



Volume 18 | Issue 1

Article 5

2011

America's Cup in America's Court: Golden Gate Yacht Club v. Societe Nautique de Geneve

Joseph F. Dorfler

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>

 Part of the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Joseph F. Dorfler, *America's Cup in America's Court: Golden Gate Yacht Club v. Societe Nautique de Geneve*, 18 Jeffrey S. Moorad Sports L.J. 267 (2011).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol18/iss1/5>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

Casenotes

AMERICA'S CUP IN AMERICA'S COURT: *GOLDEN GATE YACHT CLUB V. SOCIÉTÉ NAUTIQUE DE GENÈVE*¹

I. INTRODUCTION: "THE OLDEST CONTINUOUS TROPHY IN SPORTS"²

One-hundred and thirty-seven ounces of solid silver, standing over two feet tall, this "One Hundred Guinea Cup" created under the authorization of Queen Victoria in 1848 is physically what is at stake at every America's Cup regatta.³ However, it is the dignity, honor, and national pride that attach to the victor of this cherished objet d'art that have been the desire of the yacht racing community since its creation.⁴ Unfortunately, this desire often turns to envy and has driven some to abandon concepts of sportsmanship and operate by "greed, commercialism and zealotry."⁵ When these principles clash "the outcome of the case [will be] dictated by elemental legal principles."⁶

1. 907 N.E.2d 276 (N.Y. 2009).

2. See *America's Cup: History*, CBS SPORTS, <http://www.cbssports.com/sailing/americascup/history> (last visited Oct. 8, 2010) (noting that America's Cup is "the oldest continuous trophy in sports").

3. See RANULF RAYNER, *THE STORY OF THE AMERICA'S CUP: 1851-1995* 34 (Warwick Publishers 1996) (describing creation and characteristics of actual America's Cup). See generally *Thirty-Third America's Cup Match: Notice of Race* ¶ 15 available at http://www.alinghi.com/multimedia/docs/2009/11/091110_33rd_Americas_Cup_Notice_of_Race.pdf (posting official prize for winning Thirty-Third America's Cup).

4. See Hamish Ross, *America's Cup History*, ALINGHI.COM, http://www.alinghi.com/en/racing/americas_cup/facts/history.php?idIndex=0&idContent=8699 (last visited Oct. 14, 2010) (chronicling history of America's Cup challenges). The victor of the Thirty-Third America's Cup described winning as "a fabulous experience. I am very proud to be part of this team and I am exceptionally proud to bring the America's Cup back to the United States of America for the first time in a very long time." Larry Ellison, <http://33rd.americascup.com/en/actualite/news/they-saidquotes-from-bmw-oracle-racing-and-alinghi-19-2913> (last visited Oct. 14, 2010).

5. See *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 107 (N.Y. 1990) (Hancock, J., dissenting) (citations omitted) (discussing how commercialism behind America's Cup has led some to perceive sporting regatta as business).

6. *Id.* at 96 (Wachtler, C.J., concurring) (noting how case at bar, while comparing sportsmanship and business of America's Cup, will be decided by legal principles that they raise). For a further discussion on how *Golden Gate Yacht Club* was settled based on elemental legal principles, see *infra* notes 87-108 and accompanying text.

Indeed, the thirty-third challenge for the Cup found more action in New York courtrooms than on the water.⁷ Wealthy contributors, state-of-the-art ships and large egos created a predicament that had to be sorted out before the regatta could get underway.⁸ This battle manifested itself in front of the New York Court of Appeals in the case *Golden Gate Yacht Club v. Société Nautique De Genève*.⁹

The issue surrounding this case dealt with the interpretation of the Deed of Gift for the America's Cup ("Deed of Gift"), which granted the America's Cup as a "perpetual Challenge Cup for friendly competition."¹⁰ Section II of this article pertains to the history of the America's Cup and the document that established it, the Deed of Gift.¹¹ Section III outlines some of the legal instrumentalities that are applicable to the case.¹² Section IV discusses the court's application of these instrumentalities to the case at bar.¹³ Section V analyzes the court's logic in its application of the legal doctrines or lack thereof.¹⁴ Finally, section VI focuses upon the consequences that the court's decision will have on the America's Cup and similar legal documents in the future.¹⁵

7. See Posting of Alexander Smith to REUTERS COMMENTARIES BLOG, <http://blogs.reuters.com/commentaries/2009/08/05/time-to-get-americas-cup-back-on-the-water/> (Aug 5, 2009 13:22 EST) (commenting on extensive legal battles over thirty-third America's Cup and how legal battles cheapen regatta).

8. See *id.* (complaining that wealthy yacht owners are preventing Thirty-Third America's Cup by continuously filing legal motions). See also Cory Friedman, *A Perpetual Cup for Not So Friendly Competition Between Lawyers: Part 52 – Catching the Ripe Fruit*, SCUTTLEBUTT NEWS, Dec 15, 2009, <http://www.sailingscuttlebutt.com/news/07/cf/#p52> (stating that with latest legal battle between Golden Gate Yacht Club and Société Nautique De Genève being over the clubs can sail Thirty-Third America's Cup); *Golden Gate Yacht Club v. Société Nautique De Genève*, 907 N.E.2d 276 (N.Y. 2009) (representing last legal hurdle before Thirty-Third America's Cup).

9. See generally *Golden Gate Yacht Club*, 907 N.E.2d at 276 (noting legal clash between Thirty-Third America's Cup regatta to determine rightful participants).

10. See RAYNER, *supra* note 3, at 36 (discussing original letter by George Schuyler donating America's Cup as one "for friendly competition between foreign countries"); Deed of Gift for the America's Cup, Oct. 24, 1887, ¶ 3, available at http://www.a3.org/ac2000_DeedofGift.html http://.a3.org/ac2000_DeedofGift.html [hereinafter Deed of Gift] (stating purpose of America's Cup is to foster international competition in yacht racing).

11. For a further discussion of the history behind the America's Cup, see *infra* notes 18-45 and accompanying text.

12. For a further discussion of the applicable legal doctrines, see *infra* notes 47-86 and accompanying text.

13. For a further discussion of the court's application of the legal doctrines, see *infra* notes 88-109 and accompanying text.

14. For a further discussion of the court's opinion, see *infra* notes 109-41 and accompanying text.

15. For a further discussion of the impact of the case, see *infra* notes 144-70 and accompanying text.

II. "ONE HELL OF A BOAT RACE"¹⁶: HISTORY OF THE AMERICA'S CUP

A. "Your Majesty, There Is No Second"¹⁷

The America's Cup is named after the yacht *America*, the first vessel to win the Cup in 1851.¹⁸ Upon receiving the Cup, the five man crew of the *America* decided to donate it to the New York Yacht Club.¹⁹ The spirit of this donation was to create an international forum in which yachts from different countries could compete for the possession of the Cup.²⁰ The document donating the America's Cup to the New York Yacht Club was called the Deed of Gift and was drafted by George L. Schuyler, a member of the original crew of the *America*.²¹ While the Cup was donated in 1857, the Deed of Gift was modified twice before it became the current Deed of Gift.²²

16. James Spithill, THEY SAID. . . QUOTES FROM BMW ORACLE RACING AND ALINGHI, <http://33rd.americascup.com/en/actualite/news/they-saidquotes-from-bmw-oracle-racing-and-alinghi-19-2913> (last visited Oct. 15, 2010).

17. Alfred E. Loomis, "Ah, Your Majesty, there is no second," 9 AMERICAN HERITAGE MAGAZINE, 5 (Aug. 1958), available at http://www.americanheritage.com/articles/magazine/ah/1958/5/1958_5_4.shtml (describing events at first regatta to win America's Cup). Queen Victoria asked a signalmaster at the first race, "Are the yachts in sight?" *Id.* To which he answered, "Only the *America*, may it please Your Majesty." *Id.* "Which is second?" she asked. *Id.* "Ah, Your Majesty, there is no second," was the answer. *Id.*

18. See RAYNER, *supra* note 3, at 36 (describing circumstances of first regatta to win America's Cup). In fact, the yacht *America* was so superior to the other yachts of the day that the regatta to win the Cup was the only one that would accept it as a challenger. *Id.* All others turned it away because it would make the race unfair for the other yachts. *Id.*

19. See *id.* (describing reaction to winning Cup and desire to create international regatta). The original race for the Cup was one that was open to many challengers for the Cup; it was not meant to turn into a cup of international competition. See *id.* (noting history behind international competition). See also *Who Owns the Americas Cup? The Defender, or Persons Unknown?*, BYMNEWS.COM, May 2009, <http://www.bymnews.com/americas-cup-33/ownership.php> (explaining origins of Deed of Gift). The five members of the *America* crew decided to donate the Cup to the New York Yacht Club while the members met socially at a party. See *id.* (depicting donation of Cup to New York Yacht Club).

20. See *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 89 (N.Y. 1990) (noting original intent by donors to create avenue for friendly international yacht racing). See generally Deed of Gift, *supra* note 10 (setting forth intentions behind donating America's Cup).

21. See RAYNER, *supra* note 3, at 17 (chronicling Deed of Gift and America's Cup).

22. See *id.* at 36 (setting date of original donation by Schuyler to New York Yacht Club to be 1857). See also Alex M. Johnson, Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 545, 549-50 (1989) (describing subsequent America's Cup regattas and their effect on original donors to make modifications to Deed of Gift).

B. The Deed of Gift for the America's Cup²³

The objective of every America's Cup challenge is to win the regatta, thereby possessing the Cup and becoming its sole trustee.²⁴ The holder of the Cup "is to be succeeded by a competitor who successfully challenges the trustee"²⁵ The formal submission by a challenger to the current holder of the Cup to race is called the Notice of Challenge.²⁶ Once the Notice of Challenge is accepted by the current holder, the challenger becomes the Challenger of Record, and the current holder becomes the Defender.²⁷

Within the Deed of Gift, there are certain requirements that must be met before the regatta can be held.²⁸ For instance, a challenger must be an organized yacht club of a foreign country and must hold "an annual regatta on ocean water course on the sea."²⁹ There are also restrictions on the size of the vessels to be used and the location where the race can take place.³⁰ There is some flexibility, however, in the conditions of the regatta itself.³¹ The parties can, by mutual consent, determine what the course will be, the

23. See Deed of Gift, *supra* note 10, at Title (setting forth deed donating America's Cup). The Deed of Gift was written and signed by George L. Schuyler, the sole survivor of the original *America* crew at the time of donation, 1887. See *id.* ¶ 1 (asserting Schuyler to be the writer and signor of Deed of Gift).

24. See *Mercury Bay Boating Club Inc.*, 557 N.E.2d at 89 (describing goal of America's Cup); Deed of Gift, *supra* note 10, ¶ 2 (laying out circumstances of passing down America's Cup through regattas).

25. *Mercury Bay Boating Club Inc.*, 557 N.E.2d at 89.

26. See *Golden Gate Yacht Club v. Société Nautique De Genève*, 907 N.E.2d 279 (N.Y. 2009) (outlining how America's Cup is initiated).

27. See *id.* (describing how Société Nautiqu de Genève accepted Club Náutico Español de Vela's Notice of Challenge, Société Nautiqu de Genève became Defender and Club Náutico Español de Vela became Challenger of Record).

28. See Deed of Gift, *supra* note 10, ¶ 4-6 (listing all requirements that must be met before America's Cup can take place).

29. *Id.* ¶ 4. "Any organized Yacht Club . . . having for its annual regatta on ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match for this Cup" *Id.*

30. See *id.* ¶ 5.

The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line.

Id.

[N]o race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere.

Id. ¶ 6.

31. See *Golden Gate Yacht Club*, 907 N.E.2d at 279 (noting how yacht clubs can agree on specific regatta venue conditions).

number of trials, dates, "and any and all other conditions of the match."³² This resulting agreement made by mutual consent is called the protocol.³³ Other challengers have traditionally been allowed to participate in the regatta as Mutual Consent Challengers, as provided by past protocols.³⁴ If, for any reason, the two parties cannot agree to a protocol, then there is a default provision in the Deed of Gift: a one-on-one match between the Defender and the Challenger of Record.³⁵

C. The Thirty-Third America's Cup in Court

On July 3, 2007, the same day Société Nautiqu de Genève ("SNG") won the Thirty-Second America's Cup, Club Náutico Español de Vela ("CNEV") submitted its challenge for the Cup.³⁶ SNG

32. Deed of Gift, *supra* note 10, ¶ 7. The mutual consent clause in the Deed of Gift allows the racing clubs to, "by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the ten months' notice may be waived." *Id.*

33. *See Golden Gate Yacht Club*, 907 N.E.2d at 279 (naming resulting agreement made by competing yacht clubs as "protocol").

34. *See id.* at 279 (noting how traditionally past protocols have allowed for other racers to participate). These other racers are called Mutual Consent Challengers because they are allowed to race as challengers only via the execution of the mutual consent clause in the Deed of Gift. *See id.* (discussing what constitutes Mutual Consent Challenger).

35. *See id.* at 279 (describing how default provision for regatta venue becomes invoked if no protocol call can be agreed upon by yacht clubs). *See also* Deed of Gift, *supra* note 10, ¶ 8 (outlining default provision for regatta venue). The default provision for the race reads:

In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup. All such races shall be on ocean courses, free from headlands, as follows: The first race, twenty nautical miles to windward and return; the second race an equilateral triangular race of thirty-nine nautical miles, the first side of which shall be a beat to windward; the third race (if necessary) twenty nautical miles to windward and return; and one week day shall intervene between the conclusion of one race and the starting of the next race. These ocean courses shall be practicable in all parts for vessels of twenty-two feet draught of water, and shall be selected by the Club holding the Cup; and these races shall be sailed subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any times allowances whatever. The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours.

Id.

36. *See Golden Gate Yacht Club*, 907 N.E.2d at 279 (outlining history behind case).

accepted the challenge and the two parties drafted the protocol.³⁷ Eight days later, on July 11, 2007 Golden Gate Yacht Club (“GGYC”) presented its own Notice of Challenge, disputing the validity of CNEV’s challenge on the basis that it was not a qualified yacht club under the terms of the Deed.³⁸ GGYC pointed to the fact that CNEV was formed only a few days before its challenge and accordingly CNEV had never held an annual regatta.³⁹

SNG rejected GGYC’s challenge because it had already accepted CNEV’s, and it would not consider any other challenge until CNEV’s was decided.⁴⁰ Thus, on July 20, SNG submitted to arbitration to determine the validity of CNEV’s challenge under the Deed of Gift.⁴¹ The Arbitration Panel decided that “the Deed of Gift does not require a challenging club to have held an annual regatta prior to issuing its Notice of Challenge” and held CNEV’s challenge valid.⁴²

With all parties in agreement that the arbitration decision did not impose a binding decree, GGYC brought action against SNG for breaching its fiduciary duty as trustee of the Cup by accepting CNEV’s challenge despite the fact that it had never held a regatta.⁴³ The Supreme Court of New York dismissed the breach of fiduciary claim, but held that CNEV’s challenge was not valid because CNEV had not held an annual regatta as required in the Deed of Gift.⁴⁴ A divided Appellate division reversed this decision, holding that that the language of the Deed was too ambiguous and CNEV was the rightful Challenger of Record.⁴⁵ GGYC appealed.⁴⁶

37. *See id.* (noting beginnings of Thirty-Third America’s Cup). This meant that SNG became the Defender and the CNEV the Challenger of Record. *See id.* (noting when SNG accepted CNEV’s Notice of Challenge, SNG became Defender and CNEV became Challenger of Record).

38. *See id.* (establishing origin of questioning validity of Thirty-Third America’s Cup).

39. *See id.* (describing GGYC’s original challenge to CNEV credibility).

40. *See id.* (noting SNG’s response to GGYC’s challenge).

41. *See id.* at 280 (describing mitigating steps taken by SNG in response to GGYC’s challenge). The protocol provided for the arbitration. *See id.* at 279-80 (explaining how SNG sought arbitration by thirty-third America’s Cup Arbitration Panel as provided by protocol).

42. *Id.* at 280 (outlining arbitration panel’s decision).

43. *See id.* (noting original charges brought against SNG by GGYC in court).

44. *See id.* (providing holding of Supreme Court of New York).

45. *See id.* (stating opinion of Appellate Division of New York). The Appellate Division found that the phrase “having for its annual regatta” was ambiguous. *Id.* at 281). Thus, the court used extrinsic evidence to “glean the settlor’s intention as to the meaning and purpose of this phrase. . . .” *Id.*

46. *See id.* at 280 (noting that “GGYC appealed pursuant to CPLR 5601(a) dissent grounds”). For a further discussion of this case, see *infra* notes 87-108 and accompanying text.

III. APPLICABLE LEGAL DOCTRINES

In this case were various clashing legal doctrines.⁴⁷ The New York Court of Appeals needed to decide what exactly the Deed of Gift was and which applicable doctrines could be used in its ruling.⁴⁸

A. Charitable Trust

A charitable trust is a trust created for religious, charitable, educational or any other benevolent purposes.⁴⁹ Though there is some reference to charitable trusts in antiquity, it was used in English chancery court in the middle ages as a way for people to donate money upon their death to the church as penance for their sins.⁵⁰ In New York, the charitable trust doctrine was outright banned in 1788 and continued that way until the Tilden Act of 1892.⁵¹

Today, a trust of property may be made for any charitable or benevolent purpose for an indefinite amount of time or when the beneficiaries are uncertain.⁵² If a trustee is named, then it will go to that trustee.⁵³ A legal corporation, however, can be named as

47. For a further discussion of the law regarding these legal doctrines, see *infra* notes 49-87 and accompanying text.

48. See *Golden Gate Yacht Club v. Société Nautique De Genève*, 907 N.E.2d 276 (N.Y. 2009) (outlining basis of ruling for reviewing court).

49. See ROBERT L. BLEVINS, ET AL., *THE TRUST BUSINESS* 173 (American Bankers Association 1982) (defining charitable trusts). See also N.Y. EST. POWERS & TRUST LAW § 8-1.1(a) (McKinney 2009) (recognizing charitable trusts as valid in State of New York).

50. See EDITH L. FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* 4-5 (Matthew Bender & Company 1950) (describing origins and original intents of charitable trusts).

51. See *id.* at 30-38 (noting initial prohibition of charitable trusts in New York and their eventual legalization). The fact that the Deed of Gift was written before it was technically legal does not matter; it can still be considered a valid charitable trust despite the fact that it was written before the Tilden Act. See *In re Matter of Bd. of Tr. of Huntington Free Library & Reading Room*, 771 N.Y.S.2d 69, 69 (N.Y. App. Div. 2004) (holding that charitable trusts created before Tilden Act are still valid).

52. See N.Y. EST. POWERS & TRUST LAW, § 8-1.1(a) (outlining current New York law for charitable trusts). The rule against perpetuities and the suspension-of-alienation rules do not apply to charitable trusts. See *In re Hamilton's Will*, 63 N.Y.S.2d 265, 267-68 (3rd App. Dep't 1946), *aff'd* 296 N.Y. 578 (1946) (holding that charitable trusts are not bound by rule against perpetuities and suspension-of-alienation rules).

53. See N.Y. EST. POWERS & TRUST LAW, § 8-1.1(a) (depicting charitable trust characteristics in naming trustees).

trustee.⁵⁴ If no one is named as trustee, the title will vest in “the court having jurisdiction over the trust.”⁵⁵

In defining whether a trust is charitable, it is essential to note the purpose of the gift.⁵⁶ If a benevolent purpose can be construed from the testamentary language, then the language should be interpreted liberally to uphold the gift.⁵⁷ For example, the awarding of a specific prize for merit is important because it honors a worthy purpose.⁵⁸ The reward “encourage[s] noble aspirations for the benefit of the participants, and of a community, or of mankind.”⁵⁹ This is controversial, though, and does not mean that any trust that promotes sports by awarding a prize is charitable.⁶⁰ Rather, the classification of a trust that promotes sports as charitable rests on the nature and purpose behind the sport.

B. Parol Evidence Rule

Sometimes the legal community purposefully uses vague and ambiguous language to its advantage.⁶¹ This can be quite beneficial when drafting contracts and statutes in order to allow for flexibility and unforeseen contingencies.⁶² Other times, though,

54. See *id.* at § 8-1.1(b) (noting that charitable trusts can name corporations as trustees).

55. *Id.* at § 8-1.1 (a)

56. See *In re Harmon's Will*, 80 N.Y.S.2d 903, 909-10 (N.Y. Sur. Ct. 1948) (noting that charitable trust must have charitable purpose behind it).

57. See *id.* at 910 (holding that if charitable purpose can be construed from language of will, then will should be interpreted broadly in order to uphold that charitable purpose).

58. See *id.* at 909-10 (deeming award for merit in aeronautics charitable because it promotes achievement and aspirations that benefit mankind and have no apparent private or selfish purpose).

59. *Id.* at 910.

60. Cf. RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. n (1959) (“A trust merely for the promotion of sport is not charitable.”).

61. See Samuel A. Terilli, *Inartful Drafting Does Not Necessarily a Void, as Opposed To a Vague, Statute Make – Even Under the First Amendment: The Eleventh Circuit Applies Common Sense to “Common Understanding” In Void-For-Vagueness Challenges to Lobbying Regulations*, 63 U. MIAMI L. REV. 793, 794 (2009) (explaining how vague drafting by legislatures can be precisely what is needed to effectuate legal principles). In particular, Professor Terilli argues that, aside from technical components and possibly open-ended meanings, language has common sense elements upon which legislators often rely to effectuate a broad legislative goal. See *id.* at 793-95 (discussing how Florida legislature, seeking to regulate lobbying of government officials, “essentially employed a little ambiguity to get at an ambiguous subject”).

62. See E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 572 (Univ. Casebook Series ed., Foundation Press, 6th ed. 2001) (1965) (noting how contract drafters find it convenient to use vague terms “as a means of delegating decisions to a later adjudicator at such time as a dispute on particular facts arise []”); see also *United States v. Alford*, 274 U.S. 264, 267 (1927) (allowing ambiguous reading of “near” as constitutional in statute prohibiting forest fires).

imprecise language can lead to confusion.⁶³ When dealing with a legal instrument that has multiple interpretations, courts can look at extrinsic evidence to fill in the gaps regarding the author's intent.⁶⁴ If the document is unambiguous, however, then the court must only look at the writing itself and not try to uncover the author's intent through other sources.⁶⁵ This interpretive principle is known as the parol evidence rule.⁶⁶

The point of the parol evidence rule is to enforce a document as close as possible to what the original drafter intended.⁶⁷ With some exceptions, this principle can be applied to contracts, deeds and many other legal documents.⁶⁸ The reasoning for this rule is that the document itself is the best evidence of what the drafter intended.⁶⁹ When applying this rule, the reviewing court must first determine whether there is ambiguity in the document's terms that may give rise to alternative applications.⁷⁰ If so, then certain extrinsic evidence may be brought in to help prove the original drafter's intent.⁷¹

63. See Gerald Lebovits, *Legal-Writing Ethics – Part II*, 77 N.Y. ST. B.J. 57, 57 (2005) (noting how vague writing damages legal effectiveness).

64. See *New York Life Ins. & Trust Co. v. Hoyt*, 55 N.E. 299, 301 (N.Y. 1899) (holding that extrinsic language can only be considered when language in will is ambiguous).

65. See *id.* at 301 (stating that unambiguous language in will is dispositive). Cf. *Cent. Union Trust Co. v. Trimble*, 174 N.E. 72, 73 (N.Y. 1930) (stating that rules of construction are only to be applied to interpret ambiguous or doubtful meaning).

66. See FARNSWORTH ET AL., *supra* note 62, at 555 (identifying and explaining parol evidence rule).

67. See *id.* at 559 (stating rationale behind parol evidence rule is to affirm intention of drafter).

68. See David E. Nykanen, *The Danger of the Unintended Uncapping: Issues in Estate Planning and Financing Transactions*, 36 MICH. REAL PROP. REV. 138, 139 (2009) (providing examples of when parol evidence rule was used in application to life estates and life leases); David Steuer, *A Litigator's Perspective on the Drafting of Commercial Contracts*, 1780 PRAC. L. INST.: CORP. L. & PRAC. COURSE HANDBOOK 459, 477 (providing examples of exceptions to parol evidence rule). See generally FARNSWORTH ET AL., *supra* note 62, at 555-71 (applying parol evidence rule to variety of legal documents).

69. See *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 93 (N.Y. 1990) (noting that original deed's words are what drafter intended to say).

70. See *New York Life Ins. & Trust Co. v. Hoyt*, 55 N.E. 299, 301 (N.Y. 1899) (noting that reviewing court must look at document first to see if there is any ambiguity or doubt in its language before going to extrinsic evidence).

71. See *id.* (stating that only after ambiguity is found can courts look to extrinsic evidence to fill in gaps left by ambiguous writing).

C. Cy Pres Doctrine

Another principle that New York courts have available to them is the *cy pres* doctrine.⁷² The *cy pres* doctrine is applicable to charitable trusts when the court determines that compliance with the instrument is “impracticable or impossible.”⁷³ Upon this determination, the court may make an order specifically directing the application of the deed such that it “will most effectively accomplish its general purposes.”⁷⁴ Thus, before the court can apply reformation to the will, the court must make a determination that the reformation would likely have been approved of by the decedent.⁷⁵ Unlike the parol evidence rule, the *cy pres* doctrine may only be used by the court when its application is raised by either the trustee or “the person having custody of the property.”⁷⁶

D. Equitable Deviation Doctrine

Another method for analyzing a trust is the doctrine of equitable deviation, which is similar to the *cy pres* doctrine, except equitable deviation only applies to altering administrative provisions in the trust as opposed to substantive provisions.⁷⁷ The first prong of equitable deviation requires that circumstances surrounding the will have changed.⁷⁸ The second prong looks to determine if the

72. See N.Y. EST. POWERS & TRUST LAW, § 8-1.1(c)(1) (McKinney 2009) (allowing New York courts use of *cy pres* doctrine).

73. See *id.* (granting New York courts use of *cy pres* under condition that strict compliance to document is “impractical or impossible”). Compare *Bd. of Tr. of Museum of Am. Indian, Heye Found. v Bd. of Tr. of Huntington Free Library & Reading Room*, 610 N.Y.S.2d 488, 501 (N.Y. App. Div. 1994) (holding that because library could still exist with someone benefiting, no *cy pres* was allowed), with *In re Bd. of Tr. of Huntington Free Library & Reading Room*, 771 N.Y.S.2d 69, 71 (N.Y. App. Div. 2004) (holding use of *cy pres* valid because Huntington Library had ran out of money and essential to sell books to continue existence).

74. N.Y. EST. POWERS & TRUST LAW, § 8-1.1(c)(1).

75. See *In re Hummel*, 817 N.Y.S.2d 424, 427 (N.Y. App. Div. 2006) (using *cy pres* doctrine to donate gift only to hospital that decedent would have approved of and no other).

76. Compare N.Y. EST. POWERS & TRUST LAW § 8-1.1(c)(1) (stating that *cy pres* can only be used by court “on application of the trustee or of the person having custody of the property subject to the disposition”), with U.C.C. § 2-202 (2009) (stating that court conducts preliminary review to determine ambiguity and that evidence may be introduced by either party).

77. See *Johnson & Taylor*, *supra* note 22, at 565 (outlining doctrine of deviation and comparing it with *cy pres* doctrine); see also RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2003) (listing unanticipated circumstance when court has power to modify administrative provision of trust).

78. See RESTATEMENT (THIRD) OF TRUSTS § 66(1) (requiring that court determine that circumstances surrounding will have changed before modification). “The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provi-

changes of circumstances were anticipated by the drafter.⁷⁹ If the court determines that the changes were not anticipated, the court must examine whether the deviation or modification “further[s] the purposes of the trust.”⁸⁰

Determining the difference between an administrative and substantive provision can be difficult.⁸¹ However, the standard for meeting the doctrine of equitable deviation is not as strict as that of *cy pres*.⁸² Deviation has been upheld in situations where there was a more practical and efficient way to invest the original donator's money than what was called for in the will.⁸³ Under these circumstances, it would also be the duty of the trustee to petition the court for appropriate modification of or deviation from the terms of the trust.⁸⁴

The different legal doctrines all have their own criteria and uses.⁸⁵ Whether they were raised by the court, plaintiff or defendants, the court must consider each.⁸⁶

sion, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.” *Id.*

79. *See id.* (setting second prong of deviation doctrine to be that settlor did not foresee changed circumstances).

80. *Id.* The third prong of deviation doctrine is set forth to be that “modification or deviation will further the purpose of the trust.” *Id.*

81. *See* Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U. L. REV. 153, 154-55 (1967) (“The terms ‘substantive’ and ‘administrative’ are obviously conclusionary and give rise to confused and vague court decisions, particularly when an administrative provision is of such central importance in the trust instrument as to take on a substantive nature.”).

82. *See In re Tr. of Estate & Prop. of Diocesan Convention of N.Y.*, 484 N.Y.S.2d 406, 409 (N.Y. Sur. Ct. 1984) (stating that *cy pres* should be used when trust is impossible to carry out, but deviation should be used when “compliance with an administrative provision of the governing instrument impractical but does not defeat or substantial impair the purpose of a charitable trust”).

83. *See id.* (holding deviation to more efficient investing plan proper when economic environment has made original investing plan inadequate for purposes of trust or for purposes intend by grantor).

84. *See* RESTATEMENT (THIRD) OF TRUSTS § 66(2) (2003).

If a trustee knows or should know of circumstances that justify judicial action [of deviation] with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.

Id.

85. For a further discussion of this law, see *supra* notes 48-87 and accompanying text.

86. For a further discussion of this law, see *infra* notes 87-141 and accompanying text.

IV. THE COURT'S RULING IN *GOLDEN GATE YACHT CLUB*

The New York Court of Appeals, in an opinion authored by Judge Ciparick, decided to reverse the Supreme Court, Appellate Division's holding in *Golden Gate Yacht Club* and rule in favor of the plaintiff, GGYC.⁸⁷ The Club's claim turned on the interpretation of paragraph four of the Deed of Gift, which outlined the requirements of becoming a Challenger of Record.⁸⁸ Paraphrasing the Deed, the court determined that:

a challenger must be (1) an organized yacht club, (2) foreign, in that it is not of the same country as the trustee yacht club, (3) incorporated in its local jurisdiction or officially recognized either through a license or patent from its government, (4) and "having for its annual regatta an ocean water court on the sea, or on an arm of the sea, or one which combines both."⁸⁹

The court held that the phrase, "having for its annual regatta," is unambiguous, requiring that the challenger has held an annual regatta in the past and will continue to do so in the future.⁹⁰

The court also looked at the text of the Deed of Gift and evaluated the phrase "having for its annual regatta" in relation to its placement in the document.⁹¹ The phrase was located in a list of requirements, constituting condition precedents that the challenging yacht club must meet before it could become the Challenger of Record.⁹² Among those on the list were requirements that the challenging yacht club be "organized, . . . incorporated, patented, or

87. See *Golden Gate Yacht Club v. Société Nautique De Genève*, 907 N.E.2d 276, 278 (N.Y. 2009) (noting opinion of court reversing lower court's ruling).

88. See *id.* at 281 (stating GGYC's reasoning behind their claim). For a further discussion on the claim, see *supra* notes 38-39 and accompanying text. The relevant part of the Deed of Gift states that:

[a]ny organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match for this Cup.

Deed of Gift, *supra* note 10, ¶ 4.

89. *Golden Gate Yacht Club*, 907 N.E.2d at 280-81.

90. *Id.* at 281 ("[W]e conclude that the settlor intended to link the annual regatta requirement to the other eligibility requirements in that the challenging yacht club has in the past and will continue in the future 'having' an annual regatta.").

91. *Id.* (stating that list including "annual regatta" requirements had characteristics requiring past, present and future attributes).

92. See Deed of Gift, *supra* note 10, ¶ 4 (listing requirements that must be fulfilled before yacht club can become Challenger of Record).

licensed.”⁹³ The drafter mentioned these requirements in the past tense and “intended that a challenger would continue to meet these eligibility requirements in the present and future.”⁹⁴ By listing the annual regatta within a string of prerequisites, the court determined that the donator meant for this requirement to be interpreted in the same manner.⁹⁵ Furthermore, the word “annual” connotes the notion that there was an event in the past and there will continue to be regular events in the future.⁹⁶

CNEV claimed that the annual regattas that they held since their Notice of Challenge in July 2007 fulfilled the annual regatta requirement.⁹⁷ At the time of the ruling, CNEV held regattas in November of 2007 and 2008.⁹⁸ The first regatta was within five months after their Notice of Challenge submission.⁹⁹ The court, however, did not consider this fact as bearing any weight on the issue.¹⁰⁰ The court ruled that the requirements outlined in the

93. *Golden Gate Yacht Club*, 907 N.E.2d at 281 (citing Deed of Gift, *supra* note 10, ¶ 4) (noting that place of requirement in list of requirements effects meaning of phrase “annual regatta”). Paragraph four of the Deed of Gift in its entirety reads:

Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta on ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match for this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

Id.

94. *Id.* The court stated:

[W]e first note that the annual regatta requirement is in only one of a list of eligibility requirements set forth in the Deed of Gift. The settlor clearly placed the requirements of “organized” and “incorporated, patented, or licensed” in the past and intended that a challenger would continue to meet these eligibility requirements in the present and future.

Id. (quoting Deed of Gift, *supra* note 10, ¶ 4).

95. *See id.* (noting that placement of phrase affects meaning of phrase).

96. *See id.* (“By using the word ‘annual,’ the settlor suggested an event that has already occurred at least once and will occur regularly in the future.”).

97. *See id.* (arguing that as long as requirement is fulfilled by race day, challenge is valid).

98. *See id.* at 281 n.9 (explaining that CNEV conducted ocean course regattas in November 2007 and November 2008).

99. *See id.* (noting that date of CNEV’s first regatta, November 2007, was five months after its submission of its Notice of Challenge in July 2007).

100. *See id.* at 281-82 (holding that even though regattas have been held post submission of Notice of Challenge, this holds no bearing on them fulfilling requirements by time of submission).

Deed of Gift must be fulfilled by submission of a challenging yacht club's Notice of Challenge.¹⁰¹

The court also dismissed the defendant's claim that tradition has allowed for this requirement to be waived.¹⁰² SNG and CNEV argued that because of an existing practice between the Defender and Challenger of Record to allow Mutual Consent Challengers to race, without having held annual regattas, there is evidence that the drafter intended the requirement to be capable of being waived.¹⁰³ However, the court rejected this argument, stating that because the language in the annual regatta clause is unambiguous, the defendants' assertion was irrelevant.¹⁰⁴ Furthermore, even if the Deed was ambiguous, the defendants' assertion would not have been dispositive.¹⁰⁵ Mutual Consent Challengers appeared much later than the authorship of the Deed of Gift and the court had to determine the intention of the testator at the time the will was created.¹⁰⁶ Specifically, a tradition that arose after the drafting of the Deed of Gift does not have any bearing on the requirements to become the Challenger of Record.¹⁰⁷ Such a tradition must not be considered unless the drafting language is vague or uncertain.¹⁰⁸

101. *See id.* (citing Deed of Gift, *supra* note 10, ¶ 10) (alteration in original) (citation omitted) ("When read in the context of the entire Deed of Gift, the challenger must demonstrate that its Notice of Challenge 'fulfill[s] all the conditions required' at the time it submits its challenge.").

102. *See id.* at 282 (holding that traditions arising after drafting of Deed of Gift have no weight on determining Challenger of Record).

103. *See id.* (asserting defendants' claim that practice of allowing Mutual Consent Challengers who have not met annual regatta requirement in protocols is evidence that settlor intended for them to participate).

104. *See id.* (noting that because defendant "failed to show that at the time it submitted its Notice of Challenge it was a '[c]lub fulfilling all the conditions required by' the Deed of Gift, it does not qualify as the Challenger of Record . . .").

105. *See id.* ("This assertion has no merit because the plain language of the Deed of Gift itself forecloses such an illogical conclusion.").

106. *See id.* (finding that practice of Mutual Consent Challengers emerged much later than creation of Deed of Gift); *see also In re Harmon's Will*, 80 N.Y.S.2d 903, 906 (N.Y. Sur. Ct. 1948) (citing *In re Chamberlin's Estate*, 46 N.E.2d 883, 886 (N.Y. 1948)) ("It is the duty of the court to ascertain the intention of testator at the time the will was made."). "And such intention when ascertained must prevail even though the expression of such intention be ambiguous or incomplete." *Id.* (citing *Cahill v. Russell*, 35 N.E. 664 (N.Y. 1893)).

107. *See Golden Gate Yacht Club*, 907 N.E.2d at 282 (holding that post drafting traditions do not affect interpretation of intent by original drafter).

108. *See id.* (holding that only ambiguous language will give rise to court considering post drafting traditions).

V. INTERPRETING THE APPLICABLE LEGAL DOCTRINES IN
GOLDEN GATE YACHT CLUB

The court's reading of the document was a clear application of the parol evidence rule.¹⁰⁹ The court interpreted the Deed of Gift as unambiguous and found for the plaintiff.¹¹⁰

Contrary to the court's decision in *Mercury Bay*, what the *Golden Gate Yacht Club* court neglected to consider was whether the Deed of Gift is actually a charitable trust.¹¹¹ There is some authority for disallowing it as a charitable trust.¹¹² Historically, a charitable trust used to promote a sport, particularly yacht racing, was not upheld as a valid trust.¹¹³ Although the Restatement (First) of Trusts does not mention the applicability of a charitable trust for a purely sporting purpose, this concept was explicitly prohibited in the Restatement (Second) of Trusts.¹¹⁴ At the time of *Mercury Bay*, the Second

109. *See id.* at 281 (finding that phrase "annual regatta" clearly shows intent of original drafter and, therefore, no extrinsic evidence ought to be looked at to determine intent of original drafter).

110. *See id.* at 280-81 (holding that "annual regatta" requirement was clear, that defendant did not meet this requirement and, therefore, ruling in favor of plaintiff).

111. *See Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 95 n.4 (N.Y. 1990) (citing RESTATEMENT (SECOND) OF TRUSTS § 374 (1959)); *In re Nottage*, (1895) 2 Ch. 649 (U.K.) (recognizing that there is authority that would consider Deed of Gift not true charitable trust, but dismissing it because it was not raised by any of parties); *George Schuyler Trust: Would It Stand Scrutiny?*, BYM NEWS.COM (May 2009), <http://www.bymnews.com/americas-cup-33/george-schuyler-trust.php> [hereinafter *George Schuyler Trust*] (discussing validity of Deed of Gift as legitimate trust under current law).

112. *See* RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. n ("A trust merely for the promotion of sports is not charitable."); *In re Nottage*, (1895) 2 Ch. 649, 652-54 (U.K.) (holding that trust merely for promotion of sport is not true charitable trust). In fact, at the time of the writing of the Deed of Gift, it was not legal in the state of New York to create a charitable trust. *See* FISCH, *supra* note 50, at 36-37 (chronicling history behind charitable trusts in America).

113. *See In re Nottage*, (1895) 2 Ch. 649, 652-54 (U.K.) (holding that trust establishing annual cup to be awarded to most successfully raced yacht is not true charitable trust). The court there held that, although yacht racing implies the community of ship builders and those affiliated with the sport, the trust itself did not directly specify any class of community that the cup was intended to benefit and thus it failed as a charitable trust. *See id.* (neglecting to specify class of community trust was to benefit). This is still the case in England, with few exceptions. *See* BOGERT'S TRUSTS AND TRUSTEES § 379 (comparing charitable trusts in England and America).

114. *Compare* RESTATEMENT (FIRST) OF TRUSTS § 374 (1935) (failing to mention any prohibition on using promotion of sport as purpose behind charitable trust), *with* RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. n (prohibiting promotion of sport as legitimate purpose behind charitable trust).

Restatement was the prevailing Restatement.¹¹⁵ The issue of whether the Deed of Gift was a valid charitable trust was not considered by the court and was only raised in a footnote because it was not raised by either one of the parties.¹¹⁶

The court in *Golden Gate Yacht Club* did not once mention the validity of the trust.¹¹⁷ At the time of its decision, the Restatement (Third) of Trusts was the predominate Restatement.¹¹⁸ The Restatement (Third) leaves out the prohibitive language of a charitable trust for sports mentioned in the Restatement (Second) of Trusts.¹¹⁹ In fact, the Restatement (Third) almost expressly allows charitable trusts for sports as long as the sport “provide[s] recreation and entertainment to a large class of a community.”¹²⁰ The reason the court did not entertain this issue is because neither party to the suit raised this issue.¹²¹ Based on court precedent and the substance of the Restatement (Third), if the court had discussed the issue, it would have most likely upheld that the Deed of Gift was a charitable trust.¹²²

Even if the court tried to constrict the breadth of charitable trusts, the court would have a hard time trying to find that the America’s Cup did not fit the category of the Restatement

115. See RESTATEMENT (SECOND) OF TRUSTS § 374 (dating publication of Restatement (Second) of Trusts at 1959); *Mercury Bay Boating Club Inc.*, 557 N.E.2d at 95 n.4 (recognizing Restatement (Second) of Trusts as current authority).

116. See *Mercury Bay Boating Club Inc.*, 557 N.E.2d at 95 n.4 (citations omitted) (“While there is authority for the proposition that trusts created for the purpose of promoting sporting events are not true charitable trusts, no one has disputed the characterization of this trust as a charitable trust.”).

117. See generally *Golden Gate Yacht Club v. Société Nautique De Genève*, 907 N.E.2d 276 (N.Y. 2009) (failing to mention whether Deed of Gift is true charitable trust).

118. Compare RESTATEMENT (THIRD) OF TRUSTS § 28 (2003) (dating Restatement (Third) of Trusts at 2003), with *Golden Gate Yacht Club*, 907 N.E.2d at 276 (providing final ruling on April 2, 2009).

119. Compare RESTATEMENT (THIRD) OF TRUSTS § 28 (failing to prohibit pure promotion of sport as valid purpose behind charitable trust), with RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. n (“A trust merely for the promotion of sports is not charitable.”).

120. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. l

121. See *Mercury Bay Boating Club Inc.*, 557 N.E.2d at 95 n.4 (stating that unless issue of true charitable trust is raised, court will not entertain it).

122. See *In re Harmon’s Will*, 80 N.Y.S.2d 903, 909-10 (N.Y. Sur. Ct. 1948) (upholding purpose of awarding prizes for achievement in aeronautics as valid charitable trust because trust promotes aeronautical community); RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. l (recognizing promotion of sport as valid charitable trust when it provides entertainment or recreation for large groups of community). See also generally *Mercury Bay Boating Club Inc.*, 557 N.E.2d at 87-100 (treating Deed of Gift as valid charitable trust).

(Third).¹²³ There is a large yacht racing community worldwide, and the Cup was designed for international competition.¹²⁴ Further, the entertainment value of yacht racing has increased over the past twenty years, not only to the yachting community, but also to the world as a whole.¹²⁵ Accordingly, the court could not ignore the value that the America's Cup has as a competitive international regatta and as a pastime for observers and rule the Deed of Gift invalid.¹²⁶

SNG's claim, that requiring a challenging yacht club to hold a regatta prior to submitting its Notice of Challenge effectively inhibits the settlor's original intentions, is an argument for equitable deviation.¹²⁷ SNG illustrated how tradition permitted a non-strict adherence to this requirement because it allowed more challengers to participate in the America's Cup.¹²⁸ This arguably administrative provision of the Deed would enhance the Cup as a "friendly competition between foreign countries."¹²⁹

123. See RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. *l* (providing promotion of sport as valid charitable trust when sport entertains or provides recreation for large groups of community); see also Jared Peter Grellet, *The America's Cup 2007: The Nexus of Media, Sport and Big Business* (2009) (unpublished Masters of Arts thesis, University of Canterbury), (on file with Macmillan Brown Library, University of Canterbury) Canterbur (noting increase of media coverage and participation of America's Cup over past twenty-five years).

124. See Grellet, *supra* note 123 (describing increase in global participation of America's Cup regattas and challenges); see also Deed of Gift, *supra* note 10, ¶ 3 (opening participation in America's Cup to any yacht club on Earth).

125. See Grellet, *supra* note 123 (stating that media coverage of America's Cup has expanded, leading many to become more involved in regatta).

126. See *George Schuyler Trust*, *supra* note 111 (arguing that many yacht clubs and investors have interest in keeping Deed of Gift valid charitable trust in order to keep America's Cup alive); see also Grellet, *supra* note 123 (stating that many non-yacht club members enjoy America's Cup and benefit from its existence through entertainment and recreation).

127. See *Golden Gate Yacht Club v. Société Nautique De Genève*, 907 N.E.2d 276, 282 (N.Y. 2009) (arguing that tradition of allowing Mutual Consent Challengers exemplifies settlor's original intent behind Deed of Gift and focuses on how challenges operate); see also Johnson & Taylor, *supra* note 22, at 565 (noting that details on how challenges operate is administrative provision that can trigger deviation).

128. See *Golden Gate Yacht Club*, 907 N.E.2d at 282 (claiming that practice of allowing Mutual Consent Challengers opens America's Cup regatta to more yacht clubs and furthers it as "Cup for friendly competition between foreign countries"); Deed of Gift, *supra* note 10, ¶ 3 (stating that Cup "shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries").

129. Deed of Gift, *supra* note 10, ¶ 3). See Johnson & Taylor, *supra* note 22, at 565 (arguing that changing administrative provisions of how challenges operate would lead to more efficient practices).

In rejecting this argument the court based its finding on the parol evidence rule.¹³⁰ Applying the doctrine of equitable deviation, however, the result would have been the same.¹³¹ SNG's claims may be technically correct, but they do not fully satisfy the doctrine.¹³² The circumstances surrounding the issue are ones that Schulyer, the settlor, certainly foresaw.¹³³ The very fact that certain requirements were set forth in the Deed of Gift that a yacht club must meet before becoming a challenger is evidence that Schulyer knew that restrictions would be necessary for maintaining good sportsmanship in the regatta.¹³⁴ Because of Schulyer's consideration and his reference to an annual regatta requirement, SNG's argument does not meet the first prong of the equitable deviation doctrine.¹³⁵

Any *cy pres* argument would similarly fail.¹³⁶ In *Mercury Bay*, a *cy pres* application was raised and litigated and arguably should have been applied.¹³⁷ If the *Golden Gate Yacht Club* court were to stay congruent with the trend of the *Mercury Bay* court, then it would not have used a *cy pres* argument either.¹³⁸

130. See *Golden Gate Yacht Club*, 907 N.E.2d at 282 (rejecting SNG's Mutual Consent Challengers claim based on unambiguous language of document).

131. For a further discussion of this law, see *infra* notes 132-36 and accompanying text.

132. Compare *Golden Gate Yacht Club*, 907 N.E.2d at 282 (claiming that waiving requirement of holding annual regatta would increase participation and use of Cup as one for friendly competition), with RESTATEMENT (THIRD) OF TRUSTS § 66(1) (noting that circumstance must be one not contemplated by original settlor).

133. See *Golden Gate Yacht Club*, 907 N.E.2d at 281 (noting that settlor inserted requirement of holding annual regatta, implying that settlor recognized that yacht clubs that do not hold annual regattas would still like to challenge for Cup).

134. See Johnson & Taylor, *supra* note 22, at 549-51 (noting that settlor inserted certain requirements after complications arose under original Deed of Gift, which had no such requirements). This specific requirement, that they hold an annual regatta, which was added later to the Deed of Gift, did nothing to actually perpetuate friendly competition and had an initially poor reaction by the yachting community. See *id.* (discussing requirement of annual regatta). (Nevertheless, it still shows that requirements were considered by Schulyer who hoped that they would "provid[e] a 'well made' match for the defender." *Id.* (citations omitted).

135. See RESTATEMENT (THIRD) OF TRUSTS § 66(1) (providing first prong of deviation doctrine that original settlor did not conceive change in circumstances). See also Deed of Gift, *supra* note 10, ¶ 4 (listing requirements precludes possibility that settlor did not conceive circumstance that challenger might not meet requirements).

136. For a further discussion of this law, see *infra* notes 137-141 and accompanying text.

137. See Johnson & Taylor, *supra* note 22, at 560-61 (noting that circumstances surrounding *Mercury Bay* would have been ideal for application of *cy pres*, but that courts are hostile to its use and, therefore, declined its application).

138. See *id.* (outlining trend of courts declining to apply *cy pres* doctrine).

Furthermore, even if SNG attempted to use *cy pres*, it would have failed.¹³⁹ The *cy pres* doctrine requires that abiding by the trust is “impracticable or impossible.”¹⁴⁰ The fact that there is a challenger who can meet the requirements of the Deed of Gift, as interpreted by the court, shows that the Deed of Gift is not impracticable or impossible to follow.¹⁴¹

VI. “THIS IS A 159 YEAR OLD TROPHY, LET’S LOOK AFTER IT”¹⁴²

Golden Gate Yacht Club has set the precedent for the interpretation of the Deed of Gift.¹⁴³ Over the years, the Deed of Gift was modified and corrected by first the original donors, and second by the New York courts.¹⁴⁴ All of these corrections led some commentators to claim that the Deed ought to be rewritten due to its impracticality.¹⁴⁵

This case gave the courts a chance to alter the interpretation of the Deed.¹⁴⁶ Had the reviewing court affirmed the lower court’s judgment, the Deed would have been deemed ambiguous.¹⁴⁷ Extrinsic evidence would have been considered, encouraging future yacht clubs to challenge the Deed and argue for an interpretation

139. For a further discussion of this law, see *infra* notes 140-42 and accompanying text.

140. See N.Y. EST. POWERS & TRUST LAW 49, § 8-1.1(c)(1) (McKinney 2009) (outlining when *cy pres* doctrine is appropriate for New York courts).

141. See Bd. of Trs. of Museum of Am. Indian, Heye Found. v Bd. of Trs. of Huntington Free Library & Reading Room, 610 N.Y.S.2d 488, 501 (N.Y. App. Div. 1994) (holding that no *cy pres* was allowed because it was not impossible to carry out intent of Huntington Library, that library could still exist with at least one person benefiting).

142. Russell Coutts, THEY SAID. . . QUOTES FROM BMW ORACLE RACING AND ALINGHI, <http://33rd.americascup.com/en/actualite/news/they-saidquotes-from-bmw-oracle-racing-and-alinghi-19-2913> (last visited Oct. 15, 2010).

143. See Friedman, *supra* note 8 (noting that court’s interpretation of Deed of Gift in *Golden Gate Yacht Club* has set standard for its interpretation).

144. See generally Johnson & Taylor, *supra* note 22, at 547-54 (outlining progress of Deed of Gift and its modifications throughout its existence); RAYNER, *supra* note 3, at 44, 48-50 (chronicling alterations to Deed of Gift and regattas that caused such alterations).

145. See Friedman, *supra* note 8 (recognizing that many commentaries have called for Deed of Gift to be rewritten due to its dated language). See also Johnson & Taylor, *supra* note 22, at 584-85 (arguing that Deed of Gift ought to be rewritten through application of *cy pres* doctrine).

146. See *Golden Gate Yacht Club v. Société Nautique De Genève*, 907 N.E.2d 276, 281 (N.Y. 2009) (recognizing that reviewing court could have affirmed and ruled that Deed of Gift was ambiguous and extrinsic evidence was needed for its interpretation).

147. See *id.* at 280 (stating lower court’s holding that Deed of Gift was ambiguous and required extrinsic evidence for its interpretation).

to their liking.¹⁴⁸ Instead, the court read the Deed for what it was and faithfully abided by it.¹⁴⁹ Accordingly, this interpretation will set the scene for future applications of the Deed of Gift and, consequently, for future America's Cup matches.¹⁵⁰

This interpretation has also continued the general trend against the use of modification doctrines, such as *cy pres* and deviation.¹⁵¹ The court chose to use a more solidified doctrine, the parol evidence rule, instead.¹⁵² Using a modification doctrine instead of the parol evidence rule would probably have yielded the same result.¹⁵³ Not even mentioning it, however, perpetuates the avoidance and underdevelopment of those doctrines.¹⁵⁴

The case has also established precedential law in the area of charitable trusts.¹⁵⁵ The clarity of using competitive sports as a charitable purpose was hazy at best.¹⁵⁶ Although *Mercury Bay* paved the way for courts to rule competitive sports as non-charitable, the court did not render a definitive ruling on the matter.¹⁵⁷ *Golden*

148. See *id.* at 282 (arguing that had Deed of Gift been ambiguous, then parties would be free to introduce outside evidence to persuade courts into ruling in their favor). See also Bill Koch: *On His Amicus Curiae & More*, BYMNEWS.COM, Jan. 1, 2009, <http://www.bymnews.com/americas-cup-33/bill-koch.php> (stating that wealthy yacht clubs would do everything that they could to try and influence courts to rule in their favor despite what true intent of Deed of Gift may be).

149. See Friedman, *supra* note 8 (noting that court in *Golden Gate Yacht Club* read Deed of Gift literally, found it unambiguous and applied its language); *Golden Gate Yacht Club*, 907 N.E.2d at 281 (holding Deed of Gift unambiguous and applying its requirements literally).

150. See Friedman, *supra* note 8 (predicting future interpretations of Deed of Gift based off of court's reasoning in *Golden Gate Yacht Club*).

151. See Johnson & Taylor, *supra* note 22, at 560-61 (noting trend in American courts to shy away from using modification doctrines such as *cy pres* or deviation); FISCHE, *supra* note 50, at 9 (chronicling history of nonuse by American courts of *cy pres* doctrine).

152. See *Golden Gate Yacht Club*, 907 N.E.2d at 281 (using parol evidence rule to determine outcome of case). Compare FARNSWORTH ET AL., *supra* note 62, at 555-60 (discussing parol evidence rule and its wide application and grounded rules), with Johnson & Taylor, *supra* note 22, at 560-61 (noting confusion held by American courts over *cy pres* and deviation doctrines).

153. For a further discussion of this law, see *supra* notes 131-41 and accompanying text.

154. See generally Johnson & Taylor, *supra* note 22, at 560 to 67 (recognizing that courts shy away from *cy pres* and deviation doctrines and that through court avoidance doctrines remain stagnant principals of law).

155. See N.Y. EST. POWERS & TRUST LAW, § 8-1.1 (McKinney 2009) (including *Golden Gate Yacht Club* in its referencing Notes of Decisions under Persons or Things Benefitted # 64 that influence application of New York law).

156. For a further discussion of this law, see *supra* notes 49-61, 112-23 and accompanying text.

157. See *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 95 n.4 (N.Y. 1990) (referencing authority that might be used to disallow Deed of Gift as true charitable trust). See also *George Schuyler Trust*, *supra* note 111 (ques-

Gate Yacht Club stopped any possible momentum towards a non-charitable ruling and has now set precedent for these types of sports-related charitable trusts.¹⁵⁸

Such a broad reading of a charitable trust is not without its consequences.¹⁵⁹ Charitable trusts are appealing for a variety of reasons, mostly because they are not subject to the rule against perpetuities and suspension-of-alienation rules.¹⁶⁰ They can also name a corporation as trustee, or no trustee at all, and will still be valid.¹⁶¹ This type of flexibility is quite popular and ideal for colleges and universities, churches, hospitals, scientific research organizations and other groups.¹⁶²

Assets for charitable organizations are in the hundreds of billions of dollars.¹⁶³ This is mainly because they offer certain tax benefits.¹⁶⁴ Congress, however, has yet to define "charitable" and relies on judicial interpretation.¹⁶⁵ This has led to a set of upper echelon of charitable purposes that are traditionally and universally up-

tioning validity of Deed of Gift as actual charitable trust and suggesting *Mercury Bay Boating Club Inc.* as opportunity for court to rule either way on this issue, but declined to do so).

158. See Friedman, *supra* note 8 (recognizing *Golden Gate Yacht Club* as new precedent for interpretation of Deed of Gift). See also N.Y. EST. POWERS & TRUST LAW, § 8-1.1 (referencing *Golden Gate Yacht Club* as influential upon New York courts).

159. See Mary Kay Lundwall, *Inconsistency and Uncertainty In the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1342 (1995) ("[D]eciding what causes and ideas may be deemed charitable is extremely important and can have far-reaching consequences.").

160. See *In re Hamilton's Will*, 63 N.Y.S.2d 265, 267-68 (N.Y. App. Div. 1946) (holding that rule against perpetuities and suspension-of-alienation rules do not apply to charitable trusts).

161. See N.Y. EST. POWERS & TRUST LAW, § 8-1.1(a) (declaring that charitable trusts can name either no trustee or corporation as trustee and still be held valid in New York).

162. See BLEVINS, ET AL., *supra* note 49, at 180 (claiming that charitable trusts are widely used by "educational, religious, scientific, medical, or other groups").

163. See Lars G. Gustafsson, *The Definition of "Charitable" for Federal Income Tax Purposes: Defrocking the Old and Suggesting Some New Fundamental Assumptions*, 33 HOUS. L. REV. 587, 590 (1996) (citations omitted) (citing that in 1991, there were 439,974 charitable "organizations (excluding private foundations and most religious organizations) [that] had assets totaling \$777.5 billion and annual revenues of \$491.1 billion, of which \$87.5 billion constituted contributions, gifts, and grants").

164. See 26 U.S.C. §§ 501(a), (c)(3) (2006) (listing charitable organizations as those which are exempt from further taxation under this subtitle); BLEVINS, ET AL., *supra* note 49, at 174-75 (describing some tax benefits afforded to charitable trusts). See also Gustafsson, *supra* note 163, at 589-90 (stating that donators to charitable organizations are allowed certain tax deductions).

165. See Gustafsson, *supra* note 163, at 590 (noting that Congress has failed to accurately define "charitable" and relies on judiciary to define it).

held.¹⁶⁶ But decline to define “charitable” has also led to a range of fringe trusts ranging “from the sublime to the ridiculous.”¹⁶⁷ As a result of *Golden Gate Yacht Club*’s broader interpretation of charitable purposes, more donors and organizations will apply for charitable trusts.¹⁶⁸ Thus, although the case at bar has set the standard for interpreting the Deed of Gift, with courts less likely to use modification doctrines and the likely increase of applications for charitable trusts, *Golden Gate Yacht Club* will make certain that the America’s Cup will not be the last contest in America’s courts.¹⁶⁹

Joseph F. Dorfler*

166. *See id.* at 613-17 (describing implications of not having concrete definition of “charitable” and leaving it to judiciary to decide its meaning).

167. Lundwall, *supra* note 159, at 1342 (citations omitted)). Among the various qualifying organizations, such as hospitals, libraries, and churches, other attempts by organizations to be declared charitable have included: “[to] establish scholarships for those who receive the lowest scores in a golf tournament, . . . provide shoes for indigent actors[,]. . . to espouse vegetarianism. . . [and] to establish a charitable trust to hire musicians to play dirges and march to the cemetery on his birthday and other holidays.” *Id.*

168. *See id.* at 1341-45 (arguing that people will continue to push boundaries of charitable trust definition, which can have far reaching consequences on society).

169. For a further discussion on how *Golden Gate Yacht Club* set the standard for interpreting the Deed of Gift, see *supra* notes 143-51 and accompanying text. For a further discussion on how courts are less likely to use modification doctrines, see *supra* notes 150-54 and accompanying text. For a further discussion on how charitable trust applications are likely to increase, see *supra* notes 159-68.

* J.D. Candidate, May 2011, Villanova University School of Law; BS in Mathematics & BA in Economics, Dec. 2007, College of William and Mary