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result of a preconception tort. The trend probably will be toward recognition of such a cause of action. This follows from the similarity between this type of action and the traditional prenatal injury action which is widely recognized. However, in view of the potential undesirable situations and problems that could result from this tort, there is also a clear need for a limitation on the cause of action. Judicial restrictions, because they are often unpredictable, would be inadequate for this purpose. A statutory restraint should be preferred over a judicial limitation in order to enhance predictability and consistency. A decision of this sort also is more appropriately made by the elected representatives of the people. In view of the probable trend toward recognition of this cause of action, state legislatures would be wise to consider enacting a statutory limitation on this cause of action which limits recovery both as to potential defendants and potential plaintiffs.

VIK ED STOLL

RENTAL HOUSING FOR THE ELDERLY AS A TAX EXEMPT CHARITY AND RETENTION OF THE NO PARTIAL EXEMPTION RULE

Franciscan Tertiary Province of Missouri, Inc. v. State Tax Commission[1]

Franciscan Tertiary Province of Missouri, Inc., a nonprofit corporation, owned and operated the Chariton Apartments for elderly and handicapped people. The apartments were constructed under an agreement entered into between Franciscan and the federal government[2] whereby the Department of Housing and Urban Development made interest reduction

1. 566 S.W.2d 213 (Mo. En Banc 1978).

2. The agreement was entered into pursuant to 12 U.S.C. § 1701r (1970), also known as the Senior Citizen Housing Act of 1962. The congressional purpose explicitly stated in the Act was:

> The Congress finds that there is a large and growing need for suitable housing for older people both in urban and rural areas. Our older citizens face special problems in meeting their housing needs because of the prevalence of modest and limited incomes among the elderly, their difficulty in obtaining liberal long-term home mortgage credit, and their need for housing planned and designed to include features necessary to the safety and convenience of the occupants in a suitable neighborhood environment. Congress further finds that the present programs

payments on behalf of the corporation.[3] Additionally, substantial sums of money and personal services were contributed by various charitable organizations.[4] The only revenues of the corporation came from the tenants' rental payments, which were fixed below cost.[5] In 1973 Franciscan received notification of ad valorem property tax assessment by the Board of Equalization of the City of St. Louis. Seeking a charitable exemption, Franciscan appealed to the Missouri State Tax Commission. The Commission denied the claim for the exemption. Franciscan brought an appeal under the Administrative Review Act[6] to the Circuit Court of the City of St. Louis. The Circuit Court determined that the property was not exempt, but reversed and remanded the decision of the Commission on the ground that the assessed valuation was excessive. On appeal the Missouri Supreme Court reversed, holding that the property was operated "for purposes purely charitable" within the meaning of the exemption statute and therefore was entitled to exemption from ad valorem property taxes.[7]

The exemption statute, Mo. Rev. Stat. section 137.100(5),[8] has been the subject of frequent litigation since the time of its enactment. Lack of narrow legislative guidelines and vaguely stated principles of public policy

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for housing the elderly under the Department of Housing and Urban Development have proven the value of Federal credit assistance in this field and at the same time demonstrated the urgent need for an expanded and more comprehensive effort to meet our responsibilities to our senior citizens.

3. Interest reduction payments were made pursuant to 12 U.S.C. § 1715z-1 (1970).

4. Initial Brief for Appellant at 11.

5. Franciscan administered through the Department of Housing and Urban Development (HUD) a rent subsidy program available to persons whose monthly income was less than four times their monthly rental. To be self-sufficient from rental income alone, Franciscan would have to charge $268 and $326 for, respectively, efficiency and one-bedroom apartments. In fact, tenants paid only $105 and $126 respectively.

6. RSMo § 536.140 (1969).

7. *See generally* Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411 (1934); Newcomer, *The Growth of Property Tax Exemptions*, 6 NAT'L TAX J. 116 (1953).

8. Also known as the "charitable exemption statute." The statute in force during the tax year in dispute, RSMo § 137.100(6) (1969), was reenacted as § 137.100(5), Mo. Laws 1974, at 761, § 1 (effective Jan. 1, 1975). Section 137.100(5) exempts from taxation, *inter alia*, "[A]ll property, real and personal, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profits . . . ."

Section 137.100 was enacted pursuant to the discretion granted to the legislature to authorize tax exemptions by MO. CONST. art. X, § 6, which provides in part: "all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law."

have resulted in a multitude of cases with apparent factual similarities but differing results.[9] Some decisions emphasize the nature of the institutions claiming exemption from ad valorem property taxes; others primarily have looked to the use made of the property owned by those institutions.[10] More specifically, the debate has centered on discordant interpretations of the words "used exclusively . . . for purposes purely charitable";[11] it has resulted in different requirements for granting a tax exemption under such language. *Franciscan* is significant because it provides a uniform interpretation of section 137.100(5) by establishing criteria to be considered by all claimants under this statutory provision.

In construing tax exemption statutes courts traditionally applied a rule of strict construction against a party claiming the exemption.[12] The theory ran that since the sovereign may tax all entities, taxation should be the general rule and exemption the exception.[13] This theory, however, has undergone considerable erosion. Courts often pay only lip service to the dogma of strict construction. The Missouri Supreme Court's opinion in *Missouri United Methodist Retirement Homes v. State Tax Commission*[14] provides a recent example:

> It has long been the rule "that exemption statutes are strictly but reasonably . . . construed. . . ." However, Missouri has

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9. *See* cases cited notes 26-28 *infra*.

10. *Compare* Salvation Army v. Hoehn, 354 Mo. 107, 188 S.W.2d 826 (En Banc 1945) *with* Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365 (Mo. 1969). Recent cases seem to draw a clear distinction, however. *See* Bethesda Gen. Hosp. v. State Tax Comm'n, 396 S.W.2d 631 (Mo. 1965) (the charitable use exemption depends upon the use made of the property and not solely upon the stated purposes of an organization); Frisco Employes' Hosp. Ass'n v. State Tax Comm'n, 381 S.W.2d 772 (Mo. 1964) (charitable use exemption from ad valorem taxes depends upon actual use made of property and the stated objectives of the corporate organization are not controlling).

11. *See* note 8 *supra*.

12. St. John's Mercy Hosp. v. Leachman, 552 S.W.2d 723 (Mo. En Banc 1977) (charitable exemption denied to hospital building in which 56% of space was leased to private practitioners); Farm & Home Sav. Ass'n v. Spradling, 538 S.W.2d 313 (Mo. 1976) (savings and loan association not exempt from compensating sales and use tax law); City of St. Louis v. State Tax Comm'n, 524 S.W.2d 839 (Mo. En Banc 1975) (charitable exemption granted to building owned by engineers' club); Iron County v. State Tax Comm'n, 437 S.W.2d 665 (Mo. En Banc 1968) (leasehold interest in city property held to be taxable real property and not immune under exemption for property owned by a city and used for state, county or local purposes).

13. Missouri Church of Scientology v. State Tax Comm'n, 560 S.W.2d 837 (Mo. En Banc 1977); Community Mem. Hosp. v. City of Moberly, 422 S.W.2d 290 (Mo. 1967); Bethesda Gen. Hosp. v. State Tax Comm'n, 396 S.W.2d 631 (Mo. 1965); Midwest Bible & Missionary Inst. v. Sestric, 364 Mo. 167, 260 S.W.2d 25 (1953).

14. 522 S.W.2d 745, 751 (Mo. 1975). *See also* YMCA v. Baumann, 344 Mo. 898, 902, 130 S.W.2d 499, 501 (En Banc 1939).

> declared as its public policy that property actually and regularly used exclusively for charitable purposes shall be exempt from taxation, and the taxing authorities are not to be permitted to defeat that announced public policy by unreasonable or unrealistic application of the "strict construction" rule.

Courts in jurisdictions with similar statutory provisions have rejected the rule of strict construction; they apply a rule of construction which they believe recognizes the intent of the legislatures in enacting tax exemption statutes.[15] In these jurisdictions, the legislatures' intent to encourage charity normally prevails over blind application of the strict construction rule generally applicable to tax statutes.[16]

Although older and stricter views considered charity solely relief of the destitute,[17] a more encompassing approach has been accepted today. Under this approach, institutions which confer a benefit upon "an indefinite number of persons, either by bringing their hearts under the influence of education or religion, [or] by relieving their bodies from disease, suffering, or constraint . . ."[18] are considered charitable.[19] A parallel view is that those institutions which save the government expenditures by preempting necessary governmental action also should be deemed charitable.[20] More

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15. *E.g.*, Sunday School Bd. v. Evans, 192 Tenn. 495, 241 S.W.2d 543 (1951); City of Richmond v. United Givers Fund, 205 Va. 432, 137 S.E.2d 876 (1964).

16. *But see* Princeton Univ. Press v. Borough of Princeton, 35 N.J. 209, 172 A.2d 420 (1961); Commonwealth v. 2101 Coop Inc., 408 Pa. 24, 183 A.2d 325 (1962); Appeal of Univ. of Pittsburgh, 407 Pa. 416, 180 A.2d 760 (1962).

17. State *ex rel.* St. Louis YMCA v. Gehner, 320 Mo. 1172, 11 S.W.2d 30 (En Banc 1928).

18. The full text of this definition of charity is found in *In re* Rahn's Estate, 316 Mo. 492, 511, 291 S.W. 120, 128 (1926), where the court quoted with approval from 5 RULING CASE LAW, *Charities* §§ 2, 3 (1914), as follows:

> Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government . . . . A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering under special diseases, for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. . . .

19. Exemptions should be granted where it would encourage a humanitarian activity even if the state would not have provided the service itself. 566 S.W.2d at 226.

20. Also known as the *quid pro quo* theory. RESTATEMENT (SECOND) OF TRUSTS § 373, Comment a (1959). *See* Note, *Taxation: Charitable Institutions:*

germane to *Franciscan*, however, is the fact that the general concept of relief of the aged has long been held to be charitable.[21] The English Statute of Charitable Uses[22] begins its citation of charitable purposes with relief of the aged, illustrating the antiquity of this concept.[23]

The Missouri courts have nonetheless applied different requirements for granting a tax exemption to homes for the aged than for other categories of charitable exemptions arising under section 137.100(5).[24] This inconsistency has appeared most frequently when the courts have focused on the nature of the owner rather than on the use of the property. A trilogy of YMCA cases demonstrates this incongruity.[25] In the first of these cases,

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Effect of tax exemption in defining a charity, 23 CORNELL L.Q. 170, 171 (1938); Note, *Taxation—Exemptions—Corporation Furnishing Hospitalization to Subscribers Held Not Under Charitable Exemption of Social Security Act*, 55 HARV. L. REV. 1055, 1056 (1942); Note, *Tax Exemption of Charitable Property*, 80 U. OF PA. L. REV. 724 (1932).

21. The expansive view of charitable purpose taken by many courts is illustrated by the following decisions, granting exemptions to homes for the aged: Fredericka Home for the Aged v. San Diego County, 35 Cal. 2d 789, 221 P.2d 68 (1950); Fifield Manor v. County of Los Angeles, 188 Cal. App. 2d 2, 10 Cal. Rptr. 242 (1961); City of Winter Park v. Presbyterian Homes for the Synod, 242 So. 2d 733 (Fla. App. 1970); State Bd. of Tax Comm'rs v. Methodist Home for the Aged, 241 N.E.2d 84 (Ind. App. 1968); South Iowa Methodist Homes, Inc. v. Board of Rev., 173 N.W.2d 526 (Iowa 1970); Bozeman Deaconess Found. v. Ford, 151 Mont. 143, 439 P.2d 915 (1968); Glass v. Oklahoma Methodist Home for the Aged, Inc., 502 P.2d 1268 (Okla. 1972); *In re* Tax Appeals of United Presbyterian Homes, 428 Pa. 145, 236 A.2d 776 (1968); Milwaukee Protestant Home for the Aged v. City of Milwaukee, 41 Wis. 2d 284, 164 N.W.2d 289 (1969). *But see* the following decisions denying exemptions for charitable purposes to homes for the aged: United Presbyterian Ass'n v. Board of County Comm'rs, 167 Colo. 485, 448 P.2d 967 (1968); Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149, 233 N.E.2d 537 (1968); Lutheran Home, Inc. v. Board of County Comm'rs, 211 Kan. 270, 505 P.2d 1118 (1973); Madonna Towers v. Commissioner of Tax., 283 Minn. 111, 167 N.W.2d 712 (1969); Westminster Gerontology Found. v. State Tax Comm'n, 522 S.W.2d 754 (Mo. 1975); Paraclete Manor v. State Tax Comm'n, 447 S.W.2d 311 (Mo. 1969); Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365 (Mo. 1969); County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961); Presbyterian Homes v. Division of Tax Appeals, 55 N.J. 275, 261 A.2d 143 (1970); Friendsview Manor v. State Tax Comm'n, 247 Or. 94, 420 P.2d 77 (1966), *aff'd per curiam on rehearing*, 427 P.2d 417 (1967).

22. 43 Eliz. I, c.4 (1601).

23. The Statute of Charitable Uses was repealed by the Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict., c.42, but the preamble was specifically retained by § 13(2) of that act as a definition of charitable purposes.

24. Westminster Gerontology Found. v. State Tax Comm'n, 522 S.W.2d 754 (Mo. 1975); Paraclete Manor v. State Tax Comm'n, 447 S.W.2d 311 (Mo. 1969); Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365 (Mo. 1969).

25. A fourth YMCA case frequently cited with the cases indicated in the text is State *ex rel.* Koeln v. St. Louis YMCA, 259 Mo. 233, 168 S.W. 589 (1914) (exemption denied). It is distinguishable in that portions of the ground floor of the

State ex rel. St. Louis YMCA v. Gehner,[26] the court upheld the assessment of three pieces of real estate. The decision was based upon the presence of a cafeteria and other facilities which were open to members and non-members at commercial prices. Similarly, in *St. Louis YMCA v. Gehner*[27] the exemption was denied; the only variation from the facts of the previous case was that use of the facilities was limited solely to members. Both decisions placed substantial emphasis upon the character of the persons actually served by the facilities and upon service charges sufficient to defray the costs incurred. In contrast, the court in *YMCA v. Sestric*[28] upheld as exempt the same residence halls determined to be taxable in the earlier cases. The court focused on the use of the property. It determined that the operation of facilities for board and lodging was intimately related to a charitable purpose, not carried on for the purpose of making a profit. It seems apparent that the distinctions among these cases lie not in the facts but in the principle of law applied by the courts. The court in the third YMCA case applied the proper legal principles, guided by the reasoning of *Salvation Army v. Hoehn*.[29] *Salvation Army* is the seminal case regarding what property is to be exempt from ad valorem taxation under the Missouri charitable exemption statute. The case involved a claim for exemption of a thirteen story building in which young women were housed. Charges for rooms and meals were substantially less than those levied at commercial establishments in the area. In addition, needy and deserving applicants were subsidized by a reduction in the regular rental rates. The court rejected the assessor's contention that the mere receipt of payment from occupants of an institution suffices to preclude it from charitable exemption status.[30] Overruling the first two YMCA cases, the supreme court held that the charitable exemption provision had been construed too narrowly in those cases.[31] While the cost to residents was more than nominal, the furnishing of humanitarian services at cost or less was deemed a sufficient basis for granting exempt status.

The reasoning of *Salvation Army* was utilized extensively in granting charitable exemptions to hospitals.[32] At the same time, though, no attempt was made to apply this interpretation to exemption claims by homes

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two buildings involved were rented to others for use as commercial stores. *See* note 49 *infra*.

26. 320 Mo. 1172, 11 S.W.2d 30 (1928).

27. 329 Mo. 1007, 47 S.W.2d 776 (En Banc 1932).

28. 362 Mo. 551, 242 S.W.2d 497 (En Banc 1951).

29. 354 Mo. 107, 188 S.W.2d 826 (En Banc 1945).

30. *See* cases collected in Annot., 34 A.L.R. 364, 638 (1925); Annot., 62 A.L.R. 328, 330 (1929); Annot., 108 A.L.R. 284, 286 (1937). *See also* Westminster Gerontology Found. v. State Tax Comm'n, 522 S.W.2d 754 (Mo. 1975) (not-for-profit operation to provide housing for the elderly does not lose its charitable nature because residents are charged for facilities they receive).

31. 354 Mo. at 114, 188 S.W.2d at 830.

32. Jackson County v. State Tax Comm'n, 521 S.W.2d 378 (Mo. En Banc 1975); Community Mem. Hosp. v. City of Moberly, 422 S.W.2d 290 (Mo. 1967);

for the aged.[33] Instead, courts consistently tested such claims by reference to inconsistent pre-*Salvation Army* cases.[34] This regressive approach can be traced to *Defenders' Townhouse, Inc. v. Kansas City*.[35] The court there undertook a review of prior Missouri cases, but failed to adopt the standard enunciated in *Salvation Army*. Instead, it focused on the economic aspects of the operation, not for the purpose of determining whether the operation was not-for-profit, but as a substitute for concentrating on whether the property was used for a charitable purpose. Without explaining why the tests of *Salvation Army* and *YMCA v. Sestric* were inadequate, the court examined and applied the treatment given similar claims by courts in other jurisdictions.[36] This resort to inquiry into other jurisdictions is indicative of a view that homes for the aged are in some way so different from other exemption claimants as to warrant special treatment.

The court in *Franciscan* made it clear that *Defenders' Townhouse* constituted a departure from prevailing principles in its interpretation of section 137.100(5).[37] Although the latter case was not expressly overruled, the court in *Franciscan* stated that in the future tax assessors and the Commission should not look to and follow *Defenders' Townhouse* and its progeny. The court held that "the words 'used exclusively . . . for purposes purely charitable' . . . should and do have the same meaning whether applied to property used for a hospital,[38] for training handicapped workers,[39] for operating a YMCA type of program[40] or for providing housing for the aged."[41] It clarified and reemphasized the mandate set forth in *Salvation Ar-*

Bethesda Gen. Hosp. v. State Tax Comm'n, 396 S.W.2d 631 (Mo. 1965); State *ex rel.* Alexian Bros. Hosp. v. Powers, 10 Mo. App. 263 (St. L.), *aff'd*, 74 Mo. 476 (1881).

33. *See* cases cited note 24 *supra*.

34. *See* cases cited note 24 *supra*.

35. 441 S.W.2d 365 (Mo. 1969).

36. The court, however, did not discuss or reconcile the variations in the statutory or constitutional provisions construed in the cases examined from other jurisdictions.

37. 566 S.W.2d at 223.

38. *See* cases cited note 32 *supra*.

39. Missouri Goodwill Indus. v. Gruner, 357 Mo. 647, 210 S.W.2d 38 (1948).

40. *See* cases cited notes 26-28 *supra*. *See generally* Annot., 81 A.L.R. 1453 (1932) (exemption from taxation of the property of a YMCA or YWCA). *Cf.* Jewish Community Centers Ass'n v. State Tax Comm'n, 520 S.W.2d 23 (Mo. 1975) (youth summer camp).

41. 566 S.W.2d at 223-24 (footnotes added). *See* note 21 *supra*. *See also* Note, *Tax Exemption of the Property of Educational Institutions*, 6 GEO. WASH. L. REV. 342, 344 (1938); Note, *Real Estate Taxation of Fraternities and Faculty Houses*, 20 WASH. & LEE L. REV. 187 (1963); Annot., 15 A.L.R.2d 1064 (1951) (property used by personnel as living quarters or for recreational purposes as within contemplation of tax exemptions extended to property of religious, educational, charitable, or hospital institutions); Annot., 66 A.L.R.2d 904 (1959) (exemption from taxation for college fraternity or sorority houses).

my: that the focus of the exemption should be on the use of the property and not on the nature of the owning institution.[42]

The notable significance of *Franciscan* is that it expanded on the *Salvation Army* decision by establishing three prerequisites for property to be exempt as charitable under section 137.100(5). The first and most quantifiable prerequisite is that the property be owned and operated on a not-for-profit basis.[43] This proviso typically has been strictly construed;[44] however, it does not mean that the organization must operate on a break-even or deficit basis.[45] In essence it simply means that any profit derived from an organization's operations must be achieved *incidentally* to the primary goal of the organization.[46] Furthermore, any profit so achieved must be devoted to furtherance of the charitable objectives of the organization.[47]

The unmistakable emphasis is that the property be operated purposefully not-for-profit. If the property is used for the primary purpose of producing income, the exemption will be forfeited[48] even though all profits derived were later devoted to charitable purposes.[49] The policy underlying

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42. *See also* YMCA v. Sestric, 362 Mo. 551, 559, 242 S.W.2d 497, 502 (En Banc 1951); Missouri United Methodist Retirement Homes v. State Tax Comm'n, 522 S.W.2d 745 (Mo. 1975).

43. 566 S.W.2d at 224.

44. RSMo § 137.100(5) (1969) states in part, "the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes . . . ."

45. *See, e.g.*, Community Mem. Hosp. v. City of Moberly, 422 S.W.2d 290, 296 (Mo. 1967), where the court in discussing income from pay patients stated:

> Such considerations as whether a profit or loss was in fact realized or sustained, or that some competition with private business exists, or that pay patients are admitted for treatment, or that a large part of its revenue is derived from pay patients, are not determinative if, from the evidence, it may be fairly said that the actual use made of the corporation's property is consistent with the nonprofit features and charitable purposes expressed in the corporation's articles of agreement.

46. Franciscan's stated purpose is "to provide for elderly or handicapped persons on a non-profit rental basis housing and related facilities and services designed to meet the physical, social and psychological needs of the aged or handicapped and contribute to their health, security, happiness and usefulness in longer living." Initial Brief for Appellant at 5.

47. *See* Community Mem. Hosp. v. City of Moberly, 422 S.W.2d 290, 294 (Mo. 1967), where the court stated: "all such margin of income over expenses in each year has been expended on improvement of building, facilities, equipment, services, and retirement of debts." *But see* authorities cited note 49 *infra*.

48. *See* Note, 4 U. CIN. L. REV. 249, 250 (1930); Note, 11 ROCKY MTN. L. REV. 62, 63 (1938).

49. Evangelical Lutheran Synod v. Hoehn, 355 Mo. 257, 196 S.W.2d 134 (1946) (exemption denied to a publishing corporation organized as a subsidiary of the Lutheran Church, even though all profits made by the publishing company

this prohibition can be stated quite plainly: a tax exemption granted by the public should not inure to the benefit of an individual or organization in such a way as to amount to a return on investment. The courts have not yet developed a satisfactory answer to the question of how close to commercial rates an organization can charge and still qualify as a charity. It does appear that a charitable organization cannot support a claim for exemption to the extent that its charges for services are commensurate with those of other profit-seeking entities supplying the same service in the community.[50]

The second prerequisite for charitable exemption is that the dominant use of the property be designed, directly or indirectly, to benefit an indefinite number of people.[51] This prerequisite is easily satisfied when the property of the claimant is utilized in such a manner as to relieve the state of a burden.[52] It is the state which generally assumes care of the indigent and the helpless. The assumption of these duties by charitable organizations pro tanto benefits the public.[53] Charitable activities which are intended to improve the physical, mental and moral condition of the recipients not only make it less likely that the recipients will become burdens on society but make it more likely that they will become useful citizens. Where no such public advantage can be shown, the institution, despite the best of motives, will not qualify as a charity for purposes of tax exemption.[54]

The final prerequisite for exemption is that the property be *used exclusively*[55] for charitable purposes. Cases employing this factor prior to *Franciscan* have not construed it literally. In 1974 a building owned by an

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were turned over to the church for use in its religious activities). *Cf.* Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461, 501 (1959) (indicating a "division of authority, explainable largely in terms of whether judicial attitudes are directed upon immediate uses or upon ultimate purposes").

50. In its requirement that any excess of income over expense be achieved incidentally to the dominant charitable objective of the claiming organization, the Missouri courts have by negative implication indicated that an exemption will not be granted to such organizations which are in competition with profit-seeking enterprises. Other jurisdictions have explicitly taken this position. *E.g.*, Homewood-Brushton Citizens Renewal Council v. Pittsburgh, 27 Pa. Commw. Ct. 630, 635, 367 A.2d 405, 408 (1976) (denying exemption for roller-skating rink operated by non-profit corporation which charged fees roughly comparable to commercial operations and stating "[w]hen an institution, otherwise charitable, seeks to compete with private enterprise for the custom of the general public at commercial rates it cannot qualify for a charitable exemption on the portion of its holdings so operated").

51. 566 S.W.2d at 224.

52. *See* note 20 *supra.*

53. Note, *Tax Exemptions of Charitable Property*, 80 U. PA. L. REV. 724 (1932).

54. *See* City of St. Louis v. State Tax Comm'n, 524 S.W.2d 839, 846 (Mo. En Banc 1975) ("controlling factor is the extent to which such activity is designed to benefit the public and society in general").

55. The phrase "used exclusively" refers to the primary and inherent use as opposed to a mere secondary and incidental use. *See* St. John's Mercy Hosp. v.

engineer's club which was used for limited social activities and on occasion was used by private companies was found to be exempt as a charity from ad valorem taxes.[56] Similarly, residential properties owned by a charitable hospital and occupied by hospital personnel were held to be used exclusively for charitable purposes and hence exempt from taxation.[57] The unwillingness of the Missouri courts to deny an exemption where there has been incidental use of the property for nonstatutory purposes is consonant with the flexible attitude taken by other state courts interpreting the exclusiveness requirement.[58] Moreover, the nonliteralist reading conforms to the policy underlying the statute of encouraging charitable organizations. As long as the improper use is de minimis, the charitable organization should retain its exemption.[59]

The liberal interpretation given section 137.100(5) by the supreme court in *Franciscan* supports the observation that Missouri has chosen exemptions as an integral and ever-increasing part of its property tax system. The prerequisites enumerated above for the granting of an exemption certainly will decrease the confusion that previously existed. Nevertheless, some criticism of the existing judicial interpretation of this statute is likely to continue. Particular criticism presently focuses on the refusal of the

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Leachman, 552 S.W.2d 723 (Mo. En Banc 1977); YWCA v. Baumann, 344 Mo. 898, 130 S.W.2d 499 (En Banc 1939). *But see* Community Mem. Hosp. v. City of Moberly, 422 S.W.2d 290 (Mo. 1967); State *ex rel.* Koeln v. St. Louis YMCA, 259 Mo. 233, 168 S.W. 589 (1914).

56. City of St. Louis v. State Tax Comm'n, 524 S.W.2d 839 (Mo. En Banc 1975).

57. Bethesda Gen. Hosp. v. State Tax Comm'n, 396 S.W.2d 631 (Mo. 1965).

58. *E.g.*, Cedars of Lebanon Hosp. v. Los Angeles County, 35 Cal. 2d 729, 221 P.2d 31 (1950); People *ex rel.* Goodman v. University of Ill. Found., 388 Ill. 363, 58 N.E.2d 33 (1944); Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N.W.2d 455 (1965); Princeton Twp. v. Tenacre Found., 69 N.J. Super. 559, 174 A.2d 601 (App. Div. 1961); Willamette Univ. v. State Tax Comm'n, 245 Or. 342, 422 P.2d 260 (1966); Multnomah Sch. of the Bible v. Multnomah County, 218 Or. 19, 343 P.2d 893 (1959); Engineers & Scientists of Milwaukee, Inc. v. Milwaukee, 38 Wis. 2d 550, 157 N.W.2d 572 (1968). *But see* Teaneck Twp. v. Lutheran Bible Inst., 20 N.J. 86, 118 A.2d 809 (1955).

59. A fair reading of the few Missouri cases on religious organizations could reasonably lead one to conclude that the court would be quite tolerant in permitting established churches a wide degree of latitude in using the premises for secular activities, while at the same time less willing to extend the exemption to property devoted to philosophical or untraditional forms of activity. One example of overreaction to an unpopular religious activity (reported by NBC News on June 28, 1971) in Kansas City was the threatened loss of property tax exemption of the United Presbyterian Church because of its contribution to the Angela Davis legal defense fund. It is difficult to comprehend the rationale behind letting the contribution itself jeopardize the tax exemption of a church building used predominantly for religious purposes. *But see* St. Louis Gospel Center v. Prose, 280 S.W.2d 827 (Mo. 1955).

Missouri courts to accept the partial exemption theory.[60] In some states a building under single ownership used partly for exempt purposes and partly for other purposes will be taxed only to the extent used for non-exempt purposes.[61] Missouri, however, continues to follow the opposing view, and maintains that the nonexempt use of any portion of the building renders the entire building taxable.[62]

Although the Missouri courts generally have not strictly construed the "used exclusively" proviso of section 137.100(5),[63] they interpreted this

60. Judge Bardgett, in his dissenting opinion in St. John's Mercy Hosp. v. Leachman, 552 S.W.2d 723, 728 (Mo. En Banc 1977), advocated acceptance of the partial exemption theory. "In my opinion the rule would not violate any Missouri constitutional provisions as it would allow the exemption for charitable purposes and not allow the exemption for premises not so used."

61. At least 32 states currently allow partial exemptions. McKee v. Evans, 490 P.2d 1226 (Alaska 1971); Hanagan v. Rocky Ford Knights, 101 Colo. 545, 75 P.2d 780 (1938); Hartford Hosp. v. Hartford, 160 Conn. 370, 279 A.2d 561 (1971); State *ex rel.* Cragor Co. v. Jones, 150 Fla. 491, 8 So. 2d 17 (1942); Peachtree on Peachtree Inn, Inc. v. Camp, 120 Ga. App. 403, 170 S.E.2d 709 (1969); Illinois Inst. of Tech. v. Skinner, 49 Ill. 2d 59, 273 N.E.2d 371 (1971); Sahara Grotto and Styx, Inc. v. State Bd. of Tax Comm'rs, 147 Ind. App. 471, 261 N.E.2d 873 (1970); Trustees of Iowa College v. Baillie, 236 Iowa 235, 17 N.W.2d 143 (1945); Louisville v. Board of Trade, 90 Ky. 409, 14 S.W. 408 (1890); Grand Lodge v. New Orleans, 44 La. Ann. 659, 11 So. 148 (1892); Lewiston v. All Maine Fair Ass'n, 138 Me. 39, 21 A.2d 625 (1941); Frederick County v. Sisters of Charity, 48 Md. 34 (1877); Assessors of Worcester v. Knights of Columbus Religious Educ. & Benev. Ass'n, 329 Mass. 532, 109 N.E.2d 447 (1952); Detroit Young Men's Soc'y v. Detroit, 3 Mich. 172 (1854); Christian Bus. Men's Comm. v. Minnesota, 228 Minn. 549, 38 N.W.2d 803 (1949); Northwestern Improvement Co. v. Rosebud County, 129 Mont. 412, 288 P.2d 657 (1955); YMCA v. Douglas County, 60 Neb. 642, 83 N.W. 924 (1900); Alton Bay Camp Meeting Ass'n v. Alton, 109 N.H. 44, 242 A.2d 80 (1968); State v. Haight, 35 N.J.L. 178 (1871); Community-General Hosp. v. Onondaga, 80 Misc. 2d 96, 362 N.Y.S.2d 375 (1974); Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940); New Haven Church v. Board of Tax Appeals, 9 Ohio St. 2d 53, 223 N.E.2d 336 (1967); Board of Equalization v. Tulsa Pythian Benev. Ass'n, 195 Okla. 458, 158 P.2d 904 (1945); Hibernian Benev. Soc'y v. Kelly, 28 Or. 173, 42 P. 3 (1895); YMCA v. Reading, 402 Pa. 592, 167 A.2d 469 (1961); De Soto Bank v. Memphis, 65 Tenn. 415 (1873); Morris v. Lone Star Chapter, 68 Tex. 698, 5 S.W. 519 (1887); Odd Fellows' Bldg. Ass'n v. Naylor, 53 Utah 111, 177 P. 214 (1918); Spaulding v. City of Rutland, 110 Vt. 186, 3 A.2d 556 (1939); Wilson's Modern Business College v. King County, 4 Wash. 2d 636, 104 P.2d 580 (1940); Columbia Hosp. Ass'n v. Milwaukee, 35 Wis. 2d 660, 151 N.W.2d 750 (1967); Independent Order of Odd Fellows v. Scott, 24 Wyo. 544, 163 P. 306 (1917). States which have rejected partial exemption are: State v. Bridges, 246 Ala. 486, 21 So. 2d 316 (1945); Defenders of the Christian Faith v. Board of County Comm'rs, 219 Kan. 181, 547 P.2d 706 (1976); Wyman v. City of St. Louis, 17 Mo. 335 (1852); State *ex rel.* Hayes v. Board of Equalization, 16 S.D. 219, 92 N.W. 16 (1902).

62. City of St. Louis v. State Tax Comm'n, 524 S.W.2d 839 (Mo. En Banc 1975); Missouri Goodwill Indus. v. Gruner, 357 Mo. 647, 210 S.W.2d 38 (1948); Evangelical Lutheran Synod v. Hoehn, 355 Mo. 257, 196 S.W.2d 134 (1946); Wyman v. City of St. Louis, 17 Mo. 335 (1852).

63. *See* notes 56 & 57 *supra.*

proviso to preclude exemption of property used concurrently for charitable purposes by the owner and for non-charitable purposes by the owner or some other institution or individual.[64] This apparent inconsistency, while criticized as being outmoded and unjustified, is not wholly without merit. Analysis of the few Missouri cases on this subject reveals that the opposition to partial exemption is rooted in an understandable reluctance to invade the province of the legislature.[65]

Wyman v. City of St. Louis[66] stands as the leading Missouri case advocating rejection of the partial exemption theory. The taxpayer in *Wyman* owned a four story building; the top two floors were used as a school, while the first floor contained stores and the second was used partly for the school and partly as a concert hall for hire. The owner sought to enjoin the collection of half the assessed property taxes on the basis that one-half of the building was used for school purposes. The court commented on the incongruity which results "when religion and learning are mingled with trading and trafficking—with fiddling and singing."[67] It discussed the inherent difficulties in collecting taxes on the nonexempt portion of the building in case of delinquency, as well as the initial problem of determining valuation and assessment of that portion. In denying the exemption the court established a precedent which has been upheld for over 125 years.

A Minnesota decision, *Christian Business Men's Committee v. State*,[68] typifies cases on the other side of the ledger. There the court apportioned a three story building between the commercial nonexempt first floor uses, and the exempt charitable uses of the basement, second and third floors. The court rejected as unsuited to modern times the "assumed arbitrary rule of thumb that a building is necessarily taxable or nontaxable in its entirety."[69] The Minnesota court dismissed the problems of assessment and collection which had troubled the Missouri court in *Wyman*, stating:

> Where, as here, we have divisions within the buildings by floors—or by rooms of a substantial size—there is no insurmountable difficulty in effecting an apportionment. Likewise, there is no insurmountable difficulty in enforcing a collection of the tax. A substantial and certain fractional part of realty obviously may be sold for nonpayment of an ad valorem tax, and in the event the purchaser thereby ultimately acquires a title in fee he may, if necessary, segregate or sell his interest therein through partition proceedings.[70]

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64. *See* text accompanying note 62 *supra*.
65. *See* text accompanying note 71 *infra*.
66. 17 Mo. 335 (1852).
67. *Id.* at 337.
68. 228 Minn. 549, 38 N.W.2d 803 (1949).
69. *Id.* at 558, 38 N.W.2d at 811.
70. *Id.* at 560, 38 N.W.2d at 811 (footnote omitted).

While Missouri courts probably would not argue with the conclusion that such an assessment presents "no insurmountable difficulty," their basis for disagreement would be simply that section 137.100 does not contemplate the assessment, nor did the legislature intend it.[71]

The property referred to by the courts in partial exemption cases has been a single building under single ownership. It is precisely for this reason that the Missouri courts would not be so sanguine as was the Minnesota court regarding the problem of tax collection through the sale of an undivided portion of a building. The Minnesota court suggested that the purchaser of a part of a building could, "if necessary, segregate or sell his interest therein through partition."[72] The result of this course of action would be a forced sale of the entire building, thus defeating the interests of the exempt user. A reading of the Missouri cases indicates that since it is a legislative function to determine how delinquent taxes are to be collected, including what property or portions thereof are to be sold, if the purchaser at a tax sale is to be the purchaser of a partition suit, the legislature is the body to so declare. The court has applied this same rationale in determining that if partial exemption is to be permitted, it is the legislature's function to do so.[73]

To meet the qualifications for charitable exemption from ad valorem taxation, then, it is incumbent upon the property owner to show clearly that use of the property satisfies the prerequisites set forth in *Franciscan*.[74] The mere fact that property is held by an institution of public charity is insufficient to meet this burden.[75] An exemption should be granted when

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71. South Dakota was succinct in rejecting the apportionment concept. In State *ex rel.* Hayes v. Board of Equalization, 16 S.D. 219, 227, 92 N.W. 16, 18 (1902), the court said:

> It is held in some jurisdictions that where property is used for different purposes, or, as in this case, where a part of the building is used for other than charitable purposes, there may be a due apportionment of values in the assessment, so as to confine the exemption to so much of the value as the privileged part represents. We cannot subscribe to this doctrine. It conflicts with the letter and spirit of our constitution. Any quantity of real property so situated as to be properly assessed as one tract or parcel, under one description, should be treated as an entity, all or no part of which is taxable. (citations omitted).

72. *See* note 70 *supra.*

73. In State v. Bridges, 246 Ala. 486, 21 So. 2d 316 (1945), the majority based its decision to reject partial exemption on the lack of any statutory provision for collecting delinquent taxes by sale. The court relied heavily on Wyman v. City of St. Louis, 17 Mo. 335 (1852) for support of its position.

74. *See* text accompanying notes 43-59 *supra.*

75. St. Louis Lodge v. Koeln, 262 Mo. 444, 448, 171 S.W. 329, 330 (1914).

> Charity is not a promiscuous mixer. Here she modestly stands outside or goes her way and waits; waits until the plaintiff has finished using the spacious and comfortable rooms for the pleasure of its members; waits until the curtain has fallen upon the last scene of the vaudeville performance on the stage; until the billiard rooms have been deserted to the