Creating Charitable Gift Agreements with Nonprofits

By Carolyn Noble

Have you ever made a charitable gift to a nonprofit? Perhaps an annual gift around $100? Have you ever considered making a truly impactful investment but wanted the money to be used for a specific purpose? If so, you would work with a major gift officer. A major gift to an institution like Wayne State University Law School would be considered $25,000 or more. This article covers some suggestions and pitfalls when creating conditions placed on a gift of that size or larger. The information will be helpful if you ever decide to give to your alma mater. It will also be helpful to clients who may want to leave a lasting financial gift to a nonprofit in their own wills or trusts.

Many trust and estate lawyers deal with clients who want to leave bequests to nonprofits. If your clients want help navigating giving through their estate, there are some dos and don'ts you can share with them. As their attorney, your job is making sure you convey to the nonprofit the donor's exact expectations. With that in mind, it's helpful to look at gift agreements in which problems arose between donors and nonprofit organizations.[1] I focus on giving to universities since that is my area of expertise.

For obvious reasons, there are not many cases regarding gifts to universities gone awry. Most gift officers at universities want to make donors happy and will find a way to implement donors' conditions on gifts to the best of their abilities. Therefore, I treat this review of caselaw as more of an interesting exercise than a foreshadowing of things to come.

Cases regarding gift agreements and donations to nonprofits

There are few Michigan cases concerning gifts to universities or gift agreements. This is likely because universities don't generally sue their donors and not many donors have issues with their gift agreements. However, I found a few cases in other states that illustrate problems that can occur between donors and universities.

One major dispute revolved around a $100 million gift to the University of Chicago.[2] This is an unusually large gift; at Wayne Law for instance, a $1 million gift is considered a particularly generous contribution.[3] The $100 million donation was given by the Pearson Family Foundation, which sued the University of Chicago in 2018 after signing an agreement to establish a center devoted to finding new ways to resolve global conflict. To say the Foundation was unhappy with the university was an understatement. In its lawsuit, filed in the U.S. District Court in Tulsa, Oklahoma, the Foundation claimed the university failed to demonstrate that it used the first pledge payment of $22.9 million for its intended purpose.[4] Specifically, the Foundation said the university failed to hire a full-time daily director, develop academic curriculum, hire high-quality faculty, or schedule the institute's annual forum, all of which were stipulated in the gift agreement.[5] There were major issues regarding university academic freedom with many of these claims.[6] University leaders called the lawsuit baseless and filed a counterclaim, stating that the Foundation breached the gift agreement by failing to make a scheduled $13 million payment last year.[7] A trial was scheduled for this summer.[8] In another lawsuit with similar claims filed by Tom Pearson, the founder and chairman of the Pearson Family Foundation, a judge sided with the educational institution.[9]

In a Tennessee case, the judge stated that a donor can make a conditional gift that is enforceable using contract law.[10] However, the terms in the written agreement will be construed "strictly," and if there is a breach of the terms, the only recourse the donor has is a return of the donation, adjusted for inflation.[11]

Suggestion: A donor obtaining a tax deduction or a foundation fulfilling its annual giving requirement can't control every detail once a gift is given due to IRS rules. Also, violation of a gift agreement must be significant and specific for a donor to win in court.

Princeton University had a legal battle in 2008 regarding how closely it had to follow

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"Best Practices" is a regular column of the *Michigan Bar Journal*, edited by Gerard Mantese and Theresamarie Mantese for the Publications and Website Advisory Committee. To contribute an article, contact Mr. Mantese at gmantese@manteselaw.com.

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a donor's gift agreement.[12] Heirs to a large grocery chain, Charles and Marie Robertson, donated $35 million in 1961 to be specifically used to educate graduate students for careers in government. The university invested the money wisely, and the sum ballooned to more than $900 million in June 2008. The donors' descendants claimed the money was being used for a broader range of careers, including most of the graduate programs in the Woodrow Wilson School of Public and International Affairs. The university and the Robertson heirs settled out of court right before the case was to go to trial. Out of the $900 million, the university agreed to create a separate foundation of $50 million to support education in government service. The university also agreed to pay the heirs' legal fees, which totaled $40 million. The university used the remaining money for the Wilson School. *The New York Times* cited this as an example of how difficult and costly it is to battle a wealthy university regarding how a donation is used. However, after working in higher education philanthropy for almost three years, I believe it is rare for donors to sue universities. In most instances, institutions try to adhere to gift agreements.

The Supreme Court of New York decided an interesting case in which a couple sued a university claiming that their donations and pledges were subject to certain restrictions and conditions that were agreed upon verbally and not stated nor indicated in writing.[13] They also wanted an account of how their donations were being used. Interestingly, the university counterclaimed the couple for outstanding pledges. The university said it relied on the donors' $900,000 pledge to expand its library. Applying New York caselaw, the Court stated that, "with contracts generally, when the pledge is made in writing, unless conditions are expressed, or at least implicit, in the agreement itself, parol evidence may not be used to supply them."[14] The Court also ruled that the cause of action for an accounting failed because a pledged gift does not create a fiduciary relationship. Ultimately, it ruled in favor of the university. Under New York law, a charitable gift is enforceable because it is considered an offer of a unilateral contract. After the university accepted the pledge and started constructing the new section of its library, it became a binding contract.[15]

Suggestion: Include in the written gift agreement everything the donor desires.

A case in the U.S. District Court, 6th Circuit, involved a doctor who left a $500,000 bequest from a retirement account. The money would transfer at his death to create a scholarship fund to the University of Louisville's School of Medicine.[16] The gift was memorialized in a gift agreement with the university. He also added the university as a beneficiary of his IRA. However, the doctor included language stating that his broker had to follow his wife's directives if there were any questions regarding the agreement—including whether the university would receive the money at all. After the doctor's death, the wife revoked the gift to the university on the basis that the agreement did not reflect his intent.[17]

The university sued the wife and broker. Unfortunately, it sued in the wrong state, because the wife was an Arizona resident and she prevailed in her argument that the U.S. District Court for the Western District of Kentucky lacked personal jurisdiction.[18] We will never know the result of this lawsuit; presumably, it was settled out of court.

Suggestion: Don't give a third party the power to revoke a bequest after a donor's death. To avoid litigation costs, have the spouse agree to it during the donor's lifetime.

The Michigan Court of Appeals reviewed a case in which two sisters had mutual wills.[19] Mutual wills are separate wills of two or more people with reciprocal provisions. The wills can be executed pursuant to a contract or agreement to dispose of property to each other or another in a particular mode or manner.[20]

In this case, the president of Lake Superior State University had a wonderful relationship with the MacLaren sisters, who regularly contributed money toward his many community and fundraising initiatives. He suggested that they contribute to an extension to the Walker Cisler College Center on the university campus. The sisters agreed, deciding to contribute $250,000 *each* in a bequest toward the construction of the new wing. The president wrote a letter of mutual understanding, indicating that the wing would be named after the sisters.[21]

The sisters were both competent to change their wills at the time, but shortly thereafter, one sister's health rapidly deteriorated. A substantial portion of the sisters' wealth was held in joint tenancy primarily because they were concerned about having enough money to care for themselves before their bequests to the university went through. One sister needed substantial medical care. The second sister suffered a stroke and died. Because their assets were held in joint tenancy, the probate court found that the second sister's assets were insufficient to fund the $250,000 gift to the university. After the first sister died and her estate went into probate, the university claimed it was entitled to $500,000 from her estate to cover the gifts from both sisters. The estate did not contest a gift of $250,000, but said it would not cover the *second* sister's failed $250,000 bequest. The university argued that the sisters executed mutual wills with a reciprocal contract to make a bequest to the university. Ultimately, this argument failed because it was not in writing and was not found in the sisters' wills.[22]

Suggestion: Be clear in the gift agreement *and* the donor's will or trust as to how the money will get to the nonprofit.

In 1913, during the nadir period of race relations, the United Daughters of the Confederacy (UDC) entered into a gift agreement with Vanderbilt University.[23] The endowment made by the UDC built and created the Confederate Memorial Hall. Years later, Vanderbilt changed the building's name

to Memorial Hall and placed a small plaque with the UDC's history on the building.[24] The UDC sued, stating that the name change breached the gift agreement terms. "Vanderbilt framed the primary issue before the trial court as 'whether Vanderbilt should be required to maintain a name on one of its campus buildings in spite of the fact that that name evokes racial animosity from a significant, though unfortunate, period of American history.'"[25] The trial court granted Vanderbilt's motion for summary judgment. The Tennessee Court of Appeals reversed, stating that Vanderbilt breached the original contract. The Court disagreed with Vanderbilt's argument that it should be excused from complying with the inscription condition contained in the contract because the UDC had already received enough value for its original contribution to the construction of the building. It determined that "[t]he courts must interpret contracts as they are written."[26]

Using this case as an illustration, understand that if a gift restriction is too narrow, the nonprofit may not be able to use the funds for their intended purpose indefinitely. To avoid litigation or future issues, consider including language in the contract stating that if a gift is impracticable, impossible, or no longer in alignment with the nonprofit, the nonprofit may use the gift as closely to the donor's intent as possible. This avoids the need to get consent from a donor or, if deceased, a donor's family.[27]

Suggestion: Add a provision allowing funds to be used as closely to the donor's intent as possible, such as, "If changing conditions make these provisions no longer applicable, practical, or suited to the general purposes stated above, the University is authorized to use the funds for any suitable purpose, related as closely as possible to the donor's original intent and to provide the maximum service to the community."

To ensure your donation is going where you want it to go, work with someone at the university or nonprofit to which you are donating. If you are donating in your will or trust, it is also important to properly communicate where you want your donation to go. Give the nonprofit documentation of your gift so the organization can make sure it is properly written. And remember, any bequest you make to a nonprofit is revocable. The goal for the donor and nonprofit is to avoid conflict and litigation, so consider the following suggestions.

Gift agreement suggestions for you or your clients giving major gifts to nonprofits

- Be clear in writing about when your gift will be given and how it will be given.
- Write down all specific requirements for the use of your funds.
- Remember that universities need educational discretion to choose their faculty.
- For tax purposes, you must relinquish control of your gift.
- Ask the institution for options regarding where the money can go.
- Ensure that a third party cannot change your gift after your death.
- Have a third party review the gift agreement and will or trust before you sign.
- Trust that the major gift officer or nonprofit employee wants to make you happy. ■

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ENDNOTES

1. For purposes of this article, a gift agreement is a signed document by the donor and university personnel that sets out the amount of the gift from the donor, when the donation will be given, what it will be used for, and any policies the university has regarding accepting gifts.
2. See Rhodes, *Pearson Family Members Foundation sues University of Chicago, aiming to revoke $100M gift*, Chicago Tribune <http://www.chicagotribune.com/news/local/breaking/ct-met-university-of-chicago-donation-lawsuit-20180305-story.html> [https://perma.cc/YY6Z-J6DA]. All websites cited in this article were accessed August 4, 2019.
3. Lorin, *College Donors Are Getting Picky*, Bloomberg Businessweek <https://www.bloomberg.com/news/articles/2018-08-15/college-donors-are-getting-picky> [https://perma.cc/UX24-QWUU] (the Pearson Family Foundation gift was the fifth largest in 2018).
4. *Pearson v Univ of Chicago*, opinion of the United States District Court for the Northern District of Oklahoma, issued June 29, 2018 (Case No. 18-CV-99-GKF-FHM).
5. *Id.* at 1–3. The gift agreement was 60 pages long.
6. 20 USC 170(a).
7. *Id.*
8. *College Donors Are Getting Picky.*
9. *Id.* ("In 2011, Pearson sued [Garrett-Evangelical Theological Seminary] in U.S. District Court in Chicago, and a judge sided with the seminary, which declined to comment. Pearson appealed. The outcome may be sobering for the University of Chicago. The seminary settled and gave Pearson his money back.").
10. *Tennessee Div of the United Daughters of the Confederacy v Vanderbilt Univ*, 174 SW3d 98, 118 (2005).
11. *Id.* at 119.
12. Lewin, *Princeton Settles Money Battle Over Gift*, The New York Times (December 10, 2008) <http://www.nytimes.com/2008/12/11/education/11princeton.html> [https://perma.cc/RL8U-BXUE].
13. *Paul and Irene Bogoni Foundation v St. Bonaventure Univ*, 78 AD3d 616; 913 NYS2d 154 (2010).
14. *Id.* at 616–617.
15. *Id.* at 617.
16. *Univ of Louisville v Merrill Lynch, Pierce, Fenner & Smith Inc*, unpublished opinion and order of the United States District Court for the Western District of Kentucky, issued November 2, 2017 (Civil Action No. 3:17-CV-00212-GNS).
17. *Id.* at 2.
18. *Id.* at 5.
19. *In re Estate of Thwaites*, 173 Mich App 697; 434 NW2d 214 (1988).
20. MCL 700.2514.
21. *Estate of Thwaites*, 173 Mich App at 699–703.
22. *Id.* at 703.
23. *Tennessee Div of the United Daughters*, 174 SW3d at 102–103.
24. *Id.* at 107.
25. *Id.* at 109.
26. *Id.* at 118.
27. Under the Uniform Prudent Management of Institutional Funds Act, MCL 451.921 *et seq.*, which was adopted in Michigan in 2009, if a nonprofit wants to avoid litigation, it must get consent by the donor to use the gift in a different manner than what was written in the contract (MCL 451.926).

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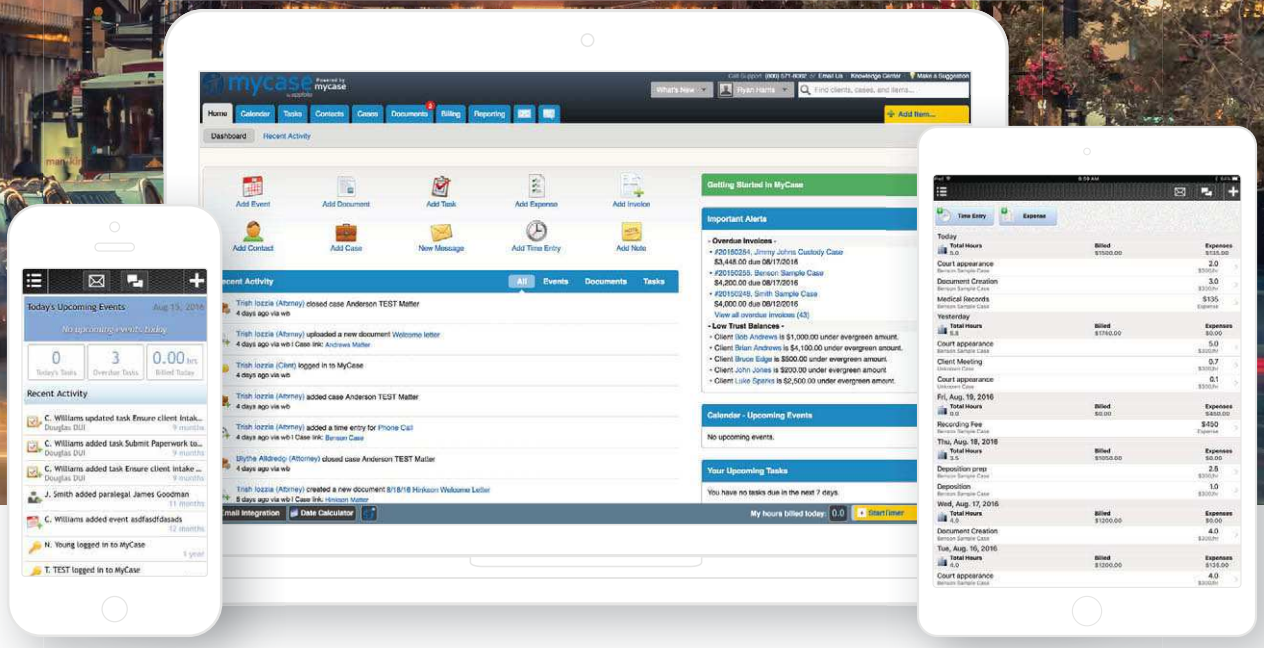

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