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The Attorney General and the Charitable Trust Act—Wills, Contest and Construction

Dale R. Martin*

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.¹ This right is predicated on the ancient English doctrine that the king, as *parens patriae*, through his officer, the Attorney General, watched over the administration of charities.² Since charities are matters of public interest the Attorney General is a necessary party to any matter dealing with them.³

In Ohio the Attorney General shall appear in any court or tribunal in which the state is interested.⁴ The common law interpretation of the duties of the Attorney General regarding charitable trusts in the state of Ohio has been supplanted by statutory law which is enumerated in Sections 109.23-109.33 of the Ohio Revised Code, often referred to as the Charitable Trusts Act.

Contest and Construction

In order to apply the Charitable Trusts Act to actions to construe a will and to will contests, we must first differentiate between the two. In an action to construe a will the court assumes the validity of the will, whereas in a will contest the only issue is the validity of the instrument.⁵ The object of an action to construe a will is to interpret the testator's intentions as to the dispositive provisions of the instrument; in a will contest the court studies its mechanical construction, while its meaning and intent are immaterial.⁶

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¹ 5 Am. Jur. 246 (1936).

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

³ Anno: 74 A. L. R. 2d 1066 (1960).

⁴ Ohio Rev. Code, Sec. 109.02.

⁵ 56 Ohio Jur. 2d 215 (1963).

⁶ *Ibid.*

Ohio Revised Code, Section 109.23 defines charitable trusts falling under the jurisdiction of the Attorney General and lists exceptions to this definition. It reads as follows:

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

According to Section 109.25, the Attorney General must be a party to any charitable trust proceedings, the object of which is to:

(1) Terminate a charitable trust or distribute its assets to other than charitable donees; (2) Depart from the objects or purposes of a charitable trust as the same are set forth in the instrument creating the trust, including any proceeding for the application of the doctrine of *cy pres*; (3) Construe the provisions of an instrument with respect to a charitable trust.

If the Attorney General is not served with process in such proceedings, then the judgment rendered therein is void and unenforceable.⁷

a. *Will Contests*

Participation of the Attorney General is based on the fact that the will contest seeks to establish whether the instrument is the last will and testament of the testator.⁸ If it is determined not to be the last will and testament, then naturally the charitable bequest therein will fail. The Attorney General likewise participates in an action to construe a will under Section 109.25 (3), which states that he is a necessary party in all actions seeking to construe the provisions of an instrument with respect to a charitable trust.

⁷ Ohio Rev. Code, Sec. 109.25.

⁸ *Ibid.*, Sec. 2741.04.

However, in *Spang v. Cleveland Trust Co.* the court determined that the Attorney General was not a necessary party.⁹ After providing for the payment of debts, the testator left the rest and residue of the estate to The Cleveland Trust Company in trust for specific uses and purposes. The trust provided for monthly payments to relatives from its income, with the remainder of the income to be divided three ways: one-fourth to the Rainbow Hospital, one-fourth to the Eliza Jennings Home of Cleveland, and one-half to be used by the trustee at his discretion as a revolving loan fund for the education of young people.

The court held that Revised Code, Section 109.25 does not apply to a will contest case, because the object of a will contest case is not the termination of a charitable trust.¹⁰ The court, however, went on to say:

This is a question of first impression and should be passed upon by the reviewing courts.

This decision is questionable owing to its deviation from basic common law rules.¹¹ It also lacks authoritativeness because the Attorney General was not given the opportunity to explain his position.¹²

The reasoning in the *Spang* case is founded upon the court's interpretation of Section 109.23 as to vesting in use or enjoyment. The definition of charitable trusts as set out in this section is not all-inclusive:

vast amounts of property which are, in fact, devoted to charitable uses by means of gifts to charitable corporations exclusively for a corporate purpose are excluded from the requirement of the act, as are those trusts which are ultimately to be used for charitable purposes, but which, by the terms of the trust instrument, have no part of the trust income or property presently being devoted to any charitable use.¹³

In *Spang* the court held that the charitable trust had not vested in the beneficiaries at the time of the will contest. The court did concede that the law favors early vesting of estates

⁹ 73 Ohio L. Abs. 164, 134 N. E. 2d 586 (C. P. 1956).

¹⁰ *Id.* at 169.

¹¹ 9 Ohio Jur. 2d 12, 1963 Cumulative Supplement, Footnote 14.

¹² *Ibid.*

¹³ Klapp and Wertz, *Supervision of Charitable Trusts in Ohio—The Ohio Charitable Trusts Act*, 18 Ohio St. L. J. 181 (1957).

upon the death of the testator but added that this trust only vested in the trustee and not in the use or enjoyment of the beneficiaries and thereby was excluded from the provisions of the Ohio Charitable Trusts Act.¹⁴ The *Spang* case involved only specific qualifying charities as the court doubted that the revolving loan fund provided for in the will was charitable.¹⁵

Since critics feel that the case lacks certain elements of prestige,¹⁶ it appears that the application of the rule should be limited, if followed at all, to cases involving only specific qualifying trusts. No will contest cases concerning this issue have arisen since this decision. This might be attributed to fear on the part of contestants as to the authority of this ruling.

b. *Action to Construe a Will*

The necessity of the Attorney General being joined as a party comes up more frequently in actions to construe wills than in will contests. This is easily explained when one realizes that there is a great deal more litigation dealing with will constructions.

Along with the majority of other jurisdictions Ohio has held that the Attorney General is a necessary party where there is a charitable bequest or devise in a will. This is evidenced by *Blair v. Bouton*,¹⁷ wherein it was held that the Attorney General is a necessary party when the construction would affect the size of the charitable trust passing in the residue. The necessity of the Attorney General's presence in such cases is also cited by the Supreme Court in *Donner v. Shanafelt*.¹⁸

More recently there appears an exception to this general rule in *Baily v. McElroy*.¹⁹ In construing the will, the Probate Judge ruled that the Attorney General was not a necessary party where there had been no vesting in use or enjoyment of the trust. Although the will had been probated some years prior to this action, no trustee had been appointed to administer the funds designated for charitable purposes. The Court of Appeals later reversed the decision on other grounds, but in so doing

¹⁴ Ohio Rev. Code, Secs. 109.23-109.33.

¹⁵ *Supra* n. 9 at 166.

¹⁶ *Supra* n. 11.

¹⁷ 15 Ohio Op. 2d 474, 176 N. E. 2d 280 (App. 1959).

¹⁸ 159 Ohio St. 5, 110 N. E. 2d 772 (1953).

¹⁹ 89 Ohio L. Abs. 289, 186 N. E. 2d 213 (Pro. Ct. 1961).

indicated that the Charitable Trusts Act of Ohio was applicable and therefore the Attorney General was a necessary party.²⁰

Comparable State Statutes

Numerous states have enacted legislation on the administration of Charitable Trusts. The authors of the Ohio Charitable Trusts Act²¹ appear to have looked to the statutory law of New Hampshire and Rhode Island for guidance in framing the Act. New Hampshire Revised Statutes Annotated²² resembles in large degree Ohio Revised Code, Sections 109.23-109.33. The New Hampshire statute also excludes certain public charities from the definition of a charitable trust, i.e. those trusts to take effect upon the death of the settlor until such trust becomes vested in use or enjoyment.²³ Whether the New Hampshire courts would agree with the previously cited Ohio cases²⁴ is a moot question, as there are no cases involving will contest or actions to construe a will on point dated after the effective date of the statute. Generally, the New Hampshire courts have held that the attorney general is an indispensable party in any judicial proceeding relating to the supervision and enforcement of charitable trusts.²⁵

Rhode Island also has a somewhat comparable statute but does not list any exceptions, so it would appear that it is all-inclusive.²⁶ The leading case in Rhode Island, a will construction action, held that where a charitable trust is involved the attorney general in his capacity as the representative of the interests of the public is a necessary party.²⁷ There are no subsequent cases on point, so it would appear that enactment of the Rhode Island Charitable Trust Act has not substantially modified the common law.

²⁰ Baily v. McElroy, 195 N. E. 2d 559 (Ohio App. 1963).

²¹ *Supra* n. 14.

²² Chap. 7:19-7:32.

²³ N. H. Rev. Stat. Anno., Chap. 7:21

²⁴ Spang v. Cleveland Trust Co., *supra* n. 9. Baily v. McElroy, *supra* n. 19.

²⁵ Concord Nat. Bank v. Haverhill, 101 N. H. 416, 145 A. 2d 61 (1958).

²⁶ Gen. Laws of R. I., Secs. 18-9-4, 18-9-5 (1950).

²⁷ Leo v. Armington, 74 R. I. 297, 60 A. 2d 475 (1948).

Other Jurisdictions

Kentucky: Using *Spang* as authority, the Court of Appeals in a recent decision held that the attorney general cannot intervene in a will contest action.²⁸ The court determined that the Attorney General in the absence of any statute authorizing him to intervene, failed to show that he was authorized by "any established and recognized law of England to that effect prior to 1607," and therefore since the sole purpose of a will contest is to determine whether the instrument is valid and not primarily to determine a charitable trust, he is not a proper or necessary party. The charitable gift in the will was of a general charitable nature and provided for two trusts, the income from the first to be transferred to the second, the Annie Gardner Foundation; the funds of this second trust to be distributed for charitable purposes.

England: As to specific legacies the court held that the Attorney General is a necessary party to suits respecting the management of funds bequeathed or devised for charitable purposes. However, they excluded legacies given to an established charitable institution to be comingled with that organization's general funds.²⁹

Pennsylvania: In an action to construe a will the Attorney General is an indispensable party in any charitable trust proceeding whether the object of the proceeding be to invalidate, terminate, enforce, or administer the trust. The court went on to say that his position is a result of the authority vested by the power of *parens patriae*.³⁰

New Jersey: On an action to construe a will the Attorney General should be a party to the proceeding. This suit, to determine the plan or scheme of payment and an appointment of a trustee to administer the distribution, concerned a specific qualifying charity.³¹

Iowa: The reason for the rule that the Attorney General is the proper person to institute and/or defend suits involving public charities is that he is the only person capable of vindicating

²⁸ *Commonwealth v. Gardner, supra* n. 2.

²⁹ *Wellbeloved v. Jones*, 1 Sim. & Stu. 40, 57 Eng. Reprint 16 (1822).

³⁰ *In Re Voegtly's Estate*, 396 Pa. 90, 151 A. 2d 593 (1959).

³¹ *Christian v. Catholic Church of St. John the Baptist of Paterson*, 51 N. J. Eq. 374, 110 A. 579 (1927).

the public's right, since no private individual can say that he is the designated object of the charity's benevolence.³²

Also, see *Lackland v. Walker*,³³ and *Attorney General v. Clark*.³⁴

Conclusion

The *Spang* decision places Ohio in the minority as to the necessity of the Attorney General as a party in a will contest action wherein a specific qualifying charity is designated. Yet the reasoning in this case, *i.e.*, the absence of vesting in use or enjoyment of the beneficiaries, appears sound in conjunction with the exact statutory language and no doubt will be extended to include general charitable bequests and devises.

The *Baily v. McElroy* decision³⁵ on actions to construe a will used the same reasoning, although it was later reversed because of a faulty ruling on the merits. Both cases, in this writer's opinion, point out an inadequacy in the Charitable Trusts Act of Ohio. As the designated representative of the public, the Attorney General should be a necessary party to any proceedings involving public charities. To insure that he is made a party, the language of the statute relating to vesting in use and enjoyment requires clarification, at least, and possibly elimination.

³² *In Re Owens Estate*, 244 Ia. 533, 57 N. W. 2d 193 (1953).

³³ 151 Mo. 210, 52 S. W. 414 (1933).

³⁴ 167 Mass. 201, 45 N. E. 183 (1896).

³⁵ *Supra* n. 19.