Title

The charitable corporation: A trust in disguise?

Summary

The charitable trust can have certain practical advantages over the charitable corporation, at least in some quarters and under certain circumstances. Operational simplicity and low-cost maintenance are some of the pluses. The charitable trust can be more respectful of donor intent, as well. Neither vehicle has shareholders; each exists to further one or more charitable purposes. Professor Austin Wakeman Scott, while acknowledging some technical differences between the charitable trust and the charitable corporation, on balance found them more similar than dissimilar. Charles E. Rounds, Jr. elaborates in §9.8.1 of *Loring and Rounds: A Trustee's Handbook* (2014). The section is reprinted bellow in its entirety.

Text

§9.8.1 *The Charitable Corporation: Is It a Trust?* [from Charles E. Rounds, Jr., *Loring and Rounds: A Trustee's Handbook* (2014)].

> *Princeton is under the impression that this is their money, says Mr. Robertson. If my parents intended Princeton to have the money, they would have just given it to them instead of having a separate foundation.*[4]
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> *The Robertsons have spent about $20 million in pursuing the lawsuit, and Princeton has spent $22 million defending itself. No trial date has been set.*[5]

[4]Editorial (Review & Outlook), *Follow the Money*, Wall St. J., July 19, 2002, at A15.

[5]John Hechinger, *Ruling May Cost Princeton Millions if Heirs Win Case*, Wall St. J., Oct. 26, 2007, at B6 ("the lawsuit is the biggest dispute over donor intent in higher education"). It is worth noting here that a prospective charitable donor can structure his or her benefaction in a way that

The charitable corporation: a quasi-trust that also may serve as a trustee. To be sure, under *the tax laws* of the United States, a so-called charitable foundation can be structured as either a charitable trust or a charitable corporation.[6] Likewise, the doctrine of charitable immunity draws no distinction between the charitable trust and the charitable corporation.[7] But under a particular state's common law of trusts and property, is a gift of property to a charitable corporation a transfer in trust? Is a charitable trust and a charitable corporation essentially one and the same?

In the case of a charitable trust, the state attorney general may maintain a suit to prevent the subject property from being squandered or misapplied.[8] The attorney general also has standing to maintain a suit to prevent the squandering or misapplication of the assets of a charitable corporation.[9] "Likewise, in both cases, cy pres may be available."[10] But is the charitable corporation *a trustee* of its own property such that its governing body is subject to all the common law duties and obligations of a trustee?[11]

Professor Scott, while acknowledging some technical differences between the charitable trust and the charitable corporation, on balance found them more similar than dissimilar.[12] In the noncharitable context it is not uncommon to see trusts masquerading as corporations.[13] Certainly if the gift is restricted, the directors of the corporation should segregate the gift from the corporation's other assets and act as if they were the trustees of the gift, even though it is in the entity that the legal title to the gift resides. Above all, they should carry out the lawful intentions of the transferor, and the attorney general, and the courts should see to it that they do.

The better view is that a restricted gift to a charitable corporation is a gift to the charitable corporation as trustee of a charitable trust, the subject of which is the restricted gift.[14] This should

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the charity will have little choice but to carry out the donor's charitable intentions, a topic we cover in Section 4.1.1.2 of this handbook. In other words, there are some steps that the Robertson family perhaps could have taken *before* the gift to Princeton was made that would have, for all intents and purposes, put them in the driver's seat.

[6]*See generally* Bogert, Trusts and Trustees §330.

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

[8]5 Scott & Ascher §37.1.1.

[9]5 Scott & Ascher §37.1.1.

[10]5 Scott & Ascher §37.1.1. *See generally* §9.4.3 of this handbook (*cy pres*).

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

[12]4A Scott on Trusts §348.1; 5 Scott & Ascher §37.1.1. *See also* Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 489 (N.J. Super. Ct. 1967) (suggesting that a charitable corporation is not strictly speaking a charitable trust but that the law of charitable corporations has its roots in the law of trusts). *But see* Stegemeier v. Magness, 728 A.2d 557, 562 (Del. Super. 1999) (noting that the absolute prohibition under common law against self-dealing by a trustee has been modified in the corporate setting to offer a safe harbor for the directors of a charitable corporation if the transaction is approved by a majority of disinterested directors). *See generally* Bogert, Trusts and Trustees §361 (also discussing the differences between a charitable trust and a charitable corporation).

[13]*See, e.g*., §9.7.5.2 of this handbook (the incorporated U.S. or U.K. mutual fund is trusteed).

[14]5 Scott & Ascher §37.1.1. *See, e.g.*, In re Estate of Lind, 314 Ill. App. 3d 1055, 248 Ill. Dec. 339, 734 N.E.2d 47 (2000). *See generally* §8.6 of this handbook (the trustee who is not a human being). Because the "community" has a beneficial interest in the charitable corporation, not the

certainly apply to an endowment fund, which is a fund that under the terms of a gift instrument is not wholly expendable by the charitable corporation on a current basis.[15] In California, a charitable corporation formed in California has general statutory authority to serve as a trustee.[16] When property is left to a charitable corporation upon a charitable trust and the corporation either declines to accept the trust, or accepts the trust and then proceeds to violate it, the court has inherent equitable powers to order a transfer of the legal title to the property to a charitable corporation that is ready, willing, and able to properly carry out the terms of the trust.[17]

There is no question that a gratuitous transfer of property to a third party, *e.g.*, a bank or trust company, in trust for the benefit of a charitable corporation gives rise to a charitable trust.[18] Moreover, "[w]hen the settlor creates a trust of unlimited duration to pay the income to a charitable corporation, the court will neither compel nor permit the termination of the trust by a transfer of the principal to the corporation, even if the corporation is the sole beneficiary and wants to terminate the trust."[19] Nor will the court permit an early termination of the trust in favor of the corporation if acceleration would be contrary to a material purpose of the trust.[20]

It is when the initial transfer of legal title is to the charitable corporation itself that things can get ambiguous, particularly if the gift is unrestricted.[21] Do we have a trust or don't we? One court has referred to the arrangement as a quasi trust.[22] Presumably most of the corporation's donors intend that their gifts be used only for the legitimate expressed charitable purposes of the corporation, and expect that those purposes will not change materially after the gifts have been made.[23] As a practical matter, however, especially if it is the practice of management to commingle unrestricted gifts with the general assets of the charitable corporation, a donor will find it difficult, if not impossible, establishing a link between his or her particular gift and any particular expenditure.[24] Money is fungible. The governing body certainly has a moral obligation to the donors of unrestricted gifts to see to it that the corporation cleaves to the letter and spirit of the corporation's stated charitable purposes, and, at minimum, that it gives them advance warning of any material deviation from those purposes. Whether that obligation is, as a practical matter, enforceable is another matter.[25] If management expects to materially deviate from the charitable

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corporation, the doctrine of merger would not apply in the case of a restricted gift to a charitable corporation. *See generally* §8.7 of this handbook (merger).

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

[16]Cal. Prob. Code §15604.

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

[18]5 Scott & Ascher §37.1.1.

[19]5 Scott & Ascher §37.4.2.4.

[20]5 Scott & Ascher §37.4.2.4.

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

[22]American Institute of Architects v. Attorney General, 332 Mass. 619, 624, 127 N.E.2d 161, 164 (1955).

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

[24]*See, e.g.*, Jose Cabranes, University Trusteeship in the Enron Era <http://www.nacua.org/documents/Enron_Speech_07-23-02.pdf> (suggesting that bad feelings between donor families and universities are almost guaranteed these days: While donors expect more from a university in the way of transparency and accountability, universities generally give less).

[25]*See, e.g.*, Morris v. E. A. Morris Charitable Corp., 358 N.C. 235, 593 S.E.2d 592 (2004) (court declining to apply *cy pres* though remainder beneficiary of a charitable remainder trust, a charitable corporation, made various changes to its administration, management, and pattern of

corporation's stated mission, in theory it should, at least for accounting purposes,[26] segregate benefactions already in hand and conduct its deviations with future funds. This is, of course, all much easier said than done, and almost impossible to effectively monitor privately from the outside. Moreover, in at least one jurisdiction, namely, Virginia, the directors of a nonstock charitable corporation would likely have no such duty to segregate, her Supreme Court having in no uncertain terms rejected any notion that such corporations are governed by the law of trusts.[27]

Qualifying the foreign charitable corporation. In Section 8.6 of this handbook, we take up the topic of qualifying foreign corporations to service as testamentary trustees of local trusts. In the case of the charitable corporation, "[i]t has been held that even though a bequest to a foreign charitable corporation is to be applied to a specific charitable purpose, the corporation is entitled to the legacy without qualifying in a court of the testator's domicil."[28] Local qualification may be required, however, if the property is for the benefit of persons in the state of the testator's domicil.[29] Qualification might entail the execution by the foreign charitable corporation of a power of attorney appointing an in-state official to accept service of process in proceedings relating to the administration of the local charitable trust, quasi trust, or what have you.[30]

Donor intent. The Uniform Prudent Management of Institutional Funds Act (UPMIFA), which would regulate the activities of fiduciaries charged with administering the endowment funds of charitable trusts and charitable corporations, endeavors to shore up the principle that donor intent is generally paramount. It provides that "[u]nless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution."[31] Unfortunately, its efforts are largely toothless, as it still falls to the state attorney general, a politician, to protect both "the public interest in charitable assets" as he or she perceives it and donor intent.[32] As dead donors generally don't vote, the game in most cases can be expected to be rigged in favor of the "public interest" which, like public policy, is an unruly horse that is not easily corralled.

One influential academic journal, however, has been cited by a court in support of the proposition that donors really should have no say when it comes to changing the mission of a charitable corporation:

> With respect to the right to modify the charter powers of a charitable corporation it has been said, "Where there is general statutory authority allowing amendment of the corporate charter, the corporation and its board of trustees are the proper parties to institute the amendment process. Donors, who are generally considered to have surrendered all

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charitable giving). *See generally* Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 Emory L.J. 617, 668–671 (1985).

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

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

[28]7 Scott & Ascher §45.2.1.3.

[29]7 Scott & Ascher §45.2.1.3.

[30]7 Scott & Ascher §45.2.1.3.

[31]Unif. Prudent Management Inst. Funds Act §4(a).

[32]Unif. Prudent Management Inst. Funds Act §6 cmt.

> their rights, and beneficiaries, who are of necessity an indefinite group without ability to act effectively, lack this power. Allowing amendment at the instigation of the corporation alone has been justified on the ground that the charity in effect represents the interest of the donors, and that the interest of the beneficiaries is protected by the consent of either the corporation or the state. However, such reasoning seems unnecessary to justify changes which are actually allowed because of society's interest in the efficient utilization of property held for charitable purposes…."[33]

Failed dispositions and the *cy pres* doctrine. Enforceability and fiduciary obligation are key elements of the trust. With respect to an unrestricted gift to a charitable corporation, the former element may well be lacking as a practical matter, as we have alluded to above. Thus benefactors interested in enforceability may want to shun the charitable corporation in favor of making gifts to a charitable trust for the benefit of the corporation where the parties are more legally defined and where their rights and obligations more legally settled.[34] The *cy pres* sections of the Uniform Trust Code would *not* control failed dispositions made through charitable corporations.[35] As the common law doctrine of *cy pres*, however, does apply to such dispositions,[36] presumably there is nothing to prevent courts wrestling with the doctrine in the corporate context from looking to the Code for guidance.[37] In jurisdictions that have enacted the UPMIFA, which has replaced the Uniform Management of Institutional Funds Act (UMIFA), the *cy pres* doctrine applicable to trusts has been made expressly applicable to charitable corporations as well.[38]

When a charitable corporation takes property as trustee for a "particular charitable purpose" and subsequently the purpose fails, there is the question of whether the corporation can then apply the property to its own general purposes.[39] If the settlor so intended, the answer is yes.[40] Otherwise it will be up to the court to determine what is to be done with the subject property, whether by the application of *cy pres* or by the invocation of a resulting trust.[41] The *cy pres* doctrine is covered in Section 9.4.3 of this handbook.[42] The resulting trust is covered in Section 4.1.1.1 of this handbook.

When a *restricted gift* to a charitable corporation fails *ab initio* because the charitable

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[33]City of Paterson v. Paterson Gen. Hosp., 97 N.J. Super. 514, 520, 235 A.2d 487, 490 (1967) (citing to Note, *The Charitable Corporation*, 64 Harv. L. Rev. 1168, 1178–1179 (1951) but noting that when a charitable corporation's charter provides for third-party supervision of the trustees by "visitors" or others, then their consent to a mission change would probably have to be obtained).

[34]*See* Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 Harv. L. Rev. 433, 435 (1960).

[35]Uniform Trust Code §413 cmt. (available on the Internet at <http://www.law.upenn.edu/library/archives/ulc/ulc/php>).

[36]*See generally* 5 Scott & Ascher §37.1.1 (confirming that the directors of a charitable corporation may bring a *cy pres* petition); 6 Scott & Ascher §39.3.3 (Gift to Charitable Corporation).

[37]Uniform Trust Code §413 cmt. (available on the Internet at <http://www.law.upenn.edu/library/archives/ulc/ulc/php>).

[38]Unif. Prudent Management Inst. Funds Act §6(d).

[39]6 Scott & Ascher §39.5.2.

[40]6 Scott & Ascher §39.5.2.

[41]6 Scott & Ascher §39.5.2.

[42]We also briefly discuss the *cy pres* doctrine in §8.15.28 of this handbook.

corporation has disclaimed the gift or because the corporation does not exist, then it falls to the court to consider whether it should apply the property *cy pres*.[43] One solution might be for the court to appoint a suitable trustee to receive the gift and carry out its intended charitable purposes, provided the particular corporation was not the very "essence of the gift."[44] The same also applies to a gift to a charitable corporation that subsequently goes out of existence.[45] In such cases, it is probably more accurate to say that the court is invoking the doctrine that "a trust shall not fail for want of a trustee" than it is to say that it is invoking the *cy pres* doctrine. On the other hand, in the case of *unrestricted gifts* to such charitable corporations, there could be vested equitable reversionary interests that need to be accommodated:

> Some cases have held that the property reverts to the donor, either because the corporation takes only a determinable fee or by resulting trust. It would seem, however, that cy pres should apply, and that the property should not revert to the donor unless he or she has manifested a contrary intention. In many states there are now statutes dealing with the dissolution of nonprofit corporations.[46]

We should note here that in response to concerns "about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose,"[47] the Uniform Trust Code would sharply curtail the ability of a settlor to create a charitable *trust* whose property would revert to the settlor's personal representative, *i.e.*, the settlor's probate estate, upon the accomplishment of that purpose (or upon the impossibility of its fulfillment), even when the purpose is a limited one.[48] This is a topic we cover in some detail in Section 9.4.3 of this handbook as part of our coverage of the *cy pres* doctrine.

Investments. When it comes to investing, it is probably safe to say that charitable trusts and charitable corporations are now regulated by the same default rules, or soon will be, namely, those embodied in the Uniform Prudent Investor Act applicable to trusts.[49] "UPMIFA reflects the

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[43]6 Scott & Ascher §39.3.3. A disposition to or for the benefit of a named charitable corporation generally will not fail though no entity precisely fits the description, or though two or more do. When the ambiguity is patent, that is apparent from the face of the instrument, extrinsic evidence as to the settlor's intent is generally not admissible. When the ambiguity is latent, which is likely to be the case with there is a misnomer, extrinsic evidence generally will be. *See generally* 6 Scott & Ascher §39.3.3 (Misnomer).

[44]6 Scott & Ascher §39.3.3.

[45]6 Scott & Ascher §39.3.3. Note also that "[w]hen there is a disposition to a charitable corporation that is consolidated with, or merged into, another, the surviving corporation is entitled to the property, unless the settlor has manifested a contrary intention." 6 Scott & Ascher §39.3.3. The merger or consolidation of charitable corporations is now dealt with by statute in many states. 6 Scott & Ascher §39.3.3. The merger of colleges and universities and the withdrawal of local churches from their parent organizations raise troubling issues of donor intent. 6 Scott & Ascher §39.3.3. *See generally* §4.1.1.2 (measures that can be taken at the drafting intent to protect a donor's charitable intentions).

[46]6 Scott & Ascher §39.3.3. *See generally* §4.1.1.1 (discussing the vested equitable reversionary interest and how it can become possessory through the imposition of a resulting trust).

[47]Uniform Trust Code §413 cmt.

[48]Uniform Trust Code §413. *See generally* 6 Scott & Ascher §39.5.2.

[49]*See generally* 5 Scott & Ascher §37.3.8.

fact that standards for managing and investing institutional funds are and should be the same, regardless of whether a charitable organization is organized as a trust, a nonprofit corporation, or some other entity."[50] Lawyers with a corporate focus, however, need not fear: "The standard is consistent with the business judgment standard under corporate law, *as applied to charitable institutions.*"[51]

It may well still be that there remain outstanding some residual differences between the default standards of loyalty applicable to directors of charitable corporations and trustees of charitable trusts. It has been said that directors are subject to a "best interest" standard, whereas trustees are subject to a "sole interest" standard.[52] How this subtle difference might play itself out in a given set of facts and circumstances is at present not entirely clear to these authors. Suffice it to say that UPMIFA makes no effort to fashion an overarching loyalty standard applicable to both directors and trustees in the charitable context.[53]

Creditor access. Creditor access is another area where the charitable trust and the charitable corporation are more and more coming to be subject to the same rules.[54] "It has long been the case that, when a charitable corporation incurs a liability in contract or in tort, a…[direct]…action at law lies against the corporation itself."[55] As we discuss in Section 7.3 of this handbook and the sub-sections thereto, under classic principles of trust law the recourse of a third-party contract or tort creditor of a "trust" was limited to an action at law against the trustee personally.[56] Under certain circumstances, the creditor might have been able to reach the underlying trust assets, but only derivatively in an equitable action to reach and apply whatever rights that the trustee might have had against the trust estate.[57] Today, either by contract or by statute a creditor of the "trust" is likely to be afforded direct access to the trust estate incident to an action at law against the trustee.[58]

Fiduciary liability. While we have touched on some important similarities, and some relatively minor differences, between the charitable trust and the charitable corporation,[59] limiting fiduciary liability is one area where there is fundamental divergence: "…[A]n exculpatory

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[50]Unif. Prudent Management Inst. Funds Act, Prefatory Note. *See generally* 5 Scott & Ascher §37.3.8.

[51]Unif. Prudent Management Inst. Funds Act §3 cmt.

[52]Unif. Prudent Management Inst. Funds Act §3 cmt.

[53]Unif. Prudent Management Inst. Funds Act §3 cmt.

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

[55]5 Scott & Ascher §37.1.1 n.9.

[56]*See generally* §§7.3.1 of this handbook (trustee's external liability as legal owner in contract to third-party creditors), 7.3.2 of this handbook (trustee's agreement with creditors to limit external contractual liability), 7.3.3 of this handbook (trustee's external liability as legal owner in tort to third parties).

[57]*See generally* §§7.3.1 of this handbook (trustee's external liability as legal owner in contract to third party creditors), 7.3.2 of this handbook (trustee's agreement with creditors to limit external contractual liability), 7.3.3 of this handbook (trustee's external liability as legal owner in tort to third parties).

[58]*See generally* §§7.3.1 of this handbook (trustee's external liability as legal owner in contract to third-party creditors), 7.3.2 of this handbook (trustee's agreement with creditors to limit external contractual liability), 7.3.3 of this handbook (trustee's external liability as legal owner in tort to third parties).

[59]4A Scott on Trusts §348.1 ("In both cases the Attorney General can maintain a suit to prevent a diversion of the property to purposes other than those for which it was given; and in both cases the doctrine of cy pres is applicable.").

provision relieves or exempts a party from liability for his or her prospective acts, while an indemnity agreement obligates one party to make good a loss or damage that another party has already incurred."[60] *Settlors* of charitable trusts generally control the insertion of exculpatory provisions into trust instruments, not the trustees.[61] When it comes to charitable corporations, however, it is the *directors*, the fiduciaries themselves, who generally have statutory authority[62] to determine whether they are entitled to be indemnified by the corporation for their negligent acts.[63]

Such self-indemnification authority, however, is not without its limitations. In California, for example, indemnification for amounts paid in settlement of a threatened or pending derivative action is not permitted.[64] On the other hand, most states would permit a director who prevailed on the merits of a contested matter to be indemnified by the entity. Some state statutes provide for automatic indemnification or certain specified liabilities; others require as well that there be express authority in the instruments that govern the entity. Accordingly, the director of a charitable corporation interested in ascertaining the limits of his or her liability needs to examine both the applicable statutes and the organization's governing instruments. Note that an attorney who drafts an indemnity provision into the bylaws of a private foundation should be careful not to run afoul of the provisions of the Internal Revenue Code's Section 4941.[65]

The Revised Model Nonprofit Corporation Act provides that a director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including without limit, property that may be subject to restrictions imposed by the donor or transferor of such property.[66] The Restatement (Third) of Trusts is in accord, the director not holding title to either the corporation or its property.[67]

Principal invasion. Another fundamental divergence in the law of charitable trusts and charitable corporations relates to principal invasion. An unrestricted gift to a charitable corporation carries with it the presumption that principal as well as income may be devoted to its charitable purpose; a charitable trust is presumed to be income only, absent an expression of contrary intent in the governing instrument.[68]

Standards of care. A third fundamental difference between the charitable trust and the charitable corporation relates to the fiduciary's standard of care. "As nonprofits gradually came to be organized as corporations, many courts began to apply the corporate standard of care to nonprofit directors, a level of care that, at least in the for-profit world, goes hand-in-hand with the

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[60]86 Ops. Cal. Atty. Gen. 95, 2003 WL 21672836 (Cal. A.G.).

[61]*See generally* §7.2.6 of this handbook (exculpatory (also exemption or indemnity) provisions covering breach of fiduciary duties to the beneficiary). It should be noted that under §410(a) of ERISA, an ERISA trustee may not be relieved from responsibility by the plan documentation and by the instrument governing the associated trust.

[62]*See* Revised Model Nonprofit Corporation Act Subchapter E, cmt. 1 (Directors and Officers) (1987); *see also* Moody, *State Statutes Governing Directors of Charitable Corporations*, 18 U.S.F. L. Rev. 749, 782–783 (1984) (presenting a table of state indemnification statutes applicable to nonprofit corporations).

[63]*See generally* T. G. Lynch & M. K. Fallon, *A Primer on Suing Charitable Corporations*, 27 Mass. Law. Wkly. 539, Nov. 16, 1998, at 11, col. 1 (focusing on Massachusetts, the authors suggest that plaintiffs may avoid statutory caps by suing compensated employees and officers directly).

[64]Cal. Corp. Code §5238.

[65]*See generally* Berry, 879-2nd T.M., Private Foundations—Self Dealing [I.R.C. §4941].

[66]Model Revised Nonprofit Corporation Act §8.30(e).

[67]Restatement (Third) of Trusts §5 cmt g.

[68]*See generally* §5.4.1.3 of this handbook (right to income or possession).

business judgment rule."[69]

Ancient restrictions on the right to take and hold land. What was once a fourth difference between the charitable corporation and the charitable trust related to ancient statutory restrictions on the right *to take and hold* land in England.[70] Early on, Parliament took to placing certain restrictions on the ability of a corporation, which in most cases would be the church, to take and hold land, this so as not to "deprive the overlord, including the king as lord paramount, of the benefits accruing from human tenants, who would live, marry, have children, and die" and so as not "to undermine the defense of the realm, which was based on the relationship between land-lord and tenant."[71] The process of imposing such restrictions began with the signing of the Magna Carta.[72] In 1960, they were removed once and for all by an act of Parliament.[73]

Mortmain. What was once a fifth difference between the charitable corporation and the charitable trust related to one's ability to *devise* one's land by will. Prior to the enactment of the statute of wills in 1540, a land owner at common law could not devise his land to anyone, "except, by local custom, in London and certain other towns."[74] With enactment of the statute of wills, land could now be devised, but not to corporations.[75]As discussed in Section 8.15.1 of this handbook, landowners in the latter part of the fifteenth century and early part of the sixteenth century employed the feoffment to use in part as a will substitute.[76] The statute of charitable uses, which Parliament enacted in 1601 and which we cover in Section 8.15.4 of this handbook, came to be construed by the English courts as validating devises to charitable corporations.[77] In 1736, however, Parliament enacted the Georgian Statute of Mortmain, "which forbade devises of land to any person or corporation for charitable uses."[78] In 1891, this statute was repealed.[79] In England, by 1960, most statutory restrictions on one's ability to devise land to a charitable corporation had been lifted.[80] In the United States, there are now only a few states that still place some restriction on one's ability to bequeath or devise property to a charitable corporation,[81] or on the amount or type of property that may be so transferred.[82]

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[69]Denise Ping Lee, *The Business Judgment Rule: Should It Protect Nonprofit Directors?*, 103 Colum. L. Rev. 925 (2003). *See also* §9.12 of this handbook (the condominium trustee) (noting that a condominium trustee is generally held to a corporate-like business judgment standard rather than to the prudent man standard of a trustee).

[70]*See generally* 5 Scott & Ascher §37.2.6.1 (Restrictions in England on the Holding of Land by Corporations).

[71]*See generally* 5 Scott & Ascher §37.2.6.1.

[72]*See generally* 5 Scott & Ascher §37.2.6.1.

[73]*See generally* 5 Scott & Ascher §37.2.6.1.

[74]*See generally* 5 Scott & Ascher §37.2.6.2 (Restrictions in England on Devises of Land to Corporations).

[75]*See generally* 5 Scott & Ascher §37.2.6.2.

[76]*See also* 5 Scott & Ascher §37.2.6.2.

[77]*See generally* 5 Scott & Ascher §37.2.6.2.

[78]5 Scott & Ascher §37.2.6.2 (referring to Stat. 9 Geo. II, c. 36 (1736)).

[79]*See* Stat. 54 & 55 Vict. C. 73 (1891).

[80]*See* Charities Act, 1960, 8 & 9 Eliz. II, c. 58, §38.

[81]5 Scott & Ascher §37.2.6.4 n.6.

[82]5 Scott & Ascher §37.2.6.4 n.7.