# RESTRICTED CHARITABLE GIFTS: PUBLIC BENEFIT, PUBLIC VOICE

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## I. INTRODUCTION

Donors who contribute to charities or create new charities often have specific intentions about the use of their donated assets. One donor may want to ensure that the charity follows the donor's personal views about how best to address climate change. Another donor may want to support an already established program for homeless youth. And a third donor may want to devote resources to finding a cure for the Zika virus. These donors may impose restrictions on their gifts, trying to require the charity to honor their wishes over time, but over time, things change. What if the donor's views about climate change become outdated and the charity identifies strategies that the charity concludes will be more effective? What if the charity wants to expand its program for homeless youth to include veterans or mothers with children? And what if scientists find a cure for the Zika virus, but plenty of other mosquito-borne viruses continue to plague humans?

In the face of change, the question will be who decides how best to use the charitable assets. The donor may have provided alternatives in the original gift instrument. If not, the charity may ask a court to apply cy pres to a purpose that has become impossible (the cure has been found),[1] or maybe wasteful (the endowment increased in value dramatically, producing far more income than needed to run the

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[1] Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U.L. REV. 41, 44 (1989).

specified program).[2] The charity may not, however, be able to shift purposes to ones that, in the view of the charity, are more efficient or provide greater benefit to the public.[3] If the charity changes the purposes without donor approval or a cy pres authorization, the donor may want to challenge the charity's actions in court, but may not have standing to do so.[4] Issues involving donor intent and changed circumstances raise interesting policy questions, which scholars have debated in numerous articles.[5] Usually the analysis considers whether donors should have more or less control over gifts or whether charities should be able to modify restrictions.[6] The articles discuss the following conflicting themes:

- Donor intent should be honored;[7] dead hand control should be discouraged or addressed.[8]
- Donors should be able to direct the use of their philanthropic largesse;[9] the charity may need to adjust restrictions over time and will know best what changes to

[2] Alex M. Johnson Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 362 (1999).

[3] *See id.* at 372.

[4] *See infra* Part III.B.

[5] *See, e.g.*, Lewis M. Simes, *The Dead Hand Achieves Immortality: Gifts to Charity*, *in* PUBLIC POLICY AND THE DEAD HAND 110, 111 (1955); Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1112, 1113–14 (1993); Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 876 (1997) (recommending tax law changes to reduce amounts held in perpetual endowments); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1186 (2007) [hereinafter Brody, *Dead Hand*] ("For hundreds of years, scholars and practitioners have debated the central position of donor intent in Anglo-American law."); Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 940, 1036 (2004) [hereinafter Brody, *Whose Public*]; Verner F. Chaffin, *The Rule Against Perpetuities as Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 16 GA. L. REV. 235, 293 (1982); Chester, *supra* note 1, at 44; Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 609 (1981); Johnson, *supra* note 2, at 391 (recommending application of the current cy pres rule during the period of the Rule Against Perpetuities and then applying an expansive view of cy pres after the period runs); Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 443, 445 (1960); Robert J. Lynn, *Perpetuities: The Duration of Charitable Trusts and Foundations*, 13 UCLA L. REV. 1074, 1089 (1966).

[6] *See, e.g.*, Brody, *Dead Hand*, *supra* note 5, at 1274–75; Chester, *supra* note 1, at 44; Hansmann, *supra* note 5, at 609.

[7] *See, e.g.*, David L. Wilkinson, *Donor Intent and the Failure of the Honor System*, UTAH B.J., no. 4, July/Aug. 2012, at 12.

[8] *See, e.g.*, John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 694–95 (2007) (discussing both sides of the donor intent/dead hand control issue); Johnson, *supra* note 2, at 391 (1999); Ray D. Madoff, *What Leona Helmsley Can Teach Us About the Charitable Deduction*, 85 CHI.-KENT L. REV. 957, 974 (2010) (advocating the curtailment of perpetual charitable trusts, particularly private foundations); Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663, 1667 (2015).

[9] *See, e.g.*, Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment,* 58 VAND. L. REV. 1093, 1158 (2005).

make.[10]

- Managerial authority permits change over time;[11] obedience to purpose is an important fiduciary duty.[12]

Although all these issues are important in thinking about charitable assets, this article will focus on the public's interest in charitable gifts and whether the public should have a voice separate from the voices of the charity and the donor. One can argue that either the donor or the charity, or both, represent the public interest in the way they direct the use of the charitable assets, but sometimes "the public" holds views about social good that differ from the views of the donor and the charity.

If the public should have a voice, the obvious question is how can that voice be exercised. The office of the Attorney General[13] has traditionally represented the public with respect to charitable assets, while authority to make changes to a charity's purposes or management—the regulatory power—lies with the courts.[14] This article will consider the role of the Attorney General and the courts as arbiters of the public good, against a backdrop of some of the other issues affecting donor intent and modification of restrictions placed on charitable purposes.

The article begins with a brief look at history, first the English roots of charitable trusts, then U.S. developments and the current state of the law in the U.S. The article proceeds to a discussion of cy pres, the primary means for modifying restrictions placed on charitable assets, and identifies other tools for modification. The article examines the role of donor intent in current law, considering cy pres and other strategies donors use to maintain their directions. The article then addresses the public benefit standard and whether the public should have a greater voice in modification decisions. An

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[10] *See, e.g.*, Brian Galle, *Pay It Forward? Law and the Problem of Restricted-Spending Philanthropy*, 93 WASH. U.L. REV. 1143, 1202 (2016); Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI. KENT L. REV. 689, 720 (2005).

[11] *See, e.g.*, Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145, 1206 (2003).

[12] *See, e.g.*, Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty,* 34 J. CORP. L. 43, 45 (2008); Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893, 896 (2007).

[13] In most states supervision of charitable assets and therefore of donor-restrictions lies with the Attorney General and is managed by Assistant Attorneys General or other staff members, but in some states that authority may lie in another part of state government. This article uses the term "Attorney General" to refer to the person or persons at the state level who supervise charities. *See* Brody, *Whose Public*, *supra* note 5, at 938–39.

[14] *See* MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 301–02 (2004) (discussing how the Attorney General has enforcement powers over charitable assets).

examination of proposals for reforming the way the law treats restricted gifts, developed by scholars over many years, reveals ideas that could increase the public voice through expanded application of cy pres. The article concludes by advocating increased consideration of the public benefit standard in charities law, through the adoption of some of these ideas.

## II. HISTORY AND THE STATE OF THE LAW

### *A. Early History – Charitable Uses and Charitable Purposes*

The use, a precursor of the trust, developed in England following the Norman conquest.[15] Donors employed uses to avoid restrictions on ecclesiastic corporations, and uses also held charitable gifts for educational institutions such as Oxford and Cambridge and for hospitals.[16] In the fourteenth and fifteenth centuries the monastic institutions, significant sources of charity for the poor, declined in numbers and in property.[17] Their decline occurred at a time of general social and economic upheaval and increasing need for those charitable services, and as a consequence the use grew in importance.[18]

In 1601, England adopted the Statute of Charitable Uses[19] as part of an effort to deal with the economic and social issues and to clean up abuses in the administration of charitable gifts.[20] The preamble to the statute listed many charitable purposes common at the time,[21] but the statute did not on its face limit charitable purposes to those

[15] *See id.* at 23. The concept of charity existed in many cultures, long before the development of the charitable use and the charitable trust. *See id.* at 3. This section provides only a brief overview of the history of charitable trusts in the United Kingdom and the United States. *See also* GARETH H. JONES, HISTORY OF THE LAW OF CHARITY 1532-1827 (1969) (providing a detailed history of charity and charitable trusts).

[16] *See* FREMONT-SMITH, *supra* note 14, at 25, 26 (describing the development of trusts in England).

[17] *See id.* at 27.

[18] *See id.*

[19] *See* Charitable Uses Act of 1601, 43 Eliz. I, c. 4 (Eng.); Joseph Willard, in an 1894 article, described this statute and its famous preamble as the Magna Carta of charitable trust law. Joseph Willard, *Illustrations of the Origin of Cy Pres*, 8 HARV. L. REV. 69, 69 (1894); *see* Jill Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 2009 MICH. ST. L. REV. 989, 996 n.23 (2010).

[20] *See* FREMONT-SMITH, *supra* note 14, at 28.

[21] The list of charitable purposes bears a remarkable similarity to a list of charitable objects in a poem written in 1377, "Vision of Piers the Plowman," except two purposes related to the Catholic Church. *See* Willard, *supra* note 19, at 70. *See also* GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 321 (3d ed. 2014) (providing the preamble).

enumerated in the preamble.[22] Courts were left to determine the extent of what charity meant, but for the first century or more the list covered the types of charity contemplated by donors.[23] Then an 1805 decision, *Morice v. Bishop of Durham*,[24] held that only the purposes set forth in the 1601 statute were charitable.[25]

Courts continued to struggle to define charity until 1891 when Lord MacNaughten's decision in the Pemsel case provided the following definition: "'Charity' in its legal sense comprises four principal division: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."[26] The definition includes purposes "beneficial to the community" without direct guidance as to what those purposes should be. This flexibility made it possible for the meaning of charity to change as society changed.[27]

More recently, the 2006 Charities Act for England and Wales codified much of charity law, added new purposes to the four "heads," and created a Charities Commission.[28] The final category in the list of charitable purposes remains a broad one: any other purposes "that may reasonably be regarded as analogous to, or within the spirit of," the purposes listed, and any purposes which have been recognized as charitable under existing law.[29] In addition, the Charities Act codifies the requirement that an organization provide a public benefit, in order to qualify as a charity.[30]

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[22] BOGERT ET AL., *supra* note 21, § 321.

[23] John P. Persons et al., *Criteria for Exemption Under Section 501(c)(3)*, *in* 4 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 1909, 1914 (1977).

[24] Morice v. Bishop of Durham (1805) 32 Eng. Rep. 947 (HL) 947.

[25] Persons et al., *supra* note 23, at 1914.

[26] Comm'rs for Special Purposes of Income Tax v. Pemsel [1891] AC 531 (HL) (appeal taken from Eng.).

[27] *See* FREMONT-SMITH, *supra* note 14, at 3 ("Although in common parlance charity is often associated exclusively with relief of the poor, the needy, or the distressed, the legal meaning is far broader and one that constantly expands to meet changing concepts of what is of benefit to the public.").

[28] Charities Act 2006, c. 50 § 2(4) (U.K.). With amendments and the consolidation of several pieces of legislation, the Charities Act 2011 now governs charities in England and Wales and further citations will be to that Act. *See also* Anne-Marie Piper & Philip Reed, *Charitable Organisations in the UK (England and Wales): Overview*, FERRER & CO. (Sept. 1, 2016), https://uk.practicallaw.thomsonreuters.com/8-633-4989?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (discussing the 2011 Act).

[29] Charities Act 2011, c. 25 § 3(1)(m) (U.K.).

[30] *Id.* § 4; *see also* Nuzhat Malik, *Defining "Charity" and "Charitable Purposes" in the United Kingdom*, 11 INT'L J. NOT-FOR-PROFIT L. 36, 38 (2008) (explaining the public benefit requirement).

The idea that charity provides a public benefit can be seen throughout the history of charities law in England. Matthew Mills has written that the *requirement* that a charitable trust serve a public purpose developed later, in the nineteenth century, and has been part of the common law since at least 1862.[31] Matthews describes references in cases and treatises to the idea of public benefit as part of what was meant by a charitable purpose[32] and then examines the development of the requirement of public benefit in case law.[33] He explains that the requirement has two parts: the "charitable purpose must be a benefit to the community; and . . . those who benefit . . . must be sufficiently numerous to constitute a 'section of the public'" and not a group of private individuals.[34] The codification in 2006 emphasizes the importance of the public benefit rule, but the idea that charities and charitable trusts have a public purpose goes back centuries.

From the initial list in the 1601 preamble,[35] to the *Pemsel* definition,[36] to the 2006 Charities Act[37] and current 2011 Charities Act,[38] the idea that a charity provides a public benefit and eventually a requirement that a charity must provide a public benefit has continued to be part of how the law in the United Kingdom thinks about charity.[39] These ideas carried over to the development of rules on charities and charitable purposes in the United States, and they relate to the role of the public in connection with donor-restricted gifts.[40]

### *B. Charitable Purposes in the United States*

The United States developed its early charitable laws by importing the British version, although recognition of charitable trusts got off to a rocky start in a few states.[41] The concept of what constitutes a

[31] Matthew Mills, *The Development of the Public Benefit Requirement for Private Trusts in the Nineteenth Century*, 37 J. LEGAL HIST. 269, 270 (2016).

[32] *See id.* at 275–83.

[33] *See id.* at 283–88.

[34] *See id.* at 269.

[35] *See* BOGERT ET AL., *supra* note 21, at § 321; Edith L. Fisch, *American Acceptance of Charitable Trusts*, 28 NOTRE DAME LAW. 219, 222 (1953).

[36] *See* Comm'rs for Special Purposes of Income Tax v. Pemsel [1891] AC 531 (HL) (appeal taken from Eng.).

[37] Charities Act 2006, c. 50 § 1 (U.K.).

[38] *See* Charities Act 2006, c. 50 §§ 1–2 (U.K.); Charities Act 2011, c. 25 §§1–2 (U.K.).

[39] *See* Charity Comm'n, *Public Benefit: Rules for Charities*, GOV.UK (Feb. 14, 2014), https://www.gov.uk/guidance/public-benefit-rules-for-charities; Piper & Reed, *supra* note 28.

[40] *See* BOGERT ET AL., *supra* note 21, § 322.

[41] After gaining independence from England, some U.S. states repealed all English statutory

charitable purpose derived directly from the Statute of Charitable Uses.[42] A current formulation, in the Uniform Trust Code ("UTC") defines charitable purposes as "the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community."[43] The drafters of the UTC noted approvingly the history of judicial interpretation of "beneficial to the community."[44] The Uniform Prudent Management of Institutional Funds Act ("UPMIFA") uses the same definition,[45] and the Internal Revenue Code refers to the definition under trust law.[46]

In the United States, the concept of charitable purpose has always included public benefit, with the flexibility of the concept permitting changes in what qualifies as charitable as public policy changes over time.[47] Racial restrictions that did not disqualify a charitable gift when made, have, years later, been found to be contrary to public policy and therefore not charitable.[48] One case involved a park in

law, including statutes on charitable trusts. *See* C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407, 409–11 (1978); FREMONT-SMITH, *supra* note 14, at 44–45; BOGERT ET AL., *supra* note 21, at § 322; Fisch, *supra* note 35, at 225. The U.S. Supreme Court, in *Trustees of the Philadelphia Baptist Ass'n v. Hart's Executors*, declared that English equity courts did not have jurisdiction over charitable trusts, so charitable trusts were invalid in states without statutory law addressing the matter. Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs, 17 U.S. 1, 43–44 (1819). The Supreme Court overturned the case in *Vidal v. Girard's Executors*. Vidal v. Girard's Ex'rs, 43 U.S. 127, 196–97 (1844) (citation omitted). All states now permit charitable trusts, by statute or case law. *See* FREMONT-SMITH, *supra* note 14, at 47.

[42] *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (AM. LAW INST. 2003); BOGERT ET AL., *supra* note 21, at § 322.

[43] UNIF. TRUST CODE § 405(a) (UNIF. LAW COMM'N 2010). The comment to this section explains, "The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 [(2003)], and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed." *Id.* § 405 cmt.

[44] *Id.* § 405 cmt.

[45] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(1) (UNIF. LAW COMM'N 2006).

[46] I.R.C. § 501(c)(3) uses the word "charitable" as one of the purposes that entitles an organization to exemption. I.R.C. § 501(c)(3) (2012). The Treasury Regulations explain that "charitable" should be construed more broadly than relief of poverty. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2008).

[47] The public benefit standard may also permit new purposes to be considered charitable. For example, at the time of the Statute of Elizabeth, protection of the environment would not have been considered charitable, but over time environmental protection has become a charitable purpose. *See* Noice v. Schnell, 137 A. 582, 583, 587 (N.J. 1927) (citations omitted) (protecting land along the Hudson River); President & Fellows of Middlebury College v. Central Power Corp., 143 A. 384, 387 (Vt. 1928) (protecting original Vermont forest).

[48] Bob Jones Univ. v. United States, 461 U.S. 574, 577–78 (1983) (citations omitted).

Macon, Georgia, created with a "whites-only" restriction.[49] The Georgia courts concluded that the restriction had to be removed, and then decided that the donor did not have a general charitable intent that preserved the gift without the restriction.[50] The land reverted to the donor's heirs.[51] In a different case, the Maryland Court of Appeals removed a "whites-only" restriction from a nursing home and allowed the nursing home to continue to operate.[52] In that case, the donor had provided for a gift to another charity, without the restriction, if the first gift failed, but the court allowed the initial charity to keep the gift, without the restriction.[53] After discussing the Maryland case, John Eason notes that the court "recognized that giving any effect whatsoever to the donor's racial restriction [by applying the gift over provision] would affirm the donor's racial mandate in direct contravention of contemporary public policy."[54] The donor's view of the best way to provide a public benefit (a segregated nursing home) gave way to changes in public policy.[55] Although interpretation of charitable trusts and enforcement of restrictions on charitable purposes focus on the donor's intent, changes in public policy can limit a donor's attempts to freeze the donor's own views of public benefit.[56]

### *C. Charitable Trusts Are Different*

Before turning to the control issue and the modification of charitable purposes, it is useful to consider why the rules for

[49] Evans v. Abney, 165 S.E.2d 160, 162 (Ga. 1968). See John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 168–70 (2010), for a detailed discussion of the case.

[50] *Evans*, 165 S.E.2d at 163.

[51] *Id.* at 164. The U.S. Supreme Court denied a 14th Amendment challenge. Evans v. Abney, 396 U.S. 435, 437 (1970). Eason points to the public's loss of the charitable asset and notes, "Donor intent and cy pres sometimes combine, in other words, to defeat the charitable nature of a gift entirely. In such a case, whether occurring months or years after the date of the gift, society does not rescind the benefits of tax deduction, prestige, etc., bestowed on charitable donees." Eason, *supra* note 49, at 170 n.144.

[52] Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp., 797 A.2d 746, 756 (Md. 2002) (citations omitted).

[53] *Id.* at 748, 750, 754. The Hershey Trust provides another example of restrictions modified over time for reasons of public policy. The settlors had directed that the trust establish a school for "poor white male orphans." The restrictions on race and sex were removed in cy pres actions, and other changes were made to the settlors' initial plans for the school and its students. *See* Brody, *Whose Public*, *supra* note 5, at 985–86.

[54] Eason, *supra* note 49, at 171.

[55] *Id.*

[56] *See id.* at 172 ( "[B]ecause society's notions of right and wrong have progressed beyond an individual donor's static and often aged comfort level[,] [d]onor intent should not be accorded such preeminence.").

modification of charitable trusts developed differently from those for private trusts. Charitable trusts differ from private trusts in both structure and durational limits, and both differences have contributed to the development of doctrines that permit modification over time.

1. Structural Differences – Oversight

In a private trust, identified or identifiable beneficiaries hold the beneficial or equitable interest in the trust property and can enforce the trust if the trustee, who holds legal title to the assets, mismanages the assets or fails to carry out the terms of the trust.[57] Beneficiaries, therefore, have an incentive to monitor the actions of the trustee. In a charitable trust, the trustee manages the trust for a charitable purpose, rather than an identifiable beneficiary.[58] The lack of a beneficiary with the power and incentive to enforce the trust, creates a problem for oversight and enforcement.[59] Charitable trust law has had to develop oversight from outside the trust, so that if a trustee mismanages the trust, someone can enforce the trust and cause the trustee to correct the problem.[60] Under the common law, only the Attorney General had standing to enforce a charitable trust.[61] Although donor standing may have expanded beyond the Attorney General, to a limited degree,[62] the Attorney General still has the duty to oversee charitable assets.[63]

2. Perpetual Duration

Another difference between private trusts and charitable trusts makes the need for a modification potentially more likely for charitable trusts. Until rather recently (recent against the backdrop of centuries of trust law), private trusts could not last forever.[64] The

[57] *See* RESTATEMENT (THIRD) OF TRUSTS § 94 (AM. LAW INST. 2012).

[58] *See* RESTATEMENT (THIRD) OF TRUSTS §§ 27–28 (AM. LAW INST. 2003).

[59] *See* Davis v. United States, 495 U.S. 472, 483 (1990) (citations omitted).

[60] State *ex rel.* Rogers v. New Choices Cmty. Sch., 2009-Ohio-4608, ¶¶ 2, 23–24, 64 (Ct. App.) (citations omitted).

[61] *See* FREMONT-SMITH, *supra* note 14, at 324–25. *See also* Hardt v. Vitae Found., Inc., 302 S.W.3d 133, 137 (Mo. Ct. App. 2009) (citations omitted) (refusing to grant a donor standing to sue a charity organized as a nonprofit corporation); Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995, 996, 997 (Conn. 1997) (citations omitted) (denying standing).

[62] *See* UNIF. TRUST CODE § 405(c) (UNIF. LAW COMM'N 2010); *id.* § 405 cmt.

[63] *See* FREMONT-SMITH, *supra* note 14, at 301 ("[A] duty to enforce implies a duty to supervise (or oversee) in its broader sense.").

[64] RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 1.1–1.6 (AM. LAW INST. 1992); RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 27.1 (AM. LAW INST. 2011)

Rule Against Perpetuities attempted to ensure that interests in transferred property would vest within a period that was roughly equivalent to 90 years.[65] The Rule Against Perpetuities developed to promote free alienation of land and applied to future interests in property, including interests held in trust.[66]

The Rule Against Perpetuities did not apply to charitable trusts, so charitable trusts could last indefinitely.[67] Perpetual existence raised the possibility that changes might be needed far into the future.[68] The original purpose of a charitable gift might become difficult to carry out, or a restriction on the administration of a charitable trust might no longer make sense.[69] For that reason, the law developed the doctrine of cy pres to permit changes over time.[70] The doctrine of deviation, which can be used to adjust the administrative terms of a private trust if circumstances change, also applies to charitable trusts.[71]

### *D. Cy Pres and Deviation*

Under the doctrine of cy pres, a court can modify a restriction on a charitable gift, under certain circumstances.[72] In England, the doctrine of cy pres was initially applied only if the original purpose became impossible to carry out.[73] Over time the courts, and

(stating the common law rule); BOGERT ET AL., *supra* note 21, §§ 213–14; Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1313–14 (2003) (describing increases in the period of the rule against perpetuities, including abolition in some states).

[65] *See* Dukeminier & Krier, *supra* note 64, at 1307–09. Ninety years is the period used in the Uniform Statutory Rule Against Perpetuities. *Id.* at 1308.

[66] *See* BOGERT ET AL., *supra* note 21, at § 213; Dukeminier & Krier, *supra* note 64, at 1319–21.

[67] *See* BOGERT ET AL., *supra* note 21, at § 213; *see also* Russell v. Allen, 107 U.S. 163, 166–67 (1883) ("By the law of England from before the statute of 43 Eliz. c. 4, and by the law of this country at the present day (except in those states in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities."); RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. d (AM. LAW INST. 2003) (contrasting the application of the Rule to private trusts with the lack of application to charitable trusts).

[68] *See* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. a ("The cy pres doctrine's modern rationale rests primarily in the perpetual duration allowed charitable trusts and in the resulting risk that designated charitable purposes may become obsolete as the needs and circumstances of society evolve over time.").

[69] *See id.* § 67; *id.* § 67 cmt. a.

[70] *See id.* § 67.

[71] *See id.* § 66; *id.* § 66 cmt. a.

[72] *See id.* § 67.

[73] *See* FREMONT-SMITH, *supra* note 14, at 38.

eventually Parliament, relaxed the rules, at least somewhat.[74]

As cy pres developed in the United States,[75] the doctrine permitted a court to modify a donor-imposed restriction on a gift in trust if the restriction had become impossible, impracticable or illegal.[76] Even if the court determined that one of these categories applied, the court would authorize a modification only if the trustee demonstrated that the settlor had a general charitable intent with respect to the gift.[77] If not, the trust assets reverted to the settlor, which in most cases meant the settlor's estate.[78] If the settlor had general charitable intent, the court could approve a modification, which was to be as near as possible to the donor's intent at the time of the gift.[79]

The Restatement (Third) of Trusts, approved in its final form in 2003, added the word "wasteful" to the reasons for the application of cy pres.[80] In addition, the Restatement now presumes that a settlor had "general charitable intent," making the application of cy pres easier, although the presumption is rebuttable.[81] The Uniform Trust Code, now adopted in thirty-one states and the District of Columbia,[82] follows the Restatement's formulation,[83] as does UPMIFA, which applies cy pres and deviation to funds held by charities organized as

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[74] *See id.* at 38–39.

[75] Almost all states have a version of cy pres, either through the common law or by statute. RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.02 Reporters' Notes cmt. a (AM. LAW INST., Tentative Draft No. 1, 2016).

[76] RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. LAW INST. 1959). *See* Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L. Q. 382, 383 (1959) (providing additional explanation of the development of cy pres in the U.S.).

[77] RESTATEMENT (SECOND) OF TRUSTS § 399. Courts usually, although not always, found general charitable intent and preserved the gift for charity. *See* Johnson, *supra* note 2, at 372 ("[T]his requirement [of general charitable intent] rarely has prevented the application of the cy pres doctrine."); *see also* RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.02 Reporters' Notes cmt. e (discussing the history of the shift toward not requiring general charitable intent).

[78] Typically, a need for modification develops after the settlor's death.

[79] *See* FREMONT-SMITH, *supra* note 14, at 38; *see also* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (AM. LAW INST. 2003) (emphasis in original) ("[T]he substitute or supplementary purpose need not be the *nearest possible* but one reasonably similar or close to the settlor's designated purpose.").

[80] RESTATEMENT (THIRD) OF TRUSTS § 67; *see* Karst, *supra* note 5, at 472 (advocating less stringent requirements for applying cy pres); *see also* Jonathan Klick & Robert H. Sitkoff, *Agency Costs: Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 820–21 (2008) (discussing the expansion of cy pres to include wasteful).

[81] RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b; *see also* Chester, *supra* note 1, at 46 (advocating that change).

[82] *See Legislative Fact Sheet – Trust Code*, UNIF. LAW COMM'N, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code (last visited Jan. 2, 2018). The District of Columbia has also adopted the UTC. *See id.*

[83] UNIF. TRUST CODE § 413 (UNIF. LAW COMM'N 2010).

nonprofit corporations.[84] The Restatement of the Law of Nonprofit Organizations also follows the Restatement (Third) of Trusts.[85]

The Restatements and statutes all direct the court to keep the donor's intent in mind when altering a restriction. The Restatement of Trusts and the Restatement of Nonprofit Organizations direct that the property be used for "a charitable purpose that reasonably approximates the designated purpose."[86] The UTC directs that the property be used "in a manner consistent with the settlor's charitable purposes,"[87] and UPMIFA states that it must be used "in a manner consistent with the charitable purposes expressed in the gift instrument."[88] Although the statements of guidance are arguably more flexible than the "as near as possible" standard, they still focus on the donor's purposes.

Deviation, the other doctrine that permits modification of donor-imposed restrictions, applies to restrictions imposed on the administration of the trust.[89] If a court finds that due to circumstances unknown by the settlor or changed since the time the settlor made the gift, the purposes cannot be carried out as specified, the court can use deviation to adjust the restriction.[90] The idea behind deviation is that the trustee will be better able to carry out the settlor's purposes if an adjustment is made to an administrative restriction.[91] Of course, the line between a purpose restriction, subject to cy pres, and an administrative restriction, subject to deviation, is not always clear.[92] In any event, the doctrines of cy pres and deviation have been applied sparingly,[93] presumably due to

[84] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (UNIF. LAW COMM'N 2006).

[85] RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.02, § 3.02 cmt. a (AM. LAW INST., Tentative Draft No. 1, 2016).

[86] RESTATEMENT (THIRD) OF TRUSTS § 67; RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. LAW INST. 1959); RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.02.

[87] UNIF. TRUST CODE § 413(a)(3).

[88] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c).

[89] RESTATEMENT (THIRD) OF TRUSTS § 66; RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.03; UNIF. TRUST CODE § 412; UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(b).

[90] RESTATEMENT (THIRD) OF TRUSTS § 66.

[91] *See id.* § 66 cmt. a.

[92] *See* Johnson, *supra* note 2, at 354. Because the distinction is unclear, the court's decision as to which doctrine applies can be determinative. *See id.* ("[T]he distinction between administrative and substantive provisions of a trust are highly chimerical and illusory, and that courts can rather arbitrarily determine ex ante the outcome of a particular dispute or litigation by simply characterizing a proposed change in a trust's operation or management as administrative (calling for the liberal doctrine of deviation) or as substantive (calling for the much narrower doctrine of cy pres).").

[93] *See* Ilana H. Eisenstein, Comment, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable*

deference to the donor's intent.

### *E. Other Modification Tools*

In addition to cy pres and deviation, two statutory developments may affect who controls changes to charitable gifts. First, the UTC permits a trustee of a trust with assets below $50,000 to terminate the trust, if the size of the trust is too small to justify continued administration.[94] The trustee must distribute the assets "in a manner consistent with the purposes of the trust."[95] If the trust is a charitable trust, the trustee must give notice to the Attorney General.[96] In addition, a court may modify or terminate a trust if "it determines that the value of the trust property is insufficient to justify the cost of administration."[97]

For charities organized as nonprofit corporations, UPMIFA permits a charity to modify a restriction imposed on a fund that is both old and small.[98] UPMIFA defines "old" as in existence more than 20 years, and "small" as less than $25,000, although some states have increased the amount.[99] The drafters recognized that for a small fund the cost of bringing a cy pres action might be prohibitive, even if otherwise the fund could not be used for any charitable purpose.[100] The UPMIFA provision requires notice to the Attorney General but does not require the approval of the Attorney General, allowing the charity greater control in determining what modification is best.[101] The statutory provision directs the charity to use "the property in a manner consistent with the charitable purposes expressed in the gift

*Trusts*, 151 U. PA. L. REV. 1747, 1768–69 (2003).

[94] *See* UNIF. TRUST CODE § 414(a). This authority applies to both private and charitable trusts.

[95] *Id.* § 414(c).

[96] *See* MODEL PROT. OF CHARITABLE ASSETS ACT § 4(g) (UNIF. LAW COMM'N 2011).

[97] UNIF. TRUST CODE § 414(b).

[98] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(d) (UNIF. LAW COMM'N 2006).

[99] *See id.* Some states have increased the amount considered small. *See, e.g.*, 760 ILL. COMP. STAT. 51/6(d)(1) (2009) ($50,000); OHIO REV. CODE ANN. § 1715.55(D)(1) (LexisNexis 2009) ($250,000). A few states set the amount at $50,000 or $100,000 and then allow modifications up to $250,000 with consent of the Attorney General. *See, e.g.*, HAW. REV. STAT. § 517E-6(d)–(e) (2009) (consent for amounts between $50,000 and $250,000). Florida allows a charity to modify a fund with a value of less than $100,000, if the donor is dead or cannot be found, and then provides that the charity can modify a fund valued between $100,000 and $250,000 with notice to the Attorney General. FLA. STAT. § 617.2104(6)(b)–(c) (2012).

[100] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL.FUNDS ACT § 6(d) cmt. ("The rationale is 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.").

[101] *See id.* § 6(d).

instrument."[102]

Both the UTC and UPMIFA provisions maintain the oversight of the Attorney General through the notice requirement,[103] while increasing efficiency when a restriction needs to be modified or a small trust terminated.[104] If a charity plans a modification that concerns the Attorney General, the Attorney General can work with the charity to alter the modification or ask a court to direct the modification.[105] Although the UPMIFA provisions allow a charity to modify a restriction on a small fund more easily than using traditional cy pres, the focus remains on the donor's intent.[106]

A statutory development of a different sort is that the UTC gives the settlor of a charitable trust standing to enforce the trust.[107] The UTC defines "charitable trust" as any portion of a trust,[108] so a donor who makes a gift to an existing charitable trust will have standing with respect to the gift.[109] Standing does not extend to a donor's heirs, representatives, or descendants,[110] so the authority created by UTC § 405(c) dies with the donor, but some donors have perpetual life.[111] A family foundation, for example, may make a grant to a charity organized as a trust, and if so, the foundation will have standing to enforce restrictions on the gift as long as the foundation continues to exist (assuming the UTC provision applies).[112]

The extent to which the trust code provision will expand donor standing remains to be seen. Many charities are organized as nonprofit corporations, and courts have declined to apply the UTC standing provision to a nonprofit corporation.[113] For example, in *Hardt v. Vitae Foundation*, a donor alleged that the charitable donee had ignored restrictions imposed on a gift.[114] The donor argued that

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[102] *Id.* *See also id.* § 6(d) cmt. ("The Committee drafted subsection (d) to balance the needs of an institution to serve its charitable purposes efficiently with the policy of enforcing donor intent.").

[103] *See id.* at Prefatory Note.

[104] *See* UNIF. TRUST CODE § 414(a)–(c) (UNIF. LAW COMM'N 2010); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(d).

[105] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT, at Prefatory Note.

[106] *See id.* § 6(d) cmt.

[107] UNIF. TRUST CODE § 405(c).

[108] *Id.* § 103(4).

[109] *See* Alan L. Feld, *The Nature of Fiduciary Law and its Relationship to Other Legal Doctrines and Categories: Who Are the Beneficiaries of Fisk University's Stieglitz Collection?*, 91 B.U. L. Rev. 873, 874 (2011).

[110] *See id.* at 897.

[111] *See* Brody, *Dead Hand*, *supra* note 5, at 1216.

[112] *See id.* at 1215–16.

[113] *See* Hardt v. Vitae Found., Inc., 302 S.W.3d 133, 138 (Mo. Ct. App. 2009).

[114] *Id.* at 136.

it should have standing to challenge the charity's use of the gift based on the UTC § 405(c), which had been adopted in Missouri.[115] The court refused to extend the standing rule of the UTC to a situation involving a nonprofit corporation.[116] The court noted that UPMIFA, also adopted in Missouri, applies to nonprofit corporations and is silent on standing.[117]

In a Utah case, *Siebach v. Brigham Young University*,[118] donors tried a different strategy.[119] They argued that because Utah's adoption of UPMIFA did not expressly limit donor standing to the common law standard, a standard that limits standing to the Attorney General, donor standing should be permitted.[120] They lost that argument.[121]

### *F. Modification for Nonprofit Corporations*

Thus far, this article has discussed rules coming from trust law, but many charities in the United States are organized as nonprofit corporations. Trust law informs the law of charities in general,[122] and the current American Law Institute project, the Restatement of the Law of Charitable Nonprofit Organizations, continues a trend of reducing the legal differences based on organizational form.[123] Some differences will remain, but the Restatement project is attempting to create a coherent law of charities, noting the areas of law in which

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[115] *See id.* at 138.

[116] *Id.*

[117] *Id.* "[S]ome early drafts [of UPMIFA] included a provision for donor standing to enforce a restricted gift in limited circumstances." CAROL G. KROCH, AM. BAR ASS'N, UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT: SPENDING AND INVESTING IN A POST-UMIFA WORLD 14 (2009), https://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/joint_fall/2009/kroch_uni_for_prudent_mgmt_aba_rppt_wash_dc.authcheckdam.pdf. Although the drafting committee considered the issue of donor standing at length, the committee concluded that "providing for donor standing would make the management of endowments . . . difficult for many charitable institutions." *Id.*

[118] Siebach v. Brigham Young Univ., 2015 UT App 253, 361 P.3d 130.

[119] *See id.* ¶ 19 (citation omitted).

[120] *See id.* ¶ 20.

[121] *See id.* ¶ 22 ("[T]here is certainly no direct conflict between UPMIFA's silence and the common-law donor-standing rule.").

[122] *See* UNIF. TRUST CODE § 413 cmt. (UNIF. LAW COMM'N 2010) ("The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code."). This sentiment appears throughout comments to the UTC. *See, e.g.*, *id.* § 405 cmt.

[123] "Although the choice of legal form for a charity entails the choice of a concomitant legal regime, this Restatement attempts to provide a common regime for all charities." RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 1.02 cmt. d (AM. LAW INST., Tentative Draft No. 1, 2016).

the legal rules are converging.[124]

Some policy issues arise in connection with choice of organizational form and donor-restricted gifts. In general, if a donor contributes property to a charity organized as a nonprofit corporation, subject to specified restrictions, the charity must comply with the restrictions.[125] Courts have sometimes addressed the issue by finding that property subject to a donor-imposed restriction is impressed with a trust or held in trust for the specified purposes.[126] Other courts do not find a trust, but nonetheless hold that the gift is restricted to the purposes specified by the donor.[127] In addition, UPMIFA now applies the doctrines of cy pres and deviation to funds held by charitable nonprofit corporations, a provision that would be unnecessary if the directors could simply vote to change the restriction.[128] A duty to comply with a donor-imposed restriction

[124] The Comment quoted in the note directly above continues: "At the same time, this Restatement recognizes that a unified approach is not always possible or appropriate and, therefore, specifies, issue by issue, which rules apply equally to all charities regardless of their organizational form and, by contrast, which rules differ depending on organizational form." *Id.*

[125] *See, e.g.*, St. Joseph's Hosp. v. Bennett, 22 N.E.2d 305, 308 (N.Y. 1939).

[126] *See, e.g.*, Chattowah Open Land Trust v. Jones, 636 S.E.2d 523, 524–26 (Ga. 2006) ("'[T]o bequeath [decedent's home] and the surrounding acreage to [a charitable] organization which will maintain the property in perpetuity exclusively for conservation purposes within the meaning of Section 170 (h) of the [Internal Revenue] Code' . . . unambiguously created a charitable trust [and decedent's failure] to use the terms 'trust' and 'trustee' does not alter this outcome, as the strict use of these terms is not required to establish a trust."); Bankers Trust Co. v. N.Y. Women's League for Animals, 92 A.2d 820, 822, 826 (N.J. Super. Ct. App. Div. 1952) (holding that a bequest to charitable organization to be used to purchase a rural farm for the care of animals created a trust).

[127] *See, e.g.*, George W. Vallery Mem'l Fund v. St. Luke's Cmty. Found., Inc., 883 P.2d 24, 28 (Colo. App. 1993) (holding that a bequest for a specified charitable purpose constituted a "restricted gift" as opposed to a trust, but doctrine of cy pres applied); Sch. Dist. v. Wood, 13 N.W.2d 153, 156 (Neb. 1944) (citing Rohlfl v. German Old People's Home, 10 N.W.2d 686, 691 (Neb. 1943)) ("[A] gift to a charitable corporation [for a particular purpose] is equivalent to a bequest upon a charitable trust and will ordinarily be governed by the same rules."); *St. Joseph's Hosp.*, 22 N.E.2d at 308 ("[While] [n]o trust arises . . . in a technical sense, . . . [a] charitable corporation . . . may not . . . receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands."); Lefkowitz v. Lebensfeld, 417 N.Y.S.2d 715, 720 (App. Div. 1979) ("[T]he never disturbed equitable doctrine that although gifts to a charitable organization do not create a trust in the technical sense, where a purpose is stated a trust will be implied, and the disposition enforced by the Attorney-General, pursuant to his duty to effectuate the donor's wishes.").

[128] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(b)–(c) (UNIF. LAW COMM'N 2006). For assets other than funds, including art collections and land, the application of cy pres and deviation depends on state law. Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977, 1001 (2010). Nonetheless, Attorneys General and courts are likely to take the view that a donor restriction matters. *See id.* at 996 n.122 (quoting Memorandum in Support of Motion for Summary Judgment at 73, Salzburg v. Dowd, CV-2008-0079 (Wyo. 4th Jud. Dist. Aug. 12, 2009)) ("The Attorney General of Montana expressed dismay in a case in which the donee of a charitable easement on land simply ignored a restriction. The Attorney General stated, 'The most

seems clear enough, although the legal theories may vary.[129] What is less clear is whether a gift to a charity organized as a nonprofit corporation is subject to any form of purpose restriction if the donor does not say so explicitly.[130]

The potential difference in treatment between charitable trusts and nonprofit corporations lies in the relative ease or difficulty of changing a charity's purposes.[131] The trustees of a charitable trust cannot change the purpose of the trust without going to court, unless the trust instrument gives someone the ability to change the purpose.[132] The directors of a charitable nonprofit corporation can more easily change its purpose, by changing the organizational documents.[133] The directors can vote to change the articles of incorporation and bylaws of the organization, with a vote of members also required if the charity has voting members.[134] Thus, the directors (and members) can change the purpose of the charity without court involvement, as long as the new purpose is also charitable.[135]

If a charity decides to change its purposes, the policy question is how the change should affect gifts that pre-dated the change, if the gifts were made without specific restrictions attached. Should a gift to a charity for its general purposes be considered unrestricted, so that the charity can use the gift for any charitable purpose it later chooses, or should the gift be considered restricted to the purposes of the charity at the time the gift was made?

1. Control Future Uses of Assets

The argument that the assets are completely unrestricted is that if

disturbing aspect of this whole matter, however, is the complete failure of the [donee] and the Dowds [purchasers of property subject to the donated easement] to acknowledge their duty to comply with the terms of both Lowham's charitable gift of the conservation easement and the Scenic Preserve Trust.'") (alterations in original).

[129] *See* Brody, *Dead Hand*, *supra* note 5, at 1206.

[130] *See* RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.01 cmt. e (AM. LAW INST., Tentative Draft No. 1, 2016); FREMONT-SMITH, *supra* note 14, at 155–56.

[131] *See* FREMONT-SMITH, *supra* note 14, at 155–56.

[132] Perhaps a trust protector could be given that authority. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS Div. VI (AM. LAW INST. 2011); Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing*," 50 REAL PROP. TR. & EST. L.J. 267, 268 (2015).

[133] *See* RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.01(a); FREMONT-SMITH, *supra* note 14, at 156.

[134] *See* RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORG. § 3.01 cmt. a (AM. LAW INST., Tentative Draft No. 1, 2016); FREMONT-SMITH, *supra* note 14, at 156.

[135] *See* FREMONT-SMITH, *supra* note 14, at 156.

a donor makes a gift to a charity without a specific restriction, the donor is making a gift to the charity to use as the charity sees fit. If the charity changes its purposes, the gift can be used for the new purposes, even if those differ from the purposes carried out when the gift was made. The arguments in favor of greater discretion for charities to modify the way they carry out their missions apply particularly here, where the donor's intent was not specified. The donor may have expected that the charity would make changes over time to improve or increase the delivery of charitable services. Further, regardless of what a donor may have wanted, a rule that permits a charity to modify its purposes over time may improve the public benefit from the charitable sector.

Robert Katz has argued in favor of this alternative for two reasons: reducing transaction costs for donors and his view that governing boards will use their discretion in socially beneficial ways.[136] He first argues that different rules for different organizational forms will reduce the time and money donors will incur in setting up a charitable gift most in line with their needs and preferences.[137] That is, a donor who understands that the form of the charity will affect the ability of the charity to change its purposes over time can choose a charity according to the donor's preferences. Although this argument makes sense for a donor creating a new charity, it may not be easy for a donor to choose an existing charity based on organizational form. Donors to existing charities will likely focus on the objectives of the charity, and perhaps on the charity's effectiveness in carrying out its mission. It seems unlikely that a donor will choose a charity based on organizational form, or even know that the organizational form matters, but for a donor starting a charity, the donor could choose to give the new charity greater control by choosing the corporate form.[138]

Katz then argues that giving governing boards greater discretion to adjust to changes over time will increase charitable efficiency and facilitate the application of resources to more socially beneficial uses.[139] From a policy perspective, one can argue, as Katz does, that charities should be able to change direction over time. Katz notes that uninformed donors may choose to give to charities organized as

[136] *See* Katz, *supra* note 10, at 691–93.

[137] *See id.* at 715.

[138] Evelyn Brody writes that founders of charities rarely make a choice of organizational form based on an understanding of the legal differences. *See* Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1417 (1998).

[139] *See* Katz, *supra* note 10, at 718.

corporations, unwittingly permitting greater discretion than they would have chosen had they been better informed.[140]

2. Assets Already Contributed Are Restricted

The argument that assets are restricted in a general sense is that a donor making a gift to a charity likely intends the gift to be used for the purposes of the charity as the purposes exist at the time of the gift.[141] The court in *Hahnemann Hospital*[142] noted, "As the Attorney General, colorfully, but no doubt correctly, observes in his reply brief, 'those who give to a home for abandoned animals do not anticipate a future board amending the charity's purpose to become research vivisectionists.'"[143] The charity can decide to change its purposes going forward, but any assets already held by the charity and obtained through gifts from donors are restricted to the purposes of the charity at the time the gifts were made.[144] The 2009 Brandeis University situation involving the Rose Art Museum provides an example of the donors' concern.[145] When Brandeis sought to close the Rose Art Gallery and sell its art collection, donors argued that their gifts had been made with the intent that Brandeis would continue to operate the museum and display their gifts as part of their collection, not sell the art to raise money for university operating expenses.[146] This concern reflects likely intent when a donor makes an "unrestricted" gift to a charity.[147]

Some courts take this second view. In *Hahnemann Hospital*, the court stated that the charity could broaden its purposes by amending its articles but could not use unrestricted donations received prior to the amendment for the new purposes.[148] The court agreed with the

[140] *See id.* at 716–17.

[141] *See id.* at 719.

[142] Attorney Gen. v. Hahnemann Hospital, 494 N.E.2d 1011 (Mass. 1986).

[143] *Id.* at 1021 n.18.

[144] *See id.* at 1021.

[145] *See* Gary, *supra* note 128, at 993–95.

[146] *See* Complaint for Declaratory Judgment Concerning the Rose Art Museum at para. 1, Rose v. Brandeis Univ., No. SJ-2009-409, 2009 WL 2428713 (Mass. July 27, 2009); *see also* Geoff Edgers, *Museum Backers Seek Halt to Selloff*, BOS. GLOBE, Jan. 28, 2009, at A1 ("Jonathan Novak, a museum overseer and a Los Angeles art dealer who graduated from Brandeis . . . and has given art works and money over the years[, said,] 'Had I had any idea when I donated work that there was a chance they would be sold to benefit the university, I never would have donated them.'").

[147] *See* FREMONT-SMITH, *supra* note 14, at 440 ("In terms of effective and efficient regulation of the charitable sector, the English rule that the assets of charitable corporations are subject to the doctrines of cy pres and deviation, regardless of their source, and regardless of whether they were given subject to explicit restrictions, is clearly preferable.").

[148] *See Hahnemann Hosp.*, 494 N.E. 2d at 1020–21.

Attorney General "that the board also would violate its fiduciary duty to donors of unrestricted gifts by abandoning the purpose for which it was organized and had held itself out to the public."[149]

The South Dakota Supreme Court found *Hahnemann* helpful when confronted with another situation involving amended articles of incorporation.[150] A charity operating a nursing home provided in its articles that on dissolution all assets "would be distributed to the communities in which said assets are located."[151] After several name changes and mergers, it removed the dissolution restriction, and after more mergers and name changes, the successor entity, Banner Health System, sold the South Dakota assets, planning to use the proceeds in other states.[152] Although the South Dakota Supreme Court refused to find an implied charitable trust,[153] the Court concluded that if the Attorney General could show that the removal of the assets affected the rights of nonmembers of the charity,

> a constructive charitable trust may be imposed on those assets donated to the local facilities before North Central amended its articles of incorporation. Any other rule of law would allow a charitable nonprofit corporation to eviscerate the charitable purpose for which it was formed without recourse for those who donated funds for that purpose.[154]

## III. DONOR CONTROL

### *A. The Application of Cy Pres*

The doctrines of cy pres and deviation hold important roles in any discussion about control over charitable gifts, and much of the scholarship in this area involves thoughts about loosening or tightening the application of those doctrines, to make adjustments of restrictions by a charity more or less likely.[155] The structure of cy pres has changed somewhat over time, but some of the general concerns over its application have remained remarkably constant.[156]

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[149] *Id.* at 1019 n.15; *see also* Holt v. Coll. of Osteopathic Physicians & Surgeons, 394 P.2d 932, 935 (Cal. 1964) (citations omitted) ("[C]haritable contributions must be used only for the purposes for which they were received in trust.").

[150] Banner Health Sys. v. Long, 2003 SD 60, ¶ 38, 663 N.W.2d 242, 250 (citation omitted).

[151] *Id.* ¶ 6, 663 N.W.2d at 244.

[152] *Id.* ¶¶ 4–24, 663 N.W.2d at 244–46.

[153] *Id.* ¶ 35, 663 N.W.2d at 249 (citation omitted).

[154] *Id.* ¶ 38, 663 N.W.2d at 250.

[155] *See, e.g.*, Atkinson, *supra* note 5, at 1142–43; Johnson, *supra* note 2, at 391.

[156] John Goodlander, *Cy Pres Settlements: Problems Associated with the Judiciary's Role and Suggested Solutions*, 56 B.C.L. REV. 733, 734 (2015).

An early statement of concern over cy pres, which the author described as a "complex and contradictory" doctrine, explained:

> The ideal charitable gift clearly expresses the donor's intention, yet is flexible enough to be accommodated to later radical changes in the circumstances surrounding the gift. But all too often these gifts are impulsively conceived, indefinitely expressed and planned with lamentable shortsightedness. In such instances a court may be forced to balance frequently antagonistic considerations: to protect the social benefits derived from charitable endowments, to evaluate interests of contesting heirs and residuary legatees and, finally, to effectuate the donor's intention.[157]

This article, written in 1939, focused on problems with cy pres as then applied, and two important differences in the application of cy pres then, in contrast with now, indicate that some changes have occurred.[158] One difference is that in 1939 the application of cy pres could result in the return of the gift to the donor's heirs or residuary legatees if the court found no general charitable intent.[159] Since that time a finding of no general charitable intent has become less and less likely, and the Uniform Trust Code ("UTC") now creates a presumption of general charitable intent.[160] A second difference is that the author imagines gifts made with little planning, while today the larger gifts are likely to involve negotiations between lawyers for the donor and the charity.[161] The text from 1939 is interesting, however, not only for these differences, but also because it shows that the underlying themes remain the same: (1) a gift should spell out the donor's intentions and yet be flexible to permit changes, and (2) a court may ultimately be called to balance competing interests.[162]

The author of the 1939 article supports the shift toward making application of cy pres easier.[163] The author notes approvingly that "the factor of public welfare became a more important element in these cases and it became less difficult to establish impossibility or

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[157] Comment, *A Revaluation of Cy Pres*, 49 YALE L.J. 303, 303 (1939) [hereinafter *A Revaluation of Cy Pres*].

[158] *See id.* at 307–08.

[159] RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. LAW INST. 1959); *A Revaluation of Cy Pres*, *supra* note 157, at 317.

[160] UNIF. TRUST CODE § 413 (UNIF. LAW COMM'N 2010); *see also id.* § 413 cmt. ("Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor.").

[161] Gary, *supra* note 128, at 978–79.

[162] *A Revaluation of Cy Pres*, *supra* note 157, at 321.

[163] *Id.* at 323.

impracticability of applying the gift as designated."[164] The author adds, "Since the doctrine as originally adopted in this country was deemed only an intent-enforcing device, it was frequently stated that the court could never modify the donor's intent 'upon considerations of policy or convenience.'"[165] And yet, the author noted, by 1939 courts had begun to do just that.[166] The author explains that an important issue is "whether maximum social benefit from the fund or the exact effectuation of the donor's intent should be the criterion of the court."[167] The author concludes that the court should "construct intent" rather than merely construe the donor's intent:

> In view of the underlying policy of the law favoring charities, because of the social benefit accruing therefrom, where the donor has failed to provide for the contingency of changed circumstances affecting his bequest, the court should consider the donor a reasonable man conversant with the means of employing funds for the most beneficial charitable purposes, and, therefore, one who, when faced with the contingency, would have devoted the fund to such purposes.[168]

Although the author explains that the court must find impossibility or impracticability in order to apply cy pres, the author describes cases that "manifest the highly desirable trend of the courts toward disregarding the specific fulfillment of the donor's design in favor of the interests of public welfare."[169] Thus, courts have, for many years, been willing to use cy pres and deviation to alter the use of charitable assets in ways that benefit the public.[170]

### *B. Standing*

When a donor makes a restricted gift to a charity, the donor can attempt to build in protections to try to ensure that if the charity fails to follow the donor's specified restrictions some recourse will be available.[171] A donor may seek to reserve standing for the donor, the donor's estate, or the donor's descendants by including a provision in

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[164] *Id.* at 320.

[165] *Id.*

[166] *See A Revaluation of Cy Pres*, *supra* note 157, at 320.

[167] *Id.* at 321.

[168] *Id.*

[169] *Id.* at 321–22 ("The requirements necessary before the labels 'impossible' or 'impracticable' will be applied to tag a fund for cy pres application have been relaxed, and disposition made with a greater emphasis on public benefits.").

[170] *See id.*

[171] *See* Brody, *Dead Hand*, *supra* note 5, at 1188, 1209–10.

the gift agreement giving any or all of them the power to enforce the gift.[172] The court may not be bound by such a provision, but if a charity does not raise the standing issue, the court may not either.[173] Evelyn Brody has asked whether there are "public policy limits that should be invoked to protect charities from agreeing to waive the donor's traditional lack of standing?"[174] She worries that the persons representing a charity may be anxious to obtain a gift and may not be thoughtful about the charity's "best long-term interests."[175] Arguments about donor standing continue to go both ways, especially when the donor attempts to reserve standing for the donor's descendants.[176]

Even if donor standing is permitted, not all donors will plan. Another policy question is whether the law should permit donors or successors representing the donor's interests to challenge actions taken by charities.[177] The UTC now provides standing to a donor to a charitable trust, but limits standing to the donor.[178] In *Smithers*,[179] New York permitted the donor's widow, acting as a special administrator of his estate, to challenge the charity's use of his gift and its failure to comply with the restriction imposed on its use.[180] A few years later, in *Rettek*,[181] a New York court refused to extend standing to the niece of the decedent, and thus far the reach of *Smithers* has been limited.[182]

### *C. Reversion*

Another strategy a donor might employ would be to create a reversion that would operate if the charity failed to comply with a

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[172] *See, e.g.*, *id.* at 1210.

[173] *See, e.g.*, Courts v. Annie Penn Mem'l Hosp., Inc., 431 S.E.2d 864, 867–68 (N.C. Ct. App. 1993) (deciding on the merits of whether the charitable gift was restricted and not addressing standing).

[174] Brody, *Dead Hand*, *supra* note 5, at 1192.

[175] *See id.*

[176] *See id.* at 1264–66 (describing issues involving donor standing in connection with the Principles of the Law of Nonprofit Orgs.).

[177] *See id.* at 1216.

[178] *See* UNIF. TRUST CODE § 405(c) (UNIF. LAW COMM'N 2010); *id.* § 405 cmt.

[179] Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426 (App. Div. 2001).

[180] *Id.* at 429, 436.

[181] Rettek v. Ellis Hosp., 362 Fed. App'x 210 (2d Cir. 2010).

[182] *Id.* at 212 (citation omitted); Rettek v. Ellis Hosp., No. 1:08-CV-844 (GLS/DRH), 2009 U.S. Dist. LEXIS 1607, at *12–13 (N.D.N.Y. Jan. 12, 2009). In *Hardt*, the argument that Missouri should follow New York's lead in *Smithers* and grant donor standing failed to impress the court. *See* Hardt v. Vitae Found., Inc., 302 S.W.3d 133, 139–40 (Mo. Ct. App. 2009) (citations omitted).

restriction.[183] In that event, the gift would revert to the donor's heirs or beneficiaries or go instead to another charity.[184] Whoever is named in the gift instrument will have an incentive to monitor the charity's actions. Reversions are not used much, due to concerns about loss of the tax deductions for the gift.[185] With the increase in the amount that can pass with no gift or estate tax,[186] a donor might not care whether a gift qualified for the transfer tax charitable deduction.[187] If so, then a reversion will give someone standing, and whoever holds the reversion will have an incentive to monitor the gift.[188] In a UTC state, however, the statute provides that a reversion will last until the later of the death of the donor or 21 years after the date of the gift.[189] A gift over to another charity may be more appealing, although monitoring may prove difficult. Note that any negotiated protections may help maintain the donor's restrictions, but may run counter to policy concerns regarding dead hand control.[190]

### *D. Flexibility*

John Eason describes the risk that *some* future modification will be needed as the price a donor must pay in exchange for the ability to impose restrictions that may last in perpetuity.[191] This risk is, or should be, an obvious part of the bargain. The pace of change in the world continues to accelerate. The only thing certain is that change will continue and that we cannot predict the scope of that change. No one today can craft a restriction with the assurance that the

[183] Alan F. Rothschild Jr., *Planning and Documenting Charitable Gifts*, 20 PROB. & PROP., July–Aug. 2006, at 53, 54.

[184] *See id.*; Jeramie Fortenberry, *Charitable Gifts with Strings Attached*, WEALTHCOUNSEL BLOG, (Apr. 25, 2017), http://info.wealthcounsel.com/blog/charitable-gifts-with-strings-attached.

[185] Rothschild, *supra* note 183, at 54. The value of the reversion will reduce the value of the gift. *See* I.R.C. §§ 170(f)(5), 2033 (2012).

[186] In 2017, the lifetime exclusion amount for each taxpayer is $5,490,000. *See* I.R.C. § 2010(c).; Ashlea Ebeling, *IRS Announces 2017 Estate and Gift Tax Limits: The $11 Million Tax Break*, FORBES (Oct. 25, 2016), https://www.forbes.com/sites/ashleaebeling/2016/10/25/irs-announces-2017-estate-and-gift-tax-limits-the-11-million-tax-break/#8e9a4393b706. State taxes may apply. *See, e.g.*, OR. REV. STAT. § 118.010 (2017) (detailing an estate tax imposed on estates in excess of $1 million).

[187] A reversion might reduce the value of the income tax deduction, but the value of a reversion that would take effect only if a charity failed to comply with a restriction might be negligible. *See* I.R.C. § 170(f)(8)(A).

[188] Goodwin, *supra* note 9, at 1139–40.

[189] UNIF. TRUST CODE § 413(b) (UNIF. LAW COMM'N 2010). Lewis Simes recommended putting a time limit on a reversion. *See* Simes, *supra* note 5, at 139.

[190] *See* Goodwin, *supra* note 9, at 1161; Roger G. Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635 (1988).

[191] Eason, *supra* note 49, at 125.

restriction will continue to make sense over time.

In the face of high-profile litigation alleging that charities have ignored the intent of their donors,[192] new donors may try to be more specific in crafting their restrictions. A book written about *Robertson v. Princeton*[193] recommends that donors "be specific."[194] The problem is that the Robertson organizational document was fairly specific.[195] In hindsight one can imagine redrafting the Robertson Foundation Certificate of Incorporation, which served as a gift instrument, in one way or another, but the problem with increased specificity is that the limits may not be the right ones. Restrictions drafted too precisely may create costs for the charities and result in money spent on litigation rather than on charitable work.[196] When some change occurs, the charity will need to determine whether its work continues to comply with restrictions imposed by the donors or whether legal proceedings will be necessary.[197] The cost of adjudicated modifications means that dollars that could otherwise be used to carry out the charity's mission would be diverted to pay lawyers and court costs.

At the same time, building too much flexibility into a document can result in a donor's wishes being ignored, legally.[198] A charity will most often want to try to accomplish what the donor intended, because any suggestion that the charity is doing otherwise can result in bad publicity and bad donor relations.[199] In some situations, however, the donor's intent can be ignored without consequence to those ignoring the donor's meaning, as long as the legal directions permit flexibility.[200] Leona Helmsley's trust[201] was distributed to all sorts of charities other than charities providing care for dogs because

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[192] *See, e.g.*, DOUG WHITE, ABUSING DONOR INTENT: THE ROBERTSON FAMILY'S EPIC LAWSUIT AGAINST PRINCETON UNIVERSITY xxiii (2014).

[193] Robertson v. Princeton Univ., No. C-99-02, 2007 N.J. Super. Unpub. LEXIS 3015 (N.J. Super. Ct. Ch. Div. Oct. 25, 2007).

[194] WHITE, *supra* note 192, at 257.

[195] *See* Composite Certificate of Incorporation of the Robertson Foundation (July 26, 1961) (on file with the Robertson Foundation). In *Robertson v. Princeton*, both sides argued that they were the ones respecting the intent of the donor. *See* Gary, *supra* note 128, at 979, 980; Iris J. Goodwin, *Ask Not What Your Charity Can Do for You:* Robertson v. Princeton *Provides Liberal-Democratic Insights into the Dilemma of Cy* Pres *Reform*, 51 ARIZ. L. REV. 75, 124 (2009).

[196] *See* Eason, *supra* note 49, at 124, 125.

[197] *See, e.g.*, Kathryn Miree & Winton Smith, *The Unraveling of Donor Interest: Lawsuits and Lessons*, PLANNED GIVING DESIGN CTR., http://www.pgdc.com/pgdc/unraveling-donor-intent-lawsuits-and-lessons (last updated May 18, 2011).

[198] *See* Eason, *supra* note 49, at 124–26.

[199] *See, e.g.*, Eason, *supra* note 8, at 719.

[200] *See, e.g.*, Goodwin, *supra* note 9, at 1098.

[201] *See infra* Part IV.B.3.

her trustees were authorized to distribute to any charitable organization.[202]

### *E. Ideas from Private Perpetual Trusts*

An increasing number of states have repealed the Rule Against Perpetuities or adopted a time period so lengthy as to be effectively unlimited.[203] The abolition of the rule was tied to a drive by some states to attract trust business, and has been decried by some commentators as "ill[-]advised."[204] An interesting development in recent years is the growth of interest in decanting and other tools that permit modification of restrictions over time.[205] Private trusts can now last forever, but planners on the private side build in tools for modification and create trusts that are not really irrevocable.[206] The use of powers of appointment, trust protectors, decanting, and additional modification rules in the UTC, have made irrevocable trusts much more flexible.[207]

These developments in connection with private trusts may provide lessons for charitable trusts. In a private trust the settlor can identify a person to direct the use of trust property.[208] The settlor can grant someone a power of appointment, with complete discretion to appoint property as the power holder thinks best, although the settlor can limit the potential recipients (the objects of the power).[209] The

[202] When the trustees of the Helmsley trust announced their initial distributions, little went to charities providing care for dogs. The trustees distributed $135 million to medical centers, health care organizations, and a variety of educational, conservation, and anti-poverty programs and only $1 million to animal-related organizations. *See* Sam Roberts, *Trustees Begin to Parcel Leona Helmsley's Estate*, N.Y. TIMES (Apr. 22, 2009), http://www.nytimes.com/2009/04/22/nyregion/22helmsley.html.

[203] *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 377 (2005); Dukeminier & Krier, *supra* note 64, at 1313, 1314.

[204] Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised* (Univ. Mich. Law Sch., Working Paper No. 199, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614934.

[205] Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of "Irrevocable" Trusts*, 28 QUINNIPIAC PROB. L.J. 237, 239–40 (2015).

[206] *See* Elizabeth K. Arias et al., *Fixing a Broken Trust: Judicial and Non-Judicial Modifications, Reformations, and Decanting Can You Change and Irrevocable Trust?*, 49 ANN. SOUTHERN FED. TAX INST. CC-7 (2014); Gerry W. Beyer & Melissa J. Willms, *Decanting is Not Just for Sommeliers*, ESTATE PLANNING STUDIES (Merrill Anderson), July 2014, at 3; Brandon A.S. Ross, *Practical Considerations for Decanting*, 30 PROB. & PROP. 36, 36 (2016).

[207] *See* Ausness, *supra* note 205, at 263, 290, 292.

[208] Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing*," 50 REAL PROP. TR. & EST. L.J. 267, 268 (2015).

[209] *See generally*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS Div. VI (AM. LAW INST. 2011).

settlor may name a trust protector to make decisions about the trust.[210] The settlor can direct the types of decisions the trust protector can make, and can also create a process for naming a new trust protector if the original person dies or is unable to act.[211] In both cases the settlor controls future actions by choosing carefully the person to make the decisions.[212] Through these tools, the settlor can build in flexibility so that persons identified by the settlor can make changes as needed. The settlor does not maintain complete control, but can guide the changes both by careful selection of power holders and protectors, and by guiding their discretion through the way the powers are created. Settlors of charitable trusts risk losing their tax deductions if they retain too much control, but some of the strategies being developed for private trusts may provide ideas for charitable trusts.[213]

## IV. WHAT IS THE ROLE OF THE PUBLIC?

### *A. The Donor's "Deal" with the Public*

A donor and the donee charity are the key players in any charitable gift, but the public also has a role.[214] The public's interest in the charitable gift derives from two "deals" a donor makes in connection with the gift. A donor enters into an agreement with a charity, agreeing to donate money or property in exchange for the charity's commitment to use the gift in a specified way. In addition, the donor benefits from a second deal, one entered into with the public, albeit without an explicit agreement. The donor provides benefits to the public but also receives benefits from the public.[215]

A charitable donor receives two types of benefits from the public: tax benefits and benefits from legal rules that allow the donor to structure the gift differently from a gift for a private purpose.[216] The

[210] On the increase in interest in trust protectors for private trusts and explanations of their uses. *See generally* ALEXANDER A. BOVE, JR., TRUST PROTECTORS: A PRACTICE MANUAL WITH FORMS 1 (2014); Frolik, *supra* note 208, at 268. Perhaps this idea will spill over into charitable trusts. A settlor of a charitable trust could name a trust protector to monitor the trust's use of the gift over time and intervene if the trustee failed to follow the settlor's directions with respect to the gift.

[211] *See* Frolik, *supra* note 208, at 269.

[212] *See id*. at 277.

[213] *See id*.

[214] *See* Eason, *supra* note 8, at 698, 699.

[215] *See id*. at 699.

[216] John Eason elaborates on this point. *See* Eason, *supra* note 8, at 698–700. Eason notes, "Donors are afforded such perpetual control as part of a quid pro quo exchange, with society at large on the other side of the bargaining table." *Id*. at 698. Evelyn Brody describes this deal

donor receives financial benefits through tax deductions;[217] the government agrees to accept less in taxes in exchange for the donor's relinquishment of the assets given to charity.[218] The tax benefits apply even if the donor directs the use of the property given and even though the donor receives non-financial benefits such as recognition in the community or the donor's name on a building.[219]

In addition to the tax deductions, the donor benefits from being able to make a gift for a charitable purpose, without an identified beneficiary, and from being able to establish a gift to last in perpetuity.[220] With this structural framework, a donor can impose restrictions on a gift so that the donor's personal views of the appropriate use of that gift will be carried out far into the future.[221] The donor may expect to have long-term influence through the donation of assets the donor would otherwise use for some private purpose.

Beyond the benefits that flow from the "deal" with the public, the donor may receive other intangible benefits. Allison Anna Tait has written about the social and psychological benefits donors receive from charitable gifts.[222] Charities provide recognition to their donors, and the donors may seek improved social status, social and business contacts, and "public prestige" through charitable giving.[223] Tait adds that donors may also use charitable giving for self-definition and personal satisfaction.[224] Tait argues that these additional benefits are part of the exchange with the public and increase the

as a "giftract," a term that reflects the nature of the agreement as not quite a contract but something more than a gift with no strings. *See* Brody, *Dead Hand*, *supra* note 5, at 1258, 1259. *See also* Atkinson, *supra* note 5, at 1114–15 ("[R]estraints the law allows to endure are not wholly idiosyncratic; they must advance purposes that the courts, as custodians of the commonweal, certify as publicly beneficial."); Johnson, *supra* note 2, at 357 ("Under this normative theory, the settlor who establishes a charitable trust is viewed as entering into a contract with the public . . . pursuant to which the trust is given perpetual life in exchange for the public's right to modify the trust terms.").

[217] *See* I.R.C. §§ 170(a)(1), 2522(a), 2055(a) (2012).

[218] *See* I.R.C. § 170(f)(18).

[219] *See* Eason, *supra* note 8, at 699–700; Tait, *supra* note 8, at 1704.

[220] *See* BOGERT ET AL., *supra* note 21, § 363; Tait, *supra* note 8, at 1665.

[221] *See* Eason, *supra* note 8, at 704. A donor may also receive a type of personal benefit if, for example, the gift results in naming a building for the donor or for someone the donor wishes to honor. *See id.* at 699–700; Tait, *supra* note 8, at 1704.

[222] *See* Tait, *supra* note 8, at 1712.

[223] *See id.* at 1705. Tait writes that a donor may make a substantial donation to obtain a seat on a charity's board of directors, which will lead to networking opportunities. *See id.* at 1706.

[224] *See id.* at 1710. Tait explains that behaviorists use the term "warm glow" to describe the personal satisfaction that comes from charitable giving. *See id.* at 1711.

public's side of the ledger.[225]

The rationale for providing these benefits to a donor is that the charitable gift will provide something beneficial to the public. As a policy matter, one question is what constraints should be imposed on the determination of public benefit (i.e. what is "charitable"), and a second question is who should provide the oversight to make sure the public gets the benefit.[226] If the gift is charitable, should the charity, the donor, or the public control the use of the property in the future? And if a donor restriction becomes problematic in the future, should the public's interest in the charitable assets play a role in deciding how to modify that restriction?

### *B. How Do We Determine "Public Benefit"?*

The starting point for the first question—what is charitable—is the definition of charitable purposes under trust law.[227] As already discussed,[228] English law developed the concept of "charitable purposes" and the English definition carried over into the United States.[229] The jurisprudence of centuries provides guidance as to the meaning, and requires a public benefit.[230] For a donor contemplating a restricted gift to charity, the scope of the definition of charitable is broad, and many restrictions will be within the range of what is considered charitable.[231] As long as the donor does not retain a personal benefit, other than tax deductions or reputational benefits,

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[225] *See id.* at 1709. She explains that the gift as a transaction is part of the charitable gift economy. *See id.* at 1712 ("The charitable gift economy is an elaborate economy organized around personal favors, social norms, institutional access, public prestige, and elite status.").

[226] *See* David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 162 (2000). *Compare* Planned Parenthood Ass'n v. Tax Comm'r, 214 N.E.2d 222, 335 (Ohio 1966) ("[C]harity is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general."), *and* Ould v. Wash. Hosp. for Foundlings, 95 U.S. 303, 311 (1877) (citation omitted) ("A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."), *with* Little v. Newburyport., 96 N.E. 1032, 1033 (Mass. 1912) (quoting New England Sanitarium v. Stoneham, 91 N.E. 385, 387 (Mass 1910)) ("Charity in the legal sense 'is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man.'").

[227] *See* Eason, *supra* note 8, at, 699 ("While the charity is bound in its use of the gifted property by virtue of having accepted the donor's restrictions, the donor is likewise limited by the boundaries of what society regards as 'charitable.'").

[228] *See supra* Part II.A.

[229] *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (AM. LAW INST. 2003); FREMONT-SMITH, *supra* note 14, at 43.

[230] *See supra* notes 31–39 and accompanying text.

[231] *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a-f (AM. LAW INST. 2003).

the donor has great flexibility in the restrictions the donor can impose.[232] The courts impose constraints by applying the public benefit standard, so that personal whim should not be considered charitable.[233]

If a charitable gift requires a public benefit, does that requirement mean that the public should have a voice in how the charitable assets are used? Is there some limit that should be imposed on a donor's directions, even if the directions comply with a general understanding of charitable purposes?[234] Should the public have to wait awhile before arguing for a change?[235] Three examples demonstrate the issues.

1. The Barnes Foundation

In 1953 an editor for the Philadelphia Inquirer sued the Barnes Foundation, arguing that by restricting public access to the art the Foundation was failing to provide a public benefit.[236] The editor lacked standing,[237] and the case was dismissed, but seven years later the Attorney General brought the same concern back to court.[238] The Attorney General argued that the Foundation was failing to comply with the terms of the indenture of trust, but the court spoke more to concerns about public benefit: "If the Barnes art gallery is to be open only to a selected restricted few, it is not a public institution, and if it is not a public institution, the Foundation is not entitled to tax exemption as a public charity. This proposition is incontestable."[239] The Attorney General was successful in forcing the Trustees to provide at least some public access.[240]

After many years of financial troubles and law suits, a group of

[232] *See generally* Eisenstein, *supra* note 93, at 1752 ("Earlier this year, the Pew Charitable Trust and the Lenfest Foundation committed . . . $ 150 million . . . conditioned on the Barnes Foundation making significant modifications to the Foundation's restrictive bylaws.").

[233] *See* Atkinson, *supra* note 5, at 1114–15 ("Thus the restraints the law allows to endure are not wholly idiosyncratic; they must advance purposes that the courts, as custodians of the commonweal, certify as publicly beneficial.").

[234] *See* Madoff, *supra* note 8 at 958 (discussing the Helmsley Trust and how care for animals is considered a charitable purpose, but directing that $8 billion be used for animal protection may be too much).

[235] *See infra* Part IV.D.1.

[236] Wiegand v. Barnes Found., 97 A.2d 81, 81 (Pa. 1953); *see also* John Nivala, *Droit Patrimoine: The Barnes Collection, The Public Interest, and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 495 (2003) (describing this case).

[237] The Attorney General had given the editor permission to bring the suit but did not participate directly. *See* Nivala, *supra* note 236, at 495.

[238] *See* Commonwealth v. Barnes Found., 159 A.2d 500, 502 (Pa. 1960).

[239] *Id*. at 503.

[240] *See id*. at 506.

local foundations offered to help raise money for the Barnes Foundation *if* the Foundation agreed to seek court approval for changes to restrictions imposed by the donor on the number of trustees, the control of the Foundation, and the location of the collection.[241] The Attorney General supported the changes.[242] In this case, the court concluded that the public benefit gained from access to and protection of the collection outweighed the donor's instructions on how the Foundation would be managed.[243] The court found that modifying the restrictions to allow the Barnes collection to move to downtown Philadelphia was the least disruptive option available to the cash-strapped Foundation,[244] and perhaps it was, but it is hard not to think that the public benefit played a role. Critics argued that modifying the restrictions the donor had imposed and permitting move of the Barnes collection was "[p]erhaps the strongest reason donors have been given to worry" about whether charities will carry out their wishes.[245] Proponents stressed the benefits to the city of Philadelphia and the many visitors who would make their way more easily to the new museum.[246]

2. The Buck Trust

The Buck Trust provides a different sort of example.[247] When she died, Beryl Buck made the San Francisco Foundation, a community foundation, trustee of her trust, with instructions that the trust should be used to provide for the needy of Marin County, California, and for other charitable, religious, and educational purposes in the county.[248] After a dramatic increase in the value of the trust, from approximately $7–10 million to $340 million, the trustee argued that

[241] *See* Eisenstein, *supra* note 93, at 1752–53.

[242] *See id.* at 1779.

[243] Much has been written about the Barnes Foundation. *See* JOHN ANDERSON, ART HELD HOSTAGE: THE BATTLE OVER THE BARNES COLLECTION 118, 119, 121, 122 (2003); Jonathan Scott Goldman, *Just What the Doctor Ordered? The Doctrine of Deviation, the Case of Doctor Barnes's Trust and the Future Location of the Barnes Foundation*, 39 REAL PROP. PROB. & TR. J. 711, 755, 756 (2005); Gary, *supra* note 128, at 985–87; Chris Abbinante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665, 669 (1997).

[244] *See In re* Barnes Found., 69 Pa. D. & C.4th 129, 170, 171 (C.P. Montgomery 2004).

[245] *See* William Schwartz & Francis J. Serbaroli, *After the Barnes Ruling: What Donors Should Do to Protect Their Wishes*, CHRONICLE OF PHILANTHROPY, Mar. 31, 2005, at 57.

[246] *See* Eisenstein, *supra* note 93, at 1753.

[247] *See In re* Estate of Beryl Buck, No. 23259 (Cal. Super. Ct., Aug. 15, 1986), *reprinted in* 21 U.S.F. L. REV. 691, 691 (1987); John G. Simon, A*merican Philanthropy and the Buck Trust*, 21 U.S.F. L. REV. 641, 643 (1987); Sidel, *supra* note 11, at 1176–77.

[248] *Estate of Buck*, *supra* note 247, at 693, 696.

a modification to the geographic restriction was necessary.[249] In the view of the trustee, the modification would allow the trustee to use the charitable dollars more efficiently to carry out the donor's purposes.[250] The trustee also expressed concern about its own role given that it had overall fiduciary duties for all of San Francisco.[251]

When the trustee asked the court to apply cy pres and modify the geographic restriction, the Attorney General represented the public in opposing the modification.[252] In doing so, the Attorney General supported the donor's restriction as written and supported the public interest of the people of Marin County, but ignored a broader public interest in the trust.[253] The court refused to modify the restriction,[254] although one could argue that the public benefit would have been greater if the modification had been allowed. One could also argue, as John Simon has done,[255] that the court refused the modification requested by the trustee but then modified the donor's intent using its own view of what was appropriate.[256] Neither the charity (i.e., the trustee) nor the donor controlled the outcome.[257] The court, with the support of the Attorney General, made decisions about the use of the assets.[258] Whether the court's decision can be viewed as made in accordance with the public's interest in the charitable assets is the subject of debate.[259]

3. The Leona M. and Harry B. Helmsley Trust

One more example comes from a trust created by Leona Helmsley.[260] When she died, Ms. Helmsley left the bulk of her estate

[249] Simon, *supra* note 247, at 642.

[250] *Id.* at 643.

[251] *See id.*; *see also Estate of Buck*, *supra* note 247, at 691 (noting the four other Bay Area counties served by the San Francisco Foundation).

[252] *See Estate of Buck*, *supra* note 247, at 692, 756–57.

[253] *See* Sidel, *supra* note 11, at 1181.

[254] *See Estate of Buck*, *supra* note 247, at 759.

[255] *See* Simon, *supra* note 247, at 660.

[256] *See id*. at 643, 660.

[257] *See id.* at 660.

[258] The court directed that twenty to twenty-five percent of the income of the Buck Trust be allocated to three projects of "national and international importance:" the Buck Center on Aging, the Institute on Alcohol and Other Drug Problems, and the Marin Educational Institute. *See id.* at 661, 665.

[259] *See* Atkinson, *supra* note 5, at 1112 n.3 (citing articles supporting this proposition); Sidel, *supra* note 11, at 1177 & n.115 (citing articles supporting this proposition); Simon, *supra* note 247, at 665.

[260] Ms. Helmsley created an *inter vivos* charitable trust and then gave the residue of her probate estate to the trust. *See In re* Trust of Leona M. Helmsley, No. 2968/2007, at 1 (N.Y. Sur. Ct. Feb. 19, 2009), http://graphics8.nytimes.com/packages/pdf/nyregion/2009 0226decisi

to the Leona M. and Harry B. Helmsley Trust, an *inter vivos* charitable trust.[261] The trust instrument gave the trustees broad discretion to make distributions to charitable organizations, but a "mission statement" Ms. Helmsley wrote for the trust indicated her interest in making grants to charities providing for the care of dogs.[262] Her documents did not restrict grants to dog-related charities, so the trustees could ignore her preferences,[263] but what if instead she had convinced her lawyer to leave out the flexible language? Could she have limited distributions to charities concerned with the provision of care for dogs? Should public benefit outweigh such idiosyncratic wishes, especially when the benefits of a substantial tax deduction are considered?[264] The court, representing the public's interest, will decide whether a donor's idiosyncrasies offend the public benefit standard.[265]

### *C. The Role of the Attorney General*

Historically, the Attorney General represented the public in providing oversight for the use of charitable assets.[266] The difficulty for the Attorney General, or any charity regulator, is that the office has potentially conflicting duties—protecting the donor's intent and protecting the public interest more broadly.[267] Oversight may involve a concern with seeing that a charity complies with donor-imposed restrictions, but a charity regulator may conclude that the public's interest would best be served by permitting a modification to those restrictions.[268] Should the role of the state charitable regulator be to protect the intent of donors, thus encouraging more gifts to charity?[269] Should the charity regulator instead work to ensure that

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[261] *Id.* at 2.

[262] *Id.* at 1 ("(1) purposes related to the provision of care for dogs; and (2) such other charitable activities as the Trustees shall determine.").

[263] *See id.* at 2; Gary, *supra* note 128, at 1014–15.

[264] *See* Madoff, *supra* note 8, at 967 (arguing public benefit outweigh such idiosyncratic wishes).

[265] *See* Gary, *supra* note 128, at 1008 (discussing cases where the Attorney General motion for Summary Judgement asking that the court find charitable donations null and void due to the impact on the public benefit by restrictions imposed by the donor).

[266] *See* Patton, *supra* note 226, at 134–45 (discussing the development of the Attorney General's role in England and the incorporation of that role into the American legal system).

[267] *See* Gary, *supra* note 128, at 1019.

[268] *See id.* at 1020, 1021.

[269] *See id.* at 1026 ("A candidate for the office of Attorney General of Pennsylvania, John Morganelli, criticized the incumbent's support for the move [of the Barnes collection]. He argued that by refusing the fight the move, Attorney General Corbett failed to 'fulfill his responsibilities to represent the public interest when it comes to charitable trusts.' Mr.

any charitable gift continue to provide a public benefit, perhaps examining the public benefit of charities to determine whether a modification to a restriction might improve the public benefit?

When the trustees of the Hershey Trust in Pennsylvania considered selling its shares of the Hershey company stock, the Attorney General moved to block the sale, based on an expanded view of its *parens patriae* authority.[270] The Attorney General asserted its view that a charity should consider the community impact of its decisions, beyond the specific charitable purpose of the trust.[271] The trustees countered that their responsibility, and that of the Attorney General, was to carry out the trust in the best interests of the specific charitable purposes for which the trust had been established.[272] For the Hershey trust, the beneficiaries were the students attending the school for orphans supported by the trust.[273]

A further concern with respect to whether an Attorney General's office will step in to protect donor intent is that an Attorney General is a politician and political considerations may become part of a decision in connection with monitoring a charitable trust, at least in high-profile cases.[274] Yet, the political nature of the Attorney General's oversight may be appropriate, if the Attorney General is elected to protect the interests of the public.[275] Even beyond the

Morganelli worried that the failure to protect Barnes' intent would discourage other donors from making charitable gifts, and he pledged to reopen the Barnes case if elected.").

[270] *See* Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philosophy*, 65 U. PITT. L. REV. 1, 13–17 ("The Attorney General asserted that its parens patriae authority went beyond merely inquiring into whether the Hershey trustees' actions comported with the deed of trust, a more traditionally limited definition of the state regulator's role. The state Attorney General asserted the parens patriae role more broadly.").

[271] *See id.* at 17. *See also id.* at 23 ("The key argument was that charitable trusts bear a broader responsibility to the public and the community than only to their defined legal beneficiaries under a trust deed.").

[272] *See id.* at 18, 19.

[273] *See id.* at 21 & n.79.

[274] *See* Brody, *Whose Public*, *supra* note 5, 938, 991–92, 994, 997–98 (2004) (discussing the Hershey Trust litigation and the political nature of the Attorney General's actions); Klick & Sitkoff, *supra* note 80, at 818 ("[A]s the Hershey Trust [case] . . . show[ed] that the Attorney General's intervention . . . reduced the value of the [Hershey] Trust [and] support[ed] the view that the incentives of state attorneys general may well be misaligned with the best interests of the charitable organizations that they superintend."); Sidel, *supra* note 270, at 13, 33 (describing the shift in the attitude of the Attorney General's office in the Hershey case). A concern is inconsistent treatment by Attorneys General. *See* Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J. L. & PUB. POL'Y 1, 27–28 (2009).

[275] *See* Sidel, *supra* note 270, at 33 ("The Attorney General's intervention (even in its relationship to personal political interests) can well be seen as an aggressive attempt to represent community views and interests that might otherwise have gone unrepresented in the struggle for Hershey.").

potential political complications, charity regulators operate under financial constraints and cannot monitor every charity and every restricted gift.[276] If a concerned observer calls a situation to the regulator's attention, an investigation might follow, but even with information provided by someone outside the office, the regulator will not have the resources to investigate every question raised.[277] Although the office of the Attorney General may be tasked with protecting the public's interests, whether a charity's actions are challenged may depend on the financial resources of the charity regulator in the state where the charity is located, the regulator's view as to whether donor intent or some other public interest is more important, and the potential political cost or benefit to the government official of getting involved.[278]

Given the financial and political constraints on action by the Attorney General, commentators periodically recommend the creation of a separate agency that could be charged with providing oversight for charities.[279] England has a Charities Commission, and perhaps such a model would prove useful in the United States.[280] The creation of such a commission would not solve the question of what exactly its role would be in terms of protecting the public interest in charitable assets. A further problem would be that the creation of such a commission would require financial resources that most states would be unable or unwilling to provide.[281] A federal commission might be more likely to obtain funding, but a federal commission would move charitable oversight from the states, where it has

[276] *See, e.g.,* FREMONT-SMITH, *supra* note 14, at 446; Mary Grace Blasko et. al., *Standing to Sue in the Charitable Sector*, 28 U.S.F.L. REV. 37, 39, 47 (1993); Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1332 (2007); Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1123, 1128 (2007). In addition to studies that show that many states have no lawyers assigned full-time to charitable oversight, even states that focus some resources on charitable oversight tend to emphasize the regulation and oversight of charitable solicitation. *See* Blasko, *supra*, at 48, 52; Jenkins, *supra*, at 1124, 1128. The Attorney General is charged with consumer protection, and limiting fraudulent solicitation can protect consumers. Helge, *supra* note 274, at 24.

[277] *See* Gary, *supra* note 128, at 1132.

[278] In *Holt v. Coll. of Osteopathic Physicians & Surgeons*, the court worried that "[t]he Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment." 394 P.2d 932, 935 (Cal. 1964) (citations omitted).

[279] *See, e.g.*, Helge, *supra* note 274, at 82; Kelly McNabb, *What "Being a Watchdog" Really Means: Removing the Attorney General from the Supervision of Charitable Trusts*, 96 MINN. L. REV. 1795, 1826–27 (2012).

[280] *See* Helge, *supra* note 274, at 64.

[281] *See id.* at 20–21.

traditionally has been located.[282]

### *D. Proposals for Loosening Donor Control*

The Attorneys General will continue to play an important role in monitoring the use of charitable assets, and the courts will continue to approve or deny requests for modification. The public benefit standard remains an important aspect of charitable purposes, but the interface between that standard and modification proceedings remains problematic.[283] A loosening of the requirements for modification of donor restrictions could recognize and support the public's interest in charitable assets. Recall the author who, in 1939, applauded the "trend of the courts toward disregarding the specific fulfillment of the donor's design in favor of the interests of public welfare."[284] Several scholars have recommended different strategies that could lead to greater consideration of the public interest.[285]

#### 1. Relax Rules After a Set Number of Years

As time goes on, restrictions that made sense when a donor made a gift, may no longer be appropriate.[286] The restrictions may not technically be impossible or even impracticable to carry out, but the charitable assets might be put to much better use if the charity could modify or even remove the restrictions.[287] One way to balance the interests of the donor with the public's interest in productive use of charitable assets, would be to give the charity or the court greater flexibility after some number of years. A shift to more relaxed modification rules after the passage of time is a favorite strategy for reform proposals.[288]

Lewis Simes suggested that after thirty years a court should be

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[282] *See id.* at 55–56; *see also* Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 UNIV. HAW. L. REV. 593, 629–30 (1999) (demonstrating that to some degree, increased regulation of charities by the IRS has already resulted in federal oversight of fiduciary duties).

[283] *See* Helge, *supra* note 274, at 34; Johnson, *supra* note 2, at 391.

[284] *A Revaluation of Cy Pres*, *supra* note 157, at 322.

[285] *See, e.g.*, Simes, *supra* note 5, at 139; Johnson, *supra* note 2, at 354–55; Melanie B. Leslie, *Time to Sever the Dead Hand: Fisk University and the Cost of the Cy Pres Doctrine*, 31 CARDOZO ARTS & ENT. L.J. 1, 16–17 (2012).

[286] *See* Simes *supra* note 5, at 139; Brody, *Dead Hand*, *supra* note 5, at 1266–67; *see, e.g.*, Johnson, *supra* note 2, at 373–74.

[287] *See, e.g.*, Simes, *supra* note 5, at 139; Brody, *Dead Hand*, *supra* note 5, at 1266–67; Leslie, *supra* note 285, at 16–17.

[288] *See, e.g.*, Simes, *supra* note 5, at 139; Brody, *Dead Hand*, *supra* note 5, at 1266–67; Leslie, *supra* note 285, at 16–17.

able to modify a restriction the court found impracticable or inexpedient.[289] He explains, "a purpose may be found inexpedient solely because the amount to be expended is out of all proportion to its value to society."[290] He would combine the passage of time with a loosened standard, but he would still require court approval for the modification.[291] Simes would also give the trustees the power, although not the duty, to consume the principal of the trust, after a specified number of years.[292]

Alex Johnson proposed that the period governed by the common law Rule Against Perpetuities be used to set the time for a shift in how the court would apply cy pres and deviation.[293] During the period represented by the Rule, the court would apply cy pres and deviation sparingly, following the current doctrine.[294] After the period of the Rule had run, the court could modify restrictions based on an expansive application of the doctrines.[295] Johnson's argument is that the period of the Rule Against Perpetuities represents the law's balancing of the rights of the present generation and the rights of future generations, and that this same balancing is appropriate for charitable trusts.[296] Johnson explained that his recommendation addresses concerns that potential donors would be dissuaded from charitable giving if courts could change their restrictions more easily, because they would lose control altogether under a private trust scenario.[297] The abandonment of the Rule in many states undermines Johnson's argument that pairing the liberalization of the modification standard with the Rule will allay concerns of charitable donors.[298] Nonetheless, his general argument, that application of cy pres should be made easier after a period of time, remains applicable.[299]

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[289] *See* Simes, *supra* note 5, at 139. Simes would also presume general charitable intent after thirty years. *See id.*

[290] *Id*.

[291] *See id*.

[292] *See id*.

[293] *See* Johnson, *supra* note 2, at 354, 355.

[294] *See id*. at 391.

[295] *See id*.

[296] *See id*.

[297] *See id*. at 355.

[298] *See id*.; *see also* Dukeminier & Krier, *supra* note 64, at 1313–14 (describing increases in the period of the rule against perpetuities, including abolition in some states).

[299] Johnson states that potential charitable donors will be encouraged by a doctrine that permits expansive use of cy pres after the period of the Rule, because knowledge that modification can occur when necessary will give them "confidence that the assets they devote to the trust will be put to their best and highest use in perpetuity." Johnson, *supra* note 2, at 391.

Melanie Leslie has suggested that restrictions expire altogether after forty years.[300] Under her proposal, donors or their heirs would have standing during the forty-year period, and if a restriction became impossible or impracticable within the period, the charity could ask a court to apply cy pres.[301] Then, after forty years, the charity could make whatever changes it deemed appropriate, although the trustees would continue to be bound by their fiduciary duties and would be cognizant of the reputational risk of altering a donor's intent unless necessary to carry out the charity's mission.[302] Leslie notes that a time limitation of the sort she proposes "would enable donors to direct the use of charitable assets for a reasonable period but greatly reduce litigation over changed circumstances and the accompanying waste of charitable and public dollars."[303]

Evelyn Brody also recommended a policy that diminishes, with time and unanticipated circumstances, the duty to adhere to a gift restriction and any right of donor standing.[304] She explained that relaxing a restriction after the passage of time is justified because as more time passes, it becomes more likely that a donor's particular scheme will lose its relevance and become less socially worthwhile, public benefits the donor did not contemplate are more likely to arise, the donor will have "recovered" more of the value of the restriction, and it is more likely that the donor will have died.[305]

Brody pointed out that over time the interests of various people involved with a gift may change.[306] Children of a donor may resent the gift; employees of an institutional donor may worry about their own interests or careers; turnover of directors or managers of a charity may result in lack of institutional memory; and relations between the donor's family and the donee charity may have soured.[307] Because these factors will affect how these people engage in any modification process, Brody concluded that the passage of time should affect the policy about control over restricted gifts.[308]

Iris Goodwin offered a hybrid proposal, with some greater authority granted to a charity over time, but with attention to the

[300] Leslie, *supra* note 285, at 16–17.
[301] *See id*.
[302] *See id*.
[303] *Id*. at 16.
[304] *See* Brody, *Dead Hand*, *supra* note 5, at 1259–60, 1266–67.
[305] *Id*. at 1270.
[306] *See id*. at 1259–60.
[307] *Id.*
[308] *See id*. at 1260.

donor's intent part of the charity's ongoing duty.[309] Goodwin would structure a charity's review of restricted gifts based on "Program Periods" of fifteen years.[310] After fifteen years, an "Evaluation Window" would open.[311] The charity could then announce a new "Operative Interpretation" to govern the restricted gift during the next fifteen years.[312] The charity could modify donor-imposed restrictions only if the charity could show from evidence gathered during the Program Period "that the goals of the endowed project or program could not be meaningfully realized . . . ."[313] The charity could not base changes on anything external to the gift—other societal needs—but would have to focus on the donor's directions for the gift and make any changes "to the least degree necessary to respond" the problems identified by the evidence.[314] During the Evaluation Window, anyone with standing could challenge the charity's plans.[315] Goodwin's proposal allows the charity to proceed without a judicial cy pres proceeding, but retains an emphasis on donor intent and provides an opportunity for challenges to a charity's proposed changes.[316]

Allison Anna Tait's proposal substitutes the donor's life for a specific number of years.[317] She has recommended strict adherence to a donor's restrictions during the donor's life, but then a loosening of the application of cy pres after the donor's death.[318] At that time, the restrictions would be presumed to be "illegal, impracticable, impossible or wasteful" so that a court could apply cy pres without a specific finding, or perhaps the requirement would be dropped altogether.[319] The court would also presume the donor had a general charitable intent.[320] In considering a requested modification after the

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[309] *See* Goodwin, *supra* note 195, at 123.

[310] *See id*. at 123. Goodwin explains "Program Period" as follows:

> The length of a Program Period is somewhat arbitrary, but a Program Period should be a length sufficient to allow the charity to steward the grant with a degree of autonomy and also to gather evidence demonstrating the feasibility of the stipulated mission given present circumstances. A length of time equal to two business cycles (approximately fifteen years) suggests itself as being of sufficient length to permit these things to take place.

*Id.*

[311] *See id.*

[312] *See id.*

[313] *Id.*

[314] *Id.*

[315] *See id.*

[316] *See id.* at 122, 123.

[317] Tait, *supra* note 8, at 1715.

[318] *See id.*

[319] *Id.*

[320] *See id.*

donor's death, the court would focus on the public benefit of the gift rather than on the donor's intent.[321] Tait also suggested removing the requirement of a judicial proceeding altogether, after the passage of a fixed period, perhaps fifty years.[322] Tait's proposal is based on her explanation of a charitable gift economy in which the donor receives significant benefits—tax, social status, and self-satisfaction—during the donor's life.[323] Because the donor receives those benefits during life, at death the public benefit of the gift should be prioritized.[324] The problem with using the donor's life as the measuring point, however, is that some donors make restricted gifts at death.[325] Although those donors get some of the benefits Tait identifies, they will not have had the years of benefits she describes.[326]

2. Expand What the Court Can Consider

The Restatement (Third) of Trusts and the UTC have added the word "wasteful" to the reasons for which modification could be considered,[327] loosening the standard a bit, or perhaps clarifying the meaning of "impracticable." Two commentators, both writing before the addition of "wasteful," would go further. As noted above, Lewis Simes would allow modification if a restriction had become inexpedient, but only after thirty years.[328] Kenneth Karst proposed allowing modification under a standard that would allow consideration of the public interest in a charitable trust.[329] He wrote:

> Furthermore, the purposes of the settlor need not have become impossible to achieve, or even "impracticable" in that word's more restrictive sense. It would be enough to show that the charity's original purposes "have become obsolete or useless or prejudicial to the public welfare, or are otherwise sufficiently provided for, or are insignificant in comparison with the magnitude of the endowment.[330]

Another strategy for changing the way the court applies modification would be to have the court consider what a reasonable

[321] *See id.*
[322] *See id.*
[323] *See id.*
[324] *See id.*
[325] *See id.*
[326] *See id.*
[327] *See supra* notes 80–83 and accompanying text.
[328] *See* Simes, *supra* note 2, at 139.
[329] *See* Karst, *supra* note 5, at 472.
[330] *Id.* (citing the *Nathan Report* from England).

donor would want.[331] Under current cy pres rules, if a restriction has become impracticable, the court decides how to modify the restriction based on the intent of the donor.[332] John Simon has suggested that the court should instead consider what a reasonable donor would want.[333] A reasonable donor can consider the intent of the actual donor, to the extent that can be determined, but not be bound by the information available at the time the donor made the gift.[334] A reasonable donor can also consider the changed circumstances and make an adjustment that incorporates the interests of the public.[335]

Several commentators would direct the court to consider the public's interest in charitable assets when making modification decisions.[336] Katie Magallanes wrote that when a restriction becomes impossible or impracticable, the court should consider more than the donor's intent.[337] She recommended that a court consider the public benefit of the proposed change, as well as the lapse of time and cultural changes since the time of the gift.[338] The court should balance the public benefit with the donor's intent.[339] Ilana Eisenstein also proposes that the court give greater attention to the public interest when applying cy pres or deviation.[340] Eisenstein agrees with John Nivala that the public has a strong interest in assets that represent the droit patrimoine, our collective cultural inheritance.[341] The public interest in these assets deserves protection, even in the face of contrary donor restrictions.[342]

3. Turn Decisions Over to the Charity's Fiduciaries

Rob Atkinson has recommended allowing the fiduciaries managing charities to make decisions about the charitable assets under their

[331] *See* Atkinson, *supra* note 5, at 1119; Eisenstein, *supra* note 93, at 1771.

[332] *See* Simon, *supra* note 247, at 643, 644.

[333] *See id*. at 647.

[334] *See* Eisenstein, *supra* note 93, at 1771–72.

[335] *See* Simon, *supra* note 247, at 656.

[336] *See* Katie Magallanes, *Beyond Donor Intent: Leveraging Cy Pres to Remedy Unintended Burdens Caused by Charitable Gifts*, 40 AM. C. TR. & EST. COUNS. L.J. 407, 411 (2014); Eisenstein, *supra* note 93, at 1771–72.

[337] *See* Magallanes, *supra* note 336, at 426, 427.

[338] *See id*. at 428.

[339] *See id*. at 432.

[340] *See* Eisenstein, *supra* note 93, at 1771–74.

[341] *See id*. at 1783–86. Nivala uses the Barnes Foundation as an example, noting the value of the Barnes collection, as displayed, as "an intellectual, emotional and cultural experience." Nivala, *supra* note 236, at 480.

[342] *See* Eisenstein, *supra* note 93, at 1785–86; Nivala, *supra* note 236, at 481.

control.[343] He explains,

> Trustees would be legally empowered to use the assets committed to their management in whatever way they determined would most advance the public good, limited by what the state defines as charitable through common law, legislation, or administrative regulation, as well as by extralegal mechanisms to enforce donor intent.[344]

The fiduciaries would continue to be bound by the duties of care and loyalty, and the Attorney General could intervene for breaches of those duties.[345] The Attorney General could step in if a charity began conducting activities outside the scope of what is considered charitable, and any self-dealing on the part of the fiduciaries would still be a breach of the duty of loyalty.[346] Donor restrictions would no longer be legally enforceable, but would carry moral weight.[347] Charities have many practical reasons, including the desire for future donations, to carry out donor intent,[348] and in Atkinson's view those other reasons provide sufficient protection for donors.[349]

Ilana Eisenstein agrees with Atkinson's approach.[350] She proposes relaxing that the duty of obedience to allow the fiduciaries to consider the public interest more easily.[351] Eisenstein also suggests an added fiduciary duty for fiduciaries of charitable entities: "a duty to the public welfare."[352] The fiduciaries, rather than the courts would be responsible for balancing donor intent with the public interest.[353] The public would be treated as a separate beneficiary, with legally protectable rights.[354]

Greater control for charities has already happened, to a limited extent, through the small, old fund provision of UPMIFA.[355] These

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[343] *See* Atkinson, *supra* note 5, at 1143. Lewis Simes would allow charities to consume principal after the passage of time, with the result that restricted assets could be used for other purposes. *See* Simes, *supra* note 5, at 139.

[344] *See* Atkinson, *supra* note 5, at 1143.

[345] *See id.* at 1144.

[346] *See id.*

[347] *See id.*

[348] *See* Gary, *supra* note 128, at 1001–06.

[349] Atkinson provides political and economic arguments to back his proposal. *See* Atkinson, *supra* note 5, at 1144–45, 1147.

[350] *See* Eisenstein, *supra* note 93, at 1775–77.

[351] Eisenstein writes, "Trustees would still be subject to the same oversight under their duties of loyalty and care, but they would have greater freedom to change the purposes and modes of administration, even if such changes would be contrary to clear donor intent." *Id.* at 1776.

[352] *Id.* at 1777.

[353] *See id.*

[354] *See id.*

[355] *See supra* notes 97–100 and accompanying text.

provisions only apply to funds held by charities organized as nonprofit corporations, and not to other tangibles or real property or to funds held by charitable trusts.[356] As already discussed, these provisions allow a charity to make decisions about a restriction itself, although the charity must make the modification "in a manner consistent with the charitable purposes expressed in the gift instrument."[357] The charity must give notice to the Attorney General, but no court proceeding is required.[358] The provisions reflect the idea that charitable assets are better used in carrying out a charitable purpose, even if it is not exactly the one a donor had designated, than in being spent on a court proceeding to get approval for the change.[359] The amounts involved are small, but some states have increased the amount that qualifies for this action.[360] And at least one state, Florida, permits charities to modify restrictions on their own, without notice to the Attorney General, for funds with values under $100,000.[361] Perhaps this idea, that charities can be trusted to use charitable funds appropriately, can be expanded to restrictions on other types of assets.

## V. CONCLUSION

The public benefit standard has existed throughout the development of the law of charities. Too often, however, that standard is overlooked or ignored. Donor restrictions should be honored, but not to the exclusion of the public's voice. The Attorneys General and the courts, as the arbiters of what it means to be charitable, should be able to consider public benefit as well as donor intent.

Over the years, scholars have proposed ways to make cy pres more responsive to the public benefit standard, but the doctrines of cy pres

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[356] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 cmt. (UNIF. LAW COMM'N 2006). UPMIFA applies to "institutional funds." An institutional fund is defined as a fund held by an institution (a charity), but not including "a fund held for an institution by a trustee that is not an institution." *Id.* § 2(5)(B). The impact of this definition is that a fund held by a charitable trust is not subject to UPMIFA, except in the unlikely situation in which a charity serves as trustee of a trust separate from itself. *Id.* § 2 cmt. subsec. 4. A charitable trust with an individual or corporation serving as trustee is not subject to UPMIFA and cannot benefit from the small, old fund termination provision. *See id.* A small trust can be terminated under UNIF. TR. CODE § 414 (UNIF. LAW COMM'N 2010), but that provision will not help a large charitable trust holding a small restricted fund.

[357] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c).

[358] *See id.*

[359] *See id.* § 6 cmt.

[360] *See id.*

[361] *See* FLA. STAT. § 617.2104(6)(b) (2017).

and deviation as currently articulated continue to focus on making modifications that align with what the donor intended. Assuming the donor is dead, a court deciding whether and how to modify a restriction does so without really knowing what the donor wanted or would want if faced with the changed circumstances. Perhaps the creation of a "reasonable donor standard,"[362] would produce better results, making public benefit a more important consideration. A reasonable donor could embody the public's interest in the assets. Alternatively, an honest acceptance of the public benefit standard and its relevance to decisions about modifications of restrictions would help.[363]

Although deference to donor intent is enshrined in the law, the definition of charitable purpose is not static, and has changed over time.[364] As circumstances change, a donor-imposed restriction may cease to meet the public benefit standard.[365] Even if the restriction is still within the general range of what is charitable, a modification may be appropriate. As the author of the 1939 article wrote: "The issue, then, seems to be whether maximum social benefit from the fund or the exact effectuation of the donor's intent should be the criterion of the court."[366] This issue continues to lie at the heart of the question of who should control charitable gifts. Both the donor's wishes and the charity's view of how best to manage its assets are important, but the interests of the public are also worthy of consideration. As scholars and policy makers continue to examine the doctrine of cy pres, they should keep in mind the public benefit standard, so that the public can have a greater voice when adjustments to restricted charitable gifts are needed.

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[362] *See, e.g.*, Atkinson, *supra* note 5, at 1119; Simon, *supra* note 247, at 643, 644, 647; Eisenstein, *supra* note 93, at 1771.

[363] The Attorney General's position and the court's decision in *Barnes* appear to have taken the interest of the public into consideration. *See* Wiegand v. Barnes Found., 97 A.2d 81, 84 (Pa. 1953) (citation omitted). It is difficult to understand all the changes made to Dr. Barnes' original instructions as mere administrative deviation. *See id.* at 86 (Musmanno, J., dissenting). Ilana Eisenstein, writing before the case had been decided, worried about what she assumed would be the result: no changes because donor intent would control the decision. *See* Eisenstein, *supra* note 93, at 1754 ("The public interest, however, is unlikely to be considered by the Montgomery County Orphans' Court when it applies Pennsylvania law to the trustees' petition. The battle over the modification of the trust bylaws will be based on the intent of Albert C. Barnes as the court finds it."). Rob Atkinson notes that courts may consider the public interest while pretending to apply traditional rules, and suggests that such actions risk undermining judicial credibility. *See* Atkinson, *supra* note 5, at 1120.

[364] *See supra* notes 19–29 and accompanying text.

[365] *See, e.g.*, Simon, *supra* note 247, at 643, 644, 647, 656–57; Eisenstein, *supra* note 93, at 1771–72.

[366] *A Revaluation of Cy Pres*, *supra* note 157, at 321.