

## ENFORCEABILITY AND SANCTIONS

Marion R. Fremont-Smith

Choate, Hall and Stewart

Boston, Massachusetts

The New York University School of Law study entitled “Standing To Sue In The Charitable Sector,” which is part of the background materials for these meetings, contains a succinct exposition of the traditional rules governing standing to sue under charity law. My assignment is to place these rules in their current context, as well as describe the sanctions that are applicable in cases of violation and the role state officials are taking in their enforcement.

### STANDING TO SUE TO ENFORCE FIDUCIARY DUTY OF CHARITABLE TRUSTEES

Primary responsibility for assuring the proper administration of charitable trusts rests on the state attorney general as representative of the general public, which is the ultimate beneficiary of all funds held for charitable purposes. In some states, this power is specifically conferred by statute, in some by reason of a general understanding of the duties of the office of Attorney General, and in still others by judicial decision. Furthermore, except in rare instances, it is an exclusive power, and members of the public, whether actual or potential beneficiaries of the trust or not, cannot compel the attorney general to exercise his enforcement power, although he may on his own motion appoint relators to act on his behalf. *Ames v. Attorney General*, 332 Mass. 246, 124 N.E.2d 511 (1955) At-

torney General v. President and Fellows of Harvard College, 350 Mass. 125, 213 N.E. 2d 840(1966), Calif. Code, Regs tit.11, secs. 1-2 (1991).

The reasons for this exclusion were based, not on a denial of the public's interest in the charitable trusts, but on the purely practical consideration that it would be difficult to manage charitable funds, or even to find individuals to take on the responsibility, if the fiduciaries were to be constantly subject to harassing litigation. Bogert, Trusts and Trustees, section 411; Fratcher, Scott on Trusts, section 391.

There are a few instances in which the courts have permitted exceptions to the attorney generals' exclusive jurisdiction, but only to the extent of granting standing to persons with certain kinds of connections to the charity. Drawing analogies to corporate law, it is generally accepted that members have standing to sue to compel accountings. In some states, members may also sue directors to enjoin ultra vires acts and to compel compliance with their fiduciary duties. This broader right is generally granted to co-directors and co-trustees. Holt v. College of Osteopathic Physicians and Surgeons *et al.*, 61 Cal. 2d 750, 394 P.2d 932 (1963). Denckla v. Independence Foundation, 41 Del. Ch. 247, 193 A.2d 538 (1963).

In some jurisdictions, the rationale for granting standing to individuals is based on trust law concepts under which beneficiaries have an absolute right to sue to compel compliance with the terms of the trust and to enforce observance of fiduciary duties. In these cases, the basis for granting standing is that the beneficiaries have a "special" interest distinct from that of members of the general public. The most commonly-cited example is a

case involving a trust to pay the salary of a minister of a particular church in which the court held that the incumbent had standing to compel compliance with the terms of the trust. Another example is a trust established to hold funds and distribute income to another charitable organization. The fiduciaries of the beneficiary organization (referred to in some cases as the “sub-trustee”) have standing to bring suit for enforcement. Bogert, Section 413. There are also a number of cases involving gifts for the benefit of a public body such as a city or town, for example to support a library or a public park. In those cases, either by statute or judicial decision, standing has been granted to residents of the municipality. See Bogert, section 412. An example of a statute conferring such standing is Massachusetts General Laws, Ch. 214, sec. 3, 10, under which, by leave of court, ten taxpayers of the municipality may bring suit against a county, city, town or other subdivision of the state that is serving as a trustee for a charitable purpose which is not being carried out or is impractical or useless to continue as originally planned. These plaintiffs are granted standing to enforce the trust or request application of the *cy pres* doctrine.

Finally, there are a few cases in which faculty, students or alumni have been granted standing to bring suit against members of the administration of schools and universities, although there appear to be a larger number in which the courts have held that these interests are too remote or, in the case of students, that their interests arise by virtue of a contract, and not as beneficiaries. The most noteworthy of these is *Dartmouth College v. Woodward* 17 U.S.(4 Wheat.)518(1819) discussed in the NYU study at pages 11 and 12. To the same effect is *Jones v. Grant*, 344 So. 1210 (Ala. 1977). Among the cases

in which standing was denied to students and faculty are *Miller v. Alderhold*, 228 Ga. 65, 184 S.E. 2d 172 (1971) and *Associated Students v. Oregon Investment Council*, 82 Or. App 145, 728 P.2d 30 (1986). (Ala.1977).

The authors of the NYU study identified five factors usually considered by the courts in determining whether to grant standing to individuals on the basis of their “special interest”:

the extraordinary nature of the acts complained of and the nature of the remedy sought;

the presence or absence of bad faith on the part of the charity being challenged;

the availability, willingness or effectiveness of the attorney general to act;

the nature of the benefited class;

the social or subjective desirability of granting standing to a given party;

It is this author’s view that the overriding factor in almost every case in which standing has been granted to individuals has been lack of effective enforcement by the attorney general or another government official. Cases dealing with charities in the District of Columbia are typical. *Stern v. Lucy Webb Hayes National Training School*, D.D.C., 381 F. Supp. 1003 (1974) and *Hooker v. Edes Home*, 579 A2d 608(D.C. 1990). This also appears to have been the situation in New Jersey where state regulation was also minimal. See cases described in the NYU study at pp. 68-73. In these New Jersey cases, as well as a number of others in which the court has expanded the concept of interested persons, an important factor appears to have been that the question before the court was not breach of fiduciary

duty but an interpretation of the trust terms or a complaint for *cy pres* or deviation, for in these cases, the issue does not involve allegations of bad faith that reflect personally on the trustees. It is also of note that in the Edes Home case, as well as the case of *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y.2d 458, 479 N.E.2d 752 (1985), the courts noted as an additional factor influencing their decision to expand standing the existence of an immediate threat of injury to the class or of permanent loss of the charitable funds.

The study identified the existence of “bad faith” on the part of the charity as a factor, but one might question whether “bad faith” can be found before the issue of standing is disposed of. Perhaps it is an allegation of bad faith that is meant, but if that is the case one might then assume that it would be raised in every complaint. Furthermore, if the case involved application of the doctrines of *cy pres* or deviation, charges of bad faith would be irrelevant.

There are two cases dealing with the issue of standing decided after publication of the NYU study in which the courts reached divergent results. In one, the court in Minnesota permitted a former trustee, the grandson of the donor, to maintain a suit seeking to block an amendment of the trust terms dealing with successor trustees. The court held that where the Attorney General had elected not to participate in the proceedings, a complainant, who was not only a former trustee but also a relative of the settlor, had a sufficient interest in the trust to give him standing to object to the amendment. *Matter of Hill*, Minn App, 1993, 509 N.W.2d 168.