

# **Enforcing Donor Intent**

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## **Introduction and Disclaimer**

Donors who make gifts to charitable organizations for specific purposes want those purposes to be fulfilled. The gift may be for a very specific purpose, or may be more general. In addition, a donor who makes a substantial gift to charity may wish the donor's name attached in perpetuity to programs, buildings (or parts of buildings) or faculty positions. Recipients of such gifts, however, wish the flexibility to change the application of the intended gift to reflect changed circumstances. This tension is unavoidable. Other papers in this conference discuss what charities can do to lift the dead hand. This paper will examine these issues from the opposite end of the telescope: what donors can do to make certain that their charitable wishes are enforced. Let me note at the outset that I am not necessarily advocating that we encourage donors to impose such rigid restrictions. For good public policy reasons, many of the kinds of restrictions and enforcement mechanisms I discuss are not the kind I would encourage my clients to utilize. But I am pursuing my assignment without making value judgments about the wisdom of imposing these kinds of restrictions. What I hope to do in this paper is illustrate some of the recent attempts to enforce donor intent as reflected in recent (rather than historical) cases, examine what the donors might have done differently and illustrate all of this with some of the cases I have dealt with in my own practice. I am not an academic and believe I have a balanced view from my decades of practical experience representing both donors and charitable institutions. But given my charge, this paper will not reflect that balance!

## **No Shortage of Recent Examples**

The press in recent years has been replete with stories of attempts to enforce donor wishes. Many of these cases could have been avoided by use of techniques which savvy

donors can use to restrict deviations from an intended use. These can also be crafted to provide necessary flexibility.

A quick survey of some of the recent cases is illustrative.<sup>1</sup>

**Exhibit 1:** The family of Judge Roy Hofheinz sued the **University of Houston** to prevent the University from stripping the Hofheinz name from the Hofheinz Pavilion basketball arena. The family's attorney stated in a news release that "When the University was unable to finish its new athletic field house, [Hofheinz] provided funds to cover over one-third of the construction cost. There was only one condition on the donation: for once, something in Houston that he helped build would bear his name. The University agreed, took his money, spent it, and now wants to break their agreement. That is illegal and, as any fair minded Texan can see, simply wrong."<sup>2</sup>

**Exhibit 2.** Charles and Marie Robertson made a substantial gift in 1961 to **Princeton University** to create a foundation to educate future diplomats. The donors' heirs were displeased with the way Princeton University was spending the money, and filed suit arguing that Princeton was not carrying out the donors' charitable intent and asking for the gift to be moved to other universities which would more likely carry out the Robertson mission. The case was finally settled by creation of a new foundation.

**Exhibit 3:** **Georgia O'Keeffe** and her husband photographer **Alfred Stieglitz** produced a wealth of valuable artwork which ultimately, through gifts by O'Keeffe, comprised a substantial collection at **Fisk University**. The gifts were subject to restrictions on resale or disposition. The university filed a petition asking for permission to sell some of the artworks because of the cost of maintaining them, which triggered a counter suit by the Georgia O'Keeffe Museum which argued for a reverter to the museum. A proposed settlement was rejected by the court on the theory that the charitable purposes were specific rather than general. Fisk appealed an order requiring them to adhere to the original gift terms which was ultimately reversed.

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<sup>1</sup> Some of these cases are discussed in *The Unraveling of Donor Intent* by Kathryn W. Miree and Winton C. Smith, Jr., Trusts and Estates, December 2009.

<sup>2</sup> The case was settled in June, 2006. See Houston Chronicle for June 14, 2016.

**Exhibit 4.** The hall in Lincoln Center in which the **New York Philharmonic** performs opened in 1962 as Philharmonic Hall. In 1973 electronics magnate Avery Fisher contributed \$10.5 million to the orchestra, after which the hall became known as Avery Fisher Hall. When it became apparent renovations would be necessary to bring the hall to modern standards acoustically and otherwise, the Philharmonic looked for a donor and found one in David Geffen, who agreed to a \$100,000,000 gift if the hall would be renamed after him. Heirs of Avery Fisher threatened suit and ultimately agreed to accept \$15,000,000 to release the naming rights so the hall could be renamed David Geffen Hall.<sup>3</sup> What makes this particular tale so ironic is that according to news reports at the time of the original gift, Avery Fisher had to be talked into having Philharmonic Hall named for him, supposedly protesting that no one paid attention to such things. “Who’s Major Deegan?” he is reported to have asked.<sup>4</sup>

**Exhibit 5.** The **Barnes Foundation** dust-up is so familiar that only a brief summary is necessary here. Pharmaceutical magnate Albert C. Barnes must have been an unusual character, someone who loved putting his thumb in the eye of high society. He established a museum for his fabulous art collection in suburban Philadelphia, had his artwork arranged in a very idiosyncratic manner which he left to a perpetual foundation which included numerous restrictions. Among these restrictions were prohibitions on moving the museum to another location, lending art and numerous restrictions on board members. Ultimately, after extensive litigation the trustees were allowed to move the museum to a more accessible location in the Philadelphia area, but one which preserved the original character and idiosyncratic method of displaying the art.

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<sup>3</sup> An interesting question is how the payment should be taxed. Since the original gift was presumably deducted as a charitable deduction, one might think that the tax benefit rule would apply, but here the persons receiving the payment are not the same person who deducted the gift: Mr. Fisher had died in 1994. Also, is the payment in exchange for a capital asset (akin to a trademark) or would this be ordinary income? These are questions for a different symposium. This would be a great exam question in tax 101.

<sup>4</sup> See Tom Buckley, The cost of putting footprints in sands of time, *New York Times*, October 17, 1973. The Major Deegan is an expressway in the Bronx. New York has a long history of naming streets and highways after obscure bureaucratic functionaries. One assumes that the Bruckner Expressway, also in the Bronx, is not named for composer Anton Bruckner (1824-1896).

**Exhibit 6.** A local chapter of **Daughters of the Confederacy** made gifts early in the 20<sup>th</sup> century for free student housing limited to descendants of Confederate ancestry. The residence hall at **Vanderbilt University** was required to perpetually bear the name “Confederate Memorial Hall.” The university attempted to rename the hall because of the obvious negative implications of the designation. A Tennessee appeals court enforced the donor restriction.<sup>5</sup>

Note how many of these cases involve naming rights, which have only expanded in recent years. Not only does every university building bear a donor’s name these days, but so does every nook and cranny, from classrooms to study areas, to entryways.<sup>6</sup>

### **Unenforceable Restrictions**

As an initial matter, we should distinguish cases of donor restrictions which are simply unenforceable or which should not for one reason or another be enforced. There will always of course be certain donor restrictions that because of donee policy, lapse of time or change of circumstance make enforcement problematical or impossible. We will not spend time on these because in many cases the court is trying to do what the donor *would have done* had the donor been aware of the changed circumstances or lived in more enlightened times. Cases involving racial restrictions particularly come to mind. The following situations from my own practice representing charities are illustrative:

Example 1: A donor left a bequest to a college to be used to provide scholarships for Jewish students. The college, however, had a provision in its foundational documents providing that “no sectarian test” would be required for any college benefit. We obtained a court order allowing the scholarships to be reserved for majors in Jewish studies.

Example 2: A testamentary bequest early in the 20<sup>th</sup> century was restricted by its terms to providing scholarships for white students in the metropolitan St. Louis area. Despite the donor’s intent, we very recently ob-

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<sup>5</sup> Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98 (Tenn. Ct. App. 2005).

<sup>6</sup> Prof. William Drennan has suggested that no deduction be allowed for the portion of a gift allocated to naming rights. See “Where Generosity and Pride Abide: Charitable Naming Rights”, *University of Cincinnati Law Review*, Vol. 80, Issue 1 (2012).

tained a court order removing the racial restriction on the grounds that it was no longer enforceable as a matter of public policy. One hopes that the donor's views would have "matured" in the 80+ years since this provision was included in the document.<sup>7</sup>

Example 3: Early in my career, I assisted a scientific research charity which had been left a bequest by a testator who had clearly not reviewed his will for many years. The bequest was to be used to find a prevention or cure for polio. The donor's charitable goal having been fulfilled, the court allowed the bequest to be used for other scientific research.

### So What Can Donors Do?

#### Enforcement by Suit—Outright Gifts

Let's start with cases where the donor has done nothing in the planning stage to enforce charitable intent. If the charity fails to use a gift as intended by the donor can't the donor simply sue to enforce intent by litigation? Here the problem has traditionally been donor standing and a great deal of ink has been spilled on this very issue.<sup>8</sup> Part of the doctrinal confusion is caused by the fact that courts have traditionally viewed conditions imposed by donors on charitable gifts through a property law lens. Once the property was contributed, the donor's interest ceased. A Missouri case<sup>9</sup> tried by our office is illustrative. Plaintiffs Edwin Hardt and Karl Hardt were executors of an estate. Pursuant to the will, they were given discretion to distribute the estate to charitable organizations of their choosing, and chose to use a large portion of the estate to support the pro-life cause. Some millions of dollars were contributed to the Vitae Foundation to be used to air anti-abortion advertisements, but some portions of the grant were not used in accordance with the condition placed on the gift and were allegedly used instead to cover administrative expenses, including hiring of staff members and so forth. Ultimately, according to the court's opinion, little of the donated money was used for the media campaigns.

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<sup>7</sup> I still occasionally find such historic vestiges in Missouri charitable trusts from the early 20th century. A lot of Missouri's odd politics makes sense when you know that Missouri was one of two slave states which did not secede during the Civil War.

<sup>8</sup> See, for example, Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, *Vanderbilt Law Review*, Vol. 58:4:1093 and Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors to Reserve the Right to Enforce a Gift Restriction?*, 42 *Real Property, Probate and Trust Journal*, Summer 2007.

<sup>9</sup> *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133 (Mo. Ct. App. 2009)).

The Hardts sued, seeking a detailed accounting of the gifts, restoration of any part of the gifts spent in contravention of the conditions placed on the gifts, an injunction preventing future expenditure of funds from the gifts in any manner inconsistent with the applicable conditions or, in the alternative, transfer of the gift to another charitable organization of the Hardts' choosing. The trial court granted the motion to dismiss holding that the Hardts lacked standing and the Court of Appeals affirmed.

The basis of the decision was generally that it is the exclusive province of the attorney general of the state to enforce the terms of a charitable gift: "Since the attorney general represents the public at large, he can enforce the terms of the charitable donation on behalf of all of the beneficiaries, which for public charities means the general public." In this case, the donor did not specifically make the charitable gifts subject to a condition subsequent, which might have required a different result. The Court did not attempt to analyze the gift restrictions as imposing a quasi-trust analysis. Relying on the provisions of the Missouri Uniform Trust Code, which Missouri adopted in 2005, the Court noted that the law specifically grants settlors of charitable trusts the ability to file suit to enforce the trust, but the UTC provision covers trusts only. A donor wishing to enforce conditions imposed on a charitable gift would have to create an *actual* trust to do so. The Court further relied on the adoption in Missouri of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), which stresses that charitable fund managers must give primary consideration to the donor's intent, but does not expressly grant donors standing to enforce intent as the Uniform Trust Code does in the case of charitable trusts. In fact, the prefatory note of the Uniform Act explicitly acknowledges that the attorney general is the protector of both the donor's intent and the public's interest in charitable funds. Finally, the Court noted that the drafters of UPMIFA reportedly considered an amendment granting standing to donors to enforce charitable intent, but the amendment was absent from the final version adopted by the drafting committee. The Court did leave a small hole for future donors, noting as follows: "While it is conceivable that there may be times when the attorney general does not sufficiently represent a donor's interest, it has not been shown to be the case here, and we find no reason to expand the common law to give

standing to the Hardts. Indeed, in light of the legislature’s passage of the UPMIFA, it would not be appropriate for us to do so.”

I suggest that relying on the office of the state attorney general is unrealistic. State attorneys general have many priorities and enforcing charitable intent may fall fairly low on the priority list. I have learned from practical experience that attorneys general in some states “don’t do charity.” They simply don’t have the resources.

### **Enforcement by Suit—Outright Gifts Not in Trust Enforced as Contracts**

In recent years, there has been some movement in favor of enforcement by donors, perhaps--although not necessarily stated as such--on a contract theory, but that development has been a long time coming. Interestingly, in some cases where one would think standing would have been raised, it seems not to have been raised at all, such as the 2013 New Jersey decision in *Adler v. SAVE, a/k/a SAVE, A Friend to Homeless Animals*<sup>10</sup> in which without explicitly stating it as such the court seems to have viewed the case through a contract rather than a property law lens. The Adlers were long-time animal lovers who had rescued a number of dogs and cats in the Princeton, New Jersey area. As the Adlers became more involved with animals, they became aware of the mission of SAVE, a “no kill” animal shelter, and SAVE became aware of the Adlers’ interest and ability to support the charitable mission. After numerous discussions and solicitations, the Adlers agreed to contribute \$50,000 for capital expansion and to provide a space for large dogs in a more family-like setting. There was no formal gift agreement, but rather an exchange of letters and communications acknowledging the gift, the intended purpose of the gift and the naming rights to be awarded in recognition of the gift. Unfortunately, SAVE did not follow through, but instead merged with another organization outside the Princeton area, where it planned to construct a new animal shelter “significantly smaller than the facility originally proposed to be built...” Donors filed suit for return of the funds. The New Jersey court had no trouble reaching a conclusion that the funds would have to be returned.

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<sup>10</sup> *Adler v. Save*, 432 N.J. Super. 101, 74 A.3d 41 (App. Div. 2013).

In the court's words, "SAVE accepted Plaintiffs' generosity, fully aware that it was expressly conditioned upon fulfilling these material conditions...To be clear, the record shows that SAVE: (1) decided to construct a substantially smaller facility; (2) outside the Princeton area; (3) without any specifically designated rooms to serve the needs of large dogs and older cats; and (4) without any mention of plaintiffs' names."

The equities seem plain but the case could easily have come out the other way even apart from standing. For one thing, the general rule as noted in Am.Jur. (quoted in the opinion but ignored) is that "conditions with a right of reverter or right to demand forfeiture will not be implied unless the intendment is clear." There was no formal gift agreement in this case, but merely an exchange of communications acknowledging the gift and its intended purpose. The court could as easily have applied cy pres to apply the gift for specific closely related charitable purposes – nothing in the gift correspondence implies that money would be returned if not utilized as the donors intended. In fact, the court noted that there was no published opinion in New Jersey directly addressing the right of a live donor to demand the return of a conditional inter vivos gift based on the recipient's failure to honor the donor's conditions.

Other cases as well have held that donors of outright charitable gifts may sue to enforce outright charitable gifts<sup>11</sup> but those cases are in the minority.<sup>12</sup> In other cases, courts may dodge the standing question altogether and apply cy pres to modify the gift.<sup>13</sup>

### **Enforcement by Suit—Outright Gifts Not in Trust Enforced As Constructive Trust**

In some cases in which a donor imposed restrictions, the courts have viewed

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<sup>11</sup> See, for example, L.B. Research & Educ. Found. v. UCLA Found., 130 Cal. App. 4th 171, 29 Cal. Rptr. 3d 710 (2005) in which the court allowed the donor to enforce charitable intent where the donor provided for alternate takers.

<sup>12</sup> "In some cases, the donor of a charitable gift, the founder of a charitable trust, or his or her heirs, is entitled to maintain a suit to enforce the trust or to prevent misuse or diversion of the property or funds. [Footnote omitted] Most decisions, however, limit the right to instances where the gift is conditional or ineffective or there is a clear reservation of right to terminate or revoke it. [Footnote omitted]" 15 Am. Jur. 2d Charities § 135.

<sup>13</sup> Although application of cy pres has traditionally been restricted to modification of charitable trusts, some jurisdictions have applied cy pres "to absolute gifts to charitable corporations or other organizations." Bogert, *The Law Of Trusts And Trustees* § 431.

through the property law lens and looked to concepts of trust law. In effect, the settlor's restrictions imposed a quasi-trust on the property and the question then became who could enforce the restrictions.<sup>14</sup> Viewed in this way, courts applying common law routinely held that donors simply had no legal standing to enforce donor intent -- only the attorney general had standing or others with a special interest -- and that is still the law in numerous jurisdictions. But in some cases, the court was willing to impose a constructive trust and more recently courts have been willing to give donors power to enforce the constructive trust. In *re Smithers*<sup>15</sup> is illustrative of such a case. Donor made a gift not in trust to St. Luke's-Roosevelt Hospital Center which the donee did not use in the way agreed with the donor. The court found the donor had standing under the exception in Restatement (Second) of Trusts § 391 (1959) that applies when a particular group of people have a special interest in funds held for a charitable purpose. The court relied on Mrs. Smithers's rights as a special administratrix of her deceased husband's estate. One judge dissented in a lengthy separate opinion.

What is fascinating is to contemplate the obvious next step. Since the Uniform Trust Code grants donors power to enforce charitable trusts, it is not a great step for courts to enforce the quasi-trust, constructive trust imposed on outright gifts in situations when the donee has failed to comply with donor-imposed conditions. The constructive trust exception may in time swallow the rule.

### **Enforcement by Suit of Gifts in Trust**

Although at common law, grantors of charitable trusts lacked standing to enforce donor intent, as we noted above the Uniform Trust Code specifically conveys standing on grantors<sup>16</sup> of charitable trusts. In many of the cases in which a donor has been unsuccessful in enforcing charitable intent, the reason was that court did not find that a charitable

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<sup>14</sup> Prof. John Langbein has suggested that these cases be analyzed as a matter of contract law, in which case the donor will have expanded rights to enforce the "contract".

<sup>15</sup> *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (2001)

<sup>16</sup> The Uniform Trust Code gives standing to grantors of a charitable trust "and others" to enforce charitable intent, others meaning those with a special interest in trust enforcement. Contrast the 1957 Second Restatement of Trusts denying standing to the settlor with 2011 Third Restatement which specifically allows enforcement of a charitable trust by the settlor.

trust had been created in the first place. A typical case is *Ebenezer's Old People's Home of Evangelical Ass'n of Ebenezer, N.Y. v. South Bend Old People's Home, Inc.*<sup>17</sup> where the court affirmed the usual rule that a gift accompanied by a statement of intended use is insufficient to create a trust arrangement. So why can't the donor simply create a trust arrangement more explicitly? It doesn't take much in the way formalities to create a trust. § 401. Methods of Creating Trust., Unif.Trust Code § 401 provides that

A trust may be created by:

- (1) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- (2) declaration by the owner of property that the owner holds identifiable property as trustee; or
- (3) exercise of a power of appointment in favor of a trustee.

Although § 402. Requirements for Creation., Unif.Trust Code § 402 provides that one of the requirements of a trust is that "the same person is not the sole trustee and sole beneficiary" that is easily dealt with as well. So instead of saying in the deed of gift "I give this property to Harvard University to be held as a separate fund to support an endowed professorship in extrasensory perception" good language like this be used: "I give this property to X, as trustee, to be held in a separate trust to support a professorship at Harvard University in extrasensory perception." Shouldn't this be sufficient under the Uniform Trust Code to create a trust arrangement which could be enforced?

There is no dearth of cases going back many years on the question of whether a trust was even created in the first place. This is not always an easy question because generally no specific formalities are necessary to create a trust. The way to avoid this problem is to make explicit that a trust is created. A good example can be seen in a 1947 decision by the Appellate Court of Indiana. The testatrix in *Bible Institute Colportage Association*

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<sup>17</sup> *Ebenezer's Old People's Home of Evangelical Ass'n of Ebenezer, N. Y. v. S. Bend Old People's Home*, 113 Ind. App. 382, 48 N.E.2d 851, 854 (1943).

of Chicago, et al., v. St. Louis Bank and Trust Company, et al.,<sup>18</sup>, left property outright to be used for “publication and dissemination of evangelical Christian literature in harmony with its articles of incorporation...” Although the primary issue in the case was whether Moody Bible College, into which the Bible Institute had been merged, was the successor in interest to the Institute, the court also analyzed the charitable trust issue and, specifically, whether Moody Bible College as successor could enforce the trust. Even though no trust had been established “it is well established that no formality of language nor special technical words are necessary to establish a charitable trust. Courts will look through form to the substance.” There was a dissent from this conclusion. “I cannot agree that the bequest herein creates a charitable trust. It is, in my opinion a charitable gift. In Vol. 2 The Law Of Trusts And Trustees § 324, it is stated, where the gift is outright and absolute no trust is involved.” The dissent also quoted Corpus Juris to the effect that a legacy absolute in terms, but suggesting a particular use, does not create either a condition or a trust.<sup>19</sup>

Bible Institute was distinguished by a 2005 opinion by the Court of Appeals of Indiana. In *St. Mary’s Medical Center, Inc. v. McCarthy*<sup>20</sup> the court had only one issue to resolve: whether St. Mary’s Medical Center could demolish a chapel on its campus constructed in the 1950s with funds provided by the estate of one of McCarthy’s relatives. Decedent’s will created an actual trust, with a corporate trustee directed to use both income and corpus of the trust for the use and benefit of the hospital. A corporate trustee was specifically authorized to make distributions outright to the hospital, which it did in order to allow the hospital to build a chapel. A first cousin three times removed from the testatrix brought suit to enjoin destruction of the chapel, arguing that the distribution from the first trust created a second trust with St. Mary’s as trustee when it received the funds for construction of the chapel. Or, as the court put it, “He essentially contends that the first trust created by Haney’s will for the benefit of St. Mary’s morphed into a second trust with St. Mary’s as trustee when it received the funds for construction of the chapel.”

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<sup>18</sup> *Bible Inst. Colportage Ass'n of Chicago v. St. Joseph Bank & Trust Co.*, 118 Ind. App. 592, 75 N.E.2d 666 (1947).

<sup>19</sup> 11 CJ., p.351, § 68.

<sup>20</sup> *St. Mary's Med. Ctr., Inc. v. McCarthy*, 829 N.E.2d 1068 (Ind. Ct. App. 2005)

St. Mary's countered, arguing that the plaintiff lacked standing to initiate the action and that there was no charitable trust in any event.<sup>21</sup> Although citing the general rule that liberal rules of construction would typically be employed to uphold and sustain every attempt to donate property for a charitable use, and although there was no question that the decedent intended to make a charitable gift of some kind, the court declined to find that a charitable trust had been created. "That we should be liberal in construing testamentary charitable gifts does not mean that we may create a charitable trust out of whole cloth." No trust = no standing. The chapel could be demolished.

### Cy Pres

One impediment to enforcement of donor intent in the trust context is that the court may try to deviate from donor intent by applying the doctrine of cy pres. Although the purpose of cy pres is to find an alternate charitable purpose as close as possible to what the donor intended, the donor may not wish for there to be *any* deviation from standard charitable purpose. When applying the doctrine, many courts try to divine donor intent and then determine whether the grantor had a general charitable intent (in which case cy pres may be applied to deviate from the grantor's original intention) or a more specific intent in which case the doctrine will not be.

Two Missouri cases, both of which I have some personal familiarity with, illustrate general vs. specific intent. The document creating the gift involved in the 1978 case of *Comfort v. Higgins*<sup>22</sup> dating all the way back to 1912 was a conveyance of certain real property in trust. Under the deed, following a retained life estate, the property was to be used to establish a home for "aged men and women." Decades passed, the retirement home was never built and heirs of the settlor sued claiming the trust failed and the property reverted to the heirs. The Missouri Supreme Court refused to apply cy pres: the deed conveying the property in trust evinced a specific rather than a general intent; the setting

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<sup>21</sup> The court also seemed impressed by the fact that the plaintiff was "separated from Haney by seven degrees of consanguinity."

<sup>22</sup> *Comfort v. Higgins*, 567 S.W.2d 331 (Mo. 1978).

up of the home was an end, not a means; and no inference could be drawn from failure to include a reversion to heirs as the instrument was inter vivos rather than testamentary.

Contrast *Comfort v. Higgins* with the same court's decision in *Obermeyer v. Bank of America, N.A.*<sup>23</sup> Donor Dr. Joseph Kimbrough's 1955 estate plan established a trust for a niece and nephews. On the death of the last survivor the property was to be "paid over and distributed free of trust unto Washington University...for the exclusive use and benefit of its Dental Alumni Development Fund." Dr. Kimbrough died in 1963, the University discontinued the Dental Alumni Development Fund in 1965, the University closed its dental school in 1991 and the last survivor of the niece and nephews died in 2000. In denying the reversionary interest claim of decedent's great, great-nieces, the court, noting that the trust did not contain a reversionary provision providing for an ultimate disposition, applied cy pres and allowed the fund to be used to support dental medicine as a component of education at the Washington University's School of Medicine, where maxillofacial surgery, prosthodontics and pediatric dentistry were taught and performed. It did so despite the fact that cy pres is normally a doctrine applied to trusts and here the trust had terminated. The court was not bothered by this, noting that although the trust itself had ceased to exist, the gift came from a trust, further noting that cy pres has been applied in some jurisdictions to outright gifts.<sup>24</sup>

An interesting issue in determining donor intent which is beyond the scope of this paper can arise in situations where there are multiple donors, such as to an endowment fund for a specific purpose. § 67(f) of the Restatement of Trusts Third provides that if several persons contribute to a fund to be applied to a particular charitable purpose, and it is or becomes illegal, impossible, or impracticable to carry out the particular purpose, or the funds are or become excessive for the purpose, and if the doctrine of cy pres is not applicable, a resulting trust will arise in favor of the contributors or their successors in interest

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<sup>23</sup> *Obermeyer v. Bank of Am., N.A.*, 140 S.W.3d 18 (Mo. 2004), as modified on denial of reh'g (Aug. 24, 2004).

<sup>24</sup> Standing was not discussed although in other cases, donors to a fund with multiple contributors have been denied standing. See *Holden Hospital Corp. v. Southern Ill. Hospital Corp.*, 174 N.E.2d 793 (Ill. 1961)

But remember that the purpose of the doctrine of cy pres is to come as near to the donor's intent as possible. So if the donor *really, really* wants her intent to be carried out without change, the donor needs either to (1) include language of reversion or reverter or (2) indicate that cy pres is not to be applied no matter what.<sup>25</sup> Because circumstances change in unforeseeable ways, there is no guarantee that without reversion or reverter language a mere statement that cy pres is not to be applied will be very effective. Some gifts become impossible or impractical to carry out. Will language like the following work:

“It is important to me that the endowed professorship in advanced alchemy be administered exactly as I have here in described. It is my intention and specific direction that no court may apply the doctrine of cy pres in order to modify this use or deviate in any manner from the terms I have required.”

Where a gift truly becomes impractical or impossible to carry out, it is hard to imagine that language like this, unaccompanied by reversion or alternate use language, would be respected. Among the mandatory rules in the Uniform Trust Code is section 105(b)(4) which provides that among the terms which cannot be overridden are certain powers of a court in various circumstances to terminate or modify a trust, including by application of cy pres. On the other hand, §67 of the Restatement of Trusts Third provides as follows:

“Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.” (Underlining added.)

The comments to § 67 explain:

“[Parallel sections of Restatement Second] require a general charitable intent” in order to apply cy pres, rather than (as in this § 67) presuming the doctrine's applicability and requiring that a contrary intent be found in the terms of the trust to prevent its application.”

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<sup>25</sup> It may help to add language that the donor's charitable purposes are specific rather than general. Such a donor would also want to foreclose deviations which do not squarely fit in the cy pres pigeon hole.

## Enforcement of Donor Intent by Contract

Given that courts may not enforce donor intent but also recognizing that courts are (1) accustomed to enforcing contracts and (2) seemingly inclined in more recent cases to analyze charitable contributions in a contract context, why not incorporate donor intent in an actual contract? For example, the written contract could provide for a gift to be used for a specific purpose and also specifically providing an enforcement mechanism: an acknowledgment in the contract that the donor reserves the right to sue for noncompliance and a further agreement that the charity is estopped from raising standing in an enforcement action. The keys would be structuring it specifically as a contract and creating enforceable contractual rights. Would such an agreement foreclose the attorney general from raising a standing issue?

## Retained Reversions and Diversions

But since the theory under traditional standing jurisprudence is that the donor does not have a property interest once the gift is made, the donor can *create* a property interest by retaining a reversion using language like this:

“I give and bequeath \$10 million to Yale University to be used to endow a full-time professorship and major in necromancy<sup>26</sup>. If Yale University has failed to establish such professorship and major by the second anniversary of my death, such gift shall revert to my then living descendants, per stirpes.”

The first problem with such a provision is not a standing problem but a tax problem. In the case of a charitable bequest, the regulations under 26 U.S.C.A. § 2055 (West) provides as one would expect as follows:

“If an estate or interest has passed to, or is vested in, charity at the time of the decedent’s death and the estate or interest would be defeated by the subsequent performance of some act or the happening of some event, the possibility of occurrence of which appeared at the time of the decedent’s death to be so remote as to be negligible, the deduction is allowable.”

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<sup>26</sup> Look it up.

And of course the donor wouldn't include the reverter at all unless she thought the possibility that Yale might not honor her wishes was not so remote as to be negligible. So a mere reverter to the donor or other noncharitable beneficiaries is not a practical solution from a tax standpoint.<sup>27</sup>

Well if this doesn't work, how about creating a property interest in a different charity, using language like this:

“I give and bequeath \$10 million to Yale University to be used to endow a full-time professorship and major in alchemy. If Yale University has failed to establish such professorship and major by the second anniversary of my death, such gift shall become the property of Harvard University for its general charitable and educational purposes. If Harvard University shall fail within a reasonable time to enforce its rights following failure by Yale University to carry out my wishes, such gift shall become the property of Brown University for its general charitable and educational purposes. I direct my personal representative to notify Harvard University and Brown University of this gift and further direct as a condition of this gift that Yale University provide annual reports to Harvard University and Brown of its progress in establishing this gift.”

Such a provision should be fully enforceable as the property will not pass to noncharitable beneficiaries and the alternate charity with a direct property interest undoubtedly has standing. This kind of provision will not jeopardize an income or estate tax charitable deduction. So long as the property will ultimately pass to charity the IRS is indifferent as to which one.<sup>28</sup>

### **Independent Supporting Structures**

None of the solutions for enforcing donor intent which we have examined above are fully satisfactory for one reason or another. Litigation to enforce donor intent is expensive and uncertain. Gifts subject to reversion may eliminate tax benefits and in many

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<sup>27</sup> § 413. Cy Pres., Unif.Trust Code § 413 imposes further limits by providing that a provision in a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power court to apply cy pres to modify or terminate the trust only if, when the provision takes effect: (1) the trust property is to revert to the settlor and the settlor is still living; or (2) fewer than 21 years have elapsed since the date of the trust's creation.

<sup>28</sup> Charitable remainder trusts often do not designate a specific charitable remainder beneficiary but simply provide that the remainder will pass to organizations described in section 170(b)(1)(A) to be selected by the trustee or by other means.

cases are not enforceable anyway. So let's look at ways for a donor to maintain complete control by using intermediary organizations. One way to make certain that property transferred to a charity will be used as the donor intended is -- don't transfer the property, but find ways for the donor to retain control of use and application of the gift.

### **Example 1—Enforcement Through a Supporting Organization**

Especially for lifetime gifts, where the contribution limitations on gifts to private foundations can be severe, ideally the intermediary charity should be a type I or type II supporting organization. What makes type I supporting organization attractive from a control standpoint is that the type I organization can support a class of supported organizations which allows some flexibility in diversion of funds between charities. The control test can also be finessed by making a group of charities with a substantial interest a governing board. For example, suppose that the donor wishes to provide scholarships for interested students at University A in the Greater Philadelphia area. A trust could be structured so that the purpose was to provide scholarships to college and university students in the Greater Philadelphia area, with preference given to College A so long as requirements of x, y, and z were met. Colleges B, C, D, and E would be trustees of the fund. As alternate takers there would have incentives to enforce the preference for distributions to College A. The trust could specifically require annual reports from College A to the trustees showing its compliance. And lifetime gifts to a type I supporting organization are subject to the more liberal deduction rules available for gifts to public charities – fair market value deductions for gifts of most kinds of property, higher percentage limitations and so forth. The donor could be a trustee and in a close vote cast the deciding vote without violating the control requirement.

### **Example 2—Enforcement Through a Private Foundation.**

Because of the “operated, supervised, or controlled by” requirement for type I relationships, private foundations may ultimately be the best choice because there the donor can retain absolute control over charitable application. Example: Donor owns an office building adjacent to the rapidly expanding University of Northern South Dakota at Hoople campus which she is happy to lease rent-free to the University so long as it maintains a

major in Serbo-Croatian language and literature. She also wishes the building to bear the family name in perpetuity. As we have seen above, if she simply contributes the building outright to the University, enforcement can be problematical. So she contributes her property to her private foundation<sup>29</sup> which leases the property rent-free to the I.R.S. P.L.R. 7932046 (May 10, 1979) concluded that “By leasing your property rent-free to a charitable organization, you directly benefit the charitable lessee. By making your property available at substantially less than its fair market value, you assist the lessee in carrying out its charitable purposes. Thus, your leasing activity is a charitable activity.” The Service also ruled that the fair market value of the property could be excluded from the computation of minimum investment return under code section 4942(e)(1).<sup>30</sup> The disadvantage of the solution for lifetime gifts is the limitation of the deduction to basis because the intermediary organization is a private foundation.<sup>31</sup> Instead perhaps a Type I supporting organization could be created which supports a class of publicly supported organizations that are closely related in purpose or function to the principal supporting organization: colleges and universities in a certain geographic area.

**Example 3—Enforcement Through a Private Foundation.** Another example: donor, lamenting the lack of courses in geography at his favorite university, has his substantial, well-funded private foundation pledge multi-year annual payments or payments in perpetuity to the university sufficient to cover salary of a full-time faculty member to teach subjects related to geography.<sup>32</sup> Continuation of payments is contingent on compliance reports from the university. If the university defaults in any of its obligations, the donor can cause the foundation to simply stop making the payments. Why, one might fairly ask, do I need a foundation to do this? Why can’t the donor just do this directly? The answer of

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<sup>29</sup> Her charitable contribution will be limited to the lower of basis or fair market value.

<sup>30</sup> This is better from a tax standpoint than a rent-free lease by the donor herself. Allowing a charity to use property rent free is a gift for gift tax purposes not qualifying for the gift tax charitable deduction. Code section 2503(g) excepts only certain loans of artwork from this general rule.

<sup>31</sup> Internal Revenue Code section 170(e) will limit her contribution to the lower of basis or fair market value.

<sup>32</sup> The pledge should be made by the foundation rather than the donor as the IRS takes the position (foolishly in my opinion) that a foundation’s satisfaction of a donor’s pledge is self-dealing.

course is that individual donors are mortal. The foundation provides an enforcement mechanism that can last longer than the donor's lifetime.

**Example 4—Enforcement Through a Private Foundation.** Here is one more example. Donor wants to create a fund at a charity to support a specific program. He also wants to provide a way to enforce the charitable use after his death. So his private foundation lends a fund to the charity and the charity signs a note calling for payments of interest only (or no interest<sup>33</sup>) until the note is called in the event of default. The note would provide that failure by the charity to use the funds for the required purpose will be an event of default, entitling the foundation to call the note.

**Example 5—Enforcement Using a Donor Advised Fund.** Although it is unlikely that a donor advised fund will make a charitable pledge, DAFs can still be useful as a way of enforcing donor intent. A donor pledge might look like this:

“I have previously contributed \$10 million to a donor advised fund (the “Fund”) at the Metropolis Community Foundation. It is my wish to support X University’s major in socialism studies and in furtherance of that goal, I have requested that the Fund distribute \$100,000 to the University in each year, in perpetuity, in which it receives written confirmation from the University confirming that a major in socialism studies is still being offered.”

### Carrots Instead of Sticks

Many of the enforcement mechanisms described above could fairly be characterized as sticks rather than carrots. But as seen in some of the examples above, carrots may be equally effective. A donor might give an initial \$10 million gift with a promise of an additional \$10 million if the first \$10 million is used as the donor wishes. How about this language:

“I have this day given the Minnesota Symphony a \$10 million endowment gift. I have also this day caused my private foundation to make a charitable pledge to the Orchestra of an additional \$10 million payable on the 20<sup>th</sup> anniversary of this gift

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<sup>33</sup> The proposed regulations under Internal Revenue Code § 7872 exempt from the imputed interest rules “(11) loans made by a private foundation the primary purpose of which is to accomplish one or more of the charitable purposes described in § 170(c)(2)(B).” Prop. Treas. Reg. § 1-7872-5(b).

provided that in each of the Orchestra's classical subscription series seasons between now and that anniversary the Orchestra shall play on a regular subscription concert at least one symphony by Jean Sibelius."

Another example:

"I have this day given to Yale University a \$10 million endowment gift. I've also this day caused my private foundation to make a charitable pledge to the university of an additional \$10 million payable on the tenth anniversary of this gift provided that in each of the university's academic years between now and that date the university shall confer at least one doctor of philosophy degree, which degree shall not be an honorary degree, on a candidate in Finnish language and literature."

### **Conclusion**

As we have seen in this walk through donor intent enforcement techniques, there is a great deal donors can do to ensure that their charitable wishes are fulfilled. Some of the suggestions may not be good policy and many charities will resist the attempt to straitjacket them too narrowly. One also hopes that practitioners who must draft these restrictions will counsel donors wisely and perhaps explain why some of the donor's proposed attempts to enforce rigid compliance with donor wishes in perpetuity may be undesirable. A carefully worked out plan can balance donor intent and charitable mission and make the kinds of cases we have discussed unnecessary.