GIVING

Gifts, Grants, and Good Works

LINDA SPILLERS

Catherine B. Reynolds withdrew the bulk of her foundation's $38-million pledge to the Smithsonian Institution after the institution's officials spent nine months arguing over the nature of an exhibit she proposed on American achievers.

Ties That Bind

More donors specify terms for their gifts to charity

By Debra E. Blum

A $20-MILLION GIFT to a university for a new student center last year came with a 12-page contract. The agreement gave the donors, a New York couple, the right to approve the new center's architect and architectural plans, and it granted them assurances that the building will always bear their names. And if the university breaks those and other promises? The contract allows the donors to shift their money from the student-center project to some other part of the university or to sue the institution.

"These all sound like ego things, but they are very reasonable," says William D. Zabel, a lawyer in New York who advised the benefactors. "Why shouldn't a donor protect his name on a building if he's giving $20-million?" And, more important, Mr. Zabel adds: "What's wrong with making sure that institutions live up to their agreements?"

Detailed gift contracts like those Mr. Zabel draws up for his clients appear to be more prevalent than ever. Philanthropic advisers, fund raisers, and benefactors all say that donors increasingly are likely to specify in writing exactly how they want their money spent. Donors also are demanding seats on committees that oversee the projects their money supports, and they are insisting that charities report to them on how they spend their gifts.

Not only that, experts say, but donors also are increasingly using contracts to attach penalties to their gifts. Eli Broad, a Los Angeles billionaire and one of the nation's biggest donors, for example, says he regularly enters into contracts that direct beneficiaries to return gifts to his foundation if they don't use the money as Mr. Broad requests or otherwise violate terms of the gift agreements.

For charities, the trend toward more donor control raises tricky questions about money and influence. The subject is so sensitive—charity officials worry about offending the benefactors that they rely on for support—that few officials would disclose to *The Chronicle* the names or other details about their experiences negotiating with donors. Fewer still would allow their institutions to be named in this article.

Still, the charity officials do concede that they have concerns about the larger issues at stake. Some wonder if by accepting contributions with a raft of conditions attached, charities may be ceding too much control to donors. Others worry that nonprofit groups eager for cash may end up basing what ought

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Donors' Efforts to Exert Control Over Gifts Raises Questions for Charities

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to be charity-directed spending decisions too heavily on what donors want to support.

"When a lot of money is waved, institutions and fund raisers are eager to attempt to make the match fit," says Charles W. Collier, Harvard University's senior philanthropic adviser. "But sometimes, after negotiations, a gift with the conditions a donor wants just won't happen."

Adds Bruce Flessner, a fund-raising consultant in Minneapolis: "If you're working with someone who wants to give you a gift worth $100-million, even $100,000, it's hard to say no."

Spreading to Small Donors

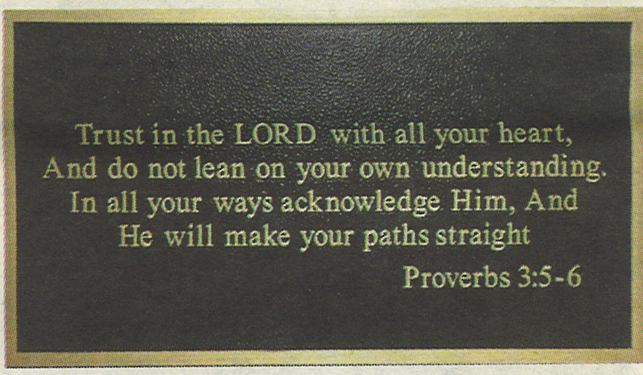
While placing conditions on gifts is nothing new—Andrew Carnegie laid out specific restrictions on his donations nearly 100 years ago—the practice is spreading beyond the ranks of the biggest givers to smaller donors who crave involvement in decisions concerning the use of their contributions.

Philanthropy observers offer various theories about why donors are more often seeking greater control over their contributions. Some say that more individual benefactors and small family foundations are finally picking up on a practice, known as strategic philanthropy, that major grant makers and corporate-giving programs began embracing years ago. The practice involves concentrating dollars in a specific charitable area and measuring the results of the gifts.

Similarly, some observers point to the rise of so-called dot-com philanthropists, the newest generation of givers who made their riches largely in the technology industry and seek to apply some of the techniques of venture capitalism to the nonprofit world.

JIM STRATFORD, FOR THE CHRONICLE

Kristin Hills Bradberry says Davidson College rejected money from a donor who wanted the institution to hang additional Bible verses like this one on campus grounds.



Others say that the trend has been fueled by the professionalization of the field of philanthropy, with more and more financial and legal advisers providing guidance on charitable giving.

And some say that broader societal changes are at work, too, such as the heightening interest in the notion of accountability in the business world.

The Enron collapse, the observers say, has underscored the need to hold companies accountable for the way they conduct business. And donors, they say, were once again reminded of the importance of making charities answerable for how they spend money when, following the September 11 attacks, the American Red Cross was accused of misleading contributors.

"The old feel-good perks of philanthropy are not as relevant anymore," says Colette M. Murray, who runs a San Diego executive-search company for nonprofit officials and is chair-elect of the Association of Fundraising Professionals. "Donors often think of themselves as investors, so involvement is important."

And that means, say Ms. Murray and others, that charities must be prepared to deal with donors' demands.

"In the last couple of years donors have been starting to see that they do have a voice, that they don't have to write a check carte blanche," says Renata J. Rafferty, a donors' adviser in Indian Wells, Calif., and author of the 1999 book *Don't Just Give It Away: How to Make the Most of Your Charitable Giving*. She adds: "It is the charities' right, option, even obligation to say, 'No, we are not willing to accept those conditions.'"

Federal Restrictions

By law, donor control can go only so far. The Internal Revenue Service does not draw a clear line, but the agency may decide to reduce or eliminate a donor's charitable income-tax deduction if the IRS decides that a donor is exerting too much influence over how a gift is spent. A donation earmarked for a particular individual's educational expenses, for example, would probably not earn a deduction. The IRS may also decide to treat a gift with too many donor restrictions not as a contribution to a charity, but as an independent charitable trust, subject to the strict rules governing private foundations.

Once a gift is made, too, donors generally have little remaining leverage and few rights to enforce their wishes, unless specific provisions are laid out in a contract. Donors won a major court victory last year when the widow of a benefactor won the right to pursue a lawsuit against St. Luke's–Roosevelt Hospital, in New York. In the suit, the widow claims that the hospital had broken promises made to her husband, such as an agreement to spend his $10-million gift exclusively to build and support an alcohol-treatment center.

In the overwhelming majority of instances, however, donors or their representatives have not obtained specific contractual rights to sue, and are not considered to have legal authority to challenge a charity's use of contributions. Usually, only state attorneys general can make such challenges.

Philosophical Debates

In any event, tax and legal concerns are typically not at issue when nonprofit organizations are considering a benefactor's demands. Rather, the key considerations are most often philosophical: The charity is wrestling to reconcile the desires of a strong-willed donor with its own mission and needs.

Sometimes, the efforts at reconciliation simply don't work.

Catherine B. Reynolds's cancellation of the bulk of her foundation's $38-million pledge to the Smithsonian Institution last month followed nine months of wrangling, mostly among the institution's officials themselves, over the nature of the project that Ms. Reynolds had proposed. The withdrawal of the gift, which was to pay for an exhibit on American achievers, represents the latest and one of the most public collapses of a donation, but it is not unique.

In 1995, Yale University returned a $20-million gift to Lee M. Bass, a wealthy alumnus from Fort Worth, who gave the money to establish a program in Western

Donors Increasingly Use Legal Contracts to Stipulate Demands on Charities

More and more donors not only want control over the gifts they make to charity, legal and fund-raising experts say, but they also are demanding that the terms of that control be put in binding, sometimes exhaustive, contracts.

The written agreements often contain a host of provisions beyond those that spell out how and when donors will make their contributions and how charities will spend the money.

For example, a contract may include a backup plan in case the charity ceases to exist or changes its mission. Or a contract may state that the institution will not challenge the right of the donor, or a representative of the donor, to sue to enforce the terms of the contract—a right typically reserved for state attorneys general.

A contract may also include what is known as a most-favored-nation clause, a provision directing an institution never to treat the gift or the project the gift underwrote any less favorably than other gifts or projects, such as when it comes to publicity or future upkeep.

Some contracts also stipulate how the proceeds gleaned from research projects financed by donations will be split and spent.

Provisions setting out penalties if beneficiaries do not meet the contracts' terms also are becoming more common. Such provisions, called Sword of Damocles clauses—after the threat faced by the Greek courtier Damocles, who, legend says, was seated at a banquet beneath a sword suspended by a single hair—may require gifts to be returned to donors' foundations, or be transferred to other charities.

Case Western Reserve University, for example, is bound by a contract with a donor to select for an endowed professorship a faculty member who belongs to a particular association of physicians. If the university does not choose a qualified individual for the post, the contract says, the money for the endowed position must be transferred to a similar institution that will appoint such a person. The contract even specifies who will judge whether a faculty member fits the criteria.

Duncan Hartley, associate vice president for development and alumni affairs at Case Western, says that the university found the conditions of the gift acceptable. Key, he says, is that the qualifications for the professorship spelled out in the contract are compatible with the university's standards.

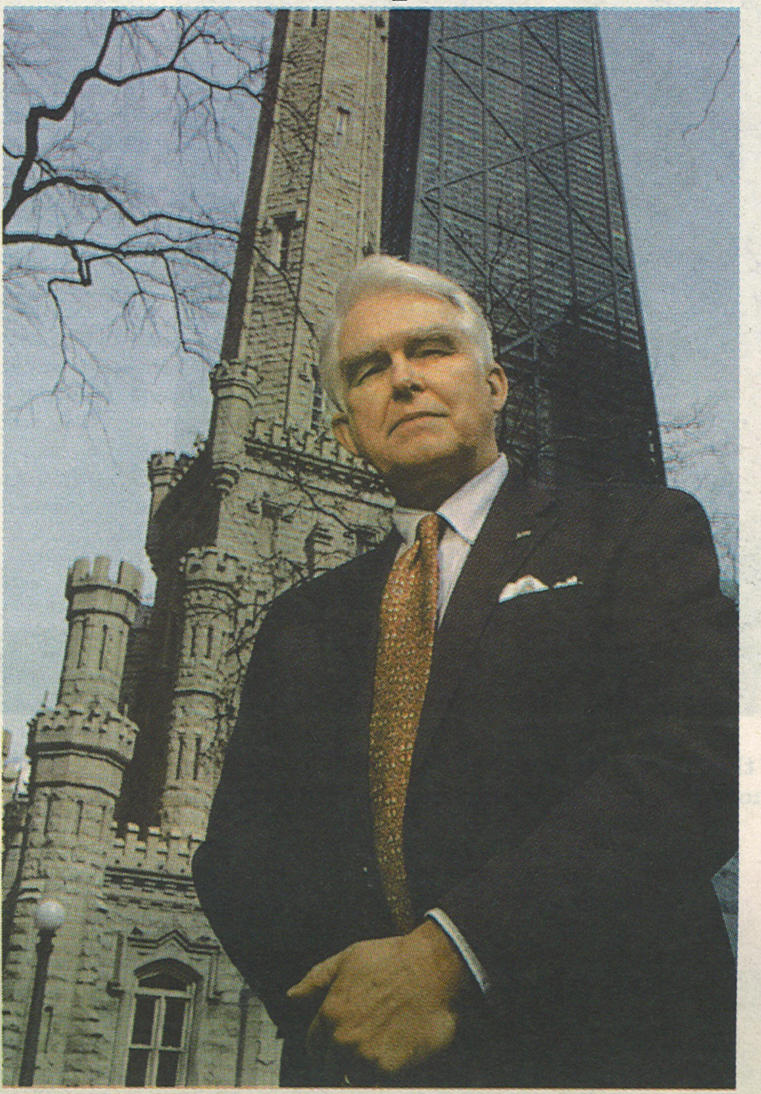
"We wouldn't agree to something we wouldn't feel perfectly comfortable carrying out," Mr. Hartley says. "And if it is something we believe in and the donor believes in, there's no reason not to feel comfortable making written assurances. It makes perfect sense that donors would want complete confidence that their money will be spent as they wished."

Protecting Charities

Still, Mr. Hartley and other charity officials say, nonprofit groups have to make sure their interests are protected, especially when donors make specific demands.

Frank J. Connors, a lawyer at Harvard University, says he favors adding language to gift agreements that give Harvard wiggle room in the event that it becomes impossible or overly burdensome to carry out a donor's wishes. For example, he says, an institution would need to maintain some discretion if a donor specifies that a gift be used exclusively for scholarships for students entering Harvard who have graduated from a certain secondary school.

Years after the gift is made, Mr. Connors says, the university could have "a scholarship fund generating a couple of million of dollars, but you have only five people graduating from the school, or there no longer is a school." In those circumstances, he says, "the university has to be able to use that money as it sees fit for other scholarships."



TODD BUCHANAN, FOR THE CHRONICLE

Retired fund raiser David W. Lawrence says charities should avoid "releasing too much control as the donor wants to become more involved."

David W. Lawrence, a longtime fund raiser who retired this year as president of the Northwestern Memorial Foundation, in Chicago, says that while many gift agreements protect the interests of contributors, they also can be shaped to help institutions handle what he describes as zealous donors.

"Some donors become more and more involved with a project, and come up with more ideas down the line," he says. "You want to try to put guidelines up front in the agreement so that you don't put the institution in the position of releasing too much control as the donor wants to become more involved."

For example, he says, an agreement could provide for the creation of a committee to hear the donor's future suggestions.

"That puts some insulation between the development officer and the donor," Mr. Lawrence says. "The donor reserves the right to enter into discussions about additional elements of the project, the acceptance of which would be determined through an established process. You wouldn't have a development officer out there having to say yes or no."

Over all, he says, a thorough gift agreement helps strike the right balance between donor and beneficiary.

"Everyone has a chance to buy into the particulars of the gift," Mr. Lawrence says. "Everyone knows what to expect."

—DEBRA E. BLUM

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civilization and wanted to approve the people who would teach in it.

Likewise, in recent years an academic medical center in the Southwest returned a $1-million contribution to a benefactor who was adamant that the center use the money to collaborate on research with investigators outside the institution. The center balked partly because the money was not originally earmarked for such collaboration, but also because the center's researchers did not approve of the outsiders' work.

And Davidson College, in North Carolina, refused an additional sum of money from a donor who had already given the institution $1-million because the benefactor offered the new gift on the condition that Davidson hang plaques around the campus featuring Bible verses chosen by the donor. The college had already fulfilled a similar request by the donor, but wanted to draw the line.

"We didn't want to be in the business of selling space for Bible verses, or appearing that anything was for sale just because a donor wanted to buy it," says Kristin Hills Bradberry, a Davidson spokeswoman.

Plenty of other organizations have faced similar decisions, eventually turning donors away.

A would-be donor to a Midwest hospital wanted his picture hung in the hospital's entryway, not in a hallway along with the institution's other benefactors. A prospective donor to a state university wanted to endow a scholarship for students from Roman Catholic families only. And a potential benefactor to a California university would give hundreds of thousands of dollars only if the institution agreed to teach a philosophy course for which the donor developed a curriculum.

Bending to Donors' Wishes

In other cases, institutions have bent to the will of donors. A hospital named its lobby for a $10-million donor even after the institution insisted it would not sell the naming rights because the building was already named for another benefactor. A university allowed a donor to endow a professorship in a narrow area of Buddhist art after the donor held firm to his wishes and indicated he would make future gifts to the institution for other uses.

"It's always a negotiation, and key to the process for the institution is to know thyself—know what's fundamental and what's around the edges," says Harold Skramstad, former president of the Henry Ford Museum and Greenfield Village, in Dearborn, Mich., who is a consultant to museums and other cultural institutions. "Agreeing to paint the lobby dark blue is not the end of the world. Agreeing to change the exhibits to fit a certain taste may signal the end of the world."

During a campaign to raise $15-million for two exhibits at the Henry Ford Museum, Mr. Skramstad says, the institution turned down more than $1-million from corporate donors making demands the museum would not meet, such as insisting their companies be featured in an exhibit about the history of American manufacturing.

Most often, though, says Mr. Skramstad and officials at other nonprofit groups around the country, fund raisers and donors can work together to reach agreement on gifts. In many cases, they say, the negotiations are subtle—one hospital told a particularly enthusiastic donor that she could help choose the artwork for a new part of a building that her money helped to buy, but that she could not, as requested, pick the uniforms for the hospital's staff. Officials at another hospital were able to gently talk a donor out of insisting that stained-glass windows be put in the atrium that bore her name.

Contract Provisions

Donors and fund raisers agree that the best way to manage donor expectations is to draft thorough written agreements that both sides discuss and sign. In the past, gift agreements commonly contained little more than a schedule of payments and a sentence or two explaining the purposes of the gifts.

Now, such contracts are likely to include specific language about exactly how the gift will be spent. For example, a Florida couple and a university recently signed a contract describing precisely how the institution will spend the couple's gift of tens of millions of dollars to create a medical-research center. Among other details, the contract specifies the number of researchers and laboratories the contribution is intended to cover.

But even with the proliferation of such contracts, some donors say they rely on much more than written agreements to make sure their wishes are met.

For example, Mr. Broad, the Los Angeles philanthropist, says that picking an institution he trusts and getting involved with the group before he makes a gift are vital. By making personal connections and gaining access at an early stage, he says, he can help ensure that the projects he may support will meet his expectations.

Mr. Broad sat on the seven-person committee that last year picked the architect for a $200-million redesign of the Los Angeles County Museum of Art. He now expects to be the project's major donor, having already privately pledged to the museum an undisclosed sum that he says tops his foundation's largest single gift to date, $23-million.

"It's my prerogative to say I don't think I want to put my name on a building by such-and-such architect," says Mr. Broad, chairman of SunAmerica, a financial-services company. But now that he is satisfied with the museum's decision, he says: "I can just give them the money and get out of the way."