ADVENTURES IN ACCEPTING RESTRICTED GIFTS

PG CALC WEBINAR

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I. INTRODUCTION

During my 25-year career in fundraising, I have worked at seven development shops. Though I had and have great admiration for my colleagues in each position who led annual gift efforts, most of my experience has been limited to restricted gifts, including gifts directed to endowment and gifts resulting from life income gifts and bequests. While I would like to say that my missteps regarding restricted gifts are distant memories from my early days in our profession, I probably could tell some stories of failures that happened as recently as last week. Though some restricted gifts are as simple as language directing the gift to a particular account representing a particular program, others come with ethical, legal, and financial strings that can confound the shared expertise of a long-tenured development team. Avoiding those situations where possible and unraveling the knots where necessary is the focus of this paper.

One caveat: At Mayo Clinic, people who make philanthropic gifts are *benefactors*. The word *donors* is reserved for blood or organ donors.

A. Scope of Paper/Presentation

Below I will explore four types of restricted gift problems: administrative, financial, legal, and stewardship. Next, I will suggest how to lay a foundation for saying yes to most restricted gifts. Here I will rely on my experience at Mayo Clinic and tell you how we negotiate acceptance issues, close and book gifts, and think and talk about risk with colleagues who may not share our perspectives on the value of the gift to the institution.

Sometimes a gift is accepted and booked, and the gift officer realizes that changes must be made or the funds will go unutilized because we now have no way of using the gift according to the benefactor’s documented wishes. Alternatively, sometimes a departed benefactor leaves the charity a lovely unspoiled piece of land save the gas station that stood there 40 years ago. Can those gifts be unwound and, if so, how?

Finally, I’ll recount the stories of some restricted gift court cases and suggest what the development officer could have done to avoid the resulting complications for the institution.

B. Definition: What Is a Restricted Gift?

When we talk about restricted gifts, from what are we distinguishing these gifts? Often we think about truly unrestricted gifts as completely undesignated. That may not be accurate, however, in that some scholarship funds or general research funds are not truly restricted. They flow in a designated direction, but most of the time we are not tracking a particular benefactor’s gift among the thousands in those broad category funds. Thus, a restricted gift is one in which we must track an identified benefactor’s gift and show that we have allocated it as the benefactor directed, hopefully in a clearly written, signed, sealed, and delivered gift agreement. Endowment gifts, especially those to establish a named endowment, are clear examples, though current or outright gifts also can be restricted.

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Though restricted purpose, which is the main focus of this document, is the most common restriction, gifts also can be restricted by terms (“spend my money in three years”), gift vehicle (“I want to name the cancer center with payments from my lead trust”) or funding asset (“I will create an endowed fund with this gift of my debt-encumbered house”).

At Mayo Clinic, our fundraising priorities are clearly defined but not static. Currently, they are comprised of these initiatives: Center for Biomedical Discovery, Center for Individualized Medicine, Center for Regenerative Medicine, Robert D. and Patricia E. Kern Center for the Science of Health Care Delivery, Mayo Medical School, Mayo Clinic Model of Care, and Proton Beam Therapy Program, as well as capital projects. Ideally, every gift we are offered will fit nicely under one of these initiatives, and when you see these broad categories, you might assume that just about every restriction a benefactor could consider could be placed under one of them. When a prospective benefactor wants to fund a program that can be placed under one of these categories, the gift officer’s job is much easier since much of the work of vetting the appropriateness of the restriction has been done by the institution, which approved the priorities through the Board of Governors and Board of Trustees.

While we are fortunate to have these initiatives to which to direct our benefactor’s interest, thinking that every restricted gift will fit under a category, no matter how broad, is unrealistic. Consider one case in point: One of the benefactors assigned to me recently wanted to fund research in familial hypercholesterolemia, a condition that causes extremely high cholesterol and until recently was the cause of early deaths for people who suffered from it, including a relative of my benefactor. Mayo Clinic does research in this disorder, but it doesn’t fall under one of these broad categories. That doesn’t mean we cannot accept the restriction; it just means that this gift is not supporting the highest priorities of the institution.

Gifts not directed to the fundraising priorities require extra levels of approval to assure that the gift can be utilized. I’ll discuss the levels of approval later in this document, but know that the work of seeking approval for a narrowly restricted gift and subsequently closing that gift is more difficult than one that is clearly supported by institutional priorities. Seeking approval for restricted gifts that are not priorities for the institution is just one example of the restricted gift problems for the gift officer.

II. Four Problems with Restricted Gifts

A. Administrative

Administrative problems may be the most difficult issues to negotiate in accepting and closing restricted gifts. Most fundraisers have experienced offers of gifts with the narrowest of restrictions, often lying outside the missional priorities of the institution, as was the case with the proposed gift to benefit familial hypercholesterolemia research. At both Mayo Clinic and other institutions I also have experienced conversations in which the benefactor mentioned a project that did not fit the mission of our organization even if we stretched the

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boundaries of our mission to its farthest point. Most gift officers have worked with benefactors who are so enamored with a medical researcher or orchestra conductor or institutional leader that they want to tie their gift to that person, which may create an administrative nightmare when that person moves to a new position.

There is no easy solution to these administrative dilemmas, but there are organizational strategies that minimize their occurrence. A well-drafted gift acceptance document, which both is enforced fairly and also has room for exceptions, helps avoid gifts that are difficult to administer, or worse, endowments that cannot be used because of the unreasonable restrictions. Development officers who are experienced in focusing prospects on the highest institutional priorities minimize narrowly restricted gifts, especially when gifts to the broader priorities offer the benefactor more attractive stewardship and recognition.

B. Legal

Negotiations with benefactors who want to retain control over the gift assets, pick the professor who holds a chair, or select a student who is awarded a scholarship are among the scenarios that gift officers face in closing restricted gifts. In these cases the restrictions create both administrative difficulties for staff and potential legal liability for both the charity and benefactor. If an illegal or unethical restricted gift agreement is allowed to go forward, the charity also can risk its reputation and brand if the gift subsequently goes awry and the illegality is made public.

One example of a legal difficulty is when a benefactor wishes to retain control over the gifted asset, either formally or informally. If the gift is tangible personal property, for instance, the prospective benefactor may wish to control the future sale to assure that the charity realizes the highest possible proceeds on the sale. In a formal way, she may want a minimum price listed in the gift agreement. More informally, she may insist that a particular broker handle the sale.

The IRS has helped define the boundaries limiting benefactor control over a gift after it is made using the “so remote as to be negligible” test.[1] If the condition included in the gift agreement is so unlikely as to be insignificant, the deduction will be allowed. If the condition is one that is more significant or likely, the deduction may be disallowed. Court decisions have outlined what is “so remote as to be negligible.” One court ruled that the phrase meant “a chance that every dictate of reason would justify an intelligent person in disregarding as so highly improbable and remote as to be lacking in reason and substance.”[2]

Would allowing the benefactor to state the amount of the gift proceeds on sale be “so remote as to be negligible?” How about informally requesting the use of a particular broker to handle the sale? Language in a gift agreement that was binding on the charity likely would be seen as more controlling and less remote than an informal request, which the charity could choose to honor or ignore. Further, depending on the price determined by the benefactor, the binding language of the gift agreement as to sale proceeds might limit the charity’s ability to liquidate the gift; thus, the control is not negligible and could disqualify the deduction.

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Benefactors may request other restrictions that are obviously aimed to control the asset after the gift is made. Prospective benefactors may ask to restrict a scholarship to a family member, usually not their child but a more distant relative, which still would disqualify the charitable deduction. The legality of other scholarship restrictions may not be so easy to discern; the courts and the U.S. Department of Education have struggled with whether race-based scholarships violate Title VI.[3]

C. Financial

Occasionally, prospective benefactors contend that they could manage their proposed gift endowment better than the institution regardless of the performance of the endowment managers. Other benefactors are eager for the institution to invest their endowment or charitable trust but sit on the investment committee of the board. Still others may be investors in a for-profit arm of the institution and want to restrict their gift in a way to impact their for-profit activities.

A well-crafted gift acceptance document helps negotiate financial problems with proposed restricted gifts, but it likely will not address every situation, especially those in which the prospective benefactor has complicated relationships with the institution as an investor, board member, or vendor. In those cases, consulting with institutional counsel, including external counsel, may be required.

D. Stewardship

As institutional endowment or capital project minimums change at charities, it is inevitable that a prospective benefactor will want the same deal his friend got in 1962. "I want to endow a scholarship for $5,000 through my will, and I want to be a member of the Champions Society, and get football tickets with a parking space on football Saturdays, and an annual private audience with the president. Oh, and don't forget Final Four tickets in case our basketball team makes it that far."

This may not be the most difficult restricted gift problem to negotiate, but it can cause some headaches, especially when the prospective benefactor requests the same recognition for a deferred commitment that is available for a current gift, or recognition in excess of institutional standards. The gift agreement also should include the stewardship of the restricted gift, including reporting and recognition, to avoid benefactor dissatisfaction after the gift is closed.

III. Laying the Foundation for Yes: Gift Acceptance Policies and Teams, Gift Agreements, Exceptions to Policy, Risk Tolerance

A. Development Administrators

At Mayo Clinic, development administrators help gift officers get to yes more quickly and with fewer missteps resulting from communication difficulties among stakeholders in the

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process. In contrast to many other development shops in health care, Mayo Clinic gift officers are generalists, and their work is guided by institutional fundraising priorities and by benefactor intent, not by the gift officer's assignment to a department or clinical area. Without development administrators, employees who serve as liaisons between clinic areas and gift officers, it is unlikely that fundraisers could master content for discussions with prospective benefactors, vet proposed restrictions with department leadership, and gather the scientific and administrative materials for proposals.

Development administrators are not just content experts. Because they relate to the leadership of the fundraising priority areas and other clinical programs, they can explore the limits of a proposed gift restriction, and they can facilitate communications between department leaders and prospective benefactors. They typically have a place at the table for meetings among leaders, gift officers, and prospective benefactors and are key participants in strategy sessions as the process for soliciting and closing a restricted gift is planned.

B. Gift Acceptance Policies

At their best, gift acceptance policies help avoid inconsistent answers for benefactors who wish to fund restricted gifts. These policies also maintain the integrity of our institutions and help entrepreneurial gift officers and volunteers limit what they promise to prospective benefactors. When we play fast and loose with endowment minimums or payouts or gift restrictions, we risk the reputations others have worked so hard to build.

Emerson noted "a foolish consistency is the hobgoblin of little minds, adored by little statesmen, and philosophers, and divines"[4]—and development professionals. Rather than ironclad rules, gift acceptance policies guide the actions of the institution for the majority of gifts and provide an adjudication process for gifts that fall outside the lines: the exceptions. Those same entrepreneurial gift officers, who sometimes need gift acceptance policies to rein them in, help refine the policies by questioning their limitations. To maximize philanthropy while protecting and benefiting the charity, the negotiation of the exceptions is as important as the rules.

Beginning the policy with a statement of the mission of the charity helps signal the gift types and assets that the charity will accept. For instance, the mission of Mayo Clinic is "to inspire hope and contribute to health and well-being by providing the best care to every patient through integrated clinical practice, education and research." The mission indicates that Mayo Clinic will accept gifts to promote its education programs, the practice, and research, but the description of the mission in the gift acceptance policy should probably say more. Mayo Clinic regularly accepts gifts of art because the Mayo brothers believed that art and music were important to the healing process. Mayo Clinic also accepts gifts to preserve the history of the institution, some of which is displayed to connect the clinic's past to current patients and employees. Drawing the mission broadly and accurately helps guide questions about the appropriateness of a gift restriction.

A conflict of interest statement within the policy outlines the situations in which gift decision-makers will recuse themselves if they would directly or indirectly benefit from a gift restriction or exception. At Mayo Clinic, if a gift acceptance team member's spouse

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would benefit by the restriction of a gift on which a vote is required, the gift acceptance team member would recuse herself from the vote. Since gift acceptance team members are also gift officers, team members would not vote on their own requested exceptions, of course.

The composition and scope of the gift acceptance team, the designated body to negotiate exceptions, should be part of the gift acceptance policy. Gift acceptance committees are discussed below.

The policy should name both assets and gift vehicles that are acceptable and should specifically include language prohibiting certain assets or vehicles if the charity never accepts them. The "never list" is usually short and is governed by two considerations: Does the institution have the resources to liquidate the asset, and as one of my Mayo colleagues asks frequently, "Is the juice worth the squeeze?" At the places at which I have worked, the "never assets" have included cemetery plots, time shares, and debt-encumbered property. The "never gift vehicles" included bargain sales at one charity because the juice in those gift scenarios had not proven to be worth the squeeze.

The length of the list of accepted assets and gift vehicles depends on the size and complexity of the development operation, though even large development shops may not offer every possible gift arrangement or accept all assets. Even small charities can accept more assets, however, than they can manage internally. If the charity does not offer gift annuities, it still is possible to include them in the list of possible gifts since the charity can work through a community foundation or commercial vendor to manage gift annuities with remainders designated for the charity. Commercial and charitable vendors also help liquidate assets that the charity may not have the resources to handle, allowing the charity to include more asset types in its policy and expanding the possibilities for prospective benefactors.

Gift acceptance policies also should govern whether and when the charity will serve as trustee. At Mayo Clinic, there are age and dollar thresholds that determine when the institution will serve as the trustee of charitable trusts. Additional rules come into play when the trust is funded by real property, and another set of regulations governs when Mayo will assume the role of successor trustee.

Other items that might be considered in drafting a new gift acceptance policy are booking, valuation, and counting standards, particularly before a comprehensive campaign; stewardship guidelines; procedures governing the acceptance and management of real property; guidelines defining whether gold coins will be considered as currency or tangible personal property; language indicating when outside counsel can be accessed; and an escalation policy to guide gift officers how to question the policy and request an exception to it.

C. Gift Acceptance Committee/Team

Gift acceptance committees or teams interpret the gift acceptance policy and determine whether exceptions should be granted. At Mayo Clinic the Gift Acceptance Team (GAT) is

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comprised of personnel from the Department of Development. At other nonprofits at which I have worked, the gift acceptance committee included leadership outside of development, including institutional counsel, directors of research, and institutional financial officers.

The leader of gift planning chairs GAT and the gift planning administrator coordinates the day-to-day work of the team: scheduling meetings; gathering information about proposed issues to come before the team; and recording, tracking, and reporting on decisions to management at regular intervals. The GAT chair convenes meetings and escalates decisions to the development department chair when the team cannot come to an agreement, when the proposed gift exceeds a stated dollar threshold, or at the request of a development manager. GAT membership also includes the department's director of finance and legal officers, the director of stewardship, and at least two gift officers. The composition of the team is designed to balance expertise and perspective on policy exceptions and to assure that the team has the support of the gift officers who are bound by its decisions.

The gift acceptance policy outlines the scope of the team and notes that the team's orientation is to find ways to facilitate gift closures rather than impede them. All exceptions are recorded so that gift officers have access to them for reference. Exceptions do not necessarily set precedents for future decisions, but they guide gift officers with similar requests, and some exceptions eventually are codified in gift acceptance policy revisions.

D. Importance of Documentation

Gift acceptance policies and committees negotiate designations before and during the closing of restricted gifts. Documentation of the gift process, particularly conversations with prospective benefactors and their family members, is important when the restrictions are questioned after the gift has closed, sometimes years after closure.

Call reports should document all meetings in which the benefactor discusses the restricted intention, capturing the intention from its earliest iteration and recording subsequent conversations about it. The gift officer should document both the benefactor's wishes and the institution's commitments, particularly as they change prior to the closing of the gift. Including family members in conversations when appropriate and documenting those conversations help avoid conflict after the gift closes.

At Mayo Clinic, a Memorandum of Understanding (MOU) is circulated among internal leadership stakeholders prior to the solicitation to assure that the institution can honor the proposed restriction. The gift is outlined in detail, with information about benefactor requests for recognition, naming, and restricted purpose. After it is initiated by a development administrator, routed to leadership electronically, and approved by several layers of reviewers, the restrictions are incorporated into a proposal and later into the gift agreement.

Documenting benefactor-requested restrictions in call reports and institutional approvals through the MOU process makes drafting the gift agreement a much less onerous process than it would be without laying the groundwork at every step of the gift process. At Mayo,

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an attorney embedded in our department reviews all gift agreements, which development officers prepare from templates he provides. The templates are reviewed regularly for compliance with current law. All benefactors are encouraged to seek the advice of counsel prior to signing the document, both in writing and through the encouragement of the development officer with whom they work.

While terms of the agreements are frequently changed in negotiation with the benefactor and her counsel, changed-circumstance language is always included in the final document signed by all parties, which guarantees that the institution will be able to spend a portion of the endowment income if the purpose for which the gift is created becomes altered. For example, a disease could be cured for which research funds were secured in a named endowment. Allowing modification of the benefactor's intent in these situation, which is discussed below, assures that both the institution's and the benefactor's wishes will be honored.

E. Risk Tolerance and Institutional Objections

Though the risk tolerance of charities varies widely, it is probably fair to say that financial and legal personnel, who are charged with protecting the institution, are generally much more risk adverse than development officers, who want to close gifts. When development officers minimize the risk of a particular gift or gift restriction, however, they endanger both the institution and institutional relationships required to advocate for future gifts that require the approval of legal and finance colleagues.

This is the area of my career in which I have made the most mistakes; here are a few things I've learned from damaging gift opportunities and relationships with my colleagues. I try to learn and remember the risk tolerance of my institution's decision-makers. Knowing what they likely will approve and at what they will balk, I now try to outline the risk in internal documents without underestimating the risk.

When the prospective gift is large (whatever that means to the particular charity), it is tempting to get ahead of the consideration of the decision-makers. In these cases, I have sometimes underestimated long-term risk. I have excited stakeholders about a gift that was possible though not certain. I also have let my superiors know when I thought their hesitancy to approve a restriction, gift vehicle, or proposed funding asset was ill-considered; no one had to wonder if I was impatient or frustrated. Only in recent years have I learned the virtues of patience with those who often know much more than I, of taking one for the team even when I am not wholly convinced of the wisdom of the ultimate decision, and of attending to relationships with institutional colleagues before I need to ask for their help.

IV. Changing Restrictions or Disclaiming Testamentary Restricted Gifts: Detours and Roadblocks

Once the gift agreement is signed or the letter arrives stating that the charity has been instructed through a will to establish a charitable tanning salon, is there any recourse for the charity? Can

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restrictions be changed short of going court? Can they be changed at all without the permission of the benefactor or heirs? The Uniform Prudent Management of Institutional Funds Act (UPMIFA) and the federal and state laws governing disclaiming testamentary distributions offer some help in answering these questions.

A. UPMIFA

As of May 2015, only Pennsylvania has not enacted a version of the UPMIFA. An updated version of the older Uniform Management of Institutional Funds Act (UMIFA), the UPMIFA provides processes for changing endowment restrictions in limited cases. When the restriction eliminates the ability to spend endowment income and the benefactor is not available to sign an amendment of the gift agreement, a court of appropriate jurisdiction can release the restriction if it "is obsolete, inappropriate, or impracticable."[5] While the doctrines of *cy pres* and deviation, which govern modification of purpose and management restrictions respectively, probably allowed these modifications by nonprofits, the UPMIFA clearly permits the court modifications of restricted funds that cannot be spent.[6]

If the fund is over 20 years old and is valued at less than $25,000 (or another amount specified in the state UPMIFA statute), the charity may amend the restriction without going to court. If the restriction is deemed to be impracticable or wasteful, the charity can inform the state attorney general (or other state charitable governance entity), wait for 60 days, and then modify the restriction. In this case, the charity is restricted to making changes consistent with the benefactor's perceived wishes, and in no case can the modification remove the nonprofit nature of the restriction.[7]

B. Disclaiming a Restricted Testamentary Gift

Governed by section 2580 of the Internal Revenue Code and by state law deadlines and designation of assets that can be refused, qualified disclaimers often are used by individuals to maximize estate tax savings by disclaimers exercised in favor of charitable beneficiaries. While the IRS has approved the use of qualified disclaimers by charities,[8] nonprofits choose to disclaim bequest transfers for other reasons, usually because the asset is unmarketable or would create institutional liability. On the rare occasions when charities choose to file qualified disclaimers, care should be taken to observe the state filing deadlines and to not accept any distribution while a disclaimer is contemplated. While consulting internal or external legal counsel for questions of bequest administration is always a good idea, to avoid the acceptance of a problematic gift asset through use of a qualified disclaimer, it is essential.

V. Restricted Gifts and the Courts: A Few Cases that Suggest What Can Go Wrong and the Consequences

A. Sweet Briar College

Sweet Briar College, a small liberal arts college in Virginia, was founded in 1901 and funded in accordance with the terms of the estate of Indiana Fletcher Williams, who left

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significant real property and $500,000 to charitable trusts to establish an educational institute for women. On March 3, 2015, the college announced the vote of Board of Trustees to close the college because it was no longer financially viable. Three lawsuits were filed within days of the announcement.

The first, *Commonwealth of Virginia, ex re. Ellen Bowyer, in her official capacity as County Attorney for the County of Amherst, Virginia, v. Sweet Briar Institute, et al.,* seeks to enjoin Sweet Briar officials from closing the college and from using charitable gifts for "purposes other than the solicited purposes or the general purposes of the college"[9] and requests that the board and president be removed and replaced.

The suit alleges that the testamentary gift and act of the Virginia legislature to incorporate the institute was conditioned on the school operating in perpetuity and prohibiting the sale of property that "shall be kept inviolate as an endowment fund, which shall be invested and reinvested by the corporation, and of which the income only shall be used for the support and maintenance of the school."[10] The suit also points to the college's reiteration throughout its history to the perpetual nature of its mission and that the county attorney possesses standing to enforce the terms of the charitable trust that created the college, and it alleges that the current officers and Board violated their duty under the terms of the trust.

Though the circuit court judge did not enjoin Sweet Briar officers from moving toward the closure of the college, the school was prohibited from selling assets for six months. The Amherst County attorney petitioned for expedited review by the Supreme Court of Virginia, and the petition was granted with oral arguments scheduled for June 4, 2015.[11]

Sweet Briar may or may not be financially viable, but the document that funded and founded the college is clear. College officers and board members seemed not to anticipate the use of the document in making claims for the continuing operation of the college. Considering the legitimacy or current applicability of the historic document might have made the case for closing the college stronger and the pending court cases fewer.

B. Garth Brooks v. Integris Rural Health

In 2012, Garth Brooks was awarded $1 million when Integris Canadian Valley Regional Hospital failed to build a women's health center in honor of his mother.[12] The amount included his $500,000 gift to construct the center and $500,000 in punitive damages.

Brooks alleged breach of contract, revocation of gift/constructive trust, fraud in the inducement, and negligent misrepresentation/constructive fraud. The hospital said that the gift from Mr. Brooks was unrestricted and that Mr. Brooks made the request to build a women's center after the gift was given. The hospital also contended that they did not spend the gift and made many attempts to give the gift back.

Bruce Lawrence, the hospital CEO, summarized the hospital's position and pointed to the beating the hospital's brand took following the verdict:

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> "INTEGRIS Health never thought we could win a popularity contest against one of Oklahoma's favorite sons. We did, however, feel a responsibility to stand up for what we believe — and continue to believe — is right. It may not play well on the evening news, but following the law and treating every donor or patient equally and with the same level of respect and care is important to our core values. It's the same calling we feel when we care for your family members or loved ones."[13]

One simple document likely would have helped the hospital avoid the loss of the gift, punitive damage award, legal fees, and bad publicity: a gift agreement. Maybe there was no agreement because the gift actually was unrestricted. Maybe the hospital gift officers had balked at the idea of getting a celebrity like Brooks to sign an agreement; they surely thought he was good for the money. Signing a gift agreement allows the charity and benefactor to work through a process of language approval, which assures that both can live with the restrictions. Skipping that step proved disastrous for the hospital.

C. The Barnes Foundation

Dr. Albert Barnes, who co-invented an antiseptic with a business partner, amassed a fortune by 1908 through sale of his product. He and a friend working on his behalf purchased a collection of Impressionist, Post-Impressionist, and early Modern paintings as well as medieval manuscripts, sculptures, and ancient Greek, Roman, and Egyptian art. He later bought an arboretum and built a residence and gallery on the grounds.

He founded the Barnes Foundation as an educational institution in 1922. The foundation's documents restricted the art to educational purposes and banned tours of the collection pieces.

Barnes' intended audience for the foundation included factory and shop workers, poor and disenfranchised people, African-Americans, and young artists. The Barnes educational method was based on experiencing original works, participating in class discussions, reading key texts in philosophy and the traditions of art, and looking objectively at the use of color, line, light, and space in each work of art. Barnes believed that students would not only learn about art but also would improve their critical thinking and their ability to learn and succeed in general, enabling them to be more productive participants in a democratic society.

Barnes struggled for years with questions about the eventual disposition of his foundation, including whether it should remain an independent organization or be affiliated with an established institution of learning such as the University of Pennsylvania. In 1947, Barnes made a donation to Lincoln University, a small, historically African-American college in Chester County, Pennsylvania, which initiated a formal relationship between the foundation and the college. In 1951, Barnes amended the foundation's by-laws so that, eventually, Lincoln's board of trustees would nominate four of the five members of the board of trustees of the Barnes Foundation.

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The Foundation trustees went to court in 1991 to amend the foundation documents that prohibited the sale or touring of the art pieces. The court did not allow the amendment but did allow the foundation art to tour to raise $16 million for renovations of the house/gallery.

In 2002, the trustees went back to the well again, asking that the collection be moved to a new building in Philadelphia and to expand the number of trustees to 15. The Pew and Annenberg Foundations agreed to help raise the money for construction of the building and create an endowment for maintenance. In 2004, the court approved the increase in trustees and postponed the decision regarding the move until the funds issue was resolved; the move was subsequently approved, and the new museum opened in May 2012.[14]

While charity policy reform advocates cite the Barnes case as proof that benefactor intention is routinely overlooked by nonprofits and the courts,[15] and the Barnes case was fought in the courts and in the Philadelphia and arts press for many years, the new museum seems to honor Dr. Barnes' devotion to arts and horticulture education. We are left to wonder if Dr. Barnes would agree with those who contend that his wishes were disregarded in sharing his collections with a wider audience than was possible in the original location.

D. The United Daughters of the Confederacy v. Vanderbilt University

In 1913, the Tennessee Division of the United Daughters of the Confederacy entered into the first of a series of gift agreements with George Peabody College for Teachers ("Peabody College") to raise $50,000 for the construction of a dormitory, a portion of which would provide rent-free housing for students of Confederate ancestry. The agreements spelled out key restrictions on the gift, including the requirement the dormitory bear the name of "Confederate Memorial Hall." The dormitory was completed in 1935, and for many years Peabody College, and Vanderbilt University, following its merger with Peabody, abided by the terms of the gift.

In 2002, however, Vanderbilt's then president, E. Gordon Gee, decided to rename the building in response to requests from across the university and noting that "Confederate" created a marketing problem for the university.

The United Daughters of the Confederacy, who were not consulted about nor informed of the change, filed a lawsuit to compel Vanderbilt to honor the terms of the gift agreement. At trial, the court granted Vanderbilt's motion for summary judgment finding the obligation to comply with the gift agreements was "impractical and unduly burdensome."[16] The Court of Appeals of Tennessee, however, reversed the trial court and upheld the gift agreement. It gave Vanderbilt two choices: (1) either abide by the terms of the agreements between the United Daughters of the Confederacy and Peabody College or (2) return the present value of the original gift to the United Daughters of the Confederacy.[17] Vanderbilt decided not to appeal the decision and to honor the gift terms.

Though the Vanderbilt personnel who closed the original gift probably could not envision a world in which the word "Confederate" would be a liability in the South and so did not include changed-circumstance language in original documents, their successors might have

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prevailed if they had been less unilateral in their actions. There obviously were women with whom they could have negotiated, compromise they could have offered, and legal bills they might have avoided if they had met with the United Daughters of the Confederacy and proposed possible alternatives.

Conclusion

If nonprofit consultants are correct, Generation X and Y benefactors will request more gift restrictions than their predecessors. Identifying the roadblocks to closing restricted gifts, creating structures to consider carefully restrictions before they are made permanent, assuring that documentation of intentions is complete, and providing for changes in restrictions where necessary, are goals that will help charities raise more money now and when Gen Xers replace Baby Boomers as the main source of gift revenue.

Endnotes

1. IRC Reg. Sec. 1.170A-1(e).
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3. U.S. Department of Education, "Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964", *Federal Register*, Vol. 59, No. 36 Wednesday, February 23, 1994.
4. Ralph Waldo Emerson, "Self Reliance" (1841).
5. "Uniform Prudent Management of Institutional Funds Act" accessed May 28, 2015 at http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf.
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10. Ibid.

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Additional Resources

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