

Charity Begins With The Gift Agreement: Keeping Intent Fluid

Author : Browne Lewis

Date : December 6, 2010

Susan N. Gary, [*The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*](#), 85 Chi.-Kent. L. Rev. 977 (2010).

Charities have a legal duty to comply with the restrictions donors place on gifts. Most charities act in good faith and honor the conditions the donors place on the donations. Problems usually occur when internal or external events make it necessary for the charity to change the manner in which it is carrying out the donor's intent. Persons objecting to those changes may go to court to prevent the charity from taking certain actions. The litigation does not benefit the charities or the donors. Professor Gary addresses this problem with a comprehensive and thought-provoking article. She starts with an explanation of charitable trust law and identifies the legal issues that can arise because donor intent is difficult to determine and to enforce.

Professor Gary starts the article discussing recent high profile cases involving disputes over donor restrictions on charitable gifts. The five cases Professor Gary highlights contain facts that are interesting enough to get the reader's attention. By starting with illustrations of recent cases Professor Gary shows that the issues she examines in her article are timely and in need of resolution.

In order to resolve the cases Professor Gary mentions, the courts had to determine the intent of the donors with regards to the gifts. That task was made more difficult by the fact that the donors were dead. As a result, the courts were forced to rely upon testimony from persons representing the donors' descendants and the charities to ascertain the donors' original intent. In addition, the courts had to decide how to carry out the donor's intent in light of changed circumstances. Professor Gray uses the cases to highlight the difficulty of identifying and giving effect to donor intent. According to Professor Gray, attorneys representing charities and attorneys representing persons making charitable donations should take steps to ensure that the donor's intent is clear enough to avoid costly litigation.

When the donor, donor's descendants, or state attorney general sues to enforce the charitable trust, the critical issue the court must resolve is usually whether or not the charity is distributing the funds in a manner that is consistent with the donor's intent. Professor Gary states that resolution of the issue is complicated by the fact that it is difficult to determine the donor's intent. The charity may be administering the trust in accordance with its interpretation of the donor's intent. The problem is that words in a gift agreement or solicitation may be unclear and open to several different interpretations. Professor Gray analyzes several common problems that make it hard for courts to determine donor intent. Changed circumstances can make it difficult to identify the donor's intent. At the time the gift is made, the donor may clearly express his or her intent with regards to the purpose of the gift. Nonetheless, it may be challenging for the court to predict what the donor would have wanted had he or she been able to anticipate the changed circumstances. The court has to decide if the donor's intent would have changed based upon the new circumstances. The court's interpretation of the donor's intent may be further complicated by the fact that the interpretation of words changes over time. For example, the legal definition of "family" is always evolving.

Professor Gray takes a balanced approach when she addresses the issue of donor intent. She analyzes

the importance of donor intent from the perspective of the charity, the donor and the public. The charity has ethical, economic and legal reasons for carrying out the donor's intent. In order to adhere to the Standards of Professional Practice established by the National Society of Fund Raising Executives, a charity must take steps to honor the donor's intent. Moreover, if a charity wants to be able to raise money, it must take steps to maintain the trust of potential donors. A charity with the reputation of ignoring donor intent is unlikely to get donors to make contributions. Furthermore, from a legal perspective, the state attorney general may investigate and file an action against a charity that disregards the donor's intent. Consequently, the attorney general may take control of the gift away from the charity. This could also lead to more government scrutiny of the other funds that the charity administers. When the donor chooses one charity over another, the donor is putting his or her trust in that charity. The donor wants the charity to perform a task that the donor will not be able to undertake. Thus, the donor benefits when the charity carries out his or her intent. In addition, the sector of the public that benefits from the donor's vision is protected when the charity carries out the donor's intent. Since members of the public do not have standing to enforce the terms of a charitable trust, they must rely on the charity to use the funds in the manner indicated by the donor.

Professor Gray ends her article with a discussion of things lawyers representing donors and charities can do in order to avoid unnecessary litigation about donor intent. Professor Gray suggests that the parties draft a gift agreement that serves a two-fold purpose. The agreement should give a sufficient description of the donor's intent. It should also be flexible enough to permit the charity to use discretion when carrying out the donor's intent. In addition, Professor Gray urges donors to place fewer restrictions on contributions made to charities in order to allow those organizations to fund operational expenses, to implement new programs, to manage its assets, and to avoid unnecessary costs. Professor Gray also recommends that lawyers drafting gift agreements include provisions giving the donor, the donor's estate, or the donor's descendants standing to enforce the trust. This type of provision would be strengthened if the agreement contains a provision stating that the charity will not challenge the standing of those persons. In order to protect the intent of a dead donor, Professor Gray proposes that the gift agreement names another charity as a contingent beneficiary. Thus, if the primary charity fails to carry out the donor's intent, the contingent charity would take the gift. Professor Gray acknowledges that costly litigation over donor intent hurts the charity and the persons acting on behalf of the donor. To avoid that consequence, Professor Gray opines that lawyers should include mediation clauses in their gift agreement. The parties would agree to go through mediation or arbitration to resolve disputes over donor intent. Professor Gray stresses that "the donation of a charitable gift should not be an adversarial process." To that end, she encourages attorneys representing charities and donors to work together to draft a gift agreement that reflects the donor's intent and gives the charity the flexibility to interpret that intent in light of changing times.

In light of the tough economic times, charitable donations are on the decline. Those charities fortunate enough to receive gifts must take appropriate actions to respect the donor's intent and to avoid expensive litigation. The practical suggestions Professor Gray includes in her article will assist charities in accomplishing those goals.

Cite as: Browne Lewis, *Charity Begins With The Gift Agreement: Keeping Intent Fluid*, JOTWELL (December 6, 2010) (reviewing Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 Chi.-Kent. L. Rev. 977 (2010)), <https://trustest.jotwell.com/charity-begins-with-the-gift-agreement-keeping-intent-fluid/>.