



PHILANTHROPY IN ESTATE PLANNING: DONOR INTENT

**Presented to the Chester County Estate Planning Council
West Chester, PA**

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Hershey's Mill Clubhouse (5:30 cocktails/6:15 buffet/7-8 panel)

with

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TOPICS:

- 1. to discern how and when to consider including philanthropy in the client estate planning process**
- 2. to understand the roles, perspectives and needs of the client/donor, the advisor, and the charity**
- 3. to understand a range of possible ethical concerns, attorney loyalty to client interest issues, conflict of interest, and donor intent issues**
- 4. to outline key elements of the gift agreement**
- 5. to understand various gift vehicle options**

DONOR INTENT IN TESTAMENTARY GIFTS: Legal Lessons and Practical Advice

Kathryn W. Miree, Esq., May 2010

I. Donor Intent

A. What is Donor Intent?

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

1. The Broadest Definition

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

2. A Legal Definition

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

B. The Parties Who Define Intent

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

1. *The Donor*: The donor originates, plans, contributes the property and completes the transaction. It is only during this process that the donor can define how the gift is to be used. Once the gift is complete, it is out of the donor’s hands and he no longer has any rights to direct the use of the property. If the donor retains the right to control or direct the application of the gift assets, the gift is not complete.

2. *The Donor’s Advisor*: The donor’s advisor also plays an important role in defining donor intent since it is generally the advisor’s job to translate the donor’s goals into a completed gift and to incorporate that intent into a written gift agreement.

3. *The Charity*: The charity generally has the opportunity at the creation of the gift to clarify donor intent and ensure it is reduced to writing. The charity has significantly more influence, however, since it controls the gift after completion. A charity may be bound by a written agreement or it may choose to follow the directives relayed to it orally in the gift transaction. This “interpretative” role may ebb and flow with the transition of staff.

4. *The Attorney General.* The Attorney General of each state is generally charged with the protection of charitable interests. Conceivably, the Attorney General could weigh in to enforce the use of a gift. In practical terms, this is a rare occurrence due to manpower limitations and far more egregious issues confronting the Attorney General's office.

5. *The Courts:* The courts are the ultimate arbiter. To engage the court, however, a litigant must have standing to sue. Many courts do not recognize a donor's right to sue once he or she has parted with the gift.

II. Perspectives in the Planning Process

A. The Donor's Perspective

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

1. *The donor is generally focused on a particular program and a specific result.* For example, a donor may be excited by a "Success by Six" program, which is an early intervention program for children at risk of falling behind in the educational system sponsored by United Ways across the country. The donor may want to leave a gift to "Success by Six" in a specific city or county in perpetuity. Over time, Success by Six may be incorporated by a larger early childhood education effort, may disappear, or may no longer be needed because of changes in the educational system. This change may occur as quickly as five years down the road or as late as 30 years after the gift. The better way to express the gift might be for "early childhood education", for "early education for disadvantaged youth (which should be defined in some way), or in some broader fashion. The gift can always reference the "Success by Six" program as an example of such a program.

2. *The donor is not likely to anticipate social or cultural changes that may impact the need for a gift.* Consider a gift made in the 1950s to support a home for unwed mothers. In the 1950s, the Salvation Army and other charities ran homes to shelter (and keep from public view) mothers who were pregnant out of wedlock. By the 1980's and 1990's, those homes no longer existed because society no longer perceived mothers with out-of-wedlock children as social pariahs. Homes for unwed mothers went out of business because they were no longer needed. It would have been impossible for a donor in the 1950's to believe such a change could have occurred in such a short period. Yet it did. In this case, the gift was a part of a community foundation, and that foundation's board had a *cy pres* power to reapply the funds to as similar a purpose as possible.

3. *Donors sometimes express gifts in a manner that is illegal or unconstitutional.* Donors who have strong personal opinions may express those in a gift restriction. One example from personal experience involved a trust creating an independent school that limited students to white boys. These restrictions were quickly removed to accommodate a broader student pool.

4. *Donors are reasonable people and respond well to an education on these issues.* While donors come to the table with a specific set of goals and expectations about a gift, they generally respond well an education on the limitations of the approaches set out above. The conversation may occur in the professional planner's office or in the charity's development office.

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

B. The Planner's Perspective

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

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

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

- *Appropriately expressing the gift goals and providing flexibility.* The planner must not only help the donor articulate his or her goals, but must be able to reduce those to writing. The most effective expression of gift intent will also anticipate change and allow modification if necessary. If possible, the document should include language that includes the donor’s motivation in creating the gift, its measures for success, and the broad impact envisioned in the planning stage to provide guidance to later generations.

- *Selecting a gift form that best achieves the donor’s goals and objectives.* This is the area highlighted by most planners, in which outright gifts, bequests, charitable remainder trusts, and charitable gift annuities are considered.

- *Selecting the best gift timing.* This is another area of planning emphasis. Should the gift be executed today, next year, or at death?

- *Selecting the best asset with which to fund the gift.* Many planners also rightly take the donor through a consideration of the most appropriate asset. Should he use cash, should he redeem savings bonds, or is a vacation home the best asset?

- *Creating an effective gift – one that can be properly administered and executed.* Too often, the charity is not consulted in the planning. A restricted gift must fit within the charity’s mission, comport with its gift acceptance policies, and fall within its administrative abilities. If the donor prefers to remain anonymous until the gift is complete, take the gift concept to the charity without revealing the client’s name.

C. The Charity’s Perspective

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

1. Establish Standards and an Evaluation Process: Charities will have a difficult time evaluating the appropriateness of a gift and its design without clear, written policies to guide that decision making. The gift policies should go beyond the types of assets accepted or gift forms permitted. The policies should include ethical guidelines governing donor involvement and representations made to that donor³⁴ as well as a discretionary process involving parties key to the gift acceptance process (for example, the chief financial officer, chief development officer, planned giving officer, and top volunteer) that raises and answers questions that help the charity think through the gift impact. Discretionary questions include:

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

Add any additional questions specific to the charity. After review and decision, reduce the committee’s conclusions to writing and make that decision a permanent part of the gift file.

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

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

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

4. Keep Good Records: The charity should keep good records. Permanent records should include:

- *The gift document*, whether that is a will, a revocable trust with testamentary provisions, a beneficiary designation with restrictions, an endowment agreement or a gift agreement defines the restrictions and use of the gift
- *Court orders affecting the gift.*

Upon probate. Sometimes the charity learns of a gift for the first time when the donor's will is probated and the bequest is revealed. When the purposes of a gift are ambiguous or unclear, the probate court should be petitioned to clarify the use of the gift.

Upon petition of the court during the administration of the gift. Courts may issue rulings affecting the gift upon petition of the charity or Attorney General, years after the gift's establishment.

Upon court settlement. Gifts may result from the settlement of a lawsuit. For example, in a settlement of a lawsuit involving Nine West, funds were distributed to states and through those states to charities to be used for certain purposes. A local women's fund received a large distribution to be devoted to support of women and children.

- *Notes from discussions with the donor* and the donor's advisor in establishing the gift.
- *Periodic accountings* on the use of the gift.

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

III. Executing the Plan through the Gift Agreement

A. The Goals of the Gift Agreement

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

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

While gift agreements are often used in current gifts where the donor has specific goals they are equally – if not more – important in testamentary gifts. When donors make current gifts, the donors are there to watch over the charity and its use of the funds. With testamentary gifts, the donor is not there to monitor the application of funds, and without a clear directive in a gift agreement, there is a risk – especially long-term – the fund application may vary from the donor's goals.

B. The Key Elements

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

1. *Fund Name.* The name may include the donor's name, the donor's family name, or a fund purpose.
2. *Amount/asset to be contributed to fund the gift.* (If additional assets are to be contributed, list amounts and timing of anticipated subsequent distributions.) A commitment to made additions may or may not be binding, depending upon how the agreement is structured. However it is difficult to assess the long-term effectiveness of a gift without discussing its ultimate size.
3. *Donor goals.* Make sure the donor's broad goals and objectives are clearly defined in the agreement. In some cases it will be helpful to talk in terms of short-term and long-term goals.
4. *Directives on gift use.* Directives of a gift's use will vary, depending on the type of gift. For example, a scholarship gift might provide parameters for selection and even name a selection committee. Other gifts may simply define that the revenues are to be used for a particular program area.
5. *Recognition, if any, to be provided for the gift.* Specify:
 - a. *Type of recognition.* Will the donor's name be place on a building, on a chair designation, on a program? If so, does the gift size and type comport with recognition awarded donors who make similar gifts?
 - b. *Clear communication of minimum* required to receive the gift recognition outlined. Donors may fund a gift in stages. Initial gift may not constitute minimum levels.
 - c. *Timing of recognition and alternatives if the gift does not reach the anticipated funding level.* Recognition should generally be awarded upon reaching the designated level. Provisions should be for a gift that never reaches anticipated levels – such as a form of recognition at the highest level possible for the gift amount. Many things can happen to families and family assets over time – and the donor may not be in a position to fully fund the gift.
6. *Directives on accounting.* The document should specify whether the gift should have a separate accounting on fund balance, expenses, revenue generated, and revenue application. The charity should have a policy requiring a minimum dollar amount (for example, \$250,000 or more) at which a fund will have a separate accounting. Ensure the fund document does not require a level of accounting or process that will be expensive, labor intensive, or otherwise be wasteful. Negotiate an accounting process that protects the interests of all involved.
7. *Directives on reporting.* Accounting (above) refers to an internal alignment and tracking of funds. Reporting refers to an external communication of those results.
 - a. *Type of report required.* If the gift document specifies reporting, it should detail the type of report required. The requirement may be the fund balance and application of funds is to be included in the charity's annual report, or simply that living family members receive a copy of the fund accounting.
 - b. *Who receives the report?* If family members are to receive the report, the gift agreement should designate the individuals to receive the report, both currently and long-term. Short-term, individuals may be designated by name; long-term, individuals should be designated by position, family tier, and/or generation.
 - c. *Length of time to report.* Some gift agreements require reporting only during the donor and/or donor's spouse's lifetimes. Other extend several generations.
8. *Publicity.* Public recognition may be important to the donor, just as anonymity may be important. Seek permission for publicizing the gift, featuring a story on the donor and gift, and other anticipated forms of public recognition. Get the donor to approve recognition, direct anonymity, or specify the type of publicity that is permissible.
9. *Directives on Investments.* Investment restrictions can be the most cumbersome form of fund restriction. The charity should include permission for the following:
 - a. *Allow pooling with other like assets.* Pooling assets is the most efficient and effective way to manage long-term funds. Managing hundreds of small funds, each with its own investment objectives, is counter-productive.
 - b. *Allow investment of assets subject to the charity's then-applicable investment guidelines.* Investment strategies change with current economies, long term needs, and the applicable spending policy. When donors are given a choice, they have a tendency to impose personal investment guidelines and restrictions on charities. The gift document should clearly give the charity this discretion.

c. *Allow a spending policy in keeping with the charity's then-applicable spending policy for like funds.* The spending policy is generally set each year (or more frequently if circumstances require) and is based on both need, the economy, and investment returns. To invest the funds in a pooled manner, all funds should have the same spending policy.

10. *Flexibility to make non-judicial changes* ("Plan "B" and "Plan C"). Designing flexibility is at the heart of the gift agreement, and is perhaps the most difficult element to design and negotiate. Use creativity. Literally take the use of the gift through a progression of 5, 10, 30, 50 and 100 years to expand thinking about the evolution of the gift.

a. *Think through gift options.* This requires a discussion of the gift goals, gift measurement, and multiple ways those objectives might be achieved. The donor may have only one approach to achieving the gift goals; this discussion should expand that thinking making the case for the need for flexibility.

b. *Alternate program:* Specify purposes related to the gift that might serve as appropriate secondary beneficiaries in the event the original gift purpose is achieved, is no longer appropriate, or becomes impossible to achieve.

c. *Gift over.* Specify another organization to receive funds in the event the originally-named entity does not honor the gift terms. Consider the appropriateness of naming a group (by title, not individuals who may or may not be alive) to make this decision. After all, that secondary beneficiary may also be out of business or may not longer be considered accountable or effective.

d. *Provide for the use of institutional discretion.* The document may specify that the institution can exercise discretion to make changes when the gift has achieved its purpose, is no longer needed for that purpose, is no longer appropriate, is no longer possible, or a variation on those options. Name a group (by title, not name) who has the ability to make the determination that a change is necessary or the specified conditions have been met.

e. *Designate those parties who can make changes, the types of changes that can be made, and how those changes are to be effected.* The document should designate individuals responsible for making changes to the gift purpose. This group may be the same group set out in the paragraph above (who determine it is time to make a change) or it may be a different group. The document should also designate the type of changes that are appropriate without court approval, and what to do if there is conflict among the appointed group. Placing discretion in a group qualified to make those decisions based on the facts and circumstances at the time is a principal used in multi-generational trusts and makes those trusts effective long after the grantor is there to make decisions.

11. *Standing to sue.* While the charity may not want to include a "standing to sue" clause in its standard gift agreement, donor advisors may be interested in such a clause. Check state law to determine if this is legally possible and appropriate. If reserved, clearly specify who has that standing. Remember that generations change dramatically from one to the next in their perspectives on what is right, wrong, and necessary. Finally, ensure that any reservation is not so strong that it would cause the IRS to determine the donor had not relinquished control. If the reservation is untested, the advisor may want to seek a ruling.

12. *Termination.* The gift document should provide for non-judicial termination of the fund in the event the gift purposes are fully achieved or the gift is reduced to a *de minimis* level.

a. *Termination upon completion of gift purposes.* It is possible that a gift will achieve its intended purpose. While this is rare, the document should provide how the fund is to be terminated or where remaining funds are to be distributed in this event.

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

C. Contact the Charity When Drafting

Contact the charity who will be the beneficiary of the endowment gift to get a copy of the organization's standard endowment gift agreement and to ensure the gift purpose is appropriate and workable.

1. Standard Gift Agreement

Even if you have your own standard gift agreement, it is important to request a copy of the nonprofit's to determine if there is critical language that should be incorporated, or any unusual elements of endowment administration you should know more about.

2. Gift Purpose

Always discuss the gift purpose and goals with the charity to ensure the donor's goals fit the charity's mission, purpose, and priorities. Charities are sometimes forced to decline gifts that cannot be used, or create a deviance from program priorities and operations. If the donor wants to remain anonymous, simply discuss the gift goals and have the document reviewed and approved without revealing the donor's identify.

IV. Lessons Learned: The Ten Planning Rules

1. *Change is inevitable.* Understand that charitable institutions, their needs, and solutions for problems change over time. Change is certain. Where that change takes the charity is uncertain.

2. *Planning is essential for the long-term effectiveness of gifts.* The donor and the charity should make sure they understand donor intent, and the long- and short-term purposes of a gift. The exercise is not natural. Most of us shape our thinking by events, facts, and circumstances of today.

3. *Revel in the charitable vision, but design the gift to outlive the vision.* Advisors should begin this process with donors. What does the donor hope to achieve? What are the measurable outcomes? Set benchmarks, consider the gift/need's evolution and build in flexibility. Designate an informed – but independent group – to make decisions.

4. *The charity plays a critical role in the planning process.* Always make contact with the charity, obtain its standard endowment agreement if available. If the donor wants to remain anonymous, the advisor can seek the donor's permission to take the gift proposal to the charity on an anonymous basis.

5. *Charities must have gift acceptance policies that demand an evaluation of critical issues related to long-term gifts.* The policies should focus on the charity's mission, its programs, and its administrative abilities.

6. *Once the gift has been explored and decisions reached, the gift agreement should be reduced to a formal, written document.* Memories fade but words don't fade. Just make sure the gift agreement terms are clear, comprehensive and interpretable without donor explanation.

7. *The gift agreement should include Plans A, B, and C.* The best agreement will anticipate the impossible to imagine. What if the program is discontinued? What if the charity is dissolved? What if the charity merges with another charity? What if the fund produces more than is required by the original gift purpose? What if the funds are no longer needed for that purpose? Who will make the decisions about how changes are to be made? Under what circumstances does the donor want changes made without judicial intervention? Every donor may have different answers to these questions, but they should be asked and answered.

8. *Once the gift is completed, keep the documents in a safe place.* This seems obvious, but too many charities are unable to put their hands on key donor documents even 20 years after the gift – and have little chance of finding those documents after 50 or 100 years. Gift purposes become more a matter of folk lore than legal reality. (Institutional policies are the smartest way to ensure consistency.) Also keep records of planning sessions and donor conversations. These contemporary recorded observations may be valuable to later generations in interpreting donor intent. Some charities include these records as a part of board minutes (when the gift is reported and accepted) because these records are retained as a matter of law.

9. *Engage in regular communication with donors and their families.* Stewardship is important not only in maintaining good relationships – it may result in additional gifts to the charity. Most importantly, ongoing communication means there are no surprises that may result in conflict. The donor's descendants may not have the same goals, objectives, or perspectives as the donor. In fact, they rarely do. Sharing the donor's conversations, goals, and regular reports on how those objectives are met are powerful tools in managing expectations.

10. *Avoid crisis management.* When things begin to go bad – either because of disagreements with family members or an unanticipated turn in the road – address the issues early. In most cases, it will be beneficial to involve family or original advisors to provide input about options. Problems generally grow worse – and relationships deteriorate – when no action is taken. Just deal with it.

V. Final Thoughts

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

APPENDIX A
UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT
WITH COMMENTS
ADOPTED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS,
AT ITS ANNUAL CONFERENCE, AUGUST 4-11, 1972
SECTION 7. [Release of Restrictions on Use or Investment]

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

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

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

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

Comment

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

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

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

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

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

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

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

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

APPENDIX B
REVISED UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT APPROVED
JULY 2006, HILTON HEAD, SC
SECTION 6. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT,
OR PURPOSE

- (a) With the donor's consent in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.
- (b) If a restriction contained in a gift instrument on the management or investment of an institutional fund becomes impracticable or wasteful or impairs the management or investment of the fund, or if because of circumstances not anticipated by the donor a modification of a restriction will further the purposes of the fund, the court, upon application of the institution, may modify the restriction. The institution shall notify the [Attorney General], who must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.
- (c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the [Attorney General], who must be given an opportunity to be heard.
- (d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, [60 days] after notification to the [Attorney General], may release or modify the restriction, in whole or part, if:
- (1) the institutional fund subject to the restriction has a total value of less than [\$25,000];
 - (2) more than [20] years have elapsed since the fund was established; and
 - (3) the institution uses the property in a manner the institution reasonably determines to be consistent with the charitable purposes expressed in the gift instrument.

APPENDIX C

Status of UPMIFA Legislation <http://www.nacubo.org/x8911.xml> *States that have enacted UPMIFA*

Connecticut (S.B.1143) Submitted by the Banks Committee on 1/24/07. Hearing held on 2/20/07 by Banks Committee. The bill was favorably reported from the committee on 3/6/07. On 4/30/2007 the bill was filed with the Legislative Commissioners' Office. The Senate adopted the legislation (senate amendment [Schedule A 7303](#)) on 5/16/2007. The House passed the Senate bill on 5/22/2007. Governor Jodi Rell signed the bill into law on 6/5/2007. Effective on 10/1/2007.

Delaware (S.B. 139) Submitted by Senator Tony DeLuca (D-11, Senate Majority Leader) on 6/14/2007, passed by the Senate on 6/20/2007. Introduced in the House on 6/21/2007 and passed by the House on 7/1/2007. The bill was signed into law by Governor Ruth Ann Minner on 7/18/2007. Effective on 7/31/2007.

District of Columbia (Act 17-181) Introduced by Councilmember Phil Mendelson on 3/20/07 as B17-145. Signed into law by Mayor Adrian Fenty on November 19, 2007. Effective December 19, 2007.

Idaho (S. 1016) Introduced by Sen. Bart Davis (R-33, Senate Majority Leader) on 1/16/07, passed by the Senate on 2/1/07. Introduced in the House on 2/2/07, amended and then passed the House on 3/12/07. The amended bill passed the Senate on 3/15/07 and was signed into law by Governor Butch Otter on 3/26/07. Effective 7/1/2007.

Indiana (H.B. 1505) Introduced on 1/23/07 by Rep. Ralph Foley (R-47) and Rep. Jeb Bardon (D-25), passed by the House Committee on Financial Institutions on 2/15/07. The House passed the legislation on 2/26/07. The House legislation was introduced in the Senate by Senators Bray (R-37) and Simpson (D-40), and was referred to the Senate Committee on Insurance and Financial Institutions, which approved the legislation on 3/22/07. The full Senate approved the legislation on 3/27/07. Governor Mitch Daniels signed the bill into law on 5/11/07. Effective 7/1/2007.

Montana (S.B. 424) Introduced by Sen. Lynda Moss (D-26) on 2/3/07. Hearing held by Senate Judiciary Committee on 2/19/07. The Judiciary Committee passed the bill on 2/21/07 by a vote of 11-0. The legislation passed the Senate on 2/27/07 and was transmitted to the House. The House Judiciary Committee held a hearing on the legislation on 3/29/07 and approved a modified version of the bill on 4/3/07. The full House approved the legislation on 4/4/07. On 4/21/07, the Senate adopted the revised legislation that passed the House. Governor Brian Schweitzer signed the legislation into law on 5/3/07. Effective 5/3/2007.

Nebraska (L.B. 136) Introduced by Sen. Mike Flood (D-19, Speaker of the Legislature) on 1/8/07. Hearing held by Committee on Banking, Commerce and Insurance on 2/6/07. Bill unanimously approved by the committee on 2/6/07, without amendment. The bill was adopted by the legislature on 3/14/07 and signed into law by Governor Dave Heineman on 4/4/07. Effective 9/1/2007.

Nevada (S.B. 70) Introduced by Senators Terry Care (D-7) and Mark Amodei (R-Capital) on 2/6/07. The Senate Judiciary Committee held a hearing on the legislation on 2/27/07, where it was adopted. On 3/7/07, the bill was passed by the Senate by a vote of 21-0. On 3/8/07, the bill was received in the Assembly and referred to the Committee on Judiciary. Bill unanimously approved by the committee on 5/3/07, without amendment. The bill was adopted into legislature on 5/7/07 and signed into law by Governor Jim Gibbons on 5/14/07. Effective 10/1/07.

Oklahoma (H.B. 1596) Introduced by Representative Rex Duncan (R-35) on 2/5/07. The bill was referred to the Judiciary and Public Safety Committee, and discussed by its Civil Justice Subcommittee on 2/12/07. On 3/5/07 the measure was passed by the Judiciary and Public Safety Committee. Passed the House on 3/12/07 and transmitted to the Senate. On 4/4/07, the bill was approved by the Senate Judiciary Committee. The bill was signed into law by Governor Brad Henry on 5/7/07. Effective 11/1/2007.

Oregon (H.B. 2905) Submitted by the House Committee on Judiciary on 3/1/07 and referred to the Committee on Judiciary. A committee hearing was held on 3/20/07. The House passed the bill on 5/14/07 and the Senate passed the bill on 6/5/07. The bill was signed into law by Governor Ted Kulongoski on 6/22/07. Effective 1/1/2008.

South Dakota (S.B. 89) Introduced on 1/19/07 by Sen. Dave Knudson (R-14) Senate Judiciary Committee held a hearing on the bill on 1/24/07 and passed the legislation unanimously. On 1/29/07 the Senate approved the bill 35-0. The bill was subsequently considered and adopted by the House Commerce Committee on 2/12/07 by a vote of 12-1. The bill was passed by the House on 2/21/07, and signed into law by Governor Mike Rounds on 3/2/07. Effective 2/22/2007.

Tennessee (S.B. 691 and H.B. 1621) Introduced by Senator Dewayne Bunch (R-9) on 2/7/07 and Representative Doug Overbey (R-20) on 2/14/07. S.B. 691 has been referred to the Senate Commerce, Labor and Agriculture Committee. On 5/8/2007 the bill passed unanimously in the House and Senate. Governor Phil Bredesen signed the bill into law on 5/18/2007. Effective on 7/1/07.

Texas (H.B. 860) Introduced by Rep. Ken Paxton (R-70) on 1/25/07. A public hearing was held on 2/26/07 in the House Committee on State Affairs, which subsequently adopted the legislation by a vote of 7-0. The bill passed the House Committee on State Affairs on 3/13/07. On 5/28/07 the bill was signed in the Senate unanimously. Governor Rick Perry signed it into law on 6/15/07. Effective on 9/1/07.

Utah (S.B. 60) Introduced by Senator Lyle Hillyard (R-25) 1/22/07. The legislation passed the Senate on 2/2/07 and the House on 2/20/07. Governor Jon M. Huntsman signed the bill into law on 3/7/07. Effective on 4/30/2007.

Virginia (H.B. 951) Introduced by Delegate Sal R. Iaquinto (R) on 1/08/2008. The legislation passed in the Senate on 2/18/08 and in the House on 2/20/2008. Governor Tim Kaine signed the bill into law on 3/5/2008.

West Virginia (H.B. 4080) Introduced on 1/17/2008 by Delegates Pino, Blair, Guthrie, Reynolds, Walters and Frederick. Passed by the House Finance committee on 2/19/08 and the Senate Finance committee on 3/5/2008. Governor Joe Manchin signed the bill into law on 3/15/2008. Effective June 15, 2008.

States That Have Pending Legislation

Alabama (H.B.927) Introduced by Representative Demetrius Newton (D-53) on 5/17/2007. Bill will be reintroduced in 2007-2008 session.

Kentucky (H.B. 515) Introduced by Scott Brinkman (R-32) on 2/15/07 and referred to the House Judiciary Committee. Bill will be reintroduced in 2007-2008 session.

Michigan (S.B. 0393) Submitted by Senator Gretchen Whitmer (D-23) and referred to the Committee on Economic Development and Regulatory Reform. On 4/18/2007 it was reassigned to the Committee on Judiciary. Bill will be reintroduced in 2007-2008 session.

Minnesota (S.F. 1406 and H.F. 1499) The Senate bill was introduced on 3/1/07 by Senator Scheid (DFL-46) and referred to the Senate Judiciary Committee. The House legislation was introduced on 3/1/07 by Representative Hortman (DFL-47B) and referred to the House Committee on Commerce and Labor. On 5/21/07 the House returned it to the Committee for review.

Missouri (H.B. 1038) Introduced by Trent Skaggs (D-31) on 3/1/07. On 5/18/2007 the House referred the bill to the Special Committee on Financial Institutions. Bill will be reintroduced in 2007-2008 session.

Vermont (S. 0161) Introduced by Senator Vincent Illuzzi (R-VT) on 3/1/2007. The bill is currently held in the Senate Judiciary Committee. Bill will be reintroduced in 2007-2008 session.

U.S. Virgin Islands (29-0339) Bill was introduced. No hearings set.

Studies are being held in the following states: **Georgia, Kansas, North Carolina and Pennsylvania.**