



Court Requires Return of Charitable Donation for Failure of Express Condition

Client Advisories

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Many charitable institutions wrestle with the dilemma of what to do with donations, subject to an express condition of use, when the charity decides not to go forward with that specific use.

In *Adler v. Save*, [A-0643-10T3 \(App.Div.\)](#), the Court considered this issue and held in favor of the respondent donors, Bernard and Jane Adler. The Adlers had donated \$50,000 to Save, a 501(c)(3) charitable organization, whose mission is to provide for the rescue, shelter, veterinary care and adoption of stray companion animals in the Princeton, New Jersey, area. The donation was made specifically to fund, in part, a capital campaign by SAVE to finance the construction of a new, 35,000-square foot facility intended to replace an existing shelter. The Adlers claimed they were told the new facility would have two separate rooms designated for the care of large dogs and elderly cats and that their money would get them naming rights to those rooms at \$ 25,000 each. However, after receiving the gift, SAVE faced difficulties with land use approvals and failed to meet its \$7.5 million campaign goal for the new facility. SAVE then decided to merge with another shelter in Montgomery Township, N.J., and determined not to proceed with construction of the new facility in the Princeton area, but rather to use the funds in connection with construction of a new smaller shelter located in Montgomery Township.

Evidence at the trial court level revealed that neither the Adlers nor SAVE had discussed what would happen if the capital campaign was not successful and SAVE decided not to construct the new facility. Additionally, although none of the donation checks was accompanied by a donor note that the funds were for the capital campaign, one of the checks was acknowledged as received for the capital campaign in a thank you letter to the donors from SAVE, and all of the donations at issue were made after the Adlers had received a capital campaign brochure with certain giving levels and naming rights specified.

The Adlers requested return of their gift based upon a failed condition, but SAVE refused to do so and the Adlers filed suit. The trial court held in plaintiffs' favor, finding they were entitled to return of their gift (*Adler v. SAVE*, Law Div., Mercer County, L-2611-07). SAVE then filed the appeal.

The Appellate Court, applying principles governing fiduciary relationships, held that by failing to abide by the Adlers' conditions, SAVE breached its fiduciary duty to them. In the absence of SAVE's seeking and obtaining of the Adlers' express consent to modify the original condition of their gift for use with the new smaller shelter, in Montgomery Township, the gift had to be returned to them.

The panel also rejected SAVE's alternative argument under the *cy pres* doctrine, also known as equitable deviation, holding that "it would be a perversion of equitable principles to permit SAVE to...solicit funds..., accept their unequivocally expressed conditional gift, and then disregard those conditions and rededicate the gift to a purpose materially unrelated to plaintiff's original purpose...without even attempting to ascertain from the plaintiffs what, in their view, would be 'a charitable purpose as nearly as possible' to their particular original purpose."

The lesson to be learned here is that when a 501(c)(3) solicits donations, such solicitation must clearly note that if the intended use of the solicited donation is not feasible, the donation will be used in the organization's general operations, or for capital projects not yet specified. Without such clear indicators noted in the solicitation, the organization must be sensitive to any condition of use ascribed to the gift by the donor. If it disregards such condition, it faces the very real possibility of having to refund that gift to the donor.

Should you have questions or wish to discuss this client advisory or a related matter, please contact [Arnold D. Litt](#) or [Andrew J. Cevasco](#), Partners in Archer's office in Hackensack, N.J., at (201) 342-6000, or at alitt@archerlaw.com for Mr. Litt or acevasco@archerlaw.com for Mr. Cevasco, or [Frances A. McElhill](#), Chair of the firm's [Nonprofit Practice Group](#) at (856) 354-3137 or fmcelhill@archerlaw.com.

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