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HELPING NONPROFITS POLICE THEMSELVES:
WHAT TRUST LAW CAN TEACH US
ABOUT CONFLICTS OF INTEREST

Melanie B. Leslie 551

Fiduciary duty law seeks to minimize agency costs that occur when the interests of the agent and principal diverge. That law is context specific: the substance depends upon the objectives of the fiduciary relationship and the degree to which other forces, such as markets and social norms, help align the incentives of principal and fiduciary.

Trust law has no business judgment rule, and prohibits even “fair” conflict of interest transactions unless they are approved by fully informed beneficiaries. Strict rules bolster norms against self-dealing and compensate for trust beneficiaries’ poor monitoring abilities and inability to exit or diversify. Corporate fiduciary duty law is more relaxed, and does not require the board to obtain advance approval prior to engaging in “fair” transactions with board members. The standard is more generous because diversified shareholders want to encourage risk, and because market forces pressure corporate directors to avoid conflicts that are not in the corporation’s best interests.

Neither monitors nor markets exert meaningful pressure on nonprofit fiduciaries. When nonprofit corporations function effectively it is because the most vocal directors have internalized fiduciary duties as social norms. Fiduciary duty law in the nonprofit context should therefore seek to support and reinforce fiduciary duties as social norms.

Trust law teaches that clear rules are superior tools for generating and supporting social norms. That lesson has been lost on policy makers, who have transplanted fuzzy corporate law fiduciary duty standards to the nonprofit context. The result has been the erosion of the fiduciary duty of loyalty.

RESPECTING FOUNDATION AND CHARITY AUTONOMY:

HOW PUBLIC IS PRIVATE PHILANTHROPY?

Evelyn Brody 571
& John Tyler

Recent years have seen a disturbing increase in legal proposals by the public and government officials to interfere with the governance, missions, strategies, and decision-making of foundations and other charities. Underlying much of these debates is the premise—stated or merely presumed—that foundation and charity assets are “public money” and that such entities therefore are subject to various public mandates or standards about their structure, operations, and policies. The authors’ experiences and research reveal three “myths” that, singly or collectively, underlie claims that charitable assets are public money. The first myth conceives of charities as shadow governments due to the requirement that they have public purposes and are subject to attorney general *parens patriae* oversight. The second myth asserts that, because philanthropies exist under state charters, they are government agencies, “state actors,” or quasi-public bodies subject to constitutional constraints or accountable to the public in the same way as is government. The third myth asserts that revenue forgone on deductible charitable contributions and the tax exemption are a contribution from the state that entitles the state to a say in nonprofit governance structure, operations, and decision-making. In debunking these myths, this paper demonstrates the lack of legal support for the “public money” view of charitable assets.

GOVERNING AND FINANCING
BLENDED ENTERPRISE

Dana Brakman Reiser 619

The image of nonprofit and for-profit as dual and exclusive categories is misleadingly simple. This blurring of the boundary between for-profit and nonprofit has gone on for years and appears only to be gaining steam. Yet, traditionally, the law has put to organizations a choice of either the nonprofit or for-profit form of organization. In the first decade of this century, organizational law is beginning to catch up with the boundary-blurring trend. In the United States and abroad, legislatures are creating new forms for blended enterprise, including several U.S.

states' low-profit limited liability company (the "L3C") and the community interest company (the "CIC") in England and Wales. Along with these more formal efforts, at least one self-regulatory scheme provides a framework to fashion a blended form (the "B Corporation") under traditional state for-profit corporation law. This article will describe and compare these forms and evaluate whether they can enhance the governance and finance of blended enterprise.

RECENT DEVELOPMENTS IN COMMUNITY
FOUNDATION LAW: THE QUEST FOR
ENDOWMENT BUILDING

Mark Sidel 657

Using legal and judicial means to build community foundation assets are the focus of some of the more interesting recent developments in community foundation law. This article discusses a recent state supreme court case that pitted a community foundation against a trustee bank for control over the management and investment of a trust for the benefit of the community foundation; state incentive programs for community foundations, including tax credits and the use of gambling revenues to build community foundation assets; the growth of community foundation self-regulation; and other new developments that converge on a key issue—building endowment—that faces the vast majority of America's underfunded, under-endowed community foundations in a time of growing community and social needs.

**ARTICLES ON TAX AND DONOR INTENT
FROM THIS SYMPOSIUM CAN BE FOUND IN
PART II, LOCATED IN THE NEXT ISSUE
(85 CHI.-KENT L. REV. — (2010)).**

THE KENNETH M. PIPER LECTURE

REFORMING THE UNITED STATES' ECONOMIC
MODEL AFTER THE FAILURE OF
UNFETTERED FINANCIAL CAPITALISM

Richard B. Freeman 685

This Article is based on the 2009 Kenneth M. Piper Lecture at the Chicago-Kent College of Law. The 2008–2009 financial meltdown and ensuing economic developments have shown three things about modern capitalism: First, that unfettered financial markets remain the Achilles heel of capitalism with the capability of destroying economic stability and bringing misery to all. Second, that high-powered incentives paid to "talent" in finance are a fundamental cause of the excessive risk-taking, chicanery, and financial fraud that contributes to instability. Without a new compensation system that rewards banking and finance for contributing to sustainable economic progress rather than for economic rent-seeking and a renewed regulatory system that punishes chicanery and financial crime and near-crime, there is unlikely to be any change in the behavior of the financial world. And finally, that in the wake of the implosion of laissez faire finance, labor and allied groups have to participate in rewriting the rules and regulations governing banking and finance so that finance serves the real economy rather than the reverse. Accordingly, if Wall Street insiders continue to make the key policy decisions alone, banking and finance will remain a loose cannon on the good ship Capitalism, sure to crash the ship yet again.

STUDENT NOTES

IT IS NOT TOO LATE FOR THE HEALTH SAVINGS ACCOUNT

Jessica A. Bejerea 721

The Health Savings Account (HSA), a tax-advantaged savings vehicle for paying medical expenses, paired with the high deductible health plan, has become a popular means of controlling health care costs and insurance premiums. Recently Congress attempted to increase the attractiveness of the HSA and the high deductible health plan when it amended HSA law in 2006. This note examines these recent changes and argues that certain provisions of the amendments, along with IRS guidance, have instead complicated the rules for HSAs and have neglected to resolve at least one important issue.

FOOD ALLERGIES IN PUBLIC SCHOOLS: TOWARD A MODEL CODE

Michael Borella 761

Sufferers of food allergies can experience anaphylactic shock, and even death, within minutes of exposure to allergens such as peanuts, soy, wheat, eggs, milk, and fish. This causes unique problems when the food allergy sufferers are children in public schools. The widespread availability of these allergens in school lunchrooms and classrooms places children with food allergies in danger while they are entrusted to the government's care. Since these children, especially young children, cannot be relied upon to be able to avoid allergens on their own, reasonable and logical laws should be in place to ensure that children are safe while in school. However, such laws do not exist. Accordingly, this note provides an overview of the insufficiency of today's disparate federal and state laws, and proposes a model code that is designed to protect children with food allergies.

THE POWER OF THE PARENTAL TRUMP CARD: HOW AND WHY *FRAZIER v. WINN* GOT IT RIGHT

Jocelyn Floyd 791

When two fundamental rights are in conflict, such that the protection of one requires the infringement of the other, courts must weigh those rights against each other to determine which is ultimately greater. In *Frazier v. Winn*, the Eleventh Circuit dealt with precisely such an issue: specifically, the rights of parents pitted against those of their children. This note explores the history of both parental rights and student's rights in school to show why the court appropriately affirmed that children's right to free speech is only as expansive as their parents allow, justified by the parents' fundamental right to rear their children as they see fit.

FREEDOM FROM COMPULSION

Tess Slattery 819

A recent Eleventh Circuit case, *Frazier ex rel. Frazier v. Winn*, upheld as facially constitutional a Florida statute that requires a student to obtain parental permission before abstaining from participation in the Pledge of Allegiance. This note argues that the court reached the wrong conclusion because it failed to properly weigh the students' right to free speech against the parents' right to control the upbringing of their children. This note argues that Justice Breyer's framework for balancing conflicting rights should be adopted for use in this context. By applying Justice Breyer's balancing test, the Florida statute should be found to be unconstitutional because the requirement of parental permission to refrain from participation in the Pledge of Allegiance is a substantial interference with a student's First Amendment rights while there is minimal interference with parental control by allowing students to choose for themselves whether or not to participate in the Pledge of Allegiance.

SYMPOSIUM:

**Symposium on the Law of Philanthropy
in the Twenty-First Century, Part I**

Anne-Marie Rhodes
Symposium Editor

