

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

BARNSTABLE, ss.

FAR No. 30572  
A.C. 2023-P-0889

In the Matter of:  
The Richard E. Howard Trust

**JOINT APPLICATION FOR  
FURTHER APPELLATE REVIEW**

The parties to this appeal hereby jointly request, pursuant to Mass. R. App. P. 27. 1, further appellate review of the Probate and Family Court’s decision in this matter. *See Exhibit A hereto*. The Appeals Court issued a published opinion vacating the Probate and Family Court’s decision, but in so doing, unsettled the law concerning trust interpretation as it relates to charitable bequests and the potential creation of a “public charitable trust.” *See In re Richard E. Howard Trust*, 105 Mass. App. Ct. 795 (2025), *attached hereto as Exhibit B*. The parties believe that these and other aspects of the opinion present exceptional questions of public importance.

This joint request is made by (1) appellee Jennifer Vecchi, as she is the Trustee of the Richard E. Howard Trust, together with appellee Raymond Moore Foundation (collectively, “Appellees”) and (2) appellant Massachusetts Attorney General’s Office (“the Attorney General”).<sup>1</sup>

---

<sup>1</sup> If further review is granted, both parties intend to seek permission to file new briefs pursuant to Mass. R. App. P. 27.1(f), given that the Appeals Court’s decision, in and of itself, injected issues that call for further review.

This joint application represents a case where adverse parties (the Appellees and the Attorney General) both believe that this Joint Application is “founded upon substantial reasons affecting the public interest or the interests of justice” within the meaning of Rule 27.1. As a published opinion, the Appeals Court’s decision represents the views of the entire court and can be cited as binding precedent, making further review especially important.

Without limitation, both parties are concerned that the Appeals Court’s opinion could unsettle existing law in a manner that discourages and inhibits charitable bequests in estate planning. Both believe that by relying on evidence extrinsic to the Trust in this case and requiring fact-finding concerning the nature of the charitable bequest, the Appeals Court departed from clear principles of trust interpretation. Both believe that the opinion raises important questions concerning the *cy pres* doctrine, including its relationship to a statute that this Court has not interpreted, G.L. c. 12, Sec. 8K, which provides: “A gift made for a public charitable purpose shall be deemed to have been made with a general intention to devote the property to public charitable purposes, unless otherwise provided in a written instrument of gift.” More specifically, the questions presented in this case include, without limitation, (1) the definition of public charitable trusts and what constitutes “general charitable intent”; (2) the operation of the *cy pres* doctrine as it relates to those issues; (3) the charitable status of gift instruments providing restricted gifts to charities; (4) whether those gift instruments manifest a general charitable intent necessary for conducting a *cy pres* proceeding pursuant to G.L. c. 12, Sec. 8K; (5) what must be alleged for the Attorney General to have standing for enforcement of a public charitable trust; and (6) whether general principles of trust interpretation were disregarded by the Appeals Court in resorting to extrinsic evidence to ascertain both charitable intent and general charitable intent.

These questions are of exceptional public importance, affecting thousands of Massachusetts charities and their donors. Accordingly, the parties respectfully request further appellate review.<sup>2</sup>

### **STATEMENT OF PRIOR PROCEEDINGS**

On January 12, 2022, the Cape Cod Center for the Arts (“CCCA”) filed a petition in the Barnstable Division of the Probate and Family Court Department seeking reformation of the Howard Trust (the “Trust”) under the *cy pres* doctrine to substitute CCCA for the Raymond Moore Foundation (“RMF”) as beneficiary of the Trust. RMF and the Trust jointly moved to dismiss on July 1, 2022 and the motion was heard on August 25, 2022, with the Attorney General joining CCCA in opposing the motion. On September 30, 2022, the Probate Court (Ordoñez, J.) granted the motion to dismiss concluding, *inter alia*, that the Trust is not a public charitable trust and therefore the *cy pres* doctrine did not apply.

The Appeals Court vacated the trial court’s judgment of dismissal and remanded for further proceedings on August 26, 2025. The court held, among other things, that there is an inadequate record to determine whether the Trust is a private irrevocable trust lacking a charitable bequest to RMF. *Howard Trust*, 105 Mass. App. Ct. at 801.

The Appeals Court further held that, even if the trial court should conclude that the Trust is charitable, the Trust is not impossible or impracticable to effectuate. *Id.* at 805. The court therefore declined to address the existence of general charitable intent necessary for application

---

<sup>2</sup> Because of the complexity of the opinion of the Appeals Court, the parties to this Joint Request are continuing to analyze its nuances. Relatedly, the parties represent the interests of their own respective clients and seek different results on the merits, despite the joint nature of this request. As such, they reserve their rights to raise other issues and to respond to each other’s positions. Likewise, the parties do not intend to be limited by this joint filing in their framing of the issues in their subsequent filings in the event that this Court grants their request for further appellate review.

of the *cy pres* doctrine under G.L. c. 12, Sec. 8K, *Id.* at 806, and stated that if it became necessary for the trial court to address that issue it would need a more developed factual record. *Id.* at 807.

**POINTS AS TO WHICH  
FURTHER APPELLATE REVIEW IS SOUGHT**

The parties agree that the following issues, without limitation, warrant further appellate review: (1) the definition of public charitable trusts and what constitutes “general charitable intent.”; (2) the operation of the *cy pres* doctrine as it relates to those issues; (3) the charitable status of gift instruments providing restricted gifts to charities; (4) whether those gift instruments manifest a general charitable intent necessary for conducting a *cy pres* proceeding pursuant to G.L. c. 12, Sec. 8K; (5) what must be alleged for the Attorney General to have standing for enforcement of a public charitable trust; and (6) whether general principles of trust interpretation were disregarded by the Appeals Court in resorting to extrinsic evidence to ascertain charitable intent and general charitable intent.

**WHY FURTHER APPELLATE REVIEW IS APPROPRIATE**

The parties, despite their differences on the merits, believe that each of these issues are: (1) extremely important to the public interest and (2) for the reasons stated below, those issues should be resolved by this Court upon further appellate review.

For example, the parties believe that the Appeals Court raised, but did not resolve, issues relating to the *cy pres* doctrine and general charitable intent, upon which this Court has not recently weighed in. This Court has never interpreted G.L. c. 12, Sec. 8K. Given the absence of guidance from this Court, the Appeals Court’s confusing analysis on this issue unsettles the law.

In addition – and again without limitation – the parties agree that testators must have an understanding of whether their drafting will involve the creation of a “public charitable trust.”

The parties disagree on the merits of this question but – once again – are united on their belief that the Appeals Court unsettles the law concerning trust interpretation as it relates to charitable bequests and the potential creation of a “public charitable trust.”

The Appeals Court decision raises new issues beyond those contained in the decision of the Probate Court or addressed in the parties’ briefs before the Appeals Court. Unless those questions are resolved, the resulting uncertainty will likely have a deleterious impact on charitable giving and estate planning in the Commonwealth. Should further appellate review be granted, the parties agree on the necessity for further briefing to address these new issues and accordingly intend to apply for permission to file new briefs pursuant to Mass. R. App. P. 27.1(f).

**CONCLUSION**

For the foregoing reasons, the parties' Joint Application for Further Appellate Review should be allowed.

Respectfully submitted,

Respondent-Appellee  
Jennifer E. Vecchi, Trustee  
By her attorney,

Respondent-Appellant  
ANDREA JOY CAMPBELL  
ATTORNEY GENERAL

/s/ C. Alex Hahn (by JCG)  
C. Alex Hahn, BBO# 634133  
655 Centre Street, P.O. Box 168  
Boston, MA 02130  
(617) 756-7941  
alex@hahnlawgroup.com

By: /s/ Jonathan C. Green  
Eric Carriker, BBO# 075820  
Emily Gabrault, BBO# 682555  
Jonathan C. Green, BBO# 655036  
Assistant Attorneys General  
One Ashburton Place  
Boston, MA 02108  
(617) 727-2200  
Eric.Carriker@mass.gov  
Emily.Gabrault@mass.gov  
Jonathan.Green@mass.gov

Respondent-Appellee  
Raymond Moore Foundation, Inc.  
By its attorney,

/s/ Brian J Wall (by JCG)  
Brian J. Wall, BBO# 360063  
Troy Wall Associates  
90 Route 6A  
Sandwich, MA 02563  
(508) 888-5700  
bjw@troywallassociates.com

Dated: November 3, 2025



# Exhibit A

**JUDGMENT OF DISMISSAL**

Docket No.  
BA22P0183PO

**Commonwealth of Massachusetts  
The Trial Court  
Probate and Family Court**

**The Richard E. Howard Trust date November 20, 1993  
In the matter of:**

Barnstable Probate and Family Court  
3195 Main Street  
PO Box 346  
Barnstable, MA 02630  
(508)375-6710

This action came on for

- Trial
- Hearing

before the Court and

- was argued by counsel
- upon agreement of counsel/parties
- parties failed to appear

and thereupon, after consideration thereof, it is ordered and adjudged that the complaint for:

Trust Petition filed January 12, 2022

be and hereby is dismissed

- with prejudice
- without prejudice

Date September 30, 2022

*Angele M. O'Connell*  
\_\_\_\_\_  
Judge of the Probate and Family Court

A TRUE COPY  
ATTEST

*Anastasia Velazquez*  
\_\_\_\_\_  
REGISTER

**COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
PROBATE AND FAMILY COURT DEPARTMENT**

**Barnstable Division**

**Docket No. BA22P0183PO**

**in re:**

**THE RICHARD E. HOWARD TRUST**

**MEMORANDUM and ORDER**

*(Respondents' Joint Motion to Dismiss filed on July 1, 2022)*

The above-captioned matter came before the Court (Ordoñez, J.) for hearing on August 25, 2022. The Petitioner, the Cape Cod Center for the Arts, Inc., was represented by Attorney Lawrence D. Hunt. The Respondent, the Raymond Moore Foundation, Inc., was represented by Attorney Brian J. Wall, and the Respondent, Leslie-Ann Morse,<sup>1</sup> was represented by Anthony A. Scibelli. Attorney Eric B. Carriker appeared on behalf of the Massachusetts Attorney General's Office. After hearing, it is ordered as follows:

1. The Respondents' Joint Motion to Dismiss dated July 1, 2022 is hereby *allowed*. Accordingly, a separate Judgment of Dismissal on the Petition for Instructions filed on January 12, 2022 shall enter.

**MEMORANDUM OF DECISION**

*Background*

On November 20, 1993, Richard E. Howard (hereinafter "Mr. Howard") executed The Richard E. Howard Trust (hereinafter "the Trust"). The Declaration of Trust dated November 20, 1993 lists Mr. Howard as donor. The Trust became irrevocable a few years later on February 9, 1996 upon Mr. Howard's death. The Trust includes two named beneficiaries: the Raymond Moore Foundation, Inc. (hereinafter "RMF") and Dennis-Yarmouth Regional High School (hereinafter "the school").

The Trust established a scholarship fund known as the "RICHARD E. HOWARD SCHOLARSHIP" and directs that the sum of \$500.00 from the Trust's income be distributed each year to the school to be awarded to a student selected by the superintendent of the school system and the head of the art department. Moreover, Article II (b) of the Trust expressly provides as follows regarding RMF:

*"The remaining balance of income shall accumulate until a sum suitable to erect a room to the Joshua Nickerson Archives Building is available, at which time a sum not to exceed*

---

<sup>1</sup> Leslie-Ann Morse is the Trustee of the Richard E. Howard Trust dated November 20, 1993.

*Fifty Thousand (\$50,000.00) shall be advanced to the Trustees of the Raymond Moore Foundation for the construction of an addition, which shall be known as the 'RICK HOWARD ROOM' and shall be used for the display of Playhouse archives and paintings of the Donor. The income from said trust after the completion of the addition shall be used annually for equipment, supplies, materials, and maintenance."*<sup>2</sup>

A review of the history of RMF is necessary in order to analyze the present controversy between the parties. RMF was originally established as a tax-exempt non-profit organization in 1947. The Internal Revenue Service later determined, in 1967, that RMF did not qualify as a tax-exempt non-profit organization under the tax code. In the 1990s, RMF established "the Seasonal Theatre Archives Athenaeum," a non-profit organization. In 2005, the Seasonal Theatre Archives Athenaeum changed its name to "the Cape Cod Center for the Arts, Inc." (hereinafter "CCCA").

In 2006, several years after the Trust had been executed, RMF conveyed certain assets to CCCA, and transferred its right, title and interest in the building known as the "Joshua Nickerson Archives Building" (hereinafter the "Nickerson Building") to CCCA. This transfer was effectuated by a Conveyance and Lease Agreement (hereinafter "the Agreement").<sup>3</sup> The Agreement also conferred upon CCCA a leasehold interest in the land upon which the Nickerson Building is located and certain surrounding land for a period of 99 years.<sup>4</sup>

The present action commenced sixteen years later in January 2022 when CCCA filed a General Trust Petition (hereinafter "the Petition") wherein it requested that the Court 1) order that the Trust be reformed to substitute CCCA for RMF as a beneficiary of the Trust; 2) order the trustee of the Trust, Leslie-Anne Morse (hereinafter "Ms. Morse"), to render an accounting; 3) order distribution of \$50,000 to CCCA; 4) remove Ms. Morse as trustee; and 5) permit CCCA to name a successor trustee. CCCA asserts that the Trust must be reformed because the gift to RMF to construct the building is impossible since RMF no longer owns the building. CCCA further asserts that a distribution of the funds to any entity other than CCCA would frustrate the decedent's intent, which was to create a room in the Nickerson Building, which is currently owned by CCCA. CCCA requests that the Court apply the "doctrine of cy pres" to substitute CCCA for RMF to carry out the decedent's intent. CCCA asserts that the Court may apply cy pres when a gift for a charitable purpose has become impossible or impracticable of fulfillment. See G. L. c. 214, § 10B.

On March 4, 2022, Ms. Morse filed a Notice of Appearance and Objection to the Petition filed by CCCA. On March 9, 2022, RMF similarly filed a Notice of Appearance and Objection to the Petition.

---

<sup>2</sup> On page 10 of the Trust: XVII. EARLY TERMINATION: Notwithstanding any other provisions of this instrument, in the event any trust held hereunder shall, in the opinion of the TRUSTEE, become uneconomic or otherwise inadvisable to administer as a trust, the TRUSTEE, in his absolute discretion, are authorized to terminate such trust and distribute the principal as though the DONOR has then died: (a) twenty (20%) percent to the RICHARD E. HOWARD SCHOLARSHIP FUND at the Dennis-Yarmouth Regional High School, and (b) eighty (80%) percent to the RAYMOND MOORE FOUNDATION.

<sup>3</sup> Recorded in the Barnstable County Registry of Deeds at Book 21648, Page 141.

<sup>4</sup> The Agreement provides that "... the GRANTOR does hereby lease, demise and let unto the said GRANTEE, which expression shall include its successors and assigns, the premises ... for a period of ninety-nine (99) years, commencing December 31, 2006, and terminating December 30, 2105."

A TRUE COPY  
ATTEST

*Anastacia Wolik*  
REGISTRAR

On July 1, 2022, RMF and Ms. Morse filed a Joint Motion to Dismiss and a Memorandum in Support thereof requesting that the Court dismiss the underlying action pursuant to Mass. R. Civ. P. 12 (b)(1) and 12 (b)(6). CCCA filed an "Objection" to the Motion to Dismiss. The parties appeared before the Court (Ordoñez, J.) for hearing on August 25, 2022.

### *Standard*

An action shall be dismissed pursuant to Mass. R. Civ. P. 12 (b)(1) in circumstances where the Court lacks subject matter jurisdiction. Standing is a question of subject matter jurisdiction. See HSBC Bank USA, N.A. v. Matt, 464 Mass. 193, 199 (2013).

A motion to dismiss for failure to state a claim for which relief might be granted pursuant to Mass. R. Civ. P. 12 (b)(6) cannot be allowed unless it is certain "that the pleader is entitled to no relief under any combination of facts which could be proved in support of his claim." Bahceli v. Bahceli, 10 Mass. App. Ct. 446, 451 (1980), citing Conley v. Gibson, 355 U.S. 41, 44-45 (1957); Romano v. Sacknoff, 4 Mass. App. Ct. 862, 862-863 (1976). In ruling on such a motion, all inferences must be taken in favor of the non-moving party. See Blieden v. Blieden, 14 Mass. App. Ct. 959, 960 (1982).

Further, "[w]hile a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." Iannacchino v. Ford Motor Co., 451 Mass. at 636, quoting Bell Atlantic Corp., 550 U.S. at 557.

### *Joint Motion to Dismiss*

Ms. Morse and RMF (hereinafter collectively referred to as "the Respondents") request that the Court dismiss the underlying Petition pursuant to Mass. R. Civ. P. 12 (b)(1) for a lack of subject matter jurisdiction and Mass. R. Civ. P. 12 (b)(6) for a failure to state a claim upon which relief can be granted. The Court addresses both arguments in turn.

CCCA requests that the Court apply the doctrine of cy pres<sup>5</sup> to substitute CCCA for RMF and asserts that the Court may apply cy pres when a gift for a charitable purpose has become impossible or impracticable of fulfillment. See G. L. c. 214, § 10B, which governs procedural requirements in actions for the application of the cy pres doctrine.<sup>6</sup> The Respondents, however,

<sup>5</sup> The doctrine of cy pres is codified in G. L. c. 12, § 8K ("A gift made for a public charitable purpose shall be deemed to have been made with a general intention to devote the property to public charitable purposes, unless otherwise provided in a written instrument of gift.").

<sup>6</sup> "Upon a petition commenced after the death of the donor for the application cy pres to similar public charitable purposes of a gift for a public charitable purpose which has become impossible or impracticable of fulfillment, the

AT THE COPY  
AT THE  
*Assessment Notice*  
*Parsons*  
*RECEIVED*

assert that the cy pres doctrine is inapplicable here as the Trust is a private irrevocable trust that contains specific bequests to two particular beneficiaries and does not contain any general charitable bequest to the public at large, and that the Trust also directs that, if a bequest fails, the funds associated with that bequest will be paid as directed by RMF. The Respondents assert that it is well-settled under Massachusetts law that the cy pres doctrine does not apply to a trust that makes a specific bequest, even if it is a charitable bequest, to a particular institution as opposed to a general charitable bequest to the public. See Phipps v. Barbera, 23 Mass. App. Ct. 1, 3 (1986).

After consideration of the arguments set forth by the parties, and after a close review of the case law and applicable statutory law, the Court finds that the Trust is not a public charitable trust, and therefore the doctrine of cy pres does not apply.

“It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done, [a] court will cause it to be fulfilled, as nearly in conformity with the intent of the donor as practicable.” Phipps, 23 Mass. App. Ct. at 6, quoting Rogers v. Attorney General, 347 Mass. 126, 131 (1964). “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.” Board of Selectmen of Provincetown v. Attorney General, 15 Mass. App. Ct. 639, 646 (1983), quoting Restatement (Second) of Trusts, § 399 (1957). “But if the charitable purpose is limited to a *particular object* or to a *particular institution, and there is no general charitable intent*, then, if it becomes impossible to carry out the object . . . the doctrine of [cy pres] does not apply, and, in the absence of any limitation over or other provision, the legacy lapses.” Id., quoting Teele v. Bishop of Derry, 168 Mass. 341, 343 (1897) (emphasis added).

“As with other questions which require interpretation and construction of wills, to ascertain whether the testator manifested a general charitable intent, as distinguished from an intent limited to devoting the property to a specific charitable purpose, the court looks to not only the language of the applicable provisions of the will . . . but also to the language of [the] instrument as a whole.” P. M. Annino, Probate Law and Practice, § 30.11 (3d ed.), citing Rogers, 347 Mass. at 131.

The Massachusetts Uniform Trust Code defines a “charitable trust” as one that is “created for a charitable purpose described in” Section 405 (a). G. L. c. 203E, § 103. Section 405 (a) provides that “[a] charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes or other purposes which are beneficial to the community.” G. L. c. 203E, § 405 (a). Here, the Trust at

---

court may exercise jurisdiction without requiring that the heirs or next of kin of the donor or others who would be entitled to take upon failure of any charitable gift be joined as parties . . . . Upon a petition to permit reasonable deviation from any of the subordinate terms of a charitable gift of a donor who has died, the court may exercise jurisdiction without requiring that those who would be entitled to take upon failure of such gift be joined as parties or notified of the proceeding. Nothing in this section shall preclude the joinder as a party in any such petition of a person who would be entitled to take upon failure of any charitable gift. The provisions of section eight G of chapter twelve shall be applicable to all such petitions.” G. L. c. 214, § 10B.

issue is not a public charitable trust; it has two specific beneficiaries, RMF and the Dennis-Yarmouth High School, and it does not contain a general charitable bequest for the benefit of the public at large. Rather, the Trust makes two specific bequests, one in the form of a scholarship to a school, and the other to build an addition onto a specific building. The Trust contains no provision for a general charitable bequest to an educational institution to support education in general. Instead, the donor made two specific bequests to two specific institutions. Ultimately, the Court finds that because the subject trust is not a public charitable trust, and because it does not make a general charitable bequest to the public, the doctrine of cy pres is inapplicable here. Similar to the circumstances in Phipps, the decedent here “clearly intended to benefit a ‘particular,’ although nonexistent, institution, rather than museums in general of the public at large.” Phipps, 23 Mass. App. Ct. at 6.<sup>7</sup>

In support of their request for dismissal of the underlying action, the Respondents further assert that CCCA is not a beneficiary of the Trust, and therefore it lacks standing to file the Petition, or to assert any claims concerning the Trust. In support thereof, the Respondents cite to General Laws Chapter 203E, Section 411, entitled “modification or termination of non-charitable irrevocable trust by consent”,<sup>8</sup> and Weaver v. Wood, 425 Mass. 270, 275 (1997). Standing is an issue of subject matter jurisdiction that is properly challenged by way of a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b)(1). See Ginther v. Commissioner of Ins., 427 Mass. 319, 322 (1998). “In the case of a private trust, only a named beneficiary, or one suing on his or her behalf, can maintain an action to enforce a trust.” Weaver, 425 Mass. at 275.

Here, even if the Court had determined that the Trust is a public charitable trust, which it has not done, CCCA does not have standing to bring the underlying action for reformation. “When a trust is charitable, and is created not to benefit one or more individuals but is devoted to purposes that are beneficial to a broader community, the Legislature has determined that the Attorney General is responsible for ensuring that its charitable funds are used in accordance with the donor’s wishes.” Weaver, 425 Mass. at 275. See also G. L. c. 12, § 8 (“The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof.”). In a dispute over the administration of a charitable trust, a plaintiff who is not a legal beneficiary, such as CCCA, lacks standing to bring such an action. See generally, Weaver, 425 Mass. at 274-275.

---

<sup>7</sup> Article IV of the Trust directs that, if there is a failure of any disposition of any beneficial interest under the terms of the Trust, then the property comprising the beneficial interest which has failed of disposition shall be paid over and distributed as directed by the Board of Trustees of RMF. This provision is similar to the “gift over” clause in Phipps. Here, pursuant to Article IV, RMF is the residual beneficiary in the event of a failed disposition. The Court finds that this further supports the conclusion that the trust was not intended to be one of general charitable intent.

<sup>8</sup> “(a) If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a non-charitable irrevocable trust, the court may approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. (b) A non-charitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A non-charitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. (c) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that: (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected.” G. L. c. 203E, § 411 (a)-(c).

In further support of its determination that CCCA is not a beneficiary of the Trust and that it therefore lacks standing to bring any claims on behalf of the Trust, the Court is unpersuaded by CCCA's argument that it has "special interest standing" to bring the underlying Petition. CCCA argues that it has standing to bring the Petition to carry out the decedent's wishes and cites case law which examines a public charity. See DeGiacomo v. City of Quincy, 476 Mass. 38 (2016).<sup>9</sup> Here, however, the Court has determined that the Trust does not contain a general charitable bequest for the benefit of the public at large, and therefore this argument advanced by the Petitioner fails.

CCCA further contends that it has standing as a beneficiary of the Trust due to the Agreement that conveyed the building and lease rights to CCCA in 2006. CCCA claims that because it now owns the Nickerson Building upon which the archive room was to be built, and because the Agreement transferred RMF's rights of distribution from the Trust to CCCA, it enjoys status as a beneficiary. As previously noted, the Agreement, however, does not reference the Trust. Moreover, the Agreement does not contain any language purporting to transfer any of RMF's rights under the Trust to CCCA, or to any other entity or individual. Furthermore, it bears repeating that CCCA is not one of the two beneficiaries named in the Trust. Ultimately, the Court finds that CCCA has no standing to assert any claims, including a claim based on the applicability of the cy pres doctrine, on behalf of the Trust because it is not a beneficiary. The Trust is a private irrevocable trust that contains two specific bequests to two particular beneficiaries and does not contain any general charitable bequest to the public at large. Moreover, pursuant to G. L. c. 203E, § 411, modification of an irrevocable noncharitable trust must be initiated by a petition brought by the settlor and/or a beneficiary. Because CCCA is neither the settlor nor a beneficiary of the Trust, it lacks standing to file the underlying petition.

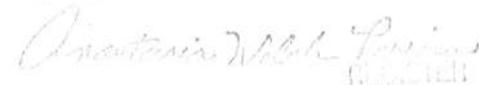
As noted above, a Mass. R. Civ. P. 12 (b)(6) motion cannot be allowed unless the Court is certain "that the pleader is entitled to no relief under any combination of facts which could be proved in support of his claim." In taking all inferences in favor of the nonmoving party, here, CCCA, and accepting all allegations in the petition as true, the Court finds that CCCA has failed to provide sufficient factual allegations in the Petition for Instructions which plausibly suggest an entitlement to relief based on the foregoing. Accordingly, the Motion to Dismiss dated July 1, 2022 is hereby *allowed*.

September 30, 2022

  
Angela M. Ordoñez, Justice

---

<sup>9</sup> "Whereas the trustee of a private trust owes a fiduciary duty to manage trust property 'for the benefit of designated beneficiaries,' 'there are ordinarily no definite beneficiaries' in a charitable trust. Rather, a charitable trust must provide some benefit to 'either the public at large . . . or an indefinite class of persons.' A charitable trust is created for the benefit of 'a broader community.' It serves 'to the greatest possible extent the public as the ultimate beneficiary.'" DeGiacomo v. City of Quincy, 476 Mass. 38, 44-45 (2016) (internal citations omitted).

RECEIVED  
SEP 30 2022  


# Exhibit B

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRReporter@sjc.state.ma.us

23-P-889

Appeals Court

IN THE MATTER OF THE RICHARD E. HOWARD TRUST.<sup>1</sup>

No. 23-P-889.

Barnstable. October 2, 2024. - August 26, 2025.

Present: Massing, Henry, & Grant, JJ.

Trust, Charitable trust, Public trust, Cy pres. Probate Court, Standing. Devise and Legacy, Charitable trust. Attorney General. Practice, Civil, Motion to dismiss.

Petition filed in the Barnstable Division of the Probate and Family Court Department on January 12, 2022.

A motion to dismiss was heard by Angela M. Ordoñez, J.

Eric Carriker, Assistant Attorney General, for the Attorney General.

Lawrence D. Hunt for the petitioner.

C. Alex Hahn for the trustee.

Brian J. Wall for The Raymond Moore Foundation, Inc.

HENRY, J. The petitioner, Cape Cod Center for the Arts, Inc. (CCCA), and the Attorney General appeal from a judgment dismissing CCCA's general trust petition concerning the Richard

---

<sup>1</sup> Dated November 20, 1993.

E. Howard Trust dated November 20, 1993 (trust). In the petition, CCCA sought, among other things, reformation of the trust under the doctrine of cy pres to substitute CCCA for the Raymond Moore Foundation, Inc. (RMF), a nonprofit charitable entity, as the recipient of a gift. The trust, through its trustee, and RMF filed a joint motion to dismiss the petition pursuant to Mass. R. Civ. P. 12 (b) (1) and (6), 365 Mass. 754 (1974), which was allowed by a judge of the Probate and Family Court. The judge concluded that CCCA lacked standing, and that the trust is not a public charitable trust and therefore the doctrine of cy pres did not apply. The conclusion that the trust is not a public charitable trust was dispositive on the issue of the Attorney General's standing as her duties are limited to cases involving those types of trusts. See, e.g., Ames v. Attorney Gen., 332 Mass. 246, 250 (1955).

On appeal, CCCA and the Attorney General argue that either or both have standing,<sup>2</sup> the trust is a public charitable trust made with a general charitable intent, and the doctrine of cy pres should apply to the gift to RMF. For the reasons that follow, we conclude that the Attorney General has standing to pursue this suit; however, the record is inadequate to determine

---

<sup>2</sup> The Attorney General did not take a position on CCCA's standing.

whether cy pres should apply to the gift to RMF. Although CCCA does not have standing to bring this action as a petitioner, it may move to intervene in light of its ownership of a building affected by the trust's administration. Accordingly, we vacate the order dismissing the petition and remand for further proceedings consistent with this opinion.

Background. We summarize the facts alleged in the petition and documents attached thereto, including the trust, unless otherwise noted. See Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

1. Trust. In 1993, Richard E. Howard (donor) executed a declaration that created the trust and provided that on his death the income of the trust would be used for two purposes. First, the declaration provided for the establishment of the "Richard E. Howard Scholarship" fund and directed that \$500 from the income of the trust be distributed annually to a student selected by the superintendent and the head of the art department of the Dennis-Yarmouth Regional High School. Second, the declaration provided,

"The remaining balance of income shall accumulate until a sum suitable to erect a room to the Joshua Nickerson Archives Building is available, at which time a sum not to exceed Fifty Thousand (\$50,000.00) Dollars shall be advanced to the Trustees of [RMF] for the construction of the addition, which shall be known as the 'RICK HOWARD ROOM', . . . and shall be used for the display of Playhouse archives and paintings of the DONOR. The income from said trust after the completion of the addition shall be used

annually for equipment, supplies, materials and maintenance."

The express terms of the trust do not state that the display be for the benefit of the public, and the petition does not describe who can access the Joshua Nickerson Archives Building, also known as the "Nickerson Studio Building" (Nickerson building), and for what purpose(s). The declaration further stated that any failed disposition "shall be paid over and distributed, free of all trust, as directed by the Board of Trustees of [RMF]." The donor passed away in 1996, at which time the trust became irrevocable. CCCA alleges that the donor's estate was valued at \$167,000 at the time of his death and that other funds were held by the trust.<sup>3</sup>

2. RMF and CCCA.<sup>4</sup> RMF was formed in 1947, "[g]enerally for charitable purposes and more particularly for the education and benefit of the public by the promotion and fostering of music, drama, horticulture[, ] and the fine arts." RMF owns a twenty-one-acre parcel of land in the town of Dennis on which several buildings are situated. Those buildings include the Cape

---

<sup>3</sup> RMF states that the trust received \$150,000 after the donor's death and settlement of his estate.

<sup>4</sup> We include some facts concerning RMF from its affidavit of objections. These facts are provided for background purposes only; none of the facts outside of the petition affects our analysis below.

Playhouse, the Cape Cinema, the Cape Museum of Fine Art, and, relevant here, the Nickerson building that is referenced in the trust declaration. The land and the buildings form an "arts-oriented campus" that has been owned and operated by RMF for many years.

In 1967, the Internal Revenue Service (IRS) determined that RMF did not qualify as a tax-exempt organization under the Federal tax code.<sup>5</sup> In light of that determination, RMF began to transform itself from the owner-operator of the campus into a landlord.<sup>6</sup> To that end, in the 1990s, RMF created a separate nonprofit organization, the Seasonal Theatre Archives and Athenaeum, Inc., which changed its name to Cape Cod Center for the Arts, Inc., in 2005.

In 2006, ten years after the donor's death, RMF conveyed its "right, title and interest" to several buildings and their contents, including the Nickerson building and the Cape

---

<sup>5</sup> The IRS's determination was due to the fact that RMF derived its principal income and support from ticket sales and rental income rather than public donations. An entity may still be considered charitable under State law even if it does not have tax-exempt status from the IRS. See 940 Code Mass. Regs. § 2.01 (1993); 940 Code Mass. Regs. § 2.01 (2012). The trust and RMF concede, and CCCA and the Attorney General agree, that RMF is a nonprofit charitable organization under Massachusetts law.

<sup>6</sup> At oral argument, RMF represented that it rents the premises at a discounted rate in an effort to promote the arts.

Playhouse, to CCCA. RMF also leased the land underneath those buildings to CCCA for a ninety-nine-year term.<sup>7</sup> To date, none of the trust income has been paid toward the addition to the Nickerson building.<sup>8</sup> As discussed further below, the record does not indicate whether RMF offered the \$50,000 to CCCA or if CCCA could build the room (either with that amount, by adding its own funds, or by using that amount to seed a capital campaign). At oral argument, the Attorney General and CCCA represented that CCCA presently owns the Playhouse archives, but not any of the donor's paintings.

3. Present suit. In January 2022, CCCA brought this suit in the Probate and Family Court seeking to be substituted for RMF as the recipient of the trust distributions for the Nickerson building plus statutory interest. CCCA also sought an accounting, removal of the trustee of the trust, and the authority to name a successor trustee. In April 2022, RMF and the trust filed affidavits of objections. In June 2022, on the day of the pretrial conference, the Attorney General filed a notice of appearance but did not attend the hearing.

---

<sup>7</sup> The conveyance and lease agreement between RMF and CCCA dated December 20, 2006, is attached to the petition.

<sup>8</sup> RMF further states that the trustee was not able to make the \$50,000 distribution of "accumulated income" to RMF at the time of the 2006 conveyance of the Nickerson building. No party has indicated the income as of January 2022, when the petition was filed.

In July 2022, the trust and RMF filed a joint motion to dismiss, which CCCA opposed. A judge held a hearing on the motion at which counsel for all parties, including an assistant attorney general, appeared. Relevant here is that the assistant attorney general argued that the trust is "straightforwardly a charitable trust" because it "serves charitable purposes [and] has charitable beneficiaries." The assistant attorney general also asserted that if the trust is a public charitable trust, the Attorney General had standing even if the judge determined that CCCA did not.<sup>9</sup>

After the hearing, the judge allowed the joint motion to dismiss by a written memorandum and order. The judge concluded that the doctrine of cy pres was inapplicable because the trust "is not a public charitable trust." Instead, the judge stated that the trust is a "private irrevocable trust that contains two specific bequests to two particular beneficiaries and does not contain any general charitable bequest to the public at large." The judge also concluded that CCCA does not have standing because it is not a legal beneficiary or settlor of the trust.

---

<sup>9</sup> The assistant attorney general did not take a position on how the office of the Attorney General would proceed if the judge concluded that CCCA lacked standing, but he suggested that in other cases the Attorney General has been permitted to take over as petitioner where the party who initially brought the suit lacked standing.

The decision did not address the Attorney General's standing. CCCA and the Attorney General each appealed.<sup>10</sup>

Discussion. "In reviewing a motion to dismiss under rule 12 (b) (1) or (6), 'we accept the factual allegations in the [petitioner's] complaint, as well as any favorable inferences reasonably drawn from them, as true'" (citation omitted).

Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15, 20-21 (2006).

1. Standing. As an initial matter, RMF and the trust argue that CCCA and the Attorney General do not have standing.

a. Private trusts and public charitable trusts. Here, the standing issue turns on whether the trust is a private trust (in which case neither CCCA nor the Attorney General would have standing) or a public charitable trust (in which case, at a minimum, the Attorney General would have standing). See DeGiacomo v. Quincy, 476 Mass. 38, 44 (2016). A private trust

---

<sup>10</sup> RMF and the trust moved to strike the notices of appeal on the bases that CCCA failed to file its notice of appeal within thirty days of the entry of the judgment, and that the sixty-day time period to file a notice of appeal in cases involving the Commonwealth did not apply because the Attorney General was not a party to the suit. See Mass. R. A. P. 4 (a) (1), as appearing in 481 Mass. 1606 (2019). The judge denied the motion by margin endorsement noting that the "Attorney General was a party to this action." RMF and the trust sought leave to file a late notice of appeal from that order, but the motion was denied by a single justice of this court. The Attorney General's and CCCA's notices of appeal are properly before us.

benefits designated beneficiaries. See id. These designated beneficiaries have standing to bring a suit for enforcement of a private trust, see Weaver v. Wood, 425 Mass. 270, 275 (1997), cert. denied, 522 U.S. 1049 (1998), and the trustee also may seek instructions from the court, see DeGiacomo, supra at 45.

Unlike a private trust, a public charitable trust provides some benefit to the public at large or to an indefinite class of persons who are reasonably described. See DeGiacomo, 476 Mass. at 44; Staman v. Assessors of Chatham, 351 Mass. 479, 483 (1966). The class that benefits from a public charitable trust "need not be large," Staman, supra, and may be "narrowly circumscribed" (citation omitted), Wesley United Methodist Church v. Harvard College, 366 Mass. 247, 252 (1974) (Wesley United). "The designee of the charitable trust's income is not deemed the true beneficiary of the trust but instead the 'conduit' of the trust's over-all charitable mission" (citation omitted). DeGiacomo, supra at 45. "[T]he public or the community . . . is the real beneficiary of every charitable trust." R. Chester, E. Deleery, N.A. McLaughlin, G.G. Bogert, & G.T. Bogert, Trusts and Trustees § 363, at 29 (3d ed. 2018) (Bogert on Trusts).

The donor of a public charitable trust may specify a particular charitable purpose for the gift. See Wesley United, 366 Mass. at 249-250. Such a gift may be made with either a

"general charitable intent" or for a "charitable purpose . . . limited to a particular object, or to a particular institution." Teele v. Bishop of Derry, 168 Mass. 341, 343 (1897). See Wesley United, supra at 250. However, the question whether a trust is a public charitable trust should not be conflated with the question whether the donor had a general charitable intent.<sup>11</sup> See Teele, supra; Selectmen of Provincetown v. Attorney Gen., 15 Mass. App. Ct. 639, 646 (1983) (determining whether settlor of public charitable trust had "general charitable intention . . . . [or] charitable purpose . . . limited to a particular object or to a particular institution" [citations omitted]). In determining who may sue for reformation of a trust, we consider whether the trust is a public charitable trust. This inquiry is objective and turns on the purpose to which the property is to be applied -- i.e., does the gift serve a charitable purpose and will that purpose be carried out for the benefit of the public at large or for some indefinite class of persons? See 6 A.W.

---

<sup>11</sup> The trust and RMF appear to contend that, as a matter of law, a trust does not become a public charitable trust by virtue of making a single charitable gift with its funds. While the better practice, which is less likely to engender litigation, would be to create separate trusts for charitable and noncharitable purposes and to state expressly whether one has or does not have a public charitable intent, we disagree that a trust with mixed purposes cannot be a charitable trust as a matter of law. See Restatement (Third) of Trusts § 28 comment e (2003).

Scott & M.L. Ascher, *Scott and Ascher on Trusts* § 38.1, at 2752-2753 (6th ed. 2024) (*Scott and Ascher on Trusts*). Cf. Matter of Troy, 364 Mass. 15, 58 (1973). The donor's motive in creating the trust is immaterial.<sup>12</sup> See *Scott and Ascher on Trusts*, supra; *Restatement (Second) of Trusts* § 368 comment d (1959).

The Attorney General has the duty "of taking action to protect public charitable trusts and to enforce proper application of their funds." Ames, 332 Mass. at 250. The Attorney General's role in the enforcement of public charitable trusts is grounded in common law and has been codified by statute. See id. Specifically, the Attorney General must "enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." G. L. c. 12, § 8. Moreover, the Attorney General must be made a party to judicial proceedings in which she has a potential interest in the

---

<sup>12</sup> The nature of the donor's charitable intent -- as we discuss later -- is part of the fact-specific analysis to determine whether the doctrine of cy pres applies to a charitable gift with a specified purpose that is impossible or impractical to effectuate. See Rogers v. Attorney Gen., 347 Mass. 126, 131-132 (1964). See also *Bogert on Trusts* § 366, at 67. As part of the inquiry into intent in this case, the judge on remand may consider various provisions of the trust, including the article that allows the trustee to make a payment or distribution directly to any beneficiary, and the provision that allows the trustee to terminate the trust early and distribute the principal to RMF and the scholarship fund.

performance of those duties, including in cy pres proceedings to determine whether a gift was made for a "public charitable purpose." G. L. c. 12, § 8K. See G. L. c. 12, § 8G; G. L. c. 214, § 10B. Our case law often refers to the Attorney General's authority in this regard as "exclusive"; however, "a plaintiff who asserts an individual interest in the charitable organization distinct from that of the general public has standing to pursue her individual claims." Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 245 (2007), cert. denied, 552 U.S. 1099 (2008).

b. Analysis. Here, the motion judge concluded that the trust is a "private irrevocable trust" that contains two specific bequests to two specific beneficiaries and does not contain any general charitable bequests. We cannot determine whether this view is correct because it is not adequately supported by the record. The donor made one gift to establish a scholarship fund. See Wesley United, 366 Mass. at 252 (trust to award scholarship in honor of donor's mother each year to one member of specific congregation, selected by congregation's board of trustees, to attend Harvard College, was charitable trust). The donor also bequeathed certain funds to RMF -- an entity that all parties agree is a nonprofit charitable organization -- to construct the Rick Howard room for the

purpose of displaying his paintings and the Playhouse archives.<sup>13</sup> See Attorney Gen. v. Weymouth Agric. & Indus. Soc'y, 400 Mass. 475, 477 (1987) ("public charity" arises "either by being organized with the intent to limit the organization's use of its funds to charitable purposes or by engaging in conduct which results in the entity holding funds for charitable purposes").

Certainly, a bequest to build a museum may serve a public charitable purpose if it benefits members of the public who visit to view the exhibits. See Jackson v. Phillips, 96 Mass. 539, 556 (1867) (promotion of education is charitable purpose).<sup>14</sup> Indeed, the Restatement (Third) of Trusts (2003) (Restatement [Third]) recognizes that gifts such as this one are charitable if the works to be displayed are of public interest or literary or artistic value. See Reporter's Note to Restatement (Third) § 28 comment h (trust "to exhibit a settlor's art collection is not charitable if the writings or collections are of negligible

---

<sup>13</sup> We consider the bequests at the time the trust became irrevocable, notwithstanding that the donor reserved certain rights during his lifetime. See Coffin v. Attorney Gen., 231 Mass. 579, 581-582 (1919). See also Restatement (Second) of Trusts § 361 comment a, illustration 1 (1959).

<sup>14</sup> For example, "[i]f a settlor leaves money with which the trustees are to found and operate perpetually an art museum, there are never any definite beneficiaries, even in the broadest sense. The educational and cultural advantages of the museum flow to the neighboring community and its visitors" (citation omitted). Bogert on Trusts § 363, at 32.

public interest or literary or artistic value"). The

Restatement's illustrations on this issue are instructive:

"A wealthy citizen of Townville left his estate to T, in trust, to construct and maintain a small museum solely to exhibit his own paintings and his personal collection of paintings by others. The testimony of experts establishes that the paintings are without artistic merit, and no other evidence is presented proving that there is public interest in the contemplated museum. The intended trust is not charitable." (Emphasis added.)

Restatement (Third) § 28 comment 1, illustration 5. By

contrast,

"S has devised and her family has donated funds to T, in trust, to construct and support a small museum to collect works of regional artists and to exhibit the collection and also to exhibit and otherwise promote the work of regional artists. The trust is charitable as a trust of interest and benefit to the community."

Restatement (Third) § 28 comment 1, illustration 4.

On this point, RMF represented in its pretrial memorandum that the donor "was a widely known painter who painted, inter alia, Cape Cod landmarks." The parties do not appear to dispute that the donor's paintings have artistic merit;<sup>15</sup> however,

---

<sup>15</sup> Indeed, the donor appears to have been a painter of some renown. See Cape Cod Museum of Art, Ric [sic] Howard: Red, White and Blue, <https://www.ccmoa.org/single-post/ric-howard-red-white-and-blue> [<http://perma.cc/XX36-8N7V>]. If through fickle fashion or for some other reason the room was no longer of interest to the public, if the donor is found to have had general charitable intent, the trustee could seek permission from the court to use the funds consistent with that general charitable intent. See, e.g., Norris v. Loomis, 215 Mass. 344, 345-347 (1913) (where testatrix left her home to be used as "'Old Folks' Home," but property was too small and accompanying

whether the display would be accessible to the public and, if so, whether there is a public interest in the contemplated addition to the Nickerson building and the items to be displayed (including the Playhouse archives if they alone are displayed)<sup>16</sup> is not addressed in the record, and no fact finding was done on that issue. On this limited record, we think the petition adequately alleges that the trust at issue is a public charitable trust such that the Attorney General has standing to bring a suit for its enforcement and is a required party.<sup>17</sup> See G. L. c. 12, §§ 8, 8G. See also DeGiacomo, 476 Mass. at 45; Weaver, 425 Mass. at 275. However, nothing in this decision precludes the judge from finding otherwise on a more developed factual record.

---

money gift insufficient to maintain such home, funds should be administered according to cy pres because language of will showed general aim of establishing home outweighed requirement that it operate out of her former house).

<sup>16</sup> CCCA concedes that it does not own any Richard Howard paintings, and the trust declaration permits the trust to sell donor paintings to support the trust. The record is not clear whether the trust or RMF owns any paintings.

<sup>17</sup> To the extent that the trust and RMF argue that the Attorney General was not a party to the suit in the trial court proceedings, failed to raise her arguments below, and is not aggrieved by the judgment of dismissal, we disagree. Although the Attorney General did not file a written opposition to the joint motion to dismiss, the assistant attorney general's argument at the hearing on the motion adequately preserved the issue of her standing in this suit.

We recognize that the suit at issue was filed by CCCA. Generally, an institution that hopes to be named as the recipient of a distribution by operation of the cy pres doctrine does not have an "interest different in kind from that of the public generally, which is represented exclusively by the Attorney General." First Christian Church v. Brownell, 332 Mass. 143, 147 (1955). However, as the present owner of the Nickerson building, CCCA's participation in the suit, at least as an intervener, may be proper.<sup>18</sup> See R. Chester, G.G. Bogert, & G.T. Bogert, *Trusts and Trustees* § 441, at 250 (3d ed. 2005) (on cy pres application, "institutions or persons seeking to secure benefits from the application are heard and sometimes permitted to intervene"). Cf. Brookline v. Barnes, 327 Mass. 201, 202 (1951) (Brookline No. 2) (parties making proposals to court for use of charitable funds allowed as interveners in cy pres proceedings); Bolster v. Attorney Gen., 306 Mass. 387, 388 (1940) (same).

Accordingly, we conclude that the judgment dismissing the petition should be vacated and the matter remanded. On remand,

---

<sup>18</sup> CCCA argues that it has standing because RMF's beneficial interest in the trust was transferred to CCCA by virtue of the 2006 assignment to CCCA of RMF's ownership interest in the Nickerson building. Nothing in the conveyance and lease agreement that transferred ownership of the Nickerson building and its contents to CCCA purported to transfer RMF's interest in the potential gift from the trust to CCCA.

the Attorney General is free to move to substitute herself as petitioner in this matter, and CCCA may move to intervene. To the extent that the Attorney General does not seek to pursue this suit, she shall file a notice with the Probate and Family Court to that effect, and the suit may be dismissed.

2. Remand. We next address issues that are likely to arise on remand if a judge concludes that the bequest to erect the Rick Howard room creates a public charitable trust. As the Supreme Judicial Court has aptly noted, "It is easier to state the doctrine [of cy pres] than to apply it." Brookline v. Barnes, 324 Mass. 632, 638 (1949) (Brookline No. 1). Under the doctrine,

"[w]here property is given in trust for a particular charitable purpose, and it is impossible or impracticable to carry out that purpose, the trust does not fail if the testator has a more general intention to devote the property to charitable purposes. In such a case the property will be applied under the direction of the court to some charitable purpose falling within the general intention of the testator" (citation omitted).

Wesley United, 366 Mass. at 249-250. "In applying the doctrine of cy pres the courts endeavor to accomplish the general charitable purpose of the [donor] 'as nearly as it can be conveniently done, consistently with the efficacious promotion of the general design'" (citation omitted). Brookline No. 2, 327 Mass. at 208. The doctrine applies only if the bequest is impossible or impractical to effectuate and the donor had a

general charitable intent as opposed to "an intent to devote the property to a specific charitable purpose." Brookline No. 1, 324 Mass. at 638. See Wesley United, supra. A court reaches the question of the donor's intent only if the charitable bequest is impossible or impractical to effect as written. See Pritchard v. Attorney Gen., 77 Mass. App. Ct. 494, 496 (2010).

a. Impossibility or impracticability. CCCA, RMF, and the trust take the position that the bequest to RMF cannot be carried out as written because CCCA now owns the Nickerson building (and apparently the Playhouse archives). However, nothing in the record as it presently stands demonstrates that the bequest to RMF is impossible or impracticable to effectuate.

The declaration of trust requires only that a sum not exceeding \$50,000 be advanced to RMF for the construction of the addition to the Nickerson building. RMF may obtain CCCA's consent to construct the addition with the trust funds, or the two entities may work in concert to build the Rick Howard room. Notably, the record here does not reflect that RMF or the trust has ever requested CCCA's consent or made any other reasonable effort to build the room. For its part, CCCA has represented that it is "ready, willing and able to carry out [the donor's] vision, with the very artifacts and building that [the donor]

included in his dream."<sup>19</sup> Therefore, "[u]ntil such [reasonable] efforts are made, and are shown to be futile, there is no need for further proceedings on the issue whether cy pres would apply . . . ." Museum of Fine Arts v. Beland, 432 Mass. 540, 545 (2000) (trustees made no reasonable efforts to explore alternative locations to exhibit fourteen paintings held in trust). See Davenport v. Attorney Gen., 361 Mass. 372, 376 (1972); Cohen v. Lynn, 33 Mass. App. Ct. 271, 279 (1992). To the extent that any entity fails to cooperate in effectuating the bequest as written without just cause to do so, such conduct may preclude that entity from receiving distribution of trust funds. See Brookline No. 2, 327 Mass. at 208. Contrast Briggs v. Merchants Nat'l Bank of Boston, 323 Mass. 261, 270 (1948) (charitable gift failed where master found owner of property and trustee controlling certain assets were at impasse that was not

---

<sup>19</sup> At oral argument, CCCA suggested that it could satisfy the condition to "erect a room" by dividing an existing room in the Nickerson building. We do not resolve that question but direct the parties back to the language of the trust. At oral argument, CCCA also represented that CCCA and RMF "do not see eye to eye" such that it is "not a workable solution" for the two entities to work together. For its part, RMF questioned whether CCCA could erect the Rick Howard room consistent with environmental limitations. RMF represents that the gift can be facilitated through the erection of a room at one of the other buildings on the campus. These are questions of fact that cannot be resolved on a motion to dismiss.

result of personality conflict or lack of honesty or good faith).

b. Donor's charitable intent. If the parties make the requisite showing of impossibility or impracticability, the judge then may consider whether the donor intended to devote the gift only to the specific charitable purpose stated in the declaration of trust such that the gift passes through the provision for failed gifts to RMF, or whether the donor had a more general charitable intent such that cy pres proceedings are necessary. See Wesley United, 366 Mass. at 249-250.

A donor has a general charitable intent if "the donor would attach so much more importance to the object of the gift than to the mechanism by which he intended to accomplish it that he would prefer to alter the mechanism to the extent necessary to save the object." Worcester County Trust Co. v. Grand Knight of the Knights of Columbus, 325 Mass. 748, 754 (1950), quoting Briggs, 323 Mass. at 274-275. Stated another way, the court is tasked with determining whether the donor would have preferred for his bequest be applied to a similar charitable purpose or for the funds to pass under the provision of the trust for failed gifts.<sup>20</sup> The court may consider the language of the

---

<sup>20</sup> The donor's inclusion of a provision that any failed gift would pass to RMF is not necessarily dispositive on the issue whether the donor had a general charitable intent. See Rogers,

donor's will and declaration of trust, as well as "the circumstances relevant to the property involved in the testamentary trust." Rogers v. Attorney Gen., 347 Mass. 126, 132 (1964).

The parties cite a host of cases in support of their respective views on the issue whether the donor had a general charitable intent. Most of those cases predate 1974, when the Legislature enacted a statute that provides a presumption in favor of finding a general charitable intent when a gift is made for a public charitable purpose. See G. L. c. 12, § 8K.<sup>21</sup> Although the issue of the proper application of that statutory presumption is not before us at this juncture, we recognize that there is a dearth of case law interpreting the statute. See Phipps v. Barbera, 23 Mass. App. Ct. 1, 6-7 (1986) (no general charitable intent where testatrix directed that three paintings

---

347 Mass. at 134; Attorney Gen. v. Briggs, 164 Mass. 561, 568 (1895). Cf. Trustees of Dartmouth College v. Quincy, 357 Mass. 521, 524, 532-533 (1970) (where will provided failed gift would pass to Dartmouth College for promotion of science and literature, court allowed reasonable deviation to ensure continuance of original charitable gift to create school for girls in Quincy).

<sup>21</sup> The statute provides that "[a] gift made for a public charitable purpose shall be deemed to have been made with a general intention to devote the property to public charitable purposes, unless otherwise provided in a written instrument of gift." Section 8K was originally enacted by St. 1974, c. 562, §§ 1, 3, and later reenacted verbatim by St. 1974, c. 716.

be donated to particular, nonexistent institution and, if institution did not accept gift, then to testatrix's cousin); Selectmen of Provincetown v. Attorney Gen., 15 Mass. App. Ct. 639, 647 n.10 (1983) (noting that summary judgment decision concerning charitable gift predating statute was not contrary to policy favoring construction for general charitable intent). If necessary, we leave that issue for the judge to resolve, in the first instance, on a more developed factual record.<sup>22</sup>

We note that some factors favoring a "charitable purpose . . . limited to . . . a particular institution," Teele, 168 Mass. at 343, include that the donor named RMF as the recipient of any failed gift and provided that RMF would receive eighty percent of the principal if the trustee terminates the trust early. See id. at 344-345 (testator's primary purpose was to build chapel in particular town in Ireland; no general intent to benefit particular religion). Moreover, at least according to RMF's pretrial memorandum, the original trustee named by the donor was the donor's friend and a member of the board of trustees of the Cape Playhouse. See First Church in Somerville (Unitarian) v. Attorney Gen., 375 Mass. 332, 336 (1978)

---

<sup>22</sup> For instance, we note that CCCA owns the Nickerson building but only leases the land for a ninety-nine-year term. At the end of the term, CCCA might have to move the building or the building might revert to RMF, and any resolution in favor of CCCA would have to address that possibility.

(settlor's intent to benefit particular church; conditional gift over to Harvard consistent with settlor's religious beliefs and gift over to Massachusetts General Hospital supported by settlor's "well documented" ties to hospital). Again, these are factual issues to be resolved by the judge on remand.<sup>23</sup>

Conclusion. The judgment of dismissal is vacated. The matter is remanded for further proceedings consistent with this opinion.

So ordered.

---

<sup>23</sup> The request by the trust and RMF for fees and costs under G. L. c. 215, § 45, is denied.