



TRUST AND ESTATES

Cy Pres and Charitable Gifts

By Robert M. Harper

For most practitioners, the cy pres doctrine is an abstract legal theory that is glossed over in law school and long forgotten upon entering practice. However, given two recent decisions of the Surrogate's Courts in Kings and Nassau Counties, the doctrine is worth yet another look. This article discusses the doctrine generally and its recent application in Surrogate's Courts.

The common law cy pres doctrine is codified in section 8-1.1 of the Estates, Powers and Trusts Law ("EPTL"). The thrust of the doctrine is that a court has a duty to effectuate "the general charitable intention of [a] testator as nearly as possible, when the subsidiary intent that a gift take effect in a particular manner is impossible to implement." In other words, the doctrine allows a court to save a testator's gift when his or her stated intent is impossible to implement, but the general charitable purpose can still be satisfied.

Pursuant to EPTL section 8-1.1, a court can "direct the manner in which a charitable disposition is to be administered in order to accomplish the testator's intent when the terms of a charitable bequest become impracticable or impossible." To do so, the court must conclude that: (1) "the gift or trust is charitable in nature;" (2) "the donor demonstrated a general rather than a specific charitable intent;" and (3) "the particular purpose for which the gift was created has failed or become impossible to achieve[.]"

The recent decision of Kings County Surrogate Diana A. Johnson in *Matter of Dowdall* is illustrative. There, the decedent's will was admitted to probate in 1969. While Article Fourth of the will contained specific bequests to several charities operating under the auspices of the Roman Catholic Diocese of Brooklyn (the "Diocese"), Article Fifth of the will directed that the decedent's residuary estate be used to fund a trust for the benefit of the Catholic Child Care Society of the Diocese of Brooklyn ("Catholic Child Care Society").

At the time of the will's admission to probate, the Catholic Child Care Society operated the St. John's Residence for Boys ("St. John's Residence") and St. Joseph's Children's Services pro-



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grams. Although the St. John's Residence was separately incorporated in 1995, it remained affiliated with the Catholic Child Care Society until the Catholic Child Care Society stopped operating in 2001.

After it terminated its operations, the Catholic Child Care Society petitioned the Surrogate's Court, Kings County, to modify the decedent's will to designate the St. John's Residence as the beneficiary of the testamentary trust created under Article Fifth of the decedent's will.

Upon considering the parties' contentions, the Surrogate's Court granted the relief requested in the petition. The court reasoned that the decedent had a general intent to benefit organizations associated with the Diocese in providing services to children. The court also explained that the decedent had a general charitable intent, as evidenced by the bequests to the Diocese's charitable entities in her will. Those factors, when taken in conjunction with the fact that the purpose of the residuary trust failed because the Catholic Child Care Society no longer existed, necessitated the modification of the decedent's will to reflect the St. John's Residence as the beneficiary of the trust created under Article Fifth of the will.

Conversely, in yet another noteworthy decision, *Matter of Huntingdon College*, Nassau County Surrogate John B. Riordan recently denied Huntingdon College's (the "College") petition to amend an inter vivos trust instrument pursuant to EPTL section 8-1.1. In *Huntingdon College*, the grantor created a "charitable remainder unitrust" in December 1995, designating the Huntingdon College (the "College") "Endowment Fund" as one of the trust's remainder beneficiaries. Following the grantor's death, the college petitioned the Surrogate's Court, Nassau County, to have the trust instrument amended to "provide that the funds in question be paid to the [C]ollege's Annual Fund and utilized for scholarships, without any restriction." The bases for the petition were the facts that the college did not have an "Endowment Fund" – although it did have another endowment-like fund – and that the grantor intended to make an "unrestricted gift" to the college.

The court first addressed whether it had jurisdiction to consider the college's petition. Although EPTL section 8-1.1(c) "limits [the] jurisdiction of the Surrogate's Court to dispositions under a will probated in the court[,]" section 209(6) of the Surrogate's Court Procedure Act ("SCPA") vests the Surrogate's Court with jurisdiction to "determine all matters relating to inter vivos trusts . . ." Additionally, section 2(d) of the New York State Constitution "confers jurisdiction on the Surrogate's Court as to all matters relating to the affairs of a decedent." Based upon SCPA section 209(6) and section 2(d) of the State Constitution, the court noted that the matter concerned an inter vivos trust, and concluded that it had jurisdiction to entertain the college's petition to amend the subject instrument.

Upon concluding that it had jurisdiction, the court considered the merits of the college's petition. Recognizing that the trust instrument did not contain any specific directions as to the use of the funds, the court explained that the grantor made an unrestricted gift as to purpose, but not duration. The court reasoned that a gift to an "endowment fund" in New York typically connotes a transfer to an institution's permanent fund. Considering that the college had a "Permanently Restricted Fund," the court found that the grantor intended to make a gift to that fund and that the gift could be honored without the requested amendment. Accordingly, the court denied the college's petition to modify the trust instrument under EPTL 8-1.1.

The cy pres doctrine, as codified in EPTL section 8-1.1, is a useful tool for amending a will or trust instrument to effectuate a testator or grantor's general charitable intent in appropriate circumstances. It should not, however, be used as a mean toward avoiding the testator or grantor's instructions.

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¹ EPTL § 8-1.1; *Matter of Dowdall*, 2009 N.Y. Slip. Op. 50845(U) (Sur. Ct., Kings County 2009).

² *Matter of Huntingdon College*, 22 Misc.3d 1124(A) (Sur. Ct., Nassau County 2009).