

PERFECTING DONOR INTENT: Legal Lessons and Practical Advice



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TABLE OF CONTENTS

I.	Defining the Issues in Donor Intent.....	4
A.	What is Donor Intent?.....	4
B.	The Parties Who Define Intent.....	5
II.	What Could Possibly Go Wrong? Case Studies in Erosion of Donor Intent.....	5
A.	The Barnes Foundation.....	6
B.	The Robertson Foundation Lawsuit Against Princeton.....	7
C.	The Catherine B. Reynolds Foundation and the Smithsonian.....	8
D.	Maddox Foundation.....	8
III.	The Issues and Options.....	10
A.	The Concept of Standing to Sue.....	10
B.	Uniform Management of Institutional Funds Act (UMIFA).....	13
IV.	Perspectives in the Planning Process.....	14
A.	The Donor's Perspective.....	14
B.	The Planner's Perspective.....	15
C.	The Charity's Perspective.....	16
V.	Executing the Plan Through the Gift Agreement.....	19
A.	The Goals of the Gift Agreement.....	19
B.	The Key Elements.....	19
C.	Sharing the Document with Advisors.....	23
VI.	Final Thoughts and Lessons Learned: The Ten Planning Rules.....	23
	Appendix A: UMIFA with Comments, August, 1972.....	26
	Appendix B: UMIFA with Comments, July 2005.....	28
	Appendix C: States Adopting 1972 UMIFA.....	32

Perfecting Donor Intent: Legal Lessons and Practical Advice

Kathryn W. Miree

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

I. Defining the Issues in Donor Intent

C. What is Donor Intent?

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

1. The Broadest Definition

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

2. A Legal Definition

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

D. The Parties Who Define Intent

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

1. *The Donor:* The donor originates, plans, contributes the property and completes the transaction. It is only during this process that the donor can define how the gift is to be used. Once the gift is complete, it is out of the donor's hands and he no longer has any rights to direct the use of the property. If the donor retains the right to control or direct the application of the gift assets, the gift is not complete.
2. *The Donor's Advisor:* The donor's advisory also plays an important role in defining donor intent since it is generally the advisor's job to translate the donor's goals into a completed gift and to incorporate that intent into a written gift agreement.
3. *The Charity:* The charity generally has the opportunity at the creation of the gift to clarify donor intent and ensure it is reduced to writing. The charity has significantly more influence, however, since it controls the gift after completion. A charity may be bound by a written agreement or it may choose to follow the directives relayed to it orally in the gift transaction. This "interpretative" role may ebb and flow with the transition of staff.
4. *The Attorney General.* The Attorney General of each state is generally charged with the protection of charitable interests. Conceivably, the Attorney General could weigh in to enforce the use of a gift. In practical terms, this is a rare occurrence due to manpower limitations and far more egregious issues confronting the Attorney General's office.
5. *The Courts:* The courts are the ultimate arbiter. To engage the court, however, a litigant must have standing to sue. As discussed later, many courts do not recognize a donor's right to sue once he or she has parted with the gift.

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

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

E. The Barnes Foundation

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

Dr. Barnes died in 1951. In 1991, the trustees went to court to amend the Foundation’s governing documents which prevented the trustees from selling or loaning the art in the collection.³ While the lawsuit – which cost the Foundation about \$10 million in expenses – did not result in a change in the Foundation’s by-laws, the Judge did allow the Foundation to take the art on tour raising about \$16 million for renovations.⁴

In September 2002, the financially-strapped trustees filed another lawsuit seeking permission to move the art collection from the Merion building to a new building (to be constructed) in downtown Philadelphia; in addition, it asked the Court to allow it to expand the number of trustees from 5 – as designated by Dr. Barnes in the governing documents – to 15.⁵ A consortium including the Pew Charitable Trusts, the Annenberg Foundation, and the Lenfest Foundation⁶ agreed to contribute and help the Barnes Foundation raise the \$100 million needed to construct the new building and a \$50 million endowment to fund operations.⁷

In early 2004, the Court approved the increase in the number of Trustees, deferring the decision on the move until other options to raise funds were explored. Then, on December 13, 2004, the Court of Common Pleas of Montgomery County, Pennsylvania, Orphans’ Court Division granted the Trustees’ request to move the Foundation’s art gallery from Lower Merion Township, Pennsylvania to a new location in downtown Philadelphia. The court’s 41-page published opinion⁸ acknowledged the changes ran counter to the terms of the Foundation’s 1922 charter and governing documents but noted there was “no viable alternative” for the financially-compromised charity.⁹ An appeal to the ruling filed by an art student at the Foundation was dismissed by the Pennsylvania Supreme Court for lack of standing.¹⁰

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

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

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

⁴ *Id.*

⁵ *Id.*

⁶ These foundations are all located in Philadelphia.

⁷ Solis-Cohen, *supra*.

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

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

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

F. The Robertson Foundation Lawsuit Against Princeton

Charles S. and Marie H. Robertson¹¹ contributed \$35 million in A & P stock to Princeton University in 1961 to create a supporting organization to fund the Woodrow Wilson School of Public and International Affairs “where men and women dedicated to public service may prepare themselves for careers in government service, with particular emphasis on the education of such persons for careers in those areas of the Federal Government that are concerned with international relations and affairs.”¹² Specifically, they wanted to produce high-level foreign diplomats. The Foundation has provided a substantial portion of the operating budget of the Woodrow Wilson School of Public and International Affairs at Princeton, but has also funded other budgets, including a \$13 principal distribution to build Wallace Hall, a building designed to house the expansion of the Woodrow Wilson School as well as other school programs.

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

The Robertsons are now dead – Marie died in 1972 and Charles died in 1981 – and the Foundation is currently valued at approximately \$600 million. Their son William S. Robertson, his sisters Katherine Ernst and Anne Meier, and cousin Robert Halligan – also unhappy about the application of Foundation funds – filed a lawsuit in July 2002 to redirect funds to other universities that could fulfill the donors’ goals. The suit alleges the school has intentionally violated the donors’ intent and further claimed Princeton was engaged in self-dealing with regard to the Foundation’s investments and distribution of funds. The lawsuit has involved numerous depositions and other discovery, costing Princeton \$7 million through November 2004.¹³ The trial is expected to take place in Fall 2005.

¹¹ Mrs. Robertson was the daughter of the founder of the A & P grocery chain.

¹² The language setting out the Foundation’s purpose is taken from its Certificate of Incorporation. To provide context, in 1961 the U.S. and Russia were engaged in a cold war, the United States was involved in Vietnam, and President Kennedy was asking American to “ask not what your country can do for you – ask what you can do for your country.”

¹³ Hathirimani, Raj, Robertson Lawsuit Most Expensive in University History, *Dailyprincetonian.com* (November 19, 2004)

G. The Catherine B. Reynolds Foundation and the Smithsonian

The Catherine Reynolds Foundation story did not progress as far as the previous cautionary tales before the gift was rescinded. The Catherine B. Reynolds Foundation made a \$38 million pledge to the Smithsonian for the National Museum of American History. The Foundation was quite clear about the gift's goals. The exhibit was designed to recognize the power of a single individual to influence lives and to inspire other Americans to make their mark. Specifically, the exhibit was designed to recognize individuals who received the Nobel Prize, had invented something of great importance, had achieved success in the arts or sciences, or had conducted a significant public service.¹⁴ When Ms. Reynolds was asked about the type of individuals to be honored, she suggested Oprah Winfrey, Sam Donaldson, Dorothy Hamill, and Martha Stewart as those typical of influential individuals.

The terms of the gift were negotiated and agreed to in a written document signed by the Foundation and the Smithsonian. Following the gift's announcement, however, many of the Smithsonian curators – and much of the public – objected strenuously to the stated goals and the rights the Foundation had retained to stay involved. As an example, the Foundation reserved the right to appoint a number of the initial board members who would select recipients, although the Museum had the final say over those honored. In addition, Ms. Reynolds name would be added to the front of one of the Museum's buildings.

The gift stirred such a controversy and criticism that the Catherine B. Reynolds Foundation withdrew the bulk of its gift. (\$1.5 million had already been spent for planning.)¹⁵ Shortly after that, the American Association of Museums issued a set of ethical guidelines to be used by its 3,000 members in acceptance of gifts. These guidelines are designed to ensure gifts comply with the law, gift purposes are consistent with the museum's mission, that museum officials control content and integrity of exhibitions, that no individual benefits at the expense of an organization's mission or reputation, that transactions are open to the public, and that a donor understands how the gift will be used.¹⁶

H. Maddox Foundation

In 1968, Dan and Margaret Maddox created a Foundation in Tennessee, their state of residence, and were actively involved in its management during their lifetimes. When the Maddoxes were killed in a boating accident in 1998, control of the Foundation was assumed by Mr. Maddox's long-time assistant and one other Trustee. The Foundation was worth approximately \$100 million at the time of the Maddoxes' accident.

In 1999 – one year after their deaths – the Foundation was moved to Mississippi and reincorporated as a Mississippi entity. The Foundation subsequently purchased interests in two sports teams, and engaged in other non-traditional expenditures of funds which reduced its assets to just over \$40 million. In August 2004, the Attorney General of the State of

¹⁴ Lewis, Nicole Controversy Over Donor's Role Causes Smithsonian to Lose \$36.5 Million, *The Chronicle of Philanthropy*, Vol. 14, Issue 9 (February 21, 2002)

¹⁵ Lewis, *supra*.

¹⁶ Lipman, Harvy, Museum Group Issues Guideline on Ethics, *The Chronicle of Philanthropy*, Vol. 15, Issue 4 (November 28, 2002). These guidelines can be viewed at www.aam-us.org.

Tennessee filed suit to move the Foundation back to Tennessee; the Tennessee/Davidson County Probate Judge ruled the Foundation did not have permission to leave the state. In response, the Attorney General of the State of Mississippi filed for a temporary restraining order to prevent the Foundation assets from being moved; this TRO was granted by the Mississippi/DeSoto County Chancery Court. The litigation continues.

These cases represent only a sampling of the litigation alleging violation of donor intent. They also highlight two issues for donors and gift planners: the practicality of placing narrow, binding restrictions on gifts, and the need for flexibility when economic, social, or environmental factors make the original gift terms impractical.

III. The Issues and Options

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

A. The Concept of Standing To Sue

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

1. The Three Requirements for Standing to Sue

There are three constitutional requirements for standing to sue:¹⁷

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

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

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

Donors receive a charitable deduction for a contribution to a qualified charitable entity if six gift conditions are met:¹⁸

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

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

¹⁷ *Allen v. Wright*, 468 U.S. 737 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

¹⁸ IRC §170(a).

3. The Court's Perspective

For many years, courts have held that donors who make a gift have released all rights in that gift and therefore, have no standing to sue. This principal, arising from the common law, is based on the principal that the donor has relinquished all rights in the property. In a case typical of the court's approach, the Carl H. Herzog Foundation filed to recover a portion of a \$250,000 grant made to the University of Bridgeport designated for medical education scholarships claiming the University had used the funds for another purpose. The court found the donors had no standing to sue. The court noted the donors would have had an actionable claim if the donor had included language had been in the gift agreement granting them the right to enforce the restrictions through litigation. (The court also observed the right to enforce the use of the funds might have represented enough control over the contributed funds to deny them a deduction for the gift.)¹⁹

However, the courts seem to be reconsidering this issue, allowing donors to pursue such lawsuits in some state. For example, a July 2003 lawsuit filed in Amarillo, Texas by the Estate of Sybil B. Harrington and the Amarillo Area Foundation (appointed by Ms. Harrington to oversee the use of the funds) sought the return of \$5 million from the Metropolitan Opera in New York. Ms. Harrington had created a significant endowment with the Metropolitan Opera to fund traditional opera, and the suit alleged they had applied the funds for purposes outside that scope.²⁰ The lawsuit was allowed to proceed.

In another example, R. Brinkley Smithers gave \$10 million to St. Luke's-Roosevelt Hospital Center in New York to create an alcoholism research and treatment facility over a period extending from 1971 to 1983. After his death in 1998, his widow sued the hospital alleging it had not lived up to the terms of the agreement with Mr. Smithers. The hospital settled the lawsuit in July 2003, agreeing to transfer \$6 million to another nonprofit to establish a freestanding alcohol treatment center, and to restore \$15 million to the endowment. In

¹⁹ Carl J. Herzog Foundation, Inc. vs. University of Bridgeport, 243 Conn. 1, 699 A.2d 995 (1997). In that opinion the court stated: "At common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so. Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the attorney general, to devote the property to that purpose. . . . At common law, it was established that equity will afford protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation. . . . The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are [enforceable] at the instance of the attorney general. . . . It matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift." (Citations omitted) "The donor himself has no standing to enforce the terms of his gift when he has not retained a specific right to control the property, such as a right of reverter, after relinquishing physical possession of it. . . . As a matter of common law, when a settlor of a trust or a donor of property to a charity fails specifically to provide for a reservation of rights in the trust or gift instrument, neither the donor nor his heirs have any standing in court in a proceeding to compel the proper execution of the trust, except as relators. . . . There is no such thing as a resulting trust with respect to a charity. . . . Where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him have any standing in a court of equity as to its disposition and control."

²⁰ Wolverton, Brad, "Bequest to Metropolitan Opera Challenged," *The Chronicle of Philanthropy* (August 7, 2003).

addition, the Surrogate Court will award her reasonable fees and expenses, although the amount has not yet been determined.²¹

More recently, the state of Tennessee ruled that Vanderbilt University could not remove the name “Confederate” from its “Confederate Memorial Hall” because the name was the subject of a \$50,000 gift agreement executed in 1913. Vanderbilt’s Trustees had voted to change the building’s name to “Memorial Hall” and had used the new name in its campus materials, maps, and on its website. The United Daughters of the Confederacy – the organization creating the gift – filed suit. In its defense, Vanderbilt alleged it had met its commitment under the gift agreement and the name had to be changed because it “evokes racial animosity from a significant, though unfortunate, period of American history.”²² The trial court supported Vanderbilt, but the Tennessee Court of Appeals reversed the trial court’s decision, concluding: “[A]llowing Vanderbilt and other academic institutions to jettison their contractual and other legal obligations so casually would seriously impair their ability to raise money in the future by entering into gift agreements such as the ones at issue here.” In the alternative, Vanderbilt the court indicated the school could change the building’s name but would be required to return the gift – based upon the present value of that 1913 donation. The case is interesting in that it approaches the issue from a contractual perspective.

Finally, the California courts have also recently ruled in the donor’s favor on a standing to sue issue. In 2002, the L. B. Research and Education Foundation made a \$1 million grant to the UCLA Foundation to create an endowed chair in Cardiothoracic Surgery governed by a written grant agreement specifying the criteria for the chair holder. The grant agreement required ongoing reporting and had a “gift over” provision providing for the transfer of funds in the event the UCLA Foundation did not meet its obligations. Shortly thereafter, the UCLA Foundation used the fund for individuals the L.B. Research and Education Foundation did not feel met the terms of the agreement, and the donor-Foundation sued. While the lower court dismissed the lawsuit stating the L. B. Research and Education Foundation had no standing to sue, the appeals court reversed that decision determining the arrangement was contractual, and that even if not contractual the plaintiff had a “special interest” that allowed it standing, and the Attorney General’s power to enforce charitable trusts under California law (the defendants had argued the arrangement was a charitable trust rather than contractual) was not exclusive.²³

4. Who Has the Power to Sue?

The limitation in donor standing to sue must certainly be considered when designing a gift arrangement, since donor standing to sue may vary from state to state based on state law and

²¹ Greene, Stephen G., “Seeking Control in Court”, *The Chronicle of Philanthropy* (November 28, 2002); Greene, Stephen G., “N.Y. Hospital Settles Case Filed by Donor’s Widow,” *The Chronicle of Philanthropy* (October 30, 2003).

²² *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*, No. M2003-02632-COA-R3-CV (May 3, 2005). A copy of the opinion is available at <http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/052/UDCOPN.pdf>.

²³ *L. B. Research and Education Foundation v. The UCLA Foundation et. al.*, Cal. App. No. B176151 (6/14/2005). The opinion is available at <http://www.courtinfo.ca.gov/opinions/documents/B176151.PDF>.

the court's interpretation of that law. The key is to retain enough rights to enforce the gift while relinquishing sufficient control to constitute a completed gift.

B. Uniform Management of Institutional Funds Act (UMIFA)

Sometimes the donor's family is no longer alive so there is no one to object. However, the charity is stuck with a rigid document that must be changed. In these cases, there may be some relief. The Uniform Management of Institutional Funds Act is a model law promulgated by the Commissioners on Uniform State Laws²⁴ and recommended for adoption in all states.

1. The 1972 UMIFA

At the time of this writing, the applicable Uniform Management of Institutional Funds Act was adopted at the 1972 Annual Meeting of the National Conference of Commissioners on Uniform State Laws. Section Seven of the model statute is designed to permit a "release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court."²⁵ The Section has 4 parts:²⁶

- i. Restrictions can be released with the written consent of the donor.
- ii. If the donor's written consent cannot be obtain, a court of appropriate jurisdiction can release the restriction if the restriction "is obsolete inappropriate, or impracticable."²⁷
- iii. A release cannot change the use of the funds to non-charitable purposes.
- iv. The section does not limit the court's application of the *cy pres* doctrine.²⁸

All but four states have adopted a version of the 1972 UMIFA. A list of those states – and citations to state code – are provided at Appendix C.

2. The 2005 Draft

Much has changed since 1972. The Commissioners on Uniform State Laws, realizing the current version of the Act needed revision, proposed a Revised Uniform Management of Institutional Funds Act for adoption at its 2005 Annual Meeting taking place in Pittsburgh in late July.²⁹ While this draft was not final at the writing of this paper, it is anticipated it will be adopted. The 2005 UMIFA Draft expands on the release or modification of donor gift

²⁴ Commissioners on Uniform State Laws, <www. >.

²⁵ Uniform Management of Institutional Funds Act (1972), Section 7, Comments.

²⁶ Section 7, governing a change to donor restrictions and comments are set out in Appendix A.

²⁷ UMIFA, 1972, Section 7(b).

²⁸ *Cy pres* is a French term that means "as near as possible"; in this context, it means a court of equity has the power to alter use of the gift for a purpose as near as possible to the donor's intent. This application could mean application of the funds to another charity if it is impossible for the named charity to fulfill the donor's specified use of the gift. It can also mean application to another purpose if the original is impossible, impractical or illegal to fulfill.

²⁹ The due date for these materials came before the author could determine the outcome of that meeting; it is anticipated the revised version of UMIFA was adopted as proposed.

restrictions in Section 6. (Section 6 governing changes to donor restrictions and comments are set out in Appendix B.) The 2005 Draft allows changes under 4 circumstances:

- i. *Donor Release*: “With the donor’s consent in a record”, the charity can release a restriction in whole or in part, so long as the gift is still used for the organization’s charitable purposes.³⁰
- ii. *Doctrine of Deviation*: If a modification to a gift agreement/document will enhance the furtherance of the donor’s purposes, or a restriction is “impracticable or wasteful and impairs the management or investment of the fund”, the charity can ask a court to modify the restriction. The Attorney General must be notified and allowed to be heard, and the modification must reflect the donor’s “probable intention.”³¹
- iii. *Doctrine of Cy Pres*: If the purpose or restriction becomes “unlawful, impracticable, impossible to achieve, or wasteful”, the court may use the cy pres doctrine to modify the fund purposes. The Attorney General must be notified and allowed to be heard.
- iv. *Small Funds*: For funds with a value less than \$25,000 that have been in place more than 20 years, court action is not required if the charity determines a restriction is “unlawful, impracticable, impossible to achieve, or wasteful” so long as the charity waits 60 days after notice to the state Attorney General of the intention to make the change, and the change is designed to be a good faith reflection of the expressed charitable purposes.³²

While UMIFA provides release for existing documents, and the 2005 Draft will allow more flexibility, there is still no substitute for an effective document. Good drafting will also avoid the costs of litigation to made the modification or release the restriction.

IV. Perspectives in the Planning Process

A. The Donor’s Perspective

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

1. *The donor is generally focused on a particular program and a specific result.* For example, a donor may be excited by a “Success by Six” program, which is an early intervention program for children at risk of falling behind in the educational system sponsored by United Ways across the country. The donor may want to leave a gift to “Success by Six” in a specific city or county in perpetuity. Over time, Success by Six may be incorporated by a larger early childhood education effort, may disappear, or may no longer be needed because of changes in the educational system. This change may occur as

³⁰ UMIFA 2005, Section 6(b).

³¹ UMIFA 2005, Section 6(c).

³² UMIFA 2005, Section 6(e).

quickly as five years down the road or as late as 30 years after the gift. The better way to express the gift might be for “early childhood education”, for “early education for disadvantaged youth (which should be defined in some way), or in some broader fashion. The gift can always reference the “Success by Six” program as an example of such a program.

2. *The donor is not likely to anticipate social or cultural changes that may impact the need for a gift.* Consider a gift made in the 1950s to support a home for unwed mothers. In the 1950s, the Salvation Army and other charities ran homes to shelter (and keep from public view) mothers who were pregnant out of wedlock. By the 1980’s and 1990’s, those homes no longer existed because society no longer perceived mothers with out-of-wedlock children as social pariahs. Homes for unwed mothers went out of business because they were no longer needed. It would have been impossible for a donor in the 1950’s to believe such a change could have occurred in such a short period. Yet it did. In this case, the gift was a part of a community foundation, and that foundation’s board had a *cy pres* power to reapply the funds to as similar a purpose as possible.
3. *Donors sometimes express gifts in a manner that is illegal or unconstitutional.* Donors who have strong personal opinions may express those in a gift restriction. One example from personal experience involved a trust creating an independent school that limited students to white boys. These restrictions were quickly removed to accommodate a broader student pool.
4. *Donors are reasonable people and respond well to an education on these issues.* While donors come to the table with a specific set of goals and expectations about a gift, they generally respond well an education on the limitations of the approaches set out above. The conversation may occur in the professional planner’s office or in the charity’s development office.

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

B. The Planner’s Perspective

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

- *Clarifying the donor’s goals and objectives.* The planner should help the donor clearly articulate short-term and long-term objectives. The planner should help the donor think 5, 10, 50, and even 100 years down the road. In some cases, the donor’s objectives may not be realistic or practical and will require further discussion. The planner should also engage in a discussion of how the donor will measure success, and what will happen if things change. Help

the donor consider may “what if” scenarios to ensure goals are consistent. Anticipate roadblocks and draft alternatives. For example, if the gift’s purpose is valid, but the recipient charity simply fails to honor the gift terms, the document should provide for a transfer of funds to a charitable entity that will honor the agreement. If the gift’s purposes are no longer appropriate or possible to achieve, the document should provide for a method of non-judicial change that allows the gift to be applied to as similar a purpose as possible or a different charitable purpose designated by the donor.

- *Appropriately expressing the gift goals and providing flexibility.* The planner must not only help the donor articulate his or her goals, but must be able to reduce those to writing. The most effective expression of gift intent will also anticipate change and allow modification if necessary. If possible, the document should include language that includes the donor’s motivation in creating the gift, its measures for success, and the broad impact envisioned in the planning stage to provide guidance to later generations.
- *Selecting a gift form that best achieves the donor’s goals and objectives.* This is the area highlighted by most planners, in which outright gifts, bequests, charitable remainder trusts, and charitable gift annuities are considered.
- *Selecting the best gift timing.* This is another area of planning emphasis. Should the gift be executed today, next year, or at death?
- *Selecting the best asset with which to fund the gift.* Many planners also rightly take the donor through a consideration of the most appropriate asset. Should he use cash, should he redeem savings bonds, or is a vacation home the best asset?
- *Creating an effective gift – one that can be properly administered and executed.* Too often, the charity is not consulted in the planning. A restricted gift must fit within the charity’s mission, comport with its gift acceptance policies, and fall within its administrative abilities. If the donor prefers to remain anonymous until the gift is complete, take the gift concept to the charity without revealing the client’s name.

C. The Charity’s Perspective

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

1. Establish Standards and an Evaluation Process

Charities will have a difficult time evaluating the appropriateness of a gift and its design without clear, written policies to guide that decision making. The gift policies should go beyond the types of assets accepted or gift forms permitted. The policies should include ethical guidelines governing donor involvement and representations made to that donor³³ as well as a discretionary process involving parties key to the gift acceptance process (for example, the chief financial officer, chief development officer, planned giving officer, and top volunteer) that raises and answers questions that help the charity think through the gift impact. Discretionary questions include:

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

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

2. Educate the Board

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

³³ The National Committee on Planned Giving has promulgated ethical standards for planning entitled “The Model Standards of Practice for the Charitable Gift Planner;” these standards can be found on the NCPG website at www.ncpg.org. Also see the standards recommended by the American Association of Museums at www.aam-us.org.

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

3. Educate the Staff

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

4. Keep Good Records

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

- *The gift document*, whether that is a will, a revocable trust with testamentary provisions, a beneficiary designation with restrictions, an endowment agreement or a gift agreement defines the restrictions and use of the gift
- *Court orders affecting the gift*
 - ✓ At probate of a bequest. Sometimes the charity learns of a gift for the first time when the donor's will is probated and the bequest is revealed. When the purposes of a gift are ambiguous or unclear, the probate court should be petitioned to clarify the use of the gift.
 - ✓ Upon petition of the court during the administration of the gift. Courts may issue rulings affecting the gift upon petition of the charity or Attorney General, years after the gift's establishment.
 - ✓ Upon court settlement. Gifts may result from the settlement of a lawsuit. For example, in a settlement of a lawsuit involving Nine West, funds were distributed to states and through those states to charities to be used for certain purposes. A local women's fund received a large distribution to be devoted to support of women and children.
- *Notes from discussions with the donor* and the donor's advisor in establishing the gift.
- *Periodic accountings* on the use of the gift.

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

V. Executing the Plan Through the Gift Agreement

A. The Goals of the Gift Agreement

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

- i. Ensure the gift's goals and donor's intent are clear.
- ii. To provide flexibility in use of the funds over time, specifying what will happen if elements of the gift (its size its purpose, its management) change over time.
- iii. Provide a non-judicial roadmap for change, when necessary.
- iv. Specify how decisions are to be made on change.

B. The Key Elements

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

1. *Fund Name.* The name may include the donor's name, the donor's family name, or a fund purpose.
2. *Amount/ asset to be contributed to fund the gift.* (If additional assets are to be contributed, list amounts and timing of anticipated subsequent distributions.) A commitment to made additions may or may not be binding, depending upon how the agreement is structured. However it is difficult to assess the long-term effectiveness of a gift without discussing its ultimate size.
3. *Donor goals.* Make sure the donor's broad goals and objectives are clearly defined in the agreement. In some cases it will be helpful to talk in terms of short-term and long-term goals.
4. *Directives on gift use.* Directives of a gift's use will vary, depending on the type of gift. For example, a scholarship gift might provide parameters for selection and even name a selection committee. Other gifts may simply define that the revenues are to be used for a particular program area.
5. *Recognition, if any, to be provided for the gift.* Specify:
 - a. *Type of recognition.* Will the donor's name be place on a building, on a chair designation, on a program? If so, does the gift size and type comport with recognition awarded donors who make similar gifts?

- b. *Clear communication of minimum* required to receive the gift recognition outlined. Donors may fund a gift in stages. Initial gift may not constitute minimum levels.
 - c. *Timing of recognition and alternatives if the gift does not reach the anticipated funding level.* Recognition should generally be awarded upon reaching the designated level. Provisions should be for a gift that never reaches anticipated levels – such as a form of recognition at the highest level possible for the gift amount. Many things can happen to families and family assets over time – and the donor may not be in a position to fully fund the gift.
6. *Directives on accounting.* The document should specify whether the gift should have a separate accounting on fund balance, expenses, revenue generated, and revenue application. The charity should have a policy requiring a minimum dollar amount (for example, \$250,000 or more) at which a fund will have a separate accounting. Ensure the fund document does not require a level of accounting or process that will be expensive, labor intensive, or otherwise be wasteful. Negotiate an accounting process that protects the interests of all involved.
7. *Directives on reporting.* Accounting (above) refers to an internal alignment and tracking of funds. Reporting refers to an external communication of those results.
- a. Type of report required. If the gift document specifies reporting, it should detail the type of report required. The requirement may be the fund balance and application of funds is to be included in the charity’s annual report, or simply that living family members receive a copy of the fund accounting.
 - b. *Who receives the report?* If family members are to receive the report, the gift agreement should designate the individuals to receive the report, both currently and long-term. Short-term, individuals may be designated by name; long-term, individuals should be designated by position, family tier, and/or generation.
 - c. Length of time to report. Some gift agreements require reporting only during the donor and/or donor’s spouse’s lifetimes. Other extend several generations.
8. *Publicity.* Public recognition may be important to the donor, just as anonymity may be important. Seek permission for publicizing the gift, featuring a story on the donor and gift, and other anticipated

forms of public recognition. Get the donor to approve recognition, direct anonymity, or specify the type of publicity that is permissible.

9. *Directives on Investments.* Investment restrictions can be the most cumbersome form of fund restriction. The charity should include permission for the following:
 - a. *Allow pooling with other like assets.* Pooling assets is the most efficient and effective way to manage long-term funds. Managing hundreds of small funds, each with its own investment objectives, is counter-productive.
 - b. *Allow investment of assets subject to the charity's then-applicable investment guidelines.* Investment strategies change with current economies, long term needs, and the applicable spending policy. When donors are given a choice, they have a tendency to impose personal investment guidelines and restrictions on charities. The gift document should clearly give the charity this discretion.
 - c. *Allow a spending policy in keeping with the charity's then-applicable spending policy for like funds.* The spending policy is generally set each year (or more frequently if circumstances require) and is based on both need, the economy, and investment returns. To invest the funds in a pooled manner, all funds should have the same spending policy.

10. *Flexibility to make non-judicial changes* (“Plan “B” and “Plan C”). Designing flexibility is at the heart of the gift agreement, and is perhaps the most difficult element to design and negotiate. Use creativity. Literally take the use of the gift through a progression of 5, 10, 30, 50 and 100 years to expand thinking about the evolution of the gift.
 - a. *Think through gift options.* This requires a discussion of the gift goals, gift measurement, and multiple ways those objectives might be achieved. The donor may have only one approach to achieving the gift goals; this discussion should expand that thinking making the case for the need for flexibility.
 - b. *Alternate program:* Specify purposes related to the gift that might serve as appropriate secondary beneficiaries in the event the original gift purpose is achieved, is no longer appropriate, or becomes impossible to achieve.
 - c. *Gift over.* Specify another organization to receive funds in the event the originally-named entity does not honor the gift terms. Consider the appropriateness of naming a group (by

title, not individuals who may or may not be alive) to make this decision. After all, that secondary beneficiary may also be out of business or may not longer be considered accountable or effective.

- d. *Provide for the use of institutional discretion.* The document may specify that the institution can exercise discretion to make changes when the gift has achieved its purpose, is no longer needed for that purpose, is no longer appropriate, is no longer possible, or a variation on those options. Name a group (by title, not name) who has the ability to make the determination that a change is necessary or the specified conditions have been met.
 - e. *Designate those parties who can make changes, the types of changes that can be made, and how those changes are to be effected.* The document should designate individuals responsible for making changes to the gift purpose. This group may be the same group set out in the paragraph above (who determine it is time to make a change) or it may be a different group. The document should also designate the type of changes that are appropriate without court approval, and what to do if there is conflict among the appointed group. Placing discretion in a group qualified to make those decisions based on the facts and circumstances at the time is a principal used in multi-generational trusts and makes those trusts effective long after the grantor is there to make decisions.
11. *Standing to sue.* While the charity may not want to include a “standing to sue” clause in its standard gift agreement, donor advisors may be interested in such a clause. Check state law to determine if this is legally possible and appropriate. If reserved, clearly specify who has that standing. Remember that generations change dramatically from one to the next in their perspectives on what is right, wrong, and necessary. Finally, ensure that any reservation is not so strong that it would cause the IRS to determine the donor had not relinquished control. If the reservation is untested, the advisor may want to seek a ruling.
12. *Termination.* The gift document should provide for non-judicial termination of the fund in the event the gift purposes are fully achieved or the gift is reduced to a *de minimis* level.
- a. *Termination upon completion of gift purposes.* It is possible that a gift will achieve its intended purpose. While this is rare, the document should provide how the fund is to be terminated or where remaining funds are to be distributed in this event.

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

C. Sharing the Document With Advisors

Share the gift agreement checklist with all professional advisor who may work with the charity. Include the checklists in ongoing communications with advisors, post it on the charity's website, and mention it in conversations about potential gifts. Advisors unfamiliar with gift agreements will appreciate a sample document or checklist to guide their discussions with donors. There's an additional benefit for charities. By sharing the document with advisors, those advisors will be encouraged to consult with the charity since many of the decisions relate to the charity's ability to execute the gift administration.

VI. Final Thoughts and Lessons Learned: The Ten Planning Rules

1. *Change is inevitable.* Understand that charitable institutions, their needs, and solutions for problems change over time. Change is certain. Where that change takes the charity is uncertain.
2. *Planning is essential for the long-term effectiveness of gifts.* The donor and the charity should make sure they understand donor intent, and the long-and short-term purposes of a gift. The exercise is not natural. Most of us shape our thinking by events, facts, and circumstances of today.
3. *Revel in the charitable vision, but design the gift to outlive the vision.* Advisors should begin this process with donors. What does the donor hope to achieve? What are the measurable outcomes? Set benchmarks, consider the gift/need's evolution and build in flexibility. Designate an informed – but independent group – to make decisions.
4. *Professional advisors play a critical role in the planning process.* In many cases, the advisor is the only arbiter or interpreter of the donor's goals and should take the initiative to fully explore objectives and long-term options. If the donor wants to remain anonymous, the advisor can seek the donor's permission to take the gift proposal to the charity on an anonymous basis.
5. *Charities must have gift acceptance policies that demand an evaluation of critical issues related to long-term gifts.* The policies should focus on the charity's mission, its programs, and its administrative abilities.

6. *Once the gift has been explored and decisions reached, the gift agreement should be reduced to a formal, written document.* Memories fade but words don't fade. Just make sure the gift agreement terms are clear, comprehensive and interpretable without donor explanation.
7. *The gift agreement should include Plans A, B, and C.* The best agreement will anticipate the impossible to imagine. What if the program is discontinued? What if the charity is dissolved? What if the charity merges with another charity? What if the fund produces more than is required by the original gift purpose? What if the funds are no longer needed for that purpose? Who will make the decisions about how changes are to be made? Under what circumstances does the donor want changes made without judicial intervention? Every donor may have different answers to these questions, but they should be asked and answered.
8. *Once the gift is completed, keep the documents in a safe place.* This seems obvious, but too many charities are unable to put their hands on key donor documents even 20 years after the gift – and have little chance of finding those documents after 50 or 100 years. Gift purposes become more a matter of folk lore than legal reality. (Institutional policies are the smartest way to ensure consistency.) Also keep records of planning sessions and donor conversations. These contemporary recorded observations may be valuable to later generations in interpreting donor intent. Some charities include these records as a part of board minutes (when the gift is reported and accepted) because these records are retained as a matter of law.
9. *Engage in regular communication with donors and their families.* Stewardship is important not only in maintaining good relationships – it may result in additional gifts to the charity. Most importantly, ongoing communication means there are no surprises that may result in conflict. The donor's descendants may not have the same goals, objectives, or perspectives as the donor. In fact, they rarely do. Sharing the donor's conversations, goals, and regular reports on how those objectives are met are powerful tools in managing expectations.
10. *Avoid crisis management.* When things begin to go bad – either because of disagreements with family members or an unanticipated turn in the road – address the issues early. In most cases, it will be beneficial to involve family or original advisors to provide input about options. Problems generally grow worse – and relationships deteriorate – when no action is taken. Just deal with it.

VII. Final Thoughts

Good gifts are a matter of planning. Donors need to carefully express their goals and objectives and think long-term in the impact of their gifts. Advisors should encourage donors to explore the long-term use of the gift, design flexibility into the document, and discuss plans with the charity before making the gift final. And charities should develop standards with which to review long-term gifts, should encourage the use of gift agreements (providing a format to advisors and donors), and should remaining in ongoing

communication with donors and their families. If all parties to the process do their part, the courts would have less business and there would be fewer cautionary tales to warn off potential donors.

For more information or questions:

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APPENDIX A
UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT
WITH COMMENTS
ADOPTED BY THE NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS, AT ITS ANNUAL CONFERENCE,
AUGUST 4-11, 1972

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

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

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

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

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

Comment

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

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

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

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

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

Subsection (d) makes it clear that the Act does not purport to limit the established doctrine of *cy pres*. A liberalization of addition to, or substitute for *cy pres* is not without respectable support. Professor Kenneth Karst in "The Efficiency of the Charitable Dollar: An Unfilled State Responsibility," 73 *Harv.L.Rev.* 433 (1960) suggested that the doctrine of *cy pres* be expanded to permit the courts to redirect charitable grants if the purpose had become "obsolete, or useless, or prejudicial to the public welfare, or are insignificant in comparison with the magnitude of the endowment . . ." quoting from the Nathan Report (of the British Committee on the Law and Practice Relating to Charitable Trusts, Cmd. 8710, 1952) quoting the Scotland Education Act 1946, 9-10 Geo. 6, ch. 72 § 119(b). The Uniform Act provision is far less broad; it applies only to the release of restrictions on the gift under limited circumstances.

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

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

APPENDIX B
REVISED UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS
ACT
WITH COMMENTS
FOR APPROVAL AT ANNUAL MEETING, JULY 22-29, 2005

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

(a) In this section, “institutional fund” includes each fund of two or more institutional funds collectively managed.

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

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

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

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

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

Preliminary Comment

Section 6 expands the rules on releasing or modifying restrictions that are found in Section 7 of UMIFA (1972). Subsection (b) restates the rule from UMIFA (1972) allowing the release of a restriction with donor consent. Subsections (c) and (d) make clear that an institution can always ask a court to apply equitable deviation or cy pres to modify or release a restriction, under certain circumstances. Subsection (e), a new provision, permits an institution to apply cy pres on its own for small funds that have existed for a substantial period of time, after giving notice to the state attorney general.

Subsection (a). Individual Funds. The rules on modification require that the institution, or a court applying a court-ordered doctrine, review each institutional fund separately. Although the term institutional fund can mean more than one fund for other purposes of the Act, for purposes of this Section, each fund must be considered individually.

Subsection (b). Donor Release. Subsection (b) permits the release of a restriction if the donor consents. A release with donor consent cannot change the charitable beneficiary of the fund. Although the donor has the power to consent to a release of a restriction, this section does not create a power in the donor that will cause a federal tax problem for the donor. The gift to the institution is a completed gift for tax purposes, the property cannot be diverted from the charitable beneficiary, and the donor cannot redirect the property to another use by the charity. The donor has no retained interest in the fund.

Subsection (c). Equitable Deviation. Subsection (c) applies the rule of equitable deviation, modifying the language from UTC § 412 for application in this section. *See also* Restatement (Third) of Trusts § 66 (2003). Under deviation, a court modifies restrictions on the way an institution manages or administers a fund, doing so in a manner that furthers the purposes of the fund. Deviation implements the donor's intent. A donor may have a predominate purpose for a gift and, secondarily, an intent that the purpose be carried out in a particular manner. Deviation does not alter the purpose but rather modifies the means of carrying out the purpose.

Sometimes deviation is needed due to circumstances unanticipated when the donor created a restriction on a gift. In other situations a restriction may impair the management or investment of the fund. Modification of the restriction may permit the institution to carry out the donor's purposes in a more effective manner. A court applying deviation should attempt to follow the donor's probable intention in deciding how to modify the restriction.

Subsection (d). Cy Pres. A court can modify the purpose of an institutional fund using the doctrine of cy pres. Under subsection (d) the focus is on the purpose of the fund rather than on the means of carrying out the purpose. The term "modify" encompasses the release of a restriction as well as an alteration of a restriction and also permits a court to order that the fund be paid to another institution. A court can apply the doctrine of cy pres only if the restriction in question has become unlawful, impracticable, impossible to achieve, or wasteful. This standard, which comes from UTC § 413, updates the circumstances under which cy pres may be applied by adding "wasteful" to the usual common law articulation of

the doctrine. Any change must be made in a manner consistent with the charitable purposes expressed in the gift instrument. *See also* Restatement (Third) of Trusts § 67 (2003).

Subsection (d) is intended make the case law under cy pres applicable to institutions covered by UMIFA (200-) and does not limit the doctrine of cy pres. In addition to requesting that a court apply cy pres to modify a restriction, an institution may seek court assistance otherwise, for example by requesting the dissolution of the institution.

Subsection (e) permits an institution to release or modify a restriction using a cy pres approach but without court approval if the amount of the institutional fund involved is small and if the institutional fund has been in existence for more than 20 years. The Drafting Committee determined that under some circumstances a restriction may no longer make sense but the cost of a judicial cy pres proceeding will be too great to warrant a change in the restriction. The Committee discussed at length the parameters for allowing an institution to apply cy pres itself, without court supervision. The Committee drafted subsection (e) to balance the needs of an institution to operate efficiently for its charitable purposes and the need to protect donors' wishes. The subsection assumes that an institutional fund with a value of \$25,000 or less is sufficiently small that the cost of a judicial proceeding will be out of proportion with the need to change the restriction. The Committee included a requirement that the institutional fund be in existence at least 20 years because it seemed reasonable to require additional safeguards for donors' intent for some period of time after the creation of the institutional fund. The 20-year period begins to run from the date of inception of the fund and not from the date of each gift to the fund. The amount and the number of years have been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure.

As under judicial cy pres, an institution acting under subsection (e) must change the restriction in a manner that is in keeping with the intent of the donor and the purpose of the fund. For example, if the value of a fund is too small to justify the cost of administration of the fund as a separate fund, the term "wasteful" would allow the institution to combine the fund with another fund with similar purposes. If a fund had been created for nursing scholarships and the institution closed its nursing school, the institution might appropriately decide to use the fund for other scholarships at the institution. In using the authority granted under subsection (e), the institution must make a good faith determination of which alternative use for the fund reasonably approximates the original intent of the donor. The institution cannot divert the fund to an entirely different use. For example, the fund for nursing scholarships could not be used to build a football stadium.

The Drafting Committee decided not to require an institution acting under subsection (e) to give notice to the donors who had contributed to the fund. Subsection (e) can only be used for an old and small fund. For such a fund, locating multiple donors may be prohibitively expensive, and notice by publication is not likely to be effective in providing actual notice to the donors. Good practice dictates notifying known donors of any change considered by the institution. The Drafting Committee concluded that an institution's concern for donor relations would serve as a sufficient incentive for following that practice when donors can be located. In other circumstances, the attorney general can protect the interests of the donors and the public.

APPENDIX C

**STATUS OF STATE ADOPTION OF UNIFORM MANAGEMENT OF
INSTITUTIONAL FUNDS ACT**

States That Have Adopted UMIFA in Whole Or in Part (as of July 2005)

State	Code Section	State	Code Section
Alabama	Ala. Code §§16-61A-1 to 16-61A-8	Montana	Mont. Ann. Code §§72-30-101 to 72-30-207
Arkansas	Ark. Code Ann. §§28-69-601 to 28-69-611	Nebraska	Neb. Rev. Stat. §§58-601 to 58-609
California	Cal. Probate Code §§18500-18509	Nevada	Nev. Rev. Stat. §§164.500 to 164.630
Colorado	Colo. Rev. Stat. §§15-1-1101 to 15-1-1109	New Hampshire	N. H. Rev. Stat. §§292-B1 to 292-B:9.
Connecticut	Conn. Gen. Stat. §§45a-526 to 45a-534	New Jersey	N. J. Stat. Ann. §§15:18-15 to 15:18-24
Delaware	Del. Code Ann. §§4701 to 4708	New Mexico	N.M.S.A. §§46-9-1 to 46-9-12
District of Columbia	D.C. Code Ann. Div. VIII, §§44-1601 to 44-1609	New York	N.Y. Not-for-Profit Laws §§102,512, 514, 522
Florida	Fl. Stat. §1010.10	North Carolina	N.C. Gen. Stat. §§36B-1 to 36B-10
Georgia	Ga. Code Ann. §§44-15-1 to 44-15-9	North Dakota	N.D. Cent. Code §§15-67-01 to 15-67-09
Hawaii	Haw. Rev. Stat. §§517D-1 to 517D-11	Ohio	Ohio Rev. Code Ann. §§1715.51 to 1715.59
Idaho	Idaho Code §§33-5001 to 33-5008	Oklahoma	Okla. Stat. tit. 60 §§300.1 to 300.10
Illinois	760 ILCS §§50/1 to 560 ILCS 50/10	Oregon	Or. Rev. Stat. §§128.310 to 128.355
Indiana	Ind. Code §§ 30-2-12 to IC 30-2-12-13	Rhode Island	R. I. Gen. Laws §§18-12-1 to 18-12-9
Iowa	Iowa Code §§540A.1 to 540A.9	South Carolina	S.C. Code Ann. §§34-6-10 to 34-6-80
Kansas	Kan. Stat. Ann. §§58-3601 to 58-3610	Tennessee	Tenn. Code Ann. §§25-10-101 to

			25-10-109
Kentucky	Ky. Rev. Stat. Ann. §§273.510 to 273.590	Texas	Tex. Stat. Property Code §§163.001 to 163.009
Louisiana	La. Stat. Ann. §§9:2337.1 to 9.2337.8	Utah	Utah Code Ann. §§13-29-1 to 13-29-10
Maine	Title 13 Me. Rev. Stat. Ann. §§4100 to 4110	Vermont	Vt. Stat. Ann. Tit. 14 §§3401 to 3407
Maryland	Md. Code Ann. §§15-401 to 15-409	Virginia	Va. Code Ann. §§55-268.1 to 55-268.10
Massachusetts	Mass. Gen. Laws. Ann. ch. 180A §§1 to 11	Washington	Wash. Rev. Code §§24.44.010 to 24.44.900
Michigan	Mich. Comp. Laws §§451.1201 to 451.1210	West Virginia	W. Va. Code §§44-6A-1 to 44-6A-8
Minnesota	Minn. Stat. §§309.62 to 309.71	Wisconsin	Wis. Stat. §§112.10 to 112.10(7)(b)
Mississippi	Miss. Code Ann. §§79-11-601 to 79-11-617	Wyoming	Wyo. Stat. Ann. §§17-7-201 to 17-7-205
Missouri	Mo. Rev. Stat. §§402.010 to 402.225		

States That Have Not Adopted UMIFA

Alaska	Pennsylvania
Arizona	South Dakota