STATE OF MAINE

KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-05-27

CITY OF AUGUSTA,

Plaintiff

v.

DECISION AND ORDER

STEVEN ROWE, in his capacity as Attorney General of the State of Maine,

Defendant

ROBERT G. FULLER, JR. and PATRICIA E. MARVIN,

Intervenors

This matter is before the court on plaintiff's motion for summary judgment. In July of 2005, the City of Augusta initiated an action against the Attorney General in his official capacity asking the court to exercise equity jurisdiction pursuant to 14 M.R.S.A. § 6051 to modify or extinguish the terms of a certain charitable trust and authorize the assets of said Trust to be converted to cash for purposes of construction of a new high school and to remove any and all restrictions against the real estate which is the subject of the Trust. A motion to intervene as defendants by abutters of the real property was denied. A motion to intervene by two heirs of the Settlor creating the Trust was granted.[1]

[1] The court granted a motion to intervene by two heirs and an interested party. Upon request by the City, the court removed the interested party inasmuch as its decision to allow the intervention was based upon any interest of heirs which, according to law, could be honored in the event the court does not find authority to modify the trust and, therefore, create a resulting or constructive trust in the heirs. *See* RESTATEMENT (SECOND) OF TRUSTS § 413 (1959) ("when the purposes of a charitable trust cannot be accomplished, the transferee holds the property in a resulting

Asserting that there are no genuine issues of material fact and recognizing the role of the court solely within its equitable jurisdiction, the plaintiff has moved for summary judgment. The defendant Attorney General does not oppose the motion but challenges the evidentiary foundation of facts asserted by the plaintiff in its motion. Heir and intervenor Robert G. Fuller, Jr. has entered into a settlement agreement with plaintiff which may or may not be consistent with this court's decision. Heir Patricia E. Marvin opposes the motion for summary judgment and the relief prayed for by the plaintiff.

On December 25, 1815, Daniel Cony of Augusta conveyed a parcel or parcels of land "with a hope of providing the foundation of a liberal school for the education of youth, but more especially females, . . ." to Samuel S. Wilde, a Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts; Samuel Cony, a representative to the legislature of the Commonwealth; Reuel Williams, counselor at law; Nathan Weston, Chief Justice of the Circuit Court of Common Pleas; and Daniel Stone, pastor of a church and religious society in Augusta. Said conveyance was to the Trustees and "their successors, forever . . ." Said property was conveyed to the individuals "in trust for the use and benefit of aiding and supporting a female academy on the site hereby conveyed . . . ."

In 1816, the General Court of the Commonwealth of Massachusetts established in Augusta the Cony Female Academy for the purpose of promoting the education of youth, and more especially females. The grantees of the first Daniel Cony deed were named trustees "and they and their successors shall be in continue a body politic and corporate, by the same name forever." The Trustees were designated to be Visitors,

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trust for the transferor or his estate."); *Estate of Craig v. Hansgen*, 848 P.2d 313 (Ariz. Ct. App. 1992); *Perry v. Town of Friendship*, 237 A.2d 405 (Me. 1968).

Trustees and Governors of the Academy, "in perpetual succession, ..." By said legislation, the Trustees were deemed to stand seized in fee simple, holding possession "in trust for the use and support of the Female Academy."

On July 4, 1825, Daniel Cony conveyed "for the promotion of Female Education, in Morals, Religion and Literature, for the accommodation for perpetual use of the Cony Female Academy . . ." to the Trustees of said Academy "to hold in trust for the use of said Academy forever. . . ." The property was conveyed "to have and to hold the same to said Trustees for the use for benefit of the Cony Female Academy forever, ..."

In 1908, the Trustees of the Cony Female Academy brought before the Supreme Judicial Court a bill in equity against the City of Augusta, *et al.* reciting the deed of Daniel Cony of December 25, 1815, and the deed of Daniel Cony of July 4, 1825. In their petition, the Trustees assert that the corporation[2] administered the Trust until the year 1844 and stated: "at which time, to provide for 'improved accommodation' it purchased and suitably altered the Bethlehem Church in said Augusta, and with it replaced the original Academy building, and thus continued the execution of the Trust until the year 1872." After which time, in order to prevent a failure of the Trust due to their inability to meet the strict and literal terms of the Trust, and to prevent the defeat of Daniel Cony's general charitable intention of "promoting the education of youth," the Trustees explain they leased the Academy building to a private individual to conduct a private school for both sexes from 1872 until the spring of 1876. At that time, the Trustees further allege, the school was closed and the administration of the Trust was suspended until 1879, when the Academy building was sold and removed from the lot. The Trust then commenced the construction of the school building known as Cony

[2] Presumably the Academy as established by the General Court of Massachusetts.

Free High School. This was completed in 1880. The bill goes on to say, "to prevent a failure of the Trust, and in reliance upon the provisions of the public laws of 1873, ch. 115, as amended by the Public Laws of 1874, ch. 216, the said Trustees on July 1, 1881, leased said building and the lot whereon it stands to the municipal officers of said Augusta, and their successors in office, for the term of 99 years from that date, ..." The Trustees then explained that the City of Augusta had administered a free high school open to the youth of both sexes under the name of "Cony Free High School" up to the date of the 1908.

The pleadings then explained, "On June 27, 1905, from the proceeds of the sale of certain real estate previously held by it, the plaintiff purchased of one Helen W. Nichols a certain lot of land (whereon the Reuel Williams Athletic Field, so called, is now located) adjoining the school house lot, ..."[3]

Finally, the bill asserts that the Trust corporation is without funds and unable to administer the school and asks the court to find "that the City of Augusta is the appropriate and only agency that can administer the Trust and prevent a total failure thereof, ..."[4] The court is asked to cancel and declare void the lease of July 1, 1881, and the Trustees ordered to execute and deliver a quit claim deed to the City of Augusta.

By deed of June 27, 1908, the Trustees of Cony Female Academy conveyed to the City of Augusta the property which was the subject of, "the suit entitled Trustees of Cony Female Academy v. City of Augusta, et al., numbered 469, on the Equity Docket

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[3] A subsequent conveyance of the Trustees of Cony Female Academy to the City of Augusta recites as a source the deed of "Helen W. Nichols to the Trustees of Cony Female Academy, dated June 27, 1905, ..." This appears to be a lot of land adjacent to what is described as Cony High School.

[4] Of interest in light of subsequent developments, the Trustees' pleading goes on to say, "but many of its citizens have declared that at the meeting of May 11, 1908, they will not vote the required relief, or consent to the erection of valuable property upon said High School lot, unless the City is assured of a perpetual tenure and right of administration of said property and of said school."

of said Court, ..." Source deeds cited were the deeds of Daniel Cony of December 25, 1815, and of July 4, 1825, and the deed of Helen W. Nichols dated June 27, 1905. The June 27, 1908 deed specifically recites that the property is conveyed:

> In perpetual trust, nevertheless, for the purpose of maintaining under its present name the Cony Free High School; and the premises described in said deed of Helen W. Nichols, to Trustees of Cony Female Academy, recorded in said registry, Book 462, Page 491, shall be specially held by said City of Augusta, in perpetual trust for the purpose of an athletic field, and pleasure ground in connection with said Cony Free High School, except so far as it may be necessary to encroach upon the same by additions to or enlargements or replacements of the present school building.

On July 30, 1908, the Trustees of Cony Female Academy conveyed a parcel to the City of Augusta, again citing the Nichols deed and again with a document reciting the condition that the conveyance is "in perpetual trust, nevertheless for the purpose of an athletic field, and pleasure ground in connection with the Cony Free High School, except so far as it may be necessary to encroach upon the same by additions to or enlargements or replacements of the present school building."[5]

Finally, by document dated November 17, 1941, and recorded in the Kennebec Registry of Deeds, there exists a return of municipal officers of taking by eminent domain by the City of Augusta a parcel of land described as "the location for the enlargement and extension of Williams Field, so-called, the athletic field or playground of Cony High School, said parcel of land to be used exclusively as an athletic field for girls." The document goes on to declare that the land is owned by William P. Viles and upon the appraisal of no damages caused by the taking, "but in lieu of such damages, this taking is conditioned upon the use of said land exclusively as an athletic field for

[5] The court reads "Pleasure ground" to mean "playground."

girls and that said land shall be duly fenced within five years from the date of this taking and that said land shall be known as the Viles Athletic Field for Girls."

The City of Augusta, the plaintiff, determined that the Cony High School building was not satisfactory to meet the requirements of high school education and that its location was no longer satisfactory for the safety of its students. The State of Maine Department of Education agreed to fund a substantial portion of the construction of a new high school. In accordance with such circumstances, in June of 2004, the City of Augusta entered into an agreement with a limited liability corporation to sell the property upon which Cony High School and its athletic fields sit, excepting the so-called "Flatiron Building." The City intends to use the selling price of $1.5 million to pay a portion of the construction costs of a new Cony High School and the City seeks authority from the court to do so in light of the factual and legal history of the real estate involved.[6]

In its statement of material fact, the plaintiff asserts that the use of the entire property was consistent with Daniel Cony's intent from 1815 until 2006. Cony High School was constructed in 1964. The so-called "Flatiron Building" is an older historic building on the same site and is not being sold. The City asserts that the high school has severe physical problems, including: deficient electrical and mechanical systems, absence of a sprinkler system, defective insulation, disrepair, roof and flooring deficiencies, shortage of space, etc. The City has acquired a professional analysis indicating that the costs of renovating the school would exceed the costs of building a new school at a new site, and further, places the cost of demolition of the buildings at $1 million. The plaintiff's statement of material fact also declares that the high school,

[6] The new Cony High School has been built and went into operation in August 2006. Because of this fact, and for the sake of clarity for the contemporaneous reader, references to Cony High School in this order specifically pertain to the old school and its property, unless otherwise noted.

located on 6.67 acres of land, is too small for a high school under current State standards, that it has insufficient parking space, is below minimum code standards, and that it has space for just one athletic field. The City also notes that the property's location is directly off Cony Circle, which the City asserts is "among the most dangerous intersections in the State of Maine."[7] The statement of material fact continues with a number of additional deficiencies. The statement also contains an attached affidavit of a real estate appraiser indicating that the $1.5 million sales price is in excess of the property's value of $1 million to $1.2 million.

Finally, the plaintiff alleges that it has reached a settlement agreement with all parties except intervenor Marvin in which it is agreed that, if approved by the court, all trust restrictions on the property would be removed and the City would use the proceeds from the sale of the property for certain specific uses, to include: $600,000 towards the costs of the new Cony High School, $200,000 toward preservation of the historic Flatiron Building, $500,000 to be held in trust as the Daniel Cony Scholarship Fund, and $200,000 to be held in trust as the Daniel Cony Educational and Athletic Assistance Fund.[8]

The intervenor's statement of material fact disputes some details of plaintiff's statement, but the vast majority of the intervenor's objections note that the City's statement is simply hearsay of the City Manager and without foundation.

The Law Court has explained that:

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[7] The court takes judicial notice of the "rotary roulette" of Cony Circle.

[8] All of the allegations in plaintiff's statement of material fact, with the exception of those provided by the real estate appraiser, are alleged to be supported by the affidavit of the City Manager of the City of Augusta. As pointed out by the Attorney General's response to the plaintiff's statement of material fact, many of the factual assertions ostensibly supported by the City Manager affidavit are not based upon sound and competent knowledge such as would support evidence being offered in any hearing. This fact was pointed out to counsel for the City at oral argument and he has requested leave to file supplemental affidavits to address those deficiencies. In the interest of judicial economy and given certain time limitations in the City's contract for sale, the court has granted that leave and notified other counsel of the opportunity to file supplemental material as well.

> Summary judgment is no longer an extreme remedy. It is simply a procedural device for obtaining judicial resolution of those matters that may be decided without fact-finding. Summary judgment is properly granted if the facts are not in dispute or, if the defendant has moved for summary judgment, the evidence favoring the plaintiff is insufficient to support a verdict for the plaintiff as a matter of law.

Curtis v. Porter, 2001 ME 158, ¶ 7, 784 A.2d 18, 21-22. Summary judgment is proper if the citations to the record found in the parties' Rule 56(h) statements demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Dickinson v. Clark*, 2001 ME 49, ¶ 4, 767 A.2d 303, 305. The party opposing summary judgment will be given the benefit of any reasonable inferences that can be drawn from the presented facts. *See Perkins v. Blake*, 2004 ME 86, ¶ 7, 853 A.2d 752, 755. "A fact is material if it has the potential to affect the outcome of the case under governing law." *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 4, n.3, 770 A.2d 653, 655, n.3 (citing *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575). "The invocation of the summary judgment procedure does not permit the court to decide an issue of fact, but only to determine whether a genuine issue of fact exists. The Court cannot decide an issue of fact no matter how improbable seem the opposing party's chances of prevailing at trial." *Searles v. Trustees of St. Joseph's College*, 1997 ME 128, ¶ 6, 695 A.2d 1206, 1209 (quoting *Tallwood Land & Dev. Co. v. Botka*, 352 A.2d 753, 755 (Me. 1976)). To avoid a judgment as a matter of law for a defendant, a plaintiff must establish a *prima facie* case for each element of her cause of action. *See Fleming v. Gardner*, 658 A.2d 1074, 1076 (Me. 1995).

The plaintiff argues that the court should proceed by following the doctrine of equitable deviation. 18-B M.R.S.A. § 412. It argues that the court should modify or terminate the Trust because of unanticipated circumstances which Daniel Cony could not have envisioned at the time the Trust was established. It argues that none of the

circumstances as they now exist could have been anticipated by the Settlor at the time the property was first put to charitable use and that the equitable deviation provided in the statute would better advance the Settlor's purpose. The City argues that the sale of the realty in question, with the resulting proceeds used to provide direct and substantial support for education in the City of Augusta, is more appropriate under the circumstances and does a better job of furthering the purposes of the Trust in accordance with the Settlor's probable intention to support education than preserving a specific building and plot of land beyond the point they have ceased to serve as an effective means toward their ultimate end.

The Attorney General is satisfied that the facts support the proposition that the purposes of the Cony Trust can no longer be met where the Trust property is currently situated but that the purposes can be met and "are being fulfilled at another location within the City of Augusta." The Attorney General is satisfied that the sale is within the parameters of fair market value and the disposition would be consistent with the original educational purposes. While the Attorney General agrees with plaintiff that the statutory provision of equitable deviation applies, and may be the favored vehicle, he also argues the applicability of the *cy pres* doctrine as codified in 18-B M.R.S.A. § 413. While the equitable deviation theory permits a court to find an alternative way to fulfill the original purpose by modification of the terms of the Trust, the *cy pres* doctrine allows the court to terminate or modify the Trust to carry out the original charitable purpose.[9]

The intervenor argues that the plaintiff has failed to offer any admissible evidence as to why the property cannot continue to be specifically used for athletic

[9] The common law equitable deviation doctrine provides authority in a court of equity to modify the terms of administration by trustees of a charitable trust. The Maine statute allows the doctrine to be applied to both administration and dispositive functions exercised by the trustees.

fields and pleasure grounds. She argues the property could be used by other educational systems, not necessarily secondary schools.

Intervenor also argues that because the legislative background of 18-B M.R.S.A. §§ 412-413 is silent, there is no standard at law for "circumstances not anticipated by the Settlor." Therefore, the Intervenor argues the court should rely on common law interpretations of the doctrines. The Intervenor notes that historically the power of the court to modify administrative terms of the trust was very strictly limited and required some emergency or exigency which greatly threatens the trust estate and the beneficiary. Citing *Porter v. Porter,* 138 Me. 1, 20 A.2d 465 (1941), the intervenor argues that the court can utilize deviation only upon "a showing of extreme hardship, of virtual necessity, of serious impairment of principle, or of inability to carry out the purposes of the trust." *Porter,* 138 Me. at 7.

Finally, Intervenor argues that the court cannot find a general charitable intent as opposed to a specific intent because of the language relating to the specific parcels of land in question. She alleges that the Trust covenants run with the land and that the condition of the building is irrelevant inasmuch as it is the land that is subject to limitation and the City has not provided any evidence that the land is unsuitable for educational or athletic purposes. In making this argument, Ms. Marvin challenges the affidavit of the real estate appraiser as being an opinion of value and not an appraisal and that failure to provide such appraisal should be fatal to plaintiff's petition.

Utilizing the argument of the status of the land, rather than the building, the intervenor argues that the City has failed to establish a sufficient change of circumstances warranting deviation from Daniel Cony's specific intent. The intervenor notes that the City intends to retain and maintain the Flatiron Building for educational, recreational or pleasure pursuits, which in and of itself provides an admission that the

Trust estate is secure and there exists no emergency or exigency that warrants deviation. Intervenor cites *Robert W. Traip Academy v. Staples*, 317 A.2d 816, 819 (Me. 1974) for the axiom that the intention of the donor is the "'lodestone[]' of the court." (quoting *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 591 (1866). Ms. Marvin believes that the 1908 decree of the Supreme Judicial Court and its subsequent deed established a specific intent since the deeds used the term "specially held by said City . . . in perpetual trust."

An analysis of the operative language expressing Daniel Cony's intent in the transfer of real estate to a charitable trust (corporation) and ultimately to the City of Augusta, in its most plain language terms, reveals certain basic requirements in order to satisfy the gift. First, it is unequivocally clear that Mr. Cony intended the property to be held as a charitable trust in perpetuity and forever. With the use of that language, he exercised the law of charitable trust that distinguishes its ownership of real estate from individual title. Charitable trusts are capable of having a perpetual existence. Charitable trusts are "not subject to the ordinary rules against perpetuities and may continue indefinitely, [even though] special problems arise with respect to their administration." *Snow v. Bowdoin College*, 133 Me. 195, 199, 175 A. 268, 270 (1934). The second clear indication of intent is displayed by Daniel Cony's transfer of parcels of land for purposes of a school for the education of "youth, but more especially females." Third, his language does not express the desire for the existence of a school maintained exclusively for females, which would, therefore, allow the Trust to exist for land to support a school for both females and males. Fourth, Mr. Cony's gift was for the land to

be used for a "school for the education of youth," thereby excluding college or university education.[10]

The original grantees in both 1815 and 1825 were obviously persons known to Daniel Cony and this court may reasonably infer that those individuals were well aware of Mr. Cony's intent. This inference can be found in the language of the successor Trustees in their deed to the City of Augusta of 1908 wherein, in addition to expressing the perpetual Trust, they recognized that the athletic field and pleasure ground (possibly playground) in connection with Cony Free High School may be subject to "additions to or enlargements or replacements of the present school building." Such an expression would recognize an acknowledgement that the future holds a likely possibility of additions to, enlargements of, or replacements of the then school building. Attributing this language to Daniel Cony, it becomes the limitations of the Trust on the land in question. It also suggests the considerable changes in the environment between 1815 and 1908 regarding the requirements of a free high school.

This court is satisfied that Mr. Cony expressed a specific intent to create in perpetuity a parcel of land upon which would be located a public school for females, as well as athletic fields and playground in support thereof.[11] The undisputed facts support the conclusion that the continuation of the land in question for purposes of a City of Augusta high school does not meet the contemporary legal standards and the establishment of the high school at a different location, while appropriate, may or may

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[10] The court believes the use of the term Cony "Free" High School in its early stages indicates intent to support what is now the public school program.

[11] Contrary to argument of the intervenor, the court does not believe that the land subject to the charitable trust language would allow stand-alone athletic fields or playgrounds since it is clear from the language of the deeds that the athletic fields and pleasure grounds are in support of and in conjunction with the school.

not require the court to declare the restrictions of the real estate in question null and void.

The common law of the so-called doctrine of *cy pres* is spelled out in section 399 of the RESTATEMENT OF THE LAW, SECOND, OF TRUSTS (1959). The section is entitled Failure of Particular Purpose Where Settlor Has General Charitable Intention. [T]he Doctrine of *Cy Pres*.

> 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 the 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.

This doctrine has been codified in 18-B M.R.S.A. § 413.

> 1. Charitable purpose becomes unlawful, impracticable, impossible to achieve or wasteful. Except as otherwise provided . . ., if a particular charitable purpose of a trust becomes unlawful, impracticable, impossible to achieve or wasteful:
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> A. The trust does not fail, in whole or in part;
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> B. The trust property does not revert to the settlor or the settlor's successors in interest; and
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> C. The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

A series of Maine cases apply this common law doctrine. In the matter concerning the South Congregational Society of Augusta, the court notes the requirement under *cy pres* of a general charitable intention. The court must be satisfied that some other object may be found answering the intention of the donor in a reasonable degree. *Lynch v. South Congregational Parish,* 109 Me. 32, 38, 82 A. 432, 435 (1912). In a case involving a perpetual trust of a farm and woodland in Augusta, the court found a particular charitable gift but no general charitable intent and, therefore,

the *cy pres* doctrine did not apply. The facts of this case were such that the language of the settlor made it clear that the charitable purpose was linked with a particular piece of real estate, a farm. *Gilman v. Burnett,* 116 Me. 382, 102 A. 108 (1917).

In 1934, a Maine court reported what is generally considered to be a landmark case in this doctrine. In this case, a testamentary gift was made to the Medical School of Maine through Bowdoin College. This case made it clear that even though the intent of the donor cannot be exactly carried out, that does not mean there must be a failure of the general benevolent purpose. "The rule has been many time[s] expressed by this court that a fund for a charity will be administered *cy pres,* where there is a failure of the specific gift and a general charitable intent disclosed in the instrument creating the trust." *Snow v. Bowdoin College,* 133 Me. 195, 199, 175 A. 268, 271 (1934). The case concludes that even if it becomes impossible to carry out the exact purpose of the donor, the court in equity will not permit the failure of "her general charitable benefaction." *Id.* at 273.

A conveyance of a parcel of land to the City of Portland for purposes of a memorial park to honor one's mother and father was the subject of a 1976 case where the construction of Interstate 295 required a taking by the parcel by the State of Maine by eminent domain. The court discussed the matter in terms of the *cy pres* doctrine finding a general charitable intent from the absence of an express reverter clause and analyzed whether the precise original location of the park was essential to the settlor's desires. Finding that the grantor did not provide a term for the gift to expire rather than continue at another location, which would have resulted in a reverter to the donor's estate, the court found the general charitable intent sufficient to allow the City to apply the proceeds from the sale to another location. *State of Maine v. Rand,* 366 A.2d 183 (Me. 1976).

We next look at a will directing a trustee to create a benevolent corporation for purposes of the establishment of a children's outing home. At the time the bequest was to take effect, the assets of the trust were inadequate to carry out the testator's specific benevolent purpose. The court explained the doctrine of *cy pres* as a "judicial principle for the preservation of a charitable trust when the accomplishment of the particular purpose of the trust is or becomes impossible, impractical or illegal." *In re Estate of Thompson*, 414 A.2d 881, 885 (Me. 1980). Under the circumstances, the court determined that the *cy pres* doctrine would allow it to apply the trust funds to a charitable purpose as nearly as possible to the particular purpose of the settlor or testator. The court makes note of the special "favoritism which the law has toward a charitable gift or trust." *Id.* at 888.

In 1939, an Illinois case contains a factual situation where a school was erected in accordance with a charitable trust. By virtue of a reorganization of the educational geography of the city, the issue was whether the property could be sold and the proceeds applied to the building fund of the board of education and to use such proceeds for school building purposes. The court found a general charitable trust saying "[a] trust to establish or maintain a school or other educational institution or otherwise to promote education is charitable although the beneficiaries are limited to the inhabitants of a particular place, whether a country, State, city, town or parish, provided the class is not so small that the purpose is of no benefit to the community." *Bd. of Education of the City of Rockford v. City of Rockford*, 24 N.E.2d 366, 370 (Ill. 1939). The court found the key question to be whether the property to be used for school purposes is consistent with the "reasonable contemplation of the creators of the trust." *Id.* at 372.

In 1949, an Arkansas court was faced with a determination of whether the trustees of a charitable trust could sell land owned and held for library purposes and use the proceeds to construct a library building and then turn the building over to a permanent tax supported library organization. In this case, a library could not be built on the land expressly limited to that purpose. While this court discusses the *cy pres* doctrine, it said, "Where a literal execution of a charitable devise becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose." *Bossen v. Women's Christian National Library Assn.*, 225 S.W.2d 336, 338 (Ark. 1949). The court then cites 10 AM. JUR. CHARITIES, § 51:

> Thus, where the circumstances existing at the time of the creation of a charitable trust have changed to such an extent that in order to carry out properly the charitable intention of the donor, it is necessary to dispose of the trust property and devote the funds to the acquisition of a more suitable location, a court of equity will authorize the sale of the property.

Id.

In examining whether the doctrine of *cy pres* is appropriate to the facts of this case, the court makes particular note of a 1972 Michigan case. In this case, the testator by his will directed the creation of a charitable trust for educational purposes that was limited to being fulfilled by a specific college, with the testator's books to be utilized in a political science course, and other specific limitations. The court noted that the *cy pres* doctrine had three prerequisites; the court must first determine whether the gift creates a valid charitable trust, it must be established that it is impossible or impractical to carry out the specific purpose of the trust, and the court must determine whether in creating the charitable trust the testator or settlor had a general charitable intent. Most notably, the court goes on to explain by footnote:

> It should be noted that the *cy pres* doctrine is inapplicable when the particular purpose of the testator (or settlor) can effectively be carried out subject to some deviation in the method of administration of the trust.

In re Rood Estate Hannah v. Attorney General, 200 N.W.2d 728, 735, n.7 (Mich. Ct. App. 1972). This case discusses the power of the court in equity to change the methods of administration, quoting Bogert, TRUST & TRUSTEES (2d ed), § 394, pp. 236-37, "Deviation from the administrative provisions of a charitable trust can be authorized, even though the trust possessed a narrow and not a general trust intent, whereas *cy pres* could not be used in such a case." *Id.*

An analysis of these cases causes this court to conclude that in order to apply the *cy pres* doctrine the court must find that it is the purpose of the charitable trust that must be found to be unlawful, impracticable, impossible to achieve or wasteful. Notwithstanding the fact that the land subject to the charitable trust that Cony High School was created on has difficulties and caused it to be unable to continue at that location, this court finds that Daniel Cony's charitable purpose is not unlawful, impracticable, impossible to achieve or wasteful.

The common law of equitable deviation is articulated in RESTATEMENT OF THE LAW, SECOND, TRUSTS, § 381, entitled "Deviation From Terms of the Trust."

> The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

Any person with a basic education would know that the circumstances of the City of Augusta as it existed in 1815 are substantially different than those that exist in 2007. At the time of the original creation of the charitable trust, Maine was a province of the Commonwealth of Massachusetts. Indeed, the Cony Female Academy was a legal entity created by act of the general court of the Commonwealth of Massachusetts. By 1825, the State of Maine had existed for five years. Obviously, there existed a need for

free public education of females. It is further obvious from the allegations of the bill in equity brought by the trustees before the Supreme Judicial Court in 1908 that during the intervening years, there existed a lack of financial support of the Academy and there came into existence the Cony Free High School, a function of the City of Augusta. The use of large school buses, automobiles and trucks of substantial horse power and speed, population growth, wear and tear of infrastructure, are all matters which might have been conceived by Daniel Cony but it certainly cannot be said that he anticipated that this relatively large tract of land within the City of Augusta would become too small to achieve the purposes for which he created the charitable trust. There can be no dispute that circumstances that could not possibly be known to Daniel Cony, and certainly not anticipated by him, would cause a situation where compliance with the precise terms of the trust, i.e., the limitation of use of land, would defeat or substantially impair the accomplishment of the purposes of his Trust. As stated before, Mr. Cony desired to create a charitable trust which would hold title to land upon which would be a school and athletic fields for purposes of the free education of females. That purpose is not changed by the circumstances of this case and the question before the court is whether or not, through the use of the doctrine of equitable deviation, the terms of the Trust may be changed by the court's exercise of equity sufficient to achieve the alienation of the real estate in question.

Historically, the doctrine of equitable deviation could only apply to the administrative terms of the Trust document. However, the legislature has codified the doctrine in 18-B M.R.S.A. § 412, Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

> 1. Modification or termination. The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or

> termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
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> 2. . . . .
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> 3. Distribution after termination. Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(Emphasis added).

The intervenor relies heavily upon a 1941 case applying the doctrine of deviation. In *Porter v. Porter*, 138 Me. 1, 20 A.2d 465, the court held that deviation from the express terms of the trust can be granted only upon a showing of extreme hardship, of virtual necessity, of serious impairment of principle, or of inability to carry out the purposes of the trust. The situation considered must present an emergency or exigency which menaces the trust estate and the beneficiary. The mere fact that such deviation would result in pecuniary benefits of the beneficiaries does not constitute such necessity as would justify a court of equity to modify the terms of the trust.

This issue in this case involved the investment of trust funds, wherein the authority of the trustees was limited to investments of certain governmental bonds, notes or bonds secured by first mortgages on improved real property or first mortgage bonds of corporations "upon which no default in payment of interest shall have occurred for a period of five years before the purchase thereof." *Id.* at 138 Me. 3. The trustees sought deviation from the requirements in order to improve the income and growth and value of the trust fund. The court did not allow the deviation because there was a lack of extreme conditions, which was a necessary condition under the prevailing doctrine, before which deviation would be allowed to occur. Since that time there seems to be a relaxation of that harsh standard depending upon the facts of the challenge to the court's use of equitable powers.

In 1944, the Maine court, in discussing the doctrine of *cy pres*, "in accordance with the doctrine approved in *Porter v. Porter*," discussed deviation from the trust instrument. The court reasoned that:

> [I]f the court may, to prevent a failure of a charitable trust, apply the gift to a different object of a similar character, it may modify the method prescribed by the testator for carrying out the specific object. It is doubtful if such procedure represents a true application of the rule of *cy pres*, for a deviation from the express terms of the grant is often permitted to prevent the failure of a trust which is not charitable.

Manufacturers National Bank v. Woodward, 141 Me. 28, 31, 38 A.2d 657, 658 (1944). The court goes on to cite a number of authorities illustrating the distinction between the use of the *cy pres* power of the court and the modification which equity sanctions of the method designated by the creator of the trust for its administration.

In 1975, the Maine Law Court said:

> It is well settled that a Court possessing equitable powers (as does each of the lower courts in these cases) may in its discretion modify trust administrative provisions. This court has always permitted such modifications if (1) consistent with the settlor's primary intent, *and* (2) required by necessitous circumstances.

The court goes on to explain:

> In the deviation situation trustees are permitted to administer a private or charitable trust in some way contrary to a particular direction of the settlor; in *cy pres* the court may sometimes order application of the charitable gift to a different object of a similar character.

Canal National Bank v. Old Folks Home, 347 A.2d 428, 436, n.7 (Me. 1975) (cited with approval in *In re Estate of Burdon-Muller*, 456 A.2d 1266, 1271 (Me. 1983)).

In *Pennebaker v. Pennebaker Home for Girls*, 181 S.W.2d 49, 50-51 (Ky. 1944), the court, in discussing deviation, relied upon American Law Institute's RESTATEMENT OF THE LAW ON TRUSTS, § 381, Cmt. E:

> If a testator devises land for the purpose of maintaining a school or other charitable institution upon the land, and owing to a change of circumstances it becomes impracticable to maintain the institution upon

> the land, the court may direct or permit the trustee to sell the land and devote the proceeds to the erection and maintenance of the institution on other land, even though the testator is specific words directed that the land should not be sold and that the institution should not be maintained in any other place.

In Arkansas in 1960, the court expressly declined to invoke the *cy pres* doctrine on the grounds that the change of location was not a change of purpose of the trust. The court noted it is "required to stand in the place of the creator of the trust and authorize what he would have authorized had he anticipated the exigencies rendering some change in his scheme necessary in order to prevent the loss of the subject of it." *Anderson v. Ryland,* 336 S.W.2d 52, 56 (Ark. 1960). In a concurring opinion, one judge states, "If we are willing to approve a principle that permits the fundamental purpose of the trust to be changed, as the *cy pres* doctrine does, there is no sound reason for refusing to permit a deviation in mere administrative detail." *Id.* at 347-348. This case is particularly notable because the court examined what it determined to be the intent of the settlor and ordered the use of the proceeds from the sale of the old site to the construction of a new building on a new site to specifically meet the terms of the charitable trust which were not modified by the court's action. Making it clear that the settlor intended that the trust exist in perpetuity, and use of the proceeds were for a specific purpose within the charitable intent, the court placed severe limitations on the use of the proceeds from the sale of the land to include; there being no change in the substantive terms of the trust except the location of the property, that it was the charity itself and not the perpetual use of the location which governed, and that the use of the funds on the new real estate created a requirement that said real estate could not be subject to a mortgage or other encumbrance with the potential to interfere with the perpetual nature of the trust.

Arizona notes that the equitable deviation doctrine applies where there is no diversion of the trust and no transfer of assets to a different charity or to a different purpose. *Estate of Craig v. Hansgen*, 848 P.2d 313 (Ariz. 1992).

Is *Porter v. Porter* the standard in the State of Maine or can it be distinguished on the basis of the limited principle of administration of a trust, specifically its limitation of investment vehicles? In examining the theories of Maine cases applying both *cy pres* and equitable deviation, this court believes the case is distinguishable because even though Daniel Cony had the specific intent to see that a school was placed upon charitable trust land for purposes of education of females, he and his successors clearly showed an intent to support free public education of females (and by contemporary law, males as well).[12]

The most recent case discussing this issue, albeit not from Maine, is the 2005 case of *Neimann v. Vaughn Community Church* from the State of Washington, 113 P.3d 463 (Wash. 2005). In this case, a church congregation sought relief from a provision in the deed to real property requiring the church to hold the property for the perpetual use of its church organization. The church wished to sell the property and use the proceeds to build a new facility at a new location. The court conducts a substantial discussion of *cy pres* versus equitable deviation and quoting from section 381 of RESTATEMENT (SECOND) OF TRUSTS (1959) it states "equitable deviation has to do with the powers and duties of the trustees of charitable trusts with respect to the administration of the trust; it has to

[12] Many contemporary appellate court decisions dealing with charitable trusts created in the early years of the 20th Century apply the *cy pres* and equitable deviation doctrines to trust instruments which contain race restrictions. It appears from the written court decisions that the courts simply ignore those requirements, presumably because they are so patently unconstitutional. Knowing full well the history of this country and the development of suffrage, the educational environment for females in the 19th and early 20th Centuries was obviously limited, a condition which in the field of free public education, does not exist today.

do with the methods of accomplishing the purposes of the trust."[13] *Neimann*, 113 P.3d at 469. The decision says the courts apply equitable deviation to make changes in the manner in which the charitable trust is carried out. The court notes that the trustee does not seek to modify the primary purpose of the trust, to apply the funds to an alternative objective, nor to substitute beneficiaries, but to remove the alleged restriction on alienation of the property in order to further the trust's primary purpose. The court also takes note of the comment under RESTATEMENT (SECOND) OF TRUSTS § 381 that specifically supports the view that the court, in exercising its equitable powers, may deviate the terms even if the testator in specific words directs the land not be sold and that the institution is not to be maintained in any other place. The court notes that "the theory is that he [the settlor] would not have forbidden it, but on the contrary would have authorized it if he had known of or anticipated the circumstances."[14] *Id.* at 470. The factual findings as reported by the court are almost identical to the facts before this court. In determining whether or not there were material circumstances not anticipated by the settlor, the court found:

> These include significant congregational growth, limitations with the building and property, stricter development and building codes, drastic changes in the 'community of Vaughn,' including growth, expansion, and relocation of its business core, and finally changes in the attitudes, expectations, and needs of parishioners compared with the 1950s. These findings support the conclusion that present day conditions present 'circumstances not anticipated by the settlor[s]' in the maintenance of the church and its service to the Vaughn community.

Id. at 471. Substitute the words "students" for "congregation," "school" for "church," and "City of Augusta" for "Vaughn" and we have the present circumstances.

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[13] The Maine law is not limited to administration but also may include modification of dispositive terms.

[14] Note *State of Maine v. Rand, supra.*

Based upon an analysis of the law of Maine and other jurisdictions in the application of the doctrines of *cy pres* and equitable deviation, the court is satisfied that first, present circumstances clearly not known to the settlor and which could not be anticipated by him make continued compliance with the terms of the Trust and the restrictions on the real estate such that they would defeat or substantially impair the accomplishment of the purposes of the Trust. Secondly, Daniel Cony intended that there exist a parcel of real estate limited in perpetuity to the free education of the community. Third, there is no need for the Trust to be terminated as the doctrine of equitable deviation allows the court to modify its terms such as to continue to comply in perpetuity with the desires of Daniel Cony. Neither the object of Mr. Cony's gift nor his charitable purpose has failed. Accordingly, the corpus of the charitable Trust, the three parcels of land owned by the City of Augusta upon which is placed the now defunct Cony High School and athletic fields are no longer held in Trust, the property may be sold at its proper value, but any and all proceeds from the sale shall be subject to the terms of the Daniel Cony Trust and must be applied within those terms. Those terms include; requirements that their use must be such that the Trust will exist in perpetuity, the proceeds must be used for the ownership of a parcel or parcels of real estate, the activities of that real estate must be used for public education and athletics and playground in support of that education, and that land must be held by the City of Augusta in trust under the same conditions. Clearly, Mr. Cony anticipated and was aware of the creation of the female academy but the record provides no evidence of his placing that building within the Trust other than its becoming part of the real estate by resting on Trust land. Accordingly, the use of the Trust proceeds may be utilized in the construction of a building upon land subject to Trust restrictions.

In its complaint, the City asks this court to enter a judgment modifying the terms of the Trust to allow the assets to be converted to cash for purposes of construction of a new high school and to remove any and all restrictions against the property. For that limited purpose, the court will render such judgment. However, the court notes that the City has proposed an order, apparently consistent with a settlement agreement reached with intervenor Robert G. Fuller, Jr., which contains a number of provisions which would violate the terms of Mr. Cony's charitable Trust. The use of $600,000 of the charitable Trust funds to "defray the costs of extra items not approved by the State for the new Cony High School" depends for its legitimacy on the nature of the use of the funds, their relationship to free public education and their perpetual existence. Furthermore, inasmuch as the $600,000 is subject to its perpetual existence, expenditure of those funds for assets which will deplete the fund are not consistent with the charitable Trust. The use of $200,000 toward the preservation of the historic Flatiron Building is not consistent with the terms of the charitable Trust. The use of $500,000 for college or post-secondary expenses are not consistent with the charitable intent since Daniel Cony was interested in free public education. Furthermore, use of the principal of the $500,000 would be a violation of the perpetual nature of the gift. The use of $200,000 for an educational and athletic assistance purpose is approved provided it is invested in the real estate and not subject to a mortgage or any other encumbrance or used as collateral for any indebtedness which would be inconsistent with the terms of the charitable Trust.

For all the reasons stated herein, the plaintiff's motion for summary judgment is GRANTED in principle; judgment for the City of Augusta as follows:

> It is hereby ORDERED that certain real estate located in the City of Augusta and standing in the name of the City of Augusta acquired by deed of the Trustees of Cony Female Academy on June 27, 1908, and recorded in the Kennebec County Registry of Deeds, Book 487, Page 195, conveying the property acquired by the grantor by deed of Daniel Cony dated December 25, 1815, and recorded in the Kennebec Registry of Deeds, Book 25, Page 88, deed of Daniel Cony dated July 4, 1825, and recorded in the Kennebec County Registry of Deeds, Book 54, Page 484, and deed of Helen W. Nichols dated June 27, 1905, and recorded in the Kennebec County Registry of Deeds, Book 462, Page 491, are freed from the restrictions of the charitable Trust created by Daniel Cony and the Trustees of the Cony Female Academy, which restrictions shall attach to and become a part of the proceeds of any sale of said real estate which shall become the corpus of the Daniel Cony Charitable Trust and which may only be applied in accordance with the remaining terms of the Daniel Cony Charitable Trust; the City of Augusta, as Trustee of the Daniel Cony Charitable Trust, is directed to submit to this court a proposal for the disposition of the proceeds of the charitable Trust in accordance with the terms of this Decision and Order; the court will retain jurisdiction for purposes of approval of the disposition of the corpus of the charitable Trust and its enforcement.

Dated: March 20, 2007

Donald H. Marden
Justice, Superior Court

(RE-05-27)

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-05-27

CITY OF AUGUSTA

Plaintiff

vs.

STEVEN ROWE, in his capacity as ATTORNEY GENERAL for the STATE OF MAINE

Defendant

ROBERT G. FULLER, JR. & PARTICIA E. MARVIN

Intervenors

ORDER

The City of Augusta's Motion for Leave to File Supplement Affidavits is hereby granted, ~~for the reasons given in the Motion.~~ W/O OBJECTION; MARVIN TO FILE SUPPLEMENTAL INFORMATION ASAP.

Dated: 3-26-07

Justice, Superior Court

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