

refusal of the vendor's wife to release inchoate dower in the land the vendee may elect to enforce specific performance to the extent of the vendor's ability to perform with allowance of an amount proportionate to the highest contingent interest of the wife to be held by the vendee without interest and to be paid over only if the inchoate right is released or the marriage is terminated.

Recovery of benefits conferred, restitution in monetary value or in specie, is under some circumstances a remedy in contract cases.¹³⁶ Specific restitution through an action in equity to cancel a deed for substantial failure to perform promises of support has been granted, in *Timberman v. Timberman*¹³⁷ and *Snider v. Godfrey*,¹³⁸ restitution was denied in *Nine v. Goode*,¹³⁹ where the Court felt there was insufficient evidence to show substantial breach of the agreement to support. Recovery of \$1,200 paid on a purchase price of \$3,500 was denied to a defaulting land buyer in *Lake v. Bernstein*¹⁴⁰ even under a contract that did not contain a clause authorizing forfeiture of payments made under a land contract, where the buyer had not responded to a notice of forfeiture and apparently had abandoned the contract. Recovery of a down-payment on a quonset building for storing grain by a buyer who elected to cancel (rescind) the contract for failure of a condition precedent of a storage guarantee agreement was held not to preclude granting, as an additional item so as to restore to status quo, the expense in leveling the ground and constructing a concrete slab, in *Miller-Piehl Equipment Co. v. Gibson Commission Company*.¹⁴¹

ANNOTATIONS § 365-B. Granting of specific performance and adjustment of the price, for the failure of one of three owners to consent, was denied in *Jaspersen v. Bohner*, 243 Iowa 1275, 55 N.W.2d 177 (1952), for the reason that where the purchaser knows only a partial interest could be conveyed and also because of conclusion there was no contract, that consent of two was contingent on the third. See *Morrow v. Goodell*, 246 Iowa 982, 68 N.W.2d 916 (1955), an action by buyer for specific performance of contract for realty in which Court decreed specific performance and outlined rights and duties as to such things as allowing for fact only one of proposed two vendors was conveying, for crops on date possession was to be transferred, interest on money in escrow and the expense of continuing abstract.

¹³⁶ RESTATEMENT § 347; CORBIN § 1104.

¹³⁷ 229 Iowa 835, 295 N.W. 158 (1940); see RESTATEMENT § 354; CORBIN § 1120.

¹³⁸ 232 Iowa 1, 4 N.W.2d 380 (1942).

¹³⁹ 241 Iowa 404, 41 N.W.2d 94 (1950).

¹⁴⁰ 215 Iowa 777, 246 N.W. 790, 102 A.L.R. 846 (1933). See IOWA ANNOTATIONS § 357-III. Section 357-I-A refers to prior Iowa cases allowing recovery in restitution for benefits conferred where employee quits with or without cause. In *Westercamp v. Smith*, 239 Iowa 705, 31 N.W.2d 347 (1948), referred to *supra*, note 16, and accompanying text, the absence of a clause authorizing forfeiture of contract effectively prevented seller from defending against specific performance action on basis buyer was guilty of numerous deficiencies.

¹⁴¹ 244 Iowa 103, 56 N.W.2d 25 (1952). This position is apparently contrary to the position stated in RESTATEMENT § 384(1) that damages and restitution are alternative remedies, but is consistent with some earlier Iowa precedent referred to in IOWA ANNOTATIONS § 384 allowing in addition to the purchase price recovery of special expenditures made necessary by the performance.

CHARITABLE TRUSTS IN IOWA

ARLO F. CRAIG, JR.*

Charitable trusts are an inveterate part of the Anglo-American legal tradition. They were recognized and enforced by the Court of Chancery in England before 1601, and appear to have been used even before the Norman Conquest.¹ Parliament gave legislative recognition to charitable trusts in 1601, with the enactment of the Statute of Charitable Uses,² which stated several purposes for which charitable trusts could be created and gave the chancellor additional powers to enforce them.³ In *Vidal v. Girard's Executors*,⁴ Mr. Justice Story held that charitable trusts are a part of the common law, independent of the Statute of Charitable Uses. Charitable trusts in the United States, therefore, do not depend upon that statute for their validity, although the Statute of Charitable Uses has been considered part of the common law of Iowa.⁵ Charitable trusts were recognized in Iowa as early as 1856, when the Iowa Supreme Court sustained two such trusts, one for an orthodox Congregational Church in Keokuk,⁶ the other for the use of the Methodist Episcopal Church.⁷

In 1959 the Iowa legislature added to the laws governing charitable trusts a requirement for registration of such trusts with and provisions for their supervision by the Attorney General.⁸ It is therefore appropriate to reexamine the subject of charitable trusts in Iowa. This will involve discussion of what a charitable trust is, what constitutes a charitable purpose, the attitude of liberal construction of trust instruments, the doctrine of cy pres, what is the position of the trustee, what methods are available to assure the carrying out of the trust's objectives, and what the consequences of the new legislation have been and may be.

WHAT IS A CHARITABLE TRUST?

The Iowa Supreme Court has defined a charitable trust as "a gift to a general public use which extends to the poor as well as

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¹ *Shotwell v. Mott*, 2 Sandf. Ch. 46, 51 (N.Y. 1844); 4 SCOTT, TRUSTS § 391 (2d ed. 1956).

² Statute of Charitable Uses, 1601, 43 Eliz. 1, ch. 4.

³ 2 RESTATEMENT (SECOND), TRUSTS § 368, comment (1959).

⁴ 43 U.S. (2 How.) 127 (1844).

⁵ *Klumpert v. Vrieland*, 142 Iowa 434, 121 N.W. 34 (1909); *Grant v. Saunders*, 121 Iowa 80, 95 N.W. 411, 100 Ann. St. Rep. 310 (1903); *Johnson v. Mayne*, 4 Iowa 180 (1856).

⁶ *Miller v. Chittenden*, 2 Iowa 315 (1856). A demurrer to the original attack on this trust, sustained by the trial court, was overruled because the cestui que trust was not *in esse*, and the trial court was told to hold the deed creating the trust void, in *Marshall v. Chittenden*, 3 G. Greene 382 (Iowa 1852). After the Congregational Church, the cestui que trust, was organized, the deed again came before the court, which held it void, and was again reversed in the *Miller* decision, the court now overruling *Marshall*.

⁷ *Johnson v. Mayne*, 4 Iowa 180 (1856).

⁸ Iowa Laws, ch. 364 (1959).

the rich."⁹ It also has used this definition: "A charitable trust is one in which property is devoted to purposes beneficial to the community."¹⁰ The *Restatement of Trusts* defines a charitable trust in these terms:

A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.¹¹

The usual distinction made between a charitable trust and a private trust is that the property of a private trust is devoted to the use of specified purposes, whereas in a charitable trust the property is devoted to a purpose beneficial to the community.¹²

WHAT PURPOSES ARE CHARITABLE?

The preamble of the Statute of Charitable Uses specified several purposes as charitable.¹³ That basic outline has been recognized in Iowa.¹⁴ The Iowa Court has stated that, in general, a trust is for a charitable purpose if it is:

to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of a government.¹⁵

Trusts for the relief of poverty,¹⁶ advancement of education,¹⁷

⁹ *Grant v. Saunders*, 121 Iowa 80, 81, 95 N.W. 411, 100 Ann. St. Rep. 310 (1903).

¹⁰ *Amundson v. Kletzing-McLaughlin Memorial Foundation College*, 247 Iowa 91, 94, 73 N.W.2d 114, 116 (1955).

¹¹ 2 RESTATEMENT (SECOND), TRUSTS § 348 (1959).

¹² *In re Estate of Owens*, 244 Iowa 533, 536, 57 N.W.2d 193, 194 (1953).

¹³ Trusts for the following purposes were enumerated as charitable: "Some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, seabanks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes."

¹⁴ *Klumpert v. Vrieland*, 142 Iowa 434, 121 N.W. 34 (1909).

¹⁵ *Heald v. Johnson*, 204 Iowa 1067, 1070, 216 N.W. 772, 773 (1927).

¹⁶ *In re Estate of Owens*, 244 Iowa 533, 57 N.W.2d 193 (1953) (education of poor children of Warren County); *Mary Franklin Home v. Edson*, 193 Iowa 567, 187 N.W. 546 (1922) (home for aged women); *In re Estate of Clevon*, 161 Iowa 289, 142 N.W. 986 (1913) (home for poor old people); *Klumpert v. Vrieland*, 142 Iowa 434, 121 N.W. 34 (1909) (poor of Voorst, Gelderland, Netherlands); *Grant v. Saunders*, 121 Iowa 80, 95 N.W. 417, 100 Ann. St. Rep. 310 (1903) (benefit of the poor); *Bond v. Home for Aged Women*, 94 Iowa 458, 62 N.W. 838 (1895) (Orphan Asylum in Iowa; issue in case was as to beneficiary of another bequest, to "Old Ladies' Home").

¹⁷ *Amundson v. Kletzing-McLaughlin Memorial Foundation College*, 247 Iowa 91, 73 N.W.2d 114 (1955) (college grounds); *In re Estate of*

advancement of religion,¹⁸ promotion of health,¹⁹ advancement of governmental²⁰ and municipal purposes,²¹ and for cemetery purposes²² have been sustained in Iowa.

THE ATTITUDE OF LIBERAL CONSTRUCTION

Charitable trusts are highly favored by the law.²³ For ex-

Pierce, 245 Iowa 22, 60 N.W.2d 894 (1953) (fund to make loans to boys and girls in Marshalltown, for purposes of their education, at a rate two per cent less than commercial loans); *In re Will of Hagan*, 234 Iowa 1001, 14 N.W.2d 638, 152 A.L.R. 1296 (1944) (college scholarships); Iowa Federation v. Dilley, 234 Iowa 417, 12 N.W.2d 815 (1944) (scholarship loans); Lupton v. Leander Clark College, 194 Iowa 1008, 187 N.W. 496 (1922) (college endowment); Liggett v. Abbott, 192 Iowa 742, 185 N.W. 569 (1921) (upbuilding public schools of a school district); Wilson v. Bank, 164 Iowa 402, 145 N.W. 948 (1914) (industrial training school for children, and library).

¹⁸ *In re Estate of Small*, 244 Iowa 1209, 58 N.W.2d 477 (1953) (persons who believe in the fundamental principles of the Christian religion and the Bible and are endeavoring to promulgate the same); *In re Estate of Durham*, 203 Iowa 497, 211 N.W. 358 (1927) (original chapter of the Salvation Army located in Council Bluffs); *Martinson v. Jacobson*, 200 Iowa 1054, 205 N.W. 849 (1925) (foreign mission work); *Wilmes v. Tiernay*, 187 Iowa 390, 174 N.W. 271 (1919) (masses); *Beidler v. Dehner*, 178 Iowa 1338, 161 N.W. 32 (1917) (curate of Appollonia Church at Rollingen, Canton Mersch, Luxemburg, to distribute among the poor curates of the county of Luxemburg to say masses); *Heisler v. Methodist Church*, 166 Iowa 333, 147 N.W. 750 (1914) (church building); *Francis v. Preachers' Aid Society*, 149 Iowa 158, 126 N.W. 1027 (1910) (aid to retired ministers); *In re Estate of Crawford*, 148 Iowa 60, 126 N.W. 774 (1910) (Salvation Army); *Seda v. Huble*, 75 Iowa 429, 39 N.W. 685 (1888); (specific Catholic Church in Tama County); *Quinn v. Shields*, 62 Iowa 129, 17 N.W. 437 (1883) (Sisters of the Humility of Mary, Ottumwa); *Johnson v. Mayne*, 4 Iowa 180 (1856) (conference of the Methodist Episcopal Church); *Miller v. Chittenden*, 2 Iowa 315 (1856) (Orthodox Congregational Church in Keokuk). In *Sisters of Mercy v. Lightner*, 223 Iowa 1049, 274 N.W. 86 (1937), a contract under which Lightner agreed to construct and maintain a grotto on the Sisters' property and the Sisters' agreed not to transfer the property was held invalid as a restraint on alienation. In *Moran v. Moran*, 104 Iowa 216, 73 N.W. 617 (1897), a bequest to "Sisters of Charity" was held void for uncertainty as to which of the many organizations throughout the country so designated was intended.

¹⁹ *In re Estate of Anderson*, 244 Iowa 325, 56 N.W.2d 913 (1953) (county hospital); *Brinton v. Washington County Hospital*, 232 Iowa 617, 5 N.W.2d 905 (1942) (county hospital); *Phillips v. Harrow*, 93 Iowa 92, 61 N.W. 434 (1894) (foundling hospital to relieve unfortunate females and care for their offspring).

²⁰ *Jensen v. Nelson*, 236 Iowa 569, 19 N.W.2d 596 (1945) (construction of a new county courthouse; even though the county had constructed the courthouse before testator died, it was permitted to take the bequest); *Blackford v. Anderson*, 226 Iowa 1138, 286 N.W. 735 (1939) (construction of a specified hard surfaced highway in Lee and Henry Counties); *Chapman v. Newell*, 146 Iowa 415, 125 N.W. 324 (1910) (permanent school fund of Louisa County).

²¹ *In re Estate of Nugen*, 223 Iowa 428, 272 N.W. 638 (1937) (free public library); *Phillips v. Harrow*, 93 Iowa 92, 61 N.W. 434 (1894) (public library).

²² *In re Estate of Scott*, 240 Iowa 35, 34 N.W.2d 177 (1948) (maintenance and upkeep of mausoleum crypts); *Hipp v. Hibbs*, 215 Iowa 253, 245 N.W. 247 (1932) (perpetual maintenance of cemetery lot); *Meeker v. Lawrence*, 203 Iowa 409, 212 N.W. 688 (1927) (cemetery association).

²³ *In re Will of Hagan*, 234 Iowa 1001, 1007, 14 N.W.2d 638, 642, 152 A.L.R. 1296 (1944); *In re Estate of Durham*, 203 Iowa 497, 502, 211 N.W.

ample, they receive many special privileges, including tax immunities²⁴ and exemption from the rule against perpetuities.²⁵ In addition, they do not fail even if partially invalid²⁶ or if the corpus of the trust is insufficient to carry out the settlor's purpose completely.²⁷ As a consequence of this high favor instruments purporting or attempting to create a charitable trust are liberally construed in order to make effectual the intent of the donor.²⁸ The Iowa Court has stated that:

Charitable gifts are strongly favored. The courts will carry them into effect if this can be done consistently with established rules of law. Indeed it is said that courts never construe a charitable bequest void unless it is so absolutely dark that they cannot find out the testator's meaning.²⁹

When ascertaining the settlor's meaning, a court will consider all circumstances surrounding the creation of the trust.³⁰ If there are two constructions, or two meanings of a word, one of which would result in the creation of a charitable trust, and one which would not, the one which would create the trust will prevail.³¹ However, despite the Court's extremely liberal attitude toward charitable trusts, it has stated that established principles of law will not be ignored to effectuate such a trust.³²

Furthermore, a charitable trust ordinarily will not fail either for lack of a trustee³³ or for failure of the trustee to act.³⁴ If the named trustee has no legal existence,³⁵ or is without power to

358, 361 (1927); *Beidler v. Dehner*, 178 Iowa 1338, 161 N.W. 32 (1917); *In re Estate of Johnston*, 141 Iowa 109, 119 N.W. 275 (1909).

²⁴ INT. REV. CODE OF 1954, §§ 170, 501, 2055(a), and 2522(a) and (b); IOWA CODE §§ 422.34(2), 422.45(3), 423.4(6), 427.1(9) and (10), and 450.4(2) (1958).

²⁵ *In re Estate of Pierce*, 245 Iowa 22, 60 N.W.2d 894 (1953); *Sisters of Mercy v. Lightner*, 223 Iowa 1049, 274 N.W. 86 (1937); *Wilson v. Bank*, 164 Iowa 402, 145 N.W. 948 (1914); *In re Estate of Cleven*, 161 Iowa 289, 142 N.W. 986 (1913); *Chapman v. Newell*, 146 Iowa 415, 125 N.W. 324 (1910); *Phillips v. Harrow*, 93 Iowa 92, 61 N.W. 434 (1894); *Johnson v. Mayne*, 4 Iowa 180 (1856). The Rule is found in Iowa in IOWA CODE § 558.68 (1958): "Every disposition of property is void which suspends the absolute power of controlling the same, for a longer period than during the lives of a person then in being, and twenty-one years thereafter."

²⁶ See *Phillips v. Harrow*, 93 Iowa 92, 61 N.W. 434 (1894).

²⁷ *Mary Franklin Home v. Edson*, 193 Iowa 567, 187 N.W. 546 (1922); *Wilson v. Bank*, 164 Iowa 402, 145 N.W. 948 (1914).

²⁸ *In re Estate of Anderson*, 244 Iowa 325, 56 N.W.2d 913 (1953); *Gray v. Watters*, 243 Iowa 430, 51 N.W.2d 885 (1952); *In re Estate of Walden*, 190 Iowa 567, 180 N.W. 679 (1920); *Beidler v. Dehner*, 178 Iowa 1338, 161 N.W. 32 (1917).

²⁹ *In re Estate of Johnston*, 141 Iowa 109, 111, 119 N.W. 275 (1909).

³⁰ *Lupton v. Leander Clark College*, 194 Iowa 1008, 187 N.W. 496 (1922); *First Constitutional Presbyterian Church v. Congregational Society*, 23 Iowa 567 (1867).

³¹ *Jensen v. Nelson*, 236 Iowa 569, 19 N.W.2d 596 (1945).

³² *In re Estate of Nugen*, 223 Iowa 428, 434, 272 N.W. 638, 641 (1937) (however, the Court sustained the trust involved).

³³ *Klumpert v. Vrieland*, 142 Iowa 434, 121 N.W. 34 (1909); *Grant v. Saunders*, 121 Iowa 80, 95 N.W. 411, 100 Am. St. Rep. 310 (1903); 2 RESTATEMENT (SECOND), TRUSTS § 397(1) (1959).

³⁴ *In re Estate of Walden*, 190 Iowa 567, 180 N.W. 679 (1920).

³⁵ See *Miller v. Chittenden*, 2 Iowa 315 (1856).

accept or to administer the trust,³⁶ or refuses to act as trustee,³⁷ the court will intervene and appoint a trustee.³⁸ Similarly, a charitable trust will not fail if the beneficiary or beneficiaries have no legal entity³⁹ or are not definitely designated,⁴⁰ when the general class to be benefitted can be determined.⁴¹

CY PRES IN IOWA

A singular feature of charitable trusts is the application thereto of the cy pres doctrine. The term "cy pres" is derived from the French expression "cy pres comme possible", meaning "as near as possible."⁴²

There were two divisions of the cy pres doctrine in the English common law; the prerogative doctrine and the judicial doctrine.⁴³ Under the prerogative doctrine, the Crown, by virtue of its position as *parens patriae*, was permitted to apply property given to a charitable trust as it chose, without reference to the intent of the settlor, if the charitable purpose was a peculiar use, charitable in nature but illegal, as for a form of religion not tolerated by law,⁴⁴ or if the gift was "to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who died without using it."⁴⁵ Prerogative cy pres is not recognized in Iowa.⁴⁶

³⁶ *In re Estate of Crawford*, 148 Iowa 60, 126 N.W. 774, Ann. Cas. 1912B, 992 (1910).

³⁷ *In re Estate of Scott*, 240 Iowa 35, 34 N.W.2d 177 (1948).

³⁸ 4 SCOTT, TRUSTS § 388 (2d ed. 1956).

³⁹ *Meeker v. Lawrence*, 203 Iowa 409, 212 N.W. 688 (1927); *Lewis v. Curnutt*, 130 Iowa 423, 106 N.W. 914 (1906).

⁴⁰ *Martinson v. Jacobson*, 200 Iowa 1054, 205 N.W. 849 (1925) (to be used for furtherance of trustee's foreign mission work); *Wilson v. Bank*, 164 Iowa 402, 145 N.W. 948 (1914); Note, *Definiteness of Beneficiaries in Charitable Trusts*, 12 Iowa L. Rev. 66 (1927). But see *Filkins v. Severen*, 127 Iowa 738, 104 N.W. 346 (1905) (testator made no indication in will as to any intended beneficiary); *Lepage v. McNamara*, 5 Iowa 124 (1857) (to Bishop Loras, to apply so much to the church, or to education and maintenance of poor children, as he should think proper and legal).

⁴¹ *In re Estate of Small*, 244 Iowa 1209, 58 N.W.2d 477 (1953); *Beidler v. Dehner*, 178 Iowa 1338, 161 N.W. 32 (1917); *Phillips v. Harrow*, 93 Iowa 92, 61 N.W. 434 (1894); *Quinn v. Shields*, 62 Iowa 129, 17 N.W. 437 (1883).

⁴² 2A BOGERT, TRUSTS AND TRUSTEES § 431 (1953).

⁴³ 4 SCOTT, TRUSTS §§ 399-399.1 (2d ed. 1956).

⁴⁴ A classic case illustrating the arbitrary use of prerogative cy pres is *Da Costa v. De Pas*, 1 Amb. 228, 27 Eng. Rep. 150 (1754), cited in 4 SCOTT, TRUSTS § 399.1 (2d ed. 1956), where a Jewish testator left property in trust to be used for establishing a "jesuba", or assembly for reading the Jewish law and teaching the Jewish religion. At that time, such a gift was illegal, as promoting a religion contrary to the state religion. However, since the trust was for a religious purpose, it was held that it was a charitable trust and did not fail. The property was ordered used to support a Christian minister in a Foundling Hospital, and to instruct the children in the institution in the Christian religion, a purpose which the testator probably would not have approved.

⁴⁵ *Klumpert v. Vrieland*, 142 Iowa 434, 437, 121 N.W. 34, 35 (1909).

⁴⁶ *Filkins v. Severn*, 127 Iowa 739, 104 N.W. 346 (1905); *Grant v. Saunders*, 121 Iowa 80, 95 N.W. 411, 100 Ann. St. Rep. 310 (1903);

The doctrine of judicial cy pres, basically, is that when a charitable trust for a particular purpose cannot be carried out exactly as the settlor intended, if the settlor expressed a general charitable intent the equity court will apply the property to a purpose as similar as possible to the settlor's original intention.⁴⁷ Although early Iowa cases indicated that Iowa did not recognize judicial cy pres,⁴⁸ since the decision in *Hodge v. Wellman*⁴⁹ it has been settled that judicial cy pres is recognized in Iowa.⁵⁰ Most other American jurisdictions also now recognize judicial cy pres.⁵¹

WHAT IS THE POSITION OF THE TRUSTEE?

Trustees of a charitable trust have basically the same duties as do trustees of a private trust.⁵² The fiduciary relationship of the trustee exists, although ordinarily it is enforceable by the Attorney General rather than by any individual beneficiary, who would enforce it in a private trust.⁵³ Trustees holding property upon a charitable trust may not delegate duties which they can reasonably be required to perform.⁵⁴ The trustee of a charitable trust may be given liberal discretion in administering the trust.⁵⁵ The equity court has the power to supervise a charitable trust, but normally it will not interfere unless the trustee is neglecting his duties, abusing his power or otherwise acting in an improper or unlawful manner.⁵⁶ The trustee of a charitable trust may

Miller v. Chittenden, 2 Iowa 315 (1856). *But cf. Schell v. Leander Clark College*, 10 F.2d 542 (N.D. Iowa 1926).

⁴⁷ "The doctrine of cy pres with reference to charitable trusts in [sic] that, where a definite function or duty is to be performed which cannot be done in exact conformity with the plan of the person who has provided therefor, such function or duty will be performed with as close approximation of the original plan as is reasonably practicable." *Curtis & Barker v. Central University*, 188 Iowa 300, 322, 176 N.W. 330, 338 (1920). See also 2 RESTATEMENT (SECOND), TRUSTS § 399 (1959).

⁴⁸ *Filkins v. Severn*, 127 Iowa 739, 104 N.W. 346 (1905); *Lepage v. McNamara*, 5 Iowa 124 (1857); *Miller v. Chittenden*, 2 Iowa 315 (1856).

⁴⁹ 191 Iowa 877, 179 N.W. 534 (1920).
⁵⁰ *Schell v. Leander Clark College*, 10 F.2d 542 (N.D. Iowa 1926); *Lupton v. Leander Clark College*, 194 Iowa 1008, 187 N.W. 496 (1922); *Mary Franklin Home v. Edson*, 193 Iowa 567, 187 N.W. 546 (1922). For a discussion of the status of the Iowa law regarding the cy pres doctrine, before *Hodge v. Wellman*, see Note, *The Cy Pres Doctrine in Iowa*, 6 Iowa L. BULL. 177 (1921).

⁵¹ *Fisch, The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375 (1953); *Sullivan, Cy Pres Doctrine in Ohio*, 18 OHIO ST. L.J. 196 (1957).

⁵² *In re Estate of Owens*, 244 Iowa 533, 57 N.W.2d 193 (1953); 2 RESTATEMENT (SECOND), TRUSTS § 379 (1959).

⁵³ 2 RESTATEMENT (SECOND), TRUSTS § 386 (1959).

⁵⁴ See *In re Estate of Owens*, 244 Iowa 533, 57 N.W.2d 193 (1953).

⁵⁵ *Martinson v. Jacobson*, 200 Iowa 1054, 205 N.W. 849 (1925); *Liggett v. Abbott*, 192 Iowa 742, 185 N.W. 569 (1921); *Wilson v. Bank*, 164 Iowa 402, 145 N.W. 948 (1914).

⁵⁶ *In re Estate of Small*, 244 Iowa 1209, 58 N.W.2d 477 (1953).

select the beneficiaries,⁵⁷ if the trust so provides.⁵⁸ As is the case in private trusts,⁵⁹ trustees of charitable trusts are strictly limited in their actions by the terms of the trust instrument.⁶⁰

WHAT METHODS ARE AVAILABLE TO ASSURE THE CARRYING OUT OF TRUST OBJECTIVES?

The enforcement of charitable trust objectives has always been a problem. Because of their very nature, charitable trust funds are extremely susceptible to misapplication, whether through malfeasance or nonfeasance.⁶¹ One of the principal reasons for the

⁵⁷ *Ibid.*; *Grant v. Saunders*, 121 Iowa 80, 95 N.W. 411, 100 Ann. St. Rep. 310 (1903); *Phillips v. Harrow*, 93 Iowa 92, 61 N.W. 434 (1894); *Quinn v. Shields*, 62 Iowa 129, 17 N.W. 437, 49 Am. Rep. 141 (1883).

⁵⁸ See *Jones v. American Home Finding Ass'n*, 191 Iowa 211, 182 N.W. 191 (1921); *Moran v. Moran*, 104 Iowa 216, 73 N.W. 617, 39 L.R.A. 204 (1897).

⁵⁹ *Barnhouse v. Lewis*, 93 N.W.2d 117 (Iowa 1958); *In re Trust of Lunt*, 235 Iowa 62, 16 N.W.2d 25 (1944).

⁶⁰ *Zion Church v. Parker*, 114 Iowa 1, 86 N.W. 60 (1901); 2 RESTATEMENT (SECOND), TRUSTS § 380 (1959).

⁶¹ A case in point is the Thomas D. Gregg Fund, file number 661, in the office of the Clerk of the District Court of Dallas County, Iowa. In 1866, Thomas D. Gregg deeded 160 acres of farm property in Dallas County to Dallas County, to be used "... to aid in establishing in and for said County of Dallas a seminary of learning wherein studies of a higher range than is convenient to be taught in common free schools may be included in the course of instruction, and wherein attention shall be given to training teachers for primary schools." The Dallas County Board of Supervisors sold the land for \$4,600 and gave the funds to the Adel Independent School District for construction of a brick school, in return for an undivided one-third interest in the real estate upon which the school was built. In 1879, Dallas County received approximately \$9,000 under the Will of Thomas D. Gregg, "to aid in building up a high school or seminary for the education of teachers in surveying civil engineering, & c [sic] my aim being to benefit the largest number as the greatest good of the greatest number." From 1879 until 1889, the County Auditor of Dallas County controlled the fund, loaning it out on real estate loans. In 1889, three trustees were appointed "... for the purpose of carrying said provision (of the Will) into effect and to properly manage and control the said High School and seminary of learning and obtain the objects mentioned. ..." The trustees took control of the fund and continued to loan it out on real estate loans. For several years their annual reports to the Court stated that soon the trust would be large enough to be applied, but by 1900 their annual reports made no reference to applying the fund for the purposes stated by Thomas Gregg. In 1900 Dallas County attempted to tax the fund, but failed. In 1914, the trustees sold their interest in the Adel school property to the Adel Independent School District for \$4,600, and put the money in the loan fund. In the early 1930s the trustees foreclosed on several mortgages and rented the farms. Dallas County attempted to tax the receipts from the rented farms. In *McColl v. Dallas County*, 220 Iowa 434, 262 N.W. 824 (1935), the Court held the property was a part of the school system of Dallas County and thus tax exempt, under the provisions of what is now Iowa Code § 427.1 (11) (1958). In 1938 two petitions were filed, by residents of Dallas County, requesting that the trustees be required to set up college scholarships for graduates of Dallas County high schools. On July 18, 1939, an order was issued to the trustees to "use the net income of the said Gregg Fund ... for the purpose of so assisting worthy young men and women of Dallas County ... in obtaining a higher education ... by establishing scholarships for that purpose in the various schools of the State of Iowa. ..." This order has been ignored by the trustees. In 1942, a petition was filed to

enactment of the Statute of Charitable Uses was to create a more efficient system for enforcing charitable trusts.⁶² In private trusts, the beneficiaries have an interest in seeing that the trust is enforced, and they have the standing to go into court and have it enforced, if necessary.⁶³ Charitable trusts present a different situation. Beneficiaries of a particular charitable trust are usually indefinite,⁶⁴ often very numerous,⁶⁵ and sometimes not aware of the terms or even the existence of the trust.⁶⁶ The settlor of a charitable trust, and his heirs, lack the standing to enforce the trust unless they have a reservation or condition which amounts to a property interest.⁶⁷ Members of a community do not have the standing to bring suit to enforce a charitable trust merely because they, as members of the public, may benefit from the enforcement of the trust.⁶⁸ Nor can parties who have no standing to sue for the enforcement of a charitable trust acquire such standing by joining the Attorney General as a party.⁶⁹

In Iowa,⁷⁰ as well as most other Anglo-American jurisdictions,⁷¹ the Attorney General has a common law duty to bring suit to enforce charitable trusts, on the theory that the Attorney

require the trustees to contribute to the Junior College at Perry, Iowa. The petition was dismissed for lack of prosecution. The annual report for the year 1958 showed that the trust had grown to \$300,437.47. Trustees' fees and legal fees for 1958 totaled \$3,900 (the attorney for the trust was also one of the three trustees). Not one cent has been applied, during the 94 years the trust has been in existence, for the purposes for which the fund was created.

⁶² 4 SCOTT, TRUSTS § 391 (2d ed. 1956).

⁶³ 1 RESTATEMENT (SECOND), TRUSTS § 197 (1959).

⁶⁴ "Indefiniteness as to the individual beneficiary is no objection to the validity of a charitable trust. On the contrary, such indefiniteness is rather a characteristic feature of a good devise to charitable uses." *Wilson v. Bank*, 164 Iowa 402, 409, 145 N.W. 948, 951 (1914).

⁶⁵ *Martinson v. Jacobson*, 200 Iowa 1054, 205 N.W. 849 (1925).

⁶⁶ *Bogert, Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633 (1954).

⁶⁷ *Amundson v. Kletzing-McLaughlin Memorial Foundation College*, 247 Iowa 91, 73 N.W.2d 114 (1955); *Brinton v. Washington County Hospital*, 232 Iowa 617, 5 N.W.2d 905 (1942); *Starr v. Morningside College*, 186 Iowa 790, 173 N.W. 231 (1919); *Francis v. Preachers' Aid Society*, 149 Iowa 158, 126 N.W. 1027 (1910).

⁶⁸ *Schell v. Leander Clark College*, 10 F.2d 542 (N.D. Iowa 1928); *Amundson v. Kletzing-McLaughlin Memorial Foundation College*, 247 Iowa 91, 73 N.W.2d 114 (1955); *Lupton v. Leander Clark College*, 194 Iowa 1008, 187 N.W. 496 (1922); 2 RESTATEMENT (SECOND), TRUSTS § 391 comment d (1959).

⁶⁹ *Amundson v. Kletzing-McLaughlin Memorial Foundation College*, 247 Iowa 91, 73 N.W.2d 114 (1955). But see *Schell v. Leander Clark College*, 10 F.2d 542 (N.D. Iowa 1928).

⁷⁰ *In re Estate of Owens*, 244 Iowa 533, 57 N.W.2d 193 (1953). The Attorney General also derives power to enforce charitable trusts under the general power given to him in IOWA CODE § 13.2 (1958): "It shall be duty of the Attorney General, except as otherwise provided by law to: . . . (2) Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly."

⁷¹ *Thatcher v. City of St. Louis*, 343 Mo. 597, 122 S.W.2d 915 (1938); *State ex rel. Hunter v. Home Sav. & Loan Ass'n*, 137 Neb. 231, 288 N.W. 691 (1939); 4 SCOTT, TRUSTS § 391 (2d ed. 1956).

General, as the representative of the community, has authority to protect the interest of the community.⁷² Unfortunately, in practice the Attorney General often has no knowledge of the manner in which charitable trusts are or are not being enforced.⁷³ In fact, in many cases he is not even aware that a particular charitable trust exists.⁷⁴

The increasing size and number of charitable trusts in the United States⁷⁵ and the revelations of the manner in which some of them have been administered,⁷⁶ have led to many demands that an effective and efficient system of supervising charitable trusts be created.⁷⁷ The 58th General Assembly of Iowa enacted a bill⁷⁸ designed to create such a system in Iowa.⁷⁹ It requires the Attorney General, in addition to his other statutory and common law duties relating thereto, to "prepare and maintain a register of all charitable trusts heretofore or hereafter established or active in the state."⁸⁰ This register, which is a public record,⁸¹ is designed

⁷² *In re Estate of Owens*, 244 Iowa 533, 57 N.W.2d 193 (1953).

⁷³ However, Iowa requires fiduciaries to render to the supervising court an annual accounting of invested funds. IOWA CODE § 682.38 (1958).

⁷⁴ Taylor, *Accountability of Charitable Trusts*, 18 OHIO ST. L.J. 157 (1957).

⁷⁵ In Ohio, where a statute requiring all charitable trusts in the state to register with the Attorney General was enacted in 1953, a total of 734 trusts, with an approximate aggregate value of \$204,161,008, registered the first year the registration act was in effect. Three years after the enactment of the registration act, 910 trusts, totaling over \$224,000,000, had registered. Klapp and Wertz, *Supervision of Charitable Trusts in Ohio*, 18 OHIO ST. L.J. 181, 186 (1957).

⁷⁶ An outstanding, well publicized example of alleged abuse of tax immunities and other benefits enjoyed by charitable trusts was the manipulation of several trusts to finance post-World-War-Two expansion of Textron, Incorporated. For a discussion of this, see Note, *The Modern Philanthropic Foundation: A Critique and a Proposal*, 59 YALE L.J. 477, 492 (1950). This situation was investigated by the United States Senate, in *Hearings Before Subcommittee of Senate Committee on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. (1948), publicized in a report, S. REP. NO. 101, 81st Cong., 1st Sess. (1949).

⁷⁷ Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633 (1954); Bogert, *The Nathan Report and the Supervision and Enforcement of Charitable Trusts*, 29 N.Y.U.L. REV. 1069 (1954); Forer, *Forgotten Funds: Suggesting Disclosure Laws for Charitable Funds*, 105 U. PA. L. REV. 1044 (1957); Vestal, *Critical Evaluation of the Charitable Trust as a Giving Device*, 1957 WASH. U.L.Q. 195; Note, *State Supervision of the Administration of Charitable Trusts*, 47 COLUM. L. REV. 659 (1947); Note, *Supervision of Charitable Trusts*, 21 U. CHI. L. REV. 118 (1953).

⁷⁸ Iowa Laws, ch. 364 (1959).

⁷⁹ The explanation attached to the original bill, H. F. 718, states its purpose thus: "Without proper supervision vast sums of money in trust funds for charitable purposes are likely to become forgotten and neglected or revert to the exclusion of charitable purposes and beneficiaries unaware of the status may not receive distribution in due course, all to the exclusion of the wishes and desires of the donor. If charitable trusts are to retain a favored position supervisory measures are urgently needed. This bill provides for supervision of charitable trusts by the attorney general so that the purposes of the charitable trust as evidenced by the wishes and desires of the donor may be achieved."

⁸⁰ Iowa Laws, ch. 364, § 3 (1959).

⁸¹ *Id.*, § 4.

to make available to the Attorney General the information he needs in order to effectively supervise the administration of charitable trusts.⁸² The Attorney General is authorized to make any rules and regulations reasonable or necessary to secure records and other information for operation of the register.⁸³ He is also given broad investigative powers, including the power of subpoena,⁸⁴ to secure information relating to charitable trusts, and he must be given notice, as an interested party, of all judicial proceedings affecting or dealing with property held for charitable purposes.⁸⁵

In order to obtain the information necessary to "prepare and maintain a register of all charitable trusts heretofore or hereafter established or active in the state," the rules and regulations promulgated by the Attorney General require the trustee or trustees of all such trusts in Iowa to file a registration statement with the Attorney General.⁸⁶ In addition, trustees must also file

⁸² *Id.*, § 5.

⁸³ A copy of the rules and regulations so promulgated, which became effective July 4, 1959, can be obtained by writing to the Attorney General, State House, Des Moines, Iowa.

⁸⁴ Iowa Laws, ch. 364, §§ 6, 7, 8 and 9 (1959).

⁸⁵ *Id.*, § 2 Article II, section 1, of the Rules and Regulations adopted provides: "The Attorney General shall be notified by the trustee or trustees of all judicial proceedings affecting or in any manner dealing with a trustee or trustees who holds in trust within the State property given, devised or bequeathed for charitable, educational or religious purposes, and who administers the same in whole or in part for said purposes within the State. Such notice may be given to the Attorney General:

(a) By mailing a notice of such proceedings by registered mail to the Office of the Attorney General, or

(b) By leaving said notice at the office of the Attorney General with some person in charge thereof, or

(c) In any other manner prescribed by law."

⁸⁶ Article I of the Rules and Regulations provides:

"Section 1. There is hereby established in the Department of Justice, a Register of Charitable Trusts.

"Section 2. On or before December 31, 1959, the trustee or trustees of each charitable trust established or active in the State on July 4, 1959, shall file with the Attorney General a statement showing:

"(1) Whether such charitable trust was established by will, deed, indenture or other instrument, and the name of the testator or settlor.

"(2) The name and address of the trustee or trustees.

"(3) The name and address of the present charitable beneficiary or beneficiaries.

"(4) The name and address of any future charitable beneficiary or beneficiaries.

"(5) The value of the trust as of the latest appraisal and the date of said appraisal.

"Section 3. The trustee or trustees of each charitable trust becoming effective or active in the State after July 4, 1959, shall, within 30 days after such trust is effective or active in the State or on or before December 31, 1959, whichever is later, file with the Attorney General a statement containing the same information which is required of charitable trusts established or active in the State on July 4, 1959, under Section 2, hereof.

"Section 4. Each registration statement filed under Section 2 or Section 3 of Article I hereof, shall be accompanied by a registration fee of five dollars (\$5.00). Checks should be made payable to 'Treasurer, State of Iowa'.

"Section 5. Forms for filing registration statements shall be obtained

an annual report with the Attorney General.⁸⁷ The first annual report is due on or before July 1, 1960.⁸⁸

A few other states, led by New Hampshire in 1943,⁸⁹ have also enacted legislation designed to make available to the Attorney General the information he needs to enforce charitable trusts.⁹⁰ In 1954, the National Conference of Commissioners on Uniform State Laws drafted a uniform supervision of charitable trustees act.⁹¹ Iowa did not adopt the uniform act.⁹² The Iowa statute closely resembles the Rhode Island law.⁹³

CONSEQUENCES OF THE NEW LAW

As of March 21, 1960, 256 charitable trusts had registered with the Attorney General.⁹⁴ The appraised value of the trusts totaled \$28,268,485.00.⁹⁵ There were four trusts valued in excess of \$1,000,000.00, the largest of which was valued at \$3,216,565.00.⁹⁶ The smallest trust was appraised at \$43.00,⁹⁷ and there were three others valued at less than \$100.00. The largest number of trusts, 47, were located in Polk County, with Linn and Scott registering 29; Woodbury 20; Dubuque 19; Des Moines 12; Wapello 10; Black Hawk, Johnson and Muscatine 8; Jasper and Jones 6; Cerro Gordo, Cherokee and Hamilton, 4; Cedar, Lee, Marshall and Wright 3; Bremer, Clinton, Marion, Montgomery, Washington and Webster 2; and Boone, Buchanan, Butler, Dallas, Emmet, Floyd, Greene, Henry, Humboldt, Jefferson, Keokuk, Louisa, Lucas, Page, Pottawattamie, Poweshiek, Sac, and Wayne, 1 each.

A total of 125 of the trusts were created by will, 9 were created by deed, and 122 were created by some other type of trust instrument.

A total of 39 trusts were for the benefit of the poor, 49 were created for educational purposes, 56 for religious purposes, 8 for

from the Attorney General, State House, Des Moines 19, Iowa.

"Section 6. Charitable trusts in which the charitable interest is contingent upon the happening of an uncertain future event are exempt from registration; provided, however, that upon the happening of said event vesting the charitable interest the trustee or trustees of such trust must, within a period of 30 days from such vesting, file a registration statement containing the information aforesaid."

⁸⁷ Iowa Laws, ch. 364, § 10 (1959).

⁸⁸ *Ibid.*

⁸⁹ N.H. Laws, ch. 181 (1943).

⁹⁰ 4 SCOTT, TRUSTS § 391 n. 13 (2d ed 1956) discusses several charitable trust registration acts.

⁹¹ UNIFORM SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT (1954), 9C U.L.A. 208 (1957).

⁹² California temporarily adopted the Uniform Act in 1955. Calif. Stat., Ch. 1820 (1955). In 1959 the Act was adopted permanently. Calif. Stat., Ch. 1258, § 1 (1959).

⁹³ R.I. GEN. LAWS ch. 18-9 (1956).

⁹⁴ *Register of Charitable Trusts*, Office of the Attorney General, Capitol Building, Des Moines, Iowa, hereinafter referred to as *Charitable Trust Register*.

⁹⁵ All statistics cited were compiled from the *Charitable Trust Register*.

⁹⁶ *Charitable Trust Register*, Trust No. 173.

⁹⁷ *Id.*, Trust No. 34.

governmental purposes, 19 for cemetery purposes, and 20 for health purposes. Miscellaneous purposes beneficial to the community, such as plowing matches,⁹⁸ veterans' rehabilitation,⁹⁹ and the prevention of cruelty to children and animals,¹⁰⁰ were beneficiaries of 17 trusts. The single purpose most often stated, named in 63 trusts, was a general gift to religious, educational and charitable purposes to be selected by the trustees. Tax considerations evidently were uppermost in the mind of one settlor, who named "organizations exempt from taxation under Section 501(a) and described in Section 501(c)(3) of the Internal Revenue Code of 1954."¹⁰¹ Six other trusts also limited their beneficiaries to such tax exempt organizations.¹⁰²

Trustees of 108 of the trusts registered were individuals, and in 45 of the 108 at least one of the trustees had the same family name as the settlor. Banks registered as trustees of 141 trusts, and other corporations registered as trustees of seven.

The Iowa Charitable Trust Registration Act has not been in effect long enough to fairly judge its efficaciousness. Experience will perhaps dictate a few changes. However, it is well drafted, and should assure that in the future the more than 28 million dollars held by charitable trusts in Iowa will be applied as intended.

⁹⁸ *Id.*, Trust No. 37.

⁹⁹ *Id.*, Trust No. 34.

¹⁰⁰ *Id.*, Trust No. 9.

¹⁰¹ *Id.*, Trust No. 108.

¹⁰² The number of charitable purposes listed totals more than 256, because some trusts named more than one beneficial purpose.

SOLICITATION OF CLIENTS AND ADVERTISING BY ATTORNEYS

The problem of the manner in which an attorney may go about obtaining professional employment without violating the standards of ethics of the legal profession is one that has been viewed with varying degrees of interest through the years. The purpose of this article is to examine and appraise the various standards governing an attorney's conduct in procuring business, as determined by the American Bar Association, the Code of Iowa, and various court decisions on the subject.

Advertising for clients appears not to have been disfavored, or at least not considered, in the mid 1800's.¹ Shortly thereafter one of the first state Codes of Ethics provided that "Newspaper advertisements, circulars and business cards, tending professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided." The Code also condemned certain types of indirect advertisement.² The view that, in general, all forms of solicitation and advertising by attorneys should be condemned as unprofessional began to become deep-rooted in the ethics of the profession in the early part of this century³ and continues to be strongly sanctioned by the courts today.⁴

Canon 27 of the American Bar Association Canons of Professional Ethics was first adopted in 1908 and, through several revisions,⁵ is today a prohibition against any form of solicitation and advertising by attorneys, with specified exceptions.⁶ This Canon, together with Canon 28 which declares it to be "unprofessional for

¹ Advertising for clients was not mentioned in SHARSWOOD'S PROFESSIONAL ETHICS (1854), according to DRINKER, LEGAL ETHICS 213 (1953).

² A.L.A. CODE OF ETHICS § 16 (1887, 1899), DRINKER, LEGAL ETHICS 352-63 (1854).

³ *People ex rel. Deneen v. Smith*, 200 Ill. 442, 66 N.E. 27 (1902); *Chreste v. Commonwealth*, 171 Ky. 77, 186 S.W. 919, L.R.A. 1917B, 1123 (1916); *In re Newell*, 174 App. Div. 94, 160 N.Y.S. 275 (4th Dept. 1916); *Ex parte Hitson*, 15 N.M. 6, 99 Pac. 689 (1909).

⁴ *In re Cohn*, 10 Ill. 2d 186, 139 N.E.2d 301 (1957); *Morris v. Pennsylvania R.R.*, 10 Ill. App. 2d 24, 131 N.E.2d 21 (1950); *In re Meldrum*, 243 Iowa 777, 51 N.W.2d 881 (1952); *State v. Kaufmann*, 202 Iowa 157, 160, 209 N.W. 417, 418 (1926) ("The solicitation of business by members of the bar, the working up of legal controversies, and all kindred acts and conduct cannot be too severely condemned. Such conduct is unprofessional and violates all the ethics of the profession.").

⁵ The Canon was completely redrafted in 1937, and amended in 1940, 1942, 1943 and 1951.

⁶ Canon 27 states in part: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper."