

Charitable Trusts Act

BY ROBERT J. LYNN* AND JOHN E. SULLIVAN**

A concomitant of the public favor accorded charitable trusts is the public accountability exacted from the trustees of such wealth devolution devices. That an accurate reporting of administration should on occasion be forthcoming is usually conceded,¹ but the methods by which accountability is sought, and the channels through which accountability flows, vary.

Infrequently the trust instrument itself requires periodic reporting by the trustee. Charters and declarations of trust of the so-called "community trusts" often prescribe an annual audit conducted by a certified public accountant, with publication of the auditor's summary of findings in one or two local newspapers and transmission of copies of the auditor's report to the attorney general of the state in which the trust functions.² The declaration of trust of the Cleveland Foundation further provides that either the attorney general of Ohio or the law officer of the city of Cleveland may inspect the books of the several trustee institutions and of the distribution committee. Under the charter, either official may also institute proceedings in the proper court to restrain, correct, or recover for any maladministration of the trust estate.³ Salutory though such provisions are, they are the exception rather than the rule.

Even though the instrument of trust is silent on the subject, reporting of a sort may be secured through exercise of the visitorial power by the founder of the trust or his heirs. The right of visitation is said to have its origins in the latitude which everyone has, within rather ill-defined limits, to direct the devolution of the wealth he possesses, be it inherited or accumulated through his own efforts.⁴ The power of visitation encompasses going to the charitable institution, examining accounts, and enforcing the conditions under

* Assistant Professor of Law, College of Law, The Ohio State University, Columbus.

** Research Assistant, College of Law, The Ohio State University, Columbus.

¹ 3 SCOTT ON TRUSTS § 391 (1939); 2A BOGERT ON TRUSTS AND TRUSTEES § 411 (1953).

² LOOMIS, COMMUNITY TRUSTS OF AMERICA 1914-1950 34 (1950).

³ CHAMBERS, CHARTERS OF PHILANTHROPIES 42 (1948); THE CLEVELAND FOUNDATION—A COMMUNITY TRUST 16 (undated).

⁴ Green v. Rutherford, 1 Ves. Sr. 462, 471 (Ch. 1750); TUDOR ON CHARITIES AND MORTMAIN 66 (4th ed. 1906).

which the charitable gift was made.⁵ Although this particular form of property right was well established in England,⁶ the status of the doctrine of visitation is doubtful in the United States,⁷ and its limitations are obvious: the donor may be long since dead and his heirs scattered. Even if his successors are well known, they may be indifferent or openly hostile to a long established institution serving purposes to which the living are unsympathetic.

The common form of statutory regulation of charitable trusts requires that the trustee file periodic reports with the probate or equity court. Section 2109.30, Ohio Revised Code, states in part:

"Every . . . fiduciary shall render an account of the administration of his . . . trust at least once in each two years. An account shall be rendered . . . at any [other] time . . . upon the order of the court . . . or upon the motion of any person interested in the . . . trust for good cause shown."

Occasionally statutes of this type deal exclusively with charitable trusts. A statute said to be typical of this class requires that every trustee of an inter vivos or testamentary trust render an annual accounting.⁸ In some instances the trustee may account at any time or the beneficiaries of the trust may petition for an accounting.⁹ Ohio has a little-used statute authorizing the prosecuting attorney to examine the accounts of charitable corporations established under the terms of a trust and located in his county.¹⁰ Such corporations are required to file an annual report with the probate court of the county where located.¹¹

Sections 2109.30 and 1719.05, Ohio Revised Code, are inherently weak. If the trustee fails to submit an initial report, the responsible public official may never know of the existence of the charitable trust; and even if the initial report is forthcoming, failure to file subsequent reports may pass unnoticed. And in any event, the continuing examination of reports tendered by charitable trusts and charitable corporations is a function which the offices of the court and the prosecutor are not equipped to perform.

The duty of enforcing charitable trusts in Ohio is placed on the attorney general, as it was at common law.¹² Section 109.11,

⁵ *Green v. Rutherford*, 1 Ves. Sr. 462 (Ch. 1750); *Attorney General v. Dulwich College*, 4 Beav. 255 (Ch. 1841); *TUDOR*, *op. cit. supra* note 4 at 63; *BOGERT*, *op. cit. supra* note 1, § 416.

⁶ *TUDOR*, *op. cit. supra* note 4, at 68.

⁷ *BOGERT*, *op. cit. supra* note 1, § 416.

⁸ *IND. STAT. ANN.* (Burns 1933) §§ 7-714, 7-715.

⁹ See *Notes*, 23 *IND. L. J.* 141 at 144 (1948) and 47 *COL. L. REV.* 659 at 663 (1947) for citation of illustrative accounting statutes.

¹⁰ *OHIO REV. CODE* § 1719.05 (1953).

¹¹ *Ibid.*

¹² *SCOTT*, *op. cit. supra* note 1.

Ohio Revised Code, provided in part:

"The attorney general shall institute a proper action to enforce the performance of a trust for charitable and educational purposes, and to restrain the abuse thereof . . ." ¹³

The legislative statement is mandatory, but inasmuch as trustees of charitable trusts in Ohio have not been required to file reports with the attorney general, it is extremely likely that breaches of trust have occurred without knowledge of the wrong ever reaching the office of the official specifically charged with protecting the interests of the public. It has been estimated that the number of instances in which charitable trust proceedings are brought to the attention of the attorney general does not exceed one-half of one per cent of the total number of such trusts in the state, and that in the past ten years the attorney general has performed his function in the charitable trust field not more than a dozen times! ¹⁴

The lack of activity by the office of the attorney general has been attributed to the fact that under the existing Ohio statutes information essential to the initiation of proceedings protecting the public interest in charitable trusts has not been forthcoming. ¹⁵ Instances in which intervention by the attorney general is desirable have been reviewed elsewhere. ¹⁶ Suffice it to say here that paucity of relevant information and dearth of trained personnel have moved attorneys general to recommend the adoption of legislation which would provide the necessary data and staff to enable them to maintain at least a minimum vigilance over philanthropic trust property. ¹⁷ Under recently enacted statutes, Ohio becomes one of the few states seeking modern solutions to an old, old problem. ¹⁸

The new charitable trusts act requires the preparation of a

¹³ Section 109.11, Ohio Revised Code, is repealed by Section 2 of the new Act.

¹⁴ Address by C. William O'Neill, Attorney General of Ohio, to Montgomery County Bar Association (March 3, 1953).

¹⁵ *Ibid.*

¹⁶ Matters pertaining to charitable trusts requiring the attention of the Department of the Attorney General of Massachusetts were classified in 1945 as follows: (1) Petitions for allowance of will; (2) Petitions for instructions; (3) Petitions for sale of real estate; (4) Petitions for amalgamation; (5) Petitions for allowance of accounts; (6) Petitions for approval of settlements; (7) Petitions for application of doctrine of *cy prés*; (8) Petitions for appointment and removal of trustees; (9) Miscellaneous petitions. Bushnell, *Report and Recommendations for Legislation*, 30 MASS. L. Q. 22, 27 (1945).

¹⁷ Notes 14 and 16 *supra*.

¹⁸ N. H. REV. LAWS 1942, c. 24, §§ 13-a to 13-n (as inserted by LAWS 1943, c. 181 and amended by LAWS 1945, c. 92 and LAWS 1947, c. 94); N. H. LAWS 1949, c. 39; MASS. GEN. LAWS (Ter. ed. 1932) c. 68, § 15, c. 180, §§ 12, 12A (as amended by LAWS 1946, cc. 23, 24, 25); MASS. GEN. LAWS (Ter. ed. 1932) c. 217, § 19 (as amended by LAWS 1948, c. 354); R. I. LAWS 1950, c. 2617 (as amended by LAWS 1951, c. 2852).

register of charitable trusts and the registration of all such trusts with the attorney general.¹⁹ The register is to be open to inspection "at such reasonable times and for such legitimate purposes as the attorney general may determine . . ."²⁰ Probate of wills containing clauses creating charitable trusts is to be brought to the attention of the attorney general,²¹ and each probate and common pleas judge is required to furnish to him "copies of papers and such information as to the records and files of his office relating to charitable trusts as the attorney general may require."²² Trustees must submit biennial reports to the attorney general unless required by law or court order to file a report with a court, in which case the attorney general must accept a certified copy of such report in lieu of the biennial report.²³

Although wilful failure to register a charitable trust carries a criminal penalty under the act,²⁴ no provision is made for investigation of charitable trusts by the attorney general. Under legislation adopted in other jurisdictions, trustees may be compelled to appear at hearings and give testimony under a grant of immunity.²⁵ A comparable provision in the new act as originally drawn was stricken from the substituted bill.²⁶ The General Assembly of Ohio has not granted to our attorney general an effective enforcement technique available to some of his brethren elsewhere.

Although both inter vivos and testamentary trusts are within the purview of the new legislation, excluded are trusts "until such time as the charitable, religious or educational purpose . . . becomes vested . . ."; charitable, religious, and educational institutions holding funds in trust exclusively for their own purposes; and agencies of the state and local governments.²⁷ A tremendous amount of charitable wealth, therefore, lies beyond the scope of the act.

Perhaps the best feature of the new law is the requirement that the attorney general be made a party to proceedings affecting charitable trusts and that he intervene "in any proceeding affecting a charitable trust when requested to do so by the court having jurisdiction of the proceeding."²⁸ A permissive provision allows intervention "when [the attorney general] determines that the public interest should be protected."²⁹ If the spirit as well as the letter

¹⁹ OHIO REV. CODE § 109.26 (1953).

²⁰ OHIO REV. CODE § 109.28 (1953).

²¹ OHIO REV. CODE § 109.30 (1953).

²² OHIO REV. CODE § 109.29 (1953).

²³ OHIO REV. CODE § 109.31 (1953).

²⁴ OHIO REV. CODE § 109.99 (1953).

²⁵ Note 18, *supra*.

²⁶ See the original Senate Bill No. 196 § 109.33.

²⁷ OHIO GEN. CODE § 109.23 (1953).

²⁸ OHIO REV. CODE § 109.25 (1953).

²⁹ *Ibid.*

of this section of the act is followed, representation of the public at proceedings touching upon the conservation and disposition of quasi-public property will obtain much more frequently than has been the case heretofore.

The Charitable Trusts Act does not offer a complete solution to the troublesome problem of securing the common stake in wealth devoted to philanthropic purposes. A truly satisfactory system for reconciling private bent and public good is yet to be devised. But the new legislation is a beginning. Implemented by conscientious enforcement, it can do much good.