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Death of Charitable Trust Corporation Law

B. Richard Sutter*

SINCE THE SUBJECT of non-profit corporations covers such a broad area, this paper will be limited to "Type B corporations"¹ (i.e., the "charitable" type) as described in the new New York Not-For-Profit Corporations Law. These classifications of the new statutory concept (Types A, B, C, D) look to the *general* purpose of the organization, rather than to a very *specific* purpose,² or to whether or not stock is issued.³ The New York law further provides for the possibility of any corporation having multiple and overlapping purposes,⁴ thus providing a very rational and simple (though debatable as to policy) test to apply for classification purposes.^{4a}

It is generally felt that the *administrative* machinery for enforcement of non-profit gifts is inadequate.⁵ And who is to enforce the substantive rights of the minority members of the non-profit corporation which possesses these gifts? Can members themselves intervene in a dispute as to planned action? Upon what theory can enforcement of minority rights be made?

The purpose of this paper is to sketch the development of *minority rights* in one narrow area—that of non-profit property transfers, and especially in religious or charitable organizations. Representative state statutes, as well as case law, are used in order to demonstrate the confusing lack of uniformity in this area.

Under What Theory?

At common law, gifts to a religious society were given with the implied trust that they be used *only* for the specific purpose for which the society was founded.⁶ However, the United States Supreme Court in *Watson v. Jones*⁷ said that so long as no trust was imposed when the

* B.A., Case-Western Reserve Univ.; Second-year student at Cleveland State University College of Law.

¹ N.Y. Not-For-Profit Corp. Act, § 201(b). Type B defined as having non-business purposes that are charitable, religious, educational, scientific, literary, cultural, or prevention of cruelty to children or animals.

² Ohio Rev. Code, tit. 17 generally. Over 26 general chapter headings on types of corporations are described in the statute.

³ Mich. Comp. L. Anno., § 450.117-450.119.

⁴ N.Y. Not-For-Profit Corp. Act, § 201(c).

^{4a} For a critical analysis of the New York statute, see Oleck, *Proprietary Mentality and the New Non-Profit Corporation Laws*, 20 Clev. St. L. Rev. 145 (1971).

⁵ Alford, *The Disposition of Assets Upon Failure of a Charitable Trust or Corporation: Policy Relationship to Enforcement of Charities*, 9 Utah L. Rev. 217 (1964-65).

⁶ *Ferraria v. Vasconellos*, 31 Ill. 25 (1863); *Hale v. Everret*, 16 Am. Rep. 82, 53 N.H. 9 (1868).

⁷ 80 U.S. (13 Wall.) 679 (1871) dictum.

property was acquired for a religious organization, none would be *implied* for the purpose of expelling those whose ideas of religious truth had changed. Further, as to the rule of trusts, Professor Bogert⁸ indicates that implied trusts to further the dogma of the church do not necessarily represent the desires of the donor, especially where dogmas and creeds have lost their importance in this century.

The Ohio courts have uniformly held that in congregational disputes (even where property transfers are involved), majority actions will not be enjoined by minorities.⁹ In the recent case of *Mack v. Huston*,¹⁰ the defendants (a group of members of a Unitarian church in Cleveland), through a majority vote, had given their church property to a black separatist group on a lease-back arrangement. The plaintiffs, representing minority interests, sought an injunction on several grounds, all of which were rejected by the court. In looking at the church regulations, the court said that this was *not* a disposal of all assets, which would have required a two-thirds vote of the members. Further, since the regulations did not cover a partial disposition (seventy-five percent of all assets were involved in the transfer), the court would look to the portion of the Ohio code¹¹ providing for a *majority* vote in the disposition of all, or substantially all, of a non-profit corporation's assets. After supervising a second vote, the court held that a majority of the members *present* and constituting a quorum could dispose of substantially all of the corporation's assets in the manner they had attempted. The court added:

This Court would be disappointed and disillusioned if at a later date it developed that the actions of the membership of the Society . . . were only the first step in a two-step procedure to change the location or terminate the operation.¹²

Subsequently, it was revealed in a newspaper that the operations of the church were indeed terminating, and that the members were looking for a new locale.¹³ The very thing that the minority members were opposed to, and the very thing that the court was sure would *not* happen, became a fact hardly one year after the decision. One must wonder just

⁸ Bogert, *Trusts and Trustees*, § 398 at 264 n. 61 (2d ed. 1964).

⁹ *Heckman v. Mees*, 16 Ohio Rep. 584 (1849). Majority breakaway upheld on the grounds that implied trust is for the benefit of the majority. *Wiswell v. First Congregational Church*, 14 Ohio St. 31 (1862). Court would not find implied trust for creed-less Unitarian church. *Keyser v. Stansifer*, 6 Ohio Rep. 364 (1834). Majority held the property in fee simple, thereby solving the court's dilemma of implied trusts. *Katz v. Goldman*, 33 Ohio App. 150 (1929). No implied trust to support orthodox Judaism. Majority was allowed to specify the use of the property.

¹⁰ 256 N.E. 2d 271 (Comm. Pleas, Ohio 1970).

¹¹ *Supra*, n. 2, § 1702.39.

¹² *Supra*, n. 10, at 281.

¹³ *Cleveland Plain Dealer*, Feb. 20, 1971, at 2-B, col. 1.

what rights a minority member *does* have, even under a statute and under court supervision.

In light of past decisions in this area, the *Mack*¹⁴ court probably would have come up with the same result had they used an implied trust theory. Perhaps the failure to use this theory indicates the reluctance of the courts to use legal fictions, and a tendency to rely more heavily on statutory requirements. The trend in Ohio seems to be away from the implied trust, except where lack of good faith can be shown.¹⁵ Texas is another jurisdiction that will not interfere in church property transfers until all ecclesiastical appeals have been exhausted.¹⁶ Apparently they also follow the doctrine of *Watson v. Jones*,¹⁷ and will not allow an implied trust to defeat the property transfers of a majority.¹⁸ New York's new statute^{18a} seems to have completely obliterated trust law as far as non-profit corporations of the type being discussed. This concept is treated below.

Other jurisdictions, however, favor an implied trust theory. This is so perhaps because of their reluctance to get involved in ecclesiastical matters, or perhaps because of the equitable nature of the remedy, or even because of their desire to refrain from causing resentment among devoted members.¹⁹ In Minnesota, it has been held that property acquired by a church is impressed with a trust in favor of the church doctrine.²⁰ Arkansas,²¹ Indiana²² and Virginia²³ are among other jurisdictions that still recognize an implied trust to a limited extent.

In light of the Supreme Court's holding in the recent *Presbyterian Church* case,²⁴ it would appear that the state courts now have a prece-

¹⁴ *Supra*, n. 10.

¹⁵ Ohio Rev. Code, § 1702.54. See also *Gochenour v. Cleveland Terminal Bldg. Co.*, 118 F. 2d 89 (C.C.A. Ohio 1941). Fiduciaries charged with handling affairs honestly and in good faith.

¹⁶ *Groce, Authority of Officers to Convey for Church*, 22 Bay. L. Rev. 222 (1970).

¹⁷ *Supra*, n. 7.

¹⁸ *Supra*, n. 16.

^{18a} *Supra*, n. 1, § 513.

¹⁹ *Chafee, The Internal Affairs of Associations Not For Profit*, 43 Harv. L. Rev. 992, 1026 (1930).

²⁰ *Veltman v. DeBoer*, 118 N.W. 2d 808 (Minn. 1962). Due notice of meeting and right of all members to be heard apparently would suffice for majority transfer.

²¹ *Holiman v. Dovers*, 366 S.W. 2d 197 (Ark. 1963).

²² *Stansberry v. McCarty*, 149 N.E. 2d 683 (Ind. 1958). Majority rule final unless property rights of members, all of whom have interest in property, are violated.

²³ *Barber v. Caldwell*, 152 S.E. 2d 23 (Va. 1967). Majority cannot divert property to support conflicting doctrines.

²⁴ *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). In reversing the Georgia Supreme Court's finding of an implied trust in favor of the loyal members, the United States Supreme Court said that in order to decide if the implied trust has been breached, a civil court must necessarily involve itself in the relative importance of religious doctrines—plainly forbidden by the First Amendment of the Constitution.

dent for denying the implied trust doctrine when looking at majority transfers. With this theory not available, minority interests may now have to rest on statutory provisions, trust or deed provisions, or corporate by-law provisions.²⁵

The doctrine of implied trusts, being a legal fiction,^{25a} has been used in the past to limit majority rule. The trust is usually "implied" to prevent a change in the dogma of the church (or to prevent the flock's straying from the shepherd, if you will). Today, many of the gifts for non-profit corporations are given by non-members, corporations, or with no limitations. In light of these gifts, it becomes difficult for courts to justify using an implied trust where the donor has made no specific request that the "creed" of the corporation be continued.

With the absence of a very specific creed or doctrine, how can a member of a non-religious non-profit corporation²⁶ claim that an implied trust should be found to prevent the transfer of corporate assets? While not using the words "implied trust," the court in *Lefkowitz v. Cornell University*²⁷ was able to prevent the transfer of property by the majority interest on a similar theory, i.e., specific purpose. Cornell University, as the recipient of a fully staffed aerodynamics research laboratory, wished to sell the lab and put the money to use for general education purposes. The court said that the fact that Cornell had treated this as a *specific purpose* gift estopped them from selling it for *general purposes*. Also, the court said that Cornell must show how the sale of the property would promote the best interest of carrying out the charitable purposes of the trust. Despite the "changing times" (there was no longer a need for a propeller test lab) and the nature of the gift ("advancement of science and education"²⁸), the court was able to come up with a means of preventing a property transfer. Had Cornell been a religious corporation, the court could have said that the lab had been impressed with a trust for the *specific purpose* of the advancement of the dogma of Cornell, and that Cornell must prove that its dogma is being advanced by the sale of the property.

While New York was rejecting the use of "changing times" and upholding minority interests in the *Cornell*²⁹ case, Connecticut was putting a great deal of reliance on it in the case of *Dagget v. Children's Center*.³⁰ That case involved the religious affiliations of the board of directors of

²⁵ Kauper, Church Autonomy and the First Amendment: the Presbyterian Church Case, Sup. Ct. Rev. 347 (1969).

^{25a} Elliot, Majority Control of the Property of Independent Churches, 12 Kan. L. Rev. 436 (1963-64).

²⁶ *Supra*, n. 1.

²⁷ 62 Misc. 2d 95, 308 N.Y.S. 2d 85 (Sup. Ct. 1970).

²⁸ *Supra*, n. 27, 62 Misc. 2d 95 at 96, 308 N.Y.S. 2d 85 at 87 (1970).

²⁹ *Supra*, n. 27.

³⁰ 28 Conn. Sup. 468, 266 A. 2d 72 (1970).

an orphanage. The original grantor had specified that the board of directors be comprised solely of Protestants. The court overlooked that specific provision by stating that "(t)he change in the religious make-up of the Center's board of managers has not affected the operation of the center."³¹ Further, after looking at the desire not to discriminate and the fact that the original gift was valued at only one-half percent of the operating revenue of the foundation, the court was able to conclude that the purpose of the gift was *general* enough to allow the majority interest to prevail.

It would seem from these two cases, that if a member can show a very *specific* purpose in the operation of the non-profit corporation, he could probably enforce the proposed disposition to that purpose. However, because a non-profit corporation is tested by its *actual* rather than its *stated* purposes,³² most corporations involve themselves in purposes broad enough to encompass the problem presented in the *Cornell*³³ situation. Therefore, the possibility of a minority member prevailing in an action to prevent a majority transfer is greatly diminished if the purposes of the corporation are broad in scope.

The Death of Trust Law in New York!

Section 513 of the New York Not-For-Profit Corporation Act, in two short pages, wipes out hundreds of years of trust law for charitable corporations. The statute makes Type B corporations *full owners* (not merely trustees) of all corporate assets. Further, the statute denies that a Type B corporation can ever be deemed a trustee—even in the event that the gift *names* the corporation as trustee (gone forever is the donor's intent). The statute makes the transfer of assets fully discretionary with the board of directors and relies nowhere on the approval of the members.

This section was purportedly passed to give these types of corporations flexibility in the administration of their funds within the principles of corporation law, rather than trust law.^{33a} However, by giving the corporation *full ownership*, the legislature has taken Type B corporations past the control of corporate law and into the control of common law property concepts. It seems that a non-profit corporation can buy and sell property under § 513 (completely at its discretion), and be liable only for a breach of contract—or perhaps a breach of discretion. The fiduciary relationship present in corporate law is not present in this New York law.

³¹ *Supra*, n. 30, 28 Conn. Sup. 468, 266 A. 2d 72 at 75 (1970).

³² Oleck, *Non-Profit Corporations, Organizations and Associations*, 454 (Prentice-Hall, Inc., 2d ed. 1965).

³³ *Supra*, n., 27.

^{33a} *Supra*, n. 1, § 513. Legislative Studies and Reports.

Nowhere^{33b} are corporate directors given the power that New York gives them. Nowhere have the rights of minority interests been so severely restricted as they have been by § 513. It is difficult to imagine why the legislature would want to wipe out the remaining police powers of minority interests, other than to free the courts forever of supervisory responsibilities. This statute is so broad and clear, that it is difficult to imagine a situation in which minority interests could ever prevail.

Who May Enforce?

There is little doubt that an outside trustee may enforce a trust to its *specific* purpose within the framework of the non-profit corporation;³⁴ but who is to enforce the rights of the minority members *within* the corporation? It has been held that the attorney general, through *quo warranto* proceedings,³⁵ can enforce minority rights where there has been a misuse of the charitable gift.³⁶ However, this is a common law power of enforcement, and it is generally considered a very passive method.³⁷ Several states (*e.g.*, California,³⁸ Illinois,³⁹ New York,⁴⁰ Ohio⁴¹) have set up procedures for investigation and enforcement by the attorney general. Texas,⁴² on the other hand, only provides that the attorney general's office is the proper party in an enforcement action, but provides for no method of initial investigation.⁴³

Some states are silent as to the role of enforcement by the attorney general,⁴⁴ or deny him the right of enforcement altogether.⁴⁵ Professor

^{33b} For a discussion of corporate property sales on a state-by-state basis, see 4 Oleck, *Modern Corporation Law*, § 1710-§ 1762 (Bobbs-Merrill Co., Inc., 1960, with 1965 supp.).

³⁴ *St. Joseph's Hospital v. Bennett*, 281 N.Y. 115, 22 N.E. 2d 305 (1939). Use of income for anything other than perpetual fund would be violation of testator's intent.

³⁵ *State ex rel. Attorney General v. Norcross*, 132 Wis. 534, 112 N.W. 40 (1907). *Quo warranto* is a redress of a public wrong, or the enforcement of a public right. Also see Oleck, *supra*, n. 32, at 180.

³⁶ *Commonwealth v. Seventh Day Baptists*, 317 Pa. 358, 176 A. 17 (1935).

³⁷ Bogert and Oaks, *Cases on the Law of Trusts*, p. 699 (Foundation Press, 1967 ed.).

³⁸ *West's Ann. Cal. Gov. Codes*, § 12580 et seq.

³⁹ *Ill. Rev. Stats.*, c. 14 § 51 et seq.

⁴⁰ *N.Y. Est., Powers and Trusts L.*, § 8-1.4.

⁴¹ *Ohio Rev. Code*, § 109.23 et seq.

⁴² *Tex. Civ. Stat.*, § 4412(a).

⁴³ Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 Mich. L. Rev. 633 at 647 (1952). A bill, which would have given the attorney general broad powers of enforcement, was defeated by the Texas legislature. Apparently strong pressure was put on by church groups and wealthy trustees to defeat the bill.

⁴⁴ *Alaska Stat.*, tit. 23, § 10.20.375. This section provides that the attorney general may bring proceedings to liquidate a non-profit corporation. Otherwise the attorney general is not mentioned as a proper party in an enforcement action. Also see *Colo. Rev. Stat. ch. 31, art. 20, § 1-14*.

(Continued on next page)

Bogert⁴⁶ states that because the attorney general is a political officer with duties in (and pressures from) the state government, he has little time for enforcing charitable gifts. Thus, it appears that the attorney general's office is not the best place to initiate litigation where minority interests are at stake.⁴⁷

Because a director of a non-profit corporation is a fiduciary,⁴⁸ a member (majority or minority) can bring an action where there has been a breach of faith in the property transfer. Since some statutes assume the good faith of the director in a property transfer,⁴⁹ it would seem that breach of faith becomes a difficult matter for the minority member to prove. Additionally this would not seem to be a likely remedy for a minority member since he, more than likely, would be acting with the majority to prevent further fraud and self-dealing.

It would seem that presently, the best that minority members can hope for, where there are non-profit statutes, is to attack the statutory requirements as was done in the *Mack*⁵⁰ case. In the case of *Davis v. Congregation Beth Tephila Israel*,⁵¹ one member of a non-profit corporation was allowed to maintain an action to prevent a property transfer. The case involved a consolidation agreement by two religious corporations with no attempt to comply with the statutory requirements of merger.⁵² The court said that since this was an *ultra vires* act, a single dissenting member of either congregation could maintain an action to set aside the agreement. The case decisions in this area have added to the confusion of who may maintain an action. For instance, one Ohio court⁵³ said that members, not the trustees of the non-profit corporation, were vested with the powers to adopt, and presumably enforce, the fundamental principles of the society. Another Ohio court⁵⁴ has said

(Continued from preceding page)

⁴⁵ Tenn. Code Anno., tit. 23, § 2809. Although this section says that the attorney general and the governor (together) may direct that an action be brought, the courts have interpreted this to mean that the attorney general alone has no authority under the statute to bring an action to recover misappropriated charitable funds. *State ex rel. Tennessee Children's Home Society v. Hollinsworth*, 193 Tenn. 491, 246 S.W. 2d 345 (1952).

⁴⁶ *Supra*, n. 43.

⁴⁷ *Souhegan National Bank v. Kenison*, 92 N.H. 117, 26 A. 2d 26 (1942). Admission that the attorney general is forced, by an overload in work, to move sporadically.

⁴⁸ *Oleck, supra*, n. 32, at 301.

⁴⁹ Texas Not for Profit Corp. Act. § 1396-5.08 provides that recordation of deed is prima facie evidence of proper procedure by director in transfer of property.

⁵⁰ *Supra*, n. 10.

⁵¹ 40 App. Div. 424, 57 N.Y.S. 1015 (1899). See also *Agoodash Achim of Ithaca v. Temple Beth-El*, 147 Misc. 405, 263 N.Y.S. 81 (Sup. Ct. 1933).

⁵² N.Y. Rel. Corp. L., § 12.

⁵³ *Veterans of W.W.I. v. Levy*, 70 Ohio Abs. 49, 118 N.E. 2d 670 (1954).

⁵⁴ *First United Presbyterian Church of New Concord v. Young*, 21 Ohio Nisi Prius (N.S.) 569, 29 Ohio Dec. 477 (1919). Minority members must go through trustees to enjoin property transfer.

that trustees, having the powers vested in them, are the proper parties to bring an action. Professor Howard L. Oleck⁵⁵ suggests that the best view is that the trustee actually is vested with power to act for the benefit of all members. With this in mind, it would seem that all a member would have to do is show that the director (trustee) did not act for the benefit of all the members of the corporation in transferring the corporate assets. Yet case law and statutes indicate that, whether or not it *should* be, this is not always the test used.⁵⁶

Ohio provides that directors may mortgage any and all property of a non-profit corporation without the vote of a single member.⁵⁷ Ohio, by statute, also provides for court supervision of corporate property sales at any time.⁵⁸ This procedure, however, is not mandatory for all non-profit corporations according to the court in *Fenn College v. Nance*.⁵⁹ In that case, Fenn sought a declaratory judgment on whether it could cease functioning as an educational institution and transfer its assets to a newly created state university without court supervision. In answering the question affirmatively, the court said that since Fenn's Articles of Incorporation gave it broad plenary powers

"... (i) t is abundantly clear that Fenn has full and complete legal authority . . . to enter into the (a)greement and . . . (i) t need not even have resorted to the Court to have such action sanctioned."^{59a}

It almost seems as if the court did not want to involve itself in a judicial sale and was willing to let the trustees continue on without any interference.

New York^{59b} provides that leave of court (under Gen. Corp. L. § 50 and Relig. Corp. L. § 12) is necessary in order to transfer property of a religious society.⁶⁰ However, New York too has case law to the effect that court approval is not necessary. In the *Sun Assets*⁶¹ case, the defendant church was alleged to have failed to convey the church property pursuant to a contract to sell. The church claimed that since it had

⁵⁵ Oleck, *supra*, n. 32, at 301.

⁵⁶ Tex. Rev. Civ. Stat., art. 5523a provides that any person who has a right of action against a trustee in a conveyance of property must do so within ten years. While one court has ruled that this is a statute of limitations to bar an action by a member: *Dall v. Lindsey*, 237 S.W. 2d 1006 (Tex. Civ. App. 1951); another court has said that since the trustee did not have authority to sell, the ten year period did not affect an action brought against him: *Burrow v. McMahon*, 384 S.W. 2d 124 (Tex. Sup. Ct. 1964).

⁵⁷ *Supra*, n. 2, § 1702.36.

⁵⁸ *Supra*, n. 2, § 1702.40 and § 1715.39.

⁵⁹ 33 Ohio Op. 2d 292, 4 Ohio Misc. 183, 210 N.E. 2d 418 (1965).

^{59a} *Id.*, 33 Ohio Op. 2d 292 at 296, 4 Ohio Misc. 183 at 189, 210 N.E. 2d 418 at 422 (1965).

^{59b} *Supra*, n. 1, § 1112.

⁶⁰ *Wilson v. Ebenezer Baptist Church, Inc.*, 187 N.Y.S. 2d 861 (1963).

⁶¹ *Sun Assets Corp. v. English Evangelic Lutheran Church of the Ascension of Borough Park*, 185 N.Y.S. 2d 695 (1963). See also *Application of Margolin*, 183 N.Y.S. 2d 36 (1963).

not sought the court's supervision, the contract entered into was void. The court rejected this argument by stating that the court can always give approval *after* the contract is entered into. Since this case involved two purchasers of the same property, the holding of the case seems to be *contra* to the purpose of the statute,⁶² which is to give the court supervisory powers over the sales of property of religious corporations. The problem presented in *Sun Assets*⁶³ probably never would have arisen if the court had supervised the sale *before* the contracts were entered into.

Texas⁶⁴ provides that one-tenth (1/10) of the voting members is a quorum sufficient to transfer property. Also, the recordation of a deed of conveyance is *prima facie* evidence that a resolution of conveyance was duly adopted by the members.⁶⁵

Under these statutes and case law the benefit to the corporation would be very difficult to rebut by a minority interest. How could a minority complain in Texas when the statute says that the benefit to the corporation can be shown by a majority vote of little more than five percent of the members? How can a minority member deny that there is no benefit to the corporation in Ohio when the courts deny that they themselves need to supervise property transfers, or when the statute says that mortgaging property is permissible without voter approval? How can a minority member in New York complain when the courts will not supervise the sale of assets *until* the contractual obligations have been entered into?

With the state attorneys-general busy in other areas, trustees not aware of minority interests, members having to overcome statutory presumptions of good faith transfers, and benefits to the corporation difficult to rebut under existing statutes and case law, it appears that protection of minority interest is a chancey possibility at best.

New Paths?

Several writers have suggested corporate remedies in the area of non-profit corporation litigation.⁶⁶ While not citing these authorities, the court in *Atwell v. Bide-A-Wee Home Association*⁶⁷ seems to bear out these advocates. In that case, the plaintiffs brought a derivative action on behalf of the defendant non-profit corporation. Defendant was

⁶² *Supra*, n. 52.

⁶³ *Supra*, n. 61.

⁶⁴ Tex. Non Profit Corp. Act, art. 1396-2.13. See also Ill. Gen. Not-for-Profit Corp. Act, § 163 a15.

⁶⁵ Tex. Non Profit Corp. Act, art. 1396-5.08.

⁶⁶ Oleck, Non-Profit Types, Uses, and Abuses 1970, 19 Clev. St. L. Rev. 207 (1970). See also Leshner, The Non-Profit Corporation—A Neglected Stepchild Comes of Age, 22 Bus. Law. 951 (1967).

⁶⁷ 59 Misc. 2d 321, 299 N.Y.S. 2d 40 (Sup. Ct. 1969).

alleged to have destroyed animals entrusted to its care. The court agreed with the defendant's contention that plaintiffs were not voting members. However, the court went on, the mere fact that one of the plaintiffs had contributed to the corporation gives her standing to bring a derivative action. The significance of this case is that it was decided *before* the New York Not-For-Profit Corporation law was passed (which allows members' derivative actions).⁶⁸ However forward-looking this decision may appear on its face, it is tempered by the earlier decision of *In re Dissolution of Cleveland Savings Society*⁶⁹ which dismissed the derivative action of the members because they represented personal interests, as opposed to corporate interests. Therefore, derivative actions will only be supported by the courts (if they are supported at all) where the minority members can show that corporate interests are at stake.

It would hardly be proper to draw a conclusion from these two cases that a trend is developing to allow derivative actions in the area of non-profit property transfers. However, with the provisions of the New York statute, these cases, and the writers who advocate such a position, a strong argument can be made for allowing derivative actions—as well as other corporate remedies.⁷⁰

Conclusion

There have been varying suggestions for degrees of control, from intra-corporate board control⁷¹ to infra-structural⁷² ("private initiative") enforcement. This paper, it is hoped, has shown the reluctance of the courts and legislatures to deal effectively with the problem of controlling harsh dominance of majority interests over minority interests. With the rapid growth in the numbers of non-profit corporations, the attorney general's office cannot possibly police them, the legislatures are inherently slow in patchworking outmoded statutes, and the courts are hopelessly bogged down in legal fictions and conflicting results.

Admittedly it is difficult to balance control and enforcement with initiative and philanthropy and still come up with a viable policing mechanism that will not stifle non-profit growth. To this end, the only hope seems to be to either adopt a uniform non-profit statute with enforce-

⁶⁸ *Supra*, n. 1, § 623.

⁶⁹ 90 Ohio Law Abs. 3, 183 N.E. 2d 234 (1962).

⁷⁰ Oleck, *supra*, n. 26. Professor Oleck lists corporation law principles that apply in non-profit corporations. § 218 at 450.

⁷¹ Taft, *Control of Foundations and Other Non-Profit Corporations*, 18 Clev. St. L. Rev. 478 (1969).

⁷² Alford, *supra*, n. 5.

ment sections that will work,⁷³ or set up a separate policing agency not unlike what the SEC does for profit oriented corporations.⁷⁴

As stated at the outset, my purpose is to show the development (or should I say *lack* of development) of minority rights in non-profit property transfers. I leave to others the task of devising the system to effectively police non-profit corporations and thus properly protect minority interests.

⁷³ *E.g.*, Oleck, *supra*, n. 26, at 577. Professor Oleck advocates, in his proposed Uniform Act for Non-Profit Organizations, a licensing commission, state supreme court supervision, and intervention by "any interested person."

⁷⁴ Oleck, *supra*, n. 51, at 236.