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To be argued by:
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New York Supreme Court
Appellate Division - Third Department

In the Matter of the Application of TRUSTCO BANK,
f/k/a TRUSTCO BANK OF NEW YORK, as Trustee of
the **KENNETH T. LALLY REVOCABLE TRUST**, the
**KENNETH T. LALLY CHARITABLE REMAINDER
TRUST- A**, and the **KENNETH T. LALLY
CHARITABLE REMAINDER TRUST-B**, created
under Agreement with Kenneth T. Lally, deceased, Dated
November 24, 1993.

File No. 2008-611

PROBATE PROCEEDING, WILL OF
VERA O. CHASE

Deceased

File No. 2008-131

PROBATE PROCEEDING, WILL OF
MARY G. YORK

Deceased.

File No. 2010-544/A

Brief of Petitioners-Respondents

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PRELIMINARY STATEMENT

Petitioners-Respondents Ellis Hospital and Ellis Hospital Foundation, Inc. (collectively “Ellis Hospital”) submit this answering brief in opposition to the appeal brief of Respondent-Appellant St. Clare’s Hospital of Schenectady, N.Y. Foundation, Inc. (“St. Clare’s Hospital Foundation”).

This appeal arises from a Decision and Order dated October 19, 2012 (“Summary Judgment Order”) of the Schenectady County Surrogate’s Court (Versaci, S.) granting Ellis Hospital’s motion for summary judgment for the application of the *cy pres* doctrine and a decree that Ellis Hospital is the proper alternative beneficiary for bequests to St. Clare’s Hospital of Schenectady, New York, Inc. and/or St. Clare’s Hospital Foundation, (collectively “St. Clare’s Hospital”) in the three consolidated cases: (1) In the Matter of the Application of Trustco Bank, f/k/a Trustco Bank of New York, as Trustee of the Kenneth T. Lally Revocable Trust, the Kenneth T. Lally Charitable Remainder Trust-A, and the Kenneth T. Lally Charitable Remainder Trust-B, created under Agreement with Kenneth T. Lally, deceased, Dated November 24, 1993 (“Lally Trust”); (2) Probate Proceeding, Will of Vera O. Chase, deceased (“Chase Estate”); and (3) Probate Proceeding, Will of Mary G. York, deceased (“York Estate”).

Based on undisputed facts, and drawing largely from this Court’s decision in *Matter of Hummel*, 30 A.D.3d 802 (3d Dept. 2006), the Surrogate’s Court correctly held that St. Clare’s Hospital Foundation could no longer fulfill the donors’ intent of benefitting a hospital and that under the *cy pres* doctrine, Ellis Hospital was the proper beneficiary. The Surrogate’s Court specifically held that (1) each decedent had a general charitable intent; and (2) the donors’ intent was to benefit St. Clare’s Hospital, a purpose that had been rendered impossible or impracticable. The Court further held that under the *cy pres* doctrine, Ellis Hospital was the

proper beneficiary of the gifts at issue, given its assumption of the assets of St. Clare's Hospital and its operation of the former facilities of St. Clare's Hospital.

St. Clare's Hospital Foundation offers no valid grounds for upsetting the Surrogate's Court's ruling. The Surrogate's Court correctly held that at the time each donor made the gifts in issue, St. Clare's Hospital Foundation had one purpose: to support the then-operative St. Clare's Hospital. Ellis Hospital assumed substantially all of the assets of the former St. Clare's Hospital, operates its facilities and is now the only hospital in Schenectady County in the wake of the 2008 New York State-mandated consolidation of St. Clare's Hospital and Ellis Hospital. Thereafter, St. Clare's Hospital surrendered its license, changed its name to St. Clare's Corporation and adopted a new charitable mission.

St. Clare's Hospital Foundation principally takes issue with the Surrogate's Court's holding on donor intent. St. Clare's Hospital Foundation argues that the court below improperly presumed that the donors intended to benefit a hospital, *i.e.*, benefit the provision of acute patient care services, when they made their gifts to St. Clare's Hospital Foundation. As a matter of law, however, this Court expressly held in *Matter of Hummel* that gifts to a hospital are presumptively intended to benefit the support of acute patient care services, and that a hospital that has surrendered its license can no longer fulfill that purpose even if it continues as a corporate entity. St. Clare's Hospital Foundation in effect suggests that the Surrogate's Court should have reversed the presumption, and asserts that there was no evidence in the record that the donors did not intend to benefit St. Clare's Hospital Foundation, rather than St. Clare's Hospital. These arguments ignore controlling precedent and the undisputed facts in the record. It is notable that St. Clare's Hospital Foundation offers no grounds for the Court to repudiate its holding in *Matter of Hummel*.

Even under the legal standard that it proposes, however, St. Clare's Hospital Foundation could not prevail on the record facts. The Surrogate's Court's holding rested on undisputed facts. It is undisputed that at the time of each gift at issue, the St. Clare's Hospital Foundation had no charitable purpose other than the support of St. Clare's Hospital. Moreover, there is record evidence of each donor's intent to benefit a hospital, confirming the presumptive intent adopted in *Matter of Hummel*. On the contrary, and most notable on this appeal, the record reveals no evidence that any donor intended to benefit any function of St. Clare's Hospital Foundation other than the support of St. Clare's Hospital.

The Surrogate's Court's holding that under the *cy pres* doctrine Ellis Hospital is the proper beneficiary of the gifts at issue is unimpeachable given the donors' intent to benefit a hospital. Ellis Hospital operates the facilities of the former St. Clare's Hospital and provides the very hospital services that St. Clare's Hospital's previously provided. St. Clare's Hospital (now called St. Clare's Corporation) surrendered its license to operate a hospital and changed its charitable purpose. It is essentially a corporate shell that provides no hospital services and currently is not even engaging in any charitable activities.

St. Clare's Hospital Foundation is asking the Court to reverse this holding by suggesting that it somehow unduly burdens not-for-profits that transfer substantially all of their assets and adopt a new charitable purpose. Again, however, it offers no basis to reverse existing law or to create any special exceptions to the fundamental principle of *cy pres*, namely, that the doctrine must be applied where a charitable entity can no longer fulfill the donor's charitable intent.

Based on all of the undisputed record facts and the applicable law, the Surrogate's Court's grant of summary judgment in favor of Ellis Hospital correctly applied the *cy pres* doctrine to fulfill the donors' intent. The decision should be affirmed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Surrogate's Court properly grant summary judgment on the issue of *cy pres*, where the subject gifts were among many charitable gifts that each donor made, and where there is record evidence of each donor's intent to benefit a hospital?
2. Did the Surrogate's Court properly hold that Ellis Hospital is the appropriate beneficiary of the subject gifts when Ellis Hospital operates the facilities of the former St. Clare's Hospital and provides the very hospital services that St. Clare's Hospital previously provided, and where St. Clare's Hospital Foundation provides no hospital services and currently is not engaging in any charitable activities?

STATEMENT OF THE CASE

I. St. Clare's Hospital and Ellis Hospital

The material facts that formed the basis for the Summary Judgment Order are undisputed. Ellis Hospital and St. Clare's Hospital Foundation entered into a Stipulation of Facts at the conclusion of discovery [R. 21-30].

Ellis Hospital is a hospital founded in 1885 and licensed by the State of New York, with its main facility located at 1101 Nott Street, Schenectady, New York. [R. 22 ¶ 1]. Ellis Hospital provides medical/surgical, geriatric, emergency, psychiatric and obstetric/gynecological care, primary care, long-term care and out-patient facilities. [R. 22 ¶ 2]. The Ellis Hospital Foundation, Inc. ("Ellis Hospital Foundation") is a New York not-for-profit corporation, and its purpose is to provide financial assistance to Ellis Hospital in support of the hospital's medical mission. [R. 22 ¶¶ 4-5].

Until June 16, 2008, St. Clare's Hospital operated as a hospital licensed by the State of New York, with its principal facility located at 600 McClellan Street, Schenectady, New York. [R. 22-23 ¶ 8]. On or about June 16, 2008, St. Clare's Hospital ceased operating a hospital. [R.

23 ¶ 11]; *Matter of Trustco Bank New York*, 2011 N.Y. Misc. LEXIS 4387 *3, 6, 2011 Slip Op. 21324 (Sur. Ct., Schenectady County 2011). St. Clare's Hospital, like Ellis Hospital, provided a wide range of in-patient and out-patient services. [R. 22 ¶ 9]. St. Clare's Hospital Foundation is a not-for-profit corporation established in 1981 to assist St. Clare's Hospital and its affiliates in expanding and developing its services to the community. [R. 23 ¶ 10]. Until St. Clare's Hospital surrendered its license to operate a hospital, St. Clare's Hospital Foundation engaged in fundraising activities. [R. 23 ¶ 27]. St. Clare's Hospital Foundation would receive donor funds, deduct its expenses, if applicable, and turn over the net proceeds to St. Clare's Hospital. [R. 23 ¶ 29]. While St. Clare's Hospital was in operation as a hospital, St. Clare's Hospital Foundation provided funds only to St. Clare's Hospital (on two occasions it provided loans to other local charitable organizations). [R. 23 ¶ 31]. Although St. Clare's Hospital still exists as a not-for-profit corporation, it no longer supports or operates any hospital. [R. 23 ¶ 12].

II. The Berger Commission and the Asset Transfer Agreement

In or about November 2006, the New York State Department of Health released a report issued by the Commission on Health Care Facilities in the 21st Century (commonly known as the "Berger Commission"). [R. 23 ¶ 13]. The Berger Commission's recommendations included consolidation of the operations of St. Clare's Hospital and Ellis Hospital. [R. 23 ¶ 16].

In compliance with the Berger Commission report, St. Clare's Hospital and Ellis Hospital executed an asset transfer agreement (the "Agreement"), effective June 16, 2008, whereby Ellis Hospital became the sole remaining hospital in Schenectady County. [R. 23-24 ¶ 17, R. 31-75]. Ellis Hospital assumed responsibility for providing hospital and other healthcare services previously provided by St. Clare's Hospital. [R. 24 ¶¶ 18, 21].

Ellis Hospital acquired St. Clare's Hospital's facilities, and that facility is now known as the McClellan Campus of Ellis Hospital. [R. 24 ¶ 20]. Ellis Hospital's main facility at 1101

Nott Street in Schenectady is now known as the Nott Street Campus. [R. 24 ¶ 24]. The overarching name for the new healthcare system, including both the Nott Street Campus and the McClellan Campus, is “Ellis Medicine.” [R. 24 ¶ 26].

III. Post-Closing Status of St. Clare’s Hospital and St. Clare’s Hospital Foundation

St. Clare’s Hospital revised its Certificate of Incorporation on March 3, 2010, to reflect a new primary purpose once it no longer operated a hospital. The new primary purpose is: “To promote the health and well-being of the residents of the City and County of Schenectady, New York, by providing information, programs and special events promoting healthy habits, life-style choices and activities, all in a manner consistent with the convictions and teachings of the Roman Catholic Church.” [R. 25 ¶ 32]. Since St. Clare’s Hospital relinquished its license and operating certificate to operate a hospital, its principal activities have been the collection of receivables, payment of payables and administration of its debts. [R. 25 ¶ 33].

Similarly, with the winding down of the operations of St. Clare’s Hospital, the St. Clare’s Hospital Foundation is not currently engaged in any charitable activities. [R. 25 ¶ 34]. Since June 16, 2008, St. Clare’s Hospital Foundation has not engaged in any fundraising activities and has not provided any charitable grants. [R. 25-26 ¶¶ 35, 36]. St. Clare’s Hospital currently runs no facilities, employs no persons and provides no healthcare services, much less any hospital services. [R. 310, 64:16-20 (St. Clare’s is “not operating a hospital” and is “not treating any patients”), R. 311, 65:11-13 (St. Clare’s Hospital currently has no employees), R. 311, 65:17-66:6 (Mr. Pofit is the only current employee; a secretary was employed after the asset transfer, but is not currently employed)]. St. Clare’s Hospital is essentially run by Joseph Pofit, an official of the Roman Catholic Diocese of Albany; he addresses administrative tasks associated with the winding down of the former hospital’s operations, such as the satisfaction of payables,

receipt of receivables and administration of the pension plan. [R. 308-312, 62:24-66:6, R. 313,

67:15-25. During Mr. Pofit's deposition, he testified as follows:

Q What - - what kind of activities are - - has St. Clare's Corporation since June 16th, 2008, engaged in any activities to promote the health and well-being of the city's - - residents of the City and County of Schenectady, New York?

A Since we are under a lawsuit, the board said we need to, basically, clear that up before we do anything new.

Q All right. [The certificate of incorporation] goes on to say, by providing activities and programs. Has St. Clare's Corporation organized or sponsored any activities or programs to date?

A No.

Q Has it organized fundraising activities?

A No.

Q Solicited donations?

A No.

Q Or applied for private or public grants - -

A No.

Q -- to facilitate any of the foregoing?

A No.

[R. 314-315, 68:23-69:20].

IV. Lally Trusts

Kenneth T. Lally died on November 7, 2008, and left a Trust Agreement titled the Kenneth T. Lally Revocable Trust Agreement Amended and Restated ("Lally Trust") dated November 24, 1993. *See* [R. 26 ¶¶ 26, 38; R. 77-118]. Kenneth T. Lally's wife, Thelma P. Lally, predeceased her husband and died on March 22, 2005. [R. 26 ¶ 39]. On December 10, 2008, Trustco Bank, f/k/a/ Trustco Bank of New York, as Trustee of the Kenneth T. Lally

Revocable Trust, the Kenneth T. Lally Charitable Remainder Trust-A, and the Kenneth T. Lally Charitable Remainder Trust-B, created under Agreement with Kenneth T. Lally, deceased (“Trustco”) was appointed Executor of the Lally estate. [R. 26 ¶ 40].

Pursuant to Article VIII of Kenneth T. Lally’s Last Will and Testament, all the rest, residue and remainder of the Lally estate poured over to the Lally Trust. [R. 26 ¶ 41]. Under the terms of the Lally Trust, St. Clare’s Hospital Foundation is designated as one of the various charitable beneficiaries to receive a portion of the trust remainder of the Kenneth T. Lally Charitable Remainder Trust-A (“Lally Trust A”), and the Kenneth T. Lally Charitable Remainder Trust-B (“Lally Trust B”). [R. 26 ¶ 42]. Article IX(b) of the Lally Trust provides that fifty percent (50%) of the two-thirds (2/3) remainder be divided equally among fifteen (15) designated charities, including St. Clare’s Hospital Foundation. [R. 27 ¶ 44]. St. Clare’s Hospital Foundation is named a one-fifteenth beneficiary of fifty percent of the Lally Trust A remainder. [R. 27 ¶ 46]. St. Clare’s Hospital Foundation is named a one-fifteenth beneficiary of fifty percent of the Lally Trust B remainder. [R. 27 ¶ 48].

Among the fifteen named charities set forth in Article IX(b) of the Lally Trust are four hospitals: (1) Ellis Hospital Foundation; (2) Samaritan Hospital Foundation, Inc.; (3) St. Clare’s Hospital Foundation; and (4) Sunnyview Hospital and Rehabilitation Center Foundation, Inc. [R. 27 ¶ 49]. The last paragraph of Article 9(b) of the Lally Trust distinguishes these gifts as hospital gifts and states, “I direct that the amounts bequeathed to all of the above charities with the exception of the four hospital beneficiaries be specifically utilized to either add to existing endowments of the said organizations or for the purpose of creating an endowment.” [R. 27 ¶ 50]. Identical language is set out in Section 10.2 of the Lally Trust, which governs disposition of

funds that are to be deposited into so-called ‘unitrusts’ for a period of five years and then distributed to the same charitable organizations identified in Article 9(b). [R. 27-28 ¶ 51].

The scrivener for the Lally estate and Lally Trust, Higgins, Roberts, Beyerl & Coan, P.C., searched its files comprising all matters related to the estate planning for the Lallys and found no information that would indicate the intent of Kenneth or Thelma Lally. [R. 28 ¶¶ 53-54].

The first above-captioned proceeding was initiated by Trustco and sought *cy pres* relief of Articles 9 and 10 of the Trusts and, more specifically, sought direction regarding the payment of gifts designated for St. Clare’s Hospital Foundation ‘in a manner which would most effectively accomplish the trusts’ general purposes.’ [R. 134-145].

V. Chase Estate

Vera O. Chase died on March 20, 2007. [R. 28 ¶ 55]. Vera O. Chase’s Last Will and Testament, dated November 18, 1996, (the “Chase Will”) was probated on May 28, 2008. *See* Exhibit C. [R. 28 ¶ 56]. Under paragraph H of Article VII of the Chase Will, Mrs. Chase granted five percent of her residuary estate to St. Clare’s Hospital Foundation, “or its successor in interest.” [R. 28 ¶ 57].

The scrivener for the Chase estate searched its files comprising all matters related to the estate planning for Vera O. Chase and found no information that would indicate the intent of Vera O. Chase in making her will. [R. 28 ¶¶ 58-59].

The second above-captioned proceeding was initiated by Trustco seeking an order or decree directing whether or not Ellis Hospital is entitled to the St. Clare’s bequest either as a successor in interest or pursuant to the *cy pres* doctrine. [R. 153-156].

VI. York Estate

Mary G. York died on September 2, 2010. [R. 29 ¶ 60]. Mary G. York’s Last Will and Testament, dated June 10, 2004, (the “York Will”) was probated on December 14, 2010. [R. 29

¶ 61, R. 127-132]. Under paragraph E of Article VIII of the York Will, five percent of her residuary estate was gifted to St. Clare's Hospital Foundation, "or its successor in interest." [R. 29 ¶ 62].

The scrivener for the York estate searched its files comprising all matters related to the estate planning for Mary G. York and found no information that would indicate the intent of Mary G. York in making her will. [R. 29 ¶¶ 63-64.

The third above-captioned proceeding was initiated by Frances L. Gagnon seeking an order or decree directing whether or not Ellis Hospital is entitled to the St. Clare Hospital Foundations's bequest either as a successor in interest or pursuant to the *cy pres* doctrine. [R. 169-173].

VII. The Surrogate's Court's Grant of Summary Judgment

The above proceedings were joined for purposes of conducting depositions and for summary judgment by stipulation of the parties and order of the Court on March 26, 2012. [R. 360-365]. As noted above, at the completion of discovery, the parties entered into a Stipulation of Facts [R. 21-30]. Both Ellis Hospital and St. Clare's Hospital Foundation filed motions for summary judgment [R. 7]. Ellis Hospital sought summary judgment on the issue of the application of *cy pres* to the subject gifts, and further sought a ruling that it be deemed the proper recipient under the doctrine of *cy pres* [R. 11]. St. Clare's Hospital Foundation sought summary judgment on the grounds that there was no basis to apply *cy pres* to the subject gifts [R. 10-11].

Notably, the Attorney General submitted answering papers in support of Ellis Hospital's position and in opposition to that of St. Clare's Hospital Foundation [R. 12].

In the Summary Judgment Order, the Surrogate's Court granted Ellis Hospital's motion for summary judgment. The Surrogate's Court noted that with regard to the three requirements for application of *cy pres* under EPTL § 8-1.1(c)(1), there was no dispute as to the first prong in

that “all three bequests at issue are charitable in nature” [R. 13]. The Surrogate’s Court further held that the second prong was satisfied in that “each of the donors had a general, rather than a specific charitable intent in making their respective gifts to St. Clare’s” [R. 13]. As to the final *cy pres* prong, the Surrogate’s Court concluded that St. Clare’s had failed to overcome the legal presumption that each donor intended to benefit a hospital in the provision of acute care [R. 16-18]. The Surrogate’s Court concluded that fulfillment of that charitable purpose had failed, given that St. Clare’s Hospital “has ceased to exist in the manner that was known to the donors, that is, as a hospital providing acute patient care services” [R. 18].

Having concluded that the record warranted application of the *cy pres* doctrine, the Surrogate’s Court further held that “Ellis, as the current operator of the hospital at 600 McClellan Street, Schenectady, New York and the sole remaining hospital in Schenectady County, most closely resembles St. Clare’s as it existed at the time of the gifts at issue, and therefore is the proper alternative beneficiary of the gifts and is entitled to receive the gifts under the *cy pres* doctrine” [R.14]. It is notable that the Surrogate Court’s findings of fact are not only supported by the record, but are almost exclusively supported by the stipulation of facts executed by Ellis Hospital and St. Clare’s Hospital Foundation.

ARGUMENT

I. APPLICATION OF THE *CY PRES* DOCTRINE IS WARRANTED

The Surrogate’s Court correctly held that the *cy pres* doctrine applies to the subject gifts based on the undisputed and stipulated facts. While a court must always “find and implement the intention of the testator as it is manifested in the language of the [instrument][,]” . . . “[w]here gifts to charity are involved, several additional rules of construction are relevant.” *Matter of Carper*, 67 A.D.2d 333, 336 (4th Dept. 1979), *aff’d* 50 N.Y.2d 974, 975 (1980) (citation

omitted). In particular, a decedent's charitable intent "will be given effect by application of liberal rules of construction[.]" and "should be sustained whenever possible under the cy pres doctrine in the light of the intention of the testator." *Id.* (citations omitted).

For this reason, "[w]hen a court determines that changed circumstances have rendered the administration of a charitable trust according to its literal terms either 'impracticable or impossible,' the court may exercise its cy pres power to reform the trust in a manner that 'will most effectively accomplish its general purposes.'" *Matter of Wilson*, 59 N.Y.2d 461, 472 (1983), quoting N.Y. Est. Powers & Trusts §8-1.1(c)(1); accord *Hummel*, 30 A.D.3d at 804; see *Sherman v. Richmond Hose Co. No. 2*, 230 N.Y. 462, 469-473 (1921); *Matter of Goehring*, 69 Misc. 2d 145, 146-151 (Sur. Ct., Kings County 1972). For *cy pres* to apply, "(1) the gift or trust must be charitable in nature; (2) the language of the will or trust instrument, when read in light of all attendant circumstances, must indicate that the donor demonstrated a general, rather than specific, charitable intent; and (3) it must be determined to the court's satisfaction that the particular purpose for which the gift or trust was created has failed, or has become impossible or impracticable to achieve." *Matter of Othmer*, 185 Misc. 2d 122, 126 (Sur. Ct., Kings County 2000); see *Hummel*, 30 A.D.3d at 804.

Here, as in the Surrogate's Court, St. Clare's Hospital Foundation does not dispute the first prong, because the Lally Trust, the Chase Estate and the York Estate are plainly charitable in nature. [R. 13; Appellant's Brief at 5]. Rather, St. Clare's Hospital Foundation suggests in passing that the second prong was not met, but then focuses principally on the third prong. However, the law and the undisputed facts readily support the Surrogate's Court's holdings that (a) the donors had a general charitable intent; and (b) the donors intended to benefit a hospital.

A. The Lallys, Mrs. Chase and Mrs. York Had a General Charitable Intent

In its appeal brief, St. Clare's Hospital Foundation states almost in passing that "the donors demonstrated a specific rather than a general charitable intent." [Appellant Brief at 5]. St. Clare's Hospital Foundation did not dispute below in Surrogate's Court that the donors had a general charitable intent, and its belated challenge on that issue before this Court is therefore unpreserved and should not be considered. *Matter of Murray*, 49 A.D.3d 1003, 1006 (3d Dept. 2008); *Matter of Gates*, 120 A.D.2d 890, 892 (3d Dept. 1986).

Notwithstanding the failure of St. Clare's Hospital Foundation to preserve the argument, it lacks any merit. The grantors "manifested a general intent to devote the property to charitable purposes, rather than an intent to confine [their] beneficence to the [named] institution." *Matter of Bowne*, 11 Misc. 2d 597, 600 (Sur. Ct., New York County 1958). As the court explained in *Matter of Othmer*, "where a trust settlor or donor of a gift shows an inclination to benefit a variety of charities, a court is likely to conclude that the donor had a general charitable intent and to apply the cy pres doctrine in the appropriate circumstances." *Othmer*, 185 Misc. 2d at 127 (citing *Bowne*, 11 Misc.2d at 601). As one court explained, a specific intent will be found "infrequently, indeed almost never, when there has been a failure [or lapse] *after* vesting." *Goehringer*, 69 Misc. 2d at 148 (citing cases) (emphasis in original).

Applying this principle, the Surrogate's Court correctly concluded that "[a] plain reading of the trust and wills at issue evinces a general charitable intent held by each of the donors, in that each instrument names several different charitable organizations as beneficiaries." [R. 13]. As the Surrogate's Court noted, Mr. Lally named in his trust sixteen charitable beneficiaries and, along with his wife, had been a major contributor to Ellis Hospital. [R. 13-14; *see also* R. 26-27 ¶¶ 43-49; R. 90-97 Articles 9-10]. Ms. Chase named eight charitable beneficiaries as residuary beneficiaries and made a gift to Ellis Hospital during her lifetime. [R. 14; *see also* R. 28 ¶ 57; R.

121-23 Article VII]. Ms. York named five charitable beneficiaries [R. 14; R. 29 ¶ 62; R. 129 Article VIII].

In light of each decedent's numerous charitable dispositions, the Surrogate's Court's finding that each donor had a general charitable intent was well grounded. *See Hummel*, 30 A.D.3d at 804, *aff'g Matter of Hummel*, 9 Misc. 3d 996, 1012-1013 (Sup. Ct. Albany County 2005) (finding a general charitable intent when decedents "left their entire estates to charitable institutions," except for two bequests to relatives); *Carper*, 67 A.D.2d at 337; *Matter of Kramer*, 20 Misc. 3d 383, 385 (Sur. Ct., Nassau County 2008) (general charitable intent found when settlor made "several provisions for charitable gifts"); *Othmer*, 185 Misc. 2d at 127 (general charitable intent found when the Othmers "bequeathed all but an infinitesimal amount of their vast millions to numerous other charities"); *Bowne*, 11 Misc. 2d at 601-02 (general charitable intent found where decedent made fifteen charitable gifts).

St. Clare's Hospital Foundation does not dispute the factual bases for the Surrogate's Court's finding of a general charitable intent or that court's legal analysis. Rather, it argues that in making their gifts to St. Clare's Hospital Foundation, the donors did not intend to benefit a hospital. [Appellant Brief at 5-7]. As explained below, that argument ignores clear case law to the contrary, as well as evidence in the record offering further support for the Surrogate's Court's conclusion. This argument, however, has nothing to do with whether the donors had a general or specific intent. St. Clare's Hospital Foundation offers no basis for its assertion that the donors lacked a general charitable intent.

B. The Specific Charitable Purpose Is No Longer Capable of Being Performed

It is a fundamental tenet of the *cy pres* doctrine that trust or estate assets may not be dispensed to a charity whose purpose or objective changed following the trust's creation.

Hummel, 9 Misc. 3d at 998, *aff'd*, 30 A.D.3d at 802; *see St. Joseph's Hosp. v. Bennett*, 281 N.Y. 115, 122 (1939); *Matter of Kraetzer*, 119 Misc. 2d 436, 436 (Sur. Ct., Kings County 1983); *Kittinger*, 6 Misc. 2d at 126-128; *Bowne*, 11 Misc. 2d at 598-602. As the Court of Appeals has made clear, a charitable corporation may not “receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands.” *St. Joseph's*, 281 N.Y. at 122. As such, “the bare legal existence of a charitable corporation to which a testamentary disposition is made does not ensure entitlement to receipt of the gift in its favor” where it is no longer fulfilling the charitable purpose in place when the gift was made. *Kraetzer*, 119 Misc. 2d at 436.

Given this fundamental principle of the *cy pres* doctrine, the Surrogate’s Court properly framed the operative question in this case as “whether there is sufficient proof to establish either that the donors intended to benefit St. Clare’s as a hospital, which no longer exists, or that they intended to benefit the corporation itself, which does still exist.” [R. 14]. The Surrogate’s Court’s holding that the donors intended to benefit a hospital rests firmly on the law, including this Court’s decision in *Matter of Hummel*, and on the undisputed facts.

Courts have recognized that gifts to hospitals are presumptively intended to support acute patient care. An early case adopting this principle was *Matter of Kraetzer*. There, the hospital at issue had filed for bankruptcy and no longer functioned as a hospital. The court held that the hospital could no longer fulfill the donor’s intent, holding that “[i]n the case of hospital corporations, [a donor’s] purpose is deemed to be the actual and continued provision of acute patient care services rather than the satisfaction of creditors’ claims.” *Kraetzer*, 119 Misc. 2d at 439. The court added that the hospital’s continued “bare legal existence” was insufficient to warrant its entitlement to the gift. *Id.* at 437-38. Later, the Appellate Division, Fourth

Department, adopted this reasoning in *Matter of Coffey*, 187 AD2d 929 (4th Dept. 1992). The court there similarly reasoned that a gift to a hospital that was in bankruptcy was properly re-directed under the *cy pres* doctrine to another hospital located in the same county.

This Court expressly adopted this principle in *Matter of Hummel*. That case concerned a nearly identical factual scenario to that in this case. The action arose from a trust that named the former Child's Hospital in Albany as one of three beneficiaries. After the donors formed the trust, Albany Medical Center Hospital ("AMC") acquired the assets of Child's Hospital. In connection with the sale of its assets, Child's Hospital changed its name to "Episcopal Charities of Albany, Inc., and amended its corporate purpose, precluding it from operating a hospital and instead permitting it to fund faith-based health services." 30 A.D.3d at 803. The Surrogate's Court held that the Hummels intended to benefit Child's Hospital, that that purpose was no longer being fulfilled by Child's Hospital and that, under the *cy pres* doctrine, AMC was the proper beneficiary. 9 Misc. 3d at 1013-14. On the issue of intent, the Surrogate's Court adopted the reasoning of *Matter of Kraetzer* and *Matter of Coffey*, holding that "general gifts to a hospital are intended to fund hospital activities, and when the designated hospital's functions have ceased, even if the formal corporate existence continues, the doctrine requires that such gifts be redirected to an active, charitable hospital." *Hummel*, 9 Misc. 3d at 1010-11.

On appeal, this Court affirmed the Albany Surrogate's Court's decision. In affirming the holding on the issue of charitable intent in particular, this Court specifically cited *Matter of Kraetzer* for the proposition that the "purpose of [a] gift to [a] hospital is deemed to be for the object of the corporation, 'actual and continued provision of acute patient care,' not for [the] corporation itself." *Hummel*, 30 A.D.3d at 804 (quoting *Kraetzer*, 119 Misc. 2d at 439-40), and citing *Coffey*, 187 A.D.2d at 929.

In light of this Court's holding in *Matter of Hummel*, the Surrogate's Court correctly held that, as a matter of law, the gifts at issue were intended to benefit acute patient care in a hospital. [R. 16]. In asking the Court to reach the opposite result, St. Clare's Hospital Foundation suggests that this Court should apply a reverse presumption and thereby assume, in the absence of contrary evidence, that the donors intended to benefit St. Clare's Hospital Foundation as a corporate entity rather than St. Clare's Hospital. St. Clare's cites no legal authority for such a proposition, and such a holding would require the Court to reverse the rule that it adopted in *Matter of Hummel*.

In any event, the record offers no support for St. Clare's Hospital Foundation, even under the standard that it asks the Court to adopt. As the Surrogate's Court noted in holding that St. Clare's Hospital Foundation had failed to put forward evidence to rebut the presumptive intent to benefit a hospital, it was undisputed that (i) "at the time that each of the donors executed their respective trust and wills, St. Clare's was operating as a hospital that provided acute patient care services[;]" (ii) "St. Clare's has ceased operating as a hospital, no longer provides acute patient care services, and is not currently engaged in any type of benevolent services[;]" and (iii) the stated intention of St. Clare's "to provide community based health-related services going forward . . . is of no consequence, since there is no proof in the record that any of the donors ever intended to benefit that type of activity." [R. 16-17].

Further, the Surrogate's Court below expressly rejected St. Clare's Hospital Foundation's argument that it was not "technically" impossible or impracticable to distribute the gifts to them because it is still in existence. [R. 19]. The court below held that even if St. Clare's Hospital Foundation were engaging in its new mission, which it is not, the court would still redirect the gifts because the foundation's new mission is "significantly different from the provision of acute

patient care services provided by a hospital, which is the type of services the donors intended to benefit.” [R. 19].¹

With no legal basis to overturn settled law, St. Clare’s Hospital Foundation attempts to suggest that *Matter of Hummel* and *Matter of Kraetzer* are distinguishable because here, the donors made their gift to St. Clare’s Hospital Foundation, as distinct from St. Clare’s Hospital. As noted above, however, that is a distinction without a difference. It is undisputed that at the time the donors made their gifts, the charitable purpose of St. Clare’s Hospital Foundation was solely the support of St. Clare’s Hospital. Discovery did not reveal any other function of St. Clare’s Hospital Foundation, and the foundation cites no such record evidence on appeal. In naming St. Clare’s Hospital Foundation as a beneficiary, therefore, the donors can rightly be presumed to have intended to benefit St. Clare’s Hospital. To suggest otherwise would be to read into the then-existing charter of St. Clare’s Hospital Foundation a purpose that did not exist at the time.

In any event, the Surrogate’s Court did not, as St. Clare’s Hospital Foundation suggests, rest its holding solely upon a presumption of intent. Rather, the court cited additional, undisputed evidence in the record that bolstered the finding of presumed intent to benefit a hospital. The language of the Lally Trust establishes that Mr. and Mrs. Lally’s charitable intent in naming St. Clare’s was to benefit the hospital. It names, among the beneficiaries, four hospitals: (1) Ellis Hospital Foundation; (2) Samaritan Hospital Foundation, Inc.; (3) St. Clare’s

¹ Notably, the Surrogate’s Court, Albany County, which issued the trial court decision in *Matter of Hummel*, applied *Hummel*’s holding in favor of Ellis Hospital and against St. Clare’s Hospital Foundation in *Matter of Ogsbury*. (A copy of the Decision and Order, File No. 2011-572, dated November 19, 2012, is attached hereto as Exhibit 1.) N.Y. CPLR §4511(a); *see, also, Galasso Langione & Botter, LLP v. Liotti*, 22 Misc. 3d 450, 451 (Supreme Court, App. Term, 1st Dept. 2008) (judicial notice of a decision in an unrelated cases is proper). The court there held that although St. Clare’s Hospital continued to exist, because it no longer operated a hospital it could no longer fulfill the donor’s intent.

Hospital Foundation; and (4) Sunnyview Hospital and Rehabilitation Center Foundation, Inc. The last paragraph of Article 9(b) of the Lally Trust removes any doubt on this issue by identifying the “four hospital beneficiaries” for the treatment different from the other non-hospital beneficiaries. Identical language is set out in Section 10.2 of the Lally Trust. Also manifest is Mrs. Chase’s intent to benefit a hospital. In fact, like the Lallys, Mrs. Chase previously made a gift to Ellis Hospital during her lifetime. [R. 386, 18:8-11]. Finally, it is also indisputable that Mrs. York intended to benefit a hospital. This is confirmed by the fact that, in addition to her gift to St. Clare’s Hospital, she also gave a gift to Mid Coast Hospital in Maine. [R. 129].

Apart from any legal presumption, these donor-specific facts support the Surrogate’s Court’s finding that the donors intended to benefit St. Clare’s Hospital. It is telling that St. Clare’s Hospital Foundation does not address any of these facts. Instead, consistent with the ‘presumption’ that it asks this Court to adopt, St. Clare’s Hospital Foundation points to an alleged lack of evidence that the donors would have objected to the use of their gifts “to promote and support health-related services to the community and in addition to satisfy obligations of St. Clare’s incurred while operating a hospital including employee pensions.” [Appellant’s Brief at 9]. In fact, the proper question is what evidence in the record supports a finding that the donors intended to benefit any purpose other than the support of St. Clare’s Hospital. There is no such evidence, and St. Clare’s Hospital Foundation cites none. As the Surrogate’s Court explained, there is no proof “that any of the donors, in naming St. Clare’s as a beneficiary, wanted to benefit a different charitable purpose other than its operation as a hospital providing acute patient care services.” [R. 17-18].

In a similar vein, St. Clare’s Hospital Foundation suggests that *Hummel* should not

control here because the foundation, although affiliated with the Roman Catholic Church, is not “devoted to principally religious causes[.]” *Hummel*, 30 A.D.3d at 804. [Appellant’s Brief at 8]. The religious affiliation of St. Clare’s Hospital Foundation, however, has no bearing on the issue before the Court. The issue is whether St. Clare’s Hospital Foundation is still capable of fulfilling the charitable intent of the donors. Because St. Clare’s Hospital Foundation now has the purpose of promoting the health and well-being of Schenectady residents, rather than the support of St. Clare’s Hospital, it is no longer supporting that purpose.

II. ELLIS HOSPITAL IS THE PROPER BENEFICIARY UNDER THE *CY PRES* DOCTRINE

Where the conditions for application of the *cy pres* doctrine exist, a court should modify the bequest or trust to “most effectively accomplish [the donor’s] general purposes.” N.Y. Est. Powers & Trusts §8-1.1(c)(1); *Hummel*, 30 A.D.3d at 804. The application of *cy pres* “necessarily assumes that the literal terms of the terms of the bequest or trust will not, because they cannot, be fully executed,” and that a deviation from the express terms of the bequest is contemplated so long as “the general charitable intention of the testat[or] is carried out.” *Lawless*, 194 Misc. at 859. When circumstances have changed, the Court shall “direct an administration that will most effectively accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation or direction contained therein.” *Othmer*, 185 Misc. 2d at 129 (citation omitted). The Court should evaluate potential charitable beneficiaries “with a view towards selecting as the recipients of the bequest such hospitals or sanitoriums best equipped to discharge the obligations which would attach to the acceptance of the bequest in a manner in keeping with the wishes of the testat[ors].” *Bowne*, 11 Misc. 2d at 602.

St. Clare’s Hospital Foundation insists that even if *cy pres* were to apply to the gifts at

issue, it is still the rightful beneficiary. St. Clare's Hospital Foundation insists that the Surrogate's Court's holding that Ellis Hospital is the proper beneficiary not only misapplied the *cy pres* doctrine, but it also suggests that the Court should do something that it explicitly rejected in *Matter of Hummel*, namely to give effect a provision in the subject asset transfer agreement governing the allocation of charitable gifts. These arguments lack any merit.

A. Ellis Hospital Is Most Capable of Fulfilling the Donors' Intent

Given the finding that the donors intended to benefit St. Clare's Hospital, the Surrogate's Court's holding that Ellis Hospital was the proper beneficiary of the gifts under the *cy pres* doctrine is unassailable. Just as in *Matter of Hummel*, where the Court affirmed the distribution of the gift to AMC, distribution of the gifts at issue here to Ellis Hospital would "most effectively accomplish [the] general purposes" of the donors. *Hummel*, 30 A.D.3d at 804 (quoting *Matter of Wilson*, 59 N.Y.2d 461, 472 (1983)). In *Matter of Hummel*, the Court noted that the Hummels "intended to benefit the hospital operating at 25 Hackett Boulevard[,] and that AMC and an affiliated entity "as current operators of the hospital at 25 Hackett Boulevard, were entitled to receive that portion of the trust under the *cy pres* doctrine." *Id.* at 804.

Similarly, as the Surrogate's Court noted below, Ellis Hospital (i) "purchased the assets and facilities of St. Clare's;" (ii) "is currently providing the hospital services that St. Clare's had been providing at the time of the bequests, at the same location from which St. Clare's had been operating;" and (iii) is "the sole remaining hospital in Schenectady County." [R. 19]. In short, Ellis Hospital "most closely resembles St. Clare's as it existed at the time of the gifts in issue, and therefore is the proper alternative beneficiary of the gifts and is entitled to receive the gifts under the *cy pres* doctrine." [R. 19].

By contrast, the rebranded St. Clare's Corporation is an entity with an aspirational

purpose and mission, and is not yet defined. It is not even currently fulfilling its generalized revised mission and is currently not supporting any charitable activities. *See* [R. 25-26, ¶¶ 35, 36]. Therefore, any gift to St. Clare’s would fund activities that are necessarily unknown at this time and, even when undertaken at some future date, would be subject to an amorphous and potentially fluid interpretation of its purpose and mission.

It is notable that in its Appeal Brief, St. Clare’s Hospital Foundation does not attempt to articulate how it is the appropriate beneficiary if the donors intended to benefit a hospital. Rather, it repeats the same argument that it advances as to why *cy pres* should not apply at all, namely, that the donors intended to benefit the foundation *per se*, not a hospital. (Appellant’s Brief at 12.)

Yet, as the Surrogate’s Court held below, St. Clare’s Hospital Foundation would still not be an appropriate beneficiary even if St. Clare’s Corporation were currently fulfilling its new charitable mission. St. Clare’s Hospital’s charitable purpose is in fact markedly different from its previous one, namely “[t]o promote the health and well-being of the residents of the City and County of Schenectady, New York . . .” [R. 25 ¶ 32]. Even if St. Clare’s Hospital were in fact currently engaged in fulfilling this purpose, it would not come close to fulfilling the grantors’ intent. The general purpose of supporting “health and well-being” is markedly different from the operation of a hospital. As the Surrogate’s Court held, the “community based health-related services” in which St. Clare’s Corporation intends to engage in the future “are significantly different from the provision of acute patient care services provided by a hospital, which is the type of services the donors intended to benefit.” [R. 19].

The record therefore presents a stark choice. On the one hand, Ellis Hospital conforms precisely to the donors’ intent of benefitting a hospital in Schenectady County. On the other

hand, St. Clare's Hospital has a general purpose not associated with the operation of a hospital. Indeed, that purpose is currently an aspiration that is not yet being fulfilled. There are no facts that could lead to a different result.

Based on the undisputed and stipulated facts, the Surrogate's Court correct held that Ellis Hospital is the appropriate beneficiary of the gifts as a matter of law, as it plainly is the entity that can "most effectively accomplish [the donors'] general purposes." N.Y. Est. Powers & Trusts §8-1.1(c)(1); *Hummel*, 30 A.D.3d at 804.

B. There is No Basis to Create an Exception to the *Cy Pres* Doctrine Here

Unable to articulate a basis for its entitlement to the gifts on the present record, St. Clare's Hospital Foundation asks the Court to create an exception to the *cy pres* doctrine here.

St. Clare's Hospital Foundation insists that where, as here, a not-for-profit engages in a transaction under Section 511 of the N-PCL (involving the transfer of substantially all of its assets) and revises its purpose under Section 804(a)(ii) of the N-PCL, a court should give effect to any terms in the parties' asset transfer agreement as to the disposition of charitable gifts. [Appeal Brief at 10-11]. Without citing the contractual provision, St. Clare's Hospital Foundation appears to be invoking a provision of the Asset Transfer Agreement that identified charitable gifts among those assets that St. Clare's Hospital was to retain.

This belated argument of St. Clare's Hospital Foundation lacks any factual support. As an initial matter, this is an argument that St. Clare's Hospital Foundation did not make below and should not be heard to raise for the first time on appeal. *Murray*, 49 A.D.3d at 1006; *Gates*, 120 A.D.2d at 892. This is not merely an academic matter. Had St. Clare's Hospital Foundation raised the argument below, Ellis Hospital would have put before the Surrogate's Court the Section 511 Order signed by Justice Powers on July 20, 2010 ("Section 511 Order"). In any

event, a copy of the Section 511 Order is attached hereto as Exhibit 2, and the Court may take judicial notice of it. N.Y. CPLR §4511(a); *see, also, Galasso*, 22 Misc. 3d at 451. The Section 511 Order specifically provides that nothing therein shall be construed as judicial approval of the bequests clause in the Asset Transfer Agreement and that, to the contrary, the entitlement to any current or future bequests to St. Clare’s “shall be determined on a case by case basis without regard to the provisions of the Asset Transfer Agreement[.]” [Ex. 2 at 2-3.]

Even if the bequests clause of Asset Transfer Agreement had not been voided by the Section 511 Order, it would still be unenforceable as a matter of law. In *Matter of Hummel*, this Court specifically held that a clause in an asset transfer agreement purporting to govern the disposition of bequests is unenforceable as a matter of public policy: “Public policy will not permit parties to circumvent the donor’s intent, evade the court’s cy pres powers and determine among themselves who will receive charitable gifts which cannot be distributed as specified.” *Hummel*, 30 A.D.3d at 805 (citing *Matter of Notkin*, 45 A.D.2d 849, 849 (2d Dept. 1974), and *Matter of Birch*, 50 A.D.2d 475, 479-80 (3d Dept. 1976)).

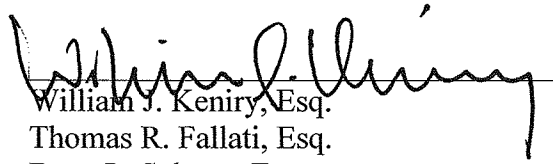
Without directly asking the Court to overrule this holding of *Matter of Hummel*, St. Clare’s Hospital Foundation suggests that the Court create an exception to this rule in the context of a Section 511 transfer. It offers no rationale, however, for setting aside the fundamental *cy pres* principle that it is the intent of the donors that should govern the disposition of a charitable gift. It also fails to articulate how the rule impedes any provisions of the Not-For-Profit Corporation Law. The rule does not preclude parties to a Section 511 transaction from allocating assets and liabilities generally. It simply provides that for one distinct class of assets – charitable bequests – it is the intent of the donors, not the contracting parties, that governs.

CONCLUSION

For the reasons set forth above, Ellis Hospital respectfully requests that the Court affirm the Summary Judgment Order and dismiss the appeal of St. Clare's Hospital Foundation in its entirety, together with such further relief as the Court deems appropriate.

Dated: June 20, 2013
Albany, New York

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STATE OF NEW YORK
SURROGATE'S COURT

COUNTY OF ALBANY

In the Matter of the Petition of Bank of America, N.A., as Successor in Interest to State Bank of Albany as Trustee of the Trust Under Agreement with John P. Ogsbury and Mable I. Ogsbury dated July 3, 1964, for a Determination as to the Construction and Reformation of Paragraph "SIXTH (2)" of said Agreement.

DECISION AND ORDER

File No. 2011-574

In the Matter of the Petition of Bank of America, N.A., as Successor in Interest to State Bank of Albany as Trustee of the Trust Under Agreement with John P. Ogsbury and Mable I. Ogsbury dated January 4, 1965, as amended, for a Determination as to the Construction and Reformation of Paragraph "SIXTH (2)" of said Agreement.

DECISION AND ORDER

File No. 2011-572

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ALBANY COUNTY
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Doyle, S.

The petitioner/trustee, Bank of America, N.A., is seeking construction and/or reformation of the following two similar, but separate trusts: Trust Under Agreement with John P. Ogsbury, Mable I. Ogsbury and petitioner's predecessor in interest (State Bank of Albany) dated July 3, 1964 (File No.: 2011-574), and Trust Under Agreement with John P. Ogsbury, Mable I. Ogsbury and petitioner's predecessor in interest (State Bank of Albany) dated January 4, 1965, as amended (File No.: 2011-572). All persons required by law to be cited or who are interested in this proceeding have either failed to appear in response to a duly served citation or have appeared and consented to the relief requested in the petitioner/trustee's separate petitions. The Attorney General, in his verified answer filed with this Court, suggests this Court consider granting additional relief to the parties. Specifically, the Attorney General seeks reformation of the Trust Agreements to identify alternative beneficiaries in the place of two beneficiaries, St. Clare's Hospital and The Child's Hospital, named in the Trust Agreements. The Attorney General seeks such reformation pursuant to the Court's *cy pres* authority as set forth in EPTL 8-1.1.

BACKGROUND

John P. Ogsbury and Mable I. Ogsbury executed two nearly identical trust documents establishing trusts providing them with the "net income from said trust[s] in equal share semi-annually for each calendar year on June 30 and December 31 thereof to the grantors JOHN P. OGSBURY and MABLE I. OGSBURY during the balance of their respective lives, and upon the death of either of them pay the whole of said net income to the survivor of them during the balance of the life of such survivor." Following the death of both spouses, the trusts established shall continue in perpetuity and the net income derived therefrom payable in certain specified

percentages among numerous charitable beneficiaries including, but not limited to, St. Clare's Hospital of Schenectady, New York, Inc., "to be used for the treatment of cancer", and The Child's Hospital "to be used for the general purposes of said hospital as the governing board of said hospital shall direct". Mable I. Ogsbury died on August 6, 1976 and John P. Ogsbury died on May 5, 1987.

PETITIONER/TRUSTEE'S APPLICATION FOR CONSTRUCTION AND/OR
REFORMATION OF PARAGRAPH "SIXTH (2)"

Petitioner/Trustee seeks an Order of this Court recognizing that the investment of Trust funds in common trust funds or mutual funds, whether or not they be proprietary funds of the Petitioner/Trustee, should be construed as authorized investments under the existing language of both Trusts.

The Trust Agreements provide that the net income of the Trusts be paid in equal shares to the grantors or to the survivor of them during the balance of their respective lives, and upon the death of the last of the grantors to the charitable, religious, education and benevolent purposes of the following remainder beneficiaries: Altamont Reformed Church, Knox Reformed Church, St. Lucy's Catholic Church, American Bible Society, Missionaries of Our Lady of Lasalette, Inc., Cobb Memorial School, Inc., The Salvation Army, The American National Red Cross, Albany Area Chapter, Rescue Squad, Inc., of Altamont Fire Department, Cobb Memorial School, Inc., Albany Association of the Blind, Inc., Albany County Tuberculosis and Respiratory Disease Association, Inc., St. Peter's Hospital, Memorial Hospital, St. Clare's Hospital, Ellis Hospital and The Child's Hospital.

The Trustee's power to invest assets of both Trusts is defined in paragraph SIXTH (2) of

said 1964 Trust and 1965 Trust, as amended, states the following:

“SIXTH: The trustee is hereby expressly authorized and empowered in its sole and absolute discretion: 2. To acquire by purchase or otherwise United States Government obligations in such quantities or amounts as the trustee may determine and with or without diversification as to kind or amount, and such common stocks, convertible preferred stocks and secured and unsecured obligations as are listed for trading on a national securities exchange, without being limited to investments authorized by law for trust funds, and hold funds uninvested or deposit monies in certificates of deposit or in one or more insured accounts in savings banks or other banks including the trustee’s own bank in amounts not exceeding the insured limit in any one account whether or not interest bearing provided, however, that not less than 5% of the market value of the corpus of such trust shall be maintained in cash in insured accounts in either savings banks or commercial banks in amounts not exceeding the insured limit in any one account or in short term United States Government obligations, provided further, however, that such cash deposits or short term United States Government obligation investments need not be maintained until such time as sufficient cash assets become part of the corpus of the trust estate by means of additional cash contributions to such corpus by gift or bequest, with power and authority to the trustee, however, in its discretion to apply such monies to be restored to principal only as funds accumulate, and provided further, however, that investments in United States Government bonds or obligations shall at no time exceed 20% of current market value of the entire trust estate except that short term United States Government obligations may be purchased in any amount” (emphasis added).

The petitioner/trustee notes that while the language in paragraph SIXTH (2) of the Trusts provide for the investment in a variety of securities, it does not explicitly authorize the Trustee to invest Trust funds in what are known as common trust funds or mutual funds, even though they could be limited to the investments already described and permitted in SIXTH (2). Petitioner/Trustee seeks an Order of this Court recognizing that the investment of Trust funds in common trust funds or mutual funds, whether or not they be proprietary funds of the

Petitioner/Trustee, should be construed as authorized investments under the existing language of both Trust. The petitioner/trustee believes that such construction is consistent with the language of the Trust Agreements and would enhance the administration of the Trusts, and benefit the beneficiaries in terms of safety, soundness and reduced expense.

It is well settled that the intention of the settlors is the guide to be followed in the analysis in the construction of a trust agreement (see In re Larkin, 9 NY2d 88 [1961]). Here, the Court is presented with a legitimate reason to question the language in the trust such that a construction proceeding is necessary (see SCPA 1420). Upon reading the Trust Agreements in the entirety, the Court agrees with petitioner/trustee and finds that authorizing the investment of Trust funds in common trust funds or mutual funds, whether or not they be proprietary funds of the petitioner/trustee is consistent with the language of the Trust Agreements and would enhance the administration of the Trust, further benefitting the charitable beneficiaries consistent with the settlors' intent.

In addition to the construction/reformation granted above, petitioner/trustee also seeks a reformation of paragraph SIXTH (2) of the Trust as the language is incorrect with regard to the nature and term of Government bonds or obligations. The present language of paragraph SIXTH (2) concludes with the following: "and provided further, however, that investments in United States Government bonds or obligations shall at no time exceed 20% of current market value of the entire trust estate except that short term United States Government obligations may be purchased in any amount".

United States Government obligations maturing in 10 to 30 years are commonly referred to as "bonds", while those maturing in 2-10 years are classified as "notes", and those maturing in

less than one year are called "bills". Petitioner/trustee correctly notes that the existing trust language that specifies that United States Government "bonds or obligations" shall not exceed 20% but "short term obligations" may be purchased in any amount is confusing, inconsistent and incorrect. Petitioner/trustee seeks an Order of reformation specifically using the term "bond" and clarifying the petitioner/trustee's rights under the Trust Agreements.

Where the intention of the settlor is plainly set forth in the Trust, a court may reform the Trust instrument to conform the language to the actual intent of the testator (see In re Gerstler, NYLJ, July 27, 1993, at 24 [Sur. Ct. Nassau County]). The Court agrees with petitioner/trustee and holds that paragraph SIXTH (2) should be clarified and reformed to conclude with the following: "... investments in United States Government bonds or obligations with maturities exceeding 10 years shall not exceed 20% of the total assets. United States Government obligations with maturities not exceeding 10 years, including short term obligations, may be purchased in any amount." Based upon the foregoing, petitioner/trustee's application is granted in the entirety.

APPLICATION OF THE DOCTRINE OF CY PRES

The Attorney General requests this Court apply the doctrine of cy pres as codified in EPTL 8-1.1, to the charitable dispositions found in both Trust Agreements to St. Clare's Hospital and The Child's Hospital. Both Trust Agreements provide that the gift to St. Clare's Hospital is "to be used for the treatment of cancer" and the gift to "The Child's Hospital, of 25 Hackett Blvd., Albany, New York, to be used for the general purposes of said hospital as the governing board of said hospital shall direct". Although St. Clare's Hospital and the Child's hospital continue in existence, neither organization now operates a hospital nor can either include

“Hospital” in its corporate name. St. Clare’s Hospital surrendered its license to operate a hospital in June 2008 and changed its name to “St. Clare’s Corporation”. The Child’s Hospital sold its hospital related assets to an entity controlled by Albany Medical Center in 1999 and, changed its name to “Episcopal Charities of Albany, Inc.”

EPTL 8-1.1 (c)(1) provides, in relevant part, that

“[W]henver it appears to [the] court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may . . . make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein”.

“A cy pres proceeding is commenced where a charity named in a will no longer exists, is improperly named or operates under a different name. The petitioner may ask that the court construe the will to establish that the testator had a charitable intent, if the court so construes, a comparable charity may be proposed to receive the assets.” (Harris, *New York Estates: Probate Administration and Litigation*, Vol.2, Sec. 28:214 [6th ed. 2011]). In order for this Court to exercise its cy pres powers pursuant to EPTL 8-1.1 (c)(1), the following three prong test must be met: 1) the gift or trust must be charitable in nature; 2) the language of the will or trust instrument, when read in light of all the attendant circumstances, must indicate that the donor demonstrated a general, rather than specific, charitable intent; and 3) it must be determined to the court’s satisfaction that the particular purpose for which the gift or trust was created has failed, or become impossible or impracticable to achieve (see Matter of Trustees of Columbia University, 27 Misc3d 1205A [Surr. Ct. Nassau Co. 2010]; Matter of Othmer, 185 Misc2d 122).

The trust documents presented here evince a general charitable intent on behalf of the Ogburys and, because no hospital or corporation named Child's Hospital exists and St. Clare's Hospital no longer operates a hospital, circumstances have changed making it impossible to carry out the specific charitable purpose of the trusts (see Matter of Othmer, 185 Misc 2d 122 [Surrogate's Court, Kings County 2000]). The remaining issue before this Court is which entity should be named as the alternate recipient of the gifts at issue in order to "most effectively accomplish [the settlors] general purposes" (EPTL 8-1.1).

GIFT TO "CHILD'S HOSPITAL"

In Matter of Hummel, (30 AD3d 802 [2006]), the Appellate Division, Third Department, affirmed a decision by Supreme Court holding that Vincent D. Hummel's and Jane M. Hummel's bequest to Child's Hospital should be transferred to AMC-SCC pursuant to the *cy pres* doctrine (see Matter of Hummel, 30 AD3d 802 [Third Dept. 2006]). Having presided over that matter as an Acting Supreme Court Justice, this Court is well aware of the similarities presented here.

Pursuant to EPTL 8-1.1, this Court is obligated to fashion a disposition of the trust property that, in the Court's judgment, would "most effectively accomplish its general purposes" (EPTL 8-1.1 [c][1]). Based on the facts, including that in 1999, Child's Hospital entered into an asset purchase agreement whereby Albany Medical Center Hospital (hereinafter AMC) and its affiliate, Albany Medical Center-South Clinical Campus (hereinafter AMC-SCC) agreed to purchase Child's Hospital's assets and facilities, AMC-SCC is located at 23-25 Hackett Boulevard and has been continuously operated at the site since the time of the acquisition, and as part of hospital operations, the AMC-SCC has approximately 150 employees at the site, 20 inpatient beds, multiple operating rooms, a specialized laser room for the treatment of many

diseases of the eye, a procedure room dedicated to the treatment of patients with chronic pain and many other features integral to the area's healthcare needs, this Court determines that the settlors intended to benefit the hospital operating at 25 Hackett Boulevard. The trust documents specifically state "The Child's Hospital, of 25 Hackett Blvd., Albany, New York, to be used for the general purposes of said hospital". Child's Hospital, now known as Episcopal Charities of Albany, Inc., changed its corporate purpose and is precluded from operating a hospital. Notably, Episcopal Charities did not file a responsive pleading or memorandum of law with this Court. Based upon the foregoing, this Court holds that the bequest to Child's Hospital is transferred to AMC-SCC pursuant to the *cy pres* doctrine.

GIFT TO ST. CLARE'S

At the time the Ogsburys executed the trust documents at issue here, St. Clare's was an operating hospital that provided acute patient care services with its principal facility located at 600 McClellan Street, Schenectady, New York. In June 2008, pursuant to an Asset Transfer Agreement entered into between St. Clare's and Ellis Hospital and Ellis Hospital Foundation, Inc. (hereinafter referred to collectively as Ellis), Ellis assumed certain assets of St. Clare's, including the facility at 600 McClellan Street, Schenectady, which is now known as the "McClellan Campus of Ellis Hospital", and St. Clare's ceased operating as a hospital. St. Clare's Foundation, a not-for profit corporation that assisted the hospital in expanding and developing its services to the community, still exists, although it no longer supports or operates the hospital or provides acute patient care services.¹ Ellis assumed sole responsibility for providing hospital and

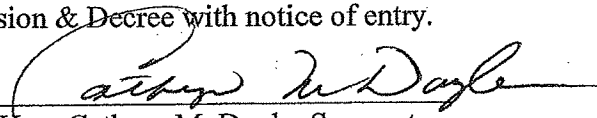
¹ St. Clare's Corporation and/or St. Clare's Hospital Foundation of Schenectady, NY, Inc. did not file a responsive pleading with this Court.

other healthcare services previously provided by St. Clare's Hospital.

The facts presented here regarding St. Clare's Hospital and Ellis compel an outcome similar to the one in Matter of Hummel regarding The Child's Hospital and AMC-SCC. Based on the similarity in facts, including that Ellis purchased the assets and facilities of St. Clare's, Ellis is currently providing the hospital services that St. Clare's had been providing at the time of the bequests, and at the same location at 600 McClellan Street, Schenectady, the Court determines that the settlors intended to benefit Ellis, as the current hospital operating at 600 McClellan Street, Schenectady. Accordingly, the Court holds that the bequest to St. Clare's Hospital is transferred to Ellis. The Court has considered and hereby denies Ellis' request for a Court Order granting this relief *nunc pro tunc* to June 2008. Up until this Court's determination that the bequest to St. Clare's be transferred to Ellis, the trustee had no obligation and therefore no liability to make payments to anyone other than the entity named in the original trust documents. Now, it is hereby **ORDERED** that petitioner/trustee's petition is granted in its entirety; it is further **ORDERED** that pursuant to the doctrine of cy pres the bequest to Child's Hospital is transferred to AMC-SCC; and it is further **ORDERED** that pursuant to the doctrine of cy pres the bequest to St. Clare's Hospital is transferred to Ellis.

This shall constitute both the decision and decree of the Court. All papers are retained by the Surrogate's Court Clerk who is directed to enter this Decision & Decree this date without notice and send copies to the attorneys of record. Counsel for petitioner/trustee is directed to serve all attorneys of record with a copy of this Decision & Decree with notice of entry.

Dated and Entered: 19 November 2012


Hon. Cathryn M. Doyle, Surrogate

STATE OF NEW YORK
SUPREME COURT : SCHENECTADY COUNTY

In the Matter of the Application
of

ST. CLARE'S HOSPITAL OF SCHENECTADY, N.Y.

Petitioner,

ORDER

Index No. 2010-1647

For an order approving the Transfer of Assets
and Approving the Certificate of Amendment
to the Certificate of Incorporation

RJI No:

46-1-2010-1156

Upon reading the Petition of St. Clare's Hospital of Schenectady, N.Y. dated June 24, 2010, and duly verified by the Petitioner on June 24, 2010, and the exhibits attached thereto, including the affidavits of Robert O. Perry, dated June 25, 2008, Margaret Connolly dated May 21, 2010, and Joseph F. Pofit dated May 25, 2010 and June 24, 2010, and the Attorney General having waived notice and hearing and certified no objection to the entry of this Order, and this court having given due consideration hereto, and it appearing to the satisfaction of this court that the provisions of Section 511 of the Not-for-Profit Corporation Law have been complied with, and that the public interests would not be adversely affected by (i) the transfer of assets and (ii) the amendment to the Petitioner's certificate of incorporation, each as described in the Petition,

Now, on motion of Hiscock & Barclay, LLP, attorneys for the Petitioner, it is hereby

ORDERED, that the Petitioner, St. Clare's Hospital of Schenectady, N.Y., be and hereby is authorized to transfer substantially all of its assets as described in the Petition, to wit:

- i. a certain hospital facility located at 600 McLellan Street Schenectady, a warehouse facility located at 1037 Stanley Street, Schenectady, New York, mixed use property located at 515/517 McClellan Street, Schenectady, New York, vacant residential property located at 1615 Bradley Street, Schenectady, New York, unimproved land 650 McClellan Street and 700 McClellan Street, Schenectady, New York, and

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SCHENECTADY COUNTY
NEW YORK

- ii. substantially all tangible personal property of the Petitioner used by Petitioner in connection with operating a hospital and providing health care services;
- iii. substantially all inventories of the Petitioner, wherever located, used by Petitioner in connection with its provision of operating a hospital and providing health care services;
- iv. all data and records related to Petitioner's hospital and health care services, including patient and vendor lists and records, treatment, hospitalization, assessment, admission, service and other clinical records;
- v. certain St. Clare's intangible rights and property and intellectual property related to its hospital and health care operations;
- vi. other similar property used in or related to Petitioner's hospital and health care operations

all as described in a certain Asset Transfer Agreement by and between the Petitioner and Ellis Hospital dated as of June 15, 2008; upon the following terms: (i) payment by the New York of Department of Health to the Petitioner of grants in the aggregate amount of \$41,134,780; and it is further

ORDERED, that the aforesaid sum of \$41,134,780 received as consideration for the transfer authorized hereby be used as disposed of as follows: (i) \$28,500,000 shall be contributed to the St. Clare's Hospital Retirement Income Plan to fund the pension benefits of the Petitioner's former employees, and (ii) \$12,634,780 shall be dedicated by Petitioner to pay transaction costs and various other expenses in connection with the transfer; and it is further

ORDERED, that nothing herein shall be construed as this court's approval of the provision of the Asset Transfer Agreement which provides that St. Clare's shall retain "all bequests, donations, pledges and donor restricted funds where St. Clare's or one of its affiliated entities are the named beneficiary"; and it is further

ORDERED, that entitlement to current or future "bequests, donations, pledges and donor restricted funds where St. Clare's or one of its affiliated entities are the named beneficiary" shall

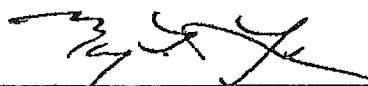
be determined on a case by case basis without regard to the provisions of the Asset Transfer Agreement; and it is further

ORDERED, that the proposed certificate of amendment to the Petitioner's Certificate of Incorporation attached to its Petition as Exhibit "L" thereto is hereby approved

July 20, 2010
Schenectady, NY

Enter,

Hon. Mark L. Powers



J.S.C. (Acting)

THE ATTORNEY GENERAL HEREBY APPEARS HEREIN,
HAS NO OBJECTION TO THE GRANTING OF
JUDICIAL APPROVAL HEREON, ACKNOWLEDGES
RECEIPT OF STATUTORY NOTICE, AND DEMANDS
SERVICE OF ALL PAPERS SUBMITTED HEREIN
INCLUDING ALL ORDERS, JUDGMENTS AND
ENDORSEMENTS OF THE COURT, SAID NO OBJECTION
IS CONDITIONED ON THE COMPLETION OF THE MATTER
TO THE COURT WITHIN 30 DAYS HEREAFTER.

Patrick J. Murphy 7/12/10
ASSISTANT ATTORNEY GENERAL DATE

