

Embracing the Tension: Enforcing or Modifying Donor Intent

Harvey P. Daleⁱ

The paper following this sheet addresses both (1) steps donors may consider to enhance their ability to enforce their donor-imposed restrictions on gifts to charities and (2) steps charities may consider to enhance their ability to modify such donor-imposed restrictions in appropriate cases. Only the second is relevant for this conference panel, which is captioned in the Conference Agenda as “Charities Choose Your Weapons: Protecting Charitable Flexibility.”

It is suggested, therefore, that participants should skip reading Part III of the paper (pages 7 through 14) and should focus primarily on Parts I (pages 1 through 3) and IV (pages 14 through 34), dipping lightly, however, into Parts II (pages 3 through 7), V (pages 34 through 36) and the Conclusion (page 36).

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I. Introduction¹

This paper suggests methods of controlling the ability of donors or their agents to enforce donor intent. Like Janus, this two-faced goal involves considering both how to enhance donor control and how to enhance donees' ability to modify donor-imposed restrictions. There is an obvious tension between the former and the latter. It is important to manage that tension, but it is neither possible nor desirable to eliminate it.² Some donors have a powerful — and sometimes also narrow — vision of how their charitable donations should be deployed. A regime that limits their ability to enforce their vision might chill their willingness to give.³ Charitable donees, on the other hand, usually prefer flexibility in the use of their funds, and in some situations wish to be able to modify donor restrictions when circumstances indicate that adhering to them has become impossible or impractical or otherwise significantly undesirable.

As one author has thoughtfully written, “at the deepest level and the broadest scope, concern about dead hand control merges with Jefferson’s looming question about law itself: ‘whether, by the laws of nature, one generation . . . can, by any act of theirs, bind those which are to follow them?’”⁴ On the one hand, if today can never bind tomorrow, all contracts become impossible or incredibly expensive and no promises are enforceable. On the other hand, if today can bind all tomorrows, tomorrow loses its ability to modify or abrogate undertakings that have become irrelevant, inappropriate, or unduly rigid.

¹ References to the Internal Revenue Code of 1986, as amended, will be to “I.R.C.”; references to regulations under the I.R.C. will be to “Treas. Reg.”

² In recognition of this abiding tension, a conference held at New York University in 2005 under the aegis of the National Center on Philanthropy and the Law was entitled “Grasping the Nettle: Respecting Donor Intent and Avoiding the Dead Hand.” The papers presented at that conference are available at http://www1.law.nyu.edu/ncpl/resources/rp_conference.html.

³ As Chief Justice John Marshall observed nearly 200 years ago, “One great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable.” *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 647 (1819). Not everyone entirely agrees with the quoted language which, after all, could be impeached by empirical evidence to the contrary. See, e.g., John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 459-60 (2005).

⁴ Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets*, 58 CASE W. RES. L. REV. 97, 99 (2007) (footnote omitted).

Changed circumstances sometimes strongly suggest permitting modifications. Lenin might wish to cancel work on the construction of a new dacha for the Czar; after Jonas Salk, the March of Dimes might wish to stop funding work on the design of an improved heart-lung machine for treatment of polio victims. The passage of time, moreover, is always a dominant factor: binding tomorrow for ten or twenty years is very different than binding tomorrow for a thousand years.⁵ While no particular period of time is unalterably determinative, it is instructive to recall that the common law long forbade certain dispositions to be enforced for longer than lives in being plus 21 years,⁶ although many states have now adopted a statutory 90-year “wait-and-see” period instead.⁷ Today must be neither impotent nor omnipotent in constraining tomorrow. The challenge is to find principled rules and processes for navigating to a proper middle ground while embracing the tension between too much and too little fealty to donor-imposed restrictions.

Much has been written about standing in the charitable sector. Part II of this paper briefly summarizes the current state of the law in order to set the stage for an analysis of how to control donor-imposed restrictions. Part III considers how to enhance donor control of donor-imposed restrictions on the use of donated funds or property. Part IV con-

⁵ “[D]onor attempts to control the use of gifted property in perpetuity will often eventually conflict with the accomplishment of charitable objectives.” John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 178 (2010). As an earlier American Law Institute project noted, “[i]n general, after the passage of a significant period of time following the creation of a charitable trust or gift instrument, the policy of adhering to the terms in the trust or gift instrument increasingly weakens” PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 440 (AMER. LAW INST., Tentative Draft No. 2, March 18, 2009) [hereinafter PRINCIPLES OF NONPROFITS].

⁶ See W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938), for an exposition of the common-law Rule Against Perpetuities. For an update, demonstrating that “the common law Rule Against Perpetuities is going the way of the dinosaur in a number of American jurisdictions,” see Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2589 (2003). “As of 2011, every state has abandoned—at least in part—the traditional, twenty-one-years-plus-life-in-being rule.” Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 89, 100 (2013). Cf. text accompanying n.54, *infra*. For a recent review of New York State’s modifications to the Rule, see Kyle G. Durante, *A Modern Guide to the Modifications of the Rule Against Perpetuities in New York*, 32 TUORO L. REV. 947 (2016).

⁷ UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1, 3 (1990) [hereinafter USRAP]. As of April 13, 2016, USRAP has been enacted by 28 states, the District of Columbia, and the U.S. Virgin Islands, and has been incorporated into the Uniform Probate Code. UNIF. PROBATE CODE §§ 2-901, et seq. (2010). As of March 2012, eight states — Alaska, Delaware, Idaho, Kentucky, New Jersey, Pennsylvania, Rhode Island, and South Dakota — had repealed the Rule either altogether or partially. American College of Trust and Estate Counsel, *State Surveys*, http://www.actec.org/assets/1/6/Zaritsky_RAP_Survey.pdf.

siders the opposite: how to enhance the ability of charities to modify donor-imposed restrictions when appropriate. Part V suggests some steps that might be taken to achieve three results: (1) appropriate protection of donor intent, (2) recognition of the donee charity's need for appropriate flexibility in the use of donated funds or property, and (3) establishing a non-judicial process for mediating between the first and second.⁸ Conclusions appear in Part VI.

II. Donor Standing in the Charitable Sector

For many decades, it was settled law that the donor (or settlor)⁹ of a charitable trust lacked standing to enforce its terms.¹⁰ Both the first Restatement of Trusts (in 1935) and the second Restatement of Trusts (in 1957) explicitly stated that no suit to enforce a chari-

⁸ The author recognizes that much turns on the meaning and scope of “appropriate” in this sentence.

⁹ This paper uses “donor” and “settlor” interchangeably. Black’s Law Dictionary defines “settlor” as follows: “Someone who makes a settlement of property; esp., one who sets up a trust. — Also termed *creator, donor, trustor, grantor, founder.*” BLACK’S LAW DICTIONARY (10th ed. 2014) (italics in original). See also § 103(15) of the UNIFORM TRUST CODE, 7C U.L.A. 486 (2010) [hereinafter UTC].

¹⁰ For an excellent survey of the law as of the early 1990s see Mary Grace Blasko, et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37 (1993). Among the many other articles addressing the legal issues of standing, see Reid Kress Weisbord & Peter DeScioli, *The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving*, 45 GONZ. L. REV. 225 (2010); Sanford J. Schlesinger & Martin R. Goodman, *Enforcement of Charitable Transfers: A Question of Standing*, EST. PLAN. (WGL), Aug. 2009, at 37; William Josephson, *Donor Intent and Donor Standing to Enforce It*, 59 EXEMPT ORG. TAX REV. 307 (2008); Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets*, 58 CASE W. RES. L. REV. 97 (2007); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable Donor Standing*, 41 GA. L. REV. 1183 (2007); Winton C. Smith, Jr., *Power to the Donors*, TR. & EST., Oct. 2007, at 66; Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors to Reserve the Right to Enforce a Gift Restriction?*, 42 REAL PROP. PROB. & TR.J. 245 (2007); Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093 (2005); Joshua B. Nix, *The Things People Do When No One Is Looking: An Argument for the Expansion of Standing in the Charitable Sector*, 14 U. MIAMI BUS. L. REV. 147 (2005); Alan F. Rothschild, Jr., *How Donors May — and May Not — Exercise Control of Charitable Gifts*, TAX'NEXEMPTS, Nov./Dec. 2004, at 110; Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37 REAL PROP. PROB. & TR. J. 611 (2003); Elizabeth M. Yanelli, et al., *No Trespassing: Donors Lack Legal Standing to Challenge Corporate Acts of Florida Not-for-Profit Corporations*, FLA. B.J., Dec. 2001, at 50; Paula Kilcoyne, Note, *Charitable Trusts — Donor Standing under the Uniform Management of Institutional Funds Act in Light of Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 21 W. NEW ENG. L. REV. 131 (1999); Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 IOWA J. CORP. L. 655 (1998); Charles R. Berry & Gerald J. Buchwald, *Enforcement of College Trustees’ Fiduciary Duties: Students and the Problem of Standing*, 9 U.S.F. L. REV. 1 (1974); Peter W. Blackman, Comment, *Selected Problems of California Charitable Corporation Administration: Standing to Sue, and Directors’ Ability to Change Purpose*, 13 U.C.L.A. L. REV. 1123 (1966).

table trust could be maintained by “the settlor or his heirs, personal representatives or next of kin.”¹¹ All agreed that the Attorney General (or similar state official) did have standing and that such standing was generally exclusive. An exception existed, however, for a “person who has a special interest in the enforcement of the charitable trust.”¹² While there was some uncertainty about what constituted a “special interest” for this purpose,¹³ it was clear that “the settlor or his heirs, personal representatives or next of kin” lacked such an interest and did not have standing.¹⁴

The Uniform Management of Institutional Funds Act, in 1972, provided that a charity, with the consent of the donor, could “release, in whole or part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.”¹⁵ The Uniform Prudent Management of Institutional Funds Act, in 2006, similarly provides that a charity, with the consent of the donor, “may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or

¹¹ RESTATEMENT OF TRUSTS (AM. LAW INST. 1935) [hereinafter RESTATEMENT I OF TRUSTS] § 391; RESTATEMENT (SECOND) OF TRUSTS (AM. LAW INST. 1957) [hereinafter RESTATEMENT II OF TRUSTS] § 391.

¹² *Ibid.* The most recent Restatement of Trusts contains this description of the policies affecting the special-interest doctrine:

“The special-interest concept and its application involve a balancing of policy concerns and objectives. The special-interest requirement provides a safeguard for charitable resources and trustees by limiting the risk, and frequency, of potentially costly, unwarranted litigation; but the recognition of special-interest standing, in appropriate situations, is justified by society’s interest in honoring reasonable expectations of settlors and the donor public and in enhancing enforcement of charitable trusts, in light of the limitations (of information and resources, plus other responsibilities and influences) inherent in Attorney General enforcement.” RESTATEMENT (THIRD) OF TRUSTS (AM. LAW INST. 2011) [hereinafter RESTATEMENT III OF TRUSTS] § 94 cmt. g.

¹³ New York’s highest court has said that a particular group of people may be found to have a special interest “when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number.” *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y.2d 458, 465, 479 N.E.2d 752, 755 (1985). See also *Sagikos Manor Historical Society, Inc., v. Robert David Lion Gardner Foundation, Inc.*, 127 A.D.3d 1056, 9 N.Y.S.3d 80 (App. Div. 2d Dep’t 2015). It is interesting that the class held to have standing in *Alco Gravure* comprised the employees of the plaintiff company, a group too small to constitute a charitable class, with the larger charitable beneficiary class only entitled to a residual interest after the claims of the employee class were satisfied. In apparent recognition of this, the New York Court of Appeals, in a later decision, referred to *Alco Gravure* as involving a “private trust” rather than a charitable trust. *Consumers Union of U.S., Inc. v. State of New York*, 5 N.Y.3d 327, 351, 840 N.E.2d 68, 80 (2005).

¹⁴ RESTATEMENT I OF TRUSTS § 391; RESTATEMENT II OF TRUSTS § 391.

¹⁵ UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT [hereinafter UMIFA] § 7(a).

purpose of an institutional fund.”¹⁶ These donor-consent provisions, however, do not grant general standing to the donor. As the comments to UMIFA stated, “The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect.”¹⁷ The comments to UPMIFA are also clear that the provision does not give the donor standing.¹⁸ Courts that have considered the issue have agreed.¹⁹ The New York version of UPMIFA adds a non-uniform requirement that the donor must be notified if the charity seeks court modification or release of a restriction.²⁰ That additional requirement should also not be construed to give the donor standing more generally.²¹

More recently, however, some legal authorities have reversed the earlier no-donor-standing rule in the case of charitable trusts (but not for charitable corporations). These authorities now grant donors to charitable trusts standing to maintain a suit to enforce its terms. The third Restatement of Trusts (in 2011) states that “[a] suit for the enforcement of a charitable trust may be maintained . . . by a settlor . . .”²² The UTC, now adopted by more than half of the states, provides that “[t]he settlor of a charitable trust . . . may maintain a proceeding to enforce the trust.”²³ These developments are in line with case law in

¹⁶ UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT [hereinafter UPMIFA] § 6(a).

¹⁷ UMIFA § 7 cmt.

¹⁸ “Although the donor has the power to consent to a release of a restriction, this section does not create a power in the donor that will cause a federal tax problem for the donor. The gift to the institution is a completed gift for tax purposes, the property cannot be diverted from the charitable beneficiary, and the donor cannot redirect the property to another use by the charity. The donor has no retained interest in the fund.” UPMIFA § 6 cmt. to Subsection (a). See text accompanying nn.47-50, *infra*, for an explanation of the reference to “a federal tax problem for the donor.”

¹⁹ *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 243 Conn. 1, 699 A.2d 995 (Conn. 1997); *Rettek v. Ellis Hosp.*, 2009 U.S. Dist. LEXIS 1607, *10, 2009 WL 87592 (N.D.N.Y. 2009); *Pearson v. Garrett-Evangelical Theol. Seminary, Inc.*, 790 F. Supp. 2d 759, 764 (N.D. Ill. 2011); *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 138-39 (Mo. Ct. App. 2009); *Siebach v. Brigham Young Univ.*, 361 P.3d 130 (Utah 2015).

²⁰ N-PCL §§ 555(b), 555(c), 555(d)(4) (McKinney Supp. 2014).

²¹ *Accord, Harvey P. Dale, et al., Evolution, Not Revolution: A Legislative History of the New York Prudent Management of Institutional Funds Act*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 377, 441 n.334 (2014).

²² RESTATEMENT III OF TRUSTS § 94(2). The donor’s standing is “subject to three qualifications” described in RESTATEMENT III OF TRUSTS § 94, cmt. g(3).

²³ UTC § 405(c). UTC § 410(b) also permits a settlor to maintain a cy pres proceeding. As of April 1, 2016, the UTC had been enacted by 31 states and the District of Columbia. Several courts have held that UTC § 405(c) does not apply to gifts made to a charitable corporation (rather than to a charitable trust). *Siebach v.*

New York that permits donor standing even if not specifically reserved in the gift agreement.²⁴ The New York rule applies to gifts made to charities that are corporations as well as to charitable trusts.²⁵

Trusts are not contracts. The official comments to both the first and the second Restatement of Trusts confirmed that “[t]he creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property *rather than as a contract.*”²⁶ Notwithstanding those comments, both earlier Restatements recognized the power of the donor, by agreement with the charitable trustee, to retain standing to enforce the trust. The official comments stated that “[i]f the settlor makes a contract with the trustee, he can maintain an action on the contract against the trustee.”²⁷ The comments to the third Restatement of Trusts elaborate:

“The terms of a charitable trust may reserve to the settlor or confer upon others power to enforce the trust, power to control or advise the trustee, or even power to modify the terms of the trust. Express powers of these types give the power holder a special interest in enforcing the charitable trust, and therefore standing”²⁸

The same result would obtain if a donor to a corporate charitable donee contracts for standing.²⁹ Thus the more recent expansion of donor standing primarily affects donors who failed to provide for such standing in an agreement with the charitable donee.

These rules for standing differ from those used by U.S. federal courts in determining standing for purposes of Article III of the Constitution. The federal standing rules are

Brigham Young Univ., 361 P.3d 130 (Utah 2015); Courtney C. & Lucy Patten David Found. v. Colorado State Univ. Research Found., 320 P.3d 1115 (Wyo. 2014); Hardt v. Vitae Found., 302 S.W.3d 133 (Mo. Ct. App. 2009); Dodge v. Trustees of Randolph-Macon Woman’s College, 661 S.E.2d 805, 276 Va. 10 (Va. 2008).

²⁴ Smithers v. St. Luke’s-Roosevelt Hospital Center, 281 A.D.2d 127, 723 N.Y.S.2d 426 (App. Div. 1st Dep’t 2001); Lucker v. Bayside Cemetery, 114 A.D.3d 162, 979 N.Y.S.2d 8 (App. Div. 1st Dep’t 2013); Associate Alumni of Gen. Theological Seminary v. Gen. Theological Seminary, 163 N.Y. 417, 57 N.E. 626 (1900). Standing, however, is still denied to heirs and next of kin. Lucker, *supra*.

²⁵ See, e.g., Lucker, n.24, *supra*.

²⁶ RESTATEMENT I OF TRUSTS § 197 cmt. b; RESTATEMENT II OF TRUSTS § 197 cmt. b (emphasis added).

²⁷ RESTATEMENT II OF TRUSTS § 391 cmt. b. The comment goes on to clarify that donor standing is not conferred by the trustee “merely . . . accepting the trust and agreeing to perform his duties as trustee” *Ibid.* See generally John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

²⁸ RESTATEMENT III OF TRUSTS § 94, cmt. g(2).

²⁹ See, e.g., Kerbow v. Frostburg State University Foundation, Inc., 40 F. Supp. 2d 724, 727 (D. Md. 1999).

of constitutional dimension, respond to the need to decide only “cases” or “controversies,”³⁰ and are complex as well as befuddling.³¹ By contrast, the standing rules discussed in this paper are of prudential dimension, respond to “the need to strike the difficult balance between the desire to assure that abuses will be corrected and the desire to permit fiduciaries to function without unwarranted abuse and harassment,”³² and are fairly flexible in striking that balance by weighing all of the relevant facts and circumstances of each situation.

III. Enhancing the Ability of Donors to Enforce Donor-Imposed Restrictions³³

Standing. Although most states now automatically give donors standing, for gifts to a charitable trust, by virtue of § 405(c) of the UTC,³⁴ a donor desiring to preserve standing may wish to provide for standing by agreement with the charitable donee. That would protect a donor making donations to a charitable corporation. It would also protect the donor against changes in applicable law, migration of the charitable donee to a jurisdiction less sympathetic to donor control, or other risks of weakening donor standing. In addition, such a donor may wish to consider providing for successors’ standing by naming them or setting forth processes for their appointment in the agreement. Alternatively, a donor may establish an intermediate entity, such as a private foundation, to be funded by the donor and to become, in turn, the direct donor to the charitable donee.³⁵ That intermediate enti-

³⁰ U.S. CONST., art. III, § 2, cl. 1 (describing the “cases” and “controversies” to which U.S. courts’ “judicial Power shall extend.”)

³¹ See generally Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEXAS L. REV. 1061 (2015), in which the author refers to the case law as giving rise to “occasional befuddlement.” *Ibid* at 1062. See also Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases — A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105 (2014) (“[S]eeking to make sense of standing doctrine is a fool’s errand.” (footnote omitted))

³² MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 333 (2004).

³³ Because this article focusses on legal issues and processes, it does not purport to address the steps that may be taken, outside of legal structures, to protect donor intent. Other resources, however, do consider some of them. E.g., JEFFREY J. CAIN, PROTECTING DONOR INTENT: HOW TO DEFINE AND SAFEGUARD YOUR PHILANTHROPIC PRINCIPLES (Philanthropy Roundtable 2012). See also <http://protectingdonorintent.com>.

³⁴ See text accompanying n.23, *supra*.

³⁵ The use of a private foundation as an intermediate entity is discussed in PRINCIPLES OF NONPROFITS § 420, Reporter’s Notes ¶ 8. Several other options, including “friends of” organizations, supporting organizations, donor-advised funds, and community trusts, are also mentioned.

ty could agree with the charitable donee that it would have standing, and then its own governing procedures could control the future selection of its trustees, directors, or others entitled to exercise standing. Furthermore, because the intermediate entity could have unlimited life, there could be no time limit on the standing power thus obtained. The donor might also wish to stipulate, by agreement with the charitable donee, for the governing law of a jurisdiction favorable to recognizing donor standing and enforcing donor-imposed restrictions.³⁶

Cy Pres or Deviation. A donor desiring to maximize control of donor-imposed restrictions may wish to minimize the donee charity's ability, through court proceedings, to modify or release such restrictions. To do so, the donor may wish to limit or prevent the donee's recourse to cy pres (or deviation) proceedings. The comments to the most recent draft of the Restatement of Charitable Nonprofit Organizations provide a concise summary of the circumstances that historically permitted courts to grant cy pres modifications:

“Under early common law, the courts were empowered to modify a charity’s purposes or the purposes for which it held certain assets if: (1) a valid charitable trust, a charity that was a corporation, or a gift to be used for valid charitable purposes existed; (2) it had become unlawful or impossible to carry out the settlor’s or donor’s original intention; and (3) the settlor or donor had a general charitable intent as well as the intention to benefit the particular charitable object the donor had designated.”³⁷

³⁶ It is beyond the scope of this paper to discuss so-called “party autonomy” in choice-of-law or conflict-of-laws rules. Suffice it to note that the second Restatement of Conflict of Laws elevated party autonomy to a general rule. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971). One recent review of the growing acceptance of party autonomy concludes that “it is no exaggeration to claim that party autonomy has become the most important principle in conflict of laws. . . . American courts have followed no other provision more than Article 187 of the Second Restatement of Conflict of Laws” Matthias Lehmann, *Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 389 (2008). A recent decision of New York State’s highest court agrees, holding that a stipulation for New York law controls even over a New York statute that would have looked to the law of a different jurisdiction. Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466 (2015) (citing Article 187 with approval). Section 107(1) of the UTC supports party autonomy for trusts.

³⁷ RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGANIZATIONS, § 3.02, cmt. b (AM. LAW INST., Tentative Draft No. 1, April 13, 2016) [hereinafter RESTATEMENT OF CHARITIES]. Note that the quoted language contemplates that cy pres may apply both to charitable trusts and charitable corporations. Accord, UTC § 413, cmt. The comments to the Restatement also confirm that, “[a]s with the doctrine of cy pres, the doctrine of deviation applies to all charities regardless of legal form” RESTATEMENT OF CHARITIES § 3.03, cmt. a.

The comments go on, however, to note that “[o]ver time, the second and third of these three requirements became more permissive or were eliminated altogether.”³⁸ Thus, donors wishing to block cy pres proceedings might consider not only reciting that they had no “general charitable intent” but also having the charitable donee explicitly agree not to apply for cy pres relief from their restrictions.

The validity of such an agreement is uncertain: the Restatement Third of Trusts and the current version of the Restatement of Charities enforce it,³⁹ but the UTC does not.⁴⁰ In addition, some authorities suggest that, even if a no-cy-pres agreement is sustained, a court might then nevertheless apply the doctrine of deviation, rather than cy pres, to modify the terms of the donation.⁴¹ A donor might therefore also consider trying to block the use of deviation proceedings by agreement with the donee charity. It is doubtful that such a double-block would be sustained if it appeared that it had become unlawful, impossible, impracticable, or wasteful to carry out the restricted charitable purposes, and that no alternative process existed to modify them.⁴² A profound public policy favors the protection and preservation of charitable funds; flexible adjustment to changing circumstances importantly serves that public policy; courts should and probably would decline to enforce a restriction that purported to prevent appropriate and necessary modifications altogether. As a Massachusetts court stated nearly 150 years ago, in declaring void a donor’s direction

³⁸ *Ibid.* Accord, UTC § 413(a). The comment to that section confirms that it “modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve.”

³⁹ The introductory clause to the cy pres section in the Restatement Third of Trusts reads, “Unless the terms of the trust provide otherwise” RESTATEMENT III OF TRUSTS § 67. See also RESTATEMENT III OF TRUSTS § 67, cmt. b; RESTATEMENT OF CHARITIES § 3.02, cmt. e.

⁴⁰ Section 105(b)(4) of the UTC provides that terms of a charitable trust agreement cannot preclude cy pres proceedings. See n.54, *infra*.

⁴¹ See n.37, *supra*, and n.59, *infra*.

⁴² If the gift agreement provides a reasonable alternative process for modifying donor-imposed restrictions, the existence of that process should be helpful to a donor (or charity) seeking to block cy pres or deviation litigation; it might also be persuasive to a court in deciding whether to honor the alternative process in lieu of court proceedings. Query, however, the extent to which any such alternative process could circumscribe or eliminate what would have been the role of the Attorney General in court proceedings. One court has said that a charity exercising its variance power did not have to notify the Attorney General. Cnty. Serv. Soc’y v. N.Y. Cnty. Trust (In re Preiskel), 275 A.D.2d 171, 185, 713 N.Y.S.2d 712, 722 (App. Div. 1st Dep’t 2000) (“Community Trust explicitly possessed the variance power pursuant to the terms of the Trust Declaration. While nothing prevented it from notifying the Attorney General, there is no requirement at law to do so.”)

that his charitable trustees would not be accountable to anyone, “[n]o testator can obtain for his bequests that support and permanence which the law gives to public charities only, and at the same time deprive the beneficiaries and the public of the safeguards which the law provides for their due and lawful administration.”⁴³ Donor-imposed restrictions are entitled to substantial deference but a donor would be wise to make them not altogether unreasonable.

A donor, wishing despite the above analysis to maintain strict enforceability of donor-desired restrictions, and fearful of cy pres or deviation proceedings, could make the gift to an intermediary private foundation or donor-advised fund created by the donor. A gift to the intermediary entity could set forth the desired restrictions and could stipulate that periodic distributions from the intermediary entity should be made to the ultimate charity so long as the restrictions on the use of such distributions were being honored by it. This effectively transfers responsibility for adhering to the donor’s wishes from the ultimate charity to the intermediary entity, thus permitting the donor to arrange for control of the latter to remain with people dedicated to following the donor’s wishes strictly.

Donors may also wish to consider sanctions for a charitable donee’s violation of gift restrictions or its attempted recourse to cy pres (or deviation) proceedings.⁴⁴ Donors can consider either a reverter⁴⁵ or a gift over to a different charity or person. A reverter provision in a gift agreement might stipulate that if the charitable donee attempts to modify or release the restriction, the funds in question must be returned to the donor or successors or assigns. Three tax problems arise when using a reverter.⁴⁶ First, if the funds are re-

⁴³ Jackson v. Phillips, 96 Mass. (14 Allen) 539, 571 (1867).

⁴⁴ In the absence of such sanctions, the donor’s only remedy for enforcing the restrictions is likely to be to seek a court order mandating compliance with them. As the comments to the Restatement (Third) of Trusts state: “if a nonprofit organization receives a restricted gift or devise . . . , [donor] standing entitles the settlor to maintain a suit against the trustee-organization only to enforce the restriction—that is, to restrain the trustee from diverting funds from the specified charitable purpose . . . and to compel restitution for any such breach of trust.” RESTATEMENT III OF TRUSTS § 94 cmt. g(3).

⁴⁵ Strictly speaking, one might more accurately refer to a “possibility of reverter” rather than merely to a “reverter.” BLACK’S LAW DICTIONARY (10th ed. 2014), however, in its definition of a “possibility of reverter,” states that the phrase is “[o]ften shortened to reverter.” In the interest of brevity, “reverter” will be used throughout this paper.

⁴⁶ These generally are only problems for taxable donors; if the donor is a private foundation, donor advised fund, or other tax-exempt entity, these problems usually are irrelevant. There may be tax consequences for

turned in a taxable year following the year in which a charitable contributions tax deduction was allowed, that constitutes taxable income to the donor or successors or assigns.⁴⁷

Second, the existence of the reverter may make the gift incomplete ab initio for federal tax purposes thus preventing the donor from getting any charitable contributions income tax deduction. The Treasury Regulations provide that when property is transferred but, as of the date of the gift, the transfer —

“is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is *so remote as to be negligible.*”⁴⁸

Third, even if the possibility of reversion is so remote as to be negligible,⁴⁹ the amount of the allowable deduction is for the value of the property donated as reduced by the risk (no matter how minor) of reversion.⁵⁰

private foundations, however, if a reverter is retained and some portion of a prior year’s qualifying distribution is returned. See I.R.C. § 4942(f)(2)(C)(i); Treas. Reg. § 53.4942(a)-2(d)(2)(iii)(a); Rev. Rul. 77-252, 1977-2 C.B. 390; G.C.M. 38397 (June 4, 1980).

⁴⁷ Rosen v. Comm’r, 611 F.2d 942 (1st Cir. 1980); Alice Phelan Sullivan Corp. v. United States, 381 F.2d 399 (Ct. Cl. 1967); Rev. Rul. 76-150, 1976-1 C.B. 38; G.C.M. 36528 (Dec. 29, 1975) (supporting Rev. Rul. 76-150). See also Conrad Teitel, *What Happens to Taxes When a Charity Returns a Gift?*, Tr. & Est., July 1995, at 63. These results depend upon the operation of the tax benefit rule. See generally BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES & GIFTS ¶¶ 5.7.1 – 5.7.3 (2016); BORIS I. BITTKER, MARTIN J. McMAHON, JR., & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 3.07 (3d ed. 2016); Steven J. Willis, *The Tax Benefit Rule: A Different View and a Unified Theory of Error Correction*, 42 FLA. L. REV. 575 (1990); Boris I. Bittker & Stephen B. Kanner, *The Tax Benefit Rule*, 26 U.C.L.A. L. REV. 265 (1978).

⁴⁸ Treas. Reg. § 1.170A-1(e) (emphasis added). See also Treas. Reg. §§ 20.255-2(b)(1), 25.2522(a)-2(b), and 25.2522-3(b)(1). Accord, Graev v. Comm’r, 140 T.C. 377 (2013); 885 Investment Co. v. Comm’r, 95 T.C. 156 (1990); Briggs v. Comm’r, 72 T.C. 646 (1979), aff’d without opinion, 665 F.2d 1051 (9th Cir. 1981); Rev. Rul. 2003-28, 2003-1 C.B. 594; TAM 9443004 (Jan. 7, 1994). See generally Johnny Rex Buckles, *When Charitable Gifts Soar Above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 FORDHAM L. REV. 1827 (2003). A useful discussion of the “so remote as to be negligible” standard can be found at G.C.M. 35756 (March 29, 1974), supporting Rev. Rul. 74-410, 1974-2 C.B. 187. In addition, some guidance may be found in other sections of the Code and Regulations: the “so remote as to be negligible” language also appears at I.R.C. § 170(h)(5)(B)(iii) and in Treas. Reg. §§ 1.276-1(f)(3)(i), 1.642(c)-2(d), 1.679-2(a)(2)(ii) and -2(a)(iii) Example 7, 20.2055-2(b)(1) and -2(b)(2) Example (2), 25.2518-3(d) Example (14), 25.2522(c)-3(b)(1) and -3(b)(2) Example (2), 26.2612-1(b)(1)(iii), and 26.2632-1(c)(2)(ii)(A).

⁴⁹ If the risk of reverter is “negligible,” the deduction is allowable. Treas. Reg. §§ 1.170A-1(e), 1.170A-7(a)(3).

⁵⁰ Cooley v. Comm’r, 33 T.C. 223, 225 (1959), aff’d per curiam, 283 F.2d 945 (2d Cir. 1960); Deukmejian v. Comm’r, T.C. Memo 1981-24; Dresser v. Comm’r, T.C. Memo 1956-54; Rev. Rul. 2003-28, 2003-1 C.B. 594; Rev. Rul. 85-99, 1985-2 C.B. 83. As a result, any subsequent reverter would be included in the

For these reasons, a gift over may sometimes be preferable to a reverter because — although no authority could be found to confirm this — a gift over to an alternative charity should not give rise to income to the donor.⁵¹ Even a gift over, however, may on occasion be ineffective: some courts have held that a gift over will fail if the original donation contained a restriction that was illegal or contrary to public policy, in which case the court may excise that provision and permit the original donee to retain the property notwithstanding the gift-over language. For example, the Court of Appeals of Maryland held that:

“where a bequest is conditioned upon the commission of an illegal act or an act which is legally impossible of fulfillment, the condition is invalid on the ground of public policy. Under these circumstances, the condition will not be enforced by awarding the bequest to an alternative beneficiary; instead, the illegal condition will be excised.”⁵²

Donors wishing to avoid this Maryland rule might wish to stipulate, by agreement with the charitable donee, for governing law of a jurisdiction that doesn’t follow such a rule.⁵³

The UTC tightly limits the efficacy of reverters or gifts over to noncharitable persons. It provides that:

“[a] provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the 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

donor’s income only to the extent of the amount of the donor’s original charitable contributions deduction as so reduced. I.R.C. § 111(a). See text accompanying n.47, *supra*.

⁵¹ If the original charitable donee for any reason cannot or will not make a donation to the alternative charity, a later agreement between the original donee and the donor, pursuant to which the original donee rescinds the gift and then transfers the property directly to the alternative charitable donee, may give rise to taxable income to the donor. PLR 8518033 (Feb. 1, 1985). Thus it may be important, in designing a gift over, for the donor to determine that the original charitable donee is both willing and legally able to make a donation to the alternative charitable donee rather than rescinding the original gift.

⁵² *Home for Incurables of Baltimore City v. University of Maryland Medical System Corp.*, 369 Md. 67, 75, 797 A.2d 746, 751 (1999). Not all courts agree. See, to the contrary, *Connecticut Bank and Trust Co. v. Johnson Memorial Hospital*, 30 Conn. Supp. 1, 294 A.2d 586 (1972); *Smyth v. Anderson*, 238 Ga. 343, 348–349, 232 S.E.2d 835, 839 (1977). See also *Tinnin v. First United Bank*, 502 So.2d 659, 666–70 (Sup. Ct. Miss. 1987), in which the court, after holding that a racially-discriminatory provision violated public policy, remanded the case to the trial court to consider whether to permit a reverter or instead to excise the offending provision. The *Home for Incurables* case is discussed in Eason, n.5 *supra*, at 170–71 (2010).

⁵³ See n.36, *supra*.

still living; or (2) fewer than 21 years have elapsed since the date of the trust's creation.”⁵⁴

A donor wishing to avoid this rule could (i) limit the life of the restriction to not more than 21 years, (ii) designate a charity as the beneficiary of any gift-over provision,⁵⁵ (iii) interpose a private foundation or donor advised fund as the settlor entitled to the reverter, or (iv) stipulate for the law of a jurisdiction that has not enacted the UTC. The fourth option, of course, will only work if the chosen jurisdiction does not later adopt that Code.

Variance Power. If the potential donee charity has a variance power in its governing documents, a donor may wish to have the gift agreement with the charity provide that the charity will not exercise that power with respect to the donation in question. If the charity agrees, that presumably would be dispositive of the question.⁵⁶ Failing such agreement, the donor, even if still willing to make the donation, might explicitly state that the donor does not agree with or assent to the variance power. No legal authority has been found, however, dealing with the effectiveness of such a unilateral donor declaration in the face of a variance power contained only in the charity's own documents.

Wise lawyers should counsel their donor clients to avoid imposing restrictions and conditions that are unduly obdurate or long lasting. That is not merely because moderation is better on the merits; it is also more likely that a court will smile on and uphold

⁵⁴ UTC § 413(b). Query the impact of this provision on a reverter if the settlor is not an individual but, for example, an LLC or S corporation. The comments to the above-quoted provision note that it “does not control dispositions made in nontrust form,” but they go on to state, “[h]owever, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.” *Ibid.*, comment. An additional confusion: UTC §105(b)(4) appears to say that the provisions of UTC § 413 cannot be overridden by the terms of the trust agreement, but the comments to UTC Article 4 say that § 413(b) controls “absent a contrary provision in the terms of the trust” UTC Article 4, General Comment. It is understood that the comments are in error, that they will be corrected, and that UTC § 413(b) cannot be overridden by agreement.

⁵⁵ The negative implication of the quoted UTC provision appears to be that the existence of a gift over to a charity will prevent application of cy pres, but it would clearly be wise for a donor to state explicitly whether that result is intended. See generally Ronald Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41 (1989).

⁵⁶ It is unlikely that a community trust would agree to such a request from a donor. If it did, the resulting fund would probably not be eligible for treatment as a “component part” and therefore presumably would be subject to the private foundation rules in Chapter 42 of the I.R.C. See text accompanying nn.72-76, *infra*.

moderate restrictions rather than frowning on and modifying or excising immoderate ones.

IV. Enhancing the Ability of Charities to Modify Donor-Imposed Restrictions

The most current draft version of the Restatement of the Law of Charitable Non-profit Organizations sets forth different routes a charity may follow to change the purposes to which assets are dedicated.⁵⁷ The paths vary depending on whether the assets in question are “restricted assets” or “general or unrestricted assets.” In both cases, changes may be made (1) according to the terms of the gift agreement governing them,⁵⁸ (2) according to applicable law, (3) by deviation proceedings,⁵⁹ or (4) by cy pres proceedings. In the case of unrestricted assets, changes may also be made “by following the terms that were in the entity’s governing documents at the time the assets were acquired . . .”⁶⁰ It is not clear why changes via the charity’s governing documents may be made to unrestricted assets but not to restricted assets. Preventing a charity from using its governing-document provisions to modify restricted assets would seem to denigrate the variance powers of many community foundations. It is also inconsistent with the legal authorities discussed further below.⁶¹ Because the Restatement is still in draft form, pending final approval by the American Law Institute, further drafting changes may be made.

⁵⁷ The current version of § 3.01 of the Restatement is set forth in Appendix A to this paper. Section 3.01(a) deals with a charity’s overall change of purposes or addition of new overall purposes. The comments recognize “that [such] changes in charitable purposes are rare,” RESTATEMENT OF CHARITIES § 3.01, cmt. b. In addition, charities often have such broad purpose statements in their formation documents that no amendment of their purpose language is needed for course changes. Accordingly, this paper does not discuss such changes or additions, but rather focuses exclusively on changing the purposes to which specific charitable assets are dedicated.

⁵⁸ In the case of restricted assets, changes are to be made “by following the specific terms governing those restricted assets,” whereas in the case of unrestricted assets, changes are to be made “by following the terms governing those unrestricted assets.” RESTATEMENT OF CHARITIES §§ 3.01(b)(1)(i) and 3.01(b)(2)(i). It is not clear what the adjective “specific” adds to, or subtracts from, the language of § 3.01(b)(2)(i).

⁵⁹ Although deviation is not mentioned in § 3.01(b), it is mentioned in § 3.01(c). Section 3.03 is captioned “The Doctrine of Deviation.” Subsection (b) of § 3.03 says that “[i]f it is unclear whether a particular term governing the use of charitable assets applies to either the administration of those assets or the purposes to which they are dedicated, the court will apply the doctrine of deviation rather than the doctrine of cy pres . . .” The comments explain that equitable deviation trumps cy pres “[b]ecause of the comparatively liberal standards for application of deviation . . .” RESTATEMENT OF CHARITIES § 3.03 cmt. d.

⁶⁰ RESTATEMENT OF CHARITIES § 3.01(b)(2)(ii).

⁶¹ See text accompanying nn.88-120, *infra*.

A charity desiring to enhance its ability to vary donor-imposed restrictions might wish to select, for the relevant governing law, a jurisdiction whose legal rules minimize donor standing, maximize cy pres and deviation relief, and recognize the validity of the charity's governing documents to bind donors.⁶² The charity might also wish to select such a jurisdiction as being the exclusive forum for donor suits against the charity.⁶³

Variance Powers. Frederick Harris Goff was instrumental in establishing the Cleveland Foundation in 1914.⁶⁴ Because of his hostility to long-lasting, inflexible, "dead hand" restrictions imposed by donors on their gifts,⁶⁵ he had the Foundation adopt a variance power which, in turn, became a model (albeit often in different words) for the governing documents and gift agreements of many other community foundations. The resolution of the Board of Directors of the Cleveland Trust Company, dated Jan. 2, 1914, creating the Cleveland Foundation, contemplated that donors might restrict their gifts in various ways, but provided that:

"the Trustee shall respect and be governed by the wishes as so expressed, but only in so far as the purposes indicated shall seem to the Trustee, under conditions as they may hereafter exist, wise and most widely beneficial, absolute discretion being vested in a majority of the then members of the Board of Directors of The Cleveland Trust Company to determine with respect thereto."⁶⁶

The Cleveland Foundation, like most if not all community foundations, does not solely rely on that language located in its constituent documents. Instead, it inserts language incorporating the variance power into each gift agreement. For example, the form it uses for the creation of an inter vivos Donor Advised Fund says "[t]he Fund is subject to the governing instruments of the Cleveland Foundation, its variance power, and its policies in ef-

⁶² See n.36, *supra*.

⁶³ See the discussion in the text accompanying nn.88-89, *infra*.

⁶⁴ For an overview of the creation of the Cleveland Foundation, and Goff's role in it, see NATHANIEL R. HOWARD, TRUST FOR ALL TIME: THE STORY OF THE CLEVELAND FOUNDATION AND THE COMMUNITY TRUST MOVEMENT (1963).

⁶⁵ Goff was known to rail against the "dead hand," a phrase made popular by, although not created by, Sir Arthur Hobhouse in his lectures on "The Dead Hand — Addresses on the Subject of Endowments and Settlements of Property," collected in an 1880 volume available at <http://tinyurl.com/zv4t4jc>.

⁶⁶ Bd. of Dirs. of the Cleveland Tr. Co., *Resolution Creating the Foundation*, CLEV. FOUND. (Jan. 2, 1914), <https://www.clevelandfoundation.org/wp-content/uploads/2013/08/Cleveland-Foundation-1914-TCF-Resolution-Creating-Foundation.pdf>.

fect from time to time, including without limitation, policies about the maintenance and duration of a fund.”⁶⁷

There is no reason why variance powers may only be employed by community foundations; they could be adopted by any charity. They could be located in the formation documents of the trust or corporate charity (e.g., in the trust agreement or the corporate articles of incorporation or by laws), in corporate or trust policy documents (especially in a gift acceptance policy), in resolutions of the trustees or directors, in the gift agreements between the charity and donors to it, or in some combination of these.

Perhaps because of the nearly universal practice of incorporating variance powers into gift agreements, no legal precedent could be found clarifying whether the existence of a variance power in a charity’s governing documents would — by itself and without any evidence of a donor’s knowledge of or assent to it — be effective to permit variation by the charity without cy pres or deviation court proceedings. Prudent caution, of course, suggests that charities should endeavor to include variance powers in each gift agreement rather than relying only on a variance power located in other documents,⁶⁸ but there is no reason why a charity should not also adopt a variance power in its other documents in the hope that it might be found effective even in situations in which a contractual variance power has not been agreed. To enhance the argument for enforcing such a non-contractual power, the charity should consider making the existence and language of the variance power publicly available, e.g., by posting it prominently on its web site, by including it in its publications and other relevant communications, and by having its agents regularly mention it in their public appearances. The New York Community Trust states, in one of the estate planning notes on its website:

“The variance power is at the core of community foundations; the exact standards for invoking that power differ. For example, the Cleveland Foundation, the country’s first community foundation, allows its board to change a fund’s purpose if it is no longer ‘wise or beneficial.’ The New York Community Trust’s Resolution and

⁶⁷ *Lifetime Creation of a Donor Advised Fund*, CLEV. FOUND. 4 (last updated May 2013), <https://www.clevelandfoundation.org/wp-content/uploads/2013/05/Cleveland-Foundation-Donor-Advised-Fund-Application.pdf>.

⁶⁸ Including the variance power in gift agreements is also important for the financial statements of community foundations. See text accompanying nn.81-85 *infra*.

Declaration of Trust, written nearly 90 years ago, provides that the board (known as the Distribution Committee) may use its judgment to redirect a donation if ‘circumstances have so changed’ that it becomes ‘unnecessary, undesirable, impractical, or impossible’ to achieve literal compliance.”⁶⁹

Notwithstanding the above-quoted language praising the variance power, sometimes community foundations downplay that power. In the wake of the Buck Trust litigation,⁷⁰ the Community Foundations of America placed a half-page advertisement in the New York Times Book Review. It urged readers to make contributions to community foundations. It never even hinted at the existence of any variance powers. Instead it said that donors “enjoy several unique benefits, including . . . the right to specify the purpose for which your dollars are to be used; and the assurance that your gift will live on in perpetuity, always carrying out the purpose you originally established.”⁷¹ It is understandable, of course, that some community foundations, fearing that trumpeting the variance power might chill some donors’ willingness to make gifts, may mute their advertising of the existence of the power. It is, however, regrettable when community foundations compete to be supine rather than being appropriately assertive (as in the language quoted above) about the virtues of the flexibility deriving from the variance power.

Clearing Underbrush

A detour to clear away some underbrush is in order. Three separate federal tax rules and one accounting rule will be considered but each will be shown to be not dispositive of the questions raised here. The first tax rule affects community trusts. The Treasury Regulations contain some special provisions to enable community trusts to be treated as public charities, rather than private foundations, by meeting the public-support test of the Internal Revenue Code.⁷² Because community trusts regularly receive donations that are

⁶⁹ New York Community Trust, October 2013 Professional & Estate Planning Notes — Templates for Flexibility: The Variance Power & Other Alternatives, available at <http://tinyurl.com/gpneolq>.

⁷⁰ See generally Harvey P. Dale, *The Buck Trust*, available at <http://tinyurl.com/hkokcbd>. See also the articles and the text of the opinion, dated Aug. 15, 1986, of the California Superior Court, Marin County, in a 1987 symposium issue of the University of San Francisco Law Review. 21 U. SAN FRAN. L. REV. 585 et seq. (1987).

⁷¹ NEW YORK TIMES BOOK REVIEW, November 23, 1986, at 27.

⁷² I.R.C. § 170(b)(1)(A)(vi). A useful discussion of these regulations can be found at George Johnson & David Jones, *Community Foundations*, 1993 (FOR FY 1994) EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM TEXTBOOK 135.

held as separate trusts or funds, if each such trust or fund were tested separately the public-support test usually could not be met. To ameliorate this problem, the Regulations provide that such “separate trusts or funds may be treated as component parts of a [single] community trust, fund or foundation . . . for purposes of . . . classification as a ‘publicly supported’ organization.”⁷³ Among the conditions that must be met for the community trust to qualify for this “component part” relief is that the trust has a variance power, i.e., that its:

“governing body must have the power in the governing instrument, the instrument of transfer, the resolutions or bylaws of the governing body, a written agreement, or otherwise . . . to modify any restriction or condition on the distribution of funds . . . if in the sole judgment of the governing body (without the necessity of the approval of any participating trustee, custodian, or agent) such restriction or condition becomes, in effect, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community or area served.”⁷⁴

Those regulations therefore appear to recognize variance-power provisions as valid even if they are only contained in resolutions or bylaws of the community trust, apparently whether or not donors are actually aware of and consent to them. Even more fascinating is that such provisions are given effect even if they are unenforceable under state law! The regulations say that “if a [variance] power . . . is inconsistent with State law . . . then the community trust will be treated as meeting the requirements . . . if it meets such requirements to the fullest extent possible consistent with State law”⁷⁵ Of course, all of this deals only with the federal tax status of the community trust; it does not provide an answer to the question of whether a variance power in a trust’s or corporation’s governing documents is binding on donors to the trust.⁷⁶

⁷³ Treas. Reg. § 1.170A-9(f)(10).

⁷⁴ Treas. Reg. § 1.170A-9(f)(11)(v)(B). Examples of language satisfying this requirement can be found in Rev. Rul. 77-333, 1977-2 C.B. 75. It appears that a governing body’s resolution, merely cross-referring to the relevant Treasury Regulations, would also suffice. Rev. Rul. 77-334, 1977-2 C.B. 77

⁷⁵ Treas. Reg. § 1.170A-9(f)(11)(v)(D)(1).

⁷⁶ Cf. Treas. Reg. § 1.507-2(a)(7)(v), Example 4, holding that I.R.C. § 507(b)(1) — allowing a private foundation to terminate that status by transferring its net assets to a public charity — will not apply if the transfer is to a community trust that is a public charity but the “governing body [of that trust] has no authority . . . to vary” the directions of the creator of the private foundation naming the charities to which the community trust must make distributions from those assets. See BRUCE R. HOPKINS & JODY BLAZEK, PRIVATE FOUNDATIONS: TAX LAW AND COMPLIANCE §§ 16.5-16.6 (4th ed. 2014).

The second tax rule disallows income tax deductions for contributions made to donor advised funds unless “the taxpayer obtains a contemporaneous written acknowledgment . . . from the sponsoring organization . . . that such organization has exclusive legal control over the assets contributed.”⁷⁷ This could be read to mean that such an acknowledgment, provided by the donee organization, is legally enforceable even if the donor did not know of or assent to the donee’s “exclusive legal control” over the donated assets. Once again, however, the provision bears only on the tax deductibility of the contribution; it does not provide an answer to the question of whether any unilateral variance power is binding on donors.

The third tax rule arises because of the Internal Revenue Code’s denial of a tax deduction for contributions by U.S. persons to foreign-organized charities.⁷⁸ The Service has published a series of revenue rulings that attempt to describe when a donation to a U.S. charity, which in turn donates those funds to a foreign charity, gives rise to an allowable charitable contributions deduction.⁷⁹ The second of those rulings involves a U.S. domestic charitable corporation that solicits donations for a specific project of a foreign charitable corporation. The bylaws of the domestic entity provide that its Board of Directors has authority to make, or decline to make, contributions to that project. The ruling holds that, because “under the terms of its bylaws the domestic corporation may make such solicitations only on the condition that it shall have control and discretion as to the use of the contributions received by it,” donors to the domestic corporation are allowed an income tax deduction for gifts to it.⁸⁰ This could be read to mean that the bylaws of the donee organization are legally enforceable even if the donor did not know of or assent to them. As

⁷⁷ I.R.C. § 170(f)(18)(B). Substantially identical provisions disallow gift and estate tax deductions. I.R.C. §§ 2055(e)(5)(B), 2522(c)(5)(B). These provisions were added to the I.R.C. by § 1234 of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780. The I.R.S., in Notice 2007-21, 2007 C.B. 611, asked for comments on regulations to be adopted under these provisions. No regulations have yet been proposed. The I.R.S.’s 2015-2016 Priority Guidance Plan lists only one project that might refer to I.R.C. § 170(f)(18): item 10 under the heading “Exempt Organizations” reads “Guidance regarding the excise taxes on donor advised funds and fund management.” That Priority Guidance Plan is available at <http://tinyurl.com/zov4cuu>.

⁷⁸ I.R.C. § 170(c)(2)(A).

⁷⁹ Rev. Rul. 63-252, 1963-2 C.B. 101; Rev. Rul. 66-79, 1966-1 C.B. 48; Rev. Rul. 69-80, 1969-1 C.B. 65; Rev. Rul. 75-65, 1975-1 C.B. 79.

⁸⁰ Rev. Rul. 66-79, 1966-1 C.B. 48.

in the prior two cases, however, the provision bears only on the tax deductibility of the contribution; it does not provide an answer to the question of whether a variance power in corporate or trust documents is binding on donors.

The fourth rule addresses the proper accounting treatment of donations to an intermediary charitable organization for the ultimate benefit of a different charitable organization. The relevant Financial Accounting Standards Board statement⁸¹ distinguishes between two alternative treatments of such transactions: if the intermediary (or “recipient organization”) is bound to use the donated assets exclusively for the benefit of the donor-designated ultimate beneficiary, it must “recognize the fair value of those assets as a liability to the specified beneficiary,” but if the recipient organization has a “variance power” then it must “recognize the fair value of any assets it receives as a contribution received.”⁸² For this purpose, “variance power” is defined as including only “the unilateral power to redirect the use of the transferred assets to another beneficiary.”⁸³ This is narrower than the legal usage adopted in this paper, which focuses on purpose and time restrictions as well as, indeed more often than, change-of-beneficiary restrictions. As now codified, “variance power” is defined as:

“[t]he unilateral power to redirect the use of the transferred assets to another beneficiary. A donor explicitly grants variance power if the recipient entity’s unilateral power to redirect the use of the assets is explicitly referred to in the instrument transferring the assets. Unilateral power means that the recipient entity can override the donor’s instructions without approval from the donor, specified beneficiary, or any other interested party.”⁸⁴

⁸¹ Statement of Accounting Standards No. 136 (June 1999) [hereinafter FAS 136], available at <http://tinyurl.com/hxt6zov>. An amended version, dated 2008, with additional comments [hereinafter FAS 136 of 2008], can be found at <http://tinyurl.com/z7a4v8f>. The provisions of FAS 136 now appear in FASB’s Accounting Standards Codification [hereinafter FASB ASC] at ¶¶ 958-605-25-23 to -31. The definition of “variance power” appears in FASB ASC Glossary at ¶ 958-605-20.

⁸² FAS 136 Summary and FAS 136 ¶¶ 11-12. This oversimplified description of FAS 136 is sufficient for purposes of this paper. As the FAS ASC explains, if the intermediary recipient organization does not have a variance power, “the transfer of assets from the donor is not a contribution received by the recipient entity, and the transfer of assets to the [ultimate] donee is not a contribution made by the recipient entity.” FAS ASC ¶¶ 958-605-05-4 and 958-605-55-13.

⁸³ FAS 136 ¶ 12, now codified at FASB ASC ¶ 958-605-25-25 and Glossary at ¶ 958-605-20.

⁸⁴ FASB ASC Glossary at ¶ 958-605-20.

The first sentence does not appear to require any explicit grant from the donor; the second sentence might therefore be viewed as illustrating one, but not necessarily the only, method of creating a variance power, i.e., via explicit donor grant. So understood, the rule might recognize a legally-enforceable power as a “variance power” even in the absence of an explicit donor grant, but this interpretation is dubious. It appears, to the contrary, that when FAS 136 was promulgated the Financial Accounting Standards Board intended that an explicit grant from the donor was indeed the exclusive way of creating a variance power that would be effective for these accounting purposes.⁸⁵ Either way, however, the accounting principle governs only the treatment of such transactions for generally accepted accounting purposes; it does not provide an answer to the question of whether a unilateral variance power in corporate or trust documents is legally binding on donors.

Delaware Law

Even though none of the four above-mentioned rules provides precedential guidance on the question of the legal enforceability of variance provisions in a charity’s documents (other than in gift agreements), they appear to rest on an assumption that such provisions may be enforceable. The law in Delaware seems particularly clear on this point.

Delaware courts apply a two-step analysis in assessing the validity of corporate bylaws. The first step tests whether the bylaw in question is “facially” valid, i.e., whether it is, on its face, consistent with Delaware statutes and legal precedents without regard to its effect in the particular circumstances of its invocation. The second step tests whether, if the bylaw survives the first step, it is nevertheless unenforceable because, as applied to the particular facts of the case, to enforce it would be inequitable.⁸⁶ The first step — testing for facial validity — will be discussed first.⁸⁷

⁸⁵ See ¶ 74 of FAS 136 of 2008, which reads in part: “The Board concluded that when a recipient organization accepts assets from a donor and agrees to use them on behalf of or transfer them to a beneficiary specified by the donor, the recipient organization assumes an obligation that meets the definition of a liability *unless the donor explicitly grants variance power.*” (emphasis added) See also, to the same effect, FAS ASC ¶¶ 958-605-25-25, 958-605-25-26, 958-605-25-28, 958-605-25-31, 958-605-55-78, 958-605-55-87, 958-605-55-89, 958-605-55-90, 958-605-55-91, and 958-605-55-92.

⁸⁶ See text accompanying n.122, *infra*. See also Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1661 (2016).

⁸⁷ The second step is discussed in the text accompanying nn.121-122, *infra*.

Delaware courts have held that a for-profit corporation's bylaws, restricting shareholder suits against the corporation to an exclusive forum, are enforceable.⁸⁸ These decisions rest on the principle that "the bylaws of a Delaware corporation form part of a binding broader contract among the directors, officers, and stockholders . . ."⁸⁹ The Delaware Chancery Court explained that:

"bylaws, together with the certificate of incorporation and the broader [Delaware General Corporation Law], form part of a flexible contract between corporations and stockholders, in the sense that the certificate of incorporation may authorize the board to amend the bylaws' terms and that stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations."⁹⁰

Although described by the Court as a "flexible contract," the corporate documents should not be understood as creating an actual contract in the usual sense.⁹¹ Actual contracts usually require "a manifestation of mutual assent"⁹² whereas the Delaware law conclusively presumes "assent to be bound" without regard to any such "manifestation."⁹³ The central

⁸⁸ City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229 (Del. Ch. 2014); Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013). These decisions are discussed in Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 BUS. LAW. 161 (2015); Henry duPont Ridgely, *The Emerging Role of Bylaws in Corporate Governance*, 68 S.M.U. L. REV. 317 (2015); Recent Cases, *Corporate Law—Exclusive Forum Bylaws—Delaware Chancery Court Upholds Delaware Corporation's Bylaw Designating Non-Delaware Exclusive Forum.—City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229 (Del. Ch. 2014), 128 HARV. L. REV. 2286 (2015). DGCL § 115 now prevents a Delaware stock corporation from prohibiting the bringing of claims against the corporation in Delaware, but it permits making Delaware the exclusive forum for such claims. No such forum-selection limitation applies to Delaware nonstock corporations.

⁸⁹ Chevron, n.88 *supra*, at 939. For a forceful criticism of the theory that bylaws are a contract, see Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583 (2016) (arguing that arbitration clauses in corporate documents should not be treated as contracts for purposes of the Federal Arbitration Act).

⁹⁰ Chevron, n.88 *supra*, at 940. Cf. Oswald v. Comm'r, 49 T.C. 645 (1968), acq. (court relied on counsel's opinion that a corporate bylaw was binding on corporate officers).

⁹¹ "In fact, corporate governance arrangements are not contractual. . . [C]orporate law does not have, even as a formality, the same requirements of notice and consent that exist in contract law." Lipton, n.89 *supra*, at 587. Accord, Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1008 (1930) ("[B]ylaws . . . do not constitute a contract in the ordinary sense . . ."); Developments in the Law, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1001-02 (1963).

⁹² RESTATEMENT (SECOND) OF CONTRACTS §§ 3, 17(1) (AM. LAW INST. 1981).

⁹³ As the Delaware Chancery Court put it, "stockholders assent to not having to assent to board-adopted bylaws. . . [B]ylaws are not contractually invalid simply because the board-adopted bylaw lacks the contemporaneous assent of the stockholders." Chevron, n.88 *supra*, at 956 (footnotes omitted). Accord, 8 FLETCHER, CYC. CORP. § 4198 (2015).

focus of this portion of this paper is on the enforceability of bylaw provisions in the absence of any actual “manifestation of mutual assent” to them.

Under Delaware law, both stock corporations and nonstock corporations (whether or not for profit) are created under and regulated by the Delaware General Corporation Law.⁹⁴ Section 109 of that Law deals with bylaws of Delaware corporations.⁹⁵ In relevant part, it reads:

“In the case of a nonstock corporation, the power to adopt, amend or repeal bylaws shall be in its members entitled to vote. Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body.”⁹⁶

It goes on to provide that “[t]he bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”⁹⁷ Thus, a charitable corporation in Delaware can adopt, amend, or repeal bylaws either by action of its voting members or, if its certificate of incorporation permits, by action of its governing body, and those bylaws may contain any provision relating to the conduct of the affairs of the corporation and its rights or powers. Any provision that can be included in bylaws may also be included in the certificate of incorporation;⁹⁸ the certificate can be amended by the governing body;⁹⁹ the certificate of

⁹⁴ “Delaware has not provided a separate statute for nonstock corporations, but has instead dealt with such corporations within the ambit of the DGCL, which is geared largely toward stock corporations.” John Mark Zeberkiewicz & Blake Rohrbacher, *New Day for Nonstock Corporations: The 2010 Amendments to Delaware’s General Corporation Law*, 66 BUS. LAW. 271 (2011). The applicability of the DGCL to nonstock corporations is specified in DEL. CODE ANN. tit. 8 [hereinafter DGCL], § 114 (2015).

⁹⁵ “[T]he 2010 amendments [to the DGCL] made clear that Section 109 applies in its entirety to nonstock corporations.” Zeberkiewicz & Rohrbacher, *supra* note 94, at 293. DGCL §§ 114(a) and (b).

⁹⁶ DGCL § 109(a).

⁹⁷ DGCL § 109(b).

⁹⁸ DGCL § 102(b)(1).

⁹⁹ DGCL § 242(b)(3). Unless the certificate of incorporation provides otherwise, only the Directors, and not the members, are entitled to vote on charter amendments.

incorporation is a “flexible contract” in the same sense as bylaws are;¹⁰⁰ therefore, placing provisions in the certificate of incorporation is an alternative to putting them in the bylaws.

Charities, of course, generally do not have stockholders. The closest analog to a for-profit’s stockholders would probably be a charitable corporation’s members.¹⁰¹ That analogy suggests that, under the Chancery Court’s precedents, a charity’s board-adopted bylaws (as permitted by its certificate of incorporation) should be viewed as forming “part of a flexible contract” between the charity and its members, and that such members “assent to be bound by board-adopted bylaws.” The Supreme Court of Delaware has confirmed that § 109 of the DGCL does treat nonstock corporate bylaws, as amended by the Board of Directors, as binding on members of the corporation, stating that “bylaws normally apply to all members of a non-stock corporation regardless of whether the bylaw was adopted before or after the member in question became a member.”¹⁰² The Court’s opinion treated members of the nonstock corporation as identical, for this purpose, to stockholders of a for-profit corporation;¹⁰³ the DGCL, as amended in 2010, now explicitly provides that “[a]ll references to stockholders of the corporation shall be deemed to refer to members of the [nonstock] corporation.”¹⁰⁴

¹⁰⁰ Centaur Partners, IV v. Nat’l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990) (citing to earlier Delaware precedents confirming this contractual standard, including Ellingwood v. Wolf’s Head Oil Refining Co., Inc., 38 A.2d 743, 747 (1944) and Gaskill v. Gladys Belle Oil Co., 146 A. 337, 339 (Del. Ch. 1929)).

¹⁰¹ “[T]he closest analogy to the position of a member of an association is to found in the relation between a stockholder and a corporation” Chafee, *supra* n.91, at 1008.

¹⁰² ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 555 (Del. Sup. Ct. 2014). The decision responded to questions certified to the state court by the federal district court in Delaware. Plaintiffs were the Hamburg and Qatar tennis associations aggrieved by a decision of the ATP Tour to relegate their tournaments from first-tier to second-tier status. ATP Tour had amended its bylaws to reflect that change. The plaintiffs alleged violations of both federal anti-trust law and state fiduciary standards. Defendants ultimately prevailed on all counts. See generally Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010), cert. denied, 562 U.S. 1064 (2010).

¹⁰³ The Court, discussing whether members of a nonstock corporation are bound by director-amended bylaws, said that “[i]f directors are so authorized, ‘stockholders will be bound by bylaws adopted unilaterally by their boards.’” ATP Tour, *supra* n.102, 91 A.3d at 560 (quoting from Boilermakers Local 154, *op cit. supra* n.88). See also Oberly v. Kirby, 592 A.2d 445, 458-59 (Del. 1991) (“The analogy between members and stockholders is, perhaps, an imperfect one. . . . [but] we think that the members’ power was intended to resemble that of stockholders.” (footnote omitted)).

¹⁰⁴ DGCL § 114(a)(1).

The default rule in Delaware is that a member of a nonstock corporation has an interest in the corporation's profits and losses, or a right to receive distributions of the corporation's assets, or both.¹⁰⁵ Since either would be inconsistent with charitable status, a charity formed under the DGCL has to provide, in its certificate of incorporation, that its members have neither. The DGCL gives effect to such a provision.¹⁰⁶ A Delaware nonprofit nonstock corporation must have members, but “failure to have members shall not affect otherwise valid corporate acts or work a forfeiture or dissolution of the corporation”¹⁰⁷ The members may have “full, limited, or no voting rights,” as specified in either the certificate of incorporation or the bylaws.¹⁰⁸ If the certificate of incorporation and bylaws are silent as to membership rights, “the members of the corporation shall be deemed to be those entitled to vote for the election of the members of the governing body pursuant to the certificate of incorporation or bylaws.”¹⁰⁹ Thus, if a nonprofit nonstock Delaware corporation wishes to have a self-perpetuating Board of Directors, it can either provide that the directors from time to time comprise the only voting members, or achieve the same result by silence.¹¹⁰ A charity interested in enhancing its ability to modify donor-imposed restrictions via its own governing documents might consider forming itself as, or converting itself into, a nonprofit nonstock corporation in Delaware to get the benefit of this argument.¹¹¹

¹⁰⁵ DGCL § 114(d)(2).

¹⁰⁶ DGCL § 114(d)(2) reads: “A ‘membership interest’ is, *unless otherwise provided in a nonstock corporation’s certificate of incorporation*, a member’s share of the profits and losses of a nonstock corporation, or a member’s right to receive distributions of the nonstock corporation’s assets, or both.” (emphasis added)

¹⁰⁷ DGCL § 102(a)(4).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ “For example, a museum may have voting members who elect the members of the governing body (indeed, they may be the members of the governing body themselves), and it may have non-voting members who pay annual membership fees but do not get to vote on any corporate matter.” Zeberkiewicz & Rohrbacher, *supra* note 94, at 292.

¹¹¹ Alternatively, a separate charitable membership organization could be formed in Delaware to receive contributions and to hold, invest, and ultimately distribute them to the original non-Delaware charitable corporation.

It could also make any donor to the corporation a member simply by virtue of the donation.¹¹²

An alternative reasonable analog to shareholders of a corporation is donors to a charity.¹¹³ That analogy would suggest that a charity's board-adopted bylaws might be viewed as forming "part of a flexible contract" between charities and their donors, and that donors who make contributions to such charities "assent to be bound by board-adopted bylaws" when they make such contributions. A charity interested in enhancing its ability to modify donor-imposed restrictions via its own governing documents might consider forming itself, or forming a separate foundation supporting it, in Delaware to get the benefit of this argument.

Other States' Laws

Delaware is not alone in its position on the effect of corporate bylaws. It appears to be the rule in most states that bylaws are binding on a member if they are in effect at the time he or she becomes a member. One leading treatise says that "[s]hareholders and members are presumed to know the provisions of the company's bylaws. Accordingly, existing bylaws that were legally adopted by the corporation are binding upon all the shareholders or members, whether they expressly consented to them or not"¹¹⁴ Thus, a variance power placed in a charitable corporation's bylaws is probably binding on all persons thereafter becoming members.¹¹⁵ A charity organized outside of Delaware might consider adopting such a bylaw and having donors to it become members of it.¹¹⁶

¹¹² Such members might be nonvoting, or, alternatively, voting control could be maintained in others simply by having different classes of voting members, some of which would be entitled to multiple votes or the ability to elect a stated majority of the governing body.

¹¹³ It is recognized that this analogy is considerably weaker than the analogy of members to stockholders. It gathers no strength from the language of the DGCL. Still, it is notable that all three of the federal tax rules discussed at nn.72-80, *supra*, dealt with donors to, rather than members of, the charitable donees in question.

¹¹⁴ 8 FLETCHER CYC. CORP. § 4198 (2015) (footnotes omitted). In the case of New York nonprofit membership corporations, "the by-laws represent a contract between the organization and its members." VICTORIA B. BJORKLUND, JAMES J. FISHMAN & DANIEL L. KURTZ, NEW YORK NONPROFIT LAW AND PRACTICE: WITH TAX ANALYSIS § 3.07[1] (3d ed. 2015) (footnote omitted).

¹¹⁵ A New Jersey court recently squarely so held: Matahen v. Sehwail, No. A-4312-14T1, 2016 N.J. Super. Unpub. LEXIS 647, at *3, *6-8, 2016 WL 1136602 (N.J. Super. Ct. App. Div. Mar. 24, 2016). The plaintiffs, who were "active members" of the general assembly of a (charitable) mosque, were bound by an arbitration provision in the mosque's bylaws; "active members" were defined to include "those who attend pray-

Many other states also appear to follow the Delaware rule that makes a bylaw binding on members even if it was adopted or amended after they became members.¹¹⁷ If, as would typically be the case, the charitable corporation's bylaws expressly provide for future amendments at the time a member joins the corporation, later-adopted or later-amended bylaws are likely to be held to be binding.

"Fraternal and mutual benefit corporations may reserve the power of amendment by requiring their members, either in their contracts of membership or by other express assent, to agree in the most general terms and without specification to be bound by and comply with all amendments and new bylaws that may be adopted in the future; this reservation of power by agreement is, in itself, valid and binding upon the parties to it. The same is generally true with regard to membership certificates issued by a nonprofit-nonstock corporation."¹¹⁸

The power to make later-adopted or later-amended bylaws binding may be helpful, but it obviously is of lesser significance if a well-drafted variance power has been adopted in the corporate bylaws prior to a donor becoming a member.

Even if these arguments have merit, it would nevertheless be prudent for a cautious charity to attempt to get explicit donor consent to its variance powers by embedding them in each gift agreement.¹¹⁹ There would seem to be no downside risk, however, to having variance powers also set forth in the corporate charity's bylaws (and perhaps also in other constituent documents) so that those powers arguably might be exercisable and effective

ers regularly, participate 'actively' in mosque 'activities,' abide by the bylaws, pay dues, and practice Islam daily."

¹¹⁶ See n.112, *supra*.

¹¹⁷ A leading treatise states that "a person who becomes a shareholder in, or a member of, a corporation does so with knowledge and implied assent that its bylaws may be amended. Amendments that meet the applicable requirements are valid and binding on all of those who come within the operation of the bylaws, as amended . . ." 8 FLETCHER CYC. CORP. § 4176 (2015) (footnotes omitted). Accord, *Reynolds v. The Surf Club*, 437 So.2d 1327 (D.C. App. Fla., 3rd Dist., 1985) (citing with approval *Hayes v. German Beneficial Union*, 35 Pa. Super. 142, 147 (Pa. Super. Ct. 1908)), *review denied*, 484 So.2d 9 (Fla. 1986). But see *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011) (refusing to enforce a unilaterally- and later-adopted bylaw of a Delaware corporation). The Galaviz decision, however, is an outlier and has been criticized and rejected by several other courts. See *North v. McNamara*, 47 F. Supp. 3d 635, 640-646 (S.D. Ohio 2014), and cases cited therein.

¹¹⁸ 8 FLETCHER CYC. CORP. § 4177 (2015) (footnotes omitted).

¹¹⁹ Getting donor consent not only enhances the legal enforceability of the charity's variance power but also reinforces donors' perceptions of the charity as being attentive to donors' wishes. It also may trigger the accounting rule discussed at nn.81-85, *supra*.

even in any case in which a member or donor for any reason failed to agree to them in a gift agreement. Indeed, if a charity prefers not to utilize the Delaware venue, the above arguments might suggest following similar steps in non-Delaware corporate documents or, for that matter, in trust documents for trusts formed either in Delaware or elsewhere. To leave foot room for negotiating with potential donors, however, any variance powers located in a charity's constituent documents probably should follow language such as: "Except as otherwise agreed between this charity and a donor in a gift agreement . . ."¹²⁰ but to preserve negotiating leverage for the charity it might be wise also to include language such as: "Modifications to this charity's variance power will rarely be accepted, but in unusual circumstances may be accepted only by a majority vote of the charity's governing body."

Appropriate protection of donor intent is a good thing; appropriate preservation of charitable flexibility is a good thing. The tension between them is best understood neither as a conflict between good and evil nor as a conflict between right and wrong, but rather as a conflict between good and good. A unilateral variance power is a good thing. While it should not be used inappropriately — to interfere unduly with donor intent — it can and should be used appropriately — to provide proper flexibility by permitting modification of no-longer-sustainable donor restrictions without costly, lengthy, and risky *cum proposito* or deviation legal proceedings.

A charity invoking a unilaterally-adopted variance power, however, may be subject to judicial oversight if the invocation is for an improper purpose; this is the second step of the Delaware courts' analysis.¹²¹ As the ATP court said, "[b]ylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose."¹²² Charities are unlikely to exercise unilateral variance powers inappropriately. To do so would

¹²⁰ This qualifying clause is consistent with making a gift agreement the paramount authority on modification of restrictions. See text accompanying nn.150-152, *infra*.

¹²¹ See text accompanying n.86, *supra*.

¹²² ATP Tour, n.102, *supra*, at 558. Accord, *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) ("[I]nequitable action does not become permissible simply because it is legally possible."). See the discussion in Michael J. Kaufman & John M. Wunderlich, *Paving the Delaware Way: Legislative and Equitable Limits On Bylaws After ATP*, 93 WASH. U. L. REV. 335, 349-57 (2015).

risk alienating current and future potential donors, becoming the target of significant media criticism, and suffering serious reputational damage. Using such powers carefully, cautiously, and prudently, however, would — by avoiding costs, delays, and uncertainties — enhance charities’ ability to modify unduly rigid donor restrictions in order to enable charities to meet tomorrow’s needs more effectively.

Charities should consider adopting a formal Gift Acceptance Policy.¹²³ There are both prudential and legal reasons for doing so. Such a Policy, if posted on the charity’s web site and routinely publicized and delivered to potential donors, can usefully guide both the charity’s and donors’ agents in structuring gift agreements. The charity’s bylaws should incorporate or cross-refer to the variance power provisions in the Gift Acceptance Policy. That way, the legally-binding effect of bylaws, at least on members of the charity but perhaps also on donors to the charity, may be achieved.¹²⁴ Schedule M to the 2015 Form 990 asks “Does the organization have a gift acceptance policy that requires the review of any non-standard contributions?”¹²⁵ Although the existence of this question does not imply that there is any legal requirement to have such a Policy, adopting one “will have established a useful protocol for its board members and staff” in evaluating potential donations.¹²⁶ A group of California attorneys, referring to themselves as the “Form 990 Policy Series Group,” wisely recommends that the Gift Acceptance Policy “should include uniform policies related to endowments that will be included in written gift agreements with donors, including a provision that gives the organization variance power to use the endowment for a similar purpose, if the original purpose is no longer possible or practical.”¹²⁷

¹²³ One leading authority states that “[a] charitable organization should adopt clear policies, based on its specific exempt purpose, to determine whether accepting a gift would compromise its ethics, financial circumstances, program focus, or other interests.” INDEPENDENT SECTOR, PRINCIPLES FOR GOOD GOVERNANCE AND ETHICAL PRACTICE, Principle 30 (2015). An internet search for “nonprofit gift acceptance policy” brings up a number of web sites that set forth or link to model Gift Acceptance Policies.

¹²⁴ See the discussion in the text accompanying nn.88-118, *supra*.

¹²⁵ Line 31, Schedule M, Form 990 (for 2015), available at https://www.irs.gov/pub/irs-access/f990sm_accessible.pdf.

¹²⁶ Form 990 Policy Series, Memorandum on Gift Acceptance Policy (Sept. 25, 2012), available at <http://tinyurl.com/jcwex7y>.

¹²⁷ *Id.* at ¶ 4G.

Great care should be taken in drafting a variance power. Linguistic differences may be significant.¹²⁸ For example, the Cleveland Foundation’s variance power is exercisable if donor-restricted purposes are no longer viewed as “wise and most widely beneficial, absolute discretion being vested in a majority of the then members of the Board of Directors of The Cleveland Trust Company to determine with respect thereto.”¹²⁹ By contrast, the New York Community Trust’s variance power permits redirection of a donation if “‘circumstances have so changed’ that it becomes ‘unnecessary, undesirable, impractical, or impossible’ to achieve literal compliance.”¹³⁰ The former is more flexible than the latter. In one case challenging the New York Community Trust’s exercise of its variance power, the Trust argued on appeal that the judge below, who found against the Trust, “substituted her judgment for that of the Distribution Committee.” The appellate court disagreed with that argument, saying that the judge “merely held the Trust to the clearly enunciated standard set forth in its own Trust Declaration.”¹³¹ This suggests that a broader, more-flexibly-worded standard might have led to a different result upholding the Trust’s exercise of that variance power.¹³²

UPMIFA has been adopted in the District of Columbia and by every state except Pennsylvania. Section 6(d) of UPMIFA provides that a charity may “release or modify” a donor-imposed restriction affecting an “institutional fund,” without having to go to court (but after notice to the Attorney General), if the charity determines that the restriction is “unlawful, impracticable, impossible to achieve, or wasteful” and the fund in question is

¹²⁸ The Community Foundations National Standards Board has set forth various linguistic formulae for variance powers, some of which it describes as “sufficient” and others as “insufficient.” Its comments, however, primarily focus on tax issues affecting community foundations rather than on the enforceability of such powers vis-à-vis donors. See <http://www.cfstandards.org/FAQ/what-variance-power> (2016). Those standards state that “although the tax regulations and the accounting [rules] do not absolutely require the variance power [to be] in both the governing documents and fund agreements, the National Standards require it [to be] in both.” The National Standards are hortatory but probably influential for community foundations; they are not applicable to other charities.

¹²⁹ Quoted in text accompanying n.66, *supra*.

¹³⁰ Quoted in text accompanying n.69, *supra*.

¹³¹ Cmtv. Serv. Soc’y v. N.Y. Cnty. Trust (In re Preiskel), 275 A.D.2d 171, 182, 713 N.Y.S.2d 712, 719 (App. Div. 1st Dep’t 2000).

¹³² Because the appellate court ultimately held that the plaintiff’s claims were barred by the statute of limitations, its discussion of and disagreement with the Trust’s arguments are dicta.

both small and old. The New York version of UPMIFA selects less than \$100,000 and more than 20 years as, respectively, small and old.¹³³ Might a New York charity ask a \$1 million donor to make 20 separate (but simultaneous) donations of \$50,000 each so that, after 20 years, the charity could employ UPMIFA's small-and-old provision to release the donor's restrictions without having to resort to court proceedings?¹³⁴ Of course, if the donor is willing to accede to this request, the same result could more safely be achieved, without subdividing the donation, by proper drafting of the agreement between the donor and the charity.¹³⁵

Standing. For the same reasons that donors have long been able, by agreement with the donee charity, to reserve standing,¹³⁶ it should be possible for such agreements to modify or circumscribe donor standing. Donor standing could be totally waived, time limited, or otherwise restricted, e.g., to clarify that no one other than the donor (such as legal representatives, surviving spouses, heirs, or agents of the donor) would have standing. The gift agreement might perhaps provide that the donor would only have standing in specified and agreed alternative dispute resolution processes (rather than in court proceedings). Donor-agreed limitations on standing should be effective to modify or eliminate even statutory or case law grants of standing; no strong policy to the contrary can be discerned (after all, denying donors standing altogether was long the prevailing legal rule), but no legal precedents bearing on this question have been found.

Because the more recent enhancements to donor standing apply primarily, if not exclusively, to charitable trusts,¹³⁷ charities that are corporations may still be able to resist

¹³³ N-PCL § 555(d) (McKinney Supp. 2014).

¹³⁴ The Attorney General might decide to intervene with a court proceeding, thus preventing this gambit, if he or she found the multiple-subdivided donation routine to be suspect. As the comments to UPMIFA state, "An institution seeking to modify a provision under subsection (d) must notify the attorney general of the planned modification. The institution must wait 60 days before proceeding; the attorney general may take action if the proposed modification appears inappropriate." UPMIFA § 6(d), cmt. Subsection (d).

¹³⁵ The agreement could also require, or alternatively waive the need for, prior notification to the Attorney General.

¹³⁶ See text accompanying nn.26-27, *supra*.

¹³⁷ See text accompanying nn.22-24, *supra*.

donor standing even if the gift agreement is silent on the issue.¹³⁸ Charities that are trusts might consider forming a corporate subsidiary, in a jurisdiction that has not extended donor standing for charitable corporations, to receive, invest, manage, and ultimately remit donations to the parent charitable trust. The governing documents of the charity, whether a trust or corporation, might also state that donors lack standing. Such provisions, even if not expressly accepted by donors, might be held to be effective based on the analysis suggested above for sustaining variance powers in a charity's governing documents.¹³⁹

Negotiating constraints on donor standing in the case of naming gifts may be particularly helpful.¹⁴⁰ When David Koch donated \$100 million to rename the New York State Theater at Lincoln Center as the David H. Koch Theater, the gift agreement contemplated both a time limitation and an alternative renaming possibility. The New York Times reported that:

“[u]nder the arrangement the theater could be renamed for a new donor after 50 years, with members of the Koch family retaining the right of first refusal. ‘A naming opportunity should be a defined length of time to allow the institution to regenerate itself with another round of major fund-raising,’ Mr. Koch said.”¹⁴¹

Perhaps if Avery Fisher had agreed with Lincoln Center that his children would not have standing to object to a renaming opportunity for Avery Fisher Hall,¹⁴² the amount paid by Lincoln Center to his children to obtain their consent — reported to have been \$15 million¹⁴³ — might have been reduced or eliminated.¹⁴⁴ Following the children’s consent, the

¹³⁸ Of course, if relevant state law permits donor standing in the case of charitable corporations, charities that are corporations will not have this defense. See text accompanying n.25, *supra*.

¹³⁹ See text accompanying nn.88-118, *supra*.

¹⁴⁰ For a useful extended analysis of such gifts see Eason, *supra* n.3. See also John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657 (2001).

¹⁴¹ Robin Pogrebin, *David H. Koch to Give \$100 Million to Theater*, N.Y. Times, July 10, 2008, at E1, available at <http://tinyurl.com/5bhss9>.

¹⁴² It appears doubtful that Avery Fisher’s children had legal standing to object, but an agreement that they did not, between Avery Fisher and Lincoln Center, might well have put to rest any lingering concerns to the contrary.

¹⁴³ Robin Pogrebin, *David Geffen Captures Naming Rights to Avery Fisher Hall With Donation*, N.Y. Times, March 4, 2015, at A1, available at <http://tinyurl.com/pqcb9gj>. It is not clear from this article or any other published reports whether the \$15 million was paid to the Fisher children or instead to a charity (perhaps a private foundation) controlled or designated by them.

Hall was renamed David Geffen Hall in perpetuity as a condition of David Geffen's \$100 million donation.¹⁴⁵

When Andrew Carnegie established the Carnegie Corporation, his deed of gift said, in part:

“Conditions upon the [earth] inevitably change; hence, no wise man will bind Trustees forever to certain paths, causes or institutions. I disclaim any intention of doing so. On the contrary, I [give] my Trustees full authority to change policy or causes hitherto aided, from time to time, when this, in their opinion, has become necessary or desirable. They shall best conform to my wishes by using their own judgment.”¹⁴⁶

That language provides a helpful paradigm for a charity seeking to limit donor standing by agreement with the donor.

For the same reasons that donors should not be unduly obdurate in restricting their gifts,¹⁴⁷ charitable donees should not overreach in seeking flexibility to modify donor restrictions through the charity's constituent documents. Variance powers should be publicized appropriately to avoid the appearance of their being hidden or devious, and they should be made subject to any agreements between the charity and its donors. Whenever possible, such powers should be incorporated into or cross-referred to by gift agreements. The powers should be drafted to require a finding of sufficiently-changed circumstances or the passage of enough time, or both, to justify modifying donor-imposed restrictions.¹⁴⁸ Consideration should be given to providing notice to the donor (if available) and the Attorney General before modifications become effective. Decisions about whether to invoke unilateral variance powers should be made very carefully, following rigorous procedural

¹⁴⁴ A helpful discussion of the Avery Fisher naming-gift controversy can be found in Eason, *supra* n.3, at 449-62.

¹⁴⁵ *Ibid*; Laura M. Holson, *The Boy From Brooklyn: David Geffen Comes Home, With Cash to Spare*, N.Y. Times, Feb. 21, 2016, at ST1, available at <http://tinyurl.com/hh37rew>.

¹⁴⁶ Andrew Carnegie's Deed of Gift to the Carnegie Corporation, Nov. 10, 1911.

¹⁴⁷ See text at p. 13, *supra*.

¹⁴⁸ The standards might be extremely flexible, as in the case of the Cleveland Foundation's determination that the restrictions are no longer “wise and most widely beneficial” (see text accompanying n.66, *supra*); moderately flexible, as in the case of the New York Community Trust's test that the restrictions are “unnecessary, undesirable, impractical, or impossible” (see text accompanying n.69, *supra*); or less flexible, as in the RESTATEMENT OF CHARITY's articulation of the standards for cy pres relief: “unlawful, impossible, impracticable, or wasteful” (see text accompanying nn.41-42, *supra*).

guidelines, and should be well documented. Charities should be aware that courts may decline to enforce even otherwise-legally-valid bylaws if, under the facts of the particular case, enforcing them might be inequitable.¹⁴⁹

V. Steps for Balancing Controls on Donor Intent

The balance of power between donors and charitable donees always rests with donors. After all, they hold the assets that charities solicit and they retain the ability to make or withhold donations. Charities do have the ability to decline to accept a donation that is too narrowly restricted, but they understandably are reluctant, except in the clearest of circumstances, to refuse a contribution. Charities may even be loath to seek modification of unduly-restrictive purposes affecting already-completed donations lest that be perceived, by other potential donors, as an indication of indifference to donors' wishes. On balance, therefore, there is a greater risk of undue rigidity resulting from donor-imposed restrictions than of undue disregard of donor intent. This suggests that steps should be taken to enhance charities' power to modify donor-imposed restrictions, subject however to donors' power to limit such modification powers by agreement with the charity and to preventing charities from abusing donors by employing insufficiently-publicized variance provisions.

This paper argues that — whether by legislation, regulations, court decisions, or some combination of them — a charity's variance powers, even if located only in the governing documents of the charity and even if there is no evidence of donor knowledge of or assent to them, should be given legal effect to enable the charity to change the purposes to which either restricted or unrestricted assets are dedicated. This should, however, be subject to two conditions: (1) that the existence and substance of the variance powers are adequately and prominently publicized so that a reasonably diligent donor, or the donor's agents, could become aware of them, and (2) that the terms of any gift agreement between a donor and the charity would be able to modify or eliminate any such variance power.

Making the agreement between the donor and the charity paramount has several virtues.¹⁵⁰ It means that the parties can negotiate the nature of any restrictions on the pur-

¹⁴⁹ See text accompanying n.122, *supra*.

poses to which donated assets are dedicated, including the length of time such restrictions will be enforced. It means also that the parties can agree on both mediation- and arbitration-like provisions, the former to provide processes by which disagreements can be aired and hopefully compromises reached, and the latter to provide appropriate alternatives to resorting to other legal proceedings (such as *cy pres* or deviation).¹⁵¹ There may, nevertheless, be certain exceptions to the overriding status of donor-charity agreements. For example, there may be certain situations in which applicable governing law might apply notwithstanding a contrary agreement.¹⁵²

Because the agreement is dominant, significant resources and effort should be devoted to crafting it.¹⁵³ In preparation, charities should put in place, in their constituent documents (including particularly their bylaws and their Gift Acceptance Policies), the terms of their variance power, suggested protocols for mediation or arbitration (or both) of any disputes between the parties, and any limitations on the nature or length of donor-imposed restrictions. Any desired choice-of-law or forum-selection provisions should also be set forth. These should be referred to in solicitation materials used by the charity¹⁵⁴ and should be posted prominently on the charity's web site. Relevant charity staff should be made aware of these documents and should be trained in how to present them to and ne-

¹⁵⁰ This is probably already the law. See text accompanying nn.26-27, *supra*. A comment to the RESTATEMENT OF CHARITIES says that "if, in the documents governing the donation, a donor explicitly rejects the application of the variance power described in the charity's governing documents to the donated assets, the charity would not be permitted to apply its general variance power." RESTATEMENT OF CHARITIES § 3.01 cmt. g.

¹⁵¹ Sample mediation and arbitration clauses, recently prepared by the Alternative Dispute Resolution Committee of the New York City Bar Association, can be found at <http://tinyurl.com/gmachrl>.

¹⁵² See the discussion in the text accompanying nn.39-43, *supra*.

¹⁵³ It will often be desirable to provide that the written agreement constitutes the entire understanding between the parties in order to attempt to exclude any prior parol evidence. UPMIFA's definitions of "gift instrument" and "record" do exclude oral evidence. UPMIFA §§ 2(3) and 2(8). See also UPMIFA §2, cmt. Sub-section (3). See generally RESTATEMENT (SECOND) OF CONTRACTS § 213 (AM. LAW INST. 1981); Eric A. Posner, *Essay, The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 537-38, 551-52 (1998).

¹⁵⁴ Such materials might include solicitation letters and printed materials, periodicals sent to alumni and friends, "case statements" for fundraising campaigns, reports from the charity that are distributed to donors, and other letters and documents emanating from the charity's development office.

gotiate them with prospective donors.¹⁵⁵ To the extent that agreements can be crafted to deal with both the donor’s wish to protect the donor’s intent and the charity’s wish for appropriate flexibility, i.e., to address the ineluctable tension between those wishes, the three results mentioned at the beginning of this paper¹⁵⁶ may be achieved.

VI. Conclusion

Because both a donor’s intentions and a charity’s adaptability are profoundly worthy of protection, it is useful to examine the tools available to protect each. Because they are sometimes in tension with each other, however, there will be situations in which either one or the other will prevail. Escaping the tension is not a tenable goal because it will often be impossible to avoid. Rather, the goal is to embrace and then manage the tension by understanding the weapons available to donors and to charities, by negotiating agreements that reflect suitable compromises on a principled case-by-case basis, and by embodying the agreements in appropriate documents (whether constituent documents of the charity, gift agreements between the parties, or both). This goal is significantly more likely to be achieved if charities prepare for such discussions, well in advance, by formulating their constituent documents — including particularly their bylaws, Gift Acceptance Policies, and solicitation materials — with care, clarity, and candor.

¹⁵⁵ Recommended responsible fundraising practices include “provid[ing] appropriate training and supervision of the people soliciting funds on [the charity’s] behalf to ensure that they understand their responsibilities and applicable federal, state, and local laws” Principle 31, PRINCIPLES FOR GOOD GOVERNANCE AND ETHICAL PRACTICE, *supra* n.123. Staff members should be encouraged to understand donors’ concerns and to be aware of things other than legal documents that may matter to donors focused on protecting the restricted purposes to which their donations are dedicated. See, e.g., the references in n.33, *supra*. Another useful source for perceiving the intensity of some donors’ agitation is DOUG WHITE, ABUSING DONOR INTENT: THE ROBERTSON FAMILY’S EPIC LAWSUIT AGAINST PRINCETON UNIVERSITY (2014).

¹⁵⁶ See text at n.8, *supra*.

APPENDIX A
RESTATEMENT OF THE LAW
OF CHARITABLE NONPROFIT ORGANIZATIONS § 3.01
(AM. LAW INST., TENTATIVE DRAFT NO. 1, APRIL 13, 2016)

**§ 3.01. Procedures for Changing a Charity's Purposes in its Governing Documents
and the Application of Existing Assets to New or Additional Purposes**

- (a) A charity may change the charitable purposes stated in its governing documents to new charitable purposes or may add additional charitable purposes:
 - (1) by following any procedures required by the charity's governing documents, subject to applicable law;
 - (2) by following the procedures required by applicable law; or
 - (3) as provided in subsection (c).
- (b) A charity may change the purposes to which:
 - (1) assets restricted to specific purposes are dedicated:
 - (i) by following the specific terms governing those restricted assets, subject to applicable law and subject to terms that were in the entity's governing documents at the time the assets were acquired and that do not conflict with specific terms governing restricted assets;
 - (ii) by following the procedures required by applicable law; or
 - (iii) as provided in subsection (c).
 - (2) all other assets, commonly known as unrestricted or general assets, are dedicated:
 - (i) by following the terms governing those unrestricted assets, subject to applicable law and subject to terms that were in the entity's governing documents at the time the assets were acquired and that do not conflict with terms governing unrestricted assets;
 - (ii) by following the terms that were in the entity's governing documents at the time the assets were acquired, subject to applicable law;
 - (iii) by following the procedures required by applicable law; or
 - (iv) as provided in subsection (c).
- (c) Except as provided in subsections (b)(1)(i) and (ii), (b)(2)(i) and (ii), and in § 3.03(b), a change of purposes in an entity's governing documents or a change of purposes to which charitable assets are dedicated must be authorized in a judicial proceeding to which the attorney general is a necessary party and in which the court applies the doctrine of cy pres as stated in § 3.02.