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THE ADMINISTRATION OF TRUSTS AND ENDOWMENTS IN SCHOOLS OF THE UNITED STATES

by

Russell Francis Gearin

A Dissertation Submitted to the Faculty of the

DEPARTMENT OF EDUCATIONAL ADMINISTRATION

In Partial Fulfillment of the Requirements
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GRADUATE COLLEGE

I hereby recommend that this dissertation prepared under my direction by Russell F. Gearin

entitled The Administration of Trusts and Endowments in Schools of the United States

be accepted as fulfilling the dissertation requirement of the degree of Doctor of Education

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*This approval and acceptance is contingent on the candidate's adequate performance and defense of this dissertation at the final oral examination. The inclusion of this sheet bound into the library copy of the dissertation is evidence of satisfactory performance at the final examination.

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ABSTRACT

Throughout their history, the public schools of the United States have been publicly supported and publicly controlled. Today, a great amount of support comes from private sources. The ever-increasing amounts of money contributed to public education is of particular concern to those who are charged with the responsibility for the administration of these funds. School districts, as quasi corporations with limited power granted by the state, are finding a need for legislation to implement the use of these funds.

There is little consistency among the states in the administration of gifts to public elementary and secondary schools. Mention is made in the legislation of some states concerning gifts or endowments at the college or university level. It is seldom mentioned in connection with elementary and secondary schools.

Courts distinguish between outright gifts and gifts which are actually charitable trusts under the protection of the Attorney General. The common law in some states and legislation in others provides this protection. Many states employ a doctrine called cy-pres which helps to perpetuate the charitable trust by substituting a beneficiary or a trustee when the trust is in danger of failing because the expressed grant by the donor cannot be given literal effect.

Despite the protection of the Attorney General, it has become apparent to most observers, and it is conceded by many who have served or who are presently serving as Attorneys General, that a lack of budget and staff combined with a lack of information have denied supervision to charitable trusts. Yet, the Attorney General is the only one considered to be the proper party to bring an action in twenty-two states which follow the common law.

Any trust administered by a school is considered to be administered by the state, for public schools are state institutions. It follows, therefore, that a public school cannot be a party, through its acceptance of a gift in trust, of anything that is in violation of the rights of individuals under the United States Constitution.

Private gifts to public schools must not contain restrictions in violation of the Fourteenth Amendment of the United States Constitution nor is it constitutional to appoint private persons as trustees in an attempt to circumvent the law. When a charitable trust is administered by the state or one of its agencies, the trust is given a public character which cannot be taken from it.

It is lawful for a state agency, with the approval of the state a. a court of equity, to assist a charitable trust in the distribution of funds but any further action on the part of the state or its agency to exercise custody and control of the charitable trust has been held an unconstitutional taking of private property.

Although a few states subscribe to a Uniform Trust Act, there is a need for this legislation in all states. Such legislation makes mandatory the presence of the Attorney General or his duly appointed representative to oversee all actions involving charitable trusts and to supervise such trusts by requiring registration, annual audits and annual reports.

CHAPTER I

INTRODUCTION

An examination of the statutes of the various states reveals great disparity in the laws regulating the administration of gifts to public elementary and secondary schools. These schools are, at times, the beneficiaries of devises, endowments, or funds left in trust for the benefit of the schools and their educational activities.

The diversity of gifts made to schools and the amount of funds involved increases constantly. The Harold Steele Elementary School in Tucson, Arizona, for example, is the beneficiary of a bequest in the amount of $36,000 as residuary legatee in a will probated in Michigan. The city schools of Macon, Georgia, administer a trust fund to maintain a public zoo. The right to solicit, receive, administer, or terminate these private funds is dependent primarily upon existing statutes.[1] This is of particular importance, since school districts, as quasi

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1. Carter Oil Co. v. Liggett, 371 Ill, 482, 21 N. E. 2d 569 (1939); People ex rel Biddison v. Bd. of Educ. of Paris Union High School Dist., 256 Ill. 568, 99 N. E. 659 (1912); Superior Oil Co. v. Harsh, D. C., 39 F. Supp. 467, Affirmed 126 F. 2d 572 (1941).

corporations,[2] may exercise only those powers expressly given by statute or necessarily implied in the powers granted.

The amounts of money contributed to education in general and schools in particular is of increasing concern to those who are charged with the responsibility of the administration of these funds.

The Problem

The primary purpose of this study is to identify and describe the legal principles which affect the administration of trusts and endowments in elementary and secondary schools. It is also concerned with how gifts to these schools are received, the legal implications of such receipt and the administration and accountability of the trustee.

Background of the Study

Current problems in financing an ever-increasing program at all levels of education have emphasized the need for finding new sources of revenue. In the field of public education this has involved the solicitation and use of private funds. It is significant that in the three-year period ending in 1966, elementary and secondary schools in the United States received approximately $17 million in foundation grants for public education. This amounted to 11 per cent of the total foundation grants to

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2. People v. Furman, 26 Ill. 2d 334, 186 N. E. 2d 262 (1963); Lehigh Coal and Navigation Co. v. Summit Hill School District, 289 Pa. 75, 81 (1927).

education. Higher education received $63 million during this period of time, or 40 per cent of the total educational grants. Endowments, not popular in foundation gifts, reached $10 million or 7 per cent of the total.[3]

Funds in large amounts have usually gone to the colleges and universities. However, with the tremendous growth of education and the ever-increasing awareness of the importance of the early and formative years to the child and his education, private funds now seek to aid public education at all levels of development. It is the manner in which such funds are presented to the school that is the primary concern of this study, as well as the procedure prescribed for the administration of these funds. There is every reason to believe that funds for education will continue to affect the public school. "Charity has been called the fourth largest industry in the United States. Some ten billion is contributed to charity each year by the American public."[4]

Scope and Limitation of the Study

This study is concerned with the legal conditions which affect the administration of trusts and endowments in the elementary and

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3. M. O. Lewis, ed., The Foundation Directory, Edition 3 (New York: Russell Sage Foundation, 1967) pp. 36-38, 45-47.

4. Lois G. Forer, "Relief of the Public Burden; The Function and Enforcement of Charities in Pennsylvania" 27 Univ. of Pittsburgh Law Review 751 (1966).

secondary schools and is limited to such gifts. Constitutional provisions and probate records are beyond the scope of this study. Nor is this study concerned with private trusts, except in those instances where a comparison serves to provide a basis for understanding or differentiation.

Research in this field is, of course, limited to available sources. Legal encyclopedias, restatements of the law, statutes, legal periodicals, digests, reporting systems, and collections of annotated cases provided information basic to this study.

Questions That Guide the Study

Questions that guide the course of this study are:

(1) What provisions are established in the law for the solicitation, administration and auditing of private funds contributed to public schools?

(2) To whom, if anyone, does the responsibility belong for carrying out the wishes of the donor?

(3) To what extent may public funds be expended in the solicitation of private or government funds?

Significance of the Study

The school administrator must be knowledgeable in matters concerning the obtaining of funds, both public and private, and skilled in the management and accounting of these funds as required in the law.

The significance of this study is in the assistance it offers in its treatment of educational trusts and endowments to those charged with the responsibility of administering them.

Also, the need for a uniform act for state supervision is made more apparent. With such an act the Attorney General would supervise charitable trusts and protect them from special interests of trustees, donors and tax collectors.

Prior to 1950, many tax-saving devices were possible in connection with charitable trusts. It was a device for reducing annual income taxes, avoiding estate taxes and retaining and increasing capital. The Revenue Act of 1950 had a punitive effect on charities since tax-exempt status could be lost when the trustee violated terms of the Act. It is also possible that this possible loss of tax-exempt status because of the wrongful act of a trustee could discourage charitable contributions.

Assumptions

For the purpose of this study two assumptions are made: (1) statutes, court decisions, and the opinions of Attorneys General are binding on school districts; (2) in the absence of charitable trust legislation, the court will follow the common law governing charitable trusts.

Definitions of Terms Used

Assignment. A transfer or making over to another of the whole of any property, real or personal. A transfer by writing, as distinguished from one by delivery.[5]

Bequest. A bequest is defined as a gift by will of personal property.[6]

Residuary bequest. This is a gift of all of the remainder of the testator's personal estate, after payment of debts and legacies.[7]

Charitable gift. In a legal sense, every gift for a general public use, to be applied with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint.[8]

Common law. As distinguished from law created by legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing,

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5. Black's Law Dictionary (Third Ed.; St. Paul: West Publishing Company, 1933), p. 155.

6. Ibid., p. 210.

7. Ibid.

8. Ibid., p. 312.

affirming and enforcing such usages and customs; and in this sense, particularly the ancient unwritten law of England.[9]

Convey. To pass or transmit the title to property from one to another; to transfer property or the title to property by deed or instrument under seal.[10]

Cy-pres. As near as (possible). The rule of cy-pres is a rule for the construction of instruments in equity, by which the intention of the party is carried out as "near as may be," when it would be impossible or illegal to give it literal effect.[11]

Devise. A testamentary disposition of land or realty; a gift of real property by the last will and testament of the donor.[12]

Eleemosynary corporation. A private corporation created for charitable and benevolent purposes.[13]

Endowment. The act of settling a fund, or permanent pecuniary provision, for the maintenance of a public institution, charity, college, etc.[14]

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9. Ibid., p. 368.
10. Ibid., p. 431.
11. Ibid., p. 497.
12. Ibid., p. 572.
13. Ibid., p. 650.
14. Ibid., p. 660.

Equitable. Just; conformable to the principles of justice and right.[15]

Equitable assignment. An assignment which, though invalid at law, will be recognized and enforced in equity.[16]

Equity. The synonym of natural right or justice. In this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals.[17]

Fiduciary. A person is a fiduciary who is invested with rights and powers to be exercised for the benefit of another person. As an adjective it means of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence.[18]

Gift. A voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money. As distinguished from a gift in trust, it is one where not only the legal title but the beneficial ownership as well is vested in the donee.[19]

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15. Ibid., p. 672.

16. Ibid.

17. Ibid., p. 673.

18. Ibid., p. 774.

19. Ibid., p. 843-4.

Jurisdiction. The power and authority constitutionally conferred upon, or existing in, a court or judge to pronounce the sentence of the law, or to award the remedies provided by law. . . .[20]

Trust. A right of property, real or personal, held by one party for the benefit of another.[21]

Charitable trust. Trusts designed for the benefit of a class or the public generally. They are essentially different from private trusts in that the beneficiaries are uncertain.[22]

Constructive trust. A trust raised by construction of law, or arising by operation of law, as distinguished from an express trust. Wherever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment.[23]

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20. Ibid., p. 1038.

21. Ibid., p. 1759.

22. Ibid.

23. Ibid.

Educational trust. Trusts for the founding, endowing and supporting of schools for the advancement of all useful branches of learning, which are not strictly private.[24]

Trustee. The person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another called the cestui que trust.[25]

Organization of the Study

The following general outline will be followed in reporting this study:

Chapter II reviews the literature pertaining to private gifts to public education. Devises and bequests to education are reviewed to provide insight into the data analyzed in this study.

Chapter III presents an analysis of the legality of trusts and endowments when established for the benefit of public schools. The solicitation and management of these funds are also considered.

Chapter IV presents a summary, conclusions and recommendations for further study. It also reviews some of the unresolved problems in this field.

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24. Ibid., p. 1760.

25. Ibid., p. 1763.

CHAPTER II

REVIEW OF THE LITERATURE

There is virtually no literature concerning trusts and endowments which is directly pertinent to elementary or secondary schools. However, there is a wealth of material on devises and bequests to education and this is reviewed to provide insight into the data analyzed in conducting this study.

The General Nature of Gifts to Education

The Endowment

In 1800, total college endowment was not more than $500,000. Endowments for elementary and secondary schools were, it seems, non-existent for all practical purposes. Indeed, while some gifts may have been given to these schools, they were apparently not of such import or quantity as to warrant recording. By 1900, college endowments had increased to $165 million. Endowments at this time contributed about 20 per cent of the total operating budget of higher education. It was at this time that the great foundations became active.

To increase the amount of existing endowments was seen as the way to solve the problems of higher education. One of the leaders in

encouraging endowments and in stimulating drives for their development was the Carnegie Foundation for the Advancement of Teaching.[1] Carnegie was outstanding in the support he gave to education, both public and private, frequently utilizing the device of matching funds.

Traditionally, gifts to higher education have taken the form of the endowment, and the laws of the respective states are fairly consistent in providing legislation for the acceptance and administration of such gifts at the college or university level. There is an equally consistent lack of such legislation for the public elementary and secondary schools.

The Foundation

The swift expansion of our country in the early 1900's helped to create tremendous personal fortunes and many endowments to education resulted. When these fortunes continued to multiply despite the usual attempts to spend accumulated surplus, it became necessary to use business methods to provide for an effective disposition of such huge sums of money. Boards of directors and managers were employed to solve the problem. Thus the foundation came to be, arising from many varied and basic industries in our country.

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1. F. Emerson Andrews, Philanthropic Giving (New York: Russell Sage Foundation, 1950), p. 70.

In the first ten years of this century at least sixteen foundations were established. Seventy-five were established in the next ten years, and more than double that number between 1920 and 1930. Americans give about $8 billion to charity each year. Foundations give about $400 million or 5 per cent of the amount.[2] There are about 6,000 charitable foundations in the country today. Carnegie, Ford, and Rockefeller still lead the list with well above a hundred million dollars in each fund. Their holdings amount to more than two billion dollars and are responsible for a hundred million dollars a year in philanthropy.

The impact of foundations upon the development of education in America is beyond measure, and it is important to note that public institutions will find an ever-increasing need for such private funds.

The concept of a foundation has considerable appeal to those who are interested in philanthropy because the law provides an opportunity whereby the foundation can become a permanent institution.

Rules Against Perpetuities

Early in British legal history, it became necessary to curtail the abuse of placing an encumbrance on property by setting a limit beyond which such a restriction was not enforceable. This was known as the

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2. Joseph C. Kiger, "Foundations," The World Book Encyclopedia (1968), VI, 369-370.

Rule Against Perpetuities.[3] This simply required that a gift or a transferred interest must vest absolutely in some person or persons within a certain time, usually measured by a life or lives in being and twenty-one years. This is the common law rule, and approximately two-thirds of our states follow this rule. The remaining states have modified the rule to some extent.[4]

In the presence of such a rule, how can foundations become permanent? The answer lies in a legal fiction which defines a corporation as "a person," infinite though its life may be. Because any interests transferred to a corporation vest immediately, the Rule Against Perpetuities is satisfied.

The Charitable Trust

In creating a trust, the intent of the donor is that the principal is to be kept intact and that it be used for one or more particular purposes. A charitable trust creates a relationship which is present despite the size of the charity or the class of persons benefited.[5]

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3. W. Barton Leach, "Perpetuities in a Nutshell," 51 Harvard Law Review 638 (1938).

4. Donald F. Turner, (ed.), "The Modern Philanthropic Foundation; A Critique and a Proposal," 59 Yale Law Journal No. 3, (Feb. 1950).

5. Merrill Freed, (ed.), "Supervision of Charitable Trusts," 21 Univ. of Chicago Law Review 118 (1953).

Where a court ruling identifies a gift as a charitable trust, the Attorney General may enforce any restrictions accompanying the gift. Also, the property would be subject to the claims of creditors, statutes concerning gifts in trust, and the prohibition against commingling these funds with general funds, as well as the right of the Attorney General to recover the property if it were transferred.

The issue is placed in doubt when restrictions are placed upon the purpose of the gift and thereby control its use, or where directions are given to invest the principal and use the interest or income. In these instances, there is a division of authority as to the nature of the interest created.[6] Scott states that a charitable gift is not created.[7] However, another authority, Bogert, is of the opinion that a charitable trust may be created.[8]

A gift in trust to a charitable institution appears to be the same as an absolute gift because the use is similarly limited to the purpose of the institution. The principal distinction to be made is that when a gift is absolute, the use of the principal is unrestricted.

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6. American Law Institute, Restatements of the Law of Trusts (St. Paul: American Law Institute Publishers, 1935), p. 1093.

7. Austin Wakeman Scott, Law of Trusts, First Edition (Boston: Little, Brown and Co., 1939), sec. 348.1.

8. George Gleason Bogert, Handbook of the Law of Trusts (St. Paul: West Publishing Co., 1942), 1031, sec. 324.

Property is usually transferrable to a charitable institution in one of three ways. First, the gift may be absolute and unrestricted. In this case the donee is free to use the gift as he desires. Second, the purpose of the gift may be stated, and in this way the use of the gift may be limited but not necessarily the amount of the principal that may be spent. Third, instructions may be given to invest the principal and use the income derived therefrom to support any of the institutional purposes or for a particular purpose desired by the donor.[9]

However, the mere fact that property is conveyed to a charitable institution with requirements that it be used for one of the authorized purposes of the institution, is not sufficient to establish a charitable trust.[10]

The essential feature of a charitable trust is that it is broad in scope and not confined to a privileged few but rather, is available to a reasonably well-defined class of the indefinite public. It is this very lack of restriction that gives it a public character.[11]

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9. George M. Dell (ed.), "Trusts - Gifts to Charitable Corporations," 26 So. Calif. Law Review 80 (1952-1953).

10. Town of Winchester v. Cox, 129 Conn. 106, 26 A. 2d 592 (1942).

11. Waterbury Trust Co. v. Porter, 131 Conn. 206, 38 A. 2d 598 (1944).

Background on Trusts

Historically, uses and trusts were introduced into England shortly after the Norman Conquest. The use was a general or passive trust in which the trustee had no active duties but was merely a receptacle of the legal title for the beneficiary of the trust.

In feudal times, when one person transferred his legal title to property to another person and relied upon the promise of the transferee to hold the property for the "use" of some third person, the law courts would decree that the holder of the legal title was the absolute owner and no recognition was given to any obligation arising from his promises. The courts of equity then acted, and without disturbing the legal title directed the transferee to perform his promises and hold the property for the "use" of the parties equitably entitled to it. Property owners quickly saw this as a means of retaining control over the use and disposition of their property simply by imposing enforceable restrictions on the holder of the legal title. Some of these were designed to last for centuries with a consequent effect of curtailing the rights of subsequent owners. The courts acted to stop this abuse. Their action resulted in the Rule Against Perpetuities which has previously been mentioned. Other rules were also created against restraints on alienation of property and against the accumulation of income. As part of the common law of England, these rules found their way to the United States, where they have remained in effect despite some modification through legislation and judicial interpretation.

Equity, as it is known in the American judicial system, was adopted almost completely from the English system of equity jurisprudence. Despite the protection given to it by courts of equity, the trust is actually a common law structure. The courts have generally held charitable trusts to be exempt from the Rule Against Perpetuities, and this exemption is embodied in the laws of our several states, thus limiting the use of the trust property to the purpose intended by the grantor without limit of time.

In allowing charitable trusts of unlimited duration, the risk is accepted that with the passage of time the use of trust funds stipulated by the grantor may become impractical if not impossible. A vast amount of litigation testifies to the problem thus created. The courts, in seeking to grant relief, have determined that a trust for a charitable purpose should not fail, and, accordingly, have applied the doctrine of cy-pres.

Cy-Pres

The rule of cy-pres is a rule for the construction of instruments in equity by which the intention of the party is carried out as "near as may be," when it would be impossible or illegal to give it literal effect.

In the application of this doctrine, the courts have spoken at some length. Opinions range from an outright refusal to accept the doctrine to a very liberal application of its precepts. Because of the importance of this doctrine to school administrators, it will be considered at

some length with particular attention to those states whose courts have given direction or further clarification to this doctrine.

California: The courts of California hesitate to employ the doctrine of cy-pres in cases where the gift fails from the beginning.[12] A general charitable intent must first be demonstrated by the testator bequeathing his property to charity.

Colorado: This state will follow the doctrine of cy-pres only when it is apparent that the original purpose cannot be accomplished.[13]

Connecticut: When the intentions of the testator would fail of accomplishment because of the method used by the testator to carry his general intent into effect, the court will act. However, the Superior Court of Connecticut has stated that the doctrine of cy-pres arises from, and is limited by, the necessities of the particular case.[14]

Illinois: Where a charitable purpose cannot be carried out, an equity court in order to carry out a more general charitable purpose may decree the sale of trust realty, even where there is an express prohibition against sale.[15]

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12. In re Black's Estate, 27 Cal. Rptr. 418 (1962).

13. City and County of Denver v. Currigan, 362 P. 2d 1061 (1961).

14. Hinkley Home Corp. v. Bracken, 152 A. 2d 325, (1959).

15. City of Aurora ex rel Egan v. Young Men's Christian Assoc., 137 N.E. 2d 347 (1956).

Iowa: In a case involving the Iowa State Public School Fund concerning a testator's wish to promote instruction in vocal music and proper development of the lungs, the court considered whether vocal music would tend to proper development of the lungs and decided to uphold the bequest insofar as was possible.[16]

Kentucky: A Kentucky court pointed out that an essential condition in the application of the doctrine of cy-pres is that the testator manifested a general charitable intent not restricted to one particular organization.[17] This doctrine has no application where an alternative disposition of the property is provided for should the original disposition fail. The alternative must be recognized.[18]

Louisiana: Here the court ruled that where a testamentary provision was concerned with providing for destitute orphans and a secondary purpose of building a home for such a purpose, and where this latter purpose could not be accomplished, trust funds from the sale of the property could not, under the equitable principle of cy-pres, be given to the Young Men's Christian Association, a university educational fund, or to the Boy Scouts of America, Inc. Although these are worthy organizations there is

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16. Eckles v. Lounsberry, 111 N.W. 2d 638 (1961).

17. Defenders of Furbearers v. First Nat'l Bank and Trust Co. of Lexington, 306 S.W. 2d 100 (1957).

18. Ibid.

a continuing need of care for destitute orphans and funds could be given to such institutions.[19] Thus, if a fund with an alternative disposition is bequeathed to a school, failure of that school to continue to exist would not authorize use of the doctrine of cy-pres or the alternative dispositions as long as the primary wish of the testator could be realized.

Maine: The courts of Maine establish three requirements as basic to the application of cy-pres:[20]

(1) The court must find that the gift created a valid charitable trust.

(2) It must be established that it is to some degree impossible, or impractical, to carry out the specific purpose of the trust.

(3) There must be a general charitable intention.

Maryland: This state applies the doctrine of cy-pres to both an absolute bequest to a charitable corporation and to a bequest in trust. When a charitable institution ceases to exist and such dissolution precedes the date of the devise, the doctrine of cy-pres will be applied.[21]

Miller v. Mercantile Safe Deposit and Trust Co. sets a precedent for one educational institution to be substituted for another which has

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19. In re Succession of Milne, 89 So. 2d 281 (1956).

20. Petition of Pierce, 136 A. 2d 510 (1957); First Portland Nat'l Bank v. Kaler-Vaill Memorial Home, 151 A. 2d 708 (1957).

21. Miller v. Mercantile Safe Deposit and Trust Co., 168 A. 2d 184 (1961).

ceased to exist when it can be shown that a conformity with the testator's intentions would result.

Massachusetts: The work of the school is more important than the school itself. This conclusion is based upon an important Massachusetts case. We can also infer that a bequest to enable a school to purchase books, supplies, and equipment need not fail because the school might cease to exist. The court held that a bequest to a charitable, nonprofit institution showed a general charitable intent and that the particular institution was not of the essence of the gift. Thus, the gift did not fail when the institution did not continue in service.[22]

However, it is generally true that where the charitable purpose is limited to a particular object or institution, and there is no general charitable intent, if the institution should fail or if it becomes impossible to carry out the object, the cy-pres doctrine will not apply, and the legacy will lapse.

Michigan: A trust will not fail if the amount of money left by the testator is insufficient to satisfy the purpose of the trust completely. Where an educational trust in Michigan directed that twenty-four scholarships be established and there was an insufficient sum of money to

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22. Anna Jaques Hospital v. Attorney General, 167 N.E. 2d 875 (1960).

accomplish this, the court directed that the funds be applied as far as they would go and that the students be billed for the balance.[23]

Missouri: In 1962, in a case involving property given to a public charity, a Missouri court held that the Attorney General could enter a suit to prevent diversion of property to purposes other than those for which it was given. The court is privileged to act when unforeseen circumstances, not anticipated by the grantor, arise to terminate a charity. Here, the court of equity held that the doctrine of cy-pres was applicable[24] and that the court of equity has the power to alter or amend administrative details in the performance of a charitable trust.[25]

New Jersey: More than administrative details were involved where a college limited to one field of study sought to accept, under the doctrine of cy-pres, a gift to a college offering a combined course field of study. A New Jersey court denied the request.[26]

New York: A court is not obliged to recognize and enforce a contract involving the sale of a school's assets and the transfer of its

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23. Knights of Quity Memorial Scholarships Commission v. University of Detroit, 102 N.W. 2d 463 (1959).

24. Voelker v. Saint Louis Mercantile Library Assn., 359 S.W. 689 (1962).

25. Reed v. Eagleton, 384 S.W. 2d 578 (1964).

26. Montclair Nat'l Bank and Trust Co. v. Seton Hall College of Medicine and Dentistry, 217 A. 2d 897 (1966).

endowment funds from a private to a public institution where it has discretion in the application of the cy-pres doctrine.[27]

A general charitable trust was created by deed in the state of New York when a grantor erected buildings to be used as schools and conveyed them to the commissioners of the common schools without any conditions or limitations. This gift was subject to the cy-pres doctrine.[28] The court held that where there is a gift or grant to a city, town or board of education in trust for general charitable or educational purposes, title vests in the devisee or grantee and the conditions of the trust must be carried out. However, where circumstances change so that it is no longer possible or practical to carry out the terms of the trust, a case is made out for the application of the doctrine of cy-pres.

The courts of New York will usually apply the cy-pres doctrine if the donor's specific directions are impractical or impossible to carry out. In these cases the courts will look to the general intent of the testator. Where a testator left a fund to a school district for an athletic field, grand stands, and other facilities, and where the fund was

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27. In re Heffron's Will, 156 N.Y.S. 2d 779 (1956); Education Law, New York, sec. 354, subd. 2.

28. Application of Bd. of Educ. of Utica City School Dist. 184 N.Y.S. 2d 735 (1959); Education Law, New York, sec. 2502 subd. 1, 2503 subd. 6.

enhanced about three times before it vested, the court held that it was a correct expenditure of the fund for the purposes directed by the testator and for additional facilities such as field houses, gymnasium, swimming pool, cafeteria, and other facilities and equipment.[29]

Ohio: Even though it is possible to carry out the donor's wishes, if the particular purpose or the manner of administration is impracticable, the court will act on a petition of cy-pres to change or deviate from the prescribed procedure set forth by the donor. An example of this exists in a case in which the testator desired to provide an education by setting up a school with certain courses. Since it was impossible to follow the exact method outlined by the testator, the court allowed a change from the operation of a school to the operation of a scholarship foundation.[30]

Pennsylvania: Although it could be shown that modern educational methods and concepts were superior to those being employed, a Pennsylvania court held that the doctrine of cy-pres could not be used to effect a change

a. in the absence of a showing that the policies and methods of the testator are inherently harmful and

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29. In re Earl and Mabel Nellis Athletic Fund of Canajoharie Cent. School Dist. No. 1, 247 N.Y.S. 2d 752 (1964); Education Law of New York, sec. 408, 1701, 1804, 3702, 2703.

30. Kingdom v. Saxbe, 161 N.E. rd 461 (1958).

b. where adoption of such modern concepts would require changing an express provision of the will.[31]

The court allowed a change in the use of funds given by a testator for the purpose of constructing a school building and a gymnasium when it could be shown that cost and need indicated the wisdom of a different use of the funds. It was pointed out that

a. The academy or boarding school had an adequate gymnasium constructed since testator's death, and

b. existing infirmary facilities were inadequate and this represented the greatest need on campus, and

c. since any structure essential to the orderly and safe operation of a school must be classified as a school building, and

d. through other contributions for that purpose an infirmary could be constructed debt free, and

e. testator conferred discretion upon the academy's trustees in the determination of the type of building to be constructed.[32]

The extent to which a court will go in allowing the use of the doctrine of cy-pres is well illustrated in a case wherein the testatrix did not name the school or college to receive an endowment fund which she created to assist worthy students. The Pennsylvania court held that the doctrine would apply and the fund would be held by Pennsylvania trustees

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31. Girard Will Case, 138 A. 2d 844 (1958), 359 U.S. 84 (1958).

32. In re Hoffman's Estate, 15 D. & C. 2d 295 (1958).

and the income disbursed according to the will, to women students of the community as indicated by the testatrix.[33]

Rhode Island: This state followed the rule of "general charitable intent" when it applied the cy-pres doctrine to control the disposition of a trust when the specific charity, a school, ceased to exist.[34]

South Carolina: Here the court looks to the purposes intended by the charitable trust, and if it is necessary to carry out those purposes, the court will allow deviation from the terms.[35]

Tennessee: Although the courts of Tennessee do not follow the doctrine of cy-pres as it was known in England, neither are the courts bound by rigid rules of construction which ignore substance for mere matter of form.[36] Where the terms of a charitable trust called for the construction of a charity hospital and the funds were used to construct a charity wing on an already existing hospital, the court held that this was not a prohibited application of the cy-pres doctrine but constituted,

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33. In re Barclay's Estate, 18 D. & C. 2d 489 (1959).

34. New England Yearly Meeting of Friends v. Anthony, 186 A. 2d 349 (1962).

35. Furman University v. McLeod, 120 S. E. 2d 865 (1961) citing 14 C. J. S. Charities sec. 48.

36. Hardin v. Independent Order of Odd Fellows of Tenn., 370 S. W. 2rd 844 (1963).

rather, a correct application of funds for the exact purpose and use as directed by the creators of the trust.[37]

Washington: the courts of the state of Washington, while recognizing the doctrine of cy-pres, insofar as it reflects the intention of the testator, are like Tennessee in that they oppose any degree of "prerogative power" as it was known and practiced in England in connection with the doctrine of cy-pres.[38] Prerogative law is that part of the common law which refers to the rights or capacities of the sovereign.

Wisconsin: This state will follow the cy-pres doctrine only when circumstances have made it impossible to carry out the intent of the testator.[39] It is considered an error to invoke this doctrine in the absence of necessity, since to do so would permit the court to substitute its judgment and discretion for that of the testator. Where a testator has given an alternative in the disposition of his estate, such alternative must be examined and found impossible, illegal or impracticable before the court will resort to cy-pres.

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37. Bell v. Shannon, 367 S. W. 2d 761 (1963).

38. Puget Sound Nat'l Bank of Tacoma v. Easterday, 350 P. 2d 444 (1960).

39. In re Berry's Estate, 139 N. W. 2d 72 (1966).

The doctrine of cy-pres has been put in statutory form in some states.[40] The law of New York states:

> The Supreme Court shall have control over gifts, grants, and devises in all cases . . . and whenever it shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant, or devise to religious, educational, charitable or benevolent uses as to render impracticable or impossible a literal compliance with the terms of such instrument. . . .[41]

Testamentary Trusts

Chambers, in a review of eight testamentary trusts,[42] points out that uncertainty is not the formidable trap for the destruction of intended charitable trusts that it was a half century ago. Today, it is highly unlikely that a court would hold that specific definitions and detailed plans are essential to the validity of a trust instrument. "When a charitable purpose has been clearly expressed, the donor may delegate to the trustee full discretion regarding the selection of the beneficiaries and the management of the funds." Chambers states further:

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40. In re Boyer's Estate, 123 Cal. 614, 56 P. 461 (1899); Ford v. Thomas, 111 Ga. 493, 36 S. E. 841 (1900); Calif. Probate Code sec. 101; Ga. Code 1933 sec. 108-202; Minn. St. 1927, sec. 8090-3; Pa. 10 P. S. sec. 13, 15; W. Va. Code 1939, sec. 3502; Wis. St. 1941, sec. 231.11 (d).

41. New York Real Property Law, sec. 113. In re Brundage's Estate, 101 Misc. 528, 167 N. Y. S. 694 (1911).

42. M. M. Chambers, "Charitable Trusts for Student Aid," School and Society (January 16, 1960), 31-33.

Table 1. State Courts Observing the Doctrine of Cy-Pres

(Reported Cases)

ALABAMA	X	MONTANA	
ALASKA		NEBRASKA	
ARIZONA	X	NEVADA	
ARKANSAS		NEW HAMPSHIRE	X
CALIFORNIA	X	NEW JERSEY	X
COLORADO	X	NEW MEXICO	
CONNECTICUT	X	NEW YORK	X
DELAWARE	X	NORTH CAROLINA	
FLORIDA		NORTH DAKOTA	
GEORGIA	X	OHIO	X
HAWAII		OKLAHOMA	
IDAHO		OREGON	
ILLINOIS	X	PENNSYLVANIA	X
INDIANA		RHODE ISLAND	X
IOWA	X	SOUTH CAROLINA	X
KANSAS		SOUTH DAKOTA	
KENTUCKY	X	TENNESSEE	
LOUISIANA	X	TEXAS	
MAINE	X	UTAH	
MARYLAND	X	VERMONT	
MASSACHUSETTS	X	VIRGINIA	
MICHIGAN	X	WASHINGTON	X
MINNESOTA	X	WEST VIRGINIA	X
MISSISSIPPI	X	WISCONSIN	X
MISSOURI	X	WYOMING	

> . . . the statutes touching the administration of charitable trusts vary greatly among the 50 states, and in but few states is there a central administrative or research office which has even part of the facts regarding the thousands of such trusts extant in the state. . . .
>
> Unknown thousands of charitable trust instruments are mostly in the archives of probate courts, scattered across the nation in 3,000 county court houses.

Attorney General Opinions

Robert Bushnell, former Attorney General of Massachusetts, in his report to the legislature, stated:

> The Attorneys General have had neither sufficient information about the 'funds' referred to nor personnel to enforce their application and prevent breaches of trust in their administration, even if the necessary information had been available.
>
> The Public Charities within the concern of the Attorney General 'may be more fully defined as a gift to be applied for the benefit of an indefinite number of persons.'[43]
>
> How many testators have left funds or other property to be charitably used for that 'indefinite number of persons'?
>
> How many estates should now receive the attention of the Attorney General equipped to perform his duties to the fullest extent?
>
> How much money is at present lost to the charitable purposes for which it was intended?
>
> What 'funds' are there--and where are they--of which the Attorney General should be enforcing due application or preventing breaches of trust in the administration thereof?[44]

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43. Jackson v. Phillips, 14 Allen 539, Mass. (1871).

44. Robert Bushnell, "Report and Recommendations for Legislation of Former Attorney General Bushnell, Reprinted from Public Document No. 12," 30 Mass. Law Quarterly 22 (May, 1945).

The Hon. Harry McMullan of North Carolina is quoted as follows:

> No notice has ever been given this office by any clerk of the superior court under G. S. 36-20 that any charitable trust is being violated in any county, and no action has ever been brought by the State under authority of this section. I am not informed as to the extent which charitable trusts comply with the provisions of G. S. 36-19 in the various counties of the State but I am of the opinion that very few reports have been filed as required by this section.[45]

Indiana has a comprehensive statute such as that in North Carolina, but the Attorney General wrote, "I know of no specific instance in which any proceeding was instituted as a result of information sent by a court."[46]

The Attorneys General of Ohio, Indiana, Nevada, Wisconsin, Texas, and North Carolina do not inspect or investigate any sort of records, but rely for the most part on complaints.[47]

In New Hampshire, which has a model Supervision of Charitable Trust Act, the Attorney General has written:

> Trust funds which lay dormant for years came to life again for the benefit of charities. . . . Probate accounts by trustees became more numerous and complete.[48]

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45. Freed, p. 123.

46. Ibid.

47. Ibid., p. 122.

48. Ibid., pp. 128, 129.

Summary

The role of the public elementary and secondary school as donees of private funds is a relatively new one. Traditionally, endowments and trusts were almost exclusively bestowed upon colleges and universities. Many of these endowments and trusts have come from large foundations. Because of the charitable nature of the foundation, the law looks upon it in its corporate status as "a person" and it is thus able to accept permanent transfer of funds without violating the Rule Against Perpetuities.

The responsibility of the school administrator or school district in accepting a gift is determined by the kind of gift it is. No duties accompany the outright gift. Responsibility and fiduciary status accompany the endowment and the trust.

Since gifts to schools can often present a problem in carrying out the wishes of the testator, the court of equity in most states will use the doctrine of cy-pres to prevent the gift from failing. This includes altering it from an administrative point of view so that it can be carried out. In this way, petition can be made when a school ceases to exist, to have the endowments or gifts transferred to another school of similar circumstances.

Because of the doctrine of cy-pres, there is much less chance of a gift for charitable purposes failing today than was the case fifty

years ago. A clear charitable intent must be shown as a first requirement in the application of this doctrine.

Statutes vary greatly among the fifty states in the administration of charitable trusts. Unknown thousands of charitable trusts lie dormant in the probate courts throughout the country. Attorneys General, in the majority of cases, do not have the knowledge or the staff to adequately administer and enforce charitable trusts.

CHAPTER III

ANALYSIS OF DATA

This chapter considers the legality of trusts and endowments for the benefit of the public schools as well as court decisions and legislation which affect their creation, and the administration of trusts where school administrators or school boards are the trustees. Consideration is also given to limitations placed upon the solicitation and management of such funds.

Legality of Trusts and Endowments

Elementary and Secondary Schools

Early in the history of our country, public schools were regarded as pauper schools, and those who could do so relied upon private facilities. Property owners resisted the expenditure of public funds for the improvement of the schools; the wealthy avoided them because of their inadequacy, and the general public because of their taint of pauperism.[1] Obviously, these were not the conditions which would create a loyal and generous graduate body. This loyalty was given primarily to colleges

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1. Dwight Lowell Dumond, A History of the United States (New York: Henry Holt and Co., 1942), p. 305.

and universities and philanthropy, usually from individuals, took various forms. Chief among them was the endowment. Another type of philanthropy which created a fiduciary responsibility was the trust.[2] By contrast a clear gift is without any obligation upon the part of the donee.

Gift or Trust

The distinction between these philanthropies is often a cause of adjudication. Thus, the Supreme Court of the state of Missouri held that a devise to a charitable institution without reservation or limitation, authorizing the executor to dispose of the property as he might think best, and to use the proceeds for the purpose of the charitable institution in the manner thought best by the institution, was a clear gift and not in the nature of a charitable trust.[3]

However, a court in Nebraska ruled that a devise or bequest, though in form an outright gift, when made to an institution whose sole reason for existence and whose entire activity is charitable, is in purpose and effect a "charitable gift," and in such cases a recipient takes

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2. Walter G. Hart, "What is a Trust?" 15 Law Quarterly Rev. 301 (1899).

3. National Board of Christian Women's Board of Missions of the Christian Church of the United States v. Fry, 239 S. W. 519, 293 Mo. 399 (1922).

not beneficially, but as a trustee to use the funds in furtherance of the charitable purpose.[4]

The seeming contradiction with the Missouri case is explained by the manner of the giving and the freedom of the executor to dispose of the property as he thought best, and by the lack of restraint upon how the institution would use the gift. It is reasoned that if the gift were made, and in the manner of the Nebraska case, the donee would be expected to use the gift to fulfill the purpose of the institution thereby showing a trust intent. This seems to be the thinking of the court in an Ohio case wherein the provision in a will directing that proceeds derived from the sale of certain personal property should be paid directly to certain designated chapters of the Red Cross constituted a direct gift and not a "charitable trust."[5]

The Supreme Court of the state of Washington pointed out that "Neither intent to create a trust nor the use of the word 'trust' compels a finding that a trust has been created."[6]

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4. In re Halstead's Estate, 46 N. W. 2d 779, 783, 154 Neb. 31 (1951).

5. American National Red Cross v. McCoy, (Ohio) 19 O. L. A. 603 (1935).

6. Merritt-Chapman & Scott Corp. v. Public Utility Dist. No. 2 of Grant County Washington, 237 F. Supp. 985 (1961).

Also, a deposit made by an individual, with an endorsement to be paid after death to another individual, does not create a tentative trust.[7]

Gifts given in outright terms to a charitable donee have been held "subject to trust," or a trust has been implied. Thus, a Minnesota court ruled that a devise to an institution whose sole reason for existence and whose entire activity is charitable, is a "charitable trust" in purpose and practical effect, though the devise is in form an outright gift.[8]

There is ample precedent for such decision. In 1714, a deed was executed in Rhode Island conveying land to a grammar school master of the town of Bristol for the instruction of the children of the town. This was held a gift which created a public charitable trust.[9] Similarly, a deed conveying land to trustees of a named school district and their successors created a charitable trust for educational purposes.[10]

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7. In re Choma's Estate, 64 Lack. Jr. 137 (1963).

8. In re Peterson's Estate, 202 Minn. 31, 277 N. W. 529 (1938); Matter of Syracuse Univ. (Hendricks), 1 Misc. 2d 904, 148 N. Y. S. 2d 245 (Sup. Ct. Onondaga County, 1955) aff'd., 4 N. Y. 2d 744, 148 N. E. 2d 911 (1958) (where gift was given as an endowment a trust was implied).

9. Town of Bristol v. Nolan, 53 A. 2d 466, 72 R. I. 460 (1947).

10. Duffee v. Jones, 68 S. E. 2d 699, 208 Ga. 639 (1952).

Trusts, Express and Implied[11]

Dependent upon the method of origin, trusts are described as express or implied. A trust is created by a statement in which the owner of the property declares his intention to hold the property in trust for another person, by a transfer of the property to one who will hold it in trust for the beneficiary, and by a contract in which the maker of the trust pays money to one who will hold it in trust for a third person.

In addition to the above, there are some trusts which have no written evidence or oral statement showing a trust intent. These are called implied trusts.[12] Here the court infers that from certain acts the parties intended a trust to exist. These acts must exhibit an intent for an express trust to take effect and to that end the property involved is very definitely described.[13] It is not necessary that particular language be used to convey the trust as long as the intent can be recognized.[14]

The State as Trustee

The New York Court of Appeals has held that a state agency can obtain the right to administer and disburse trust income. The donor of a

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11. American Law Institute, sec. 1.

12. Lovett v. Taylor, 54 N. J. Eq. 311, 34 A. 896 (1896).

13. Pratt v. Griffin, 184 Ill. 514, 56 N. E. 819 (1900).

14. Martin v. Moore, 49 Wash. 288, 94 P. 1087 (1908).

charitable trust may name the State or one of its agencies to act as trustee.

State schools, colleges and universities accumulate many endowments from private gifts and accordingly become trustees of the funds. This issue was decided in a case involving the sale by Syracuse University of the physical assets of its college of medicine to the trustees of the State University of New York. Included was the payment by the seller to the State University of New York, of the income of the medical college endowments for the use of the college.[15] The courts of the state approved the terms of the transfer as to the income of most of the charitable trusts. In one case, however, approval was lost by a four to three vote of the judges. This case turned on whether the donor intended his gift to be conditioned on the continuance of the medical schools as part of Syracuse University. Accordingly, the trust failed since it could not comply with the exact terms of the will.[16]

In 1952, the state of Maryland attempted to control the endowment funds of the University of Maryland. Transfer of control of the endowment funds to the board of regents from a private charitable

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15. In re Hendrick's Will, 171 N. Y. S. 2d 863, 4 N. Y. 2d 744, 148 N. E. 2d 911 (1958), affirming 3 A. D. 2d 890, 161 N. Y. S. 2d 855 (1957), which affirmed 1 Misc. 2d 904, 148 N. Y. S. 2d 245 (1955).

16. Application of Syracuse University, 171 N. Y. S. 2d 545, 3 N. Y. 2d 665, 148 N. E. 2d 671 (1958), reversing In re Heffron's Will, 2 A. D. 2d 466, 156 N. Y. S. 2d 779 (1956).

corporation which had acted in behalf of the funds since 1893, was termed an unconstitutional act by the Maryland Supreme Court which stated:

> The power to alter or repeal such a charter is not unlimited. It cannot be exhorted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or to make alterations arbitrarily that are inconsistent with the scope and object of the charter, or to destroy or impair any vested property right.[17]

M. M. Chambers, in an article concerning the agency of the state in matters of charitable trust, commented on the Maryland case as follows: "This reasoning seems to imply a belief that donors to the endowment funds are entitled not only to have them administered for the purposes for which they were given, but also by the identical agency originally created for that purpose, a doctrine which is seriously questionable."[18]

When a state created a new board of governors to govern what had been a privately controlled university, but where the original corporation remained in control of the funds acquired from private sources and also acted in an advisory capacity to the new board so that the charitable trusts of long standing which composed the aggregate of the university's private endowment continued unimpaired under the trusteeship

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17. Board of Regents of the Univ. of Maryland v. Trustees of Endowment Fund of the University of Maryland, 112 A. 2d 678 (1955).

18. M. M. Chambers, "The State as Agent for Charitable Trusts," School and Society (Sept. 26, 1959), 358-360.

of the same corporation, the acceptance of this act by the old board of trustees does not constitute an abandonment or a violation of the trusts. So ruled the New Jersey Supreme Court in the famous Rutgers University case.[19]

A further case, usually cited as authority in the transfer of property involving endowments and trusts, concerned Cincinnati College, a private corporation, from which property and funds were transferred to the University of Cincinnati, a municipal institution. It was held that this was an unconstitutional taking of private property, thus preventing the merger of these institutions in that manner.[20]

It can be assumed that where a private charitable trust seeks to transfer its responsibilities to a state agency, it can do so. However, the private charitable trust may not divorce itself completely from its responsibilities. The procedure to be followed in order to have the substitution of the stage agency acceptable would be to first obtain the approval of the state and then the court of equity to allow the payment of the income from the endowments and trusts to the state agency for further disbursement. Custody and control of the endowment funds and trusts must be retained by the private institution.

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19. Trustees of Rutgers College in New Jersey et al, v. Richman et al (N. J. Super. Ct.) 125 A. 2d 10 (1956).

20. State ex rel White v. Neff, 52 Ohio St. 375 (1895), 40 N. E. 720, 723.

The Lowell case in Arizona concerned the supervision and administration of a trust. The court held that state courts, by virtue of their common law and equity powers, have jurisdiction to supervise and control the administration of a trust which is charitable and of a public nature and by virtue of this power may act to prevent the misuse or the abuse of a trust and may also enforce its execution.[21]

Jurisdiction of Courts

A question of jurisdiction arises when a gift in the nature of a charitable trust involves a beneficiary in a jurisdiction foreign to that of the donor. However, because of rather consistent findings in such matters, it may now be considered a general rule that the courts of the donor's jurisdiction will merely supervise the carrying out of the donor's wishes concerning the establishment of a charitable trust. It will leave to the courts of the jurisdiction in which the beneficiary resides the matter of seeing to the proper application of the assets and the administration of the trust. The rule will be followed unless there has been some expression to the contrary by the settlor or the testator.[22]

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21. Lowell v. Lowell, 29 Ariz. 138, 240 P. 280 (1925).

22. Beidler v. Dehner, 178 Ia. 1338, 161 N. W. 32 (1917); Burbank v. Whitney, 41 Mass. 1, 24 Pick. 146, 35 Am. Dec. 312 (1871); Chamberlain v. Chamberlain, 43 N. Y. 424 (1871).

Persons Entitled to Enforce Charitable Trusts

Whatever remedy exists for the school administrator or school board who have reason to believe that the acts of a trustee are limiting the advantages which their schools should be sharing under a trust depends upon the law of the particular state in which the trust property is located. The common law recognizes that the Attorney General is the only authority which the court will recognize as a proper party to enforce a charitable trust, and this is true in twenty-two states.

A Pennsylvania case sets forth the position of the Attorney General most clearly. Petitioner, a public charity not named in the will and so not a party in interest, sought to have an award of surplus funds set aside since it had not received notice of the audit regarding said funds. The court held that since the charitable trust could not be carried out in conformity with the wishes of the testator, the doctrine of cy-pres was applicable and it became the duty of the Attorney General, representing the public interest, to supervise the application of the cy-pres doctrine and the Attorney General, in this capacity, is the only one with actual standing and the only one to whom formal notice must be given.[23]

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23. In re Nevil's Estate, 51 Del. Co. 58, Penn., (1963).

Function of the Attorney General

In addition to the interest of the courts in seeking to prevent a charitable trust from failing, the Attorney General is also an interested party, since charities are matters of public interest, welfare, and safety.

There is an historical basis for the position of the Attorney General in matters of public charity or charitable trusts. Dale R. Martin mentions this history as follows:

> There is general accord that the Attorney General, as the chief law enforcement officer of the state, shall represent the public when a will makes provision for a public charity or charitable trust. This right is predicated on the ancient English doctrine that the king, as 'parens patria' through his officer the Attorney General, watched over the administration of charities.[24] Since charities are matters of public concern, the Attorney General is a necessary party to any matter dealing with them.[25]

The charitable trust is valid at Common Law. With the decision in Vidal v. Girard's Executor it was made clear that in those states recognizing charitable trusts, the Attorney General has exclusive responsibility for their enforcement.

States and the Common Law

There are eight states in which the Attorney General is charged with complete responsibility for carrying out the requirements of a

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24. Commonwealth v. Gardner, 327 S. W. 2d 947, 74 A. L. R. 2d 1959 (Ky. App. 1959).

25. Dale R. Martin, "The Attorney General and the Charitable Trust Act," 14 Cleveland-Marshall Law Review (1) 194, (Jan., 1965).

charitable trust or for removing a negligent trustee from his responsibility. These states are as follows: Florida,[26] Georgia,[27] Michigan,[28] Minnesota,[29] New York,[30] North Carolina,[31] South Carolina,[32] and South Dakota.[33]

While the legislatures in fourteen states have not acted on this subject, the courts of those states have upheld the common law concept of the duties and responsibilities of the Attorney General. California, however, which originally upheld the rule in Geo. Pepperdine Foundation v. Pepperdine[34] overruled this decision in a later case,[35] but for ten years it was law in California.

The original case in 1954, held that the Pepperdine Foundation was a charitable trust, the beneficiaries of which were an indefinite

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26. Fla. Stat. sec. 737 (1964).

27. Ga. Code Ann. sec. 108-212 (1959).

28. Mich. Stat. Ann. sec. 26.1200 (4)(a,b) (Supp., 1965).

29. Minn. Stat. Ann. sec. 501.12 (1947).

30. New York Pers. Prop. Law sec. 12-4 (Supp., 1965).

31. N. C. Gen. Stat. sec. 36-19-23 (1950).

32. S. C. Code Ann. sec. 1-240 (1962).

33. S. D. Code, cit. 59.0603 (Supp., 1960).

34. Geo. Pepperdine Foundation v. Pepperdine, 126 Cal. App. 2d 154, 271 P. 2d 600 (1954).

35. Holt v. College of Osteopathic Physicians and Surgeons, 40 Cal. Rptr. 244, 394 P. 2d 932 (1964).

class of persons. Therefore, the only person qualified to act was the Attorney General. This portion of the case was later overruled. Trustees are not now precluded from bringing an action to enforce a trust in California.[36]

The state of Connecticut followed the common law rule in holding that the enforcement of the conditions of a testamentary gift for religious and charitable use is the responsibility of the Attorney General.[37] However, several cases have held that in the absence of the intervention of the Attorney General in a charitable trust matter, a member of the intended class of beneficiaries may institute appropriate action.[38]

Seven states have recognized the right of a beneficiary to bring an action. In addition to Connecticut, the states of Maryland,[39] Nevada,[40] New Mexico,[41] West Virginia,[42] Virginia,[43] and Wisconsin,[44]

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36. Ibid.

37. New York East Annual Conference of the Methodist Church v. Seymour, 199 A. 2d 701 (1964).

38. McCoy's Appeal from Probate, 5 Conn. Supp. 89, (1937).

39. Md. Ann. Code art. 16 sec. 195-196 (1957).

40. Nev. Rev. Stat. sec. 165.190 (1955).

41. N. M. Stat. Ann. secs. 33-2-1-24 (1953).

42. W. Va. Code Ann. sec. 3502(2) (1961).

43. Va. Code Ann. secs. 55-26-34 (1950).

44. Wis. Stat. Ann. sec. 23134(1,2,3) (1963).

have some statutory provision to that effect. Maryland statutes speak of an interested party as does West Virginia. Nevada and New Mexico provide a means whereby any beneficiary may apply to the court for an order requiring a trustee to perform.

It was recently held in Iowa (1962), that it is the duty of the Attorney General to protect the public interest in all matters of charitable trusts and that the court must assume that such officer will do his duty.[45]

Under Michigan statutes the prosecuting attorney is the proper party to contest a will, but the Attorney General must act in matters of charitable trusts.[46]

Minnesota is quite definite in reserving these powers to the Attorney General when it states:

> The Attorney General is the proper party to compel compliance with the conditions impressed upon a gift for a charitable purpose and citizen, resident, and taxpayer cannot maintain an action in his own behalf or on behalf of all of the beneficiaries of the charity.[47]

A New York statute provides that the Attorney General shall represent the beneficiaries of a charitable trust. He has the right, not unnamed beneficiaries.[48]

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45. In re Dietz Estate, 117 N. W. 2d 825 (1962).

46. In re Powers' Estate, 106 N. W. 2d 833 (1961).

47. Minn. S. A. sec. 501.12 subd. 3, (1951); In re Everett's Trust, 116 N. W. 2d 601 (1962).

48. Pers. Prop. Law N. Y. sec. 113, subd. 3; Revici v. Conf. of Jewish Material Claims Against Germany, Inc. 174 N.Y.S. 2d 825 (1958).

New Hampshire, one of the few states with a comprehensive plan for the administration of charitable trusts, holds that the Attorney General or the Director of Charitable Trusts, as his representative, is an indispensable party to any judicial proceeding involving the enforcement and supervision of trusts.[49]

New Jersey follows the common law and looks to the Attorney General to protect the public interest in the matter of charitable trusts.[50]

An Oregon case seems to imply that other representatives may act in the public interest. Agan v. U. S. National Bank held that "generally, a charitable trust is enforceable only by appropriate representatives of a community, usually the Attorney General."[51]

Pennsylvania affirms the common law in holding that the Attorney General represents the public interest in a charitable trust and that he is authorized to inquire into matters pertaining thereto.[52]

South Carolina also follows the common law and refers to the Attorney General as "the proper party to protect the interest of the public in administering or enforcing trusts."[53]

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49. Concord Nat. Bank v. Town of Haverhill, 145 A. 2d 61 (1958).

50. In re Katz Estate, 122 A. 2d 185 (1956).

51. Agan v. U. S. Nat. Bank, 303 P. 2d 765 (1961).

52. Com. v. Barnes Foundation, 159 A. 2d 500 (1960).

53. Furman Univ. v. McLeod, 120 S. E. 2d 865 (1961).

Tennessee is represented by a decision which places a duty upon the Attorney General to act when the interest of beneficiaries of charitable trusts is threatened.[54]

The law of the state of Texas not only follows the common law but reinforces it by declaring that the power and the duty of the Attorney General to act in the interest of the general public in matters of charitable trusts cannot be assumed by anyone else with or without his consent.[55]

The state of Washington follows the common law in holding that the Attorney General is the only proper party to bring an action in a charitable trust case.[56]

Problems Involving Endowments and Trusts

Charity

Well over one hundred years ago, in a landmark case, Judge Story proclaimed:

> Not only are the charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations for the establishment of colleges,

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54. Carson v. Nashville Bank and Trust Co., 321 S. W. 2d 798 (1959).

55. Vernon's Ann. Civ. Statutes, Texas Art. 4412a (1903).

56. State v. Taylor, 362 P. 2d 247 (1961).

Table 2. States Wherein the Attorney General Has the Exclusive Right to Act in Charitable Trust Cases

ALABAMA		MONTANA	
ALASKA		NEBRASKA	
ARIZONA		NEVADA	
ARKANSAS		NEW HAMPSHIRE	X
CALIFORNIA		NEW JERSEY	X
COLORADO		NEW MEXICO	
CONNECTICUT		NEW YORK	X*
DELAWARE	X	NORTH CAROLINA	X*
FLORIDA	X*	NORTH DAKOTA	
GEORGIA	X*	OHIO	
HAWAII		OKLAHOMA	
IDAHO		OREGON	X
ILLINOIS	X	PENNSYLVANIA	X
INDIANA	X	RHODE ISLAND	X
IOWA	X	SOUTH CAROLINA	X*
KANSAS		SOUTH DAKOTA	X*
KENTUCKY		TENNESSEE	X
LOUISIANA		TEXAS	X
MAINE		UTAH	
MARYLAND		VERMONT	
MASSACHUSETTS	X	VIRGINIA	
MICHIGAN	X*	WASHINGTON	X
MINNESOTA	X*	WEST VIRGINIA	
MISSISSIPPI		WISCONSIN	
MISSOURI	X	WYOMING	

*Required by statute.

> schools, and seminaries of learning, especially such as are for the education of orphans and poor scholars.[57]

What is a "charity under the law? A 1966 Maine case states that:

> 'Charity' in a legal sense is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, under the influence of religion or education, relief from disease, assisting people to establish themselves in life, or erecting or maintaining public works.[58]

Thus, gifts have been upheld as charitable trusts for any of the following purposes:[59]

a. founding or maintaining a school[60] or a college[61]

b. aiding or supporting public schools[62]

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57. Vidal v. Girard's Executor, 43 U. S. (2 How. 127) 11 L. Ed. 205 (1844).

58. Johnson v. South Blue Hill Cemetery Ass'n., 221 A. 2d 280 (1966).

59. Bogert, p. 286.

60. Sears v. Chapman, 158 ,ass. 400, 33 N. E. 604 (1890); Grand Prairie Seminary v. Morgan, 171 Ill. 444, 49 N. E. 516 (1893); McDonough v. Murdock, U. S. 15 How. 357, 14 L. Ed. 762 (1853); Vidal v. Philadelphia, U. S. 2 How. 127, 11 L. Ed. 205 (1844).

61. Connecticut College for Women v. Calvert, 87 Conn. 421, 88 A. 633 (1913); Dexter v. President of Harvard College, 176 Mass. 192, 57 N. E. 371 (1913).

62. Smart v. Town of Durham, 77 N. H. 56, 86 A. 821 (1913).

c. procuring a site for[63] or erecting a building for a school[64]

d. making provisions for increased high school facilities[65]

e. providing for education of a town's colored children[66]

f. employing more teachers[67]

g. subsidizing salaries of teachers[68]

h. payment of teachers as well as providing clothing for poor scholars[69]

i. aiding needy students in obtaining an education[70]

j. founding scholarships[71]

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63. Price v. School Directors, 58 Ill. 452 (1871).

64. Meeting St. Baptist Soc. v. Hall, 8 R. I. 234 (1865).

65. Newton v. Healy, 100 Conn. 5, 122 A. 654 (1923).

66. Craig v. Secrist, 54 Ind. 419 (1876).

67. Webster v. Wiggin, 19 R. I. 73, 31 A. 824, 28 L. R. A. 510 (1883).

68. Price v. Maxwell, 28 Pa. 23 (1856).

69. Rushmore v. Rushmore, 35 N. Y. Sr. 845, 12 N. Y. Sup. 776 (1891).

70. Hoyt v. Bliss, 93 Conn. 344, 105 A. 699 (1919).

71. In re Bartlett, 163 Mass. 509, 40 N. E. 899 (1895).

k. making awards[72]

l. founding and maintaining libraries.[73]

Gifts in the interest of education are so well considered by the courts that the Supreme Court of Iowa stated: "The rule regarding gifts to establish or endow schools for the mental or moral improvement of the people and especially of those members of society who are handicapped by actual or comparative poverty, are lawful public charities, is so well settled as to require no elaboration of argument or citation of authority."[74]

A gift for educational purposes or for the advancement of education is for a recognized charitable purpose and will, therefore, qualify in that respect as a charitable trust and usually without regard to the field of learning.[75] Also, the courts have gone so far as to hold that a gift which is consistent with the law will not be declared invalid because the court regards the donor's act as improvident or the gift unreasonable. However, where a donee is in a confidential relationship with the donor, a gift to the donee will be closely examined and will be held valid only

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72. Franklin v. Hastings, 253 Ill. 46, 97 N. E. 265 (1912).

73. Fordyce v. Woman's Chris. Nat. Lib. Ass'n., 79 Ark. 550, 96 S. W. 155 (1906); Minns v. Billings, 183 Mass. 126, 66 N. E. 593 (1903).

74. Wilson v. First Nat. Bank, 164 Iowa 402, 145 N. W. 948 (1914).

75. Jones v. Habersham, 107 U. S. 174, 27 L. Ed. 401, 2 S. Ct. 336 (1882).

where there is an unquestioned and convincing display of the utmost good faith and no evidence of undue influence.[76]

On the basis of cases decided to date it is clear that a trust for the purpose of education is a charitable trust and the particular character of the education sought to be fostered by the charitable trust should not affect its validity.[77]

Trust Enforcement

Statutes concerning ordinary trusts are of little help in matters concerning charitable trusts. In regular trust administration it is a truism that any dereliction or abuse by the trustee in the performance of his duties will be quickly challenged by the beneficiaries. This personal interest is not present in a charitable trust.

The need for legislation to protect charitable trusts and provide supervision of the proper disposition of the various provisions of the trusts is well established. Legislation, to be effective, must provide for the enforcement of charitable trusts and establish penalties for the errant trustees. Only a few states have adopted measures for such enforcement. These include authorizing the Attorney General to conduct

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76. Amado v. Aguire, 160 A. L. R. 1126 (1945).

77. Town of So. Kingston v. Wakefield Trust Co. 48 A. L. R. 1122 (1926).

such investigations as he deems necessary, take legal action to enforce a charitable trust, and demand an accounting of a trustee.

State Requirements

Despite the apparent need for supervision, only ten states require that a charitable trust be registered.[78] Among these, a considerable difference exists in the time allowed for such registration. Some states require that a charitable trust be registered within thirty days while others have no time limit. Nevada[79] and New Mexico[80] require that a trust be registered within thirty days; Michigan[81] and South Carolina[82] specify a sixty-day limit to register; Illinois[83] and California[84]

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78. Luis Kutner and Henry H. Koven, "Charitable Trust Legislation in the Several States," 61 Northwestern Law Review 411 (1966); Robert L. Gray, "State Attorney General--Guardian of Public Charities?" 14 Cleveland-Marshall Law Review 236 (1965).

79. Nev. Rev. Stats., secs. 165.030, 165.130 (1957).

80. N. M. Stats. secs. 33-2-2, and 33-2-12 (1953).

81. Mich. Stat. Ann. secs. 26.1200(1) to 26.1200(16) (Supp. 1965).

82. S. C. Code Ann. sec. 67-81 (1962).

83. Ill. Rev. Stat. ch. 14 sec. 52 (1965).

84. Cal. Gov't. Code, sec. 12585 (1963).

allow six months while Iowa,[85] New Hampshire,[86] Ohio,[87] and Rhode Island[88] do not state a time limit.

Charitable trusts are required by statute to be audited annually in Connecticut,[89] Florida,[90] Indiana,[91] Massachusetts,[92] North Carolina,[93] Oregon,[94] Vermont,[95] Virginia,[96] Wisconsin,[97] and Wyoming.[98] Each of these states also requires an annual report with the exception of Wyoming. Other states requiring an annual report are California,[99]

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85. Iowa Code Ann., secs. 682.48 to 682.59 (Supp. 1964).

86. N. H. Rev. Stat. Ann., secs. 7:19-22 (1955).

87. Ohio Rev. Code Ann., sec. 109.26 (1964).

88. R. I. Gen. Laws Ann., secs. 18-9-6, 18-9-7 (1956).

89. Conn. Gen. Stat. Ann., ch. 780, secs. 45-82 (1960).

90. Fla. Stat., ch. 737 (1964).

91. Ind. Ann. Stat., sec. 31-701 (Supp. 1965).

92. Mass. Gen. Laws, ch. 12, secs. 8A-8J (1961).

93. N. C. Gen. Stat., Art. 4, secs. 36-19 to 23 (1950).

94. Ore. Rev. Stats., ch. 128 (1965).

95. Vt. Stat. Ann., ch. 109, Tit. 14, sec. 2501 (1958).

96. Va. Code Ann., secs. 55-26 to 55-34 (1950).

97. Wis. Stat., sec. 317.07 (1963).

98. Wyo. Stat. Ann., sec. 9-104 (1957).

99. Cal. Gov't Code, sec. 12588 (1963).

Illinois,[100] Iowa,[101] Nevada,[102] New Hampshire,[103] New Mexico,[104] Rhode Island,[105] and South Carolina.[106]

Table 3 compares the various state procedures in dealing with charitable trusts. It is of particular interest that thirty states do not require registration, nor do they require any reports or annual statements.

New Hampshire, in 1943, adopted legislation[107] which gave authority to the Attorney General to register all charitable trusts and to investigate and compel compliance of trustees with the act. The success of this legislation brought to the attention of other states the need for such controls and Rhode Island,[108] Massachusetts,[109] Ohio,[110] and South Carolina[111] soon adopted similar legislation.

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100. Ill. Rev. Stat., ch. 14 sec. 57 (1965).

101. Iowa Code Ann., secs. 682.48 to 682.59 (Supp. 1964).

102. Nev. Rev. Stat. ch. 165 (1963).

103. N. H. Rev. Stat. Ann., secs. 7:19-32 (1955).

104. N. M. Stat. Ann., sec. 33-2-1 (1953).

105. R. I. Gen. Laws Ann., ch. 2617 (1956).

106. S. C. Code Ann., secs. 67-85 (1962).

107. N. H. Rev. Stat. Ann., ch. 7 secs. 19-32 (1955).

108. R. I. Gen. Laws, tit. 18, ch. 9 secs. 1-15 (1956).

109. Mass. Gen. Laws, ch. 12 secs. 8A-8J (1961).

110. Ohio Rev. Code, secs. 109.23 to .99 (1953).

111. S. C. Code Ann., secs, 67-81 (1962).

Table 3. State Control of Charitable Trusts

	Uniform Act in Effect	Registration Required	Annual Audit Required	Annual Report Required	Periodic Report Required
ALABAMA					
ALASKA					
ARIZONA					
ARKANSAS					
CALIFORNIA	X	X		X	
COLORADO					
CONNECTICUT			X	X	
DELAWARE					
FLORIDA			X	X	
GEORGIA					
HAWAII					
IDAHO					
ILLINOIS	X	X		X	
INDIANA			X	X	
IOWA	X	X			
KANSAS					
KENTUCKY					
LOUISIANA					
MAINE					
MARYLAND					
MASSACHUSETTS	X		X	X	
MICHIGAN	X	X			X
MINNESOTA					
MISSISSIPPI					
MISSOURI					
MONTANA					
NEBRASKA					
NEVADA		X		X	
NEW HAMPSHIRE	X	X		X	
NEW JERSEY					
NEW MEXICO		X		X	
NEW YORK					
NORTH CAROLINA			X	X	
NORTH DAKOTA					
OHIO	X	X			X*
OKLAHOMA					
OREGON	X		X	X	

*Biennial Report.

Table 3, Continued.

	Uniform Act in Effect	Registration Required	Annual Audit Required	Annual Report Required	Periodic Report Required
PENNSYLVANIA					
RHODE ISLAND	X	X		X	
SOUTH CAROLINA	X	X		X	
SOUTH DAKOTA					
TENNESSEE					
TEXAS					
UTAH					
VERMONT			X	X	
VIRGINIA			X	X	
WASHINGTON					
WEST VIRGINIA					
WISCONSIN			X	X	
WYOMING			X		

Trusts and Endowments Consistent with the Law

The true beneficiary of a charitable trust is society. Society can, therefore, control the charitable trust to best benefit the public interest. The public interest is, of course, reflected in the Fourteenth Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

In a famous Pennsylvania case,[112] the U. S. Supreme Court held that the exclusion of negro boys from Girard College was a violation of the Fourteenth Amendment, although the funds establishing the college were provided under the will of Stephen Girard, which stipulated that only white, male orphans be admitted. The court reasoned that the school was administered by a board of directors created by the City of Philadelphia, and since, under the terms of the statute the Board was an agency of the state, then the Fourteenth Amendment was in effect. The case was, therefore, remanded for further proceedings in accordance with this decision.

In conformity with this mandate the Orphan's Court of Philadelphia removed the Board of Directors of City Trusts as trustee and appointed private persons. The Supreme Court of Pennsylvania held that this was

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112. Comm. of Penn. v. Board of Directors of City Trusts, 353 U. S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792 (1957).

a proper action. The appeal was dismissed and certiorari was denied.[113]

In 1966, the plaintiff in the above action again sought federal intervention.[114] This time, relying on Evans v. Newton,[115] they were successful. The U. S. Supreme Court stated: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. The action of the City in serving as trustee of property under a private will serving a segregated cause is an obvious example."

It appears that the U. S. Supreme Court will not allow a will to be broken if that charitable will is privately administered. However, a gift by endowment or trust from a private source to a public school must not contain provisions which are either in violation of the law or place the school in the position of acting as trustee for private purposes.

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113. Comm. of Penn. v. Bd. of Directors, 391 Pa. 434, 138 A. 2d 844, 357 U. S. 570, 78 S. Ct. 1383, 2 L. Ed. 2d 1546.

114. Brown et al v. Pennsylvania, 270 F. Supp. 782 (1966).

115. Evans v. Newton, 382 U. S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966).

The Administration of Trusts

The School Board as Trustee

All authority possessed by a school board or board of trustees for public schools is derived from the statutes. This authority is limited to those powers expressly granted or reasonably implied.[116] The state has never granted, irrevocably, the title to school property to any particular person or group.[117] Statutes make trustees of schools the holders of all school property for the use of the people of the state. Title vests in these trustees but the real owner is the people.[118]

It is accepted practice and perfectly proper for a school district to accept a trust for educational purposes.[119] This thought was confirmed in a recent Illinois case which held that trustees of schools may, by proper grant, take title to real estate to be used for school purposes.[120] An earlier case held that a board of education may receive as a gift, a conveyance of real estate for use as a playground.[121] Also, an Iowa case in which a residuary clause in a will gave the remainder of the

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116. Superior Oil Co. v. Harsh, D. C., 572.

117. City of Chicago v. People, 80 Ill. 384 (1875).

118. Low v. Blakeney, 403 Ill. 156, 85 N. E. 2d 741 (1949).

119. Charities, 10 Am. Jr. 618, sec. 47.

120. Miner v. Yantis, 410 Ill. 401, 102 N. E. 2d 524 (1952).

121. Reiger v. Bd. of Educ. of Springfield School Dist. No. 186, 287 Ill. 590, 122 N. E. 838 (1919).

estate to "the permanent school fund" held that there was no ambiguity or uncertainty present and upheld the gift.[122] Also, a school district may act as trustee of a charitable trust for the support of free or public schools within the district.[123] An early Illinois case marked the thinking of the courts regarding this point when the court held that trustees are authorized to manage a gift in trust, and equity will not appoint a special trustee where the funds are being properly handled.[124]

An Arkansas case leaves little doubt as to the status of trust funds when the court stated: "Such funds do not belong to the district or to the officers of the district, but are merely held by them in trust for the public."[125]

In speaking of private donations to public schools, a Missouri court held:

> It is perfectly proper for a school board to receive contributions from private sources toward the expenses incident to an exercise of a duty proper under the law, and the fact that the board has been influenced by the donation to some extent in the manner of the exercise of the duty does not render its action void as being contrary to public policy.[126]

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122. Chapman v. Newell, 146 Ia. 415, 125 N. W. 324, (1910).

123. Skinner v. Harrison Twp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137 (1888); Town of So. Kingston v. Wakefield Trust Co. 48 R. I. 27, 134 A. 815, 48 A. L. R. 1122 (1926).

124. Myers v. School Trustees, 21 Ill. App. 223 (1886).

125. Pearson v. State, 56 Ark. 148, 19 S. W. 499 (1892).

126. Kansas City School Dist. v. Sheidley, 138 Mo. 672 40 S. W. 656, 37 L. R. A. 406 (1897).

The position of the school board as trustee of public property has been judicially recognized. The acceptance of private gifts to support public education is consistent with that concept.

Precatory Language

Where the language employed in the creation of a trust shows a trust intent, it will have that effect. Similarly, if the word "trustee" is used, it does not conclusively show the creation of a trust.[127] If the responsibilities of the appointee are those of a trustee, a trust has been created and he will be considered a trustee.[128] This point was expounded further in a Rhode Island case in which it was held that an absolute gift to a charitable organization without reference to the uses to which it may be put and without the use of the words "in trust," is as the testator intended it to be, for the purpose of the organization, and it will be held so despite the possibility of it being misused.[129]

The School Administrator as Trustee

Any person who is capable of taking title to property may be a trustee. While the management of the schools[130] is the first

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127. In re Hawley, 104 N. Y. 250, 10 N. E. 352 (1887).

128. Angus v. Noble, 73 Conn. 56, 46 A. 278 (1900).

129. Rhode Island Hospital Trust Co. v. Williamson, 50 R. I. 385, 148 A. 189, 74 A. L. R. 664 (1929).

130. Low v. Blakeney, 403 Ill. 156, 85 N. E. 2d 741 (1949).

responsibility of the public school administrator, he may still be named a trustee. It is not necessary that any particular language be used to describe the trustee.[131] It is only necessary that a trust intent be indicated and that a person be identified either by name or position to administer it.[132] In the event of failure to name or indicate a trustee, the trust will not necessarily fail since equity will not allow a trust to fail for want of a trustee.[133] It would appear that equity will also act where an administrator might prefer not to serve in the capacity of trustee either of his own volition or at the request of the school board.

Duties

Whether a trustee for a charitable trust is an individual[134] or a municipal corporation[135] his duties are essentially the same as those of a trustee of a private trust.[136] Of course, the trustee of a charitable

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131. Grant Trust & Savings Co. v. Tucker, 49 Ind. App. 345, 96 N. E. 487 (1912).

132. Boreing v. Faris, 127 Ky. 67, 104 S. W. 1022 (1907).

133. Attorney General v. Goodell, 180 Mass. 538, 62 N. E. 962 (1902).

134. Atkinson v. Lyle, 191 Ark. 61, 85 S. W. 2d 715 (1935).

135. Attorney General v. City of Lowell, 246 Mass. 312, 141 N. E. 45 (1923).

136. Bogert, sec. 379.

trust is subject to the suit of the Attorney General and he must answer to the public rather than to a named beneficiary.

The school board is similar to the directors of a charitable corporation acting as trustee. A Southern California Law Review article[137] summarized the duties of the trustee of a charitable corporation as follows: (1) administer the trust strictly in accordance with its terms,[138] (2) use reasonable care to preserve the trust property,[139] (3) delegate no duties which he can perform himself,[140] (4) account for the administration of the trust,[141] and (5) not sell the individual property of the directors to the corporation as trustee, nor sell trust property to the corporate directors individually.[142]

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137. George M. Dell, (ed.), "Trusts - Gifts to Charitable Corporations," 26 So. Calif. Law Review 80 (1952-1953).

138. Ray v. Homewood Hospital, 223 Minn. 440, 27 N. W. 2d 409 (1947).

139. Trustees of the Protestant Episcopal Church v. Church of the Messiah, 115 S. C. 285, 105 S. E. 414 (1920).

140. President & Fellows of Harvard College v. Society for Promoting Theological Education, 69 Mass. (3 Gray) 280 (1855).

141. Price v. United Hebrew Charities, 3 N. J. Misc. 706, 129 A. 712 (1925).

142. Kenney Presbyterian Home v. State, 174 Wash. 19, 25 P. 2d 403 (1933).

Personal Liability

Directors of a charitable trust are not immune from personal liability for their own fraud, breach of duty, bad faith or negligence.[143]

Trust funds, if wrongfully converted, remain subject to the trust as long as identity is possible. This is also true where trust funds have been intermingled with other funds or assets such as land, bills and notes, money or any other asset of the unfaithful trustee or one who has knowledge of the character of the funds. In this instance the trust funds become a preferred charge.[144]

Investments

Trustees are usually expected to invest the principal in a prudent manner so that the objectives of the trust can be realized. The terms of the trust provide the guide lines for the trustee as well as the general common law principles which apply to fiduciaries.

Trustees may choose to continue any investments already established and if this choice is made no liability will exist for any loss by depreciation in their value. However, it is still expected that a trustee shall show reasonable prudence to prevent loss.[145]

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143. City of Boston v. Curley, 276 Mass. 549, 177 N. E. 557 (1931).

144. Myers v. Board of Education, 51 Kans. 87, 32 P. 658 (1893).

145. Bassett v. City Bank and Trust Co., 160 A. 60, 68, 115 Conn. 1,26, 81 A. L. R. 1488 (1932).

The Prudent Investor

The standard of care used by the courts is the rule of the so-called "prudent investor."

A Massachusetts decision regarding the status of the trustee held as follows:

> It has long been the rule in this Commonwealth that in making investments, as well as in the general management of the trust, a trustee is held only to good faith and sound discretion, and hence that he cannot be held for the consequences of an error in judgement, unless the error is such as to show either that he acted in bad faith or failed to exercise sound discretion.[146]

In connection with the propriety of an investment Bogert[147] states:

> 1. The trust funds must be kept separate from the trustee's private funds and from any other trust funds.[148]
>
> 2. Trust funds must be invested in the name of the trust and never in the name of the trustee.[149]
>
> 3. The trustee should not handle the investment in any way that will allow him to personally benefit.[150]

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146. Taft v. Smith, 186 Mass. 31,32 70 N. E. 1031 (1904).

147. Bogert, pp. 346-348.

148. Strong v. Dutcher, 174 N. Y. S. 352, 186 App. Div. 307 (1919).

149. Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333,341 (1916).

150. In re Carr's Estate, 24 Pa. Super. Ct. 369 (1904).

4. Trust funds, when possible, should be invested within the jurisdiction in which the trust is being administered.[151]

5. The trust fund should be invested to bring as high a rate of interest as possible commensurate with safety.[152]

6. The trust fund must be kept in such a way that it can be easily understood by those who are interested.

7. Bank deposits must be made in the name of the trust. The trustee may be held liable for any losses occurring to the trust if it is deposited in his private account.[153]

Lawful Investments

Most states specify those investments that are of minimum risk and therefore lawful for a trustee to consider when investing the funds of the trust. This, of course, provides a safeguard for the trustee against what might be termed speculation, and yet it is not a complete guarantee. Although a stock might be listed as acceptable, later changes in the situation which would warn a prudent investor could cause the trustee to be held accountable. Investments usually encouraged or permitted are obligations of the United States government or any of the individual States as well as political subdivisions thereof, i.e. towns, cities, counties

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151. McCullough's Ex'rs. v. McCullough, 44 N. J. Eq. 313, 14 A. 642 (1888).

152. In re Whitecar's Estate, 147 Pa. 368, 23 A. 575 (1892); Davis v. Davis Trust Co., 106 W. Va. 228, 145 S. E. 588 (1928).

153. McAllister v. Commonwealth, 30 Pa. 536 (1858).

or other municipal corporations. Of course, it must be recognized that a settlor may expand the area of discretion of the trustee.

Fiduciary Status

The trustee owes the beneficiaries of the trust his complete loyalty. His integrity must be unquestioned at all times.[154] He must never benefit either directly or indirectly from his management of the trust.[155] The burden is always upon the trustee to show that he acted honestly and justly and without any benefit to himself.

Solicitation of Private Funds

The solicitation of private funds to support public education is a fairly recent development which poses the question of the limits to which a school administrator or school board may go in this regard. An examination of the laws of the various states indicates that state legislatures have been generally silent in this matter.

The pursuit or promotion of private funds is not without consequential expenses. Obviously, the school administrator or school board seeking private funds must underwrite the cost of such a solicitation program. However, the expenditure of public funds in the hope of gaining private support would appear to be a gamble which may be beyond the

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154. Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

155. Linsley v. Strang, 149 Iowa 690, 126 N. W. 941 (1910).

scope of authority of any school board or school administrator. Such a promotion may also be in the nature of illegitimate expenses or unjust enrichment which could be interpreted as a gift. There is no doubt that the making of a gift from the public treasury is illegal.

Under the circumstances, school administrators are quite limited in the extent of any solicitation of private funds. The prudent administrator or school board will confine solicitation to that which does not involve public funds or time consuming promotions.

Termination of Charitable Trusts

Unlike private, express trusts in which the court will terminate the trust when it becomes impossible to continue, the charitable trust will have the help of the court in replacing or removing a trustee, and where necessary the court of equity will employ the doctrine of cy-pres to carry out the wishes and directions of the settlor.

Charitable trusts are usually of perpetual duration. It is a well established maxim that such a trust will be terminated only when its continued performance has become impossible or illegal.[156] A charitable trust could become impossible in a state that does not recognize the doctrine of cy-pres.[157] A charitable trust could become illegal where

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156. Bogert, sec. 335.

157. Taylor v. Rogers, 130 Ky. 112, 112 S. W. 1105 (1908).

legislation governs the time interval of a gift prior to the settlor's death or where a limit is placed upon the amount of the gift.[158]

Generally, when a charitable corporation ceases to exist, the doctrine of cy-pres is applicable and a gift to the corporation does not revert to the donor or his heirs.[159]

Summary

Because of the legal implications, it is necessary for school administrators to recognize the difference between a gift and a trust. Many times such a trust can be express or implied. Also, it is possible for a state agency to act as trustee. However, the transfer of endowments and trusts to a state agency would be open to serious question in a court of equity.

In matters of charitable trusts in which a school or schools might be involved, any redress by or against a trustee would depend very much upon the law of the particular state. If it is a state adhering to the common law principle, any action would have to come from the office of the Attorney General of that state. There are some states where a trustee or a beneficiary may bring an action.

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158. Unger v. Loewy, 236 N. Y. 73, 140 N. E. 201 (1923).

159. Stevens Bros. Foundation, Inc. v. C. I. R., 324 F. 2d 633 (1963).

The court of the beneficiary's jurisdiction would be the one to see to the proper application of the trust where the donor is in a foreign jurisdiction.

Gifts have been upheld as charitable trusts for many educational purposes including founding, supporting, maintaining and procuring the land for a school as well as subsidizing teachers' salaries, providing facilities for a high school and aiding needy students. A trust for the purpose of education is a charitable trust and the particular character of the education to be fostered does not necessarily affect its validity.

School administrators should be familiar with the charitable trust laws of their state. This will enable them to carry out the statutory requirements of the trust instrument, to obtain the help of the state in enforcement of the terms of the trust, and to see to the proper execution of the trust in the absence of state enforcement.

There is a need for uniform legislation to protect charitable trusts. A majority of the states have little or no legislation in this regard. About twenty states have requirements regarding registering a charitable trust and making annual audits and reports.

Trusts and endowments must not be in violation of the law. The Fourteenth Amendment bars any state from abridging the privileges or immunities of citizens. Since a public school is an agency of the state it cannot accept private funds which discriminate in their use.

The school board acts as trustee of all school property. It is perfectly proper for a school board to accept and to administer a trust for educational purposes.

The trustee of a charitable trust must be alert at all times to the care and safety of the trust, and his integrity must be above question in every act taken on behalf of the trust. Trust funds become a preferred charge on the estate of any trustee when such funds are traced to his possession as a result of his disloyalty or carelessness.

The trustee has the further duty of being aware of changes in the status of investments and is expected to act with prudence in the management thereof.

School districts and school administrators may be restricted in their efforts to pursue and acquire private funds for public education. The use of funds for purposes other than legitimate educational expenses may be ultra vires the powers and duties of the school board and school administrators.

The charitable trust, unlike the private trust, will not be allowed to fail. Equity will act to replace or remove a trustee and even overcome the failure of a corporation via the doctrine of cy-pres.

CHAPTER IV

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Legal and Historical Aspects

The present study drew upon the literature of law and education. Legal literature was examined in regard to the law of trusts and its effect upon gifts to education. Literature concerning the common law provided necessary information for understanding judicial procedure in the various states. It is important for any school administrator to possess some knowledge of the American system of jurisprudence and those particular aspects of it which affect or control the schools.

Educational literature was utilized to discover the procedure followed in the acceptance of gifts by the public schools. The manner in which such funds are presented to education as well as the procedure, if any, prescribed for the administration of these funds were examined in this study. Also of concern were those legal and related principles which affect the administration of trusts and endowments in the public elementary and secondary schools. The study was limited to such gifts. Case studies, statutes, legal opinions, legal encyclopedias, treatises, and literature were used in the basic research.

The growth in population of the United States has made it apparent that present demands upon our public school system will be surpassed in the near future. Increased funds will be needed to cope with increased enrollment. This will include private funds wherever available. Accordingly, the need for such funds will concern every public school administrator in the country. Actually, the impact of foundations upon the development and maintenance of education in the United States is beyond measure, and an ever-increasing need for private funds by public education can only point to their continued importance. The solicitation and administration of private funds will pose many legal questions, and the legal relationship which arises with the acceptance of these funds will undoubtedly assure increasing importance.

When a gift is absolute, the use of the principal is unrestricted. When restrictions are placed upon the use of the principal, we must look to the nature of the interest created. The conveyance of property to a charitable institution does not of itself create a charitable trust. Where there is a devise without reservation or limitation and the executor is authorized to dispose of the property as he thinks best, the proceeds therefrom to be used as the institution thinks best, there is a clear gift. If the institution's entire activity is charitable and the devise or bequest is in effect a charitable gift without restrictions by the testator, the recipient takes as trustee to use the funds to aid the charitable purpose of the institution. It is apparent that the deciding factor in both of these cases

is the restriction that may be placed upon the use of the gift by the institution. In the latter case where nothing oral or written exists to show trust intent but where it can be inferred from certain acts of the testator, courts have held that an implied trust is created.

Gifts to education are looked upon as lawful public charities and where a charitable trust is created the courts will invoke, where possible, the doctrine of cy-pres to prevent such a trust from failing. Some states do not employ this doctrine, and in these states it is presumed that trusts to education which cannot be executed or continued must fail.

Attorneys General admit their lack of effectiveness in matters of charitable trusts and give as a reason their lack of information concerning gifts included in devises and bequests, as well as insufficient staffs or budgets to cope with the supervision of such trusts. Basic to this lack of effectiveness is the absence of legislation such as the Uniform Trust Act which has been enacted by only ten states.

In twenty-two states, the Attorney General is the only one who can bring an action in a charitable trust matter. However, only a very few states have provided legislation authorizing the Attorney General to initiate proceedings, demand particular accountings and take whatever legal action he deems necessary to enforce a charitable trust. Thirty states do not have any requirements for registration, annual audits, annual reports or even periodic reports.

While there is an apparent need for greater supervision of charitable trusts throughout the country, the courts will not allow a state to nullify a charter granted to an institution where such nullification destroys or impairs any vested property right. The transfer of property involving endowments and trusts from one school to another must show that the donor did not intend his gift to be conditioned upon the continuance of the original recipient, otherwise there would be an unconstitutional taking of private property. A state agency may, however, with state approval and the approval of a court of equity, act as a disbursing agent of the income from endowments and trusts, but the actual control and custody of such income must be retained by the private institution.

Private gifts to state institutions, e.g. public schools, must not contain restrictions for their administration which are in violation of the Fourteenth Amendment of the United States Constitution. It is also unconstitutional for any state or state agency to attempt to relieve itself of responsibility or to circumvent the provisions of the Amendment by appointing private individuals to act as trustees. The United States Supreme Court has ruled that where any state or state agency has, for any period of time, administered a charitable trust, the trust becomes impregnated with a public character and will be judged so despite the appointment of private trustees.

Where a charitable trust is an inter-state matter, any problem involving conflict of laws has been resolved through consistent decisions

which have resulted in the general rule that the courts of the donor's jurisdiction only concern themselves with the establishment of a charitable trust. The courts of the beneficiary's state have jurisdiction over the proper application of the assets and the administration of the trust.

Questions Guiding This Study

Three questions guided the progress of this study:

1. What provisions are established in the law for the solicitation, administration and auditing of private funds contributed to public schools?

Provisions relating to this question vary considerably from state to state. Actually, no guidance is given in any of the states concerning the solicitation of private funds by public school authorities. Apparently, this has not been considered necessary, although it is a matter of public knowledge that public school systems solicit private as well as public funds.

Since there is no legislation establishing the procedure for administering the funds by elementary and secondary schools, attention must be given to the requirements that apply to the trustee of a charitable trust. He is subject to suit by the Attorney General for any breach of trust or lack of prudence. He is, of course, liable for his own fraud or negligence. Where he has intermingled trust funds with his own estate they may be traced and they become a preferred charge upon the estate.

The trustee is held to the standards of good faith and sound discretion. He must never invest trust funds in his own name, and bank deposits must be in the name of the trust. He is personally liable for any loss of funds invested in his own name or where prudence on his part could have prevented loss. Any profits accruing to the trustee by this misuse of trust funds become the property of the trust. As a fiduciary, the trustee owes the highest degree of loyalty and integrity to the trust. He must use reasonable care to preserve the trust property. He may not sell trust property to any of the directors of the trust, nor may he purchase from them for the trust.

Provisions for the auditing of private funds contributed to public schools vary considerably among the states. At present, only ten states require annual audits of any charitable trusts. There are no provisions concerning the deposit, and expenditure of endowments and trusts in the elementary and secondary schools.

2. To whom, if anyone, does the responsibility belong for carrying out the wishes of the donor?

The school administrator or the school board named as trustee bears the responsibility for carrying out the wishes of the donor. The teacher, principal or superintendent who receives a bequest or devise in his official capacity is actually the recipient of a charitable trust for educational purposes. However, where a devise to a teacher, principal or superintendent authorizes him to dispose of the property as he sees fit

and to use the proceeds as he desires for a class, a school or schools, the devise becomes a clear and outright gift.

It is important to note here that the law does recognize the doctrine of the implied trust, and some courts have ruled that gifts given in outright terms to a charitable donee are subject to an implied trust. Because of such rulings, a school administrator should either regard a devise or bequest as a trust or seek the assistance of an attorney to determine the status of the gift.

3. To what extent may public funds be expended in the solicitation of private or government funds?

An examination of the laws of the fifty states reveals that there is no legislation in this field, nor has there been adjudication to guide us. Since various title monies are available under the federal government for schools that qualify under the regulations for disbursement, there is, at least, an implication of consent for schools to expend funds to make application for available funds. It is a moot question whether this implied consent would also apply to the solicitation of private funds.

Unresolved Problems

There are many unresolved problems in the field of endowment and trust administration in the area of public education.

The acceptance of a gift by a public school or schools might carry with it the legal responsibilities of an implied trust. Advice should

be obtained from an attorney concerning the status of the gift, and in the case of a trust, an explanation of the duties of a trustee.

School boards should consider their policy regarding teachers or administrators serving as trustees when they have been so designated in a devise or bequest.

A further problem presents itself at this point in determining who can function as legal counsel as well as who shall pay for these services if a private attorney is retained.

Where a charitable trust is an inter-state matter, as previously discussed, a problem arises in deciding how the court in the state of the beneficiary can properly supervise a trust when it is doubtful that it even knows of the existence of the trust. No procedure exists for assuring such supervision.

If a gift is given to the principal of a school, in the absence of any instructions, oral, written or otherwise, will such a gift be considered a constructive trust? If so, the court would have to presume or infer from certain acts that the donor intended a trust to exist, or it could simply impose a trust to accomplish justice or to prevent unjust enrichment.

If an endowed elementary school was closed because of insufficient enrollment, what disposition would be made of the endowments? Would adjoining schools in the same school district be able to share in endowment funds under the doctrine of cy-pres? Would the gift fail if the doctrine of cy-pres were not recognized?

If a gift to a particular school served to make that school more desirable than others in the district, what alternatives would be available to the administration? May other schools be allowed to share in the gift? If not, would its acceptance carry out a private purpose to benefit a particular school and thereby discriminate against children attending other schools in the district?

Is a school board's right to refuse an endowment affected by the inter-state or intra-state nature of the gift? Does a school board have the right to refuse a gift and thereby deny pupils the benefits to which they may be entitled?

Where a residuary clause in a will leaves a sum of money to a particular school with the only requirement being that it be spent as the principal directs, does the principal become the trustee if the fund was officially accepted by the school board? If the principal-trustee is transferred to another school, what, if any, effect would such a transfer have on the trust? Is this not, at least, an indirect control of the trust? Who, then, actually has the responsibility for carrying out the wishes of the donor?

In the matter of the solicitation of private funds, the school board seeking such funds must underwrite the cost of such a program of solicitation. In requesting public funds, a school submits proposals to share in the various title monies. It is the right of the public school to

follow the regulations of the law in making application to qualify under the law. It is also recognized that a considerable amount of time is spent and expenses incurred in preparing and submitting such proposals. Because such a program is inter-governmental in nature, the expense involved is not questioned. However, in the solicitation of private funds such a promotion is in danger of being considered an illegal expenditure of public funds, especially if the program is unsuccessful. Yet, there is little difference between the programs.

Recommendations

In identifying and describing the legal and related conditions which affect the administration of trusts and endowments in schools of the United States, the following possibilities for further study were noted:

1. Many times in the course of the school year the Attorney General is requested to submit an opinion regarding some aspect of school finance. These opinions may well include some reference to gifts to public schools. Since such opinions are binding upon school districts they are of major importance. It is recommended, therefore, that a study be made of Attorney General opinions and their influence upon the administration of trusts and endowments.

2. There are over 6,000 charitable foundations in the United States. Many of these foundations describe themselves as educational and non-profit in nature; hence they have a tax-exempt status.

Accordingly, it is recommended that further study of educational trusts in selected regions of the United States be made to show the basis for their tax-exempt status and whether this status is legitimate. Such a study could also publicize the aid these trusts give to public education.

3. The need for uniformity in the administration of charitable trusts involving public schools requires the drafting and proposal of a model act. Such an act could simplify and standardize the solicitation and administration of gifts.

It is recommended that further study be made of desirable guidelines for charitable trust administration and that this study develop a model act which would serve as a guide to state legislatures. Such an act should include a provision calling for notice to be given to the office of the Attorney General of all probate matters concerning gifts to both public and private schools.

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