Title

Fiduciary litigators beware: The overlapping coverage of the Uniform Trust Code and the Uniform Prudent Management of Institutional Funds Act is muddling standing jurisprudence

Text

Some administered charitable gifts may qualify as "charitable trusts" under the Uniform Trust Code (UTC) *and* as "institutional funds" under the Uniform Prudent Management of Institutional Funds Act (UPMIFA). An "institutional fund" is defined in UPMIFA as a fund held by an institution exclusively for charitable purposes. This textual overlap is muddling standing jurisprudence. The UTC affords the settlor of a charitable trust standing to seek its enforcement. UPMIFA, on the other hand, has been interpreted either as depriving the donor of an institutional fund standing to seek enforcement of the gift or as deferring to equity's general doctrinal reluctance to recognize donor standing. Assume we have a donation to a charitable corporation "in trust" for a specified charitable purpose. Which statute regulates the arrangement, the UTC or UPMIFA? Both would appear to. The donor will argue that he is afforded standing under the UTC; the donee will argue that donor standing is lacking, as per UPMIFA.

For a real-world example of the jurisprudential muddle this legislative malpractice is causing, consider *Herbst v. University of Colorado Foundation*, 513 P.3d 388 (Col. App. 2022), in which the donor of a gift that had been transferred "in trust" to a charitable corporation endeavored to bring an equitable action against the corporation for maladministration. Invoking UPMIFA, the court denied the plaintiff standing, although in the body of the decision the arrangement was referred to as a charitable trust, with much ink being spilt on why under Colorado common law as enhanced by equity the donor would lack standing in any case. The court apparently had not been made aware of the fact that Colorado had enacted the UTC, including its generous donor-standing provisions.

Is there a practical solution to this critical absence of coordination between the UTC and UPMIFA? It has been suggested that an effort to amend the UTC and UPMIFA so that they no longer overlap in coverage risks backfiring. "Whether this would be possible given the different and often strongly-held views regarding these issues is unclear. There also is no guarantee that states would revise their statutory laws if such amendments were made." Nancy A. McLaughlin, *Laws Governing Restrictions on Charitable Gifts: The Consequences of Codification*, 70 UCLA L. Rev. Discourse 424,447 (2023).

Prof. McLaughlin also does not seem entirely convinced that fashioning an "entirely new uniform law" to address "standing to sue with regard to all charitable gifts, regardless of the organizational form of the recipient, whether the gift was conveyed in trust or nontrust form, or the label assigned to charitable gifts under state law" would be feasible considering the politics of the situation. *Id*. at 447. Whether feasible or not, I, for one, strongly-hold the view that inflicting on the jurisprudence a partial codification of the law of trusts the purpose of which is to remedy selected glitches in other partial codifications of the law of trusts, such as the UTC and UPMIFA, is taking statutory whack-a-mole in the trust space to a whole new level.

Moreover, even assuming each partial codification of an aspect of trust doctrine has been well coordinated with the partial codifications of other aspects of trust doctrine, enacted verbatim

in all jurisdictions, and well drafted, none of which is the case, as a practical matter there are now just too darn many trust-related partial codifications out there. It is asking an awful lot of real-world trust professionals and real-world jurists to keep up with and digest all this hyper-technical, sometimes conflicting, statutory meddling with the principles-based equity jurisprudence that regulates the trust relationship, which at its core is still an invention and ward of the judiciary not the legislature. Twenty-five different uniform statutes are reproduced in the 2024-2025 Edition of *Uniform Trust and Estate Statutes* (Foundation Press). Many either directly bear on the law of trusts, such as the UTC, or do so tangentially, such as the Uniform *Probate* Code with its arcane anti-vesting traps.

As an aside, it is said that equity deems a charitable corporation to be a quasi-trust. We explain in §9.8.1 of *Loring and Rounds: A Trustee's Handbook* (2025), the relevant part of which section is reproduced in the appendix below.

Appendix

§9.8.1 *The Charitable Corporation: Is It a Trust?*[from *Loring and Rounds: A Trustee's Handbook* (2025)]

The charitable corporation: a quasi-trust that also may serve as a trustee. To be sure, under *the tax laws* of the United States, a so-called charitable foundation can be structured as either a charitable trust or a charitable corporation.[4] Likewise, the doctrine of charitable immunity draws no distinction between the charitable trust and the charitable corporation.[5] But under a particular state's common law of trusts and property, is a gift of property to a charitable corporation a transfer in trust? Are a charitable trust and a charitable corporation essentially one and the same?

On this side of the Atlantic, a so-called public charity can arise in two general ways, "either by being organized with the intent to limit the organization's use of its funds to charitable purposes, or by engaging in conduct which results in the entity holding funds for charitable purposes. Such conduct incudes accepting funds on express trust for charitable purposes as well as holding the entity out as charitable and soliciting and accepting donations on the basis of a charitable appeal."[6] In the case of a charitable trust, the state attorney general may maintain a suit to prevent the subject property from being squandered or misapplied.[7] The attorney general also has standing to maintain a suit to prevent the squandering or misapplication of the assets of a charitable corporation.[8] "Likewise, in both cases, cy pres may be available."[9] But is the charitable corporation *a trustee* of its own property such that its governing body is subject to all the common law duties and obligations of a trustee?[10] Professor Scott, while acknowledging some technical differences between the charitable trust and the charitable corporation, on balance found them more similar than dissimilar.[11] In the noncharitable context it is not uncommon to see trusts masquerading as corporations.

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[4]*See generally* Bogert §330.

[5]*See generally* 5 Scott & Ascher §37.3.13.2.

[6]Attorney Gen. v. Weymouth Agric. & Indus. Soc'y, 400 Mass. 475, 509 N.E.2d 1193 (1987).

[7]5 Scott & Ascher §37.1.1.

[8]5 Scott & Ascher §37.1.1.

[9]5 Scott & Ascher §37.1.1. *See generally* §9.4.3 of this handbook (*cy pres*).

[10]*Cf*. Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473, 479 (2007) (an incorporated U.S. or U.K. mutual fund is actually a trust).

[11]4A Scott on Trusts §348.1; 5 Scott & Ascher §37.1.1. *See also* Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 489 (N.J. Super. Ct. 1967) (suggesting that a charitable corporation is not strictly speaking a charitable trust but that the law of charitable corporations has its roots in the law of trusts). *But see*

Certainly, if the gift is restricted, the directors of the corporation should segregate the gift from the corporation's other assets and act as if they were the trustees of the gift, even though it is in the entity that the legal title to the gift resides. Above all, they should carry out the lawful intentions of the transferor, and the attorney general, and the courts should see to it that they do.

The better view, at least from the donor's perspective, is that a restricted gift to a charitable corporation is a gift to the charitable corporation as trustee of a charitable trust, the subject of which is the restricted gift.[12] This should certainly apply to an endowment fund, which is a fund that under the terms of a gift instrument is not wholly expendable by the charitable corporation on a current basis.[13] In California, a charitable corporation formed in California has general statutory authority to serve as a trustee.[14] When property is left to a charitable corporation upon a charitable trust and the corporation either declines to accept the trust, or accepts the trust and then proceeds to violate it, the court has inherent equitable powers to order a transfer of the legal title to the property to a charitable corporation that is ready, willing, and able to properly carry out the terms of the trust.[15]

There is no question that a gratuitous transfer of property to a third party, *e.g.*, a bank or trust company, in trust for the benefit of a charitable corporation gives rise to a charitable trust.[16] Moreover, "[w]hen the settlor creates a trust of unlimited duration to pay the income to a charitable corporation, the court will neither compel nor permit the termination of the trust by a transfer of the principal to the corporation, even if the corporation is the sole beneficiary and wants to terminate the trust."[17] Nor will the court permit an early termination of the trust in favor of the corporation if acceleration would be contrary to a material purpose of the trust.[18]

It is when the initial transfer of legal title is to the charitable corporation itself that things can get ambiguous, particularly if the gift is unrestricted.[19] Do we have a trust or don't we? One court has referred to the arrangement as a quasi-trust.[20] Presumably most of the corporation's donors intend that their gifts be used only for the legitimate expressed charitable purposes of the corporation, and expect that those purposes will not change materially after the gifts have been made.[21] As a practical matter, however, especially if it is the practice of management to commingle unrestricted gifts with the general assets of the charitable corporation, a donor will find it difficult, if not impossible, establishing a link between his or her particular

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Stegemeier v. Magness, 728 A.2d 557, 562 (Del. Super. Ct. 1999) (noting that the absolute prohibition under common law against self-dealing by a trustee has been modified in the corporate setting to offer a safe harbor for the directors of a charitable corporation if the transaction is approved by a majority of disinterested directors). *See generally* Bogert §361 (also discussing the differences between a charitable trust and a charitable corporation).

[12]5 Scott & Ascher §37.1.1. *See, e.g.*, *In re* Est. of Lind, 314 Ill. App. 3d 1055, 248 Ill. Dec. 339, 734 N.E.2d 47 (2000); Univ. of London v. Prag [2014] EWHC 3564 (Ch.) (Eng.). *See generally* §8.6 of this handbook (the trustee who is not a human being). Because the "community" has a beneficial interest in the charitable corporation, not the corporation, the doctrine of merger would not apply in the case of a restricted gift to a charitable corporation. *See generally* §8.7 of this handbook (merger).

[13]Unif. Prudent Management of Institutional Funds Act §2(2) (defining the term *endowment fund*).

[14]Cal. Prob. Code §15604.

[15]*See generally* 5 Scott & Ascher §37.3.7.

[16]5 Scott & Ascher §37.1.1.

[17]5 Scott & Ascher §37.4.2.4.

[18]5 Scott & Ascher §37.4.2.4.

[19]*See generally* 5 Scott & Ascher §37.1.1.

[20]Am. Inst. of Architects v. Attorney Gen., 332 Mass. 619, 624, 127 N.E.2d 161, 164 (1955).

[21]*See, e.g.*, Dodge v. Trs. of Randolph-Macon Woman's Coll., 661 S.E.2d 805 (Va. 2008).

gift and any particular expenditure.[22] Money is fungible. The governing body certainly has a moral obligation to the donors of unrestricted gifts to see to it that the corporation cleaves to the letter and spirit of the corporation's stated charitable purposes, and, at minimum, that it gives them advance warning of any material deviation from those purposes. Whether that obligation is, as a practical matter, enforceable is another matter.[23] If management expects to materially deviate from the charitable corporation's stated mission, in theory it should, at least for accounting purposes,[24] segregate benefactions already in hand and conduct its deviations with future funds. This is, of course, all much easier said than done, and almost impossible to effectively monitor privately from the outside. Moreover, in at least one jurisdiction, namely, Virginia, the directors of a nonstock charitable corporation would likely have no such duty to segregate, her Supreme Court having in no uncertain terms rejected any notion that such corporations are governed by the law of trusts.[25]

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[22]*See, e.g.*, José A. Cabranes, *Myth and Reality of University Trusteeship in the Post-Enron Era*, 76 Fordham L. Rev. 955 (2007) (suggesting that bad feelings between donor families and universities are almost guaranteed these days: While donors expect more from a university in the way of transparency and accountability, universities generally give less).

[23]*See, e.g.*, Morris v. E. A. Morris Charitable Corp., 161 N.C. App. 673 (2003) (court declining to apply *cy pres* though remainder beneficiary of a charitable remainder trust, a charitable corporation, made various changes to its administration, management, and pattern of charitable giving), *aff'd*, 358 N.C. 235, 593 S.E.2d 592 (2004) (per curiam). *See generally* Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 Emory L.J. 617, 668–671 (1985).

[24]*But see* 5 Scott & Ascher §37.3.8 (suggesting that even restricted gifts to a charitable corporation may be "mingled" in a "common pool"). *See generally* §3.5.3.2(d) of this handbook (common funds or pools).

[25]*See, e.g.*, Dodge v. Trs. of Randolph-Macon Woman's Coll., 661 S.E.2d 805 (Va. 2008) (involving benefactors to Randolph-Macon Woman's College who objected to its conversion from a single-sex educational institution to one that educates both men and women).