

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

ALLAN P. KIRBY CENTER FOR FREE	:	IN THE SUPERIOR COURT OF
ENTERPRISE AND	:	PENNSYLVANIA
ENTREPRENEURSHIP, BY AND	:	
THROUGH ITS SUCCESSOR TRUSTEE,	:	
THE AP KIRBY, JR. FOUNDATION	:	
	:	
Appellant	:	
	:	
	:	No. 538 MDA 2025
v.	:	
	:	
	:	
WILKES UNIVERSITY	:	

Appeal from the Order Entered March 25, 2025
In the Court of Common Pleas of Luzerne County Orphans' Court at
No(s): 6027

BEFORE: BECK, J., NEUMAN, J., and BENDER, P.J.E.

MEMORANDUM BY NEUMAN, J.:

FILED: OCTOBER 6, 2026

Appellant, Allan P. Kirby Center for Free Enterprise and Entrepreneurship (the "Center"), by and through its successor trustee, the AP Kirby, Jr. Foundation (the "Foundation"), appeals from the March 25, 2025 order, which granted the motion for judgment on the pleadings filed by Wilkes University (the "University"), pertaining to its Petition for Declaratory Relief and Reformation of Deed of Gift ("Declaratory Judgment Petition"). After careful review, we vacate the order and remand with instructions. Additionally, we deny the University's application to quash this appeal.

Background

At the heart of this dispute is a document titled "Indenture and Deed of Gift" ("Deed of Gift"), purportedly executed on May 21, 1993, between Allan

P. Kirby, Jr. (“Donor” or “Mr. Kirby”),¹ and the University,² for the purpose of “(a) acquiring and refurbishing a building and grounds in memory of the Donor’s father, Allan P. Kirby,” (“Memorial Building”); and “(b) establishing an endowed Chair (the “Chair”) to be occupied by an exponent” for free enterprise, as that concept is described in the Preamble of the instrument. **See** Declaratory Judgment Petition at Exhibit A (“Deed of Gift”) at 1 (providing the Memorial Building is to house the endowed Chair).

The Deed of Gift provides, in pertinent part:

I, Allan P. Kirby, Jr., establish for Wilkes University, and for its successors and assigns forever, a fund of ... \$2,150,000.00..., to acquire, refurbish and hold in trust the Memorial Building, and with the balance to be held in trust, as hereinafter provided and to constitute a perpetual endowment for the Memorial Building and Chair on the following terms and conditions:

(1) The Donor has funded the acquisition by the University of the Memorial Building, situated at 65 South Street, Wilkes-Barre, Luzerne County, Pennsylvania, for the site where the occupant of the Chair shall reside and in which his or her office and related teaching and writing facilities shall be located. The name of the Memorial Building, clearly displayed on it, shall be ... “The Allan P. Kirby Center for Free Enterprise and Entrepreneurship[.]” ... The site of the Chair shall forever remain at 65 South Street, Wilkes-Barre, Luzerne County, Pennsylvania, unless the Board of Managers[(as that term is referenced in Paragraph 5 below)], in [its] sole discretion, determine[s] to move it to a different location within the boundary of the University’s campus....

¹ Mr. Kirby died on September 16, 2020. Declaratory Judgment Petition, 12/12/23, at ¶ 8. As discussed *infra*, there is a dispute as to whether Mr. Kirby ever signed the Deed of Gift.

² “The University is a Pennsylvania nonprofit corporation that offers undergraduate and graduate degree programs and operates primarily within the City of Wilkes-Barre, Pennsylvania.” ***Id.*** at ¶ 3.

(2) The Chair shall be known and designated as the "ALLAN P. KIRBY, JR. DISTINGUISHED PROFESSOR OF FREE ENTERPRISE AND ENTREPRENEURSHIP" and shall be announced as such in the publications of the University.^[3]

(3) The principal of the fund shall forever be held intact and the income only of said fund used for the purpose of the Memorial Building and Chair. The form and character of investment of the principal of the fund, and of any accretions to it,^[4] shall be identical to, and shall be segregated within, the general endowment of the University, or as the University's Board of Trustees may otherwise determine to be advisable, to assure that the intentions of this Chair are realized and perpetuated, and that the Memorial Building in which the occupant shall reside and conduct the affairs of the Chair is always maintained in excellent repair and perfect condition. Whether segregated within the University's endowment or maintained separately, the fund shall forever be held in trust solely for the benefit of the Memorial Building and Chair, and there shall at all times be a record of the fund....

(4) Appointment of the occupant of the Chair shall be by the Board of Trustees of the University, upon nomination by the President of the University, in accordance with the following process. A Search Committee, appointed by the President, ... shall invite, interview and recommend to the Board of Managers a candidate (or candidates) who ... demonstrated a capacity for communicating and promoting effectively the concepts envisaged in the Preamble of this instrument. ... The Board of Managers may accept in whole, reject in whole, or reject in part, the candidates recommended by the Search Committee, reserving unto themselves the right to interview any or all the candidates before taking further action. The Board of Managers shall recommend to the President [the] candidate(s) ... the Board of Managers deems qualified to occupy the Chair. The President shall recommend to the University's

³ "The responsibilities of the occupant of the Chair shall be limited to instructing, lecturing, consulting, writing and counseling in the matters of free enterprise and entrepreneurship (within the meaning contained in the Preamble of this instrument) as he or she may deem appropriate...." Deed of Gift at ¶ 8.

⁴ The principal amount of the fund donated by Mr. Kirby, along with any accumulated income, are referred to collectively herein as the "APKC Funds."

Board of Trustees for appointment to the Chair a candidate from among those recommended by the Board of Managers. In the event the Board of Managers determines ... the search for the occupant of the Chair is being conducted in a spirit not in keeping with this instrument, or that no candidates satisfactory to the Board of Managers have been identified..., the Board of Managers may, at their sole discretion, use and distribute the income from the fund ... for other than the benefit of the Memorial Building and/or the Chair, and other than for the University. However, no distribution may be made to a recipient which is not a charitable entity exempt from taxation under the applicable provisions of the Internal Revenue Code [(“IRC”)] or as a consequence of which the fund’s exemption from taxation under the applicable provisions of the [IRC] would be jeopardized. In the event the University ceases to exist, or the Board of Managers determines that continuation of the University as the host of the Chair is no longer in the best interest of the Chair and the purposes for which the Chair was created, the Board of Managers (in their sole judgment) shall select a substitute host for the Memorial Building and Chair, which host shall serve as Trustee in place of the University, under and subject to such grant, conditions[,] and terms as the Board of Managers shall make; provided, however, that any substitute for the University, in hosting the Memorial Building and housing the Chair, must agree to do so in accordance with the Preamble of this instrument; must continue the name of the Memorial Building and Chair as required by this instrument; and must be a charity exempt from, and which will not subject the grant or the fund to, taxation under the applicable provisions of the [IRC]. Pending such substitution, the Board of Managers shall take immediate possession and control of the Memorial Building and fund and shall maintain and preserve them in safekeeping with full power to invest the fund.

(5) The Board of Managers to oversee the application of the income from the fund for, and the operation of, the Memorial Building and the Chair, shall consist of seven (7) persons, five (5) of whom shall initially be appointed by the Donor in consultation with the President of the University, one (1) of whom shall be the President of the University, and one (1) of whom shall be a representative appointed by the President of the University in consultation with the Donor. ...

(6) It shall be among the responsibilities of the Board of Managers to review and approve the annual budget for the Memorial Building and Chair as prepared and submitted to it by the University’s

administration. ... The approval by the Board of Managers of the budget shall be a prerequisite to appointment of the occupant of the Chair for the fiscal year contemplated by the budget.

(7) All actions by and decisions of the Search Committee, the Board of Managers[,] and the Board of Trustees under and pursuant to this instrument shall be by majority vote of the whole of each such body and no actions under and pursuant to this instrument may be taken unless the Board of Managers is at its full complement of seven (7) members. The Board of Managers shall adopt such operating procedures and practices as they shall deem appropriate for efficient and expeditious conduct of the Board of Managers'[] affairs. Among them shall be the annual election of a Chairman and the adoption of by-laws....

And the Trustees of the University in accepting this endowment covenant ... agree for themselves and their successors and assigns forever, in consideration of the receipt of the fund, to forever maintain the Memorial Building and Chair on the terms and conditions stipulated in this instrument, and to strive in all sincerity to carry out, both in letter and in spirit, the purposes and wishes of the Donor, as expressed in this instrument.

Id. at 2-11 (some formatting altered).

On November 21, 2023, Appellant filed an amended complaint against the University,^{5, 6} averring that after historically acknowledging it held the

⁵ Appellant explained the Center “is an unincorporated association which is acting through its Successor Trustee, the ... Foundation, ... a nonprofit 501(c)(3) entity organized and existing under the laws of the State of New Jersey....” Amended Complaint, 11/21/23, at ¶¶ 1-2; **see also *id.*** at ¶ 1 (providing the Center’s principal place of business is located at 83 W. South Street, Wilkes-Barre, Luzerne County, Pennsylvania).

⁶ This action was originally commenced on May 24, 2023, in the trial court’s civil division at Docket No. 2023-cv-05724, with the filing of a complaint by the Center — acting through its Board of Managers — and the Foundation against Gregory Cant, individually and as a former member of the Center’s Board of Managers, and the University. **See** Complaint, 5/24/23, at ¶ 3 (*Footnote Continued Next Page*)

APKC Funds “in trust for others,” the University began to claim ownership of the APKC Funds and the Memorial Building in early 2023 and refused to relinquish possession and control of the same to Appellant. **See** Amended Complaint at ¶¶ 19, 20, 26. As such, Appellant sought damages for conversion of its property rights, as well as a declaratory judgment stating: (1) the Deed of Gift requires the University to hold the APKC Funds, the Memorial Building, and personal property as a trustee for the benefit of the Center, not for itself; and (2) the University must return the APKC Funds, the Memorial Building, and personal property to the Center. **Id.** at 7-9. On December 12, 2023, the University filed an Answer and New Matter in the Nature of Objections to Amended Complaint, in which it denied Appellant has any property rights in the APKC Funds or the Memorial Building. **See** Answer and New Matter, 12/12/23, at ¶¶ 31-35. On May 16, 2023, the University filed a second set of objections, arguing the Foundation lacks standing to pursue the relief sought

(indicating Gregory Cant “currently occupies the office [of] President of [the] University”). Thereafter, the defendants filed preliminary objections to the complaint, alleging, *inter alia*, a lack of subject matter jurisdiction. **See** Preliminary Objections, 7/10/23, at ¶ 25 (“Because the claims asserted in the Complaint involve claims related to a charitable gift made to the University, a registered nonprofit organization, for the advancement of education, the case must be brought in the orphans’ court division of this court.”) (cleaned up). On October 23, 2023, the trial court issued an order transferring the matter to the orphans’ court division, directing the plaintiff to file an amended complaint, and rendering the defendants’ preliminary objections moot. **See** Pa.R.J.A. 2156 (providing the orphans’ court division shall hear matters involving “[t]he administration and proper application of property committed to charitable purposes held or controlled by any domestic or foreign nonprofit corporation”); **id.** (defining “property committed to charitable purposes” as including property committed to “the advancement of education”).

in the Amended Complaint. **See** Second Set of Objections, 5/16/23, at 3-7.⁷ After an evidentiary hearing limited to the issue of the Foundation's standing, the orphans' court found the Foundation "was not properly appointed as 'Successor Trustee' or validly authorized to pursue the present litigation." Order, 8/27/24, at 1. Accordingly, it sustained the University's objections and dismissed the Amended Complaint. **Id.** at 2.

Prior to the dismissal of the Amended Complaint, however, the University filed its Declaratory Judgment Petition, which is the subject of this appeal.⁸ Therein, it averred the Deed of Gift was drafted in 1993 to establish a \$2.15 million fund for the University; however, Mr. Kirby never signed the document. Declaratory Judgment Petition at ¶¶ 6, 7. The University claimed that in the years following the drafting of the Deed of Gift and prior to his death in September 2020, "[Mr.] Kirby donated a total of \$1,407,227.53 that was designated to the purposes described in the Deed of Gift; the University

⁷ The Commonwealth of Pennsylvania ("Commonwealth"), as *parens patriae*, joined in the University's Second Set of Objections to the Amended Complaint. **See** Commonwealth's Joinder to Second Set of Objections to Amended Complaint, 6/6/24, at 1 (single page); **see also** *In re Shoemaker*, 115 A.3d 347, 350 n.3 (Pa. Super. 2015) ("Charitable trusts are continuously subject to the *parens patriae* power of the Commonwealth through the Attorney General and the supervisory jurisdiction of the courts.").

⁸ The Commonwealth, as *parens patriae*, joined in the University's Declaratory Judgment Petition. **See** Commonwealth's Joinder in Petition for Declaratory Relief and Reformation of Deed of Gift, 12/28/23, at 1 (single page). The Commonwealth explains, "[it] joined in the University's petition in order to facilitate the circulation of charitable dollars for the benefit of Pennsylvanians. At the time, the funds were 'sitting' and not being put to 'good use' because the parties' relationship had deteriorated." Commonwealth's Brief at 6-7 n.3.

held those donations in its endowment, and they accumulated income.” **Id.** at ¶ 9. It believed Mr. Kirby reported his donations “to taxing authorities as charitable donations and obtained a tax benefit by doing so.” **Id.** at ¶ 10.

According to the University, “[t]he Deed of Gift includes language that reflects intent to provide a **gift** that supports the University in perpetuity.” **Id.** at ¶ 13 (emphasis added). For example, it noted “the document is identified as a ‘Deed of Gift[,]’” and it provides: (a) Mr. Kirby is establishing a \$2.15 million fund for the University to constitute a “perpetual endowment” for the Memorial Building and the Chair; (b) “[t]he principal of the fund shall forever be held intact and the income only of said fund used for the purpose of the Memorial Building and Chair”; (c) the APKC Funds shall be held in the manner specified so as to assure the intentions of the endowed Chair “are realized and perpetuate[d]” and the Memorial Building “is always maintained in excellent repair and perfect condition”; (d) the University’s Trustees, by accepting the endowment, “covenant and agree for themselves and their successors and assigns forever, in consideration of the receipt of the fund, to forever maintain the Memorial Building and Chair on the terms and conditions stipulated” in the Deed of Gift; and (e) the University must use its own funds to pay the costs for insuring, maintaining, improving, and repairing the Memorial Building. **Id.** (citing Deed of Gift at 1-5, 12-13).⁹ Moreover, it

⁹ Regarding the University’s assertion that it is required to pay for all repairs to the Memorial Building, we observe the Deed of Gift provides: “[T]he Board
(Footnote Continued Next Page)

averred the Deed of Gift reflects an intent that the APKC Funds be exempt from taxation, as it states, “no distribution may be made to a recipient which is not a charitable entity exempt from taxation under the applicable provisions of the [IRC] or as a consequence of which the fund’s exemption from taxation under the applicable provisions of the [IRC] would be jeopardized.” **Id.** at ¶ 14 (citing Deed of Gift at 8).

Yet the University observed the instrument also contains language purporting to establish a **trust**, which it opined is inconsistent with the provision of a gift to the University. **Id.** at ¶ 15. For example, it noted “the Deed of Gift states that the University shall hold the fund ‘in trust’ and that the Memorial Building shall be held ... ‘in trust’ by the University[.]” **Id.** at ¶ 16 (citing Deed of Gift at 2, 4). It further averred:

To the extent ... the Deed of Gift purports to create a trust, the University is named as the sole trustee, because it is the sole entity designated to hold the funds and Memorial Building ‘in trust’[;] ... the University is [also] the sole beneficiary of the trust, in that the University is the sole recipient named to receive a benefit from the purported trust.

Id. at ¶¶ 17, 18.

Additionally, the University averred the Deed of Gift grants the Board of Managers the power to oversee the application of the APKC Funds, authorizes it “to take immediate possession and control” of the funds and the Memorial Building “if the University ceases to exist or if the Board of Managers

of Managers may from time to time ... authorize expenditures of proceeds from the fund for improvements and/or repairs to the Memorial Building.” Deed of Gift at 3.

determines that continuation of the University as the host of the Chair is no longer in the best interest of the Chair and the purposes for which the Chair was created[,]” and authorizes it to “direct the income of the fund away from the University” under certain circumstances. ***Id.*** at ¶¶ 19, 21, 22; ***see also id.*** at ¶ 23 (noting the Deed of Gift “authorize[s] the Board of Managers to ‘use and distribute the income from the fund ... for other than the benefit of the Memorial Building and/or the Chair’ if the Board of Managers determines that a search for the occupant of the endowed Chair is being conducted by the University ‘in a spirit not in keeping with this instrument’”) (quoting Deed of Gift at 8). The University argued, “The provisions purporting to authorize the Board of Managers to control the funds and redirect the funds away from the University are inconsistent with the provision of a gift to the University.” ***Id.*** at ¶ 24. “Pennsylvania law provides that property committed to a charitable purpose ‘shall not ... be diverted from the objects to which it was donated’ absent an order of Court.” ***Id.*** at ¶ 25 (quoting 15 Pa.C.S. § 5547).

The University further alleged the Deed of Gift “erroneously recites” that Mr. Kirby funded the University’s acquisition of the Memorial Building. ***Id.*** at ¶ 28. To the contrary, the University claimed it purchased the Memorial Building in 1992, prior to the date on which the Deed of Gift was created. ***Id.*** at ¶ 27; ***see also id.*** (asserting a true and correct copy of the deed reflecting the University’s purchase of the Memorial Building is attached to the Declaratory Judgment Petition as Exhibit B). It stated, “From 1993 through 1997, approximately \$667,000 of Kirby’s donations to the University were

used, as directed by [Mr.] Kirby, to reimburse the capital expenses the University incurred for the Memorial Building.” **Id.** at ¶ 29. “Since the University purchased the Memorial Building in 1992, it has borne the costs of insuring and maintaining the Memorial Building.” **Id.** at ¶ 30.

Regarding the APKC Funds, the University averred “[Mr.] Kirby donated approximately \$1.41 million to the University for purposes listed in the Deed of Gift.” **Id.** at ¶ 31. It recalled, “After the \$667,000 that was committed to capital expenses for the Memorial Building, the remaining \$745,000 (approximate) was held by the University in its endowment.” **Id.** at ¶ 32. “The University used the income from that endowment to support the operations of the [Center] as directed in the Deed of Gift and with input from the Board of Managers.” **Id.** at ¶ 33. “As of October 31, 2023, the total of the APKC Funds was approximately \$4.25 [m]illion.” **Id.** at ¶ 34.

The University argued that, “[b]ecause the Deed of Gift contains terms that treat the [APKC F]unds as a gift to the University and terms that purport to require the University to hold the funds as a trustee, the Deed of Gift is ambiguous, and declaratory relief or reformation of the Deed of Gift is necessary.” **Id.** at ¶ 35. In support, it averred:

During his life, [Mr.] Kirby treated the funds as a gift to the University, in that he expected ... the funds would be exempt from federal taxation because they were to be held by the University[, and] ... he claimed charitable tax deductions on his income taxes for the donations made to the University, ... thereby receiv[ing] a tax benefit.... From 1993 through May 2007, the University treated the APKC Funds as irrevocable gifts to the University restricted to the purposes set forth in the Deed of Gift. At all

times, the University used the APKC Funds only for the purposes permitted under the terms of the Deed of Gift.

In 2007, the University's auditor reviewed the Deed of Gift and concluded that the Deed of Gift created a revocable trust, not an irrevocable gift. Beginning in 2007, based upon the advice of the auditor, the University began reporting the APKC Funds as "funds held in trust" in its financial statements. Beginning in 2021, the University communicated to the Board of Managers its concern that if the Deed of Gift created a revocable trust, that trust would not benefit from the University's status as a tax[-]exempt entity, and the University's concern that such a revocable trust would result in significant tax liability that would diminish the APKC Funds. The University identified options for the Board of Managers to address the situation. The Board of Managers disagreed with the University's belief that the APKC Funds were not tax exempt. The disagreement between the University and the Board of Managers regarding the tax[-]exempt status of the APKC Funds led to further disagreements between some members of the Board of Managers and the University, including the present litigation.

Id. at ¶¶ 36-45 (paragraph numbers omitted; formatting altered).

Hence, the University requested the orphans' court resolve the ongoing dispute over the APKC Funds "by a court declaration and reformation of the terms of the Deed of Gift." ***Id.*** at ¶ 47. The University averred the Board of Managers has an interest in the subject matter of the petition and named each of the individual board members as interested parties. ***Id.*** at ¶¶ 49, 51; ***see also id.*** at 50 ("Counsel for [Appellant] has confirmed that he represents the Board of Managers in this litigation."); ***id.*** at 16 (indicating notice of the Declaratory Judgment Petition was served on Michael R. Mey, Esquire, as counsel for Appellant and the Board of Managers).¹⁰

¹⁰ Appellant's counsel, Attorney Mey, is listed as one of the board members. Declaratory Judgment Petition at ¶ 51.

In its request for declaratory relief, the University specifically averred:

Pennsylvania law provides that a trust for charitable purposes cannot be created absent a writing signed by the settlor. 20 Pa.C.S.[] § 7732(a)(2). Upon information or belief, [Mr.] Kirby did not sign the Deed of Gift. Because the Deed of Gift was not signed by [Mr.] Kirby, it is legally insufficient to create a charitable trust. Additionally, under 20 Pa.C.S.[] § 7732(a)(5) and the common law doctrine of merger, a charitable trust is not created when the same person is both the sole trustee and the sole beneficiary of the trust. As a matter of law, if one person acquires legal and equitable title, the trust terminates, and the beneficiary holds the property free of trust. Because the Deed of Gift named the University as the sole trustee and sole beneficiary, it was legally insufficient to create a trust. Any trust purportedly created by the Deed of Gift was immediately terminated.

Because the Deed of Gift was legally insufficient to create a valid trust, the APKC Funds are held by the University as donations and free of any trust. The University is prepared to continue to honor the intent of [Mr.] Kirby's gift by restricting the use of the APKC Funds for the purposes set forth in the Deed of Gift, as it has always done. Because the APKC Funds are not subject to a trust, [Appellant is] not entitled to recover the APKC Funds, [is] not entitled to take possession of the personal property purchased with the APKC Funds[,] and [is] not entitled to take title to the Memorial Building, even though capital expenses for the building were reimbursed to the University by a portion of [Mr.] Kirby's donations.

WHEREFORE, the University petitions for a court order declaring:

- (a) ... the Deed of Gift was insufficient to create a trust;
- (b) ... the Deed of Gift created a restricted gift to the University;
- (c) ... the University holds the APKC Funds as a restricted gift, to be used for the purposes set forth in the Deed of Gift; and
- (d) ... neither [Appellant] nor the Board of Managers have any right to take possession of the APKC Funds or any portion of them, have no right to take title to the Memorial Building, and have no right of possession in any personal property purchased with the APKC Funds.

Id. at ¶¶ 55-64 (paragraph numbers omitted; formatting altered).

Pertaining to its request for reformation of the Deed of Gift, the University alleged:

The Deed of Gift and the parties' actions pursuant to the Deed of Gift reflect an intent to create a gift to the University, to be held in perpetuity for the specific purposes referenced in the Deed of Gift. Because the language of the Deed of Gift is ambiguous, a reformation of the Deed of Gift is necessary to clarify the nature of [Mr.] Kirby's restricted gift to the University. If the Deed of Gift is reformed in any way other than to confirm [Mr.] Kirby's intent to provide a charitable gift to the University, the APKC Funds will lose their tax[-]exempt status and will be exposed to potential taxes and tax penalties that will have the potential to divert a significant portion of the APKC Funds away from their charitable purpose. Language in the Deed of Gift that references the APKC Funds and the Memorial Building being held "in trust" by the University are [*sic*] inconsistent with the provision of a gift to the University and with Pennsylvania law.... The provisions of the Deed of Gift that purport to allow the Board of Managers to control the APKC Funds or the operations of the ... Center..., to take possession of the APKC Funds and the Memorial Building, and to direct the funds to the benefit of another entity are inconsistent with the donative intent expressed elsewhere in the Deed of Gift and with Pennsylvania law.... The University can report directly to a representative of the Kirby family regarding its use of the APKC Funds to assure the family that the gift is being used for its intended purpose, so there is no need for the Board of Managers [to] continue in existence. The Deed of Gift must be reformed to eliminate provisions that are inconsistent with the APKC Funds being treated as a restricted gift to the University.

WHEREFORE, the University requests that the [c]ourt reform the Deed of [Gift] to reflect [Mr.] Kirby's intent to provide a restricted gift to the University.

Id. at ¶¶ 66-72 (paragraph numbers omitted; formatting altered).

On February 27, 2024, Appellant filed an answer to the University's Declaratory Judgment Petition, in which it denied, *inter alia*, the University's

contention that the Deed of Gift is legally insufficient to create a trust because Mr. Kirby never signed it. **See** Answer, 2/27/24, at ¶ 57; **see also id.** at ¶ 7 (stating the Deed of Gift was signed on May 21, 1993); **id.** at ¶ 56 (same). It also denied the University's assertion that the Deed of Gift is legally insufficient to create a trust because the University is named as both the sole trustee and the sole beneficiary. **See id.** at ¶¶ 17, 18, 60; **see also id.** at ¶ 60 (countering that the University is not named as the sole beneficiary). Moreover, Appellant denied the University's suggestion that the Deed of Gift reflects Mr. Kirby's intention to provide a gift to the University. **Id.** at ¶¶ 13, 35, 66.

Appellant argued that in making the foregoing claims, the University "purposefully and intentionally" cited only those portions of the Deed of Gift which it deemed to be in its best interest and ignored any explicit language in the document which it found to be to its disadvantage. **Id.** at ¶¶ 17, 18. It added:

Mr. Kirby was prescient in the language he chose contemplating the very dispute which exists now between the University and the Center by providing for the eventuality of the University[']s ceasing to exist or where the Board has determined that it is not in the Center's best interest for the University to continue as the host of the Chair.

Id. at ¶ 17 (citing Deed of Gift at 8).

Appellant maintained that when read in its entirety, the Deed of Gift clearly reflects Mr. Kirby's intention to create a trust. **See id.** at ¶ 13 (asserting the Deed of Gift "states with specificity Mr. Kirby's purpose for the

Memorial Building and endowment to be held **in trust** by the University[,]

specifically conditioned upon the University[’s] continuing to honor the terms and conditions of the Deed of Gift”) (emphasis added); **id.** at ¶ 15 (“The Deed of Gift is explicit in creating exclusively a trust with the University as trustee so long as deemed by the Board of Managers that it is ‘in the best interest of the Chair and the purposes for which the Chair was created....’”); **id.** at ¶ 35 (noting the Deed of Gift explicitly requires the endowed funds and Memorial Building to be held by the University “in trust” and “in accordance with the direction and control of the Board of Managers”); **see also id.** at ¶ 69 (“There was no gift to the University.”).

Appellant further argued the University’s claim that the Deed of Gift established a gift rather than a trust is directly contradicted by the University’s historic treatment of the APKC Funds as “funds held in trust by others” in its financial statements, as well as multiple other representations it has made regarding its treating the endowment as a trust. **See id.** at ¶¶ 24, 66. In support, Appellant attached a letter dated November 19, 2021, from President Cant to Milan Kirby, Chairman of the Board of Managers, in which President Cant discussed “long-standing issues related to the treatment of the funds held **in trust** by the University....” **Id.** at Exhibit 2 at 1 (emphasis added).

The letter stated, in part:

In 2007, the University’s auditors[,], KPMG[,], noted that the Deed of Gift used by your father to create the Kirby Center **did not reflect an intent to make an irrevocable gift. Rather, it established a revocable trust** established for the purpose of acquiring the building now used by the Center and to provide

financial support for the newly-created Kirby Chair. KPMG concluded that, as a revocable trust, the Center's assets were properly reflected on the University's balance sheet as "Funds Held in Trust for Others" in recognition of the creation by your father of a separate trust.

Although the Deed of Gift recites reliance by the trust on the exempt status of the University for purposes of ensuring that trust income is not subject to federal income tax, a preliminary legal opinion recently obtained by the University confirms that, as a trust, the Kirby Center must qualify separately for exemption from federal taxation. We understand from that legal opinion that, at the present time, **the trust created by the Deed of Gift is a nonexempt charitable trust** and, as such, must file annual federal and state income tax returns and pay income tax on income not distributed annually to charitable organizations.

As you know, **your father designated the University as trustee of the trust created by the Deed of Gift.** As trustee, the University is responsible for exercising a variety of fiduciary duties relative to the trust....

Id. at 1-2 (emphasis added); ***see also id.*** at ¶ 66 (averring the University is asking the court "to turn a blind eye to its financial statement[s] which unequivocally report the endowment to be held as 'funds in trust for others' and the admissions made by President Cant in his November 19, 2021 letter"). Additionally, while Appellant admitted the University took title to the property upon which the Memorial Building is located, it stated that the University did so "with the funds provided by Mr. Kirby for that purpose." ***Id.*** at ¶ 27; ***see also id.*** at ¶ 28 (insisting the acquisition of the Memorial Building was funded by Mr. Kirby).

Appellant denied the University's averment that the Deed of Gift is ambiguous and therefore declaratory relief and/or reformation of the instrument is necessary. ***Id.*** at ¶¶ 35, 67, 72. Instead, Appellant suggested

“[t]he only ambiguity occurs when the University seeks to impose a twisted and parsed reading of the document instead of the document as a whole.” ***Id.*** at ¶ 67. As such, it averred, “There is no need to reformulate a Deed of Gift which has functioned with efficiency and fidelity to its purpose through its Board of Managers. The only reformation truly sought by the University is for exclusive control of the Memorial Building and the endowed funds.” ***Id.*** at ¶ 72; ***see also id.*** at ¶ 71 (alleging the University is attempting to eliminate the Board of Managers so it can gain exclusive control over the APKC funds; stating “the University has shuttered the Center, terminated the Kirby Scholars[,] and ceased all work required by Mr. Kirby in the Deed of Gift”).

On September 19, 2024, the University moved for judgment on the pleadings regarding its Declaratory Judgment Petition, arguing:

Based upon its express language, the Deed of Gift failed to establish a trust as a matter of law because it designated the University as the sole trustee and sole beneficiary. To meet Mr. Kirby’s intent to create a tax-exempt fund to be used as provided in the Deed of Gift, the Deed of Gift must be reformed to create a restricted gift to the University.

Motion for Judgment on the Pleadings, 9/19/24, at 1-2; ***see also generally*** Brief in Support of Motion for Judgment on the Pleadings, 9/19/24. Appellant filed a response, in which it advanced the University is not entitled to judgment on the pleadings, as there are numerous disputed material issues of fact. ***See*** Response to Motion for Judgment on the Pleadings, 10/25/24, at 1 (stating Appellant has expressly denied 49 of the 72 averments in the University’s Declaratory Judgment Petition and 34 of those denials contain “extensive and

specific statements of fact which are both material and dispositive of the Motion for Judgment on the Pleadings”).

After numerous continuances, the orphans’ court heard oral argument on the motion for judgment on the pleadings on January 27, 2025, at which time Appellant, the University, and the Commonwealth were all represented by counsel. On March 25, 2025, the orphans’ court granted the University’s motion for judgment on the pleadings and petition for declaratory relief and declared, in pertinent part:

The 1993 ... Deed of Gift ... was insufficient to create a trust and instead created a restricted gift to Wilkes University.

Wilkes University shall hold the funds donated pursuant to the Deed of Gift as a restricted gift to be used in a manner consistent with the purposes set forth in the Deed of Gift.

The Deed of Gift must be modified to eliminate provisions that are inconsistent with the restricted gift, and as set forth in the Allan P. Kirby, Jr. Gift Agreement[(“Reformed Gift Agreement”)], attached hereto.

Wilkes University is ordered to sign the attached [Reformed] Gift Agreement and to comply with its terms, unless or until otherwise ordered by a court.

The modification of the Deed of Gift directed by this Order is hereby given retroactive effect to the date the Deed of Gift was created.

Order, 3/25/25, at 1-2; **see also id.** at 4-8 (“Reformed Gift Agreement”).

The Reformed Gift Agreement attached to the orphans’ court’s March 25, 2025 order provides that the funds donated by Mr. Kirby “shall be held by the University as an endowment fund, with the principal held forever intact,”

Reformed Gift Agreement at ¶ 2, and the income is to be used only for the following purposes:

- (a) the Endowed Professorship;
 - (i) the endowed professor shall be known and designated as the "Allan P. Kirby, Jr. Distinguished Professor of Free Enterprise and Entrepreneurship" and shall be announced as such in the publications of the University;
 - (ii) the endowed professor shall be appointed by the Board of Trustees of the University pursuant to its procedures for faculty searches and hiring;
- (b) to provide and maintain a building or other physical space on campus to house the ... Center..., which shall include signage designated [*sic*] the space as "THE ALLAN P. KIRBY CENTER FOR FREE ENTREPREISE AND ENTREPRENEURSHIP" and office space for the endowed professor;
- (i) The University shall be responsible for providing and funding insurance utilities, and janitorial services for any such building(s) or physical space(s); and,
- (c) to support a course of study, educational programs, and/or lectures in the topics of entrepreneurship and free enterprise and/or to provide; and,
- (d) to provide scholarships for students working on projects at the ... Center....

Id. at ¶ 3; ***see also id.*** at ¶ 2 ("For all purposes, the principal amount of the [APKC] Funds as of the date of this Gift Agreement is deemed to be \$4.2 [m]illion.").

Noticeably absent from the Reformed Gift Agreement is any mention of a Board of Managers. Thus, the reformed instrument effectively eliminates any oversight power the Deed of Gift had granted to the Board of Managers

regarding the selection of the Chair and/or control over the Memorial Building and APKC Funds. In fact, the Reformed Gift Agreement is also void of any reference to the Memorial Building, as identified in the original Deed of Gift, and provides for the establishment of an “endowed professorship” instead of a “Chair.” ***See id.*** at ¶ 3(a), (b); ***see also id.*** at ¶ 3(b) (directing income from the funds be used “to provide and maintain **a building or other physical space** on campus to house the ... Center ... and office space for the endowed professor...” (emphasis added).

Additionally, the Reformed Gift Agreement requires the University to report at least once annually to a “representative designated by the family of Allan P. Kirby, Jr.[,] regarding the University’s use of the [APKC] Funds....” ***Id.*** at ¶ 4. It directs, “The initial representative for this purpose shall be Milan Kirby[,], and any subsequent representative shall be designated in writing by Milan Kirby, his heirs, or other heirs of Allan P. Kirby, Jr., as they may agree.” ***Id.*** No other rights or powers are expressly granted to the designated Kirby family representative.

On April 11, 2025, Appellant filed a petition seeking reconsideration of the orphans’ court’s March 25, 2025 decision. By order of court dated April 14, 2025, the orphans’ court granted Appellant’s petition for reconsideration “for the purposes of oral argument[,]” and scheduled oral argument for May 20, 2025. Order, 4/14/25, at 1. Due to a scheduling conflict on the part of Appellant, oral argument was continued to June 9, 2025; the orphans’ court ultimately denied the petition for reconsideration on June 23, 2025.

In the meantime, on April 24, 2025, Appellant filed a notice of appeal from the March 25, 2025 order.^{11, 12} The orphans' court filed its Rule 1925(a) opinion on July 16, 2025. On August 11, 2025, the University filed an Application for Relief to Quash Appeal ("Application to Quash Appeal I") with this Court, which we denied without prejudice on August 29, 2025. On March 25, 2026, the University filed a second Application for Relief to Quash Appeal ("Application to Quash Appeal II"), to which the disposition was deferred to the merits panel.

Issues

Herein, Appellant presents the following issues for our review:

1. Did the orphans' court lack subject matter jurisdiction to rule on [the] University's [Declaratory Judgment] Petition ... because all indispensable parties were not parties to the action?
2. Did the orphans' court err as a matter of law in determining that the Deed of Gift created a restricted gift to [the] University rather than a charitable trust to promote free enterprise and entrepreneurship?
3. Did the orphans' court err as a matter of law by reforming the Deed of Gift without evidence of record to eviscerate the Donor's express requirements concerning the fund he provided, including eliminating the oversight of the Board of Managers and maintenance of a Memorial Building in honor of Donor's father, which were not found to have been included by mistake, which could have been maintained regardless of

¹¹ The orphans' court did not direct Appellant to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal.

¹² The Office of Attorney General entered its appearance on behalf of the Commonwealth, acting as *parens patriae*, in this appeal. **See** Entry of Appearance, 7/9/25, at 1.

whether the fund was a trust or restricted gift and the removal of which was not necessary to achieve the Donor's tax objectives?

Appellant's Brief at 3 (cleaned up).

Discussion

Application for Relief to Quash Appeal

Preliminarily, we must address the University's outstanding application for relief and determine whether this appeal is properly before this Court. The University's argument is premised largely on Pa.R.A.P. 1701, which provides, in pertinent part:

- (a) General rule.**—Except as otherwise prescribed by these rules, after an appeal is taken..., the trial court ... may no longer proceed further in the matter.
- (b) Authority of a trial court ... after appeal.**—After an appeal is taken..., the trial court ... may:

(3) Grant reconsideration of the order which is the subject of the appeal or petition, if:

- (i) an application for reconsideration of the order is filed in the trial court ... within the time provided or prescribed by law; and
- (ii) **an order expressly granting reconsideration of such prior order is filed in the trial court ... within the time prescribed by these rules for the filing of a notice of appeal** ... with respect to such order, or within any shorter time provided or prescribed by law for the granting of reconsideration.

A timely order granting reconsideration under this paragraph shall render inoperative any such notice of appeal ... theretofore or thereafter filed or docketed with respect to the prior order. The petitioning party shall and any party may file a praecipe with the prothonotary of any court in which such an inoperative notice ... is filed or docketed and the prothonotary shall

note on the docket that such notice ... has been stricken under this rule. Where a timely order of reconsideration is entered under this paragraph, the time for filing a notice of appeal ... begins to run anew after the entry of the decision on reconsideration, whether or not that decision amounts to a reaffirmation of the prior determination of the trial court....

Pa.R.A.P. 1701(a), (b) (some emphasis added).

The University contends Appellant's notice of appeal was rendered inoperative under Pa.R.A.P. 1701(b)(3), as the trial court expressly granted reconsideration of the March 25, 2025 order within the 30-day appeal period and no new notice of appeal was thereafter filed. **See generally** Application to Quash Appeal II, 3/25/26, at 8-10; **see also id.** at ¶ 31 (citing Pa.R.A.P. 1701(b)(3)); **id.** at ¶ 33 (asserting the orphans' court's April 14, 2025 order "expressly granted timely reconsideration of the March 25, 2025 order"); **id.** at ¶ 34 (concluding the notice of appeal filed on April 24, 2025, was rendered inoperative by the orphans' court's express grant of reconsideration, pursuant to Rule 1701(b)(3)). Consequently, the University argues we lack subject matter jurisdiction over this appeal. **See id.** at 8; **id.** at ¶¶ 44, 46.

Appellant counters the orphans' court did **not expressly grant** reconsideration; rather, it merely granted oral argument on the motion for reconsideration. Answer to Application to Quash Appeal II, 4/13/26, at 1. In support, Appellant observes "[t]he order in question specifically states ... the motion is granted '**for purposes of oral argument.**'" **Id.** (emphasis added). It argues, "An order entered in response to a motion for reconsideration 'fixing a briefing schedule and/or hearing date, or any other order except for one **expressly** granting reconsideration,' is not an order expressly granting

reconsideration as required under Pa.R.A.P. 1701(b)(3).” *Id.* at ¶ 30 (quoting ***Sass v. Amtrust Bank***, 74 A.3d 1054, 1062 (Pa. Super. 2013) (emphasis in original)); **see also** *id.* (noting the orphans’ court entered an order on April 14, 2025, scheduling oral argument only, and then entered an order on June 23, 2025, expressly denying reconsideration); *id.* at ¶ 34 (asserting the April 14, 2025 order did not toll the appeal period). Thus, Appellant concludes “the [April 14, 2025] order does **not expressly grant** reconsideration, and Appellant’s appeal within 30 days of the order being appealed was proper and timely.” *Id.* at 1 (emphasis added).

Likewise, the Commonwealth persuasively argues:

Case law instructs that “issuing a rule to show cause or scheduling a hearing will not suffice” to extend the time period in which a trial court may “modify or change a final order.” ***Commonwealth v. Butler***, 566 A.2d 1209, 1211 (Pa. Super. 1989). Rather, trial courts must speak unambiguously. **See, e.g., *Haines v. Jones***, 830 A.2d 579, 584 (Pa. Super. 2003) ([observing] “the trial court **expressly granted** reconsideration”) (emphasis added); **cf. *Barron v. City of Philadelphia***, 754 A.2d 739, 740 (Pa. Cmwlth. 2000) (“When a court enters an order **expressly granting** reconsideration[,] ... the order under reconsideration is effectively vacated, permitting the court to retain jurisdiction.”) (emphasis added)).¹³

Because the orphans’ court’s April 14, 2025 order granted reconsideration for the limited purpose of **hearing oral argument only**, it did not satisfy the ***Butler*** standard, and the orphans’ court lost jurisdiction by operation of Rule 1701 on April

¹³ We recognize that “a decision of the Commonwealth Court is not binding precedent upon this Court; however, it may be considered for its persuasive value.” ***Holland ex rel. Holland v. Marcy***, 817 A.2d 1082, 1083 n.1 (Pa. Super. 2002) (citation omitted).

25, 2025. **See** Pa.R.A.P. 1701(b)(3); 42 Pa.C.S. § 5505^[14]; **Cheathem v. Temple Univ. Hosp.**, 743 A.2d 518, 520-21 (Pa. Super. 1999) ([stating] “a hearing date, or any other order except for one ‘expressly granting’ reconsideration, is inadequate”) (citation omitted). Put differently, the orphans’ court never vacated the underlying order. Thus, the Center’s timely post-judgment notice of appeal vested this Court with jurisdiction.

Commonwealth’s Brief at 8 n.4 (cleaned up; emphasis in original).

Indeed, this Court has previously clarified:

There is only one way for the trial court to toll or stay the appeal statute and thus to “retain control” once a petition for reconsideration has been filed. As stated in the Rules of Appellate Procedure, the 30-day period may only be tolled if that court enters an order “expressly granting” reconsideration within 30 days of the final order. Pa.R.A.P. 1701(b)(3)(i), (ii) and Note thereto; **Valley Forge Ctr. Assocs. v. Rib-It/K.P., Inc.**, 693 A.2d 242 (Pa. Super. 1997). ... There is no exception to this Rule, which identifies the only form of stay allowed. A customary order and rule to show cause fixing a briefing schedule and/or hearing date, or any other order except for one “expressly granting” reconsideration, is inadequate. **Valentine v. Wroten**, ... 580 A.2d 757 ([Pa. Super.] 1990).

Therefore, as the comment to Pa.R.A.P. 1701 explains, although a party may petition the court for reconsideration, the simultaneous filing of a notice of appeal is necessary to preserve appellate rights in the event that either the trial court fails to grant the petition expressly within 30 days, or it denies the petition.

Valley Forge [Ctr. Assocs.], *supra* at 245.

Cheathem, 743 A.2d at 520-21.

¹⁴ “Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.” 42 Pa.C.S. § 5505.

Based upon our review of the record and the relevant case law, we are convinced the orphans' court's April 14, 2025 order scheduling oral argument on the motion for reconsideration did not constitute an order "expressly granting reconsideration" as required to toll the appeal period. **See** Order, 4/14/25, at 1 (declaring Appellant's petition for reconsideration of the orphans' court's March 25, 2025 decision "is **GRANTED for the purposes of oral argument**[.] Oral argument is scheduled for May 20, 2025[,], at 10:00 a.m.") (some emphasis added; formatting altered); **see also** Pa.R.A.P. 1701(b)(3); ***Cheathem, supra; Butler, supra***. As the orphans' court ultimately denied Appellant's request for reconsideration on June 23, 2025, **after** the expiration of the 30-day appeal period, we agree with Appellant and the Commonwealth that Appellant's notice of appeal was not rendered inoperative under Rule 1701(b)(3), and the appeal was therefore timely. **See** Order, 6/23/25, at 1 (denying Appellant's petition for reconsideration); **see also** Pa.R.A.P. 1701(b)(3); ***Cheathem, supra; Butler, supra***.

Nevertheless, the University alternatively argues this appeal must be quashed because it was filed by the Foundation, purportedly in its role as successor trustee; however, the orphans' court ruled the Foundation was not properly appointed as the successor trustee and Appellant never appealed that determination. Application to Quash Appeal II at 2; **see also id.** at ¶ 50 ("The present appeal was filed by the 'Allan P. Kirby Center for Free Enterprise and Entrepreneurship, by and through its Successor Trustee, the AP Kirby Foundation.'"); **id.** at ¶ 52 (noting the orphans' court ruled on August 27,

2024, “the Foundation had not been properly appointed as successor trustee”).

The University reasons that “[b]ecause the Foundation was never appointed successor trustee..., it has no interest that was adversely affected by the reformation of the Deed of Gift; in fact, it has no interest whatsoever in the Deed of Gift and thus, has no standing to pursue this appeal.” **Id.** at ¶ 53; **see also id.** at ¶ 47 (“As a threshold matter, a party seeking to pursue an appeal must show ... it has standing to pursue the appeal....”) (citation omitted); **id.** (“Standing requires a party to have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence...[.] A person who has no stake in the matter has no standing to obtain judicial resolution of his challenge to the matter.”) (quoting **Rock v. Pyle**, 720 A.2d 137, 142 (Pa. Super. 1998)).

In response, Appellant avers the University’s argument improperly conflates two separate and distinct actions — the action on appeal, which the University initiated by filing its petition seeking declaratory relief and reformation of the Deed of Gift, and a separate prior action which was dismissed by the orphans’ court. Answer to Application to Quash Appeal II at 2. It notes the order on appeal is the order which granted the University’s Motion for Judgment on the Pleadings regarding its Declaratory Judgment Petition and, therefore, argues “no matters outside those pleadings are in any way relevant to the matter on appeal.” **Id.** Moreover, Appellant contends the

University never raised the issue of the Foundation's standing in its Declaratory Judgment Petition, nor did it ever file any motion in connection with this matter raising the Foundation's standing as an issue. ***Id.*** Thus, Appellant argues the University has waived any argument that the Foundation lacks standing to participate in this appeal. ***Id.*** at 3; ***see also id.*** at ¶ 47 (stating "an objection to standing is waivable and must be raised at the earliest opportunity") (citation omitted).

Initially, we reject Appellant's contention that the University waived its argument regarding the Foundation's lack of standing to bring this appeal due to its failure to raise the issue below, as standing to **appeal** is distinguishable from the concept of standing to **sue** and cannot be raised in the trial court. ***See In re Jackson***, 174 A.3d 14, 24 (Pa. Super. 2017) ("A challenge to a party's standing to sue is waived if it is not raised in the trial court...; a challenge to a party's standing to **appeal**, however, need not (and indeed cannot) be raised in the trial court.") (citation omitted; emphasis in original). Instead, a challenge to a party's standing to appeal is properly raised in a motion to quash or dismiss the appeal, or in an appellee's brief. ***See id.*** (citation omitted). Notwithstanding, a challenge to standing must be raised at the earliest possible opportunity or it may be deemed waived. ***See In re Condemnation by Urban Redev. Auth. of Pittsburgh***, 913 A.2d 178, 181 n.6 (Pa. 2006) (stating "the courts of this Commonwealth view the issue of standing as nonjurisdictional and waivable"); ***see also Interest of K.N.L.***, 284 A.3d 121, 151 n.22 (Pa. 2022) (noting challenges to standing "must be

raised at the soonest possible opportunity and may be waived if not promptly raised"); ***In re Estate of Brown***, 30 A.3d 1200, 1204 (Pa. Super. 2011) (“[T]he issue of standing may be waived by a party if not objected to at the earliest possible opportunity.”) (cleaned up).

Here, the University initially sought quashal of this appeal with the filing of its application for relief on August 11, 2025, in which it solely challenged this Court’s subject matter jurisdiction. ***See generally*** Application to Quash Appeal I, 8/11/25, at 2-9. The University did not raise the issue of the Foundation’s standing at that time. ***See id.*** On August 29, 2025, we denied the application to quash without prejudice as to the University’s right to again raise “this issue” in its appellate brief or in a new application after the appeal is assigned to a merits panel. *Per Curiam* Order, 8/29/25, at 1 (single page). Subsequently, on March 25, 2026, the University filed its second application to quash this appeal, which is currently pending before this Court. Therein, it raised for the first time the issue of the Foundation’s standing to appeal. ***See generally*** Application to Quash Appeal II at 17-20. Because the University failed to raise the issue of standing at the earliest opportunity in its initial application to quash, we deem this issue waived and deny the University’s second application to quash. ***See K.N.L., supra.***

Subject Matter Jurisdiction

Having determined this matter is properly before us, we address the merits of the issues presented by Appellant. First, Appellant claims the orphans’ court lacked subject matter jurisdiction to rule on the University’s

Declaratory Judgment Petition because the University failed to join all indispensable parties, rendering the March 25, 2025 order void *ab initio*. Appellant's Brief at 19, 22.

"It is well-settled that the question of subject matter jurisdiction may be raised at any time, by any party, or by the court *sua sponte*. Our standard of review is *de novo*, and our scope of review is plenary." ***In re Estate of Anderson***, 317 A.3d 997, 1004 (Pa. Super. 2024) (citation omitted).

In general,

an indispensable party is one whose rights are so connected with the claims of the litigants that no decree can be made without impairing its rights....

The absence of an indispensable party goes absolutely to the court's jurisdiction. If an indispensable party is not joined, a court is without jurisdiction to decide the matter. The absence of an indispensable party renders any order or decree of the court null and void. The issue of the failure to join an indispensable party cannot be waived.

Id. at 1004-05 (citation omitted); ***see also CRY, Inc. v. Mill Service, Inc.***, 640 A.2d 372, 375 (Pa. 1994) ("[T]he basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party....").

Furthermore:

[I]n an action for declaratory judgment, all persons having an interest that would be affected by the declaratory relief sought ordinarily must be made parties to the action. ***See Mains v. Fulton***, ... 244 A.2d 195, 196 ([Pa.] 1966). Indeed, Section 7540(a) of the Judicial Code, 42 Pa.C.S. § 7540(a), which is part of Pennsylvania's Declaratory Judgment Act[(42 Pa.C.S. §§ 7531-7541)], states..., "[W]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would

be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

City of Philadelphia v. Commonwealth, 838 A.2d 566, 582 (Pa. 2003) (footnote and some citations omitted).

Here, Appellant contends the individual members who comprise the Board of Managers are indispensable parties to this action, as they have a proprietary right and interest in maintaining control over the APKC Funds, the Memorial Building, and the Chair, which the University sought to eliminate in its declaratory judgment action. Appellant’s Brief at 23-25; ***see also id.*** (noting the Deed of Gift grants the Board of Managers the power to oversee the application of income from the fund, to oversee the operation of the Memorial Building and the Chair, to control the selection of the occupant of the Chair, and the right to distribute income from the fund “for other than the benefit of the Memorial Building and/or the Chair, and other than for the University”) (citing Deed of Gift at 8-9); ***id.*** at 25-26 (averring the orphans’ court’s reformation of the Deed of Gift, which eliminated the Board of Managers, not only affected the rights of the individual managers but also stripped them of any control whatsoever over the APKC Funds, the Memorial Building, and the Chair).

Despite their status as indispensable parties, Appellant asserts that the University failed to name the managers as parties to its Declaratory Judgment Petition and to obtain service of original process on them. ***Id.*** at 25-26; ***see also id.*** at 26 (acknowledging the University recognized the individual managers as “interested parties” in its petition, but arguing it failed to request

citations be issued to the individual managers pursuant to Pa.O.C.R. 3.5(a)(1), nor did it serve the managers with a notice to plead); *id.* (“[J]urisdiction of the court over the person of the defendant is dependent upon proper service having been made.”) (quoting ***Northern Forests II, Inc. v. Keta Realty Co.***, 130 A.3d 19, 30 (Pa. Super. 2015)); *id.* at 27 (noting the individual managers were not named in the caption); *id.* at 27-28 (claiming the orphans’ court had not previously obtained personal jurisdiction over the individual managers and, therefore, the University was required to obtain a citation from the orphans’ court directed to each manager); *id.* at 29 (suggesting that even if the University was not required to obtain citations directed to each manager, it would have been required to endorse its petition with a notice to plead but failed to do so).¹⁵ As such, Appellant avers the managers were deprived of their control over the APKC Funds, the Memorial Building, and the Chair without due process of law. *Id.* at 25; ***see also id.*** at 29 (“The University had the obligation to make sure all proper parties were before the [orphans’ court] by properly naming and serving them. The University’s failure to do so deprived the [orphans’ court] of subject matter jurisdiction.”). Appellant

¹⁵ Appellant avers, “The University did not endorse the petition itself with a notice to plead[,] but rather sent a separate document entitled Notice to Plead, directed solely to the Center, to the Center’s counsel...” Appellant’s Brief at 29. It attached a copy of the Notice to Plead to its appellate brief. We observe, however, that the Notice to Plead is not included in the certified record. We “cannot consider evidence which has not been made a part of the certified record.” ***Bennyhoff v. Pappert***, 790 A.2d 313, 319 (Pa. Super. 2001).

therefore concludes the orphans' court's March 25, 2025 order is void *ab initio* and must be stricken. ***Id.*** at 25-26.

The University does not contest Appellant's assertion that the individual board members are indispensable parties in this declaratory judgment action. It argues, however, that the individual managers were already parties to the case at the time the University filed its petition, because the Board of Managers initiated the case by filing the original complaint, through its counsel, in the trial court's civil division. University's Brief at 17 (observing "the original complaint in this action was filed by the '... Center[,], by and through its Board of Managers'" (cleaned up)¹⁶; ***see also id.*** at 20 (noting Attorney Mey continuously represented to the court that he was representing

¹⁶ The University acknowledges the complaint should have been brought in the name of the individual board members as trustees *ad litem* for the Center, pursuant to Pa.R.Civ.P. 2152. ***See*** University's Brief at 18 n.2; ***see also*** Pa.R.Civ.P. 2152 ("An action prosecuted by an association shall be prosecuted in the name of a member or members thereof as trustees *ad litem* for such association."); Pa.R.Civ.P. 2151 (defining 'association' as "an unincorporated association conducting any business or engaging in any activity of any nature whether for profit or otherwise under a common name, but does not mean a partnership as defined in Rule 2126 or a corporation or similar entity as defined in Rule 2176"); Amended Complaint at ¶ 1 (averring the Center is "an unincorporated association"). However, the University does not object to Appellant's noncompliance with Rule 2152. Instead, it avers the certified record establishes the identity of the individual board members and that they authorized Attorney Mey to file the complaint. ***See*** University's Brief at 18 n.2; ***see also Allegheny Cnty., Pa., Prison Emp. Local Union No. 693 of Am. Fed'n of State, Cnty. & Mun. Emp, AFL-CIO, v. McClelland***, 190 A.2d 324, 325 n.1 (Pa. 1963) ("[I]n contravention of Pa.R.Civ.P. 2152..., this action was brought in the name of the union and not by members of the association as trustees *ad litem*. However, since [the] appellee ... did not object to this defective procedure, we shall consider this case on the merits.").

the Board of Managers in this case). By filing the complaint, the University contends “the members of the Board of Managers voluntarily subjected themselves to the jurisdiction of the [c]ourt....” ***Id.*** at 17-18 (footnote omitted).¹⁷ Moreover, the University conveys that it properly served its petition on Attorney Mey, as counsel for the Board of Managers, in accordance with Pennsylvania Orphans’ Court Rule 4.2. ***Id.*** at 23-24; ***see also*** Pa.O.C.R. 4.2(c) (“If counsel has entered an appearance on behalf of an individual, entity or representative who would otherwise receive notice or a citation..., then such notice or citation **shall** instead be given to counsel....”) (emphasis added); University’s Brief at 23 (noting Rule 3.5(a) only requires a citation “when personal jurisdiction ... has not previously been obtained”) (cleaned up). Hence, the University maintains “no further action was required for the [c]ourt to obtain jurisdiction over the Board of Managers for any purpose related to the case.” ***Id.*** at 18.

¹⁷ Notably, the University contends, “[t]he fact that the amended complaint was not pursued by the Board of Managers did not remove the members of the Board of Managers from the jurisdiction of the court.” University’s Brief at 19-20. It reasons that an amended pleading may “add a person as a party, correct the name of a party, or otherwise amend the pleading[,]” but it does not remove a party already named in the case. ***Id.*** at 20 (quoting Pa.R.Civ.P. 1033). Rather, “Rule 229 provides that a discontinuance is the ‘exclusive method’ for termination of an action by a plaintiff.” ***Id.*** (quoting Pa.R.Civ.P. 229). As no discontinuance was ever filed by any plaintiff in this action, the University concludes “the members of the Board of Managers continued to be parties subject to the [lower] court’s jurisdiction for purposes of adjudication of [the University’s Declaratory Judgment] Petition.” ***Id.***

The Commonwealth agrees. It asserts, “the University did not need to obtain jurisdiction over individual members of the Board of Managers by separate citation[,]” because the orphans’ court already had jurisdiction “based on the Board’s incontrovertible participation in the civil division, and the lack of any formal withdrawal after the transfer to orphans’ court.” Commonwealth’s Brief at 18-19 (cleaned up); **see also id.** at 17 (emphasizing the initial complaint was filed by the Center “by and through its Board of Managers”); **id.** (“Though the case caption changed slightly following [the] transfer [from the civil division to orphans’ court], the Center did not file a new ‘Complaint,’ but an ‘Amended Complaint.’”); **id.** at 17 n.5 (“[F]iling an amended complaint ... is not the proper vehicle for discontinuing an action as to [a party.]”) (quoting **Hileman v. Morelli**, 605 A.2d 377, 380 (Pa. Super. 1992)); **id.** at 19 (stating jurisdiction of the person “may be obtained through consent, waiver, or proper service of process”) (quoting **Fleehr v. Mummert**, 857 A.2d 683, 685 (Pa. Super. 2004)).

There is no question the individual members of the Board of Managers have an interest that would be affected by the relief sought in the University’s Declaratory Judgment Petition. As outlined above, the Deed of Gift expressly granted the Board of Managers tremendous influence and control over the APKC Funds, the Memorial Building, and the Chair. The relief sought — and, in fact, granted — was a reformation of the instrument which eliminated the Board of Managers, thereby depriving the managers of any control whatsoever over these assets. **See City of Philadelphia**, 838 A.2d at 582 (“[I]n an

action for declaratory judgment, all persons having an interest that would be affected by the declaratory relief sought ordinarily must be made parties to the action.”); **see also** 42 Pa.C.S. § 7540(a) (“When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”). Thus, we consider whether the managers were properly joined in the Declaratory Judgment Petition.

Pursuant to Pennsylvania Orphans’ Court Rule 3.4(a), a petition shall set forth, *inter alia*, “the names and addresses of every interested party who has an interest in the matter that is the subject of the petition[.]” Pa.O.C.R. 3.4(a)(5); **see also** Pa.O.C.R. 1.3 (defining ‘interested party’ as “one or more individuals or entities having or claiming an interest in the estate, trust, person[,], or other entity that is the subject of the legal proceeding”).

When personal jurisdiction is required and **has not previously been obtained** or conferred by statute, ... the petition shall include a preliminary decree for the issuance of a citation to those interested parties for whom a citation is necessary to show cause why the relief requested in the petition should not be granted.

Pa.O.C.R. 3.5(a)(1) (emphasis added). However, where personal jurisdiction has been previously obtained, “the petitioner shall, either in advance of filing or contemporaneously therewith, provide a copy of the petition to the interested parties identified in the petition.” Pa.O.C.R. 3.5(b)(1). Additionally, “[t]he petition shall have affixed to its first page a notice to plead” that shall substantially comply with the form set forth in this subsection. **Id.** If counsel has entered an appearance on behalf of an interested party, then a

Rule 3.5 notice or citation shall instead be given to counsel. **See** Pa.O.C.R. 3.5(b)(3); Pa.O.C.R. 4.2(c).

Instantly, the University acknowledged “[t]he Board of Managers has an interest in the subject matter of [its] petition.” Declaratory Judgment Petition at ¶ 49. Thus, in accordance with Rule 3.4(a), it listed the names and addresses of the current board members in its petition. **See id.** at ¶ 51. We agree with the University and the Commonwealth that the managers had previously subjected themselves to the orphans’ court’s jurisdiction, as they authorized the filing of the original complaint in the civil division, which was later transferred to the orphans’ court division, and never filed a discontinuance in this matter. **See *In re Estate of Forte***, 352 A.3d 1024, 1031 (Pa. Super. 2026) (“Jurisdiction of the person may be obtained through consent, waiver[,], or proper service of process. A challenge to personal jurisdiction is readily waivable.”) (internal citations omitted); ***McCullough v. Clark***, 784 A.2d 156, 157 (Pa. Super. 2001) (“A party may expressly or impliedly consent to a court’s personal jurisdiction.”); 2 Standard Pa. Practice 2d § 9:8 (“When plaintiffs commence an action, they enter an appearance submitting themselves to the jurisdiction of the court.”); **see also** Pa.R.Civ.P. 229. Therefore, the issuance of a Rule 3.5(a) citation was not required, and the University properly served a copy of the petition on the managers through their counsel. **See** Pa.O.C.R. 3.5(a)(1), (b)(1), (b)(3); Pa.O.C.R. 4.2(c); **see also** Declaratory Judgment Petition at ¶ 50 (averring Attorney Mey “has confirmed ... he represents the Board of Managers in this litigation”); **id.** at 16

(certifying the petition was served upon the Board of Managers through its counsel, Attorney Mey); Answer to Declaratory Judgment Petition at ¶ 50 (admitting Attorney Mey represents the Board of Managers in this litigation).¹⁸

¹⁸ To the extent Appellant avers the University failed to endorse its petition with a notice to plead directed to the individual managers, it fails to state how this deficiency would affect the orphans' court's jurisdiction in this matter. Thus, we deem this issue waived. **See Banfield v. Cortes**, 110 A.3d 155, 168 n.11 (Pa. 2015) ("Where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived. It is not the obligation of an appellate court to formulate an appellant's arguments for him.") (cleaned up). Nonetheless, we have recognized "the remedy for an interested party not receiving notice is for it to be sent to that party before the orphans' court acts on the petition, not dismissal of the petition." **Estate of Rose**, No. 1164 WDA 2022, unpublished memorandum at 9 n.9 (Pa. Super. filed Aug. 17, 2023); **see also** Pa.R.A.P. 126(b) (unpublished non-precedential decisions of the Superior Court filed after May 1, 2019, may be cited for their persuasive value); Pa.O.C.R. 1.2(b) ("These Rules shall be liberally applied to secure the just, timely, and efficient determination of every action or proceeding to which they are applicable. The court at every stage of any action or proceeding may disregard any error or defect of procedure that does not affect the substantive rights of the parties in interest.").

Based on our review of the record, it appears the managers were timely served with a copy of the Declaratory Judgment Petition through their counsel, albeit purportedly without a notice to plead. Attorney Mey obviously received the petition, as he filed an answer on behalf of Appellant. The University also served the managers with its Motion for Judgment on the Pleadings through their counsel. **See** Motion for Judgment on the Pleadings at 3 (certifying the motion was served upon Attorney Mey, as "Counsel for the Members of the Board of Managers"). Again, Attorney Mey filed a responsive pleading on behalf of Appellant. Attorney Mey also attended the January 27, 2025 hearing on the Motion for Judgment on the Pleadings. Thus, as the University states, "the Board of Managers, through counsel, had notice of the [Declaratory Judgment] Petition and the opportunity to oppose, it, but ... simply failed to do so." University's Brief at 25. As such, we fail to see how the individual managers were deprived of due process in this declaratory judgment action.

Deed of Gift

Next, Appellant challenges the orphans' court's finding that the Deed of Gift created a restricted gift rather than a charitable trust and its reformation of the instrument. We are mindful these claims arise from the granting of the University's motion for judgment on the pleadings. In reviewing such an order, we do so in accordance with the following:

Our scope and standard of review in an appeal of an order granting a motion for judgment on the pleadings is well settled: the reviewing court applies the same standard as the trial court and confines its consideration to the pleadings and documents properly attached thereto. The reviewing court must determine whether the trial court's action respecting the motion for judgment on the pleadings was based on a clear error of law or whether there were facts disclosed by the pleadings which should properly go to the jury. The reviewing court will affirm the grant of judgment on the pleadings only if the moving party's right to succeed is certain and the case is so free from doubt that trial would clearly be a fruitless exercise.

Tibbitt v. Eagle Home Inspections, LLC, 305 A.3d 156, 159 (Pa. Super. 2023) (citation omitted). "Like the trial court, we must accept as true all well pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed, considering only those facts which were specifically admitted." ***Boyle v. Meyer***, 344 A.3d 839, 844 (Pa. Super. 2025) (cleaned up); ***see also Commonwealth v. All that Certain Lot or Parcel of Land Located at 4714 Morann Ave., Houtzdale, Clearfield Cnty.***, 261 A.3d 554, 560 (Pa. Super. 2021) (clarifying "no affidavit or depositions may be considered, nor is

any matter before the court except the pleadings”); *id.* (“It is clear that the briefs of the parties are not pleadings.”).

In considering the merits of Appellant’s claims, we are further guided by the following principles and controlling law:

A trust is a relationship between two persons, by virtue of which one of them as trustee holds property for the benefit of the other. There must be sufficient words to raise a trust, property to be subject to it, and a purpose to be accomplished. A trust creates two primary interests: the interest of the settlor in creating the trust, transferring interest in trust property, and establishing the conditions of the trust; and the interest of the beneficiary in enjoying the benefit to which the trust is directed. The trustee has a derivative interest in performing the agreed duty to administer the trust assets for the benefit of the beneficiaries in accordance with the terms established by the settlor.

When construing a trust, the intent of the settlor, if not contrary to law, must prevail.

In re Trust B Under Agreement of Richard H. Wells Dated Sept. 28, 1956, 311 A.3d 1057, 1068-69 (Pa. 2024) (cleaned up).

We are not permitted to construe a provision in a trust so as “to destroy or effectually nullify what has always been considered the inherent basic fundamental right of every owner of property to dispose of his own property as he desires, so long as it is not unlawful.” ***Estate of Pew***, [655 A.2d 521,] ... 533[(Pa. Super. 1994)]. Critically, the settlor’s intent must be ascertained from the language of the trust, and we give effect, to the extent possible, to all words and clauses in the trust document. ***See In re Estate of McFadden***, [100 A.3d 645, 650 (Pa. Super. 2014) (*en banc*)]; ***accord Farmers Trust Co. Bashore***, ... 445 A.2d 492, 494 ([Pa.]1982) (“A settlor’s intent is to be determined from all the language within the four corners of the trust instrument, the scheme of distribution and the circumstances surrounding the execution of the instrument.”).

In re Estate of Loucks, 148 A.3d 780, 781-82 (Pa. Super. 2016). “When the terms of a written trust instrument are clear and certain, parol or extrinsic evidence is not admissible to explain the settlor’s intent. However, such evidence is admissible to prove intent where the written instrument is ambiguous.” ***Factor v. Getz***, ... 276 A.2d 511, 512 ([Pa.]1971) (citations omitted).

In re Jackson, 174 A.3d 14, 29-30 (Pa. Super. 2017) (cleaned up).

Pursuant to Section 7732 of the Uniform Trust Act (“UTA”), 20 Pa.C.S. §§ 7701-7799.3,¹⁹ which governs charitable and noncharitable express trusts:

A trust is created **only if**:

- (1) the settlor has capacity to create a trust;
- (2) the settlor signs a writing that indicates an intention to create the trust and contains provisions of the trust;
- (3) the trust has a definite beneficiary or is:
 - (i) a charitable trust;
 - (ii) a trust for the care of an animal, as provided in section 7738 (relating to trust for care of animal – UTC 408); or
 - (iii) a trust for a noncharitable purpose, as provided in section 7739 (relating to noncharitable trust without ascertainable beneficiary – UTC 409);
- (4) the trustee has duties to perform; **and**
- (5) the same person is not the sole trustee and sole beneficiary of the trust.

20 Pa.C.S. § 7732(a) (emphasis added).

¹⁹ The General Assembly enacted the UTA, effective November 6, 2006. Subject to two exceptions that are not relevant here, the UTA applies to all Pennsylvania trusts, including those created before its enactment. ***See Trust Under Will of Augustus T. Ashton, Deceased Dated Jan. 20, 1950***, 260 A.3d 81, 89 n.9 (Pa. 2021); ***Trust Under Agreement of Taylor***, 164 A.3d 1147, 1149 (Pa. 2017).

A charitable trust is a trust created for a charitable purpose. 20 Pa.C.S. § 7703; **see also** 20 Pa.C.S. § 7735(a) (providing ‘charitable purposes’ include “the relief of poverty, the advancement of education or religion, the promotion of health, government or municipal purposes[,] or other purposes the achievement of which is beneficial to the community”). “A charitable trust is created only if the settlor manifests an intention to create such a trust.” ***Valley Forge Historical Soc’y v. Washington Mem’l Chapel***, 426 A.2d 1123, 1126 (Pa. 1981). “No particular form of words is necessary for the manifestation of intention to create a charitable trust.” ***Id.***; **see also id.** (determining “a charitable trust is created by deed when any intention is declared, either expressly or by implication, that the transferee is under an equitable duty to hold and use the land for a charitable purpose”).

Instantly, the orphans’ court determined that on its face, the Deed of Gift does not meet the requirements to establish a trust. **See** Orphans’ Court Opinion (“OCO”), 7/16/25, at 6 (“Despite referencing a ‘trust’ or to hold funds ‘in trust’ various times throughout the instrument, the elements required to create a valid trust are not present in the instrument.”). Specifically, the orphans’ court stated, “[t]he express language strictly goes against the statutory requirements of a valid trust,” because “[n]umerous times throughout the instrument itself, the University is indicated as both the sole trustee and the sole beneficiary of the ‘trust.’” ***Id.*** (citing Pa.C.S. § 7732(a)(5) (providing a trust cannot be created if “the same person is ... the sole trustee and sole beneficiary of the trust”)); **see also id.** at 2-3 (“[T]he instrument

not only names [the] University and its successors and assigns as the beneficiary of the instrument, but also tasks the University with holding both the building and the [C]hair in trust.”). It explains, “when the identities of the sole beneficiary and the sole trustee are one of the same, the legal and equitable interest[s] are merged..., which effectively fails to create a valid trust.” ***Id.*** at 7.

Appellant claims the orphans’ court erred in finding the Deed of Gift names the University as both the sole trustee and the sole beneficiary. Appellant’s Brief at 31. First, it acknowledges the instrument names the University as the initial trustee, but points out that it also grants the Board of Managers the discretion to remove the University as trustee; thus, it contends the University is **not** the **sole trustee**. ***Id.*; see also id.** at 32 (noting paragraph 4 of the Deed of Gift authorizes the Board of Managers to “select a substitute host for the Memorial Building and Chair, which host shall serve as Trustee in place of the University”). Moreover, Appellant stresses the University is **not** the **sole beneficiary**,²⁰ as the Deed of Gift expressly grants the Board of Managers “sole discretion” to “use and distribute the income from the fund ... for other than the benefit of the Memorial Building and/or the Chair,

²⁰ Appellant notes the UTA’s definition of a ‘beneficiary’ includes “[a] person that ... has a present or future beneficial interest in a trust, vested or contingent[.]” Appellant’s Brief at 31 (quoting 20 Pa.C.S. § 7703); ***see also id.*** (“‘Person’ includes ‘a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.’”) (quoting 1 Pa.C.S. § 1991).

and **other than for the University.**" *Id.* at 31-32 (citing Deed of Gift at 8) (some emphasis omitted); **see also id.** at 32 (averring the orphans' court "utterly disregarded" said language in the Deed of Gift). It states the orphans' court's interpretation "violate[s] the rule that 'a construction which renders any of the words futile or nugatory must be rejected.'" *Id.* at 33 (quoting ***In re Deed of Trust of McCargo***, 652 A.2d 1330, 1337 (Pa. Super. 1994)).

Appellant further argues the orphans' court failed to recognize a charitable trust does not have beneficiaries in the usual sense; rather, it is created to benefit the community at large. *Id.* at 34 (citing ***In re Atwater Kent Museum***, 329 A.3d 128, 140 (Pa. Cmwlth. 2024)); **see also, e.g., id.** at 34 (citing ***Taylor v. Hoag***, 116 A. 826 (Pa. 1922) (deeming a trust charitable, *i.e.*, for the benefit and welfare of the public, where its stated object was to "promote improvements in the structure and methods of government, with a view to efficiency and popular control and to use all lawful means to increase the knowledge of citizens on governmental and political questions")). Here, Appellant contends the Deed of Gift "explicitly set[s] forth a charitable purpose — promoting the free enterprise system and actively encouraging entrepreneurship." *Id.* at 35. "Reading the Deed of Gift as a whole, giving meaning to all the words and phrases[] as required by Pennsylvania law, makes clear that Mr. Kirby intended to and did create a charitable trust." *Id.* at 33. As such, Appellant argues there was no statutory requirement that the instrument name a definite beneficiary. *Id.* at 36; **see also id.** at 34 (citing 20 Pa.C.S. § 7732(a)(3) (requiring that a trust "has a

definite beneficiary **or is ... a charitable trust**")) (emphasis added by Appellant).

Contrarily, the University contends the orphans' court properly found the Deed of Gift named the University as the sole trustee and the sole beneficiary, thereby rendering the Deed of Gift ineffective at creating a trust. **See** University's Brief at 33, 36; **see also id.** at 36 (asserting the University "was given the full legal interest as the trustee and the full equitable interest as the beneficiary from the start"); **id.** ("Merger occurs when the legal and equitable interests are not separated.") (citation omitted).²¹ Additionally, it rejects the Appellant's claim that the Deed of Gift established a charitable trust, countering that the instrument failed to identify a charitable purpose or empower the trustee to select beneficiaries consistent with that interest. **Id.** at 39; **see also id.** at 38 (suggesting "[a] charitable trust typically does not name a specific beneficiary; rather[,] it empowers the trustee to identify

²¹ The University further argues it is entitled to judgment on the pleadings, because no party with standing disputed the allegations in its Declaratory Judgment Petition. **See** University's Brief at 27-28; **see also id.** at 27-29 (averring the Center "is not a legal entity, and as such, has no capacity to appear as a party in court"; any denials made by the Foundation are irrelevant, as the Foundation has no standing in this matter; and the Board of Managers never filed a response to the petition). We decline to address this argument as the standing issue seemingly implicates questions of fact — particularly regarding whether the Center is a legal entity — that should be addressed by the trial court in the first instance. **See In re A.J.R.-H.**, 188 A.3d 1157, 1176 (Pa. 2018) (stating "where disputed facts must be resolved, appellate courts should refrain from assuming the role of a fact-finder") (citation omitted). Nothing herein shall be deemed to prejudice the University's right to pursue the issue of the Center's standing below.

beneficiaries that support the donor’s charitable interests.”) (citation omitted). Instead, it maintains that the University was specifically designated as the sole beneficiary, but because the University was also named as the sole trustee, no trust was created as a matter of law. ***Id.*** (citing 20 Pa.C.S. § 7732(a)(5)).²² We disagree.

Indeed, a trust cannot be created where a single person is made both the sole trustee and the sole beneficiary. ***See*** 20 Pa.C.S. § 7732(a)(5). As treatise authority explains:

It is essential to the existence of a valid trust that there be a separation in different persons of the legal and beneficial interests in the same property. Where a sole trustee acquires the **entire beneficial interest** of the trust property, the legal and equitable interests in the *res* have merged, and the trust is terminated.

11 Summ. Pa. Jur. 2d Probate, Estates, and Trusts § 34:39 (2d ed.) (August 2026 Update) (footnote omitted); ***but cf. id.*** at § 30:22 (“A trustee may be a beneficiary of the trust as long as he or she is not the sole beneficiary....”) (footnotes omitted).

Instantly, aside from the language empowering the Board of Managers to potentially select a substitute trustee in the future, the parties do not dispute that the Deed of Gift — at least initially — designates the University as the trustee. Moreover, neither party contends the University has been removed as the trustee and/or replaced by a substitute trustee. Thus, we focus our inquiry on who is the intended beneficiary of the Deed of Trust.

²² The Commonwealth did not take a position on whether the Deed of Gift created a charitable trust.

Whether the Deed of Trust was intended to create a charitable trust is dispositive to this issue. **See** 20 Pa.C.S. § 7732(a)(3) (requiring that a trust have a definite beneficiary **or** is a charitable trust).

Giving effect to all the words, we believe it is clear Mr. Kirby intended for the Deed of Gift to create a charitable trust. He expressly stated the APKC Funds were to be held in trust by the University for the purpose of acquiring and refurbishing the Memorial Building in honor of his father and to establish an endowed Chair who would engage in education regarding free enterprise and promote entrepreneurship. **See** Deed of Gift at 1-2; **see also** 20 Pa.C.S. § 7703 (providing “[a] charitable trust is a trust created for a charitable purpose”); 20 Pa.C.S. § 7735(a) (defining the advancement of education as a charitable purpose); **Wells Trust**, 311 A.3d at 1068 (“There must be sufficient words to raise a trust, property to be subject to it, and a purpose to be accomplished.”). As further evidence of Mr. Kirby’s intent to establish a charitable trust which would further the advancement of education regarding free enterprise, the instrument also provides that candidates for the Chair shall have

demonstrated a capacity for communicating and promoting effectively the concepts envisaged in the Preamble of this instrument.^[23] ... In the event the Board of Managers determines ... that the search for the occupant of the Chair is being conducted **in a spirit not in keeping with this instrument**, or that no candidates satisfactory to the Board of Managers have been identified..., the Board of Managers may, at their sole discretion,

²³ The Preamble defines at length the concept of free enterprise as envisioned by Mr. Kirby. **See** Deed of Gift at 1-2.

use and distribute the income from the fund ... for other than the benefit of the Memorial Building and/or the Chair, and other than for the University. However, **no distribution may be made to a recipient which is not a charitable entity....** In the event the University ceases to exist, or the Board of Managers determines that continuation of the University as the host of the Chair is no longer in the best interest of the Chair and the **purposes for which the Chair was created**, the Board of Managers (in their sole judgment) shall select a substitute host for the Memorial Building and Chair, which host shall serve as Trustee in place of the University, under and subject to such grant, conditions and terms as the Board of Managers shall make; provided, however that any substitute for the University, in housing the Memorial Building and housing the Chair, **must agree to do so in accordance with the Preamble of this instrument**; must continue the name of the Memorial Building and Chair as required by this instrument; **and must be a charity** exempt from, and which will not subject the grant or the fund to, taxation under the applicable provisions of the [IRC].

Deed of Gift at ¶ 4 (emphasis added); **see also id.** at ¶ 7 (providing the Board of Managers shall meet at least twice per fiscal year for the purpose of, *inter alia*, “evaluating the performance and suitability of the occupant of the Chair”).

Likewise, Mr. Kirby’s intent is made clear through the detailed description of the Chair’s role:

The responsibilities of the occupant of the Chair shall be limited to such **instructing, lecturing, consulting, writing and counseling in the matters of free enterprise and entrepreneurship** (within the meaning contained in the Preamble of this instrument) as he or she may deem appropriate, but **with general emphasis upon the University’s undergraduate and graduate students and the academic environment in which they study and learn**, and with specific emphasis upon the University’s undergraduate and graduate students who have been attracted to the University because of the Chair and the opportunity to learn and experience the free enterprise system and entrepreneurship from and under the guidance of the occupant of the Chair. The occupant of the Chair shall be encouraged to bring his or her insight, experience and expertise (from a practical viewpoint) to the University’s faculty,

as well as **to the community and region in which the University functions and thrives**, and to encourage practical experience where possible through the blending of the student's learning process and the application of that process to the everyday realities of the free enterprise system.

Id. at ¶ 8 (emphasis added).

As our sister court has explained:

Typically, ... a charitable trust does "not have beneficiaries in the usual sense." [20 Pa.C.S.] § 7703 cmt. "Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large,^[24] persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in [the UTA]." ... **Id.** (cleaned up). Thus, the "fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary." **Id.**

Atwater Kent Musuem, 329 A.3d at 140; **see also In re Pruner's Estate**, 136 A.2d 107, 109 (Pa. 1957) ("The beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts accrue."); **Milton Hershey School**, 867 A.2d at 683 ("[T]he beneficiaries of a charitable trust are indefinite in identity and in number, whereas the beneficiaries of a private trust are specific, often few in number, and readily ascertainable.").

²⁴ The Commonwealth Court explained:

Though the beneficiary of a charitable trust is often said to be the public at large, it does not matter that each and every member of the entire public receive a direct benefit from a charitable trust so long as the trust benefits an indefinite class of people to a degree where the performance of the trust substantially benefits the community as a whole.

In re Milton Hershey School, 867 A.2d 674, 683 (Pa. Cmwlth. 2005), *rev'd on other grounds*, 911 A.2d 1258 (Pa. 2006).

In the case *sub judice*, it is apparent the intended beneficiary is the community surrounding the University and, particularly, the undergraduate and graduate students attending the University. **See** Deed of Gift at 1-2, ¶¶ 4, 8. The University is therefore not the sole beneficiary, and the merger doctrine does not apply.

Based on the foregoing, we conclude the orphans' court erred as a matter of law in finding that the Deed of Trust designated the University as both the sole trustee and the sole beneficiary, thereby failing to create a valid trust. **See** OCO at 6-7. Notwithstanding, we note that Section 7732 of the UTA mandates **all** the following requirements are met in order to establish a trust: (1) the settlor has capacity to create a trust; (2) the settlor signs a writing that indicates an intention to create the trust and contains provisions of the trust; (3) the trust has a definite beneficiary or is a charitable trust; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary of the trust. 20 Pa.C.S. S 7732(a). While we have determined the requirements set forth in subsection (a)(5) have been met, the orphans' court did not address whether the Deed of Gift complies with the other mandatory prerequisites outlined in Section 7732(a). Based on our review, at least one of those other factors — namely subsection (a)(2), which requires a writing signed by the settlor indicating his intent to create a trust — is clearly in dispute. **See** Declaratory Judgment Petition at ¶ 7 (averring Mr. Kirby never signed the Deed of Gift); Answer at ¶ 7 (denying the University's allegation that Mr. Kirby never signed the instrument;

declaring “The Deed of Gift was signed May 21, 1993”).²⁵ Thus, we cannot say at this juncture that the University is entitled to judgment as a matter of law, as such a disputed issue of fact is a question which should properly go to the trier of fact. ***See Tibbitt, supra; Potts v. Step By Step, Inc.***, 26 A.3d 1115, 1118 (Pa. Super. 2011) (“[C]ourts should only grant a motion for judgment on the pleadings when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law.”).

Accordingly, we vacate the orphans’ court’s March 25, 2025 order granting the University’s motion for judgment on the pleadings and remand for further proceedings consistent with this memorandum.²⁶

²⁵ We observe the only copy of the Deed of Gift attached to the pleadings is a copy signed solely by the University. Nevertheless, we recognize Appellant was not required to produce a copy of the Deed of Gift signed by Mr. Kirby to survive judgment on the pleadings. ***See Keil v. Good***, 356 A.2d 768, 771 (Pa. 1976) (vacating a decree granting the appellees’ motion for judgment on the pleadings where the appellants had alleged in their complaint “the existence of a [signed] writing which, **if its existence is proven**, would remove the bar of the Statute of Frauds”) (emphasis added).

²⁶ Due to our disposition, we need not address Appellant’s final issue as to whether the orphans’ court erred in reforming the Deed of Gift. Nevertheless, in the event the court determines the Deed of Gift created a valid charitable trust, we caution it against modifying or reforming the instrument in contravention of the governing statutes. In particular, Section 7740.3 of the UTA, which is applicable only to charitable trusts and codifies the common law doctrines of *cy pres* and administrative deviation, provides:

- (a) **General rule.**--Except as otherwise provided in subsection (b), **if** a particular charitable purpose becomes unlawful, impracticable[,], or wasteful:

(Footnote Continued Next Page)

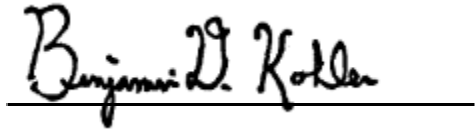
- (1) the trust does not fail, in whole or in part;
 - (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
 - (3) the court **shall** apply *cy pres* to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific.
- (b) **Exception.**--A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply *cy pres*.
- (c) **Administrative deviation.**--A court **may** modify an administrative provision of a charitable trust to the extent necessary to preserve the trust.

20 Pa.C.S. § 7740.3(a)-(c) (emphasis added); **see also Wells Trust**, 311 A.3d at 1069 (explaining under the common law, "[e]quitable deviation permitted a court to alter the provisions of a charitable trust to account for unanticipated circumstances in order to give effect to what the settlor probably would have intended had the settlor anticipated the circumstances"; "[c]*y pres* empowered the court to reform a trust when changed circumstances made implementation of the settlor's express directions impossible, illegal, or impracticable to implement").

In addition, the court "**may reform** the terms of a trust ... to conform to the settlor's probable intention **if** it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." 20 Pa.C.S. § 7740.5 (emphasis added); **see also id.** at Uniform Law Comment ("Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, **reliance on extrinsic evidence is essential.**") (emphasis added). The court **may** also "**modify** the terms of a trust in a manner that is **not contrary to the settlor's probable intention** in order to achieve the settlor's tax objectives." 20 Pa.C.S. § 7740.6 (emphasis added); **see also id.** at Uniform Law Comment (distinguishing the 'modification' authorized in Section 7740.6 from the 'reformation' permitted under Section 7740.5); **Ebersole v. Commonwealth**, 303 A.3d 546, 558 n.19 (Pa. Cmwlth. 2023) (clarifying 'probable intention,' in the context of Section 7740.6 of the UTA, "considers the settlor's **non-tax** as well as tax objectives") (cleaned up; emphasis added).

Application to Quash Appeal II, filed on March 25, 2026, denied. Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 10/06/2026