





A. WHY IS A GIFT AGREEMENT NECESSARY ANYWAY?

1. Basic Considerations

- Starting Point: A gift agreement is not a legal requirement in order to make a gift
- To establish a gift at common law simply involves the voluntary transfer of property without consideration
- However a gift agreement provides evidence that there has been (or will be) a gratuitous transfer of property to a charity intended as a gift
- As such, a gift agreement can help to avoid confusion at a later time concerning whether there was a gift and what the terms of the gift were

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2. Understanding The Difference Between a Gift Agreement and a Pledge Agreement

- A gift agreement provides documented evidence of a gift having been made by a donor to a charity and is legally enforceable on the charity when the gift involves restrictions
- A pledge agreement, on the other hand is an agreement that records a commitment by a donor to make a gift at a future time
- The terms "Gift Agreement" and "Pledge Agreement" are often used interchangeably, particularly when a gift agreement for a current gift includes a pledge to make a future contribution

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- unless:
 - There is some type of consideration, even a nominal amount of two dollars (It may be possible that (i) naming rights or (ii) the charity agreeing to a project or a restriction may constitute sufficient consideration):
 - The charity can establish that it has acted to it's detriment as a result of the pledge (i.e. detrimental reliance); or
 - The pledge falls within the provisions of "Public Subscription" legislation in Nova Scotia or the Statute of Frauds in P.E.I.



- The Brantford General Hospital Foundation and Marguis Estate case (2003) is the most recent decision on pledges, but case law is not usually clear in this area
- Important to include testamentary provision in a will to ensure that any outstanding pledge is fulfilled
- Since a pledge may not be enforceable, it should not be considered and counted as a gift until the pledge is actually received, or alternatively it should only be identified as a "pledge" as opposed to an actual gift received



- It is important to determine whether that portion of a gift agreement that includes a future pledge is intended to be enforceable; i.e. with consideration which can be treated akin to a gift received, or unenforceable, which amounts to generally only a hope of a gift to come
- With a pledge for a future gift, whether enforceable or not, it is important to determine the timeframe in which the gift is to be paid (e.g. 2, 5, or 10 years)
- As well, if there are naming rights associated with a pledge agreement, whether enforceable or not, at what point do the naming rights come into effect; e.g. at 25%, 50%, or more of the gift, etc.
- Once the pledge is fulfilled, then the terms of the pledge agreement will become the basis of an enforceable gift agreement for the charity

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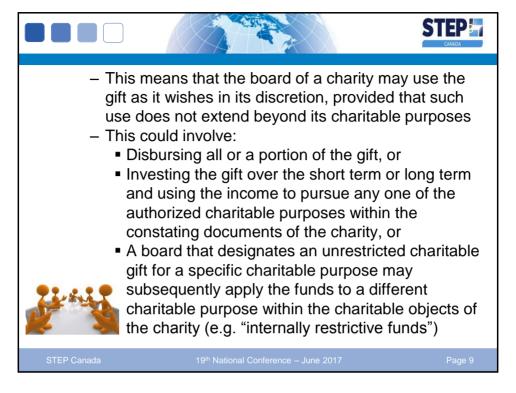


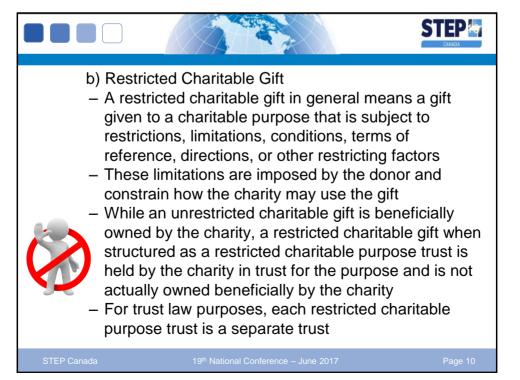
B. GIFT AGREEMENTS INVOLVE DONOR RESTRICTIONS

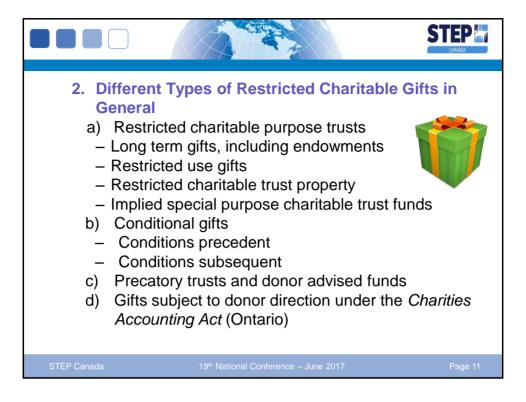
- 1. The Difference Between an Unrestricted Charitable Gift and a Restricted Charitable
- It is important to understand the difference between a restricted and an unrestricted charitable gift
 - a) Unrestricted Charitable Gift
 - An unrestricted charitable gift is to be applied towards a charitable purpose of a charity and not subject to any specific restrictions imposed directly or indirectly by the donor
 - However, the board of a charity may therefore apply an unrestricted gift to its charitable purposes in whatever manner it deems appropriate

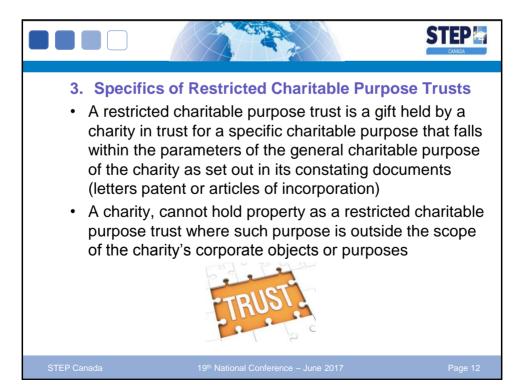
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- A charity can only use the gift to accomplish the specific charitable purpose established by the donor
- Common types of restricted charitable purpose trusts include:
 - Endowments
 - Long term funds
 - Scholarship funds
 - Building funds
 - Research funds



For more information, see attached paper on "Considerations in Drafting Restricted Charitable Purpose Trusts"

http://www.carters.ca/pub/seminar/charity/2017/step/StepPaper2017.pdf

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- There are conflicting approaches concerning the type of evidence necessary to establish that the donor intended to create a special purpose charitable trust
- In Re Christian Brothers of Ireland in Canada (Ont), Blair
 J. held that a high, formal standard of "in trust" is required, which would necessitate that it be in writing
- In Rowland v. Vancouver College (BC), Levine J.
 determined that the requirements for a restricted charitable
 purpose trust are less formal and could involve
 consideration of all relevant circumstances
- In Re The Land Conservancy of British Columbia (BC), Fitzpatrick J. followed the less formal requirement and considered the "surrounding circumstances" when a will or gift is made
- The dichotomy between the two approaches remains unresolved

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C. NINE COMMON DRAFTING PITFALLS TO AVOID

PITFALL #1: Failure to Accurately Describe Restrictions What are the Issues to Consider?

- Lack of clarity concerning whether there is an enforceable restriction or not
 - Unrestricted gift vs. Restricted gifts
 - Precatory gifts; i.e. unenforceable but implying a moral obligation; i.e. "it is my wish" or "desire that"
- Lack of clarity concerning what restriction is to apply e.g. is it a conditional or restrictive charitable purpose trust
 - The Norman Estate "Watch Tower Bible Society" decision http://www.carters.ca/pub/update/charity/14/aug14.pdf is a good example of the impact of uncertain provisions

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- The court had to determine if there was an inter vivos condition subsequent gift or a testamentary gift (which would have required a testamentary instrument to be enforceable)
- Courts found that there was an inter vivos gift, which was good for the charity given the confusion in the applicable wording
- Do the restrictions on use; i.e. contributions towards a particular type or use of building continue to apply to replacement property?
- Restriction on alienation of gifted property; (i.e. shares in a company) can have an impact upon the fair market value of the gift for receipting purposes

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Tips to Help Avoid the Pitfall

- Determine what the donor actually wants and what the charity can accept from a practical perspective and then choose the appropriate language of restriction that will work best for both the donor and the charity
 - E.g. use a conditional gift with a gift over to another charity to enforce naming rights
- Use correct technical terminology
 - E.g. with restricted charitable purpose trust, use the words "in trust" to ensure it is enforceable
 - E.g. for conditional gifts, use clear conditional language such as "on the condition that" as opposed to less clear wording such as "but" or "if"

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PITFALL #2: Failure to Address What is Meant by "Endowment"

What are the Issues to Consider?

- 1. General Confusion
- Use of the term "endowment" when drafting needs to be carefully considered as confusion normally results
- "Endowment" is not a well understood legal term
- It generally describes the holding of the capital of a gift on a permanent basis in order to generate income for a charitable purpose
- In Arthritis Society v Vancouver Foundation (BC), the BC Supreme Court held that "the most common definition of the term 'endowment' is the provision of a fund which is intended to generate fixed revenue for the support of a charity"

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- The court also cited with approval the definition of endowment from Black's Law Dictionary that it is "the bestowing money as a permanent fund, the income of which is to be used in the administration of a proposed work"
- However, the word "endowment" has also been used to refer to trusts where the capital was to be retained for "10 years or more" for purposes of avoiding the 80% disbursement quota under the ITA prior to the 2010 amendments to the ITA
- Many donors and charities may not actually want to set up a permanent endowment fund when drafting a gift agreement or a will
- As a result, the actual words used in drafting a restricted gift must carefully reflect what the donor really wants in order to avoid creating an "endowment" when it is not actually intended

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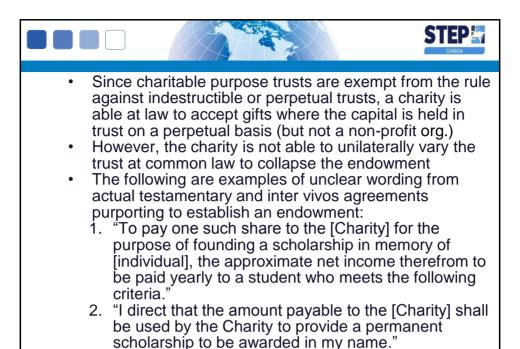


2. Understanding Endowments as a Type of Time Restricted Gifts

- Time restrictions are the length of time that a restricted gift is to be held, creating a type of long-term gift
- The gift may be directed to be held permanently as an endowment or alternatively for a fixed number of years
- The donor may give the charity a right to encroach on the capital during the restricted period or not
- The income (and the capital where encroachment on capital is authorized) are used either for a specific application, like a scholarship, or for the general charitable purposes of the charity
- Once the restricted period has expired, if applicable, the charity can distribute the entire capital of the gift
- An endowment is an extreme form of time restricted gift where the capital of the gift is held in perpetuity and invested to produce income

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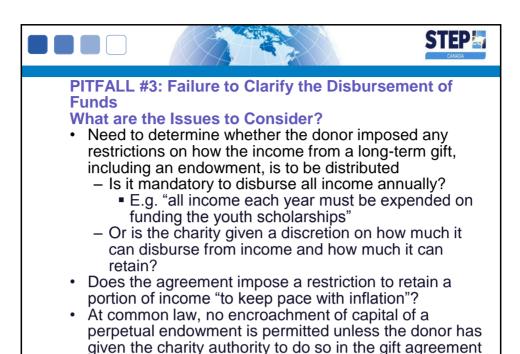


Tips to Help Avoid the Pitfall

- Clarify whether the gift is intended to be a long term gift or a perpetual endowment, as frequently the donor does not actually want a perpetual endowment
- Essential to include the right to encroach on capital in an endowment and the ability to vary the purpose with regards to a use restriction
- Avoid using the word "endowment" in fundraising literature without clear explanation of what it means

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- What constitutes "capital" that cannot be disbursed?
 - At trust law, capital gains forms part of capital and as such is not income



- Therefore, unless the gift agreement defines income as including capital gains, expending realized capital gains would constitute breach of trust
- This means that a "total return strategy" to invest and disburse income (i.e. to look at the best total return, without distinguishing between capital and income) is not permissible without authorization by the donor when the gift is established or by court order
- In Re Killam Estate (Nova Scotia), the court authorized a total return strategy based on the inherent jurisdiction of the court over the administration of charitable trusts

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- In Re Stillman Estate (Ontario), the court restricted the authority of the court to authorize a total return strategy to the cy-près jurisdiction of the court in the situation where there is either an impossibility or an impracticality
- Stillman generally reflects the approach taken by the Ontario Public Guardian and Trustee, so court authorization for a total return strategy in Ontario will be limited to when there is either an impossibility or an impracticality
- Stillman was recently followed in Fenton Estate(Re)(BC)
- What would constitute an impracticality for purposes of a cy-près court application involving a total return strategy?
 - Inability to meet the 3.5% disbursement quota for the charity under the ITA

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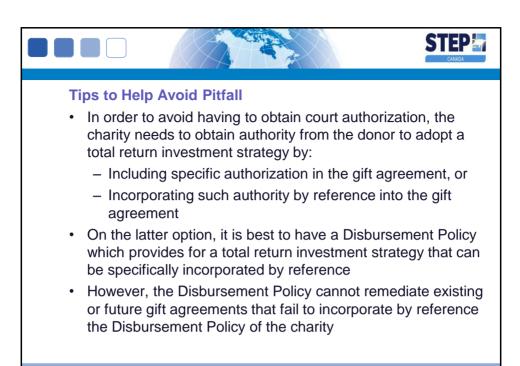


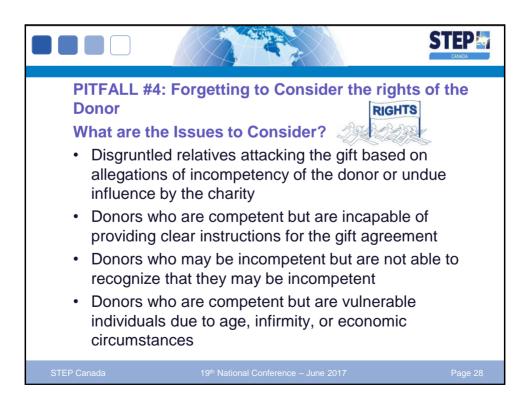


- For larger institutions, query whether it might be possible to argue that it would be impractical to not apply a total return strategy to the collective endowment funds of the charity if it would be an excessively costly administrative burden for the institution to administer those endowment funds different from other investments done on a total return basis
- In Ontario, court authorization may be possible on a consent basis through the Public Guardian and Trustee under s. 13 of the *Charities Accounting Act*, or alternatively by an order in open court

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Tips to Help Avoid the Pitfall

- Standard gift agreement used by the charity should contain a provision that states a recommendation and acknowledgement that the donor has been advised to obtain independent legal advice
- Where the competency or the vulnerability of the donor is in question, insist that the donor must obtain independent legal advice before signing the gift agreement and that such advice be confirmed in writing
- In situations where the gift agreement may be challenged by family members, seek an independent opinion of competency before the gift is made
- Where the potential for allegations of undue influence could arise, carefully document the steps that are taken to avoid circumstances that might otherwise suggest undue influence

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PITFALL #5: Giving Excess Control to the Donor What are the Issues to Consider?

- Donor imposing a restriction that is outside the charitable purposes of the charity
- Donor instructing the charity who is to benefit
- Donor instructing the charity which charities are to benefit
- Donor retaining the right of approval over management and/or investment of gifted funds
- Donor retaining the right to vary or approve a variation of restrictions
- Donor's entitlement extending from that of a "Donor Advised Fund" to that of a "Donor Directed Fund"
- Excessive donor's rights could mean that no gift may have been made in the first place

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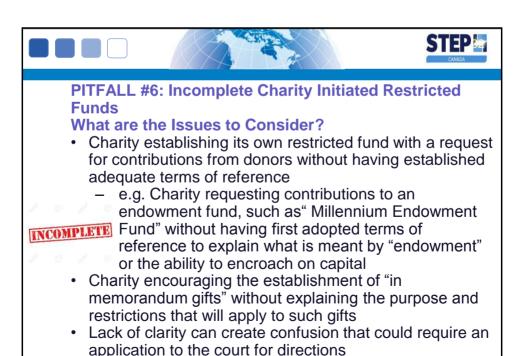
- Donor direction that a subsequent gift be made to a foreign charity without adequate "direction and control" by the charity (see CRA Guidance on Foreign Activities)
- Donor directing how gifts are to be used in a conflict area could result in compliance issues with regards to anti-terrorism and anti-bribery legislation

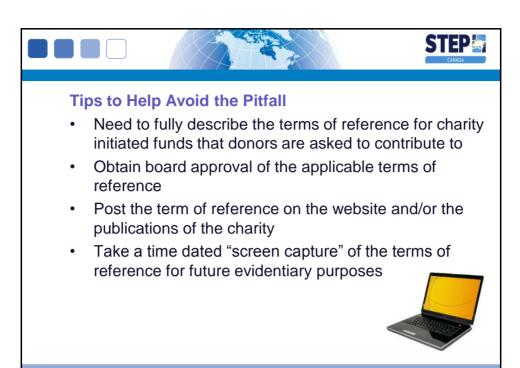
Tips to Help Avoid the Pitfall

- "Donor advice" is permissible but must avoid "donor approval" or other forms of overt control by the donor
- Use of restrictions by the donor is permissible but not ongoing management control
- Discretion over the management of the fund must lie solely with the charity and not with the donor
- Considering using a condition subsequent

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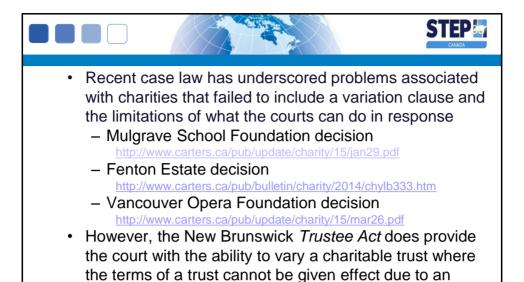


PITFALL #7: Failure to Include a Variation Clause What are the Issues to Consider?

- A donor cannot retain the right to vary the terms of a restricted charitable gift after it has been gifted because the gift has become the property of the charity
- However, the donor can retain the ability to provide nonbinding input through the inclusion of a donor advised option in the gift agreement
- The charity cannot unilaterally vary the terms of a restricted gift unless the gift agreement provides such authority to the charity or court approval is given

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donor's intentions

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impractibility, impossibility or other difficulty and a variation would facilitate carrying out the settlor's or

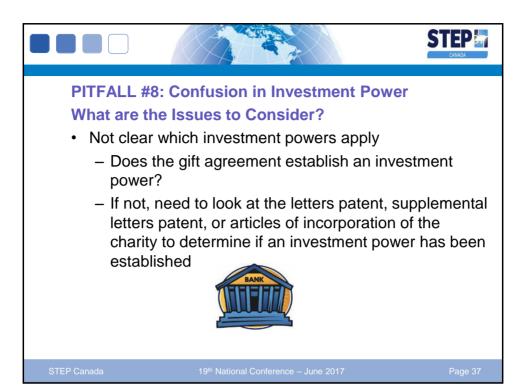
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- As well, in Nova Scotia, the Variation of Trusts Act has been held to apply to charitable purpose trusts
 Tips to Help Avoid the Pitfall
- The gift agreement should include a provision that gives the charity the ability to vary the terms of the restricted gift, including both use and time restrictions
- The terms of reference for the charity to be able to utilize a variation power is normally tied to terminology like "impossibility or impracticality" in accordance with the common law cy-près power of court
- However, a variation power granted to a charity does not have to be restricted to only situations where a court could exercise its "cy-près" power, as it is up to the charity to determine the circumstances under which the use or time restriction can be varied

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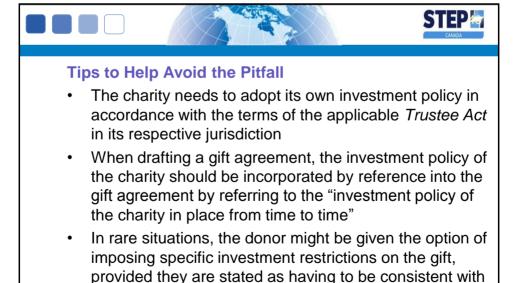




- Failure of the charity to have a general investment policy
 - The charity should have a general investment policy that reflects the requirements under the *Trustee Act* as oppose to what a financial institution may propose
 - e.g., the *Trustee Act* (Ontario) provides that:
 - Prudent investor standard applies
 - The ability to invest in mutual and pooled funds
 - The seven mandatory investment criteria
 - The need to diversify investment
 - Each restricted fund may require a different investment approach that builds upon the general investment policy of the charity

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the "prudent investor standard" set out in the applicable *Trustee Act*, and the investment policy of the charity



PITFALL #9: Failure to Authorize Administration Fee What are the Issues to Consider?

- Disgruntled family members of a donor who expect that all income from the donor's restricted gift must be used towards the restricted charitable purpose with no part to be used for administrative costs
- This can result in the general funds of a charity having to cover all of the administrative costs of restricted gifts
- Charities that unilaterally state after the fact that they
 charge an administrative fee on restricted gifts may
 encounter problems if there is no authority that can be
 cross referenced in the gift agreement
- In some extreme situations, this could lead to allegations of breach of trust and embarrassment to board members and as well as senior management

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Tips to Help Avoid the Pitfall



- The gift acceptance policy for a charity should provide that an administrative fee will be charged on restricted gifts, with the amount of the administrative fee to be determined from time to time in the discretion of the charity
- Provisions dealing with the administration fee in a gift acceptance policy should be incorporated by reference into the gift agreement
- As well, the website and/or documentation publicizing the fundraising by the charity should clearly indicate that an administrative fee, as determined by the charity, will be charged on all restricted gifts

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