

The Amicus Brief, Trustees of the Presbytery of Philadelphia v. Provident Mutual Life Insurance Company, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the Commonwealth Court of Pennsylvania on October 2, 2000.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1114 CD 2000

TRUSTEES OF THE PRESBYTERY OF PHILADELPHIA,

Appellant,

v.

PROVIDENT MUTUAL LIFE INSURANCE COMPANY,

Appellee.

BRIEF FOR AMICUS CURIAE CLIFTON KIRKPATRICK AS THE
STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.)
GENERAL ASSEMBLY IN SUPPORT OF APPELLANT

Appeal from the Order entered April 14, 2000 by the
Honorable Esther R. Sylvester, Philadelphia Court
of Common Pleas, No. 1604 April Term, 1995

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STATEMENT OF INTEREST

The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States with approximately 2,600,000 members in 11,216 congregations organized into 174 presbyteries under the jurisdiction of 16 synods. It has fourteen presbyteries containing 1,090 congregations located within Pennsylvania. Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.).

The General Assembly does not speak for all Presbyterians, nor are its deliverances and policy statements binding upon the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretative body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

The Presbyterian Church (U.S.A.) has a vital interest in seeing that courts faithfully uphold the intent of charitable donors. Throughout its history, the Presbyterian theology of stewardship has both undergirded the Church's approach to charitable donations and created an expectation in individual Presbyterians of how the Church and its related entities will utilize such contributions. Donors give voluntarily, generously, and sacrificially of their wealth with the expectation that Presbyterian entities will carefully employ those gifts to advance the purposes for which they were given. Violating or disregarding that sacred trust endangers the indispensable basis of charitable giving in the Church and, more broadly, endangers all contributions made to charitable institutions.

The evidence in this case establishes that such a trust has indeed been violated. Donations clearly intended to underwrite low-cost insurance for the families of deceased Presbyterian ministers have recently been merged with a for-profit insurance company's general fund, vitiating the charitable purpose of the original donors. The Stated Clerk urges this Court to uphold and apply the intent of those original donors, ensuring that their sacrificial gifts are used charitably and not merely to generate commercial gain.

STATEMENT OF JURISDICTION & STATEMENT OF FACTS

Amicus adopts the Statement of Jurisdiction and Statement of the Case set forth in Appellant's Brief, pages 1 and 5-10, respectively.

INTRODUCTION

The issue presented by this case is straightforward. This Court must ultimately determine whether funds donated by Presbyterian members and congregations for the express purpose of assisting widows, orphans, and families of Presbyterian ministers should continue to be utilized for that charitable purpose, or whether instead those donated funds may be commandeered by a commercial insurance company for company and stockholder gain. Ignoring or explaining away compelling evidence (both direct and circumstantial) of donor intent, the Court of Common Pleas ruled in favor of the insurance company. In wholly disregarding the original donors' intentions regarding the manner in which these funds should be employed, the decision below strikes at the very heart of how churches and synagogues fund their religious and charitable activities.

This case involves funds donated by Presbyterians in England, Scotland, Ireland and Pennsylvania in pre-Revolutionary War times. The undisputed purpose of these donations was to provide support for the families of deceased Presbyterian ministers who had bravely carried the Gospel to the New World. Until 1994, these funds were managed by various insurance companies for the benefit of ministers' families so that insurance was available to them at the lowest possible premiums.

The last company to exercise its stewardship over these assets was Covenant Life Insurance Company ("Covenant"). In 1994, Provident Mutual Life Insurance Company ("Provident"), a for-profit insurance company, acquired the assets of Covenant and ceased to provide special services and benefits to the religious community. Provident has now commingled the donations of early Presbyterians with all other funds in its coffers, with the result that the donated funds are now simply part of the working capital of a commercial enterprise with no ties of any kind to a religious entity and devoid of any purpose remotely compatible with the intentions of the original donors.

The Synod of New York and Philadelphia sponsored and directed the solicitation of the original donations. Invoking the doctrine of cy pres, the Presbytery of Philadelphia ("the Presbytery") petitioned the court below to employ its equitable powers and rule that the original donors' intent would be best served by awarding the Presbytery control over the donated funds so that the work of providing support to the families of ministers can continue. Pennsylvania's cy pres statute expressly allows for such a remedy, providing that if "the charitable purpose for which an interest shall be conveyed" "shall be or become indefinite or impossible or impractical of fulfillment," the court may "order an administration or distribution of the interest for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor." 20 Pa. C.S.A. § 6110(a). Yet despite clear Pennsylvania law requiring the court to administer the funds "in a manner as nearly as possible to fulfill the intention of the conveyor," the lower court instead allowed the donations to become merged with the general operating capital of Provident, negating their charitable purpose.

Such an outcome not only violates the intent of the original donors, it also threatens the basis of trust upon which charitable giving in the Church – indeed, charitable giving in all religious bodies – depends. Unless every effort – by both the donee and the courts – is made to honor donor intent, those contemplating long-term gifts to their religious communities will rightly fear that their contributions may be diverted to noncharitable, even commercial, ends. The court below failed to comply with its equitable duty to uphold donor intent, thus undermining the foundation of charitable giving. The decision below should be reversed.

ARGUMENT

I. THE PRESBYTERIAN CHURCH HAS LONG TAUGHT THAT RESPECTING DONOR INTENT IS A SACRED STEWARDSHIP.

A general understanding of the primacy of donor intent within the Presbyterian Church, of which the original donors then and the Appellant now is a part, provides a valuable context for understanding the concerns raised by this case. The Directory of Worship, a part of the Constitution of the Presbyterian Church (U.S.A.), establishes the central place of stewardship in a believer's life:

In the Old Testament the people of Israel were commanded to bring a tenth of their income to support the work of the house of God and those who served God in it. In the New Testament the apostles recognized that the work of the Church required disciplined support. Both in Israel and in the early Church the people were encouraged to give generously to meet the needs of the poor. God calls believers today to be disciplined and generous in giving support to the ministries of the church.

Directory for Worship, W-2.5003.b (emphasis added).

Giving has always been a mark of Christian commitment and discipleship. The ways in which a believer uses God's gifts of material goods, personal abilities, and time should reflect a faithful response to God's self-giving in Jesus Christ and Christ's call to minister and share with others in the world. Tithing is a primary expression of the Christian discipline of stewardship.

Directory for Worship, W-5.5004 (emphasis added).

Just as the believer is to be "disciplined and generous in giving support to the ministries of the church," so too the Presbyterian Church itself is doctrinally obliged to be "disciplined and generous" in using such funds for the purposes for which they were intended. It is incumbent upon the Church to strive to discern the donor's intention for the funds and to do all in its power to apply the funds as the donor would have wished.

Thus, in 1954 a case was brought in the Presbyterian Church's ecclesiastical court system involving the "moral obligation of the West Hollywood Presbyterian Church with reference to the disposition of funds bequeathed to it by George E. Walhizer." *Van Norman v. Synod of California*, 170 PCUSA B-51-B-55 (1954) (a copy of which is attached for the court's reference as Appendix A) Walhizer had donated a portion of his estate to the West Hollywood Presbyterian Church, with the instructions that it "be donated to the Presbyterian Foreign Mission Society by said church and if possible, to be used by said Missionary Society in Japan." However, the West Hollywood church session (the local church governing body) ignored that intent and failed to send the funds to the Foreign Mission Society, resulting in the church court action. Unequivocally emphasizing that Walhizer's intent must be respected, the Church's highest court¹ held:

The testator's direction to the church to donate this property to the Board of Foreign Missions is clear and unequivocal.... It is in any case an unmistakable direction which it would be morally unconscionable not to follow.... Therefore ... we are not free to disregard the clearly expressed wishes of a donor.
Id. at B-55.

In short, the doctrines of the Presbyterian Church, and the decisions of its ecclesiastical courts interpreting those doctrines, have long held that it is "unconscionable" not to follow the "expressed wishes of a donor." *Van Norman*, at B-55. That doctrine is as strongly felt now among Presbyterians as it was when the disputed donations were made. As further explained below, those early Presbyterians who sacrificed to support the ministry in the New World had the firm expectation, grounded in their theology, that their donations would be used for the religious purposes for which they were made – the support of the families of Presbyterian ministers. Amicus believes that it would be both morally and legally unconscionable to allow funds donated for such religious ends to swell the coffers of a for-profit entity.

¹The Permanent Judicial Commission is the highest ecclesiastical court in the Presbyterian Church's court system. Its decisions are binding on all governing bodies of the Church.

II. THE INTENT OF THE ORIGINAL PRESBYTERIAN DONORS WAS TO ESTABLISH A FUND FOR THE SUPPORT OF THE FAMILIES OF PRESBYTERIAN MINISTERS IN THE NEW WORLD.

As set forth more fully in Appellant's brief, the evidence at trial unequivocally established that the intent of the early Presbyterian donors to the Corporation for Relief of Presbyterian Ministers ("Corporation") was to provide relief to Presbyterian ministers and their families who were spreading the Presbyterian faith on the American frontier. The evidence also clearly demonstrated that the Corporation was the Presbyterian Church's established charitable vehicle through which the donors wished their funds to be administered. In process of time, the Corporation became Covenant, an insurance company devoted to similar ends.

Taking as a model an insurance program instituted by the Presbyterian Church of Scotland, in the mid-1700's the Synod of New York and Philadelphia established a fund for the support of Presbyterian ministers in America. (Heyrman, RR 1370(a)) The initial minutes of the Corporation, which was formed to administer the fund, confirm that its intent was to provide support for Presbyterian ministers, and their widows and children, who were spreading the Gospel in the New World. The Corporation's minutes from 1757 state:

The Synod of Philadelphia have often seriously considered the many distresses of this infant Church & how thro the smiles of Providence they might best relieve them; and were deeply Sensible that among other things, the small and uncertain Stipens of ministers, and the Poverty & Distress of their widows & children, were great discouragements to many pious & able men in the ministry, & great hinderance to parents, from educating their children for this necessary & honourable, but laborious, Employment, So that ye Gospel ministry was like to fall into weak hands, & many People were like to be without the benefit of Ministers & ordinances.

As remedy of this evil, they were encouraged by the laudable example of other Protestant churches, to promote a fund for the releif of the Distressed widows and children of their Deceased Bretheran....
(Exhibit A-4, RR 2314a (original spelling retained)).

The Corporation's initial capital consisted of charitable donations from individual Presbyterians and from Presbyterian churches. These donations were made to the Synod of Philadelphia, which actively sought and secured contributions for this work. In 1760 the Corporation sent as its agents the Rev. M. Charles Beatty and a member of the Synod of New York and Philadelphia to each of the General Assemblies of the Presbyterian Churches in Scotland, Ireland and England "to procure contributions for this charitable Institution." (RR 2319a). The Synod-formed Corporation provided Rev. Beatty with letters of introduction explaining the Corporation's charitable mission to provide for the sustenance of ministers and thereby to advance the cause of religion in the New World. The letter to the General Assemblies of Scotland and Northern Ireland is illustrative:

... and even where ministers are Settled in, their Subsistance is generally So Small & precarious in this new planted countrey, that it is with great difficulty many of them can maintain their familys with any Decency; and much less make any provision for them after their decease; Nay they are

often obliged to remove from place to place for want of confident support, which is not only an injury to religion but a great discouragement to young Men to enter into ye Sacred work

....

Resolving in our Minds what method to take in order to find help under these difficulties, we could think of none So proper, none which afford us such a hopeful prospect as applying to the venerable assembly of the Church of Scotland; whose Zeal for propagating Christian Knowledge, & promoting ye Interests of Christ kingdom in this American Wilderness we are not unacquainted with.... (Exhibit A-4, RR 2322a-25a (original spelling retained)).

The letter to the Churches of England and Ireland reveals the same charitable purpose:

We have often with Sorrow and Regret, seen the Widows and Children of great and good Ministers extremely pinched and distressed by want and Poverty, without being able to afford them any suitable relief.

These things have always been great Discouragements to Pious and good men in the Ministry; they have also been great Hinderances to Parents from educating their Children to this necessary, and honourable, but laborious Employment; and must bring the Gospel into Content, but its falling into weak hands; and deprives many Congregations in this wide extended Wilderness of the Benefit of ministers and ordinances.

(RR 2327a)

In response to the entreaties of Rev. Beatty and his companion, the devout Presbyterians of Scotland, England, Ireland, Northern Ireland, and the Pennsylvania Colony, contributed funds to accomplish the purposes stated in the referenced letters. They gave of their means to spread the Christian Gospel and advance the Presbyterian faith in America. They made these contributions specifically to support the ministers who would teach the Word and, ultimately, to care for these ministers' widows and children. A significant portion of these contributions was used to provide working capital for the Corporation to enable it to pay operating expenses and to provide policies of insurance on the lives of ministers for the benefit of their families to fulfill the Corporation's charter and charitable purpose. (Heyerman, RR 1364a, and RR 3976a). The contributed money became the source of the Corporation's surplus and remained in the Corporation as an integral part of its capital until its merger with Provident. (Barbee, RR2183a-2184a; Hunt, RR 1152a; see also Plaintiff's Exhibit Q-3 at RR 2913a). The trial court's disturbing finding that the intent of these donors "cannot be ascertained" (Adjudication, pp. 3-4) is simply untenable; to the contrary, the record is plain and extensive in this regard. The refusal to credit such evidence directly undermines the principle of charitable intent which is so important to all charitable organizations and their donors.²

²Also troubling is the lower court's failure to distinguish between a settlement relating to control over charitable funds and the abolition of the charitable purpose of such funds. The lower court found that in 1771 "the Synod and the Corporation reached an agreement which ... settled any and all disputes between the Synod and the Church and released the Corporation from all future claims regarding the monies remitted by Reverend Beatty to it."

The fact remains that up until 1994, when it merged with Provident, the Corporation remained reasonably faithful to the donors' intent. It focused on providing low cost, affordable life insurance and annuity policies for Presbyterian and other clergy who would otherwise be financially unable to obtain such coverage. Responding to the unique financial condition of clergy, it provided insurance products that were specially tailored to the needs of ministers and their families. (Plaintiff's Exhibits A-2 at RR 2290a, A-5 at RR 2375a, A-7 at RR 2387, B-3 at RR 2407a; B-4 at RR 2433a, B-5 at RR 2442a, B-6 at RR 2511a; Q-1 at RR 2901a; see also Bishop testimony, RR at 487a, MacBean testimony at RR 619a; Hibbs testimony at 953a; Cole testimony at RR 2971a, and testimony of ordained ministers cited at Appellant's Brief p. 32). Provident has abandoned this service to ministers and their families – contrary to the original intent of those early donors.

III. THIS COURT SHOULD APPLY THE CY PRES DOCTRINE TO ASSURE THAT THE INTENT OF THE EARLY PRESBYTERIAN DONORS IS FAITHFULLY CARRIED OUT.

A. The Equitable Doctrine of Cy Pres Ensures that Donor Intent Is Honored.

The cy pres doctrine, codified in 20 Pa. C.S.A. Sec. 6110(a), provides a vehicle for this Court to carry out the charitable intent of those early Presbyterian donors to provide funds for the sustenance for widows and children of Presbyterian ministers. Pennsylvania's cy pres statute states:

General Rule.- Except as otherwise provided by the conveyer, if the charitable purpose for which an interest shall be conveyed outright or in a testamentary or inter vivos trust shall be or become indefinite or impossible or impractical of fulfilment, or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General, after proof of notice to the Attorney General when he is not the petitioner, order an administration or distribution of the interest for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyer, whether his charitable intent be general or specific.

20 Pa. C.S.A. Sec. 6110(a).

The court in *Farrow v. First Presbyterian Church of Shamokin*, 412 Pa.Super 135, 602 A.2d 1346 (1992) elaborated on Pennsylvania's cy pres doctrine:

The application of the doctrine of cy pres requires the court to exercise its discretion in such a manner as to award the fund to a charity which most resembles the one the Settlor intended to benefit. To that end, it is necessary to examine the purposes and objects of the defunct or non-existent organization, and the nature of the population which was the intended object of the charitable gift.

Adjudication, ¶ 25 This entirely misses the point. Whatever agreement the Synod and the Corporation may have made with respect to what entity would have operational control over the funds is irrelevant to the deeper question of how the funds should be used. The settlement may indeed have given the Corporation full authority to manage the charitable funds, but the Corporation was still duty bound to carry out the charitable purpose for which the funds were donated. The settlement did not – nor could it – vitiate the charitable intent of the original donors.

Id. at 1138-139, 602 A.2d at 1347-1348. The court went on to state that the cy pres doctrine mandates that when a donor's charitable intention cannot be carried out exactly, "it must be performed with as close approximation to that scheme as reasonably practical" in a way that "approximates the testator's express intention as nearly as possible and does no violence to it." Id. at 140, 602 A.2d at 111348(citations omitted). In short, "[c]harities are favorites of the law and a gift, even for a specific purpose, should be liberally construed whenever possible." Id. at 139, 602 A.2d at 1348 (quoting *In re Pruner's Estate*, 400 Pa. 629, 635, 162 A.2d 626, 629 (1960)).

Accordingly, Pennsylvania courts have consistently and unequivocally recognized the primacy of donor intent in dealing with donated charitable funds. "The application of the doctrine of cy pres should effectuate the intent of the testator as nearly as humanly possible.... We recognize that in applying [this doctrine], courts in the attempt to effectuate the testator's intent, ordinarily select only one eleemosynary institution whose services approximate that intended by the donor." *In re Estate of Kay*, 456 Pa. 43, 51, 317 A.2d 193, 198 (1974); see also *In Matter of Women's Homeopathic Hospital of Philadelphia*, 393 Pa. 313, 318, 142 A.2d 292, 294 (1958).

Pennsylvania's cy pres statute and jurisprudence is consistent with the rule applied by courts throughout the United States when addressing questions of donor intent and charitable contributions. As one treatise explains:

The nearly universal desire of courts to uphold trusts of a charitable nature wherever possible has led one legal writer to comment that "[t]he constant and ever increasing efforts of courts and legislatures over the past decade to sustain and support charitable gifts has propelled the law of charities well along the path towards establishment of a principle that property once given to charity is forever dedicated to charity." While this may be somewhat overstating the matter, nevertheless the courts wherever possible will uphold a charitable gift and apply the cy pres doctrine where they can reasonably do so.

9 AmJur Proof of Facts 2d 199, "Charitable Intent of Trust Settlor—Cy Pres Doctrine" (1976) (emphasis added), quoting Fisch, *Changing Concepts and Cy Pres*, 44 Cornell L. Q. 382 (1959); other citations omitted.

B. The Equitable Doctrine of Cy Pres Applies to Effectuate Donor Intent in Cases of Merger, Consolidation, and the Expiration of an Intended Donee.

Pennsylvania follows the rule set forth in the Restatement of Trusts, § 399, that a merged or consolidated corporation will be entitled to receive trust funds as a matter of law unless the donor's wishes would be violated by such a course of action.

As indicated in 4 Scott, Trusts s 397.3 (3d ed. 1967) and Restatement, Trusts s 399, comment o (3d ed. 1959), the consolidated corporation or the surviving corporation as the case may be will be entitled to receive the trust funds as a matter of law, unless the settlor evidences a different intention. *Trust of Bodine*, 429 Pa. 260, 263, 239 A.2d 315, 316-317 (1968). In *Trust of Bodine*, the Pennsylvania Supreme Court explained that if a consolidated or merged corporation fails to carry out the charitable donor's intent, the doctrine of cy pres will apply:

The only situation in which the funds would not inure to the benefit of the surviving corporation (and not as a result of cy pres) is if the settlor clearly manifested an intent to the contrary.

If the surviving corporation continues to carry out the terms of the trust in accordance with the settlor's intent the doctrine of cy pres would never apply, since the funds would not be utilized in a manner which frustrates or renders incapable of fulfillment the charitable purposes of the settlor.

Nevertheless, we are not unmindful of the fact that in the event the [merged entity] fails to perpetuate the charitable purposes of the settlor, such failure will be an event necessitating the application of cy pres....

239 A.2d at 265, 239 A.2d at 317 (emphasis added).

In re Drexel Home Petition, 7 Fid. Rep. 512, 13 Pa. D. & C. 371 (1957), is instructive. In Drexel, the court faced the question of whether two trust funds from a closed children's hospital could be transferred to another hospital which treated children. Some of the trust funds in question, as in the present case, came from "inter vivos gifts made over a period of years." (Drexel, 13 Pa. D. & C. at 377). Much like the trial court in the present case, the Drexel court was faced with determining donor intent:

The balance remaining in the [trust] ... was contributed by numerous donors as inter vivos gifts. Whether or not the funds represented by the inter vivos gifts are now held in trust is solely a matter of the intention of the fourteen or more donors. Although it is difficult to ascertain the composite intent of these donors, after a careful examination of the record, I conclude that these people did intend that their money should be held in trust by the Drexel Home for the purpose of providing hospital care for children in their Children's Hospital. The evidence concerning the bulk of the gifts is confined to notations in the minutes of the Board of Trustees of the Drexel Home alluded to above. These notations are very brief and are usually to the effect that \$5,000 has been received from a particular donor "to the Children's Hospital," or "to endow a free bed at the Children's Hospital," or simply "for a free bed in the Children's Hospital." In addition to this record, a typical solicitation card dated 1934, used by the Friends of Children, a women's organization dedicated to raising funds for the Children's hospital gives an accurate indication of the intent of the more modern donors.

Id. at 378-379.

The court went on to hold that the funds could be transferred to the petitioning hospital's pediatrics department because it was "a continuation of the same work by essentially the same group of people in the care and treatment of children and that the intention of the donors would be more closely approximated and carried out if such funds are awarded to the [hospital] for the use of its pediatrics department". Id. at 382. The court cited with approval the following language from Craig Estate, 356 Pa. 564, 568 (1930):

Where a gift is made directly to a charitable or religious body for purposes which are within the powers of the corporation, it is a trustee for itself, and holds for the purposes specified in the gift. It is, however, a trust in the sense that the fund does not merge into the general property of the corporation but remains under the jurisdiction of a court of Equity.

Drexel, 13 Pa. D. C. at 380 (emphasis added). Accordingly, the court awarded the funds to the successor hospital "to be held in trust for the purpose of providing hospital care for children in its pediatrics department." Id. at 382.

The result in *Drexel* is consistent with the case law of other jurisdictions. Courts throughout the United States have applied the cy pres doctrine to ensure that the donor's intent controls the ultimate disposition of charitable funds. In *Estate of Coleman*, 584 P.2d 1255 (Ks. App. 1978), the Kansas Court of Appeals was faced with construing a residuary clause in a will which granted a bequest to a liberal arts college affiliated with the Kansas Synod of the Presbyterian Church. The liberal arts college had closed and its assets and corporate existence had been purchased by an organization called "The Way International," a fundamentalist sect devoted to the study of the Bible which had opened a new, unaccredited college. Ruling that the residuary bequest could not go to the fundamentalist college, the court explained:

The fundamental concept of the doctrine [of cy pres] is that a donor may have a general charitable intent, and that the particular charitable institution he has designated as recipient of the gift is only an agent for effectuating that gift. Therefore, when it becomes impossible for the gift to take effect exactly as the donor specified, the court must look for another agent, as nearly like the designated one as possible, that will receive the gift and effectuate the general charitable intent expressed in the will or gift instrument.

Id. at 1261.

Courts have repeatedly³ held that "[s]ome mergers could so alter the character of [the] purpose of the charity as to violate the testator's intent," and that "some mergers could so change the religious denomination of the administrator of the charitable trust as to violate the testator's intent." *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 746 (Tenn. 1991). In *Cowden*, that was not a problem because the court found that the successor charitable institution properly continued the work which the donor intended and thus was not violating donor intent. However, the courts have not hesitated to hold that a corporation which violates donor intent cannot retain donated assets. For instance, in *Queen of Angels Hospital v. Younger*, 136 Cal.Rptr. 36 (Cal.App. 1977), the California Court of Appeal was asked to determine whether a charitable hospital could cease running a hospital, run clinics instead, and still retain a charitable trust established to benefit the hospital. The Court held that donor intent must be respected or the funds forfeited:

[The Hospital] may maintain a hospital and retain control over its assets or it may abandon the operation of a hospital and lose those assets to the successor distributees ..., but it cannot do both.

Id. at 41. The Angels court cited with approval the holding in *Holt v. College of Osteopathic Physicians*, 394 P.2d 932 (Ca. 1964), whose language is instructive here:

In addition to the general public interest, however, there is the interest of donors who have directed that their contributions be used for certain charitable purposes. Although the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust.

Holt, 394 P.2d at 936 (emphasis added).

³Thomas J. Goger, Annotation, Merger or Consolidation of Corporation as Terminating Charitable Trust of Which Corporation is Beneficiary, 34 A.L.R.3d 743 (1970) (reviewing the Pennsylvania case of *Bodine's Estate*; see discussion *supra*).

Thus, the cy pres doctrine applies to effectuate the donor's purpose even when the intended donee has ceased to exist. In *New York East Annual Conference of Methodist Church v. Seymour*, 199 A.2d 701, 703 (Ct. Sup. Ct. Errors, 1964), a remainder interest in an estate was bequeathed to the Bald Hill Methodist Episcopal Church, which subsequently went out of existence. In considering whether the bequest could go to the Annual Conference of which the individual church had been a part, the court held:

[A] donation, although not a trust, is, however, a gift for a religious use, and, so, is a gift for a charitable use. Even though given, as here, in apparently absolute terms, the donee may not divert it to a use not fairly within the expressed intention of the donor. Where the gift is made in absolute terms, the intent of the donor will ordinarily be assumed to be that the donated property was to be devoted to the general purposes of the donee as authorized in its charter, or if, as here, it has no charter, then to the general purposes actually being carried out. Id. (citations omitted; emphasis added).

As these cases demonstrate, courts across the country liberally apply the doctrine of cy pres to ensure that donor intent is honored.

C. The Court Below Erred in Failing to Apply the Doctrine of Cy Pres to Effectuate the Intent of the Original Presbyterian Donors.

As in *Cowden*, Provident's purchase of Covenant "so alter[s] the character" of the charitable donation of the original Presbyterian donors that it clearly violates the intent of the gift. *Cowden*, 816 S.W.2d at 746. Beyond any argument, the charitable contributions at issue here were never intended to be part of the assets of a commercial insurance company unconcerned with serving the clergy community. Rather, they were intended to benefit "the Widows and Children of great and good Ministers extremely pinched and distressed by want and Poverty." (Letter to the Churches in Scotland, Ireland and England (Exhibit A-4, RR 2322a-25a)).

The lower court's inability to perceive such intent was clear error. The court below had even more emphatic evidence than that which the court considered in *Drexel* to determine donor intent. As in *Drexel*, the court had minutes of the corporation to which the funds were donated and solicitation cards which were sent to donors. The *Drexel* court had no trouble ascertaining donor intent from these types of documents. See *Drexel*, 13 Pa. D. & C. at 378. Here, the intent of the original donors is at least as clear. It is inconceivable to amicus that using funds which were donated to support the families of Presbyterian ministers to fund a for-profit, commercial insurance business can be considered consistent with the intention of the early Presbyterian donors to the Corporation for the Relief of Presbyterian Ministers. Clearly, the charitable purposes of the early Presbyterian donors would not be "perpetuated," but rather would be "frustrate[d]" and "render[ed] incapable of fulfillment" if those early donations are allowed to become part of the general operating funds of Provident. *Trust of Bodine*, 429 Pa. at 265, 349 A.2d at 317.

Only when a merger or consolidation continues to carry out "the primary purpose for which the charitable trust was created" can the resulting entity be allowed control of those funds. *Estate of Nesbit*, 438 P. Super 365, 371, 652 A.2d 855, 858 (1995). Where, as here, a merger or consolidation renders impossible the effectuation of the donor's intent, the court should "frame[] a scheme which is well suited to accomplish the charitable purpose evidenced by [the donors]." *Trust of*

Rothrock, 452 N.W.2d 403, 406 (Iowa 1990) (allowing funds donated to construct a new church to be used to improve or remodel existing church facilities).

In Drexel, the court did not hesitate to place the funds at the new hospital "in trust" to effectuate the original intent of the donors. Drexel, 13 Pa. D. & C. at 378. This court had even stronger evidence to do likewise. It should have ruled that the gifts made by the original donors to the Corporation "[did] not merge into the general property of the corporation but remain[ed] under the jurisdiction of a court of Equity." Drexel, 13 Pa. D. & C. at 380, citing Craig Estate 356 Pa. at 56. The lower court should then have used its equitable powers to award these funds to an "eleemosynary institution" (In re Estate of Kay, 456 Pa. at 51, 317 A.2d at 198) which would most clearly effectuate the intent of the donors.

The Presbytery of Philadelphia is an appropriate institution to administer the disputed monies. The Presbytery is willing and able to comply with the intent of the original donors by establishing a fund dedicated to the support of clergy and their families. This course would undoubtedly effectuate donor intent far better than allowing the funds to remain part of the operating capital of a for-profit insurance company with no charitable interest in servicing the needs of ministers.

CONCLUSION

Charitable donations are the lifeblood of churches and other eleemosynary institutions. Without the support of donors, beneficent associations cannot continue their vital work. One of the most significant elements in ensuring that people of good will continue to support charitable institutions is rigorous adherence to donor intent. Recognizing that, the law provides powerful equitable tools to guard against the misuse of charitable bequests. The equitable doctrine of cy pres allows a court to examine the intent of the donor and fashion a remedy that mostly nearly effectuates it, thereby safeguarding not only the wishes of a single donor, but also the integrity of all charitable donations.

An appropriate remedy is called for in this case. Though much time has passed, the intent of the original Presbyterian donors to benefit the families of ministers remains clear. Within broad parameters to be sure, Covenant attempted to carry out that mandate. Provident will not. Accordingly, the equitable doctrine of cy pres calls for an appropriate remedy to ensure that donor intent is respected.