

MEMORANDUM

Date: March 1, 2018

To: Alliance for Vermont Communities
From: Sam Lambert, Ray Quinney & Nebeker
Re: Whether a gift condition could plausibly justify transfer of property from NewVistas Foundation to David Hall

Question Presented

Can David Hall plausibly claim that the transfer of real property by NewVistas Foundation (“NV Foundation”) to Hall’s private for-profit companies was lawful because Hall’s original gift of cash (or cash equivalents) to NV Foundation was conditional and that the condition had failed by December 2016?

Facts

The following facts are on information and belief:

In 2015 David Hall donated approximately \$14 million in cash or cash equivalents to NV Foundation. So far as we know, there was no written gift agreement related to this donation. NV Foundation has no other significant donors. Hall and his family members control NV Foundation. NV Foundation’s articles of incorporation express that NV Foundation’s assets are committed to charitable, educational, and other purposes consistent with tax exemption pursuant to IRC § 501(c)(3), and contain no other restriction on the scope of NV Foundation’s activities. In 2016, Hall caused NV Foundation to acquire (with the donated funds) properties in Utah and Vermont. Hall also apparently caused NV Foundation to spend funds on other organizational and operational pursuits of NV Foundation, such as public educational efforts and public relations.

In January 2016, NV Foundation applied to the IRS for recognition as a private foundation, tax exempt pursuant to IRC § 501(c)(3). The exemption application, signed by Hall under penalty of perjury, states that “Hall has contributed approximately \$14,000,000 for the acquisition, conservation, and maintenance of real property by the Foundation.” Elsewhere the application acknowledges the \$14,000,000 was contributed to the foundation in 2015. There is no indication, suggestion, or even hint in the exemption application that any of these contributions were anything but unconditional. In August 2016 Hall wrote a



letter to the IRS in an attempt to convince the IRS that NV Foundation does not seek to further the interests of NewVistas Trust, a trust that was described by Hall in NV Foundation's exemption application as the owner of three for-profit subsidiaries and formed for the purpose of establishing and supporting a for-profit community of businesses and individuals on the "NewVistas model."

In late 2016, before the IRS had even made a final decision about NV Foundation's exemption request, Hall caused NV Foundation to transfer, without consideration, its real property to two other for-profit entities owned and controlled by Hall.

In 2017 the IRS informed NV Foundation that its application for exemption was approved, but that the tax exemption was not retroactive to the foundation's organization date. Rather, it would be considered an exempt entity only as of February 16, 2017. This unusual refusal by the IRS to make NV Foundation's exemption retroactive is likely because Hall failed to convince the IRS that NV Foundation's activities as originally planned were charitable, educational, etc. within the meaning of IRC § 501(c)(3). Hall presumably directed NV Foundation to transfer its real property to Hall's for-profit entities in late 2016 because he wanted to develop the properties, but the IRS informed Hall that NV Foundation would not be recognized as a tax exempt private foundation under federal law if the foundation's assets were used to develop a community on the for-profit NewVistas model.

Discussion

A. The Law Governing Restricted and Conditional Gifts

1. General Principles Regarding Restrictions & Conditions

A charitable donor can make stipulations that affect whether a gift occurs at all, about the permanence of the gift, about the permitted uses of the gift, and so forth. In discussing these various possible stipulations, it is useful to define terminology.

If a donor stipulates that a gift must be used for a particular purpose, the gift is "restricted."¹ For example, the donor might provide, "I donate \$1 Million to be used to construct a hospital." A restriction alone creates no reversionary interest in the donor, it merely limits how the donee can use the donation. The doctrine of *cy pres* allows a court to modify a restriction when the purpose for the restriction is no longer possible, practical, or legal.

¹ Cases do not always use these terms as terms-of-art consistent with our definitions. In other words, a court might say a donor made a "conditional gift" and the context of the case may make it clear that the court is using the concept we have defined as a restricted gift.

If a donor stipulates that a gift is not complete until a particular event occurs, the gift is “conditional.” For example, the donor might provide, “If the University names the hospital after my mother, this \$1 Million will transfer to the University.” The condition illustrated here is a condition precedent because it must occur before the gift.

A gift can be both restricted and conditional: “If the University names the hospital after my mother, this \$1 Million will transfer to the University, to be used solely for maintenance of the hospital lobby.”

Some gifts have a condition subsequent. If a specified event happens after the gift is completed (commonly a failure to abide by a restriction), the property is transferred back to the grantor (or the condition’s occurrence may merely give the donor the option to reclaim the property).

As a corollary to these rules, a donee can use an unrestricted gift for any lawful purpose and has absolute and immediate ownership of an unconditional gift. See 38 Am. Jur. 2d Gifts § 67 (“An intervivos gift, made without condition, becomes irrevocable upon acceptance.”). If a gift to a charity is unconditional, not only is a charity not required to honor a request by the donor for return of the funds, it is in fact *barred* from honoring such a request. Honoring a request to return an unconditional gift would violate both state law² barring private distributions from nonprofit corporations and federal laws³ barring private benefit, private inurement, self-dealing, excess benefit transactions, and taxable expenditures. We have addressed the illegality of such transfers and how they apply specifically to NV Foundation and Mr. Hall in a previous memo.

2. Common Law Governing Conditional Gifts

Under the common law, “Whether a gift is conditional or absolute is a question of the donor’s intent, to be determined from any *express* declaration by the donor at the time of the making of the gift or from the circumstances.” 38 Am. Jur. 2d Gifts § 66 (emphasis added). The law disfavors completed charitable transactions being unraveled over unprovable claims of donor intent. Accordingly, courts will interpret gifts as not being subject to a condition unless there is clear evidence to the contrary. *Tennessee Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98 (2005) (“Because noncompliance results in a forfeiture of the gift, the conditions must be created by express terms or by clear implication and are construed strictly.”); *Murphy v. Bilbray*, 1997 WL 754604 (S.D. Cal. 1997) (“[I]f a doubt exists, ‘a gift must be interpreted in favor of a charity’ ... ‘reverter is a type of forfeiture, abhorrent to the law.’”).

² E.g., UCA §§ 16-6a-116, 825, 1301, 1302

³ E.g., IRC §§ 4958, 4941, 4945(d)(5).

“The intent of a donor to condition a gift must be measured as of the time the gift is made.” 38 Am. Jur. 2d Gifts § 66. Attempts by donors to attach “‘after-the-fact’ conditions [to a gift] are not recognized by the law.” *Courts v. Annie Penn Memorial Hospital, Inc.*, 431 S.E.2d 864, 868 (N.C.App. 1993). *See also Bills v. Wardsboro School District*, 554 A.2d 673 (Vt. 1988) (affirming trial court determination that gift of land to a town for a school site was unconditional, notwithstanding deed provision including condition, where plaintiffs made a “completed gift of the land” one decade earlier).

The absence of express language in the documentation of a gift that the property will “revert” to the donor upon the occurrence of certain circumstances is generally treated as conclusive that the gift is not conditional. *See* 15 Am.Jur.2d Charities § 140 (“Absent a provision in a charitable disposition for reversion to the grantor, none will be implied.”); *id.* (“Conditions placed by the donor upon the use of the property or fund donated for charitable purposes, restrictions upon alienation or encumbrance, and other limitations so clearly expressed as to amount to conditions, *coupled with language indicating that the reservation of a right to revert in case of breach*, are valid and will be enforced at the instance of the donor, his or her heirs, or successors in interest.”) (emphasis added). *See also Lucker v. Bayside Cemetery*, 979 N.Y.S. 2d 8, 17 (App Div.2013) (“When a valid charitable trust is created, without provision for a reversion, the interest of the donor is permanently excluded”), quoting *Stewart v. Franchetti*, 153 N.Y.S. 453, 457 (App Div. 1915).

A donor’s purpose or intent to achieve a particular end in making a charitable donation is not sufficient to make a gift conditional. *See Colgan v. Sisters of St. Joseph*, 694 N.E.2d 989 (Ill.App. 1992) (“The fact that a clause in a will merely states the purpose for which a bequest is made or defines or explains the use to which it is to be applied is not ordinarily regarded as creating a condition subsequent subjecting an estate to divestiture in case of breach of such condition.”); *cf. Suffolk v. Greater New York Councils*, 413 N.E. 2d 363, 364 (N.Y. 1980) (language that is “essentially precatory in nature (‘It is my wish’)” does not create an enforceable restriction on a gift). Accordingly, “the mere fact that the donee fails to do what the donor hopes and expects of the donee does not warrant the revocation of a completed gift.” 38 Am. Jur. 2d § 66. Or as the Utah Court of Appeals succinctly put it, “the reason for a gift should not be confused with the donor’s intent that the gift be revocable.” *Hess v. Johnson*, 163 P.3d 747, 753 (Ct. App. Utah 2007).

3. Examples of Unconditional Gifts and Conditional Gifts.

Courts across the country not infrequently encounter the question of whether a gift made to charity was conditional or unconditional, and whether the donor (or his or her successor in interest) is entitled to return of the donated property based on some subsequent action or circumstance. These cases, which

follow a generally consistent pattern, provide useful guidance on when a gift to charity can or cannot reasonably be determined to be conditional.

a. Unconditional Gifts.

In *Courts v. Annie Penn Memorial Hospital, Inc.*, 431 S.E.2d 864 (N.C.App. 1993), the Court of Appeals of North Carolina affirmed a trial court's entry of summary judgment against a woman who sought return of thousands of shares of R.J.R. Nabisco she had donated to a local hospital. She alleged she made the gift on the condition that the hospital would establish a foundation named after her family but the hospital failed to do so. To determine whether the gift was conditional, the Court said, "The intent of the donor to condition the gift must be measured at the time the gift is made, as any 'undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention.'" *Id.* at 866-67, quoting *Howell v. Smith*, 128 S.E. 2d 144 146 (1962). Examining the evidence and documentation of the gift, the Court found no evidence that a condition was attached to the gift at the time the gift was made. Rather, the donor later became disappointed with the donee and wanted her donation back.

In *Solomon v. Hall-Brooke*, 619 A.2d 863 (Conn, App. 1993), the Appellate Court of Connecticut affirmed the rejection of an action by a donor seeking the return of a hospital and its assets donated to a charitable foundation on the ground that there had been a breach of conditions attached to the gift. The plaintiff claimed that her gift to the foundation was conditioned on her continued employment by the foundation and lifetime tenure as a trustee of the foundation. After the foundation board removed the plaintiff from all her positions at the foundation, she claimed a breach of these conditions and sought return of the hospital and its assets to her. The appellate court affirmed the rejection of this claim based on the trial court's findings that there was "an absence of written documentation" of the alleged conditions.

In *Maffei v. Roman Catholic Archbishop of Boston*, 867 N.E. 2d 300 (2007), the Supreme Judicial Court of Massachusetts affirmed rejection of a suit by parishioners who had gifted real property to a church alleging, among other things, that they were entitled to return of the property because the church had breached a condition of their gift by closing the parish located on the property. The court said the claim of a conditional gift "was belied by the clear and unambiguous words of the deed," which did not "recite any alleged agreement concerning using the property 'forever' as a church" and made no reference to ever returning the property to the donors.

b. Conditional Gifts

In *Adler v. SAVE*, 2013 WL 401286 (N.J. Super. A.D.), the New Jersey intermediate appellate court affirmed an order requiring an animal welfare group to refund a gift where the organization solicited and accepted the gift, “knowing that the donor’s expressed purpose was to fund” the construction of a specific animal shelter. The group diverted the funds to other purposes. A judicial order requiring return of the gift was warranted, the Court explained, where “the record . . . makes it clear that plaintiffs expressly announced their conditions at the time they made their gift, and defendant expressly acknowledged those conditions at the time it accepted plaintiffs’ gift.”

4. Modern Statutory Law - UPMIFA

Almost every state (including Utah -- in 2007) has adopted the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”), which governs the receipt, management, and use of funds by “institutions.” UCA § 51-8-101 *et seq.* “Institution” is defined to include any entity “organized and operated exclusively for charitable purposes.” UCA § 51-8-102(6)(a), (10). “Charitable purpose” is broadly defined to include “the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of governmental purposes, and *any other purpose the achievement of which is beneficial to the community.*” UCA § 51-8-102(1) (emphasis added).

UPMIFA provides that a charitable gift is unrestricted unless restrictions are made *in writing*. UCA § 51-8-102(3) (“‘Gift instrument’ means a *record or records*, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution”) (emphasis added). The National Conference of Commissioners on Uniform State Laws, which drafted UPMIFA, explained in its commentary on the law that “The definition clarifies that the only legally binding restrictions on a gift are the terms set forth in writing.”⁴ UPMIFA thus intentionally supersedes any suggestion in any pre-UPMIFA case that unwritten instructions might create a binding restriction. In *Koret v. Taube*, 2016 Cal. Super. Lexis 7316 (April 11, 2016), the Court relied on the gift instrument requirement in UPMIFA (which had by then been incorporated into the California probate code) in holding that the gift at issue was not restricted: “Donors may create binding restrictions on the use of gift money only by expressing the restrictions in a ‘gift instrument.’”⁵

UPMIFA covers restrictions, and does not explicitly discuss conditions, but its application to conditions is apparent. If a condition relates to a restriction on the use of donated property or funds, then a restriction *and* a condition are in

⁴ http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf at 8.

⁵ It’s not clear that application of UPMIFA was appropriate where the gift was made prior to passage of UPMIFA, but the case clearly illustrates how UPMIFA is interpreted and applied.

place. In other words, a gift may be restricted for use in furthering a particular purpose, and the gift also may be conditioned upon the donee complying with the restriction.

B. Hall's Gift Was Neither Restricted nor Conditional

1. Hall's Gift Was Unrestricted

a. NV Foundation is Governed by UPMIFA

NV Foundation is an institution governed by UPMIFA. NV Foundation is organized as a Utah nonprofit corporation. Property owned by nonprofit entities is a "gift to the community." *Utah County Board of Equalization v. Intermountain Health Care*, 709 P.2d 265, 269 (Utah 1985). Thus, such funds fall within UPMIFA's definition of a charitable purpose. More specifically, NV Foundation's Articles of Incorporation specifically declare that it "is organized exclusively for charitable, religious, educational, and scientific purposes," and that NV Foundation "shall not carry on any other activities not permitted to be carried on (1) by a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code." NV Foundation Articles § II.B, E.

b. No Gift Instrument Imposed a Restriction

So far as we can determine, Hall's donation was not accompanied by any gift instrument that would suggest the gift was restricted. The transfer of funds was done informally in a manner suggesting an unrestricted gift. Without a gift instrument, Utah law provides that the gift is unrestricted. There may be an exception to this rule in the event of fraud, but Hall is the Executive Director of the donee and he can hardly claim he defrauded himself.

We note that the exemption application signed by Hall under penalty of perjury and filed with the IRS says that the contribution had already been completed in 2015. So the application itself, filed in 2016, is not contemporaneous with the gift and cannot impose after-the-fact restrictions. In any event, the statement that the funds were "for the acquisition, conservation, and maintenance of real property by the Foundation" underscores that in 2016 Hall merely intended that the funds be used for activities that the foundation did actually undertake (acquiring, conserving, and maintaining property) and could continue to undertake to this day. So, even if the exemption application could be construed as creating a restriction (we don't think it can), it would not support a conclusion that such restriction has been violated, nor (as discussed below) would it support the conclusion that the gift was conditional. Furthermore, the fact that Hall directed NV Foundation to spend funds on other activities such as public relations casts doubt on any claim that Hall believed a restriction existed.

2. Hall's Gift to NV Foundation Was Unconditional

Under UPMIFA, because Hall's gift was unrestricted, it follows that there was no condition attached to a restriction. There was no restriction that could have related to a condition subsequent (e.g., "Use the gift for a particular purpose in perpetuity or the funds revert to me.>").

Application of common law principles also leads to the conclusion that the gift was unconditional. As discussed above, the common law disfavors unwritten, unclear, and unexpressed conditions. Here there was no formal instrument indicating that Hall had any reversionary interest in his gift. To our knowledge there also is no informal evidence suggesting Hall thought the donation could be returned to him. In addition to conditions generally being disfavored by the law, the law must guard against a person who controls a foundation claiming, after the fact, to have made a conditional gift to the foundation. Otherwise, a donor would have unlimited discretion to void his own charitable gifts if it later suited him.

The unconditional nature of Hall's gift is consistent with the other available, objective facts. At the time Hall made his gift, Hall was personally aware of NV Foundation's articles and bylaws, which expressed that NV Foundation's assets were committed, without limitation, to charitable, educational, and other purposes consistent with tax exemption pursuant to IRC § 501(c)(3) and contained no other restriction on the scope of NV Foundation's activities. Those broad purposes remain available to NV Foundation.

Following Hall's gift to NV Foundation, NV Foundation used the donated funds to conduct operations and acquire property. Hall himself was in control of NV Foundation and its activities. He personally directed use of the funds. It does not appear that he believed the Foundation's ownership and control over the funds was in any doubt or subject to any conditions. When Hall caused NV Foundation to convey the real properties to the for-profit entities, there was no suggestion that these transactions were triggered by the occurrence of some condition; to the contrary, the deeds transferring the land simply stated that "Grantor [*i.e.* NV Foundation] is the sole owner of the premises." No recorded deeds or other written records indicate any limit or qualification as to the ownership of the original funds or the lands purchased with the funds.

The exemption application signed by Hall and filed with the IRS states that "Hall has contributed approximately \$14,000,000 for the acquisition, conservation, and maintenance of real property by the Foundation." There is no claim or even suggestion that the transfer was conditional.

We assume that when Hall made his gifts to the NV Foundation his plan may well have been to use these funds (at least in part) to purchase real estate that would eventually be developed into NewVistas communities. But plans, hopes,

or intentions are not enough to make an otherwise unconditional gift to charity conditional.

Furthermore, in order for Hall to plausibly claim that a condition was unsatisfied here such that Hall could demand repayment of his gift, the condition would have to have been very specific and narrow. The condition could not have been that NV Foundation qualify as a 501(c)(3) entity - because it *did qualify* (and in any event, the foundation transferred the property to Hall before the IRS even made a final decision related to the foundation's exemption request). The condition could not have been that NV Foundation be able to acquire, maintain, and conserve property, because it *can* do those things. The condition would have to have been something unrelated to any restriction (because no written restriction was put in place), *and* it would have to have been specific enough that it would have been triggered as early as December 2016 (before the IRS approved or rejected NV Foundation's exemption application). Because we have no written record of a condition, we can only speculate what condition Hall could possibly claim to have imposed on his gift. Given the evidence we have available (including no contemporaneous written evidence of any conditions, and publicly-filed documents strongly suggesting a completed, unconditional gift), it is impossible to believe that a court would agree that Hall made a condition specific enough to have allowed NV Foundation to lawfully transfer millions of dollars of real property to his for-profit companies in December 2016.

Conclusion

The available, objective evidence supports the conclusion that Hall's gift to NV Foundation was unrestricted and unconditional. There was no formal gift agreement. Hall's statements made to the IRS under oath after the gift was complete support no other conclusion but that the transfer was complete and unconditional. Application of statutory requirements and common law principles leads to the conclusion that Hall's transfer was unconditional. Accordingly, Hall cannot plausibly claim he could lawfully cause NV Foundation to transfer millions of dollars of real property to his for-profit companies for no consideration.

Limitations

While our views and conclusions expressed herein are based upon our best interpretation of existing sources of law, no assurance can be given that such interpretations would be followed if they became the subject of administrative or judicial proceedings.

We express our views only as to those matters expressly set forth above. This memorandum should not be applied to other cases or circumstances. We disclaim any obligation to update these findings or to advise you regarding facts,

circumstances, events, or developments which hereafter may be brought to our attention and which may alter, affect, or modify the views expressed herein. The conclusions expressed herein are dependent upon the accuracy of the facts represented.