

MILTON HERSHEY SCHOOL**and****HERSHEY TRUST COMPANY
TRUSTEE OF MILTON HERSHEY
SCHOOL TRUST**

**: IN THE COURT OF COMMON PLEAS
: DAUPHIN COUNTY, PENNSYLVANIA
:
: ORPHANS' COURT DIVISION
:
:
: NO. 712, YEAR OF 1963**

ORDER

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

By the Court:

Warren G. Morgan
Warren G. Morgan, S.J.

DISTRIBUTION:

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

CERTIFICATION

COMMONWEALTH OF PENNSYLVANIA :

COUNTY OF DAUPHIN :

SS

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

ORDER

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

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


Jane D. Marfizo
Register of Wills & Clerk of the Orphans' Court

MILTON HERSHEY SCHOOL

and

**HERSHEY TRUST COMPANY
TRUSTEE OF MILTON HERSHEY
SCHOOL TRUST**

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: DAUPHIN COUNTY, PENNSYLVANIA**

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: ORPHANS' COURT DIVISION**

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: NO. 712, YEAR OF 1963**

ORDER

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

By the Court:

Warren G. Morgan
Warren G. Morgan, S.J.

DISTRIBUTION:

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MILTON HERSHEY SCHOOL

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

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

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

DISCUSSION

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

At the outset, two points should be made: First, the Trustees and the Managers of the School¹ who rescinded the Agreement now sought to be reinstated are not all the same persons

¹ Under the provisions of the Trust, the Managers must also be members of the Board of Trustees and reference herein will be made as "Trustees/Managers."

who made that Agreement. As is well known by the Association, subsequent to the July 31st Agreement a lawsuit filed by the Attorney General successfully opposed a proposed sale by the Trustee of its controlling interest in Hershey Foods Corporation and led to the resignation of nine of the sixteen members of the Trustees/Managers, including the then President of the School. The re-constituted Board of Trustees now numbers eleven, four of whom are newly appointed. Three of the current Trustees/Managers are alumni of the School as is the recently installed new President of the School.

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

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

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

We reject out of hand the implication of the foregoing argument that the School and the Attorney General have subordinated to other interests the interests of the children who now or later may attend the School. We do not discount the commendable concern the Association has

for those children but it cannot draw standing from a source that lacks it. The following statements of the prevailing law from Bogert, Trusts and Trustees, Second Edition, Revised, explain why:

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

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

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

The purpose of vesting in some public official such as the Attorney General the exclusive power to begin proceedings to enforce charitable trusts is obvious. The persons affected by such trusts are usually some or all of the members of a large and shifting class of the public. If any member of this class who deemed himself qualified might begin suit, the trustee would frequently be subjected to unreasonable or vexatious litigation²... In ultimate analysis it is the public at large which benefits and not merely the individuals directly assisted. Obviously, there is good reason for vesting in a single authority the discretion and power incident to the enforcement of such trusts rather than leaving the matter to the numerous, changing and uncertain numbers of the group directly to be aided.

See Sections 414 (emphasis added) and 411.

² The prayer for relief in the Petition is preposterous. It asks that we appoint nominees of the Association as guardian and trustee ad litem for the current and potential students of the School respectively whose consent will be required for any amendment to the re-instated Agreement and thereafter "otherwise to protect the interests of" their wards. In addition, the Petition asks that we direct that the Trustees/Managers shall take no further action that in any way affects the future use of Trust lands for child purposes until a long term growth plan for the school has been developed with the participation of the aforementioned guardian and trustee ad litem.

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

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

Granted, courts from time to time have relaxed the rule requiring the charity to be represented by the Attorney General but the cases granting standing to actual or prospective "beneficiaries" are relatively few and invariably the applicant for standing is or claims to be a member of the class for whom the benefit is sought.³ Obviously, the Association is not a member of the children classes it purports to represent and no member of those classes seeks standing.

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

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

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

As this member of the Court has personally observed, the alumni of the Milton Hershey School exhibit an impressive gratitude to Milton and Catherine Hershey and an intense loyalty to the institution they founded. There is, indeed, a family-like bond shared by the alumni, a

³ The case of Hooker v. Edes Home, 579 A.2d 608 (D.C.C.A. 1990), cited by the Petitioner, demonstrates the narrow ambit of these cases. See Bogert, supra, 1999 Cumulative Pocket Part, Section 414 at footnote 24.5.

relationship that Mr. Hershey approved of and fostered. Until about a decade ago, the activities of the Association consisted, in the main, of noteworthy efforts in furtherance of the stated purpose to foster fellowship among the members, to serve the welfare of each other and to mentor children then in residential care in the School.

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

In recent years, members of the Association became concerned that the School was no longer being managed in the manner of the model observed during Mr. Hershey's lifetime. Accordingly, the Association made known these concerns to the Attorney General who persuaded the Trustees/Managers to address some of the concerns in an Agreement dated July 31, 2002, to which the Attorney General was also a party. Among the provisions recommended by the Association and included in the Agreement were certain enrollment and education criteria and a restriction against a Trustee/Manager serving on the board of the Hershey Foods Corporation or of the Hershey Entertainment & Resort Company (HERCO).⁴ The reason for the restriction seems to be an apprehension that a Trustee having a connection with one of these

⁴ Hershey Entertainment and Resort Company is a wholly owned asset of the Trust which also owns a controlling interest in Hershey Foods Corporation.

entities may influence all of the other Trustees/Managers to improperly favor those entities against the interests of the School.

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

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

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

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

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

As we previously noted, the Association is not mentioned in any Trust instrument of Mr. Hershey; it does not possess any beneficial interest in the School Trust. It does not have any "integral involvement or prerogative" in the administration of the Trust or the day-to-day operation of the School. The Association does not have that relationship that would warrant the finding of a substantial and special interest in the Trust. There is no claim that any of its members have been denied a contribution to their education. The Petition does not allege that that actions complained of in the Petition will jeopardize or threaten a denial of benefits to it or its members. Thus, the Association cannot meet the requirements of showing a direct harm to its interests and it follows that there is no "immediate" interest. Significantly, the Association points to no instance of harm that has occurred by reason of the rescission of the July 31st

Agreement or by failure to implement the specific provisions. Unrealized fears do not meet the direct and immediate requirement for standing. In re McClune, *supra* at 864.

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

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

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

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

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

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

ORDER

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

BY THE COURT:

Warren G. Morgan
Warren G. Morgan, Senior Judge

CERTIFICATION

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

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