THE PROBLEMS WITH DONOR INTENT: INTERPRETATION, ENFORCEMENT, AND DOING THE RIGHT THING

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INTRODUCTION

Recent cases involving donor restrictions on charitable gifts have made headlines. *Robertson v. Princeton* settled on December 8, 2008, after six years of litigation during which both sides argued their interpretations of the donor's intent. A Montgomery County, Pennsylvania, court ruled that the Barnes Museum can move to downtown Philadelphia, despite the donor's directions that the art be left in the building designed to house it. In a case involving the Buck Trust, a court refused to apply *cy pres* because, said the court, it had to protect donor intent. The court then modified the trust in ways the donor probably did not intend. After unprecedented donations to the Red Cross in the aftermath of September 11, politicians accused the Red Cross of failing to follow donor intent with respect to those contributions, and the Red Cross changed its plans for the use of the funds. Most recently, Brandeis University announced that it would close the Rose Art Museum and sell the artwork, only to back off after family members of the donors pointed out the donor restrictions on gifts creating the museum and providing the artwork.

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In each of these high profile cases, as in many other reported cases,[1] one side or the other, and usually both, based their arguments on donor intent. The difficulty, of course, is that in most of these cases, the donor was dead at the time the controversy began, and no one really knew what the donor intended at the time of the gift or would have intended had the donor known about the changed circumstances.[2] Written documentation for the gifts exists in all but the Red Cross controversy, but the written documents have not prevented legal wrangling over what the charity should do in the face of changed circumstances.

A question then is whether the lawyers who work with donors and charities can and should do a better job of helping those clients draft charitable gift agreements that reduce the likelihood of future problems. A second question is whether when a disagreement arises, the charity and family members of the donor can resolve the dispute in a way that honors the intent of the donor while taking changes that have occurred since the gift was made into consideration. And a third question is how the law should address donor restrictions and changes that occur over time.

This article will start with short descriptions of the five cases described above, to illuminate the problems faced by those who would pin down donor intent. The article then explains the legal duty to give effect to donor intent and notes the self-interested reasons charities usually want to give effect to donor intent. The article then discusses four circumstances under which donor intent may be difficult to determine and identifies problems that can arise over time. The article also describes the legal rules that permit a donor and charity to agree to modify a restriction in certain situations and the rules that allow a court to modify a restriction under other, limited, circumstances. A court modification depends on the distinction between *cy pres*, used to modify a restriction on the purpose of a gift, and deviation, used to modify a restriction on how the charity carries out the

1. *See, e.g.*, Hood v. Maddox Found., No. Civ.A. 2:04CV347-P-B, 2005 WL 1669024 (N.D. Miss. 2005) (attempt to move foundation may be counter to donors' implicit intent to benefit Tennessee charities); Howard v. Adm'rs of Tulane Educ. Fund, 986 So. 2d 47 (La. 2008) (Tulane closed Sophie Newcomb College and donor's descendants sued to enforce condition or revoke gift); *In re* Milton Hershey Sch., 867 A.2d 674 (Pa. Commw. Ct. 2005), *rev'd*, 911 A.2d 1258 (Pa. 2006) (*cy pres* and diversification issues); Georgia O'Keeffe Found. v. Fisk Univ., No. M2008-00723-COA-R3-CV, 2009 WL 2047376 (Tenn. Ct. App. 2009) (sale of paintings to cover financial difficulties).

2. Donor intent depends on documentation at the time of the gift and not thoughts about what a donor might have intended under changed circumstances, but the discussion of donor intent often includes thoughts about later intent as well as intent at the time of the gift. The doctrine of *cy pres* directs the court to modify a gift "in a manner consistent with the settlor's charitable purposes." UNIF. TRUST CODE § 413(a)(3) (2004) (amended 2005). The RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (2003) explains, "In framing a scheme for the application of property cy pres, the court will consider evidence suggesting what the wishes of the settlor probably would have been if the circumstances had been anticipated."

purpose. *Cy pres* changes the intent of the donor, while deviation permits a change that will help a charity carry out the donor's intent. As the five cases demonstrate, this distinction can affect the outcome of a case in which a charity requests a modification. The article concludes by considering options available to donors, considerations for lawyers drafting gift restrictions, and cautionary recommendations for donors, charities, and lawyers who might try to pin things down too tightly or try to draft intentionally ambiguous, as opposed to flexible, gift agreements.

II. FIVE EXAMPLES

A. Robertson v. Princeton

Both sides,[3] and many commentators,[4] have characterized *Robertson v. Princeton*[5] as a donor-intent case. The difficulty was, not surprisingly, that the two sides had different views of what the donor intended. The settlement of the case recognized that the plaintiffs and defendants had different understandings of the donor's intent and provided that Princeton would manage some of the funds in keeping with its interpretation of the donor's intent and that the Robertson family would manage other funds in keeping with their interpretation of the donor's intent.[6]

In 1961, Marie Robertson—or Marie and Charles Robertson, depending on who is writing about the gift[7]—gave $35 million to Princeton Uni-

3. Victoria Bjorklund, one of the lawyers representing Princeton, wrote that the case should be characterized as an academic freedom case, rather than a case focused on donor intent. She also discusses donor intent and explains that the University followed the donor's intent with respect to the gift. *See* Victoria B. Bjorklund, *Robertson v. Princeton – Perspective and Context* 3, http://www.princeton.edu/robertson/documents/docs/Nonprofit_Forum.pdf (Jan. 2008).

4. *See* Posting of Darryll K. Jones to Nonprofit Law Prof Blog, http://lawprofessors.typepad.com/nonprofit/ (July 15, 2008) (stating that *Robertson v. Princeton* "has been termed the most import donor intent lawsuit ever to face the nonprofit community . . . .").

5. Robertson v. Princeton Univ., No. C-99-02 (N.J. Super. Ct. Ch. Div. filed Jul. 17, 2002).

6. *See* Settlement Agreement, http://www.princeton.edu/robertson/documents/docs/Robertson_Settlement_Agreement-Executed.pdf (last visited Feb. 1, 2009).

7. It appears that Marie Robertson was the legal donor of the Robertson Foundation. Marie was heir to the A&P grocery fortune, and the A&P stock used to make the gift was held in her name. Her husband, Charles, played an active role in negotiating the terms of the gift and was involved in the foundation from the time of the gift until his death. *See* Robertson Lawsuit - Background, http://www.princeton.edu/robertson/about/background (last visited Feb. 17, 2010); Charles Robertson, *Charles Robertson's December 15, 1960 Notes Contemplating an Expanded Woodrow Wilson School*, Dec. 15, 1960 http://www.princeton.edu/robertson/documents/docs/Charles_Robertson_12-15-60_notes.pdf. At the time of the gift, Jack Myers wrote a memo for Princeton President Robert Goheen detailing a discussion Myers had had with Mr. Hatfield, assistant director of the Tax Rulings Division of the IRS. The letter from Myers to Goheen refers to "Mrs. Robertson's proposed gift," and then the memo states "We advised Mr. Hatfield that in fact Mr. Robertson had virtually given up to Princeton every right except the right to witness his money being spend [sic] and an opportunity to speak with

versity to support the graduate program of the Woodrow Wilson School at Princeton. Mrs. Robertson[8] and Princeton agreed to create a separate organization, called the Robertson Foundation, to hold the assets. The terms of the agreement appear in the Certificate of Incorporation and the Bylaws for the Robertson Foundation.[9] The terms include restrictions imposed on the use of the gift and a management structure that assured control of the foundation by Princeton.[10]

The donor's decision to make the gift through a separate organization controlled by Princeton appears to balance two concerns. By using the foundation rather than giving the money directly to Princeton, the donor's family would continue to oversee the use of the gift. And by giving Princeton control over the foundation, the donor would be able to obtain deductions for gift and income tax purposes.[11] Princeton agreed to the structure, probably for two reasons as well. Princeton needed to control the gift in order to be able to make the financial commitments necessary to carry out the plans the Robertsons and Princeton had in mind—a substantial expansion of the graduate program at the Woodrow Wilson School. Princeton planned to hire new faculty and make other long-term arrangements based on the gift, and the university needed assurance that it would control the

respect to operation (but not to exercise any control)." Memorandum from Jack Myers on Princeton Control of Foundation (and the Gift Generally) (May 4, 1961) (on file at http://www.princeton.edu/robertson/documents/docs/John_Myers_memo_5-4-61.pdf) [hereinafter Myers Memorandum]. The default in 1961 was probably to think about a gift of this magnitude as a gift from a man, and Charles may have taken a leading role in negotiating the agreement with Princeton. Princeton documents from the time of the lawsuit consistently refer to Mrs. Robertson as the donor. *See* Bjorklund, *supra* note 3, at 4, 8, 16. Comments from the Robertson family describe the gift as a gift from Charles and Marie Robertson. *See* Complaint at 2, Robertson v. Princeton Univ., No. C-99-02 (N.J. Super. Ct. Ch. Div. filed Jul. 17, 2002) (on file with author); Press Release, Regarding Amended Complaint (June 2004) (on file with author). The Memorandum in Support of the Settlement Agreement, agreed to by both sides, states: "Marie Robertson made the generous gift in 1961 (facilitated by her husband Charles Robertson, a Princeton alumnus with strong ties to and affection for the University)." Memorandum of Law in Support of the Parties' Joint Motion on Consent Seeking the Court's Approval of Settlement Agreement and Dismissal of Action with Prejudice and Without Costs at 2, Robertson v. Princeton Univ., No. C-99-02 (N.J. Super. Ct. Ch. Div. filed Jul. 17, 2002), http://www.princeton.edu/robertson/documents/docs/Memo_of_Law-Settlement.pdf [hereinafter Settlement Memorandum]. This statement seems to best capture the situation at the time of the gift.

8. In this article I will refer to Mrs. Robertson as the donor, and I acknowledge that Charles Robertson played a significant role in establishing and running the Robertson Foundation.

9. *See* Robertson Foundation Certificate of Incorporation (as amended through Jul. 26, 1961), http://www.princeton.edu/robertson/documents/docs/Robertson_Foundation_Certificate_of_Incorporation.pdf (last visited Feb. 1, 2009); Robertson Foundation Bylaws, http://www.princeton.edu/robertson/documents/docs/Robertson_Foundation_By-laws.pdf (last visited Feb. 1. 2009).

10. *See* Robertson Foundation Certificate of Incorporation, *supra* note 9 at 1; Robertson Foundation Bylaws, *supra* note 9 at 1, 3.

11. *See* Myers Memorandum, *supra* note 7, at 1–2 (describing attempts to persuade Mr. Hatfield at the Internal Revenue Service that the Robertsons should obtain both income and gift tax deductions because Princeton controlled the foundation).

use of the money.[12] Princeton probably also was happy to have the Robertsons involved. Charles and Marie were supportive of the school, and Princeton likely welcomed the continuing involvement of the family. And, of course, the Robertsons' agreement to make the gift may have depended on Princeton's willingness to accept the foundation structure. As with most significant gifts, the success of the gift depends on both parties finding the terms of the gift satisfactory.[13] In the case of the Robertson Foundation, everyone seemed pleased with the structure.[14]

The Robertson Foundation's Certificate of Incorporation provides that the foundation will have seven directors, states that the members of the foundation will be the directors, and adds that the directors will be called trustees.[15] The Bylaws explain that the organization will have seven members: four "Princeton members" and three "family members."[16] Three of the Princeton members are the persons holding the following positions: Chairman of the Executive Committee of the Trustees of Princeton University, the President of the University, and Chairman of the Finance Committee of the Trustees of Princeton.[17] The President of the University appoints the fourth Princeton member.[18] The Bylaws provide that Charles and Marie Robertson will appoint the three Family Members, and after the deaths of

12. *See* Letter from Robert F. Goheen, President of Princeton University, to the Comm'r of the Internal Revenue Service (May 1, 1961) (on file at http://www.princeton.edu/robertson/documents/docs/Pres_Goheen_letter_5-1-61_to_the_IRS.pdf) ("[T]he prospective donor has fully understood and agreed that the University must have the responsibility for the direction, maintenance and operation of the [Woodrow Wilson] School in all its aspects."); *see also* Charles Robertson's August 20, 1970 Notification to IRS Concerning Foundation Status, http://www.princeton.edu/robertson/documents/docs/Notification_Concerning_Foundation_Status_8-20-70.pdf (last visited Feb. 1, 2009). The notification, filed by Charles Robertson as President of the Robertson Foundation, states that the foundation is not a private foundation because it is controlled by Princeton. An attachment explains that Princeton required the control in order to "undertake the long term commitment involved in the project." The attachment adds that the donors agreed, "and the Certificate of Incorporation and By-laws were accordingly drawn to give Princeton permanent control of the Board of Trustees." *See id.*

13. *See* Bjorklund, *supra* note 3, at 3 ("[T]he terms governing this generous gift were not unilaterally dictated by the donor. Instead, the terms were the product of extensive negotiations between the Robertson Family and Princeton University, and their mutual agreement is ultimately set forth in the Foundation's Certificate of Incorporation.").

14. In a 1977 letter to John Gardner, first Chairman of the Advisory Committee of the Robertson Foundation, Charles Robertson urged Mr. Gardner to return as a member of the committee and noted that "[t]he Woodrow Wilson School is first rate" and that he "never had cause for regret" that he and Marie had supported the school through the Robertson Foundation. *See* Letter from Charles Robertson to John Gardner (Jan. 8, 1977), *available at* http://www.princeton.edu/robertson/documents/docs/Charles_Robertson_1-8-77_letter_to_John_Gardner.pdf.

15. Certificate of Incorporation, *supra* note 9, at 2.

16. Bylaws, *supra* note 9, at 1.

17. *Id*.

18. *Id*.

Charles and Marie, their descendants have that power.[19] Charles served as Chairman of the Board of Trustees from the creation of the foundation until his death, twenty years later.[20]

The Certificate of Incorporation states the objective of the Robertson Foundation and the purposes for which the foundation's assets may be used.[21] The purpose restrictions are both detailed and broad, and the two sides have used different sections of the purpose statement to argue over whether Princeton followed the restrictions. Princeton argued strenuously that the document defines its obligations and that it had complied with the restrictions.[22] The Robertson family argued that Princeton had failed to follow the intent of the donor, using narrow language in describing that intent.[23] Each side had a different view of what the donor intended.

In 2002, members of the Robertson family[24] filed suit against Princeton University, the four Princeton trustees, and the Robertson Foundation,[25] arguing that Princeton had failed to follow the mission of the Robertson

19. *Id.*

20. *See* Robertson Lawsuit – Background, *supra* note 7.

21. *See* Certificate of Incorporation, *supra* note 9, at 1:

> This corporation is organized and shall be operated exclusively for charitable, scientific, literary, or educational purposes and for no other purpose. In furtherance of such purposes its objective is to strengthen the Government of the United States and increase its ability and determination to defend and extend freedom throughout the world by improving the facilities for the training and education of men and women for government service and to contribute, lend, pay over, or assign the income of the corporation and/or the funds or property of the corporation (any payments of principal being subject to the limitations of article 11(c) hereof) to or for the use of Princeton University for any one or more or all of the following uses:
>
> (a) To establish or maintain and support at Princeton University, and as part of the Woodrow Wilson School, a Graduate School, where men and women dedicated to public service may prepare themselves for careers in government service, with particular emphasis on the education of such persons for careers in those areas of the Federal Government that are concerned with international relations and affairs;
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> (b) To establish and maintain scholarships or fellowships, which will provide full, or partial support to students admitted to such Graduate School, whether such students are candidates for degrees, special students, or part-time students;
>
> (c) To provide collateral and auxiliary services, plans and programs in furtherance of the object and purpose, above set forth, including but without limitation, internship programs, plans for public service assignments of faculty or administrative personnel, mid-career study help, and programs for foreign students or officials training.

22. *See* Letter from Robert K. Durkee, Vice President and Secretary of Princeton University, to the Editor of the Chronicle of Higher Education and Chronicle of Philanthropy (Jan. 26, 2009), *available at* http://www.princeton.edu/robertson/statements/viewstory.xml?storypath=/main/news/archive/S23/29/90M60/index.xml.

23. *See* William Robertson, Letter to the Editor, *For Charities, It's a Matter of Trust*, THE STAR-LEDGER (Newark N.J.), Jul. 22, 2008, at 13.

24. Plaintiffs were four children of Marie and Charles—William Robertson, Anne Meier, Katherine Ernst, and John Robertson—and a cousin, Robert Halligan. John Robertson died during the lawsuit. William Robertson, Katherine Ernst, and Robert Halligan served as the three family-member trustees at the time the suit began. *See* Complaint, *supra* note 7.

25. *See id.*

Foundation "to support the government of the United States and for that purpose to maintain and operate, at Princeton University, as part of the Woodrow Wilson School, a graduate school to train young men and women for careers in government service, particularly international relations and affairs."[26] The Original Complaint requested that the court declare that the Robertson Foundation documents prohibited using PRINCO for investment management, substitute a different university for Princeton, and require Princeton repay to the foundation amounts improperly paid by the foundation.[27] Two years later the plaintiffs filed an Amended Complaint asking the court to modify the Certificate of Incorporation of the Robertson Foundation, changing the foundation into a private foundation controlled by Robertson family members and removing Princeton's control over the foundation.[28]

Princeton countered that, in its view, a charity should honor the agreements it made with a donor and that Princeton had done just that with respect to Mrs. Robertson's gift.[29] Robert K. Durkee, Vice-President and Secretary of Princeton, wrote, "it is the descendants of the donor, not Princeton University, who are trying to overturn the donor's intent through an expensive lawsuit and public relations campaign."[30] Echoing this sentiment, a statement released by Princeton after the case settled described the lawsuit as brought by "members of the Robertson family who sought to seize control of the Robertson Foundation's funds and redirect them to purposes other than the purpose agreed to by the donor and the University in 1961 . . . ."[31] Princeton noted that the Robertsons' request that the foundation be turned over to them ran counter to the donor's decision to entrust the gift to Princeton.[32]

After six years of legal fighting, the Robertson Foundation and Princeton settled the suit.[33] The Memorandum of Law filed with the court ex-

26. *See id.* at 2.

27. *See id.* at 5.

28. First Amended Complaint at 5, Robertson v. Princeton Univ., No. C-99-02 (N.J. Super. Ct. Ch. Div.) (on file with author).

29. *See* Robert K. Durkee, Letter to the Editor, *Princeton Seeks to Honor Intent*, USA TODAY, June 5, 2008, at 9A.

30. *Id.*

31. Settlement Retains Princeton's Control, Use of Robertson Funds, http://www.princeton.edu/robertson/statements/viewstory.xml?storypath=/main/news/archive/S22/81/66C43/index.xml (last visited Feb. 1, 2009).

32. *Id.*

33. Final Judgment and Order of Dismissal, Robertson v. Princeton Univ., No C-99-02 (N.J. Super. Ct. Ch. Div.), *available at* http://www.princeton.edu/robertson/documents/docs/Robertson_Final_Judgment_and_Order_of_Dismissal_12-12-08.pdf.

plained that the settlement "will achieve three critical goals – furthering the charitable objectives as agreed upon by the Robertson Family and Princeton in 1961, obtaining finality, and avoiding further burdensome litigation and trial."[34]

Pursuant to the settlement agreement, the Robertson Foundation will be dissolved and its assets transferred to Princeton to be held by Princeton as the Robertson Fund.[35] Princeton will hold the Robertson Fund as a separate endowment fund and will use the fund "to further the object and purpose set forth in the Robertson Foundation's Certificate of Incorporation, as understood and interpreted solely by Princeton."[36] Princeton will pay, from the assets of the Robertson Fund or from other sources, the sum of $50 million to the Robertson Foundation for Government, Inc. (RFGI),[37] a private foundation created by the Robertson family plaintiffs during the litigation. The new foundation's "object and purpose mirrors the object and purpose of the Robertson Foundation, as understood and interpreted by plaintiffs."[38] The settlement stipulates that the funds be held under this restriction.[39] Princeton also agreed to pay $40 million, from the Robertson Fund or other sources to reimburse the Banbury Foundation for legal costs incurred in connection with the lawsuit.[40] The Robertson family controls the Banbury Foundation, and the plaintiffs had used assets of that foundation to pay their legal expenses.[41] The end result of the settlement is that most of the Robertson funds will continue to be used for the purposes Mrs. Robertson intended, but two different organizations—Princeton and

34. Settlement Memorandum, *supra* note 7.

35. Settlement Agreement, *supra* note 6, at 5.

36. *Id.*

37. *Id*. at 6.

38. Settlement Memorandum, *supra* note 7, at 2.

39. *See id*. at 6–8; Settlement Agreement, *supra* note 6, at 8.

40. *See* Settlement Agreement, *supra* note 6, at 8.

41. The Banbury Fund is a private foundation controlled by William Robertson, his sisters and the sister's spouses. *See* Bjorklund, *supra* note 3, at 21–22. Ms. Bjorklund found no statement of charitable purpose in any publicly available documents (the organization had no website and its Form 990 did not describe its charitable purpose). Ms. Bjorklund raised the issue of whether William Robertson and his sisters, all of whom are officers of the Banbury Fund and plaintiffs in the Princeton litigation, engaged in self-dealing when they used Banbury Fund assets to pay their legal expenses in the lawsuit against Princeton. *Id.* An article in *The Chronicle of Philanthropy* quotes Charles Robertson as writing, "The Banbury Fund is specifically dedicated to support the purpose of the Robertson Foundation," and the article says that the Robertsons got a legal opinion that the spending was okay. Ben Gose, *Family Uses Nonprofit Funds to Pay Legal Expenses in Princeton U. Case*, THE CHRONICLE OF PHILANTHROPY, Oct. 24, 2007, http://www.ncrp.org/news-room/news-2007/185-family-uses-nonprofit-funds-to-pay-legal-expenses-in-princeton-u-case (last visited Apr. 10, 2010). Nonetheless, Aaron Dorfman, executive director of the National Committee for Responsive Philanthropy, describes the use of Banbury Funds to pay the legal expenses as "yet another egregious example of people abusing philanthropy for personal gain." *Id.*

RFGI—will interpret her intent. All other payments associated with the settlement will also be dedicated to charitable purposes, and no further litigation expenses will reduce money otherwise available for charitable purposes.

B. The Barnes Foundation

Dr. Albert Barnes created the Barnes Foundation in 1922 as an educational institution that would train students in Dr. Barnes's theories of art aesthetics.[42] The trust indenture, charter and bylaws creating the Foundation imposed many restrictions, including a requirement that the art he conveyed to the trust be displayed in the building he had built to house the art, hung exactly as it was when he died.[43] The art could not be moved, sold, or lent to other museums.[44] The gallery was to be open to the public on an extremely limited basis, and fees were prohibited.[45] Successor trustees were to be five representatives appointed by Lincoln University, a small, historically black college located in nearby Chester, Pennsylvania.[46]

A panoply of problems developed in connection with the Barnes Foundation.[47] The gallery gradually opened its doors to the public, causing traffic problems in the suburb of Merion where Dr. Barnes had built the gallery. The resulting lawsuits with neighbors in Merion may have contributed to the financial woes of the Barnes Foundation.[48] With limited ability

42. *See* The Barnes Foundation Bylaws, art. IX, para. 29, http://www.barneswatch.org/main_bylaws.html (last visited Jan. 25, 2010) ("[A]rt gallery is founded as an educational experiment under the principles of modern psychology as applied to education, and it is Donor's desire during his lifetime, and that of his wife, to perfect the plan so that it shall be operative for the spread of the principles of democracy and education after the death of Donor and his wife."); *see also* JOHN ANDERSON, ART HELD HOSTAGE: THE BATTLE OVER THE BARNES (2003); Chris Abbinante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665, 666–74 (1997) (describing Dr. Barnes, the circumstances surrounding the creation of the Foundation, and the history of the Foundation's troubles); Ilana H. Eisenstein, Comment, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1749–50 (2003); About the Barnes Foundation, http://www.barnesfoundation.org/h_main.html (last visited Feb. 3, 2009) (describing the influence of John Dewey and others on Dr. Barnes' views of education).

43. *See* Barnes Foundation Bylaws, *supra* note 42, art. IX, para. 13; Abbinante, *supra* note 42, at 671–72.

44. *See* Barnes Foundation Bylaws, *supra* note 42, art. IX, para. 10.

45. *Id.* paras. 29, 30.

46. *Id.* para. 17.

47. *See* Jeffrey Toobin, *Battle for the Barnes: Can One of America's Greatest Private Collections Survive?*, THE NEW YORKER, Jan. 21, 2002, at 34 (detailing the many legal battles).

48. *See, e.g.*, Barnes Found. v. Twp. of Lower Merion, No. CIV.A 96-372, 1999 WL 1065213 (E.D. Pa. Nov. 24, 1999); *see also* Barnes Found. v. Twp. of Lower Merion, 242 F.3d 151 (3d Cir. 2001) (alleging that defendants had acted to oppose the expansion of museum operations as part of a

to raise money to cover operating expenses, the trustees of the Foundation pursued a series of requests that the court modify the restrictions Dr. Barnes had imposed.[49] Over the years the Foundation was permitted to increase the hours it was open to the public, to hold fundraising events in the gallery, and to take part of the art collection on a world tour to raise money for the Foundation.[50] The changes kept the Foundation financially viable for awhile, but by 1998 the Foundation found itself in dire financial straits.[51] A consortium of Philadelphia charities agreed to provide financial assistance to the Foundation, but only if the Foundation agreed to obtain modifications permitting it to move the gallery to downtown Philadelphia; to lift restrictions on public access and social gatherings; to enlarge the board of trustees to fifteen, with Lincoln University appointing only four (thereby giving up control); and to provide that in the future, the bylaws could be amended by the trustees rather than through the court.[52]

The Foundation sought and received court approval to make these changes.[53] The decision to move the Barnes gallery to downtown Philadelphia will address many of the problems surrounding the Barnes Foundation, but the modifications clearly conflict with donor intent.[54] Indeed the organizations brokering the deal were the sort of mainline organizations and interests Dr. Barnes despised.[55] The court side-stepped the intent issue

conspiracy to violate foundation's constitutional rights because of the race of some of its trustees. All claims were eventually dismissed).

49. *See In re* Barnes Found., 684 A.2d 123, 124–28 (Pa. Super. Ct. 1996) (detailing a series of lawsuits involving the Barnes Foundation).

50. *See id.* at 126.

51. *See* Eisenstein, *supra* note 42, at 1751–52.

52. *Id.* at 1752–53.

53. *In re* Barnes Foundation, No. 58,788, 2004 WL 2903655, at *20–*21 (Pa. Ct. of Common Pleas Dec. 13, 2004); *see also* Heinrich Schweizer, *Settlor's Intent Vs. Trustee's Will: The Barnes Foundation Case*, 29 COLUM. J.L. & ARTS 63, 65 (2005).

54. *See* William Schwartz & Francis J. Serbaroli, *After the Barnes Ruling: What Donors Should Do to Protect Their Wishes*, THE CHRONICLE OF PHILANTHROPY, March 31, 2005 (noting that the ruling to permit the Barnes Foundation to move is "[p]erhaps the strongest reason donors have been given to worry" about whether charities will carry out their wishes); *see also* Leslie Lenkowsky, *In the Fray: A Risky End to the Barnes Case*, WALL STREET JOURNAL, Dec. 16, 2004, at D8. Julian Bond, a civil rights activist and NAACP chairman, whose father was president of Lincoln University at the times Barnes wrote his indenture, said, "When power speaks, institutions are likely to crumble and lose. In this case, tourism trumped Albert Barnes's trust, and the accumulated interests of Philadelphia's wealth and might and political power broke Albert Barnes's intention." Lita Solis-Cohen, *Camp to Leave Barnes*, MAINE ANTIQUE DIGEST, *available at* http://www.barnesfriends.org/downlload/news-camp-leave-barnes.pdf.

55. *See* ANDERSON, *supra note* 42, at 29, 219. Dr. Barnes wanted to make the art collection accessible to working-class people. The Indenture provides that "men and women who gain their livelihood by daily toil in shops, factories, schools, stores and similar places, shall have free access to the art gallery and the arboretum upon those days when the gallery and the arboretum are to be open to the public . . . ." Barnes Foundation Bylaws, *supra* note 42, art. IX, para. 30. The Indenture also makes clear that Dr. Barnes does not want the Foundation to come under the control of mainstream academics.

by basing its decision on deviation rather than *cy pres*. Whether Dr. Barnes considered the directions concerning the location of the art part of his purpose restrictions or only administrative restrictions remains, and will forever remain, uncertain.

An organization called Friends of the Barnes Foundation continues to protest the move to Philadelphia,[56] and in 2008 Montgomery County and the Friends of the Barnes—art students, alumni, and neighbors of the museum—asked the judge to reopen the case.[57] On May 15, 2008, the judge denied standing and dismissed the petition.[58] The plaintiffs have said they will not appeal that ruling,[59] and the move to downtown Philadelphia now seems inevitable.[60]

C. The Buck Trust

In the Buck Trust, changed circumstances affected the trustee's ability to carry out the terms of the trust. In 1975 Beryl Buck created a trust under her will to provide for the needy of Marin County, California. She named the San Francisco Foundation the trustee and funded the trust with stock worth $7 million. Due to unexpected changes in the value of the stock, the trust assets increased in value to $400 million in only ten years.[61] The San Francisco Foundation became concerned that limiting the use of the trust to Marin County, the wealthiest of the five counties that make up San Francisco, would threaten the integrity of its work in the other four counties it served.[62] The Foundation sought court approval to permit distributions in all five counties.[63] The court denied the Foundation's request and expressed dismay that the Foundation would suggest changing the donor's

It states, "no Trustee shall be a member of the faculty or Board of Trustees or Directors of the University of Pennsylvania, Temple University, Bryn Mawr, Haverford or Swarthmore Colleges, or Pennsylvania Academy of the Fine Arts." *Id*. art. IX, para. 17.

56. The Friends of the Barnes Foundation website still says, "It's not too late to STOP THE MOVE . . . ." Friends of the Barnes Foundation, http://www.barnesfriends.org/ (last visited Feb. 19, 2010).

57. Posting of Amaris Elliott-Engel to The Legal Intelligencer Blog, http://thelegalintelligencer.typepad.com/tli/ (Jun. 17, 2008 10:58 EST).

58. *See id.*

59. *See id.*

60. Construction of the new building began with a ceremony on October 16, 2008. The Barnes Foundation Announces New Building on Benjamin Franklin Parkway to be Complete by 2011, http://www.barnesfoundation.org/v_pr_101608.html (last visited Feb. 3, 2008).

61. Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145, 1177 (2003).

62. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 744 (7th ed. 2005).

63. Homer B. Thompson, *Opinion: In the Matter of the Estate of Beryl H. Buck*, 21 U.S.F.L. REV. 691, 692 (1987).

intent by expanding the geographical reach of the trust to five counties in the San Francisco area, altering Mrs. Buck's direction that the money be spent only in Marin County.[64] The court determined that a change in where the trust spent its funds would require the application of *cy pres*, and the direction to spend the money in Marin County did not reach the impossibility threshold required for *cy pres*. The court then made other changes to the Buck Trust, including designating certain charities as beneficiaries of the income of the trust.[65] The court described these changes as administrative. As John Simon points out, however, the changes the court imposed may have done more damage to Mrs. Buck's intent than the geographical change would have done.[66] Would Mrs. Buck have considered the geographic restriction a purpose restriction rather than an administrative restriction? And would Mrs. Buck have considered the change in trustee a mere administrative change and not a violation of her intent with respect to the purposes of the trust? Further, would Mrs. Buck have insisted that the trust be used entirely in Marin County had she known about the dramatic change in value? Determining donor intent on these facts seems impossible, therefore; describing the court's decision as one made in conformity with donor intent seems inapposite.[67]

D. The Red Cross and September 11

Following the terrorist attacks on September 11, 2001, contributions poured into the Red Cross and other funds created specifically for victims of the attacks.[68] The story of the Red Cross and the September 11 contributions provides interesting commentary on the role of donor intent in the use of charitable gifts. Perceived donor intent became a key factor in the use of charitable funds, undermining legal rules that normally apply to distributions by disaster relief charities. Politicians and talk show hosts pressured the Red Cross to spend all of the funds received in response to the Septem-

64. *See id.*; *see also* Aaron Wildavsky, *Exchange Versus Grants: The Buck Case as a Struggle Between Equal Opportunity and Equal Results*, 22 U.S.F.L. REV. 841, 850 (1988) (reproducing the statement Mr. Wildavsky made in opposition to the petition for *cy pres*, in which he concludes, "I cannot see the rationale in taking the radical action of rejecting the donor's intent [that all the money be spent in Marin County]").

65. *See* Thompson, *supra* note 63, at 691–92.

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

67. *See id.*; Harvey P. Dale, The Buck Trust 7, 11 (1987), *at* http://www.nyu.edu/projects/hdale/buck%20Trust%20Article%20by%20HPD%20_1987_.pdf.

68. *See* Stephanie Strom, *Families Fret as Charities Hold a Billion Dollars in 9/11 Aid*, N.Y. TIMES, June 23, 2002, at 29. [hereinafter "*Families Fret*"]. The totals received were between $2 billion and $3 billion, and the Red Cross alone received $997.1 million. *Id.*

ber 11 attack directly on victims of September 11 because, they said, the donors intended that result.[69] In retrospect,[70] it seems likely that donor intent was more complicated.

Special rules in charity law govern the use of funds collected by disaster-relief organizations. A charitable fund created for victims of a disaster may provide for the needs of the victims of that disaster and still have money left over. A charity can distribute money for a variety of purposes related to a disaster, without regard to the financial needs of the recipient, because victims of a disaster typically have immediate needs for food and shelter that do not depend on a victim's general financial situation. However, once the charity meets the immediate needs of a disaster's victims, the charity cannot simply make outright payments to victims, regardless of financial need.[71] An individual can give money to a person without concern for financial need, but a charity cannot. Thus, a charity may accomplish the tasks for which the funds were contributed—providing for the immediate needs of victims of the disaster—without exhausting the money contributed.

Several legal options exist for surplus funds held by a disaster relief charity.[72] If the donor's intent was limited to a purpose that has been completed, the surplus funds will be treated as a resulting trust and will revert to the donor.[73] Usually a court will find that the donor intended that the gift remain in the charitable stream and not be returned to the donor. Federal tax law favors this approach because the donor will not be entitled to a charitable deduction to the extent that any surplus could be returned to the donor.[74] Assuming that a resulting trust is not applied, the options for the surplus are: (1) to use the surplus for a related purpose, through the doctrine of *cy pres*; (2) to let the same charity use the surplus for another of its purposes; or (3) to transfer the surplus to a private trust to be distributed to the same beneficiaries who benefited from the charitable trust.[75] Courts have occasionally taken the third option and permitted the distribution of

69. *See infra* text accompanying notes 88–90.

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

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

72. For a detailed explanation of the law governing the disposition of surplus disaster relief funds, see *id.* at 272–84.

73. For information on resulting trusts, see RESTATEMENT (THIRD) OF TRUSTS § 7 (2003).

74. *See* Katz, *supra* note 71, at 278.

75. *See id*. at 272–75; *see also* RESTATEMENT (THIRD) OF TRUSTS § 8, cmt. g, § 67.

surplus to victims of the disaster.[76] More commonly, a charity is permitted to use a surplus for other purposes of the charity.[77] The courts reach this answer by making assumptions about a donor's intent. If the donor contributed to a particular charity, then the donor would likely want that charity to use any surplus for its other purposes. If a donor intends some other result, then the donor will have to indicate that preference when making the gift.[78]

The legal rules that have developed for disaster relief organizations generally permit the organizations to use surplus funds for future disasters. Disaster relief organizations need to be able to respond quickly when a disaster occurs, and building a reserve to use for future disasters allows an organization to mobilize quickly. Allocating surplus funds to future disasters also allows an organization to provide its services more equitably because some disasters draw more donations than others.[79]

The donors sending money to the Red Cross in those first anguished days following September 11 did not sign gift agreements and did not send written instructions about the use of the money. They may have responded to public service announcements created by the Red Cross, but many donors probably simply wanted to do anything to help following the tragedy. Donors likely thought of the Red Cross as an appropriate recipient due to the longstanding role of the Red Cross in responding to disasters.

Prior to September 11, in keeping with the legal rules applicable to disaster-relief organizations, the Red Cross had used money not needed for a particular disaster to fund future needs.[80] The Red Cross intended to do the same thing with funds raised following September 11, but the lack of public understanding of the legal rules combined with the Red Cross's lack of clarity about its plans led to controversy.

After September 11, Red Cross solicitations sent mixed messages. Some Red Cross solicitations asked for funds for "those affected by this and other disasters" while other solicitations focused more on responding to the September 11 attack.[81] Initially, funds received by the Red Cross following September 11 went into the Red Cross's Disaster Relief Fund, a fund used to respond to all disaster relief operations.[82] Then, on September 20, the Red Cross announced the creation of a separate fund, the Liberty

76. *See, e.g.*, Doyle v. Whalen, 32 A. 1022 (Me. 1895); *see also* Katz, *supra* note 71, at 274–75.

77. *See* Katz, *supra* note 71, at 274.

78. *Id.* at 276–77.

79. *See id*. at 304–305.

80. *See id.* at 303–05.

81. *Id.* at 306–07.

82. *See id*. at 303–06 (explaining the history of the American Red Cross and the manner in which it used donations prior to September 11).

Fund, to hold all contributions it received following September 11, whether or not the donor had specifically restricted the contribution for use in connection with September 11.[83] A memorandum posted on the Red Cross website explained the creation of the fund and that the fund would be used to support Red Cross responses to future terrorist attacks as well as to aid victims of September 11.[84] The Red Cross did not otherwise publicize the broad purposes of the fund, and given later events, it appears that few people paid attention to the statement on the website.

On October 30, the Red Cross announced that it was ending solicitation of donations for the Liberty Fund.[85] In the same press release, the Red Cross explained its intention to hold some of the funds contributed as a reserve for future terrorist attacks.[86] The announcement "drew immediate criticism."[87]

Subsequent arguments about the use of the fund focused on the perceived intent of donors[88] and ignored other legal rules applicable to charitable funds, including rules applicable to surplus funds collected by disaster relief organizations. Many of those involved in the public controversy found donor intent unequivocal. The Attorney General of New York, Eliot Spitzer, announced, "I'm of the belief that most individuals, if not all individuals, who made contributions in the aftermath of Sept. 11 fully expect those contributions to benefit those affected by Sept. 11."[89] Congressman Charles F. Bass dismissed any suggestion that a statement of the broad purposes of the Liberty Fund should control donor intent, saying, "[y]ou know that if you asked Americans where they thought the money was go-

83. *Id.* at 307-09.

84. *See id*.

85. *See* David Barstow & Katharine Q. Seelye, *Red Cross Halts Collections for Terror Victims*, N.Y. TIMES, Oct. 31, 2001, at B11.

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

87. *Id.*

88. *See* Katz, *supra* note 71, at 312 (quoting TV commentator Bill O'Reilly as saying "after collecting more than $550 million from generous Americans, the Red Cross now says that some of that money will not go to the families of the terror victims *even though the donated money was given specifically for that purpose*. The Red Cross apparently believes it has the right to do other things with your donations.").

89. Barstow & Seelye, *supra* note 85; *see also* Katz, *supra* note 71, at 318 n.430 (citing *Charitable Contributions for September 11: Protecting Against Fraud, Waste, and Abuse: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 107th Cong. 33 (2001) (statement of Eliot Spitzer, New York State Attorney General)).

ing to the Liberty Fund, they thought it was going to the victims of the disaster . . . ."[90]

In contrast, officials at the Red Cross believed that donors would support a decision to create a reserve for future terrorist attacks.[91] Joshua Gotbaum, the chief executive of the September 11 Fund, noted that surveys conducted in October and November of 2001 suggested that the majority of donors to the fund "were not specifically focused on helping only the most direct victims of the attacks."[92] Donors themselves probably had varied reasons for contributing and multiple wishes for the use of the funds.

The public outcry concerning donor intent ultimately led to a decision by the Red Cross to restrict spending of the Liberty Fund to the victims of September 11.[93] This decision resulted in a variety of problems. Surplus funds will not be available for future attacks, and the Red Cross will need to ask for more contributions in the event of future disasters.[94] "Victims of September 11" was defined so narrowly that funds could not be used for some people affected by the attack.[95] And several years after September 11, people wondered whether donor intent may have been more complex than the view that funds should be spent immediately on direct victims of the attack. One donor said he had wanted the charities to create a permanent safety net and worried that the money had been spent too quickly.[96]

90. Katz, *supra* note 71, at 312–13 (citing *Charitable Contributions for September 11: Protecting Against Fraud, Waste, and Abuse: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 107th Cong. 2, 44 (2001) (statement of Rep. Charles F. Bass)).

91. *See id*. at 313.

92. *See Families Fret*, *supra* note 68.

93. *See* Katz, *supra* note 71, at 312–17.

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

95. *See* Stephanie Strom, *A Nation Challenged: Charities; Narrowly Drawn Rules Freeze Out Tens of Thousands of Indirect Victims*, N.Y. TIMES, Apr. 23, 2002, at A, *available at* http://www.nytimes.com/2002/04/23/nyregion/nation-challenged-charities-narrowly-drawn-rules-freeze-tens-thousands-indirect.html.

96. *See* Lydia Polgreen, *Three Years Later: The Charities; With Funds Winding Down, Questions Remain About Longer-Term Needs*, N.Y. TIMES, Sept. 9, 2004, at B8 (quoting Chris Burke as saying "I gave money for that exact purpose, to create a permanent safety net, . . . [b]ut that hasn't happened and now they have spent all the money.").

E. Brandeis and the Rose Art Museum

Edward and Bertha Rose made gifts of money to Brandeis University for the purpose of creating a museum of modern and contemporary art, the Rose Art Museum.[97] Letters from the University to the Roses and other documents, including the wills of Edward and Bertha Rose, state the intent and understanding on both sides that the gifts would be used for the Rose Art Museum.[98] The Roses established an endowment fund to support the museum,[99] and the will of Edward Rose states that he and Bertha "understand that Brandeis has agreed that the Rose Art Museum will be maintained in perpetuity. . . ."[100] After the university established the museum, gifts from other donors followed, including a gift from Henry and Lois Foster for a new wing for the museum, the Lois Foster Wing,[101] and gifts of art from Mr. and Mrs. Herbert Lee[102] and other collectors.[103]

In January 2009, the President of Brandeis presented a proposal to the Brandeis Board of Directors that Brandeis close the Rose Art Museum and sell the artwork.[104] The Board agreed, although later information showed that only twenty board members attended the meeting, ten members voted by phone, and fifteen board members were neither present nor informed of the agenda and did not vote.[105] Brandeis announced the decision on January 26, 2009, explaining that the decision arose in response to the "global financial crisis and the deepening national economic recession" and the

97. *See* Complaint for Declaratory Judgment Concerning the Rose Art Museum at 1, Rose v. Brandeis Univ. (Jul. 27, 2009) [hereinafter "Rose Complaint"]; Rose Complaint at Exhibit B ("[O]n August 19th, 1958, President Sacher indicated a firm initial pledge in the amount of $250,000 from Mr. and Mrs. Edward Rose for the purpose of underwriting an art gallery and museum."). Other exhibits to the complaint document further gifts.

98. *See, e.g.*, Rose Complaint, *supra* note 97, at Exhibit A. The Will of Edward Rose includes a gift of $500,000 to Brandeis as an endowment fund "to defray the expense of maintaining the Museum. . . ." The paragraph making the gift adds "the executors may in their discretion from time to time agree with Brandeis for substitute uses of said income or said Fund B, or any part thereof." The will does not give Brandeis unilateral authority to modify the restriction.

99. See *id.* at 4.

100. *Id.*

101. *See id.* at Exhibit N–Q.

102. *See id.* at Exhibit S (letters to Mr. and Mrs. Herbert C. Lee thanking them for pieces of art and listing the art given by the Lees).

103. *See* Geoff Edgers, *Museum Backers Seek Halt to Selloff*, THE BOSTON GLOBE, Jan. 28, 2009, at A1 (quoting Jonathan Novak, a museum overseer and Los Angeles art dealer who graduated from Brandeis and has given art works and money over the years, "Had I had any idea when I donated work that there was a chance they would be sold to benefit the university, I never would have donated them.") Although a donor's thoughts about a gift are not binding on a charity unless the thoughts are put into writing, when a donor contributes to an operating charity for a particular purpose, the donor assumes the charity will continue operating for that purpose. *See* text accompanying notes 136–42.

104. Rose Complaint, *supra* note 97, at Exhibit E.

105. Ellen Howards, *Cutting Off the Rose: Brandeis Not Smelling So Sweet*, ART NEW ENGLAND, Apr./May 2009, at 10, 10.

need to "focus and sustain our core academic mission. . . ."[106] In 2008, Brandeis, like many universities, faced shrinking resources. The endowment had decreased, and in addition, many of Brandeis's big donors had assets invested with Bernie Madoff.[107] Future gifts were in jeopardy, and donations had provided a significant part of the operating resources at Brandeis, perhaps more so than at other schools.

Brandeis realized that some of the artwork held in the Rose Art Museum was of great value.[108] The Association of Art Museum Directors has developed standards and a code of ethics that apply to art museums, including deaccessioning rules or guidelines.[109] These standards provide that a museum can sell art and replace it with other art that may be better for a collection, but a museum should not sell art just to raise money.[110] Brandeis appears to have decided to close the museum so that those deaccessioning rules would not apply. [111] If the art is in storage, and there is no museum director, selling the art may be easer.

Public outcry followed the decision to close the Rose, and the Attorney General indicated that it would need to review each piece of art to determine whether a donor had imposed a restriction on the art.[112] Despite expressions of concern from donors, students, and the community, in June 2009 Brandeis closed the Rose Art Museum and terminated the employment of the director.[113] Following the closure of the museum, three Overseers of the museum, all of whom were donors or legal representatives of estates of donors,[114] filed suit against Brandeis, asking for a preliminary injunction to prevent Brandeis from closing the Rose, selling any artwork,

106. Rose Complaint, *supra* note 97, at Exhibit E.

107. Allison Hoffman, *Selling the Family Jewels*, THE JERUSALEM POST, May 26, 2009. Bernie Madoff operated a Ponzi scheme that came to light in 2008. Many investors lost everything they had invested through Madoff. *See Madoff Pleads Guilty in Wall Street Swindle* http://www.pbs.org/newshour/updates/law/jan-june09/madoff_03-12.html (last visited Feb. 16, 2010).

108. The collection was estimated to be worth $350 million in 2008. *See* Howards, *supra* note 105.

109. *See* Position Paper of the Association of Art Museum Directors, *Art Museums and the Practice of Deaccessioning*, http://www.aamd.org/papers/ (last visited Mar. 12, 2010) [hereinafter "Position Paper"]; *see also* Posting of Felix Salmon to Market Movers, http://www.portfolio.com/views/blogs/market-movers/ (Jan. 30, 2009 17:06 EST).

110. *See* Position Paper, *supra* note 109.

111. *See* Salmon, *supra* note 109; Posting of Felix Salmon to Market Movers, http://www.portfolio.com/views/blogs/market-movers/ (Feb. 1, 2009 18:29 EST).

112. CultureGrrl, http://www.artsjournal.com/culturegrrl/ (Jan. 31, 2009 14:28 EST); Museum Law Blog, http://www.museumlaw.wordpress.com (Jan. 28, 2009).

113. Geoff Edgers, *Rose Closes – Temporarily – But Art Lovers Express Anguish*, THE BOSTON GLOBE, May 18, 2009.

114. Rose Complaint, *supra* note 97. The three plaintiffs are Meryl Rose, a member of the Rose family, a donor, and an Overseer of the museum; Jonathan O. Lee, a son of Mildred Lee, the Personal Representative of the Estate of Mildred Lee, and an Overseer; and Lois Foster, a donor and Executrix of the estate of Henry Foster, and an Overseer. *Id.*

or using any of the Rose endowment funds and also asking the court, in the alternative or in addition, to order Brandeis to turn over the artwork and endowment funds to the Rose Preservation Fund, Inc. or another organization "to further, as nearly as possible, the intent of Edward and Bertha Rose and of those many donors who followed their lead."[115]

The odd thing about the way Brandeis made its decision concerning the Rose Art Museum and the artwork is that the public statements do not discuss donor restrictions on the gifts that made the museum possible. The University's press release expressed gratitude "to everyone who expressed their love for art and admiration for Brandeis's academic mission by helping to create, build, and support the museum."[116] Then the press release talked about "hard choices" without reference to the fact that the donors who helped "create, build, and support the museum" made their gifts subject to purpose restrictions.[117]

In May 2009, blogger Lee Rosenbaum wrote: "One can only hope that Brandeis President Jehuda Reinharz and his supporters have come to recognize that the potential costs to the university's reputation among donors and the broader educational and cultural communities are not worth the financial benefits that might accrue from selling off valuable educational assets."[118] Perhaps they will. The Rose reopened with a new show, entitled "The Rose at Brandeis: Works From the Collection."[119] The future of the museum remains uncertain.

III. WHY CHARITIES SHOULD (AND USUALLY DO) GIVE EFFECT TO DONOR INTENT

A. Legal Duty

The law requires charities to comply with donors' restrictions. Donors' restrictions come in several different forms. A donor's restriction will typically be in the form of a purpose restriction—a direction about how a gift should be used or a limit on the possible uses of the gift. A donor may also impose a time restriction—a direction about when a gift can be used. For example, a donor might direct that a gift be spent over a ten-year period or that a gift be held as an endowment. Finally, a donor may make a gift

115. *Id.* at 11–12.

116. *Id.* at Exhibit E.

117. *Id.*

118. CultureGrrl, http://www.artsjournal.com/culturegrrl/ (May 18, 2009, 17:52 EST).

119. Sebastian Smee, *Rose Art Museum Display Justifies the Passions*, THE BOSTON GLOBE Nov. 5, 2009, at 1.

that is facially unrestricted but that the donor intends the charity to use for the charity's current purposes. The donor may not restrict the use of the gift to a particular purpose, but the donor does not expect the charity to change its purposes and divert the gift to other uses. Finally, this article discusses only donor-restricted gifts and not board-designated funds or assets. Sometimes a board of directors will set aside assets for a particular purpose. A soup kitchen might set aside funds to build a second operating facility or to create an endowment to support the charity's work. A subsequent board can change either of those restrictions pursuant to the board's general fiduciary duties to the charity. However, if a donor contributes to the building fund or the endowment fund, then the donor contributions will likely be considered donor-restricted.

The parameters of the legal rules on restricted gifts remain uncertain[120] and may differ depending on whether a charity is organized as a trust or a nonprofit corporation,[121] but the basic legal rule requires compliance with donor intent.[122] The rule lies in various duties that apply to those who manage charitable gifts.

The law of charities began in trust law,[123] and trust law concepts infuse the law of charitable organizations whether a charity is organized as a trust or as a nonprofit corporation. In recent years, the rules applicable to charitable trusts and to nonprofit corporations have been merging[124] with the application of corporate fiduciary principles to trustees of charities organized as trusts and the application of trust law modification rules to re-

120. *See* Iris J. Goodwin, *Ask Not What Your Charity Can Do for You:* Robertson v. Princeton *Provides Liberal-Democratic Insights Into the Dilemma of* Cy Pres *Reform*, 51 ARIZ. L. REV. 75, 76 (2009) ("Where charities do operate under a woefully inadequate set of laws, however, is with respect to special purpose—or restricted—gifts. The law here does little to guide (and, when necessary, police) charities in their stewarding of such gifts over time.").

121. *See* Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion Over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 694–98 (2005).

122. The Attorney General of Montana expressed dismay in a case in which the donee of a charitable easement on land simply ignored a restriction. The Attorney General stated, "The most disturbing aspect of this whole matter, however, is the complete failure of the [donee] and the Dowds [purchasers of property subject to the donated easement] to acknowledge their duty to comply with the terms of both Lowham's charitable gift of the conservation easement and the Scenic Preserve Trust." Memorandum in Support of Motion for Summary Judgment, Salzburg v. Dowd, CV-2008-0079, at 73 (Wyo. 4th Jud. Dist. Aug. 12, 2009).

123. *See* Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 597–98 (1999) (describing the development of charity law in the United States).

124. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. 1 (The American Law Institute Preliminary Draft No. 5 2009) [hereinafter PRINCIPLES] (explaining that corporate fiduciary standards are being applied to trustees as well as to directors, modification rules are increasingly similar but not entirely the same, and regulators have the same enforcement powers over both charitable trusts and nonprofit corporations).

stricted gifts to nonprofit corporations.[125] An American Law Institute project on nonprofit organizations, the Principles of the Law of Nonprofit Organizations ("ALI Principles"),[126] continues the trend of minimizing legal differences based on organizational form, although the ALI Principles note that "some differences are irreducible."[127] These differences include a few differences in the law's treatment of restricted gifts, in that the basic duty to honor a donor-imposed restriction exists in both sets of laws, but the rules on modification differ somewhat.[128]

Trust law creates a duty of obedience in the trustee to carry out the purposes of the trust.[129] When a donor makes a restricted gift to a charitable trust, the donor is imposing on the trustee the duty to carry out the terms of the restriction. A restricted gift to a charity organized as a nonprofit corporation also carries with it the duty to carry out the restriction, although cases have applied different legal rationales to reach this result.[130] In some states the charity holds the gift "in trust,"[131] and in other states the gift is not technically characterized as a trust, although the charity is bound by any restrictions imposed by the donor.[132]

125. The UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT incorporates the modification rules of *cy pres* in § 6(c) and deviation § 6(b). UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(b)-(c) (2006).

126. PRINCIPLES, *supra* note 124. This article cites to the current draft, which may be revised as the process of developing the Principles continues.

127. *Id.* at 2.

128. *See infra* text accompanying notes 144–57.

129. *See* Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43 (2008).

130. *See* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1206–09 (2007) (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 647 (1819)).

131. *See, e.g.*, *In re* Estate of Heil v. Nevada, 210 Cal. App. 3d 1503, 1510 (Ct. App. 1989) (bequest to State of Nevada for the purpose of preservation of wild horses in Nevada created a charitable trust); Chattowah Open Land Trust v. Jones, 636 S.E.2d 523, 524–26 (Ga. 2006) (devise of decedent's home and surrounding acreage to a charitable organization for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of Internal Revenue Code § 170(h) "unambiguously created a charitable trust," and decedent's failure to use the terms "trust" and "trustee" did not alter the outcome because the strict use of those terms is not required to establish a trust); State v. Rand, 366 A.2d. 183, 186, 196 (Me. 1976) (gift of land to city to be "forever held and maintained . . . as a public park" created a charitable trust); City of Salem v. Attorney Gen., 183 N.E.2d 859, 860 (Mass. 1962) (devise of land to city to be used "forever as Public Grounds" established a trust); Bankers Trust Co. v. N.Y. Women's League for Animals, 23 N.J. Super. 170, 175, 183 (App. Div. 1952) (bequest to charitable organization to be used to purchase a rural farm for the care of animals created a trust); Lewis v. Bd. of County Comm'rs, 128 N.E.2d 818, 819–20 (Ohio Ct. App. 1954) (devise of testator's residence and residue of estate to county "for the purpose of being kept, maintained and operated as a home for old ladies" created a charitable trust); Abel v. Girard Trust Co., 73 A.2d 682, 684 (Pa. 1950) ("A charitable trust is created by deed where there appears in the deed an intention that the transferee shall hold the land subject to the equitable duty to use the land for a charitable purpose.").

132. *See* Lancaster v. City of Columbus, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) ("It is settled state law that lands taken and held by a municipality as a gift for a specific purpose are subject to the law of trusts, and any use inconsistent with that intended by the dedicator constitutes a breach of

The RESTATEMENT (THIRD) OF TRUSTS states that an unrestricted gift to a charity organized as a nonprofit corporation does not create a charitable trust, but a gift restricted to a specific purpose "creates a charitable trust of which the institution is the trustee . . . ."[133] Section 400 of the ALI Principles rejects the Restatement position and instead states that a transfer to a charity does not automatically create a charitable trust.[134] Whether a restricted gift is technically characterized as a trust should not affect donor restrictions, given that the charity must abide by restrictions imposed by a donor in any event.[135]

An additional question may arise with respect to facially unrestricted gifts to a charity organized as a nonprofit corporation. A gift may not carry a specific restriction, but a donor who contributes money or assets to a charity probably assumes that the charity will use the gift for the purposes for which the charity is operating at the time of the gift.[136] A trust cannot change its purpose without authorization by a court,[137] but a nonprofit corporation can usually amend its articles of incorporation or bylaws under state statutes.[138] If a nonprofit corporation can change its purpose by

trust."); Estate of Vallery v. St. Luke's Cmty. Found., 883 P.2d 24, 28 (Co. App. Ct. 1993) (bequest for a specified charitable purpose constituted a "restricted gift" as opposed to a trust, but doctrine of *cy pres* applied); Blumenthal v. White, 683 A.2d 410, 411–14 (Conn. App. Ct. 1996) (gift of land to a city with instructions that land be used as a public park and not transferred did not create a trust "in strict sense," but "it may be so regarded," and city held land as a "quasi-trustee" and deviation doctrine applied); Sch. Dist. No. 70 v. Wood, 13 N.W.2d 153, 156 (Neb. 1944) ("a gift to a charitable corporation [for a particular purpose] is equivalent to a bequest upon a charitable trust and will ordinarily be governed by the same rules."); St. Joseph's Hosp. v. Bennett, 22 N.E.2d 305, 308 (N.Y. 1939) (while no trust arises "in a technical sense," a charitable corporation "may not . . . receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands"); Lefkowitz v. Lebensfeld, 68 A.D.2d 488, 496, (N.Y. App. Div. 1979) ("[T]he never disturbed equitable doctrine that although gifts to a charitable organization do not create a trust in the technical sense, where a purpose is stated a trust will be implied, and the disposition enforced by the Attorney General, pursuant to his duty to effectuate the donor's wishes.").

133. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003).

134. *See* PRINCIPLES, *supra* note 124, § 400(a), (b) (cross-references omitted):

> (a) A transfer to a charity does not create a charitable trust unless the settlor expresses an intent to create a charitable trust and the trustee, which may be a charity, agrees to act as trustee of that trust according to its terms.
>
> (b) A gift to a charity not made in trust transfers complete ownership to the charity, although the charity is bound by any conditions or restrictions imposed by the donor in the gift instrument.

135. The existence of a trust could affect the nature of fiduciary duties unrelated to the enforcement of a donor's restrictions. *See* PRINCIPLES, *supra* note 124, at 1–2.

136. For example, donors of artwork to the Rose Art Museum assumed that Brandeis would continue to operate the museum and would not sell the art to generate money to cover university operating expenses. *See* Edgers, *supra* note 103.

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

138. *See* REV. MODEL NONPROFIT CORP. ACT §§ 10.01–10.21 (1987), *available at* http://www.muridae.com/nporegulation/documents/model_npo_corp_act.html (last visited Mar. 28, 2010).

amending its articles, then the question is whether that change can apply to an unrestricted gift received before the change.

Some court decisions have articulated the idea that the nonprofit corporation holds the gift "on a charitable trust" and thus must carry out the implied restriction.[139] A donor would expect that, with respect to money already received, the organization would continue to use that money for the purposes for which the donor gave it—the purposes carried out by the charity at the time of the gift.[140] Other courts have held that even if the gift does not technically create a trust, the charity cannot change its purposes with respect to gifts already received.[141] The ALI Principles take the position

> that a facially unrestricted gift made to a charity having a single, narrow purpose is not viewed as a restricted gift. Rather, a donor's desire that the gift be used for a specific purpose must be expressed, in writing, in order for the recipient charity to be bound to use that gift for that purpose. [142]

Even under the ALI Principles, in many situations a written document, perhaps in the form of a solicitation from the charity,[143] will exist, so the charity must be careful about restrictions that may apply, even if the charity amends its articles of incorporation.

Under both trust law and the law of nonprofit corporations, the rules for modifying donor restrictions indicate the legal force of restrictions im-

139. *See, e.g.*, Holt v. Coll. of Osteopathic Physicians & Surgeons, 394 P.2d 932, 937 (Cal. 1964) (permitting directors of a nonprofit corporation to sue other directors for breach of trust); Queen of Angels Hosp. v. Younger, 66 Cal. App. 3d 359, 365 (Ct. App. 1977) (agreeing with the Attorney General that the nonprofit corporation held assets "impressed with a charitable trust" to operate as the articles provided and in the manner in which it had been conducting its activities); *see also* 15 PA. CONS. STAT. § 5547(a) (2006) (stating that a nonprofit corporation holds property "in trust, for the purpose or purposes set forth in its articles.").

140. For example, if a donor made a substantial gift to a local environmental organization, and then the charity changed its purpose to promote sports for children, the donor would presumably not want the gift already made to be used for sports.

141. *See* Attorney Gen. v. Hahnemann Hosp., 494 N.E. 2d 1011, 1020–21 (Mass. 1986) (stating that the charity could broaden its purposes by amending its articles, but that the charity could not use unrestricted donations received prior to the amendment for the new purposes). In *Hahnemann*, the court noted, "The Attorney General argues that the board also would violate its fiduciary duty to donors of unrestricted gifts by abandoning the purpose for which it was organized and had held itself out to the public." *Id.* at 1019 n.15. The court added: "As the Attorney General, colorfully, but no doubt correctly, observes in his reply brief, 'those who give to a home for abandoned animals do not anticipate a future board amending the charity's purpose to become research vivisectionists.'" *Id*. at 1021 n.18; *see also Holt*, 394 P.2d at 935 (stating that "charitable contributions must be used only for the purposes for which they were received in trust.").

142. *See* PRINCIPLES, *supra* note 124, § 400 cmt. (d)(3); *see also* Katz, *supra* note 121 (advocating maximum discretion for corporate boards, including discretion to change the mission of the charity).

143. Arguably, a written solicitation from a charity can be a "gift instrument" under the UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(3) cmt. (2006). The "gift instrument" definition includes written information that is stored in an electronic medium and is retrievable, so solicitation materials posted on a website could create a donor-restriction, if a donor responded to the solicitation with a gift. *Id.*

posed by donors. If a charity could ignore the restrictions, the law would not need special rules for modification of those restrictions. In trust law, the modification rules of *cy pres* and equitable deviation have long applied to charities organized as charitable trusts.[144] These rules indicate that a donor restriction can be modified only under limited circumstances and with court approval.[145] Courts have applied the rules of *cy pres* and deviation to restricted gifts held by nonprofit corporations,[146] but no direct statutory authority existed for the application of those rules.[147] The UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT (UMIFA)[148] simply states that the act "does not limit the application of the doctrine of cy pres," after the act provides that a donor or the appropriate court may release a restriction.[149] A Connecticut court asked to apply UMIFA noted that a restriction on a gift held by a nonprofit corporation might be subject to a *cy pres* action, but the court did not need to determine the application of *cy pres* in the case before it.[150]

The Uniform Law Commission[151] revised UMIFA and promulgated the UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (UPMIFA) in 2006.[152] One of the revisions incorporated the doctrines of *cy pres* and deviation from trust law directly into UPMIFA.[153] UPMIFA applies primarily to charities organized as nonprofit corporations, but only to

144. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 1 cmt. c, 67 (2003); *infra* text accompanying notes 281–310.

145. *See* RESTATEMENT (THIRD) OF TRUSTS § 67.

146. *See supra* notes 131–32.

147. The UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT states that the act "does not limit the application of the doctrine of cy pres." UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(d) (1972). A Connecticut court asked to apply the Act noted that a restriction on a gift held by a nonprofit corporation might be subject to a *cy pres* action, but the court did not need to determine whether *cy pres* applied. *See* Yale Univ. v. Blumenthal, 621 A.2d 1304, 1306 nn.4–5 (Conn. 1993).

148. Forty-seven jurisdictions adopted this act, so its rules have had wide application. The UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT has replaced the UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT in most states. As of September 2009, forty-four jurisdictions have adopted the UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT. *See* Enactment Status Map, http://www.upmifa.org/DesktopDefault.aspx?tabindex=5&tabid=68 (last visited Mar. 12, 2010).

149. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(a), (d).

150. *Blumenthal*, 621 A.2d at 1306 nn.4–5.

151. The National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission, is a national organization that develops uniform acts on state law issues for adoption by state legislatures. *See* Uniform Law Commission, www.nccusl.org (last visited Mar. 12, 2010).

152. *See* Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1288–89 (2007), (describing the history of the UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT and the development of the UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT).

153. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(b), cmt. (c) (2006) (explaining that drafters adapted language from the UNIFORM TRUST CODE § 412 (deviation) and § 413 (*cy pres*)).

funds held by those charities as institutional funds (as defined in UPMIFA).[154] Thus, the modification rules of *cy pres* and deviation apply to charitable trusts through trust law, to restrictions on funds held by nonprofit corporations through UPMIFA, and to restrictions on other assets held by nonprofit corporations through case law.[155]

The inclusion of the modification rules in UPMIFA reflects the importance of the general rule that a nonprofit corporation must give effect to donor intent. The doctrines of *cy pres* and deviation had been applied to restricted gifts held by nonprofit corporations,[156] and now the inclusion of the statutory language in UPMIFA confirms the application of these trust law rules to nonprofit corporations. In addition, the sections of UPMIFA that describe the powers of the directors with respect to investment decision making, endowment spending, and delegation all refer to the superseding power of the intent of the donor, as expressed in a gift instrument.[157]

B. From the Charity's Perspective

1. Ethical Reasons

Documents developed by organizations of fund-raising professionals and their advisors identify respect for donor intent as an important ethical principal for those who raise money on behalf of charities.[158] The underlying reason for ethical behavior with respect to fundraising is the need to maintain donor trust,[159] which could be viewed simply as in the self-interest of the charity. A charity's ability to raise money will depend on maintaining the trust of its donors. The statements of ethical principles go beyond the interest of individual charities, however, noting that the charita-

154. The UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT's definition of "institutional funds" specifically excludes "program-related assets." UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(5)(A). Thus, restrictions on artwork held by a museum or a conservation easement placed on land held in a land trust will not be subject to the Act. *See infra*, text accompanying notes 364–71.

155. *See supra* notes 131–32.

156. *Id.*

157. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3(a), 4(a), 5(a).

158. *See* Patricia F. Lewis, *Selected Materials on Ethical Considerations in Planned Giving*, 1996 ALI-ABA COURSE OF STUDY MATERIALS, CHARITABLE GIVING TECHNIQUES 277, 279–80 (reproducing A Donor's Bill of Rights, developed by the American Association of Fund-Raising Counsel, Association for Healthcare Philanthropy, Council for Advancement and Support of Education, and National Society of Fund Raising Executives, and the Statement of Ethical Principles and Standards of Professional Practice, adopted by the National Society of Fund Raising Executives (NSFRE)).

159. *See id.* at 281 (reproducing a position paper on professional compensation prepared by the NSFRE Ethics Committee in March 1992 that explains "Charities rely, in part, on voluntary donations to meet their budgets. Donor trust is of paramount importance. To earn and keep that trust, every aspect of charitable activity must be absolutely ethical.").

ble sector as a whole depends on each charity's providing its services, not to a donor, but to the societal interests the charity serves.[160] A donor will contribute to a charity if the donor is reasonably assured that the charity will carry out its side of the "contract" implicit in a donation.[161] The Standards of Professional Practice developed by the National Society of Fund Raising Executives emphasize the importance of using contributions in accordance with donors' intent, provide guidance about solicitation materials and documentation, and remind fund raisers to obtain donor consent before altering the conditions of a gift. Ensuring that "the intent of the donor is honestly fulfilled" is good practice, of course, but is also ethically correct behavior.[162] Indeed, a perception that a charity did not comply with donor intent may lead to charges of unethical behavior.[163]

2. Reduced Donations

Any charity that depends on funds raised from donors must develop and maintain good donor relations. If a donor gives the charity money for a particular project and the donor then learns that the charity has not used the money for the specified purpose, the donor will not be likely to give the charity more money. Further, an unhappy donor may share his or her dissatisfaction with other potential donors. Either by word of mouth or more publicly, a donor may discourage others from giving to the charity.[164]

The Red Cross experienced problems with "negative branding"[165] due to perceived lack of respect for donor's intent in connection with funds

160. *See id*. at 282–83.

161. *See id*. at 282. The document compares a charity seeking donations with the profit-making business and compares a commercial transaction with the gift by a donor to a charity and "the promise that the service [to someone other than the donor] for which the donor implicitly contracted will, in fact, be delivered by the charity." *Id*.; *see* Brody, *supra* note 130, at 1189 (explaining the difficulty of determining whether property law or contract law provides a better analysis for charitable gifts. Professor Brody concludes that a new term, "giftracts," provides a better way to think about the gifts).

162. *See* Lewis, *supra* note 158, at 280.

163. *See* Katz, *supra* note 71, at 312 (describing the reaction of members of Congress at two congressional subcommittee hearings held to investigate the Red Cross and its use of contributions received after September 11).

164. During his lawsuit with Princeton, William Robertson made his fight as public as possible. In an editorial he opined, "Greed, mismanagement and in some cases outright dishonesty by officials of these organizations have created doubts in the minds of many donors whether charitable giving is the best way to use scarce resources. Eventually this growing unease will exact a price." Robertson, *supra* note 23. Whether Mr. Robertson's words had any effect on other donors cannot be determined.

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

raised by the Red Cross following the September 11 attack on the World Trade Center. Concerns about the handling of donations led to criticism of the Red Cross and perhaps to reduced donations.[166]

Empirical data tying reduced future donations directly to a charity's failure to respect donor intent is limited, but the assumption that such links exist appears in many sources. [167] The emphasis on donor intent in the Standards of Professional Practice for fundraisers is linked to a primary goal of fund raising—the goal of raising more money.[168] And commentators assume that failure to respect donor intent will result in fewer donations.[169]

3. Greater Official Oversight

Charity officials often view donor intent as a cornerstone of their enforcement concerns.[170] A charity that acts in contravention of restrictions imposed by a donor may face a legal challenge brought by a state attorney general, and the attorney general may decide that control of the gift should be taken away from the charity. In the Buck Trust case, concerns over the trustee's desire to "change donor intent" led the court to remove the San Francisco Foundation as trustee.[171] Although the donor had specifically chosen the San Francisco Foundation to manage the gift, that organization

166. Newspaper articles describe, anecdotally, the frustrations of donors over the administration of Red Cross funds. *See Families Fret*, *supra* note 68 ("Many of those who donated feel that the charitable organizations have not fully honored their wishes for their contributions . . . ."); *see also* Jennifer Vigil, *Audit: Red Cross Handled Funds Properly; $5.8 Million Spent on Victims of Fires*, THE SAN DIEGO UNION-TRIBUNE, Oct. 13, 2004, at Local (reporting that contributions to the San Diego Red Cross plummeted after criticism connected with spending of money raised for a fire in 2001 but that donations had rebounded).

167. *See* Katz, *supra* note 121, at 720 (citing George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102, 1159 n.159 (2004)).

168. *See* Lewis, *supra* note 158, at 287.

169. *See* Abbinante, *supra* note 42, at 668 (stating in the introduction the author's argument that the law should protect donor intent: "The importance of this struggle is simple – society should ensure that donors' intentions are followed in order to encourage continued philanthropic activity by the wealthy."); Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1121 (1993) (stating that "disregarding donor intent will have an adverse effect on charitable giving"); Karen W. Arenson, *Spending It: Making Those Good Causes Do What the Donor Intended*, N.Y. TIMES, Aug. 24, 1997; CultureGrrl, *supra* note 118 (commenting on the Rose Art Museum); *but see* Eisenstein, *supra* note 42, at 1758–59 (noting the argument that "potential donors will keep wealth in private hands rather than create charitable trusts if they believe their wishes will not be followed strictly" but also providing some counter-arguments suggesting other reasons that donors give to charity and create foundations).

170. Although in the Barnes Foundation case, the Attorney General of Pennsylvania approved modifications that altered the donor's intent. *See supra*, text accompanying notes 49–55.

171. *See supra* text accompanying notes 64–65.

lost its role due to concerns about whether it was carrying out the donor's intent.[172]

The perception that the Red Cross planned to allocate some funds collected after September 11 in ways that might not comply with donor intent led to significant public criticism.[173] As the criticism began to build in the public arena, New York Attorney General Spitzer threatened to sue the Red Cross for misrepresentation to donors and failure to comply with donor intent.[174] In Mr. Spitzer's view, donors who contributed to the Red Cross intended "unambiguously"[175] that the funds be used for September 11 victims. Although Mr. Spitzer did not actually sue the Red Cross, the threat probably contributed to the organization's decision to limit spending of September 11 contributions to victims of the tragedy.[176]

The criticism of the Red Cross also led to congressional hearings and demands by federal and state officials that they be permitted greater monitoring authority over the Red Cross.[177] The Red Cross is a treaty obligation organization, chartered by Congress.[178] As the only charity structured in this way, the Red Cross has used its "quasi-governmental" position to avoid oversight by state attorneys general.[179] In the aftermath of September 11, both Congress and several state attorneys general demanded a greater role in monitoring the use of contributions.[180] In May 2002, Senator Charles E. Grassley, chair of the Senate Finance Committee, ordered the Red Cross to turn over a comprehensive accounting of its finances, one that specified exactly how it and its chapters raised and disbursed its money.[181] The New York Times reported that Attorney General Spitzer was working on draft legislation for Senator Grassley that would impose more stringent reporting requirements on the Red Cross.[182] In Mr. Spitzer's words, "one

172. *See id.*

173. S*ee supra* text accompanying notes 87–90.

174. *See* Katz, *supra* note 71, at 312, 316–17.

175. *Id*. at 318 n.430 (citing *Charitable Organizations' Distribution of Funds Following the Recent Terrorist Attacks Before the Oversight Subcommittee of the House of Representatives Ways and Means Committee*, 107th Cong. 33 (2001) (statement of Eliot Spitzer, New York State Attorney General)).

176. *See id.* at 314.

177. *See* Stephanie Strom, *Red Cross Is Pressed to Open Its Books*, N.Y. TIMES, June 5, 2002 [hereinafter *Red Cross is Pressed*]; Stephanie Strom, *Red Cross Works to Renew Confidence Among Donors*, N.Y. TIMES, June 6, 2002.

178. 36 U.S.C. §§ 300101–300102 (2000).

179. *Red Cross Is Pressed*, *supra* note 177.

180. *See id.*

181. Press Release, Sen. Chuck Grassley's Office, Grassley Seeks Answers on Red Cross' 9-11 Relief (June 14, 2002) (on file at http://finance.senate.gov/press/grassley/prg061402.pdf).

182. *See Red Cross Is Pressed*, *supra* note 177.

lesson we have learned is that some additional degree of accountability would be a good thing . . . ."[183]

The efforts to increase government oversight of the Red Cross relate to the peculiar position of the Red Cross as a treaty obligation organization and thus will not be broadly applicable. Nonetheless, it is reasonable to suspect that significant public criticism of a charity could lead to the involvement of regulatory officials with respect to that charity. For example, in response to concerns about spending on athletics, the Colorado state auditor sought an extensive review of the CU Foundation, the fund-raising entity created to support the University of Colorado.[184] The audit initially focused on tracking "specific donor gift transactions to ensure their proceeds have been spent in compliance with donor intent,"[185] but sought to go substantially further. A general sense on the part of the public that charities ignore donor intent could lead to new kinds of oversight at the state or federal level.

4. Legal Proceedings Against the Charity's Executives

After the Allegheny Health, Education & Research Foundation (AHERF), a Pittsburgh based hospital chain, declared bankruptcy; the attorney general of Pennsylvania discovered that funds restricted to specific charitable purposes had been used to try to keep AHERF afloat.[186] The attorney general brought charges against three executives for misusing the endowment funds.[187] The attorney general charged the chief executive

183. *Id.* The Senate Finance Committee released a Staff Discussion Draft describing "proposals for reforms and best practices in the area of tax-exempt organizations . . . ." The proposals address reporting requirements and include a proposal that organizations with gross receipts in excess of $250,000 be required to obtain an independent audit of the organization's financial statements. Senate Finance Committee, Staff Discussion Draft, at 9, http://finance.senate.gov/sitepages/2004HearingF.htm/hearings2004.htm (Mar. 2004); *see also* THE PANEL ON THE NONPROFIT SECTOR, STRENGTHENING TRANSPARENCY, GOVERNANCE, ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS: A FINAL REPORT TO CONGRESS AND THE NONPROFIT SECTOR 7 (Jun. 2005), http://www.nonprofitpanel.org/Report/final/Panel_Final_Report.pdf.

184. Todd Hartman & Kevin Vaughan, *CU Foundation Fights Audit Critic Says Stance 'Raises Suspicions' About Its Spending*, ROCKY MOUNTAIN NEWS (Denver), Feb. 16, 2005, at 6A.

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

186. Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 948–49 n.44 (2004); Arthur L. Cobb & Herbert G. Hotchkiss, *AHERF: It May Have Started with a Bang, But Did It End in a Whimper?*, 23 AM. BANKR. INST. J. 30 (2004); PR Newswire, Pennsylvania Attorney General Fisher: Former AHERF Official Pleads to Raiding Endowments; CEO sentenced 11-1/2 to 23 Months, http://www.thefreelibrary.com/Pennsylvania+Attorney+General+Fisher:+Former+AHERF+Official+Pleads+to...-a090883281 (Aug. 29, 2002).

187. The attorney general brought charges against Sherif Abdelhak, the Chief Executive Officer, Nancy Wynstra, the general counsel, and David McConnell, the Chief Financial Officer. *See* Cobb & Hotchkiss, *supra* note 186.

officer, chief financial officer, and general counsel with theft, conspiracy, and misapplication of entrusted property.[188] Many of the charges were ultimately dropped, in part because the executives had not acted for personal gain. The chief executive pleaded guilty to a second-degree misdemeanor charge for misapplication of entrusted property.[189] He served three months of an eleven to twenty-three month sentence before being paroled.[190] The attorney general then sought return of the endowment funds in the bankruptcy proceeding. The parties in the bankruptcy proceeding agreed that $22 million of the $52 million in endowments would be returned and the attorney general hoped to increase that amount. Although some people expressed concern that the penalties imposed on the executives were too light,[191] the fact that the attorney general sought criminal penalties as well as return of the funds should serve as a warning to other charity executives.[192]

C. From the Perspective of Donors and the Public

Donors want charities to give effect to any restrictions imposed by the donors, and respect for the donors' wishes matters both to the donors and to the public. In making a gift to a charity, a donor may be choosing from among different charitable and noncharitable donees. If the donor chooses to make a gift to a specific charity for a particular purpose, and restricts the gift for that purpose, then so long as the charity agrees to the restriction, the charity should carry out the donor's intent. The donor should be able to negotiate the terms of the restrictions with the charity knowing that if the charity agrees to accept the gift, the charity will comply with the restrictions.

188. *See* Brigid McMenamin, *Donor's Intent*, FORBES, May 15, 2000. In addition, donors whose funds had been misused filed suit asserting seventeen claims against members of the Executive Committee of the Board, including the three persons charged by the attorney general. Browne v. Abdelhak, No. 98-6688, 2000 U.S. Dist LEXIS 12064, at *6 (E.D. Pa. Aug. 23 2000). The donors' suit included two counts of violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). *Id*. The court dismissed all charges because the donors did not have a property interest, such as a right of reverter, in the property that had been misused. *Id*. at *14.

189. PR Newswire, *supra* note 186.

190. Cobb & Hotchkiss, *supra* note 186 (noting that the attorney general had initially brought nearly 1,500 charges against Sherif Abdelhak).

191. *See id*.; Editorial, *AHERF Whimper; Its Former CEO Is Sentenced on a Single Count*, PITTSBURGH POST-GAZETTE, Sept. 8, 2002, at B2.

192. PR Newswire, , *supra* note 186 ("'I hope this sentence sends a strong message to business leaders across Pennsylvania: You are accountable for your actions. You can't hide the financial health of your company with accounting tricks,' [Attorney General] Fisher said. 'This case was particularly egregious, because charitable dollars were used to keep the company afloat.'")

Over time a charity and even the state government, which enforces the donor's restrictions through the office of the Attorney General, may face pressure to modify a restriction for reasons of political or financial expedience. For example, political pressure may have played a role in the Barnes Foundation case because the established art community in Philadelphia supported the decision to move the museum.[193] Financial expedience certainly played a role in the Brandeis – Rose Art Museum situation.[194] A modification may be tempting in the short-run, but the legal rules should give the parties involved enough time to reflect on whether a modification is wise. Further, a charity or the Attorney General may be no better able to predict public benefit into the future than would the donor who imposed the original restriction. Thus, the public may benefit from the donor's view of an appropriate use of the gift.[195]

Restrictions on gifts involving land or artwork provide examples of situations in which public benefit may align with a donor's restriction. In the Brandeis-Rose Art Museum case, the donors intended that the artwork be displayed in a museum.[196] If Brandeis were permitted to sell the art to help with the general financial needs of the university, then private collectors might purchase the artwork. If that happened, the public would lose the benefit of being able to see the artwork. Even though the public may benefit from a sale of the artwork because the university will be in a better position financially, the donor's restriction may be a better guide to public benefit than a decision made by Brandeis.

A case involving land in Montana provides an example of the benefits of enforcing donor intent in connection with the gift of a conservation easement.[197] In 1993, the owner of a ranch in Montana gave a conservation easement over the ranch to the Johnson County, Montana, Board of County Commissioners.[198] The Board transferred the easement to the Scenic Preserve Trust, created by the Board to hold property rights in Johnson County.[199] In 1999, the original owner of the ranch sold it to Fred and

193. *See supra* text accompanying notes 48–53.

194. *See supra* text accompanying notes 112–15.

195. This article asserts that in many cases a donor's true intention may be unclear. An argument that a donor may know best works if the donor's intent can be determined, but any determination of a donor's intent should be made with a degree of skepticism. In some cases those arguing for or against modification assert donor intent without any clear knowledge of that intent. In other cases intent may in fact be clear.

196. *See supra* text accompanying notes 97–119.

197. Salzburg v. Dowd, CV-2008-0079 (Wyo. 4th Jud. Dist. Aug. 12, 2009).

198. *See* Memorandum in Support of Motion for Summary Judgment, *supra* note 122, at 2.

199. *See id*. at 5–7.

Linda Dowd, subject to all easements and other restrictions.[200] In 2001, a company owning mineral rights underlying the property informed the Dowds that it would develop coalbed methane on the property.[201] In response to a request from the Dowds, the Board transferred the conservation easement to the Dowds, which extinguished the easement.[202] The Attorney General of Montana has filed a Motion for Summary Judgment asking the court to declare the transfer of the easement null and void and direct that the easement be held in trust for the benefit of the public.[203] Without the oversight of the Attorney General, the donor's intent that the land be protected in perpetuity would have been defeated. The public would have lost the benefit of the scenic nature of the land.

Finally, rules that protect donor intent may also protect the benefits of pluralism in the charitable sector. Donors can contribute to whatever cause and for whatever purpose they choose. Charities develop for all sorts of purposes, and the pluralism of the sector leads to innovation and the opportunity for groups of people to develop nonmajoritarian ideas. The pluralism of the charitable sector makes it "a powerfully positive force in American life."[204]

IV. HOW DO WE DETERMINE DONOR INTENT?

At their core, the disputes described at the beginning of this article not only involve the question of whether a charity honored the intent of a donor, but also what the intent of the donor actually was.[205] Words in a gift agreement or solicitation can and should provide guidance regarding the intent of a donor, but words can be ambiguous and susceptible to multiple interpretations. Even words in a carefully negotiated and written gift agreement may not have a plain meaning, especially if circumstances change.[206] For some gifts, only limited written documentation of intent

200. *See id*. at 7.

201. *See id*. at 8.

202. *See id.*

203. *See id.* at 74–75.

204. *See* John W. Gardner, *The Independent Sector*, in AMERICA'S VOLUNTARY SPIRIT: A BOOK OF READINGS 4–5 (Brian O'Connell ed. 1983); *see also* Iris J. Goodwin, *Ask Not What Your Charity Can Do For You:* Robertson v. Princeton *Provides Liberal-Democratic Insights into the Dilemma of* Cy Pres *Reform*, 51 ARIZ. L. REV. 75, 122 (2009).

205. The Rose Art Museum case may be the exception; the donor's intent that the gift be used for a museum seems fairly clear. *See supra* text accompanying notes 97–119. In cases like Buck and Barnes, circumstances had changed sufficiently that some modification was necessary, but the question of how the donor's intent should guide any modifications remained.

206. John Wigmore, the evidence scholar, attacked the so-called plain meaning rule in probate law saying, "The fallacy consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth there can be only *some person's* meaning: and that person, whose meaning the law is

may exist, and arguments may involve varied understandings of what the donor intended. Donor and donee may remember a lunch conversation in distinctly different ways.[207] An additional problem may be that lawyer-drafted language—the written documentation—may not accurately reflect what the donor intended.[208]

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

This section examines several recurring problems in determining the intent of donors. Difficulty in understanding a donor's intent can arise when circumstances affecting the purpose of the gift change, when the meaning of terms used in a gift agreement changes, when a donor states a general charitable purpose without specific guidance, and when the donor gives to "endowment" without stating what that means. This section includes a discussion of how donor intent is sometimes used to advance other arguments, and then concludes with a reminder of the legal rules on determining donor intent.

A. Changed Circumstances

A donor's intent may be reasonably clear at the time the donor makes the gift. The donor may restrict the use of a gift to a particular purpose, spelling out the restriction in a gift agreement, letter, or other document. However, if circumstances affecting the purpose change over time, determining donor intent in the face of those changed circumstances may be difficult. Documentation of donor intent, through gift agreements or solicitation materials, may not resolve the questions that arise.

seeking, is the writer of the document . . . . [T]he 'plain meaning' is simply the meaning of the people who did not write the document." 9 John H. Wigmore, EVIDENCE § 2462 at 198 (James H. Chadbourn rev. 1981) (emphasis in original). If the writer is dead, which is always the case in probate law and often the case in disputes involving donor intent, then the person whose meaning counts is not available.

207. The UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT and UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT limit the legal enforceability of donor intent to written documents. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(6) (1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(3) (2006) (defining "gift instrument" to mean written documents). The Acts then use the term "gift instrument" in several sections to indicate that the Acts are subject to donor intent, as expressed in a gift instrument.

208. *See infra* text accompanying notes 228–36 (discussing the Helmsley Charitable Trust).

1. Changes Shortly After Gift Made

Sometimes a donor will not have all the relevant facts at the time the donor makes a gift, or the circumstances may change shortly after the donation. When the Herzog Foundation contributed money to Bridgeport University for nursing scholarships, neither the donor nor the university expected the nursing school to close just five years later.[209] Typically, when circumstances change that quickly, the charity will notify the donor and try to work out a modification,[210] not only for legal reasons but also because maintaining good donor relations is key to future fundraising. However, the University of Bridgeport did not immediately notify the Herzog Foundation when the nursing school closed. The university notified the foundation some months after the closure, but apparently did not propose an alternative use for the funds.[211] The foundation then sued the university to enforce the restriction, and alleged that the university had commingled the gift with its operating funds.[212] Although the court determined that the donor lacked standing to sue,[213] the university suffered the financial costs of the lawsuit as well as the negative press.

Donors making gifts to provide for victims of the September 11 attacks may have assumed that the money would be needed to help the victims meet financial needs associated with the loss of a breadwinner or the loss of a job.[214] Given the huge amount of money raised, it seems likely that some donors would have preferred that a portion of the money be set aside for future disasters. The changed circumstances (the amount of money donated) became apparent quite soon after donors made gifts, but the number of donors involved made ascertaining individual intent—and potentially modifying the purpose restriction—impossible.

When Beryl Buck drafted her testamentary charitable trust, the stock that would fund the trust had a value of around $7 million. In just ten years, the value of the trust soared to $400 million, but because the increase in value happened after Mrs. Buck died, she could not revise her gift to take into account the change in value. She might have expanded the geographic reach of her trust or made other changes had she known how much money would be involved, but when the change occurred she had no input.

209. *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 996 (Conn. 1997).

210. For the rules on modification by donor consent, see *infra* text accompanying notes 273–80.

211. *Herzog*, 699 A.2d at 996.

212. *Id.*

213. *Id.*

214. For a discussion of donor response to September 11, see *supra* text accompanying notes 87–90.

2. Changes that Develop Long After Gift Made

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

Other changed circumstances are not easy to foresee. A donor who creates a scholarship fund for students graduating from a particular high school may not consider that the high school could someday close. A fund to protect polar bear habitats may be of no use if polar bears become extinct or no longer live in the wild. Just as a donor contributing to a fund in 1900 could not have foreseen the impacts of computers, a donor in 2009 cannot imagine the world one hundred or even fifty years from now.

B. Changes in the Meaning of Terms

Questions of intent can arise because the interpretation of words changes over time. For example, imagine a 1950 gift agreement that created a fund "to support families by assisting with the costs of adoption." In the half century since the donor made the gift, the legal definitions of "family" and "adoption" have changed. Should the charitable donee interpret the terms in the gift agreement based on 1950 definitions or based on current understandings of the terms? Did the donor mean to limit the agreement to legal definitions, or did the donor intend a more general understanding of what "family" means? Did the donor intend to cover the costs of international adoptions, including the costs of the parents' travel to pick up the adoptive child? Should someone interpreting the document look beyond the written text to try to determine what a donor intended nearly sixty years ago? And even if the intent of the donor is clear, if the donor made the gift many years ago, should "dead hand control" be loosened at some point?[215]

The Robertson family's concerns about Princeton's use of the Robertson gift to support the Woodrow Wilson School may have been based, in

215. Commentators who prefer a loosening of restrictions over time refer to "dead hand control" while those who prefer continued deference to a donor's original words describe the importance of "donor intent." *See, e.g.*, Atkinson, *supra* note 129; Atkinson, *supra* note 169, at 1142–48; Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the* Cy Pres *Doctrine*, 21 U. HAW. L. REV. 353, 391 (1999).

part, on changes in the meaning of "careers in government service, with particular emphasis of the education of such persons for careers in those areas of the Federal Government that are concerned with international relations and affairs."[216] In 1960, Charles Robertson recorded some notes of conversations he had with government employees in Washington, D.C.[217] The notes indicate interest in having the Woodrow Wilson School train graduates to take jobs with federal agencies and departments, and the notes also report that scientific knowledge was of particular importance due to the Cold War with the Soviet Union.[218] Marie Robertson made her gift in 1961, but the gift remained anonymous for over ten years. When Robert F. Goheen revealed the identity of the donor at a ceremony in 1973, he noted the changes in education that had occurred and continued to occur.[219] The documents establishing the gift had not tried to define the purposes too narrowly and had been drafted broadly enough to accommodate changes in the way the Woodrow Wilson School carried out the general purposes.[220] Mr. Goheen's 1973 remarks point with pride to the fact that deans, directors, and faculty had carried forward the idea of "advanced, professional education aimed at public service careers."[221] Charles Robertson himself wrote in 1977 about the "first-rate" program at the Woodrow Wilson School.[222]

Although Charles Robertson seemed generally pleased with the Robertson Foundation, the court documents filed by the plaintiffs in the lawsuit with Princeton quote several expressions of concern by Charles over the types of jobs students graduating from the Woodrow Wilson School were taking.[223] Fewer students were going to work for the federal government then he had expected. Although students continued to pursue careers in public service, the nature of those careers changed in the years following the gift to Princeton, due to changes in the outside world.

Professor Iris Goodwin explains:

> "Almost immediately upon the establishment of the Robertson Foundation, the world changed so that employment with the U.S. government

216. *See* Certificate of Incorporation, *supra* note 9, at 3(a).

217. *See* Charles Robertson's Notes, *supra* note 7.

218. *Id.*

219. *See* June 12, 1973 Remarks by President Goheen on Unveiling of Robertson Foundation, http://www.princeton.edu/robertson/documents/docs/Pres_Goheen_remarks_6-12-73.pdf (last visited Mar. 15, 2010) ("[T]he changing requirements of a shifting world—both overseas and domestically—have forced a broader and more balanced approach as the School's graduate program has evolved.").

220. *See* Certificate of Incorporation, *supra* note 9.

221. Remarks by President Goheen, *supra* note 219.

222. *See* Charles Robertson's Letter, *supra* note 14.

223. *See* Goodwin, *supra* note 204, at 88–89 (citing various court papers filed in the case).

> held considerably less allure. At the time the gift was made, the nuclear standoff between the United States and the Soviet Union was particularly tense and the United States was not yet mired in Vietnam or embarrassed by Watergate. This soon changed. . . . Also, not to be overlooked were the new opportunities for public service available in the burgeoning arena of nongovernmental organizations. By the early 1970s, these organizations were becoming as important in international relations as were traditional government-based agencies. Finally, the nature of government had changed. The U.S. government began collaborating with nongovernmental organizations and private firms, outsourcing policy studies and other projects once the sole province of government. "Service" in "international relations and affairs" could be rendered—and was perhaps best rendered—in ways that did not directly involve the U.S. government. [footnotes deleted][224]

The nature of "careers in government service" changed over time and may have been the source of some of the concern over Princeton's management of the fund.[225]

C. Donor's Intent Stated in General Terms

A donor with substantial wealth may create a private foundation to serve the donor's charitable purposes into the future. The donor may like the status of having a foundation, may want the donor's name to continue to be associated with good works far into the future, may want to bring future generations of the family into philanthropy, and may want the donor's charitable impact spread over many years. A donor may want to retain control by using a foundation that will spread gifts to a charity over a number of years, rather than making a substantial gift to the charity on a one-time basis. A donor's control can be strengthened through the use of a foundation, but after the donor's death the ongoing activities of the foundation may raise questions about whether the foundation continues to honor the donor's intent.

Often the organizational documents used to create a foundation may state the purpose using broad, general language. A form used to create a foundation may simply track the language of Internal Revenue Code Section § 501(c)(3),[226] perhaps with recognition of the particular purposes of

224. *Id.*

225. The negotiated gift instrument did not limit the purposes of the gift to preparing students for careers in government service, *see* Certificate of Incorporation, *supra* note 9, so reliance on those particular words fails to consider the entire expression of the donor's intent. Nonetheless, changes in the types of careers entered into by graduates of the Woodrow Wilson School fueled William Robertson's arguments.

226. For example, the articles might say, "This foundation shall be organized and operated exclusively for charitable, scientific, literary, religious, and educational purposes." *See* 26 U.S.C. § 501(c) (2000).

the foundation added in a way that does not preclude changes over time.[227] The donor may prefer maximum flexibility to enable the donor and the donor's family to change the direction of the foundation over time. If so, then the broadly worded purposes should be taken at face value. In some situations, however, the lawyer may draft the organizational documents without discussing the details with the client. Lawyers typically draft flexibility into private trusts, so that future contingencies will not create difficulties for the trustee and trust beneficiaries. Lawyers drafting documents to create a foundation may do the same, providing flexibility for the foundation's managers to the extent the flexibility does not jeopardize tax benefits.

The Leona M. and Harry B. Helmsley Trust may be an example of a lawyer creating more flexibility than the donor intended. When Leona Helmsley died in 2007, her will gave the residue of her estate to the Leona M. and Harry B. Helmsley Charitable Trust, established by Ms. Helmsley on April 23, 1999.[228] The trust instrument states that the trustees "may establish and administer programs for the charitable purposes authorized by [a prior paragraph in the trust instrument] or they may, in their sole discretion, distribute the net income and principal of the Trust Fund to and among such one or more Charitable Organizations and in such amounts or proportions as the Trustees, in their sole discretion, shall determine."[229] In 2003, Ms. Helmsley wrote a "mission statement" that indicated her intentions for the trust. She gave two priorities for distributions: indigent people and dogs. A year later she crossed out the provision for indigents, so the mission statement directed the trustees to make grants for "(1) purposes related to the provision of care for dogs; and (2) such other charitable activities as the Trustees shall determine."[230] Based on the mission statement, Ms. Helmsley seems to have intended that the primary focus of the trust be on dog welfare, but the legal language does not limit the distributions to organizations that benefit dogs.

After Ms. Helmsley's death, the trustees sought instruction from the court about the legal effect the "mission statement."[231] The Surrogate Court ruled that the mission statement did not bind the trustees, based on the lan-

227. The articles or bylaws might state the broad language of section 501(c)(3), quoted in note 226, and then say, "including for such purposes . . ." or "the primary purpose of this organization shall be . . . ."

228. *See* In the Matter of the Trustees of the Leona M. and Harry B. Helmsley Charitable Trust, for Advice and Direction, No. 2968/2007 (N.Y. Surrogate's Court filed February 19, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/nyregion/20090226decision.pdf.

229. *Id.* at 2 (quoting from the trust instrument).

230. *Id.* at 1.

231. *Id.*

guage in the trust instrument giving them discretion over distributions.[232] Shortly after the court's decision, the trustees announced initial distributions from the trust. Very little went to dogs. The trustees distributed $135 million to medical centers, health care organizations, and to educational, conservation, and anti-poverty programs. They distributed $1 million to ten animal-related organizations and many of those organizations focused on human, rather than animal, welfare; for example by training guide dogs.[233] The trustees acted in a legally correct manner, but Ms. Helmsley might not have been pleased.[234]

In the case of the Helmsley trust, contemporaneous, written statements provide information about the donor's intent. For many foundations, the organizational documents may be the only written evidence of intent. Years later, the flexibility of broadly drafted purpose provisions may prove useful and may, in fact, be what the donor intended all along. The Pew Memorial Trust, for example, was established to "help meet human needs through financial support of charitable organizations or institutions in the area of education, social services, religion, health care, and medical research."[235] The wide scope of this expression of the donor's intent gives the foundation flexibility to address issues as they change over time.[236]

D. Endowments

A separate problem involving donor intent relates to gifts to endowment funds. When a donor contributes to an endowment fund, the donor may use words with imprecise meanings. The donor may direct the charity to "pay only the income" from the fund, but that direction does not clearly indicate what the donor meant because "income" does not have a single meaning. For example, income may mean trust accounting income, which traditionally did not include capital gains.[237] The UNIFORM PRINCIPAL AND

232. *Id.* at 2–3; *see also* Stephanie Strom, *Not All of Helmsley's Trust Has to Go to Dogs*, N.Y. TIMES, Feb. 26, 2009.

233. *See* Sam Roberts, *Trustees Begin to Parcel Leona Helmsley's Estate*, N.Y. TIMES, Apr. 22, 2009.

234. The trustees mentioned that the organizations chosen were ones that Mr. and Mrs. Helmsley had supported. Perhaps the distributions represent another example of following the intent of the person who made the money rather than the intent of the donor. *See infra* text accompanying notes 253–66.

235. *See* MARTIN MORSE WOOSTER, THE GREAT PHILANTHROPISTS AND THE PROBLEM OF "DONOR INTENT" 38 (Capital Research Center 1994).

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

237. *See* WILLIAM L. CARY & CRAIG B. BRIGHT, THE LAW AND THE LORE OF ENDOWMENT FUNDS: REPORT TO THE FORD FOUNDATION 30 (1969) (describing the different interpretations of "income").

INCOME ACT (UPIA) has redefined income for trust accounting purposes, so that income now includes a portion of capital gains, at least in states that have enacted UPIA.[238] Corporate income has always included realized appreciation.[239] In tax law, income depends on a realization event, and then complex rules detail whether a receipt is taxable income or not.[240]

In 1972, the Uniform Law Commission (ULC) promulgated UMIFA.[241] UMIFA created a spending rule for endowments held by nonprofit corporations.[242] A donor can always specify the donor's intent, but the drafters of UMIFA concluded that a donor who restricted spending to "income" probably did not mean that the endowment could only distribute trust accounting income.[243] UMIFA included a rule of construction to construe the donor's intent.[244] If a donor instructed a charity to "use only income" from a gift or to hold the gift "as an endowment," then the statute assumed that the donor meant that the charity could spend such amounts of appreciation above the value of the dollars contributed (the "historic dollar value" of the fund) as the charity determined to be prudent, considering the purposes of the charity.[245] UMIFA said nothing about spending income other than appreciation, and it seems likely that a fund with no appreciation can continue to spend interest and dividend income, even if the fund's value drops below its historic dollar value.[246]

In 2002, the ULC asked a drafting committee to consider revisions to UMIFA.[247] The drafting committee worked for four years, and the ULC approved UPMIFA at the ULC's annual meeting in July 2006. Concerns about the best way to protect donor intent remained a key consideration throughout the deliberations of the drafting committee.

238. UNIF. PRINCIPAL AND INCOME ACT § 102 (1997) (amended 2000).

239. *See* CARY & BRIGHT, *supra* note 237, at 27.

240. *See id.* at 29.

241. The UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT was adopted in forty-seven jurisdictions. *See* A Few Facts About the Uniform Management of Institutional Funds Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-umifa.asp (last visited Mar. 15, 2010) for a list of adopting jurisdictions.

242. *See* UNIF. MGMT OF INSTITUTIONAL FUNDS ACT § 2 (1972) (providing for the appropriation for expenditure of appreciation above historic dollar value, to the extent the appropriation is prudent under the standard provided in section 6). The Act applies to funds held by nonprofit corporations and only to trusts of which a charity is the trustee. *See id.* § 1(2) (defining "institutional fund").

243. Although the law did not clearly require a charity operating as a nonprofit corporation to follow trust law, many charities assumed that trust rules applied for purposes of endowment spending. *See* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT Prefatory Note; CARY & BRIGHT, *supra* note 237, at 5–6.

244. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 3.

245. *See id.* §§ 2, 3.

246. *See* Advice for Not-for-Profit Corporations on the Appropriation of Endowment Fund Appreciation, http://www.charitiesnys.com/pdfs/endowment.pdf (last visited Mar. 15, 2010).

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

UPMIFA changes the rule of construction for endowment spending, and discussions of what the rule should state generated a great deal of comment. Some people argued that donors intend that the historic dollar value of their gifts be protected from spending. Others argued that donors really want to preserve the purchasing power of the gift so that the value protected is not the date-of-gift value but a value reflecting changes in the real value of the fund. Still others opined that donors want a fund to continue to make distributions for the purposes chosen by the donor, even if the fund is below historic dollar value or "underwater." The drafting committee discussed and considered many views of what donors intend, nearly all of the views stated with surprising definiteness. UPMIFA adopted a new spending rule that directs a charity to spend the amount the charity determines to be prudent, after taking into consideration a list of factors.[248] The new rule provides better guidance to charities about how to determine a prudent spending amount and provides greater flexibility by allowing a charity to continue spending even if an endowment fund has fallen below historic dollar value.[249] UPMIFA emphasizes a charity's duty to carry out a donor's intent, and includes reminders that UPMIFA is a default statute that will provide direction concerning a gift only if the donor and charity do not agree to override UPMIFA.[250]

UMIFA and UPMIFA each create a rule that interprets the use of the term "income" in a gift to an endowment. The discussions that occurred during the drafting of UPMIFA demonstrated two points with respect to donor intent: (1) the use of words, even in a carefully drafted document, may not provide clear guidance on donor intent, and (2) no one rule can accurately reflect the intent of all similarly situated donors.

E. Using Donor's Intent for Other Purposes

Donor's intent can provide a convenient tool for someone unhappy about a charity's use of donated funds or just unhappy with the charity. Even if a charity continues to follow the written restrictions on the use of a gift, a family member or a person with a political axe to grind may argue violations of donor intent.

248. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4 (2006).

249. Under the UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT, a charity could continue spending interest and dividends even if a fund was below historic dollar value, *see supra* note 246, but under the UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT, a charity with an underwater fund can continue to invest on a total return basis while maintaining a prudent amount of spending. *See, e.g.*, UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4.

250. *See, e.g.*, UPMIFA § 4(a) (the section on spending from an endowment fund, which begins: "Subject to the intent of a donor expressed in the gift instrument . . . .").

1. *Robertson v. Princeton*

The Princeton case seems a prime example of this problem. William Robertson, the donor's son and lead plaintiff in the case, served on the board of the Robertson Foundation for many years. As late as 1991 he said that the foundation was "achieving the kind of goals Mom and Dad would have hoped for."[251] The determination that Princeton had violated the donor's intent came just after he lost an argument over which manager should handle the foundation's investments. Mr. Robertson had been a member of an investment committee that hired managers to handle the funds and then directly supervised the managers' performance. The two other members of the investment committee, both with professional investment experience and both with ties to Princeton, suggested that the size of the foundation made continued management by a volunteer investment committee problematic. These two committee members recommended moving the investment management to PRINCO, an investment company created by Princeton to manage all of its endowed funds. The Robertson Foundation and its investment committee would continue to oversee the management work. Mr. Robertson argued against the decision and the board delayed the change for a year while it considered other managers. Mr. Robertson began the lawsuit shortly before the final board vote to move the management to PRINCO.[252]

The parties to *Robertson v. Princeton* settled the case, so no court ruled on whether Princeton had violated any terms of the original gift. Although some expenditures may have gone beyond the directions from the donor (Marie Robertson, advised by her husband, Charles), it appears that some of William Robertson's complaints had to do with his role on the foundation board and the loss of some of his power on the investment committee.

2. Political Purposes

Martin Wooster, a historian whose work is funded, at least in part, by conservative think tanks,[253] criticizes some of the large foundations created

251. Key Issues, http://www.princeton.edu/Robertson/about/issues (last visited Mar. 15, 2010).

252. *See* Appointment of PRINCO, http://www.princeton.edu/robertson/about/princo/ (last visited Mar. 15, 2010). Jennifer Berkowitz, whose North Carolina-based firm handled public relations for the Robertson family, said two main issues led the family members to object to the way the foundation was being run and to resort to legal action in 2002. One issue was the use of $13 million for the construction of a building, Wallace Hall, and the other was the decision that PRINCO would manage the Robertson Foundation money. *See* Don McNamara, *Donor Intent the Focus of Suit*, NONPROFIT TIMES, October 1, 2008, *available at* http://www.nptimes.com/08Oct/npt-081001-2.html.

253. Martin Wooster is a senior fellow at the Capital Research Center.

in the first half of the twentieth century for ignoring the intent of their donors.[254] Mr. Wooster focuses not on written restrictions in legal documents but on the character, personality, and philosophy of the donor as the way to determine "donor intent."[255] Mr. Wooster's book provides interesting historical details about the founders of major U.S. foundations, including Carnegie, Ford, Pew, and Rockefeller, and then posits that because these foundations were created by men[256] who made their money through capitalism and strongly believed in capitalism, the projects supported by the foundations should support capitalism and, in general, take a conservative approach to philanthropy.

Taking his argument a step farther, Mr. Wooster argues that the "intent" of the person who made the money should be honored, even if that person did not create the foundation. Mr. Wooster notes that Margaret Sage created the Sage Foundation using funds she had been left by her husband, Russell Sage.[257] Mrs. Sage sought advice in creating the foundation and had those assisting her build in flexibility to deal with changes in the future.[258] Although Mr. Wooster cannot point to any direct violation of Mrs. Sage's intent, he suggests violations of "donative intent" by noting that Mr. Sage "would certainly have been horrified at what happened . . . ."[259]

Mr. Wooster's underlying concerns surface in his description of the MacArthur Foundation. Mr. Wooster explains that John D. MacArthur

254. *See* WOOSTER, *supra* note 235.

255. In one case, The J. Howard Pew Freedom Trust, created in 1957, Mr. Wooster quotes specific instructions that the trust "be used to 'acquaint the American people' with 'the evils of bureaucracy,' 'the values of a free market,' 'the paralyzing effects of government controls on the lives and activities of people,' and 'to inform our people of the struggle, persecution, hardship, sacrifice and death by which freedom of the individual was won.' Such 'forms of government' as 'Socialism, Welfare stateism [and] Fascism . . . are but devices by which government seizes the ownership or control of the tools of production.'" *See* WOOSTER, *supra* note 235, at 38. Other trusts and foundations were created with general instructions to do "good." For example, the Articles of Incorporation of the Ford Foundation state that the Foundation is organized "[t]o receive and administer funds for scientific, educational and charitable purposes, all for the public welfare . . . ." Articles of Incorporation of the Ford Foundation, http://www.fordfound.org/pdfs/about/Charter_Articles_of_Incorp.pdf (last visited Apr. 10, 2010).

256. Women created a couple of the foundations Mr. Wooster describes, but in his book he focuses on the intent of the men who made the money used to fund the foundations. In writing about *Robertson v. Princeton*, Mr. Wooster describes the gift as having been made by Charles and Marie and then discusses what Charles Robertson wanted "with his donation." With respect to the Robertson Foundation, Wooster does not mention the intent of either Marie, who owned the stock used to make the gift, or Marie's father, who made the money. *See* Martin Morse Wooster, *Robertson v. Princeton—Who Really Won?* MINDING THE CAMPUS, Dec. 11, 2008, http://www.mindingthecampus.com/originals/2008/12/robertson_v_princeton.html.

257. *See* WOOSTER, *supra* note 235, at xi.

258. *See id*. (quoting Joseph J. Thorndike, Jr., an historian who wrote about Russell Sage).

259. Mr. Wooster briefly discusses the Buck Trust, a fund created by Beryl Buck when she died. Mr. Wooster notes that "only one percent of [Beryl Buck's] wealth is to go to a cause that her father favored." *Id*. at 51–53. The suggestion again is that the intent of the person donating the money is of less concern than that of the person who originally earned the money.

created his foundation "without instructions on how his wealth should be used."[260] Mr. Wooster then complains about the foundation's failure to honor Mr. MacArthur's "intent." Mr. Wooster describes the MacArthur Foundation as a "Bastion of Liberalism"[261] and decries the fact that MacArthur "genius awards" go primarily to liberals and only occasionally to conservatives.[262] In attempting to draw inferences as to Mr. MacArthur's intent, Wooster notes that Mr. MacArthur "was a champion of free enterprise" who argued with his son, Rod MacArthur, a liberal.[263] Despite the quarrels, Mr. MacArthur named Rod as one of five board members when the senior MacArthur created the Foundation.[264] Mr. Wooster may be correct about Mr. MacArthur's personal political views, but ascribing these views to the foundation, when Mr. MacArthur did not, carries no legal weight and may not accurately reflect Mr. MacArthur's intent for the foundation.

Mr. Wooster is even more direct about his political agenda in an article written shortly after the Robertson settlement. Mr. Wooster writes:

> Conservatives tend to support donor intent, as they feel that the general law of foundations is that conservatives tend to make fortunes and liberals tend to seize the wealth conservatives made to fund their own agenda. Liberals tend to oppose donor intent, as they tend to think that donors get in the way of their efforts to spend inherited wealth on causes they prefer.[265]

Mr. Wooster ignores Princeton's argument that it had honored donor intent and that the plaintiffs were the ones attempting to undermine that intent.[266] Mr.Wooster assumes that he knows what a donor intended and that others who interpret the intent, whether the donee or even the donor's own child as in the MacArthur Foundation example, are wrong.

F. Donor's Intent Under the Law

Mr. Wooster's book highlights the question of where to look for donor's intent. Mr. Wooster traces the money and then looks at the personal

260. *Id*. at 35.
261. *Id.* at 36.
262. *Id*.
263. *Id.* at 33–36.
264. *Id.* at 35.
265. *See* Wooster, *supra* note 256.
266. *See* Key Issues, *supra* note 251; Settlement Retains Princeton's Control, *supra* note 31 (stating Princeton's position that the Robertson family had tried, through the lawsuit, to redirect Robertson Foundation assets to purposes other than those agreed to by the donor); Settlement Agreement, *supra* note 6, at 5, 7 (explaining that assets held by Princeton will be administered based on its interpretation of the donor's intent and that assets held by RFGI, the foundation controlled by the plaintiffs, will be administered based on the Robertson family's interpretation of that intent).

philosophy of the person who made the money.[267] Charity law looks instead to the documents executed at the time of the gift.[268] Susan Berresford, former president of the Ford Foundation,[269] one of the foundations Mr. Wooster criticizes, has argued that the Ford Foundation does carry out the intent of its donor, as expressed in the Foundation's charter.[270] Henry Ford created the Ford Foundation with a broad mission to make "advances in human welfare."[271] Ms. Berresford points out that "[t]he donor had total freedom as to how to write that charter, . . . [a]nd what later generations of people ascribe to that donor may or may not be correct. But what is absolutely clearly correct is what the donor said when he or she wrote the charter."[272]

V. MODIFICATION OF DONOR RESTRICTIONS

A. Donor Consent

Under UPMIFA, a charity and a donor can agree to release or modify a restriction imposed by a donor.[273] UPMIFA applies to institutional funds held by charities organized as nonprofit corporations.[274] If the donor of a gift subject to UPMIFA can be located, the charity and the donor can agree on how to modify to the terms of the gift. Under UMIFA the ability to modify is uncertain. UMIFA provides that if the donor agrees, a charity can release a restriction,[275] and if the donor cannot be found the charity can request that the court release the restriction.[276] However, UMIFA does not provide for modification, except to say that UMIFA "does not limit the application of the doctrine of *cy pres*."[277] A provision that provides for release but not modification makes no sense because a donor would nor-

267. *See also* Robert H. Bork, *Interpreting the Founder's Vision*, THE PHILANTHROPIC PROSPECT 9 (1993) ("[E]ven where a donor has not made his intentions explicit, it will usually be possible, perhaps within a wide range but a range nevertheless with limits, to determine from his life and activities what uses he would not approve.").

268. The UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT states explicitly that only written documents control. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(8) (2006). For gifts not subject to the Act, written documents provide the best evidence of intent.

269. Ms. Berresford was President of the Ford Foundation when she made these comments.

270. Tollerson, *supra* note 236.

271. *Id.*

272. *Id.*

273. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(a).

274. *See id.* § 2(5).

275. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(a) (1972).

276. *Id.* § 7(b) (stating that the charity can apply to the court if the donor's consent "cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification. . . .").

277. *Id*. § 7(d).

mally prefer to modify a restriction than to release it altogether.[278] UPMIFA changes this provision, permitting release or modification of a restriction if the donor agrees and clarifying the application of *cy pres* and deviation. Trust law does not permit a donor and a charity to modify the trust without a court proceeding.[279] Donor-agreed modification also does not apply to program-related assets held by nonprofit corporations.[280]

If a charity needs to change a restriction on a gift subject to UPMIFA, discussing the contemplated change with the donor is not only the easiest way to effectuate a legal modification, but getting the donor's approval also makes sense from a donor relations standpoint. Unfortunately, with respect to many gifts, by the time the charity needs to modify a restriction, the donor may no longer be alive. Modification with donor consent works only if the donor can consent, and the right to consent to modification does not pass to a spouse or descendants unless the gift agreement provides for that outcome. A different problem arises with multiple gifts made to a single fund. For example, a university may establish a scholarship fund to honor a professor or graduate who died. If the fund receives many donations, each of those donors would have to consent to a modification. Contacting dozens or even hundreds of donors will likely be impossible, especially if the need for modification arises years after the gifts.

B. Cy Pres and Deviation

Charitable trusts can continue in perpetuity,[281] and modifications of original trust terms may become necessary over time. For this reason, trust law developed the doctrines that permit a court to modify a restriction imposed on assets held in a charitable trust. Under carefully limited circumstances, the doctrines of equitable deviation and *cy pres* permit modification of administrative terms or the purpose, respectively, of a

278. *See* Yale Univ. v. Blumenthal, 621 A.2d 1304 (Conn. 1993). In this case, Yale sought the release of a restriction that directed that a fund be used to build a wing on the Yale Medical Center to be used for the care of the "sick poor." The issue decided by the court was whether the fund was an "institutional fund" governed by Connecticut's Uniform Management of Institutional Funds Act. An underlying issue, however, was the dissent's concern that if the Act applied then the only option for the court would be the release of the restriction rather than a modification. *Id*. at 1310 (Berdon J., dissenting). The majority opinion noted in a footnote that the Connecticut Act did not prevent the court from applying *cy pres*. *See id*. at 1306 n.5.

279. UNIF. TRUST CODE § 411 permits modification if the settlor and beneficiaries agree, but only for noncharitable trusts. UNIF. TRUST CODE § 411 (2004) (amended 2005). The UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT applies to a charitable trust if the trustee is a charity, so a trust with a charitable trustee could presumably use the modification-by-consent provision of the Act. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2.

280. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(5)(A).

281. *See* UNIF. TRUST CODE § 413; RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

charitable trust. Courts often apply trust law to charities organized as nonprofit corporations, and the doctrines of equitable deviation and *cy pres* have applied to gifts to nonprofit corporations.[282] UPMIFA now confirms that the doctrines apply to restrictions on funds held by charities organized as nonprofit corporations.[283]

1. *Cy Pres*

Cy pres, like most of trust law, is a default rule. A donor can specify what should happen to a gift subject to a purpose restriction if the purpose either is completed or becomes impracticable for the charity. Alternatively, a donor can agree to allow the charity to find a new purpose if the one specified becomes impossible. If a donor's agreement with the charity does not provide for what should happen when changed circumstances affect a purpose restriction, *cy pres* permits a court to modify the restriction, under certain circumstances.[284] A court can modify a restriction that has become illegal, impossible, or impracticable, and, in states that have adopted the UNIFORM TRUST CODE (UTC), wasteful.[285] Courts have tended to apply *cy pres* narrowly, giving significant deference to donor intent.

The common law doctrine of *cy pres* requires a finding that the donor had a general charitable intent before a court can apply *cy pres*.[286] If a court does not find a general charitable intent, the property reverts to the donor.[287] Courts typically find general charitable intent, and the doctrine then assumes that the donor would not want the donor's intent to be frozen in time but rather would want the intent to be modified and used for another charitable purpose. *Cy pres* ties the modification to the donor's intent, and a modification should be "as near as possible" to the original purpose.[288]

282. *See* UNIF. TRUST CODE § 413 cmt.

283. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(b) (*cy pres*) and § 6(c) (deviation). The Act does not apply to program-related assets. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(5)(A).

284. UNIF. TRUST CODE § 413; RESTATEMENT (THIRD) OF TRUSTS § 67. Numerous law review articles analyze the doctrine. *See, e.g.*, Atkinson, *supra* note 169; Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 877 (1997) [hereinafter *Charitable Endowments*]; Johnny Rex Buckles, *When Charitable Gifts Soar Above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 FORDHAM L. REV. 1827, 1834–37 (2003).

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

286. *See* RESTATEMENT (SECOND) OF TRUSTS § 399.

287. *See id.* at cmt. i.

288. The term probably derives from Norman French: *cy pres comme possible* – as near as possible. The Restatement suggests that courts can be relaxed in applying the "as near as possible" test. *See*

The UTC deletes the requirement that a court find general charitable intent.[289] By making this change the drafters of the UTC did not intend to undermine donor intent but rather recognized the fact that donors who make charitable gifts usually do have a general charitable intent.[290] The UTC also changed the language of modification, directing a court to apply the funds "in a manner consistent with the settlor's charitable purposes."[291] Again, the question is not whether to comply with a donor's intent but how best to do so, given the changed circumstances.

Arguments about the correct application of *cy pres* typically have both sides arguing their positions based on donor intent. In the Buck Trust case, changed circumstances affected the trustee's ability to carry out the terms of the trust.[292] The trustee asked the court to apply *cy pres* to modify the geographical restriction imposed on the trust, enlarging the restricted area from Marin County to the five counties that make up San Francisco. The Attorney General initially agreed with the trustees but then changed positions, arguing against *cy pres*.[293] The court refused to apply *cy pres*, stating that the restriction had not become impracticable and that the modification would do harm to the donor's intent. The court made other changes to the trust, including removing the San Francisco Foundation as trustee and designating certain charitable beneficiaries. The court treated these changes as mere administrative changes and not as changes going to the purposes of the trust.[294]

2. Deviation

The doctrine of equitable deviation or deviation permits a court to make changes to administrative terms of a trust.[295] Deviation is described as furthering donor intent, because a court uses the doctrine to modify a restriction when continued compliance with the restriction will impair the accomplishment of the donor's intended purpose. The UTC permits a court to modify an administrative or dispositive term of a trust if, "because of

RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d ("courts have recognized (as does the rule of this Section) that the substitute or supplementary purpose need not be the *nearest possible* but one reasonably similar or close to the settlor's designated purpose, or 'falling within the general charitable purpose' of the settler.").

289. UNIF. TRUST CODE § 413.

290. *Id.* § 413 cmt.

291. *Id.* § 413(a)(3).

292. *See supra* text accompanying notes 61–67.

293. JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 109 (3d ed. 2006).

294. Estate of Buck, 35 Cal. Rptr. 2d 442, 444 (Ct. App. 1994).

295. UNIF. TRUST CODE § 412 (2004) (amended 2005); RESTATEMENT (THIRD) OF TRUSTS § 66 (2003).

circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."[296] A charity can also ask the court to modify an administrative term "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."[297] The distinction between a purpose restriction and an administrative restriction may not be as clear as the doctrines of *cy pres* and deviation suggest. In 1869, Ebenezer Woodward died and left property to the town of Quincy, to found a school for girls.[298] His will provided that the school was "for the education of females * * * who are native born, born, I wish it to be understood, in the town of Quincy, and none other than these, to be allowed to attend this Institute . . . ."[299] In the 1960s, the school had financial difficulties due to insufficient numbers of Quincy-born girls attending the school, and the school requested modification. The court applied the doctrine of deviation to allow non-Quincy born girls to attend the school, filling spots not taken by Quincy-born girls.[300] The court determined that Mr. Woodward's primary purpose was to create a school for girls and that the modification would make continued operation of the school possible.[301] Had the court determined that the geographical restriction was central to the donor's purpose, as the court did in *Buck*, then the court might not have permitted modification under *cy pres*.

The Barnes Foundation case demonstrates the use of deviation to permit a modification that seems to go against the donor's intent.[302] In *Barnes* the court agreed to a sweeping set of changes: moving the gallery and art to downtown Philadelphia, lifting restrictions on public access and social gatherings, changing the structure of the board of trustees so that the trustees Dr. Barnes had chosen would lose control, giving positions on the board of trustees to representatives of the museums Dr. Barnes disliked, and providing that the trustees could amend the bylaws without court oversight, thus making further changes without any protection for donor intent easier.[303] The modifications solve the financial problems faced by the Barnes Foundation, but the changes fairly clearly conflict with donor intent.[304]

296. UNIF. TRUST CODE § 412(a).

297. *Id.* § 412(b).

298. *See* Dartmouth Coll. v. City of Quincy, 258 N.E. 2d 745, 747 (Mass. 1970).

299. *Id.*

300. *Id.* at 752–53.

301. *Id*. at 750.

302. *See supra* text accompanying notes 42–60.

303. *See In re* Barnes Foundation, No. 58,788, 2004 WL 2903655, at *1 (Pa. Ct. of Common Pleas Dec. 13, 2004); Eisenstein, *supra* note 42, at 1752–53.

304. *See* Schwartz & Serbaroli, *supra* note 54 (noting that the ruling to permit the Barnes Foundation to move is "[p]erhaps the strongest reason donors have been given to worry" about whether chari-

In agreeing to the changes, the court used equitable deviation rather than *cy pres*.[305] Deviation permits a court to make an administrative change rather than a change that affects a purpose restriction imposed by the donor, and the court need not find that the restriction has become "impracticable."[306] In the Barnes Foundation case, however, the court's view that the deviation was the "least drastic modification" necessary to keep the Foundation operating[307] has raised questions. A candidate for the office of Attorney General of Pennsylvania, John Morganelli, criticized the incumbent's support for the move. He argued that by refusing the fight the move, Attorney General Corbett failed to "fulfill his responsibilities to represent the public interest when it comes to charitable trusts."[308] Mr. Morganelli worried that the failure to protect Barnes' intent would discourage other donors from making charitable gifts, and he pledged to reopen the Barnes case if elected.[309] He lost the election, so plans for the move will continue.

C. Small, Old Fund Modification Without Judicial Approval

UPMIFA includes a new provision that permits a charity to apply *cy pres* on its own, after notice to the Attorney General, but without going to court.[310] The new provision only applies to a fund that is old (more than twenty years) and small (less than $25,000), and tracks the rules of *cy pres*.[311] The restriction to be modified must be unlawful, impracticable, impossible to achieve, or wasteful, and the charity must use the fund, after modifying the restriction, "in a manner consistent with the charitable purposes expressed in the gift instrument."[312]

ties will carry out their wishes); *see also* Leslie Lenkowsky, *A Risky End to the Barnes Case: Can Donor Intent now Survive in Pennsylvania?*, WSJ.com Opinion Journal, Dec. 16, 2004.

305. Curiously, the court cited to RESTATEMENT (SECOND) OF TRUSTS § 381 (1959) rather than to RESTATEMENT (THIRD) OF TRUSTS § 66 (2003). *See Barnes Foundation*, 2004 WL 2903655, at *19 n.13.

306. Pennsylvania had not adopted the UNIFORM TRUST CODE at the time the court heard the Barnes case, so the changes the UNIFORM TRUST CODE makes to the application of *cy pres* and deviation did not apply.

307. *Barnes Foundation*, 2004 WL 2903655, at *19.

308. Press Conference, *available at* http://www.barnesfriends.org/downlload/J.%20Morganelli%20Statement%20on%20the%20Barnes%20Foundation.pdf (last visited Mar. 16, 2010).

309. *Id.*

310. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(d) (2006).

311. *Id.*

312. *Id.*

VI. DONOR REACTIONS

A. Non-perpetual Foundations

In response to concerns that foundations wander from the vision of the founder, some philanthropists now choose to establish foundations that will last for a limited time, so that the donors can have direct control over spending decisions. Aaron and Irene Diamond created a foundation with a gift of $200 million and planned to spend the entire amount over a ten-year period.[313] The foundation terminated at the end of 1996, on schedule and while Irene Diamond was still alive.[314] Other examples include the Lucille P. Markey Charitable Trust, which spent $506 million in fourteen years, and the Jacobs Family Foundation, which will terminate on the death of the last to die of the founder's three children.[315]

The most famous current example of a foundation with an intentionally limited lifespan is the Bill and Melinda Gates Foundation. That foundation, created in 2000 and now with an endowment valued at $33.5 billion,[316] will spend its money and terminate within 100 years.[317] Although Bill and Melinda Gates themselves will not likely be alive when the foundation terminates, they do not want the foundation to extend long into the future. Their hope is that the foundation will tackle and solve a number of big problems and can do so in 100 years. Future philanthropists can address the problems of the future.

Donors often articulate two advantages in operating their foundations on a short-term, or at least non-perpetual, basis. A foundation operating for a fixed period of time can remain under the control of the founder or the next generation of family members.[318] In addition, by making grants more

313. *See* Tollerson, *supra* note 236.

314. *Id.*

315. *Id.* The foundation should continue to last about three decades.

316. *See* Bill & Melinda Gates Foundation Fact Sheet, http://www.gatesfoundation.org/about/Pages/foundation-fact-sheet.aspx (last visited Mar. 16, 2010). The Gates Foundation website indicates that the amount includes the gifts made to the foundation in 2006, 2007, 2008 and 2009 by Warren Buffett.

317. *See* Letter from Bill and Melinda Gates, http://www.gatesfoundation.org/about/Pages/bill-melinda-gates-letter.aspx (last visited Mar. 16, 2010).

318. *See* Andy Hoffman, *Peter Munk's Golden Rule*, THE TORONTO GLOBE AND MAIL, Apr. 12, 2008 (saying about Munk, "[a]n unabashed political conservative, he bristles at the thought of his cash being doled out by 'left-wing bureaucrats' once he's gone."); *see also Charitable Endowments*, *supra* note 284, at 894 (discussing difficulties with perpetual endowments and pointing out that "[a] perpetual charity, however, must eventually be carried out by persons other than the founder. Sometimes lost in the veneration of perpetual charities is the very real mortality of the human beings who constitute them. Donors, trustees, directors, and officers—as well as the beneficiaries and clients—all come and go, as fate and circumstances dictate. The various players making up 'the charity' have their own, possibly diverging, interests.").

quickly a foundation may be able to have a greater impact on the causes it hopes to further.[319] Peter Munk, an eighty-year-old Toronto philanthropist, adds a third advantage, that donors should have the pleasure of seeing the results of their giving. Munk says, "I think the money should be spent in front of the founder. Otherwise it becomes a bureaucratic thing and loses the excitement. Furthermore, I love being involved. Isn't that half the fun?"[320]

B. More Stringent Donor Restrictions

A donor upset about a charity's failure to follow the donor's intent with respect to a gift may respond by imposing more stringent restrictions on subsequent gifts. Paul F. Glenn was so incensed by what he saw as the University of Southern California's misuse of the funds he had contributed that he brought suit against the university.[321] Following the resolution of the lawsuit, Mr. Glenn continued to make charitable gifts but "put his beneficiaries on a short leash"[322] by creating carefully structured contracts to govern the gifts and then keeping a careful eye on the charity's use of the money.[323]

Mr. Glenn's personal experience affected his approach to charitable donations. For other donors, general concern about lack of respect for donor intent may result in greater restrictions. Shortly after the court in *Herzog* refused to grant standing to the donor to sue the University of Bridgeport over failure to comply with a restriction imposed on a gift,[324] a newspaper reported the view voiced by some advisors that the ruling would "prompt donors to structure their gifts more carefully."[325] The increases in donor restrictions that have been observed in recent years may come in part from the entrepreneurial backgrounds of donors, but may also be affected by "an emerging belief that institutions need to be scrutinized more closely."[326]

In the aftermath of the *Robertson v. Princeton* settlement, some commentators opined that donors should tighten restrictions they impose on

319. *See* Tollerson, *supra* note 236.

320. *See* Hoffman, *supra* note 318.

321. *See* Stephanie Strom, *Donors Add Watchdog Role to Relations with Charities*, N.Y. TIMES, Mar. 29, 2003, at A8; Greg Winter & Jonathan Cheng, *Strings Attached: Givers and Colleges Clash on Spending*, N.Y. TIMES, Nov. 27, 2004.

322. Winter & Cheng, *supra* note 321.

323. *Id.*

324. *See supra* text accompanying notes 211–13.

325. Arenson, *supra* note 169.

326. Winter & Cheng, *supra* note 321.

gifts. Martin Wooster suggested that the case "may well send a signal to other donors to be extremely wary of the gifts they make to colleges and universities."[327] Mr. Wooster advises those making gifts to universities to avoid perpetuity and to "make their wishes as explicit as possible."[328] Frederic Fransen, president of Donor Advising, Research & Educational Services, a donor organization, wrote in an op-ed for the *Pittsburgh Tribune-Review* that "donors must take care to spell out their intentions clearly and establish protocols for monitoring the money's use and recovering funds if it is misused."[329]

VII. DRAFTING CONSIDERATIONS AND STRATEGIES

Donors want to support charitable causes and donees want the support of donors. Both donors and donees have strong incentives to develop a clear understanding of the intended projects. Any agreement has to be acceptable to both donor and donee. A donor will not want to cause undue burdens for the donee, and the donee will not want to disappoint the donor or the donor's family by being unable or unwilling to carry out the donor's wishes. The next section discusses some strategies that lawyers representing either the donor or the donee may find helpful. This section also includes some cautions about the type of legal representation that may be counter-productive to the intent of donors.

A. Clear Statement of Intent

A gift agreement that states, as clearly as possible, the mutual understanding of the donor and donee may help prevent future disagreements. A clear statement of intent need not try to pin down every possible contingency or try to direct decisions the charity will need to make to carry out the project envisioned. Stringent donor restrictions may not serve either the donor or the donee well, and an advisor should seek a balance between an adequate explanation of the donor's wishes and sufficient flexibility to cope with changes over time. A charity must be able to exercise discretion in giving effect to donor intent.[330]

327. *See* Wooster, *supra* note 256.

328. *Id.*

329. Frederic J. Fransen, Op-Ed., *Robertson v. Princeton—A Post-Mortem*, PITTSBURGH TRIBUNE-REVIEW, Jan. 4, 2009, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/opinion/s_605481.html.

330. *See* PRINCIPLES, *supra* note 124, § 410 Rptr. Notes 1. The ALI Principles provide that a charity will be deemed to have complied with a terms in a gift instrument "if the charity reasonably implements all material requirements of the term . . . ." *See id.* § 430. The ALI Principles recognize that some level is discretion is necessary.

As a response to the problems with funds collected after September 11, the Red Cross took steps to clarify the purposes for its appeals and created a better process to establish donor intent.[331] In October 2005, the Red Cross's homepage urged visitors to donate to the Disaster Relief Fund,[332] perhaps because the Red Cross expected donations in connection with the two hurricanes, Katrina and Rita, that had caused widespread problems that fall. In January 2009, the website does not highlight any recent disasters, and the homepage simply includes a link labeled "donate."[333] That page lists five general funds, including the Disaster Relief Fund, and provides descriptions of each fund. A donor chooses a fund before continuing with the online donation process. The new web design should help to clarify donor intent and make it easier for the Red Cross to administer the funds it receives.

B. The Costs of Stricter Restrictions

More stringent donor restrictions can be detrimental to charities in a number of ways, and if restrictions hamper the work of the donees, the restrictions may also adversely affect the donors' goals. If most donors restrict their contributions to a specific project or program, the amount of unrestricted money may be insufficient to take care of the charity's existing needs.[334] As more donors choose restricted over unrestricted gifts, money to support operating expenses and general program expenses becomes harder to find.[335] The fewer restrictions placed on funds received by a charity, the greater flexibility the charity will have in meeting its operating costs, developing new programs, and managing all of its funds in an efficient manner.

331. *See* Red Cross Announces New Disaster Fundraising Practices, http://www.charitywire.com/charity15/02840.html (last visited Mar. 16, 2010).

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

333. American Red Cross, www.redcross.org (last visited Feb. 1, 2009).

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

335. *See* Strom, *supra* note 321 (quoting Art Taylor, president and chief executive of the Better Business Bureau's Wise Giving Alliance as saying, "Restricted gifts are nice, but what organizations need is money to build and support their own infrastructure, and that is increasingly hard to come by.").

Increased donor restrictions, described as a "more muscular style of philanthropy,"[336] also create costs for charities. A charity may incur costs if the charity needs to create additional internal financial controls to comply with a donor's desire for increased monitoring and reporting.[337] To the extent that more restrictions lead to more enforcement questions, a charity may incur legal fees.[338] The fundraising process itself can become more complicated and more costly. A charity may spend more time with a particular donor, developing an agreement that protects both the donor and the charity. As donors increase the level of oversight, charities are also paying more attention to gift agreements. A charity will want to avoid future disputes with a donor over compliance with the gift agreement and will want to clarify the level of power a donor can have to limit unrealistic expectations.[339] The increased donor concern about protecting the donor's intent has resulted in "some really hairy gift agreements."[340]

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

Given the concerns of William Robertson and his sisters, should a lawyer representing Marie, or Marie and Charles together, have drawn the Robertson Foundation restrictions more narrowly? Several reasons suggest that the restrictions as drafted accomplished the goals of both the donor and the donee. First, the restrictions as drafted reflect the intent of the donor at the time of the gift. Any second-guessing now, over forty years later, may misrepresent the donor's actual intent. Second, the flexibility provided in the Certificate of Incorporation allowed the graduate program at the Woodrow Wilson School to grow into a program Charles Robertson described, after sixteen years chairing the board of trustees of the Robertson Founda-

336. *Id.*
337. *Id.*
338. *See id.*
339. *See* Winter & Cheng, *supra* note 321.
340. Strom, *supra* note 321 (quoting Janet P. Atkins, chief executive of Philanthropic Advisers).

tion, as "first-rate."[341] Marie and Charles Robertson seem to have gotten the results they wanted. Third, Princeton might not have accepted the gift had the restrictions been drawn too narrowly.[342] A university will be unwilling to consider donor restrictions that infringe on academic freedom by permitting a donor to make decisions about faculty hiring or curricular development.[343] And if the Robertsons had kept control of the foundation, as Frederic Fransen suggested they should have done,[344] Princeton would not have undertaken the expansion of the Woodrow Wilson School.[345]

To demonstrate the problems that may result if a donor insists on specific gift restrictions with no flexibility for how the charity will carry out the proposed project, imagine a hypothetical gift agreement drawn along the lines of William Robertson's view of his parents' intent. The restriction might have said, "money from the Robertson Foundation will be used to train graduate students who agree to accept employment in foreign service jobs with the U.S. government."[346] To that end, "money can be used to hire professors to instruct those students, but only to hire professors appointed solely by the Woodrow Wilson School (not sharing an interdisciplinary appointment with another school at Princeton), who are government affairs practitioners."[347] Given what we know of the donor's intent from the Certificate of Incorporation and other public documents, this restriction would not have carried out Marie's intent (or Charles' intent, for that matter). First, Princeton would not have agreed to a major expansion of the graduate program under these terms.[348] As an academic institution, Princeton must have the ability to make decisions about its curricula and its faculty and cannot allow donors to control those decisions.[349] The scope of the pro-

341. *See* Key Issues, *supra* note 251 ("In 1977 . . . Charles Robertson wrote that he 'never had cause for regret' that his wife had provided support for the Woodrow Wilson School, which he described as 'first rate' and 'doing an outstanding job.'")

342. *See* Bjorklund, *supra* note 3, at 3 (explaining that the gift agreement, documented in the Certificate of Incorporation, reflected negotiations between the donor and the donee).

343. *See id.* at 6, 10.

344. *See* Fransen, *supra* note 329 ("The mistake they [the Robertsons] made was giving Princeton control of that foundation."). Gift and income tax deductions also depended on Princeton's control.

345. *See* Myers Memorandum, *supra* note 7, at 1–2.

346. *See* Complaint, *supra* note 7, at 3 (describing the mission of the Foundation as "to train government servants with particular emphasis on international affairs"); Bjorkland, *supra* note 3, at 3–4 (citing Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment re: Fiduciary Duties and Business Judgment Rule at 2, Robertson v. Princeton Univ. No. C-99-02 (July 17, 2002) for the proposition that the graduate program had failed in its mission "of recruiting, preparing and placing professional career government employees").

347. *See* Bjorklund, *supra* note 3, at 11 (describing plaintiffs arguments about the type of faculty that should be training the graduate students).

348. *See* Myers Memorandum, *supra* note 7, at 2.

349. *See* Bjorklund, *supra* note 3, at 10–12 (discussing the importance of academic freedom and academic abstention).

gram would have been much smaller—perhaps a few scholarships for graduate students—and the Woodrow Wilson School would not have grown in renown as it has. Had the donors expressed such a narrow view of their proposed project, their gift would have not been nearly as successful in training graduate students, building a world-class faculty who contribute to academic knowledge, and developing a school that serves as a resource to the government and the country.[350] Flexibility benefits both the donor and the donee.

C. Standing for Donor

Under the common law, only the state Attorney General has standing to enforce a charitable gift.[351] The Attorney General acts on behalf of the public and may view the duty as protecting the intent of the individual donor, promoting charitable bequests by ensuring that charities do not ignore restrictions placed on gifts, and ensuring that assets in the charitable stream continue to benefit the public. The third purpose on this list can sometimes be at odds with the first—protecting the intent of an individual donor—because the public may benefit if a restriction is lifted. However, protecting donor intent can benefit the public indirectly by encouraging, and not discouraging, future gifts.

Although the Attorney General may enforce donor intent, the Attorney General may choose not to investigate a case when a donor alleges that a charity has violated a restriction. Most offices have limited staff devoted to working with charitable issues and typically do not have the ability to investigate every complaint.[352] Even if the Attorney General makes an initial inquiry, the Attorney General then exercises discretion in determining which cases to bring. Thus, a donor may have a concern that will not be addressed by the Attorney General.

Although states permit standing by persons with a "special interest" in the issue, courts have interpreted "special interest" so narrowly that private persons can rarely obtain standing because of a special interest.[353] States may permit a private person to act on behalf of the Attorney General, as a relator, but relator status is rarely sought.[354] New York has permitted per-

350. For a description of the success of the graduate program at the Woodrow Wilson School, see *id.* at 3–5.

351. Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society Vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1136 (2005).

352. *See* Gary, *supra* note 152, at 1317.

353. MARION FREMONT SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 328–34 (2004).

354. *Id.* at 325.

sons with special interests in a fund to bring a suit. In *Alco Gravure, Inc. v. Knapp Foundation*,[355] the court granted standing to a successor corporation and two individual beneficiaries to enforce a restriction that required that funds be distributed to needy employees of the corporation. In *Smithers v. St. Luke's-Roosevelt Hospital Center*,[356] the court granted standing to the special administrator of the donor's estate, appointed for the purpose of bringing the suit. However, neither the special interest doctrine nor opportunities for relators are widely used and both are fact specific. Thus, neither can be relied on at the planning stage.

The UTC provides that a settlor of a charitable trust has standing to enforce a trust.[357] The UTC defines "charitable trust" to include a portion of a trust, so a donor to a charity organized as a charitable trust would have standing to enforce a restriction on a gift made by that donor.[358] Courts have sometimes applied trust rules to charities organized as nonprofit corporations, so the UTC rule may eventually apply to nonprofit corporations. A donor in Missouri recently argued "that because common law charitable trust principles have often applied to charitable corporations, newly enacted statutes addressing only charitable trusts must also apply to charitable corporations."[359] The court determined that the Missouri UTC is limited to charitable trusts and the court could not construe the statutory language to apply a UTC rule on standing to a nonprofit corporation.[360] The court noted that UPMIFA, also a new statute and one that focuses on nonprofit corporations, is silent with respect to donor standing. The court then refused to extend standing to a donor of a nonprofit corporation.[361]

A court's finding of standing is fact specific. A donor may seek to "reserve standing" for the donor, the donor's estate, or the donor's descendants by including a provision in the gift agreement giving any or all of them the power to enforce the gift. In some of her gift agreements Victoria B. Bjorklund includes a provision in which the donee charity agrees not to challenge standing if the donor, the donor's estate or the donor's descendants sue the charity. Ultimately, the court has the authority to decide whether any party has standing in a case, but usually the court will not dismiss a party unless another party challenges standing. No reported case

355. 479 N.E. 2d 752 (N.Y. 1985).

356. 723 N.Y.S.2d 426 (App. Div. 2001).

357. UNIF. TRUST CODE § 405(c) (2004) (amended 2005).

358. *Id.* § 103(4).

359. Hardt v. Vitae Found., Inc., No. WD 70525, 2009 WL 3734190, at *4 (Mo. Ct. App. Nov. 10, 2009).

360. *Id.* at *3.

361. *Id.* at *4.

has tested this type of provision, but the provision may protect standing in a legally correct way.[362]

D. Contingent Remainder to Another Charity

Given the difficulty of providing for standing for the donor and the possibility that a problem may arise well into the future when the donor is no longer alive, another strategy to make enforcement of a restriction more likely is to name another charity as a contingent beneficiary. The gift agreement could provide that if Charity A fails to carry out the restriction, then Charity B takes the gift. For example, if the restriction is a conservation easement imposed on a piece of real property, naming Charity B as the contingent beneficiary could mean that Charity B would monitor the use of the property. With real property, monitoring whether Charity A has sold or improperly developed the property would be relatively easy to do.

A gift of money to be used for a particular purpose will be more difficult to monitor. As long as Charity A holds the gift in a separate fund, determining the amount subject to the contingency is possible. The more difficult logistical problem is whether Charity B will know if Charity A has violated a restriction. Charity A might be less interested in the gift if the agreement required providing reports to Charity B, and Charity B might be uncomfortable in the role of monitoring Charity A. Nonetheless, on certain facts, a contingent beneficiary might be an effective way to protect a restriction.

E. Mediation

The donor and charity can try to explain their intentions clearly in the gift agreement, but because changes will occur over time, they could also agree to a process for resolving any disputes that arise later. A clause could require that both sides engage in mediation in good-faith and could provide a process for choosing a mediator.[363] If the donor and charity want to include a mediation clause in the agreement, they will need to decide who in addition to the donor would be able to request mediation. The question will be how far to extend the clause—to the donor's estate, the donor's spouse or partner, the donor's children, or the donor's descendants. Although the

362. Conversation with Victoria Bjorklund, lawyer representing Princeton Univ. in Robertson v. Princeton Univ., in N.Y. (Sept. 19, 2008).

363. Fred Hopengarten recommended the idea of using of alternative dispute resolution in an email to the author. Mr. Hopengarten suggested that ADR could be "a way to resolve family disputes without breaking the bond of trust that could yield later gifts to the charitable institution." Email from Fred Hopengarten (May 13, 2009) (on file with author).

donor may want to extend the right to descendants as long as any descendants exist, the charity and the donor may agree to some time limit on the right to request mediation.

A charity and a donor may prefer to include a provision that either side could request an arbitration proceeding. The clause could provide for how an arbitrator would be chosen and the circumstances under which arbitration could be used. Arbitration may provide better protection for a donor, because without the threat of litigation, a charity might fail to participate in a meaningful way in mediation. Because a donor lacks standing to enforce a restriction, an agreement to arbitrate a dispute that arises would provide the donor with some assurance that his or her wishes will be given effect as specified in the gift agreement.

F. Collaboration

The lawyer's role, on either side, is to protect the interests of the client, but the donation of a charitable gift should not be an adversarial process. A lawyer representing a charity should remember that the charity wants to encourage donor giving but that the charity should not compromise its mission in accepting a gift with too many restrictions. A university must be careful not to compromise its academic freedom: the right to control "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[364] Another type of charity may need to be careful about accepting a gift that will overwhelm the other parts of the charity's mission or accepting a gift that will otherwise adversely affect the mission.

A lawyer representing a donor should understand the donor's wishes and work with the charity to draft an agreement that explains any restrictions on the gift as clearly as possible. The lawyer must review the language of the gift agreement carefully, to avoid any unexpected interpretations. The lawyer can also explain to the donor the benefits of building some degree of flexibility into the agreement, so that the charity can respond to changing conditions in an effective and efficient manner, consistent with the donor's overarching charitable purpose. Flexibility may mean that the charity can avoid a future court proceeding to modify an unworkable restriction, and the funds that would otherwise be spent on legal fees will be available for charitable purposes the donor favors. If the donor has specific interests, such as dog welfare, the donor's lawyer should

364. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

not create so much flexibility that the charity can ignore the donor's purpose.[365]

G. Conservation Easement Amendment Clauses[366]

Conservation easements provide an example of a flexible approach to the long-term administration of charitable assets, but one that also requires state Attorney General and court oversight of any fundamental change in the donor's charitable purpose. Many conservation easements are conveyed as charitable gifts to charitable conservation organizations (typically referred to as "land trusts). A landowner donating a conservation easement will be eligible for a federal charitable income tax deduction only if, among other things, the easement is "granted in perpetuity," the conservation purpose of the easement is "protected in perpetuity," the easement is transferable only to another holder that agrees to continue to enforce the easement, and the easement is extinguishable (other than through condemnation) only in what essentially is a *cy pres* proceeding.[367]

In its recently published report on conservation easement amendments, the Land Trust Alliance (an umbrella organization for over 1,700 land trusts) recommends that land trusts negotiate with easement donors for the flexibility to amend conservation easements consistent with their stated charitable conservation purposes and memorialize that grant of discretion in the easement deeds in the form of an "amendment provision."[368] The typical amendment provision grants the holder of a conservation easement the power to agree to amendments that further, or are not inconsistent with, the charitable conservation purpose of the easement.[369] In some cases, landowners may wish to customize the standard amendment provision to preclude the holder from agreeing to amend the easement to permit certain activities on the property (such as to increase the level of residential development permitted on the property).[370] In the event a landowner refuses to grant a land trust the type of broad amendment discretion found in the standard amendment clause, the land trust can simply refuse to accept the

365. *See supra* text accompanying notes 228–36 (discussing the Helmsley Charitable Trust).

366. The author thanks Nancy A. McLaughlin for her assistance with this section.

367. Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to* The End of Perpetuity, 9 WYO. L. REV. 1, 78–79 (2009) (discussing the federal tax law requirements); *see also* UNIF. CONSERVATION EASEMENT ACT § 2 cmt. (1981); UNIF. TRUST CODE § 414 cmt. (2004) (amended 2005); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11 (2000).

368. LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS, EVOLVING PRACTICES AND LEGAL PRINCIPLES, RESEARCH REPORT 31 (2007).

369. McLaughlin & Weeks, *supra* note 367, at 43–44.

370. *Id.* at 45.

easement, or it can accept the easement knowing that its ability to amend absent attorney general and court involvement will be more circumscribed. The Land Trust Alliance's recommendation that land trusts negotiate for amendment provisions "reflects a . . . recognition that land trusts should not bind themselves to enforcing restrictions in a conservation easement deed that might, over time, conflict with the conservation purpose of the easement and the land trust's basic conservation goals."[371]

H. Examples

1. Donor-Restricted Fund as Part of the Presbyterian Foundation

The Presbyterian Foundation has posted online an agreement that can be used by a donor to create a permanent fund as part of the Presbyterian Foundation's endowment fund.[372] The donor designates a beneficiary or beneficiaries (only "Presbyterian or Presbyterian-Related Charitable Beneficiaries")[373] who will receive the "Net Income" from the fund.[374] The agreement defines net income to include "all amounts calculated pursuant to any distribution policies authorized by applicable state law,"[375] and the agreement provides that Pennsylvania law applies.[376] The donor can indicate restrictions in the section in which the donor names the beneficiary for the fund. The agreement defines restrictions as a charitable purpose specified by the donor, including the description and use of distributions and any conditions that must be met before distributions can be made.[377] A "restriction" can also indicate that distributions can include amounts additional to "net income."[378]

This Presbyterian Foundation agreement focuses heavily on the rights of the charity and the process for making the gift. Extensive sections discuss different types of property that a donor may use to make a gift and the applicable date of gift for each.[379] The agreement gives the foundation control over investment policy and investment decision-making, as well as the right to take a fee for the investment work.[380]

371. *Id.* at 47.
372. Presbyterian Foundation Permanent Fund Application and Agreement (on file with author).
373. *See id*. at V, p. 8.
374. *See id*. at I.A, p. 1.
375. *See id*.
376. *See id*. at I.A, p. 3.
377. *See id*. at I.A, p. 2.
378. *See id*. at I.A, p. 1.
379. *See id*. at I, IV, VI, pp. 2, 3 7, 9.
380. *See id*. at I.B, p. 2.

The Presbyterian Foundation agreement permits a donor to restrict the purpose of the gift, but the form gives the foundation sole authority to make decisions about modifications that may be needed. If a restriction becomes "illegal, indefinite, impractical or impossible to perform or fulfill, the Foundation may amend such Restriction to have a purpose which parallels, to the extent possible, the original intent of the Donor, and may eliminate the Restriction if the original intent of the donor cannot be fulfilled."[381] The foundation makes the decision on its own, after consultation with the appropriate governing bodies of the Presbyterian Church.[382] Presumably the foundation could consult with the donor or surviving family members, but no part of the form directs the foundation to do that.

The agreement does not feel donor-friendly, but it may not need to be. A potential donor either accepts the terms or makes a gift in a different way. In exchange for the foundation's agreement to manage the fund in perpetuity, the donor accepts the foundation's rules.

The agreement relies on Pennsylvania law to govern distributions, rather than create its own spending rules. The spending rules in the agreement will not be clear to a typical donor, who will not likely know Pennsylvania law on the subject. Again, the document feels one-sided. Donors benefit from the management ability of the charity, and in turn, the charity benefits from the gifts, without being truly bound by the restrictions.

2. Carroll College Scholarship Fund

Carroll College, in Montana, uses a straightforward form for a donor to use in creating a scholarship fund.[383] The Memorandum of Understanding (MOU) allows the donor to name the fund, to specify criteria for selection of the scholarship recipient, and to indicate who will make the selection. The MOU provides that if a need for the fund no longer exists, at some time in the future, the college can "select an appropriate use for this fund which will come as near as possible to fulfilling the wishes of the Donors." The MOU does not provide rules on investing or distributing from the fund, so Montana's UPMIFA will govern the fund in those aspects of management.

This form does a good job of covering the basics. The donor can provide some direction in the use of the fund, but the college retains the right to redirect the fund if the designated need no longer exists. The MOU does

381. *See id.*

382. *See id.*

383. Carroll Montana, Memorandum of Understanding (on file with the author).

not say who determines whether a need for the fund still exists, and whether, if a need no longer exists, the college must continue to hold the fund as a separate fund for a different use or can commingle the fund with other assets. The donor must rely on the college's good faith effort to find another appropriate use, but for a gift of this sort, the agreement does a good job of balancing the interests of the donor and the college.

3. UC Irvine's School Naming Gift Agreement

A form posted by UC Irvine would be used for a large gift, one large enough to entitle the donor to have a building named for the donor.[384] This form, as one would expect, contains provisions outlining the purposes intended by the donor and the university and addressing possible future issues.

One section of the agreement describes the purpose or purposes for each portion of the gift. The form uses a description of a $20 million gift as an example, and the example demonstrates good balance between specifying intent and providing flexibility. Parts of the gift create three endowments, one for faculty positions, one for graduate fellowships, and one for undergraduate scholarships. The donor designates the school or department for eligible recipients, and the dean of that school controls the number of awards and the criteria. The gift description then provides two current-use funds, one to be used in the dean's discretion, and one for special projects, also determined in the discretion of the dean. For this $20 million gift, $15 million will go to the three endowed funds, and $5 million will go to the two current-use funds. Thus, some funds will continue in perpetuity, but the school will be able to use some funds as needed.

The section titled "Administration of Endowment," explains how the university will manage and distribute the endowments and by making those rules part of the gift agreement, makes UMIFA or UPMIFA spending rules inapplicable to the funds.[385] The university will invest the funds on a total return basis and then distribute the amount determined under its spending rate. The agreement indicates that information about the university's investment and disbursement policies have been provided to the donors.

384. University of California, Irvine, *Gift Agreement to Name the Donor(s) Name(s) Project at the School/College of _____, available at* http://www.supportingadvancement.com/potpourri/sample_gift_agreement/sample_gift_agreement.pdf (last visited Mar. 28, 2010).

385. California adopted UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT in the fall of 2008. The agreement refers to historic dollar value and the rules that would have applied under the UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT, in force when the university drafted the form.

Thus, the donors understand how the university manages the funds and how the university determines the amount to distribute from each endowment. The agreement makes clear that spending can continue, even if the value of the fund drops below the fund's historic dollar value. The agreement also notes that the university's standard administrative fees will apply.

Finally, a section called "unforeseeable circumstances" provides as follows:

> In the unlikely event that, at some future time, it becomes impossible for any of the categories specified above for the gift to serve the specific purpose for which they were created, the Chancellor shall direct that the principal and income from any of these categories be devoted to purposes that are deemed to be the most consistent with the wishes of the Donors and, if possible, in consultation with the Donors or their heirs.

This paragraph provides for the possibility that a purpose will become impossible to achieve, and reassures the donors that any new purposes will be the ones "most consistent with the wishes of the Donors" and that the donors, if alive, or if not, their heirs,[386] will be consulted. The university can make the needed changes without going to court, but the university will consider the donors' wishes, to the extent doing so is possible.

The UC Irvine Gift Agreement provides an example of an agreement that balances the needs of the university for control of its academic functions (naming the professors to hold chairs, for example) with provisions that protect the wishes of the donors. The agreement contains both specificity and flexibility, and provides rules to avoid unnecessary legal costs if changed circumstances make a change in the purposes necessary. Arguments could arise about whether a restriction has become impossible, what purposes are most consistent with the wishes of the donors, and to what extent the Chancellor must consult with the donors, but with reasonable good faith on both sides, the agreement represents a reasonable compromise for the charity and the donor. Although lawyers like to try to pin down anything that could go wrong later, sometimes planning for every contingency is not feasible. In this case, permitting the university to modify a

386. "Heirs" may create an interpretation problem, because a donor's heirs are determined at the donor's death, and the impossibility problem and resulting need for consultation may arise after the subsequent deaths of the donor's spouse or children (most likely to be heirs) or the donor's siblings (if the donor had no spouse or children). Someone using this form might want to indicate more precisely who would be consulted. A spouse would certainly be appropriate, if the spouse were not one of the donors, and perhaps descendants rather than heirs. Limiting consultation to one generation—children—might also be appropriate and might be sufficiently reassuring to the donor. Of course, the provision is limited to situations in which consultation is "possible" so pinning down the persons to be consulted may not be necessary.

restriction may be in the best interests of the donors as well as the university, assuming good faith on the part of the university.[387]

VIII. CONCLUSION

All of the problem areas identified in this paper have one thing in common—the fact that donor intent is more elusive than the politicians and lawyers sometimes remember. A donor can try to be specific in a gift agreement, and donors increasingly want to spell out their restrictions. However, even the most specific agreement may not address future changes in every circumstance. Other donative situations may provide limited information about the intent of a particular donor. And in some situations, a charity may decide that not accepting a gift is preferable to carrying out a purpose that interferes with the mission of the charity.

Although the focus is often on donor intent, the donee-charity's role in carrying out the donor's wishes is important. Gift agreements for large gifts typically represent the end-result of negotiations between the donor and the donee. The charity's intent, and the charity's promises in the gift agreement, must be considered when trying to determine the donor's intent. Charities need donor money, but a charity must be mindful of its mission and should not accept gifts with strings that will strangle the charity and prevent the organization from doing its work. Also, charities must be able to adapt to changing circumstances over time. Stringent restrictions imposed by a donor may seem sensible at the time, but years later the charity may not be able to meet those restrictions due to changes external to the charity. Some flexibility, and trust in the charity, will better ensure that the donor's charitable interests will be met over the long-term.

If the donor and the charity have a clear understanding of the terms of a gift, later problems may be avoided. If a gift is large, both donor and donee should have legal counsel.[388] If a donor refuses professional advice and chooses to rely on the charity's own lawyers in preparing a gift agreement, the charity should document all communications with the donor.[389]

From a legal standpoint, perceived intent cannot be enforced. From a practical and political standpoint, however, perceived intent can become an

387. A lawyer for the donor might recommend against reliance on the university's good faith because a few charities have been known to disregard the interests of a donor. However, the alternative is to require the approval of the attorney general or a court, and obtaining that approval will divert money from the charitable purposes the donor favored.

388. *See* THE CHRONICLE OF PHILANTHROPY, p. 37 (Mar. 31, 2005) (quoting Jeff Comfort, senior planned planned-giving adviser at Georgetown University).

389. *See id.*

argument that influences decision-making. The difficulty is, of course, that perceptions vary depending on the goal of the person "perceiving" the donor's intent. For this reason some wealthy donors now create foundations or charitable gift funds that will terminate either before or shortly after the donor dies. Other donors are willing to leave a foundation or a charitable donee with a flexible charge, knowing that future generations will need that flexibility to deal with changing circumstances.