

# WASHINGTON UNIVERSITY LAW QUARTERLY

---

Volume 1957

June, 1957

Number 3

---

## CRITICAL EVALUATION OF THE CHARITABLE TRUST AS A GIVING DEVICE

ALLAN D. VESTAL†

### I. INTRODUCTION\*

Charitable trusts have been a part of English jurisprudence since the time of the Magna Carta.<sup>1</sup> Even prior to the Statute of Charitable Uses of 1601<sup>2</sup> charitable trusts were commonplace in England.<sup>3</sup> However, the great utilization of this device came after the first Tudor had ascended the throne. The close of the sixteenth century had been marked by vast political and economic changes in England.<sup>4</sup> A concomitant of such changes had been the termination of vast programs of social service and education rendered by the church. There was a pressing need for some program of care for the needy, and a program had been initiated by the government to meet this felt need. The government itself, following the collapse of church-sponsored charity, supported a program that afforded only harsh treatment to those unable to care for themselves. Such a program was grounded on the feeling that poverty was the result of one's own wickedness and was not the reflection of circumstances beyond the control of the individual.<sup>5</sup>

A corollary to the program developed to replace the church in this

---

† Associate Professor of Law, College of Law, State University of Iowa.

\* The author readily admits that he is not entirely unbiased in the area under consideration since he was of counsel *In re Small's Estate*, 244 Iowa 1209, 58 N.W.2d 477 (1953). That case involved a legal question that reflected incidentally the principles here considered.

1. See MAITLAND, *EQUITY* 25 (1936).

2. 43 ELIZ. 1, c. 4.

3. 4 SCOTT, *TRUSTS* § 348.2 (2d ed. 1956).

4. REPORT OF THE COMMITTEE ON THE LAW AND PRACTICE RELATING TO CHARITABLE TRUSTS (hereinafter referred to as the NATHAN REPORT) § 37 (1952). This report is commented on in *The Nathan Committee Report*, 102 L.J. 703 (1952) and Graveson, *The Report on Charitable Trusts*, 215 L.T. 326 (1953).

5. *Ibid.*

area,<sup>6</sup> the Statute of Charitable Uses of 1601<sup>7</sup> was passed. This formalized private participation through trusts in the field of charity. It spelled out the fields of endeavor of charitable trusts in the following language:

The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars of universities; the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; the education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.

Such activities have been roughly grouped into four categories: (1) relief of poverty, (2) encouragement of education, (3) advancement of religion, (4) other miscellaneous activities "beneficial to the community" not included in the first three.<sup>8</sup> In the three centuries following the enactment of this statute a great number of charitable trusts were established. Most were designed to supplement, directly or indirectly, the minimum sustenance provided by the government for the indigent, the widow, the orphan, the sick, lame and blind. The treatment of the indigent in the colonies reflected the English background, and when independence was achieved, the mores were so well established that the American development in the area of remedial charitable activities was quite similar to the English. The harsh attitude of the government, both in England and in the United States, continued into the twentieth century. Only in the last fifty years in England and the last twenty-five years in the United States has there been a change in attitude regarding governmental welfare activities. In that time in England the so-called "welfare" state has arisen to assume affirmatively responsibility for the well-being of all the citizens beyond a bare subsistence minimum. Although the "welfare" state has not been adopted in the United States to the extent that it has been developed in England, in the last twenty-five years, the movement has been in that direction. This shift in attitude means that the government is now found in an area formerly left to voluntary action on the part of its citizens. This means that there is a lessening of the need for charitable activities of the traditional sort.<sup>9</sup> It is true that all charities generally and charitable trusts specifically are devoting much of their energies to the traditional, relief of the

---

6. See discussion, *Vidal v. Girard's Executors*, 43 U.S. 127, 144 (1844).

7. 43 ELIZ. 1, c. 4.

8. TUDOR, CHARITIES 8 (5th ed. 1929).

9. *The Conveyancer*, 215 L.T. 17 (1953).

needy, type of work.<sup>10</sup> Today, however, the emphasis seems to be shifting to entirely different, nontraditional areas. While the important role of charitable trusts in meliorating suffering must not be overlooked, their most significant function today and in the foreseeable future is probably that of supplying risk or venture capital to advance the frontiers of knowledge. Large foundations—trust and corporate—are peculiarly fitted for this role.<sup>11</sup> As one authority has said concerning charitable trusts:

They are perhaps the only agencies which at the present day are able to survey the whole field of social action, to assess where unmet needs exist or where there is overlapping or a no-man's land, to inspire voluntary organizations to greater cooperation, to new endeavor or to the reform of old methods to meet new situations. We heartily concur with the views [that] "it is the business of charitable trusts to live dangerously."<sup>12</sup>

This significant shift in emphasis merits consideration in any examination of giving through charitable trusts. Thinking along traditional lines is misleading; charitable trusts have assumed a position of great significance in the examination and development of new social and economic concepts. For this reason, if for no other, a re-examination of the charitable trust is warranted.<sup>13</sup>

10. "Indeed a study of the actual activities of modern foundations will show the vast majority of their funds are still going into these same basic traditional areas." Jaqua, *Function of the Foundation in Modern Society*, CONFERENCE ON CHARITABLE FOUNDATIONS 163 (1955).

11. *Final Report of the Select Committee to Investigate Foundations and other Organizations*, H.R. REP. NO. 2514, 82d Cong., 2d Sess. (hereinafter cited as the HAYS REPORT) 3 (1953). On the change in responsibilities of charities, see ANDREWS, *ATTITUDES TOWARD GIVING* 122-25 (1953).

12. NATHAN REPORT § 59.

[T]hey can act more flexibly, more quickly and can take risks which are inappropriate for government agencies or for philanthropies whose funds come from general public contributions. They can facilitate impartial enquiry in areas fraught with controversy and in which political pressures should not be allowed to influence research.

Jaqua, *supra* note 10, at 163.

See also c. 16 of the NATHAN REPORT, particularly § 665, wherein it is stated: We hope . . . that the maximum possible resources will continually be diverted to pioneer and experimental undertakings since it is in this field that voluntary bodies can do work for which they are particularly suited.

13. Voluntary charitable activities in some private form are still much to be desired because of their effect on society at large. Lord Beveridge, in his study of the English scene, said:

In a totalitarian society all action outside of the citizen's home, and it may be much that goes on there, is directed and controlled by the State. By contrast, vigour and abundance of Voluntary Action outside one's home, individually and in association with other citizens, for bettering one's own life and that of one's fellows, are the distinguishing marks of a free society. They have been outstanding features of British life . . . room, opportunity and encouragement must be kept for Voluntary Action in seeking new ways of social advance. There is need for political invention to find new ways of fruitful cooperation between public authorities and voluntary agencies.

## II. THE CHARITABLE TRUST

### (a) Utilization Today

The extent to which charitable trusts are used in the United States is not definitely known. Sufficient information, however, is available to establish quite conclusively that charitable trusts are commonplace rather than exceptional.<sup>14</sup> In Rhode Island, where relatively complete

---

*Id.* § 8. But this felt need does not justify a favoring of the charitable trust instrumentality. Other cooperative, charitable activities might better fill this place in our society.

On public attitude toward government supplanting private agencies, see ANDREWS, *ATTITUDES TOWARD GIVING* 42 (1953).

When we turn from voluntary service as such to consider the place of voluntary organizations in the modern social structure more complex considerations arise. The advantage of voluntary effort over state activity lies in its greater flexibility; its ability to set new standards or to undertake new work of its own volition, and without seeking fresh statutory powers; its ability to pioneer; to make additional or more special provision for people suffering from certain types of disadvantages or disabilities; or for young people of exceptional promise; to work outwards from the individual in need of help to the services he needs rather than by the reverse process of discovering the individual in providing a service (we have in mind particularly the case of work agencies); to attract to it men and women with a high sense of dedication ready and willing to give themselves to taxing and specially difficult work. We will not enlarge on these virtues, which few would deny. Some of the most valuable activities of voluntary societies consist, however, in the fact that they are able to stand aside from and criticize state action, or inaction, in the interests of the inarticulate man-in-the-street. This may take the form of helping individuals to know and obtain their rights. It also consists in a more general activity of collecting data about some point where the shoe seems to pinch or a need remains unmet. The general machinery of democratic agitation, deputations, letters to the Press, questions in the House, conferences and the rest of it, may then be put into operation in order to convince a wider public that action is necessary.

NATHAN REPORT § 55.

14. Charitable giving is big business in the United States. Although the information is not as complete or as accurate as we might wish, enough facts are available to show the vast scale of charitable activities. The assets of the philanthropies have been estimated at \$30,000,000,000, (see Lynn, *Legal and Economic Implications of the Emergence of Quasi-Public Wealth*, 65 *YALE L.J.* 786, 801 n.65 (1956)), at \$50,000,000,000, (Hayes, *Corporate Charitable Giving*, 91 *TRUSTS & ESTATES*, 492, 494-95 (1952)), and at \$64,000,000,000 (REPORT OF THE (N.Y.) JOINT LEGISLATIVE COMMITTEE ON CHARITABLE AND PHILANTHROPIC AGENCIES AND ORGANIZATIONS 15 (1954)).

The 1950 Cumulative List of Organizations published by the Bureau of Internal Revenue lists more than 30,000 tax-exempt organizations. The number of these which can be classed as foundations varies according to the definition of a foundation. Estimates ranged as high as 32,500 under the broadest possible definition. For those organizations having a permanent endowment of \$50,000 or more and embarked upon a program of philanthropic giving, the estimate was slightly more than a thousand with total assets of approximately \$2,600,000,000 and expenditures of approximately \$133,000,000 in 1950. Informed sources estimate the number of foundations having assets of \$10,000,000 to be between 60 and 100. This estimate excluded colleges, universities, and religious organizations.

HAYS REPORT 2.

An incomplete survey was made in 1936 in Massachusetts. It reported that some 26,000 estates contained charitable bequests. "In Suffolk County alone—that is where Boston is located—in the years 1915 to 1935, unrestricted bequests for charitable purposes totalled over \$26,000,000." *PROCEEDINGS OF THE CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL* 169 (1953).

Although the funds held by the foundations run into billions and form an im-

information is kept available on charitable trusts, 473 trusts of the value of \$61,374,472.78 were registered with the state in the two and one-half years prior to December 31, 1952. During the following year an additional 16 trusts of some \$798,000.00 were registered.<sup>15</sup> During a one year period these trusts disbursed \$698,018.25 to charitable beneficiaries.<sup>16</sup> Since this is the report of a single state in this country—and the smallest at that—one can guess that the magnitude of the value of charitable trusts in the country as a whole must be enormous.<sup>17</sup>

In England, where more complete information is available:

It is thought that there are in all 110,000 charitable trusts in existence today. Of these 30,000 are educational and subject to the control of the Minister of Education, the remaining 80,000 fall within the jurisdiction of the Charity Commissioners. It is stated that the aggregate securities and money held by charities is in the region of £200,000,000. In addition there are unknown but certainly vast amounts of land held on charitable trusts. Say that the land held by charity is valued at £50,000,000, which would seem to be an undervaluation, the total charitable property in this county is £250,000,000 producing a revenue of probably around £8,000,000. In addition considerable sums annually are paid under covenants for charitable purposes. It would seem that not less than £9,000,000 a year is applied on charitable trusts. Further, it is stated that new trusts are being formed at the rate of nearly ten a week.<sup>18</sup>

---

portant segment of the investment funds of the nation (see Lynn, *supra*), the activities of all the foundations comprise only about 3% of the annual giving in America. HAYS REPORT 3.

A new development in America is the enormous growth of pension trusts. A single bank in Winston-Salem, North Carolina reported:

Sachovia is not a large trust institution, but during the last ten years we have by a number of promotion activities been fortunate enough to obtain appointments in over 100 retirement plans. These now have funded assets in the neighborhood of forty millions of dollars and may be expected to multiply themselves several times over the years to come. The trusts now range in size from ten thousand to ten million and account for a sizeable part of the gross income of our trust department.

Bethel, *Patterns in Pension Trusts*, 91 TRUSTS & ESTATES 934, 937 (1952). See also NATHAN REPORT § 525; Lauritzen, *Perpetuities and Pension Trusts*, 24 TAXES 519 (1946).

15. REPORT OF THE ADMINISTRATOR OF CHARITABLE TRUSTS 1 (Rhode Island 1954).

16. *Id.* at 3.

17. "Nearly nine million dollars in about nine hundred trust estates have been given throughout the years for the promotion of charitable purposes. The funds range in amount from one hundred dollars to three million dollars." REPORT OF THE ATTORNEY GENERAL 89 (New Hampshire 1944).

"A recent cursory examination of the Register of Charitable Trusts discloses that at least thirty million dollars had been left and are available for public benefits. Considerable undetermined accumulations and appreciations must be added to this figure." *Id.* at 69 (1948).

18. *The Conveyancer*, 215 L.T. 17 (1953).

It is noteworthy that in England, according to an authoritative report, a new type of trust is to be found among those being established. These "deviational" trusts are those "with an income of £100,000 a year or more and with wide purposes and beneficial area."<sup>19</sup> A similar growth of large foundations, trust and corporate, is to be found in the United States. In 1953 there were three times as many foundations, with \$50,000,000 in assets, as there were in 1930.<sup>20</sup>

(b) *Legal Background*

"Charities have always been favorites of our law . . ." <sup>21</sup> Although there have been exceptions<sup>22</sup> it is traditional for common law courts to favor gifts to charities. Immemorially such gifts have enjoyed "a

19. NATHAN REPORT § 545.

20. NEW YORK UNIVERSITY, SECOND BIENNIAL CONFERENCE ON PROBLEMS OF THE CHARITABLE FOUNDATION 250 (1955).

21. *Jordon's Estate*, 329 Pa. 427, 429, 197 Atl. 150 (1938). This is also true of the civil law. See *State v. Executors of McDonough*, 8 La. Ann. 171, 246 (1853): "They [pious uses] are viewed with special favor by the law: *ils sont considérés comme privilèges dans l'esprit des lois*, and with double favor on account of their motives for sacred usages and their advantage to the public weal."

The extremely liberal policy generally found in the treatment of charities and charitable trusts has been written into the statutes of some states; for example, see N.C. GEN. STAT. § 36-23.1 (1950).

For a lengthy discussion of the law of charities, see *Magill v. Brown*, 16 Fed. Cas. 408, No. 8952 (C.C.E.D. Pa. 1833).

22. The favoring of charitable trusts is not an entirely one-way street. Some laws have been passed which restrict the activities of such instrumentalities. For example, some statutes make invalid gifts made to charities within a stated period after the death of the testator. See, e.g., D. C. CODE ANN. § 19-202 (1951):

No devise or bequest of lands, or goods, or chattels, to any minister, public teacher or preacher of the gospel as such, or to any order or denomination or to or for the support, use, or benefit of a trust for a minister, public teacher or preacher of the gospel as such, or any religious, sect, order or denomination shall be valid unless the same shall be made one calendar month before the death of the testator.

Some states limit the percentage of the estate that may be given to charitable organizations or to trustees for the use or benefit of such organizations. For example, see IOWA CODE ANN. § 633.3 (1950). Some states limit the property holdings of charitable organizations. RESTATEMENT, TRUSTS § 362, comment b (1935). But even such restrictions are somewhat softened by the general judicial attitude favoring charitable giving. For example, see *Hoffner's Estate*, *Anderson's Appeal*, 161 Pa. 331, 29 Atl. 33 (1894); *Linkins v. Protestant Episcopal Cathedral Foundation*, 187 F.2d 357 (D.C. Cir. 1950).

A disfavoring of charities is also revealed in legislation which restricts the holdings of charitable corporations. Among the limiting statutes are: MAINE REV. STAT. c. 54, § 5 (Supp. 1955) (\$500,000); MASS. ANN. LAWS c. 180, § 9 (1955) (\$5,000,000 limit); N.D. REV. CODE § 10-0807 (Supp. 1953) (\$500,000 limit on holdings of real estate); PA. STAT. ANN. tit. 10, § 33 (1939) (\$350,000); ALASKA COMP. LAWS ANN. § 36-4-31 (1948) (\$50,000 limit on realty). See also IND. ANN. STAT. § 25-1501 (Burns 1948); NEV. REV. STAT. § 86.160 (1957) (also limiting holdings of realty).

Other states have provisions limiting holdings to that amount which is reasonably necessary for the accomplishment of the purposes of the organization. ARIZ. REV. STAT. § 10-454 (1956); IDAHO CODE ANN. § 30-1106 (1948); KY. REV. STAT. § 271.145 (1953); N. J. STAT. ANN. § 15:14-6 (1939); OKLA. STAT. ANN. tit. 18, § 543 (1953). See also N. M. STAT. ANN. § 51-14-8 (1954).

privileged position in the law of testamentary disposition."<sup>23</sup> Charitable trusts specifically have received preferential treatment.<sup>24</sup> This favored position of the charitable trust has been manifested in a number of ways.

The Court of Chancery, favoured charity to the extent of exempting gifts to charitable objects from certain of its rules as to the validity of trusts. The extent of the privilege accorded to charity by the early Chancellors may be reduced to this: that they endowed charity with a fictitious personality, and treated it as an artificial legatee or *cestui que trust*, granting to it the right to hold property in perpetuity exempt from the old rule against rendering property inalienable for a longer period than lives in being and 21 years thereafter.<sup>25</sup>

When the rule has been cast in terms of remoteness of vesting, a remote gift over to a charitable use after the original gift for a charitable use has been held valid. This is true even though a similar gift in the case of a *private* use would be void under the rule.<sup>26</sup> When the rule against perpetuities has been cast in terms of restraint on alienation, the courts have consistently held that charitable trusts are not subject to the rule.<sup>27</sup> In the closely related rule against accumulation, it has been held that an exception is made in the case of charities.<sup>28</sup>

Another example of the favoring of charitable trusts is the doctrine of *cy pres*, whereby a charitable trust which cannot be employed as specifically intended by the donor will under certain circumstances be applied to a valid charitable use as similar as possible to that originally intended by the donor.<sup>29</sup>

23. NATHAN REPORT § 68.

24. See *Magill v. Brown*, 16 Fed. Cas. 408, No. 8952 (C.C.E.D. Pa. 1833); *Mitchell v. Reeves*, 123 Conn. 549, 557, 196 Atl. 785, 788-89 (1938); *Kronshage v. Varrell*, 120 Wis. 161, 97 N.W. 928 (1904); *Porter's Case*, 1 Coke 22 b, 76 Eng. Rep. 50 (K.B. 1592). For early English cases, see DUKE, CHARITABLE USES (Bridgeman ed. 1805).

25. TUDOR, CHARITIES 2 (5th ed. 1929). See also IOWA CODE ANN. § 558.68 (1950), *Phillips v. Harrow*, 93 Iowa 92, 61 N.W. 434 (1894); RESTATEMENT, TRUSTS § 365 (1935); 2 SCOTT, TRUSTS § 116 (2d ed. 1956); ZOLLMAN, AMERICAN LAW OF CHARITIES § 530 (1924); *cf. Girard Trust Co. v. Russell*, 179 Fed. 446 (3d Cir. 1910); *Village of Brattleboro v. Mead*, 43 Vt. 556 (1871).

26. BOBERT, TRUSTS AND TRUSTEES §§ 346-47 (1953).

27. See *id.* § 350; GRAY, RULE AGAINST PERPETUITIES § 591, at 474 (3d ed. 1915). See *Christ's Hospital v. Grainger*, 16 Sim. 83, 60 Eng. Rep. 804 (V. Ch. 1848), *aff'd.*, 1 Macn. & G. 460, 41 Eng. Rep. 1343 (Ch. 1849). See also 4 HALSBURY LAWS OF ENGLAND §§ 284-90, at 202-04 (2d ed. 1932); ZOLLMAN, AMERICAN LAW OF CHARITIES c. 13 (1924).

28. *Ingraham v. Ingraham*, 169 Ill. 432, 48 N.E. 561 (1897); *Reasoner v. Herman*, 191 Ind. 642, 134 N.E. 276 (1922); *Frazier v. Merchants Nat'l Bank*, 296 Mass. 298, 5 N.E.2d 550 (1936); *Biddle's Appeal*, 99 Pa. 525 (1882); *Thellusson v. Woodford*, 11 Ves. J. 112, 32 Eng. Rep. 1030 (H.L. 1805); *Harbin v. Masterman*, L.R. 12 Eq. 559 (1871); *cf. Girard Trust Co. v. Russell*, 179 Fed. 446 (3d Cir. 1910). Some states have adopted legislation aimed at this problem. See *Simes, Statutory Restrictions on the Accumulation of Income*, 7 U. CHI. L. REV. 409 (1940).

29. RESTATEMENT, TRUSTS § 399 (1935); TUDOR, CHARITIES c. 4 (5th ed. 1929); ZOLLMAN, AMERICAN LAW OF CHARITIES c. 10 (1924).

Moreover, in the actual day-to-day supervision of charitable trusts we find that they are given preferential treatment. While some courts do not require bonds of the trustees of charitable trusts,<sup>30</sup> thus setting them apart from private trusts, the principal advantage concerns the requirement—and enforcement of that requirement—that reports and other data be filed.<sup>31</sup> It seems to be an accepted practice to allow trustees of charitable trusts to serve for years without filing any reports at all.<sup>32</sup> Even in the field of taxation, charities are favorites of the law.<sup>33</sup> The income of certain charities is not taxed.<sup>34</sup> Similarly, federal estate and gift tax laws are kind to the donors to charities.<sup>35</sup> Some state inheritance tax laws may grant a complete exemption for gifts to charities.<sup>36</sup> It is apparent that charities generally, and charitable trusts specifically, have been treated gently by the courts.

(c) *Alternative Methods of Giving*

When one considers charitable trusts and their usefulness today, it should be borne in mind that a number of different giving techniques are available. First, the benefactor may decide to give the amount directly to the donee-recipient. This involves the minimum amount of administrative cost since no third person is involved, and it has a certain directness which recommends it. On the other hand, such direct giving does not allow any supervision by the donor over the expenditure of the funds and does not allow planned expenditures over a long period of time.

30. *Boston v. Doyle*, 184 Mass. 373, 68 N.E. 851 (1903); *Drury v. Inhabitants of Natick*, 92 Mass. (10 Allen) 169 (1865); *In re Lowell*, 39 Mass. (22 Pick.) 215 (1839).

31. For example, see IOWA CODE ANN. § 682.28 (1950), which reads:

Once in each year, and oftener if required by the court, the person so appointed must, on oath, render to the court an account in writing of all moneys so received by him, and of the application thereof.

32. "Some trustees had not reported for periods ranging from five to twenty years. These long delays, due to lack of supervision, have resulted in the loss of funds which unfortunately we are now unable to trace." REPORT OF THE ATTORNEY GENERAL 79 (New Hampshire 1946). "Loose and distracted administration was found in about twenty-five per cent of the cases. *Id.* at 89 (1944).

The Attorney General of Massachusetts stated concerning an examination of charitable trusts:

At that time I think it was learned that trustees had failed to file accounts for quite a number of years, and [it has been] determined that, at least in one instance, an account was not filed for fifty years, involving a bequest of substantial amount.

PROCEEDINGS OF THE CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 169 (1953). See also text supported by note 58 *infra*.

33. For example, see WYO. COMP. STAT. ANN. § 44-1014 (Supp. 1955).

34. INT. REV. CODE OF 1954 § 501. See also text supported by note 53 *infra*.

35. See *id.* §§ 2055, 2106, 2012(b), 2522. See also text supported by note 53 *infra*.

36. See, e.g., IOWA CODE ANN. § 450.4 (1950) (later amended by Acts 1953 (55 G.A.) c. 210, § 1 (1953)).

Secondly, the person may make a charitable gift by giving money directly to a charitable organization, corporate or otherwise. Again, this type of giving is a simple act but it does involve a person other than the ultimate beneficiary. As in the case of the direct gift to the donee, the donor has lost all control over the expenditure of the funds except as the organization itself is limited in its use of the funds by some basic instrument, such as articles of incorporation. Much of the giving at the present time is in this form. Illustrative of this type of giving are gifts to the Community Chest, the American Red Cross, the American Cancer Society, the National Foundation of Infantile Paralysis, and gifts to local community chests.

Another technique which may be used is that of giving funds to a governmental instrumentality, such as a county, city or state. For example, the donor may give certain funds to be used for the care of cemeteries, for the construction of roads, or for the construction of libraries. This type of giving may have some features to recommend it, such as the feeling that the funds will, in fact, be used for the purpose for which they are designated. On the other hand, it involves an instrumentality—the government—which was not designed to administer such funds and which has only limited powers in such matters.

Finally, a donor can establish his own charitable instrumentality. The so-called “foundations” that have been established in recent years are manifestations of the desire on the part of individuals to provide specially designed philanthropic instrumentalities.<sup>37</sup> Such foundations are, in fact, either trusts or corporations.<sup>38</sup>

Thus donors have available four methods of giving—direct giving to those to be benefited; unrestricted giving to charitable organizations of a corporate or similar form; restricted giving to a governmental agency; or establishment of a legal entity to act under the direction of the donor. The trust is a traditional device in this last category. When the charitable trust is considered as an instrumentality of voluntary action for social welfare, it must be against this background of available charitable devices. One must recognize that a number of alternatives are at hand.

---

37. See Comment, *The Modern Philanthropic Foundation: A Critique and a Proposal*, 59 YALE L.J. 477 (1950); Note, *The Use of Charitable Foundations for Avoidance of Taxes*, 34 VA. L. REV. 182 (1948).

38. Of 54 larger foundations surveyed by one writer, 14 used the trust device while 40 used the corporate form. KIGER, *OPERATING PRINCIPLES OF THE LARGER FOUNDATIONS* 122 (1954). Among those using the trust form were M. D. Anderson Foundation (present net worth of \$27,228,965), Buhl Foundation (\$13,351,678), Cullen Foundation (\$4,949,879), Duke Endowment (\$105,924,742), and Maurice and Laura Falk Foundation (\$6,420,697).

## III. EVALUATING CHARITABLE TRUSTS

(a) *Elements of Trusts to be Considered*

It is unfortunate that there has been a failure, in the consideration of the trust as a giving device, to note the enormous difference between trusts. In examining the trust instrumentality, a number of variables which affect the efficacy and the social utility of the instrument should be considered. Examples of such factors are the size of the trust assets, the terms of the trust instrument, the nature of the trustees, and whether the managing of the trust is a full time job for some person.

Charitable trusts do vary from small amounts held in trust for a particular purpose, where the income may be a few dollars a year,<sup>39</sup> to the enormous amounts left in trust in the form of large foundations, where the income may be millions of dollars each year.

Among the larger charitable trusts, an income of over a million dollars a year is not unusual. Information recently submitted to a Congressional committee indicated that the following average annual gross incomes were reported by trusts:

|   |                         |
|---|-------------------------|
| M. D. Anderson Foundation .....                     | \$1,231,119             |
| Cullen Foundation .....                             | 1,232,217               |
| Duke Endowment .....                                | 4,913,332               |
| Eugene Higgins Scientific Trust .....               | 1,000,000               |
| A. W. Mellon Educational and Charitable Trust ..... | 1,762,742               |
| William H. Miner Foundation .....                   | 1,051,936 <sup>40</sup> |

Although adequate statistics on charitable trusts in this country do not exist, information which is available indicates that trusts exist in vast numbers ranging over the entire spectrum of size.

This difference in size is closely related to other important differences, *i.e.*, the nature of trustees and the attention given the trust.

[T]he volume of personal trust property placed with individual trustees is huge. In a number of areas it was found that individual trustees were supervising a larger number of personal trusts than were being administered by trust institutions. Further data of estates probated and the number of trusts created show that individuals are nominated trustees in a large number of cases, often exceeding the number of appointments of trust institutions.<sup>41</sup>

---

39. Of the 23,880 recorded by the Brougham Commissions at the end of their enquiries in 1837 some 23,750 had had an annual income of less than £30 and 13,330 of less than £5 a year. We believe from such evidence as we have received on this subject that the proportion of small charitable trusts to the present total may be much the same today, though of course there would be many more of them.

NATHAN REPORT § 142. There is no reason to believe that the American picture would vary noticeably from the British.

40. KIGER, *op. cit.* *supra* note 38, at 122.

41. Riddle, *Trust Investments: Their Extent and Some Related Economic Problems*, 5 LAW & CONTEMP. PROB. 339, 340 (1938).

Referring to the situation obtaining in England, "Lord Nathan said that it was

Where the assets of the trust are small, the trustee will tend to give the trust only minimal attention, and this would seem to be entirely justified. After all, the trust will get only that attention which is warranted by the property involved. Some trusts may receive the attention of a trustee for only a few hours a year. On the other hand, where the trust involves millions of dollars, the trustees or some employees are engaged full time in handling the affairs of the trust<sup>42</sup> and the interests of the trust are attended to constantly. Where the trust is of suitable size, trust companies will render services for the trust and assure a constant supervision of the trust assets.<sup>43</sup>

A recent development in the area of trust management has been the growth of the community trusts,<sup>44</sup> in which the charitable activities of a number of persons are combined into a single organization.<sup>45</sup>

---

estimated that there were not less than 500,000 . . . [trustees] engaged in the day-to-day administration of charitable endowments." *Conference on Charitable Trusts—The Nathan Report*, 215 L.T. 281 (1953). Certainly the corresponding American figure would be many times this, for it seems quite apparent that the number of large trusts or foundations for charitable purposes is increasing. See text at note 20 *supra*.

For a discussion of trustees and officers of larger foundations, see KIGER, *op. cit. supra* note 38, at 31-35.

42. There are probably no great differences in the status of trusts held by individuals and those held by trust institutions with respect to most of the questions discussed in this article. There are vast differences, however, on certain points. The individual trustee usually administers one or at most only a few trusts. The trust institution, on the other hand, administers scores or even thousands of individual trusts. The individual trustee cannot afford the investment organization and facilities possessed by the average trust institution.

Riddle, *supra* note 41, at 340.

43. The trustee is responsible for safe-keeping, investment and accountings and receives, in the absence of contrary agreement, a statutory scale of compensation. On a gift of, say, \$40,000 invested to yield 3½%, a trustee's annual statutory fee in New York is \$98. If the gift were ten times as large, that commission would rise by about seven and a half times—because the statutory rate is 7% on the first \$2,000 of income (with no charge on principal) and 5% on additional income.

Hayes, *Corporate Charitable Giving*, 91 TRUSTS & ESTATES 492, 493 (1952).

44. A Community Trust is a local charitable foundation consisting of capital gifts and bequests usually from local sources and, subject to the terms of any such gifts or bequest, distributing its current income currently and portions of principal as available or as directed by the donor or testator primarily for the benefit of the people of its locality. It is free from partisan, sectarian or commercial control, preferably not limited in its trust relations to any one bank nor in its benefits to any one institution or any one type of service. Except for necessary and reasonable administrative expense it makes its distributions ordinarily through other agencies and broadly for the promotion of health, social welfare, education, culture and character of the people of its locality.

These are the opening sentences of a definition of a Community Trust adopted by the National Committee on Foundations and Trusts for Community Welfare. NATHAN REPORT § 606.

45. For a resumé of the work of the New York Community Trust, see Pringle, *They Help the Dead Spend Their Money*, *The Saturday Evening Post*, Jan. 16, 1954, p. 30.

*Community* trusts in the United States, Canada, and Hawaii listed aggregate resources of \$110,091,128 at the close of 1951 compared with \$102,005,711 a year earlier according to a survey released in May by the New York Community Trust. Philanthropic disbursements of \$5,003,811 were made by the surveyed organizations during the year, slightly less than in 1950. The number of separate funds that have come into community foundations for administration rose from 854 in 1950 to 972 last year.

Reported assets of the larger community trusts included \$19,178,448 in New York, \$17,112,607 in Cleveland, \$11,549,948 in Chicago, and \$10,166,417 in Boston.<sup>46</sup>

Obviously a trust of this size incorporates all the administrative advantages to be found in the large individual trusts.<sup>47</sup>

Another variable which is important in analyzing the charitable trust as a giving device and as a social welfare tool is the trust instrument itself. This would include the rigidity or flexibility of the provisions, the power given to the trustee, the scope or range of activities, and the multitude of provisions concerning the administration of the trust. Some trust instruments attempt to restrict quite severely the area of discretion to be exercised by the trustees. Thus the dead hand is laid heavily upon succeeding generations. The community trusts have faced this problem time and time again, and various solutions have been reached.

The New York Community Trust is often asked to accept more or different managerial responsibility than it is willing to take—as when full exercise of such powers could reach beyond purely ‘charitable’ uses or lay upon the Trust intricate tasks it is unequipped to perform. At the other extreme, it is sometimes asked to reduce its discretionary power below the minimum it feels is required for assurance of effective application. Since most of the funds are designed to continue over long periods or in perpetuity, it refrains from undertaking permanently to give literal expression to any rigid directive as to a *specific* use that may, in unforeseen circumstances, become obsolete.<sup>48</sup>

46. Note, 91 TRUSTS & ESTATES 495 (1952).

47. In referring to one community trust, one authority noted that: It aids the founder and his counsel in formulating the instrument of gift. Its “Resolution and Declaration” furnishes, in detail, a court-tested foundation “setup.” It has previously obtained from federal and state governments certificates of tax exemption applicable to the Community Trust itself. It prepares initial and annual reports to the Bureau of Internal Revenue. It applies for rulings of tax-exempt classification on each of the Trust’s funds. It ascertains whether a proposed payee is eligible to benefit from a tax-free fund. It can investigate prospective recipients or review results of prior grants. It publicizes a fund to the extent requested by the donor. It accompanies outpayments by communications specifying their purposes and identifying their donors. It does everything, in short, a separate foundation could do.

Hayes, *supra* note 43, at 493-94.

48. *Id.* at 493.

Some trust instruments seem to have been drafted with considerations *other* than the best interests of the beneficiary in mind. The so-called "Little"-type trust is an example of this:

One motive of its inventors must have been to aid charity. But the results could well be the creation of a means by which some of the economic effects that accompany the payment of income tax could be avoided and a handy depository of risk capital established.<sup>49</sup>

Other motivating factors have been a desire to reduce taxes, obtain favorable publicity or keep relatives from receiving the money. Such aberrational motivation, when reflected in the trust, should be considered an important variable.

Consideration of the variables indicates that it would seem improper to classify all charitable trusts together in deciding their efficiency as giving instrumentalities. Rather it would seem proper to consider all of these variables in determining whether, and to what extent, the trust is serving a socially useful function. The utility of a trust in promoting social welfare depends upon a number of factors and it follows that the social desirability of various trusts is a relative matter. In any consideration and analysis this must be recognized.

#### (b) *Evaluation of Efficacy*

In examining the *efficacy* of charitable giving there are a number of standards to be used. The donor, on one hand, is interested in seeing that his wishes are followed and that the program which he has outlined is accomplished, whether it be simple and of short duration or complex and existing in perpetuity. Also, society generally favors the application of funds according to the intention of the donor. There is some feeling that the wishes of the donor should be respected.<sup>50</sup>

On the other hand, it should be recognized that the public has a genuine interest in charitable trusts.<sup>51</sup> Because of the exception to

49. REPORT OF SPECIAL COMMITTEE TO STUDY THE LAWS OF THIS STATE WITH RESPECT TO AND GOVERNING CHARITABLE TRUSTS (hereinafter referred to as the RHODE ISLAND REPORT) 9 (R.I. 1950).

50. See *Jones v. American Home Finding Ass'n*, 191 Iowa 211, 182 N.W. 191 (1921).

51. The Public interest in charitable trusts and the duty of the State to prescribe reasonable rules for their administration is beyond question. The funds are public funds. The rights of the thousands of unascertained beneficiaries of such trusts can be adequately protected by the State. That is the basis for the common law authority of the Attorney General to take court action to prevent improper conduct by trustees and to stimulate sincere philanthropy by assuring charitable beneficiaries their rights.

The privileges and immunities granted charitable trusts under federal and state law are additional reasons why the State has an obligation to enter the field. Federal tax savings are the real source of a substantial portion of the capital in the Little Type trusts today. Income and capital gains accruing to a charitable trust are not taxable and as they are invested and reinvested by the trustees they eventually come to represent a

the rule against perpetuities,<sup>52</sup> charitable trusts do tie up vast amounts of property with no possibility of terminating the arrangement. Any individual can, through a charitable trust, control the use of his property in perpetuity. Certainly the public has an interest in the exercise of such a power.

Moreover, under our present tax structure certain benefits are given to charities:

Their income is exempt from Federal income tax; contributions to them are free of gift tax and estate tax; and the donor is permitted a deduction for income tax purpose to the extent of 20% of the income of the individual donor and 5% of that of a corporate donor. These exemptions are acts of grace by the Federal government. In so far as they relieve foundations and their creators and supporters from taxation, they impose a greater tax burden upon the generality of the people of the country. Thus the Federal government permits the equivalent of public money to be used by these foundations.<sup>53</sup>

In referring to a similar situation existing in England, a government committee noted that the privilege of not being subject to the income tax in that country "amounts approximately to the doubling by the state of the taxed [sic] income of every charitable trust in the country."<sup>54</sup>

Further, since the state has a genuine interest in the supplemental activities of the voluntary social welfare services,<sup>55</sup> the distribution of funds among those agencies is a matter of deep concern to the government. It becomes apparent that the establishment and maintenance of a charitable trust is not solely a matter of concern to the original settlor. The public and the government both have a genuine interest in such an instrument, its social utility, and its utilization.

It therefore seems that there are certain objective criteria by which charitable giving can be measured, that is, certain factors important in the eyes of the donors and certain factors important to society generally. Using these criteria one can examine charitable trusts to see whether they are serving efficiently the ends sought to be achieved.

Information is of fundamental importance and perhaps basic to all other considerations in evaluation of the efficacy of the trust device.

It may seem fantastic [in England] but the plain fact is that accessible, classified records of charitable trusts—of the tens of thousands of trusts, in this country with assets perhaps of the

---

great share of the total fund. Thus, they impose a predominantly public character upon the fund.

RHODE ISLAND REPORT 12.

52. See text at note 25 *supra*.

53. *Report of the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations*, H.R. REP. NO. 2681, 83d Cong., 2d Sess. (hereinafter referred to as REECE REPORT) 4 (1954). See also notes 34 and 35 *supra*.

54. NATHAN REPORT § 106.

55. *Id.* §§ 52-55.

order of £200,000,000, besides holdings of land of which no information is available save that they are vast, every single one of which is *ex-hypothesi*, for public purposes—do not exist.<sup>56</sup>

The situation in the United States is certainly more chaotic. Although many statutes require some sort of report by the trustees,<sup>57</sup> as a matter of actual practice, many charitable trusts exist for years without any reports being filed in the supervising courts.

Within the past few years a large number of so-called charitable trusts or foundations have been set up in the United States to take advantage of certain tax benefits. In many cases these organizations have kept completely silent as to their activities, the funds they have on hand, and the source of those funds.<sup>58</sup> The extent of the present failure to report is indicated by the experience in New Hampshire where, upon the institution of the program requiring reports of charitable trusts, the supervising authorities found that some trustees were delinquent in their reports.<sup>59</sup> This lack of information concerning charitable trusts means that a person who is interested in giving to one particular activity is unable to determine whether trusts exist which are designed to meet that demand. On the other hand, the lack of information also has the effect of denying to persons interested in obtaining money for a certain charitable use funds from trusts which were established for that purpose. Such persons simply do not know of the existence of a trust which might benefit them. Even in England, where there is some system of reporting on charitable trusts, there is no system of classification of trusts to allow would-be beneficiaries to get such information.<sup>60</sup>

56. NATHAN REPORT § 140.

The absence of a registry . . . makes it impossible to estimate the number of charities which are not receiving distribution in due course, the number of beneficiaries who are unaware of their position as beneficiaries, or the number of trusts whose beneficiaries are no longer in existence.

RHODE ISLAND REPORT 7.

57. See, e.g., IOWA CODE ANN. § 682.28 (1950).

58. The Russell Sage Foundation published a report of its research department in 1946. This report refers to the problem of the mushroom growth of the so-called family foundations and the fact that many of them keep complete silence about any program for social or public welfare, and suggests . . . steps toward preventing such situations: [including] compulsory reporting of financial and other operations of all tax-exempt foundations . . .

*Investigation of Closing of Nashua, N. H. Mills and Operations of Textron Incorporated*, S. REPORT NO. 101, 81st Cong. 1st Sess. (hereinafter referred to as TEXTRON REPORT) 7 (1949).

In a survey conducted by the *Virginia Law Review*, "questionnaires were dispatched to 166 foundations, principally of the 'family' variety. 103 made no reply. Somewhat uninformative letters were received from 30. 22 furnished extremely helpful information. Five requested that their names be confidential. Only 11 flatly refused information." Note, *The Use of Charitable Foundations for Avoidance of Taxes*, 34 VA. L. REV. 182 (1948).

59. See note 32 *supra*.

60. A would-be beneficiary who sets out to discover the existence of a trust likely to be useful to him will very soon find that, to all intents and purposes, the records he ought to be able to consult do not exist. If he perseveres, in

In determining the efficacy of the charitable trusts as an instrument for the promotion of social welfare it is also necessary to examine the supervision which is exercised over charitable trusts.<sup>61</sup> Frequently it is said that only the attorney general of the particular state has the power to institute actions for the enforcement of charitable trusts.<sup>62</sup> There may be exceptions to this general rule but for all practical purposes it seems to state the present law.<sup>63</sup> The result is that the attorney general, while possessing little information about the funds held, the purposes for which they are held, the income or expenditures of the trusts, or even the existence of such trusts, is supposed to supervise their activities. With no special staff to take care of this particular problem, the attorney general usually finds this is one job that is never done.<sup>64</sup> As a special committee in Rhode Island reported:

While the duty of the Attorney General to supervise charitable trusts is clear and admits of no question, he has not been able to perform this duty. In the isolated cases in which the Attorney General has been involved, his participation has been brought about at the request of trustees. Never has he been able to initiate any actions in the interest nor has he ever "supervised" the administration of these trusts.<sup>65</sup>

---

spite of this setback, he is faced with the thankless task of groping forward step by step piecing together such clues as he stumbles upon by questioning likely informants. Even if, in the end, he discovers a trust of the kind for which he is looking he can never be certain that he has not missed another better suited to his needs. Moreover, much precious time, which ought to be spent on more productive labours, is lost by social workers in hunting for the information they need. Bodies which have laboriously compiled records of trusts that they have come across find that they are looked upon as an information bureau both by individuals and by public bodies, and give much valuable time to answering enquiries.

NATHAN REPORT § 141.

61. Of course, in direct giving and unrestricted giving to charities there is also need for supervision. It would seem that charitable trusts—and other organizations existing in perpetuity—would need great supervision. The absence of interested donors as a check rein would seem to necessitate governmental supervision. Too, in direct giving and unrestricted giving to charities the funds are not in the hands of private individuals for a long period of time. The opportunity for dishonesty and the probability of loss are consequently minimized.

62. 4 SCOTT, TRUSTS § 391 (2d ed. 1956). See also ZOLLMANN, AMERICAN LAW OF CHARITIES 426-29 (1924). Where a charitable trust is the subject of litigation, the attorney general is a proper, although not an indispensable, party. *In re Estate of Pierce*, 245 Iowa 22, 32, 60 N.W.2d 894 (1953).

63. It is possible that one trustee may be able to institute an action against another trustee; an individual may have such a special interest that he will be allowed to maintain a suit for its enforcement; perhaps even a settlor will be allowed to enforce a charitable trust. But all of these seem to involve exceptional circumstances that do not invalidate the general rule. 4 SCOTT, TRUSTS § 391 (2d ed. 1956). See also *Amundson v. Kletzing-McLaughlin Memorial Foundation College*, 73 N.W.2d 114 (Iowa 1955).

64. D'Amours, *The Necessity for the Control of Public and Charitable Trusts*, PROCEEDINGS OF THE CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 91 (1946).

65. RHODE ISLAND REPORT 7. This seems to be the usual situation throughout the United States. 4 SCOTT, TRUSTS § 391 (2d ed. 1956); Comment, *Supervision of Charitable Trusts*, 21 U. CHI. L. REV. 118, 121 (1953).

Because of this lack of supervision there are millions of dollars in trust funds which are "forgotten, unused or neglected and which could be put to work for the benefit of the municipalities and of the community at large. . . ."66 According to the authorities, these long delays in reporting and the concomitant lack of supervision have resulted in the loss of funds which could not be traced;67 funds for charitable uses have been allowed to revert to private owners without being applied to charitable purposes;68 income has accumulated for long periods of time and has not been applied for charitable uses;69 beneficiaries, unaware of their status, have not received distribution in due course; testamentary directions have not been followed; and certain charitable trusts have been inactive for long periods of time so that beneficiaries have not received any benefits at all.70

Another factor to be considered in the evaluation of charitable trusts is the administrative costs that accompany the device. In New Hampshire the supervising authorities discovered that some trust funds were being exploited for personal gain.71 Although one cannot generalize from this single example, there is other evidence which indicates that loose management is found with some frequency throughout the entire area of charitable trusts.72 Even if the trustees

66. D'Amours, *supra* note 64, at 93.

67. As the NATHAN REPORT § 227, noted, "Charitable funds held by individual trustees, in course of time frequently become vested, either in a simple surviving trustee, or in a personal representative of a surviving trustee, or in some stranger to the trust," suggesting a real risk of loss of the funds.

68. In one case a fund of nearly a million dollars, with only two years to go before a testamentary limitation of twenty years might have become effective, with resulting reversion to the estate, was awakened and immediate steps were taken to prevent forfeiture and to insure its application for the benefit of the inhabitants of New Hampshire in the field of education.

REPORT OF THE ATTORNEY GENERAL 79 (New Hampshire 1946).

69. D'Amours, *supra* note 64, at 96.

70. For a résumé of the conditions in New Hampshire, see reports cited in note 81 *infra*.

71. The charges made for trustees' fees were controlled so that trust funds might not be exploited for personal gain and to the detriment of the charities involved. In one case the trustees were taking an unreasonable per cent of the annual income for fees in disregard of a specific provision in the will allowing much less for their services.

REPORT OF THE ATTORNEY GENERAL 79 (New Hampshire 1946). See also *id.* at 44 (1952); ZOLLMAN, AMERICAN LAW OF CHARITIES § 209 (1924).

72. Although general information about trusts is not available, there is some data to support this. See for example A. P. Hipp Trust, File No. 7741, Iowa County, Iowa, where, in a six year period of time from 1949 to 1955, \$31.40 was spent for flowers for a grave as provided in the trust while \$70.00 was spent for administrative costs, \$10.00 for trustees' fees, and \$60.00 for bond premiums. Hipp v. Hibbs, 215 Iowa 253, 245 N.W. 247 (1932).

See also the court file in Estate of Ballingall, Wapello District Court, Iowa, where in a six year period, 1944-50, legal fees of \$2,328.50 were charged and trustees' fees of \$10,641 were distributed. At the same time distributions to beneficiaries amounted to only \$13,000. During this same period of time this charitable trust paid \$31,740.12 in real property taxes. Phillips v. Harrow, 93 Iowa 92, 61 N.W. 434 (1894); Hodge v. Wellman, 191 Iowa 877, 179 N.W. 534 (1920). See also the so-called "Little" trusts discussed in text at notes 97-102 *infra*.

are absolutely honest, the small charitable trust suffers from lack of attention since its size does not warrant any great expenditure of time.

The charitable trust, existing for a long period of time, is subject to another criticism, that is, it is extremely rigid in many situations. The settlor cannot anticipate the developments which are going to occur, but still he establishes a specific plan. Consequently mistakes are made as to objects to be sought, geographical areas to be served, and the methods to be used in achieving the ends. A logical plan at the time the trust was set up becomes illogical because of unanticipated developments.

Hundreds, perhaps thousands of trusts [in England] need revision, and to an extent that goes beyond anything that could be achieved by the present *cy pres* doctrine. Many trustees no doubt take a common sense line and, stretching their trusts' purposes to the utmost, or perhaps even beyond their strict limits, manage to continue to put their trust funds to good use, but some may accumulate their funds against the hoped for day when the *cy pres* doctrine is relaxed, and would enable the funds to be put to "the maximum benefit of the community . . ." There can be no doubt, however, that some relaxation of the *cy pres* doctrine, so long pressed is extensive and has now become urgent.<sup>73</sup>

The indications are that the situation in the United States is roughly similar to the English.

#### IV. CONCLUSION

##### (a) *Recommended Legislation*

If one concludes that charitable trusts are comparatively inefficient, one simple method of reducing the problem would be to reduce the areas encompassed in the term "charitable trust."<sup>74</sup> This would, in all probability, reduce the utilization and relative importance of such devices. Since the courts have labeled a vast number of activities charitable, a number of authorities have suggested that some redefinition is called for.<sup>75</sup>

Having regard to the wide interpretation put on charity today it might appear that it would be desirable to curtail that which falls within the definition of "charity" or alternatively to divide charities into two kinds, those which can be established in perpetuity and those which can only be established for a limited period.<sup>76</sup>

---

73. NATHAN REPORT § 104.

74. Some states have by legislation defined the areas properly the subjects of charity. See for example GA. CODE ANN. tit. 108, § 203 (1949): "[R]elief of aged, impotent, deceased, or poor people . . . promotion of any craft or persons engaging therein . . . redemption or relief of prisoners or captives . . ."; MICH. STAT. ANN. tit. 26, §§ 26.1201-02 (1953) (includes an exception to the rule against perpetuities wherein a statutory definition of the area covered is included).

75. See, *e.g.*, NATHAN REPORT §§ 125-27.

The interest of society, great since trust property is tied up for a long period of time or in perpetuity, has become even greater because of the tax aspects.

[I]t is far from clear that it is just to call on the community to forego its right to tax on its income at the whimsey and dictation of any settlor or testator who happens to devise a trust which passes the test of being charitable.<sup>77</sup>

Since in many cases the gift to charity is not the result of a real desire to benefit the community or any group within the community, but rather reflects a desire to cut out the family of the testator<sup>78</sup> or provide risk capital for the donor's activities,<sup>79</sup> one wonders whether such gifts deserve preferential treatment. Certainly the *motivation* of such donors does not warrant relaxation of applicable laws. If any preferential treatment is to be given, its justification must be the social value to the community. Perhaps it is true that

The public should not be compelled to take what is offered to it, but should have the right of considering whether that particular use which the Founder has fancied shall take effect, or whether the property shall be turned to some other public use, or given back to private uses. . . . A certain deference should be paid to the donor's wishes . . . but they should never be allowed to interfere with the public welfare.<sup>80</sup>

There is much to be said for the idea that, as trust properties accumulate, the interests of society become paramount and society should have some control over the utilization of the trust device.

Short of such drastic changes, some so-called charitable activities and trusts could be cast outside the protective pale without seriously affecting charitable giving through the trust device. In examining the small charitable trust as an instrument for giving, one may quite justifiably ask whether the social service rendered justifies the favored treatment which such instrumentalities are given simply because the label "charitable" has been attached to them. Perhaps an exclusion

76. *The Conveyancer*, 215 L.T. 17 (1953). A similar suggestion that charitable trusts be divided into those falling under the rule against perpetuities and those outside the rule is found in the REECE REPORT 214 (1954).

77. *The Conveyancer*, 215 L.T. 17, 18 (1953).

78. *Ibid.*

79. See text at notes 97-101 *infra*.

80. From address of Sir Arthur Hobhouse, quoted in NATHAN REPORT § 95. As an original proposition, it might indeed be doubted whether a testator should be granted greater power to direct the destination of his money where he gives it to public purposes, than where he creates a merely private trust. He actually has less opportunity of adequately judging the public requirements of the centuries after his death than he has of surmising the needs of his family. . . . It has been pointed out that institutions which are commendable for piety and charity now may be, as they often have been, perverted, and that no man is far-seeing enough to provide for the altered circumstances of institutions, or the class of persons for whose benefit they are originally established.

ZOLLMAN, AMERICAN LAW OF CHARITIES § 529 (1924).

from the favored circle—by redefinition of terms—is warranted. This might minimize the criticism of charitable trusts. This is one step, however, that might be taken along with others in a general effort to revitalize the charitable trust as a socially desirable instrumentality.

If all charitable trusts as presently defined are to retain their favored position, it seems to be quite apparent that certain changes in the laws—some regulatory or supervisory measures—are urgently needed.<sup>81</sup> A number of investigating agencies that have looked into the question of charitable trusts and charitable giving have concluded that one of the basic requirements in any system of supervision is that of obtaining sufficient information about such organizations. This information has not been given voluntarily.<sup>82</sup> After an extended

---

81. See generally, Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633 (1954); Comment, 23 IND. L.J. 141 (1948); Note, 47 COLUM. L. REV. 659 (1947). For the Uniform Supervision of Trustees for Charitable Purposes Act and prefatory note, see HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 167, 168 (1954):

In view of the large amount of the national wealth now devoted to charitable purposes, and the complete lack of any practical machinery for supervision by the states, it is submitted that this proposed Uniform Act [for supervision of trustees for charitable purposes] is vitally needed and that it should be adopted by the states.

Legislation somewhat similar to this Uniform Act now exists in New Hampshire, Rhode Island, Ohio, and Massachusetts. In the case of Massachusetts the laws seem to be of questionable efficacy. The attorney general of that state in 1953, after referring to the Uniform Code provisions, reported: "I am almost ashamed to tell you this, that in my state, at least, we really don't know how many charitable trusts there are. The only comprehensive study that was ever made of charitable trusts in my state was . . . back in 1936. . . ." PROCEEDINGS OF THE CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 168 (1953).

For the story of the supervision in New Hampshire, see REPORT OF THE ATTORNEY GENERAL 89 (New Hampshire 1944); *id.* at 78 (1946); *id.* at 66 (1948) (particularly good case-by-case discussion); *id.* at 71 (1950); *id.* at 44 (1952). See also D'Amours, *supra* note 64, at 91 (1946). For the nature of the supervision being exercised in New Hampshire over charitable trusts, see particularly REPORT OF THE ATTORNEY GENERAL 71 (New Hampshire 1950), where are listed some thirty types of action then being taken by the office of the attorney general in connection with charitable trusts in the state.

For the background in the Supreme Court of New Hampshire of the adoption of supervisory legislation in that state, see *Souhegan National Bank v. Kenison*, 92 N.H. 117, 122, 26 A.2d 26 (1942).

82. The larger foundations take the position that as public trusts they are accountable to the public and that the public is entitled to know in detail about their resources, income, expenditures, personnel, and programs. Stated in the words of one of their trustees, "foundations should not only operate in a goldfish bowl—they should operate with glass pockets." HAYS REPORT 12-13 (1953). But this is certainly not the general rule. *Id.* at 13.

On the other hand, many of the small foundations, particularly those designed to receive the deductible contributions from individuals and privately owned corporations, opposed public accounting on the ground that they do not wish the public to know the amount of contributions made by the donor and his family, or by corporations owned or controlled by the donor. To a lesser extent many of the smaller foundations oppose public disclosure of their expenditures. They argue that public disclosure of contributions and expenditures will cause the abandonment of many of the small foundations now in existence and will discourage the formation of new small foundations. HAYS REPORT 13.

investigation in Rhode Island a special committee reported that "It was the unanimous opinion of those testifying before the committee that some type of trust registry is essential to enable the Attorney General to carry out his duty of supervising the administration of charitable trusts."<sup>83</sup> A recent committee report in England suggests that certain minimal information is necessary as a matter of public record, and the committee suggests at least these five things: (1) name of the charitable trusts, (2) the date of the foundation and whether created by deed, will, or another way, (3) certified extracts from the trust instruments including particulars of the monetary or other endowments and of the objects of the trust with the beneficial area, if prescribed, (4) the name and address of the chairman and secretary, and (5) place of deposit of deeds, securities, etc.<sup>84</sup> Any such trust registry, of course, must have some enforcement provision and must also include some provision for annual reports in order that the supervising authorities may be reasonably informed and that the trustees may be under some pressure to conduct their activities within the prescribed bounds.<sup>85</sup>

---

83. RHODE ISLAND REPORT 9. There seems to be almost unanimous agreement that some reporting scheme is necessary. See *TEXTRON REPORT 24*; *HAYS REPORT 12, 14 (Appendix A)*; *REECE REPORT 214*.

84. *NATHAN REPORT § 158*.

85. We recommend that failure to record particulars about their trust or changes in those particulars should render each trustee, on discovery of the failure, personally liable to a moderate penalty (e.g. a maximum fine of £5). . . . It is . . . in line with the penalty of £5 to £10 for non-compliance imposed by the early Act of 1786 for securing the recording of trusts then in existence for the poor; and with recent developments in the U.S.A. where much thought has recently been given to the reform of charitable trust law. In New Hampshire trustees are already personally liable to a fine for failure to register.

*Id.* § 163.

The committee recognizes the public disclosure of the names of contributors and the amounts contributed to foundations might result in an unfortunate curb on philanthropic giving. It does feel, however, that such information should be made known to the Bureau of Internal Revenue where it would also be available to the appropriate committees of Congress. It feels also that full public disclosure should be made by such organizations of all grants made so that the public will be in a position to determine whether tax-exempt moneys are being used for the purposes for which these organizations were created.

*HAYS REPORT 13*.

It should be noted that the Internal Revenue Code of 1954, § 6034, requires an annual report for "Every trust claiming a charitable, etc., deduction under § 642(c). . . ." Form 1041A is provided for such reports. 4 *CCH 1957 STAND. FED. TAX REP.* ¶ 5055. See also note 81 *supra*.

86. *RHODE ISLAND REPORT 10*. For statutory provisions covering this area, see *R.I. GEN. LAWS c. 2617 (1950)*; *N.H. REV. STAT. ANN. 7:19-32 (1955)*; *S.C. CODE § 62-71 (Supp. 1956)*.

The subcommittee further recommends that such new legislation requires the trustees of such trusts to render an *annual itemized accounting* to the beneficiary of the trust and direct the Secretary of Commerce to make a periodic report to the appropriate committees of Congress, containing a list of the names and addresses of such trusts, the names of the beneficiaries, and the total amounts of income, loans, and expenditures with respect to each trust. *TEXTRON REPORT 24*.

A collateral question arises concerning the information collected. A number of trustees feel that the information turned over to the public official should not be disclosed to the public at large.

Those advocating a public registry contended that since these trusts are for the benefit of the public, they should be available for public inspection. . . . Those favoring a private registry expressed fear that if the registry were public, charity-minded creators of charitable trusts as well as trustees would be swamped with requests for contributions to various charities. They also pointed out that some creators of charitable trusts desire to keep their generosity secret out of personal modesty while others need protection from prying relatives. Opponents of public registry feel that such considerations might deter otherwise charitably disposed persons. A middle ground has found acceptance in the practice of New Hampshire, where the registry is open to the inspection of any person for such legitimate purposes as the Attorney General may determine.<sup>87</sup>

If sufficient information is available to authorities, the next step, supervision, becomes much easier. A special committee in Rhode Island reported:

In accordance with the proposals of most witnesses, including our own Attorney General, independent research and the successful experience of New Hampshire, the Committee believes that Rhode Island should have a Director of Charitable Trusts to administer the Charitable Trust Registry and to maintain general surveillance over charitable trusts under the direction and supervision of the Attorney General. He should take appropriate court action to enforce the law under the direction of the Attorney General should the need arise.<sup>88</sup>

87. RHODE ISLAND REPORT 10.

There are several trust funds in the Register in which the trustees have been given broad discretion to select the charitable beneficiaries. Information relative to the objects of these funds and the names and addresses of the trustees is often sought and given to those persons and associations soliciting funds for worthy causes.

REPORT OF THE ATTORNEY GENERAL 72 (New Hampshire 1950).

The Committee considered that the lack of comprehensive classified information about trusts is a severe handicap to would-be beneficiaries and to voluntary organizations, and would be an equal handicap in drawing up comprehensive plans for a reform of trusts under the new scheme-making powers which it has suggested. It therefore recommends that trustees should be required to send to the Charity Commissioners or to the Ministry of Education basic information about their trusts, whether already in existence or coming into existence in the future, and that trustees should be liable for a small fine on failure to do so. The commissioners and the Ministry should compile and keep up to date comprehensive classified records for themselves and classified and up to date records of local trusts for county councils and county borough councils, such records being open to the public.

*The Conveyancer*, 215 L.T. 17, 32 (1953).

88. RHODE ISLAND REPORT 11. For a short summary of the English attempts at supervision of charitable trusts, see NATHAN REPORT §§ 76-85. See also recommendations included in Comment, 21 U. CHI. L. REV. 118 (1953). On supplementing the attorney general in the supervision of charitable trusts, see 4 SCOTT, TRUSTS § 391 (2d ed. 1956) (discussion of the English experience) and ZOLLMAN, AMERICAN LAW OF CHARITIES § 621 (1924) (on supervision by commission).

That there is some need for supervision of general charitable activities to

Should there be some state agency actually supervising the conduct of trustees, the beneficiaries of trusts will receive that which is properly theirs,<sup>89</sup> trustees will be less able or prone to use trust funds for their own uses, the charitable trusts generally will more nearly fulfill their proper function,<sup>90</sup> and perhaps more gifts will be forthcoming.<sup>91</sup> Adequate supervision would seem to be urgently needed in this field.

---

protect the givers seems to be well established. REPORT OF THE (N.Y.) JOINT LEGISLATIVE COMMITTEE ON CHARITABLE AND PHILANTHROPIC AGENCIES AND ORGANIZATIONS (1954). Speaking of charitable giving in New York, one expert estimated that in a single year 3% of the total giving or between twenty and thirty million went into "outright charity rackets." *Id.* at 15.

89. "Through the research work of this office several trust funds of which no one was aware were discovered and brought to light and the necessary steps were immediately taken to have the funds used for the intended charitable objects." REPORT OF THE ATTORNEY GENERAL 72 (New Hampshire 1950).

For examples of mismanagement, see *American Colonization Society v. Soulsby*, 129 Md. 605, 99 Atl. 944 (1917) (beneficiaries receiving only \$20,367 out of \$63,362, rest being used for administration); *St. Louis v. Crow*, 171 Mo. 272, 71 S.W. 132 (1902) (beneficiaries received only \$211,755 out of \$949,547); *Ex parte Cassel*, 43 Pa. (3 Watts) 408 (1834) (beneficiaries got nothing in twenty-three years from \$100,000 gift).

90. The requirement that annual reports be made by the trustees to the office of the attorney-general is already causing many dormant funds to come to life and is making trustees more alert with resulting increased efficiency and economy of administration. Such results will undoubtedly encourage benefactors to give to public charities.

REPORT OF THE ATTORNEY GENERAL 89 (New Hampshire 1944).

In very general terms it might be said that the main result was not so much to correct criminal or bad faith administration, but to substitute active administration for lack of administration. Trust funds which lay dormant for one reason or another came to life again for the benefit of charities. With the attorney general's finger on its pulse the administration of the funds gained in efficiency and economy.

*Id.* at 79 (1946).

Suffice it to say that apart from the large inactive funds enlisted for charitable work, all other trusts have shown evidence of a desire on the part of trustees to be on the alert in the administration and application of the funds in their hands. However, much more remains to be done. To bring to life dormant funds and to prevent others from going to sleep shall continue to be the main objective and responsibility of our regular supervisory task.

*Id.* at 68 (1948).

Speaking of the New Hampshire experience, it has been noted: [P]robate accounts by trustees became more numerous and complete. Non-distributed funds were turned over to the intended charities, investments became more prudent, with the corpus not speculatively sacrificed to income and vice versa. Stability of investment consistent with reasonable income was the standard laid down for trustees. The charges made for trustees' fees were controlled so that trust funds might not be exploited for personal gain and to the detriment of the charities involved.

D'Amours, *supra* note 64, at 96.

91. Moreover, in 1946, the attorney general of New Hampshire reported that "the supposed novelty of this public service is fast wearing out and its essential character is becoming more and more apparent to all. . . . It is expected that in time the supervision and control of charitable gifts in this state will attract an increasing amount of benefactions." REPORT OF THE ATTORNEY GENERAL 80 (New Hampshire 1946). The same idea, that more gifts will be forthcoming because of "the assurance that such funds will be put to work under the regular and systematic supervision of the attorney-general's office" is found in the 1948 *Report of the Attorney General* at 69.

This should, however, stop short of governmental control which apparently has been called for in some quarters.<sup>92</sup>

The third reform that should be considered if all charitable trusts are to retain their favored position is that of promoting their social utility. If it is assumed that the charitable trusts are of sufficient importance to justify their existence in perpetuity,<sup>93</sup> and that all so-called "charitable" ends are socially desirable, still the services rendered should be examined to determine whether some action can be taken to maximize the benefits derived. For example, would it not be possible to combine certain charitable trusts and thus cut down on the administrative costs, increase the probability of private surveillance and thereby maximize the services rendered?<sup>94</sup> The community trusts which are found throughout the United States stand as excellent examples of what can be done toward combining trust activities to provide the greatest social utility from the money which is available.<sup>95</sup> There is also some reason to believe that the social utility of trusts can be maximized by legislation requiring generally the distribution of a percentage of the income from any trust in a given year.<sup>96</sup>

---

92. REECE REPORT 215-16.

93. See text at note 77 *supra*.

94. Many [trusts] are insignificant, particularly in relation to the present value of money, and many are misdistributed in relation to centres of population. The committee considers that one of the first things to be tackled is the vast number of very small charitable trusts, some reduction in their numbers being considered desirable. A serious effort, it states, should be made by everyone concerned as far as possible to merge trusts of a gross annual value of less than £25 in other trusts.

*The Conveyancer*, 215 L.T. 17, 33 (1953).

For a series of recommendations concerning small trusts in England, see NATHAN REPORT, c. 13, on "The Shape and Organizations of Charitable Trusts."

Another possibility is found in the following recommendation:

Accordingly, the Committee recommends that Your Excellency propose that the Legislature enact a statute providing that regardless of any language of the trust instrument the attempted exoneration of a trustee of an *inter vivos* charitable trust from liability for failure to exercise reasonable care, diligence and prudence shall be deemed contrary to public policy.

RHODE ISLAND REPORT 14.

95. See NATHAN REPORT, c. 15, on "Common Good Trusts." And see CONN. GEN. STAT. c. 337, § 6884 (1949).

It should be understood that this advantage of greater size could be obtained without a total loss of the individual identity of the various trusts involved.

[The Nathan Report] . . . suggests merger rather than the transfer to a common trust, because it is more likely to give proper regard to the spirit of the founder. To maintain the value of trusts it recommends that the money endowments of local charities having a gross annual value of less than £100 might be put into a common trust fund to be run by a separate board of trustees chosen for their financial experience and judgment. The trusts themselves would remain separate units and would receive from the fund a share of the annual income of the fund proportionate to the capital value of the endowment contributed.

*The Conveyancer*, 215 L.T. 17, 33 (1953).

96. A Russell Sage Foundation report, commenting upon the problem of the mushroom growth of the so-called family foundations which have remained inactive, suggested as a remedial step the limiting of tax exemption "to contri-

Assuming that society wishes to maintain the charitable trust in perpetuity as a giving device, changes might be made to avoid the perversion of the charitable trust instrumentality. A flagrant example of such perversion is spelled out very neatly in a report on so-called "Little-type trusts."<sup>97</sup> In discussing a coterie of such trusts, a congressional committee stated:

It is clear . . . that one of our largest textile-manufacturing corporations and its subsidiaries has [sic] made wide use of so-called charitable trusts as a means of providing risk capital to itself. Over and over again the trustees have demonstrated that they have been at the beck and call of the president of this corporation to make available the trust funds for the benefit of this company. . . .

Many millions of dollars have been received by the trusts and but an infinitesimal portion thereof has been paid to the beneficiaries of the trusts. The indentures by which the trusts have been created contain wide-open and amazing provisions which pave the way for abuse in the conduct and affairs of the trusts.<sup>97</sup>

A clause was included freeing the trustee from liability for errors in judgment and for any losses arising out of any investment and from failure to sue for or collect funds or properties belonging to the trust estate, "which indemnity is hereby made a lien upon the trust estate prior to any rights or interests of the beneficiary thereto or therein." At this point, the indenture contains the interesting clause:

"The freedom from liability and right to indemnity herein accorded to the trustee shall exist and apply regardless of the speculative or venturesome character and extent of investments and transactions of the trustee and regardless of the absence of diversification of risk in respect to the property in the trust estate."<sup>98</sup>

One of this group, the MIT Trust, was formed in 1937 with a contribution of \$500, and earned from 1943 to 1948 approximately \$612,000. As of October, 1948, it was worth almost one million dollars. This trust never paid an income tax. The Massachusetts Institute of Technology, which is the sole beneficiary of the trust, had up until 1948 received no payments at all from the trust. The trust never gave an accounting to the beneficiary and the books have never been audited.<sup>99</sup> Another example, the Rhode Island Charitable Trust was formed in 1937 with an original contribution of \$500. In the three years from 1945 to 1948 the trust had net earnings of almost

---

butions to institutions with an active program for social welfare." *TEXTRON REPORT 7*. See also *REECE REPORT 214*; *RHODE ISLAND REPORT 11, 14-15*.

97. *TEXTRON REPORT 22*.

98. *Id.* at 11-12. See *R.I. GEN. LAWS, c. 2617, § 13 (Supp. 1950)*, wherein it is provided: "Regardless of any language in the agreement, deed, or other instrument creating an inter vivos charitable trust, no trustee or trustees of such a trust shall be exonerated from liability for failure to exercise reasonable care, diligence and prudence."

99. *TEXTRON REPORT 9*.

\$4,000,000. It has never paid an income tax. In the three years 1945 to 1947, the beneficiary of the trust received \$85,000. During that same three-year period of time the administrative costs of the trust were in excess of \$140,000. The trust has never made an accounting to the beneficiary and its books have never been audited.<sup>100</sup> One is led to believe that these trusts are not isolated examples.<sup>101</sup> Certainly there seems to be some reason to question this particular type of employment of the charitable trust.<sup>102</sup> Such employment would seem to cry for remedial legislation at the state level.

Finally, action should be taken to provide for a greater degree of flexibility and adaptability in charitable trusts than is presently found. Of course, as far as existing trusts are concerned this may be a very difficult problem. However, the legislature and the courts should find a way to serve society better with these vast accumulations of wealth. The *cy pres* doctrine offers some hope and should be utilized to the fullest, but it is no complete answer. In England, where there has been some modification of the strictness in the charitable trust field, a serious problem of obsolete trusts still exists.<sup>103</sup> There

100. *Id.* at 8.

101. *Textron* is by no means alone in this practice of using tax-exempt trusts for its own purposes. It is understood that there are many thousands of such trusts operating throughout the country and yet even the Treasury Department does not know the number or identity of all of the trusts and is ignorant of their financial maneuverings.

TEXTRON REPORT 22.

102. Many factors contributed to the invention of these Little Type trusts. One motive of its inventors must have been to aid charity. But the results could well be the creation of a means by which some of the economic effects that accompany the payment of income taxes could be avoided and a handy depository or risk capital be established. Whatever the motives, there presently exist in Rhode Island charitable trusts of this type which accumulate vast sums by reason of risk investment of trust monies. . . .

The advocates of the Little Type trust agree that their approach is novel. The experiment thus far has appreciated the trusts under favorable economic conditions. The duty of the trustee thereunder has been changed from one of conserving the fund to one of building up the fund. The creator thus uses the full exemption of our present law to substitute his private intention for the common law rule. The argument in favor of such use is that if a comparatively small sum of money is set aside in trust for charity to be risked jointly with funds of the creator, and accumulated over several years, the ultimate income available to the beneficiaries will be so great that the public interest is thus best served.

The question before your Committee thus resolves down to whether this novel departure from customary charitable trust practice actually serves the public interest. After careful study the Committee concludes that in its present form it does not.

RHODE ISLAND REPORT 9-13. For a complete report of the Little Trusts, see TEXTRON REPORT.

103. In the Endowed Schools Acts, of which the first and most important was passed in 1869, power was given (subject to ultimate control by the Privy Council or its Judicial Committee) to an independent commission set up for a term of years to reorganize educational trusts subject thereto 'in such manner as may render [them] most conducive to the advancement of education of boys and girls or either of them'; to alter and add to existing educational trusts, to make new trusts or to consolidate or divide them—all

is every reason to believe that the problem is just as serious in the United States. If the provisions of the establishing instrument become out-dated and unreasonable, then should not social interest control?

No human being, however wise and good, is able to foresee the special need to society even for one or two generations and yet our law says that anybody, though he may be a person whose opinion we should never think of taking on any subject whatever during his life, may compel us to take for all time, property settled with almost any amount or kind of conditions not positively immoral. They may be foolish at the outset; change of circumstances may have made them useless or hurtful; still we must obey them. We do not allow such things to be done when the gift is to individuals or to families.<sup>104</sup>

Certainly some method should be provided whereby obsolete trusts can be revitalized and whereby the trusts which no longer serve useful purposes can be utilized for the public good.<sup>105</sup>

(b) *Postscript*

However, it seems apparent that such remedial legislation will not be passed in the near future in all of the states.<sup>106</sup> Litigation, however,

---

without the necessity for an application from trustees. This Act still constitutes the greatest breach in the *cy-pres* doctrine. . . .

The *cy-pres* doctrine, under which, broadly speaking it is impossible to change the purposes of a trust until they have become impossible of execution, and then only to new purposes as near as possible . . . to the old . . . still applies to all trusts other than educational. For educational trusts the doctrine was relaxed as long ago as 1869. . . . Because of the rise in the standard of life and of the social legislation of the last fifty years the need for some relaxation of the doctrine for all trusts has now become urgent. . . . New scheme-making powers based on a relaxation of the doctrine . . . should take the place of the existing (strict *cy-pres*) power under the Charitable Trusts Acts and the wider scheme-making powers under the Endowed Schools Acts. . . .

The Doctrine should be so relaxed as to admit of trust instruments being altered, even though the carrying out of their objects has not become impracticable. Long-established Scottish law relating to educational endowments provides a model for this purpose. . . .

NATHAN REPORT §§ 93, 698-99.

On obsolete trusts, see Note, 34 VA. L. REV. 182, 199 (1948), and discussion at note 73 *supra*.

104. From an address by Sir Arthur Hobhouse, reported in NATHAN REPORT § 95.

105. NATHAN REPORT §§ 95, 607.

106. In commenting on the English experience it has been noted:

It was in 1835 that the Select Committee recommended the setting up of an independent authority with full inquisitorial powers: it was not until 1853 that the great Charitable Trusts Act "for securing the due administration of charitable trusts and for the more beneficial application of charitable funds in certain cases" was passed—after thirteen Bills bearing on the problem from various angles had been introduced but had failed to get on to the Statute book. The delay in the passing of this legislation was due partly to the accidents of the Parliamentary time-table, partly to changes in Government, but more than anything else to resistance to the setting up of an independent board to look into the doings of trustees. Strong objection was taken by various opponents to "arbitrary and Despotical powers" being given to "a secret and despotic tribunal," which would have the result of "absolutely depriving" people of the "management of their own affairs."

NATHAN REPORT § 86.

as to charitable trusts will continue. Courts in states with no regulation of charitable trusts will be forced to decide cases and indicate attitudes toward charitable trusts of all sizes. In view of the multitude of charitable instrumentalities of various types that are available, would it not be proper for such courts to reconsider the generally accepted policy of favoritism toward all charitable trusts and substitute a more realistic attitude based upon a rational analysis of the social value of the specific device before the court?<sup>107</sup> The courts should recognize that today very little information is available on the extant small charitable trusts. When deciding cases about small charitable trusts, the judges should understand that such trusts are subject to very little supervision and that many are of very doubtful social utility. Certainly the courts would be justified should they stop placing their imprimatur on all charitable trusts with little consideration of the real problems involved. It would seem reasonable for the courts to adopt a more critical attitude toward charitable trusts. The judicial climate should reflect a realistic evaluation of the probable social usefulness of the particular trust being considered. Such a realistic approach has merit per se since it represents the rejection of an irrational shibboleth and the substitution of a rationally conceived analysis of the facts and the law. Moreover, such an approach might, in the long run, result in directing charitable activities into more socially useful channels, and might tend to hasten the enactment of much needed supervisory legislation.

---

107. It is true that in matters of construction courts lean in favor of charity. . . . This has been said of old. It must, however, be borne in mind that our law of charitable uses has come down to us from rude and superstitious times—from times when established charities were few. In these days almost every possible useful form of charity is established and organized and invites testamentary contributions. If an eccentric testator wants to establish some particular charity of his own he may do it in New Jersey, but there is certainly less reason now than there was formerly why courts of equity should be astute to aid the establishment of eccentric charities which donors have not clearly intended to establish. It may be that this court must enforce a charitable bequest in perpetuity for the distribution of the Book of Mormon, or even the works of Joanna Southcote—*George vs. Braddock*, 45 N.J. Eq. (18 Stew.) 757 (1889)—but I do not see that there is any reason for straining the law or the declared intentions of testators in order to save such charitable bequest from becoming inoperative by a lapse. . . .

The cases cited above indicate that the present trend is most distinctly towards maintaining the doctrine of lapse as against the exercise of a judicial *cy pres* power based upon intentions of charitable donors established by uncertain inferences which often amount to mere assumptions, if not fictions.

*Brown v. Condit*, 70 N.J. Eq. (4 Robb.) 440, 452-53, 61 Atl. 1055, 1060 (1905).