

The Claremont Institute

KEEPING
FAITH
DONOR INTENT
IN THE 21st CENTURY

William A. Rusher

About the Author

William A. Rusher is a Distinguished Fellow of the Claremont Institute. He left a career in law in 1957 to become the publisher of *National Review* and one of the chief spokesmen of the American conservative movement. He played a significant role in the intellectual and political renaissance that inspired Barry Goldwater's presidential campaign in 1964, as well as the career of Ronald Reagan.

Upon his retirement from *National Review* in 1989, Mr. Rusher moved to San Francisco, where he continues to write the widely syndicated newspaper column "The Conservative Advocate." He is the author of *The Making of the New Majority Party* (1975), *The Rise of the Right* (1984), and *The Coming Battle for the Media* (1995), and editor of *The Ambiguous Legacy of the Enlightenment* (1995), published by The Claremont Institute and the University Press of America.

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Introduction

A great deal has been written in recent years about the importance of honoring a donor's intent in administering his benefactions, and about the various ways in which this can be assured. My first assumption, in preparing to write this monograph, was that the importance of the subject was by now widely understood, and that I could proceed immediately to describe certain new developments which, in recent years, have made important new resources available to donors to assure that their wishes are respected.

Subsequent discussions with people active in the field have disabused me of that happy assumption. A great many people who are seriously considering substantial charitable gifts have given little or no thought to enforcing their wishes, especially beyond their own lifetimes, and are genuinely shocked to learn how the wishes and interests of such major philanthropists as John D. Rockefeller, Andrew Carnegie and Henry Ford have been disregarded by those now in charge of the foundations they created.

Accordingly, I have begun this monograph with an historical survey of the experience of these and other men in implementing their wishes regarding their charitable contributions. Only then have I turned to the question of how those wishes might be more effectively defended. In this latter connection, I have called attention to a genuinely new development: the appearance of institutions that can reasonably be counted on to honor the donor's intention.

I should stress here, as I do in the text, that I am a member of the board of advisors of the Foundation Management Institute, which advises prospective creators of large foundations—normally involving forty million dollars or more—on ways of avoiding various pitfalls in their creation and management. The experience I have gained in that capacity is largely responsible for my interest in the field, and my familiarity with it.

My special gratitude is owed to the Bradley Foundation, which made a substantial grant toward the costs of this monograph. In addition, various individuals have also made important contributions, and they know well how thankful I am to them. Finally, I cannot over-stress the support I have received from Brian Kennedy and the staff of the Claremont Institute, under whose auspices the monograph is being published.

I should add that its publication is not, by any means, going to be the end of the story. As I said earlier, a great deal has been written on these subjects, to surprisingly little effect. A serious effort is going to be made to insure wide circulation of this monograph, and I personally hope to call attention to its message on a number of radio and television talk shows. The problem it deals with is too important, and too urgent, to continue to suffer from inattention.

William A. Risher

I. The Problem of Defending a Donor's Intent.

When a person has accumulated more wealth than he (or she) requires to satisfy his own needs and desires, it is both natural and commendable that he may be moved to give a portion of it to other individuals or projects he wishes to benefit. Such acts of charity are an important part of every society's economy. If the sum of money involved is large enough, it will often make sense to arrange to have it dispensed over a period of time, rather than all at once, and in that case arrangements must be made to execute the donor's intent through some mechanism designed for the purpose. In the United States today, many hundreds of billions of dollars are invested and disbursed through such mechanisms, and the growth of private wealth in recent decades makes it clear that in the century just opening this figure will quickly rise into the trillions.

Quite often the process of disbursement will be designed to continue after the donor's death, either for a specific period of time or indefinitely. In that event it becomes important to make sure that this ongoing process continues to fulfill the intentions that moved the donor to make the gift in the first place. It was, after all, his money and his gift, and his wishes regarding it presumably deserve respect. Conceivably it might be argued that a donor's right to influence the purposes for which his wealth is distributed ought to end with his death. But law and custom in the modern world have not adopted this view, and in any case the donor is usually able to make arrangements to insure that his wishes in this regard will be obeyed, to some important degree, even after his death.

Unfortunately, however, long experience has taught that the donor's intent is not by any means always invulnerable to distortion, once the founding gift has passed beyond his direct control by reason of his death or otherwise. Thus has arisen the problem of defending the donor's intent, which has spawned a rich history of family disputes and litigation, both in the United States and elsewhere.

The problem generally arises from one of several related but separate causes, which it will be useful to note and distinguish briefly.

1. Differing purposes of the donor's relatives.

Whether they are charged with the legal responsibility of administering the gift and honoring the donor's intent or not, a donor's surviving spouse, children, and other relatives will often exert considerable influence over the disbursements. After all, they are presumed to know best what his wishes "would have been" in unforeseen circumstances. And yet the fact is that their own desires regarding the distribution of the gift often bear little or no resemblance to those of the donor. If his interests were political, theirs may differ sharply from his. Or their charitable inclinations may simply lie elsewhere. The donor may have been aware of these differences, or he may not. He may have anticipated and tried to counter their efforts to redirect disbursements, or may simply have neglected to do so. Even if he is rightly confident that his surviving relatives will all understand and seek to honor the purposes for which he made the gift, he cannot possibly anticipate the intentions of individuals who marry into the family after his death. The wishes of surviving family members, therefore, not to mention those of the people they marry, are a major source of the difficulties faced by anyone who seeks to defend the donor's intent.

2. Differing purposes of trustees, attorneys, and other advisors.

The same considerations obviously also apply to individuals who are not related to the donor by blood or marriage but who are vested by the donor with authority to act on his behalf, with regard to disbursements, after his death. Typically, these are the trustees whom the donor names to direct the foundation's affairs. In the beginning they will often consist of his close business associates and advisors, including the attorney or attorneys who have actually set up the foundation. In most cases they will be well aware of the donor's intentions with respect to disbursements, and loyally inclined to carry them out. (More often than not, they will share his interests themselves.) But, in the very nature of things, they will tend to be of the donor's own generation, and therefore will pass from the scene not long after he does. Yet the board of trustees must continue, and is ordinarily self-perpetuating. In other words, the original trustees must of necessity choose their own successors, and the problem of honoring the donor's intent thus inevitably comes to depend upon

the choices they make in this regard. These second-generation trustees are necessarily further removed from the original donor's milieu, in terms of both age and interests, and thus give rise to a problem so different from those confronting the first generation that it deserves separate consideration.

3. The tendency of boards of trustees to fall into professional hands.

When first-generation trustees turn to the problem of choosing their successors, they often confront a situation dramatically different from that which faced the original donor. For one thing, the amount of money they are charged with investing and disbursing has very probably shrunk or grown to an extent that almost demands major changes in disbursement strategy. For another, a whole new generation of the donor's relatives by blood or marriage has usually come on the scene and is often determined to make its own wishes known and, if possible, obeyed, whether these are congruent with the original donor's intent or not. Finally, the trustees will almost always be tempted to bring onto the board, to guide the foundation's future, outside "experts" of one sort or another. Thus, if the donor intended his foundation to benefit some worthy medical cause (such as the eradication of a particular disease), a medical authority in that particular field would be almost essential. And whatever the purpose of the foundation, competent legal advice will ordinarily be indispensable as it goes forward. Finally, the temptation will be great for trustees to add to their number one or more representatives of the new and flourishing breed of business bureaucrats known as "foundation executives."

These, as the term suggests, are individuals who specialize in administering foundations. Ordinarily they will have no particular experience or even interest in the particular charitable object that inspired the donor to create the foundation in the first place. Their expertise is simply in administration—with all that that implies.

4. Changes in the surrounding circumstances over time.

Lastly, every donor must recognize that the future is largely unforeseeable, and that all sorts of circumstances affecting the foundation's management and impact are likely to arise and demand decisions on questions that no one could have anticipated. Even the most loyal

board, therefore, is almost certain to face, sooner or later, questions on which the donor's expressed wishes and reasonably inferable intent shed little light. In such a case, a sensitive respect for the donor's general views and outlook should be their guide.

For any or all of the reasons cited above, however, decisions for a foundation may come to be made by people who do not share the purposes for which the original donor created it, or who may even be affirmatively hostile to them. Relatives with far different interests, and trustees or outside "experts" with charitable or political agendas of their own, may divert the foundation's resources to recipients that would have been anathema to the original donor. The history of many of America's largest foundations (reviewed briefly below) is testimony to the seriousness of this danger, and it behooves every prospective donor to be aware of it and take what steps he can to avoid it.

Fortunately the problem, though a real and difficult one, is not insoluble. This monograph will conclude with a description of various ways in which a donor's intent can be enforced with reasonable certitude. Meanwhile, it will be useful to consider some spectacular historical examples of the way it has been betrayed in the past.

II. Historical Examples of Violations of the Donor's Intent.

Disregard of the intent of the donor has been a problem almost since private foundations were first developed as a charitable device. One of the best and most comprehensive histories of the problem is *The Great Philanthropists & the Problem of 'Donor Intent'* by Martin Morse Wooster, published by the Capital Research Center in 1994. This short but useful book contains a legal history of donor's intent, plus detailed accounts of many of the instances in which it was most notoriously violated, as well as several in which it has been successfully defended, and this monograph has drawn heavily on the information it contains.

A. The Rockefeller Foundation

Thus in 1909, at the urging of Frederick T. Gates, who had long advised him on philanthropic matters, John D. Rockefeller Sr. gave \$50,000,000 in stock of the Standard Oil Company to an entity to

be known as The Rockefeller Foundation. Gates envisioned that Rockefeller's descendants would exercise control over the foundation through membership on its board of trustees. But Jerome W. Greene, the first secretary of the foundation, favored diluting their influence by adding "independent" trustees, and believed professional managers would exercise de facto control. Interestingly, neither side seems to have felt that the elder Rockefeller's interests or preferences should necessarily predominate. "By 1914," Wooster asserts, "many foundation trustees and employees were looking for ways to exclude Rockefeller from the foundation's affairs."

In 1916, having increased his initial grant to the foundation to \$100,000,000, John D. Rockefeller Sr. transferred his fortune to his children. The bulk of the estate that did not go to charities went to his only son, John D. Rockefeller Jr. "John Jr." was surrounded by liberal advisers who moved quickly to confirm the separation of the family from the foundation.

In 1919, in one last, rather poignant attempt to influence the way in which his fortune was by then being used to subsidize attacks on the free market system, the elder Rockefeller wrote his attorney, Starr Murphy, as follows:

I could wish that the education which some professors furnish was conducive to the most sane and practical and possible views of life rather than drifting, as it does, in cases, toward socialism and some forms of Bolshevism. It seems to me that some influences ought to be brought to bear upon the universities and colleges with reference to the textbooks which, from my standpoint at least, are calculated to lead astray and do harm rather than good.

But Murphy would have none of it. "[A]s it would be extremely unwise," he replied, "for any donor to attempt to place limitations on the character of the teaching which shall be given in an institution to which he contributes, it is hardly less objectionable for him to make the determination as to whether or not he will give to any particular institution dependent upon that matter."

Thereafter, for the remaining 18 years of his life, the founder of The Rockefeller Foundation made no further attempts to influence its increasingly liberal policies.

B. The Carnegie Corporation

Andrew Carnegie was marginally more fortunate, if only because he distributed his wealth through a series of foundations rather than through a single institution on which takeover artists could concentrate their efforts. According to Wooster, several of these—the Carnegie Foundation for the Advancement of Teaching, the Carnegie Institute of Pittsburgh (now Carnegie-Mellon University), the Carnegie Institution of Washington, and The Carnegie Endowment for International Peace—“still reflect Carnegie’s wishes.” But his last major creation—the Carnegie Corporation of New York—has wandered far from the principles that inspired its founder.

In 1911 Carnegie created the Carnegie Corporation of New York, and endowed it with \$125,000,000. Aside from instructing it to provide pensions for former presidents of the United States and their widows, he gave the trustees full authority over its policies: “They shall best conform to my wishes by using their own judgment.” Carnegie himself, therefore, was thereafter in no position to complain of the trustees’ decisions, even if he disagreed with them; but the published record of his convictions (he was the author of both *Triumphant Democracy* and *The Gospel of Wealth*) could have left them in no doubt as to his core beliefs, which surely deserved some consideration in shaping the Corporation’s benefactions. Instead, successive presidents of the foundation brusquely ended its contributions to Carnegie’s own favorite charities, and one of them (John W. Gardner, who served from 1955 to 1965) stepped down only to become Secretary of Health, Education and Welfare in the Johnson administration and one of the principal architects of the Great Society. Nor was he an exception. Wooster notes that as early as 1993 three members of the Clinton Cabinet—Secretary of State Warren Christopher, Secretary of Health and Human Services Donna Shalala, and National Economic Council chairman Robert Rubin—had all previously served as trustees of the Carnegie Corporation.

C. The Ford Foundation

The story of the Ford Foundation is, however, perhaps the greatest cautionary example of how a foundation can be converted into a

vehicle for projects and ideas directly contrary to the views and wishes of the founder. In the case of the Ford family, the problem was compounded by the fact that Henry Ford left no instructions whatever as to the course the Foundation was to follow, and that his grandson Henry Ford II (to whom control of the family's interests passed with the premature death of his father, Edsel Ford, in 1943), was by personal inclination a moderate Republican who was slow to realize how thoroughly the officials of the Foundation were subverting its purposes.

Though he left no instructions as to the operation of the Foundation, various statements and writings by the elder Ford make his governing philosophy perfectly clear. Thus: "I believe in living wages—I do not believe in charity. I believe we should all be producers. Organized charity and schools of philanthropy and the whole idea of 'giving' to the poor are on the wrong track." And in *Today and Tomorrow*, written with Samuel Crowther in 1930, Ford asserted that "We hold that it is a part of our industrial duty—that is, part of our service that supports the wage motive—to help people to help themselves."

True to that principle, Ford gave jobs in his plants at good wages to many people who had experienced misfortune but were willing to work. He was particularly notable for hiring the disabled—in 1919, according to Wooster, nearly 20 percent of Ford's employees had some sort of disability.

No doubt that is why Ford was slow to accept the idea that there had to be a Ford Foundation at all. In 1923, when asked by William L. Stidger how he planned to distribute his money when he died, Ford replied, "So they want to know what I'm going to do with my money. Well, you can tell them there is no 'going to do' about it. I am doing it now! I am investing my money in men; every cent of it, and will continue to do so"

"Then the business itself is to be the Ford Foundation?" Stidger pressed. "That's right," Ford responded. "The organization is to be the Ford Foundation. I want that Foundation to be the life-saving opportunity of millions of men and women to be self-supporting and self-sustaining. My old motto, 'A chance and not charity,' will be the spirit of the Ford Foundation. I do not believe in giving folks things. I do believe in giving them a chance to make things for themselves."

Here, surely, was a philosophy clear enough to build on. But it was not to be.

By the Revenue Act of 1935, Congress increased the estate tax to 50% of assets over \$4,000,000, and 70% of assets over \$50,000,000. President Roosevelt declared that this would fight “unjust concentration of wealth and power.” To preserve family control of the Ford Motor Company (whose stock, up to that point, had been privately held), Henry Ford took the only course available to him: Ford stock was converted into non-voting Class A common stock, comprising 95 percent of the total, which would be left by will to the Ford Foundation, and voting Class B common stock, which would be held by Ford and his family. In 1945 Henry Ford II won an internal struggle with Harry Bennett for control of the company, and two years later the elder Henry Ford died. The Ford Foundation promptly became the wealthiest foundation in America.

In 1948 Henry Ford II announced that, while he would serve as chairman of the board of the Ford Foundation and his brother Benson would be a board member, they and the Ford family would not seek to control the Foundation; their influence would be no greater than that of any other members of the board. Thus was the door opened for the board to move the Foundation in directions far different from those favored by the elder Henry Ford.

For a time the problem was masked by the fact that Henry Ford II was himself not a typical conservative. He was, rather, what has come to be known as a “moderate Republican”: more comfortable with the Eisenhower than the Taft wing of the Republican party. (In 1968, Lyndon Johnson even appointed him head of the liberal National Alliance of Businessmen.)

But as the Foundation drifted leftward and became the target of sharp conservative criticism, Ford became more uncomfortable with its activities—particularly after Paul Hoffman, the Foundation’s first president, brought aboard Robert Maynard Hutchins, the long-time chancellor of the University of Chicago, whom Ford actively disliked. Their quarrel climaxed when Hutchins created the Fund for the Republic with \$15 million of the Foundation’s money and promptly launched it on a series of liberal projects that provoked loud conservative protests. In the late 1950s the Fund for the Republic evolved into the Center for the Study of Democratic Institutions, a still liberal but much less controversial organization, and that source of disagreement diminished markedly.

In those same years, however, the Ford Foundation began selling shares of Ford stock, and the company became a public business. The Foundation's shares had to be converted into voting stock under New York law, but the Ford family managed to retain 40 percent of the voting shares, and with them effective control of the company. At the same time, the sale of Ford shares by the Foundation was steadily diminishing Henry Ford II's influence there. Ford resigned as chairman of the Foundation's board, though retaining a seat.

Throughout the 1960s the rift between the Ford family and the Foundation widened, in part because Foundation president McGeorge Bundy refused Ford's request for a grant to a Ford-supported hospital in Detroit. (Bundy explained that "giving to hospitals is not part of our program.") Finally, in late 1976, Henry Ford II resigned from the Foundation's board altogether. "In effect," he stated,

the foundation is a creature of capitalism, a statement that, I'm sure, would be shocking to many professional staff people in the field of philanthropy. It is hard to discern recognition of this fact in anything the foundation does. It is even more difficult to find an understanding of this in many of the institutions, particularly the universities, that are the beneficiaries of the foundation's grant programs. I'm not playing the role of the hard-headed tycoon who thinks all philanthropoids are Socialists and all university professors are Communists. I'm just suggesting to the trustees and the staff that the system that makes the foundation possible very probably is worth preserving.

And with that, the Ford family bade a reluctant farewell to the foundation Henry Ford had created. It remains today one of the principal financial supports of American liberalism.

D. The MacArthur Foundation

There are numerous other examples of successful efforts to turn private foundations in directions antithetical to the wishes and beliefs of their founders. One cited in detail by Wooster in his book was the takeover of the John D. and Catherine T. MacArthur Foundation,

largely at the behest of his son J. Roderick (“Rod”) MacArthur, a passionate and outspoken liberal whom MacArthur unaccountably named as one of the original five trustees of the foundation. Thanks to “compromises” that subsequently turned control of the foundation over to additional board members who were liberal, and forced the resignation of William E. Simon, the board’s most outspoken conservative, the MacArthur Foundation has become one of the largest and most explicitly liberal institutions of its kind in the country, giving literally hundreds of millions of dollars to liberal individuals and causes.

E. The Buck Trust

A more mixed result was ultimately achieved in the long battle to subvert the desire of Beryl Buck, who specified that the funds in the Buck Trust were to be used “in providing care for the needy in Marin County, California, and for other nonprofit, charitable, religious or educational purposes in Marin County, California” (which is today a wealthy suburb of San Francisco). It is no doubt true that Mrs. Buck (who died in 1975) did not anticipate that her gift, which her will provided was to be administered by an entity called the San Francisco Foundation, would total \$280,000,000 by 1980, but it is clear that she never deviated in her intentions as to the purposes it was to serve.

Nevertheless, the San Francisco Foundation was soon active in legal efforts to break the will and devote the money to charitable purposes not only in Marin county but in the entire Bay area surrounding San Francisco, where the need was arguably greater than in wealthy Marin. This battle was more or less resolved in 1986, when a court removed the San Francisco Foundation as administrator of the Buck Trust funds and turned them over to a newly created Marin Community Foundation. This victory was diluted, however, when the court specified that large portions of the funds must be spent on projects such as research on aging and prevention of alcoholism which, though headquartered in Marin county, obviously benefitted far broader areas than the county specified by Mrs. Buck.

F. The Robertson Foundation

As this monograph goes to press, a new battle is being fought out between Princeton University and the Robertson Foundation, a fund created by Charles Robertson in 1961 with a stock gift of \$35 million, which he specified was to be used for the support of Princeton's Woodrow Wilson School of Public and International Affairs. The funds have now grown to more than half a billion dollars, the investment of which has been managed by a seven-member board of trustees, four appointed by Princeton; the other three are members of the Robertson family. In recent years the University has made repeated efforts to transfer the management of the fund's assets to PRINCO, which is Princeton's general endowment fund investment corporation. The Robertson family has resisted these efforts, charging that they would undermine the purposes of the Foundation's charter, and cites one allegedly unauthorized withdrawal of \$25 million from the Foundation. It would certainly appear that Princeton's purpose is to make the Foundation's money available for the more general purposes of the University, rather than merely those of the School of Public and International Affairs, and the matter is now in court.

G. Successful defenses of the donor's intent.

Of course, some foundations have been more successful in honoring the intent of their donors. Among examples discussed by Wooster, the JM Foundation, created in 1924 and possessing assets of \$22 million, has remained true to the charitable and politically conservative principles of its founder largely because it is still under the control of his son. Similarly, the Lynde and Harry Bradley Foundation of Milwaukee has been fortunate in having a small number of managers who are acutely conscious of, and loyal to, the conservative principles of the founders. In Michael Joyce, the first "outsider" to serve as the Foundation's president, the trustees found a leader who calls donor intent "the North Star of philanthropy."

But the track record of major foundations in America makes it crystal clear that the preservation of donor intent, in the face of major and often successful efforts to subvert it, is a serious and persistent problem. Let us turn, therefore, to some of the techniques that have been developed to protect it and to realize the donor's intentions.

III. Alternative Ways of Trying to Enforce the Donor's Intent.

It should be obvious from the above discussion that preserving a donor's intent beyond his death is not simply a matter of designating congenial and self-perpetuating trustees. The donor can improve his chances somewhat by being as explicit as possible in his will, and/or in the founding instrument. Beyond this, there is one approach that has been used with considerable success by certain cautious donors.

A. Limiting the life of the foundation to a specific term of years.

Clearly, the surest method of maintaining a donor's control of the expenditures of a foundation is to disburse the money during his lifetime, under his direction. Note that a donor's intentions may be defeated even then, if he has placed the foundation's assets beyond his control. This most often happens when the donor seeks and obtains an immediate tax benefit from his gift, but then tries to treat the donated funds as money he can continue to control. Courts have not been friendly to such efforts to have one's cake and eat it too.

But ordinarily a donor will be able to create a foundation and then manage the disbursement of its assets with the consent of a compliant board of trustees, as long as he continues to live. The problems, as we have seen, tend to arise thereafter, and one way that has been used with some success to manage them is to limit the life of the foundation to a specific term of years after the death of the donor.

Even this, of course, does not guarantee that the donor's intent will be respected. The differing views of relatives, trustees, and various third parties may all come into play in the (say) 25 years from the date of the donor's death to which he had limited the foundation's existence. But the memory and influence of the donor are likely to continue to be strong in those 25 years, and are thus more likely to be honored than those of a more remote founder.

One successful example of a term-limited foundation is the Olin Foundation. Its founder, John M. Olin, died in 1982. He was devoted to conservative causes, and saw to it that his foundation shared his views. Moreover, he was fortunate in having on its board, for a number

of years after his death, an equally devoted conservative, William E. Simon, who had been Richard Nixon's Treasury Secretary. Under Simon's strong leadership, the Olin Foundation continued to be a major supporter of conservative causes. But after Simon's death the foundation's executive director, James Piereson, did not forget that (as he told the *Chronicle of Philanthropy*) John Olin had "said many times that he did not want his foundation to exist in perpetuity. He feared that, over the long haul, a new generation unknown to him would come on the scene and bend the foundation in a different direction."

So the Olin Foundation will make its final grants in 2004, and close its doors in 2005.

B. Contracting with a foundation management service.

Of course, limiting the life of the foundation solves the problem of protecting the donor's intent only at the expense of its ability (and therefore his) to exert an influence in the years beyond the limit. In pure theory, there is no reason why a foundation ought not to be able to continue doing the work its founder wanted it to do, in perpetuity. And that is why a new approach to the problem has begun to find favor in recent years. This is to turn the management of the donated funds over to an organization that may be described generically as a "foundation management service." A number of such services have sprung up in recent years, and experience has shown that they do indeed constitute a valuable alternative means of defending the donor's intent. The remainder of this monograph will consist of a study of these new services, which differ in various important respects.

IV. Types of Foundation Management Service.

A foundation management service is essentially a business created for the purpose of carrying out the wishes of individuals who want to contribute money, over time, to the pursuit of certain specific objectives—charitable, political, or whathaveyou. The donor may want to retain the right to specify the recipients, or give others the right to select them for a limited period after his death, or provide for the selection of grants in perpetuity. He can specify the nature of the

recipients in as much detail as he wishes—indeed, since the point is to honor his intent, the more detail the better. He can simply turn the funds over to the service company to invest and manage for purposes he prescribes (which is probably the best idea, if the amounts are relatively small), or create a private foundation to administer them, with the help of the service company, if the size of the gift warrants this. In either case, the service company contracts to perform specified managerial functions, in explicit obedience to the expressed wishes of the donor concerning the purposes of the gift. The company will, of course, receive a fee for these services.

The advantages of a foundation management service are fairly obvious. For one thing, being a corporation, it will not die, as trustees necessarily do. For another, its obligation to the donor is based on a contract, rather than sentimental ties of consanguinity or friendship which will almost certainly attenuate after the donor's death. To be sure, even a soulless corporation's management may change over time, giving rise to the possibility that a donor's wishes may be subverted; but then a legal action for breach of contract is at least available.

Let us, therefore, examine a few examples of various types of foundation management service.

A. Donor-advised services.

There are literally hundreds of publicly supported “donor-advised” community foundations around the country, usually designed to serve the charitable needs of a specific community, region or state. Most are fairly small, but a few are relatively large, and one—Fidelity Investments—is huge. All such foundations accept charitable gifts, and distribute funds pursuant (in most cases) to the advice of the donors. There is nothing in the least wrong with this, but it is not specifically designed to serve the purposes of a donor who is interested in supporting causes with a particular political or philosophical purpose.

In the case of conservative donors, this need is met by a donor-advised fund that is dedicated to the support of conservative causes. That is to say, the fund is specifically pledged to support causes that seek (for example) to limit government intervention in people's lives, encourage private initiative, and promote free enterprise. And of course, though a gift once made is necessarily irrevocable if the

donor is to have the benefit of a charitable deduction, the donor can recommend amounts and recipients (provided these are qualified charities—i.e., 501(c)(3) organizations). The fund will make the grants, subject to the approval of its board of directors and provided they accord with the specified purposes which the fund is pledged to support.

The advantages of such an arrangement are considerable, from the standpoint of the donor. No new foundation needs to be created. The contribution is made to the fund; the gift will be invested by skilled managers; the grants will be administered by the fund (anonymously, if the donor so wishes); and the fund will attend to all requirements for reports to the IRS and the like. Moreover, and most importantly, the donor can name a successor advisor to make recommendations for grants after the donor's death, thereby achieving the objective of perpetuating the gift and insuring (always provided the successor advisor remains faithful) that it will continue to serve the purposes for which it was originally made.

Such a donor-advised fund is an ideal solution for donors with relatively small amounts of money to give—say, up to \$250,000, or certainly a maximum of \$1 million.

One such fund, and perhaps the best known and most highly regarded among conservatives, is the DonorsTrust, based in Alexandria, Virginia. Founded in 1999 by a group of prominent American conservatives, it is qualified as a not-for-profit corporation formed for charitable and educational purposes under Section 501(c)(3) and related sections of the Internal Revenue Code. It accepts contributions ranging from \$10,000 to \$250,000 (with special provisions, to be described later, for larger amounts). The donor is offered a choice of four portfolios, representing varying degrees of risk, in which to invest his contribution. And he will also have a choice of four ways to invest it:

- In a Donor-Advised Fund, reserving the right to make grant recommendations to the Trust, which the board of directors will make every effort to honor provided they fall within the (broadly conservative) mission and objectives of the Trust.
- In a Special-Program Fund, if the donor wants to focus his philanthropy narrowly on a hands-on program for a

specific area of interest (e.g., higher education, health, or tax policy), in which case he might wish to designate an advisory committee to assist in grant decisions.

- In a Field of Interest Fund, in which the donor supports the Trust's conservative policies in one or more of a number of fields designated by the Trust (economics, governance, education, social welfare, health, environment, foreign relations, and arts and culture), leaving specific grants to the Trust's discretion.
- In an Unrestricted Fund, in which the donor leaves the designation of grant recipients to the discretion of the Trust, in support of the general conservative principles to which it is pledged.

In all of the above cases, DonorsTrust will provide all standard administrative services—grant payments and disbursements, compliance with IRS reporting requirements, and periodical financial statements—for a fee of 1% of the account balance annually. Higher levels of service are also available, for appropriate fees.

Such an arrangement, with DonorsTrust or some other donor-advised fund, is probably the best solution available for a conservative donor of \$250,000 or less, or at least not more than \$1 million, who wishes to insure, as far as possible, that his gift will serve the purposes he has in mind, and will continue to do so, if he so desires and specifies, even after his death. But what if the charitable gift is in the range between \$1 million and \$40 million?

B. Foundation management organizations.

There are a large number of organizations that have been formed for the specific purpose of serving individuals who have decided to create their own charitable foundations, with endowments between \$1 million and roughly \$40 million. Ordinarily the founder need only decide what to call his foundation, how much money to put into it, and whom he wants to serve on its board. In addition however, unlike a donor-advised fund, a foundation leaves the donor in direct control, determining who or what shall receive grants, as well as such managerial questions as how the foundation's assets will be invested.

The foundation management organization will take care of all administrative details: accounting requirements, IRS regulations and filings, state tax and regulatory filings, legal compliance, grant compliance, grant administration and the like. It will also make sure that the foundation complies with the basic legal requirements: to use its assets only for charitable purposes, distribute at least 5% of its assets each year, manage its assets prudently, and avoid supporting or opposing specific legislation or particular candidates for public office. In short, its purpose is to make the creation and management of a charitable foundation as painless as possible for its founder. For these services, it will normally charge about 1% per year of the value of the assets in its care, scaling this down in the case of larger sums of money.

Once again, however, much depends on the loyalty of the management service to the donor's purposes. Since the founder remains in full control of the distribution of the foundation's assets as long as he lives, this problem cannot arise until the founder dies. At that point, as we have seen, the power of decision passes to the trustees he has chosen to carry on the work of the foundation, and those they eventually choose to succeed themselves.

But there is one further safeguard, if the founder has chosen carefully the particular service organization that manages the foundation under the guidance of the trustees. While there appears to be no foundation service organization that, like DonorsTrust, explicitly dedicates itself to serving conservative purposes, there are a number that are openly sympathetic to such purposes, and that can be counted on to keep those purposes at the forefront of the attention of the successor trustees who direct the foundation's affairs after the founder's death.

One such organization is Sterling Foundation Management of Beverly Hills, California. Sterling encourages prospective founders to create their foundations during their lifetimes (rather than by will on their deaths), because "A founder who establishes a personal imprint on his or her foundation while alive will leave that personal touch as a lasting legacy."

The advantages of a foundation are obvious. Contributions are immediately deductible from income taxes, are exempt from income taxes on any growth in the invested funds, and are also exempt from gift and estate taxes. Sterling estimates that the cumulative value of

these benefits can double the amount available for charity in one generation, and over two can multiply the available funds fivefold.

Finally, a foundation has, over a donor-advised fund, the supreme advantage that control remains in the hands of the donor and his designated successor trustees, rather than passing to the fund managers. This is the fact that makes it unnecessary for a donor to seek out a management service explicitly committed (as DonorsTrust is committed) to the furtherance of conservative values. But, given the vagaries of the future, a donor may nonetheless feel more comfortable if his foundation is managed, in its technical respects, by a service with a record of sympathy for conservative causes. As noted, there are such services—including Sterling.

But what if the contemplated foundation is going to command assets in excess of (say) \$40 million? This raises problems that are simply of a different order, and that will require direct and unremitting attention. For these, a different type of assistance can be useful.

C. Advisory services for major foundations.

The creator of a foundation with assets in excess of (say) \$40 million will benefit enormously from the advice of an organization like Foundation Management Institute (of which, be it noted, the author is an advisor).

FMI's *modus operandi* has evolved over the years, but today it is independently supported by individuals and organizations that approve of its work, so its services are normally provided on a pro bono basis. It has no formal commitment to any particular ideology, and is thus available for consultation by donors of both conservative and liberal orientation; but it believes firmly that a donor's intent, whatever it may be, deserves full attention and respect. Conservatives, therefore (for whom this monograph is primarily intended), can be confident that their intentions will guide FMI in its activities on their behalf.

Those activities often begin with a prospective donor's initial thoughts regarding the possibility of creating a foundation with a corpus of \$40 million or more. FMI provides peer counseling on such basic questions as: What shall the basic mission of the foundation be? What principles shall it seek to serve? Once these threshold questions have been answered, the key question of the membership of the board of trustees can be considered, with appropriate recognition of

(often difficult) family situations and the like. Then will come the challenge of recruiting executives and other staff members to manage the foundation, invest its assets, evaluate and administer its grants, etc. The new foundation can thus be shaped in the manner most likely to maintain fidelity to the donor's vision and values.

Dozens of major foundations have already availed themselves of FMI's services, with gratifying results. They confirm the intuitive conviction that launching a successful foundation requires thoughtful planning, and that consultation with people who have had broad experience in this field can be extremely useful.

FMI, of course, is only one of a number of such advisory services available to major foundations. None are committed to the service of a particular ideological viewpoint, but most (emphatically including FMI) can be counted on to respect the donor's intent, and to seek, in shaping the foundation, to reinforce it.

V. The Unavoidability of Legal Oversight.

When all is said and done, however, the thoughtful donor will recognize that absolute certainty, in the matter of honoring his intent in perpetuity, is an unattainable ideal. Much will depend upon his precision in specifying the purposes he wishes his foundation to pursue—a desideratum overlooked by many major donors in the past, with disastrous results. Moreover, as this monograph has indicated, new and highly professional organizations have come onto the scene, which offer dependable allegiance to a donor's founding purposes. But time and circumstances will inevitably pose problems that no amount of imagination can have anticipated, and which will offer ingenious possibilities to surviving relatives and administrators to turn the foundation in directions that would have been of no interest, and quite possibly anathema, to the original donor. In such cases, as Princeton's current dispute with the Robertson Foundation indicates, the only recourse is to the courts.

It is, of course, the obligation of the courts to enforce the intent of a donor, if he has set up a foundation with clear and lawful purposes and has not invested in any individual or group the authority to modify those purposes. But, as the examples discussed earlier illustrate, circumstances may change over time in ways that make precise enforcement of the donor's intent impossible. In such cases,

it is the obligation of the courts to seek to approximate the donor's intent as nearly as possible.

Not even recourse to the courts, of course, can guarantee that a donor's intent will be honored as precisely as possible. Judges are human too, and we saw, in the earlier description of the legal controversies involving the Buck Trust, how difficult it may be for them to achieve an equitable result. Still, legal enforcement of a donor's wishes is the ultimate sanction, and must be considered the final weapon in the arsenal of those seeking to defend a donor's intent.

VI. Conclusion

The history of America's major foundations is a record of appalling indifference, in far too many cases, to the wishes and interests of their founders. But one cannot contemplate that record without recognizing that the founders themselves laid the basis for that disregard by failing to spell out precisely enough the purposes they had in mind. Of course, they were the pioneers, and did not have the benefit of the hindsight that has taught us the importance of such precision. But there is certainly no excuse, today, for a donor who wants his foundation to further certain purposes, for failing to specify those purposes in unmistakable detail.

Beyond that, as this monograph has demonstrated, there have come into being in recent years new types of institutions that can be employed by donors to add a large degree of certainty to the expectation that their wishes will be honored. Finally, the courts are available to be invoked, if all else fails.

A donor who is alert to the problems has, therefore, reason to feel that they are not insoluble, and that there are means available today to insure that his wishes will not be ignored after he has passed from the scene. He has the right to that assurance.