

Emphasizing the Public Interest in Charitable Gifts

Author : Sarah Waldeck

Date : October 15, 2018

Susan Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 **Alb. L. Rev** 101 (2018), available at [SSRN](#).

Susan Gary's *Restricted Charitable Gifts: Public Benefit, Public Voice* makes the case for legal reforms that reflect the public's interest in loosening donor control of charitable gifts. Gary writes that her article is aimed at advocating for the adoption of reforms that increase "the consideration of the public benefit standard in charities law," so I know that she didn't set out to change the way I teach my Estates course. But that's exactly what she did, and it's why I like her article.

In classes on charitable trusts, my big picture questions are about the relationship between donors and charities: when should the law defer to the dead hand and when should it permit charities to modify donor-restricted gifts? Gary's article has convinced me that the public interest—not donors or charities—should instead assume center stage. *Restricted Charitable Gifts: Public Benefit, Public Voice* is one of those rare articles that prompts me to re-conceptualize material I've taught for many years, particularly the enforcement role of the attorney general.

Gary begins with the familiar observation that while the donor and charity are the immediate parties in any charitable gift, the public is also part of the transaction. For example, whenever a charitable donor receives a tax benefit from a gift, the public has subsidized the donor's charitable giving. Trust law is also generous with charitable donors, exempting them from the Rule Against Perpetuities and other requirements for private gifts. When a gift is large enough, the public confers prestige on the donor, which can lead to improved social standing, business gains, and a generally enhanced reputation.

Gary uses well-known examples to illustrate why the public has an interest in whether and how long donors can place restrictions on charitable gifts. I won't belabor these examples here, but in each, the public has an obvious interest in the charitable gift: the Barnes Foundation (arguably the greatest private American art collection), the Buck Trust (hundreds of millions of dollars earmarked for "the needy" in affluent Marin County, California), and the Leona M. and Harry B. Helmsley Trust (donor desired multi-billion dollar trust to be used "for the provision of care for dogs"). As Gary explains, in order for any of these gifts to be "charitable" under trust law, they must confer a "public benefit." (P. 593-94.) The requirement of a public benefit raises questions about whether "the public should have a voice in how charitable assets are used" or if "some limit should be imposed on the donor's directions, even if the directions comply with a general understanding of charitable purposes." (P. 594.)

Enter the state attorney general. Donors usually cannot sue to enforce the terms of their charitable gifts. Instead, the attorney general oversees the use of charitable assets. As an elected official, the attorney general is likely to consider the preferences of the electorate when deciding whether to pursue an enforcement action. The examples in the preceding paragraph illustrate that sometimes donor-imposed restrictions conflict with the public interest. This conflict is frequently cited as a reason to give donors standing to enforce the terms of their charitable gifts.

Gary argues persuasively, however, that attention to the electorate may be one of the attorney general's greatest strengths since "the Attorney General is elected to protect the interests of the public." (P. 598.) In other words, oversight by the attorney general ensures that the public has a seat at the table. Using the attorney general's political status as a justification for shifting more enforcement power to donors ignores that every donation has three parties: the donor, the charity, and the public that subsidizes and supports the charitable gift.

Gary recognizes the financial constraints and other structural limitations on the attorney general's ability to monitor "every charity and every restricted gift." (P. 598.) This is another oft-cited rationale for proposals that would broaden donor standing. My Estates class has fallen into this trap for years: if not the attorney general, then the donor. But reforms that give donors increased enforcement power do little to advance the public's interest in the charitable gift. Gary surveys proposals that re-allocate control over the terms of charitable gifts, including rules that would relax donor restrictions after a set number of years and expand the application of cy pres. The cumulative effect of Gary's survey, and her article overall, is to emphasize that legal reforms in charities law must make the public's voice as loud as that of donors and charities.

Cite as: Sarah Waldeck, *Emphasizing the Public Interest in Charitable Gifts*, JOTWELL (October 15, 2018) (reviewing Susan Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 **Alb. L. Rev** 101 (2018), available at SSRN), <https://trustest.jotwell.com/emphasizing-the-public-interest-in-charitable-gifts/>.