

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Appendix VII: Deed of Trust - As of Date of Publication in 2005

MILTON HERSHEY SCHOOL

Second Restated Deed of Trust

(As of November 15, 1976)

Hershey, Pennsylvania 17033

MILTON S. HERSHEY
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APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

FOREWORD

The original Deed of Trust providing for the establishment and operation of Milton Hershey School was executed by Milton S. Hershey and Catherine S. Hershey on November 15, 1909. Other parties to the instrument were Hershey Trust Company, Trustee and the original Managers of the School.

The Deed of Trust has been modified on several occasions in order to meet changing conditions. The latest modifications were approved by the President Judge of the Orphans' Court Division of the Court of Common Pleas of Dauphin County, Pennsylvania, on November 15, 1976. In its decree on that date, the Court also approved a Second Restated Deed of Trust which incorporates all the modifications to that date. The Second Restated Deed of Trust is published herein.

In 1998, the Honorable Judge Warren G. Morgan ruled in the Orphans' Court's confirmation of the Twenty-Second and Partial Accounting dated August 12, 1998 that “. . . this Court confirming that it is appropriate for the School, from time to time, to provide minor, incidental direct support to, and/or permit the minor, incidental use of assets/facilities of the School by, certain third parties and members of the public, without charge (or for nominal charge), where such support and/or use has been determined by the School, in its discretion, to further the charitable purpose of the School, as described in the Petition for Adjudication.”⁶³³ In 1999, the Honorable Judge Warren G. Morgan wrote the Orphans' Court's Adjudication dated December 7, 1999 entered in Dauphin County Orphans' Court Docket No. 712 of 1963 and signed by the Honorable Judge Warren G. Morgan,⁶³⁴ a copy of which

⁶³³ Refer to Twenty-Second and Partial Account. (Docket Entries at No. 712 of 1963.) Accountings - Applicable Years: 08/01/93 to 07/31/96 Date Confirmed by Court: 08/12/98.

⁶³⁴ In his 1999 Adjudication, Judge Morgan denied the Trust's petition for CHILD and the Greenway Easement. Judge Morgan granted the petition for the Bike Path Easement. Here are some important points that Judge Morgan makes in his decision:

- The vision of Milton and Catherine Hershey was to relieve poor children from all of the conditions of poverty; to undertake their total care and upbringing.
- Any discretion of the Board of Managers is servient to the dominant intent of the Hersheys to care for as many children at the School as the income will permit.
- We reject the Managers' suggestion that conclusions reflected in decrees of this Court in prior proceedings in which the expression “*pro tanto* failure” was asserted are binding upon us in this proceeding.
- The specific intention of the Hersheys, as plainly stated in the Deed of Trust, was to remove children from an environment of poverty and to place them in a residential setting where they would be provided all of the necessities of food, shelter, clothing and health care together with moral and ethical guidance as well as class-room education.
- The proposed Institute does not approximate the Hersheys' express intention for the Milton Hershey School and would do violence to it.
- When, in 1976, the Managers, alleging that the requested modification was consistent with the intent of the Hersheys, obtained from this Court a decree changing applicant eligibility to include males and females, whites and non-whites, and re-defined “orphan”, they forever [St. Mark 14:7] expanded the mission of the School and the charge upon its Managers.
- The express purpose to which the Hersheys dedicated their wealth is a structured, residential setting to which a child is removed from impoverished living conditions. Any reading of the Deed of Trust must convince one that the Hersheys had in mind that theirs would be a direct gift to the child, with observable results.
- However well intentioned, the Managers' idea of philanthropic efficiency is not a ground for *cy pres*.
- In the exercise of *cy pres*, deference to the “Dead Hands” of Milton S. Hershey and Catherine, his wife, need not be so rigid as to stifle resourcefulness but our discretion is not unfettered and, if exercised, must be within the limits of approximating the dominant intent of the Hersheys. The proposed Institute does not come close.
- However worthy the motive of the Managers, the land is held under trust and their power to alienate such property is limited. The Managers have a broad discretion to sell the land but it is well established that the power of sale conferred upon a trustee does not authorize an alienation of any character other than a sale. The power to sell does not authorize a gift of the property.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

follows this Second Restated Deed of Trust. In 2002, the Orphans’ Court issued its September 10, 2002 Adjudication, a copy of which follows the 1999 Adjudication. On September 18, 2002, the Commonwealth Court affirmed the Honorable Judge Warren G. Morgan’s September 10, 2002 Adjudication. On October 16, 2002, the Honorable Judge Warren G. Morgan issued the Orphans’ Court’s Order and Decree. On November 9, 2003, the Honorable Judge Warren G. Morgan denied standing to the Milton Hershey School Alumni Association. On January 31, 2005, the Commonwealth Court of Pennsylvania, in a split decision of 4 to 3, held “Accordingly, because the Association has a “special interest” in this proceeding, it should have been allowed to challenge the modification of the July 2002 Reform Agreement, and for the foregoing reasons, the order of the trial court is reversed and the matter is remanded for hearings on the Association’s petition.”

These cases, adjudications, opinions, decrees, and orders occurred subsequent to the establishment of the Second Restated Deed of Trust, as of November 15, 1976, and serve to interpret the Deed of Trust in certain material respects. Thus, each of them is material to the current Deed of Trust’s meaning and is reproduced following the Second Restated Deed of Trust for ease of reference.

LIST OF SUB-APPENDICES VII

Sub-Appendix VII - A: December 7, 1999 Orphans Court Adjudication..... 356

Sub-Appendix VII - B: September 4 and 10, 2002 Orphans Court Injunction, Order & Adjudication..... 368

Sub-Appendix VII - C: September 18, 2002 Commonwealth Court Opinion 378

Sub-Appendix VII - D: October 16, 2002 Orphans Court Adjudication & Decree 393

Sub-Appendix VII - E: November 9, 2003 Orphans Court Order & Opinion re MHSAA Standing..... 397

Sub-Appendix VII - F: January 31, 2005 Commonwealth Court Order & Opinion re MHSAA Standing..... 409

• However, the duration of the easement [for the bike path] is for a limited period; the cost of construction will come from sources other than the trust, and the improvement will be a direct and readily available benefit to the School at its campus. Under these circumstances, there is sufficient consideration received for the grant of the easement to support the conveyance.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

SECOND RESTATED DEED OF TRUST November 15, 1909

THIS INDENTURE Made this Fifteenth day of November, in the year of our Lord One Thousand Nine Hundred and Nine (1909),

BETWEEN Milton S. Hershey and Catherine S. Hershey, his wife, of Hershey, Derry Township, Dauphin County, Pennsylvania, parties of the first part, and the Hershey Trust Company of the same place, hereinafter designated as Trustee, party of the second part, and M. S. Hershey, of Hershey, W. H. Lebkicher, and John E. Snyder, of Lancaster, John B. Curry, and A. W. Stauffer, of Swatara, John A. Landis, of Manada Hill, George M. Hocker, of Union Deposit, Israel Moyer, of Derry Church, and U. G. Risser, of Campbelltown, Pennsylvania, hereinafter designated as Managers, parties of the third part,

WITNESSETH: That the parties of the first part, with the purpose of founding and endowing in perpetuity an institution to be known as "Milton Hershey School", hereinafter designated as the School, to be located in Derry Township, aforesaid, do hereby make, constitute, and appoint M. S. Hershey, W. H. Lebkicher, John B. Curry, John A. Landis, George M. Hocker, A. W. Stauffer, John E. Snyder, Israel Moyer, and U. G. Risser, and their successors, appointed as hereinafter directed, to erect, equip, maintain, direct, and manage the School, upon, under, and subject to the trusts and conditions hereinafter declared of and concerning the same, which Managers and their successors shall be known as the Managers of Milton Hershey School, and for that purpose, and for other good and lawful considerations, hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey, and confirm unto the said party of the second part, its successors and assigns, —

ALL THOSE CERTAIN farms situated in the Township of Derry, Dauphin County, Pennsylvania, bounded and described in one tract of land, as follows:

BEGINNING at a point in line of land of Mrs. Michael Henry 497-6/10 [feet] Southeast of a stone a corner of said land and land of M. S. Hershey thence extending by said Henry's land, partly in and along a public road South 74 degrees 32 minutes East 1034-4/10 feet to a corner of land of estate of B. J. McGrann, thence extending by said McGrann land the following courses and distances:

South 39 degrees 12 minutes West 709-5/10 feet, South 20 degrees 10 minutes East 1027-3/10 feet to a point at or near the North side of a private lane, thence by said lane North 85 degrees 50 minutes East 458-7/10 feet to a point in a public road, thence along and in said public road South 21 degrees 40 minutes East 1215-5/10 feet, and South 57 degrees 19 minutes East 623-5/10 feet to a corner of land of Israel Hershey, thence by said Hershey's land the following courses and distances:—South 23 degrees 13 minutes West 918-7/10 feet to a stone on the South side of the Horeshoe Turnpike, thence along the South side of said Turnpike South 76 degrees 54 minutes East 498-2/10 feet to a stone, thence South 16 degrees 36 minutes West 368 feet and South 76 degrees 48 minutes East 714 feet to a stone, thence by lands of Israel Hershey and Samuel Kegerreis respectively South 13 degrees 58 minutes East 2541-5/10 feet to a stone in line of land of Estate of Christian Gingrich, thence by said land North 80 degrees

345

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

24 minutes West 2343 feet to a stone at or near the centre of a public road, thence by land of Barbara Coble the two following courses and distances, the first extending along or near the centre of public road North 9 degrees 45 minutes East 1432-5/10 feet to a stone, and South 77 degrees 56 minutes West 1328-5/10 feet to a stone, thence by land of the Brombach Estate North 6 degrees 49 minutes East 1935 feet to a point on the North side of the Horseshoe Turnpike, thence crossing said Turnpike and extending still by land of said Estate North 81 degrees 59 minutes West 957 feet to a stone on the South side of said Turnpike, thence extending by land of Benjamin Flowers the three following courses and distances:—North 6 degrees 45 minutes East 1042-3/10 feet to a stone, North 86 degrees 20 minutes West 534 feet to a post and South 39 degrees 18-½ minutes West 1212-5/10 feet to a stone in the Horseshoe Turnpike, thence along and in said Turnpike by land of Frank Hocker South 89 degrees 24 minutes West 1349-2/10 feet to a stone, thence by land of Frank Hocker and the Estate of Samuel Peters respectively North 28 degrees 38 minutes West 2358-5/10 feet to a point in line of remaining land of M. S. Hershey, the grantor herein, thence by said remaining land by a line parallel to Chocolate Avenue and 1410 feet distant Southward therefrom North 70 degrees 58 minutes East 4319 feet to the beginning. CONTAINING 485-781/1000 acres.

TOGETHER with all and singular the stock, implements, tools, machinery, apparatus, and all other personal property thereon, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments, and appurtenances, to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and every part and parcel thereof, and all the estate, right, title, interest, use, trust, property, possession, claim and demand whatsoever, both in law and equity, of the said parties of the first part, of, in, and to the said premises, stock, implements, tools, machinery, apparatus, and personal property, with the appurtenances, to have and to hold the said premises, stock, implements, tools, machinery, apparatus, and personal property, with all and singular the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever, upon and subject to the trusts and confidences and for the several uses, intents, and purposes hereinafter mentioned declared of and concerning the same, that is to say: in trust for a permanent institution for the residence and accommodation of poor children, and the requisite teachers and other persons necessary in and about such an institution, and the maintenance, support, and education, as hereinafter prescribed of such children: to collect and receive the rents, revenues, and income therefrom and apply the entire net revenue, income, rents, issues and profits thereof to support and maintain the said institution, and increase the facilities and efficiency thereof according to the directions hereinafter contained; to permit the said Managers, and their agents and employees under their direction, to take charge of, farm and operate the lands hereby conveyed, under such terms and conditions as they think proper, and to use the same in such manner as is in their discretion most advantageous to the purposes of the trust, to keep the said lands and buildings thereon in good repair, to renew and improve the same when necessary by erecting new buildings thereon, to direct and supervise the disposition of the products thereof, the revenues or income derived therefrom to be paid to and received and collected by the Trustee as hereinbefore provided.

1. If it so happen in the future that gifts, bequests, devises of real or personal property may be made to or for the benefit of the School, the Trustee and the Managers are authorized to accept all such gifts, bequests, devises, whenever the terms, conditions, restrictions, or limitations of such gifts, bequests,

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

devises, are not in the opinion of the Trustee and Managers in contravention of the objects and purposes of this deed, and all such gifts, bequests, devises, whether made to the School by name, or to the Trustee, or to the Managers, or in any manner whatever, shall be paid or transferred by proper conveyance to the Trustee, and be added to and become part of the corpus or principal of the trust estate or of the income, in aid of which the said gifts, bequests, devises, or any of them may have been made; in the absence of any direction accompanying any such gift, bequest, devise, as to whether the corpus or principal of the trust estate or income is intended to be the recipient of such gift, bequest, devise, the Managers shall have the power to determine to which of the funds, or in what proportion to both, such gift, bequest, or devise, shall be paid or transferred, provided however, that if any lands or other real property shall be given, conveyed, or devised, to be held, enjoyed or used for the benefit or purposes of the School, the title to the same shall be held by the Trustee under the same trusts as are herein declared of and concerning the lands conveyed to the Trustee, and with the same power to sell and dispose of the said lands or other real property so given, conveyed, or devised, and under the same trusts, as to the proceeds thereof, as are hereinafter declared of and concerning lands which may be sold by the said Trustee and Managers.

2. The Trustee shall on or before the first day of September in each year make out and deliver to the Managers separate statements of principal and income of the trust estate, showing the revenues, receipts, expenses, and disbursements for the year ending with the thirty-first day of July immediately preceding, showing what investments have been sold, redeemed, or paid, and what securities have been bought, acquired, or received, during the year, and a statement showing in detail in what property and securities the trust estate was invested on the preceding thirty-first day of July.

3. The corpus or principal, and the income of the trust estate shall at all times be kept separate and apart from each other by the Trustee, and separate and true accounts of the corpus or principal and income shall be kept by the Trustee, and at all times during the customary business hours of the Trustee, the Managers shall have access to the said accounts. At least once in every year it shall be the duty of the Trustee to exhibit to the Managers, and the duty of the Managers carefully to examine and count the several securities, and to verify them with the statements and accounts furnished and kept by the Trustee, or, in lieu thereof, to receive from reputable certified public accountants selected by the Managers a written certification that such securities have been examined, counted, and verified with the statements and accounts furnished and kept by the Trustee.

4. The Trustee shall pay from time to time, upon request of the Managers, the net income from the premises hereby conveyed, and of any future gifts, bequests, and devises, when, and as the same may be required by them, or so much thereof as in the opinion of the Managers may be necessary, to furnish the amount or amounts of money required by the Managers for the purpose of erecting on the premises above mentioned, buildings and improvements for the farms and School, and procuring furniture, stock, materials, machinery, tools, implements, plant, and equipment for the same, for the expenses, support, maintenance, management, renewals, and repairs of the farms and School, its furniture, plant, and equipment, or for the purpose at any time of enlarging, extending or adding to either or all of said buildings, furniture, plant, and equipment,—the decision of the Managers when expressed in writing and delivered to the Trustee, as to whether the said income, or any part thereof, is or is not required for the purposes mentioned, shall be final and conclusive and binding upon the Trustee, and the receipt of the Managers to the Trustee for all moneys paid to them by the Trustee out of the income, shall be full

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

and sufficient acquittance and discharge of the sums so paid, without any obligation on the part of the Trustee to look to the application of the said moneys.

5. The funds of the principal of the trust estate and the unexpended income of the property held in trust, not immediately needed for the purposes of the School, shall be invested, and the Trustee at all times by and with the authority and approval of the Managers shall have full power and authority to invest all or any part thereof in any securities which the Trustee and the Managers together may consider safe, whether the said securities or any of them are legal investments for trust funds or not, and neither the Trustee nor the Managers shall be held accountable for the exercise of its and their discretion, exercised in good faith, as to the character of the investments which may be made by the authority and approval of both. No sale of any securities shall at any time be made by the Trustee, without the authority and approval of the Managers or of the investment committee for which provision is hereinafter made, and no investments of any money shall at any time be made by the Trustee except by and with the approval of the Managers or of said investment committee. The Managers shall from time to time establish a general investment policy, and approval of investments shall be made pursuant to such policy and in conformity with this and other investment provisions of this deed, either by the Managers or by an investment committee appointed by the Managers and consisting solely of members of the Board of Managers in such number as the Managers may from time to time deem proper, having due regard for the investment expertise of potential members of the committee. The investment committee shall have such power as the Managers shall determine, to approve investments pursuant to the general investment policy of the Managers, but shall have no authority to deviate from that policy under any circumstances. The committee shall periodically report its actions to the Managers and the Managers shall keep themselves informed of the actions of the committee. The Managers shall have a veto power over any proposed action of the committee and may at any time, with or without notice, abolish, or alter the size or membership of, the committee and/or withdraw from the committee any part or all of the authority vested therein. No grant of authority to the committee shall in any way decrease the power of the Managers under this deed.

6. The Trustee may from time to time, but only with the approval of the Managers, sell and convey in fee simple any part or portion of the lands conveyed by this deed, or which may have been bought or otherwise acquired, which in the judgment of the Managers is not necessary to be kept for the purposes of the School, or which it may be advisable and advantageous to sell, and may execute and deliver a deed, or deeds, or other conveyance for the lands so sold, to the purchaser or purchasers in fee simple, free and discharged of all trusts, and without any obligation on the part of the purchaser or purchasers to look to the application of the purchase money; the purchase money of land so sold shall be held by the Trustee, and invested as herein provided for, and the income therefrom applied to the maintenance of the School.

7. The Trustee may from time to time, and at any time, but only with the approval of the Managers, purchase any additional land adjoining the School property, or conveniently near to it, and take title to the same in itself as Trustee under this deed, and hold the same under and subject to the trusts herein set forth, if they consider such land necessary or convenient for the purposes of the School.

8. No part of the corpus or principal of the trust estate, or of the income, or of the proceeds of any real estate sold, arising from the property hereby conveyed, or gifts, bequests, or devises, or other

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

accretions thereto, and all moneys and securities arising therefrom, or made with or acquired by the principal or income thereof, or accretions thereto, shall at any time be applied to any other purpose or purposes than those herein mentioned and appointed; and in no event shall any part of the corpus or principal of the trust estate ever be used or sold, disposed of or pledged to meet current expenses of the institution for which the current and accumulated income and revenues are exclusively devoted.

9. The Trustee shall receive as its full compensation for the duties required to be performed by it under this deed a commission of five percent of the income received by it as Trustee, not exceeding however the sum of One Thousand Dollars per annum, and shall make no charge against, and receive no compensation from the corpus or principal of the trust estate.

All moneys received by the Managers from the Trustee shall be received, held, and used by the Managers for, upon, and subject to the trusts and confidences, and for the uses and purposes hereinafter declared of and concerning the same, and for none other, that is to say:—

10. Out of the moneys received by the Managers from the Trustee, from the revenue or income, to erect suitable buildings, and appurtenances, to lodge, board, and instruct, as many children as, in the opinion of the Managers, the revenue and other sources of income, authorized to be expended for the purpose, will provide for, and to lodge and board as many other persons, such as officers, teachers, agents, workmen, and servants, as in the opinion of the Managers it may be necessary or convenient shall reside upon the premises, for the purpose of fully carrying out the design in view, and of completely establishing and successfully maintaining the School herein intended to be founded; to furnish and fully equip the School with such furniture, materials, machinery, tools, books, equipment, and all things needful to carry into effect the general purpose, as in the judgment of the Managers may be necessary or convenient for the purpose; to pay the insurance, repairs, and renewals of the property, to pay the compensation of officers, agents, teachers, workmen, servants, or other employees, materials and supplies, the maintenance, clothing, and instruction of the children, the expense of boarding and lodging such officers and employees whom the Managers may think it proper shall reside at the School, and any other charge or expense contracted or payable by the Managers, for, or by reason of the management, maintenance, support, renewal, improvement or repair of the School, its appurtenances, the plant, and equipment thereto belonging, and of the lands, buildings and improvements under their care and management. The decision of the Managers as to what are or may be necessary expenses for the maintenance, support, management, renewal, or repairs of the School, and its appurtenances, the plant and equipment thereto belonging or appertaining, and of the lands, buildings, and improvements under their care and management, shall be final and conclusive upon the subject.

11. The institution shall be known as "Milton Hershey School", and shall be permanently located in Derry Township, Dauphin County, Pennsylvania, upon the land hereby conveyed, and upon such other land as the Trustee has received or purchased and/or may from time to time receive, by gift or otherwise, or purchase for the purposes of the School pursuant to the terms of Paragraph 7 of this deed.

12. The Managers shall employ from time to time, at proper compensation to be fixed and established by them, a competent number of teachers, agents, mechanics, workmen, and servants, necessary to take charge of the said farms and School, and to feed, clothe, educate, and instruct in trades, as hereinafter provided, all children admitted to the School, and for other purposes necessary to carry out the objects

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

in view; but no person shall be employed who shall not be of tried skill in his or her proper department, and of established moral character.

13. The institution shall be organized as soon as practicable, and when prepared to receive children, the Managers shall from time to time receive and admit to the School as many poor, healthy children as may from time to time be determined by the Managers, as in the opinion of the Managers, the extent, capacity, and income of the School will provide for, and shall be adequate to maintain, and from time to time as there may be vacancies, or increased ability from income may warrant, others shall be admitted; provided that any such child shall have attained his or her fourth birthday but shall not yet have attained his or her sixteenth birthday at the time of his or her admission. Consistent with the purposes of this deed, only a child deemed poor and healthy by the Managers, and who, in the opinion of the Managers, is not receiving adequate care from one of his or her natural parents, is of good character and behavior, has potential for scholastic achievement, and is likely to benefit from the program then offered by the School, in addition to meeting the other qualifications set forth herein, shall be admitted to the School. The Managers shall make all decisions as to admission to the School, and their decisions shall be final and conclusive upon the subject.

14. On application for admission, an accurate statement shall be taken, in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars useful to be known of each child.

Those children for whose admission application shall first be made, shall be first introduced, all other things concurring, and at all future times, priority of application shall entitle the applicant to preference of admission, all other things concurring, but if there should be at any time more applicants than vacancies, and the applying children shall have been born in different places, preference shall be given in the admission: First, —to those born in the Counties of Dauphin, Lancaster, and Lebanon, State of Pennsylvania; Second, — to those born elsewhere in Pennsylvania; Third, — to those born elsewhere in the United States. No child who has been properly admitted with reference to the order of preference shall thereafter be displaced to make way for any later or subsequent applicant who may be higher in the order of preference hereinbefore directed to be observed. The decision of the Managers as to the number of children to be admitted, and as to the conflicting claims of any or all applicants for admission, shall be final and conclusive.

15. Those children who, in the opinion of the Managers, are worthy students making satisfactory progress, may remain in the School until they complete the full course of secondary education being offered.

16. All children admitted to the School shall be fed with plain, wholesome food; plainly, neatly, and comfortably clothed, without distinctive dress, and fitly lodged. Due regard shall be paid to their health; their physical training shall be attended to, and they shall have suitable and proper exercise and recreation. They shall be instructed in the several branches of a sound education, agriculture, horticulture, gardening, such mechanical trades and handicrafts as the Managers may determine, and such natural and physical sciences and practical mathematics as in the opinion of the Managers it may be important for them to acquire, and such other learning and science as the tastes, capacities, and adaptability of the several scholars may merit or warrant, to fit themselves for the trades they are to learn, and a useful occupation in life. No one fixed or established course shall be taken by all scholars,

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

this being in the discretion of the Managers, bearing in mind that the main object in view is to train young men and women to useful trades and occupations, so that they can earn their own livelihood. Each and every scholar shall be required to learn, and be thoroughly instructed in some occupation or mechanical trade, so that when he or she leaves the School on the completion of the period for which he or she is to remain, he or she may be able to support himself or herself.

The Manager shall determine the several kinds of mechanical trades to be taught, and the determination of the particular one that shall be taught to and acquired by each scholar, –the taste, capacity, intelligence, and adaptability of each scholar being ascertained and considered before assigning him or her to any particular trade; one of the objects of the School being to teach and instruct in agriculture, horticulture, and gardening, each child admitted to the School shall at such time or times as may be required, do such work upon the farms as may suit his or her capacity and ability.

17. The School shall be non-sectarian, but the moral and religious training of the scholars shall be properly looked after and cared for by the Managers. No favoritism shall be shown by the Managers to any particular sect or creed. Each scholar shall be taught to speak the truth at all times, and each and every scholar shall be thoroughly trained to habits of economy, and industry.

18. All the advantages and benefits to be derived by the scholars under this deed, shall be in every respect gratuitous, and under no circumstances shall any charge be made to any scholar, or any fees, rewards, or other compensations be accepted by the Managers from or on account of any scholar.

19. The Trustee shall pay the reasonable expenses which the Managers shall incur in the performance of their duties.

20. If, in the opinion of the Managers, any child admitted to the School should become incompetent to learn, or to master a trade, or from physical ailments it would be inexpedient for him or her to continue his or her studies and training, or become insubordinate, or be guilty of vice or crime, or become an unfit companion for the others, or has so conducted himself or herself as not worthy of future and continued support and education, or is so competent to work at his or her chosen trade, that he or she is qualified to be self-supporting, he or she may be removed or expelled from the School by the Managers. The decision of the Managers as to whether a scholar deserves removal or expulsion, shall be final and conclusive upon the subject. The Managers may dismiss any child from their care, and remove him or her from the School for any reason which in their judgment is good and sufficient.

21. All children shall leave the institution and cease to be the recipients of its benefits upon their completion of the full course of secondary education being offered at the School.

The Managers may in their discretion provide for such a system of premiums and rewards dependent upon good behavior, character, and proficiency, as shall enable those of the scholars entitled to its benefits to receive from the Managers, when they leave the School at the full expiration of their term, a sum of money not exceeding One Hundred Dollars to any one scholar, which sum of money shall be paid by the Managers out of any of the moneys received by them as income of the School, or the Managers may, out of the income, if sufficient for the purpose, provide for or contribute toward the further education of the scholar at some other school, college, or university.

22. All moneys received by the Managers from the sale of products, stock, material, or manufactured articles, or from any source other than those hereinabove described, shall be paid to the Trustee, and

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

expended for the same purposes as are hereinabove prescribed and directed for the expenditure of the income.

23. The Managers shall at all times keep full and accurate statements, in books to be provided by them for the purpose, of all children entering, remaining in, and leaving the School, showing their several names, parentage, birthplaces, ages, admission, and departure, and designation of trade learned; and so far as any information upon the subject can readily and without unnecessary expense be obtained, the Managers shall cause a record to be kept and preserved of the residence, occupation, condition, and success in life of all scholars who have fully completed their term, for a period of ten years after their departure from the School.

24. The Managers shall at all times keep books and accounts of the financial condition of the farms and School, showing the amount and value of all real and personal property belonging thereto, and exhibiting in detail all receipts and disbursements.

In the month of September of each year the Managers shall make a report of the operations of the farms and School for the year ending with the preceding thirty-first day of July, showing the receipts and expenditures of the Managers and the operations of the farms and School during the year. The report must include a statement showing the exact financial condition of the farms, and School at the end of the year, and an inventory and valuation of all the property, stock, implements, machinery, tools, apparatus, and shall be accompanied by other information of the condition of the School, the number of scholars, which the Managers may desire to give, and a copy of said report, signed by the Managers, shall be delivered by the Managers to the Trustee, in the said month of September, and be filed and preserved by the Trustee among the records of its trust.

25. Should any one or more of the individual Managers hereinabove appointed, die, resign, or become incapacitated to act, or decline or refuse to act, his, or their place or places shall be filled by an appointment to be made by the Trustee, from the members of its own Board of Directors, and any vacancy occurring at any time in the number of Managers by any of the above causes, or otherwise howsoever, whether among the Managers herein appointed, or among those that may be selected to fill a vacancy as herein prescribed, or among their successors to be appointed as aforesaid, shall be filled by an appointment to be made by the Trustee, from the members of its own Board of Directors. The Trustee may at any time hereafter revoke the appointment of any person or persons herein designated as Managers, or of those who become their successors, and remove such persons from the Managers, and thereafter the person or persons whose appointment is revoked shall no longer exercise the duties of the appointment; the vacancy or vacancies so created shall be filled by an appointment to be made by the Trustee in the manner hereinabove described from the members of its own Board of Directors. The Managers and the Trustee may at any time hereafter increase the number of Managers to such a number as they determine, not greater than the membership of the Board of Directors of the Trustee.

26. The Managers shall annually elect one of their number as Chairman. The person acting at the time as Treasurer to the Trustee shall be Treasurer of the Board of Managers. They shall appoint a Secretary, and prescribe the duties of the Treasurer and Secretary. The Treasurer shall give bond with good surety in such penal sum as the Managers shall determine, conditioned for the faithful performance of his duties. The offices of Treasurer and Secretary may be filled by one person, and in case of vacancy in the offices of Chairman or Secretary at any time, the Managers shall elect a

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

successor to fill the vacancy. The Managers shall notify the Trustee in writing of their organization, and of the election of Chairman and Secretary, and of any changes in either office as the same may occur. The assent of a majority of the Managers shall be necessary for the approval of any act.

27. All and several the trusts herein created and declared shall be held in perpetuity.

28. If in the opinion of the Managers it may be advantageous and convenient that they should be incorporated, and as a corporation hold and exercise the trusts herein created and directed to be held and exercised by the Managers as individuals, the Managers shall have full power and authority at their option to apply for and obtain and take corporate powers and become a corporation under the laws of the State of Pennsylvania existing at the time of the application for such corporate powers: Always provided however, and subject to the following express conditions, viz:– that the said corporation shall hold its charter in perpetuity, that it shall be called "Milton Hershey School", that the Managers holding the trust at the time of the granting of the charter, shall be the sole incorporators and Managers of said corporation; that the rights and powers to fill vacancies in their numbers as such incorporators and Managers, be subject to the same restrictions as are hereinabove given and imposed in cases of vacancies among the individual Managers, and that the said corporation, under and by virtue of the law or laws of the Commonwealth of Pennsylvania existing at the time of its creation, shall have full and complete legal authority to take and execute the trusts hereinabove created and intended to be exercised and held by the Managers as individuals, to exercise and enjoy as such corporation all the trusts herein created to be exercised and enjoyed by the said individual Managers, with all the powers and authorities, and under and subject to all the conditions, restrictions, and limitations as are herein given, granted, created, prescribed, and declared of and concerning the said trusts to be held and exercised by the said individual Managers; and upon such corporation being formed as aforesaid, it, the said corporation, by name shall thenceforth hold and enjoy all the trusts hereinabove declared and created and intended to be held and exercised by the individual Managers aforesaid, and be and become the successors in the trust of the said Managers. And upon said corporation being formed as aforesaid, the said Managers shall forthwith give notice thereof in writing to the Trustee, and thereafter the said corporation shall be consulted by the Trustee in the matter of the sale and purchase of securities and have the same power and authority in the matter of the sale and purchase of securities and investments and reinvestments, and in all other matters, as is given to the Managers under this deed; and the said corporation shall thenceforth be entitled to receive from the Trustee, and the Trustee shall pay over to the corporation, all moneys which by this deed are hereinabove directed to be paid by the Trustee to the Managers, and the corporation shall take, receive and hold the said money subject to all the trusts and confidences hereinabove declared of and concerning the same with like effect to all intents and purposes as if the said corporation had been named in this deed instead of the Managers hereinabove named.

29. No person employed by the school, in any capacity other than as an officer, counsel or consultant, in connection with which any compensation or expenses are directly or indirectly paid, shall at the same time serve as a member of the Managers of Milton Hershey School.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

IN WITNESS WHEREOF the parties of the first part hereto have hereunto set their hands and affixed their seals this fifteenth day of November, in the year of our Lord one thousand nine hundred and nine.

Milton S. Hershey (Seal)
Catherine S. Hershey (Seal)

Signed, sealed and delivered
in the presence of:

H.C. Tuxbury
E.E. Yunge

STATE OF NEW YORK :
: ss:
COUNTY OF NEW YORK :

On the 15th day of November A.D. 1909, before me, a Notary Public of the State of New York, residing in New York City, personally appeared the within-named Milton S. Hershey and Catherine S. Hershey, his wife, and in due form of law acknowledged the within deed to be their and each of their act and deed, and desired the same might be recorded as such; and the said Catherine S. Hershey being of full age, and separate and apart from her said husband by me thereon privately examined, and the full contents of the within deed being by me first made known unto her, did thereupon declare and say that she did voluntarily and of her own free will and accord, sign, seal, and as her act and deed, deliver the within-written Indenture, Deed or Conveyance, without any coercion or compulsion of her said husband.

WITNESS my hand and official seal the day and year aforesaid.

(SEAL) H.C. Tuxbury
Notary Public 530
N.Y. County

My commission expires March 30, 1910.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

The Hershey Trust Company of Hershey, in the County of Dauphin, Pennsylvania, hereby accepts the trusts declared in the above deed on its part to be observed, kept, and performed.

IN WITNESS WHEREOF the Hershey Trust Company has hereunto affixed its corporate seal duly attested at Hershey, Pa., this fourteenth day of April A.D. 1910.

(CORPORATE
SEAL)

Milton S. Hershey, President
S. C. Stecher, Secretary

We hereby accept the trusts declared in the above deed on our part to be observed, kept, and performed.

IN WITNESS WHEREOF we have hereunto set our hands and seals this fourteenth day of April A.D. 1910.

Milton S. Hershey	(Seal)
Wm. H. Lebkicher	(Seal)
Jno. B. Curry	(Seal)
J.A. Landis	(Seal)
Geo. M. Hocker	(Seal)
A.W. Stauffer	(Seal)
John E. Snyder	(Seal)
Israel Moyer	(Seal)
U.G. Risser	(Seal)

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Sub-Appendix VII - A: December 7, 1999 Orphans Court Adjudication

MILTON HERSHEY SCHOOL : IN THE COURT OF COMMON PLEAS
: :
and : DAUPHIN COUNTY, PENNSYLVANIA
: :
HERSHEY TRUST COMPANY, :
TRUSTEE OF MILTON HERSHEY: ORPHANS COURT DIVISION
SCHOOL TRUST : NO. 712, YEAR OF 1963

ADJUDICATION

The Board of Managers of Milton Hershey School and the Hershey Trust Company, trustee of the Milton Hershey School Trust, have petitioned us to invoke either the doctrine of *cy pres* or the doctrine of deviation to allow them to spend part of the trust income for a purpose other than the specific purpose for which the trust was created. They claim that the trust has partially failed because they cannot prudently spend all of the income in support of the School and they wish to spend part of the income to establish and operate an institute to study and recommend methods for teaching needy children.

The petitioners also ask to be allowed to grant public easements in certain School real estate.

The Attorney General in his role as *parens patriae* contends that there has been no failure of the School Trust and opposes the Petition as to the proposed institute. He does not oppose the grant of the easements.

The following parties filed *amicus curiae* briefs: Milton Hershey School Alumni Association (MHSAA), National Hershey Association (NHA), and a group of six charities identified as Children’s Homes. All opposed the Institute. The MHSAA had no objection to the Bikepath Easement; NHA opposed all proposals and Children’s Homes took no position on the easements.

We must deny each of the Petitioners’ requests except the Bikepath Easement which we conclude is within their discretion to convey Trust lands.⁶³⁵

FINDINGS OF FACT

1. In 1909, Milton S. Hershey and Catherine, his wife, by Deed of Trust founded an institution now known as the Milton Hershey School (MHSAA Brief, Exhibit A).

⁶³⁵ We here decide only that the doctrines of *cy pres* and deviation may not be invoked for the proposed Institute. We do not decide that the doctrines may not be invoked for some purpose where, although the purpose of the trust remains unfulfilled, there is an unusual accumulation of income.

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

2. The Deed of Trust, which originally provided for admission of poor, white, male orphans only, has been modified to allow admission of males and females, whites and non-whites, and the definition of “orphan” has been changed to include children “not receiving adequate care from one of his or her natural parents.” (Second Restated Deed of Trust, 1976, Petitioners’ Appendix Exhibit 1).
3. The School Trust has been funded by most of the Hersheys’ wealth, including the capital stock of the Hershey Chocolate Company, now Hershey Foods Corporation. (N.T. 50)
4. The principal of the School Trust is not available for operating costs of the School but except for the years 1974-1978, the income has always exceeded such costs and as of 1998 the available income had accumulated to 608 million dollars. (Pet. ¶ 48; N.T. 52-56, Pet. Ex. 5, 6, 7, 8)
5. The enrollment at the Milton Hershey School which, since its founding, has been located in Derry Township, Pennsylvania, near the town of Hershey, has varied over the years but currently has an enrollment of 1100. (N.T. 45; See also Pet. Ex. 21)
6. Over a period of the next eight years, the Board of Managers plans to increase the enrollment at the Hershey location to 1500 and will then decide whether to enroll an additional number. (N.T. 22-24, 87, 143-146)
7. The increase in enrollment to 1500 at the Hershey location will still leave substantial amounts of income unexpended. (Pet. Ex. 9, 10; Testimony of Robert Vowler, President, Hershey Trust Co; Pet. Ex. 4 Sec. 1, p.3)
8. The effort to recruit enrollees in the School will be increased. (Testimony Peter Gurt, Enrollment Director)
9. There are many potentially eligible applicants for the benefits of the Milton Hershey School Trust. (Pet. Ex. 4, Strategic Options Study (SOS), Sec. 2, p. 3; 1993 U.S. Census data, Pet. Response to Court Inquiries, Attachment to Ex. 6)
10. The proposed Institute will cost \$25 million in construction costs and have an annual operating budget of \$25 million and upward within five (5) years. (N.T. 131). The general statement of the Institute’s purpose is to “Influence public will toward the education and nurturing of needy children by linking research, policy and practice.” (Pet. Exh. 4, SOS, Sec 1 p. 3;) The specific functions will include “[c]onducting research on emerging trends...monitoring legislative activities and public policy at the federal level...in-service training programs...convening thought leaders...influencing government policies affecting disadvantaged children...designing new schools...and “developing programs...utilizing MHS funds as “seed money”. (SOS, supra. Sec 2. pp. 5, 6).

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

DISCUSSION

I

THE TRUST PURPOSE

In 1909, Milton S. Hershey and Catherine Hershey, his wife, who were childless, by deed of trust created the Milton Hershey School for poor orphan boys to which, in later years, Milton S. Hershey gave his entire fortune. Under the terms of the trust, the Hershey Trust Company manages the fund and a Board of Managers, comprised of the members of the Board of Directors of the Hershey Trust Company, manages the School.

Catherine Hershey died on March 25, 1915. Milton Hershey died on October 14, 1945.

This was no conventional school that the Hersheys had in mind. Education is a part of the School program and specific directions are set forth regarding the training of the boys “to useful trades and occupations, so that they can earn their own livelihood”; but this education is to be offered in a particular environment. The Managers are directed to provide the boys with a place to live, to see that they are fed and clothed, to arrange for their health care and recreation, to look after their moral and religious training and to see that they are “thoroughly trained to habits of economy and industry.” Of the institution founded by the Hersheys, much the same can be said as our Supreme Court said of the benevolence of Stephen Girard:

“[I]ndeed it is not merely a school at all, but...a home where fatherless boys eat, sleep, study and live together, enjoying the testator’s bounty which provides them not only an education but also lodging, board, clothing and all the necessities of life...”

Girard College Will Case, 127 A.2d 287, 293 (Pa., 1956), *reversed sub nom.*, *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957).

The vision of Milton and Catherine Hershey was to relieve poor children from all of the conditions of poverty; to undertake their total care and upbringing.

II

FUNDING THE TRUST

The initial funding of the trust in 1909 consisted of 486 acres of working farms, together with all of the stock, equipment and buildings thereon, including Mr. Hershey’s boyhood “Homestead.” In 1918, he transferred to the trust the great bulk of this wealth in the form of the capital stock of Hershey Chocolate Company, now Hershey Food Corporation. The real estate later expanded to 12,000 acres. Except for a few years in the late 1970’s, the income of the fund has always

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

exceeded the expenses of operating the School and at the close of the 1998 fiscal year, the amount of available accumulated income was 608 million dollars. The principal then stood at more than 4 billion dollars. Under the terms of the trust, no part of the principal may be used for the current expenses of the School.

III

ADMISSION TO THE SCHOOL

Under the deed of trust as signed by the Hersheys in 1909, the principal criteria for admission to the School were that the applicant must be between the ages of four and eight and must be a poor, white male whose father was deceased. The only geographical limitation is that an applicant must have been born in the United States and, if there are more applicants than vacancies, applicants from certain local counties and from the Commonwealth of Pennsylvania shall be given preference.

In later years, on petitions of the Board of Managers that a change of admission requirements was necessary to increase enrollment, this Court allowed the following modifications of the deed of trust:

- (1) In 1933, the age for admission was extended to 14 years, and the definition of “orphan” was enlarged to include applicants whose mother was deceased.
- (2) In 1970, the age for admission was extended to 16 years and the racial limitation was removed, making non-whites eligible for admission.
- (3) In 1976, females were made eligible for admission and the definition of “orphan” was enlarged to include a child who is not receiving adequate care from one of his or her natural parents.

Thus, since 1976, any child between the age of 4 and 16, born in the United States, poor and not receiving adequate care from one of his or her natural parents, has been eligible to apply for admission to the Milton Hershey School.

IV

DISCRETION OF THE MANAGERS

The Board of Managers has a broad discretion in the management of the School. The Board has authority to decide what buildings should be built and what staff to employ, to decide what the curriculum shall be, and to decide which applicants shall be admitted and removed. Its discretion includes determining the numbers of children that the School facilities and income can, at any one time, provide for; subject, however, to the further direction that “from time to

MILTON S. HERSHEY
“**HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION**”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

time as there may be vacancies, *or increased ability from income may warrant*, others shall be admitted.” Any discretion of the Board of Managers is servient to the dominant intent of the Hersheys to care for as many children at the School as the income will permit.

The Managers have no discretion to use the funds of the School Trust for any purpose except for the School. In two separate provisions, one dealing with the Trustee and one dealing with the Managers, the Hersheys directed that neither the principal nor the income of the trust shall ever be applied to any other purpose or purposes than those set forth in the deed of trust.

V
THE PROPOSED INSTITUTE

The Managers point to the present income account of the trust fund and their projection of future increases and say that they have plans to increase the enrollment at the School in Hershey from 1100 to 1500 but that a substantial accumulation of income will remain. For that reason, they ask us to declare that the School Trust has partially failed and to invoke either the doctrine of *cy pres* or of deviation to allow them to establish an Institute in Hershey to study, develop and advocate methods of teaching needy children.

The doctrine of deviation⁶³⁶ has no application to their request. “Those terms subject to deviation are limited to administrative provisions of the trust, i.e., “the details of administration which the settlor has prescribed in order to secure the more important result of obtaining for the beneficiaries the advantages which the settlor stated he wished them to have.” Bogert, *The Law of Trusts and Trustees*, § 561 at 27; *In re Barnes Foundation*, 684 A.2d 123, 130 (Pa. Super. 1996). It has to do with the powers and duties of the trustees of charitable trusts with respect to the administration of the trust. Comment, *Restatement, Second, Trusts* § 381. “The deviation doctrine does not involve a modification of the charitable purpose”.⁶³⁷ The most cursory examination of the stated plans and objectives for the proposed Institute,⁶³⁸ further evidenced by the amount and terms of its funding, reveals that it is a new enterprise, far beyond any administrative or procedural, as opposed to substantive, provisions of the trust.

As to the alleged *pro tanto* failure of the trust, we reject the Managers’ suggestion that conclusions reflected in decrees of this Court in prior proceedings in which the expression “*pro tanto* failure” was asserted are binding upon us in this proceeding. The proceeding to which

⁶³⁶ The doctrine of deviation is stated as follows in *Restatement 2d, Trusts*, § 381: The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor or anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

⁶³⁷ *Cy Pres and Deviation: Current Trends in Applications*. Report of Committee on Charitable Trusts and Foundations, Vol. 8, Fall 1973 *Real Property, Probate and Trust Journal*, p. 404.

⁶³⁸ Petitioner’s Hearing Ex. No. 4.

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

particular reference is made is that in 1963 wherein this Court authorized disbursement of \$50,000,000 from the accumulated income of the School Trust for a medical school for the Pennsylvania State University. That proceeding was not contested; the Attorney General joined in the petition. There was no public notice of the pendency of the matter, no hearing was conducted, and no Opinion was filed to support the decree. Those circumstances are quite unlike the ground upon which *Yudacufski v. Commonwealth*, 454 A.2d 923 (Pa. 1982), cited by the Managers, rested. Moreover, the thrust of the 1963 petition, drafted at a time when admission to the School was limited to white, male orphans, alleged that the Managers believed that... “it will be difficult for the School to maintain its present level of enrollment⁶³⁹ and *virtually impossible* to increase its enrollment above the present levels.” (Emphasis added) Those circumstances do not currently exist, and the expression is inappropriate for this proceeding.

Cy pres is not available to allow the proposed Institute.

Black’s Law Dictionary, 5th Ed., 1979, at page 349 provides a simple and adequate statement of the *cy pres* doctrine: “a rule for the construction of instruments in equity by which the intention of the party is carried out as near as may be, when it would be impossible or illegal to give it literal effect.” The doctrine has a long history in this Commonwealth and our Legislature enacted a statement of it in 1947⁶⁴⁰ which has been reenacted in our Probate, Estates and Fiduciaries Code (Act of June 30, 1972, P.L. 508, No. 164, eff. July 1, 1972; 20 Pa. C.S.A. 101 et seq). Section 6110 of the Code provides as follows:

Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfillment...the court may, on application...order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, *whether his charitable intent be general or specific*. [Emphasis added]

The Managers go to great lengths to persuade us that the Hersheys had a broad general charitable intent to “nurture and educate needy children” into which the Institute would fit; but this argument is irrelevant. If a court has need to determine a general charitable intent, it is simply asking whether, if the settlors had known that it would not be possible to follow the express terms of their charitable trust, would they have wanted the funds to go to a similar charitable purpose or would they have wanted them withdrawn from charitable channels.⁶⁴¹ In their Deed of Trust, which is the place we must look, the Hersheys declared that their gift was perpetual and

⁶³⁹ The enrollment was 1183. See Managers Hearing Ex. 21.

⁶⁴⁰ Act of April 24, 1947, P.L. 100

⁶⁴¹ See Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine. Lavid. 40 Stanford L. Rev. 973, April, 1988. *Wesley U.M. Church v. Harv. College*, 366 Mass. 247, 316 N.E. 2nd 620, 624 (1974)

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

they made no provision for a reverter or alternative gift. Obviously, we can find in their trust a general charitable intent but we have no need to. The Act of 1947 and its re-enactment in Section 6110 of the PEF Code, eliminates general charitable intent as a pre-requisite for application of *cy pres*.⁶⁴² As stated in the official comment in the Joint State Government Commissions' Report in 1947: “lip service to a ‘general charitable intention’ will no longer be required.”

We need not decide whether “nurturing and education of needy children” as suggested by the Managers is an apt statement of the Hersheys' general purpose because that is not where we would look if we were to apply *cy pres* here.

The term *cy pres* which is Norman French was taken from the phrase ‘*cy pres comme possible*’, meaning “as nearly as may be.” 25 Am Jur. 2nd, Charities § 158 (1976); G. Bogert & G.T. Bogert, Trusts and Trustees § 431 at 490 (2nd rev'd ed. 1977) *Cy pres* is based on the assumption that the Settlor would have desired that the property should be applied to purposes as nearly as may be like the purposes stated by him rather than that the trust should fail altogether. Scott & Fletcher, The Law of Trusts, § 399 at 476 (4th Ed. 1989).

The specific intention of the Hersheys, as plainly stated in the Deed of Trust, was to remove children from an environment of poverty and to place them in a residential setting where they would be provided all of the necessities of food, shelter, clothing and health care together with moral and ethical guidance as well as class-room education. In Pennsylvania, the meaning of the doctrine of *cy pres* is that “when a definite function or duty is to be performed, and cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it *must* be performed with *as close approximation to that scheme as* reasonably practicable...” *City of Philadelphia v. Heirs of Girard*, 45 Pa. 9, 28 (1863) (Emphasis added), *In re Farrow*, 602 A.2d 1346 (Pa. Super., 1992). Once the applicability of the *cy pres* doctrine is indicated, the problem becomes one of approximating the testators' *express* direction as nearly as possible and without doing violence thereto. *Re Williams' Estate*, 46 A.2d 237 (Pa. 1946); *Wilkeys' Estate*, 10 A.2d 425 (Pa., 1940).

According to the Managers, they will spend \$20,000,000 to construct facilities for the Institute and the annual operating expense will rise to \$25,000,000 within four years with the likelihood that it will increase in subsequent years. The Institute is viewed as a permanent, on-going activity and the Managers ask approval for them to spend annually for the Institute an amount of the trust income equal to one-half the amount allocated to the School.

⁶⁴² No case has decided whether the Act of 1947 or § 6110 of the PEF Code would be applicable to trusts created earlier. See *Will of Porter*, 447 A.2d 977, (Pa. Super., 1982); *McKee Estate*, 83 D&C 492, affirmed on O.C. Opinion, 108 A.2d 214 (Pa., 1954); but *Wiegand v. Barnes Foundation*, 97 A.2d 81 (Pa. 1953) seems to suggest that the provision or its principle would have been applied by the Court if the case had called for application [of] the *cy pres* doctrine.

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

The proposed Institute does not approximate the Hersheys’ express intention for the Milton Hershey School and would do violence to it. We concur in the Attorney General’s opposition to the proposal.

One can hardly over-state the complexity of the problems of teaching children from disadvantaged circumstances. Dealing with the influences on any group of poor children generated by the combinations and permutations of environmental, cultural, racial and ethnic backgrounds and familial relationships is a daunting challenge to our society. Almost daily, we read about some new study commenced or method tested to address the problems.⁶⁴³

We do not decide whether another study group is needed nor do we judge the merits of the Institute approach. It simply does not comport with the deference that *cy pres* in Pennsylvania mandates to the scheme that Milton S. and Catherine Hershey framed for the use of their fortune; and the protest that the Institute will also be a resource to improve the Milton Hershey School experience does not serve to validate it. To take measures to improve the School is within the Managers’ discretion without the need for recourse to *cy pres*, and indeed, it appears that a research, evaluation and policy analysis center (from which the concept of the Institute seems to have evolved) was projected for the School in its Strategic Plan for 1996-2001 (Managers Hearing Exhibit No. 2).

As we have noted, the express purpose to which the Hersheys dedicated their wealth is a structured, residential setting to which a child is removed from impoverished living conditions. Any reading of the Deed of Trust must convince one that the Hersheys had in mind that theirs would be a direct gift to the child, with observable results.

The proposal for the Institute describes a wide-ranging research, policy formulation and advocacy organization related to the education of needy children. According to the prospectus for the Institute⁶⁴⁴, there are other agencies performing activities not unlike those proposed for the Institute. The suggested benefits cannot be characterized as direct and the results of the efforts and expenditures are not readily measurable. In contrast to the Hersheys’ scheme, the Institute will not remove the child from his or her living conditions. It does not appear that the admission standards for the Milton Hershey School related to learning capacity and character evaluation will be applied to the subjects of the study; and the instructional environments, public and private, will be varied. Moreover, the funding of the Institute would impose what amounts to a continuing encumbrance on the trust fund for an indefinite period of time, diverting a substantial part of the income from the express purpose of the School Trust to which the Managers have a duty to apply their principal effort.

⁶⁴³ For example, see “Failure of Progressive Education,” Investor’s Business Daily, Nov. 12, 1999, discussing Project Follow-Through, a 28-year study (1967-95) which expended more than one billion dollars.

⁶⁴⁴ Strategic Options Study, Managers Hearing Ex. P-4

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

We have not been referred to any Pennsylvania authority that affirms the proposition, but, according to Restatement, Trusts, 2d § 399, Comment b., some courts have recognized that in choosing among possible schemes for *cy pres* the court is not necessarily required to adopt that scheme which is as nearly as possible like that designated by the terms of the gift. However, we find no warrant to do so in this case; particularly in view of the plain fact that the purpose of the Hershey School Trust has *not* been fulfilled. When, in 1976, the Managers, alleging that the requested modification was consistent with the intent of the Hersheys, obtained from this Court a decree changing applicant eligibility to include males and females, whites and non-whites, and re-defined “orphan”, they forever⁶⁴⁵ expanded the mission of the School and the charge upon its Managers. The Managers have not said that the vision of Milton and Catherine Hershey is obsolete. On the contrary, they assert that they will pursue that vision and continue to evaluate increased enrollment.⁶⁴⁶ They have ample resources in money and potential applicants to do so.⁶⁴⁷

What we see in this proposal for an Institute is the expression of a concern of the Managers that, despite having substantial financial resources, they are able to serve in the Milton Hershey School only a fraction of the children who might qualify for admission.⁶⁴⁸ They seem to have ignored the obvious fact that a very wise man, Milton S. Hershey, must also have known that he could not take in every orphan in the United States but decided that the use he would make of his wealth was to reach directly as many as he could. In what can be referred to as “charitable efficiency”,⁶⁴⁹ the Managers seem to have decided that the costs of complying with the Hersheys express intent has become excessive relative to the benefits; that the Milton Hershey School can not “do well enough while doing good.”⁶⁵⁰

However well intentioned, the Managers’ idea of philanthropic efficiency is not a ground for *cy pres*. “Courts, heirs, excluded beneficiaries often wish they could change or delete clear and plain and specific language, or re-write a will to expand or change the testator’s bounty in order to conform to what they believe would be fairer or wiser, or to conform to what they think the

⁶⁴⁵ St. Mark 14:7

⁶⁴⁶ Although the location of the School in Derry Township was important to the Hersheys if, in the opinion of the Managers, the site should not or cannot be expanded to meet increased enrollment, the Trust would not fail. Courts have been liberal in allowing change of locations and the doctrine of deviation is the available remedy; location is merely a detail of trust administration. See Esther L. Fisch, *The Cy Pres Doctrine in the U.S.*

⁶⁴⁷ Children in Poverty under 18 U.S. Census Bureau. Managers Post-Hearing Submissions, Exh. 6.

⁶⁴⁸ “Now the Board of Managers will act on his behalf...with the resources to do something new and different—something beyond the current role of the School.” Strategic Options Study, Sec. 1, p. 4.

⁶⁴⁹ See Sisson: *Relaxing the Dead Hands’ Grip: Charitable Efficiency and the Doctrine of Cy Pres*. 74 Va. L.R. 635 (April 1988); Karst: *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, Vol. 73 Harv. L. Rev. 433 (January, 1960); Atkinson, *Reforming Cy Pres Reform*, 44 Hastings L.J. 1112 (July 1993).

⁶⁵⁰ This felicitous expression is mentioned by Dr. Atkinson n. 15 *supra* at p. 1138 and attributed to Kanter & Summers, “*Doing Well While Doing Good: Dilemmas of Performance Measurement*. [...] A Research Handbook at 154 (Walter W. Powell ed. 1987)

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

testator would have said if he had foreseen the existing facts and circumstances. But that is not and never has been the law of Pennsylvania.” Concurring Opinion of Justice Bell in *In re Girard’s Will*, supra.

In the exercise of *cy pres*, deference to the “Dead Hands” of Milton S. Hershey and Catherine, his wife, need not be so rigid as to stifle resourcefulness but our discretion is not unfettered and, if exercised, must be within the limits of approximating the dominant intent of the Hersheys. The proposed Institute does not come close.

VI
THE EASEMENTS

As we have previously discussed, to invoke the Doctrine of *cy pres* we must be satisfied that the *charitable purpose* of the trust is impossible or impractical of *fulfillment*. We have demonstrated also that the Managers have not so persuaded us.

As to the Greenway easement, all of the asserted benefits to the School and its students regarding the aesthetic value of open space and a rural environment can be preserved by not disposing of the area. The described use by the students is minimal compared to the numbers of others to whom the area would be available and the duration of the easement is tantamount to a gift of 1,000 acres along 11 miles of Swatara Creek, a parcel of trust real estate of substantial value.⁶⁵¹

However worthy the motive of the Managers, the land is held under trust and their power to alienate such property is limited. The Managers have a broad discretion to sell the lands⁶⁵² but it is well established that the power of sale conferred upon a trustee does not authorize an alienation of any character other than a sale. The power to sell does not authorize a gift of the property. 76 Am. Jur. 2d, Trusts § 558 p. 547. See also *Bruner Est.*, 70 A.2 222 (Pa., 1950)

As we have held regarding the Greenway Easement, the proposed Bikepath Easement cannot be sustained under the *cy pres* doctrine. However, the duration of the easement is for a limited period; the cost of construction will come from sources other than the trust, and the improvement will be a direct and readily available benefit to the School at its campus. Under these circumstances, there is sufficient consideration received for the grant of the easement to support the conveyance.

⁶⁵¹ Appraisal Report, Exhibit 3, Managers’ Response to Court Inquiries

⁶⁵² Under the 1909 Deed of Trust, prior to modification on petition of the Managers in 1970, the proceeds of any sale had to be used for the purchase of additional land. In 1970, this limitation was deleted.

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

CONCLUSIONS OF LAW

1. The evidence does not establish that there has been a failure of the Milton Hershey School Trust, nor does the evidence establish that the purposes of the Trust have been fulfilled.
2. The proposed Institute does not approximate the charitable intent of Milton S. Hershey and Catherine, his wife, as manifested in their Deed of Trust establishing the Milton Hershey School.
3. The doctrine of deviation has no application to the proposed Institute.
4. The doctrines of cy pres and deviation have no application to the proposed easements.
5. The proposed Bikepath Easement is within the power of the Managers to alienate lands of the Milton Hershey School Trust.

DECREE

AND NOW, December 7, 1999, the Petition of the Milton Hershey School and Hershey Trust Company for the creation, funding and operation of a proposed Institute and for the authorization of a certain Greenway Easement is denied. The request for authorization of a Bikepath Easement is approved.

BY THE COURT:

/s/ Warren G. Morgan
Warren G. Morgan, Senior Judge

December 7, 1999

CERTIFIED FROM THE RECORD

/s/ Jane D. Marfizo pf
CLERK OF THE ORPHANS' COURT DIVISION

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

MILTON HERSHEY SCHOOL : IN THE COURT OF COMMON PLEAS
: DAUPHIN COUNTY, PENNSYLVANIA
and :
: ORPHANS’ COURT DIVISION
:
HERSHEY TRUST COMPANY :
TRUSTEE OF MILTON HERSHEY :
SCHOOL TRUST : NO. 712, YEAR OF 1963

DECREE

AND NOW, December 7, 1999, the Petition of the Milton Hershey School and Hershey Trust Company for the creation, funding and operation of a proposed Institute and for the authorization of a certain Greenway Easement is denied. The request for authorization of a Bikepath Easement is approved.

BY THE COURT:

/s/ Warren G. Morgan
Warren G. Morgan, Senior Judge

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MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Sub-Appendix VII - B: September 4 and 10, 2002 Orphans Court Injunction, Order & Adjudication

IN THE ORPHANS’ COURT DIVISION
COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

IN RE: :
: NO. 712, YEAR OF 1963
MILTON HERSHEY SCHOOL TRUST :

ADJUDICATION

The Hershey Trust Company and the Board of Managers of the Milton Hershey School (the Board of the Trust Company is also the Board of Managers) propose to sell the controlling interest in the Hershey Foods Corporation now held in trust for the School. On August 19, 2002, on the Petition of the Attorney General of the Commonwealth we issued a Citation directing the Trust Company and the Managers to show cause why information regarding the sale process should not be disclosed to this Court and the Attorney General and why a hearing should not be held on any proposed sale. On August 23, 2002, the Attorney General filed a Petition for an ex parte injunction against the same respondents upon which we deferred consideration until a hearing on September 3, 2002, at which all parties appeared and were heard. On September 4, 2002, we issued an Order (with Adjudication to follow) enjoining the respondents from committing to any sale until disposition of the pending Citation.

The issue herein discussed is whether the proof available to this Court supports the injunctive relief granted. We should here note that prior to the hearing on the injunction we advised counsel for both the petitioner and the respondents that we do not view our role in this matter, commencing with this proceeding, as “a passive instrument of the parties”⁶⁵³; that the public interest in the controversy and this Court’s inherent plenary powers of supervision over trusts may lead us to add to our consideration of the issues such facts not offered by the parties as might aid our determination; and we particularly referenced, but did not thus limit, judicial notice of adjudicative facts disclosed in the records of this Court in prior proceedings involving the Milton Hershey School Trust wherein the respondents here were the moving parties.

FINDINGS OF FACT

In 1909 Milton S. Hershey and Catherine, his wife, by deed of trust endowed for the benefit of orphan children an institution now known as the Milton Hershey School. In 1918, after Catherine’s death, Mr. Hershey added to the trust (hereafter referred to as the School Trust) most of his fortune including the

⁶⁵³ Wyzanski, *A Trial Judge’s Freedom and Responsibility*, 65 Harvard L. Rev. 1292 (quoting Edmund Burke).

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

controlling shares of stock of the Hershey Chocolate Company (now Hershey Foods Corporation). The Hershey Trust Company, then owned by Mr. Hershey, was and still is the trustee of the School Trust and, as directed in the trust deed, the members of the Board of Directors of the Hershey Trust Company also serve as the Board of Managers of the School.

By his Will, Mr. Hershey gave the stock of the Hershey Trust Company to the School Trust. Accordingly, there now exists a unique arrangement for the election and composition of the Directors/Managers. During Mr. Hershey's entire lifetime and thereafter until the 1980's the Directors/Managers all resided in Derry Township (where the community of Hershey is located) or nearby. The present membership of the Directors/Managers includes only four who live near Hershey. Three live in the Philadelphia area at least 100 miles from Hershey and of the remaining members, two live in New York, two in Virginia, one in Los Angeles, one in North Carolina, one in Massachusetts, one in Washington, D.C., one in Ohio, and one in Minnesota.

The Deed of Trust directs that the Milton Hershey School shall be located in Derry Township, Pennsylvania, and gives preference to children born in the Pennsylvania counties of Dauphin (where Derry Township is located) and Lebanon and Lancaster which adjoin Dauphin County. In 1935, Mr. Hershey established the M.S. Hershey Foundation providing for vocational, cultural, or professional training of any resident of Derry Township and subsequently established the Derry Township School Trust which subsidizes the Derry Township School District. These Trusts are also administered by the Hershey Trust Company. Moreover, in the area in close proximity to his chocolate factory he created a community, now known as Hershey, including banks, a department store, community center, hotel, sports facilities, theatre, hospital, utility companies, transportation, and homes for himself and for many of his employees. Milton Hershey's charitable interests were narrowly restricted. He was concerned for children and for his community.

Shares of Hershey Foods Corporation amounting to a controlling interest in the Corporation have comprised the corpus of the School Trust from 1918 until the present date. At the request of the present Directors/Managers, the Hershey Foods Corporation is soliciting bids for the acquisition of the Corporation which would include purchase of the shares of stock held in the School Trust representing 77% of the voting power of all outstanding shares of the Hershey Foods Corporation.

In 1999, Robert C. Vowler, President of the Hershey Trust Company and Dr. William L. Lepley, President of the Milton Hershey School, filed a *cy pres* petition in this Court to use accumulated income to establish and fund an institute to study problems relating to needy children. Both verified on behalf of the Directors/Managers as follows:

Petitioners believe and therefore aver that the School Trust's accumulated income fund has again grown to the point where it is more than sufficient to carry out the Settlers' specific charitable purpose (i.e., the maintenance and perpetual operation of the School), and will continue to grow further beyond the amount necessary until either the Deed of Trust is modified, or the amount is reduced through a *cy pres* award, or both.

Petition for *Cy Pres* Award, 712 Year of 1963, filed Jan. 20, 1999, paragraph 47.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

At a hearing in the same matter on July 1, 1999, in response to a question whether in many years the income received by the School Trust has been greater than the expenses of operating the School, Vowler answered, “... that would be true for virtually almost all the years of the history of this Trust,” (N.T. 51). And when queried about his confidence in his ability to predict future income flows, responded, “We know the portfolio structure. We know long term expectations of what these are and we have a high degree of confidence in that,” (N.T. 62).

The only purpose asserted by the Hershey Trust Company and the Board of Managers for the current proposal to sell Hershey Foods Corporation is to diversify its portfolio of assets in the School Trust.

Where a merger or acquisition process is being conducted with competition among those interested enough to make an offer, the bid price usually includes a premium. This leads the acquiring company to introduce management efficiencies in order to cut costs to achieve an acceptable return and, if a public company, to respond to the concerns of investment analysts. The likelihood is great that these efficiencies will result in reduced work forces with a potential for plant location changes. Unless an event during the bid process for merger or acquisition actually precludes a bid, mere delay in the process will not discourage interested parties from submitting their bids. In the sale process now being conducted by Hershey Foods Corporation, the final bids will be received within two or three weeks and a contract for sale will likely be entered into within one or two days after the bids are received. There also exists the possibility that a pre-emptive bid will be submitted that will accelerate the bid process.

DISCUSSION

At the outset we would state that the Attorney General’s Petition for a Citation raises issues of the effect on public interests of a sale by the School Trust of its controlling shares in Hershey Foods Corporation and is broad enough to also raise issues of abuse of discretion by the Directors/Managers in initiating the process.

That the Attorney General has standing in this proceeding is the law of this Commonwealth. The responsibility for public supervision of charitable trusts traditionally has been delegated to the Attorney General to be performed as an exercise of his *parens patriae* powers. See In re Estate of Coleman, 317 A.2d 631 (Pa. 1974). Our Supreme Court in In re Pruner’s Estate, 136 A.2d 107, 110 (Pa. 1957), explained this interest: “[I]n every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, the attorney general must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented.” Property given to a charity is in a measure public property, McKee Estate, 108 A.2d 214 (Pa. 1954), and the beneficiary of charitable trusts is the general public to whom the social and economic benefits of the trusts accrue. In re Pruner’s Estate, *supra*. We conclude therefore that the Attorney General has the authority to inquire whether an exercise of a trustee’s power, even if authorized under the trust instrument, is inimical to the public interest.

That this Court has broad visitatorial and supervisory powers over charitable trusts is also well established. Coleman, *supra*; In re Toner’s Estate, 103 A. 541 (Pa. 1918). The Court “within its appointed orbit is exclusive, and therefore necessarily as extensive as the demands of justice.” Shollenberger’s Appeal, 21 Pa. 337 (1853).

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

The rules relating to preliminary injunctions are stated in a number of ways but an acceptable version of the governing general principles is set forth in 15 Standard Pennsylvania Practice §83.18:

1. the relief is necessary to prevent irreparable harm;
2. the relief will restore the status quo;
3. there is greater injury in denying than granting; and
4. the right to relief is clear.

In their Answer to the petition for injunctive relief, the Directors/Managers suggest that they cannot be charged as causing any harm relative to the sale process because (1) the Hershey Foods Corporation is conducting the process, not they and (2) there is yet no proposed sale. The sale process according to them is just an “exploration” of “options” regarding a diversification policy. This explanation is more than disingenuous; it is an affront to the intelligence. They admit in their Answer that they requested the sale process. Are we to believe that having induced prospective purchasers to develop financing, tour plants, and obtain confidential information from Hershey Foods Corporation that is it just as likely that they won’t sell as it is that they will? If, as they argued at hearing, horrific fluctuations in stock price causing potential for losses to the School Fund will follow from any delay in the sale process, what, pray tell, will the market reaction be and that of prospective bidders if this process is just a “look see”? The testimony of their own witness, an officer of UBS Warburg AG, the investment bankers representing the Directors/Managers, confirms that the process is far beyond that.

The Attorney General has sufficiently carried his burden of proving the potential harm that he seeks to prevent, namely, the adverse economic and social impact against the public interest if a sale of Hershey Foods Corporation takes place, particularly in its effect on employees of the Corporation and the community of Derry Township. The persuasive thrust of the testimony of Richard A. Zimmerman, a former CEO and Chairman of the Board of Hershey Foods Corporation with years of experience in mergers and acquisitions, was that a sale of the controlling interest in Hershey Foods Corporation creates a likelihood that there will be reduction in the work force and that relocations of plant operations and closing of duplicate facilities will be matters of probable immediate consideration by the acquiring company. We would add that this Court is not required to be blind and deaf to that which has been commonplace information to the public during the recent past period of numerous mergers and acquisitions of public companies.

That the Attorney General cannot identify with certainty that the apprehended harms will occur does not put him out of court. That requirement has never been the rule.⁶⁵⁴ We are not unmindful that injunctive relief is not casually invoked. However, we are also aware that this proceeding is equitable in nature and that considerations of potential harm are perforce viewed in the light cast by the breadth or limits of the relief sought and the finality of the consequences of denying the relief. The relief requested here does not end the sale process. It is limited to a restraint of the Directors/Managers from committing to a sale pending resolution of the issues raised by the Citation. This comports with the customary approach of courts to injunctions that the relief be no broader than necessary pending

⁶⁵⁴ The reliance of the Directors/Managers on *Novak v. Commonwealth*, 523 A.2d 318 (Pa. 1987), is misplaced. The injunction there was denied because it related to employment contracts for the infringement of which there were adequate remedies at law. The issue of the quantum of proof of harm to individual employees was not controlling. The case is readily distinguishable in that it did not involve a claim of harm to public interest and the relief sought would have interfered with the functioning of government.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

adjudication of the underlying controversy. On the other hand, the finality of a consummated sale of Hershey Foods Corporation is palpable; the obstacle to reconstructing the proverbial broken egg pales by comparison.

There are also other issues that await consideration of the Citation.

Granted, the deed of trust gives the trustee discretionary powers of investment and a court will not ordinarily interfere with what appears to be an act within that discretion. The rule is, however, a general rule, not an absolute.

Mr. Hershey maintained the controlling interest in his chocolate business as essentially the sole asset of the corpus of the School Trust from 1918 when he made the gift until he died in 1945. His deed of trust provides that the corpus cannot be used for the operating expenses of the School. The trust was administered by a small trust company owned by Mr. Hershey, and located where its directors, comprised until recent years of local citizens and officers of his company, could conveniently both manage the School and monitor the condition of the business that sustained the School. The trust company is located in a small town built by Mr. Hershey around his manufacturing facilities and the entire fortune earned from that business by Mr. Hershey he dedicated to the School he located in that town and to its residents. The symbiotic relationship among the School, the community, and the Company is common knowledge. The business was not, during Mr. Hershey's life, is not now, nor foreseeably in financial difficulty, and the School, according to statements by officers of the Directors/Managers has ample funds in its accumulated income to carry out its purposes. The proposal by the Directors/Managers is for the sale of all of the shares of Hershey Foods Corporation. There is no suggestion of a sale of such number of shares as would still reserve control of the Corporation nor explanation why, if any need for funds exists for which a sale is necessary, it could not be met while still keeping control.⁶⁵⁵ The question certainly occurs as to whether an immediate premium share price obtained in losing control is a reasonable trade-off for permanently retaining it.

The foregoing circumstances, we conclude, sufficiently raise, for fuller investigation in connection with the Citation, the issue of whether the sale proposal comports with Mr. Hershey's intent as indicated in his scheme for trust management, as well as an issue whether under all relevant circumstances, the act of these respondents, the Directors/Managers, is so unreasonable as it relates to their duty to the School Trust that it amounts to a capriciousness that is an abuse of their discretion.

The only explanation given by the Director/Managers for the proposed sale is that they have a duty to diversify their investment portfolio. Their consultant who recommends this divesting of the asset that has sustained the School for most of its years was unaware that the law of Pennsylvania for long years, until 1999, was that a trustee had no obligation to diversify the trust corpus. A recital of the Pennsylvania rule is given in Estate of Pew, 655 A.2d 521, 543 (Pa. Super. 1994): “the trustees...had no obligation under Pennsylvania law to diversify the trust principal by selling the shares of the Sun Company common stock and making another investment when the trust principal, as funded by the settlor, was fulfilling [the beneficiaries' interests].” Nor did he know that in 1999 when the Legislature enacted a modified version of the Uniform Prudent Investor Act, 20 Pa. C.S. §7201 et seq. (1999), the

⁶⁵⁵ Some nisi prius judges are more able than others, but few are lacking that instinct, honed in many trials of many different causes, that from time to time tells them, “This needs looking into!” A full inquiry into the ultimate issues raised by the Attorney General's Petition for Citation may resolve that concern.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

section (§7204) requiring trustees to reasonably diversify investments was not made applicable to existing trusts. The official comment to §7204 reads in relevant part: “[T]his section is not made applicable to existing trusts because Pennsylvania had not required diversification... Retroactivity would have required drafters of old trusts to have been clairvoyant to have negated a non-existent duty to diversify.”

It is also significant that this same consultant, having stated that his investment objective is to make enough money to support the School’s current and prospective educational program in perpetuity at a reasonable level of risk, admitted on cross-examination that he had never known the Milton Hershey School not to have enough money to do what it needs to do. Indeed, in a proceeding in this Court little more than 2½ years ago, both Robert C. Vowler, the President of the Trust Company and William L. Lepley, the President of the School verified that there was then *in the accumulated income fund* not only enough money to *maintain* and *perpetually* operate the School but also to establish and operate an Institute⁶⁵⁶ utilizing one-third of the income dollars allocated to their combined operations. Relevant to the claim of a need for diversification now being advanced, Vowler testifying in the prior proceeding was asked what degree of confidence he had in being able to predict future income flows. His answer: “We know the portfolio structure. We know long term expectations of what these are and we have a very high degree of confidence in that.” (N.T. at 62).

Turning to the questions as to whether there is sufficient proof that the relief will restore the status quo, and the weighing of the harm in denying rather than granting the injunction, no extended discussion is necessary.

The status quo is usually defined as the last peaceable and lawful uncontested status preceding the underlying controversy. Plainly, that status would not be, as the Directors/Managers contend, a continuation of the sale process. This controversy erupted upon the announcement by Hershey Trust Company that it intended to seek offers for the sale of Hershey Foods Corporation. The last peaceable status would have us not only stop but to reverse the sale process. Our Order in this matter will do neither. As stated before, the requested relief does not stop the process; it delays possible consummation of the process until the issues raised by the Citation are dealt with.

If we deny the injunction, the experts in mergers and acquisitions called by both parties agreed that the sale of the Hershey Foods Corporation will be consummated within a short time; a few weeks, possibly only days. The opportunity to act against the potential harm that concerns the Attorney General will have passed as well as the immediate occasion for inquiry into issues having to do with the performance by the Trustees of their fiduciary duties.

Weighing the probative value of the testimony by an employee of the investment banking firm advising the Directors/Managers against that of an independent witness with as much or more expertise, we are persuaded by the latter that a delay in the sale process will not discourage prospective bidders at this stage from going forward in the sale process. Further, we do not find compelling the argument that any order delaying the process will cause significant fluctuations in Hershey Foods

⁶⁵⁶ This was a *cy pres* proceeding based on an allegation that there was a pro tanto failure of the School Trust because it had more accumulated income (\$750,000,000) than it was ever going to need. We denied the petition on the ground that the proposed Institute was not within the Settlers’ intent.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Corporation stock that will result in possible loss to the School fund. Guessing about the price of the stock of Hershey Foods Corporation in the ensuing weeks will be for the gambler, not for this Court.

The Directors/Managers argue at length that the Attorney General has failed to establish that he has the required right to relief. The arguments are without merit.

They first claim as a rule absolute that under the Probate, Estate, and Fiduciaries Code this Court cannot restrain any sale of trust assets if a trustee has a power to sell. They assert this purported rule on the basis of 20 Pa. C.S. §3355, arguing that the section provides that the court may restrain a sale “made under an authority not given by the governing instrument” thus it follows that a court is *prohibited* from interfering with a sale made in any exercise of an authority to sell, citing Estate of Hughes, 538 A.2d 470 (Pa. 1988). In addition to the observation that the rule as advanced would obviate a variety of long-established reasons for finding an abuse of discretion in the exercise of a power to sell and is wholly unfounded, we would also note that Hughes stands for no such proposition. The ratio decidendi of the case was Section 3360(a) of the Code relating to a power of a court to set aside for inadequacy of consideration or higher offer a contract of sale of real estate already entered into. The case expressly rejected any application of Section 3355 to the issue it was deciding.

Next, the Directors/Managers argue that the law of Pennsylvania establishes that the duty of a trustee is to administer the trust solely for the benefit of the beneficiaries of the trust, quoting in support the statement under Comment p. of §1701(1) of the Restatement, Trusts which reads, “The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person.” We are familiar with these rules but do not construe them to mean that as long as the act of a trustee is an exercise of a power given in the trust instrument and purports to serve the trust, the trustee can act with impunity and without regard for adverse effects on others. We know of no case that employs the rules advanced by the Directors/Managers in the context of an Attorney General asserting his duty to see that the public interest is not harmed by an act of a trustee that may otherwise be lawful and purports to be in furtherance of the trust. Few such issues are likely to arise and rarely one with the aspects of the case before us. How many trusts enjoy holding a controlling interest in one of this nation’s largest, historically profitable, and best-known corporations? The duties of a trustee and the Attorney General are concomitant in so far as assuring that the benefits of a charitable trust are delivered in accordance with the Settlor’s intent; but because the socio-economic benefits of a charitable trust extend beyond the designated beneficiaries to the public itself, although ordinarily compatible with each other, the Attorney General has an added responsibility of assuring that compatibility.

In sum, we are satisfied that the Attorney General, under the facts of this case, notably the circumstance that the threatened action by the Directors/Managers of the School Trust appears to be excessive and unnecessary for any foreseeable needs of the Trust, has the duty and the power to investigate its consequences and to take such actions as the consequences may warrant.

Lastly, the Directors/Managers would hold the Attorney General to a standard of proof for the required clear right to relief that is tantamount to a resolution of the ultimate issues in this matter. That is not required; a moving party need not prove an absolute right to relief in order to obtain a preliminary injunction. It is sufficient, if the other elements necessary for a preliminary injunction exist, and substantial legal questions are raised that must be resolved to determine the ultimate rights of the

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

parties. See Pleasant Hills Constr. Co. v. Public Auditorium Auth., 782 A.2d 68 (Pa. Commw. 2001) (rev. on other grounds, 784 A.2d 1277 (Pa 2001)); Chmura v. Deegan, 581 A.2d 592 (Pa. Super. 1990). Substantial legal questions have been raised as discussed herein both by the Attorney General and this Court.

Accordingly, our conclusion of law is that the Attorney General is entitled to the relief requested. For the foregoing reasons, we entered the following

ORDER

AND NOW, this 4th day of September, 2002, the petition for special injunctive relief filed by D. Michael Fisher, Attorney General of the Commonwealth of Pennsylvania, is GRANTED.

We hereby Order and Direct that pending disposition of the Citation issued by the Court on August 19, 2002, and/or further order of this Court, the Board of Managers of the Milton Hershey School and the Hershey Trust Company as Trustee of the Milton S. and Catherine S. Hershey Trust, respondents, shall not enter into any agreement or other understanding that would or could commit the respondents to a sale or other disposition of any or all of the shares of Hershey Foods Corporation held as corpus of the Trust.

/s/ Warren G. Morgan

Warren G. Morgan, Senior Judge

Adjudication dated: September 10, 2002

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Sub-Appendix VII - C: September 18, 2002 Commonwealth Court Opinion

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Milton Hershey School Trust :
:
Appeal of: Milton Hershey School and :
the Hershey Trust Company, in its :
Capacity as the Trustee of the Milton : No. 2111 C.D. 2002
Hershey School Trust : Argued: September 11, 2002

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge

OPINION BY PRESIDENT JUDGE COLINS

FILED: September 18, 2002

Before this Court is the appeal of the Hershey Trust Company and Milton Hershey School (collectively, Trust) seeking a stay of the special injunction issued by Senior Judge Warren G. Morgan of the Dauphin County Orphan’s Court and the Trust’s emergency application for expedited ruling on the merits of Judge Morgan’s grant of the special injunction. The preliminary or special injunction prohibits the Trust from entering into any agreement or understanding that would or could commit the Trust to a sale or other disposition of any or all shares of Hershey Foods Corporation held as the corpus of the Milton Hershey School Trust pending the Orphan’s Court’s disposition of the Pennsylvania Attorney General’s petition for citation for rule to show cause why a proposed sale of the Trust’s controlling interest in Hershey Foods should not be conditioned upon court approval.

The history of this matter is set forth in detail in Judge Morgan’s opinion, which we attach. Briefly, since 1918, the Trust’s corpus has consisted primarily of a controlling interest in Hershey Foods, previously known as the Hershey Chocolate Company. The Trust has recently proposed selling its controlling interest in Hershey Foods in an effort to diversify its assets. The Attorney General filed a petition for citation and request for special injunction pursuant to his office’s *parens patriae* powers.⁶⁵⁷ After a hearing, the Orphan’s Court granted the preliminary or special injunction, and the Trust

⁶⁵⁷ “*Parens patriae* powers” refers to the “ancient powers of guardianship over persons under disability and of protectorship of the public interest which were originally held by the Crown of England as ‘father of the country,’ and which as part of the common law devolved upon the states and federal government.” *In re Pruner’s Estate*, 390 Pa. 529, 532, 136 A.2d 107, 109 (1957) (citations omitted). These powers permitted the sovereign, through his officer, the attorney general, to exercise supervisory jurisdiction over all charitable trusts. *Id.*

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

appealed to this Court, seeking a suspension of the injunction pending appeal. The Orphan’s Court denied a request for suspension filed simultaneously in that court. In our scheduling order, we raised the issue of our appellate jurisdiction over this matter. Subsequently, the Trust filed an emergency application for an expedited ruling on the merits of the Orphan’s Court’s preliminary injunction.

Jurisdiction

The Commonwealth Court’s jurisdiction over appeals from the courts of common pleas is set forth in 42 Pa. C.S. §762. Any appeal that is not, by statute, taken to the Commonwealth Court or to the Supreme Court under 42 Pa. C.S. §722, falls under the residual jurisdiction of the Superior Court pursuant to 42 Pa. C.S. §742. The Commonwealth Court has exclusive jurisdiction over final orders of the courts of common pleas in all civil actions or proceedings “[b]y the Commonwealth government, including any officer thereof acting in his official capacity.” 42 Pa. C.S. §762(a)(1)(ii). “Proceeding,” “[i]ncludes every declaration, petition or other application which may be made to a court under law or usage or under special statutory authority, but the term does not include an action or an appeal.” 42 Pa. C.S. §102. The present matter having been initiated by the Attorney General’s Office by the filing of its petition for citation in the Orphan’s Court,⁶⁵⁸ we conclude that this Court has jurisdiction pursuant to 42 Pa. C.S. §762(a)(1)(ii).

As a separate basis for jurisdiction, in cases where no objection is made to the lack of jurisdiction before the record of proceedings is filed, the failure of an appellee to file an objection to the jurisdiction operates to vest jurisdiction in the appellate court. Pa. R.A.P. 741. Here, the record was filed in this Court on September 10, 2002, and no party has objected to our exercise of jurisdiction.

Appeal from Grant of Preliminary Injunction

Because we agree with the Trust that the Court has all of the necessary information and argument necessary to determine the merits of this appeal, we grant the Trust’s application for expedited ruling on the merits of the appeal of the preliminary injunction.

The prerequisites for a preliminary injunction are 1) that the injunction is necessary to prevent immediate and irreparable harm that could not be compensated by damages; 2) that greater injury would result by refusing the injunction than by granting it; 3) that the injunction restores the parties to the status quo that existed immediately before the alleged wrong; 4) that the wrong is manifest and the injunction is reasonably suited to abate it; and 5) the applicant’s right to relief is clear. *City of Philadelphia v. District Council 33*, 528 Pa. 355, 598 A.2d 256 (1991). To establish a clear right to relief, the applicant must show that it is likely to succeed on the merits. *Id.* Our review of a trial court’s grant of a preliminary injunction is to determine whether there were *any reasonable grounds* for the trial court’s action, and we will reverse only if no such grounds exist. *Id.*

⁶⁵⁸ We note that the Attorney General’s petition for citation was filed under the Orphan’s Court 1963 docket number given to the action originally filed by the Trust seeking permission from the Orphans’ Court for *cy pres* in order to build a hospital, now known as the Penn State Milton S. Hershey Medical Center.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

The Trust argues that the Attorney General has no authority to prevent an otherwise lawful disposition of trust assets under the guise of protecting the public. This underlying legal issue, while important, is not the focus of our review. Rather we must review the record to determine whether the trial court had the “apparently reasonable grounds” required to support its decision. A review of the record and Judge Morgan’s opinion does not immediately convince us no apparently reasonable grounds exist to support the order as one that restores the status quo, prevents the immediate and irreparable harm that would result if the Trust proceeded with a sale of its controlling interest in Hershey Foods before the issues raised by the parties are resolved, and prevents a greater injury than what might result if the injunction were denied.

In ruling on the Attorney General’s likelihood of success on the merits, Judge Morgan states that given the existence of the other elements necessary in order to obtain a preliminary injunction, it is sufficient that “substantial legal questions are raised that must be resolved to determine the ultimate rights of the parties.” (Orphan’s Court opinion, p. 14.) The sale of Hershey Foods, if consummated, would be irreversible and would terminate the entire legal proceedings prior to a resolution of the case on the merits.

Because we cannot conclude that no reasonable grounds exist to support Judge Morgan’s order, we must affirm his grant of the preliminary injunction. The Trust’s application for stay of the injunction pending appeal is therefore dismissed as moot. In the interest of concluding this matter and to mitigate any harm to the Trust or the public interest that might result from the imposition of the preliminary injunction, we will direct that the Orphan’s Court rule on the merits of the controversy expeditiously.

/s/ James G. Colins _____

JAMES GARDNER COLINS, President Judge

Judge Leavitt did not participate in this decision.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Milton Hershey School Trust :
:
Appeal of: Milton Hershey School and :
the Hershey Trust Company, in its :
Capacity as the Trustee of the Milton : No. 2111 C.D. 2002
Hershey School Trust :

ORDER

AND NOW, this 18th day of September 2002, the order of the Court of Common Pleas of Dauphin County, Orphan’s Court Division in the above-captioned matter is affirmed. The appellants’ application for stay of the trial court’s order is dismissed as moot.

The Orphan’s Court is directed to rule on the merits of this controversy within 30 days of the entry of this order.

/s/ James G. Colins

JAMES GARDNER COLINS, President Judge

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

IN THE ORPHANS’ COURT DIVISION

COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

IN RE: :
: NO. 712, YEAR OF 1963
MILTON HERSHEY SCHOOL TRUST :

ADJUDICATION

The Hershey Trust Company and the Board of Managers of the Milton Hershey School (the Board of the Trust Company is also the Board of Managers) propose to sell the controlling interest in the Hershey Foods Corporation now held in trust for the School. On August 19, 2002, on the Petition of the Attorney General of the Commonwealth we issued a Citation directing the Trust Company and the Managers to show cause why information regarding the sale process should not be disclosed to this Court and the Attorney General and why a hearing should not be held on any proposed sale. On August 23, 2002, the Attorney General filed a Petition for an ex parte injunction against the same respondents upon which we deferred consideration until a hearing on September 3, 2002, at which all parties appeared and were heard. On September 4, 2002, we issued an Order (with Adjudication to follow) enjoining the respondents from committing to any sale until disposition of the pending Citation.

The issue herein discussed is whether the proof available to this Court supports the injunctive relief granted. We should here note that prior to the hearing on the injunction we advised counsel for both the petitioner and the respondents that we do not view our role in this matter, commencing with this proceeding, as “a passive instrument of the parties”⁶⁵⁹; that the public interest in the controversy and this Court’s inherent plenary powers of supervision over trusts may lead us to add to our consideration of the issues such facts not offered by the parties as might aid our determination; and we particularly referenced, but did not thus limit, judicial notice of adjudicative facts disclosed in the records of this Court in prior proceedings involving the Milton Hershey School Trust wherein the respondents here were the moving parties.

FINDINGS OF FACT

In 1909 Milton S. Hershey and Catherine, his wife, by deed of trust endowed for the benefit of orphan children an institution now known as the Milton Hershey School. In 1918, after Catherine’s death, Mr. Hershey added to the trust (hereafter referred to as the School Trust) most of his fortune including the controlling shares of stock of the Hershey Chocolate Company (now Hershey Foods Corporation). The Hershey Trust Company, then owned by Mr. Hershey, was and still is the trustee of the School Trust and, as directed in the trust deed, the members of the

⁶⁵⁹ Wyzanski, *A Trial Judge’s Freedom and Responsibility*, 65 Harvard L. Rev. 1292 (quoting Edmund Burke).

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Board of Directors of the Hershey Trust Company also serve as the Board of Managers of the School.

By his Will, Mr. Hershey gave the stock of the Hershey Trust Company to the School Trust. Accordingly, there now exists a unique arrangement for the election and composition of the Directors/Managers. During Mr. Hershey’s entire lifetime and thereafter until the 1980’s the Directors/Managers all resided in Derry Township (where the community of Hershey is located) or nearby. The present membership of the Directors/Managers includes only four who live near Hershey. Three live in the Philadelphia area at least 100 miles from Hershey and of the remaining members, two live in New York, two in Virginia, one in Los Angeles, one in North Carolina, one in Massachusetts, one in Washington, D.C., one in Ohio, and one in Minnesota.

The Deed of Trust directs that the Milton Hershey School shall be located in Derry Township, Pennsylvania, and gives preference to children born in the Pennsylvania counties of Dauphin (where Derry Township is located) and Lebanon and Lancaster which adjoin Dauphin County. In 1935, Mr. Hershey established the M.S. Hershey Foundation providing for vocational, cultural, or professional training of any resident of Derry Township and subsequently established the Derry Township School Trust which subsidizes the Derry Township School District. These Trusts are also administered by the Hershey Trust Company. Moreover, in the area in close proximity to his chocolate factory he created a community, now known as Hershey, including banks, a department store, community center, hotel, sports facilities, theatre, hospital, utility companies, transportation, and homes for himself and for many of his employees. Milton Hershey’s charitable interests were narrowly restricted. He was concerned for children and for his community.

Shares of Hershey Foods Corporation amounting to a controlling interest in the Corporation have comprised the corpus of the School Trust from 1918 until the present date. At the request of the present Directors/Managers, the Hershey Foods Corporation is soliciting bids for the acquisition of the Corporation which would include purchase of the shares of stock held in the School Trust representing 77% of the voting power of all outstanding shares of the Hershey Foods Corporation.

In 1999, Robert C. Vowler, President of the Hershey Trust Company and Dr. William L. Lepley, President of the Milton Hershey School, filed a *cy pres* petition in this Court to use accumulated income to establish and fund an institute to study problems relating to needy children. Both verified on behalf of the Directors/Managers as follows:

Petitioners believe and therefore aver that the School Trust’s accumulated income fund has again grown to the point where it is more than sufficient to carry out the Settlers’ specific charitable purpose (i.e., the maintenance and perpetual operation of the School), and will continue to grow further beyond the amount necessary until either the Deed of Trust is modified, or the amount is reduced through a *cy pres* award, or both.

MILTON S. HERSHEY
“**HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION**”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Petition for *Cy Pres* Award, 712 Year of 1963, filed Jan. 20, 1999, paragraph 47.

At a hearing in the same matter on July 1, 1999, in response to a question whether in many years the income received by the School Trust has been greater than the expenses of operating the School, Vowler answered, “... that would be true for virtually almost all the years of the history of this Trust,” (N.T. 51). And when queried about his confidence in his ability to predict future income flows, responded, “We know the portfolio structure. We know long term expectations of what these are and we have a high degree of confidence in that,” (N.T. 62).

The only purpose asserted by the Hershey Trust Company and the Board of Managers for the current proposal to sell Hershey Foods Corporation is to diversify its portfolio of assets in the School Trust.

Where a merger or acquisition process is being conducted with competition among those interested enough to make an offer, the bid price usually includes a premium. This leads the acquiring company to introduce management efficiencies in order to cut costs to achieve an acceptable return and, if a public company, to respond to the concerns of investment analysts. The likelihood is great that these efficiencies will result in reduced work forces with a potential for plant location changes. Unless an event during the bid process for merger or acquisition actually precludes a bid, mere delay in the process will not discourage interested parties from submitting their bids. In the sale process now being conducted by Hershey Foods Corporation, the final bids will be received within two or three weeks and a contract for sale will likely be entered into within one or two days after the bids are received. There also exists the possibility that a pre-emptive bid will be submitted that will accelerate the bid process.

DISCUSSION

At the outset we would state that the Attorney General’s Petition for a Citation raises issues of the effect on public interests of a sale by the School Trust of its controlling shares in Hershey Foods Corporation and is broad enough to also raise issues of abuse of discretion by the Directors/Managers in initiating the process.

That the Attorney General has standing in this proceeding is the law of this Commonwealth. The responsibility for public supervision of charitable trusts traditionally has been delegated to the Attorney General to be performed as an exercise of his *parens patriae* powers. See In re Estate of Coleman, 317 A.2d 631 (Pa. 1974). Our Supreme Court in In re Pruner’s Estate, 136 A.2d 107, 110 (Pa. 1957), explained this interest: “[I]n every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, the attorney general must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented.” Property given to a charity is in a measure public property, McKee Estate, 108 A.2d 214 (Pa. 1954), and the beneficiary of charitable trusts is the general public to whom the social and economic benefits of the trusts accrue. In re Pruner’s

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Estate, supra. We conclude therefore that the Attorney General has the authority to inquire whether an exercise of a trustee’s power, even if authorized under the trust instrument, is inimical to the public interest.

That this Court has broad visitorial and supervisory powers over charitable trusts is also well established. Coleman, supra; In re Toner’s Estate, 103 A. 541 (Pa. 1918). The Court “within its appointed orbit is exclusive, and therefore necessarily as extensive as the demands of justice.” Shollenberger’s Appeal, 21 Pa. 337 (1853).

The rules relating to preliminary injunctions are stated in a number of ways but an acceptable version of the governing general principles is set forth in 15 Standard Pennsylvania Practice §83.18:

1. the relief is necessary to prevent irreparable harm;
2. the relief will restore the status quo;
3. there is greater injury in denying than granting; and
4. the right to relief is clear.

In their Answer to the petition for injunctive relief, the Directors/Managers suggest that they cannot be charged as causing any harm relative to the sale process because (1) the Hershey Foods Corporation is conducting the process, not they and (2) there is yet no proposed sale. The sale process according to them is just an “exploration” of “options” regarding a diversification policy. This explanation is more than disingenuous; it is an affront to the intelligence. They admit in their Answer that they requested the sale process. Are we to believe that having induced prospective purchasers to develop financing, tour plants, and obtain confidential information from Hershey Foods Corporation that is it just as likely that they won’t sell as it is that they will? If, as they argued at hearing, horrific fluctuations in stock price causing potential for losses to the School Fund will follow from any delay in the sale process, what, pray tell, will the market reaction be and that of prospective bidders if this process is just a “look see”? The testimony of their own witness, an officer of UBS Warburg AG, the investment bankers representing the Directors/Managers, confirms that the process is far beyond that.

The Attorney General has sufficiently carried his burden of proving the potential harm that he seeks to prevent, namely, the adverse economic and social impact against the public interest if a sale of Hershey Foods Corporation takes place, particularly in its effect on employees of the Corporation and the community of Derry Township. The persuasive thrust of the testimony of Richard A. Zimmerman, a former CEO and Chairman of the Board of Hershey Foods Corporation with years of experience in mergers and acquisitions, was that a sale of the controlling interest in Hershey Foods Corporation creates a likelihood that there will be reduction in the work force and that relocations of plant operations and closing of duplicate facilities will be matters of probable immediate consideration by the acquiring company. We would add that this Court is not required to be blind and deaf to that which has been

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

commonplace information to the public during the recent past period of numerous mergers and acquisitions of public companies.

That the Attorney General cannot identify with certainty that the apprehended harms will occur does not put him out of court. That requirement has never been the rule.⁶⁶⁰ We are not unmindful that injunctive relief is not casually invoked. However, we are also aware that this proceeding is equitable in nature and that considerations of potential harm are perforce viewed in the light cast by the breadth or limits of the relief sought and the finality of the consequences of denying the relief. The relief requested here does not end the sale process. It is limited to a restraint of the Directors/Managers from committing to a sale pending resolution of the issues raised by the Citation. This comports with the customary approach of courts to injunctions that the relief be no broader than necessary pending adjudication of the underlying controversy. On the other hand, the finality of a consummated sale of Hershey Foods Corporation is palpable; the obstacle to reconstructing the proverbial broken egg pales by comparison.

There are also other issues that await consideration of the Citation.

Granted, the deed of trust gives the trustee discretionary powers of investment and a court will not ordinarily interfere with what appears to be an act within that discretion. The rule is, however, a general rule, not an absolute.

Mr. Hershey maintained the controlling interest in his chocolate business as essentially the sole asset of the corpus of the School Trust from 1918 when he made the gift until he died in 1945. His deed of trust provides that the corpus cannot be used for the operating expenses of the School. The trust was administered by a small trust company owned by Mr. Hershey, and located where its directors, comprised until recent years of local citizens and officers of his company, could conveniently both manage the School and monitor the condition of the business that sustained the School. The trust company is located in a small town built by Mr. Hershey around his manufacturing facilities and the entire fortune earned from that business by Mr. Hershey he dedicated to the School he located in that town and to its residents. The symbiotic relationship among the School, the community, and the Company is common knowledge. The business was not, during Mr. Hershey's life, is not now, nor foreseeably in financial difficulty, and the School, according to statements by officers of the Directors/Managers has ample funds in its accumulated income to carry out its purposes. The proposal by the Directors/Managers is for the sale of all of the shares of Hershey Foods Corporation. There is no suggestion of a sale of such number of shares as would still reserve control of the Corporation nor explanation why, if any need for funds exists for which a sale is necessary, it could not be met while still keeping

⁶⁶⁰ The reliance of the Directors/Managers on Novak v. Commonwealth, 523 A.2d 318 (Pa. 1987), is misplaced. The injunction there was denied because it related to employment contracts for the infringement of which there were adequate remedies at law. The issue of the quantum of proof of harm to individual employees was not controlling. The case is readily distinguishable in that it did not involve a claim of harm to public interest and the relief sought would have interfered with the functioning of government.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

control.⁶⁶¹ The question certainly occurs as to whether an immediate premium share price obtained in losing control is a reasonable trade-off for permanently retaining it.

The foregoing circumstances, we conclude, sufficiently raise, for fuller investigation in connection with the Citation, the issue of whether the sale proposal comports with Mr. Hershey's intent as indicated in his scheme for trust management, as well as an issue whether under all relevant circumstances, the act of these respondents, the Directors/Managers, is so unreasonable as it relates to their duty to the School Trust that it amounts to a capriciousness that is an abuse of their discretion.

The only explanation given by the Director/Managers for the proposed sale is that they have a duty to diversify their investment portfolio. Their consultant who recommends this divesting of the asset that has sustained the School for most of its years was unaware that the law of Pennsylvania for long years, until 1999, was that a trustee had no obligation to diversify the trust corpus. A recital of the Pennsylvania rule is given in Estate of Pew, 655 A.2d 521, 543 (Pa. Super. 1994): “the trustees...had no obligation under Pennsylvania law to diversify the trust principal by selling the shares of the Sun Company common stock and making another investment when the trust principal, as funded by the settlor, was fulfilling [the beneficiaries' interests].” Nor did he know that in 1999 when the Legislature enacted a modified version of the Uniform Prudent Investor Act, 20 Pa. C.S. §7201 et seq. (1999), the section (§7204) requiring trustees to reasonably diversify investments was not made applicable to existing trusts. The official comment to §7204 reads in relevant part: “[T]his section is not made applicable to existing trusts because Pennsylvania had not required diversification... Retroactivity would have required drafters of old trusts to have been clairvoyant to have negated a non-existent duty to diversify.”

It is also significant that this same consultant, having stated that his investment objective is to make enough money to support the School's current and prospective educational program in perpetuity at a reasonable level of risk, admitted on cross-examination that he had never known the Milton Hershey School not to have enough money to do what it needs to do. Indeed, in a proceeding in this Court little more than 2½ years ago, both Robert C. Vowler, the President of the Trust Company and William L. Lepley, the President of the School verified that there was then *in the accumulated income fund* not only enough money to *maintain* and *perpetually* operate the School but also to establish and operate an Institute⁶⁶² utilizing one-third of the income dollars allocated to their combined operations. Relevant to the claim of a need for diversification now being advanced, Vowler testifying in the prior proceeding was asked what degree of confidence he had in being able to predict future income flows. His answer: “We know the

⁶⁶¹ Some *nisi prius* judges are more able than others, but few are lacking that instinct, honed in many trials of many different causes, that from time to time tells them, “This needs looking into!” A full inquiry into the ultimate issues raised by the Attorney General's Petition for Citation may resolve that concern.

⁶⁶² This was a *cy pres* proceeding based on an allegation that there was a pro tanto failure of the School Trust because it had more accumulated income (\$750,000,000) than it was ever going to need. We denied the petition on the ground that the proposed Institute was not within the Settlers' intent.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

portfolio structure. We know long term expectations of what these are and we have a very high degree of confidence in that.” (N.T. at 62).

Turning to the questions as to whether there is sufficient proof that the relief will restore the status quo, and the weighing of the harm in denying rather than granting the injunction, no extended discussion is necessary.

The status quo is usually defined as the last peaceable and lawful uncontested status preceding the underlying controversy. Plainly, that status would not be, as the Directors/Managers contend, a continuation of the sale process. This controversy erupted upon the announcement by Hershey Trust Company that it intended to seek offers for the sale of Hershey Foods Corporation. The last peaceable status would have us not only stop but to reverse the sale process. Our Order in this matter will do neither. As stated before, the requested relief does not stop the process; it delays possible consummation of the process until the issues raised by the Citation are dealt with.

If we deny the injunction, the experts in mergers and acquisitions called by both parties agreed that the sale of the Hershey Foods Corporation will be consummated within a short time; a few weeks, possibly only days. The opportunity to act against the potential harm that concerns the Attorney General will have passed as well as the immediate occasion for inquiry into issues having to do with the performance by the Trustees of their fiduciary duties.

Weighing the probative value of the testimony by an employee of the investment banking firm advising the Directors/Managers against that of an independent witness with as much or more expertise, we are persuaded by the latter that a delay in the sale process will not discourage prospective bidders at this stage from going forward in the sale process. Further, we do not find compelling the argument that any order delaying the process will cause significant fluctuations in Hershey Foods Corporation stock that will result in possible loss to the School fund. Guessing about the price of the stock of Hershey Foods Corporation in the ensuing weeks will be for the gambler, not for this Court.

The Directors/Managers argue at length that the Attorney General has failed to establish that he has the required right to relief. The arguments are without merit.

They first claim as a rule absolute that under the Probate, Estate, and Fiduciaries Code this Court cannot restrain any sale of trust assets if a trustee has a power to sell. They assert this purported rule on the basis of 20 Pa. C.S. §3355, arguing that the section provides that the court may restrain a sale “made under an authority not given by the governing instrument” thus it follows that a court is *prohibited* from interfering with a sale made in any exercise of an authority to sell, citing Estate of Hughes, 538 A.2d 470 (Pa. 1988). In addition to the observation that the rule as advanced would obviate a variety of long-established reasons for finding an abuse of discretion in the exercise of a power to sell and is wholly unfounded, we would also note that Hughes stands for no such proposition. The ratio decidendi of the case was Section 3360(a) of the Code

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

relating to a power of a court to set aside for inadequacy of consideration or higher offer a contract of sale of real estate already entered into. The case expressly rejected any application of Section 3355 to the issue it was deciding.

Next, the Directors/Managers argue that the law of Pennsylvania establishes that the duty of a trustee is to administer the trust solely for the benefit of the beneficiaries of the trust, quoting in support the statement under Comment p. of §1701(1) of the Restatement, Trusts which reads, “The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person.” We are familiar with these rules but do not construe them to mean that as long as the act of a trustee is an exercise of a power given in the trust instrument and purports to serve the trust, the trustee can act with impunity and without regard for adverse effects on others. We know of no case that employs the rules advanced by the Directors/Managers in the context of an Attorney General asserting his duty to see that the public interest is not harmed by an act of a trustee that may otherwise be lawful and purports to be in furtherance of the trust. Few such issues are likely to arise and rarely one with the aspects of the case before us. How many trusts enjoy holding a controlling interest in one of this nation’s largest, historically profitable, and best-known corporations? The duties of a trustee and the Attorney General are concomitant in so far as assuring that the benefits of a charitable trust are delivered in accordance with the Settlor’s intent; but because the socio-economic benefits of a charitable trust extend beyond the designated beneficiaries to the public itself, although ordinarily compatible with each other, the Attorney General has an added responsibility of assuring that compatibility.

In sum, we are satisfied that the Attorney General, under the facts of this case, notably the circumstance that the threatened action by the Directors/Managers of the School Trust appears to be excessive and unnecessary for any foreseeable needs of the Trust, has the duty and the power to investigate its consequences and to take such actions as the consequences may warrant.

Lastly, the Directors/Managers would hold the Attorney General to a standard of proof for the required clear right to relief that is tantamount to a resolution of the ultimate issues in this matter. That is not required; a moving party need not prove an absolute right to relief in order to obtain a preliminary injunction. It is sufficient, if the other elements necessary for a preliminary injunction exist, and substantial legal questions are raised that must be resolved to determine the ultimate rights of the parties. See Pleasant Hills Constr. Co. v. Public Auditorium Auth., 782 A.2d 68 (Pa. Commw. 2001) (rev. on other grounds, 784 A.2d 1277 (Pa 2001)); Chmura v. Deegan, 581 A.2d 592 (Pa. Super. 1990). Substantial legal questions have been raised as discussed herein both by the Attorney General and this Court.

Accordingly, our conclusion of law is that the Attorney General is entitled to the relief requested. For the foregoing reasons, we entered the following

MILTON S. HERSHEY
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APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

ORDER

AND NOW, this 4th day of September, 2002, the petition for special injunctive relief filed by D. Michael Fisher, Attorney General of the Commonwealth of Pennsylvania, is GRANTED.

We hereby Order and Direct that pending disposition of the Citation issued by the Court on August 19, 2002, and/or further order of this Court, the Board of Managers of the Milton Hershey School and the Hershey Trust Company as Trustee of the Milton S. and Catherine S. Hershey Trust, respondents, shall not enter into any agreement or other understanding that would or could commit the respondents to a sale or other disposition of any or all of the shares of Hershey Foods Corporation held as corpus of the Trust.

/s/ Warren G. Morgan

Warren G. Morgan, Senior Judge

Adjudication dated: September 10, 2002

MILTON S. HERSHEY

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APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

**IN THE ORPHANS’ COURT DIVISION
COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA**

IN RE: :
: **NO. 712, YEAR OF 1963**
MILTON HERSHEY SCHOOL TRUST :

ORDER

AND NOW, this 4th day of September, 2002, the petition for special injunctive relief filed by D. Michael Fisher, Attorney General of the Commonwealth of Pennsylvania, is GRANTED.

We hereby Order and Direct that pending disposition of the Citation issued by the Court on August 19, 2002, and/or further order of this Court, the Board of Managers of the Milton Hershey School and the Hershey Trust Company as Trustee of the Milton S. and Catherine S. Hershey Trust, respondents, shall not enter into any agreement or other understanding that would or could commit the respondents to a sale or other disposition of any or all of the shares of Hershey Foods Corporation held as corpus of the Trust.

/s/ Warren G. Morgan

Warren G. Morgan, Senior Judge

Adjudication dated: September

Distribution:

D. Michael Fisher, Esquire, Mark A. Pacella, Esquire, Office of Attorney General, Strawberry Square, Harrisburg, PA 17101

Jack M. Stover, Esquire, Jayson R Wolfgang, Esquire, Paul Kevin Brobson, Esquire, Buchanan Ingrossoll, One South Market Square, 213 Market St., 3rd Floor, Harrisburg, PA 17101

MILTON S. HERSHEY

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APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Sub-Appendix VII - D: October 16, 2002 Orphans Court Adjudication & Decree

**IN THE ORPHANS’ COURT DIVISION
COURT OF COMMON PLEAS OF DAUPHIN COUNTY,
PENNSYLVANIA**

IN RE: :
: **NO. 712, YEAR OF 1963**
MILTON HERSHEY SCHOOL :
:
TRUST :

ADJUDICATION

On August 19, 2002, on the Petition of the Attorney General of the Commonwealth of Pennsylvania, we issued a Citation directing the Respondents, Hershey Trust Company and the Board of Managers of the Milton Hershey School, to show cause why details of the process for sale of the controlling interest in Hershey Foods Corporation should not be disclosed to this Court and to the Attorney General and why any proposed sale should not be conditioned upon approval by this Court. On September 4, 2002, after hearing on a subsequent Petition filed by the Attorney General seeking injunctive relief, we enjoined the Respondents from committing to a sale until disposition of the pending Citation. On September 17, the Respondents rejected all bids received pursuant to the sale process and directed the Hershey Foods Corporation to terminate the process.

We now have before us the Motion by the Respondents to dissolve the injunction and to dismiss the Petition for Citation on the ground that the issues are now moot. We will grant the Motion in part but will retain jurisdiction.

A case is moot when a determination is sought in a matter which, when rendered, cannot have any practical effect on the existing controversy. Sonder v. Sonder, 549 A.2d 155, 179 (Pa. Super. 1988). The general rule is that courts lack jurisdiction to entertain or consider matters where a controversy is moot. An actual claim or controversy must be present at all stages of the judicial process for a case to be actionable. In re Duran, 769 A.2d 497 (Pa. Super. 2001).

We must conclude that the issues raised in the Citation entered on August 19, 2002, are now moot. They related to a specific proposal then in process for a sale of the controlling interest in Hershey Foods Corporation. By letter dated September 26, 2002, to the Attorney General, A. John Gabig, Chairman of the Board of Directors of Hershey Trust Company, advised that on September 17, 2002 that Board had rejected all bids for the purchase of Hershey Foods Corporation and had notified the Corporation to end the sale process. Moreover, Gabig stated that the Board committed itself “not to agree to any sale of the School Trust’s controlling interest in the Corporation without the approval of the Dauphin County Orphans’ Court following

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

advance notice to the Office of the Attorney General.” On October 2, 2002, the Board of Directors of the Hershey Trust Company and the Board of Managers of the School each ratified the contents of Gabig’s letter and certifications thereof were entered at the hearing on the Motion to Dismiss on October 10, 2002.

The Attorney General opposes the Motion to Dismiss because of a concern that, contrary to the commitments made by the members of the present Board of Directors and Managers, some future Board may rescind or ignore the resolutions and not disclose to the Attorney General an intent to sell a controlling interest in Hershey Foods Corporation, thereby evading judicial review of their action. Such deception would be an act of bad faith that would lead to removal of the Board members but in order to further resolve the Attorney General’s concern we shall include in our Decree the provision for notice he requests.

Having decided, as discussed above, that the issues defined by the Citation are moot, we would make the following observations:

The memorials of a good and generous man have not been well served by events surrounding this litigation. In this midstate area, Hershey is everybody’s town; there is a shared pride in identifying with that community, its industry and the School, all founded by Milton S. Hershey. Respect for the memory of Milton S. Hershey demands reconciliation among those three interests as essential to effectively carrying out his philanthropic scheme. We view the resolution adopted by the Directors/Managers on October 2, 2002, as a proper gesture toward that reconciliation; but it will not be enough. It appears to many that the Directors/Managers, whatever their skills and however well-intentioned their efforts, have become detached from that philanthropic scheme, not the least significant reasons for this being that the membership of each Board is unusually large and the residences and daily lives of too many members are distant and disconnected from the charitable interests they serve. Reconstituting the Boards in number and composition closer to the model utilized by Milton S. Hershey during his lifetime, and until recently by all succeeding Boards, will hasten the reconciliation.

Accordingly we enter the following

MILTON S. HERSHEY
“**HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION**”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

DECREE

AND NOW, October 16, 2002, we Order and Decree as follows:

1. The injunction granted by this Court on September 4, 2002 is hereby dissolved and the Petition filed by the Attorney General on August 12, 2002 is dismissed as to the issues raised in the Citation awarded by this Court on August 19, 2002.
2. The Hershey Trust Company as Trustee of the Milton Hershey School Trust and the Board of Managers of the Milton Hershey School shall give prompt written notice to the Office of the Attorney General of this Commonwealth of any intention to offer for sale shares of the Hershey Foods Corporation amounting to a controlling interest in the Corporation.
3. The Court retains jurisdiction.

By the Court:

/s/ Warren G. Morgan

Warren G. Morgan, Senior Judge

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Sub-Appendix VII - E: November 9, 2003 Orphans Court Order & Opinion re MHSAA Standing

MILTON HERSHEY SCHOOL	: IN THE COURT OF COMMON PLEAS
and	: DAUPHIN COUNTY, PENNSYLVANIA
	:
HERSHEY TRUST COMPANY	: ORPHANS’ COURT DIVISION
TRUSTEE OF MILTON HERSHEY	:
SCHOOL TRUST	:
	: NO. 712, YEAR OF 1963

ORDER

AND NOW, November 19, 2003, upon stipulation of the parties, the following relevant matters are admitted into the record: the Second Deed of Trust, the Agreement between the Attorney General, Milton Hershey School, and the Hershey Trust Company dated July 31, 2002, and the Agreement between the same parties dated June 26, 2003.

By the Court:

/s/ Warren G. Morgan
Warren G. Morgan, S.J.

DISTRIBUTION:

Victor P. Stabile, Esq., 112 Market Street, Suite 800 Harrisburg, PA 17101
 Barbara W. Mather, Esq., 3000 Two Logan Square, 18th and Arch Streets, Philadelphia, PA 19103
 F. Frederic Fouad, Esq., 230 Park Avenue, Suite 625, New York, NY 10169
 Thomas B. Schmidt, III, Esq., 200 One Keystone Plaza, North Front and Market Streets, PO Box 1181, Harrisburg, PA 17108-1181
 Heather J. Vance-Rittman, Deputy Attorney General, Office of Attorney General, Charitable Trusts & Organizations Section, 14th Floor, Strawberry Square, Harrisburg, PA 17120

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

CERTIFICATION

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF DAUPHIN : SS
:

I, **JANE D. MARFIZO**, do hereby certify that I am the duly elected Register of Wills and Clerk of the Orphans’ Court in and for the County of **DAUPHIN**, Commonwealth of Pennsylvania, and as such duly elected official do hereby certify that the attached

ORDER

is a true and correct copy of the said document as it appears in the records of the Office of the Register of Wills & Clerk of the Orphans’ Court of said county.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of my office this 19th day of November 2003, at **HARRISBURG**, Pennsylvania.

/s/ Jane D. Marfizo
_____ **Register of Wills & Clerk of the Orphans’ Court**

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

MILTON HERSHEY SCHOOL	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
and	:	
	:	
HERSHEY TRUST COMPANY	:	ORPHANS’ COURT DIVISION
TRUSTEE OF MILTON HERSHEY	:	
SCHOOL TRUST	:	
	:	NO. 712, YEAR OF 1963

ORDER

AND NOW, November 19, 2003, the Petition is DISMISSED.

By the Court:

/s/ Warren G Morgan
 Warren G. Morgan, S.J.

DISTRIBUTION:

- Victor P. Stabile, Esq., 112 Market Street, Suite 800 Harrisburg, PA 17101
- Barbara W. Mather, Esq., 3000 Two Logan Square, 18th and Arch Streets, Philadelphia, PA 19103
- F. Frederic Fouad, Esq., 230 Park Avenue, Suite 625, New York, NY 10169
- Thomas B. Schmidt, III, Esq., 200 One Keystone Plaza, North Front and Market Streets, PO Box 1181, Harrisburg, PA 17108-1181
- Heather J. Vance-Rittman, Deputy Attorney General, Office of Attorney General, Charitable Trusts & Organizations Section, 14th Floor, Strawberry Square, Harrisburg, PA 17120

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

CERTIFICATION

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF DAUPHIN : SS
:

I, **JANE D. MARFIZO**, do hereby certify that I am the duly elected Register of Wills and Clerk of the Orphans’ Court in and for the County of **DAUPHIN**, Commonwealth of Pennsylvania, and as such duly elected official do hereby certify that the attached

ORDER

is a true and correct copy of the said document as it appears in the records of the Office of the Register of Wills & Clerk of the Orphans’ Court of said county.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of my office this 19th day of November 2003, at **HARRISBURG**, Pennsylvania.

/s/ Jane D. Marfizo _____
Register of Wills & Clerk of the Orphans’ Court

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

MILTON HERSHEY SCHOOL : IN THE COURT OF COMMON PLEAS
and : DAUPHIN COUNTY, PENNSYLVANIA
HERSHEY TRUST COMPANY :
TRUSTEE OF MILTON HERSHEY : ORPHANS’ COURT DIVISION
SCHOOL TRUST :
: NO. 712, YEAR OF 1963

OPINION

The Milton Hershey School Alumni Association (Association) asks us to decide that a certain Agreement made on July 31, 2002, by the Attorney General, the Milton Hershey School (School) and the Hershey Trust Company (Trustee) relating to School and Trust administration, later rescinded by the parties in favor of a new Agreement dated June 26, 2003, should be reinstated.

We will hold that the Association does not have standing to litigate this matter and the Petition will be dismissed.

DISCUSSION

In an Opinion dated May 14, 1999, we decided that the Association lacked standing to intervene in a *cy pres* proceeding initiated by the Trustee. Arguably, that decision is controlling authority in the instant matter under the “law of the case” doctrine. However, our acquaintance with and respect for members of the Association, some who support and others who oppose this proceeding, and our regard for the traditional role of the Association leads us into further treatment of some of the issues raised by the Petition.

At the outset, two points should be made: **First**, the Trustees and the Managers of the School⁶⁶³ who rescinded the Agreement now sought to be reinstated are not all the same persons who made that Agreement. As is well known by the Association, subsequent to the July 31st Agreement a lawsuit filed by the Attorney General successfully opposed a proposed sale by the Trustee of its controlling interest in Hershey Foods Corporation and led to the resignation of nine of the sixteen members of the Trustees/Managers, including the then President of the School. The reconstituted Board of Trustees now numbers eleven, four of whom are newly appointed. Three of the current Trustees/Managers are alumni of the School as is the recently installed new President of the School.

⁶⁶³ Under the provisions of the Trust, the Managers must also be members of the Board of Trustees and reference herein will be made as “Trustees/Managers.”

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Second, the Association asserts that it filed this proceeding for itself and on behalf of all of the children currently enrolled at the School and all of those unknown who may in the future be eligible for enrollment.

There is simply no warrant in fact or in law that confers on the Association the asserted representative capacity. The membership of the Association, according to its own Articles, is comprised only of former students of the School. No current student nor any allegedly eligible potential student is identified as a party to this proceeding. The Association cannot assume, simply by saying so, a capacity to file a lawsuit on behalf of others.

The Association argues at some length, however, that because the Trustees/Managers assert that the School is the beneficiary of the Trust and because the Attorney General asserts that the beneficiary of a charitable trust is the public, this leaves the “true beneficiaries,” the children currently and potentially eligible to attend the School, without anyone to protect their interests. On this ground, the Association asks us to grant it standing on their behalf.

We reject out of hand the implication of the foregoing argument that the School and the Attorney General have subordinated to other interests the interests of the children who now or later may attend the School. We do not discount the commendable concern the Association has for those children but it cannot draw standing from a source that lacks it. The following statements of the prevailing law from Bogert, Trusts and Trustees, Second Edition, Revised, explain why:

...[T]he public is the beneficiary of a charitable trust and individuals who may be among those to gain from its operation can be described as beneficiaries in a loose sense only.

* * *

...[I]n the case of charitable trusts the obligation of the trustee is to apply the trust res for some form of public benefit, and persons who received advantages from the administration of the trust do so because they are conduits through whom the social gains flow and not because they are beneficiaries who can qualify as enforcers of the trust.

* * *

The public benefits arising from a charitable trust justify the selection of some public official for its enforcement and since the Attorney General is the governmental officer whose duties include the protection of the rights of the people of the state in general, it is natural that he has been chosen as the protector, supervisor, and enforcer of charitable trusts.

* * *

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

The purpose of vesting in some public official such as the Attorney General the exclusive power to begin proceedings to enforce charitable trusts is obvious. The persons affected by such trusts are usually some or all of the members of a large and shifting class of the public. If any member of this class who deemed himself qualified might begin suit, the trustee would frequently be subjected to unreasonable or vexatious litigation⁶⁶⁴ ... In ultimate analysis it is the public at large which benefits and not merely the individuals directly assisted. Obviously, there is good reason for vesting in a single authority the discretion and power incident to the enforcement of such trusts rather than leaving the matter to the numerous, changing and uncertain numbers of the group directly to be aided.

See Sections 414 (emphasis added) and 411.

The foregoing from Bogert states the long established and controlling law in this Commonwealth: See Estate of Pruner, 136 A.2d 107 (Pa 1957); In re McCune, 705 A.2d 861 (Pa. Super. 1997).

Granted, courts from time to time have relaxed the rule requiring the charity to be represented by the Attorney General but the cases granting standing to actual or prospective “beneficiaries” are relatively few and invariably the applicant for standing is or claims to be a member of the class for whom the benefit is sought.⁶⁶⁵ Obviously, the Association is not a member of the children classes it purports to represent and no member of those classes seeks standing.

Thus, we are left with only the Association as a party on its own behalf whose standing is at issue.

The Milton Hershey School Alumni Association was organized in 1930, some twenty years after Mr. Hershey created the Trust for the establishment of the School. Until very recently, when the purpose of the Association was rephrased to express a “dedication to the educational and other principals [sic] of Milton and Catherine Hershey’s Deed of Trust, with a commitment to the well-being of Milton Hershey School, its students and alumni”, the stated purpose was as follows:

⁶⁶⁴ The prayer for relief in the Petition is preposterous. It asks that we appoint nominees of the Association as guardian and trustee ad litem for the current and potential students of the School respectively whose consent will be required for any amendment to the re-instated Agreement and thereafter “otherwise to protect the interests of” their wards. In addition, the Petition asks that we direct that the Trustees/Managers shall take no further action *that in any way affects the future use of Trust lands for child purposes until a long term growth plan for the school has been developed with the participation of the aforementioned guardian and trustee ad litem.*

The Association would thus have us supplant the Office of the Attorney General in the exercise of its common law duty and to add two members never contemplated by Milton S. Hershey to the Trustees/Managers; not to mention creating a court-endorsed climate for potentially vexatious litigation.

⁶⁶⁵ The case of Hooker v. Edes Home, 579 A.2d 608 (D.C.C.A. 1990), cited by the Petitioner, demonstrates the narrow ambit of these cases. See Bogert, supra, 1999 Cumulative Pocket Part, Section 414 at footnote 24.5.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

. . . to continue the friendships formed in orphanhood at the Milton Hershey School and to foster fellowship among all who have left, to inspire and promote the welfare of each other by mutual concern and inquiry, and to reflect credit on the Milton Hershey School and Milton S. Hershey its founder.

As this member of the Court has personally observed, the alumni of the Milton Hershey School exhibit an impressive gratitude to Milton and Catherine Hershey and an intense loyalty to the institution they founded. There is indeed, a family-like bond shared by the alumni, a relationship that Mr. Hershey approved of and fostered. Until about a decade ago, the activities of the Association consisted, in the main, of noteworthy efforts in furtherance of the stated purpose to foster fellowship among the members, to serve the welfare of each other and to mentor children then in residential care in the School.

The Deed of Trust contains no mention of the Association. Mr. Hershey expressly directs that the children shall remain at the School only until they complete its course of secondary education, and that upon such completion they “*shall leave the institution and cease to be the recipients of its benefits.*” (School Trust at Paragraph 21). As to an alumnus, the Deed provides only that he or she may receive One Hundred Dollars upon leaving the School if found deserving by the Managers and, subject to the discretion of the Managers, a contribution can be made toward his or her further education. (School Trust at Paragraph 21). As we stated in our Opinion of May 14, 1999 the Association does not possess any beneficial interest in the School Trust and has no stake in the Trust that could be adversely affected by the Trustee.

In recent years, members of the Association became concerned that the School was no longer being managed in the manner of the model observed during Mr. Hershey’s lifetime. Accordingly, the Association made known these concerns to the Attorney General who persuaded the Trustees/Managers to address some of the concerns in an Agreement dated July 31, 2002, to which the Attorney General was also a party. Among the provisions recommended by the Association and included in the Agreement were certain enrollment and education criteria and a restriction against a Trustee/Manager serving on the board of the Hershey Foods Corporation or of the Hershey Entertainment & Resort Company (HERCO).⁶⁶⁶ The reason for the restriction seems to be an apprehension that a Trustee having a connection with one of these entities may influence all of the other Trustees/Managers to improperly favor those entities against the interests of the School.

On June 26, 2003, the re-constituted membership of the Trustees/Managers, with the consent of the Attorney General, rescinded the Agreement of July 31, 2002 and entered into a new agreement to which the Attorney General was again a party. The new Agreement addresses generally most of the earlier included concerns advanced by the Association but eliminates the restriction on Trustee/Manager membership and does not bind the re-constituted

⁶⁶⁶ Hershey Entertainment and Resort Company is a wholly owned asset of the Trust which also owns a controlling interest in Hershey Foods Corporation.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Trustees/Managers to the exact text of the financial and academic criteria for admissions to the School set forth in the earlier Agreement.

We have scrutinized the lengthy Petition filed by the Association and conclude that it resolves itself into complaints that the Trustees/Managers in years preceding the re-constituted current membership established a centralized campus and housing model for the School that differs from the separated units spread around the Hershey community in the manner of Mr. Hershey’s time; and that those Trustees/Managers allowed municipal and other entities, especially HERCO, to utilize too much of the School Trust lands. The complaints may have a general relevancy to the content of the July 31st Agreement which the Petition seeks to reinstate. However, the thrust of the Petition appears to be to establish a ground for standing for the Association on allegations that the failure of the Attorney General to resist the actions complained of, together with his acknowledgement that his duty is to represent the public in supervising and enforcing the School Trust, demonstrates that he has so elevated concern for other interests over the interests of the children who now or potentially may attend the School that the Association should be designated to represent them. We have already discussed why the Association cannot have standing on this ground.

We agree with the principle advanced by the Association that the Attorney General does not have preclusive standing with regard to the enforcement of charitable trusts. However, a private party such as the Association, seeking to enforce a charitable trust, must possess a special interest which surpasses the common interest of the public in continuing to benefit the trust. See Wiegand v. Barnes Foundation, 97 A.2d 81 (Pa. 1953). It requires a substantial, direct and immediate interest.

A “substantial” interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A “direct” interest requires a showing that the matter complained of caused harm to the party’s interest. An “immediate” interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it . . .

In re Barnes Foundation, 684 A.2d 123, 129 (Pa. Super 1996) (quoting South Whitehall Police Service v. South Whitehall Township, 555 A.2d 793 (Pa. 1988); In re McClune, *supra*).

As we previously noted, the Association is not mentioned in any Trust instrument of Mr. Hershey; it does not possess any beneficial interest in the School Trust. It does not have any “integral involvement or prerogative” in the administration of the Trust or the day-to-day operation of the School. The Association does not have that relationship that would warrant the finding of a substantial and special interest in the Trust. There is no claim that any of its members have been denied a contribution to their education. The Petition does not allege that that [sic] actions complained of in the Petition will jeopardize or threaten a denial of benefits to it

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

or its members. Thus, the Association cannot meet the requirements of showing a direct harm to its interests and it follows that there is no “immediate” interest. Significantly, the Association points to no instance of harm that has occurred by reason of the rescission of the July 31st Agreement or by failure to implement the specific provisions. Unrealized fears do not meet the direct and immediate requirement for standing. In re McClune, *supra* at 864.

The Association suggests in its brief that, as other courts have done, we should consider expanding standing because the number of charitable trusts may cause the Attorney General to be unable to give proper attention to supervising them. That consideration is not present here. The offices of the Attorney General and the Charitable Trusts and Organizations Section are located in Harrisburg just twelve miles from the Milton Hershey School. Within the past three years, the Attorney General has successfully litigated proposals by the Trustees/Managers: a *cy pres* petition to direct trust funds to a use other than the School, and the effort to divest the Trust of the controlling interest in Hershey Foods Corporation. After the latter suit, the Attorney General was a significant factor in reconstituting the membership of the Trustees/Managers. The time expended and obvious consideration by the Attorney General of the concerns of the Association reflected in the terms of both the rescinded and the new Agreements clearly belie any charge that the office of the Attorney General has been inattentive or is likely to be inattentive to its duty regarding supervision of the Milton Hershey School Trust.

Finally, no legal or equitable right of the Association or its members is touched in the Agreement of July 31, 2002 and they cannot be heard to complain, as they do, that abrogation of it impairs some contractual obligation to them. See Com. v. Stock, 499 A.2d 308 (Pa. Super. 1985). Granted, some of the suggestions strenuously advanced by certain members of the Association to the Attorney General were included in the rescinded Agreement but the only parties to that Agreement were the Attorney General and the Board of the Hershey Trust Company as Trustees and Managers of the School. The role of the Association was advisory, nothing more.

Milton S. Hershey, in the trust instrument creating the School, expressly conferred a broad discretion on the Managers; authorizing, among other powers, the sale of any part of the School lands they decide is not necessary for the School or otherwise advisable to sell (Paragraph 16, Second Restated Deed of Trust); and making “final and conclusive” the decision of the Managers as to the maintenance of the School (Paragraph 10), as to admission to the School (Paragraph 13, and 14) and as to the removal and expulsion from the School (Paragraph 20). The July 31st Agreement does not, as its purpose, charge or admit any breach of trust or abuse of discretion by the Trustees/Managers. The Association has not identified any of its members or any child now enrolled or having potential for enrollment in the School who has been harmed because of the abrogation of the July 31st Agreement or by the terms of the 2003 Agreement. The Attorney General consented to the abrogation of the earlier Agreement and is a party to the new Agreement. To make a new Agreement was entirely within the discretionary powers of the Trustees/Managers. Considering the circumstances under which the current Trustees/Managers were constituted, that they might modify or suspend for later consideration positions taken by the

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

prior membership on matters of School management and Trust administration should not have been unexpected.

A court will not interfere with the discretion of those managing a charity unless there has been such a substantial departure from the dominant purpose as amounts to a perversion of that purpose. Fisch, Freed, and Schachter, Charities and Charitable Foundations, § 476. The matter of the abrogation of the July 31st agreement is not of such substance. Moreover, the Attorney General exercising his duty of supervision over charities is a party to the new Agreement and we find no occasion or authority here for judicial interference with the performance of the duties of that office of the executive branch.

The Petition filed by the Association has 68 pages and contains 253 paragraphs. It is less a pleading than a diatribe deploring the manner in which former Trustees/Managers, exercising their discretion, have handled Trust real estate and School management. It impugns the integrity of the Attorney General and insultingly disparages the new Board. Its claims regarding the dire consequences that will follow from rescinding the July 31st Agreement are conjectural and extravagant.

The foregoing notwithstanding, the Court recognizes that in addition to its traditional role, the Association through its members is a repository of past and evolving School experiences to which the Managers and the President, who bear the formidable responsibility for the operation and management of the School, may look for relevant insight. That the Association and its members are committed to the well being of the School is undeniable. Nonetheless this Court must categorically reject the Petition's postulates that those who filed the Petition are the only true interpreters of the vision of Milton S. Hershey and that they stand alone to protect the interests of the children who now or someday may benefit from his generosity. The Association does not have standing to litigate the Petition, and we believe that the filing of it was improvident.

ORDER

AND NOW, November 19, 2003, the Petition is DISMISSED.

BY THE COURT:

/s/ Warren G. Morgan

Warren G. Morgan, Senior Judge

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Sub-Appendix VII - F: January 31, 2005 Commonwealth Court Order & Opinion re MHSAA Standing

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Milton Hershey School and :
Hershey Trust Company, Trustee of :
Milton Hershey School Trust :
: **No. 759 C.D. 2004**
Appeal of: Milton Hershey School : **Argued: December 8, 2004**
Alumni Association :

BEFORE: **HONORABLE JAMES GARDNER COLINS, President Judge**
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE L. COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION BY JUDGE PELLEGRINI

FILED: January 31, 2005

I.

The Milton Hershey School Alumni Association (Association) appeals an order of the Court of Common Pleas of Dauphin County (trial court) dismissing for lack of standing the Association’s challenge to the rescission of an agreement between the Office of Attorney General (OAG), the Milton Hershey School (School) and the Hershey Trust Company (Trust Company) that prohibited conflicts of interests and other actions by the trust managers that were deemed inimical to the interests of the orphan beneficiaries.

A.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Because standing is largely determined by the type of interest a party is asserting, it is necessary to determine the sufficiency of the interest and to set forth in some detail what the object of that interest is – in this case, the School and the Trust Company. In 1909, Milton and Catherine Hershey (the Hersheys) established the Milton Hershey School, a charitable institution funded by the Milton Hershey School Trust (Trust). The School provides residential care for dependent and at-risk children, or “orphan” children as the term was then used. The Hersheys originally contributed 12,000 acres of land to the corpus of the trust and bequeathed virtually their entire fortune for the purpose of saving orphan children.

The deed of trust is the original agreement between the Hersheys, the Hershey Trust Company as Trustee of the Trust, and the Managers of the Trust (originally, Milton Hershey, W.H. Lebkichner and John E. Snyder). The original deed was amended in 1976 and provides that the School is to be administered by the Trust Company and the Board of Managers. It states that the School was organized to “receive and admit to the School as many poor, healthy children as may from time to time be determined by the Managers, to the extent, capacity, and income of the School will provide for and shall be adequate to maintain.”

(Reproduced Record at 23a).

As directed by the deed of trust, the members of the School’s Board of Managers are also members of the Board of Directors of the Trust Company. The deed endows the Board of Managers and the Trust Company with decision-making responsibility for all aspects of running the School and for management and administration of Trust assets. Together, they are charged with making all decisions about the use of trust funds, land development and sales, admissions and education under the standards set forth in the deed of trust. For instance, the sale of land owned by the Trust is administered as follows: “[T]he Trustee may from time to time, but only with the approval of the Managers, sell and convey in fee simple any part or portion of the lands conveyed by this deed, or which may have been brought or otherwise acquired, which in the judgment of the Managers is not necessary to be kept for the purposes of the School[.]” (*Id.* at 21a).

The deed of trust provides that the beneficiaries of the Trust are the orphan children attending the School. Children cared for by the Trust within the orphan parameters established by the Hersheys have a high degree of social and financial need and would otherwise require residential care in other facilities, such as foster care. Once enrolled, these children have all of their educational, physical, spiritual and other needs met by the Trust in a setting commonly referred to as the children’s home. Those within the care of the Trust establish familial bonds with each other, viewing the School as a home and viewing other children at the School as a type of surrogate family. These bonds cross generational lines, and adults who had been within the care of the School have shown a devotion and commitment to the welfare of children later entering the School’s care.

At the direction of Milton Hershey, the Association was created 74 years ago and is comprised entirely of orphan graduates of the School. It is a tax-exempt organization under Section 501(c)(3) of the

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Internal Revenue Code, 26 U.S.C. §501(c)(3), incorporated under the laws of Pennsylvania. One of its functions is to directly serve orphan beneficiaries and to continue the bonds that form in orphanhood while under the care of the School. Pursuant to the Association’s Articles of Incorporation, its purpose includes:

the promoting in every proper way of the interests of Milton Hershey School, including ... the establishment and maintenance of supplemental educational programs and activities for students ... that encourage habits of thrift, industry, leadership, scholarly achievement, and other attributes of good citizenship; and to foster among its graduates an attachment to their Alma Mater.

(Brief for Appellant, Attachment 4). From its office on the School’s property (owned by the Trust), the Association provides student-related functions and young graduate assistance programs, including programs directed at mentoring, job shadowing, transitioning, general graduate assistance and graduate crisis services. Orphan children that graduate from the School often become members of the Association.

The Association is not a division of the School or of the Trust Company. It was not named in the deed of trust and is not an intended beneficiary of the Trust. As the deed states, “[a]ll children shall leave the institution and cease to be the recipients of its benefits upon the completion of the full course of secondary education being offered at the School.” (Reproduced Record at 25a). The Managers of the Trust may, in their discretion, contribute to the higher education of a graduate of the School, in which case graduates would continue to be beneficiaries of the Trust, but generally, once orphans graduate from the School, they are no longer Trust beneficiaries.

Though the Association is not a division of the School, a division of the Trust, or a beneficiary of the Trust, it has participated in many efforts aimed at protecting the charitable intent of the Trust, i.e., to assure that Trust assets are used to promote the child-saving mission of the Hersheys. It has made efforts in the past to prevent Trust resources from being diverted to non-child purposes and has lobbied the OAG and the Trust Company for assistance in this regard.

Another participant in the affairs of the Trust is the OAG. The OAG is charged with enforcing the duties of charitable trustees and protecting the public. In addition to overseeing the Trust administration, the OAG also holds the position that in exercising that duty, it is seeking to protect the community and general public in addition to the orphan beneficiaries designated as such under the terms of the deed of trust.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

From 1970 to 2003, Trust assets grew from \$200 million to \$5.5 billion (at the time this action was filed with the trial court).⁶⁶⁷ It is currently the largest residential childcare charity in the world, dwarfing any comparable facility in asset size. Other entities owned by, controlled by or affiliated with the Trust, such as Hershey Entertainment & Resort Company (HERCO) and the Hershey Medical Center (HMC), also enjoyed tremendous growth during this period.

B.

While Trust assets grew during this period, the amount of children served by the Trust decreased, as did the amount of land appropriated to house the orphaned children (from approximately 10,000 acres to 2,000 acres). To illustrate, some of the land formerly designated for the School use was closed, sold, abandoned or transferred to HERCO, thereby reducing the amount of homes that could house roughly 310 orphans. Another example dates back to 1963, where the OAG and the Trust Company successfully sought removal of 500 acres of land and \$50 million in cash from the Trust to build HMC for Penn State University.

Beginning in 1990, the Association began observing what it believed were Trust activities that diverted from the Trust’s charitable intent to help orphan children. As alleged in its petition before the trial court, the Association noticed that School enrollment policies were altered to disfavor or turn away children requiring year-round residential care. In addition, it observed that education, housing and other policies were similarly altered to reflect the differing needs of the enrolled children who increasingly did not require substantially year-round residential care. It also observed that the childcare facilities at the School reached crisis levels in 2001 because of overcrowding, safety concerns and incidents of physical or sexual abuse resulting in a one-year moratorium on enrollment.

The Association became actively involved in efforts to quell what it believed were gross deviations from the charitable intent of the Trust. For instance, the Association reacted to an attempt by the Trust to end entirely the vocational education program mandated by the deed of trust, a program that targets non-college bound students. The Association’s efforts resulted in an agreement signed by the OAG and the Trust compelling the Trust to preserve some form of vocational education at the School. The Association also participated as *amicus curiae* in a proceeding initiated by the Trust Company to create the Catherine Hershey Institute of Learning and Development (CHILD) and to divert land to public use that was ultimately rejected by the trial court because it found that CHILD would have violated the Trust’s charitable intent.

With the Association’s concerns elevating, it alerted the OAG to what the Association believed were serious improprieties associated with the administration of the Trust. The Association alleged that

⁶⁶⁷ The Association asserts in its brief that the total could be up to \$6.3 billion. For our purposes, we will use the \$5.5 billion figure.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

conflicts of interest among the Trust Managers mired their ability to properly administer the Trust to carry out its charitable intent of saving orphan children. It also alleged that there were improper enrollment policies, improper and unsafe residential policies, and improper utilization of Trust assets to serve only orphan children and as many of them as possible. The Association believed that these actions taken as a whole constituted a perversion of the Trust’s charitable intent.

Responding to the concerns raised by the Association, the OAG initiated and conducted an exhaustive 12-month investigation into the administration of the Trust.⁶⁶⁸ On December 5, 2001, the OAG determined that the Trust Company was diverting from the Trust’s charitable intent and called for broad reforms. The OAG made clear that conflicts of interest burdened the Trust Company’s decisions and emphasized that personnel changes would be inadequate to address the failures of the Trust, requiring instead structural reforms to obtain lasting improvements to Trust administration. The OAG threatened legal action if necessary to obtain the reforms. As a result, the parties (the OAG, the School and the Trust Company) participated in negotiations. The Association participated in an advisory role and invested millions of dollars to the process. Though it was not a party to the ultimate agreement, the Association acted to protect its own central purpose of preserving bonds formed in orphanhood and furthering the child-saving mission of the Trust.

On July 31, 2002, the parties reached an agreement (July 2002 Reform Agreement) outlining the reforms that the parties negotiated. The Reform Agreement purported to (1) end all conflicts of interests;⁶⁶⁹ (2) ensure the admission of needy children;⁶⁷⁰ (3) mandate a foster care program;⁶⁷¹ (4) restrict land transfers and land uses that focused on anything but childcare;⁶⁷² (5) reform academic standards for admissions and expulsions;⁶⁷³ and (6) require biannual status reports to the OAG.⁶⁷⁴

C.

⁶⁶⁸ The Association alleges that the OAG initially resisted conducting an investigation and only agreed to proceed if the Association committed more resources to the investigation. The Association did so.

⁶⁶⁹ This provision sought to prohibit members of the Trust from serving on the boards of HERCO, HFC or HMS to ensure that the child-saving mission was the chief concern among Trust administrators.

⁶⁷⁰ This provision responded to the School’s trend to admit children whose true social and financial need were lacking. It tied admissions to federal poverty levels to assure that truly needy children were admitted to the School.

⁶⁷¹ This provision purported to establish a foster care pilot admission program in Dauphin, Lancaster and Lebanon Counties to seek out children at risk of foster care.

⁶⁷² In an effort to prevent the diversion of land for non-childcare uses, this provision prohibited the sale or transfer of land without giving 90-day notice to the OAG before a sale of the land, lease of the land, grant of an easement or grant of a right-of-way.

⁶⁷³ This provision would work to avoid disqualifying applicants for lacking scholastic potential and to avoid expelling students for academic reasons unless certain assistance programs were exhausted and used for at least one year.

⁶⁷⁴ This provision required the School to personally meet with the OAG to discuss progress and to report on major developments with the School. It also assured that the OAG would actively monitor the performance of the School.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

After the Reform Agreement was executed, the highly publicized litigation over the controversial sale of a controlling interest in HFC took place. *See In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Cmwlth. 2002). Though, ultimately, there was no sale of HFC, there was a significant reorganization of leadership within the Trust Managers shortly after the attempted sale. As a result of the reorganization of leadership within the Trust Company and the Board of Managers of the School, the OAG, the School and the Trust Company determined that the Reform Agreement should be modified.

On June 27, 2003, the OAG, the School and the Trust executed an agreement (June 2003 Agreement) modifying the July 2002 Reform Agreement. The background statement included within that agreement indicated that because personnel changes in the Trust Company resulting from the attempted sale of HFC obviated the need for the reforms as they were presented in the original July 2002 Reform Agreement, the parties needed to modify that agreement. By comparison, the June 2003 Agreement (1) modified the provisions relating to conflicts of interest; (2) deleted the income and poverty level guidelines set forth in the July 2002 Agreement aimed at assuring the admission of truly needy children; (3) deleted the foster care program; (4) modified the restriction on land transfers to “sales” and exempting the notice requirement for the sale of land that is already commercially used; (5) modified the academic standards; and (6) changed the status report requirement from biannual, face-to-face meetings to annual written reports.

On September 4, 2003, the Association filed the petition for rule to show cause at issue in this case, seeking rescission of the June 2003 Agreement, reinstatement of the July 2002 Reform Agreement, appointment of a guardian, and appointment of a trustee *ad litem*. The School and the Trust Company filed preliminary objections to the petition, alleging that the Association lacked standing to challenge the rescission of the July 2002 Agreement.

The trial court granted the preliminary objections of the School and the Trust. In finding that the Association lacked standing, the trial court rejected the Association’s contention that it was bringing suit on behalf of current and potential students because the Association’s composition was limited to past members of the School. It also rejected the Association’s contention that it was the only party that could protect current and potential students because it argued that the OAG’s interest in the Trust was to benefit the public at large, not just the students at the School. Noting that the Association was not part of the original deed of trust, was not a party to any of the agreements, and was merely an advisor during the negotiations that led to the July 2002 Reform Agreement, the trial court refused to confer standing upon the Association because there was no evidence of a complete perversion of the charitable purpose of the Trust and no evidence that the OAG would fail in its purpose of supervising the Trust.

The Association has appealed that determination to this Court. The sole issue on appeal is whether the Association has standing to bring an action to rescind the July 2003 Agreement and reinstate the June 2002 Reform Agreement.

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

II.

Now that we have the factual background that led to the dispute, it is also necessary to describe the legal terrain on which the issue of standing will be resolved. This involves a discussion of the law of trusts in general and the law of charitable trusts in particular followed by a discussion on the concept of standing.

A.

Generally, a trust is a legal instrument created by one person or entity (the “settlor”) purporting to transfer property (the “trust res” or “trust property”) to another person or entity (the “trustee”) to hold in trust for the benefit of another (the “beneficiary”). See generally *Buchanan v. Brentwood Federal Savings & Loan Association*, 457 Pa. 135, 320 A.2d 117 (1974). The ability to convey property to another to hold in trust has been in existence since the enactment of the Statute of Uses in mid-14th Century England and the enactment of the Statute of Charitable Uses in 1601,⁶⁷⁵ both allowing for the transfer of real property to hold as a “use” for the benefit of another.⁶⁷⁶ The former commonly dealt with the transfer of real property among private citizens, while the latter, as the name suggests, dealt with the transfer of real property for the benefit of the people. These statutes served as the foundation for modern American trust law and have long been recognized and applied in some form as the law of every state, including Pennsylvania.⁶⁷⁷ See, e.g., *Marshall v. Fisk*, 6 Mass. 24, 31 (1809);⁶⁷⁸ see also, e.g., *Sheridan v. Coughlin*, 352 Pa. 226, 42 A.2d 618 (1945) (Statute of Uses is part of Pennsylvania common law); *In re Dulles’ Estate*, 218 Pa. 162, 67 A. 49 (1907) (Statute of Charitable Uses is part of Pennsylvania common law).

Though the Hershey Trust is a charitable trust, the distinctions between private trusts and charitable trusts are important for comparison and contextual reasons. To create a typical “private” trust,⁶⁷⁹ the settlor must have the intent to transfer trust property to the trustee for the benefit of a definite and specific beneficiary or beneficiaries named in the trust. *Buchanan*. The trustee, consequently, is bestowed with legal title to the property in order to manage and transfer the property for the benefit of

⁶⁷⁵ This is also commonly known as the Statute of Elizabeth.

⁶⁷⁶ Generally JAMES C. BAUGHMAN, TRUSTEES, TRUSTEESHIP, AND THE PUBLIC GOOD: ISSUES OF ACCOUNTABILITY FOR HOSPITALS, MUSEUMS, UNIVERSITIES, AND LIBRARIES 4 (1987); Maitland, *The Origin of Uses*, 8 HARV. L. REV. 127 (1894).

⁶⁷⁷ Initially, the Supreme Court of the United States held that charitable trusts were not enforceable in the United States. *Philadelphia Baptist Association v. Hart’s Executors*, 17 U.S. (4 Wheat) 1, 4 L. Ed. 499 (1819). In *Vidal v. Girard’s Executors*, 43 U.S. (2 How.) 127, 11 L. Ed. 205 (1844), the high court overruled *Hart’s Executors* and held that charitable trusts should be recognized as part of the common law. See also Jennifer L. Komoroski, Note, *The Hershey Trust’s Quest to Diversity: Redefining the State Attorney General’s Role when Charitable Trusts Wish to Diversify*, 54 WM. & MARY L. REV. 1769, 1772-73 (2004) (discussing the historical development of charities in early colonial periods).

⁶⁷⁸ Chief Justice Parsons of the Massachusetts Supreme Court stated as follows:

[T]he statute of uses being in force in England when our ancestors came here, they brought it with them, as an existing modification of the common law, and it has always been considered a part of our law.

Marshall, 6 Mass. at 31 (quoted in CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY §13, at 211-12 (1962)).

⁶⁷⁹ There are many variations of trusts in Pennsylvania, including active trusts, passive trusts, express or implied trusts, resulting trusts, constructive trusts and oral trusts. We need not delve into an explanation of all the machinations associated with these types of trusts. For purposes of context and comparison, we explain the differences between ordinary private trusts and charitable trusts such as the one involved here.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

the beneficiary, while the beneficiary has an equitable interest in the trust property and an actual property interest in the subject matter of the trust. *Jones v. Jones*, 344 Pa. 310, 25 A.2d 327 (1942). Because the role of the trustee involves the management of another’s wealth for the benefit of a third party, the trustee has a fiduciary responsibility to act in the best interests of the beneficiaries consistent with the purpose of the trust and the powers granted to the trustee.

A charitable trust differs from an ordinary private trust in several important respects, the first being that a private trust can serve any purpose for which the settlor determines, whereas the charitable trust serves some type of recognizable, charitable purpose.⁶⁸⁰ Under Section 28 of the Third Restatement of Trusts, the purposes of charitable trusts include, but are not limited to, the following:

- (a) the relief of poverty;
- (b) the advancement of knowledge or education;
- (c) the advancement of religion;
- (d) the promotion of health;
- (e) governmental or municipal purposes; and
- (f) other purposes that are beneficial to the community.

RESTATEMENT (THIRD) TRUSTS §28, at 9-10. As the General Comment to the Third Restatement of Trusts indicates, this list is not exhaustive:

The common element of charitable purposes is that they are *designed to accomplish objects that are beneficial to the community*—i.e., to the public or indefinite members thereof—without also serving what amount to private trust purposes. ... As long as the purposes to which the property of the trust is to be devoted are charitable, however, the motives of the settlor in creating the trust are immaterial.

Id. §28, at 10, cmt. a (emphasis added); *In re Tollinger’s Estate*, 349 Pa. 393, 37 A.2d 500 (1944).

Second, the beneficiaries of a charitable trust are indefinite in identity and in number, whereas the beneficiaries of a private trust are specific, often few in number, and readily ascertainable. *Provident Trust Company of Philadelphia v. Lukens Steel Company*, 359 Pa. 1, 58 A.2d 23 (1948). Though the beneficiary of a charitable trust is often said to be the public at large, it does not matter that each and every member of the entire public receive a direct benefit from a charitable trust so long as the trust benefits an indefinite class of people to a degree where the performance of the trust substantially benefits the community as a whole. *Tollinger*. For instance, a trust created to establish a shelter for the

⁶⁸⁰ The purpose of any trust, be it private or charitable, must also conform to the law and not be contrary to public interest. *Borden v. Baldwin*, 444 Pa. 577, 281 A.2d 892 (1971); RESTATEMENT (THIRD) TRUSTS §29, at 53-54.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

poor and homeless in a given community does not directly benefit those in that community with a steady job, a steady income, and a home because they would have no need to actually use the shelter. In that situation, however, everyone in that community incidentally benefits from such a trust because it is in the public interest to shelter the poor and the homeless.

B.

With these principles of trust law in mind, we turn to the difficult concept of standing. In simple terms, “standing to sue” is a legal concept assuring that the interest of the party who is suing is really and concretely at stake to a degree where he or she can properly bring an action before the court. *Baker v. Carr*, 369 U.S. 186 (1962) (stating that the “gist” of standing is whether the party suing alleged such a “personal stake in the outcome of the controversy”); 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE, §14.10, at 387 (2d ed. 1997). Pennsylvania has its own standing jurisprudence, although the doctrine of standing in this Commonwealth is recognized primarily as a doctrine of judicial restraint and not one having any basis in the Pennsylvania Constitution. *Housing Authority of the County of Chester v. Pennsylvania State Civil Service Commission*, 556 Pa. 621, 730 A.2d 935 (1999).

Fundamentally, the standing requirement in Pennsylvania “is to protect against improper plaintiffs.” *Application of Beister*, 487 Pa. 438, 442, 409 A.2d 848, 851 (1979). Juxtaposed against the federal standards,⁶⁸¹ the test for standing in Pennsylvania is a flexible rule of law, perhaps because the lack of standing in Pennsylvania does not necessarily deprive the court of jurisdiction, whereas a lack of standing in the federal arena is directly correlated to the ability of the court to maintain jurisdiction over the action. *Compare Jones Memorial Baptist Church v. Brackeen*, 416 Pa. 599, 207 A.2d 861 (1965) with *Raines v. Byrd*, 521 U.S. 811 (1997). Thus, Pennsylvania courts are much more expansive in finding standing than their federal counterparts.

In *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975), our Supreme Court held that a party has standing to sue if he or she has a “substantial, direct, and immediate interest” in the subject matter of the litigation.⁶⁸² *Id.* at 192, 346 A.2d at 281. In *William Penn*, residents, taxpayers and operators of parking lots were affected by a tax ordinance that imposed a tax on patrons of non-residential parking places. The plaintiffs challenged the ordinance and were

⁶⁸¹ *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992). The federal test is a three part inquiry: (1) Has the party bringing the action alleged an “injury in fact”? (2) Is there a causal connection between the alleged wrongdoing and the injury suffered? (3) Will a favorable ruling by the court likely redress the alleged injury? *Id.* at 560. The injury must be concrete and particularized to the plaintiff; the causation must be fairly traceable to the defendant before the court, and the relief sought must actually be obtainable from the court. *Id.* Notably, federal standing rules limit access to the courts because Article III of the United States Constitution, U.S. CONST. art. III, limits the judiciary’s power to decide only “cases or controversies,” and the United States Supreme Court has developed additional “prudential” limitations on the judiciary’s ability to decide cases. As a result, a plaintiff must first pass the constitutional standard under *Lujan* and also convince the court that there are no prudential limitations on the court’s ability to hear the case. Thus, *Lujan* arguably returns the constitutional component of federal standing jurisprudence to one of true judicial restraint, thereby limiting the types of plaintiffs that the courts would otherwise tolerate. *See* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

⁶⁸² Initially, there was a “pecuniary” component to the standing requirement, but as acknowledge by the *William Penn* Court and other courts that followed, there is no requirement that the plaintiff suffer any pecuniary harm. *William Penn*, 464 Pa. at 193, 346 A.2d at 281; *In re McCune*, 705 A.2d 861, 865 (Pa. Super. Ct. 1997) (noting that standing does not require a “direct economic interest”).

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

held to have standing because they were aggrieved by the ordinance. In other words, those challenging the taxing ordinances in that case were parking lot taxpayers and were able to bring their action for that reason because they showed a substantial, direct and immediate interest in the imposition of the tax.

Guided by much of our Supreme Court’s discussion in *William Penn*, cases that followed elaborated on the substantial-direct-immediate test. The elements have been defined as follows:

A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. ... A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. ... An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, ... and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.

South Whitehall Township Police Service v. South Whitehall Township, 521 Pa. 82, 86-87, 555 A.2d 793, 795 (1989) (internal citations omitted).

Although the substantial-direct-immediate test is the general rule for determining the standing of a party before the court, there have been a number of cases following *William Penn* that have granted standing to parties who otherwise failed to meet this test. These so-called “taxpayer standing” cases are best described as relaxations of the general standing rule where the party asserting the action can show that (1) government action will otherwise go unchallenged unless standing is granted; (2) those most directly affected by government action would benefit and would not challenge the action; (3) judicial relief is appropriate; (4) alternative remedies are not available; and (5) no one other than the party asserting the action is better suited to demonstrate an injury distinct from that of an ordinary taxpayer. See *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323 (1986) (citing *Beister*) (granting standing to a taxpayer challenging the constitutionality of a legislative pay raise).

This exception has been utilized by our courts to grant standing to taxpayers challenging a variety of governmental actions. For example, the courts have granted standing to taxpayers challenging judicial elections on the grounds that those elections were scheduled in a year contrary to that prescribed by Pennsylvania’s Constitution;⁶⁸³ to the state bar association, Pennsylvania attorneys, taxpayers and electors challenging the placement of a proposed state constitutional amendment on the ballot;⁶⁸⁴ and to a state senator challenging the governor’s failure to submit nominations to the state senate within the

⁶⁸³ *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988).

⁶⁸⁴ *Bergdoll v. Kane*, 557 Pa. 72, 731 A.2d 1261 (1999).

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

constitutional period.⁶⁸⁵ The theory underlying these cases is that public policy considerations favor a relaxed application of the substantial-direct-immediate test, particularly the “direct” element that requires the party bringing the action to have an interest that surpasses that of the common people. *Consumer Party*.

Finally, certain public officials have standing to represent the interest of the public both under their authority as representatives of the public interest and under the doctrine of *parens patriae*. The doctrine of “*parens patriae*” refers to the “ancient powers of guardianship over persons under disability and of protectorship of the public interest which were originally held by the Crown of England as ‘father of the country,’ and which as part of the common law devolved upon the states and federal government.” *In re Milton Hershey School Trust*, 807 A.2d 324, 326 n.1 (Pa. Cmwlth. 2002) (quoting *In re Pruner’s Estate*, 390 Pa. 529, 532, 136 A.2d 107, 109 (1957)) (citations omitted). Under *parens patriae* standing, the attorney general is asserting and protecting the interest of another, not that of the Commonwealth. For example, public officials have an interest as *parens patriae* in the life of an unemancipated minor. *Commonwealth v. Nixon*, 563 Pa. 425, 761 A.2d 1151 (2000).

III.

All of that leads us to the question before us: who has an interest in challenging the actions of the board of directors of a charitable trust? As mentioned above, because charitable trusts benefit a class of the public and not specific individuals, a guardian of the public interest is ordinarily charged with supervising and overseeing the administration of a charitable trust. In Pennsylvania, and all other states, for that matter, the attorney general under its *parens patriae* authority is the watch dog that supervises the administration of charitable trusts to ensure that the object of the trust remains charitable and to ensure that the charitable purpose of the trust is carried out. *Pruner’s Estate*. The attorney general has the power and duty to oversee the administration of the trust and, consequently, has standing in any case involving a charity. See David Villar Patton, *The Queen, The Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FL. J.L. & PUB. POL’Y 131, 159-61 (2000) (outlining the historical development of charitable trust enforcement by the attorney general from 13th Century England through the American Revolution). In fact, no trust can declare itself charitable without submitting to the supervision and inspection of the attorney general, *Commonwealth v. Barnes Foundation*, 398 Pa. 458, 159 A.2d 500 (1960), and the attorney general may intervene in any action involving charitable bequests and trusts under Section 204(c) of the Commonwealth Attorneys Act.⁶⁸⁶

Unlike other states, however, the OAG takes the position that it has the power to oppose that which may be in the best interests of the trust and examine the effects that the actions of the trust have on the

⁶⁸⁵ *Zemprelli v. Thornburg*, 407 A.2d 102 (Pa. Cmwlth. 1979).

⁶⁸⁶ Act of October 15, 1980, P.L. 950, as amended, 71 P.S. §732-204(c).

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

larger community. *In re Hershey School Trust*. In its petition opposing the Trust’s proposed sale of its controlling interest in HFC, the OAG acknowledged that the sale would likely diversify and increase the assets of the Trust, but nonetheless objected to the sale because any sale would have profound negative consequences for the Hershey community and surrounding areas, including but not limited to the closing and/or withdrawal of HFC from the local community, together with a dramatic loss of the region’s employment opportunities, related businesses and tax base. Agreeing with that view, the trial court, in that case, held that the OAG could take those views into consideration and ordered that those concerns were sufficient to stop any efforts by the Trust to sell its interest in HFC. *Id.* As defined by the OAG, its role, in certain circumstances, is to protect the interests of both the beneficiaries of the Trust and the surrounding community and, where necessary, to balance those interests.⁶⁸⁷

While an attorney general is the only person that has automatic standing in the enforcement of charitable trusts, Pennsylvania and other states have expanded the class of plaintiffs who can intervene and challenge the actions of a charity so long as the potential plaintiff shows a “special interest” in the proceeding. Previously, it was thought that the attorney general should have the exclusive power to enforce charitable trusts (1) to protect trustees from frequent, unreasonable and vexatious litigation by parties who have no stake in the charity at all; (2) to prevent harassment; and (3) to safeguard the assets of the charity from loss due to needless litigation. *In re Nevil’s Estate*, 414 Pa. 122, 199 A.2d 419 (1964); *Mary Grace Blasko et al., Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 41 (1993) (hereafter “Blasko”). However, criticisms of exclusive attorney general enforcement power⁶⁸⁸ gave rise to the need for courts to give third parties the ability to bring enforcement actions against charitable organizations. As Section 391 of the Second Restatement of Trusts states:

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable

⁶⁸⁷ Pennsylvania’s version of the Uniform Prudent Investor Rule, 20 Pa. C.S. §§7201-7214, was amended at the behest of the OAG to require that fiduciaries (including the Trust’s Board of Managers) consider:

- (6) an asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries, including, in the case of a charitable trust, the special relationship of the asset and its economic impact as a principal business enterprise on the community in which the beneficiary of the trust is located and the special value of the integration of the beneficiary’s activities with the community where that asset is located[.]

20 Pa. C.S. §7203(c)(6).

⁶⁸⁸ As Blasko suggests, “lack of resources and lack of interest ... both contribute to the current insufficiency of attorney general enforcement.” Blasko et al., *supra*, at 49. Other critics conclude that state attorneys general are only equipped to handle the most egregious instances of trust mismanagement, thereby overlooking other mismanagement problems, and attorneys general infrequently and arbitrarily enforce charitable trusts. Patton, *supra*, at 164-67. Other commentators suggest that conflicts of interest in the exercise of the attorney general’s *parens patriae* power add to the downfalls of exclusive attorney general enforcement. See also Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 946-50 (2004). Brody’s article outlines the role of the attorney general, the state legislature and the courts in the enforcement of charitable trusts and opines that political influence often plays a role in determining whether or not a state attorney general will become involved in the enforcement of a charity. She uses the proposed sale of HFC as an example. See also Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. PITT. L. REV. 1 (2003); Komoroski, *supra* note 11, at 1785-86.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.

RESTATEMENT (SECOND) TRUSTS §391 (1959) (emphasis added).

The special interest concept has been part of Pennsylvania law since the early 1950s. *See Wiegand v. Barnes Foundation*, 374 Pa. 149, 97 A.2d 81 (1953) (citing RESTATEMENT (SECOND) TRUSTS §391).⁶⁸⁹ In *Valley Forge Historical Society v. Washington Memorial Chapel*, 493 Pa. 491, 426 A.2d 1123 (1981), our Supreme Court elaborated on the circumstances contemplated under the special interest doctrine that allows parties other than the attorney general to enforce a charitable trust. In that case, the Historical Society sought to restrain the trustees of the Memorial Chapel from evicting the Society from its quarters in the Chapel. The Society and the Chapel had a common settlor. Under the deed of trust, the Chapel acquired the land upon which the Society also maintained its quarters, and the land was donated to be used to advance “religious and patriotic purposes,” thereby creating a charitable trust. Responding to the Society’s request for equitable relief, the Chapel argued that the Society lacked standing to enforce the charitable trust because the attorney general did not participate, and he alone was the only party with standing to enforce the trust.

Noting that only the attorney general, a member of the charitable organization (i.e., a member of the Chapel), or one with a “special interest” in the trust could enforce its provisions, and noting that the Society was neither the attorney general nor a member of the charitable organization, the Court held that the Society had a special interest in the trust and had standing to petition the court for equitable relief. The Court reasoned as follows: (1) the Society and the Chapel had a close, cordial relationship, both having occupied the same building for many years; (2) the common founder of both organizations intended for both to “aid in the development of patriotism” in a religious and educational manner; (3) the Society made significant monetary contributions to the Chapel; (4) the Society, by its origins, its link to the Chapel and its professed purpose, distinguished it from any other historical society; and (5) there was no risk of vexatious and unreasonable litigation by the Society.

Based on a review of other jurisdictions that have reached this issue, a multi-factor approach, an approach that was presaged by our Supreme Court in *Valley Forge*, is used by courts to determine whether a party has a “special interest” in the enforcement of a charitable trust:

It is clear that courts often use the “special interest” doctrine to ensure that charities are subject to some form of effective scrutiny, especially on

⁶⁸⁹ Some of the early cases merely explained that parties with interest in common to that of the general public could not have a special interest in the enforcement of a charitable trust. *In re Miller Estate*, 380 Pa. 172, 110 A.2d 200 (1955); *Wiegand*. Other cases explained that potential beneficiaries of a charitable trust lacked a special interest in the enforcement of the trust because their interest was too speculative. *See In re Nevil’s Estate*, 414 Pa. 122, 199 A.2d 419 (1964) (society for deaf and blind had no interest in *cy pres* proceedings of trust established to create asylum for deaf and blind; their interest was no different from that of the general public and were at most potential beneficiaries of the original trust).

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

important issues. This mechanism will increase in fairness and predictability, and consequently in value, if courts adhere to a specific formulation of the doctrine. The multi-factor test used so far by only a few courts seems to be an effective approach. It is flexible and can readily accommodate factual variations such as the level of activity of the relevant attorney general or the crucial quality of the complained-of actions. Certain factors should always play important roles. In particular, the presence of sincere allegations of managerial bad faith, and a request for a limited remedy should favor a grant of standing to private parties. A claim that the complained-of acts will have an extraordinary impact on the charity should be especially persuasive in the plaintiffs' favor. On the other hand, the authors hope that the influence of subjective social factors will wither away. *The nature of the relationship between the charity and the plaintiffs probably will remain a less easily measured factor, but the existence of a well-defined and limited group of plaintiffs who have a clear interest in the operation of the charity should favor a grant of standing.* If courts allow suits by larger groups of plaintiffs with more vague interests, they should understand that this could substantially expand the range of potential plaintiffs in charitable abuse cases.

In short, we recommend that courts explicitly adopt the multi-factor approach used in the Escondido (San Diego Boy Scouts)⁶⁹⁰ and Alco Gravure cases.⁶⁹¹ This method would allow courts to grant standing to private plaintiffs needed to keep charities accountable on important matters while avoiding excessive and undesirable litigation burdens on those charities, all with greater consistency and predictive value than is currently the case.

Blasko et al., *supra*, at 83-84 (internal footnotes omitted) (emphasis added).

⁶⁹⁰ In *San Diego County Council, Boy Scouts of America v. City of Escondido*, 92 Cal. Rptr. 186 (Cal. Ct. App. 1971), the County Council of the Boy Scouts and several individual scouts brought suit to enjoin the city's proposed sale of a piece of property held in trust for the scouts' benefit. The attorney general did not participate. Using a multi-factor approach to determine whether the Council had standing to enforce the trust, the court emphasized the relationship between the plaintiffs and the charity, noting that "the administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available." *Id.* at 190. The court stated that the Council of Boy Scouts was charged by its articles of incorporation and bylaws with protecting and representing its district and the scouts within, and the court stated that it could "think of no more responsive or responsible party to represent the boy scouts of the Palomar District in such litigation." *Id.* at 190.

⁶⁹¹ In *Alco Gravure, Inc. v. Knapp Foundation*, 479 N.E.2d 752 (N.Y. 1985), potential beneficiaries of a charitable trust sued to prevent a non-profit corporation from transferring its assets to another charity with a similar, but not identical, purpose. The court first noted that both the attorney general and a trial judge approved the transfer of assets and implied that it would deny standing to a private plaintiff challenging the administration of a charity. However, it recognized that the individual plaintiffs' status as preferred beneficiaries would be eliminated had the transfer occurred. Using a multi-factor approach, the court held that because the remedy sought was to preserve the existence of the charity itself, because the benefited class was small and identifiable, and because beneficiaries would be directly harmed by the transfer of the assets, the plaintiffs had a special interest sufficient to challenge the transfer.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Blasko’s article concludes that the following five factors “consistently influence a court’s willingness to allow a private party to sue for the enforcement of charitable obligations”: (1) the extraordinary nature of the acts complained of and the remedy sought; (2) the presence of fraud or misconduct on the part of the charity or its directors; (3) the attorney general’s availability or effectiveness; (4) the nature of the benefited class and its relationship to the charity; and (5) subjective, case-specific circumstances. Blasko et al., *supra*, at 61-78 (adopted with modification by *Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.*, 91 P.3d 1019, 208 Ariz. 176 (Ariz. Ct. App. 2004) (“[W]e give special emphasis to ... the nature of the benefited class and its relationship to the trust, the nature of the remedy requested, and the effectiveness of attorney general enforcement of the trust.”)).

Guided by the reasoning in *Valley Forge*, we will utilize this multi-factor test to determine whether the Association has standing under the special interest doctrine. This approach is consistent with the concern in *Valley Forge* of preventing unnecessary litigation involving charities and the concern of assuring that the philanthropic purpose of any given charity is carried out, notwithstanding the extent of the involvement by the attorney general. This approach also assures judicial scrutiny in situations where important charitable issues are at stake and where the attorney general’s involvement is otherwise lacking, ineffective or conflicted. Finally, this approach is consistent with the general purpose of standing law – to protect against improper plaintiffs – by specifically emphasizing the special relationship between the plaintiff seeking enforcement of the trust and the trust itself. *Valley Forge*.

IV.

The Association argues that it has met the special interest test for challenging the modification of the July 2002 Reform Agreement.⁶⁹² The Association points out that it was instrumental in bringing to the OAG’s attention the substantial growth in Trust assets (exceeding \$5 or \$6 billion) concomitantly with a decrease in the number of orphan children served. In addition, the Association also raised concerns about potential conflicts of interest amongst the Trust directors and potential mismanagement of trust funds that led to a decline in serving orphan children at the School. The Association was instrumental in having the OAG seek the July 2002 Reform Agreement that sought to remedy these problems, problems that were acknowledged by the OAG, by eliminating conflicts of interest, by reworking admissions and academic standards, by restricting land transfers and sales, and by requiring status reports to the OAG. Given the nature of these events, given the enormous amount of money at stake, and given that the Association merely seeks to determine whether the July 2002 Reform Agreement will better serve the charitable purpose of the Trust instead of the June 2003 Agreement struck by the OAG, the School, and the Trust, the Association has pled a special interest in this matter.

⁶⁹² The Association also contends that it meets the general direct-immediate-substantial test for standing because (1) its vast efforts to secure the July 2002 Reform Agreement at the OAG’s request and the subsequent rescission resulted in direct harm to the Association; and (2) and its unique dual purpose of assuring the bonds developed in orphanhood and assuring that the purpose of the Trust is carried out is essential to the existence of the Association. The Association alternatively argues that it meets the taxpayer exception to the general direct-immediate-substantial test because (1) rescission of the July 2002 Reform Agreement will go unchallenged were we to refuse standing; (2) judicial relief is appropriate; (3) other relief is not available; and (4) the Association is in the best position to seek reinstatement. We need not reach these issues in light of the manner in which we resolve standing in this case.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

The Association also has a special interest because of its relationship with the benefited class and the charity itself. Similar to the Historical Society in *Valley Forge*, the Association has historically maintained a close, cordial relationship with the Trust for over 70 years, and it has made monetary contributions to the School on a number of occasions. The members of the Association are all successful participants of the School, and the Association has its office on Trust lands where it conducts student-related activities and graduate assistance programs for students at the School. The Association was created by Mr. Hershey, settlor of the Trust, and the Association’s articles of incorporation and bylaws require that it maintain the common bonds formed during orphanhood and preserve the charitable, child-saving purpose of the Trust. In addition, the Association is particularly well-suited to evaluate the performance of this Trust because of its intimate knowledge of orphanhood, poverty and other alternative foster care facilities. At bottom, the Association, whose membership consists exclusively of past beneficiaries of the Hershey Trust, is the only other party with a sufficient relationship to the Trust that would have any interest in assuring that its charitable purpose was achieved.

Furthermore, the risk of vexatious or unreasonable litigation by the Association is virtually non-existent in this case. This is not a situation where a mere potential beneficiary with a speculative interest in the charity is seeking to interfere with the administration of the Trust or where a member of the general public is disagreeing with the administration of the Trust. This is also not a situation where the Association wishes to drain Trust assets by litigating each and every decision made by trust managers. The Association only seeks the reasons why the July 2002 Reform Agreement was replaced by the June 2003 Agreement when the Reform Agreement was the result of an extensive investigation funded in part by the Association to aid the OAG, which concluded that potential conflicts of interests amongst trust managers and potential asset mismanagement interfered with the Trust’s charitable mission. That inquiry is neither vexatious nor unreasonable. Given the nature of this Trust, its status as the largest residential childcare charity in the world, and the fact that the OAG agreed to modify the July 2002 Reform Agreement, this scrutiny will serve the public interest in assuring that the Trust is operating efficiently and effectively to serve its beneficiaries.⁶⁹³

Accordingly, because the Association has a “special interest” in this proceeding, it should have been allowed to challenge the modification of the July 2002 Reform Agreement, and for the foregoing reasons, the order of the trial court is reversed and the matter is remanded for hearings on the Association’s petition.

DAN PELLEGRINI, JUDGE

⁶⁹³ Because of the Association’s overwhelming special interest in the underlying proceeding, we need not address the OAG’s position that it balances the interests between the objects of the trust and the community at large as to whether there is standing on behalf of the Association. In certain circumstances, this balancing of interests will present a conflict of interest for the OAG because certain undertakings of the Trust could affect the community, positively or negatively, but undermine the central purpose of the Trust, which is to help orphan children get out of poverty and get into a suitable living and educational environment.

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Milton Hershey School and :
Hershey Trust Company, Trustee of :
Milton Hershey School Trust :
: **No. 759 C.D. 2004**
Appeal of: Milton Hershey School :
Alumni Association :

ORDER

AND NOW, this 31st day of January, 2005, the order of the trial court in the above-captioned matter is reversed and the matter is remanded for hearings on the Association’s petition.

Jurisdiction relinquished.

DAN PELLEGRINI, JUDGE

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

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: No. 759 C.D. 2004
Appeal of: Milton Hershey School : Argued: December 8, 2004
Alumni Association :

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE L. COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

**DISSENTING OPINION BY
PRESIDENT JUDGE COLINS**

FILED: January 31, 2005

I must respectfully dissent from the majority opinion while, at the same time, comment that it is one of the finest pieces of legal scholarship that I have read in my 25 years on the bench.

The reasons for my dissent follow briefly.

As noted on page 2 of the majority opinion:

As directed by the deed of trust, the members of the School’s Board of Managers are also members of the Board of Directors of the Trust Company. The deed endows the Board of Managers and the Trust

MILTON S. HERSHEY

“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

Company with decision-making responsibility for all aspects of running the School and for management and administration of Trust assets.

Further, the majority opinion continues on page 4 to state:

The Association is not a division of the School or of the Trust Company. It is not named in the deed of trust and is not an intended beneficiary of the Trust. As the deed states, “[a]ll children shall leave the institution and cease to be the recipients of its benefits upon the completion of the full course of secondary education being offered at the School.” (Reproduced Record at 25a). The Managers of the Trust may, in their discretion, contribute to the higher education of a graduate of the School, in which case graduates would continue to be beneficiaries of the Trust, but generally, once orphans graduate from the School, they are no longer Trust beneficiaries.

Unfortunately, this is where this Court’s inquiry must end. It is clear from the historical background of this saga that the Settlers in no way intended to give the Alumni Association standing in the administration of the Trust. The Settlor, Milton Hershey, was also the creator of the Alumni Association. To now give the Association legal rights that were expressly excluded by the Settlor of the Trust is a dangerous expansion of standing not supported by over 300 years of case law within the Commonwealth.

The Attorney General of the Commonwealth, pursuant to well-accepted principles of “*parens patriae*,” as noted by the majority:

is the watch dog that supervises the administration of charitable trusts to ensure that the object of the trust remains charitable and to ensure that the charitable purpose of the trust is carried out. *Pruner’s Estate*. The attorney general has the power to oversee the administration of the trust and, consequently, has standing in any case involving charity. See David Villar Patton, *The Queen, The Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. Fl. J.L. & Pub. Pol’y 131, 159-61 (2000) (outlining the historical development of charitable trust enforcement by the attorney general from 13th Century England through the American Revolution).

MILTON S. HERSHEY
“HIS DEEDS ARE HIS MONUMENT, HIS LIFE IS OUR INSPIRATION”

APPENDIX VII: DEED OF TRUST – AS OF DATE OF PUBLICATION IN 2005

To allow the Alumni Association standing, no matter how eleemosynary its purpose may be, interferes with the efficient performance of the Attorney General’s statutorily-mandated duties, as well as being violative of the wishes of the Settlor of the Trust and founder of the Alumni Association.

Such a quantum leap away from historical concepts of standing, based upon public policy considerations, and a judicially-created “special interest,” may only be undertaken by the Supreme Court of the Commonwealth.

JAMES GARDNER COLINS, President Judge

Judge Cohn Jubelirer and Judge Simpson join in this dissent.