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Assessing the Perpetual Charitable Trust: Are the Wishes of the Dead More Important than the Needs of the Living?¹

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Abstract

Are the wishes of the dead more important than the needs of the living? This question is prompted by consideration of the Hershey Trust Company, a perpetual charitable trust that not only owns and operates the Milton Hershey School in Pennsylvania, but also owns a controlling interest in various Hershey-related for-profit entities. This unusual arrangement, and the conditions under which it was formed, have produced a situation in which a small, private boarding school for low-income students has an endowment of \$12 billion (in addition to its other corporate and real estate interests). The trust has been operating according to its founder's wishes for decades, but some have wondered whether its resources could be put to better use for more urgent needs. This case will invite students to consider the question of how we should weigh the needs of the living against the wishes of the dead.

Learning Outcomes

By the end of this case study, students should be able to:

- Provide enough detail about the finances, the ownership, and the leadership of the relevant Hershey company entities to explain what makes the Hershey Trust unique.
- Explain the criticisms of the way the Hershey companies operate, including the board-related controversies and scandals starting in the early 2000s.
- Articulate the argument for limitations or restrictions on perpetual charitable trusts and the objections to that argument.
- Propose a solution that attempts to respect both the needs of the living and the wishes of the dead.

Introduction

The Milton Hershey School (MHS), located in Hershey, Pennsylvania, was founded in 1909 by its namesake, Milton Hershey. The MHS, which is operated by the Hershey Trust Company, is a private, tuition-free boarding school for low-income students. There are fewer than 2,500 students who study at MHS, but it has an endowment of \$12 billion (Kurie, 2018). In 2017, this endowment was roughly the same size as the endowment of the University of Pennsylvania ("U.S. and Canadian Institutions," 2019), which enrolls more than ten times as many students. How is it that a venerable but relatively small boarding school like MHS has access to so much wealth? The answer is complicated.

The Hershey Trust Company

When Milton Hershey signed the deed that formed his charitable trust in 1918, he set it up so that the Hershey Trust Company, as a fiduciary of the school, would own a controlling interest in the Hershey Company, all of Hershey's land holdings, and all of Hershey Entertainment. This is what produced the unusual situation in which a non-profit organization controls and draws income from for-profit companies (Segal, 2016). Some of the trust company board members also hold positions on other Hershey-related boards. As one author (Lindgren, 2018) put it: "Hershey is a publicly traded corporation owned in

perpetuity by a nonprofit trust. That unwieldy and deeply unorthodox arrangement contains a probably unsustainable legal contradiction.”

The laws governing entities such as the Hershey Trust typically require that they spend five percent of assets per year.² If there were 2,500 students enrolled at MHS, spending five percent of \$12 billion would come out to \$240,000 per student per year.³ The typical living arrangement at MHS involves 8–12 students living with two house parents. Thus, if you treat this hypothetical student spending as income, then each household should be receiving \$2.88 million per year—an amount in the top 0.1% of households in the U.S. (Lam, 2017).

Losing trust in the trust

It is perhaps not surprising that this financial situation, and the leadership structure it requires, have created some problems. For decades, the trust operated largely in the background, without much scrutiny. In 2002, however, a public outcry was sparked when the board of the trust company decided to sell its stake in the for-profit Hershey Company. The subsequent campaign against the sale garnered the support of the Pennsylvania attorney general’s office, which sued for delay. The delay became a cancellation, and the perceived crisis was averted; but the actions of the trust and its leadership have remained under heightened scrutiny (Kurie, 2018, pp. 8–9).

Despite (or perhaps because of) this added scrutiny, the board of trustees has recently been plagued by internal tensions, including accusations of misconduct and conflicts of interest. The attorney general has kept a watchful eye on the trust, and in 2010 opened an investigation into a real estate deal made by the company. That investigation was closed in 2013, but new troubles cropped up. In 2014, the trust spent millions of dollars to purchase a golf course that was owned by one of the board members; in 2015, the board spent millions more as board members investigated each other for misconduct (Lam, 2017). And in February of 2016, the attorney general sent a letter threatening legal action if changes were not made by July. A deal was struck shortly before the deadline, involving term limits, caps on base compensation, and other provisions (Segal, 2016). The fallout from this investigation has continued, however, including the resignation of the CEO of the Hershey Trust Company (Fernandez, 2018).

With or without these recent troubles, the overall situation is worth reflecting on. Milton Hershey has been dead for 75 years, but his preferences and desires are controlling vast amounts of money. The same is true of other magnates of the early twentieth century—Carnegie, Ford, Rockefeller, and others—but the details are different. Whereas other entrepreneurs created general purpose foundations whose expenditures could be adjusted based on changing needs, Hershey’s charitable trust specified that its funds would be used for the benefit of a specific group of people (MHS students), in a specific place (Derry Township, Pennsylvania), in perpetuity (Kurie, 2018, p. 3).

Hershey Trust Company funds are doing a lot of good through the work of the MHS and related endeavors, as Milton Hershey wanted; but even after taking care of all reasonable school-related expenses, there is quite a bit left over that could be used for other worthy causes were it not for the conditions of the trust.

Are perpetual trusts a good idea?

Thus the Hershey trust has been criticized for being inflexible and vulnerable to exploitation. And there are some critics who view the general idea, of a trust according to which a dead person's wishes are carried out forever, as problematic.⁴ Would it be better if this specific type of perpetual charitable trust did not exist? If so, what alternative type of legal arrangement would strike the best balance between honoring the wishes of the dead and addressing the needs of the living?

A radical response to this question would be to advocate for a complete elimination of the ability to dictate what happens to someone's assets after they die. Someone advocating for this radical solution might argue in something like the following way:

If someone is dead, then they can neither be benefited by someone carrying out their wishes nor harmed by someone failing to carry out their wishes. So even if the wealth that someone has amassed is spent after their death in a way that goes against their wishes, it does not seem as though they are being harmed. Thus, we have a situation in which we could produce significant benefits for people who are alive without harming the person whose wishes are being violated. If eliminating perpetual charitable trusts would make this kind of situation possible, does that not give us at least some reason to do so?

The advocate of this response might also note that we already do this to a certain extent: we already violate the wishes of the dead in order to satisfy the interests of the living. If the laws change in a way that conflicts with the provisions of a charitable trust, then those provisions are changed to bring them into compliance with new laws. For example: the Hershey Trust originally designated that school enrollment would be limited to white males, and that changed when discrimination on the basis of race or sex became illegal in the 1970s (Lam, 2017). Since we have already decided that there are some cases in which we should violate the wishes of the dead, why not extend that decision to other cases as well?

Nevertheless, there is also an argument to be made in favor of keeping things the way they are. First, someone might point out that these trusts are already designed for charitable purposes, so it is not as though we are choosing between throwing money away and applying it to good purposes. It should be acknowledged, however, that the notion of charity is interpreted pretty broadly, to include taking care of abandoned guinea pigs and preserving Huey military helicopters (Lam, 2019). And, as we have seen with the Hershey trust, given the right conditions and enough time, the available resources can balloon far beyond what the charitable purpose might require. But the charitable purpose restriction still seems to mitigate the force of the argument against perpetual charitable trusts.

Reflecting on the charitable purpose restriction highlights another consideration in favor of allowing this type of financial instrument. If perpetual charitable trusts were eliminated altogether, would that produce a significant decrease in the amount of money devoted to charitable purposes? This is an empirical question, which seems to depend on how much of the incentive toward charity is coming from the availability of the charitable trust and how much of the incentive is coming from the fact that such trusts can exist *in perpetuity*. It seems clear that eliminating charitable trusts altogether would significantly reduce overall charitable giving, but it is less clear what would happen if charitable trusts were simply altered so that they expired after, say, 90 years.⁵

As a final point, consider an analogy with organ donation (Lam, 2017). Someone might run an argument against giving people posthumous control over their organs that runs in parallel to the argument against giving people posthumous control over their wealth: We cannot harm someone who has died by removing their organs, and we can use those organs to great benefit for the living; so why not remove healthy organs, as needed, from every person who dies? Most people would have moral qualms about such a practice, which suggests that there are at least some moral obligations that remain in force even after someone dies. It is not clear what serves as the basis of this obligation—but if we do indeed have an obligation to respect some of the wishes of past people with respect to their bodies, then perhaps we also have an obligation to respect some of the wishes of past people with respect to their assets.

Decision point

Suppose that you are tasked with drafting legislation that will determine whether and to what extent individuals can dictate how their assets will be distributed in the future, including after they are dead. What restrictions, if any, would you place on these charitable trusts? What considerations would be the determining factors in your legislation?⁶

Discussion Questions

1. Now that you are familiar with the details (and the criticisms) of the Hershey trust, do you think that the laws should be changed in order to prevent this type of thing from happening again? Why or why not? What changes, if any, would you propose?
2. Does the fact that we already make adjustments to charitable trusts based on changes in the law (e.g., new anti-discrimination laws) imply that we should also be able to make adjustments in light of other changes, such as changes in scientific knowledge or moral consensus? Why or why not?
3. To what extent should we be able to dictate what happens after our death? If our wishes are violated after death, how (if at all) does that harm us? What, if any, obligations do we have to those who have died?
4. Under what conditions would you set up a charitable trust if you decided to give away a significant amount of wealth?

Further Reading

- For book-length treatments of the history and influence of the Hershey fortune, see Fernandez (2015) and Kurie (2018).
- For recent critical explorations of contemporary philanthropy in general (including a discussion of trusts and foundations), see Madoff (2011) and Reich (2018). The Madoff source is particularly helpful, as it provides a detailed exploration of the legal instruments that are increasingly used to execute the wishes of the dead.
- For a discussion of moral and metaphysical questions about our obligations to the dead, see Scheffler (2013).

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- U.S. and Canadian Institutions Listed by Fiscal Year (FY) 2018 Endowment Market Value and Change in Endowment Market Value from FY17 to FY18. (2019). National Association of College and University Business Officers and TIAA.

Endnotes

¹ This question was inspired by (Lam, 2017).

² Some of the relevant laws are federal laws, and some are state laws. For example, the question of whether to allow trusts at all is a federal question (the U.S. is one of the few countries that recognizes trusts), but the question of whether (and which types of) trusts can exist in perpetuity is typically decided at the state level. See Madoff (2011) for a detailed treatment of the relevant legal instruments.

³ According to tax records, in 2014 the school "only" spent \$238 million on 2,300 students, or \$120,000 per student (Lam, 2017).

⁴ See Madoff (2010) for a general critique of this type of trust, known as a “dynasty trust.”

⁵ This 90-year timeframe used to be the limit for non-charitable trusts in the U.S., but that has been changing in recent years (Madoff, 2011, p. 8).

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