

**Southwest Washington Estate Planning Council
February 21, 2012**

**Charities and Donor Intent:
Interpretation, Enforcement and Doing the Right Thing**

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I. What Is Donor Intent?

Some donors make restricted gifts, with specific plans for the use of the gifts. Other donors make gifts for the general purposes of a charity, but with the assumption that the charity will continue to carry out its mission without major changes. Planning can help, but pinning down intent may be more difficult than it seems. Disputes may arise years after the gift, often after the donor's death. Planning for changes that will inevitably occur over time may reduce disputes, saving resources for the work of the charities.

In many donor intent cases one side or the other and usually both base their arguments on donor intent. The difficulty, of course, is that usually the donor is dead at the time the controversy begins and no one really knows what the donor intended at the time of the gift or would have intended had the donor known about the changed circumstances. Written documentation for the gifts may exist, but the written documents may not prevent legal wrangling. A question then is whether donors and charities can do a better job of drafting charitable gift agreements that reduce the likelihood of future problems.

II. Five Examples

A. Robertson v. Princeton

1. The Gift

In 1961, Marie Robertson, advised by her husband, Charles, gave \$35 million to Princeton University, to support the graduate program of the Woodrow Wilson School at Princeton. Mrs. Robertson 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 Bylaws for the Robertson Foundation. The terms include restrictions imposed on the use of the gift and a management structure that assured control of the foundation by Princeton.

2. Reasons for Structure

By using the foundation rather than giving the money directly to Princeton, the donor's family could 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. 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 also welcomed the continuing involvement of Marie, Charles, and their family.

The Robertson Foundation was to have seven directors, four from Princeton and three from the family. Thus, Princeton controlled the foundation. The Certificate of Incorporation states the objective of the Robertson Foundation and the purposes for which the foundation's assets may be used as follows:

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;

(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.

3. Lawsuit

In 2002, members of the Robertson family – four children and one cousin - filed suit against Princeton University, the four Princeton trustees, and the Robertson Foundation, arguing that Princeton had failed to follow the mission of the Robertson 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.” 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. 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.

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. 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.” 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.

4. Settlement

After six years of legal fighting, the Robertson Foundation and Princeton settled the suit. The Memorandum of Law filed with the court explained 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.”

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. 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, 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”), a private foundation created by the Robertson family plaintiffs during the litigation. RFGI’s purposes are those of the Robertson Foundation, as understood and interpreted by the Robertsons. The settlement stipulates that the funds be held under this restriction. 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. The Robertson family controls the Banbury Foundation, and the plaintiffs had used assets of that foundation to pay their legal expenses. The end result of the settlement, then, is that most of the Robertson funds

will continue to be used for the purposes Mrs. Robertson intended, but two different organizations – Princeton and RFGI - will interpret her intent.

B. The Barnes Foundation

1. Dr. Barnes

Dr. Albert Barnes created the Barnes Foundation in 1922 as an educational institution that would train students in Dr. Barnes' theories of art aesthetics. 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 he directed. The art could not be moved, sold, or lent to other museums. The gallery was to be open to the public on an extremely limited basis and fees were prohibited. Successor trustees were to be five representatives appointed by Lincoln University, a small, historically black college located in nearby Chester, Pennsylvania.

2. Problems

A panoply of problems developed in connection with the Barnes Foundation. 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. With limited ability 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. 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. The changes kept the Foundation financially viable for awhile, but by 1998 the Foundation found itself in dire financial straits.

3. Deviation

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 15, 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. The Foundation sought and received court approval to make these changes.

The decision to move the Barnes gallery to downtown Philadelphia will address many of the problems surrounding the Barnes Foundation, but the modifications seem to conflict with donor intent. An organization called Friends of the Barnes Foundation continues to protest the move, and its website says that a Petition to Reopen the case was filed Feb. 17, 2011 and a hearing was held on August 1. A 2009 documentary about the Barnes, "The Art of the Steal" has been distributed across the country. The Barnes

Foundation website says the building in Merion is now closed in preparation for the move to downtown Philadelphia in spring 2012.

C. The Buck Trust

1. The Needy of Marin County

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.

2. Changed Circumstances

Due to unexpected changes in the value of the stock, the trust assets increased in value to \$400 million in only ten years. 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.

3. Cy Pres

The Foundation sought court approval to permit distributions in all five counties. The court denied the Foundation's request and expressed dismay that the Foundation would suggest "changing the donor's 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. The court then made other changes to the Buck Trust, including removing the San Francisco Foundation as trustee and designating certain charities as beneficiaries.

D. The Red Cross and September 11

1. Response to 9/11

Following the terrorist attacks on September 11, 2001, contributions poured into the Red Cross and other funds created specifically for victims of the attacks. 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 September 11 attack directly on victims of September 11 because, they said, the donors intended that result.

2. Rules for Disaster Relief

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 and the needs will 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. 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. If the donor's intent was limited to the purpose that has been completed, the surplus funds will revert to the donor. Usually a court will find that the donor intended that the gift remain in the charitable stream and not be returned to the donor. The other 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. Courts have occasionally taken the third option, but more commonly, a charity is permitted to use a surplus for other purposes of the charity. 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. Thus, the legal rules that have developed for disaster relief organizations generally permit the organizations to use surplus funds for future disasters.

3. Donor Intent

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 probably many donors simply wanted to do something 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.

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. 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. Then, on September 20, the Red Cross announced the creation of a separate fund, the Liberty 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. A memorandum posted on the Red Cross website explained the creation of the fund and the fact that the fund would be used to support all Red Cross endeavors. On October 30 the Red Cross announced that it was ending solicitation of donations for the Liberty

Fund and that it would hold some of the funds contributed as a reserve for future terrorist attacks.

Subsequent arguments about the use of the fund focused on the perceived intent of donors 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.” In contrast, officials at the Red Cross believed that donors would support a decision to create a reserve for future terrorist attacks, but suggested that while donor intent extended to any victims of terrorism, the intent might not extend to victims of natural disasters. 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.

E. Brandeis and the Rose Art Museum

Beginning in 1958 Edward and Bertha Rose made gifts to Brandeis University to establish a museum of modern and contemporary art. The museum became the Rose Art Museum, and received contributions of art and money from other donors as well as additional contributions from the Roses. In January 2009, the Brandeis Board of Directors voted to close the museum and sell the art as a way to address the University’s serious financial difficulties. Public outcry followed the announcement, and donors, alumni, students, and community members all voiced concern. The Attorney General’s office announced that it would need to review each piece of art to determine whether the art was subject to a donor restriction. Four donors or representatives of donors brought suit to block the sale of the art. In June 2011, Brandeis announced that the case had settled. Brandeis agreed that the Rose would remain open as a university museum and that no art would be sold.

III. Why Charities Should Give Effect to Donor Intent

A. Legal Duty

1. Restrictions

A donor’s restriction on a gift will typically be in the form of a purpose restriction – a direction about how the gift should be used. A donor may also impose a time restriction -- a direction about when a gift can be used. Even when the donor makes an unrestricted gift, the donor probably assumes the charity will use the gift for its current purposes and not for some new, different purpose.

Trust law imposes a duty of obedience on trustees of a charitable trust, to carry out the terms of the trust. When a donor makes a restricted gift, the duty of obedience requires the trustees to carry out the restriction. A restricted gift made to a nonprofit corporation also carries with it a requirement that the charity carry out the restriction.

Cases have applied different rationales, but the result – the duty to carry out a donor’s restriction – is the same.

2. Modification Rules

Under both trust law and nonprofit law, the rules for modifying donor restrictions indicate the force of restrictions imposed by donors. If a charity could ignore restrictions, the law would not need special rules for modification of those restrictions. These rules, cy pres and equitable deviation, apply to charities organized as charitable trusts and to charities organized as nonprofit corporations. The modification rules permit changes only under limited circumstances and usually only with the approval of a court. Thus, the legal structure for protecting donor intent reflects the emphasis the law places on that intent.

B. Other Reasons Charities Give Effect to Donor Intent

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. The underlying reason for ethical behavior with respect to fundraising is the need to maintain donor trust, 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 charitable sector as a whole depends on each charity’s providing its services, not to a donor, but to the societal interests the charity serves. 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. 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.

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 will 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.

3. Greater Official Oversight

Charity officials view donor intent as a part of their enforcement concerns. 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. Although the donor had specifically chosen the San Francisco Foundation to manage the gift, that organization lost its role due to concerns about whether it was carrying out the donor's intent.

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. As the criticism began to build, New York Attorney General Spitzer, threatened to sue the Red Cross for misrepresentation to donors and failure to comply with donor intent. In Mr. Spitzer's view donors who contributed to the Red Cross intended "unambiguously" 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 September 11.

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. As the only charity chartered by Congress, the Red Cross has used its "quasi-governmental" position to avoid oversight by state attorneys general. In the aftermath of September 11, both Congress and several state attorneys general demanded a greater role in monitoring the use of contributions.

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 Colorado University. The audit initially focused on tracking "specific donor gift transactions to ensure their proceeds have been spent in compliance with donor intent," 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. The attorney general brought charges against three executives for misusing the endowment funds. The attorney general charged the chief executive officer, chief financial officer, and general counsel with theft, conspiracy, and misapplication of entrusted property. 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. He served three months of an 11 to 23 month sentence before being paroled. 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, 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.

IV. How Do We Determine Donor Intent?

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. For some gifts only limited written documentation of intent 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.

In many cases, 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.

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.

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. Typically, when circumstances change that quickly, the charity will notify the donor and try to work out a modification, 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. The foundation then sued the university to enforce the restriction, and alleged that the university had commingled the gift with its operating funds. Although the court determined that the donor lacked standing to sue, the university suffered the financial costs of the lawsuit as well as the negative press.

In Missouri the executors of the estate of Selma Hartke made a gift of over \$7 million to the Vitae Foundation. The documentation connected with the gift provided that the foundation would use the money to produce radio programming to try to prevent abortions. Less than a year later the donor learned that the Foundation was using the money for administrative expenses and not for the agreed upon purposes. The donor brought an action to enforce the restriction, but the court held that the donor did not have standing to bring the suit. The court recommended asking the Attorney General to pursue the matter.

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. Given the huge amount of money raised, it seems likely that some donors would have preferred that some 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.

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 habitat 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 2011 cannot imagine the world 100 or even 50 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?

The Robertson family’s concerns about Princeton’s use of the Robertson Foundation money may have developed in part due to changes in the meaning of “careers in government service.” When Marie made her gift, careers in government service meant jobs with the U.S. government. By the time Marie’s children brought the lawsuit, fewer students were going to work directly with the government. The government was outsourcing work to NGOs and private firms, and graduating students found employment with those organizations and firms.

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. 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), saying “This foundation shall be organized and operated exclusively for charitable, scientific, literary, religious, and educational purposes.” The document might add “including for such purposes ...” with a statement of the particular intentions for the foundation, but those specific purposes would not be binding. The donor may want maximum flexibility, but in some situations the lawyer may draft flexibility into the organizational documents without discussing the details with the client.

When she died, Leona Helmsley gave the bulk of her estate to a charitable trust she had established during her life. 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.” Ms. Helmsley wrote a “mission statement” for the trust that gave two priorities for distributions: indigent people and dogs. A year after writing the mission statement 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.”

After Ms. Helmsley’s death, the trustees sought instruction from the court about the legal effect the “mission statement.” The Surrogate Court ruled that the mission statement did not bind the trustees, based on the language in the trust instrument giving them discretion over distributions. Shortly after the court’s decision, the trustees announced initial distributions from the trust, and very little went to dogs. The trustees acted in a legally correct manner, but probably did not carry out Ms. Helmsley’s intent.

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. Income may mean trust accounting income, corporate income, or taxable income.

UMIFA, and now UPMIFA, provide rules of construction for endowment spending. A donor’s instructions to “hold this gift as an endowment” will be interpreted under the statute. When the drafting committee worked on UPMIFA, the committee received many comments about what donors intend. 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.” Nearly all of the views were stated with surprising definiteness. The problem is that different people intend different meanings even when the same words are used.

V. Modification of Donor Restrictions

A. Donor Consent

Under UPMIFA §6(a), a charity and a donor can agree to release or modify a restriction imposed by a donor. Thus if the donor of a gift can be located, a charity organized as a nonprofit corporation can agree with the donor on how to modify to the terms of the gift. Trust law does not permit the donor and beneficiaries to modify a charitable trust without a court proceeding. UPMIFA applies to a charitable trust if the trustee is a charity, so a trust with a charitable trustee could use the modification-by-consent provision.

If a charity needs to change a restriction on a gift, 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, and modifications of original trust terms may become necessary over time. For this reason, trust law developed doctrines that permit a court to modify a restriction imposed on assets held in a charitable trust. Under carefully limited circumstances, the doctrines of cy pres and equitable deviation permit modification of terms of a charitable trust. Courts often apply trust law to charities organized as nonprofit corporations, and the doctrines probably have applied to nonprofit corporations. UPMIFA now clarifies that the doctrines apply to charities organized as nonprofit corporations. UPMIFA § 6(b) is cy pres and § 6(c) is deviation.

1. Cy Pres

Cy pres, like most of trust law, is a default rule. A donor can specify what should happen to a gift 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, cy pres permits a court to modify a restriction, under certain circumstances. 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. Courts have applied cy pres narrowly, giving significant deference to donor intent.

The common law doctrine of cy pres ties the modification to the donor's intent, and a modification should be "as near as possible" to the original purpose. The UTC directs a court to apply the funds "in a manner consistent with the settlor's charitable purposes." 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. 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 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.

2. Deviation

The doctrine of equitable deviation or deviation permits a court to make changes to administrative terms of a trust. 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 purpose intended by the donor.

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. 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” 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. 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. 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. 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. The modifications solve the financial problems faced by the Barnes Foundation, but the changes fairly clearly conflict with donor intent.

C. Small, Old Fund Modification Without Judicial Approval

UPMIFA §6(d) permits a charity to apply cy pres on its own, after notice to the Attorney General, but without going to court. The new provision only applies to a fund that is old (more than 20 years) and small (less than \$25,000), and tracks the rules of cy pres. 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.”

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 10-year period. The foundation terminated at the end of 1996, on schedule and while Irene Diamond was still alive. Other examples include the Lucille P. Markey Charitable Trust, which spent \$506 million in 14 years, and the Jacobs Family

Foundation which will terminate on the death of the last to die of the founder's three children.

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 with an endowment valued at \$35.1 billion in 2009, will spend its money and terminate within 100 years. 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. In addition, by making grants more quickly a foundation may be able to have a greater impact on the causes it hopes to further. Peter Munk, an 80-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?"

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. Following the resolution of the lawsuit, Mr. Glenn continued to make charitable gifts but "put his beneficiaries on a short leash" by creating carefully structured contracts to govern the gifts and then keeping a careful eye on the charity's use of the money.

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, a newspaper reported the view voiced by some advisors that the ruling would "prompt donors to structure their gifts more carefully." 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 a concern about the institutions willingness to carry out donor wishes.

VII. Drafting Considerations and Strategies

Donors want to support charitable causes and donees want the support of those 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.

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.

From the charity's side, clearly worded solicitation materials can set appropriate expectations. 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.

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. As more donors choose restricted over unrestricted gifts, money to support operating expenses and general program expenses becomes harder to find. 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.

Increased donor restrictions, 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. To the extent that more restrictions lead to more enforcement questions, a charity may incur legal fees. 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.

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.

C. Standing for Donor

Under the common law only the state Attorney General has standing to enforce a charitable gift. 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.

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. 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.

A few states permit standing by persons with a "special interest" in the issue, and a few states permit a private person to act on behalf of the Attorney General, as a relator. New York has permitted persons with special interests in a fund to bring a suit. In *Alco Gravure, Inc. v. Knapp Foundation*, 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*, the court granted standing to the special administrator of the donor's estate, appointed for the purpose of bringing the suit. Neither the special interest doctrine nor opportunities for relators are widely available, however, and both are fact specific. Thus, neither can be relied on at the planning stage.

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

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. 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 or Arbitration

A clause in the gift agreement could require both sides to engage in mediation in good faith and could provide a process for choosing a mediator. 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 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 might be more useful.

F. Collaboration

The lawyer’s role, on either side, is to protect the interests of the client, but 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. 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, including the benefit of making more funds available for charitable purposes the donor favors.

VIII. Conclusion

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, but 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 charities must be mindful of their missions 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 changes in 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. 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.

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