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The Life and Death of the Ipswich Grammar School Trust: Is Enduring Dead Hand Control Possible?

Ronald Chester*

“Charity suffereth long, and is kind; charity envieth not; charity vaunteth not itself, is not puffed up. . . . [It] endureth all things. Charity never faileth.”

—The Bible (King James Version) 1 Corinthians 4; 7-8.

I. INTRODUCTION

Charitable trusts potentially run forever because they are not subject to the Rule against Perpetuities.¹ Unfortunately, those who establish them often let their own egos get in the way of ensuring that their charitable legacies will endure. Since most donors are quite wealthy, they typically are used to being “in control” during life. In the individualistic society that characterizes the current United States, these wealthy donors often wish to remain in control even after death.² Thus, the charities they leave to the living may be burdened with restrictions that, if followed, will doom their charitable enterprises to failure.

In this article, the author examines the life and death of America’s longest-lived charitable trust, the Ipswich, Massachusetts Grammar School Trust. Established in 1652, the trust had one very valuable asset at its termination in 2012 – the peninsula called Little Neck in Ipswich, which was willed to the trust in 1660 by the highly successful business-

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¹ *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 550 (1867).

² See LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 2 (1955); More recently, see generally RONALD CHESTER, *FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND* (2007); RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* (2010); Mark L. Ascher, *But I Thought Earth Belonged to the Living*, 89 TEX. L. REV. 1149 (2011) (reviewing LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009)).

man, William Paine.³ It is postulated here that the incredible longevity both of the trust and of William Paine's gift to it was strongly influenced by Paine's Puritan background, which de-emphasized ego and thus dead hand control of his charitable gift, while emphasizing contributions to the community. The lesson today's charitable donors may take from this incredibly successful charitable trust is to keep one's ego in check while structuring a charitable legacy: to impose conditions and restrictions on the gift broad and flexible enough to meet the demands of the living over time.

II. WILLIAM PAINE AND THE IPSWICH GRAMMAR TRUST: THE PURITAN BACKGROUND

The Grammar School Trust of Ipswich, Massachusetts funded Ipswich schools from 1652 until it was terminated in 2012 with the acquiescence of the Massachusetts Attorney General and Courts. It was the longest-lived charitable trust in the United States. The sole property funding the trust at its termination was a unique peninsula called Little Neck, put into the trust by the 1660 will of William Paine. One might argue that the longevity of the trust was a product of the Puritanism of its founders, while its termination was the product a more secular, less visionary ethos, prevalent in 21st century Massachusetts. To support this view, one must first understand the unique society that gave rise to this trust.

The Great Migration of Puritans from England to Massachusetts from 1620-1640 was led by John Winthrop, who famously wished to build a model society – a “City on a Hill.”⁴ He “emigrated in order to undertake the ‘public service’ that ‘God had bestowed’ on him; in return, he hoped that God might reward him if his efforts were successful.”⁵ With him traveled, unlike in other migrations to the New World, largely middle-aged, middle class families, whose motivations were pri-

³ It appears that despite his prominence during the early days of the Massachusetts Bay Colony, Paine is now buried, without marker, below the Boston Athenaeum, which borders the Old Granary Burial Ground in Boston. See ALBERT W. PAINE, PAINE GENEALOGY: IPSWICH BRANCH (1881), as reprinted in HISTORIC TEXTS ON WILLIAM PAINE, IPSWICH, AND THE FEOFFEEES: FULLTEXT EXCERPTS, IPSWICH CITIZENS FOR PUBLIC TRUST 1, 7-8, <http://ipswichtrust.files.wordpress.com/2012/02/history-20120224-historic-texts-on-william-paine-and-the-feoffees.pdf>.

⁴ See ROBERT C. WINTHROP, LIFE AND LETTERS OF JOHN WINTHROP: FROM HIS EMBARKATION FOR NEW ENGLAND IN 1630, WITH THE CHARTER AND COMPANY OF THE MASSACHUSETTS BAY, TO HIS DEATH IN 1649, at 19 (Ticknor and Fields eds., 1867).

⁵ VIRGINIA DEJOHN ANDERSON, NEW ENGLAND'S GENERATION: THE GREAT MIGRATION AND THE FORMATION OF SOCIETY AND CULTURE IN THE SEVENTEENTH CENTURY 45 (1991) (internal citation omitted).

marily religious, not economic.⁶ In essence, these religious dissidents wanted to purify Christianity by building a model community in which to practice their beliefs.

According to Professor Virginia Anderson:⁷

No single trait defined the New England settlers – and distinguished them from other English emigrants to the New World – more clearly than their self-conscious commitment to communalism. . . . It was precisely this determination to maintain a careful balance between the needs of individuals and those of the community as a whole that distinguished New Englanders . . . from other English settlers in North America.⁸

New England's colonists arrived with roughly equal numbers of men and women. In the Chesapeake Bay area,⁹ by contrast, the settlers were often single young men in search not primarily of God but of wealth:

Great Migration colonists shared other distinctive characteristics. New Englanders had a high level of literacy, perhaps nearly twice that of England as a whole. New Englanders were highly skilled; more than half of the settlers had been artisans or craftsmen. Only about seventeen percent came as servants, mostly as members of a household. In contrast, seventy-five percent of Virginia's population arrived as servants¹⁰

Thus, “[i]mmigrants seeking to realize the greatest economic opportunity would choose to go elsewhere, in effect excluding from New England those who placed material concerns first.”¹¹ The result “was a remarkably homogenous population, with colonists sharing similar backgrounds, outlooks and perspectives.”¹² Atop this group sat wealthy landowners and merchants like William Paine who shared in the earliest divisions of land in towns like Watertown and Ipswich.

Under John Winthrop's leadership, the Massachusetts Bay Colony decided to structure its society by establishing towns rather than individ-

⁶ See *id.* at 28, 34, 45.

⁷ Virginia DeJohn Anderson is a Professor of History at the University of Colorado and has published various books and textbooks on American and specifically early Colonial American history.

⁸ ANDERSON, *supra* note 5, at 89-90.

⁹ Chesapeake Bay is situated on the Atlantic coast, surrounded by what is current day Virginia and Maryland.

¹⁰ Lynn Betlock, *New England's Great Migration*, 4 *NEW ENGLAND ANCESTORS* 2:18 to 2:21 (2003), available at http://www.greatmigration.org/new_englands_great_migration.html.

¹¹ *Id.*

¹² *Id.*

uals as its basic unit.¹³ To establish these towns, the colony turned to “proprietary entrepreneurs” like John Winthrop Jr. and his friend William Paine.¹⁴ Such men were prosperous on arrival and were eager to invest time and money in return for grants of land as proprietors in new towns. As proprietors, they received original land grants and rights to future divisions of land.¹⁵

The successful efforts of proprietors to establish new towns operated under communal restraints.¹⁶ Since any land grant to nonresident proprietors remained worthless until permanent settlers arrived in a given town,¹⁷ they didn’t hoard land to drive up the price. Only the settling of the new town could make the ventures of these entrepreneurs profitable; otherwise all they would have was vacant land.¹⁸

When William Paine arrived at Boston from England on the ship *Increase* (in 1635), he beheld the excitement of a new world – a small but bustling port town of several thousand inhabitants, playing host to frequent arrivals during the Great Migration of 1620-1640. Paine first settled in Watertown with his wife and five children.¹⁹ As son of William Paine of the Parish of Newton, Suffolk County, England, William himself was already a man of property.²⁰ He was on the original list when Watertown was divided up and was allotted seventy acres of land about one half mile west of Fresh Pond.²¹ Most of this tract would probably be in modern day Belmont. This formed his homestead, but Paine soon acquired many other parcels in the area and became known as a large landowner.

On July 4, 1639, Paine, with his brother Robert and a few others, procured a grant of land in the town of Ipswich on the North Shore of the colony from the Massachusetts Bay legislature.²² This town is well described during the period by Edward Johnson, a 17th century town clerk in Woburn:

This Towne is scituated on a faire and delightfull River, whose first rise or spring begins about five and twenty Miles farther up in the Countrey, issuing forth a very pleasant pond. But

¹³ See ANDERSON, *supra* note 5, at 93-94.

¹⁴ *Id.* at 94.

¹⁵ *Id.* at 97.

¹⁶ *Id.* at 94.

¹⁷ *Id.* at 94-95.

¹⁸ *Id.* at 95.

¹⁹ Albert W. Paine, *Ipswich Branch*, in 2 PAINE FAMILY RECORDS: A JOURNAL OF GENEALOGICAL AND BIOGRAPHICAL INFORMATION RESPECTING THE AMERICAN FAMILIES OF PAYNE, PAINE, PAYN & C. 25, 26 (Henry D. Paine, M.D. ed., 1883).

²⁰ PAINE, *supra* note 3, at 1.

²¹ *Id.*

²² *Id.* at 2.

soone after it betakes its course through a most hideous swamp of large extent, even for many Miles, being a great Harbour for Beares; after its comming forth this place, it groweth larger by the income of many small Rivers, and issues forth in the Sea. . . .²³

Johnson then goes on to describe the town's earliest inhabitants:

The peopling of this Towne is by men of good ranke and quality, many of them having the yearly Revenue of large Lands in *England* before they came to this Wildernesse, but their Estates being employed for Christ, and left in banke . . . they are well content till Christ shall be pleased to restore it againe to them or theirs. . . .²⁴

Finally, Johnson described the town itself:

[This town] is a very good Haven Towne, yet a little barr'd up at the Mouth of the River, some Marchants here are, (but *Boston*, being the chiefest place of resort of Shipping, carries away all the Trade) they have very good Land for Husbandry, where Rocks hinder not the course of the Plow; the Lord hath been pleased to increase them in Corne and Cattell of late . . . their Houses are many of them very faire built with pleasant Gardens and Orchards, consisting of about one hundred and forty Families. Their meeting-house is a very good prospect to a great part of the Towne and beautifully built. The Church of Christ here consists of about one hundred and sixty soules. . . .²⁵

Like other wealthy Ipswich settlers, William Paine had revenue from large land holdings in England. The new town got a good supply of East Anglican merchants like the Paines, who helped make the town the second most prosperous in the Colony to Boston until well into the 18th century.²⁶ As is mentioned above, its river mouth was heavily sand-barred which eventually led to the town's decline by 1750 as a major port, due to the increase in size of ships.

²³ Edward Johnson, *Of the Ninth Church of Christ, Gathered at Ipswich, in Two CENTURIES OF TRAVEL IN ESSEX COUNTY MASSACHUSETTS, A COLLECTION OF NARRATIVES AND OBSERVATIONS MADE BY TRAVELERS 1605-1799* 21 (George Francis Dow ann., 1921).

²⁴ *Id.*

²⁵ *Id.*

²⁶ DAVID GRAYSON ALLEN, *IN ENGLISH WAYS: THE MOVEMENT OF SOCIETIES AND THE TRANSFERAL OF ENGLISH LOCAL LAW AND CUSTOM TO THE MASSACHUSETTS BAY IN THE SEVENTEENTH CENTURY* 119 (1981).

Because of its mercantile industry, Ipswich was somewhat more stratified than more agrarian towns in the colony.²⁷ A small group, including the Paines, controlled a “high proportion of the town’s resources,” compared to more equal distributions in other towns.²⁸ Eight men, including the Paines, controlled almost one half of the wealth of the town. In turn, these men were the selectmen and town officials of Ipswich.

There was much buying and selling of land in Ipswich. Before 1660, 104 deeds were filed involving Ipswich men and land.²⁹ The Ipswich of William Paine’s time was simply a more commercial town than many of its more agrarian neighbors. Still, due to communal Puritan theology, its wealthy citizens were expected to “give back”.³⁰

William Paine was admitted as a Freeman of the town in 1640, which meant that he was both a member of the church and was entitled to vote.³¹ He and his brother Robert were both wealthy and civic-minded. However, the Paines and others similarly situated did not live very differently from their less wealthy neighbors:

Most settlers lived in circumstances similar to their [New England] neighbors and if one colonist was more prosperous than the rest, this prosperity was likely to manifest itself in a greater amount of land rather than a more ostentatious way of life. Both the community’s spiritual outlook and the material conditions experienced by the first generation in New England fostered a uniquely communal and stable way of life.³²

In large part, the Paines and their counterparts successfully established “a City on a [H]ill” for all the world to see and did so by emphasizing community, rather than by celebrating individual success.

As previously mentioned, William Paine was the more entrepreneurial of the brothers. He became involved with a number of new ventures including the Watertown Mills and the Lynn, Braintree and New Haven, Connecticut, Iron Works.³³ He also became an active member of the “Free Adventurers,” incorporated in 1645.³⁴ This group promoted the settlement of western Massachusetts and helped establish the Sturbridge Black Lead Mines.³⁵

²⁷ *Id.* at 128.

²⁸ *Id.* at 134.

²⁹ *Id.* at 130.

³⁰ See *infra* text accompanying notes 32 & 43.

³¹ PAINE, *supra* note 3, at 2.

³² Betlock, *supra* note 10. See also *infra* text accompanying note 43.

³³ Paine, *supra* note 19, at 28-32.

³⁴ *Id.* at 27.

³⁵ *Id.* at 32.

These ventures were not solely about making money.

[Paine's] property, evidently large in amount, was ever treated as a means of advancing the public weal, and it would seem that in his investments he had an eye to that use of it that would do the most good. Hence we find all his efforts at wealth were of a character to give employ to others.³⁶

Regarding the ventures described above, they were "of a character to give employment to a great number of laborers and others necessarily connected with the undertakings."³⁷

Locally, Paine's integrity and good judgment soon became publicly known, as is evidenced by his frequent Legislative appointment on committees and for the performance of duties requiring the exercise of those qualities.³⁸ Thus, "[h]is name is found all through the Legislative records. . . ."³⁹ As early as 1640 he was appointed by the legislature as appraiser of property at Ipswich and later settled the bounds of towns in other parts of New England.⁴⁰

The river in Ipswich was a busy place and Paine had a hand in this too. The coming and going of fishing craft and larger vessels that carried cargo of fish, pipe stoves and lumber to foreign ports required the building of a wharf. William Paine was allowed by the town to build one for a warehouse in 1641. This eventually led to the construction of a town wharf in 1656.⁴¹

If one understands the Puritan theology in the busy Massachusetts Bay Colony, one can better understand Paine's ceaseless public-spirited activity: "Puritans generally expected signs of God's grace to show themselves in the lives of the sanctified; the saved person lived a godly life full of good works, and that life was often blessed with worldly success. This was proof of grace. This allowed others to identify the elect."⁴²

Puritan theology thus had a very pragmatic side. If charity and good works were evidence of piety and piety led to salvation, men like Paine

³⁶ PAINE, *supra* note 3, at 6.

³⁷ *Id.*

³⁸ *Id.* at 2.

³⁹ *Id.*

⁴⁰ THOMAS FRANKLIN WATERS, *IPSWICH IN THE MASSACHUSETTS BAY COLONY: 1633-1700* (1906), as reprinted in *HISTORIC TEXTS ON WILLIAM PAINE, IPSWICH, AND THE FEOFFEEES: FULLTEXT EXCERPTS, IPSWICH CITIZENS FOR PUBLIC TRUST* 22, 22 <http://ipswichtrust.files.wordpress.com/2012/02/history-20120224-historic-texts-on-william-paine-and-the-feoffees.pdf>.

⁴¹ *Id.*

⁴² JOHN M. BARRY, *ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL: CHURCH, STATE, AND THE BIRTH OF LIBERTY* 244 (2012).

were encouraged in the public-mindedness and entrepreneurship so vital to the new colony and nascent nation. Salvation was the primary and often immediate incentive. Although the first generation of settlers was apparently healthier than its English counterparts,⁴³ death was generally a more immediate concern in those days than it is today. This probably instilled a more pressing need among men like William Paine to show themselves worthy of salvation. Paine himself died at the age of 62.

III. THE FUNDING OF COLONIAL NEW ENGLAND'S SCHOOLS: THE IPSWICH EXPERIENCE

Education was very important in the Massachusetts Bay Colony.⁴⁴ In 1647 the legislature of the Colony passed a law requiring all towns with 50 or more families to hire a teacher to instruct their male children how to read and write.⁴⁵ When a town reached 100 or more families it was required by law to set up a grammar school to prepare students for university (then Harvard); otherwise a fine of £5 was payable.⁴⁶ Parents were encouraged to contribute to the school in the form of money or goods. Schools were one-room schoolhouses usually constructed on donated land.

Into this milieu stepped first Robert and then William Paine. In about 1649 Robert offered to “erect an edifice for the purpose [of a grammar school], provided the town or any particular inhabitant of the town would devote, sett apart or give any land or other annuity for the yearly maintenance of [a schoolmaster].”⁴⁷ Accordingly, the town, on January 11, 1650, granted to Robert Paine, William Paine, Major Daniel Denison and William Bartholomew “in trust for the use of schools” certain lands.⁴⁸

On January 26, 1652, the town became a little more formal in setting up a trust for the schools:

For the better [aiding] of the schoole and the affairs thereof [nine men including William and Robert Paine] were chosen a committee to receive all such sums of money, as have and shall

⁴³ Betlock, *supra* note 10.

⁴⁴ See generally SAMUEL ELIOT MORRISON, *THE INTELLECTUAL LIFE OF COLONIAL NEW ENGLAND* (3d ed. 1965).

⁴⁵ See THE LEGAL CLASSICS LIBRARY, *THE LAWS AND LIBERTIES OF MASSACHUSETTS* 47 (Editorial Advisory Bd. ed., 1982).

⁴⁶ See *id.*

⁴⁷ D. HAMILTON HURD, *HISTORY OF ESSEX COUNTY, MASSACHUSETTS* (1888), as reprinted in *HISTORIC TEXTS ON WILLIAM PAINE, IPSWICH, AND THE FEOFFEEES: FULLTEXT EXCERPTS, IPSWICH CITIZENS FOR PUBLIC TRUST* 11, 11, <http://ipswichtrust.files.wordpress.com/2012/02/history-20120224-historic-texts-on-william-paine-and-the-feoffees.pdf>.

⁴⁸ *Id.*

be given toward the building or maintaining of a Grammar School and school-master and to disburse and dispose such sums as are given to provide a school house and school-master's house. . . and such sums of money, parcels of land, rente or annuities as are or shall be given towards the maintenance of a school-master. . . .⁴⁹

The establishment of a formal trust for the school was an idea imported from England, but was somewhat unique in the Colony, where most towns simply appointed a master and approved his salary.⁵⁰ The term Free School or Grammar School did not mean the common or public school. The term was used in the English sense to characterize a school endowed with grants of land and gifts and bequests of individuals in which Latin and Greek were taught, supported in part by the parents by payment of fees or rates.⁵¹ A house and land for the use of the master were generally attached to the grants. These classical schools, the forerunners of the academies which afterward made their appearance, used books brought from England as texts.⁵² The Ipswich grammar school became a truly free school in 1714.⁵³

Gifts began to come in to the nine Ipswich trustees. In 1652, Robert Paine actually purchased a house and two acres for the use of the school master and in 1653, "att his own proper cost and charge," built an "edifice" for a grammar school that was erected on the land he had purchased.⁵⁴ His brother William, a trustee or "feoffee" like Robert, further endowed the grammar school trust with the unique piece of land called Jeffreys Neck (later Little Neck) in his 1660 will.⁵⁵ The devise read:

⁴⁹ *Id.*; See also First Amended Complaint for Deviation Pursuant to G.L. c. 214, § 10B at Exhibit A, *Mulholland v. Att'y Gen. of Mass.*, No. ES09E0094QC, (Mass. Prob. & Fam. Ct. Dec. 17, 2009); see also Motion to Consolidate Appeals at 2, *Mulholland v. Att'y Gen. of Mass.*, No. 2012-P-1250, (App. Ct. Aug. 9, 2012).

⁵⁰ JOHN T. HASSAM, EZEKIAL CHEEVER AND SOME OF HIS DESCENDANTS (1879), as reprinted in HISTORIC TEXTS ON WILLIAM PAINE, IPSWICH, AND THE FEOFFEEES: FULLTEXT EXCERPTS, IPSWICH CITIZENS FOR PUBLIC TRUST 20, 20, <http://ipswichtrust.files.wordpress.com/2012/02/history-20120224-historic-texts-on-william-paine-and-the-feoffees.pdf>.

⁵¹ George Gary Bush, *The First Common Schools of New England*, No. VIII NEW ENGLAND PRIMER, (March & May 1885), reprinted in 2 REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1896-1897, at 1168 (1898); See also PAINE, *supra* note 3.

⁵² HASSAM, *supra* note 50, at 20.

⁵³ HURD, *supra* note 47, at 12.

⁵⁴ ABRAHAM HAMMATT, ESQ., IPSWICH GRAMMAR SCHOOL (1852), as reprinted in HISTORIC TEXTS ON WILLIAM PAINE, IPSWICH, AND THE FEOFFEEES: FULLTEXT EXCERPTS, IPSWICH CITIZENS FOR PUBLIC TRUST 17, 17, <http://ipswichtrust.files.wordpress.com/2012/02/history-20120224-historic-texts-on-william-paine-and-the-feoffees.pdf>.

⁵⁵ *Id.*

I giue unto the free scoole of Ipswich, the little neck of land at Ipswich, commonly knowne by the name of Jeferrys neeck. The which is to bee, and remaine, to the benifitt of the said scoole of Ipswich, for ever, as I have formerly Intended, and therefore the sayd land not to bee sould nor wasted.⁵⁶

This bequest greatly increased the income for the school and in effect established a charitable trust on the land “forever,” to be managed by the feoffees of whom William Paine had been a member.⁵⁷

IV. THE GRAMMAR SCHOOL TRUST THROUGH THE CENTURIES: A VERY QUICK TRIP

By 1756 the school trust, funded in part by William Paine’s generous gift, was experiencing problems in administration:

The relationship between the 1650 trust, the 1652 trust, and the terms of the various public and private grants given to the schools had created some confusion, most significantly in the method for appointment of trustees and their successors. Fearing “endless disputes” over the differently constituted grants, the Town, by vote of Town Meeting, petitioned the legislature for an Act the would clarify the terms of the trust and its management.⁵⁸

It should be noted that, today, changes in such a charitable trust would be handled via a petition for cy pres or deviation in the probate court.⁵⁹ However, as will be discussed in Section V of this article, Massachusetts courts did not get the equity jurisdiction necessary to oversee trusts until the 19th century; thus petitions to the legislature were utilized. The legislature responded to the Town’s request by passing Chapter 26 of the Acts of 1756.⁶⁰ “The act identified the confusion caused by

⁵⁶ WILLIAM B. TRASK, ABSTRACTS FROM THE EARLIEST WILLS ON RECORD IN THE COUNTY OF SUFFOLK, MASSACHUSETTS (1984), *as reprinted in* HISTORIC TEXTS ON WILLIAM PAINE, IPSWICH, AND THE FEOFFEEES: FULLTEXT EXCERPTS, IPSWICH CITIZENS FOR PUBLIC TRUST 8, 8, <http://ipswichtrust.files.wordpress.com/2012/02/history-20120224-historic-texts-on-william-paine-and-the-feoffees.pdf>.

⁵⁷ *Id.*

⁵⁸ Kathleen Brill, The Feoffees of the Ipswich Grammar School: An Extraordinary Question of Trustees’ Fiduciary Duty, The Attorney General’s Oversight Responsibility, and the Fate of the Nation’s Oldest Land Trust 3 (May 19, 2010) (unpublished Environmental Law Seminar final paper), *available at* <http://ipswichtrust.files.wordpress.com/2012/01/history-20100519-kathleen-brill-paper.pdf>.

⁵⁹ See generally, JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 752-84 (9th ed. 2013).

⁶⁰ 1756 Mass. Acts 891; See also Brill, *supra* note 58, at 4-5.

. . . differing language among such private grants and . . . trusts,” but observed that “they were all designated for one and the same use.”⁶¹

Accordingly, the act made the four existing privately designated feoffees lifetime trustees with the power to appoint their successors.⁶² “The three eldest selectmen of the town were to serve as additional [feoffees].”⁶³ Collectively, the feoffees were to “manage the land for the benefit of the schools, to charge and collect rents, to report annually to the town meeting” and basically deal with all matters relating to the school in light of the donor’s intent.⁶⁴ “Any doubts about whether early public and private grants were vested in the same trust” thus vanished.⁶⁵

In 1766, the town appealed to the legislature to renew the Act of 1756, which the legislators did for another 21 years.⁶⁶ In 1787, as the 1766 act was about to expire, the legislature passed an act making the 1766 act perpetual.⁶⁷ In the 19th century and again in 1906, the town appealed to the legislature for authority to sell certain entrusted parcels and apply the proceeds for use of the schools.⁶⁸ Throughout all these changes, the trust impressed on Little Neck by William Paine for use of the schools survived. The bicentennial anniversary of the trust was celebrated by Ipswich’s citizens in 1851 “by appropriate exercises, consisting, in part, of a history of [the school trust], and its origin and success.”⁶⁹

Reflecting on the success of William Paine’s vision, in 1881 his descendant Albert W. Paine observed:

In other ways, too, [William Paine] shows this same spirit of a public benefactor, and one who was in advance of his age in matters of public improvement and enterprise. One of the first objects of his ambition as a citizen of the “new world,” was the advancement of education among the common people. In promotion of this, he and his brother were two of the foremost and most active of a small number of men, who, at that early day, took measures to establish and endow a Free School at Ipswich. This school thus established and endowed by them, has ever since continued to exist, and is to-day doing its work upon the fund which two hundred and twenty or thirty years

⁶¹ Brill, *supra* note 58, at 4.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 1786 Mass. Acts 172.

⁶⁸ 1836 Mass. Acts 442.

⁶⁹ PAINE, *supra* note 3, at 7.

ago they provided for the purpose, the income actually received during the year (1879) being \$330; certainly a most remarkable fact in the history of pecuniary investments.⁷⁰

Albert Paine then noted that a visitor at Ipswich in 1881 would find the lot that was originally given for the purposes of the school still occupied by an old school house on "Paine Street," which like its predecessors on the same lot, for two centuries and more, had been devoted to the cause of the school.⁷¹ The land at Little Neck, by Albert Paine's time, was "covered by cottages occupied as places of summer resort, and annually rented for an income to help support the school."⁷²

Despite the longevity of William Paine's gift and Paine's instructions in his will, the school trust impressed upon Little Neck was terminated in 2012 by agreement of the feoffees and their tenants with the Attorney General and the acquiescence in this decision by the Massachusetts courts.⁷³ Paine's vision of a permanent funding source for Ipswich schools had lasted 352 years, while the trust itself had lasted for 360 years, the longest running charitable trust ever established in what is now the United States.⁷⁴ It is the author's contention that the trust could have been easily continued by removing the feoffees and replacing them with competent trustees, without the conflicts of interest that many had.⁷⁵ Such "professional" trustees could have charged market rents to Little Neck's inhabitants, unlike the ridiculously low rents paid before the settlement.⁷⁶ However, a detailed recounting of the unsuccessful battle to save the trust is not the object of this paper.⁷⁷

What instead piques one's interest is how the Ipswich Grammar School Trust and William Paine's gift of Little Neck to it lasted so long.

V. WHY DID THE GRAMMAR SCHOOL TRUST LAST SO LONG?

One reason for the longevity of the trust is that the town leaders of Ipswich, the Paines included, took the trouble to carefully set up the vehicle that could receive gifts, like William Paine's gift of Little Neck. Instead of simply receiving conditional gifts of land as in many other

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Motion to Consolidate Appeals, *supra* note 49, at 2.

⁷⁴ See Ipswich Citizens for Public Trust <http://ipswichtrust.org>.

⁷⁵ Brief for Ronald Chester as Amicus Curiae Supporting Interveners at 5-6, *Mulholland v. Att'y Gen*, No. 2012-P-1635, (2012), available at <http://ipswichtrust.files.wordpress.com/2012/08/appeals-interveners-120828-amicus-letter-chester.pdf>.

⁷⁶ *Id.* at 6-7.

⁷⁷ For a recounting of the battle to save the Ipswich Grammar School Trust, see HURD, *supra* note 47.

towns, Ipswich established this trust entity, staffed by the most eminent men in town as feoffees to handle all the gifts for the school separately from other town revenues.

While using land and its rents to fund town schools was not an idea original to Ipswich (see the situations in Dorchester, Cambridge, etc.),⁷⁸ it can be said that Ipswich, through the feoffees of its educational trust, exercised more control than other towns over the use of gifts such as that of William Paine. This was important because the colonial courts had no power to enforce trusts until the 19th century.⁷⁹

What can be said about William Paine's entrusting of Little Neck for the use of the schools? Land, although not the only form of wealth at the time, especially for merchants like Paine, was clearly the primary form of wealth in the Massachusetts Bay Colony of the mid-seventeenth century. It also had the virtue of being a perpetual source of funding for the schools. Little Neck itself was a unique piece of land, useful not only for grazing, but also for fishing. Whether or not a prescient and successful businessman like William Paine could have foreseen its future use as a summer resort colony, he could not have been immune to its scenic attractions. This was not only a piece of land, but also a unique piece of land capable of many future uses, which could be used to fund the Ipswich schools far into the future.

Being a wise man of property like his brother Robert, William Paine knew that the valuable "Little Neck" of land he left to the school could provide perpetual income for that purpose – in his day, the rents and income from grazing and fishing and in the future, whatever incomes this valuable land would give off. He could have simply given money. Paine left an estate valued at £4,239—a huge sum for the day—and, among other pecuniary bequests, he gave £20 to Harvard College.⁸⁰ But he was wise enough to know, unlike the 21st century Massachusetts Attorney General and Massachusetts courts,⁸¹ that land, unlike a sum of money, can produce revenue forever, as times change. Paine was not only an idealist, but also one of the most prominent business and civic leaders of his time. Perhaps we should have continued to trust his vision.

⁷⁸ See DORCHESTER ANTIQUARIAN AND HISTORICAL SOCIETY, *HISTORY OF THE TOWN OF DORCHESTER, MASSACHUSETTS* 163-164 (Ebenezer Clapp, Jr. ed., 1859) available at <http://name.umdl.umich.edu/AKE5680.0001.001>; see generally Bush, *supra* note 51, at 1169.

⁷⁹ Peter Dobkin Hall, *The Charity of Edward Hopkins: The Hazards of Charitable in Colonial America*, in *Documentary History of Philanthropy and Volunteerism in the United States, 1600-1900*, at 1 (Hauser Center of the John F. Kennedy School of Government, Working Paper 2014), <http://www.hks.harvard.edu/fs/phall/dochistcontents.html>.

⁸⁰ See TRASK, *supra* note 56, at 8-9.

⁸¹ See generally Motion to Consolidate Appeals, *supra* note 49.

Was there anything especially significant about the Ipswich Grammar School Trust, and about William Paine's gift of Little Neck to it, that should inform a discussion about the longevity of charitable trusts?

First, as to the trust itself its structure seems to have been remarkably well thought out. While throughout the Bay Colony lands were being donated to fund schools, the methods by which they were left varied. In Roxbury, Thomas Bell, one of its early settlers, "left by will, in 1671, lands and other property for maintenance of a 'free [grammar] school.'"⁸² "This property [and income from some of the Boston Harbor Islands], under the able management of a board of trustees . . . became of great value."⁸³ What is now the Roxbury Latin School "acquired a foremost position among the schools of New England."⁸⁴

While the Roxbury School was successfully run by a Board of Trustees, much like that in Ipswich, other Colony schools were established more haphazardly.⁸⁵ One interesting example involves the Edward Hopkins charitable trust, which after many political battles eventually gave a portion of its income to the Cambridge Grammar School.⁸⁶ In an interesting paper entitled "The Charity of Edward Hopkins: The Hazards of Charitable in Colonial America," written at the Hauser Center of the John F. Kennedy School of Government, Hall attempts to illustrate through the example of the Hopkins Trust, "the difficulties faced by Puritan philanthropists as they tried to negotiate the conflict between the well-established legal system of the Old World and the experimental one of the New."⁸⁷

In leaving his residuary estate in New England to his father-in-law Theophilus Eaton and to a group of three other Connecticut leaders, Hopkins "failed to take into account . . . either [the] importance of a juridical infrastructure to the enforcement of trusts or the lack of sophistication of the colonists with regard to the concept of a charitable trust."⁸⁸ According to Hall,

Trusts involve coextensive property rights which are divided between the trustee, who is the *legal* owner (and who has the right to buy, sell or rent the property, as if it were his own), and the beneficiary, who is the *equitable* owner (and who has enforceable claims on the use of the trust property). The problem was that legal rights and equitable rights were not enforceable

⁸² Bush, *supra* note 51, at 1169.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ *See* Hall, *supra* note 79, at 4.

⁸⁷ *Id.* at 1.

⁸⁸ *Id.*

by the same courts. And, indeed, most courts in early New England did not see themselves as possessing the equity jurisdiction which would permit them to enforce trusts. . . . Thus, while testators and others were free to create trusts, they had no assurance until well into the nineteenth century that such trusts would be enforced.⁸⁹

At his death in 1657, Hopkins gave a very general bequest to establish, *inter alia*, a “Grammar School.”⁹⁰ After numerous initial battles over the funds, Hopkins’ trustee divided this part of the bequest “among three towns in the Connecticut Valley, not one of which had . . . advanced so far towards the establishment of the grammar school as to own a school building.”⁹¹ By 1712, this portion of the fund was dedicated to establishing a grammar school in Cambridge, Massachusetts.⁹² However from Hopkins’ “simple open-handed gestures ensued a series of litigations . . . that would last for 135 years!”⁹³

According to Hall, “[t]he broad issue of jurisdiction and enforceability was only one of many problems not envisioned by the charitable Mr. Hopkins.”⁹⁴ Other issues,

such as a clearly defined set of beneficiaries, specifying the mode of succession of [the] trustees, accountability to beneficiaries for the management of trust assets, were similarly neglected. . . . [Also] the questions raised by the Trust’s ownership and rental of land . . . were considered . . . of burning importance at the time.⁹⁵

Comparisons between the Hopkins Trust and the Ipswich Grammar School Trust are instructive. Instead of Hopkins’ rather general largesse, the charitable purpose of the Ipswich trust was simple and clear – to fund the town school. The trustees were leading men of that town, who could focus on this straightforward goal. While questions of succession of trustees and the use of donated land did arise, these were settled, in absence of courts of suitable jurisdiction, by the legislature of the colony, which as previously mentioned, passed a number of special acts to solve them. Certainly compared to the endless battles that occurred over the more generally bequeathed Hopkins funds,⁹⁶ the disputes in Ipswich

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 3.

⁹² *Id.* at 4.

⁹³ *Id.* at 1.

⁹⁴ *Id.* at 2.

⁹⁵ *Id.*

⁹⁶ *Id.*

seemed relatively minor, at least until the late 20th and early 21st centuries.

If the trust itself proved a relatively simple and straightforward vehicle, what of William Paine's gift of Little Neck to the trust – a gift that outlasted all others?

The rents from land were commonly used to fund schools in colonial New England.⁹⁷ What is particularly noticeable is that, at least in the Massachusetts Bay Colony, the land was often an island. As mentioned previously, rents from the harbor Islands were used to fund Roxbury Schools.⁹⁸ In 1637 the Massachusetts Bay legislature granted Thompson's Island in the harbor to Dorchester so long as the rents from the island were used to maintain a "free school" there.⁹⁹ Unfortunately, this grant soon gave way to the claims of the original owner, Thompson's son, John. Lovell's Island, in the harbor, was granted to Charlestown in 1636, and the rents from the island were used to fund that town's school.¹⁰⁰

Little Neck, of course, is not technically an island, but is connected by a narrow isthmus to Great Neck, and thence to the rest of the town of Ipswich. In practical effect, it is isolated like an island, the only difference being that it is surrounded by water on three sides rather than four. It is easy to surmise that Little Neck, like various Harbor Islands used to fund other schools, was a particularly useful property to devote to the perpetual upkeep of schools because of its freedom from any land disputes with owners of adjoining parcels. Indeed, even the dispute over Thompson's island, which Dorchester eventually lost, was simply the result of trying to use the island for maintenance of the school before John Thompson's son reached the age of majority and could claim the island as his father's rightful heir.¹⁰¹

William Paine made two charitable gifts in his will other than the gift of Little Neck.¹⁰² These were both sums of money – £20 to Harvard College and £100 as a general charitable gift for his executors to distribute – not land.¹⁰³ His gift to the Grammar School Trust was uniquely suited to funding an Ipswich school in perpetuity; it was the gift of an isolated parcel of land, free from conflicting land disputes, which could be foreseen to have multiple productive uses over time.

⁹⁷ Bush, *supra* note 51, at 1169.

⁹⁸ *Id.*

⁹⁹ DORCHESTER, *supra* note 78, at 163; Bush, *supra* note 51, at 1170.

¹⁰⁰ DORCHESTER, *supra* note 78, at 163-64; Bush, *supra* note 51, at 1170.

¹⁰¹ DORCHESTER, *supra* note 78, at 163-64.

¹⁰² See TRASK, *supra* note 56, at 8-9.

¹⁰³ *Id.*

VI. CONCLUSION: WHAT WILLIAM PAINE AND THE GRAMMAR SCHOOL TRUST TELL US ABOUT DEAD HAND CONTROL OVER CHARITABLE TRUSTS

Observing the startling longevity of the Grammar School Trust and of William Paine's gift to it leads inevitably to contemplation about dead hand control of charitable giving. American law states that charitable entities, once established, can be perpetual,¹⁰⁴ however, as everyone knows, nothing is perpetual – everything changes. As times change, trustees and ultimately courts must confront the question of whether, in a given instance, the wishes of the dead donor should be given sway over the dictates of the living.

If one contrasts the successful Grammar School Trust with a more recent charity whose intent has been strongly altered since the 1950s, certain patterns emerge that may prove helpful both to potential donors and to those charged with making the donor's vision work after the donor's death. It may just be that the longevity a donor's charity achieves depends on the donor's swallowing his or her ego and leaving the charitable vehicle open to change by the living.

For contrast to the Ipswich situation, I have chosen the fate of the Barnes Foundation Trust of Lower Merion, Pennsylvania, and now largely of Philadelphia, Pennsylvania. Albert C. Barnes, its creator, was a self-made scientist who accumulated perhaps the greatest private art collection in the world, beginning in the early 20th Century and ending with Barnes' death in 1951.¹⁰⁵ This collection, filled with the works of giants like Renoir, Cezanne, Picasso, Modigliani, Matisse and others, was meant by Barnes to be part of an art school, primarily for working men and women, which was to be established in Lower Merion, Pennsylvania.¹⁰⁶ The son of a butcher, Barnes fought most of his life against the pretensions of "fancy folks" and the art world they sustained.¹⁰⁷ But Barnes' overweening ego, which imposed numerous restrictions on his school/museum both during his life and after death, ultimately led to the substantial reworking of this vision by those who survived him.

It was not long after Barnes' death in 1951 that the trust indenture which established it, became largely unworkable.¹⁰⁸ Imagine an incredibly valuable art collection (valued at between \$30 and \$50 billion dollars

¹⁰⁴ *Jackson v. Philips*, 96 Mass. 539, 550 (1867); see also *DUKEMINIER & SITKOFF*, *supra* note 59, at 743.

¹⁰⁵ James Panero, *Outsmarting Albert Barnes*, *PHILANTHROPY MAGAZINE*, Summer 2011, at 1, 4, available at http://www.philanthropyroundtable.org/topic/donor_intent/outsmarting_albert_barnes; see generally *DUKEMINIER & SITKOFF*, *supra* note 59, at 762-66.

¹⁰⁶ Panero, *supra* note 105.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

by 2013) housed in a school in a small town, with an endowment of under \$10 million. Imagine further that an inadequate building housed the collection and that the school and collection were open only a day or so per week with no admission to be charged; that the art itself could not be sold, moved or even shown on tour outside the museum; that the art had to be hung exactly as dictated; that the endowment of the school could not be invested, except in government bonds; and that no gala charity parties could be given to encourage donations. Imagine further that control of this foundation was given not to established institutions like the University of Pennsylvania and the Philadelphia Museum of Art, but at Barnes' death to the small, historically black Lincoln University, an institution wholly inexperienced in managing such a foundation.¹⁰⁹

This is the unworkable situation the Barnes Foundation was left with. Despite Barnes' clear and detailed instructions, most of these restrictions eventually were removed by the courts and by 2012, its collection was housed in a new facility, not in Lower Merion, but in Philadelphia (a move strictly forbidden by Barnes).¹¹⁰ The collection is now run in many ways like a typical art museum.¹¹¹ While Barnes' art school remained in Lower Merion, the new Philadelphia museum housing the collection charges admission, is open throughout the week, puts its art out on tour, and gives gala events to encourage donations. What remains of Barnes' vision, at least in Philadelphia, is an arrangement of these nearly priceless artworks that are placed as closely as possible to their original arrangement in Lower Merion, albeit in a different building and location.

Many of Barnes' restrictions were drafted by a "superlawyer" of the day, Owen J. Roberts, who later became a Supreme Court Justice.¹¹² However, while Roberts might posthumously be blamed for counterproductive "over-lawyering" through the drafting of unworkable restrictions, it is nonetheless true that he executed what the ego of Albert C. Barnes demanded.¹¹³ Barnes was the ultimate 20th century capitalist, used to being in control and wishing to remain so after his death.

Contrast the Barnes Foundation with the Grammar School Trust, which ultimately held only Little Neck. The conditions on Paine's gift were simple: he gave Little Neck to the town to fund the school, only stipulating that the property not be "sold or wasted."¹¹⁴ In other words,

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See TRASK supra* note 56, at 8.

in the community spirit of early American Puritanism, Paine trusted those who would administer his grant and choose their successors. The leading citizens of Ipswich would both administer the gift and choose future trustees. Unlike Barnes, Paine was not trying to make a point by appointing trustees inexperienced in the charitable purpose that was to be fulfilled; instead, he chose the most experienced people he knew – the very people who, with their successors, would establish and maintain Ipswich education.

Suppose that William Barnes, realizing by his death in 1951, the incredible and increasing value of his art collection, had chosen experienced trustees to succeed him and not burdened them with egomaniacal and unworkable restrictions?¹¹⁵ Would his charitable vision have survived mostly intact? The answer is probably yes, since courts tend to look to donor intent first until the gift/trust becomes unworkable.¹¹⁶

The lesson is that the charitable donor must trust those who will follow him or her to administer the gift correctly as times inevitably change and must provide for their orderly replacement. Paine's trustees were instructed only to make productive use of valuable land for the use of the Ipswich schools (not to "waste" it) and not to sell it. This was a relatively easy and workable charitable charge reflecting the trust that William Paine had in the community he left behind. The succession of trustees over time became the most difficult issue for the Grammar School Trust, but for centuries this was solved by wise people. Of course, the issue of who would become trustee became moot after the leaseholders of Little Neck waged a battle to terminate the trust, and the Attorney General and Courts went along.¹¹⁷

Once the donor's ego takes over, as in the Barnes situation, the charitable entity is unlikely to survive in anything resembling its original form. This is when the living make changes that are, in the usual case, justified. The donor has received large tax benefits for donating the property for the use of the public.¹¹⁸ If such use becomes impracticable, the donor's restrictions must yield. Otherwise, if the restrictions are simple and not onerous, as in William Paine's gift to the Grammar School

¹¹⁵ In contrast to these egoistic, unworkable restrictions which shortened the life of the Barnes trust as Dr. Barnes had envisioned it, William Paine, with his Puritan faith in community, left it for trustees he trusted to determine how the income from his land could be used to benefit Ipswich schools. Had he, for example, tried to limit the use of this income to the education of the children of Ipswich farmers only, his gift would not only have been in trouble from the outset, but would scarcely have lasted a decade, let alone 360 years!

¹¹⁶ See RONALD CHESTER ET AL., (BOGERT'S) TRUSTS AND TRUSTEES § 439 (3d ed. 2005).

¹¹⁷ Motion to Consolidate Appeals, *supra* note 49.

¹¹⁸ See I.R.C. §§170 (income tax), 2055 (estate tax), 2522 (gift tax).

Trust, the donor's intent will be given reasonable leeway by the generations that follow. If donors want their charitable purposes to survive for generations to come, they must leave vehicles restricted only by general guidelines within which future generations can navigate successfully.