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COMMENT

THE ADMINISTRATION OF CHARITABLE TRUSTS

The administration of the charitable trust has continually eluded the supervision of the law. Its proper use has made it of inestimable value as an implement furthering our social welfare,¹ but abuse by its fiduciaries has caused considerable public loss.² The supervision and enforcement of the charitable trust has long been conceded to be a governmental obligation, but the sporadic demands for legislative reform³ indicate some measure of failure in fulfilling this obligation.⁴

An active force protecting and maintaining gifts effected through a charitable trust can be found only in the favorable attitude of our courts.⁵ However, the enforcement of the charitable trust, much like any selfless endeavor, cannot be afforded the protection of our legal machinery by the mere favor of the judiciary. Judicial mechanisms are not self-starting; they must be primed by one legally constituted to do so.⁶ The instrument creating a trust expresses any limitations governing its administration.⁷ When these limits are exceeded judicial aid is available to a proper suitor to guide the return to the proper confines of the trust declaration.⁸ The private trust suffers no handicap in this instance. A specific beneficiary is indispensable to the basic validation of such a trust.⁹ He benefits from proper administration and the damage from any impropriety entitles him to a cause of action.¹⁰ In contradistinction, the charitable trust necessitates the indefinite community as its beneficiary,¹¹ the purpose of the trust substituting perhaps as a factor in determining original validity.

Individual members of the community can personally maintain and

1. Hennings, *The Road to Destiny*, 67 TRUST COMPANIES 721, 722-723 (1938); Scott, *Charitable Trusts* in 3 ENCYC. SOC. SCI. 338, 339 (1930).

2. Bushnell, *Report and Recommendations for Legislation*, 30 MASS. L.Q. 22 (1945); Hennings, *supra* note 1.

3. Girard v. Philadelphia, 7 Wall. 1 (U.S. 1868).

4. See notes 33, 38, 46 *infra*.

5. See Noble v. First Nat. Bank of Anniston, 241 Ala. 85, 87, 1 So.2d 289, 290 (1941); Powers v. First Nat. Bank of Corsicana, 137 S.W.2d 839, 841 (Tex. Civ. App. 1940); 2 BOGERT, TRUSTS AND TRUSTEES § 369 (1935); Scott, *Trusts for Charitable and Benevolent Purposes*, 58 HARV. L. REV. 548, 571 (1945).

6. Jenkins v. Berry, 119 Ky. 350, 83 S.W. 594 (1904); State v. Rusk, 236 Mo. 201, 139 S.W. 199 (1911); see Allred v. Beggs, 125 Tex. 584, 589, 84 S.W.2d 223, 228 (1935).

7. See McGooky v. Winter, 381 Ill. 516, 524, 46 N.E.2d 84, 88 (1943); *In re Procter's Will*, 157 Misc. 706, 709, 284 N.Y. Supp. 675, 679 (Surr. Ct. 1936); RESTATEMENT, TRUSTS § 164 (1935); 2 SCOTT, TRUSTS § 164 (1939).

8. See Morehead v. Central Trust Co., 54 Ohio App. 9, 12, 5 N.E.2d 932, 934 (1937); 2 SCOTT, TRUSTS § 199.1 (1939).

9. Morice v. The Bishop of Durham, 9 Ves. 399, 32 Eng. Rep. 656 (Ch. 1804); RESTATEMENT, TRUSTS § 112 (1935); 1 SCOTT, TRUSTS § 112 (1939).

10. 2 SCOTT, TRUSTS § 199 (1939).

11. 3 SCOTT, TRUSTS § 364 (1939).

enforce rights peculiarly their own. Enforcement of those rights which inure to the community in its entirety, however, must be limited by the demands of practicality to a suitable representative.¹² The attorney general or other public official is generally designated the proper enforcing officer,¹³ since traditional concepts of our law have pointed up the maintenance of our charitable institutions as an obligation of sovereign governments.¹⁴ Three facets of the law comprise this obligation. Defending the essential validity of the trust for a charitable purpose illustrates two such charges. Fortunately, our courts universally indulge in a presumption favoring their validity notwithstanding the presence of a public representative.¹⁵ This defense finds use both where the attack hits the original creation of the trust¹⁶ and where failure is urged upon defect in the specific beneficial purpose¹⁷ of a trust declaration.

The obligation to insure proper administration, however, hangs in the air. Exemplary and pertinent law is in existence. It represents the progressive instincts of past generations¹⁸ and encompasses the remedial and preventive improvements of modern statutory innovation.¹⁹ As an abstract proposition, it leaves little to be desired and upon occasional application it superficially represents both material and spiritual justice. Unfortunately, by the time the question of mismanagement comes before the court, irreparable public damage has already been incurred.²⁰ The indefinite beneficiary, vital to the existence of the trust, is generally unaware of his beneficial interest.²¹ The public officer, nominally designated to supervise the trust administration, is often under no legal mandate to do so.²² In effect, he has a duty if he is reminded of it. Ministerial and supervisory functions are beyond the jurisdiction and capability of our courts,²³ and cases affecting properties impressed

12. *State v. Baker*, 156 Kan. 439, 134 P.2d 386 (1943); *Woulfe v. Associated Realities Corp.*, 130 N.J. Eq. 519, 23 A.2d 399 (Ch. 1942).

13. *Dickey v. Volker*, 321 Mo. 235, 11 S.W.2d 278 (1928); *Boyd v. Frost Nat. Bank*, 145 Tex. 208, 196 S.W.2d 497 (1946); 2 BOCERT, TRUSTS AND TRUSTEES § 411 (1935); 3 SCOTT, TRUSTS § 391 (1939).

14. See note 3 *supra*.

15. See note 5 *supra*.

16. Where settlor's failure to state a charitable purpose is the basis of the attack. 3 SCOTT, TRUSTS § 395 (1939).

17. When the failure of a specific charitable purpose (beneficiary) is the basis of the attack, the *cy pres* doctrine may allow the court to extend the trust to a similar charitable purpose. 2 BOCERT, TRUSTS AND TRUSTEES §§ 431-441 (1935); 3 SCOTT, TRUSTS §§ 395-401 (1939).

18. The first statute to regulate the administration of charitable trusts was enacted in 1601. See note 34 *infra*.

19. See note 50 *infra*.

20. See notes 26-32 *infra*.

21. See *In re Mead's Estate*, 227 Wis. 311, 277 N.W. 694 (1938).

22. While the duty to enforce is conceded by the respective Attorneys General, a duty to supervise by investigation does not exist.

23. *Jenkins v. Berry*, 122 Ky. 34, 92 S.W. 10 (1906) (court precluded from investigating charitable trust by writ of prohibition); *State v. Rusk*, *supra* note 6.

with a public trust sometimes pass before them under questionable circumstances without any notice being given to the existing enforcing agency.²⁴

In the Florida case of *Jordan v. Landis*,²⁵ a charitable trust was created for the purpose of establishing and maintaining a coeducational vocational school for Negro youths. The settlor declared the trust by executing a trust deed in 1899 and the school, during the course of its operation, became well known as an exemplary public undertaking and acquired considerable endowment funds on that basis. In 1911, several of the trustees and others incorporated themselves under Florida law as a non-profit corporation, conveying the trust property to this corporation in 1924. In 1931, after this corporation had incurred an indebtedness far in excess of the legal limit fixed in its charter, the corporate charter was amended to extend the legal indebtedness beyond the previous excess reached. The corporation thereupon mortgaged the entire trust property.

Upon default of these mortgages, foreclosure proceedings were instituted. At this point, several heirs of the original settlor became apprised of the situation and called the case to the attention of the Attorney General. He brought suit to quiet title to the trust properties, asking cancellation of both the deeds from the original trustees to the corporation and the mortgages securing the corporate indebtedness. The decree of the court nullified those instruments and reestablished a public trust in the properties.

Despite two occasions before the court²⁶ when trust properties were being manipulated under obviously improper circumstances, no notice reached the Attorney General until thirty-eight years of administrative abuse had elapsed. Other startling examples of public loss have appeared.²⁷ When the memories of his own childhood prompted one settlor to create a testamentary trust dedicated to a hospital and public park for the poor, twenty years of unsupervised mismanagement resulted instead in an exclusive suburban hospital and a private golf course remaining from a fortune of lands and money.²⁸ In another instance dissipation of \$33,000.00 and the burden of fifty-eight mortgages resulted from sixteen years under numerous successive trustees under their own supervision.²⁹ Actual theft from his own trust³⁰ and indifferent delay to a point fourteen days short of a condition

24. See *Jordan v. Landis*, 128 Fla. 604, 175 So. 241 (1937).

25. 128 Fla. 604, 175 So. 241 (1937).

26. Upon incorporation the charter must be approved by a circuit judge subject to finding it in proper form and for an authorized object. FLA. STAT. § 617.01 (1951). Amendment of charter requires approval of circuit judge. FLA. STAT. § 617.02 (1951).

27. An outrageous example of a violent breach of such a trust was discovered and remedied by Ephraim Tutt, benevolent Yankee Lawyer. TRAIN, YANKEE LAWYER 106 (Spec. ed. 1944).

28. See *Gredig v. Sterling*, 47 F.2d 832 (5th Cir. 1931).

29. See *State v. Bibb*, 234 Ala. 46, 173 So. 74 (1937).

30. See *Methodist Religious Soc. v. Armstrong*, 231 Mass. 196, 213, 120 N.E. 678, 685 (1918) (trustee bought a claim against the trust at a discount and collected it in full).

reverting the title to trust properties³¹ were the results of two more ill-fated charitable gestures. No accurate data is available to even approximate the public loss, but it has been indicated to be substantial.³²

Discoveries of this nature have afforded the impetus for comprehensive investigation of charitable institutions and the enactment of preventive and regulative legislation. The supervision of charitable trustees was deemed necessary as early as the outset of the fifteenth century in England.³³ The English Statute of Charitable Uses³⁴ was reenacted and enlarged in 1601, its preamble setting out the first varied and detailed list of charitable purposes.³⁵ This and similar contemporary acts were directed at aiding the government in the relief of pauperism.³⁶

The statutes presently governing charitable trustees in England³⁷ have resulted from the progressive reform and development of those early acts. A fundamental defect of the original statutes was revealed by the investigation of a Parliamentary committee in 1835. The prevalent disregard of trust obligations was traced to a failure to provide for regular, active and effective supervision. The report³⁸ of this committee moved Parliament in 1853 to enact the Charitable Trusts Act³⁹ creating a board of charitable commissioners. This body exercised general supervisory powers over all charitable trusts⁴⁰ and could compel periodic accounting from each such trustee. An exemplary feature was the limited judicial power⁴¹ of this board to decree and provide enforcement for their orders.

American law has not shown such concern with its charitable institutions.^{41a} Only in comparatively recent years have most states enacted statutes regulating trust fiduciaries.⁴² Merely an isolated few have legislation directed

31. See *Carlstrom v. Frackelton*, 263 Ill. App. 250 (1931).

32. Bushnell, *supra* note 2.

33. 2 BOGERT, TRUSTS AND TRUSTEES § 321 (1935); 3 SCOTT, TRUSTS § 391 (1939).

34. 43 ELIZ. c.4 (1601).

35. Enumerated as charitable purposes under the law were: the relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; repair of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans; relief, stock or maintenance of houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; relief and redemption of prisoners and captives; aid of any poor inhabitants concerning payments of fifteens; setting out of soldiers and other taxes. See 4 HALSBURY'S LAWS, 107-138 (2d ed. 1932).

36. See HOLDSWORTH, HISTORY OF ENGLISH LAW 389-399 (3d ed. 1945).

37. 15 & 16 GEO. V. c. 27 (1925).

38. The report filled sixty volumes and was the result of eighteen years of investigation.

39. 16 & 17 VICT. c. 137 (1853).

40. Certain religious and educational trusts were excluded. *Id.* § 62.

41. Subject to court appeal, the board handled mostly uncontested cases, rendered decrees and punished for contempt. *Id.* § 14.

41a. 3 SCOTT, TRUSTS 2054 (1939).

42. See, e.g., CAL. PROB. CODE ANN. § 38-1509 (1939); FLA. STAT. § 737 (1951); MINN. STAT. §§ 501.12, 501.34 (1937); N.J. STAT. ANN. §§ 3:10-6, 3:10-24 (1939).

exclusively at the charitable trustee.⁴⁸ The Wisconsin statute⁴⁴ is representative of the latter. It provides for an annual accounting to a proper court with a penalty upon failure. Enforcement is left to the Attorney General⁴⁵ upon his own information or that of interested parties.

The nonexistence of an active and capable supervisory body is the basic inadequacy of such legislation.⁴⁶ While nominal enforcement agencies are set up by law,⁴⁷ the lack of properly equipped staffs leaves them unable to properly exercise their functions.⁴⁸ They are left to depend upon private citizens who are under no legal duty to give them the information necessary for their action and who are often unaware of the existence of charitable trusts.⁴⁹

The New Hampshire legislature in 1943 provided the United States with the first comprehensive and utilitarian act⁵⁰ regulating the administration of charitable trusts. That act required the office of the Attorney General to compile a complete list⁵¹ of all such trusts operating within the state. This Register of Charitable Trusts provides the lawful enforcing agency with notice of all charities within its jurisdiction. Authorization was also given for extensive investigation⁵² by that office, with power to compel the appearance of trustees⁵³ at hearings and to elicit testimony⁵⁴ under a complete grant of immunity from prosecution. The assets and liabilities of each trust along with a detailed report of their receipts and expenditures makes up a compulsory annual accounting⁵⁵ due from each trustee. The name and address of each ultimate beneficiary is another detail of this report.⁵⁶ Notice of each testamentary trust of a charitable nature reaches the Attorney General from the Registers of Probate under a further provision⁵⁷ of the statute. An amendment in 1949⁵⁸ created the office of Director of Charitable Trusts. He works with and has all the powers of the Attorney General in dealing with charitable trusts. He is a member of the Bar and is appointed by the Governor to a five year term.

43. See e.g., IND. STAT. ANN. § 7-714 (Burns 1933); MASS. GEN. LAWS ANN. c. 68 § 15 (Michie Supp. 1946); NEV. COMP. LAWS § 7718.21 (Hillyer Supp. 1945); WIS. STAT. § 317.06 (1949).

44. *Supra* note 43.

45. A further provision of these statutes enables ten interested parties to bring an action if the Attorney General refuses to act. The interested parties, however, must be donors to the trust or members of the class to be benefited. *Id.* § 231.34.

46. See Note, 47 COL. L. REV. 659 (1947); Note, 23 IND. L.J. 141 (1948); Bushnell, *supra* note 2.

47. See note 13 *supra*.

48. 3 SCOTT, TRUSTS 2053 (1939); Scott, *supra* note 1, at 339.

49. See note 21 *supra*.

50. N.H. REV. LAWS c. 24 § 13 (1950).

51. *Id.* § 13a.

52. *Id.* § 13e.

53. *Id.* § 13f.

54. *Id.* § 13h.

55. *Id.* § 13i.

56. *Ibid.*

57. *Id.* § 13j.

58. *Id.* § 13aa.

Enactments of this nature wherein the supervisory and enforcing agencies are effectively coordinated promise great relief in solving the problem. Rhode Island followed the example set by New Hampshire and in 1950 adopted a similar act.⁵⁹ Other jurisdictions have generally disregarded the urgings of legal periodicals⁶⁰ and the reports of public officials.⁶¹ Possibly, the bland expressions of the law reports, showing little feeling for the immense public loss, underlie the retarded progress of legislation in this field.

The need for effective supervision can best be seen when we consider the role of the charitable institution in modern American life. By its broad legal definition,⁶² the social and economic importance of charity is greatly enhanced. It extends to every contribution that can be directly related to our social welfare.⁶³ Even the most rigid imagination might allow that the funds of private philanthropy underlie and support the American standard of living. In the achievement of a better way of life, education perhaps stands out as the dominant factor. The enlightenment of increasing numbers of our population through higher education has alone made us generally better suited for a progressive and productive life. Recent astounding developments in scientific research which have transformed our physical and material well being can be traced to the laboratories of our educational institutions.⁶⁴ The contributions which maintain and support these institutions are legally classified as charity.⁶⁵

These contributions are encouraged both by the legislatures⁶⁶ and the courts.⁶⁷ No real assurance is afforded the donor, however, that his charitable expression will result in the fulfillment of his desires and satisfy the wants of his intended beneficiary. The government has also failed to insure that the public benefit received will balance satisfactorily with the favorable tax provisions that it extends to charitable institutions. The enactment of detailed legislation will cover these considerations, but the assurance that charitable giving will be perpetuated has not yet been the concern of the law.

Despite a great increase in governmental assumption of these moral obligations,⁶⁸ the private charity must still cover those areas not yet susceptible to government aid and supplement those perhaps still inadequately covered. By supplementing the proposed legislation with the requirement

59. R.I. GEN. LAWS c. 2617 (1950).

60. See note 46 *supra*.

61. See Bushnell, *supra* note 2; D'Amours, *The Control of the Charitable Trust*, address at the fortieth annual meeting of the Association of Attorneys General (1946).

62. See note 35 *supra*.

63. The purposes presently considered as charitable are well set out in RESTATEMENT, TRUSTS § 368 (1935).

64. ANDREWS, PHILANTHROPIC GIVING 222 (1950).

65. 3 SCOTT TRUSTS § 370 (1939).

66. ANDREWS, *op. cit. supra* note 64, at 230; Lynch, *The Charities Provision of the Internal Revenue Code*, 10 FORD. L. REV. 234 (1941).

67. See note 5 *supra*.

68. ANDREWS, *op. cit. supra* note 64, at 43; the forty-eight states, the District of Columbia and all territories have public welfare programs. SOCIAL SERVICE YEARBOOK 402 (1951).

that the accounting due the legal supervisors also be given the benefactors, the continued success of these endeavors can best be assured. A requirement of this nature will enable the donor to see the immediate results of his gift. It will put the administrators of charitable institutions under the scrutiny of interested observers and lend real meaning to the obligation of their trust.

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