

**KEEPING THE FAITH OR
ESCAPING THE DEAD HAND:
PLANNING TECHNIQUES TO
ENSURE NO MISSION DRIFT**

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Chapter 17

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TECHNIQUES IN DEALING WITH
THE DONOR'S OR FOUNDER'S VISION**

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KEEPING THE FAITH OR ESCAPING THE DEAD HAND: TECHNIQUES IN DEALING WITH THE DONOR'S OR FOUNDER'S VISION

I. INTRODUCTION

An often-repeated concern of philanthropists is the potential that their vision will not be honored by the charity to which they donate or by successive generations of board members. In other words, they fear a loss of control, not just of the organization or of the gift, but of the vision that drives the creation of the organization or the making of the gift. In contemporary discussion, the competing unhealthy realities of founder syndrome (too much control) and mission drift (too little control) serve as boundaries to the discussion. The purpose of this paper is to identify techniques to provide a donor (or founder) a level of comfort that his or her vision and/or purposes will be honored, while allowing successive generations the freedom to adapt strategies and operations to an ever-changing world.

In their 1996 Harvard Business Review article, *Building Your Company's Vision*, Jim Collins and Jerry Porras examined how successful companies had created such lasting success. Central to their theories of visionary companies is the idea that “companies that enjoy enduring success have core values and a core purpose that remain fixed while their business strategies and practices endlessly adapt to a changing world.” See James C. Collins & Jerry I. Porras, *Building Your Company's Vision*, Harv. Bus. Rev., Sept.–Oct. 1996, at 65. In speaking about this dynamic, they refer to preserving the core and stimulating progress. While Collins and Porras speak in business terms in their 1996 article, Jim Collins subsequently adapted this idea to the social service sector in his monograph, Good to Great and the Social Sectors: A Monograph to Accompany Good to Great. Recognizing the fundamental differences between the business sector and social sector, Collins found that this basic premise of casting a core vision and adapting strategies to accomplish that core vision does not change.

It is this idea, then, that this paper will discuss in the specific context of grantmaking foundations. This paper will break down into five broad techniques for building a grantmaking foundation that is best equipped to avoid mission drift, while remaining flexible and adaptable to current needs. The five broad techniques fall into the following areas: (1) conceptualizing vision; (2) stabilizing vision; (3) institutionalizing vision; (4) contextualizing vision; and (5) compromising vision. Each of these five topics will be discussed below.

II. CONCEPTUALIZING VISION

Within the context of this paper, the idea of conceptualizing vision means taking the time to articulate a clear vision for the organization. Often, an organizational founder has in his or her head certain ideals, goals, or purposes that he or she would like to see achieved through the organization yet no effort is made to think clearly and strategically about those ideals for the purpose of articulating a clear and coherent vision. However, taking time to think about values, goals, and objectives is critical if those values, goals, and objectives are to be baked into the DNA of the foundation in a way that protects the foundation in future years from mission drift.¹

So what is “vision?” Collins and Porras define “vision” as consisting of two major components: core ideology and envisioned future, with the core ideology being composed of core values and core purpose and envisioned future being ten to thirty-year goals (Collins and Porras coined the phrase “big hairy audacious goals” for these goals). Working together, core ideology and envisioned future combined to form a vision for the organization, functioning in the role of a “North Star” for the foundation and its board.

Critical to defining vision, then, is drilling down to core values and core purpose for the organization. The core values of an organization are the essence the organization. In the context of grantmaking foundations, these core values often began as core values of the founder. These values are deeply held based on life experiences, family background, and often faith beliefs. A founder should take the time to examine his core values that he desires to imbed as the cornerstone of the foundation. Collins and Porras suggest that most organizations will have only 3 to 5 truly core values that will truly stand the test of time regardless of how they are buffeted by the winds of change or waves of progress.

In addition to identifying the core values for the foundation, conceptualizing vision requires identifying the core purpose of the foundation, that is, the reason for the existence of the foundation. This should not be confused with the mission statement. Whereas a mission statement describes what an organization seeks to do today to effect change, the purpose statement is more fundamental and, like the core values, should be

¹ While this exercise is best accomplished at the outset by the founder, if such an exercise has never been performed, the current board should undertake it, keeping in mind all that they know of the founder and his vision and how that has adapted over time.

unchanging. Collins and Porras offer a number of examples such as Hewlett-Packard: To make technical contributions for the advancement and welfare of humanity, Wal-Mart: To give ordinary folk the chance to buy the same things as rich people, and Walt Disney: To make people happy. Each of these examples demonstrates the simple yet profound aspects of a purpose statement that provides the fundamental reason for being of the organization. Together, the core values and the core purpose comprise the core ideology of the organization that should remain fixed over time and never changing. Once articulated, it is possible to consider ways to drill that core deep into the bedrock of the foundation in order to stabilize the founder's vision.

III. STABILIZING VISION

While it necessarily matters whether or not the canvas is blank or the foundation has already been established with certain choices as to form and governance put in place, various techniques are available to create structural guards to stabilize vision and protect against mission drift. Perhaps the most fundamental of these techniques begins with choice of form.

A. Choice of Form

Foundations are most often formed either as nonprofit corporations or charitable trusts. It is generally agreed that charitable trusts provide a more rigid structure than that of a nonprofit corporation. While this may be viewed as a detriment to a board of directors, to the founder this presents an opportunity to set forth values and purpose and ensure that core ideology will not be changed absent judicial intervention. Charitable trusts are generally governed by the trust code of state in which they are organized, as opposed to the business organizations code. Absent language in the trust allowing for modification, modification of a charitable trust generally requires approval of a court. In some states, such as in Texas, any proceeding to amend a charitable trust requires notice to the state attorney general which serves as additional protection of the founder's core ideology. While unusual, it is possible to "convert" a nonprofit corporation into a charitable trust to obtain the benefits of this choice of form. In some states this may be an actual conversion of a filing entity (a nonprofit corporation) to a non-filing entity (the charitable trust) (see Texas as an example). In other states, and under federal tax law, this can be accomplished through creating a charitable trust, obtaining recognition of exemption for the charitable trust, and transferring assets from the nonprofit corporation into the charitable trusts. This process should not be

considered or undertaken without involvement of competent counsel.

B. Perpetual Foundation vs. Spend-Down/Limited Life Foundation

Regardless of the choice of form, other decisions may also serve as structural guards against mission drift. One decision that has been the subject of increasing commentary over the last decade is the decision on the lifespan of the foundation. Historically, grantmaking foundations have been created to have a perpetual life. With respect to private foundations, this perpetual existence plays itself out as the private foundation seeks to satisfy its payout requirement and earn an amount from its investments to offset that payout. However, nothing in the law requires private foundations to operate in this endowed manner. Perhaps the most famous example of a limited lifespan foundation is the world's largest foundation, the Bill and Melinda Gates Foundation, which provides that it will spend all its resources and terminate fifty years following the last to die of its current trustees. Limited life foundations (foundations that do not plan to exist in perpetuity, but rather seek to "solve today's problems with today's money") provide a structural guard against mission drift based on the fact that the founders stay involved for the life, or very nearly the life, of the foundation. Consider the childhood game of whispering a secret in a friend's ear, who then whispers the secret in the ear of the next friend and so on down the line. The tenth child down the line may have heard a completely different message than that which was first whispered. So is the fear with some founders—successive generations of board members, detached from the original founder, will take the foundation in a direction the original founder never intended. Choosing a spend-down policy such as the Gates Foundation or Atlantic Philanthropies (which has announced its intention to spend its entire endowment by 2020) guards against this concern.²

C. Trust Protector

A grantmaking foundation may choose to use a trust protector (or, in the event the organization is a corporation and does not want to use the term "trust", a mission protector) to help guard against mission drift and stabilize the founder's vision. At its simplest, the trust protector is a person appointed to hold certain discretionary powers with respect to the trust. While

² Guarding against mission drift is only one of a number of factors leading many foundations to the decision to pursue a spend-down model. For a nice discussion on this issue, see Robert L. Fox & Dorian Bon, *The Lifespan of a Private Foundation: Perpetual or Limited?*, 38 EST PLN 19 (2011).

such a role does not generally exist in the context of nonprofit corporations, depending upon state law, such a role can be crafted. For example, Texas allows nonprofit corporations to have members. In the author's practice, membership is typically utilized as a control feature with the members electing/removing directors, voting on fundamental actions such as amending the governing documents, and similar issues. However, the membership role can be adjusted, so that the member(s) holds discretionary powers vis-à-vis the nonprofit corporation that a trust protector would hold vis-à-vis a charitable trust. A trust protector may be given the right to approve amendments. A trust protector may be required to approve any change to a distribution scheme set out in the governing documents or policies. A trust protector may be utilized to avoid interested transactions that might otherwise arise. The goal of using a trust protector is to anticipate when it would be useful to have a third-party (i.e. someone other than the trustees or beneficiaries) act or make a decision. Utilizing a trust protector gives the flexibility of avoiding judicial action when a trust is involved, while also giving comfort to the founder (who may be the one serving as the initial trust protector) that the core ideology of the foundation will remain stabilized. This role of trust protector is flexible and can be adapted to the needs of the foundation. Similar to the use of a trust protector, the governing documents may require that any amendment requires the approval of an outside party (such as a court) or a super-majority of directors/trustees. This super-majority may be drafted so as to require the vote of the founder or a family member of the founder.

D. Successor Trustee/Director Provisions

The identity of the individuals making decisions on behalf of the foundation is of critical importance to maintaining fidelity to a founder's core ideology. Accordingly, care should be taken in drafting provisions governing the selection and removal of board members. Multiple options are available here. For example, a family foundation may give preference to family members (or even limit board membership to family members) or representatives of family lines, while a non-family foundation (community foundation, corporate foundation, independent foundation, etc.) might choose individuals who meet specific qualifications including specific educational requirements or commonly held beliefs with the founder or core ideology of the foundation. The goal of course is to protect against mission drift by ensuring that, to the extent possible, successive generations of board members both understand and agree with that ideology.

E. Mandatory Distribution Provisions

Private foundations must make an annual minimum under Section 4942 of the Internal Revenue Code to avoid an excise tax. See Internal Revenue Code § 4942. This annual minimum distribution is roughly 5% of the net assets of the foundation. However, there is no prohibition on providing for increased level of distributions in the governing documents of the foundation. For example, the governing documents could provide that the foundation will distribute the greater of its net income or its minimum distribution requirement (a value-based decision of the founder similar to a perpetual vs. spend-down decision). Likewise, a foundation could provide that the trustees are to distribute all gifts received in a particular year from a donor. In addition, a provision could be included to allow a founder the opportunity to know that a specific charity or a specific charitable cause would be provided for, while allowing the directors or successor directors to meet other charitable needs. For example, the charitable instrument could provide that in addition to the minimum distribution requirement, a certain amount must be distributed specifically for a narrow charitable purpose or to a specific charity.

F. Poison Pill

As an alternative to providing for specific distributions in addition to the minimum distribution, a provision could be placed in the governing documents of the foundation that would act as a "poison pill" causing termination to occur in the event a condition *fails* to occur (such as the making of a distribution for a particular purpose). This type of provision operates as an extremely restrictive provision, restricting the directors from neglecting a specific charity or specific charitable cause which the founder wishes to support. This type of "poison pill" provision starts to brush against the line of stifling flexibility in the area of strategy and practice, as opposed to preserving core values and purpose. Because the structural guards should generally be around the core ideology and not the strategy, practices, operating mechanisms, etc., care should be taken to consider the impact of structural guards to ensure they protect the core, but do not stagnate progress.

IV. INSTITUTIONALIZING VISION

Unless a foundation will have a limited life in which the founder is always involved and leading, there will come a time when the founder's vision—the core ideology—must be institutionalized. The vision must move from individual to institution, from entrepreneur to enterprise. Unlike the corporate sector, there are not market factors and outside stakeholders who act as drivers behind this movement. Rather, the

foundation (and the founder) must be intentional about passing on vision from the founder to the foundation. This section will discuss several techniques for institutionalizing vision.

A. Board Initiation

As new board members come on to a board of directors, and on an ongoing basis thereafter, the foundation should provide board member training. It is not enough to simply give board members a book of policies and procedures and carry on with business as usual. This type of attitude towards board members, and especially new board members, creates inequalities in the board room between those who “were there from the start” and those who were not. A frequent result is a boardroom that is not a place for open conversation and new ideas. While this might seem to be protective of the founder’s vision, more often it simply drives founder’s syndrome preventing growth and frustrating new board members who do not have the background in the core ideology to make contributions consistent with their qualifications.

Rather than have a stifled boardroom, foundations should orient new board members and train existing board members so that they have an appreciation for the legacy of the founder and foundation and understand their roles as fiduciaries in protecting that core ideology. While board orientation and training is important for any organization for a number of reasons, it is particularly vital for foundations seeking to institutionalize vision. Orientation teaches new board members about the organization’s beginnings—what motivated the founders to create the organization, what is the core ideology of the foundation, in what areas and which organizations has the foundation historically supported and in what amounts. Providing education in these areas is the beginning of training new board members to honor the legacy of the foundation. Armed with knowledge of what has come before board members should receive training to understand and appreciate their roles as protectors of the mission. It is at this point that directors understand their fiduciary obligations of care, loyalty and obedience. These duties do not exist in a vacuum. Rather, they play out as equitable obligations within the context of the foundation’s core ideology.

B. Board Training on Fiduciary Duties

Nonprofit directors (as well as trustees) owe the duties of care, loyalty, and obedience. The duty of care most simplified is a duty to stay informed and exercise ordinary care and prudence in management of the organization. Stated differently it is a duty to exercise good faith making decisions that the director reasonably believes to be in the best interests of the organization. The duty of loyalty requires that a

director act in the best interests of the organization, putting the organization’s interests above her own.

While the duty of care and the duty of loyalty are both widely recognized and discussed in commentary on nonprofit fiduciary duties, it is a third (and sometimes neglected) duty that is most central to a discussion of dealing with the founder’s vision—the duty of obedience. The duty of obedience is a duty to ensure that the purposes of the organization are protected and followed. More than simply understanding the background of the foundation, it is a duty to demonstrate fidelity to the core ideology of the foundation. This duty of obedience requires making every decision in light of the core values and core purpose of the organization. Understanding this duty of obedience—the duty to be the protector of the mission—helps institutionalize the core ideology of the foundation.

C. Governance and Policies

Beyond the initial on boarding, board members should be reminded of their roles as fiduciaries and the duties of care, loyalty and obedience. Regular meetings and board retreats should have time set aside for board governance training and focus on mission. As a part of this time the board should focus on the organization’s mission statement to make sure it remains consistent with the foundation’s core ideology while being flexible enough to meet changing needs. Likewise the board should consider policies that will assist in fulfilling the three fiduciary duties. Policies such as grantmaking policies, gift acceptance policies and conflict of interest policies are helpful for furthering the three fiduciary duties. Similarly policies can assist in institutionalizing vision. In addition to those previously referenced, ethics statements, policies on discretionary grants, and document retention (which aids in memorializing how the board has focused on vision over time) should also be considered.

D. Advisory Boards

An additional governance-related area through which vision can be institutionalized is the use of advisory boards. An advisory board is a committee of individuals who are not on the board of directors of the foundation and therefore have no voting authority and no fiduciary responsibility. Advisory boards may be composed of experts in a certain field in which event those experts are “loyal” to the subject area (such as a specific area of scientific research). In giving advice to the board of directors they keep the focus on mission as it relates to that area of expertise. In addition to standard advisory boards, junior advisory boards can serve the unique role of institutionalizing the core ideology by serving as a training ground for the next generation of donors in a family. In a recent study

produced by 21/64, a philanthropic consultancy, researchers found that “honoring and continuing my family’s philanthropic legacy” was an important driver for engaging in philanthropy. The report, referenced herein as the Next Gen Donors Report, is available at www.nextgendonors.org/##section-resource.

Almost ninety percent of respondents cited their parents as influential in learning philanthropy with 62.6 percent citing the influence of grandparents. More than forty percent said they started volunteering at between 11 and 15 years of age and almost sixty percent said they were first included in their family’s philanthropy (such as through family foundations) before the age of thirty.

These results demonstrate that involving younger generations in family philanthropy has significant influence on attitudes toward the why of philanthropy. In other words, it passes on family values towards giving. While some families have small boards or choose not to include younger members until they have reached a certain age or demonstrated certain skills or desires in philanthropy, utilizing advisory boards allows a training ground for the next generation. Whether the junior advisory board conducts due diligence and site visits with board members or is tasked with analyzing a problem, finding potential solutions and presenting those solutions to the full board, real impact can be made in the lives of these younger donors and the foundations they will one day serve. For a look at how various families have handled transition, see *Family Foundations Prepare for the Next Generation*, Paul Sullivan, N.Y. Times, February 8, 2013, at B5.

E. Succession Planning

It should be noted that each of the steps identified above offering techniques for institutionalizing vision are a part of succession planning. Nevertheless, the board should not neglect to make a succession plan recognizing that there will come a day the foundation will need to carry on without the founder. When that day comes, the more steps the foundation has taken to embed the core ideology into the foundation, the easier the succession will be.

V. CONTEXTUALIZING VISION

In addition to highlighting how younger generations of donors had learned philanthropic values from their forebears, the Next Gen Donors Report also demonstrated that this next generation will seek to contextualize their giving. For purposes of this paper, “contextualize” should be understood to mean translating and adapting the communication and implementation of the foundation’s core ideology to a particular time and place without compromising that

core ideology. To state it consistently with the verbiage used by Collins and Porras: stimulating progress without changing the core. Based on this definition it can be seen that contextualizing the vision will necessarily look differently depending upon the variables involved—the board members, the investment climate, technological advances, the needs to be met, and the potential grantees. The Next Gen Donors Report found that this younger generation of donors desire more hands-on engagement (giving money alone is insufficient to them), desire a more proactive role in giving, look to create more collaborative funding models, and seek to use more tools from the philanthropic toolbox.

With those ideas in mind, contextualizing vision might look like creating a program-related investment portfolio (highlighted in detail below) and/or a mission-related investment portfolio to make investment dollars go further while also addressing social as well as financial goals. Likewise, contextualization might look like increased direct charitable activities (such as creating a research consortium) or funding social enterprises regardless of whether those organizations are exempt under Section 501(c)(3). Contextualization might look like starting with a statement of the problem to be addressed and proactively seeking grantees who are working to address those problems through systemic solutions as opposed to waiting for grant applications. In each of these techniques, the core ideology of the foundation remains fixed while business and philanthropic strategies and practices adapt to the changing world.

Example: Program-Related Investments

To highlight just one way some foundations are seeking to contextualize vision, consider the program-related investment. A program-related investment (“PRI”) is an exception to the rule prohibiting private foundations from making jeopardizing investments. PRIs have been described as a hybrid between grants and investments—investments made with the primary purpose of accomplishing a charitable purpose (and meeting certain other requirements more fully discussed below). As such, PRIs provide an alternative form of financing to flow capital to charitable programs, a form that allows for (and anticipates) repayment thereby enabling reinvestment of that same capital in other charitable programs. Ultimately, PRIs are a tool allowing the funder to leverage its philanthropic dollars to achieve greater impact.

According to Treasury Regulation Section 53.4944-3, a “program-related investment” is an investment which possesses the following characteristics:

- (i) The primary purpose of the investment is to accomplish one or more of the purposes described in Section 170(c)(2)(B);
- (ii) No significant purpose of the investment is the production of income or the appreciation of property; and
- (iii) No purpose of the investment is to accomplish one or more of the purposes described in Section 170(c)(B)(2)(D) [political purposes].

PRIs are used for many purposes. They have a unique ability to address areas where the for profit market fails to operate due to lack of financial incentive, for example, PRIs can be used to incentivize for profit companies to create vaccines and medicines in developing countries where the market would not support such activities. Likewise, PRIs are often employed to support economic development in deteriorated urban areas, undeveloped rural areas, or to support businesses owned by economically disadvantaged groups. PRIs can even be used to provide financial support to socially and economically disadvantaged individuals allowing them to go to college or find gainful employment. PRIs are becoming increasingly popular in the context of microfinance allowing foundations to make investments either directly for microfinance or through the use of intermediaries such as MicroCredit Enterprises, a public charity that provides microfinancing to alleviate poverty. In each example, the key is finding an exempt purpose to be accomplished by the investment that is consistent with the foundation's exempt purpose. Where such an exempt purpose can be found and where the parties are willing to structure the investment to meet the other two tests set forth in the Code, PRIs can be a tremendous source of private capital to accomplish socially-beneficial goals.

VI. COMPROMISING VISION

The core values and core purpose of the founder becomes the core ideology of the foundation. This paper has argued that core ideology should be protected through it being conceptualized, stabilized, institutionalized, and contextualized. However, there may nevertheless come times when the core has to be changed in some way. While these instances should be few and far between, if ever performed, this section will deal with when the vision should be compromised.

A. *Cy Pres and Equitable Modifications*

The aspect of the core ideology likely to be changed (if any part of the core is changed) is the foundation's purpose. If a founder had created a foundation for the purpose of funding research to find a viable vaccine for polio, the foundation's purpose would have been achieved in 1955 through the work of Jonas Salk. In such event, the purpose would need to be modified. If a founder had created a foundation for the purpose that has subsequently been deemed unlawful, in such event the purpose would need to be modified. If a donor had given a gift with a restriction that can no longer be honored, the gift restriction would need to be modified. In these types of instances, the core values (the intent behind the founding/donation) should be followed while making a modification to the purpose to make it as near as possible the original purpose. This is known as the cy pres doctrine, an equitable doctrine used to reform a charitable trust (whether a true charitable trust or a nonprofit corporation holding funds impressed with a charitable trust to further a specific purpose) in order to prevent the trust from failing when the purpose becomes impossible, inexpedient, or impracticable of fulfillment (or already accomplished). Cy pres allows for the substitution of another charitable purpose that is as close as possible to the original charitable purpose. As noted, the doctrine of cy pres should be used only when a purpose has become impossible, inexpedient, or impracticable of fulfillment—not because a new board believes a different purpose should be pursued.

B. *Statutory Modifications (UPMIFA)*

In addition to the doctrine of cy pres, board members should also be familiar with modification and release of restrictions under other laws such as, where applicable, the Uniform Prudent Management of Institutional Funds Act (UPMIFA). UPMIFA applies to organizations that manage and invest “institutional funds” exclusively for charitable purposes. UPMIFA includes provision specific to the modification and release of donor restrictions explaining the circumstances under which court involvement is necessary and when it is not. Likewise, with respect to charitable trusts, state trust codes should be consulted to determine whether specific statutory requirements govern modification of purpose.

C. *Splitting Up the Foundation*

Finally, family unity may be the core value or purpose causing concern for the foundation. In such event, the board may want to consider a foundation split-up to allow different family lines to manage, invest, and make grants from their own charitable

foundation so that the ultimate charitable beneficiaries are served rather than being negatively impacted by difficult family dynamics. For guidance on the technical process for such a split up under state law and federal tax law, see *Resolving Trustee Disputes: Foundation Split-Ups and Other Approaches*, by Megan A. Cunningham and Michael V. Bourland.

VII. CONCLUSION

Organizational founders and other philanthropic donors want their vision to be followed. Where they have been specific and intentional in embedding their values and purpose into the organization or gift the law requires that core ideology to be followed. Boards should seek to understand the vision, institutionalize the vision for successive generations of board members, and, where change is needed in the strategic implementation of the vision, adapt the vision to the new context. Only when absolutely necessary (either because the vision has been fulfilled, has become impossible, inexpedient or impracticable, or to protect the vision from factions within the organization) should the core vision be compromised. In following these guidelines, a foundation is able to keep the faith while escaping the dead hand.