Title

Has the Uniform Trust Code's liberal facilitation of mistake-based reformations rendered the *cy pres* action obsolete?

Text

Has UTC § 415 (mistake-based reformation of a trust's terms) rendered classic non-statutory *cy pres* obsolete and UTC § 413 (statutory *cy pres* in the charitable trust context) redundant? UTC § 415 provides that "[t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." Assume that a trust with either a limited or a general charitable purpose fails for whatever reason (the "failure event"). Invoking UTC § 415, the state A.G., the trustee, and anyone else with standing to seek a failed trust's continued judicial enforcement need merely assert the self-evident, namely that the settlor (or the scrivener) had mistakenly failed to anticipate and/or address the failure event. That being the case, the court should "reform" the trust's terms to conform them to the settlor's true intentions. Assuming that UTC § 415 would regulate the mistake-based reformation of charitable trusts, as well as non-charitable trusts, and it appears by virtue of UTC § 102 that it would do just that, then in UTC § 415 we may well have a *cy pres*-substitute. The doctrine of *cy pres* is taken up generally in §9.4.3 of *Loring and Rounds: A Trustee's Handbook* (2019), which section is reproduced in its entirety in the Appendix below.

Appendix

§9.4.3 *Cy Pres* [from *Loring and Rounds: A Trustee's Handbook* (2019)]

***Cy pres* described.** In the event that circumstances make it unlawful, impossible, or impracticable to carry out the specified purpose of a charitable trust,[254] or "to the extent it is or becomes wasteful to apply all of the property to the designated purpose,"[255] the doctrine of *cy pres*[256] may be available as an alternative to the imposition of a resulting trust in favor of the settlor or the settlor's estate.[257] In other words, the

[254]*See generally* 6 Scott & Ascher §39.5.2. For an example of an "impracticable" specified charitable purpose, see Matter of Noble Hosp. Gouverneur, 39 Misc. 3d 279, 959 N.Y.S.2d 623 (Sup. Ct. 2013). The court in the exercise of its equitable *cy pres* powers modified the terms of three separate charitable trusts established for the benefit of the Hospital so as to enable the trustees to collateralize the trust corpus, this in furtherance of the trusts' general charitable purposes. The income-only restrictions in the governing trust instruments were "impracticable" in that combined net trust accounting income was being totally consumed by trustees' fees. The collateral would enable the Hospital to gain access to much-needed operating cash.

[255]Restatement (Third) of Trusts §67. The codifications are generally in accord, namely, that *cy pres* may be applied if to carry out a stated charitable purpose would be wasteful or impractical. *See, e.g.*, UTC §413(a); Unif. Prudent Mgmt. of Inst. Funds Act §6(b). *See generally* 6 Scott & Ascher §39.5.4 (advocating that the courts apply *cy pres* to charitable purposes that are no longer "useful to mankind"). *Cf*. Restatement (Second) of Trusts §399; Unif. Mgmt. of Inst. Funds Act §7(b).

[256]*Cy pres* is an Anglo-French phrase equivalent to the modern French *si pres*, meaning "so near" or "as near." 4A Scott on Trusts §399; 6 Scott & Ascher §39.5. This abbreviated phrase was taken from *si pres comme possible*, which means "as near as possible." Bogert §431; 6 Scott & Ascher §39.5. For a discussion of the "law French" phenomenon, *see* §8.15 of this handbook. *See generally* UTC §412(a) (authorizing a court to apply *cy pres* if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful).

[257]*See generally* Bogert §§431–442.

doctrine of *cy pres* may provide an alternative to the trust's termination.[258] "The theory is that the settlor would have wanted the property to be devoted to an alternate charitable purpose if the settlor had realized that it would be impossible to carry out the stated purpose."[259] The concept of *cy pres* involves the textual search for general charitable intent, for any generalized intent on the part of the settlor that is independent of the specific circumstances of a given moment.[260] There are many ways that a charitable purpose can "fail" such that a *cy pres* action is triggered. Here are some of them:

- Insufficient funds to carry out specified charitable purpose[261]
- Charitable purpose already accomplished[262]
- Specified charitable purpose impossible to accomplish, or refusal of trustee or third person to cooperate[263]
- Nonexistent charitable corporation or association is the intended beneficiary[264]
- Unsuitability of donated premises for the particular charitable institution[265]
- Excess or surplus funds[266]

***Cy pres* requires judicial involvement.** *Cy pres* is applied by the court, not the trustee, although in most cases it is the trustee who, at trust expense, brings the *cy pres* petition.[267] Generally the state attorney general is a necessary party to the proceeding.[268] The court may well refer the matter to a master to fashion an appropriate alternate scheme of disposition, which the court is free to accept or reject.[269] It is within the equitable powers of the court to allow a third party, such as a potential alternate charity, to intervene in the *cy pres* proceeding, although the charity's standing to appeal the court's ruling is uncertain.[270] Trustees, on

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[258]Of course, "[i]f the terms of the trust expressly provide for disposition of the property in case a particular charitable purpose fails, the terms of the trust ordinarily control." 6 Scott & Ascher §39.5.2.

[259]6 Scott & Ascher §39.5. The concept of a variance power is discussed in §8.15.37 of this handbook.

[260]*See, e.g.*, Am. Acad. of Arts & Sci. v. Harvard Coll., 78 Mass. 582, 596 (1832); *In re* Neher's Will, 18 N.E.2d 625 (N.Y. 1939).

[261]6 Scott & Ascher §39.5.2. *See, e.g.*, *In re* Neher's Will, 18 N.E.2d 625 (N.Y. 1939) ("In March, 1937, the village presented to the Surrogate's Court its petition asserting that it was without the resources necessary to establish and maintain a hospital on the property devised to it by the testatrix ….").

[262]6 Scott & Ascher §39.5.2. *See, e.g.*, Jackson v. Phillips, 96 Mass. 539 (1867) (involving a trust to create a public sentiment that would put an end to slavery in the United States that became operational after slavery had been abolished by the Thirteenth Amendment).

[263]6 Scott & Ascher §39.5.2.

[264]6 Scott & Ascher §39.5.2.

[265]6 Scott & Ascher §39.5.2.

[266]6 Scott & Ascher §39.5.2. *See also* 6 Scott & Ascher §39.6 (noting that when there are more funds in a charitable trust than needed to accommodate its stated charitable purpose, the court may (1) apply *cy* pres to the surplus, (2) impose a resulting trust upon the surplus, (2) or, if the trustee is a charitable corporation, allow the trustee to apply the surplus to its own general purposes). "[T]he longer the period between the creation of the trust and the generation of the surplus, the less likely the court is to impose a resulting trust." 6 Scott & Ascher §39.6.

[267]6 Scott & Ascher §39.5.

[268]6 Scott & Ascher §39.5. *See generally* §9.4.2 of this handbook (standing to enforce charitable trusts).

[269]6 Scott & Ascher §39.5.

[270]6 Scott & Ascher §39.5.

the other hand, generally do have standing to appeal *cy pres* judgments.[271] If the court finds that a particular trust is *cy pres*-eligible, it will fashion an alternative scheme of disposition that closely approximates the specified unfeasible one.[272] "In such a case, all the court can do is make an educated guess, not as to what the settlor actually intended, but as to what the settlor would have intended, if the settlor had thought about the matter."[273]

***Cy pres* can fill in gaps.** What if the settlor has enunciated a general charitable purpose but neglected to specify a particular charitable purpose or organization to receive distributions or has neglected to delegate that function to the trustee? Under the UTC, the court may validate the trust by specifying particular charitable purposes or recipients or delegate to the trustee the framing of an appropriate scheme.[274] The court, however, must apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.[275] In a state that had yet to enact the UTC, one of its courts did just that.[276] "On the other hand, when a testator leaves property for such charitable purposes as a named trustee selects, and the trustee is willing and able to make selections, the trustee may dispose of the property for such charitable purposes as the trustee selects."[277] The UTC broadens the court's ability to modify the administrative terms of trusts generally.[278] "Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable."[279]

Decanting may not be employed as a nonjudicial *cy pres* substitute. The Uniform Trust Decanting Act, for example, would not apply to a trust held solely for charitable purposes.[280] In the case of any other type of charitable trust, the Act would not authorize a decanting into a second trust whose terms would: (1) diminish any charitable interest under the first trust, (2) diminish any identified charitable organization's charitable interest under the first trust, (3) alter any charitable interest defined by the terms of the first trust, or (4) alter any condition or restriction "related" to the charitable interest or interests under the first trust.[281] Decanting is taken up generally in §3.5.3.2(a) of this handbook.

Powers of Appointment. Powers of appointment are covered generally in §8.1.1 of this handbook. The Restatement (Third) of Property proposes, as did the Restatement (Second), that the doctrine of *cy pres* be extended to exercises of nongeneral powers of appointment whose objects are charities. "If the donee of the power appoints to one or more designated charities, and the donee appoints to a charity not designated as a permissible appointee of the power, the appointment to the impermissible appointee-charity is ineffective. The court, however, may apply *cy pres* in such situations and will select from among the charities that are the permissible appointees of the power the one or more that have charitable purposes

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[271]6 Scott & Ascher §39.5.

[272]6 Scott & Ascher §39.5.

[273]6 Scott & Ascher §39.5.2.

[274]UTC §405 cmt.

[275]UTC §405 cmt.

[276]*See* Morton v. Potts, 57 Mass. App. Ct. 55, 781 N.E.2d 43 (2003). *See generally* 6 Scott & Ascher §39.5.

[277]6 Scott & Ascher §39.5. "If, however, the named trustee is unable or unwilling to make the selection, and selection by the named trustee is not an essential part of the testator's scheme, the court will either direct the framing of a scheme or name a successor trustee to make the selection." 6 Scott & Ascher §39.5.

[278]UTC §412(b). *See generally* 6 Scott & Ascher §39.5; §8.15.20 of this handbook (doctrine of equitable deviation).

[279]UTC §412 cmt. *See generally* §8.15.20 of this handbook (doctrine of equitable deviation).

[280]*See* Unif. Trust Decanting Act §3(b).

[281]*See* Unif. Trust Decanting Act §14(c).

similar to the charity selected by the donee as recipient of the appointive assets."[282] Neither restatement, however, proffers or proffered any judicial authority or public policy rationale in support of the proposition.

Related doctrines. *Cy pres* should not be confused with a court's inherent equitable power to order adjustments in how any trust is being administered, which might even include the power to countermand an express direction in the terms of the trust not to sell a particular parcel of entrusted real estate.[283] *Cy pres* relates to the core purposes of a charitable trust, not how it is administered, unless there is a clear nexus between the two.[284] The doctrines of *cy pres* and equitable deviation,[285] equitable deviation being the judicial negation of a trust's administrative provisions in furtherance of its purposes,[286] should not be confused with the variance power granted to the trustees of a charitable foundation in its governing documentation.[287] We take up the doctrine of equitable deviation as it relates to the administrative provisions of trusts generally in §8.15.20 of this handbook.[288]

The charitable corporation. The UPMIFA would have the doctrines of *cy pres* and deviation apply not only to charitable trusts but also to charitable corporations,[289] a topic we take up in §9.8.1 of this handbook.

General charitable intent. For a trust to be *cy pres*-eligible, however, the settlor must have manifested a "general charitable intent."[290] The fact that property is entrusted upon the "condition" that it be applied for a particular charitable purpose does not necessarily preclude a finding of general charitable intent.[291] The UTC presumes such an intention when a particular charitable purpose becomes impossible or impracticable to achieve.[292] The Restatement (Third) of Trusts would do so as well.[293] "Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had general charitable intent."[294] One learned commentator suggests that in the face of such a presumption, "it would rarely, if ever, be appropriate … [for a court]… to conclude that a trust created to accomplish a particular charitable purpose fails merely because it is impossible to ascertain the particular purpose that the settlor may have had in mind."[295] In England such liberal applications of the *cy pres* doctrine have been the norm since at least 1702.[296] In the case of a trust with a general charitable purpose, the settlor may leave it to the

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[282]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.15 cmt. h; Restatement (Second) of Property (Wills and Other Donative Transfers) §20.1 cmt. h.

[283]5 Scott & Ascher §37.3.3 (Deviating from Terms of a Charitable Trust).

[284]5 Scott & Ascher §37.3.3.

[285]*See generally* §8.15.20 of this handbook (doctrine of [equitable] deviation).

[286]Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 Real Prop. Prob. & Tr. J. 705, 715 (Winter 2006).

[287]The concept of a variance power is discussed in §8.15.37 of this handbook.

[288]*See also* 6 Scott & Ascher §39.5.

[289]Unif. Prudent Management Inst. Funds Act, Prefatory Note.

[290]*See generally* 4A Scott on Trusts §399; Bogert §436; Restatement (Second) of Trusts §399.

[291]6 Scott & Ascher §39.5.2. "Similarly, when a trust is for a particular purpose 'and no other purpose' or for 'only' one purpose, inclusion of the additional word or words in the terms of the trust does not necessarily preclude the court from applying the property to other purposes if the particular purpose fails." 6 Scott & Ascher §39.5.2. "So also, a direction that property be applied 'forever' to a particular purpose does not prevent the application of cy pres if the particular purpose fails." 6 Scott & Ascher §39.5.2.

[292]UTC §413 cmt. *See generally* 6 Scott & Ascher §§39.1, 39.5.

[293]Restatement (Third) of Trusts §67 cmt. b.

[294]UTC §413 cmt.

[295]6 Scott & Ascher §39.1.

[296]6 Scott & Ascher §39.1.

trustees to select the actual charitable purposes to be furthered.[297] There is no need to bring a *cy pres* action.

General charitable intent and the tax code. For a trust to be treated for federal *income tax purposes* as an exempt private charitable foundation, its charitable purposes must be general rather than specific,[298] a topic beyond the scope of this handbook.

***Cy pres* versus the resulting trust and the vested equitable reversionary interest.** As many charitable trusts are designed to continue forever, specific circumstances are bound to change. Institutions come and go; what was legal becomes illegal; problems are solved and new ones surface.[299] Even if courts had not articulated the doctrine, a trustee, in the face of changed circumstances, would always have an obligation to ascertain from the court whether the settlor's charitable intent was general or specific and then to act accordingly.[300] Thus a prospective trustee of a charitable trust would do well to insist that the settlor-benefactor spell out unambiguously whether the charitable intent is general or specific.

Having said that, the total failure of a trust with a specific charitable purpose can present expensive and time-consuming administrative problems, particularly if the settlor is deceased at the time of failure and the administration of his or her probate estate has been long closed.[301] Recall that *ab initio* the settlor of such a trust has traditionally retained a vested reversionary interest, an interest that in the United States, unlike England,[302] has generally not been subject to the Rule Against Perpetuities.[303] Thus the administration of the deceased settlor's probate estate might well have to be reopened so that a personal representative of the deceased settlor can be appointed by the court to take title to the underlying property of the failed trust.[304] The longer a trust has been in existence, the more likely it is that the settlor's residuary takers or heirs at law, as well as a number of *their* successors in interest, also will have died, thus necessitating the reopening of numerous probate estates that pour into one another.[305] In §8.2.1.9 of this handbook we provide several illustrations of how a decedent's class of descendants can relentlessly expand over time. After twelve generations, for example, the number of descendants of those who came over on the Mayflower was in the range of 25 million. Even if the court should manage to devise a process for getting the underlying property

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[297]6 Scott & Ascher §39.2.

[298]*See generally* Rockland Trust Co. v. Attorney Gen., 463 Mass. 1004, 976 N.E.2d 801 (2012) (a tax-driven judicial confirmation by reformation that the purposes of a certain charitable trust are general).

[299]*See generally* 5 Scott & Ascher §37.3.3 (Deviating from Terms of a Charitable Trust).

[300]UTC §412(a) would permit modification or termination of a *noncharitable* trust because of "unanticipated circumstances."

[301]6 Scott & Ascher §39.5.3.

[302]"In the United States, a legal right of entry for condition broken or a possibility of reverter is not subject to the rule against perpetuities, nor is a resulting trust on termination of a charitable trust, though in England the rule is otherwise." 6 Scott & Ascher §39.7.2.

[303]*See generally* §4.1.1.2 of this handbook (equitable reversions under charitable trusts); 6 Scott & Ascher §39.7.2 (Conditions Subsequent); §8.30 of this handbook (vested equitable interests subject to divestment).

[304]6 Scott & Ascher §39.5.3.

[305]*See generally* 6 Scott & Ascher §39.5.3. The entrusted property generally will revert upon a resulting trust to the residuary takers under the deceased settlor's will, or to their successors in interest, unless the probate residue was what had funded the charitable trust (or unless the will contains no residuary provision), in which case the property will pass to the settlor's heirs under the laws of intestacy, or to their successors in interest. 6 Scott & Ascher §39.5.3. Things can get fiendishly complicated should the property revert to trustees of other trusts, particularly other trusts that have terminated. On the other hand, reversionary interests being always vested, it may be of some consolation to the trustee charged with winding up the affairs of a failed charitable trust that running afoul of the rule against perpetuities at least should not be an issue. *See generally* J. C. Gray, The Rule Against Perpetuities §327.1 (4th ed. 1942).

of a failed charitable trust to its rightful owners without the reopening of probate estates, the task of ascertaining and locating the individuals, trusts and charities entitled to the property upon the reversion will likely prove daunting.[306] The legal and genealogical research costs alone are likely to be hefty.[307]

It is no wonder that American courts with great reluctance find limited charitable intent, especially when it comes to charitable trusts whose settlors are long dead.[308] A charitable trust that has been funded by the small contributions of many mostly anonymous individual donors (settlors) poses a similar logistical nightmare should the trust fail or its purposes be fulfilled without the trust estate having been fully exhausted.[309] In England a resulting trust almost never arises upon the failure of a charitable trust, once the trust has taken effect.[310] "Responding to concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose,"[311] the UTC would sharply curtail the ability of a settlor to create a charitable trust whose property would revert to the settlor's personal representative, *i.e.*, the settlor's probate estate, upon the accomplishment of that purpose, or upon the impossibility of its fulfillment.[312] Section 413 provides that the settlor's vested equitable reversionary interest would remain outstanding only until the later to occur of the following events, at which point the interest would divest:[313]

- The settlor dies
- The elapse of 21 years since the date of the trust's creation[314]

Thereafter, the court, notwithstanding the terms of the trust,[315] must apply *cy pres* in the event the specified charitable purpose ever fails.[316] "To the extent that the UTC thus disregards even the plainest of statements of the settlor's alternate plans for disposition of the trust assets upon failure of the original charitable purpose, it abruptly breaks with the traditional notion of cy pres."[317] Some states have enacted the UPC without this Section 413 divestment provision.[318] Others have done so, but with periods that are longer than 21 years.[319]

Unless a charitable trust's continuance is conditioned upon the designated trustee and only the designated trustee carrying out its terms, a breach of trust generally does not warrant the imposition of a resulting trust in favor of the settlor or the settlor's probate estate.[320] "In such a case, if it is not unlawful, impossible, impracticable, or wasteful to carry out the designated purposes, the remedy is by a suit by the

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[306]*See generally* 6 Scott & Ascher §39.5.3.

[307]6 Scott & Ascher §39.5.3.

[308]*See generally* 6 Scott & Ascher §§39.5.3 (noting that it is "rare" that a court will allow a charitable trust to fail altogether once it has become operational), 41.3 (noting that "when an intended charitable trust fails at the outset and cy pres does not apply, there is ordinarily no difficulty in enforcing a resulting trust").

[309]*See generally* §8.15.46 of this handbook (the *bona vacantia* doctrine). *See also* 6 Scott & Ascher §41.3 (Failure of Charitable Trusts).

[310]6 Scott & Ascher §39.5.3.

[311]UTC §413 cmt.

[312]*See generally* 6 Scott & Ascher §39.5.2.

[313]*Cf.* §8.30 of this handbook (vested equitable interests that are subject to divestment).

[314]*See generally* 6 Scott & Ascher §39.5.3.

[315]Even when the terms articulate only a limited charitable purpose and expressly confirm the equitable reversion.

[316]*See generally* 6 Scott & Ascher §39.5.2.

[317]6 Scott & Ascher §39.5.2.

[318]6 Scott & Ascher §39.5.2.

[319]6 Scott & Ascher §39.5.2.

[320]6 Scott & Ascher §39.7.1.

attorney general to compel the trustees to perform the trust, and not by a suit by the settlor or the settlor's estate to enforce a resulting trust."[321] The court also would have the equitable discretionary authority to remove the trustee and install a suitable successor.[322] A trust shall not fail for want of a trustee, or for want of a suitable trustee for that matter.

Racial, sexual, and religious restrictions: The political aspects of the *cy pres* doctrine. As a general rule, the trustee of a charitable trust may abide by a racial, sexual, or religious restriction in its terms, provided the trustee is not a governmental entity.[323] It may now be the law in some quarters, however, that even when the trustee and his agents are not state actors, such restrictions may not entail discrimination that is "invidious."[324] It has long been the case that such restrictions may not be unlawful or otherwise violate public policy.[325] Suffice to say that "invidiousness" and "public policy" are unruly horses not easily corralled.[326]

In the case of a restriction that is not enforceable, courts generally apply the *cy pres* doctrine or the equitable deviation doctrine to reform the terms of the trust to remove the restriction.[327] Rarely do the courts allow such trusts to fail altogether.[328] Once in a while, the court will reform the terms of a trust in a way that saves the discriminatory restriction.[329] In the case of a restriction that is not enforceable, a court's refusal to apply *cy pres* or equitable deviation to save the trust is likely to be the type of state action or inaction that is permissible.[330] The law, however, is far from clear as to whether the court may affirmatively remove the impediment in order to save the discriminatory restriction.[331] In the case of an enforceable restriction that the named trustee refuses to carry out, courts have been known to apply *cy pres* to remove the restriction.[332]

Some case studies. An example of judicial deference to reversionary interests[333] is illustrated in the events that gave rise to the Supreme Court case of *Evans v. Abney*.[334] The Court was asked to consider the constitutional implications of the administration and termination of a trust created under the 1911 will of U.S. Senator A. O. Bacon of Georgia. Pursuant to the terms of the will, property had been transferred in trust to the Senator's home city of Macon, Georgia for the creation of a whites-only public park.[335]

Following the Court's earlier decision in *Evans v. Newton*[336] (holding that the park could not continue to be operated on a racially discriminatory basis), a state court had ruled that the senator's intention to provide a park for whites only was not of a general charitable nature. Accordingly, it was held that the trust had failed and that the parkland and other trust property associated with it must revert upon a resulting

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[321]6 Scott & Ascher §39.7.1.

[322]*See generally* §7.2.3.6 of this handbook (removal).

[323]6 Scott & Ascher §39.5.5.

[324]*See generally* 6 Scott & Ascher §39.5.5; Restatement (Third) of Trusts §28 cmt. f.

[325]*Cf.* §9.24 of this handbook (incentive trusts and the public policy considerations).

[326]6 Scott & Ascher §39.5.5.

[327]6 Scott & Ascher §39.5.5.

[328]6 Scott & Ascher §39.5.5.

[329]6 Scott & Ascher §39.5.5.

[330]6 Scott & Ascher §39.5.5.

[331]6 Scott & Ascher §39.5.5.

[332]6 Scott & Ascher §39.5.5.

[333]*See, e.g.*, J. Gray, The Rule Against Perpetuities §§34, 41.1, 113, 113.1, 113.3, 327.1 (4th ed. 1942) (settlor of limited charitable purpose trust retains vested reversionary interest in trust property); Nat'l Shawmut Bank v. Joy, 315 Mass. 457, 462–469, 53 N.E.2d 113, 117–121 (1944) (failure of trust triggers resulting trust in favor of settlor or settlor's estate).

[334]396 U.S. 435 (1970).

[335]*See generally* 6 Scott & Ascher §38.6.

[336]382 U.S. 296 (1966).

trust[337] to the senator's estate. If, on the other hand, there had been a finding of general charitable intent, presumably the state court, invoking the *cy pres* doctrine, would have ordered the continued operation of the park on an integrated basis. Such a finding would have, for all intents and purposes, voided the equitable reversionary interests of those entitled to the senator's estate.

As to the actual holding of *Abney*, the Court found that the state court's failure to find general charitable intent in the establishment of the trust did not constitute "state action" under Fourteenth Amendment analysis. Thus, no federal constitutional grounds were found for extinguishing the private reversionary interests in favor of continued public operation of the park.[338]

In *Ebitz v. Pioneer National Bank*,[339] the Massachusetts court applied the doctrine of *cy pres* in substance, though not in form. At issue was the provision of a testamentary trust established "to aid and assist worthy and ambitious young men to acquire a legal education."[340] The will was executed in 1963 and allowed in 1970. The plaintiffs were female law students who made timely applications to the trustee for assistance from the fund. Their applications were rejected on the ground that the testator had intended males, not females, to be beneficiaries of his largess.

The trial judge held that "[t]o exclude females as possible recipients of financial assistance from a trust fund established for the purpose of assisting qualified students interested in the pursuit of a legal education would constitute an unreasonable and arbitrary exclusion."[341] He then speculated that the enforcement of such a provision might be unconstitutional. With that he ruled that the term "young men" meant "young men and young women." The trustee appealed. The trial judge was upheld on appeal by the Massachusetts Supreme Judicial Court, which found the reference to "young men" ambiguous in the context of the entire instrument. One would be hard pressed to conjure up a more blatant example of constructive or informal *cy pres.* Also, one cannot help but wonder what would qualify as an expression of limited charitable intent in Massachusetts after *Ebitz*. "When I say young men, I mean young men, M-E-N"?

In dissent, Justice Quirico wrote: "Surely it is not the law that a testator or donor may not bestow the benefit of his own funds on a class or persons of one sex to the exclusion of persons of a similar class but of the opposite sex, if that is his stated intention."[342] Citing *Abney*, he suggested that the case was not "clouded" by any constitutional question.[343]

In 2002, a Maryland court took an *Ebitz* approach to a charitable bequest to a private nonprofit hospital

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[337]*See generally* §4.1.1 of this handbook and §8.2.1.5 of this handbook (consequences of a violation of the common law rule) (each discussing the resulting trust).

[338]*See generally* 6 Scott & Ascher §38.6.

[339]372 Mass. 207, 361 N.E.2d 225 (1977).

[340]Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 209, 361 N.E.2d 225, 226 (1977). *See generally* Tracy A. Bateman, J.D., Annot., *Validity of charitable gift or trust containing gender restrictions on beneficiaries,* 90 A.L.R.4th 836 (1992).

[341]Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 212, 361 N.E.2d 225, 228 (1977) (Quirico, J., dissenting) (quoting trial court's holding).

[342]Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 213, 361 N.E.2d 225, 227 (1977) (Quirico, J., dissenting).

[343]*Cf.* Shapira v. Union Nat'l Bank, 39 Ohio Misc. 28, 315 N.E.2d 825 (Ct. Com. Pl. 1974) (cautioning that seeking judicial enforcement of a testamentary trust provision conditioning one's enjoyment of the decedent's property on one marrying within a particular faith not be confused with what would be clouded by a constitutional question, namely seeking to have a state court actually enjoin one from marrying outside one's faith). "It is a fundamental rule of law in Ohio that a testator may legally entirely disinherit his children." Shapira v. Union Nat'l Bank, 39 Ohio Misc. 28, 315 N.E.2d 825 (Ct. Com. Pl. 1974). *See generally* §9.24 of this handbook (the incentive trust (and the public policy considerations); marriage restraints)).

for the benefit of "white patients who need physical rehabilitation."[344] The will provided that if the bequest was not "acceptable" to the primary beneficiary, there would be a gift over to an alternate beneficiary.[345] Instead of ruling in favor of the alternate beneficiary, the court found general charitable intent and ordered the bequest administered for the benefit of the primary beneficiary "without giving effect to the word 'white.'"[346] The court concluded that "where the gift over is also to a charity, it would seem that the testator's general charitable intent is confirmed."[347] It should be noted here that absent "invidious discrimination," charitable trusts to alleviate the poverty of those of a particular race or gender are generally enforceable.[348]

The expansive approach to general charitable intent exemplified by the Maryland case is contrasted by the approach taken by the Montana court in *In re Will of Cram*.[349] At issue was a testamentary trust that provided for cash stipends to young males certified by the Future Farmers of America of Montana and the 4-H Club of Montana to be of good character, in need of financial assistance, and interested in the sheep raising business. The two organizations had links to the state educational system. In response to an equal protection challenge to those provisions of the trust that were gender exclusive, the Montana lower court modified the trust to remove any state involvement in the mechanics of the grantee selection process. On appeal, the actions of the lower court were affirmed.

The settlor clearly intended to discriminate, that is, to benefit young males to the exclusion of young females. However, the trust as modified involved no state action: "A private person has the right to dispose of his money or property as he wishes and in so doing may lawfully discriminate in regard to the beneficiaries of his largess without offending the Equal Protection Clause as long as the State and its instrumentalities are not involved, and unless the trust is unlawful, private trusts are to be encouraged."[350]

As *Abney, Ebitz, Cram*, and the Maryland case suggest, there is yet no judicial consensus as to the elasticity and limits of general charitable intent. Thus the trustee, when faced with a charitable trust whose purposes cannot be carried out, ought not to be surprised if the court uses the *cy pres* process to indulge its own collective social or political predilections.[351] The prospective settlor with definite ideas, therefore, will want to do some jurisdiction shopping. He or she also needs to choose his or her trustees and their successors carefully. And still there can be no guarantees. As one commentator has noted:

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[344]Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp., 369 Md. 67, 797 A.2d 746 (2002).

[345]Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp., 369 Md. 67, 797 A.2d 746 (2002).

[346]Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp., 369 Md. 67, 797 A.2d 746 (2002).

[347]Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp., 369 Md. at 83–84, 797 A.2d at 756.

[348]*See generally* 6 Scott & Ascher §38.2.5.

[349]186 Mont. 37, 606 P.2d 145 (1980).

[350]*In re* Will of Cram, 186 Mont. 37, 45, 606 P.2d 145, 150 (1980). *See also In re* Estate of Wilson, 452 N.E.2d 1228, 1235, 465 N.Y.S.2d 900, 907 (1983) ("The Fourteenth Amendment, however, 'erects no shield against merely private conduct, however discriminatory or wrongful.' Shelley v. Kraemer, 334 U.S. 1, 13 …."). *See also* the Prefatory Note to the Model Protection of Charitable Assets Act (2011) ("If potential donors worry that charities will misuse contributed fund, donors are unlikely to contribute. The good work charities do will suffer if reports of abuse, fraud, or other types of misbehavior reduce public confidence in the sector.").

[351]*See, e.g.*, Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp., 797 A.2d 746 (Md. 2002) (faced with a charitable trust for the benefit of the white patients of a hospital with a charitable gift over to a university, the court excised the racial restriction rather than enforce the gift over).

> Yesterday's news that the trustees of the Barnes Foundation have petitioned the court to move its collection of art from its home in Merion, Pa., to Philadelphia, should give pause to anyone who is considering a philanthropic bequest. Most people believe that, with due diligence, they can have a considerable say over how their property will be disposed after their death. Having engaged expensive legal talent, they place a high degree of trust in Trusts. How justified is their faith? The case of the Barnes Foundation provides grounds for concern ….But let the donor beware. "Perpetuity" no longer means "forever." It means "until lawyers representing powerful interests get to work."[352]

Safeguarding donor intent. What is a prospective settlor of a charitable trust to do, particularly one with very definite ideas? At minimum, the limited charitable purpose needs to be unambiguously labeled as such in the governing instrument.[353] He or she also may want to look into appointing a trust protector.[354] In §4.1.1.2 of this handbook we catalogued some countermeasures that might be taken at the drafting stage to help safeguard a donor's charitable intentions. Mergers of colleges and universities and withdrawals of local churches from their parent organizations will generally implicate the law of trusts, particularly when such events frustrate the charitable intentions of past donors.[355]

The UTC's enthusiastic facilitation of mistake-based reformations may someday render *cy pres* actions obsolete. Has UTC § 415 (mistake-based reformation of a trust's terms) rendered classic non-statutory *cy pres* (the subject of this section) obsolete and UTC § 413 (statutory *cy pres* in the charitable trust context) redundant? UTC § 415 provides that "[t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." Assume that a trust with either a limited or a general charitable purpose fails for whatever reason (the "failure event"). Invoking UTC § 415, the state A.G., the trustee, and anyone else with standing to seek a failed trust's continued judicial enforcement need merely assert the self-evident, namely that the settlor (or the scrivener) had mistakenly failed to anticipate and/or

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[352]Roger Kimball, *Donor Beware: Art May Be Long, But Trusts Aren't*, Wall St. J., Sept. 25, 2002, at D8, col. 1 (discussing a pending *cy pres* petition in a Pennsylvania court which if granted might effectively alter the terms of a charitable trust created by Albert C. Barnes in 1922 for the purpose of establishing a museum/art school to administer his priceless art collection, the terms of the trust providing that there be no loaning and reproducing of the art works). "On December 13, 2004, the Court issued its Opinion, approving the Trustee's petition, breaking the Trust and permitting the gallery to move to the City of Philadelphia." Terrance A. Kline, *Comment on the Barnes Foundation*, 31 ACTEC J., 245, 248 (2005) (concluding that the decision is "disturbing" in that the Court failed "to enforce less drastic deviations to the Trust that would have preserved the Trust consistent with Dr. Barnes' intent"). *See generally* Chris Abbinante, Comment, *Protecting Donor Intent in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. Pa. L. Rev. 665 (1997). *See also* John Anderson, The Battle Over the Barnes Collection (New York, W.W. Norton & Co. 2003).

[353]*See* Wendy A. Lee, *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions Through Expanded Use of Cy Pres*, 34 Suffolk Univ. L. Rev. 173, 201 (2000) (advising that donors "must take proactive steps to clearly articulate and mandate their philanthropic intentions, lest their words become prey to easy manipulation" and noting that "violations of donor intent have occurred in numerous situations throughout the last two centuries, even where the intent was explicit and binding").

[354]*See generally* §3.2.6 of this handbook (considerations in the selection of a trustee).

[355]*See generally* 6 Scott & Ascher §9.3.3.

address the failure event. That being the case, the court should "reform" the trust's terms to conform them to the settlor's true intentions. Assuming that UTC § 415 would regulate the mistake-based reformations of charitable, as well as non-charitable, trusts, and it appears that it would do just that, then in UTC §415 we may very well have on our hands a *cy pres*-substitute.