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THE RETURN OF DEAD DONORS

Responsibilities of Universities to Fulfill Donor Intent

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Donor Intent: What Courts Are Doing and How You Can Respond¹

In recent years, both contributors to nonprofit organizations and the public media have sought increasing scrutiny over how nonprofits utilize the donations they receive. Increasing numbers of lawsuits, including the following, have also arisen regarding this issue:

- *Robertson v. Princeton*;
- *Tennessee Division of United Daughters of the Confederacy v. Vanderbilt University*;
- *Georgia O’Keeffe Museum v. Fisk University*;
- *Children’s Friend v. Rhode Island Hospital*;
- *Howard v. Tulane*; and
- *Dodge v. Randolph-Macon Woman’s College*.

This paper first provides a summary update of some of these recent and ongoing lawsuits, and then provides a brief summary of guidelines institutions may put in place to facilitate their attempts to both honor donor intent and adapt to changing needs and circumstances, without being forced into litigation.

I. Summary of Recent and Ongoing Cases

Robertson v. Princeton was resolved by a settlement announced in December 2008. Princeton University will have full control of the endowment associated with the Robertson Foundation and will continue to use the endowment to support the graduate program of the Woodrow Wilson School of Public and International Affairs under a settlement ending the six-year old lawsuit brought against the University by members of the Robertson family.

The Robertson lawsuit was filed in July 2002 by members of the Robertson family who sought to seize control of the Robertson Foundation’s funds and redirect them to purposes other than the purpose agreed to by the donor and the University in 1961, when Marie Robertson made a \$35 million gift to Princeton and the foundation’s certificate of

¹ This paper was adapted from a longer version prepared in 2008 by Dina Epstein, while she was a second-year law student at Georgetown University Law Center. Her contributions as a legal intern in American Council on Education’s Division of Government and Public Affairs, Office of Legal and Regulatory Affairs, are gratefully acknowledged.

incorporation was adopted. The family members filed the lawsuit after William Robertson opposed a recommendation by the other two members of the foundation's investment committee to engage PRINCO to provide professional investment management. Between the engagement of PRINCO in 2004 and June 30, 2008, the end of the foundation's most recent fiscal year, the net market value of the Robertson funds increased from \$561 million to just over \$900 million, even after annual withdrawals of \$22 million to \$33 million for programmatic and capital expenses of the graduate program of the Woodrow Wilson School.

The plaintiffs in the lawsuit included the three Robertson-appointed members of the Robertson Foundation board, while the defendants included three of the four University-appointed members, including Princeton President Tilghman who has chaired the board, and the University itself. The fourth University-appointed trustee, who was not named in the lawsuit, is former New Jersey Governor Thomas Kean.

Under the terms of the agreement, the Robertson Foundation will be dissolved and its assets will be transferred to the University to create an endowed fund controlled solely by the University. The fund will support the graduate program of the Woodrow Wilson School as the funds were providing for the past 47 years. In addition, over a three-year period the foundation will reimburse the Banbury Fund, a Robertson family foundation, for \$40 million of the legal fees that were paid by that fund during the course of the litigation, and beginning in 2012 the Robertson Foundation will provide \$50 million, paid over seven years, to a new charitable foundation designated by the Robertson family that will support the preparation of students for government service.

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. It is expected that the initial \$20 million payment will be made in 2009 and that the payment schedule will extend through 2018.

Tennessee Division of United Daughters of the Confederacy v. Vanderbilt University² discusses how long a donee must adhere to donor intent and when, if ever, changed circumstances are sufficient to alter the terms of an original donation.

From 1913 to 1933, the Tennessee Division of the United Daughters of the Confederacy (the "Tennessee UDC") entered into a series of contracts with Peabody College to establish a \$50,000 donation for the creation of a women's dormitory on the Peabody campus in Nashville, Tennessee. In return for the gift, Peabody's trustees agreed to collaborate with the Tennessee UDC on plans and specifications for the building, to name the building "Confederate Memorial Hall," and to allow female descendants of Confederate soldiers to live rent-free in the dormitory. For many years, these exact terms were met: the building opened in 1935, with the name "Confederate Memorial Hall" etched into the pediment, and it served until the late 1970's as a rent-free dormitory for women descendants of Confederate soldiers.

² 174 S.W.3d 98 (Tenn. Ct. App. 2005).

In 1979, amidst financial difficulties, Peabody College agreed to merge with Vanderbilt University which, under the terms of the merger, assumed all of Peabody's legal obligations. At that time, only four women were living rent-free in Confederate Memorial Hall. Vanderbilt agreed to let these women remain pending graduation, but did not continue the practice after that point. Then, in the late 1980's Vanderbilt undertook a major renovation of the building, as part of which it added a plaque explaining the dormitory's history. In 2000, the Vanderbilt Student Government Association passed a resolution calling for the renaming of Confederate Memorial Hall, stating that it was offensive to some students and ran contrary to the values of the University. Chancellor E. Gordon Gee later finalized the decision to change the name from "Confederate Memorial Hall" to "Memorial Hall" with the intention of creating a more inclusive, welcoming, and stronger university. Although the decision was made public in 2002, the name was not immediately removed from the pediment, and the descriptive plaque remained on the building. Vanderbilt did change the building's name on its maps, website, and in its correspondence.

This change prompted a negative reaction from the Tennessee UDC, which in October 2002 filed suit against Vanderbilt for breach of contract. For relief, the Tennessee UDC sought an injunction preventing Vanderbilt from changing the "Confederate Memorial Hall" plaque, a declaratory judgment concerning its rights and obligations, and compensatory damages.

In response to the complaint, Vanderbilt justified its decision to rename the dormitory, contending that leaving the plaque on the building constituted substantial compliance. It also argued that the doctrine of laches prevented the Tennessee UDC from enforcing its rights because the dormitory had not been used to provide free or reduced rent to female descendants of Confederate soldiers since approximately 1983. Furthermore, Vanderbilt asserted that the Tennessee UDC had already received the full consideration for its \$50,000 donation through the benefit of having had numerous women live there over the years and having had the name on the dormitory for nearly seventy years. Finally, Vanderbilt contended that principles of academic freedom prevented the court from ordering the University to keep the word "Confederate" on the building, especially considering that doing so might violate federal anti-discrimination laws.

The trial court evaluated the facts under principles of contract law, concluding that the parties had, in fact, intended that the building be named "Confederate Memorial Hall." The trial court further found, however, that changes in society made it "impractical and unduly burdensome for Vanderbilt to continue to perform that part of the contract . . . and at the same time to pursue its academic purpose of obtaining a racially diverse faculty and student body." The court noted that, from 1933, when the last contract had been signed, to the present, racial segregation had been declared unconstitutional, racial discrimination had been outlawed, Vanderbilt had integrated its student body, and there was a strong stigma associated with the word "Confederate" due to its relationship to slavery. Hence, the trial court found that Vanderbilt had "carried its

burden of proof for modification of the contracts,” allowing it to meet its obligation to the Tennessee UDC merely by keeping the historical plaque near the building entrance with just the name “Memorial Hall.”

The Tennessee Court of Appeals, however, took a divergent view. It found that the original \$50,000 donation did not, in fact, form a contract, but either a revocable charitable trust or a charitable trust subject to conditions. To determine which it was, the court looked to the intent of the donor. In this instance, absent the clear intent necessary to establish a trust, the court determined that the donation was a charitable gift subject to conditions. Thus, the court concluded that, if Vanderbilt had failed to comply with the conditions, the Tennessee UDC’s remedy was limited to recovery of the gift.

The court further found that the transaction did not bind the University to the terms of the donation forever; rather, the conditions were limited to the life of the building. As long as the building stood, the conditions applied. Holding that none of Vanderbilt’s defenses had any merit, the court concluded that Vanderbilt must either return the present value of the gift or meet the terms of the original conditions.

In *Georgia O’Keefe Museum v. Fisk University*, a Tennessee Chancery Court ruled that, while Fisk University had violated the terms under which artist Georgia O’Keefe had donated her husband’s “Alfred Stieglitz Collection” to the University, the University would not lose the Collection.³ The issue arose after the Georgia O’Keefe Museum, representing the artist’s estate, attempted to prevent Fisk, a financially ailing university in Nashville, Tennessee, from selling a 50% ownership interest in the Collection for \$30 million to a new museum in Alabama founded by a Wal-Mart heiress.⁴ At trial, the O’Keefe Museum argued that it should be granted custody of the entire collection because Fisk had violated the terms of the donation.⁵ Specifically, the Museum asserted that the artist had donated the Collection on condition that it remain intact and on public display, but that Fisk had violated these conditions by keeping the pieces in storage for almost two years while seeking funds to upgrade the security and fire safety of its art gallery.

Although the court agreed that Fisk had violated the terms of the gift, it allowed the University to keep the collection, as long as the art was returned to display within a specific period of time. Notably, however, the court also prohibited transfer of the 50% ownership interest and precluded the sale of two additional paintings.

Children’s Friend v. Rhode Island Hospital, filed in 2008, questions the length of time that an institution is bound by original terms—especially in light of changed

³ Arts, Briefly, *Fisk University Keeps Its O’Keefes*, N.Y. Times, Mar. 8, 2008.

⁴ Theo Emery, *O’Keefe Museum Asks Court to Stop Art-Sharing Deal by University in Tennessee*, N.Y. Times, Oct. 17, 2007.

⁵ Hurley Goodall, *Fisk Violated Donor’s Terms but Should Keep Art Collection, Judge Rules*, Chron. H.E., Mar. 7, 2008.

circumstances. In 1912, two months before she died, Louisa G. Lippitt, a Rhode Island woman, donated \$4,000 in return for a “Permanent Free Bed in Rhode Island Hospital.”⁶ The bed, donated in honor of Ms. Lippitt’s father, was to be set aside for free medical care for needy people referred by one her favorite charities. Children’s Friend unearthed a certificate promising the free bed while searching through archives for its upcoming 175th anniversary.

Children’s Friend is seeking enforcement of this obligation. The Hospital, however, has sought dismissal, because Children’s Friend has existed as a legal entity only since 1949 and is, at most, a successor to Children’s Friend Society, the original third-party beneficiary of the gift. Further, according to both parties, the hospital has never, in the 95 years since the original donation, provided a free bed or free medical care based on referrals from Children’s Friend. Whether the court will enforce the terms of this one-hundred-year-old donation—which have never before been enforced—especially in light of the changes in medical care, fundraising, and related community relationships, remains to be seen.

In *Howard v. Tulane*⁷, the Supreme Court of Louisiana was asked to address the proper interpretation of donative terms. From 1886 to 1901, through both *inter vivos* gifts and her will, Josephine Newcomb donated approximately \$3 million to the Tulane University “for the higher education of white girls and young women.” The funds were used to establish H. Sophie Newcomb Memorial College (“Newcomb College”), a women’s college within Tulane University. In restructuring its colleges following hurricane Katrina, Tulane dissolved the Newcomb College as a separate institution and merged it, along with all of its other University colleges, into a single undergraduate institution, while establishing an Institute in the Newcomb name.

In 2006, two great-great-nieces of Mrs. Newcomb requested an injunction against Tulane to reverse the restructuring, claiming that it ignored Mrs. Newcomb’s original intent. In an appeal from the trial court’s order denying a preliminary injunction, the nieces raised four issues, claiming that:

- a) The district court erred as a matter of law in not carrying out the donor’s intent to use her estate to maintain a women’s college;
- b) The district court erred as a matter of law in ruling that Mrs. Newcomb’s will did not include “an enforceable conditional obligation” sufficient to support a preliminary injunction;

⁶ Jonathan Saltzman, *Charity sues R.I. hospital over donation in 1912: A free bed was to be provided forever*, Boston Globe, Feb. 23, 2008.

⁷ 970 So.2d 21 (La. App. 4 Cir. 2007).

- c) The district court erred as a matter of fact and law in ruling that the nieces did not make a prima facie case that they would suffer irreparable harm by the Board's implementation of a renewal plan; and
- d) The district court erred as a matter of fact and law in ruling that the nieces failed to make a prima facie case that they would prevail on the merits in showing that abolishing Newcomb College violated the express terms of Mrs. Newcomb's will.

The court of appeals first turned to whether the nieces had standing. Neither of the nieces, nor their ancestors, had been named as legatees in Mrs. Newcomb's will. Furthermore, Mrs. Newcomb's *inter vivos* donation provided as follows:

I do not mean in this my act of donation to impose upon you restrictions which will allow the intervention of any person or persons to control, regulate, or interfere with your disposition of this fund, which is committed fully and solely to your care and discretion with entire confidence in your fidelity and wisdom.

Relying upon these facts, the court of appeals concluded that the nieces had no right to assert a claim for injunctive relief regarding Mrs. Newcomb's *inter vivos* donations. The court also rejected the nieces' right of action against Tulane relating to Mrs. Newcomb's donation *mortis causa* and rejected the claim that her gift was a conditional bequest. Because none of her donations were held to be conditional, the court also rejected a claim under the *cy-près* doctrine. The Louisiana Supreme Court subsequently issued an opinion based in Louisiana law, allowing the case to be remanded to determine if the nieces were proper plaintiffs with standing.⁸ A new action was filed subsequently.

The litigation in *Dodge v. Randolph-Macon Woman's College* was instituted by a group of students, alumnae, and donors after the College trustees decided to admit men and make significant curriculum changes.⁹ The lower court's dismissal of the complaint, ruling (1) that the Virginia Uniform Trust Code does not apply to the Trustees of Randolph-Macon Woman's College; (2) that the Trustees did not breach any duty by voting to admit men or changing the college's name; and (3) that the *cy-près* doctrine was not applicable was affirmed by the Virginia Supreme Court.¹⁰ Another action, also

⁸ No. 07-C-2224 (La. Sup. Ct. July 1, 2008). A copy of the *amicus curiae* brief submitted by American Council on Education and others is available at the following website: http://www.acenet.edu/AM/Template.cfm?Section=Legal_Issues_and_Policy_Briefs2&CONTENTID=26380&TEMPLATE=/CM/ContentDisplay.cfm.

⁹ Randolph College's decision to sell four donated paintings was also subject to legal challenge. That action was withdrawn on March 7, 2008.

¹⁰ 276 Va.10, 661 S.E. 2d 805 (2008).

entitled *Dodge v. Randolph-Macon Woman's College*, was brought by students alleging a contract claim, was also dismissed and the Virginia Supreme Court affirmed.¹¹

II. Addressing Issues of Donor Intent

In recent years, nonprofit organizations have experienced increasing scrutiny over how they manage their donors' charitable contributions. Thus, it may serve the best interest for organizations to establish guidelines that will allow them to adapt their policies and practices to meet ever-changing circumstances, while avoiding litigation and, more importantly, still honoring the generous intentions of their donors. Samples of such guidelines issued by certain organizations to their administrators, fiscal officers, and development teams are summarized below that may provide some direction regarding how to clarify donor intent and donee obligations from the outset, so as to avoid later conflict.

The Donor Bill of Rights was created by the Association of Fundraising Professionals, the Association for Healthcare Philanthropy, the Council for Advancement and Support of Education, and the Giving Institute.¹² It has been endorsed by a number of non-profit institutions including Purdue University,¹³ Carnegie Mellon University,¹⁴ and The Ohio State University.¹⁵

The Donor Bill of Rights contains ten provisions including that a donor should expect to be informed of the organization's mission, how it intends to use donated resources, and its capacity to use donations effectively for their intended purposes.¹⁶ Donors can also expect to be informed of the identify of those on the organization's governing board, to have access to its most recent financial statements, and to be assured that any gifts will be used for the purposes for which they were given.

The Bill of Rights does not, however, address issues of time limits, changed circumstances, or interpreting donor intent.

Another approach can be found in Indiana University's policy I-45 issued in 2002 with the rationale that the University has a "fiduciary responsibility to ensure that donor wishes are strictly observed and that gifts are used only for the purpose stated by the

¹¹ 276 Va.1, 661 S.E. 2d 801 (2008).

¹² See <http://www.afpnet.org/> (click on "Ethics" then "Ethics and Donors"). Copy annexed.

¹³ See http://www.purdue.edu/udo/about/donor_bill_rights.shtml.

¹⁴ See <http://www.cmu.edu/giving/donor-bill-of-rights.shtml>.

¹⁵ See <http://giveto.osu.edu/areas/billofrights.asp>.

¹⁶ See <http://www.afpnet.org/> (click on "Ethics" then "Ethics and Donors").

donor.”¹⁷ The University acknowledges that there is a “close and demonstrable link between good stewardship of gifts and bequests and long-term fund-raising success.” The policy states that “gifts received for the benefit of Indiana University must be spent or utilized according to donor intent” and that the “Fiscal Officer must ensure that funds are used in compliance with donor intent.” The Fiscal Officers are further responsible for “ensuring that processes and controls are in place that ensure that the use of gift resources agree with donor intentions” and that the donor intent is determined by the gift agreement or “other pertinent documentation stating the donor’s intent.” Donor intentions are usually specified in a donor-signed gift agreement, a signed donor gift/pledge intent memorandum, donor-signed correspondence indicating intent, or a copy of a will or trust document indicating donor intent.¹⁸

Some universities have articulated policies for granting naming rights for buildings and, in certain cases, also specify terms and conditions for removing the name from a building.¹⁹

Some donors have themselves taken a proactive role in setting very specific terms to govern their charitable donations. Cable-TV pioneer Bill Daniels wrote a letter to the board of his charitable foundation two years before he died. In it, he categorically wrote: “[R]emember that I am a conservative and want no money going to liberal causes.”²⁰ Daniels also left articles of incorporation seven pages in length and identified eleven program areas that his charity should support. And it didn’t stop there. The current board members, all of whom knew Mr. Daniels personally, have “digitize[ed] the late executive’s voluminous business and personal correspondence, videotaped speeches and other memorabilia” and made these materials available through the Internet and via electronic kiosks installed at institutions Daniels funded. Their intention is to allow future generations of staff at the Daniel’s Fund to make decisions based on Daniels’ original intent. It behooves nonprofit organizations to assure donors that expressed intent will be followed when consistent with the organization’s mission and the totality of circumstances as time marches on.

III. On the Horizon

Recent reports of the planned sale of the Brandeis University art collection raise the specter of possible legal challenges. Will other institutions facing fiscal challenges be

¹⁷ Indiana University Financial Institutional Policies, Vol. I: Policies Related to Accounting Administration: Donor Intent Responsibilities. Available at <http://www.indiana.edu/~vpcfo/policies/accounting/i-45.html%2fi-45.html>.

¹⁸ *Id.*

¹⁹ See, e.g., Central Washington University’s Policy, available at <http://www.cwu.edu/%7Epres/policies/part2-2.24.pdf>, and Mississippi State University’s Policy, available at <http://www.msstate.edu/dept/audit/PDF/4102.pdf#search=%27university%20naming%20opportunities>.

²⁰ Sally Beatty, *Preserving a Donor’s Intent*, Wall Street Journal, Oct. 6, 2006.

compelled to create new legal precedents concerning responsibilities of universities to fulfill donor intent?

The Donor Bill of Rights was created by the Association of Fundraising Professionals (AFP), the Association for Healthcare Philanthropy (AHP), the Council for Advancement and Support of Education (CASE), and the Giving Institute: Leading Consultants to Non-Profits. It has been endorsed by numerous organizations.

The Donor Bill of Rights*

Philanthropy is based on voluntary action for the common good. It is a tradition of giving and sharing that is primary to the quality of life. To ensure that philanthropy merits the respect and trust of the general public, and that donors and prospective donors can have full confidence in the nonprofit organizations and causes they are asked to support, we declare that all donors have these rights:

- I. To be informed of the organization's mission, of the way the organization intends to use donated resources, and of its capacity to use donations effectively for their intended purposes.
- II. To be informed of the identity of those serving on the organization's governing board, and to expect the board to exercise prudent judgment in its stewardship responsibilities.
- III. To have access to the organization's most recent financial statements.
- IV. To be assured their gifts will be used for the purposes for which they were given.
- V. To receive appropriate acknowledgement and recognition.
- VI. To be assured that information about their donation is handled with respect and with confidentiality to the extent provided by law.
- VII. To expect that all relationships with individuals representing organizations of interest to the donor will be professional in nature.
- VIII. To be informed whether those seeking donations are volunteers, employees of the organization or hired solicitors.
- IX. To have the opportunity for their names to be deleted from mailing lists that an organization may intend to share.
- X. To feel free to ask questions when making a donation and to receive prompt, truthful and forthright answers.

*The *Donor Bill of Rights* was copied from the Association of Fundraising Professionals website.