CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 08-8619 DIVISION: "B" SECTION I

SUSAN HENDERSON MONTGOMERY

VERSUS

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This memorandum is submitted in support of the motion for summary judgment filed by Susan Henderson Montgomery, plaintiff, appearing through Margaret Lobo, her agent and attorney-in-fact pursuant to a Durable Power of Attorney.

I - INTRODUCTION AND SUMMARY OF ARGUMENT

(A) Tulane's Actions in Closing Newcomb College.

This case seeks to overturn the unilateral, unjustified decision of the Board of Administrators of the Tulane Education Fund ("Tulane Board") to terminate a 120-year-old institution of higher learning -- the H. Sophie Newcomb Memorial College ("Newcomb College") -- which was established and maintained by several inter vivos donations and a significant testamentary bequest to the Tulane Board by Mrs. Josephine Louise Newcomb. The charge that Mrs. Newcomb placed on these gifts was that the Tulane Board establish, operate and maintain Newcomb.

The Tulane Board acknowledged, understood and implemented Mrs. Newcomb's charge for 119 years, during which time Newcomb College became an icon in the New Orleans educational landscape. More than that, Newcomb College was the first women's coordinate college in the United States, the first degree-granting college for women established within an American university, and a true pioneer in the women's education movement in this country. Newcomb College was the first model for other distinguished national women's colleges such as Barnard, Radcliffe and Pembroke. All of that was made possible by the sizable donations which Mrs. Newcomb offered and the Tulane Board eagerly accepted, subject to her charge. As defined by the Louisiana Supreme Court in the recent, related litigation in *Howard v. Administrators of the Tulane Education Fund*, 07-CA-224 La. 2008, 986 So. 2d 47 ("*Howard*"), such a charge imposes an obligation for "a performance, which the donee assumed with the donation." *Howard* at 56. After faithfully performing Mrs. Newcomb's charge for 119 years, the Tulane Board now seeks to redefine Mrs. Newcomb's donations in order to escape the charge (i.e., its performance obligation) on these donations and the terms of its acceptance. Tulane's actions violate the charge imposed on Mrs. Newcomb's donations and find no support in applicable Louisiana law.

(B) <u>Plaintiff Has Standing and a Right of Enforcement</u>.

In *Howard*, the Supreme Court of Louisiana upheld the right of a non-legatee, would-be heir of a donor/testator (termed by the Supreme Court as a "successor" - *Howard* at p. 57) to sue a universal legatee "on behalf of a donor/testator, to enforce alleged conditional donations *inter vivos* and/or *mortis causa*. *Howard* at p. 58. As to Mrs. Newcomb, Plaintiff substantiates in this memorandum in support that she is a member of the class of

Mrs. Newcomb's successors (non-legatee, would-be heirs) whose right to sue to enforce the conditional donations of Mrs. Newcomb was established by *Howard*.

(C) Relief Sought by Plaintiff.

Plaintiff has prayed for and now moves for summary judgment, as follows:

1. Confirming that Mrs. Newcomb's *inter vivos* and *mortis causa* donations to the Tulane Board were subject to a charge;

2. Confirming that such charge was that the Tulane Board maintain and operate Newcomb College;

3. Confirming that the Tulane Board acknowledged, accepted and performed this charge on Mrs. Newcomb's *inter vivos* and *mortis causa* donations from 1886 to 2005; and

4. Enforcing the charge on Mrs. Newcomb's *inter vivos* and *mortis causa* donations by ordering the Tulane Board to reopen and operate Newcomb College in the same manner and condition as it was so operated prior to its closing, and to restore the Newcomb College endowments.

II - SUMMARY JUDGMENT IS THE APPROPRIATE PROCEDURE TO RESOLVE THIS CASE

(A) Summary Judgment.

Under La. C.C.P. art. 966(A)(2), summary judgment is the "favored" procedure "to secure the just, speedy, and inexpensive determination of every action." Under art. 966(A)(1), the "plaintiff's motion may be made at any time after the answer has been filed." See *Bourgeois v. Curry*, 921 So. 2d 1001, 2005-0211

(La. App. 4 Cir 2005), *writ denied*, 926 So. 2d 549, 2006-0208 (La. 4/24/06).

Article 966(C)(1) provides that "[a]fter adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted." Plaintiff filed this suit on August 20, 2008, and over the last nine months, the Tulane Board has conducted paper discovery and depositions in this case, and thus has had full opportunity for adequate discovery.

(B) No Genuine Issues as to a Material Fact.

Plaintiff asserts that there are no genuine issues as to a material fact in this case. All of the facts set forth in Part I above and in Plaintiff's Petition for Declaratory Judgment and to Enforce Condition and/or Charge are supported by the Statement of Uncontested Facts in Support of Motion for Summary Judgment, with attached Exhibits. Further, as discussed, this litigation is related to and grew directly out of the *Howard* case, in which Tulane conducted adequate discovery and which has a largely overlapping set of exhibits submitted by the Plaintiffs in that case and the Tulane Board. The attached affidavit of John F. Shreves, counsel for plaintiff, identifies and attaches certain exhibits, constituting ancient documents admitted into evidence in the *Howard* litigation, or which have been a matter of public record for many years, which are here offered again in support of Plaintiff's Motion for Summary Judgment. In addition, Plaintiff particularly calls the attention of the Court to all of the documents attached to the Affidavit of Margaret Lobo, filed in this proceeding.

(C) Plaintiff is Entitled to Summary Judgment as a Matter of Law.

Plaintiff's motion for summary judgment is unquestionably timely, and the procedure is uniquely appropriate to this case for several compelling reasons. First, as a factual matter, the case will be determined almost entirely by historical documents such as Mrs. Newcomb's Will, the correspondence accompanying her *inter vivos* gifts and the Tulane Board's resolutions. As we shall see, those historical documents effect Mrs. Newcomb's donations, place her clear charge on their use, and evidence the Tulane Board's acceptance and performance of that charge for 119 years. The authenticity and genuineness of those documents is beyond dispute.

Second, determining Mrs. Newcomb's testamentary intent from her Will is a question of law. "When a testator's intent is at issue, the court must first determine whether the language in the testament is clear. This determination is made on the 'four corners' of the testament and is a question of law." In Re: Succession of Terral, 39,554 (La. App. 2 Cir. 4/6/05), 900 So.2d 272, 275 (citations omitted).

Finally, the law governing the resolution of this case has been clearly set forth by the Supreme Court of Louisiana in the related *Howard* litigation. Although the parties will undoubtedly argue over the implications of those documents and the proper interpretation and application of the *Howard* decision, it is undisputed this case will be decided on the basis of those documents and *Howard*. Thus, all of the necessary elements are already in place for the final resolution of the case by summary judgment.

III - THE RELATIONSHIP OF THIS LITIGATION AND THE *HOWARD* CASE

On May 16, 2006, Parma Matthis Howard and Jane Matthis Smith filed a Petition for Preliminary Injunction, Permanent Injunction, and for Declaratory Relief (the "Petition") against the Tulane Board in this Court. The Petition was heard on June 12, 2006, and, by Judgment dated June 29, 2006, this Court denied the plaintiffs' requested relief. Although the Tulane Board had filed peremptory exceptions of no right of action and no cause of action, and the plaintiffs had filed a responsive opposition, the Court did not rule on those exceptions. However, in its written Reasons for Judgment, this Court noted that a **"clear reading of Mrs. Newcomb's will shows that she intended for Tulane, as universal legatee, to use the balance of her estate to maintain a women's higher education college."** But inconsistently, the court then stated that "Mrs. Newcomb's will did not create an enforceable conditional obligation that would support the granting of a preliminary injunction prohibiting Tulane from abolishing Newcomb College as a separate college within Tulane University."

Plaintiffs timely appealed, and on October 22, 2007, the Fourth Circuit Court of Appeal in a 2-1 decision affirmed this Court's ruling. The majority did not address the merits of the Petition, but rather affirmed on a different ground, that the plaintiffs did not have a right of action in this matter, and remanded the case to the trial court "with instructions to grant the exception of no right of action and to dismiss the [Plaintiffs'] petition for preliminary injunction." Judge Max Tobias dissented, noting that the majority's ruling found no support under the facts of this case or in applicable Louisiana law and jurisprudence.

On February 22, 2008, the Louisiana Supreme Court granted writs in the *Howard* case and ultimately reversed the Fourth Circuit, ruling that **Mrs. Newcomb's non-legatee, would-be heirs have the requisite standing to bring an action to enforce any conditions or charges on her universal bequest to the Tulane Board.** The Supreme Court did not address whether Mrs. Newcomb's universal bequest was subject to a charge or condition but instead remanded the case to this Court for a determination as to whether the plaintiffs were, in fact, Mrs. Newcomb's successors.

Although related by blood to Mrs. Newcomb, the plaintiffs in *Howard* were not Mrs. Newcomb's successors, as defined by the Supreme Court in that case. Therefore, the plaintiffs voluntarily dismissed the *Howard* action.

On August 20, 2008, Susan Henderson Montgomery filed the present action against the Tulane Board, which was randomly assigned to Division I ("*Montgomery*"). In September 2008, the Tulane Board filed a Motion to Transfer and an Ex Parte Motion to Supplement Record. Both filings requested that *Montgomery* be transferred to Division B, where the *Howard* case was tried, because both cases involve the same defendant (the Tulane Board), the same facts, the same attorneys and the same legal issues. The Tulane Board subsequently filed an Answer and Affirmative Defenses in this action. Mrs. Montgomery filed a No Opposition to Motion to Transfer, and, on October 21, 2008, this Court signed an Order transferring *Montgomery* from Division I to this Division B.

IV - MRS. MONTGOMERY CLEARLY HAS THE REQUISITE STANDING TO MAINTAIN THIS ACTION

In its Answer, the Tulane Board raised the following affirmative defenses: (1) Mrs. Montgomery does not have standing to bring this action; (2) even if she has standing in this case,

she does not have a right of action with respect to funds not donated by Mrs. Newcomb to the Tulane Board; and (3) Mrs. Montgomery has no cause of action against the Tulane Board in this matter. The Tulane Board reserved the right to file the exceptions of no right of action and no cause of action after completing discovery, although this reservation of rights was unnecessary under Louisiana Civil Code of Procedure article 928B. In anticipation of these exceptions, Mrs. Montgomery addresses in this memorandum her right to bring this action against the Tulane Board and her right to seek enforcement of the charge to which Mrs. Newcomb's *inter vivos* and *mortis causa* donations (the "Donations") were subject.

(A) Mrs. Montgomery's Right of Action.

The function of an exception of no right of action is to determine of whether the plaintiff belongs to the class of persons who may assert the cause of action asserted in the petition. La. C.C.P. art. 927; *Turner v. Busby*, 03-3444, (La. 9/9/04), 883 So. 2d 412, 415. The focus is on whether the particular plaintiff has a right to bring the suit, and it assumes that the petition states a valid cause of action for some person and questions whether the plaintiff is such a person. *Badeaux v. Southwest Computer Bureau, Inc.*, 05-0612 (La. 3/17/06), 2006 WL 668724 (La. 2006); *Reese v. State Dept. of Public Safety and Corrections*, 03-1615 (La. 2/20/04), 866 So. 2d 244.

In *Howard*, the Supreme Court addressed whether Mrs. Newcomb's would-be heirs, or would-be intestate successors, had a right of action against the Tulane Board, as Mrs. Newcomb's universal legatee, to enforce the charge to which her donations to the Tulane Board were subject. The Tulane Board consistently took the

position in *Howard* that, under Louisiana law, no one had such a right of action against a universal legatee. The Supreme Court, however, rejected this position and granted to Mrs. Newcomb's would-be heirs both the right of action and the cause of action described above. As stated by the Supreme Court:

> Because revocation of a universal donation mortis causa would redound to the benefit of the intestate successors, **would-be heirs have the right to bring suit to enforce the charge in conjunction with their right to seek revocation.** Once again, however, the right accrues to an individual in his capacity as a successor.
>
> The principles of equity further support this resolution. *See generally*, La. Civ. Code art. 4. If the would-be heirs had no action to proceed against the universal legatee, then the legatee could default on his obligations with impunity and Articles 1559 and 1601.1 would exist without effect.

Howard at p. 59 (emphasis added).

Of first importance then is whether Mrs. Montgomery falls within the class of Mrs. Newcomb's would-be heirs, or would-be intestate successors. To be within this class, Mrs. Montgomery's right of action would have to have been transmitted to her through the chain of testate and/or intestate successions originating with Mrs. Newcomb's fictitious intestate estate. As outlined below, Mrs. Montgomery is squarely within this chain.

Mrs. Montgomery's successorship to Mrs. Newcomb, substantiated by documents attached to the Affidavit accompanying the *Montgomery* Petition, is as follows:

Alexander Louis LeMonnier married Mary Sophia Waters on February 7, 1809, in Baltimore, Maryland, of which marriage, three children were born, namely Victor Louis LeMonnier, Eleanor Ann LeMonnier and Josephine Louise LeMonnier.

Victor Louis LeMonnier died unmarried and without descendants in 1837.

Josephine Louise LeMonnier married Warren Newcomb in 1845, from which marriage two children were born, namely Warren, who died in childbirth, and Harriott Sophie. Mrs. Newcomb's husband died testate in 1866, leaving his entire estate to his wife and daughter. Harriet Sophie Newcomb died on December 16, 1870.

Mrs. Newcomb's sister, Eleanor Ann LeMonnier, married William Henderson, from which marriage four children were born, namely Howard Henderson, Warren Henderson, William Henderson and Victorine Sophia Henderson ("Victorine #1"). William Henderson, Sr., died on May 1, 1870. Eleanor Ann Henderson died on July 27, 1880, survived by her four children.

Mrs. Newcomb died testate on April 7, 1901. Had Mrs. Newcomb died intestate, her intestate estate would have devolved under Louisiana Civil Code Article 912 (1870), as that article was in effect in 1901, to her deceased sister's children by representation, one of which was Victorine #1. Under the *Howard* decision, Mrs. Newcomb's right of action to enforce the charge on her Donations passed in part to Victorine #1 as one of Mrs. Newcomb's would-be heirs.

Victorine #1 married Michael C. McCarthy, from which marriage one child was born, namely Victorine LeMonnier McCarthy ("Victorine #2"). Victorine #1 died intestate in 1903 in the State of Kentucky, and under Chapter 251, Paragraph 11, of the Acts of the General Assembly of the State of Kentucky (1893) in effect in 1903, her estate, which included her right of action to enforce the charge on Mrs. Newcomb's Donations, devolved to her husband and to her daughter, Victorine #2.

Victorine #2 married Charles F. Westman, from which marriage one child was born, namely Victorine H. Westman ("Victorine #3"). Victorine #2 died intestate in 1922 in North Carolina, and under Chapter 29, Rule 1, of the Consolidated Statutes of the State of North Carolina in effect in 1922, her estate, which included her right of action to enforce the charge on Mrs. Newcomb's Donations, devolved to Victorine #3 as her only child.

Victorine #3 married Howard C. Henderson, from which marriage Susan Henderson Montgomery was born. Victorine #3 died testate in 1974 in Massachusetts and, by virtue of her Last Will and Testament, her estate, which included her right of action to enforce the charge on Mrs. Newcomb's Donations, devolved to Susan Henderson Montgomery, as her residuary legatee.

Therefore, through the intestate and testate successions of Mrs. Newcomb's would-be heirs (or intestate successors), Susan Henderson Montgomery is a successor of Mrs. Josephine Newcomb and under the *Howard* decision has unquestionably inherited a right of action to enforce the charge on Mrs. Newcomb's universal bequest to the Tulane Board.

(B) Mrs. Montgomery's Cause of Action.

The purpose of the peremptory exception of no cause of action under Louisiana Civil Code of Procedure art. 927(4) is to question whether the law extends a remedy to the plaintiff and against the defendant under the factual allegations in the petition. In other words, the peremptory exception of no cause of action tests the legal sufficiency of the petition. The exception is triable on the facts of the petition and, for the purpose of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. See *Industrial Companies, Inc.*

v. *Durbin*, 02-0665 (La. 1/28/03), 837 So. 2d 1207, 1213. A petition should not be dismissed for failure to state a cause of action unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. *Fink v. Bryant*, 01-0987 (La. 11/29/01), 801 So. 2d 346, 349. Every reasonable interpretation must be accorded the language of the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial. *Jackson v. State ex rel. Dept. of Corrections*, 00-2882 (La. 5/15/01), 785 So. 2d 803, 806.

Under the well-pleaded facts in her Petition for Declaratory Judgment and to Enforce Condition and/or Charge, which the court must accept as true, Mrs. Montgomery clearly states a cause of action against the Tulane Board. These well-pleaded facts are as follows:

Mrs. Newcomb's initial $100,000 donation to the Tulane Board on October 11, 1886 was for the purpose of establishing and maintaining Newcomb College. Mrs. Newcomb's letter that accompanied this donation (Exhibit 2) clearly expresses the motivation for this initial donation and the charge which Mrs. Newcomb placed on that donation - establishing, developing and maintaining the H. Sophie Newcomb Memorial College that would last forever:

> When my beloved daughter was taken from me, I determined to devote that portion of her father's estate which would have been hers, to a memorial that would enshrine her memory **in a manner best fitted to render useful and enduring benefit to humanity.** It seemed to me more appropriate that her gentle and pious life should be built into some work of the spirit **that should go on year by year doing good....** (Exhibit 2).(Bold emphasis added).

Brandt Dixon, brought to New Orleans by the Tulane Board and offered the presidency of the as-yet unborn Newcomb College, noted the relatively small size of the initial donation and recommended that it simply be added to the Tulane Fund and the university opened to women. He quickly realized his suggestion was a non-starter. "This, of course, was not acceptable, because such action would not accord with the intent of the donor...." (Exhibit 10, p. 22).

Over the next fifteen years, Mrs. Newcomb donated an additional $858,142 to the Tulane Board for purposes of developing and maintaining Newcomb College, which funds the Tulane Board accepted and used strictly for those intended purposes. During these fifteen years, Mrs. Newcomb often expresses her unwavering commitment to the development and permanent success of Newcomb College as a permanent and lasting memorial to her daughter:

> I want everything in keeping with the memorial, **lasting**, plain and handsome (Feb. 22, 1888, Vol. II, f. 405-7. (Exhibit 12, Volume IV, Brief on Behalf of Respondent Brandt V. B. Dixon, page 248). (Bold emphasis added).

> I think no more fitting memorial of my child could I have thought of, **which will remain forever**, a monument and memento to her memory. Such a memorial I consider better that statutes or monuments, to be a benefit to so many in giving knowledge, which is power, and can't be taken from you except through affliction and death. (Vol II, f. 445-9). [May 8, 1889]. (Exhibit 12, Volume IV, Brief on Behalf of Respondent Brandt V. B. Dixon,page 251). (Bold emphasis added).

These clearly are the words of a patron and founder who saw Newcomb College as a permanent gift, and for whom it had become her life's work and passion.

Consistent with everything she had done for Newcomb College over the previous fifteen years, Mrs. Newcomb bequeathed her residuary estate (to be valued at $2,668,410 at the time of her death) in her Last Will and Testament to the Tulane Board as her universal legatee "...for the present and future development of [Newcomb College], which engrosses my thoughts and purposes, and is endeared to me by such hallowed associations." The Tulane Board accepted Mrs. Newcomb's testamentary bequest subject to the "conditions and limitations therein imposed" (Exhibit 4); that is, the charge that it be used to develop and maintain Newcomb College. Thereafter, in keeping with Mrs. Newcomb's intent and the charge on her donations to it, the Tulane Board operated and maintained Newcomb College for 119 years as a separate, coordinate women's college.

There are many examples over the years of the Tulane Board's commitment to Mrs. Newcomb's charge, some very recent. In 1910, certain administrators of Tulane University proposed using the funds bequeathed by Mrs. Newcomb to the Tulane Board for purposes not associated with Newcomb College. Brandt Dixon, then President of Newcomb College, expressed his opinion that many of the "older members of the Board had died, and some of the new members did not seem to realize entirely well the peculiar conditions of this memorial donation," (Exhibit 10, page 126), and that such an appropriation "would involve a violation of trust, a view the Board evidently held." (Exhibit 10, page 149). In keeping with the intent of Mrs. Newcomb as expressed in her Will, the Tulane Board dedicated all revenues from the Newcomb funds to purposes associated with Newcomb College.

Further, in connection with organizational changes to Newcomb College in 1987 and in response to the concerns of the Newcomb

College alumnae with these changes, the Tulane Board stated the following in the Policy Statement section of its resolutions, dated November 19, 1987:

> Newcomb College will continue to function as a distinct collegial entity within the University. It will retain a separate, clearly defined entity....The Board believes that the resolutions described below constitute **a forceful and positive reaffirmation of Newcomb College as Tulane's coordinate college for the liberal arts education of women.** (Exhibit #6, p. 6). (Bold emphasis added.)

So too, on May 16, 1996, the Tulane Board unanimously voted to return $13,000,000 to Newcomb College and dedicated this money as "unrestricted funds functioning as endowment for Newcomb purposes, effective July 1, 1996." In its resolutions unanimously approved at that time, the Tulane Board once again affirmed its commitment to Newcomb College:

> RESOLVED, That the Board of Administrators hereby affirms its recognition of the unique and historic mission of Newcomb College to educate women and its commitment to preserve the fundamental spirit and special qualities that have distinguished it during its 100-year history.

(Exhibit 6).

Then came Hurricane Katrina on August 29, 2005. In response to the damage caused by Hurricane Katrina, the Tulane Administration adopted a Plan for Renewal (the "Renewal Plan"), which, among other things, suspended admissions to Newcomb College. (Exhibit 8). The Tulane Board approved the Renewal Plan on December 8, 2005 (Exhibit 9), and on March 16, 2006, the Tulane Board approved the Newcomb-Tulane Task Force Recommendation closing Newcomb College, replacing it with the H. Sophie Newcomb Memorial College Institute (the "Institute") (Exhibit 11) and diverting the Newcomb College endowments toward other purposes. The Institute

has no academic standing and is not a separate, coordinate college for women. It certainly is not a college for the education of girls and young women, as intended by Mrs. Newcomb and faithfully executed by the Tulane Board for over a century.

Although the Tulane Board's closure of Newcomb College occurred after Hurricane Katrina, noteworthy is that **the Tulane Board has never argued in this or any other case that it closed Newcomb College due to the damage cause by Hurricane Katrina.** The Tulane Board has consistently argued that it closed Newcomb College because Mrs. Newcomb's donations to it were unrestricted and without a charge, and, therefore, that it had no legal obligation or mandate to maintain Newcomb College.

The closure of Newcomb College by the Tulane Board constitutes a clear and willful violation of the charge that Mrs. Newcomb placed on her donations and which the Tulane Board acknowledged, accepted and performed for 119 years. Pursuant to the ruling in *Howard*, Mrs. Montgomery, as a would-be heir of a Mrs. Newcomb, has a right to bring this action to enforce the charge to which Mrs. Newcomb's donations were subject, that being to operate and maintain Newcomb College as a separate, coordinate college for women.

V - MRS. NEWCOMB'S CLEAR INTENT WAS TO ESTABLISH ESTABLISH AND MAINTAIN A COLLEGE FOR THE EDUCATION OF GIRLS AND YOUNG WOMEN

The roadmap for this case provided by the Supreme Court's opinion in the *Howard* litigation clearly establishes that there is a remedy under Louisiana law for the successors of Mrs. Newcomb (her non-legatee, would-be heirs) to enforce the charge on her donations. As mentioned, the Tulane Board unsuccessfully argued in *Howard* that, as Mrs. Newcomb's universal legatee, it alone can

judge the appropriateness and legality of its actions regarding her donations and that these matters are no business of the community being served, Mrs. Newcomb's successors or descendants, or the courts of Louisiana.[1]

However, the *Howard* litigation specifically left open two issues which the Plaintiff must prove in this case: (1) her standing to maintain this action and to enforce the charge on Mrs. Newcomb's donations, and (2) that Mrs. Newcomb's *inter vivos* and testamentary gifts were subject to the charge that the Tulane Board establish and maintain Newcomb College as a separate, coordinate women's college within Tulane.[2] Having already established that she possesses both a right and a cause of action, the Plaintiff now demonstrates that, as a matter of law, that Mrs. Newcomb's donations were subject to, and the Tulane Board acknowledged and accepted the donations under, a specific expectation of performance (i.e., a charge) -- that the Tulane Board establish and maintain Newcomb College as a separate college for women within Tulane University.

(A) Mrs. Newcomb's Intent Is of Paramount Importance.

The Louisiana Supreme Court has consistently ruled over the years that **the cardinal rule regarding the interpretation of a testamentary bequest is to determine the intent of the testator.** See, *e.g.*, *Succession of Williams*, 608 So.2d 973, 975 (La. 1992) ("The intent of the testator is the paramount consideration in

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[1] This basic divergence in the plaintiff's and defendant's views of the case highlights its importance in the increasingly litigious areas of the enforcement of a donor's intent in making gifts to charitable institutions. Plaintiff submits that if Tulane were held accountable to use such gifts as their donors intended, and Tulane accepted at the time, confidence would increase in the philanthropic community and there is every likelihood donations would increase also, to the overall benefit of Tulane and Newcomb College.

[2] Supreme Court opinion in *Howard* litigation, p. 17.

determining the provisions of a will."); Carter v. Carter, 332 So.2d 439, 441 (La. 1976) (the function of the court is to determine and carry out the intention of the testator if it can be ascertained from the language of the will); and *Succession of Stewart*, 301 So.2d 872, 877 (La. 1974) (the first rule in will interpretation cases is to ascertain the intention of the testator).

This jurisprudence is based upon La. C.C. art. 1611A, which provides in pertinent part:

> The intent of the testator controls the interpretation of his testament. If the language of the testament is clear, its letter is not to be disregarded under the pretext of pursuing its spirit. The following rules for interpretation apply only when the testator's intent cannot be ascertained from the language of the testament. In applying these rules, the court may be aided by any competent evidence.

In order to interpret a testamentary bequest, the trial court must first determine whether the language in the testament is clear. If the language of the will is free of ambiguity, the will must be carried out in accordance with its written terms, without reference to extrinsic evidence. *Succession of Williams, supra*, at p. 975. In addition, where there is a choice between two interpretations, one effectuating and the other defeating a testator's intention, La. C.C. art. 1612 requires the court to interpret the will with a meaning that renders it effective and not one that renders it ineffective. See also *Carter, supra*, at p.441 (quoting *Succession of LaBarre*, 179 La. 45, 48, 153 So. 15, 16 (1934)).

This Court has already determined the intent of Mrs. Newcomb in her Will; in its written Reasons for Judgment in the *Howard* case, this Court stated the following:

> La. C.C. arts. 1611 through 1616 provide that "the trial court must ascertain the intent of the testator and that the testator's intent must be given effect." Succession of Cottrell v. Quirk, 05-841 (La. App. 3 Cir. 2/1/06); 921 So.2d 1235, 1238. **A clear reading of Mrs. Newcomb's will shows that she intended for Tulane, as universal legatee, to use the balance of her estate to maintain a women's higher education college.** (Emphasis added.)

This Court correctly followed Louisiana law in determining Mrs. Newcomb's intent: it reviewed the language of Mrs. Newcomb's testament; it found the language of the testament to be clear; and it determined Mrs. Newcomb's intent without reference to extrinsic evidence. Plaintiff's argue that this Court should in this case reaffirm its determination of Mrs. Newcomb's testamentary intent in the *Howard* case. This Court's reaffirmation of its ruling in the *Howard* case that Mrs. Newcomb's clear testamentary intent was for the Tulane Board to use her bequest to maintain a women's higher education college is significant for several reasons.

(B) <u>Implementing Mrs. Newcomb's Intent</u>.

The Louisiana Supreme Court has stated that "the function of the courts is to carry out the intention of the testator" (*Succession of Bel*, 377 So.2d 1380, 1383 (La. App. 4 Cir. 1980), citing *Succession of Stewart, supra*). With a reaffirmation of its ruling in the *Howard* case that Mrs. Newcomb's clear testamentary intent was that the Tulane Board use her bequest to maintain a women's higher education college, the trial court's next function is to implement that intent. As noted by Judge Tobias on page 8 of in his dissenting opinion in the Fourth Circuit decision in the *Howard* case:

> Having found that the intent of Mrs. Newcomb's bequest to the Tulane Board was so "clear," Louisiana law mandates the trial court to implement that intent; that is, the court must

> insure that Mrs. Newcomb's donations to the Tulane Board are used to maintain a 'women's higher educational college'-- not a 'women's institute.'
>
> *Howard v. Administrators of the Tulane Education Fund*, 07-CA-224 La. 2008, 986 So. 2d 47, 56.

This Court's reaffirmation of its determination of Mrs. Newcomb's testamentary intent in the *Howard* case will, once again, confirm the charge, or performance obligation, that Mrs. Newcomb placed on her donation: that the Tulane Board was to operate and maintain Newcomb College as a women's higher education college. Civil Code article 1612 mandates such a result.

Faced with two possible interpretations, that Mrs. Newcomb's intent created a charge and/or condition or that Mrs. Newcomb's intent did not create a condition, Civil Code article 1612 requires the trial court to adopt the interpretation that effectuates, rather than defeats, Mrs. Newcomb's intent. Despite this mandate, this Court ruled in *Howard* that Mrs. Newcomb's Will did not contain a condition, which is an interpretation that defeated her clear intent. As noted by Judge Tobias on page 8 of his dissenting opinion:

> Moreover, the ruling of the trial court is internally inconsistent. On the one hand, the trial court delineated Mrs. Newcomb's clear intent to establish a women's higher education college, yet, on the other, determined that Mrs. Newcomb's donations were not subject to any restrictions or conditional obligations.

In light of the mandate of Civil Code article 1612 and Judge Tobias' correct analysis, the Plaintiff asks this Court to affirm its holding in *Howard* as to Mrs. Newcomb's clear intent, and then to proceed to the next step of determining how to implement that intent.

VI - FINDING AND ENFORCING THE CHARGE IN MRS. NEWCOMB'S WILL

(A) Finding a Charge in Mrs. Newcomb's Will.

(1) Supreme Court's Discussion of "Charge" in *Howard*.

Plaintiff submits that Mrs. Newcomb's clear testamentary intent - that her bequest be used by Tulane "to maintain a women's higher education college" - imposed a charge upon her donation. Plaintiff further submits that the Tulane Board violated this charge when it closed Newcomb College. Recognition of this charge by this Court is the critical issue in this case; therefore, it is also critical that this Court understand the meaning of "charge" in the context of a donation. Fortunately, the Supreme Court in *Howard* fully explains this term as it is employed in the donation context, as summarized below. See *Howard* at pages 55-58.

The Supreme Court commences its discussion by stating that current Civil Code articles 1559 (*inter vivos*) and 1610.1 (*mortis causa*) recognize the donor's right to revoke or dissolve a donation for nonperformance of the conditions imposed on the donee. The court then notes that these codal provisions "find their origins in the French Civil Code, specifically articles 953 and 1046 of the Code Napoleon (1804), respectively." *Howard* at p. 55. According to numerous French commentators cited by the court, the donor's right to revoke under Civil Code articles 953 and 1046 of the Code Napoleon (1804) also carried with it the right to enforce the conditional donation. The court then ruled that, under "long-standing and well-established *jurisprudence constante*," (*Howard* at page 57), the interpretation given by the French commentators to Civil Code articles 953 and 1046 of the Code Napoleon (1804) is highly instructive, if not determinative, in the interpretation to be given the current versions of these articles (1559 and 1610.1).

As such, the Supreme Court ruled that under current Civil Code article 1610.1, would-be heirs, or intestate successors, of a testator have a right to enforce a charge or condition on the testator's bequests.

This same "long-standing and well-established *jurisprudence constante,*" doctrine can also be applied to the definition of a "charge" or "condition" on a donation. Regarding Civil Code article 953 of the Code Napoleon (1804), predecessor to current Civil Code article 1559, the Supreme Court in *Howard* at page 56 explained as follows:

> Under the French civilian law, Article 953 **referred to conditions, meaning "charges."** Planiol, *supra* at No. 2630, p. 284; Aubry & Rau, *supra* (In the phrase for the non-fulfillment of the conditions' in Art. 953 [La. C.C. Art. 1559], the redactors of the Civil Code have used the word 'condition not in its proper technical signification, but in the vulgar sense to refer to the obligations or charges imposed on the donee.). **A charge was defined as a performance, which the donee assumed with the donation.** Planiol, *supra* at No. 2630, p. 284. If the donee did not execute the charge or condition, which he assumed, the donation could be revoked. *Id.* at No. 2631, p. 284; Aubry & Rau, *supra* at § 707a, p. 397. This was merely an application to donations of a much broader principle applied to all mutual contracts, and an onerous donation was considered such a contract because the donee assumed a personal duty, which made him a genuine debtor of its performance. Planiol, *supra* at No. 2631, p. 284; Aubry & Rau, *supra* at 707a, p. 397. Applying the general law, it followed that if a donee did not execute the agreed upon charge, the donor could, at his election, either sue him for specific performance, or for damages, or for rescission of the donation. Planiol, *supra* at No. 2632, p. 285. (Bold emphasis added.)

Regarding charges under Civil Code article 1046 of the Code Napoleon (1804), predecessor to current Civil Code article 1610.1, the Supreme Court in *Howard* at page 57 explained as follows:

> Under Article 1046 of the Code Napoleon, governing donations *mortis causa,* **the right to demand the revocation of a legacy for non-performance of the charges imposed on the donee was accorded to those who were to benefit thereby** and who, therefore, had an interest in having it judicially declared. Aubry & Rau, *supra* at § 727, p. 522. "Thus, depending upon the circumstances of the case, the revocation [could] be sued for by the person bound for the payment of the legacy subject to the charge; by the substitute; by the conjoint co-legatees; **and, in the case of charges imposed on a universal legatee either in favor of a third person or for the benefit of the testator himself, by the intestate successors of the latter," *i.e.*, would-be heirs.** *Id.; see also,* 6 Théophile Huc, *Commentaire Du Code Civil* No. 401, p. 511 (1892). However, the third persons in whose favor the charges had been established had no right to demand the revocation of the legacy; they had only a personal action against the legatee to compel him to perform or execute the charges imposed. Aubry & Rau, *supra* at § 727, p. 522.
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> Because the rules governing the revocation of legacies for non-performance of charges were analogous to those relative to the revocation of donations *inter vivos* for the same causes, **the same rules as discussed above applied.** *Id.;* Planiol, *supra* at No. 2853, p. 391. Consequently, the personal action for the **performance of the prescribed charges** belonged to all those who could demand revocation, as well as to the beneficiaries of the charges. 2 Gabriel Baudry-Lacantinerie & Maurice Colin, *Des Donations Entre Vifs et des Testaments* No. 2806, in 10 *Traité Théorique et Pratique de Droit Civil* (2d ed. 1899-1905). In situations **where the charge was imposed on the universal legatee, the revocation of the legacy could be demanded by the intestate heirs,** *i.e.*, would-be heirs, because the revocation of the legacy would rebound to the benefit of those heirs. Huc, *supra.* Being able to demand revocation, **the intestate heirs could advance the execution of the charges as a main remedy.** *Id.* (Bold emphasis added.)

Under the "long-standing and well-established *jurisprudence constante,*" doctrine, the interpretation given to "condition" by the French commentators for Civil Code articles 953 and 1046 of the Code Napoleon (1804) is highly instructive if not determinative of the interpretative to be given this same word when used in the

context of current Civil Code articles 1559 and 1610.1. That interpretation is that a "condition" is not to be used in a proper technical sense but rather in the vulgar sense to refer to charges imposed on the donee or legatee. According to these same French commentators, a "charge" means a performance assumed by the donee or legatee with the donation.

(B) Louisiana Law of Conditional Donations.

There is no express codal authority for conditional donations *mortis causa*. *Succession of Jenkins*, 481 So.2d 607, 609 (La.1986). Nevertheless, there remains no argument that the Louisiana courts recognize the right of a testator to make conditional donations mortis causa, "to impose any conditions he pleases, whether suspensive or resolutory, provided they contain nothing contrary to laws or good morals." *Baten v. Taylor*, 386 So.2d 333, 339 (La. 1979) (citations omitted). Such conditions or charges on a testamentary bequest are binding. *In Re: Succession of Haydel*, 00-0085, (La. App. 1 Cir. 2/16/01), 780 So.2d 1168, 1175. As stated by the court in *Voinche, supra*, at p. 663:

> It is a principle of civil law jurisprudence that the donee is bound to execute the charges or obligations imposed on him by the act of donation in the same manner and to same extent as the debtor in any ordinary contract.

(C) Condition or Charge in Mrs. Newcomb's Will.

A condition in the context of a donation, *inter vivos* or *mortis causa*, means a charge, or a performance. Clearly, Mrs. Newcomb's bequest to the Tulane Board was subject to a charge, or a performance, which the Tulane Board acknowledged, assumed and executed for 119 years. Mrs. Newcomb's Will is clear in the description of this charge:

> FIRST: I have resided of late years in different places but have made the City of New Orleans my permanent home, because I here witness and enjoy the growth of "H. Sophie Newcomb Memorial College," a Department of the Tulane University of Louisiana, which I have founded, and has been named in honor of the memory of my beloved daughter.
>
> I have implicit confidence that the "Administrators of the Tulane Educational Fund" **will continue to use and apply the benefactions and property, I have bestowed and may give, for the present and future development of this Department of the University known as the H. Sophie Newcomb Memorial College** which engrosses my thoughts and purposes, and is endeared to me by such hallowed associations.
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> (Bold emphasis added).

The charge, or expected performance, in Mrs. Newcomb's Will and her *inter vivos* donations is clear -- that the Tulane Board develop and maintain Newcomb College. This court in *Howard* acknowledged this charge or performance obligation when it ruled that the Tulane Board was to use Mrs. Newcomb's bequest to "maintain a women's higher education college." The uncontroverted evidence in this case demonstrates that this is what Mrs. Newcomb intended and devoted her life and energies to, and that the Tulane Board understood, assumed and fulfilled this performance obligation or charge for nearly 119 years.

(D) <u>Performance Implies the Existence of a Charge</u>.

Black's Law Dictionary, Seventh Edition (1999) at page 1203 defines a "presumption" as a "legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." Professor Litvinoff in his Louisiana Civil Law Treatise, *The Law of Obligations*, Section 13.2, page 402 states that "the fact a performance has been rendered gives rise to a presumption that an obligation existed...." The Supreme Court in *Howard* stated that a "conditional or onerous donation can impose an

obligation on the donee, and as in the French tradition, under our general obligation articles, an obligation can give the obligee the right to enforce the performance that the obligor is bound to render." *Howard* at p. 58.

The Tulane Board contests the Plaintiff's argument that Mrs. Newcomb's donations were subject to a charge or a performance obligation. It is an undisputed fact of this case, however, that for 119 years the Tulane Board developed, operated and maintained Newcomb College as a separate coordinate college for women within Tulane University. Plaintiff maintains that the fact of the Tulane Board's lengthy performance clearly gives rise to a presumption that Mrs. Newcomb's donations were, in fact, subject to a charge, or a performance obligation, and that the Tulane Board acknowledged, assumed and executed. One fact establishes the other fact; there is no other explanation for the Tulane Board's long and faithful performance.

(E) <u>Newcomb College as a Permanent Institution</u>.

Mrs. Newcomb was a strong woman of decision, independence and character. (See #25, Statement of Uncontested Facts). She devoted the last fifteen years of her life, and her entire fortune, to the development and growth of Newcomb College. (See #24, Statement of Uncontested Facts). Mrs. Newcomb certainly intended that Newcomb College would be a permanent institution; that it should be as durable as Tulane University itself. She made many statements to that effect between 1886, when she funded and established Newcomb College, and her death on April 15, 1901, a sampling of which is set forth in Part IV, Paragraph (B) above. This, of course, makes perfect sense and is supported by the historical record in this case. In fact, there is no historical document that supports the Tulane Board's position that Mrs. Newcomb's *inter vivos* and *mortis*

causa donations were without a charge. What the Tulane Board did in *Howard*, and no doubt will do in this case, is take a few sentences out of context in letters and other documents to support its flimsy argument that Mrs. Newcomb's donations were unrestricted. But the entire historical record, supported by numerous documents, overwhelmingly supports the fact that Mrs. Newcomb intended Newcomb College to be a permanent institution and subjected her donations to this charge.

(F) Enforcing the Charge in Mrs. Newcomb's Will.

Plaintiff has demonstrated that the establishment, support and operation of Newcomb College was the driving purpose and passion of Mrs. Newcomb's later life; that her donations and bequest to the Tulane Board were accompanied by the specific charge that the Tulane Board establish and maintain Newcomb College permanently; and that the Tulane Board understood and accepted Mrs. Newcomb's donations subject to that charge. For 119 years, the Tulane Board implemented Mrs. Newcomb's plan and operated Newcomb College as a degree-granting college for women with its own separate identity within Tulane University. In fact, in 2005 prior to Hurricane Katrina, Tulane University operated under a strategic plan that did not call for the closure, merger or absorption of Newcomb College. (Exhibit 7, p. 13-14).

In order to enforce Mrs. Newcomb's charge, the Plaintiff asks this court to order the Tulane Board to reopen Newcomb College and operate it as Tulane's separate coordinate college for women in the same manner, with the same structure, programs and endowments, as it did in 2005. The logistical details of reopening Newcomb College can be worked out after this court issues such an order. Contrary to the Tulane Board's dire warnings, the reinstitution of Newcomb College will not be complicated, expensive or disruptive.

Indeed, the Tulane Board will know precisely how to accomplish this task - after all, it operated and maintained Newcomb College for nearly 119 years.

CONCLUSION

Plaintiff is clearly entitled to judgment against the Tulane Board to enforce the charge imposed by Mrs. Newcomb on her donations and bequest. The Supreme Court in *Howard* has validated the underlying cause of action as a matter of Louisiana law, and Plaintiff has established her standing as a would-be heir or successor of Mrs. Newcomb. The Plaintiff does not seek money or property in this case; she seeks only to have the Tulane Board acknowledge, honor and implement Mrs. Newcomb's donor intent. She therefore seeks a declaratory judgment that Mrs. Newcomb's donations were subject to a performance charge and the judicial enforcement of this charge. There being no genuine issue of material fact, summary judgment should be granted in her favor and this Court should order the Tulane Board to reopen Newcomb College and maintain it as Tulane University's separate coordinate college for women, as it had for 119 years.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel in this matter by United States mail, first class postage prepaid and properly addressed, on this _____ day of May, 2009.

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