

**DONOR INTENT:  
PRESERVING THE MISSION  
OF CHARITABLE FOUNDATIONS**

by  
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# **DONOR INTENT: PRESERVING THE MISSION OF CHARITABLE FOUNDATIONS**

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## **INTRODUCTION**

Many wealthy individuals reach a point in their lives when they realize that they have more than enough financial resources to provide for their own needs and the needs of their family. They also realize that while they could pass their wealth to the next generation, doing so may be both costly because of estate and other transfer taxes and unwise because of the effect of unearned wealth on its recipients. Their thoughts therefore naturally turn, often at the urging of advisors and the public at large, to dedicating the bulk of their fortunes to improving the common good generally or promoting specific charitable causes. The most common legal vehicle for implementing this intent is the private foundation. The creation of the now-\$24 billion Bill and Melinda Gates Foundation is only the most prominent recent example of this tendency.

When most donors create a private foundation, they focus on defining and refining their vision for the private foundation's mission and activities.

They often neglect, however, the issue of how to ensure that this mission and those activities remain consistent with their vision and values when they no longer control the foundation. The result is therefore often that the later stewards of the foundation, whether they be leaders of the community, family members or trusted advisors, depart, sometimes radically, from the intent of the founding donor and use the foundation's wealth for purposes unrelated to or in opposition to that intent.

The purpose of this CONTEMPORARY LEGAL NOTE is to help donors and their advisors consider the advantages and disadvantages of various legal methods for ensuring the intent of donors is followed by private foundations that they establish and fund. This paper will not dwell on the prominent examples of private foundations that have departed from the intent of their founding donors or of the private foundations that have generally stayed true to that intent, which have been detailed by others elsewhere.<sup>1</sup> This paper also assumes that a donor has the right, within the restrictions on permissible activities imposed by federal tax law in exchange for the tax benefits enjoyed by private foundations and their donors, to determine how the wealth he has earned and accumulated will be used for perpetuity.<sup>2</sup> It should be noted,

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<sup>1</sup>See generally MARTIN MORSE WOOSTER, *THE GREAT PHILANTHROPISTS & THE PROBLEM OF "DONOR INTENT"* (1998); Chris Abbinate, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665 (1997); THE PHILANTHROPY ROUNDTABLE, *DONOR INTENT* (1993).

<sup>2</sup>Whether such a right should exist has been part of the ongoing debate regarding the role of the doctrine of cy pres and, more specifically, whether courts should have broader

however, the one fundamental aspect of respect for donor intent is honoring a donor's decision about how long the private foundation he funds should exist. It would therefore be contrary to such respect to limit the life of a private foundation to an arbitrary period of time through government regulations.

The first section of this CONTEMPORARY LEGAL NOTE discusses the current state of the law with respect to the ability of a donor to enforce his intent through provisions in the governing documents of the private foundation he creates. This discussion includes a general review of both corporate and trust law, as well as the doctrine of cy pres. The second section will discuss a number of specific strategies for preserving donor intent, including the risks of each. The second section is supplemented by an Appendix that contains sample language for implementing a number of these strategies.

## **I. THE LEGAL LANDSCAPE**

Persons interested in creating a new charitable organization in the

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authority to ensure that such trusts continue to in fact further "public" purposes in exchange for the ability of charitable trusts to exist in perpetuity. See, e.g., Wendy A. Lee, Note, *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions Through Expanded Use of Cy Pres*, 35 SUFFOLK U.L. REV. 173 (2000); Abbinate, *supra* note 1, at n.110 (citing recent articles); Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111 (1993). A similar debate has recently reemerged with respect to whether private foundations should spend down their endowments. See, e.g., David Bank, *Giving While Living: Some Foundations Have a New Idea: Spend It All Now*, WALL ST. J., Sept. 10, 2002, at A1; Paul J. Jansen & David M. Katz, *For Nonprofits, Time is Money*, MCKINSEY QUARTERLY, 2002 No. 1, at 124; Mark R. Kramer, *Perpetuity: the Real Issue in Payout Debate*, THE CHRONICLE OF PHILANTHROPY, Jan. 27, 2000, at 33; PERRY MEHLING, SPENDING POLICIES FOR FOUNDATIONS: THE CASE FOR INCREASED GRANTS PAYOUT (1999).

United States have three choices for legal form: an unincorporated association, a nonprofit corporation or a charitable trust. For organizations that will be engaging in any significant amount of activities or holding assets, the first choice is generally not advisable because the law varies greatly between jurisdictions regarding whether such an entity can hold title to assets, whether such an entity can sue or be sued, and whether contractual, tort or other types of liabilities attach to the individuals creating the association instead of the association.<sup>3</sup> The two forms that are almost always used, particularly for private foundations, are therefore the nonprofit corporation and the charitable trust.

## **A. The Nonprofit Corporation**

Most jurisdictions have a separate nonprofit corporation law.<sup>4</sup> The

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<sup>3</sup>The National Conference of Commissioners on Uniform State Laws has promulgated a uniform act to address these issues in an integrated and consistent manner by treating such associations as distinct legal entities, but this act has only been adopted in eleven states. See UNIF. UNINC. NONPROFIT ASS'N ACT, 6A U.L.A. 509 (1995) & 223 (Supp. 2002).

<sup>4</sup>ALA. CODE §§ 10-3A-1 to -225; ALASKA STAT. §§ 10.20.005-.725; ARIZ. REV. STAT. §§ 10-3101 to 11702; ARK. CODE §§ 4-28-101 to -517; CAL. CORP. CODE §§ 5000-10841; COLO. REV. STAT. §§ 7-121-101 to -137-301; CONN. GEN. STAT. §§ 33-1000 to -1290; D.C. CODE §§ 29-501 to -599.16; FLA. STAT. ch. 617.01011-.312; GA. CODE §§ 14-3-101 to -1703; HAW. REV. STAT. §§ 415B-1 to -159; IDAHO CODE §§ 30-3-1 to -145; 805 ILL. COMP. STAT. §§ 101.01-117.05; IND. CODE §§ 23-17-1 to -30-4; IOWA CODE §§ 504A.1-.101; KAN. STAT. §§ 17-1701 to -1758; KY. REV. STAT. §§ 273.161-.400; LA. REV. STAT. §§ 201-269; ME. REV. STAT. ANN. tit. 13, §§ 901-986; MD. CODE ANN., Corporations and Associations §§ 5-201 to -702; MASS. GEN. LAWS ch. 180, §§ 1-29; MICH. COMP. LAWS §§ 450.2102-.3099; MINN. STAT. §§ 317A.001-.909; MISS. CODE §§ 79-11-31 to -403; MO. REV. STAT. §§ 355.001-.881; MONT. CODE ANN. §§ 35-2-113 to -1402; NEB. REV. STAT. §§ 21-1901 to -19,177; NEV. REV. STAT. §§ 82.006-.546; N.H. REV. STAT. §§ 292:1-31; N.J. REV. STAT. §§ 15A:1-1 to 15-2; N.M. STAT. §§ 53-8-1 to -99; N.Y. NOT-FOR-PROFIT CORP. LAW §§ 101-1516; N.C. GEN. STAT. §§ 55A-1-01 to -17-05; N.D. CENT. CODE §§ 10-33-01 to -147; OHIO REV. CODE §§ 1702.01-.99; OR. REV. STAT. §§ 65.001-.990; PA. STAT. tit. 15, §§ 5101-6162; R.I. GEN. LAWS §§ 7-6-1 to -108; S.C.



American Bar Association has also developed a Model Nonprofit Corporation Act, originally promulgated in 1964 and issued in revised form in 1987.<sup>5</sup> The two states (Delaware and Oklahoma) that do not have such a law have provisions in their general corporate law to accommodate nonprofit corporations.<sup>6</sup>

For the most part these laws parallel the general corporate laws, with members, if there are any, taking the place of shareholders and directors having many of the same powers and responsibilities as their for-profit counterparts. There are, however, often restrictions that are unique to nonprofit corporations. For example, many jurisdictions prohibit or limit loans by a nonprofit corporation to its directors and officers.<sup>7</sup> California provides that not more than 49 percent of the persons serving on a nonprofit corporation's board of directors can be compensated for services to the corporation (other than

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CODE §§ 33-31-101 to -1708; S.D. CODIFIED LAWS §§ 47-22-1 to -28-17; TENN. CODE §§ 48-51-101 to -68-105; TEX. REV. CIV. STAT. art. 1396, §§ 1.01-11.01; UTAH CODE §§ 16-6a-101 to -1705; VT. STAT. tit. 11B, §§ 1.01-17.05; VA. CODE §§ 13.1-801 to -944; WASH. REV. CODE 24.03.005-.925; W. VA. CODE §§ 31-1-136 to -160; WIS. STAT. §§ 181.0103-.1703; WYO. STAT. §§ 17-19-101 to 1807.

<sup>5</sup>SUBCOMMITTEE ON THE MODEL NONPROFIT CORPORATION LAW OF THE BUSINESS LAW SECTION AMERICAN BAR ASSOCIATION, REVISED MODEL NONPROFIT CORPORATION ACT (1988).

<sup>6</sup>DEL. CODE tit. 8, §§ 127, 141(j), 215, 242, 255-258, 276, 313; OKLA. STAT. tit. 18, §§ 1019, 1027(G), 1060, 1077, 1084-1087, 1097.

<sup>7</sup>See, e.g., ARK. CODE §§ 4-28-220; D.C. CODE § 29-528; FLA. STAT. ch. 617.0833; HAW. REV. STAT. § 415B-70; ILL. COMP. STAT. § 101.80; IND. CODE § 23-17-13-3; IOWA CODE 504A.27; KY. REV. STAT. § 273.241; MINN. STAT. § 317A.501; MISS. CODE § 79-11-282; MO. REV. STAT. § 366.421; MONT. CODE ANN. § 35-2-435; NEB. REV. STAT. § 21-1988; N.J. REV. STAT. § 15A:6-11; N.M. STAT. § 53-8-29; N.Y. NOT-FOR-PROFIT CORP. LAW § 716; N.C. GEN. STAT. § 55A-8-32; N.D. CENT. CODE § 10-33-82; OR. REV. STAT. § 65.364.

services as a director) or close family members of persons compensated for services to the corporation.<sup>8</sup> Arizona requires that boards of directors adopt conflict of interest policies, although this rule does not apply to smaller (less than \$10 million in assets or less than \$2 million in annual gross receipts) nonprofit corporations and has various other exceptions.<sup>9</sup>

Several jurisdictions also place limitations on the ability of nonprofit corporations to dispose of their assets or engage in other significant corporate actions. In California, a nonprofit corporation is required to give written notice to the Attorney General 20 days before it sells or otherwise disposes of all or substantially all of its assets, unless the transaction is in the usual and regular course of its activities or the Attorney General has waived this requirement.<sup>10</sup> In New York, a nonprofit corporation that wants to engage in a formal merger, consolidation or dissolution must have its plan of merger, consolidation or dissolution approved by the state Supreme Court (the trial court in New York state).<sup>11</sup> Several other states have similar provisions relating to dissolution or

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<sup>8</sup>CAL. CORP. CODE § 5227. All discussion of California's nonprofit corporation law refers to the provisions applicable to "public benefit corporations," which would include private foundations incorporated in California that are tax-exempt under section 501(c)(3) of the Internal Revenue Code.

<sup>9</sup>ARIZ. REV. STAT. § 10-3864.

<sup>10</sup>CAL. CORP. CODE § 5913.

<sup>11</sup>N.Y. NOT-FOR-PROFIT CORP. LAW §§ 907, 1002(d). These statutes also require providing notice to the Attorney General, and the court will generally not approve a plan without the explicit consent of the Attorney General. All discussions of New York nonprofit corporate law refer to the provisions applicable to "Type B" (charitable) corporations, which

other major corporate actions.<sup>12</sup>

No jurisdiction makes it particularly difficult, however, to amend a nonprofit corporation's articles or certificate of incorporation or its Bylaws to change the corporation's purposes. The only exception is New York, which requires Supreme Court approval and notice to the Attorney General's office for any amendment to a New York charitable nonprofit corporation's certificate of incorporation.<sup>13</sup> Such approval is usually readily available as long as the changes are consistent with being a charitable ("Type B") corporation generally, although presumably a court would not approve, and the Attorney General would object to, any amendment that was prohibited by the terms of the original certificate of incorporation. Several states also specifically allow articles of incorporation to provide that approval of a third party other than the board of directors is required for any amendment to the articles or Bylaws,<sup>14</sup> and a similar provision may be permissible in the other states even if the applicable statutes do not explicitly provide for it.

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would include private foundations incorporated in New York that are tax-exempt under section 501(c)(3) of the Internal Revenue Code.

<sup>12</sup>See, e.g., GA. CODE § 14-3-1102; ME. REV. STAT. ANN. tit. 5, §§ 194-C to -H; MONT. CODE ANN. § 35-2-609; NEB. REV. STAT. § 21-19,131; N.D. CENT. CODE § 10-33-122; OHIO REV. CODE §§ 1702.39(B), 1702.41(B); OR. REV. STAT. § 65.484, 65.534, 65.627.

<sup>13</sup>N.Y. NOT-FOR-PROFIT CORP. LAW § 804(a)(ii). While the statute only requires providing notice to the Attorney General, in practice the New York courts generally also require approval by the Attorney General before they will agree to an amendment.

<sup>14</sup>See, e.g., COLO. REV. STAT. § 7-130-301; IDAHO CODE § 30-3-99; MONT. CODE ANN. § 35-2-232; NEB. REV. STAT. § 21-19,116; OR. REV. STAT. § 65.467.

Other than in New York, approval of an amendment to a governing document generally only requires a majority vote by the members of the corporation's board of directors and, in some jurisdictions, a majority vote by the members, if any, of the corporation. Amendments to articles or a certificate of incorporation must be filed with the state, but such amendments are generally only reviewed to ensure they certify that the required approvals have in fact been received and the amendments conform to whatever formatting requirements may be applicable. Bylaws are considered internal corporate documents, so amendments to Bylaws do not need to be filed with, much less approved by, the state. The articles of incorporation may themselves have more stringent requirements regarding amendments, including a prohibition on certain amendments, but except in New York, where a court and the Attorney General must approve amendments to the articles, the enforcement of such requirements is left in the first instance to the members of the board of directors or, possibly, other interested parties that are familiar with the terms of the articles.<sup>15</sup>

The Attorney General of a nonprofit's state of incorporation or operations

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<sup>15</sup>See, e.g., *Parish of Jefferson v. Lafreniere Park Foundation*, 716 So. 2d 472 (La. App. 1998) (government operating public park successfully brought suit to enjoin governing body of a private foundation from changing the purposes of the foundation from supporting a particular park to supporting a broader range of recreational activities). Some courts have held that only the Attorney General has standing to bring an action alleging misuse of charitable assets. See, e.g., *Garland v. Beverly Hosp. Corp.*, 720 N.E.2d 838, 840 (Mass. App. Ct. 1999), *review denied*, 724 N.E.2d 709 (Mass. 2000).

generally has authority and standing to bring a proceeding in court to enforce the obligations of a charitable corporation, either under the common law or by statute.<sup>16</sup> For example, in recent years Attorneys General of various states have brought suit several times to prevent transactions involving charitable hospitals that the Attorney General felt violated the charitable entity's obligations, and a few states now require notification of the Attorney General before major transactions involving charitable hospitals can occur.<sup>17</sup> Such suits are, however, relatively few and far between, and tend only to be brought when an Attorney General perceives that a significant segment of the community will be directly affected by the proposed transaction or change in operations.

Private foundations are required to provide the IRS with a copy of their governing documents when they apply for tax-exempt status and with a copy of any amendments to those documents when they file their annual information

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<sup>16</sup>For statutory grants of this authority, see, e.g., GA. CODE § 14-3-170; MASS. GEN. LAWS ch. 12, § 8; N.Y. NOT-FOR-PROFIT CORP. LAW § 112; S.C. CODE § 33-31-171. For the common law authority of an Attorney General over nonprofit organizations, see, e.g., *Younger v. Wisdom Soc.*, 121 Cal. App. 3d 683, 691 (1981); *Russell v. Yale Univ.*, 737 A.2d 941, 945 (Conn. App. 1999); *Oberly v. Kirby*, 592 A.2d 445, 486 (Del. 1991); *Riverton Area Fire Protection Dist. V. Riverton Volunteer Fire Dept.*, 566 N.E.2d 1015 (Ill. App.), *appeal denied*, 575 N.E.2d 923 (Ill. 1991); *Lefkowitz v. Lebensfeld*, 417 N.Y.S.2d 715 (N.Y. App. 1979), *aff'd*, 415 N.E.2d 919 (N.Y. 1980); *Musical Fund Soc.*, 73 D.&C.2d 115, 121-23 (Pa. 1975); *Nacol v. State of Texas*, 792 S.W.2d 810, 812 (Tex. App. 1990); *Tauber v. Commonwealth*, 499 S.E.2d 839, 842 (Va.), *cert. denied*, 525 U.S. 965 (1998).

<sup>17</sup>See, e.g., ARIZ. REV. STAT. § 10-11251 to 11254; CAL. CORP. CODE §§ 5914-5925; IDAHO CODE §§ 48-1501 to -1512. As previously noted, several states generally require notification of the Attorney General or court approval for major corporate actions such as merger, consolidation or dissolution. See, *supra*, note 12.

returns (IRS Form 990-PF).<sup>18</sup> The IRS is not, however, under any particular obligation to review either the original documents or any amendments except to ensure that they conform to the organizational requirements for an organization described in section 501(c)(3) of the Internal Revenue Code.<sup>19</sup> The IRS is also not under any obligation to review whether the activities of a private foundation are in conformity with the terms of those governing documents. The IRS also rarely audits the returns of charitable organizations; for 1996-2001, the average examination rate was less than one-half of one percent.<sup>20</sup>

## **B. The Charitable Trust**

Primarily a creature of common law, charitable trusts are now permitted in all fifty states and the District of Columbia either by statute or settled case law.<sup>21</sup> A charitable trust usually has as much flexibility as a nonprofit

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<sup>18</sup>See IRS Form 1023 (Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code), Part I, Question 10a (revised Sept. 1998); IRS Form 990-PF (Return of Private Foundation) for 2001, Part VII-A, Question 3.

<sup>19</sup>See 26 C.F.R. § 1.501(c)(3)-1(b) (describing these requirements).

<sup>20</sup>U.S. GENERAL ACCOUNTING OFFICE, TAX-EXEMPT ORGANIZATIONS: IMPROVEMENTS POSSIBLE IN PUBLIC, IRS, AND STATE OVERSIGHT OF CHARITIES, at 22 (April 2002). For private foundations, of the 56,658 returns filed in 1998 (the latest year for which statistics are available), the IRS only audited 350, or 0.6 percent. See Melissa Whitten, *Domestic Private Foundations and Charitable Trusts, 1998*, STATISTICS OF INCOME BULLETIN, Winter 2001-2002, at 44, 65 (reporting number of returns filed by domestic private foundations); U.S. GENERAL ACCOUNTING OFFICE, POLITICAL ORGANIZATIONS: DATA DISCLOSURE AND IRS'S OVERSIGHT OF ORGANIZATIONS SHOULD BE IMPROVED, at 46 (reporting audit figures) (July 2002).

<sup>21</sup>GEORGE T. BOGART, TRUSTS § 56 (6th ed. 1987); IVA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 348.3 (4th ed. 1989); see also *Vidal v. Girard's Ex'rs*, 43 U.S. (2 How.) 127, 194-96 (1844) (holding that charitable trusts existed under common law before the passage of the English Statute of Charitable Uses, and therefore could exist in a jurisdiction that had not adopted that statute). For state statutes

corporation with respect to the generality or specificity of its charitable purposes.<sup>22</sup> The trustee or trustees may therefore be granted as little or as much discretion in achieving the charitable purposes of the trust as desired. As with a charitable nonprofit corporation, the Attorney General of the charitable trust's state generally has authority and standing to bring a proceeding in court to enforce the obligations of the trust by statute or under the common law.<sup>23</sup> A trustee may also normally bring suit to enforce a charitable trust against the other trustee(s),<sup>24</sup> as can persons with an interest in a trust by being entitled to

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explicitly permitting charitable trusts, see, e.g., CONN. GEN. STAT. § 45a-515; GA. CODE § 53-2-99; KY. REV. STAT. § 381.260; LA. REV. STAT. § 9:2271; MD. CODE ANN., Estates and Trusts § 14-301; MINN. STAT. § 501B.31; MISS. CODE §§ 39-9-1; NEB. REV. STAT. § 30-239; N.Y. ESTATES, POWERS AND TRUSTS LAW § 8-1.1; N.C. GEN. STAT. §§ 36A-49, -52; TENN. CODE § 35-1-114; W. VA. STAT. §§ 35-2-1 to -2; WYO. STAT. §§ 34-5-114 to -117.

<sup>22</sup>See BOGART, *supra* note 21, at § 55 (stating that generally “[t]rusts to aid charity in general or one particular type of charity without any description of methods are sufficiently definite, since the trustee has a power of selection among charitable purposes”). As charitable corporations must satisfy the corporate formalities of the state of their incorporation, charitable trusts must also satisfy the trust formalities of the state of their creation, including, if the trust is created by a will, the applicable law regarding wills. See *generally* BOGART, *supra* note 21, at § 66-70; IV SCOTT & FRATCHER, *supra* note 21, at §§ 349-365.

<sup>23</sup>For statutory grants of such authority, see, e.g., CAL. GOV'T CODE § 12598(a); GA. CODE § 53-12-115; IDAHO CODE § 67-1401(5); ME. REV. STAT. ANN. tit. 5, § 194(2); MICH. COMP. LAWS § 14.286; MINN. STAT. § 317A.813; N.Y. ESTATES, PROBATE & TRUST LAW § 8-1.1(f); N.C. GEN. STAT. §§ 36A-52(c); N.D. CENT. CODE § 59-04-02; S.D. CODIFIED LAWS § 55-9-5; WIS. STAT. §§ 701.10(3). For court decisions recognizing such authority, see, e.g., *Davis v. United States*, 495 U.S. 472, 483 (1990); *Lieberman v. Rogers*, 481 A.2d 1295, 1297 (Ct. 1984); *Hooker v. The Edes Home*, 579 A.2d 608, 612 n.9 (D.C. Ct. App. 1990); *Ex re Oberly*, 453 So.2d 1177 (Fla. App. 1984); *Matter of Estate of Laas*, 525 N.E.2d 1089, 1092-93 (Ill. App. 1988); *St. John's-St. Luke Evangelical Church v. National Bank*, 283 N.W. 2d 852, 858 (Mich. App. 1979); *State ex rel. Champion v. Holden*, 953 S.W.2d 151 (Mo. App. 1997).

<sup>24</sup>For court recognition of such authority, see, e.g., *Holt v. College of Osteopathic Physicians and Surgeons*, 394 P.2d 932 (Cal. 1964); *Russell*, *supra* note 16; *Balls v. Mills*, 376 So. 2d 1174 (Fla. App. 1979), *cert denied*, 388 So.2d 1116 (Fla. 1980); *St. John's-St. Luke Evangelical Church*, *supra* note 23, at 858.

a benefit from the trust that is more than the benefit to which members of the public are generally entitled.<sup>25</sup> The donor does not, however, generally have standing to sue unless he is also a trustee or beneficiary.<sup>26</sup> The Attorney General is ordinarily a necessary party to such suit.<sup>27</sup>

The key distinction between charitable trusts and nonprofit corporations for the purpose of this paper is that any deviation from the terms of a trust instrument can generally only be made through a petition to the appropriate court.<sup>28</sup> Furthermore, the Attorney General is ordinarily a necessary party when a proceeding is brought for permission to change the terms of the trust.<sup>29</sup>

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<sup>25</sup>See, e.g., *Grabowski v. City of Bristol*, 780 A.2d 953, 955 (Conn. App. 2001); *Hooker*, *supra* note 23, at 612-15; *St. John's-St. Luke Evangelical Church*, *supra* note 23, at 858; *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 755-56 (N.Y. 1985); *Matter of Estate of Doan*, 727 P.2d 574, 576 (Okla. 1986); *In re Francis Edward McGillick Found.*, 642 A.2d 467, 469-70 (Pa. 1994); *Gray v. St. Matthews Cathedral Endowment Fund*, 544 S.W.2d 488 (Tex. Civ. App. 1976). *But see In re Alaimo*, 732 N.Y.S.2d 819, 820 (N.Y. App. Div. 2001) (holding that only the Attorney General has standing to enforce a charitable trust), *leave to appeal denied*, 765 N.E.2d 853 (N.Y. 2002).

<sup>26</sup>See, e.g., *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995 (Ct. 1997). *But see, e.g., Smithers v. St. Luke's-Roosevelt Hosp. Center*, 723 N.Y.S.2d 426, 433-36 (N.Y. App. Div. 2001) (holding that the wife of a deceased donor had standing on behalf of the donor's estate to seek enforcement of the terms of a gift to a charitable corporation).

<sup>27</sup>*In re Winsted Memorial Hospital*, 236 B.R. 556, 559-60 (Bankr. D. Conn. 1999); CAL. PROB. CODE §§ 8111, 11703; CONN. GEN. STAT. § 3-125; ME. REV. STAT. ANN. tit. 5, § 194(4); *Warren v. Board of Regents of Univ. System of Georgia*, 544 S.E.2d 190, 192 (Ga. Ct. App. 2001); *Horse Pond Fish & Game Club, Inc. v. Cormier*, 581 A.2d 478, 482 (N.H. 1990); TEX. PROP. CODE ANN. §§ 115.001, 123.002.

<sup>28</sup>See generally IIA SCOTT & FRATCHER, *supra* note 21, at §§ 164-168 (but noting that there are circumstances, such as if a purpose or instruction is impossible or illegal, where court permission is not required).

<sup>29</sup>See, e.g., CAL. PROB. CODE §§ 8111, 11703; *Carlisle v. Delaware Trust Co.*, 99 A.2d 764, 775 (Del. Ch. 1953); MASS. GEN. LAWS ch. 12, §§ 8, 8G; *Brady v. Ceaty*, 202 N.E.2d 49, 50 (Mass. 1965); *Voegtly Estate*, 151 A.2d 593, 594 (Pa. 1959); TEX. PROP. CODE ANN. §§ 123.002.



Trustees seeking to make such a change therefore must generally convince not only the court but also the Attorney General that the change is permitted under the applicable law, although courts have on occasion approved changes over the objections of the Attorney General.<sup>30</sup> The most common type of change sought is one when the original purpose of the charitable trust is viewed as impossible or impracticable, so a change is sought to apply the trust to similar charitable purpose. The principle under which courts permit such a change is known as *cy pres*. Absent successful invocation of the doctrine of *cy pres* or a reserved power of modification, changes to the purposes of a charitable trust are generally not permitted.

### C. Cy Pres

*Cy pres* is equivalent to the modern French *si pres*, meaning so near or as near.<sup>31</sup> The doctrine is codified in a number of states,<sup>32</sup> and accepted by court

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<sup>30</sup>See, e.g., *In re Estate of Horton*, 11 Cal. App. 3d 680, 90 Cal Rptr. 66 (Cal. 1970) (Attorney General had standing to challenge settlement by charity relating to charitable bequest, but not veto power over such settlement); *In re Estate of Reeder*, 158 N.W.2d 451 (Mich. 1968) (court, not Attorney General, had final authority to approve proposed settlement of will dispute involving a charitable bequest).

<sup>31</sup>IV SCOTT & FRATCHER, *supra note* 21, at § 399.

<sup>32</sup>Ala. Code § 35-4-251; Conn. Gen. Stat. § 45a-98; DEL. CODE, tit. 12. § 3541; GA. CODE §§ 53-4-62, 53-12-113; IND. CODE § 30-4-3-27; IOWA CODE § 633.5102; KAN. STAT. § 59-22a01; LA. REV. STAT. §§ 9:2331-2337; MD. CODE ANN., Estates & Trusts § 14-302; MASS. GEN. LAWS ch. 214, § 10B; MINN. STAT. § 501B.31; MONT. CODE ANN. 72-33-504; N.H. REV. STAT. § 498:4-1; N.Y. ESTATES, POWERS AND TRUSTS LAW § 8-1.1(c); N.C. GEN. STAT. § 36A-53; OKLA. STAT. tit. 60, § 602; 20 PA. CONS. STAT. § 6110(a); R.I. GEN. LAWS § 18-4-1; S.D. CODIFIED LAWS §§ 55-9-4; TENN. CODE § 35-13-106; VT. STAT. tit. 14, § 2328; VA. CODE §§ 55-31, 55-31.1; W. VA. CODE § 35-2-2; WIS. STAT. § 701.10(2)(a).

decision in most other states. It applies to gifts for specific purposes to charitable nonprofit corporations, even if such gifts do not technically create a charitable trust, as well as to charitable trusts.<sup>33</sup>

Two statements of the doctrine are:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settler manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settler.<sup>34</sup>

Where property is given in trust for a particular charitable purpose, and it is impossible or impracticable to carry out that purpose, the trust does not fail if the testator has a more general intention to devote the property to charitable purposes. In such a case the property will be applied under the direction of the court to some charitable purpose falling within the general intention of the testator.<sup>35</sup>

As a practical matter, courts of different states and even of the same state apply the doctrine with varying degrees of strictness or liberality.<sup>36</sup> The

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<sup>33</sup>See, e.g., *Stevens Bros. Found. V. Commissioner*, 324 F.2d 633, 644 (8th Cir. 1963), *cert. denied*, 376 U.S. 969; *Matter of Estate of Vallery*, 883 P.2d 24, 28 (Colo. App. 1993); *Alco Gravure, Inc.*, *supra* note 25, at 757 & n.6; N.Y. ESTATES, POWERS AND TRUSTS LAW § 8-1.1(c)(1); *Blocker v. State of Texas*, 718 S.W.2d 409 (Tex. App. 1986).

<sup>34</sup>RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

<sup>35</sup>IV SCOTT & FRATCHER, *supra* note 21, at § 399.2, pp. 489-90.

<sup>36</sup>See IV SCOTT & FRATCHER, *supra* note 21, at §§ 399.2; Lee, *supra* note 2 (contrasting the, in Ms. Lee's view, correct application of the cy pres doctrine to the Estate

decision of whether and how to apply the doctrine is, however, ultimately a decision of the court and not of the trustees, the Attorney General or any other interested party.<sup>37</sup> As is generally the case for all court proceedings involving a possible change of the terms of a charitable trust, the Attorney General is, however, a necessary party to a proceeding involving the application of cy pres, although the amount of attention a particular Attorney General chooses to pay to a particular proceeding may vary greatly. Other interested parties may also be permitted to bring a proceeding invoking cy pres or to intervene in such a proceeding. Certain states impose statutory limits on the application of this doctrine. For example, New York prohibits a court order invoking the cy pres doctrine without the consent of the donor of the property, if he is living.<sup>38</sup>

## **II. STRATEGIES FOR PRESERVING DONOR INTENT**

Given this legal landscape, there are a number of different approaches a donor can take to try to ensure that his intent is followed even when he is no longer personally able to enforce it. None of these approaches is foolproof, and there will be numerous other considerations that will need to be considered

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of Beryl Buck in California with the, in Ms. Lee's view, incorrect application of the cy pres doctrine to the Barnes Foundation in Pennsylvania).

<sup>37</sup>*E.g., Town of Brookline v. Barnes*, 97 N.E.2d 651 (Mass. 1951); *Application of Guaranty Trust Co. (Matter of Petroleum Research Fund)*, 184 N.Y.S.2d 413, 420-21 (1959); *In re Veterans' Indus.*, 8 Cal. App. 3d 902, 920 (1970).

<sup>38</sup>N.Y. ESTATES, POWERS AND TRUSTS LAW § 8-1.1(c)(1).

before any of them can be adopted. Nevertheless, they provide a donor and her advisors with various options for trying to ensure that the private foundation established and funded by the donor remains true to her intent.

### **A. Operation of Law**

The primary governing document for a private foundation, whether it be the articles of incorporation for a nonprofit corporation or a declaration of trust for a charitable trust, can specify in great detail the purposes and permitted activities and/or grantees of the foundation. The most important step when relying on the operation of law to uphold donor intent is therefore to take advantage of this fact by carefully drafting the necessary instructions. As anyone who has ever been party to a contract or will dispute knows, recollections about what a person may have intended are easy to dispute while the plain language of a properly executed document is much more difficult to refute. While many criticize the Ford Foundation for supporting activities that are directly contrary to the views and values of Henry Ford, it is hard to place too much blame on the Foundation's leaders when Henry Ford failed to leave any written instructions, legally binding or otherwise, about his desires relating to philanthropy.<sup>39</sup>

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<sup>39</sup>See Waldemar Nielsen, *The Donor's Role in Donor Intent*, in DONOR INTENT, *supra* note 1, at 15, 19 ("After the most comprehensive combing of the family and company papers, these people from the law firm [of Cravath, Swaine & Moore] were unable to find a single sentence or a single note from old Henry [Ford] expressing any interest in, or ideas about, his philanthropy.").

The choice of the legal form for the private foundation is also critical when relying on the operation of law to ensure compliance with donor intent. In general, altering the terms of a declaration of trust is much more difficult than altering the terms of articles of incorporation. The default rule is that a declaration of trust can only be altered through a court proceeding, and with the approval of both the court and usually the Attorney General required.<sup>40</sup> Any parties affected by the proposed change may also have the opportunity to intervene in the proceeding, and the court may very well require the notification of such parties to ensure that they are aware of this opportunity.<sup>41</sup>

While it is possible to draft articles of incorporation so that the directors (or members, if any) of the corporation have limited ability to amend the articles, the default rule is that the directors have the power to amend the articles. Even with a carefully drafted limitation along these lines, only New York requires court or Attorney General approval of such amendments, and there is no guarantee that New York will not change its laws in the future to remove this requirement.<sup>42</sup> Absent this third party approval requirement, it is easy to imagine an unscrupulous or overreaching board of directors amending the articles to both eliminate the restriction on amendments and eliminate or

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<sup>40</sup>See *supra* notes 28-30 and accompanying text.

<sup>41</sup>See *supra* notes 25, and accompanying text.

<sup>42</sup>See *supra* note 13 and accompanying text.

change the restrictions on the foundation's purposes or activities. While any such amendments would need to be filed with the state and with the IRS, neither the Secretary of State's office nor the IRS are likely to closely review such amendments except to ensure that they comply with the generally required formalities for amendments and the requirements of section 501(c)(3) of the Internal Revenue Code, respectively. In the absence of a court proceeding or required notification of the Attorney General, it is unlikely that either the Attorney General or other interested parties will learn about the proposed amendments for quite some time, if ever.

When relying on the operation of law to ensure compliance with a donor's intent, the best choice generally is therefore to use a charitable trust form and to carefully draft the provisions describing the permitted purposes and activities of the trust to match that intent. One example of language that could be used in a declaration of trust to meet these requirements is provided in the Appendix at page A-1.

It should be noted that a trust is still vulnerable, as is a nonprofit corporation, to invocation of the doctrine of cy pres. Application of this doctrine requires, however, court approval and such approval is generally only provided in narrow circumstances. There is no guarantee, of course, that the circumstances under which the doctrine might be applied will not be expanded

in the future.<sup>43</sup>

## **B. Control by Selected Organizations**

A private foundation, particularly a grant making foundation that is funded by investment income from an endowment, has little pressure to conform to a particular worldview or culture other than momentum. The members of its board of directors are not required to report to any other body or person in order to ensure the continued funding for the foundation, and the federal tax law restrictions on their activities, while not insignificant, generally permit them to direct the foundation to support any activity that furthers the relatively broad charitable, educational and other purposes described in section 501(c)(3) of the Internal Revenue Code. Other organizations, whether public charities that depend on fees or contributions from the public, government agencies that are subject to political pressures, or for-profit businesses that are subject to market forces, are therefore generally more constrained in their activities.

A donor seeking to ensure that the private foundation he creates will continue to pursue certain purposes may therefore want to tie that private foundation to one or more other types of organizations. The organizations need not be limited to charities, except in the case of the supporting organization

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<sup>43</sup>See Atkinson, *supra* note 2.

structure described below, so a donor could, for example, allow a for-profit company he founded to appoint representatives to the foundation's board. There are a variety of ways that this can be accomplished.

**1. *Board Representation and Limited Purposes***

One method would be to carefully limit the purposes of the foundation and then to reserve a minority of board seats for representatives of organizations that support those purposes. Those representatives would then, presumably, help ensure that the foundation's activities only furthered those stated purposes and would have standing, as directors, to bring suit against the foundation if a majority of the board departed from those purposes. As an additional safeguard, a supermajority vote could be required to change the foundation's purposes or reduce the voting proportion of those representatives, thereby giving those representatives veto power over any such changes. See the Appendix at page A-2 for sample language implementing such a structure.

There are at least three significant risks that exist under this structure and the other two structures discussed below that give other organizations influence or control over a foundation. One risk of this approach is that the other organizations may drift from their original purposes and activities in ways that the donor does not anticipate. For example, the YMCA in the United States has moved away from its Christian evangelical origins and become a much



more secular institution over the years.<sup>44</sup> If a donor had created a foundation devoted to Christian evangelical purposes, and which a donor attempted to ensure stayed true to those purposes by giving one or more YMCAs representation on the board of the organization, the attempt may have been in vain because of the change in the YMCA's purposes and nature. While other organizations, such as the Salvation Army, have stayed closer to their roots over time, it may be difficult for a donor to identify one or more charities in his area of interest that are not vulnerable to this kind of drift, especially over many years.

Another risk is that the organizations selected, even if their purposes do not change, will still try to use the endowment of the foundation in ways that the donor did not desire. This is particularly true when a single outside organization is involved. For example, the family of Charles and Marie Robertson recently filed suit to gain control of the endowment of the Robertson Foundation. Established in 1961, the Foundation's purpose is to support the Woodrow Wilson School of Public and International Affairs at Princeton University. The family has, however, become convinced that Princeton University has not been properly using the financial support provided by the Foundation in that the Woodrow Wilson School was not producing enough

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<sup>44</sup>See Mayer N. Zald & Patricia Denton, *From Evangelism to General Service: The Transformation of the YMCA*, 9 ADMINISTRATIVE SCIENCE QUARTERLY 214 (1963).

foreign-service professionals. The family is also charging that Princeton, through its majority control of the Foundation's board, is trying to commingle money from the Foundation's endowment with the University's general endowment.<sup>45</sup>

A third risk is that the organizations originally selected by the donor cease to exist altogether. Absent a savings clause in the foundation's governing documents, it could be very difficult for even a Board desiring to fulfill the donor's intent to discern the best course of action in this situation. It could be that the representatives seats on the Board would remain empty, thereby eliminating the influence that the donor tried to create through those seats.

## **2. Majority Board Control**

A stronger version of this model would be for the donor to grant majority control over the foundation to one or more organizations that share his purposes and interests. For example, the Bylaws of the foundation could provide for a five-member Board of Directors and then give three specific

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<sup>45</sup>Maria Newman, *Princeton University is Sued Over Control of Foundation*, N.Y. TIMES, July 18., 2002, at B1. It should be noted that courts generally have refused to grant trustees permission to terminate a charitable trust dedicated to using its income to support a single institution by transfer of the principal of the trust estate to that institution. See, e.g., *Winthrop v. Attorney General*, 128 Mass. 258 (1880) (refusing to permit the trustees of a charitable trust dedicated to providing its income to maintain a museum and professorship at Harvard University to turn over the trust principal to Harvard University to be managed as part of the University's general funds, with the income from those funds still to be used for the designated purpose); *In re Armstrong Estate*, 29 D.&C.2d 220 (Pa. 1963). But see *Biehl Estate*, 35 D.&C.2nd 148 (Pa. 1965) (trust permitted to transfer funds to charitable beneficiary for management purposes because size of trust too small to provide adequate compensation to a trustee).

organizations the power to appoint one person each to the Board. A sample Bylaws provisions implementing such a structure, and also granting special authority to the majority group of directors, is included in the Appendix at A-3.

The same risks that exist for the first structure also exist here. The selected organizations might drift from their original purposes in ways the donor did not anticipate, they may use the foundation's funds in ways the donor would not have intended, or they may simply cease to exist. This majority control of the organizational representatives would, however, greatly lessen the possibility that the organizational representatives would need to resort to legal action to prevent the foundation's board from taking actions contrary to the stated purposes for the foundation and therefore the donor's intent.

One variation on this method is to establish certain organizations as "members" of the private foundation. While nonprofit organizations do not issue stock or have shareholders, they generally can have members that function in many ways as shareholders, exercising such powers as electing directors and approving amendments to governing documents.<sup>46</sup> As members, the organizations would generally have the authority to elect a majority or all of the directors and, absent provisions in the governing documents to the contrary, to veto any proposed changes to the governing documents. The advantage of having the other organizations as members is that their authority

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<sup>46</sup>See generally the statutes cited in *supra* note 4.

would rest not only on the language of the foundation's governing documents but on the statutory provisions recognizing and granting authority to members.

### **3. *Supporting Organization***

The strongest version of this method would be to have the governing documents for the foundation require that the foundation act for the benefit of certain specified charities or a certain class of charities, give those charities majority representation on the Board of Directors of the foundation, and prevent any alteration of these provisions without the consent of the charities. For example, the governing documents could provide the foundation was created to support "Member organizations of Goodwill Industries International, Inc. operating in New York state" and provide that the chief executive officers of the five largest such organizations or their designees would serve on the foundation's nine-member Board of Directors. By giving control over the foundation to specific charities that face internal and external pressures to continue to pursue certain purposes and activities, the foundation's purpose would be less likely to drift or be torn from the donor's intent. This structure also has the advantage that the foundation would probably qualify as a "supporting organization" for federal tax purposes, which would free the foundation from having to comply with the federal tax rules that only apply to private foundations (including the tax on investment income), as long as the

supported charities were not themselves private foundations.<sup>47</sup> Sample provisions for Articles of Incorporation creating the necessary relationship are included in the Appendix at page A-4.

The same risks exist for this structure as exist for the previous two structures, and are compounded by the fact that the foundation's purpose would be frustrated if the supported charities ceased to exist or ceased to qualify as a non-private foundation charity. In that situation, the foundation's board would have no choice but to change the purpose of the foundation or, if the governing documents prevented such a change, petitioning a court to approve such a change under the doctrine of cy pres.

### **C. Control by Selected Individuals**

Another alternative is to grant certain types of individuals a role with the foundation that is designed to ensure that the foundation continues to follow the donor's intent. The individuals could be descendants of the original donor, or could be persons occupying specific positions at other organizations or with specific characteristics. For example, for an organization dedicated to the study of economics there could be board seats reserved for winners of the Nobel Prize in Economics. For an organization dedicated to aiding a particular foreign nation, there could be board seats reserved for certain government officials of

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<sup>47</sup>See CODE section 509(a)(3).

that nation.

The level of control exercised by these individuals could have the same range of influence as for organizations described in the previous section. For example, the particular individuals could fill only a minority of board seats but a supermajority vote might be required for certain major actions. The individuals could also constitute a majority or even supermajority of the directors. Similar language as is listed in the Appendix for organizational powers could be used, with minor modifications. The supporting organization model would not be available, however.

#### **D. Dangers of Self-perpetuating Boards**

A common theme of two previous sections is placing control over the selection of some or all directors in the hands of persons outside of the organization. This is intentionally contrary to the general pattern for non-member, nonprofit corporations, which usually have self-perpetuating boards. The danger to donor intent of self-perpetuating boards is that there are no controls in place to ensure that later board members are chosen because of their loyalty to the donor's original intent other than the relatively weak control of the directors themselves. People are asked to become members of foundation boards of directors for a broad range of reasons, including factors completely unrelated to the donor's intent such as personal friendships. To trust such a

mechanism to ensure compliance with the donor's intent, particularly in perpetuity, is unwise at best.

### **E. Limited Life**

One often recommended method for attempting to ensure compliance with donor intent is limiting the life of the foundation to a set number of years.<sup>48</sup> For example, John M. Olin made it clear that the Foundation named after him should not exist in perpetuity but should “close its doors by the time those trustees who best knew his philanthropic ideals had retired.”<sup>49</sup> The Foundation's Board of Trustees therefore plans to spend down the Foundation's endowment over the next several years.<sup>50</sup>

Limiting the life of a foundation should generally be an effective counter to the tendency of foundations to drift from the intent of their donors, particularly when combined with one of the control methods discussed above. What length of life a foundation should have, however, and even whether it should have a set life, is dependent on more than a donor's interest in ensuring his intent is honored. For example, a donor's intent may be to address a

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<sup>48</sup>See, e.g., WOOSTER, *supra* note 1, at 152-53; Bank, *supra* note 2; Bertrand M. Harding, *Implement Self-Destruct Mechanism To Preserve Foundation Mission*, WASHINGTON LEGAL FOUNDATION LEGAL OPINION LETTER, Sept. 20, 1996; Bertrand M. Harding, *Preventing Subversion of the Private Foundation's Mission*, WASHINGTON LEGAL FOUNDATION LEGAL BACKGROUNDER, January 10, 1992.

<sup>49</sup>See [www.jmof.org/history\\_purposes.html](http://www.jmof.org/history_purposes.html).

<sup>50</sup>See “National Review”: *Sunset for Olin Fund*, THE CHRONICLE OF PHILANTHROPY, June 14, 2001 (reporting on an article in the June 11, 2001 edition of THE NATIONAL REVIEW).

perpetual and critical problem, such as preventing the spread of nuclear materials to unstable countries and terrorist organizations, which the donor is convinced will not receive enough public attention to ensure sufficient funding, absent his foundation's continued existence, until some horrific event occurs. The donor's desire would then be both to ensure that the foundation remains committed to this goal *and* that the foundation exist in perpetuity because the problem is a perpetual and neglected one.

Another example would be when a donor has a very specific goal in mind but is unsure how long it will take to address that goal. For example, a donor might create a foundation to find a cure for AIDS, which could happen in a decade or might not happen for a century. The donor could certainly provide for the foundation to disburse its remaining funds if and when such a cure is found, but setting what would necessarily be an arbitrary time limit on the foundation's life could actually frustrate the donor's intent.

## **CONCLUSION**

Creating a private foundation to carry out one's philanthropic desires is an admirable activity, whether motivated by a desire to solve a particular problem, to leave a legacy for posterity or to simply avoid leaving excessive wealth to one's heirs (and the government). A donor cannot, however, assume that after he surrenders his assets to such a foundation, the foundation will



adhere to his philanthropic vision in perpetuity. If a donor desires to limit his foundation's activities in some manner even when he no longer controls the foundation, he must, in consultation with his legal advisors, carefully consider what controls should be in place that will impose such limits while not preventing the foundation from pursuing that vision.

First and foremost, a donor must clearly state what the purposes and activities of the foundation should be in the foundation's governing documents. A donor must also weigh the advantages and disadvantages of choosing between a charitable trust and a nonprofit corporation legal form, whether control over the foundation should be vested in particular organizations or types of individuals, and whether the life of the foundation should be limited. A donor may very well choose to reject the most common private foundation model, a nonprofit corporation with perpetual life and a self-perpetuating board, as being too likely to lead to undesired deviations from the donor's intent, although by the same measure this model also grants the most flexibility to the foundation in the future.

It is ultimately the donor's decision regarding how to balance ensuring adherence to his intent with flexibility for his foundation. This article provides a starting point for donors seeking to make this decision in a systematic and thoughtful manner. Competent legal advisors will undoubtedly be able to identify other means of ensuring that a donor's intent is followed, but donors

and their advisors should be thinking about these issues when creating private foundations in order to ensure that the philanthropic legacies left by donors remain true to the donors' desires and wishes.

## **APPENDIX A:** Sample Language

### ***Operation of Law (Trust)***

#### DISTRIBUTIONS

A. As long as the Donor is the sole Trustee, the Trustee may make payments or distributions from income or principal, or both, to or for the use of such qualified charitable entities, within the meaning of that term as defined in Article \_\_\_\_, in such amounts and for such charitable purposes of the Trust as the Trustee shall from time to time select and determine; and the Trustee may also make payments or distributions from income or principal, or both, directly for such charitable purposes as defined in Article \_\_\_\_ in such amounts as the Trustee shall from time to time select and determine without making use of any other charitable entity. The Trustee may also make payments or distributions of all or any part of the income or principal to states, territories, or possessions of the United States, any political subdivision of any of the foregoing, or to the United States or the District of Columbia but only for public purposes within the meaning of that term as defined in Article \_\_\_\_\_. Income or principal derived from contributions by corporations (if any) shall be distributed by the Trustee for use solely within the United States or its possessions.

B. Commencing with the fiscal year of the Trust immediately following the year in which the Donor ceases to be the sole Trustee, all (100%) of distributions made by the Trustee(s) for the Trust's charitable purposes during each year shall conform to the following:

(1) Not less than fifty percent (50%) of total charitable distributions for the year shall be for the purpose of benefiting [ethnic group] health, welfare, or education in the United States or elsewhere, with the following additional restrictions:

(a) Not less than ten percent (10%) of total charitable distributions for the year shall be for the purpose of benefiting [ethnic group] health, welfare, or education in [city], [state] and its environs.

(b) Not less than ten percent (10%) of total charitable distributions for the year shall be for the purpose of

benefiting [ethnic group] health, welfare, or education in [name of foreign country].

(2) Not less than thirty percent (30%) of total charitable distributions for the year shall be for the purpose of benefiting grantees, other than [ethnic group] charities, operating in or resident in [city], [state] and its environs.

(3) Any charitable distributions not meeting the requirements of (1) and (2) above shall be for the purpose of benefiting grantees, other than [ethnic group] charities, in [state].

Should the amount of distributions to any class of beneficiaries described in (1) and (2) above for any year be less than the prescribed amount, the deficiency shall be made up by excess distributions to that class of beneficiaries by no later than the end of the subsequent fiscal year.

### ***Control: Minority Board Representation***

## **ARTICLE \_\_\_\_ BOARD OF DIRECTORS**

Section 1: **Powers.** The Board of Directors of the Corporation shall supervise, manage and control all of the affairs, business activities and policies of the Corporation.

Section 2: **Number.** The number of directors constituting the Board of Directors shall be not less than seven (7), except that the initial number of directors shall be three (3). The Board of Directors shall be divided in two (2) classes: Class A Directors and Class B Directors. The number of Class A Directors shall be three (3), and the initial Class A Directors shall be the three (3) directors named in the Certificate of Incorporation. The number of Class B Directors shall be four (4).

Section 3: **Appointment and Term.**

(a) Class A Directors, other than the initial Class A Directors, shall be chosen as follows: in 2002 and every second year thereafter, [organization A], [organization B], and [organization

C] shall each select and designate in writing one director, each such director to hold office for a term of two (2) years and until his or her successor has been duly elected and qualified or until his or her earlier death, resignation or removal. Class A Directors may be elected to succeed themselves.

(b) Class B Directors shall be elected by a majority vote of the Class A Directors then in office. Each Class B Director shall hold office for a term of two (2) years and until his or her successor has been duly appointed and qualified (unless the Board of Directors determines that there is to be no such immediate successor) or until his or her earlier death, resignation or removal. Class B Directors may be elected to succeed themselves.

**Section 4: Resignation.** A director may resign at any time by giving written notice of his or her resignation to the Executive Director or to the Secretary of the Corporation, or by presenting his or her written resignation in person at an annual, regular or special meeting of the Board of Directors. Such resignation shall be effective at the date and time specified therein; if no such date and time is specified, such resignation shall be effective upon delivery. Unless otherwise specified in the written notice of resignation, no acceptance of such resignation shall be necessary to make it effective.

**Section 5: Removal.** A Class A Director may be removed, with or without cause, by the entity that selected that Class A Director. A Class B Director may be removed, with or without cause, at any annual, regular or special meeting of the Board of Directors by a majority vote of the Class A Directors and Class B Directors then in office. The notice of any such annual, special or regular meeting shall set forth the proposal to remove such Class B Director.

**Section 6: Vacancies and Newly-Created Directorships.** A Class A Director vacancy resulting from the death, resignation or removal of a Class A Director or other cause may be the entity that selected that Class A Director. A Class B Director vacancy resulting from the death, resignation or removal of a Class B Director or other cause may be filled by a majority vote of the Class A Directors and the remaining Class B Directors, or by a sole remaining director. A director appointed to fill a vacancy shall

hold office for the unexpired term of his or her predecessor in office and until his or her successor has been appointed and qualified (unless the Board of Directors determines that there is to be no such immediate successor) or until his or her earlier death, resignation or removal.

## **ARTICLE \_\_\_\_ AMENDMENTS**

The Articles of Incorporation of the Corporation may be adopted, altered or repealed in whole or in part by an affirmative vote of a two-thirds majority of the directors then in office. These Bylaws may be amended, altered or repealed and new Bylaws may be adopted by an affirmative vote of a two-thirds majority of the directors then in office. Such action or actions may be taken at any annual, regular or special meeting of the Board of Directors for which written notice of the purpose shall be given.

### ***Control: Majority Board Representation***

## **ARTICLE \_\_\_\_ BOARD OF DIRECTORS**

Section 1: **Powers.** The Board of Directors of the Foundation shall supervise, manage, and control all of the affairs, business activities and policies of the Foundation.

Section 2: **Number, Tenure and Qualifications.** The initial Board of Directors of the Corporation shall be those individuals named in the Certificate of Incorporation. Thereafter, the number of directors constituting the Board of Directors shall be eleven and the identities of the directors shall be determined in the following manner:

(a) six directors (collectively, the “Class A Directors”) shall be chosen as follows: in 2002 and every third year thereafter, [organization A], [organization B], and [organization C] shall each select and designate in writing two directors, each such director to hold office for a term of three (3) years and until his or her successor has been duly elected and qualified or until his or her earlier death, resignation or removal;

(b) five additional directors (collectively, the “Class B Directors”)

shall be chosen by the Class A Directors by majority vote in 2002 and every second year thereafter, each such director to hold office for a term of two (2) years and until his or her successor has been duly elected and qualified or until his or her earlier death, resignation or removal.

Section 3: **Resignation.** A director may resign at any time by giving written notice of his or her resignation to the Chair or to the Secretary of the Foundation, or by presenting his or her written resignation in person at an annual, regular or special meeting of the Board of Directors.

Section 4: **Removal.** A Class B Director may be removed, with or without cause, at an annual, regular or special meeting of the Board of Directors by the affirmative vote of a majority of the Class A Directors then in office. The notice of any such annual, special or regular meeting shall set forth the proposal to remove such director. A Class A Director may be removed at any time, with or without cause, by the entity that originally selected such director. Such removal shall be effective upon the entity giving written notice of such removal to the members of the Board of Directors.

Section 5: **Vacancies.** A Class A Director vacancy on the Board of Directors resulting from the death, resignation or removal of a Class A Director or other cause shall be filled by the entity that originally selected such director; a Class B Director vacancy on the Board of Directors resulting from the death, resignation or removal of a Class B Director or other cause shall be filled by an affirmative majority vote of the Class A Directors then in office. The director elected to fill any such vacancy shall hold office for the unexpired term of his or her predecessor in office and until his or her successor has been elected and qualified.

### ***Control: Supporting Organization***

The Corporation is organized and will be operated exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"). All references to sections of the Code include the corresponding provision of any subsequent Federal tax law. More specifically, the Corporation is organized and shall be operated exclusively for the benefit of, to perform the functions of, and to carry out the purposes of [charitable organization(s)].