

PROTECTING DONOR INTENT PROTECTS GIVING

BY JACK SALMON

EXECUTIVE SUMMARY

- ◆ **ACCOUNTABILITY AND TRUST BETWEEN DONORS AND CHARITIES ARE VITAL TO FOSTER CHARITABLE GIVING AND A ROBUST CIVIL SOCIETY.**
- ◆ **PROTECTING DONOR INTENT IS PARAMOUNT TO THIS TRUST. THIS IS TRUE FOR INSTANCES WHEN DONORS GIVE TO A CHARITY WITH SPECIFIC AGREEMENTS FOR HOW THE DONATION WILL BE USED, AND THIS IS ALSO TRUE FOR WHEN DONORS PASS, AND THEIR INTENT IS PROTECTED BY THEIR SUCCESSORS.**
- ◆ **EMPIRICAL RESEARCH DEMONSTRATES THAT BETRAYING A DONOR'S TRUST CREATES A SIGNIFICANT DROP IN THE DONOR'S WILLINGNESS TO GIVE AGAIN. ULTIMATELY, THOSE SERVED BY CHARITIES LOSE WHEN DONOR INTENT IS VIOLATED.**
- ◆ **HISTORY OFFERS US AN ABUNDANCE OF EXAMPLES OF PHILANTHROPISTS WHOSE CHARITABLE INTENTIONS WERE MANIPULATED OR DISREGARDED OVER TIME. WHILE THERE ARE SPECIFIC STEPS DONORS CAN AND SHOULD TAKE TO PROTECT THEIR INTENT, ADDITIONAL LEGAL PROTECTIONS WOULD BENEFIT BOTH DONORS AND THOSE WHO BENEFIT FROM THEIR GIFTS.**
- ◆ **FOR DONORS TO GIVE FREELY WITHOUT CONCERN THAT THEIR MUTUALLY AGREED UPON INSTRUCTIONS WILL BE VIOLATED, A LEGAL PATHWAY FOR THE ENFORCEMENT OF ENDOWMENT AGREEMENTS SHOULD BE ESTABLISHED.**

INTRODUCTION

Philanthropy Roundtable supports the right of Americans to give freely to the charities of their choice. An integral pillar of respecting philanthropic freedom is ensuring fidelity to a donor's intent over time. Protecting donor intent is an important precondition for encouraging generous Americans to support charities hard at work in our communities.

Our charitable sector faces ever-increasing challenges in supporting the most vulnerable in our communities. Ensuring the resources are available to meet these challenges depends on maintaining the trust of donors, and existing laws and regulations should reflect this. More than just a contractual issue of laws, donor intent is a moral issue: The integrity of donors' principles and values should be preserved, even after they have passed away.

In this report, we describe two facets of donor intent. The first is the adherence to a donor's values and priorities by his or her successors. For example, if a donor establishes a private foundation to support local education opportunities, and the foundation continues to operate after his or her passing, it is incumbent on the successors to ensure the donor's intent is respected. To protect this facet of donor intent, donors must take action to plan for the future of their resources.

The second element of donor intent, and the primary focus of this report, is the compliance with explicit gift agreements when a donor gives to a charity. To protect donor intent when such a gift is made, policymakers should consider enacting legal pathways to enforce agreements so that donors and their representatives can enforce written agreements.

Unfortunately, history abounds with examples of philanthropists whose charitable intentions were manipulated or disregarded over time. These philanthropists include great tycoons, such as John Howard Pew, as well as some less well-known families who offer equally important examples of disregarded donor intent.¹ As things currently stand, there is often no legal recourse to enforce mutually agreed upon instructions for how gifts are disbursed once a donor gives money to a charity. State lawmakers might consider establishing enforcement mechanisms to protect the fidelity of donors' investments and maintain the trust that is so vital to our thriving charitable sector.

MECHANISMS OF DONOR INTENT: ENSURING PHILANTHROPIC GOALS ARE ACHIEVED



When donors make gifts to charities, they often do so with specific purposes in mind. For example, a donor may wish to fund a scholarship program for disadvantaged students, support scientific research in a particular field or establish a fund to provide aid to a disaster-stricken area. Donor intent is therefore an essential component of any philanthropic gift, as it serves as a guide to the use and distribution of funds. It is vital for charities to comply with the explicit gift agreements made with donors, as this is a fundamental aspect of respecting donor intent.

A written gift agreement typically outlines the donor's wishes, providing a clear and enforceable set of instructions for the use of the donation. The written agreement, signed by the donor and charity, outlines the specific goals and objectives of the donor's gift. It typically includes information on how the funds should be used, any restrictions or conditions attached to the donation and how the charity should report on the use of funds to the donor. A written agreement provides clarity and transparency for the donor and the charity. It ensures the donor's intentions are clearly understood and the charity is aware of its obligations regarding the use of the funds. In this way, a written agreement can help to prevent misunderstandings and disputes over the use of the donation.

The current laws surrounding charitable endowment giving do not adequately protect donor intent. The Uniform Prudent Management of Institutional Funds Act (UPMIFA), which governs charitable endowment funds, does not require charities to follow explicit donor intent when making decisions about the use of funds.² This can lead to situations where charities use

endowment funds for purposes that do not align with the donor's wishes, thereby violating donor intent. Furthermore, some charities may attempt to modify the terms of a gift agreement or redirect funds to other programs without the donor's consent or in violation of a written agreement. These actions can lead to a breach of trust and damage the donor's confidence in the charity's ability to respect their intentions.

DONOR INTENT HAS MULTIPLE MEANINGS



Before reviewing the history of disregarded donor intent, it is important to clearly define what is meant by donor intent. For the purposes of this primer, we are using the term donor intent to capture the express intent of a donor when making a gift to a charity. In terms of other uses of donor intent, it is important to note the importance of protecting donor intent within a foundation.

Notable donors who established foundations often achieved their success through entrepreneurial skills, accumulating large sums of wealth and disbursing that wealth as gifts to philanthropic causes that align with their values. Once a charitable foundation has been operating for some years, especially after the passing of the donor, the charitable funds are easily diverted to causes completely at odds with the donor's values and original intent.

One noteworthy example is John Howard Pew—a successful oil entrepreneur who made his fortune running the Sun Oil Company (later Sunoco) for almost four decades in the first half of the 20th century. A devout Christian and conservative, Pew gave away hundreds of millions to philanthropic causes in religious philanthropy, funding higher education and advancing the ideas and principles of a free society. After founding the J. Howard Pew Freedom Trust in 1957, Pew instructed the trust to be used “to acquaint the American people” with “the evils of bureaucracy,” “the

values of a free market” and “the paralyzing effects of government controls on the lives and activities of people.”³ After J. Howard Pew passed away in 1971, his values were increasingly ignored as The Pew Charitable Trusts became increasingly focused on left-leaning causes such as climate change and health care reform. According to Roger Williams in *Foundation News*, by the 1990s, under a new progressive leadership, the philanthropy had “eliminated almost all of their right-wing grantmaking and embraced a wide range of projects, including some that manifestly oppose the business interests the old Pews held inviolable.”⁴ One estimate suggests that by 1994 liberal organizations were receiving 40 times as much money from The Pew Charitable Trusts as conservative organizations.⁵

While donors may lack legal recourse to enforce their intent, there are ways in which donors have successfully avoided their intent being manipulated, disregarded or violated. One of the ways in which donors have avoided their funds being used for causes against their values over time is through “giving while living” or sunseting their foundations. One notable example of this model of giving is Julius Rosenwald, who gave generously to construct some 5,000 elementary and secondary schools in the American South during the Jim Crow era.⁶ Rosenwald was critical of the idea of giving in perpetuity and instead argued that philanthropists should spend most of their assets while they are still living. After Rosenwald passed away in 1932 he left written instructions for his successor to spend all the remaining assets held by his foundation within a short period of time—by 1948 his wish had been fulfilled and the foundation was disbanded.

Other philanthropists have since adopted the “Rosenwald model” of spending down assets to secure donor intent. The 1960s saw the growth of anti-capitalist activism on university campuses around the country, with groups such as Students for a Democratic Society totaling over 300 campus chapters by 1969.⁷ Increasingly concerned with college students and professors who were more ideologically hostile to the free

enterprise system, philanthropist John Olin adopted the Rosenwald model and instructed his trustees to liquidate the assets of the foundation over their working lifetimes.⁸ Olin passed away in 1982, and the John M. Olin Foundation was dissolved in 2005. The “giving while living” model adopted by Rosenwald and Olin was motivated by an attempt to ensure donor intent would be honored by trustees who respected their values.

While sunseting foundation funds and “giving while living” can be an effective mechanism for securing donor intent for foundations, it doesn’t protect the intent behind gifts after they are donated. Enforcing compliance with donor intent requires empowering donors with legal recourse to fulfill the agreed upon instructions for how a charitable endowment gift is to be invested and allocated over time.



A HISTORY OF DISREGARDED DONOR INTENT



There are a multitude of stories on donors' charitable intentions being disregarded over time and many of these stories reveal common themes.

For example, alumnus of The Ohio State University (OSU) law school, Michael Moritz donated \$30.3 million to the university in 2001. Under the terms of Moritz's gift, OSU would use the funds as a permanent endowment for very specific purposes: to support four chaired professorships and 30 annual law school scholarships plus stipends.⁹ Fifteen years after donating this gift, Michael's son Jeff Moritz reviewed a financing report from OSU on his father's endowment fund. To his surprise, Jeff discovered OSU had only disbursed 12-16 scholarships per year (not 30 as agreed), and the endowment held only \$21.9 million, with around \$3 million being taken out of the fund to support OSU's development operations. Unfortunately, the Moritz family had no legal recourse to enforce Michael Moritz's agreed upon instructions for how his endowment gift was to be disbursed. Due to OSU disregarding donor intent, over 300 law students incurred

large sums of debt for a legal education that should have been financed by the privately endowed funds of the Moritz Merit Scholarship.

Another example is the Robertson family, whose specific instructions of intent were disregarded by Princeton University. Marie Robertson, with her husband Charles, was heir to the Great Atlantic & Pacific Tea Company (otherwise known as A&P). In 1961 the Robertsons donated a \$35 million endowment to Princeton University establishing the Robertson Foundation. The endowment gift came with specific instructions for establishing a graduate school "where men and women dedicated to public service may prepare themselves for careers in government service, with particular emphasis on careers in those areas of the federal government that are concerned with international relations and affairs."¹⁰ By 2002, the endowment fund had ballooned to almost \$900 million and was supporting the renowned Woodrow Wilson School of Public and International Affairs (now the Princeton School of Public and International Affairs). However, the descendants of the Robertsons discovered that, far from preparing graduates for careers in the federal government, less than one-in-five (18%) Wilson School graduates were employed by the federal government.¹¹ As Michael Toscano notes in a review of Doug White's "Abusing Donor Intent:" "At issue for the Robertsons,

obviously, was donor intent: The intentions of Charles and Marie, who died in 1981 and 1972, respectively, were now actively circumvented by Princeton.¹² To make matters worse, a forensic audit conducted by PriceWaterhouseCoopers (PwC) found that Princeton University had misused over \$100 million of the Robertson Foundation’s earmarked funds.¹³ In the end, the Robertson family and Princeton reached a settlement, with Princeton returning \$100 million to the Robertson family. Lead plaintiff and heir to the Robertson family William Robertson called the settlement “a message to nonprofit organizations of all kinds throughout our country that donors expect them to abide by the terms of the designated gifts or suffer the consequences.”¹⁴ It is worth noting that while the settlement was viewed as a victory for the Robertson family, Princeton got to keep the remaining \$800 million in endowment funds which faced no spending restrictions.

A more recent example involved country music star Garth Brooks, who donated \$500,000 to the Integris Canadian Valley Regional Hospital in 2009. Brooks testified that he made this donation under an agreement with the hospital that a portion of the planned women’s center would be named after his late mother, Colleen Brooks, who passed away in 1999 from cancer.¹⁵ The hospital reneged on their agreement to name a women’s center after Brooks’s late mother, resulting in a lawsuit. The Oklahoma jury awarded Brooks with the return of his \$500,000 donation as well as an additional \$500,000 in punitive damages. The jury determined that the president of the hospital had acted “intentionally with malice” after a memo revealed he had told his staff, “We may not deny Garth access to the money. However, we can sure as hell make him work to get it back.”

An example of a smaller dollar donor whose intent was disregarded is that of Carol Bratton. Bratton worked as an administration assistant to the dean of the Logsdon School of Theology at Hardin-Simmons University. Her late husband also worked at the university as associate vice president of information technology. After her husband passed, she decided to honor his

memory by donating to their longtime employer. In 2008, she made a \$5,000 gift, and after another five years she had saved enough to gift \$10,000—the minimum required to establish an endowment at Hardin-Simmons.¹⁶ Carol Bratton’s agreement stipulated that if the Doctor of Ministry program should cease to exist, then the dean of Logsdon would have discretion to award the funds to benefit seminary students. In 2020, Bratton received an email informing her that the Logsdon seminary was being closed, and her scholarship would be eliminated. There is no way Hardin-Simmons can now uphold the intent of Bratton’s gift. When she requested the gift be returned to her, the university’s vice president for advancement laughed, and told her it would never happen.¹⁷

THE IMPORTANCE OF TRUST



The relationship between a donor and charitable beneficiaries rests upon trust. Fidelity to a donor’s intent signals to other philanthropists that they can rest easy knowing their gifts will serve the causes that best align with their values and their philanthropic intentions will be honored. If beneficiaries deviate from the donor’s intent over time, it risks creating a ripple effect of distrust among the philanthropic community. In this sense, disregarding or manipulating donor intent leads to lower levels of trust, which in turn can lead to lower levels of generosity.

It isn’t just a theoretical assumption that violating donor intent breaks down institutional trust. The importance of trust in charitable giving and respecting donor intent is also reflected in public opinion polling and existing research. A poll conducted by Zogby Analytics in 2005 reported that 53% of Americans would “definitely stop giving” and 26% would “probably stop giving” if a charity accepted contributions for one purpose but used the gift for another purpose.¹⁸

The same poll asked, “How important do you think showing respect for a donor’s wishes is to the ethical governance of nonprofit charitable organizations?” A total of 83% answered “very important” and 15% said “somewhat important.”

While the availability of empirical studies on the subject of trust and charitable giving is quite limited, the few academic articles that do exist offer some compelling indicators on the importance of trust between donors and charitable beneficiaries. One 2014 study implemented a survey to determine the factors influencing the repeat donation intention of residents in the Netherlands.¹⁹ The study shows that repeat donations are influenced by respondents’ affinity for the cause of the charitable organization, their trust in the organization and the organization’s positive reputation. A second study published in 2021 in the *Nonprofit and Voluntary Sector Quarterly Journal* surveyed over one thousand U.K. residents on their willingness to donate to local, national and international causes.²⁰ The study uses multiple regression analysis to identify the key variables that correlate with willingness to donate. The results reveal that donor willingness correlates with levels of trust, preferred types of charitable cause and donation channels.

Observing the impact of disregarding donors’ intent on the behavior of charitable donors, academic researchers at Washington State University conducted a study on how donors felt and how they reacted after having their intent disregarded. Published in the *Journal of the Association for Consumer Research*, the study found that after having their donation used for a project the donor did not select, the redirected donations increased perceived betrayal, lead to lower future donation intentions, plus heightened negative word of mouth intentions and switching of charities.²¹ The authors found the perceived betrayal from redirected donations results from a feeling among donors that their preferred projects were more morally imperative than those where funds were redirected. When donors’ money was distributed as planned, only 12% of

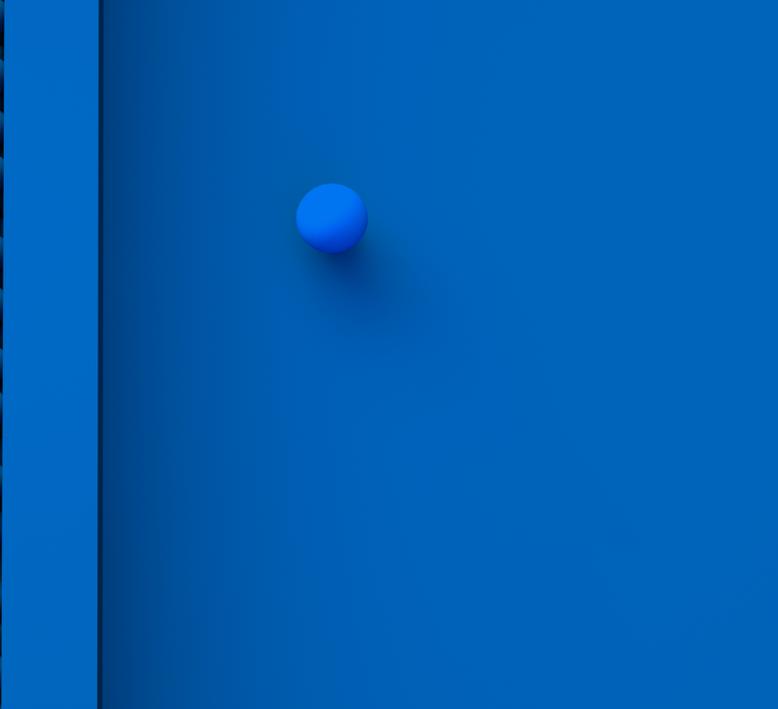
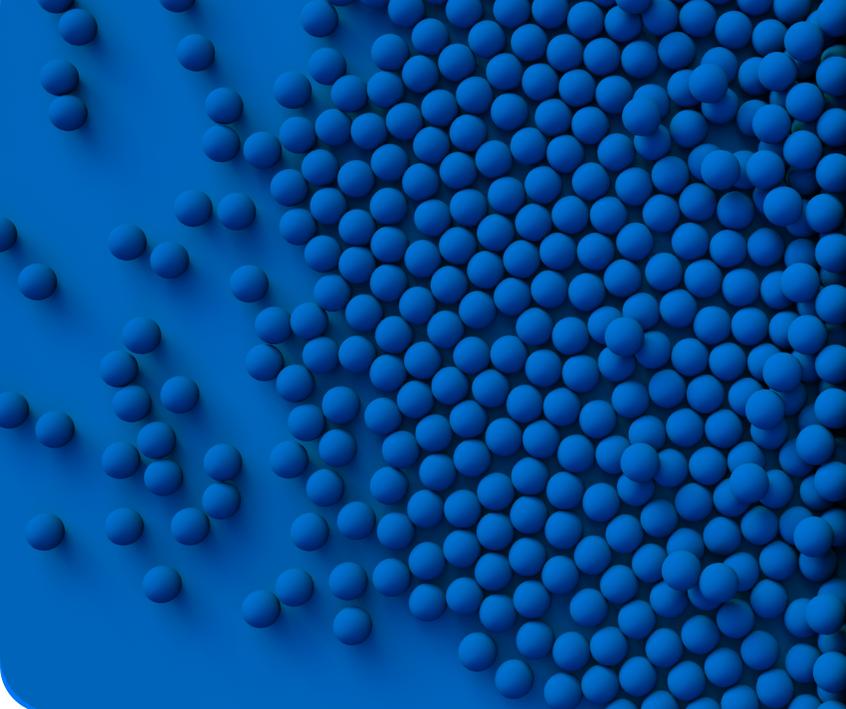
donors switched charities when asked if they would like to double their donation. However, after having their donated funds redirected, 62% of donors chose to switch charities when given the same opportunity to double their donation. The importance of trust between donors and those entrusted with donors’ gifts cannot be understated as a vital foundation of philanthropy, generosity and a thriving civil society.

STATE POLICYMAKERS SHOULD HELP PROTECT DONOR INTENT TO FOSTER GIVING



In order to maintain trust between donors and charitable beneficiaries—a foundational bedrock of charitable giving and generosity—state policymakers can provide a legal pathway for the enforcement of written endowment agreements. Legislation to enforce written endowment agreements may give recourse for donors to file a complaint in a court of general jurisdiction if they feel donor intent has been violated. The legislation may be specific in only covering gifts to 501(c)(3) organizations accepting gifts to their endowments. This deliberate limitation would prevent a deluge of lawsuits by donors without explicit written agreements signed by the charity and safeguard charities from legal action in case their missions, activities or investments in their general funds change over time.

Such legislative initiatives have been introduced at the state level. For example, in 2023, Kansas enacted legislation to provide legal recourse to a donor when “the donor’s gift restrictions pursuant to an endowment agreement ... are not followed by the recipient charitable organization.”²² This follows the introduction of similar legislation in Ohio in 2021, which applied specifically to higher education endowments. The Ohio legislation stemmed



from the Moritz family’s dispute with OSU and offered provisions that would protect donor intent in three important ways: giving donors the legal standing to file complaints, allowing for the appointment of legal representatives and providing remedies that are restorative rather than punitive. While Ohio lawmakers dropped the donor intent language from the bill before its passage in 2022, it has been considered in other legislative packages since then.

Notably, since the passing of the Donor Intent Protection Act in Kansas we are already seeing generous donations to important charitable institutions. For example, the Sunderland Foundation based in Kansas City recently donated a \$100 million gift to the University of Kansas Cancer Center.²³ The funds will be used to build a new building that brings together cancer research, treatment, and patient care teams. Donors in Kansas can continue to give generously knowing that their funds will be used as intended, while the ultimate beneficiaries of increased generosity are the recipients and communities that those funds support.

The benefits of implementing donor intent protection legislation, such as the proposed bill in Kansas, are twofold: 1) Providing legal standing—the bill allows donors to file a complaint with the court within six years of a violation being found in a written endowment agreement, and

2) Offering appropriate remedies to a donor should a violation be found. These remedies will be consistent with the recipient charity’s mission and with the intent of the written endowment agreement. The donor would receive neither damages nor any personal benefit.

With such protections in place donors can give freely and generously without concern that their mutually agreed upon instructions will be violated. A legal pathway for the enforcement of endowment agreements would also bolster levels of trust between donors and charities by adding an extra layer of protection for donor intent. Protecting donor intent and bolstering trust between donors and beneficiaries ensures that charities can continue to provide the support the most vulnerable in our communities depend on.

CONCLUSION

Philanthropy Roundtable supports the right of all Americans to freely give to the charities of their choice and believes trust between donors and those entrusted with funds is essential for continued generous giving. One of the key aspects of this support is the idea of respecting the donor’s intent. Donor intent is not only a contractual issue but also a moral one that involves preserving the integrity of donors’ principles and values. Donors expect



their funds to be used for causes that align with their values, and gift agreements often specify how they would like their gifts to be used or invested. A thriving civil society depends on the trust of donors, and it is important that our laws and regulations reflect this.

Unfortunately, there is often no legal recourse for donors to enforce agreed upon instructions for how gifts are to be disbursed. This lack of accountability often leads to beneficiaries

violating donor intent and choosing instead to conform with industry trends or beneficiary preferences. State lawmakers should consider establishing enforcement mechanisms to protect donor intent by creating a legal pathway for the enforcement of written endowment agreements.

ENDNOTES

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ABOUT PHILANTHROPY ROUNDTABLE

Philanthropy Roundtable is a nonprofit organization dedicated to building and sustaining a vibrant American philanthropic movement that strengthens our free society. To achieve this vision, the Roundtable pursues a mission to foster excellence in philanthropy, protect philanthropic freedom and help donors to advance liberty, opportunity and personal responsibility.



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