

Pouring a Stable Foundation
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Back in 1909, candy maker Milton S. Hershey wanted to do something for orphans, so he set up a trust to pay for the children's housing, schooling and other needs. Hershey intended for the orphans to live in a forward-looking network of homelike facilities integrated into the community. He made it clear in the original indenture that orphans were the sole purpose of the enterprise.

Yet in 1963 the trust gave \$50 million and more than 500 acres of land for Penn State University to build a new medical school. Today the trust has holdings worth some \$5.4 billion—and an ongoing battle with adults who grew up as orphans in Hershey facilities. “Commencing with the death of Milton S. Hershey in 1945,” the alumni asserted in a recent court petition, “virtually every proceeding brought before this Court by either the Trustees or the OAG (Pennsylvania's Attorney General) and the Trustees working together, has in some manner sought to compromise the rights of Child Beneficiaries.”

How much the Hershey Trust really has deviated from its founder's intentions is a matter of debate. But what nobody can dispute is that over time, with or without a judge's sanctification, foundations often seem to wander far from their donor's intentions when the charity was established. Says Martin Morse Wooster, whose works on philanthropy include a book entitled *The Great Philanthropists and the Problem of Donor Intent*: “I can count on the fingers of one hand the number of foundations that don't have a problem with donor intent after the donor dies.”

For a donor about to launch a foundation, making sure the organization spends its money as intended is never easy simply because nobody lives forever, even rich people. Times change, too, along with circumstances, values and the state of human knowledge. So the challenge is creating a foundation that will not just hew closely to the donor's intent, but doing so without creating a structure so rigid that it is unable to respond to a changing world.

Donors do have the law on their side, at least in theory. Foundations are supposed to adhere to their official purposes as laid out in their founding documents, and judges can block actions inconsistent with those aims. But aside from habitual grant recipients, there is often no one to complain when the founder is long dead and the foundation takes a sharp turn in a new direction. Poor planning in structuring the foundation and failing to leave explicit instructions only make this more likely.

Financial advisers can play a major role in improving the odds that donors will get what they pay for, even after they are gone. How the foundation is structured, how its mission and goals are laid out, and who is named to its board can all help determine whether the donor's wishes are carried out. But clients should understand that there is no magic bullet for this problem, and even the experts often disagree on some recommendations. About

the only thing for sure, when establishing a charitable foundation that will survive the donor, is that it's extremely difficult to control what happens from the grave.

Part of the difficulty stems from this need to balance donor intent, on the one hand, and flexibility for the future on the other. Wooster, for instance, says it's vital for the donor to lay out in the most specific possible terms how he or she wants the money spent. He cites the case of James B. Duke, who "left explicit instructions—and even required that the indenture establishing the Duke Endowment be read aloud at one trustees' meeting each year (running time, approximately 25 minutes) to remind the trustees of his wishes. The result is that the Duke Endowment, 74 years after its creation, still spends its funds in ways that its founder would have approved."

Indeed, "in quite a number of cases the founder is at fault" when his or her foundation goes astray, says Adam Meyerson, president of the nonprofit Philanthropy Roundtable. Michele McKinnon, a trusts and estates lawyer in Richmond, Va., says donor inattention is often the culprit; often motivated by tax considerations, "some clients set these things up and don't pay attention to them." But the most common problem, Meyerson says, is that the founder hasn't given sufficiently clear instructions. "Times change and needs change," he says. "But you certainly want to be clear about your principals and what you believe in and what principles should be used in grant making."

Meyerson urges donors to convey these principals not just in the foundation's founding documents, but by example during a lifetime of giving. Donors, moreover, should document this giving, writing about what they learned and approved of and what didn't work out quite as well. A strong philanthropic record, he suggests, will make it much easier for trustees to follow your wishes—and much harder for them to stray. It can even be helpful, Meyerson says, for donors to describe their principles and beliefs by writing a memoir, however brief.

The financier John M. Templeton is one donor who has gone to extraordinary lengths to keep his foundation on its intended course. Templeton established the John M. Templeton Foundation mainly to fund research into the connections between science and religion. In doing so, he drafted extremely clear governing documents and put in place a series of checks and balances. For example, three outside auditors chosen by the trustees are to review the foundation's grantmaking every five years. If the donor's intent is violated and foundation officials don't fix the problem in a year, the trustees can replace them. Trustees are elected annually by a special core of "foundation members" that includes the Templeton family, winners of the annual Templeton Prize and representatives from organizations, such as the Heritage Foundation, that share Templeton's personal world view.

Everyone approves of clear founding documents, yet Melissa Berman of Rockefeller Philanthropy Advisers argues against extreme explicitness. "We ask people to avoid delineating specific problems or prescriptions," she says, urging donors to focus on *goals* rather than *process*. She suggests that the donor write a statement laying out four things: core principles, core issue areas, favored approaches (such as grants to advocacy groups

versus individuals), and desired outcomes. For example, urge a donor to write a statement directing the foundation to “help wayward boys reach their full potential,” rather than mandating the creation of a home for wayward boys, since the latter might not be workable or necessary at some future date.

Berman recalls a foundation (she won't say which) that was started to provide pensions to workers who met a certain means test. The Social Security system, Medicaid and corporate pensions have since rendered the original purpose fairly moot, Berman says. The problem is, the donor left no general statement of principals or instructions on what to do if a national retirement system came into being, and so successive generations have had to try to figure out what he would have wanted to do with the money now that a public pension system is in place. The foundation now supports health and anti-poverty services, which were also important to the founders.

Alexander Bove, a Boston attorney who works with donors, says those who specify explicitly on what cause the foundation is to spend its money should also include a back-up choice. Pledge funds for the cure of polio, for instance, and you'd better include some indication of what is to be done once polio is cured. Otherwise, says Bove, the trustees will have to go to court (in what is known as a *cy pres* proceeding) to get a judge's approval for the foundation to adopt a similar mission—say, the cure of muscular dystrophy.

Choosing to fund a scientific purpose has advantages for a donor, because the nature of the foundation's mission can influence the extent to which it wanders off course, and non-ideological missions wander less. Foundations tend to be started by older men who made their money in business and whose politics are more likely to be conservative. People who work in philanthropy tend to be younger, poorer and more liberal. Over time, says Meyerson, foundations dedicated to social causes tend to slide leftwards.

The Ford Foundation is perhaps the best known example. Founded by the auto industry pioneer Henry Ford without any clear expression of his charitable intentions, the Foundation became a mainstay of such liberal social causes as affirmative action after Ford's descendants rashly relinquished control of it. Henry Ford II resigned from the board in disgust in 1976.

Claudia Sangster, director of philanthropy services at the myCFO unit of the Harris Private Bank, says the problem goes beyond ideology. “Folks in their seventies and eighties are more tied to institutions and localities,” she observes. “They stayed put.” Thus, these wealthy donors tend to behave more like George Eastman, the photographic pioneer who focused his giving on cultural and educational institutions in Rochester, N.Y., where he lived. The younger generation, Sangster says, is more mobile, and its philanthropic interests tend to focus more on causes, particularly environmentalism, rather than particular communities or institutions.

Sangster says this points to an essential question donors should answer before setting up any foundation: “do you want this to be a founder's foundation or a family foundation?”

In other words, are you trying to accomplish a specific goal with your money, or do you want to establish a legacy of philanthropy that your children and their children will maintain and expand? “If you want the next generation involved,” says Sangster, “they have to feel the passion you feel.”

That may mean providing more flexibility so they can pursue their own philanthropic passions when you are gone. Donors sometimes have a hard time coming to grips with this. Sangster says she is working with a 90-year-old widow who is “very focused on causes her children aren’t going to be satisfied with” but wanted to get her children and grandchildren involved. The solution Sangster came up with was to dedicate a percentage of the money to the founder’s pet causes, leaving the rest to be expended more flexibly by subsequent generations. As Berman puts it, “If the goal is to let the descendants demonstrate their own commitment to philanthropy, then evolution is what should be expected.”

One way to determine how much evolution you get is to make the right decision about the form of the foundation when you establish it. Basically, a foundation can be a corporation or a trust. Most experts agree that the corporate form is more flexible—which is precisely why, if you are bound and determined to keep your foundation from straying, you probably want to go for an irrevocable trust. Corporate directors, after all, can change the bylaws and even articles of incorporation, and thus the enterprise’s purpose. By using a trust, the donor can spell out everything right in the trust instrument, which the trustees can’t change without going to court. And, says Sangster, the court usually will take account of the interest of the founder in making a decision.

That’s just what happened in the case of the Buck Trust back in 1986. When Beryl Buck died in 1975, she specified that her \$10 million estate be placed in trust to help the needy of Marin County, across the bay from San Francisco. But by 1986 what had come to be known as the Buck Trust was worth \$430 million—and Marin County was one of the richest places in America. So the San Francisco Foundation—the trust’s executor—petitioned a judge to let it start spending the money elsewhere in the Bay Area where there were more poor people. A Santa Clara County Superior Court judge rejected the request on the grounds that the San Francisco Foundation failed to prove it couldn’t comply with the donor’s clear wishes. The foundation agreed to relinquish control of the money to a newly created Marin Community Foundation, which has been funding Marin charities ever since.

Does it matter for donor intent where the trust is domiciled? A little. State laws vary, and those seeking flexibility often establish a corporate foundation in Delaware. But if donor intent is the paramount issue, says Manhattan attorney Seth Perlman, who specializes in these matters, a highly regulated state such as New York might be just the thing.

Even more important is picking the right board of trustees. To Bove, family members are often the best bet. “We often provide that a family member with a veto will always be on boards,” he says. But family is not always the answer, especially in the long run. In a Philanthropy Roundtable monograph on starting a foundation, attorneys Paul K. Rhoads

and Stephanie H. Denby wrote: “The longer the anticipated life of the organization, the more important the need for the donor to articulate at the outset the qualifications and the process for selection of future board members.”

At the very least, donors may want to list certain qualifications board members must meet, or require that one or more board members have particular training. Donors might even want to specify that the trustees will always include the president of a particular college or university or the chief executive of a certain well-established charity. And keep the board small to minimize the likelihood of logrolling. Choose an odd number, too, to prevent a lot of deadlocks.

Don’t assume that, if a foundation does eventually run off the rails, there will be somebody around to raise a fuss after the donor is gone. Typically state attorneys general function as official watchdogs on behalf of beneficiaries, but they aren’t always watching. And politics can play a role. In the Buck Trust case, for instance, California’s Attorney General at first sided with the executor who wanted to divert the money from Marin County (the state eventually switched sides). In the ongoing Hershey battle, in Pennsylvania, the Attorney General in 2002 interceded to prevent the trust from selling its controlling interest in Hershey Foods Corp., citing irreparable harm to the children of the Milton Hershey School and the people of the state. The action struck many experts in the field as bizarre. The holdings of a charitable foundation should be diversified, after all, and Milton Hershey never said anything about not selling his stock—which brought bids as high as \$12 billion. Yet when the Trust decided to pay for the medical school, a purpose completely outside the founder’s intent, Pennsylvania’s Attorney General at the time raised no objection at all.

One way around this problem is to try and designate—or even stimulate—someone to have standing to sue in case the foundation goes off course. It probably won’t be effective simply to designate some person or entity, but if you dedicate some modest portion of the annual disbursements for a particular charity, that organization might then have the standing—as well as the motivation—to take action if things go awry.

Another tool available to donors obsessed with keeping a foundation on course is a reversionary clause. Perlman says donors can specify in the foundation’s original documents that if the purposes of the foundation change, the money reverts to the donor’s heirs. If they don’t exist or can’t be located, a court proceeding is held to find an organization with a purpose similar to the donor’s to receive the money.

Perhaps the surest way for donors to address the problem of intent is to set up a sunset provision requiring all the funds to be spent by a certain date not too far into the future. Tim Gill, for instance, a software entrepreneur who founded Quark, Inc., used his wealth to establish the Gill Foundation, which says it is the nation’s largest funder of gay and lesbian organizations. Tim Gill has let it be known to the foundation’s board and staff that he intends for the foundation, in the words of a spokeswoman, “to spend itself out of existence” no later than 20 years after his death. Gill’s reasoning is that philanthropy, like

business, must change with the times, and he doesn't want others to have to guess at his wishes (and potentially, guess wrong).

Finally, bear in mind that a foundation may not be for everybody. Christine W. Letts, Associate Director of the Hauser Center for Nonprofit Organizations at Harvard, says advisers should ask clients not just what they want, but also what they are afraid will happen—and that perhaps a better option for some donors is to endow a building or position at a preexisting institution, rather than insisting upon a foundation. “It’s important to really probe that,” she says, “and figure out whether their fears can be accommodated within this particular vehicle.”

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