

CHARITABLE TRUSTS AND ORGANIZATIONS AND THE ROLE OF PENNSYLVANIA’S ATTORNEY GENERAL *AS PARENS PATRIAE*¹

In Pennsylvania, the role of *parens patriae* has been delegated to the Attorney General and includes broad supervisory authority over all property committed to charitable purposes through decedents’ estates, trusts, foundations, unincorporated associations, nonprofit corporations, and public solicitation campaigns. Pennsylvania’s case law makes clear that the public-at-large is the ultimate beneficiary of all charitable trusts and that the Attorney General is charged with representing the public’s interest when acting as *parens patriae*.

I. Historic/Common Law Authority of the Attorney General over Charities and Charitable Assets

A. In General—“The king, as *parens patriae*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney general . . . files ex officio an information in the Court of chancery to have the charity properly established.” 3 Blackstone, Commentaries 47

1. *Fontain v. Ravenal*, 58 U.S. 369, 17 How. 369, 15 L.Ed 80 (Mem) (1854), recognized broad powers of attorney general to protect the public interest and insure that charitable funds are properly applied.
2. *Synanon Foundation v. California*, 444 U.S. 1307, 100 S.Ct. 496 (1979), Attorney General, as chief law enforcement officer, has traditional power to intervene in the administration of charitable trusts.
3. Restatement (Third) of Trusts §94(2) (2012), “[a] suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust.”
4. Scott and Asher on Trusts, 5th Edition, §37.3.10, the Attorney General represents the community’s interest in the enforcement of charitable trusts.

B. In Pennsylvania—

¹ “‘Parens patriae,’ literally ‘parent of the country,’ refers traditionally to role of state as sovereign and guardian of persons under legal disability. . . . It is a concept of legal standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people” Black’s Law Dictionary, 5TH Edition, Pg. 1003 (citations omitted).

1. **Pruner Estate**, 390 Pa. 529, 136 A.2d 107 (1957), “[t]he beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trust accrue. But because the public is the object of the settlor’s benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised.” **Id.**, 390 Pa. at 531-532, 136 A.2d at 109-110. The court recognized that the *parens patriae* authority for the public supervision of charities had been traditionally delegated to the Attorney General and held that the Attorney General must be made a party of record to every proceeding affecting a charitable trust.
2. **Garrison Estate**, 391 Pa. 234, 137 A.2d 321 (1958), “Henceforth in all proceedings involving charitable trusts notice thereof must be given to the Attorney General.” **Id.**, 137 A.2d at 323, n.2 (emphasis in original). Court reasoned that notice to the Attorney General is necessary for the proper representation of the public which is the real party-in-interest.
3. **Voegtly Estate**, 396 Pa. 90, 151 A.2d 593 (1959), Attorney General is “an indispensable party in every proceeding which affects a charitable trust, whether the proceeding be one of invalidation, termination, administration, or enforcement of such trust.” **Id.**, 396 Pa. at 91-92, 151 A.2d at 594.
4. **Commonwealth v. Barnes Foundation**, 398 Pa. 458, 159 A.2d 500 (1960), “Attorney General . . . by virtue of the powers of [the] office, is authorized to inquire into the status, activities and functioning of public charities.” **Id.**, 398 Pa. at 467, 159 A.2d at 505.
5. **Little Estate**, 403 Pa. 534, 170 A.2d 106 (1961), Attorney General as an indispensable party must approve family settlement agreements in estates involving charities.
6. **Estate of Feinstein**, 364 Pa. Super. 221, 527 A.2d 1034 (1987), Attorney General’s *parens patriae* role is completely independent of the charity and its legal counsel. A charity’s failure to object to a particular matter, “neither limits nor vitiates the force of the Attorney General’s arguments. The Attorney General represents a broader interest than that of the charity alone. He must protect the interests of the public at large ‘to whom the social and economic benefits of [charitable] trusts accrue.’” **Id.**, 364 Pa. Super. at 226, 527 A.2d at 1036, n.3.

7. *In re Allegheny Health, Education and Research Foundation*, 252 B.R. 309; 252 B.R. 332 (1999), Attorney General’s *parens patriae* powers to protect debtor’s charitable assets/mission from the reach of creditors fell within police power exception to the automatic stay under federal bankruptcy code.
8. *In re Milton Hershey School Trust*, 807 A.2d 324 (Cmwlth. Ct., 2002), “Attorney General has authority to inquire whether an exercise of a trustee’s power, even if authorized under the trust agreement, is inimical to the public interest.” *Id.*, 807 A.2d at 330.
9. *Commonwealth v. Citizens Alliance for Better Neighborhoods, Inc., et al.*, 983 A.2d 1274 (Cmwlth. Ct., 2009), “. . . the Attorney General always has standing in any case involving a charity.” *Id.*, 983 A.2d at 1278.

II. Statutes and Rules of Court Pertaining to the Authority of the Attorney General and Notice Requirements Regarding Charities and Charitable Assets

- A. Commonwealth Attorneys Act, 71 Pa. C. S. §§ 732-101 *et seq.*:
 1. Section 732-204(c) provides that, “[t]he Attorney General shall represent the Commonwealth and all Commonwealth agencies . . . and may intervene in any other action including those involving charitable bequests and trusts”
 2. Section 732-206(a) provides that, “[t]he Attorney General shall be the chief law enforcement officer of the Commonwealth;”
- B. Prudent Investor Rule, 20 Pa. C.S. § 7203(d), requires the fiduciary of a charitable trust having voting control of a publicly traded business corporation received as an asset from the settlor to provide at least 60 days prior notice of the consummation of a transaction that would result in the trust no longer having voting control of that business corporation, by sale, merger, consolidation or otherwise.
- C. Uniform Trust Act, 20 Pa. C.S. §§ 7701 *et seq.*:
 1. Section 7710(d) provides that, “[t]he Office of Attorney General has the rights of a charitable organization expressly named in the trust instrument to receive distributions from a trust having its situs in this Commonwealth and the right to notice of any proceeding or nonjudicial settlement agreement in which there is a charitable interest or purpose.”

2. Section 7735(c) provides that, “[a] proceeding to enforce a charitable trust may be brought . . . at any time by the Attorney General”
3. Section 7740.3 authorizes:
 - a. The administrative termination of trusts created solely for charitable purposes with assets less than \$100,000 with the consent of the Attorney General and all designated charitable beneficiaries. Upon termination, the assets, subject to the approval of the Attorney General, shall be delivered to the designated organizations, or, if none, to organizations selected by the trustee, in either case to be held and applied for the general or specific charitable purposes and on the terms that fulfill the settlor’s intention as nearly as possible. 20 Pa. C.S. § 7740.3(d).
 - b. The judicial termination of trusts created solely for charitable purposes whenever the trust results, or will result, in administrative expense or other burdens unreasonably out of proportion to the charitable benefits, upon application of the trustee or any interested person and after notice to the Attorney General, and requires that the trust assets be awarded outright, free of trust, to the organizations designated in the trust or, if none, charitable organizations selected by the court, in either case for the purposes and under terms that fulfill the settlor’s intention as nearly as possible, other than the intent to continue the trust. 20 Pa. C.S. § 7740.3(e).

D. Nonprofit Corporation Law of 1988, 15 Pa. C.S. § 5101 *et seq.*:

1. Section 5547(b)—Non-diversion of property committed to charitable purposes, provides that Property committed to charitable purposes shall not, by any proceeding under Chapter 59 (relating to fundamental changes) or otherwise, be diverted from the objects to which it was donated, granted or devised, unless and until the board of directors or other body obtains from the court an order under 20 Pa.C.S. Ch. 77 (relating to trusts) specifying the disposition of the property.
2. Reference to Section 5547(b) exists throughout Chapter 59 of Title 15, which governs fundamental changes effected through

amendments of articles, mergers, consolidations, sales of assets, divisions, conversions and dissolutions, both voluntary and involuntary.

- E. Solicitation of Funds for Charitable Purposes Act, 10 P.S. §162.19(a), provides in pertinent part that, “[w]henver the Attorney General . . . shall have reason to believe . . . that the person is operating in violation of the provisions of this act, the Attorney General . . . may bring an action in the name of the Commonwealth against such person . . . to enjoin such person from continuing such violation and for such other relief as the court deems appropriate.”
- F. Associations Code, 15 Pa. C.S. § 503, is applicable to nonprofit corporations and authorizes the Attorney General to pursue revocation of corporate articles if the corporation:
 - 1. Misused or failed to use its powers, privileges or franchises;
 - 2. Procured its articles by fraud; or
 - 3. Should not have been incorporated under the statutory authority relied upon.
- G. Pennsylvania Rule of Civil Procedure No. 235 provides in pertinent part that, “[i]n any proceeding in a court subject to these rules in which . . . a charitable bequest or trust is involved and the Commonwealth is not a party . . . the plaintiff in a proceeding involving a charitable bequest or trust shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice.”
- H. Pennsylvania Orphans’ Court (Pa. O.Ct.) Rules 2.5, 4.4 and 10.5 (*Effective September 1, 2016*)
 - 1. Rule 2.5(a)(4) requires notice to the Attorney General, “[f]or an Account where a charitable interest is involved” and refers accountants and/or their counsel to Rule 4.4.
 - 2. Rule 2.5(c) requires notice to the Attorney General, “[i]f the proposed distribution is to an estate or trust and a charity is a ‘qualified beneficiary,’ as defined in 20 Pa.C.S. § 7703, of that recipient estate or trust”
 - 3. Rule 4.4(a) requires that, “[i]n every court proceeding involving or affecting a charitable interest . . . , at least 20 days advance written notice thereof shall be given to the Attorney General”

4. Rule 10.5(a) (6) requires that within three months of the grant of letters to the personal representative written notice shall be sent to, “the Attorney General on behalf of any charitable beneficiary (i) which is a residuary beneficiary, including as a beneficiary of a residuary testamentary trust; (ii) whose legacy exceeds \$25,000; or (iii) whose interest in a legacy will not be paid in full”.
- I. Cases within the Office of Attorney General are generally assigned to one of three regional offices, depending upon the matter’s venue/county, *i.e.*, the Headquarters and Central Regional Office (CRO) located in Harrisburg; the Western Regional Office (WRO) located in Pittsburgh; and the Eastern Regional Office (ERO) located in Philadelphia. The address and phone number of each regional office is as follows:
1. 14th Floor Strawberry Square,
Harrisburg, PA 17120 – 717.783.2853.
 2. 1251 Waterfront Place, Mezzanine Level
Pittsburgh, PA 15222 – 412.565.7680.
 3. 1600 Arch Street, Suite 300
Philadelphia, PA 19103 – 215.560.2402.

Generally speaking, each regional office is responsible for the cases that arise within the following geographically assigned counties:

WRO (PGH.)

Allegheny
Armstrong
Beaver
Butler
Cambria
Cameron
Clarion
Clearfield
Crawford
Elk
Erie
Fayette
Forest
Green
Indiana
Jefferson
Lawrence
McKean
Mercer
Somerset
Venango
Warren
Washington
Westmoreland

CRO (HBG.)

Adams
Bedford
Blair
Bradford
Center
Clinton
Columbia
Cumberland
Dauphin
Franklin
Fulton
Huntingdon
Juniata
Lackawanna
Lancaster
Lebanon
Luzerne
Lycoming
Mifflin
Montour
Northumberland
Perry
Potter
Schuylkill
Snyder
Sullivan
Susquehanna
Tioga
Union
Wyoming
York

ERO (PHILA.)

Berks
Bucks
Carbon
Chester
Delaware
Lehigh
Monroe
Montgomery
Northampton
Philadelphia
Pike
Wayne

III. Practical Implications of the Attorney General’s *Parens Patriae* Role

- A. In General— The Attorney General objectively assesses the merits of each case, but is never a neutral party or mere “devil’s advocate.”

1. The Attorney General acts as the public’s advocate as the “real party-in-interest” and “ultimate beneficiary” of charitable trusts and, therefore, does not represent charitable organizations, trustees or settlors.
2. The interests of a charity and the public-at-large may often appear parallel, but they are rarely if ever identical. As such, the Attorney General:
 - a. Can take positions that a charity or its private counsel prefer to avoid or refuse to take.
 - b. Can insulate a charity from the public perception of overreaching.
 - c. Can insulate a charity from alienating potential donors.
 - d. Unlike private counsel, will not be in position of representing a fiduciary in another case.
 - e. Has no reluctance to challenge attorney or fiduciary fees.
3. The Attorney General is responsible to investigate and prosecute enforcement actions against charitable organizations, trustees, directors, officers and others administering charitable assets for any breach of their fiduciary duties of loyalty and/or care.
4. The Attorney General is not a substitute for a charity’s private counsel.
5. Private counsel represents charitable organizations and the fiduciaries administering estates and trusts, not the interests of the general public.
6. Because the public bears all inherent costs of enforcement, the Attorney General is obliged to weigh enforcement costs against the practical benefits to be obtained and will typically favor the most cost efficient alternative available.

B. Specific Examples—

1. Fiduciary Accounts— Review all pertinent aspects of accounts as would any interested party, including, but not limited to, the nature

of assets received, appropriateness of investments and their performance, disbursements, tax calculations, attorneys' fees, fiduciaries' commissions and distributions.

- a. Nature of assets received and administered.
- b. Investments.
 - i. Appropriateness for charitable beneficiary, *e.g.*, **Feinstein Estate**, 364 Pa. Super. 221, 527 A.2d 1034 (1987).
 - ii. Overall performance.
 - iii. Specific inappropriate investments, *e.g.*, high risk.
- c. Disbursements generally.
 - i. Disbursements for pre-death and personal services suspect.
 - ii. Tax apportionment questions considered.
- d. Fees and Commissions.
 - i. Standard is reasonableness based upon the value of the services rendered. **LaRocca Estate**, 431 Pa. 542 (1968); **Reed Estate**, 462 Pa. 336 (1975).
 - ii. No Attorney General approved fee schedule.
 - A) Internal, unpublished guidelines and application of **LaRocca** criteria.
 - B) "Guidelines" published in **Johnson Estate**, 4 Fiduc. Rep. 2d 6 (O.Ct. Chester Co. 1983) are not Attorney General guidelines. See

Preston Estate, 385 Pa. Super. 48, 560 A.2d 160 (1989), rejecting *Johnson* on finding egregious error when commissions and fees awarded simply on percentage basis.

- iii. Discount expected when administration of estate is abbreviated. *In re Estate of Rees*, 425 Pa.Super. 490, 625 A.2d 1203 (1993), fees of attorney/executor claimed on full percentage basis for estates of husband and wife who died less than two months apart reduced as unreasonable in the absence of any time records.
 - iv. Discount expected where counsel is also fiduciary. *Rees*, fees of attorney/executor reduced as unreasonable in absence of any time records distinguishing attorney's legal services from those as executor.
 - v. Oppose prospective approval of fiduciary commissions. *Keasbey Trust*, 27 Fiduc. Rep. 215 (Phila. 0.Ct. 1977).
 - vi. Cost of outside accounting and investment advisory services should be charged against fiduciary's reasonable commission (absent specific direction in instrument authorizing payment as well as delegation).
 - vii. Tax letter fees (prepared for benefit of taxpaying beneficiaries) should not be charged against charity
- e. Distribution to bona fide charity/recipient.

- i. Active, operating entity
 - ii. Financially solvent, not a debtor in bankruptcy.
 - f. Issue clearance letters (“No Objection Letters”) regarding accounts submitted for audit to the orphans’ court. Local practice requires “Clearance Certificates” issued in Bucks, Chester, Delaware, Montgomery and Philadelphia counties.
 - g. Attorney General will accept informal accounts, *i.e.*, accounts not submitted for audit to an orphans’ court, for estates of any size and, absent grounds for objection, issue clearance letters.
 - h. Attorney General will not accept a fiduciary’s monthly, quarterly, or other periodic reports or computer generated account statements of the type provided to beneficiaries and co-fiduciaries.
2. *Cy Pres* Petitions— The Attorney General has the duty to ensure that the settlor’s intentions are indefinite, impractical or impossible to fulfill and that the requested relief approximates as nearly as possible the settlor’s intention.
- a. Attorney General will object or take action to preserve settlor’s intention when appropriate, but has no duty to oppose in cases where he has determined that *cy pres* is appropriate. See *In re Milton Hershey School*, 712, Year of 1963 (O. Ct., Dauphin Cty.), the December 7, 1999 *Unreported* Adjudication and Order denying Trustee’s *cy pres* request. Attorney General objected on basis that settlor’s intended purpose had not become indefinite, impractical or impossible to fulfill.
 - b. Attorney General generally indifferent between competing charities that appropriately approximate settlors’ intentions.
3. Deviation Petitions— Attorney General has the duty to ensure that the requested relief is necessary under the circumstances to fulfill the settlor’s intentions.

- a. Attorney General will object or take action to preserve the status quo when appropriate.
 - b. Attorney General has no duty to oppose cases when he or she has determined that deviation is necessary to fulfill settlor's intention.
4. Charitable Trust Terminations—
- a. Attorney General will consent to administrative termination of small charitable trusts with assets of less than \$100,000, provided charitable purposes will be carried out by designated recipient. 20 Pa. C.S. § 7740.3(d), *supra*.
 - b. Attorney General will not object to termination of burdensome charitable trusts in excess of \$100,000 provided charitable purposes will be carried out by designated recipient and orphans' court approval is obtained. 20 Pa. C.S. § 7740.3(e), *supra*.
 - c. Attorney General will not consent to terminations in favor of non-charitable beneficiaries, unless the charitable interest receives appropriate distribution, *e.g.* the actuarial value of a remainder interest.
5. Nonprofit Corporations Incorporated for Charitable Purposes—
- a. Absent a substantive public interest, *e.g.*, the waste, mismanagement, theft or diversion of assets, the Attorney General will not intervene in the internal disputes among members, *e.g.*, contested elections, by-law disputes, etc.
 - b. Review of fundamental change transactions, *i.e.*, amendments to articles, affiliations, mergers, divisions, conversions, sales and dissolutions to ensure directors and officers have exercised due diligence in fulfilling their fiduciary duties of loyalty and care. Specific protocol for transactions involving health care entities at [https://www.attorneygeneral.gov/Consumers/Charitable Trusts and Organizations Sections/Review Protocol for Fundamental change transactions affecting health care nonprofits](https://www.attorneygeneral.gov/Consumers/Charitable_Trusts_and_Organizations_Sections/Review_Protocol_for_Fundamental_change_transactions_affecting_health_care_nonprofits)²

² *Review Protocol for Fundamental Change Transactions Affecting Health Care Nonprofits.*

- c. Duty to pursue breaches of fiduciary duties of loyalty or care committed by directors and officers whenever substantive public interest is implicated.
 - d. No diversion of charitable assets pursuant to Section 5547(b) of the Nonprofit Corporations Law of 1988, 15 Pa. C.S. § 5547(b).
 - e. Orphans' Court Jurisdiction
 - i. Pennsylvania Rule of Judicial Administration No. 2156
 - ii. PEF Code §711(21)
 - iii. *Pa. Home Teaching Society*, 25 Fiduc. Rep. 556, 69 D.&C. 2nd 1 (0.Ct. Phila. 1975)
 - iv. *Musical Fund Society of Phila.*, 25 Fiduc. Rep. 1, 73 D.&C. 2d 15 (0.Ct. Phila. 1975)
 - v. *Otto v. Barziloski*, 44 D.&C. 3d 144 (Lackawanna 1986)
 - vi. *In re Butler County Memorial Hospital*, 27 Pa. Cmwlt. 561, 368 A.2d 849 (1976)
 - vii. *In re Philadelphia College of the Performing Arts*, 5 Fiduc. Rep. 2d 335 (0.Ct. Phila. 1985)
6. Public Fundraising Campaigns— Attorney General has the duty to investigate and pursue violations of the Solicitation of Funds for Charitable Purposes Act, 10 P.S. §§ 162.1 - 162.24, to ensure that those soliciting the public for charitable donations are properly registered with the Pennsylvania Department of State, Bureau of Charitable Organizations, and that charitable contributions are properly administered and accounted for.
- a. *Commonwealth v. Frantz Advertising, Inc.*, 23 Pa. Cmwlt. 526, 353 A.2d 492 (1976). The test of a "public charity" under the act is the object sought to

be obtained or the purpose for which contributions are to be applied, not the motive of the contributor; non-charitable organizations holding themselves out as charitable are subject to registration and regulation under the act.

- b. **Commonwealth v. Association of Community Organizations for Reform Now (ACORN)**, 502 Pa. 1, 463 A.2d 406 (1983). Community-based organization advocating legislative, economic and social reforms with widespread benefits beyond organization's membership subject to registration and regulation under the act.
- c. **Commonwealth v. Society of the 28th Division, A.E.F. Corp.**, 113 Pa. Cmwlth. 456, 538 A.2d 76 (1986). Unfair Trade Practices and Consumer Protection Law (UTCPL), 73 P.S. §§ 201-1 *et seq.*, applied to charitable solicitations.
- d. **Commonwealth v. Watson & Hughey Co.**, 128 Pa. Cmwlth. 484, 563 A.2d 1276 (1989). Enjoining fraudulent and deceptive charitable solicitations not an impermissible prior restraint on free speech; UTCPL applied to sweepstakes solicitations by charitable organization.
- e. **Commonwealth v. Pennsylvania Chiefs of Police Association, Inc.**, 132 Pa. Cmwlth. 186, 572 A.2d 256 (1989). Sale of advertising space on behalf of fraternal organization to benefit charitable purposes subject to the act and UTCPL.
- f. **Commonwealth v. Events International, Inc.**, 137 Pa. Cmwlth. 271, 585 A.2d 1146 (1990). Foreign corporations' solicitation of charitable donations by phone calls to donees in Pennsylvania was "doing business" in the Commonwealth and required procurement of certificate of authority and compliance with registration requirements under the act.
- g. **Commonwealth v. Cancer Fund of America, Inc.**, 153 Pa. Cmwlth. 124, 620 A.2d 647 (1993). Charitable organization can be charged with violations of act even after Department of State

determines that registration requirements have been met since department's review is administrative, not investigative or prosecutorial.

7. Inheritance Tax Appeals— Attorney General does not represent the Department of the Treasury in escheat matters or the Department of Revenue regarding any tax matters. *Thompson Estate*, 416 Pa. 249, 206 A.2d 21 (1965) “The Attorney General has and will continue to hold paramount his duty as parens patriae and that he will not be influenced by any interest in tax gathering on the part of the Commonwealth.” *Id.*, 206 A.2d at 27, n.13 (emphasis in original).