TRUSTS AND ESTATES—CHARITABLE TRUSTS—APPLICATION OF RULE AGAINST PERPETUITIES AND DOCTRINE OF CY PRES. *Rice v. Stanley*, 42 Ohio St. 2d 209, 327 N.E.2d 774 (1975).

Donating gifts to charity is a popular activity in the United States.[1] Charitable funds are administered through a variety of legal forms and are applied to diverse public purposes.[2] Donors are motivated to make charitable gifts for reasons ranging from the expiation of one's sins[3] to qualification for a charitable deduction.[4] Whatever the motivation, the important societal role that charity has assumed is well documented.[5]

Since funds donated to charities and used to support functions normally provided by public monies reduce the financial burden on government treasuries, the charitable trust has long been a favored child of the courts and legislatures.[6] Indeed, courts often find it desir-

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[1] In 1973, projections indicated that the total dollar giving exceeded $31.43 billion. Living individuals accounted for $26 billion, foundations for $2.11 billion, corporations for $1.25 billion, and bequests for $2.07 billion. Additionally, the estimated value of the six billion hours of volunteer work contributed to nonprofit organizations in 1973 was $26 billion. REPORT OF THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, GIVING IN AMERICA 14-15 (1975) [hereinafter cited as GIVING IN AMERICA].

[2] The methods available to a donor for making a contribution for charitable purposes fall into two broad categories. First, the donor may give funds directly to a particular individual, school, church, museum, or orphanage. Second, the donor may want to benefit a public purpose by transferring his donation to an intermediary that will administer the funds in accordance with guidelines prescribed by the donor. The intermediary may be a charitable trust created by the donor, a community trust, or a foundation.

Charitable trusts have been characterized as follows: "It is the purpose to which the property is to be devoted which determines whether the trust is charitable, not the motives of the testator in giving it." 4 A. SCOTT, LAW OF TRUSTS § 348, at 2768 (3d ed. 1967) [hereinafter cited as SCOTT]. The Restatement lists the following purposes as those which qualify as charitable purposes:

a) Relief of poverty
b) Advancement of education
c) Advancement of religion
d) Promotion of health
e) Governmental or municipal purposes
f) Other purposes beneficial to the community.

RESTATEMENT (SECOND) OF TRUSTS § 368 (1959).

[3] Included among the various functions ascribed to charities in furtherance of public purposes are initiating new ideas and processes, developing public policy, supporting minority interests, providing services that the government is constitutionally barred from providing, monitoring the government and the marketplace, giving aid abroad, and furthering active citizenship and altruism. GIVING IN AMERICA, *supra* note 1, at 41-47.

[4] *See* Willard, *Illustrations of the Origin of Cy Pres*, 8 HARV. L. REV. 69 (1894).

[5] *See* INT. REV. CODE OF 1954, § 170 (income tax), § 2055 (estate tax), § 2522 (gift tax).

[6] *See* E. FISCH, D. FREED, & E. SCHACTER, CHARITIES AND CHARITABLE FOUNDATIONS §§ 23-24 (1974) [hereinafter cited as FISCH]. The situation has not always been thus. Early courts in the United States treated charitable trusts with considerable suspicion. After the American Revolution, the vehement reaction in several states against all vestiges of English sovereign

able to mold the substantive property law applicable to charitable gifts into the form that will maximize the public benefit. In the past, Ohio has proved no exception to this notion:

> It is a significant fact that the Ohio Supreme Court reports show that many charitable trusts have been construed, and that in but a few isolated instances has a trust for charitable purposes been allowed to fail. . . .
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> The general doctrine is that charitable trusts have been favored, and trusts created for such purposes are carried into effect by courts of equity upon general principles of equity jurisprudence under circumstances where private trusts would fail . . . .[7]

The techniques utilized by courts result in a subtle manipulation of the substantive character of property doctrines, but with no attendant variation in the descriptive language. Those seeking to employ restrictive doctrines such as the Rule Against Perpetuities to void charitable trusts find courts reluctant to invoke such rules. Conversely, those petitioning for the judicial use of the cy pres power[8] in order to revitalize a faltering trust fund find courts waiting with open arms, more than happy to overlook the barriers that would otherwise render cy pres inappropriate. In *Rice v. Stanley*,[9] the Supreme Court of Ohio was presented with an opportunity to reexamine the implications of its rule-bending in dealing with charitable trusts. Unfortunately, the court chose to stop short of clear analysis by resorting to the use of familiar catchwords.

I. THE FACTS

In 1945, Harold Conover died leaving a will that created a trust to fund a nonprofit, nonsectarian hospital near Franklin, Ohio.[10] The

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power precipitated the legislative repeal of the English Statute of Charitable Uses and the judicial rejection of the doctrine of cy pres. Courts and legislatures also feared that "dead hand" control of charities with unlimited duration would unduly restrict the commerce of the new country. *Id.* § 22.

[7] Gearhart v. Richardson, 109 Ohio St. 418, 431-32, 142 N.E. 890, 894 (1924).

[8] The words "cy pres" are Anglo-French for "as near" and were originally part of the phrase "cy pres comme possible" meaning "as near as possible." Cy pres allows a court to alter the particular purpose of a charitable trust under certain circumstances. Although its historical origin is unclear, the doctrine of cy pres is used by modern courts as an intent-enforcing tool in applying trust property to the support of some other charity whenever the particular purpose contemplated by the settlor fails. FISCH, *supra* note 6, §§ 561-62.

[9] 42 Ohio St. 2d 209, 327 N.E.2d 774 (1975).

[10] The charitable gift in trust was in fact an equitable remainder because Marie Conover, the wife of the testator, had been given an income interest for life in the corpus of the trust. However, she died only one month after her husband's death. Her will created another trust which was subject to provisions identical to those regulating her husband's trust. The validity of each trust was contested by the heirs in a consolidated action.

trustee was instructed that, if no hospital fitting the description existed at the effective date of the instrument, the trust should be maintained until a corporation was organized for the purpose of erecting and equipping such a hospital.[11] Once organized, the hospital corporation had to conform to several conditions before the trustee could release funds. The will also contained directions to the trustee pertaining to the manner in which the principal was to be depleted through distributions to the qualifying corporation. Five years after the completion of the hospital or fifteen years from the death of Conover, whichever was later, the trustee was to pay over the remaining funds to the corporation, which was to use both principal and income "for the purpose of operating and improving such hospital."[12] At the death of Conover, no such hospital existed and no hospital corporation had been formed.

In 1962, the widow of an heir of Conover instituted a proceeding for the purpose of having the trust terminated and the principal distributed to the heirs. The trustee counterclaimed, asking for the application of cy pres and for instructions on his duties as trustee. The proceeding lay dormant until 1968, when an amended complaint was filed alleging that the Conover trust violated the Rule Against Perpetuities and hence that the interest intended for charity was void *ab initio*. After a second amended complaint was filed in 1971, the trustee again sought instructions and contended that cy pres should be applied to the trust.

In affirming the ruling of the court of appeals, the Supreme Court of Ohio held that the trust did not violate the Rule Against Perpetuities and that the doctrine of cy pres was applicable. The action was remanded to the probate court with instructions to conduct cy pres proceedings for the purpose of distributing the corpus of the trust in accordance with the general intention of the testator.

The heirs had relied on two arguments in seeking termination of the trust for their benefit. First, they contended that the provision restricting the trustee from releasing funds until a qualified hospital corporation was organized constituted a condition precedent to the vesting of the interest. Since the trust was contingent upon an event which might not happen within the period prescribed by the Rule Against Perpetuities, the interest was void *ab initio* and the property

[11] The operative language directed the trustee to hold the trust funds until the organization of a nonprofit corporation "which is controlled in such manner as not to be directly or indirectly controlled by any church . . . and which . . . in the opinion of my said trustee is properly organized and . . . properly managed . . . ." Rice v. Stanley, 42 Ohio St. 2d 209, 210, 327 N.E.2d 774, 776 (1975).

[12] *Id.* at 211, 327 N.E.2d at 777.

passed to the heirs of Conover by intestacy. Second, the counterclaim of the trustee seeking the application of the doctrine of cy pres was challenged as inappropriate because Conover expressed a limited charitable purpose (giving funds to a qualified hospital corporation to erect and equip the hospital) in making the gift in trust for charity. Because the charitable purpose had become impossible and impracticable of accomplishment, they argued, the trust had failed and the trustee held the property in a resulting trust for the settlor's successors in interest.[13]

In sustaining the charitable trust and deciding that Conover's purpose was sufficiently broad to permit the application of cy pres, the court focused primarily on two issues: (1) whether the instrument manifested a "general charitable intent" on the part of the testator, and (2) whether the trust purpose had become impossible or impractical to fulfill. The court responded to both issues in the affirmative, thereby providing the classic prerequisites to the invocation of the judicial cy pres power. The use of these a priori concepts made easier the court's decision in *Rice*. However, the existence of such loose formulas in the framework of black-letter perpetuities and cy pres law as applied to charitable trusts has permitted courts to resolve cases on the basis of an unarticulated method of decision. The remainder of this Case Note will examine the *Rice* case in the context of how a court uses these catchwords to shield other motives that underlie the decision to sustain a trust, and why this technique may result in undesirable consequences.

II. CATCHWORDS THAT DISGUISE THE EXTENT OF RULE BENDING

A. *General Charitable Intention*

1. As a Guide for the Discovery of Vested Interests

Although the statement that charitable trusts are exempt from the Rule Against Perpetuities is occasionally encountered,[14] the or-

[13] For a discussion of the numerous authorities that support trust termination in cases involving similar circumstances, see G.G. BOGERT & G.T. BOGERT, LAW OF TRUSTS § 75, at 283 (5th ed. 1973) [hereinafter cited as BOGERT].

[14] *See* Ingraham v. Ingraham, 169 Ill. 432, 450, 48 N.E. 561, 566 (1897); O'Neal v. Caulfield, 5 Ohio N.P. 149, 8 Ohio Dec. 248 (C.P. Warren Cty. 1898); cases cited in FISCH, *supra* note 6, § 110, at 113 n.13. The statement is misleading because the Rule Against Perpetuities is used in different senses by courts. There are four restrictive rules which have carried the label of the "Rule Against Perpetuities": the rule against remoteness of vesting of contingent interests, the common-law rule voiding most restraints on the alienation of property interests, statutory rules prohibiting the undue suspension of the power of alienation, and the rule against postponing the direct enjoyment of property through a trust of unreasonable duration. In

thodox "remoteness of vesting" test[15] is applied to charitable trusts in Ohio;[16] and at the time of the Conover disposition in *Rice*, a prior codification of the common-law Rule Against Perpetuities was in effect.[17] Thus the Conover heir argued that the gift was subject to a condition precedent that might not have been performed within the period of the Rule Against Perpetuities, and that it was therefore invalid.

As indicated in the syllabus,[18] the court in *Rice* rephrased the operative language of the will as a direction to the trustee to hold the funds "in trust for a charitable corporation to be organized" after the testator's death. Although this quotation does not accurately reflect the wording of the will,[19] the use of customized language is understandable. Authorities divide the set of charitable gifts made in trust to corporations not yet formed into two categories—those directing the trustee to pay the funds over to a corporation *to be* organized and those directing that payment be made to a corporation *if* organized.[20] Although both phrases are conditions, the former is not considered a condition precedent to the vesting of the gift; rather, it merely postpones payment until either the corporation is organized or a court acts under the doctrine of cy pres. However, the interest is viewed as being vested immediately in charity.[21] The phrases "corporation to be

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jurisdictions which have adopted the latter rule, charitable trusts are usually said to be exempt from its effect and therefore may be of perpetual or indefinite duration. The rationale for permitting a donor to restrict the disposition of his property long into the future is based on the social advantages derived from trusts for philanthropic purposes.

However, in nearly all jurisdictions which have retained the common-law Rule Against Perpetuities in its orthodox form, a remote contingency may result in the invalidation of a charitable disposition. An exception insulates some charitable interests from the operation of the Rule Against Perpetuities: if a donor makes a gift from one charity to another, the interest is valid even though the gift is to take effect upon the happening of a contingency that may not occur within the period of the Rule. The exception follows logically from the unlimited duration that charitable trusts are allowed to enjoy. BOGERT, *supra* note 13, §§ 68-70; FISCH, *supra* note 6, § 111; SCOTT, *supra* note 2, § 401.5.

[15] The most commonly encountered statement of the Rule is that of John Chipman Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[16] OHIO REV. CODE ANN. § 2131.08 (Page 1976). Statutory modifications of the orthodox rule were also enacted as part of the 1967 statute. The changes were not retroactive. *See* Lynn, *The Ohio Perpetuities Reform Statute*, 29 OHIO ST. L.J. 1 (1968).

[17] OHIO GEN. CODE § 10512-8 (1932). Act of April 10, 1931, § 1,114 Ohio Laws 320, 470.

[18] 42 Ohio St. 2d 209, 327 N.E.2d 774 (1975).

[19] *Id.* at 210-11, 327 N.E.2d at 776.

[20] G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 344, at 747 (2nd ed. 1964); SCOTT, *supra* note 2, § 401.8, at 3163.

[21] "While it may be pure fiction to say that the equitable interest is vested in a charitable purpose, that analysis has never been questioned." L. SIMES, PUBLIC POLICY AND THE DEAD HAND 113 (1955).

organized" and "corporation if organized" are used as conclusory terms to describe the legal effect of similar language contained in an instrument.

As illustrated by *Rice*, delimiting phrases attached to the gift can be characterized as either conditions precedent to the vesting of the interest in charity or as restrictions on the method of applying the gift to charitable purposes. To resolve the issue, the court looks for factors that indicate the emphasis given by the settlor to the restrictive language in relation to his overall intent to make a charitable gift. If the settlor manifested a desire to benefit a charitable purpose or objective rather than a particular object or institution, then the court will impute to the settlor a general charitable intention. Once a general charitable intention is ascertained, the perpetuities issue is resolved quickly: regardless of the language of the instrument, the settlor's general charitable intent negatives any contention that a contingency has prevented vesting. Instead, the gift is vested in charity immediately with the funds held in trust for a "corporation to be organized." This is true even if the particular method of applying the property to charity might not be possible within the perpetuities period.[22]

The only indicia cited by the court in *Rice* for the proposition that Conover possessed a general charitable intent was the manner in which the settlor "carefully separated the statement of the desired restrictions . . . upon the instrumentality from the statement of the purposes of the bequest."[23] This justification is unpersuasive since the stylized language of the instrument indicates that the meticulous writer who "carefully separated" the restrictions from the purposes was likely an attorney, not the settlor.

Different courts have gleaned a general charitable intent from a variety of other such factors.[24] When courts combine these readily available and marginally relevant factors with the judicial sympathy historically expressed for charities,[25] it becomes apparent that chari-

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[22] *See* note 20 *supra.*

[23] 42 Ohio St. 2d at 216, 327 N.E.2d at 780.

[24] Among those mentioned as influential by courts are: (1) an absence of a gift over, (2) separate provisions for gifts to several charities, (3) an express exclusion of a charitable purpose from the operation of the gift, (4) the broad appeal of the name or object of the institution to which the gift was made, (5) disposition by the donor of the bulk of his fortune to charity, and (6) for inter vivos gifts, either a lack of interest on the part of the donor while alive in the particular object of his gift or a broad interest in activities that extend beyond the narrow purpose specified in the trust instrument. *See also* text accompanying note 43 *infra.* For a collection of illustrative cases, see BOGERT, *supra* note 13, § 147, at 528; FISCH, *supra* note 6, § 575.

[25] *See* note 6 *supra.*

table gifts have been granted an "exemption"[26] from the operation of black-letter perpetuities law in the form of a lesser requirement for vesting. Charitable gifts with contingencies unlike the one in *Rice* also enjoy the exemption from the full rigor of the Rule Against Perpetuities.[27] This may hold true even if the settlor explicitly labels the provision a condition.[28]

A charitable trust is occasionally invalidated on the basis of a contingency that may be resolved remotely. Such a conclusion is buttressed by a preliminary finding that there is no general intent on the part of the settlor to make the gift vest immediately in charity. Yet the evidentiary factors used to support a finding of a general charitable intent are often just as visible when the donor is deemed to have intended to pass a contingent interest. For instance, the testator in *Malmquist v. Detar*[29] donated funds

> to the board of trustees . . . in charge and control of the first public hospital which shall hereafter be established in Kinsley . . . to be used to apply upon the cost of construction of a suitable building for such hospital . . . . In the event that no such hospital shall have been established in Kinsley at the date of my death, then . . . I direct the said sum shall be taken and held by my executor . . . and whenever such a hospital shall be established . . . then said executor . . . shall pay over said sum . . . to the board of trustees . . . of such hospital . . . .[30]

This language closely resembles the wording of the Conover will. The testator in *Malmquist* also stipulated that the hospital be operated on a nonprofit, nonsectarian basis. In the parlance of the *Rice* opinion, the testator appeared to have "carefully separated" the restrictions on the gift from the purposes of the trust. Nevertheless, the Supreme Court of Kansas held that the attempted gift violated the Rule Against Perpetuities because vesting of the interest depended on a contingent event that might be resolved remotely.

The strain on courts to balance their collective desire to sustain charitable gifts whenever possible with the need to force them into the framework of black-letter law is resulting in distortions of legal

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[26] R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 21-22 (1966).

[27] *See* FISCH, *supra* note 6, § 112. One observer identified a judicial tendency to classify as contingent all charitable interests that are conditioned on the performance of an act by a person or entity other than a representative of the donor. Najarian, *Charitable Giving and the Rule Against Perpetuities*, 70 DICK. L. REV. 455 (1966). As *Rice v. Stanley* illustrates, this distinction has been discredited. *See* FISCH, *supra* note 6, § 112, at 117.

[28] *E.g.*, City of Providence v. Payne, 47 R.I. 444, 134 A. 276 (1926).

[29] 123 Kan. 384, 255 P. 42 (1927).

[30] *Id.* at 384, 255 P. at 43.

principles. In cases that involve the doctrine of cy pres, the friction caused by the competing impulses is more intense.

2. As a Requirement of the Doctrine of Cy Pres

The traditional view[31] requires that three elements be present before the doctrine of cy pres can be invoked: (1) there must be a valid charitable trust (and one that is invalid will not be cured by an application of the doctrine), (2) it must be established that the donor evinced a general charitable intent,[32] and (3) it must be established that the specific purposes of the trust are impossible or impractical to carry out. Ohio courts have adopted these classic elements of cy pres in a piecemeal fashion.[33] The Supreme Court of Ohio has never explicitly enumerated the three requirements in a single case. In *Rice*, only the second element was examined in depth before the doctrine was held to apply.

When cy pres is applied, courts claim to be enforcing the actual, expressed intent of the settlor. Selection of a secondary charitable objective is based on what the court believes the donor desired. Wide discretion is vested in the court in its use of the power, but it cannot substitute its judgment capriciously for that of the donor. The restraint on judicial activism imposed by the intent requirement is a vestige of a nineteenth century common-law emphasis on individual rights and private property.[34] If the purpose of the trust has become impossible or impractical of fulfillment but the donor manifested

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[31] RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

[32] In the principal case, the issue of whether or not the will manifested a general charitable intent on the part of the testator is considered twice. For perpetuities purposes, a finding of a general charitable intent aided the court in construing the gift to have been unencumbered by a condition precedent and therefore vested in charity from its inception. For cy pres purposes, a finding of a general charitable intent was essential before the doctrine could be held applicable.

The separate analysis employed by the court in resolving the question may suggest that the determination can produce different results depending on the ultimate issue on which the absence or presence of a general charitable intent bears. However, the method of analysis does not appear to vary in arriving at a general charitable intent in separate parts of the opinion. In both instances, the court simply tallies up the number of indicia which support a finding of a general charitable intent and balances them against the evidence supporting a contrary inference.

The implication of the Restatement buttresses the contention that a finding of a general charitable intent for perpetuities purposes may not be sufficient to show a like intent for cy pres purposes. RESTATEMENT (SECOND) OF TRUSTS § 401, comment (j) (1959).

[33] These three elements have been cited approvingly by some Ohio lower courts. *See, e.g.*, Cheney v. State Council of Mechanics, 81 Ohio L. Abs. 395, 162 N.E.2d 242 (P. Ct. 1959).

The development of cy pres in Ohio has been totally a matter of judicial adoption. *See* Sullivan, *Cy Pres Doctrine in Ohio*, 18 OHIO ST. L.J. 196 (1957).

[34] *See* Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L. REV. 382 (1959).

only a narrow charitable object, then the trust is terminated and the property is held in a resulting trust for the benefit of the donor's successors in interest.

Recent decisions among courts indicate that cy pres is being used to preserve trusts for charitable purposes with increasing regularity.[35] When faced with the failure of specific language in a trust instrument, some courts permit variance of the particular object through the use of a doctrine related to cy pres, but with no intent requirement. This "doctrine of deviation" has been used extensively by Ohio courts.[36] Although limited by definition to changes in administrative terms of the trust, deviation is permitted in cases that seem to call instead for the application of cy pres.[37] By construing the dominant purpose of the donor more broadly than the specific language of the instrument would seem to warrant, courts have authorized trustees to channel the property into a variety of uses, unencumbered by any restrictive language.[38]

If cy pres is invoked, the court must confront the intent require-

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[35] *See* FISCH, *supra* note 6, § 589; ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, REPORT OF THE COMMITTEE ON CHARITABLE TRUSTS 63, 75 (1965).

[36] *See* Sullivan, *supra* note 33, at 207.

[37] *E.g., In re* Farren, 27 Ohio App. 2d 3, 272 N.E.2d 162 (1970) (trust income allowed to be paid to another hospital when the donee hospital closed on the theory that the latter was an agency through which the charitable funds were channeled for the benefit of the indigent); First Nat'l Bank v. Unknown Heirs of Donnelly, 96 Ohio App. 509, 122 N.E.2d 672 (1954) (trustees directed to apply trust funds for the maintenance of Summit County orphans in a Catholic orphanage in Cuyahoga County; the testator had left funds in trust for the establishment of a Catholic orphanage in Summit County); Craft v. Shroyer, 81 Ohio App. 253, 72 N.E.2d 589 (1974) (trustees ordered to use charitable funds for the care and support of Miami County orphans staying at a neighboring orphanage, even though the testatrix had contemplated the establishment of a separate orphanage in Miami County for orphans of a particular church); Fenn College v. Nance, 4 Ohio Misc. 183, 210 N.E.2d 418 (C.P. Cuyahoga Cty. 1965) (private college permitted to transfer its lands and other assets to a state university and to change its purpose from the operation of a college to the operation of a foundation supporting the cause of education); Cleveland Museum of Art v. O'Neill, 72 Ohio L. Abs. 11, 129 N.E.2d 669 (C.P. Cuyahoga Cty. 1955) (trustees authorized to divert income from trusts that had been created to facilitate the purchase of art objects and to use it for additonal construction and an overall remodeling).

[38] The doctrine of deviation can also be used to obviate the cy pres requirement that the particular purpose must be impossible, impractical, or illegal to fulfill. Although a similar prerequisite must be met before deviation is applicable—compliance with the terms of the disposition must be impossible, impractical, or illegal or must substantially impair the accomplishment of the charitable purpose—substantial impairment is easily shown. *See, e.g.*, Cleveland Museum of Art v. O'Neill, 72 Ohio L. Abs. 11, 129 N.E.2d 669 (C.P. Cuyahoga Cty. 1955).

When the trustee has already taken action inconsistent with certain trust provisions and without judicial approval, the court can work with the doctrine of deviation to ratify the trustee's course of conduct. Since variances from the charitable purposes of the trust can only be made pursuant to a judicial application of cy pres, a court will strive to characterize the action as a deviation from an administrative term of the trust so that the court can ratify the propriety of the trustee's action. *See* SCOTT, *supra* note 2, § 167.1.

ment. It is the rare settlor who foresees the possible failure of his particular charitable object and provides for an alternative disposition. Consequently, the judicial task of resolving whether the donor had a general or particular intention can be arduous. The testator's intention "is the trail which the court must follow in all its turns and winding, through swamps and over hills, provided only that it has been sufficiently blazed and does not trespass on forbidden territory."[39]

The degree of hardship that a court may endure on the trek varies considerably. Some courts, eager to sustain charitable trusts for the public benefit whenever possible, simply neglect the intent requirement.[40] Others presume the existence of a general charitable intent, thereby altering the burden of proof.[41] A legislative answer, found only in Pennsylvania, is statutory elimination of the requirement.[42] But perhaps the most common approach to circumscribing the donor's intention is to sift through the many evidentiary matters that may be relevant to the question, such as the settlor's professed beliefs, the circumstances leading up to his creation of the trust, the general milieu when the trust was created, the nature and extent of the settlor's philanthropic activities, his financial status, and his degree of consanguinity to heirs.[43] Of course, since it is improbable that the testator thought about the possible failure of his particular purpose, the process is largely a fiction.

The requirement of a general charitable intent has been described as a cloak behind which the court can appropriate the trust funds and apply them in whatever manner it deems desirable.[44] The truly decisive factors are usually left unarticulated.[45] In *Rice*, the

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[39] C. ZOLLMAN, AMERICAN LAW OF CHARITIES § 140, at 93 (1924).

[40] *See, e.g.*, Smith v. Moore, 225 F. Supp. 434 (E.D. Va. 1963); *In re* Hawley's Estate, 32 Misc. 2d 624, 223 N.Y.S.2d 803 (Sur. Ct. 1961).

[41] *E.g.*, Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973). Because of the favorable tax treatment accorded charitable transfers, a committee of the ABA has concluded that a presumption of a general charitable intent is warranted unless it has been specifically negatived by the trust instrument. Committee on Charitable Trusts and Foundations, *Cy Pres and Deviation: Current Trends in Application*, 8 REAL PROP. PROB. & TRUST J. 391, 396 (1973).

[42] 20 PA. CON. STAT. ANN. § 6110 (1972) provides in part:

> Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfillment . . . the court may . . . order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor *whether his charitable intent be general or specific.* [Emphasis added].

[43] For other indicia used by courts to undergird a finding of a general charitable intent, see FISCH, *supra* note 6, § 112.

[44] *Id.* § 575, at 438 n.88, *citing* Lutheran Hospital v. Goldstein, 182 Misc. 913, 918, 46 N.Y.S.2d 705, 709 (Sup. Ct. 1944).

[45] Commentators have urged that several factors be given explicit recognition by courts

court stated that it arrived at the donor's general charitable intent by "guessing,"[46] a candid acknowledgment of the fiction involved. It is disappointing that the court chose not to draw more discernible guidelines for resolving the intent question. The broad discretion left to Ohio courts will perpetuate the undesirable practice of obscuring the factors which undergird a decision. The use of the cy pres doctrine has always been plagued by unpredictability,[47] and the *Rice* decision encourages inconsistencies in its application. If courts are to continue to balance the desirability of effectuating the donor's intent against the possibility of achieving maximum public benefit from the trust property, an overt adoption of the technique of weighing competing interests is advisable.[48]

B. *The Cy Pres Requirement of the Impossibility or Impracticality of the Donor's Specific Plan*

"In regard to the . . . requirement for the application of the doctrine, that it is impractical or impossible to carry out the specific purpose of the donor, Ohio law is not clear."[49] Written nearly twenty years ago, these words describe accurately the modern status of the Ohio law of cy pres. With the brief phrase, "this case cries out for the application of the doctrine of cy pres,"[50] the court in *Rice* resolved in the affirmative the issue of whether the particular charitable purpose had become impossible or impractical to fulfill. In applying the impossibility or impracticality of purpose requirement, Ohio courts

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as influential in the decision-making process. Of primary importance among such factors is the public interest served by the prevention of waste and the promotion of utility in the application of charitable funds to community needs. L. KUTNER, LEGAL ASPECTS OF CHARITABLE TRUSTS AND FOUNDATIONS 43 (1970); Comment, *A Revaluation of Cy Pres*, 49 YALE L.J. 303, 320 (1939). Other factors which writers encourage courts to acknowledge whenever they become instrumental in trust termination proceedings include the following: (1) the degree of consanguinity between the settlor and his heirs, (2) the likelihood that the trust property will be removed from the local jurisdiction if the trust is terminated for the benefit of the heirs, (3) whether the heirs are residents of the state in which the court sits, (4) whether the property is presently in the possession of a favored party, *e.g.*, a governmental or nonprofit institution, and (5) the collective judicial desire to pursue the disposition of the trust funds that would most effectively serve the public interest.

One writer has outlined an excellent proposal for courts to employ as an analytical guide in resolving such issues without resorting to unnecessary distortions of black-letter law. Lynn, *The Questionable Testamentary Gift to Charity: A Suggested Approach to Judicial Decision*, 30 U. CHI. L. REV. 450, 466-68 (1963).

[46] 42 Ohio St. 2d at 224, 327 N.E.2d at 784.

[47] *Compare In re* Farren, 27 Ohio App. 2d 31, 272 N.E.2d 162 (Clinton Cty. 1970), *with* Murr v. Youse, 52 Ohio L. Abs. 321 (P. Ct. 1946).

[48] Otherwise, the consequences summarized in section III of this Note will likely flow from a continuation of the fiction.

[49] Sullivan, *supra* note 33, at 204.

[50] 42 Ohio St. 2d at 225-26, 327 N.E. 2d at 785 (1975).

have demanded showings which range from true impossibility[51] to an improbability of effectuating the purpose within a reasonable time.[52] No Ohio court has shown interest in adopting suggestions offered by some commentators that would relax the requirement further.[53]

The court in *Rice v. Stanley* indicated that a degree of impracticality far less than true impossibility should be used as the measure for determining whether the particular purpose of the trust can be carried out. Such a relaxation of the impossibility standard substantially reduces the number of trusts that survive judicial review in the form that their settlors originally envisioned. Instead, a series of trusts modeled after prevailing judicial preferences emerges from litigation. Courts that demand a substantial degree of impracticality/impossibility in achieving the specified purpose provide a desirable curb on the liberal application of cy pres to alter a testamentary scheme. A settlor should be permitted to devote his property to an eccentric and marginally beneficial charity; in the future, the idiosyncratic gift may prove to be of more benefit to the public than the gift to a charity with a more normal purpose.[54] Moreover, a limited degree of "dead hand" control gives substance to the American emphasis on individualism and its attendant values.

Unfortunately, not every judge has ears sharp enough to pick up the plaintive wails of a dormant trust "crying out" for reform. *Rice* offers little guidance for determining when the crying has become intolerable. With such imprecise standards,[55] lower courts in Ohio have occasionally chosen to avoid the difficulties of applying cy pres through the use of a doctrinal sleight-of-hand. The donor's plan is first changed by interpreting the "charitable objective" language in the instrument more broadly than the specific purpose indicates. Then, the doctrine of deviation is employed to vary the term. An example of this is found in *Cleveland Museum of Art v. O'Neill*,[56] in which several trusts had been established for the purpose of acquiring art objects to stock the museum. Because its building had become inadequate to house the collection, the museum sought permission to use the trust income to provide temporary financing for building

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[51] Heinlein v. Elyria Savings & Trust Co., 75 Ohio App. 353, 62 N.E.2d 284 (1945).

[52] Harper v. Central Trust Co., 8 Ohio N.P. 157, 11 Ohio Dec. 240 (Super. Ct. 1901).

[53] *See* note 85 *infra*.

[54] *See* L. KUTNER, LEGAL ASPECTS OF CHARITABLE TRUSTS AND FOUNDATIONS 326-46 (1970).

[55] This imprecision is not unique to Ohio. One writer has been driven by the inconsistencies into grouping cy pres cases in the United States according to "trends" in the use of the doctrine. *Id.* at 45.

[56] 72 Ohio L. Abs. 11, 129 N.E.2d 669 (C.P. Cuyahoga Cty. 1955).

additions and modifications. The particular purpose of the settlor was found to be that of benefiting the museum, and not that of acquiring art objects. Even though the use of the funds could have been continued as directed, the court held that it was proper to divert the income to pay for the construction. The court concluded that the deviation was more in conformity with the settlor's basic, unarticulated purpose of helping to create a showcase for art in Cleveland. To maintain the preeminent status of the museum, the wisest use of the income had shifted from acquiring art objects to improving the building. Although the maximum benefit was derived from the trust in *Cleveland Museum of Art*, one wonders if the settlor would have been totally indifferent to the prospect of his benevolence being commemorated by a cornerstone of a museum wing rather than a memorial collection of favored art objects.[57]

III. INTERESTS AFFECTED BY *Rice v. Stanley*

From the foregoing discussion it is clear that the elements of legal principles such as cy pres, deviation, and the Rule Against Perpetuities can be used to obfuscate the actual method of decision. "General charitable intention," "specific charitable intention," "impossibility," and "impracticality" are conclusory terms which may be expanded or contracted to fit the facts of particular cases. Conclusory aids to construction of legal instruments often become a basis for justifying the decision,[58] thereby obscuring the actual motivations for relaxing legal rules as applied to charitable trusts. *Rice* changes no substantive law, nor does it represent a major shift in doctrinal emphasis. It does fail to capitalize on an opportunity to clarify a murky area of the law. Few cases involving the cy pres doctrine reach the Supreme Court of Ohio.[59] By resorting to conventional analysis in a narrow area of the otherwise evolving charitable trust field, the court in *Rice* strongly affects the positions of the broader interests and policies in conflict. In any action that seeks to modify or terminate a charitable trust, a court usually must consider and accommodate the interests of the settlor, the successors in inter-

[57] As a practical matter, actions brought by trustees seeking court approval to deviate from the terms of a charitable trust are rarely contested. For a case which did arouse the public ire, see Kutner, *The Desecration of the Ferguson Monument Trust: The Need for Watchdog Legislation*, 12 DEPAUL L. REV. 217 (1963).

[58] Phrases such as "courts favor the early vesting of interests" and "courts prefer a finding of testacy to intestacy" occasionally appear as part of the rationalization for a particular decision.

[59] Sullivan, *supra* note 33. Since the publication of the article in 1957, *Rice* is the only case which has reached the Supreme Court of Ohio squarely on a cy pres issue.

est of the settlor, the public, the Attorney General, the trustee, and the beneficiaries.[60] Four significant implications of *Rice* with respect to these competing interests are noteworthy.

A. *The Settlor*

Although charitable trust litigation is not generally newsworthy, one group that keeps abreast of the news is the class of potential donors. Among the more visible aspects of trust litigation are intra-family quarrels, lengthy hearings with prodigious attorneys' fees that are recoverable from the trust, a judiciary and Attorney General eager to shake off the clasp of the "dead hand,"[61] and claims of wrongdoing alleged against trustees. Undoubtedly, these aspects tend to discourage beneficience on the part of would be donors. As a case likely to provoke litigation because of its lack of guidelines for future decisions, *Rice* must bear partial responsibility for the decrease in constant, uninflated dollars donated annually to charity, and for the consequent diminution of benefit to the public interest.[62]

B. *The Laughing Heir*

Rice exemplifies the modern judicial willingness to go to great lengths to discover a general charitable intention, thereby preserving the trust and frustrating the claims of heirs. In light of this general policy of favoring charitable gifts at the expense of eliminating windfalls for remote heirs, a decision like *Rice* is defensible as a product of the twentieth century emphasis on public welfare over individual rights.

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[60] *See* note 45 *supra* and accompanying text.

[61] Such an irreverent attitude toward the testamentary scheme of a charitable donor smacks of a modern version of prerogative cy pres, a power exercisable by the king in early England. Charitable gifts were required to comply with public policy as established by the king. Discrepancies were corrected by the king's representative regardless of whether evidence of a general charitable intent existed or the testator's particular plan had become inoperative. Prerogative cy pres was rejected in the United States due to its arbitrary and unreasonable features. E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 2.03 (1950).

A restrictive form of prerogative cy pres has arguably appeared in Ohio and has manifested itself through two current characteristics of charitable trust litigation, both of which have tended to reduce the importance of the testator's intent for the purpose of deciding which charitable object should be the beneficiary of his donation. First, while retaining the language of traditional cy pres, modern courts have unquestionably relaxed the substantive content of the cy pres requirements (as illustrated by the case in question). The result has been a liberal use of the doctrine in saving gifts for charitable purposes other than those expressed by the testator. Second, the nonadversary context that characterizes most trustee actions which seek the application of cy pres or permission to deviate enables the trustee to modify the testator's plan with relative ease. Court approval merely makes legitimate a course of conduct the trustee may have been pursuing for some time.

[62] GIVING IN AMERICA, *supra* note 1, at 70.

Another reason for such decisions is that the specter of a remote heir thumbing through a wad of bills and chuckling over his good fortune in terminating the trust of a distant relative apparently haunts some people. An occasional court will use this factor as an express basis for preserving a trust.[63] Legislatures have been urged to bar attempted recoveries by the settlor's successors in interest.[64] As a policy matter, the question may be asked why it is so undesirable for the laws of intestacy to operate in this area. Trusts which are salvaged by the application of cy pres may be of limited social value. By definition, something has gone wrong with such a trust. In framing a new scheme, a court must be guided by the settlor's intention as manifested by the trust's obsolete purpose. Of questionable trusts terminated for the benefit of the heirs, one writer has remarked that at least "we can reason with the living who dispose of their wealth, but the dead are beyond persuasion; and once we have indulged them, we may be centuries in shaking them off."[65] Based on the implications of *Rice* though, the laughing heir had better look for other sources of amusement.

C. *The Dormant Trust and the Public Interest*

Absent any duty imputed to the trustee to seek reformation of a dormant trust,[66] the administrative machinery provided by the Ohio legislature for the policing of dormant trusts is handled by the Attorney General's office.[67] Although Ohio has maintained a very progressive attitude in equipping the Attorney General with extensive enforcement powers,[68] there are gaps in the statutory coverage and in

[63] *See The Questionable Testamentary Gift to Charity*, *supra* note 45, at 463-65. The author suggests that the emphasis on the degree of consanguinity between the testator and those who are challenging the charitable gift may indicate a judicial attempt to modify the law of intestate succession.

[64] RESTATEMENT (SECOND) OF TRUSTS § 399, comment (i) (1959).

[65] *The Questionable Testamentary Gift to Charity*, *supra* note 45, at 467.

[66] The term "dormant trust" is used herein to denote a charitable trust whose purpose has become impossible, impractical, illegal, or undesirable to carry out in the manner specified by the donor, or whose purpose is so easily fulfilled that an unreasonable accumulation of funds has resulted.

[67] In both the United States and England, the attorney general has supervised and enforced the performance of charitable trusts as part of his duty to protect the rights of the people of the state. At common law the attorney general's powers were limited and enforcement was haphazard. Consequently many states, including Ohio, have statutes that broaden the powers of the attorney general in the areas of collecting information regarding charitable trusts, initiating actions to enforce their performance, and investigating and restraining the abuse of these trusts. Thorough discussions of the scope and efficiency of the attorney general's role can be found elsewhere. BOGERT, *supra* note 13, § 156; FISCH, *supra* note 6, §§ 682-89; SCOTT, *supra* note 2, § 391.

[68] *See* OHIO REV. CODE ANN. §§ 109.33, 109.99 (1969), *as amended*, (Page Supp. 1975). Some specific tools available to the Ohio Attorney General include the following:

the level of attention actually devoted by the Attorney General to the problem of dormant trusts. Emphasis in recent years has been directed toward investigating scandalous abuses by trustees rather than toward ferreting out trusts with charitable purposes that are no longer sensible, feasible, or expansive enough to exhaust accumulating funds. With limited funds for a legal and investigative staff, the charitable trust division of the Attorney General's office understandably applies its energies to those areas of greatest public concern. Public reaction to wrongdoing on the part of trustees of multimillion dollar foundations[69] dwarfs the concern for remedying obsolete trusts which are no longer fulfilling public needs.

One notable deficiency in the statutory coverage in Ohio is the absence of a requirement that a copy of a recorded instrument making an inter vivos transfer of property for charitable purposes be furnished to the Attorney General. A harried Attorney General's staff is unlikely to embark on the time-consuming searches necessary to discover the existence of such inter vivos trusts. Even for those trusts which are registered, the Attorney General rarely institutes proceedings against a trustee seeking the application of cy pres.[70] And yet the amount of money not benefiting any charitable purpose because of changed conditions has been estimated in the many millions of dollars.[71]

In the case of a charitable trust whose purpose has become impossible of fulfillment, the only parties who have standing to apply

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1) The power to investigate transactions and operations of charities to determine whether their purposes are being properly carried out and their assets properly administered. The power to investigate includes the power to compel the production of books or papers. *Id.* § 109.24.

2) Full discretion as to the manner in which an action is to be prosecuted or alternatively the authority to settle the action. *Id.*

3) The right to receive notice after the admission to probate of any will purporting to create a charitable trust or containing a gift valued in excess of one thousand dollars to any charitable trust. *Id.* § 109.30.

4) The authority to maintain a register for charitable trusts and the power to exempt certain classes of charitable trusts from the registration requirements. *Id.* § 109.26. A refusal by the trustee to register is punishable by fine or imprisonment or both. *Id.* § 109.99 (Page 1969).

5) The power to seek judicial removal of the trustee for failure to comply with the annual report requirement. *Id.* § 109.31 (Page Supp. 1975).

6) The power to employ personnel, including experts, for the effective administration of the statute. *Id.* § 109.33 (Page 1969).

7) The power to make rules which are necessary for the administration of the statute. *Id.* § 109.27, *as amended*, (Page Supp. 1975).

[69] *See* State v. Kline, 266 Minn. 372, 124 N.W.2d 416 (1963), *cert den.*, 376 U.S. 962 (1964), in which the designated purposes (for research and a hospital) of the Sister Kenny Foundation received less than 50% of the funds contributed; FISCH, *supra* note 6, § 43.

[70] FISCH, *supra* note 6, § 585, at 549 n.1.

[71] D'Amours, *Control of Charitable Trusts*, 84 TRUSTS & ESTATES 345 (1947).

for cy pres are the trustee and the Attorney General. For several reasons,[72] the Attorney General is unlikely to seek cy pres. Likewise, the trustee usually remains aloof from dealing with the trust deficiency unless pressured by a concerned group. One such group is the heirs who would benefit from the failure of the trust. For dormant charitable trusts, a common pattern of litigation finds an heir challenging the validity of the trust on a conventional legal basis (such as the Rule Against Perpetuities), and the trustee and Attorney General joined in defense of the action. Perhaps prodded by the knowledge that the watchful eyes of the court and Attorney General may be scrutinizing his managerial competence, the trustee often realizes that it has become impossible or impractical to carry out the charitable plan in the manner specified by the donor, and thus he counterclaims for cy pres instructions. Unable to institute a cy pres proceeding,[73] the heir seizes the opportunity to contest the propriety of applying cy pres.

As noted above a "grasping heir" conjures up a distasteful image of extreme irreverence. This attitude provides substantial impetus for courts to do everything possible to preserve charities against attack.[74] However, attacks by disgruntled heirs of the donor on the validity of charitable trusts have a significant positive impact on the effective-

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[72] While the beneficiary of a private express trust has a financial interest in enforcement, the attorney general has no comparable self-interest except as the public representative. Indeed, the political impact of seeking cy pres may be quite negative. The implication of such an action is that the trustee, normally a respected member of the community, has not performed well. Some recent cases have involved the application of cy pres to delete an offensive racial restriction from the terms of the gift. *E.g.*, Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973); Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966); Coffee v. William Marsh Rice University, 387 S.W.2d 132 (Tex. Civ. App. 1965). Racial issues have little political appeal to public officials, including the attorney general. Moreover, a limited staff and budget cut against the active supervision of dormant charities. Finally, a natural reluctance to upset a testamentary plan is prevalent, particularly where the scheme has been in effect for some time.

It has been suggested that the exorbitant cost of a cy pres proceeding may be causing attorneys general to use a de minimus rule in deciding whether a dormant trust should be enforced. Lynn, *Perpetuities: The Duration of Charitable Trusts and Foundations*, 13 U.C.L.A.L. REV. 1074, 1094 (1966).

[73] Not only are the heirs of the donor denied standing to institute a cy pres proceeding, but they are rarely held to be proper parties to such an action. FISCH, *supra* note 6, § 585, at 459 nn.3-4.

[74] *See, e.g.*, Storch v. Longfellow, Case No. 880 (Ct. App. Drake Cty., October 26, 1972). Funds were left for the benefit of the "Children's Home, Greenville, Ohio." After the will was executed, the use of the home was transferred to the county department of welfare and the orphans placed in foster homes. Heirs of the testator contended that the disposition failed because the donee ceased to exist before the gift became effective. Cy pres and deviation were held inapplicable because the testator did not show a general charitable intent to benefit any purpose broader than contributing to the specific orphanage in which he had once lived. Nevertheless, the court delayed the failure of the bequest by giving the county ninety days to establish a new Children's Home and thus save the gift.

ness of charitable trust supervision and enforcement.[75] An action instituted by an heir may indirectly contribute to the functioning of the state administrative machinery in a variety of ways, such as alerting the attorney general to the existence of an unregistered trust, pressuring a reluctant trustee into seeking cy pres instructions, or illuminating instances of possible mismanagement in the administration of the trust. The beneficiaries of a private express trust have a financial incentive to insure the proper administration of the trust. Conversely, when the public is the beneficiary, its representative, the attorney general, is usually disinterested and sometimes hostile toward seeking judicial review of a charity.[76]

The ease with which the Supreme Court of Ohio preserved the Conover trust in *Rice* should dissuade many heirs from mounting a challenge against a dormant charity. The cost of such litigation precludes other heirs from suing. While attorneys' fees incurred in the enforcement of a trust by one seeking to promote the charitable purpose of the donor are generally recoverable from the fund itself, the legal expenses of an heir for an attempt to invalidate a charitable trust are never recoverable.[77] This statement usually holds true even if the result of the action is the indirect enforcement of the trust.[78] The allowance of attorneys' fees is apparently resolved on the basis of whether or not the litigant was motivated by personal gain. Thus the expense of challenging a charity, coupled with the considerable antagonism exhibited in *Rice* toward heirs, foreshadow a decline in such litigation. Consequently, the heir's informal role in the supervision and enforcement of charitable trusts will diminish considerably.

To offset the reduction in the number of suits initiated by heirs, a proportionate increase in enforcement is needed elsewhere. After *Rice*, the Ohio legislature expanded the powers of the Attorney General in this area.[79] However, the transfusion of power from the private sector to the Attorney General is not necessarily laudable. Aside from the economic inefficiencies of public versus private

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[75] Alford, *The Disposition of Assets Upon Failure of a Charitable Trust or Corporation: Policy Relationship to Enforcement of Charities*, 9 UTAH L. REV. 217 (1964).

[76] The hostility is particularly evident in dealing with charities created through an instrument which contains an offensive racial restriction. *See The Duration of Charitable Trusts*, *supra* note 72, at 1093 n.67.

[77] *See* cases collected in Annot., 89 A.L.R.2d 691 (1963).

[78] *Compare* Tincher v. Arnold, 147 F. 665 (7th Cir. 1906), *with* Barnard v. Adams, 58 F. 313 (C.C.N.D. Iowa 1893). Some writers have proposed that legal fees incurred by heirs for an action instituted in good faith should be recoverable from the challenged charitable trust if the litigation results in its enforcement. L. KUTNER, *supra* note 45, at 46-47; ALFORD, *supra* note 75, at 231.

[79] Ohio Charitable Trust Reform Act, codified at OHIO REV. CODE §§ 109.23-.33 (Page Supp. 1975).

regulation, attorneys general have not proved to be effective guardians of the public interest in preserving charitable trusts.[80] Too often, a court must decide whether to approve a trustee's proposed course of conduct without the benefit of an adversary hearing because the attorney general only nominally contests the action.[81]

D. *The Indolent Trustee*

In *Rice*, the dissenting opinion notes that "the judgment validates ineptly drawn and defective instruments which have permitted the estates to remain in limbo for a period of more than 30 years . . . . [T]here are other funds which in similar circumstances become personal fiefdoms of the draftsman or of a trustee of his choice, persisting not for a public benefit but for a private one."[82] The propriety of the trustee's conduct was not in issue and hence was avoided in the majority opinion. No court has attached an obligation to institute cy pres proceedings whenever appropriate to the normal fiduciary duties of a trustee. The rationale for this is apparent. Cy pres proceedings have been depicted as lengthy, complicated affairs which may last five or six years and cost the estate as much as $200,000 in costs and fees.[83] Additionally, trustees are not trained to make the difficult determination of when a trust purpose has become impossible, impractical, or illegal to carry out in the manner specified by the donor. Standards which range from "undesirable" to truly "impossible" have been proposed as the proper test;[84] without a more definite guide, it is unreasonable to expect a layman to handle this responsibility properly.

Nevertheless, some writers have found disturbing the image of an indolent trustee dozing atop an obsolete fund, completely oblivious to the whimpering of the trust "crying out" for reform.[85] More-

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[80] FISCH, *supra* note 6, at § 723.

[81] *See The Duration of Charitable Trusts*, *supra* note 72.

[82] 42 Ohio St. 2d 209, 233, 327 N.E.2d 774, 789 (1975) (Brown, J., dissenting).

[83] Forer, *Relief of the Public Burden: The Function and Enforcement of Charities in Pennsylvania*, 27 U. PITT. L. REV. 751, 778 n.98 (1966).

[84] Heinlein v. Elyria Savings & Trust Co., 75 Ohio App. 353, 361, 62 N.E.2d 284, 288 (1945) ("impossible, impractical, or inexpedient"); WIS. STAT. ANN. § 701.10 (1972) (an "uneconomic" charitable trust if valued at less than $5,000 may be terminated and distributed to another charity); SIMES, *supra* note 21, at 139 (obsolete, useless, prejudicial to the public welfare, otherwise provided for, or insignificant in comparison with the size of the gift); DiClerico, *Cy Pres: A Proposal for Change*, 47 B.U.L. REV. 153, 199 n.163 (1967) ("inexpedient, inefficient or unwise"); Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1, 17 (1920) (not unreasonable to change "in view of the general purposes of the donor and of the changes that time has brought to pass").

[85] FISCH, *supra* note 6, § 585, at 460; L. KUTNER, LEGAL ASPECTS OF CHARITABLE TRUSTS AND FOUNDATIONS 180-81 (1970); Forer, *Relief of the Public Burden: The Function and*

over, in a similar context the trustee has been held accountable for changing the scheme of the trust or for using trust property for a purpose different from the specified one without judicial approval.[86] Admittedly, an intentional deviation from the donor's plan is clearly distinguishable and in most cases more deplorable than a failure to take steps to remedy a dormant charitable trust. Nevertheless, the trustee is generally obliged to effectuate the intent of the settlor. Rarely do courts find that a donor manifested anything less than a general charitable intent. Consequently, for obsolete trusts to which cy pres could apply, the trustee who passively manages the dormant fund is in the courts' view frustrating the general intention of the settlor to benefit the public interest.

In *Rice v. Stanley*, the court justifiably avoids the issue of whether it was proper for a trustee to wait almost thirty years before seeking cy pres instructions for an inactive trust that was likely to remain dormant because the trustee's conduct is not an appropriate subject for review in a trust termination proceeding. However, the increasing amount of attention being devoted to the problem, particularly in the context of the Attorney General's watchdog role, suggests that the issue may soon be before the court.[87]

V. CONCLUSION

"[T]he law of charities remains unreformed, cumbrous, and in places exceedingly obscure."[88] After *Rice*, Ohio charitable trust law remains equally obscure. The result reached in *Rice* is defensible, and probably correct; however, the conclusory mode of analysis used in resolving the perpetuities and cy pres issues shields the crucial factors in the adjudicative process from all concerned parties. The law with respect to charitable trusts in Ohio will remain unpredictable and inconsistent until the need for special substantive rules that reflect charitable preferences is recognized.

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Enforcement of Charities in Pennsylvania, 27 U. PITT. L. REV. 751, 791 (1966); Lynn, *Perpetuities: The Duration of Charitable Trusts and Foundations*, 13 U.C.L.A.L. REV. 1074, 1083-85 (1966); Lynn, *The Questionable Testamentary Gift to Charity: A Suggested Approach to Judicial Decision*, 30 U. CHI. L. REV. 450, 455 (1963); Note, *State Supervision of the Administration of Charitable Trusts*, 47 COLUM. L. REV. 659, 662 (1947).

[86] *See* cases cited in FISCH, *supra* note 6, § 586, at 461 n.23.

[87] *See* note 85 *supra*. *See also* DiClerico, *Cy Pres: A Proposal For Change*, 47 B.U.L. REV. 153, 155 (1967).

[88] G. KEETON, SOCIAL CHANGE IN THE LAW OF TRUSTS 108 (1958).