

Below is an Opinion of the Court.

  
ELIZABETH PERRIS  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
          ) No. 04-37154-elp11  
ROMAN CATHOLIC ARCHBISHOP OF )  
PORTLAND IN OREGON, AND SUCCESSORS, )  
A CORPORATION SOLE, dba the )  
ARCHDIOCESE OF PORTLAND IN OREGON, )  
          ) Debtor. )  
\_\_\_\_\_) )  
TORT CLAIMANTS COMMITTEE, ) Adv. Proc. No. 04-3292  
          ) )  
          ) Plaintiff, ) MEMORANDUM OPINION RE TORT  
          ) ) CLAIMANTS COMMITTEE'S FOURTH  
18           v. ) ) MOTION FOR PARTIAL SUMMARY  
          ) ) JUDGMENT AND DEBTOR'S CROSS-MOTION  
ROMAN CATHOLIC ARCHBISHOP OF ) FOR PARTIAL SUMMARY JUDGMENT  
PORTLAND IN OREGON, AND SUCCESSORS, ) (PERPETUAL ENDOWMENT FUND)  
A CORPORATION SOLE, dba the )  
ARCHDIOCESE OF PORTLAND IN OREGON, )  
et al., )  
          ) Defendants. )

In this chapter 11<sup>1</sup> case, the Tort Claimants Committee (TCC) filed

<sup>1</sup> Unless otherwise indicated, all chapter and section references  
(continued...)

1 this adversary proceeding to obtain a declaration of whether certain real  
2 and personal property is property of debtor Roman Catholic Archbishop of  
3 Portland's (debtor) bankruptcy estate. The parties have filed cross-  
4 motions for a determination of whether the Perpetual Endowment Fund  
5 (fund), which was established in 1981, more than 20 years before  
6 bankruptcy, is property of debtor's estate. In the alternative, the TCC  
7 seeks a determination that debtor's beneficial interest in the fund and  
8 certain powers it may exercise are property of the estate.

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

FACTS

Debtor is a corporation sole, organized under Oregon non-profit corporation law. It filed chapter 11 in 2004. In its Statement of Financial Affairs filed in connection with the bankruptcy case, debtor listed a Perpetual Endowment Fund,<sup>2</sup> valued at approximately \$36,000,000, as "personal property held for another." Debtor takes the position that the fund is held in a charitable trust and therefore is not part of the bankruptcy estate and is not available to pay the obligations it may owe to the tort claimants. The TCC takes the position that the fund is not a valid trust, and is therefore part of debtor's bankruptcy estate and is subject to the claims of creditors.

---

<sup>1</sup>(...continued)  
are to the version of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, in effect before the 2005 amendments.

<sup>2</sup> This fund has at times been referred to as the "Quasi-Endowment Fund," but there is no dispute that the two different names refer to the same fund. Because the Declaration of Trust establishes the Perpetual Endowment Fund, I will refer to it by that title to the extent I use a particular title.

1 The fund was created in 1981 by a Declaration of Trust. Because  
2 interpretation of the particular provisions of the declaration is the key  
3 to resolving these motions, I will set out at length the language of the  
4 Declaration of Trust:

5 CORNELIUS M. POWER, Archbishop of Portland in Oregon, being mindful  
6 of the solemn duty imposed upon him by reason of his office to see  
7 to the perpetuation of the work of the Church in western Oregon,  
hereby establishes the Perpetual Endowment Fund (Fund) for the  
Archdiocese of Portland in Oregon (Archdiocese).

8 Source of Endowment Fund.

9 The net proceeds from the sale of land in Washington County, Oregon,  
10 known as the St. Mary's Home property, shall constitute the initial  
11 assets of the Fund. Other money or property may, from time to time,  
12 be designated by the Archbishop as assets of the Fund. In addition,  
any gifts, bequests or other assignments of property to the Fund,  
upon acceptance thereof, shall become a part of the Fund, subject to  
the provisions of this Declaration of Trust.

13 Goals and Objectives.

14 The primary goal of the fund shall be the perpetuation of the  
15 mission of the Church. The particular objectives of the Fund are as  
follows:

- 16 1. The funding of the operating expenses of the Chancery Office of  
17 the Archdiocese.
- 18 2. The funding of the religious, charitable and educational  
19 programs of the Archdiocese.
- 20 3. The funding of the religious, charitable and educational  
21 programs of the Roman Catholic Church in America and throughout  
the world.

22 Management of the Fund.

23 The management of the assets of the Fund shall be handled by one or  
24 more Investment Managers selected by the Vicar for Business Affairs  
25 of the Archdiocese, with the approval of the Archbishop. Subject to  
26 other provisions of this Declaration of Trust and the authority of  
the Archbishop or other authorized officers of the Archdiocese, the  
Investment Managers shall have, in dealing with the assets of the  
Fund, all of the powers and duties set forth in the Uniform

1 Trustees' Powers Act as the same is now or may hereafter be enacted  
2 in the State of Oregon.

3 . . . . .

4 Investment Objectives and Inviolability of Principal of the Fund.

5 The primary investment objective shall be the safety of the  
6 principal of the Fund. In order to protect the Fund from erosion by  
7 inflation, the Investment Managers shall annually return to the  
8 principal of the Fund such amount as shall be directed by the Vicar  
9 for Business Affairs, but not less than 5% nor more than 20% of the  
10 income of the Fund.

11 Subject to the foregoing priority, the Fund shall be managed with a  
12 view to maximum income. Subject to long-term economic trends, it is  
13 contemplated that the income from the Fund should be not less than  
14 10% per annum.

15 Distribution and Uses of Income.

16 After reinvestment of a portion of the income to preserve the  
17 integrity of the Fund, as provided above, the annual income of the  
18 Fund shall be distributed for the following purposes:

- 19 1. The first priority shall be the operating expenses of the  
20 Chancery of the Archdiocese. To the extent that income from  
21 the Fund is sufficient, minimal assessments shall be levied  
22 upon the parishes of the Archdiocese for such purpose.
- 23 2. The second priority for the use of the income from the Fund  
24 shall be the support of programs of the Archdiocese, including  
25 St. Mary's Home.
- 26 3. The third priority for the use of the income of the Fund shall  
be assistance to other segments of the Church in the United  
States and throughout the world.

All uses of the anticipated income of the Fund shall be subject to  
the normal budgetary procedures of the Archdiocese.

Procedure for Withdrawal of Income from the Fund.

After appropriate budgets have been completed, income from the Fund  
shall be distributed in such manner as the Fund managers are  
instructed in writing by three corporate officers of the  
Archdiocese.

Modification and Amendment of this Declaration of Trust.

1 The Fund established hereby is intended to be perpetual. However,  
2 recognizing that change is inevitable, the power to amend or modify  
3 any of the provisions of this Declaration of Trust is reserved to  
4 the office of the Archbishop of Portland in Oregon. Should this  
instrument be terminated or the Fund otherwise dissolved, all assets  
of the Fund shall be distributed to the General Treasury of the  
Archdiocese.

5 Declaration of Trust, Declaration of Albert N. Kennedy in Support of Tort  
6 Claimants Committee's Fourth Motion for Partial Summary Judgment, Exhibit  
7 6 at 127-130.

8 The entity that established the fund in 1981 was the Archdiocese of  
9 Portland in Oregon, an Oregon non-profit corporation incorporated in 1909  
10 (the 1909 corporation). In 1991, the 1909 corporation merged with  
11 debtor, the Roman Catholic Archbishop of Portland in Oregon. Debtor is  
12 the surviving corporation.

13 The fund was originally made up of the proceeds from the sale of  
14 certain land owned by the 1909 corporation. There is no indication that  
15 the real property was a substantial portion of the real property used in  
16 the 1909 corporation's operations. Additions to the fund included  
17 unrestricted gifts to the Archdiocese or the Archbishop, and interest  
18 income on the fund that was retained in the fund. Declaration of Leonard  
19 Vuylsteke at ¶ 4.

20 After debtor filed its chapter 11 petition, it listed the fund in  
21 its Statement of Financial Affairs as personal property held for another.  
22 The TCC filed an adversary proceeding to obtain a determination whether  
23 the fund and other assets listed by debtor as being held for others were  
24 in fact property of the bankruptcy estate. With regard to the fund, the  
25 TCC filed a motion for summary judgment "(a) declaring that the fund  
26

1 . . . is not subject to a valid trust and is property of the Debtor's  
2 estate; or, alternatively, (b) declaring that Debtor's powers to amend,  
3 modify, terminate and direct distribution of the Fund, together with  
4 Debtor's beneficial interest in the Fund, are property of the estate."  
5 TCC'S Fourth Motion for Partial Summary Judgment at 2. Debtor in turn  
6 filed a cross-motion for partial summary judgment "that the Perpetual  
7 Endowment Fund is a charitable trust and is not property of the Debtor's  
8 estate." Debtor's Cross Motion for Partial Summary Judgment at 2.

#### 9 ISSUES

- 10 1. Whether the fund is property of debtor's bankruptcy estate.
- 11 2. Whether debtor has a beneficial interest in the fund or certain  
12 powers that are property of the estate.

#### 13 DISCUSSION

##### 14 I. Standard for summary judgment

15 The court shall grant summary judgment "if the pleadings,  
16 depositions, answers to interrogatories, and admissions on file, together  
17 with the affidavits, if any, show that there is no genuine issue as to  
18 any material fact and that the moving party is entitled to a judgment as  
19 a matter of law." Fed. R. Civ. P. 56(c), made applicable to adversary  
20 proceedings by Fed. R. Bankr. P. 7056.

##### 21 II. The fund as property of the estate

22 The filing of a bankruptcy petition creates an estate that is  
23 comprised of "all legal or equitable interests of the debtor in property  
24 as of the commencement of the case." § 541(a). Property of the estate  
25 does not include "any power that the debtor may exercise solely for the  
26

1 benefit of an entity other than the debtor," § 541(b)(1), or "[p]roperty  
2 in which the debtor holds, as of the commencement of the case, only legal  
3 title and not an equitable interest . . . ." § 541(d). Under § 541(d),  
4 property held in trust by a debtor for another is not property of the  
5 bankruptcy estate. In re Unicom Computer Corp., 13 F.3d 321, 324 (9th  
6 Cir. 1994); In re Bishop College, 151 B.R. 394 (Bankr. N.D. Tex. 1993)  
7 (charitable trust not property of bankruptcy estate).

8 Debtor asserts that the fund is a valid charitable trust and that,  
9 as trustee, debtor holds only legal but not equitable title to the fund.  
10 The TCC argues that the fund is not a valid trust, because it is self-  
11 settled and revocable, and because debtor is both the trustee and the  
12 sole beneficiary of the trust. In the alternative, it asserts that the  
13 estate holds the power to modify, amend, terminate, and direct  
14 distribution of the fund, together with debtor's beneficial interest in  
15 the fund.

16 Although bankruptcy law defines what is property of the bankruptcy  
17 estate, "[p]roperty interests are created and defined by state law."  
18 Butner v. U.S., 440 U.S. 48, 55 (1979). I turn then to Oregon law to  
19 determine what rights debtor has in the fund, which it holds in its name.

20 A. Did the Declaration of Trust create a charitable trust?

21 The first question is whether the Declaration of Trust purported to  
22 create a trust that is charitable in nature.

23 A charitable trust is a fiduciary relationship with respect to  
24 property arising as a result of a manifestation of an intention to  
25 create it, and subjecting the person by whom the property is held to  
26 equitable duties to deal with the property for a charitable purpose.

1 Restatement (Second) of Trusts § 348 (1959).<sup>3</sup> A charitable trust is  
2 created in the same way as a private trust is created. Id. at § 349 cmt.  
3 a. However, there are differences between private trusts and charitable  
4 trusts. A private trust requires an identifiable, specific beneficiary,  
5 while a charitable trust has indefinite beneficiaries and has a "public  
6 charitable purpose." Pennoyer v. Wadhams, 20 Or. 274, 278-79 (1891).  
7 Unlike a private trust, a charitable trust may continue for an indefinite  
8 or unlimited period; the rule against perpetuities does not apply.  
9 Restatement (Second) of Trusts § 365; Agan v. U.S. Nat'l Bank, 227 Or.  
10 619 (1961).

11 Determining whether the Declaration of Trust created a valid,  
12 enforceable charitable trust requires interpretation of the Declaration  
13 of Trust. Under Oregon law, "[t]he same rule of construction applies in  
14 the interpretation of an instrument creating a trust as controls in  
15 construing any other document, to wit, that the intention of the maker of  
16 the instrument must, if possible, be determined and given effect."  
17 Williams v. Morris, 144 Or. 620, 625 (1933).

18 In this case, the 1909 corporation executed a Declaration of Trust

---

19  
20 <sup>3</sup> Oregon courts have relied on the Restatement (Second) of Trusts  
21 in deciding cases dealing with trusts under Oregon law. See, e.g., Agan  
22 v. U.S. Nat'l Bank, 227 Or. 619 (1961); Lozano v. Summit Prairie  
23 Cattlemens Ass'n, 155 Or. App. 32 (1998). They have cited the  
24 Restatement (Third) of Trusts, the first two volumes of which were  
25 published in 2003, only once. See Generaux v. Dobyngs, 205 Or. App. 183  
26 (2006). The parties do not point to any substantive differences between  
the second and third restatements that are relevant to my decision on  
these motions. Therefore, I will rely primarily on the Restatement  
(Second) of Trusts where reference to the Restatements is necessary or  
helpful.



1 under which it declared that it was holding certain property in a fund  
2 for particular uses that benefit certain definite and indefinite  
3 beneficiaries. That language manifests an intent to create a trust. A  
4 trust can be created by the owner of property declaring that he holds the  
5 property in trust. Restatement (Second) of Trusts § 17(a)(trusts in  
6 general). A charitable trust can be created by the owner of property  
7 declaring that he holds the property "upon a charitable trust[.]"  
8 Restatement (Second) of Trusts § 349(a)(charitable trust).<sup>4</sup> Nothing  
9 prevents a charitable organization that owns property from declaring that

---

11 <sup>4</sup> Debtor cites ORS 130.155, Oregon's enactment of the Uniform  
12 Trust Code, as setting out the requirements for creation of a trust. ORS  
13 chapter 130 was enacted by the 2005 legislature, with an effective date  
14 of January 1, 2006. Debtor says that this statute applies to this case,  
15 quoting ORS 130.910(a) as follows: "O.R.S. Chapter 130 applies to all  
16 trusts created before, on or after January 1, 2006."

17 That quotation is misleading and debtor's assertion that chapter 130  
18 applies to this case is wrong. What the application statute actually  
19 says, when the pertinent portion is quoted in its entirety, is:

20 (1) Except as otherwise provided in ORS chapter 130:

21 (a) ORS chapter 130 applies to all trusts created before, on or  
22 after January 1, 2006.

23 (b) ORS chapter 130 does not apply to judicial, administrative  
24 and other proceedings concerning trusts commenced before January 1,  
25 2006.

26 ORS 130.910(a)(emphasis supplied). This bankruptcy case was commenced in  
2004, as was this adversary proceeding, which concerns the trust. Thus,  
ORS chapter 130 does not apply to my determination of whether the fund is  
property of the bankruptcy estate. See also Generaux v. Dobyngs, 205 Or.  
App. 183, 188 n.3 (2006) (Uniform Trust Code as adopted by 2005  
legislature does not apply to judicial proceedings concerning trusts that  
were commenced before January 1, 2006).

1 it holds that property in a charitable trust. Further, "[i]t is not  
2 uncommon for a non-profit corporation to be a trustee of a charitable  
3 trust[.]" In re Parkview Hospital, 211 B.R. 619, 638 (Bankr. N.D. Ohio  
4 1997). See also Restatement (Second) of Trusts § 348 cmt. f. (property  
5 may be put in charitable trust by transferring it to charitable  
6 organization).

7 The purpose of this trust is charitable. The fund has three  
8 objectives: payment of operating expenses of the Chancery Office of the  
9 Archdiocese; funding the religious, charitable and educational programs  
10 of the Archdiocese; and funding the religious, charitable and educational  
11 programs of the national and international Roman Catholic Church.  
12 Whether or not the funding of the operating expenses of the Chancery  
13 Office is a charitable purpose, funding religious and educational  
14 programs of the church, either local, national, or international,  
15 certainly is a charitable purpose. See Restatement (Second) of Trusts  
16 § 368 (charitable purposes include advancement of education and  
17 religion); Pennoyer v. Wadhams, 20 Or. 274 (1891)(support of religion is  
18 charitable purpose).<sup>5</sup>

19 Thus, debtor has established that the Declaration of Trust created a  
20 charitable trust. I turn now to whether that charitable trust is valid.

21 B. Is the trust valid under Oregon law?

22 The TCC argues that the fund is not a valid trust enforceable under  
23

---

24 <sup>5</sup> The TCC does not seriously challenge the fact that the fund is  
25 a charitable trust; its argument is that the trust is invalid for reasons  
26 discussed below.

1 Oregon law, because it is a self-settled revocable trust, and because  
2 debtor is its sole beneficiary.

3 1. Is the fund a revocable self-settled trust?

4 Under Oregon law, the settlor of a trust that the settlor can revoke  
5 is considered to be the owner of the trust property, and the trust assets  
6 are subject to being reached by the settlor's creditors. Johnson v.  
7 Commercial Bank, 284 Or. 675, 680-82 (1978).

8 (i) Settlor of fund

9 The parties agree that the settlor of the fund was the 1909  
10 corporation, the Archdiocese of Portland in Oregon, which merged into  
11 debtor after the fund was created. The original trustee of the fund was  
12 also the 1909 corporation.

13 Debtor argues, without citing any authority, that, because debtor is  
14 the surviving corporation of the merger of the 1909 corporation with  
15 debtor, debtor was not the settlor. It argues that debtor is the trustee  
16 of the fund only as a "successor trustee" under trust law, not by virtue  
17 of having absorbed the 1909 corporation into debtor.

18 There is no dispute that debtor is the current trustee of the fund.  
19 The question is whether debtor was the settlor of the fund. I agree with  
20 the TCC that debtor was the settlor of the fund, because debtor is the  
21 surviving corporation to the 1909 corporation that created the fund.

22 ORS 65.494 sets out the effect of a merger of non-profit  
23 corporations: "Every other corporation party to the merger merges into  
24 the surviving corporation" when the merger takes effect. ORS 65.494(1).  
25 "The surviving corporation has all liabilities and obligations of each  
26

1 corporation party to the merger[.]” ORS 65.494(3). Actions pending  
2 against merging corporations may continue as if the merger did not occur,  
3 or the surviving corporation may be substituted as a party. ORS  
4 65.494(5). Thus, the corporation that merges into the surviving  
5 corporation simply becomes part of the surviving corporation, and actions  
6 that had been taken by the corporation that ceases to exist after the  
7 merger should be considered to be the actions of the surviving  
8 corporation.

9 The Restatement (Second) of Trusts § 385, on which debtor relies,  
10 does not specifically deal with merger of corporations, but merely says  
11 that “powers conferred upon a trustee of a charitable trust can properly  
12 be exercised by his successors . . . .” As I said above, the question is  
13 not whether debtor is a successor trustee; it is whether debtor was the  
14 settlor.<sup>6</sup>

15 Even apart from the statute, debtor’s argument that the 1909  
16 corporation must be viewed as different from debtor would lead to  
17 illogical results. For example, the Declaration of Trust lists as an  
18 objective of the fund “funding of the operating expenses of the Chancery  
19 Office of the Archdiocese.” Under debtor’s theory, because the  
20 Archdiocese (the 1909 corporation) merged into debtor, there is no longer  
21 a Chancery Office of the Archdiocese that could receive operating  
22 expenses from the fund. That is clearly not the position debtor takes  
23

---

24 <sup>6</sup> Because I conclude that debtor is the settlor of the fund by  
25 virtue of having absorbed the 1909 corporation, I will hereafter refer to  
26 the settlor of the fund as debtor.

1 with regard to the use of the income from the fund.

2 I conclude that debtor, through its predecessor the 1909  
3 corporation, was the settlor of the fund.

4 (ii) Right to revoke or terminate

5 The TCC argues that the Declaration of Trust gives debtor the right  
6 to modify, amend, or terminate the trust. Debtor responds that debtor  
7 does not have the power to amend or modify the trust, and that the trust  
8 is intended to be perpetual and therefore irrevocable.

9 The pertinent portion of the Declaration of Trust provides:

10 The Fund established hereby is intended to be perpetual. However,  
11 recognizing that change is inevitable, the power to amend or modify  
12 any of the provisions of this Declaration of Trust is reserved to  
13 the office of the Archbishop of Portland in Oregon. Should this  
instrument be terminated or the Fund otherwise dissolved, all assets  
of the Fund shall be distributed to the General Treasury of the  
Archdiocese.

14 Declaration of Trust, Declaration of Albert Kennedy, Exh. 6 at 130. This  
15 language contains three ideas. First, that the fund is intended to be  
16 perpetual. Second, that the fund may be amended or modified by "the  
17 office of the Archbishop of Portland in Oregon." Third, that, upon  
18 termination of the fund, the fund assets will be distributed to debtor's  
19 general treasury.

20 The Declaration of Trust does not specifically reserve to anyone the  
21 right to revoke the fund. The Declaration of Trust does reserve to "the  
22 office of the Archbishop of Portland in Oregon" the right to amend or  
23 modify the fund. Assuming for purposes of this section of the discussion  
24 that the right to modify or amend a declaration of trust includes the  
25 right to revoke the trust, the question is whether that right is reserved  
26

1 to debtor.

2 Debtor argues that "the office of the Archbishop" is not debtor, the  
3 corporation sole, but instead is the canonical office of Archbishop.

4 The Declaration of Trust says that it is created for "the  
5 Archdiocese of Portland in Oregon," which is then referred to as  
6 "Archdiocese." The parties agree that "the Archdiocese of Portland in  
7 Oregon" is debtor's predecessor 1909 corporation, which has merged into  
8 debtor. Thus, where the Declaration of Trust intended to refer to debtor  
9 (or its predecessor), it used the term "Archdiocese" or "Archdiocese of  
10 Portland in Oregon."

11 The language in the provision dealing with amendment and  
12 modification is very different; it reserves the right to modify or amend  
13 not to the Archdiocese, but to "the office of the Archbishop of Portland  
14 in Oregon." It is not readily apparent what the term "office of the  
15 Archbishop" means. What is readily apparent is that it refers to  
16 something or someone different from the Archdiocese.

17 In determining the intent of the settlor, the court looks at the  
18 language used in the document, giving the language its ordinary meaning.  
19 See ORS 42.250 (terms of a writing presumed to have been used in their  
20 "primary and general acceptance"). However, evidence is admissible that  
21 certain terms "have a technical, local, or otherwise peculiar  
22 signification and were used and understood in the particular instance[.]"  
23 Id. Here, it is not clear what the meaning of "the office of the  
24 Archbishop" is. Given that the role of the court is to determine the  
25 intent of the settlor, and that this Declaration of Trust was executed by  
26

1 a Roman Catholic Archbishop, dealing with Archdiocesan assets, the term  
2 should be interpreted according to the understanding of the Archbishop  
3 who used the term. See Restatement (Third) of Property (Wills & Donative  
4 Transfers) § 11.2(b)(3) cmt. r. ("The donor's personal usage is . . . the  
5 donor's habitual usage of a term in a manner used in the donor's  
6 profession, business, religion, or academic discipline[.]"); ORS 42.250.

7 Debtor has presented evidence that the term "office of the  
8 Archbishop of Portland in Oregon" means the ecclesiastical office of  
9 Archbishop under Canon Law. Declaration of Most Rev. John G. Vlazny at  
10 ¶ 15; Declaration of Nicholas P. Cafardi at ¶ 11. Archbishop Vlazny  
11 reasons that the office of the Archbishop referred to in the modification  
12 and amendment provision is the same office referred to in the Preamble of  
13 the Declaration of Trust, where Archbishop Power refers to "being mindful  
14 of the solemn duty imposed upon him by reason of his office to see to the  
15 perpetuation of the work of the Church in western Oregon[,]" and "[t]he  
16 only 'office' which imposed a solemn duty upon him would be the  
17 ecclesiastical office of Archbishop." Declaration of Most Rev. John G.  
18 Vlazny at ¶ 15. Professor Cafardi relies on the 1983 version of the Code  
19 of Canon Law, c. 383 § 1, which describes the pastoral functions of a  
20 diocesan bishop.

21 In light of the difference in language used to refer to debtor and  
22 to the person who holds the power to modify or amend the Declaration of  
23 Trust, I agree with debtor that the two are not the same. The TCC has  
24 not provided any evidence contradicting debtor's evidence of the  
25 specialized meaning of "office of the Archbishop" as used in the  
26

1 Declaration of Trust. Therefore, I conclude that the power to modify or  
2 amend the Declaration of Trust is reserved to the Archbishop as an  
3 ecclesiastical office, not to debtor, which is a corporation sole  
4 organized under state law. Thus, debtor, as the settlor of the trust,  
5 does not retain the power to modify or amend the trust. Therefore, even  
6 if a power to modify or amend included the power to revoke, that power  
7 does not belong to debtor.

8 Furthermore, even if the Declaration of Trust reserved to debtor the  
9 right to modify or amend, that would not necessarily mean that debtor has  
10 the power to revoke the trust. Under Oregon law applicable to this  
11 adversary proceeding, the settlor of a trust may reserve the right to  
12 revoke a trust, but if the settlor does not reserve that right, the trust  
13 is irrevocable without the consent of the beneficiaries. Stipe v. First  
14 Nat'l Bank of Portland, 208 Or. 251, 268 (1956).<sup>7</sup> Here, the Declaration  
15 of Trust does not mention revocation, let alone expressly reserve that  
16 right.

17 The TCC argues that, because the terms of the trust allow

18 \_\_\_\_\_  
19 <sup>7</sup> ORS 130.505(1) now provides that the settlor may revoke or  
20 amend a trust unless the terms of the trust expressly provide that it is  
21 irrevocable. As I explained in n.4, supra, Oregon's enactment of the  
22 Uniform Trust Code, of which ORS 130.505 is a part, does not apply to  
23 this adversary proceeding.

24 I reject the TCC's argument that the Oregon Trust Code merely  
25 codified what was already the law in Oregon. First, it has cited no  
26 legislative history to support that assertion. More importantly, at  
least with regard to this particular provision of the code, the Uniform  
Trust Code is directly contrary to existing Oregon law as set out in  
Stipe.



1 modification of any of the provisions of the Declaration of Trust, the  
2 trust could be modified to provide for revocation.

3 "If the settlor reserves a power to modify the trust, it is a  
4 question of interpretation to be determined in view of the language used  
5 and all the circumstances whether and to what extent the power is subject  
6 to restrictions. If the power to modify is subject to no restrictions,  
7 it includes a power to revoke the trust." Restatement (Second) of Trusts  
8 § 331 cmt. h. Where there is a question of whether the settlor intended  
9 to reserve the right to revoke, a statement that the trust is irrevocable  
10 will control, unless contradicted by other terms of the trust. George G.  
11 Bogert, et al., The Law of Trusts and Trustees § 992 (Rev. 2d ed. 2005).

12 I conclude that, reading the Declaration of Trust as a whole, the  
13 power to modify does not include the power to revoke the trust. The  
14 Declaration of Trust specifically says that the fund "is intended to be  
15 perpetual." "Perpetual" is defined as "[l]asting or destined to last  
16 forever, eternal; never ending or ceasing." Oxford English Dictionary  
17 (Online), <http://www.oed.com/> (enter "perpetual" and click on "Find  
18 Word").

19 The TCC is correct that the Declaration of Trust does not say that  
20 it is irrevocable or that it actually is perpetual (as opposed to being  
21 intended to be perpetual). However, the court's job is to ascertain the  
22 intent of the settlor of the trust. Language that the trust is intended  
23 to be perpetual indicates an intent that it not be revocable. Therefore,  
24 even if debtor had reserved to itself the right to modify the trust, that  
25 right did not include the right to revoke the trust.

1           The facts of this case differ from those in Askanase v. LivingWell,  
2 Inc., 45 F.3d 103 (5th Cir. 1995). In that case, the bankruptcy trustee  
3 sought to exercise the reserved rights of the debtor settlor to modify  
4 the termination provisions of a trust to make termination effective  
5 immediately instead of after 36 months, as provided in the trust  
6 instrument. Unlike in this case, the debtor settlor itself had the right  
7 to modify the trust. Also, the trust in Askanase was expressly  
8 terminable under certain conditions. Therefore, the bankruptcy trustee,  
9 succeeding to the rights of the debtor, had the power to modify those  
10 conditions to allow termination at an earlier date than originally  
11 provided in the trust instrument. In this case, in contrast, debtor does  
12 not have the power to modify the trust. Further, the Declaration of  
13 Trust does not provide for the right to revoke, which right could be  
14 exercised on behalf of the bankruptcy estate. In fact, the trust  
15 instrument indicates that the trust fund is intended to be perpetual.  
16 There is no power granted in the Declaration of Trust for debtor or  
17 anyone else to revoke the trust.

18           The TCC also claims that debtor has the right to terminate the  
19 trust, pointing to the provision in the Declaration of Trust that,  
20 "Should this instrument be terminated or the Fund otherwise dissolved,  
21 all assets of the Fund shall be distributed to the General Treasury of  
22 the Archdiocese." That provision does not contain a reservation of a  
23 right to terminate the fund, but instead provides for the possibility  
24 that termination could occur at some future time and directs distribution  
25 of the assets if that happens.

1 Trusts may terminate for various reasons other than revocation by  
2 the settlor.<sup>8</sup> For example, a trust may terminate because the purposes  
3 for which the trust is created become impossible to accomplish,  
4 Restatement (Second) of Trusts § 335, or because, as a result of  
5 unanticipated circumstances, continuation of the trust would impair the  
6 accomplishment of the purposes of the trust. Id. at § 336. Merely  
7 providing for the disposition of trust assets if termination occurs is  
8 not a reservation of the right to terminate the trust.

9 Because the fund is an irrevocable trust, I reject the TCC's  
10 argument that the fund is subject to the claims of creditors as a self-  
11 settled revocable trust.

12 2. Is debtor the sole beneficiary of the fund?

13 The TCC next argues that the fund is not a valid trust, because  
14 debtor is both the trustee and the sole beneficiary, and a trustee cannot  
15 hold property in trust for itself. Debtor responds that the  
16 beneficiaries of the trust are an indefinite group comprised of Catholics  
17 and non-Catholics, both in western Oregon and throughout the nation and  
18 the world, who benefit from debtor's work.

19 Although the trustee of a trust can be one of several beneficiaries,  
20 there is no valid trust where the same person is the trustee holding  
21 legal title and the sole beneficiary holding the entire equitable

---

22  
23 <sup>8</sup> The concepts of revocation and termination are not the same. A  
24 trust may be terminated in various ways; revocation by the settlor is but  
25 one method of termination. See In re Marrama, 316 B.R. 418, 422 (1st  
26 Cir. BAP 2004); Restatement (Second) of Trusts §§ 330 - 343 (listing  
various methods of terminating trusts).

1 interest in property. Allen v. Hendrick, 104 Or. 202 (1922)(trustee can  
2 be one of several beneficiaries); Morse v. Paulson, 182 Or. 111, 117  
3 (1947)(no trust where sole beneficial interest and legal title in same  
4 person). See also Restatement (Second) of Trusts § 99(5) (sole  
5 beneficiary cannot be sole trustee).

6 In support of its argument that debtor is the sole beneficiary of  
7 the trust, the TCC relies on the language of the trust document, other  
8 contemporaneous evidence of intent, and debtor's recent characterizations  
9 of the nature of the fund.

10 (i) The trust document and other contemporaneous evidence

11 In arguing that the Declaration of Trust shows that debtor is the  
12 sole beneficiary of the trust, the TCC first points to the preamble, in  
13 which Archbishop Power declares that he establishes the fund "for the  
14 Archdiocese of Portland in Oregon (Archdiocese)." The TCC reads that  
15 statement as an indication that the fund was created solely for the  
16 benefit of debtor (through its predecessor).

17 That language is ambiguous. Creating the fund "for" debtor could  
18 mean "on behalf of," as the Archbishop was acting on behalf of debtor and  
19 not himself. Or creating the fund "for" debtor could mean "for the  
20 benefit of" debtor, in which case debtor would be a beneficiary. The  
21 identity of the beneficiary or beneficiaries cannot therefore be  
22 determined by reference to the preamble alone.

23 The TCC next relies on the statement under the Goals and Objectives  
24 heading that "[t]he primary goal of the Fund shall be the perpetuation of  
25 the mission of the Church." It argues that "the Church" is the same as  
26

1 debtor, and therefore debtor is the sole beneficiary. Debtor responds  
2 that "the Church" is a broader concept under Canon Law than just this  
3 debtor.

4 It is clear, reading the different provisions of the Declaration of  
5 Trust in context, that the drafter did not use the terms "Archdiocese"  
6 and "Church" interchangeably. Although it said that the primary goal of  
7 the fund was to perpetuate the mission of the Church, it then listed  
8 three particular objectives, two of which referred to the Archdiocese and  
9 the third of which referred to "the Roman Catholic Church in America and  
10 throughout the world."

11 The declaration identifies the settlor as the "Archdiocese," not  
12 "the Church." In the first and second distribution priorities, the  
13 declaration refers to "the Archdiocese." But in the third distribution  
14 priority, it refers to "assistance to other segments of the Church in the  
15 United States and throughout the world." Considering the use of these  
16 different terms throughout the Declaration of Trust, I conclude that "the  
17 mission of the Church" must refer to the mission of the church beyond  
18 simply the Archdiocese of Portland.

19 The identity of the beneficiaries can most readily be determined by  
20 looking at the language relating to the goals and objectives of the fund,  
21 and to the provisions for distribution. The objectives of the fund are  
22 listed as:

- 23 1. The funding of the operating expenses of the Chancery Office of  
24 the Archdiocese.
- 25 2. The funding of the religious, charitable and educational  
26 programs of the Archdiocese.

- 1           3.    The funding of the religious, charitable and educational  
2           programs of the Roman Catholic Church in America and throughout  
3           the world.

4   The distribution provision says that income from the fund is to be  
5   distributed for these purposes:

- 6           1.    The first priority shall be the operating expenses of the  
7           Chancery of the Archdiocese. To the extent that income from  
8           the Fund is sufficient, minimal assessments shall be levied  
9           upon the parishes of the Archdiocese for such purpose.
- 10          2.    The second priority for the use of the income from the Fund  
11          shall be the support of programs of the Archdiocese, including  
12          St. Mary's Home.
- 13          3.    The third priority for the use of the income of the Fund shall  
14          be assistance to other segments of the Church in the United  
15          States and throughout the world.

16   Declaration of Trust, Declaration of Albert Kennedy, Exh. 6 at 127, 129.

17                   a.    Funding of operating expenses of the Chancery  
18                   Office of the Archdiocese

19           The TCC argues that funding the operating expenses of the Chancery  
20           Office of the Archdiocese is merely funding the operating expenses of  
21           debtor itself, because the Chancery Office (now called the Pastoral  
22           Center) is simply a part of debtor, not an independent entity that may  
23           benefit from a trust administered by debtor. It further argues that a  
24           religious corporation is a beneficiary of a charitable trust if the  
25           purpose of the trust is to support the corporation's programs and  
26           administration, citing Restatement (Second) of Trusts § 391 cmt. c.

          I agree with the TCC that debtor is a beneficiary of this trust,  
because one of the objectives of the trust is to provide funding for  
debtor's Pastoral Center. The fact that debtor is to benefit from the

1 income of the trust, through funding of the Pastoral Center, makes debtor  
2 a beneficiary.

3 That does not make debtor the sole beneficiary, however. As I  
4 explain below, debtor is but one of several beneficiaries of this trust.

5 b. Funding of the religious, charitable and  
6 educational programs of debtor and of the national and  
7 international Roman Catholic Church

8 The second and third objectives of the fund are funding of the  
9 religious, charitable, and educational programs of debtor and of the  
10 national and international Roman Catholic Church.

11 Although religious, charitable, and educational programs are  
12 charitable purposes, see Restatement (Second) of Trusts § 368, the TCC  
13 argues that these two objectives in actuality are to benefit debtor by  
14 supporting its own programs and funding its obligations to the national  
15 and international church. It relies on a memorandum written by  
16 Archbishop Power to the priests of the Archdiocese within weeks of the  
17 creation of the fund, in which Archbishop Power explained the priorities  
18 of use of the income from the fund:

19 First priority after the annual reinvestment of some of the income  
20 will be to relieve the parishes of a major portion of the annual  
21 assessment by using the endowment income to support most of the  
22 services provided by the Archdiocesan offices. The second priority  
23 will be to support Archdiocesan programs, and the third priority  
24 will be to enable the Archdiocese to meet its obligations to the  
25 national and international Church.

26 Declaration of Albert Kennedy, Exhibit 6 at 131. The TCC argues that  
this memorandum clarifies the Declaration of Trust and shows that, in  
fact, the sole beneficiary of the fund is debtor.

The language of the Declaration of Trust is clear with regard to the

1 objectives and priorities. There is no ambiguity that needs to be  
2 clarified by resort to extrinsic evidence. The objectives listed in the  
3 Declaration of Trust refer to the funding of "religious, charitable and  
4 educational programs" of debtor and of the Roman Catholic Church in  
5 America and worldwide. The provision governing distribution of income  
6 refers to the second and third priorities as "support of programs of the  
7 Archdiocese" and "assistance to other segments of the Church in the  
8 United States and throughout the world." Nothing in that language  
9 indicates any preexisting obligation of debtor to those programs or  
10 segments of the church.

11 In determining the intent of the settlor of a trust, the court looks  
12 at the language of the trust instrument. Here, the language is clear  
13 that the income is to be used to support charitable works both of debtor  
14 itself and of the wider church.

15 In any event, debtor has provided uncontroverted evidence that  
16 debtor has no legally enforceable obligations to the national or  
17 international church. Second Declaration of Leonard Vuylsteke ¶ 4;  
18 Second Declaration of Most Rev. John G. Vlazny ¶ 10.

19 The TCC also relies on the provision of the Declaration of Trust  
20 that provides that the use of income generated by investment of the fund  
21 is subject to the normal budgetary procedures of debtor. Presumably, the  
22 use of income from a trust to fund charitable works will normally be  
23 subject to a budgetary process of the trustee, in order to provide  
24 financial accountability. The fact that the use of income is subject to  
25 debtor's budgetary process does not demonstrate that debtor is the sole  
26



1 beneficiary of the fund.

2       The Declaration of Trust shows that the fund is intended to benefit  
3 not only debtor, by providing for the operating expenses of the Chancery  
4 Office, but also the community that is served by the religious,  
5 charitable, and educational programs of debtor and the national and  
6 international church. Although that may make debtor a beneficiary,  
7 debtor is not the sole beneficiary.

8                   (ii) Debtor's recent characterizations

9       The TCC also points to debtor's recent characterizations of the  
10 purpose of the fund as showing that debtor has treated the fund as a  
11 discretionary asset to be used for its sole benefit, not as a trust fund  
12 for the benefit of the public.

13       First, the TCC points to a September 26, 1996 Memorandum written to  
14 Archbishop George by the Vicar for Administration, proposing a spending  
15 limit policy for the fund. The Vicar describes the fund as being  
16 discretionary, so that "not only the earnings but the principal may be  
17 utilized to support annual operations." Declaration of Albert Kennedy,  
18 Exhibit 6 at 133.

19       This statement, made long after the establishment of the fund,  
20 cannot vary the clear terms of the Declaration of Trust. Intent is  
21 determined by looking at the manifestations of intent made at the time  
22 the trust was created, not long afterward. See Trustees of the  
23 Presbytery of Willamette v. Hammer, 235 Or. 564, 566 (1963)(intent to  
24 create trust must be manifested before or at time trust created). See  
25 also Allen v. Hendrick, 104 Or. 202, 227 (1922)(whether trust exists

26

1 depends on intent of party "as manifested by the words used and the  
2 surrounding circumstances.") Further, extrinsic evidence cannot be used  
3 to vary the terms of an integrated document. Abercrombie v. Hayden  
4 Corp., 320 Or. 279 (1994).

5 Nor is the statement a part of the spending limit policy that the  
6 Archbishop actually authorized. The spending limit policy itself, which  
7 is found on the second page of the September 26, 1996 Memorandum, does  
8 not authorize the invasion of principal to fund operations of debtor.

9 I also note that debtor has provided evidence that this policy and  
10 the description of the fund that accompanied the transmission of the  
11 policy to Archbishop George was written during a time when the actual  
12 Declaration of Trust was lost, and debtor was not aware of the precise  
13 language of the trust document, which must govern its terms. Whether or  
14 not debtor misunderstood the limitations on use of the fund at the time  
15 the 1996 spending limit policy was adopted, that misunderstanding cannot  
16 govern interpretation of the clear language of the Declaration of Trust.

17 The TCC does not claim that the spending limit policy was a  
18 modification or amendment of the Declaration of Trust. The original  
19 Declaration of Trust controls whether the fund is a valid charitable  
20 trust.

21 The TCC also complains that debtor has represented in its more  
22 recent financial statements that the fund is unrestricted and may be used  
23  
24  
25  
26

1 at the discretion of the Pastoral Center.<sup>9</sup> This conduct, says the TCC,  
2 indicates that the fund is in fact unrestricted and discretionary,  
3 showing that debtor is the sole beneficiary.

4 As I explained above, the validity of the fund as a charitable trust  
5 is determined by the language of the Declaration of Trust, not by  
6 debtor's conduct in administering the trust long after it was created.  
7 The trust language is not ambiguous, and therefore the extrinsic evidence  
8 is not necessary to determine the settlor's intent. The trust language  
9 shows that debtor is but one of multiple beneficiaries outlined in the  
10 trust objectives and priorities. To the extent the TCC seeks to use the  
11 extrinsic evidence to show that the use of the fund is not circumscribed  
12 by the priorities set out in the Declaration of Trust, that evidence  
13 would be offered to vary or alter the unambiguous terms of the trust,  
14 which is not permitted under Oregon contract interpretation law.  
15 Abercrombie v. Hayden Corp., 320 Or. 279, 292 (1994).

16 I also note that debtor has provided evidence that characterizing  
17 the fund as an unrestricted net asset is correct under Generally Accepted  
18 Accounting Principles, because "any assets, whether restricted or not for  
19 legal purposes, which were not transferred to the Archdiocese of Portland  
20 in Oregon with a restriction for use or time by an external donor, are  
21 required to be reported as 'Unrestricted.'" Declaration of Gary McGee

---

22  
23 <sup>9</sup> The TCC points mainly to the Annual Financial Statements for  
24 fiscal years ending June 30, 1999, 2000, and 2001, which list the fund as  
25 an "unrestricted net asset" and indicate that unrestricted net assets  
26 "may be used at the discretion of the Pastoral Center." Declaration of  
Albert Kennedy, Exh. 6 at 117; Exh. 7 at 30.

1 ¶ 7. Therefore, a characterization of the fund as unrestricted on a  
2 financial statement does not provide persuasive evidence that its use is  
3 subject to the unfettered discretion of debtor. It may be misleading,  
4 but it does not change the intention of the settlor of the trust as set  
5 out in the 1981 Declaration of Trust.

6 The TCC complains that the charitable purposes of the fund are the  
7 same or nearly the same as the charitable purposes of debtor corporation.  
8 It is not surprising that the purposes of the trust parallel the purposes  
9 of debtor as a non-profit corporation. As one court said, if the  
10 purposes of a trust administered by a non-profit, charitable corporation  
11 were not closely parallel to the purposes of the corporation's existence,  
12 there would be a question whether the corporation was acting ultra vires  
13 in administering the trust. In re Parkview Hosp., 211 B.R. 619, 638  
14 (Bankr. N.D. Ohio 1997).

15 By its very nature the mission of a non-profit is charitable as  
16 compared to the profit motive of other corporations. The fact that  
17 the purpose of the trust in this case furthers the existence and  
18 mission of the trustee-hospital does not defeat the charitable  
19 intent of the hospital in initiating and contributing to a  
20 charitable trust.

19 Id.

20 I conclude that debtor is not the sole beneficiary of the fund.  
21 Because debtor is not the sole beneficiary, it does not hold both legal  
22 title and the entire beneficial interest.

23 The TCC seems concerned that a charitable organization could create  
24 a trust for which it is both the sole trustee and the sole beneficiary,  
25 and holds complete control over use of the funds, as a way of shielding  
26

1 its assets from creditors.

2 There are three ready answers to that argument. First, that  
3 hypothetical trust is not this case. Here, debtor is not the sole  
4 beneficiary of the trust, but is one of multiple beneficiaries.

5 Second, there is no evidence or argument that debtor created this  
6 fund with the intent of shielding its assets from the claims of  
7 creditors. This fund was created in 1981, more than 20 years before  
8 debtor filed bankruptcy. It was created with the proceeds of the sale of  
9 real property, which does not appear to have been substantially all of  
10 the real property that the 1909 corporation used in its operations. If  
11 there were indicators that the 1909 corporation had created the fund to  
12 shield its assets from creditors, there might be theories available to  
13 support a claim for disregarding the trust. None of those arguments is  
14 being made here.

15 Third, debtor has not retained complete control over the fund. As I  
16 explained above, debtor itself does not have the right to modify or amend  
17 the fund, and the fund is irrevocable. Further, contrary to what the TCC  
18 argues, debtor does not have a right to use the principal for whatever  
19 uses it desires. The Declaration of Trust provides for distribution of  
20 income only. Under the heading "Investment Objectives and Inviolability  
21 of Principal of the Fund," the document says that "[t]he primary  
22 investment objective shall be the safety of the principal of the Fund."  
23 The fund managers are required to return to the fund at least 5% of the  
24 income of the fund annually to protect the principal against inflation.  
25 Under the heading "Distribution and Uses of Income," the document says:

1 "After reinvestment of a portion of the income to preserve the integrity  
2 of the Fund, as provided above, the annual income of the Fund shall be  
3 distributed for the following purposes[.]" Finally, under the heading  
4 "Modification and Amendment of this Declaration of Trust," the document  
5 says that the fund "is intended to be perpetual." Those provisions make  
6 it clear that the principal is to remain untouched, and indeed protected  
7 against inflation by adding a percentage of income each year to the  
8 principal. The use of income is circumscribed by the distribution  
9 provisions that I discussed above.

10 I agree with debtor that this fund is similar to the fund that was  
11 found to be a charitable trust and so excluded from the debtor's estate  
12 in In re Parkview Hosp., 211 B.R. 619 (Bankr. N.D. Ohio 1997). In that  
13 case, a non-profit hospital established a development fund for use in  
14 furthering research and staff development activities of the hospital.  
15 The hospital solicited donations for the fund and also placed  
16 unrestricted donations in the fund. Only the income could be used to  
17 further the purposes of the fund; the principal was to remain untouched.

18 When the hospital ceased operation and filed bankruptcy, the chapter  
19 11 trustee argued that the fund was property of the estate and should be  
20 available to pay the claims of the hospital's creditors.

21 The court concluded that the fund was a restricted charitable trust,  
22 and so was not property of the bankruptcy estate.

23 There are many similarities between Parkview Hosp., and this case.  
24 In both cases, the non-profit organization created the fund and acted as  
25 its trustee in administering the fund. In both cases, unrestricted gifts  
26

1 to the organization were placed in the fund. The principal may not be  
2 touched, and only the income may be used to further the purposes of the  
3 fund.

4 The TCC argues that the fund in this case is different from Parkview  
5 Hosp., because in Parkview Hosp., the hospital's solicitation of funds  
6 specified that the use of the contributions would be restricted, and so  
7 keeping those funds from the bankruptcy estate followed the donors'  
8 intent, and because the purpose of the charitable trust was not to  
9 benefit the hospital.

10 These distinctions do not detract from the value of the case to my  
11 analysis of this case. Although in this case debtor did not specifically  
12 solicit donations for the fund (as had happened in Parkview Hosp.), here  
13 debtor has a written trust document creating the fund and showing its  
14 intent with regard to the fund. Thus, debtor's intent in creating the  
15 fund can be determined from the trust document itself, rather than from  
16 looking at debtor's actions over a period of years. Second, as I have  
17 explained above, I do not agree that the purpose of the fund in this case  
18 is solely to benefit debtor. It has as its purpose the furthering of the  
19 work of the church locally, nationally, and internationally. Thus, the  
20 purpose to benefit the public is similar to, not different from, the  
21 purpose of the fund in Parkview Hosp.

22 C. Conclusion

23 I conclude that the Declaration of Trust created a valid, charitable  
24 trust, and that debtor is not the sole beneficiary of that charitable  
25 trust. Therefore, the fund itself is not property of the bankruptcy  
26

1 estate, as debtor holds legal but not the entire equitable title to the  
2 fund. See § 541(d).

3 III. Debtor's beneficial interest in the fund and right to exercise  
4 certain powers over the fund as property of the estate

5 As an alternative to a holding that the fund itself is property of  
6 the bankruptcy estate, the TCC seeks a determination that debtor's  
7 beneficial interest in the income of the trust is property of the estate,  
8 as is its right to exercise the powers to amend, revoke, and direct  
9 distribution of the fund.

10 A. Beneficial interest

11 Property of the estate includes all legal or equitable interests of  
12 debtor in property. § 541(a). As I have explained above, debtor is not  
13 the sole beneficiary of this charitable trust. It is, however, one of  
14 multiple beneficiaries, and has a beneficial interest in the fund that is  
15 limited to its receipt of a portion of the income from the trust to fund  
16 the operating expenses of the Pastoral Center and its other programs, so  
17 it can further the mission of the church.

18 The bankruptcy estate takes whatever interests a debtor has in  
19 property as of the petition date, subject to the same limitations and  
20 restrictions on the use of the property that existed prepetition. In re  
21 Bishop College, 151 B.R. 394, 398 (Bankr. N.D. Tex. 1993). The estate  
22 also includes "[a]ny interest in property that the estate acquires after  
23 the commencement of the case." § 541(a)(7).

24 The TCC first argues that the restrictions on use of the fund income  
25 are illusory, because debtor has used the fund to pay tort liabilities  
26



1 and as collateral to obtain financing for the plan. The TCC points to  
2 evidence that debtor borrowed money from the fund to put into debtor's  
3 insurance fund to pay tort liabilities, and that it has offered the fund  
4 as collateral for a loan to fund debtor's reorganization plan, subject to  
5 the approval of the Archbishop and other financial advisors. Deposition  
6 of Leonard Vuylsteke, Second Declaration of Albert Kennedy, Exh. 1 at 8-  
7 13.

8 This evidence does not show that the restrictions on use of the fund  
9 are illusory. The Declaration of Trust requires investment of the  
10 principal to produce income. The evidence is that the fund loaned debtor  
11 money from the fund, at an interest rate of 7%, to replenish its  
12 Insurance Fund, which had been depleted by the payment of claims. Second  
13 Declaration of Leonard Vuylsteke ¶ 6. There is no evidence that the loan  
14 to debtor was anything other than a legitimate investment of fund assets.

15 Further, the Declaration of Trust allows for use of the fund,  
16 subject to approval of the Archbishop and the financial advisors for the  
17 fund. Leonard Vuylsteke testified in his deposition that the fund was  
18 being offered as collateral for a line of credit to fund debtor's  
19 proposed plan, "if it's approved by the archbishop" and the financial  
20 advisors. Second Declaration of Albert Kennedy, Exh. 1 at 12-13. There  
21 is no evidence that debtor has in fact pledged the assets of the fund for  
22 a loan or that the use of the fund as collateral could not be consistent  
23 with the fund's investment goals.

24 Second, the TCC argues that the restrictions on use are invalid  
25 spendthrift trusts, because the fund is a self-settled trust.

1 Section 541(c)(2) provides that an interest of a debtor in property  
2 becomes property of the estate despite a restriction on transfer of that  
3 interest, unless the "restriction on the transfer of a beneficial  
4 interest of the debtor in a trust [is one] that is enforceable under  
5 applicable nonbankruptcy law[.]" § 541(c)(2). The TCC argues that what  
6 it views as the fund's restriction on the transfer of debtor's beneficial  
7 interest in the fund is a spendthrift provision that is not enforceable  
8 under applicable state law.

9 I disagree that the restrictions on use imposed by the Declaration  
10 of Trust make this a spendthrift trust. A spendthrift trust is one that  
11 provides funds for the beneficiary "while at the same time protecting the  
12 beneficiary not only from himself or herself, but also from his or  
13 creditors[.]" 76 Am.Jur.2d "Trusts" § 94 (2005)(footnote omitted). It  
14 is "one in which the beneficiary is unable to transfer, assign, or  
15 alienate his or her right to future payments of income or principal."  
16 Id. (footnote omitted). "A spendthrift trust can only be created by an  
17 express restraint on alienation; the trust agreement must include a  
18 spendthrift clause." Id. at § 95 (footnote omitted). Where a settlor of  
19 a trust is also the beneficiary, a restraint on the voluntary or  
20 involuntary transfer of the beneficiary's interest is invalid as against  
21 the beneficiary's creditors. Restatement (Second) of Trusts § 156(1).

22 Here, the Declaration of Trust limits the use of the income of the  
23 fund to certain specified purposes. It does not include a restraint on  
24 alienation. The restrictions on use of the income to fund the operating  
25 expenses of the Pastoral Center and to further the charitable purposes of  
26

1 the trust do not make the fund a spendthrift trust.

2 The TCC next argues that the restriction on use is invalid, because  
3 debtor exercises dominion and control over the fund. As I have explained  
4 above, however, debtor's exercise of control is as a trustee for the  
5 benefit of the multiple beneficiaries of the charitable trust. The  
6 Declaration of Trust requires debtor as trustee to administer the fund in  
7 accordance with the Uniform Trustees' Powers Act, which requires it "to  
8 act with due regard to his obligation as a fiduciary." Uniform Trustees'  
9 Powers Act § 3(b). Debtor does not have the power to amend, modify, or  
10 revoke the trust, nor does it have unfettered discretion about how to use  
11 the income. The Declaration of Trust preserves the principal and limits  
12 the purposes to which the income can be put. The TCC does not point to  
13 any authority that would support a conclusion that the restrictions on  
14 use of the charitable trust assets are invalid, based on the narrow  
15 discretion given to debtor as trustee to administer the fund assets.

16 The TCC's argument on this point goes more to whether debtor is  
17 acting in violation of its fiduciary duties as trustee in allowing use of  
18 fund assets for uses other than those specified by the Declaration of  
19 Trust. If someone with standing asserts that debtor is violating its  
20 fiduciary duties in administering the fund, that person may seek to hold  
21 debtor accountable for that alleged violation. That is not a question  
22 that is before this court in determining what is property of the estate.

23 Finally, the TCC argues that public policy prohibits limiting the  
24 use of the fund to those purposes set out in the Declaration of Trust.  
25 It relies on the fact that charitable immunity has been abolished in  
26

1 Oregon and reasons that, because charitable organizations are liable for  
2 their tortious acts, those organizations cannot create trusts that limit  
3 the use of the assets that are put into the trust.

4 The TCC does not cite any authority for the proposition that a  
5 charitable organization is precluded from limiting the use of property by  
6 placing it in a charitable trust. If a charitable organization attempts  
7 to place all of its assets beyond the reach of tort creditors by creating  
8 a trust and transferring all of its assets into the trust, there could be  
9 an argument that the transfer to the trust is fraudulent. See ORS  
10 95.230. There is no argument here that the 1909 corporation transferred  
11 substantially all of its assets into the fund back in 1981, or that it  
12 created the fund in an attempt to place its assets beyond the reach of  
13 creditors.

14 I conclude that property of the estate includes debtor's beneficial  
15 interest in the income from the fund, subject to whatever restrictions on  
16 use of that income are enforceable under nonbankruptcy law. Thus, if  
17 income is distributed to debtor, subject to conditions on the use of the  
18 income in accordance with the provisions of the Declaration of Trust, and  
19 those conditions are enforceable under nonbankruptcy law, the estate  
20 takes that income subject to the conditions on use.

21 B. Debtor's powers as trustee

22 The TCC also argues that debtor's power that it can exercise over  
23 the trust for the benefit of debtor is property of the estate under  
24 § 541(b)(1). Property of the estate includes powers that debtor may  
25 exercise for its own benefit. See § 541(b)(1)(property of the estate  
26

1 does not include "any power that the debtor may exercise solely for the  
2 benefit of an entity other than the debtor[.]"). I have already held  
3 that debtor did not retain the power to modify, amend, or revoke the  
4 trust. Therefore, those are not powers that became property of the  
5 bankruptcy estate.

6 Debtor does have the power as trustee to direct distribution of the  
7 income (not the principal) of the fund to its Pastoral Center and other  
8 charitable uses, in accordance with the provisions of the Declaration of  
9 Trust. That power is property of the estate. However, that power may be  
10 exercised only as provided or limited by the Declaration of Trust, and in  
11 accordance with the Uniform Trustees' Powers Act.

#### 12 IV. First Amendment and Religious Freedom Restoration Act (RFRA)

13 Debtor argues that the First Amendment and RFRA prohibit bringing  
14 the fund into debtor's bankruptcy estate. Because I have concluded that  
15 the fund is a valid charitable trust that is excluded from the estate,  
16 that any right debtor has as a beneficiary to income from that fund is  
17 limited by the restrictions imposed by the Declaration of Trust that are  
18 enforceable under nonbankruptcy law, and that debtor's powers as trustee  
19 must be exercised as provided in the Declaration of Trust, I need not  
20 consider the First Amendment and RFRA arguments.

#### 21 CONCLUSION

22 The Declaration of Trust created a valid charitable trust.  
23 Therefore, debtor's Cross-Motion for Summary Judgment will be granted.  
24 Debtor's beneficial interest in and trustee's power to control the income  
25 from the trust assets are property of the bankruptcy estate, but are

1 subject to restrictions contained in the Declaration of Trust that are  
2 enforceable under nonbankruptcy law. Therefore, the TCC's Fourth Motion  
3 for Partial Summary Judgment will be granted insofar as it seeks a  
4 declaration that debtor's beneficial interest in the income generated  
5 from the fund and debtor's power as trustee to direct distribution of the  
6 income are property of the estate, subject to enforceable restrictions on  
7 use set out in the Declaration of Trust. The TCC's Fourth Motion for  
8 Partial Summary Judgment will otherwise be denied. Mr. Levine shall  
9 submit the order.

10 ###

11  
12 cc: Howard M. Levine  
13 Albert N. Kennedy  
14 Brad T. Summers  
15 Steven M. Hedberg  
16 Brad S. Copeland  
17 Phoebe Joan O'Neill  
18 James Ray Streinz  
19  
20  
21  
22  
23  
24  
25  
26