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John W. Vinson

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THE CHARITY OVERSIGHT AUTHORITY OF THE TEXAS ATTORNEY GENERAL

JOHN W. VINSON*

* Assistant Attorney General, Office of the Texas Attorney General Consumer Protection Division, Charitable Trust Section. B.A., Southern Methodist University; J.D., Lewis & Clark School of Law. This Article reflects the view of the author and does not represent the position of the Office of the Attorney General.

I. INTRODUCTION

The Texas Attorney General[1] is the only elected official charged with regulating Texas charitable interests. This duty and authority over charitable assets and entities is comprehensive and unique, with the general parameters of the responsibility and authority being derived from English common law. Although the broader state representational role of American attorneys general has evolved considerably and has been substantively codified in the statutory law, the area of charity regulation has remained remarkably true to its common law roots. This Article will briefly examine the early roots of charity regulation and then discuss the authority and duties of the Attorney General in the modern context of charity regulation.

In Texas, the assets held and managed by charitable entities are quite significant.[2] The Attorney General represents the public's interest in these assets by ensuring that they are used for proper charitable purposes. Such role is akin to, but greater than, the role of an attorney for the stockholders of a business corporation or the beneficiary of an express trust.[3] Charitable interests, however, having no stockholders or specifically identifiable owners, are pro-

1. In this Article, "the Attorney General" refers to the Texas Attorney General. All other attorneys general are referred to as "attorney general."

2. In 2002, American individuals and corporations contributed more than $240 billion to charity, and American charitable entities controlled assets valued in the trillions of dollars. *See* CTR. ON PHILANTHROPY AT IND. UNIV., AAFRC TRUST FOR PHILANTHROPY, GIVING USA 6, 94 (2003). The American charitable community (i.e., charitable corporations, foundations, associations, trusts, and other charity obligations) has been called the "non-profit sector," "the tax-exempt sector," even "the eleemosynary sector," as well as the "third sector"—third only to the corporate/business and governmental sectors. *See* Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: "Rent-Seeking" Charities or Virtuous Politicians?*, 1996 WIS. L. REV. 971, 973 n.1 (describing different terms for charitable organizations).

3. It should be noted that "charity," as a legal term of art, does not necessarily denote a gratuitous gift or service. *See* Paschal v. Acklin, 27 Tex. 173, 199 (1863) (explaining the term "charity").

> [A]lthough the relief of the poor, or a benefit to them in some way, is in its popular sense a necessary ingredient in a charity, this is not so in view of the law, by which it is

tected and enforced by the Attorney General on behalf of the public—charity's ultimate beneficiary. A parallel goal of the Attorney General's powers and duties in the charity realm is the protection and perpetuation of the beneficent intent of charity donors—often those who have long since died. The Attorney General's uniquely broad representational capacity is the bedrock concept of common law charity regulation.

The Attorney General's activities in the charity regulation area can also be quite interesting. In addition to the usual matters involving modifications of charitable trusts, contested testamentary gifts to charity, and other such matters pertaining to public charities, private foundations, and other non-profit entities, the Attorney General has sued or investigated some rather interesting entities in the past decade: two exotic feline (lion/tiger) sanctuaries,[4] a primate (non-human) sanctuary,[5] a rodeo association,[6] a charter school,[7] a little-league baseball association,[8] a modern/minimalist art foundation,[9] a televangelist,[10] a DNA research facility (from which many of the donors requested a return of their samples),[11] a healthcare system managed by an order of nuns,[12] a Cath-

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defined to be "a gift to a general public use," which extends, or doubtless may do so, either to the rich or the poor.

Id.; *see also* Boyd v. Frost Nat'l Bank, 145 Tex. 206, 214, 196 S.W.2d 497, 502 (1946) (stating that "charity need have no special reference to the poor").

4. Morales v. Reitnauer, No. 96-14173 (345th Dist. Ct., Travis County, Tex.) (on file with the office of the Attorney General of the State of Texas); Tex. Exotic Feline Found. v. Morales, No. 96-14173, 1997 WL 672157 (Tex. App.—Austin 1997, pet. denied) (per curiam) (not designated for publication); State v. Zoocats, Inc., No. 62828 (86th Dist. Ct., Kaufman County) (case pending).

5. State v. Primarily Primates, Inc., No. 93CI-09856 (224th Dist. Ct., Bexar County, Tex. 1994) (settled) (on file with the office of the Attorney General of the State of Texas).

6. Evans v. Bricker, 942 S.W.2d 794 (Tex. App.—Beaumont 1997, no writ) (on file with the office of the Attorney General of the State of Texas).

7. Cornyn v. Heritage Acad., No. GV-201808 (200th Dist. Ct., Travis County, Tex. 2002) (settled) (on file with the office of the Attorney General of the State of Texas).

8. Riddell Family P'ship v. Manchaca Optimist, Inc., No. 99-03425 (250th Dist. Ct., Travis County, Tex. 2001) (settled) (on file with the office of the Attorney General of the State of Texas).

9. *In re* Estate of Donald Judd, No. 1577 (394th Dist. Ct., Presidio County, Tex. 2002) (settled) (on file with the office of the Attorney General of the State of Texas).

10. Word of Faith Outreach Ctr. Church, Inc. v. Morales, 787 F. Supp. 689 (W.D. Tex. 1992), *rev'd* 986 F.2d 962 (5th Cir. 1993).

11. Cornyn v. Fifty-Two Members of the Schoppa Family, 70 S.W.3d 895 (Tex. App.—Amarillo 2001, no pet.).

olic bishop (as a foundation board chair),[13] a Blue Cross organization,[14] and a testamentary trust for the benefit of all Americans living in the year 2346.[15] In Texas, charity regulatory activities span the legal field, involving the gamut of litigation (trial and appellate practice) and the substantive areas of taxation, real estate, probate, trust, corporate (usually, but not always, nonprofit), contract, property, and constitutional law. Despite the applicability of the aforementioned areas, which, like most areas of law, are comprehensively covered in Texas statutory law, the Attorney General's primary charity regulation authority remains based in the old common law.

II. Historical Roots of Attorney General Authority

The historical underpinnings of charity law and the favored status of charity in our society have allowed the continued application of the ancient principles and precepts of the amorphous common law.[16] In medieval Europe, matters of charity (enforcement and administration) originally were the provinces of religious authority through the ecclesiastical courts.[17] In England, regulation of charity eventually passed to the common law equity courts or "Courts of Chancery," which applied flexible standards to disputes—as opposed to the courts of law which, based on rigid rules, awarded damages for wrongs and resolved contract and deed disputes.[18]

Like the law of charity generally, the authority of American attorneys general over charitable entities and assets has roots reaching back into English common law. The attorney general was, by

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12. St. Paul Found. v. Ascension Health, No. 02-04686 (298th Dist. Ct., Dallas County, Tex.) (case pending).

13. Rene H. Gracida v. Morales, No. 96-05-34687 (79th Dist. Ct., Jim Wells County, Tex. 1998) (settled) (on file with the office of the Attorney General of the State of Texas).

14. Abbott v. Blue Cross & Blue Shield of Tex., Inc., 113 S.W.3d 753 (Tex. App.—Austin 2003, pet. filed).

15. Anna Spohn Welch Marsh v. Frost Nat'l Bank, No. 13-01-00639-CV (Tex. App.—Corpus Christi 2001) (settled) (on file with the office of the Attorney General of the State of Texas).

16. For example, modern attorneys general effectively use the breach of fiduciary duty cause of action, the writ of *quo warranto*, and the equitable remedies of constructive trust and receivership as regulatory tools.

17. Gareth Jones, History of the Law of Charity, 1532-1827, at 5 (S.J. Bailey ed., Wm. W. Gaunt & Sons, Inc. 1986) (1969).

18. *See id.* at 6-8 (discussing the process of bringing a case before the Lord Chancellor).

custom and law, the representative of the interests of the Crown in equity matters, including charity, and was the primary participant for the government in such proceedings.[19] The attorney general's position as protector of charitable interests was solidified during the fifteenth and sixteenth centuries, culminating in 1601 with the passage of the Statute of Charitable Uses.[20] This statute is important because, for the first time, a listing of purposes considered "charitable" was formally promulgated.[21] The statute also codified the older common law of charity and thus provides a sanctioned framework for the regulation of charity.[22] Among the statute's procedural provisions was its enforcement section that, with later enactments, confirmed the role of the attorney general as representative of the Crown's interest in charity, which, of course, was to ultimately benefit the people.[23]

After recovering from the upheaval of the Revolution and separation from Britain, all American states, with the exception of Louisiana, adopted wholesale the common law of England.[24] English charity precedent, and ultimately the Statute of Charitable Uses, were recognized in some form or another by the states. In two early cases, the United States Supreme Court solidified the American law of charity and helped guide various United States jurisdictions in formulating coherent bodies of charitable trust law. The

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19. *See* David V. Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 141-45 (2000) (noting the role of the attorney general was "rooted in the Crown's power as *pater patriae*," which was sufficient to give the attorney general jurisdiction over charitable entities).

20. See Charitable Uses Act, 1601, 43 Eliz. c.4, *reprinted in* GARETH JONES, HISTORY OF THE LAW OF CHARITY 1532-1827 app. D at 224 (S.J. Bailey ed., Wm. W. Gaunt & Sons, Inc. 1986) (1969) (recognizing that the Statute of Charitable Uses granted power to the Lord Chancellor to serve as protector of charitable interests).

21. *Id.*

22. *Id.*

23. *See* David V. Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 141-45 (2000) (detailing the early origins of attorneys general power and authority over charitable organizations).

24. *See* Dickson v. Strickland, 114 Tex. 176, 200-01, 265 S.W. 1012, 1021-22 (1924) (finding that the common law is in effect in Texas, except where inconsistent with the Constitution and laws); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002) (stating that "[t]he rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state").

first case, *Trustees of Philadelphia Baptist Ass'n v. Hart's Executors*,[25] was overruled by the more important *Vidal v. Girard's Executors*.[26] *Vidal* established in American jurisprudence the above-discussed common law pertaining to charity and affirmed that "there is an inherent jurisdiction in equity in cases of charity."[27] The result of the opinion was to usher in the favored status of charity in American jurisprudence[28] and to allow dispositions simply "to charity," or for general, unspecified charitable purposes. Equity courts would provide any assistance needed in properly directing the assets.[29]

Along with the English common law and equity jurisdiction came the charity enforcement authority and duties of American attorneys general, who were recognized as the protectors and sole representatives of the public's interest in charity.[30] Similarly, in Texas, the Texas Attorney General, the government's top legal executive, possesses those powers and duties accepted as inherent in the common law office of the attorney general and, in charity matters, the Attorney General exercises the role of charity protector, "a function belonging to his office under the Constitution and laws of the state."[31] The constitutional provision outlining the Attorney General's power and duties is found in Section 22, Article IV of the

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25. 17 U.S. 1 (1819). In *Trs. of Philadelphia Baptist Ass'n v. Hart's Ex'rs*, the Supreme Court voided a testamentary gift simply "to charity" as too unspecific and prevented the association from benefiting from the gift. Trs. of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 17 U.S. 1, 28 (1819).

26. 43 U.S. 127 (1844).

27. *See* Vidal v. Girard's Ex'rs, 43 U.S. 127, 195-96 (1844) (finding that Pennsylvania's common law included charitable devises to nonspecific associations).

28. This was not always so in England and the Colonies. *See infra* Part III (discussing mortmain statutes).

29. Hopkins v. Upshur, 20 Tex. 89, 96 (1857) (recognizing for the first time in Texas "that a court of equity has such power by virtue of its general jurisdiction, independent of a statute"). Thus, the *Hopkins* court appears to adopt the United States Supreme Court's application of *Vidal*. *See id.* (referencing the United States Supreme Court's decision in *Vidal* as fully describing the applicable law).

30. *See* Newberry v. Blatchford, 106 Ill. 584 (1883), 1883 WL 10252 at *6 (asserting that in the administration of a public charity, the attorney general is the proper party); Ass'n for the Relief of Respectable, Aged Indigent Females v. Beekman, 21 Barb. 565, 569 (N.Y. Gen. Term. 1854) (noting that in the case of a public charity, the attorney general must bring suit).

31. Powers v. First Nat'l Bank of Corsicana, 138 Tex. 604, 620, 161 S.W.2d 273, 284 (1942); *see also* Boyd v. Frost Nat'l Bank, 145 Tex. 206, 214, 196 S.W.2d 497, 502 (1946) (stating that it is the Attorney General's duty to prevent abuse of public charities); Carroll v. City of Beaumont, 18 S.W.2d 813, 820 (Tex. Civ. App.—Beaumont 1929, writ ref'd)

Texas Constitution, which, after outlining specific duties of the Attorney General, provides that the Attorney General shall "perform such other duties as may be required by law."[32] The quoted provision has been specifically interpreted to include the Attorney General's common law duty to protect the public's interest in charity.[33] This same section provides the Attorney General with broad "visitorial" oversight authority over all Texas corporations—non-profit and for-profit—as well as any foreign corporations doing business in Texas:

> The Attorney General . . . shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power . . . not authorized by law.[34]

The Attorney General's authority and duties, being constitutionally provided, are inviolate, subject to change only by constitutional amendment.[35]

The Texas Attorney General today exercises unquestioned general oversight of charitable entities and assets and is the sole elected official authorized to bring litigation on behalf of the public and its interests in charity.[36] The Charitable Trusts Section of the Attorney General's Consumer Protection Division is generally charged with the regulatory, investigatory, and enforcement duties of the Attorney General in charity matters.[37]

(requiring the Attorney General to represent a public charity before a final and conclusive settlement).

32. TEX. CONST. art. IV, § 22.

33. *See* Hill v. Lower Colo. River Auth., 568 S.W.2d 473, 480 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (asserting that a public or charitable trust may be protected by the Attorney General).

34. TEX. CONST. art. IV, § 22.

35. *See* Garcia v. Laughlin, 155 Tex. 261, 265, 285 S.W.2d 191, 194 (1955) (discussing the role of the Attorney General, holding that "[t]he powers conferred by the Constitution upon the state officials are generally held to be exclusive, and except in the manner authorized by the Constitution, these powers cannot be enlarged or restricted").

36. *See generally* TEX. PROP. CODE ANN. §§ 123.001-.005 (Vernon 1995 & Supp. 2003) (describing the Attorney General's role in providing oversight to charitable entities).

37. Off. of the Att'y Gen. of Tex., *Charities and Non-Profits*, *at* http://www.oag.state.tx.us/consumer/charitabletrusts.shtml (summarizing the role of the Charitable Trusts Section of the Attorney General's Consumer Protection Division) (last visited Oct. 19, 2003) (on file with the *St. Mary's Law Journal*).

III. MODERN PRESUMPTIONS IN FAVOR OF CHARITY

At common law, charity dispositions were not always looked upon with favor. Partly due to the distrust the English monarchy harbored against the Catholic Church and the predominantly religious nature of charity at the time, charitable intent and dedication of assets were suspect.[38] The desire to prevent charitable dispositions resulted in the enactment of "mortmain statutes," which prohibited perpetual dedication of assets for charity, and later, gifts made on the deathbed (or sometimes years before) of a testator or settlor.[39]

As social consciousness and public concern for the disadvantaged increased, charity began to be seen as a positive force. *Blair v. Odin*[40] was the first Texas Supreme Court opinion dealing with the issue of charity. Today, charity status and dedication of assets is highly favored.[41] Reflective of this is the universal abolishment of mortmain statutes in the United States, some after having been held unconstitutional.[42] No Texas court has

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38. *See* David V. Patton, *The Queen, The Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 134-35 (2000) (articulating the origins of the concern of the government over religious groups in medieval England).

39. *Id.*

40. 2 Tex. 288 (1848). *Blair* cites *Vidal v. Girard's Ex'rs* as authority for the general validity and social beneficence of charitable designations. Blair v. Odin, 2 Tex. 288, 302 (1848). At issue in *Blair* was the original Mexican land grant of property in the City of Victoria to the Catholic Church for the purpose of building and maintaining a sanctuary. *Id.* The supreme court upheld the validity of the land grant, stating that the crown could not "resume property it had once granted." *Id.* at 304.

41. *See* Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: "Rent-Seeking" Charities or Virtuous Politicians?*, 1996 WIS. L. REV. 971, 976 (outlining the policy rationale for giving charitable organizations a favored status in society).

42. *See In re* Estate of French, 365 A.2d 621, 624-25 (D.C. App. 1976) (invalidating a statute as over-inclusive that prevented donations to clergy and other religious organizations within thirty days of death); Shriners Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64, 69 (Fla. 1990) (rejecting the constitutionality of Florida's mortmain statute); *In re* Estate of Kinyon, 615 P.2d 174, 175 (Mont. 1980) (agreeing with a lower court that the statute was "arbitrary, unreasonable and lack[ed] a fair and substantial relation" to its legislative intent); Shriners' Hosp. for Crippled Children v. Hester, 492 N.E.2d 153, 157 (Ohio 1986) (declaring the Ohio statute "unreasonable" and lacking "the requisite degree of rationality to withstand constitutional scrutiny"); *In re* Estate of Cavill, 329 A.2d 503, 506 (Pa. 1974) (rejecting the constitutionality of a statute preventing testamentary dispositions within thirty days of death).

ever applied mortmain restrictions on testamentary or inter vivos gifts.[43]

Charity's favored status is also demonstrated by the enactment of "charitable immunity" statutes[44] and the nonapplication of the general rule against perpetuities to charitable trusts and other charity dedications.[45] In two early Texas cases dealing with charity status, the Texas Supreme Court held that assets may be dedicated in trust for charitable purposes in perpetuity, despite the constitutional prohibition against perpetuities and entailments.[46]

The generous exemptions from taxation granted to charitable entities and the deductions allowed to donors of gifts thereto is probably the most valuable benefit bestowed upon charity by state and federal governments.[47] Such exemptions have played a great role in fostering charity.[48]

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43. *See* 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 362.4, at 83 & nn. 1-19 (4th ed. 1989) (noting the absence of statutory restrictions in some states and discussing the application of statutory restrictions throughout the United States, with Texas being notably missing from the discussion).

44. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 84.001-.008 (Vernon 1997) (granting immunity to charitable organizations). In *Howle v. Camp Amon Carter*, the Texas Supreme Court had previously completely abrogated the doctrine of charitable immunity, replacing it with vicarious liability under the doctrine of respondeat superior. Howle v. Camp Amon Carter, 470 S.W.2d 629, 670 (Tex. 1971). The Texas statute is intended to supplant older common law doctrines of charitable immunity that originated in seventeenth and eighteenth century English law.

45. *See* TEX. PROP. CODE ANN. § 112.036 (Vernon 1995) (stating that "[t]he rule against perpetuities applies to trusts other than charitable trusts"); *see also* Foshee v. Republic Nat'l Bank of Dallas, 617 S.W.2d 675, 677 (Tex. 1981) (finding that if the trust is created for charitable purposes, the rule against perpetuities does not apply). The interest must vest in the trustee within the Rule, but after such proper vesting, the interest may exist in perpetuity. Atkinson v. Kettler, 372 S.W.2d 704, 711 (Tex. Civ. App.—Dallas 1964), *aff'd*, 383 S.W.2d 557 (1964).

46. *Compare* Bell County v. Alexander, 22 Tex. 350, 364-65 (1858) (enforcing a charitable trust in perpetuity), *and* Paschal v. Acklin, 27 Tex. 173, 191 (Tex. 1863) (allowing a charitable trust in perpetuity), *with* TEX. CONST. art. I, § 26 (declaring that "[p]erpetuities . . . are contrary to the genius of a free government, and shall never be allowed").

47. *See* Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: "Rent-Seeking" Charities or Virtuous Politicians?*, 1996 WIS. L. REV. 971, 982 (showing the "staggering" amount of personal wealth and labor given to charitable organizations in 1995).

48. Issues pertaining to state and particularly federal taxation are beyond the scope of this Article. One critical point, however, is that tax exemption authority and precedents may have little application to the question of whether an entity or specific assets are impressed with a charitable obligation. The presumptions, burdens of proof, and underlying policy assumptions in cases involving a purported charity's entitlement to exemptions and other governmental/legal benefits are often quite distinct. To be so entitled, the purported

As shown by the *Vidal* case in 1844, the federal courts have also shown great deference to charitable entities and dispositions for charity.[49] More recently, the United States Supreme Court has held that the act of soliciting charitable donations is "fully protected speech" under the Free Speech Clause of the First Amendment. Such solicitation is not considered "commercial speech," which is subject to less protection.[50]

Additionally, under Texas law, corrective measures may be taken against a charity or its errant fiduciaries without regard to the passage of time. The Attorney General is not subject to statutes of limitations, laches, and other equitable doctrines barring suit when asserting nonproprietary governmental functions.[51] Charity regulation, being a constitutionally provided and common-

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charity must demonstrate not only that it is organized as a charity, but that it actually operates as a charity. *See* N. Alamo Water Supply Corp. v. Willacy County Appraisal Dist., 804 S.W.2d 894, 899 (Tex. 1991) (holding that "exemptions from taxation are not favored by the law and will not be favorably construed"); *see also* Circle C Child Dev. v. Travis Cent. Appraisal Dist., 981 S.W.2d 483, 486 (Tex. App.—Austin 1998, no writ) (announcing that the party seeking a tax exemption has the burden to clearly show the exemption applies). Also, organizations must affirmatively apply for tax-exempt status, whereas common law charity status, and the obligations imposed by law because of such status, will be applied as a matter of law. *See generally* Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations*, 50 FLA. L. REV. 419 (1998) (explaining federal income tax exemptions for charitable organizations); Bruce R. Hopkins, *Overview of Current Developments in the Law of Charities Regulations, Rulings, and Other IRS Pronouncements, Court Opinions, Proposed and Enacted Legislation, and Other Current Developments*, 49 A.L.I.-A.B.A. COURSE OF STUDY 1 (Dec. 6, 2001), *available at* WESTLAW SG049- ALI-ABA 1 (providing a general treatment of federal tax exemption).

49. Vidal v. Girard's Ex'rs, 43 U.S. 127, 192-97 (1844) (discussing the rationale for providing considerable deference to charitable organizations).

50. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 787-88 (1988) (stating that the charitable solicitations were not previously viewed as purely commercial speech); Vill. of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (claiming that prior authorities have held that the solicitation of charitable donations involves speech protected by the First Amendment). The fully protected speech status of charity solicitation is retained even if a professional, for-profit fundraiser does the soliciting. *Vill. Of Schaumberg*, 444 U.S. at 632. *But see* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 123 S. Ct. 1829, 1836 (2003) (reaffirming that states may prosecute fraudulent or deceptive charity fundraising "[l]ike other forms of public deception, [because] fraudulent charitable solicitation is unprotected speech").

51. *See* City of Fort Worth v. Johnson, 388 S.W.2d 400, 403 (Tex. 1964) (explaining that a city is not subject to a bar by the statute of limitations when enforcing a zoning ordinance); McKinney v. Freestone County, 291 S.W. 529, 530 (Tex. Comm'n App. 1927, judgmn't adopted) (holding that neither the statute of limitation nor laches defenses are applicable to sovereignty); Bryant v. Mission Mun. Hosp., 575 S.W.2d 136, 138 (Tex. Civ. App.—Corpus Christi 1978, no writ) (noting that incorporated cities are exempt from cer-

law based power, is clearly one of the Attorney General's governmental roles. Furthermore, courts have held that "no length of diversion from the plain provisions of a charitable trust will prevent restoration to its true purpose."[52] Thus, the Attorney General may correct a diversion or misuse of charity assets many years after it occurs.[53]

From the mid-1800s until today, Texas courts have consistently treated charity dispositions with great deference and solicitude.[54] This deference has greatly promoted the goals of charity and aided the execution of the Attorney General's charity regulation duties.[55]

IV. THE VARIOUS FORMS OF CHARITY ADMINISTRATION

The purpose or mission of a charitable enterprise may be accomplished through a variety of means, and the assets may be adminis-

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tain defenses); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.061 (Vernon Supp. 2003) (listing the rights of incorporated cities not barred by statute).

52. William Buchanan Found. v. Shepperd, 283 S.W.2d 325, 336 (Tex. Civ. App.—Texarkana 1955), *rev'd by agr.* 155 Tex. 406, 289 S.W.2d 553 (1956).

53. *See generally* TEX. REV. CIV. STAT. ANN. art. 1396 (Vernon 2003) (indicating there is no bar or limitation to the time in which the Attorney General may bring a corrective action).

54. *See* Powers v. First Nat'l Bank of Corsicana, 137 S.W.2d 839, 842 (Tex. Civ. App.—Waco 1940) (noting the general presumption in favor of charity dispositions), *aff'd*, 161 S.W.2d 273 (Tex. 1942). In *Powers*, Justice Alexander eloquently stated that

> [i]t should be noted in the outset that charitable gifts and trusts are favorites of the courts. Voluntary gifts of this nature by those in comfortable circumstances for the relief of the poverty and distress of those less fortunate, or for bringing their minds and hearts under the influence of education and religion, or relieving their bodies of disease, suffering or restraint, evidence man's finest qualities. Moreover, they tend to relieve the government of a part of its responsibility to a portion of its citizens and thus reduce the general tax burden on the public. They are therefore to be encouraged rather than discouraged. Consequently, in passing on the validity of such gifts, every reasonable intendment, consistent with the terms and purposes of the gift, will be made, and every presumption consistent with the language used will be indulged, and the trust will be upheld and declared to be valid where it is possible to do so consistent with the established principles of the law. Of two possible constructions, the court will adopt that one which operates to sustain the trust or gift.

Id. at 841.

55. *See* Blocker v. State, 718 S.W.2d 409, 411 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (describing a breach of fiduciary duty action brought by the Attorney General against members of a non-profit corporation's board for inappropriate distribution of assets). *Blocker* held that "[b]ecause our law favors the protection and preservation of charitable trusts, the trial court properly impressed the assets of the dissolved HCM with a public charitable trust in perpetuity and correctly applied the doctrine of *cy pres*. . . ." *Id.* at 416.

tered in many forms: by non-profit corporations, trusts (inter vivos and testamentary), associations, cooperatives, lodges, and certain mutual entities. Even a simple gift of ten dollars given to a person who asserts that the gift will be used for some charitable purpose establishes or impresses a "constructive" charitable trust on that ten dollars for the intended purpose.[56]

Different Texas statutory titles and codes govern the administration of each of these various entities: non-profit corporations are governed by the Texas Non-Profit Corporation Act[57] and the Miscellaneous Corporation Laws Act;[58] express trusts by the Trust Code;[59] associations by the Unincorporated Non-Profit Association Act;[60] cooperatives by the Cooperative Association Act;[61] lodges and social welfare entities by Article 1399 of the Civil Statutes;[62] and charitable gift annuities by the Insurance Code.[63] For each of these forms of charity administration, the applicable statutory law is undergirded by the common law of charity, where not inconsistent or otherwise specifically made inapplicable.[64] For example, the common law doctrine of cy pres and its statutory em-

56. *See* Hull v. Fitz-Gerald, 232 S.W.2d 93, 99 (Tex. Civ. App.—Amarillo 1950) (describing a constructive trust as imposed on public policy grounds in order to prevent someone from improperly gaining a benefit "by reason of a fiduciary relation subsisting between him and those for whose benefit it is his duty to act"), *aff'd*, 150 Tex. 39, 237 S.W.2d 256 (1951).

57. TEX. REV. CIV. STAT. ANN. art. 1396-1.01 (Vernon 2003).

58. *Id.*

59. TEX. PROP. CODE ANN. § 111.001 (Vernon 1995).

60. TEX. REV. CIV. STAT. ANN. art. 1396-70.01 (Vernon 2003).

61. *Id.*

62. *Id.*

63. TEX. INS. CODE ANN. § 102.001 (Vernon 2003). While Texas chooses to categorize charitable organizations in one manner, the Internal Revenue Service opts to categorize charitable organizations in its own unique and complicated manner. *See generally* I.R.C. §§ 1-9833 (West 2001) (categorizing charitable entities in its own complex, arcane way). Although somewhat different from the asset protection duty of states' attorneys general, the IRS's duty is to ensure that entities truly qualify for the specific tax exemptions Congress has decreed. These exemptions have various application to: "public charities," "private foundations," "community foundations," "private operating foundations," "supporting organizations," "charitable remainder unitrusts," "charitable remainder annuity trusts," "charitable lead trusts," "pooled income funds," and "non-exempt charitable trusts," to name a few.

64. *Cf.* TEX. PROP. CODE ANN. § 5.042 (Vernon Supp. 2004) (illustrating that when the legislature desires to abolish common law doctrines, it does so specifically, as in the case of the common law rules such as the Rule in Shelley's Case and the Doctrine of Worthier Title).

bodiments generally apply to all charitable entities.[65] As discussed in this Article, the various statutory provisions guiding the managers and fiduciaries of Texas charity assets rarely address the Attorney General's role, or do so only peripherally, leaving such authority to the established common law.

V. STATUTORY PROVISIONS AFFECTING CHARITY OVERSIGHT

A. *Chapter 123 of the Texas Property Code*

The only specific set of statutory provisions pertaining to the Attorney General's charity regulation role is found in Chapter 123 of the Texas Property Code, which declares that the Attorney General is a proper party to defend "proceedings involving charitable trusts."[66] Chapter 123 defines "charitable trusts" to include all entities with a charitable purpose or which hold charitable trust funds, and defines "proceeding" to include most any judicial action which may affect a charitable interest.[67] The statute requires parties involved in a proceeding that may affect the charitable interest

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65. *See* City of Fort Worth v. Johnson, 38 S.W.2d 400, 403 (Tex. 1964) (explaining that a city is not subject to a bar by the statute of limitations when enforcing a zoning ordinance); McKinney v. Freestone County, 291 S.W. 529, 530 (Tex. Comm'n App. 1927, judgm't adopted) (holding that neither the statute of limitations nor laches defenses are applicable to sovereignty); Bryant v. Mission Mun. Hosp., 575 S.W.2d 136, 138 (Tex. Civ. App.—Corpus Christi 1978, no writ) (noting that incorporated cities are exempt from certain defenses); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.061 (Vernon Supp. 2003) (listing the rights of incorporated cities not barred by statute); *In re* Bishop College, 151 B.R. 394, 400 (Bankr. N.D. Tex. 1993) (stating that if a particular charitable purpose of a corporation becomes impossible or impracticable, under Texas law, the court will exercise its cy pres power and authorize another public charity that is as near as possible to the one designated). The doctrine of cy pres permits a court to give effect to the charitable purpose when the donor's intent cannot be carried out. 12 TEX. JUR., *Charities* § 16 (1993). For the doctrine of cy pres to be invoked, there are two prerequisites: (1) an established charitable intent; and (2) the charitable intent has failed. *Id.*

66. TEX. PROP. CODE. ANN. § 23.002 (Vernon 1995). The original text of the legislation provides that

> [i]t is the purpose of this Article to resolve and clarify what is thought by some to be uncertainties existing at common law with respect to the subject matter hereof. Nothing contained herein, however, shall ever be construed, deemed or held to be in limitation of the common law powers and duties of the Attorney General.

Tex. S.B. 126, 55th Leg., 1st C.S., 1957 Tex. Gen. Laws 204. The emergency clause of the Act stated: "The need for a clarification of possible uncertainties in existing law concerning the powers and duties of the Attorney General with respect to charitable trusts, creates an emergency. . . ." *Id.*

67. *See* TEX. PROP. CODE ANN. § 123.001 (Vernon 1995 & Supp. 2003) (providing a specific list of actions which constitute a "proceeding").

to provide notice of the proceeding to the Attorney General.[68] As a simple notice statute, Chapter 123 does not specifically assign the Attorney General any powers or authority other than to provide for venue and attorney's fees in actions brought by the Attorney General for breach of fiduciary duty.[69]

Chapter 123 allows the Attorney General to intervene in cases which may only indirectly involve charity interests. For example, in In re *Estate of York*,[70] the Attorney General was allowed to intervene in a determination of heirship proceeding in Charles York's estate in which he left a will providing a residuary gift to his mother, Myrtle York.[71] Myrtle York died soon after Charles, and her will contained a residuary gift to charity.[72] Because Charles's estate might pass to his mother's estate to then be given to charity, there was an interest sufficient to allow Attorney General intervention.[73]

Failure to properly provide the Attorney General with notice of charitable trust proceedings could be disastrous. Section 123.004(a) of Chapter 123 provides that "[a] judgment in a proceeding involving a charitable trust is voidable if the [A]ttorney [G]eneral is not given notice of the proceeding as required by this chapter. On motion of the [A]ttorney [G]eneral after the judgment is rendered, the judgment shall be set aside."[74] In conjunction with the inapplicability of statutes of limitations, estoppel, or laches, this is a very strong charity enforcement provision. Without the required notice, the Attorney General could conceivably sue to correct an improper modification or termination of a charitable

68. *Id.* § 123.003.

69. *Id.* § 123.005 (Vernon 1995 & Supp. 2003).

70. 951 S.W.2d 122 (Tex. App.—Corpus Christi 1997, no pet.).

71. *In re* Estate of York, 951 S.W.2d 122, 124-26 (Tex. App.—Corpus Christi 1997, no pet.).

72. *Id.* at 124.

73. *Id.* at 126; *see also* TEX. PROP. CODE ANN. § 123.005 (Vernon 1995 & Supp. 2003) (permitting the Attorney General to intervene in many probate and trust matters involving charitable dispositions). Processing the notices provided pursuant to Chapter 123, with the resultant interventions, account for approximately one-half of the Attorney General's charity regulation duties. Investigations of charitable entities, often from citizen or board member/fiduciary complaints, accounts for most of the other work.

74. TEX. PROP. CODE ANN. § 123.004(a) (Vernon 1995).

trust or other charitable interest long after the change occurred, even one approved by a court.[75]

The actual participation level of the Attorney General in Chapter 123 notice cases can vary considerably. The Attorney General may intervene as an active party to protect the subject charitable interest (sometimes as the only party with standing to do so), or simply waive further participation in the matter, usually when another party adequately represents the charitable interest.[76] In many instances, depending on many differing and variable circumstances, the Attorney General will intervene or simply monitor the proceeding in a role supportive of the charitable interest, allowing other responsible parties to lead the litigation. In proceedings involving an unrepresented charitable interest, the Attorney General will play a more active role.[77]

B. *The Texas Trust Code*

Charity assets are often dedicated to a particular purpose or to particular charitable entities by means of an express trust (i.e., the formal relationship established by a settlor designating a person or entity to serve as a fiduciary, the trustee, to provide a defined benefit for one or more beneficiaries).[78] Such trusts may be inter vivos or testamentary and may take many forms beyond that distinction.

Charity interests and the oversight function of the Attorney General are mentioned in only a few provisions of the Trust Code.

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75. *See e.g., id.* (demonstrating that an amendment by a trustee is effective when the original is filed with the Attorney General's office); *id.* § 123.002 (identifying the Attorney General as a proper party who may intervene in a proceeding involving a charitable trust). The Attorney General's Charitable Trusts Section customarily files a so-called "notify letter" letting the parties to the proceeding—and most importantly the court—know that the Attorney General has received Chapter 123 notification and is in the process of reviewing the matter to determine whether to intervene.

76. TEX. PROP. CODE ANN. § 123.002 (Vernon 1995). Though not required by Chapter 123 or other law, the "waiver" filed by the Attorney General is a courtesy apprising the parties and the court of the Attorney General's determination not to become involved in the subject proceeding. The Attorney General, as noted in the customary waiver, may withdraw the waiver and enter the proceeding if there is any change in the circumstances, the parties, or the relief sought.

77. For example, a probate proceeding involving a will contest in which the subject will contains a large bequest in trust simply "to charity" or "for the needy" and naming the will contestant as trustee would militate for very active Attorney General involvement.

78. *See* TEX. PROP. CODE ANN. § 111.004(4) (Vernon 1995) (defining what constitutes an express trust).

Most references to charity involve "housekeeping" measures which aid charities in preserving their federal tax exempt nature,[79] and the Attorney General is mentioned only by cross-referencing the notice requirements of Chapter 123.[80] The Attorney General's common law powers and authority over charity assets are not in any manner abrogated or infringed by the provisions of the Trust Code.[81] The Trust Code, in fact, defers to the common law as generally applicable to express trusts in the confusingly worded Section 111.005.[82]

C. *The Texas Non-Profit Corporation Act*

The Texas Non-Profit Corporation Act (NPCA)[83] applies to all non-profit corporations, including those organized as charities.[84] The NPCA applies when not inconsistent with other specific laws that apply to each type of non-profit corporation. In the case of a charitable non-profit corporation, the NPCA applies generally to its operations and corporate procedures, but the common law, unless clearly inconsistent with an NPCA provision, continues to ap-

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79. *See id.* § 112.055 (delineating amendments of charitable trusts by operation of law); *id.* § 112.056 (creating the requisite standards for permissive amendments by the trustee, including filing a duplicate with the Attorney General's office); *id.* § 112.058 (authorizing the conversion of a community trust to a non-profit corporation after following the delineated procedures); *id.* § 113.026 (listing the necessary applicable circumstances to designate a new charitable beneficiary).

80. *See* TEX. PROP. CODE ANN. § 115.011(c) (Vernon Supp. 2003) (ordering that the Attorney General shall be given notice of any proceeding involving a charitable trust); *id.* § 115.015(a)(2) (Vernon 1995) (requiring that a plaintiff in a contract action involving a charitable trust to give notice to the Attorney General).

81. TEX. PROP. CODE ANN. § 111.005 (Vernon 1995).

82. *See id.* (indicating that the statute generally defers to the common law). The statute reads: "If the law codified in this subtitle repealed a statute that abrogated or restated a common law rule, that common law rule is reestablished, except as the contents of the rule are changed by this subtitle." *Id.*

83. TEX. REV. CIV. STAT. ANN. arts. 1396-1.01 to 1407a (Vernon 2003). The NPCA will be re-codified into the Business Organizations Code, effective January 1, 2006. Adoption of the Business Organizations Code, 78th Leg., R.S., ch. 183, § 1, Tex. Gen. Laws 466.

84. *Id.* art. 1396-2.01(A). Though a great many non-profit corporations are also common law charities, an entity organized as a non-profit corporation is not necessarily such. *Cf.* Baywood Country Club v. Estep, 929 S.W.2d 532, 537-38 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (holding that a non-profit country club could not be a charitable non-profit corporation because club members possessed distribution rights upon dissolution). A non-charitable, non-profit corporation is usually a membership organization, the members of which have specific rights in the management of and assets held by the corporation (e.g. entitled to distribution on dissolution). *Id.*

ply to its assets.[85] Stated differently, the general doctrines of charitable trust law have not been abrogated by the NPCA, but have only been modified and refined by it.[86]

Significantly, the NPCA requires non-profit corporations to keep accurate and complete books, records, and financial statements.[87] The Attorney General, under the common law and the Texas Miscellaneous Corporation Laws Act (MCLA), has unfettered access to such corporate records, as does the general public in many instances.[88]

Ultimately, the NPCA and the MCLA allow the Attorney General to seek the appointment of a receiver to take over a non-profit corporation and rehabilitate its operations, finances, or business operations.[89] Such a receivership is akin to "corporate martial law": the court-appointed receiver assumes total control of the management and finances of the corporation until the court determines the future course of the corporation, such as whether to dissolve it or continue its operations and mission in some new form or

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85. *See* Holmans v. Transource Polymers, 914 S.W.2d 189, 192 (Tex. Civ. App.—Fort Worth 1996, writ denied) (stating that "[a]brogation by implication of a cause of action and remedy recognized at common law is disfavored and requires a clear repugnance between the common law and statutory causes of action").

86. *See* TEX. REV. CIV. STAT. ANN. art. 1396-2.28 (Vernon 2003) (announcing that the "General Standards for Directors" establish the circumstances under which individual board members may be held liable to the corporation or others); *see also id.* art. 1396-2.26 (noting that these standards are somewhat different than the common law fiduciary duties imposed on charitable trust trustees). However, the 1993 Comment of the Bar Committee notes that legal regimes other than the NPCA (i.e., the common law) have application to certain non-profit corporations (i.e., charitable ones). "Article 2.28 preempts other rules related to a trustee standard even though the corporation, as distinguished from its director[s], may hold or be deemed to hold property in trust or subject to restrictions." *Id.* art. 1396-2.28.

87. *See* TEX. REV. CIV. STAT. ANN. arts. 1396-2.23, 1396-2.23A (Vernon 2003) (outlining that each corporation shall maintain complete records of accounts and finances).

88. *Id.* arts. 1302-5.01 to 5.03.

89. *See id.* arts. 1396-7.04, 7.05 (recognizing the ability of the Attorney General to dissolve a non-profit involuntarily or to appoint a receiver to rehabilitate the non-profit corporation); Nacol v. State, 792 S.W.2d 810, 811 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (addressing the Attorney General's authority to protect and conserve the assets of a non-profit corporation after being appointed receiver); *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 66.001(4), (5) (Vernon 1997) (allowing a *quo warranto* action against a corporation that performs or fails to perform an act which requires the surrender of its rights as a corporation or when a corporation exercises powers not granted by law). In limited circumstances, generally ministerial in nature, the Texas Secretary of State also possesses the power to involuntarily dissolve a non-profit corporation. *Id.* art. 1396-7.01B.

under new direction.[90] A court may appoint a new board of directors to run the non-profit corporation in accordance with Texas law and the corporation's articles and by-laws.[91]

D. *The Texas Miscellaneous Corporation Laws Act*

Consistent with Article IV, Section 22 of the Constitution, the MCLA provides the Attorney General with various remedies, including the right to inspect and examine all books and records of corporations.[92] These broad powers are exercised over both for-profit and non-profit corporations.[93] The MCLA provides that the Attorney General may present a written request to the president or other officer of a corporation when the Attorney General desires to examine the business of the corporation, that is, without advance notice.[94] The failure to immediately permit the Attorney General to examine documents or other material may result in forfeiture of the right to do business in Texas and potential criminal liability.[95] Thus, the Attorney General uses the MCLA as a charity regulation tool to inquire into the mission activities of charitable corporations and to ensure that they otherwise appropriately conduct their operations as charitable, non-profit organizations.

The MCLA specifically provides the Attorney General with the remedies of receivership, *quo warranto*, liquidation, foreclosure, and other rights and remedies.[96] In support of the Attorney General's remedies, the MCLA establishes a lien on the assets of a corporation accused of violating state law.[97]

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90. TEX. REV. CIV. STAT. ANN. art. 1396-7.07 (Vernon 2003) (setting forth the general powers of a court-appointed receiver).

91. Greater Fort Worth v. Mims, 574 S.W.2d 870, 871 (Tex. App.—Fort Worth, 1978, writ dism'd). Note that in *Greater Fort Worth*, the court appointed the receiver sua sponte. *Id.*

92. TEX. REV. CIV. STAT. ANN. arts. 1302-5.01 to 5.03 (Vernon 2003). The MCLA will be re-codified into the Business Organization Code, effective January 1, 2005. Adoption of the Business Organization Code, 78th Leg., R.S., ch. 183, § 1, Tex. Gen. Laws.

93. *See* Humble Oil & Ref. Co. v. Daniel, 259 S.W.2d 580, 589 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.) (acknowledging that the State has "the undoubted right to require full information as to all of the business[es] . . . created by it or which it has permitted to come into the State").

94. TEX. REV. CIV. STAT. ANN. art. 1302-5.02 (Vernon 2003).

95. *See id.* (stating that it is "the duty of the officer or agent of any corporation . . . to immediately permit the Attorney General" to inspect any requested materials).

96. *Id.* arts. 1302-5.10, 5.11, 5.12, 5.14, 5.15.

97. *Id.* art. 1302-5.07.

E. *The Texas Deceptive Trade Practices Act*

The Texas Deceptive Trade Practices and Consumer Protection Act (DTPA)[98] provides the Attorney General with authority to investigate and take various actions against persons and entities violating its fraud and deception provisions.[99] The DTPA has been held to apply to non-profit organizations even if they provide "goods or services" at no charge.[100] An unresolved issue is whether "pure charity activities," such as collecting donations from individuals for purported charitable purposes, comes within the DTPA's "trade and commerce" definition. The DTPA should be applicable to a charity or a for-profit fundraiser for a charity that engages in false, misleading, or deceptive acts such as fraudulent solicitations for donations, whether or not a traditionally recognized "good or service" is offered as part of the solicitation. The assurance that a donation will be used for a particular charitable purpose is itself a valuable service, and the Attorney General assists in this by assuring that there is a fiduciary conduit through which a donor can provide the intended charitable benefit.

F. *Non-Profit Hospital Charity Care Requirements*

Non-profit hospitals in Texas are required by statute to provide free or reduced-cost care to indigent patients. Section 311.042 of the Health & Safety Code specifies the duties and responsibilities of non-profit hospitals in providing such care and defined "community benefits."[101] The availability and actual provision of "charity

98. TEX. BUS. & COM. CODE ANN. § 17.41 (Vernon 2002).

99. *Id.* § 17.46(a) (reserving enforcement of the DTPA to the "consumer protection division" of the Attorney General).

100. *See* Mother & Unborn Baby Care of N. Tex., Inc. v. State, 749 S.W.2d 533, 538 (Tex. App.—Fort Worth 1988, writ denied) (recognizing that transactions in goods or services subjects a person to liability under the DTPA).

101. TEX. HEALTH & SAFETY CODE ANN. §§ 311.042(2), 311.043 (Vernon 2001); *see also* State v. Methodist Hosp., No. 494,212 (126th Dist. Ct., Travis County, Tex. Feb. 19, 1993, appeal withdrawn/nonsuited) (refusing to recognize the Attorney General's ability to file suit against a non-profit hospital that fails to provide significant charity care). *But see* Kevin M. Wood, Note, *Legislatively-Mandated Charity Care for Non-Profit Hospitals: Does Government Intervention Make a Difference?*, 20 REV. LITIG. 709, 728-33 (2001) (noting the adverse legislative response to *Methodist* as new charity care legislation). The specific legislation that corrected the *Methodist* decision is Section 311.048 of the Texas Health and Safety Code, which reserves all "common-law rights or remedies available to the state. . . ." TEX. HEALTH & SAFETY CODE ANN. § 311.048 (Vernon 2001).

care," the provision of medical services to indigent patients, is the primary component of the law.[102] Texas is currently the only state with this type of non-profit hospital charity care legislation.[103]

The basic purpose of the law is to help ensure the provision of medical services for Texas communities in the face of the current health care crisis.[104] The basic premise of the law is to ensure that at least some of that care is provided on an actual charitable basis, that is, at no cost or reduced cost to indigent patients, as a part of the charitable mission of a non-profit hospital.[105] One underlying policy rationale for the charity care law was the recognition that taxing authorities annually forgo millions of dollars of tax revenues in the form of tax-exemption for non-profit hospitals.[106] The assumed quid pro quo—if not the consideration—for the tax exemption is the provision of a significant community benefit or the actual relief of a governmental burden.[107] Clearly it is appropriate to require such hospitals to perform charity care since this is contemplated in the stated charitable health care missions of most non-profit hospitals.[108]

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102. *See* TEX. HEALTH & SAFETY CODE ANN. § 311.031 (Vernon 2001) (defining charity care as providing medical services to those who are "financially indigent" or "medically indigent").

103. Other states have created specific charity care duties by case law, often in the context of entitlement to *ad valorem* (property) taxation exemption.

104. *See* TEX. HEALTH & SAFETY CODE § 311.041 (Vernon Supp. 2003) (stating that the purpose of the legislation is to "clarify and set forth the duties, responsibilities, and benefits that apply to hospitals for providing community benefits that include charity care").

105. *Id.* § 311.042(2).

106. *See* Kevin M. Wood, Note, *Legislatively-Mandated Charity Care for Nonprofit Hospitals: Does Government Intervention Make Any Difference?* 20 REV. LITIG. 710, 732 (2001) (discussing the value of community care benefits provided by non-profit hospitals in Texas vis-à-vis the tax benefits received by those hospitals and lamenting the fact that there is little reporting from the hospitals and that the tax benefits may outweigh the charity care provided).

107. TEX. TAX CODE ANN. § 11.18(d)(1) (Vernon 2001).

108. *See* I.R.C. § 501(c)(3) (West 2002) (identifying most non-profit hospitals as exempt from federal taxation). The Internal Revenue Service assesses the qualification for such tax exempt status under its own guidelines, which differ significantly from the general state common law requirements of charitable entities. *See e.g.*, Rev. Rul. 69-545, 1969- 2 C.B. 117, 1969 WL 19168 (providing an example of a non-profit hospital qualifying for a tax exemption); Rev. Rul. 83-157, 1983-2 C.B. 994, 1983 WL 190185 (supplying another hypothetical fact situation to determine whether a non-profit hospital qualifies for a federal tax exemption).

Specifically, the charity care law requires non-profit hospitals to annually provide a minimum amount of indigent care and care to patients who are sponsored by various governmental programs such as Medicaid.[109] The law prescribes several "community benefit standards" from which non-profit hospitals may choose, including community benefits amounting to 5% of net patient revenue, 4% of which must be care for indigent patients, or charity care equaling 100% of the hospital's tax-exempt benefits, excluding federal income tax.[110] The law also allows an amorphous "reasonable[ness]" standard in identifying the charity care to be provided in various community-relevant circumstances.[111] Non-profit hospitals are also required to prepare a community benefits plan, taking into consideration the health care needs of the community.[112] Hospitals must also post notices regarding the availability of charity care and shall file annual reports with the Texas Department of Health.[113] The Attorney General reviews the hospital filings with the Department of Health, and from other sources including the hospitals themselves, to ensure compliance with the law.

Hospitals in violation of this law are subject to losing their valuable state tax-exempt status.[114] Possibly more significant, hospitals are subject to breach of fiduciary duty lawsuits by the Attorney General for failure to comply with their general medical health care mission.[115] It has been the position of the Texas Attorney General, as well as other attorneys general, that non-profit, charitable hospitals should provide charity care and other community benefits in amounts as great as reasonably possible within corporate fiscal safety. Some of the factors to assess in making such determinations should include hospital resources and financial health,

109. TEX. HEALTH & SAFETY CODE ANN. § 311.043 (Vernon 2001).

110. *Id.* §§ 311.045(b)(1)(B), (C).

111. *Id.* § 311.045(b)(1)(A).

112. *Id.* § 311.044(a)(2).

113. *Id.* § 311.045(a).

114. *See* TEX. HEALTH & SAFETY CODE ANN. § 311.043(a) (Vernon 2001) (establishing requirements which must be met for a non-profit hospital to retain tax-exempt status). Such hospitals would then be required to pay property taxes, sales taxes, and franchise taxes. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 84 (Vernon 2003) (categorizing various charitable immunities and liabilities).

115. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 311.045(e), 311.046 (Vernon 2001) (allowing hospitals a safe haven once every five years). The tax exemption revocation (and likely other remedies) will not be applied if the hospital makes up for any *inadvertent* shortfall the next year, in addition to normal compliance with the law. *Id.* § 311.046.

the needs of the community, and the amount a hospital receives in tax exemptions and other governmental/public benefits.[116]

VI. Rights of Charity Donors and Other Potentially Interested Parties

Once assets are donated to charity, or otherwise become part of the corpus of a charitable entity, those assets, until expended, are dedicated in perpetuity for the stated charitable purpose. In light of the unique, quasi-public nature of charity, attorneys general have been held to have the exclusive right and duty to bring actions to correct alleged or potential violations of law regarding the management of the business or assets of charities.[117] This duty and right of action is afforded to attorneys general to the exclusion of members of the public, potential beneficiaries of the charity, heirs or successors of donors, and even the donors themselves.[118]

The law concerning the standing of charity donors, potential beneficiaries, and other parties is fairly uniform throughout the common law jurisdictions, including Texas. As discussed previously, attorneys general have traditionally fulfilled the duties of protector of public charity and charitable trusts. These exclusive duties preceded even the Statute of Elizabeth.[119] Other parties as-

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116. *See generally* Kevin M. Wood, Note, *Legislatively-Mandated Charity Care for Nonprofit Hospitals: Does Government Intervention Make Any Difference?*, 20 Rev. Litig. 709 (2001) (providing a review of Texas's non-profit charity care law with related discussions on state and federal tax exemptions for non-profit hospitals).

117. Nacol v. State, 792 S.W.2d 810, 812 (Tex. App.—Houston [14th Dist.] 1990, writ ref'd); Gray v. St. Matthews Cathedral Endowment Fund, Inc., 544 S.W.2d 488, 490 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); *see also* Botelho v. Griffen, 25 P.3d 689, 693 (Alaska 2001) (acknowledging the attorney general's role in the enforcement of charitable trusts); Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995, 999 n.6 (Conn. 1997) (addressing state law permitting the attorney general a role in actions involving charitable organizations); Loring v. Marshall, 484 N.E.2d 1315, 1322 (Mass. 1985) (asserting that the attorney general "alone represents the public interest"); Nixon v. Hutcherson, 96 S.W.3d 81, 84 (Mo. 2003) (recognizing that the attorney general is responsible for representing the public's interest).

118. *See Nacol*, 792 S.W.2d at 812 (indicating that when the charity is for the public's benefit, only the representative of the public may assert rights on behalf of the public).

119. *See* Vidal v. Girard's Ex'rs, 43 U.S. 127, 197-99 (1844) (providing a discussion of early American charitable trust law and pre- and post-Statute of Elizabeth law in the common law jurisdictions).

serting standing to vindicate those interests must have a relationship to the charity distinct from members of the general public.[120]

For example, in *Coffee v. William Marsh Rice Univ.*,[121] the Texas Supreme Court explained:

> There is much authority outside of Texas that the Attorney General is the representative of the public in suits to enforce or attack a charitable trust or to question the operation thereof . . . . While the Attorney General is not regarded as the only person who can bring suit, any other person must have some special interest in the performance of the trust different from that of the general public. The reason given is that if third parties could bring suit, the charities and their trustees would be subject to undue harassment.[122]

In *Coffee*, alumni of Rice University were allowed to participate in a cy pres action pertaining to various restrictions on the student body of the University.[123] The court held that the specific procedural posture of the litigation made it appropriate for the alumni to participate as litigants, but stressed that they could not have initiated the action themselves:

> The Attorney General and the intervenors Coffee et al. concede that to *initiate* any action to enforce or attack a trust, or to initiate any *cy pres* action, the suit may not be brought by third parties (such as intervenors Coffee et al.), and that such action must be brought or initiated by the Attorney General or by the trustees themselves.[124]

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120. *See* Lokey v. Tex. Methodist Found., 479 S.W.2d 260, 261 (Tex. 1972) (noting that to bring suit, a person must have some special interest distinct from the general public in the performance of the trust); *Nacol*, 792 S.W.2d at 812 (finding no special interest distinct from the general public). Of course, trustees, officers, and other managers of a subject charity would have standing to initiate certain types of litigation pertaining to a charitable trust/corporation and are necessary parties to any litigation appropriately brought by others. *See* TEX. PROP. CODE ANN. § 111.004(7) (Vernon Supp. 2003) (defining interested person); *id.* § 115.001 (indicating the parties necessary for a suit under a trust).

121. 403 S.W.2d 340 (Tex. 1966).

122. Coffee v. William Marsh Rice Univ., 403 S.W.2d 340, 343 (Tex. 1966) (citation omitted).

123. *Id.* at 340.

124. *Id.* at 343. The Attorney General and the other party agreed to allow the alumni to intervene and participate in the case. *Id.* at 341. In such matters where the Attorney General has not consented to participation, an intervenor would likely not have standing. *See* Howard Hughes Med. Ctr. Inst. v. Neff, 640 S.W.2d 942, 953 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (stating that third parties may not intervene in charitable trust litigation if named parties object). There are situations in which the granting of standing to private parties may be entirely antithetical to the public interest—matters involving scientific inquiry and research in which private party intervention is sought to control the

The court stressed the concern presented of allowing donors or beneficiaries to sue in such matters by stating that "[t]he policy behind the refusal to let others bring suit is to protect the trust and the trustees from harassment."[125]

The special interest of a potential charity plaintiff must be somewhat akin to that of a direct trust beneficiary with a legally enforceable right to benefit from the charitable mission of the trust.[126] The possibility of a benefit or even status as a class member who may benefit is not enough.[127] Moreover, it is firmly established that donors to charities, and even settlors of charitable trusts, do not have standing to direct the application of their gift unless they specifically reserve the right to do so.[128] For example, in *Carroll v. City of Beaumont*,[129] a corporation conveyed property to a city as a public

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scientific process, skew results, or otherwise control data. *Cf.* Cornyn v. Fifty-Two Members of the Schoppa Family, 70 S.W.3d 895, 900 (Tex. App.—Amarillo 2001, no pet.) (stating that a public interest in a public trust does not preclude donors of tissue samples and relatives of brain donors to an Alzheimer's research program from attempting to force the return of their donated samples). The court held that under certain circumstances a subset of the donors would have standing to seek the return of the brain and tissue samples. *Id.* at 901.

125. *Coffee*, 403 S.W.2d at 347.

126. *See* TEX. PROP. CODE ANN. §§ 111.004(7), 115.011 (Vernon 1995 & Supp. 2003) (defining "interested" and "necessary" parties in trust litigation).

127. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c. (1959); *see also* Hooker v. Edes Home, 579 A.2d 608, 611 (D.C. Cir. 1990) (holding that persons who receive advantages from the administration of a charitable trust do so because they are members "of a large and constantly shifting benefited class," not because they have a property interest in the trust property); Victims v. Funds, Third Parties, & Reeves County, Tex., 715 F. Supp. 178, 181 (W.D. Tex. 1989) (holding that the plaintiffs, who were victims of a tornado, were not entitled to sue for disbursement funds raised by a charity for victims of that specific tornado because they did not have a specific, personal claim to the funds). Thus, affording standing to individuals who may incidentally benefit from the trust would burden the trustee and trust corpus with undue harassment. *Hooker*, 579 A.2d at 612.

128. RESTATEMENT (SECOND) OF TRUSTS § 391 (1959); *see also Coffee*, 403 S.W.2d at 347 (noting the exception to the rule involving a settlor or donor who reserves a visitory or other right of intervention in the instrument creating the charity). A result contrary to *Coffee* was reached in a similar Connecticut case which did not involve the attorney general's consent. *See* Russel v. Yale Univ., 737 A.2d 941, 945-46 (Conn. App. Ct. 1999) (involving a case in which alumni donors, students, and the heir of a charitable trust settlor initiated a lawsuit contesting various actions of the Yale University School of Divinity, with the court holding that the settlor of the charitable trust did not retain a specific right to control the property, and thus, the heir did not have standing to contest the university's reorganization actions, and also holding that neither the alumni of unrestricted charitable gifts nor current students had standing). The petitioner claimed that a special interest gave him standing in the absence of the attorney general's participation. *Id.* at 943.

129. 18 S.W.2d 813 (Tex. Civ. App.—Beaumont 1929, writ ref'd).

charitable trust.[130] The city accepted the property and controlled it for many years.[131] Subsequently, several stockholders of the granting corporation sued the city, complaining about the administration of the trust and demanding an accounting and other relief.[132] The court of appeals, noting that the corporation reserved no rights in the fully executed gift, ultimately upheld the city's plea in abatement challenging the standing and capacity of the plaintiffs to bring the suit.[133] Absent such a special interest separating a potential plaintiff from the general public, such person would be a mere intermeddler in charity litigation.[134]

Further demonstrating the strictness of charity standing law is *Nacol v. State*,[135] in which the court held that individuals who were current members of a scientific, medical research charity did not have sufficient interest different from that of the general public to allow their intervention in litigation involving the appointment of a

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130. Carroll v. City of Beaumont, 18 S.W.2d 813, 819 (Tex. Civ. App.—Beaumont 1929, writ ref'd).

131. *Id.* at 814.

132. *Id.*

133. *Id.* at 819-20. In *Coffee*, the supreme court noted that in a private trust, where property is given for the benefit of a specific person or entity, the beneficiary or beneficiaries can enforce the execution of the trust. *See* Coffee v. William Marsh Rice Univ., 403 S.W.2d 340, 343-46 (Tex. 1966) (citing examples from case law in which beneficiaries were permitted to enforce the execution of trusts). The same is true in a suit by one claiming a reversionary interest in charity by reason of a private right of entitlement to the property as the result of a revision under the instrument that created the trust. *See* Stone v. Salt Lake City, 356 P.2d 631, 634 (Utah 1960) (noting that a donor can reserve visitory rights or impose conditions on a charity gift). The Utah Supreme Court observed that

> if he fails to [reserve rights or impose conditions], by his act of donating his money he manifests his decision to entrust the control and disposition of his funds to the [charity] and those who manage it. And the donor has no right to retrieve, control, or direct the manner in which the money so given shall be used simply because he has made such contributions to the [charity], nor because he is a member of the class which may be benefited by the carrying out of its purposes. This is in accord with the majority of the authorities, and what we believe to be the better considered view of the law.

Id.

134. *See* Gray v. Saint Matthews Cathedral Endowment Fund, Inc., 544 S.W.2d 488, 490-91 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (discussing the problems presented by third-party assertion of charity claims and holding that a church parishioner and former vestryman who was, *inter alia*, a successor trustee of the subject trust with a power of appointment, had sufficient special interest to litigate charitable trust matters).

135. 792 S.W.2d 810 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

receiver for the charity.[136] Only the Attorney General could prosecute such litigation.[137]

On the other hand, non-profit membership entities, which can sometimes also be considered common law charities, may be sued by their members for most causes of action available to the Attorney General.[138] These include civic clubs such as the Elks and Rotarians, some cooperatives, most homeowners' associations, and many religious organizations.[139] In such cases, the Attorney General often defers to the members in their attempts to vindicate their specific rights vis-a-vis the organization. In light of the number of charitable entities in the State of Texas, the Attorney General's efforts and resources are generally more appropriately expended in regulating and enforcing the obligations of charitable entities with no such membership base.

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136. Nacol v. State, 792 S.W.2d 810, 812 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

137. *Id.* However, not all jurisdictions always agree with the Texas position. *Compare* Weaver v. Wood, 680 N.E.2d 918, 923 (Mass. 1997) (stating that membership alone in a public charity does not rise to the level of standing needed to pursue claims that officials have acted beyond their actual authority or mismanaged the charitable organization), *with* YMCA v. Covington, 484 A.2d 589, 591-92 (D.C. 1984) (determining that plaintiffs fell within the special interest exception justifying standing to sue the YMCA for breach of charitable trust duty because they were members of the YMCA branch and entitled to use its facilities with more freedom than nonmembers).

138. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 1396-203(B)(1) (Vernon 2003) (stating that a member can enjoin the corporation from doing any acts, including the transfer of real or personal property); *id.* art. 1396-705(a)(1) (permitting the appointment of a receiver after an action has been brought by a member in which it has been established that the corporation is insolvent, the directors are engaged in a deadlock, the directors or those in control are acting illegally or fraudulently, or the corporate assets are being misapplied); *id.* art. 1396-2.23(B) (regarding the membership rights to review the books and records of non-profit corporations). Members usually possess the power to elect and remove the individuals sitting on the board of directors–the ultimate corporate corrective power. *See id.* art. 1396-2.15(D) (stating that a director can be removed from office by those who elected him).

139. Considering the state and federal constitutional provisions pertaining to church and state relations, religious membership entities present a special case for charity regulator non-involvement, particularly matters involving internecine doctrinal disputes. This topic is beyond the scope of this Article. However, note that religious organizations are usually considered per se charitable entities in the common law. *See* Hackfeld v. Ryburn, 606 S.W.2d 340, 342 (Tex. Civ. App.—Tyler 1980, writ dism'd) (stating that churches are considered charitable organizations).

VII. NON-PROFIT ENTITY CONVERSION TRANSACTIONS

An area of charity regulation that has received much recent attention, and which implicates many of the common law and statutory authorities discussed above, involves the conversion of charitable, non-profit entities to for-profit status.[140] Most recent Texas conversion transactions, those occurring in the last decade, have involved healthcare entities such as hospitals, hospital systems, and other medical, HMO, and insurance entities. The Texas Attorney General has actively monitored such conversion transactions.

A non-profit conversion takes place when a charitable entity alters its organizational status, structure, or obligations in any manner that may jeopardize the non-profit, charitable purpose of the entity or its charity-dedicated assets.[141] Most commonly, such conversions involve an outright sale to a for-profit entity of all the assets controlled by a non-profit entity.[142] Outright sales can take the form of an initial issuance of stock,[143] which is then sold to specific buyers or the public generally. Other such transactions, for example, may involve a unilateral organizational conversion to for-profit

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140. *See generally* Philip P. Bisesi, *Conversion of Nonprofit Health Care Entities to For-profit Status*, 26 CAP. U. L. REV. 805 (1997) (focusing on the surge in regulatory activity surrounding nonprofit conversions); Kevin F. Donohue, *Crossroads in Hospital Conversions—A Survey of Non-profit Hospital Conversion Legislation*, 8 ANNALS HEALTH L. 39 (1999) (discussing the status of conversion activity and relevant laws); Christopher W. Frost, *Financing Public Health Through Nonprofit Conversion Foundations*, 90 KY. L.J. 935 (2002) (discussing the process of converting from a non-profit to a for-profit organization and the laws relating to such transactions); Terri R. Reicher, *Assuring Competent Oversight to Hospital Conversion Transactions*, 52 BAYLOR L. REV. 83 (2000) (analyzing the conversion of non-profit to for-profit hospitals); Vincenzo Stampone, *Turning Patients into Profit: Non-profit Hospital Conversions Spur Legislation*, 22 SETON HALL L. REV. 627 (1998) (commenting on hospital conversions and the applicable state and federal guidelines).

141. *See* Terri R. Reicher, *Assuring Competent Oversight to Hospital Conversion Transactions*, 52 BAYLOR L. REV. 83, 87 (2000) (describing a non-profit conversion).

142. *See id.* at 87-88 (noting the typical form of non-profit conversion).

143. As payment of dividends or any other form of profit sharing is impermissible in the non-profit realm, non-profit entities do not generally issue stock. *See* TEX. REV. CIV. STAT. ANN. art. 1396-2.24 (Vernon 2003) (prohibiting the payment of dividends). In the rare instances that non-profit entities issue stock, the shares are essentially membership certificates. *See* Evans v. Bricker, 942 S.W.2d 794, 796 (Tex. App.—Beaumont 1997, no writ) (finding that even though there had been a distribution of stock, there was no distribution of benefits or income); Raulston v. Everett, 561 S.W.2d 635, 637-38 (Tex. Civ. App.—Texarkana 1978, no writ) (determining that the stock in the corporation was akin to a membership certificate rather than a right to receive dividends).

status (the non-profit entity becomes a for-profit one), partnering or joint venturing with a for-profit entity, or the sale of a for-profit subsidiary controlled by the non-profit entity.[144] Conversion transactions may take other forms; such transactions are limited only by the creativity of corporate counsel and other transactional specialists.[145] The Attorney General carefully reviews these transactions to ensure that the interests of the public in the charitable assets are protected and preserved.

Notice of a proposed transaction is an obvious precondition to any conversion review by the Attorney General. As there are no statutory requirements for Attorney General notice of such transactions,[146] the Attorney General often learns of such transactions from press reports or citizens' calls. It is certainly in the best interests of the transaction participants to quickly provide notification in light of the inapplicability of statutes of limitations or laches.[147] If the Attorney General learns of a transaction, even many years later, the circumstances may justify requiring additional consideration or even entirely undoing the transaction. A breach of fiduciary duty action could also result.[148]

Ultimately, the Attorney General is concerned with two aspects of conversion transactions: whether the fair market value of the

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144. *See* Terri R. Reicher, *Assuring Competent Oversight to Hospital Conversion Transactions*, 52 BAYLOR L. REV. 83, 88 (2000) (commenting on the fact that non-profit conversions are more recently taking the form of a joint-venture or partnership).

145. The IRS looms large over non-profit conversion transactions. Because non-profit entities generally desire to keep their valuable federal income tax exemptions as "public charities," converting entities must comply with IRS rules and regulations. The IRS has recently issued several rulings and has otherwise provided guidance in this area. *See* Rev. Rul. 98-112, 1998-1 C.B. 718, 1998 WL 89783 (discussing tax consequences of participation by hospitals in Section 501(c)(3) of the Internal Revenue Code in ventures with for-profit entities); *see also* St. David's Health Care Sys. v. United States, 2002 WL 1335230, at *1 (W.D. Tex. 2002) (relating to litigation over the involvement of a non-profit hospital with a for-profit entity and jeopardizing the non-profit hospital's tax-exempt status).

146. *See* TEX. PROP. CODE ANN. § 123.003 (Vernon Supp. 2003) (requiring litigants to provide the Attorney General with notice of actual judicial proceedings).

147. *See* McKinney v. Freestone County, 291 S.W. 529, 530 (Tex. Comm'n App. 1927, judgm't adopted) (holding that neither the statute of limitations nor laches defenses apply to the sovereign). *See generally* TEX. REV. CIV. STAT. ANN. art. 1396 (Vernon 2003) (indicating there is no time limitation placed on the Attorney General).

148. *See* John W. Vinson, *Perspective: A 'Major Revolution' in Texas*, HEALTH AFFAIRS, Mar.–Apr. 1997, at 99 (focusing on the cause of action employed by the Texas Attorney General in ensuring that board of directors follow the law).

assets is maintained in the "charity stream" (that the full value of the assets continues to be perpetually dedicated for charitable purposes), and whether the specific charitable use for which the converting entity's assets were dedicated is respected and continued (for example, that the proceeds from a sale of a non-profit hospital be used for similar medical and other actual healthcare purposes).

Ensuring that a proper valuation of the converting or selling non-profit entity is accomplished is vitally important.[149] An undervaluation of the charitable entity inures to the benefit of private interests and to the detriment of the public—the ultimate, beneficial owner of the charitable entity's assets.[150] In the case of an outright sale to a for-profit entity, an undervaluation of the non-profit results is a "gift" to the for-profit entity of the difference between market value and the consideration based on an improper valuation. Such a "gift" to a for-profit entity or its investors may also constitute illegal "private inurement" under federal tax laws, for which the IRS assesses severe penalties and possible revocation of the entity's federal tax exemption. There is also a potential for inappropriately advantageous board member/officer remuneration deals to be cut at the expense of the public interest in the charitable entity.

Although the members of a non-profit board are legally guided and constrained by their fiduciary duties, board membership is sometimes perceived as an emollient of community status that does not require much attention, time, or care. The common law and statutory fiduciary duties are sometimes seen as trite beatitudes to be ignored when inconvenient. In situations where some or all of the board members or officers of the converting non-profit entity continue to serve in similar positions with the newly created for-profit entity, receiving a price fair to the community and general public may be of little concern to such a non-disinterested negotiator.[151] As there are no owners or stockholders of a non-profit corporation, no one other than the Attorney General has standing to contest the sale price or consideration aspect of a sale or merger.

149. *See id.* at 100 (discussing the valuation process and the need for a proper valuation of assets in a health care conversion).

150. *See id.* (explaining the problems that can arise if the valuation of the charity is too low).

151. *See id.* at 100-01 (describing potential conflicts of interest of board members during a health care conversion).

Situations such as this militate for careful Attorney General participation and monitoring. The Attorney General will often engage valuation experts such as investment bankers or business appraisers to assist in the valuation review process, if only to review the valuations or opinions obtained by the non-profit converting entity.

The Attorney General's second major concern in conversion transactions is the post-conversion use of the conversion proceeds. In accordance with the common law of charitable trusts (the cy pres doctrine), and the Texas Non-Profit Corporation Act,[152] the proceeds from the sale of a non-profit entity must continue to be used for a similar non-profit purpose. Under Texas law, a non-profit entity is essentially impressed with an obligation to use its assets in comportment with the entity's articles of incorporation, and certain of such assets may be dedicated by individual donors to a specific charitable purpose.[153] In the hospital sale or merger situation, the sale proceeds must be used for non-profit, healthcare purposes.[154] Substantial donations to a community theater, art museum, or other entity with no conceivable relation to the hospital's former community health care mission may be improper and subject the entity to corrective action by the Attorney General. Removal of charity assets from the community in which a non-profit entity operated for many years may also be a breach of fiduciary duty. The mission of the converting entity may be express in this regard, or the implied "contract" with the state and the general public may be that the assets would be used in the specific community in perpetuity.[155] The assets of such entities are usually derived

152. *See* TEX. REV. CIV. STAT. ANN. art. 1396-6.02A(3) (Vernon 2003) (stating that the remaining assets of the corporation shall be distributed only for tax exempt purposes to one or more organizations which are exempt under Section 501(c)(3) of the Internal Revenue Code).

153. *See* Blocker v. State, 718 S.W.2d 409, 415 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (holding that directors of a dissolved charitable organization were under a statutory duty to distribute the remaining assets of a charitable organization with a similar purpose).

154. *See* John W. Vinson, *Perspective: A 'Major Revolution' in Texas*, HEALTH AFFAIRS, Mar.–Apr. 1997, at 100 (relating the Texas Attorney General's role in maintaining the integrity of charitable assets for charitable purposes); *see also* Richard C. Allen, *Perspective: The Massachusetts Experience*, HEALTH AFFAIRS, Mar.–Apr. 1997, at 85, 87 (referencing requirements that the resulting proceeds after a conversion must remain dedicated to charitable purposes).

155. *See* Banner Health Sys. v. Long, 663 N.W.2d 242, 250 (S.D. 2003) (recognizing that the assets of a non-profit corporation or proceeds from the sale of those assets may be

from the local community, through client/patient payments, fundraising efforts, and general philanthropy.[156]

VIII. CONCLUSION

As seen in the non-profit entity conversion context, the power and authority of the common law office of the Attorney General as overseer of charitable organizations and assets is quite broad. The Texas Attorney General has enjoyed such authority and thereby provided great public benefit for many years—at least this writer hopes this is so. For public policy reasons and in light of the importance of charity, such oversight should be expansively interpreted and implemented. There is no other governmental entity willing, equipped, and able to assert this oversight role.

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subject to an implied or constructive charitable trust, even in the absence of an express trust agreement).

156. See John W. Vinson, *Perspective: A 'Major Revolution' in Texas*, HEALTH AFFAIRS, Mar.–Apr. 1997, at 99 (identifying typical fundraising approaches taken by non-profit organizations). Many of the issues involved in the non-profit conversion context, and those of charity law generally, were dealt with in the Third District Court of Appeals at Austin case of *Abbott v. Blue Cross & Blue Shield of Tex., Inc.*, 113 S.W.3d 753 (Tex. App.—Austin 2003, pet. filed). The matter involved whether Blue Cross of Texas was a charitable entity when it converted to mutual insurer status in its merger with Blue Cross of Illinois. *Id.* at 756. The Attorney General argued that Blue Cross Texas was a charitable, non-profit corporation, while the Blue Cross representatives argued that it was a non-charitable, non-profit corporation. *Id.* The court held that the Attorney General had "failed to demonstrate that the evidence establish[ed], as a matter of law, all vital facts necessary to support his position that [Blue Cross Texas] was a public charity." *Id.* at 766. The Attorney General is seeking review in the Texas Supreme Court. If the Attorney General prevails, more than $590 million, paid over twenty years, will become available for charitable health-related purposes in Texas.