

HOLDING THE TENSION: HISTORY AND POLICY

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The subject of this conference is one that has received a great deal of scholarly attention over the years - with no sign that this interest is abating – witness our presence here today. This interest cannot be due to the complexity of the legal principles involved, nor to any inherent difficulty in applying them in specific situations. What appears to peak continuing interest is the fact that the doctrines involved were designed to deal with situations in which conflicting societal interests clash with each other and the outcomes invariably affect fairly broad segments of the public.

The "tension" in the title of this paper refers to the potential clash between the desires of donors to control the disposition of assets they have given for charitable purposes and the needs of the public to assure that those assets are being used to meet current needs. Although property law developed in large measure to protect private rights, it did contain limits on the length of time in which property could be held in trust or the

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income could be accumulated. Charities from earliest times have been exempt from these particular limits. They were allowed to last in perpetuity and accumulate their income for reasonable times. Importantly, once a gift for charitable purposes was complete, unless he reserved the power, a donor no longer had any ability to modify its terms or to sue to assure their proper administration and their rights to receive the property if there was a failure of purpose were circumscribed. The ability of members of the public to sue to enforce the behavior of charitable fiduciaries was also greatly circumscribed, and a unique concept, the doctrine of cy pres, was developed to assure that charitable assets would be available to respond to changing needs and changing societal interests. Together with its corollary, deviation, these doctrines provided a mechanism by which, if certain conditions were met, the courts could alter the terms of charitable gifts or their methods of administration to assure that they were relevant to contemporary needs.

Historically, after the time of the Reformation, there was less tension between donor intent and the dead hand than now appears to be the case. In fact, the thrust of the law, embodied in the Reformation, was to limit the power of the "dead hand". Ironically, however, the very doctrines devised to provide flexibility for gifts that were permitted perpetual life contained within them a deference to the intent of donors that was at odds with the attempts to avoid the dead hand. The reason was that the cy pres doctrine was not applicable unless it could be demonstrated that the donor had what was termed a "general charitable intent", not a narrow intent to support the specific purpose set forth in the terms of the gift. In addition, once the court found a general charitable intent and was therefore able to modify the original purposes to make them fit contemporary needs, it

was required to frame a scheme that had some degree of proximity to the donor's original intent, although as will be seen, the exact degree of proximity has varied over time.

Given that the cy pres doctrine was designed to provide flexibility, and the limits on donors' rights to control their gifts were designed to give charitable fiduciaries fairly wide latitude to carry out their missions, it was inevitable that conceptions of the proper reach of the law would itself be subject to change. Among the most widely publicized of recent cases in which tension between donor intent and the perceived needs of the public have clashed are controversy over the proper administration of the art collection held by the Barnes Foundation; the numerous cases determining the disposition of the proceeds from the conversion of hospitals, HMOs and other health care organizations to for-profit entities; disputes over the proper application of surplus funds originally donated to alleviate the suffering generated by the September 11 terrorist attacks; and the continuing question of how to deal with discriminatory restrictions. However, it is easy to find cases involving similar tensions going back to earliest common law. And inevitably, as one side or another prevails in the clash between donor intent and contemporary needs, there is a new call for change in the doctrines that are used to resolve the tension.

My assignment here is to introduce our topic by reviewing the history of the cy pres doctrine and its related components in charity law; describing the manner in which the law has attempted to resolve the tension between “respecting donor intent and avoiding the dead hand,” and the policy considerations that should frame our discussion as we attempt to “grasp the nettle”. In doing so, I have had some difficulty in determining where "history" ends and I apologize, particularly to my fellow presenters, if I have ventured too far into current law and thereby duplicated their work.

THE DOCTRINES OF CY PRES AND DEVIATION¹

The doctrine of cy pres originated with the Romans. As early as the first century A.D. associations or foundations were recognized as legal entities and were permitted to receive bequests to be held in perpetuity. Originally they were encouraged to honor the gods, but were later established to help the underprivileged. Constantine in 313 AD by edict reiterated the legal rights of the Christian Church as an association whose property could be neither alienated by any individual nor used within the Church for purposes other than those designated by the donor. Thereafter, the Church was utilized as the medium for distributing all public funds for the underprivileged and individuals were encouraged to make gifts to the Church for charitable purposes. These gifts, called *Piae Causae*, were administered by the bishop of the church where the donor was domiciled.

There were abuses in the management and disbursement of these charitable funds, however, and during the revision of the Roman law in 550, reforms were instituted to place the church foundations on legal bases more appropriate to the changing society of the times. Ecclesiastical foundations were declared legal persons with their own legal capacity. A comprehensive list of safeguards was enacted to protect the foundations and keep them socially useful. The bishops were given appointive and supervisory power over administrations of the funds. Appropriate to our topic today, provision was made for the selection of a similar cause if the original purpose of a gift should lose its social utility, and a gift would revert to a donor or his heirs if not made effective within a certain period.

¹ Much of the material in the this section is taken from Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation*, ch. 2 (Cambridge, Mass: Belknap Press of Harvard University Press, 2004).

The Roman concepts of charity were brought to England and form the basis of contemporary charity law there (as well as in the rest of Great Britain and in the United States), although with a unique stamp that was developed during the Reformation. A system of ecclesiastical courts was created during the Norman Conquest, starting in 1066, with a special jurisdiction over gifts for pious causes. The powers of these courts gradually were expanded to cover all testamentary matters and charitable gifts were afforded three distinct privileges not granted to other persons or legal entities – privileges that we confer to this day: indefinite existence; validity even if the gift was in general terms, so long as its objective was exclusively charitable; and the ability to obtain fresh objectives if those specified by the founder became incapable of execution.

It is this third “privilege” that we know as the doctrine of cy pres. It assumed particular importance during the period of the Reformation when the power of the Church and with it the jurisdiction of the ecclesiastical courts was limited. As part of this movement, statutes limiting gifts of land to charitable corporations were enacted. Called Acts of Mortmain, their purpose was to prevent land from being controlled by a “dead hand”. This fear of donor control of the future became an underlying concept in the law of charity, affecting the ability of corporations to hold property, and giving particular credence to the doctrine of cy pres.

The power to exercise the cy pres doctrine was always bifurcated. It was initially considered the power of the king which he delegated initially to the ecclesiastical courts but, starting in the 16th century, it was delegated to the courts of equity in all but two circumstances. The Crown retained the power when the gift was made to charity generally without designating a trustee, a circumstance that included gifts to nonexistent or defunct

charities; and when the object of the gift was illegal or void as contrary to public policy. This included gifts for "superstitious uses", which encompassed those for support of the Catholic Church or other outlawed religions. The use of the Crown's retained power to alter the purpose of charitable property was known as the prerogative cy pres power, while the power held by the courts was termed the judicial power. In time the prerogative power came to be exercised by the chancellor, acting directly for the king and not in his role as the presiding judge of the equity courts. In many cases it was not clear which power – judicial or prerogative – was being exercised. In 1803 an attempt was made to delineate the two types of cy pres powers, although by then the provisions banning superstitious uses had been repealed. Nonetheless, the two sources of power to exercise the cy pres doctrine remain distinct in English law to this day.

The Meaning of Cy Pres: "Near This" or "As Near as Possible"

The term cy pres is considered to be Norman-French. Sheridan and Delany in their 1959 treatise contend that, contrary to common understanding, it is not a late variant on "si-pres", meaning "so near" or "as near". Rather, based on the first source in which the phrase appears, namely Littleton's *Tenures* of c. 1481, "cy" merely reinforces the word "pres" and means near, as in Modern French "ici", or alternatively, it is the shortened form of "aussi". The authors acknowledge that, in its modern application, the courts have interpreted the phrase to mean "as near as possible" and have consequently insisted upon getting as close as possible to a settlor's original intention. The authors believe, however, that it is not at all certain that this was the case when the doctrine was first known, "for its earliest characteristic was a liberality, even promiscuity of construction, and the general

feeling was that a charitable gift must not be allowed to fail.” They posit that there was a general reaction to this liberal view starting at the end of the 18th century that carried over to more recent times. Their conclusion was that, although historically cy pres probably meant simply “near this,” nevertheless its force seemed, by professional usage, to have been changed to mean “as near (as possible)”. In the sense of our discussions today, this meant the triumph of donor intent over concerns about the evil effects of the dead hand.²

As to the definition of the cy pres doctrine, Sheridan and Delany set forth four elements:

(1) a gift of specific or ascertainable property by a donor to charitable purpose; (ii) a determination by the court that this specific gift either embraced a broader plan of which the specific gift was only a mode or application or was out and out; (iii) the defeat of the specific gift; and (iv) an application of the property by the court in order to achieve the continued fulfillment of the broader plan, if any, or to charity anyway.³

As the law developed in England, a distinction was made between gifts for charity generally or for a specified purpose but with no trust designated, and gifts in trust for charity generally or for more specific charitable purposes. For the gifts for charity generally, whether in trust or not, there was a time when it was held that cy pres did not apply. Rather under their general equity powers the courts were empowered to validate the gifts or trusts by framing a scheme or appointing trustees following the general rules that gifts for charity should be upheld if at all possible and that equity will not allow a trust to fail for lack of a trustee. Unfortunately, the courts did not always exercise their

² L.A. Sheridan and V.T.H. Delaney, *The Cy-Pres Doctrine*, 5-7 (London: Sweet & Maxwell, 1959).

³ Sheridan & Delaney, *The Cy Pres Doctrine*, 4-5.

equity powers in this manner and, although they should not have found it difficult to apply cy pres liberally under this formulation, in fact, this was not the case.

Throughout the 19th century and well into the 20th, despite calls for reform of the cy pres doctrine, it continued to be narrowly interpreted by the English courts. In 1952 a parliamentary committee, under the leadership of Lord Nathan, recommended relaxing the need for impossibility and dispensing with the “nearest” rule. Although Parliament did not accept these recommendations, in 1960 it did grant to the Charity Commissioners, the body that regulates charities, the power to make cy pres schemes other than on the application of the trustees and to exercise jurisdiction over certain small charities.

In a 1976 report to Parliament on Charity Law and Voluntary Organizations, the Goodman Committee noted that it did not appear that these powers had ever been used and reported doubts as to whether the rule was yet sufficiently wide to enable schemes to be made for the best use of charity funds.

The notion of cy pres implies that the objects of the charity will only be altered to the minimum degree necessary to enable the charity to serve a useful purpose and that otherwise the objects must be kept as near as possible to the objects laid down in the original trust instrument. The question is then whether the cy pres rule should be extended to enable cy-not-so-pres schemes to be made by the Commissioners or the Court...⁴

The recommendation of the Goodman Committee was to amend or clarify the doctrine to make it clear that in appropriate cases a fundamental change in the objects of the charity could be authorized. Again, Parliament took no direct action, although the Charity Commissioners were given broader powers to deal with small trust. In 1992, following recommendations of a special commission established in 1987, Parliament did

amend the charity laws by making it easier for small charities to merge or terminate. We will hear tomorrow from Richard Fries about the newest developments in charity law in Great Britain, in particular the provisions in a draft Charities Bill that incorporates recommendations from the English Cabinet Office published in 2002. Included are provisions that would broaden the doctrine of cy pres and extend it to apply to gifts made in response to certain solicitations. The public debate on this initiative has important lessons for all of us.

The Doctrine of Cy Pres in American Law

In the United States, the judicial cy pres power was recognized by the courts in those states which adopted the English common law, but was rejected, as was the validity of charitable trusts, by the courts in New York and other states that followed New York precedent. As to the prerogative cy pres power, the state legislatures were considered to be the inheritors of many of the powers of the English kings. However, despite some contrary authority, the prerogative cy pres power did not pass to the legislatures. Rather it was almost uniformly rejected and except in unusual circumstances does not have a place in contemporary law.⁵

Until the latter half of the 20th century, the basic requirements for application of the cy pres doctrine in almost all of the states that accepted the doctrine were essentially similar to the British formulation, namely: (i) a valid charitable trust or corporation or a gift to be used for valid charitable purposes; (ii) a change of circumstances such that the original purpose was or became unlawful, impossible, or impracticable to carry out; and

⁴ *Charity Law and Voluntary Organizations*, 93 (London: Bedford Square Press, 1976).

(iii) a manifestation that the donor had a general charitable intention as well as the intention to benefit the particular charitable object he designated. If these elements were present, equity courts could modify purposes to reflect current needs, choosing those near to the donor's original intent - the degree of proximity, however, varying over time and the predilection of the court framing the scheme. Less emphasis was placed on the difference between "out and out" gifts and gifts in trust. However, in a number of jurisdictions, the courts took the position that cy pres would not be applied to save a gift the purposes of which were impossible or impracticable to fulfill if the donor had provided for an alternate gift on failure of the original one.

The range of situations under which cy pres has traditionally been applied is extremely broad and this fact has undoubtedly fueled interest in changing the scope and application of the doctrine itself. The more traditional conditions for application of the doctrine encompass non-existence of a donee, through misnomer or because it has merged or dissolved; inability of a donee to accept because of illegality or incompatibility with its charter provisions or basic tenets; insufficient funds to accomplish the stated purposes; or the obverse, a surplus of funds. Still another reason would be accomplishment of a specified purpose, the most common example being the discovery of the polio vaccine. Finally, governments may have taken over the provision of aid or services for which gifts were intended to be used, or political events may have rendered it impossible to apply funds abroad.

⁵ Jill R. Horwitz and Marion R. Fremont-Smith, "The Common Law Power of the Legislature: Insurer Conversions and Charitable Funds," 83 *Milbank Quarterly* 225 (2005).

Deviation: A Corollary to the Doctrine of Cy Pres

The doctrine of cy pres has an important corollary that developed from the concept that gifts for charity should be upheld and that it was the role of the equity courts to assure that they continued to be applied to meet contemporaneous needs. This power is embodied in the doctrine of deviation under which equity courts are empowered to alter administrative terms of charitable gifts imposed by donors if compliance appears to be impossible or illegal or if, owing to circumstances not known to the donor and not anticipated by him, compliance will defeat or substantially impair the accomplishment of the purposes of the trust.⁶ The distinction between the two doctrines, one often misunderstood by the courts, is that cy pres applies when a change of charitable purposes is involved, while deviation is confined to matters relating solely to administration. In other words, cy pres relates to ends, deviation to means. Thus a donor-imposed restriction mandating that trust funds be invested only in government bonds can be modified through application of the doctrine of deviation.⁷ As discussed below, this doctrine has been liberally applied by the courts since the mid-20th century to nullify restrictions based on race or gender and in states in which the cy pres doctrine is narrowly construed, the courts will sometimes turn to deviation to effect a change when they find that the basic requirements of the cy pres doctrine cannot be met.

⁶ Restatement (Third) of Trusts, §66.

⁷ In South Carolina, where the doctrine of cy pres was not accepted, the courts traditionally applied deviation to permit changes in purposes. In keeping with that precedent, when the legislature enacted the UTC in May 2005 section 413 was retitled "Equitable Deviation" not "Cy Pres".

Liberalization of Cy Pres and Deviation in the U.S. since Mid-20th Century

Until the start of the 20th Century, the cy pres doctrine was strictly construed and courts construed both the requirement of general charitable intent, as nearness to original purposes narrowly. A tendency toward liberalization began at the start of the 20th Century as some judges began to look at the broad purposes of a gift and expressed more concern for the needs of society than the narrow wishes of donor.⁸ The loosening of the traditional standards was sufficiently wide-spread by 1957 for the American Law Institute in Restatement of Trusts, Second, adopted in that year, to provide in section 399 that it was permissible for the court to order application of the property “to some charitable purpose which falls within the general charitable intention of the settlor.”

Further liberalization was signaled with the adoption in 2003 of section 67 of Restatement of Trusts, Third, in which “wastefulness” was added to the conditions under which the doctrine could be applied and the guide for determining an alternative purpose was that it “reasonably approximates the designated purpose.” The Comment notes that the term “wasteful” was intended to mean more than inefficient but less than destructive or ultra vires and that a purpose would be wasteful only if circumstances suggest that the donor would not have imposed the contested restriction had he know of the unanticipated circumstances.

This formulation of the cy pres doctrine was incorporated in section 413 of the Uniform Trust Code (UTC), adopted by the Commissioners on Uniform State Laws in 2003. Paragraph (a) of section 413 of the UTC provides that if a charitable purpose

⁸ See Appendix 1 for list of cases and statutes by states.

becomes unlawful, impracticable, impossible to achieve or wasteful:

- (1) the trust does not fail, in whole or in part;
- (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
- (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

The Comments make it clear that this section was intended to codify the court's inherent authority to apply cy pres to modify an administrative or dispositive term, thereby removing the distinction between cy pres and deviation. It noted that the new formulation was similar to the rule in Tentative Draft No. 1 of Restatement of Trusts, Third, section 67, (the final version not yet having been adopted by the ALI) by presuming a general charitable intent. Finally, the Comment makes clear that the doctrine applies not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. Although it does not control dispositions made in nontrust form, the Comment recognizes that courts often refer to the principles governing charitable trusts, which would include the UTC.

A corollary to section 413 of the UTC is to be found in paragraph (b) of section 405 of the Code. Paragraph (a) of this section contains a definition of charitable purposes that restates what is described in the Comment as "well-established categories of charitable purposes" found in Restatement of Trusts, Second, and the Tentative draft of Restatement, Third. Subsection (b) then provides that "If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained." The Comment contains a paraphrase of section 413(a):

"A trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained." (Emphasis added). This final phrase does not appear in section 413(b), raising the question of how far a court must in fact attempt to "ascertain" the original purposes.

In 2002 the ALI approved a new project to frame Principles of the Law of Nonprofit Organizations. Preliminary Draft Number 3, published in May of 2005, contains in section 440 a formulation that adopts the liberalized standards of Restatement of Trusts, Third, while providing more guidance on factors that determine the rigor or liberality of available relief. Unlike the UTC, the distinction between cy pres and deviation is retained, with greater flexibility accorded in determining when deviation may be applied and the degree of proximity to the donor's original intent. Recourse to donor intent is retained as a guide in determining alternate use. If the gift instrument provides for a gift over to an alternate beneficiary, deviation may be applied, but cy pres will not "ordinarily" be available if transferring the gift to the taker in default will carry out the donor's charitable purpose.

Current Formulations of the Doctrines in the Various States

The cy pres doctrine has been a part of the common or statutory law of nearly all of the states for the last forty years. Today there are only three states in which it is not recognized, Alaska, Arizona and North Dakota, although in Hawaii and Nevada it has been recognized only in dictum and in South Carolina it is called "deviation". The Arizona legislature in 2003 enacted the cy pres provisions as part of its adoption of the UTC, but

the Act was repealed in its entirety in the following year, returning the state to the list of those in which the doctrine is not recognized.⁹

The cy pres doctrine has a statutory basis in thirty-five states and the District of Columbia. The statutes in force in Maryland, Oklahoma and Vermont follow the language of a Model Act Concerning the Administration of Charitable Trusts, Devises and Bequests, which was recommended by the Commissioners on Uniform State Laws in 1944. The Alabama statute follows the Model Act with some modification and the statute in Kansas has similar language. As of September 2005, the cy pres provisions in the Uniform Trust Code had been enacted in their entirety in Arkansas, Maine, Missouri, Nebraska, New Mexico, Oregon (effective 1/1/06), South Carolina (renamed "equitable deviation", effective 1/1/06), Tennessee, Utah, and Virginia (effective 7/1/06). In addition paragraph (a) had been adopted in North Carolina, Wyoming and the District of Columbia. Indiana and New Hampshire have not enacted the UTC in its entirety but have adopted paragraph (b) of the cy pres provision together with a broader version of paragraph (a). This makes a total of thirteen jurisdictions in which the cy pres provision in the UTC have been adopted, with nine of these having been enacted in 2004 and 2005. It is not uncommon for a new Uniform Act to be widely enacted in the years immediately after its adoption by the Commissioners, and such is likely to be the case with the UTC. Thus, it can fairly be stated that the doctrines of cy pres and deviation are being liberalized, although it is regrettable that there may well be three different versions in effect in the states, two recommended by the ALI and one by the Commissioners on Uniform State Laws.

⁹ See Appendix 1 for citations and description of state laws and Appendix 2 for summary of provisions.

Finally, although Delaware had enacted a cy pres statute in 2000 that follows the formulation of the UTC, in another section of its general laws it appears to have greatly circumscribed the power of the court to modify charitable trusts if the settlor so directs in the trust instrument.¹⁰ Subsection (a) of section 3303 grants broad powers to a settlor of a trust in the terms of the governing instrument to expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries. It concludes with the following sentence: “It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.” Subsection (b) then provides

In furtherance of and not in limitation of the provisions of subsection (a) of this section, and notwithstanding any contrary provisions of section 3542, the terms of a governing instrument of a trust established and existing for religious, charitable, scientific, literary or educational purposes shall not be modified by the court to change the trust’s purpose unless the purposes of the trust have become unlawful under the Constitution of this state or the United States or the trust would otherwise no longer serve any religious, charitable, scientific, literary or educational purpose, in which case the court shall proceed in the manner directed by section 3541 of this title.

In addition to the statutes defining cy pres and deviation, there are statutes in 23 states, including those in which the UTC is in effect, that permit expedited reformation or termination of small charitable trusts. Many of these statutes require that notice of the petition be given to the attorney general and to any taker in default. They also empower the court on its own motion to modify or terminate a trust that is too small to justify the cost of administration. The threshold for application of the statutes varies from \$10,000 to \$150,000. Section 414 of the UTC permits a trustee to modify or terminate a trust with

¹⁰ Del. Code Ann. tit. 12, §3303.

assets valued at less than a certain amount (\$50,000 being suggested), if the trustee determines that the cost of administration is too high to justify continuation. Notice must be given to "qualified" beneficiaries and the trust property is to be distributed consistent with the purposes of the trust.

No mention is made in the text or the Comments as to the applicability of this provision to charitable trusts. However, subsection (d) provides that "This section does not apply to an easement for conservation or preservation." The Comment notes that easements for conservation or preservation will frequently create a charitable trust, and the drafters of the Code concluded that these trusts are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section. In view of the fact that is only in rare instances that there are identifiable beneficiaries of charitable trusts, it would appear that this provision could not be applicable to charities unless notice to the attorney general would be considered sufficient. As it stands, the import of the provision is unclear.

The thrust of traditional criticism of the cy pres doctrine has been directed toward the requirement of general charitable intent. However, even before adoption of the UTC and the formulation in the third Restatement of Trusts, in Georgia, Massachusetts and Virginia general charitable intent was presumed in cases in which a valid charitable trust or gift was created, while in Delaware and Pennsylvania the requirement was entirely eliminated. In another fifteen states, the courts will infer a general charitable intent from evidence that the settlor left almost all of his estate to the charity or similar evidence of intent in the document. Furthermore, the absence of a gift over or a reversionary clause if a charitable gift failed was considered evidence of general charitable intent while the

obverse was held to negate any application of the cy pres doctrine and courts wanting to save the original gift would in many instances apply deviation, rather than enforce the gift in default.

The second focus of criticism has been on the requirement that it must be impossible or impracticable to carry out the donor's purposes. As noted in Appendix 2, there are 20 states in which the standard for application of the doctrine has been liberalized by the addition of other conditions, including the inclusion in the laws of those states adopting the UTC of "wasteful", or as in New Hampshire a finding that the purpose would be "prejudicial to the public interest to carry out", and the addition of "inexpedient" in the statutory formulations in Minnesota and South Dakota. The statute in Illinois, enacted in 1997, permits application of the doctrine if the continued administration of the trust has become impractical because of changed circumstances that adversely affect the charitable purposes. The statute defines "changed circumstances" as a condition in which the charitable purpose or purposes of the trust have in the judgment of the trustees become illegal, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community. The Idaho statute incorporates the condition of impractical due to "changed circumstances" but does not define the phrase. Noteworthy in these statutes is the fact that the trustees may proceed with assent from the attorney general, but do not need court approval.

The third component of cy pres and deviation is the requirement that the new purposes be close to those originally specified by the donor. As noted, the degree of proximity has changed over time and the trend had been to liberalize this component of the cy pres doctrine. However, so long as the law requires any recourse to donor intent

other than what appears in the terms of the gift, the courts will continue to face questions with no clear cut answers and potential beneficiaries will continue to press their claims for the assets. The draft Principles of Nonprofit Law include new guidance to the courts by specifying that relevant donor intent is that which is originally expressed in the gift instrument, not what either the donor, if living, or the court thinks it may be at the time that modification is requested. In addition, the draft Principles propose that the policy of adhering to a gift restriction, whether it relates to administration or purposes, should diminish with time and unanticipated circumstances.

Cy Pres and Deviation Applied to Charitable Corporations

An important, largely undecided issue in regard to the doctrines of cy pres and deviation is whether and if so to what extent they are applicable to assets held by charitable corporations. Both Restatements of Trusts, Second, and Third make it clear that the doctrines apply to all funds devoted to charitable purposes, including gifts to and property held by charitable corporations. Some courts and commentators take a contrary position holding that they do not apply to assets of a charitable corporation that have been received as receipts for services rendered nor to income from the investment of those receipts, it being within the power of the board to determine their disposition. Others go further arguing that the doctrines should apply only to gifts specifically designated to be used for named purposes or to be permanently held as endowment.

Preliminary Draft No. 3 of the Principles of Nonprofit Law contains a liberal position in this regard, providing that the governing board of a charity other than a charitable trust may change its purpose to another charitable purpose without the need to determine that the current purpose has failed. The determination of a new purpose is to be

considered a matter of business judgment, not subject to judicial review for abuse of discretion. In contrast, corporations holding restricted gifts are subject to the rule applicable to charitable trusts, requiring that they institute judicial proceedings to change the purposes of those gifts, unless their terms provide otherwise. This proposed rule follows from a decision by the drafters that there is a difference in the legal regime of trusts and corporations, that founders of charities are free to choose the regime they wish, and that by choosing a charitable trust they will be limited in their ability to change purposes, while by forming a corporation they have broad freedom to change its purposes and to apply existing funds to the new purposes, with some limitations described below.

The Principles also posit a duty to keep the purposes of the charity current and useful, thereby rejecting a duty of obedience to the extent that it prevents a board from altering purposes prospectively. Most important, there is no requirement that the new purposes reasonably approximate or reasonably relate to the prior purposes. This proposed rule is contrary to the law in a number of states and the drafters acknowledge that such a liberal policy may have untoward consequences that may require some degree of state oversight or greater judicial control, as for example when the purposes of a charitable hospital are changed after its conversion to support the arts, or, as posited in a Massachusetts case, from operating a home for abandoned animals to support of “research vivisectionists.”¹¹

Section 245 of the draft Principles provides that a charity other than a charitable trust may use its assets, other than restricted gifts imposing contrary requirements, for any pre- or post-amendment charitable purpose. The effect of this is that restricted gifts must

be applied for their original purpose unless there is judicial reformation under cy pres or deviation. However, the other corporate assets, namely unrestricted gifts and non-donated assets may be directed by the board to any purposes, old or new. This includes income received from the sale of goods and services as well as income earned from investment of earnings and of unrestricted gifts. The assumption here is that unless a donor specifically imposes restrictions, he has implicitly consented to future amendments to the purposes for which his gifts may be used.

Statutes in twenty-three states govern the distribution of assets on dissolution of charitable corporations, requiring application of the property under the cy pres doctrine, but with no requirement of a showing of general charitable intent, although a right of reversion expressly stated will be respected. In New York the courts have articulated what is described as a quasi-cy pres doctrine that applies to the general assets upon dissolution of a charitable corporation under which the degree of proximity to original purposes is more relaxed than is the case with charitable trusts or restricted funds of charitable corporations.¹²

Release of Discriminatory Restrictions

Worthy of separate consideration in this review is the application of cy pres and deviation to gifts containing restrictions on the basis of national origin, race, religion, gender, sexual preference, age, group, political affiliation, or other characteristics. The first issue to be decided in cases involving discrimination is the validity of the gifts, for if carrying out these purposes involves state action, or invidious discrimination, the gift or

¹¹ Attorney General v. Hahnemann Hospital, 494 N.E.2d 1011 (Mass. 1986).

¹² Fremont-Smith, *Governing Nonprofit Organizations*, 185; N.Y. Not-for-Profit Corp. Law §1005.

trust will fail from the outset. If the gift is valid, the question then becomes whether cy pres or deviation can be applied and, as might be expected, the outcome of the cases has varied from state to state.

Where the courts have found that no state action is involved, restrictions based on race and in some instances gender have been upheld on the grounds that they were remedial measures designed to expand opportunities for disadvantaged groups. A majority of these gifts involve admission to educational institutions and financial aid and religious restrictions are generally upheld.¹³ Again the clash is between donor intent and public policy, with as yet no clear precedent, although in a 2002 Maryland case, described as "most interesting and potentially significant" by the Reporter of Restatement of Trusts, Third, in the Comment to section 67, the court applied cy pres to remove a whites only restriction on a gift to build a nursing home, rather than enforce a gift over in default. The court affirmed the position of the beneficiary that it should not be punished by refusing to carry out what would be an illegal action.¹⁴

Variance Power of Community Foundations

There are a distinctive group of foundations called "community foundations" that are a subset of publicly supported charities. They were created to pool contributions from and conduct programs for the benefit of a designated geographical area, and often will be comprised of a general fund, which may support many purposes, as well as a number of individual trusts administered by constituent banks, the income of which is distributed under the direction of the "foundation". An essential element of the community

¹³ Fremont-Smith, *Governing Nonprofit Organizations*, 122-125.

foundation form is the retention by the foundation trustees of a “variance power”, permitting them to change the purpose of any restricted gifts if there is a change of circumstances.

The variance power was intended to be less restrictive than traditional cy pres. There is no requirement of general charitable intent, no need to ascertain or adhere to donor intent once the governing body “in its sole judgment” determines that the original restriction is “unnecessary, incapable of fulfillment, or inconsistent with the charitable needs” of the beneficiary community and no requirement for the foundation to seek court approval of the change.¹⁵

Recent Cases Involving Cy Pres and Deviation

Despite what the literature and treatises describe as a trend toward liberalization, there are jurisdictions in which the courts continue to articulate a requirement of general charitable intent and the need to frame a scheme as close as possible to the donor's original intent. In a survey of seventeen cases involving cy pres or deviation decided since January 2000, the cy pres doctrine was applied in nine and deviation in one of them. In four cases the original charitable beneficiary had dissolved, merged, converted to for-profit status, or was not properly identified.¹⁶ In two others, decided in New York, the courts applied the more liberal "quasi cy pres doctrine" to restricted funds held by charitable corporations,

¹⁴ *Home for Incurables of Baltimore City v. University of Maryland Medical System Corp.*, 797 A.2d 746 (Md. 2002).

¹⁵ See Mark Sidel, “Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving,” 36 *U.C. Davis L. Rev.* 1145 (2003).

¹⁶ *Mattox v. The Annabella R. Jenkins Foundation*, 2003 WL 21210353 (Va. Cir. Ct. 2003); *In re Mary Holbrook Russell Memorial Scholarship Fund*, 730 N.Y.S.2d 702 (N.Y. Sur. Ct. 2001); *In re Estate of Post*, 769 N.Y.S.2d 332 (N.Y. App. Div. 2003); *In re Board of Trustees of Huntington Free Library and Reading Room*, 771 N.Y.S.2d 69 (N.Y. App. Div. 2004).

but with results that would not likely have differed under traditional cy pres principles.¹⁷ One case dealt with the not uncommon situation of a gift to a university for support of its dental school which, at the date the gift matured, had been closed. The court upheld the gift to the donee university and directed that they be used to support those of its own programs with related purposes, rather than awarding them to another institution that did have a dental school.¹⁸ The eighth case involved a clear case of impossibility – a gift of real property on which a medical facility was to be operated, a use prohibited under the zoning laws, with the court awarding the funds to the taker in default.¹⁹ The final case involved the Keswick Home described above in which the court removed a racial restriction rather than enforce a gift over.²⁰

In the case in which deviation was applied, at issue was the question of whether a restriction in a deed prohibiting use of real property for other than church purposes prevented the sale of the property and application of the proceeds to build a larger church on other property. The Supreme Court of Washington rejected the trial court's decree that it was applying cy pres and deviation, noting the distinction between the doctrines and holding that only one could be applied. It found that a trust was created by the original conveyance and that deviation from the administrative trust provisions was the appropriate remedy.²¹

¹⁷ *In re Estate of Thurston*, 746 N.Y.S.2d 343 (N.Y. Sur. Ct. 2002); *In re Hummel*, 2005 WL 1683597 (N.Y. Sup. Ct. 2005).

¹⁸ *Obermeyer v. Bank of America, N.A.*, 140 S.W.3d 18 (Mo. 2004).

¹⁹ *Joslin Diabetes Center, Inc. v. Whitehouse*, 2002 WL 1804083 (R.I. Super. Ct. 2002).

²⁰ *Home for Incurables of Baltimore City v. University of Maryland Medical System Corp.*, 797 A.2d 746 (Md. 2002).

²¹ *Niemann v. Vaughn Community Church*, 113 P.3d 463 (Wa. 2004). (Plaintiff was a church member and it appears that no challenge was made as to her standing to sue. The decision notes that there was a two-week trial.)

In seven of these nine cases the courts stated that before applying cy pres, they were required to find a general charitable intent. This was the case in the Maryland (Keswick) and Rhode Island (Joslin) decisions, while the Missouri and Nebraska cases were decided before the state adopted the Uniform Trust Code in which the requirement has been eliminated. In three of the New York cases, the courts held that a general charitable intent was a precondition for application of the cy pres doctrine, although the current New York statute does not recite such a requirement (Hummel, Post, and Russell Memorial).

There were seven cases in which the courts declined to apply the cy pres doctrine. In two of these, the courts found that there was no charitable gift. One of these involved the disposition of the assets of BlueCrossBlueShield of Wisconsin following its conversion. Here the court held that the organization was not a charity so that the cy pres doctrine was not applicable.²² The other case involved a trust of \$1,000,000, the income of which was to be accumulated until it was large enough to provide "a million dollar trust fund for every American 18 years or older", a term the testator estimated to be 346 years. The court found that the trust did not promote the social interest of the community as a whole, relying on Restatements of Trusts, Second and Third, and decreed that the gift failed, despite the request of the Attorney General to apply the cy pres doctrine and save the gift.²³ In three of these cases, the courts found that restrictions that the trustees were attempting to have released could still be carried out²⁴ and in another the court declined to apply cy pres, instead exercising its equitable powers to determine the identity of the

²² ABC for Health, Inc. v. Commissioner of Revenue, 640 N.W.2d 510 (Wis. Ct. App. 2001).

²³ Marsh v. Frost National Bank, 129 S.W.3d 174 (Tex. Ct. App. 2004).

²⁴ In re Ruth Easton Fund, 680 N.W.2d 541 (Minn. Ct. App. 2004); Museum of Fine Arts v. Beland, 735 N.E.2d 1248 (Mass. 2000); In re R.B. Plummer Memorial Loan Fund Trust, 661 N.W.2d 307 (Neb. 2003).

beneficiary among several organizations with similar names and purposes.²⁵ In the fourth, a gift to create a "private operating foundation" without further specifying its purposes in a will that contained vague and inconsistent provisions led the court to find that the gift was too vague to permit modification, despite the fact that the IRS had determined that the trust was entitled to tax exemption by virtue of being described in IRC section 501(c)(3).²⁶

If these cases provide any lessons, they at least underscore the need for greater vigilance on the part of attorneys when drafting gifts to charities. They also provide evidence, as might be anticipated, that the presence of a gift over will assure contested litigation, and that misnomer will also bring in contesting parties claiming they were the ones whom the testator intended to benefit. If, as is asserted, many donors today are including default gifts in order to provide an enforcement mechanism for their gifts, we can expect an increase in litigation as these default takers assert their claims.

DONOR POWER TO CONTROL CHARITABLE GIFTS

The foregoing description of recent trends toward limiting the power of donors to control the future disposition of charitable gifts might be considered to be the vanquishment of the power of the "Dead Hand". There are, however, contemporaneous developments that tend in the opposite direction, increasing the power of donors to control the disposition of their charitable gifts. Ironically, the contraction and the

²⁵ McDonald & Co. Securities, Inc., Gradison Division v. Alzheimer's Disease and Related Disorders Association, Inc., 747 N.E.2d 843 (Ohio Ct. App. 2000).

²⁶ Smith v. Snow, 106 S.W.3d 467 (Ky. Ct. App. 2002).

expansion of donor power are in large part being effectuated within the same legislative initiative, namely the Uniform Trust Code.

Under the common law, donors have only the rights they may reserve at the time of their gifts. If none are reserved, once a charitable gift is complete, the donor has no further property interest in the gift. As a practical matter, if a donor reserves a right of reverter, unless the possibility of reversion is so remote as to be negligible, the gift will not be considered complete for purposes of the tax laws, so that the donor will not be entitled to a deduction for income, estate and gift taxes. Donors wishing to assure that the terms of a gift will be observed, but unwilling to risk loss of tax benefits, may provide in a deed of gift for a transfer of assets to another charity if the original donee fails to carry out the terms of the gift, thereby making the alternative beneficiary the enforcer of the condition. However, even this is not always a guarantee of compliance. Thus in *Trustees of Dartmouth College v. City of Quincy*, a case in which the Massachusetts Supreme Judicial Court enunciated the doctrine of deviation, the court modified the terms of a gift to support a school for girls from a certain town to admit eligible candidates from surrounding towns rather than enforcing the terms of a gift in default to Dartmouth College.²⁷

Section 7(a) of the original version of the Uniform Management of Institutional Funds Act permits donors to release restrictions they have placed on institutional funds, but affords them no right to agree to modifications or standing to sue to enforce restrictions. The proposed revisions of UMIFA now under consideration by the Commissioners retains this provision and there is a similar provision in the Uniform Trust

Code.²⁸ The draft Principles of Nonprofit Law, in section 430(b)(1), recognize and affirm the UMIFA provisions if they are permitted under state law. If not, a restriction can be released according to a procedure included in the original gift instrument or in a court proceeding in which the donor may be a proper party only if he has reserved this right in the gift instrument. The Comment notes, however, that donor input may be useful, suggesting that the charity may want to consult the donor, if living, or the court may permit the donor to be called as a witness or admit evidence as to his intent at the time of the gift.

As to the degree to which donor intent must be considered, in Restatement of Trusts, Third, the Reporter justifies what is termed a “more liberal application,” both because settlors’ preferences are almost inevitably a matter of speculation in any event and because it is reasonable to suppose that among relatively similar purposes charitable inclined settlors would tend to prefer those most beneficial to their communities.” Nonetheless, he suggests that the courts consult the donor if available, but if not, they should consider his relationships, social or religious affiliations, personal background, charitable-giving history, “and the like”.

Section 8 of Restatement of Trusts, Third, contains a rule governing the disposition of property on failure of an express trust. In those circumstances, generally the trustees will hold the property on resulting trust for the transferor or his successors. As to charitable gifts, Comment g of Section 8 states that unless the settlor manifested an intention to substitute one or more other charitable purposes or a valid noncharitable

²⁷ 118 N.E.2d 89 (Mass. 1954).

purpose, or unless the doctrine of cy pres is applicable, a resulting trust normally arises. However, noting that it is rare for a settlor to forbid application of cy pres and provide no other purpose or disposition, the Comment acknowledges that the cy pres doctrine will ordinarily apply.

While, as explained further below, the UTC does grant standing to donors to bring cy pres actions, it does limit their rights to retain reversionary interests in charitable trusts. Thus, section 413(b) states that the court may not apply cy pres if in the terms of the trust there is a provision that would result in distribution of the trust property to a noncharitable beneficiary, but only if the donor is living at the date the reversion is to take effect or fewer than 21 years have elapsed since the date the trust was created. The Comment refers to an article by Chester for the reasons for this provision. In this article Chester proposed that when there is a gift over on failure of an original charitable gift to noncharitable beneficiaries, the overriding concern of the court should be to preserve the original charitable trust, because doing so preserves the primary charitable intent of the testator and better serves the interests of society.²⁹ Thus the only circumstance in which a noncharitable gift in default should be upheld would be if it was completely impracticable to apply it to a modified charitable use that could be demonstrated by overwhelming evidence was contrary to the donor's intent. The UTC provision appears to be a compromise in that it permits reversions during the donor's life or, if shorter, twenty-one years.

²⁸ Revised Uniform Management of Institutional Funds Act, §6 (2005 Annual Meeting Draft), available at http://www.law.upenn.edu/bll/ulc/umoifa/2005AMDraft.htm#TOC1_8.

²⁹ Ronald Chester, "Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts," 23 *Suffolk U. L. Rev.* 41 (1989).

The draft Principles of Nonprofit Law also recognize that failure of a charitable gift may under certain circumstances result in return of the property to the donor or his successors. In addition, under section 425, they provide that if a charity has in good faith accepted a gift lawfully made and subsequently it becomes aware of circumstances that make retention of the gift imprudent or undesirable, the charity may return the gift.

There are a few, well-publicized, recent cases in which donors have attempted to enforce the terms of their gifts by relying on the contract theory of trusts or specific terms in their gifts, with reverter or its equivalent being the remedy sought on the grounds of breach of contract or unjust enrichment. A Comment to section 750(a) in the draft Principles contrasts gifts made by individuals and those made by another charity, suggesting that in the latter case, contract theory may be applicable and that reverter may be an appropriate “remedy”. Judicial acceptance of this approach will, of course, drastically expand the degree of donor control, as well as change the law of standing described below.

DONORS’ STANDING TO SUE TO ENFORCE THE TERMS OF THEIR GIFTS

The extent of the rights of donors to sue to enforce the terms of their gifts is the third subject we are addressing at this conference. In general, a person may bring a legal suit only if he has some defined personal or property interest in the proceedings. In regard to trusts, it is the beneficiaries who have the right to bring suit to enforce the duties on the trustees. However, in the case of charitable trusts, except in limited circumstances, the

number of persons with standing to sue has been severely circumscribed since the earliest days of the common law.

The rationale for limited standing was that it would be impossible to find persons to serve as fiduciaries of charitable funds if they were at the mercy of any member of the public claiming to represent the indefinite beneficiaries of the charitable trust. Since it was considered necessary that there be some mechanism by which trustees of charities could be called to account, the courts turned to the attorney general, acting for the King, as representative of the interests of the indefinite members of the public who are the ultimate beneficiaries of all charitable trusts. There are a limited number of instances in which, because of the nature of the charitable trust, certain individuals will have standing to sue, but they are rare.³⁰

As to donors, in contrast to members of the general public, early law made a distinction between "founders" and other donors, and certain donors were granted the right to enforce the execution of a charity they had created. They were permitted to prescribe rules for its management and administration, and to oversee the proceedings of the trustees and to correct abuses. Similarly, an individual who founded and donated property to a charitable corporation could reserve what was termed a power of visitation. This included the power and duty to hear and determine all differences of the corporation among its members, and to supervise the internal governance of the body. The decision of a visitor within the scope of his powers was final, but the attorney general was empowered to prosecute him for exceeding those

³⁰ Fremont-Smith, *Governing Nonprofit Organizations*, 324-325, 328.

powers. This power has rarely been exercised in the United States and there is some question as to whether it has validity today.³¹

Restriction on donor standing has been criticized by many legal scholars, and since 2003 there have been an increasing number of instances reported in the press in which donors are attempting to enforce the terms of restricted gifts. Section 405 of the Uniform Trust Code provides a statutory basis for these actions, although in some instances they have been permitted under a contract theory without aid of a statute.³² Under the UTC, donors are empowered to sue to enforce the terms of their charitable gifts. This UTC provision is described in the Comments as a corollary to section 413, Cy Pres. It grants to the settlor or a charitable trust the right, among others, to maintain a proceeding to enforce the trust. The Comment notes that this provision is contrary to section 391 of the 1959 Restatement of Trusts, Second. Chester describes this provision as "a concession to a contractarian view of trust law promulgated by one of the UTC drafters, Professor John Langbein of Yale Law School."³³

Under this approach, a trust is treated as the functional equivalent of a third-party beneficiary contract, with the grantor considered the promisee and the trustee the promisor. The terms of the trust are then specifically enforceable by the grantor. In the case of gifts, this analysis applies only if there is an express contract distinct from the gift. In the 2001 New York case of *Smithers v. St. Luke's-Roosevelt Hospital Center*, the court

³¹ Fremont-Smith, *Governing Nonprofit Organizations*, 338-342.

³² *Governing Nonprofit Organizations*, 341-342.

³³ Ronald Chester, "Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is it and How Extensive Should It Be?," 37 *Real Prop. Prob. & Tr. J.* 611 (2003).

did appear to give credence to this view.³⁴ A similar approach was taken in the case of *L.B. Research and Education Foundation v. UCLA Foundation*, decided in June of 2005.³⁵ Eason's study of charitable gifts with naming conditions contains an excellent analysis of the difficulties that arise when part of an agreement with a donor is to name a facility or fund as acknowledgment of his gift.³⁶

A proposed amendment to UMIFA incorporating the UTC rule granting standing to donors was initially rejected by the UMIFA drafting committee in 2003. However, at the meeting of the Commissioners in the summer of 2005, at which final approval of the revisions was postponed until 2006, donor standing was among the issues that the drafting committee was directed to revisit. In 2005 Delaware enacted a statute granting a settlor of a charitable trust the right to maintain an action to enforce the trust and to designate persons born or unborn to succeed to his rights.³⁷ This statute goes further than the UTC by permitting the donor to name successors.

The primary argument in favor of modifying the common law limits on donors rights is that in the majority of the states, the attorney general is not fulfilling his duty to protect charitable assets; and that this failure is unlikely to change, given the shortage of funds available in most states for the office of the attorney general. The donor is considered the most appropriate person to fill the gap. As noted it is likely that the UTC will be widely adopted within the near future, and thus one can expect to see the common law doctrine of limited standing eroded.

³⁴ 723 N.Y.S.2d 426 (Sur. Ct. 2001).

³⁵ 130 Cal. App. 4th 171 (App. Ct. 2005).

³⁶ John K. Eason, "Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad," *38 U.C. Davis L. Rev.* 375 (2005).

POLICY CONSIDERATIONS IN REGARD TO CY PRES AND THE DEAD HAND: HIGHLIGHTS FROM THE LEGAL LITERATURE

The first "modern" assault on the cy pres doctrine was formulated by Simes in 1955 in his study, *Public Policy and the Dead Hand*, in which he proposed abandoning the traditional grounds on which cy pres could be applied and instead granting courts authority to modify charitable gifts after they have been in existence for 30 years if the amount to be expended is all out of proportion to its value to society. Fisch affirmed this view in 1959, stating that "the continued requirement of the cy pres prerequisites serve no useful end."³⁸ Summarizing the current state of the law in 1974, she noted with approval what amounted to avoidance of the doctrine of cy pres in cases where impossibility could not be found – by looking at the broad purposes of a charitable gift as the standard by which to judge impossibility, thereby encouraging change. She also found that the scope of the cy pres doctrine was being narrowed with increased use of other principles, particularly deviation. She called for the use of administrative agencies to frame schemes on the basis that this was a legislative not a judicial function, although possibly accompanied by a requirement of court approval.³⁹

Karst had also severely criticized the narrow applicaiton of the cy pres doctrine in 1960, as well as suggesting that schemes would be more appropriately framed by an administrative body than by the courts. He also argued for granting standing to founders

³⁷ 2005 Del. Laws ch. 97 (S.B. 150), amending Del. Code Ann. tit. 12, §3303.

³⁸ Edith L. Fisch, "Changing Concepts and Cy Pres," 44 *Cornell L. Rev.* 382, 383-84 (1959).

and, in limited instances, to other donors but with a dollar threshold for their gifts. A potential donor plaintiff would not be able to pursue his case until the attorney general, after hearing from the donor at a public hearing, had refused to bring suit. Donor plaintiffs would be required to post security for costs and would be prevented from receiving any private gain from their suit, although he would allow counsel fees to be paid if the donor was successful.⁴⁰

Chester, in 1979, recommended abolishing the requirement of a finding of general charitable intent, calling instead for a presumption of general donor intent in the case of all charitable gifts.⁴¹ He suggested that the courts' reluctance to take this position stems from a perception that its function will change from a legal one of determining whether to apply cy pres to an essentially legislative one of determining how it should be applied. In 1989, Professor Chester revisited the subject, addressing the "general rule" that the existence of a gift over upon failure of the original gift precludes application of the cy pres doctrine to save the original gift.⁴² He proposed that in instances in which the gift over is non-charitable, for example, when it would pass as part of a residuary clause to private beneficiaries, there should be a strong presumption in favor of saving the original gift. If the gift over is to another charity, the existence of the presumption should be determined by the degree to which the initial taker would be harmed and society would benefit from

³⁹ Edith L. Fisch et al., *Charities and Charitable Foundations 468-469* (Pomona, New York: Lond Publications, 1974).

⁴⁰ Kenneth L. Karst, "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility," 73 *Harvard Law Review* 444, 446-8 (1960).

⁴¹ Ronald Chester, "Cy Pres: A Promise Unfulfilled," 54 *Ind. L. J.* 407 (1979).

⁴² Ronald Chester, "Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts," 23 *Suffolk U. L. Rev.* 41 (1989).

enforcing the forfeiture, although he would allow the presumption to be rebutted by a demonstration of a contrary preference of the donor during his life.

Most recently, in 2003, Chester argued for granting standing to donors when the use of funds is the subject of an explicit contract with the charitable grantee.⁴³ He would also extend this right to the grantor's estate in the case of an individual donor, and a successor organization in the case of an institution.

There are a large group of articles on the subject of cy pres and donor control published during the last 30 years that analyze or were inspired by specific cases in which there were anomalous or, to the authors, abhorrent results. Some, such as a 1977 paper by Gettleman and Hodgman criticized a 1976 decision of the Illinois court on the grounds that the court had broadened the requirement of general charitable intent.⁴⁴ They lamented the tendency of the courts to favor cy pres application to save charitable trusts over adherence to donor intent.

The 1984 petition of the San Francisco Foundation to apply cy pres to the Buck trust attracted wide-spread attention and a spate of articles analyzing the appropriate application of the doctrine.⁴⁵ For example, Schrag proposed a model cy pres statute designed to protect donor intent.⁴⁶ Simon argued instead for broadening the grounds under which cy pres could be applied to add “surprise” in cases exemplified by the Buck gift where the charitable purposes were originally written with an expectation that the

⁴³ Ronald Chester, “Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is it and How Extensive Should It Be?,” 37 *Real Prop. Prob. & Tr. J.* 611 (2003).

⁴⁴ Robert W. Gettleman & David R. Hodgman, “Judicial Construction of Charitable Bequests: Theory vs. Practice,” 53 *Chi.-Kent. L. Rev.* 659 (1977).

⁴⁵ *In re Estate of Buck*, No. 23259 (Cal. Super. Ct. 1986), reprinted in 21 *U.S.F. L. Rev.* 691 (1987).

⁴⁶ Frederic D. Schrag, Comment, “Cy Pres Inexpediency and the Buck Trust,” 20 *U.S.F. L. Rev.* 577 (1986).

value of the trust would be between \$7 to 10 million, not the \$340 million it turned out to be.⁴⁷

Sisson argued for extra judicial routes to modify charitable trusts, including granting trustees the power to modify terms at their discretion or according to some triggering mechanism; he also proposed adding “inefficiency” as a grounds for application of the doctrine, eliminating the requirement of general charitable intent, and requiring the court to regard trustees as experts and defer to their determinations of what is efficient use of trust assets.⁴⁸ Macey in the same year applied an economic perspective to charitable trusts and the cy pres doctrine, arguing that neither the common law in general nor the laws of trusts in particular tend toward efficiency and that broadening the application of cy pres would not promote efficiency.⁴⁹

Laird in a Comment published in 1988 analyzed the controversy over the Buck trust in terms of the clash between finding general charitable intent and upholding individual property rights, arguing that the presence of general charitable intent fails to serve as an adequate justification for judicial modification of charitable trusts and that judicial willingness to write as though the particular testator's charitable intent determines cases has political significance insofar as it obscures the contextual incoherence of the principle that individuals should determine the use of their property.⁵⁰

⁴⁷ John G. Simon, “American Philanthropy and the Buck Trust,” 21 *U.S.F. L. Rev.* 641 (1987).

⁴⁸ Roger G. Sisson, Comment, “Relaxing The Dead Hand’s Grip: Charitable Efficiency And The Doctrine Of Cy Pres,” 74 *Va. L. Rev.* 635 (1988).

⁴⁹ Jonathan R. Macey, “Private Trusts for the Provision of Private Goods,” 37 *Emory L.J.* 295 (1988).

⁵⁰ Vanessa Laird, Note, “Phantom Selves: The Search For A General Charitable Intent In The Application Of The Cy Pres Doctrine,” 40 *Stan. L. Rev.* 973 (1988).

Johnson in 1989 analyzed the cy pres doctrine in the context of litigation over the terms of the gift establishing the America's Cup.⁵¹ He urged courts to interpret charitable trusts liberally to promote efficient use of resources, considering them a form of "relational contracts." He argued that termination should not be an option unless the settlor expressed intent to let the courts take that step. He further proposed that there should be a hierarchy of interpretation of charitable gifts in the application of cy pres. With recently established trusts, the clear trust language should prevail. With older trusts, although an examination of the text was important, he believed that courts should also consider the historical and evolutive perspectives, with the latter perspective prevailing.

Posner in his classic treatise described the dilemma of whether to enforce donor intent or modify gift terms because of changed conditions as often being a false one that would more often frustrate both the donor's purposes and efficient use of resources. "Since no one can foresee the future, a rational donor knows that his intentions might eventually be thwarted by unpredictable circumstances and may therefore be presumed to accept implicitly a rule permitting modification of the terms of the bequest in the event than at unforeseen change frustrates his original intention."⁵²

A unique approach to charitable enforcement was suggested by Manne who proposed creation of private for-profit monitoring companies to police charities.⁵³ In reply, Johnson suggested that the attorney general was better suited as a monitor and that it would be more appropriate as well as efficient to impose annual fees on each charity in a

⁵¹ Alex M. Johnson, Jr., "Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts And Dynamic Interpretation To Cy Pres And America's Cup Litigation," 74 *Iowa L. Rev.* 545 (1989).

⁵² Richard A. Posner, *Economic Analysis of Law*, 520 (New York: Aspen Publishers, 6th ed. 2003).

state, to be used to support a charities division that would monitor and enforce charities.⁵⁴ He suggested further that cy pres and deviation not be applied until after the expiration of the period of the rule against perpetuities, after which a liberalized, expanded version would be available. He argued that this would give donors the same power over charitable gifts they have over the disposition of their property for private purposes, a proposition no longer valid in those states that have abolished the rule.

More recent articles have addressed contemporary concerns and current controversial cases, including proposals for dealing with the assets generated from hospital and health care conversions, analysis of the proposed modifications of the terms of the Barnes Foundation and of the Hershey trust, suggestions for dealing with surplus donations for the victims of the September 11 terrorist attacks, and the proper scope of the variance power in community trusts. The range of observations and suggestions for reform of some or all of the aspects of cy pres, deviation, and donor control reinforces the conclusion that the tension we are addressing here has not been resolved.⁵⁵

Omitted from this survey are the most cogent analyses of the problems, namely articles by Atkinson,⁵⁶ Brody,⁵⁷ Chisolm,⁵⁸ Eason,⁵⁹ Gary,⁶⁰ Goldschmid⁶¹ and Simon⁶²

⁵³ Geoffrey Manne, "Agency Costs and the Oversight of Charitable Organizations," 1999 *Wis. L. Rev.* 227.

⁵⁴ Alex M. Johnson, Jr., "Limiting Dead Hand Control of Charitable Trusts: Expanding The Use Of The Cy Pres Doctrine," 21 *U. Haw. L. Rev.* 353 (1999).

⁵⁵ See Bibliography prepared by NYU Center for Philanthropy and Law for this Conference.

⁵⁶ Rob Atkinson, "Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?," 23 *J. Corp. L.* 655 (1998); Rob Atkinson, "Reforming Cy Pres Reform," 44 *Hastings L.J.* 1111 (1993).

⁵⁷ Evelyn Brody, "Charitable Endowments and the Democratization of Dynasty," 39 *Ariz. L. Rev.* 873 (1997); Evelyn Brody, "Institutional Dissonance in the Nonprofit Sector," 41 *Vill. L. Rev.* 433 (1996).

⁵⁸ Laura Brown Chisolm, "Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework," 6 *Nonprofit Mgmt. & Leadership* 141 (1995).

⁵⁹ John K. Eason, "Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad," 38 *U.C. Davis L. Rev.* 375 (2005).

⁶⁰ Susan N. Gary, "Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law," 21 *U. Haw. L. Rev.* 593 (1999).

– each of whom we will be hearing from during our proceedings. I would not venture to paraphrase their recommendations; I do unreservedly commend to you their insights – all of which have enhanced my ability to provide this background summary of our topic.

QUESTIONS FOR THE FUTURE

As we move from this introduction to the heart of our deliberations, the following are questions I suggest we keep in mind:

** How best to ring the death knell on that aspect of the “dead hand” that requires a demonstration of general charitable intent before charitable gifts can be modified?

** Are “illegality, impossibility, impracticability, and wastefulness” the appropriate prerequisites for application of cy pres or will we more nearly meet society’s need by using the standard now applied for deviation, namely that a change will “further the accomplishments of the broad purposes” of the trust or gift.

** Should there be time limits set for application of cy pres or deviation– e.g. limited or no application of cy pres or deviation during the first 21 years of a trust or restricted gift and liberal application of the doctrines thereafter?

** How close do we need to get to original intent and can we do this without requiring the courts to undertake the time-consuming and often unrewarding exercise of looking to donor’s “actual” intent?

⁶¹ Harvey J. Goldschmid, “The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms,” 23 *J. Corp. L.* 631 (1998).

⁶² John G. Simon, “American Philanthropy and the Buck Trust,” 21 *U.S.F. L. Rev.* 641 (1987).

** Should there ever be rights of reversion or should all gifts to charity remain forever in the public domain?

** Should we permit fiduciaries of charitable corporations virtually unlimited power to exercise cy pres for other than restricted funds by giving them unfettered power to amend the charitable purposes of their organization? If not, what are proper limits?

** Should we continue to permit donors of charitable trusts the right to reserve broad powers to change the nature or purposes of their gifts, the methods by which they will be administered or their ability to sue to enforce the terms of their gifts?

** Is application of cy pres a proper judicial function or should it be the province of an administrative body such as the English Charity Commission?

** How can we improve enforcement of the duties of charitable fiduciaries, particularly, in the context of this meeting, the duty to keep charitable purposes relevant to current and future – not past – needs of society?

** Must we continue to grapple with two Uniform Laws (UMIFA and UTC), one ALI Restatement (Trusts) and one ALI Principles (Nonprofit Law), and at least one Model Act (ABA Nonprofit Corporations) or would it be possible to inculcate an appreciation of the value of coherence in the law of charity?

I look forward to expressing my views on these - and other - questions during the course of our deliberations. However, as a start, here are a few responses. They stem from what has been a new look at an old, familiar subject, colored by my belief that the essential feature of the law of charity that we must preserve is its flexibility to be relevant over time and that we must do all we can to encourage this state of affairs. Thus, I believe that the

tensions between donor intent and the public interest are best resolved by coming down on the side of the public interest. We need to dispense not only with the general charitable intent requirement, but with any need to look to a donor's wishes beyond those stated in the gift instrument, and in framing alternative purposes or forms of administration, the only appropriate degree of proximity is to the broad purposes of the original gift. I believe we should drop the distinctions between cy pres and deviation and adopt a single set of rules for their application. Further in this vein, I have long argued that there should be a single law of charity, so that I must object to a framework that perpetuates distinctions between trusts and corporations, whether in regard to changes of purposes and administration, or any other matter such as liability of fiduciaries.

As to what we might call "the other side", namely the rights of donors, we should do away with reverter; gifts to charity should be irrevocable. Donors should not be given any power to modify their gifts – this should be a matter for the charity, the courts and the attorney general and, where there is a default gift, the alternate taker. Finally, we should not attempt to solve the serious shortcomings in our enforcement systems by turning it over to donors whose interest will not necessarily – or even ordinarily – be the same as those of the public. We do need to find ways to encourage the states to institute or increase enforcement of charity law and hopefully some new ideas for that will come from our deliberations. However, expanding the ability of individuals to bring suit, whether donors or members of the general public, but primarily donors or their successors, will only increase the cost of operating charities, and unduly burden the courts, without providing any assurance that the outcome of these suits will benefit other than those who prevail.

