

**Hearing Date: April 23, 2024 at 12:00 noon**

STATE OF RHODE ISLAND  
PROVIDENCE, SC.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF  
RHODE ISLAND, INC.

:  
:  
:

vs.

C.A. No: PC-2017-3856

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:

ST. JOSEPHS HEALTH SERVICES OF  
RHODE ISLAND RETIREMENT PLAN,  
as amended

:  
:  
:

In re:

:  
:

CHARTERCARE COMMUNITY BOARD,  
ST. JOSEPH HEALTH SERVICES OF  
RHODE ISLAND and ROGER  
WILLIAMS HOSPITAL

:  
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:  
:

C.A. No.: PC-2019-11756

**RECEIVER'S RESPONSE TO BANK OF AMERICA, N.A.'S  
PETITION FOR INSTRUCTIONS**

Stephen F. Del Sesto (the "Receiver") is the duly appointed Permanent Receiver of each and every entity named in the above-captioned cases, C.A. Nos. PC-2017-3856 and PC-2019-11756.

On behalf of each such receivership estate, the Receiver files this response to Bank of America, N.A.'s Petition for Instructions (the "Petition") dated March 29, 2024.

The Receiver joins in seeking the precise result requested by Bank of America, N.A. as set forth in the concluding sentence of its Petition:

Bank of America now seeks instructions to pay those trust funds into this receivership proceeding, so that they may be applied to the Pension Plan.

Bank of America, N.A.'s Petition at 4.

## BACKGROUND

As stated in Bank of America, N.A.'s Petition for Instructions:

1. The trust in question is the Anthony A. Lavazzo Trust (hereinafter the "Lavazzo Trust" or simply the "Trust"). It was established on February 9, 1981 and amended on June 12, 1984.<sup>1</sup>
2. At the time that the Trust was executed (and amended) naming "St. Joseph's Hospital" as a residuary beneficiary, that was the correct legal name of the entity now known as "St. Joseph Health Services of Rhode Island."<sup>2</sup>
3. According to its terms, the Lavazzo Trust entitles St. Joseph Health Services of Rhode Island ("SJHSRI") to a distribution of 10% of the trust assets upon termination of the Trust. The Trust is now set to terminate by its terms.<sup>3</sup> SJHSRI is now entitled to receive from Bank of America, N.A. that 10% share as "an unrestricted gift" (one given "absolutely and free of any trust").<sup>4</sup>
4. The funds representing this 10% share are not subject to the doctrine of cy pres.
5. The funds are rather the subject of an "unrestricted gift" given "absolutely and free of any trust." They are not subject to any condition requiring "return transfer or conveyance." Nor are they subject to any limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes.

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<sup>1</sup> Petition at 1; Exhibit 1 (Trust Agreement).

<sup>2</sup> Petition at 2; Exhibits 3 & 4 to the Petition.

<sup>3</sup> Petition at 4.

<sup>4</sup> Petition at 2 (quoting from its Exhibit 1 § 10(d)(gg)).

6. Even if, *arguendo*, there were such conditions or limitations, the funds must be available first to satisfy SJHSRI's liabilities and obligations. See R.I. Gen.

Laws § 7-6-51:

§ 7-6-51. Distribution of assets.

**The assets of a corporation in the process of dissolution shall be applied and distributed as follows:**

**(1) All liabilities and obligations of the corporation shall be paid and discharged, or adequate provision shall be made for their payment and discharge;**

(2) Assets held by the corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred, or conveyed in accordance with the requirements;

(3) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes, but not held upon a condition requiring return, transfer, or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, societies, or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution adopted as provided in this chapter or as otherwise provided in its articles of incorporation or bylaws;

(4) Any other assets shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws to the extent that the articles of incorporation or bylaws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others;

(5) Any remaining assets may be distributed to any persons, societies, organizations, or domestic or foreign corporations, whether for profit or nonprofit, that may be specified in a plan of distribution adopted as provided in this chapter.

[Emphasis supplied]

7. St. Joseph Health Services of Rhode Island is a corporation in the process of dissolution. See *infra*.

TRAVEL

8. On August 18, 2017, SJHSRI initiated the action captioned *St. Joseph Health Services of Rhode Island, Inc*<sup>5</sup> *v. St. Joseph Health Services of Rhode Island Retirement Plan*, C.A. No. PC-2017-3856 (the “Plan Receivership Proceedings”). On August 18, 2017, the Plan Receiver was appointed temporary receiver of the Plan. On October 27, 2017, the Plan Receiver was appointed permanent receiver of the Plan.

9. On June 18, 2018, the Plan Receiver, together with the seven individual Plan participants<sup>6</sup> as putative class members, brought an action captioned *Stephen Del Sesto, as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, et al. v. Prospect CharterCARE, LLC, et al.*, C.A. No. 1:18-CV-00328-WES-LDA (D.R.I.) (the “Federal Action”).

10. Thereafter, the Plan Receiver, the Seven Plan Participants, and the Legacy Hospital Entities<sup>7</sup> entered into a settlement agreement dated as of August 31, 2018 (“Settlement A”).

11. Subsequently, CharterCARE Foundation, the Plan Receiver, the Seven Plan Participants, and the Legacy Hospital Entities entered into a settlement agreement dated as of November 21, 2018 (“Settlement B”).

12. On November 16, 2018, Settlement A received approval from the Superior Court (Stern, J.), in the Plan Receivership Proceedings.

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<sup>5</sup> *Sic, recte* “St. Joseph Health Services of Rhode Island.”

<sup>6</sup> *I.e.* Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Carol Short, Donna Boutelle, and Eugenia Levesque (the “Seven Plan Participants”).

<sup>7</sup> *I.e.* SJHSRI, CharterCARE Community Board (“CCCB”), and Roger Williams Hospital (“RWH”) (collectively the “Legacy Hospital Entities”).

13. On December 27, 2018, Settlement B received approval from the Superior Court (Stern, J.) in the Plan Receivership Proceedings.

14. On September 30, 2019, Settlement B received final approval from the U.S. District Court in the Federal Action. In connection with such final approval, the federal court certified a settlement class, appointed the Seven Plan Participants as class representatives, and appointed Wistow, Sheehan & Loveley, PC as class counsel.

15. On October 9, 2019, Settlement A received final approval from the U.S. District Court in the Federal Action. In connection with such final approval, the federal court again certified a settlement class, appointed the Seven Plan Participants as class representatives, and appointed Wistow, Sheehan & Loveley, PC as class counsel.

16. On October 15, 2019, pursuant to Settlement B, the parties to Settlement B filed a Joint Petition to (*inter alia*) modify an April 20, 2015 Cy Pres Order entered in KM-2015-0035 (the "April 20, 2015 Cy Pres Action") and for entry of final judgment. That Joint Petition sought to modify the April 20, 2015 Cy Pres Order to permit the settlement payment due under Settlement B from CharterCARE Foundation (from moneys it originally received from the Legacy Hospital Entities pursuant to that Order) and, in all other respects, sought to confirm the other terms of that Order.

17. On November 7, 2019, an entry of appearance was filed in the 2015 Cy Pres Action on behalf of Bank of America, N.A. in its capacity as trustee of the trusts enumerated in the 2015 Cy Pres Petition. This appearance was in addition to Bank of America, N.A.'s other counsel who had previously entered an appearance on its behalf in 2015.

18. On December 3, 2019, the Superior Court entered an Order granting the October 15, 2019 Joint Petition and directed entry of final judgment in the 2015 Cy Pres Action.

19. The Final Judgment affirmed that *cy pres* approval had been granted for payment of the defined Outstanding Pre and Post Closing Liabilities (including the Pension liability) from the income and principal distributions due SJHSRI and/or RWH from the named Existing Charitable Trusts.

20. Thereafter, neither Bank of America, N.A. nor anyone else took any appeal from the November 25, 2019 Final Judgment.

21. On December 13, 2019, pursuant to paragraphs 1(s) and 21 of Settlement A, the Legacy Hospital Entities petitioned themselves into judicial liquidation. Pursuant to paragraph 28 of Settlement A, the Legacy Hospital Entities have agreed they were jointly and severally liable to the Retirement Plan Receiver and the other class plaintiffs in the Federal Action for at least \$125,000,000. Pursuant to paragraph 24 of Settlement A, the Legacy Hospital Entities agreed “to cooperate with and follow the requests of the [Plan] Receiver and to take all reasonable measures in the Liquidation Proceedings to obtain court approval of the Petitions for Judicial Liquidation, including but not limited to marshalling the Settling Defendants' Other Assets and other rights of the Settlement Defendants and opposing and seeking to limit the claims of other creditors where appropriate.” By Superior Court order dated January 17, 2020, “the Liquidating Receiver on behalf of the Petitioners [the Legacy Hospital Entities] shall perform and continue to perform their obligations under the Settlement Agreement, including, but not limited to paragraph 24 of the Settlement A Agreement . . . .”

22. On December 18, 2019, Thomas S. Hemmendinger (“Receiver Hemmendinger”) was appointed Temporary Liquidating Receiver of CCCB, SJHSRI, and RWH, and on January 17, 2020, Receiver Hemmendinger was appointed Permanent Liquidating Receiver of CCCB, SJHSRI, and RWH.

23. On May 18, 2020, the Plan Receiver (on behalf of himself, all participants and beneficiaries in the Plan, and all members of the settlement classes certified in the Federal Action) filed a proof of claim in the liquidating receivership against all the Legacy Hospital Entities in an amount exceeding \$125,000,000. The Plan Receiver’s claim is the largest claim and is both undisputed and supported by the Liquidating Receiver.

24. The Legacy Hospital Entities and Receiver Hemmendinger did not dispute the Plan Receiver’s Proof of Claim.

25. On November 17, 2022, the Plan Receiver and Receiver Hemmendinger filed a Joint Petition (in both the Plan Receivership and Liquidating Receivership) to discharge Receiver Hemmendinger and to appoint the Plan Receiver as permanent Liquidating Receiver of SJHSRI, RWH, and CCCB. On December 16, 2022, that Joint Petition was granted, Receiver Hemmendinger was discharged, and Stephen Del Sesto was appointed permanent Liquidating Receiver of SJHSRI, RWH, and CCCB.

26. The Plan Receiver is entitled to apply the proceeds of the lavazzo Trust to Pension Plan liabilities, because the transfer gift to SJHSRI on Trust termination was “absolutely free of any trust.”

## ARGUMENT

### I. **The Receiver is entitled to apply SJHSRI's interest in the lavazzo Trust to Pension Plan liabilities pursuant to R.I. Gen. Laws §§ 7-6-50(b) and 7-6-61**

Sections 7-6-50(b) and 7-6-61 of the Rhode Island General Laws provides that assets such as SJHSRI's interest in the lavazzo Trust must be applied first to pay SJHSRI's liabilities and can only be transferred to other charitable entities pursuant to the doctrine of *cy pres* if all such liabilities have been satisfied. SJHSRI is currently in the process of voluntary judicial liquidation. Section 7-6-50(b) of the Rhode Island General Laws sets forth the procedure whereby a nonprofit corporation may voluntarily wind up its affairs and dissolve, and directs that assets are to be applied and distributed "as provided in" that chapter:

(b) Upon the adoption of the resolution by the members, or by the board of directors if there are no members or no members entitled to vote on dissolution, the corporation shall cease to conduct its affairs except to the extent necessary for the winding up of its affairs, **shall immediately mail a notice of the proposed dissolution to each known creditor of the corporation, and shall proceed to collect its assets and apply and distribute them as provided in this chapter.**

[Emphasis supplied]

Section 7-6-51 of the Rhode Island General Laws sets forth the specific order of application and distribution of assets applicable to voluntary dissolution:

§ 7-6-51. Distribution of assets.

The assets of a corporation in the **process of dissolution** shall be applied and distributed as follows:

(1) **All liabilities and obligations of the corporation shall be paid and discharged, or adequate provision shall be made for their payment and discharge;**

(2) Assets held by the corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred, or conveyed in accordance with the requirements;



(3) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes, but not held upon a condition requiring return, transfer, or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, societies, or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution adopted as provided in this chapter or as otherwise provided in its articles of incorporation or bylaws;

(4) Any other assets shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws to the extent that the articles of incorporation or bylaws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others;

(5) Any remaining assets may be distributed to any persons, societies, organizations, or domestic or foreign corporations, whether for profit or nonprofit, that may be specified in a plan of distribution adopted as provided in this chapter.

[Emphasis supplied]

The 10% distribution of the termination proceeds of the lavazzo Trust contains no such limitations or restrictions.

As discussed below, the order of subsections (1) through (5) both establishes an order of payment and entitles creditors to payment even out of the nonprofit corporation's restricted assets, **including assets received with a charitable use restriction, and even assets that were given to the corporation under the condition that they be re-conveyed in the event of dissolution.**

The same order of payment applies under the statute for court-approved liquidations of nonprofit corporations, R.I. Gen. Laws § 7-6-61. That statute sets forth the "procedure in liquidation of corporation by court," and sub-section (c) mirrors the above-quoted payment priorities of R.I. Gen. Laws § 7-6-51.

Thus, whether pursuant to voluntary dissolution or court-approved liquidation, the assets of a non-profit corporation must be applied first to satisfy the corporation's

liabilities and obligations, and, until that is accomplished and creditors are paid in full, no assets can be transferred to anyone else, by *cy pres* petition or otherwise.

The argument that restricted charitable assets (which these are not) are not available to satisfy the claims of creditors is contrary to the plain meaning of the statute and has been rejected by the courts. R.I. Gen. Laws §§ 7-6-50 & 7-6-61(c) are based upon the Model Non-Profit Corporation Law, has been adopted across the United States, and the priorities they establish have been judicially construed, most notably in In re Crossroad Health Ministry, Inc., 319 B.R. 778 (D.C. Bankr. 2005), *aff'd, sub nom. Bierbower v. McCarthy*, 334 B.R. 478 (D.D.C. 2005) (*de novo* review).

In that case the bankruptcy court addressed that precise issue in construing the District of Columbia's statute (D.C. Code § 29–301.56(c)) that was identical to R.I. Gen. Laws § 7-6-61(c). That case involved a dispute between a trust that had made a \$60,000 grant to a nonprofit corporation and sought its money back upon the bankruptcy of the nonprofit, on one side of the dispute, and the trustee in bankruptcy who argued that the money must first be used to satisfy any administrative expenses or allowable claims against the bankruptcy estate that remained unpaid, on the other.

First, the bankruptcy court set forth the arguments of the parties:

According to the Trustee, § 29–301.56 directs that a corporation fully satisfy each enumerated portion of the distribution statute before even considering whether subsequent subsections might apply. Thus, before a liquidating non-profit corporation can even reach the question of whether certain corporate assets must be returned or transferred to a different entity pursuant to D.C.Code §§ 29–301.56(c)(2)–(3), the statute first requires that “[a]ll costs and expenses of the court proceedings and all liabilities and obligations of the corporation [must] be paid, satisfied, and discharged, or adequate provision [ ] made therefor.” D.C.Code § 29–301.56(c)(1). Thus, argues the Trustee, under District of Columbia law, **funds held by a non-profit corporation subject to charitable use limitations are corporate assets available to creditors upon dissolution or liquidation, notwithstanding the restriction placed upon such funds by the donor.**

Stewart Trust interprets the statute differently. According to Stewart Trust, the three enumerated subsections of D.C.Code § 29–301.56(c) can be separately triggered, and subsection (c)(1), calling for the payment of all creditors and expenses, simply does not apply to funds that fall within subsections (c)(2)-(3). **As such, a liquidating nonprofit corporation holding funds subject to a charitable use restriction would be governed solely by subsection (c)(3), and such funds would not be available to satisfy creditors or the payment of expenses under subsection (c) (1), because those funds would be either returned to the donor or distributed to a different charitable organization.**

In re Crossroad Health Ministry, Inc., *supra*, 319 B.R. at 781 (emphasis added).

The bankruptcy court came down on the side of the trustee, stating as follows:

Basic principles of statutory construction support the Trustee's reading of the statute. The terminology “as follows” suggests that distributions are to proceed in a sequential fashion, with expenses of dissolution and claims of creditors to be paid first as listed first. Moreover, a dissolution will require paying compensation to professionals who are employed to facilitate the dissolution, otherwise such professionals will not be attracted to handle the dissolution. The legislature would not have envisioned such professionals being put to the risk that distributions would be made under paragraphs (2) and (3) before paying such professionals under paragraph (1). It is thus evident that distributions under paragraph (1) were intended to be made first. Accordingly, the court agrees with the Trustee that District of Columbia law **treats donations held by non-profit corporations subject to charitable use limitations as corporate assets, at least to the extent that such funds are needed to pay creditors and administrative expenses associated with liquidation proceedings.**

In re Crossroad Health Ministry, Inc., *supra*, 319 B.R. at 781 (citations omitted).

The District Court on a *de novo* review agreed:

The Bankruptcy Court's interpretation of the statute is correct. The plain meaning of the language “as follows” suggests that a dissolution or liquidation of a nonprofit corporation under D.C.Code § 29–301.56 should proceed sequentially. **The text of the statute reflects an apparent legislative determination that, upon dissolution of a nonprofit corporation, grant funds in the corporation's possession should be used to satisfy corporate liabilities and obligations, notwithstanding any charitable-use limitations. In other words, the ultimate charitable goals of the grantor are subordinate to the corporation's responsibilities to its creditors.**

Bierbower v. McCarthy, *supra*, 334 B.R. at 481 (emphasis added).

The District Court did not rely exclusively on basic rules of statutory construction, but also found the result supported by public policy:

Moreover, this scheme of distribution is supported by several policy rationales. For instance, as appellee asserted during the Bankruptcy Court proceeding, it creates an incentive for bankruptcy specialists to assist in dissolution proceedings because § 29–301.56(c)(1) guarantees them compensation. See *In re Crossroad Health Ministry, Inc.*, 319 B.R. 778, 781 (Bankr.D.D.C.2005) (hereinafter “Opinion”). The Bankruptcy Court suggested an additional justification: that payment of debts is essential to a nonprofit corporation's operation and, therefore, that **the use of grant funds to satisfy debts is not at odds with a grantor's donative intent.** *Id.* at 782 n. 2. The Court therefore affirms the Bankruptcy Court's interpretation of the statute.

*Bierbower v. McCarthy*, *supra*, 334 B.R. at 481-482 (emphasis supplied).

There is no conflict between the provisions of the Nonprofit Corporations Act and any other Rhode Island statutes applicable to the disposition of charitable assets) *viz.* R.I. Gen. Laws § 18-4-1 (entitled “Application of Cy Pres Doctrine”), R.I. Gen. Laws § 18-9-1 (entitled “Division of Charitable Trusts -- Establishment”), and R.I. Gen. Laws § 18-12.1-1 *et seq.* (entitled “Uniform Prudent Management of Institutional Funds Act”). These three statutes do not contradict the priorities of payment set forth in the Nonprofit Corporations Act.

R.I. Gen. Laws § 18-4-1 applies solely to “**trust property**”<sup>8</sup> and “where the purpose of the donor cannot be literally carried into effect,” and does not mention either corporate assets or dissolution, whereas Section 7-6-61(c) deals expressly with nonprofit corporations and **restricted** assets, and expressly sets forth how assets of a non-profit corporation in dissolution are to be applied. Section § 7-6-61(c) is clearly the

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<sup>8</sup> The money to be distributed by Bank of America to St. Joseph Health Services of Rhode Island is an “unrestricted gift” “absolutely free of any trust.”

more specific of the two statutes applicable to this proceeding. Indeed, it expressly concerns dissolution and gives creditors first priority over all “[a]ssets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes,” which are exactly the types of restricted funds that were the subject of this proceeding.

“‘It is a commonplace of statutory construction that the specific governs the general.’ ” RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645, 132 S.Ct. 2065, 2071, 182 L.Ed.2d 967 (2012) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)). See also South County Post & Beam, Inc. v. McMahon, 116 A.3d 204, 215 (R.I. 2015) (“When a specific statute conflicts with a general statute, our law dictates that precedence must be given to the specific statute.’ ”) (quoting Warwick Housing Authority v. McLeod, 913 A.2d 1033, 1036-37 (R.I. 2007)).

Moreover, as noted, R.I. General Laws § 18-4-1 applies solely to “a cy pres application of the **trust** property.” (emphasis supplied). SJHSRI is a nonprofit corporation, not a charitable trust. A nonprofit corporation is governed by corporate law and not trust law. See Grace v. Grace Institute, 226 N.E.2d 531, 279 N.Y.S.2d 721, 724 (N.Y. 1967) (upholding right of charitable corporation to remove trustee based on corporate law, not the law of trusts) (“While the Institute disputes the Appellate Division's interpretation of the law of trusts as it existed at the time the Institute was created, it is clear that a corporation and not a trust was created and, regardless of what the law as to trusts was at the time, corporate law and not trust law should govern.”); City of Paterson v. Paterson General Hospital, 235 A.2d 487, 489 (N.J. Ch. 1967) (“In my opinion defendant is not, strictly speaking, a charitable trust. It is, rather, a charitable

corporation, governed by the law applicable to charitable corporations.”) (allowing a hospital to move from Paterson, New Jersey to another location, notwithstanding that many of its charitable assets were intended to benefit residents of Paterson).

## II. Conclusion

For all the foregoing reasons, an order should issue, as Bank of America, N.A. has requested, directing Bank of America, N.A. to pay, to the Plan Receiver, SJHSRI's share of the corpus of the lavazzo Trust and any income not yet paid but due.

Receiver,  
Stephen F. Del Sesto, Esq., solely in his  
capacity as Permanent Receiver for the  
St. Joseph Health Services of Rhode  
Island Retirement Plan and Permanent  
Receiver of CharterCARE Community  
Board, St. Joseph Health Services of  
Rhode Island, and Roger Williams  
Hospital,  
By His Attorneys,

/s/ Max Wistow

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Dated: April 17, 2024

### CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of April, 2024, I filed and served the foregoing document through the electronic filing system on the following users of record:

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