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January 21, 1954

To the Attorney General

Re: Cy Pres -- Application in City of Belfast v. Goodwill Farm et al.

At the request of Glynn Frost, Deputy Attorney General, I contacted Justice Robert Williamson, to discuss what interest, if any, the State of Maine would have in the case of City of Belfast v. Goodwill Farm, Belfast Home for Aged Women, Girls Home, Ivan L. Bartlett, Virgie Knapp, Stewart Kingsbury, Lamont Kingsbury, Herman O. Beckwith, Exr., which case is now pending before the Supreme Court.

The facts of the case are briefly as follows:

F. Louis Bartlett, by his will dated August 4, 1949, which will was duly allowed on December 12, 1950, made the following bequest and devise:

"Fourth: I give, bequeath and devise to the City of Belfast, Maine, forever, all the rest, residue and remainder of my estate, real, personal and mixed, wherever situated and however and whenever acquired, conditioned, however, that the City of Belfast, Maine shall maintain a home for aged men on my homestead farm, said home to be named 'Bagley Home for Aged Men'. Said City of Belfast to have the right to make such charges as an entrance fee to each individual or applicant in the same manner and under like circumstances as is done by the Belfast Home for Aged Women located in said Belfast, Maine, in other words, it is not my purpose to request the City of Belfast to maintain a poor farm. It is also my wish that all of my books and furniture found in said buildings at the time of my decease, in so far as is practicable, shall be used to furnish said home and be kept for the use and occupancy of the residents of said home for aged men. In the event, however, the City of Belfast, Maine, refuse to accept this legacy and devise, I give, bequeath, and devise the same to the Girls Home and Belfast Home for Aged Women, both located in Belfast, Maine, and the Good Will Farm located in Fairfield, Maine, to share and share alike."

On July 16, 1951, the City of Belfast voted to accept the gift and thereafter the City sold certain items of personal property at auction. After advertising for applicants for admission to the home for aged men, the City Council, having received no applications, became convinced that there were no candidates for admission to the home, and that the trust fund was insufficient to equip and maintain the testator's homestead farm as a home for aged men. On the thirteenth of August, 1952 the City Council voted to bring a bill in equity to determine to whom the assets of said trust should be delivered in order to terminate completely and for all time any connection of the said City of Belfast to said trust.

The question which concerned Judge Williamson was whether the Attorney General of the State of Maine should not be a party to this

matter with respect to the possibility that the Doctrine of Cy Pres might be applicable in so far as respects the rights of "aged men" who might be entitled to the charity offered by the testator.

It is, of course, under Section 4, Chapter 17, R.S. 1944 as amended, the duty of the Attorney General, to "enforce due application of funds given or appropriated to such charities within the state, and to prevent breaches of trust in the administration thereof." There is no question but what this duty of the Attorney General extends to and involves the instant case, in that there is no other party and interest to represent the "aged men".

I have reviewed the question as to whether or not the Doctrine of Cy Pres should apply in this interest and it is my opinion that the Doctrine should not apply as respects the charity for the "aged men". It is my opinion that the alternative disposition of the property as specifically set forth by the testator in his will, is applicable in this case and that therefore the principle of cy pres does not apply.

"The presence of an alternative disposition of the property in the event that a particular purpose fails has been regarded as evidence of a particular intent, and the cy pres power will ordinarily not be applied in such a case."

See "The Cy Pres Doctrine in the United States" by Edith L. Fisch (1950) Section 5.02 (a) Page 151. See also Bogert, "The Law of Trusts and Trustees", Vol. 2A, Section 431, Page 318.

"Cy Pres will not be applied where the settler has made an express provision for an alternative disposition of his property, if the charity as he planned it proves impossible, inexpedient or impractical. He may prevent the need for the application of cy pres by making a gift over in such case to a private donee or to another charity."

In accord:

In re Harrington's Estate (1949), 36 N.W.(2d) 577, 151 Neb. 81

Gunderson v. Sage (1951), 225 P (2d) 136, 54 N.M. 347

In re Merrett's Will (1939), 16 N.Y.S. (2d) 1, 258 N.Y.App.Div.188

Penns. Co. for Bk. and Trusts v. Bd. Gov London Hosp.(1951) 83 A (2d)

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There is also a Pennsylvania district county case, which is in point with the case in question, which holds that the Doctrine of Cy Pres does not apply. See In Re McCann's Estate (1940). This case is cited at Page 318, Bogert, Law of Trusts and Trustees, in which it is stated as follows:

"Where a settler provides for a gift to a school district for library purposes, and provides that if the district refuses the gift or fails to maintain the library, the property is to go to the Town for park purposes, acceptance of the gift by the

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school district and operation of the library for a time, but later suspension of operation, do not give ground for applying cy pres, but rather for giving effect to the gift to the Town."

The above referred to alternative disposition of property eliminates one of the prime requisites, a general charitable intent, which is necessary for the application of the Doctrine of Cy Pres, in that the intent of the testator is applied to a specific charity in the alternative.

I find no cases in Maine which are on all fours with this case, nor do other counsel submitting briefs.

Bancroft v. Maine Sanitorium Assn., 119 Me. 56, is the closest and is, I believe, authority for holding that the cy pres doctrine should not be applied to a situation where the intent of the testator is specifically set out in the will. See also for application of cy pres in Maine:

Lynch v. South Congregational Parish, 109 Me. 32, 74 A.L.R. 674.
Snow and Clifford v. Bowdoin College, 133 Me. 195
Gilman v. Burnet, 116 Me. 382
First Universalist Society of Bath v. Swett, 148 Me. 142

There is the possibility of the further question as to the interest of the Attorney General in protecting the rights of the alternative charities. I think, however, that in this particular case no emphasis need to be placed on this question, in view of the fact that all of the alternative charities are represented by counsel and the briefs have been submitted in behalf of these charities.

I have further reviewed the briefs of counsel representing the alternative charities and I am satisfied that counsel for those charities have presented most favorably the position of their clients. I do not see that the Attorney General could add to the position of the alternative charities by submitting a brief or by intervening in this matter for the purpose of adding anything to the case, which has not already been presented in behalf of the alternative charities.

I have reported my conclusions to Justice Williamson and he suggests that you intervene and disclaim in order that the record may show that the Attorney General was a party.

I do, however, believe that in order that the record be complete on this matter, it would be well for the Attorney General to intervene in this matter, by petition to the Supreme Judicial Court in Equity sitting as a single justice, and disclaim any further interest in the matter.

If you are in sympathy with such procedure and desire that I proceed accordingly, will you so indicate on the copy attached hereto and return the same to me?

David B. Soule

Procedure approved!

James G. Frost

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