

Preserving Donor Intent

By Frederic J. Fransen, PhD, and Keith Whitaker, PhD

Donor intent is a difficult topic to discuss with clients because any honest discussion rests upon two truths:

1. Someday, the client will die.
2. Unless every penny is spent first, the client will need to rely upon others to enact his or her wishes.

A comparison with the analogous topic of “original intent,” which creates such uproar in constitutional law circles, can prove illuminating. Talking about “original intent” always involves looking retrospectively at certain legislators or legislative bodies and trying to discern their intent in creating a certain law. But legislators themselves look prospectively, at the possible legislation and its possible consequences. Indeed, whether you’re politically liberal or conservative, you might wonder if James Madison would have penned the Bill of Rights if he’d had a rear-view-mirror perspective.

It is no wonder, then, that most estate-planning conversations focus either on the here and now technical matters of a possible transfer or prospectively on (financial) consequences. These conversations don’t usually take an imaginary retrospective view and identify potential problems. But if clients are going to enter into plans knowingly, and if advisors are going to exercise a true duty of care in offering clients wise counsel, such considerations are necessary. And we believe that advisors can manage those conversations in ways that preserve donor intent practically and effectively.

In this article we place donor intent into the larger discussion of estate plans and wealth transfer. We then outline the multiple considerations clients must begin with to enact their intent as donors. Finally, we offer sug-

gestions on how advisors can most efficiently and effectively counsel clients to preserve intent.

Hope for the Best but Plan for the Worst

Most donors naturally feel warmly toward the recipients of their giving, whether the recipients are family or charity. If donors felt otherwise, they probably wouldn’t give. But that warmth must not upstage the need for sound planning, which is necessary to ensure that the giving takes the form the donor wishes it to take. Indeed, errant interpretations of donor intent can happen with gifts to family members or gifts to charity.

Sometimes donors will express hope that problems will be worked out based on their written intentions (in trusts or wills or even attached letters or videos). They should recognize that such materials are useful in guiding well-intentioned executors, boards, etc., but they are a flimsy defense against those with mixed motives and interests in tension with a donor. For example, consider the dispute over Leona Helmsley’s trust, valued at more than \$5 billion. Mrs. Helmsley clearly wanted a significant portion of her estate to provide for the care of dogs, but she and her advisors failed to properly limit the discretion given to her trustees, who appear to have other priorities. Animal advocacy organizations have challenged the validity of the trustees’ authority in court. The Buck Trust is another example; the overseers of funds set aside for use of the people of Marin County, California, spent them elsewhere, in areas they considered more deserving. In this instance, the court reinstated the original scope of the trust.

The first lesson in trusts and estates law is that dead men possess no property. Not only can you not take it with you, your dead hand is truly dead.

Western law allows the dead to offer directives to the living people entrusted with their former property, but such directives must do more than just represent the wishes of those who have passed. Should a trustee go against the donor’s directive, it takes a willing living challenger to set things straight. To put this another way, Western law has done away with ancestor worship. No legally enforceable duties exist to the dead. We may as a matter of public policy want grantors to feel secure that their wishes will be followed. But that public policy focuses on us, the living, and our good. And even this general public policy will be overridden if a court believes some other clear good (for the living) can be served by deviating from a donor’s intent—or if no one living complains, as is generally the case.¹

In many instances trustees and courts have deviated significantly from donors’ intent; in some of these cases that intent was forcefully expressed or carefully crafted and stated. These include Henry Ford’s foundation becoming an outspoken funder of anti-capitalist political movements in the 1960s and 70s, the Barnes Foundation’s repudiation of its founder’s meticulously expressed artistic educational vision, Princeton University’s redirection of hundreds of millions of dollars in gifts from the Robertson Foundation, and Brandeis University’s plans to sell its Rose Art Museum collection. Arguments about the legitimacy of such actions tend to take place on the plane of politics, culture, or, most commonly, financial expediency. Against the con-



cerns of the living, abstract arguments about donor intent tend to hold little water, especially when institutions are in fiscal straits and financial liquidity has passed under the proverbial bridge.

Basic Considerations

The groundwork for preserving donor intent begins long before the gift is made. Wealthy people and their financial advisors should begin this groundwork as soon they can imagine that the resources of an estate will outlive the estate's owner to any significant degree. Lack of planning leaves the door open to a violation of donor intent; to paraphrase Don Corleone at the beginning of *The Godfather*, "If you want justice, why do you go to the courts?"

Importantly, donor intent is not just a matter of charity. Whether the net recipients are family or charity, the problem of ensuring donor intent is structurally the same: Articulate the donor's intentions, develop appropriate oversight for the funds given, and create procedures to reallocate the funds if they are improperly used by recipients.

If they have competent advisors, clients know that all their unconsumed wealth will be "allocated" among three categories of recipients: family, charity, and government (in the form of taxes). Typically, wealth advisors have focused on the third category and how to minimize it. This is probably the easiest part of planning, not because it is simple—it is notoriously complicated—but because the principle is clear: Few people prefer to pay more in taxes than they have to. Elvis Presley was famous for taking pleasure in his large tax bill, but he's the exception, not the rule.

Allocating among family members according to a donor's intent is more difficult. Specialists in family dynamics help the wealthy navigate complex interactions within families to assure that goals are understood and that steps are taken to achieve those goals. Such practices, however, are beyond the scope of this article.

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Charitable giving is often thought of as a "remainder" generated as part of a tax-saving plan; whatever doesn't go to family or to Uncle Sam is available for charity. But sophisticated advisors increasingly recognize that allocations to charities also can be integrated into family goals as well as wealth plans. In the best instance, all three are developed simultaneously.

A plan that accommodates family, taxes, and charity requires a well-structured asset allocation plan, which is essential for enacting donor intent. In other words, donor intent is not just expressed in written statements, videos, language of a will, etc. It also is expressed by the wealth management structure that the donor and advisor create.

Putting a Plan to Work

Ensuring donor intent includes supervising transfers made to either family or charity. The appropriate structure for this supervision will be determined in part by the specific desires of a donor.

Family

The law limits the time frame in which a donor can "supervise" from the grave transfers to noncharitable entities (children, grandchildren, etc.). For this reason, and to develop skilled heirs rather than dependents, many advisors encourage limiting trusts to the minority or early adulthood of an heir.

Different family members, of course, are more appropriate to receive different parts of an estate. Consider two family businesses. One has become a corporation and the family holds 10 percent of the shares. Family members

still sit on the board and are involved in hands-off management; that is, the family has progressed from manager-owners to owners-only. The second business is privately held (let's say it's an investment business) and family members still control the day-to-day decisions. One heir might be more adept at managing relationships and seeing the big picture, another better at the detail work of picking investment opportunities. In this case, allocating these assets may be relatively straightforward—unless the valuations of the two businesses are quite different or the heirs have preferences at cross purposes with their abilities.

A more difficult situation arises when one heir lacks the aptitude or desire to do much of anything productive. Most donors want to allocate resources to the most productive steward. Family dynamics become difficult when the ability to exercise good stewardship is unequally allocated among heirs (as is usually the case). If the donor's intent is not carefully planned and executed, the courts can be counted on to thwart that intent in these types of situations.

Charity

Charitable giving, in contrast, usually takes two distinct forms. Wealth advisors need to know which kind of charitable giving—or which mix of the two—a donor intends to engage in, because the overall wealth plan will follow from this choice.

Family wealth/stature preservation.

In families where the preservation of family wealth and/or family stature



are top priorities, charity can be an important part of strategy. Charity may be a necessary part of a tax minimization strategy, and/or it may be a way to build or maintain a family's reputation as a community benefactor. Because the top priority likely is to keep wealth within the family, the amount donated will be a small fraction of the total estate value.

The primary reward for donors who are motivated by reputation occurs at or near the time of the gift and relates to the publicity the gift attracts; the longer-term reward may take the form of reduced taxes. The long-term risk such donors face is relatively small. It involves such low-probability events as failure or disgrace of the charity or loss of identification of the family with the gift. Such gifts tend to take on the character of monuments. Trouble can occur when the gift has a significant resale value and the recipient falls on hard times.²

Charitable investments. A second form that charitable giving is likely to take is as an alternative to transferring wealth within the family. That is, some wealth generators believe their "children should make it on their own"; they believe that unearned wealth doesn't serve their children's best interest and that their wealth will do more good if it is put to work in charitable investments. Bill Gates and Warren Buffet are the most famous living examples of this creed (though both have provided generously for their children). Andrew Carnegie expressed the same belief most enduringly in his *Gospel of Wealth* in the late 19th century.

This intention creates a requirement for a more robust and complicated charitable wealth plan, in particular when the donor wants to maximize the amount given during his/her lifetime and/or sunset any assets remaining after death. Charitable gifts in such instances tend to be large in proportion to the total value of the estate. They are more likely to be given anonymously, although they still tend not to be, and donors generally see gifts as a long-term investment rather than the

creation of a monument. Donors' advisors need to watch over such investments, even long after a donor's death.

What to Do to Help Ensure Donor Intent

We focus now on what advisors can do to help donors create a long-term charitable investment plan to accomplish that second approach, an alternative to transfers among family. Because monumental gifts generally are expended soon after receipt (for the construction of a building, for instance) rather than placed into an endowment, they generally can be safeguarded by clear gift agreements regarding naming and the like. Of course, even here vigilance is necessary.

Donors who wish to make long-term investments in charitable programs rather than just in bricks and mortar need structures to oversee their gifts. The details of such structures depend on the particular purpose, but the following practices will go a long way to help preserve donor intent:

Keep control of the funds. The gift should be in the form of an ongoing income stream, not principal. Thus, the wealth advisor must determine the advantages of keeping the funds in a taxable account within the estate; or whether to create a tax-exempt alternative through a private foundation or an account at a community foundation or donor-advised fund. Each has its own set of financial and philanthropic risks.

Provide appropriate oversight. Oversight involves assuring proper and independent reporting on the funded program and a proper structure to adjudicate disputes between those in control of the funds and the recipient organization managing the program.

Plan for the "worst case." Arrange alternative uses should the recipient go out of business or no longer desire to work in the area intended. For example, nonprofit hospitals have been purchased by for-profit ones, sometimes terminating the reason-for-being of large charities that have been sustaining

the purchased hospitals. Through such conversions, the recipient simply no longer exists.

While wealth advisors need to be aware and involved throughout the wealth transfer process, much of the work falls outside an advisor's area of expertise. Thus, advisors need to call upon experts to help clients create an integrated wealth plan that carries out donor intent of asset transfers among family and charity and minimizes taxes. In addition, few who have created great wealth (or the rest of us, for that matter) have thought much about how to develop a charitable strategy that maximizes the investment return of charitable assets as well as the investment return of other assets, and also preserves donor intent. Whatever measures one uses to maximize this "charitable return" requires living representatives, motivated to follow the donor's wishes, to enact and enforce them.

Summary

1. Donor intent has two parts: creating a proper structure for wealth management within an estate, and creating a structure for supervision of the funds as they are transferred out of the estate to family members as well as charities.
2. Preserving donor intent requires thoughtful preparation of an overall wealth strategy and requires the integration of decisions about how to allocate resources among family members as well as charities. Concerns about donor intent arise at the onset of an estate plan and remain until all the resources have been consumed.
3. Donor intent involves family dynamics as well as charitable giving.
4. The donor intent concerns of charitable giving depend on the mission of the donor. Monumental gifts are different from charitable investments. The former require legal protections to preserve the legacy of the

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family in the gift; the latter require ongoing oversight to preserve the mission of the investment.

5. Doing right by clients requires that wealth advisors consult with experts and develop a strategy for the family as well as for the family's charitable giving. Wealth advisors also have an obligation to see that a long-term structure is in place to oversee clients' assets as they are utilized by charities and others. 

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Endnotes

¹ This is where the doctrine of cy pres, which allows for the modification of irrevocable charitable donations, arises. One also should note that our law doesn't tend to take into account the yet-unborn. In this context, one could note the rule against perpetuities is measured by "lives in being."

² For a recent example, besides the turmoil over the Rose Art Museum in January 2009, Brandeis University faces a new lawsuit from a donor's nephew who claims that the school plans to destroy a building named for the donor and to build in its place a building named for a more recent donor (see John Hechinger, Brandeis Plan to Raze a Building Sparks Donor Suit, *Wall Street Journal*, May 13, 2009).