

THE BUCK TRUST¹

Much of the prevailing wisdom about the Buck Trust litigation is false. The case has been described as significant because of its impact on the legal “cy pres” doctrine (discussed below). Commentators have said that the San Francisco Foundation (the “Foundation”) was unsuccessful because the Trial Judge’s rulings “blocked” the Foundation from “presenting the heart of its case.”² Neither is accurate. Rather, the scope of the cy pres doctrine was and is narrower than the position taken by the Foundation. The Foundation and its attorneys knew this. Their hope was to change the law, which meant taking appeals to the higher courts in California.³ The Judge’s rulings were probably helpful — not harmful — in this context.⁴ Yet no appeal was ever taken, and the law was never changed.

1. Copyright © 1987 Harvey P. Dale. All Rights Reserved. (This version of the article is dated March 18, 1987.) Much of the factual material about the Buck Trust case, below, is taken from Statement of Decision, Superior Court of the State of California, County of Marin, In the Matter of the Estate of Beryl H. Buck, Deceased, No. 23259 (August 15, 1986), Homer B. Thompson, J. (hereinafter the Decision). Some of it, however, derives from newspaper and magazine articles, the Trial Briefs of the parties in the litigation, and personal interviews by the author. The facts are believed accurate through the date of writing: January 20, 1987. A forthcoming issue of the University of San Francisco Law Review is entirely devoted to the case, and will contain contributions from several of the attorneys who were involved in the litigation. It will also contain the text of the Statement of Decision.

2. The Council on Foundation’s FOUNDATION NEWS, July/Aug. 1986, at 6, said:

“But it was not name-calling that finally moved the San Francisco Foundation to withdraw. Having been blocked by California Superior Court Judge Homer B. Thompson from presenting the heart of its case . . . the foundation recognized that its request was headed for certain defeat.”

Other press reports also generally treated that ruling as a terrible blow to the Foundation’s case. Thus, the San Francisco Examiner, on July 13, 1986, wrote that the Judge’s ruling “removed the heart of the San Francisco Foundation’s legal case” The Marin Independent Journal, on July 12, 1986, asserted that the ruling “had gutted its case.” The Tribune (Oakland, California), on July 18, 1986, declared, “Thompson’s ruling left foundation attorneys floundering without a case.” Even the New York Times, on July 26, 1986, said that the Judge’s ruling “dealt a lethal blow” to the Foundation. The Council on Foundations’ Newsletter of August 1986 (Vol. 5, No. 12) said, “An evidential ruling by Judge Thompson early in the case made it difficult for the San Francisco Foundation to prove that the Trust ought to be modified under a ‘Cy pres’”

3. The attorneys for the Foundation do not concede that the law was clearly against them from the outset. It does appear, however, that they always felt their chances for victory were

The case presents fascinating questions about the behavior of the attorneys, the Foundation, and the charitable community in general. Exploration of these issues is clouded by a mystery: why was no appeal taken, and why was the ultimate settlement agreed to? The concluding portion of this paper addresses some of these questions. What follows is a statement of some of the facts, and a description of the litigation.

Background Facts

Frank Buck⁵ was a successful investor in Los Angeles real estate, and oil and gas, in the late 19th century. In 1911, Frank Buck and others founded Belridge Oil Company. When Frank Buck died, the Belridge Oil stock passed to his two sons, one of whom was Leonard. Leonard Buck became a medical doctor after studies at the University of California. Although he did teach pathology, without compensation, he never practiced, but instead concentrated on his investments. He met his future wife, Beryl, while at medical school. She was then training to become a nurse. They married in 1914. They never had children.

Leonard and Beryl Buck moved to the City of Ross in Marin County in 1935, and lived there the rest of their lives. When, in 1938, they moved out of their first Marin house to their new (and final) home next door, they sold the former to John Elliott Cook for \$20,000. He had been their attorney on a few prior occasions. He lived next to them for the rest of their lives, and became their friend and principal lawyer. He has lived in that same house for 49 years.

Leonard Buck predeceased Beryl by 22 years.⁶ He left his entire estate, including the Belridge Oil stock, to her. The Belridge Oil stock was listed “over the counter,” but was not actively traded.⁷

much greater in the appellate courts than at nisi prius.

4. See the discussion of offers of proof, below.

5. This Frank Buck has no relationship to the “bring ‘em back alive” character.

6. He died on December 23, 1953; she survived until 1975.

7. More than 95% of the Belridge Oil stock was then held by two major oil companies and three families. According to John Elliott Cook, Beryl Buck was familiar with the business and reserves of the company. She, like her husband, viewed the stock as their “crown jewel,” and thought it was worth much more than the traded price OTC. They both told John Cook not to sell it, but to hold until it became much more valuable.

Beryl Buck made substantial charitable gifts during her life. Many of them were given anonymously. Both Beryl and Leonard Buck loved Marin County. (Marin County is the second-wealthiest county in the U.S. Its 227,000 residents have an average household income of \$57,810.)⁸

Beryl Buck executed five wills from 1961 through 1973. The last was dated June 25, 1973. Mr. Cook was the principal draftsman. Each will provided for the creation of a charitable foundation, and each contained a limitation for the use of the funds within Marin County.⁹

8. The statistics come from Facts About Marin: The State of the County, 1985-1986, Marin Council of Agencies Update, vol. 6, no. 2, Fall 1986, at 3.

9. The Tenth Clause of Mrs. Buck's last will directed that the residue of her estate, to be known as The Leonard and Buck Foundation:

“shall always be held and used for exclusively non-profit charitable, religious or educational purposes in providing care for the needy in Marin County, California, and for other non-profit charitable, religious or educational purposes in that county.”
(Quoted in the Decision, p. 4)

Note that this language does not restrict the beneficiary class to Marin residents: as long as the funds are spent within Marin, the benefits can flow outside of the County. The quoted language was incorporated into a July 16, 1979, Stipulation for Final Distribution (“Stipulation”), among the Foundation, Mr. Cook, and Wells Fargo Bank, the trustees of the Buck Trust, which was also approved by the Attorney General of California. On December 17, 1979, the Court entered a preliminary Decree Establishing Trust, Distributing Assets Thereto, and of Preliminary Distribution (the “Preliminary Decree”). The Preliminary Decree also contained the quoted language. The Decree of Settlement of Second and Final Account and Supplemental Account of the Executor and of Final Distribution (the “Final Decree”), dated March 24, 1980, repeated the quoted language.

The last paragraph of the Tenth Clause of the will provides as follows:

“The assets hereof are irrevocably dedicated to charitable, religious or educational purposes. If the purposes specified herein cannot, at any time, be accomplished, the then remaining assets shall be distributed to such public charities, for charitable, religious or educational purposes, as the Court having jurisdiction in the matter shall determine proper.” (Quoted in the Decision, p. 14)

This paragraph was added by Mr. Farrell, who assisted Mr. Cook in the drafting of Mrs. Buck's final will, as a tax-savings clause to insure the deductibility of the charitable request.

John Elliott Cook had met and was impressed with John May, who — from the early '60's through the mid-'70's — was the Director of the San Francisco Foundation (the "Foundation"), a community foundation which serves the five Bay Area counties of Alameda, Contra Costa, Marin, San Francisco, and San Mateo. Like almost all such foundations, the Foundation's governing documents contain a so-called "variance power," intended to permit changes in purposes of charitable gifts with a flexibility much broader than permitted by the legal cy pres doctrine.¹⁰ John Cook, however, says he never knew of this "variance power," never discussed it with Beryl Buck, and was repeatedly assured by John May — orally and in writing — that the Foundation would be loyal to Mrs. Buck's wishes.¹¹ He testified that had he known of such a power, he would not have recommended the Foundation as trustee.¹² Each of Mrs. Buck's five wills named the Foundation as trustee of the Buck Trust.¹³

Beryl H. Buck died on May 30, 1975. Her will was admitted to probate on June 23, 1975. After protracted proceedings, the IRS allowed a charitable deduction to Mrs. Buck's estate in the amount of approximately \$11.7 million for her 69,156 shares of Belridge Oil stock.¹⁴ This represented a price of about \$170 per share. It had been trading OTC in a range of \$85 to \$126 per share. In 1979, the stock was sold to Shell Oil Company for \$3,665 per share, making the Buck Trust holdings worth \$253,456,740.¹⁵ The Foundation

10. The cy pres doctrine played a large role in the saga of the Buck Trust litigation. Both the variance power and the cy pres doctrine will be discussed further, below.

11. Trial Brief of Co-Trustee John Elliott Cook, January 23, 1986 (hereinafter Cook Trial Brief), at 9.

12. The "variance power" was never exercised. It required a unanimous vote of the Distribution Committee to invoke, and the committee was never able to vote unanimously on the question.

13. More accurately, the Foundation was named as distribution trustee, in contrast to the investment trustees, which were John Cook and Wells Fargo Bank.

14. The Internal Revenue Service had at first claimed that the Buck Trust would not qualify for an estate tax charitable deduction. On appeal to the national office of the Service, however, the deduction was allowed. This made moot the valuation question, because the entire residuary bequest became free from estate tax. Cook Trial Brief at 12.

15. Cook Trial Brief at 13. The present value of the trust assets is approximately \$450 million. That makes the Trust one of the twenty largest foundations in the country, and probably larger than any other community foundation.

knew of this higher value when it agreed to act as trustee of the Buck Trust, and accepted the funds in question.¹⁶

The Variance Power and the Cy Pres Doctrine

The Foundation had two paths from which to choose if it wanted to modify the Marin-only focus of the Buck Trust.¹⁷ First, it could proceed to invoke its internal variance power. This power, common to community foundations, permits variation of charitable objects from those originally fixed by the donor. No court proceeding is necessary. Such powers were the response of community foundations to a fear of the so-called “Dead Hand,” i.e., the need to adhere to inflexible-but-binding restrictive instructions of the donor long after his or her death, regardless of changed circumstances.¹⁸ Invocation of this power, in the case of the Foundation, required a unanimous vote of the Distribution Committee.

Second, the Foundation could petition the California courts to apply the cy pres doctrine.¹⁹ In its most common form, that doctrine is often described as follows:

“If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the

16. See note 9, supra. As the court said, “The Foundation accepted the Buck Trust fully cognizant of the increased value of its assets and of the administrative burden such a large trust would impose on a relatively small community foundation.” The Decision, p. 104.

17. No implication is intended that either route was free from legal risk. Indeed, use of either quite probably would have generated litigation, and -- as will be seen -- the selection of the latter certainly did.

18. The “Dead Hand” concern is long-standing. See, e.g., A. HOBHOUSE, *THE DEAD HAND* (Chatto & Windus, London 1880). The community foundation response (i.e., the use of variance powers) and the role of Frederick Harris Goff (a Cleveland lawyer who was peculiarly obsessed with the “Dead Hand” problem) are described in HOWARD, *TRUST FOR ALL TIME: THE STORY OF THE CLEVELAND FOUNDATION AND THE COMMUNITY TRUST MOVEMENT* (1963). Literature published by community foundations, and by their national organization, Community Foundations of America (which shares offices in Washington, D.C., with the Council on Foundations), historically has trumpeted the importance of the variance power. The Buck Trust case may have changed that, as discussed in the final portion of this paper, below.

19. “Cy pres” is an abbreviation of the Norman-French phrase, “cy pres comme possible,” which translates, “as near as possible.”

property to some charitable purpose which falls within the general charitable intention of the settlor.”²⁰

In the case of Beryl Buck’s will, the existence of “a more general intention to devote the property to charitable purposes” was clear.²¹ The only question was whether the gift’s restriction to Marin County made its purposes “impossible or impracticable or illegal to carry out.” None of the parties seriously argued that it was either “illegal” or “impossible” to carry out Beryl Buck’s wishes. Thus, the cy pres issue resolved itself into a question about the meaning of “impracticable.” Almost all legal observers agreed that the scope of that concept in existing precedents was probably not broad enough to encompass the views argued by the Foundation.²² The Foundation’s petition, then, was not likely to succeed unless the California courts adopted an expansive reading of “impracticability” for purposes of the cy pres doctrine.

The Cy Pres Controversy — Early Tremors

During the four years following the Final Decree, while “the Foundation administered the Trust, publicly proclaiming its commitment to carry out the terms of Mrs. Buck’s will,”²³

20. RESTATEMENT (SECOND) OF TRUSTS section 399 (1959). The literature analyzing the cy pres doctrine is vast. References are not here provided, but can be found, inter alia, in Comment, Cy Pres Inexpediency and the Buck Trust, 20 U. SAN FRAN. L. REV. 577 (1986).

21. See note 9, supra, for the language of the last paragraph of the Tenth Clause in the will.

22. See the legal memorandum quoted in note 26, infra. Also see generally Comment, Cy Pres Inexpediency and the Buck Trust, 20 U. SAN FRAN. L. REV. 577 (1986). Counsel for the Foundation have argued that, in California, “there is [sic] at least dicta” supporting their view, and that various commentators “appear to support the approach urged by the Foundation.” March 13, 1987, letter to the author from Stephen Bomse. But they did recognize, early on, that the appellate courts might be more favorably inclined to their position than a trial court.

23. The Decision, pp. 19-20. As late as January 4, 1983, Martin Paley, the Foundation’s Director, wrote a memorandum recommending against varying the Marin-only restriction, and arguing that there was ample opportunity for effective philanthropy within that County. The memorandum contains the following language:

“[T]he program, policies and processes of The Foundation as they relate to the Buck Trust in Marin County are in place and progressing satisfactorily. . . . [T]he level of acceptable and appropriate grant applications, both in number and dollar value, substantially exceeds the spendable income generated by the Buck Trust. I do not foresee any change in that condition, in which worthwhile requests exceed available income,

pressures were building to change it. Public Advocates, a public-interest law firm in San Francisco headed by Robert Gnaizda, began to argue that at least some of the Buck Trust funds should be used outside of Marin.²⁴ The California Attorney General also hinted that, at some point, a condition of “charitable surplus or saturation in Marin County” might exist.²⁵ Furthermore, even the Foundation itself had doubts — not publicly voiced at that time — about the geographical restriction.²⁶ Despite these doubts and pressure from the AG’s office, no needs assessment was undertaken.²⁷

within at least the next five years.”

(The letter is reproduced as exhibit B to the Attorney General’s Trial Brief, dated February 3, 1986 (hereinafter AG Trial Brief).)

24. See Cieply, Enhanced Lotus-Eating, FORBES, July 19, 1982, at 89 (quoting Gnaizda as saying, “It’s a perversion of philanthropy.”) The Trial Brief of the Foundation, dated January 23, 1986 (hereinafter Foundation Trial Brief), documents these criticisms, and those of the AG, at pages 31-36.

25. The AG so stated in obtaining a court order, in December 1980, requiring the Foundation to file annual reports about the Buck Trust. See Comment, Cy Pres Inexpediency and the Buck Trust, 20 U. SAN FRAN. L. REV. 577, 585 (1986) (quoting the “saturation” language). See also Brickley & Powledge, Marin County Legacy, or the Curse of the Buck Bucks, THE NATION, May 14, 1983, at 608. The AG also began to press for a study of needs in Marin County, and asked the Foundation to appoint an independent expert to conduct such a needs assessment.

26. Even before it accepted the Buck Trust, some people at the Foundation had serious concerns about its administration. As early as June 1979, the Foundation began to explore the possibility of modifying the geographical restriction of the Buck Trust. A legal memorandum dated July 26, 1979, directed to Mr. Harris, then vice-chairman of the Distribution Committee, as well as counsel for the Foundation, states, in reference to “the suggested petition” that:

“Although no United States court has as yet been as liberal in its application of the cy pres doctrine as the proposed petition would require, a tenable argument could nevertheless be made for application of the doctrine.”

The author -- who was a summer associate at the Foundation’s outside law firm -- concluded that:

“‘[c]haritable’ is so broad in scope that the San Francisco Foundation could never successfully argue on the basis of the will alone that Mrs. Buck’s intentions had been fully carried out.” (Quoted in the Decision, p. 20)

The possibility of changing the will arose at a meeting of the Distribution Committee and

On April 4, 1983, the Foundation convened a meeting with several persons it selected from the philanthropic community²⁸ to discuss questions of saturation, limits to giving, needs assessment, and ultimately, the basis, if any, for seeking a change in the Marin-only limitation in the Buck Trust.²⁹ A general consensus emerged in favor of some (unspecified) varying of

Foundation staff held on November 10, 1979, one month before the Preliminary Decree was entered. At that time, the Foundation considered “perhaps spending the money outside of Marin County.” At its June 1980 meeting, the Distribution Committee had a “brief discussion of the time period for seeking court release from the provisions of the Buck trust.” The following month, at its July 1980 meeting, the Distribution Committee discussed “(1) Marin’s capacity to utilize [the Buck Trust income] indefinitely, and (2) the question of court action regarding the provisions of the trust.” The Distribution Committee “agreed to follow the letter of the will until [the Foundation has] enough experience to determine that this is not feasible.”

27. Pursuant to a court order dated December 22, 1980, which initiated the monitoring proceedings, the Foundation filed five annual reports on its administration of the Buck Trust. None of these reports contained any assessment of the charitable needs in Marin County, or any systematic or comprehensive assessment of the impact of the Buck Trust grant making. “In fact, the Foundation has insisted that such [needs-assessment] studies are neither feasible nor useful.” The Decision, p. 29. Thus, in a January 21, 1983, response to the AG, the Foundation said it “has serious reservations concerning . . . the appropriateness of a ‘needs assessment’ or the ability of an expert to identify ‘objective needs’ in Marin County.” Foundation Trial Brief at 37. Despite the reservations of its Director, the Foundation did hire a consultant, Stephen M. Pittel, to study whether there was “a theoretical upper limit” for grant making in Marin. Dr. Pittel’s May 16, 1983, study concluded:

- “1. It is unlikely that any level of charitable giving will eliminate or significantly reduce the legitimate needs of a community.
- “2. It is unlikely that any level of charitable giving will necessarily have a harmful impact on a community.”

Quoted in the Decision, at 31, and in County of Marin’s Trial Brief, February 3, 1986 (hereinafter Marin Trial Brief), at 9. The study was not disclosed to the AG. AG Trial Brief at 22.

28. Those attending included Paul Ylvisaker of Harvard University, John Simon of Yale University, Susan Berresford of the Ford Foundation, Tom Layton of the Gerbode Foundation, and Tom Beech of the Minneapolis Foundation. Others in attendance included members of the Foundation’s Distribution Committee, Foundation management, and Foundation counsel. Foundation Trial Brief at 39.

29. The participants discussed “distribution of the Buck Trust outside of Marin County”

the terms of Mrs. Buck's will. At a Distribution Committee meeting two months later, an informal consensus developed to spend up to ten percent of the Buck Trust funds outside of Marin.³⁰ No vote was taken at that time.

When the Distribution Committee met in December of 1983, the informal consensus had evaporated. By then, several members of the Committee were opposed to changing the Marin-only restriction.³¹ On January 26, 1984, the Distribution Committee formally voted on the question of whether to use the Foundation's variance power to change the geographical limitation. Four members of the Distribution Committee voted for modification, two voted against, and one abstained from voting. Although this split prevented the Foundation from using its inherent variance power to modify the Buck Trust — because that power could only be exercised by a unanimous vote — the Foundation took the majority vote as sufficient authorization to commence a court proceeding to modify the Trust under the cy pres doctrine.³²

The Cy Pres Controversy — Court Proceedings

On Sunday morning, January 29, 1984, the Foundation announced to Marin County community leaders that it planned to file a petition for modification. The next day, the Foundation filed the petition and held a press conference to announce it.³³ As described by the Court:

and “alternatives to outside distribution,” including a proposal “treating Marin as a laboratory for developing models of social service delivery.” The Decision, p. 32. Martin Paley, the Foundation's Director, “observed that the Foundation staff is presently comfortable with Marin grantmaking, and it does not believe that the saturation level has begun to be approached.” Memorandum of Meeting Held April 4, 1983, quoted in Marin Trial Brief at 9. Robert Harris, a Distribution Committee member and attorney, stated that the “Distribution Committee has identified virtually no support for a ‘relative need’ approach.” Id.

30. Foundation Trial Brief at 41-42.

31. Foundation Trial Brief at 44.

32. The January 26, 1984, resolution of the Distribution Committee stated that it was “impracticable and inexpedient” to continue to spend all of the income from the Buck Trust in Marin County, and authorized the filing of a petition to modify the geographic restriction.

33. The Foundation did not inform the Buck Trust beneficiaries or Marin County of its intention to seek modification until the day before it filed the petition for modification. In addition, the Foundation did not consult with or even advise most of its staff members of its intention to seek modification prior to the filing of the petition.

“The Petition for Modification asked that, after a three-year transition period, the Foundation be permitted to spend an undefined portion of Buck Trust income outside Marin County in the four other Bay Area counties served by the Foundation. . . . The Foundation’s Petition . . . did not contend that all charitable needs in Marin County had been met, that distributing Mrs. Buck’s bequest in Marin County would be illegal or impossible, or that a condition of charitable saturation existed in Marin County. Rather, it contended that, due to the increase in the magnitude of the Buck Trust, the relative affluence of Marin County, and the relative needs in the other counties served by the Foundation, it was ‘impracticable’, ‘inexpedient’ and ‘inefficient’ to comply with the Will’s provision”³⁴

After extensive pre-trial disclosure proceedings, the trial began two years later, on February 3, 1986, before Homer B. Thompson, Superior Court Judge. Roughly three dozen lawyers were involved in the representation of the various parties.³⁵

Early during the trial proceedings, Judge Thompson ruled out evidence of comparable needs in other counties.³⁶ The Foundation did not reply with an offer of proof for several weeks, and its offer, when made, showed signs of having been prepared in some haste.³⁷

34. The Decision, pp. 1-2. This litigation theory led inexorably to a trial strategy which had a dramatic effect upon the Foundation and its staff: it made it necessary for the Foundation to prove that its prior grant-making activities in Marin County were less “efficient” than alternatives outside of that County. See the discussion of trial strategy impact, below.

35. Supporting the petition for modification, as intervenors, were the so-called forty-six objector beneficiaries, represented by Public Advocates; opposing it were the County of Marin, the Attorney General of California, the investment co-trustees (John Elliott Cook and Wells Fargo Bank), the Marin Council of Agencies (MCA), and, as *amicus curiae*, the Marin County Bar and the Pacific Legal Foundation. Finally, three intervenors -- the counties of Sonoma and Solano and the Regents of the University of California -- took no position on the propriety of modification, but sought a share of Buck Trust income should the modification be granted the court.

Concurrently with the Foundation’s petition for modification, the court considered (1) the petitions for the removal of the Foundation as trustee, filed by Marin County, John Elliott Cook, and the Marin Council of Agencies (the “removal petitions”), (2) a petition for instructions, filed by the Attorney General, and (3) a petition for instructions relating to certain grant-making policies, filed by the Foundation on April 17, 1986.

36. It was this ruling that commentators said “blocked” the Foundation from “presenting the heart of its case.” See note 2, *supra*.

37. A further discussion of offers of proof is deferred until later in this analysis, below.

On July 28, 1986, after nearly six months of trial, the Foundation collapsed. It dismissed its cy pres petition. It asked the court to permit it to resign as distribution trustee of the Buck Trust.³⁸ Its settlement agreement with most of the other parties provided that they would not bring actions against the Foundation, the Distribution Committee members, or Foundation employees for surcharge, and that the legal fees of the Foundation's attorneys would be paid out of the Buck Trust.³⁹ Larry L. Sipes, Esq., was appointed Special Master.

Notwithstanding the resignation and withdrawal of the Foundation, some of the intervenors,⁴⁰ who were not parties to the settlement, continued to urge the court to apply cy pres. The court was thus obligated to decide the legal issue. In an opinion filed on August 15, 1986, the court held that cy pres was not applicable on the facts at bar, and denied the petition for modification.⁴¹ No appeal was taken by any party from the Court's decision. It has now become final.

Postlude

Martin Paley has resigned as Director of the Foundation. The Foundation has laid off a substantial portion of its staff.

Counsel for the Foundation, although not directly disagreeing with the statements in the accompanying text, writes:

“[A]s you should be aware, it was not even necessary for the Foundation to make such offers in order to preserve fully its position on appeal. Be that as it may, I am satisfied that the offers of proof which were made by the Foundation during the trial were in all senses appropriate to the task and effectively done.” March 13, 1987, letter to the author from Stephen Bomse.

38. As described in the Decision, concurrently with that petition, the court heard the joint petitions of the County of Marin, the Marin Council of Agencies, and the AG for the appointment of a successor distribution trustee and a special master. All of these petitions were granted by the court after hearing on July 31, 1986, rendering moot the removal petition. In addition the AG and the Foundation dismissed their petitions for instructions. The Decision, p. 3.

39. Agreement dated July 25, 1986 (the “Settlement Agreement”), attached as Exhibit A to the Petition of the San Francisco Foundation to Resign as Distribution Trustee of Charitable Trust, dated July 28, 1986.

40. I.e., the so-called forty-six, represented by Public Advocates.

41. The Decision, op. cit. supra, note 1.

Legal fees were approved by the Court and paid to the attorneys in the litigation, out of the Buck Trust, in the aggregate amount of over \$12 million. Counsel for the Foundation received about \$3.9 million.

The Special Master and the new Marin County Foundation (as successor distribution trustee) have assumed their new roles. Parties are expected to submit their proposals for a “Big Project” in Marin County, with a final decision on that project to be made after further court hearings on it in August 1987.

Observations and Mysteries

Several matters remain for discussion: the offer-of-proof procedure, and why it was not eagerly exploited by the Foundation’s lawyers; the trial strategy of the Foundation’s counsel, and why its impact was not foreseen; and the use of the variance power by community foundations after the Buck Trust litigation. They will be considered in turn.

Offers of Proof

If a judge’s ruling excludes evidence at a trial, an offer of proof may be made instead. The party wishing to introduce the evidence prepares a statement — called an offer of proof — describing what the evidence would have shown had it been allowed. The judge’s ruling may then be challenged on appeal.⁴² In many ways, offers of proof are better than witnesses: they do not get confused, stutter, or stammer; they do not “break” under cross examination; it takes no trial time to use them; they do not request witness fees or other compensation; and, since they are prepared by lawyers, they often are more focussed on the legal issues than actual testimony.

The Judge’s ruling, excluding evidence of comparable needs in other counties, surely was foreseeable. The central legal strategy in the Foundation’s case involved proof of comparable needs, and was understood to require an expansive reading of cy pres which quite likely could not be resolved without an appeal to the highest court in California. An offer of proof might well have been the best way to get the ultimate legal issue decided. It is submitted that the Judge’s ruling, far from “blocking” the Foundation from “presenting the heart of its

42. For a general discussion of offers of proof, see E. CLEARY, MCCORMICK ON EVIDENCE 123-26 (3d ed. 1984), and authorities cited therein.

case,” was foreseeable and probably helpful to that case.⁴³ Yet the Foundation apparently did not have an offer of proof ready when the Judge ruled.⁴⁴

Trial Strategy Impact

The Foundation’s “charitable efficiency” theory required it to prove that more “efficient” and “effective” philanthropy could be carried on if funds were spent outside of Marin County. There were two inevitable consequences: first, the case required proof of needs outside of Marin; second, it required a showing of relative inefficiency within Marin. The first aspect was the subject of the Judge’s exclusionary ruling, discussed above, and thus no such evidence was introduced. Evidence as to the second aspect, however, was permitted. The Foundation’s counsel duly called witnesses to testify how the grant-making activities of the Foundation had been inefficient, i.e., to disparage the prior Marin County grants of the Foundation.

This had several painful consequences. The Foundation staff responsible for the grants in question felt attacked and undermined. Their morale was seriously affected, and they became angry at the Foundation for subjecting them to such “abuse.” The Marin County grant recipients felt betrayed and angered, and became much more aggressive both in their opposition to the Foundation’s petition and in favor of the removal petitions. The relationship between the grant maker and the grant recipients was deeply damaged, perhaps beyond any hope of repair.⁴⁵ The public image of the Foundation, which was now itself impugning the grants which it had so often before extolled, was seriously disfigured.

43. It was, of course, not helpful if the Foundation expected to prevail at the trial level, rather than having to pursue an appeal. But it seems unlikely that counsel would stake everything on a trial-level victory, given the state of the law on cy pres in California.

44. As mentioned above, the Foundation’s offer of proof was not submitted for several weeks after the Judge’s exclusionary ruling. See text at note 38, supra. No appeal, based upon the offer of proof, was ever pursued; although an application was made for leave to file an interlocutory appeal, it was denied. See note 37, supra, for comments of Stephen Bomse.

45. In an interview with the Pacific Sun, after the litigation had been settled, Marin County Counsel Douglas J. Maloney said:

“We required them to list every grant that they claimed was ‘inefficient’ so they put out a . . . ‘hit list.’ Up to that point a lot of Council of Agency members had been unwilling to go all out for removal of the foundation. But when agencies read that the foundation had called their grant ineffective or inefficient, they became really riled and a lot more militant in court. When (SFF program executive John) Kreidler testified, he said that all these arts organizations were inefficient and ineffective. The first question I asked him (on cross examination) was, ‘Do you realize that you’ve destroyed

There is reason to believe that the Foundation management had not realized the need to introduce such evidence of inefficiency at the trial.⁴⁶ It is quite clear that the effects of this

everyone's reputation?' From then on they were pussyfooting around, afraid to really go after any agency for fear they would alienate more agencies and get hit repeatedly with the same kind of cross-examination.

"Kreidler was one of their best witnesses, one of the smartest guys down there, and he just crashed and burned. Plus he got all those arts groups after him."

Zimmerman, SunInterview, Pacific Sun, August 1-7, 1986, at 5.

A more recent article says:

"To prove that Buck grants in Marin were 'inefficient' and would be better spent elsewhere, [the Foundation's counsel] tried to show how Marin groups wasted the money. To do so, [he] put San Francisco Foundation program directors on the stand to criticize Marin County charities that were receiving Buck grants. In Buck trial parlance, this became the famous 'hit list.' It was the turning point of the trial.

"'For years the foundation had told these people (the heads of charities) they were doing a good job,' [Yeoryios] Apallas [Deputy Attorney General of California assigned to the Buck Trial] says. 'Then all of a sudden they get handed a report card with failing grades.' The hit list galvanized the normally mild-mannered human-services counselors into a hard-bitten brigade of angry fighters on the witness stand."

Bartholomew, The Battle for the Buck, LOS ANGELES TIMES MAGAZINE, December 21/28, 1986, at 26-28.

46. Foundation Director Martin Paley says he had specifically asked whether such evidence would be required, because he was very troubled about that prospect. He says he was assured by counsel that it would not be necessary to impugn the Foundation's prior activities or its staff's competence. He says that if he had understood, in advance, that such evidence would be necessary, he would have opposed the litigation, and believes that almost all of the Distribution Committee members would have also. Counsel for the Foundation takes "strong exception" to this point, but does not feel free -- given its "obligation to maintain the confidences of our client" -- to describe what advice was given. Martin Paley, however, reaffirms (1) that the March 1983 memorandum from counsel (which outlined the litigation prospects) did not explain the need to impugn or impeach Marin grantmaking, (2) that he explicitly asked whether such testimony would be needed, and was advised that it would not be, and (3) that had he understood it in advance he would have urged against the suit. Conversation with the author, March 18, 1987.

sort of testimony were extremely deleterious to the Foundation, and probably had a significant effect upon its ultimate decision to settle the case on terms which amounted to total defeat.⁴⁷

Counsel for the Foundation, commenting on the above portion of this paper, says that

“the Foundation’s witnesses were careful not to impugn the Marin County grants within their four corners. Instead, the testimony uniformly given was that the Foundation had, in its view, done an extremely effective job of making grants in Marin County but was constrained from producing materially greater charitable benefits by the terms of Mrs. Buck’s will.”⁴⁸

But Martin Paley, the ex-director of the Foundation, affirms that the trial testimony in question “was the most unfortunate feature of our trial behavior.”⁴⁹ Most other observers agree.

Variance Power and Community Foundations

As mentioned above, community foundations usually provide for an internal variance power in their governing documents. This power, designed to avoid the “Dead Hand” problem, has often been touted as desirable.⁵⁰ Will it continue to be so advertised after the Buck litigation? Will such powers be exercised as frequently as before?⁵¹

47. It is not contended that this was the only or even the most important reason for the settlement. By the Spring of 1986, the membership of the Foundation’s Distribution Committee had changed significantly from what it had been in January 1984, when the vote authorizing the litigation was taken. Press reports about the case had turned from generally favorable towards the Foundation’s cy pres case to generally hostile to what had become to be perceived as “will busting.” An appeal to higher courts, always known to be at least a likely possibility, had become a clear necessity if the case was to be pursued. Other factors may also have played a part.

48. March 13, 1987, letter to the author from Stephen Bomse.

49. Conversation with the author on March 18, 1987. Mr. Paley said that the public perception of the testimony was “devastating,” and that it “was unrealistic to think you could go forward,” and have the public understand your view, on the basis of the distinction suggested by Mr. Bomse, i.e., that the Marin grants were quite effective but not as effective as others might have been outside of Marin. Mr. Paley reconfirmed that he was not advised adequately, in advance, of the need to impeach the Marin grantmaking at the trial.

50. See note 18, supra.

51. It is not known how frequently they have been exercised in the past.

There have always been fears that an overly-broad exercise of such a power, just like an expansion of the cy pres doctrine, might deter future charitable giving.⁵² Now added to that concern is heightened sensitivity to the “will busting” charges which came to dominate press and public reaction to the Foundation’s case. The Community Foundations of America placed a half-page advertisement in the New York Times Book Review on November 23, 1986. It urged readers to make contributions to community foundations. It never even hinted at the existence of any variance powers. It did say that donors:

“enjoy several unique benefits, including . . . the right to specify the purpose for which your dollars are to be used; and the assurance that your gift will live on in perpetuity, always carrying out the purpose you originally established.”⁵³

Conclusion

Even though the Buck Trust case did not illuminate cy pres law, it will continue to be discussed and contemplated because of its power to evoke deeper considerations about philanthropy. For example: what should be the minimum size of a “charitable” class? Under what circumstances should a trustee seek, or a court permit, variances from a donor’s original restrictive intent? To what extent does that turn on questions of what the donor actually wished — or might have wished?⁵⁴

52. Many statements to that effect can be found in the writings about the Buck Trust case. No empirical data are known to the author, however, which shed light on whether such a chilling effect does indeed occur. The U.K. Charities Act of 1960 adopted a quite dramatic expansion of the cy pres power. It would be interesting to find out whether any measurable decline in charitable giving resulted there.

53. NEW YORK TIMES BOOK REVIEW, November 23, 1986, at 27.

54. The Foundation, and some of its consultants, argued that Beryl Buck should not be presumed to have desired a Marin-only restriction for such an enlarged trust corpus. For example, Professor John Simon notes that most foundations observe some proportionality between the breadth of coverage and the amount of funds being distributed, which he calls the “philanthropic standard.” Referring then to “posthumous surprise,” he argues:

“The gift Mrs. Buck thought she was making was not inconsistent with that standard. But as it turned out, the gift she in fact made is so grossly out of line with that standard as to cause us to ask whether she would have wished to be the one exception to the standard -- or whether, instead, she would have wished to share some of her unexpected wealth with Marin’s neighbors served by the Foundation.” Professor John Simon — P.S. On “The Philanthropic Standard”, THE PHILANTHROPY MONTHLY, February 1986, at 20.

In the action itself, the Foundation was a real “loser.” In part, that seems to have been the result of the way its lawyers conducted themselves.⁵⁵ In part, it derived from the way the press treated the issues. In part, it eventuated from the apparently-changed views of the AG.⁵⁶ In part, it stemmed from a perceived loss of support for the Foundation’s position among the rest of philanthropic community.⁵⁷ In part, it may have followed from the simple wear and tear of the litigation process.⁵⁸ Other factors may have contributed.⁵⁹

John Elliott Cook, on the other hand, affirms that Mrs. Buck would have desired a Marin-only limitation regardless of the size of the bequest. The Court so found, stating:

“While Mrs. Buck may not have known the exact value of the residue of her estate before her death, she intended that the Buck Trust always be devoted to . . . Marin County irrespective of its value.” The Decision, p. 112.

If the issue is one of fact, and is to be gleaned from the documents, what may result is merely a change in drafting style. For example, Mrs. Buck’s Tenth Clause might have contained an extra sentence reading something like: “I intend the Marin-only limitation regardless of the value of my residuary estate,” In more terse form: “I really mean it!”

55. Counsel for the Foundation “strongly disagree.” They do not feel free, however, to describe their view of the reasons for the ultimate settlement, because of their view of their “obligations of confidentiality to the Foundation.” March 13, 1987, letter to the author from Stephen Bomse.

56. In the early days of the Buck Trust, the AG was articulating concerns about the Marin-only restriction, and discussing possible charitable “saturation.” By the time of the trial, the AG was aligned with Marin County in opposition to the petition of the Foundation. Although the AG’s staff articulates reasons for viewing its positions as always consistent, most observers disagree, and think a “flip-flop” occurred.

57. Martin Paley says that many of his friends from other foundations avoided the topic of the litigation, and would no longer discuss it with him.

58. It is tempting to suggest that the Foundation’s staff and the members of its Distribution Committee -- chosen or self-selected for quite different traits than those required for courtroom warfare -- were simply not “tough enough” to engage in protracted litigation. Martin Paley agrees. He adds that even the “outside” members of the distribution committee “were not comfortable with conflict or with difficulty” in their roles at the Foundation. Despite the willingness of some to litigate fiercely in other contexts (e.g., in a contested take-over suit), they adopted, he said, a “less demanding” stance and a “different style” when wearing their Foundation hats. Conversation with the author, March 18, 1987.

Attention should not be limited to post mortems, however. Of equal or greater importance will be future developments. As for Marin County, observers will have to watch carefully what now will happen with the Buck Trust, under its new trustee, the Marin County Foundation. In the broader charitable context, observers will scrutinize the conduct of the rest of the philanthropic community to see whether it becomes more cautious in administering gifts. Balanced judgment is still crucial. The Buck Trust case teaches a important lesson about appropriate fidelity to the wishes of a donor. It would be sad, however, if the Buck Trust trauma leads to undue timidity in making “risky” but creative grants, seeking variances, employing cy pres, and avoiding unnecessary adherence to “Dead Hand” restrictions.

59. As noted above, the membership of the Distribution Committee had changed between January 1984, the date of the vote to begin the litigation, and July 1986, the date of the settlement. (Martin Paley says that the “changes in the distribution committee were as significant as any other changes that took place.”) And, with the passage of time, the weaknesses in the Foundation’s legal position may have seemed more substantial.