

Title: Standing to Seek Enforcement of Charitable Trusts

Summary: “It is the duty of the king, as *parens patriae*, to protect property devoted to charitable use; and that duty is executed by the officer who represents the crown for all forensic purposes.” See *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 579 (1867). This is the foundation of the state attorney general’s authority to seek enforcement of charitable trusts in the courts. Under certain circumstances others may as well. Charles E. Rounds, Jr. explains in §9.4.2 of *Loring and Rounds: A Trustee’s Handbook* (2014), at pages 1376-1386.

Text:

§9.4.2 *Standing to Enforce Charitable Trusts* [reproduced from Charles E. Rounds, Jr., *Loring and Rounds: A Trustee’s Handbook* §9.4.2 (2014)]

*Several commentators have noted that foreclosing the donor from enforcing the terms of his or her gift is an inefficient method of ensuring that charitable organizations comply with the donor’s stated intent. They assert that the resources available to attorneys general are insufficient to adequately monitor and protect the wishes of donors. Further, these commentators state that attorneys general interpose public policy considerations that often do not coincide with the donor’s stated interests.*¹³⁹

¹³⁹Michael M. Schmidt & Taylor T. Pollock, *Modern Tomb Raiders: Nonprofit Organizations’ Impermissible Use of Restricted Funds*, 31-SEP Colo. Law. 57, 59 (Sept. 2002). In one case involving a charitable education trust with gender, race, and religious restrictions, the scholarship selection committee filed a *cy pres* action seeking removal of the gender and race restrictions. The state attorney general sought the removal of the religious restrictions as well, citing public policy considerations. His efforts to interpose his policy predilections were rebuffed by the court. See *Lockwood v. Killian*, 172 Conn. 496, 375 A.2d 998 (1977). In the United States the courts have had no difficulty in upholding trusts for the promotion of any form of religion. 4A Scott on Trusts §371. “[A]s early as 1639 [in England] it was held that a trust to maintain a preaching minister was a valid charitable trust.” 4A Scott on Trusts §371. See also *Jackson v.*

A cotrustee. It should be self-evident that a cotrustee of a charitable trust would have the requisite standing to bring an action against his cotrustee to remedy the cotrustee's breach of trust, or to otherwise seek enforcement of the trust.¹⁴⁰ For more, the reader is referred to Section 3.4.4.1 of this handbook. In any litigation involving a charitable trust, except in the rare case "[w]hen the interests of the community would not be affected by the suit," the state attorney general will be a necessary party.¹⁴¹ The attorney general would be entitled to a citation in any one of the following actions involving *the internal affairs* of the trust,¹⁴² bearing in mind that the consent or nonconsent of the attorney general can never bind the court:

- Complaint for deviating from the terms of a trust
- Complaint to apply the doctrine of *cy pres*
- Complaint to terminate a trust
- Complaint to compromise the terms of a trust¹⁴³

We now take up the traditional role of the attorney general in seeking the enforcement of charitable trusts. As we do so, the reader should keep in mind that the court always has the last word.¹⁴⁴

The attorney general. As a general rule, the court does not act on its own initiative in enforcing trusts, charitable or otherwise.¹⁴⁵ "It is the duty of the king, as *parens patriae*, to protect property devoted to charitable use; and that duty is executed by the officer who represents the crown for all forensic purposes."¹⁴⁶ This is the foundation of the state attorney general's authority to seek enforcement of charitable trusts in the courts.¹⁴⁷ Even in the case of trusts that mix charitable and noncharitable interests, *e.g.*, charitable lead trusts, charitable remainder unitrusts (CRUTs), and charitable remainder annuity trusts (CRATs), the state attorney general has an oversight function.¹⁴⁸

It is in the nature of the typical charitable trust that its beneficiaries are so numerous and their interests under it so contingent and tangential that, as a practical matter, no beneficiary possesses

Phillips, 96 Mass. (14 Allen) 539, 553 (1867) (noting that from very soon after the passage of the statute of charitable uses or Statute of Elizabeth "gifts for the support of a minister, the preaching of an annual sermon, or other uses connected with public worship and the advancement of religion, have been constantly upheld and carried out as charities in the English courts of chancery").

¹⁴⁰ See generally §37.3.10 of this handbook (who can enforce a charitable trust).

¹⁴¹ See generally §37.3.10 of this handbook (who can enforce a charitable trust).

¹⁴² Absent special facts, the attorney general need not be brought into an action in contract or tort brought by a trustee of a charitable trust against a third party. See generally 5 Scott & Ascher §37.3.11 (Actions against Third Persons).

¹⁴³ See generally 5 Scott & Ascher §37.3.10.

¹⁴⁴ See generally 5 Scott & Ascher §37.3.10.

¹⁴⁵ 4 Scott & Ascher §24.4.4 (Court Acting on Its Own Motion).

¹⁴⁶ Jackson v. Phillips, 96 Mass. (14 Allen) 539, 579 (1867).

¹⁴⁷ See generally, Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 Real Prop. Prob. & Tr. J. 705, 706–709 (Winter 2006); 5 Scott & Ascher §37.3.10.

¹⁴⁸ See, *e.g.*, Fifth Third Bank v. Firststar Bank, Slip Copy, 2006 WL 2520329, Ohio App. 1 Dist., 2006, Sept. 01, 2006 (involving a CRUT). See generally §9.4.5 of this handbook (tax-oriented trusts that mix charitable and noncharitable interests (split-interest trusts)).

a sufficient interest to seek its enforcement.¹⁴⁹ While each of us, for example, is a direct and indirect contingent beneficiary of endowed medical research, in essence it is all of us *collectively*—the *public*, the *community* as it were—who is the beneficiary.¹⁵⁰ As one learned commentator has observed: “It is difficult, if not impossible, in dealing with charitable trusts to employ the terminology of the late Professor Hohfeld, who insisted that all legal relations are relations between persons, and that, when one person is under a duty, another person always has a correlative right.”¹⁵¹ Be that as it may, the trustee of a charitable trust is a fiduciary whose equitable duties with respect to the subject property run not to the attorney general, not to the state, but to the public, to the community.^{152,153}

Still, for hundreds of years both in the United States and in England¹⁵⁴ the “duty of maintaining the rights of the public, and of a number of persons too indefinite to vindicate their own, has vested in the [state] and is exercised here, as in England through the attorney general.”¹⁵⁵ In fact, records show that in the sixteenth century, suits to enforce charitable trusts were being brought in England by the Crown’s Attorney General. This is a practical solution to the enforceability dilemma inherent in the charitable trust.¹⁵⁶ The alternative —vesting everyone

¹⁴⁹*See generally* 5 Scott & Ascher §37.3.10; 4A Scott on Trusts §391; Bogert, Trusts and Trustees §§411–417; Jackson v. Phillips, 96 Mass. (14 Allen) 539, 579 (1867). In the noncharitable context, *cf.* E.F. Hutton Sw. Props. II, Ltd. v. Union Planters Nat’l Bank, 953 F.2d 963, 970 (1992) (“... a trust for the benefit of a numerous and changing body of bondholders appears to us to be preeminently an occasion for a scruple even greater than ordinary; for such beneficiaries often have too small a stake to follow the fate of their investment and protect their rights”). *See generally* §9.31 of this handbook (corporate trusts; trusts to secure creditors; the Trust Indenture Act of 1939; protecting bondholders).

¹⁵⁰*See generally* 5 Scott & Ascher §37.1.

¹⁵¹5 Scott & Ascher §37.1 (The Definition of a Charitable Trust).

¹⁵²5 Scott & Ascher §37.1. Only in rare cases is the state itself actually a beneficiary of a charitable trust, as was the case in *The Franklin Trust*. *See* §8.31 of this handbook (the Franklin Trust (Boston)).

¹⁵³*See, e.g.*, *Fifth Third Bank v. Firststar Bank*, Slip Copy, 2006 WL 2520329, Ohio App. 1 Dist., 2006, Sept. 01, 2006 (involving a CRUT). *See generally* §9.4.5 of this handbook (tax-oriented trusts that mix charitable and noncharitable interests (split-interest trusts)).

¹⁵⁴*See* David Hayton, *The Uses of Trusts in the Commercial Context*, in *Trusts in Prime Jurisdictions* 431 (Alon Kaplan ed., 2000) (noting that in England the Attorney General, the government’s law officer representing the legal interest of the Crown, or some statutory body like the English Charity Commissioners has rights to enforce the terms of charitable trusts against the trustees).

¹⁵⁵*Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 579 (1867). In a few states, the district or county attorney is charged with the responsibility of overseeing public charities. *See* *Warren v. Board of Regents*, 527 S.E.2d 563, 564 (Ga. 2000); *Collins v. Citizens & S. Trust Co.*, 373 S.E.2d 612, 613 (Ga. 1988). In England, a permanent Charity Commission was established in the nineteenth century to oversee public charities, this in response to a parliamentary commission’s findings that England’s charitable sector was in a “sorry state of affairs” due to a lack of any meaningful supervision. *See generally* 5 Scott & Ascher §§37.1.2 (History of Charitable Trusts in England), 37.3.10 (Who Can Enforce a Charitable Trust).

¹⁵⁶*See, e.g.*, §8.35 of this handbook (the Hershey trust) (discussing a charitable trust portfolio with a 50 percent concentration in a single enterprise and quoting the Pennsylvania deputy chief attorney general charged with overseeing charitable trusts on the subject of prudent investment diversification).

with standing to seek enforcement—would be intolerably chaotic and impractical.¹⁵⁷

Here is how the process generally works. “In most states, as in England, . . . suit is brought in the name of the Attorney General, although in some states the Attorney General prosecutes the case in the name of the people of the state.”¹⁵⁸ A relator action in the trust context is an action brought by and in the name of the Attorney General “on the relation,” *i.e.*, at the suggestion of, a third party who does not necessarily have any interest in the trust.¹⁵⁹ If it turns out that the suit is without merit, the relator may be personally liable for the litigation costs.¹⁶⁰ When it comes to enforcing charitable trusts, the attorney general is vested with prosecutorial discretion that is virtually limitless, as we shall see further on in this section when we consider a possible role for the guardian ad litem in the enforcement of charitable trusts. “. . . [I]ndeed, there is authority to the effect that a person who has no special interest in the performance of a charitable trust cannot maintain a proceeding, by mandamus or otherwise, to compel the Attorney General to bring an action to enforce a charitable trust.”¹⁶¹

Certainly one drawback to giving the state attorney general a central role in the enforcement of charitable trusts is that he or she is first and foremost a politician,¹⁶² with responsibilities that go well beyond the enforcement of charitable trusts.¹⁶³ Moreover, when there is tension between the “public interest” and donor intent, there is not much law on the extent to which the state attorney general must give deference to the latter in his or her advocacy. The Uniform Prudent Management of Institutional Funds Act (UPMIFA), which would regulate the investment activities of charitable corporations as well as charitable trusts, does little more than acknowledge

¹⁵⁷See generally Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 Real Prop. Prob. & Tr. J. 705, 720 (Winter 2006) (noting that a traditional justification for limiting those who have standing to seek enforcement of charitable trusts is to “ensure that charities are not constantly harassed by suits brought by individuals with no substantial stake in the charity”); 5 Scott & Ascher §37.3.10 (“If everyone were entitled, as a matter of right, to seek to enforce charitable trusts, charitable trusts would be subject to repetitious and harassing, and perhaps often baseless, litigation”).

¹⁵⁸5 Scott & Ascher §37.3.10.

¹⁵⁹Snell's Equity ¶16-09.

¹⁶⁰Attorney Gen. v. Butler, 123 Mass. 304, 308–309 (1879).

¹⁶¹5 Scott & Ascher §37.3.10.

¹⁶²An attorney general is first and foremost a political animal. See generally Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 Real Prop. Prob. & Tr. J. 705, 727 (Winter 2006) (suggesting that the “understandable political desire of the attorney general to emphasize the interest of the public at large can conflict with and work to the detriment of the interest of the smaller public that the donor intended to benefit or that the charity was established to serve”). See, e.g., Sarah Ellison, *Sale of Hershey Foods Runs Into Opposition*, Wall St. J., Aug. 26, 2002, at A3, col. 1 (suggesting that the Pennsylvania attorney general who had at one time called for diversifying The Hershey Trust investment portfolio has since reversed his position out of personal political considerations: “While the recent opposition by Mr. Fisher is viewed by many as political posturing, it could complicate the sale. . . [of the trust's 77 percent stake in Hershey Foods Corp] . . . by scaring off bidders and giving some board members of the trust, already being criticized from local officials and employees, the cover they need to scrap the sale, say takeover experts”). See generally §8.35 of this handbook (the Hershey trust).

¹⁶³See 5 Scott & Ascher §37.3.10 (confirming that “[i]n both England and the United States, . . . the Attorney General has a great many duties that have nothing to do with the enforcement of charitable trusts”).

that “the attorney general protects donor intent as well as the public’s interest.”¹⁶⁴ One learned commentator “is astonished that there has been no in-depth consideration of the parameters of the attorney general’s enforcement duty.”¹⁶⁵

Under the Uniform Trust Code, the attorney general of a state has the rights of a qualified beneficiary with respect to charitable trusts whose principal place of administration is in the state.¹⁶⁶ So also does a charitable organization expressly entitled to receive benefits under the terms of a charitable trust.¹⁶⁷ “Under UPMIFA, as under trust law, the court will determine whether and how to apply cy pres or deviation and the attorney general will receive notice and have the opportunity to participate in the proceeding.”¹⁶⁸

To say, however, that a state attorney general “oversees” public charities is not to suggest that he or she “audits” charitable trusts.¹⁶⁹ In fact, until relatively recently most overworked and understaffed attorneys general had no idea even how many charitable trusts they were supposed to be “overseeing.”¹⁷⁰ Many a charitable trust was going unperformed for one reason or another, including indifference, neglect, or death of the trustee. In an effort to get an accurate running head count of how many charitable trusts are running or supposed to be running at any given time, and to maintain as well a depository of basic information regarding them, many states have enacted statutes requiring that charitable trustees make certain periodic filings with their respective attorneys general.¹⁷¹ In some states, the reporting and licensing function is handled by a separate agency altogether, e.g., the office of the secretary of state or some consumer protection bureaucracy. In ten states, there is no general system of registration and reporting whatsoever.

These reforms have enhanced somewhat the oversight of charitable trusts if only because these informational filings are generally available for public inspection.¹⁷² Still, most state attorneys general lack the staffing, resources, and organization, and often the inclination, to properly oversee charities.¹⁷³ There are only eleven offices that have designated sections staffed by three or more full-time attorneys. “Staffing problems and a relative lack of interest in monitoring nonprofits make attorney general oversight more theoretical than deterrent.”¹⁷⁴ Today, England has a permanent Charity Commission that is charged with overseeing, along with the Attorney General, most of her charitable trusts.¹⁷⁵ It was put in place in 1853.¹⁷⁶ “The United

¹⁶⁴Unif. Prudent Management Inst. Funds Act §6 cmt.

¹⁶⁵Craig Kaufman, *Sympathy for the Devil’s Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 Real Prop. Prob. & Tr. J. 705, 708 (Winter 2006).

¹⁶⁶Uniform Trust Code §110(c) (available on the Internet at <<http://www.law.upenn.edu/library/archives/ulc/ulc/php>>).

¹⁶⁷Uniform Trust Code §110(b) (available on the Internet at <<http://www.law.upenn.edu/library/archives/ulc/ulc/php>>).

¹⁶⁸Unif. Prudent Management Inst. Funds Act, Prefatory Note.

¹⁶⁹See generally 5 Scott & Ascher §37.3.10.

¹⁷⁰See generally 5 Scott & Ascher §37.3.10.

¹⁷¹See generally 5 Scott & Ascher §37.3.10.

¹⁷²See generally 5 Scott & Ascher §37.3.10.

¹⁷³See generally Craig Kaufman, *Sympathy for the Devil’s Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 Real Prop. Prob. & Tr. J. 705, 726–727 (Winter 2006).

¹⁷⁴James J. Fishman, *Improving Charitable Accountability*, 62 Md. L. Rev. 218, 262 (2003).

¹⁷⁵See generally 5 Scott & Ascher §37.1.2.

¹⁷⁶See 5 Scott & Ascher §37.3.10 (outlining the various changes that Parliament has made since 1853 to the Commission’s structure and mission, to include in 2006 an expansion of its writ

States,...[on the other hand]...has been slower than England to supervise the administration of charitable trusts.”¹⁷⁷

Citizens and taxpayers. But just because a member of the universe of contingent beneficiaries of a charitable trust would lack the standing to seek its enforcement, the universe essentially being everyone, it does not necessarily follow that the member of a somewhat smaller class of individuals, such as taxpayers, would, as well. To be sure, “...a person ordinarily does not have a special interest in the enforcement of a charitable trust merely because he or she is a citizen or a taxpayer, even in the case of a trust administered by the state or a local municipality.”¹⁷⁸ In one case involving a charitable corporation formed to maintain a hospital in a particular municipality, however, the municipality itself and two individual residents and taxpayers of the municipality brought an action in the court to prevent the corporation from proceeding with a plan to move the hospital facilities to an adjacent municipality. Although the court ruled that the corporation could carry through with its plan, it went out of its way to say that the plaintiffs had had the standing to bring the action: “While public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest.”¹⁷⁹

Persons with special interests. Let us assume that many years ago a number of grateful citizens contributed sums of money to a city for the purpose of erecting and maintaining a tomb and museum to house the remains and papers of a famous general. The tomb was built and the museum established. Now the tomb is in disrepair and the museum has been all but abandoned by the mayor, whose thoughts are on other matters. What about the currently living relatives of the general? Would they have standing to enjoin the city from neglecting its stewardship of the tomb and museum? Would those who contributed to the complex have standing in their capacities as settlors to seek enforcement of the trust? Must the welfare of the tomb and museum be dependent solely on the enforcement discretion of the attorney general who perhaps does not want to embarrass the mayor?¹⁸⁰

According to Professor Scott, persons having a special interest in the performance of a charitable trust can maintain a suit for its enforcement.¹⁸¹ They, however, must show that their interest is not merely derived from their status as members of the general public. “Indeed, a study of the Calendars in Chancery, listing numerous cases brought prior to the enactment of the Statute of Charitable Uses in 1601, shows that although in many instances the Attorney General brought the suit, in many others, the suit was brought by a third person.” Professor Bogert has found cases that are in accord with Professor Scott’s assertion:

to include Wales and the creation of a Charity Tribunal “to hear appeals and applications in respect of the decisions, orders, and directions of the Commission”).

¹⁷⁷5 Scott & Ascher §37.3.10.

¹⁷⁸*See generally* 5 Scott & Ascher §37.3.10.

¹⁷⁹*City of Paterson v. Paterson Gen. Hosp.*, 97 N.J. Super. 514, 235 A.2d 487 (1967). *See generally* 5 Scott & Ascher §37.3.10.

¹⁸⁰*See generally* *Hochman v. Babbitt*, 94 Civ. 3000 (wk) (S.D.C.N.Y. 1994) (the “Grant’s Tomb Case”); 6 Scott & Ascher §38.7.10 (Monuments and Tombs).

¹⁸¹4A Scott on Trusts §391; 5 Scott & Ascher §37.3.10. *See also* Uniform Trust Code §405 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives/ulc/ulc/php>>) (noting that the grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests).

Thus where a trust was established for the sick and destitute members of a National Guard regiment, the president of the board of officers of the regiment has been allowed to sue to have the trustee removed and to compel him to pay damages for improper investment. In the case of a trust for the orphans and widows of deceased members of the brotherhood of locomotive engineers, several of the officers of the brotherhood were permitted to sue to enforce the trust on behalf of themselves and others similarly situated.¹⁸²

One also may have standing if one is entitled to a preference under the terms of the trust, is a member of a small class of identifiable beneficiaries, or is certain to receive trust benefits.¹⁸³ Thus, the incumbent of an endowed chair at a medical research facility would have standing to seek enforcement of the endowment trust.¹⁸⁴ Rights of enforcement would also accrue to a minister entitled to income distributions from a clergy support trust.¹⁸⁵ Likewise, a respectable argument could be made that the general's proximate relatives who are currently living would have an interest in the proper maintenance of their ancestor's tomb and that this interest is sufficiently "special" to vest them with standing to seek enjoinder of its neglect. For gifts to charitable trusts that are subject to conditions subsequent or conditions precedent, see Bogert.¹⁸⁶

The guardian ad litem. In a Massachusetts case involving a charitable trust for the purpose of making interest-free educational loans, the court appointed a *guardian ad litem* "to represent the interests of potential student charitable beneficiaries." The state attorney general had failed to file an appearance after having been notified of the court proceeding. On appeal, the Supreme Judicial Court of Massachusetts confirmed that the judge had properly exercised his authority to appoint a guardian ad litem,¹⁸⁷ but expressed some concern that the guardian ad litem's fees would be paid from trust assets:

But it may be, as the judge noted, that for reasons of resource allocation or otherwise, the Attorney General did not undertake a detailed review of the activities of these trustees, sufficient to satisfy the concerns of the judge. In the future, before a guardian ad litem is appointed to review the activities of the trustees of a charitable trust, the Attorney General should be informed of a judge's intent to make the appointment, and of his reasons for doing so. The Attorney General should be provided with a reasonable date by which to register an objection, if any, to such appointment. If the Attorney General does not respond within the designated period, the judge may conclude that there is, in fact, no

¹⁸²Bogert, *Trusts and Trustees* §412.

¹⁸³*See generally* 5 Scott & Ascher §37.3.10. *See, e.g.*, *State v. Hutcherson*, 96 S.W.3d 81, 84 (Mo. 2003) (denying standing to putative class representatives in class-action lawsuit to enforce certain provisions of a charitable trust, the representatives having failed to show a clear, identifiable, and present claim to any benefits sufficient to establish that they had had a "special interest" in the trust).

¹⁸⁴4A Scott on *Trusts* §391; 5 Scott & Ascher §37.3.10.

¹⁸⁵4A Scott on *Trusts* §391; 5 Scott & Ascher §37.3.10.

¹⁸⁶*Trusts and Trustees* §420. *See also* Bogert, *Trusts and Trustees* §419 (Possibility of Reverter May Be Expressly Reserved).

¹⁸⁷*See generally* §8.14 of this handbook (when a guardian ad litem (or special representative) is needed; virtual representation issues).

opposition to the appointment of a guardian ad litem, and that the Attorney General has no objection to the expenditure of charitable trust resources to pay such services.¹⁸⁸

The trustee ad litem. One learned commentator would have the court appoint a *trustee ad litem* for purposes of ascertaining what the *donor* would have wanted in a given situation, provided the donor is no longer alive or there is no one with a special interest in the administration of the charitable trust. “Under certain circumstances,...courts should use their equitable powers to allow other interested persons—not just the attorney general and the trustees—into the courtroom to ensure that charitable trusts are properly administered.”¹⁸⁹

The settlor or those with an interest as fiduciary or otherwise in a deceased settlor’s probate estate. Some jurisdictions by statute allow for some settlor involvement in the enforcement of a charitable trust.¹⁹⁰ California, for example, has enacted a statute granting settlors of irrevocable living trusts standing to petition for trustee removal.¹⁹¹ California also provides for settlor involvement in the modification or termination of an irrevocable trust.¹⁹² The Uniform Trust Code expressly bestows on the settlor standing to maintain an action to enforce or modify a charitable trust.¹⁹³ Perhaps it is time to get the settlor back into the picture.¹⁹⁴

“...[T]he traditional position has been that the settlor lacks standing to enforce a charitable trust. There is, however, impressive and growing authority, including under the Uniform Trust Code, for the contrary proposition, i.e., that the settlor can enforce a charitable trust. Given the historical under-enforcement of charitable trusts in both England and the United States, it would seem that allowing the settlor to enforce his or her own trust might well be a step in the right direction. In any event, settlor standing is a small price to pay for the settlor’s generosity.”¹⁹⁵

UPMIFA provides for the release or modification of a restriction on the management, investment, or charitable purpose of an institutional fund with donor consent.¹⁹⁶ On the other

¹⁸⁸In the Matter of the Trusts Under the Will of Lotta M. Crabtree, 440 Mass. 177, 795 N.E.2d 1157 (2003).

¹⁸⁹Craig Kaufman, *Sympathy for the Devil’s Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 Real Prop. Prob. & Tr. J. 705, 731 (Winter 2006).

¹⁹⁰The matter of whether the settlor, in the absence of statute, has standing to enforce the trust is covered in §4.1 of this handbook (interests and powers remaining with the settlor by operation of law). See generally Rounds, *Protections Afforded to Massachusetts’ Ancient Burial Grounds*, 73 Mass. L. Rev. 176, 180–182 (1988).

¹⁹¹Cal. Prob. Code §15642 (West 1991).

¹⁹²Cal. Prob. Code §15404 (West 1991).

¹⁹³Uniform Trust Code §409(b) (available on the Internet at <<http://www.law.upenn.edu/library/archives/ulc/ulc/php>>).

¹⁹⁴One can trace the concept of a transferor’s standing to seek enforcement of the obligations of the transferee at least as far back as the Anglo-Normans. In the fourteenth century, if the *feoffee to uses* failed to perform his duties, the *feoffor* could seek enforcement in the Court of Common Pleas. Later, the *cestui que use* also gained a right to seek enforcement, but in the Court of Chancery. See generally W. F. Fratcher, 6 Intl. Encyclopedia of Comp. Law 14 (F.H. Lawson ed., 1973). See generally Restatement (Second) of Trusts §25 cmts. c, a (1959).

¹⁹⁵5 Scott & Ascher §37.3.10.

¹⁹⁶Unif. Prudent Management Inst. Funds Act §6(a).

hand, UPMIFA does not require that the donor even be notified of an equitable deviation or *cy pres* proceeding.¹⁹⁷ Here is the rationale: “The trust law rules of equitable deviation and *cy pres* do not require donor notification and instead depend on the court and the attorney general to protect donor intent and the public’s interest in charitable assets.”¹⁹⁸ When, in a given situation, donor intent and the public interest cannot be reconciled, presumably the attorney general would have an ethical obligation to retain special outside counsel to advocate on behalf of donor intent.

In the absence of a statutory grant of standing, however, the settlor of a charitable trust will have an uphill battle obtaining it from the court. Certainly the settlor’s chances for a grant of standing are enhanced if it can be demonstrated that the settlor “has a special interest in the performance of the trust,” such as a reserved power to nominate the candidates for a faculty chair that the trust is supporting financially.¹⁹⁹ A few courts might even grant the settlor’s executor or administrator, or even the settlor’s heirs at law, standing to seek the trust’s enforcement.²⁰⁰ If standing is denied, the settlor might explore “petition[ing]...in mandamus seeking an order requiring the Attorney General to act.”²⁰¹ If that is not a practical option, and it is likely not to be,²⁰² then the settlor’s only recourse would be to attempt to exert some kind of nonjudicial pressure on the state attorney general, whether by mounting a press campaign or by exploiting political contacts.²⁰³ Most settlors, however, will not have the financial resources and/or political clout needed to persuade a dilatory or reluctant attorney general to do the right thing.

In one case, the Connecticut attorney general actually stood on the sidelines and watched a grantor charity and grantee charity battle it out in the courts over whether the grantor charity had standing to seek enforcement of certain grant restrictions.²⁰⁴ The Carl J. Herzog Foundation had filed an action against the University of Bridgeport, the foundation in 1987 and 1988 having made various restricted grants to the University “to provide need-based merit scholarship aid to disadvantaged students for medical related education.” The grants were used to provide scholarship aid to students in the university’s nursing program. On November 21, 1991, however, the foundation was informed that the university had closed its nursing school on June 20, 1991. It was alleged by the foundation that the grant money had then been commingled with the general funds of the university and used for its general purposes. The foundation requested that the university be ordered to segregate from its general funds the \$250,000 in grant money and begin to administer those funds in accordance with the restrictions.²⁰⁵

The trial court determined that the Connecticut attorney general, not the foundation, was vested with standing to seek enforcement of the restrictions in the courts. The attorney general had chosen for whatever reason not to get involved. And with that, the case was dismissed. The actions of the trial court were upheld on appeal. One commentator has referred to the saga of the Carl J. Herzog Foundation as “perhaps the most shocking example of a court’s unwillingness to

¹⁹⁷Unif. Prudent Management Inst. Funds Act §6 cmt.

¹⁹⁸Unif. Prudent Management Inst. Funds Act §6 cmt.

¹⁹⁹5 Scott & Ascher §37.3.10.

²⁰⁰5 Scott & Ascher §37.3.10 n.61.

²⁰¹Estate of Leitner, 2004 WL 440202 n.3 (2004).

²⁰²See generally 5 Scott & Ascher §37.3.10.

²⁰³See generally 5 Scott & Ascher §37.3.10.

²⁰⁴See Carl J. Herzog Found., Inc. v. University of Bridgeport, 243 Conn. 1, 699 A.2d 995 (1997).

²⁰⁵See generally §9.8.1 of this handbook (the charitable corporation) (discussing the segregation of restricted gifts to charitable corporations).

enforce contractual rights in charitable entities.²⁰⁶ Whether or not contractual rights are involved, the court's unwillingness to vindicate the equitable expectation interests of donor charities is certainly troubling.

In 2001, however, a New York court actually granted standing to the wife of a deceased settlor of a charitable trust (in her capacity as court-appointed special administratrix of his estate) so that she might seek judicial enforcement of the trust's charitable provisions. "The donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent,"²⁰⁷ opined the court. The court went on to say that the circumstances of the case "demonstrate the need for co-existent standing for the Attorney General and the donor."²⁰⁸ Whether the decision of the New York court is an aberration or the start of a trend remains to be seen.

Again, public oversight of charitable trusts is generally more apparent than actual.²⁰⁹ As a practical matter, there may be no one looking over the trustee's shoulder. Still, the ethical trustee conscientiously carries out the intentions of the settlor-benefactor.

Faced with the stark reality that public oversight of charitable trusts is often illusory, sometimes even subversive of donor intent, more and more prospective settlors are taking matters into their own hands by including express "donor control" provisions in their governing instruments, such as by reserving the right to receive and object to trustee accountings.²¹⁰ "What better way to see that the gift is delivered than to have an accounting?"²¹¹ For more on such countermeasures, the reader is referred to Section 4.1.1.2 of this handbook. While a donor control provision should take care of the standing problem, it needs to be carefully drawn so as not to cause another problem, namely a tax problem. For more on the tax implications of donor control provisions, the reader is referred to Alan F. Rothschild, Jr.²¹²

The visitor. In England one may create and fund a charitable corporation that provides in its governing documentation that a third party, known as a visitor, shall have the power to "elect and remove the members of the corporation, to regulate the management of its property, to decide the construction of the statutes of the foundation, and to adjudicate all claims and complaints concerning the internal affairs of the corporation."²¹³ Such a provision is generally enforceable.²¹⁴ In 1946, the Massachusetts Supreme Judicial Court rendered a decision that lends the impression at least that under the right facts and circumstance it would recognize visitor oversight in the charitable trust context.²¹⁵ The visitor would seem to have many of the attributes of the protector, a creature we endeavored to corral in Section 3.2.6 of this handbook, albeit with limited success.

²⁰⁶Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 Real Prop. Prob. & Tr. J. 705, 721 (Winter 2006).

²⁰⁷*Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 434 (2001).

²⁰⁸*Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d at 435.

²⁰⁹*See generally* 4A Scott on Trusts §391.

²¹⁰*See, e.g., Patton v. Sherwood*, 152 Cal. App. 4th 339, 61 Cal. Rptr. 3d 289 (2007).

²¹¹*Patton v. Sherwood*, 152 Cal. App. 4th 339, 347, 61 Cal. Rptr. 3d 289, 295 (2007).

²¹²*The Do's and Don'ts of Donor Control*, 30 ACTEC J. 261 (2005).

²¹³*See generally* 5 Scott & Ascher §37.3.10.

²¹⁴*See generally* 5 Scott & Ascher §37.3.10.

²¹⁵*See Trustees of Putnam Free Sch. v. Attorney Gen.*, 320 Mass. 94, 100, 67 N.E.2d 658, 661 (1946).