

History and Policy: Who Should Control Charitable Gifts?

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I. Introduction – Plus ça change, plus c'est la meme chose

Scholars have considered the question of control of charitable gifts for centuries, with increasing attention to this topic in recent years. My task, to provide some historical context and to identify some of the policy issues we will discuss, is challenging given the quantity and quality of the existing literature. Nonetheless, I hope to provide enough broad context to get us started, without encroaching too much on the other papers.

During this conference we will focus on donors and charities, but other interests play a role in controlling how charitable gifts are used. The public's interest in charitable assets may influence changes to the ways a charity carries out its mission, and we may want to consider whether the public should have a voice separate from the voices of the charity and the donor. One can argue that either or both of the donor and the charity represent the public interest in the way they direct the use of the charitable assets, but sometimes "the public" holds views about social good that differ from the views of the donor and the charity.

If we conclude that the public interest should have a voice, then the obvious question is how can that voice be exercised? The office of the Attorney General has traditionally represented the public in connection with charitable assets, but perhaps we should consider other means to take the public interest into account. And if we want to take the public interest into account, how do we determine what the interest is? We may agree that a public interest exists, but exactly what that is and whether it matters, or should matter, in controlling the use of charitable assets, remains murky.

In reviewing articles and books written about charitable gifts, donor intent, modification, cy pres, and deviation, I found the following conflicting themes:

Donor intent should be honored; dead hand control should be discouraged or addressed.¹

Donors should be able to direct the use of their philanthropic largesse; the public's interest in a charitable gift deserves recognition in how the gift is used.

Managerial authority permits change over time; obedience to purpose is an important fiduciary duty.

I expect that our discussions during the conference will touch on all of these concerns, and I hope we will be able to tease out the issues posed by the often oppositional perspectives.

In addition to these themes, the general concern about donor control and modification of donor restrictions resonates throughout the literature. The doctrines of cy pres and deviation hold important roles in any discussion about control over charitable gifts, and much of the scholarship in this area involves thoughts about loosening or tightening the application of those doctrines, in order to make it more or less likely that a charity will be able to adjust restrictions imposed by donors. The structure of cy pres has changed somewhat over time, but some of the general concerns have remained remarkably constant.

An early statement of concern over cy pres, which the author described as a “complex and contradictory” doctrine, explained:

The ideal charitable gift clearly expresses the donor's intention, yet is flexible enough to be accommodated to later radical changes in the circumstances surrounding the gift. But all too often these gifts are impulsively conceived, indefinitely expressed and planned with lamentable shortsightedness. In such instances a court may be forced to balance frequently antagonistic considerations: to protect the so-

¹ See, e.g., John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693 (2007) (“The overriding issue is thus one of honoring donor intent. As time passes after the inception of the gift, the issue is often less favorably characterized as one of enduring and potentially unwise dead-hand control.”)

cial benefits derived from charitable endowments, to evaluate interests of contesting heirs and residuary legatees and, finally, to effectuate the donor's intention.²

This article, written in 1939, focused on problems with cy pres as then applied, and two important differences in the application of cy pres then, in contrast with now, indicate that some changes have occurred. One difference is that in 1939 the application of cy pres could result in the return of the gift to the donor's heirs or residuary legatees if the court found no general charitable intent. Since that time a finding of no general charitable intent has become less and less likely, and the Uniform Trust code ("UTC") now creates a presumption of general charitable intent.³ A second difference is that the author imagines gifts made with little planning, while today the larger gifts are likely to involve negotiations between lawyers for the donor and the charity. I include the text not only to show the differences, however, but to point out that the underlying themes remain the same: (1) a gift should spell out the donor's intentions and yet be flexible to permit changes, and (2) a court may ultimately be called to balance competing interests.

My paper begins with a brief look at history, first the English roots of charitable trusts and the cy pres doctrine, then U.S. developments and the current state of the law in the U.S. I proceed to policy questions, discussing the concept of public benefit in charitable gifts and then a number of different policy questions, with some background. I identify a number of the proposals made by others through the years, but I have not attempted to create extensive footnotes. I apologize to anyone at the conference whose prior work is not mentioned.

II. History and the State of the Law

A. Early History – Charitable Uses and Charitable Purposes

The use, a precursor of the trust, developed in England following the Norman

² *A Revaluation of Cy Pres*, 49 YALE L.J. 303 (1939).

³ UNIF. TRUST CODE (UTC) § 413; *see also* UTC § 413, cmt. ("Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor.")

conquest.⁴ Donors employed uses to avoid restrictions on ecclesiastic corporations, and uses also held charitable gifts for educational institutions such as Oxford and Cambridge and hospitals.⁵ In the fourteenth and fifteenth centuries the monastic institutions, significant sources of charity for the poor, declined in numbers and in property.⁶ Their decline occurred at a time of general social and economic upheaval and increasing need for those charitable services, and as a consequence the use grew in importance.⁷

In 1601 England adopted the Statute of Charitable Uses⁸ as part of an effort to deal with the economic and social issues and to clean up abuses in the administration of charitable gifts.⁹ The preamble to the statute listed many charitable purposes common at the time,¹⁰ but the statute did not on its face limit charitable purposes to those enumerated in the preamble. Courts were left to determine the extent of what charity meant, but for the first century or more the list covered the types of charity contemplated by donors.¹¹ Then an 1805 decision, *Morice v. Bishop of Durham*, held that only the purposes set forth in the 1601 statute were charitable.¹² Courts continued to struggle with a definition of charity, and in 1891, Lord Macnaghten's decision in the *Pemsel* case provided a definition:

“Charity” in its legal sense comprises four principal division: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.¹³

⁴ MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION* 22 (Harvard Univ. Press: 2004).

⁵ See *id.* at 23-28 (describing the development of trusts in England).

⁶ *Id.* at 27.

⁷ *Id.*

⁸ 43 Eliz., Ch. 4 (1601). Joseph Willard, in an 1894 article, described this statute and its famous preamble as the Magna Carta of charitable trust law. See Joseph Willard, *Illustrations of the Origin of Cy Pres*, 8 HARV. L. REV. 69 (1894). See also Jill Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 2009 MICH. ST. L. REV. 989 (2010).

⁹ See Fremont-Smith, *supra* note 4, at 28.

¹⁰ The list of charitable purposes bears a remarkable similarity to a list of charitable objects in a poem written in 1377, “Vision of Piers the Plowman,” with the exception of two purposes related to the Catholic Church. See Willard, *supra* note 7, at 70-71.

¹¹ John P. Persons, John J. Osborne, Jr. & Charles F. Feldman, *Criteria for Exemption Under Section 501(c)(3)—The Development of the Legal Definition of Charity in England*, IV Research Papers Sponsored by the [Filer] Commission on Private Philanthropy and Public Needs 1909, 1912-16 (1977).

¹² *Id.*

¹³ *Commissioners of Income Tax v. Pemsel*, 22 Q.B.D. 296 (1891); A.C. 531 (1891).

Much more recently, the 2006 Charities Act for England and Wales added new purposes to the four “heads.” The final category remains a broad one: any other purposes “that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognized, under [the law]” and any new purpose similar to an already listed purpose. Charities Act, 2006, c.50 § 2(4).¹⁴ In addition, the Charities Act requires that an organization demonstrate that it provides a public benefit, in order to qualify as a charity.

From the initial list in the 1601 preamble, to the *Pemsel* definition, to the 2006 Charities Act, the idea that a charity must provide a public benefit has continued to be part of how the law thinks about charity. These ideas carried over to the development of rules on charities and charitable purposes in the United States, and they relate to the role of the public in connection with donor-restricted gifts.

B. Charitable Trusts are Different from Private Trusts

Before turning to the control issue and the modification of charitable purposes, it is useful to consider why the rules for modification of charitable trusts developed differently from those for private trusts. In a private trust, identified or identifiable beneficiaries hold the beneficial or equitable interest in the trust and can enforce the trust if the trustee, who holds legal title to the assets, mismanages the assets or fails to carry out the terms of the trust. Beneficiaries have an incentive to monitor the actions of the trustee. In a charitable trust, the trustee manages the trust for a charitable purpose rather than an identifiable beneficiary. The lack of a beneficiary with the power and incentive to enforce the trust, represents a problem for the settlor of a charitable trust. A successful trust relationship depends on the balance between the power of the trustee and the oversight provided by the beneficiary. Charitable trust law has had to develop oversight from outside the trust. If a trustee ignores a donor-imposed restriction, then a process for enforcing the restriction may be needed.

¹⁴ See Fremont-Smith, *supra* note 4, at 48.

A second difference between private trusts and charitable trusts makes it more likely that a trustee may need to modify a restriction. Until rather recently (recent against the backdrop of centuries of trust law), private trusts could not last forever. The Rule Against Perpetuities attempted to ensure that transferred property would vest after a period of time that was roughly equivalent to two generations. Although a restriction in the form of an easement or a restriction placed on real property could extend longer, restrictions imposed on interests in trusts had to end. The Rule Against Perpetuities developed to promote free alienation of land.

The Rule Against Perpetuities did not apply to charitable trusts, so charitable trusts could last indefinitely. Perpetual existence raised the possibility that changes might be needed far into the future. For that reason, the law developed two doctrines to permit changes over time—*cy pres* and deviation.¹⁵ These doctrines seem to reflect the law's emphasis on donor intent, although that emphasis may have been less important initially.

C. Early History of *Cy Pres*

The idea of *cy pres* as a tool to modify charitable trusts came to England with the Romans and developed as part of the law of charitable trusts.¹⁶ In England the doctrine was initially applied only if the original purpose became impossible to carry out, but over time the courts, and eventually Parliament, relaxed the rules, at least somewhat.¹⁷ Joseph Willard has argued that although *cy pres* existed in the Roman Code of Justinian, part of the development of the doctrine in England may have been influenced by the view that donors were using charitable gifts to buy their way into heaven or to reduce their time in purgatory.¹⁸ His article quotes from grants from the 8th century and from wills from the 15th and 16th centuries, in which the donors and testators are making charitable gifts “for

¹⁵ See RESTATEMENT (THIRD) OF TRUSTS § 66 (deviation), § 67 (*cy pres*) (2003).

¹⁶ *Id.* at 38; Willard, *supra* note 8, at 72.

¹⁷ See Fremont-Smith, *supra* note 4, at 38-39.

¹⁸ Willard, *supra* note 8, at 79. Willard reports:

Through all these wills, as through all the medieval testaments, sounds the keynote of salvation by church agencies at a price. Every one of these is paid for, "for the health of my soul." Nor was it confined to wills or the donations of individuals. In many of the statutes the same form obtains, and "charitable deeds to be done by their executors for the health of their souls" [thrice repeated], and that "debts remain unpaid to the great damage and perils of the souls" of the testators is the staple and burden of these enactments even as late as the reign of Henry VIII. *Id.*

the health of my soul.” His article focuses on testators and deathbed gifts, when the health of the soul of the person making the gift might be of particular concern. He notes that Lord C.J. Wilmot, in *Attorney-General v. Downing*, announced, “the Court thought one kind of charity would embalm the testator’s memory as well as another,”¹⁹ before applying *cy pres* to save a gift. If the health of the testator’s soul depended on the charitable bequest, the bequest should be upheld, even if it would be carried out by a charity different from the one identified by the testator. Willard concludes:

While it certainly cannot be denied that this conclusion derives logically from the origin of *cy pres*, and that the testator's paramount object being salvation, the means were immaterial, yet that such a doctrine should not only have survived the state of society and of belief in which it originated, but also have been developed into an integral part of the jurisprudence of a social order and faith radically diverse, may occasion surprise. And a doubt may arise whether in administering it, the peculiar circumstances of its beginning and development -we might indeed say the necessary conditions of its existence- are borne in mind; or whether it is considered that the modern testator, not intending a purchase of heaven with his "bonis caducis" but a specific bequest to a specific charity, may be presumed to have known not merely what he intended, but what he did not intend, in the case of a charity, as well as of any testamentary disposition made by him; or that the court in imputing to him what he did not say, because he might have said it, may not run some risk of making him say what he would have emphatically repudiated.²⁰

Willard’s point, then, is that the doctrine of *cy pres* developed as a way to maintain a charitable gift even though the purpose had become impossible, because to do otherwise would have endangered the testator’s soul. He explains that in that earlier period, the testator’s “intent was not the application of the purchase-money, but the delivery of the goods purchased.” A decision to apply the “purchase-money” to a different charity would be what a testator would prefer, as long as the “goods purchased”—that is, the testator’s place in heaven—was secured. Willard wonders whether the “modern testator” acting in the 1890s would have the same intent and suggests that courts should not be so quick to modify a restriction taking property from one charity and giving it to another that the testator did not name as the testator’s desired recipient.

¹⁹ Wilmot's Notes, I. 33; 1 Jarm. Wills, *243 n. 2 Amb. 228 (cited in Willard, *supra* note 8, at 69).

²⁰ Willard, *supra* note 8, at 91-92.

In this respect Mr. Willard seems to recommend a less expansive application of cy pres, with the result that a charitable gift might fail and be returned to the donor's estate. The shift in academic sentiment, from narrowing the application of cy pres to expanding it, may be based on a number of social and governmental developments. One issue is the fact that today's charitable donors received tax benefits for their gifts to charity and the taxing authorities give up revenue in exchange for public benefit created by these gifts. The tax benefit creates an additional bargained-for deal between the public and the donor. Beyond the tax benefit donors receive, scholars have argued that modifications will enable charities to carry out their missions more efficiently.

In the end, the author supports the shift toward making application of cy pres easier. He notes approvingly that "the factor of public welfare became more important in these [modification] cases and it became less difficult" to apply cy pres to modify the cases. He adds, "Since the doctrine as originally adopted in this country was deemed only an intent-enforcing device, it was frequently stated that the court could never modify the donor's intent "upon considerations of policy or convenience." And yet, by 1939 courts had begun to do just that. He identifies the issue we will be discussing during this conference: "whether maximum social benefit from the fund or the exact effectuation of the donor's intent should be the criterion of the court." He concludes that the court should "construct intent" rather than merely construe the donor's intent:

In view of the underlying policy of the law favoring charities, because of the social benefit accruing therefrom, where the donor has failed to provide for the contingency of changed circumstances affecting his bequest, the court should consider the donor a reasonable man conversant with the means of employing funds for the most beneficial charitable purposes, and, therefore, one who, when faced with the contingency, would have devoted the fund to such purposes.²¹

Although the author explains that the court must find impossibility or impracticability in order to apply cy pres, he describes cases that "manifest the highly desirable trend of the

²¹ *Revaluation of Cy Pres, supra* note 2, at 321.

courts toward disregarding the specific fulfillment of the donor’s design in favor of the interests of public welfare.”²²

D. Current Rules on Modification

Cy pres as developed in the United States permitted a court to use cy pres to modify a donor-imposed restriction on a gift in trust if the restriction had become impossible, impracticable or illegal.²³ Even if the court determined that one of these categories applied, the court would authorize a modification only if the trustee demonstrated that the settlor had a general charitable intent with respect to the gift.²⁴ If not, the trust assets reverted to the settlor, which in most cases meant the settlor’s estate. If the settlor had general charitable intent, the court could approve a modification, which was to be as near as possible to the donor’s intent at the time of the gift.²⁵

The Restatement (Third) of Trusts, approved in its final form in 2003, added the word “wasteful” to the reasons for the application of cy pres.²⁶ In addition, Restatement now presumes that a settlor had general charitable intent, making the application of cy pres easier, although the presumption is rebuttable. The Uniform Trust Code, now adopted in – states, follows the Restatement’s formulation,²⁷ as does UPMIFA, which applies cy pres and deviation to funds held by charities organized as nonprofit corporations.²⁸ The Restatement of the Law of Nonprofit Organizations does so as well.

All of these statements of the doctrine of cy pres also make the application of the property after the release of the restriction a bit more flexible. Both Restatements direct that the property be used for “a charitable purpose that reasonably approximates the des-

²² *Id.* at 322 (“The requirements necessary before the labels “impossible” or “impracticable” will be applied to tag a fund for cy pres application have been relaxed, and disposition made with a greater emphasis on public benefits.”).

²³ RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). For additional explanation of the development of cy pres in the U.S., see Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L. REV. 382 (1959).

²⁴ *Id.*

²⁵ See Fremont-Smith, *supra* note 4, at 38.

²⁶ RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

²⁷ UTC § 413.

²⁸ UPMIFA § 6.

ignated purpose,”²⁹ the UTC directs that the property be used “in a manner consistent with the settlor’s charitable purposes,” and UPMIFA states that it must be used “in a manner consistent with the charitable purposes expressed in the gift instrument.”³⁰

Almost all states have a version of cy pres, either through the common law or by statute. The Restatement of the Law of Nonprofit Organizations provides details of the current state of the states with respect to cy pres in the Reporters’ Notes to 3.02.

Deviation, the other doctrine that permits modification of donor-imposed restrictions, applies to restrictions imposed on the administration of the trust.³¹ The idea behind deviation is that the trustee will be better able to carry out the settlor’s purposes if an adjustment could be made to an administrative restriction. Thus, deviation is considered intent effectuating, while cy pres is intent defeating. Of course the line between a purpose restriction and an administrative restriction is not always clear, and that has been the subject of other discussions. In any event, the two doctrines have been applied sparingly, presumably due to deference to the donor’s intent.

In addition to cy pres and deviation, two statutory developments may affect who controls charitable gifts. First is the possibility that a small, uneconomic trust can be terminated. The UTC permits a trustee of a trust with assets below \$50,000 to terminate the trust and distribute the assets, after notice, in the case of a charitable trust, to the Attorney General.³² In addition, a court may modify or terminate a trust if “it determines that the value of the trust property is insufficient to justify the cost of administration.”³³ The distribution will be to another charity, “in a manner consistent with the purposes of the trust”³⁴ but one can imagine a specific restriction getting lost after the distribution to another charity.

²⁹ RESTATEMENT (THIRD) OF TRUSTS § 67; RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.02, TD No. 1 (2016).

³⁰ UPMIFA § 6(c).

³¹ RESTATEMENT (THIRD) OF TRUSTS § 66; RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.03, TD No. 1 (2016).; UTC § 412; UPMIFA § 6(b).

³² UTC 414(a).

³³ UTC 414(b).

³⁴ UTC § 414(c).

The other statutory development is that the UTC gives the settlor of a charitable trust standing to enforce the trust.³⁵ The UTC defines “charitable trust” as any portion of a trust,³⁶ so a donor who makes a gift to an existing charitable trust will have standing with respect to the gift. Standing does not extend to a donor’s heirs, representatives, or descendants, so the authority created by UTC § 405(c) dies with the donor, but some donors have perpetual life. A family foundation, for example, may make a grant to a charity organized as a trust, and if so, the foundation will have standing to enforce restrictions on the gift as long as the foundation continues to exist (and assuming the UTC applies).

Whether the trust code provision will expand donor standing remains to be seen. Many charities are organized as nonprofit corporations, and courts have declined to apply the UTC standing provision to a nonprofit corporation. For example, in *Hardt v. Vitae Foundation*, a donor alleged that the charitable donee had ignored restrictions imposed on a gift.³⁷ The donor argued that it should have standing to challenge the charity’s use of the gift, based on the UTC § 405(c), which had been adopted in Missouri. The court declined to extend the standing rule of the UTC to a situation involving a nonprofit corporation. The court noted that UPMIFA, also adopted in Missouri, applies to nonprofit corporations and is silent on standing.

In a Utah case, *Siebach v. Brigham Young University*, donors tried a different strategy.³⁸ They argued that because Utah’s adoption of UPMIFA did not expressly limit donor standing to the common law standard that limits standing to the Attorney General, donor standing should be permitted. They lost that argument.³⁹

E. What About Nonprofit Corporations?

Thus far, this paper has discussed rules coming from trust law, but many charities are organized as nonprofit corporations. Trust law informs the law of charities in gen-

³⁵ UTC § 405(c).

³⁶ UTC § 105(4).

³⁷ *Hardt v. Vitae Foundation*, 302 S.W.3d 133 (Mo. 2009).

³⁸ *Siebach v. Brigham Young University*, 361 P.3d 130 (Utah 2015).

³⁹ *Id.* (“there is certainly no direct conflict between UPMIFA’s silence and the common-law donor-standing rule.”).

eral,⁴⁰ and the current American Law Institute project, the Restatement of the Law of Charitable Nonprofit Organizations, continues a trend of reducing the legal differences based on organizational form.⁴¹ Some differences will remain,⁴² but the Restatement project is attempting to create a coherent law of charities, noting the areas of law in which the legal rules are converging.

Some policy issues arise in connection with choice of organizational form and donor-restricted gifts, and one paper at this conference will be devoted to these issues. I raise the issues here, as part of the overview of policy questions. In general, if a donor contributes property to a charity organized as a nonprofit corporation, subject to specified restrictions, the charity must comply with the restrictions. Courts have sometimes addressed the issue by finding that property subject to a donor-imposed restriction is impressed with a trust or held in trust for the specified purposes.⁴³ Other courts do not find a trust, but hold that the gift is restricted to the purposes specified by the donor.⁴⁴ In addition, UPMIFA now applies the doctrines of cy pres and deviation to funds held by charitable nonprofit corporations, a provision that would be unnecessary if the directors could simply vote to change the restriction.⁴⁵ A duty to comply with a donor-imposed restriction seems clear enough, although the legal theories may vary.⁴⁶

⁴⁰ See UTC § 413, cmt. (2010). “The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.” This sentiment appears throughout comments to the UTC.

⁴¹ “Although the choice of legal form for a charity entails the choice of a concomitant legal regime, this Restatement attempts to provide a common regime for all charities.” RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 1.02, TD No. 1 (2016).

⁴² The Comment quoted in note 41 continues: “At the same time, this Restatement recognizes that a unified approach is not always possible or appropriate and, therefore, specifies, issue by issue, which rules apply equally to all charities regardless of their organizational form and, by contrast, which rules differ depending on organizational form.” *Id.*

⁴³ See the list of cases in note 131 in Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement and Doing the Right Thing*, 85 CHICAGO-KENT L. REV. 977 (2010).

⁴⁴ See the list of cases in note 132, *id.*

⁴⁵ See UPMIFA § 6. For assets other than funds, including art collections and land, the application of cy pres and deviation depends on state law. Nonetheless, Attorneys General and courts are likely to take the view that a donor restriction matters. The Attorney General of Montana expressed dismay in a case in which the donee of a charitable easement on land simply ignored a restriction. The Attorney General stated, “The most disturbing aspect of this whole matter, however, is the complete failure of the [donee] and the Dowds [purchasers of property subject to the donated easement] to acknowledge their duty to comply with the terms of

What is less clear is whether a gift to a charity for its general purposes is subject to any form of purpose restriction if the donor does not say so explicitly. The question may have different answers depending on the organization form of the charity, although debate continues on whether that is currently the case. More interesting, for purposes of this discussion, is the policy question of whether the law for respecting donor intent should be different depending on organization form.

The potential difference in treatment lies in the relative ease or difficulty of changing a charity's purposes. The trustees of a charitable trust cannot change the purpose of the trust without going to court, unless the trust instrument gives someone the ability to change the purpose.⁴⁷ The directors of a charitable nonprofit corporation can more easily change its purpose, by changing the organizational documents. The directors can vote to change the articles of incorporation and bylaws of the organization, with a vote of members also required if the charity has voting members. Thus, the directors (and members) can change the purpose of the charity without court involvement, as long as the new purpose is also charitable.

If a charity decides to change its purposes, the policy question is how the change should affect gifts that pre-dated the change, if the gifts were made without specific restrictions attached. Should a gift to a charity for its general purposes be considered unrestricted, so that the charity can use the gift for any charitable purpose it later chooses, or should the gift be considered restricted to the purposes of the charity at the time the gift was made?

both Lowham's charitable gift of the conservation easement and the Scenic Preserve Trust." Memorandum in Support of Motion for Summary Judgment, *Salzburg v. Dowd*, CV-2008-0079, 73 (Wyo. 4th Jud. Dist. Aug. 12, 2009).

⁴⁶ See Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1206 (2007).

⁴⁷ With the increase in interest in trust protectors for private trusts, see generally Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing,"* 50 Real Prop., Tr. & Est. J. 267 (2015), perhaps the idea will spill over into charitable trusts. A settlor of a charitable trust could name a trust protector who would monitor the trust's use of the gift over time and intervene if the trustee failed to follow the settlor's directions with respect to the gift. The use of the trust protector idea for a gift to a charity—and not the creation of a new charitable trust—could be interesting to explore.

1. Nonprofit Corporations Should Be Able to Control Future Uses of Assets

The argument for the first alternative (unrestricted) is that if a donor makes a gift to a charity without a specific restriction, the donor is making a gift to the charity to use as the charity sees fit. If the charity changes its purposes, the gift can be used for the new purposes, even if those differ from the purposes carried out when the gift was made. The arguments in favor of greater discretion for charities to modify the way they carry out their missions apply particularly here, where the donor's intent was not specified. The donor may have expected that the charity would make changes over time to improve or increase the delivery of charitable services. Further, regardless of what a donor may have wanted, a rule that permits a charity to modify its purposes over time may improve the public benefit from the charitable sector.

Robert Katz has argued in favor of this alternative for two reasons: reducing transaction costs for donors and his view that governing boards will use their discretion in socially beneficial ways.⁴⁸ He argues that different rules for different organizational forms will reduce the time and money donors will incur in setting up a charitable gift most in line with their needs and preferences. That is, a donor who understands that the form of the charity will affect the ability of the charity to change its purposes over time can choose a charity according to the donor's preferences. Although this argument makes sense for a donor creating a new charity, it may not be easy for a donor to choose an existing charity based on organizational form. Donors to existing charities will likely focus on the objectives of the charity, and perhaps on the charity's effectiveness in carrying out its mission. It seems unlikely that a donor will choose a charity based on organizational form, but for a donor starting a charity, the donor could choose to give the new charity greater control by choosing the corporate form.

Katz's more effective argument is that giving governing boards greater discretion to adjust to changes over time will increase charitable efficiency and facilitate the application

⁴⁸ See Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion Over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689 (2005).

of resources to more socially beneficial uses. From a policy perspective, one can argue, as Katz does, that charities should be able to change direction over time. Katz adds to the general argument in favor of allowing change, by suggesting that uninformed donors may choose to give to charities organized as corporations, unwittingly permitting greater discretion than they would have chosen had they been better informed. A strategy that capitalizes on whether a donor has the legal knowledge of how a charity can modify its purposes over time seems a curious way to argue a policy point, but his general arguments in favor of governing board discretion are in line with others who have made those arguments.

2. Assets Already Contributed Should Be Considered Restricted

The argument for the second alternative is that a donor making a gift to a charity intends the gift to be used for the purposes of the charity as the purposes exist at the time of the gift. The court in the Hahnemann Hospital case noted, “As the Attorney General, colorfully, but no doubt correctly, observes in his reply brief, ‘those who give to a home for abandoned animals do not anticipate a future board amending the charity’s purpose to become research vivisectionists.’”⁴⁹ The charity can decide to change its purposes going forward, but any assets already held by the charity and obtained through gifts from donors are restricted to the purposes of the charity at the time the gifts were made. The 2009 Brandeis University situation involving the Rose Art Museum provides an example of the donors’ concern. When Brandeis sought to close the Rose Art Gallery and sell its art collection, donors argued that their gifts had been made with the intent that Brandeis would continue to operate the museum and display their gifts as part of their collection, not sell the art to raise money for university operating expenses.⁵⁰ This concern reflects likely intent when a donor makes an “unrestricted” gift to a charity.⁵¹

⁴⁹ Attorney Gen. v. Hahnemann Hosp., 494 N.E. 2d 1011, 1021, n.18 (Mass. 1986).

⁵⁰ See Geoff Edgers, *Museum Backers Seek Halt to Selloff*, The Boston Globe, Jan. 28, 2009, at A1 (quoting Jonathan Novak, a museum overseer and Los Angeles art dealer who graduated from Brandeis and has given art works and money over the years, “Had I had any idea when I donated work that there was a chance they would be sold to benefit the university, I never would have donated them.”)

⁵¹ See Fremont-Smith, *supra* note 4, at 440 (“In terms of effective and efficient regulation of the charitable sector, the English rule that the assets of charitable corporations are subject to the doctrines of cy pres and

A number of cases take this second view. In *Hahnemann Hospital*, the court stated that the charity could broaden its purposes by amending its articles but could not use unrestricted donations received prior to the amendment for the new purposes.⁵² The court agreed with the Attorney General “that the board also would violate its fiduciary duty to donors of unrestricted gifts by abandoning the purpose for which it was organized and had held itself out to the public.”⁵³

F. Changes to the Rule Against Perpetuities – Lessons for Charitable Trusts

An increasing number of states have repealed the Rule Against Perpetuities or adopted a time period so lengthy as to be effectively unlimited. The abolition of the rule was tied to a drive by some states to attract trust business, and has been decried by some commentators as a “race to the bottom.” An interesting development in recent years is the growth of interest in decanting and other tools that permit modification of restrictions over time. Private trusts can now last forever, but planners on the private side build in tools for modification and create trusts that are not really irrevocable. The use of powers of appointment, trust protectors, decanting, and additional modification rules in the UTC, have made irrevocable trusts much more flexible. Although the desire to make modification easier continues to grow in connection with private trusts, the interest in permanently restricting charitable gifts remains strong.

I raise the discussion of private trusts for the lessons these developments may suggest for charitable trusts. In a private trust the settlor will identify the person who may be making changes to the trust. The person may hold a power of appointment, with complete discretion to appoint property as the power holder thinks best, although the settlor can limit the potential recipients (the objects of the power). A trust protector is also a person identified by the settlor. The settlor can direct the types of decisions the person can

deviation, regardless of their source, and regardless of whether they were given subject to explicit restrictions is clearly preferable.”)

⁵² See *Attorney Gen. v. Hahnemann Hosp.*, 494 N.E. 2d 1011, 1020–21 (Mass. 1986).

⁵³ *Id.* at 1019 n.15; see also *Holt v. Coll. of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 935 (Cal. 1964) (stating that “charitable contributions must be used only for the purposes for which they were received in trust.”).

make, and can also create a process for naming a new trust protector if the original person dies or is unable to act. In both cases the settlor controls future actions by choosing carefully the person to make the decisions. Through these tools, the settlor can build in flexibility so that persons identified by the settlor can make changes as needed. The settlor does not maintain complete control, but can guide the changes both by careful selection of power holders and protectors, and by guiding their discretion by the way the powers are created. Settlers of charitable trusts risk losing their tax deductions if they retain too much control, but some of the strategies being developed for private trusts may provide ideas for charitable trusts.

III. Policy – What Is the Role of the Public?

A. Donor’s “Deal” with the Charity and Donor’s “Deal” with the Public

The public’s interest in a charitable gift derives from two “deals” a donor makes in connection with the gift. A donor enters into an agreement with a charity, agreeing to make a donation in exchange for the charity’s commitment to use the gift in a specified way. In addition, the donor benefits from a second deal, one entered into with the public. The donor benefits *from* the public in exchange for providing benefits *to* the public.

The donor of a charitable gift receives two types of benefits from the public: tax benefits and benefits from legal rules that allow the donor to structure the gift differently from a gift for a private purpose.⁵⁴ The donor can impose restrictions on a gift so that the donor’s personal views of the appropriate use of that gift will be carried out far into the future.⁵⁵ The donor expects to have long-term control and influence through the donation of assets that could otherwise go to some private purpose. On the other side of the ex-

⁵⁴ John Eason elaborates on this point. See Eason, *supra* note 1, at 698-99 (“Donors are afforded such perpetual control as part of a quid pro quo exchange, with society at large on the other side of the bargaining table.”) Evelyn Brody describes this deal as a “giftract,” a term that reflects the nature of the agreement as not quite a contract but something more than a gift with no strings. See Evelyn Brody, *supra* note 46. See also Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114-15 (1993); Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 357 (1999).

⁵⁵ A donor may also receive a type of personal benefit if, for example, the gift results in naming a building for the donor or for someone the donor wishes to honor.

change, the rationale for providing these benefits to a donor is that the charitable gift will provide something beneficial to the public. As a policy matter, one question is what constraints should be imposed on the determination of public benefit (i.e. what is “charitable”) and a second is who should make sure the public gets the benefit. Assuming that the initial gift is charitable, does or should the charity, the donor, or the public control the use of the property in the future?

B. How Do We Determine “Public Benefit”?

The starting point for this first question is the definition of charitable purposes under trust law.⁵⁶ We have the English history of “charitable purposes,” discussed earlier in this paper, and more recently we have the Uniform Trust Code’s definition of charitable purposes, based on the English ideas. The UTC’s definition includes “purposes the achievement of which is beneficial to the community”⁵⁷ and relies on the jurisprudence of centuries to give that meaning.⁵⁸ The definition is not static, and can change over time. Thus, a donor-imposed restriction may cease to be for the public benefit at some time in the future. For example, racial restrictions are no longer permitted as part of a charitable purpose. New charitable purposes beneficial to the community, such as the protection of the environment, may be added to what was meant by charitable back in 1601. For a donor contemplating a restriction, looking to the legal definitions of charitable purposes should provide adequate guidance. Some purposes will not be charitable, due to personal benefit or because the purpose is benevolent but not charitable. A restriction that creates a personal benefit will cause the gift to fail to be a charitable gift.

The question about public benefit could be asked in a different way. Does public benefit mean that the public has a voice in how charitable assets should be used? Is there

⁵⁶ Eason, *supra* note 55, at, 699 (“While the charity is bound in its use of the gifted property by virtue of having accepted the donor’s restrictions, the donor is likewise limited by the boundaries of what society regards as ‘charitable.’”)

⁵⁷ UTC § 405(a). The comment to that section explains, “The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed.” See also RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 1.01(b), TD No. 1 (2016).

⁵⁸ Rob Atkinson adds, “Thus the restraints the law allows to endure are not wholly idiosyncratic; they must advance purposes that the courts, as custodians of the commonweal, certify as publicly beneficial.” Atkinson, *supra* note 55, at 1114-15.

some limit that could be imposed on a donor's directions, even if the directions comply with a general understanding of charitable purposes? Should the public have to wait awhile before arguing for a change? Three examples demonstrate the issues.

1. Barnes Foundation

In 1953 an editor for the Philadelphia Inquirer sued the Barnes Foundation, arguing that by restricting public access to the art the Foundation was failing to provide a public benefit.⁵⁹ The editor lacked standing,⁶⁰ and the case was dismissed, but seven years later the Attorney General brought the same concern back to court.⁶¹ The Attorney General argued that the Foundation was failing to comply with the terms of the indenture of trust, but the court spoke more to concerns about public benefit:

If the Barnes art gallery is to be open only to a selected restricted few, it is not a public institution, and if it is not a public institution, the Foundation is not entitled to tax exemption as a public charity. This proposition is incontestable.⁶²

The Attorney General was successful in forcing the Trustees to provide at least some public access.

After many years of financial troubles and law suits, a group of local foundations offered to help raise money to keep the Barnes Foundation afloat and the collection intact, if the Foundation agreed to seek court approval for changes to restrictions imposed by the donor on the number of trustees, the control of the Foundation, and the location of the collection. The Attorney General supported the changes. In this case the public benefit gained from access to and protection of the collection outweighed the donor's instructions on how the Foundation would be managed.⁶³ The court found that modifying the re-

⁵⁹ *Wiegand v. Barnes Found.*, 97 A.2d 81, 81-82 (Pa. 1953). See John Nivala, *Droit Patrimoine: The Barnes Collection, The Public Interest, and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 495-96 (2003) (describing this case).

⁶⁰ The Attorney General had given the editor permission to bring the suit but did not participate directly.

⁶¹ *Commonwealth v. Barnes Found.*, 159 A.2d 500 (Pa. 1960).

⁶² *Id.* at 503.

⁶³ Much has been written about the Barnes Foundation. See JOHN ANDERSON, *ART HELD HOSTAGE: THE BATTLE OVER THE BARNES* (2003); Chris Abbinante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. Pa. L. Rev. 665 (1997); 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); Jonathan

restrictions to allow the Barnes collection to move to downtown Philadelphia was the least disruptive option available to the cash strapped Foundation, and perhaps it was, but it is hard not to think that the public benefit played a role. Critics argued that modifying the restrictions the donor had imposed and permitting move of the Barnes collection was “[p]erhaps the strongest reason donors have been given to worry” about whether charities will carry out their wishes.⁶⁴

2. The Buck Trust

A different sort of example arose with the Buck Trust. When she died, Beryl Buck made the San Francisco Foundation, a community foundation, trustee of her trust, with instructions that the trust should be used to provide for the needy of Marin County, California, and for other charitable, religious, and educational purposes in the county. After a dramatic increase in the value of the trust, from approximately \$7-10 million to \$340 million, the trustee argued that a modification to the geographic restriction was necessary. In the view of the trustee, the modification would allow the trustee to use the charitable dollars more efficiently to carry out the donor’s purposes. (The trustee also expressed concern about its own role given that it had overall fiduciary duties for all of San Francisco.) The Attorney General represented “the public” in opposing the modification. The court refused to modify the restriction, but one could argue that the public benefit would have been greater if the modification had been allowed. One could also argue, as John Simon has done,⁶⁵ that the court refused the modification requested by the trustee but then modified the donor’s intent using its own view of what was appropriate. Neither the charity (i.e., the trustee) nor the donor controlled the outcome.

3. The Leona M. and Harry B. Helmsley Trust

One more example comes from the trust created by Leona Helmsley. Her wishes were that the multi-million trust be distributed primarily to charities serving dogs. Her

Scott Goldman, *Just What the Doctor Ordered? The Doctrine of Deviation, the Case of Doctor Barnes’s Trust and the Future Location of the Barnes Foundation*, 39 Real Prop. Prob. & Tr. J. 711 (2005).

⁶⁴ See William Schwartz & Francis J. Serbaroli, *After the Barnes Ruling: What Donors Should Do to Protect Their Wishes*, *The Chronicle of Philanthropy*, March 31, 2005.

⁶⁵ See John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F.L. REV. 641 (1986-87).

documents did not restrict grants to dog-related charities, so the trustees could ignore her preferences,⁶⁶ but what if instead she had convinced her lawyer to leave out the flexible language? Could she have limited distributions to charities concerned with the provision of care for dogs? Should public benefit outweigh such idiosyncratic wishes, especially when the benefits of a substantial tax deduction are considered? Perhaps some limit is appropriate, but we are always left with the question of who decides what is idiosyncratic.

C. What Role Does/Should the Attorney General Play? Does Concern with the Public Benefit Mean Protecting the Donor’s Intent, to Encourage More Charitable Giving, or Does it Mean that the Attorney General Should Promote the Public Interest?

Historically, the Attorney General⁶⁷ represented the public in providing oversight for the use of charitable assets.⁶⁸ The difficulty for the Attorney General, or any charity regulator, is that the office has potentially conflicting duties—protecting the donor’s intent and protecting the public interest. Oversight may involve a concern with seeing that a charity complies with donor-imposed restrictions, but a charity regulator may conclude that the public’s interest would best be served by permitting a modification to those restrictions. Should the role of the state charitable regulator be to protect the intent of donors, thus encouraging more gifts to charity?⁶⁹ Should the charity regulator instead work

⁶⁶ See *In the Matter of the Trustees of the Leona M. and Harry B. Helmsley Charitable Trust*, for Advice and Direction, No. 2968/2007 (N.Y. Surrogate’s Court filed February 19, 2009). See Gary, *supra* note 43, discussing this Matter at 138-39.

⁶⁷ In most states supervision of charitable assets and therefore of donor-restrictions lies with the Attorney General and is managed by Assistant Attorneys General or other staff members, but in some states that authority may lie in another part of state government. I will use the terms “Attorney General” and “charity regulator” to refer to the person or persons at the state level who supervise charities.

⁶⁸ For a discussion on the development of the Attorney General’s role in England and the incorporation of that role into the American legal system, see David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POLY 131, 134-45 (2000).

⁶⁹ During the Barnes Foundation litigation, a candidate for the office of Attorney General of Pennsylvania, John Morganelli, criticized the incumbent’s support for the move of the Barnes collection. He argued that by refusing the fight the move, Attorney General Corbett failed to “fulfill his responsibilities to represent the public interest when it comes to charitable trusts.” Mr. Morganelli worried that the failure to protect Barnes’ intent would discourage other donors from making charitable gifts, and he pledged to reopen the Barnes case if elected. See Gary, *supra* note 43, at 150.

to ensure that any charitable gift continue to provide a public benefit, perhaps examining the public benefit of charities to determine whether a modification to a restriction might improve the public benefit.

A further concern with respect to whether an Attorney General's office will step in to protect donor intent is that an Attorney General is a politician, even though a charity regulator may be an Assistant Attorney General or other staff member, and political considerations may become part of a decision in connection with monitoring a charitable trust, at least in high-profile cases.⁷⁰ Even beyond the potential political complications, charity regulators operate under financial constraints and cannot monitor every charity and every restricted gift.⁷¹ If a concerned observer calls a situation to the regulator's attention, an investigation might follow, but even with information provided by someone outside the office, the regulator will not have the resources to investigate every question raised. Although the office of the Attorney General may be tasked with protecting the public's interests, whether a charity's actions are challenged may depend on the financial resources of the charity regulator in the state where the charity is located, the regulator's view as to whether donor intent or some other public interest is more important, and the potential political cost or benefit to the government official of getting involved.

Most discussions of the limits on oversight provided by the Attorneys General focus on mismanagement of charitable assets and breaches of fiduciary duties that adversely af-

⁷⁰ See Evelyn Brody, *Whose Public? Parochialism & Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 946-48 (2004) (discussing the challenges of monitoring fiduciaries and ensuring that charitable donations are spent "as represented to donors"). A concern is inconsistent treatment by Attorneys General. See Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J. L. & PUB. POL'Y 1, 27-30 (2009).

⁷¹ The issue of the limited resources dedicated to charitable oversight has been discussed in numerous articles. See, e.g., Fremont-Smith, *supra* note 4, at 445-46; Mary Grace Blasko, Curt S. Crossley, and David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 939, 947 (1993); Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1123, 1128-30 (2007). In addition to studies that show that many states have no lawyers assigned full-time to charitable oversight, see Blasko at 48, Jenkins, at 1128, even states that focus some resources on charitable oversight tend to emphasize the regulation and oversight of charitable solicitation. The Attorney General is charged with consumer protection, and limiting fraudulent solicitation can protect consumers. Helge, *supra* note 71, at 24-25.

fect the assets available for the public good.⁷² The comments may address concerns that a fiduciary is failing to carry out a charity's mission, but more from the standpoint that the public has an interest in the mission than from the standpoint of a donor concerned about a change that affects a donor-imposed restriction.⁷³ Thus, these discussions may be of interest, but they do not directly affect the donor intent question. They indicate, however, a general concern with the lack of resources available in the Attorney General's office to devote to donor intent and restricted gifts.

Periodically a commentator recommends the creation of a separate agency that could be charged with providing oversight for charities.⁷⁴ England has a Charities Commission, and perhaps such a model would prove useful here. The creation of such a commission would not solve the question of what exactly its role would be in terms of protecting the public interest in charitable assets. A further problem would be that the creation of such a commission would require financial resources that most states would be unable or unwilling to provide. A federal commission might be more likely to obtain funding, but a federal commission would move charitable oversight from the states, where it has traditionally has been located.

D. What Can/Should the Donor Do for Control?

When a donor makes a restricted gift to a charity, the donor can attempt to build in protections to try to ensure that if the charity fails to follow the donor's specified restrictions some recourse will be available. A donor may seek to "reserve standing" for the donor, the donor's estate, or the donor's descendants by including a provision in the gift agreement giving any or all of them the power to enforce the gift. Because the gift agreement is not a contract—or may not be treated as a contract—the court may not consider the provision in the agreement sufficient for standing. The donor may instead ask the charity to agree not to contest standing, and then if standing is not raised, the court is not

⁷² See, e.g., Helge, *supra* note 71; Kelly McNabb, *What "Being a Watchdog" Really Means Removing the Attorney General from the Supervision of Charitable Trusts*, 96 MINN. L. REV. 1795 (2012).

⁷³ Helge at 11 ("The duty of obedience requires a director to adhere to the governing documents of the organization and to faithfully adhere to its mission.")

⁷⁴ See, e.g. Helge, *supra* note 71; McNabb, *supra* note 73.

likely to remove a party. Protections negotiated between the charity and the donor may give the donor some comfort, but Evelyn Brody has asked whether there are “public policy limits that should be invoked to protect charities from agreeing to waive the donor's traditional lack of standing?”⁷⁵ She worries that the persons representing a charity may be anxious to obtain a gift and may not be thoughtful about the charity’s best long-term interests.

The donor might consider a reversion that would operate if the charity failed to comply with a restriction. In that event, the gift would revert to the donor’s heirs or beneficiaries, to a named person, or to another charity. Whoever is named will have an incentive to monitor the charity’s actions. Reversions are not used much, due to concerns about loss of the transfer tax deduction for the gift. With the increase in the amount that can pass with no gift or estate tax, a donor might not care whether a gift qualified for the charitable deduction. If so, then a reversion will give someone standing, and whoever holds the reversion will have an incentive to monitor the gift. In a UTC state, however, the statute provides that a reversion will last until the later of the death of the donor or 21 years after the date of the gift.⁷⁶ Note that any negotiated protections may help maintain the donor’s restrictions, but may run counter to our policy concerns over dead hand control.

E. Can a Donor Prevent any Modification?

John Eason describes the risk that *some* future modification will be needed as the price a donor must pay in exchange for the ability to impose restrictions that may last in perpetuity.⁷⁷ This risk is, or should be, an obvious part of the bargain. The pace of change in the world continues to accelerate. The only thing certain is that change will continue and that we cannot predict the scope of that change. No one today can craft a restriction with the assurance that the restriction will continue to make sense over time.

⁷⁵ Brody, *supra* note 46, at 1192.

⁷⁶ UTC § 413(b). Lewis Simes recommended putting a time limit on a reversion. See Lewis M. Simes, *The Dead Hand Achieves Immortality: Gifts to Charity*, V Lectures Given at the University of Michigan 139 (1955).

⁷⁷ John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 125 (2010).

In the face of high-profile litigation alleging that charities have ignored the intent of a their donors,⁷⁸ new donors may try to be more specific in crafting their restrictions. A book written about *Robertson v. Princeton* recommends that donors “be specific.”⁷⁹ The problem is that the Robertson gift agreement was fairly specific. In hindsight one can imagine redrafting the agreement in one way or another, but the problem with increased specificity is that the limits may not be the right ones. Restrictions drafted too precisely may create costs for the charities and result in money spent on litigation rather than on charitable work. When some change occurs, the charity will need to determine whether its work continues to comply with restrictions imposed by the donors or whether legal proceedings will be necessary. The cost of adjudicated modifications means that dollars that could otherwise be used to carry out the charity’s missions would be diverted to pay lawyers and court costs.⁸⁰

At the same time, building too much flexibility into a document can result in a donor’s wishes being ignored, legally. A charity will most often want to try to accomplish what the donor intended, because any suggestion that the charity is doing otherwise can result in bad publicity and bad donor relations. In some situations, however, the donor’s intent can be ignored without consequence to those ignoring the donor’s meaning, as long as the legal directions permit flexibility. Leona Helmsley’s trust was distributed to all sorts of charities other than charities providing care for dogs because her trustees were authorized to distribute to any charitable organization.

F. How Does Donor Standing Fit Into the Discussion?

If we conclude that donor intent should be protected, and if we worry that the charity regulators may not take much of a role in protecting donor intent, either due to

⁷⁸ See, e.g., DOUG WHITE, *ABUSING DONOR INTENT: THE ROBERTSON FAMILY’S EPIC LAWSUIT AGAINST PRINCETON UNIVERSITY* (2014).

⁷⁹ *Id.* at p. 257.

⁸⁰ The small, old fund modification provision in UPMIFA, permitting a modification to a fund that is small (less than \$25,000 under the UPMIFA version, although higher in some states) and old (more than 20 years) with notice to the state charity regulator but without the need to go to court has proved useful. If a cy pres proceeding costs more than the value of a fund, the fund might just stay on the books and not be used for the intended purpose or any other purpose. Modification has made it possible to combine funds or otherwise modify them so that the funds can be used. The Attorney General, or other state regulator, can review the funds.

lack of resources or because donor intent conflicts with the regulator's view of the public interest in the charity, then perhaps the law should allow the donor or the donor's successors to have a role in protecting the intent. The donor might try to anticipate future problems and build in standing to enforce a restriction, but not all donors will plan. Perhaps the courts should permit successors representing the donor's interests to challenge actions taken by charities. In *Smithers*⁸¹ New York permitted the donor's widow, acting as a special administrator of his estate, to challenge the charity's use of his gift and its failure to comply with the restriction imposed on its use. A few years later a New York court refused to extend standing to the niece of the decedent,⁸² and thus far the reach of *Smithers* has been limited.

G. When the Charity and the Donor's Successors Disagree about What the Donor Intended, Who Should Be the Arbiter of the Donor's Intent?

Ultimately, if the charity and the donor's successors disagree about the charity's use of donor-restricted property, a court can resolve the dispute, but only if someone with standing can bring the disagreement to court. In *Robertson v. Princeton*, both sides argued that they were the ones respecting the intent of the donor. The Robertson family members who thought that Princeton had acted contrary to the wishes of the donor were able to pursue the case in court, and ultimately it settled. At issue in the litigation was what the donor actually intended. Given that words may be interpreted in different ways, a donor's intent may not be clear many years into the future.

H. Should Donor Control Be Loosened after Some Number of Years?

In 1955 Lewis Simes proposed that courts be permitted to modify charitable gifts after the passage of a specified number of years, for example 30 years, if a restriction was found to be impracticable or inexpedient. He explained, "a purpose may be found inexpedient solely because the amount to be expended is out of all proportion to its value to society." Simes would also give the trustees the power, although not the duty, to consume the principal of the trust, after a specified number of years.

⁸¹ *Smithers v. St. Luke's Roosevelt Hosp. Center*, 281 A.D.2d 127 (2001).

⁸² *Rettek v. Ellis Hospital*, 362 Fed. Appx 210 (2d Cir. 2010).

More recently, Melanie Leslie suggested that restrictions expire after 40 years.⁸³ Under her proposal, donors or their heirs would have standing during the 40-year period of the restrictions, and if a restriction became impossible or impracticable within the period, the charity could ask a court to apply *cy pres*. Then, after 40 years, the charity could make whatever changes it deemed appropriate, while bound by the trustees' fiduciary duties and cognizant of the reputational risk of altering a donor's intent unless necessary to carry out the charity's mission. Leslie notes that a time limitation of the sort she proposes "would enable donors to direct the use of charitable assets for a reasonable period but greatly reduce litigation over changed circumstances and the accompanying waste of charitable and public dollars."⁸⁴

Evelyn Brody has also described a policy that diminishes, with time and unanticipated circumstances, the duty to adhere to a gift restriction.⁸⁵ Any right of donor standing will also diminish over time. This policy statement appeared in the – draft of the ALI Principles of Nonprofit Organizations.⁸⁶ The comments explain that relaxing a restriction after the passage of time is justified because as more time passes, it becomes more likely that a donor's particular scheme will lose its relevance and become less socially worthwhile, public benefits the donor did not contemplate are more likely to arise, the donor will have recovered more of the value of the restriction, and it is more likely that the donor will have died.⁸⁷

I. Should Donor Intent Be Strictly Enforced or Should *Cy Pres* Be More Flexible?

The Restatement (Third) of Trusts, The Restatement of the Law of Charitable Nonprofit Organizations, and the UTC all reflect a loosening of the requirements of *cy pres*. The changes reflect the direction courts have been going for some years, and also

⁸³ Melanie B. Leslie, *Time to Sever the Dead Hand: Fisk University and the Cost of the *Cy Pres* Doctrine*, 31 CARDOZO ARTS ENTL. J. 1, 16-17 (2012).

⁸⁴ *Id.* at 16.

⁸⁵ See Brody, *supra* note 46, at 1266-67.

⁸⁶ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450 (Preliminary Draft No. 3, 2005).

⁸⁷ *Id.* at 1270.

follow from scholarly articles advocating the loosening. Kenneth Karst, writing in 1960, proposed:

Furthermore, the purposes of the settlor need not have become impossible to achieve, or even “impracticable” in that word’s more restrictive sense. It would be enough to show that the charity’s original purposes “have become obsolete or useless or prejudicial to the public welfare, or are otherwise sufficiently provided for, or are insignificant in comparison with the magnitude of the endowment”⁸⁸

The UTC’s addition of the word “wasteful” follows from this line of thinking. Further, in 1979 Ron Chester suggested creating a presumption of general intent, a proposal that the UTC also incorporated.

As a counter to further relaxation of the cy pres standard and a critique of the UTC revisions to that standard, Alberto Lopez proposes a presumption of specific intent for a donor.⁸⁹ The result would be that more cy pres petitions would be denied, because it would be difficult to establish a general charitable intent. This change, in his view, would result in public benefit by “reducing ambiguity in the law, thereby saving litigation costs.”⁹⁰ He suggests that faced with a specific intent presumption, donors would be more likely to identify an alternative use for their gift, to apply if the original use became impossible, or would have to accept that the property might return to their heirs or residuary legatees.⁹¹ A doctrine of presumed specific intent would provide an incentive to improve planning.⁹²

But other scholars continue to seek ways to make cy pres more responsive to the public benefit purpose of charitable gifts. The doctrines of cy pres and deviation as currently articulated focus on making modifications that come as close as possible either to what the donor intended at the time of the gift or what the donor might have intended if the donor knew about the changes that had occurred. Either way, the court is modifying a restriction without really knowing what the donor intended. Perhaps the creation of a

⁸⁸ Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 444, 472 (1960) (citing the Nathan Report from England).

⁸⁹ Alberto B. Lopez, *A Reevaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307 (2010).

⁹⁰ *Id.* at 1312.

⁹¹ *Id.* at 1354.

⁹² *Id.* at 1354-55.

“reasonable donor standard” would produce better results, especially when public benefit becomes a more important consideration. Katie Magallanes proposes that when a restriction becomes impossible or impracticable, the court should consider the trustee’s proposed modification against four factors: whether the proposed change increases the public benefit, the lapse of time and cultural changes since the donation, the administrative burden of alternative proposals, and the likelihood that the proposed change would deter future charitable gifts.⁹³ Her strategy balances donor intent with public benefit, giving a charity greater control over time, but only if a restriction has become impossible or impracticable.

IV. Conclusion

Nivala has argued that assets that represent the *droit patrimoine*, our collective cultural inheritance, deserve particular protection.⁹⁴ He uses the Barnes Foundation as his example, noting the value of the Barnes collection, as displayed, as “an intellectual, emotional and cultural experience.”⁹⁵ He argues that by placing the collection in the Barnes Foundation and giving the public access to the collection, Dr. Barnes gave local government a basis for interceding to protect the public’s interest in the collection.⁹⁶ Nivala argues that for assets infused with a public interest, state and local governments must exercise their power to protect the public’s interest in those assets.⁹⁷ His focus is on assets related to our cultural heritage, and to some degree he would apply his arguments about the *droit patrimoine* to assets still in private hands,⁹⁸ but he explains that because Dr. Barnes

⁹³ Katie Magallanes, *Beyond Donor Intent: Leveraging Cy Pres to Remedy Unintended Burdens Caused by Charitable Gifts*, 40 ACTEC L. J. 407, 426-32 (2014).

⁹⁴ Nivala, *supra* note 60.

⁹⁵ *Id.* at 480.

⁹⁶ *Id.* at 508.

⁹⁷ *Id.* at 492.

⁹⁸ *Id.* at 528-41. Nivala notes that Dr. Barnes might have been able to destroy the art before his death, in 1951, but argues that under the theory of *droit patrimoine*, a private owner should no longer be permitted to destroy art with a public interest.

transferred his collection to the foundation, the foundation owes a fiduciary duty to the public.⁹⁹

I conclude by returning to the 1939 article: “The issue, then, seems to be whether maximum social benefit from the fund or the exact effectuation of the donor's intent should be the criterion of the court.¹⁰⁰ This issue continues to lie at the heart of the question of who should control charitable gifts. During this conference we will consider arguments that donors should be able to control the gifts and alternatively that charities should be given more control. In connection with both, we should remember the role that public benefit plays in any charitable gift and consider whether the public should play a greater role in connection with charitable gifts.

⁹⁹ *Id.* at 491.

¹⁰⁰ *Revaluation of Cy Pres*, *supra* note 2, at 321.