IMPLIED CHARITABLE TRUST RESTRICTIONS ON NONPROFIT LANDS, AND A LOOK AT THE POSSIBLE IMPLICATIONS FOR SCOUT CAMPS (November 2020)

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I. INTRODUCTION

As a manager of a nonprofit, you have a firm grasp of the rules that govern the operation of your business. As part of that, you understand that there are general assets in your control, and that those assets must be utilized only for the furtherance of your nonprofit objectives; and that there also may be restricted assets, which must only be utilized for specifically delineated nonprofit purposes. What many nonprofit managers do not fully understand, however, is that there may be a third category of assets that are subject to restrictions that arise out of the facts and circumstances surrounding the nonprofit's acquisition of the assets, and that cause the assets to be subject to an implied charitable trust that restricts how the assets can be used and disposed of. Further, the violation of these restrictions (which restrictions might actually be currently unknown) can have significant consequences for the nonprofit and its managers, up to and including criminal charges against those who violate the trust.

In this article we will explore the nature of charitable trusts as they may apply to land owned by a nonprofit. Specifically, we will look at how a charitable trust may restrict the ability of a nonprofit to sell or otherwise dispose of land that the nonprofit no longer wishes to own. We will then look at how such trusts could apply

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to a topical area of interest: Boy Scout and Girl Scout camps. Finally, we will conclude by looking at some practical measures that nonprofits can take to deal with potential issues involving charitable trusts.

II. THE NATURE OF CHARITABLE TRUSTS

In very brief, charitable trusts are restrictions that are imposed on ownership of property, dedicating the property to a particular charitable use. As simple as this sounds, the structure and application of such trusts is muddy. This is because trusts in general are relatively ancient legal constructs that were originally created by courts to deal with situations where the normal rules of property ownership seemed inequitable. A classic example would be where Smith transfers her land (black-acre) to Jones, but the property is actually intended only to be administered by Jones, for the benefit of Brown. Later, when Jones tries to sell the property and use the proceeds for his own purposes, it seems wrong that he should get away with it, so a trust would be imposed to avoid the inequitable outcome. Similarly, if Jones gets himself into financial trouble, and his creditors are seizing his property, the trust would prevent the inequitable outcome of the creditors taking away the property that is only nominally owned by Jones, but is really intended to benefit Brown.

From the above described situation, it was but a short step to a situation where Smith gave black-acre to Jones for the benefit not of a single person (Brown), but rather for the benefit of a class of persons (like the poor), or for a generally beneficial undertaking (like a museum). This kind of trust came to be known as a charitable trust. If such a trust was specifically and clearly described by the party establishing the trust (Smith, the settlor), the trust came to be known as an express charitable trust, and if the trust was merely inferred from the actions and understanding of the parties, it was called an implied charitable trust.

The kinds of situations described above first came to pass in early common law, before there were specific legal entities that did good works as their sole purpose. When such entities later became more common, they were given their own legal form, which was, confusingly, sometime referred to as a charitable trust (for example, the Pugh Charitable Trust). Thus, people are often confused by the use of the term “charitable trust”, which can refer either to the treatment imposed on a particular piece of property (like in the Smith-Brown example above) or to an entity that has public-interest related purposes (like the Pugh Charitable Trust). In current times, the concept of charitable trust entities has somewhat faded, and most such entities today are in the form of not-for-profit corporations, which are today often called nonprofits, charities or NGOs.

Today charitable work tends to be performed by purpose-driven entities, like nonprofits. These entities are regulated and controlled by various federal and local laws and governmental institutions, chief among them being the IRS, with its vast regulatory structure governing the operation of 501(c) organizations. Additionally, all states have their own laws that govern the operation of charitable organizations within their jurisdictions.

These various regulatory structures make it clear in today’s world that the assets of a nonprofit must be used only for charitable purposes, and cannot be diverted to other purposes. That could lead one to

conclude that the ancient common law notion of imposing a charitable trust on particular property is no longer necessary, at least with respect to property owned by established nonprofit entities, but you would be mistaken. In fact, through all of these evolutionary changes applicable to charitable organizations, the notion of property being subject to a charitable trust never disappeared.

So, perhaps counterintuitively, a particular piece of property like black-acre can be owned by a nonprofit, and thus be subject to all of the general rules and restrictions governing the operations of nonprofits in this day and age. But it can also be subject to the additional ancient common law restrictions that come from having a charitable trust imposed on the property. Moreover, as will be discussed in greater depth, in the case of implied charitable trusts, it will often be the case that, with respect to a particular asset owned by a nonprofit, like black-acre, no one might know the precise restrictions imposed by the charitable trust, or even if such a charitable trust exists.

III. LEGAL PARAMETERS OF CHARITABLE TRUSTS[2]

A. *General:* The creation of a trust is, in a perfect world, an act of volition. Someone (called the settlor) decides that she wants to create a trust by which she will place certain of her property in trust (with a trustee) for the benefit of someone or something else (the beneficiary). In order to do so, in a perfect world, the settlor creates a set of unambiguous documents that comply with all legal requirements, and all parties--settlor, trustee, and beneficiary--consent to the transaction via execution of the required documents. But of course, in the real world, this process can fall short of perfection in all sorts of ways. The settlor can fail to execute the appropriate documents, or not make clear what she is attempting to do, or fail to even realize that she is creating the trust. The trustee, similarly, can misunderstand the situation, or attempt to cheat by saying that the property now belongs to the trustee unencumbered. Even the beneficiary can misunderstand the situation, and either think that he has no interest in the property, or that he has the full interest in the property, unencumbered by a trust. In all of these situations, and many more, judges have intervened, and using their equitable powers, have attempted to re-cast the transaction in a manner that accomplishes what the parties intended to do, or even what the judges think the parties should have intended to do.

   The desire of judges to fix the kind of shortcomings described above have created various kinds of remedies that are generally called constructive trusts. These trusts have then been refined by the common law process into different sub-categories. For purposes of this article, we are only looking at one such category: the implied charitable trust. In these cases, the original owner of the property transferred the property to a third party for specific charitable purposes, but failed to fully incorporate those charitable restrictions into appropriate trust documents. This failure is sometimes because the original owner did not know how to set up a trust, or made a mistake in attempting to set up a trust, or, more confusingly, did not even realize that they were creating a trust.

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[2] For purposes of economy, we will not provide citations regarding the general principles of trusts, but we will refer the curious reader to these sources: Restatement 3rd of trusts section 67; Scott on Trusts section 40; Bogert Trusts and Trustees section 471.

Charitable trusts can involve two broad types of situations. In one, the original owner transfers the property to a regular person or entity, but it is for the charitable benefit of another person or group. An example would be that Aunt Sally deeds land to Uncle Tim, but it is intended that Uncle Tim is really to own and operate the land for the benefit of the local church. In the second category, the original owner transfers the property to a charitable entity (in recent times, the entity is typically a nonprofit), but in doing so, creates a trust that further restricts the property, and requires that it not be used merely for the general charitable purposes of the nonprofit, but rather for a specific sub-charitable purpose. It is this second kind of situation; a charitable trust imposed on property within a charitable entity, that we will focus on in this article, and for simplicity's sake, we will simply refer to the holder of the property as a "nonprofit."[3]

The archetypical case would look like this: Original owner donates a painting to local museum, and in doing so, provides that the painting must always be owned by local museum, and must be displayed in a certain manner, in perpetuity for the viewing and education of the visitors to the museum. In such a case, even if the documents associated with the donation do not strictly comply with the requirements for the creation of a trust, a judge may find that an implied charitable trust was created, and that local museum's ownership and treatment of the painting is thus subject not just to the normal requirements with which a nonprofit must always comply (such as no private inurement of benefits), but must also comply with the additional requirements and strictures of a trust.[4]

Needless to say, when a judge is considering imposing a trust to accomplish the intent of the parties, or in some cases, what their intent should have been, there is plenty of opportunity for confusion and ambiguity. In order to deal with that uncertainty, courts have created various requirements for the creation of charitable trusts, but a study of the cases shows that these requirements are often either used, or not used, in order to achieve the outcome that the court feels is equitable.

B. *Requirements for Creating or Demonstrating a Charitable Trust:* According to legal treatises the requirements for the formation of an implied charitable trust focus first on the intent of the parties. However, when it comes to divining someone's intent, things quickly become fuzzy.

As a threshold barrier to asserting claims of charitable trusts, there are numerous legal principals of interpretation that seek to prevent judges from interposing their own intent for that of the parties. Those principles include the statute of frauds, merger, and the parole evidence rule. Without going deeply into those doctrines, the basic thrust is that, if a party does not put something into a written document (like a deed or bill of sale by which a donation is made), a court cannot add provisions to the document, even if there is clear evidence that the parties intended to include such provisions. Similarly, the doctrines include the concept that a court cannot add provisions to a document unless there is ambiguity in the provisions included in the written documents.

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[3] Note that, for these purposes, what we are including in the term nonprofit may even be a government, which is often the case for land donated as a park.

[4] There is another common situation, where donors give money, rather than property, to a nonprofit, with the requirement that the money be used for a specific purpose, e.g., a donation to a college for the scholarship fund. This is typically simply called a restricted donation, but it can also sometimes be treated as a charitable trust, especially if the parties did not fully document the nature of the restriction. Further, sometimes a donor may give money that is intended to be used by the nonprofit for a specific purchase of property (such as a camp), and in such cases the property purchased with such funds can be subject to the charitable trust.

There also may be requirements related to standing that prevent the imposition of charitable trusts. Standing requires that a person raising a legal issue has to be legally entitled to raise that issue. In the case of charitable trusts, it is often the case that the person who created the trust (and would most obviously have standing to enforce it) is no longer around. This means that often questions arise regarding whether the person seeking to assert the argument (perhaps a descendant of the original donor, perhaps a neighboring property owner) has the ability to raise the claim.[5] Courts often use this standing issue as a quick and convenient way to dispose of charitable trust cases, without the necessity of getting into the difficult issues of the parties' intent. For example, in the Case of Hicks vs Dowd, 157 P 3d 914 (2007) the party seeking to enforce a charitable trust was merely a landowner in the same county as the disputed parcel. Wyoming's Supreme Court dismissed the claims on the basis of lack of standing, saying: "While Appellants may meet the definition of "beneficiary," Appellants do not meet the definition of "qualified beneficiary" a term analogous to the common law concept of "special interest". Appellants' only benefit from enforcement of the trust is that shared by other members of the public. Therefore, we hold that Appellants lack standing to enforce the terms of the …trust".[6]

As a practical matter, it is very hard to know in advance whether a court, in looking at a charitable trust issue, will or will not find that a document is ambiguous, or will or will not find that the parole evidence rule or the statute of frauds prevent the court from looking at the intent of the parties.[7] Moreover, once you get beyond these threshold issues that can prevent a court from looking at the intent of the parties, and a court does look at that intent, the result will be a factual matter, the outcome of which, by definition, is difficult to predict.

Because of the various issues discussed above, it is, to say the least, difficult to apply simple statements about the formation of implied charitable trusts to a specific case, and to thus determine whether a charitable trust will be found to exist in a particular situation. This is true in part because, when a court is determining whether to impose a charitable trust, the court is acting "in equity" rather than "at law." This distinction loosely equates to doing what seems right (equity) as opposed to following written rules (law). This is a somewhat anachronistic distinction that arguably does not fit well into today's highly regulatory world, but which, no matter, persists in judge-created law. As can be imagined, imposing a result that seems fair involves considerably more discretion and subjectivity than does simply applying written rules. Because of this difficulty in predicting outcomes, when we look at some cases, below, we will focus on the types of situations where courts seem to be more or less inclined to use their equitable powers to impose a charitable trust, rather than on a mechanical application of rules to facts.

C. *Effect of a Charitable Trust and Remedies for Violation:* At the dawn of the creation of trusts under ancient rules of property, the concept was that, even though it looks like the trustee is the owner of

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[5] See, generally, Nancy A. McLaughlin, & W.W. Weeks, In Defense of Conservation Easements: A Response to the End of Perpetuity, 9 Wyo. L. Rev. 1 (2009) at 60.

[6] It should be noted that, as a general matter, the Attorney General of a state always has standing to enforce a charitable trust, so, if concerned parties can convince the Attorney General to assert the claim, they can avoid standing issues. In fact, that is what later happened in the Hicks case, when the Wyoming Attorney General joined in the case, thus obviating the standing issue.

[7] It should be noted that common law concepts like statute of frauds and the like vary from state to state, and therefor differences in courts interpretations of these concepts in charitable trust cases might be attributable to differences in state laws.

certain property, the trustee is merely holding the property for the benefit of a third party, and is not the true beneficial owner. That made perfect sense when it applied to personal situations, like Mrs. Smith placing property in trust with banker Jones for the benefit of her son. It arguably makes less sense when applying it to the kinds of cases we are looking at in this article: Mrs. Jones donates land to the Nature Conservancy, but subject to limitations on how the property can be used. In that second situation, it is not intuitively clear who the "real" beneficial owner of the land might be. Nevertheless, the same concepts continue to apply, and can result in the same sorts of legal results that stem from what amounts to a split ownership of the property. These results include:

1. *Limits on Disposal of the Property:* Perhaps the most significant limitations and restrictions that can come from the imposition of a charitable trust are those related to the disposition of the property. Ordinarily, a nonprofit can make any decisions it wishes with respect to the retention or disposal of its property, as long as the actions are consistent with the organization's charitable purposes. So, if, for example, a church no longer needs the typewriter that was donated to the church, it can sell the typewriter, and use its proceeds for whatever charitable purposes it wishes. But, if the typewriter was an antique instrument that was used by the founder of the church, the donor may have intended that the gift is in trust, and that trust might be violated by a sale or disposition of the typewriter by the church.

2. *Limits on Third Party Claims Against the Property:* As noted above, when specific property is subject to a charitable trust, the trustee does not have beneficial ownership of the property, but is rather holding it in trust for a third-party beneficiary for a specific purpose. Because the trustee does not own the property outright, third parties who are pursuing collection of debts owed by the trustee will likely be barred from attempting to satisfy the obligation out of trust assets. This can be true with respect to general collection efforts, or with respect to actions of a bankruptcy trustee within a bankruptcy proceeding (as will be discussed later with respect to Boy Scout camps). Thus, when the City of Detroit filed for a municipal bankruptcy, the issue arose whether certain assets that were owned by the City's Art Museum were actually held in charitable trust, and would therefore not be subject to liquidation to satisfy the debts of the City (again, discussed further below).

3. *Limits on Uses of the Property:* Perhaps the most common disputes regarding charitable trust assets focus on the uses of the property involved. In some cases, the terms of a trust are carefully spelled out, and the limitations are clear. In other cases, the trust arises by implication, and the donor and trustee may not have even realized they were creating a trust, in which cases the specific terms of the trust will, by definition, be vague. In any case, there is the possibility that the parties will disagree on the terms and requirements of the trust. Thus, when a nonprofit wants to change its operations, for example by moving a facility, the beneficiaries of a charitable trust may object and seek to demonstrate that the charitable trust requires the trust assets to continue to be used in the manner originally contemplated by the donor. Two of the most high-profile cases in the charitable trust arena involved just such issues. In the Banner Health case (discussed in Section V below), there was a battle over whether a nonprofit could shut down a clinic in one area and reopen it in another. In the Rose Museum case, there was a similar dispute about where a university could move a museum, along with all its donated art works,

from one location to another.[8] In both cases there was protracted and expensive litigation centered on the question of how charitable trust assets could be used.

4. *Remedies for Violations:* The imposition and enforcement of charitable trusts falls into the area of equitable actions of a court, and the remedies available to a court acting in equity are broad. More often than not, when there are disputes about a charitable trust, the matter is prospective in nature. That is, a nonprofit plans to do something (dispose of some property, change the use of some assets), and a beneficiary disagrees with the proposed action. In these cases the remedy most often sought is a prohibition, or injunction, of the action by the court. Such actions invariably also ask the court to clarify the terms of the trust in advance of future disputes.[9]

   A more serious situation can arise when an action on the part of a nonprofit (such as the sale of land) has already occurred, and the beneficiaries are seeking to remedy the situation after the fact. As noted above, in the case of a charitable trust, the trustee is not the beneficial owner of the property, but is rather just possessing the property for the benefit of others. That being the case, in some cases beneficiaries claim, and courts can hold, that that a purported transfer was ultra vires, and effectively never took place. This would allow the court to unwind the purported sale, and re-vest the property in the ownership of the trustee. Moreover, those objecting to an action that has already occurred may decide to pursue claims against the officers and directors who engaged in the action, claiming that those parties breached their fiduciary duties, and are personally liable for damages. In some even more extreme cases, it can also be claimed that the officers and directors committed criminal fraud by violating the trust, and those objecting to the transaction can seek to have the authorities, typically the State Attorney General, bring criminal charges against the nonprofit's representatives.[10]

   Finally, there is another significant potential issue involved when claims are asserted that a property sale violates the terms of a charitable trusts. Under general real estate law, a person who acquires real property takes it subject to claims against the property that the purchaser knew about, or should have learned about through the exercise of normal diligence. If a nonprofit seeks to sell real estate, and certain alleged beneficiaries of the property make known their belief that the sale would violate the terms of a charitable trust, the nonprofit will likely need to disclose this claim to third parties who are considering buying the property (in fact, in most jurisdictions, the seller of property is required to disclose material adverse facts, such as the existence of a third party claim against title to the property). This can effectively "cloud the title" to the property, and make a buyer unwilling to purchase the property (or make a title company unwilling to insure the sale of the property) until the matter is resolved, either by agreement of the objecting beneficiary, or by a court quieting title to the property. All of this can happen without the beneficiary actually filing any litigation, but by merely informally raising the assertion regarding the proposed sale. This, of course, can give considerable leverage to those claiming that a land sale would violate a charitable trust.

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[8] See discussion of the Rose Museum situation in, The Problem with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing, Susan N. Gary, 85 Chi-Kent L. Rev. 977 (2010).

[9] It should be noted that in most charitable trust cases it is not the court that crafts the remedy; rather, it is the parties themselves, who tire of the litigation, and settle the matter, subject to the court's approval, as is discussed further below.

[10] This type of claim was included in the Allegheny Health Case, as discussed in The Problem with Donor Intent: Intent, at 1005, and is sure to get the attention of the officers and board members on the receiving end of the criminal charges.

D. *The Cy Pres Doctrine: The Exception to the Rule*: In this article we focus mostly on the question of whether a charitable trust may exist with respect to specific real property owned by a nonprofit. Even if, however, there is a charitable trust, the cy pres doctrine can mitigate or even fully eliminate the requirements of that trust.[11] The principle thrust of the doctrine is that, if the charitable restriction on the property is impossible or unreasonably difficult to honor, a court can alter or eliminate the restriction, so long as it takes action to replace the restriction with another restriction that attempts to, as closely as possible, honor the donor's charitable intent. So, by way of a simple example, if a painting at a museum was required to be displayed for the public Sunday through Friday, and the jurisdiction enacted a law requiring Sunday closures, the court could restructure the restriction so as to require display of the painting Monday through Saturday.[12] In real world cases, the issues are, of course, much more difficult to resolve. Recently in Virginia, Sweet Briar College, a venerable women's educational institution, decided that it could no longer feasibly operate, and sought court permission to shut down, and to apply all of its assets (which were definitely restricted to uses for a women's college) to other purposes. After a protracted battle, there was a settlement by which the college agreed to continue its operations, subject to some modifications in the restrictions that made it operations more feasible[13].

   A notable limitation to the relief that can be obtained under the cy pres doctrine is the requirement that the original restricted donation must have been motivated by general charitable intent, rather than the sole desire that the donation was only intended for one specific purpose, and with no desire to benefit the other purposes of the nonprofit. If for example, in the Sweet Briar case, the court were to conclude that there was no general charitable intent, and if the nonprofit was arguing that it was impossible to fulfill that specific intent, the result could be that the donation fails for reasons of impossibility, and thus the assets must be returned to the original donor or, in most cases, the donor's descendants.

IV. A LOOK AT SOME CATEGORIES OF CHARITABLE TRUST SITUATIONS

As is often the case with the law, it can be easy to articulate the requirements of a legal principle in the abstract, but hard to know how things will come out in actual application. This is certainly the case with understanding implied charitable trusts. Because of the vague standards being applied, such as divining the intent of the parties (often many years after a donation is made), and because of all of the opportunities for courts to side-step the issue because of other doctrines, it is very difficult to know, from the black letter law, whether or not a charitable trust will be found to exist.

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[11] The cy pres doctrine is relatively complex in its application. For a more complete explanation of it, see Rethinking the Perpetual Nature of Conservation Easements, Nancy A. McLaughlin, 29 Harvard Environmental Law Rev. 421 (2005).

[12] The cy pres doctrine actually has a watered-down version of itself sometimes called equitable (or sometimes administrative) deviation. This applies in the case of minor alterations that do not go to the core intent of the donation, and it does not require compliance with all requirements for full cy pres relief. The above example of Sunday closure vs Saturday would actually likely be addressed under this lesser equitable deviation standard.

[13] See the thoughtful article, The Will to Prevail: Inside the Legal Battle to Save Sweet Briar, 51 U. Rich L. Rev 227, Giudice & Smithers (2016).

In researching for this article, it became apparent that the better way of understanding charitable trusts is not to look at the requirements in the abstract, but rather to look at them as they are applied in different categories of cases. By doing that, one can begin to better understand and predict the situations in which a charitable trust will apply. Below we will look at four categories of cases, and see how they can illuminate the broader landscape of charitable trusts.

A. *General Monies or Properties:* Humans, in particular rich humans, have always sought to control matters on this earth even after they pass away. Most often, this has been seen with respect to real estate, where landowners seek to restrict the uses of their land by way of restrictions in wills and the like, which are often called restraints on alienation. The law has always looked on such restraints with disfavor, and has created various rules, such as the rule against perpetuities, to try to avoid situations where the proverbial "dead hand" can emerge from the grave and control future uses of land.

   The law has generally made an exception to this disfavor on future restrictions when people give property to charitable uses. Accordingly, a donor can donate land to a city, and say it must always be used as a park, or a donor can create a fund within a nonprofit, and restrict that fund to certain specific uses. Even though such charitable restrictions are allowed, judges may still act with disfavor if they perceive that current good works are being thwarted by idiosyncratic restrictions imposed by a person long gone. So, in cases of restrictions on the activities of current, often highly respected nonprofits, a judge will often default in favor of the views of the nonprofit over those of the original donor.[14] Often, this will occur in the form of the court failing to find an implied charitable trust, either by interpreting the somewhat ambiguous intent of the parties in a way favorable to the nonprofit, or by deciding to invoke one of the many pressure relief valves (statute of frauds, merger, standing) to preclude the imposition of a trust. There are of course other cases where courts do find an implied charitable trust in situations that might seem like micro-management by the donor[15].

   For the above reasons, looking at general cases regarding charitable trusts might not yield much useful information regarding charitable trusts involving a specific kind of asset, like land. Situations involving any of the three below areas of specific kinds of cases do, however, provide for a more useful analysis.

B. *Cases Involving Governmental Parks:* There is a long history of people donating land to local governments for use as public parks. In most of these cases, the parties specifically agree at the time of the donation that the land is in trust, and must be used in perpetuity for specific purposes. Often, however, the parties are not clear on their intent regarding a trust, and so disputes arise. While these disputes theoretically center on the donor's intent, they are most often brought forth by third parties, who have come to rely on the park as a permanent feature.

   Before talking about parks, at this point it is useful, as background information, to talk about conservation easements. A conservation easement (CE) is essentially an agreement between a landowner and the easement holder by which the land will, in some way, be protected in perpetuity. CEs have now become by far the most common method by which people seek to protect land, and almost

[14] See Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion Over a Charitable Corporation's Mission and Unrestricted Assets, Robert A. Katz, 80 Chi-Kent L. Rev. 689 (2005).
[15] See Lefkowitz vs Cornell University, 308 N.Y. 2d 85 (1970), where the court prohibited the University from Selling off an Aeronautical Lab.

every state has enacted legislation that specifically allows the use of CEs for such purposes. People often forget, however, that CEs are a relatively new phenomenon, and that before approximately 50 years ago, CEs were rarely used and not widely available.[16] Today, if a landowner feels that their land is somehow special and deserving of protection (and many landowners do feel that way about their land), the obvious solution is to pursue a conservation easement. But a generation or two ago, a landowner trying to protect their special land had to find a way to do it that, first, did not run afoul of the various laws against restraints on alienation, and second, incorporated a landowner that was willing to own the land throughout the indefinite future, but not develop it. Without CEs being available, one obvious solution was to donate the land to a government for use as a park.

There have been many cases where a government seeks to shut down or change the use of a donated park, and where lovers of the park have challenged the government's action as violating an implied charitable trust. As a rule of thumb, the government almost always loses in these cases, and the courts almost always find that a charitable trust exists. Frequently, the government also tries to claim that, even if a trust exists, the continued use of the land as a park is not feasible, and the government should thus be released from the trust under the cy pres doctrine. Again, as a rule of thumb, the government always loses those claims too. To put it another way, courts generally assume that if a person was donating land to a government to be used as a park, the donor probably intended the land to remain in that use; in part because people do not tend to make general donations to the government, in the same way that they might make general donations to a nonprofit. Because courts often start with that assumption, they seem to seek out, or to easily accept, facts and circumstances that support that conclusion.

The case of Cohen vs City of Lynn is typical of these cases, 598 N.E.2d 682 (1992). There, the city sought to convert a beach-front park into a parking lot, and the action was challenged as violating a charitable trust. The court found that a charitable trust did, in fact, exist based on the intent of the parties, even though the city had at least partially paid the donor for the land involved (a fact that normally would militate against the finding of a charitable trust). The court went on to deny the City's argument that the park was too small to allow any reasonable use, noting that the land, nevertheless, could still provide a "Pleasant vista" that is "pleasing to the eye". Id. at 279. [17]

Similarly, in the case of City of Wilmington vs Lord, 378 A. 2d. 635 (1977), the Supreme Court of Delaware found that attempting to locate a water tank on parkland violated a charitable trust, and noted that: .."it is the general rule that in determining any inconsistency of use, restrictions in a deed given by a private individual donating land as a park must be strictly construed against the donee-government (Id. At 639).[18]

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[16] See section 5-D, below.

[17] It should be noted, as was mentioned above in the discussion regarding remedies, that this case provided for the harsh remedy of declaring that the sale of the land was null and void, and thus the court took the drastic action of un-doing the sale of the land, after the fact.

[18] Harkening back to our earlier discussion on standing, in this case the court brushed aside standing arguments, and in doing so stated: "..if suit by taxpayers is not allowed, the governmental action questioned will likely go unchecked…". Id. at 638. This is a good illustration of the fact that courts will sometimes accept or reject standing arguments, and other technical arguments, based on whether or not the court wishes to exercise its equitable powers. Here, the court wanted to intervene, so it essentially ignored standing issues.

It is not hard to see why courts tend to favor charitable trusts in these government park cases. Often the donor can be seen as trying to accomplish not just a benefit for the citizens using the park, but also the protection of the land that was special to the donor. Further, the donor can be seen as pursuing a narrow goal that is different than the general goals of the government. This can be distinguished from the kind of general asset cases discussed above, where the donor might be viewed as just trying to micromanage the activities of a nonprofit.

C. *Cases Involving Art:* In theory, the law regarding charitable trusts is what it is, whether it is being applied to fish or fowl. In reality, the subject matter in question hugely affects the process; and the subject matter where charitable trusts are favored more than in any other area is donations of works of art. In fact, there is even a specific term: "deaccession", that refers to situations where a nonprofit seeks to divest itself of any works of art in its collection.[19] Further, and somewhat inexplicably, fights in this arena are often times couched in terms of the fiduciary duty of the nonprofit's board members, rather than in terms of charitable trusts, even though the same essential question, that of whether it is permissible to dispose of a certain asset, is being addressed.

   There is a great deal that has been written about the subject of disposal of art works, but most of it is from secondary sources, such as articles, codes of museum ethics, etc., and very little from the courts.[20] Everyone seems to acknowledge, however, that the focus on this area comes from the fact that works of art are somehow special, and thus their disposal must be carefully scrutinized. In fact, it has been stated that there is a "rebuttable presumption, created by museum codes of ethics" that deaccessioning to cover operating expenses is unethical behavior".[21] In explaining the unique nature of art works, it has been said that "objects in museum collections are unique", and that "works of art are not simply collectable curiosities or cultural artifacts, but have a moral and aesthetic existence of their own".[22] It is not hard to see how factors applying to art works--uniqueness, having a special nature about them--could also apply equally to cases involving land, as discussed below.

D. *Cases Involving Conservation Easements:* In recent years there has been an interesting development in the mostly theoretical realm of discussions regarding charitable trusts. The argument has been put forth that, when a landowner donates a conservation easement to a government or nonprofit, the CE is not only what it appears to be on its face (a CE granted pursuant to the state statutes specifically allowing for the existence of conservation easements), but it also constitutes a general donation that gives rise to a charitable trust.[23]

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[19] The term actually applies to disposal of any items in a museum, but it is most typically works of art that are involved.

[20] This fact is noted in an article where the author states: "There have been relatively few court cases dealing with deaccession. Judges tend to give one-time orders that do not provide insight into their decision-making processes, and, as a result, offer no direction for future applicability. When It's OK to Sell the Monet: A Trustee-Fiduciary Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses, Jennifer L. White, 94 Michigan Law Rev, 1041, 1046 (1996).

[21] Id at 1047.

[22] Id at 1043.

[23] This argument is thoroughly discussed in the Rethinking Conservation Easement article, supra, which argued in favor of the possibility of such charitable trusts.

The context in which this argument would typically arise would be that of termination of a conservation easement. Such a situation actually arose in a Wyoming case, Hicks v Dowd, 157 P. 3rd 914, supra, where the holders of a conservation easement essentially stipulated to a voluntary termination of the easement. That case became a platform for asserting the notion that the donation of a conservation easement creates a charitable trust, and can thus only be modified in the manner allowable pursuant to trust law, and more specifically, that the cy pres doctrine would apply to any termination or significant modification of a conservation easement. The Wyoming Supreme Court essentially sidestepped the issue by ruling that the plaintiffs lacked standing. Then, the State Attorney General, who does have standing, intervened and reasserted the claim that the conservation easement should not be able to be terminated, and at that point the parties settled, essentially keeping the conservation easement in effect. That case also spawned a series of back and forth law review articles arguing about whether a charitable trust would be applicable in such a case.[24]

The courts have, by and large, not chosen to become involved in the debate about whether charitable trust principles apply to donated CEs. The existence of the arguments and protracted academic debate in this context, however, serves to highlight one of the main points of this article: that the contexts in which charitable trust arguments can arise are broad, and that the potential scope and application of the equitable notion of charitable trusts is difficult to pin down.

V. APPLYING CHARITABLE TRUST PRINCIPLES SPECIFICALLY TO DONATIONS OF LAND

It should be clear by now that there are two overriding characteristics regarding charitable trusts. First, the finding that a charitable trust exists can have very significant implications; and second, because courts acting in “equity” are relatively unconstrained in what they can do and why they can do it, it is hard to know in advance whether a charitable trust will be found to exist with respect to a specific donated asset. This is as true with respect to donated lands as it is to other donated assets. Land, however, has unique attributes, and when a court wishes to do so, it is relatively easy to look at these attributes and come up with a coherent general framework regarding how to analyze charitable trusts as they apply to land donations.

Courts have long recognized that land is unique, and that no one parcel of land is exactly equal to another. That is why the common law has always provided that agreements with respect to land are specifically enforceable, and that simply giving money damages for violations of agreements regarding land is not sufficient. Having said that, donations of land can effectively be viewed in three general categories: Those where the land is essentially a fungible thing of value; those where the land itself is not unique, but its location is; and those where the land has specific unique attributes applicable to it. We will look at each situation below.

[24] There were 4 articles involved in the exchange. The final ones, by each of the authors, were Hicks v. Dowd, Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight, Nancy A. McLughlin & W. William Weeks, 10 Wyo L. R. 73 (2010), Conservation Easements, Common Sense and the Charitable Trust Doctrine, C.T. Lindstrom, 9 Wyo. L. Rev. 397 (2009). The earlier articles are cited therein.

A. *Land as a Fungible Asset:* Most donations to nonprofits are of money, and unless the money is earmarked (restricted) for a specific use, the funds can be used for any legitimate expense of the nonprofit. A minority of donations however, are of property--real property or personal property. Often times such property is being given just like a gift of funds, and simply constitutes a thing of value given to help the nonprofit do its job. This is often the case, in recent times, with gifts of used cars, which gifts are actively solicited by many charities. When a donor gives her used car to the local NPR affiliate, the donor has no expectation that the charity will use that car itself to drive around town and conduct its business (although it certainly could). Rather, the expectation is that the car is just a thing of value, and that it will be somehow liquidated/monetized, and thus turned into funds that the charity can use for its operations.

   Not all gifts of personal property are fungible in the manner discussed above. Many donors give property to charities with the specific understanding that the item will be used only for a specific purpose and in a specific manner. This, as discussed above, is almost always considered to be the case with respect to gifts or art to a museum. Sometimes, it may not be clear, even with gifts of personal property, which category the gift falls into. A donation of a used Subaru to your local NPR affiliate would almost certainly be a fungible gift of value, with no charitable trust attached. But, a gift of the first Subaru ever sold in America, to a local Museum of Industry and Culture, would just as likely be found to be subject to a charitable trust, like a piece of artwork donated to an art museum.

   As noted above, courts have always found that land is unique, but notwithstanding that fact, in the context of a donation, the parties might be treating the land not as a unique item, but as a fungible thing of value. In that way, land is no different that the two different Subaru examples discussed above, one of which would likely be treated as a unique asset subject to a charitable trust, and one of which would not. There are plenty of situations where land is donated to a charity simply as a thing of value to be liquidated/monetized for the general use of the nonprofit. A classic situation would be where a donor owns a dozen condo units in a particular development, and donates them to his alma mater. In such a situation, knowing nothing else, it would be reasonable to assume that the condo units are intended to be fungible things of value to be liquidated with the funds applied to general charitable purposes, rather than unique parcels of land which may be subject to a charitable trust.[25]

   Harkening back to our discussions above, a court can find the existence of an implied charitable trust, even though the donation documents do not expressly establish a trust, by looking to the intent of the parties. As we have seen, in some cases, such as those involving donations of works of art to a museum, or those involving donations of land to governments for use as a park, courts will essentially apply a presumption that the donor must have intended for a charitable trust to apply. At the opposite end of the spectrum, when courts do not want to find a charitable trust, they will not only look for high levels of proof of the intent to create a charitable trust, but they will also apply any number of more or less discretionary doctrines (statue of fraud, parole evidence rule, merger, lack of standing) to avoid the imposition of a trust.

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[25] It is worth noting here that, in most current situations, if a charity is accepting a gift of land, it would and should specifically agree upon the nature of the gift. Thus, in the case of the donation of a number of condo units, the gift agreement or deed should, these days, expressly state that the gift is intended as general economic support, and that it is allowed and expected that the condo units would be sold, with the proceeds used for general support. This will be discussed further in the Conclusions and Recommendations section below.

Applying this understanding of how and why courts behave with respect to charitable trusts, it would be fair to assume that, in cases where land is being treated as a fungible thing of value, there should be a low level of scrutiny applied by the court, and the court should be expected to require substantial evidence of a specific intent before imposing a charitable trust. Similarly, in such situations, it would be expected that a court would be more likely to apply legal barriers to the imposition of a trust, such as requiring a strong showing of standing, or showing a high level of ambiguity in the donative documents.

B. *Land With a Significant Location:* Another unique aspect of land, and of gifts of land, is that land cannot be moved; its location is fixed as a point of the earth. In many cases that fact may be irrelevant to considerations of whether a charitable trust exists, such as in the case of fungible condo units being donated as a thing of value. In other situations, however, the location of the land, especially as it applies to the charitable activities that may be conducted on the land, may be highly relevant. Often donors care where a charitable activity takes place. If a donor gives a charity a parcel of land upon which the charity will operate a health clinic for the needy, the donor might, for a variety of reasons, have a clear desire and expectation that the clinic will be located at the site of the original land donation. Alternatively, in other situations, like giving land to a nonprofit for the location of its headquarters building, the donor might only desire to provide a place of operations, but not care at all whether the headquarters, in the future, remains in that precise place.

   This location issue is often the cause of disputes regarding charitable trusts. For example, in the Banner Heath case, the proponents of a charitable trust argued that the operation of a clinic within a specific community was a key element of the donor's intent, and therefore the location cannot be moved without a cy pres analysis by a court finding that the operation of the clinic at that location was no longer viable.[26]

   Returning to our degree-of-scrutiny analysis, we can apply it to issues of location. In cases where the donated land was put to use in a situation where location would likely not be relevant (like, for example, an administrative use), it would be reasonable for a court to apply a low level of scrutiny to the possible imposition of a charitable trust, and to require a strong showing of donor intent. At the other end of the spectrum, if the use on the land is very location specific, such as providing onsite services to high-need communities, a court could be expected to apply more of a presumption in favor of finding the existence of a charitable trust.

C. *Land With Unique Qualities:* The most interesting category of donated lands is that where the lands are, or are believed to be, possessed of unique characteristics. That unique status could already exist at the time of the donation, or it could be anticipated to come into existence by the intended use of the land (for example, a sacred site for worship). Generally, if donated land is truly uniquely special (the land where a famous person was born; land providing habitat to an endangered species; land with a truly specular view), that fact would be relevant in determining whether the parties intended that the land be subject to a charitable trust. To put in in the parlance that we have developed above, such a fact should lead to a court applying a high level of scrutiny and a strong presumption in favor of a charitable trust.

[26] See The "Charitable Trust" Doctrine:Lessons and Aftermath of Banner Health, 23-4 ABLJ 28 (2004).

One axiom in the area of land conservation is that everyone believes that their lands, like their children, are uniquely special, and in a sense they are always right about that. So, it may be hard to tease out the difference between land that is truly special, in some respect, and land that merely subjectively feels special to its owner/donor. But, as we have seen above, courts will generally go out of their way to honor the charitable intent of the donor, just because, when someone shows generosity in making a gift, it feels right to honor their wishes with respect to the gift. Also, when donors know that there is a policy of honoring their intent, it makes donors, in general, more likely to make gifts to charities. Thus, even if the unique and special aspects of a gift are merely subjective in the eyes of the donor, that is still a factor that should be expected to militate in favor of finding a charitable trust. Obviously, if the unique qualities of the land are obvious to all, that would be expected to create an even stronger presumption of a charitable trust.

D. *Timing of the Gift:* At this time, it is useful to take a look at the changes over time in land conservation strategies. At the current time, most charities are careful about how they accept donations of land, and if a charitable trust is intended, it would be expected that it would be carefully documented. Also, presently, the existence of conservation easements and land trusts are widespread, and so it can be expected that if a donor was primarily interested in protection/preservation of donated lands, the donor would employ a conservation easement. But both of those assumptions, while true now, were not true in the relatively recent past.

With respect to conservation easements and land trusts, even though they are widespread phenomena, they are recent ones.[27] It was not until 1980 that the IRS first recognized that conservation easements could be tax deductible. Until that time, there were few CEs granted, and there were few charitable organizations that would accept the donation of easements. The Land Trust Alliance, the national umbrella organization for land trusts, did not come into existence until 1982, and at that time there were only about 430 land trusts in the nation [28] (as of the 2015 National Land Trust Census there were 1,363).[29] Moreover, as discussed above, at common law, there were many presumptions against perpetual restrictions on land, and the public policy was squarely on the side of promoting the free transferability of land.[30] For all these reasons, if you look back in history 50 years or more, there was not an easy answer for landowners who felt that there was something special about their land, and felt a need to protect that special asset. In those times, the best that donors may have been able to do was find an organization that seemed to have a long life (like a college, a government, or a prominent nonprofit), and donate the land to it with the hope that the land would be protected in perpetuity. Oftentimes the donor might not have been aware of the possibility of imposing a charitable trust on top of the donation. On the other side of the equation, the donees were often in the same boat, wishing to take the donation, in part because the land seemed special, but not necessarily wanting to go thru the trouble of establishing an actual legal restriction or trust that would protect the land.[31] So, in light of all this, a court looking at a

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[27] See, An Introduction to Conservation Easements in the United States: A simple Concept and a Complicated Mosaic of Law, Frederico Cheever & Nancy A. McLaughlin, 1 J.L. Prop. & Soc'y 107 (2015)
[28] Land Trusts and The Land Trust Movement, Richard Brewer, The Trustees of Reservations, Volume 9, No. 3, 2001.
[29] Number of Accredited Land Trusts Reaches Milestones, Land Trust Alliance, February 22, 2017.
[30] These presumptions were overridden by state statutes that specifically authorized perpetual conservation easements, but these state authorizing statutes did not start to be enacted until the 1970s.
[31] In the article, The Restricted Gift Life Cycle, or What Comes Around Goes Around. John K. Eason, 76 Fordham L. Rev. 693 (2007), the author does a good job of explaining how gifts could come in the door with the assumption that the gifts were restricted, but later be treated as though the gifts are unrestricted.

donation might reasonably apply a different level of scrutiny depending on the vintage of the gift, and assume that gifts made long ago would be more likely to have an unstated intent to apply a charitable trust to the donation.

E. *Summing Up Land Donations:* Land donations share some qualities with situations like gifts of artwork, or public parks, where there should, in appropriate cases, be a strong presumption that a charitable trust was intended. They also share some qualities with simple gifts of things of value, where it is unlikely that a charitable trust would have been intended. Further, the era in which the gift was made can strongly factor into determining whether the land donation was or was not intended to be restricted in some way. All of this conspires to make for a tough job for the holder of donated lands to determine whether the land involved can be treated like any other asset of the nonprofit, and for example sold-off to raise operating revenues, or whether taking such actions would violate a charitable trust, with all the consequences that may entail.

VI. APPLYING CHARITABLE TRUST ANALYSIS TO BOY SCOUT/GIRL SCOUT CAMPS

A. *General Observations Regarding Scout Camps:* After going through the above analysis, what is left is to apply the principles we have been discussing to a real-world situation. The camps owned by the Boy Scouts and Girl Scouts provide a perfect vehicle for doing just that.[32] The Boy Scouts and the Girl Scouts each own hundreds of camps spread across the US (as well as in other countries). The camps tend to be relatively large, and made up of relatively natural and pristine lands, often including water features, with significant natural resource and scenic values. In short, they tend to be very nice parcels of land. The lands also, by and large, were acquired by the scouts via direct charitable donations and/or by purchase utilizing donated funds.[33] Finally, most of the camps have been in existence for a long period of time, and were obtained by the Scouts during the time period (discussed in Section V.D. above) when conservation easements were not widely available, and when procedures regarding careful documentation of charitable trusts were not widely practiced.

Both the Boy Scouts and Girl Scouts currently face challenges regarding their camps. First, both organizations have been dealing with declining participation by scouts. Currently the Boy Scouts have approximately 2 million members, down from a high in 1970 of 4,000,000. Similarly, as of 2018, the Girl

[32] It should first be noted that the author has no relationship to either the Boy Scout or Girl Scout Organizations, and that the observations made about the organizations and their camps are simply based on public information. It should also be noted that both organizations have complex structures involving both national parent organizations and regional or local sub-entities or counsels, and that some of the camp properties may be owned by any of those entities. However, for simplicity sake, in this article we will merely refer, generically, to the Boy Scouts and the Girl Scouts, as referring to the cluster of related entities that each of them encompasses. Finally, the author has not been involved in any situations involving claims of charitable trusts being asserted in cases involving Scout camps, but has been involved in numerous situations where Boy Scout, Girl Scouts, and other nonprofit camp owners have placed voluntary conservation easements on their camp properties.

[33] It is certainly possible that a particular camp could have been acquired by the Scouts with no donation, and out of general unrestricted funds that were not donated for the purpose of acquiring a camp. For the purposes of our analysis, however, we will be assuming that some level of donation was involved.

Scouts have 1.76 million members, down from a high in 2003 of 2.9 million in 2003.[34] Generally speaking, having fewer scouts requires fewer camps. Additionally, starting in January of 2019, the Boy Scouts began accepting girls as members. This could be expected to result in a shifting of girls away from the Girl Scouts and to the Boy Scouts, with the resulting lower need for Girl Scout camps. Finally, in February of 2020, the Boy Scouts national organization filed a chapter 11 bankruptcy, in part to deal with numerous claims of abuse being filed against the national organization and/or its affiliates.

All of the above pressures on the Boy Scouts and Girl Scouts conspire to increase situations where each of them may wish to close down camps, and sell off the land to raise revenues that can be used for other organizational purposes.[35] In recent times, there have been various news stories highlighting specific situations where Boy Scout and/or Girl Scout camps are being closed down and offered for sale, often of the objections local scouting members.[36] As mentioned above, the bulk of these camps were likely acquired by donation, or via funds donated for the acquisition, and so they certainly fall into the sphere where issues of charitable trusts could be involved.

B. *Applying Charitable Trust Principles to Scout Camps:* Considering the factors we have discussed above regarding how courts do, or perhaps should, look at situations involving charitable donations of land, let us now examine how the principles might apply to a typical situation involving a Scout camp.[37] First is the question of the unique and special values of the land. As in the case of artworks, if the donated property is considered to be unique and special, that should give rise to more of a presumption that a charitable trust was intended. Scout camps would seem to fall solidly into that category. The camps tend to be scenic and rich with recreational opportunities. They also tend to be large and relatively pristine--all characteristics that would make a person want to camp and recreate on the property. It is easy to imagine that the donor of the land, and the Scout organization, would have both been aware of such positive qualities associated with the land, and it is also likely that they would have discussed such matters at the time of the donation (thus providing evidence to support a claim of a charitable trust).[38] Considering all of this, it would seem likely in a typical case that it could be convincingly argued that a Scout camp presents the type of unique and special land that would justify the presumption that a charitable trust was intended.

A second factor to look at is the location of the land, and as noted above, if the location is somehow highly relevant, that fact could militate in favor of a presumption of a charitable trust. In the case of scout camps, the location factor is a bit confusing. At the time of the donation of the land, there is not likely to be a perceived need to have a camp at that precise location, as opposed to, for example, in that general area. However, the anticipated use of the land may ultimately make its location relevant. Scout camps are generally considered as being special places, and the Scouts are encouraged to form a special bond with the land. Additionally, the Scouts are taught land-related values, and how to treat the

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[34] As to Boy Scouts, Salt Lake Tribune, McCombs & Crary (Dec 17, 2019); as to Girl Scouts, Christian Science Monitor, David Crary, July 26, 2018.
[35] See, A shift for Survival: The Impact of the Girl Scout Realignment on Camps, Gregory A. Copeland & Elizabeth W. Iszler, Camp Business (January/February 2010).
[36] Why are Girl Scout Camps Big Closed? Alessandra Rafferty, thedailybeast.com, (2014).
[37] It should be noted, at this point, that there really is no such thing as a typical case. Each situation will obviously be unique, and, in the real world, would need to be evaluated based on its own facts and circumstances.
[38] Recall that the “donor” of the land can sometimes not be an individual, but can rather be the various parties who donated funds for the acquisition of a camp.

land with respect and reverence, often harkening back to Native American principals of the sacred nature of land. With these as the anticipated uses of the donated land, it would be reasonable to assume that the donor and the Scouts would anticipate that the particular land would, over time, be imbued with intangible qualities and characteristics that would make it a special and unique place. Additionally, it could reasonable be assumed that the parties may have intended that, if there was ever a reason to terminate the use of the camp, that the land would be treated with some form of reverence, rather than just being sold off as surplus property.

The final factor that we discussed as possibly influencing presumptions regarding charitable trusts on donated lands is the era in which the donation was made. In the modern era, if a donor wished to have her land protected in perpetuity, she might be expected to know about and make use of a conservation easement. In earlier times (say, before 1980) such would not be the case. Obviously, each Scout camp was created at a different point in time; however, it appears from a cursory review of camps, that most were created before 1980, at a time when land was less expensive, and when large undeveloped tracks of land suitable for a scout camp were more widely available. This could justify a presumption that a charitable trust may have been intended, since the donor would have had no other convenient way to protect the property in perpetuity.

C. *The Bankruptcy Wrinkle:* As was discussed in Section 2 above, one of the characteristics of any kind of trust is that the trustee is not considered to be the actual owner of trust properties, but is rather a nominee holding the property on behalf of the beneficiary, who has the true beneficial interest in the property. That is also true of a charitable trust, although the logic is not always easy to discern, since the "beneficiaries" may be ill-defined or diffused, such as, for an art museum, the beneficiaries being the art-loving public. In the case of a Scout camp that is subject to a charitable trust, presumably the beneficiaries would be past, present, and future Scouts who may use the camp.

An important side-effect of a trustee not being the beneficial owner of trust property is that the creditors of the trustee, who may have claims against the trustee, and who may be able to satisfy their claims out of the trustee's actual property, cannot satisfy their claims against trust property held by the trustee. In other words, trust assets are generally not subject to claims against the trustee.[39] Since a charitable trust within a nonprofit is a trust, this is also true for charitable trusts. For example, in the case of a nonprofit that owns some assets outright, and some in charitable trusts, only the directly owned assets would be subject to claims of the nonprofit's creditors, even though all of the assets are essentially held and used for charitable purposes. Moreover, in the case of an *implied* charitable trust (which is the subject of this article), it may not necessarily be clear whether or not particular property is subject to a charitable trust.

Bankruptcy is typically the forum where these creditor-related issues are played out. In bankruptcy, the trustee is deemed to be a good faith creditor, and can essentially take control of the value of all of the debtor's assets, and distribute that value to the creditors. But, even in bankruptcy, a trustee cannot seize and distribute the value of trust assets held by the debtor, because they are not the beneficial property

[39] Applying this rule to specific assets of a nonprofit, such as interests in a financial fund or the like, can be tricky. See, Generally, Charities in Financial Distress: The impact of Bankruptcy on Donor-Restricted Funds. Planned Giving Design Center , Richard L. Fox (2015).

of the debtor.[40] This is also true in the case of a charitable trust, but again, things get a little cloudy when dealing with an implied charitable trust.[41]

As noted above, as of February 2020, the Boy Scouts of America filed for chapter 11 bankruptcy, and they are operating within bankruptcy as of the time of the writing of this article. According to the general principles discussed above, if the Boy Scouts own a camp, and the camp is subject to a charitable trust, the value of that camp may be excluded from the Boy Scouts' assets, and thus may not be subject to claims of its creditors in bankruptcy. This situation raises a multitude of questions, including:

- How are claims of charitable trusts raised in bankruptcy? Can the Boy Scouts themselves assert the claims or would they need to be asserted by trust beneficiaries?
- What would the terms of any such charitable trusts be? Would the trust completely remove the value of the camp from the estate, or would only some lesser amount of beneficial interest be removed?
- What about camps owned by Boy Scout local councils, when the councils themselves have not filed for bankruptcy? Could claims of charitable trust regarding those entities effectively be addressed in the bankruptcy proceeding?
- Would the Boy Scouts want to claim that camps are subject to charitable trusts (which might remove the value of the camp from the estate subject to creditors), or would they want to oppose the existence of the charitable trust, since the trust would forever limit their ability to deal with the camp property as if it is their own?

The situation that is perhaps most analogous to the Boy Scout bankruptcy is that of the Bankruptcy of the City of Detroit, and the consideration of the value of the artwork in the Detroit Institute of Art (DIA) within that bankruptcy. While there are notable differences in that situation,[42] the gist of the situation is the same: general creditors of the bankruptcy estate were arguing that the value of the artwork should go to the creditors, and beneficiaries of the trust (with the support of the Michigan Attorney General) were arguing that the City did not own the beneficial interest in the art, so its value should not go to the creditors.[43] Unfortunately, the Detroit case never yielded answers to such questions because, as is often the case, the matter was settled in what came to be known as the "Grand Bargain." As part of that settlement, a group wishing to protect the artworks injected approximately $816 million into the bankruptcy estate (which funds were used to satisfy the claims of creditors), and in return, it was deemed that the artwork would thereafter be in a special trust and would not be subject to any further creditor claims. Tantalizingly, in approving the Grand Settlement, the judge said that if the case were actually litigated, "the position of the Attorney General and the DIA would almost certainly prevail".[44] The judge's comments strongly imply that the judge felt that a charitable trust would have ultimately trumped the claims of the creditors, and that the value of the artworks would not have been included in the bankruptcy estate.

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[40] 11 USC 541(d).
[41] See Assets Held by Charitable Organizations Are Safe from Claims of Creditors in Bankruptcy Cases…Or are They? Non Profit Law (2013).
[42] The Detroit situation involved a municipal bankruptcy under chapter 9 of the bankruptcy code, rather than under chapter 11, and the artwork was arguably subject to a direct trust, rather than an implied trust.
[43] See In Art We Trust: The Intersection of Trust and Bankruptcy Law in Detroit, 48 Tex.Tech L. Rev. 313 (2016).
[44] Id at 335.

Only time will tell if the Boy Scout bankruptcy sheds more light on some of these difficult charitable trust questions pitting one worthy group (the Boy Scout creditors, many of them victims of abuse) against another worthy group (those seeking to preserve the camps for the enjoyment of the beneficiaries).

VII. CONCLUSIONS AND RECOMMENDATIONS

The message that this article seeks to impart is that a nonprofit does not want to find itself in the position of having an assertion being made that some property of the nonprofit is subject to an implied charitable trust.[45] This is true for several reasons. First, the law governing this area is nebulous. When a court imposes a charitable trust upon nonprofit property, it is doing so acting in equity, rather than in law. When courts act in equity, they are essentially just trying to do what seems right, and it is hard to have a clear set of rules or guidelines governing such matters. Accordingly, there is plenty of room for litigation, and, if the parties asserting the claim have resources, the cases can quickly become far-reaching and expensive. In fact, when one looks at the most-talked about cases in this arena, they almost always end in a negotiated settlement, rather than in a court ruling. This is so because the parties eventually realize that litigation is an expensive quagmire leading to an unknown result, and that they are better off just crafting their own settlement.[46]

The second reason to avoid implied charitable trusts is that there is no way to know where they begin and where they end. Issues regarding implied charitable trusts typically arise when a charitable entity seeks to make a major change with respect to an asset: to close a clinic, to move a museum, to sell a camp. If a judge finds that a charitable trust exists and issues a ruling in such a case, it will typically simply prohibit that particular action from happening. Thereafter, the parties know that there is a charitable trust, but they have no idea of the precise parameters of the trust. If the ruling prohibited the sale of a camp, what about other changes in the camp's operations, such as cutting back on the camp's operations, or leasing the camp to other organizations? If a ruling prohibited the sale of certain artwork, what about the lending of the artwork to another museum, or the moving of the artwork from a prominent position in the museum to a less prominent one. Since the parties know that there is a charitable trust involved, the charity would never know if and when the issue might arise again, and if it does, whether there might then be another judge at that time, who has her own ideas about the scope and extent of the trust.

In light of all of the above, in closing, here are two relatively simple tips for avoiding the pitfalls of implied charitable trusts for donated real estate:

A. *Avoid New Problems:* This is preaching to the choir. Most nonprofits in this day and age understand that they should be careful when accepting donations of real estate. This goes beyond simple physical matters (such as conducting an environmental review of the property), and extends to fully

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[45] See The Unraveling of Donor Intent: Lawsuits and Lessons, Planned Giving Design Center, Miree & Smith, (2009), in which the author uses numerous cases to illustrate the problems with charitable trust litigation, and then offers some sound suggestions for avoiding such problems.

[46] It is worthwhile to look at the pleadings to a recent case in which a nonprofit sought to dispose of land that had traditionally been used as the Foxfield horse racetrack. https://pecva.egnyte.com/dl/1hNs8auqdL. As these pleadings show, the case quickly became complex and extensive. In that case, like in some of the other widely known cases, the parties quickly settled.

understanding and documenting the intent of the parties. There are plenty of resources on the web describing, for instance, the use of donation agreements to make sure that there are no unintended restrictions on the future use of the property, and there are plenty of consultants who can work with charities that are contemplating accepting gifts of land. Follow these directions, and avoid creating new problems.

B. *Address Existing Problems Preemptively:* In most cases involving claims of implied charitable trusts on land, the donations occurred long ago. Consequently, many of these claims presently lie dormant, and will not arise until the charity tries to do something with its real property, and suddenly claims are asserted. So, many charities do not even know whether they have potential charitable trust issues hanging over them like proverbial Swords of Damocles. Because of these uncertainties, the first rule of thumb is to tread carefully. Most claims of charitable trusts are asserted by people who feel disaffected, or excluded from the decision-making process. So, before making any big decisions about changes of use of donated lands, conduct initial scoping to see if there is anyone around who would be interested in the action: the classic example of which being the donor of the property or the heirs of the donor. Similarly, conduct scoping to see if there are third parties who might be interested in the disposition of the land, classic examples of which would be users of the land (like people who recreate on the land, use a charitable clinic, etc.) and neighbors of the land, who may have come to rely on the current use (or perhaps non-use) of the land. If none of such constituents are discovered in the scoping process, moving ahead with the plans may be appropriate, but if some interested parties emerge, the charity would obviously want to deal with them in a respectful and inclusive manner, so as to try to have them as supporters of the endeavor, rather than opponents.

   If a charity does believe that certain of its land might be subject to an implied charitable trust, it may be best to face the issue head-on, and to fully clarify the restrictions involved. One way to do this would be to create an actual trust instrument that fully sets forth the terms of the otherwise implied trust. By doing this, the nonprofit can fully flesh out the terms of the trust, and avoid the uncertainty, discussed above, regarding the reach of the trust. This, of course, can best be done if the parties who are asserting or may assert the trust (for instance the donor) are available and involved in the process, and can sign-off on the resolution. If such parties are unavailable, it may be that the charity would need to seek approval of the terms of the trust agreement from an appropriate authority, such as the State Attorney General's charitable gifts officer, or from a court of competent jurisdiction.

   A final approach would be to replace the restriction embodied in the implied charitable trust with a better form of a restriction, such as a conservation easement. As noted above, conservation easements are legislatively-approved instruments that are intend to achieve the perpetual protection of land. As such, they are far superior to a deed restriction or an implied charitable trust for achieving the permanent protection of land. Moreover, the terms of a modern conservation easement tend to be clear and fully encompassing of all of the restrictions involved, and so they avoid the kind of continuing ambiguity that can be involved with an implied charitable trust. Finally, the holder of a conservation easement is typically structured in a manner so as to assure the perpetual enforcement of the easement, and a typical modern conservation easement donation typically includes an endowment payment, calculated to cover anticipated future costs of enforcement of the easement.

In most situations, those asserting a charitable trust would be much more satisfied with a conservation easement, as being more likely to actually enforce the charitable intent of the donor in perpetuity. Additionally, if the nonprofit ever desires to dispose of the property (and such changes of ownership are not prohibited by the new conservation easement), there is often a ready market of buyers who are willing to purchase land protected by a conservation easement, whereas there may be no market for selling land subject to an implied charitable trust.[47] As noted above with respect to creating a trust document, it will simplify matters if there is someone involved in the process who can provide the donors approval for substituting the conservation easement for what might have been an implied charitable trust; otherwise, again, the action may require the approval of the State Attorney General or a court of competent jurisdiction.

As in any area of the law, forewarned is forearmed. As a manager of nonprofit lands, it might be nice to believe that the lands can be dealt with in any manner that promotes the current interests of the nonprofit; however, a full understanding of potential charitable trust implications regarding that land arms the manager with critical information. That knowledge can allow the nonprofit to avoid stumbling into costly battles regarding changes of use of the land. Perhaps more importantly, it can allow for preemptive actions that can maximize the value of the land for the nonprofit, while at the same time assuring permanent honoring of the donor's intent.

[47] See previous article by the author, Landing in a Tough Spot, Navigating the Challenges of Gifts of Land, Strugar & Garcia, CASE Currents (Sept-Oct 2019) which describes how some colleges have used conservation easements to both protect donated lands, and make those lands marketable to third parties.