

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## Philip Pinkert v Schwab Charitable Fund

United States Court of Appeals for the Ninth Circuit, Eugene E. Siler, Milan D. Smith, Jr., and Daniel A. Bress, Circuit Judges, 14 September 2022

An appeal against lack of standing to challenge alleged excessive fees charged in a Donor Advised Fund arrangement.

**Key words:** Donor Advised Fund, United States of America, Appeal, Standing, Fiduciary Duty, Excessive Fees

1. Smith J delivered the majority opinion of the Court, with Bress J concurring with the majority apart from one aspect of the decision.
2. Schwab Charitable operated a Donor Advised Fund (DAF).
3. A DAF is a charitable giving vehicle that allows donors to take a present-year income tax deduction while distributing the funds to charity at a later time.
4. To establish a DAF, one must donate funds to a sponsoring organization, which, in many cases, is a nonprofit organization affiliated with a private asset manager.
5. The sponsoring organization then holds those funds in a separately identified account that it owns and controls (beyond the control of the donor, as it must be a completed gift). However, the donor can advise the sponsoring organization regarding how it should invest the funds and where it should donate them, but the sponsoring organization is not legally obligated to comply with the donor's advice.
6. The sponsoring organizations are nonprofit organizations, but they generally do not perform charitable works themselves, but rather distribute the funds to other charities.
7. Pinkert opened a DAF at Schwab Charitable in 2007.
8. The DAF was subject to at least two kinds of fees: an administrative fee and an investment fee.

9. Pinkert, although agreeing to pay these fees, alleged that Schwab Charitable, its board of directors, and its Investment Oversight Committee breached their fiduciary duties under California law by partnering with Schwab & Co., a legally separate but closely related company, for brokerage, custodial, and administrative services.
10. Pinkert alleged that the arrangement led to excessive fees and imprudently selected suboptimal investment options.
11. The lower Court held that Pinkert lacked standing under Article III of the US Constitution (which limits the jurisdiction of federal courts to “cases” or “controversies”) and statutory standing under California law.
12. To establish Article III standing a plaintiff must show:
  - (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent;
  - (ii) that the injury was likely caused by the defendant; and
  - (iii) that the injury would likely be redressed by judicial relief.
13. Pinkert claimed that:
  - (i) although he donated the funds to Schwab Charitable for some purposes, he retained a property right to direct the funds to charities, and the excessive fees and Schwab Charitable’s related mismanagement of the funds impaired his ability to exercise that property right.
  - (ii) that each donation from his DAF enhanced his reputation. These reputational benefits were directly correlated with how much was donated, and because his DAF did not contain as much money as it would have absent the excessive fees and Schwab Charitable’s allegedly imprudent management of his account, his reputation would not be enhanced as much as he intended.
  - (iii) that each donation he directed from his DAF expressed his values, that the level of expression corresponds to the amount he directed, and that having less funds available to direct meant that he could not express his values as strongly as he would have been able to otherwise.
  - (iv) that he might need to contribute more funds to his DAF in the future to make up for the excessive fees and other mismanagement by Schwab Charitable.
14. The Appeal Court reviewed the matter de novo.
15. The Appeal Court dismissed the claims that Pinkert would need to contribute more to the DAF and the related impact on his reputation and his expressive rights, as Pinkert did not allege that he had experienced or will experience any of these purported injuries. Nor were they imminent.
16. The Appeal Court found that Pinkert’s right to provide non-binding recommendations to Schwab Charitable was not a property right. It rejected the notion that Pinkert’s advisory rights entitle him to advise where every cent he contributed to Schwab Charitable would go, and that by charging excessive fees and mismanaging his account, Schwab deprived him of the ability to advise with respect to the amount that his account otherwise would have contained.

17. Such rights were not reserved by Pinkert in his agreement with Schwab Charitable at the time of creation of the DAF and thus did not exist.
18. Bress J agreed with the majority that Pinkert had no standing under Article III of the US Constitution. In relation to the issue of impact on Pinkert's reputation and his expressive rights, he found that the majority decision was too narrowly decided, but correctly. Bress J made it clear that the privileges claimed by Pinkert would not create Article III standing for suits alleging expressive and reputational injuries associated with money fully relinquished for charitable purposes. Such injuries have never been previously recognized as a basis for lawsuits in American courts.

## IMPLICATIONS



In Australia, a similar arrangement to a DAF exists with sub-funds in Public Ancillary funds. Sub-fund donors can have an individually named account to which their tax deductible donations are credited and they may make recommendations on the organisations to receive distributions of grants from that account.

An issue in tax law is whether a sub-fund could create a separate fund with its own tax consequences outside the host Public Ancillary Fund. A separate fund is not created if the donor merely expresses a preference to be considered when the trustee is making grants: *Re Australian Elizabethan Theatre Trust*; *Lord v. Commonwealth Bank of Australia and Others* (1991) 30 FCR 491; (1991)102 ALR 681 and [TD 2004/23](#).

## VIEW THE CASE



This case may be viewed at <https://caselaw.findlaw.com/us-9th-circuit/1912100.html>

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