MAINE STATE LEGISLATURE

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Maine Dept. of Attorney General

The University of the State of Maine

Preliminary memorandum

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UNIVERSITY OF MAINE

PRELIMINARY MEMORANDUM

October 16, 1967

Re: The University of the State of Maine

FACTS:

It has been proposed that a University of the State of Maine be created. This entity would absorb, among other things, the several state teachers colleges. (Presumably, it would also absorb the State vocational technical institutions and possibly Maine Maritime Academy.)

The colleges would be incorporated into a state-wide university system. All the physical assets, real and personal, of the colleges, would be transferred to the University of the State of Maine. The University of the State of Maine would assume the care, control, and disposition of the property together with all the duties obligations and management of former affairs of the colleges.

The University of the State of Maine would also assume any obligations in connection with indebtedness for dormitories and dining facilities.

Employees of the colleges are also to have the option of continuing membership in the Maine State Employees Retirement System or of becoming members of the retirement system in effect at the University of the State of Maine.

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Provision will be made in the enabling legislation to insure that truste funds left to individual institutions being merged into the University of the State of Maine are to retain their identity as to use.

No attempt has been made in the proposed legislation to preserve the identity of the individual schools so as to preclude the lapse of gifts, bequests and devises, failure of trust provisions or reversion of realty conditionally granted.

Questions have been raised as to the effect of the proposed legislation in this regard and as to whether endowments, trusts and other non-expendable funds can be merged and pooled for the purpose of investment only.

Too, it must be determined whether such a merger would result in the reversion of real properties held by the State colleges and whether any endowments or trust funds would by their terms, lapse and result for the benefit of the settlors heirs or devisees.

LAW: (Present)

University of Maine

"Trustees; commissioner ex officio member

"As the State is providing large appropriations for the support of the University of Maine, the State should have a more direct connection with its affairs both financial and educational, therefore, the commissioner shall be ex officio a member of the Board of Trustees of the University of

Maine with all of the powers and privileges of members and that his membership on said board shall be coetaneous with his term of office as commissioner.

"The trustees of the University of Maine shall serve without pay but shall receive their actual traveling and other expenses incurred in the performance of their official duties. T. 20 M.R.S.A. § 2251

"<u>State agency</u>

"The University of Maine is declared to be an instrumentality and agency of the State for the purpose for which it was established and for which it has been managed and maintained under chapter 532 of the private and special laws of 1865 and supplementary legislation relating thereto. T. 20 M.R.S.A. § 2252

"<u>Trust funds - Pooling of trust funds</u>

"Endowment, trust and other nonexpendable funds for investment held by the trustees of the University of Maine, which have been and may be hereafter created and established by private donors for the benefit of said university or for any purpose related directly to the activities of said university, shall be preserved in their several separate identities in the books of account of the unviersity and administered according to the terms of the gift. The trustees of the University of Maine, for the purpose of investment only, and in order to afford to each fund the advantage of a diversification of risk wider than can be obtained by preserving the investment unity of each fund, and in the absence of any conditions or restrictions to the contrary made by the donor, may combine, pool and merge any such funds with other similar funds, and account for profits, losses and income to each individual fund in the proportion which its value bears to

the total value of the merged fund as of the date of merger. Whenever a new fund is so merged in an existing combination of funds for the purpose of determining the proportionate shares, the assets of such existing combination of funds shall be calculated at the then market value, and the future shares of each individual fund shall be determined in the proportion of its value to the whole of the new combination. T. 20 M.R.S.A. § 2253

"<u>Treasurer; Compensation</u>

"The trustees of the University of Maine shall appoint a full-time treasurer who shall give bond for the faithful performanace of his duties in such amount and with such conditions and sureties and shall receive such compensation as the said trsutees may determine. T. 20 M.R.S.A. § 2254

"<u>Powers and duties</u>

"The treasurer of the University of Maine shall receive and have custody of all moneys received for the University of Maine, and shall make all expenditures upon vouchers authenticated and approved in a manner designated by the trustees. The treasurer shall have no authority to contract debts and obligations, excepting loans in anticipation of assured revenues when approved by vote of the trustees, and other loans when directed by vote of the trustees and duly and properly authorized by the Governor and Council. T. 20 M.R.S.A. § 2255

"<u>Report</u>

"The treasurer shall prepare a complete report for the periods ending on June 30th and December 31st of each year and forward a copy of said semiannual report of the colleges to the Governor and Council and to the Board of Trustees. T. 20 M.R.S.A. § 2256.

State Colleges

"Five state colleges

"The Farmingto State College at Farmington, the Gorham State College at Gorham, the Washington State College at Machias, the Fort Kent State College at Fort Kent and the Aroostook State College at Presque Isle shall be conducted for the purposes and upon the principles set forth.

"1. Training of teachers. They shall be devoted to the training of teachers for their professional labors and such other post high school courses of study as may be designated by the state board. Section 2304 shall apply only to the regular teacher education courses, and the state board may in its discretion establish special tuition charges for other post high school work.

1963, c. 280, § 1.

"2. Course of study. The course of study shall be left to the discretion of this board.

"3. Art of school management. The art of school management, including the best methods of government and instruction, shall have a prominent place in the daily exercises of said schools.

"4. Free from denominational teaching s. Said schools, while teaching the fundamental truths of Christianity and the great principles of morality recognized by law, shall be free from all denominational teachings and open to persons of different religious connections on terms of equality.

"5. Register of Students. The presidents of state colleges, supported wholly or in part by the State, shall keep a permanent record containing the names of all students entering such schools or department, the dates of entering and leaving, their ages, the courses for which registered and all other information commonly recorded by institutions of higher learning. T. 20 M.R.S.A. § 2301

"Courses of study

"The courses of study at the state colleges shall not exceed 5 years in length with suitable vacations, and, with the terms of admission, shall be arranged by the commissioner. The board may arrange for courses of study for such students as elect to pursue the same. T. 20 M.R.S.A. § 2302

"§ 2303. Diplomas and degrees

"Any student, who completes a course of study prescribed at institutions of higher education under the control of the state board and otherwise complies with the regulations of the college shall receive a diploma certifying the same.

"The board may confer appropriate degrees based upon 2, 4 or 5 years of instruction with such equipment and faculties as will safeguard the integrity of the degrees conferred.

"Degrees beyond the bachelor's degree may be granted only by colleges accredited by the New England Association of Colleges and Secondary Schools. T. 20 M.R.S.A. § 2303.

"Applicants for admission; qualifications; tuition

"Applicants for admission to teacher training courses in the state colleges shall signify thei intention to become teachers. The board shall charge $200 for tuition to nonresidents of the State and $100 for tuition to residents of the State. It may permit

not exceeding 10% of the enrollment of residents to pay their tuition charges at such future dates as it may determine. T. 20 M.R.S.A. § 2304.

"Supervision

"The state colleges shall be under the direction of the state board. Said board shall have charge of the general interests of said colleges; shall see that the affairs thereof are conducted as required by law and by such bylaws as the board adopts; employ teachers and lecturers for the same; and shall have authority, by and with the consent of the Governor and Council, to dispose of and acquire property for the improvement of the plants and grounds; and biennially render to the Governor and Council an accurate account of the receipts and expenditures for the biennium preceding, including same as a part of the commissioner's report. The clerical and staff services for this board shall be performed by the employees of the department under the direction of the commissioner. The head of a state college shall be designated as a president. T. 20 M.R.S.A. § 2305

"State scholarships

"The state board shall develop and administer a plan for awarding scholarships to selected students enrolled in the teachers training courses of the state colleges of the State who have evidenced qualifications of general worth and professional promise as potential teachers, and who have demonstrated ability and willingness to support their educational expenses, but who may be in need of partial financial assistance with respect to their education costs. Each scholarship shall not exceed $300 in any one year. The board may, at its discretion, reduce the amount of any particular award, when such a reduction would better serve the need of any otherwise eligible recipient. Amounts available for such scholarships shall be distributed annually by the board to the 5 state colleges in the following manner:

"1. $1,500 or 5 full scholarships per school. $1,500, or the equivalent of 5 full scholarships, to each college;

"2. Allocation of balance. Allocation of the balance of the scholarship fund to the 5 state colleges in the same proportions as the proportion of each institution's enrollment in teacher training courses bears to the total student teacher training enrollment of the 5 institutions for the fall semester of the current year. (1961, c. 387, § 9; 1965, c. 276, § 7)" T. 20 M.R.S.A. § 2306.

Pertinent provisions proposed at the regular session of the 103rd Legislature to amend Title 20 M.R.S.A.:

"At the last regular legislative session several bills were introduced to create a central statewide university system.

"Those bills would have provided for the creation of 'The University of the State of Maine' and for its establishment as a State agency. Provisions of laws concerning the University of Maine were to be amended to provide for control of its funds and facilities by 'The University of the State of Maine'.

"The legislation would have created a Board of Trustees of 'The University of the State of Maine' and would have provided a new administrative hierarchy. Too, provision was made spelling out the duties of the Board of Trustees.

"An important provision of the bill was the inclusion within 'The University of the State of Maine' of the State colleges, vocational technical institutes and the Maine Maritime Academy. Provision was also made for the assumption of assets and liabilities of the merged entities. No provision was made as to the use or disposition of trust, bequest, or acquisition of conditionally owned realty."

The history of the University of Maine as it is now created is important since a determination of its legal structure is essential to the creation of new entities within it.

"1. History of University of Maine

"Contrast now the history and the legal statutes of the University of Maine. By an act approved July 2, 1862, c. 130, 12 Stat. 503, Congress donated a certain quantity of public lands to such states as might provide colleges for the benefit of agricultural and the mechanic arts, the money to be received from the sales thereof to be invested as a perpetual fund, and the income thereof to be appropriated by each state acting as trustee to the endowment, support, and maintenance of at least one such college. Acting under this offer from the general government, the state of Maine, by chapter 532, p. 529, Priv. & Sp. Laws 1865, created certain persons therein named a body politic and corporate by the name of the 'Trustees of the State College of Agricultural and Mechanic Arts,' with power to establish and maintain such a college as was authorized by the act of July 2, 1862, to purchase and hold real estate, and through its trustees to have the general management of the institution. A separate and distinct corporation was established, and the separation between the college and the state thus created by the charter has always been observed and maintained. By chapter 59, p. 41, the town of Orono, and by chapter 66, p. 44, Priv. & Sp. Laws 1866, the city of Old Town, were authorized to grant aid to the college. No appropriation was made by the state to the institution for 10 years after its incorporation but by chapter 100, p. 38, Resolves 1875, the sum of $10,500 was donated on condition that the trustees should 'not under any circumstances contract any further debts in behalf of said college.' Annual appropriations have been made since that time, with the exception of 1879, and in varying amounts, the

appropriations for 1880 and 1881 being $3,000 and $3,500 respectively, and for 1907 and 1908 $110,000 each. Such gifts, however, cannot change the character or legal status of the institution, any more than smaller gifts to academies and private hospitals could make them a part of the sovereign state. In 1897 the name of the corporation was changed from the 'Trustees of the State College of Agriculture and Mechanic Arts' to the 'University of Maine,' but it was expressly provided that 'the said University of Maine shall have all the rights, powers, privileges, property, duties and responsibilites, which belong or have belonged to the said trustees.' Chapter 551, p. 947, Priv. & Sp. Laws 1897.

"This change of name did not change the status of the institution, or work its adoption as a part of the state, or make its property the property of the state. It remained the same distinct corporation as before.

"Nowhere in the Revised Statutes is the University of Maine mentioned except in connection with the compensation of its trustees (Rev. St. c. 116, § 12), and with the duties imposed upon the Experiment Station, which was established by chapter 119, p. 88, Pub. Laws 1887. It is nowhere recognized as a part of the educational system of the state. Even when power was conferred upon the trustees by chapter 393, p. 581, Priv. & Sp. Laws 1903, to guarantee loans for the construction of fraternity houses, it was expressly provided that 'nothing herein contained shall be construed as binding the state of Maine to pay said loans, or any of them, or any part thereof, or any interest thereon; and provided further that no appropriation therefor shall be hereafter asked of the state of Maine.' No language could more plainly recognize the distinction between the corporation and the state. The legal status of this institution has been and is the same as that of the other colleges in Maine,

chartered by Massachusetts or by Maine, Bowdoin College, Colby College, and Bates College. They are each doing excellent work along the lines of higher education, but not one of them is a component part of the state's educational system." Orono v. Sigma Alpha Epsilon Society (1909) 105 Me. 214, 74 A. 19.

(Though the University of Maine is chartered by the State and fostered by it, it is not a branch of the State's educational system, nor an agency or instrumentality of the state, but a corporation and legal entity wholly separate from the State. Inhabitants of Orono v. SAE Society (1909) 105 Me. 214.)

For the same reasons, the history of the state colleges is important since they are to be for all practical purposes, dissolved and merged into the University of Maine.

> "The state maintains at the present time four normal schools, one each at Farmington, Castine, Gorham, and Presque Isle. This system originated in 1863, when a public act was passed providing for the appointment of commissioners to establish two normal schools. Pub. Laws. 1863, p. 155, c. 210. This act also prescribed the qualifications for admission, the principles upon which the schools should be conducted, the course of study, and made the State Superintendent their superintendent under the approval of the Governor and Council. Four half townships of wild land were appropriated for their benefit, the proceeds from the sale to be deposited in the state treasury to the credit of the normal school fund. In this way the state itself took on a new form of public service, and the educational system thus adopted became in fact an instrumentality of the state. No corporation was created, no separate entity was brought into existence, but the state simply put its own

beneficent hand in a new direction, and the title to the property was taken in the name of the state. Priv. & Sp. Laws 1867, p. 306, c. 372; Resolves 1871, p. 206, c. 281. In the Revision of 1871 the normal school system takes its place alongside the common school and free high school system. Rev. St. 1871, c. 11 §§ 83-87. In 1873 these schools were placed under the direction of a board of trustees, the Governor and Superintendent of Schools to be members ex officio, and the others to be appointed by the Governor and Council. In 1878 the Gorham Normal School was established (Pub. Laws 1878, p. 37, c. 44), and in 1903 the normal school at Presque Isle (Priv. & Sp. Laws 1903, p. 363, c. 223). The entire system is now regulated under Rev. St. 1903, c. 15, §§ 109-115, and is an apt illustration of what is known as an instrumentality or agency of the State." Orono v. Sigma Alpha Epsilon Society (1909) 105 Me. 214, 74 A.19.

The "normal" schools were formerly called teachers colleges and are now only called colleges. At the present time, there are five (5) such colleges.

Analysis of the Problem:

Since each of the colleges involved in a merger into the University of the State of Maine may be the beneficiary of trusts and endowments, bequests or devises, and may be holding property subject to certain conditions, it is necessary to examine the legal implication of such a merger.

1. What are the general legal implications of a merger?

A state college or university is generally subject to dissolution by act of the legislature.

> "State universities and colleges, being public corporations, are subject to dissolution by act of the legislature. A statute creating a state board as a corporate body and conferring on it the control and management of a state college leaves the latter without any corporate function to perform, and thus in legal contemplation destroys the corporate existence of such college." 14 C.J.S., Colleges and Universities, § 31. See also: Harris v. Louisiana State Normal College, 134 So. 308 (La. 1931)

It has also been held that it is not unconstitutional to affect such a merger since the dissolution and transfer is not precluded by the contract clause of the federal and state constitutions.

> " . . . The contractual clause of the federal and state constitutions has no application to obligations on the part of the State as to the location, conduct, or management of its own institutions." Stevenson v. Thames, Ala. (1920), 86 So. 77. (Emphasis supplied)

Generally where an incorporated educational institution is dissolved or ceases to exist, property or funds donated or contributed revert to, and are distributed among, the donors or contributors. (See: 14 C.J.S., Colleges and Universities, § 36.)

Too, a merger or dissolution of a university may also operate under the provisions of a deed, bequest or devise, or conditional provision to work a reversion of the real property, a lapse of the bequest or devise and a failure of the trust with the possibility of a resulting trust for the benefit of settlors heirs.

A college or university may hold absolute or conditional title to property in accordance with the circumstances involved, and title to property of a state institution is sometimes regarded as vested in the state.

> "In determining the title of an incorporated college or university to real property held by it, reference must be had not only to the terms of the conveyance, but also to the charter of the institution and pertinent statute, as the property is held under the conveyance and charter as if they constituted but one instrument, . . . Conditions attached to a grant or donation should be observed by the college or university, are ordinarily enforceable where the instrument is supported by sufficient consideration, although not where in violation of law, and the absence of waiver breach of a valid condition subsequent may afford ground for reversion of the property to the donor or his representatives." 14 C.J.S., Colleges and Universities, § 13.

The control and disposition of college or university funds ordinarily rests with the trustees of a private institution or with the Board of Education in the case of a public institution and must be in accordance with applicable provisions of controlling grants, charter, statute and contract. (See: 14 C.J.S., Colleges and Universities, § 14.)

Where the trust given is to a specific college, the state university of which such college is a part has no claim on the fund. (See: In re Opinion of the Justices (N.H.) 128 A. 812, and Bowman v. Albuquerque (N. Mex.) 139 P. 148.)

2. What are the legal implications of a merger upon trusts or endowments created by will or inter vivos instruments?

A. What is the nature of an educational trust?

It is clearly established that trustees to advance education are charitable in nature. (See: Bogert, Trusts and Trustees, § 375).

An educational trust may be general or specific. A general education trust usually encompasses a broad class, does not define in any manner the means by which the trustee is to employ to bring about the education results and is usually only to benefit "education".

Specific trusts are usually specific as to the field of education or a trust may be specific in that it creates a scholarship or aids a particular institution.

Since some of the trust provisions involving the various state colleges may be specific in nature, it must be determined what course of action to follow to preserve the trust assets.

B. Can the Legislature alter the provisions of an educational trust?

Generally speaking a legislature has no power to alter the purpose of a charitable trust by statute. (Bogert on Trusts, § 395)

> "It is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of cy pres." Opinion of the Justices, (Mass. 1921) 131 N.E. 31.

A Legislature may enact a law intended to effect the methods of administration of charitable trusts, but a question may arise as to the constitutionality of such legislation.

There is no doubt of the legality of statutes which apply to all trusts and are intended to increase the efficiency of trust administration and insure that the public will obtain the benefits prescribed by the settlor. For example, a statute dealing with the powers and duties of the Attorney General with regard to the supervision and enforcement of trusts would be such a provision. (Bogert on Trusts § 395) See also Stanley v. Colt, 1866, 72 U.S. 119 and Delaware Land Co. v. First and Central Presbyterian Church, Del. 1929, 147 A. 165.

When it comes to a statute affecting the administration of a charitable trust, there is no doubt as to the power of the legislature to adopt a law regarding the methods of operation of a charitable trust established by the <u>statute</u>, in which the <u>trustee is the state</u> or an officer or agency thereof. (Bogert on Trusts § 395.)

Sometimes legislatures have tried to change by statute the methods of administration of a charity as written down in the trust instrument, or in the charter of a charitable corporation. Their acts have been held unconstitutional as impairing the obligation of a contract. The duty of the trustee to carry out the trust as set forth by the settlor in his trust instrument has been treated as a relationship of the type protected under the impairment clause. For example, acts altering the method of appointing school trustees; terminating a particular charitable trust or authorizing a trustee to convey real property have been held to be unconstitutional. (See: Bogert on Trusts § 395.)

In the case of Board of Regents of the University of Maryland, Md. 1955, 112 A.2d 678, the Court reviewed the question of whether an act of the legislature amending a corporate charter was unconstitutional. The act undertook to amend the charter of the corporation operating under the name of the "Trustees of the Endowment Fund of the University of Maryland" to provide that thereafter its members should be the Regents of the University of Maryland and that all the rights, powers, duties, obligations and functions of its members should be conferred on the Regents.

The corporation contended that the transfer of the entire power of management and control is an impairment of the obligation of contract.

The Court held the act unconstitutional saying:

> "The nub of the controversy is the character of the alteration.
>
> "In the instant case, we think the complete transfer of management and control over the Endowment Fund to the Board of Regents is arbitrary and unreasonable. It defeats the very purpose for which the corporation was formed, for there would have been no need whatever for a separate corporation to hold, invest, control and distribute the fund, unless for the purpose of limiting the control of the Board of Regents. The removal of the limitation is, in effect a nullification of the charter without any justification arising out of the police power or an existing proprietary interest in the State." 112 A.2d at page 686.

Clearly, an alteration of a trust is forbidden by the contract clause of the Constitution. See also: Trustees of New Gloucester School Fund v. Bradbury, 1834, 11 Me. 118.

The alternatives to a legislative enactment concerning trusts are distribution of the assets to donors or reversioners or in an appropriate case, to another entity under the cy pres doctrine. Cy pres involves court decision in individual cases of trusts or bequests.

If the Legislature cannot by enactment solve the problems relating to trusts which are created by a merger, assuming a

complete merger of the institutions, what alternative may be utilized?

C. Can the doctrine of cy pres be used after merger to preserve trust assets by operating to transfer the assets to a successor entity?

The question really is whether the doctrine of cy pres can be applied when monies have been left to a specifically named educational institution for a specific purpose.

The meaning of the doctrine of cy pres has been well stated in the case of Pierce v. How, 1957, 53 Me. 180.

> "The doctrine of cy pres is the principle that equity will when a charity is originally or later becomes impossible or impractical of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies."

> "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." Restatement of the Law, Trusts, § 399, page 1208.

> 'Where property is given in trust for a particular charitable purpose, the trust will not ordinarily fail even though it is impossible to carry out the particular

purpose. In such a case the court will
ordinarily direct that the property be
applied to a similar charitable purpose.
The theory is that the testator would
have desired that the property be so
applied if he had realized that it would
be impossible to carry out the particular
purpose. The theory is that although
the testator intended that the property
should be applied to a particular charitable
purpose named by him, yet he had a more
general intention to devote the property
to charitable purposes. The settlor would
presumably have desired that the property
should be applied to purposes as nearly as
may be like the purposes stated by him rather than
that the trust should fail altogether. The
principle under which the courts thus attempt
to save a charitable trust from failure by carry-
ing out the more general purpose of the testator and
carrying out approximately though not exactly his
more specific intent is called the doctrine of cy
pres. Scott on Trusts, Vol. 3, § 399.'

'Cy pres means 'as near to,' and the doctrine
is one of construction, the reason or basis
thereof being to permit the main purpose of
the donor of a charitable trust to be carried
as nearly as may be where it cannot be done
to the letter." 14 C.J.S., Charities, § 52,
c., page 514.'" Pierce v. How, supra.

'Our own court has in many instances expounded
the doctrine.

"In the administration of trusts under the
general equity jurisdiction of the court, it
is an old and familiar principle that if the
original purpose of a public charity fail
and there are no objects to which, under the
specific terms of the trust the funds can be
applied, the court may determine whether, in
the event that has happened it was not the
probable intention of the donor that his gift

> should be applied to some kindred charity as nearly like the original purpose as possible. This is commonly known as the doctrine of cy pres, which, in its last analysis is found to be a simple rule of judicial construction designed to aid the court to ascertain and carry out, as nearly as may be, the true intention of the donor. Jackson v. Phillips, 14 Allen, 539; 2 Perry on Tr. §§ 717-729, and cases cited. But if it appears that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift cy pres the original purpose. 'There is a class of cases,' says Mr. Perry, 'where the gift is distinctly limited to particular persons or establishments, and upon a change of circumstances the doctrine of cy pres does not apply. Doyle v. Whalen, 87 Me. 414, at 426; 32 A. 1022.'" Pierce v. How, supra.

The Courts which have applied jurisdictional cy pres have usually required that it appear that the settlor had a general or broad charitable intent, that is, that he showed that he intended to aid charity in general or some particular type of charity in general; and that cy pres cannot be implied when the donor had a special or particular intent, that is, where he expressed a direct charitable project should be aided and nothing else. (See: Bogert on Trusts, § 435.)

> "For example, a settlor who expressed an intent to aid education might have a general intent to advance that cause , or he might name as his objective assistance to the students in the high school in his home town with no thought of rendering help otherwise or elsewhere." Bogert on Trusts § 47.

There are four prerequisites in the application of the Cy-Pres doctrine:

(1) The Court must find that the gift creates a public trust;

(2) The Court must find that the gift creates a valid charitable trust;

(3) It must be established that it is to some degree impossible or impractical to carry out the specific purpose and

(4) There must be a general charitable intent.

(See First Universalist Society of Bath v. Swett, 148 Me. 142 and Pierce v. How, 153 Me. 180).

It has been held that legislation which abolishes school districts and makes the execution of a trust impossible justifies the use of cy pres. (See Bogert on Trusts, § 438 citing Attorney General v. Briggs, (Mass.) 1895, 42 N.E. 118 and Drury v. Sleeper (N.H.) 1929, 146 A. 645.)

In most cases involving trusts for educational purposes the first two prerequisites are fulfilled. In the case of a merger of a beneficiary institution the third prerequisite would be fulfilled.

In many cases, however, involving educational trust, the fourth prerequisite for the application of the doctrine of cy pres, that of general charitable intent, is more difficult of fulfillment.

The question of whether a testator or settlor in making a charitable bequest has evinced a general charitable intent is a question of interpretation of the particular will or instrument under construction. (See First Universalist Society of Bath v. Swett, supra.)

Whether or not the testator or settlor evinced a general charitable intent or, as otherwise said, evinced an intent to devote the subject matter of a gift to charitable purposes generally, is a question of interpreting the instrument. Being a question of interpretation the intent must be discovered within the four corners of the instrument being construed, read in the light of the surrounding applicable circumstances, or as said in Lynch v. Congregational Parish, 109 Me. 32, "'in the light of existing conditions.'" (See: First Universalist Society of Bath v. Swett, et al., supra.)

If there is a proper showing of general charitable intent in an educational trust, a Court, utilizing the doctrine of cy pres, will order the trust proceeds paid over to a successor institution.

If there is no showing of general charitable intent cy pres would not be ordered and absent an alternative disposition in the instrument there is a resulting trust for distribution to heirs of the decedent.

For example, a provision providing monies for a specific educational institution for a specific charitable purpose would not indicate a general intent to benefit education as a whole.

It can be seen, therefore, that the application of the cy pres doctrine, is dependent upon the language of the instrument creating the trust. Although the Court in most cases would apply cy pres its application is not sure.

The above comments apply equally to trusts created by will or by intervivos instrument.

In a case of an outright bequest by a will similar rules of construction would apply.

D. What are the implications of a merger upon bequests by will?

A case similar to that which would arise under facts similar to those here has been considered by the Surrogates Court of the State of New York.

In the case of In re Dunbar's Will, 1964, 247 N.Y.S. 2d 512, the testatrix left monies to the "University of Buffalo". Subsequent to the execution of the testatrix' will the University of Buffalo merged with and became part of the State University of New York.

The Court said that in view of the fact that by contract and statute the University of Buffalo absorbed and consolidated with

the state university, parties would deem to have intended that future gifts, as well as vested gifts, were to become part of the assets transferred to the state university, and therefore a bequest to University of Buffalo would be directed to be paid to the University of the State of New York upon the condition that the University of the State of New York accept the gift solely for use and benefit of the University of the State of New York at Buffalo for endowment fund and such request would not be considered payable to the University of Buffalo Foundation, Inc. cf. Brooks v. Belfast, 1897, 90 Me. 318.

E. <u>What are the legal implications of a merger upon real property held by the institutions?</u>

A typical problem concerning real property held by a state college is best exemplified by the language of a grant of property from the Town of Gorham (Gorham Seminary) to the State of Maine. This grant, found at Book 455, pages 55-59 in the Cumberland County Registry of Deeds, grants certain property of the State of Maine contains the following condition:

> "Provided nevertheless, and it is made a condition hereof, that should grantee cease to use and apply the property conveyed by this deed for the purposes of said Normal School according to the true meaning and intent of said act establishing the same, said property shall revert to said Seminary, its successors or assigns."

Clearly, any use contrary to the act establishing Gorham State College would work a reversion of the property. A retention of Gorham State College as an entity, with possible amendment of the original act would probably prevent such a reversion.

There is no possibility of change of this language other than by agreement between grantor and grantee or legal action to clear title since any legislation affecting the grant would be unconstitutional under the impairment clause of the Maine Constitution, Art. I, § 11.

3. Can the above problems be avoided with properly drafted legislation designed to effect the desired purpose?

A. Analysis of the provisions of other states.

1. Legal basis of central agencies of coordination

There are three (3) types of central agencies of coordination of higher education. Those agencies are voluntary agencies; governing agencies and coordinating agencies.

Voluntary Agencies

The three voluntary systems fall into two types, one represented by the Ohio Inter-University Council and the Indiana Voluntary conference and the other by the California Liasion Committee.

The Ohio State University and the other University in Ohio on January 17, 1939 adopted the following resolution:

> "There be and is hereby established an Inter-University Council, as an advisory and consulting body, to consist of one member of the Board of Trustees, the President and the Business Manager of the Ohio University, Miami University, Ohio State University, Kent State University and Bowling Green State University to meet regularly at least four times a year; the purpose of said Council being to consider questions of common interest and concern, and to formulate, in the interest of efficiency and economy, a coordinated program of nurture and support which will strengthen each of the five state universities within the limitations of its own best competence and reasonable public demand. (Wilberforce University, later named Central State College, became a member of the Inter-University Council on November 8, 1943.)"

A further resolution was adopted on November 26, 1940 and this resolution attempted to allocate among the institutions certain functions and programs. This resolution stated in part:

> "1. The Ohio State University with its existing plant, facilities, and specifically trained personnel is the logical institution among the five state universities for the development and prosecution of graduate work at the Ph.D. level; for specialized technological training; and for professional training such as Law, Medicine, Dentistry, Veterinary Medicine, Pharmacy, etc. Accordingly, the Ohio State University will place its developmental emphasis in these areas.

"2. The other state universities will find their fields for constructive expansion, in response to public demand, in liberal arts (including finearts), education, business and commerce through undergraduate curricula leading to the Bachelor's degree and in graduate work for the Master's degree."

In 1951 Indiana's two Universities and two State Teachers Colleges at the request of the State Legislature in a rider to the Appropriations Bill for higher education also formed a conference of institutional representatives. The purpose, organization and membership have been not as well established in writing as those in the Ohio Council, but the conference aims at a similar goals.

The Ohio and Indiana systems have as their primary tasks the reviewing of budget requests before they are submitted to the Legislature. Under board systems the institutions also exchange data about each other's programs.

Although the Ohio Council can be considered more voluntary in nature than the legislatively created Indiana system, both have semi-official status with their state governments. For example, when reviewing the institutional budgets and making appropriations, the state budget officers and the legislators have followed the appropriated formulas agreed upon by the educators.

In 1945 the Regent's of the University of California which

is itself a unified system consisting of eight campuses and the state board of education, which governs the state colleges' agreed on a central agency for coordination which has become known as the Liasion Committee.

Unlike the Ohio and Indiana systems coordination in California emphasizes state-wide planning and programming. No effort is made to cooperate on appropriation requests. The concentration has been on the delineation of the functions as between the university and state colleges, the development of graduate and special-degree programs, the planning of new institutions and campuses and evaluation of current educational programming.

Governing Agencies

Governing agencies are legally established for formal central agencies of coordination of higher education. These include the governing agencies of Iowa, Oregon, Georgia, New York and the state college system of California together with the coordinating agencies of Oklahoma, New Mexico, Wisconsin and Texas. The first type (Iowa, Georgia, et als) usually supplants individual institutional governing boards while the second (Oklahoma, New Mexico, et als) is superimposed over existing boards.

The Iowa system, based on a single board for its three institutions was established in 1906; the California State College system came into existence in 1920; the Oregon and Georgia systems came into existence in 1931 and 1932; and New York, was the most recently established in 1946.

The law establishing a single board system usually assigned to the new agencies all powers and duties formerly held by the boards for the individual institutions. The Georgia and Oregon laws are the most typical and perhaps the best drafted.

The Georgia Constitution states:

> "There shall be a Board of Regents of the University System and the government, control and management of the University System of Georgia and all of its institutions in said system shall be vested in said Board of Regents of the University System of Georgia."

The enabling legislation creating the Georgia Board states:

> "The powers, rights, privileges and duties originally conferred upon and exercised by the Board of Trustees of the University of Georgia are vested in the Board of Regents . . . as successors to said Board of Trustees."

The Oregon law makes no mention of previous boards but states:

> "There is created a department of the government of the State of Oregon to be known as the Department of Higher Education. This Department shall be conducted

> under the control of a board of nine directors, to be known as the State Board of Higher Education, which board is hereby created."

The powers and duties assigned by law to the governing agencies specifically include the management and control of finances and property, conferring of degrees, faculty and personnel matters, and courses of instruction. In addition, the legislation may contain some provision for coordinating the system. The stated aim of the statutes creating the various government agencies is the establishment of a unified system of higher education.

Coordinating Agencies

Coordinating agencies generally have a single function; their purpose is to establish policies which will create a new system out of the independent colleges and universities. The first of these coordinating agencies to be established in this country was placed over the existing boards of the Oklahoma Higher Education Institution in 1941. The Oklahoma constitution states in part:

> "All institutions of higher education supported wholly or in part by direct legislative appropriations shall be integral parts of a unified system to be known as 'The Oklahoma State System of Higher Education . . . . . The Regents shall constitute a co-ordinating board of control . . .

with the following specific powers: (1) it shall prescribe standards of higher education applicable to each institution; (2) it shall determine the functions and courses of study in each of the institutions to conform to the standards prescribed; (3) it shall grant degrees and other forms of academic recognition for completion of the prescribed courses in all of such institutions; (4) it shall recommend to the State Legislature the budget allocations to each institution; and (5) it shall have the power to recommend to the Legislature proposed fees for all of such institutions, and any such fee shall be effective only within the limits prescribed by the Legislature."

The powers of the institutional boards are preserved by the following statute in Oklahoma:

"Except to the extent herein granted, and except as specified in Article XIII-A, of the Constitution of the State of Oklahoma, the various boards of regents or boards of control, now in existence or hereafter created, of the constituent institutions of higher education, shall have custody and control of the books, records, buildings and physical properties of said institutions, the supervision, management, control and the power to make rules and regulations governing such institutions, and shall fix the salaries of, and appoint or hire all necessary officers, supervisors, instructors, and employees for the same."

In 1951 New Mexico became the second state to establish a coordinating agency. It is interesting to note that there are only a few short paragraphs in the New Mexico statutes devoted to this agency, while the Oklahoma law contains much detail, in fact, over 200 pages. The New Mexico statutes provide:

"There is hereby created a board of educational finance whose function shall be to deal with the problems of finance of those educational institutions designated in sections 11 and 12 of article XII of the Constitution of the State of New Mexico. The Board shall be concerned with the adequate financing of each of said institutions and with the equitable distribution of available funds among them. The Board shall receive, adjust and approve the budgets submitted by the several institutions prior to the submission of said budgets to the budget officers of the state and shall exercise such other powers as may hereafter be granted it in law."

Wisconsin established a coordination committee for higher education in 1955. Although the powers of the committee are carefully set forth in the law, the last provision quoted below sets forth the spheres of activity of the committee and of the boards of regents.

"The coordinating committee shall have final authority in determining the single, consolidated, biennial budget requests to be presented to the governor and shall have full responsibility for such presentation. The over-all educational programs offered in the state-supported institutions of higher learning shall be those determined by the coordinating committee and facilities and personnel shall be utilized in accordance with the coordinated plan adopted by the committee. The boards of regents in the discharge of their duties shall observe all decisions of the coordinating committee made pursuant to this section. Except as expressly provided in this section, nothing herein shall be construed to

deprive the board of regents of the university and the board of regents of the state colleges of any of the duties and powers conferred upon them by law in the government of the institutions under their control."

Texas also established a coordinating committee for higher education in 1955.

The titles of the agencies vary widely among the states and are as follows:

Coordinating agencies
- Board of Educational Finance (New Mexico)
- Coordinating Committee for Higher Education (Wisconsin)
- Oklahoma State Regents for Higher Education
- Texas Commission on Higher Education

Governing Agencies
- Board of Regents of the University System of Georgia
- Oregon State Board of Higher Education
- Iowa State Board of Regents
- State Board of Education (California)
- Trustees of the State University of New York

In view of the legal problems described above, it is recommended that a governing agency type of system be utilized in Maine. This system would closely follow previously suggested legislation but would have the effect of preserving individual college agencies to an extent necessary to prevent lapses of bequests or devises, failure of trusts and reversion of realty.

2. <u>Recommended provisions for inclusion in a Maine statute creating central agency for higher education.</u>

1. Create central state university

   a. New entity or change name and purposes of existing entity.

   b. Entity should be designated as a state agency.

2. Provide for composition of university system-branches

3. List branches of university

4. Provide for governing body of university and officers together with provisions for administration

5. Provide for duties of governing body and officers

6. Provide for transfer of assets and for any duties respecting assets.

7. Provide for assumption of indebtedness

8. Provide for preservation of identity of individual institutions incorporated in central university

   a. Provide that acts and statutes relative to institutions if not inconsistent are of force and effect. Show intent not to repeal any of laws creating institutions of defining functions.

      1. Broaden functions and purposes of institutions.

9. Provide for use of funds of particular institutions

10. Provide for non-lapse of trust funds and restriction as to use of trust funds for institution intended to be benefited.

11. Provide for reports

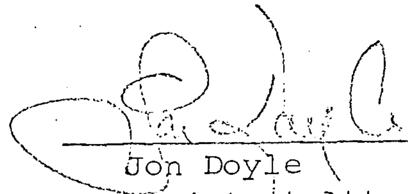
12. Provide for administration, assumption and initiation of scholarship programs

13. Provide for investment of endowment and trust funds

14. Provide for employment benefits of employees

15. Provide system of legislative appropriations

16. Provisions as to litigation and suits



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