

1-1954

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Recommended Citation

George G. Bogert, *Recent Developments Regarding the Law of Charitable Donations and Charitable Trusts*, 5 HASTINGS L.J. 95 (1954).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol5/iss2/1

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RECENT DEVELOPMENTS REGARDING THE LAW OF CHARITABLE DONATIONS AND CHARITABLE TRUSTS

By GEORGE G. BOGERT*

In the past few years a number of changes or proposed alterations in the law of charities have been adopted or advanced.

Solicitation of Gifts for Charity.

A subject which has received great attention in the press is the solicitation of gifts to charitable causes and the use of funds thus collected. It has been alleged that large sums have been received by solicitors for projects of public interest, that in some cases the promoters were unscrupulous and embezzled the contributions or paid exorbitant salaries or expenses, that often only a small part of the proceeds of the campaigns ever reached the intended beneficiaries, and that no representative of the public had adequate knowledge of the disposition of these donations.

The Attorney General in California has made an investigation of this subject and the State Senate Interim Judiciary Committee has taken testimony and made a report with recommendations.¹ The Municipal Code of Los Angeles² requires promoters of such campaigns to secure licenses from the City Board of Social Service Commissioners and gives that board powers of regulation and prohibits the promoters from committing certain described acts which would involve fraud on the public. It appeared in evidence that in 1951 approximately 1,556 individuals or organizations sought to solicit funds in Los Angeles and that some \$36,000,000 was collected.

The State Welfare and Charitable Contributions Code³ requires a solicitor of charitable gifts to file with the Department of Social Welfare a copy of an audit of its books annually, but excepts religious, educational or hospital organizations, community chests, the Red Cross and the Salvation Army. This law also requires persons or organizations intending to solicit to file with the Department a detailed statement as to the contributions to be sought and the use to be made thereof.

The Senate Committee recommended⁴ that, since many of the drives were interstate in character, Congress be memorialized to investigate the subject and that the California Committee cooperate with any such federal inquiry; and it urged that the California statute be amended so that penalties should be provided for failure to file reports with the Department of Welfare and that powers of enforcement should be given to that agency.

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¹Second Progress Report by Senate Interim Committee, Senator Burt W. Busch, Chairman, 1953.

²Ord. No. 77,000.

³Secs. 147-147.4.

⁴*Supra* note 1 at 50.

During the latter part of 1953 a New York Senate Committee held hearings on this same problem under the chairmanship of Senator Tompkins and received startling testimony as to imposition upon the contributing public and the waste of charitable donations. It appears that legislation to exclude unscrupulous solicitors and to give state supervision and control over funds collected is likely to be adopted in New York soon.⁵

Inspired by these and similar disclosures it would seem likely that efforts will soon be made in many states to increase safeguards for donors and the public with reference to such solicitors and the funds they receive.

State Supervision and Enforcement of Charities.

The law considers the public the beneficiary of charitable trusts and imposes a duty on the Attorney General of the State to act for the State in keeping track of the existence of charities and in seeing that they are properly guarded and administered. Originally in England, and until recently in the United States, this duty was stated by common, statute or constitutional law briefly and in general terms, with no specification of the methods to be employed and no provision for furnishing the Attorney General with the facts regarding the charities in his jurisdiction. The state legal departments have had no systematic plans for listing charities and their records have been fragmentary and haphazard. Nor has there been generally any organized effort to supervise and enforce trusts which were known. Sporadically and casually there have been investigations and suits. The work of the Attorney General in this field has been considered one of his minor functions and has not received much attention unless public spirited citizens have complained about the administration of a particular charity. Consequently, it is generally agreed⁶ that a substantial portion of charitable trusts have become neglected or abused and no action has been taken to apply a remedy.

The authorities in England have recognized this problem and long ago attempted to solve it by statutory provisions for investigations and the making of inventories of charities⁷, and in more recent times have set up an agency of a quasi-judicial or administrative nature, namely, the Board of Charity Commissioners which has been collecting statistics about charities and their status since 1853.⁸ Under this Charitable Trusts Act great progress has been

⁵N.Y. Times, Dec. 21, 1953. It is reported in the N.Y. Times of Feb. 17, 1954, that bills have been introduced in the New York Legislature requiring registration and bonding of solicitors of funds for charity (except religious, educational, fraternal and social organizations), giving the Attorney General powers of supervision, and requiring non-resident charitable organizations which solicit in the state to designate the Secretary of State as an agent for the receipt of process. These bills have now become law.

⁶TAYLOR, PUBLIC ACCOUNTABILITY OF FOUNDATIONS AND CHARITABLE TRUSTS (1953).

⁷For an historical resume of the steps from 1601 to 1853 see pp. 18-21, REPORT OF THE COMMITTEE ON CHARITABLE TRUSTS (the Nathan Committee), presented to Parliament in Dec., 1952.

⁸The Charitable Trusts Act, 1853, 16 and 17 Vict., c. 137.

made toward the establishment of a complete register of charities, the collection of annual reports of their work, and the enforcement of such trusts by the Board through advice to trustees, administrative orders, and *cy pres* applications.⁹ In 1950, the Prime Minister, Mr. Attlee, appointed a Parliamentary Committee, headed by Lord Nathan, to study the situation regarding charities and to recommend improvements. This committee reported in 1952¹⁰ and urged the continuance and strengthening of the Charity Commissioners system, with its register and accounts. Parliament has not yet acted on this report.

In the United States a movement along lines similar to the English system began in 1943 in New Hampshire¹¹ with the creation of a special department in the Attorney General's office for charitable trust supervision, and for investigations, the preparation of a register, annual reports by trustees, and duties on the part of public officials like court clerks to aid the Attorney General. This scheme has been followed, with some slight changes, in Rhode Island in 1950¹² and Ohio in 1953,¹³ and was proposed but rejected in Massachusetts in 1945¹⁴ and in Texas in 1953.¹⁵

Although in California there has been some statutory recognition of the power and duty of the Attorney General to collect information regarding charities and to enforce them,¹⁶ the state law department feels that better results could be obtained if a statute like the New Hampshire Act were enacted. Hence the Attorney General's office has drafted a statute to that end which will probably be introduced soon. Attorney General Brown's office has found many cases of idle or dormant funds and believes that research would bring others to light.¹⁷ Investigations of the handling of the proceeds of "charity days" at the race tracks showed instances where they had been diverted to private benefit and gave rise to much comment in the newspapers.

The legislative investigation in New York, previously mentioned, may well lead to the statutory establishment of a special division of charitable

⁹REPORT OF THE CHARITY COMMISSIONERS FOR 1953; NATHAN REPORT, p. 25.

¹⁰Report available at H.M. Stationery Office, London, price 6s. 6d.

¹¹N.H. Laws 1943, c. 181, as amended in 1945, 1947 and 1949.

¹²R.I. Acts 1950, c. 2617, as amended in 1951.

¹³OHIO REV. CODE (1953) §§ 109.23-109.33, 109.99. Similar legislation was also adopted in South Carolina in 1953. S.C. Acts 1953, No. 274. Trustees for charity are required to file with the Attorney General copies of their trust instruments and annual reports. The Act is not to apply to trusts or trustees of churches, cemeteries, orphanages operated in conjunction with churches, hospitals, colleges, universities, school districts, or to banking institutions which are under the supervision of state or federal agencies.

¹⁴30 MASS. L.Q. 22, 51 (1945).

¹⁵H.B. 538.

¹⁶CALIF. CORP. CODE § 9505 (non-profit corporation holding property in trust for charity subject to examination by Attorney General who shall bring proceedings to enforce trust); § 10207 (corporations for eleemosynary or charitable purposes subject to examination by Attorney General who shall bring needed proceedings to enforce compliance).

¹⁷REPORT DEPARTMENT OF JUSTICE 1950-1952 at 14.

trust enforcement, with elaboration of duties similar to those laid down in the New Hampshire Act.

Due to the request of the National Association of Attorneys General the Conference of Commissioners on Uniform State Laws has been working since 1952 on the preparation of a model or uniform act covering this topic of the law.¹⁸ It appears likely that such a proposed statute may be completed in 1954.

All in all it seems that there is a probability that developments along the lines of the English and New Hampshire Acts will continue in the United States in the next few years.

The Widening of the Cy Pres Doctrine.

A major feature of the English Nathan Report of 1952¹⁹ was a plea for the enlargement of the cy pres power so that it should cover not only cases where the charity as originally established was "impossible" or "impracticable" of fulfillment, but also instances where the charity was, or had become, wasteful or inexpedient, so that it could reasonably be argued that it would be much better social policy to apply the fund to a purpose of greater value to the public. A possible example might be found in a case where a donor had a hundred years ago established a trust to print and distribute books on a topic of popular interest, but which, due to recent discoveries and a change in the tastes and habits of the people, now receives very slight attention. In such a case it is not physically impossible or impracticable to continue offering the books to the public and an occasional reader may get some benefit from them, but the educational advantage to the state will be very slight as compared to the benefits which might be received from encouraging some other similar objective.

The idea suggested has had some support in Scotland²⁰ and was discussed at length in a debate in the House of Lords²¹ on the Nathan Report, but no action has been taken on the proposal, and since the Report was a creature of the Labour Government the fate of all its recommendations seems to depend upon a return of that party to power.

There has been no corresponding change proposed in the United States and it seems probable that none will be offered. It is believed that the American Courts have not confined cy pres to cases of strict "impossibility" or absolute "impracticability," but rather have applied the doctrine to clear

¹⁸HANDBOOK, NAT. CONF. COMRS. UNIFORM STATE LAWS (1952), p. 512; and 1953 Handbook (not yet published). A revised draft of the proposed Uniform Act has very recently been prepared by Rupert R. Bullivant of Portland, Oregon, Chairman of the Committee. Another draft has been separately prepared by Professor Allison Dunham of the University of Chicago Law School and his assistant, Mr. Gordon P. Ralph.

¹⁹NATHAN REPORT, p. 70.

²⁰NATHAN REPORT, p. 78.

²¹Parliamentary Debate Reports, July 22, 1953.

cases of wastefulness, inexpediency, and other situations where it has been physically possible but socially highly undesirable to continue the charity as the donor framed it. Thus, in California in the case²² of a gift to construct a monument on Telegraph Hill in San Francisco in honor of the pioneers, where the Coit Tower had already been constructed on that hill, and it appeared that another monument could not be erected there "without obstructing the roadway leading to the summit and without detracting from the beauty of the landscaping," the fund was applied *cy pres* to collect written material regarding the pioneers and to construct monuments and plaques to celebrate the events of their time. Here there was not impossibility or impracticality in a technical sense, but rather a high degree of inexpediency. This tendency in the case of American courts to construe "impracticality" as including wastefulness, or to add "inexpediency" as a separate cause for the use of *cy pres*, probably makes unnecessary the statutory expansion of the *cy pres* doctrine proposed in the Nathan Report.

A change in *cy pres* law accomplished by a recent revision of the Pennsylvania statutes²³ is worthy of extension to other states, but no tendency to copy it has been noticed. This amendment accomplished the abolition of the distinction between "general" and "particular" charitable intent in the application of *cy pres*. The orthodox doctrine at common law is that only where the settler showed an intent to benefit charity as a whole or one type of charity in general could *cy pres* be employed. If his purpose was construed to be to help a single charity only, and this purpose failed of accomplishment, the court would not frame a scheme to substitute some related or similar charity. The objection to this doctrine is that the line between general and narrow intent is extremely difficult to draw, that the donor rarely expresses himself clearly on the subject, and that the court is in reality speculating whether his purpose was broad or particular. It would seem better to require a settler who had a local or limited purpose to state this fact expressly and to provide that *cy pres* should not be applied but rather that the property should go elsewhere in case of failure of the charity. This would remove a cause of occasional wasteful litigation and make the pathway of the charitable trustee an easier one to follow.

The Salvaging of Mixed Charitable and Non-charitable Trusts.

The Nathan Report of 1952 made a recommendation intended to save for charity the property of certain trusts which are vulnerable to attack.²⁴ These are the gifts where the trustees are at liberty to spend the funds for

²²*Society of California Pioneers v. McElroy*, 63 Cal.App.2d 332, 146 P.2d 962 (1944).

²³Pa. Estates Act, § 10 (1947).

²⁴*Supra* note 7 at 120. It appears that a bill has been introduced in Parliament validating to a certain extent as charitable mixed trusts which took effect prior to Dec. 16, 1952, the date of the publication of the Nathan Report. 97 SOL. J. 888 (Dec. 26, 1953). The bill is called the Charitable Trusts (Validation) Bill.

objects admittedly charitable but also are permitted to make expenditures for certain secondary purposes which are not technically charitable. The best example is found in the case where the trust is for "charitable or benevolent" objects and the court holds that benevolent is wider than charitable and includes purposes which have no social benefit. Here, if the donor has not provided a method of splitting the property between the two types of objects, the usual holding has been that the entire trust was void because of the indefiniteness of the non-charitable objects and also usually because the trust was a mixed trust to last for an indefinite period and so was said to involve a "perpetuity."

In England it was not until about 1949 that the situation with regard to this problem had become clear, as the result of decisions.²⁵ The Nathan Committee believed that large numbers of these trusts having a primary charitable and a secondary or incidental non-charitable purpose had been created prior to 1949 in ignorance of the law applicable. It felt that it would be greatly to the public advantage, and not unfair to the next of kin of the donors, to adopt a statute validating as exclusively charitable (with some qualifications) all mixed trusts created before December 31, 1950, a date at which the 1949 decisions should have been known and appreciated, but leaving subject to attack mixed trusts created after December 31, 1950. This would not only insure the application of much valuable property to public uses, instead of turning it over to relatives of the donor who were never intended by him to get it, but would also remove from the trustees of these trusts liability for expending the funds for charity in good faith over a period of many years.

There seems little likelihood that this suggestion will appeal to American legislators. The courts in this country have been liberal toward mixed trusts and have made great efforts to validate them for charity, either by finding means of dividing the capital between the charitable and non-charitable purposes,²⁶ or by treating as immaterial a minor and temporary non-charitable purpose,²⁷ or by construing words like "benevolent" as synonyms for charity.²⁸ But where the trust could not be saved in some such way the American courts have felt obliged to strike it down at the suit of the heirs or next of kin, and it seems very doubtful whether the courts or the legislatures would be sympathetic toward salvaging for charity an indivisible trust which, due to the ignorance or blundering of the draftsman, had been given purposes which were clearly mixed objects. The law to this effect seems to have been settled here for many years. No startling new decisions have been

²⁵*Ellis v. Commissioners of Inland Revenue*, [1949] 31 Tax Cases 178; *Oxford Group v. Commissioners of Inland Revenue*, [1949] 2 All E. R. 537; *In re Diplock*, [1944] A.C. 341.

²⁶*Coffin v. Attorney General*, 231 Mass. 579, 121 N.E. 397 (1919); *In re Palethorp's Estate*, 249 Pa. 389, 94 Atl. 1060 (1915).

²⁷*Graham v. Bergin*, 18 Ohio App. 35 (1923); *Wright's Estate*, 284 Pa. 334, 131 Atl. 188 (1925).

²⁸*Estate of Hinckley*, 58 Cal. 457 (1881); *Smith v. U. S. Nat. Bk. of Denver*, 120 Colo. 167, 207 P.2d 1194 (1949).

handed down. Subject to the statutes of limitation, and to the avenues of escape mentioned above, sentiment here would probably be that the mixed, indivisible trust must fail. Furthermore, to take away from the successors of the settlor their rights to a resulting trust previously vested would seem to run afoul of our constitutional provisions. The English would have no worries on that score.

Proposed Redefinition of Charity.

The Nathan Report discussed a proposal that the legal definition of "charity" be reworded and placed in a statute.²⁹ Under the Charitable Trusts Act of 1853 the list of charities found in the preamble to the Statute of Charitable Uses of 1601 had been taken as a complete list of all permissible charities, although it admittedly contains many objects which during the intervening 350 years have become obsolete, such, for example, as providing dowries to enable poor maids to get married and furnishing funds to redeem captives. And, of course, economic and social changes have introduced many new ways of accomplishing social benefit. The English courts have made many decisions as to what is or is not charitable and some judges have attempted definitions or classifications of charities, as, for example, Lord Macnaghten's often quoted statement that charity includes education, relief of poverty, religion, and other purposes beneficial to the community.³⁰

After some hesitation the Nathan Committee reported as follows:³¹

"We consider that a rewording of the 'definition' of charity is needed and we favour a definition which would allow of flexibility in interpretation. We recommend that the existing 'definition' of charity by reference to the Preamble to the Statute of Charitable Uses should be repealed and that in its stead there should be put on the Statute book a 'definition' based on Lord Macnaghten's classification, but preserving the case law as it stands."

It is not believed that this suggestion will be attractive to American legislators. While in this country there have been occasional judicial attempts to give abstract definitions of charity,³² they seem to have been of little value, and have often been mere recitals of some admitted types of charity³³ or statements as to the motives which the donor of a charitable gift must have. The preamble to the Statute of Charitable Uses, even if held to be a part of American law, has universally been regarded not as containing an all inclusive and final catalogue of charities, but as merely giving examples of common types in existence at the beginning of the 17th century in England. While perhaps some argument could be made for the position that charitable trusts must have as their object "the public good," "social welfare," or "community

²⁹Supra note 7 at 31.

³⁰Commissioners v. Pemsell, [1891] A.C. 531, 580.

³¹Supra note 7 at 36.

³²Mr. Justice Swayne in *Ould v. Washington Hospital*, 95 U.S. 303, 311 (1877).

³³Gray, J., in *Jackson v. Phillips*, 14 Allen 539, 556 (Mass. 1867).

benefit,³⁴ there has been no authoritative adoption of such a short descriptive phrase. The courts and legislatures have been content to let the definition of charity receive development through the hundreds of cases deciding that this or that purpose is or is not charitable, and to allow new cases to be solved by analogy or comparison. To adopt a short, all-inclusive definition would require much construction to determine its meaning, and to decide whether it was intended merely to codify the case law or to alter it in some way. It would seem better to retain clearly the great mass of case law with its elasticity.³⁵

Use of Charitable Trusts for Tax Evasion.

In the last few years the use of charitable trusts and foundations by wealthy businessmen for the purpose of avoiding taxes has been exposed. A Senate Sub-Committee under the chairmanship of the late Senator Tobey held hearings during which spectacular testimony was presented. A brief filed by the C.I.O. at the time of hearings regarding proposed legislation in Rhode Island discussed the methods used by Mr. Royal Little and the Textron Trust and similar instances.³⁶ Law review articles have outlined the procedures followed.³⁷ Not only were death taxes avoided by the making of gifts to trusts and foundations which were within the control of the founder and his family, but the payment of income taxes was also evaded by having the property vested in an agency which was at least in form a charitable enterprise, while the actual control of it was in the donor and his family and business associates. In some cases extravagant salaries were paid to the founder or his nominees. In other instances business property was sold to the charity and leased back to the corporation in which the founder was interested. The rentals were thus owned by charity and freed from taxation.

By an amendment of the Revenue Act in 1950 an attempt was made to prevent these abuses.³⁸ Tax privileges were denied to a charitable trust which engaged in certain named "prohibited transactions," such as lending trust funds without adequate security and interest, paying unreasonably high compensation for personal services, making its charitable services available on a preferential basis, buying property at more than an adequate consideration or selling for less, or diverting trust property to the creator of the trust, his family or a corporation controlled by him.

³⁴The Restatement of Trusts, sec. 368, defines charitable purposes by giving five common classes and adding that it includes "other purposes the accomplishment of which is beneficial to the community".

³⁵For judicial views as to the impracticability of finding an abstract definition of "charity", see *Perin v. Carey*, 65 U.S. 465 (1860); *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 45 Pac. 270 (1896); *Staines v. Burton*, 17 Utah 331, 53 Pac. 1015 (1898).

³⁶Brief prepared by Solomon Barkin, Director of Research, Textile Workers Union of America.

³⁷*Eaton, Charitable Foundations, Tax Avoidance and Business Expediency*, 35 VA. L. REV. 809, 987 (1949).

³⁸26 U.S.C.A. § 162 (g).