



JONES DAY
COMMENTARY

PROVENA COVENANT MEDICAL CENTER v. DEPARTMENT OF REVENUE: ILLINOIS SUPREME COURT SUGGESTS NEW, NARROW TESTS FOR CHARITY CARE

On Thursday, March 18, 2010, the Illinois Supreme Court issued what will be a controversial opinion in the long-running saga of the *Provena Covenant Medical Center* real estate tax-exemption case in Illinois (available at http://www.state.il.us/court/Opinions/recent_supreme.asp). While all five justices agreed exemption was not proper for the 2002 tax year, the court failed to advance a unified rationale as to why the exemption was not available. As discussed below, three justices offered a very narrow view of what constitutes “charity” and “charitable use.” Because only three of the seven justices adopted this narrow view, and because a majority of the seven justices is required to hand down a binding, precedential decision, the *Provena* plurality’s pronouncements do not constitute the law, even in Illinois. That said, the plurality’s views will no doubt prove to be very controversial, and we can expect them to be discussed and debated across the country.

ESSENTIAL FACTS

The owner of the properties in question was Provena Hospitals, a 501(c)(3) organization affiliated with Provena Health, a 501(c)(3) Catholic health system. The properties in question consisted of 43 parcels of real estate located in Champaign County, Illinois. Tax revenues were shared among the county and a number of smaller governmental units. The plurality opinion considered each of these separate governmental units to have “granted” the tax exemption. There was no evidence in the record that any of these various governmental units had as part of its governmental purposes the delivery of health care, a factor the plurality deemed crucial to charitable use of the property.

Provena Hospitals had a policy of accepting all patients regardless of ability to pay, and no patient

who presented for care was denied care due to inability to pay for the service. The charity-care policy provided free or discounted care based upon a sliding scale tied to the federal poverty guidelines. It also had an asset test that would require payment even for those with incomes within the poverty guidelines if their assets indicated an ability to pay. Provena Hospitals would not classify a patient as eligible for discounted or free care under its charity-care policy until it had first verified that the patient did not have sufficient insurance (whether private or governmental) and could not otherwise afford to pay for the service under the guidelines in the charity-care policy. In other words, Provena Hospitals would bill for its services if it did not have sufficient information to determine eligibility; however, there were absolutely no examples of any patient being refused care for inability to pay. During the relevant tax year, Provena Hospitals did not advertise the availability of charity care, and it referred nonpaying patients to collection agencies. In addition, virtually all patients were paying patients through either private insurance, Medicare, Medicaid, or self-pay. Virtually all of Provena Hospitals' support came from fee income, and there was nothing in the record to indicate that there were material charitable contributions to Provena Hospitals, a factor the plurality found to be crucial under Illinois law. The plurality also did not consider the level of donations to any separately incorporated foundation or other affiliates.

ILLINOIS TWO-PART TEST FOR EXEMPTION

Under Illinois law, real property will be exempt if the owner of the property establishes, by clear and convincing evidence, both: (i) that the property is owned by an institution of public charity, and (ii) that the property is actually and exclusively used for charitable purposes and not with a view to profit.¹

¹ 35 ILCS 200/15-65 (West 2002).

The First Prong—Institution of Public Charity

As to the “institution of public charity” requirement, in *Methodist Old Peoples Home v. Korzen*,² the Illinois Supreme Court established a five-part test for whether or not an institution is an institution of public charity. The five criteria are: (i) the institution has no capital stock or shareholders; (ii) the institution *earns no profits or dividends but rather derives funds mainly from private and public charity* and holds them in trust for the purposes expressed in the charter; (iii) the institution dispenses charity to all who need it and apply for it; (iv) the institution does not provide gain or profit in a private sense to any person connected with it; and (v) the institution does not appear to place any obstacles in the way of those who need and would avail themselves of the charitable benefits it dispenses (emphasis supplied). The majority agreed that Provena Hospitals did not have sufficient evidence in the record to establish that it met the second criterion of the five-part *Methodist Old Peoples Home* test for charitable-institution status.

The Second Prong—Actually and Exclusively Used for Charitable Purposes

However, the plurality and the remaining justices differed dramatically on the meaning of “charity” for purposes of whether or not the property was “actually and exclusively used for charitable purposes.” In this regard, the plurality conflated the disjunctive listing of charitable uses in the common law into one and only one charitable use: lessening the burdens of government. Moreover, under the plurality's view, it is not enough to show that the use lessens the burden of the state or federal government. Under the plurality's view, the activity has to lessen the burden of the specific governmental units granting the exemption for the real property. Finally, under the plurality's view, to show that a use lessens the burden of a governmental unit, it has to be shown that the use of the property is both a *type* of use that is charitable under the plurality's narrow view and that the use is on *terms* that are charitable.

² 39 Ill. 2d 149, 156–57 (1968).

THE PLURALITY'S VIEW OF CHARITY CARE

While never expressly saying so, the plurality apparently agreed that giving away care on the premises without any intent ever to receive compensation for that care is a type of charitable use. However, the plurality made clear that, in order for free care to be on charitable *terms*, the applicant needs to show considerably more than merely never intending to receive payment. In this regard, the plurality indicated that some undefined quantum of care is needed. Merely having a policy of treating all comers regardless of ability to pay and never turning anyone away due to inability to pay is not enough. In the plurality's view, almost nothing Provena did was good enough. For example:

- Any Medicare or Medicaid shortfall was disregarded and was not considered charity care on the grounds that any payment disqualifies care as being charitable, and participation in the programs is voluntary, not mandatory.
- Emergency-room service provided to all patients presenting there was disregarded because it is mandated by state and federal law.
- According to the plurality, screening patients to ensure that they are really eligible for charity care before spending charitable assets is not the approach of a prudent fiduciary ensuring that charitable assets are spent only for charitable purposes; rather, it is the functional equivalent of a for-profit institution's approach to writing off a bad debt. Such arguments by the IRS have been soundly rejected at the federal level in the *St. David's Health Care* case.
- Provena was not allowed to "rationalize" the fact that it did not provide enough care just because it served all the indigent who applied for care. Instead, to the plurality, this was evidence that Provena was failing to carry out its Catholic health-care mission. In the plurality's view, if there were too few poor, uninsured, and underinsured in the area to meet the plurality's undefined quantum-of-care metric, then Provena should not operate there but should move its operations to where there were enough patients eligible for charity care.

- Ambulance subsidies did not constitute sufficient charitable activity because, among other things, the ambulances delivered patients to the emergency room, which was viewed as a feeder of patients to the hospital, which was viewed as operating for profit.
- Activities that promoted the health of the community, while providing a community benefit, were, in the plurality's view, not charitable.
- Training of community members and wellness activities were dismissed as marketing.
- Residency programs were dismissed on the grounds that Provena was paid for those programs.

THE DISSENT'S VIEW OF THE PLURALITY OPINION

Two of the five justices dissented from the overly restrictive charitable-use findings. The dissent took issue with the plurality's quantum-of-care metric, and it took issue with the notion that in order to be exempt, Provena Hospitals had to show that its charity care alleviated some identified governmental burden of one of the jurisdictions involved. As to the quantum-of-care point, the dissent concluded that the plurality had inserted a requirement into the statute which had not been there, thus usurping the legislative function, and that the quantum-of-care approach had been rejected by well-reasoned case law in other jurisdictions in favor of a more flexible community-benefit approach. As to the narrow view that the only use that is charitable is one that lessens the burden of the governmental unit granting exemption, the dissent said the plurality had turned a part of the rationale for exemption into a condition for exemption not found in the statute.

CONCLUSION

As noted, the *Provena Covenant* opinion settles the exemption issue for the 43 parcels of real property at issue for the 2002 tax year, but it does not establish any new law, even in Illinois. Charitable-care providers throughout the United States, however, can expect that state and local taxing jurisdictions across the country will look at the plurality opinion as a blueprint that can help them defeat real property exemption claims in their jurisdictions.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

James R. King

1.614.281.3928

jrking@jonesday.com

Tracy K. Stratford

1.216.586.7288

tkstratford@jonesday.com

Travis F. Jackson

1.614.281.3833

tfjackson@jonesday.com

David E. Cowling

1.214.969.2991

decowling@jonesday.com

Todd S. Swatsler

1.614.281.3912

tswatsler@jonesday.com

Charolette F. Noel

1.214.969.4538

cfnoel@jonesday.com

Gerald M. Griffith

1.312.269.1507

ggriffith@jonesday.com

David S. Boyce

1.213.243.2403

dsboyce@jonesday.com

Stephen G. Sozio

1.216.586.7201

sgsozio@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our “Contact Us” form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.