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Laws Governing Restrictions on Charitable Gifts: The Consequences of Codification

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Laws Governing Restrictions on Charitable Gifts: The Consequences of Codification

Nancy A. McLaughlin

ABSTRACT

Over the last two decades we have seen marked changes in the laws governing donor-imposed restrictions on charitable gifts. These changes have occurred primarily as a result of the adoption in many states of the Uniform Trust Code (the UTC) and the Uniform Prudent Management of Institutional Funds Act (UPMIFA). This Essay explains that codification in the UTC and UPMIFA of liberalized versions of *cy pres* and deviation, as well as other related changes to the common law, have had unintended negative consequences. Those negative consequences include a lack of coherence in the law, an elevation of form over substance when it comes to the laws applicable to a particular gift, uncertainties regarding how the statutory provisions operate, inequities between sophisticated or well-represented donors and donees and those who are less sophisticated and without the resources to hire experienced advisors, and confusion in the courts as they grapple with this new, much more complex landscape of laws. This Essay outlines these problems and begins to consider what might be done to address them.

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INTRODUCTION

Over the last two decades we have seen marked changes in the laws governing donor-imposed restrictions on charitable gifts. These changes have occurred primarily as a result of the Uniform Law Commission's approval of the Uniform Trust Code (the UTC) in 2000 and the Uniform Prudent Management of Institutional Funds Act (UPMIFA) in 2006, and the subsequent adoption of these uniform laws in thirty-six and forty-nine states, respectively.¹ Both the UTC and UPMIFA contain liberalized versions of the *cy pres* and deviation doctrines, as well as provisions allowing charities to modify restrictions on charitable gifts without court approval in certain circumstances.² The UTC also grants the settlor of a charitable trust the power to sue to enforce the trust.³

With publication in 2021 of the Restatement of the Law of Charitable Nonprofit Organizations, which details the state of the law in the charitable gift context, now is an excellent time to consider whether the changes wrought by the UTC and UPMIFA have been all for the good.⁴ This Essay posits that codification

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1. See UNIF. TR. CODE (UNIF. L. COMM'N 2000, amended 2010); UNIF. PRUDENT MGMT. INST. FUNDS ACT (UNIF. L. COMM'N 2006). For information regarding enactment of the UTC and UPMIFA by the states, see *Trust Code*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d> [<https://perma.cc/C9T9-S824>]; *Prudent Management of Institutional Funds Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3> [<https://perma.cc/FAE7-5RLU>].
 2. The *cy pres* doctrine authorizes a court in certain circumstances to modify the purposes of a charity or the purposes to which one or more charitable assets are devoted. See RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. § 3.02 cmt. a (AM. L. INST. 2021). The deviation doctrine authorizes a court in certain circumstances to modify the terms that direct the means by which charitable purposes are accomplished. *Id.* § 3.03 cmt. b. For the UTC, UPMIFA, and common law versions of *cy pres* and deviation, as well as the UTC and UPMIFA provisions authorizing charities to modify restrictions on charitable gifts without court approval in certain circumstances, see *Appendix A*.
 3. See UNIF. TR. CODE § 405(c) (UNIF. L. COMM'N 2000, amended 2010). For the differing approaches of the UTC, UPMIFA, and the common law to the issue of standing to sue to enforce a charitable gift or trust, see *Appendix A*. The issue of who should have standing to sue to enforce a charitable gift or trust has been much discussed. See, e.g., Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655 (1998); Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37 REAL PROP., PROB. & TR. J. 611 (2003); Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093 (2005); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183 (2007); Edward C. Halbach, Jr., *Standing to Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement*, 62 U. MIAMI L. REV. 713 (2008).
 4. See RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. (AM. L. INST. 2021).

in the UTC and UPMIFA of liberalized versions of the *cy pres* and deviation doctrines, as well as other changes to the common law, have had unintended negative consequences.

Part I explains that one result of codification is a lack of coherence in the law regarding various important issues, including donor standing, reversions, attorney general oversight, extrajudicial modification of “small” gifts, donor consent to modifications, and the *cy pres* and deviation doctrines. Part II explains that codification has led to an elevation of form over substance: the same charitable gift may now be subject to significantly different laws depending on the form the gift takes, the label assigned to the gift under state law, or the organizational form of the donee. Part III describes just a few of the uncertainties that have arisen regarding operation of the codified versions of *cy pres* and deviation and other related provisions in the UTC and UPMIFA. Part IV describes the confusion in the courts as they attempt to navigate this new, much more complex landscape of laws. The brief conclusion to this Essay begins to consider what might be done to address these issues.

I. LACK OF COHERENCE IN THE LAW

In 2005, leading nonprofit law scholar Marion Fremont-Smith asked whether we must continue to grapple with multiple sources of authority when it comes to *cy pres*, deviation, and standing to sue to enforce charitable gifts, or whether it would be possible to “inculcate an appreciation of the value of coherence in the law of charity.”⁵ Rather than moving toward coherence in the law in the ensuing eighteen years, we now find ourselves with a complex system of varied laws that apply to different categories of charitable gifts.

This complex system of laws consists of the UTC, UPMIFA, the common law, and in some states, nonuniform statutes. The UTC applies only to gifts that are treated as “charitable trusts.”⁶ UPMIFA applies only to gifts that qualify as

5. Marion R. Fremont-Smith, *Holding the Tension: History and Policy* 41 (2005), https://ncpl.law.nyu.edu/wp-content/uploads/pdfs/2005/Conf2005_FremontSmith-FINAL.pdf [<https://perma.cc/EAML-6G6S>].

6. The Uniform Trust Code “applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.” UNIF. TR. CODE § 102 (UNIF. L. COMM’N 2000, amended 2010). “Charitable trust’ means a trust, or portion of a trust, created for a charitable purpose described in Section 405(a).” *Id.* § 103(4). UTC § 405(a) provides that “[a] charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.” *Id.* § 405(a).

“institutional funds”⁷ held by “institutions”⁸ and not to “program-related assets.”⁹ And charitable gifts that fall outside the purview of the UTC or UPMIFA are subject to the common law or, in some jurisdictions, to a nonuniform state statute.

Because of the many ways in which the UTC, UPMIFA, the common law, and the nonuniform statutes differ, the administration and enforcement of a charitable gift can differ significantly depending on which law is deemed to apply. Just a few of the important differences between these laws are highlighted below.¹⁰

A. Donor Standing

The UTC expressly authorizes the settlor of a charitable trust to maintain a proceeding to enforce the trust.¹¹ Accordingly, if a charitable gift is treated as a charitable trust governed by the UTC, the donor will have standing to sue to enforce the gift. On the other hand, UPMIFA is silent regarding whether the donor of an institutional fund has standing to sue to enforce the gift, and several courts have held that such donors do not have standing.¹² Further

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7. “‘Institutional fund’ means a fund held by an institution exclusively for charitable purposes . . . [but] does not include: (A) program-related assets; (B) a fund held for an institution by a trustee that is not an institution; or (C) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.” UNIF. PRUDENT MGMT. INST. FUNDS ACT § 2(5) (UNIF. L. COMM’N 2006).
 8. “‘Institution’ means: (A) a person, other than an individual, organized and operated exclusively for charitable purposes; (B) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or (C) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.” *Id.* § 2(4).
 9. “‘Program-related asset’ means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.” *Id.* § 2(7). *See also id.* § 2 cmt. subsections (5), (7); UNIF. L. COMM’N, PROGRAM RELATED ASSETS UNDER UPMIFA (May 21, 2019), <https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/UPMIFA%20Program%20Related%20Assets%20Article.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1686718664&Signature=00U94iLCO4xcQ%2BvKIFEG7pZGWx0%3D> [<https://perma.cc/CBE2-DU93>].
 10. *Appendix A* indicates the differences between the UTC, UPMIFA, and the common law regarding the *cy pres* doctrine, the deviation doctrine, extrajudicial modification of “small” gifts, donor consent to modification, and standing to sue. For the different articulations of the *cy pres* and deviation doctrines and who has standing to sue to enforce a charitable gift or trust in the Restatement of the Law of Charitable Nonprofit Organizations, the Restatement (Third) of Trusts, and the Restatement (Second) of Trusts, see *Appendix B*.
 11. UNIF. TR. CODE § 405(c) (UNIF. L. COMM’N 2000, amended 2010).
 12. *See, e.g.,* Courtenay C. v. Colo. State Univ. Rsch. Found., 320 P.3d 1115 (Wyo. 2014); Hardt. v. Vitae Found., Inc., 302 S.W.3d 133 (Mo. Ct. App. 2009).

complicating matters is the unpredictability of donor standing under the common law, with some courts denying donors standing, others granting standing to donors on various legal grounds, and still others allowing donors to press their claims without addressing the standing issue.¹³

B. Reversions

The UTC contains a special rule invalidating reversions to noncharitable beneficiaries in certain circumstances. Specifically, if the donor of a gift treated as a charitable trust provided that, should the purpose of the gift no longer be possible to carry out, the property shall revert to a noncharitable beneficiary (such as the donor or the donor's descendants), the UTC will invalidate that reversion after the passage of a specified period of time.¹⁴ UPMIFA, on the other hand, is silent regarding reversions and the comments thereto imply that reversions will be honored.¹⁵ Reversions are also generally honored under the common law.¹⁶

C. Attorney General Oversight

An institution seeking court approval to modify or release a restriction on an institutional fund under UPMIFA's version of *cy pres* or deviation is required by statute to notify the state attorney general, who must be given an opportunity to be heard.¹⁷ UPMIFA's Prefatory Note explains: "as under trust law, the court will determine whether and how to apply *cy pres* or deviation and the attorney general will receive notice and have the opportunity to participate in the proceeding."¹⁸ But the UTC's *cy pres* and deviation provisions do not require that the attorney general receive notice of a *cy pres* or deviation proceeding, leaving the issue to be

13. See, e.g., RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. § 6.03 cmt. a (AM. L. INST. 2021).

14. See UNIF. TR. CODE § 413(b) (UNIF. L. COMM'N 2000, amended 2010). A reversion to a noncharitable beneficiary remains valid under the UTC only if, when the reversion is to take effect, either the trust property is to revert to the settlor and the settlor is still living or fewer than twenty-one years have elapsed since the trust's creation. *Id.*

15. See UNIF. PRUDENT MGMT. INST. FUNDS ACT § 2 cmt. subsection 6 (UNIF. L. COMM'N 2006) ("If a governing instrument provides that a fund will revert to the donor if, and only if, the institution ceases to exist or the purposes of the fund fail, then the fund will be considered an institutional fund until such contingency occurs.")

16. RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. § 4.01 cmt. b(2) (AM. L. INST. 2021) (discussing reversions).

17. See UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(b), (c) (UNIF. L. COMM'N 2006).

18. *Id.* Prefatory Note at 4.

resolved by the adopting state's other law.¹⁹ And the UTC comments—in contrast to UPMIFA's Prefatory Note—take the position that “the role of the attorney general in the enforcement of charitable trusts varies greatly in the states.”²⁰

D. Extrajudicial Modification of “Small” Gifts

Both the UTC and UPMIFA contain a provision authorizing a fiduciary to modify or release donor-imposed restrictions on a gift without court approval in certain circumstances. These provisions, however, differ in important respects.

The UTC permits a trustee to terminate an uneconomic trust without court approval if the value of the trust property is less than a specified amount (the suggested amount is \$50,000) and the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.²¹ While a trustee can exercise this power only after providing notice to “qualified beneficiaries,” the provision in the UTC that names the state attorney general as a qualified beneficiary is placed in brackets, indicating that the provision is optional and therefore may not be adopted by all states adopting the UTC.²²

UPMIFA permits an institution to release or modify a restriction on the management, investment, or purpose of an institutional fund under *cy pres* principles without court approval if three requirements are met: the fund is small (the suggested amount is less than \$25,000), the fund has been in existence for a substantial period of time (the suggested time period is more than twenty years), and the institution provides advance notice to the state attorney general (the suggested time period is sixty days).²³ Under UPMIFA, the attorney general notice provision is not optional, and the attorney general is given a period of time in which to exercise its oversight authority.

The UTC provides a trustee with greater flexibility to release restrictions on a gift without court approval than UPMIFA provides to an institution because (1) the UTC's extrajudicial modification provision is suggested to apply to larger gifts, (2) there is no waiting period before a trustee can exercise the termination power, and (3) there may be no duty to provide notice to the attorney general.

19. See UNIF. TR. CODE §§ 412, 413, 106 (UNIF. L. COMM'N 2000, amended 2010). Such other law may include judicial decisions or statutes addressing the general supervisory authority of the attorney general regarding charities and charitable assets.

20. *Id.* § 110, cmt. 2004 Amendment.

21. *Id.* § 414(a).

22. *Id.* §§ 110(d), 414(a). As noted above, according to the UTC drafters, the role of the attorney general in enforcing charitable trusts varies greatly in the states.

23. UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(d) (UNIF. L. COMM'N 2006).

Characterization of a gift as a trust governed by the UTC may thus make it easier for the donee to unilaterally remove donor-imposed restrictions in the near term.

The UTC and UPMIFA extrajudicial modification provisions also vary significantly across the states. Although these provisions were intended to apply to only relatively small trusts or funds (suggested to be valued at less than \$50,000 or \$25,000, respectively), in adopting these provisions, some states have authorized fiduciaries to exercise these powers over quite sizable trusts or funds.²⁴

Furthermore, these extrajudicial modification powers, which are not available under the common law, raise equity concerns. Sophisticated or well-represented donors may be able to draft their gift instruments to override the statutory provisions granting trustees and institutions such powers.²⁵ On the other hand, less sophisticated donors and those without the resources to hire advisors are not likely even to be aware of such statutory provisions, much less the possibility of overriding them. The UTC's extrajudicial modification provision has also been criticized as reducing philanthropic democracy and diversity in the charitable sector.²⁶

E. Donor Consent to Modification

UPMIFA authorizes an institution to release or modify a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund with the donor's consent.²⁷ The UTC does not contain a similar

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24. Regarding the UTC's extrajudicial modification provision, *see, e.g.*, ARIZ. REV. STAT. ANN. § 14-10414.A (2009) (applies to a trust with a total value of less than \$100,000); WYO. STAT. ANN. § 4-10-415(a) (2003) (applies to a trust with a total value of less than \$150,000); MASS. GEN. LAWS ANN. ch. 203E, § 414(a) (2012) (applies to a trust with a total value of less than \$200,000). Regarding UPMIFA's extrajudicial modification provision, *see, e.g.*, N.Y. NOT-FOR-PROFIT CORP. L. § 555(d)(1)(A) (2014) (applies to a fund with a total value of less than \$100,000); N.J. STAT. ANN. § 15:18-30(d)(1) (2009) (applies to a fund with a total value of less than \$250,000); FLA. STAT. ANN. § 617.2104(6)(c)(1) (2012) (applies to a trust with a total value of at least \$100,000 and not more than \$250,000). For a more detailed discussion of the differences in these extrajudicial modification provisions as adopted by the states, *see* RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. § 4.03, Reporters' Notes (AM. L. INST. 2021).
25. *See* RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. § 4.03(c)(1)(C) and (c)(2) (AM. L. INST. 2021) (discussing mandatory and default rules).
26. *See* Alyssa A. DiRusso, *Euthanizing Small Charities: The Threat of Small Trust Termination Statutes*, 45 CUMB.L. REV. 473 (2015).
27. UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(a) (UNIF. L. COMM'N 2006). The release or modification may not allow the fund to be used for a purpose other than a charitable purpose of the institution. *Id.* "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund." *Id.* § 2(3). "Record" means information that is inscribed on a tangible

donor consent provision, nor is such a power generally considered to be authorized under the common law.

F. Gifts Governed by the Common Law

Both the UTC and UPMIFA liberalized the common law doctrines of *cy pres* and deviation.²⁸ For example, with regard to *cy pres*, both uniform laws added “wastefulness” to the standard for application of the doctrine, both appear to have eliminated the requirement of general charitable intent, and both relaxed the “as near as possible” to the donor’s original charitable purpose standard for the substitute use of the property, requiring only that the substitute use be “consistent with” the donor’s charitable purpose.²⁹

Importantly, charitable gifts that fall outside of the purview of UPMIFA or the UTC will not be subject to the more liberalized versions of the doctrines of *cy pres* and deviation in those uniform acts. Instead, such gifts may be subject to the more stringent articulations of those doctrines under the common law. Gifts falling outside of the purview of UPMIFA or the UTC also will not be subject to the UTC’s settlor-standing rule, the UTC’s invalidation of reversions in certain circumstances, the extrajudicial modification provisions of the UTC or UPMIFA, UPMIFA’s donor consent provision, or UPMIFA’s mandatory attorney general notice provisions.

G. Reasons for Lack of Coherence

One reason for the current lack of coherence in the law governing donor-imposed restrictions is the limited scope of the UTC and UPMIFA projects. The UTC codifies trust law and thus applies only to charitable gifts that qualify as trusts. UPMIFA applies only to institutional funds held by institutions and not to program-related assets. The failure of these uniform laws to update the common law generally is due to their limited scope, rather than a decision that gifts that fall outside their purview should continue to be subject to the more restrictive common law rules. In fact, the drafters of the UTC indicated that courts should

medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” *Id.* § 2(8).

28. See *Appendix A* for the common law doctrines of *cy pres* and deviation and the liberalized versions of those doctrines in the UTC and UPMIFA.

29. See UNIF. TR. CODE § 413(a) (UNIF. L. COMM’N 2000, amended 2010); UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(c) (UNIF. L. COMM’N 2006). *But see infra* Part III.B (discussing the uncertainty as to whether the general charitable intent requirement has been eliminated).

look to the UTC's liberalized *cy pres* provision when formulating rules for charitable gifts made in nontrust form.³⁰ Whether courts will do so remains to be seen, but it seems unlikely in light of decisions in which courts have refused to apply the UTC to charitable gifts made in nontrust form to charitable corporations.³¹

A second reason for the current lack of coherence in the law governing donor-imposed restrictions appears to be the different views and objectives of the UTC and UPMIFA drafting committees. As noted above, the UTC and UPMIFA contain different provisions governing the release or modification of donor-imposed restrictions. These differences appear to be the result of the different views of committees rather than justified by any substantive differences between the gifts covered by each statute. For example, the comments to UPMIFA explain that its release and modification provisions were derived from the approach taken in the UTC, but they provide no explanation for why the two statutes differ in numerous respects.³² The comments to UPMIFA also recommend that “conforming amendments” be made to the UTC to incorporate UPMIFA’s extrajudicial modification provision into the UTC.³³

Furthermore, some of the differences between the release, modification, and standing provisions of the UTC and UPMIFA may be attributable to the fact that UPMIFA applies only in the charitable context, while the UTC codifies trust law generally. Those involved in the drafting of UPMIFA were focused on the laws governing charities, while those involved in the drafting of UTC appear to have been focused primarily on the laws governing private trusts. For example, the UTC’s liberalized deviation provision, which differs from UPMIFA’s liberalized deviation provision, applies to both private and charitable trusts, and building more flexibility into the administration of private trusts appears to have been the main focus of the committee that drafted the UTC provision.³⁴ Additionally, as

30. See UNIF. TR. CODE § 413 cmt. (UNIF. L. COMM’N 2000, amended 2010) (“This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.”).

31. See *Courtenay C. v. Colo. State Univ. Rsch. Found.*, 320 P.3d 1115 (Wyo. 2014); *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133 (Mo. Ct. App. 2009). The term “charitable corporation” in this Essay refers to corporations that are charities, not to for-profit corporations that behave charitably.

32. UNIF. PRUDENT MGMT. INST. FUNDS ACT, Prefatory Note at 2 (UNIF. L. COMM’N 2006).

33. *Id.*, Prefatory Note at 5.

34. See UNIF. TR. CODE § 412 cmt. (UNIF. L. COMM’N 2000, amended 2010). In a break with the common law, the UTC’s deviation provision applies to both “administrative” and “dispositive” terms, thus blurring the distinction between deviation and *cy pres* in the charitable context. See

noted above, the UTC grants donors of gifts characterized as charitable trusts standing to sue to enforce such gifts, while UPMIFA does not grant donors of gifts characterized as institutional funds standing to sue to enforce those gifts. This stark difference is likely attributable to the involvement of more representatives of charities, who often resist donor standing, in the drafting of UPMIFA than in the drafting of the UTC, given the UTC's primary focus on private trusts.

II. FORM OVER SUBSTANCE

In some jurisdictions, courts traditionally have referred to charitable gifts made for specific purposes to charitable corporations or government entities as charitable trusts, even when the gifts are made in nontrust form.³⁵ In other jurisdictions, due in part to a historic hostility to charitable trusts, such gifts have not been referred to as trusts and instead have been referred to as restricted, conditional, or absolute gifts.³⁶ Regardless of the label, courts generally have held that the recipients of all such gifts are obligated to administer them in accordance with their stated terms and charitable purposes absent release or modification of the donor-imposed restrictions under the common law doctrines of *cy pres* or deviation.³⁷ In other words, traditionally, all charitable gifts, regardless of their form, were subject to the same rules regarding the modification and release of restrictions. Today, however, the same charitable gift may be subject to a different set of laws depending on the form it takes, the organizational form of the donee, or the label assigned to it under state law.

For example, a charitable gift subject to donor-imposed restrictions made in nontrust form to a charitable corporation in a jurisdiction that has traditionally referred to such gifts as charitable trusts may be subject to the modification, release, and settlor-standing provisions of the UTC. But that same gift made in a

id. § 412(a). This change appears to have been made to provide more flexibility to modify the terms of private trusts, to which the *cy pres* doctrine does not apply. UPMIFA's deviation provision, on the other hand, does not apply to dispositive terms. See UNIF. PRUDENT MGMT. INST. FUNDS ACT, § 6(b) (UNIF. L. COMM'N 2006). For discussion of how the UTC's deviation provision should apply in the charitable context, see RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. § 4.03 cmt. c(1)(A), illus. 3 and 4 (AM. L. INST. 2021).

35. See, e.g., *State v. Rand*, 366 A. 2d 183 (Me. 1976); *In re Est. of Heil v. Nev.*, 259 Cal. Rptr. 28 (Cal. Ct. App. 1989); *Chattowah Open Land Trust v. Jones*, 636 S.E. 2d 523 (Ga. 2006).

36. See, e.g., *In re Scott's Will*, 171 N.E. 2d 326 (N.Y. 1960); *Newhall v. Second Church & Soc'y of Bos.*, 209 N.E. 2d 296 (Mass. 1965); *Est. of Vallery v. St. Luke's Cmty. Found.*, 883 P. 2d 24 (Colo. App. 1993); *Adler v. Save*, 74 A. 3d 41 (N.J. Super. Ct. App. Div. 2013).

37. See, e.g., *Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995, 998 (Conn. 1997) (“The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are [enforceable] at the instance of the [a]ttorney [g]eneral It matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift.”).

jurisdiction that has not traditionally referred to such gifts as trusts may instead be governed by UPMIFA, a nonuniform statute, or the common law. Similarly, a charitable gift subject to donor-imposed restrictions made to a charitable corporation via a gift instrument that includes language, perhaps boilerplate, such as “to be held in trust,” may be subject to the modification, release, and settlor-standing provisions of the UTC. But that same gift made pursuant to a gift instrument that does not happen to include the word “trust” may instead be governed by UPMIFA, a nonuniform statute, or the common law. In each of these situations, the charitable gift may be the same, but the label assigned to it or the presence of the word “trust” in the gift instrument could result in dramatically different laws applying to the gift.

*Reno v. Hurchalla*³⁸ provides another example of how the form a gift takes can result in dramatic differences in the law that applies. Janet Reno, former U.S. attorney general, created a revocable trust during her lifetime as a will substitute.³⁹ At Reno’s death, the trust, which then became irrevocable, directed the successor trustee to offer to give the almost four-acre, historic Reno homestead to the University of Miami, subject to the condition that the homestead be preserved and maintained in perpetuity and used in ways that would not destroy it or its unique character.⁴⁰ When the University of Miami declined to accept the gift, the successor trustee, Reno’s nephew, and other family members (with one exception) sought to effectuate Reno’s charitable intent by transferring the homestead, subject to the condition in the trust, to Miami Dade College through application of the doctrine of *cy pres*.⁴¹

A Florida appellate court applied the UTC’s *cy pres* provision, a variant of which had been adopted in Florida, to authorize the substitute gift.⁴² The court found that the original gift became impracticable or impossible to achieve when the University of Miami declined to accept the gift.⁴³ The court also found that the proposed substitute gift was consistent with the settlor’s charitable purposes.⁴⁴

Reno’s revocable trust did not direct that the gift of the homestead be made to the University of Miami “in trust.”⁴⁵ In addition, the University of Miami is a charitable corporation rather than a charitable trust. The court nonetheless

38. 283 So. 3d 367 (Fla. Dist. Ct. App. 2019).

39. *Id.* at 368.

40. *Id.* at 370.

41. *Id.* at 368–69.

42. *Id.* at 369, 371 (applying Fla. Stat. Ann. § 736.0413(1)).

43. *Id.* at 371.

44. *Id.* at 369 n.1, 371.

45. *See id.* at 370.

applied the UTC's version of *cy pres* to the gift, presumably because it was dealing with a gift made under the terms of a revocable trust and the petitioner was acting in his role as trustee.⁴⁶

Had Reno not created a revocable trust during her lifetime, and instead included the gift of the homestead in her will, it is not clear that the UTC would have applied. In such a case, it would have been Reno's personal representative under her will petitioning for application of *cy pres* and, absent evidence of an intent to create a trust in the terms of the will or the designation of a charitable trust as recipient of the gift, it is not clear that the UTC would be the relevant law. UPMIFA would not have applied given that the gift appeared to be a program-related asset. Accordingly, in such a case, the common law doctrine of *cy pres* may have applied, and that doctrine may have required a finding that Reno had a general charitable intent and that the substitute gift fulfilled her original intent "as closely as possible."⁴⁷

In *Reno*, the end result may well have been the same whether the UTC's version of *cy pres* or the common law doctrine of *cy pres* applied. But it is not difficult to imagine circumstances in which the result would not be the same. Moreover, even in *Reno*, application of the common law doctrine of *cy pres* would have allowed the niece who objected to the substitute charitable gift to argue that Reno did not have a general charitable intent and that the proposed substitute charitable gift did not fulfill Reno's intent "as closely as possible."⁴⁸

It is arbitrary for one set of laws to apply to a charitable gift made under a decedent's will, while another set of laws would apply to that same gift if it happened to be made under the decedent's revocable trust. It also is arbitrary for one set of laws to apply to a charitable gift that is nominally labeled a charitable trust under state law, or that was conveyed pursuant to a gift instrument containing boilerplate "in trust" language, while another set of laws would apply to that same gift if it were labeled as a restricted, conditional, or absolute gift under state law, or conveyed pursuant to a gift instrument that did not contain the word "trust."

That the form a gift takes, or the label assigned to it, can affect the laws that apply also raises equity concerns. Sophisticated or well-represented donors may be able to structure their charitable gifts to fit within one set of laws or another, depending on their preferences. Alternatively, less sophisticated donors and those

46. *Id.* at 371–72.

47. See *SPCA Wildlife Care Ctr. v. Abraham*, 75 So. 3d 1271, 1276–77 (Fla. Dist. Ct. App. 2011) (discussing the common law doctrine of *cy pres*).

48. The niece argued that the successor trustee was required to sell the homestead and distribute the proceeds to Reno's nephews and nieces. *Reno*, 283 So. 3d at 369–70.

without the resources to hire advisors are unlikely to understand that any number of factors—such as whether the relevant jurisdiction treats restricted gifts as charitable trusts, or whether a gift instrument includes the word “trust,” or whether a bequest is made in a will or in a revocable trust agreement—could significantly affect, for example, their ability to sue to enforce the gift, the validity of a reversion, or the manner in which the restrictions they impose may be released or modified. Similar equity concerns also apply to donees. Sophisticated or well-represented donees can seek to structure gifts so the applicable law is to their advantage, while those less sophisticated and without the resources to hire experienced advisors would have difficulty doing the same.

III. UNCERTAINTIES REGARDING HOW STATUTORY PROVISIONS OPERATE

There are many uncertainties regarding the operation of the *cy pres*, deviation, and other related provisions of the UTC and UPMIFA. This Part highlights only three: (1) uncertainty regarding which law should apply when a gift qualifies as both a charitable trust under the UTC and an institutional fund under UPMIFA, (2) uncertainty regarding whether the UTC and UPMIFA eliminated the common law *cy pres* doctrine’s general charitable intent requirement, and (3) uncertainty regarding how the UTC and UPMIFA *cy pres* provisions should operate when the donor provided for a gift-over to another charity if the first specified charitable gift fails.⁴⁹

A. UTC and UPMIFA Overlap

Some charitable gifts may qualify as charitable trusts under the UTC and as institutional funds under UPMIFA. For example, if a fund is donated to a charitable corporation to be held “in trust,” with the income to be used for a specified charitable purpose, the gift may qualify as both a charitable trust under the UTC and an institutional fund under UPMIFA.⁵⁰ In such a case, both the

49. Other uncertainties include: whether UPMIFA’s *cy pres*, deviation, and extrajudicial modification of “small” gift provisions are mandatory or default rules; the impact of the UTC’s deviation provision blurring of the distinction between *cy pres* and deviation by authorizing the modification of both administrative and dispositive terms; the meaning of the wasteful standard added to both statutory versions of *cy pres*; the scope of the UTC’s settlor-standing provision; and the potential unconstitutionality of the retroactive application of certain provisions, such as the UTC’s invalidation of reversions to noncharitable beneficiaries.

50. See UNIF. PRUDENT MGMT. INST. FUNDS ACT § 2 cmt. (6) (UNIF. L. COMM’N 2006) (“trusts managed by charities can be institutional funds”).

donor and the donee could be expected to assert that the applicable law is the one more favorable to their position.

For example, the donor may argue that they have standing to sue to enforce the gift under the UTC's settlor-standing rule, while the donee may argue that the donor does not have standing under UPMIFA.⁵¹ Or the donee may assert that a reversion to a noncharitable beneficiary has been invalidated under the UTC, while the noncharitable beneficiaries, such as the donor's descendants who would be the recipients of the assets upon reversion, may assert that the relevant law is UPMIFA, which does not appear to invalidate reversions.⁵² How the courts will resolve such an overlap remains to be seen.

B. General Charitable Intent Requirement

Each of the UTC and UPMIFA *cy pres* provisions appear to have eliminated the common law requirement that the donor of a charitable gift must have had a general charitable intent for *cy pres* to apply to the gift.⁵³ Neither statute refers to a general charitable intent requirement.⁵⁴ Instead, each provides that if the particular charitable purpose of the trust or fund, respectively, becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply *cy pres*.⁵⁵

In the comments to its *cy pres* provision, however, the UTC drafters muddied the waters regarding the general charitable intent requirement. Those comments provide that the UTC's *cy pres* provision, "which is similar to Restatement (Third) of Trusts § 67, modifies the doctrine of *cy pres* by presuming that the settlor had a general charitable intent."⁵⁶ Some have interpreted this comment in light of the

51. See *supra* Part I.A (discussing the different approaches to donor standing under the UTC and UPMIFA).

52. See *supra* Part I.B (discussing the different approaches to reversions under the UTC and UPMIFA).

53. See *Appendix A* for the common law *cy pres* doctrine.

54. See *Appendix A* for the UTC and UPMIFA versions of the *cy pres* doctrine.

55. See *id.*

56. UNIF. TR. CODE § 413 cmt. (UNIF. L. COMM'N 2000, amended 2010). Section 67 of the Restatement (Third) of Trusts incorporates a presumption of general charitable intent by providing that, "unless the terms of the trust provide otherwise," in the event the designated charitable purpose becomes unlawful, impossible, impracticable, or wasteful, the trust will not fail and the court will direct application of the property or a portion thereof to a charitable purpose that reasonably approximates the designated purpose. RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. L. INST. 2003) (emphasis added). The comments explain that § 67 "presume[es] the existence of . . . a general charitable purpose [unless the terms of the trust express a contrary intention]." *Id.* cmt. b. Neither the UTC's nor UPMIFA's *cy pres* provision contains similar qualifying language. See *Appendix A*. For the different articulations of the *cy*

statute to mean that the UTC's *cy pres* provision eliminates the general charitable intent requirement by establishing a conclusive presumption of such intent.⁵⁷ Others have interpreted the comment to mean that the UTC establishes a rebuttable presumption of general charitable intent.⁵⁸ There also is some question as to whether UPMIFA's *cy pres* provision eliminates the general charitable intent requirement.⁵⁹

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- pres* doctrine in the Restatement of the Law of Charitable Nonprofit Organizations, the Restatement (Third) of Trusts, and the Restatement (Second) of Trusts, see *Appendix B*.
57. See, e.g., RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. § 3.02 cmt. c (AM. L. INST. 2021); Melanie B. Leslie, *Time to Sever the Dead Hand: Fisk University and the Cost of the Cy Pres Doctrine*, 31 CARDOZO ARTS & ENT. L. J. 1, 15 (2012); Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 669 (2005); Ronald Chester, *Modification and Termination of Trusts in The 21st Century: The Uniform Trust Code Leads A Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 706–07 (2001). This is the correct interpretation. The UTC's *cy pres* provision provides that, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, “the trust does not fail” and “the trust property does not revert to the settlor or the settlor’s successors in interest,” as it would under the common law if the settlor were determined not to have a general charitable intent. UNIF. TR. CODE § 413(a) (UNIF. L. COMM’N 2000, amended 2010). Accordingly, if the UTC were interpreted to establish a rebuttable presumption of general charitable intent, and a court were to find in a particular case that the settlor had a specific rather than a general charitable intent, the gift would be left in statutory limbo—the court would be unable to apply *cy pres* but the gift could not fail and the property could not revert. The Uniform Law Commission is revising the UTC comments to make it clear that the statute’s *cy pres* provision eliminates the general charitable intent requirement. See Memorandum to the ULC Executive Committee from Thomas P. Gallanis, Executive Director, JEB-UTEA, dated March 1, 2023 (on file with author).
58. See, e.g., ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 770 (10th ed. 2017); Katie Magallanes, *Beyond Donor Intent: Leveraging Cy Pres to Remedy Unintended Burdens Caused by Charitable Gifts*, 40 ACTEC L. J. 407, 410 (2014); John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 135 (2010); Alberto B. Lopez, *A Reevaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307, 1310–11 (2010).
59. The comments to UPMIFA’s *cy pres* provision, although silent regarding the general charitable intent requirement, state that the provision “applies the rule of *cy pres* from trust law.” UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6 cmt. (6) (UNIF. L. COMM’N 2006). See also Susan N. Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 ALB. L. REV. 565, 575–76 (2017/18) (noting that the Restatement (Third) of Trusts § 67 “presumes that a settlor had ‘general charitable intent,’ . . . although the presumption is rebuttable” and “[t]he Uniform Trust Code . . . follows the Restatement’s formulation, as does UPMIFA” (footnote omitted)); C. Boone Schwartzel, *Was it Wise to Try to Implement Trust Law Reforms Through the Uniform Prudent Management of Institutional Funds Act?*, 14 EST. PLAN. & CMTY. PROP. L.J. 179, 216–18 (2021) (noting that UMPIFA’s *cy pres* provision does not indicate whether the general charitable intent requirement was eliminated or whether the court should apply a rebuttable presumption of general charitable intent or the traditional general charitable intent requirement).

Codification of the doctrine of *cy pres* in the UTC and UPMIFA has clearly caused confusion regarding the general charitable intent requirement, and the leap forward that reformers may have hoped for regarding elimination of that requirement may not, in fact, have occurred.⁶⁰

C. Charitable Gift-Overs

Another area of uncertainty regarding application of the UTC and UPMIFA *cy pres* provisions is how those provisions operate when the donor provided for a gift-over to another charity if the first specified charitable gift fails. The Restatement (Third) of Trusts addresses this issue. Its *cy pres* provision provides that, “[u]nless the terms of the trust provide otherwise,” where a designated charitable purpose is or becomes unlawful, impossible, impracticable, or wasteful, the court will direct application of the property to a charitable purpose that reasonably approximates the designated purpose.⁶¹ The comments then explain that “[a] trust provision expressing the settlor’s own choice of an alternative charitable purpose will be carried out, without need to apply the *cy pres* doctrine, assuming not only that the initially specified purpose cannot be given effect or continued but also that the alternative purpose is one that properly can be given effect.”⁶² This is consistent with the treatment of charitable gift-overs under the common law.⁶³

60. See, e.g., *infra* Part IV.A (discussing a case in which the court applied the general charitable intent requirement to a gift characterized as a charitable trust despite the state’s adoption of the UTC’s *cy pres* provision).

61. RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. L. INST. 2003).

62. *Id.* § 67 cmt. b. For the different articulations of the *cy pres* doctrine in the Restatement of the Law of Charitable Nonprofit Organizations, the Restatement (Third) of Trusts, and the Restatement (Second) of Trusts, see *Appendix B*.

63. See, e.g., *Pa. Co. for Banking & Tr. v. Bd. of Governors of London Hosp.*, 83 A. 2d 881, 888 (R.I. 1951) (“It is generally held that when a testator makes a specific alternative bequest to take effect if a primary charitable one fails, the doctrine of *cy pres* is not applied, but the estate is distributed in accordance with the testator’s express direction.”); *Smyth v. Anderson*, 232 S.E. 2d 835, 839 (Ga. 1977) (“The authorities are universally in accord that the doctrine of *cy pres* is simply inapplicable if there is a reversionary clause or valid gift over in the event the charitable gift fails for any reason.”); *Hermitage Methodist Homes of Va., Inc. v. Dominion Tr. Co.*, 387 S.E. 2d 740, 746 (Va. 1990) (*cy pres* is inapplicable in the face of a charitable gift-over). A few courts have applied *cy pres* to modify an initial charitable gift despite the presence of a charitable gift-over in limited circumstances—e.g., in the case of surplus funds, to excise an illegal racial restriction, and to authorize sale of only a minor part of real property. See RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. § 3.02 cmt. f. (AM. L. INST. 2021).

The statutory versions of *cy pres* in the UTC and UPMIFA do not state that they apply “unless the terms of the trust [or gift] provide otherwise.”⁶⁴ In addition, the comments to those provisions are silent regarding charitable gift-overs. One commentator has noted that “[a]n attempt in earlier drafts of the UTC to deal with the effect on *cy pres* of a charitable gift[-]over was stricken in the final draft [of the UTC].”⁶⁵

How courts will deal with charitable gift-overs when applying the UTC and UPMIFA *cy pres* provisions remains unclear. In the face of silence in the statutory language and the comments, some courts might assume that the common law treatment of charitable gift-overs should apply, which would mean that *cy pres* generally would not apply and the gift-over would take effect. On the other hand, other courts might interpret the statutory language as giving them broader authority than they had under the common law to apply *cy pres* to the original charitable gift. Each statute provides that if the original charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the court “may” apply *cy pres*, arguably leaving it to the court to decide whether to apply *cy pres* to the original gift or allow the gift-over to take effect, but without providing any indication in the statute or comments as to which route should be taken.⁶⁶ Both statutes also provide that if the court applies *cy pres*, the substitute use of the property must be consistent with the donor’s specified “charitable purposes,” which arguably would allow a court to apply *cy pres* to modify the purpose of the original gift—the donor’s first choice.⁶⁷

Ultimately, uncertainty regarding the treatment of charitable gift-overs under the UTC and UPMIFA *cy pres* provisions may cause confusion among litigants and the courts. It also may engender disputes between competing charitable beneficiaries, such as in *Home for Incurables v. University of Maryland Medical System Corp.*, which involved a dispute over a \$28.8 million bequest between a private nonprofit hospital (the donor’s first choice) and a publicly owned and operated hospital (the designated recipient of the gift-over).⁶⁸

64. See *supra* note 61 and accompanying text; UNIF. TR. CODE § 413(a) (UNIF. L. COMM’N 2000, amended 2010); UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(c) (UNIF. L. COMM’N 2006).

65. See Chester, *supra* note 57, at 708.

66. See UNIF. TR. CODE § 413(a) (UNIF. L. COMM’N 2000, amended 2010); UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(c) (UNIF. L. COMM’N 2006).

67. See UNIF. TR. CODE § 413(a) (UNIF. L. COMM’N 2000, amended 2010); UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(c) (UNIF. L. COMM’N 2006).

68. *Home for Incurables of Balt. v. Univ. of Md. Med. Sys. Corp.*, 797 A. 2d 746 (Md. 2002). In *Home for Incurables*, the court excised a racially discriminatory restriction on the bequest to the private nonprofit hospital (the donor’s first-choice charity) despite the presence of a gift-over to the publicly owned and operated hospital.

IV. CONFUSION IN THE COURTS

The new, much more complex landscape of laws governing the release or modification of donor-imposed restrictions and standing to sue is causing some confusion in the courts. The following cases illustrate this confusion.

A. *Cy Pres*

In *In re Bierstadt Paintings Charitable Trust*,⁶⁹ a New Jersey appellate court (in an unpublished opinion) refused to apply *cy pres* to authorize a city to sell two valuable paintings and use the proceeds for other public purposes, even though one of the paintings was deemed to be racially offensive.⁷⁰ While the court and the New Jersey attorney general's office assumed that the UTC was the governing law and acknowledged that New Jersey had adopted the UTC's liberalized *cy pres* provision, they nonetheless proceeded to analyze the issue as if the common law's more restrictive doctrine of *cy pres* applied.

Bierstadt involved two eight-by-twelve-foot Albert Bierstadt paintings that a well-known doctor and philanthropist had given to the City of Plainfield, New Jersey (the City), in 1919 in memory of his father.⁷¹ The City accepted the gift, and the two paintings—*The Landing of Columbus* (1893) and *Autumn in the Sierras* (1873)—were placed in the City's public library, where they remained until 1967, when they had to be moved due to space limitations.⁷² Both paintings were ultimately displayed in the City's Municipal Courthouse.⁷³

Starting in the mid-1960s, various civil rights groups and Plainfield citizens began to criticize the City's display of *The Landing of Columbus* because of its portrayal of Native Americans kneeling before and seeming to worship Columbus and his landing party.⁷⁴ The painting was considered by some to be a demeaning

69. No. A-0529-20, 2021 WL 3057076 (N.J. Super. Ct. App. Div. July 20, 2021) (unpublished).

70. *Id.* It is not unusual for opinions involving *cy pres* and deviation to be unpublished. Despite nonpublication, these opinions illustrate how courts are applying these doctrines.

71. *Id.* at *1; CITY CLERK'S OFFICE, OPINION AND HISTORICAL BACKGROUND ON BIERSTADT PAINTINGS FROM 1919 TO 1987 (1992), available at https://tapinto-production.s3.amazonaws.com/documents/20305/1992_Opinion_Bierstadt_Paintings_cy_pres.pdf [https://perma.cc/9J5Y-HCHF] [hereinafter 1992 BIERSTADT PAINTINGS REPORT].

72. *Bierstadt*, 2021 WL 3057076, at *1; 1992 BIERSTADT PAINTINGS REPORT, *supra* note 71, at 3; William Zimmer, *Art Review; In Montclair, a Controversial View of American History*, N.Y. TIMES (Dec. 30, 2001) <https://www.nytimes.com/2001/12/30/nyregion/art-review-in-montclair-a-controversial-view-of-american-history.html> [https://perma.cc/2JTA-SYY].

73. Zimmer, *supra* note 72.

74. 1992 BIERSTADT PAINTINGS REPORT, *supra* note 71, at 4; Zimmer, *supra* note 72.

and offensive statement of colonial expansion and authority.⁷⁵ More specific charges were leveled that the painting had “negative visual and psychological effects on the minority citizens [of Plainfield] who must view the picture while justice is being dispensed by the Municipal Court Judge.”⁷⁶ In fact, the City covered the painting with draperies during court meetings and public sessions for a period of time.⁷⁷

In 2019, one hundred years after the gift was made, the City petitioned the court to apply both the common law doctrine of *cy pres* and New Jersey’s version of the UTC’s *cy pres* provision in order to authorize the City to sell the paintings.⁷⁸ The City proposed to use the proceeds from the sale to create a financial literacy program for the City’s youth, to create a college scholarship fund for City residents, and to construct a recreational educational facility.⁷⁹

In support of its *cy pres* application, the City asserted that *The Landing of Columbus* contained racist implications and to continue to display it in a public forum in a community now composed mostly of people of color would only continue to cause irreparable harm.⁸⁰ The City further argued that the painting no longer provided aesthetic enjoyment to the community and therefore the charitable purpose of the gift had become impracticable.⁸¹ Although the City conceded that *Autumn in the Sierras* was not offensive, it sought permission to sell that painting as well, asserting that it did not have the economic resources to maintain and protect the highly valued paintings.⁸² In 2016, *The Landing of Columbus* was appraised at \$15 million and *Autumn in the Sierras* was valued at \$4.5 million.⁸³

The New Jersey attorney general’s office, which the City had notified of the litigation, agreed that it had become impracticable for the City to continue to display the paintings.⁸⁴ Like the City, the attorney general’s office stated that sale of the paintings and repurposing of the proceeds could be done in accordance with

75. 1992 BIERSTADT PAINTINGS REPORT, *supra* note 71, at 4.

76. *Id.*

77. Grace Glueck, *Art Review; If Some Say Glory, Others Cry Hubris*, N.Y. TIMES (Nov. 23, 2001), <https://www.nytimes.com/2001/11/23/arts/art-review-if-some-say-glory-others-cry-hubris.html> [<https://perma.cc/3ZZB-SYVH>].

78. *In re Bierstadt Paintings Charitable Tr.*, NO. A-0529-20, 2021 WL 3057076, at *1 (N.J. Super. Ct. App. Div. July 20, 2021) (unpublished).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at *2.

83. *Id.*

84. *Id.*

both the common law *cy pres* doctrine and New Jersey's version of the UTC's *cy pres* provision.⁸⁵ The office further stated that it was uncertain whether the City's proposed use of the proceeds would be "as near as possible to what the Grantor intended," even though the UTC relaxed that common-law standard and requires only that the trust assets be used "in a manner consistent with the settlor's charitable purposes."⁸⁶

Taking its cue from the City and the attorney general's office, the New Jersey appellate court proceeded to analyze the issue as though both the common law *cy pres* doctrine and New Jersey's version of the UTC's *cy pres* provision applied.⁸⁷ The court first noted that it was undisputed that the City holds these paintings as trustee of a charitable trust as defined by the UTC, even though the donor's letter offering the gift of the paintings to the City did not use the word "trust" or "trustee" or otherwise indicate an intent to create a formal trust.⁸⁸ The court then referenced case law applying the common law doctrine of *cy pres* and noted that the doctrine had been codified by New Jersey's adoption of the UTC's *cy pres* provision.⁸⁹ Despite quoting New Jersey's version of the UTC's liberalized *cy pres* provision in its opinion, however, the court stated that it was required to determine that accomplishment of the particular purpose of the trust had become impossible, impracticable, or illegal, and that the donor had a general charitable intent, and only if it made such findings could it apply the trust assets to a charitable purpose "as nearly as possible to the particular purpose of the settlor."⁹⁰ Thus, despite New Jersey's adoption of the UTC's liberalized *cy pres* provision, which added "wasteful" to the standard for application of the doctrine, eliminated the general charitable intent requirement, and relaxed the "as near as possible" requirement, the court applied the more stringent common law requirements to the gift.

In the end, the court refused to apply *cy pres* to authorize the City to sell the paintings.⁹¹ The court was not convinced that current social perceptions of Christopher Columbus rendered the City's continued ownership of the paintings impracticable, noting that the City was free to display the paintings in another location or donate them to a museum where they could be appreciated for their

85. *Id.*

86. *Id.*; N.J. STAT. ANN. § 3B:31-29(a)(3) (West 2016).

87. *Bierstadt*, 2021 WL 3057076, at *5–*6.

88. *Id.* at *5; 1992 BIERSTADT PAINTINGS REPORT, *supra* note 71, at 5–6.

89. *Bierstadt*, 2021 WL 3057076, at *5 (citing N.J. STAT. ANN. § 3B:31-29(a) (West 2016)).

90. *Id.* at *5–*6.

91. *Id.* at *6. The City's appeal to the New Jersey Supreme Court was denied. *In re Bierstadt Paintings Charitable Trust*, 267 A. 3d 1153 (N.J. 2022).

artistic and historic value as a memorial to the donor's father.⁹² The court also determined that the donor did not have a general charitable intent, finding it "highly unlikely" that the donor would be amenable to the sale of paintings treasured by him and donated to the City in the memory of his father.⁹³

Whether one agrees or disagrees with the court's decision not to apply *cypres*, it is unfortunate that neither the court nor the New Jersey attorney general's office recognized that the State had liberalized the doctrine as applied to charitable trusts when it adopted the UTC.

B. Standing

Fragmentation of the law governing charitable gifts into the UTC, UPMIFA, nonuniform statutes, and the common law has also led to confusion regarding the law governing who has standing to sue to enforce such gifts. For example, in *In re Estate of Moritz v. Ohio State University*,⁹⁴ an Ohio appellate court stated that "the Ohio AG has exclusive authority . . . to enforce the terms of charitable trusts."⁹⁵ That is not an accurate statement of the law. Ohio has adopted the UTC's standing provision, which expressly grants "the settlor of a charitable trust, among others," the right to sue to enforce the trust, and the comments to the UTC explain that the class of "others" consists of a co-trustee, the state attorney general, and a person with a special interest.⁹⁶ Accordingly, contrary to the appellate court's broad pronouncement in *Moritz*, the Ohio attorney general does not have the exclusive authority in the state to enforce the terms of charitable trusts. The court in *Moritz* also failed to address whether the gift at issue constituted a charitable trust under the UTC or an institutional fund under UPMIFA (or both), making its analysis of the standing issue even more confusing and unhelpful.⁹⁷

92. *Bierstadt*, 2021 WL 3057076, at *5–*6.

93. *Id.* at *6.

94. No. 19 CAF 11 0060, 2020 WL 6193955 at *4 (Ohio Ct. App. 2020).

95. *Id.* The court referenced a statute in the section of the state's code addressing the organization, powers, and duties of the state attorney general. *Id.* (citing OHIO REV. CODE ANN. § 109.24). That statute does not state that the attorney general's powers with regard to charitable trusts are exclusive.

96. OHIO REV. CODE ANN. § 5804.05(C) (2007); UNIF. TR. CODE §§ 405(c) cmt., 413 cmt. (UNIF. L. COMM'N 2000, amended 2010).

97. *Moritz* involved Michael E. Moritz's gift of \$30 million to The Ohio State University and the University's College of Law, subject to various restrictions on its use. *Moritz*, 2020 WL 6193955, at *1–*2. Some years after Moritz's death, his adult son unsuccessfully sought standing to sue the University for its alleged failure to comply with the restrictions on the gift. *Id.* at *1–*2, *4–*5.

Similarly muddled is a Colorado appellate court's analysis of standing to challenge the University of Colorado Foundation's management of investments.⁹⁸ In *Herbst v. University of Colorado Foundation*,⁹⁹ a donor to both the foundation and the University of Colorado was found not to have standing to sue the foundation as either a donor or a party with a special interest.¹⁰⁰ Although the donor asserted that the foundation, which is a nonprofit charitable corporation, had violated UPMIFA and breached its fiduciary duties, the court stated that "[t]his case involves the management of a charitable trust" and cited various common law sources of "the law of charitable trusts" in support of its holding.¹⁰¹ Noticeably absent from the court's analysis was that Colorado had adopted the UTC, including the provision granting "the settlor of a charitable trust, among others" standing to sue to enforce the trust.¹⁰² Similar to the court in *Moritz*, the court in *Herbst* seemed unaware that Colorado had adopted the UTC's settlor-standing provision or that the common law of charitable trusts continues to apply in the state only to the extent it has not been displaced by the UTC or another statute.¹⁰³

CONCLUSION

There is no easy way to address the problems wrought by adoption in many states of the UTC and UPMIFA provisions relating to the release and modification of donor-imposed restrictions. Of the issues discussed above, the confusion engendered by these enactments is perhaps most easily addressed because it can be reduced through education. The Restatement of the Law of Charitable Nonprofit Organizations responds to this need. It provides a critical educational resource to judges, practicing attorneys, donors, and donees by detailing the new, more complex landscape of laws and making it clear that the common law, while still relevant, has been supplanted to a significant extent by the UTC, UPMIFA, and nonuniform statutes. The Restatement also offers recommendations for resolving a few of the uncertainties as to how the new statutory provisions operate.

98. See *Herbst v. Univ. of Colo. Found.*, 513 P.3d 388 (Colo. App. 2022).

99. *Id.*

100. *Id.* at 393–94. Two university graduates and a student were also plaintiffs and were similarly found not to have special interest standing. *Id.* at 394.

101. See *id.* at 390–92.

102. COLO. REV. STAT. § 15-5-405(3) (2019).

103. See COLO. REV. STAT. § 15-5-106 (2019) ("Unless displaced by the particular provisions of this [Colorado Uniform Trust Code], the common law of trusts and principles of law and equity, and other statutes of this state, supplement its provisions"). See also OHIO REV. CODE ANN. § 5801.05 (West 2007) ("The common law of trusts and principles of equity continue to apply in this state, except to the extent modified by [the Ohio trust code] or another section of the Revised Code.").

Education, however, does nothing to address the other concerns discussed in this Essay: the lack of coherence in the law, the elevation of form over substance when it comes to the laws applicable to a particular gift, many of the uncertainties regarding how the statutory provisions operate, and the resulting inequities between sophisticated or well-represented donors and donees and those who are less sophisticated and without the resources to hire experienced advisors. One approach to addressing these more vexing issues would be to amend the UTC and UPMIFA to conform their release, modification, and standing provisions. Whether this would be possible given the different and often strongly-held views regarding these issues is unclear. There also is no guarantee that states would revise their statutory laws if such amendments were made. Furthermore, even if the UTC and UPMIFA were amended to eliminate their differences, many of the gifts not falling within the purview of those statutes would continue to be governed by the more restrictive provisions of the common law.

Another approach to addressing the concerns addressed in this Essay would be to fashion an entirely new uniform law to address the release or modification of donor-imposed restrictions and standing to sue with regard to all charitable gifts, regardless of the organizational form of the recipient, whether the gift was conveyed in trust or nontrust form, or the label assigned to charitable gifts under state law. This may seem like a bold proposal, but the provisions governing the release or modification of donor-imposed restrictions and standing to sue in the UTC and UPMIFA appear to have been tangential to the main purposes of those uniform laws.¹⁰⁴ In addition, the many uncertainties in the operation of the current statutory provisions could be addressed by the drafters of the new uniform law. Of course, whether consensus could be reached regarding the provisions of the uniform law, and whether states would be willing to adopt such a law and repeal the release, modification, and standing provisions in their versions of the UTC and UPMIFA, is not clear.

In the end, there are no easy answers, and this Essay seeks primarily to alert readers of the problems and start a conversation regarding possible ways to bring coherence to the law.

104. See UNIF. TR. CODE Prefatory Note, at 1 (UNIF. L. COMM'N 2000, amended 2010) (“The primary stimulus to the Commissioners’ drafting of the Uniform Trust Code [was] the greater use of trusts in recent years, both in family estate planning and in commercial transactions...”); UNIF. PRUDENT MGMT. INST. FUNDS ACT Prefatory Note, at 1, 4 (UNIF. L. COMM'N 2006) (“[UPMIFA] provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending” and “clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts.”).

APPENDIX A

<u><i>Cy Pres Doctrine</i></u>
<p>UPMIFA</p> <p><i>Applies to “institutional funds” held by “institutions” but not “program-related assets.”</i>¹⁰⁵</p> <p>If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard.¹⁰⁶</p>
<p>UTC</p> <p><i>Applies to express trusts, or portions of trusts, created for a charitable purpose.</i>¹⁰⁷</p> <p>(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:</p> <ol style="list-style-type: none"> (1) the trust does not fail, in whole or in part; (2) the trust property does not revert to the settlor or the settlor’s successors in interest; and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor’s charitable purposes. <p>(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:</p> <ol style="list-style-type: none"> (1) the trust property is to revert to the settlor and the settlor is still living; <p style="text-align: center;">or</p>

105. UNIF. PRUDENT MGMT. INST. FUNDS ACT §§ 2(4), 2(5), 2(7) (UNIF. L. COMM’N 2006).

106. *Id.* § 6(c). The comments to § 6 of UPMIFA explain that “Attorney general is in brackets in the Act because in some states another official enforces the law of charities.” *Id.* § 6 cmt. subsection(b).

107. UNIF. TR. CODE §§ 102, 103(4), 405(a) (UNIF. L. COMM’N 2000, amended 2010).

(2) fewer than 21 years have elapsed since the date of the trust's creation.¹⁰⁸

Common Law

Applies to charitable gifts generally.

If (i) there is a gift to be used for a valid charitable purpose, (ii) it is or has become impossible or impractical to carry out the donor's original intention, and (iii) the donor had a general charitable intention as well as the intention to benefit the particular charitable object he designated, a court is empowered to modify the purpose to reflect current needs, choosing those as near as possible to donor's original intent.¹⁰⁹

108. *Id.* § 413.

109. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 173 (2004).

<i>Deviation Doctrine</i>
<p><i>UPMIFA</i> <i>Applies to “institutional funds” held by “institutions” but not “program-related assets.”</i></p> <p>The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor’s probable intention.¹¹⁰</p>
<p><i>UTC</i> <i>Applies to express trusts, or portions of trusts, created for a charitable purpose.</i></p> <p>(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor’s probable intention.</p> <p>(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.</p> <p>(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.¹¹¹</p>
<p><i>Common Law</i> <i>Applies to charitable gifts generally.</i></p> <p>Courts have power to direct or permit deviations from the terms of a trust if compliance appears to be impossible or illegal or if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust.¹¹²</p>

110. UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(b) (UNIF. L. COMM’N 2006). *See also supra* note 106 for why “Attorney General” is in brackets.

111. UNIF. TR. CODE § 412 (UNIF. L. COMM’N 2000, amended 2010).

112. FREMONT-SMITH, *supra* note 109, at 182–83; RESTATEMENT (SECOND) OF TRUSTS § 381 (AM. LAW INST. 1959).

<i>Extrajudicial Modification of “Small” Gifts</i>
<p>UPMIFA <i>Applies to “institutional funds” held by “institutions” but not “program-related assets.”</i></p> <p>If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, [60 days] after notification to the [Attorney General], may release or modify the restriction, in whole or part, if:</p> <p>(1) the institutional fund subject to the restriction has a total value of less than [\$25,000];</p> <p>(2) more than [20] years have elapsed since the fund was established; and</p> <p>(3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.¹¹³</p>
<p>UTC <i>Applies to express trusts, or portions of trusts, created for a charitable purpose.</i></p> <p>(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than [\$50,000] may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.</p> <p>(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.</p> <p>(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.</p> <p>(d) This section does not apply to an easement for conservation or preservation.¹¹⁴</p>
<p>Common Law <i>Applies to charitable gifts generally.</i></p> <p>No extrajudicial power.</p>

113. UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(d) (UNIF. L. COMM'N 2006).

114. UNIF. TR. CODE § 414 (UNIF. L. COMM'N 2000, amended 2010).

<u>Donor Consent to Modification</u>
<p>UPMIFA <i>Applies to “institutional funds” held by “institutions” but not “program-related assets.”</i></p> <p>If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.¹¹⁵</p>
<p>UTC <i>Applies to express trusts, or portions of trusts, created for a charitable purpose.</i></p> <p>No donor consent provision.</p>
<p>Common Law <i>Applies to charitable gifts generally.</i></p> <p>Generally no donor consent power.</p>

115. UNIF. PRUDENT MGMT. INST. FUNDS ACT § 6(a) (UNIF. L. COMM’N 2006).

<u>Standing to Sue</u>
UPMIFA <i>Applies to “institutional funds” held by “institutions” but not “program-related assets.”</i> Silent.
UTC <i>Applies to express trusts, or portions of trusts, created for a charitable purpose.</i> The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust. ¹¹⁶
Common Law <i>Applies to charitable gifts generally.</i> A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin. ¹¹⁷

116. UNIF. TR. CODE § 405(c) (UNIF. L. COMM’N 2000, amended 2010). The UTC comments explain that the class of “others” who can maintain a proceeding to enforce a charitable trust consists of a co-trustee, the state attorney general, and a person with a special interest in enforcing either the trust or their interests. *Id.* §§ 405(c) cmt., 413 cmt.

117. RESTATEMENT (SECOND) OF TRUSTS § 391 (AM. LAW INST. 1959). Contrary to the common law in other states, New York appears to have long permitted donors to sue to enforce their gifts under the common law. *See* *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S. 2d 426, 432–433 (2001) (citing *Assoc. Alumni of the Gen. Theological Seminary of the Protestant Episcopal Church in the U.S.A. v. The Gen. Theological Seminary of the Protestant Episcopal Church in the U.S.*, 57 N.E. 626 (N.Y. 1900) and *Mills v. Davison*, 35 A. 1072 (N.J. 1896)).

APPENDIX B

<u>Cy Pres Doctrine</u>
<p style="text-align: center;"><i>Restatement of the Law, Charitable Nonprofit Organizations</i></p> <p>If it is or becomes unlawful, impossible, impracticable, or wasteful for a charity to carry out its purposes, the court should direct application of the assets or an appropriate portion thereof to charitable purposes that reasonably approximate the designated purposes.¹¹⁸</p>
<p style="text-align: center;"><i>Restatement (Third) of Trusts</i></p> <p>Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.¹¹⁹</p>
<p style="text-align: center;"><i>Restatement (Second) of Trusts</i></p> <p>If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.¹²⁰</p>

118. RESTATEMENT OF THE L., CHARITABLE NONPROFIT ORGS. § 3.02 (AM. L. INST. 2021). The comments to this section clarify and confirm that the common law doctrine of *cy pres* authorizes a court to modify not only the purposes of a charity but also the purposes to which one or more charitable assets must be devoted. *Id.* § 3.02 cmt. a. In addition, like the Restatement of the Law of Charitable Nonprofit Organizations, the Restatements of Trusts have consistently recognized that “regardless of the legal form of the charity or the legal form in which a particular charitable asset is held, every charity is under a duty to administer each charitable asset it holds in accordance with any restriction governing the asset.” *Id.* § 4.01, Reporters’ Note 4.

119. RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. LAW INST. 2003).

120. RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. LAW INST. 1959).

Deviation Doctrine

Restatement of the Law, Charitable Nonprofit Organizations

(a) A court may modify an administrative term governing one or more charitable assets or direct or permit a deviation from such a term if deviation will further the purposes governing an asset because:

(1) compliance with the term has become unlawful, impossible, impracticable, or wasteful;

(2) the term impairs the prudent management or investment of an asset;

or

(3) circumstances exist that had not been anticipated by the donor.

(b) If it is unclear whether a particular term governing the use of a charitable asset applies to either the administration of the asset or the purposes to which it is devoted, the court should apply the doctrine of deviation rather than the doctrine of cy pres set forth in § 3.02.¹²¹

Restatement (Third) of Trusts

(1) The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.

(2) If a trustee knows or should know of circumstances that justify judicial action under Subsection (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.¹²²

Restatement (Second) of Trusts

The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, 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 purposes of the trust.¹²³

121. RESTATEMENT OF THE L., CHARITABLE NONPROFIT ORGS. § 3.03 (AM. L. INST. 2021).

122. RESTATEMENT (THIRD) OF TRUSTS § 66 (AM. LAW INST. 2003).

123. RESTATEMENT (SECOND) OF TRUSTS § 381 (AM. LAW INST. 1959).

Standing to Sue

Restatement of the Law, Charitable Nonprofit Organizations

(a) For a court to recognize the standing of a private party to bring or intervene in an action to enforce the purposes to which charitable assets are devoted or the administrative terms that govern them, the private party must demonstrate to the court that:

(1) the private party:

(A) has standing according to the documents governing the assets,

(B) has standing under applicable law, or

(C) is a party with a special interest, as defined in § 6.05; and

(2) the action is likely to be in the best interests of the charity in light of its purposes or, in the case of particular assets held by the charity, the action will advance the purposes to which those assets must be devoted.

(b) As a condition of maintaining an action under this Section, a private party must provide notice of the action to:

(1) any person with a right of reverter,

(2) any charity that is identified in the documents governing the assets in question as a beneficiary or an alternative beneficiary, and

(3) the state attorney general, as provided in § 5.01.¹²⁴

Restatement (Third) of Trusts

A suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust.¹²⁵

Restatement (Second) of Trusts

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.¹²⁶

124. RESTATEMENT OF THE L., CHARITABLE NONPROFIT ORGS. § 6.03 (AM. L. INST. 2021).

125. RESTATEMENT (THIRD) OF TRUSTS § 94(2) (AM. LAW INST. 2003).

126. RESTATEMENT (SECOND) OF TRUSTS § 391 (AM. LAW INST. 1959).