

the scene

MICHAEL GROSS

Charitable (Mis)trust

More donors are hiring lawyers to protect their wishes

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Back in the 1970s at Vassar, an apocryphal story had it that some long-gone alumna had left an endowment to ensure that Waldorf salad would be on the student lunch menu every day forever. This odd, culinary beneficence seems benign compared to latter-day examples of donor obduracy, like Larry Ellison pulling a \$115 million gift from Harvard when it jettisoned its president, Lawrence H. Summers. Under the once-upon-a-philanthropic norm, that sort of deal would have been sealed with a handshake and, of course, a check. But salad days are no longer the rule.

Today's charities and donors are making war, not love. In our era of fast and gargantuan wealth, pushy, obstreperous, and distrustful givers are the new

norm. Nonprofits, which once may have rolled over for almost any act of generosity, are starting to push back. The result? A lucrative new specialty: nonprofit law. "If you're a donor, you need a lawyer who understands how to effectively carry out your conditions and ensure they are legal, valid, and enforceable forever, which isn't easy to do," says donor lawyer William D. Zabel of Schulte, Roth & Zabel.

Nor is it easy to represent a nonprofit. "Organizations have become more sophisticated and wary," says Daniel Kurtz, head of the exempt group practice at Holland & Knight. "They're more substantial, so their dependence on angels isn't so great. They don't want to be in thrall to obsolete notions of what donors want. There are always other donors out there."

Not convinced? Conflicts are busting out all over the country. Consider the protracted struggle between the heirs of the Robertson family and Princeton University over the use of funds the family donated to the Woodrow Wilson School. Or, take a look at the battle in New Orleans that pits the family that endowed H. Sophie Newcomb Memorial College against Tulane University, which has long been its guardian. The Newcomb heirs—great-great-great-grand-nieces of the donor's sister—sued to stop Tulane from closing the all-female college there and, not coincidentally, absorbing its endowment during a post-Katrina entrenchment. [At press time, the Princeton case was unresolved. Two courts have ruled against the Newcomb heirs and they plan to appeal to the Louisiana Supreme Court.]

And now, government lawyers are jumping into the fray. In



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2000, Pennsylvania Attorney General D. Michael Fisher sued to stop the Milton Hershey Trust from changing the way the chocolate king's philanthropic honey pot was invested and spent, and then did it again in 2002, halting the sale of the Trust's company stock.

Something similar happened in 1986 in northern California, where Leonard and Beryl Buck, a Marin County couple who'd made millions with a lucky investment in an oil field, created a trust with the expectation that it would annually give away \$750,000 to Marin-based charities. But over time, its principal grew from \$7 million to more than a billion dollars, and the Buck trustees sought to start spreading the wealth around more broadly. That's when Marin lawyers stepped in and put a stop to that.

The bottom line? (What else, right?) A lot of money earmarked for good causes is ending up in lawyers' pockets, and these sums seem sure to increase. When Harvey Dale, an NYU philanthropy law professor, first came to the field 20 years ago, "three or four schools had one professor each who taught one nonprofit seminar once every two years," he says. Now, there are 10 times as many professors teaching as many students, he says. This year, the American Association of Law Schools created a new philanthropy section, giving nonprofit law parity with long-established specialties such as torts, taxes, and securities. The difference, says Dale, "is discernable and dramatic."

Like divorce lawyers, philanthropy lawyers tend to take sides. "Donor-side" specialists like Zabel typically come from trusts and estates practices dedicated to protecting and disbursing family fortunes. "Organization-side" specialists often get their start inside tax or corporate practices. Then as nonprofit lawyers, they get busy incorporating nonprofits, monitoring their operations and investments, zealously guarding their tax-exempt status, and dealing with a range of governance issues—and demanding donors. "We lay the legal plumbing so the water gushes out effective-

ly," says Victoria Bjorklund of Simpson Thatcher & Bartlett. The two sides *do* meet now and then—as when a museum lawyer touts the tax advantages of a planned giving program or a donor lawyer tells a client seeking to support Italian culture to channel gifts through an IRS-approved American group, like the Friends of Fondo per l'Ambiente Italiano.

But more and more, donor lawyers and charity lawyers are at odds. And it's no wonder. Consider the so-called dead hand, an evocatively named concept in centuries-old common law that seeks to guard against long-dead intentions preventing adaptation to new circumstances (an attempt, say, to redirect an endowment limited to curing polio). Or consider the "Sword of Damocles" clause, which a clever Zabel inserted into a gift agreement between a collector, Belle Linsky, and the Metropolitan Museum of Art, ensuring that if re-created rooms full of donated art objects from Linksy's home are ever redecorated, if even a single object is moved, her entire gift can be removed and sent packing to Boston's Museum of Fine Arts or another fine arts museum.

Regardless of which side they're on, though, many lawyers profess a wish to narrow the widening gulf between donors and nonprofits. "There's so much distrust now," says Rochelle Korman, a partner in the tax-exempt organizations group at Patterson Belknap Webb & Tyler. "So it's up to the professionals to be sure everyone is on the same sensible page when putting complex gifts together. Otherwise, these gifts can implode."

Zabel cheerfully admits that he's sometimes a midwife for selfish egotism. "Yes," he says, "absolutely! But I can argue the other way, too. 'It's my money. I made it. You don't have to take it, but if you do, honor my wishes.' The trouble is that honor is ephemeral. My clients will say, 'Okay for you, Zabel, but I want my great-great-great grandchildren to know what I did.' But a lot of people are starting to think there should be a time limit on ego." ▲

"Once you pay money to one outfit, it seems the word gets out and they can smell the blood."

—Bernard Olson, a Florida philanthropist who received 276 solicitations from 104 charities last year. *The Chronicle of Philanthropy*, October 4, 2007