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No Good Deed Goes Unpunished: How the New Hampshire Probate Court Has Strengthened the Power of the Attorney General in Charitable Trust Suits

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Angelina M. Spilios

No Good Deed Goes Unpunished: How the New Hampshire Probate Court Has Strengthened the Power of the Attorney General in Charitable Trust Suits

17 U.N.H. L. Rev. 379 (2019)

ABSTRACT. As Americans increasingly use estate planning tools to provide for their favorite charities, the charitable trust is an important instrument that fits uniquely into general trust law. While charitable trusts are similar to private trusts to a great extent, there are also some critical differences between the two vehicles, especially regarding their enforcement. Specifically, state attorneys general play a special role in the enforcement of charitable trusts. This Note examines this special role of the state attorney general—namely, how trustees interact with the attorney general, arguments for why the role of the attorney general needs to be reformed or eliminated, and arguments in support of letting the attorney general maintain his or her power in these charitable trust cases.

After considering the historical background on charitable trusts, this Note analyzes a recent New Hampshire case, *In re Nashua Center for the Arts*, as an example of how the New Hampshire Probate Court affirmed the power of the state Attorney General in this charitable trust setting. In that case, several groups of concerned citizens tried to intervene when the trust for Nashua Center for the Arts, part of the Edith Carter estate, announced it would relocate its funds to the Currier Museum of Art in Manchester, New Hampshire. The court denied their motions to intervene because only the state Attorney General has the power to represent them—the parties did not have standing to intervene on their own. The Note then explores other New Hampshire cases, Massachusetts cases, and legal disputes in other states to provide additional perspectives.

This Note concludes that while the court's decision in *In re Nashua Center for the Arts* initially seems like a harsh injustice for the nonprofits in Nashua that felt entitled to make use of the funds from Edith Carter's estate, the court correctly applied the existing law. The outcome of the case should remind nonprofits and citizens in New Hampshire that, while the state has held itself out as one of the most progressive states for trust law, the significant powers held by the state Attorney General will not be limited any time soon.

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INTRODUCTION

For as long as people have acquired monetary wealth and tangible possessions, they have found ways to ensure that those assets go to certain individuals or organizations once they, as the owner, pass away.[1] While many people use estate planning tools to provide for their family members or closest friends, a significant number of individuals would prefer that their assets go to a particular charity.[2] Overall, Americans gave over $410 billion to charity in 2017, which was a roughly five percent increase from the amount of charitable giving in 2016.[3] Of that $410 billion, around nine percent, or $35.70 billion, came from charitable bequests.[4] The U.S. Legal Wills website—offering statistical findings from a sample of over 10,000 wills created through the website's service—reveals that slightly more than seven percent of the service's users included a charitable bequest in their will.[5] While that percentage may not seem overly significant, the billions of dollars donated through these charitable bequests have the potential to enhance communities in innumerable ways.

Part I of this Note provides an overview of charitable trusts—how they are defined, how they have evolved throughout history, what they require, and how they differ from individuals' private trusts. Charitable trusts are not unique to the United States.[6] The idea of forming charitable trusts began in England and was

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1 *See generally* James Greig, *What an Ancient Egyptian Will Has to Tell Us About Inheritance Today*, BLAKE MORGAN (Aug. 18, 2014), https://www.blakemorgan.co.uk/training-knowledge/features-and-articles/ancient-egyptian-inheritance-today/ [https://perma.cc/VVT4-S4SA]. One of the earliest recorded testaments is the will of Naunakhte, a woman living in Egypt over 3000 years ago. *Id.* Naunakhte's will lists her eight children and disinherits three of them because those three children allegedly did not take care of Naunakhte as she grew older. *Id.*

2 *Charitable Giving Statistics*, NAT'L PHILANTHROPIC TR., http://www.nptrust.org/philanthropic-resources/charitable-giving-statistics [https://perma.cc/W42L-QMQS] (last visited Feb. 14, 2019).

3 *Id.* (noting a 5.2% increase).

4 *Id.*

5 Tim Hewson, *Planned Giving: The State of Charitable Bequests in the U.S.*, U.S. LEGAL WILLS BLOG (Feb. 15, 2017), http://www.uslegalwills.com/blog/planned-giving [https://perma.cc/R8ZY-5TW7]. USLegalWills.com provides a range of legal document creation services to the public, allowing users to create common legal documents themselves online. *See About Us*, U.S. LEGAL WILLS, https://www.uslegalwills.com/AboutUs [https://perma.cc/C6HK-RVDS] (last visited Feb. 14, 2019). Users can create wills, living wills, and powers of attorney through various different pricing models, and attorneys are available to give users advice about their documents upon request. *Products & Prices*, U.S. LEGAL WILLS, https://www.uslegalwills.com/Prices [https://perma.cc/MZ43-KY6D] (last visited Feb. 14, 2019).

6 *See infra* Part I, section A.

adopted by colonists in America.[7] While American colonists were initially wary of using trusts for charitable purposes because of misuse by their former countrymen, they gradually developed a more positive opinion of the trusts once the United States became established.[8]

In Part II, I explore the differences between charitable trusts and private trusts—in particular the special role that state attorneys general play in the charitable trust's enforcement. The historical background will show that state legislatures and courts have consistently given their attorney general significant powers in these enforcement cases. I present numerous examples from certain well-known charitable trusts throughout several states to reinforce this point.

In order to tie together the information from Parts I and II, and to analyze an example of how the interaction between attorneys general and charitable trust issues currently plays out in New Hampshire, in Part III I explain the controversy underlying *In re Nashua Center for the Arts*.[9] In 2017, the City of Nashua and four nonprofit groups involved in the arts and community development filed motions to intervene when the Nashua Center for the Arts (NCA) sought permission to relocate its funds to the Currier Museum of Art in Manchester, New Hampshire.[10] The court held that the plaintiffs did not have standing because they were members of the public whose interests did not meet the requisite level of specificity or uniqueness.[11] This case affirmed the New Hampshire Attorney General's power to represent members of the public when enforcing charitable trusts, just as the law currently requires.[12]

In Part IV, I highlight several Massachusetts cases involving plaintiffs who challenged the administration of charitable trusts. While *In re Nashua Center for the Arts* is noteworthy for several reasons, it is just one of many recent cases. Furthermore, given that New Hampshire is a relatively small state lacking an overabundance of case law on this topic, cases from Massachusetts provide additional insight. These Massachusetts Supreme Judicial Court decisions support the reasoning behind the probate court's ruling in *In re Nashua Center for the Arts*. This shows that even though New Hampshire has taken a more progressive approach to trust law in general, the state's standard granting power to the attorney

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7 *See infra* Part I, section A.

8 6 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 577 (Michael Allan Wolf ed., LexisNexis Matthew Bender 2018) [hereinafter POWELL ON REAL PROPERTY].

9 No. 316-2017-EQ-00191 (N.H. Cir. Ct. 9th Prob. Div. Aug. 30, 2017).

10 *See id.* at 1.

11 *See id.* at 5–6.

12 *See id.* at 6.

general is not particularly unique.

In Part V, I consider several solutions for how to improve the existing scheme. Some scholars advocate for eliminating state attorneys general from the process while others believe that the powers of state attorneys general should simply be limited. On the other hand, there are compelling arguments for not changing the attorney general's role at all. New Hampshire and other jurisdictions could benefit from considering different approaches to this problem in order to ensure that the people still have a voice in disputes over charitable trusts.

Finally, this Note concludes by bringing some closure to this issue that has stymied nonprofits and individuals in charitable trust disputes. There is likely no easy solution that would please every party in a charitable trust suit. The donor is no longer able to reiterate his or her intentions, and different parties—each with their own compelling arguments—are competing for limited resources. While at a first glance the decision in *In re Nashua Center for the Arts* may seem unfair to the intervening parties, this Note concludes that the probate court correctly applied New Hampshire law and remained consistent with the law on charitable trusts as it has developed throughout history and currently exists in several other jurisdictions.

I. OVERVIEW

A. Charitable Trusts: What Are They and How Did They Develop?

The Restatement of Trusts (Second) defines a charitable trust as "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose."[13] Charitable purposes include, but are not limited to the following: "the relief of poverty; the advancement of education; the advancement of religion; the promotion of health; [and] governmental or municipal purposes."[14] Other purposes that are "beneficial to the community" will also suffice.[15]

Like many facets of American jurisprudence, the history of charitable trust law began in England.[16] One of the practical reasons why the English began to form charitable trusts was due to the ongoing strife between the government and the

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[13] RESTATEMENT (SECOND) OF TRUSTS § 348 (AM. LAW INST. 1959).

[14] *Id.* § 368.

[15] *Id.*

[16] *See* POWELL ON REAL PROPERTY, *supra* note 8.

Church regarding land ownership.[17] Charitable trusts existed under the common law, but the Statute of Charitable Uses, enacted in 1601, "helped validate and reinforce the concept of the charitable trust."[18] The Statute of Charitable Uses contained basic information about what qualified as a charitable purpose, along with how to enforce charitable trusts.[19] The procedures were later repealed, but the list of what satisfied the definition of a charitable purpose remained, and those enumerated purposes have influenced the development of charitable trust law to this day.[20]

Before the English settlers in North America formed their new government and culture, charitable trusts were a "disfavored vehicle."[21] Due to their previous experiences living under certain governing statutes in England, the colonists brought with them a general distrust of unlimited charitable gifts, and among at least some of the new states, there seemed to be misconceptions about the 1601 Statute of Charitable Uses.[22] Much of this distrust can be traced back to the tension in England between the Church and State regarding control over valuable pieces of land.[23] Additionally, one of the reasons for early Americans' dismissal of charitable trust vehicles could be related to how the newcomers in their "growing pioneer country" prioritized "the development of business, industry, and trade [rather] than . . . the development of charities."[24] However, those attitudes gradually changed as the United States became more established.[25] The United States Supreme Court

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17 *See id.*

18 *Id.*

19 *Id.* §§ 577, 578. The preamble to the Statute of Charitable Uses enumerated nine different types of gifts regulated by the law. *See id.* § 578. For example, gifts for the "maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities," and gifts for the "education and preferment of orphans" qualified under the Statute. *Id.* The original procedures allowed the Lord Chancellor to award commissions to bishops and other officials in order to investigate any potential abuses of charitable gifts. *See id.* § 577.

20 *See id.* § 577.

21 *Id.*

22 *See id.*

23 *See id.* (explaining how some medieval statutes limited the transfer of lands to the church, as such transfers were considered less advantageous to the King, but devices to evade those limitations "took the form of 'uses,' i.e., the forerunner of the modern trust").

24 *Id.*

25 *Id.*

acknowledged charitable trusts in 1844,[26] and courts have increasingly issued decisions with more liberal interpretations on these matters.[27]

Charitable trusts also allow the settlor to preserve income, estate, and gift tax charitable deductions, all while "accomodat[ing] split-interest transfers."[28] There are several different types of charitable trusts: charitable remainder unitrusts, charitable remainder annuity trusts, charitable lead unitrusts, charitable lead annuity trusts, and pooled income funds.[29]

B. How Do Charitable Trusts Differ from Private Trusts?

A general understanding of trust law is helpful for analyzing the specific issues for charitable trusts. Like private trusts, charitable trusts have settlors, beneficiaries, and trustees.[30] The settlor is "[t]he person who creates a trust," and a trust may have more than one settlor.[31] The person who holds property in the trust is the trustee.[32] The beneficiary is "the person for whose benefit property is held in trust."[33] There are, however, some critical distinctions that make charitable trusts unique. In a private trust, "property is devoted to the use of specified persons who are designated as beneficiaries of the trust," but the property in a charitable trust is designated for "purposes beneficial to the community."[34] Additionally, a charitable trust can be valid without designating a "definitely ascertainable beneficiary," and it can continue for an indefinite period of time.[35] A private express trust, on the other hand, cannot be created in that fashion—it must have a definitely ascertained beneficiary at creation or in accordance with the Rule Against Perpetuities.[36]

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[26] *See* Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127, 197 (1844) (holding that the trust at issue in the case was valid as a charitable trust under Pennsylvania common law).

[27] *See* POWELL ON REAL PROPERTY, *supra* note 8.

[28] 3 J. MARTIN BURKE, MICHAEL K. FRIEL & ELAINE HIGHTOWER GAGLIARDI, MODERN ESTATE PLANNING § 41.02 (Matthew Bender & Co., Inc. ed., 2d ed. 2018).

[29] *Id.*

[30] *See* RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. a, d (AM. LAW INST. 1959) (discussing who is the trustee, beneficiary, and settlor in a private trust).

[31] *Id.* § 3(1).

[32] *Id.* § 3(3).

[33] *Id.* § 3(4).

[34] *Id.* § 1, cmt. c.

[35] *Id.* at ch. 11, introductory note.

[36] *Id.*; *see Rule Against Perpetuities*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the Rule Against Perpetuities as a common law property rule that prohibits "a grant of an estate unless the

Furthermore, the doctrine of *cy pres* does not apply to private trusts, but it does apply to charitable trusts.[37] The Restatement defines the doctrine as follows:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[38]

While a settlor likely forms a charitable trust because he or she has a special affinity for the charitable purpose that the trust would serve, charitable trusts are appealing in other ways. For example, some state laws provide that property held in a charitable trust is insulated from third parties "to whom liabilities in tort have been incurred in the administration of the trust."[39] Additionally, charitable trusts might be treated differently for tax purposes, depending on the relevant statutes.[40] Many of these differences exist because trust law is a function of state law. The Uniform Trust Code (UTC) provides a standard baseline for trust law. However, it is "primarily a default statute," and states have enacted different versions of the UTC.[41]

Finally, there are differences between how private trusts and charitable trusts are enforced. While a private trust's beneficiaries may sue to enforce the private trust, a charitable trust "is ordinarily enforceable at the suit of a public officer, usually the Attorney General."[42] The Restatement explains that several types of individuals cannot bring a suit to enforce a charitable trust: "persons who have no special interest or . . . the settlor or his heirs, personal representatives or next of kin."[43] That difference is the focus of this Note.

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interest must vest, if at all, no later than 21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created").

37 RESTATEMENT (SECOND) OF TRUSTS ch. 11, introductory note.

38 *Id.* § 399.

39 *Id.* at ch. 11, introductory note.

40 *See id.*

41 UNIF. TRUST CODE art. 1 (UNIF. LAW COMM'N 2000).

42 RESTATEMENT (SECOND) OF TRUSTS ch. 11, introductory note.

43 *Id.* § 391.

II. THE ROLE OF THE STATE ATTORNEY GENERAL

A. History

A state attorney general's involvement in overseeing charitable trust issues is not a recent invention.[44] Just as charitable trusts began in England, the role of the attorney general can be traced back to English common law.[45] Eventually, the attorneys general in colonial America exercised significant power.[46] By the end of the nineteenth century, the root of the state attorney general's authority was defined by the power of *parens patriae*.[47] *Parens patriae* is a Latin phrase that translates to "parent of his or her country," and in a United States legal context, it refers to either "the state in its capacity as provider of protection to those unable to care for themselves," or "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen."[48] This forms the foundation for why legislatures and courts have felt confident in placing much power in the attorney general's hands.

B. How the Trustee and the State Attorney General Interact: Basic Requirements and Conclusions Across Several States

The trustee of a charitable trust must adhere to many of the same duties that are incumbent upon the trustee of a private express trust.[49] However, trustees of

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[44] *See* Jennifer L. Komoroski, Note, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify*, 45 WM. & MARY L. REV. 1769, 1781–82 (2004) (explaining that prior to the enactment of the 1601 Statute of Charitable Uses, attorneys general in England were enforcing charitable trusts when the community had an interest in those trusts). *See generally* Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 307 (1958) (explaining how the attorney general's position gained prestige in the sixteenth and seventeenth centuries, and his authority became more narrowly defined as that of "an adviser to the government as a whole or attorney for the Crown").

[45] *See* sources cited *supra* note 44.

[46] *See* Komoroski, *supra* note 44, at 1782.

[47] *See id.*

[48] *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[49] *See* C.P. Jhong, Annotation, *Duty of Trustees of Charitable Trust to Furnish Information and Records to Attorney General Relating to Trust Administration*, 86 A.L.R. Fed. 2d 1375 (2017); *see also* RESTATEMENT (SECOND) OF TRUSTS § 379 (AM. LAW INST. 1959) (explaining that some of the trustee's duties are to administer the trust, to keep clear and accurate accounts of the trust, to use "reasonable care and skill to preserve the trust property," and to keep the trust property separate from the trustee's individual property).

charitable trusts have to follow certain rules regarding information that the state attorney general is allowed to request in order to administer the trust.[50] A survey of cases from several states—New Hampshire, New Jersey, New York, Pennsylvania, and Washington—indicates that when so required, the attorney general must make a "reasonable and proper demand" to the trustee for such information or records pertaining to the trust.[51]

For example, in *State v. Taylor*,[52] the Washington Supreme Court held that the Attorney General had standing to bring legal action against a charitable trust's trustees in order to gather information about the trust's administration, "provided that the demand [was] not unreasonable in view of the circumstances and the nature and status of the particular trust."[53] The court reasoned that this was valid even when the trustees had properly followed their duties to annually publish the records of their accounts.[54] Significantly, the Attorney General could exercise this power because he or she represented the public, "particularly . . . those individuals who might be specially benefited" by the trust.[55]

Trustees in New Hampshire have met similar outcomes. In *Souhegan National Bank v. Kenison*,[56] the New Hampshire Supreme Court held that the trustee of a charitable trust had some duty to inform and make an accounting to the Attorney General, but either party could seek relief in the superior court "in the event of conflicting claims whether or not the trustee had acted or proposes to act within the legitimate sphere of his [or her] authority."[57] Notably, the court reached this conclusion even as it acknowledged that the Attorney General's Office was, overall, "unorganized and unequipped to enforce [charitable trusts] in a comprehensive scheme under supervisory arrangement."[58] The court seemed to imply that the need for oversight from the Attorney General outweighed the need for improvement in the Attorney General's Office regarding the administration of charitable trusts.

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50 *See* Jhong, *supra* note 49, at 1.

51 *See id.*

52 362 P.2d 247 (Wash. 1961).

53 *Id.* at 252.

54 *See id.* at 252–53.

55 *Id.* at 252.

56 26 A.2d 26 (N.H. 1942).

57 *Id.* at 30.

58 *Id.*

Additionally, a case involving the Barnes Foundation in Pennsylvania[59] bolstered the state Attorney General's power by affirming that the Attorney General had the authority "to inquire into the status, activities, and functioning of public charities."[60] In *Commonwealth v. Barnes Foundation*,[61] the Supreme Court of Pennsylvania reversed an order denying a petition filed by the Attorney General for citation, calling upon the Barnes Foundation and its trustees to show cause why they should not open an art gallery to the public when the donor had expressed an intention that the gallery should be open to the public within certain restrictions.[62] Furthermore, the court held that the Attorney General's Office was allowed to conduct "suitable discovery"—to obtain the Barnes Foundation's books and records—to the extent necessary to protect the rights of the general public.[63] Again, one can see the consistent theme of how the state attorney general has the power to protect the public's interest when the activities of a charitable trust's trustees come into question.

While the theme of granting the attorney general seemingly significant powers when it comes to the administration of charitable trusts runs consistently throughout many jurisdictions, there are occasional exceptions. In *Buell v. Gardner*,[64] the Appellate Division of the New York Supreme Court held that the Attorney General could not compel the trustee to hand over the distribution scheme of certain funds created by the testator's will because there was no evidence that the trustee had not carried out his duties properly.[65] The court relied on several facts of this particular case to come to this conclusion: the testator's intent regarding the use of the charitable funds was clear, the trustee clearly understood his duties, and the trustee also had been granted some discretion in deciding to whom the funds

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[59] *See generally Our Mission and History*, BARNES FOUND., https://www.barnesfoundation.org/about [https://perma.cc/8BKC-SNLH] (last visited Feb. 18, 2019). Dr. Albert Coombs Barnes and his wife, Laura Leggett Barnes, established The Barnes Foundation in Merion, Pennsylvania, in 1922. *Id.* They purchased an arboretum and built a gallery for their extensive art collection, as Dr. Barnes was a strong advocate for being educated in the arts. *Id.* The mission of the Foundation is to promote "the advancement of education and the appreciation of the fine arts and horticulture." *Id.* The Foundation is now located in Philadelphia, and it still houses Dr. Barnes's art collection, provides educational programs, and displays special exhibitions. *Id.*

[60] Commonwealth v. Barnes Found., 159 A.2d 500, 505 (Pa. 1960).

[61] 159 A.2d 500 (Pa. 1960).

[62] *See id.* at 501, 506.

[63] *Id.* at 506.

[64] 153 N.Y.S. 1108 (App. Div. 1915).

[65] *See id.* at 1108.

should be distributed.[66] The court seemed to be comfortable with this atypical outcome here because the terms of the trust—and, especially, the testator's intent in her will—were very clear. This likely explains why the court was more willing to give the trustee more discretion and limit the participation of the state Attorney General. When the charitable trust seems susceptible to misuse or other problems, the attorney general will become more involved.

III. FRUSTRATION FOR NONPROFITS IN NEW HAMPSHIRE'S GATE CITY: *IN RE NASHUA CENTER FOR THE ARTS*

A. Background of the Case

The issue of whether nonprofit groups or other organizations have standing to sue for enforcement of a charitable trust became a controversial topic in Nashua, New Hampshire, in 2017. The Nashua Center for the Arts (NCA) decided to transfer all of its remaining assets to the Currier Museum of Art located in Manchester, New Hampshire, but several local groups opposed that decision.[67] The NCA had filed a petition with the probate court for "a decree of dissolution of the corporation pursuant to its Articles of Agreement," or, in the alternative, an order under the *cy pres* doctrine to permit NCA to transfer its assets to the Currier Museum.[68] In the meantime, five different groups filed motions to intervene: the City of Nashua, City Arts Nashua, Symphony New Hampshire, Nashua Choral Society, and Greater Nashua Chamber of Commerce.[69] Judge Patricia B. Quigley, of the Ninth Circuit Probate Division in Nashua, denied these motions based on the court's finding that those five groups did not possess "a direct and apparent interest, different from the members of the general public."[70] Instead, much to the disappointment of the City and the four nonprofits, the New Hampshire Attorney General's Office was responsible for representing their interests.[71]

B. History of the NCA

Understanding the history of NCA is an important first step before delving

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[66] *See id.*

[67] *In re* Nashua Center for the Arts, No. 316-2017-EQ-00191, slip op. at 1 (N.H. Cir. Ct. 9th Prob. Div. Aug. 30, 2017).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 6.

[71] *Id.*

more deeply into NCA's plan to move its funds to the Currier Museum and the court's decision to deny the motions to intervene. The NCA, originally named the Arts and Science Center, was incorporated in March 1961 as a New Hampshire voluntary corporation.[72] It successfully managed "a multi-faceted art, cultural[,] and educational facility" for over two decades.[73] Unfortunately, in the early 1990s, financial difficulties overshadowed the group's auspicious beginning.[74] NCA gradually reduced its operations, and according to the court, it "eventually all but dissolv[ed]."[75] However, around that time, the Edith Carter estate distributed $200,000 to the Nashua Charitable Foundation with the precatory request that those funds be used to support the NCA.[76] The Edith Carter funds that were transferred to NCA, in combination with bequests and gifts from other donors, including members of the Carter family, had grown to at least $900,000 at the time of this suit.[77] In its 2017 decision, the court noted that NCA was "essentially a non-functioning charitable organization."[78] Its board of directors did not contain the requisite number of members, and the board had made some annual distributions to Nashua-area tax exempt entities for the arts, but those distributions paled in comparison to the funds that NCA actually possessed.[79]

C. The Decision in the Probate Court

NCA's decision to move its funds to the Currier Museum created discord between NCA and the various Nashua community groups that each believed Edith Carter intended her money to go to them.[80] NCA's goal was to establish a permanent fund at the Currier to support art programs and educational activities to benefit the residents of the Greater Nashua area.[81] The monies were to be

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72 N.H. REV. STAT. ANN. § 292:1 (LEXIS through 2018 Act 379); *In re* Nashua Center for the Arts, slip op. at 1. In New Hampshire, a voluntary corporation or association may be formed by five or more people for a host of different purposes. *See* N.H. REV. STAT. ANN. § 292:1. For example, some of the purposes include the promotion of "any charitable or religious cause" or "education and the arts and sciences by any other means or for mental improvement." *Id.*

73 *In re* Nashua Center for the Arts, slip op. at 1.

74 *Id.* at 2.

75 *Id.*

76 *See id.*

77 *Id.*

78 *Id.*

79 *See id.*

80 *See id.* at 4.

81 *Id.* at 2.

monitored in a "restricted funds program," so that the intent of Edith Carter to benefit the arts in Nashua would be honored.[82] NCA informed the director of the Charitable Trust Unit at the Attorney General's Office, and the director assented to NCA's petition.[83] However, the court stepped in once the City of Nashua and the four nonprofit groups filed their motions to intervene, and NCA and the Charitable Trust Unit of the Attorney General's Office objected to the motions.[84]

Judge Quigley's order referred to several New Hampshire cases, in addition to Circuit Court Probate Division Rule 139, which states that "[a]ny person shown to be interested may become a Party to any proceeding on Motion briefly setting forth that Person's relation to the Cause . . . ."[85] In *Brzica v. Trustees of Dartmouth College*,[86] the New Hampshire Supreme Court affirmed the trial court's dismissal of the petitions for declaratory judgment and injunctive relief brought by plaintiffs, seven alumni of Dartmouth College, against the College for an alleged misappropriation of alumni donations in order to change the structure of the College's fraternities and sororities.[87] On appeal, the plaintiffs also argued that the trial court erred in allowing the Association of Alumni of Dartmouth College to intervene in the case due to concerns the Association had about potential changes to the trustee election process.[88] The New Hampshire Supreme Court could only overturn the trial court's ruling if the plaintiffs demonstrated that the trial court's "exercise of discretion [was] unsustainable."[89] The court held that the relief the plaintiffs sought against the College "would have a direct effect on the association," and, therefore, upheld the trial court's granting of the association's motion to intervene as a sustainable exercise of discretion.[90]

In contrast, the New Hampshire Supreme Court in *Scamman v. Sondheim*[91] concluded that a party's right "to intervene in pending litigation in this state has been rather freely allowed as a matter of practice without the aid of statute

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82 *Id.*

83 *Id.* at 3.

84 *See id.*

85 *Id.*

86 791 A.2d 990 (N.H. 2002).

87 *See id.* at 992, 993.

88 *See id.* at 993.

89 *Id.*

90 *Id.*

91 86 A.2d 329 (N.H. 1952).

permitting it."[92] However, the *Scamman* court also emphasized that the trial court has discretion to grant or deny motions to intervene.[93] Because the court found that the trial court did not abuse its discretion in denying the motions to intervene, the decision was affirmed.[94]

Judge Quigley relied on the aforementioned case law and specific facts related to the NCA case to deny the five parties' motions to intervene.[95] Under New Hampshire common law, the Attorney General's Office is responsible for "protect[ing] the rights of the public in a charitable trust."[96] Furthermore, "[t]he court will grant standing to intervene to a petitioner if, and only if, the petitioner has a direct interest in the outcome of the matter that is distinct from the interests of a member of the general public."[97] Counsel for the City of Nashua argued that the City had an interest in the case because the City would undoubtedly be concerned about making sure that funds raised for its citizens are used for that purpose.[98] Additionally, counsel for the four nonprofit organizations argued that those groups had a direct interest in the case because they were "potential beneficiaries" of NCA distributions.[99]

Despite these arguments, the court denied the motions to intervene because the plaintiff-intervenors lacked "a direct and apparent interest, different from the members of the general public."[100] It found that the movants had not made a specific showing of how they would have been harmed if the funds went to the Currier Museum.[101] The court also noted how the state's Charitable Trust Unit had repeatedly tried to work with NCA to make the charity more compliant with requirements for its board and other management issues, but each attempt had failed.[102] Judge Quigley concluded that the City of Nashua and the four nonprofits were trying to execute something similar to "a hostile takeover" by "wrest[ing]

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92 *Id.* at 330.

93 *Id.*

94 *See id.* at 330–31.

95 *See In re* Nashua Center for the Arts, No. 316-2017-EQ-00191, slip op. at 3–5, 6 (N.H. Cir. Ct. 9th Prob. Div. Aug. 30, 2017).

96 *Id.* at 4.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.* at 6.

101 *See id.*

102 *See id.* at 5.

control of th[e] organization from its founders."[103]

The court seemed to base its decision in part on the fact that NCA was no longer operating effectively, and the original intent of Edith Carter could be carried out more efficiently by moving the funds to the Currier Museum, even though that initially seemed contrary to her intended purpose of funding arts programs in Nashua.[104] Furthermore, the Director of the Charitable Trust Unit had assented to NCA's petition to move the funds before those five parties moved to intervene.[105] The court's decision in this case bolstered the power of the Attorney General's Office, and it gave a stamp of approval to the Office's decision that NCA could relocate its funds without violating Edith Carter's intent.

IV. A COMPARISON TO MASSACHUSETTS: HOW COURTS HAVE DECIDED SIMILAR QUESTIONS IN NEW HAMPSHIRE'S NEIGHBOR TO THE SOUTH

New Hampshire has some unique qualities that make it a desirable place for settlors to create trusts.[106] Even more generally, many retirees are drawn to New Hampshire because the state has favorable debtor-protection laws and no state sales, income, or estate taxes.[107] However, the state's early adoption of more modern trust laws has been particularly noteworthy.[108] The major changes came in 2006 with the enactment of the Trust Modernization and Competitiveness Act (TMCA) with support from former Governor John Lynch.[109] The text of the TMCA articulates the Act's purpose to "establish New Hampshire as the best and most attractive legal environment in the nation for trusts and trust services" so that the state would attract high-paying jobs in the finance, estate planning, and related industries.[110]

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[103] *Id.*

[104] *See id.* at 4–6.

[105] *Id.* at 3.

[106] *See* Joseph F. McDonald, III, *Migrating Trusts to New Hampshire: The "Why" and the "How"*, 51 N.H.B.J. 34, 34 (2010).

[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] N.H. S.B. 394, 2006 Gen. Ct., 159th Sess. (N.H. 2006). *Compare* Mary Susan Leahy, *New Hampshire's New Trust Act a Boon to Local Businesses*, McLane Middleton, http://www.mclane.com/thought-leadership/new-hampshires-new-trust-act-a-boon-to-local-businesses [https://perma.cc/3F7Q-LKN8] (last visited Feb. 5, 2019) (arguing New Hampshire's adoption of the TMCA is positive and that the legislation would benefit the state's business community because business owners would find it easier to establish "dynasty trusts" to preserve

The Act also reiterates how New Hampshire is capable of hosting "the most attractive legal and financial environment for individuals and families seeking to establish and locate their trusts and investment assets."[111]

Beyond New Hampshire, courts in other states have heard arguments from many parties who, like the groups in *In re Nashua Center for the Arts*, believed that they had a right to sue for the proper administration of a charitable trust.[112] Massachusetts courts are no exception.[113] Because of New Hampshire's unique qualities in the realm of trust law, juxtaposing New Hampshire with its closest neighboring state to the south provides an interesting comparison. One might contemplate whether the New Hampshire laws on charitable trusts are notably different from those of another New England state due to New Hampshire's adoption of the TMCA and desire to set an example for the rest of the country.[114] However, the Massachusetts cases that follow will show how New Hampshire and Massachusetts courts have addressed these charitable trust suits in similar ways.

A. Dillaway v. Burton

Dillaway v. Burton[115] was decided by the Massachusetts Supreme Judicial Court in 1926.[116] The case concerned the will of Robert B. Brigham, which established a charitable corporation for the purposes of "maintaining an institution for the care

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wealth in perpetuity, and settlors could designate special fiduciaries such as "trust advisors" or "trust protectors"), *with* Michelle M. Arruda & William F. J. Ardinger, *The Policy and Provisions of the Trust Modernization and Competitiveness Act of* 2006, 47 N.H.B.J. 6, 14 (2006) (praising how the TMCA updated New Hampshire trust law, yet also asserting that several more changes were necessary for New Hampshire to stay competitive with other states). In particular, the authors argued for the development of a formal and regular task force to constantly review New Hampshire's trust laws and suggest future changes. Arruda & Ardinger, *supra*.

[111] N.H. S.B. 394.

[112] *See generally* DeGiacomo v. City of Quincy, 63 N.E.3d 365, 367 (Mass. 2016) (holding that the state Attorney General was the only necessary party to an equity proceeding in an action brought by a successor trustee of a public charitable trust, the city and its historical society); *In re* Milton Hershey Sch., 911 A.2d 1258, 1259 (Pa. 2006) (holding that members of an alumni association of a charitable school wanting to rescind an agreement between the Attorney General and other parties had standing to do so); Russell v. Yale Univ., 737 A.2d 941, 943 (Conn. App. Ct. 1999) (holding that the settlor of a charitable trust did not retain a specific right to control the property and did not have standing for other specific rights related to administration of the trust).

[113] *See* discussion *infra* Part IV, sections A–C.

[114] *See* N.H. S.B. 394.

[115] 153 N.E. 13 (Mass. 1926).

[116] *Id.*

and support and medical and surgical treatment of those citizens of Boston who [were] without necessary means of support and [were] incapable of obtaining a comfortable livelihood by reason of chronic or incurable disease or permanent physical disability."[117] Also at issue in the case was the will of Elizabeth F. Brigham, Robert Brigham's sister.[118] Her will provided that the "rest, residue and remainder of the net income" of her estate should be paid to the Robert B. Brigham Hospital for Incurables.[119] The plaintiff was one of the trustees of Elizabeth Brigham's will, and he was also a member of the hospital established by Robert Brigham's will.[120] The plaintiff claimed that the hospital, a charitable corporation, was not being managed in accordance with the terms of Robert Brigham's will.[121] Specifically, he alleged that those managing the hospital had committed various abuses after the trustees had paid over the residue of Elizabeth Brigham's estate.[122] Moreover, the court decided a separate but related issue: whether the plaintiff could file a motion to intervene in a proceeding for a bill in equity for instructions brought by the hospital against the Attorney General.[123]

For the first issue raised in this case, the Supreme Judicial Court relied on the Massachusetts law which required that the state Attorney General enforce charitable trust suits.[124] The law in this area was "well settled," and it was the Attorney General's "exclusive function" to protect the public interest by repairing any abuses in a charity's administration.[125] The court also gave a succinct summary of the law regarding the Attorney General's powers, which became a basis for later Massachusetts cases on this issue:

> The power and duty delegated to the Attorney General to enforce the proper application of charitable funds are a recognition by the Legislature not only of his fitness as a representative of the public in cases of this kind, but of the necessity of protecting public charities from being called upon to answer to proceedings instituted by individuals, with or without just cause, who have no private interests distinct from those of the public.[126]

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117 *Id.* at 15.

118 *Id.*

119 *Id.*

120 *See id.* at 14.

121 *Id.*

122 *See id.* at 15.

123 *See id.* at 16–17.

124 *See id.* at 16.

125 *Id.*

126 *Id.*

Regarding the plaintiff-intervenor's motion, the Supreme Judicial Court affirmed the lower court's decision to deny the motion.[127] The court explained that the decision to allow a motion to intervene "ordinarily rests in the sound judicial discretion of the presiding judge," and the judge's decision will only be reversed if "it clearly appears that there has been an abuse of such discretion."[128] This policy of giving the trial judge discretion is consistent with that of the aforementioned New Hampshire cases.

At the same time, the Supreme Judicial Court acknowledged that there is a limited exception for when plaintiffs in these charitable trust cases do have standing.[129] A "board of visitors" occasionally would be deemed to have enough of a special power or duty "in connection with general visitation functions" so that it could have standing in the enforcement of a charitable trust.[130] This remote possibility did not apply to the *Dillaway* case because although Robert Brigham's will created the charity and granted visitor powers to the trustees of the hospital, the plaintiff in this case was a trustee of Elizabeth Brigham's will.[131] Furthermore, Elizabeth's will did not create the hospital, and because the plaintiff derived his standing from her will, his connection to the hospital was too tenuous for the board of visitors exception to apply.[132] Learning about this exception provides some support for a more progressive viewpoint that state courts might eventually make the attorney general's powers less absolute. However, the nature of this exception here in *Dillaway* is very narrow, and the overall message to glean from this case is that Massachusetts has historically been consistent in adhering to the traditional rules about the attorney general's power in the context of charitable trusts.

B. Ames v. Attorney General

In 1955, the Supreme Judicial Court decided another case, *Ames v. Attorney General*,[133] where the plaintiffs sought redress in a charitable trust dispute—this time, concerning Harvard College's Arnold Arboretum in what was formerly West Roxbury.[134] In an indenture from 1872, the trustees of James Arnold's will

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127 *See id.* at 17.

128 *Id.*

129 *See id.* at 16.

130 *Id.*

131 *Id.*

132 *See id.*

133 124 N.E.2d 511 (Mass. 1955).

134 *Id.* at 512.

transferred a fund to the president and fellows of Harvard College, for the purposes of establishing and maintaining the Arnold Arboretum, along with provisions for a specific professor who was to be responsible for managing the arboretum.[135] The fund was successful—the endowment grew to $5 million, and the arboretum gradually included specimens from all over the world.[136] However, this case's controversy arose when Harvard College proposed to relocate the arboretum's library and its herbarium department to Cambridge in order to blend those facilities with the College's larger overall library and botany department.[137] Those who opposed this relocation cited many different reasons, such as the move's negative effect on future endowment donations and the possibility that arboretum income would be used for purposes outside the scope of permitted activities.[138] Critics of the move also argued that even if those changes were beneficial to Harvard College, they would be harmful to the arboretum—and the funds were originally donated for the benefit of the arboretum, not the College.[139] The plaintiffs went a step further and asked the Attorney General if they could use the Attorney General's name in "an information" that would seek a declaratory decree.[140] The Attorney General refused to allow the plaintiffs to use his name, as he felt that the trustees were acting in good faith and "within the bounds of reasonable judgment and sound discretion," and, therefore, any litigation around such an issue would be "unreasonable and vexatious."[141]

The Supreme Judicial Court held that the Attorney General's refusal to allow his name to be included in the plaintiffs' court documents "was a purely executive decision which is not reviewable in a court of justice."[142] The court emphasized how the Attorney General's power in a charitable trust suit has been a longstanding tenet of Massachusetts's case law, and the Attorney General is the only individual who can protect the interests of the public.[143] Furthermore, a theme runs through the opinion: the attorney general's oversight is a safer mechanism for charitable trust management and protection than allowing individuals to have more power in

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135 *See id.*

136 *Id.*

137 *See id.*

138 *See id.*

139 *See id.*

140 *Id.* at 512–13.

141 *Id.* at 513.

142 *Id.*

143 *See id.*

charitable trust cases.[144] The court warned that "'it [cannot] be doubted that such a duty can be more satisfactorily performed by one acting under official responsibility than by individuals, however honorable their character and motives may be.'"[145] Moreover, one of the purposes for vesting the power to bring suit in the "sole discretion of one officer" is to protect charitable trusts from being "exposed to attack from all sides."[146] Clearly, the court took a very protective stance here, almost to the point of showing distrust of the motives that individuals have when they lodge complaints about the management of a charitable trust.

C. Weaver v. Wood

Finally, in the late 1990s, the Supreme Judicial Court decided *Weaver v. Wood*[147]—a case involving a dispute among members of the congregation of the First Church of Christ, Scientist, in Boston.[148] The First Church of Christ, Scientist was founded by Mary Baker Eddy in 1879.[149] The church is a public charity, as Eddy established it through a series of charitable trusts.[150] In the first deed of trust that set up the Church's board of directors, there were no specific references to individual Church members or any indications that members were considered beneficiaries.[151]

Most importantly, Eddy later executed another deed of trust that established the Church's Publishing Society "for the purpose of more effectually promoting and extending the religion of Christian Science."[152] In order to carry out this mission, the Publishing Society began publishing *The Christian Science Monitor* and later became involved with several radio programs.[153] In the 1980s and early 1990s, the Publishing Society decided to expand into television, and it developed a plan for a network called "The Monitor Channel."[154] Unfortunately, this television venture failed significantly—the channel ceased operations in 1992 after generating over

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144 *See id.* at 513–16.

145 *Id.* at 514 (quoting Burbank v. Burbank, 25 N.E. 427, 428 (Mass. 1890)).

146 *Id.* at 515.

147 680 N.E.2d 918 (Mass. 1997).

148 *Id.* at 919.

149 *See id.* at 920.

150 *See id.* at 922.

151 *See id.* at 920.

152 *Id.* at 921.

153 *See id.*

154 *See id.*

$30 million in deficits in just one year of operation.[155]

The plaintiffs brought legal action against the Church's directors and the Publishing Society, alleging that the defendants violated their fiduciary duties when they authorized the television campaign.[156] The plaintiffs argued that they had standing to bring this action because they were "life-long members in good standing" of the Church; however, they had no other special statuses.[157]

The court reiterated its holdings in *Ames* and *Dillaway*: Massachusetts law required that the state Attorney General keep watch over charitable funds and ensure that those funds "are used in accordance with the donor's wishes."[158] The court acknowledged that while the plaintiffs had a special relationship with the Church that would be different than the relationship that a general member of the public—who is not a member of the Church—would have, the court had "never held that membership in a public charity, alone, is sufficient to give standing to pursue claims that a charitable organization has been mismanaged."[159]

Additionally, just as the court opined in *Dillaway*, here the court alluded, in dicta, to the possibility that there are exceptions to this general rule.[160] The court was quick to note, however, that those exceptions still require that the plaintiffs exhibit some special interest that the general public does not possess.[161] These conclusions are not encouraging to plaintiffs like those in *In re Nashua Center for the Arts*, but at least the underlying message is consistent. If a court does not feel that members of a church congregation have enough of a special interest to set those members apart from the general public, then it is challenging to argue that the constituents of the City of Nashua and the nonprofits concerned about the NCA trust had enough of a special interest either.

V. SOLUTIONS: IS THE STATE ATTORNEY GENERAL'S INVOLVEMENT PROBLEMATIC OR HELPFUL?

After reviewing the case law, the next step is to consider the current theory on whether the state attorney general's role needs to be reformed. As this Note shows, the controversy at the heart of *In re Nashua Center for the Arts* involving the role of

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155 *See id.*

156 *See id.* at 919–20.

157 *Id.* at 921.

158 *Id.* at 922.

159 *Id.* at 923.

160 *See id.*

161 *See id.*

state attorneys general has come up repeatedly in charitable trust jurisprudence.[162] Scholars have analyzed the role of the state attorney general and identified certain negative outcomes from how these attorneys general become involved in the administration of charitable trusts.[163] At the same time, others are more optimistic and believe that attorneys general should not be removed entirely from the charitable trust landscape.[164]

A. Arguments in Favor of Revoking the Attorney General's Powers

Due to the lack of time and other resources in state attorney general offices, there have been concerns about how state attorneys general may base their decisions on whether to ignore or pursue a charitable trust case based on which cases are most advantageous for their careers.[165] In her Note, Jennifer Komoroski highlights several specific incidents where this conflict of interest has been at issue.[166] For example, in a South Carolina case, the Attorney General demanded more stringent regulations, while the state's physicians tried to block those regulations from being put into effect, claiming the Attorney General wanted to promote his own anti-abortion platform.[167] People speculated about the motives of the Attorney General in Missouri when the infamous case of *Cruzan v. Director, Missouri Department of Public Health*[168] took place.[169] The Missouri Attorney General allegedly remained in the trial proceedings just long enough to curry favor with the state's pro-life voters before he eventually withdrew, and the state subsequently did

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[162] *See supra* Part IV.

[163] *See generally* Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL'Y 1, 8–9 (2009) (advocating for the creation of a "quasi-public regulatory body" to regulate charities); Kelly McNabb, Note, *What "Being a Watchdog" Really Means: Removing the Attorney General from the Supervision of Charitable Trusts*, 96 MINN. L. REV. 1795, 1795–96 (2012) (discussing the inconsistencies in regulation of charitable trusts when state attorneys general began oversight); Komoroski, *supra* note 44, at 1786 (arguing that state attorneys general face substantial political pressures that result in biased decisions).

[164] *See generally* Komoroski, *supra* note 44, at 1793–94 (arguing that state attorneys general should be left some role in the charitable trust landscape, but that their role should be restricted).

[165] *Id.* at 1785–86.

[166] *Id.* at 1786.

[167] *See id.* (discussing Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000)).

[168] 497 U.S. 261 (1990).

[169] Komoroski, *supra* note 44, at 1786.

allow Cruzan's family to terminate her life support.[170]

State attorneys general are bombarded with diverse issues on a daily basis, and charitable trusts unfortunately tend to be overshadowed by other issues.[171] Additionally, state budgets often will not allocate more resources to help the attorney general's office administer these charitable trusts, and budgets are typically incurring substantial deficits as it is.[172] Kelly McNabb argues that these obstacles result in an imbalance where only the trusts that involve significant dollar amounts, highly visible media coverage, and "particularly reprehensible behavior" will be noticed by the attorney general's office.[173] This results in many noteworthy causes getting overlooked.[174] Finally, one of the reasons accounting for the ineffectiveness of attorneys general is the way charitable organizations may be exempt from reporting and registration requirements.[175] The rules on this may vary, but typically, certain organizations such as religious groups or churches, educational institutions, and hospitals are exempt from reporting and registration if the groups raise less than a particular amount each year.[176] Therefore, even an attentive attorney general will likely miss violations involving those exempt groups, because he or she does not know about information that is not made available.

B. Compromises: Supporting and Modifying the Attorney General's Role

It is clear that the possible harm resulting from the attorney general's involvement—or deliberate lack thereof—in a charitable trust case can be quite damaging for the other parties in the matter. On the other hand, some scholars have taken an approach focused more on compromise, asserting that the attorney general's role should be modified and reforms be put in place before deciding to

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[170] *Id. See generally Cruzan*, 497 U.S. 261. Nancy Cruzan was rendered permanently disabled as a result of an automobile accident, and she remained in a "persistent vegetative state" despite receiving various medical treatments. *Id.* at 266. Ms. Cruzan's parents "sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties." *Id.* at 265. The parents received authorization from the state trial court, but the Missouri Supreme Court reversed. *Id.* at 267. The United States Supreme Court granted certiorari and affirmed the Missouri Supreme Court's decision. *Id.* at 269, 286–87.

[171] *See* McNabb, *supra* note 163, at 1806.

[172] *See id.* at 1811.

[173] *Id.*

[174] *See id.*

[175] *See id.* at 1812.

[176] *See id.*

completely eliminate the attorney general's involvement. One such compromising approach is taken by Komoroski, which the following subsection explores in detail.

1. Diversification of the Trust's Investments

First, Komoroski has outlined a set of steps that state attorneys general should follow before they go to court to enjoin a charitable trust's diversification of investments:

> The state attorney general should be restricted from acting to halt the sale of a charitable trust's investments when: (1) the charitable trust document specifically provides that the trustees have discretion in investing the trust assets, (2) the trustees of the charitable trust wish to fulfill their duty to diversify the trust assets and have acted in a manner consistent with the manner in which a prudent investor would act, and (3) upon examining the process by which the trustees attempt to diversify the trust assets, the attorney general is satisfied that the trustees have acted in such a way as to be protected by something analogous to the business judgment rule. Consistent with the factors described above, the attorney general also should examine whether the trustees' actions to diversify have combatted the settlor's expressed intent in forming the charitable trust.[177]

In the first step, the attorney general needs to give deference to the trustee of the trust if the settlor granted the trustee discretion regarding investments.[178] If the attorney general interferes with the trustee's valid exercise of power, then the lines between the *parens patriae* power and becoming a co-trustee would be blurred.[179] It is critical that the attorney general not overstep this boundary. At the same time, the attorney general should get involved when the trustee goes against the settlor's explicit provisions for which types of investments would be authorized.[180] This ensures that the attorney general would protect the settlor's intent, and such protection is in keeping with one of the most central public policy themes in trusts and estate law.

In step two, a distinction needs to be made between two types of restrictions on inception assets: express restrictions and implied restrictions.[181] Sometimes, the language of a charitable trust will explicitly state that the trustee cannot sell the trust's inception assets, and if that is the case, then the attorney general again may rightfully step in and rectify the situation.[182] Examples from two cases illustrate this

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177 Komoroski, *supra* note 44, at 1794.

178 *See id.* at 1794–95.

179 *See id.*

180 *See id.* at 1794.

181 *See id.* at 1795–98.

182 *See id.* at 1795.

point.

The trust at issue in *Commonwealth v. Barnes Foundation* contained clear restrictions on its inception assets—the art collection of Dr. Albert Barnes.[183] The Barnes Foundation indenture prohibited the institution of entrance fees to the art collection, "the construction of new buildings on the Foundation's premises, and the loan or sale of any of the paintings under any circumstances short of physical deterioration."[184] In this case, the state Attorney General charged the trustees with failing to adhere to those specific restrictions.[185]

In contrast, in the legal strife surrounding the Hershey Trust, the state Attorney General actually went against the settlor's intent by arguing, vaguely, that the trustees' choices "harmed the public as beneficiaries."[186] Mr. Hershey founded the Hershey Trust to provide education to underprivileged children, especially those in certain Pennsylvania counties.[187] However, the language of the Hershey Trust did not indicate any restrictions on what the trustees could do with the inception assets (the Hershey common stock).[188] Komoroski argues that the Attorney General in the *Barnes Foundation* case based such actions on the need for career advancement,[189] which, as mentioned above, is one of the most common assertions among scholars who want to minimize or totally eliminate the attorney general's role in charitable trust suits.

However, Komoroski also acknowledges that the attorney general should pay close attention to any implied restrictions that may be lurking in the settlor's intent.[190] In conducting this more nuanced analysis, the attorney general needs to consider whether selling those assets would be "inimical to the *charitable purpose* of the trust."[191] This determination should be narrow in scope—the attorney general should not have wide discretion, which is likely to once again lead to too many instances of these attorneys general making decisions for their own personal gain.[192] Komoroski argues that the best way to keep the attorney general on track

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183 *See* Komoroski, *supra* note 44, at 1795–96 (analyzing the *Barnes Foundation* case).

184 *Id.* at 1796.

185 *See id.* at 1795–96.

186 *Id.* at 1796.

187 *See id.* at 1797.

188 *See id.* at 1796.

189 *Id.* at 1796–97.

190 *See id.* at 1797.

191 *Id.*

192 *See id.*

with this part of the process is for him or her to concentrate on "the use of income from the trust assets."[193]

Finally, the third step is reached only if no other problems have been encountered during the first two steps in this process.[194] The attorney general considers the overall picture of how the trustees plan to diversify the trust's assets.[195] Komoroski suggests that at this third step, the attorney general should use a thought process similar to the "business judgment rule," which is a concept from corporate law and has been codified in various forms throughout the states.[196] Generally, the business judgment rule provides corporate directors protection from liability by calling on courts to give strong deference to business directors in certain situations.[197] In New Hampshire, the legislature has defined the business judgment rule as:

> [A] rebuttable presumption that a manager has not breached the manager's duty of care if, in the matter in question, the manager has acted: (a) [i]n accordance with contractual good faith; (b) [i]n a manner the manager reasonably believed to be in the best interest of the limited liability company; and (c) [o]n the basis of reasonably adequate information.[198]

Overall, Komoroski argues, the attorney general should be most concerned with whether the trustees made their decisions "in good faith and absent any wrongdoing."[199]

2. Other Arguments for the Attorney General to Maintain Some Power

Despite the evidence of state attorneys general who wield or are perceived to wield too much power with charitable trust suits,[200] there are some significant

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193 *Id.*

194 *See id.* at 1798.

195 *See id.*

196 *See id.*

197 *Id.* ("[D]irectors are better equipped than the courts to make business judgments [when the directors] . . . act[] without self-dealing or personal interest and exercise[] reasonable diligence and act[] with good faith.").

198 N.H. REV. STAT. ANN. § 304–C:109 (2013).

199 Komoroski, *supra* note 44, at 1799.

200 *See generally* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265 (1990); Weaver v. Wood, 680 N.E.2d 918, 919–20 (Mass. 1997) (holding that only the state Attorney General has standing, and even membership in a public charity is not sufficient to give standing to members in order to pursue a claim that the charity has been mismanaged); Ames v. Att'y Gen., 124 N.E.2d 511, 515 (Mass. 1955) (upholding the state Attorney General's power to make an executive decision not

reasons why attorneys general should play some sort of active role in these proceedings. Some states have spread the duties of charitable trust enforcement among several authorities, such as state agencies, the secretary of state, or the state insurance commissioner.[201] Other states have considered creating supervisory boards or organizations that could either be separate from the attorney general and provide a check on his or her power, or could report to the attorney general and fall under his or her authority.[202] Interestingly, New Hampshire established a Charitable Trusts Unit as a department within the Office of the Attorney General in 1943, and it was the first state to do so.[203]

The mission of the New Hampshire Charitable Trusts Unit is "to protect the integrity of the charitable sector . . . through effective registration, licensing, education, and enforcement."[204] Additionally, the Unit is "the central repository" for information about charitable organizations, so it provides helpful resources for members of the general public.[205] The staff at the Unit engage New Hampshire citizens in a variety of ways, such as writing articles for the *New Hampshire Bar Journal* and working with the New Hampshire Bar Association to conduct educational workshops on the issues affecting nonprofits.[206] As of 2004, the Unit had overseen a significant number of transactions.[207] For example, in 2003, over five thousand charitable trusts were organized, which was the highest number of charitable trusts registered in the state up until that year.[208] Moreover, for the fiscal year ending June 30, 2000, the Unit calculated that the total aggregate value of registered charities native to New Hampshire was approximately $8.2 billion.[209]

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reviewable by the court when he refused to allow petitioners to add his name to court filings); Komoroski, *supra* note 44, at 1786 (discussing how a South Carolina Attorney General exploited his power by supporting additional regulations for abortion because of his anti-abortion beliefs).

201 *See* McNabb, *supra* note 163, at 1801.

202 *See id.* at 1804.

203 *Charitable Trusts Unit*, N.H. DEP'T OF JUSTICE, https://www.doj.nh.gov/charitable-trusts/index.htm [https://perma.cc/AJ6Z-D7EC] (last visited Feb. 5, 2019); *see* N.H. REV. STAT. ANN. § 7:19 (1998)

204 Michael S. DeLucia, *Charitable Trusts Unit*, 45 N.H.B.J. 8, 8 (2004). Michael S. DeLucia is the former Director of Charitable Trusts and Senior Attorney General at the New Hampshire Department of Justice. *Id.* In this article, DeLucia highlights some of the noteworthy accomplishments in the state's Charitable Trusts Unit in the 1990s and early 2000s. *Id.* at 8–9.

205 *Id.* at 8.

206 *See id.* at 10.

207 *See id.* at 8.

208 *See id.* (noting that 5163 charitable trusts were organized in New Hampshire in 2003 alone).

209 *Id.*

After 2001, the value of charitable assets in New Hampshire gradually declined due to losses in securities markets.[210] However, the data from the early 2000s show how the Unit has played a noteworthy role for nonprofits in New Hampshire.

New Hampshire's Charitable Trusts Unit has also been a vital force in the fight against telemarketer fraud,[211] which exemplifies how the Unit has stayed true to its mission of safeguarding the integrity of the charitable sector. In 1996, the Unit analyzed data on charitable donations made by New Hampshire residents through telemarketer phone calls, and the results showed that a shocking seventy-five percent of those donations went to for-profit telemarketer services.[212] In 2003, as part of a joint effort with other state attorneys general, the Unit filed an amicus curiae brief in *Madigan v. Telemarketing Associates, Inc.*,[213] which was argued before the United States Supreme Court.[214] Several years later, the Unit again found that telemarketers targeting New Hampshire citizens for charitable donations were fraudulently keeping a large percentage of the donations, so the Unit has continued to educate the public and work with other state attorneys general on this problem.[215]

Additionally, Komoroski argues that while attorneys general should avoid "bringing unnecessary suits against trustees of charitable trusts, especially in efforts to diversify," the attorney general is "a necessary party to any suits brought against charitable trusts."[216] Some have argued that the attorney general's involvement is critical because charitable trusts "lack definite ownership."[217] When compared to "definite shareholders" of for-profit corporations, beneficiaries of charitable trusts are sometimes "unable or disinclined to monitor the actions of the trustees."[218] Furthermore, having the attorney general's oversight seems to give other parties peace of mind because it is less likely that entities are able to hold themselves out as charitable trusts without proper "inspection or supervision."[219] In states like New Hampshire, charitable trusts still receive oversight from the

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210 *Id.* at 8–9.

211 *See id.* at 9.

212 *Id.*

213 537 U.S. 1182 (2003).

214 DeLucia, *supra* note 204, at 9 (describing the *Madigan v. Telemarketing Associates, Inc.* case, which upheld the right of state attorneys general to proceed against telemarketers engaging in fraudulent charitable solicitations).

215 *See id.*

216 Komoroski, *supra* note 44, at 1788.

217 *Id.*

218 *Id.*

219 *Id.* at 1787.

Attorney General, while reaping additional benefits of having a staff at the Charitable Trusts Unit that can specialize in and devote more time to charitable trust issues.

CONCLUSION

After Judge Quigley's decision in *In re Nashua Center for the Arts*, one can understand why the City of Nashua and the other local nonprofits felt they had lost their voice in a critical legal, social, and cultural matter. Edith Carter had wanted the trust's funds to benefit the arts in Nashua. Furthermore, groups like the Greater Nashua Chamber of Commerce and Symphony New Hampshire likely felt as though they had been separated from money which was meant to go directly to them, or, at the very least, money over which they would be able to exercise some control. But the court did not view the case from their perspective.

This Note has shown how the long history of attorney general involvement in charitable trusts has remained consistent. Attorney general oversight is not without its flaws; however, courts have endeavored to consistently and fairly apply the law in a way that emphasizes the notion that due to charitable trusts' benefits to the public, the public interest is protected by the attorney general. Citizens—both individually and as organized groups—could benefit from considering ways to work with the attorney general by making him or her more of an ally and finding common ground in order to have more success in charitable trust suits. For example, citizens can actively get involved with the Charitable Trusts Unit and learn about the Attorney General's objectives for managing charitable trusts in the state. People who are concerned about the current system also can advocate for some of the specific reforms explained earlier in this Note, such as forming a state agency or other secondary group that not only would provide a check on the Attorney General's power, but also would make the workload for the Attorney General's Office more manageable.

Members of the Nashua community are unable to elucidate exactly what Edith Carter wanted her progeny to do with her estate, as she is no longer alive. Her stated intent was to benefit the arts in Nashua. If she were alive during the *In re Nashua Center for the Arts* decision, she may have agreed that the funds would be utilized in the most efficient way at the Currier Museum. However, like many estate planning issues, the dilemma of no longer being able to achieve total clarification from the individual settlor herself continues to perplex the other parties involved. While the City of Nashua and the nonprofits that tried to intervene did not obtain the outcome they had hoped for, the court properly applied the existing law, and until a better solution is implemented, that consistency is valuable.