

Respecting Donor Intent: Why and How Much?

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I. Introduction

If one were to ask charities, donors, the lawyers who represent both, and state charity officials whether charities should respect the intent of their donors, they all likely would answer “yes.” The response seems so obvious that the question hardly merits asking. But the question assumes a clear understanding, on all sides and over time, of what donors actually intended when they made their gifts. This assumption raises serious questions, both about how donor intent is understood and about how donor intent is manipulated in arguments about the use of charitable funds.

If a donor gives a charity money or property for a particular purpose, then the charity should do its best to carry out that purpose. But when is a charity “doing its best” in complying with a donor’s intent? Are there times when a charity’s best efforts may be perceived to be in conflict with the intent of a donor? How should a charity balance its overarching mission with a restriction imposed by a donor? And, most fundamentally, can the charity or anyone else be sure what a donor’s intent is or was?

This paper argues that in order to understand donor restrictions and the role they play in the use of charitable assets, we should recognize that donor intent may not always

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be clear. If donor intent is not clear, then perhaps the question of respecting donor intent should be reframed in ways that incorporate the public's interests in charitable purposes.

This paper begins by considering the difficulties involved in determining what a donor or a group of donors intended when they made gifts to a charity. These issues include determining the intent of donors when circumstances affecting the purpose of the gift change, the intent of donors who state a general charitable purpose that must be carried out through specific programs, the intent of donors who give to "endowment" without stating what that means, and the intent of donors who give money in response to a broad-based appeal to raise funds for victims of a disaster.

The paper then examines the reasons a charity should respect donor intent, considering legal requirements, self-interested reasons, and societal benefits. The paper wonders whether under some circumstances a charity should not respect donor intent and explains what those circumstances might be. The paper concludes with the recognition that the issue of donor intent can be manipulated and cautions that although respecting donor intent will always be important, understanding the nuances of donor intent will also be critical.

II. How Do We Determine Donor's Intent?

The disputes described in this paper all have at their core not just the question of whether a charity honored the intent of a donor but what the intent of the donor actually was. Although words in a gift agreement or solicitation should provide guidance

regarding the intent of a donor,¹ words can be ambiguous and susceptible to multiple interpretations. Even words in a carefully negotiated and written gift agreement may not have a plain meaning, especially if circumstances change.² For some gifts only limited written documentation of intent may exist, and arguments may involve varied understandings of what the donor intended.

Difficult issues involving the determination of a donor's intent arise in a number of situations. A review of these problem areas points to the importance of greater clarity in establishing donor intent at the time of the gift. In many cases, however, a foolproof answer to the question of how to establish and determine donor intent does not exist. Instead, anyone worrying about donor intent should remember that in many situations donor intent simply cannot be determined with certainty.

A. Changes over Time

1. The Problem

In some situations, a donor's intent may be reasonably clear at the time the donor makes the gift. The donor may restrict the use of a gift to a particular purpose, spelling out the restriction in a gift agreement, letter, or other document. However, if circumstances affecting the purpose change over time, determining donor intent in the

¹ The Uniform Management of Institutional Funds Act ("UMIFA") and the revision of that act, the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), limit the legal enforceability of donor intent to written documents. UMIFA --; UPMIFA --. *See infra*.

² John Wigmore, the evidence scholar, attacked the so-called plain meaning rule in probate law saying, "The fallacy consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth there can be only *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document . . . [T]he 'plain meaning' is simply the meaning of the people who did not write the document." 9 John H. Wigmore, Evidence § 2462 at 198 (James H. Chadbourn rev. 1981) (emphasis in original). If the writer is dead, which is always the case in probate law and often the case in disputes involving donor intent, then the person whose meaning counts is not available.

face of those changed circumstances may be difficult. Documentation of donor intent, through gift agreements or solicitation materials, may not resolve the questions that arise.

Sometimes a donor will not have all the relevant facts at the time the donor makes a gift or the circumstances may change shortly after the donation. Donors making gifts to provide for victims of the September 11 attacks may have assumed that the money would be needed to help the victims meet financial needs associated with the loss of a breadwinner or the loss of a job.³ Donors might have considered other uses for the contributions if donors had realized how much money would be contributed. Although most donors were alive when changed circumstances (the amount of money donated) became apparent, the number of donors involved made ascertaining individual intent impossible.

Most questions involving changed circumstances arise long after a gift was made, usually when the donor is no longer alive.⁴ Changes may mean that the original purpose no longer makes sense, or that new interpretations of the meaning of the original purpose exist. A fund created to provide financial support for spouses and children of soldiers who fought in World War I will eventually have no beneficiaries. Someone making this gift could have foreseen the eventual problem, but a donor might not have imagined that assets would still be available at that time. Other changed circumstances are not easy to

³ For a discussion of donor response to September 11, see *infra* --

⁴ If a donor is alive and can be located, a charity will usually discuss the changed circumstances with the donor, request that the donor release the restriction that is no longer viable, and work with the donor to determine how best to use the funds. Maintaining good donor relations is key to future fundraising. Sometimes, however, a charity does not involve the donor. In *Carl J. Herzog Found. v. University of Bridgeport*, 243 Conn. 1, 699 A.2d 995 (1997), the Carl J. Herzog Foundation sued the University of Bridgeport for misuse of funds. The foundation had given the university \$250,000 “to provide need-based merit scholarship aid to disadvantaged students for medical related education. . . .” The fund was used for scholarships to the university’s nursing school but five years after the university received the gift the university closed the nursing school. The court held that the foundation lacked standing to bring the suit, so the dispute was not resolved judicially. A better course for the university after the nursing school closed would have been to work with the donor to redirect the funds in keeping with the donor’s intent.

foresee. A donor who creates a scholarship fund for students graduating from a particular high school may not consider that the high school may someday close. A fund to protect polar bear habitat may be of no use if the Arctic glaciers melt and polar bears become extinct. Just as a donor contributing to a fund in 1900 could not have foreseen the impacts of computers, a donor in 2000 cannot imagine the world 100 years from now.

Questions of intent can arise because the interpretation of words changes over time. For example, imagine a 1950 gift agreement that created a fund “to support families by assisting with the costs of adoption.” In the half century since the donor made the gift, the legal definitions of “family” and “adoption” have changed. Should the charitable donee interpret the terms in the gift agreement based on 1950 definitions or based on current understandings of the terms? Did the donor mean to limit the agreement to legal definitions, or did the donor intend a more general understanding of what “family” means? Should someone interpreting the document look beyond the written text to try to determine what a donor intended nearly 60 years ago? If the donor made the gift many years ago, at what point should “dead hand control” be loosened?⁵

2. Court Ordered Modification - Cy Pres and Deviation

The law of charities began in trust law.⁶ Charitable trusts can continue in perpetuity,⁷ and trust law developed doctrines that permit a court to modify a restriction imposed on assets held in a charitable trust. If circumstances change, the doctrines of cy pres and equitable deviation both permit modification of terms of a charitable trust.

⁵ Commentators who prefer a loosening of restrictions over time refer to “dead hand control” while those who prefer continued deference to a donor’s original words describe the importance of “donor intent.”

⁶ See Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 *HI. L. REV.* 593, 597 (1999).

⁷ See RESTATEMENT (THIRD) OF TRUSTS § 67; UNIF. TRUST CODE § 413.

Courts often apply trust law to charities organized as nonprofit corporations, so the doctrines probably can also be used by nonprofit corporations.⁸

a. Cy Pres

Cy pres, like most of trust law, is a default rule. A donor can specify what should happen to a gift if the purpose either is completed or becomes impracticable for the charity. If a donor does not provide specific guidance, cy pres permits a court to modify a restriction, under certain circumstances.⁹ A court can modify a restriction that has become illegal, impossible, or impracticable, and, in states that have adopted the UTC, wasteful.¹⁰ Courts have applied cy pres narrowly, giving significant deference to donor intent.

The common law doctrine of cy pres requires a finding that the donor had a general charitable intent before a court can apply cy pres.¹¹ In the absence of a finding of general charitable intent, the property reverts to the donor.¹² Courts typically find general charitable intent, and the doctrine then assumes that the donor would not want the donor's intent to be frozen in time but rather would want the intent to be modified and used for another charitable purpose. Cy pres ties the modification to the donor's intent,

⁸ See *infra*, text accompanying notes -- (discussing UMIFA and UPMIFA and the application of cy pres and deviation to nonprofit corporations).

⁹ RESTATEMENT (THIRD) OF TRUSTS § 67; UNIF. TRUST CODE § 413. Numerous law review articles analyze the doctrine. See, e.g., Rob Atkinson, *Reforming Cy Pres Reform*, 44 Hastings L.J. 1111 (1993); Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 Ariz. L. Rev. 873, 877 (1997) (herein cited as “Charitable Endowments”); Johnny Rex Buckles, *When Charitable Gifts Soar Above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 Fordham L. Rev. 1827, 1834-37 (2003).

¹⁰ The common law formulation of the doctrine permits the application of cy pres if the original purpose has become impossible or impractical or illegal. See RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). The Uniform Trust Code added wasteful. States that have adopted § 413 of the Uniform Trust Code will have this additional ground for applying cy pres.

¹¹ See RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

¹² See *id.*

and the name of the doctrine may mean that modification should be “as near as possible” to the original purpose.

The UTC deletes the requirement that a court find general charitable intent.¹³ By making this change the drafters of the UTC did not intend to undermine donor intent but rather recognized the fact that donors who make charitable gifts usually do have a general charitable intent.¹⁴ The drafters concluded that requiring proof of that general intent was unnecessary and unproductive. The UTC also changed the language of modification, directing a court to apply the funds “in a manner consistent with the settlor’s charitable purposes.”¹⁵ Again, the question is not whether to comply with a donor’s intent but how best to do so, given the changed circumstances.

Arguments about the correct application of cy pres typically have both sides cloaking their positions in donor intent. In one high-profile case involving the Buck Trust, changed circumstances affected the trustee’s ability to carry out the terms of the trust. Beryl Buck created a trust under her will to provide for the needy of Marin County, California. She named the San Francisco Foundation the trustee. The value of the trust increased from \$7 million when Mrs. Buck died, to \$400 million less than 10 years later, and the trustee asked the court to apply cy pres to modify the geographical restriction from Marin County to the five counties that make up San Francisco.

After a great deal of maneuvering by both sides, the court declined to modify the trust as requested and instead made other changes, including removing the San Francisco Foundation as trustee and designating certain charitable beneficiaries. The court expressed dismay that the San Francisco Foundation would suggest “changing the

¹³ UNIF. TRUST CODE § 413.

¹⁴ UNIF. TRUST CODE § 413.

¹⁵ UNIF. TRUST CODE § 413(a)(3).

donor's intent" by expanding the geographical reach of the trust to five counties in the San Francisco area, altering Mrs. Buck's direction that the money be spent only in Marin County. As John Simon points out, the changes the court imposed may have done more damage to Mrs. Buck's intent than the geographical change would have done.¹⁶ Would Mrs. Buck have insisted that the trust be used entirely in Marin County had she known about the dramatic change in value? The question cannot be answered and, therefore, describing the decision as one made in conformity with donor intent seems inapposite.

b. Deviation

The doctrine of equitable deviation or deviation permits a court to make changes to administrative terms of a trust. Deviation is described as furthering donor intent, because a court uses the doctrine to modify a restriction when continued compliance with the restriction that will impair the accomplishment of the purpose intended by the donor.

The distinction between a purpose restriction and an administrative restriction may not be as clear as the doctrines suggest. In an older case, a donor created a trust to provide scholarships for girls born in the town of Quincy. The school had difficulty due to insufficient numbers of Quincy-born girls and requested modification. The court applied the doctrine of deviation to modify the restriction to include non-Quincy born girls. The court determined that the donor's primary concern was education of young girls, and the restriction was a way to carry out that purpose. Had the court determined that the geographical restriction was central to the donor's purpose, as did the court in the Buck case, then *cy pres* might not have permitted modification.

An example from Pennsylvania, the Barnes Foundation, demonstrates the difficulty of complying with donor's intent when the donor may not have thought through

¹⁶ See John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F.L. Rev. 641, 666-68 (1987).

the costs of his intent. The case also demonstrates the use of deviation to permit a modification that seems to go against the donor's intent.

Dr. Albert Barnes created the Barnes Foundation as an educational institution that would train students in Dr. Barnes' theories of art aesthetics.¹⁷ The trust indenture, charter and bylaws creating the Foundation imposed many restrictions, including a requirement that the art he conveyed to the trust be displayed in the building he had built to house the art, hung exactly as he directed.¹⁸ The art could not be moved, sold, or lent to other museums. The gallery was to be open to the public on an extremely limited basis and fees were prohibited.¹⁹ Successor trustees were to be five representatives appointed by Lincoln University, a small, historically black college located in nearby Chester, Pennsylvania.²⁰

A panoply of problems developed in connection with the Barnes Foundation.²¹ The gallery gradually opened its doors to the public, causing traffic problems in the suburb of Merion where Dr. Barnes had built the gallery. The resulting lawsuits with neighbors in Merion may have contributed to the financial woes of the Barnes Foundation. With limited ability to raise money to cover operating expenses, the trustees of the Foundation pursued a series of requests that the court modify the restrictions Dr. Barnes had imposed. Over the years the Foundation was permitted to increase the hours it was open to the public, to hold fundraising events in the gallery, and to take part of the

¹⁷ See Chris Abbinante, *Comment: Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. Pa. L. Rev. 665, 669-74 (1997) (describing Dr. Barnes, the circumstances surrounding the creation of the Foundation, and the history of the Foundation's troubles); Eisenstein, *supra* note 13, at 1749-50 (2003); http://www.barnesfoundation.org/h_main.html (last visited Oct. 2, 2005) (describing the influence of John Dewey and others on Dr. Barnes' views of education).

¹⁸ See Abbinante, *supra* note 13, at 671-72.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Jeffrey Toobin, *Battle for the Barnes: Can One of America's Greatest Private Collections Survive?*, *The New Yorker*, Jan. 21, 2002 (detailing the many legal battles).

art collection on a world tour to raise money for the Foundation. The changes kept the Foundation financially viable for awhile, but by 1998 the Foundation found itself in dire financial straits.²² A consortium of Philadelphia charities agreed to provide financial assistance to the Foundation, but only if the Foundation obtained modifications permitting it to move the gallery to downtown Philadelphia; to lift restrictions on public access and social gatherings; to enlarge the board of trustees to 15, with Lincoln University appointing only four (thereby giving up control); and to provide that in the future the bylaws could be amended by the trustees rather than through the court.²³

The Foundation sought and received court approval to make these changes.²⁴ The decision to move the Barnes gallery to downtown Philadelphia will address many of the problems surrounding the Barnes Foundation, but the modifications fairly clearly conflict with donor intent.²⁵ Indeed the organizations brokering the deal were the sort of mainline organizations and interests Dr. Barnes despised.

In agreeing to the changes, the court used equitable deviation rather than cy pres.²⁶ Deviation permits a court to make an administrative change rather than a change that affects a purpose restriction imposed by the donor, and the court need not find that

²² See Eisenstein, *supra* note 13, at 1751-52.

²³ See Eisenstein, *supra* note 13, at 1752-53.

²⁴ Barnes Foundation, No. 58,788 (Pa. Orphans' Ct. Dec. 13, 2004).

²⁵ See William Schwartz & Francis J. Serbaroli, *After the Barnes Ruling: What Donors Should Do to Protect Their Wishes*, *The Chronicle of Philanthropy*, [date] (noting that the ruling to permit the Barnes Foundation to move is “[p]erhaps the strongest reason donors have been given to worry” about whether charities will carry out their wishes); see also Leslie Lenkowsky, *A Risky End to the Barnes Case: Can Donor Intent now Survive in Pennsylvania?*, *WSJ.com Opinion Journal*, Dec. 16, 2004.

²⁶ Curiously, the court cited to Restatement (Second) of Trusts § 381 (1959) rather than to Restatement (Third) of Trusts § 66 (2003) (stating that § 66(1) stating: “The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.”).

the restriction has become “impracticable.”²⁷ In the Barnes Foundation case, however, the court’s view that the deviation was the “least drastic modification” necessary to keep the Foundation operating²⁸ has raised questions.²⁹

3. Intent Stated in General Terms

Donors with substantial wealth create foundations to serve their charitable purposes into the future. A donor may be as concerned with avoiding estate taxes as with providing charitable benefits,³⁰ but the result in many cases will be a foundation that can continue long after the death of its founder. Often these donors create foundations with rather generic purpose language. The Pew Memorial Trust, for example, was established to “help meet human needs through financial support of charitable organizations or institutions in the area of education, social services, religion, health care, and medical research.”³¹ Given the wide scope of this expression of the donor’s intent, the foundation seems to have flexibility to addresses issues as they change over time.³²

In recent years, some commentators have criticized the large foundations for ignoring the intent of their donors. Martin Wooster, a vocal proponent of this position focuses on the character, personality, and philosophy of the donor as the way to determine “donor intent.”³³ In a book arguing that many of the foundations created in the

²⁷ Pennsylvania had not adopted the UTC at the time the court heard the Barnes case, so the changes the UTC makes to the application of cy pres and deviation did not apply.

²⁸ Barnes Foundation, No. 58,788 (Pa. Orphans’ Ct. Dec 13, 2004).

²⁹ See n. 130, *supra*.

³⁰ See Martin Morse Wooster, *The Great Philanthropists and the Problem of “Donor Intent,”* 38 (Capital Research Center: 1994) (describing the creation of seven trusts by members of the Pew family as a means to avoid estate taxes while retaining control of the Sun Oil Company).

³¹ See *id.* at 38.

³² Mr. Wooster criticizes the Pew trusts as failing to respect donor intent, but at least one of the trusts has a board controlled by Pew family members who are “very active and very involved.” See Ernest Tollerson, *Charities Debate Tactic to Limit Gifts’ Life Span*, N.Y. Times, Dec. 19, 1996.

³³ In one case, The J. Howard Pew Freedom Trust, created in 1957, Mr. Wooster quotes specific instructions that the trust “be used to ‘acquaint the American people’ with ‘the evils of bureaucracy,’ ‘the values of a free market,’ ‘the paralyzing effects of government controls on the lives and activities of

first half of the twentieth century ignore the intent of their donors, Mr. Wooster states that because these foundations were created by men³⁴ who made their money through capitalism and strongly believed in capitalism, the projects supported by the foundations should support capitalism and, in general, take a conservative approach to philanthropy.

Mr. Wooster's book provides interesting historical details about the founders of major U.S. foundations, including Carnegie, Ford, Pew, and Rockefeller. His description of the MacArthur Foundation is an example of his approach. Mr. Wooster explains that John D. MacArthur created his foundation "without instructions on how his wealth should be used."³⁵ Mr. Wooster then describes the foundation's failure to honor Mr. MacArthur's "intent." Mr. Wooster describes the MacArthur Foundation as a "Bastion of Liberalism"³⁶ and decries the fact that MacArthur "genius awards" go primarily to liberals and only occasionally to conservatives.³⁷ In attempting to draw inferences as to Mr. MacArthur's intent, Wooster notes that Mr. MacArthur "was a champion of free enterprise" who argued with his son, Rod MacArthur, a liberal.³⁸ Despite the quarrels, Mr. MacArthur named Rod as one of five board members when the senior MacArthur created the Foundation.³⁹ Mr. Wooster may be correct about Mr. MacArthur's preferences, but ascribing these preferences to the foundation, when Mr. MacArthur did not do so, seems a stretch.

people,' and 'to inform our people of the struggle, persecution, hardship, sacrifice and death by which freedom of the individual was won.' Such 'forms of government' as 'Socialism, Welfare stateism [and] Fascism . . . are but devices by which government seizes the ownership or control of the tools of production.'" See Wooster, *supra* note 134, at 38. Other trusts and foundations were created with general instructions to do good.

³⁴ Although women created a couple of the foundations Wooster describes, he focuses on the intent of the men who created the money used to fund the foundations. See *infra* text accompanying notes 43-45.

³⁵ *Id.* at 35.

³⁶ *Id.* at 36.

³⁷ *Id.*

³⁸ *Id.* at 33-36.

³⁹ *Id.* at 35.

Curiously, in looking for donative intent, Mr. Wooster believes that the “intent” of the person who made the money should be honored, even if that person did not create the foundation. Mr. Wooster notes that Margaret Sage created the Sage Foundation, using funds she had been left by her husband, Russell Sage.⁴⁰ Mrs. Sage sought advice in creating the foundation and had those assisting her build in flexibility to deal with changes in the future.⁴¹ Although Mr. Wooster cannot point to any direct violation of Mrs. Sage’s intent, he suggests violations of “donative intent” by noting that Mr. Sage “would certainly have been horrified at what happened”⁴²

The question Mr. Wooster’s book raises with regard to ascertaining donor intent is where to look for that intent. Mr. Wooster traces the money and then looks at the personal philosophy of the person who made the money.⁴³ Charity law looks instead to the documents executed at the time of the gift.⁴⁴ Susan Berresford, President of the Ford Foundation, argues that, contrary to Mr. Wooster’s view, the Ford Foundation does carry out the intent of its donor, as expressed in the Foundation’s charter.⁴⁵ Henry Ford created the Ford Foundation with a broad mission to make “advances in human welfare.”⁴⁶ Ms. Berresford points out that “[t]he donor had total freedom as to how to write that charter, . . . [a]nd what later generations of people ascribe to that donor may or may not be correct.

⁴⁰ *Id.* at xi.

⁴¹ *Id.* (quoting Joseph J. Thorndike, Jr., an historian who wrote about Russell Sage).

⁴² Mr. Wooster briefly discusses the Buck Trust, a fund created by Beryl Buck when she died. Mr. Wooster notes that “only one percent of [Beryl Buck’s] wealth is to go to a cause that her father favored.” *Id.* at 51-52. The suggestion again is that the intent of the person donating the money is of less concern than that of the person who originally earned the money.

⁴³ *See, also*, Robert H. Bork, *Interpreting the Founder’s Vision*, *The Philanthropic Prospect* 9 (1993) (suggesting that “even where a donor has not made his intentions explicit, it will usually be possible, perhaps within a wide range but a range nevertheless with limits, to determine from his life and activities what uses he would not approve.”).

⁴⁴ UMIFA (1972) § 1(6).

⁴⁵ *See* Tollerson, *supra* note 136.

⁴⁶ *See id.*

But what is absolutely clearly correct is what the donor said when he or she wrote the charter.”⁴⁷

Some philanthropists now choose to establish a foundation that will last for a limited time, so that the donor can have direct control over spending decisions. Aaron and Irene Diamond created a foundation with a gift of \$200 million and planned to spend the entire amount over a 10-year period.⁴⁸ The foundation terminated at the end of 1996, on schedule and while Irene Diamond was still alive.⁴⁹ Other examples include the Lucille P. Markey Charitable Trust, which spent \$506 million in 14 years, and the Jacobs Family Foundation which will terminate on the death of the last to die of the founder’s three children.⁵⁰ Donors articulate two advantages in operating their foundations on a short-term basis. A foundation operating for a fixed period of time can remain under the control of the founder or the next generation of family members.⁵¹ In addition, by making grants more quickly a foundation may be able to have a greater impact on the causes it hopes to further.⁵²

From a legal standpoint, perceived intent cannot be enforced. From a practical and political standpoint, however, perceived intent can be an argument that influences decision making. The difficulty is, of course, that perceptions vary depending on the goal of the person “perceiving” the donor’s intent. For this reason some wealthy donors now

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.* The foundation should last about three decades.

⁵¹ *See Brody, Charitable Endowments, supra* note 118 (discussing difficulties with perpetual endowments and pointing out that “[a] perpetual charity, however, must eventually be carried out by persons other than the founder. Sometimes lost in the veneration of perpetual charities is the very real mortality of the human beings who constitute them. Donors, trustees, directors, and officers – as well as the beneficiaries and clients – all come and go, as fate and circumstances dictate. The various players making up ‘the charity’ have their own, possibly diverging, interests.”).

⁵² *See Tollerson, supra* note 136.

create foundations that will be terminated either before or shortly after the donor dies. Other donors are willing to leave a foundation with a flexible charge, knowing that future generations will need that flexibility to deal with changing circumstances.

4. Endowments

A separate problem involving donor intent relates to gifts to endowment funds. When a donor contributes to an endowment fund or a perpetual fund, the donor typically uses words with imprecise meanings. The donor may direct the charity to “pay only the income” from the fund, but that direction does not clearly indicate what the donor meant because “income” does not have a single meaning. Income may mean trust accounting income, which traditionally did not include capital gains.⁵³ Income as defined in the Uniform Principal and Income Act (“UPIA”) redefines income for trust accounting purposes, so that income now includes a portion of capital gains, at least in states that have enacted UPIA.⁵⁴ Corporate income has always included realized appreciation.⁵⁵ And in tax law income depends on a realization event, and then complex rules detail whether a receipt is taxable income or not.⁵⁶

In 1972 UMIFA created a spending rule for endowments that addressed the meaning of “income” for purposes of gifts to endowments.⁵⁷ A donor can always specify the donor’s intent, but the drafters of UMIFA concluded that a donor who restricted spending to “income” probably did not mean that the endowment could only distribute

⁵³ See William L. Cary & Craig B. Bright, *The Law and the Lore of Endowment Funds*, 30.

⁵⁴ UNIF. PRINCIPAL AND INCOME ACT (1997, amended 2000).

⁵⁵ See Cary & Bright, *supra* note 53, at 27.

⁵⁶ See *id.* at 29.

⁵⁷ See UMIFA.

trust accounting income.⁵⁸ UMIFA created a rule of construction for donor's intent.⁵⁹ If a donor instructed a charity to use only "income" from a gift, then the statute assumes that the donor meant that the charity should keep the value of the dollars contributed (the "historic dollar value" of the fund) and should spend such amounts above that value as the charity determined to be prudent, considering the purposes of the charity.⁶⁰

In 2002 the National Conference of Commissioners of Uniform State Laws (hereinafter "NCCUSL") asked a drafting committee to consider revisions to UMIFA.⁶¹ The drafting committee worked for four years, and NCCUSL approved a new Act, the Uniform Prudent Management of Institutional Funds Act (hereinafter "UPMIFA"), at NCCUSL's annual meeting in July 2006. Concerns about the best way to protect donor intent remained a key consideration throughout the deliberations on revisions to UMIFA. Changes to the rule of construction for endowment spending generated a great deal of comment. Some people argued that donors intend that the historic dollar value of their gifts be protected from spending. Others argued that donors really want to preserve the purchasing power of the gift so that the value protected is not the date-of-gift value but a value reflecting changes in the real value of the fund. Still others stressed that donors really want even more than that protected. The drafting committee discussed and considered many views of what donors intend, nearly all of them stated with surprising definiteness. UPMIFA emphasizes a charity's duty to carry out donor's intent, but not everyone agrees with the rule of construction adopted in UPMIFA.⁶²

⁵⁸ Although the law did not clearly require a charity operating as a nonprofit corporation to follow trust law, many charities assumed that trust rules applied for purposes of endowment spending. [cite to Cary & Bright].

⁵⁹ UMIFA.

⁶⁰ *Id.*

⁶¹ The author served as the Reporter for the Drafting Committee to Revise UMIFA.

⁶² UPMIFA [describe rule of construction here and two optional provisions]

UMIFA and UPMIFA each create a rule that interprets the use of the term “income” in a gift to an endowment. The discussions that occurred in connection with thinking about what the new rule of construction should be have demonstrated two points with respect to donor intent: (1) the use of words, even in a carefully drafted document, may still not provide clear guidance on donor intent, and (2) no one rule can accurately reflect the intent of all similarly situated donors.

B. Broad-Based Appeals

1. Response to Solicitations

Determining the intent of any individual donor who responds to a broad-based appeal is guesswork, but the law does provide guidelines about donor intent when donors respond to a solicitation for contributions. When a charity solicits funds and a donor responds to the request, the solicitation from the charity can be used to establish the donor’s intent regarding restrictions on the charity’s use of the funds.⁶³

If a charity solicits contributions for a particular project or fund, a donor may reasonably expect that the charity will use all contributions received in response to the solicitation for that purpose. For example, a high school alumni association might decide to raise money for a college scholarship named in honor of a long-time principal of the high school. The alumni association might solicit contributions by mailing a letter to all alumni, explaining that money collected would be used to fund the scholarship. The letter soliciting contributions becomes the guiding document in determining donor intent,

⁶³ UMIFA (defining “gift instrument” as “. . . [a] governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund.” *Id.* at § 1(6). “Institution” as used in UMIFA means, in general, charitable organization. *Id.* at § 1(1).

because an individual donor will likely not send a letter documenting the donor's personal intent. Rather, the donor will respond with the expectation that his or her contribution will be held in the newly-created scholarship fund.

The example provided does not immediately raise concerns about construing donor intent. Depending on the circumstances, however, questions could arise. The letter might not state the amount of the scholarship or whether the alumni association would hold the fund as an endowed fund or instead could decide to expend the entire fund over a short period of time. If the alumni association raised only \$5,000, the association might decide to grant one \$1,000 scholarship in each of the subsequent five years, and then terminate the fund. An individual donor might have assumed that the fund would continue in perpetuity. Although the solicitation letter may not have created a legal restriction that the association hold the fund as an endowment, donors may have expected that result. If the association spent the fund in five years, a donor might feel that the association had not respected his or her intent.

Other concerns could develop over time. If the solicitation letter had indicated that the association would award a scholarship each year to a student attending the local community college, and if the community college specified in the letter closed, then the association would need a modification of the original restriction. Section – of this paper discusses the rules that permit adjustments based on changed circumstances.

2. Disaster-Relief Organizations

Funds received by a charity in response to a disaster are treated as purpose-restricted funds, but disaster-relief organizations may face special problems. A charitable fund created for victims of a disaster may be able to provide for the needs of the victims

of that disaster and still have money left over. A charity can distribute money for a variety of purposes related to a disaster, but under charity law cannot simply make outright payments to victims, regardless of financial need.⁶⁴ An individual can, of course, give money to a victim without concern for financial need, but a charity cannot. Thus, a charity may accomplish the tasks for which the funds were contributed – providing for the basic needs of victims of the disaster – without exhausting the money contributed.

Several legal options exist for surplus funds held by a disaster relief charity.⁶⁵ If the donor's intent was limited to the purpose that has been completed, the surplus funds will be treated as a resulting trust and will revert to the donor.⁶⁶ Usually a court will find that the donor intended that the gift remain in the charitable stream and not be returned to the donor. Federal tax law favors this approach because the donor will not be entitled to a charitable deduction to the extent that any surplus could be returned to the donor.⁶⁷ Assuming that a resulting trust is not applied, the options for the surplus are (1) to use the surplus for a related purpose, through the doctrine of cy pres, (2) to let the same charity use the surplus for another of its purposes, or (3) to transfer the surplus to a private trust to be distributed to the same beneficiaries who benefited from the charitable trust.⁶⁸ Courts have occasionally taken the third option and permitted the distribution of surplus to victims of the disaster.⁶⁹ More commonly, a charity is permitted to use a surplus for

⁶⁴ See Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 Ind. L. Rev. 251, 266-70 (2003) (explaining why and under what circumstances disaster relief qualifies as a charitable activity).

⁶⁵ For a detailed explanation of the law governing the disposition of surplus disaster relief funds, see *id.*, at 272-83.

⁶⁶ RESTATEMENT (THIRD) OF TRUSTS § 7 (2003).

⁶⁷ See Katz, *supra* note 64, at 278.

⁶⁸ See *id.* at 272-74; see, also, RESTATEMENT (THIRD) OF TRUSTS § 8, cmt. g, § 67 (2003).

⁶⁹ See, e.g., *Doyle v. Whalen*, 32 A. 1022 (Me. 1895); see, also, Katz, *supra* note 64, at 274-75.

other purposes of the charity.⁷⁰ The courts reach this answer by making assumptions about a donor's intent. If the donor contributed to a particular charity, then the donor would likely want that charity to use any surplus for its other purposes. If a donor intends some other result, then the donor will have to indicate that preference when making the gift.⁷¹

The legal rules that have developed for disaster relief organizations generally permit the organizations to use surplus funds for future disasters. Disaster relief organizations need to be able to respond quickly when a disaster occurs, so building a reserve to use for future disasters allows an organization to mobilize quickly. Allocating surplus funds to future disasters also allows an organization to provide its services more equitably, because some disasters draw more donations than others.⁷²

3. The Red Cross and September 11

Following the attacks on September 11, 2001, contributions poured into the Red Cross and other funds created specifically for victims of the attacks. The story of the Red Cross and the September 11 contributions provides interesting commentary on the role of donor intent in the use of charitable gifts. Perceived donor intent became a key factor in the use of charitable funds, undermining legal rules that normally apply to distributions by charities.⁷³ Politicians and talk show hosts pressured the Red Cross to spend all of the funds received in response to the September 11 attack directly on victims of September

⁷⁰ See Katz, *supra* note 64, at n. 174; *see, also*, RESTATEMENT (THIRD) OF TRUSTS.

⁷¹ See Katz, *supra* note 64, at 276-77.

⁷² See *id.* at 304.

⁷³ For an explanation of the legal rules that apply to disaster-relief charities, see section – *infra*.

11 because the donors intended that result.⁷⁴ In retrospect,⁷⁵ it seems likely that donor intent was not as clear as portrayed by the politicians.

The donors sending money to the Red Cross in those first anguished days following the attack did not sign gift agreements and did not send written instructions about the use of the money. They may have responded to public service announcements created by the Red Cross, but probably many donors simply wanted to do something to help following the tragedy. Donors likely thought of the Red Cross as an appropriate recipient due to the longstanding role of the Red Cross in responding to disasters.

In keeping with general legal rules, prior to September 11 the Red Cross had used money not needed for a particular disaster to fund future needs.⁷⁶ The Red Cross intended to take the same approach for funds raised following September 11, but the lack of public understanding of the legal rules combined with the Red Cross's lack of clarity about its plans led to controversy.

After September 11, Red Cross solicitations sent mixed messages. Some Red Cross solicitations asked for funds for "those affected by this and other disasters" while other solicitations focused more on responding to the September 11 attack.⁷⁷ Initially, funds received by the Red Cross following September 11 went into the Red Cross's Disaster Relief Fund, a fund used to response to all disaster relief operations.⁷⁸ Then, on September 20, the Red Cross announced the creation of a separate fund, the Liberty Fund, to hold all contributions it received following September 11, whether or not the

⁷⁴ See *supra* text accompanying notes --.

⁷⁵ Of course, most analysis is easier in hindsight, and the extreme emotions surrounding September 11 make this particular case atypical. Yet, the manner in which politicians and others employed donor intent as an argument provides useful insights.

⁷⁶ See Katz, *supra* note 64, at 303-05.

⁷⁷ See *id.* at 306-07.

⁷⁸ See *id.* at 302-05 (explaining the history of the Red Cross and the manner in which it used donations prior to September 11).

donor had specifically restricted the contribution for use in connection with September 11.⁷⁹ A memorandum posted on the Red Cross website explained the creation of the fund and the fact that the fund would be used to support all Red Cross endeavors.⁸⁰ The Red Cross did not otherwise publicize the broad purposes of the fund, and given later events it appears that few people paid attention to the statement on the website.

On October 30 the Red Cross announced that it was ending solicitation of donations for the Liberty Fund.⁸¹ In the same press release, the Red Cross explained its intention to hold some of the funds contributed as a reserve for future terrorist attacks.⁸² The announcement “drew immediate criticism.”⁸³

Subsequent arguments about the use of the fund focused on the perceived intent of donors and ignored other legal rules applicable to charitable funds, including rules applicable to surplus funds collected by disaster relief organizations. Many of those involved in the public controversy found donor intent unequivocal. The attorney general of New York, Eliot Spitzer, announced, “I’m of the belief that most individuals, if not all individuals, who made contributions in the aftermath of Sept. 11 fully expect those contributions to benefit those affected by Sept 11.”⁸⁴ Congressman Charles F. Bass dismissed any suggestion that a statement of the broad purposes of the Liberty Fund should control donor intent, saying, “[y]ou know that if you asked Americans where they

⁷⁹ *See id.* at 307.

⁸⁰ *See id.*

⁸¹ *See* David Barstow & Katherine Q. Seelye, *A Nation Challenged: Red Cross Halts Collections for Terror Victims*, N.Y. Times, Oct. 31, 2001, sec. B.

⁸² *See id.* In announcing the creation of a reserve fund for surplus funds collected, the Red Cross was simply following its usual procedures -- and the law. The manner of the announcement, and the fact that legal reasons for this use of the surplus were not explained, probably did not help the position of the Red Cross. Nonetheless, the fact that the attorney general of New York, charged with understanding and administering the law, criticized the plans of the Red Cross, suggests that politics and perceptions of donor intent took priority over legal rules involving charitable contributions.

⁸³ *See id.*

⁸⁴ *See id.*

thought the money was going to the Liberty Fund, they thought it was going to the victims of the disaster”⁸⁵

In contrast, officials at the Red Cross believed that donors would support a decision to create a reserve for future terrorist attacks, but suggested that while donor intent extended to any victims of terrorism, the intent might not extend to victims of natural disasters.⁸⁶ Joshua Gotbaum, the chief executive of the Sept. 11 Fund noted that surveys conducted in October and November of 2001 suggested that the majority of donors to the Sept. 11 Fund “were not specifically focused on helping only the most direct victims of the attacks.”⁸⁷ Donors themselves probably had varied reasons for contributing and multiple wishes for the use of the funds.

The public outcry concerning donor intent ultimately led to a decision by the Red Cross to restrict spending of the Liberty Fund to the victims of September 11.⁸⁸ This decision led to a variety of problems.⁸⁹ Surplus funds will not be available for future attacks, and the Red Cross will need to ask for more contributions in the event of some future disaster.⁹⁰ “Victims of September 11” has been defined so narrowly that funds cannot be used for some people affected by the attack.⁹¹ And several years after

⁸⁵ See *id.* (citing Charitable Contributions for September 11: Protecting Against Fraud, Waste, and Abuse, Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 107th Cong. 2, 44 (2001)).

⁸⁶ See *id.*

⁸⁷ See Stephanie Strom, *Families Fret as Charities Hold a Billion Dollars in 9/11 Aid*, N.Y. Times, June 23, 2002, sec. 1. (herein cited as “*Families Fret*”).

⁸⁸ See Katz, *supra* note 6, at 314.

⁸⁹ For further discussion of the problems, see section – *infra*.

⁹⁰ The aftermath of Hurricane Katrina highlights the importance of maintaining reserves. Following Hurricane Katrina, the Red Cross quickly distributed \$1.2 billion in aid but estimated that it would need another \$1 billion. To meet ongoing needs the Red Cross took out \$150,000 in loans to be able to maintain the pace of aid distribution as donations slowed. Paul Light, a New York University public service professor, noted that raising the additional \$1 billion will be difficult, in not impossible. See Rebecca Carroll, *Red Cross Admits Flaws in Aid*, Eugene, Oregon Register Guard, Oct. 1, 2005 (AP).

⁹¹ See Stephanie Strom, *A Nation Challenged: Charities; Narrowly Drawn Rules Freeze Out Tens of Thousands of Indirect Victims*, N.Y. Times, Apr. 23, 2002, sec. A (herein cited as “*A Nation Challenged*”).

September 11, people wondered whether donor intent may have been more complex than the view that funds should be spent immediately on direct victims of the attack. One donor said he had wanted the charities to create a permanent safety net and worried that the money had been spent too quickly.⁹² As Victoria Bjorklund pointed out, donors responded to the attack with money because “[w]e all wanted to do something to help and giving money was the easiest thing we could do . . . None of us could know who else was giving or how much or to whom.” Given the huge amount of money raised, it seems likely that some donors would have preferred that some of the money be set aside for future disasters. An unforeseen circumstance – in this case the enormous outpouring of financial donations – can affect restrictions placed on the use of funds.

As a response to the problems with funds collected after September 11, the Red Cross took steps to clarify the purposes for its appeals and created a better process to establish donor intent.⁹³ On the Red Cross website, the homepage urges visitors to donate to the Disaster Relief Fund.⁹⁴ In October 2005 the solicitation on the homepage requests gifts to help with “the recent hurricanes and thousands of other disasters across the country” No appeal is made on the homepage for a particular disaster. When a potential donor goes to the link to make a gift, however, the new page provides options

⁹² See Lydia Polgreen, *Three Years Later: The Charities; With Funds Winding Down, Questions Remain About Longer-Term Needs*, N.Y. Times, Sept. 9, 2004, sec. B. (quoting Chris Burke as saying “I gave money for that exact purpose, to create a permanent safety net, but that hasn’t happened and now they have spent all the money.”).

⁹³ See Becky Orfinger, *Donor DIRECT Program to Revolutionize Red Cross Disaster Fundraising*, press release posted on Red Cross website, <http://www.redcross.org/news/ds/fundraising/o20605direct.html> (last visited Jun. 9, 2005) (explaining that the new program will provide detailed information about the Red Cross disaster relief services and the fact that the Red Cross will use donations to the Disaster Relief Fund to help victims of all types of disasters).

⁹⁴ www.redcross.org (visited Oct. 1, 2005). Near the top of the webpage is the following: “Help the victims of **the recent hurricanes** and thousands of other disasters across the country each year by making a contribution to the American Red Cross Disaster Relief Fund.” (emphasis in the original). Two links on the webpage state: “Disaster Relief Fund 2005/Hurricane Katrina Relief Donors” and “Hurricane Season 2005 – donate to the Disaster Relief Fund.”

for designating the gift. The Disaster Relief Fund is one of eight funds that a donor can designate to receive a gift. The webpage also contains an explanation of each fund. Two funds are specific to recent disasters – Hurricane Katrina and Hurricane Rita – and the other funds are more permanent Red Cross funds.⁹⁵ The new approach taken by the Red Cross should clarify donor intent and make it easier for the Red Cross to administer the funds it receives.

II. Why Should a Charity Respect a Donor’s Intent?

A. Legal Reasons

Trust law assumes that a restriction imposed on a charitable trust cannot be changed except through the application of cy pres or deviation. These rules apply to nonprofit corporations as well, although the ability to amend articles of incorporation, including purposes, has led to some doubt regarding whether a charity could change purpose restrictions on its own. UMIFA, and now UPMIFA, provide statutory guidance for nonprofit corporations on changing donor intent through cy pres or deviation. Failure to comply with legal rules on purpose restrictions can result in action by the attorney general. The trustees or directors of the charity can be liable for breach of their fiduciary duty if they fail to carry out purpose restrictions imposed by donors.

B. Ethical Practice

Documents developed by organizations of fund-raising professionals and their advisors identify respect for donor intent as an important ethical principal for those who

⁹⁵ The other funds named are Your Local Red Cross Chapter, International Response Fund, Military Services, Biomedical Services Campaign, and Measles Initiative.

raise money on behalf of charities.⁹⁶ The underlying reason for ethical behavior with respect to fundraising is the need to maintain donor trust,⁹⁷ which could be viewed simply as in the self interest of a particular charity. A charity's ability to raise money will depend on maintaining the trust of its donors. The statements of ethical principles go beyond the interest of individual charities, however, noting that the charitable sector as a whole depends on each charity's providing its services, not to a donor, but to the societal interests the charity serves.⁹⁸ A donor will contribute to a charity if the donor is reasonably assured that the charity will carry out its side of the "contract" implicit in a donation.⁹⁹ The Standards of Professional Practice developed by the National Society of Fund Raising Executives emphasize the importance of using contributions in accordance with donors' intent, provide guidance about solicitation materials and documentation, and remind fund raisers to obtain donor consent before altering the conditions of a gift. Ensuring that "the intent of the donor is honestly fulfilled" is good practice, of course, but is also ethically correct behavior.¹⁰⁰ Indeed, a perception that a charity did not comply with donor intent may lead to charges of unethical behavior.¹⁰¹

⁹⁶ See Patricia F. Lewis, *Selected Materials on Ethical Considerations in Planned Giving*, 1996 ALI-ABA Course of Study Materials, Charitable Giving Techniques (reproducing A Donor's Bill of Rights, developed by the American Association of Fund-Raising Counsel, Association for Healthcare Philanthropy, Council for Advancement and Support of Education, and National Society of Fund Raising Executives, and the Statement of Ethical Principles and Standards of Professional Practice, adopted by the National Society of Fund Raising Executives ("NSFRE")).

⁹⁷ See *id.* at 4, (reproducing a position paper on professional compensation prepared by the NSFRE Ethics Committee in March 1992 that explains "Charities rely, in part, on voluntary donations to meet their budgets. Donor trust is of paramount importance. To earn and keep that trust, every aspect of charitable activity must be absolutely ethical."

⁹⁸ See *id.* at 4-5.

⁹⁹ See *id.* at 5. The document compares a charity seeking donations with the profit-making business and compares a commercial transaction with the gift by a donor to a charity and "the promise that the service [to someone other than the donor] for which the donor implicitly contracted will, in fact, be delivered by the charity."

¹⁰⁰ See *id.* at 2 (reproducing the Statement of Ethical Principles).

¹⁰¹ See Katz, *supra* note 64, at 312 (describing the reaction of members of Congress at two congressional subcommittee hearings held to investigate the Red Cross and its use of contributions received after September 11).

C. Reduced Donations

Any charity that depends on funds raised from donors must develop and maintain good donor relations. If a donor gives the charity money for a particular project and the donor then learns that the charity has not used the money for the specified purpose, the donor will not be likely to give the charity more money. Further, an unhappy donor will share his or her dissatisfaction with other potential donors. Either by word of mouth or more publicly, a donor may discourage others from giving to the charity.

The Red Cross experienced problems with “negative branding”¹⁰² due to perceived lack of respect for donor’s intent in connection with funds raised by the Red Cross following the September 11 attack on the World Trade Center. The Red Cross and other charities raised unprecedented amounts of money following the attack,¹⁰³ but then, two months after the attack, controversy developed over the intent of donors and how the Red Cross planned to use the money.¹⁰⁴ Although the specific intent of donors to the Red Cross is the subject of some debate,¹⁰⁵ concerns about the handling of donations led to criticism of the Red Cross and perhaps to reduced donations.¹⁰⁶

¹⁰² Maryann Slutsky, director of financial development for the Nassau County chapter of the American Red Cross, used the term “negative branding” in describing the public response when people learned that money donated after September 11 would not go entirely to victims of the September 11 attacks. Caroline B. Smith, *Fund-Raisers Face a Drop in Dollars*, N.Y. Times, May 4, 2003, 14LI. Ms. Slutsky described a significant drop in contributions to the Red Cross as due to “a very slowed economy, the war and the uncertainty in the world right now” but noted that the negative branding might also have affected donations. *Id.*

¹⁰³ See Strom, *Families Fret* *supra* note 87. The totals received were between \$2 billion and \$3 billion, and the Red Cross alone received \$997.1 million. *Id.*

¹⁰⁴ See text accompanying notes --.

¹⁰⁵ See text accompanying notes --.

¹⁰⁶ Newspaper articles describe, anecdotally, the frustrations of donors over the administration of September 11 funds. See Strom, *Families Fret*, *supra* note 87 (stating, “Many of those who donated feel that the charitable organizations have not fully honored their wishes for their contributions”) See, also, Jennifer Vigil, *Audit: Red Cross Handled Funds Properly; \$5.8 Million Spent on Victims of Fires*, San Diego Union-Tribune, Oct. 13, 2004, Sec. Local (reporting that contributions to the San Diego Red Cross plummeted after criticism connected with spending of money raised for a fire in 2001 but that donations had rebounded).

Empirical data tying reduced future donations directly to a charity’s failure to respect donor intent probably does not exist, but the assumption that such links exist appears in many sources. The emphasis on donor intent in the Standards of Professional Practice for fund raisers is linked to a primary goal of fund raising – the goal of raising more money.¹⁰⁷ And commentators assume that failure to respect donor intent will result in fewer donations.¹⁰⁸

D. Greater Official Oversight

Charity officials view donor intent as a cornerstone of their enforcement concerns. A charity that acts in contravention to restrictions imposed by a donor may face a legal challenge brought by a state attorney general.

The perception that the Red Cross planned to allocate some funds collected after September 11 in ways that might not comply with donor intent led to significant public criticism.¹⁰⁹ As the criticism began to build in the public arena, the New York State Attorney General, Eliot L. Spitzer, threatened to sue the Red Cross for misrepresentation

¹⁰⁷ See Lewis, *supra* note 1.

¹⁰⁸ See Abbinante, *supra* note 17, at 668 (stating in the introduction the author’s argument that the law should protect donor intent: “The importance of this struggle is simple – society should ensure that donors’ intentions are followed in order to encourage continued philanthropic activity by the wealthy.”); Atkinson, *supra* note 9, at 1121 (stating that “disregarding donor intent will have an adverse effect on charitable giving”); Karen W. Arenson, *Spending It; Making Those Good Causes Do What the Donor Intended*, N.Y. Times, Aug. 24, 1997 (reporting after the court in *Carl J. Herzog Found. v. University of Bridgeport*, 243 Conn. 1, 699 A.2d 995 (1997) denied standing to an unhappy donor that “[s]ome advisors to donors said the ruling could discourage donations”); *but see* Ilana H. Eisenstein, *Comment: Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. Pa. L. Rev. 1747 (2003) (noting the argument that “potential donors will keep wealth in private hands rather than create charitable trusts if they believe their wishes will not be followed strictly” but also providing some counter-arguments suggesting other reasons that donors give to charity and create foundations).

¹⁰⁹ See Katz, *supra* note 64, at 312 (quoting TV commentator Bill O’Reilly as saying “after collecting more than \$550 million from generous Americans, the Red Cross now says that some of that money will not go to the families of the terror victims even though the donated money was given specifically for that purpose. The Red Cross apparently believes it has the right to do other things with your donations.”).

to donors and failure to comply with donor intent.¹¹⁰ In Mr. Spitzer’s view donors who contributed to the Red Cross intended “unambiguously”¹¹¹ that the funds be used for September 11 victims. Although Spitzer did not actually sue the Red Cross, the threat probably contributed to the organization’s decision to limit spending of September 11 contributions to victims of September 11.¹¹²

The criticism of the Red Cross also led to congressional hearings and demands by federal and state officials that they be permitted greater monitoring authority over the Red Cross.¹¹³ The Red Cross is a “treaty obligation organization, chartered by Congress.”¹¹⁴ As the only charity structured in this way, the Red Cross has used its “quasi-governmental” position to avoid oversight by state attorneys general.¹¹⁵ In the aftermath of September 11, both Congress and several state attorneys general demanded a greater role in monitoring the use of contributions.¹¹⁶ In May 2002, Senator Charles E. Grassley, chair of the Senate Finance Committee, ordered the Red Cross to turn over a comprehensive accounting of its finances, one that specified exactly how it and its chapters raised and disbursed its money.¹¹⁷ The New York Times reported that Attorney General Spitzer was working on draft legislation for Sen. Grassley that would impose

¹¹⁰ See Katz, *supra* note 64, at 312, 316-17.

¹¹¹ *Id.* at note 430 (citing Spitzer’s testimony at the hearing of the Oversight Subcommittee of the House of Representatives Ways and Means Committee, held Nov. 8, 2001: “those who gave to the Red Cross in the aftermath of September 11 intended unambiguously that those funds be used for the victims of September 11”).

¹¹² See Katz, *supra* note 64, at 314.

¹¹³ See Stephanie Strom, *Red Cross Works to Renew Confidence Among Donors*, N.Y. Times, June 6, 2002, sec. B; Stephanie Strom, *Red Cross Is Pressed to Open Its Books*, N.Y. Times, June 5, 2002, sec. B (herein cited as “*Red Cross Is Pressed*”).

¹¹⁴ 36 U.S.C. 300101, 300102 (2002).

¹¹⁵ See Strom, *Red Cross Is Pressed*, *supra* note 113.

¹¹⁶ See *id.*

¹¹⁷ Letter from Sen. Chuck Grassley to Harold Decker, Interim Chief Executive Officer, Red Cross, May 2, 2002, press release dated June 14, 2002 on Sen. Grassley’s website, <http://grassley.senate.gov>.

more stringent reporting requirements on the Red Cross.¹¹⁸ In Mr. Spitzer’s words, “one lesson we have learned is that some additional degree of accountability would be a good thing”¹¹⁹

The efforts to increase government oversight of the Red Cross relate to the peculiar position of the Red Cross as a treaty obligation organization and thus will not be broadly applicable. Nonetheless, it is reasonable to suspect that significant public criticism of a charity could lead to the involvement of regulatory officials with respect to that charity. For example, in response to concerns about spending on athletics, the Colorado state auditor sought an extensive review of the CU Foundation, the fund-raising entity created to support Colorado University.¹²⁰ The audit initially focused on tracking “specific donor gift transactions to ensure their proceeds have been spent in compliance with donor intent,”¹²¹ but sought to go substantially further. A general sense on the part of the public that charities ignore donor intent could lead to new kinds of oversight at the state or federal level.

E. Legal Proceedings against the Charity’s Executives

After the Allegheny Health, Education & Research Foundation, a Pittsburgh based hospital chain, declared bankruptcy, the attorney general of Pennsylvania

¹¹⁸ See Strom, *Red Cross Is Pressed*, *supra* note 113.

¹¹⁹ *Id.* The Senate Finance Committee released a Staff Discussion Draft describing “proposals for reforms and best practices in the area of tax-exempt organizations” The proposals address reporting requirements and include a proposal that organizations with gross receipts in excess of \$250,000 be required to obtain an independent audit of the organization’s financial statements. Senate Finance Committee, Staff Discussion Draft, at 9; *see, also*, The Panel on the Nonprofit Sector, convened by the Independent Sector, *Report to Congress and the Nonprofit Sector on Governance, Transparency, and Accountability*, June 2005.

¹²⁰ Todd Hartman & Kevin Vaughan, *CU Foundation Fights Audit Critic – Says Stance ‘Raises Suspicions’ About Its Spending*, Denver Rocky Mountain News, Feb. 16, 2005, sec. News.

¹²¹ *See id.* (quoting Pete Webb, spokesperson for the CU Foundation).

discovered that funds restricted to specific charitable purposes had been used to try to keep AHERF afloat.¹²² The attorney general brought charges against three executives for misusing the endowment funds.¹²³ The attorney general charged the chief executive officer, chief financial officer, and general counsel with theft, conspiracy, and misapplication of entrusted property.¹²⁴ Many of the charges were ultimately dropped, in part because the executives had not acted for personal gain. The chief executive pleaded guilty to a second-degree misdemeanor charge for misapplication of entrusted property.¹²⁵ He served three months of an 11 to 23 month sentence before being paroled.¹²⁶ The attorney general then sought return of the endowment funds in the bankruptcy proceeding. The parties in the bankruptcy proceeding agreed that \$22 million of the \$52 million in endowments would be returned, and the attorney general hoped to increase that amount. Although some people expressed concern that the penalties imposed on the executives were too light,¹²⁷ the fact that the attorney general sought

¹²² Press Release, Pennsylvania Office of the Attorney General, *Former AHERF Official Pleas to Raiding Endowments; CEO Sentenced to 11 to 23 Months*, Aug. 29, 2002, available at <http://www.attorneygeneral.gov/press/release.cfm?p+00D4F106-2A92-42CF-BB86D1A6C7> 268849 (last visited Sept. 29, 2005); Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 Ind. L.J. 93, n.44 (2004); Arthur L. Cobb & Herbert G. Hotchkiss, *AHERF: It May Have Started with a Bank, But Did It End in a Whimper?* 23 Am. Bankr. Inst. J. 30 (2004).

¹²³ The attorney general brought charges against Sherif Abdelhak, the Chief Executive Officer, Nancy Wynstra, the general counsel, and David McConnell, the Chief Financial Officer. See Cobb & Hotchkiss, *supra* note 32.

¹²⁴ See Brigid McMenamin, *Donor's Intent; Court are starting to get tough with nonprofits that play fast and loose with your gifts*, *Forbes*, May 15, 2000; In addition, donors whose funds had been misused filed suit asserted 17 claims against members of the Executive Committee of the Board, including the three persons charged by the attorney general. The donors' suit included two counts of violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The court dismissed all charges because the donors did not have a property interest, such as a right of reverter, in the property that had been misused. *Browne, et al., v. Abdelhak, et al* (2000 U.S. Dist. LEXIS 12064).

¹²⁵ Press Release of PA attorney general, *supra* note 32.

¹²⁶ Cobb & Hotchkiss, *supra* note 122 (noting that the attorney general had initially brought nearly 1,500 charges against Sherif Abdelhak).

¹²⁷ See *id.*; Editorial: *AHERF Whimper/Its Former CEO Is Sentenced on a Single Count*, *Pittsburgh Post-Gazette*, Sept. 8, 2002.

criminal penalties as well as return of the funds should serve as a warning to other charity executives.¹²⁸

F. More Stringent Donor Restrictions

A donor upset about a charity's failure to follow the donor's intent with respect to a gift may respond by imposing more stringent restrictions on subsequent gifts. Paul F. Glenn was so incensed by what he saw as the University of Southern California's misuse of the funds he had contributed that he brought suit against the university.¹²⁹ Following the resolution of the lawsuit, Mr. Glenn continued to make charitable gifts but "put his beneficiaries on a short leash"¹³⁰ by creating carefully structured contracts to govern the gifts and then keeping a careful eye on the charity's use of the money.¹³¹

Mr. Glenn's personal experience affected his approach to charitable donations. For other donors, general concern about lack of respect for donor intent may result in greater restrictions. Following the decision in *Carl J. Herzog Found. v. University of Bridgeport*,¹³² a case that refused to grant a donor standing to sue a charity over failure to comply with a restriction imposed on a gift, a newspaper reported the view that the ruling would "prompt donors to structure their gifts more carefully."¹³³ The increases in donor restrictions that have been observed in recent years may come in part from the

¹²⁸ Press Release of PA attorney general, *supra* note 122 (stating "I hope this sentence sends a strong message to business leaders across Pennsylvania: You are accountable for your actions. . . This case was particularly egregious, because charitable dollars were used to keep the company afloat.")

¹²⁹ See Stephanie Strom, *Donors Add Watchdog Role to Relations with Charities*, N.Y. Times, Mar. 29, 2003, sec. A (herein cited as "*Donors Add Watchdog Role*"); Greg Winter & Jonathan Cheng, *Strings Attached: Givers and Colleges Clash on Spending*, N.Y. Times, Nov. 27, 2004, sec. A.

¹³⁰ Winter & Cheng, *supra* note 129.

¹³¹ *See id.*

¹³² 243 Conn. 1, 699 A.2d 995 (1997).

¹³³ Arenson, *supra* note 108.

entrepreneurial backgrounds of donors, but may also be affected by “an emerging belief that institutions need to be scrutinized more closely.”¹³⁴

More stringent donor restrictions can be detrimental to charities in a number of ways. If most donors restrict their contributions to a specific project or program, the amount of unrestricted money may be insufficient to take care of the charity’s existing needs.¹³⁵ As more donors choose restricted over unrestricted gifts, money to support operating expenses and general program expenses becomes harder to find.¹³⁶ The fewer restrictions placed on funds received by a charity, the greater flexibility the charity will have in meeting its operating costs, developing new programs, and managing all of its funds in an efficient manner.

Increased donor restrictions, described as “a more muscular style of philanthropy,”¹³⁷ also create costs for charities. A charity may incur costs if the charity needs to create additional internal financial controls to comply with a donor’s desire for increased monitoring and reporting.¹³⁸ To the extent that more restrictions lead to more enforcement questions, a charity may incur legal fees.¹³⁹ The fundraising process itself can become more complicated and more costly. A charity may spend more time with a particular donor, developing an agreement that protects both the donor and the charity.

As donors increase the level of oversight, charities are also paying more attention to gift

¹³⁴ Winter & Cheng, *supra* note 129.

¹³⁵ Andrea Muirragui Davis, *Designated Gift-Giving Frustrates United Way: Earmarked Funds on the Rise*, Indianapolis Business Journal, Sept. 13, 2004 (reporting the United Way of Central Indiana’s inability to make the grants it wanted to make, despite increased donations, due to an increasing number of restricted gifts).

¹³⁶ See Strom, *Donors Add Watchdog Role*, *supra* note 129 (quoting Art Taylor, president and chief executive of the Better Business Bureau’s Wise Giving Alliance as saying, “Restricted gifts are nice, but what organizations need is money to build and support their own infrastructure, and that is increasingly hard to come by”).

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

agreements. A charity will want to avoid future disputes with a donor over compliance with the gift agreement and will want to clarify the level of power a donor can have to limit unrealistic expectations.¹⁴⁰ The result of the increased donor concern about protecting the donor's intent has been "some really hairy gift agreements."¹⁴¹

A final problem with greater restrictions may seem counterintuitive, but may in fact be of concern. If a donor and charity work together to specify in great detail the terms of a gift, perhaps they can avoid future misunderstanding. At the same time, however, specificity reduces flexibility for charities. Minor changes in circumstances, easily addressed when a donor expresses a more general intent, may lead to the very misunderstandings the donor and charity wished to avoid. The restrictions may prevent the charity from using donated resources in the most efficient manner possible, in keeping with its donors' general intent.

IV. When Should a Charity Not Respect a Donor's Intent?

Most charities want to carry out the intent of their donors, for all the self-interested reasons discussed and for basic ethical reasons. Yet under some circumstances carrying out a donor's intent may be contrary to a charity's mission. The circumstances can arise due to misunderstandings between a donor and the charity or due to changes that develop subsequent to the time the donor made the gift.

A. Spending for Noncharitable Purposes

For charities that received contributions for victims of September 11, difficulties arose simply due to the magnitude of the giving. Following September 11, charities

¹⁴⁰ See Winter & Cheng, *supra* note 129.

¹⁴¹ Strom, *Donors Add Watchdog Role*, *supra* note 129 (quoting Janet P. Atkins, chief executive of Philanthropic Advisers).

raised \$3 billion for the victims of the attack.¹⁴² The amount of money donated in connection with the disaster raised logistical problems in how to distribute and use the funds and also raised legal issues. The Internal Revenue Code exempts charities from income taxes¹⁴³ and permits donors to take income tax deductions for amounts contributed to charities.¹⁴⁴ These tax benefits carry with them certain restrictions on how charities use their funds. In general, exempt charities can provide religious, scientific or educational benefits to the public and can address the basic needs of members of the public who cannot meet those needs for themselves.¹⁴⁵ Basic needs include food, shelter, and clothing based on the recipient's financial need. Charities can also provide in-kind assistance, for example programs that address psychological and emotional needs, not based on financial need.¹⁴⁶ In the view of the Internal Revenue Service ("IRS"), an exempt charity should not make cash payments to a victim of a disaster if the payments are not tied to a particular financial need or distress.¹⁴⁷

In the aftermath of September 11, the public became concerned that the charities that had received donations for the victims of the disaster had not transferred the money quickly enough to the victims.¹⁴⁸ In the view of the Red Cross, a proper approach was to make distributions based on ascertained need, to set aside funds to address psychological

¹⁴² See Polgreen, *supra* note 92.

¹⁴³ I.R.C. § 501(c)(3).

¹⁴⁴ I.R.C. § 170(c).

¹⁴⁵ I.R.C. 501(c)(3) (defining exempt purposes as "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals"); *see, also*, Treas. Reg. 1.501(c)(3)-1(d)(2) (defining charitable as including "relief of the poor and distressed or of the under privileged" and "promotion of social welfare").

¹⁴⁶ See Katz, *supra* note 64, at 266-272 (explaining the legal rules for distributions from charities that provide disaster relief).

¹⁴⁷ Ruth Rivera Huetter & Marvin Freidlander, *Disaster Relief and Emergency Hardship Programs*, in Exempt Org. Continuing Prof'l Educ. Technical Instruction Program for FY 1999 (cited in Katz, *supra* note 6).

¹⁴⁸ See Strom, *Families Fret*, *supra* note 87.

or other needs that would surface later, and to set aside surplus funds for other disasters.¹⁴⁹ Beginning in early November 2001, however, the public began demanding that the Red Cross and other charities make direct payments more quickly.¹⁵⁰ Congress and the New York Attorney General joined the demand that charities distribute the funds outright to victims.¹⁵¹ The IRS initially tried to explain the legal restrictions on charitable contributions.¹⁵² The Director of the Exempt Organizations Division explained at a Congressional hearing that “[m]erely being present at the scene of a disaster does not establish a need for assistance” and that distributions must be based “on meeting individual victims’ needs.”¹⁵³ The IRS was characterized as being obstructionist, and soon after the hearing the IRS announced that payments from a charity to victims of September 11 would be presumed to be charitable if “made in good faith using objective standards.”¹⁵⁴ Congress responded by enacting the Victims of Terrorism Tax Relief Act of 2001,¹⁵⁵ creating an exception from the general rule that charities responding to disasters had to make payments based on need. Congress instead adopted a rule that deemed payments charitable if made “in good faith using a reasonable and objective formula which is consistently applied.”¹⁵⁶ Thus both the IRS and the charities gave in to the public pressure that money should be distributed directly to the victims of September 11, based on the perceived intent of donors to the funds.

¹⁴⁹ See Barstow & Seelye, *supra* note 8 (reporting the Red Cross’s plans to hold some of the money collected for unanticipated needs related to September 11 and for future terrorist attacks); see, also, text accompanying notes *infra* (describing the legal rules that apply to surplus funds collected after a disaster).

¹⁵⁰ See Katz, *supra* note 64, at 312-13.

¹⁵¹ See text accompanying notes --.

¹⁵² The IRS posted guidance on disaster relief on its website on September 17, 2001. See Katz, *supra* note 64, at 286-87 (explaining the IRS’s restrictions on payments from disaster relief organizations).

¹⁵³ See Katz, *supra* note 64, at 290.

¹⁵⁴ See *id.* at 292 (citing Notice 2001-78; 2001-50 I.R.B. 1 (Nov. 16, 2001)).

¹⁵⁵ Pub. L. No. 107-134, 104, 115 Stat. 2427, 2431 (codified at 26 U.S.C. § 501 (2005)).

¹⁵⁶ See Katz, *supra* note 64, at 292-95 (citing to 26 U.S.C. § 104(a) and describing possible methods of distributing September 11 funds).

Three years after September 11, people began to wonder whether distributing all the funds so quickly, and in some cases without regard to financial need, had been the right approach.¹⁵⁷ Some programs designed to address long-term mental health needs had already been shut down three years after the attack and other programs would likely last only a few more years.¹⁵⁸ An analysis of money distributed by the 40 largest September 11 funds found that those funds had distributed 72 percent of the money directly to victims in the first two years following the attack.¹⁵⁹ Although the funds planned to use the remaining money for longer-term services, 97.5 percent of the funds planned to give away all their money by June 2004.¹⁶⁰ Nancy Anthony, executive director of the Oklahoma City Community Foundation, worried that the money had not been put to the best use based on her experience with the long-term effects of a disaster on victims.¹⁶¹ Nikki Stern, the executive director of Families of September 11, agreed that in the future more attention should be paid to balancing current and future needs, but Ms. Stern concluded, “I think giving cash was the only thing that could have been done at the time because it was what donors expected.”¹⁶²

Several problems resulted from the pressure to spend the September 11 funds quickly, based on perceived donor intent. As indicated, the charities could not take an approach more in line with their general charitable mission, an approach that might have resulted in more help over a longer period of time.¹⁶³ Another problem arose from a

¹⁵⁷ See, e.g., Polgreen, *supra* note 92.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* (describing an analysis completed by the Foundation Center).

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See Ford Fessenden, *After the World Gave: Where \$2 Billion in Kindness Ended Up*, N.Y. Times, Nov. 18, 2002, Sec. F. (reporting that Marla Simpson, a section chief at the charities bureau of the New York attorney general, commented, “There’s no precedent for hundreds of thousands of dollars, much less

narrow interpretation of “victim.” Workers who lost jobs in the area around the Trade Center received assistance, but workers who lost jobs due to the drop in tourism to New York City or for other reasons related to the disaster, could not apply for aid from the September 11 charities.¹⁶⁴ The executive vice president of the United Way of New York City confirmed the focus on “the area below Canal Street” explaining that the September 11 charities “need to be very concerned about donor intent.”¹⁶⁵ All of the September 11 charities wanted to avoid the criticism that had surfaced concerning respect for donor intent.

B. Impermissible Donor Control over the Charity’s Mission

Sometimes a charity determines that it cannot honor a donor’s intent because doing so would be contrary to the charity’s mission. As donors demand the right to exercise more control over their gifts, charities work with donors to reach agreements that set reasonable expectations for both sides. Ideally, the donor and charity reach an understanding of the restrictions placed on the gift before the charity accepts the contribution. Sometimes, however, misunderstandings or a change in donor intent mean that a charity will be unable to carry out a donor’s intent. The Bass gift to Yale provides an interesting example.

In April 1991 Yale announced that alumnus Lee Bass had agreed to give the University \$20 million to start a course of studies in western civilization.¹⁶⁶ The money

millions, to go to individuals. That’s quite contrary to what’s happened in the past, and what the tradition of charities is, which is service.”).

¹⁶⁴ See Strom, *A Nation Challenged*, *supra* note 91.

¹⁶⁵ See *id.* (quoting Lawrence Mandell).

¹⁶⁶ See Anthony DePalma, *Another Bass Gives Yale \$20 Million*, N.Y. Times, Apr. 18, 1991, sec A, p. 20, col. 4.

was to fund 11 professorships, some to be filled by professors already on the faculty and some to be new positions.¹⁶⁷ The restrictions on the gift generated debate by the university faculty. Some faculty members argued that because the University already offered some 100 undergraduate courses in Western history or thought, the money could be better used to fund other courses.¹⁶⁸ The arguments raised the question of whether a donor should be permitted to dictate curricular decisions. By December 1994 only five of the positions had been filled, and the Yale president, Richard Levin, met with Mr. Bass again.¹⁶⁹ Although Mr. Levin assured Mr. Bass that the University would carry out the terms of the original gifts, Mr. Bass added a new condition: a right to approve faculty appointments.¹⁷⁰ The University could not accept donor control over hiring decisions and agreed to return the gift.¹⁷¹

Questions of donor control raise particular issues at universities. If donors want to direct curricular needs or dictate hiring decisions, universities will likely balk. But if the university sees a curricular need and seeks donor support for the need, the restriction may carry out university as well as donor intent. As universities' dependence on donated funds increases, these issues will grow ever more complicated.

C. Change in Circumstances Affects Mission

A charity may also find that changes in circumstances compromise the charity's ability to carry out its mission and comply with donor intent at the same time. In Section

¹⁶⁷ See *id.*

¹⁶⁸ See Jacques Steinberg, *Is Western Civilization Worth \$20 Million?; The Gift Is Huge and Welcome, but Its Restriction to Western Studies Fuels a Debate*, N.Y. Times, Dec. 12, 1994, Sec. B, p. 1, col. 3.

¹⁶⁹ See *id.*

¹⁷⁰ See Jacques Steinberg, *Yale Returns \$20 Million to an Unhappy Patron*, N.Y. Times, Mar. 15, 1995, sec. 1, p. 1, col. 2.

¹⁷¹ See *id.*

– this article discussed the failed attempt by the trustee of the Buck Trust to apply cy pres to a geographical restriction imposed on trust spending. The unanticipated change in the value of the Buck Trust assets, from \$7 million in 1975 when Beryl Buck died to \$400 million in 1984,¹⁷² threatened the mission of the trustee.

The trustee of the Buck Trust, the San Francisco Foundation, is a community foundation serving five counties in the San Francisco area. The terms of the trust limited the use of trust funds to Marin County, the wealthiest of the five counties. After the dramatic increase in value of the Buck Trust, the San Francisco Foundation became concerned that limiting the use of the fund to Marin County would threaten the integrity of its work in the other counties.¹⁷³ The Foundation sought court approval to permit distributions in all five counties.¹⁷⁴ The court denied the Foundation's request for the application of cy pres to modify the restriction and, in addition, removed the Foundation as the trustee of the fund. Whether the end result of the case – new trustees and the selection by the court of recipients of a portion of the income – was more in keeping with the intent of the donor than expanding the geographical region for distributions remains unknown and unknowable.¹⁷⁵ The trustee's decision to attempt modification, however, was understandable given the change in circumstances and the underlying mission of the San Francisco Foundation.

Conclusion

¹⁷² See Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. Davis L. Rev. 1145 (2003).

¹⁷³ JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN, ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 744 (2005).

¹⁷⁴ 21 U.S.F.L. REV. 691 (1987).

¹⁷⁵ Harvey P. Dale, THE BUCK TRUST (1987); Simon, *supra* note 16.

All of the problem areas identified in this paper have one thing in common -- the fact that donor intent is more elusive than the politicians and lawyers sometimes remember. A donor can try to be specific in a gift agreement, and donors increasingly want to spell out their restrictions, but even the most specific agreement may not address future changes in circumstances. Other donative situations may provide limited information about the intent of a particular donor. And finally, in some situations the donor's wishes should not remain paramount. A charity may decide that not accepting a gift or returning a gift if a donor is dissatisfied is preferable to carrying out a purpose that interferes with the mission of the charity. In other situations, society's interest in charitable gifts may trump the intent of an individual donor. Any decision to consider general community interests when modifying restrictions imposed by a donor should be made carefully and infrequently, but under some circumstances modification may be the right answer.

An argument that a court should consider modifications in light of changed circumstances without slavish adherence to donor intent does not mean that the court should ignore the intent of the donor. Rather, the court should be honest about what the court can and cannot know about the intent of a donor and take that into consideration when approving modifications.