



Thou Shalt Not Alter Thy Gift Annuity Agreements

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By Jeffrey Frye, PG Calc Associate Director for Gift Planning

This question comes up from time to time: can the non-profit organization that is sponsoring charitable gift annuities modify its templates for the gift annuity agreements? Sometimes a person at the sponsoring charity wants to change portions of the agreements from an aesthetic standpoint – they want the language to be more flowing, or they have unique terminology they would like to be incorporated into the agreements. In other situations, there is concern about the technical aspects of the agreements – perhaps a consultant or some other outside advisor thinks the terms should be stated differently. Whatever interest there is – however well-intended – behind the idea of modifying the gift annuity agreement templates, our general recommendation is NO! – don’t do it – don’t even think about doing it, except, of course, on the advice of your legal counsel. Let’s discuss some of the reasons why.

The gift annuity agreement is the official document binding the sponsoring charity to the obligation of making payments to one or two individuals for the rest of their lives – no matter how long they live. And we all know, people with charitable gift annuities live longer than anyone else! All kidding aside, the agreement to make payments is a binding contractual arrangement, and if the charity fails to make payments, the annuitants can take the charity to court. Moreover, should the sponsoring charity run out of money and go out of existence, CGA annuitants would be treated as general creditors in any court proceedings.

Starting with the Basics

This much we can say: the gift annuity agreement – in all its different variations – is not actually carved in stone. In fact, there is no standard template issued by the federal government, or by any state or jurisdictional government. Instead, the gift annuity agreement is a legal interpretation of a combination of requirements mandated at the federal, state, and other levels.

PG Calc’s gift planning software – the cloud-based *PGM Anywhere* and the desktop version *Planned Giving Manager* (or “PGM”) – produce a variety of charitable gift annuity agreements,

depending on a number of parameters. It makes a difference how many donors are involved, how many annuitants there will be (either one or two), the relationship between donors and annuitants, and whether or not the payments will be deferred. In addition, there are places for the names of donors and annuitants and their corresponding addresses, as well as the amount of funding and the specific payment amounts. There is also a fair amount of “static” data that is stored in the application, including the name and address of the sponsoring charity, and the name and title of the person signing the agreement on behalf of the organization.

Defining the Specific Terms

It's important to understand what the gift annuity agreement does, and what it does not do. The agreement is memorializing the intent of the parties: the donor to make a contribution in exchange for the annuity stream, and the charity to make payments as agreed to. The first paragraph of the agreement confirms in writing what the donor or donors have already done – made the gift. We created a [Sample Two Lives - Joint and Survivor Funded with Jointly-Owned or Community Property Immediate Payments Gift Agreement](#) for reference, and we'll quote portions of it here. The first paragraph reads as follows:

Transfer of Property by Donors

THE CHARITY certifies that the Donors, as an evidence of their desire to support the work of THE CHARITY and to make a charitable gift, on January 9, 2023 contributed to THE CHARITY the property described in Schedule A attached hereto, the fair market value of which is \$10,000.00.

This is a critically important provision, and any thoughts about removing or making significant changes to this section should be put aside.

The second paragraph is where we get down to the business of the sponsoring charity becoming obligated to make payments. It reads as follows:

Payment of Annuity

In consideration of the property transferred by the Donors, THE CHARITY shall pay to the Donors during their joint lives, and then to the survivor during his or her life, an annual annuity of \$570.00 from the date of this Agreement.

This verbiage is clear and direct and to the point; it states the charity's obligation to pay in the appropriate legal manner. There should be no consideration of any possible modifications to this paragraph.

Some Things Are Optional But Highly Recommended

One of the subsequent areas frequently questioned by gift planning professionals is the Payment Correction paragraph. It starts out this way:

Payment Correction

If the stated birth date of either of the Donors should be found to be incorrect at any time, the amount payable or benefit accruing under this Agreement shall be such as would have been provided according to the correct birth date.

[See additional text in the sample]

The point of this paragraph is to allow the sponsoring charity to modify the terms of the agreement based on the correct date of birth(s). We're not suggesting any malfeasance – we've never heard of any donors deliberately providing incorrect dates of birth – but the concern is that, inadvertently, the birth dates provided initially will not be accurate. Since the gift annuity agreement is irrevocable and cannot otherwise be altered, it is necessary to carve out a special provision for the protection for the charity. Three states (New Jersey, New York, and Washington) require this provision, but we strongly recommend that the clause be included in all agreements for all states.

Some Things Are Simply Required

Another area that is often questioned is the Irrevocability, Non-assignability, and Termination paragraph. It begins as follows:

Irrevocability; Non-assignability; Termination

Except as provided in Paragraph 7, this annuity is irrevocable. This annuity is also nonassignable, except that it may be assigned to THE CHARITY. THE CHARITY's obligation under this Agreement shall terminate with the regular payment preceding the death of the survivor of the Donors.

[See additional text in the sample]

This is yet another important section, in that the gift annuity arrangement must be irrevocable in order for the donor to receive a charitable income tax deduction. The non-assignability portion is specifically required for the ratable reporting of capital gain if an appreciated long-term asset is contributed. Note that the non-assignability clause includes an exception for assigning the annuity to the charity.

There is an important distinction between revoking the arrangement and giving up the life income interest. Revoking would mean that the donor could "take it back," and that is expressly prohibited. But on the other hand, the annuitant may at any time officially relinquish his or her life income interest, thereby accelerating the charity's use of the residuum. In some cases, there may be a charitable deduction available to the annuitant who takes this action.

Legacy IRA QCD Funding a Charitable Gift Annuity

As a side note, the recent **Secure Act 2.0** legislation (informally known as the Legacy IRA Act) allows for a charitable gift annuity to be funded with a Qualified Charitable Distribution (QCD) from a traditional IRA, up to \$50,000 as a one-time occurrence, but the agreement must specify that the CGA is non-assignable, period. There can be no exception stated in the agreement for the annuitant to assign the interest to the sponsoring charity.

Some Things Are Complex and Confusing

The section that our clients ask us about most often is probably the Power to Revoke Payments section. This language will only appear when there are two or more persons involved in the gift annuity arrangement. The easiest example is when the donor is not the annuitant; with this language, the donor reserves the right to revoke the future payments of the annuitant, typically either during life or at death (by means of a will). This is actually a concept used frequently in estate planning to prevent transfers of wealth from being considered as completed gifts. With a gift annuity, when the donor is not the annuitant, the power to revoke future payments means there can be no gift tax up front on the establishment of the gift annuity. Instead, each year's annuity payments will be considered as potentially taxable transfers for gift tax reporting purposes.

The most difficult variation of this power to revoke is when the gift annuity is funded by two persons – specifically, a married couple – to benefit them both as annuitants. The language in our sample agreement begins as follows:

Power to Revoke Payments

a. John Smith reserves the power to revoke the survivorship annuity payments for Mary Smith attributable to his one-half interest in the joint property transferred under this Agreement.

There is a similar provision for the other spouse. [*\[See additional text in the sample\]*](#)

The critical point here is that John Smith essentially owns one half of the annuity, and his wife, Mary Smith, essentially owns the other half of the annuity. They are only reserving the right, in the event that they die first, to prevent their 50% of the annuity to be paid to the other person as a successor annuitant.

This might not make sense at first blush – why would a husband reserve the power to revoke his wife's right to receiving his 50% of the annuity, in that case that she survives him? And why would there be a mirror version of the clause for the wife? To the casual observer, it might seem like this would only be appropriate in the case of the couple parting ways and obtaining a divorce in the future. Those situations, although rare, certainly do occur in real life. But the clause is about more than that. The reality is that we don't know what changes the future will bring, not merely in terms of the relationship between the husband and wife, but also, in many other ways. Tax laws will certainly change over time, and there may be a need at some point in the future for a spouse to minimize the income of the other spouse as a survivor.

But Enough Fun and Frivolity – Let's Wrap This Thing Up

We hope this discussion demonstrates the complexities of the gift annuity agreements and how important it is to follow the standardized formats. There are legal concerns overall, but also, there are compliance issues at the state level. The regulations for charitable gift annuities vary from state to state, and PG Calc does extensive research on the laws of all 50 states and other jurisdictions (like Washington, DC). We know how the gift annuity agreement should look if the donor is from the state of New York and the charity is in the state of California. Any modification of the gift annuity agreement in that case might risk being rejected and disqualified by the

regulating authorities of either state. In addition, some states require that forms of agreement be submitted and approved for use as part of the registration process. Any modification of an agreement, without first obtaining approval on the new form of agreement, would be a violation. In a future blog post, we will take up the challenge being felt by charities that have annuity agreements on file in one or more states. These agreements likely include fixed language stating the annuity is non-assignable except to charity, whereas the new law doesn't allow the "except to charity" language.

For all these reasons and more, it's best for sponsoring charities not to attempt any substantive alterations to their gift annuity agreement templates. We won't go so far as to assert that no changes can ever be made to the agreements, but we're recommending, as much as possible, that charities stick with the already-approved versions of the agreements. It can be far too much work – and far too costly – to go through the process of making changes and waiting for approvals of those changes. As the old sayings go, stick to the tried and true, and if it ain't broke, don't fix it.