2005

Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad

John K. Eason

U.C. DAVIS LAW REVIEW

University of California Davis

VOLUME 38 FEBRUARY 2005 NUMBER 2

Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad

John K. Eason[*]

This Article explores the problems that often result from a charitable naming opportunity contribution. A charitable naming opportunity contribution exists when a donor transfers money or property to a charitable organization upon terms that result in an individual's name being associated in some way with the organization, its institutions, activities, or facilities. Implementing such arrangements can become problematic as circumstances change over time. Matters considered here include the meaning of "charity" as affected by a donor's personal desire to perpetuate a name. This Article also highlights the quite varied doctrinal analyses that may apply when deviation from the precise terms of a charitable naming arrangement is suggested. The enduring nature of naming agreements, imprecise donor-charity dealings, malleable equitable

[*] Associate Professor of Law, Tulane Law School; Visiting Assistant Professor of Law, University of Florida College of Law Graduate Tax Program (1999-2000). LL.M. (Taxation) 1999, University of Florida College of Law; J.D. *summa cum laude* 1992, Duke University School of Law; B.S. *cum laude* 1989, University of North Carolina at Chapel Hill. Member: North Carolina State Bar, North Carolina Bar Association, and American Bar Association. Formerly with the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Greensboro, North Carolina. The author expresses sincere gratitude for the support of Dean Lawrence Ponoroff, Vice-Dean Steve Griffin, Marjorie Kornhauser, Cynthia Samuel, David Snyder, and the faculty of Tulane Law School. Special thanks also goes to the author's able research assistants, Rachel Brown, Erin Houck, Megan Levens, and John Work.

doctrines, and the vagaries facilitated through reverence to donor intent are shown to contribute to this variability. Specific examples are employed to demonstrate relevant points. Those examples include the well-publicized, but as yet unresolved, charitable naming dispute over the Lincoln Center's Avery Fisher Hall. Also considered is the modern spate of philanthropically inclined, but ethically challenged, "bad actors" whose notorious names now adorn various charitable facilities and institutions across the nation. This Article ultimately presents suggestions for dealing with both existing and future charitable naming arrangements where some deviation from the original charitable naming scheme is suggested.

"[P]erpetuity in the fund-raising world is a very short time."[1]

TABLE OF CONTENTS

[1] Editorial, *What's in a Name*, N.Y. TIMES, May 23, 2002, at A1. The quote reflects reaction to a dispute over the possible removal of donor Avery Fisher's name from the Lincoln Center's philharmonic concert hall despite a 1970s agreement contemplating perpetual use of the name. For a discussion of the dispute over the naming of Avery Fisher Hall, see *infra* Part VII.

I. THE MULTI-FACETED NAMING BARGAIN

Persons contributing funds to charity often enjoy the prerequisite of a "naming opportunity" in return for their donation. Some naming opportunities may seem insignificant — for example, the donor's name on the back of a seat in a theater, or on a brick in a walkway outside an institution.[2] Though nominal in terms of recognition, these "lower end" naming opportunities can be quite effective in motivating broad-based community financial support and providing a sense of ownership for those so publicly supporting a charitable endeavor.[3] Other naming opportunities may be grand in scale and absolutely critical to the success of a charity's efforts to accomplish a given objective.[4] Familiar examples include the multi-million dollar founding gift for a new hospital or campus building, or perhaps for a less tangible institute, center, or school that transcends any single bricks-and-mortar edifice.[5] As a general

---

[2] The prerequisite of having a donor's or a donor's loved one's name placed on a memorial brick, theatre seat, etc., has become common in the charitable fundraising world. New York's Lincoln Center, for example, promotes on its website the prospect of "[h]onoring a loved one by having a memorial nameplate affixed to the back of a seat in Avery Fisher Hall." *See* http://www.lincolncenter.org/supportLC/mgfs.asp?session (last visited July 19, 2004). Other charities offer similarly creative, small-scale opportunities. *See, e.g.*, Eric Gibson, *Giving Without Giving a Darn Who Gets the Credit*, WALL ST. J., Aug. 3, 2001, at W13 ("[The] naming . . . idea has . . . been 'leveraged' by fundraisers to absurd levels. It is commonplace to find not just an institution bearing the name of a donor, but wings, rooms, individual seats . . . [and] even steps on a staircase . . . ."); Mike Murphy, *Workers Set Up The Stage For a Performance at the $43 Million Ford Community and Performing Arts Center*, DETROIT NEWS, Feb. 21, 2002, at D3 ("Dearborn [Michigan] is offering theater seats, bricks and trees to people willing to exchange a donation for the opportunity to have their names emblazoned on a piece of the [new Performing Arts Center] project."); Kathleen Teltsch, *The Memorial Alumni Boulder — Colleges are Naming Anything and Everything to Get Donors' Bucks*, S.F. CHRON., July 4, 1993, at 5 (noting opportunity to name individual locker in college men's football team locker room for $1,000).

[3] John D. Colombo, *The Marketing of Philanthropy and the Charitable Contribution Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 699 (2001) (noting this "ownership" aspect); J.R. Brandstrader, *Your Name Goes Here: From Benches to B-schools, It's a Buyers Market for Monikers*, BARRONS, Dec. 8, 2003, at 30 (identifying "lower end" naming opportunities to include bridges, bricks, park benches, and even trees at $250).

[4] *See, e.g.*, Mike Boehm, *Performing Arts Center Tries Plan B*, L.A. TIMES, Apr. 19, 2000, at B1 (noting Orange County, California's pursuit of $50 million naming gift as cornerstone of $200 million campaign to build two new concert halls).

[5] *See* Brandstrader, *supra* note 3, at 30 (discussing significant naming opportunity gifts such as, among others, $35 million for Mendoza College of Business at Notre Dame, $10 million for alternative medicine institute at Harvard Medical School); *see also* Karen Herzog, *Last $17 Million is the Hardest*, MILWAUKEE J. SENTINEL, Feb. 5, 2001, at 1A (providing extensive list of naming opportunities and prices relating to $100 million expansion of Milwaukee Art Museum); Elizabeth Mullener, *The Power of Giving*, NEW ORLEANS TIMES-PICAYUNE, June 14, 1999, at A1 (listing naming opportunity prices at

matter, society often considers the fact that each of these enterprises will bear the name of its most generous benefactor to go hand in hand with the charitable mission supported by the contribution.[6] This is so regardless of whether such contributions are the result of altruism, vanity, a desire for immortality, or some blend of these and other factors.[7] Whatever the donor's motivation, the longstanding and increasing prevalence of this fundraising technique suggests that the ability to sell naming opportunities facilitates the flow of private funds into charitable coffers.[8] The technique is at least 5000 years old.[9] As one

several New Orleans area universities).

[6] Naming opportunities have been described as "a time-honored way of getting public credit for a generous gift." Sarah Bryan Miller, *Symphony Needs to Think Big (as in Bucks)*, ST. LOUIS POST-DISPATCH, Nov. 12, 2000, at C4; *see also* 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.").

[7] Altruism is certainly one possible explanation for such gifts, with the name recognition a noncritical perquisite. *See, e.g.*, Susan Cheever, *Giving Is One Thing, but Charity's Another*, NEWSDAY, Nov. 13, 2002, at B2 (discussing merits of anonymous giving in current environment of naming opportunities); Gibson, *supra* note 2, at W13 (discussing altruism versus vanity in case of naming opportunity gifts); Patrice M. Jones, *Gift Has Name For It*, CHI. TRIB., Jan. 10, 1999, at C1 (discussing naming opportunities but also pointing out recent $300 million gift to Vanderbilt University, for which donors "asked for nothing in return"). In fact, many naming opportunities are requested by the charity, rather than the donor, on the theory that the donor's support lends credibility to the fundraising project. *See* Gibson, *supra* note 2 at W13 (noting that "naming serves a useful purpose," then quoting executive director of IUPUI's Center on Philanthropy to explain that "[t]he person who makes that big gift adds credibility to the project, . . . [and if he is willing to go public] the institution can use that gift for leverage"); Muchnic, *supra* note 6 at F1 (quoting charitable consultant as stating that "[w]e have been in the position of asking people who prefer to give anonymously if we could reveal their identities. . . where we think it would have a good effect").

Professor Colombo provides a thorough review of the sociological, psychological, and economic perspectives on "pure" altruism in connection with naming gifts as part of his consideration of the tax implications of such transactions. Noted motivations for such giving include reputational enhancement, derivation of personal pleasure through enhancing the welfare of others, and "a desire to purchase some measure of immortality." Colombo, *supra* note 3, at 668-78; *see also* Eric A. Posner, *Altruism, Status and Trust in the Law of Gifts and Gratuitous Transfers*, 1997 WIS. L. REV. 567, 572-85 (1997) (discussing altruism, status enhancement, and other donor motives); David R. Unruh, *Death and Personal History: Strategies of Identity Preservation*, 30 SOC. PROBS. 340 (1983) (discussing ways in which people can use gifts and devises to shape and preserve their identities).

[8] For a discussion regarding the importance of naming opportunities as a fundraising technique, see Herzog *supra* note 5 at 1A (noting that addition of "donor wall" naming opportunity inspired 30 donors to museum campaign to increase contributions to $10,000 naming level); John Gurda, *Naming Rights, or Naming Wrongs*, MILWAUKEE J. SENTINEL, Aug. 2, 1998, at 6 ("Professional fundraisers . . . will tell you that no campaign could hope to succeed without a full range of naming opportunities."); Jones, *supra* note 7 at C1 ("naming opportunities are an important part of attracting wealthy donors. . . [with charities showing] growing reliance [on the technique]. Certainly it's likely that an

writer noted in reporting on the $120 million that Ohio State University recently raised through naming opportunity contributions, "One constant endures: names are worth cash."[10]

That flow of funds, or, more specifically, the terms upon which those funds flow from donors to charity, reflects a bargain that society has struck with donors.[11] Specifically, society potentially bestows several direct legal benefits upon donors in return for a contribution to charity. First, rules that limit a donor's ability to restrict the use of funds given to private persons do not apply where funds are instead given to charity. A donor might, for example, impose restraints on the alienation of property contributed to charity, restraints which would be invalid in a private context.[12] Similar societal concessions permit a donor to exercise other forms of perpetual (a/k/a "dead-hand") control over the use of contributed charitable funds in ways that might otherwise be foreclosed.[13] Professor Rob Atkinson explains that:

---

increasing number of facilities will be named for . . . donors."); Muchnic, *supra* note 6 at F1 (quoting various charitable leaders for such propositions as "Most people, I'd say 90% of donors, want recognition of some sort" and "Given the size of the gifts needed to build and maintain institutions these days, recognition seems to be necessary.").

[9] Henry Goldstein, *When Wealthy Philanthropists Put Their Mouths Where Their Money Is*, CHRON. PHILANTHROPY, Nov. 28, 2002, at 1 ("Since the first known donor plaque — an engraving on a Sumerian tablet — went up 5,000 years ago, special treatment for wealthy benefactors has been standard operating procedure."); *see also* Edith L. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 375 (1952) (discussing third century bequest to support commemorative games).

[10] Alice Thomas, *Naming Rights at OSU Come in All Sizes*, COLUMBUS DISPATCH, June 18, 2001, at A1.

[11] The term "bargain" has particular implications when speaking of the legal status of a given donor-charity naming arrangement. *See infra* Part V. In the above context, the term is used more generically to convey the idea of certain trade-offs that occur in framing the broader charitable environment, as discussed in scholarly literature on the subject.

[12] *See, e.g.*, Quinn v. People's Trust & Sav. Co., 60 N.E.2d 281, 287 (Ind. 1945) (discussing inapplicability to charitable gifts of rule against unlawfully accumulating income and unlawfully restraining power to alienate property). *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).

[13] This is particularly so where the gift gives rise to a charitable trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. d (2001) (explaining application of rule against perpetuities to charitable versus noncharitable trust interests, and noting that "[a] charitable trust is not invalid although by its terms it is to continue for an indefinite or unlimited period of time."); WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 3.18 (3d ed. 2000) (explaining application of Rule Against Perpetuities to contingent future interests involving private versus charitable interests); *see also* 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

> As a general rule, the state limits dead hand control [over property] through the rule against perpetuities, under which property owners can dictate the use and enjoyment of amassed societal wealth for roughly a century after death. The rule strikes a balance between property owners' desires to exercise control from beyond the grave and a perceived societal interest in having the use of resources determined by the living. In the case of gifts to charity, however, the state strikes a more generous bargain with donors. Donors get to extend their control indefinitely . . . [and] the state not only allows [this] . . ., but monitors and enforces it. The reason . . . is an implicit quid pro quo: In exchange for perpetual donor control, society gets wealth devoted to recognizably "public" purposes.[14]

Although the Rule Against Perpetuities would make it difficult for a donor to favor forever those of her descendants who bear her name, that same donor could clearly endow a charitable institution to perpetually bear her name.[15] Other advantages might also pertain, such as a more

---

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.

Ball, 264 A.2d at 523. For a discussion of dead hand control over property, see, for example, Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

[14] Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114 (1992). This bargain is further extended in the case of charitable trusts, to which the doctrine of cy pres might apply to permit some modification flexibility in exchange for the grant of perpetual life. *See id.* at 1114-15 (extending his analysis of donor-society bargain to encompass the cy pres doctrine); 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 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 . . . ."); *infra* Part VI.A (discussing cy pres doctrine).

[15] If the donor attempted to fund a perpetual trust to favor particular descendants, the trust would fail in those states that have not altogether joined the trend of exempting private trust interests from the Rule Against Perpetuities. In contrast, the same trust would be held valid if its purposes favored a perpetually named charitable organization. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. d (2001); Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304-12 (2003) (discussing basic principles and the recent evolution of the Rule Against Perpetuities). As a practical matter, it would be quite difficult for a donor to perpetually control consumable personal property or fungible commodities, absent the use of a trust. This explains why "most future interests . . . are equitable interests subject to a trust, the corpus of which is likely to consist entirely or principally of personal property such as stocks and bonds . . . ." STOEBUCK & WHITMAN, *supra* note 13, § 3.1.

With regard to the statement appearing in the text *supra* and the use of nontrust conditions to control property given to private persons, a donor might attempt to control

liberal construction of poorly articulated charitable gifts in an effort to effect the donor's charitable designs, where in the private context the gift would simply fail.[16] Finally, society essentially subsidizes the donor's choice of charitable cause by reducing the donor's tax liability when a charitable contribution is made.[17] This indirect subsidy is accomplished

---

property by imposing a condition on the recipient's right to retain the property and by correspondingly calling for forfeiture in the event of noncompliance with the condition. If the forfeiture in the event of noncompliance is in favor of the donor or the donor's heirs, the gift over is not subject to the Rule Against Perpetuities in the United States. *Id.* at §§ 3.1-3.4, 3.17-3.18. Although the condition and gift over would be valid, the call for forfeiture would be of little consequence as an enforcement mechanism, unless the donor were living or had other heirs who could take the property via forfeiture upon breach of the condition. A donor without other heirs might instead provide for forfeiture to an unrelated third party in the event of breach of the condition. Again, absent a charity as primary beneficiary, the condition would be subject to the Rule Against Perpetuities. Because the condition creates an executory interest in the third party following a noncharitable interest, subject to a contingency of indefinite duration, the third party's interest would violate the Rule Against Perpetuities and be void. *See* STOEBUCK & WHITMAN, *supra* note 13, §§ 2.4-2.8. Thus, the condition would again be of little consequence as an enforcement mechanism with regard to compliance with the condition. As to the ongoing validity or invalidity of the condition itself in such a case, see *id.* With regard to gifts over in favor of alternative charitable beneficiaries upon forfeiture, see *infra* Parts VI.A.2.b. and VI.A.4.

[16] This rule of liberal construction of attempted charitable gifts is a longstanding one. *See, e.g.*, Jackson v. Phillips, 96 Mass. (1 Allen) 539, 1867 WL 5527 (Mass. 1867) ("[T]he words of a charitable bequest . . . are to be so construed as to support the charity, if possible."). Where the gift is in trust, for example, the donor is not even required to designate a particular charitable beneficiary, so long as the gift is clearly charitable. 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 364 (1989). In contrast, the failure to designate a specific beneficiary is fatal to a private trust. *See id.* (describing this as "[t]he most important distinction between a private trust and a charitable trust").

[17] The concept of a subsidy is most often stated in the context of justifying the tax exemption granted to the charitable organization, though the policies underlying this exemption and those underlying the contribution deduction are closely related. *See, e.g.*, JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS CASES AND MATERIALS 849-68 (2d ed. 2000) ("Congress has justified the charitable deduction, like tax exemption generally, as an efficient alternative to government support for those nonprofit organizations providing a public benefit."); Colombo, *supra* note 3, at 661, 682 ("[T]he main thesis of this Article is that the section 170 deduction is best explained as an indirect government subsidy to charitable organizations . . . . . [T]he most widely accepted rationale for the section 170 deduction remains that the deduction helps subsidize the activities of charitable organizations."); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430-39 (1998) (explaining various theories, including subsidy theory, underlying tax treatment of charitable organizations). For a discussion regarding the distinction between tax exemption and charitable contribution tax deduction, see DARRYL K. JONES ET AL., THE TAX LAW OF CHARITIES AND OTHER EXEMPT ORGANIZATIONS 2-3 (2003) and BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT CHARITABLE ORGANIZATIONS § 1.2 (8th ed. 2003).

via the grant of a charitable contribution tax deduction to donors.[18] That deduction generally serves to reduce the donor's tax liability, and the resulting tax savings, therefore, reduce the donor's cost of funding the chosen cause.[19]

A proper evaluation of the ramifications of charitable naming opportunities requires attention to two relationships or agreements. The first is the immediate agreement struck at the donor/charity level, where donees solicit specific gifts and the parties fashion their terms. The second is the macro level "bargain" between donors and society, where the broader privileges afforded to charitable naming gifts are derived.[20] This Article considers those donor, charity, and societal perspectives in its examination of the ramifications and proper treatment of charitable naming contributions.

More specifically, this Article explores the conflicts that often result from a charitable naming opportunity contribution. In furtherance of that exploration, this Article analyzes several state law doctrines that often affect the implementation of the terms of charitable naming agreements. This exploration reveals that various legal outcomes are possible under current law with regard to the long-term implementation of charitable naming contribution arrangements. The enduring nature of naming agreements, imprecise donor-charity dealings, flexibility in applicable state law doctrines, and the vagaries facilitated through reverence to donor intent contribute to this variability in outcomes. Such variability in witnessed outcomes presents difficulties for both donor and societal interests. Donors, for example, may be inspired to even more strictly condition their charitable naming contributions in an effort to foreclose judicial "meddling" with their charitable naming design. The Article argues that the noted variability in outcomes and resulting

---

[18] "The basic concept of the federal income tax charitable contribution deduction is that individuals who itemize deductions . . . can deduct . . . an amount equivalent to the value of the contribution made . . . ." HOPKINS, *supra* note 17, § 2.5; *see also* 26 U.S.C. § 170(a) (2002) (authorizing income tax deduction for "charitable contribution"); 26 U.S.C. § 170(c)(2) (explaining that "charitable contribution" is "contribution or gift to or for the use of" certain specified types of entities organized for purposes of furthering certain specified purposes). A charitable contribution tax deduction may alternatively be available under gift or estate tax provisions. *See* 26 U.S.C. §§ 2522 (gift tax), 2055 (estate tax). Title 26 of the United States Code is hereinafter referred to as the "Internal Revenue Code" or "I.R.C."

[19] *See* Colombo, *supra* note 3, at 683 ("Because a contribution is [tax] deductible, the contributor saves the taxes that otherwise would have been due on the contribution, making its true economic cost to the contributor lower.").

[20] *See infra* Part V.B.3 (discussing more technical use of term "bargain" in context of these charitable naming contributions); *see also supra* note 11 and accompanying text.

donor tactics may ultimately work to the disadvantage of charities. As explored below, the referenced tactics can result in the imposition of onerous, inflexible, and often unclear naming conditions. Such conditions, in turn may unduly constrain the charitable recipient from effectively pursuing the very charitable mission that allegedly inspired the donor's contribution in the first instance. Such constraints may arise, for example, by forcing decisions that are tailored to preserve the donor's naming scheme to the detriment of more logical charitable direction.[21] This Article presents suggestions for dealing with both existing and future charitable naming arrangements where some deviation from the original charitable naming scheme is implicated. The posited suggestions respect both the donor's name perpetuation intentions and the broader societal interest in the effective pursuit of charitable mission, while demonstrating that the two objectives are not mutually exclusive.

Part II of this Article details the nature of the problems that charitable naming opportunities can create. Part III explores the meaning of "charity" as affected by a donor's personal desire to perpetuate a name. Part IV considers the modern spate of philanthropically inclined, but ethically challenged, "bad actors" whose notorious names now adorn various charitable facilities and institutions. Parts V and VI discuss relevant contract, conditional gift, and trust doctrines and the application of those doctrines to charitable naming situations. Part VII examines the practical contours of the various perspectives and legal doctrines at issue here. That examination employs the important and highly publicized ongoing dispute involving a possible name change for Avery Fisher Hall, site of the Lincoln Center's philharmonic concert hall.[22] Part VII also presents suggestions as to how the implicated legal doctrines might better accommodate the competing concerns that arise when an otherwise positive charitable name association becomes problematic.

---

[21] With regard to the prospect of more onerous conditions and how they might affect the pursuit of charitable mission, see *infra* Parts V.C and VI.A.4. "Allegedly inspired" with regard to donor motivations is a loaded term in this context, as the judicial decisions that evaluate charitable naming opportunity situations are replete with references to the importance — or irrelevance — of a donor's desire to promote charitable objectives in connection with the imposition of a perpetual naming condition. *See infra* Part VI.

[22] The dispute has made news from coast to coast, and even overseas. *See, e.g.*, Elaine Dutka, *Avery Fisher Now, But Will It Stick*, L.A. TIMES, June 5, 2002, at F2; Robin Pogrebin, *Avery Fisher Hall Forever, Heirs Say*, N.Y. TIMES, May 13, 2002, at E1; David Usborne, *Discord Over Name of Orchestra Home*, THE INDEPENDENT (London), June 5, 2002, at 15. For a more detailed exposition of the Avery Fisher Hall dispute, see *infra* Part VII.

II. CHARITABLE NAMING SITUATIONS AND THE ULTIMATE PROBLEM

The arguments and ideas pursued here require an understanding of the particular naming opportunities and consequent problems that are the focus of this Article. The concern is with individual donative naming arrangements. These arrangements involve natural-person donors and their contributions of money or other property to charitable organizations upon terms that result in the donor's name being associated in some way with the organization, its institutions, activities, or facilities.[23] A layman's explanation might describe the commonly understood charitable contribution as one that results in a charitable contribution tax deduction, only now with the added prerequisite of the recipient charity allowing the donor some type of naming recognition.[24] Another explanation would describe the naming opportunity as a "quid pro quo" given by the charity to the donor in exchange for the donor's contribution.[25]

Not at issue here are commercial sponsorships or naming rights, such as those that have given us "3-Com Stadium" or "Official Sponsor of the Summer Olympics."[26] Also excluded from primary consideration are honorary name recognitions. San Diego's former "Jack Murphy Stadium" presents an example of both situations. Jack Murphy was a sports columnist who played an instrumental, albeit nonmonetary, role in helping the city to acquire a professional football franchise many years ago.[27] Those efforts resulted in Mr. Murphy's name adorning the city's professional sports stadium.[28] When the stadium naming rights were sold to Qualcom for $18 million in 1997, however, replacing the Jack

---

[23] The name could also be a family name, or the name of a loved one of the donor. The point is that some perpetuation of an individual or private name is required.

[24] For a discussion regarding the charitable contribution tax deduction, see *supra* notes 17-20, *infra* notes 125-135, and accompanying text.

[25] Viewed more technically, these two descriptions suggest a potential contradiction in that one explanation describes a gift while the other proposes an exchange. *See infra* Part V.B.3. With regard to use of "quid pro quo" terminology in the context of naming opportunity contributions, see *supra* note 14, *infra* note 127, and accompanying text.

[26] For examples of commercial naming opportunities or sponsorships, see Beverly Beyette, *Welcome to Logo Land*, L.A. TIMES, May 13, 1997, at E1; Geoff Mulvihill, *Sale of Naming Rights Puts School in Line of Fire*, CONTRA COSTA TIMES, Apr. 19, 2004, *available at* http://www.contracostatimes.com/mld/cctimes/news/8465851.htm?1c (last visited June 17, 2004) (discussing sale of naming rights by public schools to corporations); Doug Saunders, *No Billboard Too Small as Arts Go Hunting for Sponsors*, GLOBE & MAIL (Toronto), Dec. 28, 1996, at C17 (noting that "[l]ike big-league stadiums before them, arts venues are changing their look and function in order to become more attractive to big business").

[27] M.L. Stein, *Cash Erases Scribe's Name*, EDITOR & PUBLISHER, Mar. 29, 1997, at 3.

[28] *Id.*

Murphy name was a matter of public relations and not legal rights.[29]

In contrast, the situations discussed in this Article involve a charitable organization's desire or effort to deviate from naming provisions that accompanied an individual's monetary transfer to that organization. The prospect of deviating from those naming provisions raises numerous legal and policy issues.

A. *The Ultimate Problem Stated*

The ultimate charitable naming opportunity conflict arises when the charitable recipient seeks to rid itself of the donor's name at some point following acceptance of a charitable naming contribution. Other variations on this name problem exist and are collectively referred to here as "name deviation" situations.[30] Short of discarding a name altogether, for example, a charity may instead desire to alter the particular project bearing the donor's name, or perhaps to relocate or subordinate the name within the confines of a donor's chosen charitable pursuit. This would be the case, for instance, where a donor long-ago contributed funds for the establishment of a named hospital wing to treat victims of a stated disease. As time passes in this example, medical advances ultimately dictate the avoidance of such dedicated hospital space in light of current manifestations of that disease. Such medical advances might further dictate that treatment of the disease is now more effectively pursued through an outpatient facility.[31] This suggests what

---

[29] City officials were careful to consult with the editor of Mr. Murphy's former newspaper to ensure that goodwill would not be undermined by the 1997 name change. Stein, *supra* note 27, at 3. The playing field itself will be named for Jack Murphy, the trolley stop outside the stadium will bear his name, and his statue will be erected outside the stadium. *Id.* Qualcom acquired the right to name the stadium in 1997, and retains those rights through 2017. *See* Stadium History, at http:// www.chargers.com/stadium /stadium_history.cfm (last visited Oct. 19, 2004).

Similarly excluded from consideration here are those situations where the association of a donor's name with a charity is at all times subject to removal or modification in the discretion of some governing board or agency. An example of this situation would be Northwestern University's football stadium, formerly named Dyche Stadium. *See* Rick Morrissey, *Fans, Players in Heaven Thanks to NU's Angel*, CHI. TRIB., Sept. 11, 1997, at 1.

[30] The general idea of a charity seeking to avoid or alter its use of a donor's name, for whatever reason, is hereinafter referred to generally as a "name deviation."

[31] These types of circumstances as affecting naming and other provisions are discussed in detail in Parts VI and thereafter in this Article. This example will be referenced again. For an example of how a circumstance like that noted immediately above might arise, see *In re Scott's Will*, 171 N.E.2d 326, 329 (N.Y. 1960). In that case, the court found that the donor had three purposes in mind when the gift was made: (1) to perpetuate his family name through a memorial building; (2) to associate that building with a New York Church

may be a plausible reason for deviating from the strictures of the naming provision — perhaps in this case by transferring the name from the hospital wing to an affiliated outpatient facility dedicated to treatment of the disease of initial donor concern. For good or ill, however, the hospital is constrained in reacting to these changes. Constraints arise because any change in operations would affect the donor's specified association of her name with a hospital wing dedicated to a particular purpose.[32] When issues like this arise, charities and courts are left to ponder whether the donor was more concerned with assisting the particular hospital, assisting victims of the specified disease, or simply taking advantage of both to facilitate her private name perpetuation objectives.

B. Two Scenarios, Two Perspectives

Two name deviation scenarios emerge as particularly relevant. The first scenario involves the surprising number of charitably inclined malfeasants whose names now adorn various charitable institutions or facilities across the nation.[33] These "bad actor" naming situations raise questions about whether our public institutions are forever bound to memorialize such persons. If such persons' names may, in fact, be

---

with which the donor had been affiliated; and (3) to assist in the treatment and care of persons suffering from tuberculosis. *Id.* at 329. The provision in the donor's will that included the gift to effect these purposes did not become effective until approximately 45 years after the donor's death, due to intervening life interests. *Id.* at 327. By that time, both the cost and methods for treating tuberculosis had evolved beyond the donor's vision. *Id.* As stated by the court, "the need for homes for the care of tuberculosis patients has precipitously declined during the course of the years since the [donor's] death . . . ." *Id.* The Arizona court confronted a similar issue three decades later in *In re Estate of Craig*, where it noted that since the terms of the donor's gift were established, "[t]he incidence of tuberculosis has greatly diminished and the methods of treating it have undergone a revolution." *In re* Estate of Craig, 848 P.2d 313, 319 (Ariz. Ct. App. 1992). In *Craig*, the court dealt with a gift to establish a new hospital for treatment of tuberculosis patients. Significant changes occurred in both the cost of the donor's desired hospital facilities and in the manifestations and treatment of tuberculosis subsequent to the time the gift was incorporated into the donor's will. *Id.* at 318.

[32] Four possible outcomes include: (1) continued operation of the named hospital wing for treatment of the stated disease, even though clearly a sub-optimal way to approach treatment of that disease; (2) continued operation of the named hospital wing for treatment of maladies more logically addressed in a hospital setting, with treatment of the disease of initial donor concern (Original Disease) being moved to an outpatient facility; (3) moving the name to an affiliated outpatient facility that focuses upon treatment of the Original Disease; (4) closure of the hospital wing, at least with regard to treatment of the Original Disease, and forfeiture of the donor's naming contribution due to noncompliance with the original gift terms.

[33] *See infra* Part IV (discussing specific examples).

avoided, a further question concerns the consequences of deviating from the bad actor's contribution terms. The specific question is whether the affected charity must forfeit the underlying contribution in order to escape the name.

A second problematic charitable naming opportunity scenario centers upon the questions that arise when the strictures of a privately motivated, well-aged, and often imprecisely stated naming condition confront the simple reality of evolving charitable circumstances. Such circumstances often implicate the possible need to deviate from the specific terms of the donor's naming condition, either directly or as associatively intertwined with a particular charitable purpose or its pursuit. The example noted above — involving the named hospital wing for treatment of a specified disease and evolving circumstances that suggest superior treatment through an outpatient facility — fits this mold.[34] Although creativity alone suggests many possible outcomes for that hospital-outpatient facility situation,[35] two general perspectives emerge as to how such situations might be characterized.

1. The Pro-donor Perspective

On the one hand, a pro-donor viewpoint favoring strict adherence to the terms of donor-charity dealings would demand ongoing charitable compliance with the naming condition precisely as stated. To continue the previous hospital-outpatient facility example, a pro-donor viewpoint would argue that the name must continue to be associated with the specified hospital wing for treatment of the specified disease, without variation.[36] Under this view of the base conflict, there is simply nothing else meriting consideration. Any charity effort to escape or vary the naming requirements would likely be characterized as "charitable opportunism." This implies an improperly motivated desire to escape the donor's terms and perhaps even to remarket the naming privilege.

2. The Societal Perspective

The socially beneficial dimensions of the donor's original contribution suggest a second view. That view would characterize the hospital-outpatient scenario as one involving questions of charitable efficiency

[34] *See supra* notes 30-31 and accompanying text (regarding hospital-outpatient facility example).

[35] *See supra* note 32 (discussing four possible outcomes).

[36] Outcomes 1 and 4, noted *supra* note 32, would be most directly suggested by the pro-donor perspective.

versus the negatives of perpetual dead-hand control over charitable pursuits through donor imposition of detailed naming conditions.[37] This view would favor flexibility in the accomplishment of a charitable mission, with a correspondingly flexible accommodation of a donor's name association demands. The suggested prioritization recognizes that a naming condition has nothing to do with the accomplishment of any charitable purpose, beyond the bare premise that the naming opportunity may have facilitated the contribution to charity in the first instance. The *name condition itself* promotes only private concerns and cannot possibly be conceived as adding anything to the meaning, pursuit, or accomplishment of any charitable objective. The societal viewpoint, therefore, posits that such conditions should hold only limited power to impede the efficient accomplishment of charitable objectives.

3. Flexibility and Nuance

There are, of course, many nuances that affect the merits of both the pro-donor and societal perspectives. First, there is the question of determining the donor's preferred objective if changed circumstances undermine the simultaneous accomplishment of both charitable and name perpetuation goals.[38] Even if the donor clearly preferred to perpetuate her name to a subordinate charitable mission, a further question arises concerning the respect that society should afford such prioritization.[39] That question becomes more clouded upon realization that many courts have found alternative routes to preserve the name perpetuation aspect of a donor's plan when the precise charitable scheme is varied.[40] Wholesale sacrifice of the donor's name perpetuation purposes is not, therefore, a necessary incident to giving adequate respect to society's stake in the venture.

Against this background, the doctrines, policies, and factual circumstances that tend to dominate the realm of charitable naming contributions present themselves for more detailed exploration.

---

[37] Outcomes 2 and 3, noted *supra* note 35, would be most directly suggested by a perspective that focuses upon the public benefit associated with the donor's original contribution. *See infra* note 258 and accompanying text (discussing charitable efficiency).

[38] *See infra* Part VI.

[39] *See infra* Parts VI.E, VI.

[40] *See infra* Part VI.C.

III. A FIRST LOOK AT INTENT AND MOTIVATION IN CHARITABLE NAMING GIFTS

From the noted societal perspective, charitable naming opportunity problems arise when donor-charity naming conditions intersect with and threaten to diverge from society's expectation that the contribution will "facilitate the achievement of a general charitable purpose."[41] In that regard, and in order for the noted advantages of more enduring donor control and tax deduction to apply, both the common law and federal tax law insist that a contribution be made to a charitable recipient and for a charitable purpose. "Charitable" as used in this context is a term of art that most basically encompasses the furthering of a substantial public interest.[42] The basic distinction is between the dedication of property to private purposes, such as to benefit a limited class of defined persons like the donor or her heirs, versus dedication of that property to benefit a sufficiently broad (albeit not all-encompassing) segment of the public like the poor, the sick, or students.[43] Although there is "no fixed standard" for determining the charitable nature of a contribution, one

---

[41] Trs. of Dartmouth Coll. v. City of Quincy, 258 N.E.2d 745, 753 (Mass. 1970). The policy issues relating to charitable opportunism and the potential for disregarding donor-charity bargains are discussed more fully in *infra* Parts VI and VII.

[42] *See* Preamble to the Statute of Charitable Uses, 43 Eliz., C. 4 (1601 Eng.) (enunciating nonexclusive list of purposes thought to be charitable in nature); Perin v. Carey, 65 U.S. (1 Black) 465, 506 (1861) ("[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 . . . . , but that does not make a devise good to a college for purposes not of a collegiate character, intended chiefly to gratify the vanity of the testator . . . . All property held for public purposes is held as a charitable use, in the legal sense of the term charity."); Morice v. Bishop of Durham, 9 Ves. 399, 405 (1804) (applying Statute of Charitable Uses); Jackson v. Phillips, 96 Mass. (1 Allen) 539, 1867 WL 5527 (Mass. 1867) (expounding upon meaning of "charity" and "charitable" gift); RESTATEMENT (THIRD) OF TRUSTS § 28 (2001) (echoing preamble to Statute of Charitable Uses).

For the importation of common-law conceptions of "charitable" into the Internal Revenue Code, see *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) ("[A]n examination [of the Internal Revenue Code] reveals unmistakable evidence that, underlying all relevant parts of the [Internal Revenue Code], is the intent that entitlement to [charitable] tax exemption depends on meeting certain common law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."). *See also* 26 U.S.C. §§ 170(b), 501(a), 501(c)(3) (2002) (regarding nature and function of recipient charitable organizations for tax purposes.). With regard to the charitable contribution tax deduction, see 26 U.S.C. §§ 170(a), 170(c), 2055(a), 2522(a). *See generally* BORIS BITKER & LAWRENCE LOKKEN, 2 FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS Ch. 35 (3d ed. 2000) (discussing charitable contribution income tax deduction requirements). The terms "contribution" and "gift" do not have distinct meanings in this context.

[43] RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a(1) (2001).

basic criterion is that the "purposes [must be] of a character sufficiently of interest or beneficial to the community to justify permitting the property to be devoted forever to their accomplishment and to justify whatever other special privileges are accorded."[44]

A fundamental question with regard to naming opportunity contributions concerns the characterization of such contributions as charitable in nature. This question arises because naming contributions clearly further two distinct purposes. On the one hand, such contributions are clearly charitable in that they provide an immediate flow of funds to an organization deemed charitable under the noted standards.[45] The contribution, therefore, promotes whatever public good underlies that organization's charitable status. On the other hand, naming contributions also exploit the recipient organization's charitable status for private name perpetuation purposes. In so doing, the donor avails herself of the advantages of both tax deduction and the waiver of rules that otherwise prevent perpetual donor control over gifted property.[46] The donor could also be described as having purchased an identity associated with some aspect of the public good.[47]

Potential problems arise from this mix of charitable and private purposes. From the donor's perspective, for example, the waiver of certain rules and other favoritisms accorded charitable gifts may not apply absent a sufficient charitable flavor. This could result in failure of a donor plan that was structured to take advantage of those favoritisms.[48]

---

[44] *Id.* at cmt. l. For a discussion regarding the privileges society accords charitable gifts, see *supra* Part I.

[45] *See supra* notes 41-44 and accompanying text (regarding standard for "charity").

[46] *See supra* Part I (discussing waiver, in context of charitable gifts, of restrictive rules that might otherwise limit enduring donor control over transferred property). In his examination of the tax treatment of charitable naming opportunities, Professor Colombo observes, "The payments that resulted in these commemorative plaques and inscriptions almost certainly were deducted from the payer's gross income [for tax purposes]." Colombo, *supra* note 3, at 658.

[47] *See supra* note 7 (discussing identity preservation as motive in charitable giving).

[48] For example, if a donor's gift violates the Rule Against Perpetuities as applied to private interests, or is in trust but vague as to specified beneficiaries, the gift will fail if it is deemed to support private purposes. On the other hand, similar gifts will be upheld if the private purposes, like establishing some type of named memorial, are not deemed so significant as to overwhelm the overall charitable character of the gift. *See, e.g.*, Bills v. Pease, 100 A. 146, 147 (Me. 1917) (confronting these issues and upholding gift as charitable in nature); SCOTT & FRATCHER, *supra note* 16, § 398 (discussing charitable and invalid purposes). This problem is sometimes stated as that arising in the case of "mixed trusts" (i.e., those that are both private and charitable in nature). In such cases, "[i]t is usually held . . . , where there is no basis for dividing the fund . . . , that the entire trust is void because of indefiniteness of beneficiaries and because of the perpetual or indefinite duration of the trust." GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 372

A troublesome issue for society surfaces upon realization that the donor's purely *private* naming demands may endure well beyond the foreseeable future and into perpetuity precisely because of the *charitable* nature of the gift. Yet, subsequent failure in regard to that private naming demand may call for termination of the charitable benefit.[49]

Legal doctrine, however, does not treat charitable status and name perpetuation goals as necessarily mutually exclusive. Determination of the charitable nature of a contribution ultimately turns upon the *effect* of the gift as advancing the public welfare.[50] If that end is served, the donor's personal *motivation* to perpetuate her name will not defeat characterization of the gift as "charitable" under common-law notions of that concept.[51] As summarized by one court:

> The fact that the [donor] desired to have his name associated with the charity and to perpetuate it therein, does not detract from the charitable character of the bequest. The [donor] may have [made the transfer] solely to satisfy his personal pride, for self-glorification, or he may have [been motivated by] altruism; but regardless of the reasons, a court of equity is not interested in the [donor's] motive. We are interested only in the result of the [transfer] upon the community and society in general.[52]

(rev. 2d ed. 1991). For a discussion regarding more liberal rules of construction as applied in the case of charitable gifts, see, for example, *supra* note 16 and accompanying text.

[49] *See infra* Part V.B (discussing forfeiture as potential remedy for noncompliance with donor conditions).

[50] *See, e.g.*, Gibson v. Frye Inst., 193 S.W. 1059, 1061 (Tenn. 1917) ("[T]he . . . effect of a gift determine[s] its character, rather than the motive of the donor."); BOGERT, *supra* note 48, § 366.

[51] *See, e.g.*, Estate of Campbell, 97 Cal. Rptr. 726, 728 (Ct. App. 1971) ("[T]he fact that decedent may also have been motivated by a desire to perpetuate the memory of her mother . . . does not destroy [the gift's] charitable nature."). Although some cases have mistakenly equated "charitable" to require a particularly unselfish or pure motive on the part of donors, this view is not correct. BOGERT, *supra* note 48, § 366. Professor Bogert calls "unsound" the idea that the donor's motive is important in determining if a particular gift is charitable. *Id.* If the name provision relates to memorializing a public figure of historical significance unrelated to the donor, the question is much easier to resolve, as the name is, in fact, part of the charitable nature of the gift. *See, e.g.*, Smith v. Powers, 117 A.2d 844, 849 (R.I. 1955) (holding that trust established to preserve home as memorial to unrelated, distinguished citizens of state from Revolutionary War period, was charitable in nature). For a discussion regarding the nature of a donor's contribution as "charitable" for tax deduction purposes, see *supra* notes 42-44 and accompanying text.

[52] Heinlein v. Elyria Sav. & Trust Co., 62 N.E.2d 284, 288 (Ohio Ct. App. 1945); *accord*, Estate of Cambell, 97 Cal. Rptr. 726, 728 (Ct. App. 1971) ("[T]he fact that decedent may also have been motivated by a desire to perpetuate the memory of her mother . . . does not destroy [the] charitable character [of the gift].").

This result is defensible as a general proposition. Typically, naming "motives . . . do not detract from the social benefit which the [transfer] may bring, [and the naming scenario] may . . . [also] have social advantages by inducing others to emulate the character of the donor and to make gifts which are in the public interest."[53] Clearly, then, there is ample precedent for the proposition that a naming provision does not *per se* defeat the charitable nature of a donor's transfer.

For many people, moreover, the foregoing ideas and a strict view of enforcing agreements provide clear direction for resolving charitable naming disputes. These ideas suggest that naming conditions should be honored, absolutely.[54] Such general propositions often require qualification when examined more closely, however. For example, the question of whether the donor's name on a plaque above a building entrance somehow defeats the charitable nature of the educational, artistic, or other endeavors realized through that facility is a fairly easy one to answer, from an abstract, present tense point of view.[55] The challenge becomes more complicated and its implications more severe, however, when burdened with the consequence that any future removal of the name plaque for any reason may compel forfeiture of the contributed funds. This would be the case even if the removal were occasioned by changed circumstances and accompanied by an alternative accommodation of the name.[56] Removal of the name plate could thus force closure of the facility or a reduction in charitable operations, either actually or through the practical equivalent of diversion of charitable funds to meet the forfeiture consequence.[57] As noted, however, legal doctrines that define the concept of "charity" are not dissuaded by such arguments.

---

[53] *See, e.g.*, BOGERT, *supra* note 48, § 366; Gibson, *supra* note 2 at W13 (discussing how big donors add credibility and allow charities to "leverage" their participation). Of course, in the case of bad actors like the corporate malfeasants, this rationale arguably fails on both accounts. *See infra* Part IV.

[54] *See supra* Part II.B.1.

[55] *See, e.g.*, *In re* Mayer's Estate, 47 Cal. Rptr. 44, 46 (Ct. App. 1965) (noting that devise called for name plates or plaques).

[56] Forfeiture is the primary remedy for noncompliance with a naming condition. *See infra* Part V.B.

[57] In other words, through forfeiture or mandatory refund of the contribution, society returns the "value" of the contribution to the donor. Even if the facility does not actually close, society essentially repurchases the facility from the donor by operation of the forfeiture provision. *See infra* Part VI.A.4 (discussing forfeiture to alternative charitable beneficiary).

IV. BAD ACTORS, LOGIC, AND POLICY PERSPECTIVES

An unusual, but increasingly common, situation that demonstrates the potential dilemmas that can result from a naming contribution warrants specific consideration. That situation involves the charitable donor who is later revealed to have engaged in notoriously bad conduct. The focus is upon the recent spate of corporate malfeasants who, though charitably inclined, are alleged or proven to have engaged in clearly reprehensible conduct as judged by the standards of the day.[58] In this realm of name-limited charitable contributions, the concept of public policy has a particular role to play in the evaluation of continued adherence to these donor-charity naming agreements.

A. *Corporate and Other Malfeasants*

Consider the case of Dennis Kozlowski, former CEO of Tyco International Ltd. Kozlowski is now under indictment for tax evasion, misappropriation of corporate funds, and illegal stock sales.[59] His conduct led *Business Week* to dub him "a rogue CEO for the ages."[60] *For the ages*, indeed: on Seton Hall's campus sits "Kozlowski Hall," and at his

[58] The concern here is not with long-dead corporate magnates, like John D. Rockefeller or Andrew Carnegie, who may stand accused of using heavy-handed or now-disfavored business practices. *See, e.g.*, JOSEPH C. GOULDEN, THE MONEY GIVERS 20 (1971) ("[M]uch of the wealth controlled by American [charitable] foundations was ruthlessly accumulated . . . by men who took full and knowing advantage of the casual, do-anything mores of the Robber Baron era of American Business."); *id.* at 33-35 (discussing Rockefeller foundation and its founder's legal troubles). Similarly excluded would be philanthropists like James B. Duke, who endowed Duke University with tobacco proceeds — a source of wealth that many may now condemn. *See id.* at 46-49 (discussing James B. Duke and his philanthropy). In fact, those long-established names today have acquired such philanthropically or mission-specific value in their charitable field that it is implausible to assert that the arguments presented here will be regarded as presenting any challenge to their continued longevity. The analysis here is simply not concerned with names that are, today, more commonly recognized for their philanthropic or mission-specific association than for someone's early century business tactics. It would be implausible to argue, for example, that Duke University might now seek to change its name on the grounds that after so many decades of association, the name now contradicts the charity's stated mission. Of course, this raises the more philosophical issue of whether past donors should have been permitted to purchase redefined immortality through perpetual naming gifts in the first instance.

[59] Anthony Bianco et al., *The Rise and Fall of Dennis Kozlowski*, BUS. WK., Dec. 23, 2002, at 64. Kozlowski was indicted in 2002 on charges that he looted $600 million from Tyco International, Ltd., the company for which he served as CEO. *Id.* His case ended in a mistrial after a juror received a threatening letter but is expected to be tried again soon. Chad Bray, *Executives on Trial: Belnick's Defense Wants to Use Testimony From First Tyco Case*, Wall St. J., May 25, 2004, at C3.

[60] Bianco, *supra* note 59, at 64.

daughters' private prep school sits the "Kozlowski Athletic Center."[61] The Seton Hall facility houses the university's business school, where students learn how to get ahead, but hopefully also learn something about business ethics.[62] Even more oxymoronic is the professorship Kozlowski helped endow (with tainted funds) at Cambridge University. That professorship focuses upon the topic of corporate leadership and accountability![63]

Surely this notorious CEO is an aberration on the charitable naming front; the odd-ball case that always lurks on the fringes to undermine otherwise sound application of legal doctrine to achieve results that are consistent with a straightforward pro-donor perspective.[64] That would be the case only if one chooses to ignore the two other buildings *on Seton Hall's campus alone* that are named for convicted or accused corporate malfeasants.[65] And, of course, there are many other similarly situated former corporate executives *cum* philanthropists. Take, for example, the now-indicted Richard Scrushy, former HealthSouth Corp. chairman charged with facilitating a $3 billion accounting fraud.[66] As the *Wall Street Journal* noted, "Mr. Scrushy's name adorns roads, buildings, schools and athletic facilities . . . across Alabama."[67] Also notable is Alfred Taubman. Mr. Taubman is the price-fixing former chairman of Sotheby's who gave $15,000,000 for Harvard's "Taubman Center for State and Local Government," and whose name adorns the "Taubman Center for Public Policy and American Institutions" at Brown University and a medical center and architectural college at the University of Michigan.[68] Not to be overlooked are the millions that Texas and

---

[61] These naming opportunities were likely funded by the ill-gotten gains of Kozlowski's criminal activities, and charges filed by Tyco assert that these naming opportunities were purchased with Tyco funds. Christine Dugas, *Tyco Sues Former Chief Over Self-Serving Gifts*, USA TODAY, Sept. 16, 2002, at B-3. Tyco is not, however, seeking to recover those funds from the benefited charities. *Id.*

[62] Ameet Sachdev, *What's a School To Do When Fallen CEO's Name on Wall?*, CHI. TRIB., Oct. 14, 2003, at 1.

[63] Dugas, *supra* note 61, at B3.

[64] *See supra* Part II.B.1 (describing pro-donor perspective).

[65] John Byrne, *Seton Hall's Hall of Shame*, BUS. WK., Sept. 30, 2002, at 14 (noting that recreation center at Seton Hall is named for Robert Brennan, First Jersey Securities founder now convicted of fraud and money laundering; Seton Hall's "Walsh Library" is named for another Tyco executive now being sued for breach of fiduciary duty).

[66] John R. Wilke & Chad Terhune, *Scrushy May Be Indicted Today*, WALL ST. J., Nov. 4, 2003, at A3.

[67] *Id.*

[68] Matthew Benjamin, *An Embarrassment of Riches*, U.S. NEWS & WORLD REP., Dec. 30, 2002, at 36; Marcella Bombardieri, *Harvard Benefactor In Furor Abroad*, BOSTON GLOBE, Mar. 10, 2003, at A1; Sachdev, *supra* note 62.

Missouri business schools accepted from former Enron chairman Ken Lay "to create professorships and fancy-sounding programs in his name."[69] Lest there be any tendency still to proclaim this an isolated phenomena, one can venture outside the realm of former corporate executives, a/k/a *mere* criminals. Consider, for example, the $5,000,000 Harvard received to fund the Kokkalis Program on Southeastern and East-Central Europe.[70] The program is named for a telecommunications magnate now under investigation in Greece for betraying his country as a Cold War spy for *communist* East Germany.[71] The mission of that Harvard program, incidentally, happens to be the strengthening of *democracy and free market economies* in the Balkans and nearby countries![72]

The recent case of *Stock v. Augsburg College*[73] demonstrates both the reality and variability of this bad actor charitable naming situation. In *Stock*, the donor and recipient college agreed that a wing in a new facility would be named after the donor.[74] Unknown to the college at the time it accepted the gift and accompanying naming conditions was the fact that the donor "had for years been secretly mailing anonymous letters to families and individuals of mixed race and religion . . . denounce[ing] mixed marriages [and] profess[ing] a viewpoint based on racial purity."[75] The donor was subsequently exposed, resulting in much unfavorable publicity to the college by virtue of this donor relationship and the naming opportunity.[76] The college went on to construct the originally contemplated building. The college, however, refused to name the wing after the donor *and* refused to return the donor's money.[77] Institutions that dealt with the bad actors noted above faced similar prospects.[78]

---

[69] Carrie Johnson, *Former Chairman of Enron Charged*, WASH. POST, July 8, 2004, at A1; Boert Trigaux, *USF Business Dean Hopes It Is Not Too Late To Teach Ethics*, ST. PETERSBURG TIMES, Jan. 13, 2003, at 1E. Ken Lay was indicted on July 7, 2004.

[70] Bombardieri, *supra* note 68, at A1.

[71] *Id.*

[72] *Id.*

[73] Stock v. Augsburg Coll., 2002 Minn. App. WL 555944 (Minn. Ct. App. 2002).

[74] *Id.* at *3.

[75] *Id.*

[76] *Id.*; *see infra* note 85 (using example of Vanderbilt University's decision to remove "Confederate Memorial Hall" to discuss how negative association might pertain).

[77] *Stock*, 2002 Minn. App. WL 555944, at *3.

[78] *See, e.g.*, Sachdev, *supra* note 62, at 1 (discussing various Universities' stances on prospect of removing bad actor names, and possibly returning contribution); Greg Allen, *University of Missouri Under Pressure to Return a Donation Made by Former Enron Chairman Ken Lay* (NPR, All Things Considered, Sept. 24, 2004), *audio available at* http://www.npr.org/rundowns/segment.php?wfId=3935835 (last visited Oct. 6, 2004) (discussing calls for University of Missouri to return contribution, and University's pledge to do so if Lay is convicted). The NPR story raises the interesting question of when,

Although shamed donors have been known to accept personal responsibility for charitable avoidance of the naming aspect of their contribution, the donor in *Stock* was not so inclined.[79] The *Stock* donor adopted the pro-donor stance elucidated above.[80] Unfortunately for inquisitive observers, the *Stock* court was able to resolve the dispute on procedural grounds; namely, the donor simply waited too long to sue.[81] The court did clearly opine, however, that the donor would have been able to recover his contribution upon showing breach of the naming condition — forfeiture apparently being the remedy by whatever name the action was given.[82] Clearly staking out its position on the matter, the court concluded by suggesting that:

> [I]t would be startling news to [the college's] alumni that their college's "charitable and educational mission" includes specifically soliciting contributions for a particular purpose, formalizing that solicitation . . . and then claiming the power to say "Oops, we changed our mind. We are not going to give your money back, but instead we are going to keep it."[83]

The court's perspective on the matter clearly reflects the donor's preferred view of the situation. It is possible that this view will also govern other potential disputes involving the continued name association of the bad actor-philanthropists noted above. Further

---

exactly, a donor's "bad actor" status is sufficiently confirmed so as to warrant action regarding a contribution or name. Specifically, the reporter notes that "[t]he University administration . . . did not feel that it would be fair to [Lay] to more or less convict him until he had gone through the entire judicial process." *Id.* This issue is considered further *infra* note 91.

[79] For an example of a donor acknowledging the extent of his bad acts and the resulting potential for a negative charitable association, see Teltsch, *supra* note 2, at 5 (discussing Ivan Boesky's request that one of his charitable beneficiaries remove his name "to save the school embarrassment").

[80] *See supra* Part II.B.1 (discussing pro-donor stance).

[81] *Stock*, 2002 Minn. App. WL 555944, at *4. It would have been most insightful had the court reached the merits of a fully briefed dispute.

[82] *Id* at *6. The court recognized a cause of action for breach of contract, and also addressed the matter under conditional gift doctrine. *Id.* at *4-7. The potential characterization of the donor's action as one grounded in contract or other doctrine is discussed in more detail *infra* Part V.B. It appears that the only possible outcome considered by the court in *Stock* was forfeiture. *Stock*, 2002 Minn. App. WL 555944, at *3-7. The contract analysis could have been affected by the clearly executory nature of the arrangement, given that the name was never actually associated as agreed to at the time the contribution was accepted. *See infra* note 107 and accompanying text.

[83] *Stock*, 2002 Minn. App. WL 555944, at *6. For a comprehensive treatment of charitable solicitation of restricted gifts, see 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 (2003).

analysis of this donor bad actor situation, however, reveals shortcomings in an unquestioning adherence to the pro-donor perspective. In particular, the court overlooked entirely the broader societal dimensions of the situation.

B. *The Public Policy Dimension*

"Bad actor" situations raise a public policy argument both as a matter of pure logic and legal doctrine. Most generally, public policy should encompass concerns for whether and how charitable institutions are affected by privately motivated naming conditions as those conditions relate to charitable mission. Charitable organizations — often denominated "public benefit organizations" to reflect the fact that such organizations serve the public interest — conduct activities and provide beneficial services in ways that neither the government nor the private sector can match.[84] Prominent names that ultimately come to convey an ideal that is contrary to the institution's charitable mission should provoke a public policy inquiry as a matter of simple logic.[85] After all, do we really want to enforce perpetual naming privileges for the "O.J.

---

[84] *See* LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 11-13 (2d ed. 1999) (discussing "inherent limitations" of government and private providers of goods and services that result from market, contract, and government failures); Henry Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 504-09 (1981) (comparing nonprofit organizations to private providers); Henry Hansmann, *The Role of the Nonprofit Enterprise*, 89 YALE L.J. 835, 840-45 (1980) (categorizing nonprofits based upon their donative, commercial, and other characteristics). *See generally* FISHMAN & SCHWARZ, *supra* note 17, at 37-56 (discussing these authors and other theories for existence of nonprofit, charitable sector).

[85] Consider, for example, the situation confronting Vanderbilt University when it decided to change the name of "Confederate Memorial Hall" to something less "inflammatory." *Confederate Hall to be Renamed*, CHI. TRIB., Oct. 1, 2003, at 18. The United Daughters of the Confederacy had given $50,000 to help fund construction of the building in the 1930s, and they were reportedly "outraged" at the University's decision. *Id.*; Dahleen Glanton, *Old South Rises to Save Symbols*, CHI. TRIB., Nov. 18, 2002, at 1. In response, the group sued the University — the first time the group had been so inspired to act in its 108 year history. *Id.* In upholding the University's position, the judge opined that "[t]he name 'Confederate' on its building, with the stigma of the institution of slavery, is in contradiction of [the University's] policy of diversity and makes it extremely difficult to recruit minority faculty members and minority students." *Confederate Hall to be Renamed*, *supra*, at 18.

As to the importance of mission consistency and negative connotations associated with charitable naming opportunities, consider the opposite situation. Specifically, the naming of one university's school of journalism after a prominent minority journalist has been touted as "a magnet for black students — and a diversity lesson for white journalism students that will prick their racial consciousness." DeWayne Wickham, *A Name on a Building — One of Several Important Strides for Black Journalists*, USA TODAY, Sept. 14, 2004, at 21A.

Simpson Shelter for Battered Women" or "the Michael Jackson Children's Home"? These suggestions might seem flippant were they not set forth immediately after the above recitation of business schools, professorships, and free-enterprise institutes named for headlining corporate malefactors and alleged communist spies. Indeed, the point has not gone unnoticed. One newspaper commentary, for example, recently noted in connection with Seton Hall's notorious "Kozlowski Hall" that "[a]s more and more chief executives are hauled into court in handcuffs, business schools are trying to teach their minions not to steal."[86]

In addition to undermining the force of a stated mission by sheer contradiction, such associations can also blunt an organization's effectiveness by bringing it into disrepute. Unless fully endowed, for example, such institutions rely upon ongoing public support to finance their community-benefiting activities.[87] It is not unreasonable to assume that alumni or other donors would be hesitant about contributing to the operating expenses or renovation costs of the "O.J. Simpson Shelter for Battered Women," the "Michael Jackson Children's Home," or the "[Name Your Felon] School of [Something Honorable]." The name, quite simply, detracts from the mission for which support is sought and fosters the avoidance by others of future association.[88]

Although many scholars recite the speculative assumption that any curb on donor control over charitable gifts would irreparably "chill" future charitable giving,[89] refusal to enforce naming conditions on bad actor grounds should have precisely the opposite effect. One reason is that the "[Name Your Scoundrel] Hall" scenario devalues future naming opportunities for *all* charitable institutions. Respect for the bad actor's naming terms, in other words, carries its own "chill" consequences. Further evidence of this contra-chill effect arises from the fact that

---

[86] *The Auditor: An Inside Look at the Week in New Jersey*, STAR-LEDGER (Newark), Sept. 29, 2002, at 3. Similarly, some have suggested that the University of Missouri apply Ken Lay's contribution to endow a chaired professorship in business ethics, in lieu of complying with Lay's instruction that the funds be used to endow a named chair in international economics. Allen, *supra* note 78; *see supra* note 69 and accompanying text (discussing Ken Lay).

[87] *See, e.g.*, Susan Gill Vardon, *A New Construct for Seniors*, ORANGE COUNTY REG., May 6, 2002, at A3 (noting that following $1.3 contribution for named senior center, "agency struggle[s] each year to raise the funds to pay the $200,000 in operating costs and the $50,000 building loan bill").

[88] *See supra* note 85 and accompanying text (discussing Vanderbilt University's decision to remove "Confederate Memorial Hall").

[89] *See also infra* notes 375-379 and accompanying text (discussing potential "chilling" of donor contributions).

criminal or mission-contradictory namings could impair further efforts to raise more anonymous funds to support the now infamously named charitable cause, as just noted.[90] Ultimately, donor knowledge that only "good" names will truly endure should enhance the lure of this fundraising device to the philanthropic community, most of whose members are not overly nervous about the Securities Exchange Commission, Attorneys General, or other prying eyes discovering the true nature of their lives.[91]

This line of reasoning survives the transition from layman's logic to legal precedent. That precedent derives from established rules of contract — cited here to dispel the simplistic "enforce the contract" reaction seen in *Stock*, but nonetheless relevant whatever the characterization given to a particular naming agreement.[92] Those rules provide that "[s]ometimes . . . a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public

---

[90] *See supra* note 87 and accompanying text.

[91] Arguments that a more flexible public policy approach would lead to rampant charitable opportunism should be mitigated by the fact that this public policy analysis is not unbounded, and charities have also shown the ability to distinguish the types of bad actors contemplated here. With regard to charities distinguishing bad actors from the more honorable, consider the recent defense of Arthur Andersen (the man) offered by the dean of Northwestern University's Kellogg School of Management (part of which is housed in Andersen Hall) in the midst of questions about the continued name association following the scandals that destroyed Arthur Andersen the firm: "We feel that [Andersen the man] was a great contributor to management education . . . [and we] separate the individual from the institution." Sachdev, *supra* note 62, at 1.

I have not attempted to precisely define the boundaries of "bad actor" conduct beyond the idea of a name suggesting mission-inconsistency or spurring negative publicity that demonstrably detracts from the charity's ability to accomplish its mission. Perhaps the standard should require a criminal conviction or civil fine/liability, or perhaps such facts should merely raise a presumption of name removability. It would perhaps be a more straightforward matter to address if charities could be encouraged to incorporate their own views of "moral turpitude" into their naming opportunity policies. For such a policy to realistically work without offending donors, the terms would have to be applicable across the institution and not simply negotiated on a case by case basis, because donors would find offensive the suggestion of a potential for misconduct implicit in the particulars of such individual negotiations. Unfortunately, many entities have very general policies or no set policy at all in regards to naming opportunities. *See* Benjamin, *supra* note 68, at 36 (quoting Brown University official) ("I've never seen a moral turpitude clause in a donor agreement," and noting that subsequent to its naming fiascos, Seton Hall, adopted policy for name removal from facilities).

[92] For a discussion of the *Stock* case, see *supra* notes 73-83 and accompanying text. The potential characterization of the donor's action as one grounded in contract or other doctrine is discussed in more detail *infra* Part V.B. With regard to the application of policy reasoning in a broader context, see *infra* Part VII.

policy."[93] In this context, the public policy override should excuse the charity's compliance with the naming condition while otherwise leaving the contribution arrangement and more substantive conditions in place.[94] As to concern for a donor's expectation that her naming provisions would be enforced as written, the Restatement makes clear that "to the extent [the donor] engaged in misconduct that was serious or deliberate, [the donor's] claim to protection of [her] expectations fails."[95]

Along these same lines, one could further argue for excuse of the naming condition on the grounds that a bad actor donor violates an implicit duty of good faith by demanding a prominent and perpetual naming opportunity while concealing or later engaging in notoriously bad conduct or other reprehensible bad acts.[96] In such cases, and regardless of the precise legal nature of the arrangement, courts should be mindful of public policy considerations and look beyond the narrow confines of the naming agreement to find support for deviation from the donor's naming terms.

Bolstering such outcomes in the case of bad actors like Kozlowski and his ilk is the idea that "a refusal to enforce the promise may be an appropriate sanction to discourage undesirable conduct, either by the parties themselves or by others."[97] However, there is something inherently wrong with allowing persons who operate well outside the acceptable boundaries of their day to force both immortality and a measure of redemption through a tax deductible perpetual naming opportunity.[98] Competitive fundraising pressures and the resulting temptation for charities to accept funds without significant inquiry also suggests that the matter should not be left entirely on the donor-charity negotiating table.[99] This is exemplified by the longstanding joke among

---

[93] RESTATEMENT (SECOND) OF CONTRACTS ch. 8, introductory note at 2 (1981); *see also id.* § 178 (addressing unenforceability of contract terms on grounds of public policy).

[94] *Id.* at § 185 ("[A court] may disregard the . . . condition by excusing the non-occurrence of the condition . . . and the rest of the agreement is not affected."). More substantive terms might include, for example, the donor's stipulation that the funds be used in support of education. Section 185 provides that a condition will be excused "unless its occurrence was an essential part of the agreed exchange." *Id.*

[95] *Id.* at § 178 cmt. e.

[96] *Id.* at § 230 (1981) (discussing events that may excuse occurrence of conditions in contracts).

[97] *Id.* at ch. 8, introductory note at 2; *see also id.* § 178(3)(c) (taking into account seriousness of misconduct).

[98] Benjamin, *supra* note 68, at 36.

[99] Charities are under tremendous competitive fundraising pressure, and suggesting that they question a potential large donor's ethical background too closely is a realistic assertion only in the case of well-known malefactors and well-endowed charities. *See, e.g.,*

charitable fundraisers that the only problem with tainted money is "there t'aint enough of it." At its core, then, resolution of conflicts in this area should more broadly turn upon the public policy implications of allowing donor bad actors to enforceably demand perpetual association of their name with charitable undertakings. The matter should, therefore, be resolved as part of the donor-society bargaining nexus, with a clear pronouncement that bad conduct in the case of charitable naming contributions results in *donor* forfeiture. The forfeited benefit, of course, is that of perpetual naming control.[100]

C. *A Partial Picture*

Consideration of donor bad actors provides only partial insight into the difficulties that can result from charitable naming contributions. Also requiring further analysis are charitable naming situations that pit continued adherence to a naming provision against present circumstances that suggest change, apart from any bad actor considerations. Further attention must also be given to the contract-gift nature of charitable naming arrangements. Such factual and legal nuances cloud the resolution of charitable name deviation situations, as introduced next.

GOULDEN, *supra* note 58, at 21 (quoting fundraiser) ("If someone wants to give . . . and if blood isn't dripping from the check, I'll take it and give the damnedest thank-you speech imaginable."); Brandstrader, *supra* note 3, at 30 ("The naming opportunity frenzy is a natural consequence of tough times in philanthropy."); Dugas, *supra* note 61, at B3 (noting that in many cases "charities had little reason to question the donation . . .
[a]nd charities would be reluctant to probe the origin of a million dollar donation . . . ."); Sachdev, *supra* note 62, at 1 ("Seton Hall's dilemma of having accepted money from someone who went on to be accused of wrongdoing is part of a broader ethical challenge for colleges, especially those facing budget constraints because of reduced state funding . . . or declines in their investment portfolios."); *see also supra* note 91 and accompanying text.

[100] *See supra* Part I (discussing noted donor-charity-societal bargaining nexus). If the donor was a known "bad actor" and the charity, nevertheless, accepted the gift, this weakens the relative merits of the charity's argument for retaining the funds while avoiding compliance with the condition. The situation should not, however, turn solely upon the relative donor-charity positions or any unclean hands argument in that regard. Instead, all of the foregoing arguments should still hold sway, because as noted above, resolution of the matter should turn upon the public policy implications of allowing donor bad actors to forcibly demand perpetual association of their name with charitable missions. This implicates the donor-society bargaining nexus, and, thus, the relative donor-charity merits should not thwart this more demanding view of enduring donor control via a naming provision.

V. A SUPPOSEDLY SIMPLE MATTER OF CONTRACT

This part explores the tempting conclusion that donor-charity name agreements should simply and unapologetically be enforced as a matter of contract. This conclusion is both easily understood and often readily adopted by even informed observers. This pro-donor viewpoint, however, may fail to dictate outcomes in a given name deviation situation.

A. Promises of a Future Contribution

Donors may contribute funds to charity without demanding anything apart from the understood promise that the contribution will be employed by the recipient in furtherance of charitable ends.[101] Apart from this promise to apply the funds for charitable purposes, such outright contributions are "absolute" or "unconditional" gifts without any binding naming requirement.[102] If an unconditional charitable gift is thus completed by delivery and acceptance, the donor may not thereafter insist that the charitable recipient grant a naming opportunity to the donor.[103] A similar situation arises when donors "request" or state a "desire" for some name perpetuation, or otherwise merely state that memorial purposes motivated the gift.[104] Although the charity, on its own initiative, may recognize such donors with an honorary naming opportunity, there is no formal obligation to adopt or to continue any name association. Departure from a previously recognized name under such circumstances, therefore, raises no significant legal issue.

---

[101] *See* FISHMAN & SCHWARZ, *supra* note 17, at 72-78, 122-32 (discussing charitable organization's responsibility to employ contributed funds in furtherance of charitable purposes).

[102] *See, e.g.*, Courts v. Annie Penn Mem'l Hosp., Inc., 431 S.E.2d 864, 867-68 (N.C. Ct. App. 1993) (holding that hospital in receipt of absolute gift is not required to adhere to donor name demands).

[103] The intent to impose a naming condition must exist as of the time of the gift, and cannot thereafter be imposed. *Id.* In this regard, it is often said that a gift, once completed, is irrevocable. *Id.*; *see also infra* note 122.

[104] 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 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 case suggesting that memorial motives alone do not give rise to a charitable trust, see *Y.W.C.A. v. Morgan*, 189 S.E.2d 169, 175 (N.C. 1972) ("The expression as to use is merely a statement of motive in making the bequest . . . . The testatrix unequivocally gave the fund to the charitable corporation . . . for its charitable purposes."). Honorary naming opportunities are discussed *supra* Part II.A.

If the donor merely promises to make a contribution *in the future*, the accepted rule is that the donor's seemingly gratuitous promise is enforceable by the charity, and much has been written on the subject.[105] Enforcement of these pledge agreements or "charitable subscriptions" is generally based upon promissory estoppel.[106] Conversely, if the donor promises to make a future contribution only upon a charity's compliance with some executory condition — like constructing a named facility — the charity may not enforce the donor's promise if the charity fails to fulfill its promise.[107] In this latter circumstance, the court in *Carson's Estate*[108] held that where a new named facility was promised by the charity, that charity could not seek to enforce the donor's contribution promise upon associating the donor's name with only an older, renovated facility.[109]

B. *Progressing Towards —or Away from —an Operative Bargain*

More developed naming opportunity contributions, however, give rise to more enduring legal relationships and embody a greater potential for longer term disputes. These charitable naming contributions typically

---

[105] *See, e.g.*, T. C. Billig, *The Problem of Consideration in Charitable Subscriptions*, 12 CORNELL L.Q. 467 (1926) (discussing matter of charitable subscription agreements); E. Allan Farnsworth, *Promises to Make Gifts*, 43 AM. J. COMP. L. 359, 369-74 (1995) (same); Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1939-47 (2001) (explaining and critiquing current scholarship on gifts and consideration).

[106] The donor is compelled to fulfill the contribution pledge regardless of whether the charity or other donors have relied upon the donor's promise. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

[107] *See, e.g., In re* Carson's Estate, 37 A.2d 488, 491-92 (Pa. 1944) (holding that donor's promise to contribute upon charity's beginning construction on new memorial building gave rise to executory contract, and that charity failed to execute contract when it attached donor's name to older, renovated facility); Rothenberger v. Glick, 52 N.E. 811, 812 (Ind. App. 1899) (charitable subscription not enforceable against donor where charity failed to comply with condition precedent to contribution obligation).

[108] *In re Carson's Estate*, 37 A.2d at 491-92.

[109] *Id.* Similarly, in *Stock v. Augsburg College*, the court held that if the donor delivered the funds but the charity failed to ever associate the name, a cause of action arose for breach of contract. Stock v. Augsburg Coll., 2002 Minn. App. WL 555944, at *4 (Minn. Ct. App. 2002); *see also supra* notes 73-83 and accompanying text (discussing *Stock*). Two factors distinguishing both *Stock* and *Carson* from the more difficult situations discussed *infra* Part VI and thereafter are that (i) in both cases, it was the charity's decision never to honor the terms of the naming agreement — although in *Stock* there were new facts (i.e., facts within the donor's control that were revealed subsequent to consummation of the naming arrangement) that perhaps justified that decision; and (ii) in neither case had there been any dedication of funds to facilitate the agreed-to name association, and, thus, there was little negative consequence or complexity in finding that forfeiture would leave both parties in their approximate original positions.

entail a donor's completed transfer of money or property to a charity. That transfer is coupled with an understanding that, among other things, the donor's name will be enduringly associated in some way with the charity, its facilities, or its activities.[110] Once the contribution has been made and the name associated, however, resolution of charitable name deviation disputes tends to focus upon the donor-charity agreement, but not so strongly on the "contract." In other words, the application of contract principles generally gives way to analysis that focuses upon the parameters of the donor's "gift," more so than the technical bargain or contract nature of the transaction. As a result, the parties' relationship with regard to the contribution and enforcement of its terms is typically addressed under property-based principles.[111]

---

[110] As noted *supra* note 23, the name could also be a family name, or the name of a loved one of the donor. The point is that some perpetuation of an individual or private name is required. Of course, if the donor makes the gift and the charity thereafter volunteers the name association, any bargained-for element would seem to be lacking, unless the donor specifically negotiates to increase the contribution in return for a naming opportunity (or for a naming opportunity that is more prestigious than the one originally volunteered). *See supra* Part II.A (regarding honorary naming opportunities). As also noted *supra* Part II.A, commercial sponsorship agreements are not at issue here.

[111] Although some courts reference contract principles and the possibility of a name deviation action based on simple breach of contract grounds, there is a dearth of authority actually resolving completed-transfer name deviation situations on such grounds. See, for example, the case discussed in the text accompanying *infra* note 245, referencing "the contract" but applying cy pres analysis. It also appears that in such cases, where a breach of contract is found to exist in isolation from the three property-based relationships noted in the text *infra*, the remedy itself would in any event be similar to that granted in the case of conditional gifts and charitable trusts (i.e., specific enforcement, forfeiture, or perhaps some forfeiture variation based upon a restitution theory). *See, e.g.*, Foote Mem'l Hosp., Inc. v. Kelley, 211 N.W.2d 649, 662 (Mich. 1973) (noting that conveyance subject to provision for reverter was neither contract nor trust, but simply called for forfeiture if conditions were not satisfied — result that respects property aspect of donor-charity dealings and which is practical equivalent of proceeding under conditional gift analysis); Rothenberger v. Glick, 52 N.E. 811, 812 (Ind. App. 1899) (noting charitable subscription case in contractual nature of pre-contribution subscription agreement, but proceeding to state, without explanation, that in case of deviation from conditions of subscription after contribution is complete, "the subscriber has his remedy"); *Stock*, 2002 Minn. App. WL 555944 (finding that name deviation specifically gives rise to cause of action for breach of contract, but then finding that cause of action was precluded based upon statute of limitations — court noted with regard to breach of contract action that donor's remedy would be charity's forfeiture of contribution). None of this is intended to imply that the possibility of proceeding on contractual grounds is somehow foreclosed. *But see infra* note 135 and accompanying text. For a discussion of property law versus contract status in the context of donor standing to enforce charitable gifts, see Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37 REAL PROP. PROB. & TR. J. 611, 622-25 (2003); John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N.C. L. REV. 905, 910-12 (1983). Professor Gaubatz notes that "the relative paucity of modern cases . . . which [address] the question of the grantor's contractual right to enforce

1. Absolute and Conditional Gifts

A primary consequence of this property-based analysis is that outcomes in charitable name deviation situations tend to turn upon a court's finding that the contribution gave rise to one of three legal relationships.[112] The first possibility is that the donor made an absolute gift with no binding or enforceable naming obligation. This possibility is discussed above.[113] The second possibility is that the donor made a "conditional gift."[114] The remedy for noncompliance with a donor's conditions in the case of a conditional gift is the charity's forfeiture of the gift.[115] The enforcement mechanism is, therefore, encompassed within the very terms of the donor's contribution. The third possibility is that

---

a trust at law . . . ." Gaubatz, *supra*, at 911. He also notes that "[s]ome cases appear to obscure the importance of any distinction between trust and contract analysis," though he goes on to conclude that contractually-based relief is available. *Id.* at 910-11, n.30. Professor Chester also gives attention to the contractual nature of the trust relationship itself, as advanced in John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995). See also *supra* note 107, for cases referencing contract doctrine where the transfer and name association were not completed.

[112] The specific finding turns upon the donor's intentions, though few donors contemplate such matters with the level of complexity noted here. *See, e.g.*, BOGERT, *supra* note 48, at ch. 2 introduction ("Few property owners will understand the different legal requirements or consequences associated with these various dispositions [i.e., absolute gift, trust, or some other relationship]"). Intent is gauged as of the time of the contribution. *See supra* notes 102-103; *see also* Courts v. Annie Penn Mem'l Hosp., Inc., 431 S.E.2d 864, 866-67 (N.C. Ct. App. 1993). Where the gift is inter vivos, courts look to words or acts accompanying the transfer. *Id.* Where the gift is testamentary, standard rules of will construction pertaining to ascertaining the decedent's intent apply. Wilson v. First Presbyterian Church, 200 S.E.2d 769, 776-77 (N.C. 1973).

[113] *See supra* notes 101-104 and accompanying text.

[114] The court in *In re Marceck* noted, "A gift may have a charitable purpose and yet not constitute a charitable trust . . . [in which case the gift] is construed as some type of absolute or conditional gift." *In re* Marceck, 100 N.W.2d 758, 762 (Minn. 1960); *see also* Dunaway v. First Presbyterian Church of Wickenburg, 442 P.2d 93, 95 (Ariz. 1968) (reciting that naming subscription creates bilateral contract, and then proceeding to resolve dispute subsequent to delivery by reference to conditional gift analysis); City of Palm Springs v. Living Desert Reserve, 82 Cal. Rptr. 2d 859, 865 (Ct. App. 1999) (stating that where property was given for establishment of memorial park, possible relationships were absolute transfer, transfer subject to condition, or charitable trust, and noting that charitable trust may be subject to condition subsequent); Ewing v. Hladky Constr. Co., 48 P.3d 1086, 1088 (Wyo. 2002) (discussing contractual status of transfer agreement and then resolving dispute on basis of conditional versus absolute gift principles).

[115] *See infra* note 118. The forfeiture may be in the nature of a reversion or resulting trust to the donor or her heirs, or the donor may expressly identify an alternative beneficiary to take in the event of forfeiture. *See infra* note 123 and accompanying text; *see also* LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 132 (2d ed. 1966) (noting that reversions arose in part as means for charitable donors to maintain "strings" to enforce compliance); STOEBUCK & WHITMAN, *supra* note 13, § 3.17 (same).

the donor's gift gave rise to a charitable trust.[116]

2. Charitable Trust Status

An important ramification of charitable trust status is that the charity's obligations with respect to the contribution and its terms can be specifically enforced.[117] A donor who makes a conditional charitable gift not affected by charitable trust status, in contrast, generally cannot compel the charity to comply with the name condition in light of the inherent forfeiture remedy.[118]

Perhaps even more significantly, charitable trust status often permits courts to invoke the trust doctrines of cy pres and equitable deviation. When one of those doctrines applies, a court may alter the terms or even the precise purpose of a donor's contribution.[119] This suggests flexibility to perpetuate the name via an altered charitable association. In other words, if a donor's charitable naming contribution is affected by charitable trust status and one of these modification doctrines applies, the charity may be permitted to escape strict compliance with the naming condition without suffering forfeiture as a consequence of such noncompliance.

---

[116] *See supra* note 114 (discussing charitable trust status as relationship that may result from donor's gift). Most basically, charitable trust status subjects the holder of property — in this case, the charity-recipient of the donor's gift — to fiduciary duties in dealing with the trust property for charitable purposes. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 5 (2003) (distinguishing trust relationship from contracts, conditions, and other arrangements); SCOTT & FRATCHER, *supra* note 16, § 398 (discussing various definitions of "charitable trust"); BOGERT, *supra* note 48, § 17 (same).

[117] *See infra* note 118.

[118] *See City of Palm Springs*, 82 Cal. Rptr. 2d at 866 ("The transferee of a conditional gift . . . has no enforceable duties. The breach of the condition may result in termination of the transferee's interest, but it does not subject the transferee to actions for damages or to enforce the condition."); Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56 (Ky. 1942) (noting importance of donor intent and distinguishing covenants held in trust, which are enforceable by action of attorney general or charitable trust beneficiaries, from conditions subsequent that entail forfeiture upon noncompliance); Foote Mem'l Hosp., Inc. v. Kelley, 211 N.W.2d 649, 662 (Mich. 1973) (finding that deed to charity with provision for reverter upon failure of condition did not give rise to charitable trust or contract rights, but simply demanded forfeiture upon noncompliance); *In re Marceck*, 100 N.W.2d at 762 ("[T]he distinction between a charitable trust and a conveyance on a conditional fee lies mainly in the duties [imposed]. In the case of a charitable trust, the trustee assumes an affirmative duty to use the property in accordance with the trust. In the case of a conditional fee, the grantee has permissive right to use as directed and he may lose the title if he departs from such use."); RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. h (noting this limitation upon enforcement of transfers subject to conditions); RESTATEMENT (SECOND) OF TRUSTS § 11 cmt. b (1959) (same).

[119] These doctrines and their applicability are considered in detail *infra* Part VI.

3. A Bargained-for Donative Agreement?

Despite the potential modification flexibility afforded by invocation of charitable trust doctrines like cy pres and equitable deviation, property-based principles clearly offer viable enforcement mechanisms or remedies with regard to noncompliance with donor naming provisions.[120] General reference to "enforcing the parties' agreement" therefore still pertains, notwithstanding the seeming departure from "pure" contract principles.[121] This propensity to venture outside the realm of pure contract doctrine, however, deserves additional attention before proceeding with a more detailed consideration of conditional gifts and charitable trusts.

The propensity to operate under property-based principles could derive from a perception that once the familiar charitable subscription agreement is fulfilled upon donor delivery of funds and acceptance by the charity, there is a completed transfer that is thereafter governed by the rules pertaining to gifts.[122] A related perception likely governs where the contribution is testamentary, because conditions imposed under a will are not so much bargained-for as simply accepted by the recipient of the devise upon receipt of the property. The propensity to operate under property-based principles could also reflect that many charitable contributions involve real property and are, therefore, implemented by deed. Thus, the terms of the contribution and consequences of

---

[120] Specific enforcement and forfeiture are two such enforcement mechanisms that are available where property-based analysis pertains. *See supra* Parts V.B.1, V.B.2.

[121] For a discussion regarding the terms "agreement" and "bargain," see *infra* note 126.

[122] For a discussion regarding charitable subscriptions (i.e., pledges), see *supra* Part V.A. One contracts text transitions between contract and gift doctrines as follows: "While a promise to make a gift in the future is not an enforceable obligation under contract law [absent, of course, the particular treatment noted *supra* of charitable subscriptions], property law provides that once a gift has been 'executed' — delivered by the donor with the intent to make a gift, and accepted by the donee — it is irrevocable . . . ." CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW, CASES AND MATERIALS 117 (4th ed. 1999). The term "executed" is also sometimes used to describe a contract that has been fulfilled, which may be the perception with regard to a charitable subscription following the contribution and name association. *See, e.g., In re* Carson's Estate, 37 A.2d 488, 492 (Pa. 1944) (noting in context of unfulfilled charitable subscription that "the doctrine of cy pres has no application because there was no *executed* gift to the trustees for charity. The pledge created, at most, an *executory contract*."). Williston comments, however, that the idea of an "executed" contract is a misnomer, because the notion of contract implies a promise of future performance, which if fulfilled, places the transaction beyond the realm of contract. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, § 1.19 (1990). As to gift doctrine, irrevocability of a gift does not mean that a gift cannot be subjected to conditions that will result in forfeiture if not complied with. *See infra* notes 130-135 and accompanying text.

noncompliance most directly depend upon the nature of the real property conveyance as absolute, defeasible/on condition subsequent, or in trust.[123] Another explanation could be an outright reluctance (or inability) to grapple with the gift versus bargained-for nature of the arrangement, particularly in light of property law principles that provide the basic remedial avenues to addressing complaints of noncompliance with contribution terms.[124]

As to the gift versus bargained-for nature of the parties' dealings, many naming contributions could perhaps be described as the result of a bargained-for exchange.[125] From a contractual standpoint, the argument is that the donor bargained for a promise of ongoing charitable performance that should be enforceable as a matter of contract.[126] In tax

---

[123] The court in *City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859, 865-67 (Ct. App. 1999) considered a conveyance of land to establish a memorial park and stated the issue as follows: "The Deed obviously does not convey the Land . . . in fee simple absolute. But was the Land given in trust, or in fee simple subject to a condition subsequent?" The court goes on to discuss the various types of common-law defeasible estates, reduced by statute in California to interests subject to condition subsequent. *Id.* at 867 n.4; *see also* HERBERT TIFFANY & BASIL JONES, 1 TIFFANY REAL PROPERTY § 188 (2003) (discussing special limitations, conditional fees, covenants, and trusts in context of real property conveyances); Kevin A. Bowman, Comment, *The Short Term Versus the Dead Hand: Litigating Our Dedicated Public Parks*, 65 U. CIN. L. REV. 595, 601-11 (1997) (discussing particulars of various interests that might arise upon donor's conveyance of real property to charitable municipal corporation); Joseph C. Cove, *Gifts and Other Charitable Dispositions to the Municipal Corporation*, Mass. CLE 2002, *available at* Westlaw JLR database as doc MLII MA-CLE 18-1 (discussing absolute versus restricted gifts).

The use of terms like "condition subsequent" and "condition precedent" are said to cause much confusion in the context of contractual relations, absent further qualification. *See* RESTATEMENT (SECOND) OF TRUSTS § 224 cmt. a & reporter's note (1979); WILLISTON, *supra* note 122, § 38.4 (discussing this point of confusion and various possible meanings use of "condition" might imply). Condition "precedent" and "subsequent" terminology is disavowed under the Second Restatement of Contracts, which proceeds to deal primarily with what have traditionally been called conditions precedent to a duty of performance. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 11.2 (5th ed. 2003) (making this observation about section 224 of Second Restatement of Trusts).

[124] The remedies available under property analysis are discussed *supra* Part V.B.1-2. Two basic remedies are specific enforcement (in the case of a gift giving rise to a charitable trust) and forfeiture, with forfeiture of the contribution perhaps being viewed as a near equivalent of contractually-based restitution.

[125] Professor Colombo describes naming opportunities as "quasi-purchase transactions" in framing a tax-based analysis of these arrangements. *See* Colombo, *supra* note 3, at 661.

[126] *See* E. ALLAN FARNSWORTH, III FARNSWORTH ON CONTRACTS § 2.9 (3d ed. 2004) ("In principle, . . . the bargain test requires that the promisor's purpose in making the commitment be to induce some action in return —to induce an exchange."). As set forth in Second Restatement of Contracts:

> The word "agreement" contains no implication that legal consequences are or are not produced. It applies to transactions executed on one or both sides, and also to those that are wholly executory . . . . [The word "bargain"] includes

parlance, this grant of a charitable naming opportunity in apparent exchange for a transfer of money or property could thus be characterized as a "quid pro quo," meaning that the transaction possesses elements of reciprocity or return benefit to the donor.[127] Such quid pro quos are generally said to defeat the tax deductibility of a donor's contribution.[128] The noted bargained-for characterization would, thus, seem to negate (or itself be negated by) a donor's claiming to have made a tax deductible "contribution or gift." The IRS has nevertheless acquiesced in the deductibility of donor transfers that command some form of donor recognition.[129] The donor's claim of a tax deduction does not, therefore,

---

> agreements which are not contracts, such as transactions where one party makes a promise and the other gives something in exchange which is not a consideration. As here defined, it includes completely executed transactions . . . although such transactions are not within the scope of this Restatement unless a promise is made.

RESTATEMENT (SECOND) OF CONTRACTS § 3 cmts. a, c (1981); *see also* WILLISTON, *supra* note 122, § 1.1-1.4 (defining "contracts," "promises," "agreements," and "bargains"). The word "agreement" is often employed in this Article, in order to generically identify donor-charity dealings concerning the name without suggesting the precise legal characterization of that arrangement.

[127] *See* Colombo, *supra* note 3, at 662-67. Though complex in technical detail, the tax code basically grants a deduction for a "contribution or gift" to a qualified recipient. *See generally* BITKER & LOKKEN, *supra* note 42, § 35.1 (discussing charitable contribution income tax deduction requirements). "Contribution" and "gift" are synonymous for purposes of the charitable contribution tax deduction. *See* Hernandez v. Comm'r, 490 U.S. 680, 687 (1989) (stating this proposition); Jacob L. Todres, *Internal Revenue Code 170: Does The Receipt by a Donor of an Intangible Religious Benefit Reduce the Amount of the Charitable Contribution Deduction? Only the Lord Knows for Sure*, 64 TENN. L. REV. 91, 100 (1996) (same).

[128] Specifically, a transfer to charity in return for some benefit flowing from the charity to the donor (i.e., "a quid pro quo exchange") generally constitutes a deductible "contribution or gift" only to the extent of the excess value flowing to charity. *Hernandez*, 490 U.S. at 687. Where that return benefit is intangible or only available from a charitable source, this greatly complicates the analysis. *See, e.g., id.* at 704-13 (O'Connor, J., dissenting). *See generally* Colombo, *supra* note 3, at 665-67, 695-96; Douglas A. Kahn and Jeffrey H. Kahn, *Gifts Gafts and Gefts: The Income Tax Treatment of Private Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts From Income*, 78 NOTRE DAME L. REV. 441 (2003) (discussing meaning of "gift" in context of charitable contributions and tax deductibility); Todres, *supra* note 127, at 101-02 (discussing various approaches taken by courts in construing "contribution or gift" language).

[129] *See, e.g.*, Rev. Rul. 68-432, 1968-2 C.B. 432 (1968) ("Such privileges as being associated with or being known as a benefactor of the organization are not significant return benefits [i.e., quid pro quos] that have a monetary value [justifying denial of the tax deduction]."). The IRS noted, however, that such conclusions are dependent upon the particular facts and circumstances of each case. *Id.* The reasons for this outcome are likely grounded in the history of IRS deference, the administrative difficulties of valuing the donative versus purchased aspects of such transactions, and the likely outcry from charitable organizations were they to be denied the benefits of this tax-deductible charitable naming opportunity fundraising tool. *See also* FISHMAN & SCHWARZ, TEACHERS' MANUAL 193 (2d ed. 2000), *cited*

inherently preclude the donor from asserting that the parties' "bargain" should be enforced.

Notwithstanding the existence of an enforceable agreement, there is clearly some donative element to these transactions.[130] Instances of private *individuals* purchasing *noncharitable* naming opportunities, for example, are virtually nonexistent.[131] This suggests that a predominant purpose underlying most naming contributions is to provide some benefit to the charitable recipient, rather than to create a contractually-based bargained-for exchange.[132] Any such contribution, moreover, must be affected by some objective benefit to the public good if the contribution is to be deemed charitable in the first instance, such that the donor might enjoy the favoritisms afforded such contributions.[133] The conditioned nature of the contribution suggests that the donor wanted her naming terms to be honored as an incident of the gift, but the presence of such conditions does not necessarily imply that a strictly contractual relationship was intended. The presence of naming conditions, in other words, is more readily understood in substance as "signifying that the conditions placed upon the transfer are binding on the [recipient], rather than as creating a formal contract."[134] This view supports the application of property-based principles to enforce

---

in Colombo, *supra* note 3, at 666 n.38 (citing Fishman Teachers' Manual as authority).

[130] As to a more technical use of the term "agreement," see *supra* note 126. Regarding the donative nature of similar transactions, Justice O'Connor's dissent in *Hernandez* recognized the difficulties with a quid pro quo analysis where return benefits are of an intangible nature that are not comparably sold in a nondonative context. 490 U.S. at 706-08. O'Connor noted that even if, for example, a charity were "selling" poppies at $10 each, "it would absurdly not be true that everyone who 'bought' a poppy for $10 made no contribution." *See also* Colombo, *supra* note 3, at 665 (relating O'Connor's dissent to tax deductibility of naming opportunity contributions).

[131] *See, e.g.*, Eleena de Lisser, *Airlines: Frequent Fliers View Awards of Jewels, Catered Feasts as Resistible Temptations*, WALL ST. J., Nov. 8, 1995, at B1 (discussing American Airline's promotion to put passenger's names on side of airplane in exchange for frequent flier mileage — "The . . . airline called the . . . auction its 'most prestigious' ever. But no one came forward.").

[132] See *supra* note 126 regarding bargains, agreements, and contracts. In this regard, there is a bargained-for exchange only if the donor made the contribution specifically in order to induce a return promise of future performance from the charity (i.e., the ongoing association of the name). According to Farnsworth, if the name association was simply an incident of an arrangement undertaken to bestow a benefit upon the charity, but was not an inducement for the gift, there is no bargain in that regard. FARNSWORTH, *supra* note 126, § 2.9.

[133] See *supra* Parts I and III regarding "charitable" status and the favorable treatment afforded contributions that fit that categorization.

[134] *Equitable Transfers of Forfeited Monies or Property*, 18 OP. OFF. LEGAL COUNSEL 74 (1994).

charitable naming arrangements. This view, moreover, is frequently encountered (though perhaps only implicitly) when a charitable name deviation situation requires judicial resolution.[135]

C. *Distinguishing the Relationships*

The binding nature of the donor-charity naming agreement is most often given force through application of conditional gift or charitable trust analysis, as just explained. The status distinctions and resulting analysis matter when a name deviation circumstance arises. This part discusses the nuances and implications of distinguishing charitable trust status from gifts subject to a nontrust forfeiture condition.

1. Stating the Condition

An initial question concerns the particular form that a donor might adopt to express her intent to make a gift subject to a naming condition, in lieu of making an absolute gift with no binding obligation concerning the name. An instructive example of specific naming condition language can be seen in *Herron v. Stanton*.[136] In *Herron*, the donor made a contribution of cash and real property to charity for the establishment of an art school and gallery.[137] The terms of the gift stated that it was "absolutely and forever . . . [p]rovided, however, [that] this bequest is upon the condition . . . that the art gallery and art school . . . shall each be designated and named by such name as will include the name of the

---

[135] *See supra* note 111. It is possible that contract remedies could apply to a charitable name deviation, although such findings are rare. One case that does blend the remedy of restitution into the concept of a conditional gift is *Ball v. Hall*, 274 A.2d 516, 520 (Vt. 1971). In that case, the donor incorporated into their gift agreement a provision stating that in the event the donor's conditions were not complied with, the "gift" would convert into a "loan," repayable on demand. Ultimately, this is not so unlike a straightforward conditional gift, except perhaps in that the donor's remedial specificity clarifies the repayment terms and perhaps characterizes the nature of the remedy. In this regard, the donor's terms led the court to conclude that "[t]he result of nonperformance . . . is not a forfeiture in the true sense of the term." *Id.* The case law tends to focus upon the distinction between *conditional gifts versus charitable trusts*, however, and additional subtleties affecting the possible availability and consequences of other "purely" contractual remedies in the context of charitable name deviations are left to other scholars. For a recent grappling with the interrelationship between conditional gifts, contractual remedies, and claims at law and equity, see *Ver Brycke v. Ver Brycke*, 843 A.2d 758, 771-77 (Md. Ct. Spec. App. 2003) (noting "dearth of authority" in this realm of conditional gifts and discussing legal versus equitable nature of potential remedies available).

[136] 147 N.E. 305 (Ind. Ct. App. 1920).

[137] *Id.* at 306.

[donor] . . . and the use of such name . . . shall be perpetual."[138] In the context of distinguishing absolute from conditional gifts, this language appears sufficient to go beyond a precatory "request" and, instead, to express an intent to subject the gift to a true naming condition.[139] The donor in *Herron*, however, went on to even more clearly state her intent. After the language just quoted, she provided that "[i]f said [charity] shall not see fit to comply with the foregoing [name] condition, or if, for any. . . reason, this bequest should fail . . . then . . . my executor shall distribute [the affected property] to . . . [other] religious and charitable societies . . . ."[140] The court in *Herron* held that the donor's gift was subject to a condition (subsequent) that would require divestment in favor of the alternative beneficiary if not complied with into perpetuity.[141] Utilization of such conditional language *coupled with* express language of forfeiture is, in fact, the recommended route for a donor who desires maximum control and assurance that her naming desires will be met.[142]

Prior to reaching its conclusion, however, the *Herron* court had to address a potential problem with the noted language. The heirs argued that the donor intended the establishment of the named art school and gallery to be a condition precedent to the vesting of the gift in the charitable recipient.[143] Had that been the case, the initial vesting of the charitable interest would have been subject to a contingency of indefinite duration, and therefore, void under the Rule Against Perpetuities (the waiver of which requires some definitive charitable interest).[144] This would cause the gift to fail and, thus, to revert to the donor's heirs.[145] The court, however, applied rules of construction that favor upholding

---

[138] *Id.* Note that *Herron* is utilized here for the clarity of language as evidencing a conditional versus absolute gift. The court in *Herron*, however, was also required to confront the heirs' assertion that the language created a condition precedent and was therefore void as violative of the rule against perpetuities. *See infra* notes 143-148 and accompanying text.

[139] See *supra* note 104 and accompanying text regarding precatory naming requests.

[140] *Herron*, 147 N.E. at 306. For a further discussion of gifts over to alternative beneficiaries upon forfeiture, see *infra* Part VI.A.

[141] *Herron*, 147 N.E. at 309.

[142] The reasons will become more apparent as discussion progresses to distinguishing conditional gifts from charitable trusts, and then to gifts over and their effect on application of the doctrine of cy pres.

[143] *Herron*, 147 N.E. at 307. See *supra* Part I regarding the potential waiver of the Rule Against Perpetuities in the case of contributions in favor of a charitable recipient.

[144] *Herron*, 147 N.E. at 308-09.

[145] *Id.*

attempted gifts to charity as valid.[146] The court specifically rejected the condition precedent claim and instead held that the donor made a vested contribution that was merely subject to divestment upon noncompliance with the condition of establishing and maintaining a named art school and gallery.[147] This finding also validated the donor's gift over to other charities in the event of noncompliance with the conditions, because the Rule Against Perpetuities does not apply to a gift over to charity following a valid, noncontingent charitable interest.[148]

Consider, finally, the *Herron* court's statement that "[t]he purpose of the [naming] condition was to compel continued use, and thereby the perpetuation, of the [donor's] name in connection with [the selected charity]."[149] Whether such conditions actually promote this purpose is a question that should be kept in mind as the discussion here progresses.[150]

2. Donor Precision

Analysis to this point suggests that the donor who seeks to ensure straightforward compliance with a naming condition should simply specify her terms and expressly provide for forfeiture if those terms are not met. The very premise of conditional gift status enforces this viewpoint.[151] Some might argue, therefore, that if donors would simply be more precise in stating their charitable naming conditions, much of the uncertainty over name deviation situations could be avoided. While there is, no doubt, some degree of truth to this assertion, the argument proves inadequate on a practical level for at least two reasons.

---

[146] *Id.*

[147] *Id.* at 309. Note that the donor therefore made a completed transfer of property to the charity, removing the case from the realm of charitable subscriptions and other promises of a *future* contribution to charity. Compare this situation with those in the cases cited *supra* note 107. Here, the charity will be allowed to proceed with establishing and naming the art school and gallery in due course, so long as the requirement is not obviously abandoned. *See, e.g.*, Palmer v. Evans, 124 N.W.2d 856, 865 (Iowa 1963) ("In the case at bar the corporation contemplated by the testator has been formed. Even without such action by the trustees the gift could have been saved by the application of the cy pres doctrine."). The charity, in other words, will not be found in breach of the condition unless there is "such neglect to comply as to indicate an intention to disregard the condition." Erskine v. Bd. of Regents of Univ. Neb., 104 N.W.2d 285, 291-92 (Neb. 1960). *Compare Erskine*, 104 N.W. 2d 285, *with In re* Carson's Estate, 37 A.2d 488, 491-92 (Pa. 1944) (characterizing situation as one where "the party obligated to perform *deliberately* and *intentionally* departs from the terms of the contract").

[148] *Herron*, 147 N.E. at 309.

[149] *Id.* at 305.

[150] This matter is revisited, with the benefit of additional legal doctrine, *infra* Parts VI and VII. *See infra* notes 184-187 and accompanying text.

[151] *See supra* Part V.B.1.

First, there are many previously established charitable naming situations. More donor precision in framing these past contribution terms is now foreclosed. Yet, many of those charitable naming arrangements will undoubtedly present future problems because significant time periods often pass between the framing of a charitable naming scheme and the actual occurrence of a name deviation circumstance.[152] Thus, an orphanage founded and named in 1900 may be operating without complication today, but circumstances in the coming decades may require that the parameters of that ongoing charitable name association be revisited — all with an eye towards a donor contribution penned over a century ago.

Second, it is not at all clear that donors and charities can be prompted to generally adopt a sufficient level of specificity to avoid variable outcomes under whatever legal doctrine is deemed to govern.[153] The growing prevalence of naming agreements at smaller gift levels and smaller charitable organizations[154] renders it likely that many such gifts will continue to be made with a minimal level of sophisticated (and informed) legal counsel.[155] Moreover, even large charities find it difficult to confront prospective donors with the caveat that "your terms will be honored into perpetuity, unless, of course, you should ultimately be exposed as a scoundrel or your foresight should prove ill-conceived."[156]

---

[152] *See, e.g., In re* Estate of Craig, 848 P.2d 313, 316 (Ariz. Ct. App. 1992) (dealing with 1930 will and charitable gift that did not become effective until 1987); Burr v. Brooks, 416 N.E.2d 231, 232 (Ill. 1981) (dealing with 1898 will and charitable gift that did not become effective until 1976); *In re* Downer Home, 226 N.W.2d 444, 445-46 (Wis. 1975) (discussing 1885 will and failure of charitable gift in 1960s).

[153] This is true despite recent attention given to the use of detailed donor agreements, though the prospect of increasing donor attention to such matters may ultimately result in a more contracts-based perspective on such matters. *See generally* Debra E. Blum, *Donors Increasingly Use Legal Contracts to Stipulate Demands on Charities*, CHRON. PHILANTHROPY, Mar. 21, 2002, at 9 (discussing examples and ramifications of 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*, CHRON. PHILANTHROPY, Mar. 21, 2002, at 7 (same). If anything, these reports highlight the potential mischief that such donor controls might ultimately occasion. Whether such agreements will be treated as true "contracts" in a future dispute is discussed *supra* Part V. *See supra* note 135. The rules applied in distinguishing conditions from charitable trusts are more fully developed *infra* Part V.D.

[154] With regard to smaller gifts and smaller charities, see Brandstrader, *supra* note 3, at 30 (discussing "lower end" naming opportunities).

[155] *See also infra* Part VII.D.1 (discussing vagaries in Avery Fisher's multimillion dollar gift agreement with Lincoln Center).

[156] On this point, however, I believe much could be accomplished in this area were charities, on a very broad scale, to adopt general policies that permit in every instance certain escapes from the particulars of a naming condition. A general policy would avoid

3. Complicating the Simple Case: Good Works and Its Named Library

The foregoing points are exemplified by the case of Good Works. Good Works is an actual, small-town, community-based charity that recently sought to modernize and enhance its mission and service to the community through a facilities expansion.[157] Several decades ago, the Good Works charity moved into what was then a new building. This building included a library that was named for "Ms. Jones."[158] Two years ago, Good Works undertook a significant renovation of this building. The renovation included the complete destruction and redeployment to other uses of the former library space within the walls of the original building. The project also called for the addition of an entirely new structure that would house, among other facilities, a larger, more usable, and interactive library space. Good Works called this new space a "media center" to reflect the enhanced library benefits the upgrade promised. Not surprisingly, fundraising was particularly important to the project, and the now oft-encountered price list for various naming opportunities was devised. The price for the "[Your Name Here] Media Center" was set at $90,000.[159]

As the project progressed into 2004 and the economy staggered, it became increasingly obvious that more dollars would be needed to complete the project. Selling the library/media center naming opportunity would be a great (if not crucial) help for this small-town charity. However, the charity and potential donors encountered roadblocks in utilizing a new naming opportunity gift. The problems were due, in part, to uncertainty over the terms of the original library naming, and, thus, over the legitimacy of renaming the new library for a new donor. These complications arose even though the new library represented new space in a completely new facility.[160]

---

any insinuation that the concern is with the particular donor's ethics or foresight. However, for this line of reasoning to address the various issues discussed in this Article, such policies would have to be widely adopted across the charitable sector. *See also supra* notes 91, 99 and accompanying text.

[157] The name "Good Works" is adopted here for purposes of simplicity. Information concerning the website of the actual organization upon which this example is based, as well as pictures of the building project discussed here, are on file with the author.

[158] The library represented only one aspect of Good Works' charitable mission.

[159] The price list for naming opportunities within the organization is on file with the author.

[160] These concerns were actually first voiced internally by Good Works Board of Trustees, thus blunting arguments that the renaming was a simple case of charitable opportunism in complete disregard of prior donor dealings. The new structure is connected to the original building by a breezeway.

a. Reconstructing the Bargain

Good Works' charitable management and potential donors faced initial uncertainty due simply to the age of the original gift and its sparse documentation.[161] Both groups were initially uncertain as to whether the former space had been named simply in honor of Ms. Jones, or whether the naming rights had been granted in exchange for a monetary contribution.[162] If we assume that Ms. Jones did make a monetary contribution — imagine even a specific writing that referenced "the library" in connection with her gift — an interpretive question immediately arises: namely, to what, *exactly*, did the naming contribution relate? Possibilities include binding the charity to name only the original library housed within the original structure. Alternatively, the name could have been intended to bind Good Works with regard to *any* library (or modern media center variation) thereafter housed within *any* facility operated by Good Works. Notably absent in resolving these questions was the ability to know with any certainty whether the long-since deceased Ms. Jones cared more about her name appearing on a library wherever located, on only the particular former library space, or not so much about her name being anywhere relative to the fundamental goal of facilitating Good Works' mission both at the time of the gift or as circumstances later dictated. In the latter case, the library would merely reflect her preferred, but not critical, vehicle for proceeding, and the naming opportunity would constitute a simple lagniappe.[163]

---

[161] *See supra* note 152 and accompanying text.

[162] Similar issues often confront charities even where the documentation is quite complete, because the legal consequences of such documentation are often far from clear, as evidenced by many of the cases discussed in this Article.

[163] The analysis would change if Ms. Jones were still alive. In addition to being able to speak to her intentions, she could also agree to a waiver or modification of the past naming conditions. *See, e.g.*, Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995 (Conn. 1997) (applying Connecticut's version of UMIFA to case involving donor's right to enforce terms of charitable gift); *Uniform Management of Institutional Funds Act ("UMIFA")*, 8 REAL PROP. PROB. & TR. J. 405, 411-16 (1973) (including commentary from ABA Committee on Charitable Giving). UMIFA is not discussed further in this article, for two reasons. First, UMIFA does not limit application of the doctrine of cy pres, which is discussed in detail *infra* Part VI. *See* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(d), 7A U.L.A. 316 (1972). Second, the "situation where an extant institution or living donor believes that the charitable institution has not adhered to the terms of the gift . . . is rare because of the impact it may have on other development efforts and public relations. More common is where the contributor's descendants, after the donor is in the ground, discover that the gift restrictions have not been upheld." FISHMAN & SCHWARZ, *supra* note 17, at 271-72 (discussing UMIFA and restricted gifts in notes following cited case).

b. Donor Prescience

These are important questions, especially given doubts about whether Ms. Jones ever conceived of more than a bound paper collection in a given space. Consider also that Good Works sought to establish an expanded library in a new facility that incorporated technological innovations that, today, go well beyond (even to the point of superceding) any traditional concept of a library.[164] Many in Good Works' management and membership, sitting on both sides of the name removal issue, rightfully wanted to know how Ms. Jones would respond today if she knew that her name was potentially thwarting Good Works' ability to modernize its library services. Even if Ms. Jones did conceive of Good Works abandoning its original library space or services, it is difficult to assert that she ever contemplated the extent to which interactive multimedia pervades modern informational services. It is, therefore, sheer speculation to argue that she would today reject the prospect of associating her name with, for example, a bound paper collection housed within a more comprehensive and otherwise named media center.[165]

More generally, it seems illogical to conclude that Ms. Jones or any reasonable donor would prefer to jeopardize a charity's mission through obstinance over her name adorning the library in all events. Such obstinance could force the disgorging of needed funds otherwise dedicated to the underlying charitable mission. That outcome may obtain by virtue of forfeiture consequences for deviation from the donor's naming condition.[166] This prospect could possibly lead to the complete abandonment by Good Works of all library services, given the added cost it would impose upon proceeding as desired. It seems similarly implausible to argue that Ms. Jones would prefer to have her name adorn a little-utilized facility which, because of an inability to modernize, is left ill-suited to fulfill the very aspect of Good Works' charitable mission that Ms. Jones originally found worthy of her support

---

[164] The twenty-six volume encyclopedia reduced to an interactive DVD or web address represents merely one example.

[165] With regard to donor anticipation of changed circumstances, see the discussion of equitable deviation *infra* Part VI.B. and thereafter. *See infra* notes 268-270 and accompanying text. As to associating one donor's name within a larger charitable endeavor named for a different donor, see, e.g., *Old Colony Trust Co. v. O. M. Fisher Home*, 16 N.E.2d 10, 14 (Mass. 1938) ("Our oldest college is none the less a memorial to John Harvard because a number of dormitories, museums, and other buildings serve also as memorials to others.").

[166] See *supra* Part V.B regarding forfeiture as a remedy for noncompliance with a naming condition.

and name association.[167] As will be seen, however, the case law purports to concern itself with a donor's *actual* intent, unaffected by the court's deduction of what a *reasonable* donor might have wanted.[168]

Finally, even if we assume that such matters can be dealt with via more clearly articulated donor intentions, the resulting precise and stringent donor terms — and their consequent constraints on charitable mission-oriented decision making — raise a more normative question.[169] Specifically, one could question whether perpetual naming rights (and attendant forfeiture conditions) should ever attach perpetually to a physical facility that will no doubt require funds from other future sources for maintenance, renovation, modernization, and, ultimately, replacement. A contribution conditioned upon perpetually naming a physical facility but inadequate to indefinitely address those concerns simply presumes too much. Stated differently, such conditions take too much from the societal bargaining table.[170]

D. Charitable Trust Status

There are two additional reasons why a simple call for more donor precision fails to comprehend the full dimensions of the dilemmas posed by charitable name deviation situations. First, rules of construction and equitable doctrines that permit flexible adherence to donor terms demand acknowledgement in this area. The availability and malleability of such rules and doctrines suggest that, even in the face of seemingly clear donor naming provisions, outcomes in name deviation situations are often much less certain than a call for more "donor precision" might presume. Second, and perhaps representing the trade-off to such uncertainty, is that the offered flexibility presents an adaptable approach to accommodating both charitable and name perpetuation purposes. Such adaptability may ultimately lead to outcomes that are preferable, from both donor and societal perspectives, to outcomes occasioned by rigid adherence to a narrow, decades (or centuries) old view of charitable

---

[167] Inability to modernize is suggested here in the sense that modernization requires funds, in this case an estimated minimum $300 million. Although raising this amount might be possible without selling the naming opportunity for the renovated concert hall, it is not beyond reason to suggest that selling a naming opportunity can be fundamental to a given fundraising endeavor. *See also* sources cited *supra* note 8.

[168] The specific legal relevance of court perceptions of donor intent is developed *infra* Part VI.

[169] A specific example of how a naming condition might constrain charitable decision-making is discussed *infra* Part VI.A.4.

[170] See also *infra* Part VII.C. for further discussion of this point.

possibilities.

1. Trust Status as an Avenue to Flexibility

Flexibility is particularly apt to be seen where a donor's contribution is said to give rise to a charitable trust. A charitable trust basically entails the idea that a donor intends for her contribution to be held and managed for the benefit of a third party — in this case, for the benefit of the public via application for charitable purposes.[171] Specific rules guide this inquiry and focus upon the donor's intent.[172] Uncertainties immediately appear, however, because many donors fail to contemplate the legal distinctions noted here.[173] Courts, thus, tend to focus upon the donor's manifestation of intent as embodied in the contribution terms.[174] Interpretive flexibility is immediately apparent, as a donor's use of the terms "on condition," "provided that," "to be used forever," or, conversely, "in trust" are not in themselves determinative.[175] In fact, "trusts can be created by words of condition."[176]

However, this inquiry is not wholly without guidelines. The ultimate question turns upon whether the donor intended to impose an *obligation* that the contribution be devoted to specified charitable purposes — in which case a charitable trust arises and specific enforcement may be had. The alternative is to find an intention that the property simply be forfeited when and if the donor's specifications are not complied with —

---

[171] City of Palm Springs v. Living Desert Reserve, 82 Cal. Rptr. 2d 859, 865 (Ct. App. 1999) (defining "charitable trust"); RESTATEMENT (SECOND) OF TRUSTS § 11 (1959); *see also* RESTATEMENT (THIRD) OF TRUSTS §§ 2, 28 (2001) (defining "trust" and stating purposes that are "charitable"); SCOTT & FRATCHER, *supra* note 16, § 348 (defining charitable trust). Professor Bogert notes that many donors are unaware of the distinction between trust and other legal status regarding their charitable gifts. *See* BOGERT, *supra* note 48, at ch. 2 introduction § 17. Of course, donors should not be faulted, because "the distinctions between [these] . . . relationships is not always an easy one to draw, even for the trained lawyer." SCOTT & FRATCHER, *supra* note 16, § 23.

[172] SCOTT & FRATCHER, *supra* note 16, § 23.

[173] BOGERT, *supra* note 48, at ch. 2 introduction, § 17; SCOTT & FRATCHER, *supra* note 16, § 23.

[174] It does not really matter if the donor understands the nature or significance of the relationship created, because the donor's actual subjective state of mind is less relevant than her outward manifestation of intent as gleaned from the terms of and circumstances surrounding the contribution. SCOTT & FRATCHER, *supra* note 16, § 23 ("In the interest of accuracy . . . it is necessary . . . to speak not of the [donor's] intention but of [the donor's] manifestation of intention.").

[175] RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. a (2001); BOGERT, *supra* note 48, § 35; SCOTT & FRATCHER, *supra* note 16, § 24.

[176] City of Palm Springs, 82 Cal. Rptr. 2d at 865 (citing SCOTT & FRATCHER, *supra* note 16, § 351).

in which case a condition will be found.[177] The interpretive preference clearly falls in favor of finding the existence of a charitable trust.[178] An often stated rule in this regard posits that "[i]t would seem that nothing short of express provisions for forfeiture and either a reverter, or a gift over or a right to retake the property in the donor or [her] heirs would enable a donor to effectively impose a condition [in lieu of being deemed to have created a charitable trust]."[179]

Courts and commentators justify the interpretive preference for finding charitable trust status on several grounds. First, forfeiture is a harsh remedy and, therefore, reluctantly imposed.[180] Courts also favor gifts to charity and will strain to retain funds for charitable uses.[181] Recall, in this regard, that a charitable trust can be specifically enforced, whereas bare conditional gifts are enforced through the charity's forfeiture of the affected property.[182] A finding of charitable trust status is, therefore, more likely to result in continued application of the funds for charitable purposes.[183]

These concepts lend themselves to a related justification for preferring charitable trust status in name deviation situations. That justification is usually stated in terms of promoting the donor's charitable purpose. Specifically, "a [forfeiture] condition is not a very effective method of accomplishing the transferor's purpose to benefit third persons."[184] This rationale only holds in its entirety, of course, if the donor intended to further some charitable cause in the first instance. Recall, however, that

---

[177] SCOTT & FRATCHER, *supra* note 16, § 351.

[178] BOGERT, *supra* note 48, § 324; *see also* SCOTT & FRATCHER, *supra* note 16, § 11 ("Rarely . . . will a conveyance [whether] inter vivos [or] . . . testamentary . . . be construed as creating a condition, unless . . . it is expressly provided . . . that the transferee shall forfeit [the contribution] . . . for breach of the condition. The disposition will usually be construed as creating a trust.").

[179] BOGERT, *supra* note 48, § 324.

[180] *See, e.g.*, SCOTT & FRATCHER, *supra* note 16, § 401.2 (stating this conclusion and citing cases).

[181] *Id.*; *see also supra* note 16 and accompanying text. With regard to gifts over to alternate charitable beneficiaries, see *infra* Parts VI.A.2.b, VI.A.4.

[182] *See supra* Parts V.B.1, V.B.2.

[183] The "other reasons" suggested include the possible application of the doctrines of cy pres and equitable deviation, as discussed *infra* Part VI.

[184] The benefited third party is the beneficiary class served by the charitable contribution (e.g., the poor, the sick, etc.). SCOTT & FRATCHER, *supra* note 16, § 11. *Compare* Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp., 797 A.2d 746 (Md. 2003) (noting that primary charitable intent trumps operation of forfeiture condition), *with* Burr v. Brooks, 416 N.E.2d 231 (Ill. 1981) (stating that court felt the primary purpose was more narrow and, thus, found forfeiture to alternative charitable beneficiary appropriate). See also *supra* Part VI.A regarding the prospect of continuing the name perpetuation via a gift over to an alternative charitable beneficiary.

even the most selfishly motivated donor must latch on to some charitable cause in order to perpetually achieve the desired positive name association.[185] The availability of charitable trust doctrines to facilitate the continuation of charitable purposes — in lieu of forfeiture — therefore often provides an avenue to continue *both* charitable and name perpetuation goals.[186] In contrast, forfeiture will likely defeat the name perpetuation goal.[187]

2. A Broad View of Equitable Powers

Even where the donor has clearly stated a condition coupled with the prospect of forfeiture, leeway may still exist for a court to apply charitable trust doctrines like cy pres or equitable deviation. In *Blumenthal v. White*,[188] for example, the court actually obviated the need for finding any formal trust at all by more generally invoking judicial equitable powers to apply trust doctrines where contributed property is given for charitable uses.[189] The court explained that "while a charitable use is not a trust, it may be so . . . treated by the courts . . . and it has become definitely settled that charitable uses, or public charities, as known at the present time, are [subject to the court's] equitable . . . powers."[190] Charitable recipients are frequently organized as trust entities, moreover, and even if organized in some other form like a charitable corporation, they are frequently deemed to hold property in

---

[185] *See supra* Parts I, III.

[186] *See, e.g., infra* Part VI.A.3 (discussing *Zevely*).

[187] The donor's precise name association would fail unless there were a gift over to another charity serving the same charitable beneficiaries or mission that would accept the same name association terms. The implications of such gifts over are discussed *infra* Parts VI.A.2.b and VI.A.4. A different but ongoing name association might be accomplished if an alternative charitable beneficiary were named and accepted the naming terms. Donors, however, often simply provide for an alternative beneficiary upon failure of a naming condition, without any effort to exact the same degree of name specificity from the alternative charitable beneficiary. See, e.g., *supra* note 140 and the quoted language in the accompanying text. Any forfeiture outside the charitable stream, however, would presumptively result in complete failure of the name perpetuation goals.

[188] 683 A.2d 410 (Conn. App. Ct. 1996).

[189] *Id.* at 412.

[190] *Id.* at 413; *see also In re* Carper's Estate, 415 N.Y.S.2d 550, 553 (N.Y. App. Div. 1979) ("[C]y pres may be applied even in the absence of a properly created express trust."); SCOTT & FRATCHER, *supra* note 16, § 11 (discussing situations where trust and conditions are found to coexist). "Even ignoring trust doctrine, a court acting under its equity powers may simply refuse to enforce a condition if doing so would be "inequitable." SCOTT & FRATCHER, *supra* note 16, § 11. This observation is particularly relevant to the case of bad actor philanthropist naming conditions such as those discussed *supra* Part IV.

trust for the public benefit.[191] This also implicates judicial latitude to invoke more flexible trust doctrine.

The *Blumenthal* decision reveals another twist to the foregoing discussion of charitable trust versus condition status. As the *Blumenthal* court correctly noted, "a trust and a condition . . . are not exclusive of each other."[192] Even if a technical condition exists, in other words, a charitable organization may hold a contribution in trust, but subject to the condition.[193] There are dual implications of this conclusion. On the one hand, the condition may ultimately prevail, particularly if paired with appropriate gift over or other forfeiture limitations. On the other hand, even in such circumstances, courts may nevertheless perceive broader donor intentions that implicate utilization of the court's equitable modification powers. The matter ultimately turns upon the court's perception of donor intent.

With regard to donor intentions and potential name deviations, the specific applicability and impact of cy pres and equitable deviation must be more directly considered. That consideration implicates the relationship between the donor's charitable purposes and her more personally motivated desire to perpetuate her name through a given charitable association.[194] The discussion in Part VI, therefore, considers such matters.

VI. MODIFICATION DOCTRINES, DONOR INTENT, AND PRECEDENT

The doctrines of cy pres and equitable deviation present a pervasive means by which donees may escape or circumvent the particulars of naming conditions. The preferred characterization, of course, depends upon one's perspective.[195] This part directly confronts the noted

---

[191] *See* FISHMAN & SCHWARZ, *supra* note 17, at 122-34; SCOTT & FRATCHER, *supra* note 16, § 348.1. Consider also the comment to section 413 of the Uniform Trust Code, where it is acknowledged that:

> The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. *However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts*, which would include this Code.

UNIFORM TRUST CODE § 413, cmt. (emphasis added).

[192] *Blumenthal*, 683 A.2d at 412 (citing BOGERT, *supra* note 48, § 35).

[193] *Id.*; *see also* BOGERT, *supra* note 48, § 420 ("A settler may create in his trustee for charity an estate or interest on condition subsequent.").

[194] *See infra* Parts VI.A-B.

[195] See *supra* Part II.B regarding pro-donor versus societally-attuned perspectives. As to

equitable doctrines as applied to charitable name deviation situations.

A. Cy Pres Doctrine and Name Deviations

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.[196] Courts authorize such diversions in order to further the donor's charitable intentions.[197] The doctrine only applies, therefore, where it has become "impossible, impracticable or illegal" to carry out the donor's original charitable purpose as stated by the donor.[198] Professor Atkins characterizes satisfaction of this circumstantial trigger as denoting a failure in the "bargain" between the donor and society — cy pres is implicated because the donor's charitable intent either cannot be carried out or has ceased to equate with society's view of charitable purposes.[199] Examples of such failures include provision for the treatment of a disease that has been eradicated, or an earlier-era scholarship fund that is permeated with now decried racially

---

cy pres and equitable deviation, see 2 RESTATEMENT (THIRD) OF TRUSTS §§ 66-67 (2003) (discussing equitable deviation and cy pres, respectively) and RESTATEMENT (SECOND) OF TRUSTS §§ 381, 399 (1957) (same).

[196] 2 RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); 2 RESTATEMENT (SECOND) OF TRUSTS § 399 (1957). The doctrine applies only where property is initially dedicated to some charitable purpose. Recall that "charitable" purposes are not defeated by the mere presence of a naming provision. *See supra* Part III. For recent scholarly commentary on the topic of cy pres, see Buckles, *supra* note 83, at 1827 (discussing cy pres in specific context of restricted gifts and proposing tax-code based solution to problems presented); 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). Less recent treatments are exemplified by Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U. L. REV. 153 (1967); Fisch, *supra* note 9, at 375.

[197] 2 RESTATEMENT (SECOND) OF TRUSTS § 399 (1957).

[198] *Id.* Section 399 states the traditional cy pres rule as follows:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

Id.

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* 2 RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); UNIFORM TRUST CODE § 413 (2003).

[199] Atkinson, *supra* note 14, at 1115-17. "Bargain" as a term of art in the context of distinguishing charitable gifts from contractual relationships is discussed *supra* Part V.

discriminatory bias.[200] Where such a failure exists, a court can "save" the charitable nature of the contribution by directing its application to alternative but similar charitable uses.[201]

Naming conditions complicate the analysis, for two reasons. First, such alternative charitable applications may implicate an association of the name in a manner that differs from that stated by the donor. Second, a court may view the donor's naming provisions as having some bearing upon the breadth of the donor's charitable intentions.

1. The Presence of General Charitable Intent

Cy pres modification flexibility reflects society's stake in the donor-charity venture, but only applies if certain requirements are met. One pivotal requirement supposedly respects the donor's stake in the venture, requiring that the donor possess a "general charitable intent" before cy pres will apply.[202] A donor possesses general charitable intent if, upon confronting the failure of her express charitable designs, she would nevertheless have preferred that the funds be dedicated to some similar charitable purpose.[203] A donor, alternatively, possesses a more narrow, specific intent if she instead prefers that her charitable designs simply terminate if they cannot be carried out precisely as originally contemplated.

Despite the proffered distinction, the general intent requirement is perhaps the most rhetorically cited but variably applied of the cy pres criteria.[204] The general intent requirement and its consequent impact

---

[200] Atkinson, *supra* note 14, at 1117-18.

[201] *See* 2 RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. a (2003) (noting that diversion shall be "as nearly as may be" to donor's original scheme). Application of cy pres also requires that a charitable trust exist, and that its purpose has become "impossible, impracticable, or illegal" to carry out. *See supra* note 198. For a recent expansion of these criteria, however, see *infra* Part VI.D.

[202] *See* 2 RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); 2 RESTATEMENT (SECOND) OF TRUSTS § 399 (1957).

[203] The Restatements and other articulations of the cy pres rule as cited *supra* notes 198 and 202 make this clear. *See also* Atkinson, *supra* note 14, at 1117-18 (discussing this requirement and what it means in terms of donor's desired course of action where 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 inquiry to ascertaining which of two outcomes donor preferred); Craft v. Shroyer, 74 N.E. 2d 589, 592-93 (Ohio Ct. App. 1947) (discussing requirement).

[204] *See, e.g.*, Ronald Chester, *Cy Pres or Gift Over? The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41, 46 (1989) ("[T]he general intent requirement is not only unclear but mischievious in its use to prevent the application of cy pres . . . . [T]his requirement should be completely abandoned . . . . [T]he concept is worse than useless . . . ."); Johnson, *supra* note 14, at 383 ("[A]sking an interpreter who is extant in

upon cy pres results has thus been roundly criticized by scholars as a "legal fiction"[205] that thwarts even "diligent judges"[206] in applying cy pres in any consistent or predictable manner.[207] The inquiry is factual and courts acknowledge the limited value of precedent — apart, of course, from demonstrating the potential range of outcomes possible under the doctrine.[208] Perhaps it is such observations that led the drafters of the recent *Restatement (Third) of Trusts* to describe the inquiry as "artificial and speculative."[209] Charitable naming situations do little to dispel such criticisms, though several observations are in order.

2. Relating Charity to the Name

The naming contributions at issue here all imply some minimal level of charitable intent as demonstrated by the association of some charitable cause with the name. This is so even though the donor's motivations may be wholly selfish.[210] Unless the donor was unusually specific in

---

today's society whether [a long dead donor] had a general or specific intent. . . is largely indeterminate . . . ."); Laird, *supra* note 203, at 977 (opining that general intent requirement as applied does little to further donor's intentions).

[205] Terri R. Reicher, *Assuring Competent Oversight to Hospital Conversion Transactions*, 52 BAYLOR L. REV. 83, 129 (2003).

[206] Laird, *supra* note 203, at 977.

[207] *See, e.g.*, *In re* Loring's Estate, 175 P.2d 524, 531 (Cal. 1946) ("The cy pres doctrine has meant many things to many courts and its limits have rarely been defined."); Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281, 285 (Ind. 1945) ("[C]y pres decisions. . . have not been free from contradiction and confusion). *See generally* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003) (noting that "[m]uch criticism has focused on the artificial and speculative inquiry whether the settlor had a 'general' charitable intent . . . ."); Johnson, *supra* note 14, at 380 ("[C]ourts have no principled basis for the application of the cy pres doctrine . . . ."). Once again, the fact that a contribution is made "upon condition . . . does not necessarily indicate the absence of a more general charitable commitment." RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003).

[208] *See, e.g.*, Wilson v. First Presbyterian Church, 200 S.E.2d 769, 779 (N.C. 1973) ("[N]o two cases are exactly alike . . . . Consequently, it is not possible to reconcile all of the decisions of the various courts, even where the circumstances are quite similar."); *Craft*, 74 N.E.2d at 595 ("It will serve no useful purpose to discuss at length the numerous cases . . . in which the cy pres doctrine has been invoked."). Demonstrative of the strength of this criticism is Professor Bogert's observation that "directly opposite results in cases where the facts are similar prove the unsatisfactoriness of the search for the settlor's intent." BOGERT, *supra* note 48, § 436. Courts have acknowledged this reality by noting, for example, that "[a] line of demarkation [between specific and general intent] is not well-defined . . . [and] research . . . does not disclose any particular tests which have been applied." *Craft*, 74 N.E.2d at 593.

[209] RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b, reporter's note (2003).

[210] See *supra* Part III regarding the necessarily charitable effect of a charitable naming contribution. The inquiry noted here is much more donor-intent dependent and subjective than that concerning the "charitable" nature of the donor's gift, which is gauged by reference to the objective effect of the gift.

stating, "I care absolutely nothing about the associated charitable cause," there will remain an invitation for courts to consider the scope of the donor's charitable intentions. Variable outcomes in name deviation situations are the demonstrated consequence of this invitation.

a. General Intent and Charitable Naming Opportunities

In this regard, a donor's express purpose to perpetuate her name through charitable association does not alone negate a finding of general charitable intent.[211] Application of cy pres is, therefore, not *per se* precluded by the presence of a naming provision. Numerous courts have reached this conclusion.[212]

In *Hardy v. Davis*,[213] for example, the donor included provisions in her will for a named orphanage.[214] Operation of that facility later became impracticable, and the trial court refused to apply the doctrine of cy pres on the basis of its finding that the donor possessed only a narrow or specific charitable intent.[215] The appellate court reversed that decision, reasoning that:

> The fact that [donor] wished to name the home after herself is not regarded as a controlling consideration in the matter of whether her charitable intent was general as distinguished from restricted, narrow, exclusive or particular. It is difficult to assume that [the donor] had no interest in orphan children, apart from [operation of the specific named facility].[216]

---

[211] *See supra* note 210.

[212] *See, e.g.*, Rogers v. Att'y Gen., 196 N.E.2d 855, 860 (Mass. 1964) ("Her dual desire to have the property thus used [for charitable purposes] and to have the family name perpetuated does not foreclose the court from finding a general charitable intent."); Village of Hinsdale v. Chi. City Missionary, 30 N.E.2d 657, 664-65 (Ill. 1940) (emphasizing general charitable purposes over clear memorial purposes); Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281, 285 (Ind. 1945) (applying cy pres doctrine despite clear memorial purpose for gift); *In re* Petition of Downer Home, 226 N.W.2d 444, 447-48 (Wis. 1975) (emphasizing general charitable purposes over clear memorial purposes). Of course, factual distinctions may always affect a court's perception on such matters. *See, e.g.*, Nelson v. Kring, 592 P.2d 438 (Kan. 1979) (noting that donor was familiar with hospital's operation prior to his death and refusing to apply cy pres when hospital closed; however, donor also specifically provided that principal should never go to hospital); Hardy v. Davis, 148 N.E.2d 805 (Ill. App. Ct. 1958) (specific home was not in existence or operation prior to donor's death, thus reducing likelihood of specific attachment to that institution versus its beneficiaries more generally).

[213] 148 N.E.2d 805 (Ill. App. Ct. 1958).

[214] *Id.* at 807.

[215] *Id.*

[216] *Id.* at 813.

On the other hand, naming circumstances have been referenced in findings of specific intent where cy pres was accordingly held inapplicable. In *Nelson v. Kring*,[217] for example, the donor devised funds to support a hospital that he had founded and named after himself while living.[218] When the hospital failed several decades later, the court refused to apply cy pres to divert the funds to more general healthcare purposes.[219] On the matter of general charitable intent, the court found that the donor "intended to support the particular hospital which bore his name in his small town and had no broader charitable intent."[220] The court did not, however, clarify whether the name simply identified a preferred and limited charitable objective, versus the name on the hospital being in and of itself important in finding only a specific charitable intent.[221]

Name perpetuation took on an added degree of relevance in *Wilson v. First Presbyterian Church*.[222] In that case, the court determined that the donor was only interested in perpetuating her brother's name via establishment of a new church in his home community, because it was only in that community that the brother, a former sheriff, would be remembered most fondly.[223] Thus, when circumstances precluded the building of a new church in that community bearing the brother's name, the court refused to apply cy pres to allow some similar charitable object to perpetuate the name.[224] The court also refused to permit the donor's contribution to be diverted to an existing church for application in the donor's community of choice — an outcome that could easily have been tailored to foster the donor's name perpetuation purposes.[225] On the one

---

[217] 592 P.2d 438 (Kan. 1979).

[218] *Id.* at 440-41.

[219] *Id.* at 443.

[220] *Id.* at 444.

[221] A better conclusion would be that the presence of a gift over upon failure of the designated hospital was provided for, along with clear language negating any intention to have the principal of the gift fall to general heathcare uses. *Id.* at 441, 443-44.

[222] 200 S.E.2d 769 (N.C. 1973).

[223] Because the court further found that the donor did not have an intention to foster religion generally, a church in another community or a diversion of funds to an existing church in the community was not possible under cy pres. *Id.* at 776.

[224] *Id.* at 779.

[225] See *Rogers v. Attorney General*, wherein the court stated that: "[a]lthough a donor may clearly manifest a desire to have the trust serve as a memorial, the doctrine of cy pres may still apply. Some effort, however, should be made to frame a scheme so as to include, in some appropriate and practical manner, a suitable reference to the donor's family." 196 N.E.2d 855, 861 (Mass. 1964); *accord*, *Wilson*, 200 S.E.2d at 782 (Branch, J., dissenting). See also *infra* Part VI regarding alternative means of perpetuating a donor's name where cy pres or equitable deviation is held applicable.

hand, *Wilson* seems to reflect the court's more general impression that the donor lacked any intention to benefit religion generally, in light of her specificity as to the location and nature of the benefit (i.e., only a new church on the donated land).[226] On the other hand, the case could be viewed as more directly implicating the potential importance of a naming condition as a factor in discerning general charitable intent for cy pres purposes. In this regard, *Wilson* has been distinguished on the grounds that "[t]he terms of the *Wilson* gift mandated a 'memorial,' while the [gift in the distinguishing case] specified no such narrow, limited intent."[227] The suggestion is that the presence of a naming condition was central to the outcome in *Wilson*. At a minimum, then, the foregoing cases reveal that the oft-criticized and malleable nature of the cy pres general intent requirement holds true in name deviation situations.[228]

b. Gift Over Provisions

There is an additional factual distinction that may strongly influence outcomes across the doctrine of cy pres. Specifically, a donor may clarify the general or specific nature of her charitable intent by expressly providing for a gift over to alternative beneficiaries in the event the stated charitable purpose fails.[229] Many courts and statutes regard such a provision as conclusive evidence of a specific intent that precludes application of the cy pres doctrine.[230] Such deference to a donor's gift over provision is not without its critics, however,[231] and there are courts that consider such a gift over as merely one of several factors to be considered in gauging general charitable intent.[232] In any event, it is

---

[226] 200 S.E.2d at 777-79.

[227] Bd. of Trs. U.N.C. Chapel Hill v. Heirs of Prince, 319 S.E.2d 239, 244 (N.C. 1984).

[228] See *supra* notes 204-209 and accompanying text regarding such criticisms.

[229] *See generally* Chester, *supra* note 204, at 45-47 (1989) (discussing effect of gift over as negating general charitable intent).

[230] *See, e.g.*, Burr v. Brooks, 416 N.E.2d 231, 236 (Ill. 1981) ("It is . . . well established that cy pres will not apply if provision is made for an alternate charitable gift."); Chester, *supra* note 204, at 47 (discussing "no cy pres in the face of a gift over" rule). Regard for such provisions addresses to some degree the criticisms of the general charitable intent requirement and its malleability.

[231] *See, e.g.*, Chester, *supra* note 204, at 44 ("The concept [of general charitable intent] is worse than useless and should be abandoned . . . [in which case] any mandatory use of the gift over rule is dead.").

[232] Such courts, in other words, may apply cy pres even though the donor provided for an alternate disposition in the event her conditioned charity should fail. *See, e.g.*, Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp., 797 A.2d 746, 756 (Md. 2003) ("[T]he presence or absence of a gift over is merely one factor among many in determining

worthy to note that such a gift over provision is widely viewed as a cy pres "opt out," in that the donor specifies alternative uses (charitable or noncharitable) in the event that her original purpose fails.[233] This directive potentially obviates the need for further inquiry into the parameters of the donor's intent.

3. A Culmination of Doctrines

Despite its perceived strength as intent-indicative and forfeiture-mandating, however, a gift over provision by no means guarantees that the precise naming conditions of a donor's contribution will be carried out. Also not guaranteed is the conclusion that forfeiture will result from the failure of or noncompliance with a seemingly clear condition regarding a name association. The case of *Zevely v. City of Paris*[234] provides an instructive example of cy pres inspired analysis affecting the court's treatment of a donor's particular institutional name association provision. The case also demonstrates how a court's perception of a donor's charitable intentions can affect a court's insistence upon compliance with the precise terms of a donor's desired name association.

More specifically, the donor in *Zevely* entered into an agreement to endow a room in the city-run W.M. Massie Hospital.[235] The agreement provided that the room would be made available for the treatment of young men and would bear the name "Green Clay, Jr.," in honor of the donor's deceased son.[236] The donor expressly provided that "[i]n case the W.M. Massie Hospital should permanently cease to be used as a hospital, the [contribution] is to be returned to [the donor] or her heirs."[237] A seemingly logical inference is that the donor intended that her naming objectives be carried out only in association with a specific charitable institution. Failing to adhere to that scheme, the charity was

whether the testator had a general charitable intent."). For a good discussion of other factors affecting the determination of whether the donor possessed a general charitable intent, see Bd. of Trs. U.N.C. Chapel Hill v. Heirs of Prince, 319 S.E.2d 239, 243-44 (N.C. 1984).

[233] *See* Atkinson, *supra* note 14, at 1120 (discussing gift over as cy pres opt-out).

[234] Zevely v. City of Paris, 298 S.W.2d 12 (Ky. 1956). The court described the donor-charity agreement as a "contract." Despite that moniker, however, the case clearly turned upon application of charitable trust doctrine, at least in the eyes of the majority.

[235] *Id.* at 13. The gift was made during the donor's lifetime, and the legal enforcement action was subsequently brought by the donor's heir. The heir sued "on grounds that there was a reverter." *Id.* Thus, whether contract or gift on condition, the matter can be reduced in an effort to enforce the donor-charity agreement, with forfeiture set as the potential remedy for noncompliance.

[236] *Id.*

[237] *Id.*

to forfeit the contribution.

Over forty years later, the W.M. Massie Hospital was in fact closed and its facilities were sold.[238] A new hospital was opened in a different location, bore a different institutional name, and was operated by a different government entity.[239] The *new* hospital did, however, include a *wing* adorned with the "W.M. Massie" name.[240] It was proposed that this wing in the new hospital house the donor's dedicated memorial room bearing her son's name, in lieu of forfeiture of the donor's gift.[241]

The donor's heir brought an action alleging that these changes triggered the gift over/forfeiture provision.[242] Despite the apparent clarity of the donor's terms, the lower court invoked cy pres doctrine to continue the donor's charitable and memorial purposes.[243] The appellate court upheld that continuation, but on different reasoning.[244] Utilizing language that reflects the contractually inspired but property-based analysis often employed in such cases, the appellate court specifically determined that:

> [The donor's] purpose in creating the trust was to provide a free hospital room for needy young men in memory of her son . . . . This purpose is being carried out by the new county hospital. There is nothing in the contract which discloses any intent on the part of [the donor] for any particular building [to house the room]. Her paramount purpose was not to benefit the hospital, but to benefit needy young men and provide a memorial for her son . . . . Obviously, since the purpose of the trust is being carried out, cy pres need not be invoked. There has simply been no breach of trust in this case . . . . [A] free room . . . inscribed "Clay Green, Jr. Memorial Room". . . fulfills the purpose of the trust and there is no reverter.[245]

---

[238] *Id.*

[239] *Id.*

[240] *Id.* Note the altered use of the "W.M. Massie" name as identifying the hospital, and then merely a wing in a new facility. Such altered use of a name is discussed further *infra* Part VI.C.

[241] *Id.*

[242] *Id.*

[243] *Id.* The court specifically invoked the doctrine of cy pres.

[244] *Id.* The reported decision references the Kentucky Court of Appeals, which was the name given to the highest court in Kentucky at the time of the *Zevely* decision.

[245] *Id.* Note the court's reference to "the contract," while proceeding under cy pres analysis. A court, in considering *cy pres* analysis and its implications, may avoid operation of the gift over provision by refusing to find a failure of the donor's original purpose. Even in the context of conditional gifts not burdened by charitable trust status, courts may

Under the rubric of cy pres analysis, the court simply refused to find any violation of the naming condition that might trigger the gift over/forfeiture provision — thus avoiding any need to invoke cy pres at all. The court did this by finding that the donor's primary intentions were broadly charitable and, thus, still being served. Consistent with this inquiry, the court could just as easily have found general charitable intent and adequate service to that intent via a named room in the new hospital wing — the ultimate result being the same, in either case, as demonstrated by the lower court's invocation of cy pres to preserve the charitable memorial room. Ultimately, by either route, the outcome indicates that the broader a court's perception of a donor's charitable purposes, the broader will be that court's permitted variation in the donor's proffered name association scheme.

The *Zevely* dissent, however, objected to the majority's cy-pres-inspired analysis by emphasizing the clarity of the donor terms.[246] The dissent pointedly observed that:

> The designation of the wing of the new hospital and the naming of a room is a too obvious attempt to avoid the [forfeiture] condition . . . . The old building was sold and the proceeds used for the construction of a nurses home on the new hospital site. The language of the [forfeiture] provision is plain and unequivocal. It describes the happening of a definite event or condition, to wit: the permanent cessation of the use of the W.M. Massie Hospital as a hospital. The term "W.M. Massie Hospital" was used to describe a known institution comprised of definitely identified premises at a certain location. Can there be any question that the hospital known to [the donor] as the W.M. Massie Hospital has ceased to exist?[247]

The contrasting views reflect the uncertainties that name deviation circumstances present for donors and charities, both in planning for and resolving potential conflicts. A pro-donor view would no doubt find the *Zevely* dissent convincing and the departure from the donor's express terms unwarranted. A broader perspective — perhaps more attuned to a societal view — would find the ultimate outcome defensible.[248] Regardless of which *Zevely* perspective holds more sway, it is apparent

---

similarly take a strict view of what constitutes breach of a condition. This obviously matters a great deal, because in the absence of breach of the condition, there is no basis for forfeiture or cy pres modification, as applicable.

[246] See *supra* Part V.B.1 regarding the operation of forfeiture conditions.

[247] 298 S.W.2d at 14.

[248] Note in this regard that the *Zevely* majority saved both the charitable and name perpetuation aspects of the gift. *See also supra* notes 184-86 and accompanying text.

that courts often invoke the noted equitable doctrines to craft contrary, but quite defensible, perspectives on the proper treatment to be accorded a donor's charitable and name perpetuation directives.

4. Alternative Charitable Beneficiaries: Good Works Revisited

Such variability is no doubt exacerbated by doctrinally-mandated divinations of donor intent.[249] As noted earlier, one donor response to such outcomes might be to attempt a more precise articulation of intentions regarding the desired charitable and associative name perpetuation objectives.[250] As also noted, donors typically proceed here by imposing perpetual naming conditions that, by their very terms, call for forfeiture upon noncompliance.[251] Putting aside practical limitations on a call for more donor precision as a panacea for the name deviation circumstance,[252] donors may craft naming provisions that clearly call for forfeiture to an alternative *charitable* beneficiary in the event of noncompliance.[253] This enforcement mechanism at least ensures society that the contributed property will remain in the charitable stream even if the naming provision is enforced as stated against the original charity.[254] The prospect of forfeiture in favor of a second charity upon noncompliance with a naming provision shows that judicial crafting of some alternative name association is not the only approach that potentially appeases both donor and societal interests.[255]

Despite the continued public benefit, however, such forfeiture provisions do not satisfactorily resolve the problems that naming contributions often create.[256] The shortcomings of such provisions can be seen if we consider, again, the case of Good Works and its desire to upgrade an existing library into a larger and more useful media center

---

[249] Such divinations are mandated in the search for legal status as discussed in Part V, as well as under doctrines like cy pres and equitable deviation, as discussed in Part VI.

[250] *See supra* Part V.C.

[251] *Id.*

[252] *See supra* Part V.C.2.

[253] In *Zevely*, the property would have gone to the donor's heirs had the dissent's view prevailed. Zevely v. City of Paris, 298 S.W.2d 12, 14 (Ky. 1956).

[254] Even such provisions are subject to variable enforcement, regardless of applicable doctrine, on such basic matters as whether the forfeiture trigger has been met. See discussion of *Zevely supra* Parts VI.A.3 and VI.C.

[255] *See supra* Part II.B regarding donor and societal perspectives in the context of name deviation circumstances.

[256] For a discussion regarding the Uniform Trust Code's recent distinction between gifts over to private individuals versus gifts over to an alternate charitable beneficiary, see *infra* Part VI.D.

that includes more than traditional paper resources.[257] Assume, in that case, that the original naming donor, Ms. Jones, included a gift over to a community hospital "upon breach of the condition that the library perpetually bear my name." Although the alternative beneficiary upon forfeiture by Good Works is now also charitable, difficulties remain. Specifically, the current charitable beneficiary, Good Works, must now perpetually make mission-oriented decisions cognizant of the threat of forfeiture. The naming provision, in other words, motivates management to pursue charitable goals in a potentially suboptimal manner to preserve the precise name association and, thus, avoid possible forfeiture of the affected funds.[258] That forfeiture and the decisions it inspires are premised solely on the basis of a private name condition that has little, if anything, to do with the objectives that Good Works charitable management *should* be weighing in its pursuit of the entity's mission.[259] While some might argue that this is simply an acceptable consequence of society's motivating Ms. Jones to dedicate her property to charitable uses, that justification overlooks the possible extent of the resulting charitable constraints, the potential for undermining Ms. Jones's desired positive name association. It also overlooks the availability of more flexible alternatives for accommodating Ms. Jones's name perpetuation objectives as circumstances change.

With regard to charitable constraints and the undermining of Ms. Jones's desired positive name association, the gift over provision assumed for Ms. Jones's gift, for example, would clearly provide an

---

[257] The *Good Works* situation is explored in detail *supra* Part V.C.3.

[258] Of course, the argument that a court will not upset a charitable scheme simply to accomplish more effective philanthropy is well-known. *See, e.g.*, JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 872-83 (6th ed. 2000) (discussing this issue and citing multiple cases and commentaries). The point here is not so much to upset that perspective, but rather, to challenge that perspective where the only impediment to more effective philanthropy is a donor's private name perpetuation requirements. The Uniform Trust Code and Restatement incorporations of "wasteful" into the triggers for cy pres and equitable deviation standards also support this perspective. *See supra* Part VI.D. Also, in many cases the true likelihood of forfeiture will be difficult, if not impossible, for the parties to accurately gauge in advance, thus further clouding the charitable decision-making matrix. For example, the degree of suggested variation from the donor's naming scheme, the availability of interested parties (such as the donor's heirs) to challenge a proposed name deviation, and the willingness of a given court to effect a forfeiture might all complicate decision-making in this area.

[259] To say that management should pursue that mission without regard to financial consequences is unrealistic, and, therefore, a nonstarter. For a discussion regarding the relationship between a naming provision and "charitable" mission, see *supra* Parts III and VI.A.2.

incentive for Good Works management to favor choices that hinder the very mission and service to the public with which Ms. Jones originally associated her name. The specific management incentive is to simply maintain the inadequate and outdated Good Works library. Doing so would preserve Ms. Jones's gift and avoid not only forfeiture, but also potentially costly litigation and public relations issues. This is particularly so where it is apparent that major fundraising — easily conceived as greatly facilitated by the availability of a new naming opportunity for what is, in essence, a new facility — is going to be critical to the modernization project's success.[260] In light of the potential forfeiture, however, Good Works is better off focusing its modernization and fundraising efforts on other aspects of its expanded facilities project. The difficulty from a societal standpoint arises because such a decision is likely to be heavily influenced by Ms. Jones's decades-old vision of acceptably associated charity. The ultimate consequence of a name provision calling for a gift over to another charity upon any name change, then, is to allow a private name to serve as a vehicle for re-allocating from charities to donors significant long-term control over charitable decision-making — all in service only to the donor's private name perpetuation demands.

These consequences extend across the charitable sector. Consider the named hospital-outpatient facility example first introduced in Part II.[261] Only the most blind subservience to rhetorical property rights rationales could support allowing a required name association to force the continuation of a hospital wing for victims of the donor's chosen disease — or the termination of such care altogether — where modern science clearly dictates the transition from hospital to outpatient care for those victims. A transfer of the name and any accompanying assets or endowment to an affiliated outpatient facility seems sensible, particularly from a societal standpoint. Such outcomes would also appear to serve any donor contribution scheme that references name perpetuation, a hospital, or specified disease care — much less some combination of those goals. No one proposes disregarding the donor's plan by associating the name with, for example, a homeless shelter. Instead, the proffered association contemplates service to the same charitable beneficiary class, as affected by the same disease, and via functionally equivalent methods or facilities.

---

[260] *See supra* notes 4-10 and accompanying text (discussing importance naming opportunity might have to large-scale charitable undertaking).

[261] *See supra* text accompanying notes 30-37.

It takes no great imagination, however, to see how the threat of forfeiture could inspire a different outcome. Even if forfeiture is carried out via a gift over to another charity, viable choices that envision some modified deference to a required name association may be practically foreclosed to the current beneficiary if such choices threaten forfeiture of the affected funds. Simply stated, where the forfeiture threat derives from a required name association that is based upon a now-aged perspective on charitable mission, legal doctrine should more clearly embrace flexibility in accommodating the name. A key route to effecting such flexible alternatives is found in the doctrine of equitable deviation, which is discussed next.

B. Equitable Deviation and Private Name Perpetuation

The doctrine of equitable deviation permits a court to authorize a departure from a donor's directions. The departure is said to be warranted if, owing to some change in circumstances, continued compliance with the donor's directions would "defeat or substantially impair the accomplishment of the [donor's] purposes."[262] As applied, equitable deviation and cy pres can be difficult to distinguish and are often confused by courts.[263] The traditional difference between the doctrines is, however, at least easily stated. Specifically, cy pres presents a more narrowly invoked but 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

---

[262] RESTATEMENT (SECOND) OF TRUSTS § 381 (1959); *see also* RESTATEMENT (THIRD) OF TRUSTS § 66 (2003). The changed circumstances may, but need not, result in cy pres equivalent "impossibility, impracticability, or illegality." *See, e.g., In re* Estate of Craig, 848 P.2d 313, 320-22 (Ariz. App. 1992) (contrasting cy pres as grounded in failure of charitable purpose, versus equitable deviation as grounded in changed circumstances); Trs. of Dartmouth Coll. v. City of Quincy, 258 N.E.2d 745, 751-52 (Mass. 1970) (same).

[263] Many cases purport to apply cy pres doctrine, but recite what seems to be equitable deviation analysis in concluding that cy pres does or does not apply. *See, e.g.*, Chester, *supra* note 204, at 58-59 ("The blurring of the distinctions between cy pres and equitable deviation has gone far enough."); *Cy Pres and Deviation: Current Trends in Application* (Report of ABA Committee on Charitable Trusts and Foundations), 8 REAL PROP. PROB. & TR. J. 391, 398-403 (1973) (noting judicial confusion in applying doctrines); Johnson, *supra* note 14, at 376, 379-80 ("The distinction between cy pres and equitable deviation is specious and without merit."); Roger J. 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.").

charitable purpose (traditionally described as a departure from an "administrative" term).[264]

The more liberal rules for application of equitable deviation are particularly noteworthy. The accepted rules hold that equitable deviation may be invoked to continue a charitable purpose "even though there is a provision for a gift over and the [donor] may not have had an intention to aid charity in general."[265] In other words and unlike cy pres, the presence of a gift over provision and the absence of general charitable intent will not alone defeat application of the doctrine of equitable deviation to continue charitable uses.[266]

Donor intent remains relevant however. Application of the equitable deviation doctrine is at its core designed to facilitate accomplishment of the donor's charitable purposes.[267] Traditional statements of the doctrine, moreover, purport to authorize deviation only where the circumstances necessitating change were unanticipated by the settlor.[268] This latter requirement, however, is not as powerful as these statements make it appear. Two observations by the ABA Committee on Charitable

---

[264] Burr v. Brooks, 416 N.E.2d 231, 234 (Ill. 1981) (discussing both doctrines and their distinctions); *In re Estate of Craig*, 848 P.2d at 320-21 (same); Craft v. Shroyer, 74 N.E.2d 589, 598 (Ohio Ct. App. 1947) (same); RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a; RESTATEMENT (SECOND) OF TRUSTS § 381 cmt. a; *see also Cy Pres and Deviation*, *supra* note 263, at 398-400 (noting distinctions between two doctrines). Confused application of the two doctrines may be evidence of the illusory nature of the administrative/substantive distinction, but those distinctions and confusions are less important here than the ultimate impact of the name deviation analysis under whatever guise presented. For criticisms of the administrative versus substantive distinction, see, for example, Johnson, *supra* note 14, at 375 (noting that distinction is difficult, if not impossible, to make).

[265] *In re* Loring's Estate, 175 P.2d 524, 532 (Cal. 1946); *see also Cy Pres and Deviation*, *supra* note 263, at 399 (noting use of equitable deviation to avoid effect of gift over if cy pres doctrine were applied). It is also important to note that equitable deviation can be invoked under a court's general equity powers, even if the jurisdiction disavows cy pres altogether. *See In re Estate of Craig*, 848 P.2d at 320-21 ("At the present time, cy pres has not been adopted in Arizona . . . . We believe this is a compelling case for the application of equitable deviation.").

[266] For example, the court in *Craft*, 74 N.E.2d at 597, found cy pres to be inapplicable upon concluding that it "cannot conceive of . . . a trust which would contain more restrictions and a more narrow and specific intent than that found [here]." The court, nevertheless, went on to apply equitable deviation. *Id.* at 598-99.

[267] *See* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a ("The objective of the rule . . . is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated."); RESTATEMENT (SECOND) OF TRUSTS § 381 cmt. a.

[268] RESTATEMENT (SECOND) OF TRUSTS § 38, cmt. e (1959); SCOTT & FRATCHER, *supra* note 16, § 167 ("If it appears that the settlor did, however, anticipate the circumstances and clearly provided that the trustee should nevertheless have no power to act in such a way as to prevent the failure of the trust, it would seem that the court would not be justified in permitting the trustee so to act, unless the provision is against public policy.").

Trusts and Foundations are particularly relevant in this regard. These observations are also relevant to the noted potential blurring of cy pres and equitable deviation analysis.[269] Specifically, the ABA committee first observed that:

> The general judicial tendency . . . is to authorize deviation from the terms of a trust in the presence of changed circumstances where adherence to those terms is possible but impracticable to some degree. With this there seems to be little discussion as to whether the changed circumstances involved were foreseen or unforeseen by the [donor] . . . . [I]t seems to be a rare case where the court dwells on whether the changed circumstances were unforeseen by the [donor].[270]

The committee then goes on to observe that:

> "[a]s a practical matter . . . in those cases where, because of a gift over or some other circumstances, application of one doctrine [e.g., cy pres] would lead to a result different from the use of the other [e.g., equitable deviation], it is probable that the result which the court feels is equitable will control the court's choice of doctrine."[271]

With these observations in mind, equitable deviation presents a particularly potent and perhaps unpredictable doctrine where the resolution of a charitable name deviation situation is concerned.

---

[269] For a discussion regarding judicial confusion and criticisms of cy pres versus equitable deviation, as well as the administrative versus substantive distinction, see *supra* note 263 and accompanying text.

[270] *Cy Pres and Deviation*, *supra* note 263, at 401, 403. As another commentator pointed out, "The [donor's] purpose appears irrelevant to the analysis." Martin D. Begleiter, *Administrative and Dispositive Powers in Trust and Tax Law: Toward a Realistic Approach*, 36 FLA. L. REV. 957, 966, 969, 981-83 (1984) (noting but criticizing departure from requirement that settlor not anticipate changed circumstances). Professor Begleiter went on to similarly observe that "a settlor may, by specific direction . . . provide that his directions shall not be deviated from in a certain manner . . . . Most courts faced with this problem have held that deviation is permitted in these circumstances in spite of the settlor's directions." *Id.* at 982. While the Restatement (Third) of Trusts § 66 purports to adhere to this "unforeseen" requirement, the Uniform Trust Code has expressly removed the inquiry from equitable deviation analysis. UNIF. TRUST CODE § 411(b) (2003). That section states in its entirety: "The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." *See* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a, reporter's note (discussing both statements of rule).

[271] *Cy Pres and Deviation*, *supra* note 263, at 401; *accord*, Johnson, *supra* note 14, at 400 ("[T]he doctrine of equitable deviation may be manipulated to create or result in substantive outcomes that are not allowed or warranted by narrow application of the cy pres doctrine . . . . Furthermore, courts consider the results generated by the application of each doctrine before determining which doctrine to apply . . . .").

Specifically, there is ample precedent holding that required name associations, of varying degrees of exactitude and seeming importance to the donor, are administrative terms.[272] Such terms are, therefore, subject to modification under equitable deviation principles when changed circumstances call into question continued compliance with those conditions. Characterizing naming provisions as administrative (i.e., as relating to the implementation of charitable designs, but not substantively imperative to those designs) is perhaps one way that courts articulate a conclusion that name perpetuation purposes (or some specific name association) were of secondary importance to a donor, relative to a primary charitable objective.[273]

In any event, this administrative characterization clearly opens a pervasive route to escaping or circumventing a donor's seemingly restrictive name association demands. In the charitable naming opportunity context, then, this practical reality transcends disputes over the reality of the administrative-substantive distinction or donor prescience as to changed circumstances.[274] When paired with the *Blumenthal* court's statement as to the broad applicability of equitable doctrines,[275] the ultimate consequence is a clear potential for judicial modification of the donor's specified charitable naming scheme.

C. *The Inevitable Demise of the Named Facility*

Prominent institutions, undertakings, and facilities often fail. The previously noted *Zevely* case, for example, evidences that common

---

[272] *See, e.g., In re* Loring's Estate, 175 P.2d 524, 531 (Cal. 1946) ("The fact that, in making a gift to establish an institution that is otherwise charitable, the donor provides that the institution shall be named for him or some other party . . . is regarded as part of the scheme of administration . . . ."); First Nat'l Bank of Chi. v. Elliott, 92 N.E.2d 66, 73-74 (Ill. 1950) (same); Vill. of Hinsdale v. Chi. City Missionary Soc'y, 30 N.E.2d 657, 664-65 (Ill. 1950); Palmer v. Evans, 124 N.W.2d 856, 863 (Iowa 1963) (concluding that memorial aspects of gift were "an administrative tool in the accomplishment of [the donor's charitable] purpose"); Wesley United Methodist Church v. Harvard Coll., 316 N.E.2d 620, 624 (Mass. 1974) (concluding that memorial aspect of gift was mere "mechanism" to charitable object of providing scholarships); Ranken-Jordan Home v. Drury Coll., 449 S.W.2d 161, 166 (Mo. 1970) (implicitly concluding that name provision was part of administrative scheme such that change in named charity's operations did not warrant forfeiture); Adams v. Page, 79 A. 837, 838 (N.H. 1911) ("[T]he name . . . was merely a part of her scheme for administration."); Petition of Downer Home v. Downer Home, 226 N.W.2d 444, 448 (Wis. 1975) ("[T]he home name [was] 'a mere agency for administrative purposes.'").

[273] *See infra* note 325.

[274] *See supra* note 264 and accompanying text (regarding criticisms of this administrative-substantive distinction).

[275] See *supra* notes 189-93 and accompanying text for a discussion of the *Blumenthal* decision.

dilemma.[276] Actually, the *Zevely* case presented *two* names that were affected by the demise of the hospital. In addition to the donor's son's name and the alleged requirement that it adorn a dedicated memorial room in a particular hospital, the *other* name involved in the case was "W.M. Massie." That name went from adorning an entire hospital to denoting a mere wing in a completely different facility.[277] Although this altered use of the W.M. Massie name was not directly before the *Zevely* court,[278] other courts have addressed such matters directly through invocation of equitable deviation or similar analysis operating under the guise of cy pres.[279]

For example, the donor in *Adams v. Page*[280] envisioned a new "Proctor Hospital." When that goal was thwarted by the intervening formation of another hospital in the community, the donor's heirs claimed that the contribution should revert to them.[281] Though cy pres was seemingly invoked, the court echoed equitable deviation principles when it opined "that the provision in respect to the name was merely a part of [the donor's] scheme for administering the charitable trust."[282] Based upon this characterization and its legal implications, the court held that the donor's contribution should not be forfeited, but could instead be used to support the "Proctor *Ward*" of the existing hospital.[283]

Cases like *Adams* and *Zevely* raise the issue of whether inexact and often less prominent compliance with a naming provision is sufficient to avoid forfeiture or other outcomes. In this regard, judicial flexibility has also permitted the association of a name with a less ambitious facility,[284]

---

[276] Zevely v. City of Paris, 298 S.W.2d 12 (Ky. Ct. App. 1956). For a more detailed discussion of the *Zevely* case, see *supra* Part VI.A.3.

[277] *Zevely*, 298 S.W.2d at 13.

[278] The court offers no insight as to the transfer of the W.M. Massie Hospital name to a mere wing of the new hospital. *Id.* at 12. It could be that a prior naming gift for general hospital use in the county was the catalyst. It could be that the W.M. Massie name was merely honorary and those associated with the new project wanted to continue the honor. Unfortunately, both Google and Yahoo searches for any history in this regard proved unproductive.

[279] For a discussion regarding judicial blurring of cy pres and equitable deviation doctrines, see *supra* notes 263-271 and accompanying text.

[280] Adams v. Page, 79 A. 837 (N.H. 1911).

[281] *Id.* at 837-38.

[282] *Id.* at 838.

[283] *Id.*

[284] *In re* Loring's Estate, 175 P.2d 524, 532-33 (Cal. 1946) ("It is a reasonable modification of the trust to enforce the gift for a smaller [named] hospital rather than to allow the testator's intentions to provide a hospital in the town to fail entirely."); *Adams*, 79 A. at 838; *cf. In re* Estate of Craig, 842 P.2d 313, 322 (Ariz. Ct. App. 1992) (holding though not name case, "trial court erred in requiring the needless construction of the building [as required by

a facility with substantially altered means of pursuing related charitable purposes,[285] and a subordinately named component within an already named charity.[286] This judicial approach has also permitted complete rejection of the need for name association with any particular facility. Courts have accomplished this latter result by diverting the contribution to a named fund to be applied in pursuit of the donor's stated charitable objectives.[287] The court in *Grant Home v. Medlock*,[288] for example, was direct in stating that:

> Although [the donor] certainly wished to preserve her husband's memory [by her gift to help the poor via a now failed institution named for him], her intent does not require the use of the specific Home [she and her husband] established, *or of any physical structures at all.* A charitable trust that distributes money to house the needy can serve equally well as a memorial to [the donor's husband's] philanthropy.[289]

Outcomes like this are quite sweeping in that they permit the association of a name with a mere fund, where the donor seemingly contemplated something more grand. Divergent results can be found, of course. The outcome in *Adams v. Page*,[290] for example, might have been different if the donor had clearly limited her charitable intentions to her named institution and clearly foreclosed community healthcare, more generally, as one of her goals.[291] On the other hand, it could be argued that the donor in *Zevely* did exactly that with regard to the named room in a precisely described hospital, but to no avail.[292] Perhaps this suggests that greater donor precision in crafting naming conditions and their

---

the donor, but instead the charity] should [have] been allowed to use the [contribution] to renovate . . . existing facilities . . . .").

[285] Ranken-Jordan Home v. Drury Coll., 449 S.W.2d 161, 166-67 (Mo. 1970).

[286] Old Colony Trust Co. v. O. M. Fisher Home, 16 N.E.2d 10, 14 (Mass. 1938); *see also supra* note 165 and accompanying text.

[287] Grant Home v. Medlock, 349 S.E.2d 655 (S.C. Ct. App. 1986); *cf.* Rogers v. Att'y Gen., 196 N.E.2d 855, 861 (Mass. 1964) (holding that where donor's desired named home could not be established, cy pres applied to permit use of gift to benefit intended class, but that "[s]ome effort . . . should be made to frame a scheme so as to include, in some appropriate and practical manner, a suitable reference to the donor's family.").

[288] *Grant Home*, 349 S.E.2d at 655.

[289] *Id.* at 658 (emphasis added); *see also In re* Ashbridge's Estate, 61 Pa. D. & C. 279 (1948) (authorizing devise intended to establish widows' home to be maintained instead as fund to pay for admission of members of charitable class to established institutions).

[290] Adams v. Page, 79 A. 837, 837 (N.H. 1911).

[291] The *Adams* court considers the memorial possibility when attempting to discern the donor's primary purpose. *Id.* at 838.

[292] For a discussion about the *Zevely* case, see *supra* Part VI.A.3.

consequences would alleviate some of the problems raised by name deviation circumstances, if only courts would more consistently respect such provisions. Although this would provide some added degree of certainty going forward, problems such as those relating to charitable constraint and the prospect of dual service to naming and charitable goals as circumstances inevitably and unpredictably change, remain unaddressed.[293]

In any event, other courts have specifically rejected the proposition that a named fund is an acceptable substitute for a named facility or institution. The court in *Scott's Will*,[294] for example, confronted an instruction to use a contribution for a named home to care for tuberculosis patients under church supervision, which was no longer achievable due to changed circumstances.[295] In response to the argument that the court dispense with the association of the name with a physical facility, the court opined that "[n]aming a charitable fund after the [donor's] family on the records of whatever institution might administer this fund is of a different order of magnitude from causing a building to bear [that family] name."[296] The court then went on, however, to dispense altogether with the healthcare aspect of the donor's plan by holding that a portion of the contributed funds could be applied to other nonhealthcare related buildings maintained by the supervising church entity — so long as the name was attached to the buildings.[297] Though the court in *Scott's Will* no doubt concluded that the donor intended to benefit the church entity apart from its healthcare mission, it should be noted that courts have conversely found that continued name recognition will not, alone, support a deviation from the donor's stated *charitable* purposes, absent sufficient changed circumstances or impossibility, etc. affecting those purposes.[298]

Taken together, the foregoing sampling of cases demonstrates the malleability of judicial modification doctrines where a name deviation

---

[293] For a discussion regarding both donor precision in crafting naming provisions, as a panacea to the name deviation circumstance, and the impossibility of predicting the nature of changes that might prompt a name deviation, see *supra* Parts V.C.3 and VI.A.4.

[294] *In re* Scott's Will, 171 N.E.2d 326 (N.Y. 1960).

[295] *Id.* at 329.

[296] *Id.* at 330.

[297] *Id.* at 331.

[298] *See, e.g., In re* Succession of Milne, 89 So. 2d 281, 288 (La. 1956) (holding that operation of named home for orphan boys will not be expanded to include operation as named asylum for delinquent boys); *In re* Ashbridge's Estate, 61 Pa. D. & C. 279 (1948) (refusing to permit gift for establishing home for indigent women to be diverted to other organizations with divergent missions, despite proposal that such organizations would give adequate recognition to name).

circumstance exists. That malleability, as well as fact-intensive decision-making, reveals a degree of unpredictability in the interpretation and effect of charitable naming provisions. That unpredictability is, at least in part, attributable to the often elusive concept of donor intent. Donor intent in these circumstances is variously presumed, manufactured, or clearly stated but sometimes seemingly ignored by courts. Although these ideas have particular application to charitable naming situations, many of the noted problems permeate the doctrines of cy pres and equitable deviation more generally. Recognition of these issues has prompted two recent revisitations of those doctrines. Those revisitations attempt to address some of the noted concerns, as discussed next.

D. *Recent Articulations of Cy Pres and Equitable Deviation Doctrines*

Consideration of cy pres and equitable deviation doctrines would be incomplete without mention of two important and recent revisitations of those doctrines. Specifically, both the new Uniform Trust Code ("UTC")[299] and *Restatement (Third) of Trusts* ("Restatement")[300] liberalize the cy pres "impossible, impracticable, or illegal" triggering requirement. They do this by adding to the acceptable triggering events the circumstance that continued adherence to the donor's design has become "wasteful."[301] The Restatement comments explain that "it is against the policy of the . . . law to permit wasteful or seriously inefficient use of resources dedicated to charity."[302] With regard to equitable deviation, the UTC provision adds this trigger and also expressly omits any need to show that the circumstances leading to this determination were unanticipated by the settlor.[303] Though the Restatement appears to be less sweeping with regard to equitable deviation parameters, the Reporter's Notes do indicate that traditional doctrine "was considerably more restrictive" than that embodied in the new Restatement.[304] In any event, addition of the "wasteful" trigger for application of these modification doctrines clearly supports the argument that a required

---

[299] UNIF. TRUST CODE §§ 412-13 (2003) (delineating rules for equitable deviation and cy pres, respectively).

[300] RESTATEMENT (THIRD) OF TRUSTS §§ 66-67 (2003) (delineating rules for equitable deviation and cy pres, respectively).

[301] RESTATEMENT (THIRD) OF TRUSTS § 67 (discussing cy pres); UNIF. TRUST CODE §§ 412(b), 413(a) (discussing deviation and cy pres, respectively).

[302] RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b; *see also* DUKEMINIER, *supra* note 258 at 872-83 (discussing matter of charitable efficiency and cy pres modification).

[303] UNIF. TRUST CODE § 412(b).

[304] RESTATEMENT (THIRD) OF TRUSTS § 66 reporter's note.

name association should not be allowed to force the clearly suboptimal utilization of charitable resources.[305]

Both the UTC and Restatement continue to promote the donor's intent as the ultimate consideration. In the context of cy pres, however, both treatments *presume* the presence of a general charitable intent, thus requiring some specific evidence to *negate* that important cy pres determinant.[306] The Restatement requires that such evidence come in the form of an express provision in the trust instrument, while the UTC merely states the existence of the presumption. Both articulations of cy pres doctrine continue, however, to defer to gift over provisions where the original charitable purpose fails.[307] Significantly, though, the UTC limits the durational effect of such a provision to twenty-one years where the gift over is to a noncharitable beneficiary, such as the donor's heirs.[308] The period is extended to include the longer of twenty-one years or the donor's life, where the gift over is in the form of a reversion to the donor.[309] Gifts over to charitable beneficiaries, however, remain perpetually effective under the UTC, and the Restatement omits altogether any new durational limitations regardless of the alternate beneficiary's nature.[310]

As yet, there is little case law indicating the true significance these doctrinal updates will have where followed. It is unclear, for example, whether courts will continue to divine whatever general or specific intent comports with the court's view of a proper outcome, regardless of

---

[305] *See supra* Part VI.A.

[306] RESTATEMENT (THIRD) OF TRUSTS § 67 reporter's note to cmt. b; UNIF. TRUST CODE § 413 cmt. Some have asserted that the Uniform Trust Code eliminates the general charitable intent requirement altogether. *See, e.g.*, Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 37 REAL PROP. PROB. & TR. J. 697, 706-07, n.48 (2003) ("Solutions [to problems caused by the cy pres general charitable intent requirement] have included presuming that the settlor had a general charitable intent, or, under the new UTC [§ 413], eliminating the requirement altogether."). *Contra* UNIF. TRUST CODE § 413 cmt. (noting that "similar to *Restatement (Third) of Trusts § 67* . . . [UTC § 413] modifies traditional doctrine by presuming that the settler had a general charitable intent"). This may have been the general presumption under prior law, anyway. *See, e.g.*, Ball v. Hall, 274 A.2d 516, 521 (Vt. 1971) ("[T]he law presumes that if the benefactor had realized it would be impossible to carry out his first intention, she would have desired that the property be applied as nearly as possible to the initial purpose, rather than have the trust fail altogether. This is the established doctrine . . . .").

[307] RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b; UNIF. TRUST CODE § 413 cmt.

[308] UNIF. TRUST CODE § 413(b).

[309] *Id.*

[310] *Id*; RESTATEMENT (THIRD) OF TRUSTS § 67.

stated presumptions.[311] The UTC's limitation on the durational effectiveness of gifts over to noncharities does represent progress in terms of society's stake in the donor-charity venture, although the UTC drafters cite only administrative convenience as supporting the change.[312] Even with that change, donors still possess the power to perpetually control charitable decision-making under both the UTC and Restatement based solely on private name perpetuation desires. They can do this by simply calling for a gift over to a different charitable organization if the name condition is not strictly adhered to forever.[313]

While it is easy to seize upon doctrinal distinctions like the presence of a specific condition or a gift over, those important factors are by no means consistently determinative where a charitable naming opportunity is at issue.[314] The focus upon the particulars of various factual distinctions or the vagaries of donor intent, moreover, obscures more important normative questions.

E. Relative Purposes and Exploitation of the Charitable Moniker

An important normative question concerns whether a donor's demand for perpetual control is given too much weight relative to society's interest in ensuring that the donor-charity arrangement serves charitable ends. Scholars have long debated this issue in general terms.[315] Charitable naming cases are particularly noteworthy in the context of this debate. One reason is that name deviation cases bring into specific focus the manner in which society allows private concerns, wholly unrelated to any concept of charity or public good, to undermine society's stake in the donor-charity naming venture.[316] Another reason is the perpetual nature of the naming condition as compared to the potentially duration-limited benefit fostered by the naming contribution.[317] The discrepancies in outcomes where the analysis

---

[311] For a discussion regarding the criticism of the cy pres general intent requirement, see *supra* notes 204-209 and 269-271 and accompanying text.

[312] UNIF. TRUST CODE § 413 cmt.

[313] *See supra* Part VI.A.4 (discussing limiting effects of any gift over provision, even if gift over leaves property in charitable stream by designating alternative charitable beneficiary in event of forfeiture).

[314] *See, e.g., supra* notes 204-209 and accompanying text.

[315] For more general recognition of this normative issue, see, for example, Atkins, *supra* note 14, at 1114-15, DiClerico, *supra* note 196, at 154-55, Eisenstein, *supra* note 196, at 1761-66, Fisch, *supra* note 9, at 380-85, Laird, *supra* note 203, at 987, and Sisson, *supra* note 263, at 648-51.

[316] *See also infra* note 352 and accompanying text.

[317] *See also supra* note 84 and accompanying text; *infra* Part VI.C.

concerns a naming provision also raise concerns at the donor-charity level. One concern is exactly how donor-charity agreements should be conceived, given the prospects as to how those agreements might be implemented over time. That concern, as noted, may lead to even more restrictive donor commands.[318]

The reasoning in a pair of related Ninth Circuit cases aptly demonstrates how these normative issues play out in the charitable naming context. In *Pedrotti v. Marin County*[319] a naming provision figured prominently in both the Ninth Circuit and district court decisions. The donor in those cases had contributed a parcel of land to the county government so that the income could be applied for charitable uses.[320] The donor expressly called for forfeiture if the land were ever sold, and further provided that the property should be named in memory of the donor's deceased wife.[321] An eminent domain proceeding later forced a sale of the land and thus thwarted continued operations as the donor had envisioned.[322]

The district court first determined that the donor's forfeiture requirement upon "sale" did not encompass an involuntary disposition occasioned by eminent domain.[323] The district court then reduced the dispositive issue to a single question grounded in the particulars of the name association. That question was "whether preservation of the ranch as a memorial is such an essential object of the [donor's design] that its impossibility will cause the [charitable gift] to fail . . . [or whether the] paramount purpose [was] charitable."[324]

---

[318] *See supra* Part II.B.3.

[319] Pedrotti v. Marin County, 152 F.2d 829 (9th Cir. 1946), *cert. denied*, 328 U.S. 853 (1946), *rev'g* United States v. 263.5 Acres of Land, 54 F. Supp. 692 (N.D. Cal. 1944). The two cases clearly involve the same parties and the same facts, although the Ninth Circuit decision mentions that it is an appeal from the District Court decision only in its headnote. *Id.* at 829.

[320] *Id.* at 830.

[321] *Id.* Worthy of note is that the forfeiture provision preceded the memorial statement and was not expressly linked to the forfeiture condition. For a case interpreting such provisions based upon the placement of the conditional language in the gift instrument, see *State v. Rand*, 366 A.2d 183, 195 n.20 (Me. 1976).

[322] *Id.* The base dispute thus concerned the town's retention of the condemnation award proceeds for charitable uses, versus forfeiture of those proceeds to the donor's heirs. *Id.* Although one could characterize *Pedrotti* as a simple case of donor-specified location or property, the resolution of the eminent domain issue and the District Court's framing of the issue suggest the importance of the donor's memorial purposes to the outcome.

[323] *Id.*; *263.5 Acres of Land*, 54 F. Supp. at 693.

[324] *263.5 Acres of Land*, 54 F. Supp. at 693. The question no doubt related to utilizing the particular ranch as the memorial. That nuance is encompassed by the general focus here upon the particulars of a given name association.

Many courts confronted with naming circumstances have similarly focused upon the donor's primary versus secondary purposes, whether proceeding under cy pres or equitable deviation analysis.[325] The district court in *Pedrotti* proceeded under a cy pres analysis.[326] The district court concluded that the donor's desired name association could be adequately served by attaching that name to a memorial fund that would serve the donor's intended charitable beneficiary class.[327] The fund was viewed as an alternative charitable scheme that facilitated the continuation of the donor's paramount charitable intentions, notwithstanding the disassociation from the specified ranch.[328] As often seen in charitable naming cases, the court concluded that the specified name association was merely "a mode of executing" the charitable design.[329] This is one way of stating a conclusion that the particulars of the name association were of secondary importance relative to a primary

---

[325] *See, e.g.*, Porter v. Baynard, 28 So. 2d 890, 893 (Fla. 1946) (refusing to apply cy pres where "the apparent dominant purpose of the trust was not the. . . charitable beneficiaries . . . but the continuance of the . . . Memorial Fund in perpetuity"); Burr v. Brooks, 416 N.E.2d 231, 236 (Ill. 1981) (holding cy pres inapplicable where donor's "primary charitable object" was limited to particular named facility); First Nat'l Bank of Chi. v. Elliott, 92 N.E.2d 66, 73-74 (Ill. 1950) (saving gift under cy pres/equitable deviation analysis based on conclusion that charitable purposes were "substance of the gift," whereas naming provisions were "mere incident" thereto); Vill. of Hinsdale v. Chi. City Missionary Soc'y, 30 N.E.2d 657, 664 (Ill. 1940) ("[A] secondary purpose will not prevail where the primary charitable objective of the donor can be attained by a different method. The fact that the donor directed use of the funds in connection with a specific institution, or for the construction of a new building, will not prevent an application of the funds in an association different from the one named.") (citations omitted); Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281, 286-87 (Ind. 1945) (relegating naming provision to administrative status and applying cy pres/equitable deviation analysis to preserve donor's "dominant intent and purpose"; namely, education of children); Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56 (Ky. Ct. App. 1942) ("[I]f . . . it was the intention of the donor that in all events the property was to be maintained and used for a charitable purpose and that the manner of carrying out that purpose . . . was not the paramount object . . . such direction will be construed not to be a condition . . . ."); Briggs v. Merchs. Nat'l Bank, 81 N.E.2d 827, 835-37 (Mass. 1948) (considering charitable benefit "dominant object" of gift, with memorial merely means to end); Old Colony Trust Co. v. O. M. Fisher Home, 16 N.E.2d 10, 14 (Mass. 1938) (noting that "dominant purpose was charitable, and was none the less so because the charity was also intended as a memorial," and then proceeding to permit named building as part of otherwise named home); Bd. of Trs. Univ. of N.C. Chapel Hill v. Heirs of Prince, 319 S.E.2d 239, 244-45 (N.C. 1984) (finding donor's objectives to benefit charity were paramount to memorial purposes); Grant Home v. Medlock, 349 S.E.2d 655, 658-59 (S.C. Ct. App. 1986) (applying equitable deviation to save gift where "primary intent" was to benefit charitable class, as opposed to establishing memorial at specified home); *see also supra* note 273 and accompanying text.

[326] *263.5 Acres of Land*, 54 F. Supp. at 693-94.

[327] *Id.* at 694.

[328] *Id.*

[329] *Id.*

charitable objective.[330] Such characterization also implicates the possible application of more liberal equitable deviation principles, had the gift over provision been deemed an impediment to finding in favor of continued charitable application.[331]

The foregoing explanation of the district court decision in *Pedrotti* is informative with regard to the application of judicial modification doctrines where naming provisions significantly affect the analysis. The focus here, however, should remain fixed on the larger normative issue of ceding too much of the public welfare to donor control. In that regard, the Ninth Circuit in *Pedrotti* took a different view of the donor's name perpetuation goals by promoting the particular name association to paramount status.[332] The Ninth Circuit aptly captured society's capitulation to donors in this context when it denied application of cy pres, permitted the proceeds to revert to the donor's heirs, and specifically concluded that "this donation . . . for charitable uses was not the main purpose of the trust but only an incident designed to make more certain that . . . the [property] be kept as a memorial to the testator's deceased wife . . . ."[333] In other words, the donor adopted a minimally sufficient "charity" to foster private name perpetuation purposes. The court and legal doctrine, then, quite willingly allowed the donor to prostitute the charitable moniker in pursuit of private name perpetuation ends, irrespective of the ultimate consequence to the public's stake in the venture.[334] This is unfortunate, in that existing cases and current legal doctrine provide adequate guidance to employ a different approach to charitable naming contributions and the issues that arise in name deviation circumstances, as considered in Part VII.

---

[330] *See supra* note 325 and accompanying text.

[331] *263.5 Acres of Land*, 54 F. Supp. at 694; *see supra* notes 265-66 and accompanying text (discussing gift over provisions and equitable deviation).

[332] Pedrotti v. Marin County, 152 F.2d 829, 831 (9th Cir. 1946); *see supra* note 319 (discussing procedural relationship between Ninth Circuit and district court decisions).

[333] *Pedrotti*, 152 F.2d at 831. Other courts have similarly accepted such use of charitable institutions for name perpetuation purposes. *See, e.g.*, Wilson v. First Presbyterian Church, 200 S.E.2d 769, 779 (N.C. 1973), *as distinguished by* Bd. of Trs. Univ. of N.C. Chapel Hill v. Heirs of Prince, 319 S.E.2d 239, 244 (1984) (distinguishing *Wilson* case on basis that "The terms of the *Wilson* gift mandated a 'memorial.' . . . . [In contrast, the donor in *Prince*] did not attempt to use the University as a conduit for more paramount [memorial] purposes.").

[334] There is little indication that the new Restatement or the Uniform Trust Code formulations of the relevant doctrines would change the divergent outcomes of the two courts in this matter. *See supra* Part VI.D.

VII. CHARITABLE EFFICIENCY, CHARITABLE OPPORTUNISM, AND THE NAMED FACILITY

A well-publicized, but as yet unresolved, charitable name deviation dispute highlights the practical contours of the various perspectives and legal doctrines considered in this Article. Specifically, New York's Lincoln Center is currently embroiled in a dispute with the family of Avery Fisher, one of the Center's past major benefactors. The dispute concerns the continued perpetuation of the Avery Fisher name. The considerations affecting that dispute implicate the many policy issues that should influence application of the noted legal doctrines. Those considerations also present an appropriate vehicle for examining changes in current doctrine that might be warranted. Such matters are the subject of this part.

A. Objective Background

Avery Fisher was, by all accounts, a successful and ethical businessman, and a highly regarded patron of the arts.[335] His 1973 contribution of $10.5 million in support of the Lincoln Center permitted renovations to the philharmonic concert hall that, in essence, saved the facility as a haven for the performing arts.[336] That contribution, however, referenced use of his name "in perpetuity."[337] Three decades later, the facility is again in desperate need of major renovations or rebuilding, estimated to require (at the low end) some $250 to $300 million of new funding.[338] Absent such renovations or rebuilding, the concert hall faces the very real prospect of losing its major artistic tenants.[339] However,

---

[335] *See* Pogrebin, *supra* note 22, at E1 (discussing background to Mr. Fisher's gift and current dispute). The particular spin of the law firm representing the Fisher family in the dispute is set forth in its entirety in the text accompanying *infra* note 346.

[336] Pogrebin, *supra* note 22, at E1. A detailed history of the Lincoln Center and its various renovations and acoustical problems can be found in Justin Davidson, *Creating a Cultural Commons, Part II*, NEWSDAY, Jan. 23, 2002, at B6.

[337] *See, e.g.*, Dutka, *supra* note 22, at F2 ("Fisher . . . gave $10.5 million in 1973 to rebuild the acoustically flawed building . . . on the condition that it be named after him in perpetutity."); Pogrebin, *supra* note 22, at E1 ("In a 1973 Pledge Agreement, Mr. Fisher set forth the conditions of his gift . . . including the stipulation that Avery Fisher Hall 'will appear on tickets, brochures, program announcements and advertisements and the like, and I consent into perpetuity to such use.'").

[338] *See* Dutka, *supra* note 22, at F2 (putting price tag at $300 million); Robin Pogrebin, *It's Time to Face the Music for New York Philharmonic*, CHI. TRIB., Oct. 12, 2003, at 6 (discussing financial particulars of Lincoln Center and Avery Fisher construction and renovation needs and putting Avery Fisher Hall renovation at $250 million).

[339] There has been much angst over whether and which tenants might depart Avery Fisher Hall, in large part because of the state of those facilities. For insight into these tenant

such huge philanthropic undertakings in the modern era of fundraising almost by definition anticipate a major donor who will likely expect prominent name recognition for her contribution.[340] Likely cognizant of this, the Lincoln Center has refused to assure the Fisher family that the Avery Fisher name will continue to adorn its concert hall once that hall is rebuilt or extensively renovated.[341] The family has responded with threats of litigation based on the original 1973 contribution agreement.[342] The ongoing public dispute is said to have both charitable organizations and major donors "on the edge of their seats,"[343] as the outcome is anticipated to "have enormous bearing on future dealings between philanthropists and the cultural institutes they support."[344]

B. A Textbook Pro-donor Perspective

As suggested earlier, most charitable name deviation situations are susceptible to a clearly pro-donor perspective that is easily articulated, and, for many, readily adopted.[345] The Avery Fisher Hall dispute is no exception. Consider, for example, the simple appeal of the following spin derived from the website of the law firm representing the Avery Fisher family:

> A few years ago, Lincoln Center announced its intention to redevelop its campus, and this past year it took widely publicized steps towards implementing plans to either renovate or raze and rebuild Avery Fisher Hall. Representatives of Lincoln Center

---

issues, see Pogrebin, *supra* note 338, at 6; Pierre Ruhe, *New York Philharmonic, ASO Playing Similar Tune*, ATLANTA. J. CONST., June 15, 2003, at M1; Usborne, *supra* note 22, at 15.

[340] *See supra* notes 2-6 and accompanying text; Dutka, *supra* note 22, at F2 (commenting that "most of the . . . $300 million for Avery Fisher Hall . . . must come from private donors who like their name on things"). The donor may "expect" the naming opportunity as a mere accompaniment to the gift, as a bargained for quid pro quo, or as philanthropically proper precisely because others have enjoyed similar privileges.

[341] *What's in a Name*, N.Y. TIMES, May 23, 2002, at A-1.

[342] Pogrebin, *supra* note 22, at E1; Neal Travis, *Short Lease on Lights*, N.Y. POST, May 28, 2002, at 11 ("From what I hear, they [the Fisher family] will not be mollified and lawsuits will be flying . . . .").

[343] David Brancaccio, *Marketplace: Avery Fisher Hall and Lincoln Center Debate Over Naming Rights* (NPR radio broadcast, June 4, 2002) (*transcript available at* LEXIS, News Library, All News File) ("The stakes are so high that donors and officials at other performing arts centers are on the edge of their seats.").

[344] Travis, *supra* note 342, at 11; *see also* Dutka, *supra* note 22, at F2 ("The outcome of the dispute, analysts say, could set a precedent for how philanthropist and cultural organizations negotiate naming rights.").

[345] *See supra* Part II.B.1. As noted earlier, the pro-donor perspective on a charitable name deviation situation is both the most straightforward to grasp and the most immediate perspective of those presented with a bare outline of the dispute.

> refused to give assurances to the family of Avery Fisher (who was then deceased) that the building housing the Philharmonic would continue to bear the name Avery Fisher Hall in perpetuity, whether the existing hall were to be renovated or were it to be razed and completely rebuilt. Lincoln Center wished to try to lure a big donor into making a lead (perhaps $75-100 million) gift to Lincoln Center for its reconstruction efforts by offering to place that new donor's name on the outside of a new building for the Philharmonic. (*Query what donor would trust Lincoln Center to abide by the terms of that donor's gift when Lincoln Center would have violated the clear terms of Avery Fisher's prior gift?*) As a result, we were retained by the Fisher family to ensure that the terms of Mr. Fisher's gift are fulfilled by Lincoln Center regardless of the extent of the changes made to the existing hall. Our discussions and negotiations with Lincoln Center continue.[346]

This recitation not only demonstrates a pro-donor characterization of the naming situation, but also raises many additional points that warrant further consideration.

C. *The Requested Remedy*

Assuming for the moment that Avery Fisher's contribution was clearly conditioned on perpetual name association, it would seem that the most likely remedy for the Lincoln Center's noncompliance would be forfeiture.[347] From the above law firm recitation, however, it appears that the family's primary negotiating stance is to force specific performance of its interpretation of the agreement, rather than pursuing a forfeiture.[348]

---

[346] This description appears on the website for law firm of Schulte Roth & Zabel LLP, at http://www.srz.com/avery_fisher_hall.asp (last visited May 20, 2004) (emphasis added).

[347] *See supra* Part V.B.1 (discussing conditional gifts and forfeiture remedy).

[348] *See* Pogrebin, *supra* note 22, at E1 (discussing enforcement of agreement versus possible forfeiture). Seeking specific enforcement of the naming condition is actually a commendable position by the heirs in that it removes the heirs' potential monetary self-interest from the equation. It could also be an acknowledgement of the difficulties of applying a forfeiture (or even a contractually-based restitution) remedy decades after the date of the gift and utilization of both the funds and the naming opportunity. Despite the apparent simplicity of saying "forfeit the contribution if you don't comply," many questions could be raised. For example, should any forfeiture be discounted to reflect the efforts and contributions of the public in maintaining the charitable cause so as to ensure (for 30-plus years) an ongoing positive association for the name? Should some amount be withheld from the forfeiture repayment to reflect the 30-plus years that the donor did, in fact, enjoy a prominent association? If not, then why should the name display now be regarded as so singularly important that we would allow it to work a complete forfeiture to the detriment of the overriding charitable task? A simple pro-donor "that was the deal" answer has merit, but ignores completely the charitable dimensions of the donor's

Reported cases suggest that such a remedy would be unlikely, absent a finding that the Lincoln Center held the gift in trust such that it can be compelled to perform.[349] Note, however, that even if specific performance is an available remedy, the request would require that Avery Fisher's name adorn any substantially renovated or even new concert hall that ever graces the Lincoln Center campus.[350] The pro-donor perspective would no doubt embrace the argument that it is sufficient that the contribution did some immediate and future (though limited in duration) good and was accepted. From the standpoint of society's stake in this venture, however, such an outcome concedes too much to Mr. Fisher.

Any semblance of foresight suggests that facilities require upkeep and, ultimately, replacement, both of which cost money and require flexibility and other sources of prospective public support. The further point here is that if naming rights are, in fact, a valuable charitable fundraising tool, then *future generations* are shortchanged by a grant of enduring naming rights for a contribution that is limited in effectiveness to a single construction project. To allow a current donor to dictate that all future facilities will bear her name, else the charitable endeavors (formerly) pursued in some version of that facility will end or suffer forfeiture upon failing to appease that vanity, seems both unnecessary and short-sighted.

While this view promotes what some may see as an unacceptable deviation from an established agreement, there is legal precedent for avoiding such donor restrictions where future circumstances show them to be privately motivated and counter-productive to charitable objectives. Specifically, after recognizing the various and often confused legal routes that might be invoked to avoid a donor forfeiture provision where charitable interests are at stake, the court in *Trustees of Dartmouth College v. City of Quincy*[351] aptly captured the essence of the issue relevant to all naming disputes when it opined that:

> The justification for allowing a charitable gift to continue indefinitely, without regard to the Rule Against Perpetuities or related rules, is the public benefit from achievement of important charitable objectives. The same justification does not . . . apply to subordinate details . . . particularly those which tend to unduly restrict adapting use of the gift to changing conditions. In some

contribution, not to mention the policy implications of allowing donors to effect such harsh consequences far into the future.

[349] See *supra* Part V.B regarding the application of a specific performance remedy.

[350] *See* Pogrebin, *supra* note 22, at E1 (regarding heirs' desire for this outcome).

[351] Trs. of Dartmouth Coll. v. City of Quincy, 258 N.E.2d 745 (Mass. 1970).

> cases, indeed, subordinate provisions may have been imposed, not to facilitate the achievement of a general charitable purpose, but for the personal gratification of the donor in respects wholly irrelevant to any effective execution of a public purpose. There is strong ground for disregarding such subordinate details if changed circumstances render them obstructive of, or inappropriate to, the accomplishment of the principal charitable purpose.[352]

A naming provision fits squarely within the court's description of a provision that is in itself irrelevant to the effective pursuit of any charitable purpose. Of course, the court's language seems to imply some further conclusion that the condition at issue can be relegated to subordinate status, which again raises the specter of discerning donor intent. Still, three additional points support application of the *Dartmouth* court's policy-based approach to charitable naming situations.

First, any charitable name association provides the donor with much by way of recognition, status, identity definition (or redefinition), and other personal pleasures. This holds true even if the precise association does not endure into perpetuity. The prospect of future flexibility regarding the particulars of the name association, therefore, does not eviscerate the motivational force of the naming contribution as a valuable fundraising tool.

Second, deviation from the precise strictures of a naming provision can be achieved without upsetting important aspects of the donor-charity agreement. Precedent noted earlier demonstrates that some courts find alternative ways to accommodate a donor's name perpetuation desires.[353] Examples include applying the name to an alternate facility serving the same or a related charitable class or purpose, or, similarly, creating a named fund to serve those ends.[354] Although the compromise these outcomes reflect necessarily falls short of a name perpetually adorning some specific physical edifice, the balancing of donor name perpetuation objectives and the public's interest in charitable objectives is a commendable outcome. In the case of Avery Fisher Hall, for example, can anyone truly say that after thirty years of recognition, Mr. Fisher would (or should) not be satisfied with an ongoing prominent display of his name and the history of his contribution in the lobby of a substantially renovated and renamed concert hall, perhaps amplified by special annual performances

---

[352] *Id.* at 753 (citing DiClerico, *supra* note 196).

[353] *See supra* Part VI.C.

[354] *See supra* Part VI.C.

specifically commemorating his contribution? In fact, an annual performance to commemorate Mr. Fisher's gift could easily recur into perpetuity and would actually embody the very essence of his obvious charitable desires.[355] Moreover, such a tribute would arguably call attention to his interests and efforts in a manner comparable, if not superior, to that occasioned by letters etched in cold granite above a slowly deteriorating doorway. Ultimately, long-delayed but carefully tailored deviations from the particulars of a past naming contribution do not deprive donors of substantial returns on their contribution "bargains."

A third and final point revives the normative question raised previously.[356] Specifically, if Mr. Fisher would not, today, accept any compromise regarding the display of his name, the real question that society should ask is whether charities should ever be permitted to give so much away in the first instance, when the lure of immediate dollars may readily threaten to overwhelm thoughtful concern for the future implementation and accomplishment of that charity's public mission.[357] The ultimate conclusion should be that society ought not to allow the immediate pursuit of charitable dollars to mask the potential future consequences of naming conditions whose operation is functionally unrelated to any shared vision of charity. A greater emphasis on the policy implications of adhering to a privately-motivated name condition is one route to giving greater weight to those consequences when determining outcomes in name deviation situations.

---

[355] It seems apparent that Mr. Fisher had charitable inclinations and not just a bare desire to perpetuate his name. For a discussion regarding Mr. Fisher's charitable objectives, as proffered by the Fisher family or as might otherwise be debated, see *supra* note 348 and *infra* notes 358-363 and accompanying text.

[356] *See supra* note 168 and accompanying text; text introducing *supra* Part VI.E.

[357] This is not to suggest that charities are without restraint. The need for such restraint is more evident, however, where from the inception of the contribution proposal a donor's terms provide a more immediate and more blatant challenge to charitable mission or flexibility. Thus, gifts have been refused where the donor wanted the right to designate the people who would teach a proposed college curricular area, where the donor insisted that plaques featuring Bible verses be displayed prominently around campus, or where corporate benefactors insisted that they be featured in a museum exhibit on the history of American manufacturing. *See* Blum, *Ties That Bind*, *supra* note 153, at 7. The naming provisions at issue here, in contrast, appear to be fairly routine and wholly beneficial to all in the beginning, and it is only later — often decades later — that the constraining aspects of the condition begin to surface.

D. *Avery Fisher's Paramount Intentions*

The Avery Fisher Hall dispute also highlights the unpredictable malleability that results from the emphasis upon the paramount importance of donor intent where naming provisions are concerned.[358] The Fisher family's law firm explains what Mr. Fisher's original gift accomplished. Specifically, the law firm notes that the "gift literally saved the Philharmonic for the Lincoln Center — since the Philharmonic was otherwise considering leaving."[359] Thus, it seems quite fair to say that Mr. Fisher wanted to enable the Lincoln Center to take actions necessary to overcome facilities deficiencies that threatened the Center's artistic mission through loss of this important tenant. Now consider that the current rebuilding of or renovations to Avery Fisher Hall are needed precisely because a crumbling, accoustically unsound facility has once again led to specific threats of loss of tenants critical to the Center's artistic mission — specifically, the Philharmonic and the Opera.[360] No one has alleged that the facility is adequate in its current state or that management is trumpeting a non-issue with regard to the need for a facilities upgrade.

1. The Fisher Dilemma

It is reasonable to debate which was more important to Mr. Fisher — his name on a concert hall or the Center's ongoing accomplishment of its artistic mission. Nevertheless, the pro-donor perspective would immediately point to the naming condition as simply ending the debate. Again, however, the Lincoln Center dispute highlights the problems that past gifts will cause in the coming years. Despite Mr. Fisher's business sophistication, the sophistication of the Lincoln Center, and the magnitude of Mr. Fisher's gift, the agreement so heavily touted by the family is actually fairly vague on the name condition. By all accounts,

---

[358] *See* note 306 and accompanying text.

[359] The firm's website continues:

> In 1973, Avery Fisher made a substantial donation to Lincoln Center so that it could renovate the hall at Lincoln Center used by the New York Philharmonic. Mr. Fisher's gift was expressly conditioned upon the building being named "Avery Fisher Hall" in perpetuity in the written agreement memorializing the gift. This gift literally saved the Philharmonic for Lincoln Center — since the Philharmonic was otherwise considering leaving Lincoln Center for another location for acoustical and other reasons.

http://www.srz.com/avery_fisher_hall.asp, *supra* note 346.

[360] Pogrebin, *supra* note 338, at 6; *see also supra* note 339.

Mr. Fisher's agreement with the Lincoln Center actually states that the name Avery Fisher Hall "will appear on tickets, brochures, announcements and advertisements and the like, and I consent in perpetuity to such use."[361] In light of the discussion in Parts V and VI regarding malleability in construing conditions and applying equitable doctrines, it is quite plausible to suppose that a court might read the agreement's terms much less forcefully than the family would hope. In this regard, note that in the charitable fundraising arena, *charities* often request *the right to use* a major donor's name. This is often done in order to facilitate and add legitimacy to the charity's drive for dollars.[362] Given the language employed by the parties in the Avery Fisher Hall matter, who is to say today that Mr. Fisher was not just as (or even more) concerned with conferring that benefit upon the Lincoln Center as he was with blind service to his name? This line of analysis also undercuts any effort to employ strict contractual analysis to the dispute, because the suggested arrangement may well fall short of the type of bargained-for exchange that underlies contract status to the exclusion of conditional gift/charitable trust doctrine.[363]

Because of deference to individual donor intent, however, it is only through concluding that Mr. Fisher had a general charitable intent — or that he at least considered the naming condition subordinate and charitable purposes primary — that the strictures of the name condition can be properly modified under cy pres, equitable deviation, or some other rule of construction.[364] As will be likely with many disputes concerning past charitable contributions, there is really no clearly correct conclusion regarding Mr. Fisher's primary or general intentions. As noted earlier with regard to cy pres, for example, some courts regard the presence of a perpetual naming condition as implicating a general intent, while others see indications of specific intent.[365] Under the latter view, it is not clear even under the new Restatement and UTC formulations whether such a perpetual name provision might, in some circumstances, be cited to rebut the presumption of general charitable intent.[366] What is clear is that more flexibility in accommodating Mr. Fisher's name

---

[361] *See* Pogrebin, *supra* note 22, at E1 (quoting 1973 pledge agreement). Both the Lincoln Center and counsel for the Avery Fisher family refused to provide further details on this point.

[362] *See supra* note 7.

[363] *See supra* Part V.B.3.

[364] *See supra* Part VI.

[365] *See supra* Part VI.A.1.

[366] *See supra* Part VI.D (discussing presumptions under new Uniform Trust Code and Restatement); *see also supra* note 227 and accompanying text.

perpetuation desires — whatever their relative magnitude — would better harmonize and serve the donor, societal, and specific charity interests that are at stake.[367]

2. Community Assets

In any event, if Mr. Fisher did actually prefer name perpetuation at all costs to the Lincoln Center, a donor intent-based perspective remains unsatisfactory. An outcome premised on that basis suggests that, like in *Pedrotti*,[368] a donor who simply utilizes the Lincoln Center for his own private name perpetuation desires or elevates those desires above a larger charitable purpose is, in essence, authorized to purchase from the public a perpetual right to control the pursuit of charitable mission, notwithstanding the absence of foresight as to what effective accomplishment of that mission might demand decades later.[369] Charitable assets, the naming opportunities that help fund them, and the flexibility to make the best mission-oriented decisions in the future are community assets.[370] Like natural resources, those assets should not be exploited to eternal extinction simply because an immediate dollar is to be gained for the present generation.

E. Revised Societal Demand

Regardless of whether name perpetuation represents a paramount or subordinate intent, the foregoing disconnect supports a revised societal position in these matters. Society should demand that a name not upset the preservation of gifts purportedly made for charitable purposes. Those courts that craft an alternative, but similarly charitably associated, form of name recognition where the donor's charitable purposes are otherwise continued have the analysis correct from a more exacting societal standpoint.[371]

---

[367] *See supra* Part VI.C (concerning ways in which courts have authorized continuing, but alternative, recognition of donor's name where continued adherence to precise strictures of naming condition otherwise became problematic). For a discussion regarding the argument that perhaps the donor cared more for the name than any charity, see *infra* Part VII.E (discussing alternative of focusing donor intent from outset).

[368] *See* discussion *supra* Part VI.E (relating to *Pedrotti* cases).

[369] *See also supra* notes 60-61 and accompanying text.

[370] Trs. of Dartmouth Coll. v. City of Quincy, 258 N.E.2d 745 (Mass. 1970).

[371] *See supra* Part VI.C (concerning ways in which courts have authorized continuing, but alternative, recognition of donor's name where continued adherence to precise strictures of naming condition otherwise became problematic).

In particular, donor naming conditions should be conceived (for future naming opportunities) and enforced (for past naming provisions) with a different focus. That focus should emphasize (1) charitable mission or beneficiary class, and (2) society's interest in charitable flexibility over time. If charitable naming opportunities and name deviation situations were so evaluated, they would present a more straightforward dilemma. A more up-front emphasis on the charitable requirement in relation to private name perpetuation goals could eliminate speculation over donor intentions. It would also avoid counter-productive and unduly restrictive donor mandates that, at least for those with sophisticated legal counsel, rule into perpetuity. Focusing donor intent would likewise help to ensure that later invocations of equitable modification doctrines are neither misplaced nor speculative in application.

An initial question in this regard pertains to defining that newly focused donor intent. Simply stated, society should insist that donors enter into long-lived naming arrangements with a paramount charitable purpose. This does not mean that society should criticize or even care about private *motivations.* Instead, it simply means that years into the future, when considering whether a naming provision creates a contract, a condition, or possibly implicates cy pres or equitable deviation, the answer should be clear. That answer should hold that donors accept charitable purposes as paramount with respect to applying rules of construction and judicial modification doctrines *precisely because* the donor made a contribution to charity in order to avail herself of positive and perpetual name association.[372] This result would make known to the donor at the outset that charitable objectives and future circumstances, not dead-hand control, will dictate the precise manner in which a name is perpetuated over the long-term. Donor intent would, therefore, not be subject to divination or rebuttal years later. In other words, the charitable object of the gift will always be regarded as paramount. Donor naming motivations or stringent name association requirements will not be disregarded, but rather, they simply will not be allowed to thwart the efficient pursuit of charitable objectives by causing forfeiture. Even as applied to past charitable contributions, there is support for this suggested encroachment upon previously stated donor demands.[373]

---

[372] For a discussion regarding the benefits and implications of charitable association, see *supra* Part I and Part III.

[373] *See, e.g.*, Briggs v. Merchs. Nat'l Bank, 81 N.E.2d 827, 837 (Mass. 1948) ("The doctrine of cy pres is not unconstitutional. The gifts were originally made subject to the law embodied in that doctrine. No property is taken. On the contrary, the beneficial use of the property is secured to those for whom it was intended. No obligation of contract is

Further, the flexibility proposed here poses less overall risk to disserving speculative donor intentions in the case of past gifts. This is because outcomes that foster continuation of both charitable and name perpetuation goals should always bear some resemblance to the donor's original design. Such outcomes are, therefore, less severely one-sided than the forfeiture that could result from incorrect divinations of donor intentions.[374]

Some might argue that such a societal imposition would "chill" future charitable giving. Although scholars often recite that chill concern without substantive support that it actually pertains in donor control situations,[375] more probing consideration suggests that the proposals offered here are unlikely to have a chilling effect.[376] Professor Johnson, for example, recently concluded that "[i]nstead of chilling the creation of charitable trusts, the expansive use of cy pres can result in the increased creation of charitable trusts once [donors] realize that the . . . assets will be put to optimal use to benefit society beyond the period that the settlor can foresee, consistent with the settlor's [charitable] intent."[377] Others also agree with this premise.[378]

Another proposition noted earlier has added relevance in the context of this "chill" argument. Recall that name conditions do not foster accomplishment of any charitable goal, apart from the occurrence of the

---

impaired."); UNIF. TRUST CODE § 105(b) (2003) (providing that donor may "opt out" of UTC default rules, but excepting from that opt-out power of court to modify or terminate trust under UTC cy pres and equitable deviation provisions); UNIF. TRUST CODE § 1106 (providing that UTC has retroactive effect and applies to trust created prior to its enactment); *see also supra* Part VII.C (discussing *Quincy* decision).

[374] *See supra* notes 149-150, 184-187 and accompanying text.

[375] *See, e.g.*, Bowman, *supra* note 123, at 641 ("The law cannot simultaneously maintain a policy of friendliness towards charitable gifts and of disregard for conditions placed by public benefactors upon [charitable] grants. If grantors were forewarned that the conditions upon their gifts were to be disregarded, it is unlikely that they would have made such gifts in the first place."); Eisenstein, *supra* note 196, at 1758 (discussing similar assertions); Sisson, *supra* note 263, at 649 (same). For a recent assertion along these lines, though in the context of donor standing, see Lisa Loftin, Note, *Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts*, 8 B.U. PUB. INT. L.J. 361, 385 (1999) ("Currently, charitable institutions, legislatures, and courts fail to protect the interests of donors. As a result, donors may become more hesitant to contribute at all.").

[376] *See* Sisson, *supra* note 263, at 650 ("The suggestion that slavish adherence to the terms of charitable trusts would discourage their creation is untested, although . . . historical evidence actually indicates otherwise."). For example, Professor Scott cites the English experience that limitations upon donor control had no chilling effect on donor contributions whatsoever. SCOTT & FRATCHER, *supra* note 16, § 399.4; *see also* Sisson, *supra* (discussing this aspect of Professor Scott's observations).

[377] Johnson, *supra* note 14, at 357.

[378] *Id.* at 357, 371, 380-87.

contribution itself.[379] Perpetual naming conditions are, thus, *only* defensible as a facilitator of charitable contributions.[380] Such conditions, therefore, should not be allowed to defeat the continued charitable use of property unless it can be definitely said that, absent strict control, donors would truly be chilled in their desire to give. Simply stated, the noted arguments indicate that it cannot be so definitively said that a donor chill would follow the proposed societally-oriented charitable naming framework.

F. Curbing Wholesale Charitable Opportunism

The foregoing suggestions do not mean, however, that donor name provisions would be disregarded at the slightest inclination towards charitable opportunism. Nor does it mean that donors would sacrifice all control to unknown future charitable management and possibly divergent charitable goals. There are three specific curbs on these risks.

1. Flexible Adherence to Naming Provisions

The first curb lies in the very nature of the proposed approach. That approach affects only how naming contributions are viewed and accommodated when circumstances inevitably change. The proposed approach suggests neither wholesale abandonment of name recognition, nor complete disregard of the desired charitable association. In particular, that line of reasoning holding that both name perpetuation and charitable ends are best served by *flexible* adherence to the particulars of a naming condition would prevail when conflicts arise.[381] Cases that allow some alternative but similarly charitably-associated name recognition where necessary would become the judicially supervised norm. This is an acceptable outcome if any confidence is to be reposed in our judiciary's ability to accommodate conflicting viewpoints in a reasonable fashion *where both parties' overriding interests are clearly aligned* — as such interests should be if donors are deemed to have accepted the charitable dimension of their contribution where name

---

[379] *See supra* note 352 and accompanying text.

[380] Although one could also cite respect for donor property rights (i.e., the ability to give away less than what is owned), that argument is subsumed by that stated in the text, because the principal reason for respecting such rights, perpetually and in this context, is because respect for such rights allegedly fosters the dedication of such property to charitable uses.

[381] *See supra* Part VI.C (concerning ways in which courts have authorized continuing, but alternative, recognition of donor's name where continued adherence to precise strictures of naming condition otherwise became problematic).

perpetuation is desired.[382]

2. Necessary Triggers Remain

Another curb on unwarranted charitable opportunism would be the unaffected requirement that there be some "trigger" event warranting departure from the donor's specific directives. The Lincoln Center, in other words, would still be confronted with showing a sufficient change of circumstances to warrant an alternative association with Avery Fisher's name. The complete replacement or "gutting" of a facility for renovation, for example, would implicate name deviation absent an endowment adequate to address such changes.

Courts are not blind to unmitigated charitable opportunism and have shown reluctance to acknowledge ill-conceived efforts by charitable management to escape donor directives through specious allegations of impossibility, impracticability, etc.[383] The requirement that such a trigger support a proposed name deviation would shift the name deviation inquiry away from subjective explorations of donor intent regarding circumstances that may or may not have been foreseen. This approach would also reduce unproductive moralistic posturing about honoring agreements. The focus would instead concentrate on more objective and presently discernable facts concerning whether perpetual adherence to a strict view of a naming condition impedes the accomplishment of *charitable* objectives. The Avery Fisher family and the Lincoln Center, for example, would, therefore, not be distracted by disagreements over the relative weight of Mr. Fisher's name perpetuation versus charitable objectives.

This is not to say that disputes would not arise or that value judgments can be altogether avoided. Unlike the present Avery Fisher dispute, however, the suggested framework would necessitate a positive dialogue *about charitable mission and its accomplishment.* Parties would be

---

[382] Any added burden that this proposal might impose upon the judiciary should be more than offset by the proposal's conclusions about focusing donor intent upon paramount charitable objectives, because outcome-determinative, yet speculative, inquiries into donor intent — as now seen in the application of cy pres and equitable deviation doctrines — could be avoided.

[383] *See, e.g., In re* Plummer Mem'l Loan Trust Fund, 661 N.W.2d 307, 312-13 (Neb. 2003) (refusing to apply cy pres or equitable deviation). The court thus denied the trustee's request to use donor funds for scholarships where the donor's requirement that funds be used for loans presented no problems in implementation as stated. The court concluded that "the record does not clearly show that the purpose of the trusts cannot be given effect." *Id.* at 312. In the author's opinion, the case presents an example of charitable opportunism that was thwarted by a correct judicial result.

forced to investigate more readily discernable facts and articulate a clear vision in that regard. Debate would prove insightful and possibly draw in the community and other donors, rather than leaving such third parties as worried and slightly disgusted bystanders. Unjustified and poorly articulated efforts to disregard donor agreements would be more readily exposed as charitable opportunism under this redirected focus. Surely there is sufficient practical experience with fundraising and evolving charitable circumstances to provide a sound evidentiary background for parties to frame their discussions and (as a last resort) for courts to render decisions on the noted questions.

CONCLUSION

The foregoing consideration of donor bad actors and other name deviation circumstances is not intended to show how a charity might "win" or "lose" a name deviation case.[384] Rather, the foregoing discussion highlights the quite varied analyses that may apply when deviation from a charitable naming condition is suggested. The discussion here exposes the difficult and complex issues that confront charities when circumstances suggest the possibility of a name deviation, and by extension, when new naming opportunity proposals arise. Also exposed is the potential uncertainty that even the savviest of donors face when a perpetual naming condition is desired.

The analysis here questions the extent to which society should ever wholly acquiesce to the strictures of a donor's name perpetuation demands. The objections to such acquiescence are particularly strong where those demands threaten to remove funds from the charitable stream or restrict charitable decision-making for no greater purpose than ensuring that a name endures precisely as contemplated decades ago. The arguments posited in this regard suggest that society would benefit if donor intent could be more clearly aligned with the public's interest in retaining flexibility in the pursuit of long-lived charitable objectives. The foregoing discussion suggests authority, rationales, and outcomes that support both donors' and society's interests with regard to the resolution

[384] In fact, winning the legal battle represents only one of a number of considerations a charity would evaluate if name deviation were at issue. Likely public and donor reaction to a name change represents a major consideration. *See, e.g.*, Greg Allen, *Enron's Legacy at Univ. Missouri* (NPR, Sept. 24, 2004), *available at* http://www.npr.org/rundowns/rundown.php?prgId=2&prgDate=24-Sep-2004 (last visited Nov. 19, 2004) (discussing faculty, student, and other opinions in ongoing debates over possible name removal, fund redirection, or return of university contributions received from various corporate malfeasants).

of charitable name deviation situations, even in the case of previously established naming arrangements. Going forward, society should insist, from the very conception of a charitable contribution scheme, that name perpetuation requirements be subordinated to charitable objectives, as defined by charitable mission or beneficiary class. All interests would be served, in other words, if donor intent could be expressly tempered when it comes to prioritizing private name perpetuation purposes relative to charitable objectives. Doing so would avoid the well-documented disadvantages of pervasive and self-interested dead-hand control. Such acknowledged alignment of societal and donor purposes would also avoid the uncertainties, judicial inefficiencies, and negative public squabbling facilitated by intent-dependent, but much needed modification doctrines.

***