Ethics in Gift and Estate Planning

Quad Cities Confidential

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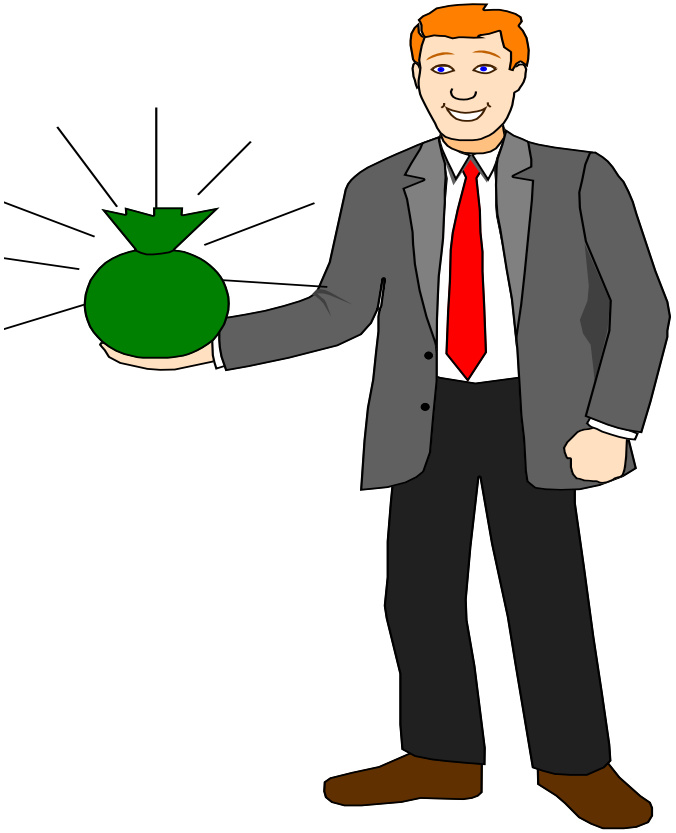
Opening the Ethical X- Files...



Off the Record...

- Overview of Ethics
- Application of Model Standards of Practice

<u>Two Qualifications:</u>

- Gift Planning requires teamwork of nonprofit and for profit planners.
- Ethical issues are sometimes easier to identify than to resolve.

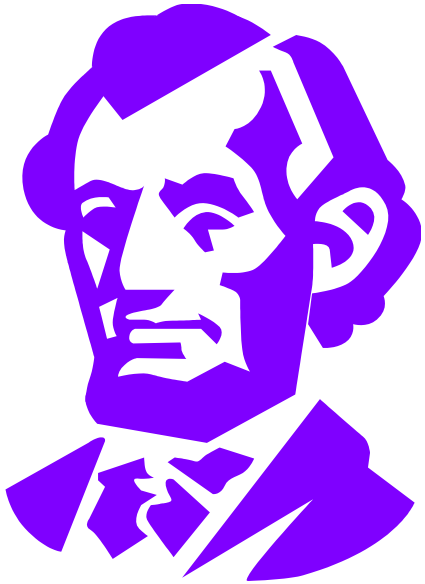
Definition of Ethics

"The rules or standards governing the conduct of the members of a profession."

- American Heritage Dictionary

Role of Ethics in Gift and Estate Planning

- Public Service
- Stewardship
- Value of a Good Reputation with Clients and Constituencies
- Recent Issues: Valuation of Non-Cash Gifts, Easements, Donor Advised Funds, Supporting Organizations



Ethical Frameworks

- **Take into account and reflect a concern for the interests and well-being of all stakeholders. (Golden Rule)**
- **Always reflect the precedence of ethical values and principles over non-ethical values. (Emmanuel Kant)**
- **Violate an ethical principle only when truly necessary to advance another ethical principle that will produce the greatest balance of good in the long run. (Utilitarianism)**

Josephson Institute: Decision-Making Model

Application of any of these approaches requires:

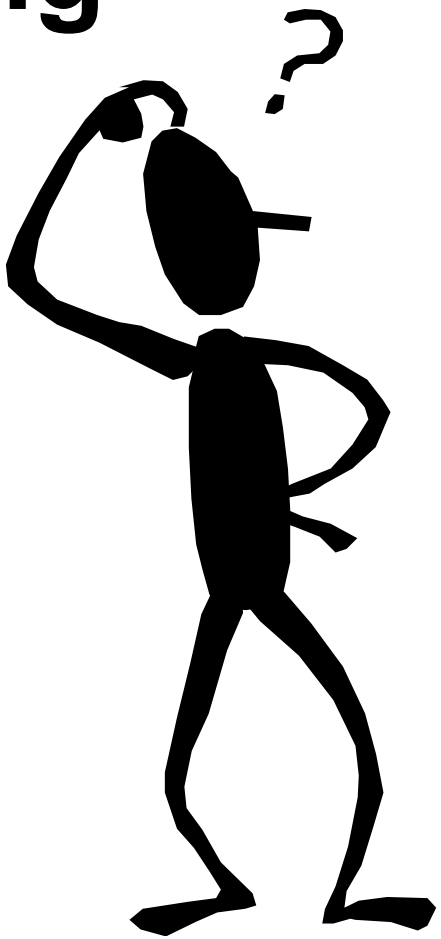
- **<u>A stakeholder analysis</u>: Who are the stakeholders? Donors, Charities, IRS, Taxpayers?**
- **<u>Clarity about your principles</u>: What are the principles that govern ethical decision-making?**

Three Stages of Concern

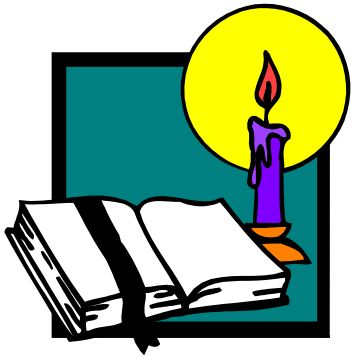
1. Clearly Illegal
2. Clearly Unethical
3. Ethical Dilemmas

Five Steps to Principled Reasoning

- Clarify
- Evaluate
- Decide
- Implement
- Monitor or
- Modify



Sources of Information



- Independent Sector
- Ethics Resource Center
- Josephson Institute of Ethics
- IU Lilly School of Philanthropy
- Greenleaf Center for Servant Leadership
- National Charity Information Bureau
- Council of Better Business Bureaus
- The John Templeton Foundation

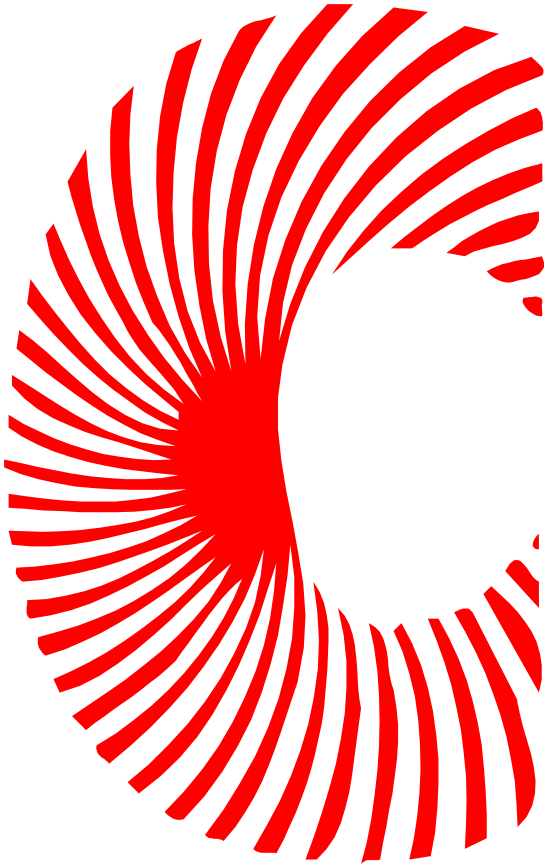
Conduct Codes: For-Profit

- American Bar Association
- American Institute of CPA's
- American Society Of Appraisers
- Appraisal Standards Board
- American Society Of CLU/ChFC
- Million Dollar Roundtable
- National Association of Insurance and Financial Advisors

Conduct Codes: Non-Profit

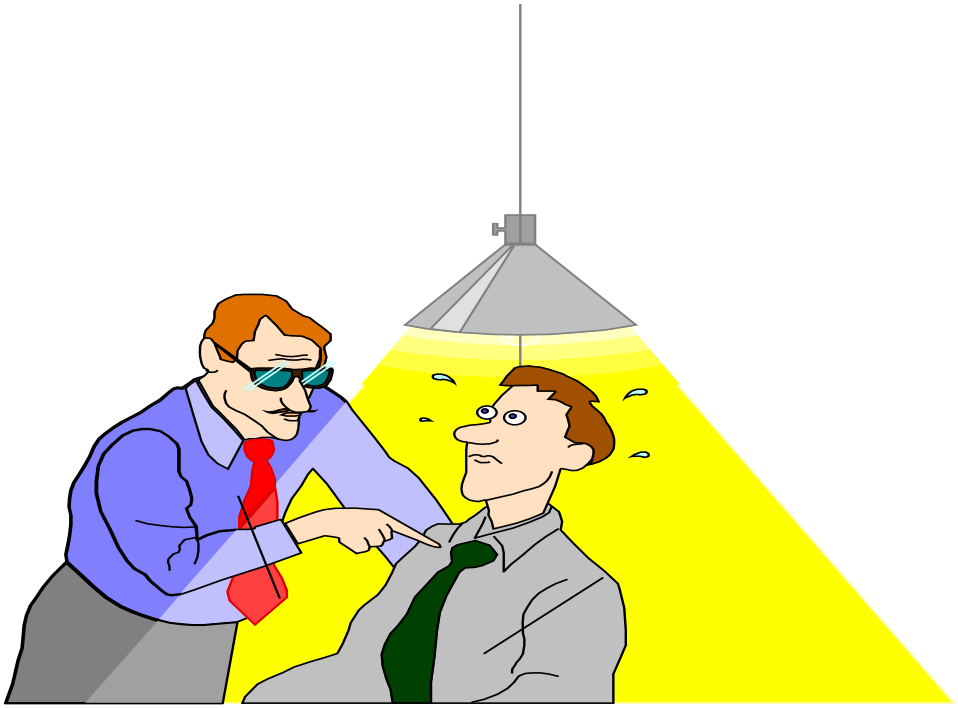
- Donor Bill of Rights
- Association of Fundraising Professionals
- Independent Sector
- Association of Healthcare Philanthropy
- Association of Professional Researchers for Advancement
- Council on Foundations

Central Themes of Codes



- Confidentiality
- Conflicts of Interest
- Competence
- Compliance
- Compensation

Confessions from the Ethical X-Files



Model Standards of Practice for the Charitable Gift Planner

National Association of Charitable Gift Planners
American Council on Gift Annuities
May 7, 1991, Revised April 1999
Available at https://charitablegiftplanners.org/

A. Primacy of Philanthropic Motivation

Do the Right Thing…

What is a Charitable Gift?

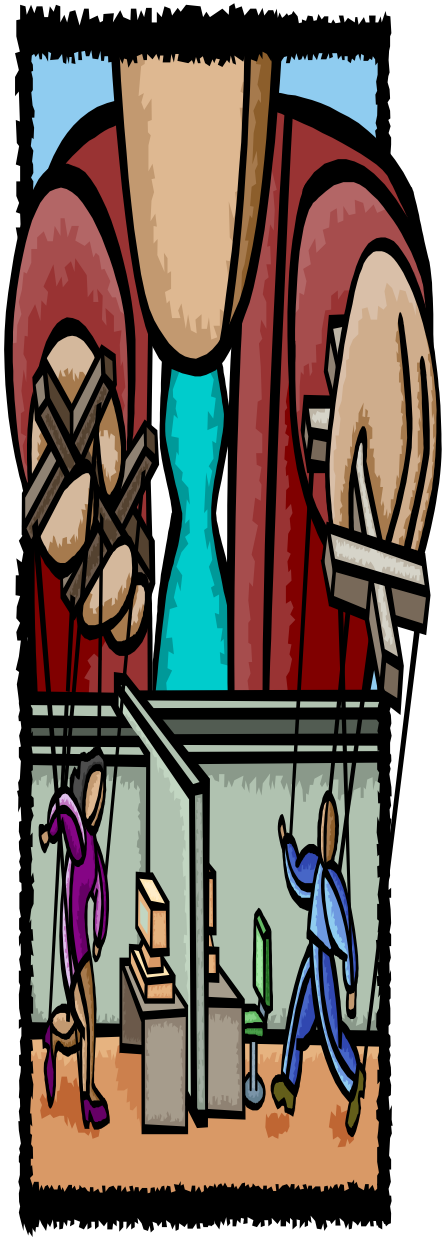
- **To qualify for tax benefits: income tax charitable deduction, capital gains tax savings.**
- **Definition of "gift": Intent plus objective test (i.e., actual transfer to qualified charitable organization).**
- **No return benefit or quid pro quo.**
- ***U.S. v. American Bar Endowment*, 477 U.S. 105 (1986).**

What is a Gift?

- **See IRS Publication 526, *Charitable Contributions***
- **No deduction for gift of time/services.**
- **No deduction for loan of property.**
- **No deduction for gifts of partial interest in property - with specific exceptions for qualified "split interest" gifts.**
- **Reduction rules for gifts of certain property (e.g., ordinary income property and tangible personal property with an unrelated use).**

No “Strings” Attached

- Deduction denied if donor asserts inappropriate control. Purpose restrictions are acceptable
- No deduction if gift is to be returned if restriction unfulfilled (right of reverter, right of first refusal). *Ferguson*, 21 B.T.A. 1032 (1930).
- Deduction denied if earmarked or conduit for a person. PLR 9405003.



Grants to Individuals

- Scholarships
- Disaster Relief
- Achievement Awards
- Best Practices:

1. Charitable class
2. Payment to intermediaries
3. Expenditure responsibility

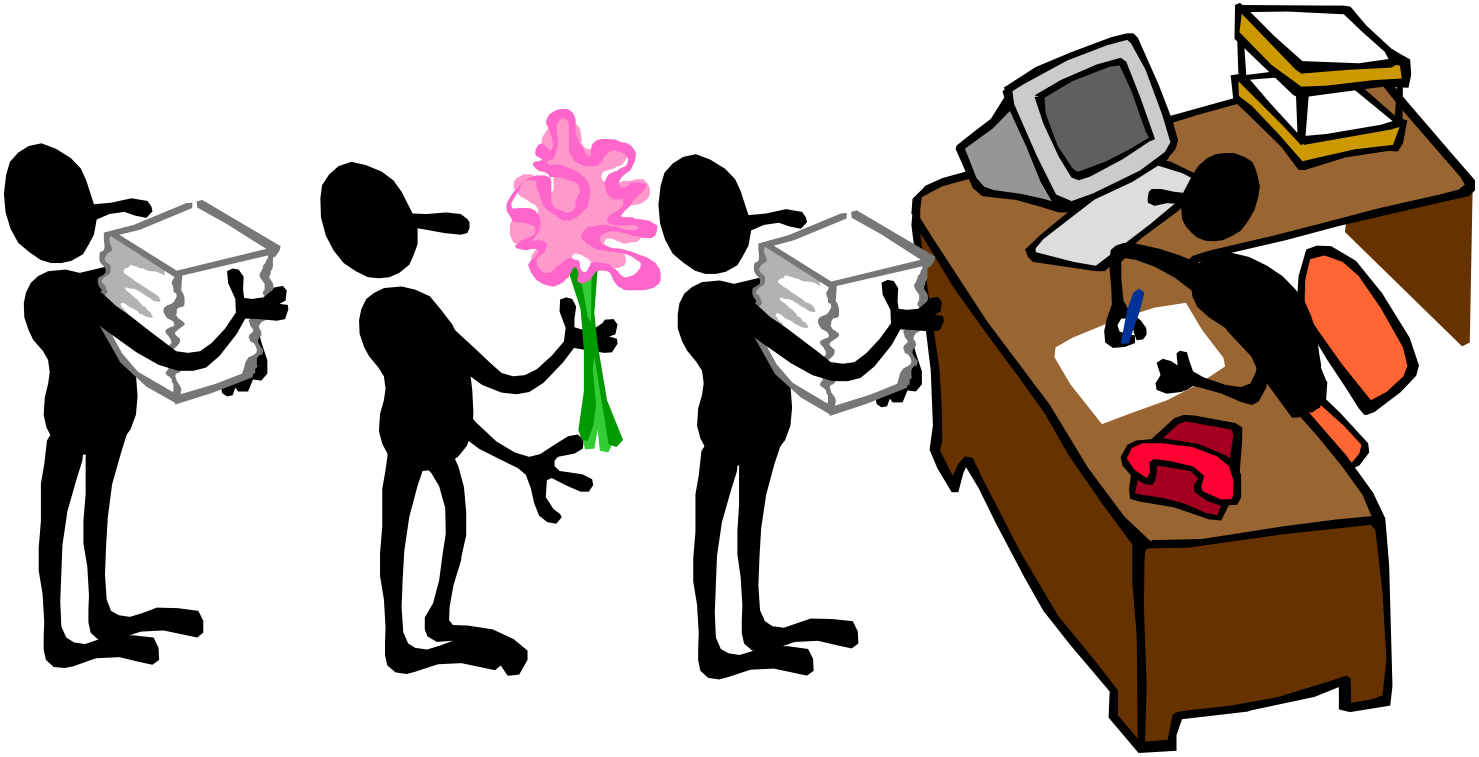
Charitable Class

- **Class of potential recipients sufficiently broad or indefinite to avoid pre-identification or selection.**
- **Award criteria is non-discriminatory.**
- **No personal benefit to donor and/or disqualified persons such as family.**

Expenditure Responsibility

1. Pre-Grant Application
2. Review and Assure Charitable Use
3. Grant Agreement (Promising Use, Reporting, etc.)
4. Segregation of Funds
5. Reporting (Intermediary and/or Final)
6. Report on IRS 990 or 990PF

I Love You, But I Don't Trust You: Dealing with Donor Restrictions



Donor Restrictions

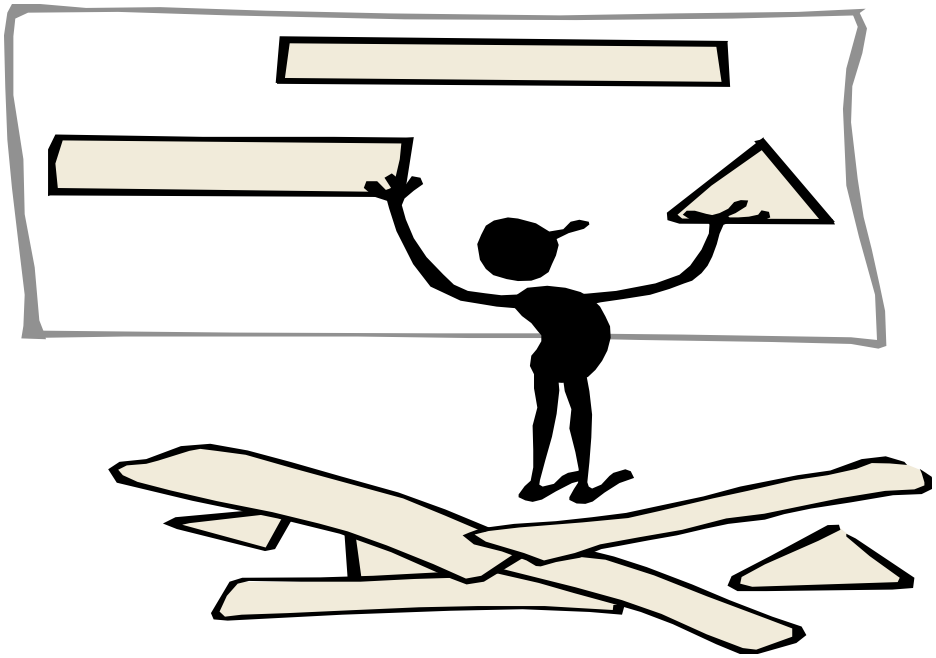
- **Trust Law: Restricted gift imposes legal duty of obedience on trustee to carry out terms**
- **Nonprofit Corporation Law: Restricted gift imposes duty to carry out terms but pursuant to various legal rationales such as contract law and substantial compliance**
- **American Law Institute Principles**

Protection of Donor Intent

- **Review restrictions prior to gift**
- **Document restrictions in agreement**
- **Helpful resources with legal citations offered by Philanthropy Roundtable at:**

  https://www.philanthropyroundtable.org

Modification of Restrictions



Trust Doctrines

- ***Cy pres*** **– when original general charitable intent becomes impossible, impractical, illegal, court may amend as close to original terms as possible.**
- ***Equitable deviation*** **– Original purpose is possible but some "mechanical" aspect must be amended by court to avoid frustration of fulfillment of purpose.**

UPMIFA

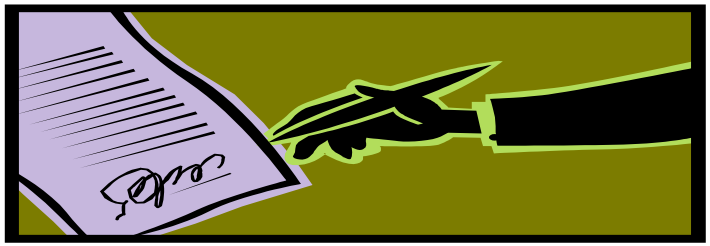
- **Uniform Prudent Management of Institutional Funds Act**
- **Iowa Code Section 540A.101, et. seq.**
- **Illinois 760 ILCS 51/1, et. seq.**

Uniform Prudent Management of Institutional Funds Act (UPMIFA)

(C) "Institutional fund" means a fund that is held by an institution exclusively for charitable purposes.

(D) "Endowment fund" means an institutional fund or any part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. "Endowment fund" does not include assets that an institution designates as an endowment fund for its own use.

Gift Instrument



"Gift instrument" means a record, including any institutional solicitations, under which property is granted or transferred to or held by an institution as an institutional fund.

"Record“ means information that is: (1) inscribed on a tangible medium; or (2) stored in an electronic or other medium; and is retrievable in a perceivable form.

UPMIFA Modification: Living Donor

Sec. 13. (a) <u>With the consent of the donor</u> in a record, an institution may modify or release, in whole or in part, a restriction in a gift instrument on the <u>management, investment, and purpose</u> of an institutional fund. A donor may give prior consent to an institution for release or modification of a restriction or a charitable purpose in a gift instrument that also includes a restriction or stated charitable purpose subject to this section.

Deceased or Disagreeing Donor: Equitable Deviation

(c) An institution may petition a court to modify, in a manner consistent with the donor's intentions to the extent practicable, a restriction in a gift instrument concerning the *management or investment* of an institutional fund if:

(1) the restriction is impracticable or wasteful;

(2) the restriction impairs the management or investment of the fund; or

Deceased or Disagreeing Donor: Equitable Deviation

(3) due to unanticipated circumstances, the modification will further the purposes of the institutional fund.

An institution shall notify the attorney general of a petition under this subsection. A court shall provide the attorney general an opportunity to be heard on the petition.

Deceased/Disagreeing Donor: Cy Pres

(d) An institution may petition a court to modify, in a manner consistent with the gift instrument, the <u>charitable purpose</u> of a fund or a restriction on the use of a fund if the charitable purpose or use becomes <u>unlawful, impracticable, impossible, or wasteful</u>. An institution shall notify the attorney general of a petition under this subsection. A court shall provide the attorney general an opportunity to be heard on the petition.

Smaller/Older Funds

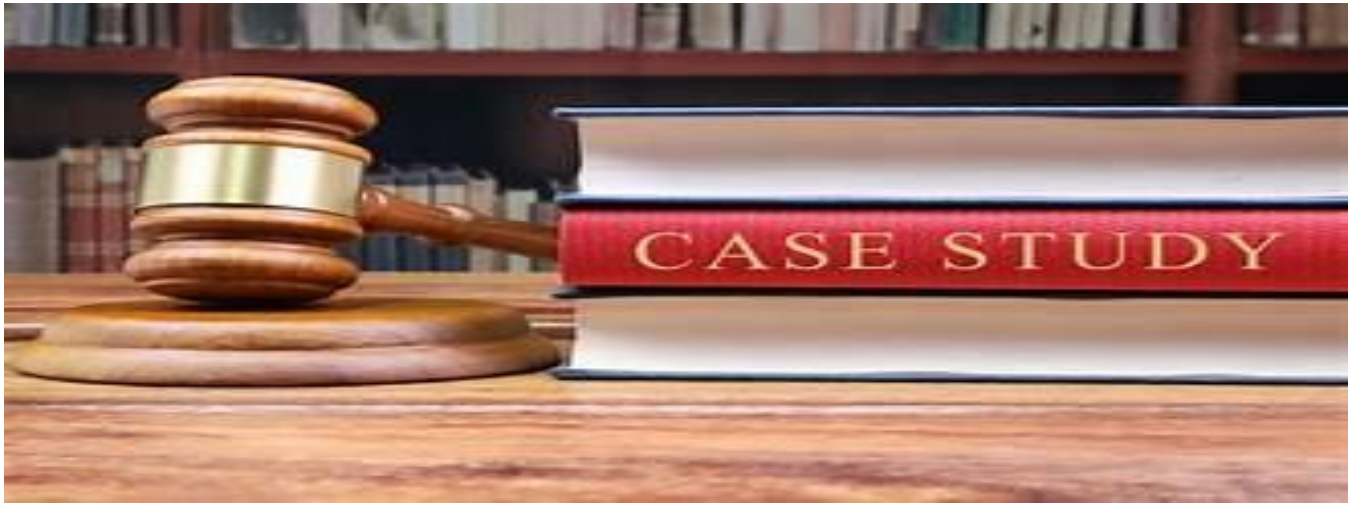
(4) Not less than sixty (60) days after sending the written notice required by subdivision (1), the institution may release or modify all or part of the restriction if:

(A) the value of the institutional fund subject to the restriction is less than $50,000 (Iowa and Illinois);

(B) the institutional fund was established more than ten (20) years earlier (Iowa and Illinois); and

(C) the institution uses the institutional fund in a manner consistent with the charitable purposes expressed in the gift instrument.

Case Studies



Case Study 1:
The Art of the Steal

- **Charitable Trust by Dr. Albert C. Barnes.**
- **Billion $ art collection.**
- **Financial and other problems: Move?**
- **Court rules: Move it!**
- **Doctrine of equitable deviation (change in means) used – not *cy pres* (change in purpose).**
- **Montgomery County, Pennsylvania Orphan's Court (2004).**

Case Study 2: Keeping O’Keefe

- **Georgia O'Keeffe donated to Fisk University 101 works by Renoir, Picasso, O'Keefe and more.**
- **Proposed sale of a 50% stake in collection to the Crystal Bridges Museum; Reside part-time in Nashville and part-time in Bentonville, Arkansas.**
- **Challenged by O’Keefe estate/Tennessee AG.**
- **Fisk gets $30 million plus funds to renovate its art museum. Rotate art every 2 years.**
- **Tennessee Court of Appeals approved using *cy pres* to approve agreement. *In Re Fisk University* (2011) 392 S.W.3d 582**

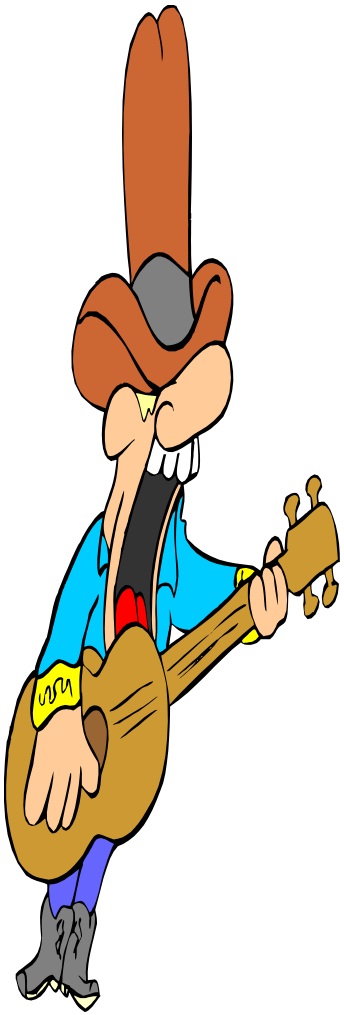
Case Study 3:
Be Careful What You Ask For

- **Trust for care of needy of Marin County, CA with SF Foundation as trustee**
- **Grew to $400 million – trustee petitioned court to expand to 5 counties**
- **Court ruled *cy pres* not met**
- **Court made equitable deviations designating specific charities**
- ***Superior Court of Marin County, No. 23259. Later appeal denied for standing.***

Case Study 4: *Going to the Dogs!*

- **Leona Helmsley estate: $12 million for "Trouble" plus $5-8 billion for a charitable trust.**
- **Mrs. Helmsley wrote a deathbed "mission statement" for trust suggesting use for care of dogs.**
- **New York court applied a broader charitable intent as stated in the trust document.**

Case Study 5:
Music Lesson for Out of Tune Charities?



- **Garth Brooks sues Integris Canadian Valley Regional Hospital for failure to name building as promised for $500,000 gift.**
- **Jury award of $1 million – return of gift plus $500,000 punitive damages.**
- **Importance of contemporaneous gift agreement.**

Case Study 6:
What's in a Name?

- **Vanderbilt: erase "Confederate" from name**
- **Court ruled that Vanderbilt must pay UDC present value of their 1932 donation of $50,000, approximately $700,000.**
- ***Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*, 174 S.W.3d 98 (Tenn. Ct. App., 2005)**

Case Study 7: *Role of Stewardship*

- **Michael Moritz gift to Ohio State University for endowment – law school naming.**
- **$30.3 million decreased over the years to $21.9 million, a 28% decline.**
- **Concerns about investment, administrative fees, and adequate spending.**
- **Attorney general chose not to intervene.**
- **Family had no standing. Proposed Ohio law to amend UPMIFA and expand standing was unsuccessful.**

Moritz – S.B. 135

- **Three proposed amendments to UPMIFA:**

1. **Replace 5% spending presumption of prudence with 7% presumption of imprudence.**
2. **Donor standing if AG does not find restitution.**
3. **Estate may be reopened for the purpose of appointing an administrator to file complaint authorized by this section if the applicant to reopen is a surviving spouse or one generation below.**

Case Study 8: Avery Fisher Hall

- Avery Fisher gave $10.5 million to Lincoln Center for construction
- Agreement: perpetual naming rights
- 2015: David Geffen pledged $100 million with condition to rename to “David Geffen Hall” in perpetuity.
- $15 million settlement/Fisher heirs.

Case Study 9:
David Koch Theater

- **Lincoln Center Theater – "David Koch Theater"**
- **Naming rights for $100 million will expire in 50 years.**

Naming Policies

- Signed gift agreement
- Copy of gift document
- Completion of financial commitment
- Recusal if may result in loss of public trust
- Recusal if building or fund ceases to exist

Case Study 10:
"Tainted Gifts"

- **Gift accepted from "gangsta" rapper Percy "Master P" Miller to New Orleans Diocese for school.**
- **Gifts by Charles Keating (junk bond king) and Haitian dictator Duvalier to Missionaries of Charity.**
- **Gift by Ken Lay (Enron CEO) to establish chair at University of Missouri. Refund refused to Ken Lay to pay bills.**

Case Study 111: *When to Say No*

- *U.S. v. Mosley*, Northern District of California (2003).
- "Gifts" to donor advised fund (DAF) held by National Heritage Foundation.
- Grants to pay tuition for education at private school of donor's child.
- 5 months in prison followed by 5 months home detention and 2 years supervised release after pleading guilty to 5 counts of tax evasion and 1 count of filing a false corporate return.

Requirements of a DAF IRC Sec. 4966

"(A) IN GENERAL.—Except as provided in subparagraph (B) or (C), the term 'donor advised fund' means a fund or account—

(i) which is separately identified by reference to contributions of a donor or donors,

(ii) which is owned and controlled by a sponsoring organization, and

(iii) with respect to which a donor (or any person appointed or designated by such donor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor.

No Personal Benefit from DAFs

- **DAF grants cannot leverage more than an incidental financial benefit for donor or advisor of the DAF.**
- **Example includes a fundraising dinner or round of golf at a fundraising event.**
- **IRC Sec. 4967.**

Two Exceptions to DAFs

- **Advised grants to single organization.**
- **Scholarship funds that are:**
  1. **Recommended by a committee appointed by the sponsoring organization.**
  2. **Donor or designees have no control.**
  3. **Grants awarded on objective and non-discriminatory basis.**

Pledges Paid from DAFs

- **Original position by IRS denied pledge fulfillment as a benefit for the donor/advisor.**
- **Pledge payments from DAFs now allowed per IRS Notice 2017-73.**
- **Some sponsoring organizations still refuse to do so,**

B. Explanation of Tax Implications

Crouching Tiger….

Hidden Dragon

Personal Confession...

Review and "proof":

1. **Software illustrations.**

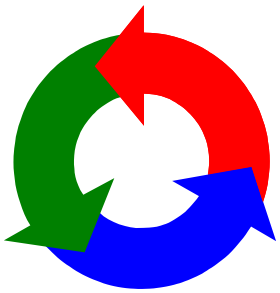
$$1+1=3$$

2. **Correspondence and explanation of tax benefits.**

Pre-Arranged Sale: Capital Gains Tax

- **Capital gains tax owed by donor of outright gift to charity or gift to CRT - per imputation or assignment of income doctrine – if charity or CRT is bound to sell to third party buyer via pre-arranged contract.**
- **"Bright line": Legally binding contract to sell imposed on charity.**
- **Buyer waiting in the wings is acceptable!**
- **See Palmer v. Commissioner, 62 T.C. 684 (1974); Rauenhorst v. Comm'r, 119 T.C. 9 (2002); Dickinson v. Comm'r. T.C. Memo. 2020-128**

Complex Gifts: FLIP CRT



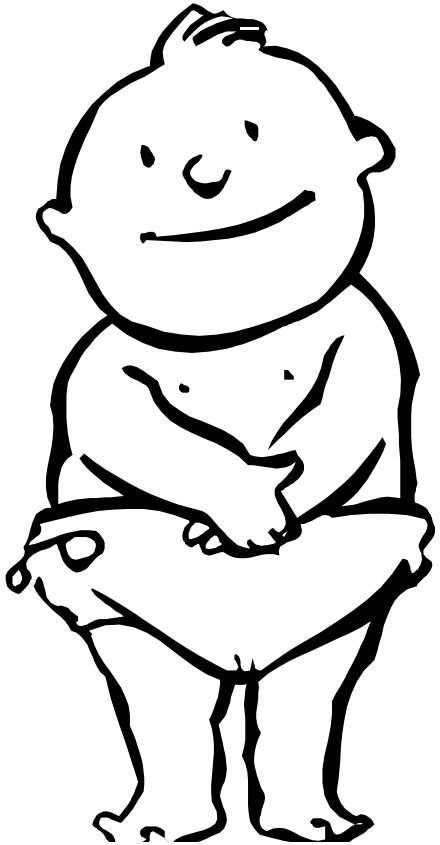
- **Triggered on a specific date or by an occurrence which is not discretionary or within the control of any person. Specific examples in regulations. Treas. Reg. § 1.664-3(a)(1)(i)(c).**
- **Donor alleged that he was not told that income would be delayed until real estate was sold, so sued charity and advisors! *Martin v. Ohio State University***

Self-Dealing Considerations

- **Charitable remainder trusts (CRTs) are subject to private foundation rules and excise taxes for self-dealing.**
- **CRT property cannot be used, sold, rented or exchanged to a disqualified person: donor or donor's family (spouse, ancestor or lineal descendant or spouse of lineal descendant). IRC § 4941(d)(1).**

C. Full Disclosure

Look who's talking…



IRS Publication 1771: Acknowledgement/Disclosure

Requirements for gift receipts:

1. **Name of charity recipient.**
2. **Date of gift.**
3. **Dollar value if cash gift.**
4. **Description if non-cash gift.**
5. **Value of goods or services received by donor if above *de minimis* token, OR**
6. **Statement: *No goods or services received in exchange for gift.***

Charity and Gift Receipts

- **Tax Court denied a $23,000 charitable income tax deduction, even though IRS conceded charitable gifts were made.**
- **Charity did not add phrase "you received no goods or services" on receipt.**
- **Law does not allow for corrections after the due date for income tax return or extensions.**
- **Durden v. Commissioner, T.C. Memo. 2012-140 (May 17, 2012).**

Valuation

- If the claimed charitable deduction exceeds $5,000, qualified independent appraisal is required of donor.
- Dated no earlier than 60 days before the contribution and no later than the date of the contribution.
- Exception for publicly traded stock.
- Donor should pay for appraisal.
- Copy of appraisal not filed unless art over $20,000 or any other gift over $500,000.
- See IRS Publication 561, Determining the Value of Donated Property

Disclosure of Non-Cash Gifts

- IRS Form 8283 (donor) – signed by donor, appraiser, and charity for gifts over $5,000
- IRS Form 8282 (charity) for gifts over $500 disposed or sold by charity withing three years of gift
- IRS audit “red flag” if charitable deduction value significantly exceeds sale value.

Valuation of Non-Cash Gifts

- U.S. Tax Court acknowledged property worth over $18 million (and not necessarily over-valued) was donated to a charitable remainder trust.
- ENTIRE charitable deduction disallowed - appraisal requirements not satisfied.
- No independent appraisal and not all information provided on 8283.
- Mohamed v. Commissioner, T.C. Memo. 2012-152 (May 29, 2012).

Fair Market Value

- Fair Market Value depends on date of gift.
- Date of gift depends on method of delivery. Delivery method can be:

1. Deed of gift for real estate
2. U.S. mail (postmark rule)
3. Hand delivery date (with or without deed) by donor or agent of donor (UPS/Fed Ex)
4. Depository Trust Company or other wiring system – date enters charity's account Gravenhurst.

Reduction Rules for Non-Cash Gifts

- **<u>Basic Rule</u>: Charitable deduction is reduced by the amount of gain which would not have been long term capital gain if the donated property had been sold by the donor instead. IRC Sec. 170(e)(1)(a)**
- **<u>Second Rule</u>: Even if the gain would be long term the deduction is reduced due specific type of property (e.g., tangible personal property for unrelated use) or recipient organization (e.g., gifts to private foundations)**

Related Use: Practice Pointers

- Charity should explain related use in gift receipt letter.
- Not “per se” unrelated use if sold within three years – and charity reports sale on IRS 8282 form. But be prepared to defend if audited.
- Property donated for charity auction is a “per se” unrelated use.

Special Considerations

- If charity disposes of property in the year of the gift, the deduction is limited to the lesser of cost basis and FMV.
- If charity disposes of property after first year, the donor must recapture as income all deduction value in excess of basis.
- Recapture rule applies to gifts of appreciated property where donor claims a deduction over $5,000.
- Exceptions available.

Exceptions

No adjustment of the tax benefit if the donee certifies to donor that:

1. **the use of the property by the donee was related to the purpose constituting the basis for the donee's exemption, describing how the property was used and how such use furthered such purpose or function; or**
2. **the intended use of the property by the donee at the time of the contribution became impossible or infeasible to implement.**

Telemarketing

Telemarketing: U.S. Supreme Court Rules

- **No required percentage for charity.**
- **No disclosure requirement.**
- **But if asked, no fraud or deceit allowed.**
- **Illinois/Madigan v. Telemarketing Associates, 538 U.S. 600 (2003).**

The Overhead Myth

Letter to America from:

1. **BBB Wise Giving Alliance**
2. **Guidestar**
3. **Charity Navigator**

To the Donors of America:

We write to correct a misconception about what matters when deciding which charity to support.

<u>The percent of charity expenses that go to administrative and fundraising costs—commonly referred to as "overhead"—is a poor measure of a charity's performance.</u>

We ask you to pay attention to other factors of nonprofit performance: <u>transparency, governance, leadership, and results</u>…That is not to say that overhead has no role in ensuring charity accountability…In most cases, however, focusing on overhead without considering other critical dimensions of a charity's financial and organizational performance can do more damage than good … In fact, many charities should spend more on overhead …

Telemarketing

- **National Do Not Call Registry List regulated in most states by Attorney General**
- **In some states, the charitable organizations are exempt if they use volunteers or employees to make the calls and immediately disclose A) the caller's true first and last name, and B) the name, address and phone number of the organization.**

Charitable Solicitations by Organizations

- **In many states, no registration required for charities of a state to solicit gifts within the state**
- **Some states may require out of state charities to register in order to solicit gifts. See summary of state regulator contacts : http://www.nasconet.org/**
- **National Association of State Charity Officials.**

Charitable Solicitors and Consultants

Annual registration and reporting by independent contractors who are:

- Professional solicitors, and/or
- Fundraising counsel

Registration requirements and forms are available from state Attorney General or other office

Charitable Gift Annuity: Disclosures Required

Philanthropy Protection Acts of 1995 and 1997

- **Class action lawsuit over gift annuities as violation of Sherman Anti-Trust Law.**
- **New disclosure requirements for gift annuities and trust investments.**
- **Provide disclosure financial disclosure before gift and document disclosure has been made in the gift annuity contract.**

Gift Annuity State Regulations

- Bankruptcy of Baptist Foundation of Arizona.
- North American Securities Administrators Association (NASAA) list gift annuities as a Top Ten Scam.
- Summary of state laws: www.acga-web.org

AMERICAN
COUNCIL ON
GIFT ANNUITIES

D. Compensation

"Show ME the MONEY!"

Commissions for Gift Annuities

- National Community Foundation of New Life International paid missions for gift annuity referrals.
- Tennessee Department of Commerce and Insurance obtained control of New Life Foundation of America for doing insurance business without certificate of authority. Also, NFOA had not received 501(c)(3) status.

Commissions for Gift Annuities

<u>Potential Problems</u>:

1. **SEC regulation.**
2. **State insurance licensing.**
3. **State securities regulation.**
4. **Potential reduction of deduction.**
5. **Reduces charitable residual.**
6. **State solicitation laws.**
7. **Violates ethical standards.**

See White Paper at www.acga-web.org

Volunteer Service of Advisors

- Attorney who chairs church legacy committee and prepares wills on a pro bono basis for church members who bequeath gifts to church.
- Violates state professional rules of conduct re: conflict of interest.
- Maryland Bar Assoc., Committee on Ethics, Docket 2003-09 re: Rule 1.7.

Indiana Ruling: Opinion 4 of 2008

- Donation of legal services for charity auction not a violation of Rules of Professional Conduct.
- Conditioned on later consultation to assure appropriateness.
- Tax consequences disclosed.
- No implied quid pro quo for attorney.
- Attorney review of related advertising.

Excess Compensation

- Criminal: United Way of America CEO.
- Compensation controversy: American University President; Harvard Management Company
- IRS audit and Attorney General investigation of The Getty Trust
- See IRC Sec. 4958 prohibition on excess benefits and intermediate sanctions rules

E. Competence and Professionalism

One for All…

And All for One!

Conflict of Interest

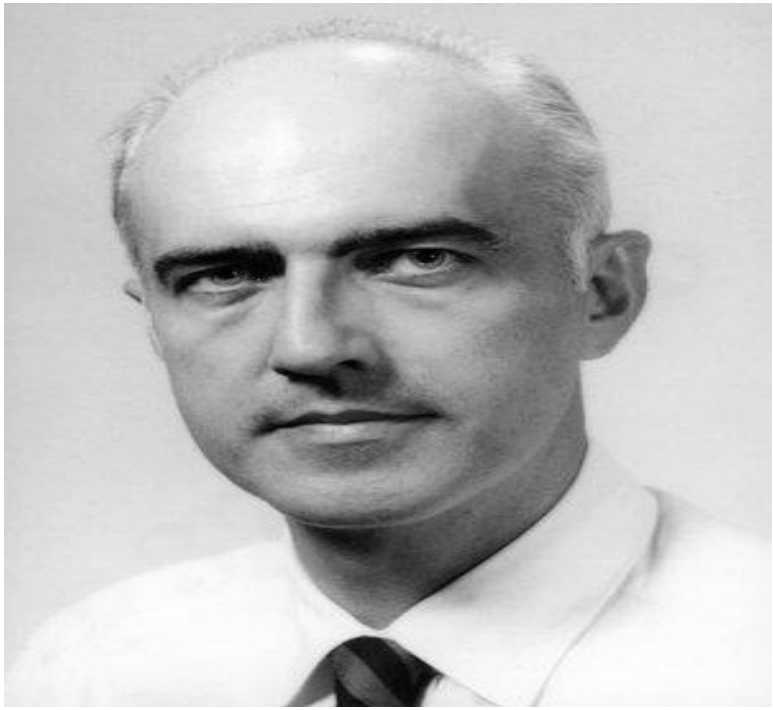
- **Attorney was the CEO, director and president of non-profit healthcare facility (Brethern's Home).**
- **Hospital sold and proceeds given to Brethern church for which respondent was also the attorney.**
- **Court found excessive fees, conflict of interest, misrepresentation, deceit.**
- **Attorney disbarred.**
- ***In Re: Becker*, 778 N.E. 2d 806 (2002).**

F. Consultation with Independent Advisors

The Man Who (Thought He) Knew Too Much…

Case Study

The case of Richard Leroy Walter at www.npr.org



Appropriate Role of Charity

Potential Roles:

- **Charity or Gift Planner as personal representative**
- **Charity or Gift Planner as trustee of a trust.**

Considerations:

- **Recommendation by legal counsel.**
- **Consider risks and potential liabilities.**
- **Conflict of interest?**
- **Approval by Board of Directors.**

Who Pays?

- Donor's legal and accounting fees
- Qualified appraisal of non-cash gift property.
- Title transfer or insurance for non-cash property gifts.
- Environmental review on real estate.

G. Consultation with Charities

Frankly, Scarlett …

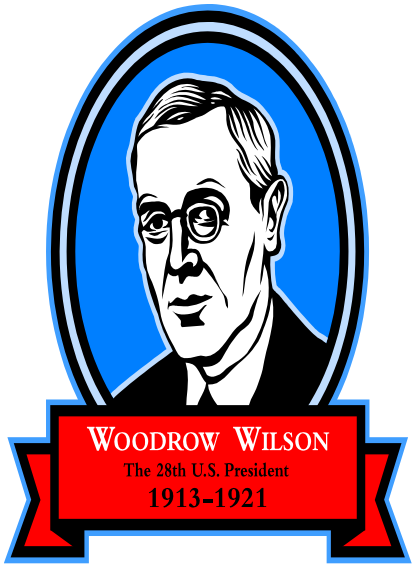
Importance of Due Diligence

- Document discussions.
- Always recommend independent counsel.
- Drafting trusts and other legal documents:

1. Unauthorized practice of law and potential liability if defective.
2. Provide IRS safe harbor charitable remainder trust and charitable lead forms available at www.irs.gov.

Document, Document, Document

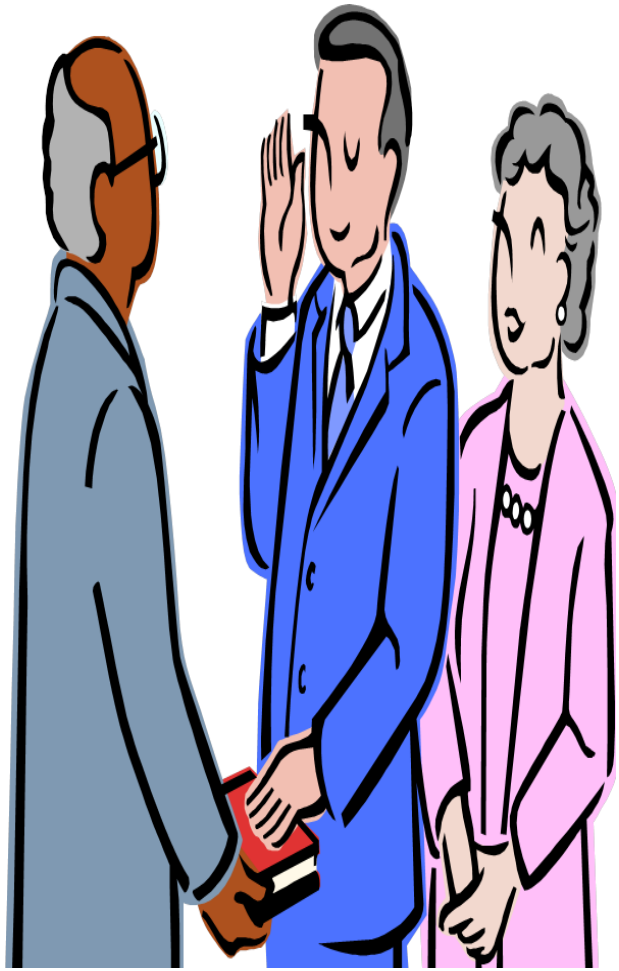
- **Gift by Robertson's to support the Woodrow Wilson School**
- **Dispute by Robertson's heirs over Princeton's role in use and investment of funds for graduate program**
- **Lawsuit and settlement - $40 million in legal fees!**
- ***Abusing Donor Intent: The Robertson's Epic Lawsuit Against Princeton University* by Doug White**



Gift Acceptance Policies and Procedures

- **Protocols for all types of gifts: cash, non-cash, planned gifts.**
- **Incorporate Model Standards of Practice, Donor Bill of Rights, Other Ethics Standards (AFP, AHP, APRA, etc.).**
- **Consider use of an Ethics Committee.**
- **Approval of policies by board of directors.**
- **Exceptions and special circumstances subject to approval of board.**

Charitable Pledges: Enforceability?



- Receivable per Financial Accounting Standards Board (FASB).
- Auditors review pledge documentation.
- Rationale: Legal enforceability.
- Are pledges enforceable?

Theories of Enforcement

- **Bilateral contract. Mutual promises with consideration. Example: Charity constructs building based on pledge.**
- **Pledge made in consideration of a pledge by another donor. No consideration by charity.**
- **Unilateral promise enforceable where donor's request for charity to take action (e.g., change mission) is a substitute for consideration.**
- **Promissory estoppel and detrimental reliance may be used when offer, acceptance or consideration is missing.**
- **Public policy without requiring consideration or reliance.**

H. Description and Representation of Gift

The Usual Suspects:

(Who is Keyser Soze?)

Charitable Endowments

- **True endowment is designated by donor per FASB and law such as UPMIFA**
- **Board-designated: “quasi-endowment”.**
- **Agreement between donor and charity to document that charity discloses board-approved policies.**

Endowment Policies

- **Investment Policy**
- **Spending Policy**
- **Fee Policy**

Endowment Agreement

- **Name of Fund,**
- **Biographical information of donor,**
- **Outright and/or deferred gifts,**
- **Legal purposes or uses of the fund,**
- **Application of state and federal law,**
- **Variance or amendment power retained by charity, and**
- **Not designated as a gift “in trust”.**

Endowment Gift State Tax Incentives for Community Foundations

- **Illinois Gives:**

  https://tax.illinois.gov/programs/illinoisgives.html

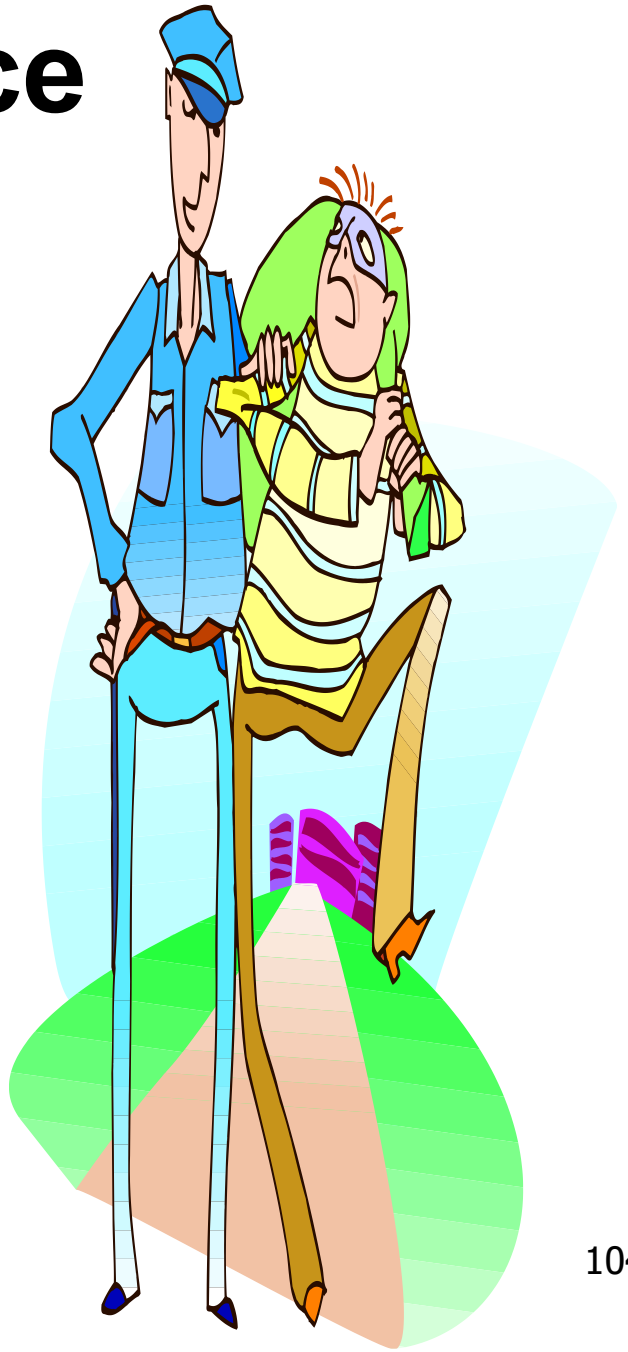
- **Endow Iowa:**

  https://opportunityiowa.gov/community/revitalization/endow-iowa

I. Full Compliance

"We're in a TIGHT SPOT!!"

('O Donor, Where Art Thou?)



Charity Gaming

- Not a deductible gift!
- Gaming regulated by states.
- Iowa Department of Inspections, Appeals, and Licensing (DIAL), Illinois Gaming Board
- See IRS Publication 3079.
- Note: Bingo exception to Unrelated Business Income Tax.

IRS "Dirty Dozen": Abuse of Charitable Organizations

- ***Internal Revenue Service warns taxpayers against scam groups masquerading as charitable organizations and over valuation of non-cash gifts.***
- ***"Feeding Our Future" fraud scheme in Minneapolis.***

Standing to Sue

Standing - Yes

- **The widow of R. Brinkley Smithers filed suit after his death alleging St. Luke's-Roosevelt Hospital Center failed to create an alcoholism research and treatment facility with the funds donated by her husband for that purpose.**
- **New York Supreme Court "[t]he donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent."**
- ***Smithers v. St. Luke's-Roosevelt Hospital et al.*, 281 A.D.2d 127 (2001).**

Standing - No

- **Carl H. Herzog Foundation filed suit against University of Bridgeport, alleging that University used the funds for an impermissible purpose.**
- **Supreme Court of Connecticut ruled the Foundation had no standing to enforce the gift restrictions. *J. Herzog Foundation, Inc. v. University of Bridgeport*, 699 A.2nd 995 (1997).**

Attorney General

- **Attorney General has broad authority to protect the public interest in charitable and benevolent instrumentalities, whether in the form of trusts for benevolent public purposes, nonprofit corporations or even for profit corporations.**
- **See *Zoeller v. East Chicago Second Century, Inc*., 904 N.E.2d 213 (2009).**

Protection of Charitable Assets Act

- Role of state Attorney General, etc. in protecting charitable assets.
- Specifies transactions and legal proceedings requiring notice.
- Registration and annual reports.
- www.uniformlaws.org

Role of Attorney General

Potential Remedies :

1. **Injunctive Relief;**
2. **Appointment of temporary or permanent receivers;**
3. **Permanent removal of trustees; and/or**
4. **Appointment of permanent replacements of trustees with court approval.**

Life Insurance: Good

- **Charitable entity generally has an insurable interest in the lives of donors.**
- **Charity as beneficiary.**
- **Charity may pay premiums.**
- **Beware plans that involve premium financing, multi-lives that are insured and life settlements.**
- **See Life Insurance Valuation Guidelines at:**

https://charitablegiftplanners.org/standards/charitable-life-insurance-evaluation-guidelines

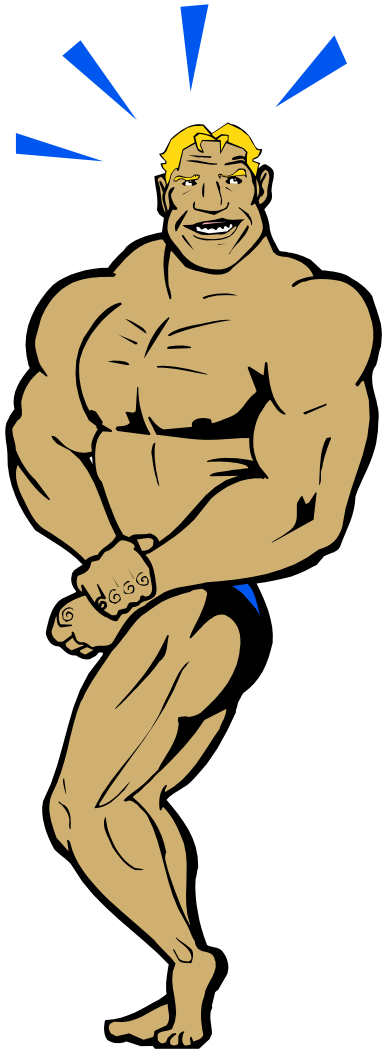
Bad and Ugly: Charitable Reverse Split Dollar Life Insurance

- **Format: Donor makes gifts to charity for part of premiums owed. ILIT or family own relatively high % of death benefit and cash value.**
- **IRS Notice 99-36 prohibited: potential penalties for all involved: "donor" (loss of deduction, penalties), charity (loss of tax exemption), promoters (various penalties)**
- ***Weiner v. Comm'r*., T.C. Memo 2002-153 and Addis v. Comm'r., 118 T.C. 32 (2002): National Heritage Foundation failed to provide good faith estimate of the value of goods/services received in consideration for gifts. Charitable deduction denied.**

Son of Accelerated CRT

- Donate appreciated stock
- 25-50% payout for 2-4 years
- Stock not sold right away
- Borrow $ or forward sales contract to provide cash for first 1-2 years of payout
- Tax -free return of principal
- Escape gain, receive income tax deduction

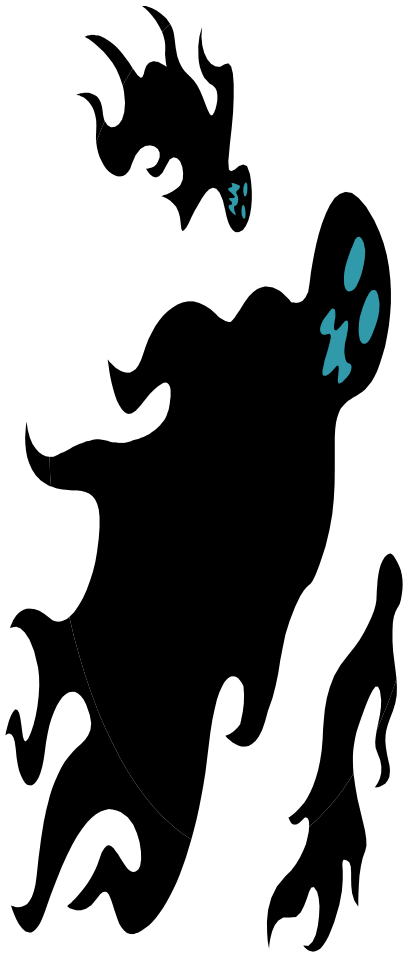
Full Monty/Chutzpah CRT



- Original Accelerated CRT concept was prohibited by amendments to IRC Sec. 664 in 1997 and 1998 (e.g., 10% minimum deduction, 50% maximum payout, etc.).
- Treasury Decision 8926 prohibits Son of Accelerated CRT.

“ER” or Ghoul CLAT

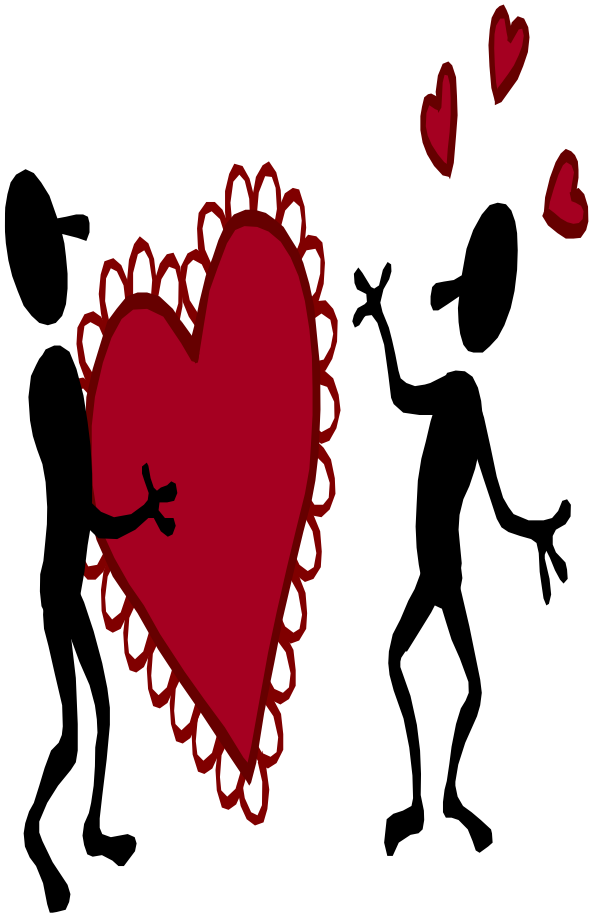
- **Format: Link payout from CLAT to a “recruited” (for a fee?) young person with a nominally long life expectancy who, in reality, is not well.**
- **Gift tax paid at much reduced rate than if an older person (e.g., parent) had been the measuring life.**
- **Prohibited by Treasury Decision 8923.**



J. Public Trust

It's a …

Wonderful Life!



Private Foundation Abuse

- Violation of self-dealing (IRC 4941) and taxable expenditures (IRC 4945).
- Boston Globe "Spotlight" series. See:

  https://nonprofitquarterly.org/spotlight-teams-story-foundation-abuses-ends-loss-52m-despite-expose/
- Inurement and excess benefit by Getty Trust (CA), Schwab Foundation (IN), etc.
- Role of Attorney General

Ethical Wills and Preparing Heirs

- **"Legacy Statements": Statements of personal values, aspirations, wishes to surviving family, loved ones and favorite charities.**
- **Executed in addition to legal documents.**
- **Resources:**

1. **National Center for Family Philanthropy – www.ncfp.org**
2. **Institute for Preparing Heirs – https://www.preparingheirs.com/index.cfm?&secure**

Duty Owed by Attorney-In-Fact

- **Attorneys in Fact may abide by donor's wishes relative to philanthropy and making gifts vis-à-vis maximizing total return on investments.**
- **Not a breach of fiduciary duty by AIF.**
- **<u>Legacy letter quoted by court</u>**
- ***Power of Attorney of Xenia S. Miller, et al. v. William Irwin Miller and Sarla Kalsi*, Indiana Court of Appeals, 2010**

Retirement Plan Distributions

- **IRA Beneficiary Center (RIFT) of National Association of Charitable Gift Planners**:

  https://charitablegiftplanners.org/ira-distribution-resource-center
- **Iowa Code Section 633.358 - Charitable organization beneficiary affidavit and third-party protection**
- **Need for a lawsuit?**

Terrorism Protection

- **Executive Order 13224: Prohibited lists.**
- **USA Patriot Act: Criminal/civil liability for material support or grant-making.**
- **Treasury Department Voluntary Guidelines: Due diligence best practices.**
- **See: http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml**

Good Governance

Independent Sector:

- **Model Code of Ethics**
- **33 Principles of Good Governance**
- **Workbook and Legal Citations Resource**
- **See www.independentsector.org**

Helpful IRS Publications

- **1828 – Guide for Churches and Religious Organizations**
- **4221-PC – Compliance Guide for 501(c)(3) Organizations**
- **4221-NC – Compliance Guide for Tax Exempt Organizations Other than 501(c)(3)**
- **3386 – Veteran's Organizations**

Are you able to fairly comply with all ethical and legal standards for estate and charitable planning?

After all…
Tomorrow is Another Day!