The Problem of Charitable Trust Enforcement: Addressing the Insufficiencies of the Attorney General System and Proposing New Law Reform

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I. INTRODUCTION

A. CHARITABLE TRUSTS, GENERALLY

A settlor can make a gift in support of a charitable purpose for an extended period of time by creating a charitable purpose trust[i] (also referred to as "charitable trust" throughout this paper). The availability of the deduction for charitable contributions[ii] has made trusts for charitable purposes common in modern estate planning. Additionally, the treatment of charitable trusts as tax-exempt[iii] provides even more incentive for the creation of charitable trusts.

Charitable trusts follow different rules from private trusts. A charitable purpose trust must have a purpose that is recognized as serving the public inherently, and courts will broadly construe the terms in favor of upholding charitable purposes.[iv] The Federal Tax Code defines charitable purposes to include "religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals."[v] Thus, charitable purpose trusts can touch and concern a broad range of public benefits.

Charitable trusts differ from private trusts in their ability to continue in perpetuity.[vi] A trust for charitable purposes "is not invalid although by the terms of the trust it is to continue for an indefinite or an unlimited period," whereas private trusts are constrained by the rule against perpetuities.[vii] Because charitable trusts can endure for so long, the equitable doctrine of *cy pres*[viii] allows courts to change the administrative, and sometimes dispositive, terms of the trust in order for the purpose to remain a charitable one.[ix] If the purpose of a charitable trust becomes impossible or impracticable to carry out or wasteful to apply, the trust will not fail for want of a charitable purpose. Under those circumstances, the court will direct application of the assets to a

charitable purpose that "reasonably approximates" the original purpose,[x] in order to carry out the donor's intent "as nearly as possible."

The cy pres doctrine provides just one example of how the law and policy of charitable trusts diverges from the law of private trusts. In any number of ways, charitable trusts pose unique challenges and demand unique solutions from lawmakers.

This paper focuses on another problem that arises in special ways with respect to charitable trusts – the mechanism for their oversight and enforcement. First, this paper analyzes the current system of charitable trust enforcement, namely, who has standing to sue for enforcement.[xi] Next, this paper explores the limitations innate to the current structure and stresses the urgency with which the current system must be modified through the use of two examples of breach of trust.[xii] The paper concludes that to address the immense agency costs and overall inefficiencies of the current enforcement scheme, the settlors of charitable trusts should be permitted to name a trust enforcer; and if they fail to do so, courts should be obliged to appoint one.[xiii]

II. THE STATE OF CHARITABLE TRUST ENFORCEMENT

The only parties who have standing to sue for the enforcement of a charitable trust are "the Attorney General or other public officer, or a co-trustee, or a person who has a special interest in the enforcement of the charitable trust, but not persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin."[xiv] The first named party with standing to sue is the Attorney General of the state under which the settlor created the trust, as the community has an interest in the enforcement of charitable trusts.[xv] The community's interest, however, does not confer to members of the public standing to sue – members of the public are considered persons having no special interest.[xvi] Some states give the power to sue to

the local district or county attorney, as well.[xvii] Even in cases where the Attorney General is not the party bringing suit, they are ordinarily joined as a party.[xviii]

A co-trustee may sue to compel another trustee to redress the other trustee's breach of trust.[xix] Unless the settlor is also a co-trustee, even the settlor and their heirs have no standing to sue for enforcement of the charitable trust they created. The settlor who created the trust with the designated charitable purpose in mind is powerless in the face of abuse by the trustee.

A person having a special interest is not necessarily a beneficiary, as charitable trusts do not have definite persons as beneficiaries, so the "mere fact that a person is a possible beneficiary is not sufficient to entitle him to maintain a suit for the enforcement."[xx] Few have standing to sue as a person with a special interest because charitable trusts typically have sweeping charitable purposes. Courts have found that a person with a special interest is not merely one who is a prior or potential beneficiary within a large class of potential beneficiaries.[xxi] However, where a charitable trust is created for members of a small, defined class of people,[xxii] a member of the class has standing to sue for enforcement of the charitable trust.[xxiii] In the absence of a definition of "special interest", scholars have suggested a five-factor balancing test which has been adopted in various cases.[xxiv] Those five factors are:

> (1) nature of the benefitted class and its relationship to the charity; (2) the extraordinary nature of the acts complained of, and the remedy sought; (3) the state attorney general's availability or effectiveness to enforce the trust; (4) the presence of fraud or misconduct on the part of the defendants; and (5) subjective and case-specific circumstances.[xxv]

A. THE ATTORNEY GENERAL'S DUTY IN DETAIL

States may require registration of the charitable trust with the Attorney General. In California, all charitable trusts are required to fill out a CT-1 to inform the Attorney General, among other things, the names of Trustees, the charitable purpose in detail, any out-of-state activities the trust conducts, and what assets have been received, if any.[xxvi] Additionally, where notice to the beneficiaries would otherwise be required for a private trust,[xxvii] such notification must be provided to the Attorney General.[xxviii]

The Attorney General can initiate new litigation or even intervene in an existing litigation concerning charitable trusts.[xxix] The State's Attorney General stands in the place of the beneficiaries for purposes of suing to enforce the trust. The Attorney General, as representative of the public, has the power to oversee charities and beneficiaries who are indefinite and unable to enforce the trust on their own.[xxx] Public policy and the doctrine of *parens patriae*[xxxi] require the Attorney General to oversee charitable trusts, making the Attorney General a necessary party to charitable trust proceedings.[xxxii] Such a duty includes "undoubted standing to seek redress in the courts of contracts entered into by charities which are collusive, tainted by fraud or which demonstrate any abuse of trust management."[xxxiii]

Involvement in will contests that concern charitable gifts is a right and a duty bestowed on the state Attorney General. Specifically, a case involving a charitable trust is subject to the jurisdiction of the Attorney General who may petition under the chapter.[xxxiv] The Attorney General is responsible "for supervising charitable trusts in [the state], for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations."[xxxv] In order for a court to have jurisdiction to modify and terminate any trust for charitable purposes, the Attorney General must be a party to the proceedings.[xxxvi]

Notice must be given to the Attorney General of any probate involving a charitable bequest or trust.[xxxvii]

III. WHY THIS MODEL IS INEFFECTIVE

The current model of charitable trust enforcement is inefficient because it lacks the type of specialized supervision required to carefully safeguard a charitable trust. The vague threat of suit by the Attorney General is insufficient to dissuade a charitable trustee from breaching the trust – to combat the mismanagement by trustees, this model requires a more personal touch.

The Attorney General must be a party to the proceedings for a charitable trust, and this is his or her only responsibility. In the State of California, as in other states, the Attorney General is *also* responsible for "safeguarding Californians from harm and promoting community safety, preserving California's spectacular natural resources, enforcing civil rights laws, and helping victims of identity theft, mortgage-related fraud, illegal business practices, and other consumer crimes."[xxxviii] Additionally, the Attorney General is charged with overseeing thousands of lawyers, representing the state's citizens in civil and criminal matters.[xxxix] Furthermore, the Attorney General manages programs to detect fraudulent, unfair, and illegal activities that victimize consumers or threaten public safety.[xl] These listed duties reflect the duties of all state Attorneys General. The Office of the Attorney General in any state has a laundry list of duties and policing charitable trusts will not always be the first priority, especially for trusts with a moderately-sized corpus.

Utilizing the Attorney General as the primary vehicle for charitable trust enforcement sustains massive agency costs. Whenever a trustee is acting on behalf of any trust, he or she has an incentive to shirk from trustee duties or to steal from the corpus. A trustee's willingness and tendency to do so depends on the closeness with which they are monitored – the more laxly a

trust is monitored, the greater the agency cost will be because the trustee has the leeway behave with greater impunity than if monitored scrupulously. Because their office has numerous duties, Attorneys General tend to monitor trusts in a laisses-faire style, stepping in only *after* massive breaches of trust are committed. The most notable cases of breach of trust, especially with charitable trusts, occur because the Attorney General surveilled the trustee too permissively.

In California, charitable trusts are required to register for the Registry of Charitable Trusts and file annual financial disclosure reports.[xli] According to the Office of the Attorney General, for the year 2019, California had over 118,000 charitable organizations registered with the Attorney General's Registry of Charitable Trusts and as of June of 2019, these registered organizations reported assets over $854 billion.[xlii]

The New York State Attorney General's Office "receives *thousands* of inquiries and complaints from the general public, news reporters, and other interested parties" and conducts investigations in cases where "there is reliable evidence of a misuse of charitable assets or mismanagement resulting in a significant financial loss to the charity."[xliii] The Texas Office of the Attorney General has more than 80,000 active charitable organizations and "countless" trust entities.[xliv] The Texas Attorney General website caveats that if a private citizen files a complaint with their Office, they may refer such private citizen to another agency and can only file suit to protect the public interest.[xlv] Even in smaller states, such as Hawaii, the Attorney General Tax and Charities Division is responsible for 8,392 registered charitable organizations.[xlvi] With this volume of assets and charitable trusts to oversee, the mundane, small-scale trustee mismanagement of funds is likely to slip through the cracks.

A. SOME SAMPLES OF THE MODEL'S INEFFECTIVENESS

One could point to any number of examples of abuse by charitable trustees. The two recounted below are notable in that they were brought to light by reporters or other private citizens and only *after* the fact did the Attorney General investigate.

1. Estate of Getty

The estimated value of the Getty Trust, at the time of breach in 2005, was estimated to have an endowment worth over $5.2 billion.[xlvii] One of the primary beneficiaries of this charitable trust was the Getty Museum. In 1998, Barry Munitz, an individual with no background in art, was appointed to head the entire Getty Trust.[xlviii] For almost a decade, Mr. Munitz used the fuds to arrange loans for employee's homes, fly first-class with his wife, and purchase a personal car worth $72,000, all while compensating himself $1.2 million a year for the job.[xlix] The sale of real property from the trust at $700,000 less than its appraised value to a friend of Mr. Munitz finally garnered the attention of California's Attorney General, who subsequently opened an investigation into the Mr. Munitz's management of the trust.[l]

The Attorney General's investigation concluded that although Mr. Munitz and violated legal duties but refused to take civil or criminal action against him, as, according to the investigation, the misuse did not result from fraud and the settlement agreement between Mr. Munitz and the trust exceeded the value of the misuse.[li] Nevertheless, the Attorney General imposed an independent overseer[lii] to monitor the Getty Trust and its subsequent actions more closely after the unveiling of its prior abuse, which was the first instance of the California Attorney General imposing an overseer against a charitable trust.[liii]

Even in cases of abuse of trust where the trust and its trustees are highly scrutinized by the media, the Attorney General's actions lag severely, allowing more financial abuse to occur under their lenient watch, such that when the breach *is* caught, the Attorney General is almost helpless.

2. The Bishop Estate

In 1884, Princess Bernice Pauahi Bishop of Hawaii settled a charitable trust (referred to as the "Bishop Estate") to establish and maintain two schools – one for boys and one for girls – called the Kamehameha Schools (also referred to as the "Schools").[liv] The Bishop Estate had an enormous corpus and was regarded as "the nation's wealthiest charity."[lv] The Trust appointed five co-Trustees to manage and distribute the estate, further directing that future trustees be selected by Hawaii Supreme Court Justices.[lvi]

After over one hundred years in existence, a group of elders from the community and a University of Hawaii professor wrote an essay entitled "Broken Trust" to expose the corruption of the Bishop Estate trustees. Among other things, the Trustees violated their duty of care and duty of loyalty. The lead trustee for asset management placed himself on the board of trust-controlled companies and gave himself a hefty director's fee; ignored the *cy pres* doctrine and function of the trust as a land conservancy, although the trust is silent as to protecting the environment; enacted a "lead trustee" system in which each trustee was assigned to a different aspect of the trust's activities and, instead of acting cooperatively, each trustee made decisions independently; one Trustee stopped attending the mandatory trustee meetings; failed to follow the provision allowing sale of property for maintenance of the Schools, as well as *adding* tens of thousands of acres of additional land; trustees personally involved the Bishop Estate in

fundraising for political campaigns; provided insufficient yearly accountings; and overall treated the Bishop Estate as their own personal investment fund.[lvii]

Following the start of the Bishop Estate controversy, an individual whose wife was an in-house counsel for the trustees during the years of abuse was appointed the new attorney general and refused to recuse himself from such matters.[lviii]

The trustees called for disqualification of Hawaii's Attorney General, arguing the Attorney General had a conflict of interest –her duty as protector of the public (and thus of charities) conflicted with her tax-collecting duties as in-house counsel for the State's Department of taxation.[lix] Ultimately, the court never fully resolved this issue, as it became moot with the settlement agreement and resignation of the current trustees.

Even in a case of trust abuse as extreme as this, where the breach implicated a portion of the state's judiciary and the funds from the kingdom's *own princess's trust*, the state Attorney General did not notice and address such breach until it was far too late.

IV. MANDATORY PRIVATE TRUST ENFORCERS/PROTECTORS AS THE FUTURE OF CHARITABLE TRUST ENFORCEMENT

As discussed previously, the Attorney General has a lot of charitable trusts to monitor, as well as a plethora of other duties to the citizens of their state. Monitoring every report from every charitable trust may not be their first priority. The solution is not to eliminate the standing of Attorneys General, as they should have standing as the protector of the citizens of their state, but to create standing in another party by introducing a new mandatory participant in charitable trust administration. Every trust for a charitable purpose, whether testamentary or inter vivos, should have a designated trust enforcer or trust protector (these terms are used interchangeably

throughout the paper but indicate the same concept). A trust enforcer is a private, typically disinterested party with standing to monitory charitable trusts.

The idea of appointing a trust enforcer is not new. Under the Uniform Trust Code[lx] (also referred to as the "UTC") and the Uniform Directed Trust Act[lxi] (referred to as the "UDTA") settlors may name a trust protector who has authority to monitor a charitable trust. The Uniform Acts make this a permissive rule, rather than a mandatory rule; in other words, settlors *may* name a trust protector, but if the settlor fails to, the court *will not* step in and name one themselves. My proposal would *require* the court to appoint a trust protector, if the settlor fails to do so.

The idea of a mandatory trust protector is likewise precedented under modern trust law by the Uniform Trust Code sections 408 and 409, covering trusts for pets and all other noncharitable purpose trusts, respectively. Under both sections, if no trust protector is appointed by the settlor, one is appointed by the court.

Section 408 of the Uniform Trust Code validates trusts created for the care of an animal by requiring appointment of a trust enforcer.[lxii] The section allows such a trust for an animal to be "enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court."[lxiii] Because animals are not parties with the ability to sue for enforcement, this provision requires trusts to appoint such a party with standing to enforce.

Section 409 of the Uniform Trust Code validates noncharitable purpose trusts that have no definite or definitely ascertainable beneficiary by requiring appointment of a trust enforcer.[lxiv] Section 409 allows a noncharitable trust without ascertainable beneficiaries to be "authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court."[lxv]

Sections 408 and 409 allow a noncharitable purpose trust be enforced, even when the beneficiaries are not necessarily the party who enforces the trust.

All states, additionally, have allowed appointment of a trust enforcer for a non-charitable purpose trust. In fact, non-charitable purpose trusts must have a settlor-appointed or court-appointed trust enforcer, otherwise the trust is not enforceable. The Trust Modernization and Competitiveness Act (also referred to as "TMCA"), enacted in New Hampshire in 2006 gives a trust protector standing to enforce a non-charitable purpose trust without ascertainable beneficiary.[lxvi] The TMCA defines "trust protector" as:

> any disinterested party whose appointment is provided for by the terms of the trust … but excludes any person who does not have the authority to direct or consent to a fiduciary's actual or proposed investment decision, distribution decision, or any other noninvestment decision or who does not have any of the powers identified in section 564-B:7-711(b).[lxvii]

The TMCA further provides that should the office of the trust protector be vacant, "the trustee shall petition the court to fill the vacancy if the trustee determines that the terms of the trust require the vacancy to be filled."[lxviii]

This problem of unenforceability may also arise in the context of private trusts – if the trust is for a living beneficiary, then such living beneficiary can monitor the trust on their own, but if the beneficiary is not born yet, is too young, or is unsophisticated, they are unable to monitor the trust effectively. Under such circumstances, courts routinely appoint a guardian ad litem who serves as trust enforcer and to whom the trustee must account.

Utilizing a mandatory trust enforcer would alleviate the agency costs of the current system of charitable trusts. A trust enforcer will be more attentive and can provide individualized surveillance over the trustee, thus disincentivizing the trustee from mismanaging the corpus. A trust enforcer guards the trust more intimately, such that if the trustee were to deviate from the

trust terms, the enforcer can step in immediately to guide the trustee, without even having to involve the judiciary at that point – actions the Attorney General would not normally take. In the event of a breach of trust, a trust enforcer observes closely enough to know when a breach occurs and can bring suit before too much damage is done, whereas the Attorney General likely will not know until the end of the year, when any annual reports are due, if the Office even catches such breach.

The proposed inclusion of a mandatory trust enforcer should be imposed proactively, not retroactively. Requiring every charitable trust in existence to amend the document to include a trust enforcer or, if the settlor is dead, to go into court and ask the court to appoint a trust enforcer would be an administrative nightmare. The goal of this proposal is to alleviate the administrative burden placed on the shoulders of the Attorney General. Clogging the probate courts with petitions to appoint a trust enforcer is contrary to such goal.

A. ROLES AND DUTIES OF THE TRUST PROTECTOR

What are the roles and duties of the trust protector? The answer is – it depends on the authority. Such defined roles and duties of a trust protector depend on the authority granted within the state's authorizing statute. If the statute provides a general grant of authority, the roles and duties depend upon the text of the trust document. Generally, a trust protector will only have limited powers – the trust protector is not intended to supplant the settlor or the trustee but is intended to serve a limited purpose. New Hampshire's statute on point, the Trust Modernization and Competitiveness Act[lxix] authorizes the trust protector with power either under the terms of the trust, an agreement of the beneficiaries, or a court order to act with respect to the trust, to act in the following ways:[lxx] modify or amend the trust for favorable tax status, take advantage of changes to the rule against perpetuities,[lxxi] appoint successor trust protector, review and approve

trustee's trust reports, remove or replace a trust protector, remove a trustee, co-trustee, or successor trustee, increase or decrease an interest of a beneficiary,[lxxii] perform a duty normally required of a trustee, advise the trustee concerning any beneficiary, consent to a trustee's action related to asset investment, and direct trust investment.[lxxiii] Among other powers, the UDTA further allows a trust to grant power to a trust enforcer to make loans, vote for securities held in trust, adjust between principal and income to a unitrust, change the principal place of administration, situs, or governing law, determine capacity of a trustee, settlor, director, or beneficiary, determine compensation to a trustee or trust director, prosecute, defend, or join a claim relating to the trust, and release a trustee from liability.[lxxiv]

The goal of statutes requiring trust enforcers is that, over time, estate planning attorneys will alter their standard charitable trust language to include trust enforcer provisions and appointment of trust enforcers by settlors will become routine. Even in the event that a settlor does not appoint a trust enforcer, the boilerplate trust enforcer provisions within the charitable trust will guide the court-appointed trust enforcer moving forward. Given its novelty, the mandatory trust enforcer rule will likely confer more limited powers at first, only to have the position evolve as the courts and estate planners experience the effects of the new policy.

The fundamental basis for requiring trust enforcers is to grant standing to a party other than the state Attorney General to sue charitable trustees for breach of trust. This proposed change at a minimum requires conferring the authority to bring suit to enforce the terms of the trust or remove the trustee for mismanagement of the corpus.

B. SOME PREDICTED ISSUES

One noted problem with appointing a trust protector is deciding who exactly should serve in the role.[lxxv] Theoretically, the settlor has already appointed the most reliable person in their life as the trustee, so how does the settlor decide who is even more ethical as to monitor the actions of the trustee in their capacity as trustee of the trust? If trust protectors become mandatory, professional trust protectors would arise as the analogue to the professional trustee, which could serve to alleviate the dilemma of deciding whom a settlor should appoint as trust protector.

In lieu of appointment by the settlor, courts could appoint a trust enforcer from a pool of professionals maintained within the state. Such professionals would include attorneys with a reputational incentive to perform their duties diligently. To avoid overburdening individual trust enforcers, each one should be limited in the number of trusts under his or her supervision at any one time. When selecting from the eligible pool, courts should filter out related parties (either through blood, marriage, business associations, or personal interest) as well as those who have a financial interest in the selected charitable purpose that is the object of the trust. The trustee will be obligated to account to the trust enforcer and the trust enforcer, either on their own, or in conjunction with an accountant, will monitor the trust more actively and effectively than the Attorney General.

C. DESPITE OTHER ALTERNATIVES, TRUST PROTECTOR IS THE BEST OPTION

Requiring mandatory trust enforcers for all charitable trusts is the best way to promote the proper enforcement of charitable trusts. Because the trustee is often the party responsible for the mismanagement of funds and distribution, reliance only on the trustee to carry out the trust is misguided. The Attorney General, additionally, should not be the party upon whose shoulders the future of a charitable trust rests – due to the immense number of charitable trusts in each state and the Attorney General's penchant to prioritize the trusts with substantial assets, the more modest trusts are likely to be ignored. This section explores a few alternative solutions proposed by scholars and used internationally but which would ultimately not resolve the dilemma of underreporting and inattentiveness caused by the current system of enforcement.

Charity Commission

The first option is a public Charity Commission to oversee all charities, which exists in Great Britain.[lxxvi] The Charity Commission registers and regulates charities in England and Wales, which involves taking enforcement action when there is malpractice or misconduct, ensuring charities meet their legal requirements, ensuring information about registered charities is publicly available, and providing guidance to help charities run effectively.[lxxvii] Most notably, where there is abuse or non-compliance by charities, the Commission *may* require trustees take corrective action.[lxxviii] Reports about the Commission's inquiries into misconduct are published online and are publicly available. Once misconduct has been determined, the Commission *may* suspend the trustee, freeze the charity's bank account, restrict the charity's transactions, etc. and may even impose an interim manager.[lxxix]

However, the Commission monitors "where there are concerns relating to *serious* non-compliance, … where it is believed that there is a *significant* risk of *serious* non-compliance, carried out in a proportionate way and targeted where intervention is *most needed*"[lxxx] (*emphasis added*).

Creating a state Charity Commission raises the same issues as the Attorney General standing scheme – both enforcement policies are administratively burdensome, have high agency costs (as they both are government agencies monitoring private citizens), and have the same under-inclusive effect. In states which have tens of thousands of registered charities, as there are in California and Texas**,** the Commission will be spread too thinly and continue to provide insufficient observation.

While only monitoring for the severe cases of misconduct does indeed isolate severe misconduct, it allows minor misconduct to continue undetected. Although the Charity Commission provides services slightly more specialized to charitable policing than the Attorney General, it is not the ideal option.

Charities and Not-for-Profits Commission

Another international alternative has been adopted in Australia through the "Australian Charities and Not-for-profits Commission Act 2012 ("ACNC Act"). The ACNC Act requires charities to register with the Commission, keep adequate records, and submit annual financial reports.[lxxxi] The ACNC Commissioner has regulatory powers, allowing the individual to obtain, inspect, and retain information and documents from charities, issue formal warnings to charities, give directions to heads to charities, and, if such warnings and directions are ignored, may file an injunction or even suspend or remove the heads of responsible entities.[lxxxii] Scholars have noted the regime has weaknesses, such as limited enforcement powers against individuals, limited

enforcement powers against registered charities that are not federally regulated entities, and no enforcement powers against charities that have been deregistered.[lxxxiii]

Similar to the Great Britain Charity Commission, the ACNC Act faces similar difficulties with workload that would be hard to remedy, and the continuous issue of underenforcement and overspreading of government agencies remains unsolved by the ACNC.

Expand "Person with A Special Interest"

Another alternative would be to expand the definition of "person with a special interest" within the meaning of the statute that confers standing to enforce charitable trusts. As the law stands, a "person with a special interest" is a small category that does not generally provide aid to those who desire to enforce a charitable trust. As charitable trusts typically cover a broad range of issues and do not have specific named beneficiaries, a "person with a special interest" is rarely the route taken in enforcing charitable trusts. This alternative solution would broaden the definition such that *more* people would be entitled to sue for enforcement of charitable trusts that more remotely affect them. Instead of the category remaining "exclusive," it would encapsulate more remote enforcers who still desire to see the trust administered to its full effect in the determination of its terms.

However, this is not a perfect solution, as complainants would still have to plead and prove that they qualify as a person with special interest – whereas with enumerated trust enforcers, the question of whether this person qualifies is already answered. Additionally, broadening the definition of "person with a special interest" runs the risk of overextending the class of people with standing, which could lead to an influx of frivolous suits.

V. CONCLUSION

Trusts for charitable purposes are a fundamental part of estate planning – they provide relief from taxes and instill a sense of virtue in the settlor. If a trust is established for one of several "charitable purposes,"[lxxxiv] courts allow the trust to continue in perpetuity and to be modified such that the purpose remains charitable by the doctrine of *cy pres.* Charitable purpose trusts follow different standards from non-charitable purpose trusts, but they are still susceptible to trustee misconduct and trust mismanagement. The current statutory scheme requires the state Attorney General to sue for enforcement of the trust. Although having the Attorney General bringing suit on behalf of a charity sounds noble, it requires the Attorney General to monitor such trust closely enough to even *catch* the mismanagement. The Attorney General has many duties and limited time to monitor *every single* trust, so the majority of the suits brought are to enforce trusts with abundant assets or gross mismanagement.

This paper set out to establish that, in order to combat every instance of trustee indiscretion, the statute conferring standing upon the Attorney General should be amended to confer standing upon a trust enforcer. Further, the statute should require every charitable trust to select a trust enforcer, and if one is not selected, then the court should appoint one. Requiring every charitable trust to have a trust protector allows for close, intimate inspection that mark the trustee's actions and whether the trustee is following the trust document. Although trust enforcers will not be perfect, this statutory proposal provides a tenable solution to the problem of the vast agency costs and superficial inspection that mark the current system of charitable trust enforcement.

[i] ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 759 (10th ed. 2017).
[ii] 26 U.S.C. § 170(c).
[iii] 26 U.S.C. § 4947(a)(1).
[iv] SITKOFF & DUKEMINIER, *supra* note 1, at 765.
[v] 26 U.S.C. § 170(c).
[vi] RESTATEMENT (SECOND) OF TRUSTS § 365 cmt. a (2012).
[vii] *Id*.
[viii] The term "*cy pres*" comes from the phrase "*cy pres comme possible*", which translates to as nearly as possible.
[ix] RESTATEMENT (THIRD) OF TRUSTS § 67 (2012).
[x] *Id*.
[xi] *See infra* Part II.
[xii] *See infra* Part III.
[xiii] *See infra* Part IV.
[xiv] RESTATEMENT (SECOND) OF TRUSTS § 391 (2012).
[xv] *Id*., cmt. a (2012).
[xvi] *Id*., cmt. d (2012).
[xvii] *Id*.
[xviii]*Id*., cmt. c (2012).
[xix] *Id*., cmt. b (2012).
[xx] *Id*., cmt. c (2012).
[xxi] *Robert Schalkenback Foundation v. Lincoln Foundation, Inc*., 91 P.3d 1019, 1025 (Ct. App. 2004).
[xxii] Examples of such classes include the following: female, indigent, aged widows who are in good health and residents of a city where the trust was established for their specific care. *Hooker v. Edes Home,* 579 A.2d 608, 615 (D.C.App. 1990). Employees of a founder's corporation and their families. *Alco Gavure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 756 (N.Y.App. 1985). Residents of a township. *Township of Cinnaminson v. First Camden Nat'l Bank and Trust, Co.,* 238 A.2d 701, 707-708 (N.J. 1968).
[xxiii] *Robert Schalkenback Foundation*, 91 P.3d at 1025.
[xxiv] Mary Grace Blasko, Curt S. Crossley, David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F.L.Rev. 37, 41-47 (Fall 1993).
[xxv] *Id*. at 61-82.
[xxvi] https://www.oag.ca.gov/system/files/media/ct1-form.pdf.
[xxvii] Cal. Prob Code § 16061.7.
[xxviii] Cal. Prob. Code § 16061.7(b)(3).
[xxix] 49 California Forms of Pleading and Practice—Annotated: Attorney General's Supervision of Charitable Trusts § 563.16 (2022).
[xxx] 49 California Forms of Pleading and Practice—Annotated: Attorney General's Supervision of Charitable Trusts § 563.16 (2022).
[xxxi] *Parens patriae* stands for the idea that the government can act as a legal protector of its citizens.
[xxxii] *Estate of Zahn*, 16 Cal. App. 3d 106, 114 (1971).
[xxxiii] *Estate of Horton*, 11 Cal. App. 3d 680, 685 (1970).
[xxxiv] Cal. Gov't Code § 17210.

[xxxv] Cal. Gov't Code § 12598 (a).
[xxxvi] Cal. Gov't Code § 12591.
[xxxvii] Cal. Prob. Code § 17203.
[xxxviii] https://oag.ca.gov/office.
[xxxix] *Id.*
[xl] *Id.*
[xli] https://oag.ca.gov/charities.
[xlii] https://www.oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf., Chapter One, p 1.
[xliii] http://www.charitiesnys.com.
[xliv] http://www.texasattorneygeneral.gov/divisions/financial-litigation/charitable-trusts.
[xlv] *Id.*
[xlvi] https://charity.ehawaii.gov/charity/welcome.html.
[xlvii] The Getty Museum: Old masters, old problems, THE ECONOMIST, November 19, 2005.
[xlviii] *Id.*
[xlix] *Id.*
[l] Edward Wyatt and Randy Kennedy, California Attorney General Appoints Overseer of Reforms at J. Paul Getty Trust, NEW YORK TIMES, October 3, 2006.
[li] *Id.*
[lii] A position which functions in the same was a trust enforcer does – watching over the actions of the trust's management with frequent accountings to the "overseer".
[liii] *Id.*
[liv] Randall W. Roth, 44 Univ of Miami Law Center on Est Planning § 1604 (2021).
[lv] Peter Walman, *Suspension of 4 Bishop Estate Trustees Clears Way for Negotiations with IRS*, THE WALL STREET JOURNAL, May 10, 1999.
[lvi] Roth, *supra* note 52.
[lvii] *Id.*
[lviii] *Id.*
[lix] *Id.*
[lx] As of May 13, 2022, the Uniform Trust Code is enacted in 36 states, Hawaii, Connecticut, Illinois, Colorado, New Jersey, Minnesota, Kentucky, Maryland, Mississippi, Wisconsin, Montana, Massachusetts, West Virginia, Michigan, Vermont, Arizona, North Dakota, Alabama, Florida, Ohio, Pennsylvania, Arkansas, North Carolina, Oregon, South Carolina, Virginia, District of Columbia, Maine, Missouri, New Hampshire, Tennessee, Utah, Nebraska, New Mexico, Wyoming, Kansas, and has been introduced in one state, New York. https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d.
[lxi] As of May 13, 2022, the Uniform Directed Trust Act is enacted in sixteen states, Kansas, Florida, Montana, Virginia, Washington, West Virginia, Arkansas, Colorado, Connecticut, Indiana, Maine, Michigan, Nebraska, Utah, Georgia, New Mexico, and has been introduced in two New York and Rhode Island. https://www.uniformlaws.org/committees/community-home?CommunityKey=ca4d8a5a-55d7-4c43-b494-5f8858885dd8.
[lxii] UNIF. TRUST CODE § 408 (b) (2017).
[lxiii] *Id.*
[lxiv] UNIF. TRUST CODE § 409 (b) (2017).
[lxv] *Id.*

[lxvi] N.H. REV. STAT. ANN. § 564-B:4-409(2).
[lxvii] N.H. REV. STAT. ANN. § 564-B:7-711(b) provides: "A directed trust is trust in which, under the terms of the trust, one or more persons have the power to direct an action by a trustee, trust advisor, or trust protector or the power to veto or consent to any actual or proposed action by a trustee, trust advisor, or trust protector. The action may relate to the investment of trust assets, distributions, or any other aspects of the trust's administration."
[lxviii] N.H. REV. STAT. ANN. § 564-B:7-712(b).
[lxix] The TMCA was enacted in 2006 and gives the trust protector standing to enforce a non-charitable purpose trust without an ascertainable beneficiary. N.H. REV. STAT. ANN. § 564-B:4-409(2).
[lxx] As noted by the statute, this list is "including, without limitation", meaning the powers are not limited to this enumerated list.
[lxxi] This power is unnecessary for purposes of enforcement of charitable trusts, as charitable trusts are not subject to any form of the rule against perpetuities, as non-charitable purpose trusts are, which is the object of the paraphrased statute.
[lxxii] This power may not be used to grant a beneficial interest in a charitable trust with only charitable beneficiaries to any non-charitable interest or purpose or to any trust protector. N.H. REV. STAT. ANN. § 564-B:12-1201(a)(9).
[lxxiii] N.H. REV. STAT. ANN. § 564-B:12-1201.
[lxxiv] UNIF. DIRECTED TRUST ACT § 6, Cmt. 2. (2017).
[lxxv] CX007 ALI-ABA 719, Estate Planning Current Developments and Hot Topics (2015).
[lxxvi] https://www.gov.uk/government/organisations/charity-commission.
[lxxvii] https://www.gov.uk/government/organisations/charity-commission/about#responsibilities.
[lxxviii] https://www.gov.uk/government/publications/where-the-charity-commission-takes-enforcement-action.
[lxxix] https://www.gov.uk/government/publications/where-the-charity-commission-takes-enforcement-action/where-the-charity-commission-takes-enforcement-action.
[lxxx] https://www.gov.uk/government/publications/where-the-charity-commission-monitors-charities.
[lxxxi] The Australian Charities and Not-for-profits Commission Act, 2012.
[lxxxii] *Id*.
[lxxxiii] Rosemary Teele Langford & Miranda Webster, *Misuse of Power in the Australian Charities Sector*, UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL VOL. 45 NO. 1, 70, 74 (April 21, 2022).
[lxxxiv] Such as: religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals. 26 U.S.C.S § 170(c).