PROTECTING THE CHARITABLE INVESTOR: A RATIONALE FOR DONOR ENFORCEMENT OF RESTRICTED GIFTS

"It shouldn't be such a problem to give away your money."[1]

I. INTRODUCTION

Fundraising by non-profit institutions embodies "the symbol of institutional quality and viability for the 1990's."[2] It is understandable, then, that the act of raising capital became big business for the burgeoning third sector.[3] Institutions of higher education came to the forefront in this quest for the charitable dollar, turning primarily to wealthy alumni for support. In exchange for their contributions, donors required control over how their gifts will be spent. Accordingly, many donors began placing restrictions on the use of their gifts.[4] Donors' outcome-oriented approach to giving creates a rift between benefactors and the colleges and universities to which they contribute; the institutions want the money, but on their own terms. For donors, this power struggle involves their right to use money to affect a desired result. The resolution of this conflict will have serious ramifications on fundraising throughout the nonprofit sector.

Nonprofit institutions have always relied on deferred giving as a source of funding.[5] However, these gifts are a mixed blessing for colleges and universities.

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[1] Larry Kramer, playwright and founder of the AIDS activist group ACT UP, describing how Yale University refused his gift of several million dollars to endow a permanent chair in gay studies, *quoted in* Kenneth L. Woodward & Brad Stone, *Gift Horses With Reins*, NEWSWEEK, Sept. 1, 1997, at 54.

[2] MARGARET A. DURONIO & BRUCE A. LOESSIN, EFFECTIVE FUNDRAISING IN HIGHER EDUCATION 1 (1991).

[3] *See id.* The authors refer to the growing field of nonprofit insitutions as the "third sector." *See id.*

[4] Author Kenneth Auchincloss suggests that this phenomenon is due to the demographics of today's philanthropists. Whereas the donors of the past gave out of an obligation to assist in good works, the 1980s marked the rise of the "harder-headed [donor] . . . less schooled in philanthropic tradition." Kenneth Auchincloss, *The Land of the Handout*, NEWSWEEK, Sept. 29, 1997, at 34. These donors approach the act of giving with a strong business ideology, expecting demonstrable results. *See id.*

[5] *See* BARBARA E. BRITTINGHAM & THOMAS R. PEZZULLO, THE CAMPUS GREEN: FUND RAISING IN HIGHER EDUCATION 3 (ASHE-ERIC Higher Education Report Nov. 1, 1990). Legislators also recognize this fact. For example, the double-edged sword of deferred giving led, in part, to the enactment of Connecticut's Uniform Management of Institutional Funds Act. House debate on the bill yielded these remarks:

> We hear of private institutions who are suffering financial straits because they cannot meet the needs of their operating expenses and when we look on paper we see that

While the institution gratefully accepts these contributions, thus increasing its asset portfolio, the benefit comes at a price: the school's inability to use the funds for a number of years.[6] Meanwhile, universities increasingly require immediate access to capital.[7] As a result, schools focus their efforts in the area of capital campaigns targeting living donors who provide immediate access to monetary gifts.[8] An unforseen outcome of this fund raising technique was that these "new donors" began to specify the intended use of their gifts.[9] Therefore, unlike the donor who incorporates charitable giving into her estate plan or a trust instrument, today's donor personally oversees a donee institution's compliance with the restrictions placed on her gift.

In August 1997, the Supreme Court of Connecticut considered the question of whether donors have standing to enforce the terms of their donation when it can be shown that the school did not comply with the restrictions placed on the gift.[10] In finding for the university, the court interpreted Connecticut's version of the Uniform Management of Institutional Funds Act to deny donors a private right of action by rejecting several arguments in support of granting donors standing.[11] The court held that the common law power of the attorney general to enforce the terms of charitable donations offered a sufficient method for the enforcement of restricted gifts, rejecting an argument in favor of an implied private

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> they are ostensibly very wealthy institutions by virtue of the portfolios that many of them maintain in terms of the stock and whatnot that they hold. But if we look very carefully at these . . . endowments we see that they are very often so restrictive in nature that what on paper appears to be a very wealthy institution turns out, in point of practical fact, to be an institution that's on the verge of bankruptcy simply because they cannot generate the operating funds from their endowment that they need to carry on the very good work that they do.

Carl J. Herzog Found. v. Univ. of Bridgeport, 677 A.2d 1378, 1382 (Conn. 1996) (quoting the floor remarks of Rep. William A. Bevacqua, 16 H.R. Proc., Pt.2, 1973 Sess. 5723, 5734-35).

[6] *See* BRITTINGHAM & PEZZULLO, *supra* note 5, at 3. Although Americans are very generous people, many prospective donors hesitate to relinquish property to charitable organizations during their lifetime. *See id.* Therefore, charitable giving has become a critical part of estate planning for many people. *See id.* This approach to giving prevents charitable organizations from predicting when funds will actually be available for use. *See id.* For a more detailed discussion of the effects of deferred giving on charitable organizations, *see* Dell Marie Shanahan Swearer, *Estate Planning for the Socially Conscious Client: An Overview of Charitable Remainder Trusts*, 65 J. KAN. BUS. ASS'N 30, 30-31 (May 1996).

[7] For example, the Dean of the College of Letters and Science at the University of Wisconsin at Madison recognizes the simultaneous need for immediate access to funding and the creation of endowment resources. In this particular instance, the school must raise $20 for every $5 that can be spent immediately. *See* Carrie Brown, *Don't Cry For Me, Couch Potatoes* (visited Nov. 8, 1997) <http://www.uwm.edu/050696news2.html>.

[8] *See* DURONIO & LOESSIN, *supra* note 2, at 5.

[9] *See* Woodward & Stone, *supra* note 1, at 54.

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

[11] *See id.*

right of action on behalf of individual donors.[12] This decision calls into question the rights of donors in 37 other states which have similar legislation modeled after the federal Uniform Management of Institutional Funds Act.[13]

The concern is for the small-to-medium size investor. Large scale donors such as Ted Turner can employ a battery of attorneys to draft an impenetrable gift instrument that also grants him standing to enforce its terms.[14] The majority of donors, however, do not find themselves in such a position. For most donors, any amount of money expended in crafting a gift-giving device would directly reduce the amount of money comprising the donation.[15] These donors can be

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[12] *See id.* at 997-98.

[13] The following jurisdictions have adopted a version of the Uniform Management of Institutional Funds Act (UMIFA): Arkansas (ARK. CODE ANN § 28-69-601 (Michie 1992)); California (CAL. PROB. CODE § 2290.1 (West 1973)); Colorado (COLO. REV. STAT. § 15-1-1101 (1973)); Connecticut (CONN. GEN. STAT. ANN. § 45a-534 (West 1973)); Delaware (DEL. CODE ANN. tit. 12, § 4701 (1974)); District of Columbia (D.C. CODE ANN. § 32-401 (1981)); Florida (FLA. STAT. ANN. ch. 237.41 (1990)); Georgia (GA. CODE ANN. § 44-15-1 (1984)); Illinois (760 ILL. COMP. STAT. ANN. 50/1 (West 1973)); Indiana (IND. CODE ANN. § 0-2-12-1 (1989)); Iowa (IOWA CODE ANN. § 540A.1 (West 1990)); Kansas (KAN. STAT. ANN. § 58-3601 (1973)); Kentucky (KY. REV. STAT. ANN. § 273.510 (Banks-Baldwin 1976)): Louisiana (LA. REV. STAT. ANN. § 9:2337.1 (West 1976)); Maryland (MD. CODE ANN. EST. & TRUSTS § 15-401 (1973)); Massachusetts (MASS. GEN. LAWS ANN. ch. 180A, § 1-11 (West 1976)); Michigan (MICH. COMP. LAWS ANN. § 451.1201 (1976)); Minnesota (MINN. STAT. ANN. § 309.62 (West 1973)); Missouri (MO. ANN. STAT. § 402.010 (West 1976)); Montana (MONT. CODE ANN. § 72-30-101 (1973)); New Hampshire (N.H. REV. STAT. ANN. § 292-B:1 (1973)); New Jersey (N.J. STATE ANN. § 15:18-15 (West 1975)); New York (N.Y. NOT-FOR-PROFIT CORP. §§ 102, 512, 514, 522 (McKinney 1978)); North Carolina (N.C. GEN. STAT. § 36B-1 (1985)); North Dakota (N.D. CENT. CODE § 15-67-01 (1975)); Ohio (OHIO REV. CODE ANN. § 1715.51 (Anderson 1975)); Oklahoma (OKLA. STAT. ANN. tit. 60, § 300.1 (West 1992)); Oregon (OR. REV. STAT. § 128.310 (1975)); Rhode Island (R.I. GEN. LAWS § 18-12-1 (1972)); South Carolina (S.C. CODE ANN. § 34-6-10 (Law Co-op. 1990)); Tennessee (TENN. CODE ANN. § 35-10-101 (1973)); Texas (TEX. PROP. CODE ANN. § 163.001 (West 1989)): Vermont (VT. STAT. ANN. tit. 14, § 3401 (1973)); Virginia (VA. CODE ANN. § 55-268.1 (Michie 1973)); Washington (WASH. REV. CODE ANN. § 24.44.010 (West 1973)); West Virginia (W. VA. CODE § 44-6A-1 (1979)); Wisconsin (WIS. STAT. ANN. § 112.10 (West 1976)); Wyoming (WYO. STAT. ANN. § 17-7-205 (Michie 1991)).

[14] *See* Howard Fineman, *Why Ted Gave It Away*, NEWSWEEK, Sept. 29, 1997, at 29-32 (discussing entrepreneur Ted Turner's decision to donate $1 billion to the United Nations).

[15] *See* Auchincloss, *supra* note 4, at 34. The author tells the story of Irene Scott, an 83-year-old resident of San Francisco. Ms. Scott donated $1,000 to a local scholarship fund created to help medical school students. Ms. Scott's income consists of $115 a month from her late husband's pension and $736 from her own Social Security. In order to accumulate the $1,000, Ms. Scott saved for four years. *See id.* Apparently, Ms. Scott did not consider it necessary to draft a gift-giving instrument to ensure that her donation would actually be used for her intended purpose. And even if she had, the cost of retaining an attorney in order to ensure her desired result would have completely consumed her funds.

thought of as charitable investors. While the prototypical financial investor seeks purely monetary gain, a charitable investor seeks a social benefit. She attempts to effect her view of how the world should be by funding programs that reflect her vision. The charitable investor alone understands the motivating forces behind making the gift.[16]

By denying charitable investors the standing to bring an action to enforce the terms of a charitable gift, courts provide donee colleges and universities with virtually unchecked power to disregard the gift-giver's intent. The courts' reliance on common law methods of enforcing donative agreements fails to protect the living donor who seeks a specific result from her charitable contribution. The courts should recognize the special interests donors have in enforcing the terms of their restricted gifts. Continued adherence to antiquated laws that deny donors standing may result in a reduction in contributions to institutions of higher education with possible widespread repercussions throughout the nonprofit sector. Therefore, donors who find that the restriction on their gifts have not been followed by the institution's governing body should be permitted to seek legal recourse.

II. UNDERSTANDING THE MOTIVATIONS OF DONOR AND DONEE

A. *The Role of Fund Raising in Charitable Organizations*

We are a society that relies on the kindness of strangers. In 1996, Americans contributed $150.7 billion to support charitable organizations.[17] Eighty percent of these funds came from individual contributors.[18] A vast array of social services rely upon these donations for their continued existence.[19] Those organizations that have historically been the most prominent in the field of fund raising are institutions of higher education, including both public and private schools.[20] In 1989, colleges and universities received almost $9 billion in private donations.[21]

Yale University established the first alumni organization in the United States in 1890.[22] In its first year, just under 400 participating alumni raised $11,000 for

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[16] *See* discussion *infra* Part I.B.

[17] *See* Auchincloss, *supra* note 4, at 34.

[18] *See id.*

[19] *See* I.R.C. § 170(c) (1997). The Code lists the seven methods of organization a corporation, trust, or foundation must follow to be considered for "charitable contributions." They include: scientific inquiry, literary studies, religion, education, national and international amateur sports, and prevention of cruelty to children and animals. *See id.*

[20] *See* Thomas H. Jeavons, *Editor's Notes, in* FUNDRAISING BY PUBLIC INSTITUTIONS 1 (New Directions for Philanthropic Fundraising Nov. 9, 1995).

[21] *See* DURONIO & LOESSIN, *supra* note 2, at 3. *See, e.g., A Gift Worth Giving*, THE PENN STATER (Pennsylvania State Newsletter, Pittsburgh), Nov.-Dec. 1997, at 12 (alumni of Pennsylvania State University announced plans to provide the school with a $30 million gift). Alumni gifts have become the norm for many institutions of higher learning. *See* Woodward & Stone, *supra* note 1, at 54.

[22] *See* BRITTINGHAM & PEZZULLO, *supra* note 5, at 74.

the University.[23] Today, alumni chapters exist at almost every four-year college and university, with many two-year institutions following suit. Alumni organizations provide the dominant source of revenue for these non-profit institutions.[24] In recent years, capital campaigns undertaken by many universities have become high stakes games, taking on the characteristics of big business.[25] Unknowingly, alumni are these institutions' primary targets.

B. *Why Donate?: From the Charitable Investor's Perspective*

Although alumni are the easiest group of potential donors to identify, they are not the only people making charitable contributions to institutions of higher education.[26] Understanding why these people choose to donate is central to the analysis. Academics have conducted considerable research to determine what motivates individuals to make donations. The bulk of this research focused on providing fund raising professionals with a systematic approach to identifying and enticing prospective donors.[27] Some literature, however, suggests that donor motivation cannot be easily categorized.

> Fund raising is charged with emotion. That is not to deny that there are rational components in the decisions donors make but rather to say that almost always powerful emotional factors are also involved . . . . Very few generalizations about them will stand up, either in describing what occurred or in predicting what might happen.[28]

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[23] *See id.*

[24] Note that corporate charitable gifts, although not herein addressed, compose a large portion of the contributions to educational institutions. This "corporate altruism" is fueled by tax benefits and the search for public good will. For a discussion of the impact of corporate donations to higher education. *See id.* at 9-12.

[25] *See* Woodward & Stone, *supra* note 1, at 54 (Columbia University currently attempts to raise $2.2 billion through a capital campaign. Similarly, Harvard set its goal at $2.1 billion and UCLA prepares to raise a total of $1.2 billion.). The president of Emory University urged the university community not to become complacent about the $400 million raised by the institution last year. The school's fund raising surpassed that of the American Heart Association and the Boys and Girls Clubs of America; but, as President William Chace noted, "[Emory is] still not as rich as Harvard." *See Sunday Sampler: Cartoons and Comments On Our Times*, ATLANTA J. & CONST., Nov. 2, 1997, at C3.

[26] *See* RUSS A. PRICE & KAREN M. FILE, THE SEVEN FACES OF PHILANTHROPY: A NEW APPROACH TO CULTIVATING MAJOR DONORS 1 (1994). The authors note that colleges and universities must reach out to diverse segments of the population to attain their ever-increasing monetary goals. *See id.* Among the different groups targeted are wealthy philanthropists, family members of alumni, and corporations. *See id.*

[27] *See id.* (describing the process of cultivating donors as "donor segmentation," which is "the process of classifying the presently undifferentiated group of wealthy individual donors into a small number of groups based on similarities in their views about philanthropy. [I]t allows non-profit organizations to determine which affluent individual donor segments offer the best potential for long term and major gift support."). *Id.* at 2. This reinforces the view that this process is nothing more than a business endeavor.

[28] BRITTINGHAM & PEZZULLO, *supra* note 5, at 60 (quoting J.P. Smith, *Rethinking the*

We can expect, however, that when the donor restricts her gift, strong social and personal forces guide that decision. This outcome-oriented analysis of donor intent suggests that donors choose beneficiary institutions based on empirical evidence regarding the organizations' ability to implement their wishes.[29] For example, a donor may give to a college in her community because she wants to sponsor a medical student who will serve the underprivileged upon graduation. If the university is unable or unwilling to use the donation in this restricted capacity, then, logically, the donor should have the ability to redirect the money to an institution that will comply with the restrictions. This analysis suggests that courts should afford the donor an opportunity to reallocate her funds to a program at another institution that will prepare medial students to practice in underprivileged areas. From this perspective, the university's ability to effect a certain outcome, not the university itself, appeals to the donor. If the university receiving the donation does not implement the donor's desired result, the donor should be entitled to seek legal redress.

At times, however, the charitable donor might herself cause conflicts to arise with the receiving institution. Donors may exert a subtle form of manipulation through restricted gifts. On the one hand, the donor seeks to maintain control over her donation by describing how institutions shall effectuate her desired result. On the other hand, the institution's board of directors believes that they, with the institution's long-term future in mind, should determine the proper allocation of funds.[30] When a restriction coincides (or at least does not conflict) with the school's existing priorities, no difficulty arises. Problems occur when the values the donor wishes to promote do not address or contradict the university's interests.

> Attaching strings (conditions) to gifts enables benefactors to maintain control over how their gifts are used . . . . [they] are unobjectionable when they express a shared understanding of the purpose of the gift and require reasonable accountability. But when strings constrict freedom in harmful ways, they invite the metaphor of puppeteers manipulating puppets.[31]

At some point, the donor ceases to exert influence over the institution's policymaking and instead attempts outright manipulation.[32] Harvard University re-

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Traditional Capital Campaign, in HANDBOOK FOR EDUCATIONAL FUNDRAISING: A GUIDE TO SUCCESSFUL PRINCIPLES AND PRACTICES FOR COLLEGES, UNIVERSITIES, AND SCHOOLS 61 (Francis C. Pray ed., 1981)).

[29] *See* Auchincloss, *supra* note 4, at 36.

[30] *See* BRITTINGHAM & PEZZULLO, *supra* note 5, at 66-67.

[31] MIKE W. MARTIN, VIRTUOUS GIVING: PHILANTHROPY, VOLUNTARY SERVICE, AND CARING 103 (1994).

[32] Occasionally, donor manipulation is obvious. For example in 1986, Villanova University accepted a $400,000 donation to be used to fund a wrestling team. *See* BRITTINGHAM & PEZZULLO, *supra* note 4, at 56. The university did not have the facilities to operate a wrestling team but accepted the gift. *See id.* It became apparent that the donor sought his own personal agenda and the wrestling team was dismantled in 1988. *See id.* For a more detailed discussion of the case, *see* BRITTINGHAM & PEZZULLO, *supra* note 4,

cently reallocated a pledge for $3 million conditioned upon the establishment of a chair in Holocaust studies.[33] The donor required that the person appointed be granted tenure.[34] The school's search committee could not agree on a candidate meeting the donor's specifications.[35] Harvard would "not be rushed" into developing a new course of study or hiring a tenured professor at the urging of a single donor.[36]

Harvard University shows, by example, that the schools themselves can police the line between influence and manipulation. Where the terms of the donation do not address the needs of the university and cannot, in good conscience, be implemented, the board of directors maintains the right to refuse the gift.[37] The right of refusal is of utmost importance where, as with a restricted gift, acceptance conveys "a statement about what the institution is willing to become, how it is willing to see itself and the world."[38] However, when the university accepts funds knowing that the donor's intent will not come to fruition, the institution effectively misleads the benefactor, and she should be entitled to an avenue of redress.

III. REGULATING THE RELATIONSHIP BETWEEN DONOR AND DONEE THROUGH NON-LEGISLATIVE MEANS

Accepting the categorization of today's donor as a charitable investor,[39] one would expect to find proactive application of the categorization to resolve conflicts resulting from restricted gifts. In reality, however, courts afforded charitable investors no such protections. A survey of the judicial system shows that few cases involving conflicts between donors and recipient universities make their way through the judicial process. Therefore, case law provides little guidance for regulating the donor-donee relationship. Charitable organizations' attempts to develop standards of conduct for dealing with the charitable investor

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at 56.

[33] *See* Richard Chacon, *Holocaust Studies Chair is Shelved at Harvard*, BOSTON GLOBE, Mar. 25, 1998, at A1.

[34] *See id.*

[35] *See id.*

[36] *Id.*

[37] *See* DEREK BOK, BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY 266 (1982) (describing Justice Frankfurter's four essential freedoms of the university. They include the right to determine: "1) who may teach, 2) what may be taught, 3) how it shall be taught, and 4) who may be admitted to study."). *Id.* The author suggests that these "freedoms" can be easily applied to other areas where restricted gifts are plentiful today, such as collegiate athletics and research. *See id.*

[38] BRITTINGHAM & PEZZULLO, *supra* note 5, at 57. *See also* Woodward & Stone, *supra* note 1, at 54 (discussing the return of a $20 million restricted gift by Yale University in 1995. The donation was to be used to fund the study of "traditional ideas" while the school undertook steps to expand their coverage of non-Western societies.).

[39] *See* discussion *supra* Part II.B.

have also proven to be unsuccessful.[40]

A. *Seeking Guidance From the Judiciary*

1. Absence of Case Law Resolving Conflicts Between Donor and Donee

Competing visions as to how donated funds should be used often generate conflict between the university and the donor. Surprisingly, little case law addresses the duties of donee institutions when such conflicts occur.[41] This may be due to the fact that, historically, universities settled donor's claims out of court.[42] Wheaton College offers a compelling example. In the late 1980s, the institution undertook a vast capital campaign.[43] Meanwhile, the board considered plans to make the women's college co-educational.[44] When the college opened its doors to men, donors brought suit claiming that the institution owed them a duty because they gave money to what they believed was a women's college.[45] Wheaton avoided setting precedent by offering to return funds to any disgruntled donors.[46]

As conflicts between donors and universities continue to develop, courts will inevitably have to grapple with these issues. However, evidence suggests that reliance upon the adversarial court system often effects an undesirable result by fracturing the relationship between the living donor and the donee institution.[47] Where judicial construction of the gift-giving instrument is required, the result depends not only on the language used to convey the gift, but also upon a number of other, unpredictable factors.[48] Under this system, there are no clear standards for donors to follow in drafting a restriction that courts will uphold upon challenge by a donee institution.[49] Instead, a judge's "reasoned" analysis of the case substitutes for the thoughtful intent of the donor. Certainly, the judge is constrained by longstanding rules of judicial interpretation, including trust law doctrines;[50] however, there is no method to predict how a judge will apply the doctrines within the confines of a specific fact pattern. Therefore, reliance solely

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[40] *See* discussion of attempts by colleges and universities to regulate themselves, *supra* Part III.B.

[41] *See* UNIF. MGMT. INST. FUNDS ACT prefatory note, 7A U.L.A. 706 (Supp. 1993).

[42] *See* BRITTINGHAM & PEZZULLO, *supra* note 5, at 50.

[43] *See Wheaton College Agrees to Return Gifts to Donors Who Object to Co Education*, CHRON. OF HIGHER EDUC., June 15, 1988, at A1.

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See* RESTATEMENT (SECOND) OF TRUSTS § 167(3) cmts. g, h (1959).

[48] *See* J.A. Bryant, Jr., Annotation, *Effect on Charitable Trust or Bequest for Particular School or School District, or Students or Graduates Thereof, of Change in School or District Structure or Organization*, 68 A.L.R.3d 997, § 2[b] (1976). The outcome may depend, for example, on what the court views as the most plausible outcome or disparity between legal counsel for the parties. *See id.*

[49] *See id.*

[50] *See* discussion of the cy pres and deviation doctrines *supra* Part III.A.2.

on the courts to fashion standards for regulating the relationship between donor and donee is misplaced.

2. Accepted Trust Law Doctrines Provide No Relief for the Charitable Investor

Courts long applied accepted trust law doctrines to issues involving charitable gifts.[51] These doctrines provide the means by which courts can alter the terms of a restricted trust instrument when time or circumstance makes adherence to such requirements impractical, impossible, or illegal.[52] Courts use the doctrine of cy pres to accomplish the general intent of the donor when the specific goals become impossible to achieve due to changed circumstances.[53] Similarily, the doctrine of deviation allows courts to strike an explicit provision of a trust where compliance with the restriction would defeat the trust purpose.[54] Both doctrines are useful in cases involving longstanding trusts, where the donor is deceased, by allowing the court to consider evidence reflecting the donor's purpose in creating the trust.[55] In the case of a living charitable investor, however, the court need not resort to these legal doctrines to obtain a concise statement of donor intent. The donor may speak for herself and describe firsthand the intended purpose of her restricted gift. Therefore, application of these legal constructs to restricted gifts may actually subvert the implementation of donors intent by failing to seek guidance from the most knowledgeable source — the donor herself.

B. *Requiring Donees to Regulate Themselves*

An initial response to the problem at issue may be to suggest that charitable institutions develop and abide by strict guidelines for the acceptance and implementation of restricted donations. Many museums, which rely in great part on donors for the procurement of artwork, have found success in this approach.[56] The Metropolitan Museum of Art, for example, enacted guidelines delineating the rights and obligations of both donor and donee.[57] Full disclosure to prospective donors, coupled with strict adherence to the donation guidelines, has proven

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[51] *See* RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959). *See also* discussion *infra* Part V.B.

[52] *See* Bryant, *supra* note 48, § 2[a], at 997.

[53] *See* BLACK'S LAW DICTIONARY 387 (6th ed. 1990) (defining "cy pres" as "a rule for the construction of instruments in equity, by which the intention of the party is carried out *as near as may be* when it would be impossible or illegal to give it literal effect.") (emphasis added).

[54] *See id.* at 452 (defining "deviation doctrine" as "principle which permits variation from terms of trust where circumstances are such that purposes of trust would otherwise be defeated.").

[55] *See generally* Jimenez v. Lee, 547 P.2d 126 (Or. 1976).

[56] *See generally* MARIE MALARO, MUSEUM GOVERNANCE: MISSION, ETHICS, POLICY 1-25 (1994).

[57] *See id.*

effective for many museums.[58] Colleges and universities, as well as other charitable organizations which rely on fund raising for their continued existence, have yet to find the same success many museums have had in implementing a method of self-regulation.[59]

1. Why Intra-Organizational Regulation Will Not Work in Theory

Experts in the field of institutional fund raising suggest why intra-organizational regulation will not resolve situations where donor and donee find themselves in conflict. Scholars assert that collegiate fundraisers, although proficient at solicitation, lack the necessary skills for implementation.[60] As a result, fundraisers, while not purposely intending to mislead donors, actually accept restricted donations without considering how these restrictions fit within the school's long range plans. The fundraisers show concern only for the end result that funds continue to flow into the school's coffers.[61] Fundraisers may theoretically accept the need for ethical guidelines for the solicitation and acceptance of donations but find themselves unable to adhere to such a code. This phenomenon ensures that attempts by universities to diffuse tension resulting from conflicts between management and donors cannot be resolved without third party intervention in the form of legislative and/or judicial action.

2. Why Intra-Organizational Regulation Does Not Work in Practice

Both the National Association of Fund Raising Executives ("NAFRE") and the Council for Support of Education ("CASE") attempted to develop formal codes addressing the ethical and legal issues surrounding implementation of a donor's express and implied intent.[62] These guidelines are composed of brief, less than insightful suggestions by which organizations are encouraged to police themselves.[63] "[These are] guidelines without lines to guide, leav[ing] unil-

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[58] *See id.*

[59] *See id.*

[60] *See* Beverly Goodwin, *Ethics in the Research Office, in* ETHICS IN FUNDRAISING: PUTTING VALUE INTO PRACTICE 87-104 (Robert E. Fogal & Dwight F. Burlingame eds., Nov. 6, 1994).

[61] *See id.*

[62] *See* BRITTINGHAM & PEZZULLO, *supra* note 5, at 74. *See also* Goodwin, *supra* note 60, at 88-89.

[63] *See* BRITTINGHAM & PEZZULLO, *supra* note 5, at 74. The National Society of Fund Raising Executives ("NSFRE") *Code of Ethical Principles and Standards of Professional Practice Statement of Ethical Principles*, adopted in November 1991, exemplifies the difficulty in crafting such regulations. A sampling of the discretionary provisions include: "Adhere to the spirit as well as the letter of all applicable laws and regulations" and "Value the privacy, freedom of choice and interests of all those affected by their actions." *Id. The Standards of Professional Practice,* adopted and incorporated into the NSFRE *Code of Ethical Principles* in November 1992, more explicitly addresses the issues of complying with the donor's intent but provides no substantive guidance. Examples of such provisions include:

luminated many of the quandaries and temptations practitioners face."[64] In the early 1990's, a coalition of non-profit organizations created a similar document entitled "A Donor Bill of Rights."[65] Although the document enumerates many of the donor's concerns, it fails to provide adequate guidance for dealing with "the difficult issues" such as the donor's right to expect that the restrictions they place on their gifts will be followed.[66] Furthermore, this attempt at regulation highlights why a code of conduct is not the appropriate method for dealing with deceptive universities.[67] Unless the university desires to comply, the document is meaningless.[68] "[R]eading a code is like reading a regulation: Unless the ideas and values are internalized, their written form is itself a form of deception."[69] The dubious success of the NAFRE and CASE standards, as well as the failure of the Donor Bill of Rights to set the ground rules for organizations involved in fund raising, casts doubts upon the ability of universities to simultaneously promote their own agenda and that of the donor.[70]

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13. Members shall take care to ensure that all solicitation materials are accurate and correctly reflect the organization's mission and use of solicited funds.

14. Members shall, to the best of their ability, ensure that contributions are used in accordance with the donor's intent

15. Members shall, to the best of their ability, ensure proper stewardship of charitable contributions, including timely reporting on the use and management of funds and explicit consent by the donor before altering the conditions of a gift.

Id.

[64] William F. May, *Professional Ethics: Setting, Terrain, and Teacher, in* ETHICS TEACHING IN HIGHER EDUCATION 213 (D. Callahan & S. Bok eds., 1980).

[65] *See* Marianne G. Briscoe, *Ethics and Fundraising Management, in* ETHICS IN FUNDRAISING: PUTTING VALUE INTO PRACTICE 125-26 (Robert E. Fogal & Dwight F. Burlingame eds. 1994).

[66] *See id.* Specific provisions of the Donor Bill of Rights include the right:

I. To be informed to the organization's mission, of the way the organization intends to use donated resources, and of its capacity to use donations effectively for their intended purposes.

. . .

IV. To be assured their gifts will be used for the purposes for which they were given.

. . .

X. To feel free to ask questions when making a donation and to receive prompt, truthful and forthright answers.

Id.

[67] *See id.*

[68] *See* ROBERT L. PAYTON, PHILANTHROPY: VOLUNTARY ACTION FOR THE PUBLIC GOOD 211 (1988).

[69] *Id.*

[70] *But see* Bill Roth, *Is It Quality Improves Ethics or Ethics Improves Quality?*, J. FOR QUALITY & PARTICIPATION 1, 6-10 (1993); R.R. Sims, *The Challenge of Ethical Behavior in Organizations*, J. OF BUS. ETHICS, 11, 505-13 (1992); BRITTINGHAM & PEZZULLO, *supra* note 5, at 96. These authors suggest that organizations involved in fund raising should

IV. A Legislative Attempt to Regulate Conflicts Between Donor and Donee: The Uniform Management of Institutional Funds Act

Courts long recognized the legitimacy of using state police power to regulate charitable solicitations.[71] Laws promulgated under this power primarily protect citizens from charitable organizations engaging in fraudulent and deceptive practices.[72] The scope of these laws has generally been limited to placing restrictions on forms of charitable fund raising activity, and requiring public disclosure of the administrative costs involved in these endeavors.[73] These regulations do not touch upon the finer points of soliciting and implementing restricted donations.[74] General laws regarding the obligations of the governing boards of charitable institutions are, therefore, the exception - not the rule.

In 1972, the Commissioners on Uniform State Laws introduced The Uniform Management of Institutional Funds Act ("UMIFA").[75] The drafters developed guidelines for non-profit institutions, such as colleges, universities, hospitals, religious, and other charitable organizations.[76] The resulting legislation delineates the rights and obligations of these institutions with respect to the management of funds.[77] The states that adopted some version of UMIFA, note, either explicitly or implicitly within their legislation, that the purpose of the act is to identify a course of action that provides charitable organizations with the greatest net return from each donated dollar.[78]

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communicate their performance expectations to employees through a vision or mission statement. It is difficult to believe that these institutions would receive much guidance from such a document that cannot address the plethora of ethical issues with which they will be faced.

[71] *See* Don F. Vaccaro, Annotation, *Validity and Application of Governmental Limitation on Permissible Amount or Proportion of Fundraising Expenses or Administrative Costs of Charitable Organizations*, 15 A.L.R. 4th 1163 (1981).

[72] *See id.*

[73] *See id.*

[74] *See* Briscoe, *supra* note 65, at 125.

[75] *See* Mary Schmid Daugherty, *Uniform Management of Institutional Funds Act - The Implications For Private College Board of Regents*, 57 Ed. Law Rep. 319, 319 (1990).

[76] *See* Unif. Mgmt. Inst. Funds Act, *supra* note 41, § 1.

[77] *See id. See also* 15 Am. Jur. 2d *Charities* § 105 (1976).

[78] The majority of jurisdictions that enacted a version of UMIFA have not included in their legislation a statement of purpose. The New Hampshire statute contains a Declaration of Purpose, which is representative of the objectives of the law:

> It is hereby declared to be in the public interest and to be the policy of the state, to promote, by all reasonable means, the maintenance and growth of eleemosynary institutions by encouraging them to establish and continue investment policies, without artificial constraints, which will provide them with the means to meet the present and future needs of such eleemosynary institutions pursuant to the provisions of this act. To this end it is hereby declared to be in the public interest and to be the policy of the state to encourage such institutions to adopt investment policies whose objective is to obtain the highest possible total rate of return consistent with the standard of prudence.

The UMIFA addresses five areas of particular concern regarding the control and use of institutional funds: 1) establishing a standard of prudence for the use of the appreciation of invested funds; 2) granting charitable organizations specific investment authority; 3) permitting non-profit organizations authority to delegate investment decisions; 4) requiring that managers of institutional funds meet the general standard of business care and ordinary prudence; and 5) developing a method for releasing restrictions on the use of funds or the selection of investment opportunities by donor consent or court order.[79] The majority of states adopted some version of UMIFA.[80] These basic provisions are common to all the states' statutes.[81]

A. *Finding A Private Right of Action in UMIFA*

The commentary accompanying UMIFA states that the legislation is specifically directed at colleges and universities.[82] The language of the Act fails to explicitly confer a private right of action to donors. However, this is not the end of the analysis. One rationale suggests that if the statute creates an arguably protectable interest in the donor, then he gains standing to enforce that interest.[83] "A statute need not specifically provide that certain persons come within its protection in order to establish aggrievement as long as that protection may be implied fairly."[84] Therefore, interpretation of the provisions of the Act is of particular importance.

Section 7 of UMIFA, entitled "Release of Restrictions on Use or Investment," requires donative or judicial consent for the release of terms placed on a gift.[85]

N.H. REV. STAT. ANN. 292-B:1 (1973). *See also* Beverly M. Wolff, *Museums and the Attorney General: The Management and Spending of Endowment*, C896 A.L.I.-A.B.A. 333, 336-37 (1994).

[79] *See* Wolff, *supra* note 78, at 333.

[80] *See* statutes cited, *supra* note 13.

[81] *See* Wolff, *supra* note 78, at 349-50.

[82] Drafters of UMIFA made reference to the need to specifically address the needs of colleges and universities:

> Over the past several years the governing boards of eleemosynary institutions, particularly colleges and universities, have sought to make more effective use of endowment and other investment funds. They and their counsel have wrestled with questions as to permissible investment authority, and use of the total return concept in investing endowment funds . . . . Some gifts and grants contained restrictions on use of funds or selection of investments which imperiled the effective management of the fund. An expeditious means to modify obsolete restrictions seemed necessary.

UNIF. MGMT. INST. FUNDS ACT, *supra* note 41, at prefatory note. *See also* Carl J. Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 1000 (Conn. 1997) (discussing the Connecticut legislature's purpose in enacting its version of UMIFA).

[83] *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 677 A.2d 1378, 1381 (Conn. App. Ct. 1996), *rev'd* 699 A.2d 995 (Conn. 1997).

[84] *Id.* (discussing Buchholz's Appeal from Probate, 519 A.2d 615, 617 (1987)).

[85] *See* UNIF. MGMT. INST. FUNDS ACT, *supra* note 41, at 712.

All state statutes contain a similar provision.[86] The commentary pertaining to this section states that "[t]he donor has no right to enforce the restriction, no interest in the fund, and no power to change the eleemosynary [charitable] beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect."[87] One court interpreted this consent provision as conferring a protected interest on donors and, therefore, standing to enforce that interest.[88] Although a higher court ultimately rejected this analysis, another jurisdiction may find merit in this approach.[89]

B. *Connecticut's Take on Donor's Private Right of Action*

Remarks made on the floor of the Connecticut legislature during debate on the state's version of UMIFA are not dispositive on the issue of whether legislators believed they were granting donors an implied right of action.[90] In discussing The Connecticut Uniform Management of Institutional Funds Act ("CUMIFA"), Representative James T. Healey stated that "if the donor has seen fit to spell out restrictions, then those restrictions govern. This bill steps in only in the event that he has not spelled out the restrictions."[91] Additional remarks suggest that legislators believed that CUMIFA would not affect those donations where the donor clearly expresses his intentions.[92]

The Connecticut courts recently considered this and other evidence of legislative intent in dealing with the issue of whether CUMIFA provides donors with

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[86] *See* Daugherty, *supra* note 65, at 319. The Connecticut statute provides an example of this consent provision:

> Release of restriction in gift instrument: . . . "(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 Superior Court for . . . a 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 . . . . "

CONN. GEN. STAT. ANN. § 45a-533 (West 1973).

[87] UNIF. MGMT. INST. FUNDS ACT, *supra* note 41, at 712.

[88] *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 677 A.2d 1378, 1381 (Conn. App. Ct. 1996), *rev'd* 699 A.2d 995 (Conn. 1997).

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

[90] *See id.* at 1002.

[91] *Id.* (quoting the floor remarks of Rep. Healey, 16 H.R. Proc., Pt. 11, 1973 Sess., at 5732).

[92] *See id.* Rep. Neiditz stated for the record that "the bill generally leaves it to the donor to make his own provisions for the matters covered in the bill. The bill applies when the donor has not specified another way." *Id.* (quoting floor remarks, 16 H.R. Proc., Pt. 11, 1973 Sess., at 5726).

standing to bring an action to enforce the terms of a gift.[93] Although the Connecticut Act, like UMIFA, does not explicitly confer a private right of action on donors, the state's courts considered alternative sources of standing.[94] An analysis of how the Connecticut courts dealt with this issue may be useful in predicting how other jurisdictions will decide the same issue.

1. Case Analysis: *Carl J. Herzog Foundation v. University of Bridgeport*

a. Facts

The University of Bridgeport contacted the Carl J. Herzog Foundation, Inc., ("Herzog") regarding participation in a matching fund program to provide "need based merit scholarships to disadvantaged students for medical related education on a continuing basis."[95] On August 12, 1986, Herzog agreed to match the sum of $250,000 with the stipulation that the University use the money to provide the described scholarships.[96] The University of Bridgeport formally accepted Herzog's offer on September 9, 1986, by written letter.[97] Herzog accumulated the specified funds over a period of several months and transferred the donated funds to the University in June 1988.[98] At this time, all parties involved believed that the donee would use the monies to provide nursing scholarships pursuant to the donative arrangement.[99]

In November 1991, Herzog learned that the University closed its nursing school in June of that year.[100] Herzog received notice that the funds remaining from the gift were commingled with general university funds and were not being used to fund need-based merit scholarships per the donative agreement.[101] Herzog brought suit seeking injunctive relief preventing the University from using the matching funds for general purposes other than those stipulated in the donative agreement.[102] In the alternative, Herzog asked the court to direct the remainder of the donation to another organization that could administer the funds in accordance with the original purpose.[103] Herzog presented evidence showing a history of donating funds to the University specifically to be used as merit scholarships for disadvantaged students seeking an education in the medical

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[93] *See Herzog,* 699 A.2d 995.

[94] *See id.*

[95] Carl J. Herzog Found. v. Univ. of Bridgeport, 677 A.2d 1378, 1379 (Conn. App. Ct. 1996) *rev'd* 699 A.2d 995 (Conn. 1997).

[96] *See id.* at 1379-80.

[97] *See id.*

[98] *See id.*

[99] *See id.*

[100] *See id.*

[101] *See id.*

[102] *See id.* Herzog brought suit under CUMIFA, claiming that the statute conferred standing on donors to enforce restrictions placed on their gift instruments. *See id* at 1381.

[103] *See id.* at 1380. Herzog identified the Bridgeport Area Foundation as his desired alternative beneficiary. *See id.*

field.[104] Herzog also testified that it made the matching fund donation with the same intent: to aid students in their study of medicine.[105] While the gift-giving instrument did not explicitly contain a right of reversion or other retention of control over the funds, Herzog claimed that the court could infer its intention from the document.[106] Similarily, Herzog claimed that the tone of the negotiation process reflected this intention.[107]

The University moved to dismiss for lack of subject matter jurisdiction, claiming that Herzog lacked standing under CUMIFA.[108] The trial court concluded that CUMIFA did not confer standing to donors and dismissed the action.[109] Herzog appealed, and the Connecticut Appellate Court reversed, holding that the statute implicitly provided donors with standing to enforce the terms of a gift.[110] The Connecticut Supreme Court reversed on appeal.[111]

b. In favor of standing: the Connecticut Appellate Court's interpretation of CUMIFA

If the parties included a reservation of a right of reverter or a right to modify the gift within the language of the gift instrument itself, the court may have avoided the standing issue.[112] As the appellate court concluded, however, Herzog did not claim to have explicitly reserved such a right.[113] Therefore, the court considered whether CUMIFA provides standing for a donor of a restricted charitable gift to seek to enforce the restriction.[114] The court attempted to review the case law from other jurisdictions that have adopted a version of the Uniform Act. The court identified *Herzog* as a case of first impression and could not gleam any guidance from other state courts.[115]

The appellate court focused its analysis on the provision of CUMIFA requir-

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[104] *See Herzog,* 699 A.2d at 996.

[105] *See id.*

[106] *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 677 A.2d 1378 (Conn. App. Ct. 1996) *rev'd* 699 A.2d 995 (Conn. 1997).

[107] *See id.* The record shows that plaintiff Herzog was approached by the University with the matching fund proposal. The University phrased the donation as restricted to the benefit of students pursuing an education in medicine. It was this proposal that Herzog accepted and to which the organization proceeded to donate $250,000. *See id.*

[108] *See id.*

[109] *See id.*

[110] *See id.*

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

[112] *See id.* at 999 n.5. Reserving a right of reverter or a right to modify the gift ensures that the donor has a continuing property interest in the donated funds. *See id.* Therefore, Herzog would have had a sufficient, cognizable interest to bring its action against the University of Bridgeport. *See id.*

[113] *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 677 A.2d 1378, 1381 n.3 (Conn. App. Ct. 1996) *rev'd* 699 A.2d 995 (Conn. 1997).

[114] *See id.* at 1379.

[115] *See id.* at 1383 n.5.

ing donor or court consent for release from a gift restriction.[116] Finding this provision to evidence the existence of a donor's interest in the gift restriction, the court held that the donor had to have standing to protect that interest.[117]

"It would be anomalous for a statute to provide for written consent by a donor to change a restriction and then deny that donor access to the courts to complain of a change without such consent."[118]

c. No standing: the Connecticut Supreme Court interprets CUMIFA

The Connecticut Supreme Court principally relied on the common law doctrine that a donor does not have standing to bring an action to enforce the restrictions placed on a gift unless she had previously reserved the right to do so.[119] At common law, the court noted, the attorney general had standing to enforce the terms of a restricted gift.[120] Many states, including Connecticut, codified this common law rule.[121] The courts in these jurisdictions find that in transferring funds to the donee institution, the donor also confers all interest over the disposition and control of the funds.[122]

C. *Going Beyond the Court's Analysis: How to Square the Conflicting Language of UMIFA*

Section 45a-534 of the Connecticut version of UMIFA mandates that the statute "shall be read as to effectuate the general purpose to make uniform the law with respect to the subject of [the provisions of the statute] among those states which enact them."[123] Therefore, section 3 of the Uniform Act, which requires that charity fund managers abide by donors' restrictions on the use of their gifts, is reflected in the Connecticut law.[124] The drafters of the Uniform Act added this

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[116] *See id.* at 1381 (discussing CONN. GEN. STAT. ANN. § 45a-533 (West 1997)).

[117] *See id.* at 1384.

[118] *Id.* at 1385 (citing Buchholz's Appeal From Probate, 519 A.2d 615, 617 (Conn. App. 1982)).

[119] *See generally* A.W. Scott, TRUSTS (4th Ed. Fratcher 1989) § 348.1.

[120] The rationale for granting the attorney general this power is described as follows:

> The public benefits arising from the charitable trust justify the selection of some public official for its enforcement. Since the [a]ttorney [g]eneral is the governmental officer whose duties include the protection of the rights of the people of the state in general, it is natural that he has been chosen as the protector, supervisor, and enforcer of charitable trusts, both in England and in the several states . . . .

G. Bogert & G. Bogert, Trusts and Trustees (2d Rev. Ed. 1991) § 411, at 2-3.

[121] The Connecticut statute exemplifies the majority position, imposing on the attorney general the duty to ". . . represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes . . . ." CONN. GEN. STAT. ANN. § 3-125 (West 1997).

[122] *See* Smith v. Thompson, 266 Ill. App. Ct. 165, 169 (1932).

[123] CONN. GEN. STAT. ANN. § 45a-534 (West 1973).

[124] *See* UNIF. MGMT. INST. FUNDS ACT, *supra* note 41, § 3. *See also* discussion of the impact of section 3 of UMIFA in 15 AM. JUR. 2d *Charities* § 105 (1976).

language to assure donors that their instructions would be enforced.[125] Therefore, if Herzog indicated how its gift should be treated, it would seem that the University of Bridgeport was obligated to implement these wishes.

The language of the statute and the court's interpretation appear to result in two very different outcomes. The drafters of the Uniform Act specifically require the donor's consent before the university can obtain a release from a gift restriction. Again, "[i]t would seem anomalous for a statute to provide for written consent by a donor to change a restriction and then deny that donor access to the courts to complain of a change without such consent."[126]

V. ALTERNATIVE MEANS OF PROVIDING DONORS WITH STANDING TO ENFORCE THEIR GIFT RESTRICTIONS

A. *Granting Donors Standing Under the Special Interest Exception*

It is commonly accepted in the law of charitable trusts that the attorney general is not the only party who has standing.[127] The Restatement of Trusts describes the principle that "[a] suit can be maintained for the enforcement of a charitable trust by the [a]ttorney [g]eneral or other public officer or by a cotrustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin."[128]

The law, however, recognizes an exception to the general rule prohibiting a private right of action in these cases.[129] There is an established exception for a person having a "special interest" in the enforcement of the trust.[130] Donors can obtain this special interest by reserving a property interest, such as a right of reverter, within the gift instrument; however, some beneficiaries of the charitable donation cannot take advantage of this exception.[131] Subsequent case law also suggests an expansion of the special interest doctrine to include other persons not specifically named as the recipient of the reverter.[132]

The Connecticut Supreme Court in *Herzog* concluded that, to fall within this special interest exception, the donor must define her property interest in the donation by reserving a right of reverter or a right to redirect within the language

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[125] *See* Wolff, *supra* note 78, at 343.

[126] Carl J. Herzog Found. v. Univ. of Bridgeport, 677 A.2d 1378, 1385 (Conn. App. 1996), *rev'd*, 699 A.2d 995 (Conn. 1997) (citing Buchholz's Appeal From Probate, 519 A.2d 615, 617 (Conn. App. 1982)).

[127] *See* RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

[128] *Id.*

[129] *See id.*

[130] *See id.*

[131] *See* Jones v. Grant, 344 So. 2d 1210, 1212 (Ala. 1977) (holding that beneficiaries *with a special interest* can institute a suit) (emphasis added).

[132] *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 999 n.5 (Conn. 1997).

of the gift-giving instrument.[133] The court attempted to bolster its conclusion by turning to an analysis of the rights of donors at common law, concluding that ". . . [w]here 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."[134] Under this analysis, to have the right to enforce the terms of a donative instrument, the donor must retain a property interest in the gift as expressed in an explicit right of reverter or right to redirect.[135] The reservation ensures that the onus falls on the donor to create an airtight gift-giving instrument to protect her targeted contribution to the university.

The appellate court had a decidedly different take on the existence of an enforceable right. The court made a distinction between property interests and protectable interests.[136] "Although a donor of an irrevocable gift has no property interest in that gift, it does not follow that no protectable statutory interest exists for the purpose of standing . . . [a] protectable interest is one in which an individual or entity is enabled to defend or to preserve."[137]

This analysis seems to disregard the significance of the restriction placed on the gift in determining the intent of the donor. The *Herzog* court's logic appears to represent nothing more than a legal requirement that the donor either clarify her intentions no less than twice within the gift-giving instrument itself, or face the possibility that her wishes will fall by the wayside. The restriction in and of itself, although dispositive of the issue of donor intent, does not retain an actionable interest. Those donors who mistakenly or unknowingly fail to include the required language creating a right of reverter or a right to redirect within the donative agreement can as much as kiss their intentions for the funds goodbye.[138]

By creating a gift instrument with explicit instructions for its implementation, a donor should be held to exemplify the necessary interest in the enforcement of the restriction. That being so, the donor could then argue inclusion in a special interest classification, and thereby establish standing. Where a university brings an action to obtain a legal decree as to the feasibility of compliance with a gift restriction, the role of the judiciary is clear.[139] The court's objective in these cases is to interpret the gift instrument by discerning the donor's intent and then, if necessary, to provide for its approximate application.[140] Requiring evidence of a right of reverter or a right to redirect is a formalism that merely serves to dis-

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[133] *See id.* at 998 n.4.

[134] *Id.* at 999 (citing Smith v. Thompson, 266 Ill. App. Ct. 169 (1932)). *But see* McGee v. Vandeventer, 158 N.E. 127 (1927).

[135] *See* Marin Hosp. Dist. v. Dept. of Health, 154 Cal. Rptr. 838 (Cal. Ct. App. 1979).

[136] Carl J. Herzog Found. v. Univ. of Bridgeport, 677 A.2d 1378, 1384 (Conn. App. Ct. 1996) *rev'd* 699 A.2d 995 (Conn. 1997).

[137] *Id.*

[138] *See id.*

[139] *See* discussion of the application of trust doctrines, *supra* Part III.A.2.

[140] *See id.*

tinguish cases that, based on the facts and interests involved, are at base undistinguishable. In these instances, it appears that the restriction itself is the focus of the court's inquiry and is the primary source of evidence as to donor intent.[141] When considering the intent inherent in the donor's restrictive language, it is not clear that the court would reach a different result in the case of an enforceable versus an unenforceable gift restriction.[142] The restriction represents the continuing will of the donor to effect a certain outcome regardless of the existence of formal provisions in the gift instrument. This continuing interest in the application of the donated funds should constitute a special interest, worthy of granting an exception to the donor's lack of statutory and common law standing to privately enforce the terms of a charitable contribution.

B. *Rejecting the Common Law Role of the Attorney General as the Enforcer of Restricted Gifts*

The Supreme Court of Connecticut's decision in *Herzog* relied, in part, on the historical role state attorneys general have played in the enforcement of charitable trusts and the regulation of charitable solicitations.[143] The court noted that, as a general rule, the enforcement of charitable gifts follows the law of charitable trusts.[144] Therefore, the court concluded that "[t]he plaintiff's gift . . . [was] undoubtedly a public gift subject to the enforcement procedures governing charitable trusts."[145] Since the enforcement procedure for charitable trusts is available only to the state's attorney general, donors cannot personally enforce the terms of their charitable gifts.

Blindly imposing the longstanding law of charitable trusts to the enforcement of charitable gifts may provide an easy solution, but it is an unsatisfactory one. The attorney general is an inadequate advocate in these cases when compared with the donor, who has a special, personal interest in the enforcement of the gift restriction.[146] Furthermore, given the great diversity in "power, duties and

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[141] *See generally* Jiminez v. Lee, 547 P.2d 126 (Or. 1976).

[142] An enforceable gift retains a right of reverter or a right to redirect. *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 998 n.4 (Conn. 1997). An unenforceable gift does not include an explicit provision retaining a right of reverter or a right to redirect for the donor. *See id.*

[143] *See Herzog*, 699 A.2d at 997 n.2.

[144] *See id.* "Ordinarily the principles and rules applicable to charitable trusts are applicable to [gifts to] charitable corporations." *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959)).

[145] *Id.*

[146] *See* STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 4 (Lynne M. Ross ed., Bureau for National Affairs, Inc. 1990) [hereinafter STATE ATTORNEYS GENERAL]. "[T]he modern Attorney General represents the diverse public interests of the sovereign people of a state or territory of the Union, usually through representation of the jurisdiction's governmental agency or as the legal spokesperson for the public at large." *Id.* Due to the very personal nature of charitable giving previously discussed, it seems more likely the exception than the rule that an attorney general would find strict adherence to the

operations" among the states' attorneys general, the inadequacy of attorney general as an advocate for restricted gifts is clear.[147] The ability of donors to seek redress for noncompliance with the restrictions on their gift may depend on the jurisdiction in which they live or in which they have chosen to donate. Finally, attempting to conform the law of gifts to the well-developed doctrines of trust law subverts one of the most sacred theories guiding the law of trusts: adherence to donor intent.

1. A Historical Analysis of the Attorney General's Role in the Enforcement of Charitable Trusts

The Attorney General's authority over charitable trusts dates back to English Common law.[148] During the fifteenth century, the courts of chancery began exercising equitable powers to enforce charitable uses.[149] Parliament supplemented the court's power when it enacted the Statute of Charitable Uses in 1601 which had commissioners investigate abuses of charitable bequests and trusts.[150] Although Parliament later repealed the Statute of Charitable Trusts, the Statute served a valuable role in the development of charitable trust doctrine in the United States.[151]

"In the post-revolutionary war period, American courts refused to recognize a common law authority to enforce charitable trusts."[152] In 1844, however, the United States Supreme Court determined that state enforcement of charitable

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terms of a gift to be in the public's interest. The fact that a gift restriction reflects the goals of an individual citizen, barring further public support, is insufficient to warrant the attorney general's intervention. Therefore, there appears to be little incentive for attorneys general to help individual donors enforce the terms of their gifts.

[147] COMM. ON THE OFFICE OF ATT'Y GEN., NAT'L ASS'N OF ATT'YS GEN., POWER, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL 1 (1977).

> The most striking characteristic to emerge from a study of the office of Attorney General in the fifty-four jurisdictions considered in this study is the great diversity of its powers, duties and operations. This varies from an extremely powerful office in some jurisdictions, exercising broad authority over state legal services and local prosecutions, to a very weak one in others . . . .

Id. See also STATE ATTORNEYS GENERAL, *supra* note 146, at 11. "There is a wide variety among the states, commonwealths, and territories in the constitutional or statutory structures conferring powers and responsibilities upon the Attorney General." *Id.*

[148] *See* STATE ATTORNEYS GENERAL, *supra* note 146, at 184.

[149] *See* POWER, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL, *supra* note 147, at 313.

[150] *See* STATE ATTORNEYS GENERAL, *supra* note 146, at 184.

[151] *See id.*

[152] *Id.* The courts held the mistaken belief that the power to enforce a charitable trust was derived from the Statute of Charitable Uses as opposed to the English common law. *See* POWER, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL, *supra* note 147, at 313. *See also* Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat 1, 4 L. Ed. 499 (U.S. 1819) (holding charitable trusts unenforceable under Virginia state law because the state had repealed English statutory law).

trusts was premised on English common law, not statutory law, thereby establishing the power of the attorney general to enforce such trusts.[153] This power includes:

> [T]he duty to oversee the activities of the fiduciary who is charged with the management of the funds, as well as the right to bring to the attention of the court any abuses which may need correction. Thus, a duty to enforce implies a duty to supervise (or oversee) in its broader sense. It does not, however, include a right to regulate, or a right to direct either the day-to-day affairs of the charity or the action of the court.[154]

Although granted this power to enforce charitable trusts, attorneys general historically failed to make use of their authority.[155] The inherent difficulties in investigating abuses of charitable trusts imposed limitations on the ability of attorneys general to pursue such cases.[156] Therefore, beginning in the 1940s, state legislatures enacted statutes requiring charitable organizations to register with the attorney general and make systematic reports.[157] In 1987, all but a few jurisdictions reported that they were involved, directly or indirectly, in the regulation of charitable trusts.[158]

2. A Bad Fit: Strict Application of Charitable Trust Doctrine to Charitable Gifts

A charitable trust involves property, held by a trustee, used for a charitable purpose.[159] Formation of a valid charitable trust requires the existence of six elements, the most important for this discussion being the requirement that the settlor have a present intent to create a trust.[160] It is evident that a grantor's intent to convey a gift is not synonymous with a settlor's intent to create a trust. By giving a gift, the grantor conveys the property directly to the beneficiary, whereas by creating a trust the property is used for a charitable purpose through a trustee.

Courts, however, opted to imply the creation of a trust even where a donor explicitly intends to give a gift.[161] "[A]lthough gifts to a charitable organization

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[153] *See* POWER, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL, *supra* note 147, at 314.

[154] MARION FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 198 (Russell Sage Foundation 1965).

[155] *See id.*

[156] *See* STATE ATTORNEYS GENERAL, *supra* note 146, at 185.

[157] *See id.*

[158] *See id.* at 183.

[159] *See generally* RESTATEMENT (SECOND) OF TRUSTS § 348 (1959).

[160] *See id.* The six elements of a valid charitable trust are: 1) the settlor's intent to create trust; 2) a trustee to administer the trust; 3) property; 4) an explicitly identifiable charitable purpose; 5) a definite class of beneficiaries; and 6) indefinite beneficiaries, in the defined class of beneficiaries, who actually receive a benefit from the trust. *See id.*

[161] *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 997 n.2 (Conn. 1997).

do not create a trust in the technical sense, where a purpose is stated a trust will be implied, and the disposition enforced by the [a]ttorney [g]eneral . . . ."[162] This implied trust provides the attorney general with standing to enforce the gift in the donor's stead.

a. The public role of the attorney general ensures that judicial action to enforce gift restrictions is rarely taken

The attorney general provides a multitude of services within the state structure.[163] For example, the attorney general serves as the state's chief legal officer and, in many jurisdictions, she is responsible for controlling all litigation involving the state.[164] The attorney general engages in public advocacy, specifically in the areas of consumer protection, child support enforcement, rate and utility regulation, and the like.[165] These public officers are also closely involved in the formation and implementation of public policy.[166] This description intends to highlight two characteristics of the modern office of the attorney general: one, that the resources in these public offices are spread thin due to the multitude of responsibilities placed upon them; and two, that the attorney general's endeavors focus on promoting the larger common good, not necessarily the goals of an individual citizen.

The recent proliferation of charitable organizations ensures that the role of the attorneys general in the enforcement of charitable gifts is more difficult.[167] The sheer number of organizations currently defined as charitable suggests that state attorneys general face an arduous task. Therefore, to conserve monetary resources, as well as manpower, the attorney general must carefully select those cases involving charitable trusts or gifts that receive her attention. This system promotes the pursuit of highly publicized cases or cases involving a larger public policy issue. Therefore, the individual donor, whose gift restriction is violated or ignored, is not likely to receive redress through this system.

b. Educational institutions are inherently different from other charitable organizations the attorney general oversees

Educational institutions conform to the definition of a charitable organization.[168] Colleges and universities, however, are treated differently than other charities.[169] Most importantly, they are exempted from the registration and reporting requirements imposed on other charitable organizations.[170]

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[162] *Id.* (citing Lefkowitz v. Lebensfeld, 417 N.Y.S.2d 715 (1979)).

[163] *See* STATE ATTORNEYS GENERAL, *supra* note 146, at 12-14.

[164] *See id.* at 12-13

[165] *See id.* at 13.

[166] *See id.* at 14.

[167] *See id.* at 183.

[168] *See supra* text accompanying note 19.

[169] *See generally* discussion *supra* Part II.

[170] *See* BRITTINGHAM & PEZZULLO, *supra* note 5, at 67.

The inability of attorneys general to monitor and investigate charitable trusts resulted in the promulgation of registration and reporting standards.[171] These standards require "[an] annual report usually contain[ing] detailed financial information on income and expenditures, credits and debits, and the nature of the transactions. This information allows the state to ascertain if trust funds are being prudently managed and expended for the proper purposes."[172] The lack of information concerning charitable donations to educational institutions frustrates the attorneys general in pursuing these cases.[173] The inherent difficulty in accessing information prevents the attorneys general from determining whether a university failed to comply with a gift restriction. Therefore, the state must rely on either the injured donor or the university administration to report when the terms of a gift have been ignored or violated. When the donor does consult the attorney general, the attorney general may not perceive the matter to merit the expense of state resources. This process, which separates knowledge from power, is unreasonable. A more effective solution is to allow donors a private right of action to enforce the terms of their restricted gifts.

The states' failure to require educational institutions to comply with regulations imposed on other charitable organizations suggests that control over the use of donated funds in universities is limited at best. Even if the attorney general were the proper plaintiff in enforcement actions, the states have shown a lack of interest in pursuing these cases by treating universities differently than other charitable institutions.[174]

c. Reliance on the attorney general to enforce gift restrictions may subvert the grantor's intent

A longstanding tenet of the law of trusts is that courts attempt to identify the settlor's true intent and to bring about that result.[175] It would seem that, where the courts have blindly imposed charitable trust law on the giving of charitable gifts, this emphasis on the grantor's intent would also be a guiding factor. However, unlike the boilerplate charitable trust case where the settlor is no longer alive to communicate his intentions, gift cases now involve inter vivos conveyances where the donor is available to clarify her intentions.

As previously discussed, the attorney general concerns herself with issues of public policy. Most often, donors give to bring about a result for which they have a personal interest.[176] Therefore, granting the attorney general the power to bring legal action results in either: 1) the grantor's intent being subverted by the

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[171] *See* POWER, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL, *supra* note 147, at 315.

[172] *Id.*

[173] *Id.* at 314.

[174] *See generally id.* at 316.

[175] *See* RESTATEMENT (SECOND) OF TRUSTS § 23 (1959). *See generally* discussion *supra* Part III.A.2.

[176] *See generally* discussion *supra* Parts I, II.B.

state's public policy goals, or 2) the attorney general opting not to pursue the case. In either instance, the donor becomes merely another member of society, thought to have a broad interest in the formation of public policy but no personal stake in the outcome. The donor, having a personal interest in the enforcement of her restricted gift, is the appropriate party to defend her interests in court.

C. *Conclusion*

As this analysis suggests, the historical reasons for granting attorneys general the power to enforce charitable trusts remain relevant today. However, permitting attorneys general to have the same power of enforcement with respect to charitable gifts serves merely to provide an outdated, insufficient protection for individual donors. In those few instances where the donor's self-interest and the public interest coincide, the attorney general can play a vital role in insuring that the donor's interests receive judicial consideration, possibly resulting in enforcement of the gift restriction. It is more likely, however, that enforcement of the donor's restriction does not promote the public good to such a degree that the attorney general will choose to intercede. Therefore, denying donors a private right of action to enforce restrictions placed on their charitable gifts eliminates the only sure avenue of redress for these individuals.

VI. CONCLUSION

"With all its ambiguities and perils, philanthropy provides a forum for moral creativity, for putting our vision of a good society into practice, and for fostering caring relationships that enrich individuals and communities alike. Faith in communities, evidenced by philanthropic giving, is faith in ourselves."[177] This optimistic approach to giving is not realized when donee institutions mislead contributors and the legal system refuses to protect the interests of individual donors. Society has shown its interest in the longevity of the charitable dollar through implementation of laws like UMIFA. Perhaps it is time to show a similar willingness to respect the individual donor and her vision.

When a financial investor loses money on an investment, he merely reallocates his resources to a lower risk, more protected investment. However, for the charitable investor, there may be no such option. Currently, charitable institutions, legislatures, and courts fail to protect the interests of donors. As a result, donors may become more hesitant to contribute at all. Granting donors standing to enforce the terms of their restricted gifts is one way to ensure the continuation of one of America's favorite past times: the act of giving.

Lisa Loftin

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[177] MARTIN, *supra* note 31, at 172.