

**Choose Your Battlefield:**  
**Choice of Entity as a Weapon for Preserving Donor Intent**

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## I. Introduction

This paper explores the confluence of donor intent and choice of entity in the context of charitable giving. This exploration takes place at the formative stages of a donor's charitable gifting strategy—in other words, before the donor's gift to her chosen donee entity is complete. More specifically, this paper focuses upon how a donor might use choice of gift-recipient entity to better ensure that the donor's intentions will be honored, once the donor has parted with ownership of the gifted assets.

As for the noted choice, “entity” here refers to the type of organization or charitable vehicle through which the donor's charitable intentions will be carried out. The term implicates creatures of state law, such as corporations and trusts, as well as derivative vehicles that find definition in tax laws, like private foundations, donor-advised funds, and supporting organizations. Regardless of origin, it is through the chosen entity that the donor will channel her gift in furtherance her personal philanthropic intentions.

While some may view choice of entity as a more practically-driven contemplation, the power of and protections for donor intent represent matters of longstanding academic and philosophical debate. That debate finds purchase in the various tensions underlying how we, as a society, chose to promote the movement of private wealth towards the support of charitable endeavors. The trade-offs inherent in this donor-society bargain, in turn, raise questions about whether and to what extent our laws should facilitate compliance with a donor's demands that her intent be honored, perhaps into perpetuity. At its core, then, this debate postures society's desire for flexibility in the donee organization's identification and pursuit of charitable objectives, on the one hand, against the dead hand's more individual-rights focused perspective. That perspective insists that donor intent be honored by those subsequently charged with managing assets gifted by the donor.

While the proper balance between the two sides of this debate remains elusive, the tensions clearly grow in tandem with the rigidity of a donor's mandates and the duration over which those mandates purportedly bind the recipient organization. A corollary to this observation holds that the likelihood of a gift-recipient organization dishonoring the

donor's intentions grows proportionately with the rigidity and duration of the donor's impositions. These tensions converge to inform the donor's choice of entity decision, because it is through that chosen entity that the donor's intentions will live or die. The discussion which follows explores this convergence, signaling the crossroads at which choice of entity and donor intent come together in service to charitable purposes.

## II. The Formative Stages of a Donor's Charitable Gifting Strategy

Individuals contemplating a gift in furtherance of charitable purposes face many choices. A prospective donor's early thoughts undoubtedly include, for example, consideration as to the amount, timing, and potential beneficiaries of the donor's contribution. The motivations affecting donor decisions on such matters might grow from the pursuit of tax advantages, or perhaps a more altruistic desire to "give something back" or to "do good" for others as opposed to self. So long as a donor's motivations inspire a contribution which supports purposes that society deems charitable, society will entrust that donor with a notable measure of discretion in making such decisions.

### A. Intended Discretions

The degree of precision with which a donor chooses to direct her gift represents one such area of donor discretion. A given donor's unique charitable intentions, coupled with the donor's level of concern for enduring adherence to those intentions, often defines the donor's chosen path to implementing her plans. A donor having more immediate and broadly conceived charitable intentions, for example, might simply write a check to a local food bank, the Salvation Army, or her Alma mater. In making her unrestricted gift to an established charitable entity, the donor chooses a fairly straightforward route towards carrying out her charitable objectives. Upon parting with the gifted property, the donor entrusts the recipient organization to implement her intent through the organization's independent pursuit of its stated charitable mission.

Many donors, however, progress through the formative stages of a charitable gifting plan with more specific intentions for their gifts. Indeed, "[d]onors who make charita-

ble gifts with the directive to ‘use the gift where it is most needed’ are a disappearing breed. In their place are donors who have specific visions and goals for the use of their contributions.”<sup>1</sup> In this regard, the donor may have particular ideas about not only the purposes for which her gifted property might be used, but also the manner in which that property should be employed in service to such purposes. The charitable bargain that society offers to donors in return for their support of charitable endeavors contemplates adherence to these more developed donor designs, at least to a degree.

### B. A Tale of Two Entities

Of course, the greater a donor’s desire to embed her intent into the fabric of the recipient entity’s flexibility in utilizing the gifted assets, the more complicated the donor’s own matrix of choices becomes. The more intent-driven donor, in other words, creates for herself an array of difficult decisions. Some of the underlying questions will present a relatively objective calculus for decision, while others blur the lines between objective analysis and evaluative guesses. In either case, the answers to such questions play a critical role in how the donor chooses to structure her gift.

The more quantifiable aspects of the donor’s calculus, for example, present questions like tolerance for ongoing administrative costs and other burdens that differ as between entity choices. A donor dissuaded by such burdens could choose to further her objectives through a donor-advised fund (“DAF”). To utilize a DAF, the donor makes her gift to a program or fund held and administered by a public charity, denominated under tax law as the “sponsoring organization.”<sup>2</sup> The sponsoring organization (“sponsor”) manages the donor’s gift in a separate account identified by reference to the donor.

With a DAF, administrative headaches and compliance burdens fall to the sponsor. The sponsor can consolidate accounts from multiple donors for purposes of investment management and administrative tasks, and therefore offer each DAF reduced costs relative

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<sup>1</sup> Kathryn W. Miree, *Perfecting Donor Intent in Testamentary Gifts: Legal Lesson’s and Practical Advice*, at 4 (Kathryn Miree and Associates, Inc. 2008).

<sup>2</sup> Federal tax laws designate that public charity as the “sponsoring organization” and otherwise define DAF parameters.

to what the donor would encounter were she to establish her own independent grant-making entity. After making her gift to fund her DAF, the donor would thereafter periodically request that the sponsor distribute some portion of her DAF's funds in support of the donor's preferred charitable organizations or causes. The fact that the donor does not need to be further involved in any of the DAF's activities, coupled with lower costs and other reduced burdens upon the donor, represent key attractions for donors interested in this type of endowed arrangement.

The less wary donor, on the other hand, could establish her own grant-making entity. More specifically, that donor could create her own private foundation to facilitate accomplishment of her charitable objectives. Like a DAF, a private foundation represents an entity classification with attributes defined by federal tax laws. Unlike a DAF, a private foundation would for state law purposes exist as a free-standing nonprofit corporation or trust.<sup>3</sup> The donor's ability to control all aspects of the private foundation's activities also distinguishes that entity from a DAF. Simply stated, a donor-established private foundation offers the founding donor a greater degree of control, and typically for a longer period time, than would a DAF.<sup>4</sup> The trade-off for this control comes in the form of higher administrative costs and compliance burdens, which fall upon the donor's surrogate private foundation. Those costs also reduce the net funds available for distribution to the donor's favored charitable causes.

### C. An Armory of Entities

The opportunities and limitations attendant a donor's choice between DAF or private foundation, or any other available entity structures, become more complex as additional donor circumstances and entity attributes factor into the analysis.<sup>5</sup> Ultimately, the entity through which the donor chooses to implement her charitable gifting plans will de-

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<sup>3</sup> A private foundation may also take the form of an unincorporated association. That form is much less common and typically less desirable than the trust or corporate forms, however, and is therefore not discussed further in this paper.

<sup>4</sup> Control options arising through use of private foundations are discussed in Part III.A.2. and Part III.B., *infra*.

<sup>5</sup> See Part III, *infra*, for a discussion of those entity details and relevant donor circumstances.

fine, confine, and with varying degrees of effectiveness protect, donor intent going forward from the date of the gift. In this context, then, choice of entity suggests an array of weapons from which a donor might choose to confront the forces that so often work to defeat adherence to the donor's expressed intentions. Although effective service to charitable purposes provides the overarching principle to which both the donor and donee swear fealty, the flag up for defense or defeat on the day's battlefield is emblazoned with the ideology of donor intent.

Many forces converge to challenge the donor's hold on this battlefield. Changing circumstances act as a leader among the insurgents, particularly those circumstances beyond the donor's date-of-gift anticipation. Malpractice or malfeasance on the part of charitable fiduciaries also poses a formidable threat. Those fiduciaries bear responsibility for managing the gifted assets consistent with both the donor's intentions and the donee's charitable mission, and the donor's choice of entity positions fiduciary obligations between the forces in play.

Government intrusion upon the charitable landscape also merits attention. In this regard, courts and attorneys general often serve as the arbiters of donor intent defections and honorable discharge of fiduciary duty. Unexpected legislative forays into the applicable entity, tax, and similar strongholds may also blunt the effectiveness of the donor's arsenal.

### III. Control as the Crux of Intent Preservation

The formative stages of a donor's gifting plan contemplate the implementation of a charitable gifting strategy that furthers multiple donor goals. Service to charitable purposes, as such purposes are defined and guided by donor intent, typically leads the way in this regard. Of course, all donors anticipate some measure of adherence to the charitable intent underlying the donors' gifts. A donor who contributes to the Humane Society, for example, has expectations that do not include seeing her chosen donee advocate for nuclear disarmament.

Beyond such implicit expectations drawn from the donee's mission, a donor may formulate her intent with great breadth or narrow specificity. She may seek its immediate implementation, enduring consequence, or both. In any case, the entity structure through which a donor expresses her preferred objectives will reflect the relative priority she places upon donee adherence to her intentions. Where the donor places a high value upon adherence to her intentions, the extent to which her chosen entity serves that prioritization depends, of course, upon that chosen entity's intent-protective attributes. The donor's ability to effectively deploy those attributes in defense of her intentions, in turn, derives fundamentally from the control the donor exerts over that entity's charitable pursuits. Control, in other words, determines the extent to which the donor's intentions will govern after the transfer to her chosen entity is complete.

Control thus represents the critical variable around which an intent-driven donor's plans coalesce. The donor's chosen entity serves as a vehicle through which the donor may exert the desired level of control over the execution of her designs. The path to translating control into an intent-protective strategy, however, turns upon a given donor's circumstances and broader vision. A younger donor seeking to bring her entrepreneurial acumen to bear upon societal problems, for example, may have a much different perspective on control—and a much different desire for it—than, say, an aged donor seeking to instill her children with philanthropic values by involving them in the donor's gifting decisions.

Further to these ideas, four approaches to control vis-à-vis a donor's entity choice most directly highlight the intent-preserving opportunities and limitations that follow that choice. Rather than presenting a simple checklist of entity pros and cons, the following discussion examines selected entities and attributes through the lens of control, which brings focus to those attributes against the backdrop of donor intent.<sup>6</sup> The four offered

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<sup>6</sup> Although the discussion presents these four approaches as distinct pathways to control, the pathways undoubtedly cross at various points. That intersection does not detract from the investigation, however, but instead facilitates a more comprehensive entity analysis by casting light upon the implications of control across various entities when pursuing a common donor objective.

perspectives on control thus provide a framework for examining the intent-driven influences upon and implications of a donor's entity choice.

#### A. Personal Control

The donor's retention of personal control characterizes the first approach to solidifying adherence to donor intent. Personal control in this context means active involvement in the chosen entity's affairs, or at least active oversight of those affairs.<sup>7</sup> The downfall of personal control, however, looms as large as the inevitability of death and taxes. Indeed, death and taxes represent two of the bigger obstacles to the efficacy of personal control as an intent-preserving mechanism. Whether immediately or over the longer term, those and other intent-eroding obstacles pertain differently across the different entity choices. A closer examination of the entities introduced above—public charities, private foundations, and donor-advised funds—set these ideas in motion. The discussion which follows elaborates upon those entity choices with specific attention to the opportunities for and limitations upon personal control. A fourth entity type, the supporting organization, also enters the conversation.

1. Public Charity. A donor's gift to an active, mission-driven public charity provides a starting point for consideration. Although most favorable from the standpoint of the income tax charitable contribution deduction, this choice seems relative less ideal from the standpoint of a donor's retention of personal control.<sup>8</sup> The primary reason for this disfavor arises from the fact that the existing charity has an existing governance structure in place—of which the donor is not a part. A donor could at best hope to parlay a very significant gift into a seat on the recipient entity's governing board. Since most public charities of the type contemplated here operate under the supervision of more than a few board members, even that anointed donor's personal control would be limited to merely

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<sup>7</sup> The donor's interest in actually having any continuing involvement once her gift is complete, of course, provides an additional consideration with regard to the chosen entity and control of or through that entity.

<sup>8</sup> As discussed at *infra* note 29, personal control exerted through a restricted gift agreement falls outside the boundaries of the paths to personal control considered here.



advocating for board consensus on actions conducive to furthering the donor's specific charitable intentions.

The need for some source of donor intent protection follows from the reality that public charity missions sometimes change or fall under the sway of considerations that run counter to the donor's values or vision. The donor's inability to exert control over that mission does not, however, rule out the public charity option as a viable choice for the intent-conscious donor. That viability pertains because the "public charity" designation applies only to entities with broad-based public support or indicia of responsiveness to the broader community's concerns, as opposed to the concerns of any single donor. In the absence of any meaningful degree of personal control, the primary protection for the donor's intentions circles back to that public association. The public's interest in the organization and its mission, in other words, provides some assurance against unwarranted changes to the charity's mission. That public watchfulness also serves to motivate potentially negative publicity where entity decisions fail to honor donor intent. Such publicity can stifle fundraising and possibly engage the state's attorney general, both of which represent consequences any public charity would hope to avoid.

2. Private Foundations. Establishing a private foundation provides an alternative for a donor unsatisfied with the intent protective offerings of a public charity. Endowment by a single individual or family characterizes the private foundation entity. The resulting lack of broad-based public support provides the key definitional distinction between private foundations and public charities under federal tax laws. Not surprisingly, the private foundation's lack of outside influence also presents a significant opportunity for the donor to exert personal control over the foundation's pursuit of the donor's identified charitable purposes. This opportunity for control makes private foundations a favored entity choice among intent-conscious donors.

Of course, power often leads to corruption, and the noted opportunity for personal control positioned private foundations as the not so charitably-inspired poster-child for that aphorism in the late 1960's. Bad publicity and Congressional investigations unveiled many cases of private foundations being abused for the personal benefit of their found-

ers—notwithstanding those founders having availed themselves of tax advantages premised upon the alleged irrevocable commitment of the founders’ gifts to charitable purposes. Among other reforms, Congress imposed new restrictions upon private foundations, including a new excise tax regime to promote compliance with those restrictions. As of consequence of these and later reforms, a donor’s choice of the private foundation entity presents a double-edged sword.

The less favorable edge of that sword limits the donor’s control over such matters as funding her gift with closely-held corporation stock, how foundation assets are invested, and certain uses of the donor’s gift that are deemed impermissible notwithstanding foundation ownership. A minimum distribution requirement presents another curb on the donor’s ability to control her private foundation. That requirement forces grant-making or “non-operating” private foundations to channel a portion of the donor’s gift to charitable causes each year. The mandated annual distributions effectively represent society’s insurance that the private foundation tax advantages enjoyed by the donor will in fact inure to the public good.<sup>9</sup> The restrictions go further in limiting the donor’s control over the implementation of her charitable intentions, however, by permitting the donor to include only distributions to certain types of charitable organizations in calculating compliance with the minimum distribution requirement.

Operating under the auspices of such restrictions combines with less favorable charitable income tax deduction rules to blunt the attractiveness of the private foundation entity. By accepting these negatives, however, the donor avails herself of an entity that allows the donor to exercise a relatively strong level of personal control. Indeed, for a donor most interested in giving cash or perhaps publicly-traded stocks to fund foundation grants, the excise tax regime causes an administrative burden but otherwise presents an acceptable restraint on her ability to pursue her intentions within the charitable realm.

For such donors, the first line of personal control—and one of the key advantages to creating any new charitable entity—lies in the donor’s ability to cement her intentions

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<sup>9</sup> IRC §4942 mandates that private foundations annually distribute an amount that approximates 5% of the value of the foundation’s assets during the year.

in the governing documents that control the entity's subsequent actions. One step in this pursuit involves the donor's expression of her intent through articulation of the entity's mission. For a grant-making foundation, that mission typically defines the particular charitable causes for which grants can be made.

A donor might, for example, provide in her foundation's governing documents that all grants must go to support environmental causes, or even more specifically, the preservation of endangered species habitat. By way of negative example, Edsel Ford's failure to specify any particular causes as preferred over others in the governing documents of the Ford Foundation demonstrates a consequential lack of attention to personal control over the foundation's mission.<sup>10</sup> That oversight gave rise to a foundation that today makes grants with little to no consideration of Ford's intentions for his gifts.

Perhaps "oversight" presents too strong a word to describe circumstances like that exemplified by the Ford Foundation. Whether gifting to a private foundation or public charity, some donors quite deliberately choose to entrust the identification and accomplishment of charitable purposes to those who, at any given time, must execute the foundation's mission. This represents a particularly favored approach from the standpoint of the gift-recipient charity.

Returning to the donor's desire to protect the wisdom of her charitable vision, a donor who creates her own private foundation can do more than simply guide the foundation by defining its mission. The donor can actively control the implementation of her chosen mission by playing an ongoing role in the management of the entity. She could most directly do this by appointing herself as director or trustee of the foundation. Significantly, this path to personal control requires that the donor now make a second, state law choice of entity decision.

More specifically, the IRC provides that an entity classified as a private foundation for tax purposes must be established as a nonprofit corporation or a trust under state

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<sup>10</sup> Edsel Ford articulated the Foundation's mission as follows: "to administer funds for scientific, educational and charitable purposes, all for the public welfare." In terms of providing guidance or expressing intent, Ford may as well have said "support anything considered charitable."

law.<sup>11</sup> Were the donor to choose the trust form of entity, most states would allow her to serve as the sole trustee. If the donor chooses to utilize the nonprofit corporation form, on the other hand, many states require a nonprofit corporation's governing board to include at least three directors.<sup>12</sup> If the donor seeks to vest control in herself alone, incorporating in a jurisdiction like Colorado, which permits single-person nonprofit corporation boards, presents one option.<sup>13</sup> Most charitable organizations, however, incorporate in the state where operations take place. In the case of a grant-making private foundation, that often means where the donor resides and from which grant decisions will be made. For a donor wishing to remain close to home, then, situs shopping may prove unappealing. That donor would therefore need to look more deeply into her home state's nonprofit corporation statutes for control options that go beyond simple numeric director advantage.<sup>14</sup>

In any event, absent some attention to details like situs or more complex corporate structures, the donor would have to share control of a nonprofit corporation private foundation with her co-directors. That multi-director mandate would nonetheless compare favorably to relinquishing control to an existing public charity, because upon founding her own private foundation, the donor may also select her co-directors. Significantly, the private foundation tax limitations do not prohibit the donor from populating her foundation's board with family members only. Through careful planning and thoughtful selection of her entity's co-directors, the donor could thus appoint her foundation's governing body so as to facilitate, for all practical purposes, her effective control.

3. Donor-Advised Funds. DAFs in many ways resemble a private grant-making foundation, except that in lieu of establishing her own corporation or trust, the donor directs her gift to one of several types of charitable organizations that offer DAF sponsor-

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<sup>11</sup> See *supra* note 3 regarding the author's deliberate omission of unincorporated associations from the list of possible state law private foundation entity forms.

<sup>12</sup> See Mod Nonprofit Corp Act § 18 (1964); Rev Mod Nonprofit Corp Act § 8.03 (1987); Tex Bus Org Code § 22.204(a); NY Not-for-Profit Corp Law § 702(a). See generally Phelan, §3.12.

<sup>13</sup> C.S.R. §7-28-103.

<sup>14</sup> Such options do exist, and Part III.B., *infra*, discusses several such options in detail.

ship.<sup>15</sup> The grant-making aspect of the DAF plays out through exercise by the donor (or her designee) of advisory privileges with respect to the fund. Under the cloak of those advisory privileges, the donor periodically requests that the sponsor distribute DAF funds to charities that pursue the donor’s favored charitable purposes.

“Advisory privileges” carries a specific meaning in this context, and therein lies the key attribute of DAFs in relation to donor intent. By law, “advisory privileges” do not include enforceable rights or privileges under the gift agreement by which the DAF was created. The donor’s completed gift to the DAF thus severs the donor’s legal right to personally control the when, how, and to whom of subsequent distributions. In fact, substantiation rules deny donors any charitable deductions for gifts to a DAF unless the gift acknowledgement from the DAF sponsor expressly states that the sponsor now has exclusive legal control over the gift.

A Nevada court applied this DAF limitation on donor control with harsh results for the contributing donor. The court in *Friends of Fiji* held that the donor lacked grounds to sue a DAF sponsor which not only refused to heed the donor’s advice, but also misdirected her DAF funds to non-charitable purposes.<sup>16</sup> Despite the clear limitations upon donor advisory privileges, the Nevada court’s reasoning seems flawed, at least from a donor perspective.<sup>17</sup> Donors clearly make DAF gifts with an expectation that the advisory privileges hold a modicum of substance. Indeed, the tax rules that define DAFs provide that the requisite “advisory privileges” do not exist unless the donor reasonably expects to provide advice, and that expectation is reciprocated by some action on the part of the sponsoring organization.<sup>18</sup> It would thus seem that a sponsoring organization would need some justification for completely disregarding a donor’s request, although the weight and merits of that justification likely need cross only the lowest of thresholds.

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<sup>15</sup> Examples of DAF sponsors include community foundations, traditional public charities, and public charities formed under the auspices of commercial investment firms like Fidelity and Vanguard.

<sup>16</sup> *Styles v. Friends of Fiji*, No. 51642 (Nev. 2011) (unpublished opinion).

<sup>17</sup> From a tax perspective, the decision does appear to accurately apply the tax rules that dictate the total relinquishment of donor control over the gifted property. The relinquishment underpins the availability of the donor’s contribution deduction, which may only be had upon making a “completed” gift. Retained control can render a gift incomplete for tax purposes.

<sup>18</sup> IRC §4966(d)(2)(A).

From a practical standpoint, the personal control available through a DAF nonetheless approximates that seen with private foundations. The ability to pace donations to build an endowed fund, and the ability to involve family or others in gifting decisions, resides with both entity choices. In this regard, some argue that from a public policy standpoint, DAFs provide a benefit lacking with the private foundation. Eugene Steuerle, for example, describes DAFs in an Urban Institute policy brief as representing the “democratization of endowed giving.”<sup>19</sup> That characterization fits because of the opportunity DAFs present to those lacking the will or resources to create and manage their own private foundation.<sup>20</sup> DAFs also offer a check on a sponsoring organization’s disregard for donor intent which is analogous to that found in public charities.<sup>21</sup> Simply put, ignoring donor intent represents bad business and can lead to unfavorable publicity and public perception, none of which are conducive to the charity’s ability to attract future donors.

In sum, three threats to donor intent lurk behind the donor’s choice of DAF entity. The first threat, just noted, lies in the notion that the DAF fund sponsor has free reign to do whatever it pleases with the donor’s gift in light of the donor’s relinquishment of legal rights thereto. The second threat resides in the DAF terms and policies dictated by the DAF sponsor. Many sponsoring organizations, for example, limit the life of a DAF to that of the donor and the donor’s spouse, or perhaps the donor’s children. This threat most concerns donors seeking a more perpetual endowment or some other benefit foreclosed by the DAF agreement, while leaving other donors undeterred. Of course, if the donor familiarizes herself with the sponsoring organization’s policies and is otherwise comfortable with the “advisory” role, these two concerns pose more of an entity choice consideration than they do a true threat to donor intent.

Donors must be wary, however, of a third threat to donor intent when the donor utilizes a DAF. That threat comes in the form of prospective legislative and regulatory un-

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<sup>19</sup> See Ellen Steele and C. Eugene Steuerle, *Discerning the True Policy Debate Over Donor-Advised Funds*, at 1, Urban Institute, Oct. 2015. At the same time, however, others take a more critical view and assert that DAFs are nothing more than “nontransparent tax shelters.”

<sup>20</sup> *Id.*

<sup>21</sup> See *supra* Part III.A.2.

knowns, which present perhaps the biggest threat to a donor's ability to achieve her charitable objectives via a DAF. A decade ago, Congress visited the DAF landscape and decided that certain of the private foundation restrictions should apply to DAFs as well. Congress and the Treasury Department continue to study possible reforms to the rules affecting DAFs, and many believe that more rules may be forthcoming.

Perhaps most demonstrative of this threat to donor intent in the DAF realm can be seen in legislation introduced in 2014 by former House Ways and Means chair David Camp. Camp's proposal would have mandated a five year spend down for DAFs, with any funds not distributed during that period facing a 20% excise tax.<sup>22</sup> Although the donor would still get to choose the charitable grant recipients, legislation like Camp's would severely undermine other important facets of donor intent. For example, a donor who created a DAF as a way to promote her children's development of philanthropic values through involvement in DAF grant decisions would have a quite narrow window for doing so. To the extent the donor's plans contemplated a gradual transition of grant-making authority to her children, the donor would need to look at other entity options.

4. Supporting Organizations. As part of its 1969 quest to reform the charitable giving landscape, Congress also created a new classification for entities that closely align themselves with one or more traditional public charities. As a result, a donor now has the option to make her gift to a supporting organization ("SO"). By doing so, the donor can avoid many of the private foundation limitations while still availing herself of the tax advantages associated with gifts to independently existing public charities.

Before control factors into the donor's analysis, the donor must first conclude that her charitable goals align with those of one or more public charities. Upon so concluding and as the "supporting" label suggests, the donor would create her SO to support the activities of those charities (collectively, the "supported organization"). Doing so might appeal to a donor who would like to capitalize upon the demonstrated abilities of an existing charity, but who is not comfortable making an outright gift to that existing charity for

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<sup>22</sup> See Steele and Steuerle, *supra* note 19. Other commentators have suggested similar reforms.

some of the control reasons noted previously. The donor could, perhaps, also wish for her gift to retain some level of independence or identity, separate from that of the public charity. A private foundation could address those donor concerns, but as also noted previously, the costs and restrictions affecting private foundations could easily render that entity unsuitable for many donor purposes.

A detailed examination of the legal intricacies of SOs might shed further light upon the SO entity and its Type I, Type II, and Type III variations. In relation to personal control as an intent-protective option, however, the key IRC-imposed attribute of the SO can be addressed without delving too deeply into that noise. Simply stated, SOs offer a level of personal control that proves inferior to that offered through the private foundation entity.<sup>23</sup> The same may or may not hold true when SOs are compared to DAFs, depending upon the donor's durational intentions and the degree to which she is willing to accept another's control over her gift. The SO entity does compare favorably on this control front, however, to a direct gift to an existing public charity.

The key SO attribute relating to a donor's ability to control the implementation of her intentions lies in the tax law mandated SO governance structures. Each of the three available SO types denies the donor the ability to retain control over her SO entity, either independently or through other disqualified persons. Although the structural details vary across the SO types, "control" of an SO means the practical ability to require the SO to act (or refrain from acting) in any way that significantly impacts the operations of the SO.<sup>24</sup> The donor may hold a position on the SO's governing board, but ultimate control must lie in other persons, the appointment of whom the donor does not control.

For Type I SOs, the mandated governance structure is akin to that of a parent-subsidiary relationship. This basically means that the supported organization must have the power to regularly elect a majority of the SO's governing body. Type II SOs follow the brother-sister model, which typically means that a majority of the SO's governing body

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<sup>23</sup> The charitable income tax deduction for contributions to SOs are the same as those applicable to public charities generally. In this regard, then, the SO proves superior to the private foundation.

<sup>24</sup> Treas. Reg. §1.509(a)-4(j)(1).



must consist of persons who are also members of the supported organization's governing body.<sup>25</sup>

The donor's ability to appoint a minority of the board, which may include the donor herself, still holds value notwithstanding the apparent relinquishment of full control. A seat at the table when entity actions and policies are in play at least brings the donor into the conversation, but more importantly, any director or trustee would have standing to sue any other board member(s) for violating their duties to the corporation and its mission.<sup>26</sup> Although the trend points towards more expansive donor standing to enforce her intent even without a co-trustee position, the seat on the SO's board provides a certain route to not only monitoring, but also potentially forcing compliance with the donor's intentions.<sup>27</sup>

Type III SOs at one time presented an often preferred alternative to private foundations. The 2006 PPA and more recently issued Treasury Regulations, however, have changed that dynamic. Rather than detour into that forest of complexity, however, suffice it to say that from the standpoint of donor-retained control and the preservation of donor intent, "dead" and "pariah" epitomize the practical appeal of the Type III SO.<sup>28</sup>

#### B. Control Through Constraint

A second route to protecting donor intent involves a donor's utilization of control through constraints imposed upon those who might otherwise affect the pursuit of the donor's charitable objectives. Controlling those who control, in other words, but by less direct means than simply assuming personal control over her chosen entity. The constraints at issue here also transcend control exerted by means of simply wrapping the donor's gift

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<sup>25</sup> The distinction between the two types of SO's derives from the fact that with the Type I SO, the SOs governing board can consist of persons who have no governance or other role in the supported organization, so long as the supported organization appoints a majority of those persons.

<sup>26</sup> The fiduciary duties of directors and trustees are discussed in more detail at *infra*, Part III.B.

<sup>27</sup> The Robertson case provides an example of this. Although the Robertson's established their foundation prior to the enactment of the SO rules in 1969, the governing structure of their charitable entity would today constitute an SO, with Princeton as the supported organization holding control over the foundation's board.

<sup>28</sup> Casteel (2016); Hoyt (2013).

in a written statement of specific restrictions or conditions that limit the donee's use of the gifted property.<sup>29</sup>

The present exploration instead centers upon the donor's choice of entity. More specifically, the entity choices available to a donor each carry certain inherent characteristics that affect the donor's ability to embed her intentions within the entity's structure. Through deliberate selection of her entity, therefore, the donor can regulate the type and degree of constraint she imposes upon those who manage that entity. The different entity choices also implicate other constraint possibilities through deviation from state law default rules, which default rules may or may not provide an appropriate degree of protection for the donor's intentions, depending upon the entity.

Consider a donor who chooses to pursue her charitable objectives through a charitable trust of her own creation. The donor, of course, will presumptively set forth her preferred charitable purposes in the governing trust document. Default trust rules generally prohibit trustees from amending the trust's governing document, absent court approval of the departure. The rule protects donor intent not simply because resort must be had to the courts, but rather, because courts will likely deny such repurposing absent a showing of meaningfully changed circumstances that render the donor's stated intentions impossible, impracticable, or illegal for the entity to pursue. The situs state's attorney general also typically has the opportunity to participate in such a proceeding as advocate for the public's interest in adherence to or departure from the donor's intentions.

Compare the donor who chooses to pursue her charitable objectives through a nonprofit corporation. That donor will articulate her intentions in the corporation's governing documents. Those intentions, however, lack security because state statutes typically empower a corporation's board of directors to amend the entity's governing documents by

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<sup>29</sup> By way of example, consider the donor most concerned with the longevity of her name on a university campus facility. Such a donor might rely most heavily upon the contractual strength of a negotiated gift agreement to ensure that the naming "receipt" for her charitable contribution remains visible for all to see. The donor might similarly rely upon the donee's acceptance of a charitable devise set forth, with restrictions, in the donor's Will. This donor would likely view her expression of control via the documented restrictions as an appropriate, and possibly adequate, safeguard against the dishonoring of donor intent. This type of constraint, however, falls outside the boundaries of this exploration of entity choice and donor intent.

simple majority vote.<sup>30</sup> The amendments typically require no outside approval or review.<sup>31</sup> Upon passage of a resolution to amend the corporation's governing documents, the donor's purposes could easily be altered or completely displaced.<sup>32</sup>

The extent to which the noted default rules might be varied to enhance or perpetuate a donor's control must factor into the donor's choice of entity decision. Planning that fails to explore those possibilities foregoes an opportunity to utilize the nonprofit corporate entity to constrain departures from the donor's intent. By simply opting out of the noted majority vote default rule for amending the corporation's governing documents, for example, the donor could enhance her chosen entity's intent-protective offerings. The donor could do so by requiring, for example and per the entity's articles of incorporation, a super-majority or unanimous director vote to effect any amendment of the entity's governing documents.<sup>33</sup> The donor could similarly improve upon the default constraints by requiring the consent of a third party to effect such change.<sup>34</sup>

A donor could obtain the same result by adopting a membership structure for her nonprofit corporation. Under that structure, the corporation would still operate under the control and supervision of its board of directors, but the corporation's members would control certain board actions, as delineated by the donor. More specifically, the donor would state in the original governing documents that approval of an amendment to the

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<sup>30</sup> Rev. Model Nonprofit Corp. Act §10.02(b); Model Nonprofit Corporations Act Third Ed. (2008) §§10.05, 8.24(c).

<sup>31</sup> Nonprofit corporations governed by New York law, however, must first obtain approval from the state's attorney general's office before a change to the corporation's purposes can be effective. See N-PCL §§ 404(a) and 804.

<sup>32</sup> As to whether pre-amendment assets will be deemed held in trust and thus bound to pre-amendment purposes, see discussion of fiduciary duties, *infra*, in this Part III.B.

<sup>33</sup> Rev. Model Nonprofit Corp. Act §10.02(b) neither permits nor expressly prohibits a non-member nonprofit corporation from stating in its articles of incorporation a greater than majority vote requirement for amendment to the corporation's articles. Section 8.24(b) of that Act, however, suggests that silence in §10.02(b) was not intended to preclude a higher voting threshold. Section 8.24(b) provides that "If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board unless this Act, the articles or bylaws require the vote of a greater number of directors." \*confirm\*

<sup>34</sup> Imposition of a third party consent requirement for amendment to the articles is expressly permitted under Rev. Model Nonprofit Corp. Act §10.30(a), which further provides that such a requirement may not be removed without consent of that third person. See also Model Nonprofit Corp. Act Third Ed. (2008) §10.05(1).

corporation's mission-defining articles of incorporation requires member approval.<sup>35</sup> While others manage the foundation as directors and officers, the donor, the donor's family, or others would comprise the membership body. This option has particular appeal to a donor who would like some oversight of the implementation of her intentions, but lacks interest in any more active role.

Through imposition of the foregoing constraints on entity leadership, the donor effectively creates a veto power over changes that affect adherence to her intentions. That veto power thus serves as a barricade between her intentions and those who might wish to take her chosen entity in a different direction. Whether effected through heightened board voting requirements, a membership structure, or other third party involvement, this approach provides a useful adaptation under a state's nonprofit corporation statutes.

Trust law empowers founding donors to approximate many of the corporate governance machinations just described by so providing in the trust agreement. The specific articulation in state nonprofit corporation statutes of the rules governing such complexities, however, arguably makes the nonprofit corporation a better entity choice in this regard. Such statutory articulation brings clarity, specified procedures, and certain enforceability to the donor's entity structure.

A donor should also consider another important implication of her choice of corporate or trust entity. Through her entity choice, the donor will call forth constraints that arise by operation of law.<sup>36</sup> Those constraints abide in the fiduciary duties that are inherent to both the corporate and trust entity types, although their parameters and impact sometimes vary as between the two. Those duties serve to protect donor intent by subjecting director and trustee decisions to certain standards and imposing consequences if those standards are not met.

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<sup>35</sup> See Rev. Model Nonprofit Corp. Act §10.02(a); Model Nonprofit Corp. Act Third Ed. (2008) §10.03. If serving on the board, the donor's family could alternatively be designated as a voting group, the consent of which is required to amend the corporation's articles.

<sup>36</sup> Lloyd H. Mayer, *Donor Intent: Preserving the Mission of Charitable Foundations*, CONTEMP. LEGAL NOTES, No. 43, at 16 (2003).

The fiduciary duties at issue include the duty of loyalty, the duty of care, and the sometimes separately articulated duty of obedience. The duty of loyalty requires faithful pursuit of the interests and charitable mission of the organization.<sup>37</sup> Pursuit of the self-interest of the decision-maker or other interests external to the organization's charitable objectives would violate the duty.<sup>38</sup>

The duty of care, by comparison, generally requires that directors and trustees be diligent and attentive, that decisions be informed, and that actions be carried out in good faith and with ordinary prudence.<sup>39</sup> The duty of care therefore protects against the squandering of a donor's gift through lack of oversight or imprudent decision-making. The donor could further constrain her entity's governing body by expressly engrafting her intentions upon her governing body's exercise of its duty of care. To accomplish this, the donor could provide in her entity's founding documents that the duty of care requires attentiveness specifically to the donor's intentions. The donor could also stipulate that prudent decision-making requires an evaluation of the reasonableness of proposed entity actions in light of those intentions. Such a statement invokes aspects of the duty of obedience, discussed below. Since no state nonprofit corporation statute expressly sets forth a duty of obedience, however, the suggested articulation presents a worthwhile endeavor for donors opting for the corporate form.

The import of the referenced duty of obedience varies depending upon the donor's choice of entity. The duty of obedience derives from the long-established trust-law principle that a trustee must "administer a trust in a manner faithful to the wishes of the creator."<sup>40</sup> Those trust standards require adherence to the donor's intentions, without regard

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<sup>37</sup> See RESTATEMENT OF THE LAW OF NONPROFIT CHAR. ORGS. § \_\_\_; RESTATEMENT (THIRD) OF TRUSTS §78.

<sup>38</sup> See RESTATEMENT OF THE LAW OF NONPROFIT CHAR. ORGS. § \_\_\_:

<sup>39</sup> See REST. OF THE LAW OF NONPROFIT CHAR. ORGS. § \_\_\_; FREMONT-SMITH, at 199–215.

<sup>40</sup> 2A SCOTT & FRATCHER, § 164.1.

to whether ordinary prudence and good faith (duty of care) or a lack of self-interest (duty of loyalty) accompany any failed attempt to comply.<sup>41</sup>

In choosing to house her intentions in a trust entity, the donor imposes upon her trustees a specific duty of obedience to the donor's stated directives and intentions. This applies even were the donor to make an outright and unrestricted gift to a public charity operating as a trust, since "the law uniformly treats" the use of charitable trust assets as restricted by the trust's stated purposes at the date of gift.<sup>42</sup>

Were the donor to utilize the nonprofit corporation form, on the other hand, the scope of the duty of obedience constraint she imposes upon her directors is less certain. The specific question turns upon whether directors of a nonprofit corporation may change the corporation's purposes and thereafter employ previously gifted assets in furtherance of the new purposes.<sup>43</sup> In answering this question, "states take drastically different approaches. Some states rely on trust law principles and impose [a strict duty of obedience] on directors, whereas others apply corporate law concepts broadly and [allow] directors" to employ previously received but not specifically restricted gifts in furtherance of the corporation's amended purposes.<sup>44</sup>

### C. Controlling Who Controls

A third path to preserving donor intent resides in the donor's control over the evolution of her chosen entity's leadership. Control here means controlling the selection of those who will control, rather than controlling future leaders by limiting their discretion as addressed in the foregoing Part III.B. The donor could, of course, empower herself or her designees to control the donor's chosen entity, including granting herself the power to ap-

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<sup>41</sup> Professor Sugin argues that properly understood, the duty of obedience goes beyond the standards of care and loyalty by imposing a substantive obligation of fidelity to mission, regardless of procedure or any lack of self-interest. See Sugin at 908–13.

<sup>42</sup> RESTATEMENT OF THE LAW OF NONPROFIT CHAR. ORGS. § 3.01, cmt. a.

<sup>43</sup> RESTATEMENT OF THE LAW OF NONPROFIT CHAR. ORGS. § 3.01, cmt. a. For a discussion of this uncertainty under the Revised and Third Edition nonprofit corporation model acts, see RESTATEMENT OF THE LAW OF NONPROFIT CHAR. ORGS. § 3.01, cmt. e. 913, 950 (2013).

<sup>44</sup> Johnny Rex Buckles, *How Deep Are The Springs of Obedience Norms that Bind the Overseers Of Charities?*, 62 Cath. U. L. Rev.

point, remove, and replace any such designees. As noted in Part III.A. above, however, such personal control only endures so long as the donor (or her selected designee) lives.

Many donors look to successive generations of family members as the natural caretakers of donor intent. Donor family members could fulfill this caretaker responsibility through an active position on an entity's governing body or through a more passive but nonetheless protective overseer role. That overseer role would function much like the membership or third party veto holder described in Part III.B. above, only now adapted to the specific task of appointing and replacing those who manage the entity.

Of course, twenty or so years following the death of the donor or the donor's last designee, the donor's true influence upon the perpetuation of her charitable objectives begins to wane. Utilizing a private foundation, whether in corporate or trust form, presents one of the better options for donors seeking to combat this decay. The reason lies in the control the donor has over her private foundation and its structure.

A donor could, for example, create a private foundation whose board automatically expands to accommodate successive generations of family, thus putting an enduring stamp on successorship, though again, the true connection to the donor's intent will nonetheless dissipate as time passes. Another aspect of the foundation's offer of control could perhaps slow this decline of the donor's influence. More specifically, the private foundation offers a donor significant flexibility to dictate when and with what power family members participate in the donor's gifting plans. While alive, the donor could involve family in foundation gifting decisions in such a way that the donor's decision-making process, values, and mentoring affect the development of those successor family members' philanthropic ideals. While the donor's imprint would still fade with time, this transfer of values should have a more lasting influence than a rote statement of purposes thrust upon a new generation of family trustees or directors. In this way, then, the donor can employ an entity structure that focuses not just upon who controls as time passes, but what values they bring to bear upon the exercise of that control.

Other entity options offer similar opportunities, though to lesser degrees. A donor utilizing an SO, for example, could achieve the same result through how she dictates suc-

cessorship to the minority of positions she controls on her SO's board. Of course, a legacy of values has more import where its disciples drive future decisions, as with a private foundation, in contrast to simply suggesting possible action to those truly in control, as with an SO.

The DAF presents an opportunity for controlling successorship that is akin to that offered by a private foundation. This kinship pertains because the donor should be able to name her successors entitled to exercise "advisory privileges" with respect to her DAF. The two primary weaknesses of a DAF in this regard emanate from the fact that, first, advisory privileges fall short of legal control, and second, many DAF sponsors impose limitations on the degree or duration of successorship permitted before remaining assets divert to the sponsor's general fund.

#### D. Control Through Association

A final path to be explored on this journey to securing homage to donor intent stems from the donor's exercise of control through association. Personal control can only endure for so long, and neither constraints nor successorship plans can negate the fact that at some point, ultimate control over the donor's entity and intent will reside with persons with whom the donor has no actual connection apart from possibly lineage. Even where the donor makes her gift and immediately places control in the hands of others, absent a specifically restricted gift, the donor's control over service to her intentions must reside in fiduciary duties and perhaps a deliberately crafted power to remove, replace, and then try again.

An alternative path to control allows the donor to protect her intent by associating with independent organizations that share her charitable ideals. In many ways, this approach mirrors the path of a donor who seeks to exert some degree of control—or at least influence—through her philanthropic modeling to successive generations. The control through association contemplated here, however, seeks to capitalize upon shared values and like-minded charitable objectives, rather than blood relation or other criteria.



Community foundations offer a more traditional example of such donor-selected association. Community foundations historically acted as a hub for supporting charitable purposes of varying types within a certain geographic region, although today many have expanded their focus. These entities distinguish themselves through the knowledge and advice they bring to donors seeking to make an impact within the geographic or other scope of the foundation's operations.

In associating control over her gifting with a community foundation, a donor's path to control may branch in a number of directions. A donor could create a DAF with the community foundation acting as sponsor and providing guidance to inform the donor's advisory directives. Community foundations, however, offer many more options than DAFs. Community foundations, for example, frequently offer field of interest funds ("FIFs"). A donor with a particular interest in the local arts community, for example, could take advantage of this by contributing to a community foundation's FIF tied to an arts-specific mission.<sup>45</sup>

Three attributes distinguish the DAF from the FIF. First, FIFs aggregate gifts from many donors into a single fund for all purposes. Second, the community foundation determines grant recipients without regard to donor recommendations, apart from the implicit preference for the given charitable field. Third, community foundations typically hold a variance power over the foundation's different funds.

The variance power allows the community foundation to change the charitable mission of a particular fund under certain conditions, but importantly, in its sole discretion.<sup>46</sup> This variance power applies whether the community foundation exists in corporate or trust form. A donor might accept the potential variance power threat to donor intent, because in return the donor obtains at least three benefits. Those benefits include a simple,

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<sup>45</sup> The donor could, alternatively, direct her gift to a community foundation's general fund, which is analogous to an FIF with a "field" defined by the overall charitable mission of the foundation itself.

<sup>46</sup> A fund will not qualify as a component part of a community foundation unless, among other things, the governing body has the power to "modify any restriction or condition on the distribution of funds for any specified charitable purpose or to any specified organization if, in the sole judgment of the governing body, such restriction or condition becomes, in effect, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community or area served."

single-step but intent-specific giving option; distributions determined by knowledgeable community foundation leadership; and the ability to aggregate her gift with those from other donors, thus enhancing the collective impact of those gifts. A fourth benefit also flows from this arrangement, and it inures to the benefit of both the donor and charitable organizations which seek grants and donor contributions. Specifically, by aggregating donor gifts into a single potential source of grant funding, contribution-seeking charities can reduce the diversion of resources otherwise required to pursue funds from multiple sources and otherwise meet multiple grant compliance burdens.

For reasons just suggested, community foundations fit within a broader category of entities sometimes referred to as “aggregators” or “intermediaries.” To be explicit, such entities pool donor funds and act as a weigh station along the donor’s path to supporting her preferred charitable purposes. From the perspective of donor intent as affected by entity choice, the “mission-driven intermediary” merits specific consideration. Similar to a community foundation, these public charities act as grant-makers, bring special expertise, and provide an opportunity to merge gifts with other donors to create a more substantial charitable impact. The “mission-driven” moniker reflects the difference between this type of intermediary and the community foundation. Specifically, whereas community foundations embrace a broad array of charitable pursuits and tend to focus upon charitable purposes with some geographic identifier, mission-driven intermediaries typically focus upon a distinct charitable purpose. Donor intentions find both protection and promotion through the intermediary’s shared vision. The focused scope of that vision, moreover, attracts other like-minded donors who will collectively monitor the intermediary’s faithfulness to the group’s shared intentions.

#### IV. Conclusion

A donor contemplating a gift to charity must first grapple with identifying the charitable purposes that she hopes to support with her gift. For some, the answer presents easily and reflects a broad charitable vision. For other donors, the considerations may prove complex and her charitable intentions may find more narrow expression. As conceived in

either case, the donor's charitable objectives next require both funding and an instrument through which those objectives might be pursued. That instrument finds life in the donor's choice of gift-recipient entity. That entity may emerge in the more commonly understood forms of nonprofit corporation or trust, or perhaps graft onto one of those state law forms a more specialized categorization like private foundation or donor-advised fund.

The most appropriate entity for a given donor will depend upon a variety of considerations and priorities. The protections an entity offers against a donee's departure from the donor's intentions will, for many donors, weigh heavily among those considerations. Analyzing how the sought-after protections might emerge from a particular entity choice, and to what effect, presents an interesting and worthwhile challenge. The answers turn in large part upon the particular paths open to the donor's assertion of control over the use and effects of her gift, once completed. Entity choices drive the donor down such pathways, but the destination for each donor dwells in the protections most suitable to both serving and preserving the donor's intentions.

*\*\*Additional references to source materials and further attribution may be obtained from the author and will be incorporated into a later draft of this paper.*