IN COMMONWEALTH COURT OF PENNSYLVANIA

No. 759 CD 2004

IN RE: MILTON HERSHEY SCHOOL TRUST

BRIEF FOR APPELLEE
OFFICE OF ATTORNEY GENERAL

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, ORPHANS' COURT DIVISION, ENTERED ON NOVEMBER 19, 2003 AT NO. 712 OC 1963

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COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Section 762(a)(5)(ii) of the Judicial Code, 42 Pa. C.S. § 101 et seq., § 762(a)(5)(ii), in that this appeal concerns the ongoing affairs of the Milton Hershey School, a nonprofit corporation subject to the Nonprofit Corporation Law of 1988, as reenacted and amended, 15 Pa. C.S. §§ 5101 et seq.

COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

A. Scope of Review

In reviewing an appeal from "an order granting preliminary objections in the nature of a demurrer," this Court's scope of review is plenary. Homziak v. G.E. Capital Warranty Corp., 839 A.2d 1076, 1079 (Pa. Super. 2003) (citations omitted).

B. Standard of Review

This Court's "standard of review mirrors that of the trial court." Homziak v. G.E. Capital Warranty Corp., 839 A.2d at 1079. "When ruling upon preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deductible therefrom. The Court is not required to accept as true any conclusions of law or expressions of opinion." Russell v. Donnelly, 827 A.2d 535, 536 (Pa. Cmwlth. 2003).

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the lower court err in refusing to accept opinions, conclusions and unsupported inferences as true when the law provides that the court must accept only well-pleaded facts?

(Not addressed by the trial court).

2. Whether an unrelated nonprofit corporation has standing to supervise the day-to-day activities of a charitable institution established through a charitable trust when the entity is not mentioned in the Deed of Trust and fails to meet any of the traditional tests for standing under Pennsylvania law?

(Answered no by the trial court).

COUNTER-STATEMENT OF THE CASE

A. Form of Action and Procedural History

The narrow issue in this appeal is whether the Milton Hershey School Alumni Association (MHSAA) has standing to challenge an agreement among the Attorney General, the Milton Hershey School, and the Hershey Trust Company (School/Trust) as well as to have its representatives, including its attorney, John W. Schmehl, appointed as guardians ad litem for current and potential students at the Milton Hershey School. (R. 67, 137a). The trial court determined that it did not and MHSAA has appealed.

MHSAA filed a Petition asking the trial court, inter alia, to rescind an agreement between the Attorney General and the School/Trust and to reinstate a prior agreement between those parties.

In response to MHSAA's Petition, the Attorney General and the School/Trust filed Preliminary Objections arguing that MHSAA lacked standing. (R. 155-190a, R. 139-154a). On October 16, 2003, the Township of Derry, Pennsylvania, filed a Petition for Leave to Intervene. On October 22, 2003, the Attorney General filed an Answer in Opposition to Derry Township's Petition for Leave to Intervene. On October 24, 2003, Derry Township filed an Amended Petition for Leave to Intervene. On October 28, 2003, the Attorney General filed an Answer in Opposition to Derry Township's Amended Petition. Despite the Stipulation of the parties, which indicates that the Reproduced Record shall include all parts of the record from September 4, 2003, forward, these items have not been included. (R. 1-2a).[1]

On November 19, 2003, the Honorable Senior Judge Warren G. Morgan entered an unreported Memorandum Opinion and an Order sustaining the Preliminary Objections and

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[1] For the convenience of the Court, true and correct copies of the pleadings have been affixed to this Brief and marked as Attachments A-D.

dismissing MHSAA's petition for lack of standing. The November 19, 2003 Order and Opinion are Attachment 1 to MHSAA's Opening Brief.

On December 17, 2003, MHSAA filed a Notice of Appeal in the Superior Court. On February 6, 2004, the Attorney General filed an Application to Transfer this Matter to Commonwealth Court. Superior Court transferred the appeal.

B. Prior Determination of the Court of Common Pleas

The Honorable Senior Judge Warren G. Morgan issued an Order dismissing MHSAA's Petition. The Order was accompanied by an unreported Opinion pursuant to which the trial court determined that MHSAA lacked standing to litigate this matter either on its own behalf or on behalf of current and prospective beneficiaries.

Judge Morgan first noted that "in an Opinion dated May 14, 1999, we [the trial court] decided that the Association [MHSAA] 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." In re Milton S. Hershey School, No. 712 of 1963, slip op. at 1 (Dauphin County Ct. Common Pls. November 19, 2003).

Nevertheless, the trial court analyzed MHSAA's standing in this matter first noting that MHSAA does not have standing to represent current and future students of the School because according to its Articles, MHSAA's members are former students. "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*.'" Id. at 5. The court concluded, "[t]he Association cannot assume, simply by saying so, a capacity to file a lawsuit on behalf of others." Id. at 2.

Judge Morgan further noted that MHSAA is not mentioned in the Deed of Trust and indicated, "[a]s 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." Id. at 5. Judge Morgan further analyzed MHSAA's standing in accordance with established legal principals and concluded, once again, that MHSAA does not have standing in relation to the School/Trust.

C. Factual Background

MHS, a charitable institution, was created in 1909 by virtue of a Deed of Trust. The Deed of Trust states that it is an agreement, "[b]etween Milton S. Hershey and Catherine S. Hershey, his wife, of Hershey, Derry Township, Dauphin County, Pennsylvania, parties of the first part, and the Hershey Trust Company of the same place, hereinafter designated as Trustee, party of the second part, and M.S. Hershey of Hershey, W.H. Lebkichner, and John E. Snyder of Lancaster, John B. Curry and A.W. Stauffer, of Swatara, John A. Landis of Manada Hill, George M. Hocker, of Union Deposit, Israel Moyer, of Derry Church, and U.G. Risser, of Campbellstown, Pennsylvania, hereinafter designated as Managers, parties of the third part." (R. 16a). The Deed of Trust was last amended and restated on November 15, 1976. Pursuant to the Deed of Trust, MHS is administered by its trustee, the Hershey Trust Company (Trust Company) and the Board of Managers of MHS (Managers). (R. 16-17a).

As set forth in Paragraph 13 of the Deed of Trust, MHS was organized to "receive and admit to the School as many poor, healthy children as may from time to time be determined by the Managers, the extent, capacity, and income of the School will provide for and shall be adequate to maintain." (R. 23a). Paragraph 13 further stipulates that the Managers shall have discretion in admitting students to the School. (R. 23a).

The Deed of Trust further outlines the manner in which MHS is to be run. With respect to land, Paragraph 6 provides that, "the Trustee may from time to time, but only with the approval of the Managers, sell and convey in fee simple any part or portion of the lands

conveyed by this deed, or which may have been bought or otherwise acquired, which in the judgment of the Managers is not necessary to be kept for the purposes of the School…" (R. 21a).

In light of the charitable nature of MHS, the Attorney General, as parens patriae, has consistently participated in matters and court proceedings affecting the School Trust, including, but not limited to, the cy pres proceedings and the recent changes in board composition and leadership.

On July 31, 2002, the Attorney General, MHS and the Trust Company entered into an agreement concerning the administration of the School Trust (July 31, 2002 Agreement). (R. 48a). The Agreement was to have become effective as of June 30, 2003, or in the event of unanticipated delays or other compelling reasons, not later than December 31, 2003. (R. 48a). Thereafter, through June of 2003, significant changes in the composition of the Managers and leadership of MHS occurred. As a result, the parties determined that it was appropriate to modify the July 31, 2002 Agreement and a subsequent Agreement was reached on June 27, 2003 (June 27, 2003 Agreement). (R. 31a). Both agreements are written documents which speak for themselves. MHSAA was not a party to or the subject of either Agreement. MHSAA seeks to replace the June 27, 2003 Agreement with a third agreement which it terms the July 31, 2002 Agreement "as Later Appropriately Modified." (R. 70a).

MHSAA is a Pennsylvania nonprofit corporation, which is separate and apart from and not a division of MHS or the Trust Company. MHSAA is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. (MHSAA's Opening Brief at 7). MHSAA was established at the direction of the Settlor, Milton S. Hershey, but it is not now nor has it ever

been named in the Deed of Trust. MHSAA is not a beneficiary of the Trust. (R. 287a).

Historically, MHSAA has been comprised of graduates of MHS. As the trial court recognized:

> [u]ntil 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."

In re Milton S. Hershey School, No. 712 of 1963, slip op. at 4 (Dauphin County Ct. Common Pls. November 19, 2003). The Deed of Trust specifically provides that graduates of MHS are no longer beneficiaries of the Trust. The Deed states, "[a]ll children shall leave the institution and cease to be the recipients of its benefits upon the completion of the full course of secondary education being offered at the School." (R. 25a). The Managers may, in their discretion, contribute to the higher education of a graduate of the School. (R. 25a).

SUMMARY OF THE ARGUMENT

In sustaining preliminary objections, the trial court did not err in refusing to accept the opinions and conclusions of MHSAA as true in that the trial court was required to accept only well-pleaded facts in determining that MHSAA lacks standing to seek the requested relief.

Pennsylvania case law clearly provides that the protection of the public's interest in charitable assets is properly protected by the Attorney General, acting in the capacity of parens patriae, and the courts rather than private parties. The instant case does not present a situation in which the Attorney General has failed to act in that the Attorney General has been an active participant in matters concerning the School/Trust.

MHSAA has not been aggrieved by the actions of either the Attorney General or the School/Trust because it is not a party to either the Deed of Trust or the July 31, 2002 and June 27, 2003 Agreements. MHSAA is an independent nonprofit corporation, comprised of alumni of the School, whose mission has not been affected by the Agreements. As such, MHSAA does not meet the traditional tests for standing to enforce a charitable trust under Pennsylvania law in that it does not have either a substantial or a special interest in the Trust. It is not a named beneficiary and has not been granted any supervisory powers in relation to the Trust. Moreover, MHSAA does not have a standing to represent possible and future beneficiaries of the Trust because it is not a member of the class of possible or future beneficiaries.

Granting MHSAA standing would lead to a multiplicity of lawsuits in that MHSAA seeks to interfere in the day-to-day operations of the School. Further, MHSAA has attempted to intervene in other matters involving the School/Trust and been denied standing.

Finally, the trial court did not err in failing to grant MHSAA standing under the alternative taxpayer standing rule because MHSAA fails to meet essential elements of that test. Further, the test is inapplicable to agreements between governmental entities and third-parties.

Accordingly, MHSAA does not have standing to challenge the June 27, 2003 Agreement either in its own right or on behalf of all orphans and its appeal should be denied.

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ARGUMENT FOR APPELLEE

A. The trial court did not err in refusing to accept the opinions and conclusions of MHSAA as true in that the trial court was required to accept only well-pleaded facts when determining whether MHSAA has standing to seek the requested relief.

The Pennsylvania Superior Court has already determined that the matter of standing presents a jurisdictional issue which must be decided before the case may proceed on the merits. In re Barnes Foundation, 449 Pa. Super. 81, 84, 672 A.2d 1364, 1366 (1996). The trial court properly concluded that the instant case could not proceed on the merits because MHSAA does not have standing to seek the relief requested.

In sustaining Preliminary Objections and determining that MHSAA lacks standing to litigate this matter, the trial court did not err in refusing to accept MHSAA's opinions, interpretations of written documents and conclusions as true. It is well settled that, "[w]hen ruling upon preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deductible therefrom. The Court is not required to accept as true any conclusions of law or expressions of opinion." Russell v. Donnelly, 827 A.2d 535, 536 (Pa. Cmwlth. 2003). MHSAA's pleadings are supported largely by MHSAA's opinions, conclusions and interpretations of the July 31, 2002 and June 27, 2003 Agreements and the Deed of Trust. The Agreements and Deed of Trust are written documents which speak for themselves and it was not necessary for the trial court to accept MHSAA's opinions and conclusions as true. Accordingly, the trial court did not err in sustaining the Preliminary Objections.

B. The Attorney General's parens patriae authority has not changed in that the Attorney General has always represented the public's interest in charitable assets.

1. Parens Patriae

MHSAA asserts that the "*parens patriae* interpretation needs clarification for orphan children." (MHSAA's Opening Brief at 46). To the contrary, the Attorney General's *parens patriae* authority has remained unchanged in that the Attorney General has always represented the public's interest in charitable assets. Pennsylvania case law makes clear that "[t]he beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts accrue." In re Pruner's Estate, 390 Pa. 529, 531, 136 A.2d 107, 109 (1957). The protection of the public's interest is entrusted not to private trustees, but to the Attorney General and ultimately to the courts. As the Supreme Court said in Pruner,

> because the public is the object of the settlors' benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised. The responsibility for public supervision traditionally has been delegated to the attorney general to be performed as an exercise of his *parens patriae* powers.

Id., 390 Pa. at 531-532, 136 A.2d at 109 (1957).

Consequently, the Attorney General is the appropriate party to invoke the equitable powers of the Orphans' Court to protect the interests implicated within the School Trust when necessary. "A charitable trust is initially and continuously subject to the *parents patriae* power of the Commonwealth and the supervisory jurisdiction of its courts." In re Coleman's Estate, 456 Pa. 163, 168, 317 A.2d 631, 634 (1974).

The Attorney General's concerns as *parens patriae*, however, are neither so narrow nor so constrained by the position or interests of a specific charity, rather the Attorney General has historically represented the interests of the public at large. The Attorney General may take a

position that diverges from the view of a charity on a particular matter in that if a charity does not object to a particular matter, "this neither limits . . . nor vitiates the force of the Attorney General's arguments. The Attorney General represents a broader interest than that of the charity alone. He must protect the interests of the public at large to 'whom the social and economic benefits of [charitable] trusts accrue.'" In re Estate of Feinstein, 364 Pa. Super. 221, 226, 527 A.2d 1034, 1036, n. 3 (1987) (citing In re Estate of Pruner, 390 Pa. 529, 531, 136 A.2d 107, 109 (1957)).

Charitable trusts "promote the well-doing and well-being of an indefinite number of persons, thus materially adding to the good of the community as a whole." In re Barnwell's Estate, 269 Pa. 443, 446, 112 A. 535, 536 (1921) (citing In re Kimberly's Estate (No. 3), 249 Pa. 483, 95 A. 86 (1915)). "Charitable trusts concern the welfare of the entire Commonwealth and the entire Commonwealth has a beneficial interest in every suit involving a charitable trust." Glenmede Trust Co. v. Dow Chemical Co., 384 F. Supp. 423, 432 (E.D. Pa. 1974). In cases involving charitable trusts, the interests of the Commonwealth are best represented by its representative, the Attorney General.

Given the impact of the Hershey Trust on the community at large, the Attorney General is the proper authority to question the activities of the Trust when appropriate. "Under Pennsylvania law, the Attorney General is charged with the duty of inquiring into the status, activities and functions of charitable trusts, and no trust is permitted to declare itself charitable without submitting to the supervision and inspection of the Attorney General." Id. At 428 (citing Commonwealth v. Barnes Foundation, 398 Pa. 458, 159 A.2d 500 (1960); Commonwealth v. Brown, 260 F. Supp. 323 (E.D. Pa. 1966)). See also, 71 P.S. § 732-204(c) (Attorney General may intervene in any action involving charitable bequests and trusts).

Accordingly, the Attorney General has a long history of representing the public interest in matters representing charitable trusts. In the context of the Hershey Trust, the Attorney General has represented the public interest in numerous proceedings before the Dauphin County Orphans' Court, as well as this Honorable Court.

2. This is not an instance in which the Attorney General failed to act.

Contrary to MHSAA's assertion that it should be granted standing because the Attorney General has failed to act, the Attorney General has acted by entering into the June 27, 2003 Agreement and monitoring the activities of the School/Trust. By arguing that the 2002 Agreement should have been amended, (MHSAA's Opening Brief at 41), MHSAA reveals that its principal objective here is to impose its own agenda upon the School/Trust.

As MHSAA cited in its brief, in the context of the Barnes litigation, the Montgomery County Orphans' Court indicated, "[w]e could grant standing to the Students only if we first accepted as true their allegation that [the OAG] cannot or will not perform adequately in this regard. Because we have no basis for such a finding, we must entrust this task to the *parens patriae*." In re Barnes Foundation (No. 11), 23 Fiduc. Rptr. 2d 127, 131 (Mont. 2003); (MHSAA's Opening Brief at 42). Similarly, in this instance, the Attorney General has performed adequately and has continued to monitor the activities of the School/Trust.

MHSAA further cited a previous Dauphin County Orphans' Court decision in which the court indicated, "[w]e would note that, in the exercise of their discretion, courts have allowed standing to a party asserting that a proper claim of benefits has been denied where the Attorney General fails or refuses to participate." In re Matter of the Estate of Milton S. Hershey, No. 712 of 1963, slip op. at 2 n. 2 (Dauphin May 24, 1999 (Morgan, J.)); (Attachment 2 to MHSAA's Brief). The decision was entered in the context of the 1999 CHILD *cy pres* litigation. The

Attorney General was an active participant in that litigation and has continued that role. As the trial court recognized in its November 19, 2003 Opinion, MHSAA filed a petition to intervene in the *cy pres* litigation and its petition was denied for lack of standing. The trial court further noted that that decision is arguably controlling under the "law of the case" doctrine. In re Milton S. Hershey School, No. 712 of 1963, slip op. at 1 (Dauphin County Ct. Common Pls. November 19, 2003).

Accordingly, MHSAA is not entitled to standing because the Attorney General has been an active participant in matters concerning the School/Trust.

C. MHSAA does not have standing to interfere in the activities of the School/Trust as governed by the Deed of Trust and clarified by the June 27, 2003 Agreement.

1. MHSAA has not been aggrieved by the actions of either the Attorney General or the School/Trust because it is not a party to either the Deed of Trust or the July 31, 2002 and June 27, 2003 Agreements.

MHSAA is a nonprofit corporation separate and apart from MHS. Contrary to its assertion that, "[n]o one from the public has a 74-year purpose and mission to further the philanthropic residential childcare mission of Milton and Catherine Hershey, as does MHSAA," (MHSAA's Opening Brief at 34), MHSAA has changed its mission and purpose. As the trial court recognized, MHSAA's original purpose was:

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

In re Milton S. Hershey School, No. 712 of 1963, slip op. at 4 (Dauphin County Ct. Common Pls. November 19, 2003 (Morgan, J.)).

MHSAA then changed its purpose to include, "a 'dedication to the educational and other principals [sic] of Milton and Catherine Hershey's Deed of Trust, with a commitment to the

well-being of Milton Hershey School, its students and alumni,'" Id. at 4. In changing its mission, MHSAA modified its membership to declare that current students at MHS are its members.

MHSAA's original mission did not contemplate a role in the administration, supervision and oversight of the School. Although MHSAA was established by Milton S. Hershey, founder of the School, MHSAA was never included or named as a beneficiary of the Deed of Trust.

The Deed of Trust outlines the Trust's intended beneficiaries. Paragraph 21 of the Deed of Trust specifically provides that, "[a]ll children shall leave the institution and cease to be the recipients of its benefits upon their completion of the full course of secondary education being offered at the School." (R.25a). Paragraph 21 further provides that, at their discretion, the Managers are permitted to provide a graduate with a sum of up to One Hundred Dollars ($100), or in their discretion, they may contribute toward a student's higher education. (R. 25). Accordingly, the Deed of Trust does not provide that MHS alumni shall remain beneficiaries of the Trust throughout their lifetimes.

The Alumni Association was initially created to serve those graduates who had departed from the School and ceased to be beneficiaries of the Trust as dictated by the terms of the Deed of Trust. MHSAA as an entity is neither a beneficiary nor an appropriate party to represent the interests of the students and prospective students at the School. As such, MHSAA has not been aggrieved by the actions of either the Attorney General or the Trust Company.

2. MHSAA does not meet the traditional tests for standing to enforce a charitable trust under Pennsylvania law.

The Pennsylvania Superior Court has already determined that, "[a]lthough standing does not require the presence of a direct economic interest, it does mandate that a party possess some sort of substantial interest, which has been adversely affected by the alleged misconduct." In re

McCune, 705 A.2d 861, 865 (1997). Further, "[i]n the absence of a beneficial interest, the . . . [petitioner] must demonstrate the existence of some other interest, which would justify its standing to pursue this matter." Id. at 865. In McCune, the court ruled that the distribution committee of a private foundation could not bring a cause of action on behalf of the beneficiaries of a charitable trust. The court cited In re Pruner's Estate, 390 Pa. 529, 531, 136 A.2d 107, 109 (1957) ("The beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts accrue."), and determined that, "[u]nder these circumstances, however, the general public is properly represented by the attorney general, not . . . [petitioner]." McCune, 705 A.2d at 865, (citing Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1123; Wiegand v. Barnes Foundation, 374 Pa. 149, 97 A.2d 81 (1953)).

The court further explained that:

> [a]lthough the attorney general does not have exclusive standing with regard to the enforcement of charitable trusts, a private party seeking to enforce a charitable trust must possess an interest in the litigation, which surpasses the common interest of the public in continuing to benefit from the trust. [Citation omitted.] Acting as purely the representative of the public, the Committee cannot acquire an interest, which surpasses that of the general public. In order to have standing to bring this action, the Committee must possess its own substantial or special interest in the enforcement of the trust.

Id. at 865, (citing Wiegand, supra, at 153-155, 97 A.2d at 83). As was the case with the distribution committee in McCune, MHSAA does not possess a direct interest in the Deed of Trust in that it is not a beneficiary and does not stand to gain a direct benefit from the Trust. Further, MHSAA's traditional role has been to serve a class of beneficiaries who have left the School and ceased to be beneficiaries of the Trust.

In addition, MHSAA does not possess an incidental interest in the Trust. The court, in McCune, further indicated that the petitioner must possess an interest that "must be of at least incidental benefit to the Committee." McCune, 705 A.2d at 865. The court distinguished *In re* Francis Edward McGillick Foundation, 537 Pa. 194, 642 A.2d 467 (1994), and determined that the petitioner in that case, "possess[ed] neither the 'integral involvement . . . in the awarding of scholarships,' nor the prerogative [that was] exercised by the diocese [in McGillick], in the establishment of a vocational school." McCune, 705 A.2d at 865, (citing McGillick, 537 Pa. at 199, 642 A.2d at 469). Similarly, MHSAA possesses neither the integral involvement in the daily operations of MHS nor the authority to control its daily activities. MHSAA is not mentioned in the Deed of Trust either as a beneficiary or as a trustee. It has traditionally served a class of beneficiaries who, in accordance with the clear terms of the Deed of Trust, have left the School and ceased to be beneficiaries of the Trust. Accordingly, MHSAA does not have standing to seek to control the activities of either MHS or the Trust Company.

3. MHSAA does not have standing under the traditional "substantial, direct and immediate interest" requirements.

MHSAA correctly states that standing requires "a substantial, direct and immediate" interest in the subject matter of the litigation. Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); MHSAA's Opening Brief at 24. These elements have been defined as follows:

> [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. (Citation omitted.) A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. (Citations omitted.) An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, (citation omitted), and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.

South Whitehall Tp. Police Service v. South Whitehall Tp., 521 Pa. 82, 86-87, 555 A.2d 793, 795 (1988) (citing Wm. Penn Parking Garage, Inc., supra, at 192, 346 A.2d at 282; Upper Bucks County Vocational-Technical School Education Ass'n v. Upper Bucks County Vocational Technical School Joint Comm., 504 Pa. 418, 422, 474 A.2d 1120, 1122 (1984))

MHSAA does not satisfy any of the three prongs of the traditional test for standing. First, MHSAA does not have a substantial interest in that MHSAA's interests are no different from the interests of all citizens in procuring obedience to the law or in this case, adherence to the Deed of Trust. MHSAA merely seeks to force the School/Trust to comply with its interpretation of the Deed of Trust. MHSAA is not unique in that other entities have attempted to intervene in matters concerning the Trust and the Attorney General has objected.[2] In the event that MHSAA is granted standing, there is nothing to prevent another group of alumni or other concerned citizens from attempting to impose their interpretations on the Deed of Trust.

Second, MHSSA does not have a direct interest in that it has not suffered harm as a result of the execution of the June 27, 2003 Agreement. MHSAA is not a party to either the June 27, 2003 Agreement or its predecessor, the July 31, 2002 Agreement. MHSAA does not have an indirect stake in either agreement by virtue of information that it may have provided to the Office of Attorney General. The Office of Attorney General has historically welcomed information from the public and/or questioned witnesses to events and such actions do not confer standing on said witnesses. Further, MHSAA is not named in the Deed of Trust nor does it have an interest in the Trust. MHSAA is an independent nonprofit corporation. It is an alumni association, which by its very definition, serves graduates of the School who have departed and ceased to be

[2] The Township of Derry, Pennsylvania, filed a Petition for Leave to Intervene in this matter on October 16, 2003, and filed an amended Petition on October 24, 2003. The Attorney General filed an Answer in Opposition to the Petition on October 22, 2003, and an Answer to the Amended Petition on October 28, 2003. Despite the Stipulation of the parties, which indicates that the Reproduced Record shall include all parts of the record from September 4, 2003, forward, these items have not been included. (R. 1-2 a).

beneficiaries of the Trust. Paragraph 21 of the Deed of Trust clearly provides that, "[a]ll children shall leave the institution and cease to be the recipients of its benefits upon their completion of the full course of secondary education being offered at the School." (R. 25a). The manner in which MHSAA has attempted to amend its articles to include current students does not modify its position in relation to the School/Trust. MHSAA is a nonprofit corporation, organized to serve graduates of the School, who in accordance with the clear terms of the Deed of Trust, have departed its campus. The June 27, 2003 Agreement does not hinder MHSAA's ability to serve graduates of the School. Further, to the extent that MHSAA now states that its mission is to serve current students at the School, the agreement does not hinder or in any way interfere with that mission. Therefore, MHSAA has not suffered harm and has no direct interest in the matter complained of.

Finally, MHSAA does not have an immediate interest in either of the Agreements or the Deed of Trust in that there is no causal connection between an injury to MHSAA and the execution of the June 27, 2003 Agreement. As set forth above, MHSAA has not suffered any injury as a result of the execution of the June 27, 2003 Agreement in that the Agreement does not interfere with or hinder MHSAA's ability to fulfill its mission. Therefore, MHSAA does not have an immediate interest in the matter complained of.

Accordingly, MHSAA does not satisfy any of the prongs of the traditional test for standing.

4. MHSAA does not have a special interest in the Trust.

MHSAA is not entitled to standing because it does not have a special interest in the Trust. In support of its argument that it should be granted standing because it has a special interest in the Trust, MHSAA analogized itself to the Society in Valley Forge Historical Society v.

Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1123 (1981). The Valley Forge case is distinguishable in that in that case the Chapel was seeking to evict the Society from its lifelong headquarters in the Washington Memorial Chapel. The action would have rendered the Society inaccessible to the public and ended its charitable mission. The case is distinguishable in that MHSAA is not in similar peril. Nothing in the 2003 Agreement prevents MHSAA from continuing its mission of serving alumni of the School.

Further, in Valley Forge, the Society was advocating its own rights in attempting to preserve its own charitable mission. In contrast, MHSAA seeks to control the ongoing activities of the School/Trust, separate nonprofit entities. The case also differs in that in Valley Forge, the Supreme Court noted that the Attorney General had chosen not to participate. Valley Forge, 493 Pa. at 498, 426 A.2d at 1127. That is not the case in the instant litigation as evidenced by the fact that the Attorney General is a party to these proceedings.

MHSAA further cited, Smithers v. St. Luke's-Roosevelt Hospital Center, 281 A.D. 2d 127, 723 N.Y.S. 2d 426 (2001), a case which has no controlling effect in Pennsylvania. In that case, the New York Supreme Court, Appellate Division, determined that, "[t]he donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent." Id. at 139, 434. In that case, the wife of the deceased donor and Special Administratrix of his estate was granted standing to enforce a charitable gift. The case is distinguishable in that MHSAA is neither the donor, Milton S. Hershey, nor the administrator of Mr. Hershey's estate.

Accordingly, MHSAA does not have a special interest in the School/Trust in that it is neither the donor nor a beneficiary of the Trust. Further, the Agreement does not modify its charitable purpose.

5. MHSAA does not have a special interest to represent the class of potential beneficiaries.

MHSAA seeks to represent poor orphan children, who have not been admitted to the School. MHSAA does not have standing to represent those children because MHSAA is not a member of that class and as set forth above, the Attorney General, as parens patriae, is the appropriate party to represent the potential beneficiaries of a charitable trust. MHSAA is not comprised of orphans who have not been admitted to the School. On the contrary, it is comprised of alumni of the School, and students who have met the admissions criteria and been admitted to the School.

The admissions criteria are outlined in the Deed of Trust. Paragraph 13 indicates, "only a child deemed poor and healthy by the Managers, and who, in the opinion of the Managers, is not receiving adequate care from one of his or her natural parents, is of good character and behavior, has potential for scholastic achievement, and is likely to benefit from the program offered by the school, in addition to meeting other requirements set forth herein, shall be admitted to the School." (R. 23a). The 2003 Agreement did not modify the Deed of Trust.

The cases cited by MHSAA, In re McNeil's Estate, 39 Pa. D & C. 15 (Phila. 1940) (A possible beneficiary was granted standing.), and In re Francis Edward McGillick Foundation, 537 Pa. 194, 642 A.2d 467 (1994), are distinguishable in that MHSAA is neither a possible beneficiary nor an incidental beneficiary.

Accordingly, MHSAA does not have standing to represent the class of possible beneficiaries and the Attorney General, as parens patriae, is the appropriate party to represent the potential beneficiaries of a charitable trust.

6. Granting MHSAA standing would lead to a multiplicity of lawsuits.

Contrary to MHSAA's assertions, granting MHSAA standing would lead to a multiplicity of lawsuits in that MHSAA seeks to control the daily activities of an ongoing nonprofit corporation. Further, MHSAA professes an inclination to continue monitoring the activities of the School/Trust to the detriment of its original charitable mission of serving MHS students and graduates of the School. (MHSAA's Opening Brief at 28).

In support of its assertion that its standing will not lead to a multiplicity of lawsuits, MHSAA cited Valley Forge, 493 Pa. 491, and Hooker v. Edes Home, 579 A.2d 608 (D.C. C.A. 1990). As discussed above, Valley Forge is distinguishable in that the Society was advocating its own rights in that it was faced with actions that would have ended its existence. Similarly, in Hooker v. Edes Home, a case which is not binding in Pennsylvania, a class of widows was faced with the permanent closure of a residential home and the court noted that the class of beneficiaries and potential beneficiaries was "at a crossroads they are unlikely to face again." Id. at 617.

In contrast, MHSAA, either in its own right or through the appointment of its selected Trustee Ad Litem, seeks an administrative or supervisory role in the ongoing activities of the School/Trust. If MHSAA were granted standing to interfere in the daily activities of the School/Trust, those entities would be rendered virtually unable to act without either consulting MHSAA or enduring the threat of litigation.

D. The trial court did not err in failing to grant MHSAA standing under the Alternative Taxpayer Standing Rule: The Five-Part Biester Test because the Biester Test is inapplicable to government agreements.

MHSAA's contention that the trial court erred in not determining that MHSAA is entitled to standing in accordance with the Biester test is misplaced. In order to apply the taxpayer standing test, the court in Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979), first assumed that the petitioner was a taxpayer, "[w]e shall assume [petitioner] Costopoulos is a taxpayer of the Commonwealth even though the Attorney General has demanded proof of that fact because, even so assuming, [petitioner] Costopoulos is without standing." Id. at 442 f.n. 1, 850, f.n. 1. In contrast, MHSAA is a tax-exempt organization.[3] (MHSAA's Opening Brief at 7.) MHSAA is not otherwise affected by the replacement of the July 31, 2002 Agreement with the June 27, 2003 Agreement because MHSAA is not a party to or the subject of either Agreement.

In its recitation of the Five-Part Biester Test, MHSAA omitted crucial information relating to expenditures. The Pennsylvania Supreme Court has summarized the Biester Test as follows:

> 1. the governmental action would otherwise go unchallenged; 2. those directly and immediately affected *by the complained of expenditures are beneficially affected and not inclined to challenge the action*; 3. judicial relief is appropriate; 4. redress through other channels is unavailable; and 5. no other persons are better situated to assert the claim.

Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 170, 507 A.2d 323, 329 (1986) (emphasis added).

The distinction in the second element is important because in the instant case, MHSAA does not complain of any expenditures, rather MHSAA seeks to void the June 27, 2003 Agreement and replace it with "an appropriately amended" version of the July 30, 2002

[3] While individual members of MHSAA may be taxpayers, the Petition was filed on behalf of the organization, which is exempt.

Agreement. Further, the Attorney General has not been beneficially affected by any expenditures. Therefore, even if MHSAA were a taxpayer, there would be no connection between any tax paid and the actions of which MHSAA complains.

MHSAA further argued, "[t]hat no one is better positioned than MHSAA to assert the Petition's claims is demonstrated by the lower court opinion, where the Orphans' Court would conclude that *no one at all* has standing to bring the claim." (MHSAA's Opening Brief at 58). The Orphans' Court did not conclude that no one at all has standing to bring claims in relation to the Trust, the court merely concluded that MHSAA did not have standing.

Finally, in Drummond v. University of Pennsylvania, 651 A.2d 572, 577 (Pa. Cmwlth. 1994), the court determined that the Biester test was inapplicable to challenge an agreement that was entered between the City of Philadelphia and a University. In concluding that Philadelphia school children had no standing to challenge a contract between the City and the University pertaining to the award of scholarships, the court concluded, "[s]omething more than mere intent to benefit some third party must be shown for the third party to have actionable rights under the contract." Drummond at 578. In reaching its decision, the court held that the Biester test did not apply to such a situation. Id. at 577. In the instance case, MHSAA objects to an agreement between the Attorney General and the School/Trust and as such, Drummond is inapplicable.

Accordingly, the trial court did not err in failing to apply the Biester test because it is inapplicable to the current situation and in the event that it were applicable, MHSAA fails to meet essential elements of the test.

CONCLUSION

In light of the foregoing, MHSAA does not have standing to challenge the June 27, 2003 Agreement either in its own right or on behalf of all orphans and its appeal should be denied.

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Date: September 24, 2004

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 759 CD 2004

IN RE: MILTON HERSHEY SCHOOL TRUST

CERTIFICATE OF SERVICE

I, Heather J. Vance-Rittman, counsel for the appellee, hereby certify that on September 24, 2004, I caused two (2) true and correct copies of the foregoing document titled Appellee's Brief to be mailed via first class, U.S. mail, postage prepaid, to all other parties of record as follows:

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