

# Dilemma of Contingent Gifts

by Rita A. Fuerst

Rita A. Fuerst is Director of Development for the American Council of Teachers of Russian. For the previous 15 years, Ms. Fuerst was president and co-owner of The Bill Heim Company, providing management and fundraising counsel for charitable and philanthropic organizations.

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The most common and widely used definition of gift is the one used by the Internal Revenue Service. That definition is used because it forms the base on which most contributors and charitable and philanthropic organizations negotiate gift agreements that provide a charitable federal income tax deduction.

The Internal Revenue Service qualifies a payment as a gift based on its *intent, qualified recipient, greater good, and economic return*:

1. *Intent*. The contributor must intend the payment to be a gift. Discussions about determining intent have led to an objective test adopted by the U.S. Supreme Court: "The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return." *United States v. American Bar Endowment*.

2. *Qualified recipient*. The recipient organization must be qualified under section 170 to receive contributions.

3. *Greater good*. Any benefit the contributor receives through a gift must be outweighed by the greater good that society receives through the gift. For example, naming a library after the contributor confers special recognition on the contributor, but the contributor may not benefit to a greater extent than the service that the library provides to the community.

4. *Economic return*. Contributors may not receive items of substantial economic value in return for gifts, although the Internal Revenue Service does allow nominal acknowledgment items. Internal Revenue Service Publications 526, *Charitable Contributions*, and 1391, *Deductibility of Payments Made to Charities Conducting Fund-Raising Events*.

## Charitable and Philanthropic Gifts

In addition to the Internal Revenue Service definition, there is a basic, legal definition of a gift:



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*Inter vivos and causa mortis*. A gift must take immediate effect. If given during the lifetime of the contributor, it is called an *inter vivos* gift. If given pursuant to a will or testament, the gift is *causa mortis*.

Provisions set forth in wills are not immediately effective and are not gifts. These provisions are revocable at the discretion of the contributor, and the charitable and philanthropic organization may not take action nor rely upon these provisions as future gifts.

## Characteristics

A gift has three legal characteristics: intent, delivery, and acceptance. A transaction must meet all three characteristics to be a gift. Copilevitz, *The Potential Dilemma of Contingent Gifts*.

*Intent*. This requirement takes several forms. The contributor must have the mental capacity to make a gift. The contributor must be able to understand the nature of the transaction and its effects on the recipient organization as well as its effects on the contributor's financial situation. Minors and people with diminished capacity, by definition, lack the mental capacity to form the requisite intent.

A competent adult also may lack the necessary intent to make a gift if the contributor's free will is overcome through fraud, undue influence, or duress. Fraud is determined on a case-by-case basis; misrepresentation as to purpose or charitable activities of an organization are two examples of *bages of fraud* that could negate a contributor's intent.

