

**THE BENEVOLENT BARISTA:
THE ART OF CONCOCTING, CRAFTING AND REFINING DONOR
ADVISED FUNDS AND CHARITABLE GIFT AGREEMENTS**

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Author and Presenter, *Tomayto, Tomahto – There Really Is a Difference: Comparing Private Foundations and Donor Advised Funds*, presented to the State Bar of Texas 27th Annual Estate Planning & Probate Drafting Course, October 6, 2016

Author and Co-Presenter, *Gifts from Cousin Eddie: Acceptance, Ownership & Management of Bizarre Assets*, presented to the Planned Giving Council of Central Texas, April 11, 2016

Author and Presenter, *Advising Donors and Managing Gifts of Oil, Gas and Mineral Interests*, presented to the Partnership for Philanthropic Planning Lone Star Council, February 23, 2016

Author and Presenter, *Things They Didn't Teach You in Law School: Practical Considerations for the Initial Client Conference*, presented to the 2015 Tarrant County Probate Bar Association Nuts and Bolts Seminar, September 18, 2015.

Author, *Self-Dealing Pitfalls and Strategic Solutions – Part I: Problems Related to Compensation and Shared-Cost Arrangements and Self-Dealing Pitfalls and Strategic Solutions – Part II: Problems Related to Estate Administration, Facility Use, Sale/Provision of Goods, Debt Assumption, and Controlled Entities*, published in Family Foundation Advisor, Vol. 14, Nos. 5 & 6, 2015.

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Information set forth in this outline should not be considered legal advice, because every fact pattern is unique. The information set forth herein is solely for purposes of discussion and to guide practitioners in their thinking regarding the issues addressed herein.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	GIFT AGREEMENTS	1
A.	Elements of Enforceability: Intent, Delivery and Acceptance	1
B.	Identifying and Focusing the Donor’s Intent	1
C.	What Strings Should be Attached?	2
1.	Restrictions Generally	2
2.	Earmarking	3
3.	Changing the Restriction	4
4.	Enforcing the Restriction.....	4
D.	Lifetime Gifts: Ensuring components of the gift agreement do not harm the income tax deductibility	5
1.	Conditional Gifts	5
2.	Quid Pro Quo	6
3.	Partial Interest Rule	6
III.	ARE CHARITABLE PLEDGES ENFORCEABLE?	7
A.	Charitable Pledges	7
B.	Examples of Binding Commitments	7
C.	Charitable Deduction	8
1.	Is a Pledge a Debt?	8
D.	Drafting Comments.....	9
IV.	GIFT AGREEMENT ELEMENTS	10
A.	Investment Directives.....	10
B.	Flexibility for Change	11
C.	Termination.....	11
V.	DONOR ADVISED FUND	11
A.	Operations and Features	11
B.	Grant Recipients	12
C.	Gift of “Unusual” Assets	13
D.	Creation	13
E.	Tax Treatment by Donors of Contributions	13
F.	Federal Tax Sanctions Applicable to DAFs.....	14
G.	Prudent Investment/Application of UPMIFA	14
VI.	DAF DRAFTING CONSIDERATIONS AND FORMS	15
A.	Donor Advised Fund Agreement Key Elements	15
1.	Advisory Privileges Only	15
2.	Intentions and Preferences	15
3.	Successor Donor Advisors.....	16
4.	Sunset.....	16
5.	Anonymity	16
B.	Potential Family Involvement	16
C.	Donor Control From the Grave	17
VII.	CONCLUSION	17
	APPENDIX A - SAMPLE DONOR RECOGNITION LANGUAGE.....	19
	APPENDIX B - SAMPLE GIFT AGREEMENT	21
	APPENDIX C - SAMPLE GIFT AGREEMENT	23

APPENDIX D - BASIC DAF AGREEMENT	27
APPENDIX E - SAMPLE NOTICE PROVISIONS FOR DAF	29
APPENDIX F - SAMPLE SUCCESSOR DONOR ADVISOR LANGUAGE	31
APPENDIX G - SAMPLE LANGUAGE FOR CONVERSION TO FOI FUND AND TERMINATION OF DAF	33
APPENDIX H - SAMPLE LANGUAGE FOR GIFT-OVER OF DAF	35

THE BENEVOLENT BARISTA: THE ART OF CONCOCTING, CRAFTING AND REFINING DONOR ADVISED FUNDS AND CHARITABLE GIFT AGREEMENTS

I. INTRODUCTION

When a client comes to your office announcing their desire to make a gift to ABC charity for the building of a new park, the high school's new stadium, or for the relief efforts after a tragic natural disaster, where do you start on reducing that intent to paper? What about the client who says they want to start their own foundation, but without all of the administrative burdens? Either of these scenarios means we need to thoroughly explore the donor's true vision. In the first case, it is crucial that we consider various aspects of the donor's gift and the donee's use of the gift in crafting the gift agreement. In the second case, the best alternative may be the use of a Donor Advised Fund ("DAF") – but do you really want to direct your client to use the charity's form DAF agreement, without tailoring it to their specific vision?

This article is intended to be a resource for those aspects of both a gift agreement and a DAF agreement we should consider in working with our donor clients, mainly focusing on inter vivos gifts. Typically, a gift agreement memorializes the intention behind a single gift, or multiple gifts to one charity for a single purpose, while a DAF can be used for multiple charitable purposes over time, with a more fluid charitable intention. Thus, we begin our discussion with the very essence of the philanthropic mind: refining our donor's charitable intent.

II. GIFT AGREEMENTS

As advisors representing a donor who wishes to make a charitable gift, our responsibilities in crafting the gift agreement have many layers, in addition to satisfying the legal requirements of an effective gift agreement:

- ✓ Clarifying with the donor their goals, objectives, and how the donor measures "success"
- ✓ Appropriately expressing the gift intent, anticipating change and allowing for modification if necessary
- ✓ Selecting the proper gift form and timing
- ✓ Advising on the type of asset to gift
- ✓ Working with the donee charity to ensure proper administration and execution of the gift will be possible within its purposes, policies and administrative abilities

A. Elements of Enforceability: Intent, Delivery and Acceptance

Three elements are required to establish a legally enforceable gift: (1) the donor's intent to make a gift; (2) delivery of the gifted property; and (3) acceptance of the property.¹ The principal issue is determining the donor's intent; if there is no donative intent, there is no gift.² The donor must intend to make the gift immediately, and there must be a complete stripping of the donor of all dominion or control over the asset given.³ Donative intent is established by evidence the donor intended an immediate and unconditional divestiture of his ownership interests and an immediate and unconditional vesting of those interests in the recipient.⁴ "Until a donor has divested himself absolutely and irrevocably of the title, dominion and control of the subject of the gift, he has the power to revoke it."⁵ An attempt to make a gift, effective in the future, amounts to merely an unenforceable promise or agreement to make a gift.⁶

In order to secure the donor's income tax charitable deduction, the gift must be complete. Thus, restrictions and conditions may impact the deductibility of the donor's gift. As will be seen later, restrictions may arise implicitly from the specific purposes identified in the charitable donee's organizing instrument or the purposes behind a fundraising event.⁷ If a gift is conditional, it may not qualify as a gift until the condition is fulfilled: inter vivos gifts "usually must go into immediate and absolute effect with the donor relinquishing all control."⁸

B. Identifying and Focusing the Donor's Intent

Your donor's intent is the very essence of what influences and directs the drafting of the gift agreement. Until this intent is memorialized in a proper written agreement, the donor's intent is not truly binding on the charity; directing the funds be used in a certain way may take the form of merely a letter of

¹ Nipp v. Broumley, 285 S.W.3d 552, 558 (Tex. App. Waco, 2009).

² *Id.*, at 559.

³ *Id.*; Olive v. Olive, 231 S.W.2d 480, 483 (Tex. Civ. App. Dallas 1950); Baldwin v. Fleck, 168 S.W.2d 904, 909 (Tex. Civ. App. – Galveston, 1943); 41 Tex. Jur. 3d Gifts § 11.

⁴ Nipp, 285 S.W.3d, at 559.

⁵ Benavides v. Laredo Nat'l Bank, 91 S.W.2d 372, 374 (Tex. Civ. App.-Eastland 1936).

⁶ Unthank v. Rippstein, 386 S.W.2d 134, 136 (Tex. 1964).

⁷ See Blocker v. State, 718 S.W.2d 409, 415 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.).

⁸ 38A C.J.S. Gifts § 39 (2008); Lauren J. Wolven and Shannon L. Hartzler, "Carefully Craft Conditions on Lifetime and Testamentary Gifts", Estate Planning Journal, Aug. 2011.

intent, a pledge statement or an actual binding agreement, the focus of this paper and the elements of which will be discussed later. As the advisor, part of our job is to define, hone in on and sharpen exactly what the donor envisions for the gift, to translate their goals into a completed gift and incorporate that intent into a written gift agreement: "...the clearer the vision, the sharper the gift's edge."⁹ Our goal here is to fix your donor's intent in a tangible, written form, so that it lasts long past the donor's lifetime (or at least for so long as your donor's vision projects).

As advisors, we have the pleasure of facilitating the donor's articulation of both short-term and long-term goals, asking those "what-if" questions, to draft flexibility into the agreement so that the donor's purposes can succeed at the highest level.

Often, the donor's mindset in making a gift is focused on an immediate use and impact at the time the contribution is made – such as a specific project or programs that are ongoing at the time of the gift. However, as advisors, we need to make sure the donor's intent includes an element of longevity – what does the donor envision long-term? What is the true intent of the gift, if those programs or projects are replaced with new activities in the future? While providing for an immediate impact is certainly noble, to truly carry full impact, our donor's intent, as expressed through the gift agreement, should be focused on more than only a short-term goal.

Of course, consulting the charitable donee will also impact the drafting of the gift agreement, and can be helpful in reducing the donor's intent to writing. We must be mindful of the charity's gift acceptance policy (if any), and discuss the proposed gift agreement with the charity to be sure it can be properly administered within its purposes and administrative capabilities. The drafting process should contemplate the charity's interpretation of the gift agreement, and the donor's written intentions, into the future – thus, will the intent as defined in the gift agreement be sufficient guidance to the charity in carrying out the goals of the donor's gift? Are broader or more narrow terms necessary to ensure compliance with what the donor intends? Involving the donee charity during the drafting phase can be very informative and make the donor's impact more effective. Even if the donor wishes to remain anonymous, advisors can take the gift concept to the charity without breaching that anonymity, so that the donor can be assured his or her vision can be properly administered and executed under that gift agreement.

While our donor's intent is the first focus of the gift agreement, and we need that intent to be fully

expressed so as to properly guide the charity in the use of the gift into the future, the restrictions that typically come with specific donor intent must be carefully balanced: they should not be so strict as to hamper the charity in the future, but also not so loose as to give the charity no vision at all. There are all too many examples of controversies alleging violation of donor intent, which highlight this big-ticket issue for donors and advisors: the delicate balance needed between placing narrow, binding restrictions on gifts and maintaining flexibility when outside factors make the original gift terms unsustainable.¹⁰

C. What Strings Should be Attached?

Attaching restrictions to the gift must be done carefully both to ensure the charitable donee can accept and effectively use the gift within its exempt purposes, and to ensure that the donor's charitable deduction is not put at risk. Additionally, flexibility should be drafted into the agreement so that the donee will not have to go through judicial modification processes due to changed circumstances in the future.

1. Restrictions Generally

Generally, a taxpayer may deduct the fair market value of his or her gift of property at the time of the contribution to a charitable organization under Internal Revenue Code ("Code") section 170, limited to certain percentages of a taxpayer's contribution base, depending upon the status of the donee and nature of the contributed property.¹¹ Fair market value is defined as the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."¹² Restrictions – strings attached to the donation – may alter this general rule. Thus, in drafting the gift agreement, we must be sure that any restrictions placed upon the gift do not prevent it from being a completed (and thus deductible) gift.

A Texas nonprofit corporation organized for charitable purposes is considered a "charitable entity".¹³ Under Texas law, monies donated to a charitable entity are said to be impressed with a charitable trust for the benefit of the public, meaning the funds must be used for the organization's stated purposes and consistent with any other restrictions.¹⁴ Although statutory law makes clear directors are

¹⁰ *Id.*

¹¹ See 26 U.S.C.A. ("I.R.C.") § 170(a), (c).

¹² Treas. Reg. § 1.170A-1(c)(2).

¹³ See Tex. Prop. Code § 123.001(1)(2).

¹⁴ See *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

⁹ Miree, Kathryn, "Perfecting Donor Intent in Testamentary Gifts: Legal Lessons and Practical Advice," May 1, 2008.

themselves not held to the fiduciary standard of a trustee, this law highlights not only the fiduciary nature played by directors but also the role of the charity as a “trust” holding a restricted gift. *See, e.g.*, Texas Business Organizations Code (“BOC”) § 22.223.

In addition, when a charity donee accepts a restricted gift, that restriction becomes binding on the charity. There are three general methods by which a gift is restricted. First, restrictions may arise from the specific purposes identified in the organizational instrument of the donee.¹⁵ Second, restrictions may be initiated by a donor including restrictions appearing in a deed or gift or grant agreement, restrictions appearing in a letter transmitting a gift, or even restrictions appearing on the memo line of a check. Finally, there are restrictions initiated by the donee through a program of solicitation.¹⁶

In order for the charity to properly interpret any restrictions, the intent of the donor needs to be crystal clear, taken from the language used in the four corners of the gift agreement.¹⁷ If ambiguous, the charity may have to seek judicial interpretation of the agreement.¹⁸

2. Earmarking

Earmarking simply acts as a designation of which of the charity’s programs the donation is to be used. Thus, where the earmark is both consistent with and in furtherance of a charity’s purpose, the earmark is not problematic. However, certain types of earmarking will make the gift nondeductible.

Where a donor earmarks a gift in such a way that he is seeking to use the charity as a conduit to effectuate a gift to an individual or a non-exempt organization (as opposed to primarily benefiting the charitable organization), the gift is not deductible. The key issue, then, is determining the true purpose of the donation.

A gift to an individual is non-deductible regardless of the charitable nature of the gift.

Likewise, gifts that are earmarked for the benefit of individuals are non-deductible because the gift is intended to benefit the individual as opposed to being “to or for the use of” a charitable organization. To determine whether the purpose of the gift is to benefit an individual or is “to or for the use of” the charitable organization, the Service looks to two tests:

- (a) Does the donor intend to benefit the charity or the individual? To answer this question the Service looks to any written gift agreement between the parties, any solicitation materials, and any other written correspondence regarding the gift.
- (b) Does the charitable organization have full discretion and control over the use of the gift? The organization has discretion and control where it has the option to apply the funds to another use if it chooses. This is often demonstrated through use of the following statement (or a modification): “Contributions are solicited with the understanding that the donee has complete discretion and control over the use of all donated funds.”

Clearly, then, where a donor restricts the use of the donated funds to benefit an individual designated by the donor *on the donor’s initiative*, no deduction is available.¹⁹ The clearest route is for the charity to create the designation (through the exercise of the fiduciary duties of the board ensuring that the designation is consistent with the charity’s purposes) and allow donors to contribute to the charity for this fund/designation. An example would be an organization established to provide for the needs of terminally ill children. Consider a situation in which a family’s child is terminally ill and the family needs additional funds to allow the family to care for the child. If a donor gives funds directly to the family for necessities, while certainly noble, the gift is non-deductible. Likewise, if the donor approaches the charity and requests to be able to “pass through” a gift to the family, the gift is non-deductible. However, if the charitable organization, consistent with its tax-exempt purposes, selects the family as a proper recipient of funding and announces to the public that a fund has been established to provide for the family, where the donor contributes to this fund (with the understanding that the charitable organization has complete discretion and control), the gift is deductible.

Similarly, regarding scholarships, if a donor sends funds to a college to be used to fund a scholarship for a

¹⁵ *See Id.*

¹⁶ For example, with the recent catastrophic hurricane, the Red Cross made it easy for donors, by texting “HARVEY” to 90999, to donate to Hurricane Harvey relief efforts.

¹⁷ The intent of the donor must be ascertained from the four corners of the trust instrument. *See Moody v. Pitts*, 708 S.W.2d 930 (Tex. App.—Corpus Christi 1986, no writ). Thus, a court does not focus on what the grantor/donor intended to write but the meaning of the words actually used. *See San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000).

¹⁸ For more detail regarding judicial interpretation of restrictions, see Darren B. Moore, Reference Outline “Giving with Strings Attached: An Examination of Key Issues for Consideration”, presented to the Governance of Nonprofit Organizations Course, Aug. 2016.

¹⁹ *See, e.g., Tripp v. Comm’r*, 337 F.2d 432 (7th Cir. 1964).

specific individual, it is non-deductible. If, on the other hand, a donor contributes to a scholarship fund with respect to which the college will choose recipients based on non-discriminatory policies, the gift is to or for the use of the college and will thus be deductible.²⁰

Some public charities may carry out international grantmaking in an intermediary capacity. In such situations, it is critical to understand the requirements to ensure deductibility for the original donor – the key distinctions with these “friends of” organizations is that the public charity have a sufficient level of discretion and control over the funds. An organization that operates as a conduit organization will not be able to demonstrate the type of discretion and control necessary to ensure charitable assets are used exclusively for charitable purposes. As opposed to a conduit entity that merely passes funds through to a foreign organization, a “friends of” organization, when properly structured, can satisfy the requirements for deductibility to the original donor and compliance with the public charity’s obligations to ensure that its charitable assets are used exclusively for charitable purposes.

3. Changing the Restriction

If a restriction cannot be fulfilled or is no longer relevant to the programs of the charity that accepted the restricted gift, the charity may seek to change the gift’s restriction if nothing is provided in the gift agreement as to the management of the fund in the event of changed circumstances. The charity may seek a release or modification of institutional funds under UPMIFA (applicable to a nonprofit corporation), or seek a release or modification of program-related funds through the doctrines of cy pres and equitable deviation.

Traditionally, the only way to alter or remove the restrictions was through application of the doctrine of cy pres. The doctrine of cy pres applies where a donor has made the donation with general charitable intent, that is, an intent that the funds be devoted to a more general charitable purpose than the specific purpose serving as the basis of the restriction. Where the donor manifests general charitable intent, a court may direct use of the funds to purposes as near as possible to the initial purposes when the initial purposes are or become impossible, impracticable, or illegal.²¹

²⁰ For more on the tests the Service uses to determine if the payment is a true charitable contribution, see Moore, *supra* note 18.

²¹ See Restatement (Second) of Trusts § 399 (1959); see also Tex. Prop. Code § 112.054; Johnny Rex Buckles, *When Charitable Gifts Soar above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 Fordham L. Rev. 1827 (2003).

Importantly, a restrictive purpose does not fail merely because it is not “efficient” to continue it.

The doctrine of cy pres applies to use of the donated funds. A similar doctrine, equitable deviation, applies to modification of administrative terms of a gift when the terms as imposed are or become impossible or illegal, or where compliance would substantially impede the accomplishment of the purposes of the gift due to circumstances not anticipated by the donor.²²

UPMIFA permits release or modification of restrictions on institutional fund management, investment and/or purpose in limited circumstances.²³ If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.²⁴ Absent donor written consent, such as in the case of a deceased or unidentified donor, an institution may apply to a court for modification of a restriction on management or investment of an institutional fund, on the grounds of impracticability or wastefulness, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund, and the court may modify. To the extent practicable, any modification must be made in accordance with the donor’s probable intention.²⁵ If an institution applies to a court for modification, Chapter 123 of the Texas Property Code applies (and therefore the AG must be notified in accordance with that chapter).²⁶ Modification and/or termination of a charitable trust is governed by the Texas Trust Code.

Thus, while a charity does have options available to modify restrictions that are no longer useful, the gift agreement can be crafted such as to provide a level of flexibility to avoid the necessity of these complications and costs to the charity. See part IV.B. below regarding drafting points for flexibility.

4. Enforcing the Restriction

Who is going to be around to ensure your donor’s restrictions are followed? Generally, absent contractual standing created by way of a gift instrument, a donor lacks standing to enforce the terms of a restricted gift

²² See Restatement (Second) of Trusts § 381; see also Tex. Prop. Code § 112.054.

²³ When considering release of restrictions under UPMIFA, keep in mind the definition of “institutional fund” expressly excludes program-related assets.

²⁴ Tex. Prop. Code § 163.007(a).

²⁵ Tex. Prop. Code § 163.007(b).

²⁶ See Tex. Prop. Code § 163.007(b) and (c).

because the very concept of a gift is that the donor has irrevocably parted with all rights in the gifted property. However, a donor who has made a conditional gift with a right of reverter or gift over has standing to enforce the terms of the gift. Likewise, a donor who has a special interest in seeing the terms followed, an interest separate and distinct from the interest of the general public, also has standing.²⁷

The Office of the Attorney General has standing to enforce compliance with fiduciary duties, such as keeping with the terms of a restricted gift, in its role as the representative of the public interest in charity.²⁸ The OAG is charged to ensure charitable assets are used for appropriate charitable purposes, including in accordance with any gift restrictions, and has broad authority to carry out that duty emanating from the Texas Constitution, common law, and various statutes. Thus, the AG is the protector of the donor's intent and of the public's interest in charitable funds.

D. Lifetime Gifts: Ensuring components of the gift agreement do not harm the income tax deductibility

To be deductible, a gift must be complete and irrevocable.²⁹ A gift is complete "if the donor has so parted with dominion and control as to leave in him no power to change its disposition" but is incomplete if any dominion or control is retained.³⁰ While the issue of the completeness of a gift is generally an issue in the context of gift taxes, it can also be an issue for federal income tax deductibility. Where the donor fails to give up complete dominion and control over the property, the gift is incomplete and there is no income tax deduction. For example, if a donor retains the right (superior to the charity) to direct the use of the gift, change the purpose of the gift, or redirect the gift, the gift is incomplete.³¹

To continue to have a right to advise on use of the funds after the gift is given, a donor should utilize a donor advised fund which allows for non-binding (though typically followed) recommendations (discussed in more detail below in Part V). In the event the donor desires a greater level of control, he may want to consider establishing a private foundation. If the issue to be addressed is the ability to cause the gift to transfer in the event the charity fails to follow the restriction or commits some other specific act or omission, the donor should utilize a gift-over provision

specifying another charity to which the gift will transfer in such event. In this way the gift is complete and remains in the hands of a qualified organization thereby protecting the donor's deduction.

1. Conditional Gifts

The income tax regulations restrict the use of a charitable deduction to gifts to qualifying charitable donees that are certain to receive that charitable contribution. The Treasury Regulations provide that if the charitable gift is conditional or dependent upon the performance of some event in order to become effective, or may be defeated by some future event, no deduction is allowable unless the possibility that the charitable transfer will not be effective is "so remote as to be negligible." This phrase has been defined by the U.S. Tax Court as a "chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction."³² This phrase has also been held to mean "a chance which every dictate of reason and common sense would justify an intelligent person in disregarding as so highly improbable and remote as to be lacking in reason and substance."³³

Placing a reversion on gifts to a charitable entity causes the gift to be contingent on a future event. For example, in Revenue Ruling 79-249, a gift to a public school system to build a school contained a reverter clause if the remaining funds were not raised to complete the project. As of the date of the gift, the transfer for charitable purposes was dependent upon the happening of other events (i.e. other donors giving sufficient funds) in order to become effective. The IRS ruled that until it was certain there were adequate funds to construct the building, the possibility the donation would be returned to the donor was not so remote as to be negligible. Therefore, the deduction was required to be deferred by the donor until it was clear that the building would be constructed.

In another case, a corporation held an option to reacquire a tract of real estate which it had donated to a charitable organization. The corporation's shareholders were not allowed to take the charitable deduction until the option to reacquire the tract had expired, since the contribution was dependent upon such expiration and the possibility of the corporation exercising the option was not "so remote as to be negligible."

An oft-cited example of a conditional gift being failing the "so remote as to be negligible test" is found in Revenue Ruling 2003-28. There, a donor gifted a patent to a university conditioned on a specific member

²⁷ See *Cornyn v. Fifty-Two Members of the Schoppa Family*, 70 S.W.3d 895 (Tex.App.—Amarillo 2001, no pet.).

²⁸ See Tex. Prop. Code § 123.001, *et. seq.*

²⁹ See *Threlfall v. U.S.*, 302 F.Supp. 1114 (D. Wis. 1969).

³⁰ See Treas. Reg. § 25.2511-2(b),(c).

³¹ See *Pauley v. U.S.*, 459 F.2d 624 (1972).

³² *Briggs v. Comm'r*, 72 TC 646 (1979).

³³ See *id.*; see also § Teas. Reg. 20.2055-2(b).

of the faculty remaining on the faculty for the anticipated fifteen-year duration of the patent's remaining life. The Service determined the possibility that the faculty member not remain in a faculty position for this time period was not so remote as to be negligible, thus disallowing the deduction.

2. Quid Pro Quo

Donors must also be wary of the quid pro quo and bargain sale rules when receiving something in return for a contribution. If the donor receives a benefit in return for the gift, the donor may be entitled to no deduction at all. A bargain sale is partly a charitable contribution (gift) and partly a sale or exchange, which may result in taxable gain to the donor.³⁴

In quid pro quo situations, the donor is not entitled to a deduction.³⁵ For example, where a couple donated their lake house to a local volunteer fire department to be used and later demolished as part of a training exercise, their claimed \$76,000 deduction was denied. The Tax Court determined that the couple received a substantial return benefit because the value of the demolition services exceeded the value of the house.³⁶ The Seventh Circuit, in affirming the Tax Court's ruling, pointed back to the rule on valuing gifted property subject to a restriction in light of the restriction.³⁷

To be deductible, a charitable contribution must be a gift: a transfer of property without adequate consideration.³⁸ A taxpayer may, however, claim a deduction for the difference between a donation to a charitable organization and the market value of the benefit received in return, based on the idea that the donation is of "dual character" of both a purchase and contribution.³⁹ The Supreme Court, in *American Bar Endowment*, has set a two-part test for determining when part of a dual payment is deductible, which was then confirmed by the IRS: (1) the payment is deductible only to the extent it exceeds the market value of the received benefit; and (2) the excess donation must be made with donative intent.⁴⁰ Intent is

to be determined by the facts and circumstances in each case; a charitable gift is the excess of the payment over the value of the quid pro quo if there is an intent to make a charitable gift.⁴¹ However, donors need not reduce their charitable deduction when they receive low-cost articles or items of "insubstantial value" (such as naming recognition).⁴² "Substantial benefits" has been defined to mean greater benefits than those which inure to the general public from charitable donations.⁴³

3. Partial Interest Rule

No deduction is allowed under section 170 for a charitable contribution, not made in a transfer in trust, of an interest in property that is less than the donor's entire interest in such property.⁴⁴ A deduction of a partial interest in property will be allowed under the exceptions of section 170(f)(3)(B). Exceptions include: (1) a remainder interest in a charitable remainder unitrust, charitable remainder annuity trust or pooled income fund; (2) a partial interest representing the donor's entire interest in the property, and which was not created for the purpose of making the gift; (3) a partial interest which is an undivided portion of the donor's entire interest in the property (a fraction or percentage of each substantial interest or right owned by the donor in such property and must last for the entire term of the donor's interest in such property and in other property into which it is converted); (4) a remainder interest in a personal residence or farm; and (5) a qualified conservation interest.⁴⁵

A contribution by a taxpayer of the right to use property is considered a contribution of less than the taxpayer's entire interest in such property, thus excluding the contribution from charitable deduction.⁴⁶ However, a deduction is allowed if such partial interest is the taxpayer's entire interest in the property, such as an income or remainder interest.⁴⁷ The deduction will be disallowed if the property was divided in order to create such interest and avoid the consequences of section 170(f)(3).⁴⁸ For example, the donor may not retain the mineral rights while making a gift of the surface (or vice-versa). Thus, if the donor owns both the surface and mineral estate, he must make a gift of a

³⁴ I.R.S. Pub. 526 (April 2007).

³⁵ See, e.g., *Ottawa Silica v. U.S.*, 699 F.2d 1124, 1131 (Fed. Cir. 1983); *Singer Co. v. U.S.*, 196 Ct. Cl. 90, 499 F.2d 413, 420, 422 (1971).

³⁶ The court determined there was no value to the house because of the condition that it be destroyed.

³⁷ See *Theodore R. Rolfs and Julia A. Gallagher*, (CA 7 2/8/2012) 109 AFTR 2d ¶ 2012-427.

³⁸ *Sklar v. Comm'r.*, 125 T.C. 14 (U.S. Tax Ct. 2005) (citing *U.S. v. Am. Bar Endowment*, 447 U.S. 105 (1986)).

³⁹ *Transamerica Corp. v. U.S.*, 902 F.2d 1540 (Fed. Cir. 1990).

⁴⁰ *Id.* (citing Rev. Rul. 64-246; *U.S. v. Am. Bar Endowment*, 447 U.S. 105 (1986)).

⁴¹ CHARITABLE PLANNING, 343 PLI/Est 301, 543.

⁴² Rev. Proc. 90-12, 1990-1 C.B. 471; Rev. Proc. 92-49, 1992-1 C.B. 987.

⁴³ *Transamerica Corp. v. U.S.* (902 F.2d 1540 (Fed. Cir. 1990) (citing *Singer Co.*, 449 F.2d at 423)).

⁴⁴ See I.R.C. § 170(f); Treas. Reg. § 1.170A-7.

⁴⁵ See I.R.C. § 170(f); Treas. Reg. § 1.170A-7; Martin Hall, *Charitable Giving Without Trusts – Deduction Rules and Techniques*, SJ087 ALI-ABA 215, 223-24.

⁴⁶ See I.R.C. § 170(f); Treas. Reg. § 1.170A-7.

⁴⁷ See Treas. Reg. § 1.170A-7.

⁴⁸ *Id.*

portion of each. Further, the donor may not sever these rights in anticipation of giving one interest to the charity and retaining the other interest (such as through the use of a partnership).

No deduction is allowed for a contribution of an undivided portion of a donor's entire interest in tangible personal property, such as a work of art or collectible, unless all interests in such property are held by the taxpayer or by the taxpayer and the donee immediately prior to the contribution.⁴⁹ Any additional contribution of this interest in tangible personal property at a later time will be valued at the lesser of the property's fair market value on the date of initial contribution, or on the date of the additional contribution.⁵⁰ Further, the amount of the income tax deduction that has been taken for a fractional interest in such property will be recaptured, unless the donor contributes all of his or her remaining interests in that property to the charity by the earlier of: 10 years after the initial contribution date, or by the date of the donor's death.⁵¹ This recapture rule will also apply if the donee charity has not had substantial physical possession of the contributed property, or has not used it in a manner related to its tax-exempt purpose during this same period.⁵² In such cases of recapture, the donor's income tax for that year is increased by ten percent (10%) of the recaptured amount.⁵³ Therefore, the donor should be sure to contribute his or her remaining interest in the tangible personal property to the donee charity within the above time period in order to keep the charitable deduction and avoid the recapture penalty.

III. ARE CHARITABLE PLEDGES ENFORCEABLE?

In drafting the Gift Agreement, we must be mindful of the impact of charitable pledges, to not unintentionally turn what would otherwise be a completed gift into an unenforceable pledge.

A. Charitable Pledges

Often, donors desire to make a pledge to a charity of a certain sum or a graduated series of gifts for a particular project. However, a mere pledge to make a gift in the future to a charitable beneficiary is not an enforceable gift, and we must look at contract law theories for enforceability of these agreements. Traditional contract law principles require there to be consideration in order to enforce a promise (such as a

promise to make a gift to a charitable organization). Thus, a promise to make a gift in the future could be seen as an unenforceable contract, for lack of consideration. For example, a gift letter citing that the donor is committed to supporting his alma mater medical school and listing pledge amounts by year, without more will not be a binding, enforceable gift agreement under contract principles.

B. Examples of Binding Commitments

Consideration in the form of mutual promises between the charitable recipient and donor may be sufficient to create a bilateral contract under traditional contract theories. Additionally, the theory of promissory estoppel as well as public policy favoring gifts to charities can be used by a court to enforce charitable pledges.

When one makes a promise to contribute money for a specific objective, and that promise is relied upon and the objective of the gift is carried out, the promisor can be held liable for his promise under Texas law.⁵⁴ This is especially true when the promise to give is made to a charitable recipient; courts have a tendency to find a charitable pledge enforceable when the promisor places a condition on his or her gift, and the charity fulfills that condition.⁵⁵

Promissory estoppel may be used to enforce an otherwise unenforceable promise, upon which someone has reasonably relied to his detriment.⁵⁶ To prevail on a claim of promissory estoppel in Texas, the plaintiff must establish: (1) a promise; (2) the plaintiff justifiably and reasonably relied on the promise to his detriment; (3) it was foreseeable that such plaintiff would rely on the promise; and (4) injustice can be avoided only by enforcement of the promise. A promise must be sufficiently definite to support a claim of promissory estoppel, and must be more than a mere statement of hope, opinion, expectation or assumption.⁵⁷

Classic examples of a bilateral promise, and promissory estoppel, include a pledge of monetary gifts in reliance upon which a university will build a stadium or a hospital will build a new medical wing. Without a present intent to give the full sum of funds,

⁵⁴ *Thompson v. McAllen Federated Woman's Bldg. Corp.*, 273 S.W.2d 105, 109-10 (Tex. Civ. App. – San Antonio, 1954).

⁵⁵ *See Allgheny College v. Nat'l. Chautauqua County Bank of Jamestown*, 159 NE 173 (NY 1927); 97 A.L.R.3d 1054; MARY FRANCES BUDIG, GORDON T. BUTLER AND LYNNE M. MURPHY, PLEDGES TO NONPROFIT ORGANIZATIONS: ARE THEY ENFORCEABLE AND MUST THEY BE ENFORCED?, 27 U.S.F. L. Rev. 47, 55-56 (1991).

⁵⁶ *Wheeler v. White*, 398 S.W. 2d 93, 96-97 (Tex. 1965).

⁵⁷ *Esty*, 298 S.W.3d, at 305.

⁴⁹ *See* I.R.C. § 170(o)(1).

⁵⁰ *See* I.R.C. § 170(o)(2).

⁵¹ *See* I.R.C. § 170(o)(3).

⁵² *Id.*

⁵³ *Id.*

there is no consideration and the agreement would be a mere recitation of what the donor plans to do in the future. However, if the agreement includes statements upon which the school (taking this for example) may rely to its detriment, promissory estoppel may be used as a substitute for consideration, thereby making the pledge agreement an enforceable contract. The following provisions would provide a basis for such reliance:

- ✓ Donor acknowledges that the university is relying on the pledge, by making expenditures to plan and construct the stadium
- ✓ Requirement that the donor's estate pay any remaining balance at donor's death
- ✓ Foreseeability that the charitable recipient will rely on the promise in the form of constructing the new stadium

Thus, with these provisions, the university would be reasonable in relying upon the gift and there would exist no other remedy than enforcing the gift, if the stadium is half-way built and the donor decides not to complete the pledged amount.

Further, as is often seen with gifts of funds to construct a building or stadium, if the pledge agreement provides name recognition such as a founder's suite and/or naming of the stadium in honor of the donor, courts may find this to be an "implied request" for naming recognition, such that it is sufficient consideration in the form of mutual promises, and thus creates a bilateral contract under basic contract law theories.

Even if the document is simply a letter of intent, with no basis for detrimental reliance on part of the charity (i.e. no promise of funds upon which the charity is relying and constructing a new building, hospital, stadium, etc.), but the letter provides for naming rights provided to the donor, this implied request for naming recognition may be sufficient to create a binding contract in the eyes of a court. For example: a letter of intent with a promise by Mr. and Mrs. Donor to make gifts in the future to a youth club for its new academic center, and in exchange the youth club will name the center after Mr. and Mrs. Donor.

C. Charitable Deduction

The mere making of a pledge does not give rise to a charitable deduction; however, an income tax deduction may be taken at the time a payment is made pursuant to the agreement. For federal income tax purposes, charitable contributions are deductible when payment is made, regardless of the accounting method

used or when the contribution is pledged.⁵⁸ The mere making of a pledge, even if enforceable under state law, therefore does not give rise to a charitable deduction; a deduction may only be taken when a payment is made pursuant to such pledge agreement.⁵⁹ However, keep in mind the quid pro quo rules noted above - the amount of the deduction must be reduced by the value of any *substantial* benefit received by the donor in exchange for his having made the donation. For example, the receipt of the privilege of exclusive access to the Founder's Suite in the new football stadium (including tickets to games) may be considered a substantial benefit received by the donors in exchange for their donation to the university, but the receipt of naming rights is likely not considered a substantial benefit (and thus requires no reduction).

1. Is a Pledge a Debt?

An enforceable pledge is not considered a debt for federal income tax purposes.⁶⁰ Revenue Ruling 64-240 determined a charitable pledge is not a legal obligation for purposes of section 677, because Revenue Ruling 55-410 had concluded that a charitable pledge does not create a debt for federal income tax purposes.⁶¹ Since the Code requires that a charitable contribution is only deductible at the time of payment, and not when the pledge is made, it would be inconsistent to treat such payment as both a contribution or gift and as a satisfaction of debt with tax consequences.⁶² The Service's position that a charitable pledge is not recognized as a debt for income tax purposes was reconsidered and reaffirmed in General Counsel Memorandum 33275.⁶³

In GCM 33275, the Service took the position that the nature of the liability which arises from the making of a charitable pledge is distinguishable from an otherwise liquidated liability, and that its satisfaction should not result in a taxable disposition. Although the donor would be legally obligated to satisfy his pledge under state law, he is not obligated to do so as a result of a bona fide contract entered into at arm's length, for full and adequate consideration.⁶⁴ Despite the fact that state courts find such pledges have been entered into for valid consideration (such as through promissory estoppel), for federal income tax purposes, such consideration received would be the same "nonmaterial

⁵⁸ Treas. Reg. § 1.170A-1(a).

⁵⁹ *Id.*; see also H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938).

⁶⁰ Rev. Rul. 64-240, 1964-2 C.B. 172; Rev. Rul. 55-410, 1955-1 C.B. 297.

⁶¹ *Id.*; GCM 38505.

⁶² *Id.*

⁶³ GCM 38505; GCM 33275.

⁶⁴ GCM 33275.

satisfaction” obtained by any donor, which has been held to not be sufficient to create a taxable disposition.⁶⁵ Further, when viewed in its entirety, the transaction does not result in an economic benefit to the donor, analogous to cases in which indebtedness is discharged at less than face value and there is no economic benefit to the pledgor, resulting in no taxable income to him.⁶⁶ The Service believed the same should result here: that the cancellation or satisfaction of a charitable pledge should not result in taxable income.⁶⁷

Given the favored status of charities, the inequitable result of taxing a gain within the context of a net economic loss, the history of reliance on the above Revenue Rulings, and the opposite result when gifts are directly transferred to charity, the Service found it more likely that courts would determine a donor’s satisfaction of an enforceable charitable pledge to not result in a taxable event.⁶⁸ Additionally, if an enforceable pledge is forgiven by a charity, there is no discharge of indebtedness income to the donor under section 108, because no income can be realized if the payment of the liability would have given rise to a deduction.⁶⁹ For income tax purposes, the making of the enforceable charitable pledge is of no consequence, since the Service has taken the position that an enforceable charitable pledge is not a debt.⁷⁰ Therefore, the fact that a charitable pledge may be enforced under state law does not prevent the donor from receiving an income tax charitable deduction as he or she makes payments pursuant to such pledge.⁷¹

However, an enforceable charitable pledge does create debt for federal gift tax and estate tax purposes.⁷² If a third party discharges the pledge, the payment by the third party will be treated as a taxable gift to the original pledgor; the pledgor is the person entitled to the deduction for the payment.⁷³ Likewise, an enforceable pledge creates a debt for federal estate tax purposes, as it is deductible as a claim against the estate under section 2053, rather than as a charitable contribution under section 2055.⁷⁴ The deductibility under section 2053 is dependent on showing that the pledge would have constituted an allowable deduction

under section 2055 had it been a bequest.⁷⁵ Therefore, if the donor were to die prior to fulfilling his charitable pledge, although he would be unable to allow a deduction on his final income tax return, the pledge would likely be deductible for estate tax purposes.⁷⁶

D. Drafting Comments

In drafting a charitable pledge agreement, we must be mindful of the language used to make the pledge enforceable, if your donor wishes the pledge to be fulfilled and be enforceable by the charity. An enforceable pledge agreement may be beneficial to your donor who wishes to give a large sum of money, but also desires to see the buildout of a certain project completed, rather than handing over a single check. Thus, making the pledge agreement an enforceable contract would mean the donor’s estate will be bound, and if done properly, the estate will be entitled to an estate tax deduction if the donor passes prior to the gift’s ultimate fulfillment.

Rather than a statement that the donors have “intent to give” or “cause to be given” the pledged funds, to strengthen the enforceability of a pledge agreement, the language should recite a more definitive promise to give, acknowledging an “irrevocable gift commitment to ABC Charity”. Further, if seeking enforcement through promissory estoppel, the agreement should recite that the donor is aware that ABC Charity is relying on the promise of the gift commitment, and providing the foreseeability that the charity will rely on that promise in the form of constructing the new hospital wing, stadium, children’s center, etc. If the document contains these elements (to the extent they are applicable), the more likely it is that the pledge agreement will be considered a contract under one of the theories above.

If the pledge is in exchange for something such as naming rights to a building, or other benefits (like those circumstances above), the pledge agreement should also address:

- ✓ How long the naming recognition will last
- ✓ If donor has the ability to change the name, who else has that ability and for how long
- ✓ Who else in donor’s family will have access to the benefits donor is receiving
- ✓ How long those benefits will last⁷⁷
- ✓ Valuation of benefits received

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 26 U.S.C.A. § 108(e)(2); SETTING THE STAGE FOR CHARITABLE GIVING, ST050 ALI-ABA 31.

⁷⁰ GCM 38505.

⁷¹ See, e.g. GCM 38132.

⁷² SETTING THE STAGE FOR CHARITABLE GIVING, ST050 ALI-ABA 31.

⁷³ Rev. Rul. 81-110, 1981-1 C.B. 479.

⁷⁴ Treas. Reg. § 20.2053-5; SETTING THE STAGE FOR CHARITABLE GIVING, ST050 ALI-ABA 31.

⁷⁵ Treas. Reg. § 20.2053-5.

⁷⁶ See 3 Est. Tax & Pers. Fin. Plan. § 31:53.

⁷⁷ For example, Texas A&M built a new stadium and took away the benefits of seating from the previous stadium donors, which incited significant publicity and litigation.

- ✓ What happens to the funds if the charity does not fulfill its promise (i.e. that stadium is never built), and how long the charity has to begin fulfilling its promise (if the stadium construction does not begin within 1 or 2 years, is that considered a breach?)

IV. GIFT AGREEMENT ELEMENTS

Primary goals of the Gift Agreement are to make the donor's goals and intent clear, and provide flexibility of the gift over time. It is crucial to work with the donee charity in drafting the gift agreement – typically, the charity will have a form gift agreement, or at minimum may have some critical or preferred language to be incorporated. There may be other unusual elements the charity specifically desires to be included. If the gift's purpose does not align with the charity's mission, the donee may be forced to decline the gift or create a deviance in order to put the gift to work – thus, coordination with the charity during the drafting phase is of upmost importance. (Example Gift Agreements are attached at Appendices B and C).

Aside from the charity's preferred form or language, the following are primary elements of the written, enforceable gift agreement⁷⁸:

- ✓ Fund Name – The name can include the donor, his/her family, the purpose of the fund, etc.
- ✓ Asset(s) being contributed – Now and any future anticipated gifts, keeping in mind the discussion of whether a pledge of future gifts is enforceable (see Part III). Is there any commitment being made for future funding?
- ✓ Donor's goals – The donor's objectives and goals should be clearly defined, both in terms of short- and long-term goals. If the donor's primary goal(s) is achieved, what are the secondary goals?
- ✓ Direction or restriction on gifts (see Part II.C. above).
- ✓ Any recognition to be provided for the gift, and if the gift is to be made in stages, what type of recognition is provided upon partial funding (if any), in case the donor is unable to fully fund the gift.
- ✓ Directives on accounting – Whether the gift will have a separate accounting for its balance, expenses, etc. The donee charity will likely have a policy with a set minimum dollar amount requiring a separate accounting. The document should not require a level of accounting or process that will be excessive for the size of the gift.
- ✓ Whether the charity will report to the donor (and/or donor's family) on the fund's success, and if so, in what method and the timing. Will the charity be required to report to the donor and donor's spouse during their lifetimes, or to future generations as well? Will the report be made annually or more often? What type(s) of records is the donor entitled to?
- ✓ Donor recognition - anonymity desired, or level of publicity allowed by the donor in relation to the gift (see Appendix A for sample language).
- ✓ Investment directives (discussed below).
- ✓ Flexibility for future changes (discussed below).
- ✓ Termination (discussed below).
- ✓ The binding effect of the agreement.
- ✓ The controlling law and venue for any disputes arising out of the agreement. (Alternative Dispute Resolution provisions if desired).

A. Investment Directives

When a charity has a large number of long-term funds, pooling assets is the most effective and efficient way for the organization to manage those. Thus, the agreement should allow the donee to pool the gifted funds with other like assets. Further, rather than imposing the donor's own personal investment guidelines on the charity, it is most helpful to allow the charity discretion in its investment strategies, so that it can adjust those with its long-term needs and policies.

Sample language:

The Funds may be invested, commingled, or merged with and become part of the general endowment funds and investment assets of the ABC University. Guidelines established by the University Board of Trustees from time to time determine the investment, allocation of return on investment, and distribution of endowment funds and the allocation of income, loss, fees and expenses associated with endowment funds and securing and administering endowment funds. The Funds and all accounting of the Funds will be subject to these guidelines.

While this is true, we all know we have some of those more "particular" clients who will insist on including their own ideas of investment strategies. In that case, make sure you craft in some level of flexibility for the charity to be able to adjust the donor's requirements, and have the charity review those provisions before they are set in stone. This may be a significant negotiating point with the donee, and will depend on the donor's investment sophistication and the amount of the gift.

⁷⁸ Adapted from Miree, *supra* note 9.

B. Flexibility for Change

As we discuss long-term vision with our donor, we must think progressively and carefully craft flexibility into the agreement to account for the potential evolution of the gift over time. Allowing in the agreement for non-judicial changes to the purpose(s) and use of the gift will provide more long-term effect for your donor's philanthropy. However, achieving such flexibility is a daunting task.

Start by thinking through what the donor sees as his or her impact in 5, 10, 20, 30, and 50 years – what does “success” mean to the donor? Rather than only thinking of a single way to achieve the donor's goals, our discussion should expand that thinking, to multiple ways those objectives can be achieved. This may call for some broadening of the initial purpose or intent statement. If the original purpose is fulfilled, or no longer appropriate or possible to fulfill, the agreement should specify alternate purposes or secondary beneficiaries for the gift. The donor may provide in the document that the entity itself will have discretion to make changes when the initial purpose is achieved, is no longer appropriate or possible, or a variation of these potential scenarios. As to the determination of when this discretion point is triggered, the donor may allow the entity to make that determination, or name a group of individuals (in a broad sense, not naming specific people for longevity reasons) to find the change is necessary or those conditions have been met.

If the original donee entity fails to honor the gift terms, or if it ceases to exist, the agreement should specify one or more successor organizations to receive the funds. In lieu of naming a successor organization, the donor may desire to name a group of trusted individuals (again, thinking long-term) to make that decision.

Finally, the donor may want to appoint a group of individuals responsible for making changes to the gift purposes, specifying what types of changes can be made without court approval, and how those changes are to take place. This would allow changes to be based on the facts present in the future, at the time when circumstances are different than the donor could have anticipated, making the fund multi-generational and more effective long after the donor is there to provide guidance to the charity. The more difficult part may be determining who those individuals should be, that will be around long after the donor and will have a good idea of the donor's long-term vision. Some ideas are: an institutional trust company; individuals based on the family line of the donor's parents (i.e. descendants of the donor's parents or even grandparents) stretching down the family tree, with one representative from each branch, or even naming the donor's family private foundation as the decision-maker.

Sample language:

If unforeseen circumstances should alter or change Donee's ability to direct the Gift funds in accordance with the Donor's intent, Donee will consult with the Donor to redirect remaining Gift proceeds to areas most consistent with the Donor's wishes. If Donee is unable to reach Donor, or if Donor is no longer able to make such direction, then Donee will consult with the then serving Board of Directors of Donor Family Foundation to provide for other use(s) for such Gift proceeds.

An example of language which leaves the flexibility to the donee, while maintaining the donor's general charitable purposes, is included at Appendix B, #14.

C. Termination

How long does your donor intend the gift to last? The gift agreement may provide for a sunset period (i.e. a term of years), or may provide for termination upon completion of its purpose or when the fund reaches a certain minimal amount. If the fund allows distribution of both income and principal, then there should be a defined point at which the fund is no longer economically efficient to continue administration, and should be terminated; however, since dollar values change over time, that minimal level should be expressed as either a percentage of initial funds, or a dollar amount with inflation as a factor. At such time, the document should specify where any remaining funds are to be distributed (the donor and the donor's family do not get the funds back).

V. DONOR ADVISED FUND

A Donor Advised Fund (“DAF”) is a helpful and popular alternative for the modern-day donor who does not want to run his or her own private foundation, but would like to establish a legacy gift, and would like to have (slightly) more “control” over the use of the gifted funds than allowed with an outright gift to a charitable donee.

A. Operations and Features

A DAF is created by an outright gift, by either an individual or another entity such as a private foundation, to the sponsoring charitable organization which has legal control over the fund.⁷⁹ The

⁷⁹ Treas. Reg. § 1.170A-9(e)(11)(ii); Levitt, D.A., “Impact Investing Through a Donor-Advised Fund”, 25 Taxation of Exempts, No. 5, 3 (March/April 2014).

sponsoring organization typically has a large network of internal management and investment advisors, which provide oversight to the collection of DAFs, yielding a significant level of service to the donor that he may not be able to achieve with his own private foundation. The sponsoring organization is usually a local community foundation or the charitable affiliate of a financial services provider.⁸⁰ The donor can name the DAF after their family or use a completely anonymous name. The assets contributed to the DAF (which can include a variety of asset types) will be invested by the sponsoring organization and grow tax-free over time.

The DAF agreement allows the donor (or someone appointed by the donor) to advise the charity on what distributions to make from the DAF; however, the sponsoring public charity is the legal owner of the funds and thus has the ultimate control over the distributions. It is crucial that the advisor's rights to the DAF are just that – advisory only – and that all ownership and control is transferred to the sponsoring organization. While this does require some level of trust on the part of the donor, this is in the basic nature of the DAF giving vehicle.

The gift becomes the property of the sponsoring organization which then has ultimate authority regarding all aspects of the gifted property: investment, management, and disposition. While the donor may *advise* the sponsoring charity as to what grants he or she would like to be made, the decision is no longer in his/her control and the asset management of the DAF are typically limited to the investment pools offered by the sponsoring organization. Further, note should be taken that some sponsoring organizations only allow the family to have advisory privileges for a certain amount of time (such as one or two generations) and then the DAF reverts to the sponsoring organization. The silver lining to this downfall of the DAF option is that the donor also does not have the responsibilities related to the management of the DAF like the administrative responsibilities of a foundation.

Some sponsoring organizations offer mission-related allocation with existing general investment pools, investment pools specifically dedicated to a mission related purpose, and other options provided as an opportunity to further donors' chosen social missions.⁸¹

The DAF vehicle is a great option for illiquid assets. For instance, an individual donor with illiquid assets can convert those assets into philanthropic capital through the use of a DAF. Additionally, a private foundation may create a DAF to receive the

types of assets it deems inappropriate to accept and manage itself, while still fulfilling its charitable purpose.

DAF investments are subject to income tax generated from unrelated business income ("UBIT"); however, mission-related investments would avoid UBIT if they qualify as "substantially related" to the charity's exempt purposes. To otherwise avoid UBIT, the DAF should invest in assets meeting a statutory exception, such as limited partnership interests owning only passive investments. While the sponsoring public charity would be responsible for reporting and paying any UBIT, the tax would likely be allocated to the individual DAF in which the investment is made.⁸²

A private foundation (which could include a charitable trust) may find a DAF useful in certain scenarios and can include the contribution as a qualifying distribution in the year of the contribution.⁸³ It may also be possible for a foundation's distribution to a DAF to reduce its excise tax on net investment income from 2% to 1%.⁸⁴ The assets distributed to the DAF can then be advised over time, and the foundation avoids the complex management and oversight of assets that it does not have the resources to handle itself. It is suggested, however, that the private foundation should avoid just passing grants through a DAF or indefinitely parking assets in the DAF. Rather, the foundation should approach the DAF with a consistent plan of contributing funds and recommending distributions to a variety of grantees.⁸⁵

Since many donors see family involvement as an important priority in giving, a DAF presents better potential for an advisor to build a bridge to the next generation, as opposed to an outright immediate charitable gift, in which the family may not have a continuing ability to remain involved. Even when compared to a charitable pledge spanning multiple years, the DAF provides a better opportunity for longevity of family involvement.

However, DAF donors and donor advisors must be mindful of things DAFs cannot do, such as making gifts for individuals (including scholarships where the DAF advisors select recipients), certain Supporting Organizations, and international grant-making.

B. Grant Recipients

The grants which can be made from the DAF are restricted: donors cannot recommend that charitable

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Choi, William, "Donor-Advised Funds: Practical Problems with Equally Practical Solutions", CV018 ALI-CLE 385, 402.

⁸⁵ *Id.*

⁸⁰ See Levitt, *supra* note 79.

⁸¹ *Id.*

grants be made to individuals, or pay tuition to private schools or colleges. Additionally, donors cannot receive any goods or services in exchange for their grant, like a ticket to a gala.⁸⁶

Distributions from a DAF can be made to: (i) certain 50% charities (public charities and private operating foundations), other than disqualified supporting organizations, (ii) the sponsoring organization of the DAF and (iii) another DAF. Thus, a sponsoring organization can make distributions from a DAF to most public charities and to other types of grantees (other than individuals) so long as it is for a charitable purpose and the organization exercises expenditure responsibility over the grants.

A “disqualified supporting organization” is a Type III supporting organization which is not functionally integrated, and a Type I or Type II supporting organization if the donor (or donor’s appointee) and any related parties directly or indirectly control a supported organization of the supporting organization.⁸⁷ Reliance criteria has been provided to private foundations and sponsoring organizations that sponsor DAFs in determining whether a potential grantee is a proper supporting organization, in Revenue Procedure 2011-33, 2011-25 IRB.⁸⁸

C. Gift of “Unusual” Assets

DAFs can be a great approach for a donor in the year of a windfall, such as the receipt of a large inheritance or liquidation of a business, in order to reduce income tax burdens.⁸⁹ If a donor were to liquidate securities and donate the proceeds to his or her DAF, the amount would be reduced by capital gains, whereas if the donor donated the securities directly to the DAF, the donor could avoid capital gains and allow the charity to sell the securities (if the charity deems sale prudent).⁹⁰

DAFs can also be useful for making contributions of illiquid and interesting asset classes, while the management of bizarre assets by a foundation is more burdensome. Examples have included a Boeing 747, \$800,000 worth of trees or a Mexican beach house, all of which have been steered into DAFs, so that the wealthy individuals could keep their liquid securities,

but still make charitable gifts in strategic ways of assets they do not normally consider a key part of their overall wealth for everyday living expenses.⁹¹ These methods provide a way for some individuals to make a larger gift than they could have made if solely relying on more liquid assets. Note, that when contributed to a DAF, asset types other than cash, cash equivalents or publicly traded securities are typically liquidated immediately by the sponsoring organization.⁹²

Finally, because of the difference in tax treatments, if a donor has or desires to create a charitable remainder trust, the remainder charity should be a public charity, and thus his/her DAF would be a proper recipient of that remainder.

D. Creation

To establish a DAF, the donor enters into an agreement that gives the donor (and/or others) the right to suggest from time to time to the organization the proposed recipients of distributions from the fund and the timing and amount of these distributions – such person(s) are identified as the “donor advisors”.

To ensure that the fund is treated as a component fund of the particular public charity maintaining it, the agreement must provide that the charity is not required to follow donor’s advice and that the charity will have ultimate control over distributions from the fund. In practice, the charity is likely to follow most, if not all, of donor’s suggestions. However, an IRS ruling suggests that, in order for such a fund to qualify as an advise-and-consult fund which is not a private foundation, the charity maintaining the fund may be required, from time to time, to make distributions to organizations other than those suggested by the donor.⁹³

E. Tax Treatment by Donors of Contributions

An individual donor can take an immediate charitable contribution deduction in the year the gift to the DAF is made, because the donated property becomes the asset of the sponsoring organization upon donation. Because DAFs are typically maintained by public charities, donors receive more favorable tax treatment for their contributions than making the same gift to a private foundation: a gift of property such as real estate or closely held business interests is entitled

⁸⁶ E.R. Heisman, 41 Estate Planning, No. 7, 27 (July 2014). Conversely, private foundations can support international organizations, establish scholarship programs, grant directly to individuals in need (with oversight) and run their own charitable activities.

<https://www.foundationsource.com/resources/library/private-foundation-vs-donor-advised-fund-comparison-chart/>.

⁸⁷ I.R.C. § 4966.

⁸⁸ 34 Am. Jur. 2d Federal Taxation ¶ 18967.

⁸⁹ Heisman, 41 Estate Planning, No. 7, 27.

⁹⁰ *Id.*

⁹¹ Dagher, Veronica, “Keep the Stock, Donate the Beans,” THE WALL STREET JOURNAL, Nov. 28, 2011, available at

<http://online.wsj.com/news/articles/SB10001424052970204394804577007992610748490>.

⁹²

<https://www.foundationsource.com/resources/library/private-foundation-vs-donor-advised-fund-comparison-chart/>.

⁹³ *Id.*

to a deduction for fair market value when contributed to a public charity, including a DAF, but limited to basis when making the same contribution to a private foundation. In addition, the limits on a taxpayer's deductions which can be taken each year are greater than with a gift made to a private foundation (50% of AGI for cash and 30% for appreciated property, as opposed to 30% and 20%, respectively).⁹⁴

F. Federal Tax Sanctions Applicable to DAFs

The Pension Protection Act of 2006 ("PPA") extended certain excise tax provisions to DAFs including the private foundation excess business holdings rules and a more stringent form of the excess benefit transaction prohibition on public charities. DAFs do not have a minimum payout requirement, although that may soon change with the Treasury having been put to the task of further studying the issue. The PPA mandated the Treasury Department specifically consider whether the existing deduction rules for contributions to DAFs are appropriate, whether DAFs should be subject to distribution requirements and whether a donor's advisory role in the investment or distribution of donated funds is consistent with a completed gift.⁹⁵ A copy of this study was submitted to Congress on December 5, 2011. Co-investments involving a DAF and donor or donor advisor may raise concerns of improperly benefitting the donor or donor advisor and incurring some of these taxes.⁹⁶ However, tax guidance in this area is very limited, as there are no Treasury regulations interpreting the Code provisions imposing these restrictions, making the tax concerns of a sponsoring organization more complex with unclear results.⁹⁷

G. Prudent Investment/Application of UPMIFA

Certain federal tax rules apply to sponsoring organizations which affect their investment decisions; however, uncertainty lies in the intersection of some of these principles and the prudent investment standards. An outstanding question is whether an investment must be considered prudent in terms of the overall assets of the sponsoring organization or in terms of each

individual DAF.⁹⁸ To the extent a sponsoring organization segregates a DAF and makes investments separately from each DAF, rather than pooling funds, a state attorney general could very well take the position that each individual DAF is an "institutional fund" subject to UPMIFA. This position could make it more difficult to meet the goal of a diversified portfolio, as each investment would make up a larger portion of the DAF's overall portfolio assets. A state attorney general could also look into the issue of whether the managers of the sponsoring organization have violated fiduciary duties by not properly diversifying the individual DAF. Until more guidance is provided, the safer course of action is to attempt to achieve diversification at both the DAF and sponsoring organization levels.

Further, because donor intent can override the statutory investment standards, a sponsoring organization may desire a written record of the donor's approval of specific investments, or types of investments, that the donor wishes to be a part of his or her DAF. It may be well advised that the organization obtain a letter from the donor at the time of the initial contribution authorizing the investments the sponsoring organization otherwise would not want to make under the standards of prudent investment. However, it is debatable as to whether the sponsoring organization should go as far as to allow the donor to approve, and recommend, an investment outside of the organization's investment policy - this could be viewed as an imprudent management of the organization's assets. For example, the Council on Foundations suggests that allowing the approval of an investment as well as an investment strategy outside of the organization's standard investment policy could be seen as excessive donor control over the DAF.⁹⁹

Private foundations have the ability to rely on the exception from the jeopardizing investment rules for program-related investments ("PRIs"); however, there is no parallel definition of a PRI for a public charity, including DAF sponsoring organizations (and the 4944 jeopardizing investment restrictions have not been extended to apply to DAFs).¹⁰⁰ PRIs are those investments made primarily to accomplish the organization's exempt purposes, rather than to produce income. To qualify as a PRI, the following must be met: (i) the primary purpose of the investment is to further at least one exempt purpose of the foundation, (ii) the production of income or appreciation of property may not be a significant purpose of the

⁹⁴ See Heisman, 41 Estate Planning, No. 7, 27; Levitt, 25 Taxation of Exempts, No. 5; Choi, CV018 ALI-CLE 385.

⁹⁵ 38.06 Community Foundation, WG&L Estate Planning Treatises, Estate Planning and Wealth Preservation: Strategies and Solutions – Henkel, note 62.2a.

⁹⁶ Levitt, D.A., "Impact Investing Through a Donor-Advised Fund", 25 Taxation of Exempts, No. 5, 3 (March/April 2014).

⁹⁷ To see more regarding the tax attributes of DAFs, see my Article from last year's Course, titled *Tomayto, Tomahto – There Really Is a Difference: Comparing Private Foundations and Donor Advised Funds*.

⁹⁸ Levitt, D.A., "Impact Investing Through a Donor-Advised Fund", 25 Taxation of Exempts, No. 5, 3 (March/April 2014).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

investment, and (iii) no electioneering (and only very limited lobbying) purposes may be served by the investment. If an investment is considered an allowable PRI for a foundation, it seems reasonable that the same or similar investments would be permissible for other organizations less heavily regulated than private foundations.¹⁰¹

The uncertainty lies in whether the IRS will distinguish PRIs from other investments of a DAF. If an investment by a DAF would be a PRI to a private foundation, should that investment provide the tax advantages to the DAF as it would to a private foundation? For example, PRIs are exempt from a foundation's excess business holding restrictions, which have now been applied to DAFs. Additionally, there is the question of whether a DAF investment could be exempt from the state law prudent investor standards, if it would be considered a PRI to a private foundation.¹⁰²

If a donor is specifically concerned about these uncertainties regarding the proper investments of a DAF, the donor could create a field of interest fund or designated fund at a sponsoring organization, which are not included within the Code definition of a DAF, and thus would not be subject to these rules.¹⁰³ A field of interest fund involves multiple donors, who pool their funds to support a particular charitable field or program area, such as education or medical research.¹⁰⁴ Unlike the advice for a DAF, the designation of a field of interest can be legally binding on the charity sponsoring the fund, subject only to an ability to change the field of interest in a limited capacity (and depending on the charity's variance power).¹⁰⁵ A designated fund is one that makes distributions to one or more specified charities: it allows a donor to provide long-term funding to a charity when the donor has concerns regarding the charity's own ability to manage the funds. Again, the charity generally cannot make distributions to other charities unless it becomes impossible or impractical to follow the donor's designation (and any successor charity must be substantially similar).¹⁰⁶

VI. DAF DRAFTING CONSIDERATIONS AND FORMS

A. Donor Advised Fund Agreement Key Elements

The form of a DAF Agreement is largely driven by the community foundation or sponsoring

organization public charity (which I will generally refer to as the community foundation) and is typically only a few pages in length. However, some community foundations offer great flexibility and customization in the drafting of the agreement, to tailor it to your donor. A basic DAF Agreement sample is attached at Appendix D. You will see several similarities in what was discussed with the elements of a gift agreement in the preceding sections.

1. Advisory Privileges Only

Arguably the most important element in a DAF agreement is that the gift be made irrevocably to the community foundation, with all ultimate decisions regarding disposition of the gift in the discretion of the community foundation. Once the donor makes the gift, he cannot pull it back, attach strings, or dictate exactly where the funds must go once placed into the DAF. An example of language to memorialize this understanding is show below:

It is understood that the Donors, (hereafter referred to as [Donor Advisors]) shall have the right from time to time to submit to the Board of Directors of the Community Foundation the names of grantees (beneficiaries) to which the Donor Advisors recommend distributions. However, it is expressly understood that the recommendations from the Donor Advisors as to beneficiaries shall be solely advisory and the Board of Directors of the Community Foundation may accept or reject these recommendations applying reasonable standards and guidelines with regard thereto. Each charitable beneficiary must qualify for tax exemption under the provisions of the IRS.

The donor advisor(s) appointed in the agreement will have the ability to *recommend* distributions to the community foundation, although the charity itself will have ultimate say over what distributions are made from the DAF.

2. Intentions and Preferences

Notwithstanding the above, the donor can suggest broad interest groups or charitable purposes which he prefers and which he would like to guide the recommendations of future advisors and the community foundation in making distributions from the DAF. For instance, your donor may wish to have a certain portion of the fund be used for the benefit of local charities, which would be a permissible provision to include in the DAF agreement. (For example, 1/3 of

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*; Choi, CV018 ALI-CLE 385.

¹⁰⁵ Choi, CV018 ALI-CLE 385.

¹⁰⁶ *Id.*

the fund while it is a DAF is to be used for local charities of the donor's hometown.)

Memorializing the original DAF donor's charitable intentions and preferences is certainly not a required element of a DAF Agreement, as the donor advisors will continue having the ability to advise and recommend grants over time, but certain donors will desire to make their intention known to guide future generations.

Sample language:

The Original Donor's charitable intentions and preferences are as follows:

At least 50% of the Fund's annual grants shall be awarded to support Christian organizations bringing mercy and justice to the poor and the needy and/or advancing the Christian faith; and/or the ABC Fund of the YWCA or directly to its intended beneficiary the Child Development Program of the Center for Transforming Lives.

The Fund's remaining annual grants, if any, shall be awarded to support activities that are being carried out by persons of goodwill where family members of the Original Donor are currently actively engaged or that respond to a need, or reflect a civic duty.

There is no geographic limitation on the grants awarded from the Fund.

Subject to the termination of the Fund, there are no minimum or maximum requirements for the amounts to be granted annually or for the size of the individual grants.

3. Successor Donor Advisors

An important feature the donor will want to include in the agreement is provision for successor donor advisors. This is particularly true when the donor wishes for the DAF to serve as a philanthropic tool for multiple generations, carrying a family legacy down his/her lineal line. Example language is attached at Appendix F which can be used to ensure that the advisory privileges are maintained within the family for as long as possible.

Further, in the event the succession of donor advisors comes to an end, or if the successor donor advisors become disinterested in further involvement with the DAF, the agreement should include a provision addressing that situation and allowing the community foundation to direct distributions from the fund:

If no grant recommendations are received from the successor donor advisors in three years or more, the Foundation will award grants from the Fund. It shall be the intent of the Foundation to continue to keep faith with the intents, desires and purposes expressed by the Donors, as evidenced by the Donors' prior recommendations.

4. Sunset

If there are no more family members living, able and willing to serve in the capacity of donor advisor, the agreement can specify what happens to the fund, and if/when the donor would like the fund to sunset. An option would be providing for the conversion of the DAF to a field of interest fund ("FOI") at the same community foundation to be used for those causes specified in the agreement and/or consistent with the recommendations made over the life span of the DAF. Example language of such conversion can be found at Appendix G, as well as sunset language.

5. Anonymity

Finally, the agreement should address whether the donor wishes to remain anonymous or if the community foundation is permitted to give recognition to the donor when distributions from the fund are made.

B. Potential Family Involvement

One of the most challenging issues can be foreseeing how involved the donor's family will be in the DAF in the future. Following the initial donor's passing, the family may become lackadaisical in the management of the DAF advisory privileges they have. Dealing with this potential issue on a prospective basis is near impossible; however, a notice provision may be helpful, to force the next generation(s) of advisors to address the DAF annually, and make a decision on advising the fund.

In order to keep the successor advisors informed and to encourage a conscious decision being made on an annual basis, depending on the community foundation's openness to the idea, the agreement can require that the community foundation give the then-serving donor advisors a certain period of notice of their right to recommend beneficiaries. The donor may want to include provisions that prohibit distributions being made if the advisors fail to make recommendations within a set time frame of having received such notice of their advisory privileges, such as 30 or 60 days. Even with such provisions, the agreement must clearly state that the community foundation has the ultimate power to accept or reject any recommendations which are made by the advisor(s). It may be prudent to also include language

regarding the type of notice that would be sufficient, to give the community foundation more concrete standards to follow as to when and how notice should occur. Sample language is provided at Appendix E. If the advisors, after having received such notice, decide to pass on the opportunity to advise the fund, the donor may convert the DAF into a FOI fund for those years. If something such as 3-5 years go by with no advice being given, the agreement can provide that the DAF is converting into a FOI fund permanently (see Appendix G).

C. Donor Control From the Grave

No, that's not a typo – even though the donor cannot really control the disposition of a DAF, we all know that giving up control is hard to do. If you do have a donor who is struggling to release control, there is a certain level of *direction* that can be drafted into the DAF agreement, to give the donor peace of mind that the sponsoring organization has sufficient motivation to continue its standards of reliability, service and investment that gives the donor comfort about placing his trust in the charity. In the event that in the future, the community foundation fails to carry out the terms of the agreement or ceases to comply with stated principals of investment, management, etc., the DAF could be “gifted over” to another sponsoring organization. While this type of provision is not suggested for every DAF agreement, it is possible to craft with the following provisos: (a) there should be guidelines and clear standards the community foundation must meet, with a reasonable way for it to remedy any shortcomings (this may include specific investment success models); (b) upon the failure of the stated conditions, the then-serving donor advisor(s) can “trigger” the gift-over language, although they cannot choose where the funds are distributed; and (c) the recipient must be chosen by the donor in the agreement, fixed at the time the agreement is executed, or by the community foundation, not by a donor advisor. Sample terms can be found at Appendix H.

VII. CONCLUSION

Drafting a gift agreement dictates that we to shepherd our clients through the various planning nuances, to effectuate their philanthropic vision at the highest level. We must keep in mind that change is inevitable, and planning is essential for the long-term effectiveness of gifts. Truly understanding the donor's intent and reducing that to writing can be complex but is the main goal of drafting gift agreements. We must work with both our donor and the donee, to set benchmarks, considering the evolution of the gift and charity's needs, and build in flexibility to design a gift that can outlive the donor's vision. Making sure the terms of the gift agreement are clear, comprehensive

and interpretable without further donor explanation is a lofty goal. Thus, keeping the charity involved in the planning process is vital to achieve the optimum gift agreement.

The DAF agreement differs slightly, in that it is not focused on a single charity or single purpose, but really allows for more fluidity in charitable intention, potentially over a longer time period. This philanthropic tool provides families with an opportunity to involve future generations in the advisory role.

With either type of agreement, our goal as advisors is to achieve our donor's overall charitable vision with maximum long-term impact – in our world, good gifts are the product of thorough planning and creative drafting.

APPENDIX A - SAMPLE DONOR RECOGNITION LANGUAGE

Donor wishes to remain anonymous, but allows publication of the amount and details related to gift:

Donor wishes to remain anonymous in any recognition Donee makes to the Gift, unless Donor gives Donee specific permission otherwise. Donee may recognize the Gift and provide details of the impact of the Gift in the Donee Blog, social media and other sources, including the weekly Donee electronic newsletter to churches and individuals. The goal of this publication is to not only recognize the Donor's generosity, but to also encourage additional gifts to the disaster recovery efforts. Donee would also like to recognize the Gift in *Donee magazine* in articles covering Donee's response to Hurricane. Unless otherwise consented to in writing by Donor, Donee may recognize the Gift in these ways, but may not name Donor specifically.

No disclosure without Donor consent or request:

In accordance with established policies and procedures of the Foundation, appropriate recognition as determined by the Board of Trustees of the Foundation, will be afforded the Donor as per the Donor's request.

If granted permission by the Donor, the Foundation shall have the right to disclose the name of the Donor in its general publications and press releases.

Disclosure allowed:

Recognition may be given to the Donor for initiatives supported by this endowed fund consistent with University policy, including, but not limited to, appropriate acknowledgement in university publications for events; credit in journals or other printed materials; a bookplate, label, placard, or other such appropriate instrument for rare items procured; and/or appropriate signage for facilities. Should, in the future, subsequent renovation or changes to facilities that may have been funded through this endowed fund become necessary, Donor will continue to receive recognition for prior contributions in a format appropriate to the then current design.

APPENDIX B - SAMPLE GIFT AGREEMENT

Agreement for Endowment Gift

This Agreement, dated this _____ day of _____ 2017, between the ABC Foundation (Donor) and the University of Pleasantville, a Florida non-profit corporation (University), is as follows:

WHEREAS, the Donor desires to create two endowed scholarships at the University of Pleasantville Jones School of Medicine (Jones School of Medicine), and

WHEREAS, the Jones School of Medicine is relying on the proceeds of the gift to provide scholarships to medical students as set forth herein and in accordance with the wishes of the Donor,

THEREFORE, the parties hereto agree as follows:

1. The Recitals to this Agreement are true and correct and are incorporated herein.
2. The parties represent to each other that they have the power and authority to enter into this Agreement and that the individuals signing below have the authority to bind their respective parties.
3. The Donor, upon execution of this Agreement, but no later than May 30, 2017, will deliver to the University a gift of \$1 million. The gift will become part of the permanent endowment funds of the University.
4. Pledge payments should be made payable to the *University of Pleasantville* and sent to the Division of University Advancement, P.O. Box XXXXX.
5. The Donor and the University of Pleasantville agree that the gift will be used to create the ***Dr. Donor 1 Endowed Medical Scholarship Fund*** and the ***Donor 2 Endowed Medical Scholarship Fund***, to be referred to henceforth in this Agreement as the Funds.
6. The gift will be divided equally between the two Funds.
7. Any individual, corporation, foundation, trust, estate or other legal entity may make additions to the Funds, and such additions shall be subject to the provisions of this agreement.
8. The Funds may be invested, commingled, or merged with and become part of the general endowment funds and investment assets of the University of Pleasantville. Guidelines established by the University of Pleasantville Board of Trustees from time to time determine the investment, allocation of return on investment, and distribution of endowment funds and the allocation of income, loss, fees and expenses associated with endowment funds and securing and administering endowment funds. The Funds and all accounting of the Funds will be subject to these guidelines.
9. The Donor requires the University to use the name so selected by the Donor for all purposes related to the Jones School of Medicine and the University of Pleasantville. Notwithstanding the foregoing, the University shall recognize the ABC Foundation as the donor of the Funds.
10. The amount distributed for spending from the ***Dr. Donor Endowed Medical Scholarship Fund***, as defined by the University of Pleasantville Growth Pool Endowment Spending Policy, as amended from time to time, shall be used only to provide merit-based scholarship assistance to students at the University of Pleasantville Jones School of Medicine. The amount distributed for spending from the ***Donor 2 Endowed Medical Scholarship Fund***, shall be used only to provide need-based scholarship assistance to students at the University of Pleasantville Jones School of Medicine.

The Office of Financial Assistance at the Jones School of Medicine shall award the scholarships. The funds will be used to supplement and augment the current scholarship program.

11. Until the Funds are fully funded by the donor in accordance with this agreement, and until the minimum holding period as defined by Endowment Spending Policy is met, no amount will be distributed for spending from this gift.
12. If the Funds are not fully funded within the time frame stipulated in this agreement, the endowment will be categorized in a different endowment class in accordance with the required minimum funding levels for endowments.

13. Once distributions for spending from these Funds commence, the Donor shall receive an annual report from the University stating the history and the purpose of the Funds, the market value thereof, the amount distributed from the Funds during the preceding fiscal year, income and gifts to the Funds during the previous fiscal year, if any, and information on current scholarship recipients to the extent allowed by law.

Notification should be sent to the following individuals:

Name: Dr. Dan
President
ABC Research Foundation

Address:

Changes in the above should be sent to:

Name: Office of the Senior Vice President for University Advancement and External
Affairs

Address: University of Pleasantville
P.O. Box XXXX

14. If, in the opinion of the President or the Executive Committee of the Board of Trustees of the University of Pleasantville, all or part of the Fund cannot, in the future, be applied usefully to the above purposes, it may be used for any related purpose which, in the opinion of the President, the Executive Committee of the Board of Trustees, or the Dean of the Jones School of Medicine, will most nearly accomplish the wishes of the Donor as expressed herein.
15. Except as expressly provided herein to the contrary, this agreement contains the complete expression of the agreement between the parties and there are no promises, representations or inducements except such as are herein provided. This agreement may not be modified or terminated orally, and no modification, termination or attempted waiver shall be valid unless executed in writing and signed by the party against whom the same is sought to be enforced.

IN WITNESS WHEREOF, the parties have executed this agreement this _____ day of _____, 2017.

Donor:

By: _____
M.D.
President
ABC Research Foundation

University of Pleasantville:

By: _____
M.D.
Senior Vice President for Medical Affairs and Dean,
University of Pleasantville Jones School of Medicine
Chief Executive Officer, University of Pleasantville Health System

APPENDIX C - SAMPLE GIFT AGREEMENT

GIFT AGREEMENT

This gift agreement (the “Agreement”) is made between Elle Woods (“Donor”) and The Delta Foundation (the “Foundation” or “Donee”), a Texas nonprofit corporation, in connection with the Gift (as defined below) by the Donor to the Foundation, to clarify the intent of the Donor with respect to the use of the Gift by the Foundation, and the mutual duties and expectations of the parties. In consideration of the mutual covenants contained herein, the parties agree as follows:

WHEREAS, Donor is a compounding pharmacist who has spent her career seeking to serve patients and advance the understanding of the pharmaceutical sciences;

WHEREAS, Donor desires to make a significant impact on the role of compounded pharmaceuticals in providing for personalized medicine for patients by funding scientific research to provide clinical evidence to assist providers in making clinical decisions to improve patient care (the “Goal”);

WHEREAS, Donor is providing initial funding of the Foundation to seek to achieve the Goal;

WHEREAS, Donor and Foundation desire to be separate and independent, dealing on an arm’s-length basis as donor and donee allowing Foundation to conduct its research in an independent manner free of any undue influence so as to provide the most objectively reliable research results;

WHEREAS, Donor has a desire to remain informed of Foundation’s efforts in achieving the Goal, and Foundation, subject to this Agreement, desires to provide such information;

NOW, THEREFORE, the parties hereto agree as follows:

1. Recitals. The recitals to this Agreement are true and correct and are incorporated herein.
2. Property to be Gifted. Donor agrees, subject to the terms and conditions of this Agreement, to make a gift of cash (the “Gift”) to the Foundation of \$600,000.00, payable in six equal monthly installments of \$100,000.00, with each monthly installment delivered to the Foundation on or before the tenth business day of each month beginning in July 2015.
3. Creation of Fund. The Foundation shall establish a fund on its books which shall be known as the Bruiser Fund (the “Fund”). The Foundation shall include the Gift referenced above in paragraph 2 as property of the Fund, along with such additional amounts, if any, as may from time to time be transferred from Donor to the Foundation under the terms of this Agreement. The Fund shall be the property of the Foundation and shall not be deemed a trust fund. Subject to the restrictions of paragraph 4 below, the Foundation shall have the ultimate authority and control over all property in the Fund and the income derived therefrom. The Foundation may commingle the Fund with other funds of the Foundation for investment purposes.
4. Designation of Purposes. The Fund shall be applied toward funding initial setup costs and the initial scientific research concerning compounded pharmaceuticals in accordance with the budget proposal attached hereto as Appendix A. Absent an amendment to this Agreement, use of the Fund for purposes other than the proposed budget attached as Appendix A shall constitute a material breach by the Foundation.
5. Books and Records. In recognition of Donor’s desire to monitor progress toward the Goal and use of the Fund, the Foundation will maintain appropriate records regarding the use of the Fund, including receipts and expenditures. Understanding that the Foundation’s directors and officers owe fiduciary and statutory duties to the Foundation to make decisions they believe to be in the best interest of the Foundation and desiring not to interfere in such decision making process, Donor agrees that Donor’s access to the books and records of the Foundation with respect to the Fund shall be limited in accordance with this paragraph and paragraphs 11 and 12 below. Within five (5) business days of the close of each month during such time as

there are assets remaining in the Fund, the Foundation will provide Donor with a written report with respect to the projects financed by the Fund during the previous month, including a summary of funds expended. If Donor desires a telephonic or face-to-face meeting regarding use of the Fund, Donor may request same on a monthly basis. Any communications from Donor pursuant to this paragraph 5 shall be directed to the Foundation's President or Treasurer. Within sixty (60) days of the end of each calendar year in which there are assets remaining in the Fund, the Foundation shall furnish Donor a narrative report detailing the accomplishments of the Foundation for the previous year attributable to financing from the Fund.

6. Right to Terminate Payments. Any material breach of the conditions set forth herein will permit Donor to terminate any and all further distributions to the Foundation whether or not such distributions have been previously promised or pledged. Prior to any such termination, Donor will give the Foundation notice and seven (7) business days to cure such breach.

7. Tax Status. The Foundation represents that it is a Texas nonprofit corporation and is applying for recognition of exemption as a qualified charitable organization for which Donor is or will be entitled to a charitable contribution tax deduction under the Internal Revenue Code. The Foundation agrees that for so long as there are assets in the Fund, it will operate as an organization recognized as exempt from taxation under Section 501(c)(3) and Section 509(a) of the Internal Revenue Code. The Foundation agrees to notify Donor within one (1) business day of receipt of determination of its tax status from the Internal Revenue Service. Receipt of an adverse determination shall entitle Donor to terminate further distributions pursuant to paragraph 6 hereof.

8. Public Disclosure. If granted permission by Donor, the Foundation shall have the right to disclose the name of Donor in its general publications and press releases.

9. Notices. Any notices required or permitted to be given under this Agreement must be in writing and shall be given by hand delivery, by facsimile transmission, by email transmission, or by mail, postage prepaid, addressed to the party at the addresses shown opposite its signature to this Agreement. Any notice required or permitted to be given by mail shall be deemed to be delivered at the time when the same shall be thus deposited in the United States mail. Any notice required or permitted to be given by facsimile transmission or email shall be deemed to be delivered upon successful transmission of such facsimile transmission or email. The addresses of the parties for purposes of notice may be changed by a party only by giving written notice of such change to the other party in accordance with this paragraph.

10. No Assignment. Neither this Agreement nor any interest therein shall be assigned by either party without the prior written consent of the non-assigning party.

11. Relationship of the Parties. Nothing in this Agreement or otherwise shall give either party an ownership or equity interest in any of the assets, either tangible or intangible, of the other party hereto. It is specifically understood and agreed to by the parties hereto that each party is separate and independent of the other, and neither party hereto shall take any action to change or vary such relationship. Specifically, nothing in this Agreement shall be construed to define the parties as agents, partners, joint venturers, co-owners, or otherwise as participants in a joint or common undertaking or venture. Rather, the relationship is one of donor and donee. Neither party shall have the right nor seek to control or direct the daily operations or other aspects of the business of the other party. Specifically, Donor agrees that Donor's access to information will be as set forth in paragraph 5 above and that Donor will have no right to approve any financial transactions in advance, no rights to access the Foundation's check register, and that Donor shall not actively solicit contracts from physicians to participate in the Foundation's research programs.

12. Compliance with Laws. The parties expressly acknowledge an intent that this Agreement and their actions hereunder comply fully with all applicable federal, state, and local laws, rules, and regulations. It is neither a purpose nor a requirement of this Agreement that the Gift or any part of the Fund be used to offer or receive any remuneration or benefit of any nature for the referral of or to solicit, require, induce, or encourage the referral of any patient, item, or business for which payment may be made or sought in whole or in part by Medicare, Medicaid, or any other state reimbursement program or other payer. Notwithstanding

any unanticipated effect of any of the provisions herein, neither party will intentionally conduct itself under the terms of this Agreement in a manner to constitute a violation of the Medicare and Medicaid Anti-Fraud and Abuse law or similar laws under the statutes of the State of Texas.

13. Entire Agreement; No Modification. This Agreement constitutes the entire agreement of the parties with regard to the matters referred to herein and supersedes all prior oral and written agreements, if any, of the parties in respect hereto. There are no side agreements or understandings between the parties with respect to the Gift or the purposes to be funded by such Gift. This Agreement may not be modified or amended except by written agreement executed by both parties hereto. The captions inserted in this Agreement are for convenience only and in no way define, limit, or otherwise describe the scope or intent of this Agreement or any provision hereof, or in any way affect the interpretation of this Agreement.

14. No Further Commitment for Funding. This Gift is made with the understanding that Donor has no obligation to provide other or additional support for the Foundation nor does this Gift represent any commitment to or expectation for future support from Donor to the Foundation. Notwithstanding the foregoing, upon appropriate amendment to this Agreement, Donor may choose to make further commitments to the Foundation.

15. Governing Law. This Agreement shall be governed by the laws of the State of Texas without regard to the conflict of laws provisions thereof, regardless of the place of execution or performance.

DONOR:

FOUNDATION:

Address: _____

Bruiser Woods, President

Address: _____

APPENDIX D – BASIC DAF AGREEMENT

An Agreement Establishing the
xx Charitable Fund in the
xx Community Foundation

This irrevocable agreement (Agreement) is made between xx (Donors) and the xx Community Foundation (the Community Foundation), a non-profit 501(c)(3) corporation organized in the State of Texas, to establish the xx Charitable Fund.

A donor advised fund known as the xx Charitable Fund shall be established as a component fund of the Community Foundation upon mutual acceptance of the following terms and conditions:

1. The Fund is to be a charitable fund. Principal and income generated by the fund may be used for charitable purposes.

2. The Fund shall include any property delivered by this agreement, any other property which later may be transferred to the Foundation by the Donors, or from any other sources, and accepted by the Foundation for inclusion in the Fund, and all undistributed income and gains from such property.

3. It is understood that the Donors, (hereafter referred to as [Donor Advisors]) shall have the right from time to time to submit to the Board of Directors of the Community Foundation the names of grantees (beneficiaries) to which the Donor Advisors recommend distributions. However, it is expressly understood that the recommendations from the Donor Advisors as to beneficiaries shall be solely advisory and the Board of Directors of the Community Foundation may accept or reject these recommendations applying reasonable standards and guidelines with regard thereto. Each charitable beneficiary must qualify for tax exemption under the provisions of the IRS.

4. The Board of Directors of the Community Foundation shall retain the right to investigate the purposes for which all grantee distributions are made and monitor their use, as is consistent with their fiduciary responsibilities both to the Donor Advisors and the community.

5. The privileges of the Donor Advisors will be continuous until their deaths. At the death of both Donor Advisors, the Fund shall continue as the xx Fund with children xx serving as successor donor advisors.

If no grant recommendations are received from the successor donor advisors in three years or more, the Foundation will award grants from the Fund. It shall be the intent of the Foundation to continue to keep faith with the intents, desires and purposes expressed by the Donors, as evidenced by the Donors' prior recommendations.

6. The Board of Directors of the Community Foundation shall have all powers necessary to manage the fund in keeping with the policies and procedures of the Community Foundation and shall have the right to collect fair and reasonable fees for service.

7. A report of all distributions from donor advised funds shall be included in the Annual Report of the Community Foundation and shall be used to educate the public with regard to the scope of the charitable services of the Community Foundation.

8. With the Donor Advisors' permission, distributions from this fund shall be made in a manner which gives recognition to the Donor Advisors.

9. The Fund may be commingled with other funds being administered, thus enabling the funds to be invested most effectively.

Kindly indicate below your acceptance of the foregoing terms and conditions.

[Insert Signature/Date Lines; Insert Schedule A of Property Gifted]
[Insert Investment Options Recommendation]

APPENDIX E - SAMPLE NOTICE PROVISIONS FOR DAF

It is understood that the Donor, (hereafter referred to as [Donor Advisor]) shall have the right from time to time to submit to the Board of Directors of the Community Foundation the names of grantees (beneficiaries) to which the Donor Advisor recommends distributions. Provided, however, the Community Foundation shall give annual notice to the Donor Advisor (or Successor Co-Donor Advisors, as applicable) of his/her right to recommend beneficiaries. If the Donor Advisor (or Successor Co-Donor Advisors) does not make a recommendation to the Community Foundation within thirty (30) days of receiving such notice, then the Community Foundation shall not make distributions from the Fund for that year.

Notwithstanding the foregoing, it is expressly understood that the recommendations from the Donor Advisor (or Successor Co-Donor Advisors, as applicable) as to beneficiaries shall be solely advisory and the Board of Directors of the Community Foundation may accept or reject these recommendations applying reasonable standards and guidelines with regard thereto. Each charitable beneficiary must qualify for tax exemption under the provisions of the IRS.

APPENDIX F - SAMPLE SUCCESSOR DONOR ADVISOR LANGUAGE

The privileges of the Donor Advisor will be continuous until his death. At the death of the Donor Advisor, the Fund shall continue as the _____ Charitable Fund with daughters, **A** and **B** serving as Successor Co-Donor Advisors. Each of **A** and **B** shall have the power to appoint a lineal descendant of hers who is at least age eighteen (18) as Successor Co-Donor Advisor to succeed her as a Successor Co-Donor Advisor.

If either of **A** or **B** should die, resign, or cease to serve in her capacity as Successor Co-Donor Advisor, then the successor she has appointed shall become the Successor Co-Donor Advisor, to serve with the survivor or other of **A** and **B**. Provided, however, if such daughter has failed to name a Successor Co-Donor Advisor, then the oldest living lineal descendant of the deceased daughter who is at least age 18 shall become a Successor Co-Donor Advisor, or if none, the remaining daughter shall serve as the sole Successor Donor Advisor until the oldest living lineal descendant of the deceased daughter has attained age 18, at which time, such descendant of the deceased daughter shall become a Successor Co-Donor Advisor. Such Successor Co-Donor Advisor shall have the power to appoint his or her own Successor Co-Donor Advisor in the same manner as each of **A** and **B** may appoint their own successors, as provided above, such that there is always a Successor Co-Donor Advisor who is a lineal descendant, at least age eighteen (18), of each of **A** and **B**. Provided, if the last living lineal descendant of one of the daughters should die or resign as a Successor Co-Donor Advisor, and no successor is named or willing to serve, the remaining Successor Co-Donor Advisor may serve as sole Successor Donor Advisor.

**APPENDIX G –
SAMPLE LANGUAGE FOR CONVERSION TO FOI FUND AND TERMINATION OF DAF**

Conversion to FOI Fund:

At the death of the last Successor Co-Donor Advisor serving, or if he or she should resign as advisor, the Fund shall become a Field of Interest Fund (“FOI Fund”), maintaining the original name of the Fund, the Field of Interest being reflective of prior grant recommendations and charitable vision of the Donor Advisor (or Successor Co-Donor Advisors, as applicable) and those causes as specified pursuant to Schedule B attached hereto.

Further, if no grant recommendations are received from the Donor Advisor (or Successor Co-Donor Advisors, as applicable) in five (5) consecutive calendar years, the Fund will terminate as a donor-advised fund, and shall become an FOI Fund, maintaining the original name of the Fund. The Community Foundation will award grants from the FOI Fund, reflecting the prior grant recommendations and charitable vision of the donor advisors over the history of the Fund and those causes as specified pursuant to Schedule B attached hereto. It shall be the intent of the Community Foundation to continue to keep faith with the intents, desires and purposes expressed by the Donor Advisor (or Successor Co-Donor Advisors), as evidenced by the their prior grant recommendations and charitable vision, as well as the allocations provided in Schedule B.

Upon the Fund converting to an FOI Fund, such FOI Fund shall be fully and completely distributed within five (5) years within the terms contained herein, such that the FOI Fund terminates no later than five (5) years following the conversion of the Fund to an FOI Fund.

Sunset:

At the death of the Advisor or at the end of 10 years from the death of the Original Donor, whichever occurs first, the Fund shall be closed and its remaining assets, if any, shall be transferred to the [Family Donor Advised] Fund, whether such fund is at the Foundation or another community foundation.

APPENDIX H – SAMPLE LANGUAGE FOR GIFT-OVER OF DAF

The Advisor will be invited from time to time to submit recommendations of distributions to be made from the Fund and to consult with the Community Foundation about the use of the Fund for charitable purposes consistent with the governing instruments of the Community Foundation. It is understood that the Board of Directors of the Community Foundation has final authority over all funds, investments, and grant distributions, and the Community Foundation may not be bound by the advice offered by the Advisor. However, the Community Foundation desires to keep faith with the charitable intentions and preferences of the Original Donor, consistent with the Community Foundation's governing instruments.

As a safeguard, for the benefit and protection of future charitable grantees, against the possibility of the Community Foundation's failing to prudently carry out its responsibilities under this agreement or failing to carry out the charitable spirit of this agreement, and as evidence of the Community Foundation's desire to honor the Charitable Intentions and Preferences [*here, a defined term, referencing the schedule of the Original Donor's charitable preferences*], the Community Foundation commits that, in the event the F Community oundation has not met or can no longer meet the Fund's needs for oversight and continuity, after having a reasonable opportunity to correct any deficiencies, the Community Foundation will transfer the Fund's assets and records to the National Christian Foundation, if it is then in existence and is an organization described in sections 170(b)(1)(a), 170(c), 2055(a) and 2522(a) of the Internal Revenue Code ("**Qualified Charity**"), or if the Advisor (or Successor Advisor) objects to the National Christian Foundation then to another community foundation provided that it has National Standards for U.S. Community Foundations accreditation and has for at least the preceding 60 months qualified as a Qualified Charity, as selected by the Community Foundation upon the recommendation of the Advisor (or Successor Advisor) ("**Receiving Organization**"), without other requirement imposed on the Donor, Advisor (or Successor Advisor) or Receiving Organization except for acknowledgement that such new fund will contain the provisions regarding the Original Donor's charitable intentions and preferences as included herein, a receipt of funds from the or Receiving Organization and reasonable release from the or Receiving Organization and Advisor (or Successor Advisor). For purposes of this determination, failure to meet the Fund's needs for oversight and continuity may be evidenced by one or more of the following:

- 1) The Community Foundation's organizational documents or governance or policies and procedures are changed such that the Community Foundation's ability to carry out the Original Donor's intent are limited (the Community Foundation is required to give the Advisor (or Successor Advisor) 90 days' advance notice of an organizational, governance or policy change);
- 2) The Community Foundation ceases to exist or to qualify for exemption under Section 501(c)(3) of the Internal Revenue Code;
- 3) The results of the investments of the Fund's assets, if invested through the Community Foundation's investment managers, are substantially below those of other community foundations or do not otherwise reflect good oversight or the Community Foundation repeatedly fails to give appropriate consideration to the investment recommendations of the Advisor (or Successor Advisor), to the extent that a retrospective analysis of all such recommendations demonstrates that failure to accept the recommendations has had a substantial negative impact on investment returns and that such recommendations would not be considered unreasonable or imprudent by industry standards.
- 4) The Community Foundation engages in any immoral or financially irresponsible conduct that might tend to bring the Donor or Advisor (or Successor Advisor) into public disrepute, contempt, scandal, or which might otherwise tend to reflect unfavorably upon the Donor or Advisor (or Successor Advisor); or,

- 5) The Foundation fails to comply with the terms of this Donor Advised/Restricted Fund Agreement.

In the event of a disagreement between the Community Foundation and Advisor (or Successor Advisor) as to whether one of the above-stated provisions has been triggered, the dispute will be decided by a proceeding in a district court in Tarrant County, Texas or by binding arbitration, as determined in the sole discretion of the Advisor (or Successor Advisor). In the event the dispute is submitted to arbitration, the arbitration shall proceed before a single agreed-upon arbitrator or, in the event no agreement can be reached with a single arbitrator, before a panel of three arbitrators with each party selecting one arbitrator and the two arbitrators selecting the third arbitrator. Any such arbitration proceeding will take place in Fort Worth, Texas. Additionally, in any disagreement the dispute of which is decided by a proceeding in a district court or arbitration and the Community Foundation is unsuccessful in such proceedings, the Fund shall not be charged with any of the Community Foundation's expenses relating to the litigation or arbitration.

Additionally, it is understood that, in the event the [Donor Family] Fund is moved from the Community Foundation to a different community foundation, this Fund, if the Advisor so desires, shall be also moved to the same community foundation as the [Donor Family] Fund.