

Understanding the Donor's Perspective: Creating Gifts That Stick
Issues Relating to Documenting Donor's Intent in Charitable Bequests,
Trusts and Gift Agreements

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- I. Introduction
 - A. Donor intent subject of greater focus in recent years
 - B. Donor intent first became an issue in 1976 when Henry Ford II resigned in protest from Ford Foundation board of directors
 - C. Donor intent and attorney general oversight
- II. Clarifying donor intent
 - A. Reasons for giving
 - B. Donor's intent must take precedent over institution's needs; institutions must work hard to match needs with donor interests
 - C. Interrelationship between donor intent and size of gift
 - D. Difficulties arising from perceived donor intent
 - E. Need to put gift on hold if unable to reach agreement on terms of gift
 - F. Need for legal counsel
- III. Donor intent and the marketplace
 - A. Well documented intent promotes good feelings on part of donors and institutions, and can influence the marketplace
 - B. Institutions need to educate staff, volunteers, donors and advisors about their standards and policies regarding the acceptance of restricted gifts before approaching prospective donors
- IV. Issues arising when institution's needs change and donor's intent no longer viable
 - A. Intentions should be documented in writing
 - B. Need for flexibility to be incorporated into gift acceptance documents; the horizon of the donor and of the charity may need to be expanded

- C. UPMIFA
 - D. Cy pres proceedings
- V. Ways to clarify institutional need and propose donor intent
- A. Written proposals submitted by institutions to prospective donors
 - 1. When prospect makes a gift in response to written proposal, institution concludes that donor accepted proposal and that the proposal expresses the donor's intent
 - B. Acknowledgement letter sent subsequent to gift
 - 1. Acknowledgement letter is simplest way to verify donor intent; allows donor to correct/clarify any confusion surrounding the purpose or restrictions of the gift
 - C. Letters of gift
 - 1. Longer documents written to state the purpose of the gift and the donor's intentions; may also address issues such as recognition and reporting
 - D. Gift Agreements
 - 1. Contracts between donor and recipient institution
 - 2. Gift agreement should be consistent with organization's Gift Acceptance Guidelines and terms should include:
 - a) Identification of parties – donor and recipient institution (an organization listed as a US charity under §501(c) (3))
 - b) Identification of gift (cash or other property?)
 - (1) Cash is preferred gift
 - (2) Gifts other than cash – institution's Gift Acceptance Guidelines and Gift Agreement should provide if noncash gifts will be sold/time frame, responsibility for expenses in connection with such gifts, obtaining appraisals, etc.
 - (a) Publicly traded securities
 - (b) Closely held securities
 - (c) Intellectual property
 - (d) Real estate
 - (e) Life insurance

- (f) Tangible personal property (art, antiques, jewelry, collections, manuscripts, books, vehicles, marine vessels and computer hardware)
- c) Is agreement to make a gift or has gift already been made?
- d) Is gift unrestricted or restricted?
 - (1) If gift is restricted, need separate paragraph describing purpose of gift and agreed upon use of funds, including alternative uses should initial purposes become impractical
 - (2) Agreement should provide that the institution will notify the donor of any change in its program that would affect its ability to achieve the agreed upon use of funds
 - (3) Agreement should provide that during the period of the gift commitment, the institution shall maintain financial records and receipts that adequately detail the application of the gift for the restricted purpose
 - (4) Agreement should provide that the organization will notify the donor should it contemplate using the gift for any purpose other than what is set forth in the Agreement
 - (5) Agreement should provide that any portion of the gift not used for restricted purpose shall be repaid to the donor, unless the donor grants written permission to apply the gift to another purpose
- e) Statement that recipient institution is accepting gift
- f) Confirm gift commitment
 - (1) One time gift or installment payments over time?
 - (2) If installment payments, include schedule with installment due dates
 - (3) If gift is for a specific project/purpose, agreement should indicate if installment payments are contingent upon satisfactory project process as outlined in written reports to the donor
 - (4) If gift is for a specific project/purpose, agreement should provide that expenditures made by recipient institution for project/purpose shall appear in the institution's financial records made available to the donor
- g) Terms and conditions of any naming/recognition opportunity
 - (1) Agreement should provide that naming opportunity is

contingent upon the donor fulfilling his contribution obligations

(2) Agreement should provide the exact name of gift, provisions for signage, wording, where displayed (e.g. location), how name is communicated

h) Dedication event

(1) If applicable, agreement should address press releases to support dedication and promotion of the gift and provide that neither party's approval will be unreasonably withheld or delayed

i) Confidentiality

(1) Agreement should provide that terms will be held confidential by the institution and officials, employees, directors and agents, except to the extent required by law to disclose certain terms

(2) If there is to be disclosure of the donor, the agreement should provide how the donor will be identified

j) Representation and Warranties

(1) Both parties should agree that they have power and authority to enter into the agreement, that it has been duly executed, that agreement won't violate law and that no consent/approval/filing is required with any governmental authority

k) Administration of gift

(1) Who manages, invests, fees

l) Governing law choice

m) Procedures for changed charitable circumstances, altering or amending agreement

(1) Agreement should include provision for use of gift in event it becomes impossible or impractical for all or part of the gift to be used for the agreed upon purpose, and permit institution to direct funds to purposes that are deemed to be most consistent with the wishes and intentions of the donor

(2) If there is a need for cy pres, modification, deviation or other court proceeding, agreement can address who bears the costs of the proceeding

(3) Agreement should provide that it may be modified,

altered or amended at any time by written mutual consent of the donor and the institution

n) Enforceability on donor's estate/heirs

VI. Charitable bequests under wills and trusts

A. Frequently, institutions learn of bequests under wills and trusts without the benefit of having negotiated the terms of the gifts with the deceased donor

1. It is still possible to address donor intent in the same manner (such as through a gift letter or gift agreement)

VII. Sustaining Donor Intent

A. Consistent communication, cultivation and collaboration with donors by institutions sends a message that their gifts are valued and appreciated (irrespective of size!)

B. These efforts can be rewarded when a donor dies and members of the next generation chose to continue the donor's commitment. The same efforts should be directed to the donor's survivors.

VIII. Conclusion

A. Taking a few preventative steps to document the intentions of a gift helps to preserve donor intent, meet the needs of the charitable sector, promote a positive image of philanthropy and reduce legal fees.

B. Even most specific agreement may not address future changes in every circumstance.

C. Flexibility in gift terms is needed if institutions are to be able to adapt to changing circumstances over time and ensure that the donor's charitable interests will be met.

D. It may be preferable for an institution to decline a gift if acceptance of the gift would interfere with the institution's mission.

E. Need for legal counsel – money well spent!