SUCCESS IN NEW JERSEY: USING THE CHARITABLE TRUST DOCTRINE TO PRESERVE WOMEN'S REPRODUCTIVE SERVICES WHEN HOSPITALS BECOME CATHOLIC

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INTRODUCTION

In 1998, a 35-year-old New Hampshire Medicaid patient went to her doctor at a recently merged Catholic hospital for an emergency abortion, because she went into labor fourteen weeks into her pregnancy. This woman had a history of miscarriages, but persisted in her attempts to have a child. Her doctor determined that she needed an emergency abortion to preserve her reproductive health, but the hospital had recently changed its policy and would not allow doctors to perform abortions, regardless of medical necessity. This woman had to travel eighty miles, while in labor, to a hospital that would provide the abortion, thereby putting her health in grave danger.[1]

Unfortunately, the potential for this type of scenario to occur more frequently in the United States is growing, as secular hospitals merge with Catholic hospitals and eliminate women's reproductive services. When a secular hospital merges with a Catholic institution, the secular hospital is typically required to adopt the Ethical and Religious Directives for Health Care Services [hereinafter "the Directives"],[2] which do not allow for the provision of most women's

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1. See CATHOLIC HEALTH RESTRICTIONS UPDATED (Catholics for a Free Choice, Washington, D.C.), 1999, at 5.

2. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 7 (1994) [hereinafter DIRECTIVES]; see generally LOIS J. UTTLEY, MERGER WATCH, RELIGIOUS HOSPITAL MERGERS & HMOS: THE HIDDEN CRISIS FOR REPRODUCTIVE HEALTH CARE 12-13 (1997) [hereinafter Uttley]; Lisa C. Ikemoto, When a Hospital Becomes Catholic, 47 MERCER L. REV. 1087, 1100 (1996); CAUTION: CATHOLIC HEALTH RESTRICTIONS MAY BE HAZARDOUS

reproductive services.[3] When such a merger occurs, women in these communities are often left without access to such services, and are forced to travel significant distances to obtain services, or to do without. Hospital mergers occurred with great frequency in the 1990s, and this trend is poised to continue, as changes in the health care industry force hospitals to consolidate to maintain financial viability.

In 1999, Elizabeth, New Jersey confronted this situation. The city's only two hospitals, one of which was Catholic, planned to merge into one Catholic entity, and the hospitals intended for reproductive services to be eliminated. Under trust law, the American Civil Liberties Union of New Jersey and other community groups [hereinafter "ACLU-NJ"][4] were able to intervene in the hospitals' petition for court approval for the merger. By using the Charitable Trust doctrine, the ACLU-NJ successfully argued that the secular hospital was changing the charitable mission of the hospital by agreeing to adopt the Directives. The ACLU-NJ received a settlement from the hospitals, in which a fund would be established to provide for reproductive services to women in the Elizabeth community. Although the ACLU-NJ achieved a significant victory, the merger nevertheless forced women in the Elizabeth community to seek reproductive services from new locations, putting their health and safety in jeopardy.

The Charitable Trust doctrine provides reproductive rights groups with a powerful method by which to attack a hospital merger. This strategy is not without limits, however. The particular circumstances of each community faced with a hospital merger have a dramatic impact on which method is most effective in mounting a challenge, as well as the most effective settlement. More importantly, the success of the Charitable Trust doctrine depends in large part on the identity and characteristics of the party challenging the merger.

In most states, significant restrictions on party standing limit the ability of advocacy groups such as the ACLU-NJ to use the Charitable Trust doctrine themselves to challenge hospital mergers.

TO YOUR HEALTH, (Catholics for a Free Choice, Washington, D.C.), 1999, at 4 [hereinafter CAUTION: CATHOLIC HEALTH RESTRICTIONS].

3. See infra Part I.B.

4. Although I will refer collectively to the community groups as the ACLU, the other groups involved in the litigation included the Women's Rights Litigation Clinic at Rutgers University Law School, New Jersey Religious Coalition For Reproductive Choice, and New Jersey Right To Choose. Individuals were also involved, including Dr. Martin Hyman, Mary Roche, and Lizette Higgins.

Traditionally, the attorney general is the enforcer of charitable trusts, and groups would have to rely on the attorney general to challenge a merger. The attorney general may intervene of her own accord in many states, but in others, community groups must rely on their own efforts. Such groups can raise awareness, and bring the issue and its dramatic consequences to the attention of the attorney general, in an effort to block the merger or construct a solution that works for the particular community.

This Note examines the hospital merger trend generally in Part I, and the rate at which Catholic hospitals are becoming a dominant part of the health care industry and eliminating reproductive services for women. Part II describes the Elizabeth, New Jersey merger situation in detail. Part III analyzes the Charitable Trust doctrine generally, and highlights situations in which hospital mergers have successfully been challenged. Finally, Part IV focuses on the most significant limit to the use of the Charitable Trust doctrine in a merger setting: the traditional restrictions on party standing. This section examines the law in a number of states, and concludes that the ACLU-NJ uniquely positioned itself in the Elizabeth merger, in a way that would be difficult to replicate in other states.

I
THE RECENT HISTORY OF HOSPITAL MERGERS

Dramatic changes in the health care industry are increasingly forcing hospitals to consolidate with other competing health care providers in their communities.[5] Such consolidations often occur in the form of a merger, in which two or more hospitals combine their assets, or a hospital or national hospital chain acquires another community hospital.[6] Other hospitals enter into joint ventures or affiliations, in order to cut costs by consolidating resources and thereby achieve economies of scale.[7] Typically, hospitals must consolidate simply to be able to continue to provide health care services to a community.[8]

Various economic factors have been the driving force behind merger activity in the hospital industry.[9] As companies increasingly turn to HMOs to provide health care for their employees, hospitals

5. See Uttley, supra note 2, at 10.
6. See id. at 11.
7. See id.
8. See id. at 10-11.
9. See JUDITH C. APPELBAUM, NAT'L WOMEN'S LAW CTR., HOSPITAL MERGERS AND THE THREAT TO WOMEN'S REPRODUCTIVE HEALTH SERVICES: USING ANTITRUST

have been forced to cut costs to compete for patients.[10] At the same time, both the federal and state governments have cut Medicare provider payments, which has resulted in reduced hospital revenues.[11] An increase in outpatient care has left hospitals with empty facilities that are too costly to support.[12] Hospitals are also facing competition from for-profit hospital chains and must find a viable way to survive in this new environment.[13]

According to Merger Watch, a non-profit organization created to monitor and report on hospital mergers that restrict access to reproductive health care, 40% of the nation's non-federal hospitals were involved in a merger, acquisition, or joint venture between 1994 and 1997.[14] An example of demonstrating the rapid rate at which mergers are occurring is Massachusetts, where more hospital mergers occurred in 1996 than in the seven years from 1988 to 1995.[15] In New Jersey, there have been 17 hospital consolidations just within the last five years.[16] Overall, the merger trend has caused the number of hospitals nationwide to decrease.[17]

A. The Role of Catholic Hospitals in the Merger Frenzy

Catholic hospitals have played an integral role in this merger trend. Much of the recent merger activity has involved not-for-profit hospitals, and in particular Catholic hospitals.[18] In 1996, Modern Healthcare magazine surveyed forty-two Catholic health care systems and reported that they demonstrated a 12% growth rate that year,[19] far surpassing the 3% growth rate experienced by Co-

LAWS TO FIGHT BACK 1 (1998) [hereinafter HOSPITAL MERGERS AND ANTITRUST LAWS].

10. See Uttley, supra note 2, at 10.

11. See id.

12. See id.

13. See id. at 11.

14. See id.

15. See id.

16. See Jonathan Jaffe, It's Official: Elizabeth Hospitals Merge, THE STAR-LEDGER (Newark, N.J.), Jan. 7, 2000, at 29.

17. See Ikemoto, supra note 2, at 1093-94.

18. See Uttley, supra note 2, at 12. Merger Watch noted that for-profit mergers accounted for only 8% of all hospital merger activity in 1996. See id.

19. See id. (citing a Modern Healthcare magazine report from 1996). Merger Watch has noted that non-Catholic religious denominations, such as Baptists and Adventists, also control hospitals and restrict services. However, these religious hospitals have autonomy from the church in choosing which services to provide, unlike Catholic hospitals. See id.

lumbia/ HCA Healthcare Corporation, one of the largest for-profit hospital chains.[20]

Catholic health care providers have a significant influence on the U.S. health care system, simply due to their overwhelming presence in the United States.[21] Catholic hospitals constitute the largest not-for-profit provider of American health care.[22] In 1996, five Catholic health care systems were counted among the nation's ten largest systems.[23] The Catholic church controls approximately 600 hospitals nationwide, which translates into 140,000 beds, $40 billion in revenues, and 15% of all hospital care.[24]

In the last decade, Catholic hospitals have increasingly merged or affiliated with secular institutions to remain competitive in the health care industry.[25] From 1990 to 1998, there were 127 mergers and affiliations between Catholic and non-Catholic hospitals, in thirty-four states.[26] In 1998 alone, there were forty-three mergers and affiliations.[27] This data is striking when compared with the fourteen mergers that occurred in 1997, twenty-four in 1996, and twenty-four in 1995.[28] While mergers may be both advantageous and necessary for economic reasons, the merger of a Catholic with a non-Catholic hospital often has dramatic repercussions for reproductive health services, due to the surviving hospital's adoption of the Directives.

B. The Ethical and Religious Directives for Health Care Services

The Catholic Church, through the National Conference of Catholic Bishops, promulgated the Directives as official standards for Catholic health care, and they govern all Catholic hospitals in the United States.[29] The Directives, which contain 70 detailed

20. See id. at 14.

21. See id. at 12.

22. See Fact Sheet: The Impact of Catholic Hospital Mergers on Women's Reproductive Health Services (Abortion Access Project, Cambridge, MA), July 28, 2001, at http://www.repro-activist.org/ AAP/ publica_resources/ fact_sheets/ impact.htm (last visited Sept. 2, 2001).

23. See id. (citing B. Jaspen & L. Scott, System Growth a Close Race: 1997 Multiunit Providers Survey Finds Not for Profits Ahead by a Nose, MODERN HEALTHCARE, May 26, 1997, at 64 chart 1).

24. See Uttley, supra note 2, at 12-13. Significantly, Columbia/ HCA, a for-profit hospital chain, controls 300 hospitals nationwide, which includes approximately 60,000 beds and accounts for $14.5 billion in revenues. See id. at 13.

25. See Ikemoto, supra note 2, at 1094.

26. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 5.

27. See id.

28. See id.

29. See Uttley, supra note 2, at 12-13.

rules, specifically forbid hospitals from providing health services that conflict with the official teachings of the Catholic Church.[30] Frequently, when a secular hospital enters into merger discussions with a Catholic hospital, the Catholic hospital will require the non-Catholic hospital to adopt the Directives as a condition of the merger.[31]

The Directives reflect the Church's vision of health care, and aim to preserve a Catholic identity in the health care services offered by Catholic hospitals.[32] The Directives prohibit Catholic hospitals "to provide or permit medical procedures that are judged morally wrong by the teaching authority of the Church."[33] The Directives address medical issues that affect women's health care specifically. The Directives include:

> 28. Each person . . . should have access to medical and moral information and counseling so as to be able to form his or her conscience.
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> . . . .
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> 36. A female who has been raped should be able to defend herself against a potential conception from the sexual assault. If, after appropriate testing, there is no evidence that conception has occurred already, she may be treated with medications that would prevent ovulation, sperm capacitation, or fertilization. It is not permissible, however, to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum.
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> . . . .
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> 45. Abortion . . . is never permitted.
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> . . . .
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> 52. Catholic health institutions may not promote or condone contraceptive practices but should provide, for married couples and the medical staff who counsel them, instruction both about the Church's teaching on responsible parenthood and in methods of natural family planning.[34]

30. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 4; DIRECTIVES, supra note 2, at 7. The Directives base the prohibition of services on whether the services are deemed morally wrong.

31. See DIRECTIVES, supra note 2, at 6, 25-27.

32. See id. at 1-2.

33. Id. at 7.

34. Id. at 15-20; see generally HOSPITAL MERGERS AND ANTITRUST LAWS, supra note 9, at 1. With reference to Directive 28, a problem at many Catholic hospitals

Other Directives governing reproduction disallow various methods of assisted conception, including in vitro fertilization and artificial insemination.[35]

Notably, Part 6 of the Directives addresses the issues surrounding "Forming New Partnerships with Health Care Organizations and Providers."[36] Directive 68 provides that all mergers that affect the "mission or religious and ethical identity of Catholic health care" services must respect the teachings of the Church.[37] Directive 69 allows for flexibility by stating that "[w]hen a Catholic health care institution is participating in a partnership that may be involved in activities judged morally wrong by the Church, the Catholic institution should limit its involvement in accord with the moral principles governing cooperation."[38] This Directive could be interpreted to allow for a compromise between a Catholic hospital and a hospital that wishes to preserve reproductive health services. Such flexibility depends in many cases on local officials, who play an active role in shaping mergers between secular and sectarian institutions in an effort to preserve the Catholic mission of a hospital post-merger.[39]

The application of the Directives to a merger can vary widely, depending on the circumstances of the locality in which the hospital is situated. A hospital preparing to become Catholic must first agree to abide by the Directives.[40] The hospital must then find a local sponsoring agency approved by Catholic bishops to guide them in the merger process.[41] The Vatican must approve deals involving $1 million or more of Church assets, and the local bishop must approve any deal within the diocese.[42] The local bishop retains flexibility, however, in determining how to interpret the Direc-

is that women are not provided with sufficient information to enable them to make a decision, particularly in the case of rape.

35. See DIRECTIVES, supra note 2, at 18-19.

36. Id. at 25.

37. Id. at 26.

38. Id.

39. See Ikemoto, supra note 2, at 1099-1100.

40. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 4. Specifically, Directive 5 provides that "Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel." DIRECTIVES, supra note 2, at 7.

41. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 4.

42. See Ikemoto, supra note 2, at 1097.

tives.[43] Each hospital therefore develops its own guidelines independently, but the result typically remains the same: services are eliminated to preserve the Catholic mission of the new entity.[44]

C. The Significant Impact of Catholic Hospital Mergers on Women's Reproductive Services

The merger of a secular institution with a Catholic health care provider has a devastating impact on women's reproductive services because the implementation of the Directives often results in the elimination of women's access to comprehensive health services. Catholics for a Free Choice[45] obtained data from 100 of the 127 hospitals that merged from 1990 to 1998, and of those, 47% discontinued all or some reproductive health services.[46] Many hospitals say that they have no choice but to follow the restrictive religious rules of the Catholic hospitals, because they would not be able to remain open without merging. These hospitals reason that it is better to have a hospital to serve a community, despite the elimination of some services, than to not have any hospital at all.[47]

When a hospital becomes Catholic and adheres to the Directives of the Catholic Church, a wide range of services are eliminated almost immediately. Women who seek access to abortions, even medically necessary abortions, cannot obtain such a procedure at a Catholic hospital.[48] Additionally, women who choose to have tubal ligations immediately after childbirth are prevented from doing so, even though it is "safer, easier, and less costly to do both procedures at the same time."[49] Birth control and general contraceptive counseling are forbidden at Catholic hospitals.[50] Patients who seek access to these services are often unable to obtain referrals to another facility that provides the services.[51] Furthermore, Catholic

43. See Tena Jamison, Should God Be Practicing Medicine? When Religious and Secular Hospitals Merge, Health Care is Often the First Victim, 22 HUM. RTS. Summer 1995, at 12.

44. See CATHOLIC HEALTH RESTRICTIONS UPDATED, supra note 1, at 10-11.

45. Catholics for a Free Choice is an organization of Catholics devoted to research, policy analysis, education, and advocacy on issues of gender equality and reproductive health.

46. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 5.

47. See Ikemoto, supra note 2, at 1110-11.

48. See DIRECTIVES, supra note 2, at 19; see also Jane Hochberg, Comment, The Sacred Heart Story: Hospital Mergers and Their Effects on Reproductive Rights, 75 OR. L. REV. 945, 952-55 (1996); see generally Uttley, supra note 2, at 16.

49. Jamison, supra note 43, at 11-12.

50. See DIRECTIVES, supra note 2, at 20.

51. See Uttley, supra note 2, at 16.

hospital mergers typically jeopardize the availability of emergency contraception.

Catholics for a Free Choice has highlighted emergency contraception as an emerging and important issue in Catholic hospital mergers, due to the lack of consistent information concerning the provision of these services by Catholic hospitals.[52] Emergency contraception involves "the use of a drug or device to prevent pregnancy after intercourse,"[53] and in its most common form consists of pills containing a high dose of hormones.[54] When taken within 72 hours of intercourse, the pills are 75% effective in reducing a woman's chance of becoming pregnant.[55] Emergency contraception is a medically accepted way of treating rape victims, and some states require that a rape victim be notified about the availability of emergency contraception.[56]

52. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 7.

53. Id. (citing Anna Glasier, Drug Therapy: Emergency Post-Coital Contraception, 15 NEW ENG. J. MED. 337 (1997)). These pills work in several different ways. They may inhibit or delay ovulation, inhibit tubal transport of the egg or sperm, interfere with fertilization, or alter the endometrium (the lining of the uterus), and thereby inhibit implantation of a fertilized egg. Emergency contraception does not cause an abortion, but instead prevents implantation of a fertilized egg. As such, it is a method of pregnancy prevention, not a type of abortion procedure. See Not-2-Late.com: The Emergency Contraception Website, How Do Emergency Contraceptives Work?, at http://ec.princeton.edu/questions/ecwork.html (last visited Aug. 31, 2001); Not-2-Late.com: The Emergency Contraception Website, Does Use of Emergency Contraception Cause an Abortion?, at http://ec.princeton.edu/questions/ecabt.html (last visited Sept. 4, 2001).

54. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 7. Emergency contraception can prevent pregnancy by interfering with ovulation or fertilization, or preventing implantation in the endometrium. Interfering with implantation is the form of birth control to which the Catholic church objects, as specifically stated in Directive No. 36. See id. at 8. However, since it is difficult to determine whether conception has occurred, the practical effect of this Directive is to allow the hospitals that choose to provide emergency contraception to do so without technically violating the Directives. See id.

55. See Not-2-Late.com: The Emergency Contraception Website, Why Do Emergency Contraceptives Work?, at http://ec.princeton.edu/questions/ecimprt.html (last visited Aug. 31, 2001). Emergency contraception is commonly referred to as the "morning after pill," although it is effective for up to 72 hours after unprotected intercourse. See Denise Gellene, "Morning-After" Pill Bill Gets Panel's OK, L.A. TIMES, May 24, 2001, at C2; Not-2-Late.com: The Emergency Contraception Website, How long after unprotected sex can emergency contraceptive pills be taken?, at http://ec.princeton.edu/questions/ectime.html (last visited Sept. 4, 2001).

56. See Brownfield v. Daniel Freeman Marine Hosp., 256 Cal. Rptr. 240, 245 (Ct. App. 1989); see also CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 7. In Brownfield, a California court found that a hospital had engaged in medical malpractice by failing to give a rape victim information about emergency contraception.

In 1998, the Abortion Access Project of Massachusetts surveyed Catholic hospitals in Massachusetts and found that all but one refused to offer emergency contraception to rape victims.[57] On a broader level, Catholics for a Free Choice surveyed 589 hospitals and found that 82% do not provide emergency contraception to rape victims.[58] Of those hospitals, 31% refuse to provide a referral on request, while 47% would provide a referral on request but no phone number.[59] Significantly, many women do not know that such a form of contraception exists, so only those already aware of this method have a chance to request and obtain this treatment.[60]

Whether a hospital provides emergency contraception to rape victims depends on that particular institution's interpretation of the Directives. Directive 36, which governs emergency contraception, does not specify how to determine whether conception has occurred.[61] A hospital located in a liberal diocese may turn a blind eye when its doctors prescribe emergency contraception, while a hospital located nearby but in a conservative diocese might not allow any form of emergency contraception.[62] This results in a lack of consistency among Catholic health care providers, which poses another problem for women in obtaining reproductive health services.

Significantly, Directive 36 does not allow for the provision of emergency contraception to women who are not victims of rape. Many women are sexually assaulted by acquaintances and do not immediately report this abuse as a rape or see a physician to determine whether they are pregnant. In the cases in which they subsequently learn that they are pregnant, these women no longer have access to emergency contraception, nor can they obtain an abortion from a Catholic hospital.

The problem posed by the elimination of reproductive health services is particularly acute in smaller communities that have been more frequently exposed to mergers. These small communities are

57. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 7.

58. See id. at 9.

59. See id.

60. See id. at 10.

61. See id. at 8; DIRECTIVES, supra note 2, at 16.

62. See Ikemoto, supra note 2, at 1101. The article notes that local bishops are increasingly tolerating collaboration arrangements; services banned by the church, such as elective sterilization, may be allowed at the Catholic hospital's nonreligious partner hospital. See id. at 1101-02. Such an arrangement works where hospitals merge and maintain more than one physical facility, or allow for a floor of a hospital to be devoted to services otherwise not tolerated by a Catholic hospital.

in great danger of losing access to a full range of health care services. In rural areas, the Catholic entity that results from a merger may be the only health care provider.[63] In 1997, seventy-six Catholic hospitals were sole providers.[64] By 1998, the number had jumped by 20% to ninety-one hospitals.[65] The impact of the elimination of services by sole providers is even more poignant considering that some sole providers are located in areas in which less than 1% of the population is Catholic.[66] Only five Catholic sole providers are located in areas in which the population is predominantly Catholic, and 75% are located in areas in which Catholics account for less than 25% of the population.[67]

When a sole provider is Catholic, the area served by the hospital is likely to have little access to reproductive health services.[68] This has a particularly devastating effect on poor women, who cannot afford to travel to obtain health care or to visit private doctors.[69] In such cases, the elimination of services by a sole provider results in a complete elimination of all women's reproductive services, since these women will not have access to any facility. Women should not have to travel long distances to obtain proper medical treatment.[70]

Fundamentally, the refusal of a Catholic hospital to provide women's reproductive services affects all women in those communities. When a hospital eliminates such services, even women in more populated communities are often left without any viable alternatives. These women might not have access to information concerning alternate service providers, if a hospital refuses to provide a referral, or may not be comfortable seeking services in an unfamiliar location.

The proposed merger of two hospitals in Elizabeth, New Jersey provides a recent example of this national merger trend, and the consequences for women's reproductive services. In Elizabeth,

63. See Uttley, supra note 2, at 14.

64. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 6. A sole provider is defined as a hospital located in an area in which no similar institution is easily accessible, so that the institution faces no competition. See Fact Sheet, supra note 22 (citing CATHOLICS FOR A FREE CHOICE, WHEN CATHOLIC AND NON-CATHOLIC HOSPITALS MERGE: REPRODUCTIVE HEALTH COMPROMISED (1998)).

65. See CAUTION: CATHOLIC HEALTH RESTRICTIONS, supra note 2, at 6.

66. See id.

67. See id.

68. See id.

69. See id.

70. See Jamison, supra note 43, at 13 (quoting Susan Fogel, Staff Attorney for the California Women's Law Center).

community groups intervened in the hospital merger litigation and were able to effect a settlement with the merging hospitals. Although the settlement did not preserve all reproductive services in the community, the unique strategy employed by the reproductive rights groups was instrumental in helping this community mitigate the devastating consequences of Catholic hospital mergers.

II
A RECENT EXAMPLE OF THE MERGER PROBLEM: THE ELIZABETH STORY

In 1998, two hospitals in Elizabeth, New Jersey entered into an agreement to merge into a Catholic facility. When the community learned that reproductive services would be eliminated after the merger, the ACLU-NJ and other community groups became involved. The ACLU-NJ employed the Charitable Trust doctrine to fight the merger. These groups were not able to block the merger, but managed to effect a settlement that worked for the community. Because the settlement left many questions unanswered and did not restore services in one central location, it was not an ideal solution; nevertheless, it was a victory for reproductive rights.

Elizabeth is New Jersey's fourth largest city, and until 1999 had two hospitals, Elizabeth General Medical Center [hereinafter "EGMC"] and St. Elizabeth Hospital [hereinafter "St. Elizabeth"]. In mid-March 1998, EGMC, a non-profit secular hospital, notified the office of the Attorney General of New Jersey of its intent to consolidate with St. Elizabeth, a non-profit Catholic hospital, under NJSA 15A:10-2.[71] The resulting entity would be Trinitas Hospital, a non-profit Catholic hospital, which would be governed by the Directives.[72]

In April 1998, EGMC and St. Elizabeth submitted a Certificate of Need application to the Department of Health and Senior Services of New Jersey [hereinafter "DOH"] seeking approval of their proposed consolidation.[73] At the time of the proposal, EGMC pro-

71. N.J. STAT. ANN. § 15A:10-2 (West 1984).

72. See Certification of Renée Steinhagen at 5, In re Application of Elizabeth Gen. Med. Ctr. and St. Elizabeth Hosp. For Approval of Consolidation (N.J. Super. Ct. App. Div. Sept. 2, 1999) (No. UNN-C-97-99); see also Jonathan Jaffe, Elizabeth Hospitals Delay Merger Until Fall; Medical Centers Are Still Settling New Policies and Refinancing Debt To Form Trinitas Health, THE STAR-LEDGER (Newark, N.J.), Aug. 20, 1999, at 41.

73. See Certification of Renée Steinhagen at 6, In re Applicatiion of Elizabeth Gen. Med. Ctr. and St. Elizabeth Hosp. For Approval of Consolidation (N.J. Super. Ct. App. Div. Sept. 2, 1999) (No. UNN-C-97-99).

vided OB/ GYN services to women in Union, Essex, and Middlesex counties. The services provided included tubal ligations and birth control counseling, but not emergency contraception or fertilization services.[74] EGMC also provided some abortions,[75] but mainly referred patients to neighboring hospitals for these services.[76] In contrast, St. Elizabeth provided only OB/ GYN services, which did not include abortion, tubal ligations, emergency contraception, or birth control counseling.[77]

In their Certificate of Need application, the hospitals stated, "[t]here will be no change in the Hospital's philosophy or policies with regard to seeking ongoing community input into the identification of community needs."[78] However, in order to abide by the Directives, EGMC would have to change its philosophy and policies to complete the merger, because Trinitas would not offer many of the reproductive services previously provided at EGMC.[79] The hospitals submitted answers to "Completeness Questions" regarding their application to merge, and specifically addressed the issue of reproductive services and referrals:

> Presently, there are no plans for facility or service relocation. Certain reproductive health programs which are utilized by a small number of individuals will be provided at other convenient community-based sites. Specifically, requests from EGMC women's health center clients for termination of pregnancy will be referred to Newark Beth-Israel Medical Center, New Jersey GYN Associates in Irvington, and Metropolitan Medical Associates of Englewood. This is the current process [at EGMC] and will not change.[80]

The hospitals did not address the other services banned by the Directives, including reproductive counseling, tubal ligations, and emergency contraception. Because the hospitals stated that there

74. See RUTGER'S WOMEN'S RIGHTS LAW CLINIC, NEW JERSEY HOSPITALS CATHOLIC MERGER UPDATE 4 (August 1998) (on file with Renée Steinhagen) [hereinafter CATHOLIC MERGER UPDATE].

75. See Hospital, ACLU Reach Deal on Funds for Abortion Services, THE RECORD (Bergen County, N.J.), Nov. 3, 1999, at L9, available at LEXIS, News Library, The Record File [hereinafter Hospital, ACLU Reach Deal]. EGMC performed 22 abortions in 1998, and five in 1999.

76. See id.

77. See CATHOLIC MERGER UPDATE, supra note 74, at 4.

78. Id. at 2-3 (quoting Letter from John Gontarski, Team Leader of the Certificate of Need and Acute Care Licensure Program, regarding the Hospitals' Answer to Completeness Question #9) (on file with Renée Steinhagen)).

79. See id. at 2-3.

80. Id. at 3.

were no plans for facility or service relocation, the community was concerned that those services could be lost.[81] In July 1998, the DOH approved the consolidation.[82]

The Attorney General of New Jersey reviewed the hospitals' application, found that there was no change in the charitable mission, and therefore did not oppose the merger.[83] Nevertheless, the attorney general required the hospitals get court approval of the merger[84] and provide the public with adequate notice for the proposed merger.[85] In August 1998, the hospitals filed a complaint in the Chancery division of the Superior Court of New Jersey seeking court authorization for their proposed merger.[86] In their complaint, the hospitals referenced an agreement with Planned Parenthood of Greater Northern New Jersey [hereinafter "Planned Parenthood"]. The agreement provided that Planned Parenthood would offer tubal ligation case management services to the Elizabeth community in addition to the other services it routinely provided, in exchange for the establishment of a $2 million trust.[87] The $2 million would result in interest of $120,000 per year, which Planned Parenthood would use to compensate for the elimination of reproductive services at EGMC. Notably, Planned Parenthood did not provide tubal ligations or abortions.[88]

Members of the ACLU-NJ determined that the amount of the settlement was insufficient to provide for the community's needs, and that the merger had not made adequate provisions for surgical

81. See id. at 4.

82. See id. at 2.

83. See Verified Complaint at 11, In re Application of Elizabeth Gen. Med. Ctr. and St. Elizabeth Hosp. For Approval of Consolidation (N.J. Super. Ct. App. Div. Aug. 12, 1998) (No. UNN-C-97-99).

84. The attorney general maintained that the hospitals did not need a cy pres hearing because they were following the dictates of New Jersey law, but the attorney general nevertheless required court approval to ensure that the public's concerns were met. See Telephone Interview with Renée Steinhagen, Special Counsel to the Women's Rights Litigation Clinic, Rutgers Law School (Feb. 3, 2000).

85. See MaryAnn Spoto, Judge Gives Voice To Pro-Choice Groups, THE STAR-LEDGER (Newark, N.J.), Sept. 14, 1999, at U39.

86. See Verified Complaint at 11 (No. UNN-C-97-99).

87. See id. The trust was to be established by Jersey Healthcare Services, the parent company of EGMC, for the benefit of Planned Parenthood. Planned Parenthood did not provide tubal ligations to its clients, but would find other facilities that would provide such services to their clients. See Letter from Jeffrey Brand, President & CEO of Planned Parenthood of Greater Northern New Jersey, Inc., to Mark Siman, Deputy attorney general for the State of New Jersey (May 19, 1999) (on file with Renée Steinhagen).

88. See CATHOLIC MERGER UPDATE, supra note 74, at 4.

services Planned Parenthood did not provide.[89] Furthermore, the merger agreement did not determine whether doctors at Trinitas Hospital could refer patients in need of the eliminated reproductive services to Planned Parenthood or other facilities.[90] Such referrals, critical to providing women with comprehensive health care, are often restricted at Catholic hospitals.[91]

In September 1999, the ACLU-NJ took an unusual step in protesting the discontinuation of reproductive services resulting from the Elizabeth hospital merger, and petitioned the Chancery Division of the Superior Court of New Jersey for leave to intervene as a party in the action.[92] The ACLU-NJ argued that it had concerns substantially affected by the litigation, because its members had used or were likely to use EGMC's services, and it was committed, as an organization, to ensuring that its members and the community would have access to a full range of reproductive services.[93]

The ACLU-NJ argued that EGMC was changing its charitable mission by converting to a Catholic hospital. EGMC had been formed for the "care, cure, and nurture of sick injured persons, without being under the management or control of any religious body or association whatever."[94] The hospital had operated as a secular institution for 120 years, and had provided reproductive services to women in the community during this entire period. In contrast, St. Elizabeth's bylaws provided that the hospital would provide services "in accord with Catholic social principles."[95] The ACLU-NJ argued that the intended beneficiaries of EGMC had concerns that the hospitals, which had strikingly different charitable missions, had not adequately considered.[96] Relying on the Charitable Trust doctrine, the ACLU-NJ argued that the merger of EGMC into a

89. See Interview with Renée Steinhagen, Special Counsel to the Women's Rights Litigation Clinic, Rutgers Law School (Feb. 23, 2000).

90. See id.

91. See Spoto, supra note 85, at 41.

92. N.J. CT. R. 4:33-1 (West 2000); see also Notice of Motion To Intervene as Defendants, In re Application of Elizabeth Gen. Med. Ctr. and St. Elizabeth Hosp. For Approval of Consolidation (N.J. Super. Ct. Ch. Div. Sept. 2, 1999) (No. UNN-C-97-99); Hospital, ACLU Reach Deal, supra note 75.

93. See Notice of Motion to Intervene as Defendants at 2-4 (No. UNN-C-97-99).

94. Id. at 7-8.

95. Bylaws of St. Elizabeth Hospital, at 1 (on file with Renée Steinhagen).

96. See Applicant-Intervener's Memorandum of Law in Support of Their Motion to Intervene at 10, In re Elizabeth Gen. Med. Ctr. and St. Elizabeth Hosp. For Approval of Consolidation (N.J. Super. Ct. Ch. Div. Sept. 2, 1999) (No. UNN-C-97-99).

Catholic institution directly affected the interests of its members, beneficiaries of the charitable trust.[97]

On September 13, 1999, Chancery Court Judge Miriam Span held that the ACLU-NJ was entitled to intervene in the merger because Trinitas Hospital, the new entity, intended to reduce the reproductive services offered to women.[98] The court found that the proposed transaction might constitute a change in charitable mission.[99] The judge's ruling allowed those who benefit from EGMC's services to have a voice in the merger, which thereby opened the deal to public scrutiny.[100] This favorable ruling provided the ACLU-NJ with a strong bargaining chip. Two months later the group was able to effectuate a settlement with the hospitals, in the form of an additional $400,000 to be placed in a second trust to provide for abortions, contraceptive counseling, and sterilization procedures.[101]

While this settlement was a victory for the Elizabeth community, it is not without problems. The interest on the funds placed in trust amounts to only approximately $120,000 per year. If expenses exceed this amount in a given year, Planned Parenthood would have to use the principal amount of the trust. The money could soon dissipate, leaving such a clinic without funding to provide the services that were once available at the local hospital.

Furthermore, relocating women's reproductive services to other areas raises significant health concerns, by fragmenting women's health care and making it less comprehensive, accessible, and timely. In Elizabeth, Planned Parenthood does not offer many reproductive services at its facility, and instead offers "case management services," in which the organization finds service providers in the community for its clients.[102] Under this system, women can re-

97. See Notice of Motion to Intervene as Defendants at 2-3 (No. UNN-C-97-99).

98. See Spoto, supra note 85, at 39.

99. See id. at 41.

100. See id. at 39.

101. See Final Judgment, In re Application of Elizabeth Gen. Med. Ctr. and St. Elizabeth Hosp. For Approval of Consolidation, No. UNN-C-97-99, slip op. at 2 (N.J. Super. Ct. Ch. Div. Oct. 21, 1999) (approving the "Charitable Asset Settlement Agreement" entered into by the parties); see also Jonathan Jaffe, Pro-choicers Satisfied with Added Funds at Hospital, THE STAR-LEDGER (Newark, N.J.), Nov. 3, 1999, at 25 [hereinafter Jaffe, Pro-choicers Satisfied]; Interview with Renée Steinhagen, supra note 89.

102. See Letter from Jeffrey Brand, supra note 87. The services Planned Parenthood offers consist of primary and gynecological care, prenatal care, HIV testing and counseling, family planning, menopausal services, and counseling and referrals for termination of pregnancy services. See id. Planned Parenthood re-

ceive birth control at one location, but must travel to a separate location to obtain an abortion. Providing services in different locations particularily isolates the poor, who might have language barriers, transportation problems, or other concerns that prevent them from traveling to different locations for reproductive services.[103]

The safety concerns of the Elizabeth settlement are also significant. Fragmenting women's health services exposes women and health care providers to dangers such as clinic violence. When services are moved from a hospital to a clinic, they can no longer be provided anonymously.[104] Clinics can be targets of violence and harassment in ways that general hospitals cannot. Patients walking in the doors of clinics are going for singular purposes, while a patient entering a hospital could be going to the hospital for a multitude of reasons, even as a visitor.

Not only do violence and harassment pose a threat to the physical safety of women seeking reproductive services from clinics, but these dangers inflict an emotional burden as well. Women in the Elizabeth community who are forced to resort to clinics to receive reproductive health treatment could suffer from a fear of clinic violence to such an extent that they may avoid seeking services. Furthermore, the fear of violence and harassment could deter doctors from agreeing to perform reproductive services in clinic locations, thus magnifying the problem imposed by the elimination of reproductive services as a result of Catholic hospital mergers. This fear could ultimately deter doctors from performing abortions generally.[105]

Despite these concerns, the settlement achieved in the Elizabeth merger was nonetheless a significant victory for reproductive rights groups in the community. After achieving this victory, Renée Steinhagan, special counsel to the Women's Rights Litigation Clinic at Rutgers Law School and co-counsel for the ACLU-NJ, stated that the additional trust would be used to provide money for women who are unable to afford abortions or tubal ligations.[106] Lenora Lapidus, Legal Director of the ACLU-NJ and co-counsel in the liti-

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ferred its patients to EGMC or Newark-Beth Israel Hospital for all other reproductive services. See id.

103. See Steve Chambers, Merger Pits Care and Doctrine – Hospital to Terminate Reproductive Services, THE STAR-LEDGER (Newark, N.J.), May 16, 1999, at 37.

104. See Creative Solutions to Save Reproductive Health Services in Catholic/non-Catholic Hospital Mergers (Merger Watch, Albany, N.Y.), 1999, at 4.

105. Many reproductive rights advocates have noted that finding doctors willing to perform an abortion is an increasing problem due to the fear of violence and harassment. See Telephone Interview with Renée Steinhagen, supra note 84.

106. See Jaffe, Pro-choicers Satisfied, supra note 101.

gation, noted that using the Charitable Trust doctrine to intervene in the litigation "is a great precedent that can be used by women's groups both in New Jersey and around the country to preserve women's access to important medical care."[107] By intervening, the reproductive rights groups were able to protect their interest in the litigation. Doug Harris, a spokesperson for EGMC, agreed that "[the] action [by the ACLU-NJ] strengthened an agreement we initiated with Planned Parenthood. . . ."[108]

Significantly, Lapidus further noted that "[t]his is the first time, in recent times, that community groups have been allowed to intervene in the consolidation of hospitals . . . . In the past, community groups have not been allowed to intervene. The state attorney general was the exclusive enforcer."[109] The Charitable Trust doctrine, as interpreted by New Jersey courts, is indeed a promising tool for women's rights groups seeking to challenge hospital mergers. As discussed in Part III, other states, including New Hampshire and New York, have recently implemented this strategy to prevent a hospital from changing its charitable mission as a result of a merger. The ACLU-NJ's success is unique, however, because it was able to intervene directly as a party in the litigation. Whether intervention by a party with an interest similar to the ACLU-NJ's is possible in other states depends on the interpretation of each state's individual laws governing charitable organizations.

III
USING THE CHARITABLE TRUST DOCTRINE TO PRESERVE WOMEN'S REPRODUCTIVE SERVICES IN HOSPITAL MERGERS

A. The Charitable Trust Doctrine

Under the Restatement (Second) of Trusts, "[a] charitable trust is a fiduciary relationship with respect to property arising as a

107. Hospital, ACLU Reach Deal, supra note 75. Significantly, the use of the Charitable Trust doctrine was possible in Elizabeth because the hospitals united in the form of a merger. When a health care system only sells part of its assets to a Catholic institution, the Charitable Trust doctrine is not implicated because that type of transaction does not cause a change in mission of the charitable organization as a whole. Furthermore, the Charitable Trust doctrine is not effective when a hospital merger occurs in a rural area and the Catholic institution becomes the sole provider of services. In such communities, local clinics do not exist that could provide the eliminated services. Thus, the Charitable Trust doctrine does not present a compelling solution in such situations.

108. Jaffe, Pro-choicers Satisfied, supra note 101.

109. Id.

result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose."[110] A charitable trust holds assets for the public benefit, so the beneficiaries of such a trust typically include members of the public or, in some cases, a specific part of the community.[111] A charitable trust is believed to create a "social contract between the charity and the public beneficiaries."[112]

Trust law regulates the charitable hospitals discussed in this Note. Comment f to the Restatement notes that the principles applicable to charitable trusts are similarly applicable to charitable corporations.[113] Directors of a trust are under a duty to apply property given to a charitable corporation to one or more of the charitable purposes for which the corporation is organized.[114] Any diversion of funds to other purposes violates the director's duty, and the attorney general may enforce this duty.[115] The assets of a non-profit corporation, organized for a charitable purpose, are ordinarily impressed with a charitable trust by operation of law.[116] This applies to the assets acquired by non-profit hospitals, because the state grants a charter for a specific charitable purpose, which provides the basis for a hospitals charitable trust obligation.[117]

When two charitable organizations merge, the distinct interests of the organizations must be maintained in order to preserve the rights of the charities' beneficiaries. Accordingly, the charitable organizations must demonstrate that a merger will not affect the charitable mission of the merged organizations.[118] In most states, the State attorney general, as a representative for the community, has

110. RESTATEMENT (SECOND) OF TRUSTS § 348 (1959).

111. See N.H. ATT'Y GEN. REP. ON OPTIMA HEALTH 9 (1998).

112. Id.

113. See RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959).

114. See id.

115. See id.

116. Id.; see generally Queen of Angels Hosp. v. Younger, 136 Cal. Rptr. 36, 39 (Ct. App. 1977) (holding a lease invalid because a hospital's articles of incorporation compelled that its charitable purpose be continued); Leeds v. Harrison, 72 A.2d 371, 376-77 (N.J. Super. Ct. Ch. Div. 1950) (holding that a charitable organization is organized for the "administration of charitable trusts"); Blocker v. State, 718 S.W.2d 409, 416 (Tex. App. 1986) (holding that gifts made unconditionally to a charitable corporation, similar to gifts made to a charitable trust, are subject to implicit charitable limitations based on the intended purpose of the gift).

117. See Applicant-Intervener's Memorandum of Law in Support of Their Motion to Intervene at 18 (No. UNN-C-97-99) (citing Blocker, 718 S.W.2d at 416).

118. See VICTORIA BJORKLAND, ET AL., NEW YORK NONPROFIT LAW AND PRACTICE: WITH TAX ANALYSIS § 8-3(b) (1997).

the authority to protect the public's interest in a charitable organization, and therefore is responsible for managing and enforcing such a trust.[119] Enforcement of a charitable trust by the attorney general often occurs under the common law equitable doctrine of cy pres.

Under the doctrine of cy pres, a court may alter a charitable trust if the purpose of the trust becomes impossible, impracticable, or illegal.[120] Comment e to the Restatement (Second) of Trusts indicates that the trustees of a charitable trust will have breached their fiduciary duties when they apply the assets of the trust to any other purpose, charitable or not, without court approval.[121] A court may find that a charitable trust cannot fulfill its obligations for a number of reasons, including situations in which a trust lacks sufficient funds to continue its charitable purpose, its purpose has already been accomplished, or its purpose becomes useless or illegal.[122]

The doctrine of cy pres has been applied in California to prevent a hospital from changing its original purpose.[123] As California courts have noted, and as suggested repeatedly in the Restatement, the organization itself cannot decide to allocate the assets of a charitable trust in a different manner than its original purpose intended.[124] Rather, the trustees must seek and receive court approval to alter the charitable mission of the organization.

When a secular hospital adopts the religious tenets of a Catholic hospital, the hospital has failed to fulfill its charitable obligations because the mission of the hospital has fundamentally changed. Using such an argument, the ACLU-NJ, as well as the Attorneys General of New Hampshire and New York, successfully used the

119. See Mary G. Blasko et al., Standing to Sue in the Charitable Sector, 28 U.S.F. L. REV. 37, 42 (1993); see also N.H. ATT'Y GEN. REP. ON OPTIMA HEALTH 11 (1998). Standing in the context of the Charitable Trust doctrine is fully discussed in Part IV. The traditional rule is that the attorney general is the sole enforcer of charitable trusts, but exceptions have evolved over the last thirty years. See Blasko et al., supra at 52-53. Such exceptions provided the basis for the ACLU-NJ to intervene in the Elizabeth hospital merger.

120. See RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

121. See id. at § 399 cmt. e.

122. See id. at § 399 cmt. j, k, m, n.

123. See Thomas Silk, Conversions of Tax-Exempt Nonprofit Organizations: Federal Tax Law and State Charitable Law Issues, 13 EXEMPT ORG. TAX REV. 745, 746 (1996); see, e.g., Queen of Angels v. Younger, 66 Cal. App. 3d 359 (1977) (applying reasoning analogous to the cy pres doctrine in a California case involving a hospital merger).

124. See, e.g., Queen of Angels Hosp. v. Younger, 136 Cal. Rptr. 36, 41 (Ct. App. 1977); RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

Charitable Trust doctrine in recent attempts to block hospital mergers. The next section examines the Charitable Trust doctrine generally, and its potential as a litigation strategy for reproductive rights groups when challenging hospital mergers that eliminate women's reproductive services.

B. Successful Use of the Charitable Trust Doctrine in New Jersey

The Elizabeth, New Jersey litigation involving the ACLU-NJ was unique, in that it was the first known time a group has successfully used the Charitable Trust doctrine to attack a merger and effect a favorable settlement to compensate for the loss of a community's access to reproductive services. This achievement can serve as a guide for other reproductive rights groups in the future, as they increasingly attack the religious hospital mergers that jeopardize women's reproductive health services. As discussed throughout this Note, however, the potential of the Charitable Trust doctrine is limited.

The ACLU-NJ demonstrated to the Chancery Court that EGMC was incorporated as a Charitable Trust, authorized by the state of New Jersey.[125] The ACLU-NJ argued that the state of New Jersey had imposed an obligation on EGMC to operate a secular hospital, and that adopting the Directives would constitute a fundamental change in the hospital's mission, in that it would be controlled by the Catholic religion.[126] By operating as a religious hospital post-merger, EGMC would not be able to satisfy its secular charitable obligations.[127] The ACLU argued that the doctrine of cy pres applied, and the hospitals had to provide for the availability of the secular health services that would be eliminated due to Trinitas Hospital's adoption of the Directives.[128] The ACLU-NJ succeeded in forcing the hospitals to establish a trust that would fund the reproductive services that would be discontinued as a result of the merger.

C. Successful Use of the Charitable Trust Doctrine In Other States

The Attorneys General of both New Hampshire and New York recently used the Charitable Trust doctrine to block hospital merg-

125. See Bylaws of St. Elizabeth's Hospital, supra note 95.

126. See Applicant-Intervener's Memorandum of Law in Support of Their Motion to Intervene at 18-20 (No. UNN-C-97-99).

127. See id. at 22.

128. See id. at 23.

ers in their respective states. The mergers in these two states are the only recent examples of the use of the Charitable Trust doctrine to challenge a hospital merger that eliminates health services from a community.[129] These mergers provide a useful comparison to the Elizabeth, New Jersey hospital merger, in determining whether the strategy of the ACLU-NJ can be replicated by other groups fighting for the continuation of women's reproductive services in a merger setting.

1. New Hampshire

In 1998, the New Hampshire Attorney General used the Charitable Trust doctrine to invalidate a Catholic hospital merger in the Manchester, New Hampshire community. The attorney general found that the hospitals had altered the fundamental mission of the hospital in merging, and had not sought the requisite court approval.[130] The attorney general's action thus enabled the community, as a public beneficiary of the charitable trust, to regain access to reproductive services eliminated because of this merger.

Two hospitals in Manchester, Catholic Medical Center [hereinafter "CMC"] and Elliot Hospital [hereinafter "Elliot"], had merged in 1994 into Optima Health Systems [hereinafter "Optima"][131] but never sought proper approval to transfer corporate assets to the parent company, Fidelity Health Systems.[132] In its agreement with Elliot, CMC stated that an aspect of its essential mission was "to maintain its identity as a Catholic hospital" under the authority of the Directives.[133] Elliot was established as a secular hospital, but CMC insisted that Elliot Hospital follow the Ethical and Religious Directives upon the merger.[134]

Elliot's physicians had been promised at the time of the merger that there would be no interference with their ability to

129. This note does not purport to be an exhaustive survey of the use of the Charitable Trust doctrine in challenging hospital mergers, but significant research uncovered only these two recent situations.

130. See N.H. ATT'Y GEN. REP. ON OPTIMA HEALTH, supra note 111, at 34.

131. The incorporation of the two hospitals into the new entity was accomplished by merging the parent companies of the secular and Catholic hospitals, but for simplicity I refer to each group by the name of the hospital initially controlled by the parent company.

132. See N.H. ATT'Y GEN. REP. ON OPTIMA HEALTH, supra note 111, at 21.

133. Id. at 14. (quoting Catholic Medical Center's Articles of Agreement).

134. See CATHOLIC HEALTH RESTRICTIONS UPDATED, supra note 1, at 5.

make the best medical judgments for their patients.[135] While the boards of the two hospitals never articulated an abortion policy,[136] many doctors at Elliot performed abortions and intended to continue doing so after the merger.[137] In 1996, however, after learning that some doctors continued to perform abortions, the Optima Board banned all abortions.[138] Significantly, 160 Elliot physicians had urged the Optima Health Board to "allow medical decisions to be made by professionals who are qualified to make those decisions in consultation with their patients."[139]

Community outrage, and in particular the loud voice of the group of doctors affected by the Optima Board's policies, led the attorney general to review the merger in 1997. The attorney general found, under the Charitable Trust doctrine, that Optima had failed to reconcile the different charitable missions of the two hospitals. Specifically, the attorney general found that in the four years since the merger, Optima had instituted radical changes in the community's health care system and changed the essential core mission of the secular hospital.[140] The change in mission required the hospitals to seek approval of the attorney general under the doctrine of cy pres, and the attorney general found that the hospitals had made no showing that it was illegal, impracticable or impossible to continue the distinct charitable missions of the two hospitals.[141]

Although successful, the New Hampshire attorney general's challenge of the Optima merger occurred in a starkly different setting from the Elizabeth merger. Because the attorney general himself challenged the merger, the Optima situation did not present any issues of standing that were of critical importance in the Elizabeth litigation. Consequently, a New Hampshire reproductive rights group faced with a hospital merger condoned by the attorney general cannot be assured, simply because of the Optima precedent, that they can achieve standing to sue.[142]

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135. See Merger Comes to an End (Merger Watch, Albany, N.Y.), at http://www.mergerwatch.org/hospitals/manchester.html (last visited Oct. 19, 2001) [hereinafter Merger Comes to an End].

136. See CATHOLIC HEALTH RESTRICTIONS UPDATED, supra note 1, at 5.

137. See Telephone Interview with Renée Steinhagen, supra note 84.

138. See CATHOLIC HEALTH RESTRICTIONS UPDATED, supra note 1, at 5.

139. Merger Comes to an End, supra note 135.

140. See N.H. ATT'Y GEN. REP. ON OPTIMA HEALTH, supra note 111, at 27.

141. See id. at 26.

142. The ability of such a group to achieve standing similar to that achieved by the ACLU-NJ is discussed more fully in Part V.

2. New York

The successful use of the Charitable Trust doctrine to restore reproductive services to the Manchester community parallels the New York attorney general's attempt to challenge a hospital sale involving the Manhattan Eye, Ear and Throat Hospital [hereinafter "MEETH"]. While the MEETH merger situation did not concern the elimination of reproductive services in a community, it aptly demonstrated the ability of the attorney general to use the Charitable Trust doctrine in challenging hospital mergers in New York.

The first known challenge to a New York hospital sale under the Charitable Trust doctrine occurred in 1999. Due to changes in the hospital industry, MEETH, a hospital primarily established to treat diseases of the eye, ear, throat and nose, experienced a declining inpatient population and could no longer afford to maintain its facilities. The Board ultimately voted to close the hospital and to sell the hospital's real estate assets to Memorial Sloan Kettering, another non-profit hospital, and a private real estate development group.[143] Initially, the MEETH doctors brought suit challenging the Board's decision by arguing that the Directors had exceeded their authority under the hospital's charter to sell the assets and close the hospital.[144] The court found that the doctors failed to state a cause of action under the applicable section of New York law.[145]

Under New York law, a hospital must obtain court approval for "fundamental changes in the life of a Type B charitable organization."[146] New York requires the attorney general to be statutorily involved in an action to ensure that the interests of the public, the ultimate beneficiaries of the charitable organization, are adequately represented.[147] After the doctors' suit was dismissed, the board of MEETH petitioned for judicial approval of its decision to sell its assets.[148] The attorney general, acting as parens patriae under New

143. See Board of Surgeon Directors Lacks Standing in Challenge to Sale of Hospital Buildings, 221 N.Y. L.J. 111 (1999). The hospital had three buildings at the 64th street location, one of which was to be sold to Memorial Sloan Kettering, and the other two to be sold to the private real estate developer. See id.

144. See id.

145. See id.

146. In re Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575, 592 (Sup. Ct. 1999). MEETH was a Type B corporation under New York Corporation law, which is a charitable organization.

147. See id. at 587.

148. See id. at 576.

York Nonprofit Corporation Law § 511, then challenged the transaction.[149]

In deciding whether to allow the merger to go forward, the court focused on whether the transaction promoted the purposes of the organization.[150] The court first found that the terms of the transaction were not fair and reasonable to the corporation, because they did not reflect the full value of the hospital.[151] Furthermore, the court determined that the proposed transaction would constitute a fundamental change in the charitable organization's mission, one that was not accounted for in the terms of the transaction.[152] The court ultimately denied MEETH's petition to sell its assets.

While the MEETH case did not involve women's health care issues, it is nevertheless strong precedent for reproductive rights groups to consider when confronted with a hospital merger in New York in which the charitable mission of a hospital is at risk of being fundamentally changed. Like New Hampshire, however, the MEETH litigation did not involve the issue of party standing, because the attorney general himself intervened to prevent the hospital from deviating from its fundamental mission when selling its assets. In New Jersey, the ACLU-NJ's ability to intervene as a party in the litigation was critical, and, as discussed more fully in Part IV, unique. Party standing represents the most significant barrier to the successful use of the Charitable Trust doctrine by reproductive rights groups challenging hospital mergers.

IV
ENFORCEMENT OF A CHARITABLE TRUST: WHO HAS STANDING TO SUE?

A. Standing Generally

Traditionally, only a public officer, and usually the state attorney general, has standing to bring an action to enforce the terms of a charitable trust.[153] The rationale behind this rule has been noted as the "inherent impossibility of establishing a distinct justiciable interest on the part of a member of a large and constantly shifting

149. See id. at 577, 586-88.

150. See id. at 591-92.

151. See id. at 594.

152. See id. at 594-95.

153. See Hooker v. Edes Home, 579 A.2d 608, 611-12 (D.C. 1990) (citing RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. a (1959)).

benefited class . . . ."[154] In many states, the attorney general is not a compulsory party to transactions involving charitable trusts. Rather, the parties to an action must provide notice to the attorney general, and she may use her discretion as to whether to intervene.[155] Thus, raising the awareness of the state attorney general is critical in mounting a challenge to a hospital merger.

The common law has a long tradition of disallowing private parties to bring suits against charitable corporations and instead has relied on state attorney general to oversee charitable corporations.[156] Most states have limited private party standing in order to protect the charitable organizations from "vexatious litigation,"[157] and to protect the assets of these organizations so they can direct their resources to their stated charitable purposes.[158] In New Jersey, the attorney general has the authority and responsibility to protect the public interest with respect to the activities and assets of charitable corporations.[159]

Relying on the attorney general to intervene in situations in which a charitable organization changes its mission is often problematic. In the Elizabeth merger, the attorney general was not willing to intervene in the transaction to challenge the merger.[160] While this lack of representation could positively affect a court's decision to grant standing to a class of plaintiffs such as the ACLU-NJ, if the particular state does not have a liberal standing rule, such a group may be left without any recourse. Furthermore, if an attorney general decides not to intervene, a court may not want to interfere with that decision.[161]

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154. Id. at 612.

155. See e.g., In re Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575 (Sup. Ct. 1999).

156. See Blasko et al., supra note 119, at 38.

157. See Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 756 (N.Y. 1985).

158. See Blasko et al., supra note 119, at 42.

159. See Letter from Mark Siman, Deputy Attorney General of New Jersey, to Richard Width, Esq., of Lindabury, McCormick & Eastabrook (Mar. 23, 1999) (on file with Renée Steinhagen). The letter concerned the consolidation of EGMC and St. Elizabeth, and the deputy attorney general noted that this power of the attorney general is independent of and in addition to that of the commissioner of health and senior services, who also reviews hospital merger applications.

160. See Interview with Renée Steinhagen, supra note 89. Ms. Steinhagen noted that the attorney general had approved the merger between EGMC and St. Elizabeth, despite the protests of the ACLU and other activist groups.

161. See Blasko et al., supra note 119, at 68-69. The authors noted that when the attorney general is available to enforce a Charitable Trust, courts are more likely to deny standing to plaintiffs such as those who fit within the special interest exception. Id. at 69.

Attorneys General may not have the resources to become involved in merger situations, or they may have conflicts with the transaction, for religious or other reasons.[162] The preservation of reproductive services for women may not be an important issue to an attorney general or could be a controversial political issue in an election year.[163] Additionally, the merger of two hospitals is typically a benefit to a community,[164] and an attorney general may believe that she is acting in the best interest of the public by allowing the merger to proceed.

As a result of the problems associated with attorney general enforcement of charitable trusts, many states have modernized their standing rules.[165] These states have recognized exceptions to the traditional rule of party standing, although the definition of the exception varies significantly by state. Generally, such exceptions allow certain groups of people to intervene in litigation involving charitable organizations.[166] The Restatement (Second) of Trusts notes that:

> A suit can be maintained for the enforcement of a charitable trust by the attorney general or other public officer, or by a cotrustee, 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.[167]

The "special interest" rule is an exception to the traditional rule that only the attorney general has standing to bring an action to enforce a charitable trust.[168]

The critical issue in determining a plaintiff's standing is the type of interest the group has in the charitable organization.[169]

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162. See id. at 47-48.

163. The attorney general of New York, Eliot Spitzer, found that secular and sectarian hospital mergers were of such great concern to his state that he set up a reproductive rights division specifically directed towards the development of useful strategies to preserve women's access to reproductive services. See Letter from Jennifer Brown, Director, Reproductive Rights Unit, Office of the attorney general of the State of New York, to Renée Steinhagen, Special Counsel to the Women's Rights Litigation Clinic at Rutgers Law School (Oct. 21, 1999) (on file with Renée Steinhagen).

164. In many situations, hospitals have noted that a community could be left without any hospital to service the needs of the community if a merger transaction does not succeed.

165. See Blasko et al., supra note 119, at 48-52.

166. See id. at 52.

167. RESTATEMENT (SECOND) OF TRUSTS § 391 (1999) (emphasis added).

168. See id.; see also Hooker v. Edes Home, 579 A.2d 608, 612 (D.C. 1990).

169. See Blasko et al., supra note 119, at 52.

The Restatement notes that "the mere fact that a person is a possible beneficiary is not sufficient to entitle him to maintain a suit for the enforcement of a charitable trust."[170] The Restatement also notes that a person's status as a member of the public does not automatically entitle that person to sue for enforcement of a charitable trust.[171] Such a determination depends on various factors, and the Restatement provides examples of groups with special interests.[172] Significantly, beneficiaries of a charitable organization often have difficulty defining themselves as a group with a special interest.[173]

Courts look to several factors to determine whether a party has standing to sue. First, they examine the nature of the class of beneficiaries. The "special interest" exception allows a group access to the courts only if it has a legitimate connection with the charitable organization and its purposes.[174] For example, in Alco Gravure, Inc. v. Knapp Foundation,[175] the New York Court of Appeals found that a sharply defined class of plaintiffs that is limited in number could meet the definition of the "special interest" exception.[176] In that case, the employees, as intended beneficiaries, challenged the Foundation's decision to apply principal and income of the Foundation to other charitable organizations.[177] The court noted that the plaintiffs in the case were entitled to a preference in the distribution of the charitable organization's funds, prior to the organization's divestment of its assets.[178] Generally, groups falling within the special interest exception must demonstrate that they have a

170. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1999); see also Hooker, 579 A.2d at 612 (citing Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752 (N.Y. 1985)); Lefkowitz v. Lebensfeld, 417 N.Y.S.2d 715, 720 (1979). The Restatement cites several examples of persons who have a special interest, and can therefore maintain a suit on her behalf as well as on the behalf of other members of the class. See RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1999). These include: a small class of persons for whom a charitable trust was created, where a charitable trust has been created to relieve poverty or promote education, and persons who preferentially receive these benefits may maintain such a suit. See id. Notably, the Restatement also states that when another party brings a suit for enforcement of a Charitable Trust, the attorney general should be joined as a party. See id.

171. See RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. d (1999).

172. See id. at cmt. c. Examples of special interest groups include a church minister for whom a trust was established, or those receiving benefits from a trust created for the promotion of education or the relief of poverty. See id.

173. See Blasko et al., supra note 119, at 60.

174. See id. at 60-61.

175. 479 N.E.2d 752 (N.Y. 1985).

176. See id. at 755.

177. See id. at 754.

178. See id. at 755-56.

special interest in the funds held for a charitable purpose, and that the group of beneficiaries is defined and limited in number, distinct from members of the general public.[179]

Of equal importance to a court's determination of what party has standing to sue is the type of act of which the party complains. In Alco Gravure, for example, the court was concerned that the charitable organization would be terminated and that "the complete elimination of the individual plaintiffs' status as preferred beneficiaries of the funds" would ensue.[180] That the transfer of assets was such a significant event in the life of the Foundation weighed heavily in the court's decision to allow the plaintiff employees standing.[181] When a hospital abandons its charitable mission as the result of a merger, and no longer provides fundamental health services to women, a court may be permissive in granting standing to a group with a "special interest." Significantly, however, the Alco Gravure plaintiffs met the court's definition of a group with a "special interest" because they were limited in number and sharply defined.[182]

Whether the beneficiaries of a community hospital's services can obtain standing to challenge a hospital merger depends largely on how broadly a court in the particular jurisdiction defines "special interest." A review of standing rules in several states suggests that the ACLU-NJ's ability to intervene was unusual, due to New Jersey's liberal construction of standing rules in the context of the Charitable Trust doctrine. In similar cases in other states, courts may not be as sympathetic to the claims of community members affected by the elimination of reproductive services.

B. States With Liberal Standing Rules

Chancery Court Judge Miriam Span's determination that the ACLU-NJ had standing to sue in the Elizabeth hospital litigation presents a different interpretation of the "special interest" exception than was pronounced in Alco Gravure. New Jersey's liberal standing rule allowed Judge Span to find that the ACLU-NJ could intervene. New Jersey is an example of a state whose common law

179. See Hooker v. Edes Home, 579 A.2d 608, 613 (D.C. 1990) (discussing Alco Gravure, Inc., 479 N.E.2d at 755); see also Blasko et al., supra note 119, at 70.

180. Alco Gravure, Inc., 479 N.E.2d at 756.

181. See id.

182. See id. at 755.

interprets "special interest" broadly. Over thirty years ago, a New Jersey case established this liberal standing rule.[183]

In City of Paterson v. Paterson General Hospital, the Chancery Court determined that the decision of a hospital's trustees to relocate to a neighboring city was in the best interests of the hospital. Although the court ruled against the citizens of Paterson in determining that the hospital could relocate, despite its charitable mission to serve that community, the court noted that "[a] person who has a special interest in the performance of a charitable trust can maintain a suit for its enforcement."[184] The court found that in New Jersey, as well as elsewhere in the United States, Attorneys General had neglected their duties of supervising charitable trusts.[185] The court used this finding to suggest that "[w]hile public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest."[186]

Since City of Paterson, New Jersey has maintained a liberal definition of "special interest" such that parties with an interest in hospital merger litigation, such as the ACLU-NJ, can intervene. One year after City of Paterson, the Chancery Court held that individual members of a general benefited class are able to bring suits to compel the enforcement of a charitable trust.[187] More recently, in Newark v. Essex County Board of Taxation,[188] citizens were allowed to intervene in litigation because they would be affected by the determination of whether a tax abatement statute was constitutional.[189]

Furthermore, New Jersey allows liberal intervention in the case of organizations such as the ACLU-NJ. In Crescent Park Tenants Association v. Realty Equities Corporation,[190] the court found that the plaintiff non-profit corporation had standing because the harm to the organization's constituency constituted a "sufficient stake and real adverseness."[191] In determining whether an organization may

183. See City of Paterson v. Paterson Gen. Hosp., 235 A.2d 487 (N.J. Super. Ct. Ch. Div. 1967).

184. Id. at 495 (citing 4 SCOTT W. AUSTIN, SCOTT ON TRUSTS 2758 (2d ed. 1956)).

185. See id.

186. Id.

187. See Township of Cinnaminson v. First Camden Nat'l Bank & Trust Co., 238 A.2d 701, 707 (N.J. Super. Ct. Ch. Div. 1968).

188. 707 A.2d 493 (N.J. Super. Ct. App. Div. 1998).

189. See id. at 498.

190. 275 A.2d 433 (N.J. 1971).

191. Id. at 438.

obtain standing, courts examine whether the public interest in the matter is sufficiently implicated and whether the plaintiff is an "interloper"[192] or "stranger to the controversy."[193] In another situation involving reproductive rights but not invoking the Charitable Trust doctrine, two organizations, New Jersey Religious Coalition for Reproductive Choice and New Jersey Right to Choose, were granted standing because of their substantial interest in maintaining access to reproductive services for their constituents.[194]

In the Elizabeth litigation, the ACLU-NJ argued that its members were directly affected by the consolidation proposed, and that the organization was committed to ensuring that reproductive services would be provided in their community.[195] The ACLU-NJ sought standing to protect the interests of the beneficiaries of EGMC, and to ensure that the directors of the hospital complied with their duty to maintain the charitable mission of the hospital to "care, cure and nurture" sick and injured persons.[196] Because EGMC had operated as a secular hospital for its entire existence, the ACLU-NJ argued that the hospital had a fiduciary duty to ensure that the assets of the hospital were used for the secular purposes for which they were intended. Transferring its assets to St. Elizabeth, whose bylaws were dominated by Catholic teachings, fundamentally changed the mission of EGMC. Judge Span articulated that intervention was justified because the court needed to determine whether the initial settlement between the hospitals and Planned Parenthood was adequate.[197]

The ACLU-NJ represented precisely the "possible beneficiar[ies] of a charitable trust" that are not entitled to sue for enforcement of a trust in many other states.[198] Because of New Jersey's liberal intervention rules, however, Judge Span found that a group such as the ACLU-NJ could fall within the "special interest" exception to the standing rule. As long as the party seeking intervention is a small, identifiable class, not a class of possible benefi-

192. In re Quinlan, 355 A.2d 647, 660 (N.J. 1976).

193. Bergen County v. Port of N.Y. Auth., 160 A.2d 811, 813 (N.J. Sup. Ct. 1960).

194. See Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982). In that case, the reproductive rights advocates challenged a statute prohibiting Medicaid funding for abortions except when necessary to preserve a woman's life.

195. See Applicant-Intervener's Memorandum of Law in Support of Their Motion to Intervene at 13-14, (No. UNN-C-97-99).

196. Id. at 8 (citing the Bylaws of Elizabeth General Medical Center).

197. See Spoto, supra note 85, at U39.

198. See, e.g., Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 755 (N.Y. 1985).

ciaries, a court may grant standing.[199] As a result, the ACLU-NJ was able to effect a settlement they would have otherwise had to rely on the attorney general to achieve.

In addition to the nature of the class seeking standing, various other factors bear on a court's standing determination, including the effectiveness of the attorney general and the nature of the act complained of.[200] In a California case, the attorney general's inadequate enforcement of charitable trusts weighed heavily on the court's decision to allow intervention by a private party to enforce a charitable trust.[201] Additionally, an egregious violation of a charitable organization's purpose, such as that in Alco Gravure Inc. v. Knapp Foundation,[202] increases a party's chance of obtaining standing.[203] Groups facing hospital mergers, in which services will be terminated, thus could stand a strong chance of affecting the state's decision of whether to allow a hospital merger to proceed.

Fundamentally, the party seeking intervention must have a strong connection to the litigation, one that is neither ambiguous nor similar to the interest of the general public.[204] Many jurisdictions might define the ACLU-NJ as an amorphous class of possible beneficiaries. New Jersey's liberal standing rules, however, allowed for the ACLU-NJ to become a party to the litigation. In the states discussed in the following section, however, intervention by such a group is not a possibility, and alternative methods of challenging hospital mergers must be pursued.[205]

C. States With Restrictive Standing Rules

Many states have not modernized their standing rules,[206] and even those states that do recognize the "special interest" exception do not interpret this term liberally. This section examines those states, such as New York, Massachusetts, Delaware and Texas, that

199. See id.; see also Blasko et al., supra note 119, at 61, 70.

200. See Blasko et al., supra note 119, at 61.

201. See Holt v. Coll. of Osteopathic Physicians and Surgeons, 394 P.2d 932, 935-36 (Cal. 1964).

202. 479 N.E.2d 752 (N.Y. 1985).

203. See id. at 756; Blasko et al., supra note 119, at 62.

204. See Blasko et al., supra note 119, at 70.

205. See Telephone Interview with Renée Steinhagen, supra note 84. Ms. Steinhagen pointed out that New Jersey is the only state to allow a private party such as the ACLU-NJ to intervene in a Charitable Trust litigation. My research, while not exhaustive, confirmed this.

206. These states, such as Delaware, Texas, and Oklahoma, rely on the traditional notion that the attorney general is the sole enforcer of charitable trusts. See Blasko et al., supra note 119, at 44.

do recognize the "special interest" exception, but nevertheless define it narrowly so that a plaintiff such as the ACLU-NJ could not intervene as a party in a hospital merger.

1. New York

The traditional rule in New York was that the attorney general was the sole statutory representative of the beneficiaries of a charitable trust.[207] The rationale, as discussed supra, was based on the idea that a large and constantly changing class could not have a distinct interest in the enforcement of a charitable trust, and the attorney general was the best party to act on behalf of beneficiaries of charities.[208] The attorney general continues to retain broad authority to enforce charitable trusts, as courts remain unwilling to allow standing to private parties without a formal relationship to the charity.[209]

New York Not-For-Profit Corporation Law § 907(b) states that "[a]ny person interested may appear and show cause why the application should not be granted."[210] While this suggests that private parties will not have standing to challenge a merger, a number of court decisions in New York recognize the "special interest" exception, but in a much narrower sense than New Jersey does. The general rule in New York is based on the court's decision in Alco Gravure v. Knapp Foundation, in which the Court of Appeals stated that "[t]he general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust."[211] The Alco Gravure court compared the class to whom it granted standing with members of the general public. The court found that public citizens are not sharply defined beneficiaries of a trust, but rather only possible beneficiaries of a charitable trust, and thus are not entitled to sue for the trust's enforcement.[212]

In In re Estate of May,[213] the court found that a diocese was one among an unlimited and undefined group lacking a preferred status under the will, and consequently could not attain standing to

207. See Pamela A. Mann & David G. Samuels, Standing to Pursue Claims Involving Charitable Organizations, 210 N.Y. L.J. 21, July 30, 1993, at 1; see also RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. a (1959).

208. See In re Schlussel, 89 N.Y.S.2d 47, 53, 55-56 (Sup. Ct. 1949).

209. See Mann & Samuels, supra note 207, at 1.

210. N.Y. NOT-FOR-PROFIT CORP. LAW § 907(b) (McKinney 1999).

211. Alco Gravure, Inc., 479 N.E.2d at 755.

212. See id. at 755-56.

213. 623 N.Y.S.2d 650 (App. Div. 1995).

sue for enforcement of the trust.[214] As many courts have noted, the policy of preventing those parties that do not fall within a narrow and specially carved exception is to avoid the proliferation of wasteful and vexatious lawsuits.[215]

The ACLU-NJ would certainly not fit within New York's narrow definition of a trust beneficiary. The ACLU-NJ represents the members of the general public that New York courts disallow from enforcing a charitable trust. Furthermore, in the Elizabeth merger, there was no evidence that the class of potential beneficiaries would be limited in number. Thus, New York's standing rules would likely prevent parties such as the ACLU from challenging hospital mergers in court, and such parties would instead have to rely on the attorney general to enforce a charitable trust.[216]

2. New Hampshire and Massachusetts

New Hampshire courts have been silent as to whether a private party may intervene to enforce a charitable trust. As discussed supra, the Attorney General of New Hampshire noted in his report on the Optima Health hospital merger in 1998 that his office has the authority to "protect the public interest" by enforcing the duties of charitable trusts.[217] R.S.A. § 7.19-b, enacted in 1997 after the Optima hospital merger, provides that merging hospitals must give the public notice of the proposed transaction, so that a public hearing may be conducted if necessary. Similar to the New York statute, this suggests that reproductive rights groups, representing the public, would not have the ability to challenge a Catholic hospital merger through the Charitable Trust doctrine.

Other states have provisions similar to New York and New Hampshire regarding who has standing to sue for the enforcement of a charitable trust. In Massachusetts, an appellate court recently held that only the attorney general has standing to bring an action alleging misuse of charitable funds.[218] However, the court did rec-

214. See id. at 652.

215. See Alco Gravure, Inc., 479 N.E.2d at 756.

216. In a recent case in New York, the attorney general challenged the closing of a school that had been funded through the charitable bequests of a single donor. The court found that the school should remain open so as to fulfill the intent of the donor who was responsible for creating the school. See In re Abrams, 574 N.Y.S.2d 651, 655 (Sup. Ct. 1991), aff'd, 614 N.Y.S.2d 321 (App. Div. 1994). This case demonstrates the limitations of New York's strict standing rules and further acknowledges the degree to which an attorney general can effect a favorable result in Charitable Trust litigation.

217. N.H. ATT'Y GEN. REP. ON OPTIMA HEALTH, supra note 111, at 11.

218. See Weaver v. Wood, 680 N.E.2d 918, 922 (Mass. 1997).

ognize a "special interest" exception where a claim arises from a personal right that directly affects members of a charitable organization.[219] Another Massachusetts court noted that "it is the exclusive function of the attorney general to correct abuses in the administration of a public charity. . . ."[220] That court also recognized the special interest rule, by finding that plaintiffs with interests distinct from those of the general public may have standing to assert their rights.[221] As in New York, therefore, a group such as the ACLU would likely not have standing to enforce a charitable trust, because the group represented by the ACLU-NJ more closely resembles an amorphous and undefined class, rather than beneficiaries with a narrow and well-defined interest in the charitable organization.[222]

D. Barriers Caused by Strict Standing Rules

Even if a party such as the ACLU-NJ can achieve standing in a suit involving enforcement of a Charitable Trust, other barriers exist that limit a party's success in using this strategy in a hospital merger. Strict standing rules appear to have a dramatic effect on the types of settlements private parties can achieve. The results of a hospital merger litigation involving the Charitable Trust doctrine appear dependent on the identity of the party with standing. In both New Hampshire and New York, where the attorney general intervened in mergers, the Attorneys General were able to avert the merger. In contrast, in Elizabeth, the ACLU-NJ, as a "special interest" plaintiff, was not able to prevent services from being eliminated. Instead, the ACLU-NJ obtained a settlement that did not restore reproductive services to the community, and left many ques-

219. See id. at 923.

220. Lopez v. Medford Cmty. Ctr., Inc., 424 N.E.2d 229, 232 (Mass. 1981) (quoting Dillaway v. Burton, 153 N.E. 13 (Mass. 1926)).

221. See id.

222. Other courts interpret the standing rule in the context of the Charitable Trust doctrine more narrowly than New York and Massachusetts. Courts in both Delaware and Texas allow only the attorneys general of each state to enforce charities. See, e.g., Wier v. Howard Hughes Med. Inst., 407 A.2d 1051, 1057 (Del.Ch. 1979); Nacol v. State, 792 S.W.2d 810, 812-13 (Tex. Ct. App. 1990). These states rely on the policy reasons underlying the traditional rule to limit standing. In Nacol v. State, a Texas court found that members of a charitable institution had no greater interest than members of the general public in attacking the charity's decision to liquidate its assets. See id. at 812-13. Thus, any attempt by a special interest group, such as the ACLU, to challenge a Catholic hospital merger in Texas or Delaware would fail because of this strict standing rule. These groups would be forced to rely on the attorney general to satisfy its demands for the continuation of women's reproductive health care services in their communities.

tions unanswered.[223] This suggests that, despite a private party's ability to achieve standing, that party may still not be able to prevent a merger from resulting in the elimination of reproductive services in a community.

Furthermore, both Renée Steinhagen, of the Women's Rights Clinic at Rutgers Law School, and Lois Uttley, Project Director of Merger Watch,[224] have indicated that mobilizing efforts to get parties to intervene in litigation is both difficult and expensive.[225] Reproductive rights advocates often have difficulty finding parties willing to become involved. Notably, however, merger challenges tend to have more force when doctors are involved, either individually or as a group.[226] Doctors may constitute, in the eyes of the Attorneys General or the courts, a more significant group with which to contend, in contrast with a group of public beneficiaries of a charitable trust.

Standing is the most significant threshold requirement for a group to meet in using the Charitable Trust doctrine to challenge a hospital merger. If communities cannot encourage legislatures or the courts to liberalize the standing rule in the Charitable Trust context, and reproductive rights groups cannot attain standing in a merger litigation, these groups must rely on other means to preserve reproductive services for women when hospitals merge.[227]

223. The unsettled issues are discussed more fully in Part V.

224. Merger Watch is a non-profit organization created to monitor and report on hospital mergers that restrict access to reproductive health care.

225. See Telephone Interview with Renée Steinhagen, supra note 84; Telephone interview with Ronora Pawelko, Assistant to Lenora Lapidus at Merger Watch (February 8, 2000).

226. See Telephone Interview with Renée Steinhagen, supra note 84. In the Elizabeth litigation, a doctor who performed abortions at EGMC was a party in the action. Additionally, in the Optima Health merger, a group of doctors was the impetus for the initiation of the attorney general review of the merger, when Optima decided to prevent doctors from performing abortions. Furthermore, in the MEETH litigation, the doctors first filed suit against the hospital challenging its plans to merge, and when their case was dismissed, the attorney general stepped in. These situations suggest that doctors as a group, or individually, can provide compelling reasons for private parties, or the attorney general, to become involved in merger litigation.

227. Other strategies to challenge hospital mergers are beyond the scope of this Note, but a commonly used strategy is the use of antitrust laws to block a hospital merger where there is no other hospital to provide reproductive services to the community. Community groups can also use the strength and energy of their members to fight the elimination of reproductive health care services. Lastly, Catholics for a Free Choice advocates the use of Directive 69 in challenging hospital mergers. This directive allows Catholic hospitals to enter into partnerships with non-Catholic institutions that continue to offer a full range of reproductive health

Fundamentally, having the state attorney general on the side of a reproductive rights group challenging a Catholic hospital merger is of critical importance.

CONCLUSION

In most Catholic health care settings, women have severely limited access to reproductive health care. The mergers that are occurring at a rapid pace throughout the United States brings this issue to light, and causes great concern to the many communities affected by the Directives. Although advocates recognize that Catholic hospitals should not be forced to perform services against their religion, a merger should not force a secular institution to refrain from providing such services.

The Charitable Trust doctrine is one viable strategy activist groups can use to retain women's reproductive services in their communities. While successful in forcing a monetary settlement with the hospitals, the settlement achieved in Elizabeth, New Jersey, nevertheless did not succeed in preserving reproductive services in the community. Furthermore, several other barriers to this strategy exist, most notably the restrictive standing rules in place in most states. New Jersey has the most liberal standing rule of all states, such that it allowed the ACLU-NJ to intervene as a plaintiff to force the hospital to settle with the members of the community the activist group represented. The ACLU can not expect to achieve this same victory in states that follow traditional standing rules. In states such as New York, community groups must rely on the attorney general to block a merger. In some areas, Attorneys General eagerly become involved in mergers that affect the reproductive rights of a community. In other areas, such as in Elizabeth, New Jersey, Attorneys General condone mergers and base their decisions on the financial need for a merger in a community.

The distinctions in standing rules in each state highlight the need for reproductive rights groups to tailor a strategy for each community that meets the needs of each particular situation. Catholic hospital mergers jeopardize reproductive services and restrict women's choices to health care. Communities and governments should actively scrutinize such transactions, because they reflect a marked change in social policy.[228]

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services, provided the Catholic facility "limit[s] its involvement in accord with the moral principles governing cooperation." DIRECTIVES, supra note 2, at 27.

228. See, e.g., Steve Chambers, supra note 103 at 1.