

**COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION**

No. 1292 NP Of 1998

Control Number 040199

Control Number 040217

Control Number 040706

Control Number 040910

**IN RE: PHILADELPHIA HEALTH CARE TRUST
A Nonprofit Corporation**

OPINION PER Pa.R.A.P. No. 1925 (a)

A “Joint Appeal” has been taken from three (3) Decrees which were entered by this Court on May 18, 2004.

One of the said Decrees Denied a “Petition For Leave To Become Amicus Curiae” which Petition had been filed by Philadelphia Unemployment Project and Action Alliance of Senior Citizens of Greater Philadelphia.

One of the said Decrees Denied a “Petition For Leave To Intervene Or For Leave To Become Amicus Curiae” which Petition had been filed by Philadelphia City Councilman Michael A. Nutter.

One of the said Decrees Sustained a Preliminary Objection under Pa.R.C.P. No. 1028 (a) (4), and, Dismissed a “Petition For Leave To Intervene.....”, which Petition had been filed by Senator Vincent J. Fumo, for Lack of Standing. This same Decree Denied Senator Fumo’s said Petition insofar as it sought Appointment as an Amicus Curiae.

The Philadelphia Health Care Trust (hereinafter “PHCT”) is a Nonprofit Corporation which was incorporated on December 10, 1975 under the Pennsylvania Non-Profit Corporation Law of 1972. PHCT was incorporated under the name “The Graduate Hospital Foundation”. It subsequently changed its name to “Graduate Health System, Inc.”. In August of 1998, the name was changed to PHCT.

In March of 1999, PHCT filed a Petition entitled “Amended Petition To Approve Amendment Of Articles Of Incorporation Pursuant To 20 Pa.C.S.A. §711 (21) And Section 5547 (b) Of The Pennsylvania Nonprofit Corporation Law Of 1988, 15 Pa.C.S. §5547 (b)”. Exhibit “B” to said Petition consisted of “Amended And Restated Articles Of Incorporation”. As Amended and Restated, Article 3 reads as follows, to wit:

“ 3. The Corporation is organized exclusively for educational, scientific and charitable purposes under Section 501 (c) (3) of the Internal Revenue Code of 1986, as amended (‘the Internal Revenue Code’) and in connection therewith:

(a) To engage in and conduct charitable activities for the support, development, advancement, enhancement and benefit of the health care system in the eight county greater Philadelphia area of Philadelphia, Bucks, Chester, Delaware and Montgomery Counties, Pennsylvania, and Burlington, Camden, and Gloucester Counties, New Jersey, including but not limited to the delivery of health care services and health care research and education.

(b) To take such other and further actions and engage in such other and further conduct and activities as may be necessary or appropriate for the furtherance of the tax exempt and charitable purposes of the corporation.”

On April 20, 1999, following a Hearing held on March 24, 1999, Judge

Pawelec entered a Decree which reads as follows, to wit:

1. The operation of Philadelphia Health Care Trust, formerly known as "Graduate Health System, Inc.," as a private foundation making grants to public charities in support of the health care system in the eight county greater Philadelphia area, as described in the Amended and Restated Articles of Incorporation attached as Exhibit "B" to the Petition, does not constitute or result in a diversion of property committed to charitable purposes under Section 5547 (b) of the Pennsylvania Nonprofit Corporation Law of 1988, 15 Pa. C.S. §5547 (b);

2. The Amendment of the Articles of Incorporation of Philadelphia Health Care Trust in the form attached hereto are approved;

3. Within sixty (60) days after the entry of this Order, Philadelphia Health Care Trust shall file with this Court a schedule of assets as of the end of the month in which this order is entered;

4. Philadelphia Health Care Trust shall file with the Court on or before August 31, 1999, an accounting for the period from the date of the schedule of assets filed with Court until June 30, 1999 and for each of the five years thereafter and for such longer time as this Court may direct, shall file on or before August 31, of each year an accounting for the twelve months ending on June 30 of such year; and

5. This Court shall retain continuing jurisdiction over Philadelphia Health Care Trust."

In June of 1999, PHCT filed a Schedule of Assets showing assets having a total value of \$104,382,156.85.

In August of 1999, PHCT filed a First Account for the period May 1, 1999 through June 30, 1999, showing a “Combined Balance On Hand” of \$104,453,856.36. The Petition For Adjudication, filed in connection with the First Account: states that there are no questions for Adjudication; and, requests an award of the entire Principal and Income to the Board of Directors of PHCT for the uses and purposes set forth in PHCT’s Amended And Restated Articles Of Incorporation, as approved by the aforementioned Decree of Judge Pawelec.

In August of 2000, PHCT filed a Second Account for the period July 1, 1999 through June 30, 2000, showing a “Combined Balance On Hand” of \$97,571,675.85. The Petition For Adjudication, filed in connection with the Second Account: states that there are no questions for Adjudication; and, requests an award of the entire Principal and Income to the Board of Directors of PHCT for the uses and purposes set forth in PHCT’s Amended And Restated Articles Of Incorporation, as approved by the aforementioned Decree of Judge Pawelec.

In August of 2001, PHCT filed a Third Account for the period July 1, 2000 through June 30, 2001, showing a “Combined Balance On Hand” of \$91,634,891.76. The Petition For Adjudication, filed in connection with the Third Account: states that there are no questions for Adjudication; and, requests an award of the entire Principal and Income to the Board of Directors of PHCT for the uses and purposes set forth in PHCT’s Amended And Restated Articles Of Incorporation, as approved by the aforementioned Decree of Judge Pawelec.

In August of 2002, PHCT filed a Fourth Account for the period July 1, 2001 through June 30, 2002, showing a “Combined Balance On Hand” of \$68,525,562.20. The Petition For Adjudication, filed in connection with the Fourth Account: states that there are no questions for Adjudication; and, requests an award of the entire Principal and Income to the Board of Directors of PHCT for the uses and purposes set forth in PHCT’s Amended And Restated Articles Of Incorporation, as approved by the aforementioned Decree of Judge Pawelec.

In August of 2003, PHCT filed a Fifth Account for the period July 1, 2002 through June 30, 2003, showing a “Combined Balance On Hand” of \$61,286,818.34. The Petition For Adjudication, filed in connection with the Fifth Account: states that there are no questions for Adjudication; and, requests an award of the entire Principal and Income to the Board of Directors of PHCT for the uses and purposes set forth in PHCT’s Amended And Restated Articles Of Incorporation, as approved by the aforementioned Decree of Judge Pawelec.

The Board of Directors of PHCT is comprised of Mr.Peter D. Carlino, Bernard J. Korman, Esquire, Janice L. Richter, Esquire, Harold Cramer, Esquire, and, Mr.Russell Kunkel. The Chief Executive Officer of PHCT is Bernard J. Korman, Esquire.

The Commonwealth of Pennsylvania, acting by its Attorney General, as parens patriae for charities, has filed Objections to the aforementioned Accounts. Said Objections read as follows, to wit:

“ The Commonwealth of Pennsylvania, by its Attorney General, as *parens patriae*, objects to the Accounts of the Philadelphia Health Care Trust as follows:

- 1. The accounts claim credit for payments of interest on a margin account at Merrill Lynch which suggests an inappropriate Investment strategy for a charitable trust.**
- 2. The accounts claim credit for payments of pensions to Harold Cramer and Robert E. Matthew without justification or basis.**
- 3. The accounts claim credit for significant legal fees to several law firms for unexplained services.**
- 4. The accounts claim credit for excessive travel and entertainment expenses without justification or basis.**
- 5. The accounts claim credit for substantial grants made outside of the eight county area formerly served by the Graduate Health System.**
- 6. The accounts claim credit for fees paid for accounting services which appear excessive.**
- 7. The accounts claim credit for fees paid to the directors which appear excessive.**
- 8. The accounts claim credit for wages and benefits paid to Bernard Korman which are unsupported and appear excessive.**
- 9. The Third Account indicates a charitable grant to the Allegheny Health Education and Research Foundation after that entity was declared bankrupt.**

10. The Fourth Account indicates disbursements of principal relating to the “Graduate Bondholder Litigation” without explanation, justification or basis.

WHEREFORE, Objectant prays that the Court schedule a hearing at which time Accountant will have an opportunity to prove and verify its Accounts and Objectant the opportunity to seek such relief, including surcharge or removal, as it deems appropriate.”

Four days before the Attorney General filed his aforementioned Objections, Philadelphia Unemployment Project and Action Alliance of Senior Citizens of Greater Philadelphia (hereinafter “PUP/AA”), being two organizations whose members are health care consumers in the Greater Philadelphia area, filed a “Petition For Leave To Become Amicus Curiae”.

On the same day as the Attorney General filed his aforementioned Objections, Philadelphia City Councilman Michael A. Nutter (hereinafter “COUNCILMAN”), filed a “Petition For Leave To Intervene Or For Leave To Become Amicus Curiae”.

Two months and three days after the Attorney General filed his aforementioned Objections, Senator Vincent J. Fumo, a member of the Pennsylvania State Senate, representing the First Senatorial District, in Philadelphia (hereinafter “SENATOR”), filed a “Petition For Leave To Intervene.....”, which Petition includes a request that the Senator be appointed to serve as an Amicus Curiae.

Insofar as they seek Leave To Intervene, this Court Dismissed and

Denied the Petitions of the Councilman and Senator for Lack of Standing. Our Supreme Court has discussed the concept of standing to enforce the terms of a charitable trust in many cases, including Wiegand v. The Barnes Foundation, 374 Pa. 149 (1953), and, In Re Francis Edward McGillick Found., 537 Pa. 194 (1994). In Wiegand, supra, at 153, it is stated that,

“ In the absence of statutory authority, no person whose interest is only that held in common with other members of the public, can compel the performance of a duty owed by the corporation to the public. Only a member of the corporation itself or someone having a special interest therein or the Commonwealth, acting through the Attorney General, is qualified to bring an action of such nature.” (emphasis supplied)

In Wiegand, supra, at 155, it is stated that,

“ Section 391 of Restatement, Trusts, states: ‘A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.’ Comment d reads: ‘A suit for the enforcement of a charitable trust cannot be maintained by persons who have no special interest in the enforcement of the trust. The mere fact that as members of the public they benefit from the enforcement of the trust is not a sufficient ground to entitle them to sue, since a suit on their behalf can be maintained by the Attorney General.’

..... The protection of the public generally against the failure of a corporation to perform the duties required by its charter is the concern of the sovereign, and any action undertaken for such purpose must be by the Attorney General on its behalf.” (emphasis supplied)

In McGillick, supra, at 199, it is stated that,

“ Standing requires that an aggrieved party have an interest which is substantial, direct, and immediate. That is, the ‘interest must have substance—there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law’. That an interest be direct requires that an aggrieved part ‘must show causation of the harm to his interest by the matter of which he complains.’ To find an immediate interest, we examine ‘the nature of the causal connection between the action complained of and the injury to the person challenging it.’” (emphasis supplied) (citations omitted)

Because the Attorney has filed Objections and stands ready to prosecute them, the Councilman and Senator do not have standing, by virtue of their Public Offices, to Intervene to enforce the terms of PHCT’s Amended And Restated Articles Of Incorporation; to enforce the terms of Judge Pawelec’s Decree of April 20, 1999; or, to enforce applicable Laws governing the operation of PHCT. In matters such as the one which is now before this Court, there is only one “Sovereign”, and, that Sovereign is the Commonwealth of Pennsylvania. When engaged in litigation before this Court, the Sovereign must be of one mind, and, must speak with one voice. When the Commonwealth acts to protect the public interest, it does so by its Attorney General. When, as in the case at bar, the Attorney General acts to protect the public interest in enforcing the terms of a charitable trust, other Public Officers cannot be permitted to Intervene to perform the same function.

The Councilman and Senator have no statutory authority to Intervene in the proceedings which are now before this Court. In Wiegand, supra, at 155-156, our

Supreme Court engaged in the following discussion of a claim that a person had statutory authority under the predecessor of Section 6110 (a) of the Probate, Estates and Fiduciaries Code, that is, under Section 10 of the Estates Act of 1947, to wit,

“ It is extremely doubtful that plaintiff is an ‘interested person’ within the intendment of the Act, but assuming that he is, it is clear that the charitable purpose of The Barnes Foundation is not and has not become ‘indefinite or impossible or impractical of fulfilment’ and the other contingencies provided for in the Act are not here present. The trust has not failed. Its objects and the administrative provisions for their accomplishment were before this Court when it was approved as a charitable institution in *Barnes Foundation v. Keely et al.*, 314 Pa. 112, Footnote 1, supra. Appellant’s bill does not seek application of the cy pres doctrine because of alleged failure of the trust, but complains of the manner in which the Foundation is being administered as being violative of its corporate purposes. The prayer of the bill is that the court require the trustees to adopt different administrative rules and regulations. Even if there were substance to appellant’s complaint, suit by the Attorney General would be required.....” (emphasis supplied)

PHCT’s charitable purposes are set forth in Article 3 of its Amended And Restated Articles Of Incorporation. By his Decree of April 20, 1999, Judge Pawelec approved said Amended and Restated Articles. In their Petitions, the Councilman and Senator do not seek application of the cy pres doctrine under Section 6110 (a) of the Probate, Estates and Fiduciaries Code, that is, they do not allege that the charitable trust has failed. Instead, they complain of misfeasance and malfeasance in the administration of PHCT’s assets, and, in the operation of PHCT as a private foundation making grants. Even if there were substance to such complaints, action by the Attorney

General would be required. See Wiegand, supra, at 155-156.

In their Petitions, the Councilman and Senator do not aver facts which indicate that they have a substantial, direct and immediate interest in PHCT.

Insofar as they seek Leave To Intervene, this Court Dismissed and Denied the Petitions of the Councilman and Senator: because neither of them is the Attorney General of the Commonwealth of Pennsylvania; because neither of them has statutory authority to proceed in the matters which are now before this Court; because neither of them is a member of PHCT's Board of Directors; and, because neither of them has a special interest, that is, an interest other than the interest of all members of the public in compelling enforcement of the terms of PHCT's Articles.

Insofar as they seek Leave To Become Amicus Curiae, this Court Denied the Petitions of PUP/AA, the Councilman, and, the Senator, for the following reasons.

The proceedings now before this Court do not raise issues of broad social concern, such as the issue of termination of life-sustaining treatment in the matter of In Re Fiori, 438 Pa.SuperiorCt. 610 (1995). Accounts have been filed. The Attorney General has filed Objections to said Accounts. Said Objections include many of the complaints of the Petitioners. Prosecution of said Objections may result in the surcharge or removal of members of the Board of Directors of PHCT. The Petitioners are free to raise their concerns to the Attorney General. They are free to offer their resources, and, the fruits of their investigations, to the Attorney General. They are free to consult and work with the Attorney General. Under all of the

foregoing circumstances, this Court sees no need to appoint the Petitioners, or any of them, to serve as Amicus Curiae.

Dated: _____

O'KEEFE, ADM. J.

**Jonathan M. Stein, Esquire
Richard P. Weishaupt, Esquire
for Philadelphia Unemployment Project
for Action Alliance Of Senior Citizens Of Greater Philadelphia**

**Susan L. Burke, Esquire
Karen M. Ibach, Esquire
For Councilman Michael A. Nutter**

**Christian A. Di Cicco, Esquire
For Senator Vincent J. Fumo**

**Marc S. Cornblatt, Esquire
Jennifer H. Stoudt, Esquire
for Philadelphia Health Care Trust**

**Lawrence Barth, Esquire, Senior Deputy Attorney General
for Attorney General As Parens Patriae**