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Attorney General Guidelines on Requirements Imposed by
Massachusetts Charitable Mechanic Association v. Beede, 320 Mass. 601 (1947)

The Attorney General has authority under common law and G.L. c. 12, § 8 to “enforce the due application of charitable funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof.” In furtherance of this duty, G.L. c. 180, § 8A(c) requires a public charity that has decided to sell all or substantially its property and materially change its activities to provide notice to the Attorney General.

In a prior memorandum (the “8A Memorandum”),¹ the Attorney General’s Non-Profit Organizations/Public Charities Division (the “Division”) set forth the Division’s expectations regarding the notice required when a charitable organization contemplates a sale of all or substantially all of a public charity’s assets with a concomitant material change in the public charity’s activities. In the 8A Memorandum, the Division explained that, after reviewing a public charity’s 8A(c) notice, it will typically issue a letter indicating the charity’s statutory notice requirements have been met. 8A Memorandum at § 4. Nevertheless, the 8A Memorandum also identified specific 8A(c) transactions for which notice alone was insufficient, and court approval would be required.

One example of a transaction for which court approval is required is a disposition of a large part of a charity’s assets without receiving fair value. Specifically, if a charity proposes to transfer a large part of its assets to another charity not controlled by the transferor and the consideration to be received in return is less than fair value (a “*Beede* Transaction”), it is necessary for the charity to file a petition in the Supreme Judicial Court (Single Justice Session for Suffolk County) with the assent of the Attorney General, following the principles set forth in *Massachusetts Charitable Mechanic Association v. Beede*, 320 Mass. 601 (1947).

These guidelines explain:

- A. the *Beede* doctrine, and the necessity of court approval for *Beede* Transactions;
- B. when notice of a *Beede* Transaction must be given to the Attorney General; and
- C. the Division’s expectations regarding the contents of a *Beede* petition.

¹ <http://www.mass.gov/ago/docs/nonprofit/ags-guidelines-on-notice-requirements-of-gl-c180-8ac.pdf>

1. The *Beede* Doctrine and its Implications for Public Charities

Beede concerned a charitable corporation chartered by special act of the legislature. Eighty years after its creation, the corporation used its assets to establish a “charity fund,” the income of which was to be used to support the corporation’s charitable work. Pursuant to an amendment to its by-laws, the corporation elected three of its members to serve as trustees of the charity fund. Those trustees held the fund’s assets in their names as trustees – rather than in the name of the corporation – and in a deposit vault and bank accounts not accessible to the corporation’s officers. After the corporation’s finances deteriorated, its treasurer demanded that the trustees of the charity fund transfer a portion of the principal of that fund to the corporation in order to retire the corporation’s unpaid tax liability. The trustees refused to do so, reasoning that the corporation did not own the charity fund, and that they could not divert the charity fund from the charitable work of the corporation to the payment of taxes. The Supreme Judicial Court rejected the trustees’ position.

The Court began by observing that “the trustees of a charity may not delegate their powers and duties to others, much less substitute new trustees for themselves.” Instead, the Court held, “[a] change of trustees, when necessary, is made by judicial decree.” Applying these principles, the Court concluded that “any action of the corporation, at least in the absence of statutory authority, whereby it attempted to divest itself of a large part of its assets by creating a charitable trust with individuals as trustees, must be deemed beyond its powers and ineffectual.” Consequently, the Court held, the corporation remained the owner of the charity fund, and its trustees were mere officers and agents of the corporation, subject to its control.

The *Beede* doctrine stands squarely for two propositions:

- A. An attempt by a public charity to divest itself of a large part of its assets to a charity that it does not control – i.e., transferring a large portion of its assets for less than fair value – is a “change of trustee” transaction.
- B. In the absence of specific authorization in the trust instrument or corporate charter, any “change of trustee” transaction requires court approval.

2. When Notice of a *Beede* Transaction Must Be Given to the Attorney General

To determine whether a non-profit organization must provide *Beede* notice to the Attorney General, the following questions must be answered.

- First, is the transferor a public charity?

The definition of what constitutes a public charity is not derived from statute but from court decisions, which provide that there are three requirements for an entity to be considered a public charity in the Commonwealth. Generally speaking, the entity must: be a non-profit organization; have a charitable purpose; and benefit an indefinite population (for example, benefits not limited to a finite membership). Typically, if an organization files an annual report under G.L. c. 12, § 8F, it is a public charity which

would be required to file a *Beede* notice when engaging in a *Beede* Transaction. The opposite, however, is not necessarily true. Organizations such as religious entities specifically exempted from filing under G.L. c. 12, §8F are still public charities and, therefore, must notify the Attorney General of *Beede* Transactions.

In addition, the *Beede* doctrine applies to all forms of public charities, whether charitable trusts or charitable corporations.

- Second, does the transaction involve a large part of the public charity's property?

Notice to the Attorney General is required when the transaction involves "a large part" of a charity's assets. There is little guidance on what is meant by "a large part," as contemplated by the *Beede* decision. With the exception of grant making organizations, as a rule of thumb the Division expects to receive notice of a transfer of more than a *de minimis* share of a public charity's assets. If the board of directors is not certain whether such a transaction involves "a large part" of a charity's property, it should obtain professional legal advice.

- Third, is the transferring public charity receiving less than fair value in exchange for its property?

The *Beede* doctrine applies whenever a charity transfers a large part of its assets without receiving fair value in exchange for such transfer. Thus, the *Beede* doctrine would capture both outright gifts and sales for less than fair value (i.e., a part sale, part gift). Fair value is typically demonstrated by way of an appraisal. If an appraisal was not performed, but the transferring charity believes that it will receive fair value in exchange for a transfer, the charity must show by other means that the price constitutes fair value.

- Fourth, is the transferee a public charity?

Only a public charity may be the recipient of assets in a *Beede* Transaction. For guidance on whether an entity is a public charity, see question "First," above.

- Fifth, is the transferee not owned or controlled by the transferor?

If the transferee is owned or controlled by the transferor, then the transfer will not result in a "change of trustee," triggering the *Beede* doctrine.

If an entity answers "yes" to the above questions, notice under *Beede* must be provided to the Attorney General. If the organization is uncertain, the organization may request informal guidance from the Division.

3. Contents of a *Beede* Petition

Before consummating a *Beede* Transaction, the transferring public charity should prepare a *Beede* petition for review and assent by the AGO and then filing with Supreme Judicial Court

(Single Justice Session for Suffolk County). While the exact contents of a *Beede* petition will vary depending on the nature of the transaction, each *Beede* petition must, at a minimum:

- A. Identify the Transferor. The petition must name the transferor as the plaintiff, identify its charitable purpose(s), and summarize its activities and history.
- B. Identify the Transferee. The petition must name the transferee as a defendant, identify its charitable purpose(s), and summarize its activities and history.
- C. Name the Attorney General as a Defendant. The petition must name the Attorney General as a co-defendant pursuant to G.L. c. 12, § 8G.
- D. Identify the Reason(s) for the Transaction. The petition must explain why the charity is transferring a large part of its assets for less than fair value.
- E. Summarize the Transaction. The petition must summarize the terms of the transaction, including the property to be transferred and the consideration (if any) to be received by the transferor (which may include the transferee's assumption of some or all of the transferor's liabilities). The petition must also explain why the transferee is the appropriate recipient of those assets. Finally, the petition must also contain a representation that the transferee will use the assets it receives for the same purposes as the transferor had used those assets.
- F. Identify Whether any of the Transferred Assets are Restricted. The petition must identify whether any permanently or temporarily restricted gifts are among the property being transferred. If so, then the petition must recite that the transferee is accepting those assets subject to those restrictions.
- G. Include Representations Regarding the Transferor's Liabilities. The petition must represent that the transferor either (a) has no liabilities other than those being transferred to the transferee or (b) will retain sufficient assets to satisfy any liabilities that have not been transferred.
- H. Include a Prayer for Relief. The petition must include a prayer for relief identifying exactly the relief being sought from the Court. Most typically, this is a request for authorization for the transferor to transfer its assets to the transferee, with such assets to be used by the transferee for the same purpose as they had been used by the transferor.
- I. Include a Motion for Entry of Judgment and a Proposed Judgment. The petition must include a motion for entry of judgment, which should recite that the transferor, with the assent of the Attorney General and the transferee, move for entry of a judgment in the form attached thereto. The attached proposed judgment should recite that the matter came before the court on the transferor's motion and that the Attorney General and the transferee have assented to that motion. The

proposed judgment should frame the court's order exactly as it was framed in the prayer for relief.

Be advised that the initial draft of a *Beede* petition may look different from the version that ultimately will be submitted to the Court. The preparation of a *Beede* petition is frequently an iterative process, requiring an exchange of multiple drafts before the Attorney General is in a position to assent. Once the Attorney General and the transferee have assented to a petition, the transferor may then file the petition with the Court.

The transferor may only deliver its property to the transferee after the court has approved the *Beede* Transaction.