



THE SAFEGUARDING ENDOWMENT GIFTS ACT: The Tao of Enforcing Donor Intent

By Justice Daniel Kelly

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INTRODUCTION

There is a telos—a purpose and an objective—that imbues philanthropic gifts to charitable organizations. Sometimes, it's as simple as general support for the recipient and whatever goals it chooses to pursue. But at other times, a gift's telos is specific, explicit, and enduring.

In an ideal world, the charity's work would always match the gift's telos. But experience proves the two sometimes diverge. This should come as no surprise—the factors that motivate a philanthropist's generosity are not the same as those that govern the recipient's activities.

For philanthropists, gifts are quite often very personal expressions of their vision, passions, and beliefs. Whether the gifts come from the store of accumulated value they have created through their own hard work, or legacies they are stewarding for others, they embody a world of meaning. And it is perfectly natural that someone making a gift from such a meaning-infused

source would want to ensure the recipient uses it for only the intended purpose.

Recipients of those gifts, on the other hand, face pressures, interests, and needs that may bear little relationship to the factors prompting the donors' generosity. Overhead costs, for example, are inescapable but unattractive aspects of a charitable organization's work. Nothing gets done if they're not paid, but few donors earmark their gifts for this expense category.

Charitable organizations with several projects underway will naturally pursue flexibility in allocating resources between budget categories to keep the enterprise as an entirety on an even keel. And, over time, the natural turnover in an organization's directors or trustees can lead to shifting priorities that may manifest as anything from missional drift to a complete about-face in the principles and philosophies that had previously informed its work. Each of these factors,

and many others, can create a powerful impulse to use already-committed funds without reference to a donor's individual wishes.

As a hedge against this potentiality, strategically sophisticated philanthropists impose restrictions on their gifts to ensure they aren't eventually used to support objectives contrary to the gifts' telos. These restrictions aren't meant to be aspirational—their value depends entirely on their legal enforceability. But what happens, as a practical matter, if the charitable organization disregards the restrictions? The gift instrument might perfectly express the donor's intended purpose, but that will be cold comfort if there is no effective avenue for enforcing the restriction when the recipient organization goes astray.

Enforcement of donor intent is not a new concern, but it lacks a nationwide consensus on how to address it. Indeed, the current state of the law regarding the enforcement of donor intent isn't wholly fit for the purpose. It's frequently messy, sometimes incoherent, and often unpredictable. Mechanisms for protecting a donor's intent may be found scattered all across a state's statutes and common law doctrines. The Uniform Trust Code (UTC) and the Uniform Prudent Management of Institutional Funds Act (UPMIFA), for example, speak to some aspects of how restrictions on charitable gifts should be handled.

Common law contract and tort concepts, as well as equitable devices like trusts, whether express, implied, or constructive, have all been asserted as legal theories to protect a donor's intent. Through one or more of these vehicles, all states require charitable organizations to honor restrictions on charitable gifts in at least some circumstances. But the legal theories have grown in an ad hoc and haphazard manner, which leaves a donor's intent with less than comprehensive and predictable protection.

Making sense of the substantive law, however,

is not the only challenge. Just because a state's law nominally protects a donor's intent doesn't mean it will actually be enforced. The default rule in many jurisdictions still provides that only the attorney general, not the donor, has the authority to file enforcement actions. This can lead to significant under-enforcement of gift restrictions if the attorney general's office is focused on issues with more practical or political salience. Or differs with the donor with respect to a restriction's meaning or importance. Or lacks expertise. Or capacity. And so on.

There is a better way. It is possible to create a legal framework that effectively and efficiently enforces the intended use of restricted charitable gifts. The Safeguarding Endowment Gifts Act (SEGA)¹ creates such an environment, and it does so without disturbing a state's existing statutory enactments (such as local implementations of the UPMIFA or UTC) or deforming traditional common law principles.

And because it specifically empowers donors or their representatives to bring enforcement actions, challenges to unauthorized uses of restricted gifts won't depend on capturing the interest of a state's attorney general. So, adopting the SEGA transforms a gift's telos—the donor's intent—from a notional desire into real-life protection. This is the way, the tao of protecting donor intent.

The SEGA is a comprehensive but straightforward response to lessons learned from historical failures to protect donor intent. Attempts to stretch existing common law principles to cover restricted charitable gifts have only occasionally succeeded, and in the process they have illustrated why this approach is particularly inapt for both structural and substantive reasons.

1 Safeguarding Endowment Gifts Act (Philanthropy Roundtable 2025) (hereinafter "SEGA").



And while uniform laws like UPMIFA and the UTC incorporate nominal protection, their limited applications and (in most adaptations of the UPMIFA) a lack of robust enforcement mechanism means that, as a practical matter, their protection is not always available.

This article explores how donor intent has been addressed—and *should* be addressed—in three sections. The first surveys the litigative and legislative landscape over the last 10 years for the purpose of illustrating the variety of ways in which courts and legislatures have been treating the subject ... and also to demonstrate that many states still lack a comprehensive toolkit for addressing it.

The second section explains why current common law and equitable theories are unequal to the task of comprehensively and reliably protecting donor intent. The third section explores how the SEGA replaces badly battered common law and equitable theories with a clear and jurisprudentially defensible requirement that charities comply with restrictions on charitable gifts, and explains how it fills in the gaps left by existing adaptations of uniform model legislation.



I. DONOR INTENT LITIGATION AND LEGISLATION OVER THE LAST 10 YEARS

At the most general level of abstraction, there are two sources of law to which donors might turn for the protection of their restricted charitable gifts. The first is legislation, which flows from the collected knowledge, experience, and judgment of state legislatures across the country.

The second is the common law and equity, which have their sources in customs, practices, and theories so old that they stretch back in time to our English roots, evidence of which we find in the judicial opinions of our state

and federal courts. The former often arises in response to a discovery that the latter does not adequately address an important interest, or protect it in a way that effectively advances societal objectives.

The movement to safeguard donor intent largely follows that pattern, so the article first examines how courts have adjudicated conflicts regarding restrictions on charitable gifts over the past decade, and then considers how legislatures have treated the subject.²

² Reference to cases or legislative enactments prior to the last 10 years will be for background and contextual purposes only.

A. COURT CASES

Litigation is a complicated and stylized dance in which success, as relevant here, depends on (1) the substantive law governing the interests donors are trying to protect, and (2) the relationship between the donors and those interests. The first component comprises the common law constructs or statutory enactments that describe enforceable rights. The second, known as “standing,” identifies who has the authority to file enforcement actions with respect to those rights.

As will be discussed in more detail below, the prerequisite for judicial relief under common law and equitable principles depends entirely on a plaintiff embodying both of these components. Today, the most significant impediment donors experience in their attempts to enforce gift restrictions is their inability to convince a court they have standing.

Standing has been such a complication because it performs a gatekeeping function—that is to say, in most cases a court will not address whether restrictions on charitable gifts are enforceable until it first satisfies itself that the plaintiff is a proper person to demand their enforcement. Based on this gatekeeping doctrine, courts have been regularly dismissing complaints without deciding whether existing legal theories require compliance with a donor’s intent.

Studying these decisions is still valuable because standing is derivative of the substantive law. That is to say, the substantive law not only identifies the rule of decision that controls the plaintiff’s claims, it also functionally identifies who may bring them. Consequently, decisions dismissing cases for lack of standing

indirectly provide insight into the viability of the substantive theories of law.

The following cases are divided into two logical groupings. The first comprises those in which donors (or their representatives) have successfully surmounted two hurdles. First, they have established standing to seek enforcement of their intent in making their restricted charitable gifts. And second, they have asserted a legal theory that the court recognizes as a legitimate basis for enforcing that intent (without regard to whether the effort was ultimately successful).

This category is expansive enough to include not only cases compelling gift recipients to comply with stated restrictions, but also those in which the donors have sought return of their gifts when their intent has not been honored. These cases are instructive for what they say about the substantive legal theories offered as controlling the disposition of such gifts, such as contract, trust, and various species of fraud or negligent misrepresentation.

The second group contains cases in which courts have held that the donors either do not have standing to bring enforcement actions, or that there is no legal theory available to support enforcement of the restrictions on their charitable gifts. Because courts that deny standing generally do not discuss the substantive legal theories upon which the complaints were based, it can be a little more difficult to extract useful lessons from them. Nonetheless, their indirectly instructive nature makes them useful data in assessing how to further the project of protecting donor intent.

1. CASES WITH STANDING AND A VIABLE LEGAL THEORY

CALIFORNIA

Kabbalah Centre International, Inc.

Carolyn Cohen and her company, Here We Grow, Inc., donated \$477,000 to Kabbalah Centre International, Inc. (the “Centre”). Of that total, Cohen says she committed \$452,000 to the Centre’s building fund (the “Building Donation”); the balance went to the Centre’s “Spirituality for Kids” program (the “Kids Donation”). The children’s program was eventually shuttered. And after the Centre took no action on any of the considerable number of properties she scouted, Cohen became convinced the Centre’s purported interest in building a facility was just a fundraising scheme.

Cohen filed a lawsuit seeking return of her donations. Her complaint included claims alleging breach of contract, fraud, and breach of fiduciary duty. The trial court dismissed her case; Cohen appealed.³

The contract claim with respect to the Building Donation failed, but for evidentiary reasons. The alleged contract, according to Cohen, was oral rather than written. But her statements regarding when it was made and, crucially, whether the contract actually existed, were hopelessly contradictory. The court affirmed the dismissal of this claim for lack of evidence.⁴

Significantly, however, the court of appeals reversed the trial court with respect to her breach of the (equally oral) contract governing the Kids Donation. Cohen swore that the Centre promised it would return any amount of the donation that was not used specifically for the Spirituality for Kids program. Because there was a triable fact relating to this claim, the court remanded it for further proceedings.⁵

The court also substantively considered her fraud claims. Fraud, under California law, comprises five elements: “a misrepresentation; the knowledge the misrepresentation is false; the intent to induce another’s reliance on the misrepresentation; justifiable reliance; and damages.”⁶ As with the Building Donation breach of contract claim, these failed for evidentiary reasons—Cohen was unable to offer any proof that the Centre made a factual misrepresentation while knowing it was false. If Cohen had had evidence supporting this element, presumably the court would have allowed her to recover her donation based on this common law theory.

Finally, Cohen’s claim that the Centre breached its fiduciary duty to her when it solicited her donations failed as a technical matter. California statutorily creates a fiduciary duty between donors and the charities that solicit them. But according to the court, they must be legal strangers for the fiduciary duty to arise, and in this case they were not because Cohen was a member of the Centre.⁷

So, although Cohen’s claim based on a fiduciary duty failed, the court’s opinion suggests that this type of claim may be a viable equitable theory for the recovery of misused charitable gifts. On the other hand, however, the court’s opinion says nothing about whether Cohen had standing to bring her claims (perhaps because the Centre did not raise the issue). There is reason to believe the Centre may have been successful on a motion to dismiss the fiduciary duty claim for lack of standing. As discussed

3 *Cohen v. Kabbalah Ctr. Internat., Inc.*, 35 Cal. App. 5th 13, 16, 246 Cal. Rptr. 3d 774, 776 (2019).

4 *Id.* at 777.

5 *Id.* at 778.

6 *Id.* at 779.

7 *Id.* at 781 (citing Cal. Bus. & Prof. Code § 17510.8).

in the *Kars 4 Kids, Inc.* matter in the second group of cases below, fiduciary duties arise in the context of trusts, and the court in that case said only the attorney general has standing to enforce such duties. But then again, the court in the next case concluded that Elon Musk

had standing to pursue his trust-based claims. The variability in these cases (all three of which were decided under California law) with respect to such a fundamental question—whether a plaintiff may be heard at all—is indicative of an underlying incoherence in the law.

Elon Musk and OpenAI

OpenAI started as a nonprofit corporation, the purpose of which was to develop artificial general intelligence, but with a twist. Unlike commercial ventures that would seek market dominance and maximum profit, the founders had a different goal for their efforts. They agreed the core tenets of OpenAI would be that “the resulting technology will benefit the public, that it would seek to open source technology for the public benefit, and that it would not be organized for the private gain of any person.”⁸

Elon Musk, OpenAI’s co-chair (the other being Sam Altman), contributed something in the neighborhood of \$38 million to the effort through YC.org (OpenAI’s fiscal sponsor until it acquired 501(c)(3) status) and donor advised funds administered by Vanguard and Fidelity. All of his contributions were made with the expectation that OpenAI was and would remain a nonprofit corporation.

As the reality of how much capital would be necessary to achieve their objectives sank in, however, conversations turned to potentially restructuring OpenAI as a for-profit venture. Musk was adamantly opposed. He eventually resigned from the board in 2018, but over the next three years contributed almost \$10 million to OpenAI to pay for its office space.

OpenAI did, eventually, start moving into the for-profit world. It formed OpenAI LP in 2019 as a for-profit subsidiary into which it then transferred all of OpenAI’s assets, including substantially all of the intellectual property developed with the nonprofit’s funds. Microsoft became interested in the for-profit subsidiary’s work, and in July 2019 took a convertible limited partnership interest in OpenAI LP in exchange for a \$1 billion investment. Microsoft would eventually invest almost \$13 billion more (either in OpenAI LP or its replacement, OpenAI Global, LLC).

Musk filed suit in 2024, alleging breach of charitable trust, constructive fraud, fraud, and unjust enrichment against the OpenAI entities.⁹ The defendants responded, in part, that Musk lacked standing to pursue any of these claims.

A charitable trust, under California law, comprises “a proper manifestation by the settlor of an intention to create a trust, a trust res, and a charitable purpose.”¹⁰ The District Court said it believed the modern trend, as evidenced by the changes between Restatement (Second) of Trusts § 391 and Restatement (Third) of Trusts § 94, is to recognize donor standing to enforce the terms of a charitable trust. It also explained that standing would exist under California’s rule that a “person having a sufficient special interest in a trust may sue for breach.”¹¹

8 *Musk v. Altman*, 818 F. Supp. 3d 1109, 1115 (N.D. Cal. 2026) (internal marks omitted).

9 The suit also alleges causes of action against Microsoft, but they are not relevant to the issues addressed by this article.

10 *Id.* at 1120 (N.D. Cal. 2026) (quoting *City of Palm Springs v. Living Desert Rsrv.*, 70 Cal.App.4th 613, 620, 82 Cal.Rptr.2d 859 (1999)) (internal marks omitted).

11 *Id.* at 1121 (quoting *Holt v. Coll. of Osteopathic Physicians & Surgeons*, 61 Cal.2d 750, 753, 40 Cal.Rptr. 244, 394 P.2d 932 (1964)) (internal marks omitted).

Although litigative and legislative activity relating to donor advised funds is outside the scope of this article, it is of some interest how the court treated the defendants' argument that Musk lacked Article III standing because he had made his contributions through a financial agent and donor-advised funds. Musk's challenge was not to the intermediaries' disposition of his contributions, but to that of the beneficiaries. So the court ruled that the interposition of the intermediaries between Musk and the OpenAI entities did not affect Article III standing. "Holding otherwise," the court said, "would significantly reduce the enforcement of a large swath of charitable trusts, contrary to the modern trend."¹²

This case promises to have a long and interesting life. An advisory jury, on May 18, decided that Musk had violated the statute of limitations by waiting too long before filing his lawsuit. That conclusion resulted in the dismissal of the case. Musk has vowed an appeal. Should that appeal occur, the OpenAI entities would likely reprise their challenge to Musk's standing. Future developments bear watching.

The Church of Jesus Christ of Latter-Day Saints

James Huntsman used to be a faithful member of the Church of Jesus Christ of Latter-Day Saints. He supported the Church through his tithes which, over time, amounted to many millions of dollars. He says he made his donations based on the Church's representation that it would use the funds solely for non-commercial purposes. When he discovered that the money was, in fact, supporting commercial ventures, he filed a lawsuit claiming the Church had acted fraudulently within the meaning of California law.¹³

The court heard, but rejected his claim. It carefully reviewed his factual allegations, and then concluded that no reasonable person would have been misled by the Church's statements.¹⁴ Huntsman's case was dismissed, but the court did not question the applicability of common law tort theories to the solicitation and use of donations in a manner inconsistent with the charity's representations.

CONNECTICUT

Newman's Own Foundation

Paul Newman wanted to cultivate his daughters' desire to engage in philanthropic giving. To that end, he caused the trust agreement for his living trust (the "Newman Trust") to transfer all the rights to his intellectual property to the Newman's Own Foundation (the "Foundation")—in exchange for which the Foundation

would use the income the intellectual property earned to carry out Newman's plan to foster his daughter's charitable giving. Part of that plan involved the Foundation making a yearly distribution of \$400,000 to each of his five daughters' charitable foundations, which in turn would be distributed to their chosen charities.

¹² *Id.* at 1125.

¹³ *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 789-90 (9th Cir. 2025).

¹⁴ *Id.* at 790.

A few months before his death, Newman added Robert Forrester, his advisor, and Brian Murphy, his business manager, as members of the Foundation and successor trustees to the Newman Trust. Cynthia R. Roland would subsequently become the third successor trustee by nomination of the daughters as provided by the terms of the Newman Trust.

Within a few days of Newman's passing, Forrester and Murphy (as the then-sole members of the Foundation) notified the daughters that they were going to disregard Newman's plans. Instead of making the anticipated distributions so the daughters' foundations could make their own gifts, the Foundation would itself make the charitable donations, but would consider the daughters' recommendations. Under Forrester and Murphy's threat of disinheritance for any objections, the daughters complied with this change. In 2020, however, Forrester and Murphy reduced the Foundation's yearly charitable gifts subject to the daughters' recommendations to \$200,000 per daughter.

Two of the daughters (and their associated foundations) as well as Roland, in her capacity as minority trustee of the Newman Trust, filed suit to enforce Newman's donative intent with respect to the disposition of the Foundation's assets. Their complaint alleged that the Foundation breached its fiduciary duties, as well as the constructive trust under which it held its assets. The complaint also requested a declaration that the Foundation must comply with Newman's donative intent.

The Foundation moved to dismiss the complaint for lack of standing. The court noted that, "[a]s a matter of common law, when a settlor of a trust or a donor of property to a charity fails specifically to provide for a reservation of rights in the trust or gift instrument, neither the donor

nor his heirs have any standing in court in a proceeding to compel the proper execution of the trust, except as relators."¹⁵ Instead, "[t]he donor's right ... is enforceable only at the instance of the attorney general."¹⁶

In this case, however, the court said there was a reservation of rights in the trust agreement. Specifically, the Newman Trust "retained a specific right to manage, control, preserve and protect" Newman's intellectual property rights, which gave rise to "special interest standing in the present matter" for the trustees of the Newman Trust.¹⁷ That was sufficient to grant Roland standing. But what of the daughters, who were not trustees of the Newman Trust? For them, the court engaged in what appears to be a rather creative reading of the trust agreement to enlarge the term "trustee" enough that it could encompass Newman's daughters in their capacity as trustees of their own respective trusts.¹⁸ The court concluded that the daughters' foundations also had standing because they were specifically identified beneficiaries of the trust agreement, which gave them a "special interest" in enforcing the terms of the Trust that was distinct from the general public.

The court denied the Foundation's motion to dismiss the complaint for lack of standing, which allowed the case to go forward. It was later voluntarily dismissed, however, pursuant to a March 2025 settlement agreement.

¹⁵ *Newman v. Newman's Own Found.*, No. X08-FST-CV-22-6058968-S, 2023 WL 4197166, at *4 (Conn. Super. Ct. June 22, 2023).

¹⁶ *Id.*

¹⁷ *Id.* at 8

¹⁸ Based on the excerpts of the trust agreement in the opinion, the court's logic does not seem sufficient to reach its conclusion.

GEORGIA

Ravi Zacharias International Ministries, Inc.

Ravi Zacharias International Ministries, Inc. (“RZIM”) was a charitable organization built, in its words, on a “strong evangelistic and apologetic foundation” from which it could pursue its mission of supporting, expanding, and enhancing “the preaching and teaching ministry of Ravi Zacharias.”¹⁹ RZIM pursued that mission “through conferences, lectures, and seminars held around the world; it also produce[d] podcast and radio shows as well as online videos which featured Zacharias until his death on May 19, 2020.”²⁰

Derek and Dora Carrier (amongst many others) listened to RZIM’s programs, and were moved to make financial contributions to support the ministry. They understood their donations would be used only to further RZIM’s mission because of, at least in part, its assurance that their “donations make it possible for us to continue to reach others with the gospel and we cannot do this work without your help.”²¹ It turned out, however, that Mr. Zacharias was a serial philanderer who used RZIM’s funds to further and support his sexual misconduct.

The Carriers filed a lawsuit against RZIM and Mr. Zacharias’s estate, claiming (as relevant here), that they were fraudulently induced to make donations to RZIM, and that RZIM was unjustly enriched. RZIM moved to dismiss the complaint, arguing that the Carriers lacked Article III standing. The U.S. Constitution authorizes federal courts to hear only “cases” and

“controversies”—categories that are meant to ensure the litigating parties have a real, immediate and concrete dispute in need of resolution. “Standing to sue,” the court said, “is a doctrine rooted in the traditional understanding of a case or controversy.” To establish standing, the plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”²²

Relying on authorities from outside the 11th Circuit Court of Appeals,²³ RZIM said the Carriers could not meet this standard because “donating money to a charitable fund does not confer standing to challenge the administration of that fund.”²⁴ The court rejected RZIM’s extra-territorial authority, and turned instead to an 11th Circuit case holding that although the simple act of donating does not give the donor standing to challenge the organization’s management, acquiring the donation through fraud is an actionable claim for which the donor would have standing.²⁵

RZIM also moved to dismiss the Carriers’ unjust enrichment claim on the basis that Georgia law says “there can be no unjust enrichment when the conferred benefit was a gift or voluntary payment.”²⁶ But that doesn’t tell the whole story, the court said. “

19 *Carrier v. Ravi Zacharias Int’l Ministries, Inc.*, No. 1:21-CV-3161-TWT, 2022 WL 1540206, at *1 (N.D. Ga. May 13, 2022).

20 *Id.*

21 *Id.* at *2.

22 *Id.* at *6. The difference between “standing” under Article III of the U.S. Constitution and “standing” in state courts is beyond the scope of this article. However, a few notes are in order to prevent too much confusion. Article III standing is, as the label suggests, a matter of federal constitutional law, which is why this court looked to federal cases for direction instead of state cases. However, as with standing in state courts, it is derivative of the plaintiff’s cause of action. That is to say, elements two and three of the Article III standing formulation inquire into whether there is a plausible legal theory under which the defendant could be held liable. That legal theory may be supplied by either federal or state law, which is why the court in this case looked to Georgia’s law governing unjust enrichment.

23 The United States District Court for the Northern District of Georgia (the court that heard this case) is located in the 11th Circuit.

24 *Id.* at *7 (quoting *Pearson v. Garrett-Evangelical Theological Seminary, Inc.*, 790 F. Supp. 2d 759, 763 (N.D. Ill. 2011)).

25 *Wilding v. DNC Servs. Corp.*, No. 16-61511-CIV, 2017 WL 6345492, at *5 (S.D. Fla. Aug. 25, 2017), *aff’d and remanded*, 941 F.3d 1116 (11th Cir. 2019).

26 *Id.* at *11 (quoting *Roberts v. Smith*, 341 Ga. App. 823, 829 (2017)).

A conclusion that one party has obtained benefits from another by fraud is also one of the most recognizable sources of unjust enrichment.”²⁷

The court denied RZIM’s motion for summary judgment on this claim and allowed the case to proceed.

MASSACHUSETTS

The Cedar Hill Retreat Center

John and Cynthia Reed live next to the Cedar Hill Retreat Center (the “Property”), a 12-acre parcel that used to be owned by the Ballou Channing District Unitarian Universalist Association, Inc., a nonprofit religious corporation. The Reeds, who desired that no commercial activity would take place on the Property, offered to gift \$3 million to Ballou Channing if it would agree to encumber the property with a conservation restriction. The arrangement was agreeable to all, so the Reeds made the gift (through the John and Cynthia Reed Foundation) and Ballou Channing granted a conservation restriction to the Wildlands Trust of Southeastern Massachusetts, Inc., a non-profit dedicated to conservation and land preservation.

The following year, Ballou Channing created Cedar Hill, a tax-exempt organization, to which it transferred ownership of the Property. Ballou Channing kept \$1.6 million of the Reeds’ gift, and transferred the remaining \$1.4 million to Cedar Hill, part of which it used to renovate the buildings. Cedar Hill then opened the retreat center to the public as a rental property.

The Reed Foundation filed a complaint against Ballou Channing and Cedar Hill, alleging (as relevant here) breach of the gift agreement,

promissory estoppel, and unjust enrichment.²⁸ Both defendants moved to dismiss, arguing that the Foundation lacked standing.

The court conflated contract and charitable trust theories to grant standing to the Reed Foundation. It observed that the Massachusetts statute giving the attorney general authority to “enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent the breaches of trust in the administration thereof” generally bars individuals from maintaining actions for the misuse of those funds.²⁹

However, it then held that the Reed Foundation, as a party to the gift agreement, had “a special interest distinct from the more general public interest protected by the attorney general.” That was sufficient for standing against Ballou Channing for breach of the gift agreement. The court performed no separate standing analysis with respect to the Reed Foundation’s equitable claims of promissory estoppel and unjust enrichment. It apparently concluded that because the Reed Foundation had standing with respect to the breach of agreement claim, it also had standing with respect to these claims as well.

27 *Id.* (quoting Restatement (Third) of Restitution & Unjust Enrichment § 13 cmt. a (Am. L. Inst. 2011)).

28 *Wildlands Tr. of Se. Massachusetts, Inc. v. Cedar Hill Retreat Ctr., Inc.*, 2016 WL 8200498 (Mass. Super. Dec. 30, 2016). Although the Wildlands Trust was also a plaintiff, this discussion will focus solely on the donor (the Reed Foundation).

29 *Id.*, 2016 WL 8200498, at *3 (quoting Mass. Gen. Laws ch. 12, § 8).

The Beit Shvidler Conference Center

The Ohr Somayach/Joseph Tanenbaum Educational Center is a nonprofit organization located in New York, and a branch of the Jerusalem-based Ohr Somayach Institutions network (“Ohr Somayach,” for ease of reference). In 2005, Farleigh International Limited (“Farleigh”) made a gift to Ohr Somayach for the purpose of building a Jewish educational facility, and documented the transaction with a deed of gift. According to Farleigh, in addition to the written deed, Ohr Somayach orally agreed that the facility would be named in honor of the Shvidler family, it would never be mortgaged, and it would only be used for specific educational purposes.

Ohr Somayach built the facility as expected, and named it the “Beit Shvidler Conference Center” in honor of Eugene Shvidler. According to Farleigh, it made subsequent gifts totaling at least \$6,650,000 pursuant to the same gift agreement.

Fourteen years later, Farleigh became dissatisfied with the governance of the Shvidler Center. Specifically, it says the center was either left vacant or rented for commercial purposes. It also believed Ohr Somayach may have mortgaged the center on several occasions. So Farleigh asked Ohr Somayach to return its gifts, confirm the Shvidler Center had never been mortgaged,

and make the accounting books and records related to the center available for inspection.

Ohr Somayach responded to the demand with a federal lawsuit seeking a declaration that Farleigh’s donations were irrevocable and the donor retained no rights in the funds or the property.³⁰ Farleigh filed a counterclaim asserting Ohr Somayach breached its contractual and fiduciary duties, and demanded an accounting.

Ohr Somayach asked the court to dismiss the counterclaims, saying that New York law grants the attorney general exclusive authority to enforce restrictions on charitable gifts. It pointed to a New York statute that says the “attorney general shall represent the beneficiaries of such dispositions for religious, charitable, educational or benevolent purposes and it shall be his duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts.”³¹ The court rejected the argument, citing a New York state case in which the Appellate Division (which is New York’s intermediate court of appeals) rejected the same argument Ohr Somayach made in this case.³² The court concluded Farleigh had standing.

Ohr Somayach’s motion to dismiss also asked the court to reject the counterclaims on the merits. In New York, a breach of contract claim requires “(1) the existence of an agreement, (2) adequate performance of the contract by

30 *Ohr Somayach/Joseph Tanenbaum Educ. Ctr. v. Farleigh Int’l Ltd.*, 483 F. Supp. 3d 195 (S.D.N.Y. 2020) (“Ohr Somayach”).

31 New York Estates, Powers and Trusts Law § 8-1.1(f).

32 *Ohr Somayach*, 483 F. Supp. 3d at 204 (citing *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (2001)). Interestingly, just one year previously, the same court said that the New York statute does give the Attorney General exclusive authority to enforce the terms of charitable gifts, subject only to the “special interest” exception. “Standing to challenge actions by the trustees of a charitable trust or corporation,” the court said, “is limited to the Attorney-General.” *Hadassah Acad. Coll. v. Hadassah Women’s Zionist Org. of Am., Inc.*, No. 18 CIV. 2446 (AT), 2019 WL 1897668, at *2 (S.D.N.Y. Apr. 29, 2019) (quoting *Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458, 466 (1985)). The Hadassah court’s comment, even though purporting to broadly state the law of standing with respect to charitable trusts, would be dicta in a case addressing donor standing inasmuch as it was addressing the standing of a trust’s beneficiary. The Second Circuit arguably resolved this apparent discrepancy in favor of donor standing. In *Israel Acad. of Scis. & Humans. v. Am. Found. for Basic Rsch. in Israel, Inc.*, No. 23-1269-CV, 2024 WL 3289482, at *4 (2d Cir. July 3, 2024), the Court of Appeals observed that “[t]o be sure, New York law ‘accords standing to donors to enforce the terms of their own gifts concurrent with the Attorney General’s standing to enforce such gifts on behalf of the beneficiaries thereof.’” *Id.* (quoting *Smithers*, 723 N.Y.S.2d at 435-36) (some internal marks omitted). I say “arguably” because the court concluded the alleged donor was not really a donor at all, and so its comment about donor standing was, technically, dictum.

the plaintiff, (3) breach of the contract by the defendant, and (4) damages.”³³ The contest was over the third element. The court concluded that Farleigh’s allegations constituted a legally sufficient claim, so it denied the motion and allowed it to proceed to an evidentiary hearing. However, it dismissed the claim based on breach of a fiduciary duty because it alleged essentially the same things as the breach of contract claim, which is insufficient under New York law. The failure of that claim resulted in the dismissal of the demand for an accounting

because “there is no right to an accounting in the absence of a fiduciary duty.”³⁴

Whether the parties eventually went to trial is not a matter of public record. However, the case is worth considering for the conclusion both that the donor has standing to enforce restrictions on a charitable gift (notwithstanding a state statute empowering the attorney general to enforce them), and that New York’s contract law supplies a viable legal foundation for the claim.

TEXAS

True The Vote

Frederic Eshelman suspected voter fraud in the 2020 presidential election, so he made a “conditional gift” of \$2.5 million to True the Vote, Inc. (“TTV”), to investigate and litigate the results prior to the election-certification deadline. These efforts would come to be known as the “Validate the Vote 2020” initiative (the “Initiative”). Eshelman says he and Catherine Engelbrecht (TTV’s president) agreed that \$1 million would be used for rewards for whistleblowers who expose voting irregularities, \$1 million would go to outreach and litigation, and the rest would be used for unspecified Initiative activities.

TTV never identified any whistleblowers, and filed lawsuits of questionable merit in four states that it shortly thereafter voluntarily dismissed. Disappointed in TTV’s ineffective efforts, Eshelman demanded return of his contributions.

After TTV offered to return only part of the total donation, Eshelman filed suit against TTV and Engelbrecht.³⁵ The complaint asserted claims

sounding in breach of contract against TTV and, as against both TTV and Engelbrecht, fraudulent and negligent misrepresentation, conversion, and money had and received.³⁶

The defendants challenged Eshelman’s standing. The Court of Appeals noted that Texas sometimes characterizes conditional gifts as contracts, so the “standing” formulation follows the standard pattern in contract cases. Standing, therefore, depended on plausibly pleading an “injury in fact” causally connected to the defendants’ conduct. An “injury in fact” is one that is actual or imminent, and capable of being redressed by a judgment in the plaintiff’s favor.³⁷

The defendants’ failure to use the \$2.5 million contribution for the agreed upon purposes comprises, without question, was an injury in fact that is causally related to the defendants’ behavior. Nevertheless, Eshelman failed to establish standing—but for procedural, rather than substantive, reasons. The defendants’

33 *Id.* at 209 (quoting *Sackin v. TransPerfect Glob., Inc.*, 278 F. Supp. 3d 739, 750 (S.D.N.Y. 2017)) (internal marks omitted).

34 *Id.* at 212.

35 Eshelman first filed suit in federal court, but voluntarily dismissed it before filing this case.

36 The complaint also included claims against several other defendants, including Catherine Engelbrecht’s son William Engelbrecht on the basis that each of them had received part of Eshelman’s contributions. The article will not address these claims because they are not relevant to the donor intent issue.

37 *Eshelman v. True the Vote, Inc.*, 655 S.W.3d 493, 499 (Tex. App. 2022).

response to the complaint contained a sworn statement that the gift was not conditional, which imposed on Eshelman a burden to respond with sworn evidence of his own that it was conditional. Although he provided a response, it contained no sworn evidence. The court dismissed his claims against TTV and Engelbrecht for lack of standing.

This case illustrates the interdependence between a plaintiff's "standing" and the

substantive causes of actions he asserts. He would have had standing if he had supported his claim of a conditional gift with evidence required at the proper procedural stage. So even though Eshelman failed to establish standing, the case is instructive because it established that donors may enforce restrictions on charitable gifts in Texas—so long as they remember to submit the proper evidentiary support for the legal claim at the right time.

VERMONT

The Mead Memorial Chapel

In 1914, John Mead, a former governor of Vermont, gave Middlebury College approximately \$75,000 (an amount that, today, would exceed two million dollars) to build an on-campus chapel. At Mead's request, the college named it the Mead Memorial Chapel. Fast forward a little more than 100 years, and the former governor's support for eugenics policies have become an embarrassment to the college. As a result, it decided to remove his name from the chapel in 2021.

The former governor's family asked another former Vermont governor, Jim Douglas, to reopen Mead's estate for the purpose of contesting the renaming decision, which he did in 2023. The resulting complaint (as amended) alleged claims based on (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) promissory estoppel, and (4) equitable estoppel. The court rebuffed Middlebury College's request to dismiss for lack of standing and allowed the case to move forward.

Responding to Middlebury College's first motion for summary judgment, the Vermont Superior Court opined that it was not clear whether Mead had made a "gift" to the college, or instead entered into a contract with it.³⁸ If it was a gift, the court said, then the condition upon which it was given—that the chapel be named for Mead—was unenforceable under Vermont law because it was not accompanied by a right of forfeiture or reverter.

The court accepted the possibility that the transaction had been a contract that required the college to name the chapel for Governor Mead, but concluded there had been no violation of the "naming" term. Under Vermont law, such a term cannot exist in perpetuity unless the contract explicitly requires it. Because there was no evidence of a perpetual obligation, Middlebury College only needed to use Mead's name for a reasonable amount of time. The court concluded that 100 years is reasonable as a matter of law.

The court later dismissed the remaining claims in response to a second motion for summary judgment.³⁹ The covenant of good faith and fair

38 *Hon. James H. Douglas, Special Administrator of the Estate of John Abner Mead v. The President and Fellows of Middlebury College*, Order on First Motion for Summary Judgment, Case No. 23-CV-01214 (Ver. Sup. Ct. Oct. 23, 2024) (available at [https://www.vtcourts.gov/sites/default/files/documents/douglas v middlebury college mello 23-cv-1214 10-3-24.pdf](https://www.vtcourts.gov/sites/default/files/documents/douglas%20v%20middlebury%20college%20mello%2023-cv-1214%2010-3-24.pdf)).

39 *Hon. James H. Douglas, Special Administrator of the Estate of John Abner Mead v. The President and Fellows of Middlebury College*, Order on Second Motion for Summary Judgment, Case No. 23-CV-01214 (Ver. Sup. Ct. Apr. 9, 2025) (available at <https://cases.justia.com/vermont/superior-court/2025-23-cv-1214.pdf?ts=1744297948>).

dealing, it said, is a promise “not to do anything to undermine or destroy the other’s rights to receive the benefits of the agreement.” That is, the covenant only addresses conduct that derogates from existing contractual obligations. Because Douglas wasn’t able to identify any such conduct, the claim failed.

The equitable claims were similarly unsuccessful. The promissory estoppel claim failed because the doctrine only applies where there is no contract, the promise in question is gratuitous, and the plaintiff relied on it. But the court had already concluded that Middlebury College had not agreed to a perpetual naming right, so

there was no promise upon which Governor Mead could have relied. The equitable estoppel claim failed for similar reasons. Equitable estoppel, the court explained, is generally available when there has been an “affirmative misrepresentation of a present fact or state of facts and detrimental reliance by another thereon.” Douglas identified no such misrepresentation.

Although this case was not successful, it is significant that the problem was a lack of evidence as opposed to a conclusion that there were no legally enforceable interests at issue, or that the estate lacked standing to pursue them.

2. CASES DISMISSED FOR LACK OF STANDING OR A NONVIALE CAUSE OF ACTION

CALIFORNIA

The Fellowship of Narcotics Anonymous

California’s law of standing differentiates between revocable and irrevocable trusts, as the unusual facts of this case illustrate. A settlor’s retained power to revoke the former constitutes a legal interest sufficient to create standing. The relationship between settlors and their irrevocable trusts, however, is no different from members of the general public—thus, they have no standing unless they can demonstrate a “special interest” in the targeted trust.

The Fellowship of Narcotics Anonymous (the “Fellowship”) uses an adaptation of the Alcoholics Anonymous 12-step program to support recovering drug addicts. The adaptation was written over time by hundreds of anonymous users, and is known as the Basic Text. The Fellowship subsequently created a charitable trust—“The NA Fellowship Intellectual Property

Trust” (the “Trust”)—as a vehicle to own and manage the Basic Text and its other intellectual property. The trust document names “Narcotics Anonymous World Services, Inc.” (“World Services”) as the trustee, and the Fellowship as the beneficiary.⁴⁰

Of particular importance here, the trust document amorphously identifies the settlor as “The Fellowship of Narcotics Anonymous, as given voice by its groups through their regional delegates at the World Service Conference.”⁴¹ The trust document allows the settlor to add, delete, or revise trust properties.

Dissatisfied with the trustee’s management of the Trust, a group calling itself the Autonomous Region of Narcotics Anonymous (“Autonomous Region”) filed a petition claiming World Services had breached the Trust and its fiduciary duties.⁴²

40 The sole criterion for becoming a member of the Fellowship is a desire to stop using narcotics.

41 Fellowship members across the country are organized into local groups called “regions.” Each region sends one delegate to a biennial meeting known as the World Services Conference.

42 *Autonomous Region of Narcotics Anonymous v. Narcotics Anonymous World Servs., Inc.*, 77 Cal. App. 5th 950, 955, 292 Cal. Rptr. 3d 851, 853 (2022).

It claimed standing both as a settlor of a revocable trust, and as an entity with a “special interest.” The court rejected both arguments.

California law provides that, with respect to revocable trusts, the “duties of the trustee are owed to the person holding the power to revoke.”⁴³ That power confers standing on whoever holds it.⁴⁴ The court held that the Autonomous Region does not have standing under this doctrine because it doesn’t fit the trust document’s definition of a settlor. It is the Fellowship as a whole, the court said, not the groups that gave voice to its wishes at the World Service Conference, that holds the power to revoke.

The Autonomous Region’s alternative claim of “special interest” standing, the court said, was a category error. The court described the very practical reasons the doctrine applies only to irrevocable trusts.⁴⁵ “California adopted special standing to solve the problem of providing adequate supervision and enforcement of charitable trusts.” The court explained that “[i]n irrevocable charitable trusts, the stage is set for abuse. The settlor has passed from the scene and no longer can vigilantly attend to trust management.”⁴⁶ With revocable trusts, on the other hand, a “living and competent settlor provides adequate supervision and enforcement of the settlor’s own trust, thus eliminating the problem that prompted the doctrine [of special interest standing].”⁴⁷

Kars 4 Kids, Inc.

Bruce Puterbaugh donated his used Volvo to Kars 4 Kids, Inc., a charitable organization benefiting needy children. He was under the impression that the charity worked equally on behalf of all needy children across the nation. As it turns out, Kars 4 Kids concentrates its efforts in New York and New Jersey.

Puterbaugh filed a lawsuit in California’s Orange County Superior Court, claiming the charity breached the fiduciary duty that arises between donors and the charities who solicit their contributions, as codified by California Business and Professions Code Section 17510.8 (the same statute on which Cohen based her claim against the Kabbalah Centre).⁴⁸

The defendant removed the case to the United States District Court for the Central District, Southern Division. Puterbaugh moved to remand the matter back to state court. In the process of granting the motion, the court noted that the provisions of section 17510.8 impose a charitable trust on any donations a soliciting charity receives.⁴⁹ It then observed that Puterbaugh could not bring an enforcement action under that provision because “a charitable trust may only be enforced by an action brought by the attorney general or an authorized relator.”⁵⁰

43 Cal. Prob. Code § 15800.

44 292 Cal. Rptr. 3d at 856.

45 *Id.* at 860.

46 *Id.* at 863.

47 *Id.* at 860.

48 *Puterbaugh v. Oorah, Inc.*, No. SACV 21-01593-CJC (DFMX), 2024 WL 6847879, at *2 (C.D. Cal. Jan. 31, 2024).

49 *Id.*

50 *Id.*

Hastings College of the Law

This dispute is a curiosity, and does not fit neatly within the contours of an article addressing restricted charitable gifts to nonprofit organizations—mostly because the gift recipient is a government. Nonetheless, it is valuable as an illustration of the lengths to which donors have gone in attempting to protect their philanthropic purposes.

The Hastings College of the Law is the product of an agreement between the California legislature and Serranus Clinton Hastings, a former justice of the California Supreme Court. The legislature embodied that agreement in an 1878 Act mandating that, upon Hastings's contribution of \$100,000 to the state treasury, "S.C. Hastings be authorized to found and establish a Law College, to be forever known and designated as 'Hastings' College of the Law.'"⁵¹ The Act further provided that the school would be governed by an independent board of directors, one seat of which would always be filled by one of Hastings's heirs or representatives.

Hastings's reputation started ebbing in 2017 based on allegations he had played a role in "fomenting violence and atrocities against Native Americans living in what is present-day Mendocino County."⁵² By 2022, sentiment against Hastings was such that the California legislature adopted Assembly Bill 1936 (the "Bill"), which changed the school's name to "College of the Law, San Francisco."

Some of Hastings's descendants, as well as a College alumni association, objected to the change and filed suit against the State and the College. Their complaint claimed that the Bill breached the contract between the State and Hastings, and asked the court to grant specific performance of the contract's terms with respect to the school's name and reserved seat on the board of directors, and to award them damages.⁵³

Claiming a contractual right to prevent repeal or modification of a legislative enactment is a bold move—one that rarely ends well for the plaintiff. The reserved powers doctrine provides that legislatures cannot contract away their sovereign authority.⁵⁴ This derives from the fundamental nature of governments, one aspect of which is that "[t]he legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach."⁵⁵ Consequently, there can be no cognizable contract to restrict a future legislature's exercise of its constitutional authority.

The California Court of Appeals affirmed the trial court's order dismissing the case and the California Supreme Court chose not to grant review. That is not *quite* the end of the road, however. The plaintiffs filed a certiorari petition with the United States Supreme Court on April 29, 2026. It will be several months before the high court decides whether it wishes to review the case.

51 *Hastings Coll. Conservation Comm. v. State of California*, 115 Cal. App. 5th 272, 278 (2025), *reh'g denied* (Nov. 7, 2025), *review denied* (Jan. 28, 2026), *petition for certiorari docketed* (Apr. 29, 2026) (quoting Stats. 1878, ch. 351, § 1, p. 533).

52 *Id.*

53 The complaint also alleged causes of action that relate only to the enforceability of legislative acts, such as claims based on the contract clauses of the California and United States Constitutions, the prohibitions against bills of attainder and ex post facto laws, and the California Constitution's provision regarding collegiate freedom. These claims are categorically beyond the scope of this article, and so will not be addressed further.

54 *Hastings*, at 281 (citing *United States v. Winstar Corp.* 518 U.S. 839, 888 (1996)).

55 *Id.* (internal marks omitted).

COLORADO

University of Colorado Foundation

Clarence Herbst is a University of Colorado graduate and a donor to the University of Colorado Foundation (“Foundation”), the purpose of which is to support the University’s philanthropic endeavors. Herbst and his fellow plaintiffs filed a lawsuit against the Foundation because they believed its investment returns and asset management were not up to snuff. They claimed the Foundation violated Colorado’s version of the Uniform Prudent Management of Institutional Funds Act (the “Act”), and breached its fiduciary duties. Although the case is not really about enforcing donor intent, it is nonetheless instructive because of what the court had to say about donor standing in general.

The court introduced its standing analysis by acknowledging that standing, as a general matter, is derivative of the substantive claims asserted by the plaintiffs. That is, the court looks to the substantive law governing the asserted claims to determine who has authority to bring them to court: “Colorado courts frequently consider the law applicable to the claims at issue when determining standing to assert those claims.”⁵⁶

Here, the substantive law in question is that of charitable trusts in light of the Act. The court’s opinion does not reflect what arguments Herbst made, but its analysis focused exclusively on whether he would have standing as a beneficiary of a charitable trust. With respect to such trusts, the court said, “the beneficiary is the unspecified, indefinite general public to whom the social and economic advantages of the trust accrue.”⁵⁷ Herbst, under this analysis, is—even though a donor—just a member of the general

public, so the common law rule that “only the attorney general has standing to protect the public interest in a trust” applies because the Act does not disturb that rule.⁵⁸

The court also addressed the “special interest” exception to the attorney general’s exclusive authority to enforce charitable trusts. “Parties with special interests in the benefits of a charitable trust,” the court observed, “have been accorded standing to enforce the trust, but only when they are entitled to benefits different from those to which members of the public are entitled generally.”⁵⁹ According to the court, a person’s “mere status” as a donor “confers upon him no special status vis-a-vis the trust” unless he is “seeking to enforce some condition attendant to his donation (with an express reservation of the right to do so) or claiming to have been misled into making the donation.”⁶⁰ With no expressly retained reservation of right to enforce a condition, and no claim of fraud, Herbst could not maintain his suit.

Interestingly, even though the court said its analysis depended on the law of charitable trusts, it did not refer to Colorado’s version of the Uniform Trust Code, which provides that “[t]he settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.”⁶¹ Herbst, under a charitable trust analysis, was the settlor (with respect to his gift) and so should have had standing. Many jurists, however, rely exclusively on the parties to bring relevant law to their attention, so this could have been an oversight on Herbst’s part.

⁵⁶ *Herbst v. Univ. of Colorado Found.*, 2022 COA 38, ¶ 8, 513 P.3d 388, 391 (Colo. App. 2022).

⁵⁷ *Id.* at 392 (quoting *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1125 (Colo. 2007)) (internal marks omitted).

⁵⁸ *Id.*

⁵⁹ *Id.* at 393 (quoting *Anderson v. Suthers*, 2013 COA 148, ¶ 19, 338 P.3d 384, 388 (Colo. App. 2013)) (internal marks omitted).

⁶⁰ *Id.*

⁶¹ Colo. Rev. Stat. Ann. § 15-5-405(3) (effective January 1, 2019).

CONNECTICUT

Our Lady of Mercy School

Fred H. Rettich wanted to make sure there would always be a Catholic school that the children of Madison, Connecticut could attend. To that end, his will left the residue of his estate to Our Lady of Mercy School (the “School”). When he passed in 2013, his executrix (Maria J. *Derblom*) probated the estate and duly sent a check comprising the residual (a sum in excess of \$4 million) to the School. Two years later, the Archdiocese of Hartford, which controlled the donated funds, closed the School.

Derblom, in her capacity as the executrix of Rettich’s estate, filed a petition asking the court to either return the funds to the estate, or transfer them to Our Lady of Mercy School of Madison, Inc. (“OLM”), a nonprofit whose purpose was to start a new Catholic school in Madison.⁶² Specifically, the complaint alleged that the bequest created a constructive trust that imposed on the Archdiocese an equitable duty to use the funds as described in the will.⁶³ It also asserted that the estate had “a legal and/or equitable interest in the endowment made to [the School], by reason of danger of loss or uncertainty.”⁶⁴ The defendant’s response argued that the plaintiffs lacked standing to bring an enforcement action with respect to a completed charitable gift.

The court agreed, and described why the estate lacked standing regardless of whether the bequest was treated as a charitable trust or a gift. The first sentence of its opinion foreshadowed the ultimate result: “The sole issue in this certified appeal is whether the plaintiffs, who are the putative beneficiaries of a testamentary

bequest, have standing under the special interest exception to the common-law rule, codified at General Statutes § 3-125, that the attorney general has exclusive authority to enforce the terms of a charitable gift.”⁶⁵

The court’s statement of the issue contained an unexplored assumption that inexorably drove the substance of its analysis. To wit, that in empowering the attorney general to “represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes,”⁶⁶ the cited statute made his authority exclusive (subject only to the special interest exception)—a question to which the statute does not speak.

Standing with respect to charitable trusts, the court said, starts with the recognition that title to donated assets rests absolutely with the trustee, and are subject only to the duties imposed by the trust instrument and the law of charitable trusts.⁶⁷ Therefore, because standing is derivative of rights and obligations, the class of people with a relationship to the trust sufficient to support standing is very limited. “[A] charitable trust by its very nature creates a narrowly defined class of persons who have a special interest in its enforcement or modification, namely, the trustees who have a legal obligation to administer the trust.”⁶⁸ The only others who may enforce the trust’s terms (beside the attorney general), are specifically identified beneficiaries: “In addition, if the instrument creating the trust identifies specific persons as beneficiaries, members of that class of persons may have a special interest in the enforcement

62 *Derblom v. Archdiocese of Hartford*, 346 Conn. 333, 289 A.3d 1187 (2023). There were several other plaintiffs, but only the executrix’s claims are relevant here.

63 *Id.* 289 A.3d at 1192.

64 *Id.*

65 *Id.*

66 Conn. Gen. Stat. § 3-125.

67 289 A.3d at 1199.

68 *Id.*

of the trust sufficient to confer standing.”⁶⁹ Donors, however, are categorically excluded from enforcing the trust’s terms. “[A] donor who attaches conditions to his gift has a right to have his intention enforced. The donor’s right, however, is enforceable only at the instance of the attorney general and the donor himself has no standing to enforce the terms of his gift when he has not retained a specific right to control the property, such as a right of reverter, after relinquishing physical possession of it.”⁷⁰

The estate fared no better under a charitable gift analysis because the court insisted it must

shoehorn itself into the “beneficiary” category as a precondition to standing. “[W]hen a donor has made a gift to a charitable organization that is unrestricted by any contractual terms or qualifications, the organization is the sole beneficiary of the gift, and the only limitation on its use is that the organization must use it in furtherance of the duties imposed on it by its charter or articles of incorporation.”⁷¹ And even if the gift were accompanied by “terms” or “restrictions,” the court said, standing would depend on the terms or restrictions identifying the estate as a beneficiary.⁷²

MASSACHUSETTS

Norman Rockwell and the Berkshire Museum

Norman Rockwell personally donated what are regarded as two of his finest paintings—“Shuffleton’s Barbershop” and “Shaftsbury Blacksmith Shop”—to the Berkshire Museum (the “Museum”). The legislative act creating the Museum provided that any gift would be “used in conformity with the conditions made by any donor and expressed in writing provided, that such conditions are not inconsistent with the provisions of this act.”⁷³ Rockwell’s sons say their father made his gift upon condition that the artwork would be committed to the viewing benefit of the Berkshire community.

The business community in Berkshire, Massachusetts has declined since the 1970s, resulting in less philanthropic and membership support for the Museum. It operated at a deficit for several years, and those involved in its management acknowledged its future was “bleak.”⁷⁴ It finally made the decision to sell the Rockwell

paintings, valued in the millions of dollars, to provide general operating funds.

Rockwell’s three sons—Thomas, Jarvis, and Peter Rockwell—objected, and filed a lawsuit to prevent the sale. Their complaint alleged the Museum breached the trust created by the gift, as well as its fiduciary duties. In response, the defendants contested their standing to bring the case.

The Rockwells asserted “that their unique right to enforce promises made to their father gives them standing in this case.”⁷⁵ The court gave two reasons for disagreeing. The first was that the sons were not representing the estate or the trust: “[T]he law does not allow [the sons] as heirs or beneficiaries to enforce their father’s contracts; that responsibility generally belongs to Norman Rockwell’s estate or his trust, which are not parties to this litigation.”⁷⁶

69 *Id.*

70 *Id.* at 1194.

71 *Id.* at 1200.

72 *Id.*

73 *Rockwell v. Trs. of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, at *1 (Mass. Super. Nov. 7, 2017) (quoting Mass. St. 1932, c.134, § 3).

74 *Id.* at *2.

75 *Id.* at *5.

76 *Id.*

The second reason addressed the broader concept of the law of standing as it relates to enforcing a donor's intent. "[E]ven if a legal representative of Norman Rockwell's interests had joined this case," the court said,

the complaint would still only be seeking "to enforce Rockwell's intent" with respect to the paintings.⁷⁷ That interest, the court concluded, is "no different from the public right that may be enforced only by the attorney general."⁷⁸

The Richard E. Howard Trust

There is supposed to be a "Rick Howard Room" at the Joshua Nickerson Archives Building (the "Nickerson Building") in Dennis, Massachusetts. Notwithstanding the provisions of the Richard E. Howard Trust, however, it still doesn't exist. This case arose out of a nonprofit organization's effort to substitute itself in place of the Trust's named beneficiary for the purpose of modifying a gift restriction. The resulting case did not implicate a donor's (or the donor representative's) effort to enforce a gift's restrictions, but it illustrates what Massachusetts law has to say about who *does* have such enforcement authority.

Howard was a 20th-century artist who "became well known for his clean, spare style of patriotic flag paintings, as well as paintings of local [Cape Cod] landmarks and amusing depictions of Victorian family life."⁷⁹ His trust provided that, upon his death, the trust's income (exclusive of a fixed amount to fund a scholarship) would accrue until there was enough to build the Rick Howard Room, a space that would be dedicated to displaying his paintings and serving as the archives of the Cape Playhouse. When sufficient income accumulates, the trust requires that a payment be made to the Raymond Moore Foundation, Inc. (the nonprofit corporation that, at the time, owned the Nickerson Building) for the construction project. Trust income would thereafter be used for equipment, supplies, materials and maintenance.

Several years after Howard's death, the Raymond Moore Foundation ("RMF") created a separate nonprofit organization that came to be known as the Cape Cod Center for the Arts, Inc. ("CCCA"). The RMF transferred several of its assets to the CCCA, which included the Nickerson Building. In addition, it granted CCCA a ninety-nine-year lease of the land on which the building stands.

There is apparently now enough trust income to build the Rick Howard Room. The question is whether the trust should make the construction payment to RMF, as specified in the trust document, or instead to CCCA, as the current owner of the building to which the Rick Howard Room is to be appended. CCCA filed a lawsuit to resolve that question.

In the course of determining whether a nonprofit that hopes to be substituted for a trust's named beneficiary may maintain a *cy pres* lawsuit, the court surveyed what Massachusetts law says, generally, about enforcing or contesting the terms of charitable trusts. It observed that the attorney general has a duty, grounded in both the common law and the state's statutes, to "enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof."⁸⁰ That duty, it observed, is exclusive but for one exception: "[A] plaintiff who asserts an individual interest in the charitable organization distinct from that of

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Cape Cod Museum of Art, <https://www.ccmoa.org/single-post/ric-howard-red-white-and-blue>.

⁸⁰ *Matter of Richard E. Howard Tr.*, 105 Mass. App. Ct. 795, 801, 268 N.E.3d 933, 941 (2025), review granted, 497 Mass. 1104 (2026) (quoting Mass. Gen. Laws ch. 12, § 8 (Due application of charity funds enforced)) (internal marks omitted).

the general public has standing to pursue her individual claims.”⁸¹

Organizations that are strangers to a charitable trust normally do not fall within that exception. “[A]n institution that hopes to be named as the recipient of a distribution by operation of the *cy pres* doctrine does not have an interest different in kind from that of the public generally, which is represented exclusively by the attorney general.”⁸² However, because the CCCA owns the Nickerson Building (to which the Rick Howard Room is to be attached), the

court concluded it had an interest in the disposition of the Trust’s funds that is distinct from the public at large.

The court’s holding as it applies to the CCCA does not *directly* bear on the question under consideration (to wit, whether donors may enforce the terms of their gifts). But it is indirectly instructive insofar as the court’s reasoning was founded on the common law rule that the attorney general’s authority to enforce restrictions on gifts to public charities is exclusive.

MINNESOTA

The Lindmark Endowment for Corporate-Business Ethics Fund

Roger M. Lindmark was a representative in a class action filed against American Express. The case reached a settlement in January 2004, one aspect of which required American Express to pay \$50,000 to Saint John’s University (the “University”). The following month, Lindmark and the University signed a document entitled “The Lindmark Endowment for Corporate-Business Ethics Criteria Statement” (the “Endowment”), which provided that the American Express payment would be used to “fund programs and activities in the field of Corporate-Business Ethics.”⁸³ American Express sent the payment four months later.

Lindmark subsequently represented an individual who had a dispute with a law firm over the settlement of a class-action lawsuit. The dispute over the settlement agreement was itself settled, one aspect of which required the targeted law firm to pay \$250,000 into the Endowment. Lindmark received the payment in 2008, and promptly turned it over to the University.

Two years later, Lindmark and the University amended the endowment to include “a prioritized list of programs and activities for which proceeds from the Endowment could be used,” the first of which was the Lindmark Fellowship in Ethics.⁸⁴ It also contained a provision directing how the funds should be used if it became impossible to implement the specified criteria, and required that Lindmark receive annual reports regarding the Endowment.

Lindmark subsequently became concerned that the University was not properly administering the programs supported by the Endowment. Specifically, he said the University had failed to properly monitor the student fellows in the Lindmark Fellowship in Ethics program. He demanded that the Endowment be dissolved and a bank draft be issued to him personally for the unused funds. The University responded by filing a complaint under Minnesota’s Uniform Prudent Management of Institutional Funds Act (UPMIFA) seeking, among other relief, “an order confirming that its actions in administering the

81 *Matter of Richard E. Howard Tr.*, 268 N.E.3d at 941 (quoting *Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245, 867 N.E.2d 300 (2007), cert. denied, 552 U.S. 1099, 128 S.Ct. 907, 169 L.Ed.2d 729 (2008)).

82 *Id.* at 942 (quoting *First Christian Church v. Brownell*, 332 Mass. 143, 147, 123 N.E.2d 603 (1955)) (internal marks omitted).

83 *Matter of Lindmark Endowment for Corp.-Bus. Ethics Fund*, No. A19-0229, 2019 WL 5546205, at *1 (Minn. Ct. App. Oct. 28, 2019).

84 *Id.*

endowment have been proper, approving the amended criteria statement as the sole governing instrument for the endowment, instructing SJU that it may not pay or transfer assets of the endowment to Lindmark, [and] confirming that Lindmark is not the legal donor of the endowment.”⁸⁵

Lindmark moved to dismiss the University’s petition, arguing that the court lacked jurisdiction because the Endowment was a contract, not a trust, and that the assets in question were not institutional funds subject to Minnesota’s UPMIFA. In response, the University contested Lindmark’s standing. The trial court denied Lindmark’s motion, concluding that “the endowment was a charitable gift, and not a contract; that the endowment was an ‘institutional fund’ governed by UPMIFA; and that only the attorney general had standing to enforce the conditions placed on the endowment.”⁸⁶ Lindmark appealed.

Key to the Minnesota Court of Appeals’ analysis was how it distinguished between the legal elements of contracts and gifts. A contract, it said, “requires communication of a specific and definite offer, acceptance, and consideration.”⁸⁷ Consideration can take many forms, but it’s essential that one party’s offer of consideration acts as an inducement for the counter-party to provide consideration in return. As the court noted, “[c]onsideration is something of value given in return for a performance or promise of performance that is bargained for”⁸⁸ But a gift, the court said, “is a transfer without consideration.”⁸⁹

The Court of Appeals concluded Lindmark couldn’t enforce the terms of the 2010 amendment to the Endowment because there was no evidence the amendments had been induced by any of the contributions. Therefore, there was no consideration; without consideration there could be no contract.

The court also concluded the Endowment was, indeed, an institutional fund. Statutorily, the court said, such a fund exists if it is “held by an institution exclusively for charitable purposes.”⁹⁰ Such a fund does not include “‘program-related assets’ or ‘a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.’”⁹¹ Lindmark said the Endowment funds were program-related assets held for the charitable purpose of supporting the Lindmark Fellowship in Ethics. The court relied on the Uniform Law Commission’s commentary on the UPMIFA for the proposition that the phrase “program-related assets,” as relevant here, refers to only tangible or real assets. Therefore, the court concluded, the Endowment’s funds were subject to the provisions of Minnesota’s UPMIFA.

After deciding the substantive questions of law, the Court of Appeals addressed what should have been the first question: Did Lindmark have the authority to challenge the University’s use of the funds? The court first said the terms of the Endowment impressed on the institutional fund the characteristics of a “conditional charitable gift” (otherwise known as a “restricted charitable gift”). It then said that the principles governing conditional charitable gifts are the same as those governing charitable trusts.⁹² And the law governing charitable trusts gives the

85 *Id.* at *2.

86 *Id.* at *3.

87 *Id.* at *4.

88 *Id.*

89 *Id.*

90 *Id.* at 5 (quoting Minn. Stat. § 309.735(5) (the Minnesota UPMIFA)).

91 *Id.* (quoting Minn. Stat. § 309.735(5)(A), (C)).

92 *Id.* at *8.

attorney general exclusive standing to enforce their terms. Therefore, the court simply applied the transitive principle of equality to finish the analysis: Because “institutional funds” equal “conditional charitable gifts,” which in turn equal

charitable trusts (at least for the purpose of the standing analysis), the attorney general has exclusive authority to enforce the terms governing institutional funds.

NEW HAMPSHIRE

The Dartmouth College Golf Course

Robert T. Keeler *really* loved the golf course at Dartmouth College, so much so that his will committed half of his residuary estate to its improvement and maintenance. The will also provided that, to the extent the golf course was sufficiently upgraded and maintained, excess amounts of the bequest would be distributed to the Robert T. Keeler Foundation (the “Keeler Foundation”). To carry out the will’s instructions, Keeler’s widow and Dartmouth created the “Robert T. Keeler 1936 Maintenance Fund” (the “Keeler Fund”) for the Hanover Country Club at Dartmouth College, and supplied it with \$1.8 million from the estate.

Fifteen years later, Dartmouth decided to close the golf course. Under the provisions of the New Hampshire Uniform Prudent Management of Institutional Funds Act, it filed a petition with the court to modify the Keeler Fund so that the assets could be used to create golf practice areas and practice holes, and otherwise support Dartmouth’s varsity golf programs.

Keeler’s estate was reopened and a fiduciary was appointed to represent its interests (the “Estate”). It moved the court to intervene in Dartmouth’s lawsuit to enforce Keeler’s intended disposition of the Estate’s assets. It said that because Dartmouth closed the golf course, all assets in the Keeler Fund were, in the will’s words, in excess of what was needed for its maintenance and so should be distributed to

the Keeler Foundation. Dartmouth contested the Estate’s standing.

In introducing its analysis of the Estate’s standing, the Supreme Court of New Hampshire noted that “[a] person who seeks to intervene in a case must have a right involved in the trial and his interest must be direct and apparent; such as would suffer if not indeed be sacrificed were the court to deny the privilege.”⁹³ The Estate, perhaps unwisely, argued standing pursuant to what the court called the Blasko test, under which it must establish the following five factors:

- (1) the extraordinary nature of the acts complained of and the remedies sought;
- (2) the presence of bad faith;
- (3) the attorney general's availability and effectiveness;
- (4) the nature of the benefitted class and its relationship to the charity; and
- (5) the social desirability of conferring standing.⁹⁴

Asserting the Blasko argument allowed the court to reframe the standing question as whether the Estate is a trust beneficiary (see factor 4, above), rather than whether it has a legal interest in securing disposition of the

93 In re *Robert T. Keeler Maint. Fund for Hanover Country Club at Dartmouth Coll.*, 176 N.H. 87, 91, 306 A.3d 795, 799 (2023) (quoting *In the Matter of Goodlander & Tamposi*, 161 N.H. 490, 506, 20 A.3d 199 (2011)).

94 *Id.* 306 A.3d at 800.

Keeler Fund as required by the will. With that reframing, the court reiterated “the general common law rule that potential trust beneficiaries, in suits involving charitable trusts, may not bring an action to enforce the terms of such a trust.”⁹⁵ Vesting exclusive power in the attorney general for such enforcement actions is necessary, the court said, because of “the inherent impossibility of establishing a distinct justiciable interest on the part of a member of a large and constantly shifting benefitted class.”⁹⁶ And, as a practical matter, it said it is important to shield “the trust res and trustee from vexatious litigation that would result from recognizing claims by any number of individuals who might benefit incidentally from the trust.”⁹⁷

However, to the extent the Keeler Fund can be accurately characterized as a public charitable trust, the Estate is the settlor, not a beneficiary. So the standing question should have turned on whether the Estate, as the settlor, has an interest in the Dartmouth lawsuit that is direct and apparent, and that would suffer or be sacrificed if it could not participate in the proceedings. Answering that question would have required the court to address the provisions of New Hampshire’s adoption of the Uniform Trust Code, which say that “[t]he settlor of a charitable trust or the director of charitable trusts, among others, may maintain a proceeding to enforce the trust.”⁹⁸

OHIO

Ohio State University College of Law

Michael E. Moritz was a very successful graduate of the Ohio State University College of Law (“OSU”). Pursuant to a written gift agreement, he made a \$30,000,000 donation to OSU for the purpose of funding four endowed chairs at the College of Law, a Merit Scholars Program, a Dean’s Fund for Innovation and Excellence, and student leadership awards. Moritz died in a car accident shortly thereafter.

Several years later, Moritz’s son, Jeffrey Moritz, developed suspicions that OSU was not using his father’s donation in accord with the gift agreement. He applied to the probate court to reopen his father’s estate for the express purpose of taking “certain steps to ensure that the university has fully complied with its obligations under the written agreement.”⁹⁹ Both OSU and the Ohio attorney general formally

objected to Jeffrey’s attempt to reopen the estate. The probate court denied the application and Jeffrey appealed.

The question before the court of appeals was whether Jeffrey had good cause under Ohio law to reopen his father’s estate. That good cause, Jeffrey argued, was to ensure OSU was using his father’s donation in accord with the gift agreement.

The court of appeals ruled that there were two insurmountable hurdles to Jeffrey’s project. First, the donation to OSU was an inter vivos gift—that is, it was made by Moritz to OSU personally while he was alive, not pursuant to a will. As a consequence, reopening the estate would be pointless because the estate would not have authority to address actions Moritz had taken before his death.

⁹⁵ *Id.* at 799 (internal marks omitted).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ N.H. Rev. Stat. Ann. § 564-B:4-405.

⁹⁹ *Matter of Est. of Moritz v. Ohio State Univ.*, 2020-Ohio-5012, ¶ 6, 2020 WL 6193955.

Second, and most significant to the subject of this article, the court of appeals said “[t]he Ohio AG has exclusive authority pursuant to R.C. 109.24 to enforce the terms of charitable trusts.”¹⁰⁰ Therefore, it concluded, “the Ohio AG has exclusive authority to enforce the terms of the Gift Agreement.”¹⁰¹ The attorney general’s authority under the referenced statute is not, as a textual matter, “exclusive” as the court of appeals claimed.¹⁰² But beyond that, the

court of appeal’s statement flatly contradicts controlling law. Ohio’s adoption of the Uniform Trust Code included a provision granting standing to settlors who wish to enforce their trusts’ terms: “The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.”¹⁰³ This provision would not likely have saved Jeffrey’s attempt to protect his father’s donation, however, because Moritz, not Jeffrey, was the settlor.

Ohio Chapter of the Arthritis Foundation

The Ohio Chapter of the national Arthritis Foundation conducted a capital campaign to support construction of a facility that would serve those stricken with arthritis. Normally, part of the funds raised in such campaigns would go to the national organization, but the Ohio Chapter obtained a waiver of the requirement, which allowed all of the raised funds to be committed to construction of the new facility. The campaign was successful and the new building, named the “Ridge Mill Drive facility,” opened in 1994.

Seventeen years later, the Ohio Chapter merged with the Great Lakes Region chapter and thereafter ceased to exist. Pursuant to the Ohio Chapter’s bylaws (the “Bylaws”), upon dissolution of the chapter its assets would be transferred to the national organization to be used for the benefit of those in the Ohio Chapter’s area. The merger, however, transferred the assets, including the Ridge Mill Drive facility, to the Great Lakes Region chapter. The Great Lakes Region chapter itself subsequently

dissolved, transferring its assets to the national organization. The Arthritis Foundation sold the Ridge Mill Drive facility in 2021.

Thomas Kromer, a former director of the Ohio Chapter, filed suit in an attempt to enforce the Bylaws’ requirement that the Ohio Chapter’s assets be used for the benefit of Ohioans. The complaint sought a declaration that the funds from the sale of the Ridge Mill Drive facility constituted restricted-use assets that could only be used according to the terms of the Bylaws. The trial court granted the Ohio attorney general’s motion to dismiss the complaint, ruling that Mr. Kromer lacked standing. Mr. Kromer appealed.

This case is notable for its separate consideration of “standing” and “capacity” with respect to who may enforce restrictions on charitable gifts. Standing, the court said, exists when the plaintiff establishes “(1) an injury that is (2) fairly traceable to the defendant’s unlawful conduct, and (3) likely to be redressed by the requested

¹⁰⁰ *Id.* at ¶ 19.

¹⁰¹ *Id.* at ¶ 20.

¹⁰² Applying some energetic interpretive effort to parts of the statute the court did not address, one could make a plausible argument that the attorney general’s authority is exclusive. Immediately after stating the attorney general’s duties with regard to charitable trusts, the statute says this: “This section is intended to allow the attorney general full discretion concerning the manner in which the action is to be prosecuted, including the authority to settle an action when he considers that advisable.” Ohio Rev. Code § 109.24. The “full discretion” to prosecute or settle the specified actions could be read to imply exclusivity. If other parties could commence such actions (or intervene in them), prosecution or settlement could no longer be pursued at the attorney general’s “full discretion.” But even at that, this would be a strained reading of the statute.

¹⁰³ Ohio Rev. Code § 5804.05(c) (effective January 1, 2007).

relief.”¹⁰⁴ Capacity, on the other hand, “refers to the eligibility of a person to commence an action,” which requires reference to the “substantive law to ascertain whether the party has the right to appear in a court in the first instance.”¹⁰⁵ “A person with capacity,” the court explained, is one who “has the legal qualifications to sue, either as an individual or on behalf of another.”¹⁰⁶

The court said Mr. Kromer lacked capacity to sue for the reason other states deny standing—the attorney general’s authority over charitable trusts. Ohio’s statutes provide that

[t]he attorney general shall institute and prosecute a proper action to enforce the performance of any charitable trust, and to restrain the abuse of it whenever he considers such action advisable or if

directed to do so by the governor, the Supreme Court, the general assembly, or either house of the general assembly. Such action may be brought in his own name, on behalf of the state, or in the name of a beneficiary of the trust.¹⁰⁷

As with the *Moritz* case, above, the court categorically stated that “pursuant to the plain language of R.C. 109.24, only the attorney general may bring suit to enforce a charitable trust.”¹⁰⁸ The quoted statutory provision does not, of course, say the attorney general’s authority is exclusive. Nonetheless, the court concluded “[t]he attorney general, therefore, is the sole person with capacity to bring the instant action.”¹⁰⁹ Axiomatically, then, “Kromer does not have capacity to bring the action.”^{110,111}

PENNSYLVANIA

The Historical Society of Pennsylvania

The Atwater Kent Museum (the “Museum”) is the product of an agreement between the Atwater Kent Foundation and Philadelphia. The city agreed to build a museum on the Foundation’s donated property subject to an indenture of trust (the “Trust”) that required establishment of a board of trustees to govern the Museum and a promise to abide by the conditions attached to any contributions, gifts, donations, legacies, devices or bequests the Museum might receive.

Meanwhile, the Historical Society of Pennsylvania (the “Society”) was amassing an impressive collection of historical artifacts and paintings. The latter included works by Pennsylvanians such as Charles Wilson Peale, as well as portraits of William Penn, Benjamin Franklin, and John Quincy Adams. The historical artifacts included the desk George Washington used in Philadelphia while president.

104 *Kromer v. Arthritis Found., Inc.*, 2025-Ohio-661, ¶ 21, 265 N.E.3d 108, 115 (Ct. App. 2025), *appeal not allowed*, 2025-Ohio-2348, 178 Ohio St. 3d 1516, 262 N.E.3d 426.

105 265 N.E.3d at 115. Most states do not separate “standing” and “capacity” in this fashion; the capacity aspect is generally treated as one element of the standing analysis.

106 *Id.*

107 Ohio Rev. Code § 109.24.

108 *Kromer*, 265 N.E.3d at 113.

109 *Id.* at 115.

110 *Id.* Any effort to legislatively empower donors or settlors to bring enforcement actions in Ohio would do well to consider explicitly conferring “capacity” in addition to “standing” on such parties.

111 A year previously, the Ohio Court of Appeals had decided a case in which a party seeking enforcement of a trust and the attorney general were in very similar postures. But the court dismissed for lack of standing rather than a lack of capacity. *Johnstown v. Smith*, 2024-Ohio-5128, 257 N.E.3d 317, 322 (Ct.App. 2024).

In 2009, the Society agreed to donate its collection to the Museum. The Museum, for its part, promised that if it were ever to sell anything from the collection, it would first seek the Society's advice, and then split the proceeds from any resulting sales.

The Museum eventually found itself in financial straits. Philadelphia, on behalf of the Museum's trustees (the "Trustees"), filed a petition seeking permission to modify the Society's gift agreement so that it could transfer the collection to Drexel University. The Society moved to intervene, offering two reasons it would be a proper party to the lawsuit. First, it asserted its gift was made pursuant to a contract and that, as a contracting party, it had standing to enforce its terms. Alternatively, it argued the Trustees received the collection in trust, which gave it standing as a beneficiary of the Trust pursuant to Pennsylvania's law of trusts. The trial court denied the motion and the Society appealed.

The Commonwealth Court (Pennsylvania's Court of Appeals) affirmed the trial court's conclusion that the Society lacked standing. However, it did so in a manner suggesting that, given the right circumstances, a party to a charitable gift contract might successfully establish standing.

In Pennsylvania, the court said, standing requires a demonstration that a party is "aggrieved."¹¹² A party is "aggrieved" if it has a "substantial, direct, and immediate interest in the outcome of the litigation"—one that is more substantial than everyone's general interest in ensuring that others follow the law, and that is also causally related to the resulting harm.¹¹³

The court said the Society's contract did not

create such an interest under the circumstances presented by this case. "[T]he mere existence of some contractual interest," it opined, "does not confer de facto standing to intervene."¹¹⁴ Standing does not exist unless "the interest may be affected by the outcome of the litigation, i.e., whether it is substantial, direct, and immediate."¹¹⁵ The court said that transferring the collection to Drexel University would not prohibit performance of the 2009 contract, so the Society would not suffer any harm from the transfer. The court's *sotto voce* reasoning indicates the Society *would* be a proper party to a lawsuit seeking enforcement of the 2009 contract's terms if Drexel should decide to sell parts of the collection.

The Society was also unsuccessful establishing standing pursuant to Pennsylvania's version of the Uniform Trust Code. It said the 2009 contract created a charitable trust that made it a beneficiary of the contract's restrictions on subsequent dispositions of the collection. As with all other settlors making this argument, however, it ran afoul of the basic principles governing charitable trusts. "[A] charitable trust does not have beneficiaries in the usual sense," the court said, because "a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large."¹¹⁶ An unnamed beneficiary, the court concluded, has the same interest in enforcement of a trust as does every other member of the community. Such a generalized interest is incapable of conferring standing.

¹¹² *In re Atwater Kent Museum*, 329 A.3d 128, 137 (Pa. Commw. Ct. 2024).

¹¹³ *Id.*

¹¹⁴ *Id.* at 138.

¹¹⁵ *Id.* at 139.

¹¹⁶ *Id.* at 140.

The Society's inability to demonstrate standing under the law of trusts may have been a tactical error, rather than the lack of an existing legal pathway. The Society premised its argument on its self-characterization as a beneficiary of the charitable trust established by the 2009 contract. But if the 2009 contract created a charitable trust, the Society is much more

naturally characterized as the settlor, rather than a beneficiary. This is significant because Pennsylvania statutorily confers standing on settlors to enforce the charitable trusts they create,¹¹⁷ something the court itself acknowledged.¹¹⁸

117 "A proceeding to enforce a charitable trust may be brought by the settlor during the settlor's lifetime or at any time by the Attorney General, [or] a charitable organization expressly named in the terms of the trust to receive distributions from the trust" PA ST 20 Pa.C.S.A. § 7735(c).

118 "Since a charitable trust typically lacks ascertainable beneficiaries, the Act defines who may enforce such a trust. *Id.* § 7735(c) (listing the settlor, AG, and 'a charitable organization expressly named in the terms of the trust to receive distributions from the trust or any other person who has standing to do so')." 329 A.3d at 140.



Litigation over the last ten years confirms that protecting donor intent is still a secondary consideration in the laws that govern restricted charitable gifts. Success is dependent on the

form of the gift, structure of the charity, and a court's willingness to create dubious theories to vindicate the donor's interest.¹¹⁹

B. LEGISLATION

Attempts to protect donor intent through litigative innovation have produced only a mixed bag of results. But legislatures across the country agree a healthy philanthropic culture requires a high degree of confidence that a donor's generosity will be put to only the intended purposes. This has manifested in two waves of legislative activity. The first involved the widespread adoption of legislation requiring nonprofit organizations to honor a donor's intent, at least in some circumstances, such as in the context of charitable trusts and institutional funds.¹²⁰

Most often, this wave took the form of local adaptations of the Uniform Trust Code and the Uniform Prudent Management of Institutional Funds Act. But as the litigative record demonstrates, those notional protections often foundered for lack of an effective pathway for enforcement actions.

The second legislative wave, which is underway now, aims to complete the project by addressing donor intent along two axes. The first is to extend protection for donor restrictions to *all*

charitable gift forms, regardless of the legal structures used to convey or hold the gift. The command to honor a donor's intent, however, has little real-world value unless there is an effective means of enforcing it when controversies arise. The modern legislative movement's most significant work, therefore, occurs along the second axis: Nominating the donor (or the donor's designee) as one who has standing to vindicate the state's interest in enforcing the terms of restricted charitable gifts.

The most common (though not exclusive) vehicle legislatures are using to pursue these objectives is the Safeguarding Endowment Gifts Act.¹²¹ Others include amendments to a state's already-existing version of the UPMIFA, or additions to state statutes controlling domestic nonprofit corporations. This section will first discuss the model SEGA and how it has been implemented, followed by an accounting of the alternative approaches states have taken to protecting donor intent within the last decade.

119 The litigation addressed in this part does not comprise an exhaustive compilation of cases addressing donor intent. There are many cases that have received a great deal of press coverage, but very little judicial treatment—either because the cases settled, neither party appealed the trial court's decisions (which are not always reflected in written opinions), or the opinions are not available in commercial databases. But it is a complete treatment of cases that have resulted in publicly accessible judicial opinions. Additionally, the article does not treat *cy pres* cases in which no party sought to enforce a donor's intent. Such cases consider only whether a gift restriction should be modified or eliminated because of changed conditions; they do not address the predicate question of whether gift restrictions should be enforced or by whom. Finally, the article does not address donor-advised funds, which implicate a number of issues not germane to the present issue.

120 The first wave of legislation took place prior to the period covered by this article, and so will not be substantively addressed here.

121 SEGA § 4(A). To ensure maximum compatibility with existing statutory obligations, this provision allows a charitable organization to disregard a donor's intent only when "specifically required or authorized by federal or state law." *Id.*

1. The Safeguarding Endowment Gifts Act

The SEGA's substantive protection of restricted charitable gifts is elegantly simple. It provides that "no charitable organization that accepts a contribution pursuant to a written donor-imposed restriction may violate the terms of that restriction without potential penalty."¹²² The key to its comprehensive applicability lies in how it defines its terms. The SEGA's definition of "charitable organization," for instance, sweeps broadly enough to make virtually any entity qualifying for tax exemption under § 501(c)(3) of the Internal Revenue Code subject to its provisions.¹²³ The "donor-imposed restriction" is a similarly broad concept. It need not be a recitation of a specific technical formulation, but can be "any written statement within an endowment agreement that specifies obligations on the management or purpose of the endowment fund."¹²⁴ Further, it protects contributions regardless of the form they take, whether "real property, personal property or money, cryptocurrency, stocks, bonds or any other asset or financial instrument."¹²⁵ And when circumstances arise that make compliance with a gift restriction impossible, the SEGA still maximizes protection for the donor's intent. Should such an occurrence come to pass, the charitable organization must notify the donor of its inability to comply, and offer an alternative disposition of the contributions that most closely comport with the donor's expressed intent.¹²⁶ Together, these terms eliminate the substantive coverage gaps that remained after the first wave of donor-intent legislation.

As important as these mandates are, the SEGA's most important work lies in how it creates a pathway linking nominal protections with real-world outcomes. Courts routinely turn aside donors' attempts to enforce their gift restrictions on the basis that they have no "standing"—that is, under existing legal theories donors are as much strangers to their completed gifts as are the rest of the general public. Without a specific, legally-recognized interest to protect, they can't access the courthouse. The SEGA remedies that deficiency by giving donors and their representatives the standing necessary to vindicate the public's interest in enforcing charitable gift restrictions: "If a charitable organization violates a donor-imposed restriction contained in an endowment agreement, the donor, or that person's legal representative ... may file a complaint ... for breach of such agreement."¹²⁷ Here, too, the SEGA prioritizes comprehensive coverage over technicalities. A donor may pursue an enforcement action "regardless of whether the agreement expressly reserves a right to sue or enforce..."¹²⁸ And the authority to bring enforcement actions is durable, which is important because history teaches that violations of gift restrictions frequently occur *after* the donor has passed away. So the SEGA defines "legal representative" as

the administrator or executor of a person's estate; a surviving spouse if a court judgment has settled the accounts of the estate; or a person designated in

122 SEGA § 4(A). To ensure maximum compatibility with existing statutory obligations, this provision allows a charitable organization to disregard a donor's intent only when "specifically required or authorized by federal or state law." *Id.*

123 SEGA § 3(A) ("Charitable organization" means an organization organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, educational, or other specified purposes and that is tax exempt from federal income tax as an entity described in Internal Revenue Code Section 501(c)(3).").

124 *Id.* at § 3(F) (Donor-imposed restriction).

125 *Id.* at § 3(H) (Property).

126 *Id.* at § 4(C) ("In the event a charitable organization is unable to fulfill a term in an endowment agreement, the donor or that person's legal representative shall be notified thirty (30) days in advance and offered an alternative solution that closely matches the initial term in the endowment agreement.").

127 *Id.* at § 4(B).

128 *Id.*

an endowment agreement, whether or not born at the time of such designation, to act in place of a party to the agreement for all matters expressed in the agreement and all of the actions it contemplates, including without limitation, interpreting, performing, and enforcing the agreement and defending its validity.¹²⁹

The SEGA recognizes, however, that litigation is only the second best method of resolving disputes over the use of charitable gifts. A donor who believes a charitable organization has violated a gift restriction must provide notice at least 90 days in advance of filing an enforcement action. The lacuna provides an opportunity for informal resolution of the dispute.¹³⁰

The remedies provided by the SEGA are open-ended and flexible, but also reinforce the principle that donor enforcement actions have their foundation in the public's interest in enforcing gift restrictions rather than an interest personal to the donor. Thus, for instance, the SEGA provides that “[i]f the court determines that a charitable organization violated a donor-imposed restriction in an endowment agreement, the court may order one or more remedies consistent with the charitable purposes expressed in the endowment agreement.”¹³¹ However, the donor may not seek “a judgment awarding damages to the plaintiff,”¹³² nor may the court “order the return of donated

funds to the donor or the donor's legal representative or estate.”¹³³

Finally, the SEGA's provisions protecting donor intent and creating a robust enforcement framework are intentionally designed so that they do not otherwise modify a state's existing statutory provisions or common law principles. So, for example, a donor's standing to bring an enforcement action is not exclusive of the attorney general's historical role in bringing such lawsuits.¹³⁴ Nor does it affect a court's authority to adjudicate an equitable *cy pres* action.¹³⁵ And charitable organizations may still seek modifications to gift restrictions under a local version of the UPMIFA (so long as it is consistent with the endowment agreement).¹³⁶

The SEGA is, of course, a model—states can and do customize it to meet their own particular interests and needs. Kansas adopted its version in 2023,¹³⁷ and although it closely followed the SEGA's terms, it contains three notable variations. First, it chose to make its terms applicable only to charitable organizations that have their principal offices in Kansas.¹³⁸ As a result, Kansas donors can take advantage of the SEGA's protection only when they contribute to either a Kansas-based charitable organization or a charitable organization located in one of the three other states (so far) that have adopted the SEGA. This is significant because, under certain circumstances, an out-of-state entity's intentional engagement with a Kansan can be sufficient to invoke Kansas's long-arm

129 *Id.* at § 3(G).

130 *Id.* at § 4(B).

131 *Id.* at § 4(E).

132 *Id.* at § 4(B).

133 *Id.* at § 4(E).

134 “Nothing in this act affects the authority of the attorney general to enforce any restriction in an endowment agreement” *Id.* at § 4(F).

135 *Id.* (“Nothing in this act ... limits the application of the judicial power of *cy pres*”).

136 *Id.* (“Nothing in this act ... alters the right of an institution to modify a restriction on the management, investment, purpose or use of an endowment fund in a manner permitted by the endowment agreement and by [the state's] Uniform Prudent Management of Institutional Funds Act.”).

137 Kan. Stat. § 58-3621, et seq. Kansas and Georgia adopted their versions of the SEGA under its prior cognomen—the Donor Intent Protection Act. See *id.*; Ga. Code § 14-3-190.

138 “‘Charitable organization’ means an organization organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, educational or other specified purposes and that is exempt from federal income taxation as an entity described in section 501(c)(3) of the federal internal revenue code and maintains its principal office in Kansas.” Kan. Stat. § 58-3622(a) (emphasis supplied).

jurisdiction over that entity.¹³⁹ Should that occur, the out-of-state charitable organization would be subject to the jurisdiction of Kansas courts. However, by defining “charitable organization” as including only Kansas-based entities, Kansans who donate to charitable organizations located in states that have not yet adopted the SEGA will face the traditional difficulties in establishing standing to enforce their gift restrictions. The second variation in Kansas’s version of the SEGA broadens the definition of what qualifies as a “donor-imposed restriction.” The SEGA provides that those terms must be found in a written “endowment agreement” with the charitable organization. Kansas provides that an enforceable restriction on a charitable gift may also have its source in the charitable organization’s solicitation of the gift.¹⁴⁰ Finally, whereas the model SEGA authorizes remedies for violations of its requirements in general terms, Kansas chose to leave no doubt about the means by which courts could enforce the donor’s restrictions. So, without limiting the scope of remedies anticipated by the SEGA, the Kansas iteration provides:

[T]he court may order any remedy in law or equity that is consistent with and restores, to the extent possible, the donor's intent as expressed by the donor-imposed restrictions and conditions in the endowment agreement, including, but not limited to:

(A) Future compliance with or performance of donor-imposed restrictions or conditions on the use or expenditure

of the gifted endowment property;

(B) restitution or restoration by the charitable organization of property to an endowment fund that has been expended or used by the charitable organization in contravention of donor-imposed restrictions;

(C) an accounting or the imposition of accounting requirements;

(D) restoration or a change to a name required by the donor-imposed restrictions;

(E) measures to preserve the property and value of the endowment fund;

(F) modification or release of a donor-imposed restriction or reformation or dissolution of the endowment agreement as permitted by Kansas law; or

(G) transfer of property from the endowment fund to another charitable organization as directed by the donor, but only if the transfer would not jeopardize or be inconsistent with the tax-exempt status of the original charitable organization.¹⁴¹

Georgia adopted the SEGA in 2024.¹⁴² Like Kansas, Georgia chose to hew closely to the SEGA’s terms. It did, however, define the pool of those who may enforce restrictions on charitable gifts a little differently. Standing under Georgia’s version of the SEGA extends to “the donor,

139 “Submitting to jurisdiction. (f) Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality, does any of the following acts, thereby submits the person and, if an individual, the individual's representative, to the jurisdiction of the courts of this state for any claim for relief arising from the act: (A) Transacting any business in this state;... (E) entering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state Kan. Stat. § 60-308(b).

140 Kan. Stat. § 58-3622(c) (“‘Donor-imposed restriction’ means a written statement within an endowment agreement or *institutional solicitation* that specifies obligations on the management or purpose of the property gifted by the donor” (Emphasis supplied)).

141 Kan. Stat. § 58-3623(c)(1).

142 Ga. Code Ann. § 14-3-190, et seq.

that donor's lineal descendants, or the donor's legal representative.”¹⁴³ The lineal descendants comprise “a donor’s children, grandchildren, or great-grandchildren.”¹⁴⁴

Kentucky adopted the SEGA in 2024,¹⁴⁵ and Montana did the same in 2025.¹⁴⁶ Both states included all material terms of the SEGA.

Oklahoma is currently considering the SEGA. The Oklahoma Senate adopted 2025 S.B. 844,

which contains all material aspects of the SEGA, on March 26, 2026.¹⁴⁷ The bill is now awaiting action in the Oklahoma House of Representatives. In recognition of the public’s interest in the enforcement of charitable gift restrictions, the bill (as currently written) requires that the donor’s pre-litigation notice to the charitable organization must also go to the state’s attorney general.¹⁴⁸

2. Other Statutory Developments

This second wave of legislation designed to address donor restrictions on charitable gifts is just getting under way. And although the SEGA is clearly the vehicle of choice in this movement, a few states have opted for alternative measures. Within the last ten years, two states have taken their own paths—with mixed results.

Pennsylvania has advanced the cause of enforcing donor intent, albeit not in the comprehensive and fully integrated manner reflected by the SEGA. As far back as 2006, Pennsylvanian donors had standing pursuant to their legislature’s adoption of the Uniform Trust Code. “A proceeding to enforce a charitable trust may be brought by the settlor during the settlor’s lifetime or at any time by the attorney general ...”¹⁴⁹ But that was just in the context of charitable trusts. In 2020, the legislature returned to the subject of donor standing, but this time in the context of all nonprofit corporations. The manner in which it approached the subject, however, was a little convoluted. Pennsylvania

nonprofit corporations were already under an obligation to use charitable contributions only for the purposes for which they were given.¹⁵⁰ The legislature apparently became concerned that this mandate would preclude donors and charitable organizations from subsequently agreeing to modify the gifts’ permissible uses. So in 2020, it added a “Nonjudicial Settlement Agreement” section to the Nonprofit Corporations chapter, which provides that “if the donor placed restrictions on the use or management of property transferred to a nonprofit corporation, the donor, together with the nonprofit corporation holding the property, may enter into a binding nonjudicial settlement agreement with respect to any matter involving the property, including a restriction.”¹⁵¹ Tucked away at the end of this new “Nonjudicial Settlement Agreement” section, the legislature tacked on a provision granting donors standing to bring enforcement actions against nonprofit corporations that violate gift restrictions. “A proceeding commenced to enforce a gift instrument related

143 *Id.* at § 14-3-192(b).

144 *Id.* at §14-3-191(8).

145 Ky. Rev. Stat. § 273.155.

146 Mont. Code § 72-30-301, et seq.

147 Okla. 2025 S.B. 844 (available at <https://www.billtrack50.com/billdetail/1786242>).

148 *Id.* at § 3(B)(1).

149 PA ST 20 Pa.C.S.A. § 7735(c).

150 “Property committed to charitable purposes shall not ... be diverted from the objects to which it was donated, granted or devised, unless and until the board of directors or other body obtains from the court an order ... specifying the disposition of the property.” PA ST 15 Pa.C.S.A. § 5547.

151 PA ST 15 Pa.C.S.A. § 5548.1(1).

to assets held by a nonprofit corporation for a charitable purpose, whether or not subject to a nonjudicial settlement agreement, may be brought by the donor during the donor's lifetime or at any time by the Office of attorney general”¹⁵² Nominating the donor as someone who may vindicate the public's interest in enforcing gift restrictions is an important development, but the effort unnecessarily hobbled itself by not allowing for appointment of a designee to serve in that role after the donor's death. The need to enforce restrictions on charitable gifts doesn't end with the donor's death, so neither should the mechanism by which to enforce them.

Washington state is no stranger to legislation addressing the handling of charitable gifts. Its legislature adopted a version of the UPMIFA in 2009,¹⁵³ and a Charitable Trusts chapter in 2010.¹⁵⁴ In 2022, the legislature returned to the subject, this time focusing on gifts to nonprofit corporations. Under the heading “Gift Restrictions,” it added a series of provisions to govern gifts to nonprofit corporations that do not fall under the purview of the Charitable Trusts chapter.¹⁵⁵ Its terms recognize that such gifts, even when subject to restrictions on their use, transfer all of the donor's ownership rights: “Giving a gift to a nonprofit corporation, including a charitable corporation, that is: (a) Accepted by the corporation; (b) not in trust; and (c) subject to material restrictions or requirements contained in a gift instrument transfers complete ownership to the nonprofit corporation.”¹⁵⁶ The restrictions are enforceable because, as the provision says, “[t]he nonprofit

corporation is bound by the material restrictions or requirements contained in the gift instrument.”¹⁵⁷ However, the “Gift Restrictions” provisions grant standing to bring enforcement actions only to the attorney general.¹⁵⁸ The restrictions may be modified or released under any of three circumstances. First, if the donor consents in writing.¹⁵⁹ Second, unilaterally by the nonprofit corporation if it “determines that a restriction contained in a gift instrument on the management, investment, or purpose of a gift is unlawful, impracticable, impossible to achieve, or wasteful” and the gift is at least 20 years old, its value is less than \$75,000, and the repurposed use of the gift is “consistent with any charitable purposes expressed in the gift instrument.”¹⁶⁰ And third, even when the donor does not approve, a restriction may be released or modified by a court-approved agreement between the nonprofit corporation, the attorney general, and “other interested parties.”¹⁶¹

152 *Id.* at § 5548.1(4).

153 Wash. Rev. Code § 24.55.005, et seq.

154 Wash. Rev. Code § 11.110.010, et seq.

155 A gift to a nonprofit corporation creates an enforceable trust only when “[t]he donor expresses an intent to create a charitable trust” and “[t]he trustee, which may be a charitable corporation, agrees in the form of a record to act as trustee of that trust according to its terms.” Wash. Rev. Code § 24.03A.185(2).

156 Wash. Rev. Code § 24.03A.185(3).

157 *Id.*

158 Wash. Rev. Code § 24.03A.185(5).

159 Wash. Rev. Code § 24.03A.190(1)(a).

160 Wash. Rev. Code § 24.03A.190(2).

161 Wash. Rev. Code § 24.03A.190(1)(c). Donors are statutorily excluded from the class of “interested parties” whose agreement is required for this procedure. Wash. Rev. Code § 24.03A.195(2)(a).

TRUST

Legislative action over the past ten years has moved strongly in favor of granting greater protection to donor intent. This almost certainly represents a growing awareness that philanthropists are increasingly chary of making absolute gifts because they cannot be confident their generosity won't eventually be turned against the very goals, purposes, or principles that motivated the gifts in the first place.

The form the legislation has taken is significant as well. Instead of leaving the enforceability of donor intent subject to variables such as the form the gift takes or the structure of the charity, most of the legislation adopted in this time period provides both substantive and procedural protection without regard to such formalities.¹⁶²

II. NEITHER THE COMMON LAW NOR EQUITY CAN RELIABLY PROTECT DONOR INTENT

There is an inherent tension between traditional common law and equitable principles, on the one hand, and on the other efforts to enforce restrictions on charitable gifts. And to the extent courts faithfully apply the former, the tension is insuperable. Here's why.

The common law comprises "those principles and rules of action, relating to the government

and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity ..."¹⁶³ Those principles and rules grew up around the generally recognized duties and interests that one person owes to another. Over time, we have developed a taxonomy to describe the different categories of those interests—contract, tort, property, et cetera. Upon a failure to perform

¹⁶² It should be noted that this article does not address federal tax regulations that have been promulgated in the last 10 years, all of which are primarily applicable to donor-advised funds (a subject outside the scope of this article).

¹⁶³ "Common law," Black's Law Dictionary 250-51 (5th ed. 1979).

an existing duty, the offended party may have recourse to the court for relief in the form of damages, an injunction, or a great variety of other remedies.

The necessary predicate to the whole structure of the common law and equity—and the Achilles heel in attempts to use those sources of authority to enforce restrictions on charitable gifts—is the existence of some type of continuing duty, interest, or relationship between the contesting parties. That predicate is a problem because a gift is a transfer of property that definitionally terminates all of the donor’s interest in and to the gifted property, and for which the donor receives nothing in return. Consequently, upon completion of a gift, there is no interest or relationship left upon which the common law or equity can operate. This is true without regard to how one classifies the purported common

law or equitable interest. But it is most starkly apparent in the context of contract law and the equitable principles governing charitable trusts.

In what is probably a sign of growing impatience with the state of the law, several courts have been willing to stretch common law and equitable principles out of recognition in a drive to provide donors a forum and remedy when charitable organizations violate the gift restrictions to which they agreed. The common law and equity depend for their operation on the existence of duties, interests, or relationships between the contending parties, whether categorized as contract, trust, or otherwise. As described below, however, judicial impatience has been manifesting as a willingness to countenance enforcement actions even in the absence of cognizable interests.

CONTRACTS AND DONOR INTENT

Although each state is the custodian of its own common law, all states recognize three irreducible elements of a contract: (1) offer, (2) acceptance, and (3) consideration.¹⁶⁴ The third element—consideration—is what separates “contracts” from “gifts.” This is a capacious term, and is meant to encompass the bargained-for exchange of virtually anything of value, including promises.¹⁶⁵ Superficially, this construct may appear to describe a donor’s restricted gift to a charitable organization. The donor offers the gift, the charitable organization accepts it, and the consideration it gives in return is its promise to use the gift as specified in the restriction. Under this theory, in exchange for the gift, the

donor receives an interest in how the gift is used (the promise). Should the charitable organization fail to honor the restriction, the obligation created by the promise to the donor would comprise the personal interest on which the common law would operate. And because the promise was made to the donor, he would have standing to enforce the obligation through a lawsuit.

The only problem with that accounting is it does not describe a gift. A gift is a transfer of property *without* consideration.¹⁶⁶ The defining characteristic of a gift is that the giver receives nothing in return for it. To qualify as a gift, the transfer has to be made with donative intent, which has

164 See, e.g., *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 311, 914 S.E.2d 139, 142 (2025) (“The elements necessary for the formation of any contract are (1) an offer, (2) acceptance of the offer, and (3) the mutual exchange of benefits the law calls ‘consideration.’”); *Runzheimer Int’l, Ltd. v. Friedlen*, 2015 WI 45, ¶ 20, 362 Wis. 2d 100, 112, 862 N.W.2d 879, 885 (“The elements of an enforceable contract are offer, acceptance, and consideration.”).

165 See, e.g., *Aquagen Int’l, Inc. v. Calrae Tr.*, 972 P.2d 411, 413 (Utah 1998) (“Consideration sufficient to support the formation of a contract requires that ‘a performance or a return promise must be bargained for.’” (quoting Restatement (Second) of Contracts, § 71 (1981)).

166 *Ott v. L & J Holdings, LLC*, 275 Va. 182, 188, 654 S.E.2d 902, 905 (2008) (“A gift has been defined as a contract without a consideration. *Spooner v. Hilbish*, 92 Va. 333, 341, 23 S.E. 751, 753 (1895).”); *Myers v. Myers*, 955 N.W.2d 223, 229 (Iowa Ct. App. 2020) (“Unlike a contract, consideration is not an element of a gift.”).

been described as “[a] clear and unmistakable intention on the part of the donor to make a gift of his property”—an intent that “must be inconsistent with any other theory.”¹⁶⁷ So, to qualify as a gift, the transfer must be incapable of satisfying the elements of any other form of property transfer. If it can be described in contractual terms, then it cannot be a gift; if it is a gift, it cannot have the elements of a contract. The two common law theories are mutually exclusive. Consequently, because a gift cannot—by definition—create an interest in the donor, the donor has no basis upon which to demand that the common law compel the recipient to honor the restriction.

Furthermore, blurring the common law distinction between contracts and gifts enough to create standing for donors—as some courts have done—can have serious downstream consequences. Without detracting from the altruistic desire to see their generosity have positive societal effects, philanthropists are presumably also interested in the tax consequences of their charitable gifts. A deduction for such a gift is generally not available unless the donor transfers the entire interest in the property. “The Code generally restricts a taxpayer’s ability to claim a charitable deduction for the donation of an interest in property which consists of less than the taxpayer’s entire interest in such property”¹⁶⁸ And although retaining an “insubstantial” interest in the property will not defeat its deductibility, the test for insubstantiality provides that the retained interest “must not potentially interfere in any manner with the donee’s interest.”¹⁶⁹ If a charitable

organization receives all of a donor’s right, title, and interest in and to donated property, but cannot use that property as it chooses because of a gift restriction, then it naturally follows that the restriction interferes with the donee’s interest in the property. And if that restriction creates an interest in the donor (as opposed to the public) sufficient to support an enforcement action, it is likely the donor’s retained interest would not pass the insubstantiality test for tax purposes.¹⁷⁰

Nevertheless, some donors have risked this perilous path in attempting to protect their charitable contributions from being used for unauthorized purposes. And sometimes, when a court doesn’t carefully analyze a breach of contract claim relating to a donation gone awry, the donor can succeed.

California offers two illustrative cases within the last decade. In *Cohen v. Kabbalah Centre International, Inc.*, the California Court of Appeals reversed the trial court’s summary judgment decision dismissing one of Cohen’s contract claims—but did so without analyzing the elements of such a claim.¹⁷¹ Nor did it appear to recognize the inherent contradiction in allowing a donor to pursue a contract claim to remedy a violation of a gift restriction. Similarly, the plaintiffs in *Hastings Coll. Conservation Comm. v. State of California* opted for a contract claim to enforce a gift restriction. Here, the objective was to restore Serranus Hastings’s name to the law school founded with his gift. The plaintiffs were unsuccessful, but not because the court recognized the incompatibility between contracts and gifts—or even mentioned the

167 *Masonic Temple Craft of Omaha v. Stamm*, 152 Neb. 604, 610–11, 42 N.W.2d 178, 182 (1950).

168 *Mann v. United States*, 364 F. Supp. 3d 553, 561 (D. Md. 2019), aff’d, 984 F.3d 317 (4th Cir. 2021) (quoting *Belk v. Comm’r*, 774 F.3d 221, 224 (4th Cir. 2014) (citing 26 U.S.C. § 170(f)(3)(A)); 26 U.S.C. § 170(f)(3)(A) (“In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer’s entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust.”)).

169 *Stark v. Comm’r*, 86 T.C. 243, 253 (1986).

170 One commentator, however, has suggested a Schrödinger’s cat-style theory of consideration in which a promise to abide by a gift restriction comprises consideration when analyzing the gift as a contract, but does not constitute consideration when determining whether the gift qualifies for a tax deduction. William P. Sullivan, *The Restricted Charitable Gift As Third-Party Beneficiary Contract*, 52 *Real Property, Trust and Estate Law Journal* 79, 104-06 (Spring 2017). The theory has yet to be tested in court.

171 *Cohen*, 35 Cal. App. 5th at 19.

distinction. Instead, the trial court ruled that the plaintiffs hadn't produced the necessary evidence to support a contract claim, and the Court of Appeals affirmed on the grounds that a state legislature cannot contract away its legislative powers. But if the defendant had not been a branch of government, and the plaintiffs had the evidence to support their contract claim, it seems that here, just as in *Cohen*, the Court of Appeals was prepared to let the claim proceed.

In New York, the Appellate Division mixed contract and charitable trust law to provide a path forward for a donor attempting to enforce a gift restriction. In *Ohr Somayach/Joseph Tanenbaum Educ. Ctr. v. Farleigh Int'l Ltd.*, the charitable organization argued the donor had no standing because only the attorney general has authority to enforce the public's interest in charitable gift restrictions.¹⁷² The Appellate Division leaned heavily on *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*,¹⁷³ a landmark New York case governing donor standing, to deny the charitable organization's argument. However, in the process of ruling that the donor had adequately pled a breach of contract claim, it completely neglected to address whether the donor had adequately pled the existence of the contract. This is significant because New York, like all other American jurisdictions, recognizes that contracts require consideration¹⁷⁴ and gifts forbid it.¹⁷⁵ Presumably, if the court had inquired into the contract's *existence*, it would have had

to wrestle with what to do with the question of consideration. And in *Wildlands Tr. of SE. Massachusetts, Inc. v. Cedar Hill Retreat Ctr., Inc.*,¹⁷⁶ a Massachusetts trial court engaged in the same admixture of contract and charitable trust law to conclude a donor had standing to pursue a breach of contract claim to enforce a gift restriction. Only by glossing over the categorical distinction between these two legal theories were these courts able to create an avenue for donors to proceed with contract claims to enforce the terms of a gift.

The different categories proved vexing for a Vermont trial court in the case *Hon. James H. Douglas, Special Administrator of the Estate of John Abner Mead v. The President and Fellows of Middlebury College*.¹⁷⁷ For the nature of gifts, it turned to the Restatement (Third) of Property: "To be a gift, a transfer must be made with donative intent. The requirement of donative intent is the essence of a gift."¹⁷⁸ The donative intent is an expression of gratuitousness—that is, the transfer "must be made without consideration."¹⁷⁹ This, it recognized, is in counterpoint to a contract. The distinction between the two categories is the "intent to transfer an ownership interest gratuitously, as opposed to engaging in an exchange transaction ..."¹⁸⁰ And that's where the court's analysis ended because it opted to punt the issue. It said "the distinction between bargain and gift may be a fine one, depending on the motives manifested

172 483 F. Supp. 3d 195 (S.D.N.Y. 2020).

173 281 A.D.2d 127, 128, 723 N.Y.S.2d 426, 427 (2001).

174 *Evansville Nat. Bank v. Kaufmann*, 93 N.Y. 273, 278 (1883) ("[T]he common-law rule applies to contracts of guaranty as well as to other contracts; that a consideration is necessary to render them valid; and that, unless such consideration be acknowledged by the contract itself, it is still necessary to prove one in order to recover thereon.").

175 "A 'gift' has been defined as a voluntary transfer of property by the owner thereof to another without any consideration or compensation therefor." *In re Polhemus' Est.*, 84 Misc. 332, 145 N.Y.S. 1107, 1109 (Sur. 1914).

176 2016 WL 8200498, at *3 (Mass. Super. Dec. 30, 2016).

177 See Order on Motion to Dismiss, Case No. 23-CV-01214 (Ver. Sup. Ct. Aug. 4, 2023) (available at <https://meadmemorialchapel.com/documents/denial-to-dismiss.pdf>) (hereinafter "Order on Motion to Dismiss"); Order on First Motion for Summary Judgment (Ver. Sup. Ct. Oct. 23, 2024) (available at https://www.vtcourts.gov/sites/default/files/documents/douglas_v_middlebury_college_mello_23-cv-1214_10-3-24.pdf) (hereinafter "Order on First Motion for Summary Judgment"); and Order on Second Motion for Summary Judgment (Ver. Sup. Ct. Apr. 9, 2025) (available at <https://cases.justia.com/vermont/superior-court/2025-23-cv-1214.pdf?ts=1744297948>) (hereinafter "Order on Second Motion for Summary Judgment").

178 Order on Motion to Dismiss at 5 (quoting Restatement (Third) of Property (Wills & Don. Trans.) § 6.1 cmt. b.).

179 *Id.* (quoting Restatement (Third) of Property § 6.1 cmt. e.).

180 Order on First Motion for Summary Judgment at 6 (quoting Restatement (Third) of Property § 6.1 cmt. b.).

by the parties,”¹⁸¹ and so “[t]he issue must be determined on the evidence at trial.”¹⁸² The court later changed its mind, observing that “[i]f there is a contract in this case, all evidence of it would appear in records around the time of its formation over 100 years ago.”¹⁸³ The court dismissed the contract claim for lack of evidence.

The difference between gifts and contracts never arose in the *In re Atwater Kent Museum* case.¹⁸⁴ The donor (the Historical Society of Pennsylvania), had characterized its donation to the Museum as a contract in which it “irrevocably and unconditionally transferred to the Museum all of the Society’s right, title, and interest in and to the Society’s collection” subject to the condition (as relevant here) that the proceeds from the sale of any part of the collection would be split between them.¹⁸⁵ The closest the court came to the question of whether the Society’s transfer was a gift was to note the Museum’s objection that because “the Society ‘irrevocably and unconditionally’ transferred title to its artifacts, ‘it has no standing as a former owner.’”¹⁸⁶ That line of inquiry, however, went no further. The Society was ultimately unsuccessful in its effort to intervene in the case, but only because the Museum’s transfer of the donated collection to Drexel University was not the type of disposition anticipated by the gift agreement. The court’s reasoning, however, suggested it was prepared to recognize a contract-based cause of action to enforce gift restrictions without worrying about the question of consideration.

The Texas Court of Appeals confronted the contract/gift dichotomy much more directly

in *Eshelman v. True the Vote, Inc.*¹⁸⁷ Upon the plaintiff’s claim that he had made a conditional gift, the court quickly recognized the category problem. “The expression ‘conditional gift’ is something of an oxymoron, for ‘to constitute a gift inter vivos there must be a delivery of possession of the subject matter of the gift by the donor to the donee, and a purpose on the part of the donor to vest in the donee, *unconditionally* and immediately, the ownership of the property delivered.’”¹⁸⁸ Such a transaction is less of a gift (in which ownership of the gift passes immediately to the recipient), than a conditional transfer in which the recipient’s ownership doesn’t vest until satisfaction of the condition. “Unlike true gifts,” the court said, “‘conditional gifts,’ ... are ‘premised upon the fulfillment of a condition by the donee’”; “[I]f the donee performs the condition, then the gift becomes the donee’s property; if not, then the gift must be returned.”¹⁸⁹ That conditional vesting makes the transfer look like a contract, not a gift. “Because of the requirement that the donee agree to the conditions placed on the donor’s contribution, ‘conditional gifts’ of personal property are sometimes characterized simply as contracts.”¹⁹⁰ Nevertheless, the court still got mired in the confusion between the categories when it came to the “standing” analysis. Because the recipient was a public charity, the court thought its analysis should be controlled by the law of charitable trusts rather than contract. The attorney general (according to Texas law) is the only one with standing to enforce gift restrictions—unless, that is, “the plaintiff seeks vindication of “some ‘peculiar or individual rights, distinct from those of

181 *Id.* (quoting Restatement (Second) of Contracts § 71 cmt. c).

182 *Id.* at 7.

183 Order on Second Motion for Summary Judgment at 7.

184 329 A.3d 128 (Pa. Commw. Ct. 2024).

185 *Id.* at 132 (cleaned up).

186 *Id.* at 138.

187 655 S.W.3d 493 (Tex. App. 2022).

188 *Id.* at 498 (quoting *Wells v. Sansing*, 151 Tex. 36, 39, 245 S.W.2d 964, 965 (1952) (emphasis supplied by the Court of Appeals)).

189 *Id.* (quoting 38 AM. JUR. 2d Gifts § 68).

190 *Id.* at 498-99.

the public at large.”¹⁹¹ The court dipped back into the realm of contracts to suggest that the condition on the gift might satisfy the “peculiar or individual right” requirement for standing in the public charity context. Ultimately, the court made no definitive ruling because it concluded that Eshelman, as an evidentiary and procedural matter, hadn’t adequately supported his claim. But the court’s reasoning leaves the impression that, had he done so, this conflation of principles would have allowed his claim to proceed.

The Minnesota Court of Appeals rebuffed a donor’s attempt to recast an endowment given to Saint John’s University as a contract. “The formation of a contract,” the court explained, “requires communication of a specific and definite offer, acceptance, and consideration.”¹⁹² The donor said each element was present, and that because “[t]he agreement had specific terms which were accepted by SJU in exchange for the class-action settlement payments [the endowment], the amended criteria statement was a contract supported by valid consideration.”¹⁹³ The court concluded, however, that “an act or forbearance” counts as consideration only if it “*induces* a contractually binding promise.”¹⁹⁴ Because the endowment was made two years before the promise the donor was attempting to impose on the gift, the former could not be said to have induced the latter. Therefore, there was no consideration and no contract. The court’s reasoning, however, was not a categorical rejection of “contract” as a vehicle for enforcing gift restrictions. Perhaps if the endowment and the University’s promise had occurred contemporaneously the court would have inquired into whether a use restriction is capable of transforming a gift into a contract. As it stands, the court rejected the contract theory simply because, as a *factual*

matter, there had been no bargained-for exchange of consideration.

The mutual exclusivity of contracts and gifts is universally accepted, and state trial and appellate courts have all the tools necessary to distinguish between them. So the muddling reflected by the cases discussed above doesn’t reflect a lack of an established body of guidance. It is more likely the consequence of two factors. First, frustration with the common law’s inability to straightforwardly protect donors from the misuse of their generosity has led practitioners to cobble together a chimera out of incongruous elements plucked from gift and contract law. Second, in the high-volume context of trial and intermediate appellate courts—where all of these cases were decided—the opportunity to reflect deeply on what to do with the chimera is limited. So the courts muddle through as best they can either by eliding the distinction or deforming gift and contract law enough to provide some relief.

Underlying these dynamics is the stark reality that the common law simply isn’t structured to handle this creature. The piece that causes courts to short-circuit when they try to accommodate it is the idea of a promise without a counter-party. When a donor makes a restricted gift, the recipient promises to use the gift consistently with the restrictions. But to whom is the promise made? It can’t be the donor because a gift is definitionally something for which the giver receives nothing in return, not even a promise. So the recipient’s promise is, on one end, free-floating—it attaches to no counterparty to the transaction. The donor is left with what the common law contemplates: nothing but the satisfaction that comes from an exercise of generosity (and, to be fair, a tax deduction). The donor no longer has an interest in the property he gifted because gifts

191 *Id.* at 499 (quoting *Lokey v. Tex. Methodist Found.*, 479 S.W.2d 260, 265 (Tex. 1972)).

192 2019 WL 5546205, at *4 (Minn. Ct. App. Oct. 28, 2019).

193 *Id.* (cleaned up).

194 *Id.* (cleaned up, emphasis supplied).

require the transfer of all interests, and he has no promise from the recipient because that would destroy the gift. This is why courts cannot properly entertain his demand that the recipient abide by the gift restriction. The common law operates only on an existing interest—whether a retained interest in the property or an interest in the recipient’s promise. But because both of those are precluded by the nature of a gift, there is no work for the common law to do. The alternative is to recognize the recipient’s promise as attaching to the donor. Such an arrangement would provide something the common law could address, but that would also transform the transaction from a gift into a contract, with all the tax implications that would inexorably follow.

There is reason to believe this muddled water might grow clearer over time. But it will likely come at the expense of donor standing to enforce gift restrictions under a contract theory. Eventually, gift-restriction cases will filter up to state Supreme Courts. The purpose of such courts is to wrestle with the most complicated

of issues in a thorough, rigorous, and complete fashion. The likelihood that the existing gloss on the irreconcilable differences between gifts and contracts will survive is low. Generally speaking, courts of last resort are loathe to introduce tectonic shifts in a state’s jurisprudence. Adjusting common law gift and contract principles enough to enable donors to maintain enforcement actions for restricted charitable gifts would require erasing a centuries-old distinction. Such judicially-engineered transformations are normally anathema. “Stare decisis,” the principle that courts should “stand by things decided,” fosters stability and continuity in the law.¹⁹⁵ Those attributes are key components to the foundational concept of the “rule of law,” upon which ordered liberty depends. In light of those principles, it would be a rare Supreme Court that would discard its prior decisions recognizing the categorical distinctions between gifts and contracts—a distinction so old it was well-developed before the existence of this country was even a speculation.

B. CHARITABLE TRUSTS AND DONOR INTENT

Restricted charitable gifts and charitable trusts are natural complements and provide none of the difficulties that donors encounter when trying to force such a gift into the mold of a common law contract. That does not mean, however, that they will necessarily find it easier to enforce their restrictions through such an arrangement. The difficulty here is more prosaic. Many states still adhere to the doctrine that, except in limited circumstances, attorneys general have exclusive authority to enforce a charitable trust’s obligations.

Restricted charitable gifts operate comfortably in a charitable trust context because, unlike the

fundamental conflict in the gift/contract context, the elements are all designed to accomplish the same thing: Effectuate a complete transfer of property from a donor to a charity in a fashion that impresses on the property an enforceable limitation on its use. This device remedies the enforceability problem caused by the evanescence of the donor/recipient relationship by introducing a new relational aspect. This arrangement creates a *trilateral* gift relationship that is, with respect to two of the parties—and this is critical—enduring. Upon making the gift to the charitable organization, the donor still relinquishes all interest in the property and still

195 “Under the doctrine of stare decisis, this court assumes that its fully considered prior cases are correctly decided. The idea underlying the doctrine is that adherence to precedent leads to stability in the law, which helps ensure predictability, efficiency, and fairness.” *State v. McCarthy*, 369 Or. 129, 143, 501 P.3d 478, 487 (2021).

receives nothing in return. But the transaction gives rise to something new—a fiduciary relationship between the charitable organization and the gift’s intended beneficiary.

Charitable trusts create this trilateral relationship by splitting the legal and equitable titles to the gift. The trustee receives the legal title, but the beneficial title vests in the beneficiaries.¹⁹⁶ Splitting the title in this manner gives rise to the enduring fiduciary relationship between the trustee (who holds the legal title to the gift) and the beneficiaries (who hold the beneficial title to the gift). “A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose”¹⁹⁷

The fiduciary relationship between the trustee and the beneficiary is the ingredient that allows for the enforcement of restrictions imposed on gifts given in trust (the trust *res*). Recall that in the gift/contract context there is a merely bilateral—and temporary—relationship. It arises between the donor and the charitable organization when the former elects to make a gift, and it ends when the transfer is complete. The gift instrument may purport to impress on the property a restriction on its future use. But the lack of any persistent duties or interests between the parties after the transaction is complete make the restrictions more aspirational than enforceable. Giving a gift in trust leaves the donor in the same position with respect to the donated property and the recipient organization. But having given the gift

in trust, the donor has left behind a recognized set of duties and interests between the recipient organization and the intended beneficiary.

Unfortunately, it is the nature of that relationship that frequently stymies donors’ attempts to bring enforcement actions when trustees fail to abide by the restrictions impressed on those gifts. Here, the relationship on which the court’s authority operates is the one between the trustee (the property recipient) and the beneficiary, which in the context of charitable trusts is the public. “The public or the community is the real beneficiary of every charitable trust.”¹⁹⁸ And although it was the donor’s gift that gave rise to the trustee/beneficiary relationship, he is nonetheless a stranger to that relationship, as well as the trust *res*, once the transfer is complete. So, just as in the gift/contract context, the donor has no enduring interest or relationship on which equitable principles can operate. In relation to the trust, the donor is indistinguishable from every other member of the public.¹⁹⁹

This is why the common law rule prohibits donors (with few exceptions) from bringing enforcement actions with respect to restricted charitable gifts given in trust. “Well established principles govern who has standing to enforce the terms of a charitable gift or trust. At common law, 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”²⁰⁰

Standing to enforce the terms of a charitable trust, according to the general common law

196 See, e.g., *Panama Processes, S.A. v. Cities Serv. Co.*, 1990 OK 66, ¶ 35, 796 P.2d 276, 290 (“The Anglo–American trust is a concept of dichotomous title—the trustee has legal title and the beneficiary has equitable title.”).

197 *Newman v. Newman’s Own Found.*, 2023 WL 4197166, at *5 (Conn. Super. Ct. June 22, 2023).

198 *Matter of Richard E. Howard Tr.*, 105 Mass. App. Ct. 795, 800, 268 N.E.3d 933, 940 (2025), review granted, 497 Mass. 1104, 279 N.E.3d 431 (2026) (quoting R. Chester, E. Deleery, N.A. McLaughlin, G.G. Bogert, & G.T. Bogert, *Trusts and Trustees* § 363, at 29 (3d ed. 2018)) (cleaned up); *id.* (“Unlike a private trust, a public charitable trust provides some benefit to the public at large or to an indefinite class of persons who are reasonably described.”).

199 See, e.g., *In re Robert T. Keeler Maint. Fund for Hanover Country Club at Dartmouth Coll.*, 176 N.H. 87, 92, 306 A.3d 795, 799–800 (2023) (“[T]he rationale for vesting exclusive power in a public officer stems from the inherent impossibility of establishing a distinct justiciable interest on the part of a member of a large and constantly shifting benefitted class . . .”).

200 *Derblom v. Archdiocese of Hartford*, 346 Conn. 333, 342, 289 A.3d 1187, 1194 (2023).

rule, belongs only to the attorney general.²⁰¹ As the Colorado Court of Appeals said, “[t]his limitation on standing exists because, in the case of a charitable trust, the beneficiary is the unspecified, indefinite general public to whom the social and economic advantages of the trust accrue.”²⁰² And because the attorney general is—by virtue of the very nature of his position—the custodian of the public’s interest, he is the inevitable and natural choice to vindicate that interest when a trustee goes astray.

The common law rule, however, is not absolute. When a party can establish a “special interest” in the operation of a charitable trust, courts will extend standing to the owner of that interest for the purposes of maintaining an enforcement action.²⁰³ But this has been, traditionally, a narrow category. It includes, most notably, the trust’s trustees. “[A] charitable trust by its very nature creates a narrowly defined class of persons who have a special interest in its enforcement or modification, namely, the trustees who have a legal obligation to administer the trust.”²⁰⁴ It could also extend, in certain circumstances, to beneficiaries of the trust. “Parties with special interests in the benefits of a charitable trust have been accorded standing to enforce the trust, but only when they are entitled to benefits different from those to which members of the public are entitled generally.”²⁰⁵

Other courts treat “special interest” standing more as a policy matter than an exercise in identifying a cognizable interest the plaintiff is entitled to protect. In *Derblom*, for example, the court opined that “[t]he special interest concept and its application involve a balancing of policy concerns and objectives.”²⁰⁶ In this telling, “special interest” standing “is justified by society’s interest in ... enhancing enforcement of charitable trusts, in light of the limitations (of information and resources, plus other responsibilities and influences) inherent in attorney general enforcement.”²⁰⁷

As an historical matter, those with a “special interest” in enforcing restrictions on trust properties have not included donors. Thus, for example, even accounting for the “special interest” exception, the Colorado Court of Appeals said the plaintiff’s “status as a donor to the Foundation and CU is ... insufficient to give him standing.”²⁰⁸ Similarly, the Connecticut Supreme Court recited the traditional formulation of the “special interest” exception before concluding that the representative of the donor’s estate “did not have standing under the special interest exception to bring an action to enforce the bequest.”²⁰⁹ That ruling echoed a much earlier case in which the court said “it is well established in the context of charitable trusts” that an enforcement action may be brought “by a person who has a special interest in the

201 “[A] charitable trust may only be enforced by an action brought by the Attorney General or an authorized relator.” *Puterbaugh v. Oorah, Inc.*, 2024 WL 6847879, at *2 (C.D. Cal. Jan. 31, 2024); *Rockwell v. Trs. of Berkshire Museum*, 2017 WL 6940932, at *4 (Mass. Super. Nov. 7, 2017) (“It has long been the rule that only the Attorney General has standing to protect public charitable trusts and to enforce proper application of their funds and assets.” (cleaned up)).

202 *Herbst v. Univ. of Colorado Found.*, 2022 COA 38, ¶ 10, 513 P.3d 388, 392 (quoting *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1125 (Colo. 2007)) (cleaned up).

203 See, e.g., *Newman*, 2023 WL 4197166, at *6 (“The special interest exception has been recognized by Connecticut courts as an exception to the rule that the attorney general has the sole and exclusive authority to bring an action to protect any gifts, legacies or devises intended for charitable purpose.”).

204 *Derblom*, 346 Conn. at 352, 289 A.3d at 1199.

205 *Herbst v. Univ. of Colorado Found.*, 2022 COA 38, ¶ 13, 513 P.3d 388, 393; *id.* (“Special standing applies only where the claim has arisen from a personal right that directly affects the individual member of a charitable organization.” (quoting *Harvard Climate Just. Coal. v. President & Fellows of Harvard Coll.*, 90 Mass.App.Ct. 444, 60 N.E.3d 380, 382 (2016) (quoting *Weaver v. Wood*, 425 Mass. 270, 680 N.E.2d 918, 923 (1997))) (cleaned up); *In re Robert T. Keeler Maint. Fund for Hanover Country Club at Dartmouth Coll.*, 176 N.H. at 92, 306 A.3d at 800 (“[W]e joined other jurisdictions and agreed with the Restatement (Third) of Trusts in recognizing an exception to this general rule ‘when a clearly identified class’ of potential beneficiaries has a ‘special interest’ in the enforcement of a charitable trust.”).

206 346 Conn. 333, 345, 289 A.3d 1187, 1195–96 (2023) (quoting 4 Restatement (Third), Trusts § 94 comment (g), p. 9 (2012)) (cleaned up).

207 *Id.*

208 *Herbst*, 2022 COA 38, ¶ 16, 513 P.3d at 393.

209 *Derblom*, 346 Conn. at 359, 289 A.3d at 1204.

enforcement of the charitable trust,” but “not by persons who have no special interest or by the settlor or heirs, personal representatives or next of kin.”²¹⁰

The “special interest” category, however, is losing its traditional cohesion. Indeed, some courts have used the “special interest” exception as a vehicle by which to come full circle on the question of donor standing in the context of charitable trust enforcement actions. In *Musk v. Altman*, for example, a federal trial court sitting in California decided that Musk, as a settlor of the OpenAI charitable trust, had a sufficient “special interest” in its operation to support standing to bring an enforcement action.²¹¹ Examining how the court reached its conclusion provides a classic illustration of how common law principles, through less than careful handling, can come loose from their historical and teleological moorings.

The *Musk* court’s reasoning started by reaching back to *Holt v. College of Osteopathic Physicians & Surgeons*, a 1964 decision of the California Supreme Court in which the justices considered the practical considerations involved in enforcing the administration of charitable trusts. The *Holt* court said “[a]lthough the attorney general has primary responsibility for the enforcement of charitable trusts, the need for adequate enforcement is not wholly fulfilled by the authority given him.”²¹² Then, after noting the risk of harassing litigation if just anyone could bring enforcement actions, *Holt* said “[t]his consideration is quite inapplicable to enforcement by the fiduciaries who are both few in number and charged with the duty of managing the charity’s affairs.”²¹³ In light of those fiduciaries’ duties, the *Holt* court

concluded “[t]he administration of charitable trusts stands only to benefit if in addition to the attorney general” “other responsible individuals”—such as trustees—were allowed “to sue in behalf of the charity.”²¹⁴ In confirming the trustee’s standing to bring an enforcement action, the *Holt* court kept faith with traditional equitable principles. It grounded its holding in the recognition of an interest on which equity could operate—to wit, the trustee’s fiduciary duty to administer the charitable trust according to its terms.

The *Musk* court then observed what the California Court of Appeals did with the *Holt* decision in a case involving the L.B. Research and Education Foundation. There, after a lengthy and verbatim recitation of the *Holt* court’s reasoning, the Court of Appeals concluded—without any further discussion—that the plaintiff had standing to bring a lawsuit to enforce a charitable trust.²¹⁵ The plaintiff, however, was a settlor of the trust, not, as in *Holt*, a trustee. Settlers of charitable trusts, of course, owe no fiduciary duty to the trust beneficiaries (the public). Indeed, they owe no duty of any sort to anyone with respect to the charitable trust or the property that endowed it.

Nonetheless, the impulse to grant standing to settlers in enforcement actions against charitable trusts has become so pressing that it is now a part of the Restatement (Third) of Trusts. The *Musk* court’s analysis turned to *Autonomous Region of Narcotics Anonymous v. Narcotics Anonymous World Services, Inc.*,²¹⁶ a case in which the California Court of Appeals favorably cited the Restatement (Third) of Trusts for the proposition that the pool of plaintiffs allowed to bring enforcement actions against

210 *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 243 Conn. 1, 7 n.4, 699 A.2d 995, 999 (1997).

211 “In any event, Musk has standing through his special interest in enforcing the trust. Musk, as the settlor, has a ‘special interest’ in the performance of the trust’s charitable purpose.” 818 F. Supp. 3d 1109, 1123 (N.D. Cal. 2026).

212 *Holt v. Coll. of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 755, 394 P.2d 932, 936 (1964).

213 *Id.*

214 *Id.* at 755-56.

215 *L.B. Rsch. & Educ. Found. v. UCLA Found.*, 130 Cal. App. 4th 171, 182, 29 Cal. Rptr. 3d 710, 717 (2005).

216 77 Cal. App. 5th 950, 965, 292 Cal. Rptr. 3d 851, 861 (2022).



charitable trusts should include “the attorney general or other appropriate public officer or by a co-trustee or successor trustee, ... *a settlor*, or ... another person who has a special interest in the enforcement of the trust.”²¹⁷ The Restatement does not identify what personal interest a settlor’s enforcement action might vindicate, noting only that “[i]t seems readily apparent that a living settlor has an expectation that the designated trust purpose will be carried out”²¹⁸ While obviously true, that isn’t the same thing as an equitably cognizable interest. The Restatement authors obliquely acknowledged this discrepancy when it admitted that “the settlor’s special-interest standing stated in Subsection (2) and in this Comment represents a departure from the general insistence of traditional trust doctrine that the settlor, as such, lacks standing to enforce a charitable trust”²¹⁹

With those developments in mind, the *Musk* court concluded that, “in any event, Musk has standing through his special interest in enforcing the trust. Musk, as the settlor, has a ‘special interest’ in the performance of the trust’s charitable purpose.”²²⁰ And that’s how the “special interest” exception to the common law rule that only the attorney general may bring enforcement actions against charitable trusts—an exception that specifically excluded settlors—came to be used as the rationale for *granting* settlors standing to bring enforcement actions.

217 Restatement (Third) of Trusts § 94 (2012).

218 *Id.* at Reporter’s Notes to Comment g(3).

219 *Id.*

220 818 F. Supp. 3d at 1123.

The equitable principles governing charitable trusts do not suffer from the type of mutually exclusive legal principles that arise upon the effort to shoehorn restricted charitable gifts into the form of a contract. But the pressure to find some vehicle by which donors can enforce charitable gift restrictions has been building, and it is distorting the equitable principles that govern charitable trusts, too. The transformation of the “special interest” exception into an

entry point for donors’ enforcement actions is opportunistic; it reflects the implementation of a new policy rather than a legal analysis. Although this development is not supportable as a faithful application of relevant equitable principles, it at least provides a datum suggesting that the issue needs to be addressed by state legislatures, which are the proper fora for turning policy considerations into law.

C. TORTS AND DONOR INTENT

Donors and courts have been characterizing restricted charitable gifts as either contracts or charitable trusts in an effort to hold charitable organizations accountable when they disregard a donor’s intent. But there is an alternative approach, although it’s a bit of a blunt instrument. Some donors have brought tort-based claims when faced with intransigent gift recipients. These theories aren’t meant to secure adherence to gift restrictions, *per se*, but instead are aimed at unwinding the gift from the beginning.

Tort claims, in this context, take aim at the formation of the charitable transactions, alleging either that the contributions were obtained through fraud or, upon receipt, were converted to unauthorized purposes. These theories are not subject to the common law rule that only the attorney general may bring enforcement actions because, functionally, they seek the return of the gift, not enforcement of a restriction. The court in the *Carrier* case, for example, specifically rejected the application of that rule because, it said, it does apply to “a scenario in which, like here, the plaintiff’s charitable gift was allegedly obtained by fraudulent means.”²²¹ Likewise, the Texas Court of Appeals concluded a donor could pursue a

conversion claim because, “[u]nlike the attorney general, who has standing to represent the general public’s interest in the charity’s administration, Eshelman has standing to assert his private interest,” which was damaged by the alleged conversion of the gift to unauthorized uses.²²² And in the *Cohen* case, the court said the donor had standing to pursue a fraud claim against the Kabbalah Centre. Cohen alleged she had relied on the Centre’s representation that her funds would be put to a specific use, that absent that representation she wouldn’t have made the gift, and that the Centre failed to use her gift for the agreed upon purpose. Even though her claim was ultimately unsuccessful, it wasn’t because the cause of action wasn’t viable, but because she failed to provide sufficient supporting evidence.²²³ Nothing in the court’s reasoning suggested that the cause of action was otherwise infirm.

Because tort theories are not specifically aimed at enforcing restrictions on charitable gifts, but on canceling or recovering the contribution, they have little to say about the effort to protect donor intent. Their most important contribution is, possibly, an *in terrorem* effect that dissuades charities from disregarding the donors’ wishes.

221 *Carrier v. Ravi Zacharias Int’l Ministries, Inc.*, No. 1:21-CV-3161-TWT, 2022 WL 1540206, at *7 (N.D. Ga. May 13, 2022).

222 *Eshelman v. True the Vote, Inc.*, 655 S.W.3d 493, 503 (Tex. App. 2022).

223 *Cohen*, 35 Cal. App. 5th at 22, 246 Cal. Rptr. 3d at 780.

The pressure on the judiciary to find some mechanism to protect donor intent regarding restricted charitable gifts is undeniable. But using the common law or equity as a vehicle is like pouring new wine into old wineskins—neither one survives the exercise. The common law embodies customs, principles, and traditions whose origins are so old that “the memory of man runneth not to the contrary.”²²⁴ So it’s no surprise it isn’t prepared to accommodate a concept that requires the blurring of its fundamental distinctions. And the equitable principles governing trusts, with their foundation in the ancient division of legal and equitable titles to facilitate the transfer of real estate in medieval England,²²⁵ are equally freighted with

age-old forms that do not naturally lend themselves to conferring standing on a donor whose relationship to the trust *res* terminates upon completion of the gift.

Although the problem looks intractable from the standpoint of the common law and equity, it is susceptible to legislative solutions. Indeed, tackling subjects and problems that are not amenable to the common law or equity is a decent working definition of the legislature’s responsibility.²²⁶ The SEGA helps legislatures shoulder that responsibility with a straightforward, broadly applicable model act that replaces badly battered common law and equitable theories.

III. SEGA’S CONTRIBUTION TO THE PROTECTION OF DONOR INTENT

The history of protecting donor intent with common law and equitable principles is a story of trying to force square pegs into round holes. The result hasn’t been great for either of them. Fortunately, the legislative movement to provide such protection hasn’t suffered from the incongruities and inconsistencies that make the equitable and common law efforts so problematic.

The SEGA is designed to function either as a stand-alone solution to the problem of unprotected donor intent, or as a supplement to the UTC and UPMIFA’s pre-existing substrate. It remedies what some commentators have

described as confusing and fractured bodies of law, the application and coverage of which is complicated by the multiplicity of its sources and objectives. Indeed, one commentator has said the adoption of the UTC and UPMIFA, and changes to the common law, have caused unintended negative consequences. Amongst these are “a lack of coherence in the law, ... an elevation of form over substance” in the structure of specific gifts, “uncertainties that have arisen regarding operation of ... the UTC and UPMIFA,” “inequities between sophisticated or well-represented donors and donees and those who are less sophisticated and without the resources to hire experienced advisors,”

224 *Wright v. Wimberly*, 94 Or. 1, 12, 184 P. 740, 743 (1919) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 67 (1765)).

225 See, e.g., *Harvey ex rel. Gladden v. Cumberland Tr. & Inv. Co.*, 532 S.W.3d 243, 253 (Tenn. 2017) (“Modern English and American trusts resulted from the struggle of landowners in medieval England to control the disposition of their real property.”).

226 “We believe that when a party seeks to abrogate or significantly limit, modify, or expand a common law rule ... that has been so venerably accepted that ‘the memory of man runneth not to the contrary,’ the responsibility for doing so is primarily a function for the legislature” *Brown v. Commonwealth*, 54 Va. App. 107, 117–18, 676 S.E.2d 326, 331 (2009) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 67 (1765)).

and “confusion in the courts as they attempt to navigate this new, much more complex landscape of laws.”²²⁷

The SEGA’s value is twofold. First, it universally replaces the unprincipled distortions of common law and equitable principles with a clear and jurisprudentially defensible duty to honor the terms of restricted charitable gifts.

And second, it extends donor standing in a way that fills in the gaps that were left unaddressed when states adopted the UTC, the UPMIFA, or both. This part of the article will first address those gaps, and then describe the theoretical and practical reasons supporting adoption of the SEGA.

A. THE GAPS LEFT BY THE UTC AND UPMIFA

The UTC and UPMIFA are welcome developments in the movement to protect donor intent. But they leave considerable gaps in what they protect and how they protect it. The SEGA is capable of providing comprehensive protection to donor intent in states that have not adopted either of those uniform acts. But it’s also capable of filling in the gaps left after adoption of the UTC and UPMIFA. To illustrate how the SEGA complements these model acts, the article will sketch out their contours and then address how the SEGA picks up where they left off.

As with equitable trusts (whether express, implied or constructive), the UTC imposes a duty on trustees to comply with the terms of the trust.²²⁸ But more germane to protecting donor intent, the UTC is important for its conferral of standing on the settlor to maintain an action against the trust to enforce its terms: “The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.”²²⁹ The UTC authors included the “among others” language to accommodate the traditional rule

that attorneys general and those with a special interest have standing to bring enforcement actions.²³⁰ The cumulative effect of this provision, therefore, is to supplement the ranks of those who may enforce the terms of charitable trusts. But it’s a temporally limited supplement. The UTC does not contemplate the appointment of successors to the settlors to take over their enforcement duties after the settlors pass.

The UTC is also limited in its coverage. According to the model legislation, the UTC applies only to “express trusts ... and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.”²³¹ While that appears to be extensive at first glance, it leaves out restricted charitable gifts in which the gift instrument lacks language explicitly calling for the creation of a trust.²³² Courts sometimes treat such restricted gifts as charitable trusts. But in the absence of explicit trust language, they are classified as “implied” or “constructive” trusts, as opposed to express trusts.²³³ Consequently,

227 Nancy A. McLaughlin, *Laws Governing Restrictions on Charitable Gifts: The Consequences of Codification*, 70 UCLA L. Rev. Discourse 424, 427, 447 (2023).

228 “[T]he trustee shall administer the trust in good faith, in accordance with its terms and purposes” Uniform Trust Code § 801 (National Conference of Commissioners on Uniform State Laws 2023) (hereinafter “UTC”).

229 UTC § 405(c).

230 UTC § 405(c) Comment (“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.”).

231 UTC § 102.

232 “The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code’s coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law.” UTC § 102 Comment.

233 See, e.g., *Matter of Coe Coll.*, 935 N.W.2d 581, 594 (Iowa 2019) (“Because we have construed the gift letter to impose restrictions on Coe College’s ownership rights in the paintings, the letter may be deemed to establish a charitable trust even though it contains no magic trust language.”).

even when the court treats such restricted charitable gifts as trusts, the UTC won't open the courthouse doors to the donors in the absence of explicit trust-creating language.

The restriction on the UTC's coverage creates a potential trap for the unwary. The difference between donor standing and its absence could turn on language as simple as "this gift is given in trust." A trust may be the result of a gift instrument without regard to whether that language appears, but in its absence the settlor won't have standing to enforce the gift restrictions. Without impugning the good faith of charitable organizations, this emphasis on magic trust-creating language and its consequences has the potential of creating a conflict of interest between donors and the charities they support. "[C]harities opposed to donor standing," for example, "can structure their model gift agreements to try to ensure that the UTC's settlor-standing rule will not apply, and hope that the donor or the donor's advisors are not aware of or, in the flush of gift-giving, are not considering the donor-standing issue."²³⁴

The UPMIFA has also played a role, albeit limited, in the drive to protect donor intent. Whereas the UTC concerns itself with creating and enforcing a comprehensive set of duties and obligations to govern the relationships arising out of an express trust, the UPMIFA is more narrowly focused on "the management and investment of funds held by" charitable organizations.²³⁵ The UPMIFA, the authors say, "improves the protection of donor intent with respect to expenditures from endowments" because "[w]hen a donor expresses intent clearly in a written gift instrument, the Act requires that the charity follow the donor's instructions."²³⁶ Specifically, the UPMIFA

commands that, "[s]ubject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund."²³⁷ And, in contrast to the UTC's narrow coverage, the obligations created by the UPMIFA sweep broadly without scrupling over the organizational structure. "The Act applies generally to institutions organized and operated exclusively for charitable purposes," and the term "institution" includes "charitable organizations created as nonprofit corporations, unincorporated associations, governmental subdivisions or agencies, or any form of entity, however organized, that is organized and operated exclusively for charitable purposes."²³⁸

Notwithstanding the broad coverage and the obligation to honor donor intent, however, the UPMIFA has some significant limitations. First, and most notable, is the lack of a provision granting donors standing to enforce gift restrictions. The absence is intentional, as the authors explain: "The emphasis in the Act on giving effect to donor intent does not mean that the donor can or should control the management of the institution."²³⁹ Not only is the failure to include a donor standing provision unhelpful, it also risks negative interaction with the UTC authors' contrary decision on this subject. Silence on a topic in a model act, such as the UPMIFA, could potentially reflect a simple desire not to say anything about it. But when a legislature adopts a model act the silence and the authors' explanation for the silence can be interpreted as the legislature's intent to reject the topic. "When interpreting a uniform law, ... the intention of the drafters of a uniform act becomes the legislative intent upon

234 Nancy A. McLaughlin, Donor Standing to Enforce Charitable Gifts in the 21st Century, 60 Real Prop. Tr. & Est. L.J. 207, 241 (2025).

235 Uniform Prudent Management of Institutional Funds Act, Prefatory Note (National Conference of Commissioners on Uniform State Laws 2006) (hereinafter "UPMIFA").

236 *Id.*

237 UPMIFA § 3(a).

238 UPMIFA § 2(4) comment.

239 UPMIFA § 3(a) comment.

enactment.”²⁴⁰ Thus, in at least one court, the disparate treatment of donor standing between the UTC and the UPMIFA caused what was almost certainly an unintended consequence. In a state that had adopted both model acts, the court relied on UPMIFA’s silence on the subject of donor standing to reject the efforts of the settlor’s estate to enforce the terms of a trust.²⁴¹

The second of the UPMIFA’s significant limitations is that it applies only to “institutional funds.” Although the definition section of this uniform act doesn’t say so explicitly, the authors clarify that the term refers only to funds held “exclusively for investment.”²⁴² Consistent with this commentary, the UPMIFA excludes “program-related assets” from the definition of institutional funds, and because they are not institutional funds, the UPMIFA has nothing to say about them.²⁴³ “For example,” the authors say,

a university may purchase land adjacent to its campus for future development. The purchase might not meet prudent investor standards for commercial real estate, but the purchase may be appropriate because the university needs to build a new dormitory. The classroom buildings,

administration buildings, and dormitories held by the university all have value as property, but the university does not hold those buildings as financial assets for investment purposes. The Act excludes from the prudent investor norms those assets that a charity uses to conduct its charitable activities ...²⁴⁴

As important as the protections provided by the UPMIFA are, the focus on fund management and investment means many restricted charitable gifts simply fall outside its parameters. A great number of disputes arise only after the institutional funds are converted into what the UPMIFA describes as program-related assets, or they address gifts of physical property or funds that were never intended for investment purposes, such as those involving the Cedar Hill Retreat Center, the Beit Shvidler Conference Center, the Mead Memorial Chapel, and the Norman Rockwell paintings at the Berkshire Museum (all of which are described above).

Both the UTC and the UPMIFA are solid pieces of model legislation that are well-suited to the specific objectives they were designed to address. But they leave significant gaps for the SEGA to fill.

B. THE LEGISLATIVE SOLUTION TO A PROBLEM EQUITY AND COMMON LAW CANNOT PROPERLY REACH

The SEGA relieves equity and the common law of a burden they were never meant to bear. The common law is designed to provide a remedy when the interest at issue and the authority to enforce it reside in the same person. When they diverge, it gets vapor-locked. This is why courts, when presented with a request to enforce a restricted charitable gift as a contract, skitter

from contract law to gift law and back again, or gloss over the “consideration” dilemma as though it doesn’t exist. The equitable principles undergirding charitable trusts present equally confounding problems when a settlor tries to enforce the trust’s terms. The settlor’s participation in the trilateral trust relationship expires when the gift vests in the trust. So when the

²⁴⁰ *In re Robert T. Keeler Maint. Fund for Hanover Country Club at Dartmouth Coll.*, 176 N.H. 87, 94, 306 A.3d 795, 801 (2023).

²⁴¹ *Id.* at 95.

²⁴² UPMIFA § 2(5) comment.

²⁴³ UPMIFA § 2(5)(A).

²⁴⁴ UPMIFA § 2(5) comment.

settlor later returns and insists on compliance, courts struggle with what relief equity can offer to what is now a phantom relationship.

Legislatures labor under no such difficulties. So long as they confine their activity within constitutional boundaries, they are free to create any duty or obligation that is consistent with the authority delegated to them by their creators—the people of their respective states. And as is particularly relevant to the problem here, that includes the creation of obligations and rights that have no common law or equitable analog.²⁴⁵

That extensive authority allows legislatures to control those transactions and relationships in ways not previously contemplated. They have the latitude to create previously unknown legal obligations, and they can legitimately vest authority to enforce those obligations in individuals who would be considered strangers to the dispute under either common law or equitable principles. The SEGA operationalizes that extensive authority to bring clarity and effective enforcement to restricted charitable gifts.

The SEGA starts by replacing the troubled common law and equitable principles with a clear and unambiguous obligation to honor donor intent. Except where specifically required or authorized by federal or state law, no charitable organization that accepts a contribution pursuant to a written donor-imposed restriction may violate the terms of that restriction without potential penalty.”²⁴⁶ The *legislative* creation of this obligation is important for both substantive and structural reasons.

As a substantive matter, the command is freighted with none of the preliminary questions that so complicate attempts to enforce gift restrictions under common law and equitable standards. The SEGA does not ask, because

it need not, whether acceptance of the gift subject to the restrictions creates a promise in favor of the gift giver. Nor does it depend on a continuing interest that grows out of an existing relationship between a settlor and a trust. This neat and tidy *ex nihilo* imposition of an obligation on the charitable organization is one of the defining benefits of legislative authority.

As a structural matter, it is important that this obligation arise out of a legislative act rather than a judicial decree. The rule of law, the irreplaceable cornerstone of our form of government, promises that parties can know, in advance, what the law requires of them. This principle depends on the branches of government confining themselves to their respective areas of authority. In practice, this manifests as legislatures and judiciaries operating on different parts of the timeline. Keeping them focused on their own temporal domain preserves the rule of law and individuals’ expectations. Legislatures take for themselves matters of the future. Creating new obligations that operate prospectively allows individuals to order their affairs in a way that, should they ever be called upon to justify them, would be answerable according to the law.

Judiciaries, for their part, address themselves to matters of the past. When parties come to court, it’s because someone committed a tort, breached a contract, engaged in a crime, or took some other unlawful action—all of it past tense. The essence of justice is re-entering the past to (1) unearth the facts relevant to the dispute, (2) identify the substantive law as it existed at the time the facts occurred, and (3) apply the latter to the former to reach a judgment. If, however, jurists were to modify the law to arrive at conclusions they believe to be

245 See, e.g., *Swogger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955) (“Statutory enactments, even though they provide new procedures to enforce pre-existing rights at law and in equity, are to be read in harmony with the existing body of law, inclusive of existing equitable principles, unless an intention to change or repeal it is apparent.”).

246 SEGA § 4(A).

superior to what the then-existing law would produce, they appropriate to themselves the legislature's authority and, in doing so, act in derogation of the rule of law. Imposing a new rule today to govern decisions taken in the past deprives the parties against whom the courts rule of the ability to know in advance what is required of them. So, creating the obligation to honor gift restrictions through a legislative act, instead of distorting common law or equitable principles to produce the same result, gets the structural question right by looking to the future-tense branch of government to supply the needed changes to the law.

As important as the SEGA's substantive obligation to honor donor intent is, the procedural enforcement regime it creates is, perhaps, even more consequential. By deputizing motivated actors to enforce gift restrictions, it translates the notional protection into reality. "If a charitable organization violates a donor-imposed restriction contained in an endowment agreement, the donor, or that person's legal representative ... may file a complaint ... for breach of such agreement."²⁴⁷

The SEGA's enforcement mechanism follows in the best tradition of statutes that encourage individuals to act, essentially, as private attorneys general to vindicate the public's interest in what would otherwise be under-enforced obligations. "The [private attorney general] doctrine is designed to encourage private enforcement of important public rights and to ensure aggrieved citizens access to the judicial process where statutory or constitutional rights have been violated."²⁴⁸ Traditionally, the encouragement to act in such a capacity has been the award of attorney's fees and costs.²⁴⁹

Although these "private attorneys general" provisions normally operate in the context of cases in which individuals also have personal rights they are vindicating, the existence of such a personal interest is not a prerequisite. The justification for constituting them as "private attorneys general" is that they are advancing the *public's* interest. "[A]n individual who brings an action to enforce a statutory right may be acting as a 'private attorney general' to enforce the *public's* rights under the statute."²⁵⁰

As the *Musk* court recognized, there is "no rule or policy against" recruiting members of the public to "supplement[] the attorney general's power" to enforce public rights—especially in light of "the practical challenges in exclusively permitting the attorney general to enforce" gift restrictions.²⁵¹ Even though the obligations to which the SEGA's enforcement provisions are directed arise out of the donor contributions, it is clear that the interests it protects—and this is critical for tax purposes—belong to the public, not the donors. So, just as attorneys general receive their authority to enforce public rights from the legislature, so too do SEGA litigants receive from the same source their authority to pursue the same interests. The SEGA confirms that only public interests are at issue in these enforcement actions. Its remedy section allows only those types of judicial relief that vindicate public, not personal, interests. "If the court determines that a charitable organization violated a donor-imposed restriction in an endowment agreement, the court may order one or more remedies consistent with the charitable purposes expressed in the endowment agreement. The court shall not order the return of donated funds to the donor or the donor's legal representative or estate."²⁵²

²⁴⁷ *Id.* at § 4(B).

²⁴⁸ *Ryan v. California Interscholastic Fed'n*, 94 Cal. App. 4th 1033, 1044, 114 Cal. Rptr. 2d 787, 795 (2001).

²⁴⁹ *Apple, Inc. v. Franchise Tax Bd.*, 199 Cal. App. 4th 1, 29, 132 Cal. Rptr. 3d 401, 423–24 (2011) (The purpose of awarding fees and costs is "to provide an incentive for the plaintiff who acts as a true private attorney general, prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate." (cleaned up)).

²⁵⁰ *Watkins v. Lab. & Indus. Rev. Comm'n*, 117 Wis. 2d 753, 764, 345 N.W.2d 482, 488 (1984) (emphasis supplied).

²⁵¹ *Musk v. Altman*, 818 F. Supp. 3d 1109, 1121 (N.D. Cal. 2026).

²⁵² SEGA § 4(E).

Finally, the SEGA's creation of a duty that applies to all charitable organizations without regard to the gift's form or the charity's organizational structure fills the gaps left by the UTC and UPMIFA. After a state adopts the SEGA, there will be no need for courts to

create theoretical chimeras or appeal to phantom relationships to protect donor intent. Nor will donors have to rely on over-worked (and sometimes uninterested) attorneys general to enforce gift restrictions.

CONCLUSION

The SEGA was called into existence almost organically by the inability of common law and equitable principles to reliably and coherently protect donor intent in a principled fashion. And, because its substantive and procedural functions were written to complement existing UTC

and UPMIFA provisions, this model act can be added to a state's *corpus juris* without unnecessary complications. Adopting the SEGA will bring clarity and cohesion to an area of the law that has demonstrably suffered in its absence.

ABOUT THE AUTHOR

HON. DANIEL KELLY

FORMER JUSTICE, WISCONSIN SUPREME COURT

Justice Daniel Kelly was appointed to the Wisconsin Supreme Court in 2016 by Gov. Scott Walker and served in that capacity until August 2020.

Before joining the Supreme Court, he spent most of his career at one of the largest and oldest law firms in Wisconsin, where he represented clients in courts across the country, including the Wisconsin Supreme Court and the U.S. Supreme Court.

Kelly earned his law degree from Regent University School of Law in Virginia Beach, Virginia, in 1991. He now provides consultation services to nonprofit and for-profit organizations, with a focus on structural constitutional issues.

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1120 20th Street NW, Suite 400 North, Washington, D.C. 20036
philanthropyroundtable.org