

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PNC BANK, DELAWARE, TRUSTEE)	
UNDER THE WILL OF FRANK B.)	
FRANCIS,)	
)	
Petitioner,)	
)	
v.)	TUW: FRAFBAD EOS
)	
THE NEW JERSEY STATE SOCIETY)	
FOR THE PREVENTION OF CRUELTY)	
TO ANIMALS AND ST. PETER'S)	
EPISCOPAL CHURCH, CLARKSBORO,)	
NEW JERSEY,)	
)	
Respondents.)	

MASTER'S FINAL REPORT

Date Submitted: December 5, 2007

Draft Report: December 5, 2007

Final Report: July 14, 2008

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GLASSCOCK, Master

I. Background

This matter involves a trust created under the will (the “Will”) of Frank B. Francis (“Mr. Francis”), executed on December 1, 1972. Mr. Francis died on October 1, 1974. The Francis trust (the “Trust”) was generously endowed: the value of the corpus currently exceeds \$4,000,000. By its terms, 5% of the value of the trust was distributed to Mr. Francis’ friend, Mary B. Lippincott (“Ms. Lippincott”) each year during her lifetime. Upon her death, the trust became a charitable trust, and trust income was directed to certain charitable beneficiaries. Ms. Lippincott died on March 28, 2005. In this action, the current trustee, PNC Bank of Delaware (“PNC”) seeks instructions as to the proper recipient of the income of the Francis Trust.

The Will names two primary remainder beneficiaries, with each to receive one-half of the net income of the trust, and provides that should either cease to exist, the remaining entity would receive the entire income. One of these beneficiaries is St. Peter’s Episcopal Church of Clarksboro, New Jersey (“St. Peter’s”)¹. The Will directed half of the trust income to St. Peter’s, provided that entity remained in existence at the time the gift vested²—that is, at the time of Ms. Lippincott’s death in 2005—and for so long as St.

¹To be precise, the income is to be paid to the “Rector, Wardens and Vestrymen” of St. Peter’s.

²The parties agree that the charitable gifts in trust vested upon the death of Ms. Lippincott.

Peter's remained in existence. St. Peter's was, and is, in existence, and the trustee is directing the appropriate income to St. Peter's under that particular provision of the Will.

The problematic part of the Will involves the remainder of the trust income not directed to St. Peter's. The Will provides at Item III(b)(1) that this portion of the net income be paid to "the branch of the Society for Prevention of Cruelty to Animals which serves Mullica Hill, New Jersey and the vicinity thereof so long as said branch exists." The respondent New Jersey State Society for the Prevention of Cruelty to Animals (the "State SPCA") argues that it is the entity referred to in the Will as that remainder beneficiary, or that the Will and Trust should be reformed to so designate it, and that it therefore should receive one-half of the trust income under Item III(b)(1). Respondent St. Peter's argues that the beneficiary designated under the Will was the Gloucester County Branch of the New Jersey Society for the Prevention of Cruelty to Animals, Inc. (the "County SPCA"), and that the County SPCA ceased to exist before the gift under the Will and Trust vested. St. Peter's argues, therefore, that under the terms of the will it should receive the entire income of the trust. After discovery, these parties filed cross-motions for summary judgment. I issued an oral draft report granting summary judgment on behalf of St. Peter's, and denying summary judgment to the State SPCA. The practical effect of that decision would be to designate 100% of the trust income to the use of St. Peter's. The State SPCA has taken exception to my draft report. This written report,

together with the transcript of the draft bench report, shall form my final report in this matter.

II. Legal Standard

I may enter summary judgment only where the facts of record, taken in the light most favorable to the non-moving party, indicate that no genuine issue of fact material to the issues involved remains, and that the moving party is entitled to a judgment in its favor as a matter of law. *E.g.* Moore v. Sizemore, Del. Supr., 405 A.2d 679, 680-81(1979); *see* Chancery Court Rules, Rule 56.

_____ III. Choice of Law

The testator was domiciled in New Jersey at the time the Will imposing the Trust at issue was created, and at death. The named trustee, Bank of Delaware, and its successor, PNC, are Delaware entities. The life beneficiary was a resident of Pennsylvania; the remainder beneficiaries are domiciled in New Jersey. The Will directs that “the trusts under my will shall be administered in accordance with the laws of the State of Delaware and shall be under the jurisdiction of the appropriate courts of that State,” but the Will is silent as to which state’s law applies to issues of construction, such as the identity of the beneficiaries. Fortunately, I need not decide whether New Jersey or

Delaware law applies here,³ because application of the laws of those jurisdictions, under the facts here, yields consistent results. *See, e.g. Liberty Mutual Ins. Co. v. Viking Pump, Inc.*, Del. Ch., No. 1465, Strine, V.C. (April 13, 2007)(Mem. Op.) at 26 n.113 (where choice of law decision is immaterial to outcome of case, court need not decide which law applies).

IV. Facts

A) Mr. Francis' Testamentary Scheme.

Mr. Francis was a resident of Mullica Hill, New Jersey. Mullica Hill is a community in western Gloucester County, New Jersey, a West Jersey county located on the Delaware River opposite Chester, Pennsylvania. Under the terms of the Will, his personalty was bequeathed to Ms. Lippincott, and the residue of his estate was placed in

³For a flavor of the choice of law issue avoided, consider the following statement by the then-Chancellor:

Unless a contrary intent appears, the essential validity of a bequest of personal property, whether in trust or otherwise, is governed by the same rule [applying the law of testator's domicile as of death]. But if a person creates a testamentary trust of personal property, to be held and administered in another State, where it is valid, the fact that its provisions are contrary to the general policy of the testator's domicile is usually unimportant in determining the validity of the gift and the conditions imposed. Ordinarily, in such cases the question of state policy is only a matter of legitimate interest in the jurisdiction in which the bequest is to be held and administered. . . . [although] application may sometimes depend upon the object and purpose of the law of the domicile
Equitable Trust Co. v. Ward, Del Ch., 48 A.2d 519, 526 (1946)(citations omitted).

trust for her, with 5% of the value of the trust to be distributed to her yearly.⁴ Upon the death of Ms. Lippincott (which occurred in 2005) the Will directed that the:

. . . Trustee shall retain the trust estate in further trust, as follows:

(1) Trustee shall pay one-half (½) of the net income from this trust into the branch of the Society for Prevention of Cruelty to Animals which serves Mullica Hill, New Jersey and the vicinity thereof for as long as the said branch exists. Trustee shall pay the remaining one-half (½) of the net income from this trust into the Rector, Wardens, and Vestrymen of St. Peter's Episcopal Church, Kings Highway, Clarksboro, New Jersey, so long as said Church shall exist. Should either of the above institutions cease to exist, the entire income of the trust shall be paid to the survivor of the two institutions. Should both of the above mentioned institutions cease to exist, the entire income of this trust shall be paid into St. Paul's Protestant Episcopal Church of Chester, Pennsylvania so long as said Church exists. The St. Paul's Protestant Episcopal Church here mentioned shall definitely be that Church whose location since 1900 A.D. until the signing of this will was at Ninth and Madison Streets, Chester, Pennsylvania. In the event that the said St. Paul's Protestant Episcopal Church shall also cease to exist, then the entire net income of this trust shall be paid to the Protestant Episcopal Church in the Diocese of New Jersey, so long as said organization shall exist.

. . .

(2)(ii) If none of the beneficiary organizations named in Subsection (b)(1) of this Item III is an organization described in 170(c) of the Internal Revenue Code of 1954 at the time any principal or income of the trust is to be distributed, Trustee shall distribute such principal or income to one or more organizations then described in 170(c) as Trustee shall select in its sole discretion, as nearly in keeping with the character of the organizations named in Subsection (b)(1) as may be practicable.⁵

On Ms. Lippincott's death, therefore, half the trust income was to be diverted to the St. Peter's Church, and half to the branch of the SPCA serving the environs of Mullica Hill.

⁴Will, Items II, III(a).

⁵Will, Item III(b).

The gift was defeasible should those entities cease to exist. The Will provided should either entity cease to exist, 100% of the income was to go to the surviving entity. The Will also provided for the possibility that neither entity would survive: in that case a specific Episcopal Church, St. Paul's Protestant Episcopal Church in nearby Chester, Pennsylvania, would become the sole income beneficiary, providing that it also remained in existence. Should that contingency also fail, the Will provided that the trust income was to be paid to the Protestant Episcopal Church in the Diocese of New Jersey. Finally, if none of the organizations survived as charitable organizations under the Internal Revenue Code, the trustee was charged to distribute the Trust in a manner "as nearly in keeping with the character [of the named beneficiaries] as may be practicable."⁶

B) The Identity of the SPCA Beneficiary

The Will provides that half the trust income, upon the death Ms. Lippincott, shall be paid to "the branch of the Society for the Prevention of Cruelty to Animals which serves Mullica Hill, New Jersey and the vicinity thereof." The parties do not dispute, and I find, that the "Society for Prevention of Cruelty to Animals" referred to in the Will is the respondent State SPCA. At the time the Will was made in December 1972, a branch of the State SPCA, the "Gloucester County Branch of the New Jersey Society for the

⁶Will, Item III (b)(2)

Prevention of Cruelty to Animals, Inc.”⁷— the County SPCA—had recently been created and held a charter from the State SPCA.⁸ The founder of the County SPCA, Ms. Abruzzo, was, like the testator, a resident of Mullica Hill. Ms. Abruzzo’s organization operated in Mullica Hill and the rest of Gloucester County for many years after the execution of the Will, until Abruzzo’s death in 2002. At that time, Ms. Geralynn Castano and others applied to continue the charter for the County SPCA, but she and her companions failed to undergo the training required by the State SPCA. As a consequence, the latter body revoked the charter of the County SPCA on September 1, 2002. At the time of the vesting of the charitable trust at Ms. Lippincott’s death, and since, there has been no Gloucester County SPCA. The record evidence demonstrates that during the existence of the County SPCA, both the County and State SPCAs provided services within the Mullica Hill area consistent with the charitable purposes of both organizations; that is, providing for the welfare of domestic animals through enforcement

⁷This is the formal name of the County SPCA as it existed at the time of final dissolution in 2002. The record does not disclose whether this was the original name of the County SPCA in 1973.

⁸At oral argument, counsel for the State SPCA conceded that the County SPCA was in existence at the time of the execution of the Will; in its exceptions, the State SPCA argues that the record is inconclusive in that regard. The parties agree that the County SPCA was created in 1972—the record is silent as to the date of creation. The Will was executed in December, 1972. It is therefore quite likely that the County SPCA, newly created, was in existence at the time the Will was made. According to counsel, State SPCA records dating from before 2004 were destroyed in a flood, which may explain the paucity of earlier evidence in the record, including evidence disclosing the precise date on which the County SPCA was chartered.

of humane and animal control laws. In addition, Ms. Abruzzo or the County SPCA (but not the State SPCA) maintained an animal shelter in Gloucester County.⁹

V. Analysis

A) *The County SPCA, not the State SPCA, is a named beneficiary of the Will and Trust.*

The primary purpose of the construction of the language of a will is to determine the intent of the testator as expressed therein. *E.g.*, In Re Barker, Del. Ch., No. 20455, Lamb, V.C. (June 13, 2007)(Mem. Op.) at 10; In Re Estate of Hendrickson, N.J. Super., 736 A.2d 540, 544 (1999). My first task, therefore, is to examine the language of Item III of the Will to determine which entity the testator intended to designate as a remainder beneficiary. One of those beneficiaries is designated as “. . . *the branch of the Society for Prevention of Cruelty to Animals which serves Mullica Hill, New Jersey and the vicinity thereof . . .*.”¹⁰ The language thus describes, not names, the beneficiary, and extrinsic evidence is appropriate to clarify the identity of the beneficiary. That evidence is not in dispute. The parties agree that the entity referred to in the Will as the “Society for Prevention of Cruelty to Animals” is the State SPCA. The evidence demonstrates that the only “branch” of the State SPCA serving the environs of Mullica Hill at the time the Will was created was the Gloucester County Branch of the New Jersey Society for Cruelty to

⁹County SPCAs are permitted to operate animal shelters. N.J.S.A. § 4: 22-13.

¹⁰Will, Item III(b)(1)(emphasis added).

Animals, Inc.—the County SPCA—which had recently been created by Mr. Francis’ fellow Mullica Hill resident, Ms. Abruzzo. The relationship between the State SPCA and the county SPCAs was provided by statute. N.J.S.A. § 4:22-1 et seq.¹¹ The County SPCA was a “district (county) society” created by the State SPCA pursuant to N.J.S.A. § 4:22-5. The purpose of the County SPCA was to aid the State SPCA, its parent organization, in the enforcement in its local jurisdiction (Gloucester County) of “all laws enacted for the protection of dumb animals.” Id. Its authority to operate could be revoked by the president of the State SPCA, for cause. Id. I find, therefore, that the County SPCA was the “branch of the Society for Prevention of Cruelty to Animals,” serving the Mullica Hill area, and was the entity designated as a remainder beneficiary in the Will.

The State SPCA points out that record evidence indicates that it was also providing enforcement of humane laws in the vicinity of Mullica Hill around the time the Will was created; it argues, therefore, that the organization designated in Item III(b)(1) could refer either to the State or the County SPCA. The construction suggested by the State SPCA, however, would read the phrase “the branch of” out of the Will, as though Mr. Francis had designated as a beneficiary simply “the SPCA serving Mullica Hill and the vicinity thereof.” Of course, if that had been the language used in the Will it would have created

¹¹Subsequent to the time of vesting of the charitable trust, on January 12, 2006, the State of New Jersey enacted new statutes concerning the Society for the Prevention of Cruelty to Animals. *See* N.J.S.A. § 4:22-1 et seq. The citations here are to the former statutes. None of the statutory changes is significant to my decision here. A new statute provides that the State SPCA “is continued as a parent corporation for the purpose of coordinating the function of county [SPCAs], and of promoting the interests of . . . animals.”

an ambiguity, because two SPCA organizations were serving Mullica Hill at the time the Will was created. Unfortunately for the State SPCA's position, the Will specifically indicates that the beneficiary organization is to be the "branch" organization serving Mullica Hill, provided that "said branch" exists at the time of vesting. "It is a general rule of construction that no word or phrase shall be rejected, or treated as superfluous, redundant or meaningless, if to it a meaning can be given which is reasonable and consistent with the object and purpose of the writing considered as a whole." Wilmington Trust Co. v. Wilmington Trust Co., Del. Supr., 24 A.2d 309, 313. The record indicates that only one SPCA organization was a branch of the other: the County SPCA was a branch of the State SPCA.¹² Therefore, I find that the County SPCA is the beneficiary designated under Item(III)(b)(1).¹³

¹²Indeed, the only "certificate of authority" existing of record issued by the State SPCA to the County SPCA granted the County SPCA the right to exist as a "branch society" of the State SPCA. In contrast, the State SPCA was not a branch of any over-arching organization. It was formed by the New Jersey Legislature, by statute, in 1868 and is the parent SPCA organization under New Jersey law. *See* N.J.S.A. § 4:22-11.2. The State SPCA speculates, without evidence, that Mr. Francis may have erroneously believed that the State SPCA was a branch organization of some super-SPCA, but for the reasons stated in the text of this report—including the fact that Ms. Abruzzo had then recently chartered the County SPCA in Mr. Francis' hometown of Mullica Hill—I find that possibility to be remote.

¹³Even if I agreed with the reading of the Will suggested by the State SPCA and determined therefore that the designation "branch of the [SPCA]" as used in Item III(b) of the Will could refer to either the State SPCA or the County SPCA, the extrinsic evidence does not support the State SPCA's position that it is the intended beneficiary of the Will. First, I note that the primary responsibility of the State SPCA is to promote animal welfare through "Enforce[ment] of all laws or ordinances enacted for the protection of dumb animals" in the State of New Jersey. N.J.S.A., § 4.22-3. The county and district branch SPCAs were created to assist in this law enforcement function, in their local areas of operation. *Id.*, at § 4-22.5. Mr. Francis' intent as evidenced by his choice of beneficiaries was to serve the Mullica Hill area, and the

B) The State SPCA does not take as statutory successor to the County SPCA.

The State SPCA points out that New Jersey law contains a saving statute that allows the State SPCA to accept gifts made to a County SPCA, in situations where the branch has ceased to exist. N.J.S.A. § 422-11.4(i). It also points out that it became the successor organization to the assets of the County SPCA when that entity ceased to exist in 2002. It argues that as a successor to the County SPCA, it now provides exclusive animal law enforcement in the Mullica Hill area and should therefore be entitled to receive the income designated to the County SPCA in the Will.

The terms of the Will are contrary, however. Mr. Francis designated the County SPCA as the object of his bounty. He also specifically provided for the contingency that the County SPCA might fail to exist at the time distributions were due from the trust: should “said branch” cease to exist, the income designated to the County SPCA must go instead to St. Peter’s Church.¹⁴ It is a matter of record that as of the time the Will was created and today the State SPCA provided and provides humane law enforcement in the

County SPCA is more closely related to that purpose than is the State SPCA. Second, shortly before the Will was created, the County SPCA had been formed by a fellow resident (with the testator) of Mullica Hill, Ms. Abruzzo. Third, in addition to undertaking local law enforcement functions, the branch SPCA created by Ms. Abruzzo also maintained an animal shelter in Gloucester County, making a distinction between the County and State SPCA yet more meaningful. In other words, it is likely that the testator’s intent was to benefit a specific local charity serving the Mullica Hill area, created by a fellow townsman, and not a state-wide agency. In any event, because I find that the language of the Will makes it clear that the designated beneficiary was not the State SPCA, but instead a branch of the State SPCA, I need not consider this evidence.

¹⁴Will, Item III(b)(1).

Mullica Hill area and throughout New Jersey. Mr. Francis could have made the State SPCA a primary remainder beneficiary or a contingent remainder beneficiary, had he so desired, and have achieved some of the charitable intent he manifested in designating the County SPCA as the object of his bounty. He could also have chosen to do that which he did: make his primary beneficiary the local branch of the SPCA, but should there not be such a local branch in existence, direct that his bounty flow to a different charity altogether. In other words, § 422-11.4(i) simply allows the State SPCA to accept a gift—it cannot *create* the gift. Only the testator may do that, and, by the explicit language of the Will, he chose not to.

C) Reformation of the Trust and the cy pres and deviation doctrines.

1) The doctrine of cy pres. The State SPCA maintains that payment of 100% of the trust income to St. Peter's would thwart the general charitable intent evidenced Mr. Francis in the Will. The State SPCA argues that, looked at as a whole, the Will and Trust create a plan that divides the income from the Francis Trust into two equal, and distinct, streams: one to flow to the Episcopal Church, and the other to flow for the protection of animals. Having discharged his bounty into these two quite separate channels, argues the State SPCA, it would thwart the charitable purpose of Mr. Francis to divert the "animal protection" stream of trust income into the "Episcopal Church" stream. The State SPCA insists that a finding that St. Peter's is entitled to the entire income stream would result in

a lapse of the largesse intended for animal protection in frustration of the intent of the testator. Therefore, the State SPCA invokes the doctrine of *cy pres*, asking this Court to deploy its broad equitable power to designate it as the successor beneficiary so as to carry out the intent of the testator.

Under the doctrine of *cy pres*, where the general charitable purpose of a trust would fail due to a circumstance, unanticipated by the settlor, that renders the literal fulfillment of the trust impossible or impractical, the court may designate an alternative beneficiary “*cy pres*” (as near as may be) to the named beneficiary, to facilitate the settlor’s general intent. *E.g.*, Matter of Gonzalez, N.J. Super., 621 A.2d 94, 95 (1992); In Re Estate of DuPont, Del. Ch., 663 A.2d 470, 478; 12 Del. C. § 3541. *Cy pres* is no more than a rule of construction designed to carry out, as near as may be, the intent expressed by the testator/settlor. It cannot be applied to defeat the intent of the testator as expressed in his will. The doctrine is invoked to carry out the testator’s presumed intention, had he foreseen the circumstances that thwart the purpose of his bequest. *See, e.g.*, Delaware Trust v. Graham, Del. Ch., 61 A.2d 110, 113 (1948). The doctrine may apply where the court, based on the evidence, answers affirmatively the question: would the settlor “have wanted the trust funds devoted to a like charitable purpose . . . [rather than] withdrawn from charitable channels?” Howard Savings Institution v. Peep, N.J. Supr., 170 A.2d 39, 42 (1961), *citing* 4 Scott, Trusts, § 399, comment (c), p. 1211 (1935).

I find two related problems with the State SPCA's argument that the doctrine should apply here. First, the failure of the gift to the County SPCA does not cause that charitable bequest to lapse in favor of a non-charitable remainderman or an heir designated by a statute of intestacy, which could provide equitable impetus for the invocation of *cy pres*. See Howard, 170 A.2d at 43 (stating that a partial motivation for enforcing settlor's presumed charitable intent via *cy pres* is the "policy of preserving charitable trusts . . . [and] the established presumption against partial intestacy.") Instead, the bequest flows to a second charitable beneficiary named in the will. Second, the State SPCA's metaphor of two streams of beneficence, flowing to different destinations and for different purposes, although creative, does not fit the actual charitable intent expressed by Mr. Francis. Mr. Francis set up a testamentary scheme by which (once his primary beneficiary died) the trust income would be split between two local charitable organizations serving the area near his hometown of Mullica Hill: St. Peter's Church (in Clarksboro, Gloucester County, New Jersey, five miles from Mullica Hill)¹⁵ and the County SPCA. Should either of those entities cease to exist, the *entire* income was to go to the survivor. Should both entities cease to exist, the entire income was to go to another local church, in nearby Chester, Pennsylvania.¹⁶ Finally, in the event that all these local charitable organizations ceased to exist, the entire income was to go to the Protestant

¹⁵See Hammond's New Supreme World Atlas, C. J. Hammond Co. (1957) at 75.

¹⁶Chester is about 12 miles northwest of Mullica Hill. Hammond's, at 75.

Episcopal Church in the Diocese of New Jersey.¹⁷ Therefore, and contrary to the “two streams of charity” model advanced by the State SPCA, Mr. Francis’s plan was to benefit one or more of several local charities, but if they ceased to exist, everything was to go to the Protestant Episcopal Church in the Diocese of New Jersey. The underlying theory of *cy pres* is that had the unforeseen occurrence been manifest to the testator, he would have allowed for it in the way the Court directs under the auspices of the *cy pres* doctrine. “Rarely does a settlor contemplate the possible non-fulfilment of his precise purpose. Therefore, the court must make an educated guess . . . as to what he would have intended had he been aware of the contingency which has frustrated the exact effectuation of his expressed intent.” Howard, 170 A. 2d at 43, *citing* 2A Bogert, Trusts and Trustees, § 436, p. 344 (1953). Here, however, the settlor *did* contemplate the precise circumstances that have come to pass. Mr. Francis considered the fact that either of the two primary remainder beneficiaries, the County SPCA or St. Peter’s Church, may have ceased to exist before his gift was distributed. He made a specific allowance for what should happen in that situation: the surviving entity was to take the entire income. Therefore, there exists no need for an “educated guess,” and any application of *cy pres* to modify the specific terms of the Will would be misplaced here.

¹⁷Should even that gift fail, the trustee was charged to use the trust for charitable purposes “as nearly in keeping” with the charitable purposes of the will “as practicable”—that is, the trustee was empowered to distribute the trust by analogy to the doctrine of *cy pres*. The Will provides that this power could be invoked by the trustee if no beneficiary existed as a charitable organization under the Internal Revenue Code. Will, Item III(b)(2)(ii).

ii) *Statutory cy pres*. Delaware has codified its *cy pres* doctrine. 12 Del. C. §

3541. That section provides at subsection (a) that

[s]ubject to subsection (b) of this section, if a particular charitable purpose or non-charitable purpose becomes unlawful under the Constitution of this State or the United States or the trust would otherwise no longer serve any religious, charitable, scientific, literary, educational or non-charitable purpose: (1) the trust does not fail in whole or in part; (2) the trust property does not revert to the trustor or the trustor's successor in interest; and (3) the Court of Chancery shall modify or terminate the trust and direct that the trust property be applied or distributed in whole or in part, in a manner consistent with the trustor's charitable or non-charitable purposes, whether or not such purposes be specific or general.

The parties dispute the extent to which this section has worked a change in the common-law *cy pres* doctrine and whether this section applies here.¹⁸ The same statute, however, at subsection (b), provides that

the power of the Court of Chancery to modify or terminate a charitable or non-charitable purpose trust, as provided in subsection (a) of this section, is in all cases *subject to a contrary provision in the terms of the trust instrument, whether such contrary provision directs that the trust property be distributed to a charitable or non-charitable beneficiary* (emphasis added).

In other words, because Mr. Francis provided for the possibility of the failure of the gift to the County SPCA, and provided an alternative beneficiary should that contingency occur, the statute does not allow this Court to substitute yet another beneficiary under the statutory doctrine of *cy pres*. Therefore, even if Delaware law applies and even if section 3541 is a deviation from the common law, it cannot be

¹⁸It is unclear to what extent § 3451 is meant to abrogate the Delaware common law doctrine of *cy pres*. See In Re DuPont, 663 A.2d at 478, n.14.

invoked to aid the State SPCA here. Because the results are the same under the laws of the State of New Jersey, the common law of Delaware and 12 Del. C. § 3541, I need make no decision on the applicability of the statute in this matter.

iii) *The doctrine of deviation.* The State SPCA also seeks to invoke the doctrine of deviation to amend the terms of the trust to make the State SPCA a beneficiary. That doctrine is similar to *cy pres*: deviation permits departure from the exact terms of a trust if the administration thereof (as called for explicitly in the document creating the trust) is impossible or illegal, “or if owing to circumstances not known to the testator and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.” University of Delaware v. Warrington, Del. Ch., No. 12440, Chandler, V.C. (June 9, 1993)(Mem. Op.) at 4; *See Howard*, 170 A.2d at 42. For the reasons stated above in reference to the doctrine of *cy pres*, the doctrine of deviation is likewise unavailable to modify the trust here.

VI. Conclusion

Mr. Francis directed that half of the income of the trust be paid to the “branch of the [SPCA]” serving the environs of Mullica Hill, but that if “said branch” ceased to exist, then that income was directed to St. Peter’s Church. At the time this gift vested, the branch SPCA—the County SPCA—had ceased to exist. Therefore, the right to receive that income devolved upon St. Peter’s Church. The equitable doctrines of *cy pres* or

deviation are available to effectuate an otherwise-frustrated charitable intent, but only where completion or administration of the gift is impossible or impractical under the explicit terms of the trust, due to circumstances unforeseen to the testator/settlor. No such impossibility or impracticality exists here. The Will specifically provides for an alternative beneficiary under the current circumstances. For the foregoing reasons and as stated in my draft bench report of December 5, 2007, summary judgment is granted in favor of respondent St. Peter's Church. The motion for summary judgment of respondent New Jersey State Society for the Prevention of Cruelty to Animals is denied.

/s/ Sam Glasscock, III
Master in Chancery