Title

The case for making substantial unrestricted gifts to a charitable corporation indirectly via assignment to an independent trustee

Text

When considering how to make a substantial gift to a charitable corporation, one should not rule out making it indirectly via assignment to an independent trustee. First, an independent trusteeship facilitates proper asset segregation. Second, an independent discretionary trusteeship can lawfully thwart the charitable corporation's contract and tort creditors. Third, if securing donor intent is a concern, a truly independent discretionary trusteeship, assuming all goes well, should give the charity no choice but to take donor intent seriously. Checks and balances and all that. Care, of course, should be taken to have the terms of the trust comply with the Private Foundation Rules. See the Internal Revenue Code. A link to the full content of this posting may be found below.

An independent trusteeship facilitates proper asset segregation. 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. Do we have a trust or don't we? One court has referred to the arrangement as a quasi-trust. 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. 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. 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. If management expects to materially deviate from the charitable corporation's stated mission, in theory it should, at least for accounting purposes, 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, its Supreme Court having in no uncertain terms rejected any notion that such corporations are governed by the law of trusts. All these asset-segregation issues are mooted when there is an independent trustee in the picture. For relevant authorities see the footnoting in §9.8.1 of *Loring and Rounds: A Trustee's Handbook* (2024).

An independent discretionary trusteeship can lawfully thwart the charitable corporation's contract and tort creditors. Were a donor to gift to a charitable corporation directly such that the donation is commingled with the corporation's general assets, the donation, as a practical matter, would be subject to the claims of the corporation's contract and tort creditors. Had the transfer instead been made to the independent trustee of a perpetual discretionary trust whose purpose was to further the charitable purposes of the charitable corporation, then any creditor access to the full entrusted donation would have been at the discretion of the trustee, a discretion that would be constrained by fiduciary considerations. Were the corporation to go bankrupt and close its doors, the doctrine of *cy pres* arguably would prevent the bankruptcy trustee from taking title to the full donation. The donation could then be devoted to charitable purposes that closely approximate the purposes of the now defunct charitable corporation. See generally *In re Wells Trust*, 2024 WL 1201265 (Penn. 2024), in this regard.

If securing donor intent is a concern. Some high-profile charitable corporations have at times not been particularly solicitous of donor intent. *See, e.g*. Doug White, *Abusing Donor Intent: The Robertson Family's Epic Lawsuit against Princeton University* (Saint Paul, Minn.: Paragon House, 2014). Vesting legal title to a donation in an independent trustee of a well-crafted discretionary charitable trust will go a long way towards making it more difficult for the charitable corporation to thwart donor intent once the donation has been made. For other measures that can be taken at the drafting stage, see *Loring and Rounds: A Trustee's Handbook* §4.1.1.2 (2024). One of the other measures relates to selecting the jurisdiction in which the independent trusteeship is to be administered. Some state judiciaries, such as Montana's, are solicitous of donor intent. *See, e.g*., *In re Will of Cram*, 606 P.2d 145 (Mont. 1980). Others, such as Massachusetts', are less so. *See, e.g*., *Ebitz v. Pioneer Nat'l Bank*, 361 N.E.2d 225 (Mass. 1977).

The independent trusteeship, however, is not a cure all. Around every corner are ill-considered legislative tweaks to trust jurisprudence, tweaks that are being judicially applied in jurisprudential isolation to specific situations with results that are doctrinally questionable. *In re Wells Trust* (Penn. 2024), mentioned above, is a case in point. Section 413 of the Uniform Trust Code restates via codification aspects of equity's *cy p*res doctrine. Pennsylvania's version of UTC §413 contains one provision that has no direct counterpart in the UTC. In our case, for example, it would authorize judicial termination of the independent trusteeship followed by distribution to *the charitable corporation* if it were determined that "administrative expense" or "other burdens" are "unreasonably out of proportion" to the independent trusteeship's "charitable benefits." The provision expressly "leaves no room for the consideration of settlor intent" when it comes to determining whether the trust should be discontinued and its property transferred outright to the charitable corporation. There may be no such room pursuant to the particular piece of legislation, but that may not necessarily be the case pursuant to prevailing general principles of equity, principles that could well trump the legislation. Equity's doctrine of *cy pres* comes to mind. In other words, the *Wells* Court parsed the legislation in isolation without regard as well to the backdrop of equity jurisprudence against which it was conceived. It is not helpful that in UTC §106, tracked verbatim in Pennsylvania's version of the UTC, it is asserted that the common law and principles of equity *supplement* the UTC. This cannot be. It must be the other way around as the very trust relationship itself is a creature of equity, not the UTC. The UTC is merely an aggregation of assorted tweaks to just one constellation in equity's universe of constellations; it is by no means an all-inclusive "code" of the type one encounters in civil-law jurisdictions, or in the U.S. of the type one encounters *at law*, such as in the taxation space.