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Henry S. Hilles Jr.

Wilfred B. Wolcott Jr.

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A FUTURE FOR GIRARD'S DREAM

By HENRY S. HILLES, JR.† AND WILFRED B. WOLCOTT, JR.††

THE EVENTS in the life of a man determine the substance of his dream. The dream of a man gives shape to the legacy he bequeathes to his community. The wisdom of the community in its use of its legacy determines in a measure the immortality of its benefactor.

Time produces changes in the community which no man can foresee. But when the intent is clearly defined and the desire to fulfill it never becomes impaired, neither the dream nor the community need suffer.

The life of Stephen Girard and his dream produced Girard College. How it grew and prospered is the story of its first century of service. The problems which new educational and economic conditions have thrust upon the college have become its contemporary concern. The future of Girard's educational dream may well depend on whether his trustees and the courts are willing to look boldly for new solutions within the framework of legal doctrines and the basic purposes of Stephen Girard.

I.

MARINER, MERCHANT, BANKER, BENEFACTOR

Stephen Girard was born in France on the twentieth of May, 1750. His father, a merchant and a naval officer, introduced his son to the sea by having him serve as a cabin boy. After six voyages Girard was made an officer, and at the age of 23 was licensed to act as captain, master, or pilot. The next year, he sailed from France to Port-au-Prince, as "officer of the ship." The same year, 1774, he sailed to New York, found employment with Thomas Randall and Son, and continued for two years to sail the Atlantic seaboard, the Carribbean, and the Gulf of Mexico.¹

† B.A., 1961, Wesleyan University; LL.B., 1964, University of Pennsylvania; Member, Pennsylvania Bar.

†† A.B., 1927, M.A., 1929, Princeton University; Ph.D., 1945, University of Pennsylvania; Former Member of Faculty and Administration of Girard College.

1. I McMASTER, *THE LIFE AND TIMES OF STEPHEN GIRARD*, 1-5 (1918).

In 1776, after an encounter with an English frigate, Girard sailed into the port of Philadelphia, the city which for most of the next fifty-five years was to be his home.² During his first year in Philadelphia he established a trading business, supplying innkeepers and ships with liquors, turpentine, and supplies. When the British occupied Philadelphia, Girard moved to Mount Holly and continued to operate a store there. After the British occupation he returned to Philadelphia and resumed his trading business.³

Girard was engaged primarily as a shipowner and merchant from 1778 until 1812. His ships visited the principal ports of the Caribbean, of Europe, of South America, and of the Orient. Trade was profitable, although the involvement of neutral ships with the belligerent French and English was a source of constant danger and loss. This unsettled situation continued during the closing decade of the Eighteenth Century and the opening decade of the Nineteenth; consequently, Girard diverted some of his interest to the world of banking.⁴ The Bank of the United State, created by Act of Congress in 1791,⁵ closed its doors on March 3, 1811, unable to obtain from Congress a renewal of its charter. Girard purchased the bank building and established the Stephen Girard's Bank with a capital of \$1,200,000.

A second Bank of the United States was authorized by Congress in 1816. Stephen Girard was named president of the commission appointed to raise \$28,000,000 in capital subscriptions. He himself subscribed the last \$3,038,300 needed to complete the amount and shortly thereafter was named one of the five Government Directors of the bank.⁶

Stephen Girard invested extensively in real estate for a variety of purposes. He purchased some seventy-five acres in Passyunk Township in 1798, where he maintained a farm for horticultural experimentation and for his personal relaxation. He speculated in land in Louisiana, purchasing over 200,000 acres. In Philadelphia the square bounded by Eleventh, Twelfth, Market, and Chestnut Streets was given over to dwellings and stores after he acquired the forty-five acre Peel Hall Farm on the Ridge Road as the site for his proposed school. Of great importance to the future of his estate was the purchase of coal lands in Schuylkill County, where his surveyor reported "the coal turns

2. *Id.* at 7.

3. *Livre Brouillard Journalier 1777-1779*, at June 3, 25, 26; July 1, 10, 30; September 20, 1777; June 16; August 11, 1778 (The day-book of Stephen Girard).

4. 1 McMASTER, *op. cit. supra* note 1, at 58, 89, 250, 271, 302, 329, 350, 360, 361, 383, 427, 428; 2 McMASTER, *op. cit. supra* note 1, at 160, 161, 214, 239.

5. An Act to Incorporate the Subscribers to the Bank of the United States, 1 Stat. 191 (1791).

6. 2 McMASTER, *op. cit. supra* note 1, at 239, 244, 247, 249, 250, 309, 310, 314, 316.

out to be of excellent quality." In furtherance of his interest in the planned development of the coal fields, Girard invested \$100,000 in the Danville and Pottsville Railroad and was elected a director of the company.⁷

The story of Stephen Girard as a humanitarian has many chapters. One of the best known is that of his service to his fellow citizens during the yellow fever epidemics in Philadelphia in 1793, in 1797, and in 1798. Girard managed the hastily organized hospital at Bush Hill in 1793 and in 1797 was appointed an inspector of the Health office and placed in charge of the City Hospital.⁸

Girard's concern for the welfare of people was also manifested by his lifelong interest in the education of youth. He provided many types of education in many different educational environments, depending on the needs of the individual involved. The interest in the proper care and training of his apprentices was recorded in many letters of instruction to the captains of his ships.⁹

He accepted the responsibility of educating the children of some of his relatives. Three nieces were cared for in the Girard home and educated by tutors or in school. Two nephews were sent to a neighborhood boarding school under Girard's supervision and with his financial support. He also supervised the education of the sons of several of his friends and business acquaintances, sharing with their fathers the belief that the boys would profit from formal schooling before entering the world of business or trade. Girard took a personal interest in the education of these children and contributed more than \$20,000 of his own money for their welfare and training.¹⁰

II.

THE REALIZATION OF GIRARD'S DREAM

A. *The Conception*

During his lifetime Stephen Girard repeatedly indicated his willingness to devote his energy and his money to the education of young people. As he faced the prospect of death he determined that

7. *Id.* at 410, 433, 437, 439.

8. 1 McMASTER, *op. cit. supra* note 1, 212-16, 340-49, 372-76.

9. Letter Book 13, Letter 388; Letter Book 15, Letters 269, 311. (Among the major documents of the Stephen Girard collection, housed at Girard College, are the Letter Books, which contain copies of business and personal letters written by Girard. Also included are the Letters Received and the books relative to financial transactions, such as the journals and ledgers for Stephen Girard, for his bank, and for his other business interests.)

10. Letter Book 9, Letter 457; Letter Book 10, Letters 48, 105; Letter Book 16, Letter 57; Letters Received 1826, Letter 513; Ledger M, No. 11, at 37, 38, 199; Letters Received 1805, Letter 569; Ledger 1819, Folios 113, 63.

his accumulated wealth should be devoted to an educational purpose. "Whereas I have been for a long time impressed with the importance of educating the poor," are the opening words of the first article of the Will of Girard concerning the school. Girard left the bulk of his \$6,699,233 estate to "the Mayor, Aldermen and Citizens of Philadelphia," specifying that \$2,000,000 be used to provide the initial buildings and equipment for a school to educate "poor male white orphan children." The income from the amount remaining, after specific bequests had been honored, was to be used primarily to maintain the school. Initially the capacity of the school was set at three hundred students.

Girard provided that boys were to enter the school between the ages of six and ten years and to leave between the ages of fourteen and eighteen. Girard intended to give all students an elementary education. At the age of fourteen many would be bound out as apprentices. Those who appeared to be able to benefit from a longer period of formal education would be granted four additional years.

He made detailed and specific recommendations concerning the curriculum. He set standards of competency and morality for teachers and supervisors. He defined the nature of the buildings to house the institution and elaborated on many details of their construction. He provided that all boys should be indentured to the City of Philadelphia, to insure the College greater independence in managing the students. He set standards of discipline and broad rules concerning food and clothing. "A pure attachment to our republican institutions and to the sacred rights of conscience" was to be fostered. "The purest principles of morality" were to be taught. Students were to emerge from the school accustomed by habit to "evince benevolence toward their fellow creatures, and a love of truth, sobriety and industry."¹¹

Typical of the reaction of the community to the beneficence of Girard was the statement published in the United States Gazette of January 3, 1832, eight days after his death. "There is not, perhaps, an instance recorded in the history of the world, of one human being devoting such an immense amount of wealth, for the benefit of his fellow men." On the seventh of January the front page of the Gazette was devoted to the complete text of the will of Stephen Girard.

B. *Early Development*

The task of carrying out the will of Girard as it applied to the founding of the school was undertaken by the Select and Common

11. The Will of Stephen Girard, Art. XX, XXI.

Councils of the City of Philadelphia. The Councils petitioned the State Legislature for authorization to undertake the project on January 13, 1832. The city treasurer was named treasurer of the Girard fund. An ordinance for the management of Girard Trusts was passed by Councils on September 13, 1832, creating the first governing board, composed of the mayor and four members from each of the Councils, and known as the Board of Commissioners of the Girard Estates. By February of the next year the Councils had named fifteen citizens as trustees of the Girard College and plans for the College were soon being considered.¹²

The corner stone of the first building was laid on July 4, 1833. Bitter controversies concerning architectural features of the College building erupted during the summer, revealing that political issue was made of decisions affecting the College. Concern for the effect of politics on the welfare of the estate and of the College varied with the events of the succeeding years, and it was not until 1869 that control of charitable trusts was transferred from the politically chosen Councils to a Board of City Trusts, selected by the justices of the Pennsylvania Supreme Court, later by the judges of the Philadelphia Court of Common Pleas.¹³

In June of 1836, while the building of Girard College was progressing, the State legislature passed a law for the establishment of public schools.¹⁴ The pauper feature of public education, a characteristic prior to that time, was repealed and the right of all children over four years of age to be educated was established.

In July of 1836, Alexander Dallas Bache, professor of natural philosophy at the University of Pennsylvania, was named the first president of Girard College by the Board of Trustees. He spent two years in Europe visiting educational institutions to obtain ideas and equipment for the opening of the College. The extensive plans which he submitted to the trustees in 1839 were largely incorporated into the policies for operating the College.

Soon, however, the fortunes of Girard College began to decline. As early as April 1840 a bill was introduced in Common Councils to dispense with the Board of Trustees of Girard College and to appoint a committee of Councils to replace it. The Board and the office of president were abolished in December, 1841 and shortly thereafter the property was placed in the hands of the Building Committee, the only

12. United States Gazette, January 14, September 17, October 3, 1832; February 12, 13, 1833.

13. WILDES, *LONELY MIDAS*, 314 (1943).

14. Pa. Laws 1835-1836, No. 166, at 525.

one of all the committees which continued to function for the next six years.¹⁵

While activity at Girard College was limited to the building program, a serious threat to Girard's dream arose when certain of his heirs petitioned that the will be set aside.¹⁶ This challenge was rejected, however, as the Supreme Court of the United States unanimously upheld the trust.¹⁷

The Councils created a Board of Directors. Final transfer of the property to the Board was made by the Building Committee in November, 1847. On January 1, 1848, Girard College opened with an enrollment of 95 boys. In the fall of that year 100 additional students were added, followed a year later by a third one hundred. These three hundred constituted the "original" pupils of the College.

C. A Century of Operation and Change

During the first decade of full operation of Girard College the average student population remained at approximately 300 boys. From 1861 to 1877 the average enrollment was slightly in excess of 500. During this period two buildings were added to the original five, a service building in 1851 and an infirmary in 1858. The need to accommodate more boys was met by the addition of a primary school building in 1877, with a capacity for 320 pupils, followed by three other residence buildings in 1882, 1886, and 1890. The average number of boys at Girard College reached 873 in 1880 and 1574 in 1890, and remained at approximately the latter figure for the next forty years.

15. Journal, Select Council, City of Philadelphia, December 23, 1841, at 29.

16. One claim raised by the heirs was that the trust was void because the plan of education proposed was anti-Christian and therefore repugnant to the laws and constitution of Pennsylvania. This allegation was based on Girard's specific admonition that "no ecclesiastic, missionary, or minister of any sect whatsoever shall ever hold or exercise any station or duty whatsoever in the said College; nor shall any such person ever be admitted for any purposes, or as a visitor, within the premises appropriated to the purposes of the said College." The Will of Stephen Girard, Art. XXI.

17. *Vidal v. Mayor*, 43 U.S. (2 How.) 126 (1844).

The will of Stephen Girard is "the most litigated will in history." Shanks, *"State Action" and the Girard Estate Case*, 105 U. Pa. L. Rev. 213 (1956). The will has been to the Supreme Court of the United States four times: *Pennsylvania v. Board of Directors of City Trusts*, 357 U.S. 570 (1958); *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Girard v. Philadelphia*, 74 U.S. (7 Wall.) 1 (1868); *Vidal v. Mayor*, *supra*. It has reached the Supreme Court of Pennsylvania at least nine times: *Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958), *appeal dismissed sub nom. Pennsylvania v. Board of Directors of City Trusts*, 357 U.S. 570 (1958); *Girard Will Case*, 386 Pa. 548, 127 A.2d 287 (1956), *rev'd per curiam sub nom. Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Girard's Appeal*, 4 Penny. 347 (Pa. 1880); *Philadelphia v. Fox*, 64 Pa. 169 (1870); *Field v. Directors of Girard College*, 54 Pa. 233 (1867); *Philadelphia v. Heirs of Girard*, 45 Pa. 9 (1863); *Soohan v. Philadelphia*, 33 Pa. 9 (1859); *Beck v. Philadelphia*, 17 Pa. 104 (1851); *Girard v. Mayor*, 4 Rawle 323 (Pa. 1833). The will's "appearances before inferior courts are without number." Shanks, *supra* at 213.

In addition to new buildings to house the laundry, power house, bakery and chapel, the Mechanical School building was erected, and a new dining room and kitchens to accommodate 1200 boys were built in the decade between 1875 and 1884.¹⁸

The opening of the Mechanical School building in 1884 followed by two years the inauguration of this department of instruction, which began as a Machine Shop with an enrollment of 150 boys. The creation of this educational facility marked a major change in the stipulated plan of Stephen Girard. It was brought about by a change in economic patterns which Girard had been unable to foresee in 1830.

Girard's intent, as has been previously stated, was to educate boys in his school until they were between age 14 and 18, then to have them serve as apprentices to masters outside the school. The Assembly of Pennsylvania carried out Girard's purpose in 1847, by authorizing "the binding by indenture of any orphan who has remained in the college until between age 14 and 18, to serve as apprentice in agriculture, navigation, arts, mechanical trades, or manufactures until age 21."¹⁹

It was the common practice during the eighteenth century and into the nineteenth for overseers of the poor to apprentice children whose parents were unable to maintain them. Every district of the State of Pennsylvania had this privilege in 1836. Benjamin Franklin in 1790 left one thousand pounds to Philadelphia to supply five percent loans to young married artificers having served apprenticeship in Philadelphia to help them establish themselves as journeymen in business.

Despite the opinions of men as astute in business as Franklin and Girard the decline in the system of indentured apprenticeship was noticable even before Girard's death. As early as 1829 the City Councils realized that the Franklin Fund was not fulfilling the intentions of the testator. A report of a Joint Committee of Councils, appointed in 1829, to suggest improvements in public education, stated that the practice of schooling apprentices had "greatly diminished and is still diminishing."²⁰ The philosophy which supported the public school as an instrument of the democratic principle tended to destroy the apprentice system which, in part, had served to provide the established classes with help at very little cost and relieved them of the burden of pauper relief.²¹

18. CUNNINGHAM, MEMORIES OF GIRARD COLLEGE, 92, 424-27 (1942).

19. Board of Directors of City Trusts, Will and Codicils of Late Stephen Girard, together with Acts of Assembly and Decisions Relating Thereto 42 (1889); see Pa. Laws 1847, No. 136, at 178.

20. FEE, THE ORIGIN AND GROWTH OF VOCATIONAL INDUSTRIAL EDUCATION IN PHILADELPHIA TO 1917, at 40, 47, 48, 85 (1937).

21. CURTI, SOCIAL IDEAS OF AMERICAN EDUCATORS, 23, 24, 44 (1935).

The changes in educational and economic practice were recognized by the men responsible for the welfare of Girard College boys, and practical means were adopted to meet the changes. The first of these changes was initiated in 1853, when the City Councils passed an ordinance permitting masters to whom Girard College boys were apprenticed to provide board and lodging at some acceptable place other than the master's home.

The Board stated in 1881 that it was embarrassed in its effort to carry out Girard's instructions concerning apprenticeship. So few masters were available, that the Board concluded that the only practical remedy was to teach mechanical skills to the students within Girard College. Questioning the legality of such a change, the Board was assured by its solicitor that the plan was permissible.

The completion of the Mechanical School building in 1884 enabled the boys to receive specialized training in trades, and mechanical instruction became an important addition to the Girard College curriculum. At the same time courses were introduced in commercial studies, with typewriting and shorthand added in 1880. After this, all Girard College students received vocational, as well as academic, instruction as resident members of the institution.

That the Board had decided wisely was illustrated by its report in 1888 on the difficulty of indenturing Girard College boys. Whereas fifty-three of the seventy boys who left the College in 1870 had been apprenticed under indenture, only six boys of the one hundred and twenty-six who left in 1888 were able to be apprenticed. One hundred and fifteen boys had found employment, however, under the general wage system. The evidence was clear that the indenture system had been effectively replaced.²²

The addition of two buildings in 1929-1931, the Junior School building and the House Group building for the youngest boys, brought the total capacity of the College to 1804. The number of boys enrolled in Girard College never reached that figure. The average number of boys remained at approximately 1730 for the decade ending in 1940.²³ By 1945 the number had declined to 1349.²⁴ Ten years later the pupil population was 1094. The number reported for 1958 was 938,²⁵ for 1963 it was 726.²⁶

22. HERRICK, HISTORY OF GIRARD COLLEGE, 235, 237, 240, 354-55 (1927).

23. CUNNINGHAM, *op. cit. supra* note 18, at 325, 424.

24. REPORT OF THE PRESIDENT, GIRARD COLLEGE, 1945, at 63.

25. BOARD OF DIRECTORS OF CITY TRUSTS, ANNUAL REPORT, FOR 1955, at 9; for 1958, at 5.

26. REPORT OF TRUSTEES OF ESTATE OF STEPHEN GIRARD DECEASED, The Evening Bulletin, Philadelphia, January 24, 1964.

The per capita cost of operating Girard College has varied widely. In the decade ending in 1860 the ordinary College expenditures per pupil, averaged for the decade, were \$235. In the decade ending in 1910, the average per capita expenditure was \$330; for the decade ending in 1930, \$1023; for the decade ending in 1940, \$968.²⁷ By 1945, the total per capita cost was \$1254.²⁸ This increased almost one-third, to \$1647 in 1950; to \$1879 in 1955; to \$2377 in 1958,²⁹ the last full year for which the Board of Directors of City Trusts administered the affairs of Girard College.³⁰

The total ordinary expenditures for the support of Girard College have remained relatively stable in the years since 1930. Stated in rounded figures in millions of dollars, the expenditures in 1930 were

27. CUNNINGHAM, *op. cit. supra* note 18, at 428-30.

28. REPORT OF PRESIDENT, *op. cit. supra* note 24, at 63.

29. BOARD OF DIRECTORS OF CITY TRUSTS, *op. cit. supra* note 25, for 1950, at 8; for 1955, at 9; for 1958, at 5.

30. After ninety years of service as trustee of the Estate of Stephen Girard and active directors of the affairs of Girard College, the Board of Directors of City Trusts was discharged as trustee of the Estate, by decree of the Orphans' Court of Philadelphia County, dated March 25, 1957). The Board was replaced by the Trustees of the Estate of Stephen Girard Deceased, a body of thirteen business and professional men named as the new trustees for Girard College by the Orphans' Court, October 4, 1957. The need for this action arose from the decision of the United States Supreme Court in 1957, *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957), reversing *per curiam* Girard Will Case, 386 Pa. 548, 127 A.2d 287 (1956), and holding that the Board of Directors of City Trusts, an agency of the State of Pennsylvania, was forbidden by the fourteenth amendment to discriminate against Negroes in refusing them admittance to Girard College. The subsequent opinion of the state supreme court held that Girard's primary purpose was to found a school for "poor male white orphan children," that naming the City of Philadelphia trustee was secondary, and directed removal of the Board as trustees of the Estate and College and substitution of private trustees who would not be agents of the State and thus not under the interdiction of the fourteenth amendment in carrying out Girard's purpose. *Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958), appeal dismissed *sub nom.* *Pennsylvania v. Board of Directors of City Trusts*, 357 U.S. 570 (1958). The practical effect of this action was to deny admission to Girard College to two Negro orphan boys who had appealed the decision of the Board of Directors of City Trusts in February 1954, excluding them because of the racial stipulation of the Will.

The proposal contained in this Article may be applied whether or not the restriction in Girard's will to "white" beneficiaries is honored; it thus seems inappropriate for present purposes to discuss in any detail whether a court should apply *cy pres* to strike the racial condition. The Pennsylvania Supreme Court has twice refused to do so. See *Girard College Trusteeship, supra*; *Girard Will case, supra*.

There is a growing body of authority that *cy pres* may, in certain circumstances, be used to strike such restrictions. See *Trustees of Pittsfield Academy v. Attorney General*, 95 N.H. 51, 57 A.2d 161 (1948) (struck requirement that trustees of a fund be Congregationalists); *Howard Sav. Institution v. Peep*, 34 N.J. 494, 170 A.2d 39 (1961) (struck requirement that scholarship beneficiaries be Protestant Gentiles); *In re Estate of Hawley*, 32 Misc. 2d 624, 223 N.Y.S.2d 803 (Surr. Ct. 1961) (struck requirement that prize recipients be Episcopalian and sons of native-born American citizens). See also *La Fond v. City of Detroit*, 357 Mich. 362, 98 N.W.2d 530 (1959) (equally divided court) (refused to strike condition that playground be for white children only; held whole bequest void as against public policy).

\$1.8; in 1940 they were \$1.7; in 1950 they reached \$2.2; dropped in 1955 to \$2.0; and climbed to \$2.2 in 1958.³¹

Confronted with a relatively fixed income and with per capita costs that more than doubled within the three decades, the Board of Directors of City Trusts was forced to curtail the scope of the services at Girard College. The number of boys accommodated by the College dropped 1000 in 23 years. Other disadvantages were noted by the Board from year to year in the Annual Reports.

"It is regrettable to note the inroads made on the work of the College by inflation," the Board reported in 1950, drawing attention to the economy move of reducing the College administrative staff by consolidating the Office of Admission and Student Relations with the Department of Student Personnel. The following year they were again concerned with the problem of adequate staffing, stating: "The difficulty of filling all positions, both professional and non-professional, with satisfactory persons has greatly increased." In 1953, "the Director of Secondary Education, the Director of Elementary Education, and the Head Dietitian of the College resigned during the year to accept more advantageous positions outside Philadelphia."³²

The effect of these personnel and budget problems was reflected in the quality of the offering to the students remaining at the College. Not only were the numbers greatly reduced, but the "decline in the purchasing power of available income has brought curtailments of services, staff, and curriculum at Girard College."

Instructional groups are larger in size and fewer in number; the third curriculum for the least able boys has been eliminated; . . . the Faculty is reduced in size; the Camp is discontinued; . . . services in areas such as music, corrective gymnastics, vocational education, art, library experience, the social program, and guidance have been reduced. [Two years later], student activities were further curtailed, though the academic offerings suffered little disturbance.³³

The House Group buildings, completed between 1929 and 1931 as a residence for approximately 180 of the youngest boys, have been closed to student use. Two of the older residence halls, Good Friends and Lafayette, which at one time could accommodate more than 600 boys,³⁴ have been demolished.

31. BOARD OF DIRECTORS OF CITY TRUSTS, *op. cit. supra* note 25, for 1930, at 7; for 1940, at 8-9; for 1950, at 8; for 1955, at 9; for 1958, at 5.

32. *Id.* for 1950, at 9; for 1951, at 9; for 1950, at 7.

33. *Id.* for 1952, at 7; for 1954, at 7.

34. HASKELL, GUIDE TO GIRARD COLLEGE, 5-6 (1948).

D. *The Contemporary Problem*

The Supreme Court of Pennsylvania has stated Girard's dominant purpose by quoting his will:

I am *particularly desirous* to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of public funds.³⁵

For many decades his school furnished a better opportunity than was available to many of the boys in public schools. In recent years is it apparent that many public schools have offered educational opportunities equivalent to those provided at Girard College. The public school movement, which started officially in Pennsylvania five years after Girard's death, has gained a momentum which now furnishes to wealthy and poor alike the advantages of which Girard dreamed.

The present day availability of payments from Social Security to the mothers of orphaned boys has minimized to some degree the economic difficulty of maintaining the fatherless family in the mother's home. The need for a privately supported school and home for poor boys has thus been affected by an unforeseen economic factor.

The inflation that has followed World War II has forced Girard College to offer a greatly reduced number of boys significantly curtailed services. The number of students profiting by Girard's legacy dropped in 1963 below that of any year since 1877.³⁶ No longer can Girard College select students from a waiting list of applicants; presently the College is engaged in a constant search for an adequate number of boys.

Today, a ten million dollar plant backed by a seventy-eight million dollar residuary fund,³⁷ providing over two million dollars of annual income may not be best serving the community which Girard intended to serve or honoring Girard to the extent that might readily be possible. The need for a vast fortune devoted to a private school and home for orphaned boys may have disappeared under the educational and economic changes of today's world.

Yet the need to keep Stephen Girard's dream alive is greater today than ever before. His purpose was to serve youth and, through them, the community. The new needs of the closing decades of the twentieth century can continue to be well served by the legacy of

35. Girard Will Case, 386 Pa. 548, 568, 127 A.2d 287, 296 (1956), *rev'd per curiam sub nom.* Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957). (Emphasis by the court.)

36. CUNNINGHAM, *op. cit. supra* note 18, at 422.

37. REPORT OF TRUSTEES, *op. cit. supra* note 26.

Girard, with no violence to his fundamental purpose and with an adjustment in thinking which both his heirs and the courts should find to be logical and legal, a boon to society and a continuing credit to the memory of Stephen Girard.

III.

THE PROPOSAL

Postponing consideration of the legal problems of change, it is appropriate here to present a suggested solution.

In order to continue the basic Girard purpose while adapting to new patterns of need, the income from the estate of Stephen Girard might more effectively be used to provide education beyond the secondary school years to high school graduates who would not be able to afford further study without financial aid. Scholarships and loans could be provided for two years of technical training, three years of nursing study, four years of liberal arts college, a fifth year for a master's degree in education, a sixth and seventh year for the doctor of philosophy and the lawyer, and perhaps an eighth for the medical doctor. Amounts granted would depend upon verified need. Continuation of grants should depend upon demonstrated worth. Students might be named Stephen Girard Scholars or Stephen Girard Fellows, while the term Girard College Student could be reserved exclusively for those who have received education at the present Girard Collge.

The main building at Girard College could remain as a museum and an alumni center.³⁸ It might house administrative offices. Top administrators could continue to occupy the residences. The library might be developed into a research center for the Girard papers. One or two of the present dormitories might be retained to accommodate visiting alumni and possibly students coming from all parts of the country with their mothers to be interviewed. The remainder of the

38. It is important legally that the most significant of the Girard buildings be maintained even if the fund is used for scholarship purposes. Maintenance of the buildings is designed to honor Girard's original intent so far as possible. As the Court of Appeals of New York stated,

Naming a charitable fund after the . . . [testator's] family on the records of whatever institution might administer this fund is of a different order of magnitude from causing a building to bear his name, as the will directs. . . . A building erected and maintained . . . was plainly important in his calculations, in order that its light (like his own) would, in Biblical words, so shine before men so that they might see their good works. These desires are deeply ingrained in human nature and are effective motivating forces in donations of this character. Cy pres is not designed to nullify them, where, as here, it is practicable to encompass them in the decree.

In re Scott's Will, 8 N.Y.2d 419, 427-28, 171 N.E.2d 326, 330, 208 N.Y.S.2d 948, 990 (1960). Compare *Murr v. Youse*, 52 Ohio L. Abs. 321, 80 N.E.2d 788 (Probate Ct. 1946).

buildings and grounds could be leased to the City for appropriate community educational and recreational purposes.

The administrators would be charged with the responsibility of contracting school guidance personnel and community welfare agencies; for determining proper criteria for the selection of award recipients; for interviewing and selecting; for the supervision of scholarship holders; for the management of loan funds. There would probably be a resident staff, community representatives, and field workers.

The estate could continue in the hands of the present board of trustees. Upon the court's authorization of the new purpose the annual income could rapidly be diverted from the maintenance of the present Girard College and its program to the implementation of the new Stephen Girard Scholarship Foundation.

Assuming that at least two million dollars of the current income might be available for scholarship purposes, one thousand scholars could be granted \$2000 annually. This could mean that two hundred students could be added each year and given the opportunity to study an average of five full years beyond high school.

Stephen Girard's ideal of providing a "better education" could now be extended to the next logical situation. Girard's purpose would be served; individual young students would be benefitted; the entire community would profit.

Stephen Girard was a man of heart. That is reflected in his purpose. He was a realist and a man of action. He would doubtless have readily sanctioned a practical change of pattern to meet new conditions, within the frame of his original purpose. Logic would support action by the trustees of Girard's legacy were they to seek changes that would perpetuate his general purpose, while adapting to the contemporary pressures of an evolving social, economic, and educational world. The next question is whether the courts would be able to support this logic and authorize the proposed changes.

IV.

LEGAL CONSIDERATIONS

A. *The Doctrine of Cy Pres*

Courts have long reserved to themselves authority to alter charitable trusts when the testator's directions are or become incompatible with the environment of the trust. This authority is necessary because charitable trusts are exempt from the Rule Against Perpetuities,³⁹ a

39. *City of Philadelphia v. Heirs of Girard*, 54 Pa. 9, 26 (1863); *Scott, SELECTED ESSAYS ON THE LAW OF TRUSTS* 14 (1940).

testator may therefore direct that such a trust last forever. Like Stephen Girard, he may leave detailed instructions, while neglecting or refusing to grant his trustees permission to alter the trust if circumstances require.⁴⁰ The reason the Rule Against Perpetuities does not apply to charities is that charities presumably promote the public interest.⁴¹

The authority to alter charitable trusts is articulated in the principle of cy pres, defined in the Restatement as follows:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.⁴²

40. As Professor Scott put it, "One who happens to acquire property during the short span of his lifetime may by giving it for charitable purposes control its disposition throughout the ages." Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1 (1920).

41. SCOTT, *op. cit. supra* note 39, at 14. The Restatement even defines charitable purpose as one whose "accomplishment is of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity." RESTATEMENT (SECOND), TRUSTS § 368, comment b.

42. 2 *Id.* at 399.

This modern doctrine of judicial cy pres should not be confused with the ancient doctrine of prerogative cy pres, exercised by the executive rather than the courts, which existed in Roman and early English law. This doctrine was generally applied to gifts to illegal charities or gifts to charity in general. The executive had little regard for the testator's intention, and substituted different charitable purposes to gain the most "social benefit" from the gifts. See Comment, *A Revaluation of Cy Pres*, 49 YALE L.J. 303, 304, 309 (1939). See generally Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 377-80 (1953). Early hostility toward the cy pres doctrine by American courts was directed toward prerogative cy pres, but occasionally extended to the entire doctrine. *Ibid.* This hostility has passed. Fisch, *Judicial Attitude Towards the Application of the Cy Pres Doctrine*, 25 TEMP. L.Q. 177, 184 (1951).

Nor should the cy pres doctrine be confused with the modern principle of deviation, which permits a trustee to alter administrative provisions in private and charitable trusts if "compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust." RESTATEMENT (SECOND), TRUSTS § 381; see *id.* § 167. See Generally 2 SCOTT, TRUSTS § 167 (1939). Fisch, *Changing Concepts and Cy Pres.*, 44 CORN. L.Q. 382, 389 (1959).

Consonant with the principle of deviation, the Pennsylvania statute permitting a trustee to sell land with court approval, regardless of the provisions of the trust, "whenever the court shall find that such sale . . . is for the best interests of the trust," PA. STAT. ANN. tit. 20, § 320.963 (1950), has been applied to the Girard estate. *Girard Estate*, 73 Pa. D. & C. 42 (O.C. Philadelphia County 1950). The Supreme Court has stated that, although Girard's will forbids the sale of realty, "this was purely an administrative matter . . . involving no change or violation whatever of any of the substantive provisions or objects of the trust. . . ." *Girard Will Case*, 386 Pa. 548, 563, 127 A.2d 287, 294 (1956), *rev'd per curiam on other grounds sub nom. Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957).

Justice Musmanno took a different view, as against the majority's assertion that despite various "onslaughts" on the Girard will, the Girard charity was left "fixed, firm and immovable as a rock." It has been shown, however, that the granitic stability of the will did not prevent a softening of its provisions

Cy pres serves a second function as well: it prevents the disappointed heirs of the charitably-minded testator from claiming the fund if it cannot be applied exactly as the testator wished, as long as he did not provide for a gift over to the heirs in that event, and provided he had a "general" intent to benefit charity beyond his specific scheme.⁴³

Commentators, led by Professor Scott, have urged that cy pres be applied to permit desirable changes in charitable trusts so that society will receive the greatest benefit from the trust within the general framework of the testator's charitable purposes.⁴⁴

The Rule against Perpetuities is inapplicable to charities only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity which by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity which shall be forever exempt from modification.⁴⁵

The courts thus far, however, have placed primary emphasis on the directions of the testator.⁴⁶ Although commentators have observed a trend toward greater emphasis on the public welfare, and a loosening of "the clasp of the dead hand,"⁴⁷ the courts, along with the Restatement, require a showing that it is or has become "impossible or impracticable or illegal to carry out the particular purpose" before they will apply cy pres.⁴⁸ Even within these criteria, however, there has been "a tendency in the more recent cases to permit a cy pres application even though it is difficult to say that it is impracticable to carry

to allow the sale of real estate, it did not hamper the augmenting from 5 to 15 years of leases, it did not interfere with the humanitarian enlargement of the term *orphan* to include children with a mother living.

Id. at 638, 127 A.2d at 329 (dissenting opinion).

43. See Fisch, *supra* note 42, at 386-88.

The Girard trust has survived five legal attacks by the heirs of Stephen Girard. Girard Will Case, 386 Pa. 548, 553-55, 127 A.2d 287, 289-290 (1956), *rev'd per curiam sub nom.* Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

44. See 4 SCOTT, TRUSTS § 399.4 at 2852 (2d ed. 1956); Fisch, *Changing Concepts and Cy Pres*, 44 CORN. L.Q. 382, 388 (1959); Scott, *supra* note 40, at 14, 17.

45. SCOTT, *op. cit. supra* note 39, at 14.

46. They have not done so in England, apparently, at least as to educational trusts. "Emphasis is placed on the welfare of the student and of the community rather than on the precise directions of the donor." 2 RESTATEMENT (SECOND), TRUSTS § 399, comment *q*, at 307.

47. Fisch, *Judicial Attitude Towards the Application of the Cy Pres Doctrine*, 25 TEMP. L.Q. 177, 185 (1951); see Comment, *A Reevaluation of Cy Pres*, 49 YALE L.J. 303, 322 (1939).

48. See text accompanying note 42 *supra*.

out the specific purpose, but where it would be so unwise to do so that the testator would presumably not have desired to insist on it."⁴⁹

B. *The Applicability of Cy Pres to Girard College*

Pennsylvania courts have statutory jurisdiction to apply cy pres to charitable trusts:

No disposition of property heretofore or hereafter made for any religious, charitable, literary or scientific use shall fail . . . by reason of the objects being indefinite, uncertain or ceasing . . . but it shall be the duty of any orphans' court, or court having equity jurisdiction in the proper county, . . . by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity. . . .⁵⁰

The effect of this statute and other ancient "conflicting and inconsistent"⁵¹ enactments is that Pennsylvania courts apply the cy pres doctrine as enunciated in the Restatement.⁵²

Whether or not the cy pres doctrine may be applied to a charity such as Girard College depends upon three major considerations: whether the donor, settlor, or testator provided for an alternative gift, or "gift over," in the event that his charitable purpose became obsolete, whether he had a general intent to benefit charity in case his particular purpose failed,⁵³ and, finally, whether his particular purpose in fact has become "impossible or impractical" of fulfillment.

The Restatement and the Pennsylvania view is that cy pres may not be applied to a trust if there is a gift over or termination clause providing an alternative disposition if the trust purpose fails.⁵⁴ How-

49. 4 SCOTT, TRUSTS § 399.4, at 2854 (2d ed. 1956). (Footnote omitted.) See Fisch, *supra* note 44 at 383.

50. PA. STAT. ANN. tit. 10, § 13 (1939).

The Estates Act of 1947 substituted a new statutory basis for cy pres, PA. STAT. ANN. tit. 20, § 301.10 (1950), but this statute applies only to conveyances made on or after January 1, 1948, and provides that preexisting law still applies to prior conveyances, such as the will of Stephen Girard. See PA. STAT. ANN. tit. 20, § 301.21 (1950). The 1947 enactment is notable because it is the first state statute to permit the application of cy pres without a judicial finding that the testator had a general charitable intent. See Fisch, *supra* note 44, at 383. See also Note, *Cy Pres in Pennsylvania*, 54 DICK. L. REV. 77, 86 (1949).

51. Commission's Comment to PA. STAT. ANN. tit. 20, § 301.10 (1950). See generally Toner's Estate, 260 Pa. 49, 56-57, 103 Atl. 541, 543-44 (1918); Note, *Cy Pres in Pennsylvania*, 54 DICK. L. REV. 77-81 (1949).

52. The Restatement has "perhaps the best enunciation of the doctrine' of cy pres. . . ." Women's Homoeopathic Hospital Case, 393 Pa. 313, 316-17, 142 A.2d 292, 294 (1958), quoting Wilkey's Estate, 337 Pa. 129, 133, 10 A.2d 425, 427 (1940).

53. The requirement of a general intent is not applicable in Pennsylvania to charitable trusts created on or after January 1, 1948. See note 50 *supra*.

54. Pruner Estate, 400 Pa. 629, 162 A.2d 626 (1960); RESTATEMENT (SECOND), TRUSTS § 399, comment c.

ever, *cy pres* may apply to a charitable gift designated as "forever," or for "no other purpose," or "upon condition."⁵⁵ Stephen Girard provided that if the city of Philadelphia "shall knowingly and wilfully" violate his will, the income and accumulations of the residue were to go first to the Commonwealth of Pennsylvania for purposes of internal navigation. But rents and profits from the realty were to go to the college forever. This provision should not be viewed as a gift over;⁵⁶ a carefully planned and judicially sanctioned application of the *cy pres* doctrine does not seem a "wilful" disregard of Girard's intent.

The absence or presence of a gift over is really part of the larger question, whether the testator had a general charitable intent. Since the basis of *cy pres* is a determination of what "the settlor would have wanted to happen if he was aware of the contingency which has made the exact effectuation of his expressed intent impossible,"⁵⁷ it is usually thought essential to the application of *cy pres* to find that the testator intended to benefit charity even if his particular project were not feasible.

Girard provided that the income from the residue of his estate should be applied first to the College, next to the city of Philadelphia to improve its police force, and finally to "improve . . . the general appearance of the City. . . ." The proposal is not an abandonment of the first purpose; there is thus no occasion to invoke the latter two provisions. To abandon Girard's educational purpose would be a perversion of his dominant intent.

Although Girard provided for alternate bequests of income to the city of Philadelphia, a court might well find that Girard manifested a general intention to benefit education by his creation of Girard College.⁵⁸ Invocation of *cy pres* to continue to benefit education would thus honor his basic intent more closely than would an award of the income to the city of Philadelphia for its police force and general appearance.

In other contexts, the courts have referred to Girard College as the "primary object" of Girard's will.⁵⁹ This provision could be viewed

55. *Ibid.*

56. See Note, *The Girard Will Case — A Charitable Trust Faces the Fourteenth Amendment*, 18 U. PRR. L. REV. 620, 631 (1957).

57. Howard Sav. Institution v. Peep, 34 N.J. 494, 502, 170 A.2d 39, 43 (1961).

58. In practice, most courts have found little difficulty in finding a general charitable intent, straining where necessary to do so. See 4 SCOTT, TRUSTS § 399, at 2824 (2d ed. 1956); Fisch, *supra* note 44, at 385. *But see, e.g.,* Murr v. Youse, 52 Ohio L. Abs. 321, 80 N.E.2d 788 (Probate Ct. 1946). Moreover, courts more easily find a general charitable intention when a trust subsequently fails in its purpose than when it fails at the outset. RESTATEMENT (SECOND), TRUSTS § 399, comment i; 4 SCOTT, TRUSTS § 399.3, at 2845 (2d ed. 1956).

59. City of Philadelphia v. Heirs of Girard, 45 Pa. 9, 25 (1863); Girard Estate, 73 Pa. D. & C. 42, 50 (O.C. Philadelphia County 1950).

as establishing Girard College as the sole purpose of Stephen Girard; such an interpretation would negate the application of *cy pres*⁶⁰ and require an award of the fund to Philadelphia. It is difficult to believe, however, that Stephen Girard would have wanted his public-spirited conception to fail entirely upon the superannuation of Girard College. His intentions might be structured in order of importance as follows: (1) the education of poor, white, male orphans, (2) in an institution bearing Girard's name, (3) that the boys be between the ages of 6 and 18, and (4) that they receive a better education than public funds would provide.⁶¹ Items (2) and (3) might well be viewed as his primary intention, and (1) and (4) his general intent. The failure of items (2) and (3), under this view, permits a court to apply the *cy pres* doctrine to carry out items (1) and (4) in the most effective manner.

The final prerequisite for the application of *cy pres* is the failure of the particular purpose. Common examples of such a failure occur when the testator bequeaths funds that are insufficient to carry out his stated purpose,⁶² when a charity which is the beneficiary of a trust subsequently ceases to exist,⁶³ or when there is a shortage of applicants or recipients for a charitable fund.⁶⁴ In the context of Girard College, the Supreme Court of Pennsylvania has made clear in refusing to apply *cy pres* to Girard College to admit otherwise qualified Negroes, that a shortage of students would be a failure of Girard's primary purpose:

The trust can be enforced according to its literal terms as it has been for well over a hundred years. To continue to execute it in compliance with the exact directions of Girard's will has not become either impossible or impractical. . . . There is no shortage

60. See 4 SCOTT, TRUSTS § 399.2, at 2835 (2d ed. 1935).

61. Cf. McKee Estate, 83 Pa. D. & C. 492, 507 (O.C. Philadelphia County 1953), *aff'd per curiam*, 378 Pa. 607, 108 A.2d 214 (1954); text accompanying notes 77-80 *infra*, in which a similar classification was attempted.

62. See, e.g., Trustees of Pittsfield Academy v. Attorney General, 95 N.H. 51, 57 A.2d 161 (1948); Keeler's Estate, 41 Pa. D. & C. 182 (O.C. Montgomery County 1941).

63. See, e.g., Dobbins Estate, 74 Pa. D. & C. 106 (O.C. Philadelphia County 1951); Pentz's Estate 42 Pa. D. & C. 296 (O.C. Franklin County 1941).

64. See Loats Female Orphan Asylum v. Essom, 220 Md. 11, 150 A.2d 742 (1959) (orphanage had difficulty finding children; *cy pres* applied); Pruner Estate, 400 Pa. 629, 162 A.2d 626 (1960) (same, except *cy pres* not applied because of gift over); Lippincott Estate, 17 Pa. D. & C.2d 80 (O.C. Philadelphia County 1959) (no applicants for fund to aid the blind; *cy pres* applied); Ellis' Estate, 8 Pa. D. & C. 775 (O.C. Philadelphia County 1910) (school for fatherless girls had decreasing enrollment; *cy pres* applied). Compare Vogan Estate, 75 Pa. D. & C. 531 (O.C. Lancaster County 1951), with Towne Estate, 75 Pa. D. & C. 215 (O.C. Montgomery County 1950).

of poor white male orphans between the ages of six and ten; on the contrary there are more qualified applicants than can be accommodated.⁶⁵

The last quoted sentence is no longer true of Girard College; the school has a shortage of applicants. In part this shortage has resulted from improved free, public education, and from the availability of social security funds. The cases have recognized that both these factors—the adequacy of existing institutions or plans at the time a trust is founded⁶⁶ or subsequently,⁶⁷ and the increase in governmental welfare and educational expenditures⁶⁸ may cause the purposes of a trust to fail.

It seems clear, barring a dramatic influx of students to Girard College, that the present trend of decreasing enrollment will continue and the trustees of Stephen Girard will in time find the College impractical or impossible to operate. It does not seem too early to plan an alternate scheme which will best honor the general charitable intent of Stephen Girard to provide education for the poor.

It is arguable that even today Girard College is not fulfilling the dictum of Girard to provide a *better* education than the public schools provide. In such a case "the doctrine of *cy pres* is applicable even though it is possible to carry out the particular purpose of the settlor, if to carry it out would fail to accomplish the general charitable intention of the settlor."⁶⁹ The particular purpose is then considered "impracticable" of fulfillment. "This is particularly likely to be the case where there has been a change of circumstances after the creation of the trust."⁷⁰

Authority as to how *cy pres* should be applied to a trust is of relatively little value because the peculiar circumstances surrounding

65. Girard Will Case, 386 Pa. 548, 569-70, 127 A.2d 287, 297 (1956), *rev'd per curiam sub nom.* Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957). The trial court had stated: "there is no shortage of 'poor white male orphans'. In fact, there are more qualified applicants than can be accepted and accommodated. There is, therefore, no present failure of the purpose of the trust; a fortiori, there is no ground for the application of the *cy pres* doctrine." Girard Estate, 4 Pa. D. & C.2d 671, 713 (O.C. Philadelphia County 1955) (*dictum*).

66. See *Town of Milton v. Attorney General*, 314 Mass. 234, 49 N.E.2d 909 (1943); *School Dist. No. 70 v. Wood*, 144 Neb. 241, 13 N.W.2d 153 (1944); *In re Neher's Will*, 279 N.Y. 370, 18 N.E.2d 625 (1939).

67. See *Ellis' Estate*, 8 Pa. D. & C. 775 (O.C. Philadelphia County 1910).

68. See *Fenske v. Coddington*, 57 So. 2d 452 (Fla. 1952); *Lippincott Estate*, 17 Pa. D. & C.2d 80 (O.C. Philadelphia County 1959). *But see Bennet Estate*, 18 Pa. D. & C.2d 595, 609-10 (O.C. Luzerne County 1959) (*dictum*).

69. RESTATEMENT (SECOND), TRUSTS § 399, comment *q*.

70. *Ibid*; see 4 SCOTT, TRUSTS § 399.4, at 2849 (2d ed. 1956). "The result of a too strict adherence to the words of the testator often means the defeat rather than the accomplishment of his ultimate purpose. He intends to make the property useful to mankind, and to render it useless is to defeat his intention." *Id.* at 2853.

each charity largely determine the result. This is particularly true with as unique a charity as Girard College. Courts endeavor to find other ways of aiding the same category of beneficiaries following as nearly as practicable the plan of the settlor or donor.⁷¹ One case awarded the proceeds of the sale of land that had become useless for purposes of an independent school to a fund to maintain the public high school.⁷² Another case applied the assets of a superannuated school for fatherless girls under thirteen years of age toward maintaining such girls at home.⁷³

To an increasing extent . . . the courts have recognized that in choosing among possible schemes 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. This is particularly true where the designated purpose becomes impossible or impracticable of accomplishment at some time subsequent to the creation of the trust. *The court seeks to frame a scheme which on the whole is best suited to accomplish the general charitable purpose of the donor.*⁷⁴

Much depends upon the plan, if any, of the trustees,⁷⁵ and the views of the trial court.⁷⁶

The present plan does involve a change in the class of beneficiaries; instead of benefitting poor orphans of elementary and secondary school age, it would benefit those who would benefit from education beyond the high school years. It is in this area that the needs of the individual as well as of society currently seem to be the greatest. But the proposed change in the class of beneficiaries need not involve a change in the identity of the beneficiaries; the same students who might have attended Girard College would be eligible for scholarship awards.

Except for that aspect, there is authority in Pennsylvania for a plan such as the one here presented. In *McKee Estate*,⁷⁷ the court

71. Compare *Board of Educ. v. City of Rockford*, 372 Ill. 442, 24 N.E.2d 366 (1939); *Loats Female Orphan Asylum v. Essom*, 220 Md. 11, 150 A.2d 742 (1959); *Town of Milton v. Attorney General*, 314 Mass. 234, 49 N.E.2d 909 (1943); *School Dist. No. 70 v. Wood*, 144 Neb. 241, 13 N.W.2d 153, (1944); *Lippincott Estate*, 17 Pa. D. & C.2d 80 (O.C. Philadelphia County 1959).

72. *Trustees of Pittsfield Academy v. Attorney General*, 95 N.H. 51, 57 A.2d 161 (1948).

73. *Ellis' Estate*, 8 Pa. D. & C. 775 (O.C. Philadelphia County 1910).

74. RESTATEMENT (SECOND), TRUSTS § 399, comment b. (Emphasis added.)

75. See *id.*, comment f. Normally the trustees apply to the court for a cy pres award. 4 *Scorr*, TRUSTS § 399, at 2827 (2d ed. 1956). However, "the doctrine of cy pres may be applied without the consent of the trustees." The Attorney General or "other persons who have an interest under the trust" may apply for a cy pres award. RESTATEMENT (SECOND), TRUSTS § 399, comment f.

76. See *Women's Homoeopathic Hospital Case*, 393 Pa. 313, 316, 142 A.2d 292, 293 (1958); *Kensington Hospital for Women Case*, 358 Pa. 458, 463, 58 A.2d 154, 156 (1948).

77. 83 Pa. D. & C. 492 (O.C. Philadelphia County 1953), *aff'd per curiam*, 378 Pa. 607, 108 A.2d 214 (1954).

considered a trust fund of \$1,000,000, bequeathed to establish and maintain a naval school for "poor colored and white orphan boys." Obviously modeled on Girard's will, McKee's will forbade the sale of real estate, and contained detailed directions concerning the operation of the school. The will stated several times that the estate shall be devoted to "no other purpose," and paraphrased from Girard's will the sentence containing the words "I am particularly desirous to provide . . . a better education . . . than . . . [such poor white and colored orphans] usually receive from the application of public funds."⁷⁸ A cy pres award was necessary because the fund was inadequate for the purposes set forth in the will. The court listed McKee's purposes in order of importance. "(1) The education of poor white and colored orphan boys; (2) from the ages of 12 to 18 years; (3) that they live together; (4) that the education be nautical in character . . . ; (5) that the college bearing McKee's name be established."⁷⁹ Various institutions claimed the fund and were rejected for various reasons — they were located in other states, were colleges, had co-education, or had insufficient racial balance or naval training. The court held that a scholarship committee of five to ten persons should administer the fund, to select

by competitive examination or otherwise an equal number of poor white and Negro orphan boys, preferably of the City of Philadelphia, mainly those seeking naval training to whom scholarships or scholarship aid shall be awarded from the income of the estate. . . . The committee shall specify the amount and kinds of aid the recipients should receive and the institutions which they should attend and such other matters as are necessary. . . .⁸⁰

The court made this cy pres award for five years only, holding that the purpose of the trust had not become impossible of fulfillment because (unlike Girard's trust) the trust was empowered to receive other funds, and if sufficient funds were given by other donors the school could be established.

McKee Estate, affirmed *per curiam* by the Supreme Court of Pennsylvania, clearly establishes the propriety of using for scholarship purposes the income of a trust to establish a school which is or has become impractical or impossible to operate.

78. See text accompanying note 35 *supra*.

79. 83 Pa. D. & C. at 507.

80. *Id.* at 517.

V.

CONCLUSION

Economic and social forces of the twentieth century have begun to render obsolete Stephen Girard's nineteenth century conception of a private institution to provide free education for orphan boys between six and eighteen years of age. Society's need for educational resources has not diminished, however; it has shifted to the post high-school area. The legal doctrine of *cy pres* might well permit a reorientation of Girard's historic scheme to provide scholarships for poor orphans to obtain various types of education beyond the high school years. This alteration seems most likely to honor Girard's ultimate intention of providing them "a better education . . . then they usually receive from the application of public funds."