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The *Cy Pres* Doctrine Explored

*Miller v. Mer.-Safe Dep. & Tr. Co.*¹

A testator bequeathed the residue of his estate to four named charitable institutions, one of which had forfeited its charter subsequent to the drawing of the will. The Maryland Court of Appeals divided the funds left to the extinct organization among the remaining three. In so doing, the Court presented an initial interpretation of the Maryland *cy pres* statute, enacted in 1945.²

Cy pres is derived from a Norman-French phrase meaning "as near as." BLACK defines it as "a rule for the construction of instruments in equity, by which the intention of the party is carried out 'as near as may be,' when it would be impossible or illegal to give it literal effect."³ The doctrine is applied where a testator, settlor, or donor has indicated a general charitable intention which is incapable of being carried out in the specific manner directed; and the result of its application is the subordination or sacrifice

¹ 224 Md. 380, 168 A. 2d 184 (1961).

² 2 MD. CODE (1957) Art. 16, § 196:

"If a . . . bequest for charity, at the time it was intended to become effective, is illegal, or impossible or impracticable of enforcement, and if the . . . testator, manifested a general intention to devote the property to charity, a court of equity may, on application of . . . any interested person, or the Attorney General of the State, order an administration of the . . . bequest as nearly as possible to fulfill the general charitable intention of the . . . testator."

³ BLACK'S, LAW DICTIONARY (4th ed. 1951).

of the specific object to the general one so that the testator's scheme may be carried out as near to his intention as is possible.

Cy pres, as a doctrine of law, has been recognized as devolving from two sources: first, as a prerogative of the English Crown, which disposed of charitable gifts where their purpose was unlawful, or where no intention to create a trust was indicated.⁴ Apparently, American courts never have possessed the prerogative power, although there is some suggestion that the various state legislatures may have it.⁵ The second source of *cy pres* is the judicial power possessed by courts of equity as part of their inherent jurisdiction over charitable trusts.

The majority of American states adopt the *cy pres* doctrine either by statute or court construction, or both, although its application to certain situations may vary among them.⁶

Prior to the enactment of the Uniform Charitable Trusts Administration Act⁷ in 1931, Maryland expressly rejected the doctrine; and, after its passage, no occasion was presented for a ruling on the question until the instant case. The long history of judicial rejection was based primarily on the exclusion from the Maryland common law of the Statute of 43 Eliz. I., c.4.⁸ Although this ancient statute did little more than establish a procedure for enforcing gifts for charitable uses it had been initially interpreted by the United States Supreme Court as being the basis of the law of charitable trusts.⁹ Despite the subsequent modi-

⁴ BOGERT, TRUSTS (3d ed. 1952) ch. 17, § 147.

⁵ *Id.*, 570.

⁶ BOGERT, *loc. cit. supra*, n. 4; 4 SCOTT, TRUSTS (2d ed. 1956) § 397.3.

⁷ 2 MD. CODE (1957) Art. 16, § 196.

⁸ *Book Depository v. Trustees*, 117 Md. 86, 91, 83 A. 50 (1912); *Dashiell v. Attorney General*, 5 H. & J. 392 (Md. 1822). See, RESTATEMENT, TRUSTS, MD. ANNO. (1940) § 399, p. 239.

⁹ *Baptist Association v. Hart's Ex'rs.*, 4 Wheat. 1 (U.S. 1819). The Court there held that the enforcement of charitable trusts could be only by virtue of the Statute of 43 Eliz. I., c. 4 or the prerogative power of the Crown, and not by the inherent powers of a court of equity. Thus, it reasoned that, absent these two sources, a charitable trust whose beneficiary was vague and indefinite was incapable of enforcement. *Cf. Vidal v. Girard's Executors*, 2 How. 127 (U.S. 1844), wherein the Court, upon further investigation, decided that the interpretation given to the Statute of 43 Eliz. I., c. 4 in the *Baptist* case was incorrect, and that the inherent powers of a court of equity were sufficient to enforce a charitable trust independent of the Statute. In reversing the ruling of the earlier case, it was noted that:

"[T]he court came to the conclusion that, at the common law, no donation to charity could be enforced in chancery . . . where both of these defects occurred (referring to a donation to trustees incapable of taking and beneficiaries uncertain and indefinite). The Court said: 'We find no dictum that charities could be established on such an information (by the attorney-general) where the conveyance was de-

fication of this ruling by the Supreme Court, the Maryland Court of Appeals, having accepted the first construction by the Supreme Court, continued to hold that the equity courts had no inherent power to enforce devises to charity independent of the statute.¹⁰

In 1844, the Court of Appeals held that where trust property is reposed in a municipal corporation for a charity within the scope of its duties, a court of chancery will prevent the misapplication of the trust funds, and compel the execution of the trust, stating further that "this jurisdiction is not founded upon the Statute of 43 Elizabeth, but is part of the original inherent jurisdiction of the Court of Chancery over the subject of trusts."¹¹ This language, which was directed at the possibility of misapplication of trust funds, was later interpreted as meaning that where there are parties capable of taking the *res*, and the objects are legal and definite, a court of equity may "take cognizance of and enforce the trust . . . though the object of the trust be in its nature charitable."¹² Finally, the Court made a clear break with the *Baptist* interpretation, and stated:

"The Statute of 43 Elizabeth in regard to charities, is not, it is true, in force here, but it is well settled that a court of chancery, has jurisdiction, independent altogether of the statute, to enforce a trust for charitable and religious purposes, provided the devise or bequest be made to a person or body corporate capable of taking and holding the property so devised and bequeathed, and provided, further, the object and character of the trust be definite and certain."¹³

factive or the donation was so vaguely expressed that the donee, if not charity, would be incapable of taking.' * * * There are, however, dicta of eminent judges . . . which do certainly support the doctrine that charitable uses might be enforced in chancery upon the general jurisdiction of the Court, independently of the statute of 43 of Elizabeth; and that the jurisdiction has been acted upon not only subsequently but antecedent to that statute."

¹⁰ *Rizer v. Perry*, 58 Md. 112 (1882); *Church Extens'n M. E. Ch. v. Smith*, 56 Md. 362, 396 (1881); *Dumfries v. Abercrombie*, 46 Md. 172 (1876); *Needles v. Martin*, 33 Md. 609 (1871); *State, Use of M. E. Church v. Warren*, 28 Md. 352 (1867); *Missionary Soc. v. Reynolds*, 9 Md. 341 (1856); *Wilderman v. Baltimore*, 8 Md. 551 (1855); *Dashiell v. Attorney General*, 5 H. & J. 392 (Md. 1822); *Trippe v. Frazier, et ux. et al.*, 4 H. & J. 446 (Md. 1815). See RESTATEMENT, TRUSTS, MD. ANNO. (1940) ch. 11, Introductory Note, pp. 230-234.

¹¹ *Barnum v. Baltimore*, 62 Md. 275, 299-300 (1884).

¹² *Crisp v. Crisp*, 65 Md. 422, 427, 5 A. 421 (1886).

¹³ *Halsey v. Con. Prot. Epis. Church*, 75 Md. 275, 281-282, 23 A. 781 (1892).

Notwithstanding this self-asserted power, the Court was often disposed to hold charitable trusts void for uncertainty — either as to recipient or object — thus precluding effective application of the judicial power.¹⁴ In an attempt to remove this objection to the enforcement of charitable trusts, the Legislature, in 1888, enacted Article 93, Section 315.¹⁵ The Court, however, refused to construe this Act as broadening the previously established law beyond its own specific terms, and struck down any charitable trust not strictly in accordance therewith.¹⁶ This situation continued until Article 16, Section 195,¹⁷ enacted in 1931, conferred jurisdiction on the equity courts to enforce charitable trusts, including trusts for those purposes defined in 43 Elizabeth I., c.4. The Court of Appeals subsequently treated this statute as eliminating the indefiniteness of beneficiaries and objects as a problem,¹⁸ and, as suggested in the instant case, it may have conferred sufficient authority for the courts to apply *cy pres*,¹⁹ although no case involving the doctrine arose between its enactment and the passage of the Uniform Act.

Once having accepted *cy pres* as a general doctrine, the question of its scope is then presented. Specifically, there is an apparent, though possibly not an actual, conflict as to whether *cy pres* is applicable only to charitable trusts or extends to charitable gifts not in trust. Most of the cases involving *cy pres* have been based on trusts, and the courts have been inclined to speak of the doctrine as applicable to trusts without mentioning or distinguishing its applicability to gifts not in trust. Some courts, however,

¹⁴ See, e.g., *Church Extens'n M. E. Ch. v. Smith*, 56 Md. 362 (1881).

¹⁵ 8 Md. CODE (1957) Art. 93, § 357:

"No devise or bequest of real or personal property for any charitable uses shall be deemed . . . void by reason of any uncertainty with respect to the donees thereof, provided the will . . . making the same shall also contain directions for the formation of a corporation to take the same, within the period of twelve calendar months from the grant of probate of such will. . . ."

¹⁶ See *Yingling v. Miller*, 77 Md. 104, 107, 26 A. 491 (1893), where the Court stated:

"Now, remembering the settled law of this State prior to the legislation of 1888, namely, that this bequest would have been void for uncertainty . . . can we assume that the Legislature intended, by the language just quoted, to set aside entirely the long established policy of this State in regard to charitable bequests and devises, and practically to enact here the Statute of Elizabeth? We find nothing in section 305A which, we think, will justify us in concluding the Legislature intended to make such a radical change."

See also *Chase v. Stockett*, 72 Md. 239 (1890).

¹⁷ 2 Md. CODE (1957) Art. 16, § 195.

¹⁸ *Rabinowitz v. Wollman*, 174 Md. 6, 197 A. 566 (1938).

¹⁹ *Miller v. Mer.-Safe Dep. & Tr. Co.*, *supra*, n. 1, 385-6. Cf. RESTATEMENT, TRUSTS, MD. ANNO. (1940) § 399, p. 239.

have used language from which it may be inferred that the doctrine is applicable only to trusts.²⁰ In the instant case, the Maryland Court of Appeals construed the Uniform Act "as applicable to an absolute bequest to a charitable corporation as it is to a bequest in trust."²¹

A review of the cases dealing with *cy pres* indicates that the doctrine will be applied only where the court determines that the testator's general intention was charitable in nature and that the particular recipient, or the means of execution of his plan, was of secondary importance. This consideration, which is the *raison d'être* of the doctrine, is the most difficult to resolve, as it involves an examination of the mental state of a person no longer living. Often, the courts look first to the instrument itself, as did the Maryland Court which paid particular attention to the following:²²

1. The proportion of the entire estate left to charity;
2. The proportion of the residuary estate left to charity;
3. The presence or absence of a gift over;
4. The presence or absence of an *in terrorem* clause;
5. The type of alternate distribution which may be suggested.

Generally, however, the courts are also inclined to examine the reported statements and conduct of the testator or donor as further evidence of his general and primary intentions. The weight put upon such evidence probably depends on how clear an answer may be obtained from a reading of the instrument itself. The difficulty in relying on evidence of this character is that it is often susceptible to several interpretations and may lead the court into adopting a more obvious construction to the exclusion of a less obvious but equally significant one. An illustration of this is seen in a recent New Jersey case where the Court was called upon to construe a will wherein a sizeable bequest, including the entire residuary estate, was left in trust to Amherst College for use as a scholarship loan fund

²⁰ *Thurlow v. Berry*, 249 Ala. 597, 32 So. 2d 526 (1947); *In re Faulkner's Estate*, 128 Cal. App. 2d 575, 272 P. 2d 818 (1954); *In re Lowe's Estate*, 117 Ind. App. 554, 70 N.E. 2d 187 (1946). These cases did not involve interpretation of the Uniform Act.

²¹ *Supra*, n. 19, 387, citing *Rabinowitz v. Wollman*, *supra*, n. 18, which dealt with an interpretation of the 1931 Act, *supra*, n. 17.

²² *Supra*, n. 19, 388-390.

for "deserving American born, Protestant, Gentile boys of good moral repute." Amherst declined to accept the trust unless the religious restrictions were removed.²³ In attempting to determine whether the primary intention of the testator was to benefit Amherst or a particular class of students, the Court, after considering a relatively unindicative will, had to rely on the fact that the testator was an Amherst alumnus, attended alumni meetings, and gave modest donations to the school. Equally as convincing, but brushed aside by the majority of the Court, was evidence of testator's affiliation with a Protestant sect and his donations thereto. In so weighing the evidence, the New Jersey Supreme Court directed that the funds go to Amherst without the religious restrictions. A strong dissenting opinion suggested that the testator's primary intention was to benefit the particular class of students, and that such intention could best be achieved by substituting another trustee for Amherst and allowing the restrictions to stand.

From the numerous cases in which *cy pres* has been in issue, a general pattern of at least six basic situations is discernible, namely:

1. The funds available for the particular purpose are insufficient to fulfill that purpose;²⁴
2. The particular charity intended to be benefited has lost its existence prior to the time when the bequest becomes effective;²⁵
3. The particular charity loses its existence after the bequest has become effective;²⁶
4. The particular charity intended to be benefited refuses the bequest;²⁷
5. The bequest, if executed as intended, would be illegal;²⁸
6. The bequest, if executed as intended would be impractical or, because of changed conditions, would not serve to carry out the intention of the testator.²⁹

²³ Howard Savings Inst. of Newark v. Peep, 34 N.J. 494, 170 A. 2d 39, 41 (1961).

²⁴ Fairbanks v. City of Appleton, 249 Wis. 476, 24 N.W. 2d 893 (1946).

²⁵ *Supra*, n. 19; In re McIlvain's Estate, 44 Berks. 173 (Pa. 1954).

²⁶ Carr v. Trustees of Lane Seminary, 43 N.E. 2d 648 (Ohio 1936).

²⁷ First Nat. Bank of Chicago v. Elliott, 406 Ill. 44, 92 N.E. 2d 66 (1950); Howard Savings Inst. of Newark v. Peep, *supra*, n. 23.

²⁸ In re Week's Estate, 154 Kan. 103, 114 P. 2d 857 (1941); In re Fowler's Estate, 43 N.Y.S. 2d 94 (1943) *aff'd.*, 50 N.Y.S. 2d 174 (1944).

²⁹ In re Swope's Estate, 121 N.Y.S. 2d 181 (1953) where impracticality was caused when the specific theological seminary named as beneficiary

In each of the above situations, once the court determines that the testator's charitable intention was general in nature, the disposition of the case normally depends on what alternatives are available by which this intention can be effectuated; i.e., what alternatives are *cy pres* — as near as — the testator's stated desires as will satisfy the court.

In the first situation, the cases generally involve a bequest for the construction and/or maintenance of some institution in accordance with specific plans, and the funds provided therefor are insufficient to accomplish that goal. If another institution exists which is reasonably close in character (curriculum, services offered, admission policy, etc.) to the intended beneficiary, several courts have directed the funds to such existing institution.³⁰ The Maryland Court, applying Virginia law, has employed this method.³¹ Even where no similar institutions exist, the strong tendency to avoid the failure of charitable trusts has led some courts to direct the funds to existing dissimilar institutions under conditions which would approximate the testator's intention.³²

Cases involving the extinction of the particular charity intended to be benefited prior to the vesting of the trust or gift have been treated similar to situations where the charity has lost its existence after the trust or gift has vested. Where the extinct charity is one of a class to which the funds are to be or have been applied, the court may divide its share among the remaining institutions if they are similar to the one which became extinct, although there is apparently no rule which compels the court to do this.³³ As in all cases where the doctrine is applied, the nearest mode of execution to the testator's general intention is what is required. Where the intended recipient has merged with another institution, the decision is based upon the proximity of purpose of the new or resulting institution to that of the old one.³⁴ Where another institution exists similar in purpose, the courts have directed the funds to

fell under Chinese Communist control; *Towne Estate*, 75 D. & C. 215 (Pa. 1951).

³⁰ *Fairbanks v. City of Appleton*, *supra*, n. 24; see also *Estate of McKee*, 378 Pa. 607, 108 A. 2d 214 (1954); *In re Wanamaker's Estate*, 364 Pa. 248, 72 A. 2d 106 (1950); *In re Williams' Estate*, 353 Pa. 638, 46 A. 2d 237 (1946).

³¹ *Fletcher v. Safe Deposit & Tr. Co.*, 193 Md. 400, 416, 67 A. 2d 386 (1949).

³² *In re Ashbridge's Estate*, 61 D. & C. 279 (Pa. 1948); *Cf. Howard Savings Inst. of Newark v. Peep*, *supra*, n. 23.

³³ *In re McIlvain's Estate*, *supra*, n. 25; *Dobbin's Estate*, 74 D. & C. 106 (Pa. 1951).

³⁴ *In re Nuckol's Estate*, 197 Okl. 175, 184 P. 2d 778 (1947); *Wellford v. Powell*, 197 Va. 685, 90 S.E. 2d 791 (1956).

that charity.³⁵ In situations where several of these possibilities exist, the court must examine the merits of each basing its ultimate decision on the relative proximity of each to the testator's intention, and it may withhold a decision until an appointed committee has studied the possibilities and rendered a report.³⁶

The applicability of *cy pres* in cases where the particular mode of execution is illegal depends largely on the extent of the illegality. Illegality itself as a grounds for the use of *cy pres* is recognized in the Uniform Act,³⁷ although several courts have used the term "inexpediency" in its place when speaking of the doctrine.³⁸ Generally, where recognized as a reason for applying *cy pres*, the illegality must not affect the trust or gift itself, but only the particular recipient. The situation where acceptance of the trust is nugatory because of invalid conditions, in which *cy pres* was applied, must be contrasted with the case where the gift itself was void under a statute expressly prohibiting the general type of gift involved.³⁹ It has also been held that *cy pres* cannot be applied to validate a charitable trust which is void under a statute invalidating such trusts if created within a stated period prior to the settlor's death.⁴⁰

The application of *cy pres* where, because of a change in circumstances, the execution of the scheme as originally intended by the testator would be impractical, or would not serve to satisfy his intention depends primarily on the relative nearness to the original desire of the altered stated recipient and the available alternatives. Where trust funds intended to be used for the purchase of fuel for indigent families of a certain village were sought to be diverted to the maintenance of the village cemetery on grounds that there were no indigent families left in the village and that, for the preceding three years there had been no need to

³⁵ In re Zuck's Estate, 33 Erie 237 (Pa. 1953).

³⁶ Estate of McKee, *supra*, n. 30. The Pennsylvania Court here withheld final disposition of the case for 50 years.

³⁷ 2 MD. CODE (1957) Art. 16, § 196.

³⁸ Allen Adm'r. v. City of Bellefontaine, 47 Ohio App. 359, 191 N.E. 896 (1934); Village of Hinsdale v. Chicago City Missionary Soc., 375 Ill. 220, 30 N.E. 2d 657 (1940).

³⁹ Cf. In re Week's Estate, *supra*, n. 28, and In re Walter's Estate, 172 Misc. 207 (1939), 15 N.Y.S. 2d 8, aff'd., 21 N.Y.S. 2d 37 (1940) mod. 285 N.Y. 158, 33 N.E. 2d 72, 133 A.L.R. 1283 (1941).

⁴⁰ In re Fowler's Estate, *supra*, n. 28. Section 12 of the Personal Property Law, and Section 113 of the Real Property Law of New York (the counterparts to Sections 195 and 196 of Article 16) validate only those charitable gifts which are otherwise valid. Thus, the New York Court reasoned that since the gift there was invalid under another statute rendering such gifts invalid if made within two months prior to donor's death, it could not be saved by application of *cy pres*.

purchase fuel, a Pennsylvania court refused to apply the doctrine.⁴¹ The cases in this area are based on such divergent factual situations that precedents are not likely to be found, and decisions usually rest on the general established requirements of *cy pres* as applied to the particular facts.

It should be noted that *cy pres* was not intended to be applied, and will not be applied where the trust or will provides for a specific alternate distribution effective on the failure of the primary charitable gift.⁴² The principle of the doctrine is that the court should ascertain and effectuate as nearly as possible the testator's true intention, without substituting its own judgment for that of the testator, or creating a fictional testamentary intent.

Maryland is in an enviable position in regard to the *cy pres* doctrine. In so far as its statute requires that it be interpreted in harmony with the interpretation given by other states which have enacted it, the Maryland courts have available decisions from other states to guide their deliberations. Furthermore, as a latecomer to the discussion, the Maryland courts, in areas of conflict, have the opportunity to choose from among the earlier decisions those which they find to be the better reasoned.

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⁴¹ *In re Vogan's Estate*, 75 D. & C. 531 (Pa. 1951).

⁴² *Camden Trust Co. v. Christ's Home of Warminster, Pa.*, 28 N.J. 466, 101 A. 2d 84 (1953); *Village of Hinsdale v. Chicago City Mis Soc.*, *supra*, n. 38.