BY RICHARD S. CONN

# Caveat Donor for Charitable Giving

**AMONG ALEXIS DE TOCQUEVILLE'S** many observations about the United States during his sojourn there during the early 1830s was the commitment of Americans to fostering nongovernmental civic groups through charitable giving. Since Tocqueville's famous visit, Americans continue to be known throughout the world for their philanthropy. In 2008, Americans gave more than $300 billion to charitable causes—and individual donors were the source of the great preponderance of these funds.

In the vast majority of these transactions, both the donor and the charitable organization are satisfied with the gift, its use, and the donor's recognition. In the past, even frustrated donors may frequently have regarded their pique as private matters, not to be addressed by legal action. However, as both the size of donations and the bureaucratic nature of charitable recipients have increased, opportunities for misunderstanding and abuse have multiplied.

In addition to commenting on the proliferation of civic groups, Tocqueville also noted the importance of law and the prevalence of lawyers in American society. It is then, perhaps, not surprising that the American charitable impulse has been sometimes met with the less charitable impulse to litigate. This litigation has frequently arisen from the desire of donors, variously expressed, either to see their donations used for a particular purpose or to secure name recognition for the donor or a family member—including signage on a building, the title of a scholarship fund, and the like.

The donor, and even the donor's counsel, may be surprised by the limited remedies available to a donor who takes even substantial precautions to secure the donor's charitable objectives. For example, say a Wall Street executive desires to donate $10 million to the donor's university of choice for research into the cause of the illness with which the donor has recently been afflicted. The donor, being a sophisticated business person, directs the donor's lawyer to prepare a contract that recites in sufficient words that the donation is being made on the condition that the university use the donated funds to build a research laboratory to be named in honor of the donor and to be used only to discover the cause of the donor's disease. Five years after the gift, the university determines that the laboratory built with the donor's funds is better used for research into the causes of a disease other than the one for which the donor contributed.

Can there be any question concerning the right of the donor to the return of the contribution? The answer is that, under existing California law, substantial doubt exists as to the donor's right of recovery. This is because, as the California Court of Appeal reaffirmed in 2005 in *L.B. Research and Education Foundation v. The UCLA Foundation,*[1] gifts to a charitable institution, even on an express condition, are likely to be deemed to have been made in charitable trust. According to the court, "Trusts can be created by words of condition. Property given 'upon condition' that it be applied to certain charitable purposes is especially likely to be construed as having been given in a charitable trust."[2]

The effect of a finding that a gift has been made in trust is to limit severely the standing of the trustor to enforce the gift. As noted by the court in *Patton v. Sherwood*, because charitable gifts are intended to benefit the public generally, they should ordinarily be enforced by the state through its representative, the attorney general.[3] Only if the trustor retains express powers, such as the power of revocation or the power to audit, will the trustor have standing to enforce the terms of a gift.

Apart from an expressly retained power by a donor, the *L.B. Research* court recognized an additional ground for standing: the making of a gift outright, subject to a condition subsequent of forfeiture.[4] The court found this issue litigable, based on language in the gift contract that expressly provided for the funds contributed to UCLA Medical School to be diverted to UC San Francisco Medical School in the event they were not used for the intended purpose by UCLA. When only language of condition is used, and not language susceptible of being construed as a forfeiture, substantial doubt remains as to whether the donor can prevail. As noted by the court in *L.B. Research*:

> Courts favor the construction of a gift as a trust over a conditional gift for several reasons. Because forfeiture is a harsh remedy [citation], any ambiguity is resolved against it [citation]. Moreover, the transferor's objective is to use the transferee to confer a benefit upon the public. To ensure that the benefit is conferred as intended, the transferor ordinarily wants the intended beneficiary to be able to enforce that intent. Because the only remedy for the breach of a condition is a forfeiture, a condition is not a very effective method of accomplishing those goals. For both of those reasons, courts will generally construe a conveyance as one upon trust rather than upon condition."[5]

This analysis is consistent with authority holding that "'contracts…declaring a forfeiture must be strictly construed, and a forfeiture can never take place by implication, but must be effected by express, unambiguous language.'"[6]

## Religious Corporations

Would the result be any different if, having given up on hope of a cure, the Wall Street donor had made a contribution to the donor's favorite religious institution (a religious corporation) on the condition that it be used to construct a church, and subsequently the religious institution proposes to use the funds to construct a school? Maybe.

The rules governing contributions to religious corporations are in fact materially different from those governing donation to other charities. These differences derive in substantial part from the realization on the part of the legislature that the attorney general is not the appropriate party to enforce charitable religious trusts, given

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the need to ensure the separation of church and state. Thus, under California Corporations Code Section 9142(a), a member, as well as a person with a "reversionary, property or contractual interest" in assets subject to a trust, has standing to bring an action "to enjoin, correct, obtain damages for or to otherwise remedy a breach of trust."[7] However, Section 9142(c) limits this standing: "No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law" unless the assets are received in trust pursuant to a board resolution, the articles of incorporation, or an "expressly imposed…trust, in writing, at the time of the gift or donation."[8]

Would the gift of funds on the condition that they be used to construct a church be deemed such an express imposition of a trust? The *L.B. Research* court held that gifts on condition are "especially likely to be construed as having been given in a charitable trust."[9] Further, the reference in Section 9142(a) to persons holding a "contractual interest" in property subject to a charitable religious trust supports the argument that the donor's gift should be deemed to constitute an "expressly imposed…trust."[10] However, to date, no court has issued a decision construing Section 9142(d). Therefore, the issue is still subject to litigation.[11]

If the donor's gift to a church is not deemed to constitute an "expressly imposed…trust," the donor is not necessarily without a remedy—at least if the donor acts in a timely manner. Under Corporations Code Section 9143, a donor who learns that a contribution solicited for one purpose has been used for another may send the religious corporation a written notice "that an action will be brought unless the corporation takes immediate steps to correct any improper diversion of funds."[12] If the religious corporation does not remedy the diversion within a 10-day period, the donor may bring suit—although Section 9143 does not specify the precise remedies available.[13]

However, Section 9143(b) vests the religious corporation with a unique defense to this type of action. If the religious corporation can demonstrate that "it was impractical or impossible for the corporation to devote the property to the specific purpose for which it was contributed" or if "the stated purpose for which the property was contributed is no longer in accord with the policies or best interests of the corporation," the board or membership of the religious corporation can adopt any other good faith use, including the use of contributed funds for general operating expenses.

While Corporations Code Sections 9142 et seq. may be helpful for addressing most issues concerning charitable donations to religious corporations, the statutory scheme leaves open certain questions. May a donor make a gift to a religious corporation outright subject to a condition subsequent of forfeiture without being subject to Section 9143(b)'s defense of impracticality or altered purpose? May such a gift be established by parole evidence? Are the essentially personal remedies of damages and rescission available under Section 9143(b)—remedies that the attorney general cannot invoke? Did the legislature intend Sections 9142 et seq. to set forth the exclusive rights and remedies existing between donors and religious corporations?

Answers to these questions will need to await decisional law or further action by the legislature. In the meantime, donors and their attorneys must place their faith in express written trust agreements with explicit reservations of rights in the trustor. Any other mode of donation may well leave both donors and their attorneys praying for one of several uncertain outcomes.

### Lessons from Recent Controversies

If counsel is aware of the need for retention of express rights in the donor, counsel should lay an adequate foundation for accomplishing the client's donative intent. However, numerous other potential pitfalls exist. For example, if the client wants naming rights to all or part of a structure, will the wording and visual presentation meet with the client's approval? Will recognition afforded other donors unduly detract from that sought by the client? If the structure is subsequently modified or torn down, eliminating or adversely affecting the donor's recognition, is the donee institution obligated to provide substitute acknowledgement? If the donor intends a specific use for the structure, what will be the effect, if any, of the inconsistent uses for limited or extended periods of time? If the donor is no longer alive when a condition of the gift is violated, who will have the authority to enforce the terms of a gift? Depending on the sensitivities of donors, counsel who draft the wording of donor gifts may wish to address one or more of these issues.

Nevertheless, drafters should not be surprised if the donee institution resists particular proposed restrictions. Many institutions are now sensitized to the need to retain flex-

## Drafting Considerations

The issues involved in the drafting of gift instruments require care by counsel to adapt each instrument to the intent of the specific donor. The following are examples of language that address the wishes of donors:

"In the event of the cancellation of the Project due to events or conditions outside the reasonable control of Donee, a substantial deviation from current plans for the Project as reviewed and approved by Donor, or suspension of significant work on the Project, other than as a result of natural causes or labor disruption, for a period in excess of two years, Donee agrees to redirect the remaining funds not used in the planning, design, construction, and renovation of the Project, as well as an amount equal to the economic benefit, if any, derived from prior expenditures, to any other tax exempt nonprofit organization described in Sections 501(c)(3) and 509(a)(1), (2) or (3) of the Internal Revenue Code, or to repay any remaining portion of the pledge to Donor, as directed by Donor, or in the event of Donor's death, by his executor, trustee of his revocable trust, or, in their absence, by his oldest living issue."

"Donee agrees to furnish regular reports to Donor as to expenditure of the Pledge and a final report upon completion of the Project. Pending completion of the Project, all payments on the Pledge shall be kept in a separate interest bearing account until expenditure for an authorized purpose. Donor reserves the right to compel an accounting concerning the expenditure of all donated funds."

"In the event there shall be unexpended funds remaining on completion of the Project, Donee shall use such funds for maintenance of the Project and for support of approved activities therein."

"The building to be constructed pursuant to the Pledge shall be named 'The Donor School' (the 'Name'). Donor's obligations under this agreement are contingent on maintenance of the Name on the building in perpetuity. The name will not be abbreviated or shortened without the consent of Donor. All references to the building or the Project in any publicity, catalogues, advertising, or any other form of communication shall refer to the building by the Name. The removal or alteration of the Name shall be a material breach of this donation agreement, entitling the Donor to refund of amounts donated, plus accrued interest. The Name shall be affixed to any building constructed to replace that to be built with funding from the Pledge."—R.S.C.

ibility after a series of recent, high-profile cases in which institutions have been penalized for ignoring restrictive covenants.

One case has its origins in 1933, when Peabody College, a predecessor-in-interest to Vanderbilt University, agreed that in return for a gift of $50,000 from the Tennessee United Daughters of the Confederacy (TUDC), a dormitory would be built and named Confederate Memorial Hall.[14] This name was inscribed in stone over the entrance of the building. In 2002, Vanderbilt announced that the inscribed name would be changed to Memorial Hall. The TUDC sued for declaratory judgment, specific performance, and damages.

Both parties moved for summary judgment, which the trial court granted in favor of Vanderbilt on the grounds that it would be "impractical and unduly burdensome for Vanderbilt to continue to perform that part of the contract pertaining to the maintenance of the name 'Confederate' on the building and at the same time pursue its academic purpose of obtaining a racially diverse faculty and student body."[15] The appellate court reversed this decision, finding a contract between the TUDC and Peabody College to maintain the name. It further held this obligation could be reasonably inferred to be applicable for the life of the building. Thus maintaining the name for over 70 years was not substantial performance, and the donor's remedy when a donee fails or ceases to comply with the condition of a gift is recovery of the gift.[16] The court concluded that the recovery would be $50,000 adjusted for inflation since 1933 by reference to the Department of Labor's consumer price index[17]—a significant amount. Vanderbilt did not appeal and did not change the name of the building.

Another case involved a donation by Avery Fisher of funds to construct a hall for concerts by the New York Philharmonic Orchestra, which named the concert hall after him.[18] When Lincoln Center was preparing to build a new concert hall, its plans to name it after a new donor were revealed. Members of the Fisher family threatened a lawsuit. The matter was resolved by allowing interior portions of the new building to be renamed, but the building itself was named Avery Fisher Hall.

In 1961, the Robertson Family contributed $35 million to Princeton University to fund a school of public and international affairs.[19] Subsequently, the Robertson Foundation provided additional funds to support the school. In 2002, heirs of the Robertsons filed suit claiming that Princeton had failed to fulfill the donor's goals. Princeton allegedly incurred $40 million in legal fees in defending the suit. In addition, Princeton settled the suit by transferring $40 million plus interest to a Robertson family foundation to cover costs of the lawsuit and $50 million to create a new foundation to fulfill the Robertsons' original purpose.[20]

In light of these widely publicized controversies, many charitable institutions have adopted gift policies that afford the institutions with the right to modify the terms and conditions of their gifts for good cause—in effect, a contractual analogue of Corporations Code Section 9143(b). These policies may be incorporated expressly or by reference in individual donation agreements.

In an era in which a bride and groom are frequently both represented by counsel to negotiate the terms of a potential dissolution, perhaps one should not be surprised that even the charitable impulse creates grist for the lawyer's mill. It is tempting to describe this as a sad state of affairs. However, these legal precautions are not as sorrowful as a donor who feels violated by a donee's failure to carry out the donor's heartfelt wishes. The careful lawyer thus may avoid grief for the client greater than that experienced in paying for legal services. ■

[1] L.B. Research & Educ. Found. v. The UCLA Found., 130 Cal. App. 4th 171, 177-78 (2005).
[2] *Id.* at 178. *See also* BUS. & PROF. CODE §17510.8 ("The acceptance of charitable contributions by a charity…establishes a charitable trust….").
[3] Patton v. Sherwood, 152 Cal. App. 4th 339, 342 (2007).
[4] The *L.B. Research* court stated in dicta that even if the gift at issue were deemed a transfer in trust, the donor would be held to have standing, because the donor's particular interest in enforcement of the gift in the circumstances presented made recognition of standing appropriate. L.B. Research, 130 Cal. App. 4th at 180. The California attorney general has expressed his intent to vigorously oppose this deviation from common law in future litigation.
[5] L.B. Research, 130 Cal. App. 4th at 180 (citing City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613, 621-22 (1999)).
[6] ABI, Inc. v. City of Los Angeles, 153 Cal. App. 3d 669, 682 (1984) (citing Cullen v. Sprigg, 83 Cal. 56, 64 (1890)).
[7] CORP. CODE §9142(a)(1)-(4).
[8] CORP. CODE §9142(c).
[9] L.B. Research, 130 Cal. App. 4th at 178.
[10] CORP. CODE §9142(a).
[11] CORP. CODE §9142(d).
[12] CORP. CODE §9143.
[13] This option is in contrast with Corporations Code §9142(a)'s specified array of remedies.
[14] Tennessee Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W. 3d 98 (Tenn. Ct. App. 2005).
[15] *Id.* at 111.
[16] *Id.* at 117.
[17] *Id.* at 119.
[18] Robin Pogrebin, *Avery Fisher Hall Forever, Heirs Say*, N.Y. TIMES, May 13, 2002.
[19] Robertson v. Princeton Univ., Docket No. C-99-02 (N.J. Super. Ct. 2006).
[20] Agreement of Settlement in Robertson v. Princeton Univ., *available at* http://www.princeton.edu/robertson/about/.


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