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THE CY PRES DOCTRINE IN THE UNITED STATES: FROM EXTREME RELUCTANCE TO AFFIRMATIVE ACTION

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Perhaps no legal principle illustrates the use of Fourteenth Amendment equal protection jurisprudence more poignantly than the relatively obscure cy pres doctrine. The ancient doctrine which allowed both courts and the Crown in England to change trust purposes when the original trust purposes proved no longer viable was adopted belatedly, sporadically and partially by jurisdictions in the United States.[2] Although use of the doctrine was meager in the 19th century,[3] use increased

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[2]Justice Taney, concurring in *William Fontain, Administrator of Frederick Kohne v. William Ravenel,* 58 U.S. 369 (Mem.), 17 How. 369, 15 L.Ed. 80 (1854), noted the differences of opinion in the few Supreme Court cases that had considered whether the doctrine had been adopted as part of the common law. Taney's conclusion highlights the difficulty the early courts had with the question of jurisdiction and of reception relating to the doctrine of cy pres, "I think I can safely conclude that the power exercised by the English court of chancery 'in enforcing donations to charitable uses,' is not a part of its jurisdiction as a court of equity, but a prerogative power exercised by that court." *Id.* at 392-94. The majority denied the application of cy pres, noting, "The chancery powers are of comparatively recent establishment in the State of Pennsylvania, and it does not appear that the cy pres power is given, and in the exercise of jurisdiction it seems to be disclaimed." *Id.* at 389.

[3]In 1867, the Massachusetts court noted the refusal to adopt the doctrine by Maryland, Virginia, North Carolina, New York, Pennsylvania, South Carolina, Connecticut and Illinois; its restricted acceptance in Kentucky; its relative acceptance in Vermont, Maine, New Hampshire, Georgia and Ohio; and contrasted this record with the doctrine's acceptance in Massachusetts. *Jackson v. Phillips,* 96 Mass (14 Allen) 539, 588-91 (1867). Judge Gray speaking for the Supreme Judicial Court explained the reception in Massachusetts, "The narrow doctrines which have prevailed in some states upon this subject are inconsistent with the established law of this commonwealth. Our ancestors brought with them from England the elements of the law of charitable uses, and, although the form of proceeding by commission

after the turn of the century and expanded dramatically after World War II.[4] Used as a means to attack discriminatory trust purposes, the doctrine elicited application of the state action concept in the fifties by the Supreme Court.[5] Proposals for reform of cy pres also began in the fifties[6] and continue today, reflecting the current debate over affirmative action. Interestingly, the proposals for reform correspond to reform

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under the St. of 43 Eliz. has never prevailed in Massachusetts, that statute, in substance and principle, has always been considered as part of our common law." *Id.* at 591. The court applied cy pres to the bequest by Francis Jackson to Wendell Phillips and others in trust for the emancipation of slaves, rendered impossible by the passage of the Thirteenth Amendment, and ordered that the funds be paid over to the Freedmen's Union Commission, to be used for the education of the "late slaves." *Id.* at 599. The court, however, refused to apply the doctrine to save the bequest to Wendell Phillips et al "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, manage, and devise property; and all other civil rights enjoyed by men; . . . ." *Id.* at 542 (deeming such purposes not to be charitable). The court commented, citing, *inter alia*, *Habershon v. Vardon,* 4 De Gex & Sm 467, "Gifts for purposes prohibited by or opposed to the existing laws cannot be upheld as charitable, even if for objects which would otherwise be deemed such." *Id.* at 555.

[4]George Gleason Bogert summarizes the situation before and after 1943. *See* George Gleason Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 54 MICH. L. REV. 633 (1954). Generally before 1943, "there was little statutory law in the United States concerning the supervision and enforcement of charitable trusts." *Id*. Bogert noted that "[b]eginning in 1943 a new trend appeared in American statute law with respect to state supervision of charitable trusts." *Id*. New Hampshire led the way with Rhode Island, Ohio, South Carolina, and Texas following, and with the states of Indiana, California, New York, Florida and Vermont showing interest. The National Conference of Commissioners on Uniform State Laws appointed in 1951 a committee to draft the Uniform Supervision of Charitable Trusts Act and directed that committee to redraft the act for presentation at the 1954 annual meeting. *Id*. at 649-50. *See also* Bogert's suggestions for a model or uniform act. *Id*. at 652-58. In 1954, both the National Conference of Commissioners on Uniform State Laws and the House of Delegates of the American Bar Association approved the Uniform Supervision of Trustees for Charitable Purposes Act. Only California, Illinois, Michigan and Oregon had adopted the Act when, in 1990, the Commission denominated it a model act, reasoning that it had really been treated by the states in that capacity. See Uniform Laws Annotated, v. 7B.

[5]*Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia* 353 U.S. 230 (1957), wherein the Supreme Court reversed a decision of the Supreme Court of Pennsylvania which allowed the Board of Directors of City Trusts of the City of Philadelphia to refuse to admit Negroes to a "college" established for poor white males by Stephen Girard's testamentary trust in 1831. The court found the Board's action to be state action prohibited by the Fourteenth Amendment, citing *Brown v. Board of Education* 347 U.S. 483 (1954); *Evans v. Newton*, 382 U.S. 296 (1966), wherein the Supreme Court held that a park established in 1911 in Macon, Georgia, by Senator Augustus O. Bacon in a testamentary trust for whites only could no longer be operated as a segregated facility, finding such discrimination violated the Fourteenth Amendment equal protection clause; *Evans v. Abney* 396 U.S. 435 (1970), wherein the Supreme Court allowed to stand the reversion of the trust assets and the subsequent closing of the park in Macon, Georgia, under the rationale that the cy pres doctrine could not be applied in the absence of general charitable intent.

[6]*See* Bogert, *supra* note 4. *See also* Stuart M. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts,* 56 GEO. L. J. 272 (1967) .

studies commissioned in England.[7] In Part I, the author illustrates how the United States jurisdictions differ from England in the requirement for charitable intent. Earlier cases reveal the United States, unlike England, has resisted relaxation of the requirement. In Part II, the author uses the Restatement of Trusts to demonstrate further how the jurisdictions had developed differently at the mid-twentieth century point.

In Part III, the author reports on the significant reforms in England and the corresponding, though halting, movement toward reform in the United States jurisdictions. In Part IV, the author describes the specific reform proposals in the United States proliferating since 1943. Finally, the author concludes that relaxation of cy pres doctrinal requirements is realized best by modest legislation and effective drafting.

I. THE CY PRES DOCTRINE IN THE UNITED STATES AND ENGLAND

In the law of charities, the doctrine of cy-pres was formulated to effectuate a trust which might otherwise fail. *Restatement (Second) of Trusts*[8] defines the doctrine in this way:

> If property is given in trust to be applied to a particular charitable purpose, and it is, or becomes, impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail, but the Court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

The doctrine has been described as one of "approximation."[9] In providing an alternative charitable purpose, the Courts have read cy pres to mean "as near as possible" to the declared object.[10] The *Restatement* definition expresses the American version of the doctrine which differs from English law by requiring that general charitable intent always be shown before a substitute purpose is applied. Attempts to formulate a single definition for the cy pres doctrine will prove impossible because jurisdictional approaches vary as does the historical development within each jurisdiction, but the *Restatement* definition expresses the traditional common law.

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[7]Parliament repealed the Charitable Trust Acts enacted from 1853 and replaced them with the Charities Act of 1960, pursuant to the report of The Nathan Committee. See GEORGE W. KEETON & LIONEL ASTOR SHERIDAN, THE MODERN LAW OF CHARITIES, (2d ed. 1971). The Report of the Committee on the Law and Practice Relating to charitable trusts known as The Nathan Report was presented by the Prime Minister to Parliament in 1952. A subsequent report published in 1987, known as the Woodfield Report, resulted from a commission by the British Home Secretary and the Economic Secretary to the Treasury of Sir Philip Woodfield to review the work of the Commissioners under the 1960 act. The latter report suggested that some relaxation of the cy pres doctrine might be advisable. See fuller discussion *infra*.

[8]RESTATEMENT (SECOND) OF TRUSTS § 399 (1958).

[9]*In re Kensington Hospital for Women,* A. 2d. 154 (Pa. 1948).

[10]KEETON & SHERIDAN, *supra* note 7, at 135.

The English use of the doctrine contrasts sharply with its practice in the United States. The English have applied the cy pres doctrine in cases where the donor, testator, or settlor has expressed a general charitable intention and, in other instances, where no general charitable intention has been manifested. Professors George W. Keeton and L. A. Sheridan summarized the requirement for a general charitable intent in English Law:

A general charitable intent must be shown:

1. Where the purpose indicated by the testator is impossible or illegal;
2. Where the purpose has never existed;
3. Where the object has existed but ceases to exist before the testator's death.

A general charitable intent need not be shown:

1. Where the purpose or institution ceases to exist after the gift has taken effect.
2. Where a charity comes to an end because the object for which it was established has ceased to exist, or has come to an end for some other reason;
3. Where the machinery for the application of the gift fails;
4. Where, after providing for the particular object, there is a surplus of charitable funds.[11]

Professors L. A. Sheridan and V. T. H. Delany, emphasizing this difference, pointed out that "except in most parts of the United States, the absence of a general charitable intent is not fatal to a *cy-pres* application."[12] They defined general charitable intent as an intent to benefit any or a type of charity, however narrow or unlimited, which is wide enough to include the stated (impossible) purpose.[13] To find general charitable intent, the terms of the gift will be taken into account as will the place of the gift in the instrument, whether the gift is surrounded by other charitable gifts, or if the disposition is in favour of an organization which has never existed.[14] All pertinent facts relating to the formation of the gift may be considered by the court.[15] The rationale behind the requirement of general intent is grounded in the historical insistence in trust law that courts respect trustor intent and in the reluctance of courts to re-write the trust instrument.

Cases from the early 1900's illustrate the traditional approach to cy pres used in the United States. In the 1929 case, *Rhode Island Hospital Trust Company v. Williams*,[16] the testatrix made a bequest to the Bristol Cottage Hospital which was in

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[11]*Id.* at 134-35; *see also* GEORGE W. KEETON, THE LAW OF TRUSTS 171 (9 ed. 1971).

[12]LIONEL ASTOR SHERIDAN & VINCENT THOMAS HYGINUS DELANY, THE CY-PRES DOCTRINE, 33 (1st ed. 1959).

[13]*Id.* at 36.

[14]For a thorough discussion of charitable intent, *see* Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine,* 42 WAYNE L. REV. 1341, 1348-51 (1995).

[15]*See* Vanessa Laird, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine*, 40 STAN. L. REV. 973 (1988).

[16]148 A. 189 (R.I. 1929).

existence when the will was executed, but ceased to exist before the death of the testatrix. Judge Barrow described the task before the court, "The difficult problem in this type of case is to ascertain whether the charitable intention of the testatrix was specific only, or if the dominant intent was of a general charitable nature so that it may be made effective *cy-pres*."[17] The court found that the testatrix had a "dominant purpose to devote the residue of her estate to general charities of the type represented" by its successor, and applied the gift cy pres.[18]

In construing the will to find the testatrix's intent, the Rhode Island Supreme Court emphasized the fact that other charities were named together in the residuary clause and the fact that the Bristol Cottage Hospital had been an active charity at the time the testatrix executed her will. These facts were sufficient to allow the court to find an interest in the general charitable project of a cottage hospital and to order the charitable funds accordingly.

In the 1920 case, *Bancroft v. Maine State Sanitorium Association*,[19] the Maine court noted: "The general principle running through all the cases is that, in order to apply the *cy-pres* doctrine, there must be two pre-requisites: first, a failure of the specific object; and, second, a general charitable intent disclosed in the instrument creating the trust."[20]

The gift in *Bancroft* failed because the court could not find a general charitable intent. The object of the gift was a charitable tuberculosis sanitorium which had been turned over to the State. Although the instrument provided for forfeiture under certain conditions with a gift over to specified persons, the fact that the association to whom the gift was made ceased to hold the sanitorium was not within the scope of the forfeiture clause. The court, finding no general charitable intention, ruled that the trust should fail.

A general charitable intent is consistently required throughout the states in which the doctrine had been judicially adopted, and in most of the states statutorily adopting cy pres.[21] However, a recent Connecticut case has been criticized as precedent for completely doing away with the requirement of testator intent under the Connecticut version of the Uniform Management of Institutional Funds Act.[22]

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[17]*Id.* at 190.

[18]*Id.* at 192.

[19]109 A. 585 (Me. 1920).

[20]*Id.* at 592.

[21]*See generally* 4A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 399, 476, (4th ed. 1989).

[22]Andrew C. Kruger, *Are Charitable Trusts and the Doctrine of Cy Pres Alive After Yale University v. Blumenthal?* 8 CONN. PROB. L.J. 241 (1994) (discussing the effect of the Connecticut Uniform Management of Institutional Funds Act on the doctrine of cy pres). Kruger notes that some thirty-six states have adopted similar statutes patterned on the Uniform Management of Institutional Funds Act which may give the holding "national implications regarding a limitation on a testator's 'deadhand' control." *Id.* at 242. When Thomas F. Smallman died in 1928, he left $ 225,000.00 in trust, life income to his wife with remainder at her death to Yale College for construction of a sick poor wing at the Yale Medical School. The funds in 1987 at the death of Jane Smallman were insufficient to construct such a wing and Yale sought and received permission from the Connecticut Supreme Court to use the funds to benefit the medical school as a part of the school's institutional fund. The court did

Only Pennsylvania has legislation which eliminates the requirement of finding general charitable intent before applying cy pres,[23] although Massachusetts has liberally extended the cy pres doctrine by creating a statutory presumption of general charitable intent "unless otherwise provided in a written instrument of gift."[24]

Courts in England do not invariably require both failure and general charitable intent before applying the doctrine. The doctrine in theory requires an initial finding that the specific object of the trust fail. The failure may result from an impossibility, impracticability or illegality, and the facts of each case determine whether the purpose fails. English decisions distinquish between initial impossibility and supervening or subsequent impossibility when requiring a general intent.[25]

In the 1923 case of *Carlisle County v. Norris*,[26] the Kentucky Court of Appeals refused to apply the doctrine. Norris conveyed property outright to be held in trust as a public burial ground. In addition to the initial conveyance of thirty acres of land, he conveyed an additional tract at a later date and, at another time, deposited five thousand dollars, income and profit to be used by the trustees for improving the property. At yet a later date, he placed another five thousand dollars with the trustees for the same purpose. After ten years had passed with no sales of cemetery lots, Norris brought an action to recover the assets, alleging that the trust purpose had failed because of the public's refusal to accept the grounds. The court did not examine the question of general charitable intent, but emphasized the impossiblity of obtaining the object of the trust. The court invoked public policy to find that the funds should not be allowed to remain dormant, ruled that the trust had terminated, and returned the trust funds to the donor.[27]

The English courts would not follow the result in the *Norris* case. In cases of subsequent impossibility, two possible resolutions can be made by the English courts. A resulting trust may be declared or the application of the funds may be applied cy pres.[28] Because impossibility is determined at the time the gift is made, this case should be considered a case of subsequent impossibility. The conveyance in *Norris*, however, was unconditional and was, therefore, an "out-and-out" gift.[29] In England, it is well settled that upon a supervening impossibility, an out-and-out gift

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not reach the question of intent. Although Yale worked out an agreement with the Conneticut Attorney General which recited "approximation" with the donor's intent, it did so without court direction. The precedent "could be interpreted as Yale apparently initially sought, to remove consideration of testator intent from a charitable gift." *Id.* at 248.

[23]20 PA. CONS. STAT. ANN. § 6110 (a) (West 1996).

[24]MASS. GEN. LAWS ANN. ch. 12, § 8K, as inserted by Laws 1974, c.562. The statutes also provide that persons who might stand to take from the deceased's trust need not be noticed when a petition for cy pres is filed, except in certain cases. *See* MASS. GEN. LAWS ANN. ch. 214, § 10B, as inserted by Laws 1974, c.562.

[25]*See* KEETON & SHERIDAN, *supra* note 7, at 145-55; *see also* Lionel Astor Sheridan, *Cy-pres in the Sixties: Judicial Activity*, 6 ALBERTA L. REV. 16, 23 (1968).

[26]254 S.W. 1044 (Ky. 1923),

[27]*Id*. at 1046.

[28]KEETON & SHERIDAN, *supra* note 7, at 155.

[29]SHERIDAN & DELANY, *supra* note 12, at 102.

is applied cy-pres,[30] and in cases of initial impossibility of an out-and-out gift, the majority of the English courts apply cy pres.[31] In trusts failing after the charitable object has attached, the courts do not require a general charitable intent before applying cy pres.[32] The result would apparently be the same in cases involving trusts established by an out-and-out gift whose purpose fails either initially or subsequently. These rules indicate that an English court would decide the *Norris* case differently, whether the impossibility is construed as initial or supervening, emphasizing the character of the gift as an out-and-out gift, rather than the requirement of general charitable intent.[33]

II. COMPARISON USING THE *RESTATEMENT (SECOND) OF TRUSTS*

The *Restatement (Second) of Trusts* appeared in 1957, replacing the 1935 version. As an expression of the then current common law of trusts, the *Restatement* allows an intelligible comparison between the use of cy pres in the United States and in England and helps to clarify some differences between the jurisdictions. It is clear from the *Restatement (Second) of Trusts*[34] that courts in the United States emphasize the requirement of a general charitable intention regardless of whether the failure is considered to be initial or subsequent. The courts more readily apply the cy pres doctrine when the particular purpose "fails at some time after the creation of the trust than when the particular purpose fails at the outset" because "it is easier to find a more charitable intention of the settlor."[35]

The *Restatement* and the English courts treat the application of surplus funds differently although a surplus has been defined as "after all, nothing but the most frequent instance of impossibility (usually supervening, occasionally initial). . . ."[36] Under the *Restatement*:

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[30]*Id*.

[31]In *Beggs v. Kirkpatrick* V.R. 764, 767 (1961), Justice Adam said "it appears that without there being any general charitable intention, a gift made solely for a particular charitable purpose although it has failed *ab initio*, will be administered *cy-pres* if the gift was an out-and-out gift -- the donor having abandoned all interest in it." Sheridan, *supra* note 25, at 24.

[32]*See* Sheridan, *supra* note 25, at 24-26.

[33]The English courts would also have avoided the reversion of the park in Macon, Georgia to the heirs of Senator Augustus O. Bacon. *Evans v. Abney*, 396 U.S. 435 (1970). The trust provided a life estate for Bacon's daughters and wife with a remainder to the city of Macon for the operation of a segregated park. In his dissent, Justice Douglas stressed that Bacon left "all remainders and reversions and every estate in the same of whatsoever kind" to Macon. *Id*. at 448. In dissent, Justice Brennan also noted that Macon bought the life interests from the life tenants in 1920. *Id*. at 451. These facts, although argued by the dissenters to establish state action, also unmistakenly imply that Bacon's gift was an out-and-out gift, to which the English courts would have applied cy pres.

[34]RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. i (1959).

[35]*But see* SHERIDAN & DELANY, *supra* note 12, at 104-07; Sheridan, *supra* note 25 at 26, where the author points out that it is particularly easy to prove general charitable intent when a testator has given property to a named institution which never existed.

[36]SHERIDAN & DELANY, *supra* note 12, at 115-16.

> If property is given upon trust to be applied to a particular charitable purpose, and the purpose is fully accomplished without exhausting the trust property, and if the settlor manifested a more general intention to devote the whole of the trust property to charitable purposes, there will not be a resulting trust of the surplus but the court will direct the application of the surplus to some charitable purpose which falls within the general charitable intention of the settlor.[37]

Comments to the *Restatement* make clear that a general charitable intention is required to apply the surplus funds cy pres. The English judges, however, "speak with discordant voices as to any requirement of intention."[38] The *Restatement*[39] indicates that money bequeathed to the completion and publication of a dictionary which is over and above the amount required shall be applied to a resulting trust. The rule directly conflicts with the English decision in *In re King*.[40] Money specifically designated for the installation and maintenance of a stained glass memorial window in a Church at Urchester resulted in a surplus which the courts applied cy pres for the installation of similar windows in the church.[41] No general charitable intention was shown or required by the court for the application of cy pres.[42]

The *Restatement* notes one exception to the requirement. In cases where property is given to a charitable corporation to be applied to one of the purposes of the corporation and there is a surplus, the court may apply the surplus cy pres to the other charitable purposes of the corporation unless the settlor has specifically provided for the surplus in the instrument.[43]

An out-and-out gift as a charitable subscription will generally be enforced in England, regardless of intent. This principle was followed by Justice Danckwerts in *In re Wokingham Fire Brigade Trusts*.[44] Subscriptions were taken to maintain the Wokingham Fire Brigade which was later transferred to the National Fire Service, "I think that the subscribers intended to part with all interest in the subscriptions when they made them for the benefit of this public purpose. [I]t is not necessary to consider whether there was any general charitable intention and the trust should be modified by means of a *cy-pres* application."[45] This approach differs from the *Restatement* which provides:

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[37]RESTATEMENT (SECOND) OF TRUSTS § 400 (1959).

[38]KEETON & SHERIDAN, *supra* note 7, at 159. *See also* cases collected in Sheridan & Delany, *supra* note 12, at 115, nn.1,3.

[39]RESTATEMENT (SECOND) OF TRUSTS § 400, cmt. b (1959).

[40]1 Ch. 243 (1923).

[41]*Id.* at 246.

[42]*Id.*

[43]RESTATEMENT (SECOND) OF TRUSTS § 400, cmt. c (1959). Of course, in cases where the donor has provided for a gift over, the question of general charitable intent and, consequently, that of cy pres should not arise.

[44]1951 Ch. 373, 377.

[45]*Id.*

> If several persons contribute to a fund to be applied to a particular charitable purpose, and the purpose is fully accomplished without exhausting the trust property, and the doctrine of *cy-pres* is not applicable, a resulting trust of the surplus will arise in favour of the contributors who will be entitled to share it in proportion to their contribution. If some of the contributors cannot be ascertained there will be a resulting trust of their shares to the State.[46]

Thus, in the absence of a showing of a general charitable intent on subscription of fund, the cy pres doctrine would not apply and a resulting trust to either the subscriber or the state would follow. The result should be the same in either case involving surplus: 1. where the purpose has become impossible to achieve, and 2. where the purpose has been achieved and there is a surplus.[47]

The British decision in *In re Ulverston and District New Hospital Building Trust*[48] closely paralleled the rationale of the *Restatement* comment. Funds were raised for a new hospital at Ulverston, but the enactment of the National Health Services Act of 1946 obviated the necessity for the hospital. The court declared that the money should be returned to the original donors in a resulting trust. For those donors who were unidentifiable, the court declared that they should be treated as *bona vacantia*, and the funds were passed to the Crown.[49]

Aside from uneven statutory modifications, application of cy pres in the United States was summarized in 1959 as follows:[50]

1. In cases of impossibility or surplus where there is a general charitable intent, there will be a *cy-pres* application by the court.
2. In cases of impossibility or surplus, where there is no general charitable intent, there will be no *cy-pres* application. A resulting trust ensues unless the gift was out-and-out when the property will go as on a failure of successors.
3. Where there is a general charitable gift, with no object or insufficient details specified, the property will go as selected by the trustee appointed for the purpose or if necessary by the court.
4. There is no executive power of *cy-pres* application.

III. THE OLD FACE OF REFORM: IMPLEMENTING TESTATOR INTENT

Development of the doctrine of cy pres in England proceeded both statutorily and judicially, beginning in the seventeenth century.[51] In the United States, judicial development was slow, with codification beginning in the mid-twentieth century. American courts usually construed the doctrine strictly and narrowly, and by the

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[46]RESTATEMENT (SECOND) OF TRUSTS § 400 cmt. d (1959).

[47]KEETON & SHERIDAN, *supra* note 7, at 150.

[48]1 W.L.R. 1260, 2 ALL E.R. 1032, 97 S.J. 728 (1953).

[49]*Contra*, *In re Gillingham Bus Disaster Fund* (1958) Ch. 300 England; Charities Act, 1960, § 14. The Charities Act of 1960 provided for a cy pres application in similar fact situations, rendering *Ulverston* obsolete.

[50]SHERIDAN & DELANY, *supra* note 12, at 45.

[51]*See* KEETON & SHERIDAN, *supra* note 7, at 135-36.

1950's, reformers called for supervision of charities and reform of the cy pres doctrine.[52]

In England, supervisory power is conferred upon the Charity Commissioners or, in the case of educational endowments, upon the Ministry of Education, subject in both cases to appeal to the courts.[53] The Charity Act of 1860 gave the Charity Commissioners power concurrent with the Chancery Division to establish or modify schemes within the limits of the cy pres doctrine. The Endowed Schools Act of 1869 removed power for educational trusts to an independent commission and these powers became part of the Board of Education in 1899 and are now vested in the Department of Education.[54]

The Charities Act of 1960, passed in response to the Report of the Nathan Committee of 1952, was evaluated by the Woodfield Report of 1987.[55] Although the Woodfield Report indicated that the cy pres doctrine might need to be "redefined in statute in a rather looser way, or relaxations introduced specifically for small charities,"[56] the committee report recommended only that "[t]he Commission should consult widely on possible ways of relaxing the cy pres doctrine and advise the Home Secretary whether legislation would be desirable."[57] Responding to this recommendation, the government determined that "legislation would not be appropriate," that it would in fact be "undesirable," and that the evolution of the traditional doctrine under existing law was preferable.[58]

The Nathan Committee's proposals as they applied to the doctrine of cy pres also can be briefly summarized. The Committee considered relaxation of the cy pres doctrine along two main lines: a) relaxation of the need for impossibility and b) relaxation of the nearest rule, i.e. the rule that a cy pres application must be to an object as near as possible to the one whose impracticable nature has given rise to the cy pres jurisdiction.[59]

The Nathan Report, basically repeating the Reports of the Charity Commisioners who continually argued for greater cy pres application in their annual reports,[60] prompted legislation. The requirement for impossibility was relaxed in response to

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[52]*Supra* note 4.

[53]GEORGE W. KEETON, MODERN DEVELOPMENT IN THE LAW OF CHARITIES 303 (1971).

[54]*Id*. at 304. *See* SHERIDAN & DELANY, *supra* note 12, at 45.

[55]For a more detailed discussion of the recommendations of the Woodfield Report, see Rob Atkinson, *Reforming Cy Pres Reform*, 44 Hast. L. J. 1111, 1156-57 n. 5 (1993). *See also Efficiency Scrutiny of the Supervision of Charities, Report to the Home Secretary and the Economic Secretary to the Treasury* by Sir Philip Woodfield, KCB, CBE, Graham Binns, Richard Hirst and David Neal, Her Majesty's Stationery Office, 1987, § 83-85, 31-32.

[56]*See* Woodfield Report § 85 at 32.

[57]*See* Recommendation 27 at 32.

[58]*See* Atkinson, *supra* note 55, at 1156 n. 5. The Charities Act of 1992 made specific provisions for small charities, but left the doctrine relatively intact. Also, section two of the Charities Act of 1985 provided specifically for local charities for poverty relief. *See* Woodfield Report § 83.

[59]KEETON & SHERIDAN, *supra* note 7, at 304.

[60]*Id.* at 165-75.

the Report. Part III, section 13 of the Charity Act of 1960 reflects these changes by providing:

a) Where the original purposes in whole or in part:
   i. have been as far as may be fulfilled; or
   ii. cannot be carried out, or not according to the directions given and to the spirit of the gift; or
b) Where the original purposes provide a use for part only of the property available by virtue of the gift; or
c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, egard being had to the spirit of the gift, be made applicable to common purposes; or
d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or
e) where the original purposes, in a whole or in part, have, since they were laid down:
   (i) been adequately provided for by other means; or
   (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable, or
   (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.[61]

The relaxation of the "nearest" rule is accomplished through section 13(d) of the Charities Act where the altered scheme is required to be within the spirit of the gift. Section 14 extended the application of cy pres to surplus gifts resulting from donees who are unknown or disclaiming.

Professor Sheridan noted "there had been no relaxation of the requirement of impossibility in countries without legislation."[62] The Charities Act of 1960 made it incumbent on the trustee to apply cy pres or to take steps to enable it to be so applied, under the relaxed rule in part III, section 13.

If relaxation of the cy pres doctrine is, in fact, "the key to a more rational law of charities,"[63] jurisdictions in the United States are still learning the lesson. Judicially, a more liberal approach to the enforcement of charities is desirable; but, if the English trend is followed, relaxation will come by legislation. The initial reluctance of the United States courts to accept the cy pres doctrine was being addressed by the 1950's via statutory enactments.[64] A growing awareness of the deficiencies in charitable trusts enforcement[65] spearheaded legislative interest. When the Nathan

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[61] *Id.* at 271 (appendix I).

[62] L. A. Sheridan, *Cy-pres in the Sixties: Judicial Activity,* 6 Alberta Law Review 16, 20 (1968).

[63] KEETON, MODERN DEVELOPMENTS IN THE LAW OF TRUSTS lst ed., 307.

[64] *See* Bogert, *supra*, note 4 for a summary of the enactments.

[65] Scott on *Trusts*, § 391; SHERIDAN AND DELANY, THE CY-PRES DOCTRINE 16-17, n. 88.

Report was published in 1952, George Gleason Bogert analyzed the report in his appeal for charity legislation and pointed out the reluctance in the states to legislate on public charities and to respond generally to the problems of public charities administration. In 1968, Professor Sheridan, confirming the obvious, noted that the American courts were reluctant to apply the cy pres doctrine "where it ha[d] not been specifically introduced or confirmed by statute."[66]

Two doctrines, the prerogative use of cy pres and the equitable approximation doctrine, have further confused the use of cy pres in the United States. Courts initially had difficulty accepting the cy pres doctrine because of its association with the royal prerogative.[67] The prerogative power is expressly denounced in United States as reflected in the *Restatement*:

> The prerogative power does not exist in the United States; it cannot be exercised even by the legislature, although the legislature can enact general rules as to the extent and the exercise of the judicial power of the courts to apply cy pres to property which is given for charitable purposes.[68]

Under the prerogative cy pres, the Crown directed the application of the fund to some charitable purpose when the original purpose failed.[69] The arbitrary use of the doctrine and its association with the monarchy made even the use of judicial cy pres suspect.

As an alternative to cy pres, American courts also applied, without clearly distinguishing between the two, the doctrine of equitable approximation. The doctrine of equitable approximation is based on the rationale that the intent of the settlor in a private or charitable trust should be saved from frustration of purpose. When necessary to preserve the purpose, equity will allow a variation in the administration of the trust. The case of *Smith v. Moore*,[70] illustrates the confusion in the law of Virginia over adoption of cy pres and the United States Court of Appeals' use of equitable approximation to "resolve" this confusion, while, at the same time, confusing equitable approximation with cy pres.

The District Court for the Eastern District of Virginia applied cy pres to save a bequest made by a decedent who had died before the 1946 Virginia statute formally adopted the cy pres doctrine.[71] On appeal, the heirs argued that cy pres was not a part of the law of Virginia before 1946. They relied on Chief Justice John Marshall's opinion in *Philadelphia Baptist Association v. Hart's Executors*[72] that cy pres was not

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[66]Sheridan, *supra* note 25, at 16.

[67]*See* SHERIDAN & DELANY, *supra* note 12, at 24; Sheridan, *supra* note 25, at 16-18 & n.88.

[68]RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. h (1959).

[69]The most egregious use of prerogative cy pres occurred in *Da Costa v. De Pas*, 27 Eng. Rep. 150 (Ch. 1754). The trust created by a Jewish testator for religious instructions to those of the Jewish faith was applied cy pres by the Crown toward the support a Christian minister's in giving instructions in the Christian faith. The initial purpose was illegal.

[70]225 F. Supp. 434 (E.D. Va. 1963), *aff'd*, 343 F.2d 594 (1965).

[71]*Moore*, 225 F. Supp. at 434.

[72]17 U.S.(4 Wheat)1 (1819).

an inherent power of the equity courts. The Court of Appeals noted that: "Virginia, having been one of the original states and thus having its laws enunciated under the influence of John Marshall, is in the mainstream of the confusion, contradiction and equivocation attaching to the history of the doctrine of cy pres in America."[73]

The appeals court refused to decide the issue of whether cy pres had been adopted in Virginia as part of the common law or only by the 1946 statute. The court found "it unnecessary to decide because of the doctrine of equitable approximation"[74] which allowed the court to substitute a hospital wing for a building, a clinic for a hospital and a hospital corporation as title holder instead of the trustee named by the decedent. The court noted that the results which are obtained under the cy pres doctrine had been accomplished equally well by the application of equitable approximation. Properly understood, however, the doctrine of equitable approximation, known also as administrative deviation, is *not* an alternative to cy pres. Under administrative deviation, a court may vary the administrative directives of a trust when changed circumstances require. Cy pres deals only with ultimate purpose, not with procedural efficiency.[75]

IV. THE NEWER FACE OF REFORM: IMPLEMENTING PUBLIC POLICY

Calls for reform of the cy pres doctrine in the years following 1943 have been both doctrinally and politically oriented. The use of cy pres to reach private discriminatory gifts focused initially on discrimination against race and moved to other forms of discrimination including gender. Thirty years have passed since Professor Stuart M. Nelkin of the University of Houston School of Law urged the use of "the Fourteenth amendment as a vehicle for 'social engineering' despite the absence of 'formal' state involvement."[76] Professor Nelkin advocated a bold use of the cy pres doctrine to insure that the government policy of non-discrimination announced in *Brown v. Board of Education*[77] would move forward. Discussing *Shelley v. Kraemer*[78] and its precedential value to reach private acts of discrimination, Nelkin argued that there was an affirmative state duty to guarantee equal protection and concluded that the "artificial and ambiguous state action doctrine"[79] should be discarded, along with "charitable trusts exclusively for one race."[80] He applied, however, different considerations for "charitable trusts

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[73]*Moore*, 343 F.2d at 599.

[74]*Id.* at 600.

[75]The confusion continues. *See Matter of the Estate of Wilson*, 452 N.E.2d 1228 (1983), discussed *infra*. For a more detailed discussion of the doctrines of cy pres and administrative deviation, *see* Chris Abbinante, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation,* 145 U. Pa. L. Rev. 665 (1997).

[76]*See* Stuart M. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 Geo. L. J. 272, 313 (1967).

[77]347 U.S. 483 (1954).

[78]334 U.S. 1 (1948).

[79]Nelkin, *supra* note 76, at 272, 312.

[80]*Id*. at 313.

exclusively for Negroes,"[81] reasoning that such trusts should be upheld if the purpose was to "close the gap between whites and Negroes."[82] Nelkin noted that "[i]deally, at some later date, all charities with racial overtones will be unenforceable."[83]

Nelkin's article was followed a decade later by an article from Professor Elias Clark of Yale Law School,[84] hailing the Supreme Court decision in *Pennsylvania v. Board of Directors*[85] as the "first step toward desegregation of charitable trusts."[86] The Supreme Court decided the case under the Fourteenth Amendment Equal Protection clause finding state action. Clark, however, recognized the additional dimension that cy pres could bring to solve the problem of discriminatory trusts.

> The settlor is assumed to have been an intelligent and responsible citizen. Had he foreseen the future course of public policy, it is argued, he would not have intended his limitation to continue. The reasoning has the virtue of accomplishing the public purpose within the framework of the settlor's intent. Here, again, the traditions of judicial restraint often foreclose sensible solution. If cy pres may properly be applied to a trust, the court will not hesitate to manufacture, in the settlor's name, a use for the funds more compatible with contemporary community values.[87]

Clark realized that the requirement of a general charitable intent would have to be solved in each case, unless the lead of Pennsylvania could be followed.[88] "It has been suggested that Pennsylvania, having recently enacted a statute which eliminates the requirement of general charitable intent, may now give greater consideration to the public welfare."[89] Clark also recognized the problem of using the Fourteenth Amendment to solve "the delicate problems of discrimination."[90]

> Were the Ford Foundation to disperse its millions on a discriminatory basis, society would find the result intolerable. On the other hand, a trust to educate poor children of a minority race seems useful and worthy of community approval. Yet they are of the same stuff, and when the question is limited to the presence or absence of state action, they seemingly stand or fall together.[91]

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[81] *Id*.

[82] *Id.* at 314.

[83] *Id.*

[84] *See* Elias Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard,* 66 Yale L. J. 979 (1957).

[85] 353 U.S. 230 (1957).

[86] Clark, *supra* note 84.

[87] *Id*. at 1000.

[88] *Id.*

[89] *Id*. at 1000 & n. 81. This has not happened.

[90] *Id.*

[91] *Id*. at 1009-10.

Clark stopped short of calling for social engineering, but he highlighted the context within which reformers would work. They would have to strike a balance between the private right to control one's own property and the public right to charitable assets.[92] Clark noted also that the "maliciously discriminatory trust is only of peripheral importance. To the relatively few now in existence, the addition of many more is unlikely."[93]

The Supreme Court rejected the arguments for affirmative social engineering in the 1970 case of *Evans v. Abney.*[94] Justice Black, speaking for the majority, reasoned that "freedom of testation . . . has its advantages and disadvantages." Freedom of testation dictated that Baconsfield, a park created with specific intent to discriminate, revert to the testator's heirs. Black upheld the Georgia court's refusal to apply cy pres to integrate the park, noting that the Court would not "legislate social policy on the basis of . . . personal inclinations."[95]

Justice Douglas's majority opinion in *Evans v. Newton,*[96] finding that the park could no longer be operated as segregated because parks serve a public function, and the Black opinion in *Abney,* finding no state action in Georgia's use of the cy pres doctrine, defined the continuing debate about state involvement in discriminatory trusts. The opinions also highlight the unpredictability associated with the state action concept and the entanglement and public functions exceptions by which individual discrimination can be reached.[97] The dissents of Justices Black, Harlan, and Stewart in *Newton* and of Justices Douglas and Brennan in *Abney* add contours to the discourse which remains substantially unchanged. Justice Black argued that state judicial action must affirmatively enforce "a private scheme of discrimination" to be proscribed by the equal protection clause of the Fourteenth Amendment.[98] Justice Brennan found "state action in overwhelming abundance"[99] and insisted that the facts supported a finding of significant state involvement which made enforcement of the reverter unconstitutional.

Following the 1983 New York case, *Matter of the Estate of Wilson*,[100] calls for reform again proliferated. In *Wilson*, two cases with similar trust distribution

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[92]*Id.* at 1014-15. Clark also expressed the hope that after a period of time, the courts might not need to use cy pres to invalidate discriminatory trusts.

[93]*Id.* at 980.

[94]396 U.S. 435 (1970).

[95]*Id*. at 447.

[96]382 U.S. 296 (1966).

[97]*See* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213 (1991) for an analysis of the Supreme Court's application of the state action concept in a broader context. *See also* Erwin Chemerinsky, Constitutional Law: Principles and Policies 385-417 (1997).

[98]396 U.S. at 445. Black reasoned that Senator Bacon's private act of discrimination is not prohibited by the Fourteenth Amendment because it is not state action.

[99]*Id*. at 455.

[100]452 N.E.2d 1228 (N.Y. 1983).

provisions were consolidated.[101] The New York Appeals Court reviewed the provisions which discriminated against women, and found that the exercise of cy pres was inappropriate. The court used the mechanism of administrative deviation to save the trusts.[102] Reasoning that the intent of both testators to benefit education[103] of males should not be frustrated by the provisions which required state action to administer the funds, the court affirmed the appointment of private trustees to replace the public officials who were refusing to serve.[104]

The court reasoned that the gender provisions were not illegal and refused to accept a per se rule that gender restrictions were contrary to public policy. In doing so, the court announced that it accepted the concept, advanced by the "current thinking in private philanthropic institutions,"[105] that charitable gifts should serve the needs of particular groups, and concluded that the "focusing of private philantropy on certain classes within society may be consistent with public policy."[106] The New York court relaxed the impossibility requirement and elected to apply administrative deviation to save the trust purposes. In announcing its opinion, the court recognized the value of a trust set up for gender purposes which would, in this case, benefit men, but which could, in other cases, benefit women.

Current reformers who advocate weighing public policy heavily against the testator's intent perceive the court's policy-making function as primary, urging judicial activism to further public policy agenda.[107] In a 1989 article, Mark Petrucci argued that courts should "rethink their cy pres approach and start to give more weight to the public policy issues involved."[108] Petrucci advanced an "if then" test. Treating testator intent and public policy as "co-equals," the court should search for a general charitable intent. If one is found, the court should remove the discriminatory provisions of the trust. If one is not found, the court should "allow the trust to be destroyed."[109]

The Petrucci proposal differs from the charitable trust anti-discrimination statute proposed by Steven Swanson.[110] Swanson's proposal is based on the Race Relations

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[101]*Id.* at 1228. In the *Matter of Wilson*, the testator's trust provided first year college expenses to five young men whose names were to be certified by the Superintendent of Schools. *Id*. at 1231. In the *Matter of Johnson*, the Board of Education and the high school Principal were charged with selecting deserving male students to receive educational benefits under the Johnson trust. *Id*.

[102]59 N.E.2d 461, 474-75.

[103]*Id.* at 472.

[104]*Id.* at 480.

[105]*Id*., at 473-74.

[106]*Id*., at 474.

[107]*See* Mark Petrucci, *The Cy Pres Doctrine - Is It State Action?*, 18 Cap. U. L. Rev. 383 (1989).

[108]*Id.* at 411.

[109]*Id.*

[110]Steven R. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 U. Pitt. L. Rev. 153 (1986).

Act [of] 1976 passed by the United Kingdom.[111] Swanson's statute forbids discrimination, except in situations where the discriminatory provisions would remedy past discrimination.[112]

Petrucci criticized Swanson's proposal as an affirmative action statute, "This is not an area where affirmative action will work. To allow someone to set up a discriminatory trust (one wrong) to redress a past discrimination (another wrong) is not logical."[113]

Many of the current calls for cy pres reform appear in the guise of "charitable efficiency" arguments.[114] Decrying the vise in which reformers currently find themselves, pressed on one side by "deference to dead hand control" and on the other by "undefined standards of charitable efficiency,"[115] Professor Rob Atkinson, relying on the Woodfield Report's suggestion for small charities,[116] called for giving trustees virtually unlimited power to manage assets in the way they decide "would most advance the public good."[117] Under his plan, the trustee would be limited only by "what the state defines as charitable through common law, legislation, or administrative regulation, as well as by extralegal mechanisms to enforce donor intent."[118] Atkinson proposed the "sectarian approach" as an attempt to steer between the "liberal individualism underlying 'pure' cy pres" and the "communitarianism underlying" efforts concentrating on the public good.[119] Atkinson, by transferring discretion from the courts and granting extensive decision-making to the trustee, substantially reduced recourse to the courts and created a wide area for possible abuse, as well as virtual negation of donor intent.

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[111]See the statute which inspired Swanson's proposal. *Id.* at 188.

[112]*Id.* at 190-91.

[113]Petrucci, *supra* note 107, at 409.

[114]*See* Roger G. Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 Va. L. Rev. 635 (1988), responding to the California decision in *In re Estate of Beryl H. Buck*, No. 23259 (Cal. Super. Ct. Aug. 15, 1986). *See also* John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F. L. Rev. 641 (1987). Calls for reform of the doctrine are usually sparked by a case in which application of the doctrine is criticized. For a convincing argument favoring donor intent and criticizing the efficiency arguments surrounding *In re Barnes*, see Chris Abbinante, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. Pa. L. Rev. 665 (1997). Abbinante argues that "an additional legal hurdle should be erected to protect donor intent . . . a rebuttable presumption against permitting any type of deviation from the intent of the donor, administrative or purposive, which can be overcome only when the trustee makes a showing of indisputable need." *Id.* at 705.

[115]*See* Rob Atkinson, *Reforming Cy Pres Reform*. 44 Hastings L. J. 1111, 1142 (1993).

[116]*Id.* at 1156, n.5. Atkinson acknowledged this suggestion as the basis for his broader proposals for reform.

[117]*Id.* at 1143.

[118]*Id.*

[119]*Id.* at 1144-45.

By 1998, Atkinson, admitting that it was not "entirely wise,"[120] no longer advanced the model as a "universal and mandatory alternative to . . . dead-hand control . . . and its corollary, the cy pres doctrine."[121] Atkinson recognized that a donor creates "an explicitly sectarian organization" when he gives unlimited discretion to trustees to apply funds when purposes fail. He now argues for a "flexible presumption . . . in favor of fiduciary discretion."[122] The presumption is applicable only "to particular kinds of charity" and can be rebutted "only by the donor's explicit contrary reservation."[123] Atkinson reasoned that this "flexible presumption of donor intent would function much like a liberalized cy pres rule."[124]

V. CONCLUSION

The various calls for cy pres reform in the United States inevitably favor either donor intent or public policy. Courts must engage in a balancing test when reviewing a trust which discriminates, understanding the reality that discrimination, either benign or invidious, is inherent in charitable giving. Invidious discrimination involving state action is, of course, illegal, and will not be allowed. Under the cy pres doctrine, however, the question in each case where the trust purpose has failed and a general charitable intent has been established becomes whether the trust fund will be applied to the next nearest purpose or whether the trust itself will fail. Traditionally, the courts in the United States have decided in favor of donor intent, even when to do so has resulted in trust forfeiture. If this practice continues, and history indicates that it will, the Massachusetts model, respecting tradition but recognizing the need for reform, presents a workable answer to the problem of discriminatory trusts. The statute creates a presumption of general charitable intent which can be rebutted by a writing memorializing the donor's particular intent.[125] Astute drafting should allow the donor purposefully to retain or relinquish control over the funds, and thus to guide the courts in application of the cy pres doctrine. Should he elect to create the "sectarian organization" encouraged by Professor Atkinson, the donor will inadvertently participate in the progressive development of the cy pres doctrine.

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[120]Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?* 23 J. Corp. L. 655, 687 (1998).

[121]*Id.*

[122]*Id.* at 691.

[123]*Id.*

[124]*Id.* at 692.

[125]*Supra*, note 24. Although Professor Ronald Chester called for the abandonment of the general intent requirement in Massachusetts and argued for extended use of cy pres before gift over provisions and residuary clauses control, the Massachusett courts have not abandoned the traditional requirement. See 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).