2010

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INTRODUCTION

High-stakes ranching quarrels are nothing new to Johnson County, Wyoming. The so-called Johnson County War, a violent range dispute from 1892, has captivated numerous filmmakers and novelists up until the present day.[1] It seems fitting, therefore, that a ranch in Johnson County recently became a symbolic battleground in the emerging conflict over land preservation.[2] In *Hicks v. Dowd*, a Johnson County newspaperman named Robb Hicks sued Fred and Linda Dowd, the current owners of a thousand-acre ranch formerly known as Meadowood, because they tried to extinguish a conservation easement the previous owner had effectively donated to a charitable trust.[3] The court dismissed the action brought by Hicks on the

* Assistant Professor of Law, Southern Methodist University. I would like to thank Gregory Alexander, Evelyn Brody, Regis Campfield, Ronald Chester, Thomas Gallanis, Edward Halbach, Lisa Hasday, Adam Hirsch, John Langbein, John Lowe, Nancy McLaughlin, Paul Rogers, Cynthia Samuel, Jeffrey Schoenblum, Robert Sitkoff, Stewart Sterk, Harry Tate, Russell Willis, and the other participants and attendees at the Symposium on The Law of Philanthropy in the Twenty-First Century for their helpful suggestions and criticism. I am also grateful to Christine Shea Wakeman for excellent research assistance and to Laura Justiss, Lynn Murray, and the rest of the Underwood Law Library staff for continuing to provide valuable support.

1. The episode "has found its way into western history in two archetypal forms: as a story of cattle owners punishing lawless rustlers, and as a story of homesteaders defying the rich and powerful." Daniel Belgrad, *"Power's Larger Meaning": The Johnson County War as Political Violence in an Environmental Context*, 33 W. HIST. Q. 159, 159 (2002). For examples of the latter, see JACK SCHAEFER, SHANE (1949); HEAVEN'S GATE (United Artists 1980); and JOHNSON COUNTY WAR (Hallmark Entertainment 2002). *See generally* BILL O'NEAL, THE JOHNSON COUNTY WAR 243-52 (2004) (discussing the literary and artistic treatment of the episode over the years).

2. *See* Hicks v. Dowd, 157 P.3d 914 (Wyo. 2007).

3. *Id.* at 915-17. Hicks also named the Board of Trustees of the "Scenic Preserve Trust," an entity formed by Johnson County, as a defendant. *Id.* at 914-16. For media analysis of the case, see *All Things Considered: In Land Conservation, "Forever" May Not Last* (NPR radio broadcast Mar. 11, 2008), *available at* http://www.shifting-ground.com/conservation_easements.html. Under certain circumstances, the donation of a conservation easement can create a charitable trust, even if the term "trust" is not expressly used. *See* UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (1982); UNIF. TRUST CODE § 414 cmt. (2000); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmt. b (2000); Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 128-42 (2002); Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 677-701 (2007). In *Hicks*, the former owner of Meadowood Ranch donated one acre of the

ground that he lacked standing to enforce the charitable trust.[4] *Hicks v. Dowd* soon attracted attention from commentators, who have used it to illustrate problems and issues relating to conservation easements.[5] In the general context of trust law, however, *Hicks* is also notable for its attempt to interpret section 405(c) of the Uniform Trust Code ("UTC"), a rule that has yet to find much elucidation in the courts of the states that have adopted it.[6]

In a departure from traditional law, section 405(c) grants standing to "[t]he settlor of a charitable trust, *among others*," to "maintain a proceeding to enforce the trust."[7] The UTC provision thus presents an obvious ambiguity: who are the "others" contemplated by the uniform act? The *Hicks* court gave a simple but dubious answer to this question.[8] In Wyoming, the court held, "a charitable trust may be enforced by a settlor, the attorney general, or a qualified beneficiary of the trust."[9] Moreover, the court treated the UTC term "qualified beneficiary" as "a term analogous to the common law

ranch along with a conservation easement to the Board of County Commissioners, which in turn quit-claimed the one-acre parcel to the Scenic Preserve Trust, subject to the easement. 157 P.3d at 915-16.

4. *Hicks*, 157 P.3d at 923. After Hicks lost, the Wyoming Attorney General subsequently filed his own lawsuit against the Dowds. *See* Memorandum in Support of Motion for Summary Judgment, Salzburg v. Dowd, No. CV-2008-0079 (Wyo. 4th Dist. Ct. Aug. 18, 2009). The Attorney General's suit was pending as this article was being edited for publication.

5. *Compare* C. Timothy Lindstrom, Hicks v. Dowd: *The End of Perpetuity?*, 8 WYO. L. REV. 25, 62 (2008) (arguing that improper easement termination is not likely to be a "serious problem," and "the existing remedies and disincentives are adequate, or at least have not yet proven inadequate, to deal with the problem"), *with* Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to* The End of Perpetuity, 9 WYO. L. REV. 1, 95-96 (2009), (contending that conservation easements donated as charitable gifts constitute restricted charitable gifts or charitable trusts and cannot be terminated without court approval in a cy pres proceeding, and charitable trust principles are the best means to hold grantees of conservation easements "accountable for actions taken or not taken that are in violation of their fiduciary obligations").

6. Other cases attempting to construe the provision include *Riley v. Pate*, 3 So. 3d 835, 841 (Ala. 2008) (Bolin, J., concurring), and *Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.*, 91 P.3d 1019, 1028-29 (Ariz. Ct. App. 2004).

7. UNIF. TRUST CODE § 405(c) (2000) (emphasis added); *see also* RESTATEMENT (THIRD) OF TRUSTS § 94 (Tentative Draft No. 5, 2009) (including settlor among those with standing to enforce a charitable trust). On the contrast with traditional law, see, for example, RONALD CHESTER, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 415, at 65-69 (3d ed. 2005); Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is it and How Extensive Should it Be?*, 37 REAL PROP. PROB. & TR. J. 611, 613-18 (2003); and Edward C. Halbach, Jr., *Standing to Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement*, 62 U. MIAMI L. REV. 713, 724-25 (2008). Even before the promulgation of UTC § 405(c), however, courts were willing to grant standing to the settlor of a charitable trust in some circumstances. *See* John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N.C. L. REV. 905, 921-27 (1984).

8. For criticism of the interpretation of the UTC in *Hicks*, see RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. g(1) reporter's note (Tentative Draft No. 5, 2009) (stating that "the decision was based on a strained interpretation (effectively abolishing special-interest standing) of 2006 legislation derived from the Uniform Trust Code, which clearly calls for a different result").

9. *Hicks*, 157 P.3d at 921.

concept of 'special interest.'"[10] Thus, in the view of the *Hicks* court, UTC § 405(c) merely added the settlor of a charitable trust to the list of individuals who would already have standing to enforce it under traditional law.[11] Even though the former Meadowood Ranch was subject to a charitable trust, the court found that the plaintiff (who was a resident of Johnson County, but not an adjacent landowner) had no interest in the trust distinguishable from that of the public at large, and thus lacked standing to enforce it.[12]

For decades, scholars have criticized the traditional notion that granting standing to a public official such as an attorney general provides an adequate mechanism for monitoring charitable trusts.[13] As Jonathan Klick and Robert Sitkoff demonstrated in their study of the Hershey Trust, political considerations may limit the ability to improve, through increased funding and disclosure, the monitoring and enforcement of charitable trusts by state attorneys general.[14] According to some, the practical problems of charitable trust supervision justify the decision of the UTC drafters to extend standing to the settlor of a charitable trust.[15] Professor Henry Hans-

10. *Id.* "Qualified beneficiary" is a defined term within the UTC, and the rights of qualified beneficiaries are granted to certain charitable organizations "expressly designated to received distributions under the terms of a charitable trust," as well as the attorney general or other official having power to enforce it. *See* UTC §§ 103(13), 110 (2000); *see also* T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1598-1605 (2007) (discussing different classifications of beneficiaries under UTC). The drafters of the UTC, however, did not intend to abolish the common-law doctrine of special interest standing. *See* UTC § 405 official cmt. ("The grant of standing to the settlor does not negate the right of . . . persons with special interests to enforce either the trust or their interests."). Those who own land adjacent to the property held under a conservation easement, for example, may have special interest standing under certain circumstances. *See* RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. g(1) reporter's note (Tentative Draft No. 5, 2009) (citing relevant cases).

11. *Cf.* RESTATEMENT (SECOND) OF TRUSTS § 391 (1959) ("A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.").

12. *Hicks*, 157 P.3d at 919, 921.

13. *See, e.g.*, JAMES J. FISHMAN, THE FAITHLESS FIDUCIARY AND THE QUEST FOR CHARITABLE ACCOUNTABILITY 1200-2005, at 273-79 (2007); Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 946-50 (2004); Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 622-24 (1999); Iris J. Goodwin, *Donor Standing To Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1136-39 (2005); Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 600-01 (1981); Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL'Y 1 (2009); Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 816-19 (2008).

14. *See* Klick & Sitkoff, *supra* note 13, at 816-17; *see also* Brody, *supra* note 13, at 946 ("Political cynics believe that 'A.G.' stands not for 'attorney general' but for 'aspiring governor.'").

15. *See* Chester, *supra* note 7, at 614; *see also* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1213-16 (2007) (suggesting that dissatisfaction with the result in *Carl J. Herzog Foundation v. University of Bridgeport*, 699

mann made the case for donor standing several decades ago, and his argument is no less compelling today:

> [I]t makes sense to deny standing to patrons only if the consequence would be large numbers of spite suits, strike suits, or suits filed through sheer idiocy—which are presumably what the courts and commentators have in mind when they raise the specter of "harassing" litigation .... Yet it appears extraordinarily unlikely that suits of this nature would ever become a sufficiently significant problem to outweigh the benefits of enlisting patrons into the enforcement effort. ... [T]he real problem appears to lie in creating sufficient incentives to lead individuals to bring suit rather than in creating roadblocks to hold them back.[16]

By referring in vague terms to "others" who might also have an enforcement right, however, UTC § 405(c) raises additional questions. Can anyone enforce the trust on the settlor's behalf after her death, and, if so, who? Should enforcement rights be granted to the settlor's personal representative, the settlor's heirs, or both?[17] And what about the question posed by the title of this Article—should the settlor be permitted to assign her enforcement rights to a third party? These questions are not easy to answer, but courts are likely to face them in future cases as an increasing number of jurisdictions recognize settlor standing.[18]

In *Hicks v. Dowd*, the conservation easement over Meadowood Ranch was donated by Paul Lowham, a previous owner of the property, acting through the Lowham Limited Partnership.[19] Even though they subsequently sold Meadowood to the Dowds, Lowham and his partners should be treated as settlors of the charitable trust created by the conveyance of the conserva-

A.2d 995 (Conn. 1997), a Connecticut case denying standing to a donor to enforce a charitable gift under the Uniform Management of Institutional Funds Act, may have inspired the grant of settlor standing in UTC § 405(c)). *But see* Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors to Reserve the Right to Enforce a Gift Restriction?*, 42 REAL PROP. PROB. & TR. J. 245, 297 (2007) (arguing in favor of an "opt-in model" that would "be tempered by a high burden of proof placed on the plaintiff donor seeking to enforce the terms of a charitable trust coupled with an affirmative defense framework drawn from the common law jurisprudence of charitable trusts").

16. Hansmann, *supra* note 13, at 609-10.

17. *See* Chester, *supra* note 7, at 616-17 (arguing that the personal representative, but not the settlor's heirs, should be able to act on behalf of a deceased settlor); *see also* Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426, 436 (N.Y. App. Div. 2001) (granting standing to enforce restricted gift to wife of deceased donor as "Special Administratrix" of donor's estate). Although a charitable gift may not be considered a trust "in a technical sense," a charitable donee "may not ... receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands." St. Joseph's Hosp. v. Bennett, 22 N.E.2d 305, 308 (N.Y. 1939). Under the *Restatement (Third) of Trusts*, a gift to a charitable institution "for a specific purpose ... creates a charitable trust of which the institution is the trustee" for purposes of the *Restatement*. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003).

18. *See infra* note 48 and accompanying text (noting widespread adoption of settlor standing provisions such as UTC § 405(c)).

19. Hicks v. Dowd, 157 P.3d 914, 915-16 (Wyo. 2007).

tion easement, and should have standing to enforce that trust.[20] Although Lowham did not disclose his reasons for declining to sue, the time and expense associated with litigation may be sufficient to deter some settlors in similar circumstances.[21] Contract law permits an obligee, acting as "assignor," to assign a contractual right she has against an obligor to a third party, known as the "assignee."[22] Assignment of the settlor's right to enforce a charitable trust, if allowed, could permit effective supervision in a case that the attorney general might otherwise ignore.[23] Lowham, for example, could have assigned his enforcement right to Hicks, who was evidently willing to take on the burden of suing to enforce the trust. This possibility was not presented to the *Hicks* court, which therefore expressed no opinion on whether such an assignment might be permitted under the new standing rule of the UTC.

In this Article, I consider the extent to which the settlor's right to enforce a charitable trust is, or should be, assignable in jurisdictions that now recognize such a right. I suggest that, in answering this question, it is appropriate to begin with the existing body of law governing the assignability of contractual rights, although that body of law should not be the endpoint of the analysis. John Langbein argued in a 1995 article that the gratuitous private trust is contractual in nature, for "the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract."[24] Langbein excluded the charitable trust from his contractarian account, on the ground that it exists at "the far end of the trust spectrum, where contractarian autonomy is more restrained."[25] Moreover, Langbein's overall assertion that trusts are contracts is controversial, given that a trust cannot exist without trust property.[26] By allowing the settlor to

20. *See* UTC § 103(15) (defining "settlor" as "a person, including a testator, who creates, or contributes property to, a trust"); McLaughlin & Weeks, *supra* note 5, at 67 n.262.

21. McLaughlin & Weeks, *supra* note 5, at 67.

22. 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.1, at 60 (3d ed. 2004).

23. In the end, the Wyoming Attorney General did act in the litigation involving the Dowds. *See supra* note 4. If the right of enforcement had been assigned to Hicks, however, the Attorney General's intervention would have been unnecessary. Moreover, state attorneys general cannot always be relied upon to intervene in such cases. *See supra* notes 13-15 and accompanying text.

24. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995).

25. *Id.* at 631.

26. *See, e.g.*, Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 469-70 (1998) (arguing that "it is precisely the property-like aspects of the trust that are the principal contribution of trust law"); *cf.* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b reporter's note (2003) (surveying literature debating extent to which fiduciary relationships are contractual in nature). For example, a mere expectancy or "hope of receiving property in the future" cannot be held in trust, although it can be the subject of a contract if supported by consideration. *See* RESTATEMENT (THIRD) OF TRUSTS § 41 & cmt. c; Brainard v. Comm'r, 91 F.2d 880, 881-82 (7th Cir. 1937). Those who favor a propertarian rather than contractarian view of trust law "tend

enforce her deal with the trustee, however, UTC § 405(c) has arguably given more emphasis to the contractual aspect of the trust relationship.[27] If this is so, then the law of contracts might have some bearing on the interpretation of the UTC settlor standing provision, at least in the absence of other relevant authority.[28] Standing depends on the nature of the claim being asserted and whether the person asserting it has the right to do so.[29] Contract law provides a plausible basis to grant standing to an assignee, thus furthering the goal of improved charitable trust supervision.

It may be possible to justify assignment of the settlor's right to enforce a charitable trust without reference to contractual principles. UTC § 405(c) might be viewed simply as an acknowledgement of donative intent, the promotion of which is the general policy goal of the law of donative transfers.[30] Allowing the settlor to assign the enforcement right would also respect the settlor's intent. Nevertheless, charitable trusts are required to serve purposes that are beneficial to the community, which justifies their exemption from the durational requirements that apply to private trusts.[31] Thus, whether a right of assignment is justified by reference to contractual principles or otherwise, the intent of the settlor is not the sole factor to consider in determining the extent of that right.

This Article will proceed in three parts. Part I will discuss the general problem of charitable trust enforcement and the reform of UTC § 405(c). Part II will then examine the law relating to assignment of contractual

to be more willing to use mandatory rules that impinge upon the wishes of the settlor in order to protect the property rights held by the beneficiary." Gallanis, *supra* note 10, at 1618-19; *see also* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 88-94 (2005) (defending limitations on the ability of settlor and trustee to waive trust's fiduciary terms).

27. *See* Chester, *supra* note 7, at 614-15 (characterizing UTC § 405(c) as "concession" to Langbein's "contractarian view"). The UTC official comment does not indicate, however, that a contractarian understanding of trust law motivated the grant of standing to the settlor. *See* § 405(c) cmt.; *cf.* JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS 694-95 (3d ed. 2007) (noting that UTC's departure from common law was accomplished "[w]ith little fanfare and no explanation"). Langbein has suggested that § 405(c) "is not likely to make much difference . . . since charitable trusts commonly arise on the settlor's death." John H. Langbein, *The Uniform Trust Code: Codification of the Law of Trusts in the United States*, 15 TR. L. INT'L 66, 67-68 (2001). Nevertheless, the *Hicks* case is an example of where settlor standing could make a difference even if it is limited to the settlor's lifetime. Moreover, as discussed in Part III *infra*, there is a case for allowing the settlor's right of enforcement to be assigned by her personal representative after the settlor's death.

28. For a recent and thought-provoking exploration of how certain contract principles might shape the future development of trust law, see David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675 (2009).

29. *See* Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 658 (1998).

30. On the privileged status of donative intent, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003).

31. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 & cmt. d (2003) (discussing charitable purpose requirement and exemption from Rule Against Perpetuities).

rights, and explain how and why courts might apply that law in the specific context of charitable trust enforcement. I will argue that, while the Restatement (Second) of Contracts may be a good starting point for an analysis of the permissibility of assignment under a contractarian theory of settlor standing, that Restatement should not be transplanted wholesale into the charitable trust context, but rather supplemented by principles derived from the law of donative transfers. In particular, courts should consider (1) requiring that a settlor give notice to the trustee of any assignment, (2) forbidding successive assignments after the initial assignment by the settlor, (3) precluding an assignment to an indefinite class, and (4) reviewing any attempt by a trustee to settle with an assignee.

Finally, Part III will focus on the difficult question of whether the settlor's enforcement right may be assigned after the settlor's death and, if so, by whom. I will suggest that, unless the trust specifies otherwise, courts should permit postmortem assignment by the settlor's personal representative, but not by the settlor's devisees or heirs, although the devisees or heirs might serve as assignees if so designated by the settlor or the settlor's personal representative. I will also address the possibility of naming a trust protector in the trust instrument, a possible alternative to a contractual assignment for settlors who anticipate the problem and are able to plan for it prior to the trust's execution.

I. THE PROBLEM OF CHARITABLE TRUST ENFORCEMENT

Since the dawn of the trust in the Middle Ages, courts and legislatures have struggled to hold opportunistic fiduciaries to account for mismanagement and misuse of charitable assets.[32] Traditionally, the law's response to this problem has been to give a state official, the attorney general, legal authority to hold trustees to their fiduciary duties.[33] Enforcement by the attorney general, however, has well-documented limitations.[34] As an elected or appointed public official, the Attorney General is unlikely to deal with trustees in a way that would hinder his or her future political career.[35]

32. *See, e.g.*, FISHMAN, *supra* note 13, at 57-67 (describing medieval experience with charitable institutions); 5 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 37.3.10, at 2436 (5th ed. 2008) [hereinafter SCOTT AND ASCHER ON TRUSTS] (noting that "in the absence of statutory reforms, the enforcement of charitable trusts has been more or less sporadic").

33. *See* FISHMAN, *supra* note 13, at 270-73.

34. *See id.* at 273-74.

35. *See, e.g.*, Brody, *supra* note 13, at 946-50 (explaining how the constraints of elective office "impel the incumbent to ignore cases that are politically dangerous and to jump into matters that are politically irresistible but implicate only 'business' decisions of charity managers").

Particularly when large sums of money are involved, politics can inhibit the effective supervision of a charitable trust.[36] In 2002, for example, when the trustees of the Hershey Trust sought to diversify the trust's assets by selling its controlling interest in the Hershey Company, public opposition in Pennsylvania led the state Attorney General to block the sale.[37] In an empirical study, Klick and Sitkoff concluded that the intervention of the Attorney General caused the Hershey Trust to forego hundreds of millions of dollars worth of potential gain.[38]

Even under traditional doctrine, the Attorney General is not the only individual with standing to sue to enforce a charitable trust. Such a suit can also be brought by a cotrustee, or by someone with a "special interest" in the trust's enforcement.[39] The Restatement (Second) of Trusts gives some examples of persons with "special interest" standing. If a charitable trust is created for "the poor members of a particular church," the Second Restatement explains, those members who meet the description might have standing to sue the trustee.[40] The same might be true of the church minister or corporation, if the trust was created to benefit the church as a whole.[41] Members of the general public, however, do not have standing under the traditional rule even if they derive some benefit from the church, as the Attorney General is deemed to be their representative.[42] Furthermore, the traditional rule precluded an action to enforce the trust brought "by the settlor or his heirs or personal representatives as such."[43]

Over the course of the twentieth century, courts applied the "special interest" doctrine in a variety of contexts, showing particular flexibility when confronted with egregious trustee misconduct or ineffective supervi-

36. *See, e.g.*, Gary, *supra* note 13, at 650-55 (discussing famous Bishop Estate in Hawai'i); *see also* Samuel King et al., *Broken Trust*, 21 U. HAW. L. REV. 691, 692-96 (1999) (describing role of politics in selection of Bishop Estate trustees).

37. Klick & Sitkoff, *supra* note 13, at 768-79.

38. *Id.* at 815-16.

39. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 (1959); *see also* SCOTT AND ASCHER ON TRUSTS, *supra* note 32, § 37.3.10, at 2439-50 (surveying relevant case law).

40. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c.

41. *Id.*

42. *See id.* § 391 cmt. d. Traditional law did allow members of the public to seek the Attorney General's approval to bring suit as a "relator" and pay the costs of the litigation; however, the Attorney General could not be compelled to bring suit. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. a; Ronald Chester, *Improving Enforcement Mechanisms in the Charitable Sector: Can Increased Disclosure of Information Be Utilized Effectively?*, 40 NEW ENG. L. REV. 447, 472-73 (2006).

43. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. e. The traditional rule was supported by the fact that the settlor had neither the power to modify or revoke a charitable trust, nor, in the usual case, a beneficial interest in the trust property. *See* SCOTT & ASCHER ON TRUSTS, *supra* note 32, § 37.3.10, at 2450. A settlor of a charitable trust was, however, allowed to reserve a right of "visitation," a right that is rarely invoked today. Chester, *supra* note 42, at 473-74.

sion by the attorney general.[44] Notwithstanding the traditional rule, some courts even granted standing to the settlor, either on the basis of the settlor's original expectations in creating the trust or on the theory that the settlor represented others with an interest in the trust.[45] In 2000, the Uniform Trust Code drafters explicitly rejected the rule of the Second Restatement and authorized settlors to sue to enforce charitable trusts.[46] Nine years later, settlor standing was incorporated into a tentative draft of the Third Restatement, thus bringing the Restatement in line with the position of the UTC.[47] By 2009, the basic rule of UTC § 405(c) had been adopted in some form by twenty-two states and the District of Columbia,[48] and at least two other states had embraced settlor standing without adopting the UTC.[49]

The acceptance of settlor standing to enforce charitable trusts should be considered alongside other intent-serving UTC reforms, including the granting of a right to the settlor of an irrevocable trust to petition for removal of the trustee.[50] The latter reform, like the grant of settlor standing in the charitable trust context, departs from the traditional rule.[51] In another departure, the UTC expressly authorizes trusts for pets and other noncharitable trusts without ascertainable beneficiaries, allowing the settlor to nominate in the trust an individual to enforce it.[52] The original 2000 UTC also recognized a right to modify or terminate a trust "upon consent of the settlor and all beneficiaries," although tax-motivated amendments in 2004

44. *See* Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 61-70 (1993).

45. *See* Gaubatz, *supra* note 7, at 921-27; *cf.* SCOTT AND ASCHER ON TRUSTS, *supra* note 32, § 37.3.10, at 2453 ("[A] settlor who has a special interest in the performance of the trust plainly can enforce the trust.").

46. UTC § 405(c) (2000) cmt.

47. *See* RESTATEMENT (THIRD) OF TRUSTS § 94(2) & cmt. g(3) (Tentative Draft No. 5, 2009).

48. *See* ALA. CODE § 19-3B-405(c) (2007); ARIZ. REV. STAT. ANN. § 14-10405(C) (Supp. 2008); ARK. CODE ANN. § 28-73-405(c) (Supp. 2007); D.C. CODE § 19-1304.05(c) (Supp. 2009); FL. STAT. ANN. § 736.0405 (West Supp. 2009); KAN. STAT. ANN. § 58a-405 (2005); ME. REV. STAT. ANN. tit. 18-B, § 405(3) (Supp. 2008); MICH. COMP. LAWS § 700.7405(3) (2009); MO. ANN. STAT. 456.4-405 (West 2007); NEB. REV. STAT. § 30-3831 (2008); N.H. REV. STAT. ANN. § 564-B:4-405(c) (2007); N.M. STAT. § 46A-4-405(C) (2007); N.C. GEN. STAT. § 36C-4-405.1 (2007); N.D. CENT. CODE § 59-12-05(3) (Supp. 2009); OHIO REV. CODE ANN. § 5804.05(A) (West 2007); OR. REV. STAT. § 130.170(3) (2007); 20 PA. CONS. STAT. ANN. § 7735(c) (West Supp. 2009); S.C. CODE ANN. § 62-7-405(c) (2009); TENN. CODE ANN. § 35-15-405 (2007); UTAH CODE ANN. § 75-7-405(3) (Supp. 2008); VT. STAT. ANN. tit. 14A, § 405(c) (Supp. 2009); VA. CODE ANN. § 55-544.05 (West Supp. 2008); WYO. STAT. ANN. § 4-10-406(c) (2007).

49. *See* DEL. CODE ANN. tit. 12, §3303 (2009); IOWA CODE ANN. § 633A.5104 (West Supp. 2009). The Delaware provision is part of a broader effort to unify the law relating to charitable and noncharitable purpose trusts. *See* Adam J. Hirsch, *Delaware Unifies the Law of Charitable and Noncharitable Purpose Trusts*, EST. PLAN., Nov. 2009, at 13.

50. *See* UTC § 706(a).

51. *See* RESTATEMENT (THIRD) OF TRUSTS § 94(1) cmt. d(2) reporter's note (Tentative Draft No. 5, 2009).

52. *See* UTC §§ 408, 409(2).

made this provision optional for enacting jurisdictions.[53] Nevertheless, the UTC drafters did not extend other rights to the settlor of a private irrevocable trust, "such as the right to an annual report or to receive other information concerning administration of the trust."[54] As noted by the reporter of the Restatement (Third) of Trusts, the "modest" nature of the UTC reforms regarding private trusts may reflect the fact that "[t]he widespread criticism and calls for reform that have been so noticeable in the charitable context . . . have not arisen in the private trust setting, perhaps reflecting a general satisfaction with traditional doctrine."[55]

As the UTC continues to be introduced in state legislatures, it seems likely that its recognition of settlor standing to enforce charitable trusts will soon become the majority rule in the United States.[56] Settlor standing, however, does not seem to have been a panacea in the states that have adopted it, and the few cases that have arisen in jurisdictions adopting the UTC have focused on more traditional standing questions. One of the first cases to apply UTC § 405(c) involved a foundation created by the late industrialist John C. Lincoln to promote the economic theories of Henry George.[57] Decades after Lincoln's death, certain proponents of George's theories sued the foundation and others in an Arizona probate court, complaining that the foundation's board had strayed from the guiding philosophy of the donor.[58] Looking to the Arizona version of § 405(c), the Arizona Court of Appeals concluded in *Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.* that the recently adopted UTC provision was of no benefit to the plaintiffs.[59] The court thus focused its analysis on the traditional concept of special interest standing, finding that such standing was lacking in the case.[60] Settlor standing was also unhelpful to the plaintiff in *Riley v. Pate*, who sought to challenge the administration of the Alabama state oil

53. UTC § 411(a) & cmt.

54. UTC § 706 cmt.

55. RESTATEMENT (THIRD) OF TRUSTS § 94(1) cmt. d(2) reporter's note.

56. Authors continue to debate the wisdom of the UTC approach despite its apparent popularity among state legislators. *Compare* SCOTT AND ASCHER ON TRUSTS, *supra* note 32, § 37.3.10, at 2452 (concluding that "settlor standing is a small price to pay for the settlor's generosity" and may encourage creation of charitable trusts), *with* Reid Kress Weisbord & Peter DeScioli, *The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving*, 45 GONZ. L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1435149 (contending that donor standing may paradoxically reduce charitable giving due to its psychological effects on the donor).

57. *See* Fleming & Curti, P.L.C., *Suit Against Charity Alleging Drift from Principles Dismissed*, ELDER LAW ISSUES, July 2004, http://www.elder-law.com/2004/Issue1201.html.

58. *Id.*

59. Robert Schalkenbach Found. v. Lincoln Found., Inc., 91 P.3d 1019, 1028-29 (Ariz. Ct. App. 2004).

60. *See id.* at1029-30.

and gas trust.[61] One justice, noting the lack of clarity in the UTC provision, suggested that the plaintiff might have standing as a settlor, but ultimately rejected the suit on other grounds.[62]

As discussed above, allowing the settlor to assign her right of enforcement to a third party might broaden the utility of UTC § 405(c) for charitable trust supervision, at least when the settlor is still living after the enactment of the statute and can make an effective assignment.[63] In *Schalkenbach* and *Riley*, the question of whether a settlor might assign her enforcement right was not raised, as no assignment had taken place. While UTC § 405(c) has nothing to say on the validity of such an assignment, statutes recently enacted in Delaware and Iowa expressly approve both settlor standing and the designation of a third party to act on the settlor's behalf, although the statutes differ in their specifics.[64]

Under the Delaware provision, a settlor "may designate a person or persons, whether or not born at the time of such designation, to enforce a charitable or noncharitable trust . . . ."[65] Although the Delaware statute does not explicitly state how the delegation may be made, it appears in a paragraph discussing "the terms of a governing instrument of a trust," which may indicate that the delegation must be made in the trust instrument.[66] Iowa, on the other hand, grants a right of enforcement, following the settlor's death or incapacity, to the settlor's designee, who may be designated "either in the agreement establishing the trust or in a written statement signed by the settlor and delivered to the trustee," and who may or may not be "born at the time of such designation."[67] At some point, a court is likely to face the question of whether the principle of third-party designation recognized to some extent in Delaware and Iowa ought to apply under

61. 3 So. 3d 835, 839-40 (Ala. 2008).

62. *See id.* at 840-42 (Bolin, J., concurring) (noting that, while the statute "clearly granted an additional right to a sole or joint settlor of a charitable trust to enforce that trust," the legislature "unfortunately . . . was not as clear in setting out what person or entity actually possesses that standing as a settlor").

63. *See supra* text accompanying notes 19-21 (discussing Hicks v. Dowd, 157 P.3d 914 (Wyo. 2007)).

64. On the other hand, Michigan's recently adopted version of UTC § 405(c) expressly precludes enforcement by the "settlor's heirs, assigns, or beneficiaries." *See* MICH. COMP. LAWS § 700.7405(3) (2009) (effective Apr. 1, 2010). The Vermont legislature deleted the reference to "among others" in its version of the provision, stating simply that "[t]he settlor of a charitable trust, the attorney general, a cotrustee, or a person with a special interest in the charitable trust may maintain a proceeding to enforce the trust." VT. STAT. ANN. tit. 14A, § 405(c) (2009).

65. DEL. CODE ANN. tit. 12, §3303(b) (2008).

66. *See id.* A delegation made in the trust instrument itself might be valid even without specific statutory authorization. *Cf.* Rettek v. Ellis Hosp., No. 1:08-CV-844, 2009 U.S. Dist. LEXIS 1607, at *13 (N.D.N.Y. Jan. 12, 2009) (stating that "donors can ensure their wishes are honored by expressly providing for enforcement by family members or forfeiture if their restrictions are not satisfied").

67. IOWA CODE §§ 633A.5104, 633A.5106 (2008).

UTC § 405(c) or another statute that does not address the issue directly. When that case arises, the court may be interested to learn that the common law has already dealt with this question, albeit not in the context of charitable trusts. The next Part will examine what relevance contract law might have to the assignment of the settlor's enforcement right in the charitable trust context.

II. CONTRACT LAW AND CHARITABLE TRUSTS

For contract law to have some bearing on the assignability of charitable trust enforcement rights, one must accept that a charitable trust is in some sense contractual in nature. Over a century ago, F.W. Maitland expressed the opinion that the English trust is actually a contract, even though it has evolved separately from contract law.[68] In enforcing the trust, the Chancellor enforced a "personal right" that "in truth is a contractual right, a right created by a promise."[69] Austin Wakeman Scott disagreed with Maitland's conclusion, arguing in the *Columbia Law Review* that the creation of a trust was "a legal transaction quite different from the creation of a contract."[70] Scott's reasoning was based partly on a supposed hostility in the common law to the enforcement of contract rights by third-party beneficiaries.[71] As Langbein notes in his 1995 defense of the contractarian theory of trust law, however, the right of a third party to enforce a contract made to his benefit was well-established in American contract law by the time Scott wrote his article.[72] Thus, while Scott was correct to analogize the trust relationship to a contract for a third-party beneficiary, that analogy posed no "obstacle to the contractarian analysis of the modern trust."[73]

Some scholars have criticized the contractarian theory of trust law as elucidated by Langbein in his article. Henry Hansmann and Ugo Mattei, for example, contend that the special contribution of trust law lies not in its contractual nature, but in its "property-like aspect," which allows the

68. FREDERIC W. MAITLAND, EQUITY: A COURSE OF LECTURES 110-11 (A.H. Chaytor & W.J. Whittaker eds, John Brunyate rev., 2d ed. 1936) (1909).

69. *Id.* at 29.

70. Austin Wakeman Scott, *The Nature of the Rights of the* Cestui Que Trust, 17 COLUM. L. REV. 269, 269 (1917).

71. *See id.* at 270.

72. Langbein, *supra* note 24, at 646-47.

73. *Id.* at 647; *see also* F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 200 (1953) ("Nor need the three-cornered relation of settlor, trustee, and cestui que trust trouble us; for . . . it is easily explained in the modern law in terms of a contract for the benefit of a third party."); *cf.* VERNON VALENTINE PALMER, THE PATHS TO PRIVITY: A HISTORY OF THIRD PARTY BENEFICIARY CONTRACTS AT ENGLISH LAW 1-2 (1992) (noting that the common-law rule prohibiting actions by third-party beneficiaries "has been fully overcome . . . in nearly all jurisdictions in the United States").

settlor, trustee, and beneficiaries to "(re)organize their contractual relationships with a large number of parties other than themselves, which would otherwise be extremely difficult to do."[74] Nevertheless, Hansmann and Mattei do not deny that trust law has "an important contractual aspect," and they concede that it is legitimate to emphasize that contractual aspect in advocating normative reforms that would make trust law more flexible and more responsive to the concerns of settlors.[75]

In his 1995 article, Langbein chose not to address charitable trusts, considering them to be "quasi-public institutions" that are subject to "standards of public benefit articulated both in the common law and in the tax code and regulatory law."[76] The UTC, which was promulgated after the publication of Langbein's article, reaffirmed the public benefit requirement for charitable trusts.[77] By giving the settlor standing to enforce the terms of a charitable trust, however, the UTC effectively turned the trustee's promise to administer the trust into a binding agreement between trustee and settlor, granting the settlor some supervisory authority in consideration of her acts creating or funding the trust.[78] In the private trust context, it was the historical decision of the Chancellor to treat the trustee's promise as an enforceable right that led Maitland to characterize the trust as contractual in nature.[79] Moreover, the fact that an agreement may be limited in effect by considerations of public policy, as is true for a charitable trust, does not necessarily preclude a finding that the agreement is contractually binding.[80]

74. *See* Hansmann & Mattei, *supra* note 26, at 470.

75. *See id.* at 471.

76. Langbein, *supra* note 24, at 631.

77. *See* UTC § 405(a) (2000) ("A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.").

78. In order to qualify as a settlor under the UTC, an individual must either create the trust or contribute property to it. *See* UTC § 103(15) (defining "settlor"). Traditionally, the settlor's transfer of property to the trust was treated as the equivalent of consideration in contract law, and no additional consideration was required for the creation of a trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 29 (1959). As Langbein has explained, however, the usual compensation paid to the trustee would also qualify as consideration, as would "the trustee's promise to hold the property for the beneficiary, which induces the settlor to transfer the property to the trustee." Langbein, *supra* note 24, at 632 n.31.

79. *See* MAITLAND, *supra* note 68, at 29 (explaining how the trust arose as a consequence of the Chancellor's decision to enforce the promise of the trustee).

80. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981) (setting out circumstances in which a contractual term limiting a party's liability in tort may be enforced). Additional support for the notion that a charitable gift may constitute a contract may be found in the famous case of *Trustees of Dartmouth College v. Woodward*, which held that the founding charter of Dartmouth College constituted "a contract to which the donors, the trustees, and the crown . . . were the original parties." 17 U.S. (4 Wheat.) 518, 643-44 (1819); *see also* Kapiolani Park Pres. Soc'y v. Honolulu, 751 P.2d 1022, 1027 (Haw. 1988) (describing *Dartmouth College* as "the most famous case in American judicial history, with respect to charitable trusts").

A. Assignment of Rights: A Contractarian Perspective

By granting an enforcement right to the settlor of a charitable trust, therefore, UTC § 405(c) has arguably strengthened the case for examining charitable trusts from a contractarian perspective. Although § 405(c) does not state that the settlor's right to enforce a charitable trust is assignable, neither the text nor the official comment expressly forbids assignment. There is some historical precedent for expanding contractual rights by judicial decision, as the English courts did by gradually recognizing claims brought by assignees of choses in action.[81] States enacting the UTC do so as a supplement to the existing "common law of trusts and principles of equity."[82] As the UTC drafters note, "[t]he common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions."[83] Settlor standing arguably presents a new situation that justifies a reconsideration of the traditional law of charitable trusts. Modern courts applying the settlor standing provision of UTC § 405(c), therefore, might look to contractual principles to fill in the gaps left by the language of the uniform act.

Langbein suggests that, when faced with a doubtful point of law, a court applying the contractarian theory of trusts ought to apply orthodox default rule theory as it relates to contracts.[84] In other words, courts should focus on the intention of the parties, "and if they did not articulate their intention," then consider "which default rule captures the likely bargain they would have struck had they thought about it."[85] Since the UTC provision on settlor enforcement of charitable trusts makes no mention of as-

81. *See* 7 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 532-39 (2d ed. 1937); *see also* O.R. MARSHALL, THE ASSIGNMENT OF CHOSES IN ACTION 72-80 (1950) (describing process by which Chancery circumvented common-law rule prohibiting assignment of choses in action). The "growing importance of credit" likely influenced the gradual recognition of assignability beginning in the seventeenth century. *See* FARNSWORTH, *supra* note 22, § 11.2, at 63-65. Trusts were treated differently because the beneficiary had a property interest in the trust assets. *See* D.E.C. Yale, *Introduction* to 2 LORD NOTTINGHAM'S CHANCERY CASES 89-90 (D.E.C. Yale ed. 1961); Langbein, *supra* note 24, at 635 & n.47.

82. UTC § 106 (2000).

83. *Id.* § 106 cmt.

84. For analysis of the proper role of default rules in contract law, see ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 212-14 (4th ed. 2004), and RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.1, at 96-99 (7th ed. 2007).

85. Langbein, *supra* note 24, at 664. This type of default rule is classified as a "majoritarian default." *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031, 1037-43 (2004).

signability,[86] it is worth considering what default rule has been established outside the trust context. That rule is set out in the Restatement (Second) of Contracts:

> A contractual right can be assigned unless
>
> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
>
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
>
> (c) assignment is validly precluded by contract.[87]

Thus, while the baseline presumption in contract law is in favor of assignability, there are exceptions. Assuming that no statute or trust provision precludes assignment, the most relevant exceptions in the trust context involve (a) the effects of assignment on the trustee and (b) the thorny concept of public policy.

Until recently, a charitable trustee faced with a proposed assignment of enforcement rights would have had a straightforward defense under paragraph (a) of the Restatement (Second) of Contracts quoted above. This is because, under traditional law, a trustee could resign only with the court's permission, or perhaps with the consent of all beneficiaries, unless the terms of the trust provided otherwise.[88] Under the UTC, by contrast, a trustee may resign simply by giving "30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees."[89] Thus, the trustee is no longer a prisoner in the court's control. Moreover, in light of the trustee's ability under the UTC to freely exit the trust relationship, it is hard to see the trustee as performing a uniquely personal obligation to the beneficiaries, which would bar assignment under contract law.[90]

The common-law rule prohibiting assignment of personal service contracts is illustrated by the case of *Munchak Corp. v. Cunningham*. In *Munchak*, a professional basketball player's contract with his team was held to

86. The official comment states merely that "[t]he grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests." UTC § 405(c) cmt.

87. RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981).

88. *See* RESTATEMENT (SECOND) OF TRUSTS § 106 (1959).

89. UTC § 705(a)(1). When the trustee of a charitable trust wishes to resign, the attorney general and any "charitable organization expressly designated to receive distributions" under the trust's terms may have the notice rights of a qualified beneficiary if certain conditions are met. *See id.* § 110.

90. A contract right may not be assigned when it "involves obligations of a personal nature." *See* 29 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 74:10 (4th ed. 2003 & Supp. 2009).

be assignable from one owner of that team to another notwithstanding a prohibition against assignment to a different team.[91] As the court saw it, a change in corporate ownership of the athlete's current team—in contrast to an assignment to a different team—could not affect the athlete's performance, and thus the assignment did not violate the policy of contract law "to prohibit an assignment of a contract in which the obligor undertakes to serve only the original obligee."[92] A modern trustee undertakes to serve the settlor as well as the beneficiaries, and is in effect the agent of both.[93] The trustee, however, may resign without cause at any time, leaving the settlor and beneficiaries with a new trustee. In such circumstances, a fair rule would allow the settlor also to find a substitute for herself, like the team owner in *Munchak.* This reasoning is reinforced by the modern rule allowing trustees to delegate their fiduciary duties to a third party when a prudent person would deem such delegation appropriate.[94] While a settlor may select a trustee based on personal confidence, liberal exit and delegation rules have made the trustee effectively fungible once the administration has begun. Appointing a trustee is thus quite different from hiring an artist to paint a portrait, the quintessential example of a personal services contract.[95]

It seems unlikely, therefore, that the assignment of a settlor's right to enforce a charitable trust would materially change the trustee's duty in a UTC jurisdiction. If the settlor selects a single assignee, moreover, the burden imposed on the trustee should not greatly exceed what is already imposed by UTC § 405(c), nor should the assignment substantially reduce the trustee's expected compensation. On the other hand, if the settlor attempted to assign his enforcement right to a large group of individuals, the increased exposure to litigation resulting from such an assignment might increase the trustee's burden beyond what was initially contemplated by the parties and frustrate the trustee's reasonable short-term expectations.[96]

91. 457 F.2d 721, 725-26 (4th Cir. 1972).

92. *Id.*

93. *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 623-24 (2004).

94. *Compare* RESTATEMENT (SECOND) OF TRUSTS § 171 (1959) (disallowing delegation of duties "which the trustee can reasonably be required personally to perform"), *with* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 171 (1992) (allowing prudent delegation of duties), *and* UNIF. PRUDENT INVESTOR ACT § 9 (1994) (specifying conditions for delegation).

95. *See* DeVenney v. Hill, 918 So. 2d 106, 116 (Ala. 2005) (noting that "unassignable personal-service contracts relate to services that involve special skills, such as the painting of a portrait by an artist").

96. An assignment to multiple individuals could be particularly problematic if the assignees are domiciled in different jurisdictions, although jurisdictional conflicts may arise regardless of the identity of the assignee. *Cf.* 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 17.03[D], at 17-43 to 17-44 (2009 ed.) (discussing standing and jurisdictional questions

With its focus on the intention of the parties, however, the approach of the Restatement (Second) of Contracts provides a framework for evaluating such issues on a case-by-case basis.

Perhaps the more difficult issue posed by the assignment of a settlor's enforcement right concerns the public policy exception. In addition to increasing the burden on the trustee, an assignment raising the specter of "frequent, unreasonable, and vexatious litigation" that once led the courts to consolidate enforcement rights in the person of the attorney general may also violate public policy.[97] In particular, assignment could raise a conflict with the doctrine of cy pres. Under the UTC, a court may modify a charitable trust to conform to the presumed intent of the settlor "if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful."[98] A central purpose of the cy pres doctrine is to reduce the risk "that designated charitable purposes may become obsolete as the needs and circumstances of society evolve over time."[99] If a settlor is permitted to assign his enforcement right to a third party, that individual might have standing to contest any cy pres proceeding, which could complicate such litigation by shifting the focus to private rather than public concerns. This could be particularly problematic if successive assignments are permitted—i.e., if the settlor's original assignee can make a subsequent assignment to a third party.

An example may serve to illustrate this point. Suppose that *S*, a settlor in a UTC jurisdiction, creates a charitable trust to provide scholarship funds to students of a particular race attending a university that *S* founded.[100] *S* then assigns his § 405(c) enforcement right to his son *A*, who is not a beneficiary of the trust. Many decades later, after *S*'s death, *A* assigns the enforcement right to *B*, *S*'s granddaughter. No notice is given to the trustee of the assignments by *S* or *A*. Subsequently, a court determines that the racial restriction is unlawful or impracticable. The trustee petitions to modify the trust so as to provide scholarships for needy students without regard to race. *B* objects to the modification on the ground that *S* would have preferred for the trust to terminate rather than open up the scholarship to students of all races. Should considerations of public policy bar *B* from

that may arise in applying cy pres doctrine when more than one state has "an interest in the administration of a charitable trust or corporation").

97. *See* Sarkeys v. Indep. Sch. Dist. No. 40, Cleveland County, 592 P.2d 529, 534 (Okla. 1979) (discussing this traditional concern), *quoted in* Blasko, *supra* note 44, at 41-42.

98. UTC § 413(a) (2000).

99. RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. a (2003).

100. For a notable non-UTC case involving the application of cy pres to a racial restriction of this type, see Coffee v. William Marsh Rice Univ., 403 S.W.2d 340 (Tex. 1966).

objecting to the modification, notwithstanding the sequence of assignments? And what if the trustee attempts to pay *B* from the trust funds to prevent *B* from objecting to the cy pres petition—should the payment be allowed?

Unfortunately, existing case law on the concept of public policy is far from straightforward. As one prominent state court has admitted, "[t]here is no precise definition of the term."[101] On the basis of public policy, courts have refused to recognize the assignment of various types of claims, including claims for damages for personal injury that have not yet been reduced to judgment,[102] insurance proceeds whose assignment would benefit the slayer of the insured,[103] and legal malpractice claims purportedly assigned to an adversary in the litigation that gave rise to the malpractice suit.[104] These categories of claims, however, generally have a positive market value for the assignee, while the right to enforce a charitable trust is not necessarily valuable in market terms. Moreover, delegating the primary responsibility for charitable trust supervision to the attorney general can also harm society, as the example of the Hershey Trust shows.[105]

Unless every assignment of a charitable trust enforcement right is to be treated as a violation of public policy, courts must either apply a flexible standard to determine the validity of each assignment, or simply define certain types of assignments as per se impermissible.[106] A chain of assignments from one person to the next, as in the example above, could frustrate the greater goals of society by giving too many persons in succession the power to interfere with the trust's administration. The same might be true of an attempted assignment to a large and poorly defined class of individuals. Even if only a small percentage of the general population would be willing to devote the time and expense necessary to sue to enforce a charitable trust, that percentage could add up to a significant number of lawsuits if the class of potential litigants is sufficiently large. By contrast, a single assignment to a particular individual chosen by the settlor could be a rea-

101. Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

102. Croxton v. Crowley Mar. Corp., 758 P.2d 97, 99 (Alaska 1988).

103. Rottmund v. Cont'l Assurance Co., 761 F. Supp. 1203, 1209-10 (E.D. Pa. 1990).

104. Gurski v. Rosenblum and Filan, LLC, 885 A.2d 163, 167 (Conn. 2005).

105. *See supra* notes 37-38 and accompanying text.

106. A flexible standard based on reasonableness, for example, is applied to trust provisions conditioned on a particular marriage. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 6.2 cmt. a (1983). The application of this test in the marriage context, however, has been criticized as arbitrary and unpredictable. *See* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1317-22.

sonable and effective way to ensure that a charitable trust is properly monitored during the settlor's lifetime or immediately after the settlor's death.[107]

B. The Limits of Contractarian Reasoning

The public policy concerns raised by an unrestricted right of assignment suggest that the existing law of contracts provides incomplete answers at best when applied in the context of charitable trusts. A trust involves not only a deal between a settlor and trustee, but also the transfer of legal and equitable title to the property and the creation of a fiduciary relationship between the trustee and the beneficiaries. Particularly when the trust in question is charitable, the law may have greater concern for the present needs of the charitable beneficiaries than the terms of the initial bargain between settlor and trustee.[108] Moreover, the limited nature of the UTC's expansion of settlor rights in the noncharitable context could be taken to indicate that a concern for the specific problem of charitable trust supervision, rather than a strong overall commitment to the contractarian theory of trusts, was the primary impetus for the settlor standing rule of § 405(c).[109] If this is so, the Restatement (Second) of Contracts may be of limited use in understanding the intent of the UTC drafting committee. Reasoning that is generally appropriate in contract law may be out of place in a fiduciary context.[110] While contractual principles provide a useful justification for recognizing an assignment of the settlor's enforcement right, therefore, those principles should be adapted as necessary to take into account the distinctive nature of gratuitous transfers.

To flesh out the amorphous concept of public policy with regard to the assignment of charitable trust enforcement rights, courts might look to four principles already familiar to the law of trusts. First, trust law protects a potential trustee from unknowingly assuming the burden of a fiduciary relationship. Although notice is not required for a valid trust,[111] the role of

107. One justification for allowing settlor standing in the first place is that the settlor is unlikely to bring "repetitious or harassing litigation." *See* SCOTT AND ASCHER ON TRUSTS, *supra* note 32, § 37.3.10, at 2452. An assignment to a single individual selected by the settlor might be defended on similar grounds.

108. *Cf.* UTC § 413 (2000) (modifying traditional doctrine of cy pres so as to allow modification of "wasteful" provisions and establish presumption of general charitable intent on the part of settlor).

109. On the UTC expansion of settlor rights with regard to noncharitable trusts, see *supra* notes 50-55 and accompanying text.

110. *See* Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 774-78 (2000).

111. *See* RESTATEMENT (THIRD) OF TRUSTS § 14 (2003).

trustee cannot be imposed upon a person without her consent.[112] An express trust may be created by a transfer or appointment of property to the trustee during the settlor's lifetime or at death, or by a declaration that the settlor holds certain property as trustee.[113] When the settlor intends to create an inter vivos trust other than by declaration, delivery sufficient to pass title to the property is required in order for the trust to take effect.[114] A prospective trustee, however, may decline the office prior to accepting it.[115] Only upon accepting the office does the trustee become subject to the wide range of fiduciary duties owed to the beneficiaries.[116]

Contract law does not identify a mechanism by which the other contracting party (the trustee) would be made aware of an assignment, requiring only that the assignor give notice to the assignee or a third party acting on the assignee's behalf.[117] This requirement, developed to handle specific and often short-term market transactions,[118] would seem inadequate as applied to the assignment of a general right to enforce a charitable trust, given the burdensome fiduciary duties of the trustee. Although an assignment would not augment the trustee's fiduciary duties with respect to the settlor and the public, it might increase the trustee's likelihood of being the target of litigation on the basis of a real or imagined breach, depending on the identity of the assignee. If the settlor may assign the § 405(c) enforcement right without giving notice to the trustee, the trustee could learn about the assignment only in the event of a dispute, which could occur many years after the settlor's death.

As discussed above, the trustee's ability to resign without court approval under the UTC is an important element of the case in favor of assignability.[119] The ability to resign will only protect the trustee, however, if the trustee is made aware of the assignment. Moreover, a sole trustee who resigns is not relieved of the trustee's duties until a successor trustee is

112. That is, unless the trust is a constructive trust imposed to prevent unjust enrichment. *See id.* § 1 cmt. e.

113. *See id.* § 10.

114. *See id.* § 16 cmt. b.

115. *See id.* § 35.

116. For examples of these fiduciary duties, see UTC §§ 801-813 (2000).

117. RESTATEMENT (SECOND) OF CONTRACTS § 324 (1981). Whether the obligee's actions are sufficient to make an effective assignment "is a question of interpretation to be answered from all the circumstances, including words and other conduct." *See* FARNSWORTH, *supra* note 22, § 11.3, at 69.

118. Illustrations used in the *Restatement (Second) of Contracts* typically involve building contracts and short-term employment contracts. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 321 cmts. a-b, illus. 1, 2, 3, 5.

119. *See supra* text accompanying note 89 (explaining how trustee's ability to resign under UTC § 705(a)(1) supports right of assignment for settlor).

appointed,[120] and finding a successor trustee might be difficult under the looming threat of a lawsuit by an assignee. Courts might therefore require, as a condition of validity, that the settlor provide reasonable notice to the trustee of any assignment that is not evident in the trust instrument. If the trustee resigns, the continuing effectiveness of the assignment would require giving reasonable notice to the successor trustee.

Second, trust law generally limits the settlor's ability to control the postmortem administration and disposition of trust assets to those circumstances that the settlor could reasonably foresee.[121] In the charitable trust context, this notion manifests itself in the doctrine of cy pres, while in the private trust context it has been expressed both through the Rule Against Perpetuities and through modern rules allowing modification and termination in light of changed circumstances.[122] From trust law's traditional reluctance to adhere to stale decisions by the settlor, courts could derive a rule prohibiting any subsequent assignment of the settlor's right to enforce a charitable trust under UTC § 405(c) after the initial assignment by the settlor.

Although the settlor can make an informed judgment as to who should best supervise the trust in his place, any additional assignments would reflect the judgment of the assignees, not the settlor, and are thus more difficult to justify under the language of § 405(c), which focuses on the settlor's enforcement right. Moreover, while free transferability of short-term contractual rights may be necessary for the functioning of a market economy,[123] charitable trusts can be institutions of indefinite duration.[124] Drawing the line at the settlor's initial assignment would help to ensure that the trustee does not face a new potential opponent in litigation at regular

120. UTC § 707(a).

121. *See* ARTHUR HOBHOUSE, THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY 138 (1880) ("A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see.").

122. *See, e.g.*, UTC § 413 (establishing cy pres doctrine for charitable trusts); *id.* § 412 (allowing modification and termination of noncharitable trusts in the event of changed circumstances); UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 (amended 1990) (revising traditional Rule Against Perpetuities for noncharitable trusts). For a discussion of why charitable trusts are not subject to the traditional Rule Against Perpetuities, see Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 84-87 (1999). Admittedly, the recent abolition of the Rule Against Perpetuities in many jurisdictions calls into question the commitment of contemporary legislatures to the principle of restraining the dead hand. *See, e.g.*, Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2117-18 (2003) (explaining why "agency costs and externalities" associated with perpetual trusts "are unlikely to influence legislatures considering abolition of the Rule").

123. *See* FARNSWORTH, *supra* note 22, § 11.2 at 63 (discussing importance of assignment in contracts for sale of goods on credit).

124. A charitable trust may, but need not, continue indefinitely. *See* SCOTT AND ASCHER ON TRUSTS, *supra* note 32, § 37.4.1, at 2476-77.

intervals over the course of the trust's existence. A settlor who wishes to provide for permanent supervision of the trustee could assign her § 405(c) right to a corporation or charitable organization rather than an individual, which would provide a measure of certainty for the trustee and the beneficiaries.[125] On the other hand, in the event that an individual assignee dies or becomes incapacitated during the settlor's lifetime, courts could treat the § 405(c) right of enforcement as having reverted to the settlor, thus permitting the settlor to select a replacement assignee without violating the rule against successive assignments.[126] To remove any possible ambiguity, a settlor might add an express provision to this effect in the instrument making the initial assignment.

Third, trust law generally requires a noncharitable trust to have a definite beneficiary.[127] Although charitable trusts are exempt from this principle,[128] an assignment of the settlor's enforcement right to private individuals need not be. Thus, a purported assignment of the enforcement right to the settlor's "friends," or another undefined class, could be treated as per se invalid, just as a trust in favor of such a class would be invalid for lack of a definite beneficiary.[129] Courts could look to existing precedent defining a "definite class" for trust purposes in ruling on the validity of proposed assignments.[130] In the event that a settlor attempts to make an assignment to a class that is not yet closed, such as "my descendants per stirpes," courts could construe the class of potential assignees as being limited to those individuals who are able to accept the assignment at the time it is made, as the law currently does for class gifts.[131]

125. To some extent, this can already be accomplished by providing for a gift over to an alternate charity in the event that the trust's original purposes "become outmoded or fail." *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 440 cmt. a (Tentative Draft No. 2, 2009) (describing how a gift over can be employed to circumvent presumption that settlor's initial purposes become stale over time).

126. Such a conclusion could find support in the concept of a resulting trust, which arises in favor of the transferor or the transferor's successors in interest when an express trust fails. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 7-8 (2003). The possibility of assignment by the settlor's personal representative is dealt with in Part III *infra*.

127. *See* UTC § 402(3). Limited exceptions exist under the UTC for noncharitable trusts enforced for no more than 21 years and trusts in favor of pets. *Id.* §§ 408, 409(1).

128. *Id.* § 402(3)(A).

129. *See, e.g.*, Clark v. Campbell, 133 A. 166, 170-71 (N.H. 1926) (declining to find valid trust in favor of settlor's "friends"). On the definite beneficiary requirement, see RESTATEMENT (THIRD) OF TRUSTS § 44 (2003). For an effort to define the term "friend," see Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 642-47 (2007).

130. For relevant cases in the trust context, see RESTATEMENT (THIRD) OF TRUSTS § 45 reporter's notes (2003).

131. *Cf.* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 15.1 (Tentative Draft No. 4, 2004) (explaining class-closing rule).

Finally, a rule allowing assignment of § 405(c) enforcement rights must not depart from the underlying requirement that charitable trusts serve a purpose beneficial to the community.[132] Faced with the prospect of a suit by an assignee to enforce the trust, the trustee might be tempted to pay the assignee out of trust funds to drop the suit, thus expending those funds in a way that arguably does not benefit the community. In order for a trust to qualify as charitable, the property and income from the trust may not be devoted to private use.[133] A rule requiring court approval for any payment to the assignee of the settlor's enforcement right, or any settlement between the trustee and an assignee, could limit or avoid this problem.[134]

In short, while contract law might not provide a definite answer as to whether a particular assignment violates public policy, principles derived from the law of noncharitable trusts may provide some guidance. Future courts interpreting UTC § 405(c) could combine existing rules of trust and contract law to make sense of a novel circumstance not yet anticipated in either context. Requiring reasonable notice to the trustee, barring successive assignments, mandating that an assignment be made to a definite individual or class, and subjecting any payment to or settlement with an assignee to the approval of the court could minimize the potential conflict with the special policy concerns implicated by charitable trusts.

In some cases, however, the settlor may have died without having made any initial assignment, but another individual may claim to represent the interest of the deceased settlor. When this occurs, courts will need to decide whether that individual can make an assignment on the deceased settlor's behalf. Given that many charitable trusts come into being at the settlor's death,[135] the validity of postmortem assignments is an important issue, which the next Part will address.

III. POSTMORTEM ASSIGNMENTS

When a person dies, the net probate estate passes to that person's heirs or devisees.[136] During administration, however, a personal representative has the same power over the property that the decedent had, albeit in a

132. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 (2003) (setting out examples of permissible purposes for charitable trusts).

133. RESTATEMENT (SECOND) OF TRUSTS § 376 (1959).

134. Under the UTC, a cy pres proceeding to modify a charitable trust requires court approval. *See* § 413(a)(3). Any payment to or settlement with an assignee could also be subject to court supervision.

135. *See* Langbein, *supra* note 27, at 67-68.

136. *See* UNIF. PROB. CODE § 3-101 (1990); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.1 (1999).

fiduciary capacity.[137] If a settlor has died without assigning her right to enforce a charitable trust, therefore, there are multiple parties who could plausibly claim to stand in the shoes of the deceased settlor. A court that recognizes a right of postmortem assignment must decide whether it can be exercised only by the personal representative, or also by the decedent's heirs or devisees.[138]

Under the common law, so-called "personal" actions did not survive the death of the plaintiff, under the doctrine of *actio personalis moritur cum persona*.[139] The continuing utility of this doctrine, however, is doubtful.[140] Moreover, as discussed above, the reforms of the UTC have made the role of trustee less personal in nature.[141] The same contractarian theory that explains the grant of settlor standing in UTC § 405(c) might justify making the settlor's right of action survivable, if a suitable person can be found to bring the lawsuit in the deceased settlor's place.[142] On the other hand, allowing someone to make an initial assignment on behalf of a deceased settlor raises the same concern as successive assignments: namely, that the settlor's own intent is not being given effect.[143] If postmortem assignments are to be allowed, some limitations ought to be imposed on their exercise.

It is well-established that a decedent's personal representative may assign rights that belonged to the decedent prior to death. This conclusion is reached, for example, by the Restatement (Second) of Conflict of Laws, which allows a domiciliary executor or administrator to assign "any transferable claim of the decedent."[144] When a domiciliary executor or administrator transfers a chose in action to a third party, courts have long held that

137. *See, e.g.*, UNIF. PROB. CODE § 3-711 (stating that "[u]ntil termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate").

138. Courts have reached differing conclusions on the question of whether the heirs or personal representatives of the settlor can sue directly to enforce the trust. *Compare* Three Bills, Inc. v. City of Parma, 676 N.E.2d 1273, 1276 (Ohio Ct. App. 1996) (applying traditional law to exclude settlor's heir from enforcing charitable trust), *with In re* Hill, 509 N.W.2d 168, 172 (Minn. Ct. App. 1994) (granting standing to settlor's descendant who had formerly served as trustee), *and* St. Mary's Med. Ctr., Inc. v. McCarthy, 829 N.E.2d 1068, 1072 (Ind. Ct. App. 2005) (declining to rule that relative of settlor of charitable trust lacks standing to enforce it). The majority rule, however, appears to be that they cannot do so. *See* SCOTT AND ASCHER ON TRUSTS, *supra* note 32, § 37.3.10, at 2453.

139. *See* Florence Frances Cameron, Note, *Defamation Survivability and the Demise of the Antiquated "Actio Personalis" Doctrine*, 85 COLUM. L. REV. 1833, 1833 (1985).

140. *See id.* at 1838-43.

141. *See supra* notes 89-94 and accompanying text.

142. *See* Chester, *supra* note 7, at 616-17.

143. *See supra* notes 121-122 and accompanying text.

144. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 333 (1971).

the assignee may bring suit in another state in his own name.[145] Whether the assignment should be made is within the personal representative's discretion.[146] Thus, if the settlor's right to enforce a charitable trust survives the death of the settlor, traditional contractual principles would support granting the personal representative the authority to assign the right.

By contrast, courts usually frown on attempts by heirs or devisees to sue on a contractual claim of the decedent. At least while the estate is being administered, such claims are said to be within the exclusive province of the executor or administrator.[147] Courts have allowed a few exceptions to this rule, as when the personal representative has a conflict of interest, commits fraud, or refuses to act in the interest of the estate.[148] Unless such "special circumstances" exist, however, only the personal representative has the authority to bring suit in the decedent's place.[149]

A court following this case law, therefore, might bar the heirs or devisees of a deceased settlor from assigning the settlor's right to enforce a charitable trust, but allow the personal representative to assign the right, at least while the administration is pending.[150] This would fit with existing commentary and case law regarding the postmortem exercise (as opposed to assignment) of the right of enforcement. Ronald Chester has proposed that the settlor's personal representative, but not the heirs, have the right to enforce a charitable trust under UTC § 405(c).[151] One of the few reported cases to involve a postmortem exercise of a donor's right of supervision, *Smithers v. St. Luke's-Roosevelt Hospital Center*, allowed the decedent's wife to exercise the right not as his heir or devisee, but as his estate's

145. *See, e.g.*, Harper v. Butler, 27 U.S. (2 Pet.) 239, 240 (1829); Peterson v. Chemical Bank, 27 How. Pr. 491 (N.Y. Sup. Ct. 1864).

146. *See* Archibald v. Midwest Paper Stock Co., 158 N.W.2d 739, 742 (Iowa 1968).

147. *See, e.g.*, Buchanan v. Buchanan, 71 A. 745, 746 (N.J. 1909) ("Heirs, next of kin, and creditors cannot, in their own names, prosecute actions at law or suits in equity to recover the unadministered estate of a decedent or to collect debts or other choses in action due him. Such suits can be maintained only by the qualified personal representatives of the deceased.")

148. *See, e.g.*, Trincia v. Testardi, 52 A.2d 871, 877 (Del. Ch. 1947) (examining exception for fraud); Montana *ex rel.* Palmer v. Dist. Court of the Ninth Judicial Dist., 619 P.2d 1201, 1203 (Mont. 1980) (recognizing exception when personal representative fails to act on claim); *In re* Guardianship of Archer, 203 S.W.3d 16, 22 (Tex. App. 2006) (discussing exceptions for conflict of interest and failure to act).

149. *See In re* Estate of Long, 732 P.2d 1347, 1351 (Mont. 1987). *But cf.* Howard v. Adm'rs of the Tulane Educ. Fund, 986 So. 2d 47, 58 (La. 2008) (holding that under Louisiana Civil Code "heirs and universal legatees have a right of action to seek enforcement of an obligation imposed by a charge or condition to which a donation is subjected").

150. If an initial assignee chosen by the settlor has died pending administration of the settlor's estate, a court might permit the settlor's personal representative to choose a new assignee. *Cf. supra* note 126 and accompanying text (discussing possibility of reversion to settlor in the event initial assignee dies or becomes incapacitated during settlor's lifetime).

151. Chester, *supra* note 7, at 616-17.

"court-appointed special administratrix."[152] While *Smithers* involved a restricted charitable gift rather than an express trust, its reasoning could be applied in the trust context.[153]

If the settlor's right of enforcement is assignable, and if, following *Smithers*, the right may be exercised after death by the personal representative, then the logical conclusion is that the personal representative should have a power of assignment equivalent to that of a living settlor. By contrast, courts could recognize the settlor's heirs or devisees as potential assignees but not as potential assignors. Should the settlor or her personal representative designate the settlor's heirs or devisees as successors to the § 405(c) enforcement right, and provide reasonable notice to the trustee, such a designation might be construed as a valid assignment to the heirs or devisees. Allowing the heirs or devisees to make a subsequent assignment to a third party, however, would violate the policy against successive assignments proposed above.[154]

To the extent that the settlor anticipates the problem of postmortem trust enforcement, an alternative possibility might be to appoint a "trust protector" and grant that individual the right to enforce the trust. A trust protector is "a person selected by the settlor to represent the settlor's interests in making specified trust decisions that the settlor will be unable to make."[155] Trust protectors are authorized by the UTC.[156] A settlor might appoint a trust protector either to ensure that his wishes are carried out or to protect the interests of the beneficiaries.[157] By incorporating a concept that first developed in the trust context, a settlor might try to circumvent some of the more difficult questions raised by the application of contractual principles. Selecting a trust protector would also avoid the problem of giving notice to the trustee, as the settlor's choice of the protector mechanism would be evident in the trust instrument.

Nevertheless, the law relating to trust protectors is also in an early stage of development, and important questions, such as the identity of the trust protector's principal, have not yet been fully answered by courts and

152. 723 N.Y.S.2d 426, 434 (N.Y. App. Div. 2001).

153. On the close parallel between charitable trusts and restricted charitable gifts, see *supra* note 17.

154. *See supra* notes 121-126.

155. Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2763 (2006).

156. UTC § 808(b)-(d) (2000).

157. Jeffrey Evans Stake, *A Brief Comment on Trust Protectors*, 27 CARDOZO L. REV. 2813, 2818 (2006).

legislatures.[158] If the settlor is treated as the principal, any grant of powers to a trust protector raises the traditional problem of the dead hand.[159] Moreover, the possibility of naming a protector in the trust instrument would not help a settlor who realized the importance of enforcement standing only after creating the trust, as might have been the case in *Hicks*.

In the long run, a settlor's delegation of enforcement rights to a trust protector may prove as problematic for courts as an assignment grounded in contract. Given the potential difficulties associated with both options, however, it may be sensible to permit postmortem assignability only as a default rule that the settlor could override either in the trust instrument or by subsequent notice to the trustee. Much of the law of trusts takes the form of default rules that can be preempted by contrary provisions in the trust.[160] To the extent that mandatory rules of trust law interfere with the settlor's purposes, they do so to limit the reach of the dead hand.[161] Nevertheless, existing mandatory rules already require charitable trusts to benefit the community,[162] and a term of a trust precluding postmortem assignment of the settlor's enforcement right would leave open existing mechanisms for enforcement by the attorney general, cotrustees, and persons with a special interest in the trust.[163] The effect and presumptive purpose of UTC § 405(c) should be to further, not defeat, the intent of the settlor.[164] Accordingly, a lifetime request by the settlor that the right of assignment not be exercised after death ought to be respected.

CONCLUSION

The recent and widespread recognition of settlor standing in the charitable trust context opens the door to issues that have not hitherto been explored. At least with regard to the issue of assignability, courts applying UTC § 405(c) and similar provisions need not write on a blank slate. In cases like *Hicks*, a reasonable assignment of the settlor's enforcement right

158. *See* Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807, 2808 (2006). The UTC specifies that trust protectors are presumptively fiduciaries who owe a duty "to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries." UTC § 808(d).

159. *See* Sterk, *supra* note 155, at 2763.

160. RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. a(1) (2003); UTC § 105 cmt. (explaining that "the Uniform Trust Code is primarily a default statute").

161. *See* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1107-19, 1126 (2004).

162. *See id.* at 1108-09.

163. *See* sources cited *supra* note 39.

164. *Cf.* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The donor's intention is given effect to the maximum extent allowed by law.").

could further the goal of effective supervision that was the original impetus for settlor standing. Over time, a new body of trust law jurisprudence may develop to deal with the problems raised by settlor standing. For now, however, courts would make a good start by acknowledging existing law relating to the assignment of contractual rights. On the one hand, while assignment may not be appropriate in every case, recognizing a general principle of assignability would serve the greater purpose of holding charitable trustees accountable for their actions. On the other hand, courts should impose some restrictions on the right of assignment to ensure that charitable trusts continue to serve a public purpose and to protect trustees from undue exposure to potentially frivolous litigation. Thus, the answer to the question posed in the title to this Article is a qualified "yes."

A charitable trust is obviously quite different from a contract to build a house or purchase bushels of wheat, and law that is good for market transactions may be less sensible when applied to gratuitous transfers. Nevertheless, when faced with new and changing circumstances, courts should not ignore basic principles of contract law that might have some utility in the trust context. As Maitland wrote at the dawn of the last century, the trust "is an 'institute' of great elasticity and generality; as elastic, as general as contract."[165] So long as the trust remains a flexible institution, it will no doubt remain a key instrument of philanthropy for centuries to come.

165. MAITLAND, *supra* note 68, at 23.

STUDENT NOTES