

**STATE OF NEW YORK
SUPREME COURT****COUNTY OF FRANKLIN**

In the Matter of the Application of

PAUL SMITH'S COLLEGE OF ARTS AND SCIENCES, **DECISION AND ORDER**

Beneficiary under the Last Wills and Testaments of

PHELPS SMITH,

Deceased,

Index No. 2015-0597

RJI No. 16-1-2015-0317

for an order modifying the restrictions on its bequests pursuant to Section 8-1.1 of the Estates, Powers and Trusts Law and Section 555(c) of the Not-for-Profit Corporation Law.

ELLIS, J.

This matter was heard at a special term of the Supreme Court, held in and for the County of Franklin, at the Franklin County Courthouse, 355 W. Main Street, Malone, New York, on the 18th day of August, 2015, with appearances as follow:

1. Frank J. Payti, Esq. and Douglas M. McRae, Esq. on behalf of the petitioner; and
2. Carl L. Destafano, Esq. and James G. Sheehan, Esq. on behalf of the Office of the Attorney General.

In addition, the Court considered the following submissions:

1. Verified Petition, dated July 14, 2014 [sic], with accompanying Verification of Cathy Dove, Ed.D., sworn to on July 13, 2015, with attached Exhibits A-C;
2. Office of the Attorney General's Memorandum of Law in Response to Petition and in Further Support of the Office's Affirmation of No Objection, dated August 14, 2015, and accompanying Affirmation of Service by Mail, dated August 14, 2015;
3. *In Camera* materials consisting of:
 - a. Letter of Frank J. Payti, Esq. dated August 21, 2015, with attached Exhibits A-I; and
 - b. Letter of Frank J. Payti, Esq. dated September 4, 2015, with attached Paul Smith's College Strategic Plan - Draft;

This matter was commenced on July 17, 2015 with the filing of the Verified Petition of Paul Smith's College of Arts and Sciences (hereinafter referred to as "Paul Smith's"), brought by Paul Smith's President, Cathy Dove, Ed.D, through its attorney, Frank J. Payti, Esq. Petitioner seeks an

order pursuant to Estates, Powers and Trusts Law (hereinafter "EPTL") § 8-1.1 and Not-for-Profit Corporation Law (hereinafter "N-PCL") § 555 (c), modifying the restrictions on a charitable testamentary gift from the Estate of Phelps Smith, contained in his Last Will and Testament (attached to the Verified Petition as "Exhibit A")(hereinafter referred to as "The Will"), executed on February 21, 1928.

The "Fourth" Clause of The Will, at issue in this matter, reads in pertinent part, as follows:

"I give, devise and bequeath all the rest, residue and remainder of my estate, of every name, nature and description wheresoever situate to the corporation hereinafter directed to be formed for the erection and maintenance of a college for the higher education of boys and girls, *to be forever known as 'Paul Smiths College of Arts and Sciences.'*"

I direct me Executors hereinafter named as soon as practicable after my death and during the lifetime of the said Executor, or the survivor of them, to form a corporation to be known as 'Paul Smith's College of Arts and Sciences,' whose object shall be the higher education of boys and girls, to be located upon St. Regis Lake if practicable, and I not, then at some other suitable place in the town of Brighton, Franklin County, New York. Such college is to be incorporated by and under the regents of the State of New York if possible, and by its charter of articles of incorporation is to be perpetual." [Court's emphasis added].

Petitioner seeks an Order of the Court allowing it to be released from the naming restriction contained in the above quoted clause of The Will, so that the institution may be renamed "Joan Weill-Paul Smith's College": Petitioner seeks such relief, in part, to reflect significant past support as well as a proposed naming gift of at least twenty (20) million dollars from Joan Weill and her family.

EPTL § 8 1.1(c) is the codification of the equitable doctrine of *cy pres*, a French term meaning "as near as," under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail. It is often used in construing charitable gifts when the donor's original charitable purpose cannot be fulfilled (Black's Law Dictionary, Eighth Ed., 2004).

"When a court determines that changed circumstances have rendered the administration of a charitable trust according to its literal terms either 'impracticable or impossible', the court may exercise its *cy pres* power to reform the trust in a matter that 'will most effectively accomplish its general purposes' (EPTL §-1.1, subd. [c]). In reforming trusts pursuant to this power, care must be

taken to evaluate the precise purpose or direction of the testator, so that when the court directs the trust toward another charitable end, it will 'give effect insofar as practicable to the full design of the testator as manifested by his will and codicil'." (*Matter of Wilson*, 59 NY2d 461, 465 [1983][citations omitted]).

Similarly, pursuant to N-PCL § 555 (c), "if a particular purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the purposes expressed in the gift instrument".

Three conditions must be met before applying the doctrine of cy pres: (1) the gift or trust must be charitable in nature; (2) the donor must have demonstrated a general, rather than a specific, charitable intent, and; (3) circumstances have changed subsequent to the gift that render literal compliance with the restriction impossible or impracticable (*Matter of Wilson, supra* at 472; *Matter of Scott*, 8 NY2d 419, 42 [1960]; *In re Estate of Post*, 2 AD3d 1091, 1092-93 [3d Dept 2003]).

Here, there is no question that this trust, established for the promotion of education, is for a charitable purpose within the meaning of the law (see *Matter of Wilson, supra* at 471). The charitable intent of Phelps Smith also does not appear to be at issue in this matter. As the Office of the Attorney General noted in its Memorandum of Law, the Franklin County Surrogate's Court has already found that Phelps Smith's charitable purpose was to "bring the advantages of higher education within the reach of those young people who might not otherwise have had it." (*In re Duprea [Smith's Will]*, 1938 N.Y. Misc. Lexis, 1894 *11-*12 [Sur Ct, Franklin County, September 12, 1938]). The Court is left to determine whether circumstances have changed rendering impracticable or impossible strict compliance with the terms of The Will.

Petitioner argues that the restriction of the gift from the Estate of Phelps Smith, forever limiting the name of Paul Smith's, "nearly fatally impedes the ability of Paul Smith's to seek large gifts from a single donor in order to make the investments it needs to remain viable". In light of this, petitioner argues that the Court should intervene and relieve the College of such restriction.

In support of its argument, petitioner cites several articles that note a change in demographics

of college bound students. According to petitioner, the articles demonstrate that there is a "shrinking but more diverse pool of enrollees with far higher numbers of low-income, minority, older, female, off-campus and otherwise employed individuals than what many people commonly consider".

Petitioner juxtaposes this changing demographic against its current enrollees, stating that approximately 66% are male and 87% are white, with 98% of those students living on campus. According to the petitioner, in order to stay competitive in recruiting the shrinking demographic of individuals who are most likely to go to an isolated, private, on campus college, it must make a significant investment in infrastructure, programming and nationwide college presence. Petitioner's internal estimates for the cost of such investment exceeds thirty (30) million dollars in direct investment.

The Court has reviewed a significant amount of financial information concerning Paul Smith's, to include the College's submitted annual tax returns (IRS Form 990) from 2010 to 2013. The Court has also reviewed the report from the Office of the Attorney General which includes a synopsis of the College's 990s from 2001 through 2013¹, with the exception of the years 2004 and 2006. The documents show that the College had a surplus in all of those years with the exception of years 2008 and 2013. However, since 2010, the college's surplus has steadily decreased.

Both the College and the Office of the Attorney General attribute the decrease in surplus from 2010 to 2012 and the deficit in 2013, to a decrease in revenue derived from tuition. During such time, petitioner's enrollment numbers have decreased. According to petitioner, this demonstrates the impact the changing demographic of college bound students is having on the College and the College's need to increase enrollment.

The Court has reviewed a draft of Paul Smith's five year strategic plan, which the Court is hereby exempting from disclosure pursuant to the Public Officers Law §§ 89 (5)(a) (1) and 89 (5)(a)(1-a). Such plan was developed to address the College's lower enrollment numbers.

Petitioner states that upon hearing of Paul Smith's plan to adapt for the future, Joan and

¹Available online at <http://nccsweb.urban.org/PubApps/search.php>.

Sanford Weill², offered twenty (20) million dollars toward the transformation. The only condition attached to this contribution is that the College modify its name to "Joan Weill-Paul Smith's College". The Paul Smith's Board of Trustees has unanimously approved the requested relief and the Office of the Attorney General has no objection.

With the foregoing in mind, this Court has the obligation to consider Phelps Smith's desire to establish and maintain a college for the higher education of boys and girls in the Adirondacks, to be forever known as "Paul Smiths College of Arts and Sciences". Petitioner argues, in light of the proposed naming gift and the state of the College's finances, the naming restriction contained in The Will of Phelps Smith is wasteful and impractical. This Court disagrees.

Petitioner conclusively suggests that the only way Paul Smith's can adapt to the changing demographics of college bound students is through a thirty (30) million dollar revitalization plan. However, it has not presented the Court with sufficient evidence that the plan proffered is the only effective way to stabilize the College's finances. Similarly, petitioner states that prior attempts to increase enrollment have not yielded the desired results, but has given the Court little information about such efforts.

There is little doubt the financial position of Paul Smith's, or any institution for that matter, would improve with the injection of twenty (20) million dollars of revenue. Implicit in petitioner's argument is that the College's continued existence is largely dependent on changing its name. Paul Smith's submissions demonstrate that there is potentially a change in the demographics of college bound students. The College also demonstrates a recent decrease in enrollment and, in turn, revenue. However, the petitioner falls far short of showing that its name is holding the College back from being a shining success both in enrollment and in producing successful college graduates. Significantly, Paul Smith's has failed to demonstrate the College cannot operate effectively within

² The Weill Family's generous contributions to Paul Smith's throughout the years cannot be overstated. Joan and Sanford Weill have donated millions of dollars to the College, and have been integral to the College's efforts in fund-raising millions of dollars from other donors. Joan Weill's contributions do not end there. From 1992 until 2011 she served on the Paul Smith's Board of Trustees, including as chairwoman from 2005 until 2010. She is currently a Trustee Emeritus. Both the campus student center and library bear her name in recognition of her significant contributions. There is little doubt that she has been an avid champion of Paul Smith's for decades.

that changing demographic absent the requested relief. The financial records before the Court reflect the College's fiscal problems are recent. Much of petitioner's arguments are speculative. It has not shown, nor can it, that the demographic of students that Paul Smith's has traditionally appealed to will wholly disappear.

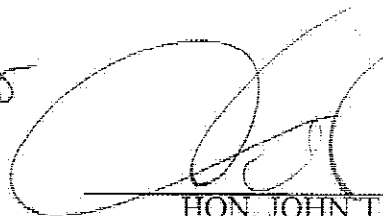
This Court does not find that the name change restriction is impractical, or wasteful, to such a degree that it frustrates the charitable purpose of the bequest of Phelps Smith, which is to bring the advantages of higher education within the reach of those young people who might not otherwise have had it. In light of the foregoing, petitioner has failed to demonstrate that the naming restriction contained in The Will of Phelps Smith is impractical and/or wasteful within the context of EPTL § 8-1.1 and N-PCL § 555 (c), and the requested relief must be denied. Accordingly, it is hereby

ORDERED that the Petition is denied in its entirety.

THIS ORIGINAL DECISION AND ORDER IS BEING MAILED, BY THE COURT, TO COUNSEL FOR THE PETITIONER, FRANK J. PAYTI, ESQ., ONE LINCOLN CENTER, SYRACUSE, NEW YORK, 13202, WHO IS DIRECTED, FORTHWITH, TO: 1) FILE SUCH ORIGINAL DECISION AND ORDER WITH THE FRANKLIN COUNTY CLERK WITHIN TEN DAYS OF THE DATE OF THIS DECISION AND ORDER; AND 2) SERVE A COPY OF SUCH DECISION AND ORDER, ALONG WITH NOTICE OF ENTRY, ON THE OFFICE OF THE ATTORNEY GENERAL.

SO ORDERED.

Dated: October 6, 2015
Tupper Lake, NY



HON. JOHN T. ELLIS, J. S.C.