Understanding Donor Intent: Legal and Ethical Lessons from a Religious Nonprofit

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To maintain public trust, nonprofit agencies are legally and ethically obligated to steward gifts according to the donor's intent. This paper examines a donor intent case complicated by more than fifty years of mismanagement of the funds. The authors highlight the legal and ethical obligations that board members and other stakeholders must abide by in managing a nonprofit to protect its reputation and 501(c)3 status. We examine the legal issues related to donor intent, findings in philosophy and moral psychology about quick/automatic and slow/deliberate ethical judgment processes, and practical implications for adoption by boards addressing donor intent challenges.

INTRODUCTION

In 1958 a small Washington State Jewish Community Center (JCC), received an unexpected conditional gift of commercial real estate, in accordance with the Uniform Trust Code § 401. The donor, Mr. John Smith (name and locations have been changed), bequeathed the property to the JCC, a 501(c)3 organization, because he trusted the "Jewish People" to be good stewards of his bequest. At that time the JCC had fewer than 30 family units and functioned as the region's Synagogue. A specific condition of the bequest stated "that the property or increment there from, shall be used to assist in local relief of indigent families, either in care, education or refugee work." Mr. Smith's ultimate aim appears to have been to use his wealth to improve how others live.

From 1958 until 2006, the JCC leased the property to various commercial agents. However, throughout this time period, virtually all of the revenue flowed directly into the JCC's budget to be used for payment of operational and overhead expenses for the organization and upkeep, maintenance and insurance for the property. These other uses, including subsidizing the dues of the member families, seem plainly to violate the original intent of the bequest. Only a very small circle of 'old timers' were aware of the intent of Mr. Smith's bequest and these respected elders of the community frequently rotated amongst themselves the position of board chair. The donor's intent was unknown to others serving on the board for nearly 50 years (1958–2005).

In 2005 an opportunity to sell the property prompted a re-examination of the original letter that accompanied Mr. Smith's gift of the building and property. With the agreement of the JCC membership, the property was sold. Having concluded that the 47 year long use of the property income to support of JCC operations and overhead was inconsistent with Mr. Smith's intent, the Board placed the funds from the sale in an "investment account trust" (named the Jewish Community Center Endowment Fund or JCCEF). Given the wording in the letter and the powers of trustees, this action presents no conflicts with the Uniform Trust Code § 816, which enables such a transfer in order to facilitate the administration of the trust. The new account is a quasi-endowment or board-designated endowment. It was not legally established as a trust or an endowment fund (Fishman & Schwarz, 2006), since it does not have a separate board of trustees and control of the funds remains under the direction of the JCC Board through a board appointed committee that reports to the Board and oversees the JCCEF.

The JCC Board in creating the JCCEF gave the specific mandate to the committee that income from the endowment fund be used "to assist those members of our community whose financial circumstances warrant assistance in paying for Jewish education and care and membership obligations." The JCCEF by-laws, which the JCC Board voted to accept, state that the funds "shall be used for purposes consistent with the wishes of the donor of the property to JCC and include, but are not limited to, the assistance of indigents and immigrants, education and such other purposes as determined by the Board of JCC. By way of example, such purposes may include but not be limited to tuition payments, campership expenses, other educational expenses and payment of all or part of individual or family JCC membership dues."

Shortly after the creation of the JCCEF, a member of the JCC Board compared the new by-laws to the original bequest and raised concerns with the Board that again Mr. Smith's intent was being ignored. Funds were being used for non-indigents and to support JCC operations and overhead. Battle lines were drawn. Some JCC members wanted to follow the "rules" outlined in Mr. Smith's will. A majority of the Board members justified using the funds for operating expenses, arguing that without these funds the JCC might be forced to close. There were no known heirs of Mr. Smith to insist that his intent be followed. To date, therefore, only a very small amount of the JCCEF has been used to aid indigents, with the majority used to provide religious school scholarships and bolster the JCC operating funds by supplementing membership dues.

In discussing this case we consider what guidance religions nonprofits could find by considering their legal responsibilities, their religious and in this case specifically Jewish values, and ethics. We begin with Jewish philanthropic values relevant to this case and current law relative to donor intent, followed by a review of problems associated with interpretation and enforcement of donor wishes. We then consider the strengths and weakness of the applicable laws and examine how applying four ethics tests based on traditional ethical theory (Hamilton & Slatten, 2013) may have prevented the JCC from repeatedly ignoring donor intent. In conclusion, we offer concrete suggestions for nonprofit organizations to meet increasing expectations to be accountable and transparent (Hamilton & Slatten, 2013) by avoiding deliberate misuse of donor specified funds.

Jewish Philanthropic Values

Mr. Smith singled out the "Jewish People" to manage the property and its income because he trusted them to be responsible fiduciaries. Jewish philanthropy has a more than 5,000 year-old tradition of coming to the aid of the widow, the orphan, the stranger and the poor (Leviticus 25:23). This tradition is recorded in the Old Testament with such phrases as "Love your fellow as yourself" (Leviticus 19:18) and, "If there is among you a poor man, one of your brethren…you shall not harden your heart or shut your hand against your poor brother, but you shall open your hand to him" (Deuteronomy 15:7-8). The Old Testament makes philanthropy incumbent on all Jews by dictating that charity is a duty, a human stewardship of God's gifts, an empathy between rich and poor promoting social peace, and a distinctive tribal virtue.

Charity in the Jewish faith is referred to as Tzedakah or Acts of Tzedakah. Tzedakah is interpreted as the giving of alms or assistance to the needy and translates as *justice*. Today the term is connected with the modern expression of righteousness, integrity, and justice for all. It is unknown if Mr. Smith was aware of the Jewish approaches to philanthropy or if he left his bequest simply out of trust for the Jewish people; neither has an impact on the obligations the JCC had to properly and responsibly steward the funds.

Donor Intent

Donor intent and other related issues are among the most debated topics in trusts and estates law (Abbinante, 1997). Founding donors often leave little direction or very vague open-ended directives for trustees with no clear guidance as to how they might carry out the strategic objectives intended by the donor. Sometimes, the wishes of the donor are never discussed at a board meeting. Also, family members and golf buddies are not always the best board members or the most skilled at disbursing the donor's money to other charities. Some organizations have clear directives but have to deal with a change in circumstances that make it difficult or impossible to honor the donor's requests, including when relevance for the donor's intentions change. Examining several examples of shifting focus can be instructive.

The Ford Foundation, created by Henry Ford, serves as an example of the murky conditions under which donor intent may get off track. Ford left no instructions on the purpose of the foundation and today the general consensus is that the foundation supports programs Ford would generally be opposed to if comments he made about philanthropy while he was alive provide information regarding his interests and core beliefs. Like Henry Ford, Andrew Carnegie also left no instructions and today the organization supports funding for government welfare programs. Benjamin Franklin's Last Will and Testament established a trust in 1790 to benefit young apprentices in Boston and Philadelphia. The industrial revolution changed the apprenticeship business and illustrates the problem with directives that extend into perpetuity (White, 2004). White (2004) notes two simple truths exist when examining the issues surrounding donor intent today: no one lives forever and the world is ever-changing.

The JCC case may be closely compared to the Buck Trust case (Estate of Buck, No. 23259, Cal. Super. Ct., Marin County, Aug. 15, 1986). In 1975 Beryl H. Buck left an estate valued between $7-10 million to the San Francisco Foundation to provide "care for the needy and Marin County and for other nonprofit charitable, religious or educational purposes in that county". At the time of the bequest, Marin County had a population of 220,000 and had the second highest per capita income of any over-50,000 person county in the country, an unemployment rate of 3.29%, and led California in per capita and household income (Fishman & Schwarz, 2006). In 1984 The San Francisco Foundation petitioned to alter the trust under the *cy pres* doctrine in order to relax the geographic limitations in order to expand the awarding of grants to the needy to four neighboring counties. In 1986, the case settled out of court with the Marin County limitation intact and the San Francisco Foundation removed as the trustee. The court found that *cy pres* was inapplicable and may not be invoked on grounds that it would be more fair, equitable or efficient to spend the trust funds in a manner different from that specified by the settlor.

The common law *cy pres* doctrine states that if "a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful…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 purpose" (Uniform Trust Code § 413). However, the Uniform Trust Code also stipulates that the application of "cy pres to modify or terminate the trust only if, when the provision takes effect: (1) the trust property is to revert to the settlor and the settlor is still living; or (2) fewer than 21 years have elapsed since the date of the trust's creation" (Uniform Trust Code § 413). For example, in the Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University case, Vanderbilt University would have been required to return the present value of a gift to the donor if it went through with a plan to rename a dormitory given to the school by the Tennessee Division of the United Daughters of the Confederacy (Appeal from Chancery Court for Davidson County No. 02-3095-I, No. M2003-02632-COA-R3-CV, 2003).

The American Red Cross came under scrutiny from the public "donors" after the terrorist attacks on September 11, 2001. Contributions to the Red Cross and other disaster relief organizations in the days following the attacks were record-setting and estimated to be $2-3 billion, with the Red Cross alone receiving $997 million (Gary, 2010). Initially, the donations were placed into Red Cross disaster relief funds. However, the Red Cross later created a separate fund, the Liberty Fund, to collect all donations received after the attacks. With little fanfare or publicity, the Red Cross posted a memo on their website explaining the creation of the fund and stating that the monies would be used for aid to the victims of the September 11 attacks and for support of all future Red Cross responses to terrorist attacks in the future (Gary, 2010). The Attorney General of New York and numerous media outlets heavily criticized the actions of the Red Cross at the time noting that the donor's intention (providing aid to the victims of the September 11 attacks) had not been honored. Despite their contention that donors would support a decision to support a reserve-fund for future terrorist attacks, public (donor) outcry forced the Red Cross to end the solicitation of donations for the Liberty Fund and they later restricted the distribution of the funds to only victims of the September 11 attacks (Gary, 2010). More recently, after Hurricane Sandy in October 2012, the Red Cross raised over $300 million for a variety of disaster and relief needs including mental health services, food and shelter needs and casework (American Red Cross, 2014). Once again, controversy surrounded the use of the donated funds which led journalists from ProPublica to begin investigating the "black box" of the Red Cross. In 2014, ProPublica filed a public records request in New York essentially forcing the Red Cross to explain how the organization spends money after disasters. The Red Cross declined the request to disclose the information and their attorneys most recently filed paperwork insisting that the spending details should be treated as "trade secrets" and so exempt from the Freedom of Information Act (Elliott, 2014).

In Robertson v. Princeton the interpretation of the donor's intent was hotly contested. In 2002, members of the donor's family, filed suit against Princeton University alleging that the university failed to follow the directives of Marie and Charles Robertson when their gift of $35 million (in 1961) was given to support the work of the graduate program at the Woodrow Wilson School (Gary, 2010). The Robertson's alleged the school was misusing the funds as outlined in the original 5-page written agreement, Princeton had a pattern of spending restricted gifts to benefit the University's general fund, and the money provided funds for 'Princeton's private slush fund' (White, 2014). Attorneys for Princeton contended that the original agreement was a participatory agreement between the two parties and as such, the university did not violate any donor intentions but rather carried out the terms of the agreement which allowed them some latitude in how the gift could be used (White, 2014). Princeton further suggested that the use of less-than-precise language in the original agreement may have caused the confusion: the funds were to be used to train students for federal government service jobs focused in international relations (Robertson's view) vs. public service (Princeton's view). In his deposition, Princeton's former president noted that over the years young people became less interested in federal government jobs with an international focus but were instead interested in domestic public service careers and so the university made this adjustment relative to their spending and administration of the gift. Princeton settled the lawsuit in 2008 ($100 million) and in 2009, the Robertson Foundation at Princeton was dissolved (White, 2014). In his book on this case, Doug White suggests that this could be the story of any charity and its donors—the story about a failed donation and the questions it raises about oversight, transparency, the rights of donors and trust between two parties when charitable gifts are made (White, 2014).

More recently, in 2009, the Brandeis University Board of Directors voted to close the Rose Art Museum and sell the artwork despite the stated intentions of Edward and Bertha Rose. Exhibits from the 2009 case indicate the Roses established an endowment fund in 1958 to support the museum. Later documents, including Mr. Rose's will, reference a mutual agreement between Brandeis and the Roses that the museum will be maintained in perpetuity (Gary, 2010). The university insists that the economic recession and financial crisis of 2008 coupled with the loss of some big donors made it difficult to keep the museum open. One point that was not overlooked, however, was that in 2008, the collection of artwork was valued at $350 million (Gary, 2010). In 2011, the museum reopened after a legal settlement prohibited the sale of the artwork.

Over and over we see examples of situations where what seems so simple (give money to a cause to save the world) can turn into something so complicated (lawsuits, injunctions, negative publicity, harbored bad feelings, angry board members, ruined reputations and loss of credibility). Abbinante (1997) advances a most basic argument for respecting donor intent: trustees have a moral and legal responsibility to respect the wishes of the donor, the person who accumulated the wealth. The concept of "donor intent" is rather broad especially when we consider the players involved include the donors (some deceased), the heirs, and the charities (White, 2014). Given the changing landscape today, charities and all involved in their administration, need to understand the issue.

It is important to realize that donors have some responsibility too. These individuals should be counseled by the lawyers, bankers and accountants in this field to take concrete actions when creating the entities that will arrange and execute their charitable giving such that their individual intention(s) are respected and not shifted to other purposes.

Legal Issues

An examination of Mr. Smith's bequest, the JCC's use of the revenue, and the by-laws of the JCCEF raise numerous questions. First, did the past and present Board members fulfill their fiduciary duties of care, loyalty, and obedience as directors of JCC? Second, are the JCCEF mandate and by-laws true to the intent of the will and therefore legal? And finally, are reparations legally required for the inappropriate use of the funds prior to the sale of the property?

Furthermore, for many decades, because the JCC Board members were not informed of Mr. Smith's wishes, they were unaware of the terms of the will rendering them unable to fulfill their duty of care, which states "that every director take steps to become knowledgeable about background facts and circumstances before taking action" on matters (American Law Institute, Principles of Corporate Governance, § 4.01(a)(1) (1993)). In addition, The Uniform Trust Code, Article 8, makes clear that another basic duty of a trustee is that of loyalty, "which requires the trustee to manage the trust solely for the beneficiaries and to avoid conflicts of interest between trustee's interests and beneficiaries' interests…" (Trust Code Summary, 2014). More specifically, in Washington State, the obligation of prudent administration, RCW 25.05.165, underscores the failure of the past JCC Board members to consider the intent of the donor as expressed in a gift instrument and comply with the fiduciary duties of loyalty and care imposed by law. This law clearly states that the only fiduciary duties a partner owes to the partnership are the duties of loyalty and the duties of care (Revised Code of Washington, 2014).

Fiduciary Duties

With respect to the question of whether the past and present Board members were fulfilling their fiduciary duties of care, loyalty, and obedience as directors of JCC we need to examine the requirement of board members to engage in informed decision-making. The informed decision requirement focuses on board directors and officers being prepared when making decisions and not on the quality of the decision itself (Fishman & Schwarz, 2006). In the JCC case, one may argue that the board members, by and large, were unaware of the specific terms of Mr. Smith's bequest and so were, unable to make knowledgeable decisions with respect to the trust. The nonprofit sector applies the 'best judgment rule' which states that "if a director has made a decision by informing herself in good faith…there will be neither judicial inquiry nor liability even if the action was unfortunate for the organization or its membership" (cf. Block, Barton, & Radin, 1998). This rule would eliminate liability for the board members serving between 1958 and 2005 who were deliberately uninformed about the conditions of the bequest. However, after the donor intent became known to the JCC directors and members, this rule would no longer apply.

Prior to the sale of the property, the JCC Board members were not fulfilling their duty of care, nor acting with integrity or good faith as they chose to ignore the conditions of the will. The JCC had allowed the funds generated to be co-mingled and used for the congregation's operating and overhead expenses. When a bequest is made to a public benefit corporation, such as the JCC, the organization must hold the bequest (or gift) in trust with the sole purpose of applying any use of the bequest or funds generated from the gift to the mission or charitable purpose as stated in its articles of incorporation. Ultimately, if the organization dissolves, any remaining assets are held in trust and eventually conveyed to another public benefit corporation. In addition, "when property is given to a charitable corporation for specific purposes or with restrictions or conditions the weight of authority holds that it can only be used for that particular purpose" (Fishman & Schwarz, 2006, p. 121). This is elucidated by the case of St. Joseph's Hospital v.

Bennett, 281 N.Y. 115, 22 N.E.2d 305 (1939) wherein the settlor devised an endowment fund dedicated to the ordinary maintenance of the hospital. However, the hospital brought action in order to use revenue generated from the endowment fund to pay off a mortgage. Ultimately settled by the Court of Appeals, the decision stated that a charitable corporation may not receive a gift for one purpose and use it for another unless the alternative use was authorized by a court applying the *cy pres* doctrine.

The second legal issue is focused on whether the JCCEF mandate and by-laws are true to the intent of the will and therefore legal? The response to this inquiry is dependent on three issues: 1) gift acceptance; 2) *cy pres*; and 3) the definition of "indigent".

First, are there legal implications associated with the fact that the JCC was never given an opportunity to negotiate the terms of the gift with Mr. Smith? According to the Uniform Trust Code, "a person designated as a trustee who has not yet accepted the trusteeship may reject the trust" (Uniform Trust Code § 701) and a trustee does not "have a duty to act until the trustee has accepted the trusteeship" (Uniform Trust Code § 801). The JCC never executed a contract specifying their willingness to fulfill the conditions included in Mr. Smith's will, but neither did they reject the trust. In fact, a written contract does not necessarily have to be signed in order to be binding on the parties. Case law does exist (St. Mary's Medical Center, Inc. v. Vincent McCarthy (Vanderburgh Circuit Court 82D03-0407-PL-3568, 2005)) recognizing that the acceptance of a bequest creates a binding agreement. In accepting the gift of the property, the JCC Board of Directors established a contract to responsibly manage the trust according to its specifications. At the time of the bequest, the JCC Board could have forfeited the gift, if they anticipated their inability to execute the trust (Uniform Trust Code § 701).

The second issue is whether JCC was legally able to make changes in the conditions of the bequest. The JCC Board must uphold their duty of obedience, to make decisions in favor of the organization regardless of personal interest, and accept the obligations bestowed upon them when they accepted this gift. As noted above, the courts have determined that property can only be used for the particular purpose stated in the trust.

While, the JCC Board does have the option of filing a request for *cy pres*, the court would likely not find a legal right to alter the conditions of Mr. Smith's gift. Applying the doctrine of *cy pres* seems inappropriate in this case because the charitable purpose of the trust has not become impossible, impractical or illegal. And, *cy pres* may not be invoked simply because it is more fair, equitable or efficient to spend funds in a manner different from that specified by the settlor. The terms of Mr. Smith's bequest are still as relevant today as they were when the bequest was made more than 50 years ago. One might expect a reasonable court would find the gift of real estate continues to be legal and the JCCEF is capable of executing Mr. Smith's conditions; therefore, the trust does not need to be altered. Similar to the Buck Trust case, it is unlikely that the court would apply the *cy pres* doctrine to the JCC, therefore, the JCC has no right to create by-laws for the trust that are contrary to Mr. Smith's desires as outlined in the bequest.

The third issue concerns Mr. Smith's intent in his use of the word "indigent." Mr. Smith specified that the funds be used to "assist in local relief of indigent families." The JCCEF by-laws state that these funds may be used for indigents, but additionally may be used to assist in dues, education and camp tuition for congregants. The legal definition of "indigent" can be summarized as a person so poor and needy that he/she cannot provide the necessities of life (food, clothing, and decent shelter) for himself/herself and who has no financial support from any other (Farlex, 'Lectric Law Library & Duhaime.org). So far, none of the families provided with assistance from JCCEF would have met this definition of indigent. Mr. Smith did not stipulate a time frame for distribution of the trust funds, therefore, the JCCEF could conceivably retain the funds in perpetuity or until such time as an indigent Jew needs assistance. However, would this have been Mr. Smith's intent? Mr. Smith never stipulated any religious, ethnic, or cultural constraints for those who could receive benefits from the trust, suggesting that the funds were to be used for indigents in the community beyond the JCC.

One final matter to consider deals with how the JCC Board might handle the misappropriation of funds. Are reparations legally required for the inappropriate use of the funds prior to the sale of the property? In 2005, the JCC Board President told the membership that, "While it would be theoretically possible to go back through the books to figure out exactly what belongs to Mr. Smith's bequest and what belongs to JCC, the effort to do this wouldn't be worthwhile." However, the JCC Board, acting as a beneficiary for Mr. Smith, is liable for the misappropriated funds (Uniform Trust Code Article 10). In fact, the successor trustees have a legal obligation to compel a redress of a breach of trust committed by the predecessor trustee and "restore the value of the trust property and trust distributions to what they would have been had the breach not occurred" (Uniform Trust Code § 1002).

Ethical Issues

In addition to applying Jewish philanthropic principles and following the law regarding donor intent, generally accepted ethics tests could have served JCC as a guide. For a nonprofit board to use ethics to judge whether their actions are right or wrong, it is important they understand what ethics is and how it operates. Ethics are the principles, rules, values, and habits that guide behavior. These guides are adopted by society and individuals because they allow people to live and work together in complex societies and pursue common and individual interests (Appiah, 2008; Haidt, 2007; Tenbrunsel & Smith-Crowe, 2008). Ethics can involve divine, societal, group and individual guidelines (Appiah, 2008; Walzer, 1994) and though these guidelines are accepted as essential to orderly functioning, individuals can dissent from this consensus on what is right or wrong. Heroes such as Martin Luther King Jr. dissent and bring about change in the consensus, while villains such as Charles Manson dissent and are punished for it. To dissent from the social consensus represented by the law, the elders and the JCC Board would have to explain why failing to honor the donor's intent was the right or good thing to do in this circumstance. To be recognized as valid, their explanation would need to be based on criteria that society recognizes as valid for determining what is right or wrong.

Current research suggests that humans have two kinds of mental processes for determining what is right or wrong: the quick/automatic functions of gut intuition and imitation of others and the slow/deliberate functions of reflection and discussion with others (Kahneman, 2011). Some researchers contend that most ethical judgments are quick/automatic gut reactions to a certain aspect or pattern in a situation joined with an emotion that trigger a conviction about what is right or wrong (Haidt, 2012, Narvaez, 2008, Reynolds, 2006). These quick/automatic intuitive judgments give us a trustworthy, energy-efficient way to recognize how we and others ought to act.

Haidt (2012) claims that there are six such pattern/emotion triggers for judging right and wrong that are our genetic inheritance as interpreted by today's society. The elders who used the money to benefit the members of the JCC may have felt it was ethical because of their much stronger loyalty/affection ties to the in-group of their fellow members than to an out-group of the indigent. On the other hand, the unfair/disgust trigger in the situation may have prompted the objecting board member to recognize immediately that ignoring donor intent was wrong. To resolve her disagreement with the elders she could acknowledge the importance of loyalty to their shared faith and traditions *and* prompt them to widen this in-group trigger to include the indigent by presenting concrete examples of the needs of the poor and pointing to Jewish traditions of philanthropy and welcoming the stranger. This strategy seeks to alter the elders' ethical judgment based on the same loyalty/affection trigger the elders are already experiencing. She can also try to alter their judgment by changing their pattern/emotion when she points to the unfair/disgust trigger she is experiencing. Changing the trigger is a harder sell because the elders are already confirmed in the pattern they see and emotion they feel.

Narvaez (2008) uses findings from developmental psychology to show that early childhood experiences of nurturing and externally-imposed discipline develop a person's confidence that the world is secure and a desire to pay attention to the needs and wants of others. These formative experiences of security and empathy are the foundations for immediate intuitive judgments of right and wrong. Failure to receive this nurturing and discipline or later experiences of danger to one's self and community can cause an individual or group to make exclusively security-focused quick/automatic ethical judgments in which right or wrong is based on what keeps the person and his/her group safe. Knowing that the elders could be operating from this security frame of mind, she should listen for strong concerns expressed by the JCC members about the survival or safety of the group. These concerns would suggest their quick/automatic intuition that ignoring the donor's intent is ethical may have come from an overemphasis on security. To resolve this disagreement, the board member could acknowledge the validity of these concerns *and* point out the more immediate threat to the group's viability from the board's failure to follow the law. She could also mention that publicity about their ignoring the donor's intent may damage their community standing/reputation and encourage members to no longer be associated with the group. Attempting to engage their empathy for the indigent is unlikely to be successful if their experiences have locked them into a security frame for making quick and automatic judgments (Narvaez, 2008).

Board members who are attempting to determine whether the policy of ignoring the donor's intent is ethical could also utilize slow and deliberate ethical judgments based on generally accepted ethics tests translated into business and professionally friendly language (Hamilton & Slatten, 2013) available at EthicsOps.com (Hamilton, 2015) and employed successfully by trainers in a variety of professional fields.

The Smell Test

Nonprofit executives and board members who have been through ethics training in industry will likely be familiar with the "Smell Test" (see Figure 1). Sometimes called the publicity test or newspaper test, this approach directs a person to ask how he/she would feel if the proposed action (ignoring the donor's intent) were published in the newspaper and became public knowledge. An alternate version asks whether the person would be comfortable explaining the action to his/her spouse or grandmother. If the JCC Board were to apply the Smell Test to their situation, they would undoubtedly see that others in our society would not think it was right to ignore the donor's intentions.

FIGURE 1
THE SMELL TEST

Introduce the Test	*"What would the action or situation smell like if we read about in a news newspaper or blog?" "Could I explain it to my spouse or grandmother?"*
Apply the Test & Draw a Conclusion	If we would be embarrassed if the action became public it is unethical because it violates the way others expect us to behave.

This test has the advantages of being quick and easy and enlists the powerful emotion of shame. A limitation, however, is that it does not provide any insight into why the action is right or wrong. Understanding why something is wrong is valuable because it may provide insight into how an unethical action could be altered (generating publicity about the use of the bequest to help the indigent as a way of increasing community support) to achieve the benefits that made it initially attractive (funding JCC activities without dues or fundraising) while avoiding what makes the action wrong (breaking their contractual promise to the donor).

The Best Outcomes Test

Because they are concerned about preserving the benefits that the JCC provides its members, the board could use the Best Outcomes Test (see Figure 2). This Utilitarian approach asks whether the action's being considered will produce the best outcomes for all those who are affected. Since everyone is equal as a human being and since everyone wants to be happy, the right action is the one that produces the most happiness and the least unhappiness for all. To apply the test, the board would determine the main alternatives for dealing with the situation (ignoring what the donor intended, or following his intentions) and who will be affected by these actions (the JCC and its members, the donor, indigent people who could be helped by the bequest, and the larger society, future donors, and those who could benefit from their generosity).

FIGURE 2
BEST OUTCOMES TEST

Introduce the Test	*Will this action produce the best outcomes for everyone affected?*
Apply the Test	Identify the possible actions and those who will be affected For each action, determine the benefits and costs to everyone affected. • Predict probable outcomes based on facts and experience • Include short-term and long-term consequences • Consider relative value or "marginal utility" of the outcomes to individuals affected
Draw Conclusion	Select the action that produces the greatest benefits over harms for all affected.

A superficial analysis might suggest that since ignoring the donor's intent can be concealed successfully, the best outcome would be to avoid having to take money from the JCC members while providing them with valuable services. Since the donor is no longer alive and has no family left to suffer the disappointment of seeing the funds used for different purposes, the harms to them and society as a whole seem negligible. Disclosing what seems to be fraud in the past would seriously harm the group without providing any offsetting benefits to society. Ignoring the donor's intent, therefore, might seem to provide the best outcomes.

Though attractive, this analysis commits two common mistakes, the short-term error and the limited stakeholder error (Hamilton, 2015). Ignoring donor intent has long-term harms that show it will not provide the best outcomes in the long term. The fact that the actions of the elders and the board did become known and discussed, even in a case study, introduces a series of harms. If their actions are discovered, the JCC and its members will likely suffer some embarrassment and loss of reputation, current members may have to begin funding ongoing operations and perhaps be forced to repay the misdirected funds.

The quick analysis also succumbs to the limited stakeholder error by considering only the outcomes for the JCC and ignoring the harm to those in need. If past and present members are financially secure, then the marginal utility of the dollars saved by them is much less than the value these dollars would have had in the lives of the indigent who could have been helped. The best outcomes would be to follow the donor's intent.

An advantage of the Best Outcomes test is that it requires a realistic assessment of how much good or harm would be brought about by each of the alternatives. For example, looking for the "best" outcome may prompt the board to suggest an additional alternative of repaying the misdirected money and doing it over several years may soften the effect on current members and insure the continuation of the organization by avoiding a rush to the exits by members who find an immediate repayment burdensome.

The Everybody Test

This standard could be introduced into the JCC Board discussion by asking what things would be like if everybody did this action: "What if all agencies failed to follow the wishes of donors?" Since everyone is equal as a human being, what is right for one person or institution should be right for everybody in the same circumstances. (see Figure 3)

FIGURE 3
EVERYBODY TEST

Introduce the Test	*What if everyone did that?*
Apply the Test	Describe the action to show the general category and/or specific features • Does it fall in a general category such as “not telling the truth” • Does it have specific characteristics such as “not telling the truth to save a life” • Does it avoid words that already contain an ethical judgment like “lying” or “murder” Ask, “What would happen if everyone did it?” If others acted this way in similar situations, would it: • Become **impossible** for anyone to do it because of the reaction to everyone acting that way (if all nonprofit organizations concealed fraud would funding sources quit funding them)? • Create a world or business climate **unacceptable to us** because everyone was doing it (do I want to operate in a business climate in which agencies don’t honor their contracts)? Ask, “What if they **did it to us**, would that be ethical?” If it is not ethical for others to do it to us, then it is unethical for us to do because everyone is equal.
Draw a Conclusion	If it is impossible for everyone to do it because of the reaction to this universal practice or if I don’t want to live in a world in which everyone acts that way, or it is unethical for others to do this to me, then it is unethical for me to act that way.

The Everybody Test is not the same as the “everyone else is doing it” justification. In most cases everyone is not doing what is wrong (Gentile, 2011; Hamilton & Slatten 2013). This test asks what would happen if everyone in similar situations really were to act the way we would like to act. As someone in the discussion might say, “If we think it is right for us to ignore the donor’s intent and use the proceeds for other activities, then we are saying that every other agency ought to be able to do the same thing.”

To apply the Everybody Test, the board would first need to describe the ethically relevant aspects of the action being considered. Ignoring the donor’s intent could fall into the ethically questionable category of failing to honor a contract or promise (to respect the donor’s intent as a condition for receiving the legacy). Actions of this type could be ethical, however, only if there are special circumstances. Refusing to honor a contract because of an inability to perform because of bankruptcy or if its provisions are no longer legal or ethical such as excluding people of color or Jews from purchasing real estate or joining social organizations, would be ethical because the circumstances are recognized as justifying an exception. In the JCC case the only special circumstances are to save members from having to pay dues and from having to do fundraising, neither of which would seem to justify making an exception to what is a universally recognized ethical obligation to keep one’s word.

To sharpen the analysis based on the Everybody principle, the board should ask what would happen if all agencies ignored donor intent in order to benefit their members. If everybody acted this way, then donors would quit making bequests to nonprofit groups since their intentions would be ignored with the result that no agency would be able to ignore intent. Nor is it easy to imagine that the board members would want to live in such a society or have an agency treat a bequest they made that way. Since it is not possible for all agencies to act this way and board members would find such a universal practice unacceptable, it is unethical for them to do it since all such agencies should be required to follow the same ethical standards.

The Choices Test

This ethics test could be introduced into the board's discussion by asking: "Are all those affected able to choose what they value?" (see Figure 4). Since everyone is equal and each person knows best what he/she likes, wants, and thinks is valuable, then each person should be *free* to choose and should have the *information* needed to choose what they value. Others should not be able to choose for them unless they are unequal to those choosing. Children, for example, may need others to choose for them as they gradually gain the ability to recognize what they value. A person may also have given up future choices by an agreement or contract in order to secure other benefit, such as employment or a place in a group or team.

FIGURE 4
CHOICES TEST

Introduce the Test	*Are all those affected able to choose what they value?*
Apply the Test	Am I giving others **freedom** to choose what they value? • Am I forcing or coercing others to choose something they do not value • Are there prior choices (contracts, promises) that limit anyone's freedom? Am I giving others the **information** necessary to know what they value? • Do they have information (or reasonable access to information) to know which alternative best fulfills what they value. • A practical test: would they choose differently if they had additional information?
Draw a Conclusion	It is unethical for me to deny others the freedom and information necessary to choose what they value.

Freedom is a complex concept and the subject of much philosophical controversy. As an operational definition for ethics, however, a person is free to choose if he/she is not being forced or coerced to make a choice that is contrary to what he/she values. Applying this definition to the case shows that ignoring the donor's intent does not limit his freedom since his is not being forced or coerced to give JCC the bequest. The requirement for freedom to choose does, however, have a bearing in the case because the JCC gave up any future choices to use the money differently since the board agreed to honor the intent when it accepted the bequest.

The information requirement in the Choices Test obligated the elders who accepted the bequest to inform the donor's legal representative that they did not intend to honor the intent. The donor's representatives could then decide whether to make the bequest anyway because the activities funded were valuable or direct the bequest to another agency to do the work the donor valued. The elders' decision to conceal the donor's intent from other board members is not ethical because the others then lack critical information to choose how they think they should discharge their duty of care as board members with regard to the funds.

A helpful way for the board to apply the Choices test would be to ask whether there are any parties that would have chosen differently if they had additional information or had more freedom to choose. Both the donor and board members would likely have acted differently if the elders' intention to ignore the donor's intent had been revealed. Using this ethics test reminds nonprofit board members of the need to ask for additional information and scrutinize budgets in order to fulfill their duty as board members.

There are other ethics approaches that could also be used to guide the board's discussion of whether to follow the donor's intent and making reparations for past failures (Hamilton, 2015). All of these tests are valid ways of arriving at ethical judgments, though some may be more pertinent to any given circumstance than others. The four tests discussed in detail herein are good candidates for staff and board member use since they capture aspects of ethics that most people in western societies recognize as essential—reflecting the society's consensus on what is ethical, concern about outcomes, applying ethical requirements to everyone equally, and the importance of those affected being able to make their own choices.

Epilogue

Fifty-five years after receiving Mr. Smith's bequest and eight years after the rereading of the donor's letter of intent, the JCC Board of Directors agreed to review the terms of the gift and the by-laws written by the JCCEF. Shortly thereafter, the Endowment Committee made the following recommendations that were accepted by the JCC Board:

1) The JCCEF will continue and enhance our support of charitable organizations in the community, and will research ways of being more active in directing support to "indigent and immigrant families in need"; and
2) The JCCEF is suspending the funding of JCC membership dues effective immediately.

These two changes eliminate the use of funds from the trust for organizational and overhead purposes and redirects the funds closer toward Mr. Smith's original intent of helping the communities poor and indigent. No effort has been made toward reparations.

CONCLUSION

Nonprofit board members cannot ignore the legal and ethical obligations that are part of serving on a board no matter the size or scope of the organization. Inherent in this responsibility is the important element of trust and a commitment to honor donor intent. In the same vein, donors bear the responsibility of making their wishes clear without being too specific or inflexible. Creating thoughtful statements about the desired intent of the gift of assets and careful planning so that family, associates and future board members or trustees can understand and carry out the intended mission set for them by the donor is important (Cain, 2012). A lack of foresight and planning may lead to violations of donor intent which could potentially cause a decrease in the amount of charitable giving by others as they see a lack of respect for donor wishes from those entrusted with decision-making power in charitable organizations (Cain, 2012).

As this paper shows, there exists a history of scandal and mis-steps relative to honoring the wishes of donors over a period of time. One may even argue that one of the great scandals in philanthropic giving today is that trustees and staff at foundations and other grant-making organizations too often pay little attention to the real wishes of those making the charitable giving possible (Meyerson, 2012). In fact, some donors are reconsidering their charitable donation practices of the past and adopting a new mindset. A recent gift to Cornell University from Chuck Feeney illustrates such innovative thinking. Feeney specifically expressed his intention to "give while living" and the foundation from which he made the large donation to Cornell has announced it will cease making grants in 2016 (Meyerson, 2012). The Bill and Melinda Gates Foundation (estimated value in March 2015 = $42.9 billion) was created to be a non-perpetual foundation and will spend its money and terminate within 50 years after the deaths of the founders (White, 2014). Perhaps these two examples will set a precedent for the future.

Preserving donor intent is the responsibility of trustees—not the courts. As White (2014) has discussed, a donor's intentions are important because the relationship between the donor and the charity is fundamentally based on trust. Managing these relationships can present a range of significant challenges to all of the parties involved. The problems discussed in the case of the JCC are not atypical and this paper profiled other charitable organizations who have struggled with safeguarding donor intent. An appropriate solution requires a two-pronged approach: proper education in the board room for trustees, including the application of common ethical standards tests and training in accountability, governance and legal issues associated with donor intent; and proactive behavior on the part of donors, including the crafting of a clear charitable mission, creating strong procedures and policies for trustees that allow them to preserve donor intent, and establishing safeguards that provide meaningful oversight consistent with the purpose and goals associated with the charitable donation.

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