



Philanthropic Choice and Donor Intent: Freedom, Responsibility and Public Interest

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It is a very great honor to be asked to add my comments to the list of distinguished voices from the fields of philanthropic thought and action that have participated in this Waldemar Nielson Issues in Philanthropy Seminar Series. Like most that have spoken here, I have had the privilege to personally know and be friends with Wally Nielson.

Some years ago, in association with the Kauffman and Kellogg Foundations, he established an annual meeting forum for the presidents of foundations located in the middle section of the United States. Wally kindly invited me to join in those meetings where, like here, nationally respected speakers and leaders stimulated discussion of significant issues facing our nation. One of my fondest memories of these meetings was sitting by an open campfire at dusk in the mountains of Colorado and conversing with John Gardner and Wally Nielson about significant philanthropic challenges and opportunities ahead for our field. Many new insights and important working relationships between foundations emerged from these meetings, largely through the efforts of Waldemar Nielson. So it is with great respect for him and his work that I will try to honor his name with my remarks today.

With a background of over forty years of active engagement with philanthropists and philanthropic efforts, I had many thoughts and reflections on topics I might use for this presentation. However, it was a passage from one of my student's papers and a statement from the *Values and Guiding Principles of the National Center for Family Philanthropy* that focused my thinking and led me to choose the concepts I want to discuss in my comments.

My student wrote: "A charitable gift is an expression of individualism. To make a charitable gift is to make a statement about one's self and one's own values....*it is the quest for individualism which, in my opinion, is the strongest motivator driving Americans to give as they do....even the smallest gift carries a symbolic value that tells, in one way or another, something about the character and the worldview of the giver.*"

And then, the National Center for Family Philanthropy wrote: "*We value the donor's right and ability to direct charitable assets through the philanthropic vehicles and giving programs of their choosing. We believe the genius of private philanthropy is the variety of opportunity and the diversity of choices available to the donor.*"¹

These two comments no doubt struck me as appropriate because of my background and life experiences with philanthropy. For the first eighteen years of my working career, I was a tax and estate-planning attorney who carefully considered and recommended the best tax and wealth transfer strategies for my clients. But I have also been:

- the executor of estates who had to execute the plans devised for the wealth distribution;
- a trustee of trusts responsible for carrying out the creator's intent through years of administration;
- the CEO of a charitable foundation charged with taking a donor's instructions and actualizing them in a future time;
- a director of nonprofit organizations that have solicited donations and made promises to their donors about the use of their funds;
- a client of lawyers, accountants and philanthropic advisors.
- I have been a consultant to families of wealth around the country on philanthropic giving,
- and now a professor of philanthropic studies.

In short, I have had the experience of having to live with the wealth transfer and philanthropic planning as well as devise it, to articulate it as well as interpret it, and to maintain fidelity to donor intent while struggling to make it enduring and relevant in a changing world.

I drafted hundreds of wills, trusts and private foundation instruments during my legal career and I learned to listen carefully as these individuals of significant wealth discussed their plans for the

¹Statement from *Values and Guiding Principles*, National Center for Family Philanthropy

distribution of a lifetime's accumulations. This was especially true when the client wanted to make a substantial charitable bequest or set up a foundation for I would be called upon to legally express what they were personally articulating. This is probably why my student's comments and the National Center's *Statement of Values and Principles* resonated so strongly with me.

Each philanthropic gift, or new foundation established, was highly motivated by the donor's free right to individually select their own charitable interest, as well as, set the time and conditions of the gift.

This fundamental right of every American citizen to engage in his or her own individual philanthropic selection and action is the foundation of the giving spirit of our voluntary nonprofit system. As a free people we want the right to live our lives with as much freedom and individual choice as possible, including the making and selection of philanthropic and charitable choices. Yet freedom always comes with the possibility of abuse and the need for responsible voluntary actions and choices, if restrictions on the freedoms are to be avoided.

In a nation that enables and permits the freedom to accumulate wealth, we have a public interest in encouraging the use of such accumulations for community purposes and needs. Through taxation, we mandate annual contributions to our common concerns to the extent that our elected representatives determine. However, because many other problems and desirable societal goals may not be addressed by governmental action, we have also used tax deductions to induce voluntary giving. The use of tax policy to encourage contributions for the common good joins with the separate efforts of private sector institutions to induce giving on moral, religious and ethical grounds.

As further incentive for philanthropic giving, our laws provide only limited legal restrictions on individual choice and enable substantial donor control over the charitable giving process and organizational structure.

However, permitting this individual freedom of selection means that some donors will make philanthropic choices that will seem wrong-minded or offensive to others. If I have learned nothing else about philanthropy, it is that whatever someone elects to support, others will question or challenge that choice or allocation. Yet the opportunity to individually choose is central to the donor's voluntary decision to give.

Nevertheless, if enough people feel that philanthropic choices or practices are offensive, or against the public interest, efforts may be made to enact laws restricting the boundaries or circumstances of choice. While it is certainly within the power of the majority to cause the enactment of new rules, changes should be undertaken very carefully. Such actions could adversely affect one of the fundamental values of our society: the opportunity for a minority to dissent with the current views of the majority, and seek, through the use of their time and their resources, to alter public opinion.

Furthermore, changing the "ground rules" for philanthropic choice according to currently prevailing viewpoints raises concerns about a donor's ability to freely and consistently address over time the philanthropic objectives the gift is intended to achieve. In spite of the possible risk to philanthropic inducement efforts, the 1969 Tax Reform Act clearly established the right of the government, as well as its willingness when politically motivated, to fundamentally alter the laws affecting established foundations *after the fact*.

In so doing, it sent signals that foundation donors may not be able to rely on the "terms and conditions of the original deal" they make with the government at the time of the foundation's creation. Since what kinds, if any, future law changes might be enacted cannot be known, foundation donors should recognize that reality, however remote. They should understand that the privilege to direct their giving hangs by a slender thread and is seen by governments as conditional. Behavior perceived as abusive, even though technically or legally permitted, can give rise to political clamor to change the "rules" and potentially alter, in some way, fulfillment of donor plans and intentions.

Since legally proscribed abusive behavior is defined by laws, interpretive court rulings and administrative regulation, the rules are more certain. However, determination of what constitutes the kind of undefined “abusive” behavior that would create demand for further legislation is a matter of debate. This is where the leadership efforts of the Council on Foundations and regional grantmakers associations to encourage their members to follow suggested best foundation practices and policies become important and very helpful. Still, for living donors, it is often hard to accept the legitimate public interest over what they do with their own money just because a tax deduction was obtained when they set up and provided funding for their foundation or charitable fund.

We all want the right to make our own philanthropic choices and at a personal, nondeductible level, we have almost unlimited freedom. It is when we move to giving directed to charitable entities operating in the “public interest” that donors qualify for tax deductions. So, by specifying who is eligible for deductible giving government exercises control over philanthropic choice. However, because of the very broad definition of qualified public interest activities embodied in Internal Revenue Code Section 501(c)(3), potential contributors currently have an estimated one and one half million tax-deductible charitable choices with more being added each year.

If it is important as an incentive for increasing the growth of philanthropic contributions that donors have the *greatest freedom possible for their philanthropic choice and selection*, then it is likewise important that donors have the *widest range possible of eligible nonprofit organizations from which to choose*. Yet some say we have too many tax-exempt groups or that we may undermine the tax base of the nation by the increasing growth of such organizations and their diverse undertakings.

What is peculiar to me about these complaints is that they often come from those who are deeply engaged in business and strong advocates for maximum free market operation. And, one of the most important principles of the free enterprise system is that it operates to enable people with new visions to enter the arena of competition and challenge established products, services, and new ways of doing things.

If an entrepreneur can obtain enough capital from supporters and is bold enough, a tiny Apple Computer Company can take on IBM and revolutionize the use of computers. And IBM can turn around and create new products to respond to the competition in ways that it might never have envisioned without the challenge.

It happens every day in business and we support and encourage that system as an expression of freedom and opportunity. We also believe that as a result new jobs are created, new wealth is generated and our economy is renewed and invigorated. However, we seem to think that a similar system is bad in the nonprofit sector.

Over the years, I have heard many people and even members of Congress, unhappy with the growing numbers of solicitations or some reported abusive situation, talk of limiting the number of new organizations that can be formed or restricting the tax deduction to apply only to charities working in specific fields. I must tell you that you ought to be very concerned if that idea ever seems to take root. When someone limits access to pursue new philanthropic and charitable visions or to raise up the new and emerging issues of our time, they limit our fundamental freedoms of choice and liberty.

Do we really want monopolies in the nonprofit world? Don’t we want the chance to try new ways of dealing with persistent problems? Don’t we feel it is important to have ways to challenge and stimulate renewal of our caring sector, as well as, our for-profit system? A lot is at stake in such a debate. If such limits had existed, I wonder if AIDS, or environmental concerns, or Mothers Against Drunk Driving or thousands of other new causes or insights would have been brought to our attention, as quickly, or at all, by existing organizations.

I believe that this vast array of nonprofit voluntary action options is a fundamental unifying strength of America. Because of the different aspirations, approaches, and interests represented in each group, we have an extraordinary richness and diversity of response to the concerns of our times. All together they form a tapestry woven out of liberty, conviction and humanity.

Philanthropic choices that involved the desire to have ongoing efforts to address difficult and vexing societal issues gave rise to the creation of foundations. These dedicated funds that were to exist for many, if not an indefinite number, of years also generated a new challenge for the founders who wanted to set boundaries for the work of their foundations after they were gone.

Probably no two words in the philanthropic and nonprofit world stir up more passions on all sides of the issue than the words, “Donor Intent.” But, what is it? How do you capture it and express it? How do you give it strength and flexibility at the same time? How do you keep it relevant through the passage of time? How do you pass it on to others as a compelling and motivating compass for future direction? These and many more questions arise as a trustee, executor, manager or director seeks to carry out their particular role and the mission of their foundation or nonprofit institution.

Depending upon someone’s role, different stakeholders have different objectives and concerns that sometimes conflict with each other in developing and expressing donor intent through a charitable gift instrument.

As a lawyer, you want to keep such expressions simple, limited and, wherever possible, use court and time tested boilerplate language.

As a donor, you want some help in thinking through and fully expressing your intentions and you have serious concerns about insuring trustee compliance.

As a trustee, you want clear and substantial donor instruction on the charitable mission, operating boundaries, goals and objectives you are mandated to pursue.

As a manager of a charitable trust or foundation, you want the governing instruments to provide the maximum freedom to pursue tactical execution of the donor’s goals and enough empowered flexibility to keep the current Board happy and engaged.

As a donee organization, you want considerable freedom to use any resources provided, as needed, with limited restrictions.

As the state Attorney General, you want your state’s public interest protected and the assets dedicated to charity used as the donor intended.

As the IRS, you want the assets receiving a charitable deduction to be dedicated to charitable, not private, use.

It is easy to see why it is difficult to meet every stakeholder’s needs and interests while maintaining the donor’s intent as primary.

Faced with these different desired outcomes, a lawyer charged with drafting something to deal with donor intent must look first at the rules courts have applied in determining and interpreting such intent. Generally a donor can impose on an independent charitable donee or their own foundation any condition he or she pleases and the recipient accepts, provided that it contains nothing contrary to established law or public policy.

This fact makes documenting conditional gifts and their terms, for the present and for future managers and trustees a vital duty for a donee organization or the foundation and yet it is one that is all too often treated lightly.

The challenge for maintaining donor intent therefore requires the building an institutional memory of what motivated the gift and what was expected of the organization and its trustees in return.

In will and trust cases, when questions over interpretations arise, over and over again, the courts seek to find if the donor clearly expressed his or her intentions and then bend over backwards trying to give that intention effect. Courts support the plain meaning of the words used, placing a heavy burden on the donor’s clear expressions of intention and the lawyer’s careful drafting of the language to be used. Hence, lawyer preference for the use of form book language that has met the

test of time as to clarity and meaning. And also, the concern of lawyers about saying too much more since that added language might introduce the dreaded ambiguity. For when ambiguity arises, facts and circumstances at the time of the governing document's execution may be considered in interpreting the donor's intentions.

The primary or cardinal rule in the construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the creator consistent with the law. As a result, courts hold the donor to high standards of careful thought in expressing their intentions. In the words of a legal treatise on the subject: "The construction of the trust instrument depends on the trustor's intent at the time of execution, as shown on the face of the documents and not by any secret wishes, desires or thoughts after the event."

Again, as mentioned before, only when the instruments are found to be ambiguous or uncertain may extrinsic evidence be admitted to aid construction.

This then is some of the legal framework surrounding the issue of defining and interpreting donor intent in founding documents. In light of these rules, documents are drafted by lawyers to be clear and unambiguous, using tried and true language that has met the test of time. The idea is to keep everything simple and the legal fees to a minimum. As we will see, this does not always work to effectively deal with preservation of the donor's intent over time. Still, at this point, the lawyer's role typically ends.

Now the responsibility of administering a charitable trust, endowment gift or foundation and carrying out the donor's intentions falls on trustees or managers of beneficiary institutions. Such persons, even though fully committed to fulfilling donor intent, are faced with certain real world challenges to accomplishment of the task.

If lawyers construct the governing instruments, for all the good and valid reasons on the lean side, trustees may be left with a perpetual

trust, boilerplate state and federal tax required language and little other binding or instructive donor expressions to guide them with their tasks.

Now it may be the donors' desire to just let the trustees take it from there, as was the intention of Andrew Carnegie and Henry Ford. Both men empowered their trustees to act as best they saw fit in the future to carry out the charitable intention of their foundations.

People who argue that trustees of the Ford and Carnegie foundations have betrayed the founders by supporting causes and programs the donors would never have supported are not really arguing that there has been a legal abuse. They are contending that the life long habits and actions of the founders should be used as a guide rather than their words. Because such critics don't like the choices being made by the current foundation's board, they would contend that "extrinsic evidence" should be used to provide Trustee guidance even when the donor did not expressly choose to give such instructions.

We have just seen that the courts will not consider such extrinsic evidence if trust language is clear and unambiguous. Nevertheless, efforts to look beyond legal documents for guidance, except when the matter is before a court, are not uncommon. Many trustees exercising the freedoms given to them to interpret their mandates decide to consider the founder's life actions, expressed interests and behavioral practices as compelling instruction and guidance for the decisions they make on the founder's behalf. Such an approach does introduce some realities they must deal with however.

If trustees look to a donor's life and actions for guidance it should be recognized that we all live numerous lives and interact with people in many different ways. At the office we may be direct, efficient, tough minded, and intense. At home we may be relaxed, loving, indirect, sloppy, and indecisive. With our friends we may be outgoing, fun loving, sarcastic and crude. At church we may be reflective, religious and caring. Which one are we really? Which practices in our lives should guide the operation of the charitable efforts we enable? Which expressions should be seen as influential? Who really can claim to

know us best when we are, in fact, all of those people? And what view of the donor and their lives is the one we want to perpetuate when all of those who knew them are gone from the board and new trustees now direct operations without a previous personal interaction with this real, but also, mythological person?

At this point perhaps a story allegedly about Henry Ford's philanthropy might be worth telling to illustrate my point. The story goes that Mr. Ford went to visit his ancestral home in Ireland. When he got there a local campaign was going on to create a hospital. The leaders of the drive came to see Mr. Ford and asked for a donation to their hospital project in the amount of \$50,000. Mr. Ford, however gave them only \$5,000. The next day the local newspaper headline read: "Henry Ford Gives Hospital \$50,000". Later that day the fund raising committee returned to Mr. Ford and offered to print a headline retraction stating that he only gave \$5,000. Mr. Ford thought it over and wrote out a second check for \$45,000. But he said that the additional gift was conditioned on the Hospital placing over the doorway at the entrance, the biblical verse that said: "I was a stranger, but you took me in!"

Now how would observing such actions guide a trustee in making current decisions about doing things the way Mr. Ford would have done. Well you could say he was courteous in receiving donees seeking his assistance. He was also immediately responsive but he only gave 10% of what was sought. He did not do a long due diligence review of the request but he relied on the charity's good faith to carry out their promise to use his donation for the hospital's construction. It could also be said that he was willing to reconsider his decisions in light of new facts and be even more generous when needed.

It looks like he favored hospital construction or bricks and mortar donations and gave in places where he had some personal connection. It is also clear from the story that he learned from his mistakes and held himself accountable. He certainly wanted to express his own viewpoint through his giving and he wasn't afraid to attach conditions to his gifts. A caution is that when we turn to looking at the life and actions of a donor for guidance we enter the realm of vignette interpretation and

introduce our personal and selective assessment of what was instructional about the episode or experience with the donor.

In considering donor intent, it should be noted that it is common practice by lawyers to insert in governing documents that the charitable trust or foundation being created will exist "in perpetuity." This simple phrase has vast implication for operation of a foundation. First of all, as John D. Rockefeller Jr. reportedly said: "Perpetuity is a very long time." It means that there will be lots of successor trustees, foundation managers, and staffs that will have to identify, articulate, and decide on the degree of allegiance they will have to the extrinsic evidence of the donor's intent.

They will likely be more inclined to rely on the actual written directions of the donor as to what they are supposed to do and be far less influenced by hearsay about a donor's personal actions reported to them out of the context of any direct interaction. And if we go back and note that most documents are limited in instruction, it is easy to see how trustees begin to interpret broad authority to be just that and rely on their own preferences and views of the world to guide their actions as trustees.

Constantly changing world circumstances introduce another challenge to preservation of donor intent. When Al Meadows set up the Meadows Foundation to benefit the people of Texas it had limited assets and was used primarily for his personal giving. When his first wife died and left the bulk of her estate to the foundation in 1961 the foundation grew to \$25 million and he enlarged the board to bring on his six brothers and sisters along with some trusted advisors. By 1978, the assets had grown to \$60 million and, under his direction, were focused on completing a few major giving efforts he had undertaken. He still believed that Texas was a big enough place to give all of the foundation's gifts.

Several of his sisters had died and members of the next generation had replaced them but none had been given any formal training or orientation for their role. Everyone understood that this was money he

made and that he had his own plans on how to spend it. The family was there to observe and perhaps counsel him from time to time as he requested.

When he was suddenly killed in an automobile accident, the family assumed the responsibility of continuing the foundation's work. I was elected to become the President with only limited interaction with my uncle on the subject of the foundation or his plans for its work. In fact, I had been elected a director only one month and attended only one meeting of the board before our founder died. I did have the impertinence to ask him some questions at that one meeting and his answers provided very important guidance on some key philanthropic issues later on.

What Al Meadows did not foresee was the tremendous increase in the value of the oil company that was the bulk of the foundation's assets. He did not fully anticipate the difficult decisions the board would have to make in deciding to sell the company stock during a take-over battle and the amazing stock market of the late 80's and early 90's that would increase foundation assets to over \$900 million at one point. He did not envision that over the next twenty years his foundation would distribute over \$400 million in charitable contributions.

He did not appreciate the intergenerational family dynamics that would have to be managed as governance moved through different generations of the Meadows Family. He did not fully anticipate that the foundation would evolve from a localized family giving enterprise into an institution of influence and engagement with the major problems of our times. He did not foresee the impact Mexico and other national and world concerns would have on the future of Texas when he limited our giving to Texas.

It wasn't his fault because none of us have crystal balls that can see much beyond five years with clarity and insight. Fortunately for us, a Texas geographical limitation was about the only unchangeable giving restriction our founder gave us. So, with the broad giving options authorized in the founding documents, we had considerable freedom to

interpret his mandate into action, as well as, expand family participation to deal with a much larger number of widely dispersed family members.

It was that flexibility that allowed us to refine and articulate donor intent in terms and systems that would provide an enduring base for the continuance of his dream for his family to always be engaged in philanthropic work. An analysis of his giving patterns gave us considerable guidance and general areas of interests for giving but interpretation in specific fact situations was still required by the family and directors.

How did we do that and how do I now recommend others undertake similar efforts if the goal is to operate in perpetuity? First, be careful about using legally binding donor restrictions in terms of institutions or unduly narrow limitations of giving. Allow, as much as is acceptable, flexibility for the present and future directors and trustees to relate the donor's broad goals to the changing issues and institutions of the future.

Second, articulate donor intent around values and principles that have the capacity to give timeless guidance to trustees. At the Meadows Foundation, we sought to articulate the unifying family values that motivated him to select his family to continue his lifetime commitment of helping others. We worked together over a considerable time to capture and express these guiding values and principles that would create common cause for the foundation's work.

These have been revisited periodically to make sure that the articulation of these values and principles still resonates with relevance and compelling power. We put in the headquarters of the foundation objects from his home, photographs and copies of art works he gave to others. We regularly discuss and remember him as we consider giving opportunities together. While there may be a few things we do that he might not have done, I am certain that he would be proud of the results because the values are the same even when the specific charitable selections are not.

If I could add one more thing for the donor to leave trustees as guidance on donor intent, I would recommend a video interview of him or her where they discussed their personal values, their hopes for the foundation, their feelings about others and their expectations of the selected trustees. I would ask donors to express these ideas in terms of a future world they could not clearly see and talk to future trustees about these matters in a way that would make any trustee feel personally instructed by the founders. I believe that this would be a very powerful force in maintaining donor intent defined around principles, objectives and goals.

Even so, it should be remembered that the Ten Commandments have had thousands of years of rabbinical interpretation. It hasn't changed the Ten Commandments but it does adapt their application to contemporary situations and needs and keeps them relevant and powerful anchors for all time. Our Constitution would have hundreds of amendments, and perhaps, even been thrown out, if we had not had the ability for our courts to interpret and make relevant the principles embodied there in the context of changing world conditions and situations.

So what do I tell charitable donors of great wealth to do about donor intent? First I say that examination of cited cases of the so called betrayal of donor intent reveal that the fault often lies with the founders. Few donors give as much thought and attention to the distributions of their assets as they did to their accumulation.

Establishing an enduring and socially relevant institution with a mission and vision that will contribute ongoing value to society for potentially hundreds of years, is a daunting task. A brief visit or two to a lawyer or accountant's office will certainly not accomplish it. In my opinion, no one and no piece of paper can absolutely assure him or her that their particular donative intent can be maintained, without change, indefinitely.

The future will mandate change or the trustees will be forced to interpret the mission and make it relevant to new conditions. If a

founder can live with this reality then he or she should be at peace and empower the trustees to vigorously pursue the foundation's real underlying objectives with timeless values.

If they can't stand that scenario for the future work of the foundation, then they have some serious work to do. I tell them that if you don't want to give it away while you are here then you must prepare those who will do so when you are gone.

If they are unwilling to give the foundation planning process significant time and thought as a priority in their busy lives, a founder, highly concerned about preservation of donor intention, may want to think in terms of ending the foundation at a time certain or when the last of the trustees appointed and instructed by him or her retires or dies.

I recommend that a founder start giving his or her accumulated assets away as soon as possible. It gives trustees of the future models and examples of donor action to consider. Lifetime giving allows founders to instruct those they want to carry on when they are gone. Actual experience enables donors to grow in insight and understanding and they themselves may come to change their views about the best way to use their funds philanthropically.

It should be noted that these same issues of donor intent, succession and preservation of institutional memory are present in any gift of endowment to nonprofit institutions. They are also subject to similar pressures to interpret the donor's intentions in light of changing times and work must be done here as well as with charitable trusts and foundations to insure adherence to donor intent.

So after all of my experience and reflection on this issue this is where I have come out. I am much more an advocate for lifetime giving by a donor than leaving it to others to do. I am an advocate for starting right away because no one can tell a donor how much time they will have to accomplish their giving objectives. I think I believe less in the power of the written document to provide lasting enduring adherence to donor intent and find it more useful as a definition of the large

boundaries of the playing field within which there is great flexibility to operate.

The only way anyone can be absolutely sure that things will be done exactly their way is to do them themselves. Everyone else, no matter how well meaning, will make some personal choices the founder might not make and, as allegiance to the founder diminishes with time and distance, so does the sense of compelling commitment to donor intent. It is inevitable in my opinion and therefore demands of a donor significant reflection and decision. Whatever they decide, society will benefit from such deeper thinking about the real importance and relevance of charitable giving vehicles that go on for years or in perpetuity.

Philanthropic choice and donor intent require an atmosphere of freedom and liberty to flourish. Yet, with such freedom and privilege come expectations of responsible and appropriate behavior by founders and donors. Public interest in the foundation's work begins at inception and will continue for the life of the foundation.

In his book Inside American Philanthropy, Waldemar Nielson writes about the central role of the founder who, with freedom of philanthropic choice, responsibly launches a foundation with "ideas, courage and entrepreneurial skills" as he says:

The ability of foundations to make significant and timely responses to the growing social crisis in America will depend on two factors above all others-namely, the capability and commitment of their donors. Each of these individuals is at the start the standard setter for his or her foundation's relevance and effectiveness-and subsequently will be the driving force behind (or sometimes the drag factor on) the organizations performance.