1970

Relocation of Publicly Supported Charitable Organizations

Deborah C. Goshien

Relocation of Publicly Supported Charitable Organizations

*Deborah C. Goshien**

IS A DONOR POWERLESS to prevent a charitable hospital from moving to another county after he has contributed substantially to its building fund? Surprisingly enough, the answer to this question may be "yes."

It has been said that the community's interest is evident when charitable monies come from direct public contributions,[1] and that even if no trust is found a charitable corporation must use a gift for the purpose intended.[2] Yet general expressions of what "should be" or what "is right" are insufficient guidelines for proper enforcement of fiduciary duties, and there has been much confusion in the administration and enforcement of gifts not in trust when a charitable corporation is involved.[3] Studies have indicated that the average state attorney general's office has supplied almost no supervision or enforcement of charitable trusts,[4] yet the number of charitable corporations and charitable trusts has been growing at an astounding rate.[5]

A recent Alabama case[6] contained language indicating the typical thinking which is thwarting the public's ability to protect its interest in non-profit charitable corporations. In this case a physician who was a member and contributor to a hospital was refused the privilege of serving on the medical staff. This refusal in turn deprived his patients, many

---

* B.A., University of Chicago; Third-year student at Cleveland State University, Cleveland-Marshall College of Law.

[Editor's Note: This paper was *not* part of the Institute held at the Univ. of Michigan C.L.E. session.]

[1] Karst, The Efficiency of the Charitable Dollar: an Unfulfilled State Responsibility, 73 Harv. L. Rev. 433 (1960).

[2] 4 Scott on Trusts (2d) 2558 (1956 with 1966 supp.). This doctrine has been well settled since St. Joseph's Hospital v. Bennet, 281 N.Y. 115, 22 N.E. 2d 305 (1939), commented on in Taylor, A New Chapter in the New York Law of Charitable Corporations, 25 Cornell L. Q. 382 (1940). In the St. Joseph's case the testator had directed that a portion of the residue of his estate be used for hospital endowment funds. The hospital attempted to use the money for ordinary maintenance expenses. The court found no trust but nevertheless found a valid, enforceable direction and maintained that the funds must be used as directed.

[3] Note: Gifts to Charitable Corporations—in Trust or not in Trust, 50 Marq. L. Rev. 671, 679 (1967).

[4] Kutner and Koven, Charitable Trust Legislation in the Several States, 61 Nw. U. L. Rev. 411, 412 (1966).

[5] Professor Oleck has commented, in his article elsewhere in this symposium, that in Ohio alone there were more than 70,000 non-profit corporation charters on file with the Secretary of State in 1969. On this significant rise in influence of non-profit corporations in the United States, see also:
Howland, The History of the Supervision of Charitable Trusts and Corporations in California, 13 U.C.L.A. L. Rev. 1029 (1966), and Note, The Legal Framework Governing Operation of Modern Nonprofit Corporations, 47 Iowa L. Rev. 1064 (1962).

[6] Moore v. Andalusia Hospital, Inc., 4 Div. 341, 224 So. 2d 617 (Ala. 1969).

of whom were also contributors, of the benefits of the hospital. The court's finding that the trustees' actions were within their discretion and not subject to judicial review may have been appropriate on these isolated facts. The court was, however, too quick to deny the public's interest in charitable corporations which rely on public donations. The decision relied on language from an older Maryland case[7] in which the equity court was reluctant to interfere with the internal management of a hospital even though supported largely by voluntary contributions.[8] As stated by the Alabama court:

> . . . So, a hospital, although operated solely for the benefit of the public and not for profit, is nevertheless a private institution if founded and maintained by a private corporation with authority to elect its own officers and directors.[9]

A recent and rather shocking Illinois case[10] failed even to discuss the fiduciaries' possible breach of duty in moving an educational institution to another state. A testator had left monies to Carthage College in Carthage, Illinois. The college disbanded its entire Illinois campus and moved to another campus in Wisconsin. The court passed off this move by saying that Carthage is a mere address, and that if the college has decided to move, then it still deserves to retain the contributions.[11] The appellate court reversed the trial judge who had awarded the money to another college located in Carthage, Illinois after invoking the *cy pres*[12] doctrine. Neither judge discussed whether the gift failed completely because of the trustees' actions, seemingly conceding the trustees' right to move the college.

In a New Jersey case,[13] donors to the Paterson General Hospital, who were also residents of Paterson, failed in their attempt to prevent the trustees from moving the hospital to another county. The court noted that authorities were in conflict as to the extent a charitable corporation is to be governed by laws applicable to charitable trusts.[14] The court also indicated that the standing of a plaintiff to complain should be liberal

---

[7] Levin v. Sinai Hospital of Baltimore City, 186 Md. 174, 46 A. 2d 298 (Ct. App. Md. 1946).

[8] *Id.* at 301.

[9] Moore v. Andalusia, *supra* n. 6, at 619. Interestingly, although there is much similar language, this supposed quote does not appear in the Levin case except in the headnote of the West Publishing Company.

[10] Bell v. Carthage College, 243 N.E. 2d 23 (Ill. App. 1968).

[11] *Id.* at 26.

[12] *Id.* at 27. Also see generally Bogert, The Law of Trusts and Trustees (2nd ed. 1964) ch. 22, The Cy Pres Power, Sec. 431-442.

[13] Paterson v. Paterson Gen. Hospital, 97 N.J. Super. 514, 235 A. 2d 487 (1967). [The trial judge's opinion and a settlement reached while appeal was pending were both approved in City of Paterson v. Paterson General Hospital, 104 N.J. Super. 472, 250 A. 2d 427 (1969)].

[14] *Id.* at 489.

because of the lack of supervision of charities in general.[15] Nevertheless the tenor of this decision was that the trustees had full discretion to make the decision to move without interference from these donors. Perhaps the underlying reason was that the hospital was being moved only a short distance:

> Were it proposed that the hospital facilities be moved to a location a considerable distance from the hospital's present site, we would be faced with a different question, for there the community to be benefited would have changed. . . . If the very basic changes in the organization of Rutgers were found acceptable, surely the relatively modest proposal we are considering must be deemed unobjectionable.[16]

This case leaves unanswered the logically consequent question: "How far is too far?" To answer would be *obiter dicta,* but our ignorance awaits further case decision in the tradition of the common lawyer.[17]

A similar situation exists today in Ohio where staff member-donors of a Cleveland hospital are attempting to enjoin the sale of facilities to a *for-profit* corporation and the removal of assets to another county.[18] Ingleside Hospital is a centrally-located psychiatric hospital which had been serving the Cleveland area. The trustees successfully solicited funds from the public for a new building on the basis of the vital need for psychiatric facilities in this location.[19] After operating for a few months in the new facility, the hospital was closed after a dispute with maintenance workers and negotiations were begun for a sale to a profit-making corporation. In this case control of the seven-member board of trustees was achieved through the use of extensive proxies. After much newspaper publicity[20] the Attorney General has intervened on behalf of plaintiffs, but the outcome of the case is in doubt.

---

15 *Id.* at 495.

16 *Id.* at 492-493.

17 See generally, Llewellyn, The Common Law Tradition (1960).

18 Florence Matthews, M.D. *et al.* v. Ingleside Hospital, Inc. *et al.*, Cuyahoga County, Ohio, Common Pleas Court case no. 873,358 (254 N.E. 2nd 923, 1969).

19 See exhibits A through E attached to Amicus Curiae Brief filed on behalf of the Greater Cleveland Hospital Association in the case of Florence Matthews, *et al.* v. Ingleside Hospital, Inc. *et al. supra* n. 18. For instance, Exhibit A is part of a brochure mailed to the public during the building fund drive which stated:

> Ingleside IS WHERE THE ACTION IS—NEEDED. The hospital is located on the edge of the Hough Area, in the University Circle-Euclid Urban Renewal Section. The mental health needs of the surrounding neighborhood alone, are staggering. Not only will Ingleside provide a service which is desperately needed, but also it will open up job opportunities where they are critically in demand. We are happy to answer questions and discuss Ingleside's future with you, in person. Please feel free to call us at your earliest convenience.
>
> FUTURE PLANS. New facilities are urgently needed to keep pace with the constantly growing demands for better and more extensive psychiatric care. Ingleside MUST build . . . Now!

20 See 1969 Cleveland *Plain Dealer* files, especially March 2, 3; April 4; November 6, 19.

Interestingly, under Ohio law, which is typical of much non-profit law in the country,[21] the Attorney General was not necessarily compelled to join in the suit because of the ambiguity of the state statutes. Ohio Revised Code Sec. 109.23 defines a charitable trust to include "any fiduciary relationship . . . subjecting . . . the . . . corporation . . . by whom the property is held to equitable duties. . . ." However, "Such sections do not apply to charitable, religious and educational institutions holding funds in trust or otherwise exclusively for their own purposes. . . ." A building fund could be such a fund and come within the exclusion. Under Ohio Revised Code Sec. 109.25, the Attorney General is a necessary party to charitable trust proceedings if there is a departure from the purpose of the trust. The problem at this point is whether certain forms of donations to charitable corporations are construed to be charitable trusts.[22] A 1958 Ohio case[23] involved a testamentary disposition to Bradford Junior College in Massachusetts in trust for certain express purposes. The court found no "technical" trust, but

> . . . the bequest to Bradford Junior College is subject to an enforcible obligation to use the money arising from the bequest, for the express purposes named therein. In this sense it may be said to have certain attributes of a charitable trust. . . .[24]

In *Ohio Society for Crippled Children v. McElroy*,[25] a testator devised his home farm to the Society to be farmed and used as a home for crippled children. The syllabus of the court states:

> Property given to a charitable corporation will be held by that corporation subject to enforceable fiduciary obligations as to its use only where the donor thereof expressed an intention to impose a duty upon the corporation to use it for certain purposes and not merely where the donor expressed a desire that the corporation so use it.[26]

Here the court attempted to distinguish between precatory language and mandatory language, a difficult task.[27] Arguably there is some basis for distinction when a written instrument such as a will or trust docu-

---

[21] Oleck, Non-Profit Corporations, Organizations, and Associations 13-17 (2nd ed. 1965); Bogert, Proposed Legislation Regarding State Supervision of Charities, 52 Mich. L. Rev. 633, 645 (1954); Committee on Corporate Laws of the American Bar Association, Section on Corporate Banking and Business Law, Model Nonprofit Corporation Act (Rev. 1964).

[22] Note, Trusts—Gifts to Charitable Corporations—Nature of Interest Created—Duties of Trustee, 26 So. Calif. L. Rev. 80, 83 (1952); Trustees of Rutgers College in New Jersey v. Richman, 41 N.J. Sup. 259, 125 A. 2d 10, 26 (Ch. Div. N.J. 1956); Bogert, *op. cit. supra* n. 12, sec. 324 at 671.

[23] In the matter of the Estate of Bicknell, 108 Ohio App. 51, 9 Ohio Op. 2d 85 (1958).

[24] *Id.* at 55-56.

[25] 175 Ohio St. 49, 191 N.E. 2d 543, 100 A.L.R. 2d 1202 (1963).

[26] *Id.* at 544.

[27] Bogert, *op. cit. supra* n. 12, sec. 324 at 666.

ment is being construed. But when a person contributes a check in response to either a general or a special plea for funds, he also expects his gift to be used in a certain way although there is no written instrument to prove his desire. This expectation may well be based upon impressions garnered from the advertising of the charity and its statement of condition to residents of the area.[28] If the contribution is made to a large charitable corporation, it is possible that the gift will be found to be absolute and not enforceable by the donor.[29] It should not be necessary for a donor to a charity such as a hospital or school to write a trust instrument or written expression of his reliance, yet the donor may not be able to enforce the trust in any other way.[30]

Based on the above discussion of recent cases it can be seen that today's donors must rely on the mercy and wisdom of the equity courts because they lack a defined position from which to exert power to see that their expectations are fulfilled.[31] Yet it should not have to be the function of the courts to superintend and administer charitable donations and the courts have traditionally been unwilling to perform in the role of administrators.

The reluctance and/or inability of states attorneys general to supervise adequately trustees of charitable corporations is well known.[32] As it stands now, a handful of trustees may have complete power over funds which have been imbued with a public interest, and may even move the charitable institution to a different community. This freedom in the trustees has been possible at least in part because state actions have been confined to the equity courts which necessitate a showing of abuse of discretion. This requirement is most difficult to meet, since a decision that is merely unwise will be found to be within the trustees' discretion and not subject to judicial review even though the consequences to the community may be severe. Also numerous jurisdictions have failed to provide even minimal state supervision of charities,[33] and of those states that do supervise, only one, California, has adopted the Uniform Act recognizing the need to treat all charitable fiduciaries alike regardless of the form of the organization.[34]

If donees to charities have no control over their gifts, and the attorneys general are reluctant or unable to sue,[35] then a handful of private

---

28 See Exhibits A through E, *supra* n. 19.

29 Bogert, *op. cit. supra* n. 12, sec. 324 at 668.

30 Kutner and Koven, Charitable Trust Legislation in the Several States, 61 Nw. U. L. Rev. 411, 425 (1966).

31 Howland, The History of the Supervision of Charitable Trusts and Corporations in California, 13 U.C.L.A. L. Rev. 1029, 1036 (1966).

32 Kutner and Koven, *op. cit. supra* n. 30 at 412.

33 *Id.* at 425.

34 Howland, *op. cit. supra* n. 31 at 1040.

35 Oleck, *op. cit. supra* n. 21 at 456.

trustees may have complete power over funds which have been imbued with a public interest.

Professor Kenneth Karst of the University of Southern California has suggested a separate centralized state board to supervise private charities, replacing the Attorney General and other state agency functions.[36] He is advocating a charities law distinct from traditional corporation and trust concepts. He has been echoed in this by Professor Marion Fremont-Smith.[37]

Distinguished Professor Howard L. Oleck of Cleveland State University advocates a special S.E.C.-type supervisory agency, both federal and in every state; not a branch of the I.R.S. This is included in his Proposed Uniform Non-Profit Organizations Act.[38]

Other suggestions have been made,[39] but the record of willingness of state legislatures to act has been poor.[40]

There is an admixture of trust and corporate law in the law of charitable corporations because the charitable corporation is the product of a change from the trust form to the corporate form and contains the elements of both trusts and corporate management.[41] Because of ambiguity of both the statutes and former case decisions, it is not clear in any given situation what the direction of the court will be and what place the Attorney General will have in the litigation.

The most immediate problem seems to be the need for an exhaustive interpretation of present ambiguously-worded statutes, and an expansion of recognition of public interest in charitable corporations. The *Ingleside Hospital* case[42] and others like it, provide the perfect opportunity for setting up guidelines to prevent abuses until such time as a separate proper supervisory agency can be established. These cases will set the trend by establishing the public's role in supervising charitable corporations and defining standing to sue, limits of fiduciary discretion and proper enforcement procedures. Donors deserve clear indications as to what the laws are and how they are to be enforced.

There has been some expansion of the right to sue. For instance,

---

[36] Karst, *op. cit. supra* n. 1 at 476.

[37] Fremont-Smith, Duties and Powers of Charitable Fiduciaries: The Law of Trusts and the Correction of Abuses, 13 U.C.L.A. L. Rev. 1041 (1966).

[38] Oleck, *op. cit. supra* n. 21 at 457; 575 *et seq.*

[39] Comment: Selected Problems of California Charitable Corporation Administration: Standing to Sue, and Directors' Ability to Change Purpose, 13 U.C.L.A. L. Rev. 1123, 1131-33 (1966) suggests a liberalization of the *cy pres* doctrine, broadening the power to alter the trust after a prescribed period; Note: Gifts to Charitable Corporations—in Trust or not in Trust, *op. cit. supra* n. 3 at 680 suggests that there should be a presumption that gifts to charitable corporations are not in trust. Then if found to be in trust, trust rather than corporation statutes should be applied.

[40] Fremont-Smith, *op. cit. supra* n. 37 at 1042.

[41] Note, The Charitable Corp., 64 Harv. L. Rev. 1168 (1951).

[42] Florence Matthews, M.D. *et al.* v. Ingleside Hospital, Inc. *et al.*, *supra* n. 18.

Justice Traynor in a 1964 California decision[43] allowed minority trustees of a charitable corporation to sue the majority trustees, reasoning that the same rules should apply to both charitable trusts and charitable corporations.[44] Justice Traynor in his typical forward-thinking fashion recognized the difficulties of leaving enforcement up to the Attorney General who may not be in a position to be aware of wrongful conduct or to know the extent of the breach of fiduciary duty. He also pointed out that other burdensome duties of office may tend to make the Attorney General refrain from joining the suit except in cases of serious public detriment.[45] The older view is shown by the dissent which insists that only the Attorney General may sue to enforce a trust assumed by a charitable corporation.[46] In an earlier case,[47] California had broadened its rules of evidence to admit donor's declarations either before or after making the gift to the charitable organization in order to determine who should control the funds.

Conclusion

In allowing donor-plaintiffs, minority trustees of a charitable corporation and other interested parties standing to sue, the courts in these recent cases have at least shown awareness of the public's interest in charitable corporations. But this is of little value if, given the right to sue, the donor-plaintiffs fail in their efforts to supervise or limit the trustees' disposition of donations from the immediate community.

Until the individual state legislatures or the Federal Government acts to set up an *adequate* supervisory agency, the courts must set guidelines on a case-by-case basis. Both family and corporate attorneys must play an increasingly important role in making their donor-clients aware of these guidelines and advising their clients as to what may happen to their charitable gifts. When donors are solicited for building funds, special drives or even general contributions to a charitable corporation that serves a vital function in their neighborhood or community, these donors must be made aware of the necessity for earmarking these donations so that the funds will be applied in the expected manner.

---

[43] Holt v. College of Osteopathic Physicians and Surgeons, 40 Cal. Rptr. 244, 394 P. 2d 932 (1964). See also Note, Capacity of Charitable Corporation to sue Co-Trustees to enjoin breach of trust, 16 Hastings L. J. 479 (1965); Wickes v. Belgian American Educational Foundation, 266 F. Supp. 38 (S.D. N.Y. 1967), in which member-directors of a charitable corporation were allowed to question the legality of a conveyance by the foundation.

[44] Holt v. College of Osteopathic Physicians and Surgeons, *id.* at 937.

[45] *Id.* at 935.

[46] *Id.* at 939.

[47] Bank of America Nat. Trust and Sav. Ass'n. v. Arakelian, 307 P. 2d 746 (Dist. Ct. App. 3rd Dist. Calif. 1957).