

# AGTRUST ISSUES: NAVIGATING DONOR INTENT IN A CHANGING WORLD

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## ABSTRACT

Amid the evolving legal landscape, the doctrine of *cy pres* confronts the challenge of harmonizing traditional donor intent with modern societal demands. This Article embarks on a critical examination of *cy pres*, navigating through its historical trajectory, legal complexities, and the shift towards a more flexible, public-oriented application. Despite its deep roots in trust law, existing scholarship often neglects the nuanced interplay between preserving donor wishes and adapting to contemporary needs. This gap is addressed by analyzing the gradual transition in United States jurisprudence towards favoring public benefit and the pivotal role of state attorney generals in ensuring trust, integrity, and accountability. Expanding the discourse, this Article presents a comparative study of *cy pres* across the United Kingdom, Japan, South Korea, and Taiwan, uncovering varied international approaches and underscoring the doctrine's global relevance and adaptability challenges. These insights reveal the necessity for context-sensitive, dynamic solutions. This Article concludes by advocating for balanced *cy pres* application, one that meticulously aligns philanthropic endeavors with evolving societal contexts while upholding donor intent. It calls for a thoughtful, nuanced approach that fosters both public trust and the integrity of charitable giving, ensuring that *cy pres* remains a vital, responsive tool in the management of charitable trusts.

## KEYWORDS

*Cy pres* doctrine, charitable trusts, donor intent, judicial *cy pres*, prerogative *cy pres*, equitable deviation, state attorney generals, trust law.

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## I. INTRODUCTION

In 2022, the Barnes Foundation was granted permission to lend works from its renowned art collection for the first time, sparking intense controversy.<sup>1</sup> This decision contravened the explicit instructions of the foundation’s founder, Dr. Albert Barnes, who stipulated in his 1922 indenture of trust that “no picture belonging to the collection shall ever be loaned, sold, or otherwise disposed.”<sup>2</sup> Yet a century later, the court ruled that limited lending aligned with the foundation’s educational mission, despite clearly departing from the donor’s wishes.<sup>3</sup>

The Barnes case highlights a fundamental tension in charitable trust law: how to balance respect for donor intent with the need to adapt to changing circumstances.<sup>4</sup> Over time, a donor’s restrictive specifications may become impractical, inefficient, or at odds with contemporary values.<sup>5</sup> In such instances, courts can invoke the doctrine of *cy pres* to modify trust terms to fulfill a purpose as near as possible to the donor’s original intent.<sup>6</sup> However, this practice raises a crucial question: to what extent can one deviate from a

1. Alexandra Even, *Case Review: The Barnes Foundation Can Now Loan Art* (2023), CENT. FOR ART L. (Oct. 13, 2023), <https://itsartlaw.org/2023/10/13/case-review-the-barnes-foundation-can-now-loan-art-2023/#post-60777-footnote-17> [<https://perma.cc/M2S2-2WLX>].

2. *Id.*

3. *Id.*

4. *Id.*

5. Author’s original thought.

6. RESTATEMENT (SECOND) OF TR. § 399 cmt. h (AM. L. INST. 1959).

donor's explicit directives without undermining the integrity of charitable giving?<sup>7</sup>

This Article explores the pivotal role of state attorney generals (AGs) in *cy pres* cases.<sup>8</sup> As representatives of the public interest, AGs have a unique responsibility to oversee the use of charitable assets.<sup>9</sup> They must weigh respect for donor intent against ensuring charitable resources are utilized effectively.<sup>10</sup> This Article argues that AG participation in *cy pres* litigation is essential for striking an appropriate balance between these competing objectives.<sup>11</sup>

Through an analysis of the Barnes case and other significant *cy pres* rulings, this Article examines the varying approaches United States (U.S.) courts have taken in applying the doctrine.<sup>12</sup> It will be seen that courts have increasingly emphasized “suitability” and “effectiveness,” rather than adhering strictly to a standard of “proximity.”<sup>13</sup> This reflects a more flexible approach aimed at maximizing the utility of charitable resources.<sup>14</sup> However, this trend has also drawn criticism for potentially excessively diluting donor wishes.<sup>15</sup>

This Article also explores the *cy pres* principle from a comparative perspective, examining approaches in jurisdictions, such as the United Kingdom, Japan, South Korea, and Taiwan.<sup>16</sup> This comparative analysis highlights the uniqueness of the American approach and the differences between common law and civil law traditions in addressing charitable trust modifications.<sup>17</sup>

Finally, this Article offers a series of recommendations aimed at improving the application of the *cy pres* doctrine.<sup>18</sup> These recommendations emphasize the importance of balancing respect for donor intent with adaptation to evolving societal needs.<sup>19</sup> This Article argues that clearer standards and enhanced AGs oversight can facilitate better balancing between these competing aims.<sup>20</sup>

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7. Author's original thought.

8. RESTATEMENT (SECOND) OF TR. § 399 cmt. f (AM. L. INST. 1959); see OHIO REV. CODE ANN. § 109.25 (West 1975).

9. *Charities Regulations 101*, NAT'L ASSOC. OF ATT'Y GEN., <https://www.naag.org/issues/charities-regulation-101/> (last visited Sep. 10, 2024) [<https://perma.cc/U3N8-5FBC>].

10. *Id.*

11. Author's original thought.

12. *See Even, supra* note 1.

13. *In re Estate of Thompson*, 414 A.2d 881, 888 (Me. 1980).

14. *Id.*

15. *Id.*

16. Author's original thought.

17. *See discussion infra* Part IV.

18. *See discussion infra* Part V.

19. *See discussion infra* Part V.

20. *See discussion infra* Part V.

As charitable giving plays an increasingly vital role in our society, ensuring that charitable trusts can effectively serve the public interest becomes crucial.<sup>21</sup> This Article aims to provide a balanced analytical framework for this complex issue and offer practical guidance for AGs, courts, and policymakers.<sup>22</sup> Navigating between the integrity and adaptability of charitable gifts requires careful weighing and prudent judgment.<sup>23</sup> Through an in-depth examination of the *cy pres* doctrine and its application, this Article seeks to inform more thoughtful and effective approaches to managing charitable trusts in the future.<sup>24</sup>

## II. CY PRES DOCTRINE

### A. History

The *cy pres* doctrine has ancient roots dating back to Roman law.<sup>25</sup> The doctrine allowed for the modification of the purpose of a charitable trust when the original intent became impossible, impracticable, or illegal to carry out.<sup>26</sup> The goal was to preserve the charitable intention of the donor as closely as possible.<sup>27</sup>

The doctrine was incorporated into English law, though the precise origins are unclear.<sup>28</sup> It developed in connection with medieval practices of almsgiving to expiate sin.<sup>29</sup> People would donate property to charity to buy salvation and avoid eternal damnation.<sup>30</sup> *Cy pres* allowed the chancellor to modify the terms of such charitable gifts to achieve the donor's intention of purchasing heavenly favor if the gift could not be implemented exactly as directed.<sup>31</sup>

Two types of *cy pres* emerged in England, judicial *cy pres* exercised by chancery courts and prerogative *cy pres* representing an exercise of royal power.<sup>32</sup> The distinction was obscure, since the chancellor acted in both judicial and ministerial roles.<sup>33</sup> Prerogative *cy pres* applied charitable gifts to

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21. RESTATEMENT (SECOND) OF TR. § 399 (AM. L. INST. 1959).

22. See discussion *infra* Part V.

23. *In re Estate of Thompson*, 414 A.2d 881, 888 (Me. 1980).

24. See discussion *infra* Part V.

25. Christopher J. Ryan, Jr., *An Historical and Empirical Analysis of the Cy-Près Doctrine*, 48 ACTEC L.J. 289, 292 (2023); Edith L. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 376 (1953).

26. Ryan, *supra* note 25, at 305; Fisch, *supra* note 25, at 375.

27. Ryan, *supra* note 25, at 292.

28. *Id.* at 293; Fisch, *supra* note 25, at 375.

29. Ryan, *supra* note 25, at 293.

30. *Id.* at 294.

31. *Id.* at 294–95; Fisch, *supra* note 25, at 376–77.

32. Ryan, *supra* note 25, at 294–95.

33. *Id.* at 295.

purposes dictated by crown policy rather than donor intent, while judicial *cy pres* aimed to carry out the donor's general charitable purpose.<sup>34</sup>

Early U.S. courts rejected *cy pres* based on disdain for English law after the Revolutionary War.<sup>35</sup> They misconstrued the doctrine as an improper exercise of sovereign legislative and executive power by the judiciary.<sup>36</sup> This violated Montesquieu's theory of separation of powers.<sup>37</sup> The prerogative type of *cy pres* was clearly unacceptable, but some courts failed to recognize judicial *cy pres* and repudiated the entire doctrine.<sup>38</sup>

*Cy pres* was also deemed objectionable as violating natural rights, especially the sacredness of private property, per John Locke's philosophy.<sup>39</sup> Courts emphasized adhering to the donor's specific intentions over public benefit.<sup>40</sup> Altering charitable gifts to other uses, despite donor stipulations, was regarded as confiscation of private property without consent.<sup>41</sup> Even impossibility did not warrant deviation from the donor's original scheme.<sup>42</sup>

As the nineteenth century progressed, *cy pres* gained favor as charitable gifts themselves became more accepted, especially with the rise of philanthropy from industrial fortunes.<sup>43</sup> Courts promoted charitable dispositions through liberal construction and gradually relaxed rigid *cy pres* prerequisites like impossibility.<sup>44</sup> They focused more on serving the public benefit than blindly enforcing donor intent.<sup>45</sup> By the early twentieth century, many states had enacted *cy pres* statutes or expressly adopted the doctrine.<sup>46</sup> New York has adopted the *cy pres* doctrine under the Estates, Powers, and Trusts Law (EPTL), specifically, Section 8-1.1.<sup>47</sup> This section provides that if a charitable trust's original purpose becomes unlawful, impracticable, or wasteful, the court may direct the application of the property to a charitable purpose that is as near as possible to the original intent of the donor.<sup>48</sup>

Modern courts now readily apply *cy pres* to preserve and reshape charitable gifts in light of changing conditions.<sup>49</sup> They emphasize the

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34. *Id.*

35. *Id.* at 296; Fisch, *supra* note 25, at 378.

36. Ryan, *supra* note 25, at 298–99.

37. *Id.* at 299–300.

38. *Id.*

39. *Id.* at 299–301; Fisch, *supra* note 25, at 381.

40. Ryan, *supra* note 25, at 301–02.

41. *Id.*

42. *Id.* at 305–07.

43. *Id.* at 289, 301; Fisch, *supra* note 25, at 387.

44. Ryan, *supra* note 25, at 305–07.

45. *Id.*

46. *Id.*

47. See N.Y. EST. POWERS & TR. § 8-1.1 (2014); *but see In re Fleet Nat. Bank*, 864 N.Y.S.2d 706, 707–09 (2008).

48. *Id.*; Rudolf J. Karvay, *Cy Pres in New York: The Application and Impact on Charitable Trusts*, N.Y. PROB. BLOG (Mar. 20, 2023), <https://www.nycprobate.com/probate-blog/cy-pres-in-new-york-the-application-and-impact-on-charitable-trusts/> [<https://perma.cc/Q4RX-86JK>].

49. Ryan, *supra* note 25, at 390.

doctrine's role in effectuating donor intent is to benefit the public rather than letting gifts fail.<sup>50</sup> *Cy pres* has been invoked to modify racial restrictions, support new charitable purposes when old ones become obsolete, and transfer funds when intended beneficiaries cease to exist.<sup>51</sup> The doctrine continues to balance respect for donor wishes with flexibility to adapt trusts to better serve the public good.<sup>52</sup>

### *B. Understanding "Cy Pres" and "Equitable Deviation"*

The doctrines of *cy pres* and equitable deviation are crucial legal mechanisms for modifying restricted charitable trusts when circumstances change.<sup>53</sup> Both provide courts flexibility to alter administrative or dispositive provisions of a trust in order to carry out the settlor's charitable purposes.<sup>54</sup> However, there are important distinctions between the two doctrines.<sup>55</sup>

#### *I. Cy Pres Doctrine*

The equitable doctrine of *cy pres* provides courts the ability to reformulate the charitable purpose of a trust when the settlor's specific intent becomes impossible, impractical, or illegal to achieve.<sup>56</sup> *Cy pres* originated in the English courts of chancery as a way to preserve charitable trusts from failure when circumstances changed over time.<sup>57</sup> The name derives from the Norman French phrase "*Cy pres comme possible*" meaning "as near as possible."<sup>58</sup>

Rather than allow a charitable trust to lapse when its stated purpose could no longer be fulfilled, the chancellor would apply the trust property to some other charitable purpose as near as possible to the settlor's original intent.<sup>59</sup> This enabled the general charitable vision animating the gift to be carried forward in a practicable way.<sup>60</sup> Though not identical to the precise terms stated, the new purpose reflected the settlor's charitable values as closely as circumstances permitted.<sup>61</sup>

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50. *Id.* at 330.

51. *Id.*

52. *Id.* at 335.

53. *Id.*

54. *Id.* at 290.

55. Ryan, *supra* note 25, at 295.

56. Charles E. Rounds, Jr., *Is there a practical difference between Equitable Deviation and Cy Pres when it comes to seeking modification under the Uniform Trust Code of a charitable trust's administrative term?*, JDSUPRA 1, 2, 4 (Apr. 1, 2016), <https://www.jdsupra.com/legalnews/is-there-a-practical-difference-between-04330/> [https://perma.cc/SZ8R-GU5A].

57. *Id.*

58. Ryan, *supra* note 25, at 290.

59. See Fisch, *supra* note 25, at 379.

60. *Id.*

61. Ryan, *supra* note 25, at 290.

For a court today to exercise *cy pres* power, three key elements must be established.<sup>62</sup> First, the charitable trust's specific purpose must have become impossible, impractical, or illegal to achieve.<sup>63</sup> This represents a failure of the particular charitable intent stated by the settlor.<sup>64</sup> Impossibility encompasses factual situations that physically prevent the trust's purpose from being carried out.<sup>65</sup> Impracticality, more broadly, includes circumstances that render the stated means unworkable, even if theoretically possible.<sup>66</sup> Most courts apply a standard of genuine impossibility or extreme impracticality, rather than just inconvenience or inefficiency.<sup>67</sup>

Second, the settlor must have exhibited a general charitable intent that goes beyond the particular purpose that failed.<sup>68</sup> This intent provides the basis for *cy pres* to reconstitute the trust to fulfill the settlor's broader charitable aims rather than simply terminating the trust.<sup>69</sup> The court examines the trust document language and extrinsic evidence of the settlor's values and objectives to discern a general charitable vision animating the specific gift.<sup>70</sup> Some jurisdictions employ a rebuttable presumption that a general intent underlies charitable gifts.<sup>71</sup>

Finally, the *cy pres* application must provide a substituted scheme for the trust's property that approximates the settlor's original charitable purpose as near as possible under the circumstances.<sup>72</sup> In shaping a new plan, courts will consider the scope of the settlor's philanthropy, relationships with other charities, the amount of funds available, and community needs.<sup>73</sup> Though not identical to the stated terms, the dispensation of the trust under *cy pres* must represent a next best charitable use reflecting the settlor's values.<sup>74</sup> This advances the settlor's general charitable vision in a practical manner when the particular means fail.<sup>75</sup>

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62. *Id.*

63. George Reese, *Cy Pres Powers of the Federal Bankruptcy Courts - New Hope for Financially Distressed Charities?*, 5 FORDHAM URB. L.J. 435, 437 (1977).

64. *Id.*

65. RESTATEMENT (FIRST) OF TR. § 399 (1935).

66. *Id.*

67. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV'T. L. REV. 421, 466 (2005).

68. Rounds, *supra* note 56, at 2.

69. *In re Estate of Heinecke*, No. A-3604-21, 2024 WL 1125786, at \*6 (N.J. Super. Ct. App. Mar. 15, 2024).

70. *Id.* at \*7.

71. Alberto Lopez, *A Revolution of Cy Pres Redux*, 78 U. CIN. L. REV. 1307, 1311 (2010).

72. *Id.* at 1318.

73. *Cy Pres Donations: Serving the Class and the Public Interest*, PUB. JUST., <https://www.publicjustice.net/cy-pres-donations-serving-class-public-interest/> (last visited Sep. 8, 2024) [<https://perma.cc/2AM5-DG9T>].

74. Rounds, *supra* note 56, at 1–2; Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065, 1095 (2011); *In re Dep't of Energy Stripper Well Exemption Litig.*, 578 F. Supp. 586, 594 (D. Kan. 1983).

75. Jessica Smith, *Charitable Trusts and the Cy Pres Doctrine: An Overview*, FIDUCIARY L. BLOG (Jan. 30, 2017), <https://fiduciarylwblog.com/2017/01/charitable-trusts-and-the-cy-pres-doctrine-an->

## 2. Equitable Deviation

In contrast to *cy pres*, the doctrine of equitable deviation focuses on modifying the administrative provisions of a charitable trust when compliance has become impractical or would impair the trust's operative purpose.<sup>76</sup> The doctrine does not involve substituting beneficiaries or the trust's core charitable objective.<sup>77</sup> Rather, it allows tailored alterations in the trust's administration to enable its dominant charitable aims to be achieved.<sup>78</sup>

For a court to permit equitable deviation, the petitioner must demonstrate that adherence to the trust's administrative terms has become impractical or impossible due to unanticipated circumstances.<sup>79</sup> In addition, these circumstances must meaningfully threaten substantial impairment of the trust's charitable purposes if the settlor's administrative schemes continue to be followed.<sup>80</sup> Finally, the proposed modifications must be carefully designed to enable the trust to thrive and successfully accomplish its charitable ends under the new conditions.<sup>81</sup>

The inquiry centers on what administrative changes the settlor would have sanctioned in order to see the trust's charitable mission through under the altered landscape.<sup>82</sup> The focus remains on practical fulfillment of the trust's intended charitable purposes and not wholesale reinvention of the trust on a clean slate.<sup>83</sup> Common examples of equitable deviation include authorizing the sale, mortgage, or lease of trust property, despite restrictions in the trust document; allowing retention of underproductive property; expanding investment powers beyond the settlor's specifications to achieve better returns; altering prescribed methods for trustee selection; modifying age limitations on beneficiaries; and revising provisions that violate current law or public policy.<sup>84</sup>

In summary, the doctrine of equitable deviation empowers courts to modify the management apparatus and administrative details of a charitable trust to facilitate the trust's effective functioning under unforeseen conditions.<sup>85</sup> However, the court cannot fundamentally reshape or reconstitute the trust.<sup>86</sup> A judicious balancing is required to adapt the trust's

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overview.html [https://perma.cc/WV5P-J2WT].

76. RESTATEMENT (THIRD) OF TR. § 66(1) cmt. a (2001).

77. Rounds, *supra* note 56, at 2.

78. *Id.* at 3.

79. AM. BAR ASS'N Comm. on Charitable Trs. Founds., *Cy Pres and Deviation: Current Trends in Application Report*, 8 REAL PROP. PROB. TR. J. 391, 398 (1973).

80. *Id.* at 392.

81. *Id.* at 392–93.

82. *Id.* at 392–94.

83. *Id.*; see Gordon Levine, *The "Clean Slate" Doctrine: A Liberal Construction of the Scope of the Illinois Home Rule Powers - Kanellos v. County of Cook*, 23 DEPAUL L. REV. 1298, 1299–1300 (1974).

84. *Cy Pres and Deviation: Current Trends in Application Report*, *supra* note 79.

85. Rounds, *supra* note 56, at 1.

86. *Id.* at 2.



administration to serve its purposes for many generations while remaining faithful to the settlor's intentions.<sup>87</sup>

### 3. Distinguishing *Cy Pres* and Equitable Deviation

While both doctrines provide courts flexibility to modify charitable trusts when circumstances change, there exists important conceptual distinctions between *cy pres* and equitable deviation.<sup>88</sup>

*Cy pres* involves substituting an entirely new charitable purpose and potentially new beneficiaries when the settlor's original specific charitable aim fails.<sup>89</sup> Equitable deviation entails modifying administrative provisions to better achieve the trust's existing charitable purpose without altering its purpose or beneficiaries.<sup>90</sup> *Cy pres* requires finding that the settlor exhibited a general charitable intent beyond just the specific purpose that became impossible or impractical.<sup>91</sup> Equitable deviation does not depend on proving general intent; the focus is fulfilling the trust's particular purposes.<sup>92</sup> *Cy pres* applies when the settlor's specific charitable purpose is impossible, impractical, or illegal to achieve.<sup>93</sup> Equitable deviation requires showing compliance with administrative terms is impractical and that compliance threatens a substantial impairment of the trust's purposes.<sup>94</sup>

Under *cy pres*, the court frames a new scheme for the trust property that reasonably approximates the settlor's original charitable aims.<sup>95</sup> Under equitable deviation, the court tailors changes to management and administration to facilitate the trust's functioning.<sup>96</sup> *Cy pres* involves substitution of charitable purposes and often recipients.<sup>97</sup> Equitable deviation modifies administrative provisions but does not authorize changing the trust's charitable mission or beneficiaries.<sup>98</sup>

In essence, *cy pres* reforms the substance of the trust itself, while equitable deviation reforms the trust's administrative methods and means.<sup>99</sup>

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87. *Id.* at 2.

88. *Id.* at 1.

89. *Id.* at 2.

90. *Id.* at 1.

91. *Id.* at 3.

92. *Id.* at 1.

93. *The Doctrine of Cy Pres and the Dissolution of Clauses*, NGOSOURCE (May 11, 2020), <https://www.ngosource.org/the-doctrine-of-cy-pres-and-dissolution-clauses> [<https://perma.cc/RJW9-24S7>].

94. Rounds, *supra* note 56, at 1.

95. *Modification of Charitable Trust—The Cy Pres Doctrine*, LAWSHELF, <https://www.lawshef.com/coursewarecontentview/modification-of-charitable-trusts-the-cy-pres-doctrine> (last visited Sep. 8, 2024) [<https://perma.cc/838F-UHLX>].

96. C. J. Ryan, *Confusing Cy Pres*, 58 GA. L. REV. 17, 33–34 (2023).

97. *Modification of Charitable Trust*, *supra* note 95.

98. Rounds, *supra* note 56, at 1.

99. *Id.* at 2.

This key distinction drives when each doctrine is properly applied to craft appropriate modifications while respecting donor intent.<sup>100</sup>

### *C. Recent U.S. Trends: From Proximity to Suitability and Effectiveness*

The application of the *cy pres* doctrine in the U.S. has evolved considerably over the past century, with courts moving away from a strict emphasis on adhering as closely as possible to the donor's original intent (the principle of proximity) and towards a more flexible approach focused on applying the funds in the most suitable and effective way to achieve charitable purposes.<sup>101</sup>

Traditionally, U.S. courts utilized *cy pres* in a conservative manner, only permitting modifications when it became impossible, impracticable, or illegal to carry out the donor's specific instructions.<sup>102</sup> The underlying rationale was that *cy pres* should alter the trust terms only to the minimum extent necessary, sticking as near as possible to the original scheme.<sup>103</sup> This view aligned with the sanctity of wills and the principle that donors have the right to control the use of their property after death.<sup>104</sup>

However, as social perspectives shifted in the early twentieth century and judges began to conceive of charitable gifts more as public trusts to be utilized for the common good, courts started applying *cy pres* more liberally.<sup>105</sup> The famous example is *Jackson v. Phillips* in 1867, where the Massachusetts Supreme Court invoked *cy pres* to redirect a trust intended to oppose slavery towards assisting newly freed slaves despite the demise of the original purpose.<sup>106</sup> This illustrated the emergence of a more flexible *cy pres* standard focused on fulfilling the donor's general charitable objectives rather than rigidly adhering to the specific means prescribed.<sup>107</sup>

Over the past few decades, the pendulum has swung further towards an even more expansive doctrine of *cy pres* emphasizing suitability and effectiveness.<sup>108</sup> Courts now often modify trusts when the original purposes, while still legally valid, have simply become obsolete, inefficient, or less useful compared to alternative charitable causes.<sup>109</sup> The Uniform Trust Code

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100. *Id.* at 3.

101. *Cy Pres Doctrine: An Overview of its Origins and Evolution*, FASTER CAP. (June 9, 2024), <https://fastercapital.com/content/Cy-Pres-Doctrine--An-Overview-of-its-Origins-and-Evolution.html> [<https://perma.cc/WK94-PUNV>].

102. Michael Grant, *Cy Pres: Not the First Option, but "As Near As Possible,"* 32 GEO. J. LEGAL ETHICS 637, 647 (2019).

103. *Id.*

104. *Id.*

105. Ryan, *supra* note 96, at 22.

106. *Jackson v. Phillips*, 96 Mass. 539, 599 (1867).

107. *Id.*

108. Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to "Cy Pres Comme Possible,"* 163 UNIV. PA. L. REV. 1463, 1492 (2015).

109. *The Doctrine of Cy Pres and the Dissolution of Clauses*, *supra* note 93.

adopted this view, providing that trustees can seek *cy pres* relief if “a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful.”<sup>110</sup> The trend favors applying funds where they will have the most utility and social impact.<sup>111</sup>

An example is *In re Estate of Crawshaw*, where a Kansas court authorized transferring a trust from supporting a defunct local hospital to a viable regional medical center.<sup>112</sup> The judge stated that “as nearly as possible” was an outmoded phrase and that *cy pres* now focuses on how effective and useful the application of funds may be for charity.<sup>113</sup> This illustrates the modern outlook prioritizing charitable effectiveness over donor intent.<sup>114</sup>

However, some scholars argue this expansive doctrine swings too far away from honoring the donor’s wishes.<sup>115</sup> The counter perspective is that *cy pres* should require genuine impossibility, not just comparative efficiency.<sup>116</sup> Overall, the trajectory in the U.S. reveals a shifting balance between the competing poles of donor proximity and public benefit.<sup>117</sup> The increased willingness of courts to mold restrictions for effectiveness shows the degree to which charitable gifts, upon failing, are viewed more as community assets to be optimally utilized than private bequests to be narrowly construed.<sup>118</sup>

#### *D. Role of State Attorney Generals*

State attorney generals play a critical oversight role in enforcing donor restrictions on charitable gifts, as explained in the Restatement (Third) of Trusts Section 67, Comment d: “[t]he *cy pres* power is vested in the court, not in the trustee or the Attorney General, who is, however, a necessary party entitled to notice of the proceeding.”<sup>119</sup> As the chief legal officer in each state, the AG represents the interests of the public in ensuring that charitable gifts provide benefit to the community.<sup>120</sup> This oversight function stems from the common law doctrine of *parens patriae*, which imposes a duty on the AG to represent the public regarding charitable assets.<sup>121</sup>

When a charity seeks to modify or release a donor restriction through the equitable doctrine of *cy pres*, the AG is a necessary party who must

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110. UNIF. TR. CODE § 413 (2023).

111. *Id.*

112. *In re Estate of Crawshaw*, 806 P.2d 1014, 1018 (Kan. Ct. App. 1991).

113. *Id.*

114. Author’s original thought.

115. Robert G. Bone, *In Defense of the Cy-Pres-Only Class Action*, 24 LEWIS & CLARK L. REV. 571, 583 (2020).

116. *Id.* at 584.

117. *James v. Monsanto Co.*, 38 F.4th 693, 699 (8th Cir. 2022).

118. *Id.*

119. RESTATEMENT (THIRD) OF TR. § 67 cmt. d (2012).

120. *Id.*

121. *Parens patriae*, BLACK’S LAW DICTIONARY (12th ed. 2024).

receive notice of the proceeding under the Restatement.<sup>122</sup> This notice requirement enables the AG to evaluate whether the proposed changes stray too far from the donor's original intent or fail to align with the public benefit.<sup>123</sup> If the AG concludes that the charity's petition does not meet the *cy pres* standard of impossibility, impracticability, wastefulness, or believes that the charity has not acted in good faith, the AG may formally challenge the petition in court.<sup>124</sup>

Conversely, if the AG determines that circumstances have sufficiently changed since the time of the gift to warrant modification, but the charity refuses to take action, the AG has authority to initiate a *cy pres* proceeding.<sup>125</sup> The AG would need to present evidence to the court that the donor's specifications have become impossible to fulfill, highly impracticable, wasteful, or contrary to public policy.<sup>126</sup> This may occur if the charitable purpose has already been achieved through other means, the target recipients no longer exist, or the restriction violates nondiscrimination laws.<sup>127</sup>

Although representing the interests of the public, AGs may face political or financial constraints that limit proactive engagement in *cy pres* actions.<sup>128</sup> Most state AGs' offices lack ample resources to monitor every charity, instead only getting involved in prominent cases that capture public attention.<sup>129</sup> The level of voluntary AG involvement also varies widely by state, reflecting differences in policy priorities.<sup>130</sup> Further, some critics argue that AGs may intervene based on political calculations rather than a pure view of the public welfare.<sup>131</sup>

If neither the charity nor the AG is inclined to take action when a donor restriction becomes clearly impracticable or outdated, the court has authority to appoint a special-purpose trustee under the Restatement.<sup>132</sup> This independent trustee steps into the shoes of the original charity to administer the gift in a manner that adheres as nearly as possible to the donor's general charitable purpose.<sup>133</sup> Appointing a special-purpose trustee provides a means

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122. RESTATEMENT (THIRD) OF TR. § 67 (2012).

123. *Id.*

124. *Id.*

125. *Id.* § 94.

126. *Id.* § 67.

127. *Id.*

128. Dana Brakman Reiser, *Enron.Org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 UNIV. CALIF. DAVIS L. REV. 205, 219–26 (2004).

129. *Id.*

130. Compare OHIO REV. CODE ANN. § 109.25 (West 2023) (mandating that the AG be involved in *cy pres* actions), with N.C. GEN. STAT. ANN. § 366-4-413 (West 2009) (stating that AG involvement in such actions is voluntary).

131. Margaret Lemos & Ernest Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 104 (2018).

132. RESTATEMENT (THIRD) OF TR. § 67 (2012).

133. *Id.*

for a court to adjust or relax restrictions as needed to avoid waste of charitable assets even absent initiative by the charity or AG.<sup>134</sup>

In summary, the state AG occupies an influential position in preserving donor intent and maintaining accountability in the management of charitable gifts as specified in the Restatement.<sup>135</sup> While not possessing unilateral power to modify donor conditions, the AG serves as an important check through notice and consent requirements and the ability to challenge charity petitions or initiate *cy pres* proceedings.<sup>136</sup> This oversight role on behalf of the public interest is balanced by the courts' ultimate authority to apply *cy pres* and appoint special-purpose trustees as warranted.<sup>137</sup> Negotiation normally precedes formal legal action, but the participation of the AG facilitates fiduciary adherence to donor stipulations except when modification becomes necessary to further the public benefit.<sup>138</sup>

### III. CASE STUDY

#### *A. Barnes Foundation Case*

##### *1. Facts*

The Barnes Foundation was established in 1922 by Dr. Albert C. Barnes to house his extensive private collection of late 19th and early 20th century art, including works by Renoir, Cézanne, Matisse, and Picasso.<sup>139</sup> Dr. Barnes was an eccentric but brilliant collector who carefully arranged the collection himself in an idiosyncratic manner at a gallery in Merion, Pennsylvania.<sup>140</sup> He outlined specific stipulations for the operation and management of the collection in his indenture of trust.<sup>141</sup> This document stated that the purpose of the foundation was solely educational, and access to view the collection was limited only to those enrolled in art appreciation classes.<sup>142</sup> The indenture prohibited lending or selling any works and required the collection to be

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134. *Id.*

135. *Id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. Even, *supra* note 1.

140. *Id.*

141. *Id.*; Ted Loos, *The Barnes Foundation Loosens Its Straitjacket*, N.Y. TIMES (Aug. 9, 2023), <https://www.nytimes.com/2023/08/09/arts/design/barnes-foundation-loan-painting-decision.html> [<https://perma.com/8MJ6-SNKV>]; Angelica Villa, *Philadelphia's Barnes Foundation Can Officially Lend Masterpieces, Court Rules*, ARTNEWS.COM (Aug. 10, 2023, 4:18 PM), <https://www.artnews.com/art-news/news/barnes-foundation-lending-collection-artworks-court-ruling-1234676852/> [<https://perma.cc/2NTR-PQBH>].

142. Even, *supra* note 1.

permanently installed in the exact arrangement chosen by Dr. Barnes during his lifetime.<sup>143</sup>

After Dr. Barnes's sudden death in 1951, the foundation strictly followed the terms of the indenture; however, as the decades passed, financial difficulties emerged due to restrictions on investment options for the endowment.<sup>144</sup> By the 1990s, the foundation was nearly bankrupt.<sup>145</sup> In the early 2000s, the Barnes Foundation Board of Trustees, now with new members from Philadelphia art foundations, petitioned the local court to amend the indenture's terms.<sup>146</sup> Citing impossibility of purpose, the board argued the Foundation would be forced to permanently close if the location restriction was not lifted.<sup>147</sup> Despite vigorous opposition, the court ruled in 2004 that the collection could be moved to downtown Philadelphia to ensure its continued operation.<sup>148</sup> The new facility replicated Dr. Barnes's arrangements precisely, but it allowed for expanded visitor access that fundamentally transformed the foundation into a public museum against its founder's wishes.<sup>149</sup>

In 2023, the controversy continued when the foundation was granted permission to lend works from the collection for the first time.<sup>150</sup> Supporters argued that this would advance the original educational mission, but detractors claimed this further violated Dr. Barnes's clearly stated intent.<sup>151</sup> The lending policy was narrowly restricted but represented another dilution of the founder's meticulously detailed vision for permanent control over the collection he thoughtfully assembled during his life.<sup>152</sup>

## 2. Ruling

In 2023, the Orphans' Court of Montgomery County's decree granted a significant modification to the Barnes Foundation's lending policy, allowing the storied art collection amassed by Dr. Albert C. Barnes to be lent and relocated despite explicit restrictions against such actions in his original indenture of trust.<sup>153</sup> The new lending policy instituted careful restrictions, only permitting loans or moves if certain conditions were met: (1) the borrowing exhibition makes an important contribution to art historical scholarship and the loaned painting plays an integral role; (2) the temporary

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143. *Id.*; Loos, *supra* note 141; Villa, *supra* note 141.

144. Even, *supra* note 1; Villa, *supra* note 141.

145. Loos, *supra* note 141.

146. *Id.*; Villa, *supra* note 141; *see In re Barnes Found.*, 69 Pa. D. & C. 129, 130 (2004).

147. Even, *supra* note 1; *Barnes*, 69 Pa. D. & C. at 132.

148. *Id.*; Loos, *supra* note 141; Villa, *supra* note 141; *Barnes*, 69 Pa. D. & C. at 171–73.

149. Even, *supra* note 1.

150. Even, *supra* note 1; Loos, *supra* note 141; Villa, *supra* note 141.

151. Villa, *supra* note 141.

152. Loos, *supra* note 141; Villa, *supra* note 141.

153. Even, *supra* note 1; Loos, *supra* note 141; Villa, *supra* note 141.

relocation does not adversely impact ongoing educational activities at the foundation; (3) the work is deemed in stable enough condition by conservators to withstand travel; (4) no more than twenty paintings are out of their established spots at one time; and (5) each loan lasts no longer than twelve months.<sup>154</sup>

The judge ruled that this deviation aligned with the Barnes Foundation's core educational purpose, and the attorney general's office voiced no objection to the liberalized policy.<sup>155</sup> However, Dr. Barnes's indenture unequivocally stated, "no picture belonging to the collection shall ever be loaned, sold, or otherwise disposed."<sup>156</sup> This ruling represents a dramatic undermining of the founder's clear wishes for permanent control and integrity of the collection's arrangements.<sup>157</sup> It demonstrates the court's inclination to allow fundamental departures from donor intent if a charitable organization can justify the departure and it furthers its mission and public benefit.<sup>158</sup>

### B. Hershey Case

The *In re Milton Hershey School Trust* case offers an in-depth examination of the intricacies of modifying a charitable trust's purpose when the donor's original restrictions become unworkable or inequitable.<sup>159</sup> In 1909, chocolate magnate Milton Hershey established a trust to fund and operate a residential school for orphaned white boys intending to provide them with housing, education, and all expenses.<sup>160</sup> The Milton Hershey School began operations shortly thereafter with its activities and admissions policies tightly restricted according to Hershey's specifications.<sup>161</sup>

However, as the trust's assets grew exponentially over the decades to an endowment of \$5.4 billion, serious concerns emerged regarding the school's admissions policies.<sup>162</sup> By continuing only to admit orphaned white boys, the school was excluding girls and non-white students from its charitable

154. Even, *supra* note 1; Loos, *supra* note 141; Villa, *supra* note 141.

155. Even, *supra* note 1; Loos, *supra* note 141; Villa, *supra* note 141.

156. Even, *supra* note 1; Loos, *supra* note 141; Villa, *supra* note 141.

157. Loos, *supra* note 141; Villa, *supra* note 141.

158. Loos, *supra* note 141; Villa, *supra* note 141.

159. See *In re Milton Hershey Sch. Tr.*, 807 A.2d 324, 328, 332 (Pa. Commw. 2002); Tamar Lewin, *10 Board Members to Leave Hershey's Charitable Trust*, N.Y. TIMES (Nov. 15, 2002), <https://www.nytimes.com/2002/11/15/us/10-board-members-to-leave-hershey-s-charitable-trust.html> [<https://perma.cc/FQH6-P3LR>]; Shelly Branch, *School Alumni Will Contest Board's Plan to Sell Hershey*, WALL ST. J. (July 29, 2002), <https://www.wsj.com/articles/SB1027893348331980760> [<https://perma.cc/R9ZP-75B2>].

160. *Id.*; Greg Winter, *Hershey is Put on the Auction Block*, N.Y. TIMES (July 26, 2002), <https://www.nytimes.com/2002/07/26/business/hershey-is-put-on-the-auction-block.html> [<https://perma.cc/8TMZ-SSCV>]; *Milton*, 807 A.2d at 328.

161. Lewin, *supra* note 159; *Milton*, 807 A.2d at 328.

162. *Id.*; Winter, *supra* note 160.

mission.<sup>163</sup> This policy was criticized for being discriminatory and outdated in light of modern values of gender and racial equality.<sup>164</sup> The all-white, all-male admissions criteria restricted the trust from fully achieving its charitable aims.<sup>165</sup>

The board of directors managing the trust grappled with modifying the trust's purpose by expanding admissions to serve students of all genders and races.<sup>166</sup> Such a change would align with contemporary societal norms and would allow the trust to broaden its impact by aiding more disadvantaged youth.<sup>167</sup> However, amending the trust in this manner would also clearly depart from Mr. Hershey's original restrictive intent when he established the trust.<sup>168</sup> The board weighed whether strictly adhering to or altering the donor's specifications would be most faithful to his charitable motivations.<sup>169</sup>

While Mr. Hershey had contributed the funds to assist white orphan boys specifically, he had done so in 1909 when awareness of gender and racial inequities was minimal compared to modern standards.<sup>170</sup> If Mr. Hershey were alive decades later, it is debatable whether he would still want to exclude girls and non-white students from receiving aid given today's values of inclusion and equal opportunity.<sup>171</sup> Although modifying the trust's admissions policies would contradict Mr. Hershey's literal instructions, it could be argued that the change would adhere to his charitable spirit rather than the restrictive letter of his gift.<sup>172</sup>

Ultimately, the court and the state attorney general approved amending the trust's purpose and admissions criteria to more inclusively serve disadvantaged youth.<sup>173</sup> This outcome demonstrated the intricacies of departing from outdated donor restrictions to fulfill a trust's charitable mission in a changed societal context.<sup>174</sup> The *Hershey* case offers pivotal insights into the nuanced balancing act between honoring the original donor's intent and evolving a trust's direction when circumstances render the donor's specifications impractical, impossible, or inequitable.<sup>175</sup> It highlights the gift restriction management challenges inherent in charitable trust law and administration.<sup>176</sup>

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163. Winter, *supra* note 160.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Author's original thought.

172. Lewin, *supra* note 159.

173. *Id.*; *In re Milton Hershey Sch. Tr.*, 807 A.2d 324, 332 (Pa. Commw. 2002).

174. Lewin, *supra* note 159.

175. *Id.*

176. *Id.*



### C. Evaluating the Barnes and Hershey Case

The Barnes case underscores the complexity of balancing fidelity to a donor's vision versus modifying restrictions to suit evolving circumstances.<sup>177</sup> How should institutions weigh honoring the wishes of long-deceased benefactors against altering terms to keep their charitable work vibrant?<sup>178</sup> Are we justified in contravening Dr. Albert C. Barnes's indenture, given the changed contexts and the public interest in experiencing these works?<sup>179</sup> Or does flouting his meticulously detailed conditions, despite their impracticality, cause violence to his legacy?<sup>180</sup> If Dr. Barnes were alive today, would he reluctantly accept the necessity of such changes for his foundation's survival or decry them as a betrayal?<sup>181</sup> If courts are willing to disregard explicit lending prohibitions, what other donor-mandated limits can be circumvented—even selling works one day if conditions require it?<sup>182</sup> The Barnes saga offers no simple answers.<sup>183</sup> However, it prompts difficult reflections on perpetually reconciling donor intent with organizational adaptation over time.<sup>184</sup> Here, the court took a pragmatic middle path—one which critics contend strays too far from Dr. Barnes's philosophies.<sup>185</sup> This fascinating case will continue to spark lively debate as long as institutions depend on charitable gifts bound by restrictions.<sup>186</sup>

The *Hershey* case spotlights the difficulties of adhering solely to the literal stipulations of a donor when societal norms have significantly changed since their gift was made.<sup>187</sup> While a charitable trust must aim to follow the donor's intentions, we cannot be certain that if the donor were alive today, they would not hold more progressive views aligned with modern values.<sup>188</sup>

For instance, Milton Hershey restricted his gift in 1909 to assist only orphaned white boys.<sup>189</sup> At the time, broader racial or gender inclusion was uncommon.<sup>190</sup> However, such discriminatory exclusions are rightfully seen as unethical and unacceptable today.<sup>191</sup> If Mr. Hershey were living in the 2000s or 2020s, would he truly still insist that his trust only aid white males,

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177. Even, *supra* note 1.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Author's original thought.

187. *Id.*

188. *Id.*

189. *Embracing Diversity to Fulfill Milton Hershey School's Mission*, MILTON HERSHEY SCH., <https://www.mhskinds.org/blog/embracing-diversity-mhs-mission/> (last visited Sept. 8, 2024) [<https://perma.cc/MFC2-RE9G>].

190. *Id.*

191. *Id.*

excluding women and minority youth?<sup>192</sup> Given modern perspectives, this seems doubtful.<sup>193</sup> Yet, strictly adhering to his original literal instructions perpetuates this discriminatory policy.<sup>194</sup>

This dilemma highlights the relevance of the *cy pres* doctrine in charitable trust law.<sup>195</sup> *Cy pres* provides guidance when a trust's original purpose becomes impossible, impractical, or illegal due to changing circumstances.<sup>196</sup> It allows modification of the trust's activities to fulfill its mission through the next best alternative to the donor's original intent.<sup>197</sup>

In the *Hershey* case, expanding admissions policies to serve disadvantaged youth inclusively could be viewed as the next best option, aligned with Hershey's charitable motivations if not his specific directions.<sup>198</sup> Applying *cy pres* enabled upholding his philanthropic aims in a way his literal words did not.<sup>199</sup> This showcases the doctrine's utility for avoiding adherence to outdated or illegal donor restrictions.<sup>200</sup>

The *Hershey* case exemplifies a common issue for non-profit boards managing donor intent over time.<sup>201</sup> It underscores the need to strike a nuanced balance between honoring the donor's specifications and adapting their gift to fulfill its purpose in an evolved societal context.<sup>202</sup> Organizations can modify outdated restrictions through sensible, ethical application of principles like *cy pres* while remaining faithful to a donor's core charitable mission.<sup>203</sup>

#### IV. COMPARATIVE JURISDICTIONAL APPROACHES

##### *A. United Kingdom*

In the United Kingdom (U.K.), the evolution of the *cy pres* doctrine, which dictates the adaptation of charitable trusts when their original purposes are no longer feasible, has been significantly shaped by a series of Charities Acts passed in 1960, 1993, 2006, and 2011.<sup>204</sup> Initially, before the enactment of the Charities Act of 1960, the *cy pres* principle was narrowly applied only

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192. Author's original thought.

193. *Id.*

194. *Id.*

195. *Id.*

196. See RESTATEMENT (THIRD) OF TR.: FAILURE OF DESIGNATED CHARITABLE PURPOSE: THE DOCTRINE OF CY PRES § 67 (AM. L. INST. 2012).

197. Lavie, *supra* note 74, at 1095.

198. Author's original thought.

199. *Embracing Diversity to Fulfill Milton Hershey School's Mission*, *supra* note 189.

200. See Fisch, *supra* note 25, at 383–88.

201. Author's original thought.

202. See Reese, *supra* note 63, at 451–52.

203. Author's original thought.

204. Zhuoheng Cai, *On the Application of Cy-Pres Doctrine in Charitable Trust*, J.N. CHINA ELEC. POWER U. 100, 102 (2021).

in cases where the original objectives were “impossible or impracticable” to achieve.<sup>205</sup> However, even though the scope of this principle was expanded in Section 13(1) of the 1960 Charities Act (later integrated into the 1993 Charities Act), it was still subject to stringent restrictions.<sup>206</sup>

Subsequent legislation, specifically the 1993 Charities Act, reaffirmed this expanded scope and imposed a duty on trustees to act and apply the *cy pres* principle in appropriate circumstances, ensuring that the trust properties align as closely as possible with the donor’s original intent.<sup>207</sup> This duty was further elaborated in the 2006 Charities Act, which revised the definition to consider “the spirit of the gift” and the social and economic context when contemplating changes to the original purpose.<sup>208</sup> For small-scale charitable trusts, specifically those with an income less than £10,000 and without land, the act allowed property transfer to another charitable organization with the consent of two-thirds of the trustees, bypassing the need for intervention by the High Court or Commission.<sup>209</sup>

The 2011 Charities Act further cemented the *cy pres* powers, outlining specific scenarios where the principle could be applied.<sup>210</sup> These included situations where the trust’s objectives were unachievable, impracticable, or ineffectively met.<sup>211</sup> The Act distinguished between types of failures: “initial failures” in which the *cy pres* application is contingent on a court determining the donor had a general charitable intent and “subsequent failures” in which the principle applies automatically.<sup>212</sup>

Moreover, the 2011 legislation highlighted that proximity is no longer the overriding factor in deciding the application of the *cy pres* principle.<sup>213</sup> Instead, a balance between suitability and effectiveness is emphasized, reflecting a shift towards maximizing the utility of charitable resources and continuing their beneficial use.<sup>214</sup> This evolution illustrates the U.K.’s leading role in shaping charitable law and reflects a pragmatic approach to ensuring charitable intentions are honored and adapted to contemporary needs and circumstances.<sup>215</sup>

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205. See O.R. Marshall, *The Charities Act, 1960*, 24 MOD. L. REV. 444, 453–57 (1961).

206. Charities Act 1960, 8 Eliz. 2 C. 58 § 13(1) (Eng.).

207. Charities Act, 1993, c. 10, § 13 (Eng.).

208. Charities Act, 2006, c. 50, § 15 (Eng.).

209. *Id.* §74.

210. Charities Act, 2011, c. 25, § 62 (Eng.).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Cai, *supra* note 204, at 104.

*B. Japan, South Korea, and Taiwan*

In Japan, Article 73 of the Old Trust Law (Article 9 of the Public Interest Trust Law) establishes a principle akin to the *cy pres* doctrine, stating: “[w]hen a public interest trust terminates and its trust property has no rightful claimant, the competent governmental authority may continue the trust for a similar purpose in accordance with the original intent of the trust.”<sup>216</sup> This indicates that Japan initiates this principle when a public interest trust terminates and the trust property lacks an identified owner, which is a stark contrast to the regulations found in common law jurisdictions.<sup>217</sup>

Additionally, Article 72 of the South Korean Trust Law and Article 79 of the Taiwan Trust Law both articulate that when a public interest trust terminates without a designated owner for the trust property, the responsible authority may continue the trust relationship for a similar purpose or transfer the trust property to a nonprofit organization or public interest trust with a similar objective.<sup>218</sup> This underscores that, in the event of the termination of a public interest trust without a claimant for the trust property, authorities can act in accordance with the trust’s original intent to fulfill a similar purpose.<sup>219</sup>

In summary, the application criteria for the *cy pres*-like principle in common law countries like the U.S. and the U.K. are more varied, and the principle’s function extends from continuing the use of public resources to maximizing their utility.<sup>220</sup> In contrast, civil law countries like Japan and South Korea consider the termination of a public interest trust and the absence of a claimant for the trust property as conditions for applying this principle.<sup>221</sup>

In American law, the *cy pres* doctrine has a broader and more flexible application, reflecting the dynamic nature of common law.<sup>222</sup> It is utilized in trust law, class action settlements, and other legal areas where the original intent behind funds or assets cannot be precisely fulfilled.<sup>223</sup> U.S. courts often have broader discretion to modify or redirect the purposes of trusts or funds as near as possible to the original intent, especially when it serves the public interest or adheres to the donor’s broader charitable goals.<sup>224</sup> This approach represents a significant departure from the more rigid and narrowly defined

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216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. See generally Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471, 473–77 (1998) (discussing how *cy pres* is applied in America).

223. *Id.*

224. *Cy Pres Doctrine*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/cy\\_pres\\_doctrine](https://www.law.cornell.edu/wex/cy_pres_doctrine) (last updated July 2021) [<https://perma.cc/49BH-J7FM>].

applications seen in civil law systems, highlighting the adaptive and interpretative nature of common law in dealing with issues of public and charitable trusts.<sup>225</sup>

## V. RECOMMENDATIONS AND PERSPECTIVES

The *cy pres* doctrine enables courts to modify charitable trusts when circumstances render the donor's original intent impractical or impossible to achieve.<sup>226</sup> However, the equitable application of *cy pres* requires thoughtful balancing between adhering to donor specifications and altering terms to maximize public benefit.<sup>227</sup> As seen in the cases analyzed in this Article, rigid loyalty to outdated donor instructions can undermine a trust's charitable aims.<sup>228</sup> Yet excessive judicial activism dilutes donor wishes and the integrity of charitable giving; nuanced standards and oversight mechanisms are needed to ensure *cy pres* aligns donor intent with evolved societal contexts.<sup>229</sup>

In shaping an appropriate *cy pres* standard, courts should discerningly apply the criteria of impossibility or impracticability.<sup>230</sup> Casual convenience or comparative efficiency should not justify deviation from donor intent.<sup>231</sup> The circumstances must render the original charitable purpose unworkable, not just less optimal or popular.<sup>232</sup> However, courts should also avoid an absolutist view requiring literal impossibility before considering modification.<sup>233</sup> As societal norms evolve, terms may become extremely impracticable to fulfill, even if not impossible.<sup>234</sup> Courts must apply judicious wisdom in assessing when conditions warrant *cy pres* rather than rigid adherence to donor instructions.<sup>235</sup>

When evaluating donor intent, courts should prioritize the donor's general charitable motivations rather than focusing narrowly on literal restrictive language.<sup>236</sup> The aim should be fulfilling the donor's broad charitable vision within the context of contemporary perspectives.<sup>237</sup> For

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225. *Id.*

226. *Id.*

227. Martin Redish et. al., *Cy Pres Relief and the Pathologies of Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 620 (2010).

228. See, e.g., Even, *supra* note 1.

229. OHIO REV. CODE ANN. § 5804.13 (West 2008).

230. See generally Rudko, *supra* note 222, at 476–77 (discussing how sometimes it is impossible to carry out a particular purpose).

231. See Andrew C. Kruger, *Are Charitable Trusts and the Doctrine of Cy Pres Alive After Yale University v. Blumenthal?*, 8 CONN. PROB. L.J. 241, 245 (1994).

232. See, e.g., *Keepseagle v. Perdue* 856 F.3d 1039, 1049 (D.C. Cir. 2017).

233. See generally *Krakauer v. Dish Network LLC*, No. 1:14-CV-333, 2023 U.S. Dist. LEXIS 182479, \*1–7 (M.D.N.C. 2023) (discussing the modification of an original goal).

234. See, e.g., *In re Latimer*, 78 A.3d 875, 879–80 (Del. Ch. 2013).

235. See, e.g., *United States ex rel. Smithsonian Inst.*, No. 17-mc-3005 (TSC), 2021 U.S. Dist. LEXIS 143385 (D.D.C. 2021).

236. Author's original thought.

237. *Id.*

instance, in the *Hershey* case, the court appropriately emphasized Milton Hershey's general intent to aid disadvantaged youth rather than his specific directions to serve only white orphan boys.<sup>238</sup> This enabled expanding the trust's admissions policies to reflect modern values of diversity and inclusion while still honoring Mr. Hershey's charitable spirit.<sup>239</sup>

However, when applying *cy pres*, courts should grant greater deference to a donor's substantive stipulations regarding charitable purpose and beneficiaries compared to administrative and operational details.<sup>240</sup> The wholesale reinvention of a trust's core mission warrants more caution than modifying management provisions to enable a trust's effective functioning.<sup>241</sup> Courts should be conservative in substituting purposes and recipients versus altering operational methods.<sup>242</sup>

In shaping alternative arrangements under *cy pres*, the proposed modifications should adhere as closely as reasonably possible to the donor's substantive charitable aims while also serving the public benefit.<sup>243</sup> Rather than any worthy cause, the disposition should represent the next best use compared to the donor's vision.<sup>244</sup> For instance, in the Barnes case, while expanded access benefited art lovers, the dramatic transformation from a private foundation to a public museum strayed very far from Dr. Barnes's intentions for strict limits on visitors to ensure quiet contemplation.<sup>245</sup> A more modest relaxation of access terms could have arguably adhered more closely to his educational philosophy while still advancing public enjoyment.<sup>246</sup>

To promote accountability, state attorney generals should scrutinize *cy pres* petitions and object if proposals seem to undermine donor intent without sufficient justification.<sup>247</sup> However, AGs should also take the initiative to pursue *cy pres* modifications when outdated donor restrictions substantially hinder public benefit.<sup>248</sup> Negotiation with charities should precede legal action, but robust AG participation will help ensure *cy pres* aligns with both donor wishes and contemporary needs.<sup>249</sup>

Fidelity to donor intent remains vital for the integrity of charitable giving and public trust in philanthropic institutions.<sup>250</sup> However, sensible *cy pres* application can reconcile donor specifications with evolving trusts to

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238. See *In re Milton Hershey Sch. Tr.*, 807 A.2d 324, 330 (Pa. Commw. 2002).

239. *Id.*

240. Author's original thought.

241. See TEX. PROP. CODE ANN. § 117.004.

242. Author's original thought.

243. *Id.*

244. *Id.*

245. See Even, *supra* note 1.

246. See *id.*; Author's original thought.

247. Author's original thought.

248. *Id.*

249. *Id.*

250. See Rudko, *supra* note 222, at 486.

maximize public benefit when circumstances change.<sup>251</sup> Clarifying standards and enhancing AG oversight will facilitate appropriate balancing between these competing poles.<sup>252</sup> With thoughtful judicious implementation, *cy pres* can adapt donations to enrich civil society for generations to come.<sup>253</sup>

## VI. CONCLUSION

In conclusion, the *cy pres* doctrine and equitable deviation play critical roles in adapting charitable trusts to evolving circumstances.<sup>254</sup> This Article has traced the historical roots of these doctrines, examined their application in modern contexts, and highlighted the evolving trends, especially in the U.S.<sup>255</sup> Recent U.S. trends reflect a shift towards a more flexible approach, emphasizing the suitability and effectiveness of applying funds to achieve charitable purposes.<sup>256</sup> The role of state attorney generals in enforcing donor restrictions on charitable gifts has been underscored, especially the necessity of maintaining accountability in managing charitable gifts.<sup>257</sup> Ultimately, the faithful application of *cy pres* remains vital for the integrity of charitable giving and public trust in philanthropic institutions.<sup>258</sup>

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251. A.B.A. Comm. on Charitable Trs. & Founds., *supra* note 79, at 401–03.

252. Author’s original thought.

253. Ryan, *supra* note 25, at 93.

254. *Id.*

255. See discussion *supra* Parts I–III.

256. See *Jackson v. Phillips*, 96 Mass. 539, 599 (1867).

257. See, e.g., RESTATEMENT (THIRD) OF TR. § 67 (2012).

258. See, e.g., Even, *supra* note 1; Rudko, *supra* note 222 at 486.