Transparency and Accountability for Bequests: The Case of Long Island College Hospital

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Restricted bequests to not-for-profit organizations can be challenging. Often there is significant lag time between commitment of bequest and death of donor, when operational changes in the beneficiary organization may occur that make adherence to bequest restrictions difficult. Governance systems, external to and within the organization, should exist to monitor the organization's acceptance and use of bequests. Using the $138 million bequest by Donald and Mildred Othmer to Long Island College Hospital as an example, we consider the stewardship of charitable bequests and the failure of the governance mechanisms in accepting and maintaining bequest restrictions.

INTRODUCTION

For over 100 years, Long Island College Hospital (LICH) was a leader in hospital care to the residents in the Brooklyn area of New York City. But during the 1990s the hospital suffered significant financial difficulties due, in part, to changes in the health care industry. A bequest in 1999 of approximately $100 million from the estate of Mildred Othmer, a gift that joined an earlier $37 million bequest in 1996 from Mildred's husband Donald, increased the cash position of the hospital. The wills provided that the gifts become a permanent endowment, with only the income from the endowment available for yearly general expenditures (Will of Mildred Othmer, 1988; Will of Donald Othmer, 1994). Yet this did not occur. Less than one year after receiving the funds from Mildred's estate, the hospital petitioned the court in a cy pres argument to change the terms of the bequest and to use the permanent endowment as collateral on financing. Later, with subsequent petitions to the court the permanent endowment was invaded to pay for operating expenses and malpractice claims of the hospital. Within 15 years, the hospital had ceased to exist, having used the funds at the behest of its board and with the approval of the courts. The Othmer's bequest, intended as a permanent endowment, was misdirected for other uses without, seemingly, any accountability for this.

Using LICH as an example, this paper will consider the stewardship of charitable bequests. The paper analyzes the accountability of the multiple stakeholders - donors, the trustee of the estate, the board of the recipient organization and the courts in overseeing the bequests - and considers the failure of the governance mechanisms in accepting and maintaining bequest restrictions.

RELATIONSHIP OF THE OTHMERS AND LICH MANAGEMENT

Donald and Mildred Othmer lived in Brooklyn approximately ½ mile from Long Island College Hospital. Natives of Omaha, Nebraska, they were original investors in a Warren Buffet partnership, which later became part of Berkshire Hathaway. Both Donald and Mildred invested $25,000 in the Buffet partnership. The investment was valued at approximately $780 million when Mildred, the surviving spouse, died. The wills of Donald and Mildred, written in 1988 (and Donald's amended in 1994 shortly before his death in 1995) specified that their sizable estate would be divided among 12 institutions), with LICH as one of the primary recipients.

Donald had a long history with LICH, serving on its board for 22 years. But, the management that he knew was not the management in place when the bequests were received. In 1998, Continuum Health Partners took over the operations of LICH and became its sole member. LICH continued to maintain a separate board to oversee its operations, but Continuum held the authority for naming new board members. Eventually, the original board members were replaced with a board common to all the boards of Continuum's hospitals - LICH, Beth Israel Medical Center, and St. Luke's Roosevelt Hospital (Correspondence, January 4, 2008). The board made significant changes in hospital management, appointing a new executive team with the replacement of the CEO, CFO, and COO (Form 990, 2000). It is likely that the relationship Donald had with the hospital executives when he served on the board and when writing his will did not exist with the new management who were new to the hospital.

LICH'S FINANCES

LICH experienced financial difficulties in the mid and late 1990s, years after the Othmer's wrote their wills. Congress' Balance Budget Act of 1997 reduced Medicare reimbursements, with a phase-in period of five years beginning in 1997. The regulatory environment in New York also changed with deregulation of hospital charges; New York State's Health Care Reform Act of 1996 lowered reimbursement rates, while the city also slowed payment of claims (Surrogate's Court of New York, 2000). A 1996 report by the General Accounting Office stated that New York hospitals had the "weakest credit rating in the nation" in part due to the state's reimbursement system (GAO, 1996). The 2008 report "Deteriorating Financial Condition of New York City's Nonprofit Hospitals" stated that the regulatory rate changes in 1996 essentially permitted hospital bankruptcies (Fass & Cavanaugh, 2008). Additionally, in the late 1990s, LICH experienced an increase in uninsured patients, and the revenue mix changed from the higher revenue inpatient care to ambulatory care. LICH also faced increased competition, as other New York City hospitals expanded their service area into what previously had been LICH's territory. For the years 1998 through 2001 LICH's external auditors Ernst & Young gave the hospital a going concern opinion, expressing its concern about the viability of the organization to survive. LICH may have received going concern opinions earlier than 1998. However, the audit opinion for prior years is unavailable in public records. But it is clear that the financial strength of LICH at the time the will was written was quite different from the viability of LICH years later when the bequest was received.

MONITORING BEQUEST RESTRICTIONS

Several inherent problems exist with restricted bequests. One, while donations typically occur soon after donor commitment, bequests may have a lag time between commitment in the will and death of the donor. Significant changes in the beneficiary organization can occur during this period. It is incumbent to monitor the organization to determine whether the recipient or restrictions should be altered in the will prior to the death of the donor. Two, once a bequest is received by a not-for-profit, the organization has full control over the assets and could misdirect the assets due to lack of transparency about its operations. Governance systems, both external to the organization and within the organization, should exist to monitor the adherence to the restrictions. The party most interested in maintaining the restriction, the donor, is no longer alive to monitor the organization. Other governance mechanisms are needed to fulfill this responsibility.

Responsibility of Donors to Monitor

During the life of the donor when publicly information about the financial health of an organization is available, the donors have some responsibility to determine if the future bequest and restrictions are appropriate. The Othmers were very familiar with LICH when their wills were written, and it was reasonable to assume at that time that LICH could honor the restrictions of the bequests. As the surviving spouse, Mildred should have been responsible for continuing to monitor the ability of LICH to honor the bequest restrictions. Yet Mildred suffered from Alzheimer's Disease as early as 1993, making her incapable of assuming this responsibility. Impairment of elderly donors is not an isolated example. Jack Lunzer donated a collection of 13,000 Jewish books and manuscripts to Valmadonna Trust Library with the restriction that the pieces, when sold, remain together and available for public review. However, in December 2015 the library separated the collection when it sold several manuscripts. Lunzer, still alive, has dementia and thus was in no position to monitor his gift (Lokting, 2015). Expecting donors of bequests to personally monitor the viability of the restrictions may be unreasonable, particularly as aging donors may have decreased capabilities. Other monitoring mechanisms are needed.

Responsibility of Executor Prior to Bequest Distribution

If donors are unable to monitor bequest restrictions during their lifetime, then a donor representative could serve in that capacity if provided with the legal authority. Additionally, upon the death of the donor, the executor of the estate could assume this role, as wills can be drafted to provide for an executor to alter bequests under specific conditions.

Article 11 of Mildred's will contained a provision that allowed changes to the will if the gift could not be executed as requested. Specifically, "if at the time of distribution of any gifts . . . a condition placed upon the gift is not satisfied, the amount otherwise distributed thereto shall instead be distributed to the charities named as recipients under Article 10 (that) satisfies such conditions" (Will, Mildred Othmer, 1988). The executor of the Othmer estate could change the gift allocation if there was concern about the financial health of LICH. And concern there should have been. It is unknown whether the executor considered the financial health of the organizations before disbursing funds; a review of publicly available information on LICH's financial conditions at the time of Mildred's death should have revealed the financial difficulties of the hospital.

Responsibility of Executor Subsequent to Bequest Payment

Once a gift is made, donors and, in the case of bequests, their representatives have little legal standing to safeguard a donation subsequent to payment of the gift. This is due in part to the tax deductibility of the donation, where the donor must vacate any right to the assets in return for a charitable tax deduction, and due to state laws that limit donor ability to monitor their gifts. However, there are some exceptions where donors have monitored past contributions and bequests. The children of Charles and Marie Robertson sued Princeton University for the return of their parents' donation and subsequent growth in asset value, as Princeton's spending was incongruent with the restrictions of the original gift (Goodwin, 2009).

For LICH, the possibility of donor/executor involvement subsequent to the gift occurred when, in 2011, the Supreme Court of New York asked Othmer's executors to provide an opinion about how LICH used the restricted funds. The Attorney General of New York had argued unsuccessfully that the executors had no standing in the case. One executor of the estate, Ted Wagner, claimed that his "duty as executor was already discharged" and he had "no interest in current proceedings" (Correspondence, April 28, 2011). The executor believed that the executor's responsibility to the estate had ended once the Othmer funds were distributed, and he disavowed any additional responsibility to monitor the bequest.

While the Othmer's bequests were not established with other protections, additional conditions can be written specifically into contracts to monitor that the bequest is used as intended. Donors interested in a continued monitoring of the restricted donation after their death may designate a specific legal entity to act as donor (Josephson, 2010). There would be a cost associated with this continued monitoring, one borne by the original donor.

Responsibility of Organization's Board

For nonprofits that depend upon charitable contributions as a significant source of funding its operations, governance mechanisms controlled by the organization are critical to provide the necessary assurance to donors and potential donors about their contributions. In 2015, Independent Sector, an organization that promotes governance and transparency for nonprofit organizations, updated its Principles for Good Governance and Ethical Practice and added a principle for the responsible use of donations. The principle states "contributions must be used for purposes consistent with the donor's intent, whether as described in the relevant solicitation materials or as specifically directed by the donor" (Independent Sector, 2015). Best practices also suggest that organizations have policies related to the acceptance of donations (Independent Sector). There is no transparent means to ensure the policies are reasonable and being followed unless the organization voluntarily provides this information. The challenge for not-for-profits, then, is to provide transparency about the governance systems over donations and bequests.

When acceptance policies of donations are in place, boards of nonprofits are not usually involved in the acceptance of ordinary donations or bequests. However, when the donation is other than cash or includes some restrictions as to usage, the board of the organization should consider whether the gift should be accepted and to be transparent with donors and executors when the restriction may not be met. Additionally, when the troubles of the nonprofit are not publicly known and only held by insiders, then the nonprofit may have increased responsibility to inform the potential donor about the difficulty of fulfilling the terms of the gift.

Board minutes may have provided evidence about LICH's consideration of acceptance of the Othmer bequest However, minutes are not required to be made public, and our requests made to the Board's attorney and the Charities Bureau, responsible for monitoring LICH, were denied. Without the minutes, it is unknown what conversations occurred amongst board members about acceptance of the bequest or whether LICH revealed concerns about its financial viability to Othmer's executor. However, major concern about the health of LICH was documented in publicly available information at the time of the bequest, and LICH's request to the courts to alter the terms of the bequest so soon after receipt suggests that the board may have failed in its responsibility of transparency to the executor prior to acceptance of the bequest.

State Responsibility to Protect the Endowment

In the United States, oversight on nonprofits is vested primarily in the state (Blodgett & Melconian, 2012). This has created an uneven system of controls over nonprofits with sporadic monitoring if any. However, a formal and ongoing role for the state occurs when an organization asks state courts, in a cy pres filing, for a formal change in endowment restrictions.

Cy pres, or "as near as possible", allows a nonprofit to petition the state court to permit a change in the terms of a restricted gift or bequest when it is no longer possible for the organization to spend the money in accordance with the donor's original intent. Usually cy pres is used only in rare situations and often years after receipt of the original donations. Cy pres is state specific, thus rules in one state may differ from those in another. In New York, where Long Island College Hospital was located, the rules are codified in Estate Powers and Trust Laws, EPTL section 8-1.1 (New York Code). Three specific conditions must apply for approval of a cy pres request: the gift is charitable, the will specifies language suggesting that usage of funds is for general rather than specific expenses, and the original restriction is nearly impossible to follow.

The parties who may participate in the decision for cy pres are limited. Since the donated funds are now part of the nonprofit, the only parties affected are the nonprofit and the Attorney General (AG) of the state who is the "protector of public interest in charitable gifts" (New York Attorney General, 2009, p. 3). The donor, even if alive, would not necessarily be a party to the cy pres application, although some states have relaxed the provision that disallowed donors from enforcing the restricted funds provision (Smith, 2007). The Uniform Prudent Management of Institutional Funds Act (2006), adopted by 49 states, reiterates that charitable organizations do not need to contact the donors in cy pres hearings, although they may choose to do so.

LICH initiated three separate cy pres filings. In April 2000 LICH filed a cy pres request in Kings County Surrogate's Court, New York to allow $89.1 million of the Othmer's permanent endowment to be used as collateral for additional debt that would fund capital projects of $63.4 million and working capital needs of $25.7 million. Included in this was approval for spending up to $10 million for a medical building (Surrogate's Court Kings County, New York, 2000). A second cy pres, filed in 2006, asked to borrow $25 million from the Othmer Endowment Fund (Surrogate's Court Kings County, New York, 2006). The third cy pres filing in 2011 permitted use of $85.7 million of the Othmer bequest to establish a Malpractice Trust to pay for malpractice claims during the time LICH did not carry malpractice insurance (Supreme Court Kings County, 2011).

Monitoring by the state in cy pres cases can be haphazard and results can vary dependent upon the individuals involved in the process. William Josephson, head of the Attorney General's Charities Bureau during the 2000 cy pres proceedings, would only permit LICH to use the Othmer assets as loan collateral. If conditions deteriorated requiring LICH to declare bankruptcy, the value of LICH's property would be sufficient to repay LICH's liabilities, leaving the Othmer Endowment for charitable purposes consistent with their wishes (Josephson, 2013). Josephson stated he never would approve an actual invasion of the permanent endowment (personal interview, 2016).

By 2006, different individuals and courts were monitoring the endowment than in 2000, and they enacted a fundamental change in the structuring, permitting LICH to invade the permanent endowment. Although the 2006 and 2011 cy pres decisions required repayment to the Othmer Endowment for any funds used, a ruling in 2015 by the New York Supreme Court eliminated this requirement (Supreme Court Kings County, 2015). With the closure of the hospital and subsequent sale of the hospital grounds to a real estate developer in July 2015, whatever funds remain in the Malpractice Trust after payment of all claims are to be given to Downstate Health Science Center at Brooklyn Foundation, which will need to file another cy pres to determine how to spend the remaining funds.

From 1999 to the closure of LICH in 2015, the state's Attorney General's Charities Bureau was in frequent contact with LICH, ostensibly monitoring the Othmer funds. Through the Freedom of Information Act (FOIL), we reviewed hundreds of pages of correspondence between LICH and the state's Attorney General's Charities Bureau for the time period May 7, 2004 to August 19, 2013. (The Attorney General office claimed no documentation was available prior.) Often the Charities Bureau requested specific financial information, such as an accounts payable aging schedule or financial projections. The large amount of documentation collected by the Attorney General's office suggests an effort made at monitoring LICH's usage of the Othmer funds. Yet, there was a failure by the state at protecting the Othmer endowment. This failure is apparent when the Charities Bureau and the court approved spending the permanent endowment. An argument also can be made that approval of the first cy pres request was a failure in adequate monitoring.

LICH justified the initial cy pres request by highlighting its deteriorating financial condition since 1995, an explanation that resonated with the court. In its opinion, the court stated that the Othmers "could neither have foreseen the extensive changes that would occur in the health care industry in such a short time nor have known how detrimental such changes would be to LICH financially" (Surrogate Court Kings County New York, 2000). Yet, LICH began preparing for a cy pres request in the same year as receipt of the Othmer gift, suggesting a lack of good faith at the time of the gift to maintain the restriction. The Charities Bureau and courts failed to investigate this timing.

External Interested Parties

While external parties may attempt to monitor spending by nonprofits, external parties have little legal standing. However, if the external parties have either media attention or a dogged pursuit, then they may help force transparency. This, however, is an ineffective means for monitoring as it relies upon interested outsiders that may not exist for most organizations.

For LICH, both media attention and an active independent monitor continue to bring attention to the Othmer's bequest although with little success to date at protecting the funds. When a decision was made to close LICH, community groups and employees of LICH sought legal recognition as acting on behalf of the community. The community groups had support from many in the community who in the past had been served by the hospital in what they characterized as life-saving work. While the court did not recognize the employees as a stakeholder, importantly the court did recognize a community stakeholder, acknowledging the need for a community voice not being registered by the board. "The Community Groups have established that its members possess a real and substantial interest in the outcome of this action and their motion to intervene is granted." (Supreme Court of New York Kings County, 2013).

The fight for the LICH endowment continues; in 2016 a case was won by a community activist related to a FOIL request (Supreme Court of New York Albany County, 2016). Even with a very public fight in local papers and in the courtrooms, the bequest has not been protected. Endowment funds have been used for malpractice claims without a means to replenish the endowment, and the developer is continuing to plan the property development. To date, no accounting of the remaining Othmer funds is publicly available.

External Monitoring System – Audited Financial Statements

Nonprofits may be required by grantors or creditors to have their financial statements audited. Audited financial statements follow the format as prescribed by generally accepted accounting standards and, as such, information disclosure is standardized. This may hinder transparency about usage of bequests, as required information specific to bequests is limited.

LICH's audited financial statements offered little information about the Othmer gift and subsequent cy pres amendments to the restriction. The 1998 financial statement included a footnote that stated "the Hospital received approximately $105 million in the form of an endowed bequest from a former board member and his spouse. The corpus is to be held in perpetuity while income generated from the corpus is unrestricted" (Annual Report, 1998). In the 1999 audited financial statements, the permanently restricted endowment increased for the amount of the gift, but the only information in the footnotes about the gift was very general in nature. "During 1999, the Hospital has been the beneficiary of certain residual interest endowments from third parties" (Annual Report, 1999). Additionally in Note 1 the Hospital discussed the concern to continue as an operating entity and stated that it planned to obtain regulatory approvals during 2000. The note did not disclose that the approvals included the cy pres request related to the bequest. In the 2000 audited financial statements, Note 1 stated that some of the permanently restricted net assets were used for the purchase of assets; "such transactions are permitted under donor's stipulations" (Annual Report, 2000). No information about the cy pres was disclosed, and the Othmer assets continued to be reported as permanently restricted. The audited Annual Reports of 2001, 2002, 2003, and 2004 did not specifically disclose information about cy pres or the Othmer Funds, although in the long-term debt footnote LICH disclosed that substantially all of LICH's assets were collateral for the debt. This would include the permanently restricted Othmer assets, although not specifically acknowledged. In the 2006's Annual Report, a note described the 2006 cy pres approval while the net assets of the permanent endowment remained unchanged. Thus, it would be difficult to gain a full understanding of the gift, the restrictions, and the subsequent usage of the funds from a close review of the audited Annual Reports.

External Monitors – Independent Auditors

External auditors perform the financial statement audits of not-for-profits. Their focus is on auditing the statements, which provide limited transparency on policies and uses of bequests and donations. Thus, external auditors serving in the capacity of auditing financial statements do not serve as an effective monitoring system about specific bequests and donations.

Yet, auditors have a responsibility to the users of the audited statements. Per the Code of Professional Conduct of American Institute of CPAs (AICPA), auditors serve the public interest, where the public is defined as "clients, credit grantors, governments, employers, investors, the business and financial community, and others" and public interest is broadly defined "as the collective well-being of the community of people and institutions that the profession serves" (AICPA, Code of Professional Conduct section 0.300.030). For a nonprofit hospital, the public includes donors, patients, and the community that rely upon the services of the nonprofit. The Code acknowledges that not all situations can be specifically articulated in its code; rather, CPAs are to make determinations of "what is right and just" (AICPA 2015, 0.300.040 Integrity).

It may be difficult to state that justice was done to the Othmers or the community relying on LICH. While a defense of auditors may be that their responsibility did not include verifying the ability of the organization to meet the restriction of the bequest, this example may indicate why auditor responsibility should be expanded.

CONCLUSION

While multiple opportunities exist for the monitoring of restricted bequests, internal governance is not observable and external mechanisms may be flawed resulting in governance mechanisms over donations and bequests that are ineffective. The executors of the Othmer estate allowed the bequest to a financially weak hospital and failed to assert the Othmers' rights when given an opportunity years later by the courts. LICH's management and Board of Directors failed to inform the Othmers prior to acceptance of the bequest that the restriction would be difficult to maintain and later failed to protect the restriction. The financial statements described the general financial condition of LICH but lacked specificity about donations and cy pres proceedings. The state, through court cy pres rulings and the Charities Bureau, provided some external governance mechanism but failed to protect the gift. Additionally, changes in personnel over time affected the level and focus of monitoring. Oversight, such as that initiated by employee groups or community organizations, occurred due to the diligent efforts of a few community organizers and interested employees. Such ad hoc mechanisms cannot be relied upon for regular monitoring. Had the executors of the Othmer estate, LICH's management, the board of LICH, the external auditor or the Attorney General's office been more attuned to the viability of the hospital, the bequest would have been protected either through initial denial of the gift to LICH or through subsequent protection of its restriction. Instead the bequest was wasted on an organization that now has ceased to exist.

An opportunity exists for not-for-profit organizations to differentiate themselves on stewardship of donations and bequests. A formal governance mechanism for bequests and donations could improve accountability and encourage transparency of the organization, in particular in relation to significant donations. For instance, nonprofits can provide additional voluntary information about donations that address their fiduciary responsibilities, and auditors can provide assurance about this information, much like they do in social responsibility audits. Auditors can provide an opinion on management's assessment of the internal controls over the contribution process, similar in scope and design to that required for for-profit firms. An expanded role for the auditor also can include additional review of the acceptance and management of donations and determine if the nonprofit is able to meet the restrictions attached to the assets. Additionally, auditors can provide an operational audit that provides a critical analysis of the mission and assessment on the execution of that mission.

These additional options would come with a financial cost, something that some nonprofits may be reluctant to incur. Yet, just as some firms voluntarily provided audits before they were required as a way to lower their cost of capital, charitable organizations can use these options to increase their level of donations by removing any donor uncertainty, proving fiscal responsibility and providing transparency about its operations.

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