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The Federal Estate Tax and Charitable Dispositions: Professional Associations and Gifts in Trust

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NOTE

The Federal Estate Tax and Charitable Dispositions: Professional Associations and Gifts in Trust

I. Introduction

In making a testamentary gift to a professional association, a taxpayer who intends his gift for a charitable, scientific, or educational purpose encounters section 2055 of the Internal Revenue Code of 1954.[1] To qualify for an estate tax deduction under this section, a charitable transfer must be one of two quite distinct types. If it is to a charitable[2] corporation, then the corporation[3] must be organized and operated exclusively for charitable purposes, with no substantial part of its activity directed towards influencing legislation. If it is a transfer to a trustee or trustees, it must be used by the trustees exclusively for charitable purposes, and no substantial part of the trustee's activities may be prohibited political activity. The distinction between these two types of dispositions is not necessarily a clear one. In Restatement (Second), Trusts § 348, comment *f* (1959), it is said:

> *Charitable corporations.* Property may be devoted to charitable purposes not only by transferring it to individual trustees to hold it for such purposes, but also by transferring it to a charitable corporation. It may be provided that the corporation shall take the property for any of the purposes for which the corporation is organized. It may be provided that the corporation shall take the property for only one of its purposes . . . .
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> Where property is given to a charitable corporation, particularly where restrictions are imposed by the donor, it is sometimes said by the courts that a charitable trust is created and that the corporation is a trustee. It is sometimes said, however, that a charitable trust is not created. This

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1 Int. Rev. Code of 1954, § 2055: Transfers for public, charitable, and religious uses. (a) . . . For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers . . . .

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

(3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation . . . .

See generally, Bogert, Trusts and Trustees § 275.5 (2d ed. 1964); 4 Mertens, Federal Gift and Estate Taxation ch. 28 (1959, Supp. 1965).

2 The word "charitable" will be used throughout to represent religious, charitable, scientific, literary, and educational purposes.

3 Treas. Reg. § 20.2055-1(a)(2) (1958) added after the word "corporation," the words "or association." *But see* John C. Polster, 31 T.C. 874 (1959), *rev'd on other grounds;* 274 F.2d 358 (4th Cir. 1960), where the Tax Court held that a transfer to an unincorporated religious association was not valid. See generally, Bogert, *op. cit. supra* note 1, § 328, at n.94.

> is a mere matter of terminology. The important question is whether and to what extent the principles and rules applicable to charitable trusts are applicable to charitable corporations.[4]

The tax consequences, however, make this distinction more than a mere matter of terminology. If a transfer to a corporation is to qualify for a deduction under section 2055, the corporation must fulfill the statutory requirements. But, if the gift is one to a trustee, only the purposes for which the gift is to be used, as stated by the donor-testator, need meet the requirements of section 2055.[5]

Professional associations are in a twilight area in the law of charitable gifts.[6] Several recent cases have dealt with the strict requirements of section 2055, and two have allowed the deduction. In *Dulles v. Johnson,*[7] outright gifts to the New York State Bar Association, the New York County Bar Association, and the Association of the Bar of the City of New York were held to qualify as gifts to charitable corporations that fulfilled the tests of the Code. Similarly, in *Rhode Island Hosp. Trust Co. v. United States,*[8] a bequest to uphold the standards of the bar qualified as a trust for exclusively charitable purposes. In contrast, in *Saint Louis Union Trust Co. v. United States,*[9] a bequest to the Bar Association of St. Louis was found by a jury to be a transfer to an organization not organized and operated exclusively for charitable purposes.

Medical associations have also been objects of testators' bounty. In *Hammerstein v. Kelly*[10] and *Krohn v. United States,*[11] the St. Louis Medical Society and the Denver Medical Society, respectively, failed to meet the exempt organization test.

This note analyzes the federal estate tax on gifts to these and like professional associations. It focuses on the qualifications imposed on transfers to charitable corporations and transfers to trustees. The possibility of qualifying a transfer for an exemption which would otherwise fail as an outright gift to a corporation is also examined. The transfer may be found to qualify either because it is expressly a gift in trust or could be construed as a gift in trust.

II. The Law

For purposes of this analysis, it is profitable to reflect on the basic idea of the charitable deduction contained in section 2055. The rationale for the law is that

> the Government is compensated for the loss of revenue by its relief from

4 The comment goes on to list the applicable rules: The corporation must apply property to the purposes for which it is organized. Where a purpose is specified, this must be observed. The doctrine of cy pres is applicable.

Rules applicable to charitable trusts not applicable to charitable corporations include: the duty of the trustee to account to the probate court; the remedy of one to whom the charitable trust has incurred a liability; and the visitorial power of the founder of a charitable corporation. See generally, comment, 26 So. CAL. L. REV. 80 (1952).

5 Bettie B. Brown, 21 B.T.A. 1201 (1931), *rev'd on other grounds,* 59 F.2d 922 (8th Cir. 1932).

6 See generally, 4 SCOTT, TRUSTS § 375.2 (2d ed. 1956).

7 273 F.2d 362 (2d Cir. 1959), *cert. denied,* 364 U.S. 834 (1960).

8 159 F. Supp. 204 (D.R.I. 1958).

9 16 Am. Fed. Tax R.2d 6173 (E.D. Mo. 1965).

10 235 F. Supp. 60 (E.D. Mo. 1964), *aff'd,* 349 F.2d 928 (8th Cir. 1965).

11 246 F. Supp. 341 (D. Colo. 1965).

> financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.[12]

Thus, the law is basically a self-interest measure for the protection of the government. A private body will do what the government may otherwise have to do. But this is less than a complete explanation, for there are many tasks the government cannot undertake, such as promoting religion, or should not undertake, such as propagandizing the public. Nevertheless, these are necessary and legitimate purposes; in certain situations, the organizations engaged in such activities are the recipients of favorable tax treatment. The question narrows itself to the drawing of boundaries to determine the extent the taxpayer and the organization to which he contributes are to be subsidized by the remainder of society. This is the recurrent and, at times, unspoken premise which may explain some of the decisional law in this area.

A. The Organization Test

The statutory exemption from paying federal income taxes granted an exempt organization,[13] the allowance of an individual deduction for income tax purposes when a contribution is made to an exempt organization,[14] and the federal gift[15] and estate tax deductions[16] all speak in the rhetoric of "organized and operated exclusively for charitable purposes." The regulations interpreting the income tax exemption for an exempt organization are the most detailed. They make clear that the test is a dual one: The organization must be organized for, and operated for, an exclusively charitable purpose. The articles of the organization must:

> (a) Limit the purposes of such organization to one or more exempt purposes; and
>
> (b) . . . [N]ot expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.[17]

This dual requirement has caused organizations to write their charters in statutory language, but the requirement that the charter allow only exempt purposes is often overlooked.[18] Where a charter provided organization for "education in the field of government,"[19] it was found to be too general. In this case, a corporation was organized to hold seminars and workshops on college campuses and to stimulate participation by the American business community in governmental and political affairs. This purpose was held not to be exclusively educational within the meaning of section 501(c)(3), which provides educational organizations with an exemption from the payment of the income tax. How-

12 H.R. REP. No. 1860, 75th Cong., 3d Sess. 18 (1938).
13 INT. REV. CODE OF 1954, § 501.
14 INT. REV. CODE OF 1954, § 170.
15 INT. REV. CODE OF 1954, § 2522.
16 INT. REV. CODE OF 1954, § 2055.
17 Treas. Reg. §§ 1.501(c)(3)-1(b)(1)(i)(a), 1.501(c)(3)-1(b)(1)(i)(b) (1959).
18 See Note, 57 COLUM. L. REV. 273, 275 (1957).
19 Rev. Rul. 60-193, 1960-1 CUM. BULL. 195, 197.

ever, such an organization could qualify for an exemption from the payment of the income tax because it meets the statutory test of an organization operated exclusively for the promotion of social welfare under section 501(c)(4). This illustration calls attention to the illogical character of the tax structure. While transfers have failed repeatedly to qualify for the federal estate tax deduction, the recipient of the attempted transfer has very little difficulty finding an exemption from the payment of income taxes.[20]

The government looks not only to the organization's charter, but also to its bylaws.[21] Older cases seem to have emphasized the organization test as a basis for disqualification. In *Frank E. Castle*,[22] a bequest to a medical society was denied preferred tax treatment, despite a complete absence of a showing of actual operation outside the scope of the statute. A provision in the society's charter enumerated as one of the purposes of the organization "the promotion of good understanding and harmonious intercourse and the mutual improvement of the members." A similar case was *Robbins B. Stoeckel*,[23] where an amended charter listed the purposes of the organization in statutory form. The fact that an earlier charter had allowed the promotion of "good-fellowship and social intercourse" was held to indicate that the organization's social aspects were not incidental, resulting in the disallowance of an estate tax deduction to a group providing scholarship funds.

Recent cases have taken a broader view. *Dulles v. Johnson*[24] noted that the organization test must be coupled with the operation test. Consequently, an organization should not be disqualified solely on the basis of a discordant organizational purpose. The regulations, however, have not as yet adopted this liberal approach. They have qualified the organizational test only to the extent of allowing an "insubstantial" nonexempt purpose, and "the fact that the actual operations of such an organization have been exclusively in furtherance of one or more exempt purposes shall not be sufficient to permit the organization to meet the organizational test . . . ."[25]

B. The Operation Test

The second test of section 2055 is that the organization be operated for exclusively charitable purposes. As might be anticipated, a requirement with such absolute implications has caused difficulties. It has been expanded beyond its literal sense in two areas. The first is the age-old interpretation of the word "charitable."[26] The second relates to a limitation of "exclusively charitable," so

20 *Ibid.*
21 *Ibid.*
22 19 B.T.A. 174 (1930). A case of like severity was Greiss v. United States, 146 F. Supp. 505 (N.D. Ill. 1956), where a sportsmen's club was held to be neither organized nor operated for exclusively scientific, educational, or charitable purposes. Good-fellowship was one of the purposes enumerated by the bylaws; fly-tying, rod building, and the showing of African safari movies were the illustrative nonexempt operations. These were held not to be conservation purposes.
23 2 T.C. 975 (1943).
24 155 F. Supp. 275, 279 (S.D.N.Y. 1957). See Samuel Friedland Foundation v. United States, 144 F. Supp. 74 (D.N.J. 1956). "To some degree, 'organized' cannot be divorced from 'operated,' for the true purposes of an organization may well have to be drawn in final analysis from the manner in which the corporation has been operated." *Id.* at 85.
25 Treas. Reg. § 1.501(c)(3)(1)(b)(iv) (1959).
26 See text accompanying notes 79-80 *infra.*

that the decisional law now causes it to be read "substantially charitable."[27] Congress has been in full agreement with this interpretation. In 1934 it added another qualification that read "no *substantial* part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."[28] (Emphasis added.) In *Seasongood v. Commissioner*,[29] the Sixth Circuit applied the substantial activities test. It held that five percent of the activities of a good government league devoted to propaganda was not substantial; thus a contribution to the organization was deductible for income tax purposes. Also, where an estate tax exemption was claimed for a gift to an art club, the court found that the club's social activities did not conflict with the assertion that it was operated exclusively for charitable purposes.

> The answer to this question depends upon whether the activities of said Club are primarily and predominantly in furtherance of said purposes. The existence of other activities, social in nature, if merely auxiliary to these purposes does not constitute a ground for denying the exemption. The term "exclusively" as used in section 2055(a) (2) is to be given a different connotation from that ordinarily accorded to it.[30]

Another interpretation has been that the questionable activity permitted an exempt organization must be no more than "incidental, contributing, or subservient to a primary purpose."[31] Lest it be thought this is a wide open avenue where the substantial and insubstantial are blurred, a recent dissenting opinion examines an argument the court would not accept.

> We are unable to escape the conclusion that the League of Women Voters is a completely unselfish organization operating almost exclusively in the public interest. It is clearly not the type of organization which the Congress meant to exclude from the benefits of the tax-exemption sections. The activities of the League are in no sense partisan. It is almost wholly educational in nature.[32]

C. The Political Activity Test

The third test which the activities of both a charitable corporation and a trustee must meet under section 2055 is that "no substantial part of the [activity] . . . is carrying on propaganda, or otherwise attempting, to influence legislation." Before examining the construction of this part of the statute, a prohibition, developed in the older cases, should be considered. Where a trust has been created

27 Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955); Industrial Nat'l Bank v. United States, 187 F. Supp. 810 (D.R.I. 1960); Robert Marshall, 2 T.C. 1048 (1943), *aff'd*, 147 F.2d 75 (2d Cir.), *cert. denied*, 325 U.S. 872 (1945).

28 48 Stat. 690 (1934), § 170.

29 227 F.2d 907 (6th Cir. 1955).

30 Industrial Nat'l Bank v. United States, 187 F. Supp. 810, 815 (D.R.I. 1960).

31 Robert Marshall, 2 T.C. 1048 (1943), *aff'd*, 147 F.2d 75 (2d Cir.), *cert. denied*, 325 U.S. 872 (1945). See 1950-1 CUM. BULL. 3, *acquiescing in* Huntington Nat'l Bank, 13 T.C. 760 (1949). Here a women's club activity supporting child welfare and education was found not to be substantial. 1956-2 CUM. BULL. 8 *acquiescing in* Philip R. Thayer, 24 T.C. 384 (1955), wherein alumni association social activity was found not to be substantial. *Accord*, Rev. Rul. 60-143, 1960-1 CUM. BULL. 192.

32 League of Women Voters v. United States, 180 F. Supp. 379, 386 (Ct. Cl.), *cert. denied*, 364 U.S. 822 (1960). See 39 TEXAS L. REV. 525 (1961).

to change the law, it has often encountered hostility. In *Jackson v. Phillips*[33] a trust to further the cause of women's rights was struck down. Said Mr. Justice Gray:

> This bequest differs . . . in aiming directly and exclusively to change the laws. . . . Whether such an alteration of the existing laws and frame of government would be wise and desirable is a question upon which we cannot, sitting in a judicial capacity, properly express any opinion. Our duty is limited to expounding the laws as they stand. And those laws do not recognize the purpose of overthrowing or changing them, in whole or in part, as a charitable use. . . .[34]

Professor Scott believes this notion — that a trust to change the law is non-charitable — is thoroughly rejected by the courts.[35] Supporting such a view is *International Reform Fed'n v. District Unemployment Compensation Bd.*[36] This case involved a successful claim for an exemption from payment under the Social Security Law — which also denies an exemption to those who carry on propaganda[37] — by an organization which attempted to legislate its conceptions of morality in such areas as prohibition, white slavery, and drugs. The court, after reviewing the cases that had refused educational or charitable status to organizations seeking changes in the law, and the older line of reasoning that a court is unable to decide if a change in the law will, or will not, be in the public interest, held: "[T]his reasoning is not convincing, and we prefer the more modern view that so long as the purpose can be thought by some to be in the public interest, the court is not concerned with its wisdom."[38]

One of the original cases construing the political activity section is *Slee v. Commissioner*.[39] It was held there that a gift to the American Birth Control League was not deductible for purposes of computing a taxpayer's income tax. The court's reasoning has been repeatedly cited.

> [T]he Treasury stands aside from [political agitation]. . . . Nevertheless there are many charitable, literary and scientific ventures that as an incident to their success require changes in the law. A charity may need a special charter allowing it to receive larger gifts than the general laws allow. It would be strained to say that for this reason it became less exclusively charitable, though much might have to be done to convince legislators. . . . A state university is constantly trying to get appropriations from the Legislature; for all that, it seems to us still an exclusively educational institution. . . . All such activities are mediate to the primary purpose, and

33 96 Mass. (14 Allen) 539 (1867).
34 *Id.* at 571. *Accord,* Bowditch v. Attorney Gen., 241 Mass. 168, 134 N.E. 796 (1922).
35 4 Scott, *op. cit. supra* note 6, § 374.4, at 2677. See Bogert, *op. cit. supra* note 1, § 378.
36 131 F.2d 337 (D.C. Cir.), *cert. denied,* 317 U.S. 693 (1942). *Contra,* Herbert E. Fales, 9 B.T.A. 828 (1927) (same organization). See Taylor v. Hoag, 273 Pa. 194, 116 Atl. 826 (1922) (Trust to change the law allowed).
37 Int. Rev. Code of 1954, § 3121(b)(8)(B).
38 131 F.2d 337, 340 (D.C. Cir.), *cert. denied,* 317 U.S. 693 (1942).
39 42 F.2d 184 (2d Cir. 1930) (L. Hand, J.). See Martha Hubbard Davis, 22 T.C. 1091 (1954), following Judge Hand's language and holding eligible an organization which sought the advancement of such legislative goals as child welfare, mental health, and sanitation. See generally, Clark, *The Limitations on Political Activities: A Discordant Note in the Law of Charities,* 46 Va. L. Rev. 439 (1960). 18 Ohio St. L. J. 414 (1957). 73 Yale L. J. 661 (1964).

> would not, we should think, unclass the promoters. The agitation is ancillary to the end in chief, which remains the exclusive purpose of the association.[40]

The American Birth Control League, as shown by the evidence, was not this type of organization. It was not attempting to free the organization from a restraint or obtain an advantage. Rather, it was engaged in general agitation for the repeal of antibirth-control laws.

The League of Women Voters has been a frequent visitor to the courts for a construction of the political activities section of the revenue laws; results have varied.[41] Women agitating for reform have encountered the political activities prohibition in other contexts as well.[42]

Seasongood v. Commissioner[43] has become somewhat of a classic in this field. The Hamilton County Good Government League, ninety-five percent of whose activity was essentially educational, and only five percent of whose time was spent attempting to influence legislation, was held to be an organization to which an income tax deductible contribution could be made. The court said it liberally construed a remedial statute[44] and found the organization's political activities insubstantial when related to its remaining undertakings.[45] The heart of the decision was the court's characterization of the attempts at propaganda to influence legislation. "There is nothing in the findings of fact . . . that the activities of the League were exerted for a selfish, unethical purpose, or is anywise lacking in good faith."[46] The court read the section prohibiting "or otherwise attempting" to influence legislation as equivalent to a prohibition against lobbying.

A judicial organization ran afoul of the political activities section in *Luther Ely Smith.*[47] An association advocating the amendment of the state constitution

40 Slee v. Commissioner, *supra note* 39, at 185.

41 The following cases found the League of Women Voters qualified under the political activities test: Liberty Nat'l Bank & Trust Co. v. United States, 122 F. Supp. 759 (W.D. Ky. 1954); Luther Ely Smith, 3 T.C. 696 (1944); Charles W. Dahlinger, 20 B.T.A. 176 (1930), *aff'd,* 51 F.2d 662 (3rd Cir.), *cert. denied,* 284 U.S. 673 (1931). However, other cases have held it was not qualified: Kuper v. Commissioner, 332 F.2d 562 (3rd Cir.), *cert. denied,* 379. U.S. 920 (1964); League of Women Voters v. United States, 180 F. Supp. 379 (Ct. Cl.), *cert. denied,* 364 U.S. 822 (1960); Henriette T. Noyes, 31 B.T.A. 121 (1934).

In order to assure a prospective donor that his contribution will not be disallowed, a separate educational fund has been established by the League. See Cumulative List, U.S. Treasury Department, Organizations Described in Section 170(c) of The Internal Revenue Code of 1954 (1964). Compare the attempt to establish a unit for political agitation in Krohn v. United States, 246 F. Supp. 341, 345 (D. Colo. 1965), where the state medical society established COMPAC in order to oppose Medicare. This would be one way to requalify a charitable organization that had noncharitable interests. See 18 U.S.C. § 610 (1964), where unions are forbidden to engage in certain political activities. An independent organization, the Committee on Political Education (COPE), has been established for political agitation by the AFL-CIO.

42 In Huntington Nat'l Bank, 13 T.C. 760 (1949), *acquiesced in* 1950-1 Cum. Bull. 1, 3, a woman's club that promoted legislation for the education and welfare of children was found only insubstantially engaged in questionable activity. However, where the National Woman's Party attempted to promote women's rights, it was found not to qualify. Vanderbilt v. Commissioner, 93 F.2d 360 (1st Cir. 1937).

43 227 F.2d 907 (6th Cir. 1955).

44 Int. Rev. Code of 1954, § 170.

45 Seasongood v. Commissioner, 227 F.2d 907, 910 (6th Cir. 1955).

46 *Ibid.*

47 3 T.C. 696 (1944). *But see* Rev. Rul. 64-195, 1964-2 Cum. Bull. 138 (Nonpartisan court reform no effect on tax exempt status). *Cf.* Alfred A. Cook, 30 B.T.A. 292 (1934), where a contribution to a committee to study the reform of bankruptcy laws was not allowed as an income tax deduction.

for the adoption of what was to become the Missouri Non-Partisan Court Plan was held not to be an educational organization within the meaning of section 2055, since its purpose was to change the law by amending the state constitution. The American Institute of Architects was also denied an exemption because of a claim that it engaged in propaganda.[48]

Remarks of an assistant commissioner before a House Committee[49] were followed by definitions of nonexempt organizations in the regulations. In essence, the regulations defined a nonexempt association as an "action" organization and went on to list various activities. If the organization engaged in these activities, it would be denied favorable tax status.[50]

Once the courts adopt the substantial, incidental, or subservient test, no objective rule is possible; each organization must stand or fall on the facts of the case. Consequently, cases involving professional associations must be carefully scrutinized to discover the decisive facts.

III. The Bar Associations

Although the term bar association is frequently used generically, all attorneys are aware that the name may designate anything from a powerful, integrated state bar,[51] to the local association of attorneys at the county seat.

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48 Montgomery v. United States, 63 Ct. Cl. 588 (1927).

49 "Congress saw fit only to circumscribe the exemption with a restriction against substantial activities to influence legislation." *Hearings Before the Special House Committee To Investigate Tax-Exempt Foundations and Comparable Organizations,* 83rd Cong., 2d Sess. 433 (1954).

50 Treas. Reg. § 1.501(c)(3)-1(c)(3) (1959) provides an organization is not exempt when it:

> (a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or
>
> (b) Advocates the adoption or rejection of legislation. [This includes national, state, and municipal legislation and such activity must be substantial.]
>
> (iii) An organization is an "action" organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. . . . Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.
>
> (iv) An organization is an "action" organization if it has the following two characteristics: (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered.

51 See Rev. Rul. 59-152, 1959-1 Cum. Bull. 54. A state bar association was created by statute as a public corporation and had authority to exercise governmental functions in regulating the practice of law. It was ruled that contributions to such an organization were deductible under the provisions of § 2055 since the organization had a governmental purpose. *But cf.* Lathrope v. Donohue, 367 U.S. 820 (1961). The Wisconsin Supreme Court required all attorneys to pay dues to the integrated state bar. An attorney objected and refused to pay his dues claiming the association expressed an opinion on legislative matters contrary to his own. In an opinion of four of the Justices in the majority, it was said:

> We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though

Dulles v. Johnson[52] involved three different bar associations: The New York State Bar Association, the New York County Bar Association, and the Association of the Bar of the City of New York. Applying the organization test, the district court examined the certificate of incorporation of the New York County Bar Association, which was similar to that of the others. It provided for

> the promotion of reforms in the law; the facilitation of the administration of justice; the elevation of the standards of integrity, honor and courtesy in the legal profession; the cherishing of the spirit of brotherhood among members of said Association.[53]

In denying an estate tax deduction for a gift to the Association, the court found:

> On their faces therefore, the sets of articles of incorporation indicate that none of the three organizations was organized exclusively for charitable, scientific, literary, or educational purposes. Further, it is clear that one of the purposes of each of them was the "promotion of reforms in the law". This would suggest that one of the purposes of organization was "attempting to influence legislation."[54]

The court was not blinded by the organizational requirement and recognized that "the purposes of the organizations should also be examined in the light of their actual operations, and not limited to the intent expressed in the articles of incorporation."[55]

On review, several of the activities of these associations were further enumerated by the Second Circuit. The County and City Bar maintained large libraries and published magazines. As to their social activities, the court deemed them "incidental [and] . . . auxiliary to the charitable and educational purposes."[56] The Second Circuit looked to the four activities it felt were the major

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the organization created to attain the objective also engages in some legislative activity. *Id.* at 843.

The legislative activity included the appointment of an executive director who registered as a lobbyist in accordance with state law and the taking of a formal position on a number of legislative questions. These included making attorneys notaries public and using deceased partners' names in the name of a law firm. *Id.* at 835, 837. While the case does not hold, as would the Wisconsin Supreme Court and two of the concurring Justices, that a person may be constitutionally compelled to contribute support to political activities he opposes, *id.* at 847-48, it allowed an integrated state bar to engage in a wide range of political activities. While § 2055(1), allowing a deduction from the gross estate for a transfer to a governmental unit for exclusively public purposes, does not include the limitation on political activities of a propaganda nature, the extent to which an integrated state bar may influence legislation and still receive a tax-free gift arguably should not differ from the limits on other bar associations.

52 155 F. Supp. 275 (S.D.N.Y. 1957), *rev'd,* 273 F.2d 362 (2d Cir. 1959), *cert. denied,* 364 U.S. 834 (1960). *Cf.* Stearns v. Association of the Bar of the City of New York, 154 Misc. 71, 276 N.Y.S. 390 (1934) (Charitable immunity found for association in negligence action); Thomas v. Harrison, 24 Ohio Op. 2d 148, 191 N.E.2d 862 (1962) (a gift to a bar association would be a charitable gift).

53 Dulles v. Johnson, *supra* note 52, at 277-78.

54 *Id.* at 278.

55 *Id.* at 279. In Better Business Bureau v. United States, 326 U.S. 279, 283 (1945), the Court interpreted the "organized and operated" section and warned that the words should not be given unusual or tortuous interpretations. It denied the BBB an exemption from Social Security taxes, finding it essentially an organization for the advancement of businessmen.

56 Dulles v. Johnson, 273 F.2d 362, 368 (2d Cir. 1959), *cert. denied,* 364 U.S. 834 (1960).

reasons the district court denied the deduction. Its analysis finding them charitable activities is worthy of careful study.

1. Regulating the Unauthorized Practice of Law. The argument that this activity is not charitable is based on its elimination of competitive activity. However, the bar associations were empowered expressly by statute to engage in this activity, and were the bar not to regulate itself, the public would have to bear this heavy responsibility. Since the public is being relieved of a duty by these associations, this activity is charitable.[57]

2. Disciplining the Profession. Does the "increased public esteem for lawyers"[58] benefit the bar or the public? The court resolved this question by observing that the public must act on faith in dealing with lawyers. It held: "The true benefit from a disciplined and socially responsive bar accrues directly to the public."[59]

3. Improving Court Procedures and Endorsing Judicial Candidates. The nonpartisan, technical nature of this activity and the special ability of lawyers to answer questions of this kind were found by the court to be activities related to public service, and thus not of a selfish political nature.

4. Influencing Legislation. The court viewed the term "legislation" as capable of division. There is substantive legislation and merely technical legislation.

> The Associations' work has been expressed in expert reports on matters uniquely within the fields of experts and has avoided questions which are outside those fields, i.e., questions which turn largely on economic or political decisions.
>
> These activities serve no selfish purpose of the legal profession — rather they constitute an expert's effort to improve the law in technical and noncontroversial areas. They are not intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy.[60]

While it is certainly true that a request from a lawyer for a change in the law may be of a technical nature, it is also true that changes in the law are his business, and a layman could see a business benefit to a lawyer in a restructuring of the court system. The members of a medical association could contend they should have a similar opportunity, while still enjoying the benefits of favorable tax treatment, to influence the regulation of their profession by a government health insurance law or a professional incorporation law.

In *Rhode Island Hosp. Trust Co. v. United States*,[61] the court found a bar association bequest entitled to favorable estate tax treatment. This result

57 *Id.* at 366. *Cf.* Duffy v. Birmingham, 190 F.2d 738 (8th Cir. 1951), wherein a trust to provide pensions for employees of a given corporation did not qualify for the exemption from income tax, since it did not relieve the community of a burden it would otherwise owe these employees. Many problems arise when a charitable bequest is made in trust for a limited class of beneficiaries. See generally, BOGERT, TRUSTS AND TRUSTEES § 362 (2d ed. 1964).

58 Dulles v. Johnson, *supra* note 56, at 366.

59. *Ibid.*

60 *Id.* at 367. *But cf.* Alfred A. Cook, 30 B.T.A. 292 (1934), where a grant to a committee of the same association for the study of the bankruptcy laws was held not deductible for income tax purposes.

61 159 F. Supp. 204 (D.R.I. 1958).

differs from that in *Dulles* because the court found a gift in trust for a specific purpose. This case thus avoided the otherwise necessary finding that the bar association must meet the organized and operated exclusively test, as well as the requirement of no substantial legislative activity. The testator's words were held to create an express trust for limited purposes, and not an absolute gift.[62] He provided:

> to the Rhode Island Bar Association to be used and employed by it for the advancement and upholding of those standards of the profession which are assumed by the members upon their admission to the Bar, and for the prosecution and punishment of those members who violate their obligations to the court and to the public.[63]

The association was unincorporated. Its purposes as outlined in its constitution were "to maintain the honor and dignity of the profession of the law, to increase its usefulness in promoting the due administration of justice, and to cultivate social intercourse among its members."[64] One of its committees was concerned with statutory amendments and had publicly expressed the opinion of the association on proposed legislation and judicial appointments. This activity was held not to be substantial within the terms of section 2055. The court relied on state law[65] to determine the federal tax question and held Rhode Island law required no particular words to create a trust, the testator's intent being determinative. The court said there was a clear intent to create an express trust for the benefit of mankind and public convenience.[66]

The court's approach in this case is not in harmony with the law. Under section 2055(a)(3), once the court found a trust for an express purpose, it should have looked to this express purpose and not to the provisions of the bar association constitution. Further, the legislative activity of the bar association should not have been considered. The statute is drawn in reference to the trustee's activity. It specifically reads: "And no substantial part of the activities of such trustee or trustees . . . is carrying on propaganda. . . ."[67] The statute is ambiguous in its failure to specify either activity in general, or activity as trustee. Thus, a gift in trust, for library purposes, to the central committee of a political party might encounter difficulty. This problem, however, could be met by observing that a trustee is held to the terms of the trust instrument, and engaging in political activity, in his capacity as trustee, could be restrained by the court. The "trustee's activity" should be defined by the trust instrument since it governs the scope of his operations.

Saint Louis Union Trust Co. v. United States[68] presented the court with a

62 *Id.* at 207.
63 *Id.* at 205.
64 *Ibid.*
65 Morgan v. Commissioner, 309 U.S. 78 (1940). "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Id.* at 80. See Hassett v. Associated Hosp. Serv. Corp., 125 F.2d 611 (1st Cir.), *cert. denied,* 316, U.S. 672 (1942). *Cf.* Thompson v. Wiseman, 233 F.2d 734 (10th Cir. 1956). *But cf.* Hight v. United States, 256 F.2d 795 (2d Cir. 1958), where it was said that the ultimate decision as to a federal tax exemption rests in a federal court.
66 Rhode Island Hosp. Trust Co. v. United States, 159 F. Supp. 204, 207 (D.R.I. 1958).
67 INT. REV. CODE OF 1954, § 2055(a)(2).
68 16 Am. Fed. Tax R.2d 6173 (E.D. Mo. 1965).

different kind of bar association and a different kind of gift. Judge Landwehr devised his residuary estate to a trustee

> to provide a suitable building and facilities to serve as a headquarters, office and meeting place of the Bar Association of St. Louis, and under its control as a meeting place for all lawyers and associations of lawyers in the St. Louis area.[69]

The constitution of the Association provided many of the same organizational purposes as did that of the New York County Bar Association. The bequest was found by a jury to be a transfer to an organization not organized and operated exclusively for charitable purposes.

In its brief on appeal the government focused on the issues it thought were of a substantial, noncharitable, noneducational nature. The Association's continuing legal education program was coupled with the consideration of very practical subjects, such as the settlement of negligence cases.[70] Its social activities included an annual golf tournament and annual Christmas party. The government argued:

> Under even the most critical scrutiny every portion of the record fairly blossoms with evidence of nonconforming purposes and activities which are devoted not exclusively to the public's benefit but are clearly carried on in large measure for the professional benefit of lawyers. The recurrent concern of the Association and its members with the economics of the practice of law — the level of legal fees, encouraging the hiring of lawyers by distribution of pamphlets and recommending annual legal checkups — is the very epitome of everything that an eleemosynary institution is not.[71]

The government also emphasized that operating dining facilities is as a noncharitable activity. In applying for the A.B.A. Award of Merit in 1961, the Association described the opening of the headquarter's dining room as a "really substantial program" which resulted in a major dues hike.[72] In the trial court, the government undoubtedly was helped by the fact that the jury could clearly understand that a dining room is not a charitable or educational function. While the decision on appeal has not been handed down, at a minimum, this case stands as a warning to anyone contemplating an outright gift to a professional association. Careful inquiry should be made for a possible incidental activity which is more than insubstantial. Broadly, it warns against any gift to a professional association to be used for its general purposes.

In the *Dulles* case, the court classified the social activities of the New York County Bar Association as incidental to its charitable and educational purposes.[73] Many charitable organizations maintain dining rooms. Such undertakings have usually been held auxiliary to the organization's main purposes.[74] It would seem

69 Brief for Appellant, p. 4, Saint Louis Union Trust Co. v. United States, 16 Am. Fed. Tax R.2d 6173 (E.D. Mo. 1965).
70 Brief for Appellee, p. 5, Saint Louis Union Trust Co. v. United States, 16 Am. Fed. Tax R.2d 6173 (E.D. Mo. 1965).
71 *Id.* at 16-17.
72 *Id.* at 18.
73 See note 56 *supra* and accompanying text.
74 City Club v. United States, 46 F. Supp. 673 (E.D. Wis. 1942); Aviation Club of Utah, 7 T.C. 377, *aff'd*, 162 F.2d 984 (10th Cir. 1946), *cert. denied*, 332 U.S. 837 (1947).

the *Dulles* court looked first to the primary purpose of the organization and determined it was charitable, whereas the court in *St. Louis Union Trust Co. v. United States* was more concerned with the statutory test and the substantiality of nonexempt enterprises.

IV. The Medical Associations

Hammerstein v. Kelley[75] represents the case of an "almost" successful attempt to benefit a medical society. The settlor provided a trust to be used for library purposes for a period of twenty-five years with a gift over to the society at the end of this time. She further provided, however, that it could be terminated before that time in the sole discretion of the trustee. The possibility that the trust might be terminated was fatal.[76] The statutory tests of organization, operation, and political activity thus became applicable to the medical association rather than to the trust. The association failed to meet the tests. The court relied on a case that took an extremely rigid approach. In *Frank E. Castle*,[77] the Tax Court denied an estate tax deduction where a medical association had no social activities, being concerned only with technical matters and the maintenance of a library. Nevertheless, the organization did not meet the organized and operated exclusively test. That members were informed of new developments in medicine seemed to be a reason for denying an exemption, but the court's primary concern was the organization test. Since the purposes of the association were the establishment of the practice of medicine on a respectable footing; the mutual improvement of the members; and the promotion of good understanding and harmonious intercourse, the court concluded that the association did not meet the statutory test.

The *Hammerstein* court noted two possible approaches. It could follow the bar association cases, looking at specific questionable activities; or it could look to the nature of charitable activity. The latter approach, followed by the court, is commendable, as it gives added perspective in understanding the nature of a charitable exemption. The court relied on *Duffy v. Birmingham*[78] as authority for the proposition that one of the many meanings of "charity" is relieving the community of an obligation owed by the government to the entire populace. It searched older decisions for definitions of "charity" that eventually led it to the Elizabethan Statute of Charitable Uses and the great body of law that developed construing the word "charitable."[79] The court concluded: "The cases hold a charity is a broad term, conveying more an idea than a specific meaning; it relates to the social good, the welfare of the community, existing for the good

75 235 F. Supp. 60 (E.D. Mo. 1964), *aff'd*, 349 F.2d 928 (8th Cir. 1965). A series of articles by Richard Harris has comprehensively examined the efforts of the American Medical Association as it influenced, and attempted to influence, governmental action in the field of "Medicare." The New Yorker, Annals of Legislation—Medicare, July 2, 1966, p. 29; July 9, 1966, p. 30; July 16, 1966, p. 35; July 23, 1966, p. 35.

76 Hammerstein v. Kelly, *supra* note 75, at 66. See Commissioner v. Sternberger's Estate, 348 U.S. 187 (1955).

77 9 B.T.A. 174 (1930).

78 190 F.2d 738 (8th Cir. 1951). See note 55 *supra*.

79 43 Eliz. 1, c. 4 (1601) (repealed). See generally, RESTATEMENT (SECOND), TRUSTS §§ 368-74 (1959). BOGERT, *op. cit. supra* note 57, § 369.

of the people as a whole."[80] The court continued with what is perhaps the key to its decision.

> In this regard the facts disclose that the St. Louis Medical Society is not a true charitable organization, but rather, is an organization composed of members of a particular profession who have common interests and aims, and an organization which has one prime concern and purpose — the welfare of that profession. . . . Its service to the individual is not merely secondary or incidental, but rather is primary. . . . [The Society's] primary concern and purpose still remains to be the best interests of the medical profession and the individual members of the Society.[81]

The court contrasted some of the medical association's activities with bar association activities. The ethics committee did not have the statutory authority to discipline members, as do bar association grievance committees. The medical association's legislative interests included the age at which Social Security benefits were available, medical treatment in veterans' hospitals, Medicare, and municipal and professional incorporation legislation. It had endorsed members of the association who campaigned for public office on a platform opposing "socialized medicine." The society also conducted a public relations campaign and engaged in other service activities for its members. The court concluded that many of these activities, including the political and legislative activities, deprived the association of preferred tax treatment. Against this impressive array of data, it would be difficult for one to argue for a deduction.

With this background, the result reached in *Krohn v. United States*[82] was predictable. The court held a trust for the benefit of the Denver Medical Society did not qualify under Section 2055. The society argued that when its charitable activities were compared to its noncharitable activities, the latter were incidental. The medical society's publication, library, and scientific meetings were considered. But even the publication was called into question. While "it contains some educational material [it] . . . also contains much other material, the value of which is personal to the individual doctors rather than to society as a whole."[83] The court considered the *Seasongood*[84] result, where an organization met the political activities test when only five percent of its activity was legislative. The *Krohn* court found this a

> questionable approach to the problem. The apparent certainty of a percent test obscures the basic difficulties of balancing activities in the context of organizational objectives and circumstances. For example, the amount of non-public activity arguably "substantial" may well vary between religious groups and labor organizations.[85]

V. The Charitable Trust

A. *Express Trusts and Absolute Gifts*

In *Philadelphia Baptist Ass'n v. Hart*,[86] Chief Justice Marshall decided that

80 Hammerstein v. Kelly, 235 F. Supp. 60, 63 (E.D. Mo. 1964).
81 *Ibid.*
82 246 F. Supp. 341 (D. Colo. 1965).
83 *Id.* at 344.
84 Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955).
85 Krohn v. United States, 246 F. Supp. 341, 347-48 (D. Colo. 1965).
86 17 U.S. (4 Wheat.) 1 (1819). See Vidal v. Girard's Ex'r, 43 U.S. (2 How.) 126

a charitable trust could not be enforced since the Statute of Charitable Uses[87] had been repealed in Virginia. Further, he reasoned that in the absence of this statute a charitable trust could not be enforced by a court of equity. This reasoning was the most notorious historical objection to the charitable trust. Charitable trusts were also attacked as lacking definite beneficiaries.[88] Further, it was contended they were in violation of the rule against perpetuities.[89] Today these objections are, in large part, a thing of the past, but the rules that were formulated in response to them are still found in the law. For example, the courts construed gifts in trust as absolute gifts to charitable corporations, so that a rule that would have made the charitable trust void could be evaded. Since it is possible to secure advantages for a trust under section 2055 that would not be available to a corporation receiving an absolute gift, it is important to consider the circumstances under which a gift may be declared a trust and those under which it may be held a gift absolute.

> A charitable trust like an express private trust, is created only if the settlor properly manifests an intention to create it. The settlor need not, however, use any particular language in showing his intention to create a charitable trust; he need not use the word "trust" or "trustee." It is sufficient if he shows an intention that the property should be held subject to a legal obligation to devote it to purposes which are charitable.[90]

Maryland cases illustrate one state's experience with restrictive rules on the creation of charitable trusts. In *Woman's Foreign Missionary Soc'y v. Mitchell,*[91] a bequest was given "in trust." Faced with the challenge that the objects of the trust were "vague, indefinite, and uncertain,"[92] the court found an absolute gift.

> It might be said that the design was to create a trust . . . but when it is remembered that the very end which the corporation here made the beneficiary was organized to effect is [the purpose of the trust] it becomes evident that the property was given to the corporation not in trust for indefinite objects, but . . . for its recognized and clearly defined corporate purposes.[93]

The reasons a court might reach such a conclusion, even in the absence of a restrictive rule, are clear. To impose the obligations of a trustee upon a charitable corporation is unnecessary if the purpose of the trust is the same as the charitable corporation's purpose. Thus, in *Baltzell v. Church Home & Infirmary,*[94] the court construed a gift, to be used for the support of poor, respectable sewing girls

(1844), where Mr. Binney's historical research, demonstrating that equity had enforced charitable trusts in the absence of the Statute of Charitable Uses, persuaded the Court to reverse itself. See generally, BOGERT, *op. cit. supra* note 57, § 362; 4 SCOTT, TRUSTS, § 364 (2d ed. 1956).

87 43 Eliz. 1, c. 4 (1601) (repealed).

88 See BOGERT, *op. cit. supra* note 57, § 362; SCOTT, *op. cit. supra* note 86, § 364.

89 See BOGERT, *op. cit. supra* note 57, §§ 341, 342; SCOTT, *op. cit. supra* note 86, § 365. Statutes exist which limit the amount of land a corporation may hold; other statutes limit the monetary value of a charity's property. See BOGERT, *op. cit. supra* note 57, § 327.

90 SCOTT, *op. cit. supra* note 86, § 351.

91 93 Md. 199, 48 Atl. 737 (1901).

92 *Id.* at 205, 48 Atl. at 739.

93 *Id.* at 205-06, 48 Atl. at 740.

94 110 Md. 244, 73 Atl. 151 (1909).

as not in trust, on the theory that to rule it a trust would be to declare an organization trustee for itself.[95] Maryland legislatively clarified the status of charitable trusts by declaring that a charitable trust is valid despite indefinite beneficiaries, or existence beyond a limited time.[96]

This legislation, however, did not change habits established under the old law. In New York, the Tilden Act of 1893[97] removed restrictions on charitable trusts. In *St. Joseph's Hosp. v. Bennett,*[98] a hospital was the beneficiary of a permanent fund, the income of which was to be used for ordinary maintenance expenses. The hospital wished to apply this fund in payment of a mortgage. Finding the hospital to have received a gift-absolute for a corporate purpose, the court held the funds could not be so applied since the fund was restricted to a stated purpose. However, no trust was established. "In the absence of language requiring other construction, a gift to a charitable corporation was construed as a gift to the corporation not in trust for others but a gift in perpetuity for a corporate purpose."[99] A recent case has approved the holding in *St. Joseph's Hosp.* It was held in *In re Staas' Estate*[100] that a gift in trust to a historical society is not a trust but an outright gift.

An absolute gift has also been held to be a gift in trust. Thus, in *In re Estate of Peterson,*[101] where a bequest was made for a children's home and a home for the aged, the court said: "a devise or bequest, although in form an outright gift, yet when made to an institution whose sole reason for existence and whose entire activity is charitable, is in purpose and practical effect a charitable trust."[102] In a case where property was conveyed without restrictions to a charitable corporation, upon an attempted dissolution of the corporation, the property was held to be in trust for charitable purposes.[103]

For the purposes of section 2055, these cases stand as a warning, yet they also present an opportunity. In a jurisdiction where there has been a tendency to construe gifts in trust as gifts-absolute, the case law should be studied, and the trust instrument carefully drafted to avoid a transfer to a charitable corporation with possible nonexempt purposes. Where apparent gifts-absolute have been

95 In Corporation of the Chamber of Commerce v. Bennett, 143 Misc. 513, 257 N.Y.S. 2 (1932), property was conveyed to a charitable corporation. A restriction in the gift that the property should be applied only to one of the corporation's purposes was held of no effect, since the absolute owner of property cannot be restricted in its use. However, whether it is a trust or not determines if a legal or equitable remedy is available, and this question is often important. The different duties imposed upon a trustee and a corporation also deserve consideration. See note 4 *supra.*

96 MD. ANN. CODE art. 93, §§ 348, 357 (1957).

97 L.1893, c. 701, now N. Y. PERS. PROP. LAW § 12, N. Y. REAL PROP. LAW § 113.

98 281 N.Y. 115, 22 N.E.2d 305 (1939).

99 *Id.* at 120, 22 N.E.2d at 307.

100 235 N.Y.S.2d 490 (Surr. Ct. 1962). See Zabel v. Stewart, 153 Kan. 272, 109 P.2d 177 (1941), where a gift left to a charitable corporation to be used for the building and furnishing of a church was held to be a gift-absolute to the church, since it was to aid the purposes for which the corporation was formed; and *In re* MacFarland's Estate, 95 N.Y.S.2d 258 (Surr. Ct. 1950), where a gift to be used for memorial flowers every Sunday in a church was subjected to cy pres, and held an absolute gift for other church purposes. See generally, BOGERT, *op. cit. supra* note 57, § 324.

101 202 Minn. 31, 277 N.W. 529 (1938).

102 *Id.* at 36, 277 N.W. at 532. *Accord, In re* Estate of Munson, 238 Minn. 358, 57 N.W.2d 22 (1953), where an outright gift to an orphan's home with no mention of a trust was held a trust for a charitable corporation.

103 *In re* Los Angeles County Pioneer Soc'y, 40 Cal.2d 852, 257 P.2d 1, *cert. denied,* 346 U.S. 888 (1953).

found to be gifts in trust, a cogent argument can be made for finding a deductible gift in trust to the charitable corporation with activities that are possibly noncharitable. The gift should be characterized as in trust for a charitable purpose. Only the purpose of the trust will have to meet the tests of the statute.

B. Constructive Trusts

Another possibility of attaining trust status is the constructive trust approach. In *Delaney v. Gardner,*[104] an estate tax deduction was claimed. Instead of leaving sums to named beneficiaries, a memorandum listing recommended individuals and institutions was found with, and construed as part of, the will. It provided the executors could, in their best judgment, alter the proposed distribution. The lower court found a constructive trust for charitable purposes, since the executors had followed the memorandum. It reasoned any of the named charities could have compelled the executors to pay over the amount intended as a constructive trust.[105] The First Circuit disagreed. It found the executors not bound by the memorandum,[106] stating:

> [S]ince § 812(d) offers to testators the privilege of deducting certain dispositions beneficial to society, then the policy underlying such a privilege would be best effectuated by requiring a clear and definite exercise of the privilege in the testamentary instrument.[107]

In dissent it was argued that the word "transfer" in the statute is broad enough to embrace a constructive trust.

> [The statute] should be construed to cover the transfer of money from an estate to a charity accomplished by the device of a constructive trust imposed by local law on a testamentary disposition because of a testator's reliance upon his legatee's agreement to hold the devise for the benefit of the charity.[108]

In *Marine Midland Trust Co. v. McGowan,*[109] the Second Circuit adopted this view. An estate tax deduction was claimed for a gift to an unincorporated college fraternity. Shortly after the testator's death, the fraternity incorporated an educational foundation and assigned its rights in the bequest to the exempt organization. There was no doubt that the testator intended his gift for educational purposes. He was informed erroneously that the educational foundation had been incorporated. Although it was an outright gift to the fraternity, and no purpose for the funds was stated in the will, it was held a constructive trust for exclusively charitable purposes.

Cox v. Commissioner,[110] in the same circuit, imposed a limitation on the

104 103 F. Supp. 610 (D. Mass. 1952), vacated, 204 F.2d 855 (1st Cir. 1953).
105 *Id.* at 613.
106 Delaney v. Gardner, 204 F.2d 855, 860 (1st Cir. 1953).
107 *Id.* at 859. § 812(d) of the Int. Rev. Code of 1939 became § 2055 of the INT. REV. CODE OF 1954.
108 Delaney v. Gardner, *supra* note 106, at 864.
109 223 F.2d 408 (2d Cir. 1955).
110 297 F.2d 36 (2d Cir. 1961).

concept of a constructive trust that has been adopted elsewhere.[111] In *Cox* a bequest was made to an ordained priest who had taken the vow of poverty. Refusing to establish a constructive trust, the court held that the bequest was to the named individual and not to his religious order. The reasoning in these cases is the same. Where a gift is to a named individual, the courts will not rewrite the instrument so as to create a constructive gift for the charitable corporation.

Levey v. Smith[112] represents an unsuccessful attempt to obtain an estate tax deduction, via the constructive trust approach, where it was contended that a gift was to a group organized and operated exclusively for a charitable purpose. The court said:

> The facts must be such that the failure of the legatee to use the gift for educational, religious or charitable purposes will constitute a breach of a legal duty created by the act of acceptance of the trust res under conditions imposed by the testator. . . . Plaintiff urges that the statutory test "is the use to which the property is to be put." In our view the test is: "For what purpose is the property devised?"[113]

The strong emphasis in the *Levey* case on the act of the testator may be favorably employed in arguing for a constructive trust under the *McGowan* rationale. The constructive trust fails where an attempt is made to turn a gift to an individual into a gift to a corporation.[114] Construing the gift as a constructive trust for one of the exempt purposes of a charitable corporation should be a less difficult task.

A frequent object of a gift to a professional association is its library.[115] It was earlier noted that the *Hammerstein* case almost recognized the establishment of a deductible trust for library purposes.[116] The trust failed only because the trustee had discretionary power to terminate it at any time. A revenue ruling sets the standards for gifts to a library.[117] It must operate exclusively for the exempt purpose; maintain separate books and accounts; and organize in a manner that prevents the use of its assets for the general purposes of the organization rather than purposes similar to those of the fund itself.

Elizabeth L. Audenreid[118] held that a bequest in trust for law library purposes met the requirements of section 2055. The court rejected arguments that the library was an integral part of the bar association, and it rejected the con-

111 Lamson's Estate v. United States, 338 F.2d 376 (Ct. Cl. 1964); Estate of Barry v. Commissioner, 311 F.2d 681 (9th Cir. 1962). See also Margaret E. Callaghan, 33 T.C. 870 (1960); George W. Dichtel, 30 T.C. 1258 (1958); Rev. Rul. 55-759, 1955-2 CUM. BULL. 607.

112 103 F.2d 643 (7th Cir), *cert. denied*, 308 U.S. 578 (1939).

113 *Id.* at 647-48.

114 In Young Men's Christian Ass'n v. Davis, 264 U.S. 47, 50 (1924), the Court said:

> Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific exemption of those gifts but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death.

115 See United States v. Proprietors of Social Law Library, 102 F.2d 481 (1st Cir. 1939), qualifying a law library as exempt under the organized and operated clause.

116 See text accompanying note 75 *supra*.

117 Rev. Rul. 58-293, 1958-1 CUM. BULL. 146.

118 26 T.C. 120 (1956).

tention that limitations on membership to the judiciary and dues paying members should bar a deduction. The court found that the library's availability to all who paid their dues was sufficient to treat the bequest as one for educational purposes.

A case which casts doubt on a gift to a law library being found a trust is *Gately v. El Paso County Bar Ass'n.*[119] An attorney, who was not a member of the county bar association, sought a declaratory judgment authorizing him to use the bar association library, which had been given by the testator. He contended that the library was a gift in trust and that he fit the description of those in the will for whom the library was given. His contentions were rejected, and the library was held to be an absolute gift. The court reasoned that the testator's failure to provide money to supplement library materials was inconsistent with the duty that would be imposed on the trustee to keep them current. The court held that without a fund for supplementation, a constructive trust could not be found. Thus, an argument can be advanced that a gift to a law library is not the proper subject of a constructive trust, as a law library trust should be accompanied by a special fund for supplementation. However, the court's reasoning, that a trustee would be under an obligation to keep the library current, could likewise be called into question.

VI. Conclusion

To achieve favorable estate tax treatment of a gift to a professional association, the transfer may be either an outright gift to a charitable corporation or a transfer in trust for a specific charitable purpose. The course of making an outright gift is exceedingly unwise. The corporation must be both organized and operated for an exclusively charitable purpose. The cases demonstrate that a professional association frequently has discordant purposes in its charter and has a tendency to venture into fields where the charitable status of its activities is doubtful. The latter problem has become particularly acute when the association seeks to influence legislation which, by statutory definition, is incompatible with qualification for a charitable deduction.

A trust does not encounter the above difficulties. By choosing a charitable, educational, or scientific purpose — for example a library — and by providing definite trust language, the gift is assured favorable treatment. Most organizations with truly charitable purposes seldom have legislative designs; thus this test is not relevant.

The problem is primarily one for the draftsman. A discussion at a preliminary stage will develop an acceptable object for the gift, while at the same time achieving the maximum tax advantage. Failure to plan in advance is an invitation to later litigation.

Gerard K. Sandweg

119 137 Colo. 599, 328 P.2d 381 (1958).