
THE RESTRICTED GIFT LIFE CYCLE, OR WHAT COMES AROUND GOES AROUND

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INTRODUCTION

I have been charged with the pleasant task of thinking about spending money. Of course, the exercise is confined to the intellectual, with no empirical mandate that might set me upon the path to personally engaging in that endeavor. Even in the presence of such a mandate, I would be bound, like the charitable fiduciary, to approach my task with the interests of others foremost on my mind. In the context of a nonprofit charitable organization, those “others” would be the class of charitable beneficiaries towards whom the organization’s mission is directed—that beneficiary class serving as a proxy for the broader public good.

Of course, now that I have subdued my pleasure with the concept of purpose and the attendant prospect of accountability, I may as well acknowledge another stakeholder whose interests cannot be ignored when theorizing about charitable organizations and their missions. I am referring to charitable donors—those contributors of money and assets in support of an organization’s mission. A given donor’s interests become more pronounced, or at least her objectives become more particularly identifiable, when the donor makes her contribution in the form of a restricted gift.¹ A restricted gift is one with respect to which the donor has specified certain

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1. Principles of the Law of Nonprofit Orgs. § 400(b) (Preliminary Draft No. 4, 2007). I do not mean to suggest that a donor retains an actual interest in the gifted property following a gift transfer to charity, nor do I intend to address the matter of donor standing to enforce the terms of her gift should the charity fail to adhere to the donor’s restrictions. *Id.* chs. 4, 6. The introductory note to chapter 4 explains, “In sum, a gift once made is no longer the donor’s property, and the fiduciaries of a charity must, within the bounds of their duties, be trusted to exercise their wisdom and discretion in the public interest.” With regard to standing, see also Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. Corp. L. 655 (1998).

terms and conditions that are to govern the administration and/or application of the gifted assets.² The donor's interests, in this regard, include a general desire "[t]o be assured [that her] gifts will be used for the purpose for which they were given."³ The overriding issue is thus one of honoring donor intent. As time passes after the inception of the gift, the issue is often less favorably characterized as one of enduring and potentially unwise dead-hand control.

I. THE ISSUES IN CONTEXT

In the context of charitable gifts, the classic conflict posits on one side a preference for subjecting property to the will of the living, who presumptively will seek to apply that property to its highest, best, and most currently relevant or "efficient" use. On the other side is an argument often couched in terms of individual liberty, or more specifically, respect for an individual's freedom to dictate the terms upon which that individual chooses to part with her property.⁴ The conflict is of particular importance where charitable gifts are concerned, because in that context societal concessions to charitable donors permit a donor to exercise a degree of perpetual control over the use of the contributed property in ways that might otherwise be foreclosed.⁵ On the other hand, donors seeking such

2. See, e.g., 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, 701 (2005) (contrasting restricted versus unrestricted gifts to charity); see also Principles of the Law of Nonprofit Orgs. § 400 cmt. a (Preliminary Draft No. 4, 2007) ("[T]he use of the term 'restricted gift' in this Chapter refers to gifts to corporate charities made with specified terms . . ."). A gift may also be deemed to be a restricted one, based upon actions or representations of the charity during the solicitation of the gift. See Katz, *supra* at 701; see also Principles of the Law of Nonprofit Orgs. ch. 4, introductory note (Preliminary Draft No. 4, 2007) ("A gift can be legally restricted because of actions taken by the charity itself in soliciting the gift, or by terms initiated and drafted by the donor's attorneys."); Johnny Rex Buckles, *When Charitable Gifts Soar Above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 Fordham L. Rev. 1827, 1838 (2003). A gift made in response to a charitable solicitation couched in terms of a specific purpose can also give rise to a restricted gift, even though the restriction emanates from the soliciting organization itself, and not directly from the donor. *Id.* at 1838.

3. A Donor Bill of Rights (n.d.), available at http://www.afpnet.org/content_documents/Donor_Bill_of_Rights_-_English.pdf. The bill of rights is the joint product of the American Association of Fund Raising Counsel, Association for Healthcare Philanthropy, Council for Advancement and Support of Education, and Association of Fundraising Executives.

4. See Restatement (Third) of Trusts § 29 cmts. f–h, reporter's notes (2003) (discussing this dead-hand debate and citing various authorities).

5. See *Ball v. Hall*, 274 A.2d 516, 523 (Vt. 1971). In *Ball*, the court explains, "The State affords various privileges and immunities to a donor who is inspired to establish a charitable trust which are not available to trusts for private uses. Not the least of these is the release from the rule against perpetuities and various tax advantages. Such concessions are founded on the belief that the public interest derives substantial benefit from such creations."

Id. at 523. As to the freedom granted donors in subjecting charitable gifts to enduring restrictions, see, for example, the Restatement (Third) of Trusts, explaining the application

control must generally submit to the prospect of judicial modification of the donor's terms, should future circumstances frustrate the donor's charitable objectives (or directives)—this being a belated price the donor pays for recognition of her potentially perpetual directions.

This conflict regarding enduring donor control over property gifted for charitable uses implicates numerous issues of current relevance to donors and nonprofit charitable organizations, and those who represent them. Not surprisingly, these issues, and the possible ways of both addressing and accounting for their resolution, vary by circumstance. In this essay, I frame the issues and explore the relevant circumstances by reference to the particular stage in the life cycle of the donor's restricted gift at which conflict might arise. That life cycle spans the time from initial negotiation of the gift to its potential modification or termination due to unanticipated circumstances.

By viewing particular legal doctrines, scholarly concerns, and practical options in the context of the life cycle of a restricted charitable gift, I hope to offer both perspective and insight on the noted dead-hand conflict and how it might better be avoided, or at least, managed. I also hope to highlight concerns that guide this conflict and define its parameters, by examining a few specific considerations that play a notable role at a given stage in that life cycle. The conflict, again, typically entails some degree of choice between respecting donor intent, on the one hand, and, on the other hand, encouraging the ongoing pursuit of a currently relevant charitable mission through currently appropriate means, even if that pursuit requires a departure from the donor's specific guidelines. Fundamentally, charitable organizations' actions with regard to restricted gifts raise issues of both managerial accountability and managerial autonomy.⁶

By framing the issues in this manner, I hope to explore a few ideas in pursuit of the foregoing objectives. First among them is the question of whether restricted gifts can, in fact, be viewed as having a particular life cycle comprised of discrete stages. The answer, not surprisingly, is yes, as elaborated upon in Part II. Second, acknowledging this evolution focuses attention on specific influences driving the noted dead-hand dynamic at various stages in that restricted gift life cycle, with resulting implications for both the donor and recipient organization. These influences and implications are the subject of Parts III and IV, with particular emphasis in Part IV upon the fiduciary duties attendant a charitable organization's management of a restricted gift.

of the rule against perpetuities to charitable versus non-charitable interests. Restatement (Third) of Trusts § 28 cmt. d (2003). For a further discussion of dead-hand control over property, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 Stan. L. Rev. 1189 (1985). See also *infra* Part IV.A.

6. See, e.g., Katz, *supra* note 2, at 689 ("Sometimes, this gap between the objectives of a charity's philanthropists . . . and its [trustees or directors] . . . represents a failure of accountability, as when a charity uses a restricted gift in ways that violate the donor's explicit instructions.").

Finally, the forced effort to evaluate a given influence as relevant to only one stage in the noted life cycle is difficult to maintain. It is, in other words, impossible to isolate a particular consideration as playing a limited role at a single, finite point in the evolution of a charitable organization's ongoing efforts to accommodate donor directives. This evaluative effort, however, ultimately highlights the pervasive relevance of each such influence *throughout* the organization's dealings with the donor and her enduring demands. This, in turn, suggests that a more comprehensive donor and organizational perspective towards their restricted gift dealings might at all times illuminate more mutually advantageous choices and opportunities, thus reducing the overall level of conflict throughout the life of that gift. Demonstrative of these points is the ongoing dispute between Princeton University and certain descendants of Charles and Marie Robertson, which is explored more fully in Parts V and VI.⁷ Further exploration of such matters, however, first requires a brief explanation of the restricted gift life cycle as envisioned here. That exploration begins in the following Part II.

II. THE LIFE CYCLE OF THE RESTRICTED CHARITABLE GIFT

My conception of the life cycle of a restricted charitable gift begins with, of course, the gift's "birth"—or what we might more sensibly identify as the conversations that culminate in the negotiation and documentation of the gift and its terms. This is followed by "adolescence to adulthood," a time of engagement, growth, and often troublesome willfulness and self-direction. The reference here is to the period during which the charitable organization is actively engaged in managing the restricted gift in pursuit of the organization's broader mission. Finally, we have that less welcome time when the aging process becomes more critical. We could simply call

7. The *Robertson v. Princeton* dispute is used here for demonstrative purposes only. There are many issues raised in that dispute, not addressed herein, but themselves worthy of scholarly analysis in writings dedicated specifically and exclusively to such issues. The nature of the fiduciary obligations, if any, owed by a § 509(a)(3) supported organization to a § 509(a)(3) supporting organization which it controls, is just one example. See *infra* notes 83–84 (regarding the relevance of such organizational classifications). Further, it would be both impossible and off point in the context of this essay to fully explore all facets of the *Robertson* litigation, much less to identify, discuss, and evaluate each party's contested version of matters both factual and legal. The depositions in the noted litigation, for example, "covered events which took place over a 45 year period . . . [and the litigation itself has] generated a massive and complex record, including hundreds of thousands of documents, more than 140 days of transcribed deposition testimony and not less than 16 expert witness reports." Memorandum from Defendant Princeton's Counsel to author 6 (May 24, 2007) (on file with author) [hereinafter Memorandum to author]. Multiple summary judgment motions are pending as of the date of this writing, and the parties' various briefs cited herein either include or rely upon a wealth of supporting documentation, with each party no doubt contesting their opponent's characterization of those documents. I do not attempt here to resolve or even to explore ad infinitum every allegation and contested matter in that litigation. Nevertheless, I believe that the selective discussion presented here conveys an accurate sense of the origins and nature of the dispute that is useful, again, for demonstrative purposes in relation to the topic at hand.

this stage “death,” but instead we will more optimistically (and in recognition of legal doctrines like cy pres) refer to it as “reincarnation.” This final stage is that future period when the charity must grapple with donor goals, restrictions, or mandates that have become difficult, if not impossible, to comply with due to changing circumstances over time.

Although I refer to this progression as a linear life cycle, there is a strong measure of a Disney-esque “circle of life” at work with restricted gifts.⁸ By this, I mean that considerations bearing upon the donor-recipient relationship at any given time will acquire added significance as the seemingly isolated actions inspired by those considerations reverberate throughout the period spanning from inception of the gift to its potential restructuring over time. For example, one of the most often-asserted arguments in favor of honoring donor intentions (when “reincarnating” the gift is under consideration) is that, should we fail to pay heed to the donor’s directives, there will be a chilling effect upon future charitable giving (i.e., the “birth” of future gifts might be suppressed).⁹ Similarly, the initial negotiation or imposition of gift terms that express the donor’s intentions will thereafter serve to constrain management autonomy throughout the adult life of the gift, at some point during which management may begin to question the continuing viability of the donor’s restrictions—thus potentially triggering the whole “reincarnation” dilemma once again.¹⁰ The following Part III begins a more thorough exploration of these ideas.

III. BIRTH: NEGOTIATING AND DOCUMENTING THE DONOR’S RESTRICTED GIFT

The negotiation and documentation of a restricted charitable gift is shaped, in the first instance, by legal concerns emanating from multiple sources that define the parameters of the parties’ dealings. State law definitions of “charity” and “charitable purpose” represent one such concern. Federal tax laws also reflect similar concerns. Those same tax laws further specify the acceptable degree of control that may be retained

8. For information on the pervasiveness of the “circle of life” theme in Disney films and at Disney parks, and for other cartoons and songs incorporating the “circle of life” concept, see Circle of Life, http://en.wikipedia.org/wiki/Circle_of_Life (last visited Sept. 10, 2007). For a more philosophical pictorial treatment of the issue, see David Cohen, *The Circle of Life Rituals from the Human Family Album* (1993) (charting rites of passage across cultures through photographs, including birth and childhood, initiation and adolescence, marriage and adulthood, death and remembrance).

9. See generally Principles of the Law of Nonprofit Orgs. ch. 4, introductory note (Preliminary Draft No. 4, 2007); John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. Davis L. Rev. 375, 459–60 (2005).

10. Principles of the Law of Nonprofit Orgs. § 430 cmt. a (Preliminary Draft No. 4, 2007) (detailing procedures to be followed when circumstances require the reformation of a donor’s restrictions, and providing also that “[i]t is incumbent upon the charity’s fiduciaries to ensure that its assets are productively used. Thus, if the restriction cannot be complied with . . . application of this Section is mandatory”).

by a donor who seeks a charitable contribution tax deduction in connection with her gift.

These formal considerations, however, hardly confine donors to bare statements that some identifiable charitable objective is to be pursued. Contemporary donor-charity dealings at the negotiation/documentation stage of a contribution—particularly with larger “transformational” gifts—more and more frequently result in “some really hairy gift agreements.”¹¹ Such agreements typically specify in detail the terms upon which the donor’s gift is to be employed by the recipient organization. Some might believe that such agreements are both unfortunate and a logical reaction to publicized disputes evidencing less than stellar organizational adherence to donor mandates.¹² The trend towards more explicit gift agreements is not necessarily a negative one, however, even from the perspective of recipient organizations.¹³ This part explores the noted legal constraints as well as some less formal influences upon, and consequences of, the dead hand’s design.

A. Common Law and Federal Notions of “Charitable”

Our legal system grants certain privileges to those who donate property for charitable purposes. These privileges generally do not arise when property is given away to non-charitable beneficiaries or otherwise for private purposes. Among the advantages afforded charitable donors is the opportunity to dispose of their property on terms that may govern indefinitely.¹⁴ 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. More specifically,

In exchange for perpetual donor control, society gets wealth devoted to recognizably ‘public’ purposes. Wealth that donors would otherwise pass to individuals for ‘private’ purposes is in a sense devoted to the public

11. Stephanie Storm, *Donors Add Watchdog Role to Relations with Charities*, N.Y. Times, Mar. 29, 2003, at A8 (internal quotation marks omitted); see generally Alan F. Rothschild, Jr., *The Dos and Don'ts of Donor Control*, 30 Actec J. 261 (2005) (“As part of this new venture philanthropy, donors attempt to exercise significantly more control over the donee than in the past.”); Debra E. Blum, *Donors Increasingly Use Legal Contracts to Stipulate Demands on Charities*, Chron. of Philanthropy, Mar. 21, 2002, at 9 [hereinafter Blum, *Legal Contracts*] (discussing examples and ramifications of the fact that “[m]ore and more donors not only want control over the gifts they make to charity . . . but they also are demanding that the terms of that control be put in binding, sometimes exhaustive, contracts”); Debra E. Blum, *Ties That Bind: More Donors Specify Terms for Their Gifts to Charity*, Chron. of Philanthropy, Mar. 21, 2002, at 7 [hereinafter Blum, *Ties That Bind*] (same).

12. For descriptions of some of these disputes, see the sources cited in *supra* note 11.

13. See *infra* Part III.C.; *infra* notes 143–50 and accompanying text.

14. See generally John Chipman Gray, *Restraints on the Alienation of Property* (2d ed. 1895). For a further exposition on the rule against accumulations, the rule against perpetuities, and perpetual trusts, see generally Karen J. Sneddon, *The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts*, 76 Tul. L. Rev. 189 (2001).

domain. 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.¹⁵

Conceptualizing restricted gifts as an exchange or bargain emphasizes the fact that limitations flow in both directions. While the charity is bound in its use of the gifted property by virtue of having accepted the donor's restrictions,¹⁶ the donor is likewise limited by the boundaries of what society regards as "charitable."

There are various articulations of specific purposes that qualify as "charitable," though both courts and commentators generally acknowledge that no single enumeration captures the universe of purposes that might qualify.¹⁷ Nevertheless, it is clear that "[t]he common element of charitable purposes is that they are designed to accomplish objects that are beneficial to the community—i.e., to the public or indefinite members thereof"¹⁸ It is likewise clear that there are limits to the idiosyncratic or whimsical directives that a donor can impose without jeopardizing the charitable nature of the gift.¹⁹ Among the class of "too idiosyncratic" provisions are restrictions that tend to divert the use or administration of gifted property away from the pursuit of some recognized charitable mission to other, non-charitable purposes, as well as provisions that may be deemed capricious or frivolous.²⁰

Donors may nevertheless impose directives that are not in themselves charitable, but which nevertheless do not detract from the social benefit that qualifies the gift as charitable in the first instance. A classic example would be a gift the terms of which require the perpetual association of the donor's

15. Rob Atkinson, *Reforming Cy Pres Reform*, 44 *Hastings L.J.* 1111, 1114–15 (1993); see also Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of Cy Pres Doctrine*, 21 *U. Haw. L. Rev.* 353, 357 (1999) ("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, both substantive and administrative . . .").

16. See Buckles, *supra* note 2, at 1831–33.

17. See generally Statute of Charitable Uses, 1601, 43 *Eliz.*, c. 4 (Eng.) (enunciating nonexclusive list of purposes thought to be charitable in nature); *Perin v. Carey*, 65 U.S. (24 *How.*) 465, 506 (1860) ("[A] charity is a gift to a general public use, which extends to the rich, as well as to the poor. . . . Generally, devises and bequests having for their object establishments of learning are considered as given to charitable uses All property held for public purposes is held as a charitable use, in the legal sense of the term charity."); *Jackson v. Phillips*, 96 *Mass.* 539, 551, 555 (Mass. 1867) (expounding upon the meaning of "charity" and "charitable" gift); *Morice v. Bishop of Durham*, (1805) 32 *Eng. Rep.* 656 (applying the Statute of Charitable Uses); Restatement (Third) of Trusts § 28 (2003) (echoing the preamble to the Statute of Charitable Uses).

18. Restatement (Third) of Trusts § 28 cmt. a (2003).

19. Atkinson, *supra* note 15, at 1114–15; see also Principles of the Law of Nonprofit Orgs. §§ 410, 415 (Preliminary Draft No. 4, 2007) (detailing permissible and impermissible gift restrictions); George Gleason Bogert, *Trusts and Trustees* § 379 (rev. 2d ed. 1991) ("Gifts which . . . have no practical result except the satisfying of a whim of the donor are obviously lacking in the widespread social effect necessary to a charity."); 4A *Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts* § 374 (4th ed. 1989).

20. See Restatement (Third) of Trusts § 29 cmt. m (2003).

name with a particular charitable endeavor—i.e., the charitable naming opportunity gift.²¹ Although a naming condition does not itself further any charitable objective and may reflect personal or even selfish donor motives, such directives are generally not regarded as unreasonably idiosyncratic or so pervasive that the gift can only be classified as for private (as opposed to charitable) purposes.

Directives that could be regarded as contrary to public policy, on the other hand, either will be ignored or possibly will cause the gift to fail from the outset. Racial or other discriminatory conditions are a prime example, and courts have shown increasing willingness to disregard such directives in their entirety.²² Even naming gifts can run afoul of this limitation.²³ Because public policy is a notably evolving concept, donors should feel particularly constrained when attempting to restrict a charity to the donor's own current conception of appropriate public policy by, for example, delineating a particular (and potentially discriminatory or otherwise controversial) class of persons as beneficiary of the donor's gift.

So assuming a donor with some desire for retained control, and further assuming a charitable organization with a preference for unrestricted gifts that may be applied in such manner and for such purposes as management determines, common law conceptions of "charitable purpose" establish the initial boundaries within which donor-charity discussions must occur. The donor is further constrained by the importation of that concept into the federal tax laws.²⁴ More specifically, certain tax advantages depend upon the donor making a contribution of appropriate money or property to an organization deemed charitable under the tax laws, for a use that can likewise properly be regarded as charitable.²⁵ Chief among these donor tax

21. See John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 Wake Forest L. Rev. 657, 699 (2001); Eason, *supra* note 9; see also *Gibson v. Frye Inst.*, 193 S.W. 1059, 1061 (Tenn. 1917) ("[The] effect of a gift determine[s] its character rather than the motive of the donor."); Bogert, *supra* note 19, § 366. Although some courts have mistakenly equated "charitable" to require a particularly unselfish or pure motive on the part of donors, this view is not correct. *Id.*

22. See, e.g., *Home for Incurables v. Univ. of Md. Med. Sys. Corp.*, 797 A.2d 746 (Md. 2002). For a good discussion of this case, see *Principles of the Law of Nonprofit Orgs.* § 415 reporter's note 11 (Preliminary Draft No. 4, 2007); see also *id.* § 210 reporter's note 2 ("[P]erhaps the least settled area of acceptable charitable purposes involves discriminatory trusts.").

23. See Alan Finder, *Struggling with Ghosts from the Past*, Hous. Chron., Dec. 4, 2005, at A15 (noting prominent southern universities dealing with Confederate naming gifts and other Confederate imagery). As to the traditional acceptability of naming gifts see generally Colombo, *supra* note 21, and Suzanne Muchnic, *Geffen Gift: What's in a Name?*, L.A. Times, May 15, 1996, at F1 ("[N]aming buildings and galleries for donors is a long-established tradition at arts institutions all across the country.").

24. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 575 (1983) (noting that "entitlement to tax exemption depends on meeting certain common-law standards of charity," and then proceeding to equate the requirements for tax exemption to those necessary for donors to receive a charitable contribution deduction).

25. See I.R.C. § 170(a) (2002) (authorizing income tax deduction for "charitable contribution"); I.R.C. § 170(c) (explaining that "charitable contribution" is a "contribution or

advantages is the reduction in taxable income that results when a donation meets the requirements specified by Congress for tax deductibility. Although a donor need not seek any particular tax advantages in connection with a contribution to a charitable organization, the practical reality is that donors typically structure the terms of their gifts so that the transfer will qualify for the tax advantages granted under the Internal Revenue Code.

Although there are various rules to be met in this regard, the focus here is specifically upon restrictions a donor might seek to impose in connection with her gift. As an initial matter, a donor may certainly specify which of an organization's charitable endeavors she wishes to support with her gift. A donor might even specify a new venture that she intends to fund with her gift, and this will not jeopardize her tax deduction as long as that venture is acceptable to the organization and within the organization's charitable area of competence.²⁶ If the donor's restrictions implicate a non-charitable endeavor or confer a benefit upon some finite class of specified beneficiaries—such as would be the case where the donor requires that her children be admitted to a recipient educational organization—the donor's tax deduction will be denied.²⁷ The recipient organization, moreover, is itself constrained in such matters, because accepting donor requirements that cause the organization to deviate from a "charitable" mission that benefits a charitable class may jeopardize the organization's own favorable treatment under the tax laws.²⁸

The parties to a gift negotiation must also be wary when it appears that the donor is "purchasing" something from the organization, rather than making a true "gift." If the donor's conditions suggest some return benefit to the donor, this threatens the availability of a charitable contribution tax deduction for the donor. More specifically, the donor will only enjoy a reduction in taxable income to the extent the value given to the charitable organization exceeds the value of any benefits flowing to the donor as a

gift to or for the use of" certain specified types of entities organized for purposes of furthering certain specified objectives); I.R.C. § 501(a), (c)(3) (identifying the type of organizations eligible to receive tax-deductible contributions). A charitable contribution tax deduction may alternatively be available under gift or estate tax provisions. *See* I.R.C. §§ 2522 (gift tax), 2055 (estate tax).

26. Rothschild, *supra* note 11, at 262; *see also* Principles of the Law of Nonprofit Orgs. § 405 cmt. e (Preliminary Draft No. 4, 2007) ("A charity may properly decline a gift rather than accept a gift with a restriction or condition that is contrary to its purpose or mission, or that otherwise imposes undesirable burdens.").

27. *See* Principles of the Law of Nonprofit Orgs. § 415 reporter's note 4 (Preliminary Draft No. 4, 2007) ("[I]mpermissible private benefit can, depending on the circumstances, result in loss of tax deductibility for the donor or even denial (or loss) of tax exemption for the entity.").

28. *See id.* Most prominent among these benefits is the exemption from income taxation and the ability to receive gifts that are tax deductible to donors. I.R.C. §§ 170, 501(c)(3); *see also* Rothschild, *supra* note 11, at 262 ("However, if the gift is designated . . . for . . . a charitable purpose that is outside [the scope] of the donee organization's mission, the gift is not deductible.").

result of the contribution.²⁹ So a donor is limited, for example, in demanding that a recipient hospital provide the donor with certain medical services as a condition of the donor's "gift." If a donor were to contribute funds to a charitable hospital under such terms, the value of the medical services would reduce the value of the "contribution" for tax purposes.³⁰ Indeed, return benefits insisted upon by a donor may fully negate the existence of any gift or donation, and in particular negate the possibility of a gift that is charitable in nature.

Perhaps most relevant when considered in the context of the full life cycle of a restricted gift are the limitations that the tax laws place upon a donor's ability to attach "strings" to the gift. A gift with strings attached is used as shorthand here to indicate a gift as to which the donor either (1) retains some ongoing, non-fiduciary authority to direct use of the gifted assets, or (2) retains a right to a return of the assets should the donor's restrictions be violated. Such strings imposed at the inception of the gift therefore further implicate both management autonomy over the gift during the "adolescent/adulthood" stage, as well as the potential for return of the gift to non-charitable uses should the "reincarnation" life cycle stage ever be reached.

Retained authority to control the use of gifted property—for example, ongoing authority to unilaterally select individual beneficiaries of the donor's choosing—is a classic example of the first type of string that could result in denial of any tax deduction.³¹ This is perhaps just another side of the "earmarking" prohibition noted above in connection with admission of the donor's children to a recipient educational organization, though here the problem is more particularly expressed in terms of a lack of organizational autonomy. As stated in a ruling on this subject, the test "is whether the organization has [such] control of the donated funds, and discretion as to their use, so as to ensure that they will be used to carry out its functions and purposes."³² If such organizational control is lacking, the contribution may not qualify as a completed gift at all, charitable or otherwise. Where both organizational control and extensive retained donor control are present, the gift may qualify as charitable, but with the negative consequence of

29. See generally Colombo, *supra* note 21 (discussing charitable naming gifts and the concept of quid pro quos as they relate to the laws governing the tax consequences of charitable gifts).

30. For several additional examples of impermissible private benefits flowing to donors, see the illustrations provided in Principles of the Law of Nonprofit Orgs. § 415 cmt. b(2) (Preliminary Draft No. 4, 2007).

31. See generally *Davis v. United States*, 495 U.S. 472 (1990).

32. John McGown, Jr., *Major Charitable Gifts—How Much Control Can Donors Keep and Charities Give Up?*, 91 J. Tax'n 279, 282 (1999) (quoting I.R.S. Priv. Ltr. Rul. 94-05-003 (Nov. 12, 1992)); see also Treas. Reg. § 1.507-2(a)(7) (2006). Such retained rights might also result in application of the restrictive private foundation rules to the gift, which could present problems for both the donor and the charitable recipient. McGown, *supra*, at 283.

subjecting the administration of the gifted property to the onerous private foundation rules.³³

The second type of string that donors retain relates to conditional gifts. A conditional gift is one that includes strings that might pull the gifted property back to the donor or the donor's heirs upon violation of the donor's restrictions.³⁴ Such "gifts over" or reversions (upon failure of a specified gift term) can result in a denial of donor tax benefits unless the possibility of such a violation occurring is "so remote as to be negligible."³⁵ This phrase has been defined to mean "a chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction . . . [or which is] so . . . remote as to be lacking in reason and substance."³⁶

This standard appears to beg the question to some extent, because if the prospect of the condition failing is in fact so remote, why bother to incorporate the drastic remedy of reversion in the first instance? In any event, one practitioner recently commented that "[t]his is a very high standard and advisors should counsel prospective donors on the risk[s] inherent in placing such conditions or reversions on their gifts."³⁷ This concern, in turn, invites some direction from the charitable organization during the gift negotiation. The charity might, for example, suggest alternative charitable objectives specific to that organization should the primary donor objective later be fully accomplished or thwarted. Similarly, some practitioner-commentators have suggested that instead of including a legally binding restriction that could violate these tax rules, donors might instead consider a nonbinding statement of desires regarding the use of the gift.³⁸ On the other hand, donors can seek a measure of accountability by making the gift conditional, but also directing the gift towards a second

33. Rothschild, *supra* note 11, at 263.

34. See Principles of the Law of Nonprofit Orgs. § 405 (Preliminary Draft No. 4, 2007) (regarding conditions versus restrictions).

35. Treas. Reg. § 1.170A-1(e) (income tax rule), Treas. Reg. § 20.2055-2(b) (estate tax rule). For an excellent discussion of the deductibility of conditional gifts, with specific analysis of the impact of the availability of the cy pres doctrine on the tax consequences of the condition, see Buckles, *supra* note 2, at 1861-64.

36. See *Briggs v. Comm'r*, 72 T.C. 646, 656-57 (1979) (interpreting Treas. Reg. § 1.170A-1(e) and Treas. Reg. § 20.2055-2(b)). For some examples of gifts that either fail or pass this test, see Richard L. Fox, *Planning for Donor Control and Other Strings Attached to Charitable Contributions*, 30 Est. Plan. 441, 447-48 (2003).

37. Rothschild, *supra* note 11, at 262.

38. See, e.g., Rothschild, *supra* note 11, at 263; Conrad Teitell, *Charitable Gifts with Strings Attached*, in *The Twenty-Fourth Annual Philip E. Heckerling Institute on Estate Planning* 16-1, 16-25 ¶ 1601.5 (John T. Gaubatz ed., 1990). For an example of a donor stating her desire for name recognition as a nonbinding precatory request, see *Board of Trustees of the University of North Carolina at Chapel Hill v. Heirs of Prince*, 319 S.E.2d 239, 241 (N.C. 1984) ("I ask that a suitable recognition of this gift be placed in or on the building, and it is my hope, without attaching any condition, that the building will be named the 'Lillian Prince Theatre.'"). For a discussion of various control measures a donor might adopt without running afoul of the rules for contribution deductibility, see Principles of the Law of Nonprofit Orgs. § 415 reporter's note 8 (Preliminary Draft No. 4, 2007).

charitable organization upon failure of the donor's condition, rather than back to the donor or her heirs. The dual advantages are, first, eliminating the risk that the gift will not be deemed charitable (since in no event will the property go to a non-charitable recipient) and, second, imposing a measure of accountability by motivating the alternative beneficiary to monitor compliance with the donor's terms.³⁹ This accountability obtains, of course, because, should the donor's conditions be violated or fail, the property would go to the alternative (or monitoring) charitable beneficiary organization.⁴⁰

B. *Documenting the Donor's Terms: The Gift Agreement*

There is general agreement that today's donors are quite willing to impose specific terms and conditions upon their gifts to charitable organizations.⁴¹ This trend is in part attributable to the growing number of entrepreneurial donors who are confident in both their views and their ability to effectively guide an organization towards its mission.⁴² Credit (or blame) may also be directed at a number of well-publicized donor-charity disputes over compliance with the terms of a donor's gift.⁴³ Such disputes may inspire donors to seek accountability and control through more detailed, binding gift agreements that include explicit consequences should the recipient organization fail to adhere to the donor's terms. Donor awareness of cases, such as that involving the Barnes Foundation, no doubt also plays a role.⁴⁴ In the case of the Barnes Foundation, the courts obviated the need for compliance with many of the donor's specific instructions in order to preserve what the court felt was the donor's broader charitable purpose.⁴⁵ Many donors are hesitant to cede such control to the courts, and instead try to provide for various contingencies in the gift agreement. In any event and whatever the inspiration, today "[m]ore and more donors not only want control over the gifts they make to charity . . .

39. See, e.g., Fox, *supra* note 36, at 448.

40. *But see* Home for Incurables v. Univ. of Md. Med. Sys. Corp., 797 A.2d 746 (Md. 2002) (ignoring a gift over to second charity where court applied cy pres to void a racially discriminatory condition, thus allowing the first named beneficiary to retain the gift).

41. See *supra* note 11 and accompanying text.

42. See, e.g., LaVerne Woods, *The Emergence of "Venture Philanthropy" Raises New Tax Issues*, 13 J. Tax'n Exempt Orgs. 51 (2001) (discussing the "new breed of philanthropists").

43. See *supra* note 11 and accompanying text.

44. See generally 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 (2005); 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 Trusts*, 151 U. Pa. L. Rev. 1747 (2003).

45. *In re Barnes Foundation*, No. 58,788, 2004 WL 2903655, at *19 (Ct. Com. Pl. Dec. 13, 2004).

but they also are demanding that the terms of that control be put in binding, sometimes exhaustive, contracts.”⁴⁶

There are, of course, negative ramifications to this movement. First, no matter how prescient they might believe themselves to be, donors cannot anticipate all of the future changes that might impact the route best suited to accomplishing the donors’ charitable objectives. In this regard, donor restrictions by definition reduce the autonomy of those charged with—and actively engaged in—accomplishing the charitable mission which underlies the donor’s gift in the first place. Tying management’s hands in this way could also stifle creativity and innovation, two hallmarks of the nonprofit, charitable sector.

C. A More Positive Perspective

Although these and other negative consequences certainly exist and are worthy of consideration, I prefer to instead focus on the positive. In particular, this trend towards more detailed documentation of donor objectives can be managed for the benefit of not only donors, but also the affected charitable organization and the nonprofit sector generally. First, and perhaps most obviously, donors and their unique perspectives, goals, and ideas are universally acknowledged as key contributors to the diversity and pluralism underlying our robust nonprofit sector.⁴⁷ Charitable organizations should therefore approach donor negotiations as a way to incorporate new (and funded!) viewpoints into their pursuit of a charitable mission that presumptively appeals to both the donor and the organization’s management. Framing the gift negotiations in this manner, moreover, should provide some basis for distinguishing the donor’s primary objective and ideas about achieving that objective, from more onerous and idiosyncratic demands that could easily come to hinder the organization’s accomplishment of the agreed upon mission over time.

Second, early and mutual acknowledgement of difficulties likely to arise over the restricted gift life cycle should lead to more explicit discussions of those potential problems.⁴⁸ This, in turn, should ultimately result in gift agreements that are better suited to both the donor’s and the organization’s long-term objectives.⁴⁹ Donors will be encouraged to think beyond the

46. Blum, *Legal Contracts*, *supra* note 11; *see also* Blum, *Ties That Bind*, *supra* note 11 (expressing similar sentiments and discussing real-world examples).

47. James J. Fishman & Stephen Schwarz, *Nonprofit Organizations, Cases and Materials* 43–60 (3d ed. 2006).

48. *See* Principles of the Law of Nonprofit Orgs. § 405 cmt. a (Preliminary Draft No. 4, 2007) (“The parties should consider including provisions in the gift instrument setting forth circumstances under which the charity might relax or release the restriction or condition, as well as the donor’s wishes for modification, so that the charity would not be required to seek court modification . . .”).

49. Eugene R. Tempel, *Donor Intent: Principles of Documenting a Gift*, *Nonprofit Times*, Feb. 1, 2003, at 30 (noting that the publicized disputes “provide an opportunity for nonprofit professionals to reflect upon some key principles for discussing potential gifts with donors”).

particular task or isolated accomplishment that might be driving their reluctance to relinquish control. Recipient organizations, in turn, can use this conversation to emphasize how the specific object of the donor's interest is both supported by, and essential to, the organization's broader mission. By incorporating that broader mission into the statements embodying the donor's specific directives, the donor is challenged to consider the breadth of her interest, and the organization receives both guidance and a measure of flexibility should the donor's specific directives later become problematic.

Suppose, for example, that a philanthropist wishes to make a significant contribution to a university hospital's organ transplant unit in recognition of her experience with that unit during a past family illness. Because of her respect for the generosity of anonymous organ donors and the shortage thereof, this philanthropist expresses a very specific desire to fund the staffing and facilities to be utilized by future organ donors in connection with the hospital's transplant activities. But what if science ultimately progresses to the point of growing new organs from the infirm's own genetic materials, without the need for organ donors at all? The genetics will no doubt be challenging, the problem of organ failure will still exist, and surely the philanthropist would like for her gift to remain both relevant and helpful over time.⁵⁰

At the gift agreement negotiating table, the recipient organization is presumptively at the forefront of the philanthropist's charitable intentions. This presents the recipient organization with a unique opportunity not only (1) to applaud the donor for her generosity and the merits of her specific objectives, (2) to express the organization's pleasure at being a conduit for her generosity, but also (3) to encourage the philanthropist to envision the ongoing good her generosity might foster over time within the inevitably changing environment in which her objectives will be pursued. Again, the organization can present this latter idea in the specific context of the recipient organization's own mission and particular areas of competence. With regard to the foregoing hypothetical philanthropist, for example, the hospital might discuss its likely (or desired) position as a future leader in genetic engineering research, and in particular the application of that research to organ and tissue regeneration. Note also that this "negotiating table" setting allows the charity to frame the issue for the donor's consideration: the charity can guide the discussion along lines not so negatively focused on "what if we can't achieve your goal any more," but rather "what if we get so much better at accomplishing your goal that we need to pursue it, or possibly even define it, differently?"

Such a dialogue should facilitate the incorporation into the gift agreement of some reference to the recipient organization's broader purposes as they relate to the philanthropist's more fully conceived but specifically stated objectives. Competent advisors on both sides of the table will no doubt be

50. See Johnson, *supra* note 15, at 357.

able to articulate this understanding to immediate and long-term advantage of both the philanthropist and the recipient organization. After the discussion noted in the foregoing hypothetical situation, for example, a reversionary interest in favor of unknown future heirs or a wholly unrelated alternative charitable beneficiary should appear at best unnecessary, and at worst, wholly inconsistent with the donor's overriding reason for coming to the negotiating table with this recipient organization in the first instance.

D. Birth, Mission, and Duties

Discussion of the "birth" of a restricted gift will conclude here by recognizing that in evaluating the acceptability of a donor's offer to make a restricted gift, management must from the outset act both honestly and with a desire to further the organization's charitable mission. This obligation resides in ethical standards, principles of professional practice, and the various legal duties that govern nonprofit management conduct and decision making.⁵¹ Principles of professional practice directed at nonprofit management, for example, call for the adoption of specific guidelines to govern the decision as to whether acceptance of a particular gift is in the organization's best interest.⁵² Such pronouncements also clearly state that management should decline gifts when the terms command action outside the scope of the organization's mission or which could otherwise lead to "adverse consequences."⁵³ Equally clear is that an organization should not assume that a donor's ill-fitting restrictions can eventually be tailored to fit the organization's needs. In this regard, "[i]t is unethical to accept a gift with the hope that [the recipient organization] can later change the donor's mind about its use."⁵⁴ In other words, once an organization accepts a donor's contribution and its accompanying terms, the organization must strive to honor the donor's intentions as both a matter of professional practice and ethical obligation.

Following an organization's receipt of a contribution subject to agreed upon restrictions, the organization's focus necessarily shifts towards employing the gifted assets in furtherance of the organization's charitable mission. At the outset, this should not present any particular problems if

51. As one commentator puts it, "It is unethical to accept a gift with the hope that you can later change the donor's mind about its use." Tempel, *supra* note 49.

52. See, e.g., Panel on the Nonprofit Sector, Principles for Facilitating Legal Compliance and Public Disclosure para. 26 (n.d.), available at http://www.nonprofitpanel.org/selfreg/All_Principles_Revised.pdf; see also Principles of the Law of Nonprofit Orgs. § 415 cmt. b(1) (Preliminary Draft No. 4, 2007).

53. Minn. Council on Nonprofits, Principles & Practices for Nonprofit Excellence 12 (fund-raising) para. 10 (2005) [hereinafter "MCN"], available at http://www.mncn.org/info/principles_and_practices.pdf; see also Principles of the Law of Nonprofit Orgs. § 415 cmt. b(2) (Preliminary Draft No. 4, 2007).

54. Tempel, *supra* note 49, at 31; see also MCN, *supra* note 53, at 12 (fund-raising) para. 4; Association of Fundraising Professionals, Code of Ethical Principles and Standards of Professional Practice nos. 9, 11, available at http://www.afpnet.org/ka/ka-3.cfm?content_item_id=1068&folder_id=897 (last visited Sept. 22, 2007).

the organization's management has acted responsibly in accepting the donor's terms, as just noted. Of course, this relationship between the proper acceptance and later utilization of a restricted gift demonstrates the sieve-like nature of segregating various dead-hand influences into a given stage in the life cycle of a restricted gift. Nevertheless, I will continue to employ that framework for exploring the broader point—namely, that a more comprehensive appreciation of these circular influences at any given point in the restricted gift life cycle should ultimately inspire decisions that serve to reduce the overall level of tension embodied in this restricted gift, dead-hand dynamic. In this vein, then, let us move forward to that period during which the organization employs the donor's restricted gift in furtherance of the organization's mission, but in accordance with the gift terms.

IV. ADOLESCENCE TO ADULTHOOD: MANAGING THE RESTRICTED GIFT

Two aspects of managerial responsibility threaten compliance with donor intent once the organization proceeds to employ the donor's gift in furtherance of the organization's mission.⁵⁵ The first concerns managerial competence in managing the gifted assets so as to effectively carry out the intended charitable mission. The second also involves a degree of competence, but in many cases, managerial integrity and perhaps judicial inclinations characterize the issue. More specifically, this second concern relates to the organization's potential need (or desire) to depart from the particular gift restrictions that express the donor's intentions. It is this second concern that drives the exploration here, but since managerial oversight is implicated in either case, the relevant fiduciary duties of care, loyalty, and perhaps obedience are central to the discussion in this Part IV.

A. *Fiduciary Duties*

In defining the fiduciary duties that govern charity management, an initial question is whether management in a particular case should be subjected to traditional trust law standards of conduct or the more lenient corporate standards imported from the realm of for-profit enterprises. With regard to restricted gifts, the answer is, to varying degrees, yes on both counts.⁵⁶ Authorities generally agree that regardless of whether the organization exists as a charitable trust or charitable corporation, restricted gifts give rise to trust (or in the case of a corporation, trust-like) duties—in particular, a duty to abide by the terms of the gift.⁵⁷ This is so even though

55. See William Schwartz & Francis J. Serbaroli, *After the Barnes Ruling: What Donors Should Do to Protect Their Wishes*, Chron. of Philanthropy, Mar. 31, 2005, at 55 (explaining that “challenges to carrying out a donor’s wishes may arise at two levels”).

56. See, e.g., Principles of the Law of Nonprofit Orgs. § 200 cmt. b (Preliminary Draft No. 4, 2007), quoted in *infra* text accompanying note 59.

57. Restatement (Third) of Trusts § 28 cmt. a (2003) (explaining that a contribution of property to a charitable organization that is restricted to a particular purpose is generally regarded as creating a charitable trust, regardless of whether the recipient organization is organized as a trust or corporation); Fishman & Schwarz, *supra* note 47, at 127 (“If property

in the charitable corporation context no trust technically exists.⁵⁸ The most recent draft of the American Law Institute's (ALI) Principles of the Law of Nonprofit Organizations explains this synthesis as follows:

Among the most important potential differences between charitable trusts and nonprofit charitable corporations are fiduciary standards and consequences for breach[,] . . . [levels of] decisional autonomy for the governing board[,] and supervisory regimes. In these three important areas, however, trust and corporate law have been conforming, with the general result that corporate fiduciary standards of conduct are being applied to both charity trusts and members of a nonprofit board . . . ; trust doctrine applies to modifying restrictions on gifts . . . ; and regulators have the same enforcement powers regardless of a charity's organizational form

. . . [T]hese Principles continue trends promoted by other reform projects to minimize the legal differences in organizational form where appropriate Notably, a trust instrument cannot be varied without judicial approval (unless the instrument grants the trustee authority to make the desired amendment), whereas the corporate board . . . [has] greater autonomy in adjusting to unanticipated circumstances (with protection for restricted gifts).⁵⁹

is given for a particular charitable purpose and the [recipient] corporation dissolves or changes its purposes . . . [t]he more restrictive common law cy pres or deviation [trust] doctrines will apply and the property will pass to a charitable corporation that meets those stricter standards.”); Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 438–40 (2004) (“The doctrine of cy pres . . . [is] applicable . . . in forty-nine states to charitable trusts and to charitable corporations”); Evelyn Brody, *Charity Governance: What's Trust Law Got to Do with It?*, 80 *Chi.-Kent. L. Rev.* 641, 642 (2005) (“When it comes to enforcing restrictions on gifts—even those made to corporate charities—regulators and courts commonly apply charitable trust doctrines.”); Katz, *supra* note 2, at 696 (“[A] charitable corporation's board of directors has more discretion [than would trustees of a technical trust] over its charity's mission and assets, except for restricted gifts, which are held in trust.”); *see also infra* notes 58–60 and accompanying text. A contribution of property to a charitable organization, where the use of the property is restricted to a particular purpose, can therefore be regarded as creating a charitable trust at least with respect to the strict nature of the duties' attendant adherence to the donor's restrictions, regardless of whether the recipient organization exists in trust or corporate form.

58. With regard to there being no “technical” trust in existence where a restricted gift is held by a nonprofit corporation, *see*, for example, Revised Model Nonprofit Corporations Act § 8.30(e) & official cmt. 1 (1987) (providing that a director shall not be deemed to be a trustee, but that the corporation may nevertheless be deemed to hold such property in trust). *Id.* § 11.07 official cmts. (providing that charitable corporation's may merge, but noting that the surviving corporation is still bound by the terms of any restricted gifts); *see also* Principles of the Law of Nonprofit Orgs. § 400 cmt. b (Preliminary Draft No. 4, 2007) (noting that a corporation would not be bound by trust law procedural requirements, such as those requiring the provision of information to beneficiaries); *id.* § 240 cmt. c (“[C]orporate directors have the legal power to amend the articles of incorporation, . . . in contrast to the inability of a trustee unilaterally to amend the terms of the trust”).

59. Principles of the Law of Nonprofit Orgs. § 200 cmt. b (Preliminary Draft No. 4, 2007).

In other words, the more relaxed corporate standards of conduct should govern managerial decisions that relate to preserving or utilizing the gifted assets, where such decisions do not otherwise implicate a departure from the donor's specified restrictions.⁶⁰ If a donor contributed \$20 million, for example, "to construct an inpatient care facility in Hometown for treatment of Affliction X, with no less than twenty patient beds and to be named the 'John Doe Center,'" decisions governed by the corporate standard of care would include, among other things, where (within Hometown) to locate the facility, whether to build a facility with more than twenty patient beds, and whether those beds should be housed in private, semiprivate, or common rooms.

If changed circumstances later suggest that inpatient care lacks meaningful benefit to those suffering from Affliction X, or alternatively, that a freestanding facility in Hometown is no longer economically feasible, the charity fiduciaries' conduct in redeploying the gifted assets would be governed by the stricter standards found in trust law. Those fiduciaries would, in other words, lack the autonomy typically associated with "corporate" governance to identify other, more currently relevant purposes or means of operation, and then to make a unilateral decision about how best to redeploy the assets in light of those opportunities.⁶¹ Absent provisions in the gift instrument or a donor release under the Uniform Management of Institutional Funds Act (UMIFA), those fiduciaries would instead be compelled to seek judicial approval for modification or release of the restrictions under the trust doctrines of *cy pres* or equitable deviation.⁶²

60. The comments confirm the typically greater board autonomy associated with the corporate form, but again suggest by parenthetical that a more strict approach is likely when it comes to deviating from the terms of a restricted gift: "The corporate board . . . has greater autonomy in adjusting to unanticipated circumstances (with protection for restricted gifts)." *Id.*; see also *id.* § 240(b) & cmt. a ("Because the degree of flexibility in altering charitable purpose is one of the choices the founders and donors make in selecting the charity's organizational form, [§ 240] confines the obligation to seek judicial relief to the trustees of charitable trusts with respect to all restrictions, and to the boards of directors of nonprofit corporations only with respect to restricted charitable gifts (and not to all assets of the corporation), as provided in § 250."). Comment a to section 250 further explains that "[f]or a charitable corporation, subsection (b) provides that the charity must ensure that restricted gifts (as defined in section 405) are applied to their original purposes. If that cannot be done, then the charity must obtain approval to release or modify the restriction as set forth in § 430." *Id.* § 250 cmt. a. Under section 430(b), a gift restriction can be modified or released only as provided in the gift instrument, by donor release as provided under the Uniform Management of Institutional Funds Act (UMIFA or, as revised in 2006, Uniform Prudent Management of Institutional Funds Act (UPMIFA)), or pursuant to a court order in a *cy pres* or equitable deviation action. UMIFA governs endowment funds and is currently in effect in forty-seven states. See Principles of the Law of Nonprofit Orgs. § 335 cmt. b(2) & reporter's notes (Tentative Draft No. 1, 2007) (discussing in detail UMIFA and UPMIFA provisions for modifying donor restrictions).

61. As to autonomy to alter purposes under a corporate standard of care in the case of unrestricted gifts, see, for example, *id.* § 240(b) & cmt. b.

62. Management would be "compelled" both because the board lacks autonomy to make such changes on its own accord, and because a charity's governing board has a duty to keep the gifted funds productive for the benefit of the charitable class. See *id.* § 430(b) & cmt. a;

Charitable fiduciaries sometimes find themselves in a fuzzy middle ground when it comes to determining whether certain applications of gifted assets are within the parameters of a donor's restrictions (and thus within the purview of managerial discretion), or whether judicial authorization for such applications might be required.⁶³ In the foregoing hypothetical situation, for example, if the charitable fiduciaries decided to build a thirty-bed "John Doe Center" for treating patients with discrete Afflictions X or Y, and staffed the facility with specialists trained only in treating one or the other affliction—perhaps because of some recognized synergies between the two specialties—it is less clear that this is a managerial prerogative subject to evaluation under a corporate standard of care, or a departure from donor restrictions to be addressed under trust law concepts. While at first blush these decisions seem to be the types to be made by management in its discretion, if there is no clear reservation of twenty beds or specific care for patients suffering from the donor's chosen Affliction X, a departure from the donor's purposes is arguably at issue.⁶⁴

B. *The Detail in the Duties*

Against this background, consider first the fiduciary duty of care. The duty of care relates to the competence displayed by management in carrying out its managerial responsibilities. Commentators variously describe the duty as requiring that management be diligent and attentive, that decisions be informed, and that actions be carried out in good faith and with "ordinary prudence."⁶⁵ In the context of a restricted gift, for example, the

Fremont-Smith, *supra* note 57, at 225–26, 440; *see also* Principles of the Law of Nonprofit Orgs. § 240 cmt. a (Preliminary Draft No. 4, 2007); *id.* § 240 cmt. b ("[A]ltering the activities of a charitable trust requires recourse to [a] court . . . in situations that, *in the absence of a restricted gift*, can be addressed by a corporate board." (emphasis added)); *supra* notes 57, 60.

63. *See, e.g.*, Principles of the Law of Nonprofit Orgs. § 240 cmt. b, illus. 4 (Preliminary Draft No. 4, 2007) ("[The ALI draft concludes that a] court should approve the change even though the restriction is not impossible to honor, because the board has determined in good faith that the restriction is administrative rather than the donor's charitable purpose. Applying *cy pres* instead of deviation could mean the difference between deferring to a reasonable determination by the charity fiduciaries and adhering to the wishes of [the donor] unless it becomes impossible or impracticable (or wasteful) to do so"); *id.* § 430 cmt. a ("[I]f the restriction cannot be complied with . . . application of this Section is mandatory. . . . However, the charity may exercise reasonable judgment in determining when to seek relief."). Section 430(b) provides that a gift restriction may be modified (or released) pursuant to provisions set forth in the gift instrument, pursuant to UMIFA or a similar state statute, or pursuant to a court order. *Id.* § 430(b); *see also id.* § 440(c) ("The availability of modification, the choice of remedy, and the degree of deference to the charity in framing the revised restriction depend on the circumstances."); *cf.* Principles of the Law of Nonprofit Orgs. § 250 cmt. a (Preliminary Draft No. 4, 2007).

64. Consider whether the American Law Institute (ALI) Principles provide an answer here: "A charity complies with a gift restriction . . . if the charity, acting in good faith, reasonably implements all material requirements of the terms of the restriction . . . and seeks relief under § 430 . . . when appropriate." *Id.* § 420(a).

65. For various standards of conduct articulated in state statutes, and for a discussion of the business judgment rule in the context of nonprofit organizations, see Principles of the

duty of care suggests that some procedure should be established for ensuring and monitoring compliance with the terms of a recipient organization's basket of restricted gifts.⁶⁶ More specifically, were a lack of internal controls to result in an inadvertent misuse of restricted gift funds, the organization's management might fairly be regarded as having failed to meet its duty of care by virtue of the failure of process and lack of attention to this concern.

The duty of loyalty, by contrast, is most easily described as a prohibition against self-dealing. In the context of a nonprofit organization, loyalty requires faithful pursuit of the interests of the organization, as opposed to the self-interest of the decision maker or other interests external to the organization.⁶⁷ Were an organization to accept property limited to uses tangential to its mission and difficult or costly to maintain, further burdened with terms that permit the donor's continued use or exploitation of the property in some manner, this would implicate a breach of the managerial duty of loyalty. The likelihood of such a breach would be heightened if the donor also held a fiduciary management position that allowed her to influence the organization's acceptance of the gift terms.

Equally important in the restricted gift context is the duty of obedience, or at least the managerial obligations suggested by the separate articulation of such a duty.⁶⁸ This latter caveat is necessary, because some commentators identify the duty of obedience separately, while others reject

Law of Nonprofit Organizations § 300 reporter's note 6 (Discussion Draft 2006). See generally Fremont-Smith, *supra* note 57, at 199–215; Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors 49–59 (1988); Brody, *supra* note 57, at 657–60.

66. See, e.g., Principles of the Law of Nonprofit Orgs. § 420 cmt. b(1) (Preliminary Draft No. 4, 2007) (“[T]his Section does not dictate particular procedures for conducting and documenting the required monitoring [of compliance with the terms of a restricted gift]. Needless to say, a charity with more complete records will find it easier to defend a charge that it breached a restriction or condition, but the absence of records does not of itself constitute a breach.”).

67. Restatement (Third) of Trusts § 78 (2003); Principles of the Law of Nonprofit Organizations § 310 reporter's notes 10–12 (Discussion Draft 2006) (discussing various articulations of the duty of loyalty). The duty is described in relation to a restricted gift in comment a(1) of section 310:

[T]he charity's board members must interpret [the organization's] purpose in the exercise of their discretion, subject to any restriction imposed by the settlor or donors. By using the phrase ‘best interests of the charity, in light of its stated purposes,’ this Section combines the trust and corporate language to declare an affirmative obligation of the fiduciaries to govern for charitable purposes, and not for the benefit of board members, executives, donors, or other private parties.

Id. § 310 cmt. a(1).

68. The origins of this duty can be traced to the work of Daniel L. Kurtz, *supra* note 65. Fremont-Smith, *supra* note 57, at 225. See generally Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets* (Fla. State Univ. Coll. of Law, Pub. Law Research Paper No. 176, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=845927. This duty is often discussed in the context of the restraints upon nonprofit corporation management in changing the corporation's purposes as originally expressed in the organization's charter and other governing documents.

the reach of such a freestanding duty and instead regard the suggested obligations as subsumed under the duties of loyalty and care.⁶⁹ By thus rejecting the unilateral reach of a freestanding duty of obedience, commentators in this latter camp emphasize management's duty to keep the overall purposes of a charity current so as to serve the needs of present and future charitable beneficiaries—thus keeping obedience to the dead hand in perspective.⁷⁰ Whether identified separately or characterized as part of the duties of care and loyalty, the clearly recognized obligations suggested here charge an organization's management "with carrying out the [donor's] purposes."⁷¹

Under whatever fiduciary guise, the concepts underlying the unsettled existence of this duty should be easily understood by those responsible for managing a donor's restricted gifts. Without negating the duty to overall organizational mission, fiduciary responsibility or "obedience" in this restricted gift context has roots in the long-accepted trust law principle that a trustee must administer a trust in a manner faithful to the wishes of the creator.⁷² Should changing circumstances thwart that donor purpose or should those purposes over time come to threaten the accomplishment of the charity's overall mission, these trust law principles require that management pursue judicial modification of the donor's terms.⁷³ Such authorized modification would be in lieu of, for example, management's simply implementing the desired changes under its general powers to manage the affairs of the organization, or otherwise simply continuing to

69. See, e.g., Principles of the Law of Nonprofit Orgs. § 240 cmt. c (Preliminary Draft No. 4, 2007) (rejecting a separate duty of obedience, "at least as it has been interpreted to prevent a board . . . of a nonprofit corporation from altering corporate purposes prospectively"); Fishman & Schwarz, *supra* note 47, at 219 (describing duty as "somewhat less recognized"); Katz, *supra* note 2, at 699–701 (noting variations in articulation of what duty requires). Under "the most robust version of the duty," the board must adhere to the corporation's original purposes absent circumstances akin to those required to initiate a cy pres action. Katz, *supra* note 2, at 700; see also Kurtz, *supra* note 65, at 85.

Marion Fremont-Smith and other commentators reject the existence of such a duty, instead suggesting that managerial obligations in the face of such changes are governed by the universally accepted duties of care and loyalty. See Fremont-Smith, *supra* note 57, at 225–26; see also Evelyn Brody, *Limits of Charity Fiduciary Law*, 57 Md. L. Rev. 1400, 1406 n.30 (1998). See generally Principles of the Law of Nonprofit Orgs. §§ 210 cmt. b(3), 240 cmts. a, c & reporter's notes 6–8 (Preliminary Draft No. 4, 2007); Principles of the Law of Nonprofit Organizations § 320 cmt. e (Discussion Draft 2006); Fishman & Schwarz, *supra* note 47, at 219–23.

70. See, e.g., Fremont-Smith, *supra* note 57, at 225–26, 439.

71. Kurtz, *supra* note 65, at 85. The added language perhaps bastardizes, but no doubt renders less debatable, Professor Daniel L. Kurtz's articulation of the duty by reference to organizational purposes. See also Katz, *supra* note 2, at 700 (noting positive and negative aspects of duty).

72. Fishman & Schwarz, *supra* note 47, at 219 (citing Scott & Fratcher, *supra* note 19, § 164.1); see also *supra* notes 57–60; *supra* Part IV.A.

73. In Kurtz's view, this duty would regard the organization's corporate purposes, as set forth in the organizational charter, as constituting express terms upon which all gifts to the corporation are conditioned. Kurtz, *supra* note 65, at 85.

pursue a futile objective or employing ineffective means.⁷⁴ In any event, regardless of organizational form or the specific name given the duty, an organization's management must certainly strive to be faithful to the restrictions that a donor imposes upon her gift.

V. INATTENTIVENESS TO DUTY

Although each of the noted fiduciary duties offers fertile grounds for exploration, the examination here will now focus upon why these duties should play prominently in the minds of a recipient organization's managers—apart from the general idea that any breach of a formally recognized duty is inherently a bad thing that could result in some particular brand of liability.⁷⁵ In other words, putting aside the possible invocation of formal legal remedies like fund restitution, injunction, or trustee removal, I would like to explore some of the more subtle ramifications of a recipient organization's (in)attentiveness to these duties in the context of managing restricted gifts. The current dispute between Princeton University and the Robertson family provides a path that will help guide this exploration.⁷⁶

A. Robertson v. Princeton

Commentators describe the very public dispute between Princeton University and the Robertson family as one “that could significantly influence the future of restricted charitable giving in the U.S.”⁷⁷ The dispute centers upon Princeton's handling of a \$35 million gift to the university made by Marie and Charles Robertson in 1961.⁷⁸ That gift has

74. With regard to the duties of care and loyalty and the actions those duties require when donor terms become outdated or otherwise problematic, see *supra* notes 62, 67 and accompanying text.

75. Many commentators regard the formal legal enforcement of these fiduciary duties as lax anyway. See, e.g., Fishman & Schwarz, *supra* note 47, at 248 (noting that “attorney general oversight [is] more theoretical than deterrent”); *id.* at 169 (“The duty of care . . . is quite low, and . . . liability [is] improbable except in the most egregious cases . . .”); *id.* at 151 (noting that breach of care matters are typically settled quickly with state attorneys general, while the notoriety arising from reports of such breaches “can be devastating”); Principles of the Law of Nonprofit Organizations ch. 3, introductory note, at 5 (Discussion Draft 2006) (“[T]he law generally declines to impose monetary penalties for breaches of the duty of care, and focuses instead on nonmonetary equitable remedies, such as injunctions and removal of directors or trustees (and other reputational sanctions).” (emphasis added)); see also *infra* note 121.

76. See *supra* note 7 for an explanation of the scope of this discussion.

77. Dick Dahl, *Princeton Case Puts Spotlight on Charitable Gifts with ‘Strings Attached,’* Lawyers USA, Jan. 1, 2007, at 3; see also John Hechinger & Daniel Golden, *Poisoned Ivy, Fight at Princeton Escalates over Use of a Family’s Gift*, Wall St. J., Feb. 7, 2006, at A1.

78. I take the liberty here of designating the gift as one made jointly by the Robertsons. All indications suggest that the gift was the product of the joint act and decision of Marie and Charles, and media reports typically refer to “the Robertsons” as donors. The Robertson descendants likewise refer to the gift as if it were their parents’ joint act of philanthropy. See, e.g., Geoff Mulvihill, *Princeton Donors Want Their Millions Back*, CBS News, Nov. 28, 2006, <http://www.cbsnews.com/stories/2006/11/28/national/main2211409.shtml> (“Relatives

since grown to comprise a fund worth over \$800 million, which represents six percent of Princeton's total endowment.⁷⁹ Although both Marie and Charles are now deceased, several surviving Robertson family members have filed suit against Princeton over Princeton's alleged disregard for the restrictions imposed by Marie and Charles at the time of their 1961 gift.⁸⁰

As to restrictions, the Robertsons directed that their gift be used to educate graduate students at Princeton's Woodrow Wilson School of Public and International Affairs. More specifically, the documents governing the gift provide that

[the] objective is to strengthen the Government of the United States and increase its ability and determination to defend and extend freedom throughout the world by improving the facilities for the training and education of men and women for government service and to contribute [funds] . . . to or for the use of Princeton University for any one or more or all of the following uses:

(a) To establish or maintain and support . . . a Graduate School, where men and women dedicated to public service may prepare themselves for careers in government service, with particular emphasis on the education of such persons for careers in those areas of the Federal Government that are concerned with international relations and affairs . . .⁸¹

of Charles S. and Marie Robertson said the couple wanted their gift to be spent . . ."). A&P heiress Marie Robertson is actually the donor. Her husband, Charles Robertson, graduated from Princeton in 1926, and this appears to be the primary affiliation that inspired the gift. All indications are that Charles played a very active role in negotiating the terms and structure of the gift. Marie, Charles, and a representative of Princeton, for example, signed the composite certificate of incorporation of the Robertson Foundation, the primary document setting forth the gift terms. Charles also played a prominent role in the management of this foundation, which was established solely to administer the gift. The composite certificate of incorporation can be found in its entirety at the *Robertson v. Princeton* web site. Composite Certificate of Incorporation of the Robertson Foundation (1961), available at <http://www.robertsonvprinceton.org/legaldocuments/incorporation.pdf>.

As to the significance of the gift, it was regarded as "almost inconceivably generous." Dahl, *supra* note 77. The gift is said to have "[a]t the time . . . [been] one of the largest ever in support of higher education and the largest in Princeton's history." *Robertson v. Princeton*, <http://www.robertsonvprinceton.org/> (last visited Sept. 12, 2007).

79. See John Hechinger, *Princeton Reimburses Donors' Foundation*, Wall St. J., Mar. 13, 2007, at A2 (placing gift value at \$800 million and noting the six percent figure). A May 2007 article places the value at \$840 million. *Former Gov. Tom Kean to Succeed Jay Sherrerd on Robertson Board*, News@Princeton, May 1, 2007, <http://www.princeton.edu/main/news/archive/S17/79/79M88/index.xml?section=announcement>. Princeton emphasizes the growth of the fund as evidence of good stewardship.

80. Marie Robertson died in 1973, and Charles died in 1981. The plaintiffs in the current litigation are three Robertson children and one other relative. See *Robertson v. Princeton*, *supra* note 78. The Robertson family members serving as plaintiffs in the current litigation are hereinafter referred to as the "Robertson family."

81. Composite Certificate of Incorporation of the Robertson Foundation, *supra* note 78; see also text accompanying note 84. I have taken the liberty in the above quote of changing "its" to "[The]" at the beginning of the quoted language. The composite certificate is the most direct expression of "donor intent," as that concept is discussed in this essay. Whether viewed as equivalent to an instrument of gift or a representation of a negotiated agreement regarding the use and administration of the gift, the composite certificate certainly expresses

The Robertsons made their gift to Princeton via the establishment of “The Robertson Foundation.”⁸² The Robertson Foundation is a nonprofit, charitable corporation that operates as an I.R.C. § 509(a)(3) supporting organization, with Princeton being the supported charity.⁸³ The foundation is governed by a seven-member board, as to which Princeton appoints four of the members and the Robertson family the remaining three.⁸⁴ Prior to his death, Charles Robertson was active in the foundation’s management,

the Robertsons’ understanding and desires with regard to such matters. *See, e.g.*, Principles of the Law of Nonprofit Orgs. § 420 cmt. b(2) & reporter’s note 8 (Preliminary Draft No. 4, 2007) (discussing gift acceptance policies in the context of donor negotiations and noting that “[a] major restricted gift might result only after detailed negotiation . . .”).

82. *See* Composite Certificate of Incorporation of the Robertson Foundation, *supra* note 78.

83. The Robertson Foundation was formed in 1961, prior to the enactment of the 1969 Tax Reform Act which added § 509(a)(3) and the supporting organization concept to the Tax Code. Prior to such enactment, the foundation possessed characteristics of what is today technically known as a “Type I” § 509(a)(3) organization. The foundation in fact elected such status shortly after doing so became possible by virtue of the 1969 legislation. *See* Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion for Partial Summary Judgment on “Fiduciary Duties” and “Business Judgment,” *Robertson v. Princeton Univ.*, No. C-99-02 (N.J. Super. Ct. Ch. Div. July 11, 2006) [hereinafter Def. Mem.], available at <http://www.robertsonvprinceton.org/legal.php>; Memorandum to author, *supra* note 7, at 4. For a recent discussion of I.R.C. § 509(a)(3) supporting organizations, see Neil T. Kawashima & Mary Lee Turk, *The Demise of the Type III Supporting Organization*, 32 *Actec J.* 289 (2007); *see also* Principles of the Law of Nonprofit Orgs. § 415 reporter’s note 8(c) (Preliminary Draft No. 4, 2007).

84. The ramifications of the Robertson Foundation being structured as an organization created expressly to support Princeton, and over which Princeton was by agreement given majority control, is a significant point of legal contention in the current litigation. On the one hand, decisions made regarding the Robertson gift funds are made by the Robertson Foundation board of directors, not by Princeton University directly. On the other hand and according to the Robertson plaintiffs, the Princeton appointees to the foundation board have typically been closely aligned with and subservient to Princeton’s requests and objectives, such that Princeton bears ultimate responsibility for any wrongful departure from the Robertson gift terms. *See* Reply Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment re Fiduciary Duties and Business Judgment Rule at 6–21, *Robertson v. Princeton Univ.*, No. C-99-02 (N.J. Super. Ct. Ch. Div. (n.d.)) [hereinafter Pl. Reply Mem.], available at <http://www.robertsonvprinceton.org/legal.php>.

While allegations of malfeasance could be directed solely at the Robertson Foundation board members who authorized a particular expenditure, for purposes of this essay the discussion is framed consistent with the litigation posture—i.e., both the majority/Princeton-controlled foundation board members and Princeton University itself (by virtue of its control) are responsible for any potential wrongdoing. In this regard, media reports typically refer to the matter as a dispute between the Robertson plaintiffs and Princeton University. *See supra* text accompanying notes 77–80. In any event, fiduciary duties clearly reside somewhere in this case, and thus the dispute clearly presents a good vehicle for exploring those duties notwithstanding the parties’ contentions as to exactly where those duties lie. Indeed, the fact that Princeton is both given control and identified as the supported organization should not obviate the duty discussed in Part IV to adhere to donor restrictions. The difficulty in separating Princeton from any notion of wrongdoing where funds are utilized outside the Robertson gift parameters can be seen, for example, in the potential misappropriation discussed in *infra* note 88 and accompanying text and Part V.C. In that case, after being alerted to a potential misappropriation of foundation funds by a former university general counsel and then foundation secretary/treasurer, “someone” decided that the potential misappropriation should not be disclosed to the full foundation board.

serving as its president from 1961 until his death in 1981.⁸⁵ While serving in that role, Charles Robertson allegedly clashed with Princeton over the utilization of the gift, based upon his belief that too few students of the program actually pursued government service.⁸⁶

Apart from this conflict over the university's diligent pursuit of the suggested mission, there have been other, more recent disagreements between the university and the three Robertson family trustees.⁸⁷ The trigger that spurred the current litigation appears to have been a 2002 decision to manage the Robertson gift funds as part of the university's general endowment.⁸⁸ The original gift agreement stated that the funds were not to be commingled with the university's endowment, although Princeton asserts that the funds are now appropriately held in a separate account as part of that endowment.⁸⁹

In any event, Princeton appointees made this decision in the face of express objections by the three Robertson family trustees, thus (by one view) "antagonizing" several surviving Robertson family members to the point of initiating the formal legal action.⁹⁰ Princeton and/or its appointees may have foreseen the emergence of these plaintiffs and thus weighed that negative consequence in relation to the benefits to be gained by

85. *Former Gov. Tom Kean to Succeed Jay Sherrerd on Robertson Board*, *supra* note 79.

86. See Pl. Reply Mem., *supra* note 84, at 53–58; Hechinger & Golden, *supra* note 77; see also Def. Mem., *supra* note 83, at 13–17 (discussing why students have not gone into government service). Hechinger and Golden assert that "[a]lmost from the start, Charles . . . clashed with Princeton officials because he thought too many students from the graduate program were ending up outside government." Hechinger & Golden, *supra* note 77. Princeton, on the other hand, asserts that it is more than a trade school for "low level government bureaucrats," and that in any event it has little control over student job choices upon graduation. Memorandum to author, *supra* note 7, at 3–4, 8–10.

87. See *supra* notes 82–84 (regarding the disputes over the seven-member board and legal structure underlying the gift).

88. Hechinger & Golden, *supra* note 77. Technically, the decision was made by the foundation board of directors, and not Princeton University. Memorandum to author, *supra* note 7, at 4. That decision was made by a vote of 4–3, with the four votes coming from Princeton appointees (with continuing university affiliations) and the three dissenters being members appointed by the Robertson family. This accounts for the plaintiffs' attribution of this decision to Princeton itself. See *supra* note 84.

89. The foundation's certificate of incorporation allows the foundation's assets to be managed as part of the university's general endowment upon dissolution of the foundation, though the gift restrictions are nevertheless to continue to apply and the funds are still to be held "as a separate and distinct endowment fund." Composite Certificate of Incorporation of the Robertson Foundation, *supra* note 78, at art. 13. This specific authorization following dissolution could easily be read to preclude such a merger with the university's general endowment (even via a separate fund) prior to dissolution of the foundation.

90. The pejorative term "antagonizing" appears in the previously noted 2006 *Wall Street Journal* article. Hechinger & Golden, *supra* note 77. The term "antagonizing" is repeated here simply to indicate the level of conflict over this issue prior to the decision to align the management of the Robertson Foundation funds more closely with Princeton's general endowment fund administration.

consolidating management of the funds.⁹¹ Going forward in the face of such threatened legal action, moreover, is not in and of itself a breach of any duty, and could indeed be quite the opposite where the decision to proceed is believed—after reasonable investigation and deliberation—to be in the best interests of the organization.⁹² Nevertheless, one lesson that can easily be gleaned from the present state of affairs is that there is more to restricted gift management than formal compliance with the legal fiduciary duties of care and loyalty.⁹³

More specifically, even if Princeton establishes that the investment structure represents an appropriate exercise of managerial discretion, the victory is a bittersweet one, at best. Regardless of whether the plaintiffs ultimately establish their base claim that the “investment management” decision was improper, litigation has invited intensive scrutiny of Princeton’s managerial actions. The discovery phase of this litigation has thus far produced revelations of other potential missteps by Princeton in its oversight and use of both the Robertson and other restricted gifts.⁹⁴ The Robertson family brought in an outside auditor as part of its own litigation discovery, and that auditor’s efforts now underlie their public allegation that Princeton has “used the [gift’s] growing endowment as a University ‘piggy bank,’ diverting more than \$200 million to activities, projects, programs, and personnel unrelated to the [foundation’s stated] mission.”⁹⁵

With regard to these allegations, much more is now at stake than a judicial declaration of some fiduciary failing coupled with an injunction to undo the alleged commingling, or perhaps an order to restore any misappropriated funds. If victorious in their litigation, the Robertson family seeks to separate Princeton from control of the funds, with a further

91. As to this being Princeton’s decision versus one merely endorsed by or influenced by Princeton, see *supra* note 88. In this case, standing to sue Princeton is not a major issue because two of the plaintiffs are members of the foundation’s governing board, and as such have standing to sue in the event of a perceived breach of duty by the other directors/trustees. In a more typical direct gift scenario, the attorney general may be the only outside party having standing to sue, although there is some trend towards liberalizing standing for donors and other interested parties. See, e.g., *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (App. Div. 2001).

92. Those interests are defined to some extent, of course, by the purposes stated in the gift terms.

93. With regard to the “duty of obedience,” see *supra* notes 68–71 and accompanying text.

94. See Hechinger & Golden, *supra* note 77. Among the potential problem gifts cited by *The Wall Street Journal* is one made by the family of former Senator John Danforth. The Danforth family made the gift with the intent that it support “religious work” on campus. According to a former analyst in Princeton’s development office, in 2002 only \$6000 of the then \$18.5 million Danforth fund was allocated to the university’s office of religious life, and although over \$700,000 was “supposed to go for scholarships in the religion department, the school ‘reallocated the money to general funds.’” *Id.* Also, according to *The Wall Street Journal*, “millions of [Robertson Foundation] dollars flowed to such programs as the Wilson School’s Center for Research on Child Wellbeing.” *Id.*

95. *Robertson v. Princeton*, *supra* note 78. The auditor’s report is not without contest and controversy, as clearly revealed by the parties’ briefs. See, e.g., Def. Mem., *supra* note 83, at 33–35.

authorization to employ the restricted assets in pursuit of the donors' purposes—but via colleges and universities other than Princeton.⁹⁶ By the time this litigation concludes, a Robertson family victory could easily cost the university over \$1 billion.⁹⁷ Even absent that potential loss to Princeton, the costs of this dispute in both dollar and reputational terms are already notable. As to dollar costs, the parties have collectively spent over \$30 million in pursuing and defending their respective positions since litigation was initiated in 2002.⁹⁸

B. Reputation and Publicity

As to reputation, the case is being closely watched by professionals, educational institutions, and the public in general, with the press characterizing the dispute as “the most important case higher education has faced over the question of honoring the wishes of a donor.”⁹⁹

Commentators have long suggested that the prospect of negative publicity is a significant deterrent of wrongful nonprofit management behavior.¹⁰⁰ Some have even suggested that this deterrent may be an even more potent “stick” than the prospect of formal legal sanctions for breach of fiduciary duties, the enforcement of which is often regarded as lax in the nonprofit charitable sector.¹⁰¹

In this regard, the Robertson family has used the threat (indeed, the reality) of negative publicity as a sword against Princeton with much deliberateness, if not effectiveness. The Robertson family, for example, maintains a web site chronicling the dispute from the family's perspective.¹⁰² The Robertson family has also strategically placed editorial commentary in major newspapers, and even provided litigation documents to *The Wall Street Journal* as background for a February 7, 2006, exposé on

96. The Robertsons' suit “seeks to let the Robertsons use the gift money independently of Princeton . . .” Hechinger & Golden, *supra* note 77. This may prove difficult for plaintiffs in light of Princeton's clear identification as the foundation's supported organization. See *supra* note 84. On the other hand, the Robertson family asserts that Princeton's failure to abide by the terms of the gift constitutes a serious breach of fiduciary duty that justifies removal of the funds from Princeton's control, as well as application of those funds to support universities that have been (according to the Robertson family) much more successful at achieving the objectives identified by Charles and Marie Robertson.

97. Plaintiff William Robertson proposed this figure in a newspaper account, but given that the Robertson gift grew from \$650 million to \$800 million between 2006 and 2007, this figure seems reasonable.

98. Michael Juel-Larsen, *In Court, Barbs Traded over Wilson School*, DailyPrincetonian.com, Nov. 29, 2006, <http://www.dailyprincetonian.com/archives/2006/11/29/news/16766.shtml> (noting that the dispute has cost each side more than \$15 million).

99. Hechinger & Golden, *supra* note 77.

100. See Atkinson, *supra* note 15, at 1125; see also Fishman & Schwarz, *supra* note 47, at 242–68.

101. See *supra* note 75; *infra* note 121.

102. See Robertson v. Princeton, *supra* note 78; see also Def. Mem., *supra* note 83, at 55 n.34.

the dispute.¹⁰³ That article was less than flattering with regard to the university's handling of the entire Robertson matter.¹⁰⁴ The very fact of Princeton's public acknowledgement of, and response to, that article immediately upon its publication—on its own litigation-specific web site, no less—evidences that Princeton is very aware of the public relations dimension of this dispute.¹⁰⁵

C. *An Admitted (?) Mistake*

The litigation has also revealed internal Princeton correspondence that arguably exposes other problematic university attitudes, if not conduct. In 2002, for example, the university's former general counsel (and then-serving university officer and Robertson Foundation secretary/treasurer) informed the university president (who was also then serving as foundation chair) via e-mail that a document, not yet disclosed, would reveal the university's use of \$750,000 from the Robertson fund to pay the tuition of students whose studies were arguably not in line with the purposes underlying the Robertson gift.¹⁰⁶ That correspondence further advised that the Robertson family would be "greatly upset" to learn of this.¹⁰⁷ Under any version of the disputed facts, someone in this correspondence loop made the decision *not* to disclose this information to the Robertson-appointed foundation board members charged with overseeing the Robertson gift.¹⁰⁸ The Robertson plaintiffs, not surprisingly, allege a cover-up. Although denying any intentional cover-up, "Princeton now acknowledges that it revised the document so the outlays weren't disclosed to the [Robertsons' appointed board members]."¹⁰⁹ The university concedes impropriety, however, only with regard to nondisclosure and not with respect to the merits of the expenditure itself.¹¹⁰ Allegedly on that sole basis, the university paid the Robertson Foundation \$782,375 in early 2007 as reimbursement for the expenditures.¹¹¹

103. Hechinger & Golden, *supra* note 77.

104. As stated in that article, the lawsuit has "rais[ed] broader questions about Princeton's fidelity to its donors' intentions in this and other cases." *Id.*; see, e.g., *supra* note 94.

105. See Princeton Univ., Robertson Lawsuit, <http://www.princeton.edu/main/news/robertson/> (last visited Sept. 12, 2007).

106. See Def. Mem., *supra* note 83, at 40, 49–50; Hechinger & Golden, *supra* note 77. The students were Ph.D. candidates in the departments of economics, politics, and sociology. Def. Mem., *supra* note 83, at 48–49. Princeton disputes the conclusions reached by its former general counsel as set forth in the noted e-mail, calling the correspondence "unfortunate." *Id.* at 50.

107. Def. Mem., *supra* note 83, at 50; Hechinger, *supra* note 79; Hechinger & Golden, *supra* note 77.

108. There is no dispute over the existence or contents of the e-mail, or its nondisclosure. Def. Mem., *supra* note 83, at 50.

109. Hechinger & Golden, *supra* note 77. For a more nuanced but generally consistent characterization of the nondisclosure, see Def. Mem., *supra* note 83, at 50 (disputing the allegation of a cover-up).

110. Hechinger, *supra* note 79.

111. *Id.*

As to the formal legal duties governing the conduct of fiduciaries (like the university president and the university official then serving as foundation secretary/treasurer), if true, this episode represents a likely breach of the duty of care in allowing the diversion to occur through inattentiveness in the first instance. That such care should have been deliberately employed through, for example, the adoption of oversight/monitoring procedures is bolstered by the concepts embodied in the trust law standards, attendant restricted gift oversight, and the affirmative compliance those standards require.¹¹²

The managerial shortcoming here is further compounded by the failure to disclose the breach upon discovery, which could easily be characterized as a self-interested action potentially rising to the level of a breach of the duty of loyalty.¹¹³ Loyalty comes into play because “covering up” the failing may have been motivated by a desire to avoid negative repercussions for the managers in charge, as opposed to concern for the best interests of the organization. In this regard, note that the information was known to university official(s) and the university’s foundation board appointee(s), but deliberately concealed from the Robertson appointees. It is those Robertson appointees who, in defense of what they perceive to be the Robertsons’ gift intentions, would be the most likely to question the expenditures.¹¹⁴ Deliberate concealment of such information, moreover, constitutes a direct affront to the notion of transparency that borders on fraud.¹¹⁵ As to transparency, one should keep in mind that an overriding issue here is accountability for compliance with donor intentions, as embodied in the terms of a restricted gift.¹¹⁶

112. In fact, the university has since “created an electronic database to monitor compliance with gift restrictions.” Hechinger & Golden, *supra* note 77; *see also supra* note 66 (discussing monitoring procedures). Absent any bad faith, the noted potential breach of the duty of care would likely only require a restoration of the misspent funds and perhaps an apology—regrettable, but certainly not too significant for one of the richest academic institutions in the country. *See supra* note 75 and *infra* note 121 regarding the lax penalties that often accompany such breaches.

113. *See, e.g.*, Kurtz, *supra* note 65, at 26 (placing such a failing within the context of a breach of the duty of care by noting “the failure to deal with a shortcoming noted in an auditor’s . . . review letter could . . . sustain[] a finding of inattention and, hence, a violation of the duty of care . . .”).

114. *See supra* notes 109–13 and accompanying text.

115. In this regard, the Robertson family has included a claim for punitive damages based in part on this alleged fraud. Pl. Reply Mem., *supra* note 84, at 19–21. In its defense, Princeton disputes the accuracy of Thomas Wright’s conclusions as stated in the 2002 e-mail, and further notes that President Shirley Tilghman had only recently taken office, was not familiar with the foundation’s operations or the basis for the expenditures in question, and that in any event “she did not know who made the [nondisclosure] decision or how the decision was made.” Def. Mem., *supra* note 83, at 50.

116. *See, e.g.*, Jeff Muskus & Raymond Pacia, *Univ. Gifts Raise Issue of Control: Dispute over Future of LKI Reflects Complications That Surround Univ. Donations*, Yale Daily News, Nov. 18, 2004, <http://www.yaledailynews.com/articles/view/12366> (“[D]onors have becomes [sic] a group certainly much more interested in how their gifts are going to be used. . . . It sort of reflects the tenor of the times in the sense that there are calls for

Whether representative of intentional dishonesty or a mere lack of oversight, this and similar alleged failings (and the publicity relating thereto) have ramifications that extend beyond the bounds of mere issues of compliance with the fiduciary duties of care and loyalty. In particular, Princeton's problems provide further insight on the broader topic at hand when considered in light of the university's twofold response to the Robertsons' assertions that donor intent has been neglected. Princeton first posits a more liberal interpretation of the gift terms, opining that the seemingly specific *government service* goals set forth in the Robertson gift documents are merely indicative of a broader *public service* mission.¹¹⁷ Princeton further suggests that it is not possible to implement any more limited interpretation of the Robertsons' gift restrictions. In this regard, Princeton's chief legal counsel asserts that "[t]he nature of governmental service and the best way to prepare for it have changed over time."¹¹⁸ Though this latter statement is likely true, in the context of a dispute over the scope of donor intent, such language is more characteristic of that employed when a gift "reincarnation" is on the table, under legal principles that are the subject of the following Part VI.

VI. THE CRITICAL STAGE: WHERE DEATH AND REINCARNATION LOOM LARGE

Understand first that Princeton has not requested any formal legal modification of the terms of the Robertson gift. More specifically, Princeton has not sought a judicial declaration that the terms of the gift have become so limiting over time that it is now appropriate to broaden those restrictions under the traditional judicial doctrines of *cy pres* or equitable deviation.¹¹⁹ Thus far, Princeton's defense instead focuses upon the university's own interpretation of exactly what educational pursuits the Robertsons intended their restricted gift to support—in other words, Princeton claims that its actions have at all times been consistent with the

accountability in all parts of our society.'" (quoting an alumni relations official in the context of the *Robertson v. Princeton* dispute)).

117. See Hechinger & Golden, *supra* note 77; see also *infra* Part VI. With respect to compliance with the terms of the Robertson gift, Princeton asserts that it has always been in compliance with those gift terms, and that the real issue is not one of discerning intent as much as it is the Robertson family now trying to tell Princeton how it should go about fulfilling that mission. Memorandum to author, *supra* note 7, at 2, 10. There appears to be little question, however, as to the existence of a more general disagreement over the scope of activities and breadth of mission that the Robertsons intended to support.

118. Dahl, *supra* note 77. Princeton further asserts that the real dispute is over whether the university should be required "to build a trade school which graduates entry-level bureaucrats . . . or . . . an esteemed graduate school at which men and women may prepare to be leaders in public service careers." Memorandum to author, *supra* note 7, at 10. It may be that the real question is where (if at all) to draw the line between that broader Wilson School mission and the (allegedly) more limited objectives sought to be supported by the Robertsons via their gift.

119. For a more detailed discussion of *cy pres* and equitable deviation, see *infra* Part VI.B.

Robertson's original intent.¹²⁰ It is in this context that the boundaries of managerial prerogative become more difficult to articulate with precision. I will therefore consider Princeton's interpretive focus first. I will then examine the potential relevance to this dispute of cy pres and equitable deviation. In this context, the parties' various actions and arguments are particularly informative when viewed against the broader backdrop of an evolution from an initiating donor-charity agreement, to how the recipient organization thereafter manages the property, to what the recipient would like to do with the property now.

A. *The Interpretive Approach*

The absence of any request for judicially sanctioned modification of the Robertson gift terms suggests an important route open to a recipient organization that views the literal terms of a restricted gift document as problematic. Specifically, if a recipient organization finds it difficult (or undesirable) to comply with a strict, or perhaps more obvious, construction of a donor's terms, and if that organization is reluctant to pursue judicial modification of those restrictions, then the organization might simply unilaterally (re)interpret the gift terms or otherwise disregard them.¹²¹ This is not to suggest that such action would be proper, or in many instances, even defensible. The unpredictability (and resulting mandate) of a cy pres or equitable deviation action and generally lax attorney general enforcement, however, might lead charitable management in this direction.¹²²

On the other hand, there is also support for the idea that management has some leeway when dealing with the terms of a restricted gift. Consider, for example, the most recent draft of the ALI Principles of the Law of Nonprofit Organizations, wherein the Reporter notes that "[t]he governing board will often have to exercise some level of discretion in implementing

120. Def. Mem., *supra* note 83, at 74 (arguing that cy pres is in fact not available in this case, because the Robertson Foundation is a corporation, not a trust). *But see supra* notes 56-60 and accompanying text.

121. Professor Rob Atkinson believes that well-intentioned management may be led in this direction by the prospects of lax attorney general enforcement of the noted fiduciary duties. This route might also be accompanied by some negotiation to appease the donor's descendants. The possibility of subsequent judicial ratification of the organization's departure from the donor's instructions could further underlie the organization's decision to proceed in this manner. Professor Atkinson cautions, however, that absent some confidence in the attorney general's or court's likely view of such action, "[T]he zone of comfort [here] is not only ill-defined, but also small." Atkinson, *supra* note 68, at 35, 42-44.

Less principled organizational management might ignore all of these perils and simply disregard donor instructions because management seeks to advance their own alternate agenda (without regard to any true need for gift modification). Perhaps even less flatteringly, management might seek to "indulge their private vanities or inflate their egos" by acting as they see fit, without regard to limitations imposed by others. *Id.* at 45.

122. *See supra* notes 75 and 121 regarding lax enforcement of fiduciary duties. Regarding the duty to take action to seek legal modification where appropriate, *see supra* note 62 and accompanying text.

donor intent.”¹²³ Fiduciaries, moreover, “must be free to exercise their judgment in the best interest of the organization,” so there is necessarily some room for managerial prerogative here.¹²⁴ But the precise parameters of that prerogative are elusive. Consider this statement of principle put forth by the ALI drafting committee:

A charity is considered to comply with a gift restriction if the charity acts in good faith, reasonably construes the terms of the restriction, adheres to all material requirements of the restriction, and seeks relief under §430 [referencing UMIFA, cy pres, and equitable deviation] . . . when appropriate.¹²⁵

The first part of this principle (good faith, reasonableness) suggests managerial leeway reflective of a corporate standard of care; the second clause (must adhere, seek relief) imposes the more rigid trust law approach. Both statements have merit, and the overriding principle appears sound. As to guidance, however, given that the drafters set forth the two clauses in the same statement of principle, the degree of managerial discretion courts will accept before finding abuse appears to be an open question. In addition to reasonableness and good faith, the answer to this question will likely depend upon the level of specificity the donor has provided, the proffered interpretation, and other circumstances, including those surrounding the charity’s conduct in relation to the restriction.¹²⁶

1. The Princeton Interpretation

In the Princeton matter, the interpretive question is whether the donors intended their gift to be directed towards the education and training of students for government service, or as the university asserts, for a much broader array of public service options.¹²⁷ In this regard, Princeton’s

123. Principles of the Law of Nonprofit Orgs. § 410 reporter’s note 1 (Preliminary Draft No. 4, 2007). The previous draft stated that such board discretion might pertain with respect to “construing” (versus “implementing”) donor intent. *See also* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 Ga. L. Rev. (forthcoming 2007) (manuscript at 63, on file with author) (employing the language from the previous ALI draft).

124. Fremont-Smith, *supra* note 57, at 201–09 (discussing leeway afforded in exercising the duty of care); *see also* Principles of the Law of Nonprofit Orgs. § 460 cmt. b (Preliminary Draft No. 4, 2007) (“As a threshold matter, in carrying out the requirements of a restricted gift, the charity will often have to exercise its judgment.”).

125. Principles of the Law of Nonprofit Orgs. § 425(a) (Preliminary Draft No. 3, 2005). The drafters improved upon this language in 2007, though ambiguities remain due to the inherent complexity of the issue. *See* Principles of the Law of Nonprofit Orgs. § 420(a) (Preliminary Draft No. 4, 2007) (“A charity complies with a gift restriction or condition if the charity, acting in good faith, reasonably implements all material requirements of the terms of the restriction or condition, and seeks relief under § 430 [referencing UMIFA, cy pres, and equitable deviation] . . . when appropriate.”).

126. *See* Brody, *supra* note 57, at 644 (“[T]he fiduciaries must interpret [the organization’s charitable] purpose in light of settlor and donor instruction, but are otherwise free to exercise their discretion.”).

127. *See supra* note 118 for more on framing the issue in *Robertson v. Princeton*.

assertion that the Robertsons envisioned a broader public service mission aids the university on two important fronts. First, this broader interpretation authorizes utilization of the Robertson gift to support a much more varied basket of activities than would a gift intended to support educational programs directed towards government service careers only. This broader interpretation might, for example, authorize the support of professors and programs much less directly tied to the Wilson School or its specific curriculum. The justification would be that a stronger university interdisciplinary program—of which the Wilson School is a part—enables the recruitment of more intellectually diverse Wilson School faculty and more student opportunities for research and interaction.¹²⁸ As the Robertson family is quick to point out, however, the university's overall mission is much broader than that described in the Robertson gift documents in relation to the Wilson School. Specifically, according to the Robertson family, the university is quite intent on freeing some of the Robertson gift fund's \$800 million to support more facets of the university's overall mission in derogation of the Robertsons' original intentions.¹²⁹ This represents a classic tension in the restricted gift context.

The second benefit to Princeton from this broader interpretation is that the interpretation tends to moot criticisms that the university is not doing a good job of carrying out the purposes underlying the Robertsons' gift. In this regard, note that the Robertson family criticizes Princeton for placing "[f]ewer than 12 percent of the school's graduates . . . in government service"¹³⁰—to which Princeton responds by emphasizing that the "program sends between 40 to 50 percent of its students into the public sector."¹³¹ The university likewise touts having placed "about 87 percent of [new] graduates with jobs . . . in the public or nonprofit sector" during a recent year.¹³² From the university's standpoint and in accordance with its own interpretation, this represents stellar achievement in line with the Robertsons' (more favorably construed) directives.

2. The Donors' Intent

As to which view more closely reflects the Robertsons' actual intent, note that it is the donors' intentions at the time of the gift that govern.¹³³ Once the gift has been made, the donor no longer controls the property and

128. Princeton has said as much. *See, e.g., id.*

129. Pl. Reply Mem., *supra* note 84, at 35.

130. Raj Hathiramani, *Judge Allows Robertsons to Amend Complaint*, DailyPrincetonian.com, Oct. 15, 2004, <http://www.dailyprincetonian.com/archives/2004/10/15/news/11102.shtml>.

131. Ross Urken, *Wilson School Students Voice Opinions on Lawsuit*, DailyPrincetonian.com, Sept. 21, 2004, <http://www.dailyprincetonian.com/archives/2004/09/21/news/10784.shtml>.

132. Mark Stefanski, *Robertsons Poll About Endowment*, DailyPrincetonian.com, Dec. 14, 2005, <http://www.dailyprincetonian.com/archives/2005/12/14/news/14138.shtml>.

133. *See, e.g.,* Principles of the Law of Nonprofit Orgs. § 450(a) cmt. a (Preliminary Draft No. 4, 2007).

thus subsequent changes of heart are not controlling.¹³⁴ Similarly, once a gift and its terms have been accepted, the recipient organization may not thereafter unilaterally change that gift's terms.¹³⁵ Still, subsequent dealings between the recipient and the donor may shed light upon the proper interpretation of ambiguous provisions.¹³⁶

Princeton attempts to take advantage of this latter point by citing what it characterizes as a pattern of donor acquiescence to university conduct concerning the gift's purposes. Princeton argues that various post-gift university announcements, mission statements, and correspondence emphasize the public service nature of the Wilson School's mission.¹³⁷ Princeton proceeds to assert that there were no donor objections to these communications, thus confirming the alignment of university and donor objectives.¹³⁸ If true, this is a relevant point, because prior to his death, Charles Robertson took an active role as president of the foundation charged with managing the gift.¹³⁹ He therefore had ample opportunity to object to transgressions.

Among the items cited by the university is its own 1961 press release announcing the gift. That announcement made no mention of government service, opting instead to tout the Robertsons' support for "careers in public and international affairs."¹⁴⁰ Various other university correspondence and mission statements with similar characterizations followed over the years.¹⁴¹ The nature and relevance of many of these happenings and the existence of donor acquiescence are, however, no less debatable than the underlying question of donor intent.¹⁴² Indeed, if subsequent donor acquiescence to such statements has any relevance, then so too should the organization's efforts to solicit such acquiescence, or to avoid the issue altogether.

In this regard, a more cynical view could easily cast the university's original press release as merely the first of many instances showing that Princeton was dissatisfied from the outset with the restrictive gift terms that it had accepted. In fact, two past university executives appear to have testified exactly to that effect.¹⁴³ The university president who negotiated

134. Although, the donor may have the authority to release a restriction. *See supra* note 63.

135. *See supra* Part III.B.

136. Principles of the Law of Nonprofit Orgs. § 450 cmt. b (Preliminary Draft No. 4, 2007).

137. *See, e.g.*, Def. Mem., *supra* note 83, at 5–12; *see also supra* note 7.

138. *See* Def. Mem., *supra* note 83, at 5–12.

139. *See supra* notes 78–86 and accompanying text.

140. Def. Mem., *supra* note 83, at 10–11.

141. *Id.* at 5–23.

142. Many of the items cited in the defendant's memorandum could easily be viewed as university statements consistent with Charles Robertson's steadfast commitment to government service, a focus now suggested by the Robertson family. *See* Def. Mem., *supra* note 83, at 12–23; Hechinger & Golden, *supra* note 77; *see also supra* note 86 and accompanying text.

143. Pl. Reply Mem., *supra* note 84, at 55.

the gift, for example, testified in depositions that it “was unfortunate that we allowed [the gift document] to be phrased as it was in this limited sense of government service”¹⁴⁴ Eleven years later, the dean of the Wilson School wrote the university president in preparation for an upcoming meeting with the Robertson Foundation board. In that letter, the dean listed among his objectives for the meeting a desire

[t]o obtain, either by explicit revision or interpretation effectively negotiated with [the board] a broadened definition of those purposes of the [Wilson] School which the [gift] supports—specifically . . . [that] preparation of students for careers not only in the U.S. Federal Government, but in . . . multilateral organizations, and in other public-service and public-affairs-oriented capacities is consistent with the purpose of the [gift].¹⁴⁵

The university asserts that the Wilson School dean formulated these objectives with correspondence from Charles Robertson in hand, and that this somehow confirms the Robertsons’ broader intent.¹⁴⁶ The university further attempts to bolster its case by citing generic platitudes expressed by Charles Robertson at a few post-gift events where his presence or words were solicited. If this circuitous route to establishing donor intent has any merit, however, then even more relevant should be Charles Robertson’s own direct correspondence with the university president that very same year. In a 1972 dialogue with then–University President William G. Bowen over the impact of the Vietnam War on student interest in government service, for example, Charles Robertson is quoted as stating that “[f]ederal government service concerned with international relations and affairs . . . was our original goal. It continues to be our goal, and it emphatically always will be our goal!”¹⁴⁷

Moreover, the Wilson School dean ultimately shied away from directly pursuing the gift purpose-broadening objective quoted above, thus suggesting that the university was hesitant to raise the scope of purpose issue directly.¹⁴⁸ More specifically, in the same letter setting forth Wilson School objectives quoted above, the dean concluded, “My present judgment is that we should *not* in this round try for an explicit change at the [upcoming] meeting in the stated purposes of the [gift] along the lines indicated”¹⁴⁹ As if more insight were necessary, the dean of the

144. *Id.* (internal quotation marks omitted) (containing deposition testimony of President Robert Goheen). President Goheen stated in his deposition, “[W]e were very trusting of one another and we were not meticulous in our use of language. . . . [W]e were talking about public service and not simply government service, and that was well-known . . . [and] accepted. . . . [T]hat ambiguity I think has haunted us ever since. It’s just too bad [the restrictive language is] there.” Memorandum to author, *supra* note 7, at 12.

145. Def. Mem., *supra* note 83, at 14 (emphasis omitted).

146. *Id.* at 13–14.

147. Pl. Reply Mem., *supra* note 84, at 54; Hechinger & Golden, *supra* note 77.

148. Def. Mem., *supra* note 83, at 14.

149. *Id.*

Wilson School also complained in another 1972 memo to the university president:

‘What bothers me’ about the terms of the gift, . . . is ‘the unspoken premise that, with respect to any American institution dealing in public affairs, the highest per-se loyalty automatically must be to the U.S. government The university should resist [such] a blind commitment’¹⁵⁰

The implication, of course, is that the dean believed that (1) the donor’s expressed intentions were too narrow in the first instance, and (2) directly raising the matter would not be productive in light of donor attitudes. Much of Princeton’s own evidence suggests an institutional belief that the university had allowed itself to become shackled by the donors’ gift restrictions, and that getting around those restrictions was necessary, but required finesse. The quoted conversations also demonstrate the unavoidable interconnectedness inherent in the restricted gift life cycle—the idea that what comes around, goes around. If it were indeed the case that Princeton should avoid a “blind commitment” to gearing a particular school’s curriculum towards government service, did this only become apparent a mere eleven years after Princeton accepted the gift and its documented terms? And if apparent at the time of gift, why then did Princeton officials not insist upon more clearly permissive language and a more direct statement of this broader intent *at the time the gift was accepted*?¹⁵¹ Could it be that Princeton feared a choice between fastidiously guarding its mission integrity and managerial discretion, perhaps at the cost of losing a very significant gift, and thus instead conceded some (too much?) of that discretion to a generous donor? In light of the duties attendant upon both managing an organization’s overall mission and overseeing a restricted gift, thinking about such matters surely falls within the realm of fiduciary responsibilities to be adhered to in accepting the gift. In this vein, nonprofit leadership has an obligation to refuse any such overly controlling or off-mission-directed gift, however immediately painful that might seem. Princeton’s ultimate failing—if such a failing is believed to exist—can be traced to the very act of accepting gift terms that would thereafter so confound university leadership in seeking to advance the university’s (and perhaps the Wilson School’s) broader mission.

150. Hechinger & Golden, *supra* note 77 (quoting a 1972 Princeton internal memo); *see also* Pl. Reply Mem., *supra* note 84, at 19–21. The past Princeton president who negotiated the gift reports that John F. Kennedy’s “ask not what your country can do for you” speech inspired the gift, thus bolstering the claim that the Robertsons possessed a particular desire to support federal government service. Hechinger & Golden, *supra* note 77.

151. *See* in this regard the deposition testimony of former University President Goheen, quoted in *supra* note 144 and accompanying text. If nothing else, President Goheen’s testimony shows that unstated understandings that supplant detail in the gift negotiation documentation can lead to significant problems, and legal disputes, over time. *See also* Principles of the Law of Nonprofit Orgs. § 420 cmt. b(2) (Preliminary Draft No. 4, 2007) (discussing consequences of “imprecise or poorly-thought-through restrictions”).

B. *Literal Restrictions, Changed Circumstances, and Cy Pres*

Missing from the analysis thus far is a discussion of cy pres and equitable deviation. Cy pres and equitable deviation are the primary “orthodox” routes to dealing with problematic donor restrictions.¹⁵² Because the cy pres power is the most sweeping of the two, in that it permits a change in gift purpose (not just administration), the cy pres doctrine will be the focus here.¹⁵³

The doctrine of cy pres empowers a court to direct the application of contributed property to charitable purposes that differ from those originally specified by the donor.¹⁵⁴ Courts have traditionally applied the doctrine only where it has become “impossible, impracticable or illegal” to carry out the donor’s original charitable purpose.¹⁵⁵ Where such a failure exists, a court can “save” the charitable nature of the gift by directing its application to an alternative charitable use that falls “as near as possible” to that

152. Atkinson, *supra* note 68, at 31–33. The characterization of “orthodox” is to be contrasted with what Professor Atkinson calls the “unorthodox” or “low road” to dealing with such directives, the latter reference being to the more unilateral interpretive (or “disregard”) approach discussed in Part VI.A.

153. The traditional difference between cy pres and equitable deviation is that cy pres presents a more narrowly invoked, but more sweeping, power to alter the actual charitable purpose of a gift (traditionally described as a “substantive” deviation). In contrast, equitable deviation provides a more liberally applied, but narrower, power to deviate not from the charitable purpose itself, but from particular donor directions relating to carrying out that charitable purpose (traditionally described as a departure from an “administrative” term). As applied, equitable deviation and cy pres can be difficult to distinguish, and courts often confuse the two doctrines (either out of ignorance or perhaps as a skillful route to gift modification where one or the other of the doctrines is needed, but its criteria have not been satisfied). See ABA Comm. on Charitable Trusts and Found., *Cy Pres and Deviation: Current Trends in Application*, 8 Real Prop. Prob. & Tr. J. 391, 398–403 (1973) (noting judicial confusion in applying doctrines); Johnson, *supra* note 15, at 376, 379–80 (“The distinction between *cy pres* and equitable deviation is specious [and] without merit . . .”); Roger G. Sisson, Comment, *Relaxing the Dead Hand’s Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 Va. L. Rev. 635, 645 (1988) (“[C]ourts have used the deviation doctrine to yield results that resemble modifications of purpose under the *cy pres* doctrine, and vice versa.”). The most recent ALI draft, however, retains the distinction between the doctrines, granting more managerial leeway where equitable deviation is implicated. See Principles of the Law of Nonprofit Orgs. § 440 cmt. a (Preliminary Draft No. 4, 2007).

154. Restatement (Third) of Trusts § 67 (2003); Restatement (Second) of Trusts § 399 (1957). The doctrine applies only where property is initially dedicated to some charitable purpose. For recent scholarly commentary on the topic of cy pres, see Buckles, *supra* note 2 (discussing cy pres in specific context of restricted gifts and proposing a tax-code based solution to problems presented); Eisenstein, *supra* note 44.

155. Restatement (Second) of Trusts § 399. Section 399 states the traditional cy pres trigger as “a particular charitable purpose [that] becomes impossible or impracticable or illegal to carry out.” To apply the doctrine, the court must also find that “the settlor manifested a more general intention to devote the property to charitable purposes.” More recent Restatement and Uniform Trust Code articulations of the doctrine have added the impediment of a purpose becoming “wasteful” to the circumstances that justify application of the doctrine, though that criterion had generally been rejected under prior law as too liberal. See Unif. Trust Code § 413, 7C U.L.A. 509 (2003); Restatement (Third) of Trusts § 67; Fremont-Smith, *supra* note 57, at 177–78.

originally chosen by the donor.¹⁵⁶ Traditionally, however, a court would not utilize this doctrine unless the donor possessed a “general charitable intent” such that donor intent would in fact be furthered by dedicating the funds to some purpose similar to the donor’s now-failed charitable purpose.¹⁵⁷

Generalizations begin to fail here, however, as modern formulations of the doctrine have resulted in meaningful departures from the strict or traditional form of *cy pres* (which still governs in a large number of states).¹⁵⁸ Both the Restatement (Third) of Trusts and the Uniform Trust Code (UTC) now presume the existence of general charitable intent.¹⁵⁹ These more recent formulations add the impediment of a purpose becoming “wasteful” to the circumstances that justify a change of donor purpose via application of *cy pres*—a criterion generally rejected under prior law as being too liberal.¹⁶⁰ Both new pronouncements also relax the “as near as possible” application of the gift property upon judicial modification, instead accepting an application that “reasonably approximates” or is “consistent with” the donor’s stated purposes.¹⁶¹

The laws of either New Jersey or Delaware will govern the Princeton dispute.¹⁶² Neither of these states has adopted the UTC, nor is there any affirmative indication as to whether the courts of either state will embrace the Restatement (Third) of Trusts formulation of *cy pres*. Even without such doctrinal liberalizations, however, a central question underlying the availability of judicial modification in any *cy pres* matter is whether circumstances have changed since the date of the gift such that the gift terms can no longer be carried out as stated. In the context of the Princeton dispute, a logical inquiry therefore concerns the question of what, if anything, changed after the date of the Robertson gift that might render the

156. See Restatement (Second) of Trusts § 399 (noting that the alternative charitable use should be “as near as possible” to the donor’s original scheme); Restatement (Third) of Trusts § 67 cmt. a (articulating an “as near as possible” standard for the alternative charitable use).

157. The Restatements and other articulations of the *cy pres* rule make this clear. See Restatement (Third) of Trusts § 67 cmt. b & reporter’s notes; Restatement (Second) of Trusts § 399; see also *Craft v. Shroyer*, 74 N.E.2d 589, 592–93 (Ohio Ct. App. 1947); Atkinson, *supra* note 15, at 1117–18 (discussing this requirement and what it means in terms of a donor’s desired course of action where the original charitable objective fails); Venessa Laird, *Phantom Selves: The Search for a General Charitable Intent in the Application of Cy Pres Doctrine*, 40 Stan. L. Rev. 973, 978 (1987) (reducing the inquiry to ascertaining which of two outcomes a donor preferred).

158. See, e.g., *Fremont-Smith*, *supra* note 57, at 175–79.

159. See generally *id.*

160. See Unif. Trust Code § 413, 7C U.L.A. 509; Restatement (Third) of Trusts § 67.

161. Unif. Trust Code § 413, 7C U.L.A. 509; Restatement (Third) of Trusts § 67. Although a gift over or reversion upon failure of the donor’s purposes traditionally negated the availability of *cy pres* modification, the new Uniform Trust Code formulation ignores such reversions unless the reversion favors a living settlor or otherwise is implicated within twenty-one years of the gift. Unif. Trust Code § 413(b), 7C U.L.A. 509.

162. The Robertson Foundation is a Delaware corporation, and Princeton is located in New Jersey.

literal gift terms problematic—and what might this suggest about the need for, or propriety of, a “reincarnation” of the Robertsons’ gift.

In this regard and as to the entire matter of judicial modification, Princeton’s defense filings are interesting. For one thing, relevant changes have, in fact, occurred since the 1961 gift. In particular, the educational and professional environment directly relevant to the Robertson gift terms has evolved. Princeton plausibly argued during the 1970s that the Vietnam War and the Watergate scandal dampened student desire to pursue careers in government service.¹⁶³ Princeton also accurately notes that today, many formerly federal government functions are filled by nongovernmental organizations and other public service-oriented organizations. The university points to such things as the “evolution of the *context* in which the . . . Wilson School . . . sought to carry out [its] mission.”¹⁶⁴ The Robertsons also had a clear affinity for Princeton, as opposed to preferring a reversion to heirs or some other entity upon failure of the gift.¹⁶⁵

Despite these favorable facts, Princeton has chosen to forego any judicial authorization for cy pres modification or after-the-fact ratification of Princeton’s potentially overly broad, unilateral interpretation of the gift terms.¹⁶⁶ Princeton has instead chosen to hinge its fate on the acceptability of its “managerial” interpretation of the Robertson gift terms. Perhaps Princeton views the two as mutually exclusive—i.e., that seeking (or even suggesting) cy pres modification confirms that the university’s broader interpretation is beyond the scope of the donor’s originally expressed intent, and thus beyond the power of managerial prerogative. In fact, Princeton expressly (though incorrectly) argues in its court filings that the cy pres doctrine *cannot* apply in this case because a charitable corporation (and not any technical trust) is involved.¹⁶⁷

Perhaps Princeton has taken this position because of the unpredictability inherent in any application for cy pres relief and the judicial mandate that might result. More likely, though, is that Princeton hopes to establish that it should not be held to any heightened “trust” fiduciary duties with respect to the Robertsons’ gift or the university’s actions in carrying out the gift terms.

163. Perhaps this answers the question posed in the text accompanying *supra* notes 150–51 regarding how drastically circumstances affecting the gift may have changed in only eleven years from the date of the gift.

164. Def. Mem., *supra* note 83, at 16.

165. The Robertson family does not seek a reversion of funds to themselves. The Robertson family does seek to remove control of the foundation from Princeton and, as Princeton is quick to emphasize, thereafter place such control in the hands of the Robertson family, to pursue the alleged donor intentions via other universities. *See, e.g.*, Robert K. Durkee, Vice President and Sec’y of Princeton Univ., Letter to the Editor, Pitt. Trib., Mar. 22, 2007, at A8. With regard to the sought-after removal of Princeton control and benefit, see the text accompanying *supra* notes 94–98.

166. Such after-the-fact ratification may be had under trust law principles. *See Principles of the Law of Nonprofit Orgs.* §§ 460 cmt. d, 470 cmt. d (Preliminary Draft No. 4, 2007).

167. Def. Mem., *supra* note 83, at 69–74. In this regard, recall again that trust-like duties, and therefore trust doctrines like cy pres, should apply where a restricted gift purpose is at issue. *See supra* notes 56–62 and accompanying text.

As a result, Princeton has apparently decided to absolutely resist any efforts by the Robertson family plaintiffs to invoke trust doctrine.¹⁶⁸ This again implicates the ongoing evolution in nonprofit law from trust to corporate fiduciary standards, and the complicated task of defining boundaries where restricted gifts are involved.

Despite eschewing direct applicability of the doctrine, Princeton nevertheless employs the cy pres-type analysis in defending its own utilization of the Robertsons' gift.¹⁶⁹ Perhaps Princeton emphasizes the changed circumstances in an effort to lend credence to Princeton's claims that it is acting quite reasonably in pursuing the Robertsons' purposes—suggesting a quest for acceptance of its good faith in interpreting the gift terms in the spirit of cy pres.¹⁷⁰ Princeton may also fear that (as the Robertson family alleges) other schools currently have no trouble placing large numbers of their graduates into government service positions. If true, and accepting the Robertson plaintiffs' interpretation of donor intent, such placement success belies Princeton's claim that market forces, rather than its own inability or unwillingness, underlie the lack of Wilson School graduates going directly into government service positions upon graduation. Such a reality would also likely preclude a court's finding that fulfilling the gift terms (as construed by the Robertson family) has become "impossible" or "impractical."¹⁷¹

CONCLUSION

Going beyond the *Robertson v. Princeton* dispute, I would like to conclude with a few additional thoughts about the restricted gift life cycle and the interconnectedness of decisions and outcomes across the life span of a restricted gift, with a particular focus on the trend towards a more liberalized cy pres doctrine. These doctrinal liberalizations will undoubtedly alter judicial decision making, though at what pace remains

168. See *supra* note 120 and accompanying text. See generally *supra* Part VI.A.

169. Def. Mem., *supra* note 83, at 13–23 (“[T]he University remained committed to fulfilling the Foundation’s mission, but the Vietnam War, the Watergate scandal, and the negative public image of government had dramatically changed the environment in which the Woodrow Wilson School operated and the changing nature of public service had affected [the nature of government service].”).

170. See *supra* note 125 and accompanying text, regarding good faith.

171. Since neither the Uniform Trust Code nor the Restatement (Third) of Trusts are in effect in Delaware or New Jersey, Princeton could not argue that the “wasteful” trigger for cy pres application has occurred. As to the “wasteful” trigger, see *supra* note 160 and accompanying text. That is too bad, because the Princeton dispute could be viewed as raising issues similar to those encountered in the case of Beryl Buck. The Buck gift ballooned from approximately \$10 million to over \$380 million, thus prompting the foundation board charged with administering the gift to seek a judicial broadening of the gift purposes on grounds of efficiency. That effort was denied, though the case provides ample fodder for discussion of a “wasteful” trigger for cy pres. See, e.g., Principles of the Law of Nonprofit Orgs. § 240 reporter’s note 5 (Preliminary Draft No. 3, 2005) (discussing the Buck trust case). It should be obvious at this point that both parties in the Princeton dispute would take issue with this characterization.

unclear. Such liberalization should also influence nonjudicial decision making. Interaction with the state attorney general—the primary party charged with enforcing the organization’s compliance with its fiduciary duties—is just one example.

In this regard, the more liberal doctrinal acceptance of modifying donor directives should “grease the wheels” when it comes to the recipient organization’s dealings with the state attorney general. The “grease” comes in the form of the new starting premise; namely, that the donor possessed a general charitable intent notwithstanding her specific directives. This premise, plus the addition of a “wasteful” trigger for invoking *cy pres*, should also make the prospect of “tweaking” dead-hand controls less offensive and less likely to generate a public backlash (both an organizational and attorney general concern).

Once a modification trigger is reached, moreover, negotiations should also proceed more favorably by virtue of the wider latitude granted by the “reasonably approximates” versus traditional “as near as possible” wording of the permissible modifications. The organization’s proposals for alternative uses of the restricted assets may thus appear more palatable to an attorney general when considering the state’s position on a proposed change in the use of restricted charitable assets. This prospect, in turn, should reduce the need for organizational management to take an aggressive stance in its own unilateral interpretation and implementation of the donor’s restrictions, particularly as identifiable changed circumstances begin to heighten the motivations for doing just that.

From a donor’s perspective, the noted doctrinal liberalization might solidify the move towards evermore detailed donor-charity gift agreements. From the recipient organization’s perspective, these doctrinal liberalizations should inspire more concentrated efforts to incorporate some endorsement of the organization’s broader mission into the donor’s statement of purposes—even where all parties agree that a more limited purpose is the primary objective. Such efforts are both consistent with managerial fiduciary responsibilities and could later—in the face of changed circumstances—serve to open many otherwise restrictive doors by permitting a court to find confirmation that a donor looked favorably upon the recipient organization and its broader mission. It thus seems clear that in the end, decisions must reflect the gift’s beginnings, and in the beginning, decision makers must contemplate the gift’s potential end.