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CONTENTS

SYMPOSIUM ON THE LAW OF PHILANTHROPY IN THE TWENTY-FIRST CENTURY, PART II

SYMPOSIUM EDITOR
ANNE-MARIE RHODES

ARTICLES

The Introduction and articles on Governance from this symposium can be found in Part I, located in the previous issue (85 CHI.-KENT L. REV 469 (2010)).

II. TAX

THE TIMES THEY ARE NOT A-CHANGIN':
REFORMING THE CHARITABLE SPLIT-
INTEREST RULES (AGAIN)

Wendy C. Gerzog 849

This article will review the history of the tax treatment of charitable split interest gifts, explain the inequities that Congress both cured and generated in its 1969 reforms, and propose solutions that are consistent with the goals of the 1969 legislation. The article discusses variations in the 1969 definition of a charitable split interest, which, because of the enacted statutory language, applies in instances where there is no abuse potential. The inequity produced by that definition penalizes the donor and flouts the rationale behind the 1969 legislation. By contrast, the creation of some required statutory forms of charitable split interests in trust, enacted to prevent abuse, have themselves created new opportunities for donors to evade taxes in ways unanticipated by the 1969 Act. In the spirit of the 1969 law, the article makes several recommendations, including proposals: (1) to modify the statutory definition of charitable split interest to provide an exception from the statutory requirements where there is no statutory mandate to calculate value by means of the actuarial tables under section 7520 and no abuse potential; and (2) to eliminate (or to restrict the tax avoidance aspects of) some of the charitable split interest in trust devices created in the 1969 legislation.

THE TAXATION OF CAUSE-RELATED
MARKETING

Terri Lynn Helge 883

With the economy in turmoil, charitable organizations are looking to non-traditional sources of financing to supplement contributions and fee-based revenues. One potentially lucrative source of revenue stems from cause-related marketing. Cause-related marketing is the public association of a for-profit com-

pany with a charitable organization to promote the company's product or service in order to raise money for the charitable organization. Introduced almost twenty-five years ago, cause-related marketing has now become a \$1 billion a year industry. Cause-related marketing has evolved beyond mere use of a charitable organization's name to an apparent union for the purpose of promoting products that carry the charitable organization's brand or message. While the academic literature discusses whether cause-related marketing alliances are ethically and socially desirable, it does not address whether the application of the federal income tax rules to cause-related marketing alliances adequately captures what we accept as valid charitable activities. Despite the widespread success of cause-related marketing, the IRS has issued little guidance on acceptable practices by charitable organizations engaged in cause-related marketing. An analysis of the application of the unrelated business income tax regime and the prohibition on private benefit to cause-related marketing alliances reveals that modifications to existing Internal Revenue Service guidance should be made based on social, economic and tax theory. This analysis concludes with a proposal for a framework within which such guidance should be considered.

**WHAT LEONA HELMSLEY CAN TEACH US
ABOUT THE CHARITABLE DEDUCTION**

Ray D. Madoff 957

Leona Helmsley named a number of beneficiaries under her will (both human and canine), but among the unnamed beneficiaries are scholars interested in studying the role of philanthropy in the United States. By directing that an estimated \$8 billion be used for the benefit of dogs, Mrs. Helmsley brought in to high relief policy issues regarding the appropriateness of the unlimited charitable deduction. I argue that these concerns are equally applicable, albeit less obvious, when it comes to more traditional charitable bequests. In this paper I will discuss the appropriateness of the unlimited estate tax deduction (particularly in light of the broad definition of what constitutes charitable) and the issues raised by perpetual private foundations.

III. DONOR INTENT

**THE PROBLEMS WITH DONOR INTENT:
INTERPRETATION, ENFORCEMENT, AND
DOING THE RIGHT THING**

Susan N. Gary 977

In a number of recent controversies, the way the charities involved handled restricted gifts resulted in unhappy donors, negative publicity, and costly litigation. This paper examines several of these cases and then argues that donor intent is often more difficult to divine than many people have stated.

The law requires that a charity give effect to a restriction imposed by a donor. This paper examines the legal rules that govern donor-restricted gifts and considers the other reasons a charity will, in most cases, follow the donor's intent. The paper then describes several circumstances in which donor intent may not be clear or easy to determine. A donor's intent may be stated in general terms or the meaning of the ideas the donor had may have changed over time. If the donor is no longer alive, family members may remember the donor's intentions in ways that conflict with the charity's understanding of the gift. The passage of time not only makes the intent of the original donor more difficult to ascertain, but may also make changes in the original restrictions appropriate.

This paper makes suggestions for donors, charities, and the lawyers representing both in connection with restricted gifts. A donor's intent may not be as clear as either party thinks, and trying to pin down a donor's intent with respect to a particular gift may be more difficult – and less sensible – than an advisor may at first imagine. The paper makes specific suggestions for ways to address donor intent in a gift agreement and suggests that by working collaboratively donors and charities may better accomplish the worthy goals they all have in mind.

SHOULD CHARITABLE TRUST ENFORCEMENT RIGHTS BE ASSIGNABLE?

Joshua C. Tate 1045

In recent years, scholars have given much attention to the problem of charitable trust enforcement. Departing from the common law, section 405(c) of the Uniform Trust Code provides that “[t]he settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.” Joshua Tate’s paper will address the question of whether, and to what extent, a settlor’s right to enforce a charitable trust should be assignable to third parties. Should the law permit the settlor of a charitable trust to assign her enforcement rights after the creation of the trust, or should assignments be recognized only if they are spelled out in the trust instrument? How many potential assignees may the settlor properly select? Once the right has been assigned to a third party, should that third party also retain the right of assignment, so that the right can potentially be passed from one individual to the next in perpetuity? What would be the ramifications of granting a right of assignment to the settlor’s personal representative? Any resolution of these issues must protect the interests of charitable beneficiaries, but also be fair to trustees and not overwhelm the courts with frivolous litigation.

STUDENT NOTES

DISCRIMINATION OUTSIDE OF THE OFFICE: WHERE TO DRAW THE WALLS OF THE WORKPLACE FOR A “HOSTILE WORK ENVIRONMENT” CLAIM UNDER TITLE VII

Douglas R. Garmager 1075

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual” on the basis of sex. Accordingly, in *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court recognized that sex discrimination in employment can give rise to a hostile work environment claim under Title VII. The scope of a hostile work environment claim has not been interpreted uniformly by the lower courts, however, as a circuit split exists today over whether conduct occurring outside the workplace is relevant to a hostile work environment claim. This note examines Title VII’s legislative history, Supreme Court opinions, cases on both sides of the circuit split, and other materials, arguing that conduct outside the workplace is relevant to a hostile work environment claim and that the current liability standards for employers sufficiently protect their interests without unduly interfering with Title VII’s remedial purpose.

HUMAN TRAFFICKING FOR SEXUAL EXPLOITATION AT WORLD SPORTING EVENTS

Victoria Hayes 1105

Many members of the international community fear that world sporting events, such as the Olympics and the World Cup, create surges in human trafficking for sexual exploitation, causing women and girls to be exploited for commercial sex while the rest of the world celebrates athleticism and sport. These fears have sparked heated debate about the measures hosting countries should take to prevent human trafficking at these events and the role prostitution policies play in combating human trafficking. In the lead-up to the 2010 Olympics in Canada and the 2010 World Cup in South Africa, politicians in both countries proposed legalizing prostitution as a means of combating human trafficking at the events. This Note explores the connection between prostitution laws and sex trafficking, as well as the link between world sporting events and sex trafficking, with specific reference to preparations for the recently completed 2010 Olympics and the upcoming World Cup. Drawing on research about human trafficking at the 2004 Olympics in Athens, the 2006 World Cup in Germany, and the 2008 Olympics in Beijing, this Note argues that specific anti-trafficking efforts are more effective than prostitution policy reform in combating human trafficking. Finally, this Note critiques Canada’s anti-trafficking related preparations for the 2010 Olympics and

provides general recommendations for strengthening South Africa's anti-trafficking efforts before the 2010 World Cup.

**SECURING GLOBAL TRADEMARK EXCEPTIONS:
WHY THE UNITED STATES SHOULD
NEGOTIATE MANDATORY EXCEPTIONS
INTO FUTURE INTERNATIONAL
BILATERAL AGREEMENTS**

Brian S. Kaunelis 1147

In December 2007, the European Union and the CARIFORUM States concluded a bilateral economic partnership agreement that included a mandatory fair use exception to trademark owners' rights. The EC-CARIFORUM Agreement is the first agreement that mandates the inclusion of Article 17 of the World Trade Organization's Agreement on Trade-Related Intellectual Property Rights and requires an exception to trademark rights. The push to balance international trademark owners' rights has begun, and this Note will detail why the United States should follow the European Union's lead and negotiate mandatory trademark exceptions into future bilateral agreements.

**"WILLFUL PATENT FILING": A CRIMINAL
PROCEDURE PROTECTING TRADITIONAL
KNOWLEDGE**

Vincent M. Smolczynski 1171

This article explores the interaction between current intellectual property regimes and traditional knowledge and concludes that national laws currently in place inadequately protect traditional knowledge holders. When property rights are granted on traditional knowledge, the effects can extend not only to the indigenous communities, but to the surrounding ecosystems and the global market. Commercialization and increased demand leads to shortages in natural resources and increased prices. Therefore, in order to ensure that patent applicants are deterred from acquiring property rights in traditional knowledge, as well that traditional knowledge holders receive proper benefits for their labor and knowledge, this article advocates for an addition to the TRIPS Agreement under Article 61. The amendment would mandate that signatory nations implement criminal procedures and penalties to be applied in cases where a patent is knowingly obtained, or an application for patent is knowingly filed, for subject matter that is not novel or non-obvious based on the prior use of traditional knowledge. To ensure that traditional knowledge may be made available to the public, the amendment would further recognize a quasi-right of the traditional knowledge holders which permits the community to grant to consent to access and use in return for shared benefits arrangements.

**CLOSING THE GAP LEGISLATIVELY:
CONSEQUENCES OF THE
LILLY LEDBETTER FAIR PAY ACT**

Carolyn E. Sorock 1199

With the Lilly Ledbetter Fair Pay Act of 2009, Congress both reversed the result of the widely criticized Ledbetter Supreme Court case and expanded the statute of limitations for all employment discrimination claims relating to compensation. Under the Act, a compensation-based employment discrimination claim's statute of limitations period of three hundred days begins to run whenever an employee is "affected" by a discriminatory practice. The language of the Act is far-reaching, but just five months after the Act was signed into law, the Supreme Court stepped in again to narrow the Act's application to pension benefits in *AT&T Corp. v. Hulteen*. This article [note?] examines the Lilly Ledbetter Fair Pay Act and analyzes its potential legal implications, in light of its judicial precedent in the Ledbetter and Morgan cases and subsequent narrowing in the Supreme Court's Hulteen case, as well as its possible economic implications for employers and employees.

SYMPOSIUM:

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

Anne-Marie Rhodes
Symposium Editor

II. TAX

