

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**IN RE:** :  
**INDEPENDENT FIRE CO. NO. 1,** :  
**a non-profit corporation** : **NO. 41-17-0473**  
 :  
**Commonwealth of Pennsylvania** :  
**By: JOSHUA D. SHAPIRO,** :  
**Attorney General,** :  
**Petitioner** :  
 :  
v. :  
 : **ORPHAN'S COURT**  
**INDEPENDENT FIRE CO. NO. 1,** :  
**Respondent** :

**OPINION AND ORDER**

The Attorney General's Office (Commonwealth) comes before this Court requesting it order the involuntary dissolution of Independent Fire Co. No. 1 (Independent) and apply the Doctrine of *Cy Pres* to Independent's assets and monies in Commonwealth's Petition for Citation for Rule to Show Cause Why Respondent Should Not be Compelled to Account be Surcharged and Dissolve and Have Its Assets Distributed Pursuant to the *Cy Pres* Doctrine (Petition) filed September 25, 2017. The only issues before the Court at this time are involuntary dissolution and *cy pres*.

***Procedural History***

Independent filed its reply to Commonwealth's Petition on November 20, 2017. Commonwealth filed their Reply to Respondent's Defenses, and Counterclaims on December 5, 2017. The South Williamsport Borough filed a Petition to Intervene on February 15, 2018, which was granted on April 30, 2018. A hearing on the issues of dissolution and *cy pres* was held on

two separate dates. The hearing began on June 29, 2018 and then was concluded on September 11, 2018.

***Background***

Until May 1, 2016, Independent was one of three fire companies certified to fight fires in South Williamsport Borough. N.T. 6/29/18, at 4-5, 11. The South Williamsport Fire Department (SWFD) was formed through a merger of the two other fire companies constructed by the Borough. *Id.* at 10-11. As a result of not joining the merged SWFD, Independent was decertified when the Borough instituted Ordinance No. 2016-01 officially recognizing only SWFD as the Fire Department of the Borough. *Id.* 11, 13, 17. Following this, the Borough contacted the Attorney General’s Office notifying them Independent was decertified and could no longer perform their charitable purpose, which is “[f]or the suppression of fires of property and buildings in the Borough of South Williamsport, Pennsylvania.” Independent’s Articles of Incorporation-Domestic Nonprofit Corporation, 02/26/1997. Independent still functions as a 501(c)(3) nonprofit, but has not responded to any fires since decertification, although some members have chosen to join other companies to continue their own firefighting activity. N.T. 6/29/18, at 46-56, 59-60.

The Attorney General’s Office originally called for the involuntary dissolution of Independent. Petition, 09/25/17 at Count III. To bolster this claim, the Petitioner relied on the argument that “[Independent] cannot fulfill its charitable purpose because of the loss of its tax-exempt status and no longer earns enough monies to support its operations.” *Id.* This claim was not founded in support put forward by the Commonwealth and additionally was directly contradicted by testimony put forward by Independent. N.T. 6/29/18, at 46-56. Independent has been acting as such since 1997. *Id.* at 67. At the hearing on June 29, the Commonwealth instead

stated their intention that Independent may go on existing, but their monies and property should go to SWFD. *Id.* 38-46. Prior to decertification Independent took fire calls throughout the County of Lycoming and outside the county. *Id.* Independent hosted multiple charitable events and festivals and responded to multiple emergency calls that were not fire related. *Id.* at 71-73. Since decertification, Independent has reached out to local neighboring townships in an attempt to continue their firefighting mission, which seemed to be hindered by the present litigation. *Id.* at 73-75. With regards to the merger with SWFD, it appears a large area of contention was Independent's failure to agree to a total transfer of assets. *Id.* at 83-84.

### ***Discussion***

The Commonwealth is asking two things of this Court, first to involuntarily dissolve Independent and second to find that the Doctrine of *Cy Pres* is applicable. If both of those things are found this Court would then be responsible for determining and overseeing the distribution of Independent's property and monies.

Charitable nonprofits are incorporated to aid individuals and communities through the fulfillment of designated charitable purposes such as

the relief of poverty, the advancement and provision of education, including post-secondary education, the advancement of religion, the prevention and treatment of disease or injury, including mental retardation and mental disorders, governmental or municipal purposes and any other purpose the accomplishment of which is recognized as important and beneficial to the public.

15 Pa. C.S. § 102(a).

Pennsylvania recognizes charitable nonprofits as charitable trusts and governed by the same regulations. 15 Pa. C.S. § 5547; 20 Pa. C.S. § 7740.3 cmt. (recognizes the Restatement of the Law, Charitable Nonprofit Organizations as important guiding document). If a particular charitable purpose becomes "unlawful, impracticable, or wasteful" the Court must undergo a two

part analysis to make sure the settlor's intent is most equitably fulfilled. 20 Pa. C.S. § 7740.3 (a). First, if applicable a “[a] court may modify an administrative provision of a charitable trust to the extent necessary to preserve the trust.” 20 Pa. C.S. § 7740.3 (c); *see also* Restatement of Charitable Nonprofit Organizations § 3.03(b) (“If it is unclear whether a particular term governing the use of charitable assets applies to either the administration of those assets or the purposes to which they are dedicated, the court will apply the doctrine of deviation rather than the doctrine of cy pres . . .”). Lastly, upon involuntary dissolution “the court shall apply cy pres to fulfill as nearly as possible the settlor's charitable intention.” 20 Pa. C.S. § 7740.3 (a)(3).

### **Administrative Deviation**

Deviation under 20 Pa. C.S. § 7740.3(c) is “not based on mere convenience, but on the necessity of effecting a change in a situation where compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purpose of the trust.” *In re Barnes Foundation*, 684 A.2d 123, 130-31 (Pa. Super. 1996). For the issue to be considered under this section the clause, phrase, or word to be modified must “involve a non-substantive detail of administration.” *In re Estate of Girard*, 123 A.3d 623, 633 (Pa. Cmwlth. 2016). For an administrative deviation to exist two prongs must be satisfied, there must be an “unforeseen and unforeseeable change in circumstances” and “a frustration of the settlor's main objectives [is caused] by this change.” *In re Barnes Foundation*, 684 A.2d at 130.

### **Involuntary Dissolution & Cy Pres**

The Attorney General's office brings this claim forward under their power to “institute proceedings to revoke the articles and franchises of a corporation if it . . . misused or failed to use its powers privileges or franchises.” 15 Pa. C. S. § 503 (a)(1). This allows the Court “to wind up

affairs of and to dissolve the corporation in the manner” provided by the law. 15 Pa. C. S. § 503

(b). This can be accomplished through waste, but it is

not necessary that the waste of a corporation's assets shall have continued to such an extent that its purposes are impossible of fulfillment, before its charter may be forfeited. Enough appears where a continuous and deliberate waste is shown, and where the corporate purposes have been so disregarded that the public is completely deprived of the charitable benefits for which the corporation was created.

*Commonwealth ex rel. Schnader v. Seventh Day Baptists of Ephrata*, 176 A. 17, 19 (Pa. 1935).

“Involuntary dissolution of a solvent corporation is a drastic measure which should be employed cautiously and only in extreme circumstances.” *Gee v. Blue Stone Heights Hunting Club, Inc.*, 604 A.2d 1141, 1144 (Pa. Cmwlth. 1992) (citing *Cerami v. Dignazio*, 424 A.2d 881 (Pa. Super. 1980); *see also Tate v. Philadelphia Transp. Co.*, 190 A.2d 316, 322 (Pa. 1963).

“[I]f a particular charitable purpose becomes unlawful, impracticable or wasteful . . . the court shall apply *cy pres* to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific.” 20 Pa. C.S. § 7740.3(a)(3). The application is imprecise, but the Court should attempt to “most nearly approximate the intention of the donor.” *In re Women’s Homeopathic Hospital of Philadelphia*, 142 A.2d 292, 294 (Pa. 1958). Charitable nonprofit’s assets are committed to a charitable purpose therefore “when a charitable nonprofit ceases business, then any remaining funds or property must be given to a charitable nonprofit with a similar charitable purpose.” *Commonwealth by Kane v. New Founds., Inc.*, 182 A.3d 1059, 1072 (Pa. Cmwlth 2018). The charity must be within the general donative scheme. *In re Estate of Elkins*, 32 A.3d 768, 778 (Pa. Super. 2011). When applying the Doctrine of *Cy Pres* a court is required to exercise its discretion and “award funds to charity, which most resembles the one that settlor intended to benefit, and, thus, it is necessary to examine purposes and objects of that

charity, the locality that charity intended to serve, and the nature of the population that was the intended object of the charitable gift.” *Id.* at 1073 fn. 8.

***Analysis***

Testimony was provided and it is undisputed that Independent still functions as an operating corporation, is in good standing with their accounting, and is still recognized as a 501(c)(3). N.T. 6/29/18, at 46-56. It is also undisputed that, since decertification by the Borough, Independent has not responded to any fires. *Id.* at 59-60. The charitable purpose of the organization is “[f]or the suppression of fires of property and buildings in the Borough of South Williamsport, Pennsylvania.” Independent’s Articles of Incorporation-Domestic Nonprofit Corporation, 02/26/1997.

First, “in the Borough of South Williamsport, Pennsylvania” is not administrative in nature and therefore may not be altered through the Doctrine of Deviation, as Pennsylvania only recognizes and allows the Doctrine of Deviation when the language is administrative in nature and not in the wider context of when language is dispositive in nature. *See* Restatement of the Law Charitable Nonprofit Organizations § 3.03(a) (allowing wider latitude not recognized in Pennsylvania). Although decertification was undoubtedly “unforeseen” to the founders when the Articles of Incorporation were first constructed on June 15, 1895, and that language frustrates the original purpose it is substantive in nature. Administrative Deviation under 20 Pa. C.S. § 7740.3(c) may not be applied.

Therefore, the only issue for the Court is to determine whether Independent may fulfill its charitable purpose by fighting fires outside the Borough of South Williamsport or if the Court must utilize the Doctrine of *Cy Pres* in order to fulfill the original charitable purpose. An Orphan’s Court in Pennsylvania is trusted to follow the statutes put in place and apply to it

equitable principles. *In re Estate of Pedrick*, 482 A.2d 215, 222 (Pa. 1984). “Thus, the familiar equity maxim ‘he who comes into a court of equity must come with clean hands’ applies to matters within the Orphans' Court's jurisdiction.” *Id.* In this situation, you have a fire company, Independent, that has been contributing to local communities through multiple charitable avenues other than the suppression of fires in the South Williamsport Borough, since 1895. As a result of Independent’s unwillingness to join the Borough’s proposed merger in creating SWFD, they were decertified. Since that time they continue to give to the community, but have not been fighting fires. As a result of their decertification, they may not fight fires in South Williamsport and no longer have workers’ compensation insurance.

Independent’s charitable purpose has certainly become “impractical,” since they may no longer fight fires in South Williamsport if the Borough refuses to certify them (which they have indicated is the case). For this reason, both the Commonwealth and the Borough wish this Court to find the Doctrine of *Cy Pres* is applicable and SWFD should receive their property, assets, and properties.

However, this is not a typical situation that screams for the application of *cy pres*. Typical examples of when the Doctrine is applied by courts are when a charitable gift is left through will or trust to a no longer existent charity or when a charitable nonprofit voluntarily dissolves and the court must determine where the charitable property should go. In fact, this Court has not been able to find or been provided with a similar case on point, where the Commonwealth attempts an involuntary dissolution and an acquisition of assets, absent board members self-dealing, tremendous financial troubles, or unauthorized selling or transferring of charitable assets. *See New Founds., Inc.*, 182 A.3d at 1070-74. Testimony has established there has been no distribution of property, waste of property (in the sense that equipment upkeep has been

continuous), and no allegations of self-dealing or improper conduct on behalf of the board have been made.

The Borough as of the 2017 Census has 6,142 individuals living there and only encompasses 1.89 square miles. Testimony shows the income given to Independent from the Borough was minimal in comparison to their total assets, and where at that time they were providing a service and recognized by the Borough as certified firefighters. Testimony also shows that while funds were received from the people of South Williamsport at bingo, carnivals, etc. they were not a majority of the number of individuals in attendance. From what this Court can tell since its inception, Independent has been engaged in firefighting and multiple other charitable endeavors, not only serving residents of South Williamsport, but also those throughout the County of Lycoming.

In addition, under Pennsylvania Law for a charitable nonprofit to be tax exempt an organization/corporation must be a “purely public charity.” Pa. Const. art. VIII, § 2(a)(v). In order to qualify the organization must possess a number of characteristics one being that it “[b]enefits a substantial and indefinite class of persons who are legitimate subjects of charity.” *Hospital Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985). This has been found to include not localizing an organization’s assistance to only one geographic location. *In re Sewickley Valley YMCA Decision of Bd. of Prop. Assessment*, 774 A.2d 1, 11 (Pa. Cmwlth. 2001) (case involved the determination of whether YMCA was “purely public charity,” and one of the factors in the organization’s favor was it did not refuse admission “based on the geographic location of applicant”).

Based on Pennsylvania’s determination of what qualifies as a “purely public charity,” and the fact Independent has historically been helping others throughout the county, not just South



Williamsport residents, how drastic the remedy of involuntary dissolution is, combined with the equitable nature of this Court; this Court finds the Doctrine of *Cy Pres* should not be applied. Involuntarily dissolving Independent and giving all their assets to a similarly situated company would not result in an equitable remedy, and instead would be a perversion of the Doctrine, that would amount to an asset grab. The Borough cannot create an ultimatum where either Independent merges and includes all its assets in the merger or in the alternative have the Court apply the Doctrine of *Cy Pres* and claim SWFD, as a similarly situated corporation, should receive the assets. Decertification merely eliminates their opportunity to be an official firefighting agency of South Williamsport Borough. It does not preclude them from becoming an authorized firefighting company for another municipality. *See Alliance of Williamsport Bureau of Fire and Old Lycoming Twp. Volunteer Fire Dept. 09/19/99.*

If this Court is to be presented with the choice of either involuntarily dissolving a functioning corporation or to allow it to slightly modify its terms in order to further fulfill its general charitable purpose, equity requires the Court to choose the latter. Therefore, the most equitable way to continue to fulfill Independent's original charitable purpose is to allow them to act outside the narrow constriction of only engaging in services within South Williamsport. Since the Borough is only 1.89 square miles this does not amount to abandoning the community, as the charitable impact of Independent's services will still be felt close to home. In fact, Independent could still serve the residents of the Borough and fight fires within the Borough along with another fire company and fulfill its charitable purpose. In promoting strong public policy and equity the Court is required to allow Independent to seek reasonable alternatives in nearby townships and communities to most closely fulfill its charitable purpose. In other words, the Court finds that despite its location physically within the Borough of South Williamsport,

Independent shall be free to affiliate with another borough or township to continue operating as a firefighting agency.

**ORDER**

AND NOW, this day, October 4, 2018, the portion of Commonwealth's Petition for Citation for Rule to Show Cause Why Respondent Should Not be Compelled to Account be Surcharged and Dissolve and Have Its Assets Distributed Pursuant to the Cy Pres Doctrine asking for Dissolution and application of *cy pres* is hereby **DENIED**.

By The Court,

Nancy L. Butts, President Judge

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