Legal Backgrounder

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RECENT "DONOR INTENT" LAWSUITS RAISE ISSUES FOR CHARITABLE GIVING

by

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Cases are being litigated all over the country regarding the question of "donor intent" and the use to which nonprofit institutions are putting charitable donations. Often it is the heirs of such donors who raise the issue of whether the donors' intentions are being honored. In turn, the charitable recipients of the funds question whether the heirs are entitled to involve themselves in the details of the manners in which the charitable institutions meet the donors' restrictions. The following question arises: which parties are better able to interpret the terms of these very old gifts – the institutions that have been administering the gifts for many years, often with great success, or heirs of the donors who want to defend their ancestors' motives and ensure that such motives are being respected? Recent ongoing litigation involves the defense by charitable organizations of their use of long-standing donor funds decades and sometimes centuries after such gifts have been made. In three publicized cases involving prestigious American universities, heirs are taking the recipients of donors' gifts to court with the claim that "donor intent" is being violated.[1]

One great challenge the plaintiffs in such cases often face is the length of time that has passed since the time at which the gift was made by the donor. The nonprofit defendants question whether the donor's heirs, when they are generations removed, have any more insight into the donor's intent than the institution to which such gift was made, or whether such heirs merely are guessing at what their ancestor would have wanted in changing times and raising issues unlikely to have disenchanted the donors with the institutions to which they were so loyal. Heirs are alleging deviations from the donors' gift restrictions which the defendants argue are not substantial enough to have caused the donors to retract their gifts. According to the nonprofit institutions, most reasonable donors would expect, for example, that one hundred years after their gift was made, circumstances will have changed enough to allow the gift recipient slight deviation from the original "project," assuming such divergence is as much within the spirit of the gift as possible.

On the other hand, when donors are no longer around to ensure that the restrictions they have placed on their gifts are being followed, the heirs logically are the next-best people to enforce such restrictions. Moreover, philanthropy generally is better served when donors can rest easy that they are able to donate to

[1]In order to qualify for a tax deduction for a charitable contribution, a taxpayer's transfer to a charitable organization must constitute a "contribution or gift" as defined in Section 170 of the Internal Revenue Code of 1986, as amended. Although Section 170 does not define the term "contribution or gift," authorities generally agree that a contribution or gift must be a voluntary transfer of money or other property without present or anticipated receipt by the donor of more than a purely incidental economic consideration or other benefit in return.

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charitable organizations with the assurance that a court will enforce the conditions under which they have given such gifts.

Recent media coverage portrays an environment of donors and heirs angry about gifts not being spent as the donors have dictated. However, the media fails to make it clear that such litigation, even though lately arising more often, is not widespread and in fact is rare. However, although this type of portrayal does a disservice to philanthropy generally, it just might result in donors and the institutions to which they give working even better with each other. The two parties are not adversaries. It possibly is the case that if the donors in many of these donor intent cases were living, they would be grateful for the expert management of funds which the institutions have provided, would give their blessing to the actions taken by the institutions and would embrace the change through which the institutions must go. After all, fiduciary discretion has been entrusted to these charitable organizations by loyal donors supportive of their general cause. On the other hand, nonprofit institutions need to take note of the ongoing litigation and learn from it when it comes to ironing out all details at the beginning of a relationship with a donor. As the courts deal with three ongoing cases involving universities, American philanthropy undoubtedly will be affected.

Robertson v. Princeton University. In a case involving Princeton University, relatives of Marie Robertson are suing the University to narrow the mission and take control of the Robertson Foundation (a governance mechanism the donors established to administer the gift). Plaintiffs argue that Princeton has strayed from the plan agreed to by the University and the Robertsons in 1961. Plaintiffs have asked a New Jersey court to transform the Foundation from a supporting organization committed to the Woodrow Wilson School of Public and International Affairs graduate program at Princeton into a private foundation.[2] The lawsuit, filed in July 2002, alleges that the University has ignored the intent of the donors not only by failing to honor the Foundation's mission, but also by using Foundation funds for projects unrelated to the Foundation's mission and commingling Foundation assets with those of the University by taking over control of the endowment.

The Robertson Foundation effectively is controlled by Princeton University, which appoints four of the seven-member board of trustees of the Foundation. However, the donors and University negotiated upon the making of the gift the control that the University would have and agreed that the University should have such control in order to commit to the Foundation long-term. The Certificate of Incorporation and Bylaws of the Foundation drafted by the Robinsons give Princeton permanent control. The Foundation's objective, as stated in the Certificate, is to improve facilities for the "training and education of men and women for government service." The Plaintiffs construe this purpose in disagreement with Princeton with respect to how Foundation funds should be used to prepare students for careers in government and public affairs.

The Foundation Board has performed with the same mission in mind for over forty years without question from the Robinson Family. Indeed, the original trustees included one of the donors and the attorney who negotiated the Certificate between Princeton and the donors, and both these persons participated in the activities of the Foundation for years without objection regarding its activities. Princeton has increased the value of the Foundation from an original donation of $35 million to a current value of $850 million and, in the past three or four years, the very investment strategy questioned by the Plaintiffs has increased the Foundation's value by more than $300 million. Nevertheless, Princeton has spent over $20 million in legal fees to defend its actions with respect to the world class program it has developed.

Plaintiffs, in arguing that funds are not being used as the original donor intended, cite the Donor Bill of Rights, developed by the nation's largest membership organizations for fundraising professionals, which states that "donor intent" is one of the primary "ethical standards and principles … for maintaining the

[2]*See Robertson, et al v. Princeton University et al.*, Docket No. C-99-02, Superior Court of New Jersey, Chancery Division (July 2002).

public's trust."[3] The Donor Bill of Rights also states that contributors to charity have the right "to be assured their gifts will be used for the purposes for which they were given." The plaintiffs believe that Princeton has deviated from these purposes.

Last October, the court ruled on pretrial motions, granting two motions brought by the University, finding that the court should hear and decide all remaining issues in the litigation and denying plaintiffs' request for a jury trial. A New Jersey Superior Court Judge has pushed the trial date to a date in early January, 2009. The trial is expected to take four months to a year. The case likely will continue to hold the attention of the philanthropy community as charitable organizations wait to hear the Court's interpretation of donor intent years after a gift was made.

Howard v. Tulane University. In May 2006, two great-great-nieces of Josephine Louise Newcomb filed suit against Tulane University, alleging that the University has violated the endowment that Newcomb gave to create Tulane's H. Sophie Newcomb Memorial College. Students and alumni of Newcomb College take credit for finding the remote heirs of the donor who now serve as plaintiffs. Josephine Newcomb endowed the College in 1886, donating funds for the express purpose of advancing "the cause of female education in Louisiana by establishing and maintaining 'The H. Sophie Newcomb Memorial College' in the Tulane University of Louisiana, for the higher education of Girls and young women." Plaintiffs seek to restore the College, which Tulane folded into the larger university in the aftermath of Hurricane Katrina, claiming that Tulane has violated Newcomb's specification that the money be used for the higher education of girls and young women. Tulane has formed the College into a new entity – a Newcomb "institute" – and plaintiffs question Tulane's right to do so.

In June 2006, the lower court denied the heirs' request for a preliminary injunction.[4] The Louisiana Fourth Circuit Court of Appeals then issued a 2 to 1 decision in favor of Tulane, ruling that Newcomb's great-great-nieces had no standing to challenge Tulane's decision to discontinue the Newcomb College as a separate, all-women's college.[5] The Louisiana Supreme Court heard the case on July 1, 2008, ruling that "Louisiana law grants a would-be heir or legatee standing to enforce a condition of a donation." This decision may force Tulane to reinstate Newcomb College, as the case was sent back to the lower court for adjudication, where the plaintiffs will have to amend their petition to more accurately establish their standing as would-be heirs of Mrs. Newcomb. The Court ruled that until the plaintiffs prove they indeed are Newcomb's heirs, they do not have standing to sue. The Court did not rule on whether the will put conditions on the donation.

Dodge v. Randolph College. In Virginia, students, alumnae and donors of Randolph College, a small liberal arts college formerly known as Randolph-Macon Women's College, recently sued the college to permanently prohibit it from selling off valuable pieces from its art collection, some of which were acquired with funds from a 1928 bequest of artwork along with money to buy more.[6] In 1928, a former art professor at the institution, Louise Jordan Smith, donated the money and other pieces of art. The money was used to buy artwork now valued at more than $40 million. The College asked the Virginia courts to declare that it has the authority to sell items that were purchased with funds from the 1928 bequest. The suit also involved the College's admission of men, despite no specific donor restriction related to single sex education. In addition, at issue was the discretion of the College on which artwork it is able to sell from a

[3] *Id.*, citing the Association of Fundraising Professionals.

[4] *See Howard v. Administrators of the Tulane Educational Fund*, unreported, Civil District Court, Orleans Parish, No. 2006-4200, Div. B-15.

[5] *See Howard v. Administrators of the Tulane Educational Fund*, 970 S. 2d 21 (Ct. App. 4th Cir. Oct. 22, 2007).

[6] *See Dodge, et al v. Randolph College*, Lynchburg Virginia Circuit Court (Oct. 23, 2007).

collection funded with a gift of money.

The Virginia Supreme Court issued its ruling on June 6, 2008.[7] In a 5-2 decision, the Virginia Supreme Court ruled that the College did not break a contract with female students when it decided to enroll men and rejected the claim that promotional materials and other publications promised such females an all-female institution. The Court also in a separate ruling unanimously rejected the claim that a state law governing charitable trusts prohibits the school from raising money for single-sex education and then spending it on coeducation, finding that the school's fundraising is governed by separate corporate law.

What Next? What do these challenges mean for donors and charitable organizations? For charitable organizations, the challenges imply an inherent struggle between following donor restrictions to the letter and maintaining the necessary authority over their own programs in accord with changing times. With today's donors wanting more hands-on involvement with their donations, charitable organizations will have to accommodate the donors' interests. Organizations also must be more up front with donors at the time of the gift regarding potential changes in the organizations' structures and changes in the organizations' served populations and goals over time.

If the educational institutions in the above cases prevail, their success potentially could have a chilling effect on donations from donors who wish to restrict their gifts. On the other hand, if the donors' heirs prevail, institutions might be hesitant to put gifts to the uses their trustees have decided to put them and to put as much trust in their own discretionary authority. The result of the efforts and administration that the institutions have expertly provided to funds entrusted to them by donors will be questioned. In such cases, the causes and people who benefit from the donors' charitable donations and the institutions' use of the funds are those that will suffer the most.

The only clear solution on a going-forward basis seems to be to make the terms of gifts clearer. Many years ago, donations often were made on a handshake. With adept drafting today, donors should consider up front and address on paper what shall be the outcome if the institution to which they are donating is unable to fulfill every last detail. Quite likely such donors will be willing to negotiate the terms of their gifts to suit the ever-changing needs of the institutions which the donors value enough to give to in the first place.

[7] *See Dodge, et al. v. Randolph College*, 661 S.E. 2d 801 (Va. 2008).

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