Charities and the Orphans' Court

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Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol46/iss4/3
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I. INTRODUCTION — THE BEST LAID PLANS

In 1909, Milton Hershey created a charitable trust to build and operate a school for orphans. To the trust, he gave the stock and, therefore, the ownership of his candy company. By the late 20th century, the Milton Hershey School was one of the richest educational institutions in the world, surpassed in endowment in the United States by only a handful of major universities. In 2002, the trustees of the trust concluded that good business practice might call for a more diversified asset base than the stock of a single corporation and prepared to solicit offers for the purchase of a substantial portion, or possibly all, of such stock.

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In 1922, Dr. Albert Barnes established a charitable trust to maintain a school and gallery in Merion, Pennsylvania to teach his views about art and art appreciation and to exhibit the collection of paintings that he had acquired and had donated, and would continue to donate, to the trust. By the time of Dr. Barnes's death in 1951, the Barnes Foundation owned and displayed one of the world's finest collections of impressionist and post-impressionist paintings and other art. By the beginning of the 21st century, the trustees of the foundation determined that the finances of the Foundation and the vitality of its continuing operations called for an expansion of its Board and the move of its gallery to a new, larger, and more accessible facility in Philadelphia.

In 1975, a number of individuals in the Philadelphia health care community started a corporation that eventually became Philadelphia Health Care Trust to preserve a hospital facility scheduled to be separated from the University of Pennsylvania and shut down. By 1995, that organization operated a health care system that included seven hospitals and a health maintenance organization. By 1999, it had transferred the hospitals and the HMO and continued as one of the largest health care foundations in the area. Two years later, it reached an understanding for a process to conclude its business as a foundation and to transfer its assets to the health care system of the University of Pennsylvania.

Were these organizations business corporations or entities, their boards of directors or trustees would have reviewed and decided on the proposals for changes, sales, or transfers and implemented their decisions. Assuming that the decisions involved no self-dealing, bad faith, or similar breach of fiduciary duty, no further approval would have been required for that exercise of business judgment. The Hershey School, the Barnes Foundation, and Philadelphia Health Care Trust, however, are not business corporations, and their boards do not have that level of discretion. Instead, they are nonprofit charities and must function in the very different and very special world of controlling trusts, settlor's intent, charitable purposes, parens patriae, the Attorney General, and the Orphans' Court.

II. THE PLAYERS

A. Charities

In Pennsylvania, anyone can form a nonprofit corporation by filing Articles of Incorporation listing any variation of the purposes
authorized by section 5301 of the Pennsylvania Nonprofit Corporation law, and asserting that the corporation "is one which does not contemplate pecuniary gain or profit, incidental or otherwise." Almost everyone who does form a nonprofit corporation or trust or other organization wants the entity to qualify as a charity because in most cases only charities can claim exemption from federal income tax and state real estate and sales taxes. Unlike a nonprofit corporation, creating a charity exempt from taxes requires a good deal more than a simple declaration of purpose and intent.

Pennsylvania grants a tax exemption to nonprofit organizations only if they qualify as "purely public charities." The authority to exempt such entities first appeared in section 1 of article 9 of the Pennsylvania Constitution of 1873. The constitution authorized the General Assembly to "exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." The current state constitution contains a similar provision in article VIII, section 2(a)(v), which provides that the "General Assembly may by law exempt from taxation: . . . Institutions of purely public charity, but in the case of any real property tax exemptions only that portion of real property of such institution which is actually and regularly used for the purposes of the institution."

In its first decision applying a "purely public charity" tax exemption, the Pennsylvania Supreme Court held that the Library Company of Philadelphia (founded by Benjamin Franklin and others in 1731) constituted a purely public charity. The court established the modern definition of a "purely public charity" in *Hospital Utilization Project v. Commonwealth.* A little more than a decade after the decision in *Hospital Utilization Project*, the state legislature codified this definition in the Institutions of Purely Public Charity Act. To qualify as tax exempt in Pennsylvania, a nonprofit charity must advance a charitable purpose such as relief of poverty, advancement of education or religion, treatment of disease or the like; operate entirely free from private profit motive;

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1. 15 PA. CONS. STAT. ANN. § 5301 (West 1995).
2. Id. § 5306(4).
3. PA. CONST. of 1873, art. 9, § 1.
4. PA. CONST. art. VIII, § 2(a)(v).
7. 10 PA. CONS. STAT. ANN. § 375 (West 1997).
donate or provide without charge a substantial portion of its services; benefit a substantial and indefinite class of people who are legitimate subjects for charity; and relieve the government of its burden by providing services that the government would be required to provide or that are generally the responsibility of government.\(^8\)

For most nonprofit charities, exemption from federal income tax derives from § 501(c)(3) of the Internal Revenue Code and requires that the organization be established and operated for, and fulfill, an exempt purpose, such as charitable, educational, or religious functions; assure that none of its income inures to any individual; not engage in political activity; and not violate public policy.\(^9\) A federal tax exemption also involves distinguishing between public charities and private foundations, a significant body of statutory, regulatory, and case law, and Internal Revenue Service rulings and interpretations as to what the organizations can and cannot do under numerous variations of facts and circumstances.

At both the state and federal levels, the recognition of tax exempt status necessary for the right not to pay taxes and the deductibility of contributions involves a reasonably complex application process that must satisfy the Pennsylvania Department of Revenue or the Internal Revenue Service. While there are exceptions, establishing the recognition of a state or federal tax exemption is not often routine and can be difficult, expensive, and time consuming.

Although Pennsylvania statutes, rules, and court decisions refer to charities and charitable status for a number of purposes, such as jurisdiction, use of assets, diversion of resources, and solicitation of donations, none of these authorities define what makes a corporation, trust, or other organization a "charity" for any purpose other than exemption from taxes. As a result, organizations that seek qualification as a charity define their structure, purposes, and operations to meet the requirements of federal and state tax exemption and recognition standards.

Even when recognized as a charity by the taxing authorities, however, an organization must deal with a good deal more than tax rules. It must, among other things, fulfill its charitable mission, devote its assets only to its charitable purposes, and operate


under the continuing scrutiny of the Office of the Attorney General and the jurisdiction and control of the Orphans' Court.

B. Attorney General

As in most states, the Attorney General of Pennsylvania serves as parens patriae and has the authority and responsibility to protect, monitor, and enforce obligations to the state and its citizens.\textsuperscript{10} In that capacity, the Attorney General looks over the shoulder of all charities who serve the people of the Commonwealth and can question substantially anything that a charity does, particularly if it involves a transfer of assets, a change of purposes, or another fundamental transaction.\textsuperscript{11}

Pennsylvania law grants to the Attorney General standing to intervene and participate in all matters involving charities, charitable bequests and trusts, and cy pres actions.\textsuperscript{12} The Supreme Court Orphans' Court Rules require fifteen days advance notice to the Attorney General of "every proceeding in the Orphans' Court involving or affecting a charitable interest."\textsuperscript{13} As a result, if it chooses to do so, the Office of the Attorney General may participate as an observer or active party in any matter involving a charity that comes before the Orphans' Court.

In 1997, to try to support and possibly enhance its role in reviewing and participating in matters before the Orphans' Court involving charities engaged in health care, the Office of the Attorney General issued a publication entitled General Review Protocol for Fundamental Change Transactions Affecting Health Care Nonprofits. The protocol provides for ninety days advance notice to the Attorney General for information about proposed substantial transactions such as sales, mergers, or joint ventures. It also sets forth a process for review of the proposal, possible notice to the public, and response by the Attorney General to the notice. As the protocol itself provides, however, it is "to be used as a guide by attorneys and reviewers in the charitable trust & organization section, and its outside experts." It is not law or a regulation with the force of law. While the Attorney General can draw conclusions


\textsuperscript{13} \textit{Pa. Orphans' Ct. R. 5.5'
and act on the basis of the failure of a health care charity to comply with the protocol, it cannot compel compliance.

Contrary to some popular understanding, as well as the occasional implied position of the Office of the Attorney General, mergers, sales, transfers, and other fundamental transactions by charities do not require the advance approval of the Attorney General, and the Attorney General cannot stop such transactions without recourse to a court. The Attorney General's real authority and power in matters relating to charities derives from its standing to participate as a party in interest in all proceedings involving charities.

Any charity that ignores the Office of the Attorney General may find itself compelled to respond to and deal with the Attorney General's views or objections in any matter presented to the Orphans' Court. Not surprisingly, courts tend to take very seriously the position advanced by the Attorney General as the designated advocate for the state and its citizens.

C. The Orphans' Court

In Pennsylvania, the court having jurisdiction over substantially anything involving a charity is a division of the Court of Common Pleas, the state's primary trial level court, known as the "Orphans' Court." The court began during Pennsylvania's colonial era as an institution to protect orphaned children and their right to their deceased family's estate against claims and abuses by step-parents and others. As the modern court system developed, the court became a type of probate division of the state trial court, dealing with decedents' estates, trusts, and charities. Despite the changes, the colonial name stuck, and the division remains the "Orphans' Court."

All issues involving the business, affairs, and activities of charities that call for court review or approval and all challenges to the way charities conduct their business and spend money require proceedings before the Orphans' Court. The jurisdiction of the court covers everything from diversion of assets to deviation of purposes to cy pres. Because of the specialized nature of the

court's jurisdiction and the matters that it considers, proceedings before the Orphans' Court often tend to be less formal and more equitable than other actions and proceedings in civil courts. Even at its most informal and accommodating, however, the Orphans' Court remains a division of the Court of Common Pleas, and any charity that requires relief from the court must prove its case to the court under the scrutiny of the Attorney General.

The special nature of the standards governing charities and the practice before the Orphans' Court does, however, present at least one opportunity not usually available in other trial level courts. As discussed below, the standards governing the requirement for court approval for certain types of transactions, including particularly matters relating to diversion of assets, can be sufficiently vague in practical operation as to be difficult to apply to specific significant transactions. The generally equitable and relatively permissive nature of proceedings before the Orphans' Court has led to an increasingly common type of action in which a charity that does not consider itself bound to obtain court approval for a proposed undertaking, nonetheless, requests a decree in the nature of a declaratory judgment. The approval is unnecessary, but puts the Orphans' Court's "seal of approval" on the proposed transaction or action and protects it from subsequent challenge.

III. ORPHANS' COURT ISSUES FOR CHARITIES

A. Testators, Settlors, and Intent

A charitable trust derives from a trust instrument established by a settlor in his or her lifetime or by a will. Settlors describe what the trust will do and how it will do it in as much or as little detail as the settlor considers appropriate. The management and operation of the trust rests with one or more trustees, or a board or other group of trustees, as the settlor determines, with as much or as little discretion as the settlor desires to give. Trustees and boards of trustees are expected to follow the settlor's direction and intent, and the Orphans' Court is expected to make sure that they do so.

Strict adherence to a settlor's intent leads to difficulty for one principal reason—the world changes over time, both in general and specifically with respect to the issues and activities that concern the trust and the law that governs those issues and activities. When the world or circumstances change so much that implementing the settlor's directions and intent become impossible, illegal,
obviously unreasonable, or even extremely unwise, someone must do something. Since trustees and other private parties cannot change a trust or a settlor's directives on their own, whoever chooses to do something to respond must use the courts to implement change.

In some instances, such as older trusts that mandate unlawful segregation or discrimination, the issues seem obvious even if the solutions are less simple. In the *Girard* will cases, for example, 19th century Philadelphia merchant Stephen Girard directed by his will that his estate be used to establish a school for "poor male white orphan children."\(^{17}\) It took nearly fifteen years of litigation for the courts finally to establish that the racial restrictions under the will were unconstitutional and, therefore, unenforceable.\(^{18}\)

Most cases concerning a change from a settlor's plain or implied directives or intent present much more complex and difficult issues. For example, does "impossible" really mean physically impossible or is impracticable or even impractical enough? When does excessive cost rise to impossibility? Is it when there is no money to make a required payment or when the costs deplete resources beyond reasonable levels? What about directives that make no sense in the modern world, such as travel instructions given before the era of automobiles or air travel or directives on information transfer given before the world of e-mail? What happens when the settlor's apparent general intent for the operation of a trust conflicts with specific directives because of cost, changes in technology or law, or other factors?

In some instances, changing circumstances and the passage of time place the administrative requirements of a trust instrument or other governing document at odds with the document's basic purposes and the settlor's intent. For example, if a trust instrument provided that the principal executive or operating officer of the trust was to be a recognized expert in the appropriate field but limited the officer's compensation on the basis of standards in effect many decades earlier, it is necessary to have recourse through the courts to the "deviation doctrine" to vary from the compensation requirements in order to fulfill the basic intent of highly qualified principal officers.\(^{19}\) In the *Barnes* matter, discussed be-


\(^{19}\) See *RESTATEMENT (THIRD) OF TRUSTS* § 66(1) (2003); 20 PA. CONS. STAT. § 7740.3(c) (2006).
low, the court applied the deviation doctrine to permit a change in 
the administrative requirements of the composition of the Founda-
tion’s Board of Trustees and the location of its art gallery in order 
to prevent financial collapse and to fulfill Dr. Barnes’s intent and 
the Foundation’s principal purpose with respect to the display and 
use of the art collection.

On occasion, deviation is not enough and changing the adminis-
trative terms or requirements of a trust document will not make 
the impossible possible or permit the fulfillment of the settlor’s 
intent. For example, when the settler creates a charitable trust to 
support a nonprofit institution, such as a hospital, the trust pur-
poses become truly impossible if the hospital changes its owners-
ship or operations and converts to a for-profit business. The same 
result obtains when a trust was created to fund an institutional 
program that no longer exists or to fight a disease that has been 
cured. In such circumstances, the law provides for relief by re-
course to the Orphans’ Court for the implementation of the doc-
trine known as “cy pres,” a term derived from an old French 
phrase meaning “as close as possible.”

The cy pres doctrine, now codified in Pennsylvania law,20 per-
mits the court to approve a change in the terms of a trust to direct 
it to purposes that are as close as reasonably possible to the 
settlor’s original intent and that are possible to fulfill.21 In the 
above example of the hospital, the court could permit the trust to 
direct its funds and support to another nonprofit hospital in or 
around the same area or to a charitable foundation committed to 
helping the community served by the hospital.22

B. Nonprofit Corporations — Diversion of Property

Unlike charitable trusts, nonprofit corporations generally are 
not governed by a detailed fundamental instrument describing the 
specifics of the organization’s business and operations. In most 
cases, a charitable nonprofit corporation will include in its Articles 
of Incorporation a very brief summary of its purposes, which usu-
ally is as simple as a one or two sentence recitation of a purpose 
authorized by section 5301 of the Pennsylvania Nonprofit Corpo-

20. 20 PA. CONS. STAT. § 7740.3(a) (2006).
While there may be somewhat more detailed statements of the purpose in other documents, such as the Form 1023 application for recognition of a federal tax exemption, the governing statement of purpose for the corporation will remain the summary in its Articles of Incorporation. A nonprofit corporation must, of course, operate in accordance with its stated purpose, but the statement is usually so broad and general that conformance to it rarely presents significant problems. In most cases, the issue of a charitable nonprofit corporation changing direction or purposes falls under the simple directive of section 5547(b) of the Nonprofit Corporation law, which provides:

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. 61 (relating to estates) specifying the disposition of the property.\(^2\)

In some cases, the diversion of property covered by the law is evident and the mandate of section 5547(b) very clear, so that recourse to the courts is obviously necessary. For example, when a nonprofit community hospital sells its assets to a for-profit hospital system, the sale plainly diverts the assets sold from charitable purposes. In such a situation, the parties commonly try to deal with the issue of diversion by transferring assets or funds of a total value equal to those diverted to a charitable foundation established to serve the health care interests of the affected community. While there are alternatives, no one seriously doubts the requirement of Orphans’ Court approval of the arrangement.

Other situations can be considerably more difficult. Except for sales to for-profit businesses, nonprofit corporations rarely transfer assets under circumstances that plainly constitute diversion from charitable purposes. Hospitals do not usually sell significant assets to environmental groups and health planning organizations do not sell their businesses to churches. In most significant mergers or transfers between two nonprofit corporations, strict compliance with the precise language of section 5547(b) will not require recourse to the Orphans’ Court.

\(^23\) 15 PA. CONS. STAT. ANN. § 5301 (West 1995).
\(^24\) Id. § 5547(b).
In 1996, the nonprofit Graduate Health System, Inc. transferred by merger its hospitals to a nonprofit affiliate of the nonprofit and charitable Allegheny hospital system. Although a very substantial and fundamental transaction, the transfer by merger of hospitals from one nonprofit health care system to another, in the same community without any changes in operation or endowment or restricted funds, did not constitute a diversion of property from its charitable purposes and did not, under the specific language of section 5547(b), require approval of the Orphans’ Court.

As noted above, the Office of the Attorney General has issued its Review Protocol at least in part to provide for scrutiny of major transactions in the nonprofit health care sector that might escape court review because of the limited practical application of section 5547(b). Notice under the Protocol, if given, will provide the Attorney General with sufficient information to consider challenging a transaction that might not otherwise come before the court. As also noted, however, the Protocol is not law or regulation.

No matter how the Office of the Attorney General views its Protocols and procedures in matters of possible diversion, neither the Attorney General nor the court can change the law. If a transaction of any type does not divert the assets of a nonprofit corporation from the charitable purposes for which the assets were given, nothing authorizes the Attorney General or the court to prevent or change the transaction because the Attorney General does not think it appropriate or believes that another use of the assets might be preferable. Nothing in the Attorney General’s parens patriae status or powers gives the Attorney General the authority to substitute his judgment for that of the board or trustees of a nonprofit corporation acting in good faith. While common sense usually calls for openness and cooperation with the Attorney General in matters involving fundamental transactions by nonprofit corporations, nothing in the law requires common sense.

An increasingly common mechanism for nonprofit corporations to deal with very substantial or fundamental transactions that do not fall within the precise terms of section 5547(b) involves the “seal of approval” proceeding. If a nonprofit corporation proposes a significant arrangement that is not a true diversion of property, it can satisfy the Attorney General and protect against subsequent challenges by a petition to the Orphans’ Court for a declaratory judgment determining that the proposal, in fact, does not improperly divert property. The Attorney General and the courts have not challenged the propriety of this type of action and generally welcome the opportunity for advance scrutiny and evaluation. In
1999, for example, Philadelphia Health Care Trust (PHCT) changed its Articles of Incorporation in order to convert to a private foundation for purposes of federal taxes. Although the change probably did not involve a diversion of assets covered by section 5547(b), the issues and controversy surrounding the Allegheny bankruptcy and PHCT’s former subsidiary hospitals of the Graduate Hospital group made a cautious approach appropriate. Thus, PHCT requested, and obtained after a hearing, a decree confirming the propriety of its action and, as a practical matter, insulating the action from further challenge or dispute, including challenges by the Attorney General.

C. Standing — Who Asked You?

No issue relating to charities has attracted the attention of the courts as much as the question of who has standing to challenge before a court the operations, management, and other activities of a charity. Charities control and give out a great deal of money. Not surprisingly, many individuals, groups, and organizations want some of that money and even consider themselves entitled to it. When they do not receive it, they sometimes try to use the Orphans’ Court to claim a right to it.

Charities do not owe a duty to individual members of the general public or to other groups or organizations as to how the charities use their assets and spend their money, and well-established standing rules significantly limit who can participate as parties in cases involving charities. In general, standing to challenge a charity before the Orphans’ Court resides only with stated beneficiaries of the charity, members of the charity’s duly constituted board of directors or trustees or other governing body, the Attorney General, and parties with a genuine “special interest” that materially exceeds the interest of the public.25

Because only a very small group qualifies as direct beneficiaries or trustees of a charity and there is only one Attorney General, almost all standing disputes that reach the courts involve claims of a special interest. The courts’ definitions of a special interest for standing tended to the conceptual and, in 1994, the Pennsylvania Supreme Court declared the following:

[T]he interest must have substance — there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. That an interest be direct requires that an aggrieved party must show causation of the harm to his interest by the matter of which he complains. To find an immediate interest, we examine the nature of the causal connection between the action complained of and the injury to the person challenging it.26

The most instructive cases on the meaning of the concept may be those in which the courts denied standing, usually on the basis that an interest shared with a portion of the public does not qualify as "special." On those grounds, the courts have found that parties with an interest in a charity that may appear substantial do not have enough of a special interest for standing, so that the Society for the Advancement of the Deaf had no special interest in a charitable trust established to benefit organizations that aid the blind and deaf,27 and the Milton Hershey School Alumni Association did not have a special interest in the Milton Hershey School.28

The Valley Forge Historical Society case probably provides the best example of a special interest sufficient to confer standing. In Valley Forge, a single settlor created both the Washington Memorial Chapel and the Valley Forge Historical Society for substantially the same purpose. The two organizations occupied the same building for sixty years, and the Society made significant contributions to the Chapel.29 In the litigation that lead to the supreme court decision, the trustees of the Chapel decided to evict the Society from the Chapel building that both occupied.30 The Society sued to prevent the eviction, and the Chapel asserted that the Society lacked standing to challenge the action. The court, noting the history and relationship of the organizations, found that the Society had a special and immediate interest that would be directly affected by the proposed action of the Chapel that was materially different from the interests of any segment of the general

28. Milton Hershey Sch., 911 A.2d at 1263.
29. Valley Forge, 426 A.2d at 1125.
30. Id.
public, and it concluded that the interest was sufficient to confer standing.\textsuperscript{31}

When an attempt to intervene as a party on the basis of a special interest fails, as it usually does, the next and most likely final resort involves a request to proceed in a case as \textit{amicus curiae}. In Pennsylvania, as in many states, \textit{amicus curiae} is a difficult and not easily-definable status. In the appellate courts of Pennsylvania, anyone can file a brief \textit{amicus curiae} without leave of court, although court approval is necessary to participate in oral argument.\textsuperscript{32} Before the Court of Common Pleas and the Orphans' Court division, the grant of \textit{amicus} status rests entirely within the discretion of the court, as does the role of \textit{amicus} when the status is approved.\textsuperscript{33} For example, in the \textit{Barnes} and in one of the \textit{Hershey} cases,\textsuperscript{34} Barnes students and Hershey alumni were given \textit{amicus} status after the denial of intervention as a party, while in the PHCT proceedings, community groups denied intervention were also denied \textit{amicus} status.\textsuperscript{35}

An \textit{amicus curiae} is not a party and, therefore, is not entitled to assert claims, request relief, or raise new issues.\textsuperscript{36} Once in a case, however, the role of \textit{amicus} can easily expand, so that the grant of \textit{amicus} status can involve a good deal more than the right to file a brief. In the \textit{Barnes} case, the three individuals granted \textit{amicus} status were ultimately given the authority to participate substantially as parties, with the right to review discovery, call witnesses and produce testimony, cross examine witnesses, and object to the introduction of evidence.

\textbf{IV. THE DEVELOPING LAW}

\textbf{A. The Barnes Decision}

When Dr. Barnes established his art collection at his property in Merion, Pennsylvania, he also set out detailed instructions for operation of the Foundation, its gallery, and its educational pro-

\textsuperscript{31} Id. at 1127-28.
\textsuperscript{32} PA. R. APP. P. 531.
\textsuperscript{33} Accord Wortham v. KarstadtQuelle AG (\textit{In re Nazi Era Cases Against German Defendants Litig.}), 153 F. App'x 819, 827 (3d Cir. 2005) (stating that a trial court's decision to accept or reject an amicus filing is entirely within the court's discretion); Waste Mgmt., Inc. v. City of York, 162 F.R.D. 34, 36 (M.D. Pa. 1995).
\textsuperscript{34} See \textit{In re Milton Hershey Sch.}, 867 A.2d 674, 679 (Pa. Commw. Ct. 2005).
grams, down to a listing of job positions and salaries. He provided for a five member board of trustees to govern the Foundation after his and his wife's deaths, with one board member being nominated by a bank and four by an educational institution. Shortly before his death, Dr. Barnes designated Lincoln University, a historically black institution located in a rural community outside of Philadelphia, as the nominating body for the four non-bank trustees.

By the late 1990's, a succession of lawsuits in state and federal court over disputes with the Foundation's Merion neighbors and zoning disputes involving visitation levels, traffic congestion, and parking at the Foundation's gallery had depleted the Foundation's small endowment (worth about $10 million at Dr. Barnes's death in 1951). The restrictions on visitation placed on the Foundation by local authorities also limited the Foundation's ability to raise funds for its endowment and to expand its educational or art appreciation offerings.

In 2002, facing imminent financial collapse, the Foundation determined that the best possible means for reversing decline and ensuring long term success in fulfilling Dr. Barnes's mission was to deviate from some of the terms of the Foundation's governing documents. In addition to modernizing many outdated provisions in its bylaws, it looked to three major changes to its trust documents: (1) relocating its gallery from Merion to center city Philadelphia; (2) expanding its Board from five to fifteen members, with the new members being nominated by the Board itself and not an outside institution; and (3) enhancing public access to the Foundation's gallery. The Foundation filed a petition in the Orphans' Court to invoke the "deviation doctrine," to authorize the changes.

The Petition generated considerable publicity and interest and, not surprisingly, a number of individuals and groups claiming an interest sought to intervene in the proceedings. Three Barnes Foundation students claimed that the changes would damage Dr. Barnes's educational vision; a separate charitable institution, the de Mazia Trust, which had been formed following the death of Dr. Barnes's protégé Violette de Mazia, sought to join; and Lincoln University, which believed itself entitled to nominate eighty percent of the trustees to the Foundation's Board, also asked to participate.

A few months after the petitions to intervene were filed, the Orphans' Court issued an opinion and decree denying all of the requests to intervene except for Lincoln's (which the Foundation had
Shortly before the first hearing on the Foundation's petition in late 2003, the Foundation and Lincoln resolved their disagreements, and Lincoln withdrew from the case. At that point, another group of three students (which included one of the students originally denied intervention) again asked to intervene, as did the de Mazia Trust. The court again denied the requests to intervene, reiterating that neither party had standing. The court did, however, permit the three students to participate in the matter as *amicus curiae*. As discussed, the *amici*'s role expanded dramatically throughout the case, to the point where they effectively became a party and actively participated in the two hearings on the Foundation's petition. In December 2004, following the second hearing, the Orphans' Court issued a decree and extensive opinion, granting the Foundation all of the relief it sought.  

In January 2005, one of the three students originally denied intervention (but not one of the *amici*) sought to appeal from the court's final judgment. The Foundation, concerned that a delay in obtaining final resolution of its requested changes would seriously impact its ability to begin its financial turnaround, filed an extraordinary King's Bench Petition with the Supreme Court of Pennsylvania. The Foundation asked the court to take jurisdiction over the appeal (which was then pending in the Superior Court) and summarily affirm the Orphans' Court's decree or dismiss the appeal as untimely. In April 2005, the Supreme Court granted the Foundation's petition and, in a unanimous opinion, held that the appeal was untimely, as the student had waited almost two years after his petition for intervention had been denied before seeking to appeal that ruling.

### B. The Hershey Cases

Soon after he founded the Milton Hershey School, Milton Hershey directed the formation of a school alumni organization, known as "the Milton Hershey School Alumni Association" for the purpose of promoting the interests of the School. Since its incep-

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tion, the Association’s membership has consisted only of former students of the School, and it has operated from offices on School property owned by the Trust. The Association is not, however, formally affiliated with either the Hershey School or Hershey Trust and it is not mentioned in any governing trust documents.

Although the Alumni Association enjoyed a good relationship with the School over the years, the Association, at times, believed that the trust was not managing its assets in the best interests of the School. For example, in the 1990s, the Association, participating in court proceedings as an amicus curiae, successfully opposed the Trust’s plans to create the Catherine Hershey Institute of Learning and Development.40 Around the same time, the Association prodded the Attorney General to investigate allegations that the Trust was diverting its assets from its primary purpose of funding and operating the School. After a lengthy investigation, the Attorney General concluded that the allegations were well-founded and, following negotiations, the Attorney General, the Trust, and the School entered into a consent decree governing the Trust’s activities going forward. The Association did not have a formal role in the negotiations and was not a party to the eventual agreement.

In 2002, the Trustees caused considerable controversy with a proposal to sell the Trust’s controlling interest in Hershey Foods Corporation (successor to Hershey Chocolate Company). Finding that the sale would likely not be in the best interests of the Trust or the School, the Orphans’ Court issued and the Commonwealth Court affirmed a preliminary injunction against proceeding toward a sale, and the trustees did not pursue the matter further. The sale proposal and court decisions led to changes in the governing boards of the trust and the School and to an agreement with the Attorney General to modify the consent decree.41 The Association, believing that the modified decree failed to provide the necessary protections guaranteeing fulfillment of the trust’s central purpose, filed a petition in the Orphans’ Court for Dauphin County seeking rescission of the new agreement, reinstatement of the prior agreement, and appointment of a guardian ad litem and a trustee ad litem.42 The trial court granted the trust’s and School’s preliminary objections contending that the Association

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40. See Hershey Sch., 867 A.2d at 679.
42. See In re Milton Hershey Sch., 911 A.2d 1258, 1260 (Pa. 2006).
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did not have standing to bring the action, but, in a 4-3 decision, the Commonwealth Court sitting en banc reversed, holding that the Association had the necessary "special interest" to bring its action.\(^{43}\)

In a unanimous decision (with two justices not participating), the Pennsylvania Supreme Court reversed. The court began its analysis with the principle that "[p]rivate parties generally lack standing to enforce charitable trusts."\(^{44}\) Citing, among other things, the Valley Forge case and a 1953 decision involving the Barnes Foundation,\(^{45}\) the court noted that only the Attorney General, "a member of the charitable organization, or someone having a special interest in the trust" could bring an action to enforce a charitable trust.\(^{46}\) The court then analyzed the question whether the Association had the requisite "special interest" to confer standing on it.

The court compared the facts in the Hershey case unfavorably to those in the Francis Edward McGillick Foundation and Valley Forge cases. Distinguishing McGillick, in which the court had held that the Catholic Diocese of Pittsburgh had standing to sue a Foundation with which the diocese had "integral involvement," the court noted that the Association in Hershey did not have "any decision-making power or administration over" the trust.\(^{47}\) The court also rejected the Association's attempt to compare itself to the Society in Valley Forge, which had standing because of its enduring and close relationship to the charitable institution at issue there. According to the supreme court, the Association's relationship to the trust was distinguishable from the Society's relationship to the Chapel in Valley Forge because the Association was created twenty years after the trust, and the trust's governing documents were not amended to create a close relationship such as existed in Valley Forge between the two institutions or to make the Association an express beneficiary of the trust.\(^{48}\)

The court concluded with a sweeping rejection of the Association's purported basis for standing, which applies with equal force to students and alumni seeking to intervene in the Barnes Foun-

\(^{43}\) Hershey, 911 A.2d at 1260.
\(^{44}\) Id. at 1262.
\(^{46}\) Hershey, 911 A.2d at 1262.
\(^{47}\) Id.
\(^{48}\) Id. at 1262-63.
oration cases, or community groups clamoring to participate in proceedings involving the Philadelphia Health Care Trust:

The Association's intensity of concern is real and commendable, but it is not a substitute for an actual interest. Standing is not created through the Association's advocacy or its members' past close relationship with the School as former individual recipients of the Trust's benefits. The Trust did not contemplate the Association, or anyone else, to be a "shadow board" of graduates with standing to challenge actions the Board takes.49

C. The PHCT Saga

In 1996, Graduate Health System, Inc., parent of the "Graduate" group of nonprofit hospitals mainly in the greater Philadelphia area, transferred the hospitals to components of the nonprofit Allegheny Health System. Two years later, the Allegheny System collapsed and filed Chapter 11 bankruptcy proceedings. Shortly thereafter, Graduate Health System, having no further relationship with any Graduate institution and no operations, changed its name to "Philadelphia Health Care Trust" and determined to change the purposes in its Articles of Incorporation to function as a private foundation. It concluded that the controversy surrounding the Allegheny System called for the presentation of the change to the Orphans' Court for a full and open discussion and a "seal of approval" determination that the change did not constitute a diversion of property under section 5547(b) of the Nonprofit Corporation law. After a contentious hearing and the objection of most of the principal parties involved in the Allegheny case, the court approved the change of purposes and issued the requested decree, subject to a number of conditions including a requirement that PHCT file accounts for five years. Although the court's decree served the intended seal of approval purpose and foreclosed any future objections to PHCT's conversion to a private foundation, there followed seven years of efforts by an exceptionally diverse collection of individuals and organizations to use the Orphans' Court to obtain PHCT's money for themselves or to obtain the right to direct how the money would be used.

A little more than a year after the conversion, PHCT reached a tentative agreement for the phased transfer of its assets to the

49. Id. at 1263.
health care components of the University of Pennsylvania. It filed a petition with the Orphans' Court for the approval of the proposal, although the parties subsequently terminated their intended agreement and the petition was withdrawn. The petition for approval of the arrangement with the University and the accounts filed by PHCT in accordance with the directive of the Decree of the Court approving private foundation status led to a barrage of petitions to intervene or participate in the Orphans' Court proceedings. The putative intervenors sought to challenge PHCT's proposed arrangements with the University of Pennsylvania and, particularly, its use of its money.

The claimants attempting to join the PHCT proceedings in the Orphans' Court included an unemployment program project, a senior citizens alliance, a mental health/mental retardation center, a hospital system, a Pennsylvania state senator, a Philadelphia city councilman, the director of a Philadelphia city consumer agency, and a local university. While the petitioners and claimants stated their positions in different words and with different factual and legal justifications, they all asserted basically the same claim—each did not like how PHCT used its assets and each wanted to take the assets for itself or to control how the assets were used.

In trying to find a way into the Orphans' Court proceedings, each of the petitioners asserted some variation of a claim to standing on the basis of a special interest. The community groups claimed a special relationship to the community served by PHCT's purposes; the health institutions asserted that they served the communities intended to be beneficiaries of PHCT's purposes; the political figures raised their roles as elected representatives of the community; and one petitioner even argued that it was the true successor of the rightful charitable owner of PHCT's funds. All of the petitioners requested intervention as parties and three also asked for amicus curiae status.

In proceedings over the course of several years, the Orphans' Court dismissed all of the petitions, denying all requests for intervention or appointment as amicus curiae. Some of the petitioners appealed the final group of dismissals, and the Pennsylvania Commonwealth Court affirmed the ruling of the Orphans' Court and the dismissal of the petitions. In its opinion, the Commonwealth Court stated:

In Pennsylvania, standing requires that "an aggrieved party have an interest which is substantial, direct, and immediate."
That is, the interest must have substance — there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” Although appellants attempt to establish that waste and diversion of assets constitute issues of social concern, such by itself is insufficient for purposes of demonstrating standing under [In re Francis Edward McGillick Found., 537 Pa. 194, 642 A.2d 467 (1994)]. Furthermore, Appellants fail to specifically articulate how their interests are mutually exclusive or distinct from the public interest already being represented by the Attorney General.50

As to the requests to become amicus curiae, the Orphans’ Court stated:

The proceedings now before this Court do not raise issues of broad social concern . . . . Accounts have been filed. The Attorney General has filed Objections to said Accounts. Said Objections include many of the complaints of the Petitioners. Prosecution of said Objections may result in the surcharge or removal of members of the Board of Directors of PHCT. The Petitioners are free to raise their concerns to the Attorney General. They are free to offer their resources, and the fruits of their investigations, to the Attorney General. They are free to consult and work with the Attorney General. Under all of the foregoing circumstances, this Court sees no need to appoint the Petitioners, or any of them, to serve as Amicus Curiae.51

The PHCT decisions confirm both the rules and concepts of standing before the Orphans’ Court in matters involving a charity. The court rejected every claim, category, and variation of the concept of special interest that each of the petitioners could conjure up, and it denied all of the efforts to circumvent the standing rules by amicus curiae status. While imaginative future petitioners will undoubtedly find some basis to claim a special interest in a charity that the petitioners did not utilize in the PHCT cases, they will not find many, and few petitioners who do not have a true close

50. Phila. Health Care Trust, 872 A.2d at 262-63 (citations omitted).
connection to a charity will find a basis to claim a special interest that the Orphans' Court in _PHCT_ has not rejected.

The PHCT cases send a clear message solidly confirmed by the supreme court in _Hershey_. Despite the unique circumstances of the _amici curiae_ in the _Barnes_ proceedings, the standing rules remain firmly in place. Community groups, related charitable institutions, elected officials, government agencies, and members of the population served by charities may have a good faith interest in how a charity operates and spends its money, but that interest involves some variation of the interest of the community or the citizenry in general. Only the Attorney General serves as _parens patriae_, and only the Attorney General may represent the community and the citizenry before the Orphans’ Court. Others who consider themselves interested, affected, or even aggrieved, may present their positions to the Attorney General. They do not have standing before the Orphans’ Court.

**V. CONCLUSION**

Charities live and operate in a different world than businesses conducted for profit for the benefit of shareholders, members, or other equity holders. Most charities, and particularly large charities, do conduct a species of business and must make business decisions about operations, finance, risks, and rewards and most of the other things that concern every business. In making those decisions, however, charities act for, and are responsible to, a very different constituency and are governed by very different standards than for-profit businesses, and that makes a very big difference.

As the designation makes clear, for-profit businesses operate to make a profit for their shareholders. Charities operate to pursue their charitable purposes for the benefit of the public or the community. Shareholders protect themselves individually or as a group and have recourse to the state or federal court systems when wronged. The Attorney General protects the public and the citizens of the state and has recourse on behalf of the public to the Orphans' Court when he considers the public wronged.

The Attorney General naturally plays a very important part in any proceeding or action relating to a major transaction by a charity. He has the right and standing to participate as a party in all aspects of any proceeding before a court and the right to object to or challenge any proposed action or transaction. The Orphans’ Court also protects the interests of the public and naturally takes
the positions of the Attorney General very seriously. Any charity contemplating a major transaction or other significant activity would do well to disclose everything of significance to the Office of the Attorney General and to keep it up to date.

Decisions by charities as to whether and how to proceed before the Orphans’ Court depend on the nature of the proposal under consideration. Some matters, like deviation and cy pres, dissolution, and material change of purpose, require approval by the court and leave no room for discretion. Others, such as nondiversion of property by nonprofit corporations, usually are not as clear and often involve some discretion and may depend on factors such as the visibility of the case, the likely size and intensity of possible opposition to the proposal, and the position of the Attorney General.

In deciding whether to present a matter to the court, charities should consider that the Orphans’ Court differs in a number of potentially important respects from the civil division of the Court of Common Pleas and other trial level courts. Petitions before the Orphans’ Court may not need to follow the traditional forms of adversary pleading, and petitioners have reasonable latitude in framing the issues presented. The standing rules often keep out of proceedings the most virulent opponents, and the Attorney General, most often the only opposing party, has no personal stake in the matter and can thus often be more reasonable than a true adversarial litigant. The moderately permissive procedures of the court in proceedings involving only the court and the Attorney General can allow for a more reasoned consideration of the issue and evaluation of reasonable alternatives. Finally, a decree of the Orphans’ Court, subject of course to any appeals, settles a matter and ends all meaningful opposition. It allows a transaction or activity to proceed with the usually unbreakable seal of approval.