CHAPTER 5
GOVERNMENT REGULATION OF CHARITIES

§ 5.01. Role of the State Attorney General

The state attorney general:

(a) has the authority to protect charitable assets and interests within the jurisdiction of the state and to seek judicial relief to protect the public's interest in those assets and interests;

(b) must be notified of all judicial actions that implicate the protection of charitable assets and interests described in subsection (a) and has the right to intervene in such actions; and

(c) has all the powers necessary to carry out the authority and rights described in subsections (a) and (b), including the powers to investigate claims, obtain documents, call witnesses, and issue subpoenas, as provided under state law.

Cross-References:

For the definition of a "charity," see § 1.01. For the role of the courts, including the difference between role of the court and the role of the state attorney general, see § 5.02. For the role of the federal government, see § 5.03. For discussion of choice of law and the state attorney general's authority over foreign charities, see § 5.04. For the definition of a private party with a special interest for purposes of standing when a state attorney general is not exercising the office's authority to protect the public's interest in charitable assets and interests, see § 6.05.

Comment:

a. General comments and history. The term "action" in this Restatement encompasses not only actions between adversary litigants, but also all other forms of legal proceedings. For the purposes of this Section, the "state attorney general" refers to the attorney general of a state or

territory. In addition, the authority of the state attorney general extends to all charitable assets, including those that are held by a governmental entity.

The central role of the state attorney general in the regulation of charities developed as part of the early English common law. The Crown's law officers, implementing the Crown's prerogative as *parens patriae*, defended subjects that could not defend themselves, including charities. The contemporary role of the state attorney general in the United States in protecting charitable assets and interests, as well as the justifications for that authority, can be traced back to the Crown's powers over charitable trusts, which were implemented by the Crown's senior lawyer, the attorney general.

Under traditional law, as today, a trust generally was valid only if one or more beneficiaries existed and were able to ensure that the trustees fulfilled their duties. However, as described in § 1.01, charitable trusts were created to serve broad charitable purposes and, with the exception of beneficiaries that were also charities, generally did not have ascertainable beneficiaries. Thus, unlike in the case of private trusts, there generally were no beneficiaries of charitable trusts available to monitor the trustees' actions and seek court relief to correct abuses. The common-law courts in the United States addressed that lack of oversight by giving the state attorney general the authority to represent the public as the ultimate beneficiary of all charitable trusts. Accordingly, the state attorney general became the proper party to ensure the protection of charitable assets and interests and enforce the duties of charitable fiduciaries. The state attorney general's authority to protect charitable assets and interests and enforce the duties of charitable fiduciaries applies to all charities, regardless of legal form.

However, state attorneys general are not fiduciaries of the charities they are charged with regulating. Nor does the power to regulate mean that they can substitute their judgment for that of a fiduciary in matters that are part of the fiduciary's discretion, such as appointing new fiduciaries or making certain operational decisions. Moreover, the authority of the state attorney general must be distinguished from the authority of the courts. See § 5.02.

Although the state attorney general often regulates charities and, increasingly, shapes the governance of charities through informal measures, the state attorney general's formal authority and powers are to bring actions to the court for interpretation and application of the law, as explained in Comment *b(1)*. The purpose of those actions is to protect the public's interest in the use of assets for the charitable ends to which they must be devoted. The fact that responsibility to

protect the public's interest in charities and charitable assets rests with the state attorney general does not mean that charities are public or quasi-public agencies, nor does it mean that the assets held by charities are government assets ultimately owned by the public.

Finally, in some jurisdictions, a local district or county attorney or other public official may be authorized to oversee some aspect of the public's interest in charities. For example, an official other than the state attorney general, such as the secretary of state, is often authorized to regulate charitable solicitations to prevent fraudulent or deceptive appeals. However, even when other state officers regulate solicitations, the state attorney general will litigate actions against a charity.

b. Subsection (a); authority to protect charitable assets and interests.

(1). Authority of the state attorney general under the common law. In the United States, almost every state attorney general has the authority to regulate charities, either under the common law or a state statute. The authority of the state attorney general is explained in Restatement Third, Trusts § 94(2), which provides, "[a] suit for the enforcement of a charitable trust may be maintained . . . by the Attorney General."

Under the common law, the role of the state attorney general is usually limited to bringing matters involving the protection of charitable assets to the attention of a court. It follows that, under the common law, agreements reached between the state attorney general and a charitable fiduciary must be submitted to the court for its approval. However, in practice, state attorneys general sometimes enter into settlement agreements without submitting the agreements to a court for approval. For example, some such agreements require the board of a charity to report regularly to the state attorney general's office about governance and other matters of concern. State attorneys general also provide guidance to charitable fiduciaries, including formal written guidance as well as informal guidance that can be provided at meetings of representatives of the office of the state attorney general with fiduciaries of charitable organizations. Nonetheless, enforcement of charitable fiduciary duties ultimately requires a state attorney general to bring an action before a court.

(2). Statutes confirming and expanding the role of the state attorney general. A majority of states have enacted statutes that confirm the role of the state attorney general in protecting charitable assets and interests. For example, a Massachusetts statute provides: "The attorney general shall enforce the due application of funds given or appropriated to public charities

within the commonwealth and prevent breaches of trust in the administration thereof." Mass Gen. Laws ch. 12, § 8.

Until the mid-20th century, state attorneys general rarely exercised their regulatory powers over charities unless they were made parties to an action involving the protection of a charitable interest in a will or trust document or an alleged breach of a charitable fiduciary's duties. In 1943, New Hampshire enacted a statute confirming the common-law duty of the state attorney general to regulate charities and requiring charitable trusts in the state to register and file annual financial reports with the office of the state attorney general. N.H. Rev. Stat. Ann. § 7:20. A number of other states enacted similar registration and reporting requirements. The rationale for those requirements was that the state attorney general could not perform a regulatory function without information about the charities operating within the state. After the passage of the Tax Reform Act of 1969, federal regulation of charities by the Internal Revenue Service (IRS) increased, and many state attorneys general seemed satisfied with deferring to the IRS in the absence of egregious fiduciary misconduct. More recently, however, states have greatly increased their attention to charities regulation.

(3). Uniform laws and model acts regarding the state attorney general's authority to regulate charities. A number of uniform laws and model acts contain provisions regarding the authority of the state attorney general to protect charitable assets. In 2011, the Uniform Law Commission withdrew the 1954 Uniform Supervision of Trustees for Charitable Purposes Act and adopted a new Model Protection of Charitable Assets Act (MPCAA), which "states and clarifies the role of the Attorney General in the protection of charitable assets." MPCAA, Prefatory Note at 1. The MPCAA describes the general authority of the state attorney general as stated in the Act as follows:

> The Act states the broad duty of the Attorney General to represent the public interest in the protection of charitable assets. The Act states that the Attorney General may enforce the use of charitable assets for the purposes for which the assets were given; may take action to prevent or correct a breach of a fiduciary duty in connection with the administration of the entity holding the assets or with respect to the charitable assets; and may intervene in an action brought to correct a misapplication of charitable assets, a departure from the purpose of the entity holding the charitable assets, or a breach of a fiduciary duty.

Id., at 7.

The Uniform Prudent Management of Institutional Funds Act (UPMIFA), discussed in detail in § 2.04, Comment *b*, contains many provisions related to the power of the state attorney general. For example, it requires the state attorney general to receive notice of deviation and cy pres proceedings and to be given the opportunity to participate in those proceedings. UPMIFA § 6(b) and (c). UPMIFA also permits charities to modify restrictions on "small, old" funds after notifying the state attorney general, who may agree with the modification without invoking the jurisdiction of the court; "if the attorney general has concerns, he or she can seek the agreement of the charity to change or abandon the modification, and if that fails, can commence a court action to enjoin it." Id. § 6(d), Prefatory Note at 4. With regard to modification of restrictions on charitable funds, UPMIFA's Prefatory Note explains, "in all types of modification the attorney general continues to be the protector both of the donor's intent and of the public's interest in charitable funds." Id., Prefatory Note at 4. The Prefatory Note further explains that "UPMIFA's modification rules preserve the historic position of the attorneys general in most states as the overseers of charities." Id. at 2.

The black-letter provisions of the widely adopted Revised Model Nonprofit Corporation Act (1987) (RMNCA), as well as the later Model Nonprofit Corporation Act Third (2008) (MNCA) (both discussed in detail in § 1.02 and Reporters' Note 12 of that Section), do not include broad provisions regarding the enforcement powers of the state attorney general. Instead, the acts specify circumstances in which the state attorney general must be involved. For example, RMNCA § 1.70 specifies, "(a) [t]he attorney general shall be given notice of the commencement of any proceeding that this Act authorizes the attorney general to bring but that has been commenced by another person," and permits the state attorney general to take action if no proceeding has commenced in similar circumstances. The comment to that section explains that it "carries out the policy implicit in such notice requirements by specifically empowering the attorney general to protect the public interest when it may be adversely affected."

The Uniform Trust Code (UTC), discussed in detail in § 1.02, Comment *b(2)*, explains the role of the state attorney general with respect to trusts. For example, it contains an optional provision that grants the state attorney general rights in relation to a charitable trust that are analogous to those of a qualified beneficiary to a private trust. UTC § 110(d). Commentary to UTC § 110 explains that although "[c]haritable trusts do not have beneficiaries in the usual sense[,] . . .

certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced," including the state attorney general. Another optional provision grants the state attorney general approval rights with regard to the selection of a trustee to fill a vacancy in the trusteeship of a charitable trust. UTC § 704(d)(2).

Restatement Third, Trusts § 94 also sets forth certain rights and responsibilities of the state attorney general with regard to the enforcement of charitable trusts. For example, it provides that the state attorney general may maintain an action for the enforcement of a charitable trust and must be joined as a party if an action to enforce a charitable trust is brought by another person with standing. Id. § 94(2), Comment *e*. Rules on standing are described in more detail in Chapter 6 of this Restatement.

Illustration:

1. Joliot Library is a charity organized and operating in the state of Devon. A group of donors to the library are concerned that members of the library's board are selling valuable antique books from the library's collection and retaining the proceeds for their personal use. The donors meet with an Assistant Attorney General of the Devon Office of the Attorney General and provide her with notices of auctions in which the books were sold. Following the meeting, lawyers in the office conduct an investigation into the board's activities and conclude that the donors were correct. They bring an action against the members of the board, alleging breach of the duties of loyalty and care, and seeking restitution as well as removal of the members of the board who participated in the sales. The Devon Attorney General has exercised the office's authority to protect charitable assets.

(4). Regulation of solicitation of charitable donations. A number of state and local jurisdictions have adopted laws that require registration and reporting on fundraising campaigns within their jurisdictions. Those laws, which allow the state attorney general to prevent or remedy deceptive or fraudulent solicitations, are discussed in detail in § 4.05.

c. Subsection (b); notice and the state attorney general's role as a necessary party; power to intervene in actions by third parties. The requirement of notice to the state attorney general that is included in Sections throughout this Restatement reflects the fact that the state attorney general is a "necessary party" in actions involving the protection of charitable assets or interests. That

requirement is imposed by statute in some states and by court rule or precedent in others. That requirement does not apply to every action involving a charity. It does not, for example, apply to a dispute over a contract, a dispute over the terms of employment, or a dispute resulting from the normal operations of a charity. The dispute must involve the charitable purposes of the legal entity, its use of assets that must be devoted to charitable purposes, a breach of a duty by fiduciaries, or other issues that implicate the protection of charitable assets. Once notified, the state attorney general is empowered to intervene in actions brought by third parties to request that the court correct abuses in the administration of charitable assets.

There is no uniformity in statutes or court decisions regarding the types of actions in which the state attorney general must be involved. Generally, the state attorney general must be given notice and an opportunity to be heard in actions seeking application of the doctrines of cy pres and deviation and, in certain circumstances, the termination of a charity. In some states, the requirement is interpreted to mean that the state attorney general must be given notice of the probate of every will that includes a charitable bequest. In others, participation is limited to actions in which there is a charitable bequest but no specifically named charitable beneficiary.

d. Comments on subsection (c).

(1). The powers of the state attorney general. The state attorney general carries out the authority to protect charitable assets and interests by exercising the following principal powers, among others:

(A) seeking court action to prevent or rectify breaches of duties by fiduciaries, including use of charitable assets for purposes other than the purposes for which they were given;

(B) seeking court action to recover assets diverted from charities;

(C) monitoring estates with bequests to charities and monitoring charities undergoing bankruptcy or receivership or converting from charitable nonprofit status to for-profit status;

(D) seeking relief under the doctrine of cy pres (changes in the purpose of charitable assets) and the doctrine of deviation (changes in the administration of charitable assets), as discussed in §§ 3.02 and 3.03, respectively;

(E) overseeing extraordinary transactions, as defined in Chapter 3; and

(F) protecting the public from deceptive or fraudulent solicitations, as discussed in § 4.05.

To exercise those powers, the state attorney general must have broad powers to investigate. Some of those powers are inherent and arise from the nature of the duties of a state attorney general. Others, such as the subpoena power, are conferred by statute.

The state attorney general has broad discretion in actions involving cy pres or deviation. Frequently, those matters arise in the context of a dissolution, termination, or bankruptcy of a charity.

The state attorney general also has broad discretion in determining whether to bring an action against charitable fiduciaries. The state attorney general may not be forced by interested parties to bring an enforcement action or to reconsider a decision not to bring such an action. However, as discussed in § 5.02, the court may order the state attorney general to bring an action sua sponte.

Illustration:

2. Same facts as in Illustration 1, except that the Devon Office of the Attorney General investigates and determines that the donors' allegations are baseless. It concludes that there has been no breach of fiduciary duties by members of the library's board. The donors then file an action asking the court to force the Devon Attorney General to seek restitution from members of board. The court should dismiss the action. The donors cannot force the Devon Attorney General to bring an action against the library or members of its board.

(2). Power to appoint relators. In the vast majority of states, the state attorney general has the power to appoint a relator to bring an action in the name of the state attorney general. Relators, generally, are individuals who are interested in a potential action to protect charitable assets and interests, but who lack standing. They are appointed by a state attorney general who does not wish to bring the action directly but is willing to have the action brought to court. Relators are authorized by the state attorney general to bring and conduct the action in the name of the state attorney general. They must agree to report to the state attorney general on a regular basis as the action progresses and pay all costs of the litigation. In the alternative, the state

attorney general may appoint a private lawyer to be an assistant state attorney general specifically for the purpose of prosecuting a civil action. The state attorney general retains the right to take over the action.

Illustration:

3. Same facts as in Illustration 1, except that the budget of the Devon Office of the Attorney General is insufficient to fund an action against the members of the library's board. The donors ask the Devon Attorney General to appoint them as relators so that they may bring the action on behalf of the state of Devon. The Devon Attorney General agrees, on the condition that the donors report at least weekly on the status of the action to an Assistant Attorney General assigned to oversee the litigation. The Devon Attorney General has exercised the office's authority to protect charitable assets.

REPORTERS' NOTES

Comment *a*. General comments and history.

1. For discussion of the role of the states and the state attorneys general in the regulation of charitable nonprofit organizations, see MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION (2004). For a summary of the common-law history and the role of attorneys general elsewhere, see Kathryn Chan, *The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales,* 89 CAN. BAR REV. 373 (2010). For more general histories of charities, including the role of the state attorney general, see GARETH JONES, HISTORY OF THE LAW OF CHARITY, 1532-1827 (1969); see also GEORGE W. KEETON, THE MODERN LAW OF CHARITIES 13-24 (1962).

2. There are several useful collections regarding charities that include publications addressing the authority and powers of state attorneys general. See, e.g., the New York University National Center on Philanthropy and the Law, http://ncpl.law.nyu.edu/bibliography/ (last visited Mar. 9, 2020); Charities Law Project of the National State Attorneys General Program at Columbia Law School, NAT'L STATE ATTORNEYS GEN. PROGRAM, RESOURCES, http://web.law.columbia.edu/attorneys-general/policy-areas/charities-law-project/resources (last visited Mar. 9, 2020); the Legal Compendium of state laws and the research report available from the Regulation of the Charitable Sector Project at the Center on Nonprofits and Philanthropy at the Urban Institute, URBAN INST., REGULATION OF THE CHARITABLE SECTOR PROJECT, http://www.urban.org/policy-centers/center-nonprofits-and-philanthropy/projects/regulation-charitable-sector-project (last visited Mar. 9, 2020).

3. For analyses of the regulation of charities generally, see Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479 (2010); and Lloyd Hitoshi Mayer, *Fragmented Oversight of Nonprofits in the United States: Does it Work? Can it Work?* 91 CHI.-KENT L. REV. 937 (2016).

Comment *b*. Subsection (a); authority to protect charitable assets and interests.

Comment *b(1)*. Authority of the state attorney general under the common law.

4. For an overview of the common-law powers of a state attorney general, see Emily Myers, *Common Law Powers, in* NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 27 (Emily Myers ed., 3d ed. 2013); see also Jennifer Katz, *Blumenthal v. Barnes: Civil Common Law Powers of the State Attorney General in the Charitable Sector*, 17 QUINNIPIAC PROB. L.J. 383 (2004); James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 260-261 (2003).

5. The broad common-law powers of the state attorney general are confirmed in many cases. After listing multiple citations from Blackstone's Commentaries on the Laws of England to contemporary statutes confirming the power of attorneys general to enforce the purposes of, restrain, and inquire into charities, the Supreme Court of Ohio confirmed the power of the state attorney general to impose a trust constructively when the relevant funds or their procurement are charitable in nature. Brown v. Concerned Citizens for Sickle Cell Anemia, Inc., 382 N.E.2d 1155, 1158 (Ohio 1978). More recently, citing the 1908 case Petition of Burnham, 69 A. 720 (N.H. 1908), the Supreme Court of New Hampshire noted "the general rule that when a trust is determined to be charitable, it becomes the duty of the attorney general to ensure that the rights of the public in the trust are protected and that the trust is properly executed." In re Tr. of Mary Baker Eddy, 212 A.3d 414, 418 (N.H. 2019). See also, e.g., State of Fla. ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976); State of Mich. ex rel. Kelley v. C.R. Equip. Sales, Inc., 898 F. Supp. 509 (W.D. Mich. 1995); Botelho v. Griffin, 25 P.3d 689 (Alaska 2001); State ex rel. Nixon v. Am. Tobacco Co., 34 S.W.3d 122 (Mo. 2000); State v. Robertson, 886 P.2d 85 (Utah Ct. App. 1994), aff'd, 924 P.2d 889 (Utah 1996); State ex rel. Carmichael v. Bibb, 173 So. 74 (Ala. 1937); Troutman v. De Boissiere Odd Fellows' Orphans' Home & Indus. Sch. Ass'n, 71 P. 286 (Kan. 1903).

6. Restatement Third, Trusts § 94(2) sets forth certain of the powers and responsibilities of the state attorney general with regard to enforcement of charitable trusts: "A suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust." Restatement Third, Trusts § 94(2) (AM. LAW INST. 2012). The Commentary to that Section notes that the state attorney general's "standing to enforce charitable trusts (with or without a relator) is not exclusive. When, however, suit to enforce a charitable trust is brought . . . by a person other than the Attorney General, the Attorney General must be joined as a party." Id. at Comment *e*.

7. For a case establishing that the state attorney general may bring to the attention of a court the need for deviation from the terms of the trust, but that authority to approve such deviation lies with the court, see Midkiff v. Kobayashi, 507 P.2d 724, 745 (Haw. 1973).

Comment *b(2).* Statutes confirming and expanding the role of the state attorney general.

8. For an overview of statutory powers of a state attorney general, see CINDY M. LOTT, ET AL., STATE REGULATION AND ENFORCEMENT IN THE CHARITABLE SECTOR (2016); URBAN INST., LEGAL COMPENDIUM, REGULATION OF THE CHARITABLE SECTOR PROJECT, http://www.urban.org/policy-centers/center-nonprofits-and-philanthropy/projects/regulation-charitable-sector-project (last visited March 3, 2020); MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 476-511, tbl. 1 (2004).

9. For examples of states in which the powers of the state attorney general are set forth in statutes, see CAL GOV. CODE § 12588 (charitable corporations); CAL. GOV. CODE § 12598 (trusts); CONN. GEN. STAT. § 3-125; GA. CODE ANN. § 53-12-174; 760 ILL. COMP. STAT. ANN. 55/9; ME. REV. STAT. ANN. tit 5, § 194; N.Y. EST. POWERS & TRUSTS LAW § 8-1.4 (trusts); OHIO REV. CODE ANN. § 109.26. The broad powers of the state attorney general in matters involving charities and charitable assets can be found in a wide range of statutory sections. For example, Chapter 123 of the Texas Property Code states:

> For and on behalf of the interest of the general public of this state in charitable trusts, the attorney general is a proper party and may intervene in a proceeding involving a charitable trust. The attorney general may join and enter into a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust.

TEX. PROP. CODE ANN. § 123.002. The Massachusetts statute on the Executive and Administrative Officers of the Commonwealth states, "The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." MASS. GEN. LAWS ANN. ch. 12, § 8. In addition, the Washington Probate and Trust Code section on charitable trusts grants extensive investigative powers to the state attorney general, "for the purpose of determining whether the trust or other relationship is administered according to law and the terms and purposes of the trust, or to determine compliance with this chapter in any other respect." WASH. REV. CODE ANN. § 11.110.100.

10. Some state statutes include sections specific to charitable donations. For example, in Kansas, the state attorney general has the authority to seek declaratory relief to ensure that solicited donations are used for the purpose for which they were solicited. KAN. STAT. ANN. § 17-1768(a).

11. Some states have extended the powers of the state attorney general by requiring charities to register and report financial information. For example, the New Hampshire Charitable Trustees Act provides that:

> the attorney general shall have and exercise, in addition to all the common law and statutory rights, duties and powers of the attorney general in connection with the

> supervision, administration and enforcement of charitable trusts, charitable solicitations, and charitable sales promotions, the rights, duties and powers set forth in RSA 7:19 through 32-a inclusive. The attorney general shall also have the authority to prepare and maintain a register of all charitable trusts heretofore or hereafter established or active in this state.

N.H. REV. STAT. ANN. § 7:19.

Rhode Island passed a law similar to the New Hampshire Charitable Trustees Act. 18 R.I. GEN. LAWS ANN. § 18-9-8. In 1953, Ohio and South Carolina passed similar laws. OHIO REV. CODE ANN. § 109.24; 1953 S.C. ACTS 274. The reporting provisions of the Rhode Island and South Carolina Acts apply only to charitable trusts, not to corporations that are charities, while the Ohio law applies to all charities regardless of their legal form. Iowa adopted an act similar to Rhode Island's in 1959 but repealed it in 1965. See IOWA CODE ANN. §§ 682.48-682.59 (repealed by 1965 Iowa Acts 826, (61 G.A.) ch. 432, § 69). Each of those statutes reaffirmed the common-law power of the state attorney general to protect charitable assets. They differed in the extent to which registration and reporting were required and the exemptions to those provisions, such as those for religious charities.

12. In Oregon, with several exceptions:

> [t]he Attorney General may issue an order disqualifying a charitable organization from receiving contributions that are deductible as charitable donations for the purpose of Oregon income tax and corporate excise tax if the Attorney General finds that the organization has failed to expend at least 30 percent of the organization's total annual functional expenses on program services when those expenses are averaged over the most recent three fiscal years for which the Attorney General has reports containing expense information.

OR. REV. STAT. ANN § 128.760.

Comment *b(3).* Uniform laws and model acts regarding the state attorney general's authority to regulate charities.

13. The history of the Uniform Supervision of Trustees for Charitable Purposes Act is described in the Prefatory Note to the Model Protection of Charitable Assets Act (MPCAA). MODEL PROTECTION OF CHARITABLE ASSETS ACT, Prefatory Note (UNIF. LAW COMM'N 2011). The Prefatory Note also explains that because some states have extensive statutory coverage of the subject and, therefore, states would be unlikely to adopt uniform laws, it was appropriate to repeal the uniform act and draft a new model act. Id., at 6. Finally, the Prefatory Note also provides detailed lists of types of registration statutes and the states that have adopted them. Id., at 4-6. Illinois adopted the Uniform Supervision of Trustees for Charitable Purposes Act as originally promulgated but subsequently found that the definition of "trustee" under the act was ambiguous with regard to its application to charitable corporations, and amended the statute in 1963 to clarify that charitable corporations were covered under the act. See, e.g., 760 ILL. COMP. STAT. 55/3; CAL. GOV'T CODE § 12582. In the case of People ex rel. Scott v. George F. Harding Museum, the Illinois

Appellate Court held that "[t]he 1963 amendments to section 3 of the Act, which redefined 'trustee,' were intended to bring all foundations and not-for-profit corporations 'holding property for any charitable purpose' within the scope of the Act." 374 N.E.2d 756, 760 (Ill. App. Ct. 1978).

14. The MPCAA provides that the state attorney general "shall represent the public interest in the protection of charitable assets." MODEL PROTECTION OF CHARITABLE ASSETS ACT § 3(a) (UNIF. LAW COMM'N 2011). It also describes in detail the need for regulation of charities. Id. The act "adopts registration, reporting, and notice requirements that will enable the Attorney General to fulfill the responsibility of that office to represent the public interest by protecting charitable assets." Id., Prefatory Note at 5. It requires charitable nonprofits to provide notice to the state attorney general of "dissolution or termination; [t]he disposition of all or substantially all of its property; [a] merger, conversion, or domestication; [and a] removal of the charity or of significant charitable assets from the state." Id. at 8.

15. Many sections of the Uniform Management of Institutional Funds Act (UMIFA) and the Uniform Prudent Management of Institutional Funds Act (UPMIFA) address the role of the state attorney general. For example, UMIFA provides that "only the Attorney General or similar public authority may enforce a charitable trust." UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1 cmt., at 6 (UNIF. LAW COMM'N 1972).

UPMIFA contains several provisions that specify the role of the state attorney general in particular circumstances. For example, UPMIFA provides for notification to the state attorney general of modifications to or release of restrictions on charitable funds, and for an opportunity for the state attorney general to be heard. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (UNIF. LAW COMM'N 2006). Commentary to UPMIFA § 6 explains that the drafting committee decided not to require that donors be notified of deviation or cy pres proceedings or small and old fund modifications because the "trust law rules of equitable deviation and cy pres do not require donor notification and instead depend on the court and the attorney general to protect donor intent and the public's interest in charitable assets." Id. § 6 cmt., (d). UPMIFA also explains that, "[i]f an institution diverts an institutional fund from the charitable purposes of the institution, the state attorney general can enforce the charitable interests of the public." Id. § 4, cmt., (a). In another example, commentary to UPMIFA § 4(d), which provides that spending above a fixed percentage of an endowment fund in any year creates a rebuttable presumption of imprudence, states that the presumption gives the state attorney general "a benchmark of sorts." Id. § 4 cmt., (d). The commentary also includes an optional provision that requires small institutions to notify the state attorney general if the institution decides to spend "an amount that would cause the value of its endowment funds to drop below the aggregate historic dollar value for all of its endowment funds." Id. The provision "does not require that the institution obtain the approval of the attorney general before making the distribution," but the "notification requirement gives the attorney general the opportunity to take a closer look at the institution and its spending decision, to educate the institution on prudent decisionmaking for endowment funds, and to intervene if the attorney general determines that the spending would be imprudent for the institution." Id.

16. New York adopted a slightly modified version of UPMIFA in 2010, granting even broader enforcement authority to the state attorney general than UPMIFA. N.Y. NOT-FOR-PROFIT CORP. LAW §§ 550-558. For a detailed analysis of New York's UPMIFA, see Harvey P. Dale et al., *Evolution, Not Revolution: A Legislative History of the New York Prudent Management of Institutional Funds Act*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 377 (2014).

17. For more information on the role of the Model Nonprofit Corporation Act (MNCA) and the Revised Model Nonprofit Corporation Act (RMNCA) in accountability of charities, including the role of the state attorneys general, see REV. MODEL NONPROFIT CORP. ACT (AM. BAR ASS'N 1987); Marion R. Fremont-Smith, *The Search for Greater Accountability of Nonprofit Organizations: Recent Legal Developments and Proposals for Change*, 76 FORDHAM L. REV. 609 (2007); MODEL NONPROFIT CORP. ACT, 3D ED. (AM. BAR ASS'N 2008); Lizabeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 N. KY. L. REV. 251 (1989); Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment,* 58 VAND. L. REV. 1093, 1137 (2005).

Although the Model Nonprofit Corporation Act, Third, does not contain provisions codifying the enforcement powers of the state attorney general, it does contain provisions and comments regarding the role of the state attorney general. Specifically, the MNCA, Third, includes provisions regarding the authority of the state attorney general to bring an action for judicial dissolution of a charitable nonprofit corporation. MODEL NONPROFIT CORP. ACT, 3D ED. §§ 14.30, 14.31 (AM. BAR ASS'N 2008); see also id. § 3.04, in which authority is granted to the state attorney general to bring an action to challenge the validity of a corporate action in an action for judicial dissolution. The Official Comment to MNCA, Third § 1.30, Powers [of the Secretary of State], notes that the state attorney general (not the secretary of state) should exercise the power to "enjoin [ ] illegal conduct [of a corporation] or to dissolve involuntarily the offending corporation." Id. at § 1.30, cmt. The Official Comment to § 1.25, Filing Duty of Secretary of State, notes that "the attorney general of the state may also question the validity of provisions of records filed with the secretary of state in an independent suit brought for that purpose." Id. at § 1.25, cmt. 1. The MNCA, Third, also contains an optional provision requiring notice to the state attorney general of a proceeding that the state attorney general would have been authorized to bring but that has been brought by another person, and granting the state attorney general the authority to intervene in such an action, id. at § 1.70, as well as optional provisions requiring notice of contested corporate actions, id. at §§ 1.51, 1.53. There are also a few provisions under which, if the laws of the state call for designation of a different officer or agency, the state may, but need not, designate that the state attorney general give approval for domestication or conversion, id. at § 9.03, diversion of charitable assets, id. at §§ 10.09, 14.05, mergers, id. at § 11.01, or disposition of charitable assets, id. at § 12.03; see also Lizabeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 N. KY. L. REV. 251, 281 (1989).

The Model Nonprofit Corporation Act, Third, served as the basis for the 2010 amendments to a nonprofit corporation act that was adopted in the District of Columbia. D.C. CODE ANN.

§§ 29-401.01-29-414.04. It empowered the attorney general of the District for the first time to regulate charities.

18. The Model Protection of Charitable Assets Act, if adopted in full, requires registration, reporting, and notice requirements that will enable a state attorney general to fulfill the responsibility of that office to represent the public's interest by protecting charitable assets. MODEL PROTECTION OF CHARITABLE ASSETS ACT §§ 4-7 (UNIF. LAW COMM'N 2011). It requires charitable nonprofits to provide notice to the state attorney general of such matters as dissolution or termination, the disposition of all or substantially all of its property, and a removal of the charity or of significant charitable assets from the state. Id. §§ 6-7.

The Model Protection of Charitable Assets Act was enacted in Maryland in 2014, MD. CODE ANN., BUS. REG. §§ 6.5-101-6.5-105.

Comment *c*. Subsection (b); notice and the state attorney general's role as a necessary party; power to intervene in actions by third parties.

19. Under the traditional common law, the state attorney general was a necessary party in any action regarding charitable interests. Owen Davies Tudor explained:

> The Attorney-General, as representing the Crown, is the protector of all the persons interested in the charity funds. He represents the beneficial interest; consequently, in all cases in which the beneficial interest requires to be before the court, the Attorney-General must be a party to the proceedings.

OWEN DAVIES TUDOR, THE LAW OF CHARITABLE TRUSTS ch. 12, sec. II (5th ed. 1930).

Carl F.G. Zollman provided a similar explanation of the role of the state attorney general in the United States:

> In order that the trust may be maintained, it is, therefore, not only the right, but the duty of the state, through its law officers, to take action for their maintenance and enforcement. This duty is exercised in America as in England through the attorney general, who, therefore, is a proper, though he may not be a necessary, party plaintiff or defendant as the representative of the public, and whose duty it is to prevent the breach and to enforce the proper application of a charitable trust, and to compel the restitution of any part thereof which has been diverted to other purposes. The state, through him as *parens patriae,* superintends the management of all public charities, so that a suit brought by him to establish a charity becomes, in truth as well as in form, a suit to protect public interests, and is, in fact, the only method by which the public can make its interest in the charity effective. This practice developed in England under the statute of Elizabeth and obtains in America even in the absence of a statute expressly authorizing it.

CARL F.G. ZOLLMAN, AMERICAN LAW OF CHARITIES § 613, at 427 (1924).

20. For examples of statutes codifying the rule that the state attorney general must be given notice and, either by implication or explicitly, is a necessary party to any action regarding charitable assets, see CAL. PROB. CODE § 17203; IND. CODE ANN. § 30-4-6-6; MASS. GEN. LAWS

ANN. ch. 12, § 8G; see also URBAN INST., LEGAL COMPENDIUM, REGULATION OF THE CHARITABLE SECTOR PROJECT, http://www.urban.org/policy-centers/center-nonprofits-and-philanthropy/projects/regulation-charitable-sector-project (last visited Mar. 3, 2020). For examples of states in which that requirement is found in case law, see In re Pruner's Estate, 136 A.2d 107, 110 (Pa. 1957); Trs. of New Castle Common v. Gordy, 91 A.2d 135 (Del. Ch. 1952).

21. In New York, the role of the state attorney general is described as follows: "[t]he attorney general shall represent the beneficiaries of such dispositions for religious, charitable, educational or benevolent purposes and it shall be his duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts." N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(f).

22. Courts in most states recognize the right of the state attorney general to participate in will contests involving a charitable interest. See, for example, In re Seabrook's Will, 218 A.2d 648 (N.J. Super. Ct. Ch. Div. 1966); In re Voegtly's Estate, 151 A.2d 593 (Pa. 1959); In re Estate of Stern, 608 N.E.2d 534 (Ill. App. Ct. 1992). But see In re Roberts' Estate, 373 P.2d 165, 174 (Kan. 1962), and Wilson v. Dallas, 743 S.E.2d 746, 773 (S.C. 2013).

23. In some states, the requirement that the state attorney general is a necessary party is interpreted to mean that the state attorney general must be given notice of the probate of every will that includes a charitable bequest or devise. For a case in which the state attorney general was not given notice and, therefore, the Massachusetts Supreme Judicial Court made the state attorney general a party so that the state attorney general could represent the public in a charity trust, see Budin v. Levy, 180 N.E.2d 74 (Mass. 1962).

In particular cases, the participation of the state attorney general may be limited to actions in which there is no specifically named charitable beneficiary. For example, the Court of Appeals of New York explained that:

> If the Attorney-General were suing to obtain actual enforcement of a disposition, or to require that it be applied for a stated or proper charitable purpose, there would thus be little question of his standing. [However, in the case at hand,] the Attorney-General does not seek to attain any of these goals. Rather, he is attempting to enforce obligations purportedly owing to charitable organizations by virtue of their ownership of stock.

Lefkowitz v. Lebensfeld, 415 N.E.2d 919, 922 (N.Y. 1980). In another example, the Supreme Court of Nebraska described the role of the state attorney general in the protection of charitable assets and as a proper party in such cases, but concluded, "that in a suit by heirs of the donor of a gift for a particular charitable purpose, where no general charitable intent is shown, to recover the bequest because of the failure of the purpose, the attorney general is not a necessary party." Rohlff v. German Old People's Home, 10 N.W.2d 686, 693 (Neb. 1943). There are many states in which the notice requirement is limited to actions involving the doctrine of cy pres.

Comment *d*. Comments on subsection (c).

Comment *d(1)*. The powers of the state attorney general.

24. For a description of the common-law and statutory powers of state attorneys general, see NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES (Emily Myers ed., 3d ed. 2013); Jennifer L. Komoroski, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify*, 45 WM. & MARY L. REV. 1769 (2004).

25. The specific powers of the state attorney general vary state by state. Some states grant broad powers to the state attorney general through both common law and statute, see, e.g., State ex rel. Discover Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625, 645 (W. Va. 2013), while in others, the powers of the state attorney general are more limited, see, e.g., In re Sharp's Estate, 217 N.W.2d 258, 262 (Wis. 1974) (quoting WIS. CONST. art. VI, § 3). The Supreme Court of Appeals of West Virginia noted in a 2013 case that a majority of states have held that the state attorney general retains common-law powers, and provided citations to the relevant case law in 35 states, and also noted that a minority of states do not recognize the common-law powers of the state attorney general: Arizona, Connecticut, Iowa, Maryland, New Mexico, Pennsylvania, Washington, and Wisconsin. See State ex rel. Discover Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625, 645 n.47 (W. Va. 2013).

26. In states in which there is no express statutory authority of the state attorney general with respect to charities, courts have implied inherent and common-law powers. See, e.g., State ex rel. Carmichael v. Bibb, 173 So. 74 (Ala. 1937); State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42, 89 S.W.2d 605 (Ark. 1936); Boice v. Mallers, 96 N.E.2d 342 (Ind. 1950); In re Roberts' Estate, 373 P.2d 165 (Kan. 1962); Matter of Will of Grassman, 561 A.2d 1210 (N.J. 1989); Tauber v. Com., 499 S.E.2d 839 (Va. 1998). See State ex rel. Discover Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625, 645 n.47 (W. Va. 2013). However, in Virginia, the state attorney general's powers over charitable trusts have been found to not extend to corporations that are charities. Com. ex rel. Beales v. JOCO Found., 558 S.E. 2d 280, 286 (Va. 2002).

27. For additional discussion of the role of the state attorney general with regard to breaches of fiduciary duties, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 619 (1999).

28. See Chapter 3 of this Restatement for additional discussion of the role of the state attorney general in oversight of extraordinary transactions. New York, for example, has codified the state attorney general's authority to bring an action to dissolve a nonprofit corporation. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 112 (McKinney 2015). In addition, a charitable corporation may be dissolved without court approval if the state attorney general receives notice of a proposed dissolution and the state attorney general approves of the plan of dissolution. N.Y. NOT-FOR-PROFIT CORP. LAW § 1002.

29. For more on the duties and powers of the state attorney general with regard to modification, see §§ 3.02 (cy pres) and 3.03 (deviation). "[T]he attorney general is entitled to be heard when a proceeding is brought for permission to deviate from the terms of the trust, to apply

the doctrine of cy pres, or to terminate a charitable trust." Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 REAL PROP. PROB. & TR. J. 705, 724 (2006) (footnotes omitted). For a case in which the court noted that "[t]he function of the attorney general, as parens patriae of charitable trusts, is to oversee the activities of the trustees to the end that the trust is performed and maintained in accordance with the provisions of the trust document, and to bring any abuse or deviation on the part of the trustees to the attention of the court for correction," see Midkiff v. Kobayashi, 507 P.2d 724, 745 (Haw. 1973) (citing Hite v. Queen's Hosp., 36 Haw. 250, 262 (1942)).

30. Courts differ on whether a state attorney general has the power to bring an action on behalf of a charity. For a case in which the New York Court of Appeals held that the state attorney general did not have the power to "step[ ] into the shoes of the charity" and bring an action against a third party whose stock the charity owned, see Lefkowitz v. Lebensfeld, 415 N.E.2d 919, 922 (N.Y. 1980). On the other hand, the Alaska Supreme Court has ruled that the state attorney general has the authority to pursue an action against a third party on behalf of the beneficiaries of a charity without the charity's consent because "[t]he attorney general has the power to sue to enforce charitable trusts on behalf of the trusts' beneficiaries, who lack standing to pursue such a claim themselves. When the trustees of a charitable trust divert a trust's property to purposes other than those for which it was given, the attorney general is thus the proper party to institute such proceedings as may be necessary to stop or redress the wrong," Botelho v. Griffin, 25 P.3d 689, 693 (Alaska 2001) (footnotes omitted).

31. Investigatory powers of state attorneys general vary by state. In Illinois, for example:

> the Attorney General may investigate transactions and relationships of trustees subject to this Act for the purpose of determining whether the property held for charitable purposes is properly administered. He may require any agent, trustee, fiduciary, beneficiary, institution, association, or corporation, or other person to appear, at a named time and place, in the county designated by the Attorney General, where the person resides or is found, to give information under oath and to produce books, memoranda, papers, documents of title and evidence of assets, liability, receipts, or disbursements in the possession or control of the person ordered to appear.

760 ILL. COMP. STAT. 55/9 (2016).

In New York:

> [t]he attorney general shall establish and maintain a register of all trustees containing such information as the attorney general deems appropriate, and to that end may conduct such investigations as he or she deems necessary and shall obtain from public records, court officers, taxing authorities, trustees and other sources without the payment of any fee or charge, whatever information, copies of instruments, reports and records are needed for the establishment and maintenance of the register.

N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(c). Those examples are similar to those in the states that require registration and reporting of certain charities that do not solicit for contributions.

32. For an example of a statute conferring subpoena powers on the attorney general of Massachusetts, see MASS. GEN. LAWS ANN. ch. 12, § 8H (West).

33. For a discussion of the limits to powers of the state attorney general, see James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 262 (2003). For the view that sometimes the state attorney general overreaches the authority of the office, see Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571 (2010).

34. In some states, statutes of limitations involving civil actions brought by the state attorney general for the protection of charitable assets provide more timing for beginning an action than statutes of limitations involving other civil actions. For example, a California Statute provides that:

> A civil action brought by the Attorney General against trustees or other persons holding property in trust for charitable purposes or against any charitable corporation or any director or officer thereof to enforce a charitable trust or to impress property with a trust for charitable purposes or to recover property or the proceeds thereof for and on behalf of any charitable trust or corporation, may be brought at any time within 10 years after the cause of action accrued.

CAL. GOV'T CODE § 12596.

The U.S. District Court for the District of Rhode Island found that statutes and precedent supported the claim of the Massachusetts Attorney General that, "no matter when it accrued, her claim is exempt from the statute of limitations under longstanding Massachusetts case law because it alleges a breach of fiduciary duty to a public charity." Lifespan Corp. v. New England Med. Ctr., Inc., 2010 WL 3718952 (D.R.I. Sept. 20, 2010). In 1866, the Supreme Judicial Court of Massachusetts explained that:

> Trustees of a charity may be required by a court of chancery to account for income which has been misapplied, for any length of time, without regard to the statute of limitations; but an application of such income, made in good faith, and continued for many years, will not be lightly disturbed, especially after the lapse of a considerable time.

Attorney General v. Old South Soc. in Bos., 95 Mass. 474 (1866).

In some states, the statute of limitations does not apply against the government under either statute or the common-law doctrine of *nullum tempus occurrit reipublicae*, including in actions brought by the state attorney general to protect the public's interest in charitable assets, even when the state attorney general does so through bringing a claim on behalf of the charity itself. See, e.g., Commonwealth of Pennsylvania v. Citizens Alliance for Better Neighborhoods, 983 A.2d 1274 (Pa. Commw. Ct. 2009).

For an explanation of the Texas law concluding that, "corrective measures may be taken against a charity or its errant fiduciaries without regard to the passage of time. The Attorney

General is not subject to statutes of limitations, laches, and other equitable doctrines barring suit when asserting nonproprietary governmental functions. Charity regulation, being a constitutionally provided and common-law based power, is clearly one of the Attorney General's governmental roles. Furthermore, courts have held that 'no length of diversion from the plain provisions of a charitable trust will prevent restoration to its true purpose. Thus, the Attorney General may correct a diversion or misuse of charity assets many years after it occurs.'" see John W. Vinson, *The Charity Oversight Authority of the Texas Attorney General*, 35 ST. MARY'S L.J. 243, 252-253 (2004).

Comment *d(2)*. Power to appoint relators.

35. A number of state cases deal with the discretionary power of the state attorney general to appoint relators. For example, the Arizona Court of Appeals held that potential beneficiaries may not bring an action to compel the state attorney general to grant them status as relators. Robert Schalkenbach Found. v. Lincoln Found., Inc., 91 P.3d 1019, 1030 (Ariz. Ct. App. 2004), as amended (July 9, 2004). The Supreme Judicial Court of Massachusetts reached the same result. See Ames v. Attorney Gen., 124 N.E.2d 511, 515 (Mass. 1955). It held that individuals "who have no interest other than that of the general public" may not compel the state attorney general to grant them status as relators, and that the court would intrude on the power of the executive branch if it commanded the grant. Id. A successor state attorney general to the one at the date of the *Ames* case later relented and permitted those plaintiffs to proceed as relators to enforce the trust. See Attorney Gen. v. President & Fellows of Harvard Coll., 213 N.E.2d 840 (Mass. 1966).

36. Restatement Third, Trusts § 94 explains the duty of the state attorney general to control litigation with regard to the enforcement of charitable trusts. While the state attorney general has the right to bring an action on the relation of a third party, the state attorney general "cannot be compelled to sue (or to allow suit) by the relator; and the Attorney General may exercise control over the conduct of the suit, and may terminate the suit and the authorization granted to the relator." Restatement Third, Trusts § 94, Comment *e* (AM. LAW INST. 2012).