its income benefited individuals, the Court of Claims observed:

Implicit in section 501 is the recognition that certain in-

⁸³ See, e.g., *Founding Church of Scientology v. United States*, 412 F.2d 1197, 1201 (Ct. Cl. 1969); *Duffy v. Birmingham*, 190 F.2d 738, 741 (8th Cir. 1951); *McGlotten v. Connally*, 338 F. Supp. 448, 452 (D.D.C. 1972); *Green v. Connally*, 330 F. Supp. 1150, 1158 (D.D.C.), *aff'd mem. sub nom.*, *Coit v. Green*, 404 U.S. 997 (1971).

⁸⁴ 190 F.2d 738, 741 (8th Cir. 1951).

⁸⁵ *Id.*

⁸⁶ 338 F. Supp. 448, 452 (D.D.C. 1972).

⁸⁷ *Id.*

⁸⁸ 412 F.2d 1197, 1201 (Ct. Cl. 1969).

stitutions and organizations exist and function for purposes which Congress deems beneficial to society as a whole. In order to foster these aims, funds which would otherwise be acquired and expended for the public good by the Government are left by Congress in the hands of these organizations.⁸⁹

This position was affirmed in *Green v. Connally*,⁹⁰ another District of Columbia district court case, where the court, in denying exempt status to a racially exclusive school, noted that relief of poverty is not the only meaning accorded charity in the Code.⁹¹

Perhaps the most persuasive articulation of this position is found in the court of appeals opinion in *Eastern Kentucky Welfare Rights Organization v. Simon*.⁹² In that case, the Treasury Department was held to have properly promulgated a Revenue Ruling which granted tax exempt status to non-profit hospitals which, while not providing free or low-cost care to the poor, accepted all patients able to pay directly or by third party reimbursement, and maintained a twenty-four hour a day emergency room.⁹³ The court of appeals, in reaching its conclusion that Rev. Rule 69-545 was not inconsistent with section 501(c)(3), noted that "the term 'charitable' is . . . capable of a definition far broader than merely the relief of the poor."⁹⁴ While not expressly adopting the language of relief of governmental burdens, the court's analysis thus focused on the same underlying issue — *i.e.* whether the activity is one which provides substantial benefits to the community which would otherwise be provided either by the government,

⁸⁹ *Id.*

⁹⁰ 330 F. Supp. 1150, 1158 (D.D.C.), *aff'd mem. sub nom.*, *Coit v. Green*, 404 U.S. 997 (1971).

⁹¹ *Id.*

⁹² 506 F.2d 1278, 1287-90 (D.C. Cir. 1974), *vacated for lack of standing*, 426 U.S. 26 (1976).

⁹³ *Id.*

⁹⁴ *Id.* The court also noted the language in the Treasury Regulations exempting organizations which relieve the burdens of government from income tax. Treas. Regs. § 1.501(c)(3)-1(d)(2) (1960) provides:

(2) Charitable defined. The term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outline of 'charity' as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish such purposes.

The Regulations enumerate as "charitable purposes" several additional purposes: advancement of religion, education and science, the relief of poverty, and the erection of public works. The Regulations go on to list a number of purposes which appear to be an enumeration of other purposes of general social benefit. These purposes include: defense of human rights, elimination of neighborhood tensions, racial discrimination and delinquency, and significantly, lessening the burdens of government. While the

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through tax levies, or not at all.⁹⁵ Noting that few hospitals actually provide any significant direct philanthropy anymore, since indigents are usually cared for at state expense,⁹⁶ the court reasoned that definitions of charitable which are restricted to relief of poverty are too limited and fail "to recognize the changing economic, social and technological precepts and values of contemporary society."⁹⁷

The *Eastern Kentucky* court thus developed a definition of "charitable purpose" that gives the term a meaning consonant with the needs of a community at a given time. Such a standard is more realistic than the narrow relief of poverty standard employed in *Child*, for it recognizes that society may be served in many ways which do not directly relieve poverty, and that such services may be indispensable and worthy of subsidization through tax benefits. Indeed it seems only reasonable to view the needs of a community at a given time, in considering the social value of an organization. For example, an organization which has as its chief goal promotion of harmonious race relations in a racially troubled city may provide no relief of poverty, but clearly serves a vital purpose to that city, and, significantly, may well perform services which the government cannot perform.⁹⁸ Such an organization is charitable not to the extent that it relieves poverty, but to the extent that it serves the public.

The soundness of the public benefit and relief of government burdens standard is further supported by cases which urge that the common law of charitable trusts provides a useful interpretive tool in determining whether a particular activity is charitable for tax purposes.⁹⁹ These cases suggest that if a particular purpose were deemed charitable for purposes of trust law, that purpose should also be charitable under tax statutes favoring charitable activity.¹⁰⁰

It is appropriate for courts confronting claims for the tax benefits accorded charities to analogize to the factual determination and the analytical process used by courts in charitable trust cases because in both situations a determination of charitable status produces

Regulations may be found by courts to overstep the statutory mandate, the regulation in issue specifically purports to recapitulate judicial descriptions of "charitable purposes" and to apply them broadly to the Code. In short, the Regulations purport to follow prior judicial policy, not to dictate it. Consequently, it is reasonable to suppose that the Regulations themselves adopt a view that "charity" is any activity primarily designed to benefit the public, or relieve the burdens of government.

⁹⁵ 506 F.2d at 1291.

⁹⁶ *Id.* at 1290.

⁹⁷ *Id.* While *Eastern Kentucky* cannot be viewed as binding precedent in view of the Supreme Court's vacation of the decision for lack of standing, it is, nevertheless, consonant with the decisions in *Green* and *McGlotten*, *supra* at notes 91-92, 95-96, and presumably reflects the policy, if not the express law of the District of Columbia Circuit.

⁹⁸ In fact, Treas. Reg. § 1.501(c)(3)-1(d)(2) (1960) expressly exempts such organizations from income tax. See note 94 *supra*.

⁹⁹ See note 111 *infra*.

¹⁰⁰ *Id.* A charitable trust is simply a trust without an ascertainable beneficiary which is nevertheless enforceable in equity as being beneficial to the public generally. J. POMEROY, EQUITY JURISPRUDENCE § 1018 (5th edition, S. Symons, ed., 1941) (hereinafter

certain inevitable social losses.¹⁰¹ A charitable trust is immune to the operation of the rule against perpetuities, hence taking property out of circulation.¹⁰² Similarly, allowance of a charitable deduction deprives the state of revenues. Thus in both cases, a determination of "charitable purpose" involves a result contrary to well established social policies — the free alienation of property on the one hand, and the collection of needed revenue on the other. Since in both trust and tax cases a finding of "charitable purpose" entails certain social detriments, the longstanding recognition in trust cases of the wisdom of weighing these detriments against the social benefits provided by the activity persuasively recommends adoption of the same process in tax cases, where the courts face a similar dilemma.

A court considering the validity of a bequest which allegedly constitutes a common law charitable trust must determine to what extent the community is served by according the bequest the special status of a charitable trust, not simply whether or not it relieves the burdens of poverty.¹⁰³ The process used by courts in cases where the

POMEROY). See *Bayer v. Myers*, 244 F. 902, 911-12 (8th Cir. 1917). While it appears that charitable uses were enforced in England prior to the Statute of Elizabeth (43 Eliz. c.4), that Statute, which gave Chancery a remedy to enforce certain types of trusts, marks the beginning of a long history of judicial development of the requirements which must be met if a trust is to be enforceable as a charitable trust. 4 POMEROY § 1028. It is well settled that charitable trust purposes may not be illegal, or contrary to public policy. *Green v. Connally*, 330 F. Supp. 1150, 1159 (D.D.C.), *aff'd mem.* 404 U.S. 997 (1971). Furthermore, the trust's purpose must be "charitable." *Id.* See generally IV A. SCOTT, THE LAW OF TRUSTS, § 377 (3d ed. 1967) (hereinafter SCOTT); RESTATEMENT (SECOND) OF TRUSTS § 377, Comment (c) (1957). The purposes to which charitable trusts may be dedicated include: (1) the relief of poverty; (2) religious purposes; (3) educational purposes; (4) other purposes generally beneficial to the community. This classification comes from Lord Macnaghten's opinion in *Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] A.C. 531, 538. It is cited in *Green v. Connally*, 330 F. Supp. 1150, 1158 (D.D.C. 1971). In addition, Pomeroy lists the purposes to which charitable trusts may be dedicated (other than those enumerated specifically in the Statute of Elizabeth) as religious, educational, benevolent (by which is evidently meant "relief of poverty") and other purposes beneficial to the community. POMEROY, §§ 1021-1024.

Many charitable trusts which Pomeroy regards as being of general public benefit could be called trusts for municipal purposes. Following this approach, a trust for the benefit of a fire company was upheld as charitable in *Human Fire Co.'s Appeal*, 88 Penn. 389, 391 (1879), and in *Bethlehem Borough v. Perseverance Fire Co.*, 81 Penn. 445, 457 (1876). A gift of land in trust for the residents of a town, for their use and enjoyment was upheld in *New Castle Common v. Megison*, 1 Boyce (Del.) 361, 77 A. 545, Ann. Cas. 1914A, 1207 (1941).

The RESTATEMENT (SECOND) OF TRUSTS, § 368 (1957) recognizes two additional groups of trust purposes, i.e. trusts for municipal purposes, and trusts for the promotion of health. These classes are recognized in *Bank of Carthage v. United States*, 304 F. Supp. 77, 80 (W.D. Mo. 1969).

¹⁰¹ G. BOGERT, LAW OF TRUSTS 200 (1 Vol. ed. 5th ed. 1973) (hereinafter BOGERT).

¹⁰² See, e.g., *Jackson v. Phillips*, 96 Mass. 539, 544 (1867); *Dexter v. Gardner*, 89 Mass. 243, 247 (1863).

¹⁰³ As Lord Macnaghten noted in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, 583, trusts which aid the rich and the poor "are not the less charitable in the eyes of the law" since "every charity that deserves the name must do [so] either directly or indirectly."

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charitable nature of a trust is at issue involves a balancing process.¹⁰⁴ The court must determine whether or not a particular purpose is of sufficient social benefit to outweigh the disadvantages which arise by exempting the charitable trust from the operation of the rule against perpetuities.¹⁰⁵ Thus, the process employed in trust cases of balancing social benefit with social loss is readily analagous to, and consistent with, the position taken by *Dulles* and other cases which recognize that relief of governmental burdens is a valid charitable purpose. The "governmental burdens" and "public benefit" standard presupposes precisely such a balancing test as is used in the law of charitable trusts.¹⁰⁶ The balancing process makes provision not only for organizations of a more conventionally charitable nature (*e.g.*, religious, educational, and eleemosynary) but also for organizations whose benefit to society is broadly distributed, and whose continued existence is important to society.

Furthermore, if courts applying such a balancing test have repeatedly determined that a particular activity creates a sufficient public benefit to warrant according the trust "charitable trust status," that conclusion should not be lightly thrown aside by a court seeking to determine whether the same activity is eligible for charitable tax favors.¹⁰⁷ Had the *Child* court recognized the "public benefit" or "gov-

¹⁰⁴ BOGERT, *supra* note 101, at 201.

¹⁰⁵ RESTATEMENT (SECOND) OF TRUSTS § 368, Comment (b) (1957); BOGERT, *supra* note 101, at 201, IV SCOTT, *supra* note 100, at § 368.

¹⁰⁶ This analysis of the rationale underlying the trust analogy to tax cases has, to this writer's knowledge, never been stated expressly. However, the frequent cross references in tax cases to the categories of trusts which would qualify as charitable trusts suggests that the balance of social advantage and disadvantage may be implicit in the court's reasoning. See, *e.g.*, *Duffy v. Birmingham*, 190 F.2d 738, 741 (8th Cir. 1941).

¹⁰⁷ The degree of authority to be accorded the common law of charitable trusts has been variously stated. On one extreme, it has been held that the term "charitable" in the tax codes reenacts the common law definitions. *International Reform Fed'n. v. District Unemployment Compensation Bd.*, 131 F.2d 337 (D.C. Cir.), *cert. denied*, 317 U.S. 531 (1942). There, the District of Columbia Circuit granted tax exempt status to taxpayer under the District of Columbia Unemployment Insurance Act, which used language virtually identical to that used in Section 2055(a) to exempt "charitable" organizations from unemployment tax liability. The organization was dedicated to encouraging certain reforms including prevention of drug and alcohol abuse, and encouragement of international peace and conciliation. 131 F.2d at 338. The court observed that:

if the benefit is one which the founder believes to be of public advantage, and his belief is rational . . . the gift is charitable in the eyes of the law. That Congress had in mind these broader definitions is confirmed by the words used in the Act, for by its terms it embraces religious, charitable, scientific, literary, or educational corporations, thus including in the exemption . . . those organizations designated charitable in the law of trusts. Consequently, we may properly draw analogy from trust cases.

Id.

In fact, Professor Bogert seems to imply that a conclusion that a trust is charitable for trust law purposes, means that it is necessarily tax exempt. BOGERT, *supra* note 101, at 201. This position may be too broadly stated. As Professor Scott points out, the issues of charitable status under the law of trusts, and under the tax laws are distinctly

ernmental burdens" standards, and had it undertaken the appropriate balancing process,¹⁰⁸ and had it then given weight to common-law trust adjudications with respect to charitable cemeteries, the case could well have been decided differently.¹⁰⁸

different and while ordinarily a charitable trust purpose will be entitled to a statutory exemption, "[i]t is to be borne in mind, however, that the statutes differ . . . and do not necessarily exempt all charitable organizations or trusts." IV A. SCOTT, *supra* note 100 at § 368. Indeed, as the Supreme Court of Connecticut has noted, "it may be to point out that a trust may be charitable even though it is taxable, for the Legislature can tax all charitable trusts or such only of them as are characterized by distinguishing elements." *The Westport Bank and Trust Co. v. Fable*, 126 Conn. 665, 673-74, 13 A.2d 862, 866 (1940).

A less sweeping conclusion than *International Reform Federation's* determination that all common law charitable trust purposes are perforce recognized as charitable purposes in the tax codes is found in *Girard Trust Co. v. Commissioner*, 122 F.2d 108 (3d Cir. 1941). There, the Third Circuit held that a temperance organization was eligible for deductible bequests, *id.* at 110, and raised the analogy to charitable trusts on its own motion. In determining what kind of political activity would be permitted a beneficiary of tax deductible bequests, the court considered what kind and degree of proselytizing activity was permitted the trustee of a charitable trust. *Id.*

A similar view, which concluded that charitable trust law provides a useful tool of interpretation in tax exemption cases was applied by the District of Columbia District Court in *Green v. Connally*, 330 F. Supp. 1152, 1159 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971), where the court denied tax-exempt status to a racially exclusive private school. The court noted that charitable trusts cannot be dedicated to purposes which are contrary to public policy, 330 F. Supp. at 1159 and concluded that a racially exclusive school could not be charitable, even though education is generally recognized in trust law as a valid charitable purpose, and is specifically mentioned in the Code as a tax exempt activity. The *Green* court noted that the interpretation of Code provisions by reference to the "common law background was meritorious," *id.* at 1161, and noted that "the common law of charitable trust can be used for construction of the Code." *Id.* at 1159 n.13.

The *Green* court's reasoning was similar to that used in *Eastern Kentucky Welfare Rights Organization* which focused on the fact that at any given time or place, the needs and values of a community change so as to make the concept of charitable flexible, reflecting the community's sense of which activities answer important needs and which ones violate important values. This emphasis in *Green* and in *Eastern Kentucky Welfare Rights Organization* thus focuses on the relative social gains and losses involved in granting tax benefits to a particular organization. This flexible case by case approach utilizing the balancing technique of the law of trusts, with due regard for prior decisions, is more reasonable than the rather slavish adherence to common law determinations of "charitable purpose" suggested by *International Reform Federation*.

¹⁰⁸ The dissent in *Child* did not examine the underlying rationale for the proposition that trust law provided a helpful analogy in tax cases. However, after stating the proposition that the analogy was "strong", 540 F.2d at 586-88, (Anderson, J., dissenting), the cases dealing with claims that bequests to certain cemeteries qualified as charitable trusts, were analyzed. *Id.* The dissent cited, among other cases, *Storr Burying Ground Ass'n. v. North Lane Cemetery Ass'n.*, 77 Conn. 83, 95, 58 A. 467, 469 (1904), for the proposition that a valid cemetery trust may be created where the cemetery is "open, under reasonable regulations to the use of the public for the burial of the dead." *Id.*, quoted in *Parker v. Fidelity Union Trust Co.*, 2 N.J. Super. 362, 390, 63 F.2d 902, 917 (1944) and *Davie v. Rochester Cemetery Ass'n.*, 91 N.H. 494, 495, 23 A.2d 377, 378 (1941). The dissent concluded that the Watertown Cemetery Association would have qualified under this standard as a beneficiary of a charitable trust, and, accordingly, should have been regarded as an organization dedicated exclusively to a charitable purpose.

NOTES

CONCLUSION

The fundamental issue before the court in *Child* was simply whether dedication of a substantial amount of tax-exempt money to care for a cemetery was sufficiently beneficial to the public to warrant the governmental revenue loss which would result. The *Child* court, by requiring cemeteries to show that they relieve the burdens of poverty in order to be eligible for estate tax deductible bequests, has reached a conclusion which is neither analytically sound nor adequately supported by law. By failing to recognize that relief of governmental burdens constitutes the underlying rationale for granting tax benefits to charitable organizations, the court imposed an arbitrary "relief of poverty" requirement on cemetery associations. The preferred approach both under the case law and by analogy to the law of charitable trusts would have been to balance the general public benefit, or degree of relief of governmental burdens against the social disadvantage occasioned by the revenue loss associated with allowing the deductions.

JAMES C. KNOX

Federal Courts—Diversity Jurisdiction—*Vaughan v. Southern Railway Co.*¹

Eldon Swain, a resident of Virginia, was killed in North Carolina when struck by a train operated by Southern Railway, a Virginia corporation.² The decedent's mother, Marie Swain, also a citizen of Virginia, qualified under the law of that state³ as administratrix of the Swain estate for the purposes of bringing suit against Southern Railway for wrongful death.⁴ It was determined that the most convenient place for trial would be the state of North Carolina, where the accident occurred and where all potential witnesses resided.⁵ The law of that state, however, required the appointment of a North Carolina resident as ancillary administrator in wrongful death actions.⁶ The

¹ 542 F.2d 641 (4th Cir. 1976).

² *Id.* at 642.

³ VA. CODE § 64.1-116 (1973).

⁴ 542 F.2d at 642. There were no assets in the Swain estate other than the wrongful death action. *Id.*

⁵ *Id.*

⁶ *Id.* at 642-43. N.C. GEN. STAT. § 28-8 (1966) provides: "The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify . . . (2) Is a nonresident of this State . . ." (for current version of provision see N.C. GEN. STAT. § 28A-4-2 (Supp. 1975)). N.C. GEN. STAT. § 28-173 (1966) provides:

When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefore, the person or corporation that would have been so liable, . . . shall be liable to an action for damages, to be brought by the executor, administrator, or collector of the decedent;