



IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 137 and 138 MAP 2005

IN RE: MILTON HERSHEY SCHOOL AND HERSHEY TRUST
COMPANY, TRUSTEE OF MILTON HERSHEY SCHOOL TRUST

Order entered on January 31, 2005, by the Commonwealth Court of Pennsylvania
at No. 759 C.D. 2004, reversing the order of the Court of Common Pleas
of Dauphin County, Orphans' Court Division, at No. 712, Year 1963,
entered November 19, 2003

BRIEF OF APPELLANTS THE HERSHEY TRUST COMPANY
AND THE MILTON HERSHEY SCHOOL

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to its December 1, 2005, order granting the petition for allowance of appeal of the Hershey Trust Company ("Trust Company") and the Milton Hershey School ("School"), and pursuant to 42 Pa. C.S. § 724(a) (general rule).

ORDER IN QUESTION

Appellants the Trust Company and the School appeal the Order entered in this matter on January 31, 2005, by the Commonwealth Court of Pennsylvania, which states:

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 hearing on the Association's petition.

Jurisdiction is relinquished.

/s/ Dan Pellegrini

Dan Pellegrini, Judge

STATEMENT OF SCOPE AND STANDARD OF REVIEW

In this appeal, the standard of review for questions of law is *de novo*, while the scope of review is plenary. See *Hosp. & Healthsystem Ass'n of Pa. v. Dep't of Pub. Welfare*, ___ A.2d ___, No. 219 MAP 2003, 2005 Pa. LEXIS 2975, *4 n.12 (Pa. Dec. 27, 2005).

STATEMENT OF QUESTIONS PRESENTED

1. Did the Commonwealth Court deviate from appropriate judicial practice by accepting as true the Association's opinions, interpretations of written documents, and conclusion and by failing to review the Orphans' Court decision for an abuse of discretion?

Suggested Answer: Yes.

2. Did the Commonwealth Court depart from established principles of standing by adopting a new standard for "special interest" standing derived from a California law review article, and permitting an alumni association to challenge the Attorney General's *parens patriae* regulation of a charitable trust solely because it disagrees with aspects of the trust administration and the Attorney General's actions?

Suggested Answer: Yes.

STATEMENT OF THE CASE

A. Procedural History

On September 4, 2003, the Milton Hershey School Alumni Association (“Association”) filed a petition in the Orphans’ Court Division of the Court of Common Pleas of Dauphin County (“Orphans’ Court”) at No. 712, Year 1963, seeking an order (1) that a citation be directed to the Office of the Attorney General (“OAG”), the School, and the Trust Company to show cause why the “July 2002 Reform Agreement” among the OAG, the School and the Trust Company should not be reinstated; (2) that the “child and young adult beneficiaries of the Milton Hershey School Trust, known and unknown, have appointed to represent their interests Dr. Rodney E. McLaughlin and John W. Schmehl, Esq.” as guardian *ad litem* and trustee *ad litem*, respectively; (3) that any modifications to the “July 2002 Reform Agreement” be agreed to by these representatives and approved by the Orphans’ Court; and (4) that the Orphans’ Court order compliance with its December 7, 1999, adjudication, “halting non-child use of certain land in violation of the said Adjudication.” (R. 18a). The OAG, the School, and the Trust Company were named as respondents. *Id.*

The OAG, the School, and the Trust Company filed preliminary objections to the Association’s petition pursuant to Pa. R.C.P. 1028(a)(5), challenging its standing. (*See* R. 88a-90a; 91a-95a). Following briefing and argument, the Orphans’ Court dismissed the Association’s petition for lack of standing. *In re: Milton Hershey School*, No. 712 of 1963 (Dauph. County Ct. Common Pls., November 19, 2003) (“*Orphans’ Ct. Op.*”).¹

The Association appealed the Orphans’ Court decision, and on January 31, 2005, the Commonwealth Court, after argument *en banc*, entered an order reversing the Orphans’

¹ Pursuant to Pa. R.A.P. 2111(b), a copy of the Orphans’ Court’s opinion is Appendix B to this brief.

Court order and remanding “for hearings on the Association’s petition.” In its opinion, the Commonwealth Court majority, written by Judge Pellegrini and joined by Judges McGinley, Friedman and Leavitt, held that the Association “has standing to bring an action to rescind the [June] 2003 Agreement and reinstate the [July] 2002 Reform Agreement.”² President Judge Colins wrote a dissenting opinion in which Judges Cohn Jubelirer and Simpson joined. The Commonwealth Court’s decision is reported at *In re: Milton Hershey School & Hershey Trust Company, Trustee of Milton Hershey School Trust*, 867 A.2d 674 (Pa. Cmwlth. Ct. 2005).³ The OAG, the School and the Trust Company filed timely petitions for allowance of appeal that were granted by this Court’s orders of December 1, 2005.

B. Factual Background

1. The Deed of Trust

In 1909, Milton S. Hershey and Catherine Hershey founded the School by Deed of Trust to provide a “permanent institution for the residence and accommodation of poor children.” (R. 102a). The Deed of Trust does not contemplate or mention the Association. (*See generally* R. 100a-114a).

As directed by the Deed of Trust, the members of the School’s Board of Managers are elected from the membership of the Board of Directors of the Trust Company, which is appointed as Trustee of the School Trust. The Deed of Trust endows the Board of Managers and the Trustee with decision-making responsibility for all aspects of running the

² As explained more fully *infra*, the Commonwealth Court majority misunderstood or mischaracterized the relief sought by the Association, which is both broader and more intrusive than mere reinstatement of the July 2002 Agreement.

³ Pursuant to Pa. R.A.P. 2111(b), the Commonwealth Court opinions, as officially reported, are Appendix A to this brief.

School, including decisions about uses of trust funds, land development and sales, admissions, and education under the standards set forth in the Deed of Trust. *Orphans' Ct. Op.*, p. 3.

The Association was organized in 1930, twenty years after the Trust was created for the establishment of the School. (R. 21a). The Association, whose membership consists primarily of graduates of the School,⁴ exists separate and apart from the School, the School Trust, and the Trust Company. Although the Association leases an office on Trust property, the School and the Trust Company are under no obligation by virtue of the Deed of Trust or any other mandate to provide the Association with this accommodation.

As the Orphans' Court pointed out, until recently the stated purpose of the Association was:

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.

Orphans' Ct. Op., p. 4. Before this litigation was filed, the Association changed its stated purpose 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." *Id.*

Just as the Deed of Trust does not mention the Association, it provides only very limited assistance to students after they complete their secondary education at the School. The Deed of Trust specifically directs that students shall remain at the School only until they complete its course of secondary education, and that upon such completion they shall "cease to

⁴ The Association has honorary members who are former employees of the School and who served in the classroom, in the athletic department, in residential living, etc., and associate members. See *Purcell v. Milton Hershey School Alumni Association*, 884 A.2d 372, 374 nn. 3 and 4 (Pa. Cmwlth. Ct. 2005).

be recipients of its benefits. . . .” (R. 109a). The Managers of the School may, in their discretion, contribute to the higher education of a graduate of the School, in which case the graduate would continue to receive benefits from the Trust for a limited time. *Id.* However, this is the only exception whereby a former student of the School continues to benefit directly from the Trust. (*See generally* R. 100a-114a). Thus, once a student leaves the School or graduates, he or she no longer receives benefits from the Trust. *Id.*

2. The Role of the OAG

The OAG is charged with enforcing the duties of charitable trustees and, as *parens patriae*, protecting the public’s interest in charitable trusts. In the case of the School Trust, the OAG has taken an active role. As the Orphans’ Court, which has had an extensive history in dealing with administration of the Trust, observed:

The offices of 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 *cypres* 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.

Orphans’ Court Op., p. 8; *see also, In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Cmwlth. Ct. 2002).

3. The July 2002 and June 2003 Agreements

In July 2002, the OAG, the School, and the Trust formalized an agreement (“July 2002 Agreement”) outlining certain undertakings and procedures to be employed in the management and administration of the Trust, and addressing governance restructuring; real estate transactions; program delivery (*i.e.*, financial need and admissions criteria); and actions by the OAG. (R. 134a-150a). The Commonwealth Court majority identifies the Association as a

“participant” in the affairs of the Trust, including negotiations leading up to the July 2002 Agreement, but the Association was not a party to the July 2002 Agreement. *Cmwlth. Ct. Op.*, 867 A.2d at 679. (See R. 134a). At most, the Association has acted as a volunteer in seeking to enforce its version of the Trust’s mission.

After the July 2002 Agreement was signed but before it was implemented, the composition of the School’s Board of Managers and senior administration changed. (R. 134a). In light of the commitment of the Board of Managers and senior administration to implementing certain changes that, in the view of the OAG, would better fulfill the Deed of Trust, the July 2002 Agreement was revised to allow and require the Board of Managers and the Trustee to exercise their discretion in implementing the principles referred to in that agreement (“June 2003 Agreement”). (R. 115a-123a).

4. The Association’s Petition

In its petition, the Association avers that the June 2003 Agreement does not address issues covered by the July 2002 Agreement, and then, using the two agreements as a platform, proceeds to challenge virtually every decision, large and small, that the Board of Managers and the Trustee have made since Milton Hershey’s death in 1945. (See R. 15a-87a).

For example, the Association complains about where the students play football and the cost of the lights at the football field. (R. 73a-74a). It complains about HERCO salaries and Trust dividends. (R. 40a). It complains that a former home (deemed no longer suitable for child living) is being converted to a historical archive. (R. 41a). It complains about the School’s decision to move students out of farmhouses in use when the Association’s leadership was enrolled in the School and into renovated, child-friendly living spaces. (E.g., R. 40a-41a). The Association fails to explain that its current leadership spearheading this litigation originally

opposed the June 2002 Agreement that they now seek to reinstate,⁵ and that the Association has been dramatically divided over this litigation, which many of its members do not support. *See, e.g., Purcell v. Milton Hershey School Alumni Association*, 884 A.2d 372 (Pa. Cmwlth Ct. 2005).

The Association's complaints fall into four general categories: (1) "conflicts of interest"; (2) use of land; (3) student admissions, academic requirements, and student living; and (4) OAG involvement. The Association asserts that the July 2002 Agreement addressed these issues and the June 2003 Agreement does not. However, the Orphans' Court had both agreements before it and found that "the [June 2003] 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 Trustees/Managers to the exact text of the financial and academic criteria for admissions to the School set forth in the earlier Agreement." *Orphans' Ct. Op.*, p. 6.

First, the June 2003 Agreement does address conflicts of interest. (R. 134a-167a). It permits the Trustee to exercise its fiduciary responsibility as owner of Hershey Foods and Hershey Entertainment and Resorts Company (HERCO) by electing representatives to those boards. (R. 134a-137a). In addition, the June 2003 Agreement prohibits the School and the Trust Company from purchasing goods or services from any person or business that employs or is owned by a director of the Trust Company. (R. 134a-135a). It further prohibits any member of the Trust Company board from serving on the Milton S. Hershey Medical Center Board. (R. 136a).

⁵ Todd Thatcher, "MHS Board of Managers reaches agreement with Pennsylvania Attorney General," August 7, 2002, *Hershey Chronicle*, [http://www.zwire.com/site/printer Friendly.afn?brd=brd=2249&dept_id=45ob12&newsid=4978717](http://www.zwire.com/site/printer%20friendly.afn?brd=brd=2249&dept_id=45ob12&newsid=4978717), last visited 1/26/2006 ("Fouad not pleased with . . . agreement . . . 'a watered-down reform' . . . 'this lenient slap-on-the-wrist agreement'").

The June 2003 Agreement relaxes certain unusual provisions of the July 2002 Agreement, which would have precluded any overlap between the Trust Company board and the boards of Hershey Foods and HERCO, companies in which the Trust is a major shareholder. (See R. 117a; 134a-137a). It also eliminated certain express restraints that would have prevented the Trust Company from acting as trustee for any other entities. *Id.* Both of these provisions were replaced by more general conflict of interest provisions and continued OAG supervision. (R. 134a-137a, 139a).

Second, both agreements place restrictions on real estate transactions. (See R. 118a, 137a-138a). The June 2003 Agreement requires the Trustee to notify the OAG ninety days prior to specified transactions, including “sell[ing] any land, construct[ing] any building, or plac[ing] any restriction (including, but not limited to, leases or easements) on land which would interfere with the present or future use of that land for program purposes, without first notifying the [OAG].” (R. 137a). The June 2003 Agreement further requires the Trustee to notify the OAG of lease renewals for properties that were formerly used as student homes. *Id.* The net effect of the “real estate transactions” provision in the June 2003 Agreement is exactly the same as the comparable paragraph in the July 2002 Agreement.⁶

Third, the “program delivery” items in both agreements require the School to adhere to the Deed of Trust.⁷ (See R. 119a-120a, 138a-139a). The July 2002 Agreement

⁶ The Trust currently has more land than it did ten years ago. (R. 180a). A comparison of School Trust land in 1976 to 2003 demonstrates that the change in holdings in almost thirty years is minimal. (R. 180a-182a).

⁷ On these issues, the Deed of Trust states:

[T]he 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; . . . Consistent with the purposes of this deed, only a child

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outlined how financial need criteria would be established and how the School would define “poor” during the 2003/04 and 2004/05 school years by using federal poverty guidelines established annually by United States Department of Health & Human Services. (R. 119a). The July 2002 Agreement also stated that the School would investigate various recognized methods for considering household income and, in the 2005/06 school year, assess whether the financial need criteria should be revised. *Id.* Finally, the July 2002 Agreement addressed how the “potential for scholastic achievement” criteria in the Deed of Trust would be applied as of the 2003/04 school year, and that the School would provide students with the opportunity to remain at the School year-round. (R. 120a).

The June 2003 Agreement likewise addresses these issues – and does not “[do] away with any efforts to impose strict income caps on candidates,” nor does it go back on commitments to de-emphasize scholastic achievement as a condition of enrollment, as the Association alleges in paragraph 177 of its petition. (R. 64a). To the contrary, the June 2003 Agreement specifically states that the School will only admit children who are deemed “poor” within the meaning of the Deed of Trust, and that the School will consider federal poverty guidelines published annually by the United States Department of Health & Human Services in making determinations about admissions. (R. 138a-139a).⁸

(continued...)

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 other qualifications set forth herein, shall be admitted to the School.

(R. 107a).

⁸ In fact, the Board has directed the School administration to implement strictly an admission policy committing at least half its places to those who come from families with household incomes of no more than 100 percent of the
(continued...)

On the issue of academic standards, the June 2003 Agreement requires that the School “admit students with a wide variety of potential for scholastic achievement within the meaning of the Deed of Trust, including those who are likely to benefit from the vocational education program of the Milton Hershey School.” (R. 138a). The agreement further requires the School to provide support for students who are having difficulty meeting its scholastic standards. *Id.* And, like the July 2002 Agreement, the June 2003 Agreement requires the School to provide a year-round program. (R. 138a). The June 2003 Agreement also requires the School to “continue its plans to increase student safety by, among other things, reducing the age difference between children in each home,” which was not required by the July 2002 Agreement. (R. 139a).

Finally, the June 2003 Agreement, like the July 2002 Agreement, mandates the parties’ dedication to fulfilling the Deed of Trust. (R. 115a, 134a). The June 2003 Agreement confirms the OAG’s *parens patriae* role in supervising the Trust by requiring the School to provide an annual report to the OAG describing the economic and academic characteristics of the children admitted to the School, year-round programs in place or in development, programs and policies to increase child safety, including policies to reduce age differences in student homes, and any other matter that the OAG wishes to explore. (R. 139a-140a). It also gives the OAG the right, consistent with its *parens patriae* role, of direct access to any materials, information, and personnel that it may request as necessary to carry out its role. *Id.*

(continued...)

federal poverty guideline, with the remainder drawn from families with household incomes of no more than 150 percent of the poverty guideline. (R. 203a-210a).

The OAG, the School, and the Trust Company objected to the Association's standing because the asserted factual premises concerning the June 2003 Agreement are without any merit, because the OAG is fulfilling its supervisory role, and because the relief requested by the Association is, in the words of the Orphans' Court, "preposterous." *Orphans' Ct. Op.*, p. 3 n.2. The Orphans' Court agreed with the OAG, the School, and the Trust Company in all respects and dismissed the Association's petition.

SUMMARY OF THE ARGUMENT

In a 4-3 decision, the Commonwealth Court promulgated a new rule of “special interest” standing for charitable trusts, reversed the decision of the Orphans’ Court denying standing to the Association and remanded for a hearing on the Association’s petition that, *inter alia*, challenged an agreement among the School, the Trust, and the OAG. In doing so, the Commonwealth Court erred as a matter of law and departed from accepted judicial practice by not reviewing the Orphans’ Court decision denying standing to the Association for an abuse of discretion.

Although the Commonwealth Court majority correctly observed that “special interest” standing has been a concept in Pennsylvania law since this Court’s analysis in *Valley Forge Historical Society v. Washington Memorial Chapel*, 426 A.2d 1123, 1127 (Pa. 1981), it misapplied *Valley Forge* to the facts before it. Instead, the Commonwealth Court majority chose to expand the definition of standing to include third parties who might have a “special relationship” to a trust, adopting a formula proposed in a California law review article. Adoption of the test set forth in the law review article is not sanctioned by Pennsylvania law, nor was it compelled by the facts of this case.

The Association’s 253-paragraph petition challenges virtually every decision, large and small, made by the Trustee and the School’s Board of Managers in exercising their discretion to administer the Trust and run the School. Simply stated, the underlying petition was brought by a group of graduates who believe that their ideas about how to run the School are better than the ideas of those charged with responsibility to do so by the Deed of Trust. The Association’s petition also disagrees with how the Attorney General has exercised his *parens patriae* powers and responsibilities, while conceding that the Attorney General has been deeply engaged in monitoring and supervising the administration of the Trust. If permitted to stand, the

Commonwealth Court's decision would allow standing to any third party who believes that his or her ideas for running a charitable trust are better than the decisions of the trustee or the Office of Attorney General, who are charged with making those decisions. Such a result has no basis in the law of this Commonwealth and is not called for by the circumstances of this case.

ARGUMENT FOR APPELLANT

A. The Commonwealth Court Departed from Accepted Judicial Practice in Not Reviewing the Orphans' Court Decision for an Abuse of Discretion

The Commonwealth Court should have reviewed the Orphans' Court decision for an error of law or an abuse of discretion. *In re Estate of Bartol*, 846 A.2d 209, 213 (Pa. Cmwlth. Ct. 2004). In determining whether a preliminary objection to standing was properly sustained, the Commonwealth Court is to accept as true "all well-pled facts and inferences reasonably deducible therefrom, but not conclusions of law." *Id.* Determination of a preliminary objection to standing is typically a mixed law and fact decision (*see* Pa. R.C.P. 1028(a)(5) note), and may be disposed of, as here, on pleadings, briefing, and argument. (*See Estate of Bartol, supra*, 846 A.2d at 212; *see also* R. 248a-303a).

In sustaining Appellants' preliminary objections and determining that the Association lacked standing, the Orphans' Court correctly refused to accept the Association's opinions, interpretations of written documents, and conclusions as true. The Orphans' Court relied on the actual language of the agreements and the Deed of Trust, written documents that speak for themselves. The Commonwealth Court majority, however, adopted wholesale the Association's opinions, conclusions, and interpretations of the July 2002 Agreement, the June 2003 Agreement, and the Deed of Trust. It was error for the Commonwealth Court majority to do so, not only because the Association's rhetoric was contradicted by the documents⁹ but also because the Orphans' Court judge who heard the parties' arguments on the preliminary objections and issued the opinion and order was relying on more than thirty years of judicial

⁹ A review of the agreements shows that the July 2002 Agreement was not "rescinded" as the Commonwealth Court states – it was replaced by a second agreement that, while different in phraseology and length, is the same in purpose and addresses all of the same topics, discussed *infra*, as the first agreement.

