

DISREGARDING DONORS AND TINKERING WITH TEXAS TRUSTS: JUDICIAL MODIFICATION OF RESTRICTED CHARITABLE GIFTS

by Matthew Roland*

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I. INTRODUCTION

Founded in 1881, the University of Texas at Austin has since outgrown its famed “Forty Acres” and flourished into one of the nation’s largest universities.¹ As far back as the turn of the nineteenth century, University officials foresaw student enrollment inevitably exceeding the limits of the school’s original campus.² Colonel George W. Brackenridge served on the University of Texas System’s Board of Regents at the time and devoted considerable energy and wealth towards fostering a first-class state university

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1. Farran Powell, *10 Universities With the Most Undergraduate Students*, U.S. NEWS & WORLD REPORT (Dec. 5, 2017, 9:00 AM), <http://www.usnews.com/education/best-colleges/the-short-list-college/articles/2017-12-05/10-universities-with-the-most-undergraduate-students>; *see also* The University of Texas at Austin, *Facts and Figures*, <http://www.utexas.edu/about/facts-and-figures> (last visited May 11, 2018).

2. The Brackenridge Tract Task Force, *The Brackenridge Tract Task Force Report* 11 (2007), <http://www.utsystem.edu/sites/default/files/documents/The%20Brackenridge%20Tract%20Task%20Force%20Report/brackenridge-tract-taskforce-report.pdf>.

in Austin.³ Brackenridge dreamed of relocating the University's main campus to a site more suitable for the school's long-term growth.⁴ With this plan in mind, and with the Board of Regents' support, Colonel Brackenridge formally deeded over 500 acres along the Colorado River to the University to be used as the school's new home.⁵ The deed conveyed the acreage in trust for the University's benefit to advance and promote the school's educational mission for future generations of students.⁶

However, despite the Board's initial support for a relocated campus, the University later acquired an additional small tract adjacent to the original campus and discussion of relocating the main campus died with Colonel Brackenridge in 1920.⁷ Although the Colonel's dream was never realized, the University continues to utilize and benefit from portions of his deeded land for educational, commercial, and civic purposes.⁸

The most visible and controversial use of the Brackenridge tract is the University's lease to the City of Austin for use as the Lions Municipal Golf Course, a 141-acre golf course open to the public since 1924.⁹ "Muny," as the course is affectionately known to Austinites, is widely considered the first desegregated public golf course in the South and, as of 2016, is featured on the National Register of Historic Places for its significance in the civil rights movement.¹⁰ Popular today for its cheap and conveniently-located public greens, Muny remains a rarity in the midst of high-dollar West Austin real estate.¹¹ Under the current lease, set to expire in 2019, the City of Austin pays the University nearly \$500,000 in rent each year.¹² However, a 2011 study estimated that fair market rental value for the land could be closer to \$5.5 million per year—over ten times what the city now pays.¹³

Today, Colonel Brackenridge remains the longest-serving regent in University of Texas's history, while the school has made millions leasing his valuable land throughout the years.¹⁴ Despite Colonel Brackenridge's clear

3. *Id.*

4. *Id.*

5. *Id.* at 12.

6. *Id.*

7. The Brackenridge Tract Task Force, *The Brackenridge Tract Task Force Report* 12 (2007), <http://www.utsystem.edu/sites/default/files/documents/The%20Brackenridge%20Tract%20Task%20Force%20Report/brackenridge-tract-taskforce-report.pdf>.

8. *Id.* at 15–16.

9. *Id.* at 16; see also The University of Texas System, *Lions Municipal Golf Course Lease Will Expire in 2019* (Feb. 18, 2011), <https://www.utsystem.edu/news/2011/02/18/lions-municipal-golf-course-lease-will-expire-2019>.

10. Ralph K.M. Haurwitz & Shonda Novak, *UT Offers to Renew City of Austin's Muny Lease, but at a Higher Price*, AUSTIN AMERICAN-STATESMAN, (Jan. 18, 2017), <http://www.mystatesman.com/news/offers-renew-city-austin-muny-lease-but-higher-price/1Vy61wzwzWRuHHxFXTTasK/>; see also National Register of Historic Places Program, <https://www.nps.gov/nr/feature/places/16000354.htm>.

11. *Id.*

12. *Id.*

13. *Id.*

14. See THE BRACKENRIDGE TRACT TASK FORCE, *supra* note 2, at 11, 14.

intent that the University use the tract to further its educational mission, the school effectively subsidizes a public golf course on a major portion of the land.¹⁵ For this reason, the Board of Regents is now interested in redeveloping portions of the Brackenridge tract, including Muny, to generate higher revenue for the University.¹⁶

To further complicate matters, however, a state senate bill proposed during the 2017 legislative session would force a transfer of title in the Lions Municipal Golf Course land from the University to the Texas Parks and Wildlife Department without compensation.¹⁷ The Parks and Wildlife Department would then be required to maintain the land as a public golf course in perpetuity.¹⁸ Although the proposed legislation, officially Senate Bill 822, failed to emerge from a House committee in time for the 2017 session, lawmakers could venture another attempt to pass the legislation in 2019.¹⁹ Nevertheless, the Brackenridge dilemma and Senate Bill 822 raise interesting questions regarding charitable trusts, clear donor intent, and the ability of both the legislature and the judiciary to either modify or disregard that intent altogether.²⁰

Because the law allows donor restrictions on charitable gifts to govern in perpetuity, charities often face difficulties that neither they nor the donor could have anticipated at the time of conveyance.²¹ Using the illustration of Colonel Brackenridge's gift to the University, this comment explores the balance charitable trust law attempts to strike between honoring donor intent and encouraging the efficient application of property.²² Specifically, this comment examines the interaction between Texas common law, the *Texas Trust Code*, and the *Texas Uniform Management of Institutional Funds Act* to determine how each affects the courts' ability to modify or terminate charitable trusts in the face of changed circumstances.²³ In doing so, this comment reveals the effect, if any, of the 2017 Texas Legislature's amendments allowing judicial reformation of trust terms and applying most of the *Texas Trust Code* to the *Texas Uniform Management of Institutional Funds Act*.²⁴ Finally, this comment explores both sides of the Brackenridge dilemma and Senate Bill 822 to discuss what lawyers can do to help donors

15. See William D. Pargaman, *Know When to Hold 'Em; Know When to Fold 'Em: The 2017 Texas Estate and Trust Legislative Update* 35 (Nov. 6, 2017), <https://2feb4181cb3c1ca7b97f-b698aeb26e5815c11d726b92f492547.ssl.cf2.rackcdn.com/b1ca0e40821d47ae8a8810ec71c1115c.pdf>.

16. THE UNIVERSITY OF TEXAS SYSTEM, *Lions Municipal Golf Course Lease Will Expire in 2019* (Feb. 18, 2011), <https://www.utsystem.edu/news/2011/02/18/lions-municipal-golf-course-lease-will-expire-2019>.

17. *Id.*

18. Tex. S. 822, 2017 Leg., R.S. (2017).

19. See Pargaman, *supra* note 15, at 36.

20. *Id.* at 32–33.

21. See *infra* Parts II & III.

22. See *infra* Part III.

23. See *infra* Part III.

24. See *infra* Part III.

and charities draft a charitable agreement that will avoid problems in the future.²⁵

II. RESTRICTED CHARITABLE DONATIONS

A charitable donation is a contribution of money or property to a charitable organization or trust resulting in the contribution's dedication to that charity's public purpose.²⁶ In the absence of additional terms or conditions imposed by the donor, a charity is generally free to use the gifted assets however it deems fit to support its charitable mission at the time the donor makes the gift.²⁷ A donor may further restrict a charity's use of his or her gift by designating specifications to govern the administration and application of the assets.²⁸ Donors commonly attach conditions to money or property requiring the gift to be applied to a particular charitable purpose or distributed in a certain manner.²⁹

A charity's acceptance of a restricted gift establishes a charitable trust for the charity's declared purposes or for the charity's purposes specified by the donor.³⁰ With the donor acting as the settlor of the trust, the accepting charity assumes the role of trustee while some portion of the public represents the beneficiaries.³¹ The donor therefore expects, and the law generally requires, that gifted assets will be used for the public purpose which they are given.³² In contrast to restrictions imposed upon gifts for private persons or uses, the law allows donor restrictions on charitable gifts to limit the charity's use of the property forever, free from the rule against perpetuities.³³ This difference stems from the fact that charitable gifts are, by definition, in the public's interest.³⁴ Society, therefore, permits donors to exercise perpetual control, and courts look favorably upon such restrictions.³⁵

A. Historical Background of Charitable Trusts

The modern law governing charities developed from the medieval belief that private gifts to the church were an effective method of atoning for one's

25. See *infra* Part IV.

26. 15 AM. JUR. 2D *Charities* § 74 (West 2017).

27. RESTATEMENT (THIRD) OF TRUSTS: CHARITABLE PURPOSES § 28 (AM. LAW INST. 2003).

28. *Id.*

29. 15 AM. JUR. 2D *Charities* § 4 (West 2018).

30. *Id.*

31. BOGERT'S TRUSTS AND TRUSTEES: CHAPTER 17. *The Creation of Charitable Trusts* § 323, (West 2017).

32. See RESTATEMENT (THIRD) OF TRUSTS, *supra* note 27.

33. See AM. JUR. 2D, *supra* note 29.

34. 15 AM. JUR. 2D *Charities* § 5, (West 2017).

35. See AM. JUR. 2D, *supra* note 29.

sins and achieving salvation.³⁶ The ecclesiastical courts first protected the donors' right to impose terms governing how the church could administer property.³⁷ After the Protestant Reformation, the prevailing view towards charity evolved from a primarily religious context to include public endeavors, such as community hospitals.³⁸ England's chancery courts further enforced charitable trusts, culminating in statutory recognition by Parliament in the *Statute of Charitable Uses* of 1601.³⁹

The common law governing charitable trusts eventually traveled to colonial America but found limited application due to the absence of individual wealth and a general distaste for English social customs.⁴⁰ However, as private wealth accumulated in late nineteenth century America, legislatures began to enact statutes validating and encouraging charitable trusts.⁴¹ Once treated with disdain as a remnant of aristocratic English rule, Americans now viewed charity as an alternative to reducing government spending.⁴²

However, as time passed from the date of donation some restricted gifts inevitably became impossible or impracticable to administer in accordance with the donor's wishes.⁴³ The early courts that addressed these issues were nonetheless extremely reluctant to modify donor restrictions in the face of changed circumstances.⁴⁴ Rather than alter the purpose of a trust by applying the equitable doctrines of *cy pres* or deviation, courts frequently voided the trust altogether.⁴⁵ In doing so, the judiciary deferred to the donor's charitable intentions and established a public policy that encouraged philanthropy and honored private property owners' right to dispose of property however they wished.⁴⁶

36. See generally *Medieval beliefs about sin and forgiveness*, CROSSREF-IT.INFO, crossref-it.info/textguide/The-Pardoner's-Prologue-and-Tale/12/1373?jump=h2-6 (last visited Apr. 3, 2018) (discussing medieval beliefs and atonement).

37. See *Williams v. Williams*, 8 N.Y. 525, 542 (1853) (discussing the origin of charitable donations in English law).

38. Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1346 (1995).

39. See *Charitable Uses Act*, 43 Eliz. c.4 (1601).

40. Lawrence M. Friedman, *A History of American Law* 254 (2d ed. 1985) (observing that charity's initial unpopularity with Americans was a result of its association "with privilege, with the dead hand, with established churches, with massive wealth in perpetuity").

41. See Lundwall, *supra* note 38, at 1346–47.

42. BOGERT'S TRUSTS AND TRUSTEES: CHAPTER 17. *The Creation of Charitable Trusts* § 322 (West 2017).

43. See generally John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123 (2010).

44. See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

45. See Lundwall, *supra* note 38, at 1347.

46. BOGERT'S TRUSTS AND TRUSTEES: CHAPTER 17. *Charitable Foundations* § 330 (West 2017).

B. *The Rise of Charitable Foundations*

As immense personal wealth continued to grow in America, donors turned to charitable foundations as an alternative to trust law's inflexible standards.⁴⁷ Charitable foundations first formed in the early twentieth century as wealthy individuals sought to use their considerable resources to improve social conditions.⁴⁸ While strictly charitable trusts often limited property use to a narrow purpose, the new foundations offered a broader approach to philanthropy by allowing donor assets apply to the general charitable mission advocated by the foundation.⁴⁹ This advantage, coupled with favorable tax policy changes, caused foundations to flourish in the United States and to form in greater numbers.⁵⁰

C. *Modern Charities*

Most modern charities are organized and operated as either charitable trusts or nonprofit corporations.⁵¹ Despite the respective benefits and disadvantages afforded by each legal form, traditional trust law has informed the rules governing both.⁵² For example, courts commonly construe charitable gifts or donations as property held "in trust" for the public benefit, whether through a charitable trust in the strict sense of the term or a nonprofit corporation.⁵³ In effect, a charitable corporation in possession of a restricted donation is nonetheless subject to trust law, at least where the restricted donation is concerned.⁵⁴

Therefore, donations generally take one of two forms: the strictly charitable trust or the charitable restricted gift held in trust.⁵⁵ Strictly charitable trusts are created by a declaration of the donor or conveyance to a trustee by deed or will.⁵⁶ Charitable restricted gifts held in trust are created by donating property to a charitable corporation, trust, or foundation, and thereby incorporating the terms of its charitable purpose.⁵⁷ Both forms of donation are regarded as a special type of trust, commonly known as "charitable trusts," although they often fall short of meeting the requirements for formation of other trusts.⁵⁸ Laws regulating charities can, therefore,

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. BOGERT'S TRUSTS AND TRUSTEES: CHAPTER 19. *The Charitable Trust* § 361 (West 2017).

53. *Id.*

54. *Id.*

55. See BOGERT'S TRUSTS AND TRUSTEES, *supra* note 31.

56. BOGERT'S TRUSTS AND TRUSTEES: CHAPTER 3. *The Creation of Express Private Trusts—The Settlor and His Intention* § 45 (West 2017).

57. See BOGERT'S TRUSTS AND TRUSTEES, *supra* note 31.

58. See AM. JUR. 2D, *supra* note 29.

emanate from a variety of sources, including trust law, nonprofit corporation statutes, federal tax laws, and state statutes.⁵⁹ This comment focuses on the regulations in place to prevent charity noncompliance with a restricted gift's purpose, which primarily compromises state property statutes and the common law.⁶⁰

III. CHARITABLE TRUST LAW

A charitable trust holds and limits the use of the property for the benefit of the public or a significant portion thereof.⁶¹ The requirements for creating a charitable trust essentially mirror those for creating a private trust, with two fundamental distinctions.⁶² First, as their names suggest, private trusts confer private benefits, whereas charitable trusts must devote assets to purposes beneficial to the public.⁶³ Second, private trusts require at least one identifiable beneficiary, while the individual beneficiaries of a charitable trust are often impossible to identify due to the public nature of benefits conferred.⁶⁴ Rather than name individual beneficiaries, charitable trusts typically designate a class of beneficiaries, such as “future generations of students” attending the school that receives the donation.⁶⁵ Valid charitable trusts must simply describe a legally charitable purpose to benefit a portion of the public that may be both unidentified and indefinite.⁶⁶

Both courts and commentators generally acknowledge that no single formulation exists defining what purposes qualify as “charitable.”⁶⁷ However, the common thread connecting legal charitable trusts is the performance of some function that alleviates a burden placed on the state, which directly benefits the public in some way.⁶⁸ General purposes widely accepted as charitable include: the relief of poverty; the advancement of education; the advancement of religion; the promotion of health; or governmental or municipal purposes, such as parks and museums.⁶⁹

Charitable trusts are therefore unique in how easily they may be formed despite falling short of the requirements for establishment and enforcement

59. *See id.*

60. *See for example* TEX. PROP. CODE ANN. § 112.054 (West 2017).

61. *See* BOGERT'S TRUSTS AND TRUSTEES, *supra* note 31.

62. *Compare* BOGERT'S TRUSTS AND TRUSTEES, *supra* note 31, *with* RESTATEMENT (THIRD) OF TRUSTS § 10 (AM. LAW INST. 2003) (describing the various methods of creating a private trust).

63. *See* BOGERT'S TRUSTS AND TRUSTEES, *supra* note 31.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 27.

68. *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 27, at cmt. d (explaining the application of the rule against perpetuities to trusts intended for private versus charitable interests); *see also* *Boyd v. Frost Nat'l Bank*, 196 S.W.2d 497 (Tex. 1946).

69. *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 27.

of other trusts.⁷⁰ For this reason, a charitable donation of money or property usually creates a charitable trust resulting in firm dedication to the organization's purpose or the purpose specified by the donor.⁷¹ For example, in response to the September 11, 2001, terrorist attacks, the American Red Cross established relief funds intended specifically to benefit victims of the attacks.⁷² Americans throughout the country responded with enthusiasm, and nearly \$1 billion poured into the foundation despite the relatively small number of direct victims.⁷³ As a result, the Red Cross faced difficulties spending the massive amount of money on the victims and began to siphon some of the donations into its general disaster relief fund.⁷⁴ The Red Cross faced heavy criticism for disregarding donor intent and is now much more careful in the language it uses to solicit gifts.⁷⁵

A. Modification and Release

Trust law provides a straightforward mechanism for remedying a situation where restrictive mandates intended to govern indefinitely have become sufficiently difficult to implement.⁷⁶ Where both a charity and its donor agree to revise the terms governing trust property, and the agreed-upon terms qualify as charitable, legal rules generally authorize the new agreement.⁷⁷ This simple solution is often impracticable, of course, because the donor has long been dead by the time the difficulties arise.⁷⁸ In that event, it is common that no one really knows what the donor intended when the gift was made or what the donor would have intended had he or she known of the changed circumstances.⁷⁹

Where compliance with a restriction has become sufficiently problematic, and donor approval to modify cannot be obtained, the trust law doctrine of *cy pres* enables courts to modify or release restrictions on the purpose of a gift.⁸⁰ A court's *cy pres* power allows it to effectuate the general charitable intent of a testator when his or her particular purpose becomes

70. See RESTATEMENT (THIRD) OF TRUSTS, *supra* note 27.

71. See RESTATEMENT (THIRD) OF TRUSTS, *supra* note 27.

72. Stephanie Strom, *Families Fret as Charities Hold a Billion Dollars in 9/11 Aid*, N.Y. TIMES (June 23, 2002), <https://www.nytimes.com/2002/06/23/nyregion/families-fret-as-charities-hold-a-billion-dollars-in-9-11-aid.html>.

73. *Id.*

74. *Id.*

75. *Id.*; see also Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251, 266–70 (2003) (explaining how a disaster relief fund may qualify as a charitable activity).

76. See BOGERT'S TRUSTS AND TRUSTEES, *supra* note 56.

77. 15 AM. JUR. 2D *Charities* § 4 (West 2018).

78. John K. Eason, *The Restricted Gift Life Cycle, or What Goes Around Comes Around*, 76 FORDHAM L. REV. 693 (2007).

79. *Id.*

80. See BOGERT'S TRUSTS AND TRUSTEES, *supra* note 56.

impossible, impractical, or illegal to carry out.⁸¹ The court effectively directs the trust funds or property to be utilized in a charitable manner as near to the donor's intent as possible.⁸² *Cy pres* only applies to charitable trusts.⁸³ To invoke *cy pres*, a charity must demonstrate a general charitable intent by the donor and a specific charitable intent that has failed.⁸⁴

Similarly, the doctrine of equitable deviation permits a court to make changes to the administrative or procedural terms of a trust.⁸⁵ Through deviation, a court may direct or permit the trustee of a charitable trust to deviate from a term of the trust if compliance with that term is impossible, illegal, or because of circumstances not known or anticipated by the settlor, compliance would defeat or substantially impair the purposes of the trust.⁸⁶

In other words, *cy pres* modifies the donor's intent by changing a restriction on the purpose of the gift, while the equitable deviation doctrine modifies a restriction on how the charity carries out the donor's intent.⁸⁷ In the Red Cross scenario previously discussed, a court might have applied *cy pres* to expand a donation's purpose from benefiting direct victims of 9/11 to allow the foundation to apply the funds to terror victims generally.⁸⁸ The same donation may have been subject to deviation if, for example, the donation language restricted the time span during which the Red Cross could administer the funds.⁸⁹ Because restrictions can oftentimes be characterized as both purpose-related and administrative, distinguishing between *cy pres* and equitable deviation is not always obvious.⁹⁰

1. Modification Under Texas Common Law

Texas common law recognized the courts' ability to modify or terminate trusts long before the *Texas Trust Code* granted express statutory authority to do so.⁹¹ The *Texas Trust Act*, the 1943 predecessor to today's *Code*, originally provided that nothing within that *Act* was to be construed as restricting a court's power to "authorize the trustee to deviate and vary" from the terms of any trust instrument relating to the management of trust property.⁹² The Dallas Court of Civil Appeals in 1968 expressed that a court

81. 12 TEX. JUR. 3D *Charities* § 17.

82. *Id.*

83. *General Ass'n of Davidian Seventh Day Adventists, Inc. v. General Ass'n of Davidian Seventh Day Adventists*, 410 S.W.2d 256 (Tex. Civ. App.—Waco 1966).

84. *Foshee v. Republic Nat'l Bank of Dallas*, 617 S.W.2d 675 (Tex. 1981).

85. See BOGERT'S TRUSTS AND TRUSTEES, *supra* note 31.

86. *Coffee v. William Marsh Rice University*, 408 S.W.2d 269 (Tex. Civ. App.—Houston 1966 writ denied).

87. See BOGERT'S TRUSTS AND TRUSTEES, *supra* note 31.

88. See *Strom*, *supra* note 72.

89. See *id.*

90. See *id.*

91. *Tex. Trust Act* § 46(c).

92. *Tex. Trust Act* § 46(c).

has implicit authority to order a deviation from trust terms if “compliance with the terms of the trust is impossible, illegal, impractical or inexpedient, or that owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purpose of the trust.”⁹³

The trustee in *William Marsh Rice University* encountered such circumstances when civil rights advancements rendered restrictions of its trust instrument impracticable by modern standards.⁹⁴ In 1890, William Marsh Rice donated a share of his fortune to establish the educational institute known today as Rice University.⁹⁵ The school in 1966 sought judicial modification of language in the gift stating that the money should be used to educate only white students.⁹⁶ Because William Marsh Rice died in 1900, the Houston Court of Civil Appeals had to determine what Rice’s intent was, with the view of effectuating that intent.⁹⁷ The court decided that the donor’s primary intent was to contribute to the advancement of human knowledge and accordingly authorized a deviation from the donor’s terms of the trust, allowing the school to accept students without regard to race.⁹⁸

Despite the common law authority to modify and terminate trusts, some Texas courts were reluctant to exercise these equitable powers without express statutory approval.⁹⁹ In 1977, for example, the Texas Supreme Court refused to terminate a trust whose trustee claimed had satisfied its principal purposes.¹⁰⁰ The Court reasoned that it could not substitute the settlor’s intent with its own “speculative assessment” in determining which purposes she considered principal and which were merely “incidental.”¹⁰¹

Considering the common law inconsistency and uncertainty, trustees and donors alike welcomed the *Texas Trust Code* in 1984 and, specifically, Section 112.054.¹⁰² Even with the addition of Section 122.054, granting express authority, the common law rules regarding trust modification and termination remain important.¹⁰³ Section 111.005 of the *Texas Trust Code*, “Reenactment of Common Law,” provides that common law rules will prevail except as the *Texas Trust Code* changes such rules.¹⁰⁴ In doing so, the *Texas Trust Code* clarifies that Section 112.054 may not be the exclusive

93. *Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Bd.*, 430 S.W.2d 107, 117 (Tex. Civ. App.—Dallas 1968, writ ref’d).

94. *See William Marsh Rice University*, *supra* note 86.

95. *Id.* at 270.

96. *Id.* at 271.

97. *Id.* at 276.

98. *Id.* at 285.

99. *Frost National Bank v. Newton*, 554 S.W.2d 149 (Tex. 1977).

100. *Id.*

101. *Id.*

102. TEX. PROP. CODE. ANN. § 112.054 (West 2017).

103. *See* TEX. PROP. CODE. ANN. § 111.005 (West 2017).

104. *Id.*

basis for modifying or terminating a trust.¹⁰⁵ In an appropriate case, a court could modify or terminate a trust for other reasons or on another basis using its general equity powers.¹⁰⁶

2. *Modern Modifications Under the Texas Trust Code*

The *Texas Trust Code* effectively governs all trusts, including charitable trusts.¹⁰⁷ The *Texas Trust Code* contains only a few provisions that explicitly mention charity interests, generally relating to tax measures, exemption from the rule against perpetuities, and charitable trusts' ability to exist without terminating.¹⁰⁸

Other than these select provisions, the entire *Texas Trust Code* generally applies to charitable trusts, including Section 112.054, entitled "Judicial Modification, Reformation, or Termination of Trusts."¹⁰⁹ Under the current version of the *Texas Trust Code*, Section 112.054 permits a trustee to deviate from donor instructions if the court is convinced that the donor would have consented to the change had he or she anticipated the current circumstances.¹¹⁰ A court can act under Section 112.054 when it finds that the purposes of the trust (1) have been fulfilled, (2) have become illegal, (3) are now impossible to fulfill, or (4) because of unanticipated circumstances, the deviation will further the purposes of the trust.¹¹¹

A court may then authorize fairly broad administrative revisions to the terms of a trust that include (1) changing the trustee, (2) permitting the trustee to perform acts that are not authorized or are forbidden by the trust instrument, (3) prohibiting the trustee from performing acts that the donor mandated in the trust instrument, (4) modifying the terms of the trust, and (5) terminating the trust.¹¹² However, courts will not authorize a deviation from the terms of the trust if that deviation is not clearly authorized by the *Texas Trust Code*, even if the beneficiaries agree to the change.¹¹³

The 2017 Texas Legislature granted courts broad authority to reform a trust if necessary or appropriate to (1) prevent waste or impairment of the trust's administration, (2) achieve tax objectives, (3) qualify a beneficiary for governmental benefits, and (4) correct a scrivener's error, even if the trust is unambiguous, provided the settlor's intent is proven by clear and convincing

105. *Id.*

106. *Id.*

107. TEX. PROP. CODE ANN. § 113.0211(a); *see also* 12 TEX. JUR. 3D *Charities* § 10 (West 2017).

108. *See generally* TEX. PROP. CODE ANN., Subtitle B (West 2017).

109. TEX. PROP. CODE ANN. § 112.054 (West 2017).

110. TEX. PROP. CODE ANN., Subtitle B Ch. 112.054 (West 2017).

111. TEX. PROP. CODE ANN. § 112.054; *see also* Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Bd., 430 S.W.2d 107, 117 (Tex. Civ. App.—Dallas 1968, writ ref'd).

112. TEX. PROP. CODE ANN. § 112.054 (West 2017).

113. *See In re Willa Peters Hubberd Testamentary Trust*, 432 S.W.3d 358 (Tex. App. 2014).

evidence.¹¹⁴ However, these changes are unlikely to affect the ability of trustees to disregard donor restrictions.¹¹⁵ While reformation and modification may appear to be the same, they are not.¹¹⁶ Reformation is the appropriate remedy when a mistake in the original instrument did not conform to the settlor's intent.¹¹⁷ Modification, on the other hand, is appropriate remedy where nothing was originally wrong with the instrument, but changes in circumstance subsequent to the trust's creation make a change appropriate or desirable.¹¹⁸

3. Who May Initiate Suit

Section 112.054(a) of the *Texas Trust Code* declares that a trustee or a beneficiary may commence an action to request deviation or reformation under Section 115.001, the *Texas Trust Code*'s general jurisdictional statute.¹¹⁹ Although Texas law construes gifts to charity as being held in trust, such a gift does not automatically form an express trust subject to the *Texas Trust Code*.¹²⁰ Even a charitable gift that does constitute a trust in the strict sense of the term often has uncertain and indefinite beneficiaries.¹²¹ Furthermore, the *Texas Trust Code* does not expressly provide for donor standing to enforce the terms of a restricted gift.¹²² Many interested parties are therefore left without an avenue to seek judicial relief under the *Texas Trust Code*, including donors and their families.¹²³

Chapter 123 of the *Texas Property Code* specifically governs the Office of the Texas Attorney General's participation in proceedings involving charitable trusts.¹²⁴ Those provisions charge the Office of the Texas Attorney General with representing the public interest in charity.¹²⁵ As the public's representative, the Texas Attorney General is responsible for ensuring that charitable assets are used for appropriate charitable purposes and in accordance with donor restrictions.¹²⁶ The Texas Attorney General will, therefore, be a proper party to commence an action and has the right to

114. TEX. PROP. CODE ANN. § 112.054 (West 2017).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. TEX. PROP. CODE ANN. § 112.054(a); TEX. PROP. CODE ANN. § 115.001.

120. Compare *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. App.—Houston 1986, writ ref'd n.r.e.) with Section 22.223 of the Texas Business Organizations Code (expressly negating such a reading of *Blocker*).

121. See BOGERT'S TRUSTS AND TRUSTEES, *supra* note 31.

122. TEX. PROP. CODE ANN. § 115.011 (West 2017).

123. *Id.*

124. TEX. PROP. CODE ANN. § 123 (West 2017).

125. TEX. PROP. CODE ANN. § 123 (West 2017).

126. TEX. PROP. CODE ANN. § 123 (West 2017).

intervene on the public's behalf.¹²⁷ Section 115.001(c) provides that the Texas Attorney General shall be provided notice of any proceeding, as required in Chapter 123 of the *Texas Property Code*, titled "Attorney General Participation in Proceedings Involving Charitable Trusts."¹²⁸ The Attorney General then has the opportunity to intervene as he or she sees fit.¹²⁹

B. Institutional Funds

American colleges and universities have traditionally relied upon generous donations to help fund the education they offer.¹³⁰ Today, modern educational organizations continue to hold substantial endowment funds as charitable contributions reached an all-time high of \$41 billion in 2016.¹³¹ While donations continue to grow, the law surrounding charitable contributions remains somewhat unclear.¹³²

The modern rules governing institutional funds first took root in the economically volatile 1960's, when concerns about investments inspired Professors William Cary and Craig Bright to undertake a landmark study on endowment funds.¹³³ The study addressed all charities organized as nonprofit corporations, but particularly focused on the concerns of educational institutions.¹³⁴ Charities at the time were uncertain whether courts would decide their case using principles grounded in trust law or corporate law.¹³⁵

Cary and Bright's study ultimately confirmed that courts exercised very little consistency in choosing between the two, instead applying trust principles and corporate principles at will to reach the court's desired outcome.¹³⁶ Charities faced uncertainty in their operations when cases were won or lost based solely on which law was applied.¹³⁷ Recognizing the need for consistency amidst increasing numbers of charitable organizations, Cary and Bright urged the development of state laws that would provide better guidance for charities, and, in particular, educational organizations.¹³⁸ In response, the Uniform Law Commission introduced the *Uniform Management of Institutional Funds Act* (UMIFA), which was intended to

127. TEX. PROP. CODE ANN. § 123.001 (West 2017).

128. TEX. PROP. CODE ANN. § 123 (West 2017).

129. TEX. PROP. CODE ANN. §§ 114.001(c), 123.002 (West 2017).

130. See for example HARVARD UNIVERSITY HISTORY (discussing the school's establishment on a donation by John Harvard in 1636), <https://www.harvard.edu/about-harvard/harvard-glance/history> (last visited May 14, 2018).

131. *Colleges and Universities Raise \$41 Billion in 2016*, COUNCIL FOR AID TO EDUCATION (Feb. 7, 2017), <http://cae.org/images/uploads/pdf/VSE-2016-Press-Release.pdf>.

132. See Unif. Prudent Mgmt. Institutional Funds Act, *infra* note 150.

133. See Susan N. Gary, *Charities, Endowments, and Donor Intent*, 41 GA L. REV. 1277, 1284 (2007).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

create a uniform set of laws well-tailored to the issues commonly caused by charitable donations.¹³⁹

1. *Modification and Release Under the Uniform Acts*

Since its promulgation in 1972, UMIFA and its successor, UPMIFA, have provided rules and guidance with respect to the use, management, and investment of funds held by charitable organizations.¹⁴⁰ The Uniform Acts are rooted in both trust law and corporate law, and represent an attempt to reconcile the two approaches.¹⁴¹ In doing so, the rules offer flexibility between restricted donor intent and a charity's ability to cope with changing conditions, such as economic downturns.¹⁴²

UMIFA was the first clearly defined body of law governing the management of all funds held by a charitable institution.¹⁴³ The rules, however, placed special emphasis on endowment funds accompanied by donor intent.¹⁴⁴ Under UMIFA, the ability for a trustee or court to modify donor restrictions was uncertain.¹⁴⁵ Of course, the rules held that a charity can release a restriction with donor consent.¹⁴⁶ But UMIFA further mandated that, if there is not donor consent, the charity can request that the court release the restriction.¹⁴⁷ In doing so, the rules imposed an all-or-nothing approach allowing release, but not modification.¹⁴⁸ Without addressing the possibility of modification, UMIFA simply stated that it "does not limit cy pres."¹⁴⁹

In 2006, the Uniform Law Commission revised and replaced UMIFA with the *Uniform Management of Institutional Funds Act* (UPMIFA).¹⁵⁰ Like its predecessor, UPMIFA governs institutional funds held by charities organized as nonprofit corporations.¹⁵¹ In this way, UPMIFA applies to charities organized as nonprofit corporations, but only to funds held by those charities as institutional funds.¹⁵² An endowment fund is a fund not wholly expendable by the institution on a current basis under the terms of the

139. *Id.*

140. *Unif. Mgmt. of Institutional Funds Act* (1972); *Unif. Prudent Mgmt. of Institutional Funds Act* (2006).

141. *Unif. Mgmt. of Institutional Funds Act* (1972); *Unif. Prudent Mgmt. of Institutional Funds Act* (2006).

142. *Unif. Mgmt. of Institutional Funds Act* (1972); *Unif. Prudent Mgmt. of Institutional Funds Act* (2006).

143. *Unif. Mgmt. of Institutional Funds Act* (1972).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Unif. Mgmt. of Institutional Funds Act* (1972).

150. *Unif. Prudent Mgmt. of Institutional Funds Act* (2006).

151. *Id.*

152. *Id.*

applicable gift instrument.¹⁵³ UPMIFA clarifies that the term “endowment fund” does not include funds that the charity designates as endowment.¹⁵⁴ UPMIFA’s major amendment added language clarifying that its provisions on prudent investing do not apply to assets held to carry out a charitable purpose.¹⁵⁵

Notably, UPMIFA provided additional rules with respect to the modification of restrictions on charitable funds.¹⁵⁶ An important revision incorporated the modification rules of cy pres and equitable deviation from trust law into UPMIFA.¹⁵⁷ In doing so, the rules now allow release or modification of restrictions with the consent of either the donor or the court.¹⁵⁸ Institutions may ask courts to apply the doctrine of equitable deviation, or cy pres.¹⁵⁹ Therefore, the modification rules of cy pres and deviation apply to charitable trusts through trust law, to restrictions on funds held by nonprofit corporations through UPMIFA, and to restrictions on other assets held by nonprofit corporations through case law.¹⁶⁰

Since UMIFA’s initial promulgation in 1972, forty-seven states and the District of Columbia have adopted UMIFA, UPMIFA, or, as in Texas, a close variation of the two.¹⁶¹ Although, UPMIFA claims to honor donor intent, whether or not it achieves that effect is less certain.¹⁶² As demonstrated by the previous Texas variations and the recent 2017 amendment, UPMIFA may effectively augment the conditions under which donor-imposed restrictions can be modified.¹⁶³

2. Texas Variations

The Texas Legislature adopted the *Texas Uniform Management of Institutional Funds Act* (TUMIFA) in 1989.¹⁶⁴ Unlike UMIFA, the Texas adaptation included a provision rendering the entire *Texas Trust Code*, rather than limited portions of it, inapplicable to funds governed by TUMIFA.¹⁶⁵ Although the legislature’s reasoning behind the alteration is unclear, the *Texas Trust Code* may have been excluded in the TUMIFA to eliminate the need to identify specific sections of the *Texas Trust Code* that were

153. *Id.*

154. *Id.*

155. *Id.*

156. *Unif. Prudent Mgmt. of Institutional Funds Act* (2006).

157. *Id.*

158. *Id.*

159. *Id.*

160. See Susan Gary, *The Problems With Donor Intent*, CHI. KENT. L. REV. 977 (2010).

161. *Unif. Prudent Mgmt. of Institutional Funds Act* (2006).

162. *Id.*

163. *Id.*

164. See *Unif. Mgmt. of Institutional Funds Act*, *supra* note 161.

165. Compare *Unif. Mgmt. of Institutional Funds Act* (1972) with *Tex. Unif. Mgmt. of Institutional Funds Act* (1989).

essentially being replaced by TUMIFA with respect to charitable funds.¹⁶⁶ Whatever the reason, the alteration produced some problematic results.¹⁶⁷ For example, if a trustee of a charitable trust needed to be replaced, the provisions of the *Texas Trust Code* Section 113.083 didn't apply, and there were no other statutes providing guidance on what such a petition should look like or who the necessary parties were.¹⁶⁸

In 2007, the Texas Legislature enacted the *Texas Uniform Prudent Management and Institutional Funds Act* (TUPMIFA), replacing TUMIFA.¹⁶⁹ The new legislation, however, retained the uniquely Texan provision excluding the *Trust Code's* applicability to TUPMIFA funds.¹⁷⁰ The 2017 Legislature revised this provision to limit only the applicability of Chapter 116 (*Uniform Principal and Income Act*) and Chapter 117 (*Uniform Prudent Investor Act*).¹⁷¹ The remainder of the *Texas Trust Code* now applies to these institutional funds.¹⁷²

Section 163.007 of the *Texas Uniform Prudent Management of Institutional Funds Act* addresses the release or modification of restrictions on management, investment, or purpose.¹⁷³ The section clarifies that, with donor consent, an institution may release or modify a restriction.¹⁷⁴ Upon application by an institution, the court may modify a restriction without donor consent if: the restriction has become impracticable or wasteful; the restriction impairs the management or investment of the fund; or, because of circumstances not anticipated by the donor, a modification will further the purposes of the fund.¹⁷⁵ While Section 163.007 has previously held Chapter 123 to apply, the recent legislative amendment now applies the *Texas Trust Code*, effectively reinforcing the court's ability to modify restrictions without donor consent.¹⁷⁶ Although a relatively minor change, the revision clarifies the court's power to modify all forms of charitable trusts.¹⁷⁷

IV. THE BRACKENRIDGE DILEMMA

Colonel Brackenridge's gift to the University of Texas is an intriguing modern illustration of the competing public interests that may arise and affect

166. See Pargaman, *supra* note 15 (offering an "educated guess" for the Texas Legislature's reasoning behind the original UMIFA exclusion).

167. See *id.*

168. *Tex. Trust Code* § 113.083 (West 2017).

169. *Tex. Unif. Prudent Mgmt. of Institutional Funds Act* (2006).

170. See Pargaman, *supra* note 15 (noting that the provision is unique to Texas).

171. See Gerry W. Beyer, *Texas Estate Planning Statutes with Commentary*, AuthorHouse (2017–19 ed.).

172. TEX. PROP. CODE ANN., Title 9 Subtitle B Ch. 111-17 (1984).

173. TEX. PROP. CODE ANN. § 163.007 (West 2007).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

administration of restricted charitable trusts.¹⁷⁸ The Texas rules discussed above offer an important perspective on Colonel Brackenridge's gift to the University of Texas, and the judiciary's ability to modify its restrictions.¹⁷⁹ Further comparison of case law precedent may shed light on the validity of Senate Bill 822's proposed action.¹⁸⁰

Sometimes, as in *Van De Mark*, misuse or nonuse of gifted assets triggers a reversion to the grantor.¹⁸¹ In 1930, the heirs of Henry MacGregor donated 110 acres of land to the City of Houston to be used exclusively as a public park.¹⁸² In addition to the use requirement, the deed language conditioned that the land would revert to MacGregor's heirs if ever not used as a public park.¹⁸³ Following the gift, the City of Houston spent years developing the west half of the land into a public park.¹⁸⁴ The east half, however, lay completely untouched.¹⁸⁵ In 1996, the State of Texas condemned six acres of the unused eastern half to construct a state highway, paying the City of Houston \$425,000.¹⁸⁶ In response, MacGregor's heirs sued the City of Houston, claiming that the City had failed to maintain the entire eastern half of the donation as a public park.¹⁸⁷ MacGregor's heirs argued that the land therefore reverted back to them, and additionally claimed ownership of the State's compensation for the six acres.¹⁸⁸ The City of Houston argued that the eastern segment, although overgrown and inaccessible to the public, was nonetheless a "park."¹⁸⁹ Siding with MacGregor's heirs, the court ultimately held that the deed granted the City discretion on how to regulate the land for public park purposes but not the discretion to decide not to use the property for public park purposes.¹⁹⁰ The eastern half of the land had reverted to MacGregor's heirs, and the court awarded them monetary damages from the condemnation and legal title to the remaining acreage.¹⁹¹

However, Texas courts have previously made narrow distinctions to reach different results.¹⁹² In *King*, for example, a 1914 deed gifted a tract of land to the City of Dallas for use as a public park.¹⁹³ The deed contained a

178. See generally The Brackenridge Tract Task Force, *supra* note 2 (illustrating how the administration of certain charitable trusts may be affected by public interests).

179. See *id.* at 12.

180. See *infra* Part IV.

181. City of Houston v. Van De Mark, 83 S.W.3d 864 (Tex. App.—Texarkana 2002, pet. denied).

182. *Id.* at 865.

183. *Id.* at 865.

184. *Id.* at 865–66.

185. *Id.* at 868.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. King v. City of Dallas, 374 S.W.2d 707 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.).

193. *Id.* at 708.

reverter clause stating that title to the land would revert back to the donor's heirs if that purpose is ever violated.¹⁹⁴ The City of Dallas proceeded to use the land as a public park, but later covered up sections of the green space in order to widen paved streets and a bridge.¹⁹⁵ The donor's heirs sued the City of Dallas, arguing that the construction prevented portions of the land from being used for park purposes.¹⁹⁶ The City of Dallas responded that the construction project was consistent with the "public park purpose" under the language of the deed.¹⁹⁷ The court ultimately held for the City of Dallas, noting that the construction "did not constitute a diversion or departure from the use of the property to which it was dedicated by the deed of gift."¹⁹⁸ The court also noted that the deed required the property to be used "for park purposes," rather than "as a park," and should therefore permit almost any use of the property that would reasonably contribute to the enjoyment of the remainder of the donated land.¹⁹⁹

Gifted assets to a state university for a restricted purpose are impressed with a charitable trust.²⁰⁰ Brackenridge's conveyance therefore effectively created a charitable trust for the benefit of the University of Texas.²⁰¹ Although Colonel Brackenridge expressed his clear intent that the land be used "to advance and promote University education," it is at least without dispute that the land must be held in trust for the University's benefit.²⁰²

As consideration for the transfer, the Senate Bill 822 would require the Texas Parks and Wildlife Department to use the property for a public golf course.²⁰³ The land would automatically revert from the Department back to the University System should the Department ever fail to do so.²⁰⁴ In doing so, Senator Estes presumably hopes to preserve the Muny golf course as a site of historical importance.²⁰⁵ A proposed committee substitute would have simply left the property with the University so long as the University operated the property as a golf course.²⁰⁶ If the University failed to do so, the property would have been transferred to the Department.²⁰⁷

It is unclear whether or not the state legislature may legally take property gifted to the University without any financial compensation in contravention

194. *Id.*

195. *Id.* at 709.

196. *Id.*

197. *Id.*

198. *Id.* at 710.

199. *Id.*

200. See The Brackenridge Tract Task Force, *supra* note 2, at 12.

201. See *id.*

202. See *id.*

203. S. 822, 2017 Leg., 85th Sess. (Tex. 2017).

204. *Id.*

205. See Ralph K.M. Haurwitz & Shonda Novak, *supra* note 10.

206. See Pargaman, *supra* note 15.

207. See *id.*

of the terms of the deed originally conveying the property.²⁰⁸ Should the legislature ever enact the proposed law, however, the Governor of Texas has the power to veto the measure.²⁰⁹ Additionally, the Texas Attorney General has standing to seek relief.²¹⁰

For future reference, donors to the University may be able to safeguard against these circumstances by precluding the possibility in the conveyance language.²¹¹ As found on the University of Texas's website, the University recommends specific language for making gifts to the school.²¹² An excerpt of that suggested language reads:

Such endowment shall never become a part of the Permanent University Fund, the Available University Fund, or the General Fund of the State of Texas, and **shall never be subject to appropriation by the Legislature of the State of Texas.** These funds and all future gift additions to the endowment, reinvestments, and required matching funds referenced in this agreement, including those made by the Board of Regents of University administration, shall be subject to the provisions of this agreement and shall be classified as permanent endowment funds (emphasis added).²¹³

Although Colonel Brackenridge's deed understandably failed to include this specific language, modern donors can protect their gifted property by practicing such specificity.²¹⁴

V. CONCLUSION

To prepare for the possibility that changed circumstances may eventually affect donations, a donor can protect gifts against future judicial modifications through specificity in the gift instrument and clearly describing their intended restrictions.²¹⁵ If the donor and the charity have a clear understanding of the terms of the gift, and the reasoning behind them, problems down the line may be avoided.²¹⁶ Although charities rely upon private donations, they should avoid accepting restricted gifts with conditions that could eventually interfere with their operation.²¹⁷

208. *See id.*

209. *The Executive Branch*, TEXAS POLITICS (Apr. 2, 2018), https://www.latis.utexas.edu/txp_media/html/exec/0501.html.

210. TEX. PROP. CODE. ANN. Ch. 123 (West 2017).

211. *Sample Language and Forms*, THE UNIVERSITY OF TEXAS <https://giving.utexas.edu/how-to-give/gift-planning/sample-language-and-forms/> (last visited May 14, 2018).

212. *Id.*

213. *Id.*

214. *See supra* PART III.

215. *See supra* PART III.

216. *See supra* PART III.

217. *See supra* PART III.

Some problems are unavoidable, however.²¹⁸ In this event charities and the donor's family can resolve disputes using documentation of their communications as evidence clarifying donor intent and the charity's understanding.²¹⁹ Such communication leaves little doubt as to the donor's original intentions and should preclude the court from substituting their own intent in the donor's absence.²²⁰

218. *See supra* PART III.

219. *See supra* PART IV.

220. *See supra* PART IV.