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hoped that the return to reason demonstrated by these changes will result in fewer limitations being struck down because of the fever engendered by the great legal disease. Neither justice nor public policy is served by refusal to effect the intent of a person as to the disposition of his property, simply because his attorney failed to understand the labyrinthine tunnels of the rule against perpetuities in California.

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CAPACITY OF TRUSTEES OF CHARITABLE CORPORATION TO SUE CO-TRUSTEES TO ENJOIN BREACH OF TRUST

In a recent California case, *Holt v. College of Osteopathic Physicians and Surgeons*,¹ the California Supreme Court held that the minority trustees of a charitable corporation had capacity to institute proceedings in behalf of the corporation against the majority trustees to enjoin a threatened breach of trust. This decision overruled an earlier California case, *George Pepperdine Foundation v. Pepperdine*,² which held that only the attorney general had capacity to institute proceedings to enforce a charitable trust.

Holt involved an action brought by three trustees of defendant College of Osteopathic Physicians and Surgeons (hereinafter COPS), a California charitable corporation. The other defendants were the twenty-three remaining trustees on the COPS board of trustees and the attorney general. The attorney general was joined as a party defendant because the suit involved the breach of a charitable trust. The attorney general filed an answer to the complaint denying the capacity of plaintiffs to institute such proceedings without the consent of the attorney general. The attorney general contended that he was the only one empowered to

¹ 61 A.C. 815, 394 P.2d 932, 40 Cal. Rptr. 244 (1964). Justice McComb, dissenting, thought that the doctrine of *stare decisis* should be followed. He felt that since the *Pepperdine* decision had become established California law it should not be overruled. This argument is quite illogical in the sense that once an erroneous decision has been rendered by the courts, it should not be perpetuated and become binding upon future litigants simply because it is convenient for the court.

² 126 Cal. App. 2d 154, 271 P.2d 600 (1954). *Pepperdine* involved an action by a charitable corporation against its former directors for damages resulting from breach of trust by the defendants during their incumbencies. The court held that the attorney general was the only person qualified to maintain an action on behalf of a charitable trust. The court apparently balked at the notion that the corporation could sue its former director, whose lavish contributions of capital and energy had brought the Foundation into existence in the first place, for what were essentially only errors in business judgment in the administration of the fund he himself set up. "Reason, justice, equity and law stand aghast at the judgment proposed . . ." *Id.* at 161, 271 P.2d at 605.

bring suit; that since he failed to consent to the plaintiffs bringing this action they lacked the requisite standing. As an affirmative defense the attorney general stated that the alleged threatened breach of trust did not exist since the trust funds would continue to be applied for the public benefit.³ The defendant trustees demurred to the complaint and the trial court sustained the demurrer on the grounds that plaintiffs had no capacity to bring this action. From this decision the plaintiffs appealed.

In determining the capacity of plaintiff trustees to bring this action the Supreme Court was faced with having to answer two important questions of law. First, may one or more of several trustees of a charitable trust sue the other trustees to enjoin a breach of the trust, or may only the attorney general maintain such an action? Second, does the form of the entity of the charitable trust—whether it is a common law charitable trust or a charitable corporation—make a difference in determining who may sue to enforce the trust? The first question is important in that it involves an area of California law which is uncertain and in need of clarification.⁴ The second question raises a point of law which has never been directly before a California court.⁵

Capacity of Trustees

It is widely accepted that the attorney general, as representative of the public, which is in effect the beneficiary of any charitable trust, has the primary obligation of enforcing the proper use of charitable trust funds, and is usually a necessary party to any suit affecting the public interest in the trust.⁶ However, the prevailing view of other jurisdictions is that the attorney general does not have exclusive power to enforce a charitable trust and that a trustee or other person having a sufficient special interest may also institute proceedings for this purpose.⁷ This is the position adopted by legal commentators⁸ and the American Law Institute.⁹ The majority view was followed by the California courts prior to the

³ Plaintiff trustees alleged that it was the intention of the defendant trustees to repudiate the charitable trust purpose of COPS to conduct an osteopathic medical school by converting COPS to an allopathic medical school, a distinct and separate school of medicine. 61 A.C. at 824-825, 394 P.2d at 932, 40 Cal. Rptr. at 250.

⁴ Compare *George Pepperdine Foundation v. Pepperdine*, 126 Cal. App. 2d 154, 271 P.2d 600 (1954), with *St. James Church v. Superior Court*, 135 Cal. App. 2d 352, 287 P.2d 387 (1955).

⁵ See *St. James Church v. Superior Court*, *supra* note 4.

⁶ *Estate of Schloss*, 56 Cal. 2d 248, 363 P.2d 875, 14 Cal. Rptr. 643 (1961); *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 45 Pac. 270 (1896); *McGee v. Vandeventer*, 326 Ill. 425, 158 N.E. 127 (1927); *Andover Theological Seminary v. Theological Inst.*, 253 Mass. 256, 148 N.E. 900 (1925).

⁷ *Dickey v. Volker*, 321 Mo. 235, 11 S.W.2d 278 (1928); *DiCristofaro v. Laurel Grove Memorial Park*, 43 N.J. Super. 244, 128 A.2d 281 (App. Div. 1957); *Trustees of Sailor's Snug Harbor v. Carmody*, 158 App. Div. 738, 144 N.Y. Supp. 24 (1913).

⁸ 4 SCOTT, TRUSTS § 391 (2d ed. 1956); Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 443-49 (1959-1960).

⁹ "A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust . . ." RESTATEMENT (SECOND), TRUSTS § 391 (1959).

Pepperdine decision¹⁰ and in at least one case after the *Pepperdine* decision.¹¹

California Corporations Code sections 9505 and 10207 provide that if there is a failure to comply with a charitable trust ". . . the Attorney General shall institute, in the name of the state, the proceedings necessary to correct the non-compliance or departure."¹² The *Pepperdine* court gave an extremely narrow interpretation to these code sections in promulgating the rule that *only* the attorney general had the capacity to bring an action to enforce a charitable trust. This interpretation is quite illogical in the sense that it tends to defeat the primary purpose of the legislation.

The basic reason behind the role which the State has imposed upon the attorney general has been an attempt to alleviate the problem presented by the lack of a party plaintiff to enforce charitable trusts.¹³ This problem stems from the fact that the beneficiaries of a charitable trust, unlike the beneficiaries of a private trust, are ordinarily indefinite members of the general public. Usually there are no members of the general public with sufficient interest or knowledge to bring an action. Even if there were such individuals, the law does not recognize their right to bring an action on the rationale that to do so would subject the charitable trust to harassing litigation.¹⁴

Thus, it is clearly evident that the primary purpose of sections 9505 and 10207 of the Corporations Code is to provide for the efficient supervision and enforcement of charitable trusts. If this is true, then there is no logic in the proposition that trustees of the charitable trust or other persons with a sufficient special interest should not be allowed to institute proceedings to prevent a breach of the trust. It has been pointed out "the attorney general, without great fault on his part, has proved a poor guardian of the welfare of charitable gifts."¹⁵ The reason for this is that the attorney general usually lacks detailed knowledge regarding the purpose for which the trust was created.¹⁶ On the other hand,

¹⁰ See *Pratt v. Security Trust & Sav. Bank*, 15 Cal. App. 2d 630, 59 P.2d 862 (1936); *O'Hara v. Grand Lodge of I.O.G.T.*, 213 Cal. 131, 2 P.2d 21 (1931).

¹¹ See *St. James Church v. Superior Court*, 135 Cal. App. 2d 352, 287 P.2d 387 (1955).

¹² California Corporations Code sections 9505 and 10207 subject a non-profit corporation which holds property "subject to any public or charitable trust" (section 9505), or a charitable corporation (section 10207), to examination by the attorney general on behalf of the state "to ascertain the condition of its affairs and to what extent, if at all, [it] . . . may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure."

¹³ *Holt v. College of Osteopathic Physicians & Surgeons*, 61 A.C. 815, 819, 394 P.2d 932, 935, 40 Cal. Rptr. 244, 247 (1964).

¹⁴ *Pratt v. Security Trust & Sav. Bank*, 15 Cal. App. 2d 630, 59 P.2d 862 (1936); *Barker v. Hauberg*, 325 Ill. 538, 156 N.E. 806 (1927); *Dillaway v. Burton*, 256 Mass. 568, 153 N.E. 13 (1926); *Dickey v. Volker*, 321 Mo. 235, 11 S.W.2d 278 (1928).

¹⁵ Bogert, *Proposed Legislation Regarding Supervision of Charities*, 52 MICH. L. REV. 633, 634 (1954).

¹⁶ This point is quite evident from the facts of the *Holt* case. The attorney general had answered the complaint denying the existence of the alleged breach of trust on the basis that the trust funds would continue to be used for the public benefit. The supreme court on appeal held that a change from osteopathic to allopathic medicine did con-

trustees are the persons best situated to enforce the trust. "The charity's own representative has at least as much interest in preserving the charitable funds as does the attorney general who represents the general public. The cotrustee is also in the best position to learn about breaches of trust and to bring the relevant facts to the courts attention."¹⁷

In *Holt* the court gave a broad construction to Corporations Code sections 9505 and 10207 in holding that there was nothing in these sections which precluded trustees from bringing an action to enforce the trust.¹⁸ "The attorney general . . . should continue to be responsible for protecting and supervising charities, but he should be thought of as the representative of the beneficiaries—the public—and not as a substitute for a trustee or director who is individually responsible."¹⁹ The public interest, as well as the interest of the donor to a charitable trust, can best be served if the power of the attorney general to enforce such trusts is supplemented by the trustees or other persons with a sufficient special interest in the trust. This is certainly the most logical approach to the problem of enforcing charitable trusts. The holding in *Pepperdine* is plainly erroneous since it goes against the authority, logic and public policy considerations involved in the problem.

The *Pepperdine* decision would appear to be the unfortunate result of a misapplication of a generally accepted principle concerning charitable trusts. This principle is stated as follows:

The purpose of vesting in some public official like the Attorney General the exclusive power to begin proceedings to enforce charitable trusts is obvious. The beneficiaries of such trusts are usually some or all of a large shifting class of the public. If any member of this class who deemed himself qualified might begin suit, the trustee would frequently be subjected to unreasonable and vexatious litigation.²⁰

This principle carried to its illogical extreme will result in a decision such as *Pepperdine*. The term "exclusive" should be construed as pertaining only to members of the general public with no other interest in the charitable trust than possibly a claim as a potential beneficiary. The courts should be careful not to confuse the position of an ordinary member of the general public and a trustee charged with the duty of administering the charitable trust.

Should Charitable Corporations Be Distinguished from Charitable Trusts?

Should the courts draw a distinction between the form of the charitable entity, *i.e.*, whether a common law charitable trust or a charitable corporation, in determining whether the trustee or director has the capacity to bring an action to enforce the trust?²¹ In this respect *Holt* was a case of first impression and the

stitute a breach of the charitable trust purpose thereby pointing out the error in the attorney general's judgment. 61 A.C. at 820, 394 P.2d at 938, 40 Cal. Rptr. at 250.

¹⁷ Karst, *supra* note 8, at 444.

¹⁸ 61 A.C. at 819, 394 P.2d at 935, 40 Cal. Rptr. at 247.

¹⁹ Karst, *supra* note 8, at 445.

²⁰ BOGERT, TRUSTS AND TRUSTEES § 414 (2d ed. 1960).

²¹ Such a distinction would be important as to whether the law applicable to corporations is applied or whether the law applying to charitable trusts is applied. In

court answered this question in the negative; this would appear to be a sound and logical treatment of the problem. In a purely technical sense there is a distinction between the trustee of a charitable trust and the trustee or director of a charitable corporation.²² But for the problem at hand there is no practical distinction. The functions of both the trustee of a charitable trust and the director of a charitable corporation are identical. In both cases they are fiduciaries in performing their trust duties²³ and are the ones solely responsible for administering the trust assets.²⁴

Those cases which have involved suits by directors or trustees of charitable corporations have all held that the directors had the capacity to bring the action.²⁵ The courts have so held without attempting to draw a distinction between a trustee of a charitable trust and a director of a charitable corporation. It has generally been stated that "the principles and rules applicable to charitable trusts are applicable to charitable corporations."²⁶ The primary concern should be a policy which promotes the efficient enforcement of and strict adherence to the trust purposes. This can best be achieved by not attempting to draw an unrealistic distinction between a trustee of a charitable trust and a director of a charitable corporation. The fiduciary function which both perform is identical. Therefore, they should both be extended the same legal processes for performing their fiduciary duties.

Conclusion

If the public is to receive the maximum benefit from charitable trusts it is essential that the charities be properly supervised. Logically, the trustees, be they trustees of a charitable trust or directors of a charitable corporation, are the persons best situated to enforce the trust. There is no sound reason for holding otherwise. Safeguarding the charitable trust from harassing litigation has always been a prime concern of the courts. The safeguards which have been established are in no sense violated by allowing trustees to institute proceedings to prevent a breach of the charitable trust purpose. The policy adopted by the California court in *Holt* is in accord with the majority view. It has brought clarity and uniformity to California law in the area of charitable trusts.

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California it has been held that the minority directors of a private business corporation could not initiate an action in behalf of the corporation against the other directors. *Sealand Inv. Corp. v. Emprise, Inc.*, 190 Cal. App. 2d 305, 12 Cal. Rptr. 153 (1961).

²² "Even in the case of a charitable corporation the members of the board of management, whether called directors or trustees, are not trustees in the strict sense, since the title to the property of the corporation is in the corporation and not in them." RESTATEMENT (SECOND), TRUSTS § 16, comment *a* at 52 (1959); see *Brown v. Memorial Nat'l Home Foundation*, 162 Cal. App. 2d 513, 329 P.2d 118 (1958).

²³ See CAL. CORP. CODE § 9500.

²⁴ See *St. James Church v. Superior Court*, 135 Cal. App. 2d 352, 287 P.2d 387 (1955).

²⁵ See *St. James Church v. Superior Court*, *supra* note 24; *Wiegand v. Barnes Foundation*, 374 Pa. 149, 97 A.2d 81 (1953); *Gilbert v. McLeod Infirmary*, 219 So. Car. 174, 64 S.E.2d 524 (1951).

²⁶ RESTATEMENT (SECOND), TRUSTS § 348, comment *f* at 212 (1959).

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