

SUPERVISION OF CHARITABLE TRUSTS IN OHIO

THE OHIO CHARITABLE TRUSTS ACT

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I. THE PURPOSE OF THE ACT

It is, perhaps, essential that the purpose of any legislative enactment must be that which is evident in the legislation itself; to go beyond the exact statutory provision is to open the door to a conclusion which may be influenced by the subjective thinking of the writers. The need for charitable trust legislation and the purpose to be accomplished by it would of necessity receive varying interpretations from those associated in different capacities with the duties of enforcing, restraining the abuse of, and administering charitable trusts. Nevertheless, it seems impossible to attempt any evaluation of the Charitable Trusts Act¹ without first taking a backward glance toward the situation which in fact existed prior to October 14, 1953, when the Act became effective. The Attorney General was then, as now, the public officer charged with the duty of protecting and enforcing charitable trusts. This duty was an inherent one under the common law, but more than that, the General Assembly of Ohio had as early as 1852² specifically enjoined upon the Attorney General the duty of enforcing the performance of trusts for charitable and educational purposes. This continued to be a statutory duty of the chief legal officer of the state; Ohio General Code §340 [Ohio Rev. Code §109.11 (1953)], contained this mandatory language:

The attorney-general shall cause a proper action to be instituted to enforce the performance of a trust for charitable and educational purposes, and to restrain the abuse thereof, if he deems such action advisable, * * *.

The fundamental problem was not a lack of the necessary authority to take affirmative action to enforce charitable trusts and to restrain their abuse; it was rather the lack of sufficient information to make it possible to take any active leadership in enforcing and protecting these trusts. As was said by the then Attorney General, C. William O'Neill,³ in referring to the lack of activity of his office in the charitable trust field:

This failure to protect is clearly not the result of choice on the part of our office, nor the result of negligence. It is a

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¹ Ohio Rev. Code §§109.23-33 (1953).

² 50 Ohio Laws 267.

³ Address before the Montgomery County Bar Association, March 3, 1953.

simple case of clearly defining the duty, the objective—but neglecting totally the means of accomplishment. It is like ordering the Governor to fly to the moon.

Ohio was certainly not unique in this dilemma. Professor Scott has this to say:⁴

In the United States we have lagged far behind England in the matter of the supervision of the administration of charitable trusts. As in England in the middle of the nineteenth century, the enforcement of charitable trusts is left to the more or less sporadic action of the Attorney General. In most of the states there is no officer who is charged with the duty of exercising any general supervision over the administration of charitable trusts, and no one knows how much property is held upon such trusts or to what extent they are being properly administered. In a few states there are statutes which provide that trustees for charitable purposes must account annually to the court. More recently statutes have been enacted in several states, led by New Hampshire, reorganizing the office of the Attorney General so as to enable him to deal more effectively with the supervision and enforcement of charitable trusts.⁵

Professor Bogert also refers to the growing recognition that the Attorneys General of the several states are handicapped in their duties by the dearth of information regarding charitable trusts and mentions the rather few jurisdictions which have taken effective steps toward correcting this situation by legislation.⁶ The problem of supervision of charitable trusts received attention from The National Conference of Commissioners on Uniform State Laws, which, at its meeting in 1954, approved and recommended an act for the uniform supervision of charitable trusts.⁷

Thus, the enactment of the Charitable Trusts Act placed Ohio among the relatively few states which have recognized the need for supervision of charitable trusts and have taken effective action toward making such supervision an actuality. Ohio, by this legislation, joined with those states pioneering in the field of establishing a constructive and workable plan designed for the greater protection of the vast amount of wealth devoted to public charitable purposes by means of the charitable

⁴ Scott, *Trusts* §391, p. 2755 (2nd Ed.)

⁵ Professor Scott refers in a footnote to the laws in force in New Hampshire, Rhode Island, Massachusetts, Ohio, New York, Idaho, South Carolina and California, relating to charitable trusts or charitable corporations and to the Uniform Supervision of Trustees for Charitable Purposes Act, adopted by the National Conference of Commissioners on Uniform State Laws, 1954.

⁶ 2A BOGERT, *TRUSTS AND TRUSTEES*, §441, p. 266.

⁷ Uniform Supervision of Trustees for Charitable Purposes Act, Handbook of the National Conference of Commissioners on Uniform State Laws, 1954, pages 100, 169.

trust. Let us turn now to the Act itself to consider from an objective point of view its exact purposes.

A. Charitable Funds to which the Act Applies

The definition section of the Act,⁸ which describes in some detail the scope of the Act, reads as follows:

As used in sections 109.23 to 109.33, inclusive of the of the Revised Code, 'charitable trust' means any fiduciary relationship with respect to property arising as a result of a manifestation of intention to create it, and subjecting the partnership, corporation, person, or association of persons by whom the property is held to equitable duties to deal with the property for any charitable, religious or educational purpose. There are excluded from this definition and from the operation of such sections, trusts until such time as the charitable, religious or educational purpose expressed in such trust becomes vested in use or enjoyment. Such sections do not apply to charitable, religious and educational institutions holding funds in trust or otherwise exclusively for their own purposes nor to institutions created and operated as agencies of the state government or any political subdivision thereof.

It can thus readily be seen that the Act is not all-inclusive; vast amounts of property which are, in fact, devoted to charitable uses by means of gifts to charitable corporations exclusively for a corporate purpose are excluded from the requirements of the Act, as are those trusts which are ultimately to be used for charitable purposes, but which, by the terms of the trust instrument, have no part of the trust income or property presently being devoted to any charitable use.

B. Discovery of Charitable Trusts and Current Information Reflecting Administration

It has been pointed out earlier in this discussion that prior to the enactment of the Charitable Trusts Act the Attorney General was severely handicapped in carrying out his duties relating to charitable trusts by his complete lack of knowledge of their existence. It is inconceivable that any efficient or sustained program could be developed to enforce charitable trusts and thereby protect the public for whom their benefits were intended without there being some plan for making information available to the person charged with the enforcement duty. It is apparent that the General Assembly directed its intention toward this need.

Trustees are now required to register charitable trusts with the Attorney General upon forms prescribed by that official for this purpose,⁹ and probate courts are required to notify the Attorney General immediately after the probate of any will which creates or purports to create a charitable trust.¹⁰

⁸ Ohio Rev. Code §109.23 (1953).

⁹ Ohio Rev. Code §109.26 (1953).

¹⁰ Ohio Rev. Code §109.30 (1953).

It is then made a duty of every trustee of a charitable trust to file a biennial report with the Attorney General, such report to reflect not only the property held in trust but also the receipts and expenditures during the period and any other information required by the Attorney General.¹¹

These statutory requirements, when read together, make it plain that the legislature intended that the Attorney General should have available not only the basic information concerning the existence of all charitable trusts but also current information, to be brought to date each two years, concerning the actual administration of such trusts. There are additional methods of discovery provided by the further directions to judges of the courts of probate and common pleas to furnish to the Attorney General such copies of papers and such information as to records and files relating to charitable trusts as the Attorney General may require,¹² and the requirement that the Auditor of State, when requested to do so by the Attorney General, shall make investigations and audits required in the enforcement of charitable trusts.¹³ In addition to these mandatory provisions which bring to the office of the Attorney General information regarding charitable trusts, the General Assembly granted further power in this area when it provided that the Attorney General may make such rules and regulations as are deemed necessary to secure records and other information for the charitable trust register.¹⁴

C. Enforcement

The new Charitable Trusts Act imposes upon the Attorney General the duty to enforce charitable trusts and to restrain their abuse whenever he believes it advisable to do so or when directed so to do by the Governor, the Supreme Court, the General Assembly or either house thereof.¹⁵ This particular provision is substantially similar to former Ohio General Code §340.

The Act now, however, makes the Attorney General a necessary party and provides that he must be served with process or with summons by registered mail in all proceedings which have as their objects the following:¹⁶ "(1) To terminate a charitable trust or to distribute its assets to other than charitable donees, or (2) To depart from the objects or purposes of a charitable trust as the same are set forth in the instrument creating the trust, including any proceeding for the application of the doctrine of cy pres, or (3) To construe the provisions of an instrument with respect to a charitable trust." This section then expressly makes void and unenforceable any judgment rendered in such

¹¹ Ohio Rev. Code §109.31 (1953).

¹² Ohio Rev. Code §109.29 (1953).

¹³ Ohio Rev. Code §109.32 (1953).

¹⁴ Ohio Rev. Code §109.27 (1953).

¹⁵ Ohio Rev. Code §109.24 (1953).

¹⁶ Ohio Rev. Code §109.25 (1953).

proceedings without service of process having been made upon the Attorney General and directs that such judgment shall be set aside upon that official's motion for such relief.

By the same section, discretion is granted to the Attorney General to intervene in any action affecting a charitable trust and the duty is imposed upon him to intervene when the court having jurisdiction of the action so requests. It is also now made necessary that he join in any compromise, settlement agreement, contract or judgment modifying or terminating a charitable trust in order that they may be valid, and he is expressly empowered to enter into any such compromises, settlement agreements, contracts or judgments which are for the public good.

There can be no doubt as to the purpose of this enactment. Too often litigation concerning charitable trusts could be completed with the official representing the public having no knowledge of the action, and, of course, having no part in the litigation; any such action would now be a nullity and could be set aside. It is, perhaps, entirely safe to say that in cases in which an attack was being made upon a charitable trust, this was always true in the spirit, but not in the letter, of the law, and was only too often overlooked.

II. OPERATION OF OHIO ATTORNEY GENERAL'S OFFICE IN ADMINISTERING THE ACT

The office of the Attorney General has established a division of charitable trusts under the direction of an Assistant Attorney General. This division is charged with the responsibility of establishing and maintaining the register of charitable trusts, examining from both a legal and an accounting viewpoint the biennial accounts filed with the division, counselling attorneys, trust officers, trustees, donors, and current beneficiaries of charitable trusts regarding trust problems, and taking active part in litigation regarding charitable trusts.

One of the immediate problems which confronted this charitable trust division upon the effective date of the Act was to devise a plan to assist in bringing this legislation to the attention of lawyers and trust companies throughout Ohio. A one-page bulletin summarizing the requirements of the Act was, therefore, prepared and forwarded at that time to members of the bar and to trust companies directing attention to the Act.

The registration requirement of the Charitable Trusts Act¹⁷ was an innovation in Ohio law; it was, then, not surprising that it was toward this section of the Act that the Attorney General, trustees, members of the bar, and trust officers primarily directed their attention. At that time a major function of the charitable trust division was the actual registration of charitable trusts, necessarily precedent to which was the preparation of a suitable form on which such registrations should be made.

During the last three months of 1953 and the entire year of 1954,

¹⁷ Ohio Rev. Code §109.26 (1953).

the examination and registration of charitable trusts was one of the major functions of this division. It was, of course, during this period that the larger part of the total trust registrations were received; by the end of 1954 there had been a total of 734 trusts registered, with an approximate total value of \$204,161,008. As of December 31, 1956, there had been registered 910 trusts with an approximate value in excess of \$224,000,000. There is, of course, no way of having information as to whether there is still a backlog of such trusts which have not as yet been registered.

The registration blank prescribed by the Attorney General is a rather simple, one-page form designed to secure pertinent information concerning the creation and administration of a charitable trust, including the following: the name of the donor; the method by which it was created, whether by will or by an inter vivos trust agreement; the approximate value of the corpus; investments held; investment provisions in the trust instrument; and the general charitable purpose or purposes for which the trust was created, including the identity and interest of any definite current charitable beneficiary.

The actual preparation and maintenance of the register of charitable trusts is largely a mechanical operation, as is the registration of individual trusts as they are submitted by trustees. The register itself is a simple numerical file, with each trust being assigned a permanent file number; a cross-index system is used, with the trusts indexed both by the name of the donor and the trustee. The registration file of any particular trust consists basically of the registration form executed by the trustee and a copy of the trust instrument. Upon receipt of any trust submitted for registration, both the trust instrument and the registration form are examined, and the trustee is then notified of the file number assigned to the trust.

The actual registration of the trust is, however, only the initial step in maintaining the charitable trust register. Subsequent to the registration, there is the required biennial report which must be filed by the trustee. These reports must be and are audited by the division of charitable trusts; the list of investments is examined to determine whether or not they are permissible within the language of the trust instrument; and the distribution of funds must be analyzed with a view to the expressed directions of the donor.

Another function of the charitable trust division of this office during the early months of administering this Act was the examination of many specific trust instruments or articles of incorporation of charitable corporations to determine, and to advise those from whom the inquiries were received, whether the trust or corporation fell within the definition in Ohio Rev. Code §109.23 (1953), so as to require registration.

Attention should now be directed toward Ohio Rev. Code §109.25

(1953),¹⁸ which has made it mandatory to join the Attorney General as a party litigant in many actions affecting charitable trusts. It is, perhaps, true that prior to the enactment of the Charitable Trusts Act, the Attorney General, because of his inherent power and duty to protect and enforce charitable trusts, should have been a party in many such actions. Usually, however, he received no notice and had no knowledge of the pending action, and the litigation would be completed without this representation of the public interest. This is, of course, no longer the case; the volume of litigation in which the Attorney General has been joined as a party defendant has, as anticipated, increased considerably since Section 109.25, Revised Code, became effective; the Attorney General was named a party defendant in more than 30 new actions initiated in each of the years of 1955 and 1956, in approximately 25 in 1954, and 14 in 1953; prior to 1953 such cases were rather infrequently brought to the attention of the Attorney General. This, it is suggested, indicates clearly that both the courts and members of the bar are now aware of the role of the Attorney General in protecting and enforcing charitable trusts and the statutory mandate that he must be made a party in actions affecting charitable trusts.

The types of litigation in which the Attorney General has been joined as a party defendant have been quite varied, but perhaps the types most frequently recurring are those for will construction or declaratory judgment, or both. While many of these are actions by executors or

¹⁸ Ohio Rev. Code §109.25 (1953) reads as follows:

The attorney general shall be a necessary party to and shall be served with process or with summons by registered mail in all proceedings, the object of which is: (1) To terminate a charitable trust or to distribute its assets to other than charitable donees, or (2) To depart from the objects or purposes of a charitable trust as the same are set forth in the instrument creating the trust, including any proceeding for the application of the doctrine of cy press, or (3) To construe the provisions of an instrument with respect to a charitable trust. A judgment rendered in such proceedings without service of process upon the attorney general shall be void, unenforceable, and shall be set aside upon the attorney general's motion seeking such relief. The attorney general shall intervene in any proceeding affecting a charitable trust when requested to do so by the court having jurisdiction of the proceeding, and may intervene in any proceeding affecting a charitable trust when he determines that the public interest should be protected in such proceeding. No compromise, settlement agreement, contract or judgment agreed to by any or all parties having or claiming to have an interest in any charitable trust shall be valid if the compromise, settlement agreement, contract or judgment modifies or terminates a charitable trust unless the attorney general was made a party to all such proceedings and joined in said compromise, settlement agreement, contract or judgment; provided, however, that the attorney general is expressly authorized to enter into such compromise, settlement agreements, contracts or judgments as may be in the best interests of the public.

trustees for court interpretation of instruments which are, under existing circumstances, ambiguous in some respect or in which changing conditions have made necessary the application of the doctrines of *cy pres* or deviation in order that a charitable gift may not fail in whole or in part,¹⁹ some are in fact merely a device for making an outright attack upon a trust instrument. In one such instance, in an action filed prior to the enactment of the Charitable Trusts Act, a large fund was saved for educational purposes from an attack by the heirs and by the prosecuting attorney of the county, the latter claiming at least a partial escheat for the benefit of the county school system.²⁰ In another such case the sole heir and residuary devisee and legatee, who was also a co-executor, made a vigorous attack upon a will, claiming that a gift in trust with a contingent charitable remainder had been adeemed.²¹

Among the many other kinds of actions in which the Attorney General has been joined as a party defendant are these: will contests, an action to set aside an ante-nuptial agreement,²² petitions to sell real property, a proposed action to secure approval of investments prohibited by the trust instrument, an action to secure interest at the legal rate on a charitable gift for the time prior to its payment to the charitable trustees,²³ disposition of the assets of charitable corporations,²⁴ cases in which a charitable gift was void because the will was executed within a year of the death of the testator, and litigation in which a charitable beneficiary sought to terminate a charitable trust and take the fund outright in lieu of receiving a relatively small annual income.²⁵ This listing and the few cases shown in the footnotes are intended to be merely representative and not exclusive.

It would, obviously, be a vain procedure to join the Attorney General as a party defendant if the interest of the public were not vigorously represented. It has been the policy of the charitable trust division to participate actively in litigation; briefs are prepared whenever required by the court or it is believed that a brief would be helpful to

¹⁹ Cleveland Museum of Art. v. O'Neill, Attorney General, 72 Ohio L. Abs. 11 (1956); The Benjamin Rose Institute v. O'Neill, Attorney General, Probate Court, Cuyahoga County, No. 525,896.

²⁰ Kingdom v. Casey, Probate Court, Ashtabula County, 72 Ohio L. Abs. 249 (1956), Court of Appeals of Ashtabula County, No. 517, Supreme Court of Ohio, No. 34622-23, Motions to Certify overruled.

²¹ Bool v. Bool, 165 Ohio St. 262 (1956).

²² Dawson v. Stewart, Probate Court, Greene County, No. 7575.

²³ In re Estate of Shanafelt, 164 Ohio St. 258 (1955).

²⁴ In re Orthodox Jewish Orphans' Home of Cincinnati, Court of Common Pleas of Hamilton County, No. A147040; The Grand River Institute v. O'Neill, Attorney General, Common Pleas Court of Ashtabula County, No. 44178. In the latter action the Attorney General was joined as a party under both Ohio Rev. Code §109.25 and §1702.49.

²⁵ Sisters of Charity v. O'Neill, Attorney General, Probate Court, Hardin County, No. 17665.

the court. The charitable trust division also adheres strictly to the policy of being represented at hearings on charitable trust matters.

Another major function of the Attorney General in administering the Charitable Trusts Act has been that of informally counselling and advising attorneys and trustees. This has included making decisions as to the registration requirement of Ohio Rev. Code §109.26 (1953), as defined and limited by the exceptions and exclusions in Ohio Rev. Code §109.23 (1953), suggesting possible plans of procedure prior to the actual filing of a petition, and advising counsel, after preliminary research, of the position which the Attorney General must take in the event specific litigation is initiated. It has at times been possible to resolve some seemingly rather difficult problems through such consultation and study, making it unnecessary to place upon the court the entire burden of determining the proper method and plan of administering a specific trust.

This discussion would not be complete without mentioning the procedure followed in processing and auditing the biennial accounts filed in accordance with Ohio Rev. Code §109.31 (1953). These are examined from both an accounting and a legal viewpoint and are then placed with the documents making up the trust registration; each individual trust file is marked to show the receipt of such written report, the date of receipt and the period covered by the report.

No rules and regulations have been adopted by the Attorney General; it has been believed that this duty can be performed more efficiently after greater experience has been gained in the administration of the Act.

III. DEGREE OF COMPLIANCE AND ATTITUDE TOWARD THE ACT

There is, perhaps, no way accurately to determine the degree of compliance with the Charitable Trusts Act as an entirety. It is, however, possible to draw conclusions from the facts which are available.

There have, as mentioned hereinbefore, been 910 trusts registered with the Attorney General. It is highly improbable that this number represents all trusts which require registration in accordance with Ohio Rev. Code §§109.23-33 (1953). It is apparent, however, that there is no way in which this office may readily become informed as to the existence of each charitable trust established or active in Ohio so that a specific effort could be made to secure the registration of any individual trust which does not as yet appear in the register.

It would, it is true, be possible as a research problem to examine the records in various probate courts to determine which, if any, testamentary charitable trusts falling within the definitive section of the Charitable Trusts Act²⁶ have not as yet been registered; this, however, is not a workable solution. Any such information as to testamentary trusts

²⁶ Ohio Rev. Code §109.23 (1953).

would, in any event, be of doubtful value in determining the degree of compliance; there would remain a vast number of inter vivos trusts about which no such information could be obtained. It seems, however, that it may be assumed that any failure on the part of trustees to register such trusts stems, in large part, at least, from lack of familiarity with the Act; this can and must be at least partially corrected by a further educational program carried on by the office of the Attorney General. Such a plan is now under consideration.

Then, too, the General Assembly has, in the Act itself, provided a means for transmitting to the Attorney General from the probate courts information concerning charitable trusts created by wills currently admitted to probate.²⁷

It is believed that the Attorney General has been joined as a party defendant in substantially all cases affecting charitable trusts, as set forth in Ohio Rev. Code §109.25 (1953). It is self-evident that any failure to so join the Attorney General could result only from lack of knowledge or a misapprehension of its terms, as any judgment rendered in such a proceeding is void, unenforceable, and may be set aside upon motion of the Attorney General, unless that official was served with process.

The Attorney General's office has not as yet put forth a particular effort to secure the biennial reports required by the Act,²⁸ yet many such written reports are received daily. The charitable trust division will, undoubtedly, find it desirable to call this requirement to the attention of those trustees who have registered trusts but have not at this time filed a report for the preceding two years. This section of the Act has been interpreted as requiring an accounting to be filed at the close of a two-year period from the date of registration and each two years thereafter.

It can be said that the attitude of trustees and counsel toward the Act has appeared to be favorable. As must be true with any new administrative procedure established by legislation, there have been adjustments to be made both by trustees and the office of the Attorney General. It has also been necessary to establish certain informal principles or rules for the guidance of the charitable trust division in the procedural problems incidental to the administration of the Act in order to attain uniformity; this, necessarily, involved making unofficial interpretations of certain provisions of the statutes.

As the Charitable Trusts Act has been in effect only since October, 1953, it follows that experience in administering the Act is still somewhat limited, but during this period the Attorney General's office has found that courts, trustees and counsel alike have been most cooperative in working toward an effective administration of the Act.

²⁷ Ohio Rev. Code §109.30 (1953).

²⁸ Ohio Rev. Code §109.31 (1953).

IV. EVALUATION OF THE ACT IN OPERATION AND SUGGESTIONS FOR IMPROVEMENT

It may be that before attempting any evaluation of the Charitable Trusts Act as it was enacted and now exists, it should be stated clearly that the Attorney General was active in bringing to the attention of the General Assembly the urgent need for such constructive charitable trust legislation. The Attorney General also assumed leadership in pointing out specific problems toward which any such enactment should be directed and suggesting possible solutions; the present Act incorporates many of these suggestions. It must, then, be candidly admitted that any attempt to evaluate the Act cannot be completely free from prejudice. With this preface, attention should be turned to the Act itself to determine what have appeared to be some of the strong and the rather weak or ambiguous spots in this legislation.

The definition section,²⁹ which has been quoted in full earlier in this discussion, presents practical problems in interpretation and administration. The section provides in part:

As used in Sections 109.23 to 109.33, inclusive, of the Revised Code, "charitable trust" means any fiduciary relationship with respect to property arising as a result of a manifestation of intention to create it, and subjecting the partnership, corporation, person, or association of persons by whom the property is held to equitable duties to deal with the property for any charitable, religious or educational purpose . . . Such sections do not apply to charitable, religious and educational institutions holding funds in trust or otherwise exclusively for their own purposes . . .

The foregoing quotation shows clearly that the statute provides for an exemption from the Act which could be read as practically co-extensive with the definition itself. Use of the word "institution" has increased the confusion, as the Supreme Court of Ohio has, as recently as 1954, said that, for the purpose of exemption from inheritance tax, an institution for public charitable purposes is established upon the distribution to trustees for public, charitable, or educational purposes of the fund given in trust for such use.³⁰

The Attorney General, for registration purposes, has adopted the interpretation that "institutions" is synonymous with "corporations." This office has followed the policy, in accordance with that interpretation, that non-profit corporations need not register funds which they hold exclusively for their general corporate purposes, whether held for all such purposes or for only one or more corporate purpose.

It must be that this is the sense in which this term was used by the legislature in enacting the Charitable Trusts Act. This belief may, it is admitted, be based in part upon the premise that any other interpretation

²⁹ Ohio Rev. Code §109.23 (1953).

³⁰ In re Estate of Oglebay, 162 Ohio St. 1 (1954), and cases cited therein.

would go far toward rendering the entire Act nugatory, which certainly could not lead to the intended result. In reaching this conclusion, however, resort has been had to the comparable section of the New Hampshire law³¹ governing charitable trusts, which excludes from the operation of the law charitable corporations holding property or funds for their corporate purposes. It should also be noted here that the Rhode Island legislation³² exempts from the operation of the charitable trust legislation charitable, religious, and educational institutions holding funds in trust exclusively for their own charter or corporate purposes and that the Uniform Supervision of Trustees for Charitable Purposes Act³³ excludes charitable corporations organized and operated exclusively for educational, religious, or hospital purposes.

The following exclusion, also found in Ohio Rev. Code §109.23 (1953), should, perhaps, also be re-examined:

There are excluded from this definition and from the operation of such sections, trusts until such time as the charitable, religious or educational purpose expressed in such trust becomes vested in use or enjoyment.

This language does not present the difficulties of analysis that accompany the exemption of the charitable, religious, and educational institutions from the Act, but serious consideration could be given to the scope of the language.

It is freely conceded that it may be desirable to exempt from the registration requirement of the Act, both charitable corporations holding funds for their general corporate purposes and trusts in which there is no present charitable use or enjoyment of the trust fund. But legislative thinking should be directed toward the extent of the present language excluding both such corporations and trusts from the operation of the entire Act. Should not the vast amounts of funds so held be specifically subjected to all provisions of the Act except possibly registration? The language now appearing in the section, if interpreted literally, would seem to free from any powers of the Attorney General all of the vast sums now held by charitable corporations in trust, if not on a technical charitable trust, for corporate purposes and that held in trust by any trustees, ultimately to be used for charitable purposes, although no charitable use is now being made of either income or principal.

That such widespread exclusion was not intended is clearly apparent; the Act itself provides that the Attorney General is "in addition to all his common law and statutory powers"³⁴ to prepare and maintain

³¹ N. H. Rev. Stat. Ann. §7:21 (1955).

³² Rhode Island Acts and Resolves, January, 1950, c. 2617, as amended January, 1951, c. 2852.

³³ Uniform Supervision of Trustees for Charitable Purposes Act, §3, Handbook of the National Conference of Commissioners on Uniform State Laws, 1954, p. 169.

³⁴ Ohio Rev. Code §109.26 (1953).

a register of charitable trusts. Then, too, the legislature has, aside from the enactment of the Charitable Trusts Act, shown its awareness of the role of the Attorney General in protecting public interests in relation to charitable funds.³⁵

It is hardly conceivable that there could have been an intention to diminish in any way the inherent common law powers and duties of the Attorney General relative to charitable trusts. The charitable trust division has, conversely, assumed that the Act served only to broaden and strengthen those powers. As yet, Ohio Rev. Code §109.23 (1953), has not received judicial interpretation resolving the problems suggested here.

Ohio Rev. Code §109.25 (1953), set out in full in footnote 18, also, it is believed, could be clarified in some respects. The charitable trust division has proceeded on the assumption that the language making the Attorney General a necessary party in all proceedings the object of which is "to construe the provision of an instrument with respect to a charitable trust" should be interpreted broadly. It has, therefore, been the general policy of the division, when advice is sought, to suggest that the Attorney General be made a party in any action which, although rather remotely, affects a charitable trust. Under this interpretation, the Attorney General is a necessary party in any will construction or declaratory judgment action in which the will or other instrument under consideration creates or purports to create a charitable trust.

It seems to be beyond controversy that a charitable trust can be effectively destroyed in an action which does not directly involve the validity or the construction of the trust provision itself; the determination of such a case may readily decrease or even entirely deplete the fund designated for charitable purposes. It appears that the public interest should be as actively represented in such cases as in those where the trust itself is the point on which the litigation turns.

It has been held by a court of common pleas³⁶ that Ohio Rev. Code §109.25 (1953), does not make the Attorney General such a necessary party in an action to contest a will that the court lacked jurisdiction because of the failure to join the Attorney General as a party defendant. A motion to dismiss was overruled, the court finding that "the object"³⁷ of the proceeding was to determine whether or not a certain paper

³⁵ Ohio Rev. Code §2307.131 (1953), provides that in any action in which a charitable trust not in being is a beneficiary of any future interest in any property, the Attorney General shall represent such interest; Ohio Rev. Code §2109.34 (1953), provides for representation by the Attorney General of beneficiaries of certain charitable trusts in a hearing on a fiduciary's account; and Ohio Rev. Code §1702.49 (1953), provides for making the Attorney General a party in an action brought to secure court direction for the distribution of the assets of a charitable corporation.

³⁶ Spang v. Cleveland Trust Co., 73 Ohio L. Abs. 164 (1956), Ohio Bar, Vol. XXIX, No. 33, August 13, 1956.

³⁷ Ohio Rev. Code §109.25 (1953).

writing was or was not the last will and testament of the testatrix and was not, at least primarily, to terminate a charitable trust. A court of appeals,³⁸ however, has interpreted Ohio Rev. Code §109.25 (1953), as making the Attorney General a necessary party in a will construction action where a charitable trust is involved. The court, in so holding, referred to the words "with respect to a charitable trust" and concluded that the construction of the will would affect the amount passing in trust under the residuary clause.

The Attorney General is, by the same section, specifically authorized to intervene in any proceeding affecting a charitable trust, and is directed to so do when requested by the court having jurisdiction of the action. These are certainly salutary provisions.

It is also suggested that Ohio Rev. Code §109.25 (1953), could be given consideration from the viewpoint of authorizing the Attorney General to waive service of process or summons and voluntarily enter an appearance in actions affecting charitable trusts. If such authorization appeared in the Act the Attorney General could then cooperate with counsel by following this procedure; doubt as to its advisability now stems from the language used by the General Assembly providing that judgments "in such proceedings without service of process upon the Attorney General shall be void, unenforceable, and shall be set aside upon the Attorney General's motion seeking such relief."

As must be true with any relatively new legislation, there are minor, in fact, probably relatively unimportant, questions which appear as experience is gained in administering the law. Some of these, toward which legislative thinking might be directed, are: Does the rule making power granted to the Attorney General³⁹ embrace only those functions pertaining to the register of charitable trusts? Do the required biennial reports⁴⁰ become part of the register itself within the meaning of the section providing that the register shall be open to public inspection for such legitimate purposes as the Attorney General may determine?⁴¹ Should it not be the clerk of the court of common pleas, rather than the judge thereof,⁴² who should furnish such copies of papers and information as the Attorney General may require?

The foregoing remarks are in no way intended as an attack upon the Ohio Charitable Trusts Act; they are merely suggestions as to areas toward which the thinking of the legislators and members of the bar might be directed.

The Charitable Trusts Act, it is submitted, is constructive and forward-looking legislation. It can result in immeasurable good in the

³⁸ Blair v. Bouton, Court of Appeals for Knox County, No. 503, decided Nov. 13, 1956.

³⁹ Ohio Rev. Code §109.27 (1953).

⁴⁰ Ohio Rev. Code §109.31 (1953).

⁴¹ Ohio Rev. Code §109.28 (1953).

⁴² Ohio Rev. Code §109.29 (1953).

fields of the administration of charitable trusts and the protection of the public for whose benefit these trusts are created. It is believed that it has resulted in such benefits although it is still very new. Final judgment of the effectiveness of the Charitable Trusts Act must, however, depend upon its effective administration and the continuing unqualified cooperation of trustees, attorneys and the courts.