STATE OF INDIANA	)	IN THE SUPERIOR COURT, PROBATE
	)SS:	
COUNTY OF MARION	)	TRUST DOCKET T-62, Page 11
IN THE MATTER OF THE	)	
PUBLIC BENEVOLENT TRUST	)	
U/W MARY POWELL CRUME,	)	
DECEASED; INDIANAPOLIS	)	
HUMANE SOCIETY, TRUSTEE	)	

COMPLAINANTS' BRIEF DEMONSTRATING LEGAL STANDING TO OBJECT TO TRUSTEE'S ACCOUNTING AND TOPURSUE COMPLAINT FOR BREACH OF FIDUCIARY DUTY OWED TO PUBLIC CHARITABLE TRUST; RENEWED MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Pursuant to I.C. 30-4-5-12(c), Ms. Norma Jean Balcom, Alliance for Responsible Pet Ownership, Inc.("ARPO"), Home for Friendless Animals, Inc.("HFA"), Move to Act ("MTA"), Southside Animal Shelter, Inc.("Southside"), and Spay-Neuter Services of Indiana, Inc.("Spay-Neuter") filed, or joined in as the case may be, an objection to the Trustees' Twenty-Second Annual Accounting of the above captioned public charitable trust (the "Crume Trust"). Humane Society of Indianapolis, Inc. ("H.S.I."), as beneficiary, filed its request to pledge up to 90% of the Crume Trust assets as collateral for H.S.I. to obtain a bank loan of up to $1,700,000 ("Request to Borrow").

The Attorney General changed its earlier position[1] and has now filed its objection to H.S.I.'s most recent accounting. The Attorney General has also filed its Objection to Collateralization of Trust due to lack of any security or collateral back to the Trust; as well as its request for appointment of an independent co-trustee. However, the Attorney General now indicates that it might again change its mind on the objection to collateralization of the trust if the independent co-trustee were to opine that the beneficiary/borrower is creditworthy.

Under I.C. 30-4-5-14, Complainants ARPO, HFA, MTA, Southside and Spay-Neuter filed their complaint against defendant, H.S.I., for breach of fiduciary duty and objection to

[1] Prior to MTA filing its Objection to Trustee's Accounting, the Attorney General submitted to H.S.I. its statement that it "does not object" to H.S.I.'s accounting. After Complainants revealed to the Attorney General a significant omission by H.S.I.'s accounting of an asset worth more than $250,000 ($224,000 book value plus reversionary interest in real estate and improvements), the Attorney General filed its Objection to Accounting.

collateralization of Crume Trust funds, alleging mismanagement of trust funds, self-dealing and conflicts of interest and requesting the removal of H.S.I. as trustee of the Crume Trust.

Both H.S.I. and the Attorney General then moved to dismiss all six of the complainants in the objection to the trustee's accounting and all five animal welfare service complainants in the complaint for lack of standing. Complainants (except Jean Balcom) requested leave to amend their complaint due to new evidence and to add a necessary defendant co-trustee, National City Bank of Indiana. The amended complaint virtually has been held in abeyance until the Complainants persuade this Court that they have the legal standing required to pursue their actions to enforce the administration of the public charitable Crume Trust.

This brief demonstrates that under Indiana law the Attorney General is not the exclusive party that may initiate an action involving enforcement or protection of a public charitable trust. Indiana Code 30-4-5-12 sets forth the parties, including but not limited to the Attorney General, who may demand an accounting. Those same parties can object to that accounting and bring further action to require proper administration or to prosecute mismanagement. The Complainants satisfy the statutory requirement on standing.

While the Attorney General represents the interests of the general public of Central Indiana as the public might be affected by H.S.I.'s Request to Borrow and its Trust Accounting, the Complainants have interests in the Crume Trust that are distinctly different than the public at large. Further, the Complainants' interests in the Crume Trust are facing immediate harm if the Trust's assets are loaned out to and then lost to a spendthrift beneficiary. Thus, the Complainants meet the requirements of the general rule on legal standing. Moreover, under certain exceptions to the general rule of legal standing, the complainants have standing because it is proper for individuals to bring such actions (1) as representatives of an identifiable class of organizations having similar special interests in preventing loss of Crume Trust assets; (2) where the proper parties to bring the action – here the Humane Society as beneficiary, and the Humane Society and National City Bank, as trustees – fail to do so because of fraud or other self-interest; and (3) where the Attorney General has a conflict of interest.

I. INDIANA ATTORNEY GENERAL DOES NOT HAVE EXCLUSIVE RIGHT OF ENFORCEMENT OF PUBLIC CHARITABLE TRUSTS

A. No statute in the Indiana Code or the Indiana Administrative Code vests in the Attorney General the exclusive right to enforce a charitable trust. The Supreme Court of Indiana has held that the office of Attorney General of the State of Indiana is statutory, rather than constitutional. State v. Rankin, 294 N.E.2d 604 (Ind. 1973), appeal after remand 313 N.E.2d 705. The Attorney General has only the powers delegated to him or her by statute, and does not have the powers of an Attorney General at common law. State ex rel. Pearson v. Brown, *537 N.E.2d 534* (Ind. App. 1989) (because the applicable statute under which the State, by its Attorney General, sought reimbursement of funds required that written examination show malfeasance, misfeasance or nonfeasance before the Attorney General could initiate an action; since none was alleged in the examination, Attorney General lacked standing to sue);[2] Ford Motor v. Department of Treasury of the State of Indiana, 65 S.Ct. 347 (1945) (Indiana case decisions construe strictly the statutory powers conferred on the Indiana Attorney General and hold that he exercises only those powers delegated to him by statute, and the Attorney General does not possess the powers of an attorney general at common law.) Therefore, the Attorney General only has the specific authority, and is empowered to take only certain actions, as granted by the statutes of the State of Indiana.

No statute in the Indiana Code or the Indiana Administrative Code vests in the Attorney General the exclusive right to enforce a charitable trust. See I.C. 4-6-1 *et. seq.* In a broad brush, I.C. 4-6-2-1 directs the Attorney General to prosecute and defend all legal actions that the State may institute or become named a party to,[3] as well as requirements to "attend to the interests of the

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[2] I.C. 5-11-5-1 stated in pertinent part: If the written examination "discloses malfeasance, misfeasance, or nonfeasance in office or of any officer or employee, a copy of the report, signed and verified, shall be placed by the state examiner with the attorney general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer, or upon the officer's official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for."

[3] I.C. 4-6-2-1 states: Such attorney-general shall prosecute and defend all suits that may be instituted by or against the state of Indiana, the prosecution and defense of which is not otherwise provided for by law, whenever he shall have been given ten (10) days' notice of the pendency thereof by the clerk of the court in which such suits are pending, and whenever required by the governor or a majority of the officers of state, in writing, to be furnished him within a reasonable time; and he shall represent the state in all criminal cases in the Supreme Court, and shall defend all suits brought against the state officers in their official relations, except suits brought against them by the state; and he shall

State in all actions in which the State is or may become interested in the Supreme Court." This statute of the Indiana Code governing the office of Attorney General only authorizes the Attorney General to initiate or defend such suits "the prosecution and defense of which is not otherwise provided for by law." Thus, if the Code expressly provides for standing to initiate actions involving public charitable trusts, which it does under I.C. 30-4-5-12, then the Attorney General's standing to bring actions under I.C. 4-6-2-1 is restricted.

B. Statutes Providing for the Prosecution and Defense of Certain Actions Take Precedent Over Broader Authority Under I.C. 4-6-2-1. Indiana has long recognized that more specific applicable statute takes precedence over broader statutory provisions. Where the prosecution and defense of actions is more specifically set forth in applicable statutes, then I.C. 4-6-2-1 does not control. I.C. 4-6-2-1. For example, Indiana provides specific guidelines for who may institute, intervene or defend an action under the Uniform Declaratory Judgment Act. I.C.34-4-10-2 (plaintiff must have a right that is affected by an ordinance or statute before declaratory relief can be granted); Montagna v. City of Elkhart, 271 N.E.2d 475 (Ind. App. 1971). Federal bankruptcy cases also have their own rule for standing. Hammes v. Brumley, 659 N.E.2d 1021 (Ind. 1995).

Likewise, Indiana specifically provides under I.C. 30-4-5-12(c) that a trustee of a charitable trust is required to provide an accounting to any of the following who petition the Court for such accounting: (1) the trust's settlor, (2) a beneficiary or his personal representative, (3) a person designated by the settlor to supervise the administration of the trust, or (4) "any other person having an interest in the administration of the benefits of the trust, including the attorney general in the case of a charitable trust." (underline added for emphasis). It is important to note that the statute states "including the attorney general" if the trust is a public benevolent trust; but the statute does not limit such legal standing to the exclusive authority of the Attorney General. The Court may not read into the statute any rule requiring exclusive authority in the Attorney

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be required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested in the Supreme Court of this state.

General. Herron v. State, 729 N.E.2d 1008 (Ind. App. 2000); Woods v. State[4] Thus, I.C. 30-4-5-12 and-14, under which complainants have initiated their actions[5], do not give the Attorney General exclusive "interest" in requesting accountings from charitable trustees. Indiana's Attorney General clearly does not have the exclusive right to request an accounting, object to an accounting, to request removal of trustee for breach of fiduciary duty and conflicts of interest, or other actions to enforce the proper administration of charitable trusts.

C. Boice v. Mallers Expressly Modified by Statute to Enlarge Classes of Parties Who May Take Action in Public Charitable Trust Cases. The Attorney General and H.S.I. have relied heavily, but inappropriately, on the ruling in Boice v. Mallers, 96 N.E.2d 342 (Ind. App. 1951) to argue that the "Attorney General is the only proper party to litigation involving public charitable trusts." See Trustee's [H.S.I.'s] Motion to Dismiss and Joinder in Attorney General's Motion to Dismiss, par. 7. Indeed, in its Response to Objections to Accounting, H.S.I. misleadingly states that the Attorney General is "*the* person who, under Indiana Code 30-4-5-12(c), may petition for an accounting [of a public charitable trust]" and who may seek further action pursuant to 30-4-5-14. This statement by H.S.I. clearly omits all other parties that are specifically named in the statute as set forth above.

However, 1971's codification of Indiana's trust law[6] specifically and deliberately modified Boice; indeed, the Code added parties who may sue to enforce charitable trusts in addition to the Attorney General. The Trust Code Commission's[7] comment to 30-4-5-12(c) expressly states that this statute was intended to broaden the class of persons who can bring an action involving a public charitable trust.[8] The Executive Secretary of that Trust Code Commission, Anthony E. Ard, outlined in great detail the significant changes made to Indiana's trust law by this sweeping

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[4] The Court of Appeals in Herron v. State: "Moreover, it is just as important to recognize what a statute does not say as it is to recognize what it does say. [citing Woods v. State,]. A court may not read into a statute that which is not the expressed intent of the legislature." See II, *infra*.

[5] I.C. 30-4-5-14 allows any party having the right to demand an accounting under 30-4-5-12(c) the right to object to that accounting and to file a responsive pleading seeking broader remedies for any abuse of trust administration.

[6] Pub. L. No. 416, ch. 1 §7 [1971]; formerly Senate Enrolled Act 131 introduced by Sen. Gutman.

[7] The Trust Code Commission was created by the Indiana General Assembly in 1967. Ch. 120, § 1 [1967] Ind. Acts 222.

[8] "The report of the Trust Code Commission . . . may be consulted by the courts to determine the reasons, purpose and policies of this [Code], and may be used as a guide to its construction and application." Pub. L. No. 416, ch. 1 §7 [1971] Ind. Acts 1913; IND. ANN. STAT. § 31-1307 (Supp. 1971); I.C. 30-4-1-7.

codification and set forth the principles or themes that guided the Commission in drafting those statutes:

> *Comment* [to I.C. 30-4-5-12(c)]: This subsection replaces Ind. Stat. Ann. § 31-703 (1969) and is intended to cover all trusts, including charitable trusts established for either a beneficial public purpose or a specific charity. **With respect to a charitable trust, this subsection grants standing to a broader class of persons than either the Restatement (Second) or present Indiana case law**. See RESTATEMENT (SECOND) OF TRUSTS § 391 (1959); **Boice v. Mallers**, 121 Ind. App. 210, 96 N.E.2d 342 (1951).][9]

Emphasis in **bold** added. Unequivocally, Boice is not valid precedent in Indiana as to the Attorney General being "the only proper party" to enforce charitable trusts. (However, it is important to note that Boice actually states that the plaintiff would have been "interested" in the charitable trust were he a creditor or beneficiary of the trust, or an heir or legatee of the donor.) Thus, H.S.I. and the Attorney General misplace their reliance on Boice.

The Indiana Attorney General does not have the exclusive authority to bring an objection to an accounting by, or a complaint for breach of trust against, a charitable trustee.

II. COMPLAINANTS SATISFY BROADER STATUTORY DEFINITION OF LEGAL STANDING

As outlined above, the specific statute governing standing in cases involving private trusts, including charitable trusts, affords standing to: (1) the trust's settlor, (2) a beneficiary or his personal representative, (3) a person designated by the settlor to supervise the administration of the trust, or (4) "any other person having an interest in the administration of the benefits of the trust, including the attorney general in the case of a charitable trust." Thus, the complainants must show that they fit one of these categories. I.C. 30-4-5-12(c). This statute and all of Article 4 of Title 30 refers to private trusts, which includes charitable trusts. I.C. 30-4-1

This Court must give the language of the statute its plain and ordinary meaning. Herron v. State, 729 N.E.2d 1008 (Ind. App. 2000).

> The primary goal in interpreting the meaning of a statute is to determine and effectuate legislative intent. Woods v. State, 703 N.E.2d 1115, 1117 (Ind.Ct.App.

[9] *A Proposed Trust Code for Indiana – An Effort at Reform*, 45 Notre Dame L. 427 (Spring, 1970).

> 1998). To determine legislative intent, we look to the plain language of the statute and attribute the common,ordinary meaning to terms found in everyday speech. Id. Where the General Assembly has defined a word, however, this court is bound by that definition. Rush v. Elkhart County Plan Comm'n, 698 N.E.2d 1211, 1215 (1998), trans. denied.

Id. See also Crum v. City of Terre Haute, 84A04-0309-CV-441 (Ind. App. 2004); Sadler v. State ex. rel. Sanders, Cause No. 49A02-0310-CV-864 (Ind. App. 2004). Therefore, "any other person having an interest in the administration of the benefits of the trust" must be given its ordinary meaning.

Further, in interpreting the language of I.C. 30-4-5-12 and -14, this Court may rely on comments by the Trust Code Commission. I.C. 30-4-1-7. Comment to subsection (c) of this statute clearly states that the language was intended to add more persons who could enforce a charitable trust. As Mr. Ard stated in his comment and detailed law review article introducing what soon became Indiana's Trust Code, this statutory rule on standing was deliberately stated broadly so as to enlarge the classes of persons who may bring an action in the case of a public charitable trust.[10]

A. Norma Jean Balcom, as an heir, has an interest in the administration of the benefits of the Crume Trust. In 1962, prior to codification of the above statute, this Court determined that the heirs of the settlor have an interest in enforcing the Crume Trust when it awarded to the then-living heirs of Mrs. Crume more than $200,000. Among them was Jean Balcom's grandmother, Margaret Hackney Balcom. See also III.A. below as to Jean Balcom's statutorily-provided interest under the *cy pres* doctrine codified at I.C. 30-4-3-27(b).

B. Animal Welfare Services Complainants, ARPO, HFA, Southside, Spay-Neuter, have interests in the administration of the Crume Trust as contingent beneficiaries under the doctrine of *cy pres*. If the particular charitable purpose of a trust is or becomes impracticable or impossible to carry out – perhaps due to cessation of existence of a named beneficiary, or a change in its corporate charter so as to limit or prevent its ability to carry out the charitable intent – the charitable trust need not fail; the Court may re-direct the application of the trust property to as to fulfill the charitable intention of the Settlor. I.C. 30-4-3-27; Anderson v. Wolford, 604 N.E.2d 649 (Ind. App. 1992); Quinn v. Peoples Trust and Savings, 69 N.E.2d 281 (Ind. 1945); Sendak

[10] Ard, *supra*.

v. Trustees of Purdue University, 279 N.E.2d 840 (1972) (although the alternate doctrine of equitable deviation was more appropriate in this case).

As outlined in their Complaint, each of ARPO, HFA, Southside and Spay-Neuter provide some or all of the services that H.S.I. provides to the ultimate Crume Trust beneficiaries – the animals in the care of, or that may come into the care of, H.S.I. Even though the animal welfare services Complainants are not the only organizations that might "someday" qualify as substitute beneficiaries under *cy pres*, they each nonetheless have a contingent interest in the Crume Trust that is identifiable. That interest becomes less remote and less contingent when considering that the current Crume Trust beneficiary/custodian has already cut services to the animals that the Crume Trust intends to serve; thus, other animal welfare service organizations such as the Complainants must step in to provide more of those services, incurring more expense and burden.

Furthermore, the current Crume Trust beneficiary/custodian is on the verge of complete financial failure according to its pleadings and its public statements (although it so far refuses to provide this Court any financial information that would justify its need for the Request to Borrow). Thus, according to H.S.I.'s own account, "someday" looms closer on the horizon – perhaps in a matter of just a few weeks. The remoteness or contingency of the application of cy pres in the Crume Trust is not so remote. Moreover, the sizeable impact of the proposed transaction ($1,700,000 or 90% of the Crume Trust principal, whichever is less) and the resulting devastation that would befall the future Crume Trust beneficiary/custodians demands action be taken now to prevent financial collapse of the Crume Trust.

Given their interest, as broadly intended by the statute, the animal welfare services Complainants have standing under I.C.30-4-5-12(c).

III. COMPLAINANTS ALSO SATISFY GENERAL RULE OF LEGAL STANDING UNDER COMMON LAW

A. General Rule: state attorney general usually has the authority, right, duty or power to enforce or protect a charitable trust. Where the attorney general has primary or concurrent authority, then generally, only a person with a special interest – that is, an interest in the trust that is personal to him and is beyond that general interest possessed by

the general public at large – has standing to sue to enforce or protect a charitable trust. Given the public nature of a public charitable trust, the state attorney general usually has the authority, right, duty or power to enforce a charitable trust and to prevent abuse or other mismanagement of its funds.[11] Generally, only someone with a special interest – that is, an interest in the trust that is personal and peculiar to him and is beyond that general interest possessed by the general public at large – has standing to sue to enforce or protect a charitable trust.[12] Cittading v. Indiana Department of Transportation, 790 N.E.2d 978 (Ind. 2003)

Examples of persons who usually can demonstrate a special interest to support legal standing concurrently with the State Attorney General are: the trustees of a charitable trust[13] (which often includes the executor of the decedent donor's estate); beneficiaries of a charitable trust (I.C. 30-4-5-12(c))[14]; in some cases donors or their heirs;[15] persons having a contract with the trust,[16] such as a creditor of the trust, or adjoining land owners when the issue at hand involves real estate owned by the trust, charity or public entity.[17] Depending on the question of law alleged, to show their "special" interest sufficient to grant concurrent legal standing with the attorney general, a party must show (i) a personal stake in the outcome of the litigation (such as in will contests, third-party beneficiary actions on contract; (ii) adequate injury or the immediate danger of sustaining some injury (such as where the party is challenging a statute's constitutionality);[18] or (iii) that the party is aggrieved because they are being denied some personal or property right or the imposition upon a party of a burden or obligation they otherwise would not

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[11] Hauter, *Right to Enforce a Charitable Trust*, 40 NOTRE DAME L. 349, 353 (14 C.J.S. §47 – 49; Am. Jur., Charities §§ 111-119 (the Attorney General has power to enforce the administration of charitable trusts to prevent mismanagement and waste of the trust fund, remedy malfeasance by trustees and to see that the purposes of the trust are carried out); BOGERT ON TRUSTS (Sixth) § 156 "In the United States, in most states, the Attorney General, either by constitution, statute or rules of equity is empowered to enforce charitable trusts, because he is the law officer required to protect the people of the state and they are the beneficiaries;" and 62 A.L.R. 881, supplemented at 124 A.L.R. 1237; 94 ALR3d 1204.

[12] Hauter, *supra*; 14 C.J.S. §50-53; 62 A.L.R. 881, supplemented at 124 A.L.R. 1237;

[13] See 14 C.J.S. §50; Newman v. Forward Lands, Inc., 430 F.Supp. 1320 (D.C.Pa); St. John's-St. Luke, cited in I., above (Michigan); Holt and Hardman, cited in I., above (California); State v. Toledo, 23 Ohio Cir. Ct. 327.

[14] And see American Center for Ed., Inc. v. Cavnar, 80 C.A.3d 476 (California 2nd District) (where charitable trust created for small class of beneficiaries, the beneficiaries may sue to enforce the trust).

[15] As stated above, in the early 1960s, this Court found that the heirs of Mrs. Crume had an interest enforcing the administration of the Crume Trust and awarded them monetary damages.

[16] Nat. Bd. of Exam. v. Am. Osteopathic Ass'n, *645 N.E.2d 608* (Ind. App. 1994) (third-party beneficiary to contract had standing to sue).

[17] Stokes v. City of Mishawaka, 441 N.E.2d 24 (Ind. App. 1982);

[18] Board of Commissioners v. Kokomo City Planning Comm., 330 N.E.2d 92 (Ind. 1975); Pence v. State, 652 n.E.2d 486 (Ind. 1995), *reh'g denied*; Schoss v. City of Indianapolis, 553 N.E.2d 1204.

have (such as in administrative proceedings and appeals thereon[19] or zoning or annexation cases).[20] The Court must be cautioned that showing immediate harm or injury under legal standing should not be confused with the basic elements necessary for injunctive relief.[21]

Conversely, persons having no special interest different from that of the general public have no standing to sue to enforce an action or to prevent mismanagement or other abuses of trust. For example, the plaintiff in Boice sought injunction against the charitable trustee because the plaintiff was willing to pay 10% more for securities that the trustee had already sold to another purchaser. The Boice plaintiff faced an uphill battle to show that he was harmed because he did not get the opportunity to pay *more* money for the investments than another person. Rather, the only injury the Boice plaintiff could demonstrate was that the trust might have received more cash to be added to principal; thus, there would be more disposable income to distribute or loan to students who wished to pursue advanced degrees, thereby benefiting the general community. Mr. Mallers could only demonstrate the he, as just one member of the public community benefited by the trust, might have had more trust resources available to the general public.

A. Ms. Norma Jean Balcom Is Heir of Donor. The complainants in the case at hand are quite different from Mr. Mallers. Ms. Norma Jean Balcom is an heir of the donor**.** It is true, as the Attorney General states in its Motion to Dismiss, that Ms. Balcom is a "distant" heir of the donor. However, the donor died nearly 70 years ago at a ripe age, with no children of her own. Thus, at this point, any living heir of the donor is necessarily a distant heir. Jean Balcom's grandmother (Marguerite Hackney Balcom, a niece of Mrs. Crume) received $11,000 43 years ago when this Court ruled that H.S.I. had not executed the donor's intent for the trust for the first 20 or more years; thus, the heirs of the donor were entitled to a reversion of at least a portion of the charitable gift. By granting reversion of a portion of the charitable trust to Mrs. Crume's nieces and nephews

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[19] Metro. Development Comm. v. Cullison et.al., 277 N.E.2d 905 (Ind. App. 1972), reh'g denied (government instrumentalities are not aggrieved persons, only the residents within the instrumentality could show they would be directly harmed or suffer loss); Huffman v. Department of Environmental Management, 788 N.E.2d 505 (Ind.App. 2003) (requirement that a person be aggrieved or adversely affected to initiate administrative review process is not equivalent to legal standing, which is a judicial doctrine);

[20] Montagna, supra.

[21] Ott v. Johnson, 319 N.E.2d 622 (Ind. 1974) was a case where the court found against the petitioner for failure to show injury or threatened harm, based not the general rule on legal standing, but rather pursuant to show same as an element necessary to obtain injunctive relief.

in 1962, this Court has set the precedent that the heirs of Mrs. Crume do have an interest in the Crume Trust.[22]

Furthermore, I.C. 30-4-3-27(b) (*cy pres* doctrine) designates the heirs of the charitable donor as persons who could provide opinion as to the donor's charitable intent with respect to a substitute beneficiary(ies) or substitute uses for Crume Trust income. Thus, the Trust Code recognizes the interest that an heir has in furthering the settlor's charitable intent. Ms. Balcom fits this bill since she is a living beneficiary who resides in the same community served by the Crume Trust and because this Court already has recognized her family's interest in this matter.

B. Under the Cy Pres Doctrine, Animal Welfare Complainants Are Interested Contingent Beneficiaries. When Mrs. Crume prepared her will in 1921 there were almost no organizations formed for the purposes of providing care and relief to homeless animals except the Indianapolis Humane Society, formed in 1905 (now H.S.I.). Whereas today, there exist multiple charitable organizations who provide some or all of the same services as H.S.I. If it is determined that H.S.I.'s significant cutting of some of these services frustrates the intended purpose of the Crume Trust, then this Court can either add or substitute (or both) beneficiaries who will fill in those necessary services in order to ensure that the Settlor's intent and the charitable purpose of the Crume Trust is fulfilled. See below, discussion of the significant cuts that H.S.I. has already undertaken and, therefore the immediacy of the threatened harm to the Crume Trust and to the animal welfare service Complainants.

The animal welfare services Complainants – ARPO, HFA, Southside, and Spay-Neuter – are directly impacted by the cutting or cessation of services to animals and the public by H.S.I. Because these animal welfare service organizations serve the very same beneficiaries and provide the very same types of services that were intended by Mrs. Crume – that is, the animals directly and the human community of Indianapolis indirectly – these Complainants will face heavy burdens, financially and operationally, as a result of H.S.I. ceasing or greatly reducing its shelter, medical care, spay-neuter services and adoption/retrieval of missing pets.

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[22] In limited cases in Indiana and other states, heirs of a charitable donors have been allowed to initiate an action to enforce that donor's charitable intent. See Illinois cases cited above, McGee and Garrison.

As a result of serving the same beneficiaries and providing the same types of services that were intended to be funded by Mrs. Crume, the animal welfare service complainants stand to fill the shoes as Crume Trust beneficiary(ies) under the *cy pres* doctrine both now and in the event that H.S.I. significantly reduces its services to Mrs. Crume's intended beneficiaries – Central Indiana's animals and community.

C. The "immediacy" of the peculiar threat of injury to the complainants is great. It could only be greater if the loss of Trust assets had already occurred. As the Crume Trust beneficiary, H.S.I. is requesting that the Crume Trust assets be put up for collateral against its unsecured promise to pay a loan of up to $1,700,000. H.S.I. states that it may have to cease operations if it does not obtain the cash loan sought under its Request to Borrow. Yet, H.S.I. refuses to provide this Court with documentation of its evidence showing its need for as well as its ability to re-pay its Request to Borrow.

To the contrary, H.S.I. has in its pleadings and in public statements made it clear that it is on the verge of bankruptcy. Indeed, in the last 60 days the executive director of H.S.I. confirmed in a written memorandum to her employees that H.S.I. is still operating at a deficit cash flow of between $50,000 and $100,000 per month. See **Exhibit A**, attached hereto. In its own words, H.S.I. states that it cannot currently cover its operational expenses, presumably including interest on outstanding loans. How then can it service the debt on its Request to Borrow PLUS those operational expenses PLUS service a $900,000 loan against another trust taken out less than 11 months ago?

D. Complainants Have Right to Pursue Preventative Action on Behalf of Crume Trust and Its Beneficiary/Custodians. Surely, the Complainants need not wait until the Crume Trust assets are collateralized and default occurs before they may bring their action. Indiana does not require that the injury already occur before the right to bring an action exists. Rather, action to prevent harm may be brought where there exists "a real or actual controversy, or at least the ripening seeds of such a controversy, and that ***a question has arisen affecting such right which ought to be decided in order to safeguard such right***." Zoercher v. Agler, 172 N.E. 186 (Ind. 1930) (emphasis added). Indeed, most actions to prevent harm or loss can be brought even if the

plaintiff has only a contingent interest. On point is the Schloss case.[23] Mr. Schloss challenged the amount of cable fees that could be imposed by the City of Indianapolis. Pursuant to a federal cable statute, any reduction in fees must be passed through to the consumer. However, the City argued that, even if such reduction in a franchise fee might be passed on, the cable provider could always negate that reduction by increasing its other fees due to recent deregulation. Therefore, the City argued, Mr. Schloss could not show with any certainty that he would benefit (prevent loss caused by higher City fees) from such challenge. The Schoss court held, however, that Schloss need not demonstrate certain aggregate benefits so long as he ***might*** receive an aggregate benefit.

As stated above, the animal welfare service Complainants are further adversely affected if and when H.S.I. cuts or ceases its services to the animals and the public, because these organizations will be hit with a much heavier burden to meet those same public needs. Those same types of public services, and the community and animals being turned away by H.S.I. were intended to be served by the Crume Trust. Already, H.S.I. has significantly cut its services and has begun referring away members of the community who wish to surrender animals to its care.[24] Thus, no-kill animal organizations such as Southside, HFA and ARPO already are being faced with more animals, and human-friends-of-animals, needing their services. Certainly, if H.S.I. were to close its wellness center, reportedly the major reason for the significantly increased costs that put H.S.I. in its current financial crisis, then Spay-Neuter would be more directly impacted. Nonetheless, since H.S.I. is turning away those animals and not performing spay or neuter services for them, Spay-Neuter will be and has been significantly and adversely affected by H.S.I.'s cut-back in animal intake because Spay-Neuter provides alteration services to other animal welfare service organizations who must now take on a greater burden.

IV. COMPLAINANTS ALSO MEET EXCEPTIONS TO GENERAL RULE

A. Complainants Have Standing Under the Public Standing Exception. The true beneficiaries of the charitable Crume Trust are the animals of Central Indiana and the Central

[23] See fn 17, *supra*.

[24] Complainants will furnish live testimony that H.S.I. has increased its surrender fee by 300% in many situations, and has indicated that the increased fee will be used to "put down" the surrendered animal. By doing so, H.S.I. is deliberately discouraging surrender of animals to H.S.I. and is encouraging the public to take the animals elsewhere if they prefer that the animal not be killed.

Indiana Human Community. H.S.I. admits as much in its Request to Borrow, stating that the Mary Powell Crume Trust "exists for a public purpose, namely, for the purpose of providing relief for animals in Indianapolis."

Under some circumstances, persons other than the Attorney General can represent an interest that is larger than their own personal stake in an action, perhaps even the public's interest. Thus, even if the Complainants did not have a specific injury, they can proceed with standing under the public standing exception to the general rule. Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003); Cittadine, *supra*;[25] Schloss, *supra*, at 1206, n.3; Higgins v. Hale, 476 N.E.2d 95, at 101 (Ind. 1985).

1. Indiana Has Long Recognized Public Standing Doctrine. Indiana has recognized the public standing doctrine for more than 150 years. Cittadine, citing Hamilton v. State ex rel. Bates, 3 Ind. 452 (1892) . The public standing exception has been allowed where the acting party seeks to enforce a public right[26] or require performance of a public duty[27]. In such cases, the party seeking action need not show any legal or special interest in the result sought to be maintained. Cittadine, citing Wampler v. State ex rel. Alexander, 47 N.E. 1068 (1897).

In Higgins, the parties seeking action claimed both a personal stake in the outcome as well as standing under the public standing doctrine. The Higgins plaintiffs were shown have standing under both theories. Because each had the right to vote, the plaintiffs had a personal interest in the process that would create the rule as to how vacancies in public election races would be controlled in the future. In addition, "the fundamental right of the public to vote, and the accompanying right to ensure that the election process is administered in a manner consistent with the laws of this State" were sufficient to confer standing under the public standing exception. See also Brenner v. Powers, 584 N.E.2d 569 (Ind. App. 1992) (Brenner sued both individually and on behalf of similarly situated members; as such his standing for the declaratory judgment portion of his claims was proper).

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[25] Cittadine also held that the ruling in Pence v. State, 652 N.E.2d 485 (1995) did not alter the public standing rule. (cited by Embry v. O'Bannon)

[26] Zoercher, *supra*.

[27] One method for enforcing the duty of a public officer or agent is to seek a writ of mandamus.

2. Question of Law Arising from H.S.I.'s Request to Borrow Is Whether Charitable Organization Beneficiary Can Borrow Principal from Public Charitable Trust; and further Whether It Can Borrow Without Security to the Trust. The Crume Trust Complainants, like the Higgins plaintiffs, meet both the personal interest required under the general standing rule and the public standing exception to that rule. The question of law posed as a result of H.S.I.'s Request to Borrow is whether a charitable organization beneficiary can borrow, on an unsecured basis, from or against the principal assets of a public charitable trust. Because they are, themselves, beneficiaries of charitable gifts, even and could be future beneficiaries under the Crume Trust or other public charitable trusts, the animal welfare services Complainants have standing in this matter.

Because of the question of law created under the transactions proposed by H.S.I. involving Crume Trust assets, Complainants have standing under both the general rule and the public standing doctrine.

B. Complainants Have Standing Because They Represent Limited Class of Beneficiary/Custodians of the Crume Trust. As stated above, the animal welfare services Complainants are by no means the only organizations of their kind. Likewise, in 2004, H.S.I. is not the only organization of its kind or the only organization that performs the services intended for the Crume Trust beneficiaries – the animals and the Indianapolis community. While there are other organizations in Indianapolis and contiguous counties that provide some or all of the services contemplated by and intended under Mrs. Crume's gift, that class of potential beneficiary/custodians is still distinct and limited in number.

Where a party represents a larger, but identified class having an interest in the outcome of a legal matter, the courts have found they have standing to represent the class concurrent with and without the intermediation of the attorney general. See 14 C.J.S. §51, p. 225; Cannon v. Stephens, 159 A. 234 (Del.). This is similar to the reasoning in Higgins.

The animal welfare services Complainants represent all charitable organizations that provide shelter, adoption, spay-neuter, medical care and other services to homeless animals or to pets of owners who cannot afford to provide those services. Therefore, the Complainants have

standing as a representative of all such organizations in preventing the current beneficiary/custodian to deplete assets of a charitable trust intended to insure such services are provided to those animals and their human friends.

V. ATTORNEY GENERAL'S CONFLICTS PRECLUDES ITS REPRESENTATION OF COMPLAINANTS

Indiana recognizes standing by another party to represent the public's interest where the attorney general has a conflict of interest. Family Social Services Administration v. Calvert, 672 N.E.2d 488 (Ind. App. 1996), *transfer denied*, 683 N.E.2d 591 (although in that case no true conflict of interest existed merely because Deputy A.G.'s appearance contained scrivenor's error that indicated she represented two adverse parties at the same time). See also Fitzgerald v. Baxter State Park Authority, 385 A.2d 189 (A.G. was conflicted out of representing public interest where he was a member ex officio of the state agency whose proposed program was under attack and where he was also, by statute, chief attorney for the trustee); Kapiolani Park Preservation Soc. v. City and County of Honolulu, 751 P.2d 1022 (where trustee of public charitable trust is a government instrumentality, members of general public had public standing to challenge the trustee's lease of trust lands as a violation of the trust).

The Attorney General of the State of Indiana has several conflicts of interest in this matter. First, Attorney General Steve Carter seeks to preserve the financial viability of a charitable organization over which it has jurisdiction, namely, H.S.I. This goal to preserve H.S.I.'s continued viability conflicts with preserving the Crume Trust assets: an unsecured loan to H.S.I. might help it get back on its feet; however, such loan puts assets that are intended for public use at serious risk of loss.

Second, Deputy Attorneys General Cox and Duga could be called as witnesses to the malfeasance or, at least, the improper conduct by the charitable Trustee; so a conflict under the Rules of Professional Conduct arises as to the A.G.'s representation of the charitable trust as an extension of its representation of the general public. In an effort to assist H.S.I. in its financial crisis while protecting the Crume Trust, the Deputies issued a proposal to H.S.I.: in order to protect the Crume Trust if H.S.I. defaults on the loan under its Request to Borrow, H.S.I. could

pledge back to the Crume Trust the real estate and improvements owned by H.S.I. to the Trust, such real property interests were believed to be worth approximately $3,300,000 or more. If H.S.I. defaults, this pledging back of the real estate assets would at least shift the facility at 7929 N. Michigan Road to the Crume Trust, which could then lease out such facility to other animal organizations who would be substituted as beneficiaries (and perhaps the purpose of the trust would be modified) under the *cy pres* doctrine. H.S.I. was willing to make such pledge of real property back to the Crume Trust so it could obtain its cash loan.

However, complainants quickly brought to the Office of the Attorney General evidence that the real estate and buildings that H.S.I. purported to own in its corporate name (and not as trustee) and pledge back to the Crume Trust were actually already owned by the Crume Trust. See Trust Docket regarding Trust's purchase of real property in 1967; Trust's obtaining reversionary interest in buildings and improvements in exchange for distributions of principal to build and improve that facility in 1967, 1971 and confirmation of same upon 1987 renewal of lease agreement.

Upon the Attorney General approaching H.S.I. about the ownership of the 7929 property and its improvements, H.S.I. denied same and told the Attorney General that H.S.I. owned that property outright. Further, it is complainants' understanding (though neither H.S.I. nor the Attorney General will share copies of such documents with the Complainants or this Court) that financial statements H.S.I. provided to the Attorney General clearly show the real estate to be owned by H.S.I. itself, and not as Crume Trust property.

Thus, Deputy Attorneys General Duga and Cox are witnesses to H.S.I.'s knowing commingling of Crume Trust assets with its own assets, as well as its attempt to convert Trust assets for its own use as collateral (ironically pledged back to the rightful owner).

Third, although Attorney General Carter can, under 30-4-5-12 and on behalf of the general public, bring its own action against H.S.I. for commingling of trust assets, attempted conversion of Crume Trust property and failure to account for Trust assets, the Indiana A.G. has failed or refused to do so. Perhaps one reason it has failed to take this action is because the Office of the Attorney General actually contributed to part of the problem. Not only did H.S.I. and National City Bank

fail to account for a real property asset owned solely by the Crume Trust and addition interest in the buildings and improvements on that asset for more than 25 years, the Attorney General and his predecessors in office failed its obligation under I.C. 30-4-5-13 to detect that significant omission for the same period of time.

Courts in this country have found that where an attorney general actively (or through inaction) supports an alleged breach of trust, then members of the public – as the beneficiaries of the trust – have the right to proceed in action. Kapiolani, *supra*. Attorney General Carter and his predecessors have knowledge of H.S.I.'s commingling trust assets, attempted conversion and failures to account. The A.G. has even contributed to the failure to account problem. Therefore, the Complainants can move forward to protect the Crume Trust.[28]

Likewise, when the party who truly has the right to institute proceedings fails or refuses to do so due to self-interest or fraud, then other persons or organizations can step in and do so. In re Thompson's Estate, 414 A.2d 881. H.S.I., as the beneficiary/custodian of the Crume Trust, has the right to bring an action against the Trustee for failure to account, commingling trust assets and conversion of trust assets. However, H.S.I. is also the trustee who engaged in those actions, so its own self-interest prevents it from pursuing the action. Furthermore, since H.S.I. is entity the seeking the cash loan under the Request to Borrow, it will not likely bring an action against itself for mismanagement of Crume Trust assets or to prevent unnecessary risk of loss of those charitable trust assets.

Since the Attorney General and H.S.I., who have a right to bring an action for preservation of the Crume Trust and removal of the Crume Trust trustees, the Complainants may step forward to protect the public's and their own interests in the Crume Trust.

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[28] While the Complainants are in no way alleging collusion between the Office of the Attorney General and H.S.I. (a charitable organization under its jurisdiction) in this Crume Trust matter, acquiescence in alleged breaches of trust could point to the type of collusion that was found in Illinois' Ferguson Monument Case. Art Institute v. Kerner, Case No. B269011, Cir. Ct. Cook County (1933). ***And see*** law review article that 30 years later exposed such collusion: Kutner, The Desecration of the Ferguson Monument Trust: The Need for Watchdog Legislation, 12 DEPAUL L. REV. 217 (1963); and 40 NOTRE DAME L. 349, at 353 suggesting that exclusive authority in the state attorney general leads to abuses of charitable assets, like that in the Ferguson Monument case, going uncorrected unless and until "the attorney general is disposed to act."

CONCLUSION

Under Indiana's specific statutory rules and broader common-law rules (and exceptions to such) for legal standing, the Complainants have the requisite legal standing to request and object to the Trustee's 22nd Accounting, to object to collateralization of the public charitable Crume Trust principal, and to bring further action for removal of the current trustees. Therefore, Complainants renew their Motion for Leave to File Amended Complaint for Breach of Fiduciary Duty; Objection to Borrowing Against Corpus of Public Benevolent Trust; Request for Removal of Co-Trustees in order to add a necessary party defendant, re-serve H.S.I. with summons on the Amended Complaint as a necessary defendant and because new evidence demonstrates breaches of the trustee's statutory duties to not commingle Crume Trust assets with its own and the attempted conversion of Crume Trust Assets.

Respectfully submitted,

Veronica L. Jarnagin, attorney for Norma Jean Balcom, ARPO, HFA, Southside, Spay-Neuter and Move to ACT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of August, 2004, a true and complete copy of the foregoing was made by depositing same in the United States Mail in an envelope properly addressed and with sufficient postage affixed thereto to the following:

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_____
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Indiana's position on who can be a party in an action involving enforcement of a charitable trust – the Attorney General AND other parties who meet other requirements of standing – is quite similar to most states. California's statutes did not create an exclusive right in its Attorney General, but early case law did. Pepperdine case; In 1964 this exclusive right of enforcement in the Attorney General was overturned in Holt v. College of Osteopathic Physicians & Surgeons, 394 P.2d 935-36 (1964) (minority trustees were allowed to challenge the defendants'/majority trustees' change curriculum of the school, thus, part of its charitable purpose); and see Hardman v. Feinstein, 195 C.A.3d 157 (19XX), review denied.

Likewise, early last century Illinois had operated under case-law precedent (not by statute) that its Attorney General had exclusive authority to enforce charitable trusts.[29] Unfortunately, this common-law exclusive right of enforcement led to collusion among the Illinois A.G., the judge and the charitable trustees to divert charitable trust income for more than 30 years to a private corporation in the "Ferguson Monument Case."[30] Exposure of this abuse and collusion led to Illinois' adoption of charitable trust enforcement legislation.[31] Illinois, like most other states, operates under the general rule that, in addition to the Attorney General, persons having some special interest in the administration of the trust – that is, an interest that is different from that of the general public – have the right to enforce the intent of the donor and the charitable purpose of the trust. Parsons v. Walker, 328 N.E.2d 920; Barker v. Hauberg, 156 N.E. 806; McGee v. Vandeventer, 158 N.E. 127 (heirs of donor could sue to prevent diversion of charitable trust); Garrison v. Little, 75 Ill. App. 402 (1898) (heirs of donor could sue); Northwestern University v. Wesley Memorial Hospital, 125 N.E. 13. See II., below, discussing general rule on legal standing.

The Indiana Attorney General's statutory authority, under I.C. 4-6-1 et. seq. and I.C. 30-4-5-12 and -13, is similar to that under Michigan's Supervision of Trustees for Charitable Purposes Act CITE , which directs its attorney general to represent "uncertain and indefinite" beneficiaries under charitable trusts. However, conferring this authority on Michigan's A.G. is not inconsistent with the general rule of law concurrently authorizing a person with a "special interest" to sue to enforce a charitable trust. St. John's-St. Luke Evangelical Church v. National Bank of

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[29] People ex. Rel. Courtney v. Wilson, 327 Ill. App. 231, 63, N.E.2d 794 (1945).
[30] Art Institute v. Kerner, Case No B269011, Cir. Ct. Cook County (May, 1933); and see Kutner, *The Desecration of the Ferguson Monument Trust: The Need for Watchdog Legislation*, 12 DEPAUL L. REV. 217, 222-26 (1963).
[31] Kutner, *supra*, at 219-220.

Detroit, 283 N.W.2d 852. Thus, a statute's naming the Attorney General as one interested person who can demand a trustee's accounting or to enforce a charitable trust on behalf of the public does not preclude other persons with some reasonable interest in the trust to bring an action.