

This article presents general guidelines for Ohio nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

When Donor-Imposed Gift Restrictions Outlive Their Purpose, Ohio Charities May Have a Way Out

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For many charitable institutions, accepting gifts subject to certain donor-imposed restrictions is a normal course of business. While unrestricted gifts are generally preferred by charities, gift restrictions can be a good way to assure donors that their contribution will not be used on projects beyond the donor's specific intent.

But what about those restrictions that have outlived their purpose or failed to evolve with the times? Perhaps a gift was intended to support the maintenance of a specific building or the operation of a specific program that no longer exists. Or perhaps a gift has appreciated to such an extent that the full amount could never possibly be spent on its original purpose alone. Or maybe a gift required the creation of a certain program, but the administrative and operating expenses are so great that its original purpose is defeated.

In these types of cases, the restriction can outweigh the benefit of the gift, burdening the charity and sometimes even rendering the gift useless. This is particularly common for gifts made many years or decades ago where the restriction is the only thing that has not changed. Fortunately, when these situations arise, Ohio law affords charities the opportunity to release or modify the restriction under certain conditions.

Modification by Donor Consent. The first and often most efficient method of releasing or modifying a restriction is through the consent of a living donor, so long as the gift continues to be used for a charitable purpose of the institution. Before approaching a donor, however, thoughtful consideration should be given to the necessity and scope of the release or modification, and the charity should be able and willing to articulate not only the reason for the desired change, but how the change will continue to serve the donor's purpose while better serving the charity's purpose. This may be a

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delicate line for some charities and donors. It's important to remember that one burdensome gift restriction is almost always better than a reputation for bad donor relations.

Modification by a Court. In circumstances where donor consent is not feasible or even possible, a charity may apply to the local probate court for release or modification regarding the *management or investment of a gift* if the restriction has become impracticable or wasteful, if it impairs the management or investment of the gift, or, if because of unanticipated circumstances, a modification will further the purpose of the gift. To the extent possible, any modification must be made in accordance with the donor's probable intention.

A charity may also apply to the court to modify the *charitable purpose of a gift* if the restriction becomes unlawful, impracticable, impossible to achieve, or wasteful. In this case, the modification must be made in a manner consistent with the charitable purpose expressed in the gift instrument.

In its application, the charity should articulate the amount and manner in which the funds from the gift have been used in accordance with the restriction prior to the application, the reason(s) why the restriction qualifies for release or modification, and the charity's intended use of the funds upon approval of its application. The charity should also provide to the court a clear understanding as to the donor's reason for the restriction, to the extent known, as well as a copy of the initial gift instrument and the charity's proposed changes to the language of that instrument.

In each case in which court approval is sought, the Ohio Attorney General must be made a party to the action. However, prior to filing in court, a complete application may be submitted to the Attorney General's office for advance approval. If approved, the Attorney General will provide a consent to the change and a waiver of its further involvement. If the application is initially rejected by the Attorney General, it may be amended and re-submitted to the Attorney General prior to submission to the probate court.

Unilateral Modification. Finally, for gifts made more than 10 years prior with a current value of less than \$250,000, an easier path to relief exists. If a charity deems the restriction of such a gift to be unlawful, impracticable, impossible to achieve, or wasteful, the charity may release or modify the restriction on its own after providing 60-days advance notice, via certified mail, to the Attorney General (assuming the Attorney General does not object during this period) as long as the gift has been and will continue to be used in a manner consistent with the charitable purpose expressed in the gift instrument.

Not every gift restriction should be released or modified, but when qualifying circumstances exist, charities should know that relief from an outdated restriction is possible.

If you are a client and would like to discuss your organization's particular situation or if you have questions regarding donor-imposed gift restrictions, please contact us at info@pbpohio.org.

If you are not a client but would like to apply, please contact us at info@pbpohio.org.