

Should Donors Give Up on Giving to Universities? The Ongoing Problem of Donor Intent

By Martin Morse Wooster

Summary: The out-of-court settlement in Robertson v. Princeton helped secure some protection for the donor intent of the late Charles and Marie Robertson and illustrates the lasting tension between donors and universities about how donor funds are used. Other cases are currently pending that could help provide guidance for donors and schools about how donor funds should be used.

Last December the *Robertson v. Princeton* donor intent lawsuit was settled. The heirs of Princeton University donors Charles and Marie Robertson, who died in 1981 and 1972 respectively, and Princeton University reached an agreement that calls for Princeton University to assume control of the Robertson Foundation, a supporting foundation of Princeton with assets between \$550 million and \$700 million, or 6% of Princeton’s endowment. The foundation will be terminated and its assets fully integrated into Princeton’s endowment. In return, Princeton will contribute \$50 million over 10 years to the Robertson Fund for Government, a newly established scholarship-granting nonprofit. Princeton will also repay \$40 million to the Banbury Fund, the Robertson family foundation that funded the Princeton lawsuit.

Had the case gone to trial, *Robertson v. Princeton* would have been the largest donor intent lawsuit ever. Though the Robertson case has been settled, the case illuminates the increasing tension between donors and universities about how their gifts are used or misused.

This tension cuts across political lines. Renowned conservative columnist Robert



Battling over donor intent: William Robertson (at far right in plaid jacket) and his cousin Robert Halligan (second from left) watch court proceedings in *Robertson v. Princeton* in late 2006.

D. Novak, for example, decided to give his alma mater, the University of Illinois (Urbana-Champaign), enough money to endow the Robert D. Novak Chair of Western Civilization and Culture. “Conservative friends to whom I revealed my intentions told me I was taking a terrible risk with a left-wing public university,” Novak wrote in his autobiography *The Prince of Darkness*. “Surely, after I was dead and perhaps even while I was alive, these skeptics warned, my chair would be filled by an exponent of racial and gender diversity.”

The University of Illinois did fill the position with a classics professor, Jon Solomon. But as Accuracy in Academia executive director Malcolm A. Kline noted, Solomon wrote a

book on The Three Stooges and has classes that, according to students blogging at rate-myprofessor.com, have “tons of pop culture references in every class” and have “a lot of cool trivia.” Novak let the University of Illinois keep his money.

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On most issues, Robert Novak and Jane Fonda have nothing in common. But on the issue of donor intent in universities, they are on the same side. In 2001, Fonda donated \$6.5 million and pledged an additional \$6 million to the Harvard Graduate School of Education to establish the Harvard Center on Gender and Education. Dissatisfied with the progress towards the establishment of the center, Fonda in 2003 cancelled the \$6 million pledge and persuaded Harvard to give back the \$6.5 million she had already spent. (For more examples of universities misusing individual donor's gifts, see "Giving to College Endowments: How Colleges Violate Donor Intent ... What Donors Can Do About It," by Martin Morse Wooster, *Foundation Watch*, November 2002.)

This article updates my earlier work on the Robertson case and provides information about two other important donor intent cases involving Tulane University and Randolph College. (I previously wrote about the Robertson Foundation in the third edition of *The Great Philanthropists and the Problem of 'Donor Intent.'* That section, which covered the first four years of the *Robertson v. Princeton* lawsuit was excerpted as "The Robertson Foundation Case: Can Princeton Ignore A Donor's Intent?" published in the May 2006 issue of *Foundation Watch*.)

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The Robertson Foundation

The Robertson Foundation case was initiated by the heirs of Charles and Marie Robertson. In 1961 the Robertsons donated \$35 million to Princeton. The gift came from the wealth of Marie Robertson, an heiress to the A&P grocery chain fortune.

The Robertsons wanted their money to be used to aid Princeton students who wanted to pursue careers "in those areas of the Federal Government that are concerned with international relations and affairs." To ensure that their heirs would have some say in how the money was used, they left their wealth not to Princeton, but to the Robertson Foundation, a supporting organization of Princeton that the Robertsons created. Of the foundation's seven seats, Princeton got to fill four.

For 40 years Robertson money went to Princeton's Woodrow Wilson School, the graduate school for Princeton students who wanted to pursue governmental careers. But four of Charles and Marie Robertson's children and a cousin sued Princeton in 2002 to sever the bonds between Princeton and the Robertson Foundation as they became increasingly dissatisfied with the way Princeton spent the foundation's money.

The case languished in the Chancery Division of Mercer County, New Jersey Superior Court for years. Part of the problem was that it was a gigantic suit that landed in an obscure court that dealt with probate matters. But it was also clear that Princeton's strategy was to delay the suit as long as possible in the hope that the Robertsons' money would run out before the trial got underway.

The Robertsons pursued an effective public relations strategy to advance their case. They commissioned a 2005 Zogby poll in which 53% of Americans surveyed said they would "definitely stop giving" if a charity "used your money for a purpose other than the one for which it is given." In 2006, they released PricewaterhouseCoopers accountant Michael J. McGuire's "forensic audit" of the foundation that concluded \$207 million of the \$330 million spent by the Robertson Foundation between 1996 and 2002 was "diverted" improperly and that only \$26 million of the money was used for classroom instruction.

The next move in the case came in March 2007, when Princeton returned \$782,000 to the Robertson Foundation that the university said was used on graduate student fellowships. Princeton said that the money (known as the "Graduate Funding Agreement") needed to be returned because the money was spent without informing the Robertson Foundation board. Robertson family lawyer Seth Lapidow told the Chronicle of Higher Education that the university returned the funds because "they have been caught with a story that didn't measure up."

In May 2007 Woodrow Wilson School undergraduate student David Smart corroborated one of the Robertson family's key charges—namely, that the relatively small number of Woodrow Wilson School graduates that pursued careers in international affairs was evidence that the university wasn't honoring the Robertsons' wishes.

Writing in the Daily Princetonian, Smart noted that during his summer internship at a news magazine, he saw that students at Northwestern's Medill School of Journalism were given extensive support and encouragement as they pursued media-related careers. "I don't get that sense of seriousness with the undergraduate component of the Wilson School," Smart said. The school made no effort to place students in summer internships at government agencies, offering students who wanted to work for the government "a laundry list of links to government organizations just as easily found by using Google," he said.

Smart charged that the Wilson School's desirous support for undergraduates wanting to work for the government was evidence that the Robertsons were right. "The stereotype of the [Wilson School] major with no intention to serve in government with students, looking only to join the world of investment banking, exists for a reason," Smart said. "Stereotypes exist for a reason."

The next move came in October 2007, when Judge Neil Shuster issued several rulings on how the trial would proceed. He rejected Princeton's claim that the university was "sole beneficiary" of the Robertson gift. Had he not, Princeton would have retained control of the Robertson money even if the Robertson Foundation had been allowed to

secede. But Shuster rejected the Robertson family's request for a jury trial and while he ordered Princeton to refund \$62,000 in overcharges to the Robertson Foundation, he also declared that the Robertsons' claim that Princeton misused \$17.6 million of foundation money would have to be determined at the trial. In addition, he ruled that the Robertsons had to show "egregious and nefarious" behavior on Princeton's part if they were to win their case.

Princeton appeared to be wearying of the case. In the December 2007 issue of *University Business*, Princeton spokeswoman Cass Cliatt denounced the Robertson family for having "a very aggressive PR machine" that resulted in reports "casting doubt on the university and its commitment to its donors." She said that Princeton's public relations effort was "necessary to correct the record."

Robertson v. Princeton was further delayed when Judge Shuster announced his retirement in March 2008. Citing a heavy caseload, including a rising number of foreclosure cases, his successor, Judge Marie Sypek, also pulled out of the case months later.

Princeton's next victory came in June 2008, when a New York State appeals court upheld a \$9.6 million judgment for Princeton against a subsidiary of giant insurer American International Group (AIG). In 1998, Princeton acquired a \$15 million "directors and officers" liability policy protecting its officials from lawsuits like the Robertson's. It sued the insurer, which was only willing to pay the University \$5 million. The insurer argued that because the Robertson Foundation was an entity controlled by Princeton, it should not have to compensate the university for suing itself. The New York State court disagreed and ordered AIG to pay Princeton the rest of the \$15 million, giving it additional resources to drag out the very costly case.

Also in June, Judge Sypek moved the trial date from October 2008 to January 2009. Princeton's lawyer Douglas Eakeley had good reason to be pleased. He told the *Times of Trenton* that Sypek informed the litigants "it would take her a while to get into her new role as Chancery judge, and given what's on her docket, she would not be able to get to us until January."



Princeton's Woodrow Wilson School

William Robertson said that Princeton had "one single strategy to delay it until one of three things happens: We run out of money, time wears us out, or we become ill or die."

After Judge Sypek withdrew from the case, retired Superior Court Judge John A. Fratto took over. He ruled that it would be split into two parts: one to determine if Princeton was liable for the claims the Robertsons made about violations of donor intent, and a second trial to determine what damages Princeton had to pay. The first trial was set for January 2009.

The parties settled the month before the trial. The case, Henry Gottlieb wrote in the *New Jersey Law Journal*, had produced "half a million pages of documents" from Princeton "in pretrial discovery. The trial witness list had 124 names, 80 witnesses had been deposed, 3,000 pages of briefs were required and 5,000 trial exhibits were identified."

Princeton subsequently tried to pose as a champion of donor intent. Vice-president Robert Durkee claimed in a letter to the *Chronicle of Higher Education* that the trial was about "whether the descendants of a donor can overturn the donor's intent" and that the decision ensured "that the bulk of Marie Robertson's gift is now protected from further attempts to divert it to other uses." Durkee did not address the Robertsons' claim that the university had diverted hundreds of millions of dollars away from the foundation to other uses through accounting tricks. Nor did he explain how dissolving the Robertson Foundation—and therefore removing all of the legal safeguards placed in the foundation's deed of trust—would honor the late benefactors' wishes.

The most extensive defense of the Robertsons came from Foundation Management Institute chairman Neal B. Freeman, who provided counsel to the Robertsons. In a *Hudson Institute* paper, Freeman wrote that the settlement was a triumph for donor intent. It ensured that "the Robertsons reclaimed funds sufficient to the family task and secured at least for this generation the principle of donor rights. Princeton, for its part, was publicly embarrassed and financially penalized, but it managed to avoid the death penalty. Even before the legal contest was settled, Princeton set up a new Office of Stewardship, whose responsibility it is to conform campus spending to donor intention. At this moment in time, the safest place on the planet for donor intent may well be Princeton, New Jersey."

Newcomb College: The Case Most Like *Robertson v. Princeton*

The *Robertson v. Princeton* case illuminates the continuing struggle between donors and universities over how donations are to be used. The two cases that are most like the Robertson Foundation saga are the continuing battle over the existence of Newcomb College in New Orleans and the concluded battle over the transformation of Randolph-Macon Women's College into co-ed Randolph College in Lynchburg, Virginia.

The Newcomb College case is the one most like the Robertson case. Both involve efforts by a university to fully assimilate semi-autonomous units. These units believe they have legal grounds based on donor intent to reject their assimilation. The sums associated with Newcomb College are far smaller; the Newcomb endowment is around \$40 million, compared to the Robertson Foundation's \$550 million to \$700 million. The Newcomb debate concerns whether or

not Tulane University is legally entitled to take over control of Newcomb's endowment and make it a component part of Tulane. Newcomb College had been considered a "coordinate college" of Tulane.

At issue are the intentions of Josephine Louise Newcomb (1815-1901). Mrs. Newcomb was born Josephine Le Monnier, and settled in New Orleans in 1831 to live with her sister after their father died. In 1845 she married Warren Newcomb, a merchant who made his money buying sugar, rice and molasses from Louisiana planters and then selling them to northerners. Newcomb and his wife eventually settled in New York, where Warren Newcomb ran a wholesale grocery business. They had one daughter, Harriott Sophie Newcomb, born in 1855.

In 1866 Warren Newcomb died suddenly and his widow and daughter drew close. Then, in 1870, Sophie Newcomb died from diphtheria at age 15. Josephine Louise Newcomb then spent the remainder of her life trying to raise enough money to ensure a suitable memorial for her late daughter.

Josephine Louise Newcomb was a highly successful investor, accumulating \$4 million during her lifetime. Her chief passion, however, was trying to find a suitable place for her daughter's memorial. Her husband had set up a scholarship fund at Virginia's Washington College (now Washington and Lee University), and while Mrs. Newcomb made contributions to this school and to the Confederate Memorial Home in Charleston, South Carolina, she spent much of her time scouting out candidates for her daughter's memorial.

In the mid-1880s, she found a worthwhile place for her donations. She was spending increasing amounts of time in New Orleans and had become friends with Mrs. Tobias G. Richardson, who was also interested in charities. They spent time together visiting asylums and orphanages and making small donations. But Mrs. Richardson's husband was the head of Tulane's medical school. She also knew that Tulane's president, William Preston Johnston, was very interested in women's education. Mrs. Richardson and William Preston Johnston persuaded Josephine Louise Newcomb to set her memorial at Tulane. In October 1886 Newcomb donated \$100,000 to Tulane to set up the H. Sophie Newcomb Memorial College.

Newcomb College was America's first "coordinate college"—a school separate from, but equivalent to, a larger men's college. All other coordinate colleges—Barnard and Columbia, Harvard and Radcliffe, Brown and Pembroke—were developed after Josephine Newcomb and William Johnston invented the idea.

From its origins, Newcomb College was a department of Tulane University. But the school had a great deal of independence. John P. Dyer, author of the definitive history of Tulane University, writes "Newcomb College prepared its own curricula, maintained the endowment as a separate fund from the rest of the university, and determined its own academic policies. The fact that the first head of the college was designated as a 'president' gives a good idea of the almost autonomous position of the college. It was a part of and yet separate from Tulane University."

Mrs. Newcomb was a very involved donor. She selected the first president of Newcomb College, Brandt Dixon, and worked with him for over a decade to set up the school. Dixon recalled in a history of the college that Josephine Louise Newcomb was "somewhat below the average height, and quite slender... she dressed in the simplest manner, spent dollars and dimes most carefully, but, when presented with a genuine need of which she sympathized, gave away checks most freely." Mrs. Newcomb regularly visited the campus, staying in Room No. 1 of the college dormitory until she decided to permanently move to New Orleans.

Satisfied with the progress of Newcomb College, in 1898 Josephine Newcomb decided to give her entire fortune of \$3.6 million to Tulane. Newcomb College built a campus across the street from Tulane. For much of the 20th century it had its own curriculum; its art and music departments were renowned, and Newcomb pottery remains avidly sought by collectors and museums.

But the Newcomb endowment proved a tempting prize for Tulane administrators. In 1908 Tulane attempted to fully merge the two schools and take over the Newcomb endowment, but Newcomb successfully blocked this effort. By the mid-1950s, John P. Dyer writes, "some older faculty members and graduates perpetuated the fear that there existed a latent conspiracy to deprive

Newcomb of its autonomy and to take from the college portions of its endowment funds for general university purposes."

Over the years, Tulane and Newcomb became more intertwined. How closely Tulane and Newcomb were merged prior to 2005 is a matter of dispute. Tulane's position is that Tulane and Newcomb were fully integrated except for their endowments. Newcomb College supporters contend that while most of the faculties had merged, Newcomb's art and music departments continued to be separate, and the school had a separate administrative staff. Newcomb also had separate faculty advisers, and its graduation ceremony took place just before Tulane's commencement.

Late in 2005, in the wake of Hurricane Katrina, Tulane's administrators decided to eliminate Newcomb College as of 2006 and merge the two school's endowments. They said that their rights as "universal legatee" of Mrs. Newcomb's fortune enabled them to do this. They said that the Newcomb money would now be administered by the "H. Sophie Newcomb Memorial Institute" designed to promote feminist issues at Tulane, and that this institute would be the successor to Newcomb College. In addition, Tulane undergraduates who formerly received degrees from "Tulane College" now get them from "Newcomb-Tulane College."

Many women who were graduates of Newcomb protested. "The leadership was cultivating and investing in women leaders," Tenaya Hart Wallace, a 1996 Newcomb graduate, told the Los Angeles Times. "It was really powerful to be part of a woman's college in the South."

"Save Newcomb" cards sprouted on New Orleans lawns, and in 2007 an airplane flew over the New Orleans Jazz Festival with a banner reading "Save Newcomb College." The Friends of Newcomb College was created as a nonprofit to organize the alumnae. But Newcomb College supporters were less successful in the courts. A lawsuit by nine students and seven alumnae was swiftly dismissed because the courts declared the students lacked standing.

Advocates for Newcomb College then tried to find Mrs. Newcomb's heir. They found Parma Matthis Howard and Jane Matthis Smith, who were Josephine Louise Newcomb's

great great nieces. *Howard v. Tulane* made its way to the Louisiana 4th Circuit Court of Appeal, which in October 2007 ruled in favor of Tulane. The court declared that Mrs. Newcomb had placed no conditions on her gift to Tulane, and that her requests were suggestions rather than binding wishes.

The court then addressed the issue of *cy pres*—the law that donor’s wishes should be fulfilled as close as possible to the original donor’s intent. The court declared that because Mrs. Newcomb granted her fortune to Tulane unconditionally, that no *cy pres* rules applied.

Judge Max M. Tobias protested in a dissent. The law of donor intent states that donor’s wishes have to be fulfilled unless they are impracticable, impossible, or illegal, and the judge stated that Tulane had met none of these tests. He further stated that donors would be less likely to make gifts in the future if they knew that heirs couldn’t sue to enforce a donor’s wishes. “I think someone ought to be able to state a cause and right of action to make the charity live up to its obligation when it so graciously accepted the conditional donation in the first place.”

The case then went to the Louisiana Supreme Court, which in June 2008 said that while an heir could sue to enforce a donor’s wishes, that it was unclear whether or not Howard and Smith were Mrs. Newcomb’s heirs. Louisiana’s civil law is based on the Napoleonic Code, and under those laws, Howard and Smith might not be heirs because their grandmother left all her money to their grandfather, thus breaking the line of testamentary succession.

In August 2008, Howard and Smith withdrew their lawsuit. Susan Howard Montgomery then filed a suit armed with ample documents to show an unbroken line of succession from Josephine Newcomb’s sister, Eleanor Le Monnier Henderson. *Montgomery v. Tulane* remained pending at press time.

Randolph-Macon Women’s College

In 2006, Randolph-Macon Women’s College decided to admit men and changed its name to Randolph College. A group of alumnae formed Preserve Educational Choice, a nonprofit, and nine students sued under breach-of-contract laws, stating that their contract to be educated by “Randolph-Macon

Women’s College” was broken when the school changed its name and legal identity. In June 2008, the Virginia Supreme Court ruled in favor of the college. Chief Justice Leroy R. Hassell, Sr., stated that the plaintiffs could not “demonstrate the existence of a contract that required the College to operate an academic institution primarily for women.”

In a related case, Randolph College decided to sell four paintings from the school’s Maier Museum of Art to raise money. The move, known as “de-accessioning” is a severe violation of donor intent, and the sale prompted the director of the museum to resign. In addition, the Virginia Association of Museums condemned the decision, as did Ed Maier, whose family foundation gave the donation that ensured that the museum was renamed in his father’s honor.

Preserve Educational Choice sued to block the sale, and in December 2007 a judge allowed the group to block the sale provided it posted a \$1 million bond. Preserve Educational Choice only raised \$500,000 by the deadline, and the judge allowed the sale to proceed. Christie’s sold one painting, Rufino Tamayo’s “Trovador,” in May 2008 for \$7.5 million. The other paintings are stored at Christie’s and are expected to be sold when the economy recovers.

As for Preserve Educational Choice, the group appears to be moribund. Its website has not been updated in months and emails to the group were not returned.

Conclusion

Should donors give up on giving to colleges? Of course not. But the Robertson and Newcomb cases show that donors must be very careful in *how* they give.

As with other donor intent cases, there are several steps donors can take to protect themselves:

*Avoid perpetuity. Organizations that are recipients of perpetual donations inevitably alter or abandon a donor’s wishes. I suggest that donors put a limit on their gift of no more than 30 years after their death—and that colleges accept a donor’s representative before a gift is made.

*Set up independent organizations. Nonprofits affiliated with schools do a better job in protecting donor’s inten-

tions than do direct gifts to universities. Scholarships, or directly aiding professors, are better uses of funds than giving to universities.

*Be as specific as possible. The more precisely a donor states his intentions, the greater the chance that intentions are honored. Donors have to assume that universities can and will violate donor intent if given the opportunity to do so. Above all, avoid gifts to a university endowment.

Association of Small Foundations president Tim Walter, in a comment on Neal Freeman’s Hudson Institute paper on the Robertson Foundation, states that “there is a gap of trust to be bridged between university leaders and experienced donors with regard to gifts to endowments.”

Universities make all sorts of promises to donors. Will the conclusion of the Robertson case convince universities to do a better job in working with donors? Or will cash-hungry schools continue to come up with ways of violating their donors’ intentions?

Martin Morse Wooster is a senior fellow at the Capital Research Center.

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Many thanks.

Terrence Scanlon
President

PhilanthropyNotes

Alan Schwartz, who was CEO of collapsed securities firm **Bear Stearns** when it was acquired last year by **JPMorgan Chase**, has become chairman of the **Robin Hood Foundation**. The anti-poverty charity, based in New York City, is a major donor to **ACORN** and its network of affiliates. The **Soros Fund Charitable Foundation** gave Robin Hood almost \$10 million in 2000. The Robin Hood board includes **Tom Brokaw** of NBC News, **Marian Wright Edelman**, who is president of the **Children's Defense Fund**, Hollywood movie mogul **Harvey Weinstein**, and actress **Gwyneth Paltrow**.

Philanthropist **Eli Broad** said his foundation and others should jointly purchase the money-losing Los Angeles Times newspaper owned by the **Tribune Company**. Broad said if multiple charities buy the paper it could succeed financially. "If several foundations are involved, there is likely to be journalistic freedom," he said.

The **John S. and James L. Knight Foundation** also endorses nonprofit journalism. It is spending \$25 million over five years to influence the future of news coverage. The Knight News Challenge funds unusual news-gathering experiments. One such project, called "Spot.us," would have readers and reporters propose news stories on a website and then donations would be solicited to cover reporting expenses. "It's participatory investigative journalism. The money has to come from a variety of sources, though, and contributions are capped to avoid personal crusades," the Miami Herald reports.

To save money, cash-strapped **General Motors Corp.**, which has lost around \$82 billion in recent years, said it will stop funding documentaries made by award-winning liberal PBS filmmaker **Ken Burns**. GM had funded Burns for the past 22 years and under a 10-year deal that began in 1999, the company covered 35% of each movie budget and promotional expenses.

Government health care has been a disaster everywhere it's been tried and would also be a catastrophe for the United States, according to **Sally Pipes**, president of the **Pacific Research Institute**. Americans hate standing in line and they won't tolerate the health care rationing the government is planning to impose on Americans, Pipes said on the Feb. 24 "Mark Levin Show." "When the government takes over their health care, they'll be standing in line waiting for care," said Pipes, a native Canadian and author of *The Top Ten Myths of American Health Care* (PRI, 2008).

Robert L. Gallucci, a former U.S. diplomat, has been selected to be the next president of the liberal **John D. and Catherine T. MacArthur Foundation**, replacing **Jonathan F. Fanton**, who is term-limited as president of the charity. Gallucci is dean of Georgetown University's School of Foreign Service. The MacArthur Foundation is best known for its annual "Genius" awards.

Goldman Sachs WATCH

American International Group (AIG) used money from its \$85 billion emergency Federal Reserve loan last fall to pay Goldman Sachs and other large financial concerns, the New York Times reports. Goldman got \$12.9 billion, and Merrill Lynch, Bank of America, and Citigroup got \$6.8 billion, \$5.2 billion, and \$2.3 billion, respectively. To date AIG has taken in \$170 billion in taxpayer funds and the U.S. government owns almost 80% of the company.

Neel Kashkari, the holdover from the Bush administration who is running the \$700 billion Wall Street bailout program (TARP), is unable to be effective in his job because people know he'll be leaving it soon, the Washington Post reports. Former Bush Treasury spokesman Tony Fratto said that fact makes it impossible for Kashkari, a former Goldman Sachs vice president, to engage in real negotiations with banks. The Troubled Assets Relief Program has been hurt by "uncertainty over what the policy is, the details, whether they're going to stick, whether the programs are going to change again — and these are all things that Neel probably can't answer for them, and no one can answer for them."