NONPROFITS: DONATIONS

Charitable Gifts in Perpetuity: Not a Great Idea

01.12.16 | Linda J. Rosenthal, JD

Two news stories from 2015 highlight the problem of the "dead hand" reaching out from eternal slumber, squeezing the life out of needed flexibility for a charitable institution established long ago by a bequest.

The "Dead Hand"

"Perpetuity": In Anglo-American common law, it's a concept long disfavored. – albeit not disfavored in perpe

The Rule Against Perpetuities, dreaded by generation after generation of first-year law students, is the classic embodiment of this principle of proscribing control by the "dead hand" or "*mortmain*." In a nutshell, it's a policy that "prevents a person from putting qualifications and criteria in a deed or a will that would continue to affect the ownership of property long after he or she has died."

The Rule itself "makes a future interest in property void if it can be logically proven that there is some possibility of the interest not vesting or failing within 21 years after the end of a life in being at the time the interest is created." This is generally expressed in the shorthand phrase: "lives in being plus twenty-one years."

Technically, the Rule Against Perpetuities applies only in cases of "contingent remainders" and "executory interests" and doesn't prohibit a generous soul from establishing a charitable organization or testamentary trust with all sorts of qualifications and conditions.

But the general idea holds: Perpetuity is a very, very long time indeed.

In any event, it's not a great idea to include ironclad restrictions that could get in the way of progress one hundred years later, even to the point of leaving the charitable institution with no choice but to shut its doors.

Sweet Briar College

The first example, plucked from the 2015 news headlines, is a case we reported on last year. See *Sweet Briar College: Saved – At Least For Now* (June 22, 2015).

Nestled in the beautiful foothills of the Blue Ridge Mountains, Virginia's Sweet Briar College is a small, single-gender, liberal-arts college. Over 100 years ago, its founder wanted to create a memorial for her deceased daughter to be located on the grounds of her family's beloved antebellum plantation. Following the progressive customs of that era, she established the all-female Sweet Briar College via a testamentary trust. Not only was the land for the College tied up by this bequest, but there were additional restrictions on use of the endowment funds as well.

In March 2015, the Sweet Briar College board of directors was summoned to a special meeting. There, the interim president announced that he and the executive committee had determined that the school was facing "insurmountable financial difficulties" and would need to close at the end of the semester.

A firestorm of opposition erupted. Within a few months, the leadership had been ousted and a committed group of supporters had rallied enough support and financial resources to keep the college open for the 2015-2016 academic year. The local county attorney intervened as well in order to protect the charitable trust and assets. She argued that the proposed closing of the college would violate the terms of the founder's will and trust.

The matter went up to the Virginia Supreme Court on an expedited basis. In a mediated settlement, the College was saved. But there were two related issues that were considered but averted by the settlement.

The first was whether a court would have permitted the endowment to be altered to free up cash to save the institution from closure. The second was whether a court would have modified the testamentary trust to remove the women-only restriction so that the College could become co-ed to attract more students. This issue has come up in lawsuits involving other financially struggling, women-only institutions. It's a difficult, fact-specific battle in each case to obtain the necessary court order.

Paul Smith's College

A second higher education case in the news last year involved another struggling institution: this time in rural, northern New York State. The outcome was determined by the restrictive covenants of a testamentary trust created long ago.

Paul Smith's College is "the only four-year college in the six-million-acre Adirondack Park." Its "students are mostly from rural communities, and nearly all receive financial aid." It's "known for its hospitality and forestry programs."

As an out-of-the-way school without wealthy alumni, it was encountering tough financial woes that were serious enough to possibly force the college's closure.

In the past, Paul Smith's College had benefited from the generosity of Sanford I. Weill, billionaire financier, and his wife, Nancy. "The Weills own a home near the college, and Mrs. Weill has said she was impressed by Paul Smith's."

"Mrs. Weill has been actively involved with the college's development for more than two decades and served on the board of trustees." The couple had donated many millions of dollars themselves, and garnered donations from others. The campus library and student center are named in her honor.

In 2015, the school was in dire financial straits. The Weills offered a $20-million gift, but only "on the condition that Paul Smith's College change its name to Joan Weill-Paul Smith's College."

There were two serious obstacles. First, the students, staff, and alumni of Paul Smith's College were not crazy about the cumbersome proposed new name. Second, the institution had been created by testamentary trust and a condition of that bequest was that the college be named after Paul Smith "in perpetuity." The court refused permission to break the iron-clad condition of the charitable trust.

Last year, in *Naming Rights: It's a Philanthropic Jungle Out There*, we discussed the complexities of so-called "renaming gifts." But when the name is tied up in knots in a charitable trust, the complications multiply – and may be insurmountable.

Conclusion

At the time that a charitable trust is created or – indeed – when any sizable donation is made, the restrictions on the use of the funds may seem prudent and logical to the donor as well as to the community at large. But times change, and needs change: Flexibility should be an important consideration in charitable giving.

Anything "in perpetuity" is generally not a great idea.

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