

Perfecting Donor Intent on Gifts to Charity: The Gift Agreement

By Eric A. Manterfield

Eric Manterfield explains the importance of a gift agreement in realizing the client's goals in charitable giving and the conflicts of interest that may arise when the planning attorney has ties to a charity.

Many estate planners work with clients on the development of sophisticated planned gifts, which provide needed support to charitable organizations throughout the country. These clients obtain immediate income tax deductions under Code Sec. 170 of the Internal Revenue Code of 1986, as amended. Gifts that are effective at death are tax deductible under Code Sec. 2055 and under the laws of most, if not all, states. When the donation is received by the charity, may the charity use the funds to support its overall operating budget or does the donor have a more specific use in mind? Are there restrictions on the charity's use of the gift, if made in perpetuity?

More and more donors of charitable gifts are specifying the exact use to be made of the gift, perhaps many years into the future. Your client has a vision about the charity's use of the donated assets. But what happens if your client's specific gift purposes are no longer viable or even needed by the charitable organization years after the gift is made? What steps should be taken as the gift is planned to provide flexibility in today's reality and as that reality changes over time?

Your client's intent might have made a great deal of sense when the gift was made. It satisfied a need of

the charity and it fulfilled wishes of your client; but times change, of course. A gift made in perpetuity for a particular purpose may, in time, no longer make any sense. The needs of the charitable organization will also change over time; may the charity use the donation for its greater need beyond the restrictions imposed by your client? What steps can be taken to avoid these problems? Your donor client, the charitable organization and you must work together to identify the client's intent and to set forth procedures to deal with the inevitable changes that will occur over time. Your client may have a general or even specific purpose in mind for the gift. The charity's development officers may have worked with your client to develop the case for support. The charity knows why it needs the money. Your client knows the purpose for which the gift will be made.

But once the donation is made the gift is out of your client's hands, of course. Your client may no longer have any legal right to direct how the funds are to be used. That is why you must work with the client and the charitable organization to provide for flexibility in the future. Who has the legal ability (or "standing") to challenge the charity's proposed modification of any gift restrictions and to change the restrictions imposed by your client? May the charity unilaterally change the restrictions? Must approval be obtained from your client or the client's family before the change can be implemented?

What Could Go Wrong?

The Barnes Foundation was established by Dr. Albert Barnes in 1922 to house his extensive impressionist,

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post-impressionist and early modern art collection. The estimated value of the collection today is \$6 billion. Dr. Barnes housed his collection in a modest structure in Merion, Pennsylvania and specified that it could not be moved nor could any art be sold or even loaned to other museums. The trustees of the Foundation filed a lawsuit in 2002, asking permission to move the collection to a new building to be constructed in downtown Philadelphia. Ultimately, the court granted the request to move to the new location on December 13, 2004, even though it ran counter to the Foundation's charter and governing documents. The move was approved, according to the Judge, because there was "no viable alternative."

The Pennsylvania Supreme Court unanimously rejected an art student's appeal of the decision on the basis that he had no standing to pursue the case. Thereafter, the Friends of the Barnes Foundation and the local government asked the local court to reconsider its 2004 approval of the museum's move. The judge ruled in May of 2008 that neither the Friends nor the local government had standing to pursue the litigation because "they have no interest beyond that of the general public." The public interest was to be protected exclusively by the state Attorney General, according to the Judge. Finally, the Friends of the Barnes Foundation and the local government decided in June of 2008 not to appeal this decision, ending the litigation.

The L.B. Research and Education Foundation donated \$1M to endow a chair at the UCLA School of Medicine. The gift agreement specified that the funds were to be used by the University and holders of the chair to "support basic science research activities that may have the potential for clinical application." The Foundation brought suit against UCLA and alleged that the University had, among other transgressions, failed to employ personnel meeting the criteria of the Chair. After judgment on the pleadings was entered in favor of UCLA, the issue on appeal was whether the gift agreement created a contract subject to a condition subsequent or a charitable trust. While the parties argued that the answer to this question would determine whether the Foundation had standing to enforce the agreement, the California Court

of Appeals held that the Foundation had standing regardless of the resolution of that question.

The Court of Appeals ruled that the agreement was a contract subject to a condition subsequent and that the Foundation had standing to bring suit to enforce the contract. Interestingly, the Court also ruled that, had it concluded that the gift created a charitable trust, the power of the California Attorney General to enforce charitable trusts "does not deprive the donor of standing to enforce the terms of the trust it created."¹

Charles and Marie Robertson of the Robertson Foundation donated \$35M of A&P stock to Princeton University in 1961 to create a supporting organization to fund the Woodrow Wilson School of Public and International Affairs. The Foundation noted in its Certificate of Incorporation that the School was one "where men and women dedicated to public service may prepare themselves for careers in government service, with particular emphasis on the education of such persons for careers in those areas of the Federal

The needs of the charitable organization will also change over time; may the charity use the donation for its greater need beyond the restrictions imposed by your client?

Government that are concerned with international relations and affairs." Their goal was to have the School graduate high-level foreign diplomats, which was of critical importance to the donors at the height of the cold war in the early 1960s. While Princeton had devoted a substantial portion of the donation to fund the operating budget of the Woodrow Wilson School, it has also devoted significant dollars to other purposes.

Following the death of Mrs. Robertson in 1972, Mr. Robertson wrote to Princeton to express his displeasure at the low number of Foreign Service graduates. The school responded by saying the world had changed. Descendants of the Robertsons filed suit against Princeton in 2002 to redirect the Foundation (valued at \$900M on June 30, 2008) to other universities that would comply with the wishes of Mr. and Mrs. Robertson. New Jersey is one of the few states that have granted the right to sue to donors and their representatives. The trial was set to begin on January 20, 2009.

The Maddox Foundation was created by Dan and Margaret Maddox in Tennessee, where they lived. It was worth approximately \$100M when Mr. and Mrs.

Maddox were killed in a boating accident. One year after their deaths, the trustees moved the Foundation to Mississippi, where it was reincorporated as a Mississippi charity. It subsequently invested the assets in two sports teams and engaged in other non-traditional expenditures. The assets have declined to \$40M. The Attorney General of Tennessee filed suit to compel the Foundation's return to Tennessee in a local court in that state. Not surprisingly, the court ruled that the Foundation had no power to remove itself from Tennessee. Thereafter, the Attorney General of Mississippi was granted a temporary restraining order to prevent the assets from leaving Mississippi. The litigation was finally settled by dividing the assets between the two organizations.

Eli Lilly, the grandson of the founder of Eli Lilly and Company in Indianapolis, created a charitable trust of which Earlham College was named as trustee, to own and operate Conner Prairie, an early history museum. Lilly later transferred to the College about \$30M in Lilly stock under terms that created a "first charge" upon the income and principal of the gifts for the development and operation of Conner Prairie, with any unused income (but no principal) being available to the College. Obviously, Earlham had a conflict of interest being the party that decided how much income was not needed by Conner Prairie and could therefore be used for the purposes of the college. Following several years of negotiation and mediation between Earlham College and the board of directors of Conner Prairie over the museum's operation and governance, the College fired all the independent directors of Conner Prairie and assumed direct control of the museum. The Attorney General of Indiana stepped in and eventually negotiated a settlement between the parties under which the College resigned as trustee and the endowment created by Mr. Lilly was divided between Earlham and a newly independent Conner Prairie.

Randolph-Macon Woman's College was established in 1891 for the primary purpose of educating women. When the college announced its intention to become a co-educational institution, several graduates brought suit, alleging that the college was a charitable trust and that the plaintiffs were beneficiaries entitled to enforce duties imposed on the trustees

of the college by Virginia's Uniform Trust Code. Specifically, the graduates argued that the trustees breached their duties to prior donors to the college by using the funds for purposes that were beyond the college's governing documents. They asserted that "[r]eal estate, art, money, or other property given to [the College] without any instructions on their use, were impressed with the purpose found in [the College's] articles of incorporation, as those governing documents existed at the time of the gift."

The Supreme Court of Virginia ruled that the College was a charitable corporation and, as such, was governed by corporate law and not the Uniform Trust Code. Only the Attorney General of Virginia has the statutory authority to act on behalf of the public if a charitable corporation uses charitable property in a manner inconsistent with the corporation's governing documents or applicable law.²

Negotiating New Restricted Gifts

Many of these issues could have been minimized by a thoughtful gift agreement between the donor and the charitable organization. The three players in this drama are your client (the prospective donor), the charity and you. Each brings a different perspective to the process.

Your client (the prospective donor) undoubtedly has a specific program in mind when considering a gift. It is the immediacy of the result that may be foremost in the mind of your client. The client may not be thinking as much about the long-term use of the gift. The charity may have an immediate need and your client wishes to satisfy that need. However, restricting the gift to that use in perpetuity may not be well-advised

due to changing needs and circumstances. For example, your client may wish to support the United Way's "Success by Six" program, which is an early intervention program for children at risk of falling behind in the educational system. If the Success by Six program is later incorporated into a larger early childhood education program or if the United Way's program disappears or is no longer needed because of other changes in the country's education programs, what happens to these restricted funds? Perhaps a better way for you to express the donor's intentions

Charitable organizations must develop policies and procedures for the solicitation and implementation of restricted gifts.

is to support “early education for disadvantaged children,”³ which may enable the supported United Way program to fold the donation into a successor program that has the same purpose.

Another example is a gift made in the 1950s to support a home for unwed mothers. Because society did not look favorably on this family situation, there were many such homes around the country to shelter the expectant mothers during their pregnancy. As the perception of unwed mothers changed over time most of these homes went out of existence. This change in society was undoubtedly not anticipated by donors fifty or more years ago. What happens to those restricted funds? An answer might have been provided if the donors’ lawyers had specified that the goal of these donations was to provide “support and comfort” for unwed mothers, which might have enabled those homes to divert the funds to other programs.

The estate planner must help his or her client identify short and long-term goals. Some client education will probably be needed to be certain that there is flexibility in the future as today’s goals may become impracticable over time. The charitable organization must educate its volunteers, its donors and its staff about its standards and policies about the acceptance of restricted gifts. The charity’s staff must be fully trained in these standards and policies before they approach prospective donors.

Parties who must be trained in standards of conduct and charitable giving may include the charity’s executive director, chief financial officer, chief development officer, planned giving officer, program directors and select volunteers.

Ethical issues. The charity should establish strict ethical standards for its contact and relationships with prospective donors. It must educate its own Board of Directors to become ambassadors for the charity within these guidelines and should educate and train its own staff. Ethical practices must be followed strictly to avoid charges of misconduct, waste, conflict of interest, fraud and even the appearance of impropriety. The National Committee on Planned Giving and the American Council on Gift Annuities adopted “Model Standards of Practice for the Charitable Gift Planner” in 1991 and revised them in 1999.⁴ The Preamble states that these ethical standards are designed to enable the donor, the charitable organization and the donor’s lawyer “to structure a gift that achieves a fair and proper balance between the interests of the donor and the purposes of the charitable institution.”

Based on these standards, the best practice for a charitable organization that solicits planned gifts should include these elements at a minimum:

- The role of the charity’s officers and the donor’s lawyer and how each will be compensated must be completely and accurately explained to your client.
- The charity’s officers cannot act as representatives of your client. That is your role.
- Your compensation and that of the charity’s officers must be reasonable and proportionate to the services provided. Finder’s fees, commissions or other fees to be paid by the charity as a condition of the gift are never appropriate. Commissions paid to the charity’s officers as compensation is never appropriate.
- You must completely and accurately explain to your client the tax implications of the planned gift.
- You and the charity’s officers must advise the donor within the limits of your own training and expertise and each of you should involve other advisors if you reach the limits of your own training and expertise.
- The charity’s officers should always encourage the donor to discuss the proposed gift with you.
- You should recommend that your client consult with the charitable organization on the proposed gift. If your client wishes to remain anonymous, you should consult with the charitable organization on behalf of your unnamed client.
- You should explain the consequences of the proposed gift to your client, the charity and, if applicable, the donor’s family. Any assumptions underlying the financial illustration of those consequences must be realistic.
- All parties must comply with the letter and the spirit of all applicable federal and state law and regulations.
- All parties must act with fairness, honesty, integrity and openness with each other. Except for your fully disclosed and reasonable compensation, no one should have a vested interest in the proposed gift which could result in personal gain.

The charity’s Board of Directors. The members of the charity’s Board of Directors are frequently the most effective spokespersons for the charity. Many estate planning attorneys are solicited to serve on the board of directors of local charities. Why do you support the mission of the charity with your time and financial support? All Board members must be trained on the intricacies of gift agreements before they unwittingly make commitments on behalf of

the charity. As an advisor to a donor client or to the charitable organization itself, you must be certain that all officers and directors of the charity are trained in ethical practices, statutory requirements, state law and acceptable practices.

A Board orientation program should emphasize the fiduciary responsibilities that each member assumes when joining the Board of Directors. Each Board member must put the interests of the charity above any personal interest that he or she might have. Attorneys who serve on the charity's Board of Directors must be cognizant of Rule 1.7 of the American Bar Association's Rules of Professional Conduct when you simultaneously serve on the charity's Board and represent a prospective donor. That rule provides, in pertinent part, as follows:

a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ... there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer.

Your obligation must be to your client and not with any personal wish that the client provide financial support to the charity on whose Board of Directors you sit. Does that mean you are prohibited from representing a client who wishes to support your favorite charity? I do not believe so. Nevertheless, you must never propose a gift to a charity that you support. In addition, you must disclose to the client in writing your simultaneous interest in supporting the charity and the potential conflict that exists. Failure to provide this notice and obtain your client's waiver may result in a claim of malpractice or worse. Emphasize that your client has an independent wish to support the charity and that you did not recommend the charity to the client.

The charity's employees. You should be certain that the charity that you support trains all of its staff members on its policies and procedures for accepting restricted gifts. Indeed, those employees who manage the charity's specific programs outside of the realm of development frequently are the ones who have the most contact with volunteers and others who may wish to make a restricted gift in support of that program.

The estate planning attorney. The attorney is critically important in the development of the restricted gift to the charitable organization. You represent the

donor in the transaction; you do not represent the charity (even if you serve on its Board of Directors). If you do not represent the donor, or are on the charity's board of directors, you may need to assess the expertise of the donor's attorney. Restricted charitable gifts, along with any number of other planned giving techniques, require intricate knowledge of tax and other consequences, drafting expertise and a vision about future uncertainties. Does the donor's lawyer have that capability? Not all clients are advised by lawyers who are fully competent in charitable giving techniques. The client's attorney will serve their client by bringing a charitable giving expert into the planning meetings. The client will appreciate their attorney's understanding that expertise in this area is required. A poor decision on the part of the attorney for the client is to discourage the charitable gift because the attorney does not have the expertise to handle the transaction. The client will recognize that their goals are being thwarted and that they are not being well-served by the attorney.

Some lawyers may inappropriately view the charity's officers as a perceived threat. Instead of this unreasonable approach, when the planning attorney learns that his donor client is considering making a gift, advise the client that you will meet with the charitable organization's officer and use that meeting to discuss all of the implications of the client's gift. How was the plan developed with your client? How will it support the mission of the charity? How will it provide benefits to your client? Does your client fully understand the intricacies of the proposed gift?

To the extent the charity's officer becomes a partner with the lawyer for the prospective donor, the road blocks posed by perceived threats and lack of expertise can be overcome. Nevertheless, those road blocks are a reality, which must be recognized any time the charity directs the prospective client to work with his or her lawyer to document the planned gift. Those lawyers who regularly engage in estate planning and charitable giving on behalf of their clients need to be aware of these phenomena, so that steps might be taken (perhaps as a member of a charity's Board of Directors or planned giving committee) to overcome these obstacles on behalf of the charitable organizations which they support.

As an attorney for a donor client, you must help clarify your client's short and long-term goals for the restricted gift. Are they realistic? Do you need to work with your client to modify these goals and expectations? You may have a long term relationship with

your client. You are in a better position to work with your client to articulate these goals and objectives in a more realistic manner than any other advisor. You should advise your client on the appropriate form of the planned or restricted gift and the timing of the gift. Should the gift be outright to the charity or in trust? Should the gift be made this year, next year or when the client dies? How will the gift be funded? What are the tax implications?

It will be important to explain that a gift subject to a condition subsequent that would defeat the gift will not qualify for the charitable deduction until the condition is eliminated. Another factor to consider is that a restriction imposed by a donor on the manner in which contributed property may be used may adversely impact the value of the property for purposes of the deduction. The charitable deduction is based on the value received by the charity not as the value relinquished by the donor, so in many cases, the restriction reduces the value (and deduction) of the charitable gift. As an aside, income tax deductions for gifts by individuals to public charities are subject to a limit of 50 percent of the donor's contribution basis for the tax year. Code Sec. 170(b)(1). To the extent the gift exceeds this basis, excesses may be carried forward for five years (Code Sec. 170(d)(1)(A)).

Development of a Written Gift Agreement

You must work with your client and the charitable organization to develop a written gift agreement.

Goals of the written gift agreement include:

- Stating your client's intentions clearly.
- Including specific, realistic and measurable restrictions on the charity's use of the donation.
- Providing flexibility in the charity's use of the funds over time, perhaps specifying changes that might be made depending on future circumstances (for example, the size of the donation falls below a set level or the purpose of the donation is no longer achievable or of strategic importance to the charity).
- Indicating a mechanism for a non-judicial modification of the client's restrictions if those circumstances arise. Who can make the change? Is approval by your client or the client's family required? Are there limited modifications that can be made or can the entire gift be changed to a new purpose?

How to get the important issues on the table. Some questions that you might ask your client and the char-

ity, to help develop the gift agreement, might include the following:

- Are the goals of your client short-term or long-term?
- Are your client's goals realistic and achievable?
- What are the measures of success of your clients' goals, both short-term and long-term?
- Are the goals of your client consistent with the mission of the charity?
- If your client's goals are short-term, are they consistent with the charity's current strategic plan?
- If your client's goals are long-term, what flexibility can be worked into the gift agreement as your client's goals and the needs of the charity evolve over time?
- If your client's goals are long-term, who can be given the authority to make a non-judicial modification of the restrictions imposed by your client as the needs of the charity evolve over time?
- Are your client's long-term goals stated broadly enough to contemplate changes in society and the mission of the charity over many years? Encourage your client to think years into the future. How may the gift be used under completely different circumstances and still meet the goals of your client and the charity?
- Is the charity willing to comply with your client's proposed restrictions?
- Can the charity manage the gift within the proposed restrictions in a cost-effective manner consistent with the mission of the charity?
- Is the charity willing to accept the asset that is being proposed to fund the gift?
- What will be the name of the fund? Will it carry the name of your client, the client's family, the purpose of the fund or some combination?
- What specific assets or dollar amounts are to be donated? Will the gift be made all at once or in installments? If it is to be a lifetime commitment, but completed over time, what happens if your client dies before the pledge has been satisfied?
- What are the restrictions that your client wishes to impose? Is the charity willing to accept those restrictions? Be specific. Restrictions should be quantifiable or measurable objectively.
- What recognition of the gift should be given to your client? Is the charity willing to do what your client wishes in that regard?
- Is the recognition consistent with recognition the charity has given to other donors for similar gifts in the past?

- If your client's name is to be put on a building, what happens to that recognition if the building is torn down or sold?
- Will the recognition be given only when the gift has been completed or is it to be given immediately? If recognition is to be given immediately, what happens to that recognition if the commitment is not satisfied in full?
- How will the charity account for the gift? Is the donation to be kept separate from the charity's other assets? Should there be separate accounting of fund balances, income earned and expenses paid? Can the charity realistically comply with those accounting expectations?
- What, if any, reports will be given to your client or the client's family on the charity's use of the gift? Who receives the report? What is the frequency of the reporting? Will the reports continue in perpetuity or only during your client's lifetime?
- Are there restrictions on the charity's investment of the donated property? If the gift is funded with an interest in a family business, is there an implied expectation that someone outside of the charity will purchase that interest, so the charity ends up with cash? Recall the charity's fiduciary duty to maximize its assets. Does the proposed purchase price represent fair market value?
- May the charity pool this particular gift with its other assets for investment purposes, even though the property will be separately accounted for? Management of multiple funds, each with separate investment objectives, could drain the charity of needed resources.
- Will your client attempt to restrict the investment objectives of the fund after the gift is made or may the charity manage the investments according to its normal policies and procedures?
- Is there a restriction on the rate at which dollars may be taken from the fund, to be used to satisfy the client's intentions? May the charity only spend the net income earned by the gift? Does "net income" include realized capital gains?
- May the charity institute a draw rate (say 5 percent of the annually revalued donation) that is consistent with its draw on other endowment funds? Under what circumstances may the draw rate be changed?
- Who may later modify the client's restrictions? Here is where great creativity is required!
 - If the original purpose of the gift has been accomplished, are there alternative uses of the fund by the charity that would be consistent with your client's intentions or should the donation be transferred to another institution?
- If the charity no longer carries out the programs that were supported by the fund, are there alternative programs that would be consistent with your client's intentions?
- If the dollars provided by the donation exceed those needed to comply with the stated objectives of the gift, may the charity use the excess funds for its general purposes?
- If the needs of the charity in other programmatic areas are greater than the need in the programs supported by the donation, may the charity redirect some or the entire fund?
- If the charity determines that the gift has achieved its purpose, is no longer needed for that purpose, is no longer appropriate or is no longer possible, may the donation be redirected to another activity of the charity? Specify who makes that determination on behalf of the charity (by title and not by name).
- What happens if the charity goes out of existence?
- Whose approval must be obtained before any of these changes are made by the charity?
- Under what circumstances should approval of the court (and state Attorney General) be required?
- Who has standing to enforce the terms of the gift agreement? Is this possible under local law? If your client is no longer living, who has standing to bring a suit if it is believed the charity is not complying with the agreement?
- Must all of the descendants of your client agree, must a majority agree or can any one descendant bring suit? Be certain that any "standing to sue" clause does not result in the IRS's conclusion that the gift is not complete for income tax purposes.
- Under what circumstances can the gift agreement be terminated? The agreement might provide that the donation can be commingled with the charity's other assets and used for its general purposes if the size of the fund falls below a stated level. Because it is impossible for you to determine what that level will be fifty or more years from now, the agreement might provide for termination of the restricted fund if the charity determines that continued administration of the donation as a separate fund is no longer economical. Who makes that decision on behalf of the charity?

Conclusions

As charities create new and innovative programs, the wish of their volunteers to fund those programs grows. Charitable organizations must develop policies and procedures for the solicitation and implementation of restricted gifts. Many estate planning lawyers serve on the boards of directors and the planned giving committees of local charitable organizations. You can and must work with these charities to insure their compliance with the ethical responsibilities that accompany the solicitation of planned gifts. An attorney experienced in charitable giving and ethical consideration must bring the appropriate long-term perspective to the charity's use of a planned gift made in perpetuity by your client. The charity may be so focused on securing the gift that, without your help, insufficient attention is paid to the long-term consequences of the donation. You must build

flexibility into the arrangement with the use of a thoughtful gift agreement.

The work we all do to assist charitable organizations is critical to their success. While we ethically cannot recommend that our clients make gifts to organizations we support, we can and must work closely with our clients and the charities that they independently select to receive their financial assistance to document a flexible planned gift.

ENDNOTES

- ¹ *L.B. Research and Education Foundation v. The UCLA Foundation, et al.*, CA Ct. of App., 29 Cal. Rptr 3d 710 (2005).
- ² *Jenna Dodge, et al. v. Trustees of Randolph-Macon Woman's College*, 661 SE 2nd 805 (2008).
- ³ "Disadvantaged children" would have to be a defined term in the gift agreement.
- ⁴ The Model Standards of Practice for the Charitable Gift Planner can be viewed at the Web site of the National Committee on Planned Giving, available online at www.ncpg.org. Similar guidelines have been adopted by the American Association of Museums, available online at www.aam-us.org.

Gift Agreement [Sample]

THIS AGREEMENT is entered into this _____ day of _____, 20____, between _____ (the "Donor") and _____, a tax exempt, non-profit organization located in _____ (the "Charity").

WITNESSETH:

WHEREAS, the Donor has delivered to the Charity the property which is set forth on Exhibit A attached hereto [or the Donor has agreed to make payments to the Charity according to the schedule set forth on Exhibit A attached hereto] (the "Gift"); and

WHEREAS, the Charity has accepted the Gift for the purposes and under the considerations set forth in this Gift Agreement;

NOW, THEREFORE, in consideration of the mutual covenants set forth herein, the Donor and the Charity agree as follows:

- The Donor has made the Gift in order to establish the _____ Fund (the "Fund"), which is to become an asset of the Charity and shall be governed by the Articles of Incorporation and By-Laws of the Charity and this Gift Agreement.
- The Gift and any additional gifts to the Charity by the Donor or others that are to be added to the Fund shall be held, invested and reinvested by the Charity in accordance with its standard investment policies and procedures. The assets of the Fund may, in the discretion of the Charity, be pooled with similar assets in order to facilitate a cost effective management of the assets of the Charity, so long as the Charity is able to account separately for the assets of the Fund for purposes of Paragraph 3 of this Gift Agreement.

- The Charity shall annually withdraw an amount equal to _____ percent (___%) of the fair market value of the Fund, first from net income and, to the extent that is insufficient, from realized net capital gains and, to the extent that is insufficient, from principal of the Fund (the “Withdrawal”). For purposes of this Paragraph 3, the term “fair market value” for the first two years after the date of this agreement shall mean and refer to the fair market value of the Fund on the first business day of the current valuation year; and for the third and subsequent years after the date of this agreement, the term “fair market value” shall mean and refer to an average of (a) the market value of the Fund on the first business day of the current valuation year; (b) the market value of the Fund on the first business day of the valuation year which was one year prior to the current valuation year; and (c) the market value of the Fun on the first business day of the valuation year which was two years prior to the current valuation year.
- The Charity shall hold, administer and dispose of the Fund in perpetuity in order to accomplish the following purposes of the Fund: _____

_____.
- The Charity shall apply the Withdrawal to accomplish the purposes of the Fund as set forth in Paragraph 4 of this Gift Agreement.
- The Charity shall annually provide a written report on the uses of the Withdrawal to the Donor or, if the Donor is not available, to the spouse and adult living children of the Donor.
- Despite any provision in Paragraph 12 of this Gift Agreement to the contrary, the Charity may, in its discretion, modify and amend the purposes of the Fund as set forth in Paragraph 4 of this Gift Agreement if (a) the purposes of the Fund have been accomplished or have become impracticable or impossible to achieve economically; or (b) the Board of Directors of the Charity determines that the Charity’s needs for the withdrawal are greater in other programmatic activities of the Charity; provided, however, before the Charity may take action in accordance with the provisions of this Paragraph, the Charity shall consult with the Donor or, if the Donor is not available, with the spouse and adult living children of the Donor on the proposed action that the Charity seeks to take and shall, to the extent possible, comply with the wishes of the Donor or the Donor’s family in regard to the Charity’s proposed course of action; and provided, finally, no modification or amendment of this Gift Agreement shall be effective if it would result in the Fund being treated as a separate trust or that would affect the status of the Charity as an organization described in Code Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “Code”).
- The spouse of the Donor or, if the spouse of the Donor is not available, the oldest living descendant of the Donor from time to time may, in that individual’s sole and absolute discretion, have the legal standing to bring a legal action to enforce the provisions of this Gift Agreement.
- If the Charity loses its tax-exempt status as an organization described in Code Section 501(c)(3) or otherwise ceases to exist, the Charity shall distribute the Fund to an organization that is described in Code Section 501(c)(3) that is willing to utilize the Fund to accomplish the purposes set forth in Paragraph 4 of this Gift Agreement.
- Investment funds managed by the Charity are exempt from the requirements of the federal securities laws pursuant to the exemption for collective investment funds maintained by charitable

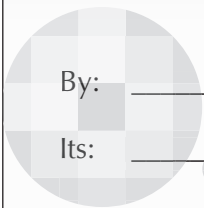
organizations under the Philanthropy Protection Act of 1995 (PL 104062). The Donor acknowledges that information on the investment of those funds has been provided to the Donor.

- This Gift Agreement constitutes the full and complete agreement by and between the Donor and the Charity and all oral agreements, understandings and discussions between the Donor and the Charity are merged into this Gift Agreement and are null and void to the extent they are inconsistent with the provisions of this Gift Agreement.
- This Gift Agreement is irrevocable and the Donor acknowledges that the Donor shall have no right or power, either alone or in conjunction with others, to amend or to revoke this Gift Agreement.
- This Gift Agreement shall be binding upon the Donor, the Charity and their successors and assigns.
- This Gift Agreement shall be subject to the laws of the state of _____, except for its conflict of laws provisions.

IN TESTIMONY WHEREOF, the Donor and the Charity have executed this agreement as of the date hereinbefore set forth.

"Donor"

_____, Inc.



By: _____

Its: _____
"Charity"

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