Q&A: Securing the Future of Restricted Gifts

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Question: I am hoping one of you can supply me with a model template for a Letter of Gift to use in the following situation: The trustee of a local foundation has offered us $50,000 earmarked to purchase the archive of an important local author whose work we collect. The author would prefer NOT to get all of the $50,000 at once, but wants to receive it in flexible chunks over the next 10 or so years, as seems best for his evolving tax situation.

Answer: Interesting problem. I can’t provide a template per se, but I can suggest some lines of a strategy based on working through a couple of similar situations.

First, I would clearly isolate the two halves of the question, that is, on the one hand, write an agreement with the foundation that establishes the purpose of the gift and your commitment to its expenditure for stated purposes. I doubt it would be wise to establish an endowment fund (which by definition permanently preserves the capital), but it should be possible to put the funds in an interest bearing account. The foundation might agree that any consequent accumulation beyond the purchase price could be used to meet account service fees or perhaps be put to work organizing and preserving the collection. The foundation might find this an additional appealing feature of the gift.

Second, on the other hand, you would need a firm understanding with the author, entirely independent of the agreement with the foundation (but which makes clear that execution of the author agreement is dependent on receipt of the foundation gift). This agreement should describe the material being purchased as the writer’s “life archive” and this should be defined appropriately to include all materials currently available as well as all materials accumulated in the course of his working life.

It may be necessary to define what “working life” means (something like “materials created and accumulated by X as long as X continues to perform the ordinary functions of a writer by creating manuscripts, publishing or attempting to publish, corresponding with colleagues, lecturing,” etc.) The point is not to leave loopholes via which either the author or his heirs can “slip out” a few important manuscripts for separate sale.

In this regard your legal counselors may recommend language with which the author and his estate agree to support (and perhaps pay total or partial costs of) recovery of materials.
properly a part of the collection but which happen to stray elsewhere. This may in turn prompt some language on the jurisdiction in which and the method by which disagreements are negotiated or resolved (e.g., arbitration rather than the courts).

The core part of the agreement, however, will be an unambiguous clause detailing the structure of payments. The total might be divided into annual (or other periodic) payments or they might vary in size, but it is essential to spell out unambiguously what the author’s expectation is (as well as what, if anything, he must do: e.g., “… notify the University not later than November 15 as to the payment expected for the current year”) as well as the institutional obligation to cut the checks (“within 30 days of xyz”).

If you agree to a variable amount, you may want to cap it on both ends, e.g., “… annual payment shall not be less than $XXX nor more than $XXXX,” unless you or the author want to leave open the option of delivering a lump sum residue at some point in the payment process. The author might want to retain this option as insurance against a special need, e.g., unexpected medical expenses.

Finally, you will have to work out what is to happen should it become impossible to complete the agreement because of the author’s death. Does the residue go to his estate? As lump sum? Per the payment schedule? Might it convert to a fund to organize, preserve and promote the collection?

This is a case where you should seek the advice of counsel after you have an acceptable general understanding with the trustee and author. Either or both of them may very well opt to review final drafts with their counsel. It is unwise to attempt to put the agreements in place on your own: much too much chance that you are setting the groundwork for nasty misunderstandings and disagreements down the road.

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