

THE ISSUE OF DONOR STANDING AND HIGHER EDUCATION: WILL INCREASED DONOR STANDING BE HELPFUL OR HURTFUL TO AMERICAN COLLEGES AND UNIVERSITIES?

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*“The cost of a Stanford education is not fully covered by tuition—all students are subsidized by the generosity of alumni, parents, and friends.”*¹

*“Paying for a legal education might not be easy, but your invaluable support of the Notre Dame Law School allows our law students to focus on their legal studies a little more, and worry about paying for their education a little less.”*²

*“Every year, thousands of Vanderbilt alumni, parents and friends give, and these contributions help fund scholarships, support great faculty, and underwrite new academic programs.”*³

*“Annual gifts from alumni are the bedrock of Columbia’s fundraising program and a measure of alumni support for the University. Current use funds, endowment, and bequests are welcomed.”*⁴

INTRODUCTION

Every alumnus of a college or university is guaranteed two things when he or she graduates: a diploma and either a phone call or letter at least once a year from his or her alma mater asking for a donation. For many of us, we briefly thumb through the alumni magazine, smile at the pictures of the newly renovated library, and chuckle that Professor So-And-So is still teaching English 101. Then we write a nominal check to the school—in part out of nostalgia and loyalty, in part because of the tax deduction. But every once in a while, there is an alumnus who really puts a smile on the face of the president and the board of trustees by writing a very large check. Such a donation can mean expansion of the school’s infrastructure, an increase in course and program offerings, new faculty, new facilities, new technology—all of which lead to a better education.

1. *The Stanford Fund*, GIVING TO STANFORD, <http://giving.stanford.edu/the-stanford-fund> (last visited Apr. 15, 2014).

2. *Law School Annual Fund*, SUPPORTING NOTRE DAME, <http://supporting.nd.edu/annual-giving/law-school-annual-fund/> (last visited Apr. 15, 2014).

3. *Vanderbilt Office of Annual Giving*, GIVING TO VANDERBILT, <https://giving.vanderbilt.edu/annualgiving/> (last visited Apr. 15, 2014).

4. *College of Physicians and Surgeons*, GIVING TO COLUMBIA, <http://giving.columbia.edu/giftguide/college-physicians-and-surgeons> (last visited Apr. 15, 2014).

As the above quotations suggest, colleges and universities depend heavily on the charitable support of alumni, parents, and friends for the operation of their schools. Larger gifts, however, tend to be accompanied with a purpose—and certain restrictions—that may give the trustees a headache to accompany their smile. Similarly, from the perspective of the donor of a sizeable amount of money, that warm feeling of giving out of college pride and gratitude may fade when the gift is not administered exactly as she had envisioned. What happens in such a case? Ultimately, the issue boils down to whether a donor may bring suit to enforce the terms of a charitable donation.

This Note will look broadly at the issue of donor standing—specifically, how it pertains to charitable donations to colleges and universities. Part I will look at the context of the issue of donor standing. Who gives to colleges and universities, and why do they do it? Part I looks anecdotally at large gifts given to various colleges and universities, and assesses the possible tax benefits which may serve as an impetus to give. Part II addresses the types of charitable donations that a person may make to a college or university, emphasizing that drafting a charitable donation in a certain manner can lead to very different legal outcomes. Part III addresses judicial characterization and enforcement of charitable donations and analyzes the case law that surrounds the issue of donor standing. It focuses on how similar donations have had divergent outcomes depending on the jurisdiction. Part IV analyzes the legislative side of the issue of donor standing, looking particularly at statutory divergence regarding how charitable donations are classified among various jurisdictions. Part V addresses possible ways to reconcile the jurisdictional differences on donor standing by looking to scholarly debate on the issue. Finally, this Note concludes by arguing that while changes in current legislation may help to create a more transparent system, they must be done in light of past judicial precedent. The title of this Note asks whether increased donor standing will be harmful or helpful to colleges and universities, and this Note concludes by answering: a little bit of both.

I. CONTEXT: WHO GIVES TO COLLEGES AND UNIVERSITIES, AND WHY DO THEY DO IT?

In 1991, a posthumous donation from Joseph A. Albertson to The College of Idaho resulted in an unusual phenomenon—the college changed its name to Albertson College of Idaho in honor of its generous alumnus and benefactor.⁵ Albertson and his wife were consistently generous supporters of the college, and the 1991 donation enabled the school to build

5. *A Tradition of Philanthropy*, THE COLLEGE OF IDAHO, <https://www.collegeofidaho.edu/giving/our-supporters/tradition-philanthropy> (last visited Apr. 15, 2014).

several new buildings. The new buildings also bore the name Albertson.⁶ While this might have seemed like a great tribute to the Albertson family, the name-change was actually met with a great deal of controversy among alumni, students, and the wider local community—many of whom ceased their financial support of the College in the ensuing years.⁷ Finally in 2007, the Albertson family reached a mutual agreement with the school to undo the 1991 name-change. While the gift was beneficial to the school, it also had the negative side effect of costing the College the loss of significant support from entities other than the Albertson Foundation.⁸ In fact, the Albertson family felt so strongly that the name-change hurt the school that the Foundation donated an additional \$50 million to the small liberal arts college with the condition that the name be changed back to its original title.⁹

Across the nation, charitable donations are given to colleges and universities every year.¹⁰ Larger gifts often come in the form of scholarships and endowments, sometimes created by a trust or through a contract subject to a condition subsequent. Often, such gifts are testamentary or made as a memorial, and thus are often contingent on specific interests of the testator or on the individual who is being memorialized. For example, Raymond G. Perelman said of his donation to the University of Pennsylvania, “I look at it as Penn Medicine gave me a gift. They offered me an opportunity to have my name on one of the best medical schools in the country.”¹¹

Naming rights may serve as a powerful impetus for charitable donations to colleges and universities. The (Albertson) College of Idaho controversy is just one of countless examples of generous benefactors having their name displayed on the marquees, buildings, and banners of institutes of higher education. Franklin & Marshall College was named for Benjamin Franklin, whose generous contribution in 1787 allowed the school to open its doors.¹² In 1936, a \$2 million donation from alumnus Lucius N. Littauer—then the largest single gift from an individual donor to a college

6. *Biographies: Joe Albertson*, J.A. AND KATHRYN ALBERTSON FOUNDATION, <http://www.jkaf.org/the-foundation/biographies/> (last visited Apr. 15, 2014).

7. *A Tradition of Philanthropy*, *supra* note 5.

8. *Id.*

9. *Biographies: Joe Albertson*, *supra* note 6.

10. See generally Reid Kress Weisbord, *The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving*, 45 GONZ. L. REV. 225 (2009).

11. Tamar Lewin, *Penn Gets \$225 Million for its School of Medicine*, N.Y. TIMES, May 10, 2011, at A18.

12. *Mission and History*, FRANKLIN & MARSHALL COLLEGE, <http://www.fandm.edu/about/mission-and-history> (last visited Apr. 15, 2014). In fact, the school initially began as two separate colleges—Franklin College and Marshall College. *Id.* The two colleges eventually merged in 1853. *Id.*

or university—enabled Harvard to open its Graduate School of Public Administration, which was originally located in the Littauer Center on campus.¹³ In 2005, Frank Eck’s contribution of \$21 million toward the expansion of Notre Dame Law School became the largest gift ever given to that law school—the fifth-largest gift ever received by the University—and led to naming the building the Eck Hall of Law.¹⁴ As mentioned earlier, in 2011 Raymond G. Perelman and his wife Ruth donated \$225 million to the University of Pennsylvania for its medical school, which was then renamed in their honor.¹⁵ These examples are just the tip of the iceberg; when visiting any given school across the country, it is nearly impossible to find a building, a bench, a quadrangle, a library, or any other facility that does not bear the name of some generous benefactor.

Besides creating the warm feeling in one’s heart and possibly the benefit of naming rights, donations to colleges and universities are appealing from the standpoint of a taxpayer. Colleges and universities are generally 501(c)(3) organizations under the Internal Revenue Code which may have beneficial tax consequences for taxpayers who make large donations.¹⁶ Very often these donations come earmarked for a particular project: a specific building, a specific endowed chair, a memorial scholarship or fellowship. Many universities even have entire offices devoted to soliciting planned gifts of this targeted nature.¹⁷

13. *History*, HARVARD KENNEDY SCHOOL, <http://www.hks.harvard.edu/about/history> (last visited Apr. 15, 2014). Today the school is known as The Harvard Kennedy School. *Id.* See also *Cornerstone for Littauer Center Laid by Founder*, THE HARVARD CRIMSON (May 11, 1938), <http://www.thecrimson.com/article/1938/5/11/cornerstone-for-littauer-center-laid-by/>.

14. *The Dedication of Eck Hall of Law*, UNIV. OF NOTRE DAME (May 1, 2009), available at http://www3.nd.edu/~ndlaw/building_expansion/EckDedicationBrochure.pdf

15. Lewin, *supra* note 11.

16. I.R.C. § 501(a) (2006) and § 501(c)(3) provide tax exemption for educational institutions. § 501(c)(3) (“Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes. . . [shall be exempt from taxation.]”) (emphasis added). See also I.R.C. § 2055(a)(2) (“[T]he value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers—to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes.”); Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593 (1999) (arguing that the shift of using corporate standards for charities has weakened fiduciary duties for enforcement and that this is exacerbated by recent tax laws favoring private foundations and diminishing the possibility of oversight).

17. See, e.g., *The Charitable Remainder Annuity Trust*, SUPPORTING NOTRE DAME, <http://nd.giftplans.org/index.php?cID=98> (last visited Apr. 15, 2014). See also *Planned Giving*, GIVING TO STANFORD, <http://giving.stanford.edu/planned-giving> (last visited Apr. 15, 2014) (providing guidelines on how to give to the school through bequests, life income gifts and other kinds of gifts including charitable lead trusts and donor

The creation of a trust can also have beneficial tax consequences. Colleges and universities can be the object of a charitable trust purpose according to the Restatement (Third) of Trusts.¹⁸ Section 28 states, in relevant part: “Charitable trust purposes include: . . . (b) the advancement of knowledge of education.”¹⁹ Section 28 also distinguishes between public and private charitable purposes and notes that the fact that an institution charges tuition or fees does not prevent it from having a trust support its programs.²⁰ The comments in Section 28 describe the breadth of what can be defined as a charitable purpose, noting, “It does not matter . . . that, for example, only one student or two may receive a scholarship from the fund as long as the potential class of recipients will be drawn from an indefinite group . . . rather than from a group so narrowly defined (e.g., the settlor’s descendants or relatives) as to make the trust a private trust.”²¹ While many gifts are certainly unrestricted, some are given with restrictions. Furthermore, donors often “expect a high degree of accountability for and loyalty to the restrictions they impose on charitable gifts.”²²

But what if this purpose is not carried out? What if it is not carried out in the way that the donor had intended? What if the purpose for which the donation was given is now obsolete? What if money was placed in an endowment for a medical school, but the university no longer has a medical school?²³ Can the endowment be repurposed for something else? If so, must the college or university even inform the donor of this change? Donative intent then becomes a tricky issue for donors and colleges and universities alike.

It may appear that the solution ought to be for the donor to sue the college or university to administer the gift as intended, but this is not always possible. The problem with this method of enforcement is the standing doctrine. When a court denies standing to a plaintiff of a suit to enforce the terms of a charitable donation, it “is merely a determination that the claim, however meritorious, should be asserted by someone else.”²⁴ This issue is especially frustrating for donors in the area of charitable

advised funds).

18. RESTATEMENT (THIRD) OF TRUSTS § 28 (2003).

19. *Id.*

20. *Id.* at cmt. a(1).

21. *Id.*

22. Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors to Reserve the Right to Enforce a Gift Restriction?*, 42 REAL PROP. PROB. & TR. J. 245, 248 (2007) [hereinafter Weisbord, *Reservations*].

23. *See, e.g.,* L. B. Research and Educ. Found. v. UCLA Found., 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005).

24. Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 658 (1998).

donations to colleges and universities, where the determination of what is best for the educational institution is sometimes at odds with the interests of the donor. Additionally, courts have not traditionally dealt with the issue of standing uniformly, nor have they employed the same legal theory when analyzing the gift itself.²⁵ Some courts have construed the charitable donation as a contract subject to a condition subsequent, allowing the donor to bring a claim when that condition has not been met, while others analyze it under property theories.²⁶ Still, other courts dismiss a case for lack of standing when the same facts in a different jurisdiction could have made it to trial.²⁷

The Uniform Trust Code (UTC) provides some insight into the issue of donor standing.²⁸ Not all states have enacted the UTC, and even among those who have, there is a divergence in how it has been interpreted.²⁹ All this leads to a lack of clarity and consistency across states. This is especially problematic in the realm of colleges and universities, where donors give across state lines or to multiple institutions in different jurisdictions that do not analyze the issue similarly. Is it fair to allow a donor to enforce his charitable donation in one state while denying the same donor standing to enforce essentially the same donation in a different state? Conversely, should a college or university that happens to be in a state that has adopted the UTC be subject to litigation when a similarly situated institution in another jurisdiction would not be?

II. BACKGROUND: THE METHODS FOR MAKING A CHARITABLE DONATION

The issue of standing is one of the most fundamental aspects of litigation. In order to bring a claim, a plaintiff must have standing.³⁰ In order to show standing in a federal court, the plaintiff must prove three elements: 1) that an injury occurred; 2) that this injury was caused by the defendant; and 3) that a favorable judgment would redress this injury.³¹ If the plaintiff does not meet one of these elements, there is no standing and the complaint is dismissed.³² Standing may also be granted by statute.³³ In

25. See *infra* Part III.

26. Compare *L. B. Research*, 29 Cal. Rptr. 3d at 716 (holding that the donor had standing to enforce the gift), with *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133 (Mo. Ct. App. 2010) (holding that donors did not have standing to bring an action enforcing the gift).

27. See, e.g., *Pearson v. Garrett-Evangelical Theological Seminary, Inc.*, 790 F. Supp. 2d 759 (N.D. Ill. 2011) (dismissing the case for lack of donor standing).

28. See *infra* note 205 and accompanying text.

29. See *infra* Part IV.

30. JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 541 (8th ed. 2008).

31. *United States v. Windsor*, 133 S. Ct. 2675, 2685–86 (2013).

32. *Id.*

cases involving charitable donations, the issue of standing separates cases that are litigated from the ones that are thrown out, no matter how meritorious the claim may be.³⁴

Early on, charitable donations were classified solely under trust law.³⁵ A trust, at its most basic level, is a relationship in which one party holds property for the benefit of another party.³⁶ When a trust is made, a settlor divides a property interest—real or personal, tangible or intangible—between one or more beneficiaries and a trustee.³⁷ The trustee holds legal title to the interest while the beneficiary holds beneficial title, or equitable title in the interest.³⁸ The trustee must then manage the property for the benefit of the beneficiary.³⁹ A fiduciary duty is thus created between the trustee of a trust and the beneficiary of the trust.⁴⁰ Generally, an action can be brought by trust-beneficiaries for a breach of fiduciary duty.⁴¹ Accordingly, the beneficiaries have an incentive to make sure that this duty is not breached because it affects them personally.⁴² The enforcement of a trustee's fiduciary duty becomes more complicated when the trust in question is a charitable trust, as tends to be the case with gifts to colleges and universities.⁴³

A charitable trust can be distinguished from a private trust by consideration of their respective beneficiaries. While private trusts must exist for the benefit of one or more ascertainable persons or entities, charitable trusts must exist for the benefit of a charitable purpose.⁴⁴ In a college and university setting, a charitable trust may benefit a very wide range of individuals, but not a specific individual or class of individuals.⁴⁵ Since charitable trusts have no ascertainable beneficiary to enforce the trust, the role of enforcement falls to the attorney general as *parens patriae* to protect the general public.⁴⁶ Thus, if the charitable trust were not carried out according to the terms of the trust, the settlor would have no power to

33. *Id.*

34. *Id.*

35. Gary, *supra* note 16, at 595.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Sanford J. Schlesinger & Martin R. Goodman, *Enforcement of Charitable Transfers: A Question of Standing*, 36 ESTPLN 37 (2009). There are instances in which someone with a “special interest” in the trust’s enforcement can be determined. *Id.* In such cases, the individual with the “special interest” is granted standing. *Id.*

45. Gary, *supra* note 16, at 596.

46. *Id.*

enforce the trust in court.

Settlor enforcement of trusts is codified in Section 405(c) of the Uniform Trust Code, which states, “The settlor of a charitable trust . . . may maintain a proceeding to enforce the trust.”⁴⁷ As of publication of this Note, twenty-four states and the District of Columbia allow donors standing by formally adopting the UTC,⁴⁸ while other states have recent legislation or judicial opinions that allow donors to have standing.⁴⁹ The problem arises from among the other twenty-six states.⁵⁰ To complicate matters even further, charitable gifts are not always given in the form of trusts. Charitable gifts can be classified in multiple ways and may be treated under both property law and contract law.⁵¹

A restricted gift can be analyzed under four legal theories: 1) as a charitable trust; 2) as a conditional gift; 3) as a restricted gift to corporate charity; or 4) as a contract subject to a condition subsequent.⁵² Property law governs the first three options while contract law governs the fourth option.⁵³

A. Charitable Trusts

As previously noted, a charitable trust is similar to a private trust, but rather than benefiting a particular ascertainable beneficiary who may bring suit to enforce the trust, a charitable trust must be for the benefit of a charitable purpose. The state attorney general is the principal party with standing to enforce the terms of the charitable trust.⁵⁴ The traditional rule is that the only way in which a settlor may have standing to enforce the terms of the trust is if the settlor retains an interest in the trust property.⁵⁵ In 1959, this rule was articulated in Restatement (Second) of Trusts Section 391, which states:

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have

47. UNIFORM TRUST CODE § 405(c) (2010).

48. *See infra* note 206.

49. *See, e.g.,* *Smithers v. St. Luke’s Roosevelt-Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (holding that the settlor’s wife, as special administratrix, had standing to bring an action enforcing the charitable trust).

50. *See, e.g., id.*

51. Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1190–91 (2007) (hereinafter *Brody, Dead Hand*).

52. *Id.*

53. *Id.*

54. DUKEMINIER, SITKOFF & LINDGREN, *supra* note 30, at 751.

55. *Id.* at 785.

no special interest *or by the settlor or his heirs, personal representatives or next of kin.*⁵⁶

The Restatement (Third) of Trusts Section 94 reflects a modern shift in the traditional understanding by removing the final sentence of the Second Restatement's provision.⁵⁷ This change allows a settlor to bring an enforcement suit regardless of whether or not an interest is retained in the property:

(2) A suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust.⁵⁸

Because enforcement by the attorney general has shown itself to be an inadequate enforcement mechanism, the recent trend has been towards allowing donors standing.⁵⁹ In jurisdictions that have not adopted the UTC, the judge's choice of either adopting the traditional rule of the Second Restatement or the modern rule found in both the Third Restatement and the UTC plays a crucial role in standing.

Under the traditional rule, a settlor is unable to bring a claim if the donated funds in question are used in a way that goes against his intentions unless he or she expressly reserves some sort of property interest in the gift.⁶⁰ But reserving that property interest can also result in negative tax

56. RESTATEMENT (SECOND) OF TRUSTS § 391 (1959) (emphasis added). *See cf. Smithers*, 723 N.Y.S.2d 426; *L. B. Research and Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005).

57. RESTATEMENT (THIRD) OF TRUSTS § 94(b) (2012).

58. *Id.*

59. GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 415 (2012). *See, e.g., Holt v. Coll. Of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 935 (Cal. 1964) ("The Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment."). *See also Brody, Dead Hand, supra* note 51, at 1244 (quoting MARION FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 333 (2004) ("The overriding factor in almost every one of the cases in which individuals were granted standing was the *lack of effective enforcement by the attorney general* or other government official") (emphasis added); Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J. L. & PUB. POL'Y 1, 20 (2009) ("Government entities lack adequate funding and qualified personnel to enforce existing laws. Very few states attempt to ensure that charitable fiduciaries obey their duties of loyalty and care.").

60. Schlesinger & Goodman, *supra* note 44, at 37. This is further exacerbated by the fact that many charitable donations are given, in part, because of the tax deduction the settlor could potentially be able to take. Such deductions may be limited if the settlor in fact retains some sort of property interest for himself. *Id.* at 40.

consequences for the settlor.⁶¹ If the settlor reserves no interest for himself, the traditional rule holds that the state attorney general has standing as *parens patriae* to bring a case, but there is no guarantee that he or she will choose to do so.⁶² This is in part because the attorney general is generally not personally affected by the misuse of the funds and therefore has less of an incentive than the settlor to actually ensure that the charitable trust is being administered according to its terms.⁶³ Likewise, attorneys general are not always the best situated to redress a problem because of political considerations, which may motivate them not to pursue the enforcement of certain charitable trusts.⁶⁴ Finally, the attorney general of a given state has limited resources and—especially in an era where state governments are increasingly affected by severe budgetary constraints—may not deem it prudent to divert these resources towards enforcing charitable trusts.⁶⁵

B. Conditional Gifts

The second way in which a restricted gift can be classified is as a conditional gift.⁶⁶ Conditional gifts differ from charitable trusts in that donors have the ability to sue for the return of the property in instances where the conditions of the gift are not satisfied.⁶⁷ The Restatement (Third) of Trusts, Section 5(h) specifies that conditions and equitable charges do not result in trusts.⁶⁸ The Comments in that subsection further explain that when a donor gives a conditional gift to another person, and the gift recipient “commit[s] or fails[s] to perform a specified act, the transferred interest shall be forfeited.”⁶⁹ The Comment further distinguishes a conditional gift from a trust by noting that no fiduciary relationship is created by the condition and therefore beneficiaries of the gift have no standing to enforce the condition.⁷⁰ In sum, donors—but not beneficiaries—of conditional gifts have standing to sue over problems with enforcement. Whether or not a gift is conditional requires a fact-based

61. *Id.*

62. Gary, *supra* note 16, at 596.

63. *Id.* at 37.

64. *See, e.g., In re Milton Hershey Sch.*, 911 A.2d 1258 (Pa. 2006) (holding that the alumni association did not have a special interest to vest it with standing).

65. Schlesinger & Goodman, *supra* note 44, at 39. *See also*, Helge, *supra* note 59, at 21–22 (“In a majority of states, staffing levels dedicated to oversight of the charitable sector are minimal and having remained relatively static for over forty years.”).

66. Brody, *Dead Hand*, *supra* note 51, at 1201–02.

67. *Id.* at 1191–92.

68. RESTATEMENT (THIRD) OF TRUSTS § 5(h) (2003).

69. *Id.*

70. *Id.*

inquiry into the donor's intent at the time that the gift was made.⁷¹

C. Restricted Gift to a Corporate Charity

The third theory of analysis once again falls under property law and is called a restricted gift to a corporate charity.⁷² Treatment of restricted gifts to corporate charities differs amongst the states, but the ultimate effect is the same.⁷³ Some states classify the charitable nonprofit corporation as a trust with the board of directors as trustees while others treat the charitable class served by the corporate charity as trust beneficiaries.⁷⁴ Ultimately, the result is that only the attorney general may enforce the terms of the gift except in extremely unusual cases.⁷⁵ Because charitable donations to colleges and universities are not typically classified under this heading, this Note will not delve into any further detail regarding restricted gifts to corporate charities.

D. Contract Subject to a Condition Subsequent

Finally, a contract subject to a condition subsequent is analyzed under contract law. If there is a condition in the contract, the contract may be frustrated by the occurrence or non-occurrence of the stipulated event.⁷⁶ This type of restricted gift is unequivocally analyzed under contract principles.⁷⁷ The problem with viewing a donative transfer as a contract subject to a condition subsequent, however, is that many such transfers are testamentary dispositions and not bargained-for exchanges; so it can easily become problematic to construe them as contracts.⁷⁸

E. Conclusion

The fact that there are so many different methods under which a court can analyze any given gift leads not only to confusion among different jurisdictions, but also to a major divergence among the kinds of cases in which donor standing is recognized and those in which it is not. In some ways, the inconsistencies and confusion between jurisdictions may indicate that the current legal regimes courts have for this analysis are insufficient to truly resolve the issue.⁷⁹

71. *Id.*

72. Brody, *Dead Hand*, *supra* note 51, at 1191.

73. *Id.* at 1206.

74. *Id.* at 1206–07.

75. *Id.* at 1209.

76. *Id.* at 1202–03.

77. *Id.*

78. *Id.* at 1192.

79. *Id.* at 1258–74 (arguing for legislation to permit “giftracts”).

Additionally, the ability to analyze a case under so many legal theories leads to several different types of remedies available to plaintiffs—assuming that they are even granted standing. While specific performance of the terms of the gift could be ordered if the gift were classified under property law, it may be more likely for the remedy to be damages if the gift was seen as a contract. Different remedies in different jurisdictions also have the potential to encourage forum shopping when possible.

III. JUDICIAL CHARACTERIZATION AND ENFORCEMENT OF CHARITABLE DONATIONS

There are a series of key cases that illustrate the divergent practices of donor standing. In the 2011 Illinois case, *Pearson v. Garrett-Evangelical Theological Seminary*,⁸⁰ the court dismissed with prejudice Pearson's amended complaint against the seminary for administering a scholarship, the funds for which Pearson had donated.⁸¹ In 1997, a Connecticut court in *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*⁸² determined that unless a donor reserves a property right in the gift, he does not have standing to sue.⁸³ In the 2001 New York case, *Smithers v. St. Luke's-Roosevelt Hospital Center*,⁸⁴ the court decided that the settlor did have standing.⁸⁵ In the 2005 California case, *L.B. Research and Education Foundation v. UCLA Foundation*, the court determined that the gift in question was a contract subject to a condition subsequent and not a charitable trust.⁸⁶ For that reason, the donor had standing to sue.⁸⁷ However, the court in this case stated that even if it had been a charitable trust, the donor would still have standing to sue.⁸⁸ In contrast, four years later in *Hardt v. Vitae Foundation, Inc.*, the Missouri State Appellate Court distinguished the case from *L.B. Research* by strictly construing the UTC, as adopted by Missouri, to refer only to trusts.⁸⁹ For that reason, the court determined that the donors did not have standing.⁹⁰ Most recently, in the 2013 Maryland case *Newell v. Johns Hopkins University*,⁹¹ the court held that a use restriction clause in a sale contract limited the scale or density of

80. 790 F. Supp. 2d 759 (N.D. Ill. 2011).

81. *Id.*

82. 699 A.2d 995 (Conn. 1997).

83. *Id.*

84. 723 N.Y.S.2d 426 (N.Y. App. Div. 2001).

85. *Id.*

86. 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005).

87. *Id.* at 712.

88. *Id.* at 717.

89. 302 S.W.3d 133 (Mo. Ct. App. 2009).

90. *Id.* at 135.

91. 79 A.3d 1009 (Md. Ct. Spec. App. 2013).

the University's planned development of the land.⁹² In essence, current law is far from uniform among the states and it is unclear under which type of instrument (trust or contract) a donor will have standing to sue, if at all.

The *Herzog* case serves as one of the first modern instances of standing in the context of a charitable donation.⁹³ On August 12, 1986 the Carl J. Herzog Foundation agreed "to participate in a matching grant program that would provide need-based merit scholarship to disadvantaged students for medical related education."⁹⁴ On September 9, 1986, the University of Bridgeport formally accepted the offer of a matching grant of up to \$250,000 and, upon raising the \$250,000, the Foundation paid the agreed upon amount.⁹⁵ The grants were allegedly used for the agreed upon purpose—specifically to fund scholarships for students in the University of Bridgeport's nursing program—until the University closed its nursing school on June 20, 1991.⁹⁶ The Foundation learned of the nursing school's closure on November 21, 1991.⁹⁷

The Foundation then brought an action seeking injunctive relief to enforce the provisions of the restricted charitable gift, but the case was dismissed for lack of standing.⁹⁸ When the Foundation appealed, the intermediate appellate court reversed and remanded the case.⁹⁹ The University then appealed to the Connecticut Supreme Court, which reversed the intermediate appellate court's judgment.¹⁰⁰ The main issue on appeal was whether or not the Connecticut Uniform Management of Institutional Funds Act ("CUMIFA") established "statutory standing for a donor to enforce the terms of the completed charitable gift."¹⁰¹ Ultimately, the court held that the legislature did not intend to establish donor standing

92. *Id.*

93. 699 A.2d 995 (Conn. 1997). *See generally* Paula Kilcoyne, *Charitable Trusts—Donor Standing Under the Uniform Management of Institutional Funds Act in Light of Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 21 W. NEW ENG. L. REV. 131 (1999).

94. *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 996 (Conn. 1997).

95. *Id.* The plaintiff transferred \$144,000 to the defendant on June 26, 1987 and the remaining \$106,000 on June 28, 1988. *Id.*

96. *Id.*

97. *Id.*

98. *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 13 Conn. L. Rptr. 622 (Conn. Super. Ct. 1995), *rev'd*, 41 Conn. App. 790 (Conn. App. Ct. 1996), *rev'd*, 699 A.2d 995 (Conn. 1997) ("CUMIFA, pursuant to which the plaintiff has brought this action, does not provide the plaintiff with the right to enforce restrictions contained in the "gift instrument," and therefore the plaintiff lacks standing.").

99. *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 41 Conn. App. 790 (Conn. App. Ct. 1996), *rev'd*, 699 A.2d 995 (Conn. 1997).

100. *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995 (1997).

101. *Id.* at 996.

in such cases.¹⁰²

The court's analysis in this case focused on the fact that the grantor had retained no property interest in the gift instrument and thus was denied standing under the traditional rule of charitable trusts.¹⁰³ The court held that "a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so."¹⁰⁴ The court first emphasized that, at common law, the plaintiff would have no standing and, before analyzing the Foundation's case under CUMIFA, highlighted the role of the attorney general in enforcing the charitable purposes of a gift.¹⁰⁵ The Foundation conceded that nothing in the plain language of the statute granted donor standing.¹⁰⁶ However, the Foundation argued that Section 45a-533, which provides for the governing board of a charitable institution to be released from any part of a gift restriction with written consent of the donor, would not make sense if the donor were denied standing to bring a claim when the restriction was ignored without written consent.¹⁰⁷ The Connecticut Supreme Court ultimately determined that the intent of the legislature was not to allow statutory donor standing.¹⁰⁸ CUMIFA was ultimately repealed in 2008.¹⁰⁹

In *L.B. Research*, the California court analyzed the donative transfer under contract law.¹¹⁰ In July 2000, L.B. Research and Education Foundation had made a \$1 million donation to the UCLA Foundation to establish the Julien I.E. Hoffman, M.D., Chair in Cardiothoracic Surgery.¹¹¹ Both foundations settled on the gift, and the basic provision of the gift was that the fund would "be used by Chair holders who met specified criteria to 'support basic science research activities that may have the potential for clinical applications.'"¹¹² The terms of the gift also contained the language:

[I]f the Cardiothoracic Surgery program shall cease to exist at UCLA, or in the event that UCLA does not meet the terms and

102. *Id.*

103. *Id.* See also 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, 615-16 (2003).

104. *Carl J. Herzog*, 699 A.2d at 997.

105. *Id.* at 998-99.

106. *Id.* at 999-1000.

107. *Id.*

108. *Id.* at 996.

109. C.G.S.A. § 45a-527, §§ 45a-526-529 (repealed 2008).

110. 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005).

111. *Id.* at 716-17.

112. *Id.*

conditions of this agreement, any and all funds shall be transferred to support an endowed chair in Cardiothoracic Surgery . . . in the Department of Surgery at the University of California, San Francisco, School of Medicine.¹¹³

An additional provision provided that if the Department of Surgery ceased to be, then the funds in question would be transferred to another university within the University of California system to support an endowed chair under the same terms.¹¹⁴ In 2003, the L.B. Research Foundation sued for the enforcement of this gift.¹¹⁵ UCLA answered that the L.B. Research Foundation had no standing to bring such a claim. UCLA argued that only the attorney general was able to bring an enforcement action in the case of a charitable trust.¹¹⁶ The trial court agreed with UCLA regarding standing and threw the case out.¹¹⁷

On appeal by the Foundation, the appellate court held that the gift was a contract subject to a condition subsequent.¹¹⁸ For that reason, the appellate court reversed the trial court and remanded the case.¹¹⁹

This opinion was not received without controversy. Evelyn Brody criticizes the legal analysis employed by the California Court of Appeals for confounding the enforcement options available whether the gift was classified under contract or property law.¹²⁰ Ultimately, Brody argues that “[t]he courts’ increased and continued confusion over what law to apply to private enforcement of charitable gifts suggests that the existing legal classifications are not working.”¹²¹ Instead of trying to fit the round peg of restricted gifts into the square hole of existing trust or contract law, Brody suggests the creation of a new hybrid legal regime to address what she dubs “giftracts.”¹²²

In contrast to *L.B. Research*, a Missouri court in *Hardt*,¹²³ held that the donor did not have standing under the UTC, the Uniform Prudent Management of Institutional Funds Act, or common law.¹²⁴ In this case, Edwin and Karl Hardt were two executors of the estate of Selma J. Hardt.¹²⁵ They were given the discretion to distribute the remainder of her

113. *Id.* at 712.

114. *Id.* at 712–13.

115. *Id.* at 713.

116. *Id.*

117. *Id.*

118. *Id.* at 716.

119. *Id.* at 717.

120. Brody, *Dead Hand*, *supra* note 51, at 1191.

121. *Id.* at 1274.

122. *Id.* at 1189.

123. 302 S.W.3d 133, 140 (Mo. Ct. App. 2009).

124. *Id.* at 140.

125. *Id.* at 135.

estate to a charitable organization of their choice.¹²⁶ In March of 2001, the Hardts met with representatives of Vitae—a pro-life, non-profit charitable organization—to arrange a donation of the estate’s remainder to that organization.¹²⁷ They met with Vitae’s National Project Director and President who presented a proposal regarding air media campaigns in the top twenty-five media markets in the United States.¹²⁸ Vitae explained that this campaign was vital to Vitae’s mission because it was the most effective way to reach women vulnerable to having abortions, and that Vitae lacked sufficient funding to reach ten of the markets identified.¹²⁹ Ultimately, Vitae was granted funding of \$4,242,000, which was the total amount that Vitae had identified as needed for air media campaigns in the ten regions.¹³⁰ The money was accompanied with a letter of intent that specified the ten markets and also explained that the gift was to be used as a challenge gift, which would require Vitae to match any contributions Vitae received from other sources.¹³¹ The intent letter also clearly indicated that the funds “will not be fully consumed in the initial media campaign but will be the basis for establishing an ongoing presence in these markets.”¹³² In November of 2002, an additional \$4 million was given to Vitae, of which \$3 million was to be used as matching gifts while the other \$1 million was to be used to develop a website aimed at teens.¹³³

The gift was allegedly not administered according to the Hardts’ plan, as portions that were intended to act as matching gifts were used instead for hiring new staff members and other administrative expenses.¹³⁴ By June 2005, the Hardts learned through accountings from Vitae that the gift had allegedly been misused significantly with nearly half spent on administrative expenses while other portions had been spent on media markets not listed in the 2001 gift.¹³⁵ On August 6, 2008, the Hardts filed a petition requesting a detailed accounting of both the 2001 and 2002 gifts, a restoration of any portion of either gift not spent on its allotted purpose, an injunction preventing any further misuse of the gifts, or transfer of the gift to another charitable organization that the Hardts would choose.¹³⁶ Vitae filed a motion to dismiss on the grounds that the Hardts lacked standing,

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 135–36.

132. *Id.* at 136.

133. *Id.*

134. *Id.*

135. *Id.* at 136.

136. *Id.*

which the trial court granted.¹³⁷

The appellate court affirmed the trial court's decision, classifying the gift as a charitable gift.¹³⁸ The only person with standing to bring a claim to enforce a charitable gift would be the attorney general or a beneficiary with a "special interest."¹³⁹ The court held that in order for the Hardts to have standing, they would have had to make the gift subject to a condition subsequent—in which case, they would have retained some interest for themselves with the ability to bring suit to protect that interest.¹⁴⁰ The court also rejected the notion that the gift could be classified as a contract.¹⁴¹

Likewise, the 2011 *Pearson* case¹⁴² was dismissed for lack of standing.¹⁴³ In 2006, Thomas L. Pearson pledged to donate to the Garrett-Evangelical Theological Seminary three installments of \$400,000—totaling \$1.2 million—for the purpose of funding the "Pearson Scholarship."¹⁴⁴ Named in honor of Pearson's parents, this scholarship was intended to support only "upcoming generations of Garrett students who were among the brightest young scholars and who planned to undertake the same pastoral ministry work in Iowa to which Richard and Ramalee had dedicated their lives."¹⁴⁵ The gift also contained language providing that if Garrett could not find students to "fulfill this objective," the funds would be transferred to DePauw University in Greencastle, Indiana to set up a similar scholarship program there.¹⁴⁶ After four years, Garrett was allegedly unable to meet the terms of the gift but did not transfer the gift to DePauw as instructed. For that reason, the Pearson family brought the matter before the court, and Garrett responded with a motion to dismiss for a lack of standing.¹⁴⁷

The district court, citing Illinois caselaw, agreed with Garrett.¹⁴⁸ It quoted, in particular, a 79-year-old Illinois appellate case that stated: "[A] mere donor to a fund creating a trust for a public charity cannot call the trustees of that fund to an account for a misapplication of the fund, or any

137. *Id.* at 135–37.

138. *Id.* at 140.

139. *Id.*

140. *Id.*

141. *Id.* at 140.

142. 790 F. Supp. 2d. 759 (N.D. Ill. 2011).

143. *Id.* at 769. *Pearson* was a federal case brought in Illinois on the grounds of diversity of citizenship.

144. *Id.* at 761.

145. *Id.* at 762.

146. *Id.*

147. *Id.* Garrett also sought to dismiss the complaint for lack of subject-matter jurisdiction but the court disagreed with this. *Id.*

148. *Id.*

breach of the trust, unless there is something peculiar in the transaction beyond the mere fact of contribution.”¹⁴⁹ The court granted that this alone was not dispositive, but, because Pearson was also arguing that the gift was a contract, there was still room for him to bring an enforcement action.¹⁵⁰ Relying on *Herzog*, however, the court held that the transfer was a completed gift and thus Pearson had no interest left to justify standing.¹⁵¹

Similarly, in November 2013, the Maryland Court of Special Appeals decided *Newell v. Johns Hopkins University*¹⁵²—a case illustrating the importance of carefully drafting the donative instrument to best effectuate the donor’s intent.¹⁵³ In 1989, Elizabeth Banks—a prominent Maryland citizen who was known for her opposition to uncontrolled development in Montgomery County¹⁵⁴—conveyed her family farm to Johns Hopkins University.¹⁵⁵ Various assessments placed on the farm property made retaining the property cost prohibitive for Banks.¹⁵⁶ She had good relations with Johns Hopkins and felt they would respect her wish that the farm not be densely developed.¹⁵⁷ With this in mind, Elizabeth Banks entered into a contract of sale with the University to convey the property in exchange for her being able to live the rest of her life on the farm.¹⁵⁸ The conveyance was a sale-and-gift transaction in which Banks sold the property to the University for well under the fair market value and “intend[ed] to make a charitable contribution to the Buyer to the extent of the excess of the actual fair market value.”¹⁵⁹ At the time of conveyance, Johns Hopkins paid \$5 million for the property which was valued at \$54 million.¹⁶⁰

However, within two decades of the gift, Johns Hopkins began to develop the land in a way that the Banks family alleged was not in accordance with Elizabeth’s donative intent. In 2010, Johns Hopkins

149. *Smith v. Thompson*, 266 Ill. App. 165, 182 (Ill. App. Ct. 1932).

150. *Pearson*, 790 F. Supp. 2d at 764.

151. It should be noted that *L.B. Research* is an appellate decision; at the trial level it was dismissed for lack of donor standing.

152. 79 A.3d 1009 (Md. Ct. Spec. App. 2013).

153. *Id.*

154. Lori Aratani, *Johns Hopkins Sued Over Plans For Belward Farm*, WASH. POST (Jan. 31, 2012), http://www.washingtonpost.com/local/johns-hopkins-sued-over-plans-for-belward-farm/2012/01/31/gIQAEPXAgQ_story.html (“Local lore has it that Elizabeth Beall Banks once chased developers off her Gaithersburg area farm with a shotgun when they came around asking questions.”).

155. *Newell*, 79 A.3d at 1011.

156. *Id.* at 1010–11.

157. *Id.*

158. *Id.*

159. *Id.* at 1012.

160. Lori Aratani, *Johns Hopkins Lawsuit Highlights Questions About Schools’ Obligations to Donors*, WASH. POST (Feb. 20, 2012), http://www.washingtonpost.com/local/trafficandcommuting/johns-hopkins-lawsuit-highlights-questions-about-schools-obligations-to-donors/2012/02/17/gIQAVMH0PR_story.html.

received zoning approval to build a 4.7 million square foot development on the property.¹⁶¹ This differed substantially from the original Master Plan that Elizabeth Banks supported.¹⁶² Finalized in 1997, the original Master Plan would have created a satellite campus with low profile buildings, totaling only 1.4 million square feet.¹⁶³ The contract of sale, signed in 1989, contained a use restriction clause specifying that the farm be used “for agricultural, academic, research and development, delivery of health and medical care and services, or related purposes only.”¹⁶⁴ The heirs of Elizabeth Banks¹⁶⁵ filed suit, alleging that the use restriction clause prohibited Johns Hopkins from developing the property in accordance with the 2010 Master Plan.¹⁶⁶ The issue of the lawsuit was how this clause impacted Johns Hopkins’ fee simple title.¹⁶⁷

Throughout the opinion, it is made clear that although Johns Hopkins was developing the land in a way that was allegedly at odds with Elizabeth Banks’ intent when she conveyed the property to the University, this was immaterial.¹⁶⁸ Despite the development allegedly being in opposition to the donor’s intent, the court of special appeals affirmed the lower court’s grant of summary judgment to Johns Hopkins because the contract had retained no property right to Banks.¹⁶⁹ The court held that the sale-and-gift was a valid contract, stating, “[T]he fact that she came to disapprove of [Johns] Hopkins’s evolving plans for the Farm does not create a right in the Family to insert new limits into the Contract now.”¹⁷⁰ Finally, the court expressed quite clearly that alleged donative intent cannot constrain a contract when property is given in fee simple, stating, “[a] bad deal does not mean a void deal, and whatever issues the Family has with [Johns] Hopkins’s long-term management of the Farm, it cannot now hold Hopkins accountable for parameters that Ms. Banks may (or may not) have had in mind that went unexpressed in the Contract.”¹⁷¹

By contrast, *Adler v. SAVE*,¹⁷² an August 2013 appellate decision from New Jersey, held that a charity that solicits and accepts donations is

161. *Id.*

162. *Id.*

163. *Id.*

164. *Newell*, 79 A.3d at 1010.

165. Ms. Banks passed away on January 17, 2005. OBITUARY OF ELIZABETH BEALL BANKS, http://www.scale-it-back.com/files/obituary_of_elizabeth_beall_banks_website.pdf (last visited Apr. 15, 2014).

166. *Newell*, 79 A.3d at 1010.

167. *Id.*

168. *Id.*

169. *Id.* at 1024.

170. *Id.* at 1023.

171. *Id.*

172. 74 A.3d 41 (N.J. Super. Ct. App. Div. 2013).

required to return the donation when it is used in a manner inconsistent with the purpose for which the donation was made.¹⁷³ In that case, Bernard Adler and his wife made a donation in the form of a conditional gift to SAVE, an animal shelter that did not euthanize.¹⁷⁴ Between 2002 and 2004, the Adlers donated \$50,000 (in various installments) to be used exclusively for a capital expansion project that would create more space for larger dogs and older cats, in exchange for naming rights.¹⁷⁵ However, in February 2006, SAVE announced that it was merging with another charitable organization and, as a result, would not be building the new facility as planned.¹⁷⁶ The Adlers requested the return of their donation and were denied.¹⁷⁷ They subsequently filed suit.¹⁷⁸

The trial court held in favor of the Adlers, ordering the full return of the charitable gift.¹⁷⁹ On appeal, SAVE argued that the donation was not a conditional gift, and, in the alternative, that even if it were classified as a conditional gift, the condition had been or would be met.¹⁸⁰ The appellate division found neither of these arguments compelling and affirmed the lower court decision.¹⁸¹ The court characterized the defendant charity as “wooing” the Adlers into giving money through the use of “sophisticated weapons of persuasion”—namely brochures and presentations featuring “happy children and their family [sic] warmly embracing puppies, kittens, and vulnerable-looking older animals.”¹⁸² Without New Jersey precedent regarding the return of an inter vivos gift, the court decided that, out of fairness, it was only right that SAVE return the gift in full.¹⁸³

When viewed together, these cases demonstrate the current divergence among jurisdictions as to how charitable donations are classified. Additionally, these different classifications produce wildly different remedies. Even in cases where the state’s statutory scheme does not permit donor standing, the *L.B. Research* court demonstrates that the judiciary has the power to permit donor standing and will exercise that power.¹⁸⁴

173. *Id.* at 43.

174. *Id.*

175. *Id.* at 47.

176. *Id.* at 49. A new facility would still be built, but it would be at a different location and of substantially different size and character. *Id.* The new building site, additionally, did not allow the Adlers to have naming rights, nor was it specifically dedicated to sheltering larger dogs and older cats. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 53.

180. *Id.*

181. *Id.*

182. *Id.* at 54.

183. *Id.* at 55.

184. *See generally* *L.B. Research and Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005).

Perhaps this trend towards increased donor standing is favorable for donors, but from the perspective of a college or university it may lead to burdensome litigation.

Both Princeton University and the University of Southern California have had recent disagreements regarding the proper allocation of funds leading to protracted litigation.¹⁸⁵ In 1961, Marie Robertson made a donation of A&P stock worth \$35 million to Princeton University's Woodrow Wilson School of Public and International Affairs in honor of her husband Charles Robertson, who was an alumnus of the school.¹⁸⁶ For tax reasons, it was agreed that the gift would be administered through the Robertson Foundation—a foundation that would be brought into existence for the sole purpose of administering the gift—and that Princeton University would control this administration.¹⁸⁷ The governance structure of the Foundation provided that four of the seven members would be from Princeton University.¹⁸⁸ The remaining three members of the board were Marie's children.¹⁸⁹ In 2002, Marie's children filed suit when they disagreed with the direction of the Foundation.¹⁹⁰ Among their requests, the Robertson children wanted to narrow the Foundation's mission and give the plaintiffs control over the Foundation.¹⁹¹ Ultimately, after six years of expensive litigation, the parties settled¹⁹²—dissolving the Robertson Foundation and creating instead the Robertson Fund, an endowed fund with Princeton as the sole controller.¹⁹³ This effectively divested the Robertson children of any property interest in the gift and also effectively removed their standing to bring suit on the gift in the future.

185. See Weisbord, *Reservations*, *supra* note 22, at 254–58.

186. *Robertson Lawsuit: Background*, PRINCETON UNIVERSITY (Jan. 31, 2013, 5:36 PM), <http://www.princeton.edu/robertson/about/background/> [hereinafter *Robertson Lawsuit*].

187. *Id.* See also Letter from Robert F. Goheen, Comm'r of Internal Revenue, to Princeton University (May 1, 1961), available at http://www.princeton.edu/robertson/documents/docs/Pres_Goheen_letter_5-1-61_to_the_IRS-ex1.pdf [hereinafter *Letter to Princeton*].

188. *Letter to Princeton*, *supra* note 187.

189. *Robertson Lawsuit*, *supra* note 186.

190. *Id.*

191. *Robertson v. Princeton Univ.*, No. C-99-02, 2007 WL 7687561 at *17 (N.J. Super. Ct. Ch. Div. 2007).

192. *Settlement Retains Princeton's Control, Use of Robertson Funds*, PRINCETON UNIVERSITY (Dec. 10, 2008 9:00 AM) [hereinafter *Use of Robertson Funds*], available at <http://www.princeton.edu/robertson/statements/viewstory.xml?storypath=/main/news/archive/S22/81/66C43/index.xml> (“Princeton’s attorneys estimate that each party to the litigation likely would have incurred additional legal expenses in excess of \$20 million to continue to prepare the case for trial, conduct the lengthy trial and pursue any subsequent appeals”).

193. Agreement of Settlement, *Robertson v. Princeton Univ.*, No. C-99-02 (N.J. Super. Ct. Ch. Div. Dec. 9, 2008), available at http://www.princeton.edu/robertson/documents/docs/Robertson_Settlement_Agreement-Executed.pdf.

While the Robertson Foundation example is not entirely comparable with other cases mentioned in this Note, because there was no question of donor standing,¹⁹⁴ it is illustrative of the integral role of charitable donations to colleges and universities and the potential effects on educational programs from litigation.¹⁹⁵ It also illustrates the potential nightmares in the future that can arise from the way a restricted gift is given. Princeton University's Vice president and Secretary Robert K. Durkee said of the Robertson Foundation's governance structure, "[s]uch a mechanism can help sustain the interest of the donor and the donor's advisers, but there are other ways to achieve this goal without introducing a structure that confers corporate obligations and standing to sue that ordinarily would not be available to donors of restricted gifts."¹⁹⁶ By reserving some level of control—even if not a majority—in the donor and later the donor's children by creating a corporate structure, the Robertson Foundation set itself up for litigation in the event the trustees one day disagreed. Durkee further describes the potential pitfalls of such a structure ultimately frustrating donor's intent: "This mechanism becomes even more problematical when participation passes from the founding generation—which has a personal connection to the terms they agreed to in making the gift—to later generations that may bring to the table a different agenda for the use of the funds."¹⁹⁷

Likewise, the University of Southern California also recently settled a lawsuit involving a large gift.¹⁹⁸ In early 1995, the Paul F. Glenn Foundation announced a \$1.6 million gift to create an endowed chair for cellular and molecular gerontology research.¹⁹⁹ The Foundation's mission is "to extend the healthy productive years of life through research on the mechanisms of biological aging."²⁰⁰ In 2001, when Paul Glenn learned that the funds were not being used as he had intended, he filed suit—claiming that he had entered into a contract as opposed to giving the funds outright

194. Because the three children of the donor were also trustees of the Foundation, they had standing to sue their co-trustees.

195. While Princeton's experience did not have devastating consequences for the University, other colleges or universities with smaller endowments and less alumni support may not be so lucky in similar situations.

196. Robert K. Durkee, *Letter to the Editor of the Chronical of Higher Education and Chronicle of Philanthropy—Updated*, PRINCETONUNIVERSITY (Jan. 26, 2009 12:22 PM), available at <http://www.princeton.edu/robertson/statements/viewstory.xml?storypath=/main/news/archive/S23/29/90M60/index.xml>.

197. *Id.*

198. Weisbord, *Reservations*, *supra* note 22, at 257–58.

199. James Lytle, *A Chair For Young Scientists to Study Aging*, USC NEWS (Feb. 27, 1995), available at <http://www.usc.edu/uscnews/stories/1058.html>.

200. GLENN FOUNDATION FOR MEDICAL RESEARCH, <http://www.glennfoundation.org/> (last visited Mar. 4, 2014).

to the University.²⁰¹ The parties ultimately settled, but unlike the Princeton case where the University was able to retain the gift, the consequences for USC were suboptimal, as the Glenn gift was transferred to Harvard University instead.²⁰² At that time the gift was valued at \$5 million.²⁰³

IV. STATUTORY DIVERGENCE: DIFFERENT RULES IN DIFFERENT JURISDICTIONS

As has previously been mentioned,²⁰⁴ Section 405 of the UTC permits a donor to bring a claim to enforce a charitable trust.²⁰⁵ At the time of this writing, the UTC has been enacted in twenty-four states plus the District of Columbia.²⁰⁶ This means that roughly half the states have not enacted the UTC, including, notably, four of the top five most populous states in the union: California, New York, Texas, and Illinois. This does not mean, however, that donor standing to enforce the terms of a charitable trust is unavailable in those states.

In California, the court has addressed the issue of donor standing.²⁰⁷ The California Government Code Section 12598(a) provides: “The primary responsibility for supervising charitable trusts in California, for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations, resides in the Attorney General.”²⁰⁸ As is evidenced in *L.B. Research*, rather than changing the traditional rule regarding enforcement of a charitable trust, at

201. See Weisbord, *Reservations*, *supra* note 22, at 258; Alan F. Rothschild, Jr., *How Donors May—And May Not—Exercise Control of Charitable Gifts*, in TAXATION OF EXEMPTS 113–14 (2004).

202. Weisbord, *Reservations*, *supra* note 22, at 258.

203. *Id.*

204. See *supra* Part II.

205. UNIFORM TRUST CODE § 405 (2000).

206. See ALA. CODE § 19-3B-405(c) (2007); ARIZ. REV. STAT. ANN. § 14-10405(C) (Supp. 2008); ARK. CODE ANN. § 28-73-405(c) (Supp. 2007); D.C. CODE § 19-1304.05(c) (Supp. 2009); FL. STAT. ANN. § 736.0405 (Supp. 2009); KAN. STAT. ANN. § 58a-405 (2005); MASS. GEN. LAWS ANN. § 405(c) (West 2012); ME. REV. STAT. ANN. TIT. 18-B, § 405(3) (Supp. 2008); MICH. COMP. LAWS § 700.7405(3) (2009); MO. ANN. STAT. 456.4-405 (West 2007); NEB. REV. STAT. § 30-3831 (2008); N.H. REV. STAT. ANN. § 564-B:4-405(c) (2007); N.M. STAT. § 46A-4-405(C) (2007); N.C. GEN. STAT. § 36C-4-405.1 (2007); N.D. CENT. CODE § 59-12-05(3) (Supp. 2009); OHIO REV. CODE ANN. § 5804.05(A) (West 2007); OR REV. STAT. § 130.170(3) (2007); 20 PA. CONS. STAT. ANN. § 7735(c) (West Supp. 2009); S.C. CODE ANN. § 62-7-405(c) (2009); TENN. CODE ANN. § 35-15-405 (2007); UTAH CODE ANN. § 75-7-405(3) (Supp. 2008); VT. STAT. ANN. TIT. 14A, § 405(c) (Supp. 2009); VA. CODE ANN. § 64.2-723 (West 2012); W. Va. Code, § 44D -4-405(2011); WYO. STAT. ANN. § 4-10-406(c) (2007) [hereinafter UTC States].

207. See, e.g., *L. B. Research and Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005).

208. CAL. GOV'T. CODE § 12598 (West 2005).

least one California intermediate court has chosen to construe such a gift as a conditional gift.²⁰⁹ Likewise, in New York, *Smithers v. St. Luke's-Roosevelt Hospital Center* is still persuasive authority.²¹⁰ What this shows is that even without the adoption of the UTC, some courts have taken an active role in expanding donor standing.

Even in those states that have adopted the UTC, there remains room for interpretation. Section 405 contains language that the settlor “among others” has power to enforce the trust.²¹¹ Paragraph 4 in the comments of Section 405 allows for the state attorney general to still bring an action, even in cases where donor standing is found.²¹² This can be read to simply expand the traditional rule recognizing standing in attorneys general and those with a special interest, but it leaves open a gray area for jurisdictions to expand the category of those with standing even further. Wyoming, for example, is a state that has adopted the UTC, and in *Hicks v. Dowd*²¹³ the Wyoming Supreme Court held that “a charitable trust may be enforced by a settlor, the attorney general, or a qualified beneficiary of the trust.”²¹⁴ The “qualified beneficiary” was determined to be analogous to “special interest” and thus the only change to the traditional rule in Wyoming is that the settlor is added to the list of charitable trust enforcers.²¹⁵

This type of expansion of the category of trust enforcers may seem to have a limited scope, but it is somewhat vague as to what rights in terms of assignability the settlor may have. Joshua C. Tate addressed this issue in his 2010 article *Should Charitable Enforcement Rights Be Assignable?*²¹⁶ Mr. Tate argued that jurisdictions that choose to analyze charitable trusts from a contractarian perspective and permit the assignment of such contractual rights might actually expand the number of persons able to bring enforcement claims in the future.²¹⁷

209. *L. B. Research and Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710, 716 (Cal. Ct. App. 2005).

210. 723 N.Y.S.2d 426 (N.Y. App. Div. 2001).

211. UNIFORM TRUST CODE § 405 (2000).

212. *Id.* (“Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests”).

213. 157 P.3d 914 (Wyo. 2007).

214. *Id.* at 921 (holding that resident was not a qualified beneficiary of the trust and therefore had no standing to bring an enforcement action, nor was the enforcement of the trust of such great public interest as to give the resident standing).

215. *Id.* at 921. *See also* Joshua C. Tate, *Should Charitable Trust Enforcement Rights Be Assignable?*, 85 CHI.-KENT L. REV. 1045 (2010) (arguing that enforcement rights of charitable trusts should, to some extent be assignable).

216. Tate, *supra* note 215.

217. *See generally id.*

At least with regard to the issue of assignability, courts applying UTC § 405(c) and similar provisions need not write on a blank slate. In cases like

Although fewer than half of the states have formally adopted the UTC, there is still a general shift in the United States that seems to be in favor of increasing donor standing through legislative measures or judicial constructions of gift instruments to grant standing. But is this the proper trajectory for the law governing donative transfers? Is expanding standing—and otherwise construing gift instruments in such a way as to enable donors to enforce them—the best policy?

V. IS THERE A WAY TO FIX THE PROBLEM OF DONOR STANDING?

A. Trust as Contract Law

In 1995, John Langbein wrote an article about viewing trust law from a contractarian basis.²¹⁸ He traced the development of the trust law in the United States historically and said that, when trust law initially came into common usage in the 14th century, contract law had not yet advanced enough to adequately deal with trust purposes.²¹⁹ According to Langbein, “[i]f . . . in the fourteenth century our law of contract had taken its modern form, I think that the courts of law would have been compelled to say ‘Yes, here is an agreement; therefore it is a legally enforceable contract.’”²²⁰ Langbein argued that trust law ought to be construed as contract law as opposed to property law because, although trust property is required in order for there to be a trust, the fundamental feature of a trust is “the trust deal that defines the powers and responsibilities of the trustee in managing the property.”²²¹ Langbein further stated:

Sometimes the trust deal also confers significant discretion upon the trustee over dispositive provisions, that is, in allocating the beneficial interests among the beneficiaries. The settlor and the trustee may express their deal in detailed terms drafted for the particular trust, or they may be content to adopt the default rules of trust law. Either way, *the deal between settlor and trustee is functionally indistinguishable from the modern third-party-*

Hicks, a reasonable assignment of the settlor’s enforcement right could further the goal of effective supervision that was the original impetus for settlor standing. . . . while assignment may not be appropriate in every case, recognizing a general principle of assignability would serve the greater purpose of holding charitable trustees accountable for their actions. . . . Thus, the answer to the question posed in the title of this Article is a qualified “yes.”

Id. at 1071–72.

218. See generally John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

219. *Id.* at 632–35.

220. *Id.* at 634, quoting FREDERIC W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 28 (John Brunyate rev. ed., 2d ed. 1936).

221. Langbein, *supra* note 218, at 627.

*beneficiary contract. Trusts are contracts.*²²²

Langbein addressed some of the reasons for which trust law was specifically distinguished from contract law in the Restatement (Second) of Trusts²²³—including the common law differences of remedy—but argued that this rationale is obsolete in an era where specific performance has grown more common as a remedy in contract law.²²⁴

Since the *Herzog* opinion, there has been a significant amount of scholarly work on this issue as well as legislative attempts to find a solution for how to characterize charitable donations.²²⁵ Section 405(c) of the UTC has done some work to mitigate the plight of the donor, but it also leaves unanswered questions as to how far the power to enforce should go. Could it be assignable or inherited?²²⁶ Additionally, while Section 405(c) has increased benefits for donors, is this detrimental to the trustees of charitable trusts? Will increased donor standing increase nuisance suits? In many ways, these are questions that only time will be able to answer, but the possible implications of increased donor standing certainly include adverse effects to those who are responsible for administering a charitable gift. In the context of colleges and universities, increased donor standing has the potential to divert time, attention, and money away from the institution's primary educational purposes in order to deal with litigation.

B. Finding Solutions Through Legislation

Reid Kress Wiesbord argues that donors should be granted a limited right to sue for the enforcement of the terms of their gift and that this

222. *Id.* (emphasis added).

223. RESTATEMENT (SECOND) OF TRUSTS § 197, cmt. b (1959) (“The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract.”).

224. Langbein, *supra* note 218, at 653. At common law, the “presumptive mode of relief” was damages as opposed to specific performance while specific performance was a routine remedy for property law. *Id.*

225. *See, e.g.,* Pearson v. Garrett-Evangelical Theological Seminary, Inc., 790 F. Supp. 2d 759, 765 (N.D. Ill. 2011) (declining to extend the *Herzog* analysis). *See also,* Russell v. Yale Univ., 737 A.2d 941, 946 (Conn. App. Ct. 1999) (discussing the application of *Herzog* in a case about a charitable trust to the Yale divinity school); Paula Kilcoyne, *Charitable Trusts-Donor Standing Under the Uniform Management of Institutional Funds Act in Light of Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 21 W. NEW ENG. L. REV. 131, 134–35 (1999) (discussing “the interpretation of donor standing under CUMIFA by both the Connecticut Supreme Court in *Herzog* and the Connecticut Appellate Court it overruled”); Lisa Loftin, *Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts*, 8 B.U. PUB. INT. L.J. 361, 364 (1999) (arguing that by “denying charitable investors the standing to bring an action to enforce the terms of a charitable gift, courts provide donee colleges and universities with virtually unchecked power to disregard the gift-giver’s intent”).

226. *See, e.g.,* Tate, *supra* note 215.

should be accomplished through legislative reform.²²⁷ Citing recent examples of donor enforcement actions—such as the Robertson Foundation’s \$35 million gift to Princeton University’s Woodrow Wilson School of Public and International Affairs²²⁸ and the Paul F. Glenn Foundation’s \$1.6 million gift to the University of Southern California for gerontology research²²⁹—Weisbord notes more parties are settling prior to trial, in part out of fear of negative publicity.²³⁰

In the case of colleges and universities, especially, fear of losing such a gift raises concerns about the ability to continue certain academic programs.²³¹ Additionally, litigation—even when a case is ultimately settled—can divert significant resources away from a college or university’s primary goal of education. Princeton University President Shirley M. Tilghman said of the Robertson Lawsuit, “[i]t is tragic that this lawsuit required the expenditure of tens of millions of dollars in legal fees that could have and should have been spent on educational and charitable purposes.”²³² Weisbord ultimately accepts that granting donor standing is becoming more prevalent and suggests that legislation should be introduced to decrease vagueness rather than allowing courts to determine how standing should be treated.²³³ Weisbord envisions legislation that allows donors standing, but requires donor plaintiffs to meet a high burden of proof in order to avoid vexatious litigation.²³⁴

Ronald Chester, meanwhile, focuses on the inadequacy of the attorney general alone for enforcement.²³⁵ He argues that grantors, whether donors or settlors, should have standing to enforce the restrictions of the gift because state attorneys general have largely been unsuccessful in policing abuses in the charitable sector.²³⁶ As he explains: “One key difference in

227. Weisbord, *Reservations*, *supra* note 22, at 245.

228. *See Robertson Lawsuit Overview*, *supra* note 186.

229. Weisbord, *Reservations*, *supra* note 22, at 257–58.

230. *Id.* at 254.

231. *See, e.g. Use of Robertson Funds*, *supra* note 192. In response to the six year lawsuit that ultimately concluded favorably for the school Princeton University President Shirley M. Tilghman stated:

This settlement achieves the University’s highest priorities in this lawsuit, which were to ensure that Marie Robertson’s gift will continue to support the graduate program of the Woodrow Wilson School and that the University would have full authority to make academic judgments about how these funds are to be used.

Id.

232. *Id.*

233. Weisbord, *Reservations*, *supra* note 22, at 296–97.

234. *Id.*

235. 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 (2003).

236. *Id.* at 612.

enforcement mechanisms available in the for-profit as opposed to the charitable sector is that the latter must rely almost entirely on government, whereas the former can rely on the self-interest of private shareholders, beneficiaries, and corporation members to augment government efforts.”²³⁷

Chester also addresses the general lack of effectiveness in existing enforcement mechanisms.²³⁸ He argues that “the problem with applying private trust fiduciary law to charitable trusts is that there are no principals to enforce the fiduciary duties of agents.”²³⁹ Chester emphasizes the need for reform and posits that expanding standing would not lead to nuisance suits that would distract charities from their charitable purposes.²⁴⁰ He addresses this common argument that increased standing would encourage individuals to sue trustees in order to get their way by pointing to recent legislative attempts that target increasing transparency within charitable organizations.²⁴¹ Ultimately, he claims that these attempts at increased transparency will mitigate the frequency of nuisance suits because donors will have knowledge of how their gift is being administered and charitable organizations will have more of an incentive to allocate funds according to the terms of the gift.²⁴²

Chester also notes that while changes to the legal framework for grantor standing seemingly would be better suited for legislatures to address, recent attempts have failed.²⁴³ He notes that “recent federal attempts at comprehensive legislation have faltered politically, largely because a considerable segment of the public and the lawmakers they elect believe that internal policing of this sector is best.”²⁴⁴ Essentially, the fear is that too much regulation of charitable institutions would create a chilling effect by “unduly penaliz[ing] important individuals who are seen as ‘doing good.’”²⁴⁵ Chester argues that because charities are so often seen as “doing good” because their missions are not for profit, there is little desire on the

237. Ronald Chester, *Improving Enforcement Mechanisms in the Charitable Sector: Can Increased Disclosure of Information Be Utilized Effectively?*, 40 NEW ENG. L. REV. 447, 451–52 (2006) [hereinafter Chester, *Enforcement Mechanisms*].

238. *Id.* at 456.

239. *Id.*

240. *Id.*

241. *Id.* at 461–63. Specifically, Chester looks at the California Nonprofit Integrity Act, effective January 1, 2005, which focused on increasing the transparency of charitable operations and accountability of those in charge of them.) *Id.* at 463. The California Non-Profit Integrity Act of 2004 amended Cal. Bus. & Prof. Code § 17510.5 and Cal. Gov’t Code §§ 12581-12586, 12599, 12599.1 and added Cal. Gov’t Code 12599.3, 12599.6 12599.7. The Act was amended in 2006 to revise Cal. Gov’t Code §§ 12585, 12599, 12599.1, 12599.2.

242. Chester, *Enforcement Mechanisms*, *supra* note 237, at 461–63.

243. *Id.* at 452.

244. *Id.*

245. *Id.* at 452–53.

part of the public to regulate their inner workings.²⁴⁶ He cites numerous examples of reported abuses in the charitable sector and contends that regulation is in fact necessary.²⁴⁷ If the legislature fails to act, the courts will be the only ones situated to improve private “enforcement” of proper standards.²⁴⁸ He also argues that they should do so by expanding standing for both donors and for “specially interested” beneficiaries.²⁴⁹

C. The “Giftract”

Evelyn Brody has written prolifically on the topic of donor standing.²⁵⁰ Her 2007 article *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, first lays out the four major ways to analyze donative transfers before launching into a discussion of the problems each of these analyses presents.²⁵¹ She argues that neither traditional charitable trust law nor pure contract law provide an effective framework for addressing donor standing and proposes a hybrid approach in the form of a “giftract.”²⁵² This proposed “giftract” would allow a donor to spell out what sort of rights they wish to retain—including standing—while still being cognizant of public policy concerns on individuals ordering charitable institutions around.²⁵³ Brody believes it is the best approach because, in her view, the existing legal classifications are not working and are leading to disparate results.²⁵⁴ Finally, Brody concludes that legislation to create a “giftract” may be the best way to deal with the increased confusion and inconsistency amongst courts.²⁵⁵

The differences between *L.B. Research* and *Hardt* demonstrate a

246. *Id.* at 468–69.

247. *Id.* at 453–55.

248. *Id.* at 453.

249. *Id.*

250. See also, Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 CHI.-KENT L. REV 571 (2010) (arguing that foundations are not inherently public but that the potential for abuses warrants a degree of state regulation); Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937 (2004) (discussing how private parties determine whom a given charity is intended to serve and how this affects the attorney general’s ability to protect the “public”). See generally, Brody, *Dead Hand*, *supra* note 51 (arguing that the “courts’ increased and continued confusion over what law to apply to private enforcement of charitable gifts suggests that the existing legal classifications are not working” and that to rectify this confusion, legislatures should establish a specific legal regime for donative transfers that would solve the problem of enforcement without giving the donor too much control over the gift after it has been given.).

251. Brody, *Dead Hand*, *supra* note 51, at 1186–93.

252. *Id.* at 1258–61.

253. *Id.* at 1274.

254. *Id.*

255. *Id.* at 1258–74.

disturbing fact about the lack of consistency and transparency among various jurisdictions regarding donor standing.²⁵⁶ The facts of the two cases are roughly the same. In each case, a gift with a specified purpose was allegedly not carried out in the manner that the donor of the gift intended it to be and was brought before a court to be enforced. In *L.B. Research*, the gift was found to be a contract and therefore enforceable. In *Hardt*, the gift was found to be a charitable trust and thus only the attorney general would have the standing to bring such a case. If the Hardts had brought their case before a California court, there could have been a dramatically different outcome.

When the stakes are so high, why would we deny a donor the standing to enforce the terms of his gift? In *Hardt*, the gift was worth upwards of \$8 million—with a significant portion allegedly misused, not simply to target a different media market, but also to completely rework the organization's strategy with extreme administrative expenses. If we continue to deny donors standing to enforce gifts, would this not lead to a decrease in charitable donations? If a donor cannot be certain that an organization will use the funds granted to it in the manner the donor intends, would this not in turn make donors less likely to give to non-profit organizations, which depend on the generosity of others for their continued operation?

If not for the generosity of donors, most colleges and universities would need to severely curtail their course and program offerings, fire faculty and staff, fund less research, and in some cases, close their doors. On the flipside of the coin, however, there is a concern that allowing donors to bring suit will cause any non-profit organization receiving a donation to worry about the donor breathing down its neck in perpetuity. Disallowing standing gives some finality to the gift. Once given, it is given. Permitting donors to have standing after the fact leaves a sort of ambiguity to the gifts and could potentially lead to costly oversight as the donor requests accountings and access to information about the administration of each dollar given.²⁵⁷

Additionally, because a gift can be construed as a contract, a savvy donor can easily avoid having to worry about handing the reins of enforcement to the attorney general by simply donating the gift via an instrument that is not a charitable trust. Contract law allows for two parties to bargain around many default rules. If a charitable donation is viewed as a charitable trust by default, one must simply indicate in the gift instrument that the gift is being given under contract. Then, the donor may reserve some interest in the gift so that he or she might be able to enforce it or

256. *L.B. Research & Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005); *Hardt v. Vitae Foundation, Inc.*, 302 S.W.3d 133 (Mo. Ct. App. 2010).

257. *See, e.g., L.B. Research*, 29 Cal. Rptr. 3d at 716 (in which the court construes the gift as a contract rather than a charitable trust).

rescind it altogether, should the recipient not administer the gift according to the instrument's terms.

Is it too paternalistic not to leave the issue of donor standing as it is? New legislation, as both Helge and Chester have noted, is politically difficult to pass because no one wants to look like he is increasing regulation among those who are “doing good.”²⁵⁸ Additionally, are scholars focusing on this issue too much in terms of its *ex post* effects? Instead, why not look to all the existing mechanisms that can avoid the issue *ex ante* through good lawyering and careful drafting of the gift instrument? While many gifts are viewed as charitable trusts, they need not always be, especially if the donor and his or her lawyer take affirmative steps to ensure that the gift is viewed as a contract.

Of course, this places a very high burden on the donor to ensure they select the instrument that best effectuates their intent, and might not result in an arm's length transaction because colleges and universities tend to be equipped with a legal department that is familiar with methods of charitable donations. In *Newell*, for example, Elizabeth Banks made a generous donation to Johns Hopkins and thought that the contract she had drafted would protect her family farm from being densely developed, but when her heirs sued the University for pursuing development anyway, the court granted summary judgment to Johns Hopkins.²⁵⁹

D. Gift-overs

Even if one were still to make a charitable trust, there are mechanisms that can incentivize the institution to properly allocate the funds. Through a “gift-over,” the donor is able to make a gift to Charitable Institution A, which is able to keep the funds so long as they adhere to the terms of the gift instrument.²⁶⁰ Should they fail to meet these terms, the gift goes to Charitable Institution B.

Gift-overs create many problems—particularly the risk that they might not provide a satisfactory remedy in the event of breach. For example, if a donor intends to make a substantial donation to the University of Blackacre for a specific purpose, he or she would likely prefer a remedy ordering specific performance of the terms of the gift to ensure that Blackacre use the funds as requested, rather than a remedy that would send the funds on to Whiteacre because Whiteacre was not the donor's first choice for the gift. Additionally, a gift-over from one charity to another can be voided “unless it is so limited as to be certain to vest in interest at a period not

258. Helge, *supra* note 59, at 27–31; Chester, *Enforcement Mechanisms*, *supra* note 237, at 468–69.

259. *Newell v. Johns Hopkins Univ.*, 79 A.3d 1009 (Md. Ct. Spec. App. 2013).

260. BOGERT & BOGERT, *supra* note 59, § 415.

more remote than the end of lives in being and twenty-one years.”²⁶¹ In such an instance where the gift-over is voided, then the funds would remain in the hands of the trustees.²⁶² A savvy donor could merely contract around the potential voiding of the gift-over by stipulating that a breach of the terms results in the cessation of the trustee’s interest in the gift.²⁶³ In spite of this, there are still a lot of gray areas in which a donor may think he or she has provided for every contingency, but end up with a void instrument. Finally, many donors may not contemplate that the charitable institution to which they are giving will not abide by the terms of the gift in the first place.

E. The Doctrine of *Cy Pres*

The doctrine of *cy pres* should also be addressed as an existing remedial mechanism.²⁶⁴ The Restatement (Third) of Trusts Section 67(a), states in relevant part that:

Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose . . . the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.²⁶⁵

Comments to Section 67 describe the historical origin of the doctrine from the English common law and the prerogative power exercised by the crown,²⁶⁶ before turning to the modern rationale of the *cy pres* doctrine in the American system.²⁶⁷ Where a charitable trust makes provisions that at

261. *Id.*

262. *Id.*

263. *Id.*

264. See generally DUKEMINIER, SITKOFF & LINDGREN, *supra* note 30, at 760–76.

265. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

266. *Id.* at § 67, cmt. a.

267. *Id.*

The *cy pres* doctrine’s modern rationale rests primarily in the perpetual duration allowed charitable trusts and in the resulting risk that designated charitable purposes may become obsolete as the needs and circumstances of society evolve over time, not to mention the sometimes unanticipated extent of decrease or increase in the funds available from a given trust. Nevertheless, the doctrine may also apply to a charitable trust if, at the time of its creation, the particular purpose of the trust has been fully accomplished or cannot possibly or practicably be accomplished. On the other hand, if at the time of the trust’s creation its intended purpose is of no value at all to the community, or is otherwise not charitable by its nature, the trust is not enforceable as a charitable trust and is not subject to the rule of this Section.

Id.

the time are ostensibly legal and relevant, there is a risk that over time—especially where a large gift goes into an endowment that could potentially continue into perpetuity—the original purpose of the gift may become illegal or obsolete.²⁶⁸ The doctrine of *cy pres* depends largely on a judicial interpretation of the donor’s original intent, but the determination is often problematic. Section 413 of the UTC reiterates the *cy pres* principle, stating:

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) the trust does not fail, in whole or in part;

(2) the trust property does not revert to the settlor or the settlor’s successors in interest; and

(3) the court may apply *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor’s charitable purposes.²⁶⁹

Comment (a) demonstrates the slight change from the Restatement’s articulation of the doctrine by presuming that the donor had a general charitable intent rather than the traditional rule, which first inquired as to whether there was an intent before applying the doctrine.²⁷⁰ *In re Estate of Elkins*²⁷¹ provides some insight as to how the doctrine might be applied in awarding the funds to a different charitable institution whose goals are in sync with the donor’s intent by looking to factors such as the charity’s named purpose, “the locality of the intended charity[,] and the nature of the

268. *Id.*

269. UNIFORM TRUST CODE § 413 (2000). Exceptions to this rule are provided in UTC § 413(b), which states:

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply *cy pres* to modify or terminate the trust only if, when the provision takes effect:

(1) the trust property is to revert to the settlor and the settlor is still living; or

(2) fewer than 21 years have elapsed since the date of the trust’s creation.

Id. at § 413(b).

270. *Id.* at § 413, cmt. a. The text states:

Comment a. . . . modifies the doctrine of *cy pres* by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust fails.

Id.

271. 888 A.2d 815 (Pa. Super. 2005)

population that would be served by the gift.”²⁷² In that case, the court held that the charitable purpose of a testamentary trust to a non-profit hospital failed when the hospital was sold to a for-profit corporation—transforming the institution from simply a hospital to both a hospital and a medical school.²⁷³ Because the purpose had failed, the doctrine of *cy pres* was applied to best effectuate the testator’s intent—enabling the trustee to award funds exclusively to the hospital portion of the corporation.²⁷⁴

Evelyn Brody describes some downside to the doctrine of *cy pres* in jurisdictions that have not adopted the Uniform Trust Code.²⁷⁵ At common law, restricted gifts are seen as completed transactions, meaning donors cannot later alter the terms of the gift; thus, a donor could participate in a *cy pres* proceeding only in order to avert a reversionary interest in the property from vesting.²⁷⁶ Likewise, because the donor’s control of the property ends when the trust is created, a court does not have to take the donor’s intent into account.²⁷⁷ Additionally, *cy pres* is a limited remedy in most cases because it depends on the impossibility or impracticability of meeting the terms of the trust.²⁷⁸ Finally, standing for *cy pres* is limited to trustees—therefore it has many of the same problems with donor standing as restricted gifts.²⁷⁹

Freedom of contract enables donors to contract around default rules *ex ante* in such a way as to preserve an interest in the property or to provide conditional provisions. This coupled with the doctrine of *cy pres* acting as an *ex post* remedy, raises the question: Do we really need any further legislation to solve the “problem”? Is there even a “problem” at all? Do the benefits to a limited number of donors who did not take proper precautions when drafting their gift instruments really outweigh the costs to charitable institutions that receive the gifts in question and are then distracted from their charitable mission by costly litigation?

F. Finding a Solution: What is at Stake

If a person wishes to leave funds in trust, he or she creates a trust. If that person intends to make a contract, then he or she makes a contract. Further, if that person wants to give a gift, then he or she may give a gift.

272. *Id.* at 826 (applying the doctrine of *cy pres* because the charitable purpose of the testamentary trust failed).

273. *Id.* at 824–25.

274. *Id.* at 826.

275. Brody, *Dead Hand*, *supra* note 51.

276. *Id.* at 1238–39.

277. Kilcoyne, *supra* note 93, at 140. Kilcoyne also states that even though this is the case, courts “undoubtedly” will try to take donor intent into account. *Id.*

278. *Id.*

279. *Id.* at 141.

By categorically allowing all donors standing in all of these situations, we would open up the courts and the non-profit sector to an extremely difficult amount of oversight. In the area of colleges and universities, this would be especially problematic when one sees the number of individuals and families who have donated significant amounts of money to a given school. If each and every one of these donors were able to bring suit, it would raise a host of administrative difficulties. Should we really subject colleges and universities to even more scrutiny from “the watchful gaze of the donor”?²⁸⁰ It is quite possible that a donor, who might otherwise be simply irritated with the administration of certain donated funds, would have the ability to bring some sort of action under this new regime.

On the other hand, if donor standing is denied, many meritorious claims will be dismissed for lack of standing. Again, there is a disparity in bargaining power between a college or university with a knowledgeable general counsel’s office that deals with charitable donations on a regular basis and an alumnus who might be making a single donation for a scholarship fund in honor of his parents. Placing the burden of good lawyering on the donor in such cases may be unfair because once the gift is made, the only enforcement mechanism may be by the attorney general, who lacks the time, resources, and personal investment in the donation to bring an enforcement suit. Additionally, failure to recognize donor standing might incentivize a larger category of donors to make restricted gifts through contracts, which could in turn lead to even more scrutiny from the donor.

There needs to be a middle ground. It is best negotiated through broad legislative guidelines that are applied narrowly by the judiciary, analyzing each case on its unique facts, in light of past precedent. Further legislation—if too specific—has the potential to create new loopholes and new confusions that the courts will then have to deal with. The most important thing is that whatever is decided upon be transparent and consistent so that donors know their position when they make a charitable donation.

Ultimately, the question of standing comes down to the donor’s intent because without the charitable donation the problem would never exist. If the donor truly intended to make a gift to a non-profit institution, such as a college or university, then we should allow this gift to stand as exactly that—a gift. While many parents would love to admonish their children for using a toy received as a Christmas present in a way other than they would like, the child in the end will be able to do with the gift what they would like. However, this does not mean that a child who uses his new toy truck to terrorize his little sister will not get a time-out or have his truck taken away from him. We should not allow donors to become overbearing

280. Weisbord, *Reservations*, *supra* note 22, at 248–50.

parents, but we should also not allow colleges and universities to become bratty children either.

There is a need for donors to have standing, but this is only in certain, very limited circumstances. The distinct gift instruments utilized indicate the type of donative transfer the donor intended. By examining the form of the gift instrument that the donor utilized, courts can infer the donor's intent at the time that the donor made the gift. Because of the variety of gift instruments available and the unique sets of facts to each donative transfer, the judiciary is better suited than the legislature for reform.

It is undeniable, however, that there is a trend towards increased donor standing. The UTC is a fairly recent document, and in just over a decade, nearly half the states have adopted it.²⁸¹ Even in jurisdictions that have not adopted the UTC, judicial precedent in some instances has increased donor standing. While the idea of introducing legislation that goes after those who are "doing good" may be classified as "politically unpopular," there are numerous instances in which such legislation has passed.²⁸² We should not stop all attempts at legislating the issue, but the broad building blocks are already present for the judiciary to apply.

CONCLUSION

Charitable institutions rely on the generosity of donors in order to fulfill their charitable purposes. Colleges and universities are no exception. Without the support of alumni and other donors, many educational institutions would need to severely curtail their course and program offerings or even shut their doors altogether. Colleges and universities that receive large gifts from donors will continue to depend on such generosity and thus will also continue to be subjected to donor scrutiny in administering these gifts according to their terms.

In part, the issue of donor standing can be solved before the word "litigation" is ever uttered. Through careful drafting of contracts or trust instruments, donors can ensure that, if need be, they will have the ability to sue the school—and if successful in that suit, convince a court to order the school to administer the gift according to its terms. Parties have been and will continue to be able to contract around default rules. By utilizing clear terms and making provisions for gift-overs or reserving an interest in the donor, the standing issue can be completely circumvented without ever having to worry about state statutes or court precedent. Likewise, colleges and universities can take affirmative steps to ensure that they will not be the objects of litigation by ensuring that they can meet the terms of the gift and by understanding in advance what sort of enforcement power the donor

281. See UTC States, *supra* note 206.

282. Chester, *Enforcement Mechanisms*, *supra* note 237, at 468–69.

does or does not have.

Ultimately, the issue of donor standing in enforcing the terms of a charitable donation is a complex problem without an easy answer. Many scholars have proffered methods by which legislatures could bring uniformity to this issue where courts have previously been unsuccessful in doing so. This could create both some uniformity among jurisdictions as well as some certainty for both the donor and the recipient institution in terms of what to expect if the terms of the gift are not met. However, legislative reform is insufficient without judicial reform also. If the trend towards increased donor standing is to continue, it is imperative that it be done not only through legislation but also at the ground level with courts leading the way to a more consistent process. It is the courts who must place a high burden of proof on the donor-plaintiff in order to safeguard colleges and universities from diverting time, energy, and money from their educational purposes. Likewise, it is the courts that must ensure that fairness and justice are promoted by recognizing the disparities in bargaining power that may have existed at the time the donative instrument was drafted.

This Note asks whether increased donor standing will prove harmful or helpful to American colleges and universities; the answer is: a little bit of both. Increased donor standing is harmful in that it may lead to more litigation in instances in which a gift is not being administered according to its restrictions, but this is a double-edged sword that will necessarily increase accountability among boards of trustees. With expanded donor standing, there is an expanded incentive for colleges and universities to act with good faith and loyalty in administering gifts. “Harmful” and “helpful” are relative terms because charitable donations are a two-way street—what the college or university may see as “harmful” may in fact be more fair and just for the donor. At the end of the day, increased donor standing will force both the donor and the donee to carefully and thoughtfully participate in donative transfers that are mutually beneficial.