PERFECTING DONOR INTENT: Legal Lessons and Practical Advice

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Perfecting Donor Intent: Legal Lessons and Practical Advice

Donors who make charitable gifts with the directive to "use the gift where it is most needed" are a disappearing breed. In their place are donors who have specific visions and goals for the use of their contributions. While it is the donor's vision that drives the gift – resulting in an increasing number of large charitable gifts – charities have found the clearer the vision, the sharper the gift's edge. What happens when the charity desperately need current operating funds? What should happen when the donor's designated gift purpose is no longer viable or appropriate? What should the charity do when the gift produces more revenue than needed for the specified purpose? That's when things can get ugly, resulting in the worst case in a lawsuit, or in the best in a parting of ways between the donor (and the donor's family) and the charity. This session provides a practical and legal perspective for donors, their advisors, and charities to avoid transforming a great gift into a cautionary tale.

I. Defining the Issues in Donor Intent

A. What Is Donor Intent?

Donor intent is a malleable concept. While intent may be easy to define in the context of the here and now with the donor and gift officer in the room, it is more difficult to interpret several years down the road when the parties to the transaction are unavailable and the charitable environment has changed.

1. The Broadest Definition

In the broadest terms, "donor intent" is defined as the donor's expected outcome in making a contribution. The donor generally has expectations about that gift's use and impact when making the contribution. However, too often the donor has not thought further than the gift's immediate impact. For example, a donor may think in terms of projects or programs operating at the date of the gift, directing that gift revenue (or gift revenue and principal) be applied to that particular project. When the project goes away, or is no longer needed, the true "intent" of the gift (for example, to provide temporary housing for battered women, or to provide playground equipment for a summer camp) is not clear because only the project goals had been expressed.

2. A Legal Definition

Donor intent has legal meaning only to the extent it has been reduced to a clear, written directive accompanying the transfer of the gift. The best example is a will which is a binding legal document filed with a court becoming a part of the public record. Another example of a written directive may be a letter of conveyance bearing simply the signature of the donor and directing the use of the funds or a formal gift agreement, bearing both parties' signatures and covering the use of the funds. These documents may bear instructions on the use of the funds but may not express the expected outcome, goals, or broader purposes of the gift. Therefore, when the legal document is determined by a court with jurisdiction – often in the context of a conflict – the written instructions may not be sufficient to prevent variance from the donor's original goals.

B. The Parties Who Define Intent

While it would seem that only the donor would define his or her intent in making a gift, there are ultimately a number of parties who may have a role in that definition. The resulting interpretation of intent will depend upon the party making the determination.

1. *The Donor*: The donor originates, plans, contributes the property and completes the transaction. It is only during this process that the donor can define how the gift is to be used. Once the gift is complete, it is out of the donor's hands and he no longer has any rights to direct the use of the property. If the donor retains the right to control or direct the application of the gift assets, the gift is not complete.

2. *The Donor's Advisor*: The donor's advisory also plays an important role in defining donor intent since it is generally the advisor's job to translate the donor's goals into a completed gift and to incorporate that intent into a written gift agreement.

3. *The Charity*: The charity generally has the opportunity at the creation of the gift to clarify donor intent and ensure it is reduced to writing. The charity has significantly more influence, however, since it controls the gift after completion. A charity may be bound by a written agreement or it may choose to follow the directives relayed to it orally in the gift transaction. This "interpretative" role may ebb and flow with the transition of staff.

4. *The Attorney General*. The Attorney General of each state is generally charged with the protection of charitable interests. Conceivably, the Attorney General could weigh in to enforce the use of a gift. In practical terms, this is a rare occurrence due to manpower limitations and far more egregious issues confronting the Attorney General's office.

5. *The Courts*: The courts are the ultimate arbiter. To engage the court, however, a litigant must have standing to sue. As discussed later, many courts do not recognize a donor's right to sue once he or she has parted with the gift.

II. What Could Possibly Go Wrong? Case Studies in Erosion of Donor Intent

Cautionary tales offer an effective way to explore other people's errors before making them your own. Consider these rather public disputes between donors/donors' families and the donees.

A. The Barnes Foundation

Dr. Albert C. Barnes established the Barnes Foundation in 1922 to house his extensive Impressionist, Post-Impressionist and early Modern art collection (including many masterpieces with a collective current value of $6 billion)[1] and to educate the working class about art. The collection – which was assembled and mounted by Dr. Barnes – was located in a modest structure in Merion, Pennsylvania, a Philadelphia suburb. Dr. Barnes arranged the paintings and designed the art education curriculum himself. He did not intend to have the entity operate as a traditional museum.[2]

Dr. Barnes died in 1951. In 1991, the trustees went to court to amend the Foundation's governing documents which prevented the trustees from selling or loaning the art in the collection.[3] While the lawsuit – which cost the Foundation about $10 million in expenses – did not result in a change in the Founda-

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[1] The Foundation also owns works by Manet, Degas, Seurat, Prendergrast Titian and Picasso.

[2] According to the Foundation's press release the Foundation has a 3-year horticulture program, and a 2-year art and esthetics program with a 1-year seminar extension.

[3] Solis-Cohen, Lita, Maine Antiques Digest, March 2004 <http://www.maineantiquedigest.com/articles/mar04/barnes0304.htm>.

tion's by-laws, the Judge did allow the Foundation to take the art on tour raising about $16 million for renovations.[4]

In September 2002, the financially-strapped trustees filed another lawsuit seeking permission to move the art collection from the Merion building to a new building (to be constructed) in downtown Philadelphia; in addition, it asked the Court to allow it to expand the number of trustees from 5 – as designated by Dr. Barnes in the governing documents – to 15.[5] A consortium including the Pew Charitable Trusts, the Annenberg Foundation, and the Lenfest Foundation[6] agreed to contribute and help the Barnes Foundation raise the $100 million needed to construct the new building and a $50 million endowment to fund operations.[7]

In early 2004, the Court approved the increase in the number of Trustees, deferring the decision on the move until other options to raise funds were explored. Then, on December 13, 2004, the Court of Common Pleas of Montgomery County, Pennsylvania, Orphans' Court Division granted the Trustees' request to move the Foundation's art gallery from Lower Merion Township, Pennsylvania to a new location in downtown Philadelphia. The court's 41-page published opinion[8] acknowledged the changes ran counter to the terms of the Foundation's 1922 charter and governing documents but noted there was "no viable alternative" for the financially-compromised charity.[9] An appeal to the ruling filed by an art student at the Foundation was dismissed by the Pennsylvania Supreme Court for lack of standing.[10]

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[4] Id.

[5] Id.

[6] These foundations are all located in Philadelphia.

[7] Solis-Cohen, supra.

[8] *The Barnes Foundation,* No. 58,788 (12/13/04).

[9] Blum Debra E. Court Ruling Could Influence Restrictions Donors Place on Bequests, *The Chronicle of Philanthropy* (January 6 2005; Court Allows Barnes Foundation To Move Collection to Philadelphia, *Nonprofit Issues* December 16, 2004 – January 15, 2005 <www.nonprofitissues.com/public/features/leadfree/2004dec2-IS....>

[10] Blum Debra E. Pennsylvania's Highest Court Allows Multibillion-Dollar Art Collection to move, *The Chronicle of Philanthropy* (April 28, 2005).

[11] *The Barnes Foundation,* No. 58,788 (12/13/04).

[12] Blum Debra E., "Court Ruling Could Influence Restrictions Donors Place on Bequests," *The Chronicle of Philanthropy* (January 6, 2005; "Court Allows Barnes Foundation To Move Collection to Philadelphia," *Nonprofit Issues,* December 16, 2004 – January 15, 2005 <www.nonprofitissues.com/public/features/leadfree/2004dec2-IS....>

viable alternative" for the financially-compromised charity.[12] An appeal to the ruling filed by an art student at the Foundation was dismissed by the Pennsylvania Supreme Court for lack of standing.[13]

The Barnes Museum and its full collection are now open to the public on a daily basis on its new campus on the Benjamin Franklin Expressway in downtown Philadelphia. The Merion campus operates as The Barnes Arboretum.

B. The Robertson Foundation Lawsuit Against Princeton

Charles S. and Marie H. Robertson[14] contributed $35 million in A & P stock to Princeton University in 1961 to create a supporting organization to fund the Woodrow Wilson School of Public and International Affairs "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."[15] Specifically, they wanted to produce high-level foreign diplomats. The Foundation has provided a substantial portion of the operating budget of the Woodrow Wilson School of Public and International Affairs at Princeton, but has also funded other budgets, including a $13 principal distribution to build Wallace Hall, a building designed to house the expansion of the Woodrow Wilson School as well as other school programs.

During his lifetime, Mr. Robertson became unhappy with the low number of foreign service graduates graduating from the Woodrow Wilson School writing a letter to Princeton in 1972. The school responded saying the world had changed. The ratios continued to decline.

The Robertsons died in 1972 (Marie) and 1981 (Charles). In July 2002, their son William S. Robertson, his sisters Katherine Ernst and Anne Meier, and cousin Robert Halligan – also unhappy about the application of Foundation funds – filed a lawsuit to redirect funds to other universities that could fulfill the donors' goals. The suit alleged the school intentionally violated the donors' intent and claimed Princeton was engaged in self-dealing with regard to the Foundation's investments and distribution of funds.[16] The lawsuit involved numerous depositions and other discovery, costing Princeton over $40 million in expenses through December 2008 when the suit was settled.[17] The settlement required Princeton to transfer $90 million plus interest to the Foundation.[18]

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[13] Blum Debra E., "Pennsylvania's Highest Court Allows Multibillion-Dollar Art Collection to Move," *The Chronicle of Philanthropy* (April 28, 2005).

[14] Mrs. Robertson was the daughter of the founder of the A & P grocery chain.

[15] The language setting out the Foundation's purpose is taken from its Certificate of Incorporation. To provide context, in 1961 the U.S. and Russia were engaged in a cold war, the United States was involved in Vietnam, and President Kennedy was asking American to "ask not what your country can do for you – ask what you can do for your country."

[16] The Funds are managed by the Harvard Management Company.

[17] Hathirimani, Raj, "Robertson Lawsuit Most Expensive in University History," *The Daily Princetonian*, www.dailyprincetonian.com (November 19, 2004); the lawsuit was settled on December 10, 2008 and approved by the court on December 12, 2008.

[18] "Robertson Lawsuit Settled," http://paw.princeton.edu/issues/2009/01/28/pages/7658/index.xml.

C. *Howard v. Administrators of the Tulane Educational Fund*

From 1886 to 1901, Josephine Louise Newcomb contributed over $3.6 million to create the Sophie Newcomb College in Tulane University to advance "the cause of female education in Louisiana." The gift, worth approximately $75 million in today's dollars, established the first separate college for women in a university in the United States. After Katrina temporarily closed Tulane in the Fall of 2005, the Trustees voted to merge Newcomb College into Tulane and to absorb its endowment.

Two heirs of Josephine Newcomb – Parma Howard and Jane Smith – filed suit to enforce Ms. Newcomb's intent in maintaining a separate college. The district court judge dismissed the Newcomb heirs' lawsuit holding they had no standing to enforce the gift; *19* this ruling was affirmed by Louisiana Fourth Circuit Court. [20] The heirs appealed, and on July 1, 2008, the Louisiana Supreme Court vacated the dismissal and remanded the case to the trial court to allow the descendants of Ms. Newcomb to proceed with the lawsuit to enforce the gift's terms. In August 2008, a second lawsuit was filed in the district court of the Parish of Orleans by another Newcomb descendant, Susan Henderson Montgomery, also seeking to enforce the terms of the gift.[21] Ms. Montgomery filed a Motion for Summary Judgment with the Civil District Court in New Orleans which was denied in August 2009. Ms. Montgomery appealed, and in October 2010 the Fourth Circuit Court of Appeals in a 3-2 decision denied the appeal finding "Ms. Newcomb's will created an unconditional bequest to the Administrators of the Tulane Educational Fund."[22] The case history and court filings can be found at www.newcomblives.com.

D. *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*

In 1913, the Tennessee Division of the United Daughters of the Confederacy entered into the first of a series of gift agreements with George Peabody College for Teachers ("Peabody College") to raise $50,000 for the construction of a dormitory, a portion of which would provide rent-free housing for students of Confederate ancestry. The agreements spelled out key restrictions on the gift, including the requirement the dormitory bear the name of "Confederate Memorial Hall." The dormitory was completed in 1935, and for many years Peabody College, and Vanderbilt University following its merger with Peabody, abided by the terms of the gift. In 2002, however, Vanderbilt's President decided to rename the building (feeling "Confederate" created a marketing problem for the University).

The United Daughters of the Confederacy, who were not consulted about or informed of the change, filed a lawsuit to compel Vanderbilt to honor the terms of the gift agreement. At trial, the court granted Vanderbilt's motion for summary judgment finding the obligation to comply with the gift agreements was "impractical and unduly burdensome." The Court of Appeals of Tennessee, however, reversed the trial court and upheld the gift agreement.[23] It gave Vanderbilt two choices: 1) either abide by the

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19 Howard v. Administrators of the Tulane Educational Fund, unreported, Civil District Court, Orleans Parish, No. 2006-4200, Div. B-15.

[20] *Howard v. Administrators of the Tulane Educational Fund*, 970 So. 2nd 21 (Ct. App. 4th Cir. October 22, 2007).

[21] *Montgomery v. Administrators of the Tulane Educational Fund*, unreported, Civil District Court, Orleans Parish, No. 08-8619, Div. B-I.

[22] This lawsuit is still unfolding and further developments may have occurred after this article was written. Please check for recent developments at www.newcomblives.com.

[23] *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*, 174 S. W. 3rd 98, 203 Ed. Law Rep. 396 Ct.App., 2005.

terms of the agreements between the United Daughters of the Confederacy and Peabody College; or 2) return the present value of the original gift to the United Daughters of the Confederacy. Vanderbilt decided not to appeal the decision and to honor the gift terms.

E. *Fisk University v. Georgia O'Keeffe Foundation*

In 1949, Georgia O'Keeffe, the widow of Alfred Stieglitz (and executrix of his estate), transferred the Alfred Stieglitz collection of 97 photographs and paintings to Fisk University in Nashville, Tennessee subject to a restriction that Fisk University would not at any time sell or exchange the pieces of the collection. Ms. O'Keeffe then contributed four additional pieces that were part of her personal collection for a total of 101 pieces. In 2005 Fisk University filed a petition in the Chancery Court of Davidson County asking the court to invoke the legal doctrine of *cy pres* to permit the sale of two of the paintings in the college citing the cost of maintaining the collection and other financial needs. The Georgia O'Keeffe Foundation originally filed to block the action; in 2006, the Georgia O'Keeffe Museum filed a petition, granted by the Court, to substitute the Museum for the Foundation, alleging the Museum was Georgia O'Keeffe's successor in interest and seeking through counterclaim to have the collection transferred to the Museum through right of reverter. In 2007, the Tennessee Attorney General was permitted to join the proceedings to protect the interests of the people of Tennessee.

A settlement with the Georgia O'Keeffe Museum involving a sale of several of the paintings was rejected, as was an outside offer from Crystal Bridges – Museum of American Art, Inc. involving the purchase of an undivided 50% interest that would allow the Crystal Bridges Museum and Fisk to share the college. In a pre-trial motion, the Court ruled the *cy pres* doctrine was not applicable because O'Keeffe had specific rather than general charitable intent when she transferred the collection to Fisk and that the Court had the power to order reversion if the Georgia O'Keeffe Museum could demonstrate Fisk breached the gift conditions. Following trial, the Court ruled that none of Fisk's actions had yet violated the gift terms and imposed an injunction that Fisk comply with the gift terms. Fisk appealed,[24] and in July, 2009 the Court of Appeals reversed the Trial Court's determination the Georgia O'Keeffe Museum had standing to sue finding the Museum had no right of reversion in either the 97 pieces transferred to Fisk from Mr. Stieglitz's Estate by Ms. O'Keeffe using her power of appointment, or the four pieces from Ms. O'Keeffe's personal collection gifted to Fisk.[25] The Court also found the Trial Court erred in dismissing the University's petition for *cy pres* relief after determining *cy pres* was not applicable because Ms. O'Keeffe's charitable intent was specific rather than general. The Trial Court did not determine *cy pres* relief was appropriate, but remanded the petition to the Trial Court for that determination.[26]

Finally, after six years of litigation, the Davidson County Chancery Court allowed the University to sell a fifty percent interest in the Stieglitz Art Collection to Crystal Bridges Museum in Bentonville, Arkansas for $30 million. The two entities will share the collection in two-year shifts.

III. The Issues and Options

Let's assume the donor completes a gift and the charity fails to honor the terms of the arrangement. Or, the donor's family watches the charity veer from the directed use of ancestral gift funds. Can that donor or family take action? They may do so only if they have a mechanism to express that voice or standing to sue.

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[24] A copy of the appeal can be found on the Tennessean website at http://www.tennessean.com/assets/pdf/DN115593814.PDF.

[25] Slip Copy, 2009 WL. 2047376, Tenn. Ct. App., July 14, 2009 (No. M200800723 COAR3CV).

[26] *Supra.*

A. The Concept of Standing To Sue

"Standing to Sue" in the broadest terms means a plaintiff – the individual or entity bringing a lawsuit against another – must have a nexus to the action or stake (harm or potential harm) in its outcome. Otherwise, that individual or entity has no right to advance the lawsuit.

1. The Three Requirements for Standing to Sue

There are three constitutional requirements for standing to sue:[27]

i. The party filing the lawsuit must have an actual or imminent injury.
ii. The injury must be caused by the person or entity against which the suit is brought.
iii. And the court must have the ability to redress (make it right or remedy) the injury.

A plaintiff can only raise personal rights – he or she can not file suit on behalf of someone else's rights.

2. The Complication for Donors: Completed Gifts Require a Relinquishment of All Rights

Donors receive a charitable deduction for a contribution to a qualified charitable entity if six gift conditions are met:[28]

(1) The donor is competent;
(2) The gift is to a qualified charitable entity that is capable of accepting the gift;
(3) There is clear donor intent to "absolutely and irrevocably divest himself of title, dominion, and control" of the gifted property;
(4) There is an irrevocable, complete transfer of the gift to the charity (donor can no longer exercise dominion and control);
(5) The gift is delivered to the charity; and
(6) The gift is accepted by the charity.

The problem is obvious – if the donor has given up all rights in a gift, does he or she (or the descendants of that donor) have any right to file suit against the charity? Does that donor have standing?

3. The Court's Perspective

For many years, courts have held that donors who make a gift have released all rights in that gift and therefore, have no standing to sue. This principal, arising from the common law, is based on the principal that the donor has relinquished all rights in the property. In a case typical of the court's approach, the Carl H. Herzog Foundation filed to recover a portion of a $250,000 grant made to the University of Bridgeport designated for medical education scholarships claiming the University had used the funds for another purpose. The court found the donors had no standing to sue. The court noted the donors would have had an actionable claim if the donor had included language had been in the gift agreement granting them the right to enforce the restrictions through litigation. (The court also observed the right to enforce the use of the funds might have represented enough control over the contributed

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[27] *Allen v. Wright*, 468 U.S. 737 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[28] IRC §170(a).

funds to deny them a deduction for the gift.)[29] In that opinion the court stated:

> "At common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so. Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the attorney general, to devote the property to that purpose. . . . At common law, it was established that equity will afford protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation. . . . The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are [enforceable] at the instance of the attorney general. . . . It matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift." (Citations omitted) "The donor himself has no standing to enforce the terms of his gift when he has not retained a specific right to control the property, such as a right of reverter, after relinquishing physical possession of it. . . . As a matter of common law, when a settlor of a trust or a donor of property to a charity fails specifically to provide for a reservation of rights in the trust or gift instrument, neither the donor nor his heirs have any standing in court in a proceeding to compel the proper execution of the trust, except as relators. . . . There is no such thing as a resulting trust with respect to a charity. . . . Where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him have any standing in a court of equity as to its disposition and control."

However, the courts are slowly opening the door to allow allowing donors to pursue such lawsuits in some state. For example, a July 2003 lawsuit filed in Amarillo, Texas by the Estate of Sybil B. Harrington and the Amarillo Area Foundation (appointed by Ms. Harrington to oversee the use of the funds) sought the return of $5 million from the Metropolitan Opera in New York. Ms. Harrington had created a significant endowment with the Metropolitan Opera to fund traditional opera, and the suit alleged they had applied the funds for purposes outside that scope.[30] The lawsuit was allowed to proceed.

In another example, R. Brinkley Smithers gave $10 million to St. Luke's-Roosevelt Hospital Center in New York to create an alcoholism research and treatment facility over a period extending from 1971 to 1983. After his death in 1998, his widow sued the hospital alleging it had not lived up to the terms of the agreement with Mr. Smithers. The hospital settled the lawsuit in July 2003, agreeing to transfer $6 million to another nonprofit to establish a freestanding alcohol treatment center, and to restore $15 million to the endowment. In addition, the Surrogate Court will award her reasonable fees and expenses, although the amount has not yet been determined.[31]

As noted earlier, the courts in Tennessee ruled that Vanderbilt University could not remove the name "Confederate" from its "Confederate Memorial Hall" because the name was the subject of a $50,000 gift agreement executed in 1913. Vanderbilt's Trustees had voted to change the building's name to "Memorial Hall" and had used the new name in its campus materials, maps, and on its website. The United Daughters of the Confederacy – the organization creating the gift – filed suit. In its defense, Van-

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[29] Carl J. Herzog Foundation, Inc. vs. University of Bridgeport, 243 Conn. 1, 699 A.2d 995 (1997).

[30] Wolverton, Brad, "Bequest to Metropolitan Opera Challenged," *The Chronicle of Philanthropy* (August 7, 2003).

[31] Greene, Stephen G., "Seeking Control in Court", *The Chronicle of Philanthropy* (November 28, 2002); Greene, Stephen G., "N.Y. Hospital Settles Case Filed by Donor's Widow," *The Chronicle of Philanthropy* (October 30, 2003).

derbilt alleged it had met its commitment under the gift agreement and the name had to be changed because it "evokes racial animosity from a significant, though unfortunate, period of American history."[32] The trial court supported Vanderbilt, but the Tennessee Court of Appeals reversed the trial court's decision, concluding: "[A]llowing Vanderbilt and other academic institutions to jettison their contractual and other legal obligations so casually would seriously impair their ability to raise money in the future by entering into gift agreements such as the ones at issue here." In the alternative, Vanderbilt the court indicated the school could change the building's name but would be required to return the gift – based upon the present value of that 1913 donation. The case is interesting in that it approaches the issue from a contractual perspective.

Finally, the California courts have also recently ruled in the donor's favor on a standing to sue issue. In 2002, the L. B. Research and Education Foundation made a $1 million grant to the UCLA Foundation to create an endowed chair in Cardiothoracic Surgery governed by a written grant agreement specifying the criteria for the chair holder. The grant agreement required ongoing reporting and had a "gift over" provision providing for the transfer of funds in the event the UCLA Foundation did not meet its obligations. Shortly thereafter, the UCLA Foundation used the fund for individuals the L.B. Research and Education Foundation did not feel met the terms of the agreement, and the donor-Foundation sued. While the lower court dismissed the lawsuit stating the L. B. Research and Education Foundation had no standing to sue, the appeals court reversed that decision determining the arrangement was contractual, and that even if not contractual the plaintiff had a "special interest" that allowed it standing, and the Attorney General's power to enforce charitable trusts under California law (the defendants had argued the arrangement was a charitable trust rather than contractual) was not exclusive.[33]

4. Who Has the Power to Sue?

The limitation in donor standing to sue must certainly be considered when designing a gift arrangement, since donor standing to sue may vary from state to state based on state law and the court's interpretation of that law. The key is to retain enough rights to enforce the gift while relinquishing sufficient control to constitute a completed gift.

B. Uniform Management of Institutional Funds Act (UMIFA)

Sometimes the donor's family is no longer alive so there is no one to object. However, the charity is stuck with a rigid document that must be changed. In these cases, there may be some relief. The Uniform Management of Institutional Funds Act is a model law promulgated by the Commissioners on Uniform State Laws[34] and recommended for adoption in all states.

1. The 1972 UMIFA

At the time of this writing, the applicable Uniform Management of Institutional Funds Act was adopted at the 1972 Annual Meeting of the National Conference of Commissioners on Uniform State Laws. Section Seven of the model statute is designed to permit a "release of limitations that imperil effi-

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[32] *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*, No. M2003-02632-COA-R3-CV (May 3, 2005). A copy of the opinion is available at http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/052/UD-COPN.pdf.

[33] *L. B. Research and Education Foundation v. The UCLA Foundation et. al.,* Cal. App. No. B176151 (6/14/2005). The opinion is available at http://www.courtinfo.ca.gov/opionions/documents/B176151.PDF.

[34] National Conference of Commissioners on Uniform State Laws, www.nccusl.org.

cient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court."[35] The Section has 4 parts:[36]

i. Restrictions can be released with the written consent of the donor.
ii. If the donor's written consent cannot be obtain, a court of appropriate jurisdiction can release the restriction if the restriction "is obsolete inappropriate, or impracticable."[37]
iii. A release cannot change the use of the funds to non-charitable purposes.
iv. The section does not limit the court's application of the *cy pres* doctrine.[38]

All but four states adopted a version of the 1972 UMIFA. The list is quickly changing as states are moving forward to adopt UPMIFA. An update (2007) from the NACUBO site is included at Appendix C.

2. The 2006 Uniform Prudent Management of Institutional Funds Act[39]

Much has changed since 1972. The Commissioners on Uniform State Laws, realizing the current version of the Act needed revision approved the Uniform Prudent Management of Institutional Funds Act (UPMIFA) to replace the 1972 Uniform Management of Institutional Funds Act at its July 2006 meeting at Hilton Head, South Carolina.[40] All states with the exception of Pennsylvania have adopted some version of UPMIFA. The new model law expands on the release or modification of donor gift restrictions in Section 6. (Section 6 governing changes to donor restrictions and comments are set out in Appendix B.) UPMIFA allows changes under 4 circumstances:

i. *Donor Release*: "With the donor's consent in a record", the charity can release a restriction in whole or in part, so long as the gift is still used for the organization's charitable purposes.[41]

ii. *Doctrine of Deviation*: If a modification to a gift agreement/document will enhance the furtherance of the donor's purposes, or a restriction is "impracticable or wasteful and impairs the management or investment of the fund", the charity can ask a court to modify the restriction. The Attorney General must be notified and allowed to be heard, and the modification must reflect the donor's "probable intention."[42]

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[35] Uniform Management of Institutional Funds Act (1972), Section 7, Comments.

[36] Section 7, governing a change to donor restrictions and comments are set out in Appendix A.

[37] UMIFA, 1972, Section 7(b).

[38] *Cy pres* is a French term that means "as near as possible"; in this context, it means a court of equity has the power to alter use of the gift for a purpose as near as possible to the donor's intent. This application could mean application of the funds to another charity if it is impossible for the named charity to fulfill the donor's specified use of the gift. It can also mean application to another purpose if the original is impossible, impractical or illegal to fulfill.

39 A copy of UPMIFA is available at http://www.law.upenn.edu/bll/ulc/umoifa/2006annualmeeting_approvedtext.htm.

[40] National Conference of Commissioners on Uniform State Laws, www.nccusl.org.

[41] UPMIFA, Section 6(b).

[42] UPMIFA, Section 6(c).

iii. *Doctrine of Cy Pres*: If the purpose or restriction becomes "unlawful, impracticable, impossible to achieve, or wasteful", the court may use the cy pres doctrine to modify the fund purposes. The Attorney General must be notified and allowed to be heard.

iv. *Small Funds*: For funds with a value less than $25,000 that have been in place more than 20 years, court action is not required if the charity determines a restriction is "unlawful, impracticable, impossible to achieve, or wasteful" so long as the charity waits 60 days after notice to the state Attorney General of the intention to make the change, and the change is designed to be a good faith reflection of the expressed charitable purposes.[43]

While UPMIFA provides greater flexibility in the release of funds, there is still no substitute for an effective document. Good drafting will also avoid the costs of litigation to make the modification or release the restriction.

IV. Perspectives in the Planning Process

A. The Donor's Perspective

The donor is likely the least likely of all parties to have experience in looking beyond the immediacy of the impact of the gift. Recognizing and acknowledging this perspective will help the planner and charity engage in a more effective discussion of long-term impact. Here are observations about the average donor:

1. *The donor is generally focused on a particular program and a specific result.* For example, a donor may be excited by a "Success by Six" program, which is an early intervention program for children at risk of falling behind in the educational system sponsored by United Ways across the country. The donor may want to leave a gift to "Success by Six" in a specific city or county in perpetuity. Over time, Success by Six may be incorporated by a larger early childhood education effort, may disappear, or may no longer be needed because of changes in the educational system. This change may occur as quickly as five years down the road or as late as 30 years after the gift. The better way to express the gift might be for "early childhood education", for "early education for disadvantaged youth (which should be defined in some way), or in some broader fashion. The gift can always reference the "Success by Six" program as an example of such a program.

2. *The donor is not likely to anticipate social or cultural changes that may impact the need for a gift*. Consider a gift made in the 1950s to support a home for unwed mothers. In the 1950s, the Salvation Army and other charities ran homes to shelter (and keep from public view) mothers who were pregnant out of wedlock. By the 1980's and 1990's, those homes no longer existed because society no longer perceived mothers with out-of-wedlock children as social pariahs. Homes for unwed mothers went out of business because they were no longer needed. It would have been impossible for a donor in the 1950's to believe such a change could have occurred in such a short period. Yet it did. In this case, the gift was a part of a community foundation, and that foundation's board had a *cy pres* power to reapply the funds to as similar a purpose as possible.

3. *Donors sometimes express gifts in a manner that is illegal or unconstitutional*. Donors who have strong personal opinions may express those in a gift restriction. One example from personal experience involved a trust creating an independent school that limited

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[43] UPMIFA, Section 6(e).

students to white boys. These restrictions were quickly removed to accommodate a broader student pool.

4. *Donors are reasonable people and respond well to an education on these issues.* While donors come to the table with a specific set of goals and expectations about a gift, they generally respond well an education on the limitations of the approaches set out above. The conversation may occur in the professional planner's office or in the charity's development office.

Change is inevitable. Even with planning, some gifts may ultimately be used for purposes beyond the donor's intent. It is more likely the gift purposes will be fulfilled if donors are counseled on this reality, and plan for alternatives when that change takes effect.

B. The Planner's Perspective

The greatest burden in planning a gift is on the planner responsible for executing the donor's intent. The gift planner – who represents the donor in the gift transaction – nonetheless has a number of responsibilities. These include:

- *Clarifying the donor's goals and objectives*. The planner should help the donor clearly articulate short-term and long-term objectives. The planner should help the donor think 5, 10, 50, and even 100 years down the road. In some cases, the donor's objectives may not be realistic or practical and will require further discussion. The planner should also engage in a discussion of how the donor will measure success, and what will happen if things change. Help the donor consider may "what if" scenarios to ensure goals are consistent. Anticipate roadblocks and draft alternatives. For example, if the gift's purpose is valid, but the recipient charity simply fails to honor the gift terms, the document should provide for a transfer of funds to a charitable entity that will honor the agreement. If the gift's purposes are no longer appropriate or possible to achieve, the document should provide for a method of non-judicial change that allows the gift to be applied to as similar a purpose as possible or a different charitable purpose designated by the donor.

- *Appropriately expressing the gift goals and providing flexibility.* The planner must not only help the donor articulate his or her goals, but must be able to reduce those to writing. The most effective expression of gift intent will also anticipate change and allow modification if necessary. If possible, the document should include language that includes the donor's motivation in creating the gift, its measurers for success, and the broad impact envisioned in the planning stage to provide guidance to later generations.

- *Selecting a gift form that best achieves the donor's goals and objectives*. This is the area highlighted by most planners, in which outright gifts, bequests, charitable remainder trusts, and charitable gift annuities are considered.

- *Selecting the best gift timing*. This is another area of planning emphasis. Should the gift be executed today, next year, or at death?

- *Selecting the best asset with which to fund the gift*. Many planners also rightly take the donor through a consideration of the most appropriate asset. Should he use cash, should he redeem savings bonds, or is a vacation home the best asset?

- *Creating an effective gift – one that can be properly administered and executed.* Too often, the charity is not consulted in the planning. A restricted gift must fit within the charity's mission, comport with its gift acceptance policies, and fall within its administrative

abilities. If the donor prefers to remain anonymous until the gift is complete, take the gift concept to the charity without revealing the client's name.

C. The Charity's Perspective

The charity has the most to lose if a donor's intent is no longer practical or beneficial, is challenged, or distorts or distracts from the charity's mission. While a charity is not always consulted when gift restrictions are designed, it can prompt more involvement through education of donors and advisors, through a thoughtful adoptions or standards and policies, and through education of the staff.

1. Establish Standards and an Evaluation Process

Charities will have a difficult time evaluating the appropriateness of a gift and its design without clear, written policies to guide that decision making. The gift policies should go beyond the types of assets accepted or gift forms permitted. The policies should include ethical guidelines governing donor involvement and representations made to that donor[44] as well as a discretionary process involving parties key to the gift acceptance process (for example, the chief financial officer, chief development officer, planned giving officer, and top volunteer) that raises and answers questions that help the charity think through the gift impact. Discretionary questions include:

- Are the gift goals achievable, on a short-term and long-term basis (by long-term, think "perpetuity")?
- Do the gift goals reflect the charity's mission?
- For short-term purposes, does the gift fit within the charity's current strategic plan?
- What are the short-term measures for success?
- What are the long-term measures for success?
- How might the gift purpose evolve over time? (To gain perspective, look back 10, 20, or 100 years to see how the gift purpose evolved over that period; then look forward anticipating as many changes as possible.) Does the gift document anticipate change and accommodate anticipated changes?
- Can the charity comply with the gift's restrictions? Does the charity have the ability to manage the gift as restricted?
- Can management of the gift be achieved at a cost-effective level?
- Does the gift have potential for wasting (i.e., to expend principal and income, reducing the market value of the gift)? If so, does the document provide for application of funds once it reaches a minimum level?

Add any additional questions specific to your charity, or that from experience you know might be an issue. After review and decision, reduce the committees conclusions to writing and make that decision a permanent part of the gift file.

2. Educate the Board

Board members can be aggressive ambassadors of gifts to the charity. Without experience, they may agree to gifts, gift forms, or gift restrictions that create problems. As ambassadors and fiduciaries, they should be educated about gift acceptance policies and the purpose of those policies. Educate the board about the charity's policies, explaining why those policies are necessary.

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[44] The National Committee on Planned Giving has promulgated ethical standards for planning entitled "The Model Standards of Practice for the Charitable Gift Planner;" these standards can be found on the NCPG website at www.ncpg.org. Also see the standards recommended by the American Association of Museums at www.aam-us.org.

On a broader level, make sure the board members understand their fiduciary obligations under state law. The fiduciary role requires the board member put the charity's interests above personal interests in all decision making, and that he protect the interests and assets of the charity. This basic education should be a part of every board orientation program With that fiduciary responsibility comes fiduciary liability for breach of that duty. Accepting gifts that may harm or damage the charity may trigger that liability.

3. Educate the Staff

Staff members – development staff as well as executive staff and even program officers – are on the front line of gift acceptance. They must be familiar with the charity's policies and gift acceptance process when communicating with potential donors and working with donor advisors. Include this training in the ongoing training program at the charity and make it a part of the employee orientation process.

4. Keep Good Records

Finally, the charity should keep good records. Permanent records should include:

- *The gift document*, whether that is a will, a revocable trust with testamentary provisions, a beneficiary designation with restrictions, an endowment agreement or a gift agreement defines the restrictions and use of the gift

- *Court orders affecting the gift*

  - ü At probate of a bequest. Sometimes the charity learns of a gift for the first time when the donor's will is probated and the bequest is revealed. When the purposes of a gift are ambiguous or unclear, the probate court should be petitioned to clarify the use of the gift.

  - ü Upon petition of the court during the administration of the gift. Courts may issue rulings affecting the gift upon petition of the charity or Attorney General, years after the gift's establishment.

  - ü Upon court settlement. Gifts may result from the settlement of a lawsuit. For example, in a settlement of a lawsuit involving Nine West, funds were distributed to states and through those states to charities to be used for certain purposes. A local women's fund received a large distribution to be devoted to support of women and children.

- *Notes from discussions with the donor* and the donor's advisor in establishing the gift.

- *Periodic accountings* on the use of the gift.

These records provide a complete picture of the donor's intentions and the gift's purposes that will provide critical perspective to later generations of charity staff and the donor's family.

V. Executing the Plan Through the Gift Agreement

A. The Goals of the Gift Agreement

The gift agreement is increasingly important in the gift negotiation and execution because it provides a platform that allows the donor and the charity to agree on its terms. The goals are to:

i. Ensure the gift's goals and donor's intent are clear.

ii. To provide flexibility in use of the funds over time, specifying what will happen if elements of the gift (its size its purpose, its management) change over time.

iii. Provide a non-judicial roadmap for change, when necessary.

iv. Specify how decisions are to be made on change.

While gift agreements are often used in current gifts where the donor has specific goals they are equally – if not more – important in testamentary gifts. When donors make current gifts, the donors are there to watch over the charity and its use of the funds. With testamentary gifts, the donor is not there to monitor the application of funds, and without a clear directive in a gift agreement, there is a risk – especially long-term – the fund application may vary from the donor's goals.

B. The Key Elements

Working through the gift agreement is tantamount to working with a checklist. Every aspect of the gift and its use should be discussed and agreed upon. Consider the following checklist as a guideline in creating an effective gift document:

1. *Fund Name.* The name may include the donor's name, the donor's family name, or a fund purpose.

2. *Amount/asset to be contributed to fund the gift*. (If additional assets are to be contributed, list amounts and timing of anticipated subsequent distributions.) A commitment to made additions may or may not be binding, depending upon how the agreement is structured. However it is difficult to assess the long-term effectiveness of a gift without discussing its ultimate size.

3. *Donor goals*. Make sure the donor's broad goals and objectives are clearly defined in the agreement. In some cases it will be helpful to talk in terms of short-term and long-term goals.

4. *Directives on gift use*. Directives of a gift's use will vary, depending on the type of gift. For example, a scholarship gift might provide parameters for selection and even name a selection committee. Other gifts may simply define that the revenues are to be used for a particular program area.

5. *Recognition, if any, to be provided for the gift.* Specify:

    a. *Type of recognition*. Will the donor's name be place on a building, on a chair designation, on a program? If so, does the gift size and type comport with recognition awarded donors who make similar gifts?

    b. *Clear communication of minimum* required to receive the gift recognition outlined. Donors may fund a gift in stages. Initial gift may not constitute minimum levels.

    c. *Timing of recognition and alternatives if the gift does not reach the anticipated funding level.* Recognition should generally be awarded upon reaching the designated level. Provisions should be for a gift that never reaches anticipated levels – such as a form of recognition at the

highest level possible for the gift amount. Many things can happen to families and family assets over time – and the donor may not be in a position to fully fund the gift.

6. *Directives on accounting*. The document should specify whether the gift should have a separate accounting on fund balance, expenses, revenue generated, and revenue application. The charity should have a policy requiring a minimum dollar amount (for example, $250,000 or more) at which a fund will have a separate accounting. Ensure the fund document does not require a level of accounting or process that will be expensive, labor intensive, or otherwise be wasteful. Negotiate an accounting process that protects the interests of all involved.

7. *Directives on reporting*. Accounting (above) refers to an internal alignment and tracking of funds. Reporting refers to an external communication of those results.

    a. Type of report required. If the gift document specifies reporting, it should detail the type of report required. The requirement may be the fund balance and application of funds is to be included in the charity's annual report, or simply that living family members receive a copy of the fund accounting.

    b. *Who receives the report*? If family members are to receive the report, the gift agreement should designate the individuals to receive the report, both currently and long-term. Short-term, individuals may be designated by name; long-term, individuals should be designated by position, family tier, and/or generation.

    c. Length of time to report. Some gift agreements require reporting only during the donor and/or donor's spouse's lifetimes. Other extend several generations.

8. *Publicity*. Public recognition may be important to the donor, just as anonymity may be important. Seek permission for publicizing the gift, featuring a story on the donor and gift, and other anticipated forms of public recognition. Get the donor to approve recognition, direct anonymity, or specify the type of publicity that is permissible.

9. *Directives on Investments*. Investment restrictions can be the most cumbersome form of fund restriction. The charity should include permission for the following:

    a. *Allow pooling with other like assets*. Pooling assets is the most efficient and effective way to manage long-term funds. Managing hundreds of small funds, each with its own investment objectives, is counter-productive.

    b. *Allow investment of assets subject to the charity's then-applicable investment guidelines*. Investment strategies change with current economies, long term needs, and the applicable spending policy. When donors are given a choice, they have a tendency to impose personal investment guidelines and restrictions on charities. The gift document should clearly give the charity this discretion.

c. *Allow a spending policy in keeping with the charity's then-applicable spending policy for like funds*. The spending policy is generally set each year (or more frequently if circumstances require) and is based on both need, the economy, and investment returns. To invest the funds in a pooled manner, all funds should have the same spending policy.

10. *Flexibility to make non-judicial changes* ("Plan "B" and "Plan C"). Designing flexibility is at the heart of the gift agreement, and is perhaps the most difficult element to design and negotiate. Use creativity. Literally take the use of the gift through a progression of 5, 10, 30, 50 and 100 years to expand thinking about the evolution of the gift.

a. *Think through gift options*. This requires a discussion of the gift goals, gift measurement, and multiple ways those objectives might be achieved. The donor may have only one approach to achieving the gift goals; this discussion should expand that thinking making the case for the need for flexibility.

b. *Alternate program:* Specify purposes related to the gift that might serve as appropriate secondary beneficiaries in the event the original gift purpose is achieved, is no longer appropriate, or becomes impossible to achieve.

c. *Gift over.* Specify another organization to receive funds in the event the originally-named entity does not honor the gift terms. Consider the appropriateness of naming a group (by title, not individuals who may or may not be alive) to make this decision. After all, that secondary beneficiary may also be out of business or may not longer be considered accountable or effective.

d. *Reverter.* A reverter clause refers to a gift subject to a condition precedent, meaning that the gift is made but may revert to the original donor or the donor's heirs upon the happening of an event. When a donor transfers a gift with a reverter provision, the condition must be so remote as to be negligible in order for the gift to qualify for a charitable deduction.[45] An example provided in Reg. Sec. 1.170A-1(e) illustrating a condition so remote as to be negligible is set out below:

"For example, a donor transfers land to a city government for as long as the land is used by the city for a public park. If on the date of the gift the city does plan to use the land for a park and the possibility that the city will not use the land for a public park is so remote as to be negligible, X is entitled to deduction . . . for his charitable contribution."

An example of a reverter that was considered not so remote as to be negligible was provided in Rev. Rul. 2003-28.[46] In that instance, a donor made a gift of a patent to a university on the condition that a specific faculty member remain on staff for the remaining fifteen years of the

[45] Reg. Sec. 1.170A-1(e); Reg. sec 20.2055-2(b), Reg. Section 25.2522(a)-2)b).

[46] Rev. Rul. 2003-28, 2003-11 I.R.B.594.

patent period, or the patent would revert to the donor. In that case the IRS found the condition was not so remote as to be negligible and denied the charitable deduction.

e. *Provide for the use of institutional discretion*. The document may specify that the institution can exercise discretion to make changes when the gift has achieved its purpose, is no longer needed for that purpose, is no longer appropriate, is no longer possible, or a variation on those options. Name a group (by title, not name) who has the ability to make the determination that a change is necessary or the specified conditions have been met.

f. *Designate those parties who can make changes, the types of changes that can be made, and how those changes are to be effected.* The document should designate individuals responsible for making changes to the gift purpose. This group may be the same group set out in the paragraph above (who determine it is time to make a change) or it may be a different group. The document should also designate the type of changes that are appropriate without court approval, and what to do if there is conflict among the appointed group. Placing discretion in a group qualified to make those decisions based on the facts and circumstances at the time is a principal used in multi-generational trusts and makes those trusts effective long after the grantor is there to make decisions.

11. *Standing to sue.* While the charity may not want to include a "standing to sue" clause in it standard gift agreement, donor advisors may be interested in such a clause. Check state law to determine if this is legally possible and appropriate. If reserved, clearly specify who has that standing. Remember that generations change dramatically from one to the next in their perspectives on what is right, wrong, and necessary. Finally, ensure that any reservation is not so strong that it would cause the IRS to determine the donor had not relinquished control. If the reservation is untested, the advisor may want to seek a ruling.

12. *Termination*. The gift document should provide for non-judicial termination of the fund in the event the gift purposes are fully achieved or the gift is reduced to a *de minimis* level.

a. *Termination upon completion of gift purposes*. It is possible that a gift will achieve its intended purpose. While this is rare, the document should provide how the fund is to be terminated or where remaining funds are to be distributed in this event.

b. *Termination upon gift's reduction to a de minimis level*. The gift agreement may allow distributions of both revenue and principal, wasting or diminishing the fund to a level so small that it is no longer cost effective to administer, account for, or report. Since de minimis amounts (minimize size for separately-accounted gifts) will change over time, it is best to specify the *de minimis* amount for separately accounted gifts at the time of review. For example, a $50,000 minimum today may be $200,000 or $500,000 in the not very distant future.

C. Contact the Charity When Drafting

Contact the charity who will be the beneficiary of the endowment gift to get a copy of the organization's standard endowment gift agreement and to ensure the gift purpose is appropriate and workable.

1. Standard Gift Agreement

Even if you have your own standard gift agreement, it is important to request a copy of the nonprofit's to determine if there is critical language that should be incorporated, or any unusual elements of endowment administration you should know more about.

2. Gift Purpose

Always discuss the gift purpose and goals with the charity to ensure the donor's goals fit the charity's mission, purpose, and priorities. Charities are sometimes forced to decline gifts that cannot be used, or create a deviance from program priorities and operations. If the donor wants to remain anonymous, simply discuss the gift goals and have the document reviewed and approved without revealing the donor's identify.

VI. Lessons Learned: The Ten Planning Rules

1. *Change is inevitable*. Understand that charitable institutions, their needs, and solutions for problems change over time. Change is certain. Where that change takes the charity is uncertain.

2. *Planning is essential for the long-term effectiveness of gifts*. The donor and the charity should make sure they understand donor intent, and the long-and short-term purposes of a gift. The exercise is not natural. Most of us shape our thinking by events, facts, and circumstances of today.

3. *Revel in the charitable vision, but design the gift to outlive the vision.* Advisors should begin this process with donors. What does the donor hope to achieve? What are the measurable outcomes? Set benchmarks, consider the gift/need's evolution and build in flexibility. Designate an informed – but independent group – to make decisions.

4. *The charity plays a critical role in the planning process.* Always make contact with the charity, obtain its standard endowment agreement if available. If the donor wants to remain anonymous, the advisor can seek the donor's permission to take the gift proposal to the charity on an anonymous basis.

5. *Charities must have gift acceptance policies that demand an evaluation of critical issues related to long-term gifts*. The policies should focus on the charity's mission, its programs, and its administrative abilities.

6. *Once the gift has been explored and decisions reached, the gift agreement should be reduced to a formal, written document.* Memories fade but words don't fade. Just make sure the gift agreement terms are clear, comprehensive and interpretable without donor explanation.

7. *The gift agreement should include Plans A, B, and C.* The best agreement will anticipate the impossible to imagine. What if the program is discontinued? What if the charity is dissolved? What if the charity merges with another charity? What if the fund produces more than is required by the original gift purpose? What if the funds are no longer needed for that purpose? Who will make the decisions about how changes are to be

made? Under what circumstances does the donor want changes made without judicial intervention? Every donor may have different answers to these questions, but they should be asked and answered.

8. *Once the gift is completed, keep the documents in a safe place*. This seems obvious, but too many charities are unable to put their hands on key donor documents even 20 years after the gift – and have little chance of finding those documents after 50 or 100 years. Gift purposes become more a matter of folk lore than legal reality. (Institutional policies are the smartest way to ensure consistency.) Also keep records of planning sessions and donor conversations. These contemporary recorded observations may be valuable to later generations in interpreting donor intent. Some charities include these records as a part of board minutes (when the gift is reported and accepted) because these records are retained as a matter of law.

9. *Engage in regular communication with donors and their families.* Stewardship is important not only in maintaining good relationships – it may result in additional gifts to the charity. Most importantly, ongoing communication means there are no surprises that may result in conflict. The donor's descendants may not have the same goals, objectives, or perspectives as the donor. In fact, they rarely do. Sharing the donor's conversations, goals, and regular reports on how those objectives are met are powerful tools in managing expectations.

10. *Avoid crisis management*. When things begin to go bad – either because of disagreements with family members or an unanticipated turn in the road – address the issues early. In most cases, it will be beneficial to involve family or original advisors to provide input about options. Problems generally grow worse – and relationships deteriorate – when no action is taken. Just deal with it.

VII. Final Thoughts

Good gifts are a matter of planning. Donors need to carefully express their goals and objectives and think long-term in the impact of their gifts. Advisors should encourage donors to explore the long-term use of the gift, design flexibility into the document, and discuss plans with the charity before making the gift final. And charities should develop standards with which to review long-term gifts, should encourage the use of gift agreements (providing a format to advisors and donors), and should remaining in ongoing communication with donors and their families. If all parties to the process do their part, the courts would have less business and there would be fewer cautionary tales to warn off potential donors.

SECTION 7. [Release of Restrictions on Use or Investment]

(a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the [appropriate] court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The [Attorney General] shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

(c) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(d) This section does not limit the application of the doctrine of cy pres.

Comment

One of the difficult problems of fund management involves gifts restricted to uses which cannot be feasibly administered or to investments which are no longer available or productive. There should be an expeditious way to make necessary adjustments when the restrictions no longer serve the original purpose. *Cy pres* has not been a satisfactory answer and is reluctantly applied in some states. See *Restatement of Trusts* (2d), §§ 381, 399; 4 Scott, *Law of Trusts* § 399, p. 3084, § 399.4 pp. 3119 et seq. (3d ed. 1967).

This section permits a release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court.

Although the donor has no property interest in a fund after the gift, nonetheless if it is the donor's limitation that controls the governing board and he or she agrees that the restriction need not apply, the board should be free of the burden. See *Restatement of Trusts* (2d) § 367. Scott suggests that in minor matters, the consent of the settlor may be effective to remove restrictions upon the trustees in the administration of a charitable trust. 4 Scott, § 367.3 p. 2846 (3d ed. 1967).

If the donor is unable to consent or cannot be identified, the appropriate court may upon application of a governing board release a limitation which is shown to be obsolete, inappropriate or impracticable.

This section authorizes only a release of a limitation. Thus, if a fund were established to provide scholarships for students named Brown from Brown County, Iowa, a donor might acquiesce in a reduction of the limitation to enable the institution to offer scholarships to students from Brown County who are not named Brown, or to students from other counties in Iowa or to students from other states, or he could acquiesce in the release of the restriction to scholarships so that the fund could be used for the general educational purposes of the school.

Subsection (d) makes it clear that the Act does not purport to limit the established doctrine of *cy pres*. A liberalization of addition to, or substitute for *cy pres* is not without respectable support. Professor Kenneth Karst in "The Efficiency of the Charitable Dollar: An Unfilled State Responsibility," 73 *Harv.L.Rev.* 433 (1960) suggested that the doctrine of *cy pres* be expanded to permit the courts to redirect charitable grants if the purpose had become "obsolete, or useless, or prejudicial to the public welfare, or are insignificant in comparison with the magnitude of the endowment . . ." quoting from the Nathan Report (of the

British Committee on the Law and Practice Relating to Charitable Trusts, Cmd. 8710, 1952) quoting the Scotland Education Act 1946, 9-10 Geo. 6, ch. 72 § 119(b). The Uniform Act provision is far less broad; it applies only to the release of restrictions on the gift under limited circumstances.

New England courts apply a rather strict doctrine of separation of powers to deny legislative encroachment on judicial *cy pres*. The Act is compatible with the New England cases because the final decision is in the courts. See *City of Hartford v. Larrabee Fund Association*, 161 Conn. 312, 288 A.2d 71 (1971); Opinion of Justices, 101 N.H. 531, 133 A.2d 792 (1957).

No federal tax problems for the donor are anticipated by permitting release of a restriction. The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect.

APPENDIX B
REVISED UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT
APPROVED JULY 2006, HILTON HEAD, SC

SECTION 6. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.

(a) With the donor's consent in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) If a restriction contained in a gift instrument on the management or investment of an institutional fund becomes impracticable or wasteful or impairs the management or investment of the fund, or if because of circumstances not anticipated by the donor a modification of a restriction will further the purposes of the fund, the court, upon application of the institution, may modify the restriction. The institution shall notify the [Attorney General], who must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the [Attorney General], who must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, [60 days] after notification to the [Attorney General], may release or modify the restriction, in whole or part, if:

(1) the institutional fund subject to the restriction has a total value of less than [$25,000];
(2) more than [20] years have elapsed since the fund was established; and
(3) the institution uses the property in a manner the institution reasonably determines to be consistent with the charitable purposes expressed in the gift instrument.

APPENDIX C
STATES THAT HAVE ADOPTED UMIFA OR UPMIFA IN WHOLE OR IN PART
Summer 2010

State	*Code Section*		*State*	*Code Section*
Alabama UPMIFA	§§19-3C-1 to 19-3C-10		Arizona UPMIFA	§§10-11801 to 10-11805
Arkansas UPMIFA	§§28-69-601 to 28-69-611		California UPMIFA	Probate Code §§ 18501 to 18510
Connecticut UPMIFA	§§ 45a-435a to 45a-535i		Delaware UPMIFA	Title 12, §§ 4701 to 4710
District of Columbia UPMIFA	§§44-1631 to 44-1639		Florida UMIFA	Title XLVIII §1010.10
Georgia UPMIFA	§§44-151 to 44-158		Hawaii UMIFA	§§517D01 to 517- D-11
Idaho UPMIFA	§§33-5001 to 33-5010		Illinois UMIFA	760 ILCS §§ 50/1 to 50/10
Indiana UPMIFA	§§ 30-2-12 to 30-2-18		Iowa UPMIFA	§§ 540A.101 to 540A. 109
Kansas UPMIFA	§§ 58-3601 to 58-3610		Kentucky UMIFA	§§ 273.510 to 273.590
Louisiana UMIFA	§§ 9:2337.1 to 9:2237.8		Maine MIFA	Title 13, §§ 4100 to 4110
Maryland UMIFA	Est. & Tr., §§ 15-401 to 15-409		Massachusetts UMIFA	Chapter 180A §§ 1 to 11
Michigan UMIFA	§§ 451.1201 to 451.1210		Minnesota UPMIFA	§§ 309.62 to 309.71
Mississippi UMIFA	§§ 79-11-601 to 79-11-617		Missouri UMIFA	§§ 402.010 to 402.225
Montana UPMIFA	§§ 72-30-101 to 72-30-103; 72-30-207 to 72-30-213		Nebraska UPMIFA	§§ 58-610 to 58-619
Nevada UPMIFA	§§ 164.640 to 164.680		New Hampshire UPMIFA	§§ 292-13:1 to 292-13:10
New Jersey UMIFA	§§ 15:18-15 to 15:18-24		New Mexico UPMIFA	Article 9, §§ 46-9-1 to 46-9-12

State	*Code Section*		*State*	*Code Section*
New York UMIFA	NPC §§ 102, 512, 514, 522		North Carolina UPMIFA	§§ 36B-1 to 36B-10
North Dakota UMIFA	§§ 15-67-01 to 15-67-09		Ohio UPMIFA	§§ 1715.51 to 1715.59
Oklahoma UPMIFA	§§ 60-300.12 to 60-300.20		Oregon UPMIFA	§§ 128.305 to 128.336
Rhode Island UMIFA	§§ 18-12-1 to 18-12-9		South Carolina UPMIFA	§§ 34-6-10 to 34-6-100
South Dakota UPMIFA	§§ 55-14A-1 to 55-14A-12		Tennessee UPMIFA	§§ 35-10-201 to 35-10-210
Texas UPMIFA	Property Code §§ 163.001 to 163.011		Utah UPMIFA	§§ 51-8-101 to 51-8-604
Vermont UMIFA	Title 14, §§ 3401 to 3407		Virginia UPMIFA	§§ 55-268.11 to 55-268.20
Washington UMIFA	§§ 24.44.010 to 24.44.900		West Virginia UPMIFA	§§ 44-6A-1 to 44-6A-10
Wisconsin UMIFA	§§ 112.10 to 112.10(7)(b)		Wyoming UPMIFA	§§ 17-7-201 to 17-7-205

States that have not adopted UMIFA or UPMIFA: Alaska, Pennsylvania