

FORGOTTEN FUNDS: SUGGESTING DISCLOSURE LAWS FOR CHARITABLE FUNDS

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In Faith and Hope the world will disagree
But all mankind's concern is charity.*

A gift to charity has always been encouraged by the Judaeo-Christian world, both as a good deed in itself and as a means for the donor to acquire benefits in the world to come. Under the present tax laws the donor acquires considerable benefits in this world by reason of charitable giving.¹ The exact extent of such gifts is not known, but it is estimated that in 1954 private philanthropy in the United States amounted to \$6,651,000,000.² This is a very sizable sum of money which is not only tax exempt but to a large measure escapes those elements of control to which our complicated society subjects moneys which are devoted to business enterprise, saving, investments or speculation, government or non-charitable gifts.³

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* POPE, EPISTLE 3, line 307.

1. See INT. REV. CODE OF 1954, §§ 170, 2522(a) (2), (b) (2). Pennsylvania law exempts from transfer inheritance tax all bequests in trust or otherwise for charitable purposes. PA. STAT. ANN. tit. 72, § 2301.1 (Purdon Supp. 1956). Charitable trusts are also exempt from the Pennsylvania personal property tax. PA. STAT. ANN. tit. 72, § 3244 (Purdon 1949).

2. ANDREWS, PHILANTHROPIC FOUNDATIONS 18 (1956).

3. With the exception of government funds, other acquisitions and expenditures are taxable by one or more levels of government. Business is regulated by fair trade laws, anti-trust laws and other restrictions. The entrepreneur and professional man are subject to licensing and reporting requirements. Note that barbers, plumbers, morticians and a host of other occupations are rigidly regulated. Each year proposals are made to include still other occupations in the licensure system. An example is water well drillers. See H.B. 612, Pa. Assembly, 1957 Sess. Transactions in securities are subject to numerous state and federal laws not only requiring disclosure, but also regulating the activities. This paper will not discuss the exemption from tort liability of charitable institutions. Note the extreme limits to which this doctrine has been carried in Pennsylvania. *Bond v. Pittsburgh*, 368 Pa. 404, 84 A.2d 328 (1951); *cf. Siidekum v. Animal Rescue League*, 353 Pa. 408, 45 A.2d 59 (1946). However, see recent decisions in other jurisdictions which find new doctrines for holding charitable institutions liable for torts. *Wittmer v. Letts*, 80 N.W.2d 561 (Iowa 1957); *Mohn v. Allendale School*, 3 App. Div. 2d 33, 157 N.Y.S.2d 655 (4th Dep't 1956); *Watry v. Carmelite Sisters*, 274 Wis. 415, 80 N.W.2d 397 (1957).

Although this sum is undifferentiated and all gifts for charitable or benevolent purposes⁴ are included, many different legal forms are used. Some are more liable to abuse than others and correlatively the need for supervision by governmental authority is greater.

The transfer inter vivos of all right, title and interest from the donor to the donee presents little difficulty. The inter vivos transfer in trust to an existing charity or to trustees for specified charitable purposes will, during the lifetime of the donor, be subject to his scrutiny even though he has divested himself of legal control. Testamentary dispositions and inter vivos transfers after the death of the donor, however, raise many subtle problems. For example, even an outright testamentary gift to a named charitable institution may be compromised by the trustees for reasons of expedience, friendship and "goodwill." The public, which is the true beneficiary should, of course, be represented in all such situations. In all trusts for charitable purposes in which the trustees must either create the institution or in their discretion distribute the funds to other individuals and institutions, a serious problem of enforcement arises. The concept of a charity, namely, that it be a benefaction for an indefinite class or group, prevents any individual or institution from having a right of action against the trustee. Thus there is lacking in this situation that spur of self interest upon which society relies for the enforcement of agreements.

Although exact figures with respect to charitable giving are difficult to obtain, it is clear that a very large proportion of such gifts is made through the device of trusts or foundations.⁵ It was estimated in 1935 that \$160,000,000 in capital was invested in charitable trusts in Philadelphia alone.⁶ Since that time increasing prosperity and a tax situation encouraging charitable giving have doubtless substantially increased this figure.

The popularity of the trust is possibly due to the fact that it gives the settlor a longer hold upon his property than the law would otherwise permit. In a world of mortality, the idea of creating a perpetuity

4. The words "charitable or benevolent purposes" for many years gave rise to considerable litigation. See Scott, *Trusts for Charitable and Benevolent Purposes*, 58 HARV. L. REV. 548 (1945). The tax laws now give a broad scope to this concept and most donors are careful to bring their benefactions within their terms. The Pennsylvania definition in the Estates Law is typical: "'Charity' or 'charitable purposes' includes but is not limited to the relief of poverty, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community." PA. STAT. ANN. tit. 20, § 301.1 (Purdon 1950).

5. In England it is estimated that there are 110,000 charitable trusts owning personalty worth approximately \$200,000,000 in addition to vast land holdings. Committee on the Law and Practice Relating to Charitable Trusts, *Report*, CMD. No. 8710, at 13 (1952) (hereinafter cited as NATHAN REPORT).

6. CLAGUE, CHARITABLE TRUSTS (1935).

seems to exercise a widespread fascination.⁷ The charitable trust, as a legal device, was created for this very purpose, namely to permit accumulations of property in avoidance of the laws of Mortmain.⁸

THE RISE OF THE CHARITABLE TRUST

The charitable trust is so old a legal concept that the American public is apt to invest it with the sanctity of a constitutionally guaranteed property right and to look askance at any new restrictions placed upon it. It is advisable to recall, therefore, that the trust or use is an exception which was grafted onto the common law many years ago. But from its inception it was subject to stringent control by the courts.

The creation of charitable uses long antedates the reign of Henry VIII. Restrictions on inalienability of land are found as early as 1225.⁹ With the religious wars, the Statute of Superstitious Uses,¹⁰ was employed to strike down trusts and charities in the control of religious orders other than the Church of England. Prior to the rise of the use, the laws of Mortmain controlled all testamentary dispositions of property. During the reign of Elizabeth, charitable trusts were reestablished subject to certain restrictions and governmental supervision.¹¹ Although the restrictions have varied from time to time, the right of a settlor or testator to dispose of his property under Anglo-American law has not been free and untrammled for at least seven centuries.

Even in modern times, courts have stricken a number of provisions in otherwise valid trusts as being violative of law or public policy.¹²

7. From the Pharaohs to Hitler, rulers have vainly attempted to create lasting kingdoms. Private individuals have sought a type of immortality in perpetuating either their ideas or their names by means of charitable trusts. The law permits the establishment of a perpetual trust for any sum of money, no matter how large or small. The York County survey cited in text at notes 37-46 *infra*, indicates that many have been created for less than \$100. The Ford Foundation, on the other hand, has assets of \$520,232,000. ANDREWS, PHILANTHROPIC FOUNDATIONS 108 (1956).

8. GILBERT, USES 7 (3d ed. 1811).

9. 9 HEN. 3, c. 36 (1225).

10. 23 HEN. 8, c. 10 (1531).

11. It should be noted that even the Statute of Uses, 1601, 43 ELIZ. 1, c. 4, did not permit the creation of trusts for all religious denominations. Many trusts were voided even after that date as being superstitious or for an illegal purpose or against public policy.

12. Provisions *in terrorem* which threaten the free exercise of religion or the institution of marriage are held to be void. Property devised in trust subject to such conditions passes unconditionally. *Devlin's Estate*, 284 Pa. 11, 130 Atl. 238 (1925); *Drace v. Klinedinst*, 275 Pa. 266, 118 Atl. 907 (1922). The Pennsylvania courts have not hesitated to strike down a similar provision in a testamentary trust as violative of public policy and freedom of religion. *Jamieson's Estate*, 55 Pa. D. & C. 435 (Philadelphia County Orphans' Ct. 1946). Other types of conditions which offend public policy have also been declared invalid. See *Manners v. Philadelphia Library*, 93 Pa. 165 (1880) (trust was held to be for atheistic purposes and hence a violation of public policy); *cf. Cook's Estate*, 3 Phila. Rep. 60 (Philadelphia County Orphans' Ct. 1858). See also *Holbrook's Estate*, 213 Pa. 93, 62 Atl. 368 (1905); *Commonwealth v. Board of Directors of City Trusts*, 353 U.S. 230, *rehearing denied*, 353 U.S. 989 (1957).

This is an *ad hoc* type of control applied individually as cases are brought before the courts. In absence of litigation initiated by the trustees or private parties, there is practically no effective public supervision of these innumerable trusts.

EXISTING CONTROLS OVER CHARITABLE FUNDS

It is generally assumed that charitable funds are subject to annual audits and reports.¹³ While it is true that the Internal Revenue Code requires annual tax returns, there are numerous exemptions from the reporting provisions.¹⁴ But even such reports as are required are solely for the purpose of determining tax liability. The control exercised inferentially through revenue laws limiting accumulations in order to obtain tax exemption is easily avoided.¹⁵ The federal government does not undertake to supervise or regulate the administration of charitable organizations.

In the United States, this is a function confided to the attorneys general of the respective states.¹⁶ The theory in support of this supervisory jurisdiction over private property is that the beneficiary, which is the public, must be represented.¹⁷ The attorney general is frequently said to be not only a proper but a necessary party.¹⁸

13. Even so knowledgeable an authority as F. Emerson Andrews, author of *Philanthropic Giving, Philanthropic Foundations* and numerous other publications of the Russell Sage Foundations, presumes that such legal accountability exists and is enforced. Andrews states categorically, "This trustee [of a charitable trust] receives the funds, invests and safeguards them, takes care of legal requirements including audit and annual reporting to the Internal Revenue Service and possibly the state, and disburses the income (together with a portion of the principal, if so provided) to the named beneficiaries." ANDREWS, *PHILANTHROPIC FOUNDATIONS* 45 (1956).

14. INT. REV. CODE OF 1954, §§ 6033, 6044; see Gresham, *Charitable Trusts*, 91 TRUSTS & ESTATES 931 (1952).

15. See Weyher & Bolton, *Loss of Charitable Status*, in CONFERENCE ON CHARITABLE FOUNDATIONS 55, 62 (Sellin ed. 1955), pointing out methods of avoiding provisions against accumulations; cf. *Lederer v. Stockton*, 260 U.S. 3 (1922); *Scholarship Endowment Foundation v. Nicholas*, 25 F. Supp. 511 (D. Colo. 1938), *aff'd*, 106 F.2d 552 (10th Cir. 1939), *cert. denied*, 308 U.S. 623 (1940).

16. Under the common law of Pennsylvania, as of many of the states, the attorney general has all of the broad powers possessed by the attorney general under the English law. *Commonwealth ex rel. Miner v. Margiotti*, 325 Pa. 17, 188 Atl. 524 (1936). The existence of this common-law power has not been questioned by the courts. See *Judkins v. Hyannis Pub. Library Ass'n*, 302 Mass. 425, 19 N.E.2d 727 (1939); *Attorney General v. City of Lowell*, 246 Mass. 312, 141 N.E. 45 (1923); *Trustees of Pittsfield Academy v. Attorney General*, 95 N.H. 51, 57 A.2d 161 (1948); *Bernardsville Methodist Episcopal Church v. Seney*, 85 N.J. Eq. 271, 96 Atl. 388 (Ch. 1915); *Larkin v. Wikoff*, 75 N.J. Eq. 462, 72 Atl. 98 (Ch. 1909); *Trustees of Sailors' Snug Harbor v. Carmody*, 211 N.Y. 286, 105 N.E. 543 (1914); *Williams Estate*, 353 Pa. 638, 46 A.2d 237 (1946); *Girard Estate*, 73 Pa. D. & C. 425 (Philadelphia County Orphans' Court 1950).

17. This point was clearly made in *Attorney General v. Foundling Hospital*, 2 Ves. Jr. 42, 46, 30 Eng. Rep. 514, 516 (1793). See also *Attorney General v. Whorwood*, 1 Ves. Sr. 534, 536, 27 Eng. Rep. 1188, 1190 (1750), in which the Lord Chancellor declared, "If this trust is no charity, there is no ground for the information in the name of the attorney general. . . ."

18. *Thatcher v. St. Louis*, 343 Mo. 597, 122 S.W.2d 915 (1938); *Trustees of Rutgers College v. Richman*, 41 N.J. Super. 259, 125 A.2d 10 (Ch. 1956); *Passaic Nat'l Bank & Trust Co. v. East Ridgelawn Cemetery*, 137 N.J. Eq. 603, 45 A.2d

The role of attorney general in the supervision of charitable trusts has a long and honorable history. The monarchs of England in the Tudor period had general superintendence over charitable uses. In performing such functions the king acted through the attorney general.

"The king, as *parens patriae*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney-general, at the relation of some informant (who is usually called the relator) files *ex officio* an information in the court of chancery to have the charity properly established."¹⁹

The right and duty of the crown to supervise the administration of charitable trusts which was an accepted principle of law in the sixteenth century was clarified by the Statute of Uses. With the Reception, this practice was adopted as part of the common law of the United States.²⁰

In England, the supervision and control of charitable trusts has been a subject of continued governmental interest. Two parliamentary inquiries²¹ have resulted in substantial development of the law. Since 1853 all trustees of charities are required to render accounts to the Commissioners of Charities.²² The Nathan Report of 1952 indicates that there is widespread dissatisfaction with the present reporting laws and a recognized need for more thorough and far-reaching regulation of all charitable trusts.

Although this subject has been strangely neglected in the United States, it is not for lack of legal authority to deal with the problem. When notified, the attorney general appears in cases involving *cy pres* or other deviation from the purposes of the trust.²³ However, the par-

814 (Ch. 1946); *Abel v. Girard Trust Co.*, 365 Pa. 34, 73 A.2d 682 (1950); *Watson v. Wall*, 228 S.C. 500, 93 S.E.2d 918 (1956). See RESTATEMENT, TRUSTS § 391, comment *f* (1935).

19. 3 BLACKSTONE, COMMENTARIES *427. See *Attorney General v. Mayor*, 1 Bill. n.s. 312, 4 Eng. Rep. 888 (1827); *Eyre v. Countess*, 2 Will. P. 103, 119, 24 Eng. Rep. 659, 664 (1722).

20. *Trustees of the Philadelphia Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. (4 Wheat.) 1 (1819).

21. The Brougham Commission of 1818 and the Nathan Charitable Trusts Committee of 1950. As early as 1597 Parliament was passing measures to correct abuses of charitable trusts. The Commissioners of Charities for England and Wales now have records for some 110,000 extant charitable trusts. NATHAN REPORT 27. See also Bogert, *The Nathan Report and the Supervision and Enforcement of Charitable Trusts*, 29 N.Y.U.L. Rev. 1069 (1954).

22. 16 & 17 VICT. c. 137 (1853).

23. For example, see the following Pennsylvania legislation which is typical of most states in requiring notice to the attorney general by the trustee of a charitable trust. PA. STAT. ANN. tit. 20, § 301.10 (Purdon 1950); Pa. Laws 1855, No. 331, § 10; Pa. Laws 1895, No. 89, § 1.

ticipation of the attorney general is largely if not wholly dependent upon the initiation of action by the trustee.

In those instances in which (1) the trustee acts pursuant to court order without notifying the attorney general, (2) the trustee acts without approval of the court or (3) the trustee simply fails to take any action at all, the attorney general has no knowledge of the facts. His enormous powers are indeed *brutum fulmen*. It is obvious that if the attorney general is to fulfill his duties in representing the public, he must be fully informed.

RECOGNITION OF THE PROBLEM

The need for the creation of legal machinery to give the state attorneys general such data was first brought to the attention of the American bar by Professor Austin Wakeman Scott in his definitive and seminal work on trusts.²⁴ The first state to enact legislation requiring reporting of charitable trusts was New Hampshire, in 1943.²⁵ Since then the problem has evoked considerable interest. It has been discussed at conferences of the attorneys general,²⁶ at bar associations and law schools.²⁷ A substantial literature has grown up.²⁸ The theme of all this writing and discussion has been the need for some type of reporting to the state attorney general and for legal machinery to implement his powers under existing law. The few states which have

24. 3 SCOTT, TRUSTS § 391 (1st ed. 1939): "Neither in England nor in the United States is the office of the Attorney General so organized as to make it possible for him to exercise any general supervision over the administration of charitable trusts."

25. N.H. REV. STAT. ANN. § 7:28 (1955).

26. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, CONFERENCE PROCEEDINGS (1946).

27. This was the subject of the alumni dinner of the University of Pennsylvania Law School in April 1957, and was also one of the subjects discussed at the Fourth National Conference on Solicitations in Detroit, Michigan on April 3, 1957.

28. The most comprehensive and widely read article is Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633 (1954). See also Bushnell, *Report and Recommendations*, 30 MASS. L.Q. 22 (May 1945); Notes, 96 SOL. J. 816 (1952), 96 SOL. J. 813 (1952); 95 TRUSTS & ESTATES 906 (1956), 21 U. CHI. L. REV. 118 (1953). A recent survey in 18 OHIO ST. L.J. 181 (1957), is devoted entirely to this problem and analyzing the Ohio experience with a registration act. The limited scope of the act is already subject to criticism. *Id.* at 191. Ohio has not yet been able to analyze the types of charities, the amounts devoted to each and the particular needs which they are meeting. An excellent cursory survey of the existing law in the United States, England and Canada is CLARK, PUBLIC ACCOUNTABILITY OF FOUNDATIONS AND CHARITABLE TRUSTS (1953) published by the Russell Sage Foundation. None of the American authors, however, has dealt with the problem with which England is grappling, namely, the conversion of charitable trusts from a less needed purpose which is not obsolescent, impossible or illegal, to a more useful one. This program has met adverse criticism in England. See 16 MODERN L. REV. 95 (1953); cf. *Re Spensley's Will Trusts*, [1952] 2 ALL E.R. 49 (Ch.). However, even the minority of the Nathan Report agreed in principle with this power. NATHAN REPORT 210-29.

passed legislation dealing with charitable trusts have followed this pattern.²⁹

The Commission on Uniform Laws has approved a Uniform Supervision of Charitable Trusts Act.³⁰ This act establishes a central register of charities in the office of the state attorney general and requires the filing of a copy of every charitable trust instrument within six months after any part of the principal or income is authorized or required to be applied to a charitable purpose, and thereafter the filing of periodic reports. The attorney general is given subpoena powers to compel the attendance of trustees and witnesses at hearings which he may conduct and to require the production of books and records. Trusts held by any federal governmental agencies or by "an officer of a religious organization who holds property for religious purposes or to a charitable corporation organized and operated primarily for educational, religious or hospital purposes," are exempt from the provisions of the act.

The Uniform Act has been adopted by only one state, California.³¹ It was introduced into the Pennsylvania Assembly during the 1955 session with the backing of the Administration but failed of passage.³²

Such legislation has been objected to on the grounds that (1) it is unnecessary (all trustees or the vast majority of them are honest), (2) it will cause an unnecessary burden and hardship upon the trustees, many of whom serve without compensation, (3) the filing of audits and reports is an expensive procedure and will result in wasting the assets of the estate, (4) interference by government in the administration of private funds will deter potential donors.

Trustees and legal authorities in the field, including those who object to specific proposals, concede that there must and should be some regulation and supervision of charitable funds. The Conference on Charitable Foundations sponsored by New York University, which discussed in great detail the use of foundations to avoid taxes, types of investments, management and other related problems, summarily glossed over that question. In discussing the duties and liabilities of the trustee, Thomas Witter Chrystie, one of the participants in the conference, stated, "In other words, it is still true that it would shock everyone's conscience if somebody or some authority did not have the

29. See IND. ANN. STAT. §§ 31-712, 31-713 (Burns Supp. 1956); MASS. ANN. LAWS c. 12, § 8 (Supp. 1956); N.C. GEN. STAT. § 36-19 (1950); R.I. Acts, 1950, c. 2617; WIS. ANN. STAT. § 317.06 (1957).

30. The Uniform Act is completely silent on the subject of *cy pres*, substitution of funds and community trusts. Cf. NATHAN REPORT 70-92.

31. CAL. GOV. CODE ANN. §§ 12580-96 (West Supp. 1956).

32. H.B. 1085, Pa. Assembly, 1955 Sess.

power to inspect and enforce the duties of charitable foundations.”³³ Mr. Chrystie then points to the visitorial rights of the donor and his heirs and the rights of the sovereign, which in most jurisdictions have devolved upon the attorney general of the state, and the obligation of the trustees to find a solution to this problem on a voluntary basis.

It is submitted that Mr. Chrystie's first suggestion is generally unworkable and in many instances illegal. The donor of a foundation can during his lifetime exercise considerable control and direction. After his death, the power of management resides in the trustees and not in the heirs unless there is a possibility of reverter. Moreover, the heirs, if any, seldom have the interest in the work of the charity which the donor had. Indeed, they may feel that the charity usurped the place of the next of kin as the natural object of the donor's bounty. With respect to a charitable trust in perpetuity, once the funds have vested in the trustees, the heirs have no standing to sue unless the instrument itself provides for a reversion in the event of a breach of specific conditions.³⁴

THE PENNSYLVANIA EXPERIENCE

If a substantial majority of the trusts are being properly administered and accounting is being made to the courts with fair regularity, then it might be argued that supervision is unnecessary.³⁵

Despite the extensive literature on charitable trusts, to date there has been no data available either to substantiate or to disprove such claims. In an effort to provide a more intelligent approach to the problem, Herbert B. Cohen, then Attorney General of Pennsylvania, appointed in 1956 a committee of leading Orphans' Court practitioners and judges to survey the problem and make legislative recommendations.³⁶ The press throughout the Commonwealth reported the appointment of this committee. A great deal of information came to the Attorney General from members of the public following this an-

33. CONFERENCE ON CHARITABLE FOUNDATIONS 21 (Sellin ed. 1955).

34. See GRAY, RULE AGAINST PERPETUITIES §§ 44-51(a), 603(i) (3d ed. 1915), in which the author points out that unless there is a reverter, upon the failure of a trust the property escheats. For this reason also, the state, as potential remainderman, should be advised. It is elementary that the heirs of a donor have no standing to enforce the trust unless there is a reverter. Estate of Mead, 227 Wis. 311, 277 N.W. 694 (1938); cf. Miller's Estate, 380 Pa. 172, 110 A.2d 200 (1955); Crozer's Estate, 341 Pa. 75, 18 A.2d 323 (1941).

35. The greater problem dealing with the direction of charitable funds into more fruitful channels would, however, still obtain.

36. Hon. Robert V. Bolger, Judge of the Orphans' Court of Philadelphia, was named chairman. The origin and work of this committee is outlined in Bolger, *Parens Patriae*, Legal Intelligencer (Philadelphia), March 26, 1957, p. 1, col. 1. Note that even the recent Ohio study does not contain this basic data. See note 28 *supra*. The Pennsylvania committee is continuing its work under Attorney General Thomas D. McBride.

nouncement. A number of cases referred to hereinafter were initiated in this way. This unsolicited public response was large and enthusiastic. It appears likely that public reporting and supervision reassuring potential donors that their gifts would be properly enforced would encourage rather than deter them.

Coeval with the appointment of the committee, in an effort to obtain basic information with respect to the number of charitable trusts, the amounts involved, and the administration thereof, the Attorney General also requested the judges of the Orphans' Courts of the Commonwealth to furnish him, insofar as possible, with this data. It immediately became apparent that there was no ready source of such information. Charities are not indexed separately. Any complete survey would require an examination of all the dockets in the Orphans' Courts and in the Courts of Common Pleas practically since the time of William Penn. Since charities may be gifts in perpetuity there is really no cut-off date.

In large measure, the judges of the Commonwealth were sympathetic to the problem of the Attorney General, recognizing that the courts themselves were unable properly to carry out their functions unless the Attorney General was able to initiate action against erring, recalcitrant, inactive or questionable trustees. The judges responded in a variety of ways. The ingenuity and flexibility of the law is clearly demonstrated by the different orders and actions taken.³⁷

The York County Survey

The most complete information was received from the county of York. Judge Harvey A. Gross of the Orphans' Court of York County issued an order to the banks and trust companies of the county requiring them to file returns with respect to all charitable gifts for which they act as trustees. A prompt response was made. Reports with respect to 277 trusts were filed.

According to the 1950 census, York County has a population of 202,737, 43.5 per cent of which is urban and 46.7 rural. The assessed valuation of the real property in 1954 was \$107,348,505. The valuation of the personal property in 1954 was \$81,418,502. The total per capita tax for that year was \$6.25. The county was formed in 1749³⁸

37. For example, the Orphans' Court of Philadelphia County entered an order upon every corporate trustee to file with the court a list of trusts under its administration and subject to its administration. Cemetery trusts were excluded. Other courts established a register of charities in which all trusts coming before the court would be entered.

38. All data with respect to York County is taken from 92 PENNSYLVANIA MANUAL *passim* (1957).

and has been a well populated and relatively flourishing community since revolutionary times. There is no reason to believe that the charitable giving in York County differs markedly from that of other counties and states.

The York survey discloses that the 286 trusts have a present value in excess of \$6,372,353.00. The trusts, grouped according to the class of beneficiaries are divided as follows:

| <i>Subject</i> | <i>Number</i> | <i>Original Amount of Trust</i> |
|-----------------------------|---------------|---------------------------------|
| Religious institutions | 136 | \$1,086,012 |
| Cemetery | 44 | 108,804 |
| Orphanages | 30 | 709,799 |
| Hospitals and nurses | 19 | 214,784 |
| The poor | 18 | 490,620 |
| Education and scholarships | 12 | 879,527 |
| The aged | 9 | 349,305 |
| Libraries | 3 | 80,000 |
| Miscellaneous ³⁹ | 15 | 222,314 |
| | 286 | \$4,141,165 |

Although certain conclusions can be drawn from this survey, it is important to point out its limited nature. It covers only banks and trust companies in York County. Obviously many trusts for charitable purposes in the county are held by trustees resident in other counties, such as those in Philadelphia, Pittsburgh and New York. And at the outset it should be noted that charitable gifts may take many forms. The report submitted by York County deals with but a few of those types. The outright gift for charitable purposes, whether inter vivos or testamentary, is not involved in this paper.

There is only one report of a foundation included.⁴⁰ It is known that there are a number of family foundations in the county but since no bank or trust company acts as trustee, they are not included in this survey. With the exception of the giants such as Ford, Guggenheim,

39. This item includes trusts for boy scouts, the Salvation Army and those established for indefinite purposes.

40. In 1955, 4,162 American foundations were listed. RICH, *AMERICAN FOUNDATIONS AND THEIR FIELDS* (American Foundations Information Service Pub. No. 8, 1955). 205 of these are located in Pennsylvania. It should be noted that Congress has already conducted an investigation of the large foundations. The thrust of this investigation was not an inquiry into the most profitable stewardship of the funds but rather an examination of the tax exempt status and the types of research and philosophy benefited by the foundations. See *Hearings Before the House Committee on Ways and Means on Revenue Revision of 1950*, 81st Cong., 2d Sess. 580 (1950); *Hearings Before the Select House Committee To Investigate Tax Exempt Foundations and Comparable Organizations*, 82d Cong., 2d Sess. (1953).

Duke, Mellon, Fels, Rockefeller, Kellogg and the like, the foundation is a device being used by smaller donors to syphon off current income rather than to set aside in perpetuity vast capital sums.⁴¹ The increasing use of the family foundation will in time present a more serious problem. During the lifetime of the donor it is reasonable to assume that he will supervise the expenditure of funds and that his vital interest will exert a salutary influence upon the management of the foundation. After his death, the only party with jurisdiction to supervise the administration of the charity and to represent the public interest is the attorney general of the state of incorporation or of the seating of the trust.⁴²

No municipalities or other public bodies are included in this report. Information regarding the exact extent of the trust funds administered by public bodies is not available. The Board of Directors of City Trusts of the City of Philadelphia⁴³ which now administers ninety charitable trusts, some of which date back to the time of Benjamin Franklin, renders an annual report. Other municipalities without such a statutory board receive many pieces of real property, as well as money and personalty, in trust for charitable purposes.⁴⁴ The enforcement or modification of these gifts frequently presents serious questions in which the interest of the public as beneficiary may not be represented by the municipality acting as trustee. Thus, the administrative authorities of a municipality may wish to relieve certain properties held subject to a charitable trust from such restrictions and, for example, to alien public parks or buildings or lease or use such property for proprietary purposes.⁴⁵ The public interest can be represented only by the attorney general.

41. See Eaton, *Charitable Foundations, Tax Avoidance and Business Expediency*, 35 VA. L. REV. 809, 810 (1949), pointing out that many family foundations are established with less than \$500. The tax avoidance that such a device permits is clearly outlined.

42. The possible reversionary interest of the heirs is frequently too remote to make their participation effective. Moreover, the rights of the heirs would come into being only upon a failure or perversion of the purposes of the charity. The Supreme Court of Pennsylvania has held that the heirs of the donor have no interest in a trust established for charitable purposes. *McCully's Estate*, 269 Pa. 122, 112 Atl. 159 (1920).

43. See 53 PA. STAT. ANN. tit. 53, §§ 6481-86 (Purdon 1957).

44. Municipalities may hold property in trust if it is for a purpose within the scope of their powers and germane to their functions. 1 MCQUILLEN, MUNICIPAL CORPORATIONS § 1.108 (3d ed. 1949). Under early Roman law, governmental bodies were prohibited from holding property in trust, but this disability was removed with respect to legacies *ad ornamentem civitatis*. HADLEY, INTRODUCTION TO ROMAN LAW 306-07 (1876).

45. The city of Pittsburgh is seeking to sell property dedicated as a public park. See *In re Estate of Elizabeth Denny*, No. 1241, Allegheny County Orphans' Ct., 1957. The Attorney General is a party to this action and required the substitution of a parcel of land of equal size, value and accessibility to the residents of the neighborhood to be dedicated as a public park before agreeing not to oppose the petition. See the following cases in which municipalities attempted to renounce charitable gifts or use them for other purposes. *Mayor and City Council v. Peabody*

The trust held exclusively by private individuals as trustees is not included in this survey. It is impossible at the present time to estimate the number of these trusts or their value, but it seems to be clear that is is large.

This survey reveals certain shocking facts. Of the 286 trusts reporting, only eight had ever filed an accounting.⁴⁶ If charity is the legitimate concern of the public, then this fact alone reveals the need for some type of mandatory disclosure legislation. When one considers that this survey is limited to those trusts held by banks and trust companies which by law are required to keep current and accurate records, it is immediately apparent that accounting on the part of the private individual trustee who is not otherwise subject to such a duty is probably almost non-existent.

Proposed Exemptions From Registration

The largest category of trusts both by number and value is that of trusts for religious purposes. The beneficiaries of these trusts are specific churches or certain activities of such churches. All are of the Protestant denominations. One must conclude that the vast holdings of the Catholic church are administered by the church itself as trustee and that no bank or trust company serves as trust officer.⁴⁷ Similarly, one must question in what form the charitable funds raised by Jewish philanthropic organizations are administered and what, if any, accounting is made of these funds.

The Uniform Act excludes from reporting requirements trusts held by religious and educational institutions for their own corporate purposes. The exemption of all religious trusts has been recommended.⁴⁸ Such exemptions should be compared with the model act with respect to charitable solicitations,⁴⁹ which not only requires reporting but also a certificate before a solicitation may be made for religious purposes. If further authorizes an investigation by the state of the books

Institute, 175 Md. 186, 200 Atl. 375 (1938); City Bank Farmer's Trust Co. v. Carpenter, 319 Mass. 78, 64 N.E.2d 636 (1946); Cary Library v. Bliss, 151 Mass. 364, 25 N.E. 92 (1890); Ormsby Land Co. v. Pittsburgh, 276 Pa. 68, 119 Atl. 730 (1923); Commonwealth v. Alburger, 1 Whart. 469 (Pa. 1836); Estate of Mead, 227 Wis. 311, 277 N.W. 694 (1938).

46. Some of these trusts were established in the early nineteenth century.

47. It is interesting to note that the overwhelming majority of trustees of secular charities are Protestants. See ANDREWS, PHILANTHROPIC FOUNDATIONS 75 (1956). It is not the purpose of this paper to draw any conclusions from these sectarian phenomena.

48. ILLINOIS CHARITABLE TRUST LAWS COMMISSION, REPORT (1956).

49. See RHYNE, CHARITABLE, RELIGIOUS, PATRIOTIC AND PHILANTHROPIC SOLICITATIONS—CITY ORDINANCES AND COURT DECISIONS—MODEL ORDINANCE ANNOTATED (1942).

and records of the charity. A number of cities now have such ordinances.⁵⁰ Such statutes and ordinances raise serious questions of separation of church and state and the right of the individual to practice his religion, which may enjoin upon him the duty of soliciting for charitable purposes. The protection of the public from spurious pleas for charity is, of course, a proper exercise of the police power.⁵¹

No such first amendment problems are involved in a mere reporting of charitable trusts. The receipt of funds for which a tax exemption is claimed requires a reporting to the taxing authorities. Further reporting of such sums to the appropriate state or local authority would not impinge upon religious freedom.

In numerous cases, religious corporations holding funds in trust for their corporate purposes have subjected themselves to the jurisdiction of the courts for leave to modify or deviate from the terms of the trust.⁵² Neither the charities nor the courts raised any question of religious freedom but simply treated the questions as problems of trust law.

Ernest D'Amours, Director of Charitable Trusts of New Hampshire, who has had the most extensive American experience with charitable trusts, objects to the exemption for religious and educational institutions. In a letter to Professor Bogert he explained, "With respect to exemptions for charitable corporations holding funds for religious and educational purposes, I think they are bad theoretically but consider them expedient for the successful passage of this legislation since the politicians are fearful of these two lobbies. However, neither reason nor common sense can justify making one class of public funds accountable and another kind exempt."⁵³ In addition to the theoretical objections, there is a very practical one. Directors of religious, hospital and educational corporations which hold trust funds for such purposes are frequently tempted to dip into the funds to meet current corporate or church expenses. Although not taken for personal gain, such

50. In 1942, sixty-seven of the leading American cities had comprehensive charitable solicitations acts. *Id.* at 6.

51. *Cf.* *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

52. See, e.g., *Petition of Franklin Street Church*, 249 Pa. 275, 95 Atl. 89 (1915).

53. Letter dated May 7, 1954. Judge Bolger writes: "[I]t would appear that the jurisdiction of Orphans' Court over gifts to charitable organizations [religious or otherwise] in trust for the general purposes of the organization are stated to be held in trust. President Judge Klein and I are of the opinion that although this type of benefaction appears to exempt from the operation of the proposed Act of Assembly [the Uniform Law] nevertheless some further study should be given to including it since this type of gift is, we believe, the most prevalent one, subject to the same abuses as are other charitable benefactions. This is particularly true respecting the operation of the *cy pres* doctrine." Letter from Judge Bolger to the Author, Sept. 19, 1956.

action is a clear violation of duty. The trustees, however, are not likely to surcharge themselves. Funds are frequently depleted in this way.⁵⁴

Property held by a charitable corporation for its own purposes and designated for a specific use is generally deemed to be a trust.⁵⁵ Court approval is required in order to divert such funds to other corporate purposes. To exempt from reporting requirements trusts which are already subject to the supervision and control of the attorney general would be anomalous and regressive.

Under the present law of Pennsylvania all trustees of charitable trusts (including those which are exempt under the Model Act) are required to notify the attorney general whenever application is made for *cy pres* or to deviate from the terms of the trust.⁵⁶ No question of church-state relationship has been raised by these statutes.

Notification to the attorney general whenever application to the courts is made is essential if the public interest is to be represented. If an annual or triennial accounting is made to the attorney general, he can merely examine the stewardship of the trust to determine whether or not he will initiate any action. But the public interest may be seriously jeopardized when property is bought or sold or put to uses other than those specified in the trust instrument. It will be of little use to the public for the attorney general to learn of these facts after the event in a regular periodic accounting. The importance of the trustees notifying the attorney general was aptly pointed out by the Supreme Court of New Hampshire in *Souhegan Nat'l Bank v. Kenison*.⁵⁷ The court there stated:

"A somewhat obscure situation exists in the relation of the State's Attorney-General to charitable trusts. The duty of his office to enforce them admits of no question. The beneficiaries of such trusts are the public or a part of the public, and an individual as a member of the public has rights only as a relator to the Attorney-General. But the office is unorganized and unequipped to enforce such trusts in a comprehensive scheme under supervisory arrangement. The result is that the office acts only in sporadic instances when complaint is made or instructions sought. . . . But to announce a rule prescribing such a duty [of

54. This practice on the part of the officials of the city of Philadelphia led to the creation by the legislature of the Board of Directors of City Trusts.

55. *Canter v. Mayor and City Council*, 197 Md. 70, 78 A.2d 212 (1951); *St. Joseph's Hospital v. Bennett*, 281 N.Y. 115, 22 N.E.2d 305 (1939), 40 COLUM. L. REV. 550 (1940); *Craig Estate*, 356 Pa. 564, 52 A.2d 650 (1947).

56. Notification to the attorney general is now required in actions relating to charitable trusts where termination, deviation or *cy pres* is sought. See, e.g., OHIO REV. CODE ANN. §§ 109.23, 109.25 (Page 1953), *Spang v. Cleveland Trust Co.*, 134 N.E.2d 586 (Ohio 1956); PA. STAT. ANN. tit. 20, § 301.10 (Purdon 1950). See also S.C. CODE § 1-240 (1952).

57. 92 N.H. 117, 26 A.2d 26 (1942).

supervision] would be impractical in view of the undue burden it would impose. The most that can be said is that the Attorney-General's office should exercise supervisory authority as incidental to enforcement when it is thought that there is proper occasion to do so, *thus placing on the trustee some corresponding duty to inform and account*, so that either party may apply to the Superior Court in the event of conflicting claims whether or not the trustee has acted or proposes to act within the legitimate sphere of his authority."⁵⁸

Cemetery trusts are generally excluded from consideration as being of minimal importance.⁵⁹ The York survey reveals, however, that the aggregate of the forty-four cemetery trusts increased in value from \$108,804 originally placed in these trusts to \$281,007.00. For example, \$500 placed in trust in 1931 had increased to \$15,459 in 1956, and \$42.60 which was placed in trust in 1919 had grown to \$16,930.71 in 1956. Any comprehensive plan for the optimum use of charitable trust funds cannot ignore this category of trusts.

The Dormant Trust

It is frequently said that mere reporting, where no fraud or dishonesty is uncovered, is an unnecessary and expensive intrusion upon the rights of private property. The survey and the information volunteered to the Attorney General by members of the public indicates that outright fraud is probably not prevalent.

However, the use of a charitable trust or foundation to provide a tax free life estate or gift to persons acting in the guise of trustees is a perversion of charitable funds. This practice is not disclosed by the survey of York County. A careful reading of each instrument itself would be required to determine whether or not the funds were being used for this purpose. But, the device has been used in several sizable trusts, one of which was revealed as a result of the activities of the Attorney General of Pennsylvania.⁶⁰

The survey does disclose substantial numbers of dormant trusts which are not being activated by the trustees, because of inertia or ignorance on the part of the trustees or because the settlor's plan is unworkable. Whatever the reason, if the funds are not being devoted

58. *Id.* at 122, 26 A.2d at 30. (Emphasis added.)

59. The Pennsylvania Attorney General's Committee recommended the exclusion of cemetery trusts from reporting requirements. Rhode Island exempts cemetery trusts by regulation. Letter from John R. Consention, Assistant Administrator of Charitable Trusts, to the Author, Oct. 9, 1956.

60. The Duke Estate pays substantial fees to the trustees. TAYLOR, PUBLIC ACCOUNTABILITY OF FOUNDATIONS AND CHARITABLE TRUSTS 19 (1953). A similar situation was disclosed in the proceedings by the Attorney General of Pennsylvania in Estate of Samuel Riddle, No. 161, Delaware County Orphans' Ct., 1951.

to charitable purposes, the public is being deprived of its rights under the trust instrument.

While possibly fraud could not be charged against a number of trustees who have failed to establish the charities described in the trust instrument, it has been to their distinct financial advantage to leave the trust dormant. In one case the trustees, who were acting without compensation, had invested substantial assets of the trust estate in their business enterprises.⁶¹ This was not prohibited by the trust instrument. The assets had appreciated substantially. However, the public was not getting the benefit of the funds. In another case, the trustees (one of whom drafted the donor's will) received twenty-five per cent of the income of the estate in addition to all other fees so long as the assets remained in the hands of the trustees.⁶² Obviously there was no incentive for the trustees to establish the charitable corporation provided for in the will and turn the trust funds over to it. Without the action taken by the attorney general, it is highly unlikely that the public would ever receive the benefits of these trusts.

In other cases, the dormancy of the trust is attributable merely to inertia. For example, \$271,586 was left in two testamentary trusts in 1913 to establish a home for the aging. By 1956 these trusts aggregated \$560,657, and no home had been established. Once the attorney general's program became known, the trustees voluntarily filed a petition for leave to deviate from the terms of the trust and to establish the home.⁶³

A private trustee, subject to the same inertia, ignorance or self-interest, is more likely to fail to establish the charity, since there is no informed party in interest to prod him. Upon the death of the trustee, such trust funds may simply become "lost."⁶⁴

The other large group of dormant trusts revealed by the York survey comprises those which are patently impracticable or impossible. For example, a gift of \$80,000 to establish a hospital.⁶⁵ Unfortunately, with the rising cost of living even substantial sums left by settlors are clearly insufficient to carry out their plans. Rather than permit the funds to accumulate without benefiting the public, the attorney general

61. *In re* Estate of John H. Neal, Franklin County Orphans' Ct., 1956.

62. *In re* Estate of Samuel Riddle, No. 161, Delaware County Orphans' Ct., 1951.

63. *In re* Estate of Anna Gardner, York County Orphans' Ct., 1956.

64. For example, the Estate of G. Edward Dickerson of Philadelphia who died in 1940. To date no accounting has been filed. The entire residuary estate was left for scholarships for graduates of Philadelphia high schools. The trustee, a private individual, is now cooperating with the Attorney General in order to devote the funds to the purposes specified by the settlor.

65. This trust was revealed in the York survey. Action is pending to *cy pres* the funds to an existing hospital serving the same area.

can bring citations or request the trustees to make application to *cy pres* the funds.

The experience of Pennsylvania even in less than a year indicates that the attorney general has ample powers to enforce these dormant trusts once they are brought to his attention. By filing a citation or rule to show cause, he can invoke all the powers of the equity court. In most jurisdictions he may utilize discovery procedures.⁶⁶ It is unnecessary for the attorney general to hold his own hearings. Few, if any, of the attorneys general have sufficient staff or budget to engage in such administrative hearings. Moreover they would be duplicative since any action by the trustee must ultimately be taken pursuant to court order. Massachusetts has found since the reporting act a substantial increase in the number of *cy pres* applications. This is an encouraging indication that disclosure legislation results in these funds being put to public use.⁶⁷ It is to be hoped that prospective donors to charity would examine the trusts extant in their jurisdictions in an endeavor to avoid duplication of facilities. Public and quasi-public bodies would also benefit from such knowledge in planning the location of future institutions.⁶⁸

LEGISLATIVE RECOMMENDATIONS

Despite the limited scope and nature of the foregoing data, certain conclusions seem ineluctably to follow:

1. Legislation requiring registration of *all* charitable trusts is a minimum necessity. There should be no exemptions for cemetery

66. *E.g.*, PA. R. Civ. P. §§ 4001-25.

67. Letter from Hugh Morton, Director, Division of Public Charities, to the Author, Oct. 25, 1956.

68. Whether the present law with its limited *cy pres* power, even when fully enforced, affords the maximum benefits to the public will be discussed in another article. Problems of the needs of the community and the relationship between private giving and public services will be explored as well as comparative costs of administration. The York survey does not cover the costs of administering trusts. However, accounts have been obtained in a number of trusts. The cost per annum, for example, of administering an estate which distributes \$54,400 in charitable giving is \$4,478.30. Andrews has estimated that the minimum economically feasible charitable foundation has an *income* of at least \$100,000 per annum. ANDREWS, PHILANTHROPIC FOUNDATIONS 144 (1956). The author examines the operating costs of seventy-seven foundations and finds that as size decreases the percentage of income spent on administration increases sharply. Only twelve of the 177 trusts in the York survey had original *capital* assets in excess of \$100,000. Even where private trustees serve without fee, the cost of disbursing such small sums appears to be disproportionate.

The wisdom of permitting the dead hand of the settlor to cling tenaciously to his property will also be considered in the subsequent article. That this is a pervasive question is clear from the York survey. The overwhelming majority of the trusts reported were perpetual. A few permitted the trustees to terminate at will. Only a negligible fraction of the reported trusts were limited in time by the trust instrument.

trusts or those held by governmental bodies or for religious and educational institutions holding funds in trust for their corporate purposes.

2. The register should be kept locally, preferably in the county court house. The role of the local press in uncovering dormant charitable trusts and arousing public interest cannot be under-estimated. It is, therefore, suggested that any legislation requiring the keeping of a register of charities should be decentralized. The effectiveness of the register will depend upon its being readily accessible to the public and the press in the local area which is the beneficiary of the trust.⁶⁹ The York survey discloses that all of the trusts reporting were for local purposes. Most of them are not even county-wide but are devoted to residents of a municipality or township. Of course, a public register wherever located would be available to the attorney general.

3. Notification to the attorney general should be required in all litigation. This can be accomplished by statute or by rule of court. Where the attention of the judges has been turned to this problem, the court *sua sponte* has required the charity to serve notice on the attorney general.⁷⁰

4. Registration should be required at the death of the settlor rather than at the time the funds come into the hands of the trustee or at the time the instrument requires the establishment of the charity. From the York survey it is apparent that most instruments give the trustee great latitude as to his duties in establishing the charity. Unless there is a public record of the charity at the death of the settlor, there can be no certainty that the charity will ever be established.

5. The bar should undertake a basic reevaluation of the entire concept of charity—the right to perpetuity,⁷¹ tax exemption, and the

69. The Uniform Act provides for a central register. Those states which have reporting legislation also have a central register. It has been concluded that both central and local records are essential. NATHAN REPORT 43. In order to ease the administrative burden, it is recommended that records be kept locally and administration by the attorney general's office be decentralized in a fashion similar to that used in the collection of inheritance taxes.

70. The Orphans' Court of Philadelphia has suggested that the attorney general be notified in a number of cases. See, *e.g.*, Girard Estate, 4 Pa. D. & C.2d 671 (Philadelphia County Orphans' Ct. 1956).

71. Julius Rosenwald possibly pointed the way to a sounder disposition of charitable funds. He stated: "I am not in sympathy with this policy of perpetuating endowments and believe that more good can be accomplished by expending funds as trustees find opportunities for constructive work than by storing up large sums of money for long periods of time. By adopting a policy of using the fund within this generation, we may avoid those tendencies toward bureaucracy and a formal or perfunctory attitude toward the work which almost inevitably develop in organizations which prolong their existence indefinitely. Coming generations can be relied upon to provide for their own needs as they arise.

"In accepting the shares of stock now offered, I ask that the Trustees do so with the understanding that the entire fund in the hands of the Board, both income and principal be expended within twenty-five years of the time of my death." EMBREE & WAXMAN, INVESTMENT IN PEOPLE 31 (1949).

unfettered discretion of the settlor to indulge his caprice or prejudice.⁷² When one considers that the very limited group of charities included in the York survey had an aggregate value of approximately three per cent of the assessed value of the combined realty and personalty in the county, the role of charity in the economic life of today demands the thoughtful attention of the bar and the legislature.⁷³

72. The York survey disclosed a trust of several hundred thousand dollars for the benefit of the poor which provides that no more than \$25 may be given to any one family during a year. With unemployment compensation, public assistance, old age security and pension plans, such a provision is patently absurd.

73. Note that in 1920 Professor Austin Wakeman Scott pointed out that unless change in trusts and charters of charitable corporations be permitted "the evils would become more pronounced as generation succeeded generation, until finally the courts would be driven to say that the Constitution does not preclude relief. Sooner or later this view must prevail, unless progress is to be stayed by a view which surrenders the welfare of the living to the fancied wishes of the dead." Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1 (1920).