

Changing Concepts and Cy Pres

Edith L. Fisch

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 Cornell L. Rev. 382 (1959)
Available at: <http://scholarship.law.cornell.edu/clr/vol44/iss3/4>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CHANGING CONCEPTS AND CY PRES

EDITH L. FISCH†

The constant and ever increasing efforts of courts and legislatures over the past decade to sustain and support charitable gifts has propelled the law of charities well along the path towards establishment of a principle that property once given to charity is forever dedicated to charity.

The changing attitude of the American judiciary and legislatures in regard to charitable dispositions has run the gamut from early rejection to complete acceptance and liberal support,¹ and as pertains to the cy pres doctrine in particular, has ranged from strict enforcement of its prerequisites to the present tendency towards liquefaction.

Until 1900 the common law emphasis on individual rights and private property led to a judicial reluctance to deviate from the original plans of the donor. Where the choice was between a variance and failure of the gift the latter alternative was adopted. The wishes of the donor were superior to the necessities of changing conditions and the interests of society as a whole.²

After 1900 the common law stress on individualism, which constituted a revolt against the spirit of the Middle Ages,³ began to lessen and the tide of thinking flowed towards society as a whole.⁴ The concept of the public good resulted in judicial recognition of a duty to secure to society the benefits of gifts contributed for charitable purposes and to a realization that the public is the real and ultimate beneficiary of charitable activities.⁵ With increasing ease the courts were able to establish the presence of the necessary prerequisites to the cy pres doctrine and to accord careful attention to the needs and interests of the community in making new applications of charitable funds.⁶

Since the middle of the 1940's the desire to support and uphold char-

† See Contributors' Section, Masthead, p. 394, for biographical data.

¹ Fisch, "American Acceptance of Charitable Trusts," 28 Notre Dame Law. 219 (1953).

² See, e.g., *White v. Fisk*, 22 Conn. 30 (1852); *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949 (1893); *Harvard College v. Society for Promoting Theological Educ.*, 3 Gray 280 (Mass. 1855).

³ Pound, "The Spirit of the Common Law," 18 *The Green Bag* 17, 24 (1906).

⁴ Fisch, "The Cy Pres Doctrine in the U.S." 115-27 (1950).

⁵ See, e.g., *State Nat'l Bank of Texarkana v. Bann*, 202 Ark. 850, 153 S.W.2d 158 (1941); *McCarroll v. Grand Lodge, I.O.O.F.*, 154 Ark. 376, 243 S.W. 870 (1922); *Thatcher v. Lewis*, 335 Mo. 1130, 76 S.W.2d 677 (1934); *City of Keene v. Eastman*, 75 N.H. 191, 72 Atl. 213 (1909); *Matter of MacDowell*, 217 N.Y. 454, 112 N.E. 177 (1916), reversing, 170 App. Div. 245, 156 N.Y. Supp. 387 (2d Dep't 1915), which affirmed, 89 Misc. 323, 153 N.Y. Supp. 653 (Surr. Ct. Westchester County 1915).

⁶ *In re Butin's Estate*, 81 Cal. App. 2d 76, 183 P.2d 304 (1947); *Ford v. Rockland Trust Co.*, 331 Mass. 25, 116 N.E.2d 669 (1954); *In re Neher's Will*, 279 N.Y. 370, 18 N.E.2d 625 (1939), reversing, 254 App. Div. 708, 4 N.Y.S.2d 983 (2d Dep't 1938); *In re Dean's Estate*, 167 Misc. 238, 3 N.Y.S.2d 711 (Surr. Ct. Westchester County 1938); *Estate of McKee*, 378 Pa. 607, 108 A.2d 214 (1954).

itable dispositions whenever possible has gained momentum and has now outstripped the narrow confines of the cy pres doctrine as traditionally applied. This has led to two important developments. One of these is the crumbling of the walls of the cy pres doctrine and its remodelling to conform to the pressures of a society intent on preserving charitable dispositions of property.⁷ The other is the judicial utilization of more flexible doctrines and trust devices in areas formerly reserved exclusively for cy pres.⁸

It is the purpose of this article to examine these developments.

THE REMODELLING OF CY PRES

Elimination of Prerequisites

As traditionally applied, the exercise of the cy pres doctrine is subject to three prerequisites—a charitable trust, a general charitable intent, and the impossibility, impracticality or illegality of carrying out the terms of the particular purpose specified.⁹ In the past the courts have meticulously sought to satisfy each of these prerequisites before applying the doctrine. Moreover all of these common law prerequisites were judicially read into cy pres legislation when the statute embodied one or more of these requirements but fell short of complete inclusion.¹⁰

Since the beginning of the twentieth century the rigors of these prerequisites have been slowly melted down by judicial construction. Gifts given in outright terms to a charitable donee have been held "subject to a trust" or a trust has been implied,¹¹ a general charitable intent almost invariably uncovered,¹² and impossibility or impracticality found with increasing ease.¹³ Not until 1947, however, had any state expressly eliminated any of these prerequisites. In that year Pennsylvania, by a statute which expressly dispensed with the requirement of a general charitable intent, became the first state to do so.¹⁴ Six years later New

⁷ See notes 9-34 *infra*.

⁸ See notes 35-37 *infra*.

⁹ Fisch, *op. cit.* *supra* note 4, at 128.

¹⁰ See, e.g., Ga. Code Ann. §§ 108-202 (1958), *Goree v. Georgia Industrial Home*, 187 Ga. 368, 200 S.E. 684 (1938) (general charitable intent); N.Y. Pers. Prop. Law § 12(2) (1958); *Matter of Rappolt*, 140 Misc. 239, 250 N.Y. Supp. 377 (Surr. Ct. Bronx County 1931) (trust); R.I. Gen. Laws § 18-4-1 (1957); *Powers v. Home for Aged Women*, 58 R.I. 323, 192 Atl. 770 (1937) (general charitable intent).

¹¹ *In re Peterson's Estate*, 202 Minn. 31, 277 N.W. 529 (1938); *Matter of Syracuse University (Hendricks)*, 1 Misc. 2d 904, 148 N.Y.S.2d 245 (Sup. Ct. Onondaga County 1955), *aff'd*, 3 App. Div. 2d 890, 161 N.Y.S.2d 855 (4th Dep't 1957), *aff'd*, 4 N.Y.2d 744, 148 N.E.2d 911 (1958) (where gift was given as an "endowment" a trust was implied); *In re Walter's Estate*, 150 Misc. 512, 269 N.Y. Supp. 400 (Surr. Ct. N.Y. County 1933).

¹² Fisch, *op. cit.* *supra* note 4, at 162.

¹³ *Id.* at 143-47.

¹⁴ Pa. Stat. Ann. tit. 20, § 301.10 (1957) (cy pres applicable whether the intention of the conveyer be "general or specific").

York expressly eliminated the trust requirement from its *cy pres* legislation.¹⁵

The trend towards express elimination of the prerequisites through legislation has been accompanied by a refusal to read these requirements into statutes which do not expressly include them. *McDonough County Orphanage v. Burnhart*,¹⁶ decided in 1955 is typical of this tendency. Here the court refused to read the common law prerequisite of a general charitable intent into section 55 of the Illinois General Not for Profit Corporation Act which requires the transference of the assets of a dissolved corporation to "one or more domestic or foreign corporations, societies or organizations engaged in activities" substantially similar to those of a dissolving corporation.¹⁷ In transferring the funds of a dissolved orphanage to the Salvation Army to be used for the care of dependent children, the court disposed of the claim by the heirs of the donor to a reversion in the fund based on an alleged absence of a general charitable intent by finding that this element was not determinative of the cause. Indeed the court went so far as to expressly assume (without so deciding) that there was no general charitable intent and that the property could not be applied to similar charitable purposes under the *cy pres* doctrine.¹⁸ The argument that the prerequisites of the *cy pres* principle must be read into the legislation was rejected on the ground that the "standard established is statutory and is not hampered by any limitations imposed on the applicability of the *cy pres* doctrine."¹⁹

Changing Standards of Impossibility

Under the *cy pres* doctrine as traditionally applied, the question of whether it has become impossible to carry out the charitable gift has been tested by reference to the particular objective of the donor as expressed in the dispositive instrument; any obstacle to the effectuation of the details of the charitable scheme or plan was deemed sufficient to satisfy this *cy pres* prerequisite. The trend today, however, is to use an implied general charitable intent rather than the specific plan expressed by the donor as the standard of impossibility, so that if, for example, a donor gives property to a stated school the impossibility of carrying out

¹⁵ N.Y. Pers. Prop. Law § 12(2-a) (1958); N.Y. Real Prop. Law § 113(2-a) (1958) ("... the jurisdiction of the court to prevent failure of such a gift, grant or devise and give effect to the general purpose thereof is not defeated by the fact that the donee, grantee or devisee does not exist or lacks capacity to take at the time the gift, grant or devise would otherwise become effective, whether or not the gift, grant or devise creates an express trust for such purpose").

¹⁶ 5 Ill. 2d 230 125 N.E.2d 625 (1955).

¹⁷ Ill. Stat. Ann. c. 32 §§ 163a53-54 (1958).

¹⁸ *McDonough County Orphanage v. Burnhart*, supra note 16, at 239, 125 N.E.2d at 631.

¹⁹ Id. at 247, 125 N.E.2d at 635.

this gift is not determined by referring to the particular details of his gift but by ascertaining whether the gift can be used for *education*. Similarly, if a gift is given to a particular hospital the court will determine not whether the gift to the particular hospital can be carried out but whether it can be used at all to benefit the *sick*. These courts thus assume without discussion the existence of one of the most controversial questions in the law of cy pres, namely whether the donor had a specific or general intent. In so doing the courts appear to have created a substantive rule to the effect that every donor who dedicates property to a specific charitable purpose, institution or organization possesses in addition a broader charitable intent.

This type of reasoning renders negligible the possibility of a finding of impossibility or impracticality. And since the question of cy pres never arises unless the directions of the donor cannot be effectuated, a holding that it is possible to carry out the purposes of the gift obviates at the very outset the necessity for resort to cy pres. The risk of a reversion of the fund to the heirs in the event that all of the cy pres prerequisites cannot be found is thereby eliminated.

This modern theory has been utilized when the expressed trust purpose was assumed by another charity after the designated charitable donee ceased to exist. In *Zevely v. City of Paris*,²⁰ the settlor directed that the income from a trust be used to establish and maintain a room in the W. W. Massie Memorial Hospital in memory of her son to be "a free room for the use of deserving young men as far as practicable." It was further provided that in the event that the W. W. Massie Hospital should permanently cease to be used as a hospital the trust fund should be returned to the settlor or her heirs. Years later the W. W. Massie Hospital was sold, the court ordering the proceeds to be applied to the construction of a nurses' home at the site of a newly built hospital. One of the heirs of the donor brought suit to recover the trust corpus on the ground that it reverted when the building ceased to be used as a hospital. This argument was rejected by the lower court which had invoked the cy pres doctrine to allow the funds to be used by the new hospital for a free room which it had established as a memorial to the donor's son. The appellate court, while it sustained this application of the funds, found no need to invoke the cy pres doctrine since the donor's

paramount purpose was not to benefit the hospital but to benefit needy young men and provide a memorial for her son. *Obviously, since the purpose of the trust is being carried out, cy pres need not be invoked.*²¹ (Emphasis added.)

²⁰ 298 S.W.2d 12 (Ky. 1957).

²¹ Cf. dissent 298 S.W.2d at 14.

This rationale has also been adopted when some change has been made in the control, ownership or method of operation of the charity, but the change has not destroyed its charitable character. *Matter of Ablett*²² is typical of these cases. Here a gift, to take effect after the termination of a life estate, was made to "London Hospital at Whitechapel" in England, the income to be used for such purposes as the board of directors deemed advisable. Although the hospital had been nationalized the Court of Appeals of New York refused to find impossibility. The court's theory was that "literal compliance" with the terms of the will was practicable since "(t)he poor whom testatrix intended to benefit were not legislated out of existence by the National Health Service Act."²³ The appellate division had come to the same conclusion, finding that:

Notwithstanding the marked administrative and fiscal changes effected by the Act, the work of the healing and caring for the sick at the London Hospital goes on as before, and viewing the problem simply as a question of the intention of the testatrix, we would not be justified in saying that the donee for whom she intended the gift has ceased to exist She desired her money to cure the sick who came to that particular hospital for treatment, and in so doing to perpetuate the memory of her late husband. Both of those purposes will still be promoted by her legacy.²⁴

That the desire to avoid the pitfalls of cy pres and thus insure the continued use of the gift for charitable purposes dictates the holding in any given case as to the presence or absence of impossibility is clearly revealed by a comparison of *In re Bishop's Estate*²⁵ and *Pennsylvania Company for Banking and Trusts v. Board of Governors of London Hos-*

²² 206 Misc. 157, 132 N.Y.S.2d 488 (Surr. Ct. Oneida County 1954), aff'd, 2 App. Div. 2d 205, 153 N.Y.S.2d 816 (4th Dep't 1956), aff'd, 3 N.Y.2d 261, 144 N.E.2d 46 (1957). In *First Nat'l Bank v. King Edward's Hospital Fund*, 1 Ill. App. 2d 338, 117 N.E.2d 656 (1954), which also involved gifts to nationalized English hospitals, an Illinois court found that the hospitals were still functioning as hospitals and the application of the gifts to the nationalized hospitals was not an application to a different charitable use but to the same charitable use. The lower court had awarded the funds to the nationalized hospitals upon the basis of cy pres. The appellate court, however, stated that "(w)e are of the opinion that the relief afforded in the instant case could have been obtained by the exercise of the court's inherent equity powers." It went on to add that "(o)nly management and ownership of the hospitals . . . have changed by reason of the Act. The award of these funds to these hospitals under the present management and ownership is not just an application of these funds to institutions of a similar charitable purpose, but to the identical purpose contemplated by the testator."

²³ *Matter of Ablett*, 3 N.Y.2d at 278, 144 N.E.2d at 54.

²⁴ *Matter of Ablett*, 2 App. Div. 2d at 209-10, 153 N.Y.S.2d at 820.

²⁵ 206 Misc. 7, 129 N.Y.S.2d 387 (Surr. Ct. N.Y. County 1954), aff'd, 1 App. Div. 2d 612, 152 N.Y.S.2d 310 (1st Dep't 1956), aff'd, 3 N.Y.2d 294, 144 N.E.2d 63 (1957). The court reached a similar holding in *Matter of Perkins*, 1 Misc. 2d 589, 145 N.Y.S.2d 775 (Surr. Ct. N.Y. County 1955), aff'd, 2 App. Div. 2d 655, 152 N.Y.S.2d 315 (1st Dep't 1956), aff'd, 3 N.Y.2d 281, 144 N.E.2d 56, 165 N.Y.S.2d 77 (1957) which also involved outright gifts to nationalized English hospitals. Since there was no gift over to other charities it was only by finding that it had not become impossible to carry out the gift and thereby cutting off invocation of the cy pres doctrine that the risk of a reversion was avoided.

pital.²⁶ *In re Bishop's Estate*,²⁷ involved a gift by a testatrix, who died in 1938, of one-half of her residuary estate, after the termination of a life estate, "to the Dunfermline & West Fife Hospital" in Scotland to have and to hold the same forever. As a result of the National Hospital Service Act enacted in 1948, the ownership of the hospital was transferred from the trustees to the Secretary of State for Scotland and its administration and control placed under the West Fife Hospital Board of Management, a public corporate body. In 1950 the life tenant died. Against the contention of the Attorney General that the nationalization of the hospital had brought about a fundamental change in its character and a resulting loss of the entity for which the testatrix intended the bequest and that the cy pres doctrine was thus applicable, the court held that the hospital had in no sense lost its former identity and that there was therefore no reason for exercising the cy pres principle. That the limitations of cy pres might have led to the return of the property to private individuals was made explicit by the court when it stated that "(w)ere that not the case [that the cy pres doctrine is inapplicable] it is quite possible that a contrary result would be required because of the holding in *Wright v. Wright*."²⁸

The *Wright* case²⁹ held that an absolute gift, as distinguished from a gift in trust, lapses if a corporate donee loses its corporate existence before the time fixed for the bequest to take effect. Since the hospital was nationalized in 1948, before the termination of the life estate, and the gift to the hospital was in outright terms it is likely that were this case deemed to be within the purview of the cy pres doctrine the gift would have to be disposed of as intestate property.

In *Pennsylvania Company for Banking and Trusts v. Board of Governors of London Hospital*,³⁰ a Rhode Island court reached a contrary conclusion by finding that the National Health Service Act brought about failure of the gift, the original governing board no longer holding title to the property. This holding, however, did not result in a reversion to the heirs of the donor because here there was a gift over to other charities in the event of failure of the primary gift.³¹ That the court was aware that despite its conclusions as to the effect of nationalization the enforcement of the gift over would preserve the gift for charity was made clear

²⁶ 79 R.I. 74, 83 A.2d 881 (1951).

²⁷ See note 25 *supra*.

²⁸ 206 Misc. 2d at 15, 129 N.Y.S.2d at 394.

²⁹ 225 N.Y. 329, 122 N.E. 213 (1919).

³⁰ Note 26 *supra*.

³¹ The court found that the presence of an alternative disposition removed the case from the scope of the cy pres doctrine. See cases cited notes 42-48 *infra*.

when it pointed out that "in the present instance there is other specific disposition and the alternate beneficiaries are also charities."³²

Thus the conclusion of any particular court on the issue of impossibility is likely to be determined by whether it will save or destroy the continued charitable use of the property.

The testing of impossibility in terms of an assumed underlying broad charitable intent rather than by reference to the specific purpose stated by the donor blocks the application of the *cy pres* doctrine. It also furnishes an apparent justification for departure from the particular charitable purpose absent its impossibility or impracticality. This is illustrated by *Cleveland Museum of Art v. O'Neill*,³³ which involved a declaratory judgment action requesting an interpretation of the provisions of three trust funds which had been established to acquire art objects for the Cleveland Museum. At the time of suit the museum was engaged in constructing additional physical facilities and requested that the doctrine of deviation be exercised so as to permit the income from these three trust funds to be applied for a limited time towards the construction work. Even though the court found that there was no *present* failure of the specific purposes of these trusts it permitted the income to be used for building purposes since the long range trust purpose, namely to maintain an outstanding museum of art would be *ultimately* defeated unless the income were used for building. The court theorized that "lack of space now means loss of pictures for public enjoyment" and that the institution could not "continue to render full service to a growing city if it is cramped to such an extent that it is unable to display masterpieces it now possesses and art it will acquire in future years."³⁴

The significance of this decision rests not only in the practical elimination of a requirement of impossibility or impracticality as a condition for variance of the donor's original plans but in the refusal to accord force to the express words of the donor. To that extent it may foreshadow an era when gifts once given to charity will not only be forever devoted to charity but may be applied by the charitable donee (with or without court approval) in whatever manner is best suited to the carrying out of its functions, free from and unrestricted by the explicit purpose expressed in the donative instrument.

³² *Pennsylvania Co. for Banking and Trusts v. Board of Governors of London Hospital*, supra note 26, at 87-88, 83 A.2d at 888.

³³ 129 N.E.2d 669 (Ohio 1955).

³⁴ *Id.* at 671. Cf. *First Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 121 A.2d 296 (Del. 1956) (a trust for the needy poor may not be used for library purposes); *St. Joseph's Hospital v. Bennett*, 281 N.Y. 115, 22 N.E.2d 305 (1939) (a bequest to be held as an endowment for "the ordinary expenses of maintenance" can not be used in partial payment of a mortgage debt on real property).

UTILIZATION OF OTHER DEVICES

Doctrine of Deviation

In recent years the courts have made increasing use of the doctrine of deviation to achieve objectives usually reached by exercise of the cy pres principle. The doctrine of deviation is analogous to, but not as extensive as, cy pres. It allows a court of equity, under its general power to administer trusts, to authorize a deviation from the terms of the trust in matters pertaining to its administration as distinguished from its purpose. Unlike the cy pres doctrine, the court need not find a general charitable intent as a prerequisite to its application.³⁵

First National Bank of Akron v. Unknown Heirs of Donnelly,³⁶ demonstrates the advantages implicit in the doctrine of deviation. This declaratory judgment action concerned a gift by a testator to "a Catholic Orphanage located in Summit County, Ohio," or for the establishment of a Catholic orphanage in that county "if there be none located" therein. There was no Catholic orphanage in Summit County either at the time of suit or when the will was executed, and the amount of the fund was insufficient to establish an orphanage. Upon these facts the court ordered the fund to be held by the trustee and administered by it under the continuing direction of the probate court for the care, maintenance and support of Catholic orphans of Summit County cared for at Parmadale (the diocesan orphanage in an adjoining county) or any other home or institution of a similar character. It was further held that the remaining fund be turned over to a Catholic orphanage in Summit County should one ever be established. On appeal the question was whether the lower court had disposed of the fund by the doctrine of deviation or by another doctrine such as cy pres.³⁷ In determining this issue the court made explicit its preference for the doctrine of deviation over that of cy pres by stating:

If the primary purpose of a charitable trust can be accomplished by deviation from express terms in the instrument of creation, in respect to purely administrative matters, it becomes unnecessary to analyze the facts in the light of the doctrine of cy pres, and in doing the latter, determine whether the donor manifested a general charitable intent, and, if so, whether the property should be used for an approximate charitable purpose

³⁵ *Craft v. Shroyer*, 81 Ohio App. 253, 74 N.E.2d 589 (1947).

³⁶ 96 Ohio App. 509, 122 N.E.2d 672 (1954).

³⁷ The decision does not make clear the manner in which this question arose. Most likely it was created by the contention of the heirs that the lower court could not base its holding upon the doctrine of deviation but only upon the doctrine of cy pres and since there was no general charitable intent the cy pres doctrine could not be properly applied. The holding therefore was erroneous.

(a purpose as nearly as may be like the purpose stated by the donor) when it is impossible to exactly carry out this specific intent.³⁸

The decision of the lower court was affirmed on the ground that the court had power "to permit deviation from the settlor's directions as to mere methods of administration, where the charitable objective is not changed but rather the means and method of accomplishing it are varied." The court expressly declined to decide whether the doctrine of cy pres could also have been applied.

A precedent for this holding had been established seven years previously by *Craft v. Shroyer*,³⁹ a construction proceeding concerning property that had been left for the purpose of establishing a home for orphans of the United Lutheran Church in Miami County, Ohio. Alleging that it had become impractical to carry out the specific terms of the trust the petitioners asked the court to exercise the cy pres doctrine so as to apply the funds to "the Oesterlen Home for children of the United Lutheran Church in America located in Clark County, Ohio." The heirs admitted the impracticality of carrying out the terms of the gift but argued that the trust had failed because of the absence of a general charitable intent. The court invoked the cy pres doctrine and awarded the funds to the Oesterlen Home. On appeal the heirs claimed that the judgment was contrary to law in that the court had failed to find that the testatrix had a general charitable intent. In disposing of this argument the appellate court found that the testatrix did not have a general charitable intent but under the doctrine of deviation, which does not require such an intent, ordered the funds expended for the support of orphans of the United Lutheran Church of Miami County during their residence in the Oesterlen Home or any other similar institution or private home. This departure from the terms of the will was apparently deemed a mere detail of administration and not a change of the purpose or object of the trust nor a change in the class of beneficiaries or a diversion of the funds from the designated charitable purpose.

Effect of a Gift Over

Formerly the fact that the donor had provided for a gift over upon the failure of the specified charitable purpose did not prevent the courts from testing the primary bequest in terms of the cy pres doctrine and applying that principle when a general charitable intent was found.⁴⁰

³⁸ First Nat'l Bank of Akron v. Unknown Heirs of Donnelly, *supra* note 36, at 514, 122 N.E.2d at 675.

³⁹ 81 Ohio App. 253, 74 N.E.2d 589 (1947).

⁴⁰ Village of Hinsdale v. Chicago City Missionary Soc'y, 375 Ill. 220, 30 N.E.2d 657 (1940); *In re Y.W.C.A. of N.Y.C.*, 96 N.J. Eq. 568, 126 Atl. 610 (1924).

As expressed by one court, "a secondary purpose will not prevail where the primary charitable objective of the donor can be attained by a different method."⁴¹

Today, cy pres is rarely, if ever, considered in this situation, the theory being that the expressed intent of the donor in regard to the alternative beneficiary obviates the need for its use.⁴² This rationale has become crystallized in the rule that the doctrine of cy pres is inapplicable when the donor by a gift over declares how the funds should be used upon failure.⁴³ Moreover, this rule has been extended so as to allow its application, with a consequent effectuation of the gift over upon failure of the primary bequest, even though the specified event or contingency upon which the gift over was to operate has not occurred.⁴⁴

Thus in *City of Belfast v. Goodwill Farms*,⁴⁵ property was left to the City of Belfast for the purpose of maintaining a home for aged men but if the city refused to accept the gift, then the property was to go to other charities. The city did accept the gift but a year thereafter brought an action to obtain a decree relieving it of the trust, chiefly on the ground that the sum left to the trustees was insufficient to equip, support and maintain the designated home. Although the absence of a general charitable intent precluded the exercise of cy pres in regard to the primary gift, and although the express condition of the gift over (refusal by the city) failed to occur the court struggled to sustain the gift for charity. This was accomplished by invoking the principle that the cy pres doctrine is not applicable where there is a specific alternative gift effective upon failure of the primary charitable gift. The court reasoned that despite the wording used by the testator in making the gift over to other

⁴¹ Village of Hinsdale, supra note 40, at 234, 30 N.E.2d at 664.

⁴² In re Harrington's Estate, 151 Neb. 81, 36 N.W.2d 557 (1949); Pennsylvania Co. for Banking and Trusts v. Board of Governors of London Hospital, 79 R.I. 74, 83 A.2d 881 (1951) (gifts to charity but in case any shall fail "(for any reasons now unimaginable by me) my property shall surely go, in such event, to the work of establishing the knowledge and following of Jesus Christ among our American people"). See also cases cited note 43 infra.

⁴³ Camden Trust Co. v. Christ's Home of Warminster, Pa., 28 N.J. Super. 466, 101 A.2d 84 (1953) (the cy pres doctrine can not, of course, be applied where the testator has directed what disposition shall be made of trust property in the event of failure of the use to which he directed it should be put); In re Shapiro's Estate, 112 N.Y.S.2d 46 (Surr. Ct. N.Y. County 1952); see In re Price's Will, 264 App. Div. 29, 35 N.Y.S.2d 111 (3d Dept. 1942), affirmed, 289 N.Y. 751, 46 N.E.2d 354 (1943).

⁴⁴ See cases cited notes 45-50 infra. See also First Nat'l Bank of Chicago v. American Bd. of Comm'rs for Foreign Missions, 328 Ill. App. 481, 66 N.E.2d 446 (1946) (although the will made no express provision for the event which occurred the court implied an intention that where one of the legatees should cease to exist the remaining charitable legatees should take). Compare the following cases in which the court applied the primary gift cy pres upon its failure when there was an alternative disposition to take effect upon a certain event which did not occur. Union Methodist Episcopal Church v. Equitable Trust Co., 32 Del. Ch. 197, 83 A.2d 111 (1951); Souther v. Schofield, 95 N.H. 379, 63 A.2d 796 (1949) (doctrine of approximation applied).

⁴⁵ 150 Me. 17, 103 A.2d 517 (1954).

charities he intended "to cover the possibility of a failure of the gift in the uncertain future."⁴⁶

Defenders of Furbearers v. First National Bank & Trust Co. of Lexington,⁴⁷ presented a similar situation. The testatrix left funds for a humane society suggesting that they be "used to hire a competent agent to work on streets of Lexington and try to relieve the condition of miserable horses allowed to be overworked and mistreated." She further provided that should the organization *decline* the bequest under her conditions, that the money be divided equally between two other charities. The humane society accepted the gift. However, a problem arose when it was discovered that there were no "miserable" or "overworked and mistreated" horses on the streets of Lexington. Since the word "suggest" as used in the will was construed as an absolute condition rather than as precatory, the lower court found that the gift to the humane society failed. But because of the absence of a general charitable intent the cy pres doctrine could not be applied. It was further held by the lower court that the gift over could not be given effect because the society had not "declined" the gift. On appeal, however, the gift over was given effect on the ground that it is to be "considered as having been intended to take effect upon an impossibility of performance the same as upon a voluntary declination of the gift."⁴⁸ The cy pres issue was thus removed from the case.⁴⁹

By utilizing these principles when there is a gift over on the failure of the primary gift, the courts are able to cut off any controversy as to whether the intent of the donor was general or specific and at the same time save the gift for charity, provided, of course, that the alternative beneficiaries are charities.⁵⁰

Implied Trusts and Rules of Construction

At one time gifts to unincorporated charitable associations, unable to take title to property under state laws,⁵¹ were upheld by applications of the cy pres doctrine.⁵² When the prerequisites to the exercise of the doc-

⁴⁶ Supra note 45, at 24, 103 A.2d at 521.

⁴⁷ 306 S.W.2d 100 (Ky. 1957).

⁴⁸ Id. at 102.

⁴⁹ Id. at 103.

⁵⁰ Where the alternative beneficiary is a private individual or non-charitable organization the courts will probably utilize other devices to save the gift for charity such as a finding that it is not impossible to carry out the donor's primary gift. See notes 20-28 supra.

⁵¹ 1 Powell, Real Property § 131 (1949).

⁵² In re Peterson's Estate, 202 Minn. 31, 277 N.W. 529 (1938); In re Walter's Estate, 172 Misc. 207, 15 N.Y.S.2d 8 (Surr. Ct. Nassau County 1939), aff'd, 259 App. Div. 1078, 21 N.Y.S.2d 37 (2d Dep't 1940), modified, 285 N.Y. 158, 33 N.E.2d 72 (1941); Prudential Ins. Co. v. N.Y. Guild for Jewish Blind, 252 App. Div. 493, 299 N.Y. Supp. 917 (1st Dept. 1937).

trine could not be established the gift failed.⁵³ Today, such gifts are sustained by implying a trust and appointing a trustee to hold the property for the association on the rationale that equity will not let a trust fail for want of a trustee.⁵⁴ New York courts have developed a so-called "rule of construction" which allows a parent corporation to hold in trust property given to its unincorporated branch or subsidiary to be used for the purposes specified by the donor.⁵⁵ Thus a gift to an unincorporated local branch of the Salvation Army or to a Red Cross chapter is upheld by awarding it to the incorporated parent to be used for the designated chapter.

Statutes have also cared for this situation by providing that the unincorporated association may take the property if it incorporates within a prescribed period⁵⁶ or by providing that property devised or bequeathed to an unincorporated entity be held or administered for the benefit of such devisee or legatee by a corporation with which it is connected.⁵⁷

These statutes and judicial devices insure the use of the gift for charity regardless of the existence of the cy pres prerequisites.

CONCLUSION

So long as courts will employ some theory, method or device, no matter how strained or distorted, to sustain a gift made to charity, the continued requirement of the cy pres prerequisites serves no useful end. Their elimination, on the other hand, would not only render unnecessary the present circumlocutions employed to take cases outside the orbit of cy pres, but would facilitate the preservation of charitable gifts since the only question in regard to a charitable scheme which can no longer be carried out in accordance with the specified terms of the donor would then be the proper exercise of the court's discretion in regard to a different mode of operation or choice of another charitable purpose.

⁵³ *Robinson v. Crutcher*, 277 Mo. 1, 209 S.W. 104 (1919); *In re Jones' Estate*, 108 N.Y.S.2d 812 (Surr. Ct. Bronx County 1951); *In re Grossman's Estate*, 190 Misc. 521, 75 N.Y.S.2d 335 (Surr. Ct. Bronx County 1947); *In re Gault's Estate*, 48 N.Y.S.2d 928 (Surr. Ct. Bronx County 1944).

⁵⁴ *Craven v. Wilmington Teachers Ass'n*, 47 A.2d 580 (Del. Ch. 1946) (teachers association); *Barnhart v. Bowers*, 143 Kan. 866, 57 P.2d 60 (1936) (old order church); *Wachovia Bank & Trust Co. v. Board of Missions of Presbyterian Church*, 226 N.C. 546, 39 S.E.2d 621 (1946) (Asheville Normal and Associated Schools); *In re Thronson's Estate*, 243 Wis. 73, 9 N.W.2d 641 (1943) (Masonic home).

⁵⁵ *In re Pfizer's Estate*, 33 N.J. Super. 242, 110 A.2d 40 (1954), *aff'd*, 17 N.J. 40, 110 A.2d 54 (1954) (New York law applied to gift to Bellevue and Gouverneur's Hospitals); *In re Welton's Will*, 156 N.Y.S.2d 628 (Surr. Ct. Westchester County 1956) (Holy Trinity School and Holy Trinity Convent); *In re Jolson's Estate*, 114 N.Y.S.2d 135 (Surr. Ct. N.Y. County 1952) (College of the City of N.Y.).

⁵⁶ N.Y. Deced. Est. Law § 47-e (1958).

⁵⁷ N.Y. Relig. Corp. Law § 48 (1958) (devise or bequest to unincorporated affiliate under the jurisdiction of the Protestant Episcopal Church to be held by the diocesan corporation).