CHAPTER

4

Finding the Right Vehicle For Your Mission

The vehicle you choose for your philanthropy has significant bearing on whether your donor intent will be honored. Some choices are a better fit than others, depending on what you hope to achieve with your giving, what timeframe you select, and whether you intend to involve family in your philanthropy. The purpose of this chapter is to evaluate the various options available through the lens of donor intent.

The good news is that you're not limited to one choice; many donors utilize more than one charitable vehicle. In general, vehicles that give you more flexibility in the here and now pose challenges for donor intent in the future, and vice versa. This chapter explores the most popular approaches, including private non-operating foundations, charitable trusts, non-stock corporations, operating foundations, donor-advised funds, philanthropically driven limited-liability companies, community foundations, supporting organizations, and philanthropic partnerships.

Private non-operating foundations

Traditionally, most donors choose to create private non-operating foundations as the vehicle for their philanthropy. "Non-operating" simply means that your foundation's chief goal is to make grants to various nonprofit organizations and not run your own programs. Most of the very large and well-recognized foundations—Ford, Gates, Packard, Rockefeller—are structured this way. But so are tens of thousands of others, many of them very small.

Donors who establish private non-operating foundations may claim a charitable deduction for up to 30 percent of adjusted gross income (AGI) for cash donations and up to 20 percent of AGI for appreciated securities and other property, with a five-year carry-forward. Publicly traded stock may be valued at fair market value, while other types of property may be valued at cost only. These entities are required by federal law to make an annual distribution of at least 5 percent of assets, pay an excise tax on investment income, limit the percentage of business enterprises they own, avoid self-dealing and grants to partisan political organizations, and file a 990-PF tax return. Typically, a private foundation derives its endowment from a single source—from an original wealth creator, a family, or a corporation—and is managed by a board of trustees in compliance with state and federal laws in addition to the foundation's bylaws, trust agreement, or articles of incorporation.

Private non-operating foundations offer both benefits and drawbacks:

- *PRO: Flexibility, autonomy, and control*
  Private foundations offer you considerable leeway to operate and allocate your charitable dollars as you see fit, largely free from government interference outside of legal regulations and mandatory reporting. You define the mission of your foundation,

choose its lifespan, make investment decisions about its endowment, and hire staff to manage grants and financial matters.

- *CON: Malleability, impermanence*
  That same latitude poses challenges. Depending on how you structure your foundation, future boards of trustees may amend its mission, bylaws, articles of incorporation, operations, leadership, and so forth in ways that counter your decisions.
- *PRO: The ability to create a family legacy*
  If one of your chief goals is to create a philanthropic legacy for your family, a private non-operating foundation may be the right choice. This vehicle can extend your giving through future generations, involving children and grandchildren in governance and grantmaking. As explored in Chapter 3 and other previous material, though, family foundations also pose certain risks to family peace, and to donor intent.

Charitable vehicles that give you more flexibility now pose challenges for donor intent in the future.

- *CON: Increased complexity and risk of bureaucratic bloat*
  The IRS demands substantial reporting and paperwork from foundations, and some states, like California, also require annual audits. You will likely need help complying with state and federal regulations and filing appropriate reports. Hiring professional staff can pose challenges for donor intent, is costly, and requires human-resource management and compliance with employment laws. In larger private foundations, a complex staff structure can contribute to bureaucratic bloat.

If you decide to use a private non-operating foundation as your philanthropic vehicle, you have two structural options: a charitable trust or a not-for-profit corporation, both of which are treated similarly by the Internal Revenue Service. Each structure has advantages and disadvantages that bear directly on donor intent, so the appropriate one for you depends on your objectives, your tolerance for change, and your desire for flexibility.

Sub-option 1: Charitable trusts

A trust is frequently the better instrument to protect donor intent because its organizational structure and funding guidelines, once established, can be changed only by court order unless a donor permits them. In theory, the rigidity of the trust instrument provides an added buffer against donor-intent violations. If you establish a trust with clear philanthropic parameters, your future trustees will face an enormous challenge amending that document. Doing so would require legal action involving the attorney general in the state where your entity is established, and trustees would be required to convince both the attorney general and the court that the original purpose of the trust is either impossible or impracticable. In these cases, the courts may invoke the *cy pres* doctrine to devise a course of action that comes as close as possible to the trust's original charitable purpose. Courts and attorneys general may vary, of course, in how narrowly or broadly they interpret your intent.

But while a charitable trust structure generally offers the strongest shield against legally sanctioned breaches of donor intent, it is not a fail-safe mechanism. Within the last 50 years, serious violations of donor intent have occurred within charitable trusts when neither trustees nor grantees objected. Even if complaints are registered, you cannot guarantee that your state's attorney general will step in to defend donor intent. "In some cases, an attorney general will step in and do a great job, but in some they don't do much," observes Paul Rhoads, president of the Grover Hermann Foundation.

The struggles of the John E. and Sue M. Jackson Family Trust over the past decade demonstrate the potential for donor-intent violations in charitable trusts. John and Sue Jackson created their wealth through the Pittsburgh-Des Moines Steel Company, a steel fabricator established in 1892 that helped erect the Gateway Arch in St. Louis, the Peace Bridge from Buffalo to Canada, and the "forked" columns in the World Trade Center. In 1950, the Jacksons created a charitable trust, naming John's brother, William R. Jackson, and the Commonwealth Trust Company of Pittsburgh (later the National City Bank of Pennsylvania) as co-trustees with equal voting power. Currently, John and Sue's niece and nephew, Polly Townsend and Dick Jackson, are trustees with a combined 50 percent voting power, and PNC Bank is the successor corporate co-trustee after multiple bank mergers and acquisitions. From 1950 through 2006, annual grant decisions were family-driven, with the bank managing investments and ensuring legal compliance.

From the beginning, the trust instrument had provided that the trust would expire "three years after the date when its assets have been entirely deleted" and that there was "no limitation" on the amount of annual donations. The original grantors had made it possible for them or their successors to add funding to the trust or simply spend it out. In 2006, long after the donors had passed away, the two family trustees asked to terminate the trust, expressing their concerns that if the trust continued past their lifetimes, future trustees "will cause the trust assets to be distributed in a manner never contemplated by the grantors." PNC's predecessor, National City Bank, opposed the termination, and the court declined to terminate the Trust at that time.

In late 2008, PNC Financial acquired National City Bank and became the corporate trustee. Since then, the bank has made a number of changes with which the family trustees have disagreed: limiting grants to the IRS-mandated 5 percent minimum payout per year, unilaterally directing donations to Pittsburgh-area charities without consent of the family trustees, and rejecting grants to charities that support free-market and religious causes long supported by the Jackson Family Trust. In late November 2016, after years of disagreement over the proper role of donor intent, PNC filed an action in the Orphans' Court to resolve a deadlock over 2016 donations. The Orphans' Court ruled in PNC's favor without hearing any evidence regarding grantor intent.

The appeal to the Superior Court of Pennsylvania filed by the family trustees in early 2017 vacated the Orphans' Court's order and directed the lower court that evidence of donor intent and "the history of the trust's giving" were relevant, and that the trial court should consider whether the limited role of the bank co-trustee throughout the Trust's history means that the bank should defer to the family trustees on donation decisions. The Court rejected both PNC's exclusion of advocacy organizations and its insistence that preference be given to charities in Western Pennsylvania.

The Superior Court's striking recognition of donor intent as central to maintaining the integrity of the Jackson Family Trust requires the three trustees to work together to resolve their differences in a way that honors the original grantors' wishes. The hearing on donor intent recently concluded and a decision from the lower court is expected in 2020.

A trust vehicle, as the Jackson Family Trust example shows, cannot always prevent donor-intent violations, especially when the trust

instrument includes vague grantmaking instructions and when future corporate co-trustees with significant voting authority fail to share or recognize the donor's values. But a careful and determined donor can increase the odds that a trust will stay true to its intended mission over time.

Henry Crowell, founder of Quaker Oats Company, established the Crowell Trust in 1927. Ninety years later, it still reflects Crowell's values and vision as a grantmaking organization whose $100 million endowment supports evangelical Christian organizations. Seeing other foundations drifting during his lifetime—and witnessing the secularization of his church denomination—Crowell gave great attention to protecting his donor intent.

He clearly defined his intent in writing, not only directing that the trust's resources be used to promote evangelical Christianity, but also explaining in detail the doctrines that underpin that movement. He structured his trust to be governed by five personal trustees and one corporate trustee and delineated their duties to ensure that the personal trustees would have sole responsibility for grant decisions and would also exercise oversight of the corporate trustee. He undertook a long and thorough vetting of his trustees, requiring them to submit in writing their own values and vision. His original trustees—a majority of whom were personally familiar with his philanthropy—would select their successors, taking care that each future trustee would be "an avowed disciple of Jesus Christ…who unreservedly believes in and subscribes in writing to the objects and purposes of this trust." At every annual meeting, trustees read aloud the indenture that Crowell wrote. And they evaluate grants to ensure that mission drift isn't occurring at recipient nonprofits.

If you choose a charitable trust as a philanthropic vehicle, here are some basic guidelines to protect donor intent:

- DO keep in mind that the same rigidity that may serve to protect your donor intent will also prevent you from amending the trust instrument without legal action. If you opt for a trust vehicle you are committed irrevocably to certain philanthropic goals.
- In choosing a financial institution to hold your trust, DON'T assume that the close relationships you currently enjoy for your personal or business banking will last through future management changes.
- DO make clear in writing your philanthropic intentions, clarifying your values, your charitable purpose, and your operating principles (including spending policy and timeframe).

- DO design a governance structure in which the trustees you select hold majority control and establish a succession process with criteria tied to your donor intent.
- DO work directly with your initial trustees for a period of time so that they better understand your values and principles and your preferred strategies for evaluating grantees.
- DON'T leave the mission of your trust to chance.
- DO avoid potential court challenges by specifying alternative funding options for objectives that may be impossible to pursue in the future.
- DO take the time to understand the charitable laws and judicial treatment of trusts in the state in which your trust will operate. They vary from one jurisdiction to another.

Sub-option 2: Not-for-profit corporations

A foundation created as a not-for-profit corporation offers greater flexibility than a charitable trust. Although the corporation form requires more paperwork and record-keeping than a trust, it makes some things easier, like the hiring of employees and the initiation of contracts. The flexibility of a corporation does, however, include serious drawbacks for donor intent. Your foundation's charter or bylaws may be amended more easily, sometimes by a simple majority vote of board members.

If your intention is to give future trustees *carte blanche* to use your charitable dollars as they see fit, this structure is fine. But if you are concerned about donor intent, then establishing a corporate structure for your foundation requires careful attention. Aside from time-limiting your foundation and creating a strong mission statement with supporting documentation (both discussed in previous chapters), you might consider a hybrid structure for your foundation. If permitted by your state's charity laws, a hybrid structure combines some advantages of both trusts and corporations. In this model, a donor can organize a foundation as a not-for-profit corporation with a board of directors, but provide that the corporation will have special "members" who are given the exclusive power to elect and remove members of the board or amend the articles of incorporation and bylaws. The donor could serve as the sole "member," or name someone who is specially trusted.

The Arthur M. Rupe Foundation in California and the T. W. Lewis Foundation in Arizona are two examples of foundations with hybrid "member" corporate structures. In the latter example, Thomas Lewis

Selecting a Jurisdiction for Charitable Trusts

Like the rules governing nonprofit corporations, the laws governing charitable trusts vary from state to state. The primary state law that governs the establishment of both private trusts and charitable trusts is the Uniform Trust Code, currently enacted (though in slightly differing versions) in 34 states and the District of Columbia. For states that have not enacted the Uniform Trust Code, each state has codified its own laws for trust creation, validity, modification, and termination.

A charitable trust is created when the donor executes a written instrument to empower and direct one or more trustees to administer and distribute the assets for charitable purposes. Although most states do not require registration of trusts with any court or other state office, there are some exceptions. Colorado, for example, requires the trustee of most trusts administered in the state to register the trust within 30 days of taking office. If the charitable trust is created under the will of a donor, the charitable trust may be automatically subject to ongoing court oversight.

A charitable trust is usually governed by the law of the jurisdiction chosen by the donor. Donors are generally granted broad discretion in this, with two primary exceptions. First, a charitable trust created by a will is initially governed by the law of the donor's domicile at the time of death. Second, choosing a particular state to govern the trust agreement will usually not be respected if the donor has no connection to that state. Donors who want to create trusts in states other than where they reside should appoint a trustee from that jurisdiction; many states will recognize this.

When creating a private trust, a donor should evaluate the advantages and disadvantages of state law by looking at a few key considerations including, for example: the income tax treatment of the trust, the ease and cost associated with hiring a resident trustee, any creditor protection afforded to the trust, whether the trust can continue in perpetuity or for some lesser period of time, the ability to later modify the trust, and whether trustees are required to provide information, accountings, and/or notices to the trust beneficiaries. States such as Delaware, Nevada, New

Hampshire, South Dakota, Tennessee, and Wyoming are among the favorite jurisdictions for trust practitioners for the reasons mentioned above.

However, some of the factors that may favor creating a *private* trust under a specific state's laws may not be relevant for establishing a *charitable* trust. For example, income taxation issues are generally not relevant to charitable trusts. In addition, charitable trusts can exist in perpetuity even in states that restrict the perpetuities period for private trusts.

In contrast to state nonprofit corporation law, state trust law has few default rules regarding the internal governance of a charitable trust (with the exception of the management of the trust's investible assets). For example, state nonprofit corporation statutes usually include rules related to number, qualification, and appointment of directors and officers, meetings, voting, and other internal governance matters. No such rules generally apply to trusts, so donors must carefully consider the pros and cons of greater flexibility. What works for a living donor, and the trustees whom he or she has personally selected, may well lead to turmoil after the settler's death, especially if clear succession and governance rules are not set forth in the trust terms. One option for charitable trusts is to include a "trust protector," who can be given the authority to remove and replace trustees—and/or other limited powers over the trust—depending on state law.

It is not permissible under any circumstances to amend the purposes of a charitable trust such that the purposes no longer qualify the trust as a charitable entity. However, the terms of a trust may permit modification of the trust's purposes (especially, for example, during the donor's lifetime) as long as the purposes remain charitable. When the trust instrument does not contain the express power to modify the purposes of a charitable trust, the trustees of the trust can petition the court to apply the doctrine of *cy pres* (which translates to "as near as") to modify or terminate the trust. State law prescribes the standards by which the court may modify or terminate a charitable trust, and historically, this standard has required demonstrating that the purposes of the charitable trust were impractical or impossible to carry out. Some states, such as Delaware, have restricted the application of *cy pres* so that the court may intervene to modify the charitable purposes of the trust only when the stated purposes have become unlawful. A more restrictive application of this doctrine means that donor intent is more likely to be preserved.

When selecting a jurisdiction for a charitable trust, donors should also consider enforcement. The state attorney general always has standing to

enforce a charitable trust, and many states give the donor standing to enforce the trust terms as well. But state law is not uniform with respect to whether others have standing including, for example, the donor's heirs or personal representatives.

Finally, it is important to note that donor intent can be incorporated through the terms of the trust, but also by imposing restrictions on a charitable contribution. Thus, a donor may create a charitable trust with fairly flexible provisions but include more restrictive provisions when making certain contributions to the trust. Generally, the gift would be structured as conditioned on certain additional requirements or restrictions, and by accepting the gift, the charitable trust is contractually agreeing to these additional requirements or restrictions. In such circumstances, state trust law will generally apply to the restricted charitable gift. It is important to consult with advisers in structuring such a conditional gift to ensure that the gift restrictions are both permissible and effective.

himself is the sole member, and he appoints the seven board directors. Following the death of Lewis and his wife, the board will become three family members and four non-family members and will operate on a 10- to 20-year sunset schedule. Donors who are not time-limiting their foundations (family foundations intended to operate for many generations are a good example) may establish a trust to serve as the sole member of the corporation. The trust instrument should include a detailed statement of donor intent and the purposes of the corporation; specific criteria for trustees and a plan for trustee succession; and a clear prohibition against changing the original charitable mission of the foundation.

Private operating foundations

If you have a very specific philanthropic goal that few, if any, charities are fulfilling, an operating foundation could be your best choice. With this option your foundation funds its own charitable services and programs—meaning you will likely make only minimal grants to outside organizations. An operating foundation must spend at least 85 percent of its adjusted net income or its minimum investment return directly on its own activities. An operating foundation brings several distinct benefits.

It is exempt from minimum charitable distribution requirements. It provides tax deductions for cash contributions up to 60 percent of a donor's adjusted gross income (compared to the typical limitation of 30 percent for non-operating foundations). It may receive distributions from independent non-operating foundations and is not subject to the public support test.

Operating foundations are engaged in a wide variety of activities. Among the better-known operating foundations:

- J. Paul Getty Trust, which operates the J. Paul Getty Museum in Los Angeles and also supports a multi-faceted arts program that includes conservation, research, publications, and training.
- Casey Family Programs, which provides direct services and conducts research on child and family well-being.
- Open Society Institute, Baltimore, which runs programs in criminal justice, youth development, and health.
- Broad Art Foundation, which was created in 1984 to lend works from its 700-piece collection without charging fees, and serve as a study center for art professionals, collectors, and students.
- Henry J. Kaiser Family Foundation, which conducts health research.
- Carnegie Foundation for the Advancement of Teaching, which funds both research and programs promoting improvement in education.

Liberty Fund is an operating foundation created to nurture a distinct ideology. Its programs are intended "to enrich understanding and appreciation of the complex nature of a society of free and responsible individuals and to contribute to its preservation." Founded in 1960 by Pierre Goodrich, an Indianapolis businessman and attorney, Liberty Fund reflects its donor's deep interest in public affairs and his love for the Great Books.

Although it functioned as a grantmaking foundation in its early years, Liberty Fund converted to an operating foundation in 1979. Since then it has sponsored its own programs, including more than 3,000 conferences for scholars and students on topics such as "Liberty and Markets in the Writings of Adam Smith" and "Shakespeare's Conception of Political Liberty." Liberty Fund has also published over 400 titles in both print and e-books, most of them exploring "the interrelationship of liberty and responsibility in individual life, society, and governance." In addition to the conferences and books, Liberty Fund maintains a free online library of important writing on individual liberty, limited government,

and free markets. Donors with missions as distinct and specific as that of Pierre Goodrich may well see a private operating foundation as their most effective vehicle for philanthropy.

In protecting donor intent, operating foundations have one obvious advantage. Because these organizations fund, design, and administer their own programs, they have direct control over how their funds are spent, side-stepping grantees who may fail to adhere to the terms of a grant agreement. But operating foundations are not foolproof. They are subject to many of the same problems as non-operating foundations, including wayward board or staff members and mission creep over time. While an operating foundation gives you more immediate control over how your charitable funds are directed, it cannot guarantee fidelity to your intent in perpetuity.

Philanthropic LLCs

If you seek maximum flexibility in your philanthropy, you might consider bypassing the tax-exempt route and forming a for-profit limited-liability company (LLC). The benefits of LLCs in charitable work are numerous: wider latitude and diversity of spending opportunities, less regulation and red tape, and augmented privacy and control.

Facebook founder Mark Zuckerberg and his wife Priscilla Chan chose this vehicle in 2015. Declaring their intention to donate 99 percent of their Facebook shares to charitable causes in their lifetimes (an estimated $45 billion pledge when it was made), they formed an LLC (the Chan Zuckerberg Initiative) to accompany the existing Chan Zuckerberg Foundation (a private non-operating foundation) and the sizeable donor-advised fund which the couple has funded at the Silicon Valley Community Foundation. Philanthropic LLCs are popular with other Silicon Valley powerbrokers as well, including Pierre Omidyar, Steven Ballmer, and Laurene Powell Jobs, widow of Apple founder Steve Jobs.

In early 2019, John and Laura Arnold announced the restructuring of their philanthropy as an LLC, Arnold Ventures, which overarches the Laura and John Arnold Foundation (a private foundation), the Arnolds' donor-advised fund, and their 501c4 Action Now Initiative. President Kelli Rhee explains that for philanthropic work on topics like criminal justice, health care, and school performance, an LLC structure fits the Arnolds' aims. Although grants to c3 nonprofit organizations will continue to come from the private foundation and donor-advised fund, "We realized that in order to create change that lasts, we would need to

Domicile considerations: Where to incorporate?

Laws governing trusts and not-for-profit corporations vary from state to state. Choosing a home for your foundation can be important in protecting donor intent.

Delaware is generally the preferred jurisdiction for corporations, including nonprofit corporations, and is the legal home to many foundations that fund exclusively in other states. Delaware provides many advantages:

- The Delaware General Corporation Law (DGCL) is a modern, current, and internationally recognized and copied corporation statute that is updated frequently to take into account new business and court developments.
- Delaware offers a well-developed body of case law interpreting the DGCL which offers certainty in planning.
- The Delaware Court of Chancery is considered by many to be the nation's leading business-entity court, where judges expert in corporate and governance matters deal with issues regularly and efficiently.
- Delaware offers a user-friendly Division of Corporation office for document filings.

Delaware governs its nonprofit corporations under the same state rules as for-profit corporations. The Delaware corporate law is considered very flexible, and is even more accommodating for non-stock corporations. There are provisions in the Delaware law which allow non-stock corporations to choose how to organize their internal governance, including placing restrictions on the power of the board.

A primary principle in Delaware corporate law is that the board of directors has the ultimate authority to manage and direct the affairs of the corporation. Most corporations find it desirable for the board to have such broad power to make substantial changes to the corporation over time. For nonprofit corporations, however, this means that even ultimate purposes and mission can be changed. To protect donor intent it may therefore be desirable to restrict the board's power over the corporation, particularly where a founding donor of a private foundation wishes to ensure that his

or her foundation will continue to adhere to certain values, or support a particular giving area or geography, even if a distant future board might wish to deviate from that. In Delaware the corporate board's power can be modified in such a way, so long as those provisions are included in the certificate of incorporation. One might, for instance, require a supermajority of the board for any fundamental change of mission. Or require that some outside person or entity have special rights to approve certain changes. Or a provision could simply say that the purposes may never be amended.

The states of Florida, Tennessee, and Texas can be attractive because they have enacted provisions into law that support philanthropic freedom and that restrict the state from attempting to direct foundations' charitable missions or demanding personal information about foundation trustees, staff, and grantees. Other important questions of state law include the scope of trustee indemnification, and provisions permitting a foundation to move to a new jurisdiction, allowing it to take advantage of another state's laws. As a donor, you should work closely with your attorney to determine where to incorporate. In any case, a foundation's "home state" will generally require it to register with the state's charities bureau.

remove barriers between data and decisive action, working swiftly across the policy-change spectrum," says Rhee.

The most obvious downsides to LLCs are the loss of a tax deduction for any funds donated to the entity, and the fact that income generated by LLCs will not be tax exempt. But donors may still write off on their personal tax filings funds donated through their LLCs to charitable causes.

The advantages of LLCs over private foundations are significant:

- They are not subject to annual distribution requirements.
- They give donors the latitude to invest in domestic and foreign for-profit ventures. For example, Powell Jobs' Emerson Collective bought a majority stake in the *Atlantic* magazine in 2017. The Omidyar Network has invested in Flutterwave, an African payment processing company, which it believes will improve African standards of living while operating as a business.
- When program staff are employed by an LLC (rather than by a c3 entity), they can move seamlessly from c3 to c4 to for-profit work.

- Donors can use LLCs to fund ballot initiatives, direct lobbying, political campaigns, and individual candidates—expenditures which are prohibited for private foundations.
- Donors can use LLCs to support foreign charities without the requirement imposed on private foundations to determine that prospective foreign grantees are the equivalents of Section 501c3 public charities.
- In contrast to a private foundation's tax return, LLC filings do not have to be public.

The benefits of charitable LLCs are numerous: wider diversity of spending opportunities, less red tape, augmented control, and privacy.

- LLCs permit donors to dedicate valuable chunks of their enterprises to philanthropic purposes without endangering their ownership of their businesses. Zuckerberg, for example, would have been gradually forced to relinquish control of Facebook if he and Chan had donated stock to their foundation rather than to an LLC, because of federal tax law forbidding excess business holdings.
- Through an LLC, donors may make concentrated investments without running afoul of federal or state rules.
- LLCs are not subject to the "self-dealing" rules applied to private foundations, so donors can structure their operations and compensation plans in ways that integrate their philanthropy with their business. (Donors who are using both LLCs and non-profit philanthropic vehicles do need to be alert to those rules, however.)

Because LLCs are designed and governed by their donors, they can typically avoid the common threats to donor intent. Their managers are employees, not the independent directors of a foundation. And LLCs can be terminated, and their assets transferred, any time their donors wish. They are ideal vehicles for donors committed to spending down their financial resources in their lifetimes. LLCs cannot pass to subsequent generations without incurring estate taxes. Donors who choose to transfer assets from an LLC to a tax-exempt vehicle (such as a private foundation) should consider making

that transfer at a time when they can still take an active role in the governance and grantmaking of the new entity, in order to put in place the recommended policies and procedures to protect donor intent.

Donor-advised funds

If you want to protect your charitable intent in the simplest way possible, you would be wise to consider donor-advised funds (DAFs). These funds originated within community foundations as a way for donors to create individual philanthropic accounts from which they could recommend grants to nonprofit organizations. Today, DAFs have become a wildly popular choice. The National Philanthropic Trust reported that in 2018, 728,563 individual DAF accounts held assets totaling just over $121.4 billion. During that year, donors used these funds to recommend $23.4 billion in grants to qualified charities.

DAFs now outnumber private foundations by more than five to one, and are continuing to grow at a much faster rate. In 2018, the largest grantmaker in the country was the Fidelity Charitable Gift Fund with $5.2 billion in donor-recommended grants. "Think of a donor-advised fund as your own private foundation," urges DonorsTrust president Lawson Bader. "You just don't have to deal with the administrative side of things. It's cheaper than a foundation, and you don't have to solicit proposals."

Donor-advised funds offer flexibility, simplicity, cost savings, and anonymity. These funds have relatively few rules and restrictions. Donors can take a tax deduction for their contribution in the year they make the deposit into their DAF, even if they do not make a grant recommendation from those funds in the same year. Gifts of cash are tax-deductible up to 60 percent of adjusted gross income, and many DAF sponsors that host your fund will also accept gifts such as securities, art, land, and business assets deductible at 30 percent of AGI. DAFs are subject neither to the excise tax nor the annual payout mandate imposed on private foundations. And contrary to some critiques, DAFs have high payout rates, collectively averaging about 20 percent a year—close to four times the payout rate of a typical foundation.

The cost of maintaining a donor-advised fund is considerably lower than the cost of operating and administering a private foundation, since the administrative burden of processing applications, philanthropic planning, and tax, legal, and accounting services is carried out by the sponsoring

organization. Sponsors charge DAF holders an annual fee for these services, typically ranging from .5 to 1.5 percent of assets held in the fund.

Donor privacy is an especially important benefit of donor-advised funds. Although the sponsoring organization is required by law to disclose its grants, that disclosure does not include the name of the DAF account from which the gift originated. As the accountholder, you can choose whether your fund's name and your contact information are disclosed to the receiving charity. This is a critical factor for individuals who do not want to be inundated with solicitations or who simply want to keep their charitable giving confidential, and distinguishes DAFs from private foundations, which must list their grants in their annual tax filings. Some donors include both foundations and DAFs in their giving strategies, using DAFs to give family members latitude to make their own gifts, or to provide younger family members with a low-risk method of philanthropic "training," or to protect their privacy completely.

You may open a donor-advised fund through the sponsoring organization of your choice. If your goal is broad philanthropic giving, your best choice might be a national fund (Fidelity, Schwab, Vanguard, National Philanthropic Trust, etc.) that gives you the leeway to support most tax-exempt charities without geographic or ideological limits. If you have a specific geography in mind for your giving, then a better choice may be the community foundation that focuses on that area, and can provide you with the knowledge and experience of both staff and fellow donors—an especially important advantage if you do not reside in the region your DAF supports. You can open a DAF at most national funds and community foundations with a modest contribution.

Some universities also offer alumni and friends the opportunity to open a donor-advised fund that will be managed within the school's endowment. These sponsors, however, will typically impose a high minimum amount for distributions, and will also require that some percentage of the fund goes to the university. Yale University, for example, mandates that distributions be made in amounts of $50,000 or more, and that at least 50 percent of the funds contributed must eventually be allocated to Yale.

Protecting your donor intent with a donor-advised fund requires that you be mindful of the policies of the sponsoring organization. Because contributions to DAFs are irrevocable, it is critical that you understand that the sponsoring organization is the legal owner of the funds in your

DAF account, and that you merely "advise" on their use. Donor recommendations are typically accepted, but there have been exceptions. Sponsoring organizations have the option to reject donor recommendations to certain organizations, and some have responded to pressure from left-wing activists to shun subjectively labeled "hate groups" or other charities for ideological reasons. You should inquire about this practice in choosing a sponsoring organization for your DAF account.

If your philanthropy is oriented around a specific set of values—religious, philosophical, or ideological—then you may find that a mission-driven intermediary is the better sponsoring organization for your donor-advised fund account. Examples of such intermediaries include:

- National Christian Foundation
- Knights of Columbus Charitable Fund
- Jewish Federations of North America
- Tides Foundation
- DonorsTrust
- Bradley Impact Fund

Opening a DAF account at one of these organizations offers you the opportunity to engage in philanthropy with like-minded people. And because they share your philosophical values, these DAF sponsors are far more likely to serve as good stewards of your philanthropic legacy. Their guidelines are clear about the grants they will approve. For example, the National Christian Foundation is forthcoming with prospective donor advisers that staff will "only approve giver-recommended grants to organizations whose purposes and activities align with NCF's beliefs and values."

The policies of sponsoring organizations vary significantly, so pay attention to their rules and make decisions that uphold your philanthropic mission. For instance, at Fidelity Charitable, a donor can bequeath a DAF account to family members or other individuals who are then free to make their own grant recommendations. Or a donor can name one or more specific charities as beneficiaries of all remaining funds in an account. At DonorsTrust, each original donor has the option of appointing a successor to advise on the account, but any grant recommendations must align with the original donor's intent. Either the original or the new adviser may choose a sunset date for the account. If no date is selected, DonorsTrust will close out the account within 20 years of the death of the successor.

If you want your DAF account to continue to reflect your grantmaking choices, then choose successors who understand that they will be stewards of your philanthropic legacy and whose values and interests align with yours. Discuss your grantmaking preferences with them to assess their willingness to make grant recommendations in line with your wishes. You may want to leave some suggestions in writing or by video, especially if you are planning a significant gift in the future.

One final note: Donor-advised funds have experienced such a rapid rise in popularity that they have attracted scrutiny from philanthropy critics and regulators. There now exist proposals like limiting the life of donor-advised funds to 10 years or less, requiring an annual payout of at least 5 percent, mandating disclosure of grant recipients, and so forth. Donors considering a DAF account should monitor potential regulatory shifts to ensure that donor-advised funds continue to be the right vehicle to protect their philanthropic intent.

Donor-advised funds outnumber foundations by five to one, and are growing fast. And contrary to critics, their payout rates average four times that of foundations.

Community foundations

More than 800 community foundations operate in the United States, serving areas large and small. What all community foundations share is a long-term commitment to their place, through the pooling of resources from many donors into a permanent endowment. Including gifts from donor-advised funds, community-foundation grants totaled more than $10 billion in 2018.

You don't have to use a donor-advised fund to give through a community foundation, particularly if you have wide-ranging interests in a particular locality. But be aware that if you go with a non-DAF option and add your donations to the broad pool of money in the community foundation, it will be impossible for you to enforce any specific donor intent down the road.

- If you give to a general unrestricted fund, the foundation will respond to community needs and fund its own priorities as it judges best.
- If you give to a field-of-interest fund your money will go to one broad priority, like arts and culture, children and youth, environment, etc., with all details at the discretion of the community fund managers.
- If you establish a designated fund, that can support a specific purpose like annual scholarships or particular local charities.

From a donor-intent perspective, it's wise to explore giving options at community foundations with a good deal of caution.

Remember that all gifts to community foundations, including those which establish donor-advised funds, are gifts that you no longer legally control. A governing or distribution board—intended to reflect community interests—typically oversees grantmaking, so your contribution could go to a cause you find objectionable. Community foundations may also impose restrictions on prospective grantees that counter your giving preferences. For example, they may disallow requests for general operating support or capital projects. They may avoid certain philosophies or ideas. Make sure you understand such grantmaking guidelines before donating.

If you create a designated fund, you can specify the beneficiary organization(s), and the timetable on which payments are made. But these are not DAFs, and if your designated organization goes out of business or changes its purpose, the community foundation can use your designated fund to support other organizations.

In many instances, donors and community foundations forge long-lasting and mutually rewarding relationships around a specific place to which they are both committed. Community foundations are no longer the only option, though, for donors who want to support their local community

but don't have the assets, time, or interest to establish their own charitable entity. From a donor-intent perspective, it's wise to explore non-DAF giving options at community foundations with a good deal of caution.

Supporting organizations

Supporting organizations are, at first glance, attractive tools for donors who value simplicity, and seek an ongoing, perhaps multi-generational, relationship with the charity to be supported. Broadly defined, a Supporting Organization (SO) is a distinct legal entity that has a supporting relationship to a public charity. For example, the FSU Foundation Supporting Organization, which supports Fitchburg State University. Unlike private foundations, supporting organizations do not have to meet the public support test, and qualify as public charities even if they have only one donor. And unlike private foundations they are not subject to a minimum annual distribution requirement.

In terms of benefits to donors, supporting organizations:

- Save you from the paperwork, administrative, and reporting responsibilities and costs associated with a private foundation.
- Generate the public-charity tax advantages for contributions that are far more favorable than those of a private foundation.
- Free you from the management of day-to-day operations, since these are typically handled by the supported charity.
- Allow you to involve generations of family members, who may act as advisers to the supporting organization.

On the downside, a donor cannot control a supporting organization. The supported charity is guaranteed majority control or—at the very least—strong influence over the use of funds. Typically, a supporting organization will be respectful of your intentions while you are alive and seem likely to make additional gifts. But once you are no longer providing funding, supported organizations lose incentives to honor your intent. To reduce this risk, you can request the appointment of board members you know and trust. You may also include an exit clause in your agreement specifying that funds will go to an alternative organization if the supporting organization is unable to carry out your instructions. Neither of these measures is foolproof, though, and your giving priorities may well be disregarded over time. The Robertson Foundation's long dispute with Princeton University

in the early 2000s—discussed in detail in Chapter 7—makes clear the potential danger to donor intent of using supporting organizations in your philanthropy.

Philanthropic partnerships

An intermediary organization can help philanthropists support an issue in partnership with other funders, using a portfolio approach instead of giving to a single organization. Examples include the Charter School Growth Fund, ClimateWorks, Give2Asia, the Global Fund for Women, Robin Hood Foundation, and Social Venture Partners. While collaborative funding, by definition, limits your donor intent, most funds offer donors some degree of control over the grantmaking process, varying according to the size of your contribution. Each fund sets its own minimum contributions and rules for exercising preferences, based on its mission and investment style.

Blue Meridian Partners, for example, seeks "to make a transformational impact on the lives of young people and families in poverty" by channelling pooled money to "promising interventions." Launched by the Edna McConnell Clark Foundation, Blue Meridian searches out organizations, evaluates their effects and ability to be expanded, develops a growth plan, provides management support, makes investments, monitors progress, and reports back to funding partners. The fund has raised $1.7 billion to date for its work. Each General Partner who contributes at least $50 million every five years has a vote in investment decisions. So-called Impact Partners contribute at least $15 million, with part of their money going into the partnership's central investment pool, and part able to be steered by the donor to groups in the Blue Meridian portfolio that are most appealing.

In all circumstances, your choice of a giving vehicle is always best done with input from your trusted advisers—wealth managers, accountants, and attorneys—and with close attention to your own values and philanthropic mission. Your advisers may have preconceived notions about what trust documents or articles of incorporation should include. Make sure they are listening to your wishes and concerns, and using the language that will best protect your goals.

Donors are increasingly utilizing multiple vehicles in pursuit of their objectives, so don't assume this is an either/or decision. If you are committed to protecting donor intent, then some of the vehicles discussed

here have clear advantages over others—but only if you also take precautions to define your mission, consider alternatives to perpetuity, and select your board and staff members carefully.