

# *Giving with Strings Attached*

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*All Gifts are Not Created  
Equal  
a/k/a  
Know What You're Getting*





# *Genesis of the Restriction*

- Express (such as in a gift instrument)
  - This gift is for the express purpose of medical research into cures for the Ebola virus.
- Response to solicitation
  - All funds raised will be used for humanitarian aid in Liberia.
- Arising from governing documents
  - This Corporation is organized and shall be operated for the charitable purpose of animal rescue.

# What is the Effect of a Restriction?

- Analogized to the creation of a charitable trust [does not impose duties of trustees on directors]
- Binding on charitable recipient
- Fiduciary duty imposed on directors
- Debate concerning restrictions arising from governing documents





# Fiduciary Duties of Directors and Trustees

Duty of Care

Duty of Loyalty

Duty of Obedience

# *The Elusive Nature of the Duty of Obedience*

- Pursue the goals of the organization
- Fidelity to corporate purposes
- Abide by restrictions imposed by donors
- Ensure charitable assets are not diverted to non-charitable uses





# *What if We Can't Follow the Restriction?*

- General Rule: Restrictions are binding
- Traditional method of modification: cy pres/equitable deviation
- Statutory enactments of cy pres concepts
  - Texas Property Code Section 112.054
  - UPMIFA Section 163.007





# UPMIFA

- Uniform law governing management, investment, and expenditure of funds held by charitable organizations within its scope.
- Intended to modernize the rules for expenditures from endowment funds and update provisions governing the release **and modification of restrictions** on charitable funds qualifying as institutional funds.
- Institutional Fund: A fund held by an institution exclusively for charitable purposes. The term does not include program-related assets.
  - An asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment

# *UPMIFA – Release/Modification of Restrictions on Management, Investment or Purpose*

Nonjudicial:

- Release/modification of a restriction on management, investment or purpose may be done with donor consent in writing (but purpose cannot be changed to a purpose other than a charitable purpose of the institution)



# *UPMIFA – Judicial Release/Modification of Restrictions on Management, Investment or Purpose*

## **Management/Investment**

- Restriction:
  - Has become impracticable or wasteful
  - Impairs the management or investment of the fund
  - If modified will further the purposes of the fund (because of circumstances not anticipated by donor)

## **Purpose**

- Restriction:
  - Has become unlawful, impracticable, impossible to achieve, or wasteful
  - Modification must be in a manner consistent with the charitable purposes of the gift instrument

# UPMIFA – Release/Modification on Small Funds

- If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after receipt of notice by the attorney general, may release or modify the restriction, in whole or part, if:
  - (1) the institutional fund subject to the restriction has a total value of less than \$25,000;
  - (2) more than 20 years have elapsed since the fund was established; and
  - (3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.



# Modification – 112.054

- Applies to charitable trusts
- Applies to restricted program-related assets (excluded from UPMIFA)
- Purpose has become:
  - Illegal
  - Impossible
  - b/c of circumstances not anticipated by donor/settlor, modification will further the purposes [impracticable]
- Modification of administrative terms necessary to prevent waste

*Is modification necessary  
where charitable charter is  
amended to change defined  
purposes?*





# *As opposed to modification, can we return the donation?*

- Generally, no – assets owned by a charity must be used for charitable purposes
- Exceptions:
  - Right of reverter
  - Lack of general charitable intent and restricted purpose fails
  - Conditional gift and condition fails
- May create tax issues for donor



*What if we choose to ignore the  
restriction?*

*Standing to enforce a breach*

- **Texas Attorney General**
- Nonprofit Corporation/Association:
  - Organization (directors, officers and/or members may have standing to bring derivative claim)
- Charitable Trust
  - Co-Trustees; named beneficiaries
- Donors in limited circumstances



# *Bases for Donor Standing*

- Conditional gift with right of reverter or gift over
- Retained special interest separate and distinct from interest of general public



# General Rule of Deductibility

- A taxpayer may deduct the fair market value of his or her gift of property to a charitable organization limited to certain percentages of his or her contribution base, depending upon the status of the donee and nature of the contributed property.





# *What is the result of a gift of a partial interest?*

- General Rule: No deduction allowed for a transfer of property interest which is less than the donor's entire interest in the property
- Exceptions if made in a qualified form:
  - Charitable Gift Annuities
  - Gift of Remainder Interest in Personal Residence/Family Farm
  - Charitable Remainder Trusts/Charitable Lead Trusts

# *What is the result of an incomplete gift?*

- **General Rule:** No deduction allowed for an incomplete gift.
- **Solution:** Utilize a donor advised fund, private foundation, or gift over provision





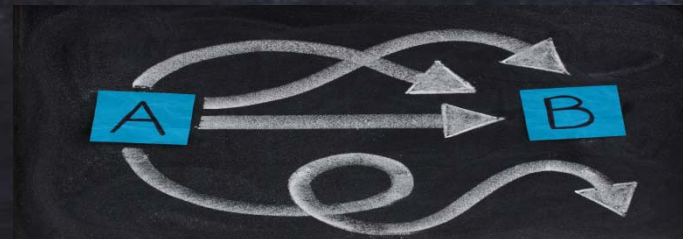
# How do conditions affect deductibility?

- No deduction allowed unless failure of condition and subsequent return of donation is “so remote as to be negligible”



# What is the effect of earmarking?

- A donation earmarked so as to use a charity as a conduit to make a gift to an individual or non-exempt organization is **not** deductible to the donor and can create private benefit problems for the donee
  - a) Does the donor intend to benefit the charity or the individual/non-exempt org?
  - b) Does the charity have full discretion and control over the use of the gifted property?





# *Charity Selection/Designation*

- The Smith Family recently suffered a house fire losing all of their possessions. The Chambers decide to give them \$1000 for a hotel.
  - Is this deductible?
  - What if the Chambers approach their church and ask if they can write a check to the church and have the church give the money to the Smiths?
  - What if the church has a benevolence fund and advises members it will make a gift to the Smiths for short-term needs and the Smiths give \$1000?

# *Deputized Fundraising*

- Mitch recently made the decision to go to work for YoungLife, a public charity. He tells you he must “raise his own salary” and requests a donation of \$50/month payable to the organization. He tells you it will be tax deductible. Is he right?



# *Fiscal Sponsorship*

- Orphans Hope is a nonprofit formed by a group of individuals concerned about the plight of children orphaned as a result of the spread of the Ebola virus. The group has not applied for 501(c)(3) status and may not depending on its resources. One of the board members approaches you seeking a donation and advises the donation should be payable to Hope for All, Inc., a public charity but designated for Orphans Hope.
  - Is it deductible?

# *Crowdfunding Issues*

- Tom and Emily Lancaster are adopting a child from the DRC. To assist with adoption expenses, they have decided to sign up for a crowdfunding website owned by a public charity that allows them a platform to solicit donations. Are gifts to the Lancasters through the website deductible?





Questions???

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