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THE VOLUNTARY CLOSING OF A PRIVATE COLLEGE: A DECISION FOR THE BOARD OF TRUSTEES?

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[I]t is inappropriate to treat survival and growth as unqualified good in themselves. Rather, I believe higher education's leaders should continue to bear in mind that the only reason for the existence of our institutions is to meet the significant and demonstrable educational and related service needs of the public.[1]

I. INTRODUCTION

In February 1979, the trustees of Wilson College, a small, church-related liberal arts college for women in Chambersburg, Pennsylvania, announced that the college would close at the end of the spring 1979 session.[2] On May 25, 1979, the closing was enjoined. The injunction raised in stark relief the legal dilemma facing trustees of a dying private college: May they permit the college to die with dignity or must they keep it alive until every last penny is expended and the college slowly has dissipated into nothing?[3] In analyzing this question, it is important to remem-

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1. Art, *Questioning the Unquestionable: Should All Colleges Survive?*, CHRONICLE HIGHER EDUC., March 24, 1980, at 64.

2. Zehner v. Alexander, 3 Franklin County Legal J. 27, 29 (Pa. Orphans' Ct. 1979).

3. During the 1960s, 77 colleges closed; another 144 closed in the 1970s. CHRONICLE HIGHER EDUC., June 9, 1980, at 1. Many anticipate that private colleges increasingly will become financially unable to continue. "The decline in the number of college-age Americans may force as many as 200 small, private, liberal-arts institutions to close their doors in the 1980's." *Id. See generally, e.g.*, Willmer & O'Connor, *Closing with Compassion*, AM. A. GOVERNING BOARDS REPS. 27 (November 1979). The trend towards more closings is exemplified by the reported decision to close Annhurst College in Woodstock, Connecticut, at the end of the Spring 1980 semester, *see* CHRONICLE HIGHER EDUC., March 3, 1980, at 3, and a suit by a New York bank to foreclose a $40 million mortgage after the mortgagor, a church-related university, missed six scheduled payments. *See* CHRONICLE HIGHER EDUC., March 10, 1980, at 2. In addition, Fort Wright College in Spokane, Wash-

ber that the interests of a number of different constituencies in the college community, which may or may not have a legally cognizable interest in the college, substantially affect the decision of the trustees.[4]

The Board of Trustees of Wilson College announced its decision to close the school in a resolution that had been reviewed by counsel for the college.[5] They based their decision on awareness of " 'the deteriorating situation with regard to admissions, retention and enrollment as well as voluntary gifts and grants and of the jeopardy in which the continuation of the College as an excellent and effective college for women is placed . . . .' "[6] Prior to passage of the resolution

> [t]he President was advised [by counsel for the college that] a cy pres proceeding would be required before the actual closing of the College, and she understood it would be necessary to proceed with cy pres to use the assets of the College for something else. She was not advised by counsel that only the Court had authority to decide whether the College would be closed.[7]

On March 27, 1979, students, faculty members, and one trustee filed a petition in state court naming the individual trustees of the college as respondents. The petition asked (1) that the trustees show cause why they should not be removed as trustees of the college, (2) that the court appoint successor trustees who would be subject to the supervisory power of the court, and (3) that the trustees be permanently enjoined from closing the college.[8]

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ington, reportedly is discontinuing most of its four-year degree programs because of a lack of funds. *See* CHRONICLE HIGHER EDUC., April 14, 1980, at 2.

4. The basic constituency groups of a college are the students, faculty, staff, alumni, donors, and the public. Each of these groups has a particular reason for wanting the college to remain open and to continue functioning. They may, however, face problems in asserting standing to raise the legal issues. *See* notes 61-100 and accompanying text *infra.*

5. Zehner v. Alexander, 3 Franklin County Legal J. 27, 69 (Pa. Orphans' Ct. 1979).

6. *Id.* at 70 (quoting the resolution of the Board of Trustees of Wilson College as adopted on February 17, 1979). One member of the Board was not present at the meeting when the resolution was adopted. *Id.* at 30.

7. *Id.* at 69-70. For a discussion of the *cy pres* doctrine, see notes 13-60 and accompanying text *infra.*

8. *Id.* at 28. In addition, the petitioners sought an injunction pendente lite against further implementation of the closing of the college, as well as an award of counsel fees and costs. The court declined to grant the injunction. *Id.* at 28-29.

Upon finding that the board had exceeded its authority by announcing and implementing its decision to close the college before obtaining court approval, the court issued an injunction permanently enjoining the closing of the college. In addition, the court removed the president of the college from the board of trustees for gross abuse of discretion, removed another member of the board for a conflict of interest, and ordered that the properly served trustee-defendants personally bear the costs of their defense.[9]

The announcement of the court's decision exploded like the proverbial bombshell in the world of academic trustees.[10] Not only had their worst fears of being second-guessed by the courts come true, but the trustees were required to pay personally for the privilege of being second-guessed.[11]

II. APPROVAL OF BOARD ACTION—WHEN TO INVOKE CY PRES?

A. The Nature of the Problem

The basic issues that must be addressed by trustees[12] contemplating the closing of a college are easy to describe. A rational prediction of how a court will review the trustees' treatment of them is more difficult. It is the purpose of this Article to analyze the questions and suggest bases for resolution.

The broad question is whether trustees alone may close the college, or whether they must obtain permission from the court through a *cy pres* proceeding. The answer to this question, in turn, depends on whether or not the closing itself is a change in fundamental purpose of the corporation resulting from financial inability to perform the existing purpose. The factual question

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9. *Id.* at 82-86.

10. For example, a general meeting for its membership was sponsored by the American Association of Governing Boards in late 1979 to explore the legal issues surrounding the closing of a college.

11. Attorney's fees and costs have been exacted from unsuccessful *challengers* of a school closing in the past. In Kolin v. Leitch, 343 Ill. App. 622, 99 N.E.2d 685 (1951), parents of students brought an action to enjoin a school closing. The action was dismissed on appeal for lack of standing. The trial court had issued a temporary injunction restraining the school from closing. Under Illinois law the school subsequently recovered damages incurred as a result of the injunction and recovered attorneys' fees and court costs from the plaintiffs. Kolin v. Leitch, 351 Ill. App. 66, 113 N.E.2d 806 (1953).

12. Trustees, as discussed in this Article, include members of the board of trustees or board of directors of a non-member, not-for-profit, charitable corporation.

faced by the trustees is twofold. First, is it financially practicable for the college to continue as it is now constituted? Second, if continuation is financially impracticable, will closing the college constitute a fundamental change in the purpose of the corporation, or can the fundamental purpose continue to be achieved by a different means?

The difficulty is that as prerequisites to application of *cy pres,* the court must also, first, conclude that financial impracticability does exist and, second, determine the fundamental purpose of the corporation. Thus, although determinations of fact must be made by the trustees, independent determination of the same facts are made by the court. With two original fact finders, each acting properly, inconsistent conclusions can be reached. The core of the problem, then, is to give legitimate scope to the role of both decisionmakers.

B. The Cy Pres *Doctrine*

Cy pres is an equitable doctrine that is invoked to allow the assets of a charity to be used for a purpose other than that specifically required by the trust instrument or articles of incorporation.[13] The doctrine is invoked when the original purpose can no longer be carried out because it is financially or otherwise impracticable or impossible, or because it is illegal and when, at the time of the gift to the charity, the donor had a general charitable intent that will encompass an alternative use of the dedicated assets.[14] The purpose of the proceeding is to find the charitable use that most nearly approximates the original purpose of the donor. The change that the court is allowing is a change in the purpose to be served by the charity.

The equitable doctrine of deviation is used when the donor has directed a particular manner of providing for the purpose of the charity or a particular method of administering the charity that is no longer possible.[15] The relief granted in deviation is relief from the direct method of performing the charitable act. The *purpose* of the charity is not changed but instead is preserved by changing the *manner* of accomplishing it.

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13. RESTATEMENT (SECOND) OF TRUSTS § 399 (1957).
14. *Id.*
15. *Id.* at § 381.

Cy pres is appropriate if the financial impracticability of continuing the operation of a college requires a change of purpose; deviation is proper if there is to be only a change in the directed method of achieving the purpose. Because deviation is not likely to be appropriate in the situation of closing a college, it will not be discussed further. It may be useful to bear in mind, however, that the same considerations would be applicable in a deviation proceeding as are applicable to the *cy pres* proceeding. Because court approval of a proposed course of action by the trustees is necessary only when there is a change in purpose that results from financial impracticability,[16] some guidance about the courts' analyses of these issues is in order.

1. Financial Impracticability.—Cases that deal with the financial exigency required to terminate the contract of a tenured professor may give some guidance to understanding the meaning of financial impracticability. In those cases the basic issue has been whether the exigency is real or whether it is simply a disguise for firing a professor without proper cause.[17]

Although courts have consistently said that they will not second-guess a board's conclusion that a financial exigency exists,[18] they have, in fact, reviewed trustees' decisions. A well-publicized example of one court's review is that of the New Jersey Superior Court, Appellate Division, which allowed a finding of financial exigency to stand, even though the dismissed professor could have been paid had the board chosen to liquidate assets rather than hold them for continued appreciation.[19]

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16. That is, when the doctrine of *cy pres* must be applied in order to change the purpose of the charity. *See generally id.* at § 399.

17. *See* Note, *Financial Exigency as Cause for Termination of Tenured Faculty Members in Private Post Secondary Educational Institutions*, 62 IOWA L. REV. 481 (1976); Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L.J. 417 (1976).

18. In an unpublished opinion, the intermediate appellate court of Iowa reasoned that

> [t]he question whether a financial exigency existed is primarily a matter of subjective judgment to be exercised by the university officials charged with the responsibility of operating the university. We do not believe it is a question of fact to be determined by a jury. Moreover, we do not believe it is a matter for the substitution of the court's judgment or the juror's judgment for that of the administrative body . . . .

Lumpert v. University of Dubuque, 255 N.W.2d 168 (Iowa Ct. App. 1977), *quoted in* H. EDWARDS & V. NORTON, HIGHER EDUCATION AND THE LAW 269 (1978).

19. AAUP v. Bloomfield College, 136 N.J. Super. 442, 446, 346 A.2d 615, 617 (Super.

At trial, existence of the assets had been held to be evidence that there was in fact no financial exigency.[20] The Fourth Circuit has found that financial exigency "should be determined by the adequacy of a college's operating funds rather than its capital assets."[21] Nevertheless, continuing deficits together with declining enrollments in a school that is predominantly tuition-based may not be sufficient to justify a decision to close and terminate the contracts of tenured professors in the face of failure to explore alternatives such as reduction of salaries and increases in tuition.[22]

When there is evidence that a financial exigency exists, courts have required that a decision not to retain tenured professors be made in a good faith attempt to avert the financial difficulty.[23] Good faith may be evidenced if no one is hired for several years to teach in the vacated position. When the college has hired younger and presumably lower-salaried faculty members to cover the same duties as the dismissed professor, the hirings are considered to be evidence that the process is nothing more than a way to dismiss the tenured professor without cause and in bad faith.[24]

The validity of this inference may be subject to challenge, however. There is some notion of critical mass involved in pro-

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Ct. App. Div. 1975).

20. AAUP v. Bloomfield College, 129 N.J. Super. 249, 261, 322 A.2d 846, 857 (Super Ct. Ch. Div. 1974).

21. Krotkoff v. Goucher College, 585 F.2d 675, 681 (4th Cir. 1978). ("As a result of the large annual deficits aggregating more than $1,500,000 over an extended period and the steady decline in enrollment, the college's financial position was precarious . . . the trustees reasonably believed that the college was faced with financial exigency.").

22. *See generally* Zehner v. Alexander, 3 Franklin County Legal J. 27 (Pa. Orphans' Ct. 1979). This case, of course, looks at the decision to close the college, including the termination of the contracts of tenured faculty members, not just at the release of a portion of the faculty.

23. *See* Krotkoff v. Goucher College, 585 F.2d 675, 681 (4th Cir. 1978); AAUP v. Bloomfield College, 136 N.J. Super. 442, 447, 346 A.2d 615, 617 (Super. Ct. App. Div. 1975). *See generally* Tucker, *Financial Exigency—Rights, Responsibilities, and Recent Decisions*, 2 J.C. & U.L. 103 (1974).

24. *See* AAUP v. Bloomfield College, 129 N.J. Super. 249, 257, 322 A.2d 846, 856 (Super. Ct. Ch. Div. 1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (Super. Ct. App. Div. 1975). In Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency, supra* note 17, the suggestion is made that when enrollment is declining and the situation is unstable, there is an exigency that justifies terminating contracts of tenured faculty members, but that when the situation is stable, termination of those contracts should be permitted only as a last resort.

viding a curricular offering of sufficient depth to attract students to an area of study.[25] An academic program in a single discipline, political science, for example, requires more than one professor to exist. Suppose that the critical mass in political science is three professors. Further, suppose that the college has two tenured political science professors, each costing the college $30,000 per year, and that the college can hire a new professor for $15,000 a year. If the college dismisses one of the tenured professors and hires two new professors, the critical mass is obtained and the enterprise continues. If the college retains the two tenured professors, the department is below the critical mass, things go from bad to worse as enrollment drops, and eventually both tenured professors will lose their jobs because of financial exigency. While this example is overly simplistic, it illustrates a dilemma that college trustees face when deciding among alternatives to reducing the staff[26] and the effects on the institution that will result if such alternatives are pursued.[27]

It is, in short, a no-win situation. Therefore, it is important for courts to be extremely cautious and to insure that they do not simply substitute their judgment of financial impracticability for that of the trustees. The legitimate public interest in requiring accountability is protected when the trustees are required to make their decisions with due care and in good faith.[28] This standard of review is particularly necessary when the courts have provided no meaningful guidelines for the trustees to use when making their decision. The financial exigency cases illustrate that assets, cash flow, and long-term economic projections are factors that the court will consider. They do not tell us how they will affect the court's decision nor how they should be viewed by the trustees.

2. *Purpose.*—Once financial impracticability is found, the

25. The court in *Zehner v. Alexander* impliedly recognized this notion when it said that an adequate student body is necessary to provide funding for a "competent faculty of adequate size to provide adequate coverage of fields." Zehner v. Alexander, 3 Franklin County Legal J. 27, 37 (Pa. Orphans' Ct. 1979).

26. Alternatives include abolition of tenure and reduction of salaries.

27. A less drastic alternative than abolishing tenure would be to put a freeze on the granting of tenure when the board believes financial difficulty lies ahead. Either step, however, likely will be viewed by the academic community as a significant drawback to affiliation with the college. Even with changes in the tenure system, a cut in operating costs will not result unless salaries are lowered or the number of employees is reduced.

28. See notes 109-114 and accompanying text *infra.*

need for a *cy pres* action further depends upon a determination of the purpose of the charity. When the property is impressed with an express trust, the express purpose of the donor is at issue. In the case of a preexisting charitable corporation, however, such as a college, it must be presumed that, when a donor makes an unrestricted gift to the corporation, it is to be used for the stated purpose of the corporation. Thus, in the latter case, the fundamental purpose of the corporation is at issue. The starting point for the determination of the fundamental purpose of the corporation is the statement of purpose in the articles of incorporation.[29] In addition, some courts have looked to the activities in which the corporation was actually engaged at the time of the gift.[30]

In *Queen of Angels Hospital v. Younger*,[31] the hospital board decided to close the hospital operated by the corporation and to use the remaining assets for the purpose of operating outpatient clinics. Since the corporation had previously operated outpatient clinics, there was no question concerning corporate authority to operate clinics in addition to the hospital. The California Attorney General objected to the proposed closing on the grounds that it would "constitute an abandonment of Queen's primary charitable purpose and a diversion of charitable trust assets."[32] The court held that the primary purpose of the corporation was defined in the articles of incorporation and in the manner in which the charity conducted its activities at the time of the gifts.[33] Applying this two-factor test, the court concluded that

> [t]he question is not whether Queen can use some of its assets or the proceeds from the operation of the hospital for purposes other than running a hospital; it certainly can and has. The question is whether it can cease to perform the primary purpose for which it was organized. That we believe it cannot do.[34]

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29. Obviously, with regard to specific property, one must also consult any document of transfer or other agreement with the donor to ascertain whether or not there is an express trust.

30. *See* Queen of Angels Hosp. v. Younger, 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977).

31. *Id.*

32. *Id.* at 365, 136 Cal. Rptr. at 39.

33. *Id.*

34. *Id.* at 368, 136 Cal. Rptr. at 41.

The result of this conclusion was to activate the provisions of the articles of incorporation relating to the distribution of assets upon dissolution. Because the charter provided for that distribution, the court did not need to approve any proposed alternative use.[35]

Frequently the articles of incorporation will list a number of purposes. When dissolution is contemplated, the court must choose the purposes that will continue to be fulfilled. When possible, courts prefer to continue to fill substantially all of the stated purposes rather than a single purpose, even when the members of the charity have indicated that they would prefer the single purpose. An example of this principle is found in *Metropolitan Baptist Church v. Younger*.[36] In this case, the purpose expressed in the articles of incorporation was to establish a fundamentalist Baptist church in Richmond, California, and to preach and teach the scriptures. Upon dissolution of the corporation, the members wished to make distributions to several charitable organizations. The court rejected the plan because the proposed distribution would not be in accord with the purposes expressed in the articles. The court decided that only a local church would meet the charter requirements of geography and religious mission and directed that all of the assets be so distributed.[37]

The consent of the attorney general to a proposed change on the ground that the change is in the public interest does not preclude the court from finding that the change is impermissible. In *Holt v. College of Osteopathic Physicians and Sur-*

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35. ABA-ALI MODEL NON-PROFIT CORP. ACT §§ 45-62 set out a proposed statutory scheme for dissolution of a corporation. Section 46 provides:

> (c) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution adopted as provided in this Act;
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> (d) Other assets, if any, shall be distributed in accordance with the provisions of the articles of incorporation or the by-laws to the extent that the articles of incorporation or by-laws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others . . . .

Id. at § 46.

36. 48 Cal. App. 3d 850, 121 Cal. Rptr. 899 (1975).

37. *Id.*

geons,[38] the majority of the trustees of an osteopathic college of medicine determined to change the accreditation to allopathic medicine. The California Attorney General had consented to the change on the ground that it would not be detrimental to the public interest. After determining that the minority trustees had standing to raise the question of whether or not the change would constitute a diversion of the funds from the primary purpose of the donors, the court held that having the osteopathic curriculum and promoting osteopathy, not merely operating a medical school, were the primary purposes of the donors.[39] The court thus implied that if the college of osteopathy could not be continued for some reason, then other methods of promoting osteopathy would be preferred to permitting the assets to be used to develop allopathic medicine in an ongoing medical college. The articles were the primary source of the court's independent determination of the fundamental purpose.[40]

Courts have found some proposed changes to be permissible, including the addition of a liberal arts college to a university already chartered to conduct programs in law, medicine, and theology;[41] the merger of a college into another university although the college relinquished its name, which was that of its principal donor;[42] and reorganization of a private college into a public one.[43] In the last of these cases, the court said:

> The basic functions, purpose and role of the University as an educational institution remains [sic] unchanged. The mode or technique of internal management is changed. I find that the modifications are fair and reasonable and consistent with the purposes set forth in the charter and its subsequent amendments.[44]

In *Trustees of Rush Medical College v. University of Chi-*

38. 61 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964).

39. *Id.*

40. *Id.*

41. State v. U.S. Grant Univ., 115 Tenn. 238, 90 S.W. 294 (1905).

42. Lupton v. Leander Clark College, 194 Iowa 1008, 187 N.W. 496 (1922) (the dominant purpose of the donor was to provide education, not to perpetuate his name).

43. Trustees of Rutgers College of Richman, 41 N.J. Super. 259, 125 A.2d 10 (1956) (The donor's purpose was not to continue the management of the college without change). *But see* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), in which a change in management was found to violate the charter of the college.

44. Trustees of Rutgers College of Richman, 41 N.J. Super. at 292, 125 A.2d at 28.

cago,[45] a medical college wished to transfer its assets to the University of Chicago to improve the financial viability of the college. The attorney general objected to the proposed transfer on the ground that "a charitable corporation created by law for a definite purpose, cannot donate or transfer its funds to another corporation organized for similar purposes."[46] After finding the purpose of Rush Medical College to be the provision of medical education, the Illinois court permitted the transfer because "the cause of medical education will be better served by transferring the college to the university as a going concern than to wait until there is a total collapse and then transfer the wreck to the university . . . ."[47] It follows that had the court concluded that the primary purpose of Rush Medical College corporation was to operate an ongoing educational institution rather than to provide education, it would not have approved the transfer.

In *Fenn College v. Nance,*[48] a case factually similar to the Wilson College case, the trustees of Fenn College proposed to liquidate the assets of the college and use the resulting funds to establish a foundation "with the purpose of wide support of educational, literary, charitable and scientific activities and projects."[49] The Ohio Court of Common Pleas approved the dissolution. The assets were being transferred to Cleveland State University, a competing school believed to be the more viable institution. Fenn would receive money in exchange for its plant and other assets. The court noted that an Ohio corporation has, by statute, the right to transfer assets.[50] In addition, the Ohio Code specifically authorizes modification of corporate names[51] and purpose.[52] Given this authority, the court concluded:

> In the instant case, it is clear that the doctrine of deviation should be applied (1) to declare that in view of altered circumstances Fenn [the closing college] is fully justified in changing the form of its corporate existence while still carrying on the broad educational purposes of its charter; and (2) to make it

45. 312 Ill. 109, 143 N.E. 434 (1924).
46. *Id.* at 113, 143 N.E. at 436.
47. *Id.*
48. 4 Ohio Misc. 183, 210 N.E.2d 418 (1965).
49. *Id.* at 185, 210 N.E.2d at 420.
50. *Id.* at 188, 210 N.E.2d at 422.
51. OHIO REV. CODE ANN. § 1702.38 (Page 1978).
52. *Id.* at § 1713.25.

> clear that the transfer of assets and facilities to or for the use by [the transferee] is a justified departure from the original object of generous gifts made in the past by so many, but not a material change in the charitable uses intended by such donors, and that therefore no donor may complain or hereafter have any cause of action against Fenn, its trustees or members growing out of the execution or carrying out of the agreement [to sell the assets].[53]

In the context of broad enabling legislation, the court in *Fenn College* viewed the broad purposes of the charter as determinative and did not look to the actual activities carried out under the charter as did the California court in *Queen of Angels*.[54]

It is important not to confuse the language of method with the language of purpose when looking at a charter. Although specific direction about method must be followed unless the court determines in a deviation proceeding that it is inappropriate, the method is irrelevant to the finding of purpose. When the charter provides no direction concerning the method of achieving the purpose, the trustees may exercise their discretion without obtaining court approval in advance, although the court may review their action to prevent abuse of discretion.[55] As stated by the Missouri court: "[C]hanges and differences in the modus operandi—in technique—in the means of accomplishing the objects and purposes expressed in the articles of agreement—. . . do not constitute a departure, deviation from or perversion of the objects and purposes of [the charity] . . . ."[56]

In summary, three conslusions may be drawn from existing case law. First, the purpose of a charitable corporation will be determined primarily from the language in the articles of incorporation.[57] In some cases, however, the activities of the corporation at the time of the gifts may provide additional guidance.[58]

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53. 4 Ohio Misc. at 191-92, 210 N.E.2d at 423.

54. See notes 30-34 and accompanying text *supra*.

55. Ranken-Jordan Home v. Drury College, 449 S.W.2d 161, 166 (Mo. 1970) (citing Taylor v. Baldwin, 362 Mo. 1224, 247 S.W.2d 741 (1952)).

56. Ranken-Jordan Home v. Drury College, 449 S.W.2d 161, 166 (Mo. 1970).

57. See notes 36-37, 40, 44-53 and accompanying text *supra*.

58. See notes 31-34 and accompanying text *supra*. The purpose also may be found in the document conveying property to the charitable corporation just as it can be found in documents of conveyance to a charitable trust. *See, e.g., In re* Los Angeles County Pioneer Soc'y, 40 Cal. 2d 852, 257 P.2d 1 (1953).

Second, if more than one purpose is stated in the articles, the court will look for a way to perform as many as possible.[59] Finally, it is doubtful that the concurrence of the attorney general in the change of purpose will be persuasive to the court.[60]

III. Standing to Challenge the Decision to Close

In the Wilson College case, the trustees apparently contemplated that a *cy pres* hearing would be required before assets were put to a new use, but did not believe that a hearing would be necessary before approval of the closing itself.[61] The petitioners, representing various interests in the school, then challenged the legality of the actual decision to close. Their action raises a question of standing that needs to be addressed by the courts.

Traditionally, the attorney general of the state has been held to have exclusive standing to challenge the management decisions of a public charitable corporation.[62] Arguably, this doctrine of exclusivity needs to be abandoned when the board of trustees has decided to close a college. Students and employees of the college have a present, definite interest in its continuation which should be protected by access to the courts.

A. The Traditional Doctrine of Exclusivity

Historically, a trustee of a charitable trust was answerable to the visitor appointed by the donor to assure that the purposes of the trust were being carried out.[63] Early in the history of the United States, educational institutions frequently were organ-

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59. See notes 36 & 37 and accompanying text *supra*.

60. See note 39 and accompanying text *supra*.

61. *See* Zehner v. Alexander, 3 Franklin County Legal J. 27, 35, 69-70 (Pa. Orphans' Ct. 1979).

62. See notes 73 & 74 and accompanying text *infra*.

63. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

> To all eleemosynary corporations a visitorial power attaches, as a necessary incident; . . . there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled. . . . [T]he founder and his heirs are the legal visitors, unless the founder has appointed and assigned another person to be visitor. . . . This visitatorial power . . . stands upon the maxim that he who gives his property has a right to regulate it in the future.

Id. at 673-74 (Story, J., concurring). *See, e.g., In re* James Murdock, 24 Mass. (7 Pick.) 303, 324 (1828); *In re* Norton, 97 Misc. 289, 161 N.Y.S. 710 (Sup. Ct. 1916).

ized in corporate form, but assets received by the trustees were restricted to specified purposes or the trustees were controlled directly by the donors or religious groups.[64] These controls assured that funds were used as intended by the donor and there was little room for the exercise of discretion, wisely or otherwise, on the part of the trustees.[65] In the late nineteenth and early twentieth centuries these informal methods of control were quite effective because donations were made primarily on an annual basis rather than in the form of a permanent endowment.[66] More recently, however, operating budgets have received substantial support from large endowment funds managed by the board of trustees.[67] As a result, a need has arisen for new assurances that the trustees use the funds for the designated purposes.

The present system does not have any natural check on the decisions of the trustees.[68] The trustees of a charitable corporation generally are a self-perpetuating group. Typically, there is no membership to whom they are legally responsible, nor are they the donors of most of the assets in their control. In addition, the visitation power, once an effective check on trustee power, has fallen into relative disuse.[69]

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64. For an interesting, well-researched discussion of early financing of private higher education, see Berry & Buchwald, *Enforcement of College Trustees' Fiduciary Duties: Students and the Problem of Standing*, 9 U.S.F.L. REV. 1, 1-11 (1974).

> In short, it appears that traditionally the financial resources of most colleges were controlled only minimally by their trustees. Lands and liquid assets were frequently managed by founders, donors, or alumni, while what money was vested in the trustees rarely exceeded that needed for earmarked projects or the annual operating expenses. In this context of no endowment for investment, subtle conflicts of interest by trustees amounting to serious breaches of fiduciary duty, understandably, were very unusual.

Id. at 8. The authors note further that "the trustees served as little more than a titular board presiding over the daily educational affairs of the college." *Id.* at 11.

65. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

66. *See* Berry & Buchwald, *supra* note 64, at 4.

67. For instance, Harvard University's endowment was valued at $1,457,690,000 on June 30, 1979. CHRONICLE HIGHER EDUC., April 14, 1980, at 16.

68. *See* Berry & Buchwald, *supra* note 64, at 13.

> University funding now vests in the trustees awesome financial power that may be exercised in their sole discretion. The mere existence of such financial power creates a much greater likelihood for trustee misconduct than was present under former extra-legal donor supervision.

Id.

69. *See* G.G. BOGERT & G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 416, at 458 (2d ed. rev. 1977).

In the situation of the typical private trust, the named beneficiaries clearly have standing to ask a court to review the decisions of the trustees regarding the management and disposition of the funds in their control.[70] In the for-profit corporate model, the share-holders are the analogous group.[71] In the charitable, nonmember corporation, however, there is no strictly analogous group because the beneficiary is "the public."[72] Although an individual may be the direct beneficiary of the particular service

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> The technical power of visitation in the founder of a charitable corporation would seem to exist in the United States, unless abolished by statute, but to be of decreasing importance.
>
> The exact status of the doctrine of visitation in modern American law is not clear. It seems to be a relic of earlier times which has not been expressly abolished by statutes in some states and has been occasionally recognized by decision. It is not believed, however, that as a feature of charitable trust administration it is practical or desirable unless statutory supervision and enforcement is inadequate.

Id. See also State v. Taylor, 58 Wash. 2d 252, 362 P.2d 247 (1961). *But see* Trustees of Andover Theological Seminary v. Visitors of Theological Institution in Phillips Academy, 253 Mass. 256, 148 N.E. 900 (1925).

70. Clews v. Jamieson, 182 U.S. 461, 479-80 (1901); Whiting v. Hudson Trust Co., 234 N.Y. 394, 138 N.E. 33, 38 (1923); Shaffer v. Shaffer, 17 N.Y. Misc. 2d 592, 183 N.Y.S.2d 882 (Sup. Ct. 1959). *See* Cook v. Holland, 575 S.W.2d 468, 473 (Ky. 1978).

71. The right is primarily that of bringing a stockholder's derivative action against the corporate officers. *See* Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522 (1946).

> The stockholder's derivative action . . . is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corporate managers. Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs. Equity therefore traditionally entertains the derivative or secondary action by which a single stockholder may sue in the corporation's right when he shows that the corporation, on proper demand, has refused to pursue a remedy, or shows facts that demonstrate the futility of such a request.

Id. See FED. R. CIV. P. 23. *See generally* 13 R. EICKOFF & MEIER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 5907-6045.5 (1980).

72. *See* Kolin v. Leitch, 343 Ill. App. 622, 99 N.E.2d 685 (1951). (Plaintiffs, parents and students of a school supported in part by funds from a charitable trust, were seeking to question the trustees' decision to close the school. They joined the attorney general as a party plaintiff who then took control of the suit and moved to dismiss. The court granted the motion, finding that the plaintiffs did not have beneficial status sufficient to allow them to maintain the suit without the attorney general even though the students were already enrolled in the school and enjoying the benefit of the trust. The court applied the rule that the purpose of the trust is to benefit the public and decided that these plaintiffs had no particular identifiable interest.); Sister Elizabeth Kenny Foundation v. National Foundation, 267 Minn. 352, 126 N.W.2d 640 (1964) (potential beneficiaries of the assets of a changing charity do not have a beneficial interest sufficient to support a suit).

that a charitable corporation provides, the purpose of the charity, according to many courts, is to benefit the public at large by providing direct benefit to individual members of the public. The logical representative of the public is the state acting through the attorney general.[73] From this line of reasoning developed the principle that the attorney general has exclusive standing to challenge decisions of the board of trustees of a charitable corporation with respect to matters of management and distribution of income.[74]

The rule of exclusive standing has not been adopted universally, however.[75] For example, if the persons directly benefiting are an ascertainable group, some courts have found the required standing.

> Notwithstanding that a trust may be charitable and may look generally to the benefit of the public, yet if the terms defining it are such that it is possible to ascertain definite persons and institutions as the recipients of its benefits, such definitely ascertained persons have a status which entitles them to sue without the intermediation of the attorney general. . . . In such cases the reason for the rule that the attorney general must sue, viz., that there is no one among the indefinite public who can assert himself to be peculiarly interested as distin-

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73. This power is sometimes described as being the exercise of the right of *parens patriae* rather than protection of the beneficial interest. *See, e.g.*, Beatty v. Kurtz, 27 U.S. (2 Peters) 566 (1829); State v. Bibb, 234 Ala. 46, 173 So. 74 (1937); Sigmund Steinberger Foundation, Inc. v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

74. *See* Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633, 633-34 (1954).

> While the courts often talk of individuals who are to get charitable benefits as "beneficiaries," strictly speaking the state is the only party having a legal interest in enforcement, and the human beings who are favorably affected by the execution of the trust are merely the media through whom the social advantages flow to the public. If a trust has as its object the care of the poor, those persons who are chosen to secure the necessities of life under it are not in reality beneficiaries of the trust but only the instrumentalities through which the state receives the social advantage of seeing that its citizens do not suffer want. That this is true is shown by the rule that only the attorney general of the state can sue for enforcement, since he is the legal officer whose duty it is to represent the interests of the state and its citizens.

Id. In some states the attorney general's role is codified. *E.g.*, CAL. CORP. CODE §§ 9505, 10207 (West 1977); GA. CODE ANN. § 108:212 (1979).

75. *See* Jones v. Grant, 344 So. 2d 1210, 1212 (Ala. 1977). In a suit concerning the management of funds by the trustees, the court held students and faculty to be "beneficiaries with a sufficient special interest in the enforcement of a charitable trust [to] institute a suit as to that trust . . . ." *Id.*

guished from others, finds no justification in fact. The reason failing, the rule should fail. In order for the attorney general to be alone entitled to enforce a charitable trust there must be "some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons."[76]

B. Refinement of the Doctrine

When it became apparent that most attorneys general would not or could not supervise all charitable corporations consistently with the interests of particular individuals, the exclusive standing doctrine was refined to permit the interested individual to bring suit in the name of the attorney general.[77] If the attorney general refused to consent to the suit for some reason, however, the individual still was denied standing and, because the consent of the attorney general to the prosecution of the suit was viewed as a matter of discretion, his decision was not subject to judicial review.[78]

These rules on standing were designed to allow proper representation of the true beneficiaries while preventing numerous

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76. Cannon v. Stephens, 18 Del. Ch. 276, 278, 159 A. 234, 236-37 (1932).

77. *See* Brown v. Memorial Nat'l Home Foundation, 162 Cal. App. 2d 513, 329 P.2d 118 (1958).

> A relator is a party in interest who is permitted to institute a proceeding in the name of the People or the attorney general when the right to sue resides solely in that official. . . . The attorney general prescribes his own rules for granting such consent and they may be entirely informal.

Id. at 538-39, 329 P.2d at 133.

78. Ames v. Attorney Gen., 332 Mass. 246, 124 N.E.2d 511 (1955).

> In our opinion the decision of the Attorney General not to permit the use of his name in a suit against the College for alleged breach of a public charitable trust was a purely executive decision which is not reviewable in a court of justice. The duty of taking action to protect public charitable trusts and to enforce proper application of their funds rests solely upon the Attorney General as the representative of the public interests.

Id. at 248, 124 N.E.2d at 513.

The situation may arise in which a state receives property from a private person in trust for the people of the state. Because the property belongs to the state, the attorney general is the representative of the state authority that manages the property and, therefore, cannot also represent the beneficiaries of the trust. The Supreme Judicial Court of Maine has permitted individual citizens who alleged injury-in-fact to maintain the suit under those circumstances. The decision was based on the ground that the attorney general could not represent both sides of the same case. It did not abandon the idea that the standing of the attorney general is exclusive. Fitzgerald v. Baxter State Park Auth., 385 A.2d 189 (Me. 1978).

nuisance suits by those who had a complaint against the charity. The supporting policy was to preserve the assets of the charitable corporation by not wasting them in the defense of suits, frivolous or otherwise.[79] Even in states that have refined the exclusive standing doctrine, there remains a need to allow access to the courts for review of the decision of the trustees when the attorney general has decided that an individual's proposed suit is ill-advised,[80] or when the attorney general has made an administrative decision to stay out of court because of lack of staff,[81] or simply when he is unaware of the alleged indiscretion.[82]

California courts have recognized the need to promote actual accountability and have substantially eroded the doctrine of exclusive standing. In *Pepperdine Foundation v. Pepperdine*,[83] a 1954 decision, the foundation sought to hold its principal donor and previous manager personally liable for losses resulting from imprudent investments. The court declined to permit the suit, stating:

> If he as an individual could not be sued for negligently investing his own moneys intended for charitable uses, why should

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79. *See* Kolin v. Leitch, 343 Ill. App. 622, 99 N.E.2d 685 (1951); Longcor v. City of Red Wing, 206 Minn. 627, 289 N.W. 570 (1940); G.G. BOGERT & G.T. BOGERT, *supra* note 69, at § 414.

80. In Veteran's Indus., Inc. v. Lynch, 8 Cal. App. 3d 902, 88 Cal. Rptr. 303 (1970), an organization was unable to challenge the attorney general's approval of an alternative use of a dissolving charitable corporation. The organization asserted that it would more nearly carry out the donor's purpose than would the proposed distributee.

81. *See* Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 451-56 (1960); Note, *State Supervision of the Administration of Charitable Trusts*, 47 COLUM. L. REV. 659, 662-64 (1947); Comment, *Supervision of Charitable Trusts*, 21 U. CHI. L. REV. 118, 119 (1953).

Berry and Buchwald suggest that very little has changed in the offices of the attorneys general since Karst wrote.

> Since the exclusive enforcement power is held by virtue of an assumed capacity to supervise, the attorney general's inability to perform effective supervision directly calls into question his continued claim to exclusive standing. Limited resources, inadequate reporting requirements, and a great dependence on citizen complaints all constrict attorneys' general capacity to monitor trustee decisions.

Berry & Buchwald, *supra* note 64, at 24-25.

82. *See* Berry & Buchwald, *supra* note 64, at 24-25. They argue that "the fact that attorneys' general access to trustee decisions is severely limited, in itself refutes the concept that supervision can be more satisfactorily performed by one acting under official responsibility than private interested groups." *Id.*

83. 126 Cal. App. 2d 154, 271 P.2d 600 (1954).

> his own "Foundation" under the management of strangers prosecute an action to recover from the original donor and his friends what through negligence, they lost for the Foundation?[84]

The court then declared that only the attorney general had the capacity to bring suit to protect the assets of a public charity.[85]

Twenty years later in *Holt*,[86] the same court declined to follow the exclusive standing rule when the attorney general would not bring suit. The court began its analysis by asserting that the doctrine of exclusive standing is not "the prevailing view in other jurisdictions"[87] and concluded "that a trustee or other person having a sufficient special interest may also bring an action . . . ."[88] It recognized that "[i]n addition to the general public interest [represented by the attorney general], . . . there is the interest of donors who have directed that their contributions be used for certain charitable purposes."[89] It did not, however, explicitly hold that interest sufficient to create standing.[90]

Two years later, the California Court of Appeals elaborated in a suit by a local Boy Scout council against a city that allegedly misused certain property that it held in trust for the benefit of the scouts.

> In view of the city's [trustee's] bald contention . . . [that] it has the right to apply the trust property, or the proceeds from the sale of it, to a wider or broader public use than that provided for in the original trust instrument, the need of the boys and girls who were the original beneficiaries of the trust for representation is at least as great as that of the general public. We think that need can best be met by representation by those who are directly concerned with their interests and welfare.[91]

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84. *Id.* at 160, 271 P.2d at 604.

85. *Id.* at 161, 271 P.2d at 605.

86. 61 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964).

87. *Id.* at 753, 394 P.2d at 934, 40 Cal. Rptr. at 246.

88. *Id.*

89. *Id.* at 754, 394 P.2d at 935, 40 Cal. Rptr. at 247.

90. *See id.* See note 95 and accompanying text *infra*.

91. San Diego County Council, BSA v. City of Escondido, 14 Cal. App. 3d 189, 196, 92 Cal. Rptr. 186, 190 (1971). For an interesting overview of the development of California's system of regulating trusts and charities, see Howland, *The History of the Supervision of Charitable Trusts and Corporations in California*, 13 U.C.L.A. L. REV. 1029 (1966).

The court concluded that the plaintiff organization represented those with a direct interest in the trust and therefore had standing to sue. The court, however, did not decide whether individual scouts also had standing as beneficiaries.[92] The approach taken in the later California cases is similar to the injury-in-fact test used by the federal courts and is consistent with the traditionally liberal interpretations of standing in state courts.[93]

C. Other Potential Plaintiffs

In addition to the group of beneficiaries that, under certain circumstances, may assert a direct interest in the charity, a group of donors also may assert an interest. The interest of a donor is not generally recognized at law as being sufficient to challenge decisions of the trustees unless there is an express trust and a retained interest in the gift. Once the property is vested fully in the trustee, the donor has no standing to enforce

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92. 14 Cal. App. at 196-97, 92 Cal. Rptr. at 190.

93. *See generally* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970). Not every state has followed California's example, however. In a suit involving Rice University, decided at almost the same time as *Holt*, the Texas Court of Civil Appeals expressed the view that standing to initiate a suit is exclusive to the attorney general.

> Neither as alumni, nor as potential or past beneficiaries, have appellants been given any peculiar or individual rights, distinct from those of the public at large, in or to the trust property by the Indenture, nor have they been charged with any duty relating to the trust by that instrument. By the terms of the Indenture, the number of potential beneficiaries is large and indeterminate. We see no reason why the fact that in the past appellants may have received special benefits from the trust gives them a justifiable interest in the subject matter of this suit. . . .
>
> A more difficult question arises on consideration of the allegation that appellants are donors and contributors to the endowment fund. However, the great weight of authority supports the rule that neither the donors of a fund devoted exclusively to charitable purposes, nor contributors to such fund, have such an interest in the fund as to entitle them to maintain suit to interfere with, or direct, the management of the fund by the trustees.

Coffee v. William Marsh Rice Univ., 387 S.W.2d 132, 136-37 (Tex. Civ. App. 1965) (citations omitted). This was supported on appeal by the Supreme Court of Texas.

> The policy behind the refusal to let others bring suit is to protect the trust and the trustees from harassment. Intervenors agree that they could not have instituted the suit. But the suit was instituted by Rice against the Attorney General, thus properly invoking the equity powers of the court.

Coffee v. William Marsh Rice Univ., 403 S.W.2d 340, 347 (Tex. 1966). The court, however, reversed the lower court's finding that the intervenors did not have standing to appeal once the equity powers were properly invoked, noting that their standing was not challenged below. *Id.* at 348.

the prescribed use.[94] Although many donors, in fact, may have substantial influence over the management and disposition of funds during their lives, the mere fact of having given money to the institution does not, under existing law, automatically provide standing to mount a legal challenge to the management and disposition of income by the board of trustees.[95]

An additional interested group is the co-trustees. These persons generally do have standing to challenge the decisions of their colleagues in order to protect themselves from liability for improper decisions.[96] In addition, trustees generally can seek removal of one another on grounds such as conflict of interest or abuse of discretion.[97]

D. Conclusion

Under present rules of standing in most state courts, access to challenge a decision by trustees to close a college is too limited. Given the disadvantages of vesting exclusive standing in the state's attorney general,[98] it is necessary to develop new rules of standing that will allow broader access to the courts. A framework for a new test already exists in the federal courts, which have moved from the old test of a legal interest toward one of injury-in-fact.[99] The rationale of the injury-in-fact test is

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94. O'Hara v. Grand Lodge, I.O.G.T., 213 Cal. 131, 139-40, 2 P.2d 21, 24 (1931). Nor will standing be conferred on a donor who makes the attorney general a party to the proceeding. *Id.*

95. See Marin Hosp. Dist. v. State Dept. of Health, 92 Cal. App. 3d 442, 154 Cal. Rptr. 838 (1979).

The standing problem is different when the issues involved are not related to management and use of funds. For example, a student may have standing to assert an action based on breach of a contract for education between the school and student or an action claiming discriminatory expulsion. *See* Williams v. Howard University, 528 F.2d 658, *cert. denied*, 429 U.S. 850 (1976); Steinberg v. Chicago Medical School, 41 Ill. App. 3d 804, 354 N.E.2d 586 (1976). A faculty member may sue for violations of his constitutional rights. *See* Shaw v. Board of Trustees of Frederick Community College, 549 F.2d 929 (4th Cir. 1976).

96. Holt v. College of Osteopathic Physicians & Surgeons, 61 Cal. 2d 750, 752-53, 394 P.2d 932, 934, 40 Cal. Rptr. 244, 246-47 (1964). Such an action would seek declaratory relief.

97. *In re* Rentschler Estate, 392 Pa. 46, 139 A.2d 910, *cert. denied*, 358 U.S. 826 (1958); G.G. BOGERT & G.T. BOGERT, *supra* note 69, at § 522.

98. See notes 80-82 *supra.*

99. *See* Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). *See generally* Davis, *supra* note 40.

that someone who will be directly injured by the proposed action should be able to represent fully the interest of the affected public, particularly if it is unlikely that the question will be raised otherwise. Applying this approach to a charitable corporation, currently enrolled students, faculty, or staff would meet the requirement of injury-in-fact when there is a proposal to close a college and would have standing to challenge the decision.[100] A contributor or alumnus probably would not meet the test because his present interest would not be affected by the closing.

IV. REVIEWING THE DECISION TO CLOSE—WHAT STANDARD TO APPLY?

Once there is an appropriate person or group to bring the action, the next question arises of what standard the court should use to judge the conclusions of the trustees that the college is financially incapable of continuing and that the fundamental purpose of the corporation may better be served by closing the college and applying the assets elsewhere.

It is useful to consider the standard applied to directors or trustees in related situations. The duty of care imposed on corporate directors in a for-profit setting is to act with ordinary care and in good faith.[101] A corporate director will be held to the standard of the "ordinarily prudent man."[102] In a for-profit corporate model, this duty can be discharged by delegation, although the director retains an obligation of general oversight or supervision and, consequently, must make reasonable efforts to keep informed about the propriety of activities carried on by the delegate.[103] A corporate director, while fully honoring the obliga-

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Note that the federal courts have the Article III "case or controversy" requirement which has dictated much of the development of the federal law of standing. Because the states are under no similar constitutional requirement they are free to develop standing differently.

100. *See, e.g.*, Jones v. Grant, 344 So. 2d 1210, 1212 (Ala. 1977) (faculty and students were found to have standing).

101. *See* KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 1.05 at 11 (3d ed. 1978) ("officials owe three basic duties to the corporations they serve: obedience, diligence and loyalty").

102. *See id.* (" 'diligence' has been said to contemplate that a director will exercise that degree of care which ordinarily prudent men would exercise under the same or similar circumstances in the conduct of their own affairs.").

103. *See* Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974) (citing ABA-ALI MODEL BUS. CORP. ACT

tion of good faith, may engage in self-dealing if he discloses fully any potential conflict of interest.[104] The standard imposed upon the for-profit corporate director is not a stringent one, probably because of the realization[105] that most corporate directors have a broad range of responsibility that no person could be expected to discharge with perfection.

A trustee, on the other hand, is held, in the true trust, to a very high standard of conduct. He is a fiduciary who must deal with the property given him with the utmost loyalty and fidelity.[106] He is responsible for loss resulting from mere negligence and may not delegate the performance of his duties.[107] Further, any self-dealing will be subject to the closest scrutiny.[108]

> The responsibilities of corporate directors appear to be less than those of trustees in at least three respects: The directors are held to less strict standards of care. They are responsible only for losses proximately caused by their default. If the default has been the commission of an ultra vires act, they are liable, not absolutely, but only to the extent they failed to exercise due care in discovering the propriety of their action. Al-

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ANN. 2d § 42 (1971)).

104. *See* Mayflower Hotel Stockholders Protective Comm. v. Mayflower Hotel Corp., 193 F.2d 666, 674 (D.C. Cir. 1951).

The responsibilities of a director are:

> a duty of care and a duty of loyalty. The duty of care imposes on the directors the obligation to act in their corporate capacity in good faith and with the degree of diligence, care, and skill which ordinary prudent men would exercise under similar circumstances. The duty of loyalty imposed on directors, somewhat more complex, requires them to act solely in the interests of the corporation and to forego conflicts of interest.

Berry & Buchwald, *supra* note 64, at 14 (citing W. CARY, CASES AND MATERIALS IN CORPORATIONS 50-69, 550, 513 (4th ed. 1969)). These duties are owed to the shareholders as well as to the corporation. *See also* Wheeler, *Fiduciary Responsibilities of Trustees in Relation to the Financing of Private Institutions of Higher Education*, 2 J.C. & U.L. 210 (1974).

105. *See* Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974).

106. *See* RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

107. RESTATEMENT (SECOND) OF TRUSTS § 171 (1959). "The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." *Id.*

108. *See* Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries, 381 F. Supp. 1003, 1014 (D.D.C. 1974) ("In conflict situations a trustee is guilty of breach of trust for mere negligence involving self-dealing while a director must show only 'entire fairness' and 'full disclosure.' ").

> though in the case of the charity formed as the result of the incorporation of existing trustees, the trust standard has been said to govern director conduct, it would seem that in other cases ordinary corporation rules should apply.[109]

College trustees are frequently involved, on a day-to-day basis, in a business or other pursuit that provides an expertise that is of particular value to the college. This source of expertise —for example, working as an investment banker or raising funds for other organizations—makes it impractical to require that a college trustee comply with a strict trustee standard of performance. Not only does the other employment raise a potential conflict of interest, but the board must delegate day-to-day duties of running the college to others.

Yet, a trustee without expertise, even though performing in accordance with the strictest of trustee standards, is not likely to benefit the college as much as the one with experience who performs at the corporate standard. Thus, the trustees of a college are rarely required to perform according to trust standards of care.[110] As stated by the United States District Court for the District of Columbia:

> [T]he modern trend is to apply corporate rather than trust principles in determining the liability of the directors of charitable corporations, because their functions are virtually indistinguishable from those of their "pure" corporate counterparts.
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> . . . .
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> . . . Since the board members of most large charitable corporations fall within the corporate rather than the trust model, being charged with the operation of ongoing businesses, it has been said that they should only be held to the less stringent corporate standard of care.[111]

Judge Gesell attempted to establish a standard for directors of charitable corporations acknowledging that the trustees are often unpaid volunteers who do not spend significant amounts of

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109. Note, *The Charitable Corporation*, 64 HARV. L. REV. 1168, 1174 (1951) (citing Boston v. Curley, 276 Mass. 549, 562, 177 N.E. 557, 562 (1931)).

110. *See* Berry & Buchwald, *supra* note 64, at 14 (university trustees appear to be held generally to the standard of a corporate director).

111. Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974) (citing Beard v. Achenbach Memorial Hosp. Ass'n, 170 F.2d 859 (10th Cir. 1948)).

time on the affairs of the corporation.[112] The court found that a trustee is in default of his fiduciary duty if he

> fail[s] to use due diligence in supervising the actions [of delegates] . . . ;
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> . . . knowingly permit[s] [the corporation] to enter into a business transaction with himself or with any corporation, partnership or association in which he then [has], a substantial interest or [holds] a position as trustee, director, general manager or principal officer without . . . previously inform[ing] the persons charged with approving that transaction of his interest or position and of any significant reasons, unknown to or not fully appreciated by such persons, why the transaction might not be in the best interest of [the charity];
>
> . . . actively participate[s] in or vote[s] in favor of a decision [involving himself]; or
>
> . . . fails to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care.[113]

This standard is slightly higher than the ordinary care required of the corporate director and might be labeled as the "charitable corporate trustee" standard. Note that it is still a lower standard than that applied to the trustee of an express trust, however.[114]

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112. *See* Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974).

113. *Id.* at 1015.

114. The trustees' duty as codified in California, for example, is to

> exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital . . . .

CAL. CIVIL CODE § 2261 (West 1954), *quoted in* Lynch v. John M. Redfield Foundation, 9 Cal. App. 3d 293, 299-300, 88 Cal. Rptr. 86, 89 (1970). In *Lynch*, the court added that the statute requires the use of diligence to make the trust productive, that the obligation is the same regardless of whether the trustee is compensated for his services, that good faith is no defense, and that any liability for negligence is joint and several. Lynch v. John M. Redfield Foundation, 9 Cal. App. 3d 293, 301-03, 88 Cal. Rptr. 86, 91-92 (1970). This case arose from disagreement among the trustees on policy matters with a resulting inability to act that permitted substantial cash accumulations in noninterest-bearing bank accounts over a period of five years.

Note that if there is an express trust, the obligation of the trustees is the same as the obligation of the trustees of a private trust even if the charity is public. *See* Murphey v. Dalton, 314 S.W.2d 726 (Mo. 1958).

V. STRUCTURING A LEGAL ANALYSIS—A SECOND LOOK AT WILSON COLLEGE

A. The Wilson College Case

Zehner v. Alexander,[115] the Wilson College case decided by the Court of Common Pleas of Pennsylvania, is a recent example of how one court handled a challenge to an attempted closing of a college by its board of trustees. The case has not, and will not, be reviewed by a higher court; thus, its value as a legal precedent is limited.[116] Nevertheless, it provides a not atypical example of the reasoning courts use in addressing these challenges and is useful as a framework for suggesting improvements in the legal analysis.

1. The Facts.—Shortly after the planned closing of Wilson College was announced, a petition was brought naming the trustees as respondents and seeking, among other relief, an order enjoining the closing of the school.[117] Petitioners included a member of the board of trustees who had not participated in the decision to close the college, a student member of each class of the college, one student who had paid a deposit to reserve a place in the class matriculating in the fall of 1979, a member of the faculty, and several alumnae. The alumnae had contributed financially to the college.[118] The college subsequently was joined by order of the court as a necessary party.[119] In addition to the named petitioners, a member of the state attorney general's staff participated in the proceedings as a representative of the public

115. 3 Franklin County Legal J. 27 (Pa. Orphans' Ct. 1979).

116. Subsequent to the May 25, 1979, order of the court, the parties agreed that in exchange for the college paying the costs of the suit not covered by insurance, the trustees would not appeal the decision and would resign in favor of a group of trustees committed to keeping the college open.

> The adjudication and Decree Nisi were filed on a Friday, and during that weekend counsel for the respective parties met with the parties and on the following Sunday presented to the Court a stipulation for a final Decree, which essentially accepted the Conclusions of Law and Decree Nisi with the exception of permitting the College to assume a limited responsibility as to costs not covered by the Trustees' liability insurance policy.

Letter from Judge John W. Keller to Miss Judy Reigel (August 20, 1979).

117. 3 Franklin County Legal J. at 28.

118. One alumna previously had served as a trustee of the college and one currently was serving as a trustee of a group formed to save the college after the announcement of closing was made. *Id.* at 33.

119. *Id.* at 28.

interest.[120]

In reviewing the financial position of the college, the court found that in 1974 the trustees had commissioned an extensive study of Wilson College to explore the mechanisms that would best assure the survival of the college.[121] A severe decline in enrollment at the college had triggered the decision to obtain this outside evaluation.[122] The consultants' report was an in-depth analysis of the present and future status of the college, together with a series of recommendations of how to continue as a viable institution. The board of trustees had adopted some of these recommendations at a regular meeting in the form of resolutions for specific action.[123] The court found, however, that these resolutions were not carried out.[124]

In the years between the 1974 report and 1979, a pattern of declining enrollment continued[125] and endowment funds were invaded to pay the annual operating deficit of the college.[126] The board was told during the 1978-79 year that the class enrolling in the fall of 1979 would be larger than the class that had entered in the fall of 1978.[127] In the spring of 1979, however, the board was informed that the class would be substantially smaller than anticipated, about the same size as the class that had entered in 1978.[128] A "hastily assembled" second panel of experts was then consulted by the president and several members of the board to determine whether or not there was anything the col-

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120. *Id.*
121. *Id.* at 51.
122. *Id.* at 50.
123. *Id.* at 58.
124. *Id.*
125. The entering classes in the four years preceding the decision were:

1975	92 students
1976	36 students
1977	62 students
1978	55 students

Id. at 62.
126. The operating budget (deficits)/surpluses were:

1974-75	($862,546)
1975-76	($442,888)
1976-77	$7,327
1977-78	$31,449

Id. at 61. The deficits were paid from unrestricted endowment. *Id.* at 62.
127. *Id.* at 66.
128. *Id.*

lege could do to persevere in the face of this critical factor. The court found this second panel to be an inappropriate resource because none of its members were experienced with small colleges.[129] In concurrence with the recommendation of the second panel, the board publicly announced its decision to close the college. Attempts were commenced to relocate students and faculty in furtherance of the decision to close. Prior to this announcement, the board did not obtain amendment to the articles of incorporation to permit creation of a foundation nor did they institute *cy pres* proceedings,[130] even though they had contemplated both of these actions in the resolution of closing.[131]

2. *The Court's Legal Analysis.*—The court disposed of the standing issue by concluding without discussion that all petitioners except the students had standing to sue.[132] It then

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129. We do not question the good intentions or the good motives of the panel of experts. However, comparing their 6 hour meeting to the meticulous preliminary preparations, on campus investigations and interviews, team meetings, preliminary and final reports of the Moon Report consultants and the Middle Atlantic Association evaluators; we find their oral report as presented utterly devoid of merit or value.

Id. at 68.

130. *Id.* at 35.

131. *See id.* at 69-70. The resolution of closing stated:

> It is agreed by the Board that as of 1 July 1979 the corporate entity in which Wilson College now conducts its function shall change its corporate name to the Wilson College Foundation, and that the assets of the foundation other than those needed for the administrative functioning of the foundation that are not already in such form shall then be converted, over such period of time as to the foundation shall seem necessary and prudent with a view to maximizing values, into endowment or investment-type assets producing an appropriate return.
>
> The purpose of the Wilson College Foundation shall thenceforth be to continue to work toward the aims of Wilson College when an operating educational institution, and to administer the assets of the foundation in a manner as nearly as possible to fulfill the purposes fulfilled by Wilson College when an operating educational institution. The purpose of Wilson College as stated by its founders and continued to the present time has been to provide for women the opportunity for a broad and thorough education of the highest quality. . . . Hence the purpose of the Wilson College Foundation shall be to foster the liberal education of women for excellence, for leadership, for service.

Id. at 70-71.

132. *Id.* at 84. The trustee-plaintiff had statutory standing to ask for the removal of a fellow trustee. *See* 15 PA. CONS. STAT. ANN. § 7726(c) (Purdon 1976). Beyond that, it is not clear why any of the remaining parties, other than the attorney general, who joined after the proceeding commenced, were allowed to proceed. *See* notes 61-100 and accompanying text *supra*.

focused the bulk of its legal analysis upon a jurisdictional question.

Since the college is a not-for-profit corporation, it was found to be subject to the jurisdiction of the Orphan's Court under Rule 2156 of the Pennsylvania Rules of Judicial Administration.[133] This jurisdiction extends to all internal matters of the corporation including removal of trustees, validity of corporate action, and supervision of the purposes for which the funds of the corporation are used.[134] In addition, the court held that it had jurisdiction under the Probate, Estates and Fiduciaries Code,[135] which requires prior approval of the court before property can be diverted from the charitable purpose for which it was given.[136]

The purpose for which Wilson College held assets was found to be the operation of an educational institution although the articles of incorporation recite a more general purpose: "The object and purpose of said corporation are hereby declared to be to promote the education of young women in literature, science and

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133. 3 Franklin County Legal J. at 80. Rule 2156 provides that the orphans' court division of the court of common pleas shall have jurisdiction of: "(1) Nonprofit corporations: The administration and proper application of property committed to charitable purposes held or controlled by any domestic or foreign nonprofit corporation . . . ." *Id.* at 80 (quoting PA. R. JUD. ADMIN. 2156).

134. *See* 3 Franklin County Legal J. at 80. For this proposition the court cites *In re* Pennsylvania Home Teaching Soc'y, 15 Pa. Fiduc. 556 (1975) (concerning a *cy pres* award of assets of one nonprofit corporation to another, but not concerning any management of the corporation by the court); The Music Fund Soc'y, 73 Pa. D. & C.2d 115 (1975) (concerning the role of the attorney general in a beneficiaries' suit for accounting, although the court noted that its jurisdiction extended to internal matters); Women's Christian Temperance Union v. Bearhalter, 6 Pa. D. & C.3d 207 (1977) (holding that the court had jurisdiction over internal matters of a nonprofit corporation even when the issues were not related to property of the corporation). 3 Franklin County Legal J. at 80. The decision examined in these cases was the trustee's decision to implement an alternative use of charitable funds, not the management of those funds. *Bearhalter* concerned setting aside a deed improperly given, not an alternative use.

135. 3 Franklin County Legal J. at 81 (citing 20 PA. CONS. STAT. ANN. § 711 (Purdon 1976)).

136. 3 Franklin County Legal J. at 81 (quoting 15 PA. CONS. STAT. ANN. § 7549(b) (Purdon 1976), as follows: "Property committed to charitable purposes shall not, by any proceeding under Chapter 79 of this title (relating to fundamental changes) or otherwise, be diverted from the objects to which it was donated, granted or devised, *unless and until* the board of directors or other body obtains from the court an order under the Estates Act of 1947 specifying the disposition of the property." (emphasis added by the court).

the arts."[137] The court did not set out what evidence it considered persuasive to conclude that operating a college was the fundamental purpose of the corporation. Nevertheless, having concluded that the board's decision to close the college was a decision to divert the assets from the purpose of the corporation, the court reasoned that the effect of allowing the trustees to go forward without prior court approval would be to divest the court of its jurisdiction granted by the statute. It followed that the attorney general, as the representative of the public, would also be divested of an opportunity to "comment upon or protest the decision."[138] Therefore, acts in furtherance of the decision to close were found to be contra to the probate jurisdictional grant and for that reason were enjoined. It is not clear whether the court concluded that the board's action also violated the court's jurisdictional grant under Rule 2156 to supervise the purpose for which funds were used.

The only legal issue actually determined was one of jurisdiction. The conclusions and order of the court, however, go further. The order not only enjoined the closing of the college because the board's implementation of its decision to close was held to be illegal, but also removed two members of the board and assessed costs to the defendants.[139] In the second section of

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137. 3 Franklin County Legal J. at 29 (quoting 1869 Pa. Laws 504, No. 481, the Act incorporating Wilson Female College).

138. The court stated:

> By implementing the decision to close Wilson College the Trustees attempted to essentially deprive the Court of its power to review the recommendation of the Board and to approve or disapprove the proposed diversion of college assets from a teaching institution to some other charitable use. In addition, the implementation of the decision to close Wilson College without prior approval of the Court attempted to deprive the public, represented by the Attorney General as parens patriae, of an opportunity to comment upon or protest the decision.

Id. at 82.

139. *Id.* at 86. The decision to remove two trustees on petition of another trustee was proper both in terms of the court's authority and application of the appropriate standard. "[T]he court may, upon petition of any member or director, remove from office any director in case of fraudulent or dishonest acts, or gross abuse of authority or discretion with reference to the corporation, or for any other proper cause." 15 PA. CONS. STAT. ANN. § 7126(c) (Purdon 1976). One petitioner was a trustee as required by the statute and the court found "gross abuse of discretion" and "other cause" as the bases for removal. 3 Franklin County Legal J. at 83. Although one could disagree with the conclusion that the statutory standards for removal had been met based on the facts produced at the hearing, the legal standard applied by the court was the proper one as mandated

the opinion, headed "conclusions of law" but not included in the "Decree Nisi," was a directive to the remaining trustees to fill the vacancies on the board "and take the action necessary to insure that Wilson College will open to discharge its chartered purposes at the appropriate time in September, 1979 . . . ."[140] The court further required that "[t]he Board of Trustees shall meet as often as the exigencies of the situation shall require."[141] The conclusions of law also included a determination that the Board of Trustees had a fiduciary duty to the college that required the "Board to use those assets of the College to continue it as an institution of higher learning and as a teaching institution until its charter purposes became impossible or impractical of fulfillment."[142] The court found that as of the February 17 board meeting, when the decision to close was made, as well as at the time of the court's decision, it may have been true that things were difficult for the college, but not "impossible or impractical."[143]

B. Restructuring the Legal Analysis

The decision of the Wilson College trustees had been to continue the charitable corporation under another name and to have it function solely as a revenue producing fund.[144] The income from the fund was to be used to continue the purpose of educating women through scholarships and contributions to women's colleges. The board could have opted instead to dissolve the corporation and been within the express grant of authority of the not-for-profit corporation code. After dissolution, distribution of the remaining assets would have required a *cy pres* proceeding if the articles of incorporation made no provision for the distribution upon dissolution.[145] The court did not allude to

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by the statute.

140. 3 Franklin County Legal J. at 86.

141. *Id.*

142. *Id.* at 85.

143. *Id.*

144. This mechanism could be characterized as resulting in a fundamental change in the purpose of the corporation or a change in the mode of accomplishing the fundamental purpose of the corporation. The Wilson Board of Trustees clearly believed it was choosing the latter approach, as expressed in the resolution of closing. See note 131 *supra.*

145. RESTATEMENT (SECOND) OF TRUSTS § 399, Comment o (1957).

whether a decision to dissolve would have been treated in the same way as the decision to continue the same corporation. It is probable, however, that the ultimate conclusion of the court would have been the same.[146]

Whether the mechanism used is retention of the same corporation or its dissolution, if the purpose to which the assets will be put is fundamentally different, the court must approve of the alternative use prior to its implementation. What the court in the Wilson College case apparently did not recognize was that the statute[147] requiring court approval of alternative use does not require prior approval of the decision to change. Thus, the court's review of the decision that continued operation of the college was financially impracticable should have been limited to whether the decision was made in good faith and with due care. If the answer to this inquiry had been affirmative then the continuation of the college would have been in issue no longer. The issue remaining for judicial determination would be simply the use to which the assets would be put, a determination that could be made prior to implementation of the decision. The court's failure to recognize the precise legal issues muddied the clarity of its analysis.

There should have been three separate inquiries: (1) was the board's decision to close the college because of financial impracticability made in compliance with the appropriate standard of due care and in good faith; (2) was the board's decision that an educational foundation is a change of fundamental purpose made with due care and in good faith; and (3) to what use shall the remaining assets be put?

Rather than separating the questions, the court determined that the closing itself was a fundamental change of purpose, which, if carried out, would divest the court of its jurisdiction to determine whether the impracticability of continuation was

146. Arguably, dissolution is a power expressly given to the board by statute and any apparent conflict between this power and the jurisdictional statute should be construed away if possible. Both could be given effect by limiting the scope of jurisdiction to a review of the process by which the board exercised the power to dissolve. In this particular case it is unlikely that a decision to dissolve would have been treated differently because the court expressly found that the board had the power to decide to close the college, but that the exercise of the power worked a divestment of jurisdiction.

147. See 15 PA. CONS. STAT. ANN. § 7549(b) (Purdon 1976). For relevant text of the statute, see note 136 *supra*.

properly determined.[148] This conclusion was reached although the court was at the time actively exercising its jurisdiction to answer that very question.

Ordinarily, the power to review a decision is not the power to substitute the judgment of the court for that of the decisionmaker. The court's review usually is limited to whether the decisionmaker properly discharged the duties imposed upon him by law. The difficulty surrounding review of a decision to close a college is that the finding of financial viability is relevant to two different inquiries. It is a business decision properly within the province of the board and it is a factual finding properly within the province of the court in a *cy pres* proceeding. To permit the board alone to make the determination precludes the court and vice versa. How is the cycle broken to permit both parties a proper domain? Perhaps the answer is for the court to question first whether the financial impracticability of the present mode as found by the board is a properly made business decision. If yes, then, second, is the fundamental purpose of the corporation as determined by the board a properly made business decision? By this analysis, the court still makes its own required findings of fact, but is limited to reviewing the board's decision, rather than making a de novo determination.

Using this analysis, the court might have reached the same conclusion, without substituting its judgment for that of the board, in the Wilson College case. The court found that the trustees violated their fiduciary duty to the college when they decided to close.[149] The finding of breach is supported in the record by a finding that the board acted without adequate information. Certainly premature decision-making based on less than full facts is insufficient to qualify as fulfillment of a duty of due care and good faith.[150] Although one might disagree with the finding of fact, it dictates the conclusion that the decision does not meet the requirements of any standard of care that might be appropriate.[151]

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148. See notes 134-43 and accompanying text *supra*.

149. *See* 3 Franklin County Legal J. at 85.

150. *See* Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries, 381 F. Supp. 1003, 1014 (D.D.C. 1974).

151. When using the label "fiduciary" it is unclear whether the court meant to apply a trustee or corporate standard of care, but in view of the lack of information, it does not matter, since the result would have been the same. To the extent that the decision is

If the trustees did breach their obligation to the college, the decision to close was improper. Upon this finding, the court might have required that the corporation continue as before. Significantly, though, the court would not have used its power to review as a means of substituting its judgment for that of the trustees. The finding would simply have been that the board's decision could not stand because it was not made with reasonable care. The implication of this approach is that if the decision were made again in compliance with appropriate legal standards, it would be upheld.

This analysis would have recognized that the actual judgment regarding the financial status of the corporation is one for the board and not for the court. Thus, appropriately limited, the decision would have left intact the authority of the board to make financial determinations while continuing to give the court the power to approve the alternative use of the assets once the board's determination was made. Protection of the legitimate donor interest in having the assets continue to be used to achieve the fundamental purpose of the Wilson College Corporation would have been assured and the public's interest in the benefits would have been maintained.

III. Conclusion: Toward an Ideal World

A. Standing

When the decision to be tested legally is the decision by the board that the continued operation of the college is financially impracticable, the most appropriate standard for determining standing to sue is one approximating the injury-in-fact standard that has been developed in the federal courts.[152] To continue to restrict standing to the attorney general as the exclusive representative of the beneficial interest is unrealistic when there are groups of people such as students and faculty who have a present interest in the effect of the decision that is both immediate and more than speculative in scope. These persons can be readily identified and are likely to provide active representation.

This is not to say that all decisions of the board should be

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persuasive in other cases, however, arguably the standard chosen by the court was the trustee standard which is out of step with the trend in other jurisdictions.

152. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). See note 99 *supra*.

subject to suit by an expanded class of plaintiffs. This particular type of decision is distinguishable from others, in that by its nature it is not subject to effective reversal once it is carried out. Further, allowance of a large number of plaintiffs is not likely to promote nuisance suits that drain the assets of the charitable corporation or bring its beneficial activities to a halt.[153] One suit can decide whether or not the decision that continuing to operate is financially impracticable has been properly made. Assuming that the decision is found to be proper, that same suit could then decide whether the proposed alternative use of the assets of the corporation requires application of the *cy pres* doctrine[154] or whether it is simply a matter of change of mode. Nor is it a situation in which the actual interest of the expanded plaintiff group is minimal.

In short, the rationale of cases finding that the standing of the attorney general is exclusive does not support continuing that rule in a case such as the Wilson College case. It is no answer that a member of the board may bring the action if the attorney general will not, because it is entirely possible that no member of the board will be in disagreement with the decision. Nor is it helpful to rely on the consent of the attorney general to an "ex rel" proceeding, because speed and certainty are important.

The goal of requiring a board to act in a responsible manner while permitting it to get on with the business of legitimately closing a college will not be served by litigation over appropriate standing. With enough time and ingenuity, the bar will find a way to place the issue of the board's decision-making before a court. Because time is important in resolving the issue in a manner that does not waste assets, artificial road blocks to an actual resolution simply are not helpful.

A move by state courts to expand their traditionally liberal approach[155] when dealing with this limited problem would be

153. *See* Davis, *supra* note 93.

154. It is the fundamental-change question in which the public has its primary interest; therefore, it would be appropriate to join the attorney general as a party to the proceeding once this issue arises if the court feels it necessary or desirable. Presumably, the immediate beneficiaries, who are the plaintiffs, will also protect the public interest in having the original purpose carried out whether or not the attorney general is joined.

155. It is ironic that states traditionally have not thwarted access to the courts by using doctrines of standing, but have been liberal in their approach. Yet when charities

consistent with the policies of the exclusive standing requirement, while recognizing that the primary objective is to make a rapid determination of the propriety of the board's decision to close.

B. The Standard for Trustee Performance

The standard of care with which a college board of trustees must make decisions concerning financial impracticability and purpose remains a second unresolved legal problem.[156] The two standards most frequently used to describe the choice available to the courts are the reasonable man standard of the for-profit corporation (the director standard)[157] and the fiduciary standard of the true trust (the trustee standard).[158] The favored approach[159] appears to be that, absent an express trust, the director standard is applicable even though the duty may be described as "fiduciary."[160] In its analysis the court should look at the facts available to the decision-maker at the time of the decision and make a two-tiered inquiry: first, were the facts available to the decision-maker adequate and, second, was the decision made with due care?

In the case of the college trustee confronted with the possibility of closing the college, the duty to exercise due care should include an affirmative obligation to find out the precise and actual financial condition of the college, both past and projected as

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are involved, they have permitted this rule to operate in a restrictive manner. The rationale has been that the restrictions operate to protect the public good.

156. The discussion here is restricted to private colleges because presumably the decision of a legislature to close a particular college in the public sector is a statement of its decision that the public interest is no longer served by continuation of the college. Because the legislature can define the public interest, it should not be subject to the same controls as the decision of the trustees of the private college. Also, it is probably fair to presume that any private endowment funds transferred from the closed public college to another purpose by the legislature will be transferred with appropriate protection of the public interest in mind. Where the "private funds" are in the hands of a separate corporation or foundation established to support the public college that is being closed, that foundation is then faced with making a determination about its fundamental purpose and whether or not it can continue to be met.

157. See notes 101-04 and accompanying text *supra.*

158. See notes 106-08 and accompanying text *supra.*

159. See text accompanying note 111 *supra.*

160. "Fiduciary" means in a relationship of trust or influence. It is frequently in this sense that the term fiduciary is used by the courts to include a director or a trustee when discussing the appropriate standard of conduct.

well as present; an affirmative obligation to understand the information acquired; and an affirmative obligation to evaluate that information thoroughly, together with its implications for the continued existence to the college. Once this duty is met, the decision of the trustees should be upheld by the courts.[161]

C. *A Determination of Purpose*

Whether the closing of a college is in fact a fundamental change of purpose or simply a change of mode is also a threshhold question that courts must consider. The distinctions are significant. While a fundamental change of purpose requires court approval of the alternative use whether or not suit is brought by third parties, a change in mode may not require any prior court approval.[162] A broad interpretation of purpose gives greater weight to the public interest in having charitable assets maximized, while a narrow interpretation gives greater weight to the presumed intention of the donor. Either is certainly a rational approach. Because both of these interpretations are rational, when a jurisdiction does not mandate a particular choice, then the choice is an exercise of discretion that should be left to the trustees, not the court.

In a time when assets are scarce, it seems something less than appropriate for the court to tell trustees who reasonably choose to use salvagable resources in an alternative mode of delivery, rather than applying them in what is perceived as a failing and inefficient enterprise, that they have misconceived their

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161. When the decision is to close rather than to continue, it is particularly important that the trustees be assured that a court will support the decision and permit the closing to occur in an orderly manner that will most efficiently preserve the assets available for alternative use. If lengthy litigation will be involved, the objective of asset preservation will be impossible because the college will be required to "pour good money after bad" pending a decision. Obviously, if the college is allowed to close pending a decision, the option of re-opening is remote at best. Therefore, to preserve the status quo and the option of continuing if the decision is found to be improper, it will be necessary to suspend the act of closing during the pendency of litigation.

162. *See* RESTATEMENT (SECOND) OF TRUSTS § 368 (1957). The issue is frequently confusing because the mode of delivery may be the fundamental purpose. For example, when the purpose is to create a free hospital, the hospital's existence is the objective as well as the mode of delivering medical care. If the purpose is to provide medical care and the method chosen is to create a free hospital, then the hospital is only the mode and not the purpose. That same objective, medical care, could be met by paying medical bills incurred at other hospitals or by operating a system of visiting nurses.

purpose.[163] This is particularly true when the language of the articles of incorporation, as in the Wilson College case, includes the purpose viewed as proper by the trustees as well as that ultimately determined to be right by the court. Certainty will be enhanced if the trustees can have confidence that their decision will be honored and that, therefore, it is not necessary to seek declaratory relief before acting, or to refrain from acting on the theory that continuing until impossibility is clear will moot any question about whether the time for action has arrived.

D. Conclusion

To require that a college waste its remaining assets when it is no longer a financially viable corporation is not in the public interest. To require that trustees litigate their decision for several years does not facilitate maximization of resources of either the college or the bench and bar. To permit trustees that act reasonably to act with certainty is the only viable alternative.

Though as alums we may love our colleges and certainly do not want to "pull the plug" prematurely, to require the college to die a slow and public death is not desirable. As the hospice movement has demonstrated in the biological world, when death is inevitable, death with dignity should be available. So, when the financial viability of a quality college has ended, the trustees should be permitted to close the college in a clean, orderly manner. No one knows the college better, nor cares about the college more. The law should be clear that the trustees' reasonable judgments will not be second-guessed, nor will they be deprived of quick adjudication of appropriate issues by a judiciary manning the barricades with worn-out doctrines of standing.

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163. It must be remembered that the board, in determining the future of the college or university, must take into account a number of factors, other than mere survival, that courts rarely mention. The relevant considerations may include whether a change in curriculum from the pure liberal arts to include more "vocational" courses in an effort to increase enrollment would be viewed by those concerned as a change worse than closing; whether the maintenance of a predominantly teaching or a more research-oriented faculty is financially more sound; whether a change in the population of the school to include older students or nonresidents is a change of mission; or whether the geographic location of the college is a crucial consideration in the mind of the donor. The decision, therefore, of whether mere survival is enough should belong to the board without the prospect of being second-guessed by the courts.