

Gift Agreement Nuts and Bolts

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What We'll Cover

- I. The What, Why, When & How of Gift Agreements: Definitions, Basic Elements.
- II. Binding/Non-binding Dilemma.
- III. Endowment gifts – Special consideration for Flexibility and the possibility of under funding.
- IV. Practice and Practical Issues.
- V. Questions?

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What are Gift Agreements?

- Formal Document Between Donor and Charity.
- Special issues (DAFs, Private Foundations).
- Sets forth details about the gift.

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Why do you need a Gift Agreement?

- Promotes Mutual Understanding.
- Sets forth Donor intentions (and expectations) for use of gift.
- Helps Charity Consider what it can and cannot do.
 - If drafted by Charity can set the starting point and specific parameters from Charity's perspective.
- Provides mechanism for dealing with changes in circumstances.

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When Do You Need a Gift Agreement

- Charity policy – What size gift requires a formal agreement?
- Complex Asset (e.g. collections)
- Complex Plans for Use of the Gift
- Recognition/Namings
- Formal Agreement not always necessary

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How: Basic Elements of a Gift Agreement

- Names of Parties
- Effective Date
- Gift Amount
- Gift Asset (valuation issues)
- Schedule of Payments
- Gift Purpose
- Recognition/Namings
- Reporting
- Change of Circumstances Clause
- Signatures

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How (cont.): Other Clauses

- Publicity
- Dispute Resolution
- Standing to Enforce
- Confidentiality Clauses
- Intellectual Property rights
- State Law
- Counterparts/electronic signatures

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How (cont.): Administrative Logistics

- Create Template Agreements
- Have policies in place for Agreement review, required signatures
- Seek assistance from Counsel or others

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Should Donor's Commitment be Non-Binding or Binding

Non-binding:

- Pros:
 - DAF/PF as donors
 - No Fiduciary obligation to enforce/collect
 - Takes into account donor uncertainty
- Con: If donor dies not an obligation of estate/trust; can't submit as creditor's claim
- Note: Agreement should explicitly say non-binding if intended to be non-binding

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Should Donor's commitment be Non-Binding or Binding (cont.)

Binding – sometimes needed

- Capital projects
- Charity relying on funds to hire new people/start new project.
- Can present as a creditor's claim to estate/trust
- Note: A pledge may be 'binding' i.e. enforceable even if it is silent on the matter: consideration/detrimental reliance
- Hybrid May be possible – Revocable enforceable pledge (per Reynolds T. Cafferata)

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Endowment Gifts

- Perpetuity
- Need Non-judicial method to modify purpose restrictions for change in circumstances.
- Need Alternative if not enough for funding minimum.

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Namings

- Conditioned on donor commitment being fulfilled?
- Duration issues/ "useful life"
- What if building demolished or destroyed
- What if Donor's reputation becomes tarnished

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What Happens in the Absence of an Agreement

- Charitable Trust Doctrine
- May need to go to court to modify/clarify purpose

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Practice

Case Study 1

- Donor Philamena Philanthropic wishes to make a gift to support the building of a new building on campus. University needs a binding (enforceable) pledge to be able to secure financing. Donor is willing to sign the pledge and says that she will be using the Donor Advised Fund she established last year to fulfill the pledge. How should the University representatives proceed.

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Practice (cont.)

Case Study 2

Continuation of 1:

Philamena wants the building to be named for her mother and wants to specify that the name will be used forever. What discussion do you suggest the University have with the her.

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Practice (cont)

Case Study 3

Donor, Pat Perpetuity, wants to establish an endowed fund at your organization to create a new program that would provide after school activities and homework help at multiple locations in your community. Pat wishes to make her gift in annual installments over 5 years. What issues do you see? How will you address these issues in the gift discussions and in the gift agreement.

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