

# Should Pledges be Enforceable? And Other Questions To Ask About Gift Agreements

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Charitable organizations are often concerned with determining how to draft a pledge to be enforceable against the donor. The more important question may be whether a charitable organization *wants* a pledge to be enforceable. The obvious advantage of an enforceable pledge is that if the donor (or the donor's heirs) chooses not to honor the pledge, the charitable organization has the opportunity of having the pledge enforced by a court. This advantage must be considered in light of the charitable organization's willingness to sue the donor or the donor's family in the event of default. In most circumstances, charities are reluctant to sue donors who do not satisfy their pledges.

If the charity does not intend to sue the donor, why make the pledge enforceable? Often, the charity believes that there is no harm in making the pledge enforceable, and that perhaps it will help with collection even if the charity never intends to sue the donor. This article explores both the harm and benefit that may arise from enforceable pledge agreements, and reviews the many issues that should be considered in drafting an enforceable agreement that serves both the donor and the charity.



## Drafting an Enforceable Pledge

In their first year contracts class, all law students learn that a promise to make a gift is not enforceable.<sup>1</sup> For a contract to be enforceable, each party must provide consideration—something of value.<sup>2</sup> When someone promises to make a gift, only one party has provided consideration. There are exceptions to the rule that a promise to make a gift is not enforceable, the most significant being the doctrine of detrimental

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**Abstract:** The author explores both the harm and benefit that may arise from enforceable pledge agreements, and reviews the many issues that should be considered in drafting an enforceable agreement that serves both the donor and the charity. He proposes alternatives to enforceable pledges, including the statement of intent to make a gift and the revocable enforceable pledge. Syllabus for Gift Planners code: 3.0

reliance. Under that doctrine, if a person reasonably relies to his or her detriment on a promise to make a gift, the promise becomes enforceable.<sup>3</sup> The classic example of detrimental reliance is an uncle who promises to buy a car for a niece. (We assume that the uncle has plenty of money to make the purchase.) The promise to make the gift will become enforceable when the niece goes to the car dealership and enters into a contract to buy a car. She has reasonably relied on the uncle's promise to her detriment by becoming obligated to pay for the car.

Charities often use the doctrine of detrimental reliance to make pledges enforceable. Where the charity takes some action such as the construction of a building or the initiation of a program in reliance on the donor's promise to make the gift, the charity has relied on the promise to its detriment. There are also cases where the courts have held that the promises by *other* donors to make gifts to the organization are the consideration for the pledge that the charity is seeking to be enforced.<sup>4</sup> A few states have statutes that provide that written charitable pledges are enforceable.<sup>5</sup> Charities are advised to explore the specific conditions that make a pledge enforceable in their own jurisdiction, but that exploration will follow a careful consideration of whether a charity *should* make a pledge enforceable.

### **Charities May Have a Duty to Seek to Enforce a Binding Pledge**

The first issue that a charity needs to consider when deciding whether or not to make a pledge enforceable is its willingness to sue the donor or the donor's heirs in order to enforce the pledge. If a charity feels it would not sue to enforce a pledge agreement for reasons of publicity or otherwise, then it likely should not enter into enforceable pledge agreements, since those agreements

have significant consequences. If, for example, the donor later decides not to satisfy the pledge, the charity will be subject to the prudent investor standard in determining whether or not to enforce the pledge.<sup>6</sup>

It may be that because of the issue of publicity, as well as of the cost of enforcing the pledge and concerns about the ability of the donor to pay the pledge, it is prudent for the charity not to file an action to enforce the pledge. On the other hand, if the donor has simply declined to make payments without a legal basis and clearly has adequate resources to satisfy the pledge, the charity may be under a fiduciary duty to enforce the pledge to prudently protect the charity's asset. In the extreme case, if the charity does not enforce the pledge and the statute of limitations on the pledge runs out, the state Attorney General could force the directors of the organization who let the statute of limitations lapse without enforcing the pledge to pay the charity the amount due under the pledge as the damages from the directors' breach of their duty.

### **Forgiving a Pledge Could Provide the Donor with a Prohibited Benefit**

If a donor is an insider for purposes of the intermediate sanctions rules, a charity will have additional considerations if the donor's pledge is to be written off.<sup>7</sup> A person who is an officer or director of the charity, or who is substantial contributor to the charity is a disqualified person.<sup>8</sup> The donor retains the status of being a disqualified person for five years after the donor ceases to have the characteristic that made the donor a disqualified person (such as serving on the board).<sup>9</sup> The intermediate sanctions provisions impose a penalty tax on excess benefit transactions between disqualified persons and public charities.<sup>10</sup> An excess benefit transaction is one in



which the disqualified person receives from the charity something of greater value than what the disqualified person gives to the charity.<sup>11</sup>

If the charity forgives all or part of a pledge of a disqualified person, the disqualified person arguably receives an excess benefit, since the donor is relieved of an obligation and gives nothing of value to the charity in return. In informal discussions, IRS representatives have indicated that if the pledge write-off is a reasonable business decision made by disinterested directors, the IRS is unlikely to seek to impose intermediate sanctions. As with the prudence requirement, the charity likely has greater latitude under the intermediate sanctions rules to forgive the pledge of a donor who likely cannot afford to pay the pledge than to forgive the pledge of a wealthy donor who has had a change of heart.

### **PFs and DAFs Cannot Satisfy Personal Pledges**

All parties to the gift should be aware that a donor who enters into an enforceable pledge agreement likely will not be able to satisfy the pledge with funds from a private foundation or donor advised fund. Treasury Regulations specifically state that it is an act of self-dealing for a private foundation to satisfy an enforceable pledge of a disqualified person.<sup>12</sup> Disqualified persons include substantial contributors to the private foundation, its officers and directors, their ancestors and descendants (and their spouses),

and businesses and trusts substantially owned by disqualified persons.<sup>13</sup> A donor advised fund provides an automatic excess benefit when it satisfies the enforceable pledge of the donor to the fund.<sup>14</sup> The donor would be required to disgorge the amount paid on the pledge plus a 25 percent penalty tax.<sup>15</sup> Accordingly, a donor cannot use private foundations or donor advised funds to satisfy charitable pledges unless the donor accounts for that possibility at the time of drafting the pledge.

It may be possible to draft a pledge agreement to allow a private foundation to satisfy the pledge if the private foundation, not the individual, makes the pledge. If the individual makes payments to the charity to satisfy the private foundation's pledge, it will not be an act of self-dealing. There is a chance, however, that when the donor makes a gift to be applied to the pledge, the donor will be treated as having made the gift to the private foundation, since it is relieved of an obligation rather than to the charity to which the pledge was made.<sup>16</sup> Assuming that the pledge is to a public charity, the donor would receive a less favorable income tax deduction if the gift is characterized as having been made to the private foundation.

Some community foundations will sign pledge agreements on behalf of donor advised funds. Generally, however, the community foundation will require the donor to deposit funds into the donor advised fund in an amount sufficient to cover the amount of the pledge before the community

While charities are reluctant to sue living donors who default, it is a more common practice to file a creditor's claim in a donor's estate.<sup>19</sup> The estate creditors claim process is fairly simple, and is not seen as a hostile act, like a lawsuit.<sup>20</sup>

foundation enters into the pledge. If a donor is looking to satisfy the pledge with future income, it may not be possible to deposit the funds in the donor advised fund when the pledge is made.

### **Pledges Are Accounting Assets**

When a charitable organization receives a binding pledge, it is an asset that is reflected on its financial statements.<sup>17</sup> In fundraising campaigns, charities often count legally binding pledges toward the goal. Correspondingly, when a pledge is written off or reduced, the assets of the charity decrease. If the pledge that is reduced had been counted in a campaign, the reduction would need to be deducted from the campaign totals as well. (The National Committee on Planned Giving has developed standards that allow the counting of revocable gifts reduced by a factor to account for the probability that the gift will not be completed.<sup>18</sup> The probability depends on the circumstances of the donor and the donor's relationship to the charity.)

Since an enforceable pledge is an asset of the charity, lenders will sometimes accept them as collateral for a loan. Generally, the pledges are collateral in addition to other collateral, such as land. If pledges are used as collateral, there is the possibility that if the charity defaulted on its loan, that the bank would sue donors to enforce delinquent pledges.

### **Donor Uncertainty**

Donors are increasingly reluctant to sign irrevocable gift agreements because of uncertainty about future events. It generally will be more difficult for a charity to close a gift if the donor must sign an enforceable pledge. The donor will be concerned that if circumstances change, he will be stuck with the pledge. The concern may be so great that even though the donor would in fact make the payments expected, the gift is lost because the donor never signs the agreement to start the payments.

### **The Good News: Pledges *Can* Be Enforced**

An enforceable pledge can help protect a gift, and one circumstance that illustrates this is a donor dying before completing the pledge payments. While charities are reluctant to sue living donors who default, it is a more common practice to file a creditor's claim in a donor's estate.<sup>19</sup> The estate creditors claim process is fairly

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simple, and is not seen as a hostile act, like a lawsuit.<sup>20</sup> If the pledge is enforceable, then the donor's personal representative is obligated to pay the debt the same as any other debts of the decedent.<sup>21</sup> If the pledge is not enforceable, however, the personal representative has a fiduciary duty to the beneficiaries of the estate to reject the claim. In addition, if the pledge is not enforceable, and the personal representative makes a payment to the charity, no estate tax deduction will be allowed for the voluntary payment.<sup>22</sup>

### **Alternatives to Enforceable Pledges**

#### **Statement of Intent to Make a Gift**

An alternative to the enforceable pledge is a written expression of intention to make a gift, with a remedy for the charity if the intention is not fulfilled. A donor could express an intention to make a gift to charity of \$100,000 per year for 10 years. The charity would agree to name a facility in honor of the donor. Instead of the enforceable pledge that uses the naming as consideration, the charity and donor would expressly agree that the charity cannot enforce the donor's intention to make a gift. Instead, the parties would agree that if the donor fails to make the required payments, the charity can remove the donor's name from the facility.

For most donors, there will be little difference in their willingness to fulfill a legally binding pledge versus an intent-to-give statement. For donors who default because of financial reverses, the enforceability of the pledge does not change their lack of ability to pay. A financially capable donor who has become dissatisfied with the charity likely will question whether the charity is willing to file a lawsuit to enforce the pledge. In this case, unless the charity is willing sue its donor, the enforceable pledge is no more effective than the statement of an intention to make a gift.

If a charity asks a donor only for an expression of an intention to make a gift, the charity should ask

the donor to backstop that statement with a provision in the donor's estate plan to complete the gift. Many living trust documents give the grantor a power of appointment, so it may be possible to include in the gift agreement an exercise of the power of appointment to complete the gift if the donor dies before all payments are made. The exercise of the power of appointment may be simpler than amending the donor's living trust.

If a charity needs to renegotiate a donor's expression of intention to make a gift, the charity is not constrained by the prudence standard because it does not have an enforceable right. In addition, since the donor has no legal obligation, a reduction of the amount to be paid under the agreement is not an economic benefit to the donor. Since the donor is not receiving an economic benefit, the charity and donor do not need to be concerned that the revision to the agreement will be an excess economic benefit.

If a donor has only expressed an intention to make a gift, but is not under any legal obligation to make the gift, the donor can fund the gift from either a private foundation or a donor advised fund. The donor is not relieved of any debt, so the payment by the private foundation or the donor advised fund is not an act of self-dealing and does not provide any private benefit.

#### **Revocable Enforceable Pledge**

Another strategy that may allow a charity to file a creditor's claim for unpaid amounts if the donor dies is a revocable enforceable pledge (see sidebar for sample language). Under this agreement, the donor pledges to make a series of payments to the charity. The donor retains the right to revoke her obligation to make future payments at any time, but once a payment becomes due, it is a binding obligation of the donor or the donor's estate. The right to revoke is personal to the donor only, and if not exercised becomes a binding obligation of the donor's estate. This structure should allow the charity to file a creditor's claim to collect the pledge if the donor dies, but can be revoked during



lifetime to avoid the problems normally associated with an enforceable pledge. The structure is more likely to be successful if the charity is providing some form of recognition that can be reduced or removed if the donor does not complete the payments.

A contract where a person is not really required to give consideration is an “illusory” contract, and is not enforceable.<sup>23</sup> The revocable enforceable pledge is not illusory because the donor will be bound if he fails to revoke the pledge. The enforceability will be strengthened if the donor makes an initial payment when entering into the pledge as part performance of the donor’s obligations.<sup>24</sup> If the donor bargains for naming or other consideration that will be lost if all payments are not made, the case for the existence of an exchange of promises to support enforcement is also strengthened.

#### SAMPLE LANGUAGE FOR REVOCABLE ENFORCEABLE PLEDGE

Donor and Charity agree that prior to the due date for any payment due under this Agreement, Donor may revoke his obligation to make any further payments under this Agreement by notifying Charity of such revocation in writing. If Donor does not notify Charity of the revocation of this Agreement before the due date of a payment under this Agreement, Donor and Donor’s estate shall be irrevocably obligated to make such payment. If Donor revokes this Agreement prior to the payment of all amounts due under this Agreement, Charity shall not be obligated to recognize the gift and may provide such recognition as Charity determines is appropriate for the amounts given by Donor prior to revocation of this Agreement. If Donor revokes this Agreement, Charity shall retain all amounts given by Donor before such revocation and shall use such amounts consistent with the purposes set forth in this Agreement. While Donor is living, only Donor individually may exercise the right to revoke this Agreement, and it may not be exercised by any other person, including, but not limited to, Donor’s personal representative or Donor’s agent under a power of attorney. Donor’s pledge shall become irrevocable upon Donor’s death if the Agreement is not revoked by the Donor during his lifetime. If Donor does not revoke this Agreement, Donor’s estate shall be liable for the difference, if any, between \$[the amount of the gift] and the sum of the amounts paid by Donor to Charity during Donor’s lifetime. If Donor revokes this Agreement during his lifetime, Donor’s estate shall be liable for all amounts that became irrevocable prior to Donor’s revocation and which were not paid by Donor during his lifetime.

Either the statement of intent to give or the revocable enforceable pledge will address donor's uncertainty. Both give the donor comfort that if circumstances change, the donor is not stuck with the terms of the gift. Such flexibility will make it easier for a charity to get a donor to sign these alternatives.

### **Enforcement Against the Charity**

Charities must also consider enforcement of a gift agreement against the charity. When a charity finds that it cannot comply with the terms of a gift agreement, the result can be years of costly litigation. This was the case for the Barnes Foundation, which found that it was not possible to operate a museum in a residential area subject to the many detailed requirements imposed by the donor's trust. Only after years of litigation was the foundation able to move to a downtown location more suited to the operation of a museum.<sup>25</sup>

The charity's obligations will last much longer than the donor's obligations. Charitable trusts are not subject to the rule against perpetuities that limits the duration of private trusts in many jurisdictions.<sup>26</sup> Perpetuity is a long time (some might say a very, very long time). Gift agreements must address the issue of perpetuity when imposing conditions or requirements of indefinite terms.

In perpetuity, many things will change. If a gift condition does not have a reasonably short time limit, provisions for adaptation should be included in the gift agreement.

### **Issues with Naming Rights**

Naming rights often create perpetuity problems. Some buildings last for many hundreds of years, but others do not. In California, for example, seismic retrofit requirements for hospitals have resulted in the demolition of buildings less than 50 years old. Any gift agreement with a naming commitment should address the eventual destruction of the building. The terms may provide that if the building is destroyed by fire or some other casualty, and rebuilt with insurance, the donor's name will be placed on the new building. If the building must be demolished because it is outdated, or under circumstances where new funds must be solicited, the donor's original gift could be recognized on a plaque in the new building, however another donor will be given the building naming. Generally donors understand that future donors may want a naming opportunity for their large gifts.

#### **SAMPLE PROVISION FOR NAMING RIGHTS:**

If the building is destroyed by fire, earthquake, flood, or other casualty, and if the charity is able to rebuild the building with the proceeds of insurance payments, the donor's name will be placed on the replacement building in substantially the same manner as it appeared in the original building. If the building is demolished because of obsolescence or other circumstances and is not replaced, or not replaced with the proceeds of insurance, the donor's contribution will be acknowledged with a plaque in a prominent location in a replacement building or on the facilities of the charity.

Even smaller naming opportunities should contain language that allows the charity to modify the recognition over time. Donor walls, rooms and other named installations will need to change over time in most instances. Ideally, this type of naming should simply last for the useful life of the building. Other recognition could be offered, but carrying on the names of all past donors in perpetuity will become burdensome. A provision for recognition might state: Charity will maintain recognition of the donor so long as the building is owned and used by Charity.

Finally, charities must consider the possibility that the donor's reputation will be damaged. To avoid having to retain a felon's name on a building, the charity should include a provision that allows a name to be removed if it will damage the charity's reputation.

Using such a provision in all gift agreements will avoid awkward comparisons of gift agreements between donors. The following is a sample provision for issues with donor reputation: Charity shall have the right to remove donor's name if Charity's association with donor will materially damage the reputation of Charity.

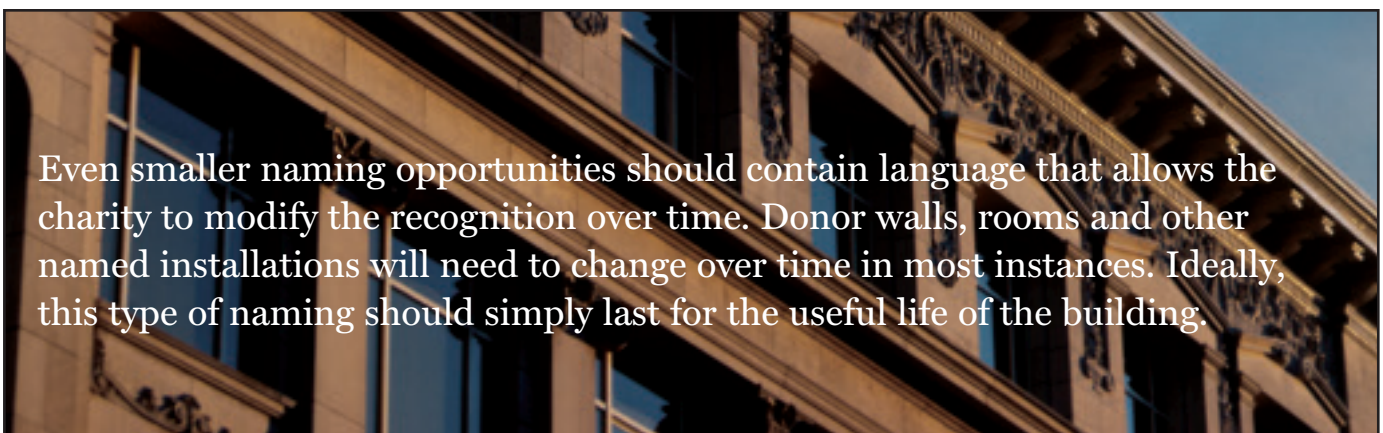
### **Managing Donor Restrictions**

Increasingly, donors desire to direct how their gifts will be used by the charity. Donor restrictions as to use of funds must be adaptable to the changing needs of the institution. At the outset, the donor and the charity should discuss restrictions to ensure that the gift meets the current needs of the charity. Charities should be comfortable proposing changes to donor restrictions. While the general nature of the restriction may be from the donor,

often the particulars of restrictions are crafted by professional advisors who are filling in the details for their clients. When a charity explains to a donor the reason for a proposed change, the donor generally is receptive to the charity's suggestion.

### **Creating Model Restrictions**

Charities also may want to consider creating funds for particular purposes to which donors can make contributions. For example, a primary school might create funds for scholarships, faculty salaries, arts education and athletics. Donors interested in these areas can be encouraged to contribute to the existing funds created by the charity. This allows the charity to draft the limitations on these funds to meet the charity's needs. The charity also can reserve the right to modify the terms of the



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funds over time. Maintaining fewer funds also will reduce the charity's administrative burden.

### **Build in a Variance Power**

Even when the charity drafts the purposes of a fund, allowances must be made for changes in the future. At common law, courts could change the purposes of a charitable fund when it became impossible to fulfill the purposes. Under the Uniform Management of Institutional Funds Act (UMIFA), the donor and the charity can agree to a change of purpose for funds.<sup>27</sup> If the donor is not available, the charity must petition the court and make the Attorney General a party to the action to modify a restricted purpose.<sup>28</sup> The charity must show the court that the restriction is obsolete or impracticable to justify having the court modify the restriction.<sup>29</sup>

The charity and the donor are free to draft their own provisions regarding the modification of a restriction on a gift. If the donor will agree, a charity should reserve to its board the power to modify a purpose if the purpose no longer serves the needs of the charity. A proposed draft of UMIFA would allow boards to take this action with respect to small funds of \$25,000 to \$50,000. While the provision will help charities clean up small funds, it will not be of use for the many funds that exceed this dollar limit. A sample provision for modifying the purposes of a fund might read: The board of directors of Charity may modify the purposes of this gift if those purposes become obsolete, impractical or inconsistent with the mission of Charity.

### **Endowment Spending Policy Issues**

In addition to limiting the purpose of a fund, donors may want to make the fund endowed and restrict spending from the fund. Historically, only the income (defined as dividends, interest, rents and royalties) of an endowed fund could be spent by a charity. In connection

with the Prudent Investor Standard which focuses on total return, UMIFA allows charities to adopt spending policies that preserve the principal of the fund but encourage total return investing.<sup>30</sup> The charity might adopt a policy of spending 3.5 percent of the value of its endowment annually. Other spending formulas are based on multi-year returns to smooth out the distributions from the endowment.

While UMIFA gives charities important flexibility in spending and investing their endowments, it has certain limitations. In particular, UMIFA prohibits spending below the historic dollar value of the endowment.<sup>31</sup> The historic dollar value is the value of the assets contributed to the endowment.<sup>32</sup> For old endowments, this is not a problem because any fluctuation in value likely will stay above the historic dollar value of the fund. For endowments that have received significant contributions in the past few years, however, a market dip could drop the endowment assets below their historic dollar value.

A charity and donor are free to adopt a spending policy for an endowed fund created by the donor. In general, the specifics of a spending policy should not be set forth in individual donor agreements. Instead, the gift agreements should adopt the general endowment spending policy of the charity as modified from time to time. This provision will keep the spending rate for all endowed funds the same, easing administration burdens. In addition, it will allow the charity to change the policy from time to time for all funds, rather than just prospectively. For example:

This fund shall be endowed, and Charity shall distribute only the earnings of the fund annually. The earnings that may be distributed from the fund shall be determined in accordance with the endowment spending policy of Charity as adopted from time to time.

If a donor is concerned about giving the charity total discretion to change the spending policy, an upper limit of distribution can be added to the agreement. Ideally, the upper limit will exceed the amount that the charity would ever distribute under any spending policy. For example:

Notwithstanding the foregoing, the distributions from the fund shall not exceed an average of six percent of the value of the fund over any four-year period.

### **Donor Role in Selecting Individual Beneficiaries of Gift**

Endowed chairs and scholarship funds are popular funds for donors to create under gift agreements. It is important that the donor's role in selecting the professor or scholarship recipients be addressed. Generally, in the case of a professorship, the donor should not have any role in selecting the holder of the chair. With respect to scholarships, the donor can participate in the selection process if she desires. Typically the charity would screen initial applicants and identify a small number of finalists. The donor can serve as a member of a selection committee chosen by the charity, but the donor must not control the committee.<sup>33</sup>

### **Addressing Standing to Enforce a Gift**

Even when a donor enters into a written agreement with a charity, it is not always clear that the donor or any other individual has standing to enforce the agreement. In most states, the Attorney General is charged with enforcing charitable trusts and has nearly exclusive authority to do so.<sup>34</sup> Donor agreements should

address who has standing to enforce the agreement—specifically conferring standing on the donor. In some cases, the donor and the charity may want to allow the donor's children to enforce the agreement after the donor's death. With that standing, the donor's children also should have the power to consent to the modification of the agreement. Generally this standing provision would not extend beyond grandchildren because the number of people with standing will become too large. The provision also should address disagreements among the parties with standing. The following is a sample provision for standing:

Donor shall have the right to enforce this agreement and to agree to the modification of this agreement during Donor's lifetime. After Donor's death, Donor's children shall have the right to enforce this agreement and to agree to the modification of this agreement. Donor's children shall act by a decision of the majority of them who are then living, and a writing signed by the majority of Donor's children then living shall be binding if agreed to by Charity.

### **Include a Counterparts Clause**

It is not always easy to get the donor and a representative with authority to sign on behalf of the charity in the same room to sign a gift agreement. Gift agreements should include a counterparts clause that allows the charity and donor to sign on separate versions of the agreement. Sample language for counterparts might read: This agreement may be signed in multiple counterparts, all of which shall constitute one original instrument.

### **Specify the Applicable State Law**

The rules governing gift agreements are a function of state law. While many states have similar laws, the charity will want to include a governing law clause that causes the agreement to be interpreted under the laws of the state that the charity used to analyze questions of enforcing and modifying the agreement. Each state's body of law includes rules for selecting applicable law when more than one state's law could apply. Generally a charity will want to be sure of the applicable law and will want to exclude any choice of law analysis. A provision for selecting state law might read: This gift agreement shall be governed by the laws of the State of California without regard to its conflict of law principles.

### **Real Contracts Are Negotiated**

Depending on circumstances, charities may or may not want to make pledge agreements enforceable. The benefit of being able to enforce a gift in court, to count the pledge as an asset on financial statements and to use a pledge as collateral must be weighed against the constraints the charity will face if it must renegotiate the pledge and the limitation on the donor's flexibility to satisfy the pledge from a donor advised fund or a private foundation. Also, the charity should consider donor resistance to irrevocable

commitment. When the gift is the lead gift of a major campaign, the charity may decide that it should be drafted as an enforceable pledge. For most of the donors, however, the charity may find that the statement of intent to make a gift or a revocable enforceable pledge is better for the donor and charity. If the charity uses an enforceable pledge the charity should review the issues that can arise with an enforceable pledge with the donor to reduce the chance of problems in the future.

Under the pressure to raise funds, sometimes a charity adopts a "just get in, we will figure out the rest later" attitude. Accepting gifts subject to restrictions without careful consideration of those restrictions eventually will lead to problems for the charity. The charity could be burdened with the cost of modifying the gift or possible loss of the gift all together. One *cy pres* remedy is to transfer assets from a charity that cannot or will not carry out the donor's purpose to another charity that will carry out the purpose. A charity that attempts to disregard a donor's restrictions that are burdensome risks litigation with the donor, the donor's family or the Attorney General. Such litigation hurts the charity's credibility with other donors. These difficulties can be avoided by incorporating provisions in gift agreements that will not conflict with the charity's needs.

Rather than being offended by a charity's negotiation of gift terms, donors see negotiating as a demonstration of the charity's recognition that it must abide by the terms of the gift agreement. Ultimately, the donor's objective is to assist the charity. If the charity can articulate the reasons for its changes and how the changes help the charity carry out its mission, the donor generally will be receptive to the changes.

Gift agreements are a deal between two parties. Like other deals, a gift works best when the donor and the charity have an open exchange about their goals and objectives. Careful consideration of issues

will produce an agreement that meets both parties' needs. In particular, the parties should consider the costs and benefits of an enforceable agreement and the duration of the provisions of the agreement. By doing so, the charity and the donor have the best chance of making a good deal for all. ■

### Endnotes

<sup>1</sup> Restatement 2d Contracts § 71.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* § 90.

<sup>4</sup> See "Lack of Consideration as Barring Enforcement of Promise to Make Charitable Contribution or Subscription—Modern Cases" A.L.R. 4<sup>th</sup> 241 (1991; Supp. 2001).

<sup>5</sup> Penn. Uniform Writer Obligations Act [Act of May 13, 1927, P.C. 985, 33 P.S. § 6].

<sup>6</sup> See e.g., Cal. Prob. Code § 16045 et. seq.

<sup>7</sup> I.R.C. § 4958.

<sup>8</sup> I.R.C. § 4958(f).

<sup>9</sup> *Id.* § 4958(f)(1)(A).

<sup>10</sup> *Id.* § 4958(a).

<sup>11</sup> *Id.* § 4958(c).

<sup>12</sup> Treas. Reg. § 53.4941(d)-2(f).

<sup>13</sup> I.R.C. § 4946.

<sup>14</sup> I.R.C. § 4958(c)(2).

<sup>15</sup> I.R.C. § 4958(a) (Funds must be returned to charity, but do not go back into the donor advised fund. I.R.C. § 4958(f)(6)).

<sup>16</sup> See Rev. Rul. 81-110, 1981-1 C.B. 479 (payment by A to a charity to satisfy B's pledge is gift to B from A—may not be the same for income taxes however because a pledge is a completed gift when made for gift tax, but is not a completed gift for income tax purposes. GCM 38505).

<sup>17</sup> Statement of Financial Accounting Standards 116.

<sup>18</sup> *NCPG Guidelines for Reporting and Counting Charitable Gifts*, available online at [www.ncpg.org/ethics\\_standards/NC\\_PG%20counting%20guidelines.pdf](http://www.ncpg.org/ethics_standards/NC_PG%20counting%20guidelines.pdf) (last viewed February 19, 2007).

<sup>19</sup> See e.g., Cal. Prob. Code § 9150.

<sup>20</sup> A Creditor's Claim, however, is technically a procedural step required to allow a lawsuit against the estate. See e.g., Cal. Prob. Code § 9351.

<sup>21</sup> See e.g., Cal. Prob. Code § 9254 (allows interested person in estate to contest allowance of a claim).

<sup>22</sup> See I.R.C. § 2053(c)(1)(A).

<sup>23</sup> Restatement (second) contracts § 77.

<sup>24</sup> Restatement (second) contracts § 72.

<sup>25</sup> D. Blum, "Court Ruling Appears to End Dispute Over Donor's Guidance" *Chronicle of Philanthropy* (May 12, 2005).

<sup>26</sup> See e.g., Cal. Prob. Code § 21225(e).

<sup>27</sup> See e.g., Cal. Prob. Code § 18507(a).

<sup>28</sup> *Id.* § 18507(b).

<sup>29</sup> *Id.*

<sup>30</sup> See e.g., Cal. Prob. Code § 18502.

<sup>31</sup> *Id.* § 18501(d).

<sup>32</sup> *Id.*

<sup>33</sup> Joint Committee on Taxation, Technical Explanation of HR 4, the "Pension Protection Act of 2006," at 345.

<sup>34</sup> See e.g., Cal. Gov't Code 12580 et seq.; *L.B. Research & Education Foundation v. UCLA Foundation*, 130 Cal. App. 4<sup>th</sup> 171 (2005).

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