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**ANATOMY OF AN INVESTIGATION**

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## **I. The Authority of the Attorney General to Represent the Public Interest in Charity.**

It is the duty of the Attorney General to represent the public's interest in the proper use of funds held in trust for charitable purposes. In Texas, the Attorney General and his authorized staff protect the public interest in charity<sup>1</sup> through a combination of common law interpreting the Texas Constitution and statutory authority.

### **A. Constitutional Authority.**

This power and duty were originally derived from English law, particularly the Statute of Charitable Uses, 43 Elizabeth I, Chapter 4 (England 1601) which established general definitions of charity (charitable uses)<sup>2</sup> and promulgated regulation for the protection of charitable interests.<sup>3</sup> The Statute of Charitable Uses also established or defined various areas of charitable endeavor, for example, the promotion of health.<sup>4</sup>

After outlining specific duties of the Attorney General, the Texas Constitution provides that the Attorney General shall "perform such other duties as may be required by law."<sup>5</sup> This provision has been interpreted to include the Attorney General's common-law duty to protect the

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<sup>1</sup> Charity is a gift to general public use and it may embrace fulfillment of the needs of either the rich or poor, without financial gain. *Taysum v. El Paso Nat. Bank*, 256 S.W.2d 172 (Tex. Civ. App.—El Paso 1952, writ ref'd). A public charity is one that benefits the public at large, or a substantial and indefinite segment of it, and serves a purpose that would otherwise require the services of the community or the state. *Wooten v. Fitz-Gerald*, 440 S.W.2d 719 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.).

<sup>2</sup> See *Powers v. First Nat'l Bank of Corsicana*, 161 S.W.2d 273 (Tex. Com. App. 1942).

<sup>3</sup> See *Vidal v. Girard's Executors*, 2 How.127, 197199, 11 L.Ed. 205 (1844), for a discussion of the older common law of charitable trusts.

<sup>4</sup> See generally the Restatement of Trusts (Second) 368; and *DeModena v. Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388, 1392 (9th Cir. 1984), cert. denied, 469 U.S. 1229 (1985).

<sup>5</sup> Tex. Const. article IV, § 22.

public interest in charitable entities and thus to give the Attorney General constitutional authority to oversee charities and charitable interests.<sup>6</sup>

Article IV, § 22 of the Constitution also provides the Attorney General with general oversight authority of all Texas corporations - nonprofit and for profit (and any foreign corporations doing business in Texas):

[The Attorney General] shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power ... not authorized by law.<sup>7</sup>

### **B. Common Law Authority.**

Based upon well-established case law, the Attorney General is the representative of the public interest in charity.<sup>8</sup> The Attorney General's duty to protect the public interest in charity and his broad authority to carry out that duty have been uniformly recognized by Texas courts.<sup>9</sup>

Texas law encourages charitable uses and the finding of charitable status.<sup>10</sup> Texas

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<sup>6</sup> *Hill v. Lower Colorado River Authority*, 568 S.W.2d 473, 478 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) citing *Powers*, and see § 5.001, Texas Civil Practice and Remedies Code.

<sup>7</sup> Article IV, § 22, Texas Constitution.

<sup>8</sup> *Boyd v. Frost National Bank*, 196 S.W.2d 497, 50203 (Tex. 1946); *Powers v. First National Bank of Corsicana*, 137 S.W.2d 839 (Tex. Civ. App.—Waco 1940) affirmed, 161 S.W.2d 273, 284 (Tex. 1942); *Nacol v. State*, 792 S.W.2d 810, 812 (Tex. App.—Houston [14th Dist.] 1991, writ denied). *Blocker v. State*, 718 S.W.2d 409, 416 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Carroll v. City of Beaumont*, 18 S.W.2d 813, 820 (Tex. Civ. App.—Beaumont 1929, writ ref'd).

<sup>9</sup> *Id.*; *Allred v. Beggs*, 84 S.W.2d 223, 227 (Tex. 1935).

<sup>10</sup> See *Powers*, 137 S.W.2d at 841; See also 10

courts will presume a charitable status and adopt constructions which operate to sustain charitable status.<sup>11</sup> The reason for this favored status is explained by the courts: “[Charities] tend to relieve the government of a part of its responsibility to a portion of its citizens and thus reduce the general tax burden on the public. They are therefore to be encouraged rather than discouraged.”<sup>12</sup>

Texas law provides that the Attorney General is the representative of the public interest in charity and is charged with the duty of ensuring that nonprofit, charity assets are used for appropriate charitable purposes. The Attorney General’s authority and standing in this area is like that of an attorney for the stockholders of a for profit corporation in a derivative action. In the case of a nonprofit, charitable entity, the “stockholders” are the general public who are the ultimate beneficiaries of such charitable assets.

### **C. Statutory Authority, Generally Chapter 123 of the Texas Property Code.**

Section 123.001 of the Property Code defines charitable trusts to include virtually all charitable entities, including nonprofit corporations with a charitable purpose. Section 123.002 provides that the Attorney General is a proper party (not a necessary party) to proceedings involving charitable trusts.<sup>13</sup> The Attorney General must receive

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American Jurisprudence, § 55.

<sup>11</sup> *Id.* See also *Powers*, 161 S.W.2d at 282-283 (affirming the lower court ruling and stating, “Charities ... are held in such high regard by the law that the rules of construction are more liberal to sustain them than they would be if the gifts were to individuals.”); *Boyd* 196 at 503; *Wooten* at 723 ; *Taysum* at 176 (stating that where the matter is in doubt, the construction which will give [the charity] effect will be adopted and that which would defeat it rejected).

<sup>12</sup> *Powers*, 137 S.W.2d at 841.

<sup>13</sup> TEX. PROP. CODE ANN. § 123.002 (West 2014); See *Gray v. Saint Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488, 490 (Tex. Civ. App.—Texarkana 1976, writ ref’d n.r.e.).

notice of judicial proceedings involving charitable trusts, and has the right to intervene on behalf of the public’s interest. If a proceeding is filed which requires notice to the Attorney General, any judgment or settlement agreement entered without such notice is voidable on motion of the Attorney General.<sup>14</sup>

Chapter 123 does not prescribe the powers of the Attorney General regarding the enforcement of charitable trusts, but builds on the common-law concepts of the Attorney General’s authority.<sup>15</sup>

Numerous other statutes delineate the authority of the Attorney General to regulate nonprofit corporations. This paper deals specifically with the Attorney General’s investigative powers and process.

### **D. Statutory Authority Specific to the Attorney General’s Investigatory Powers.**

#### 1. Texas Business Organizations Code (TBOC).

The Attorney General has statutory authority to inquire into the activities of all corporations, including the right to investigate the management and operations of charities which are organized as nonprofit corporations. This statutory authority is codified in the Texas Business Organizations Code, (TBOC) <sup>16</sup> which became effective as to all organizations on January 1, 2010. The TBOC was a

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<sup>14</sup> TEX. PROP. CODE ANN. § 123.004(a) (West 2014).

<sup>15</sup> For example, the Attorney General may initiate or intervene in a court proceeding and request the Court invoke its *cy pres* power on behalf of the public. See *Blocker, supra*. *Cy pres* is an equitable power authorizing a court to effectuate the general charitable purpose of a testator/settlor when his particular intent cannot be carried out or becomes impractical or illegal, whereupon the court may direct trust funds or property to be expended or utilized in a charitable manner as near to the donor’s intent as possible.

<sup>16</sup> TEX. BUS. ORGS. CODE ANN.

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