

# Donation by Will



## Options and Issues Regarding Gifts of Cash, Land, and Other Property

Donors who want to help a worthy charity but also need to ensure that they have sufficient assets to live comfortably until life's end may choose to make some gifts via their wills.

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## INTRODUCTION

Donations by will have been widely used for centuries to distribute to charities some or all of a donor's remaining assets upon their death.

Donors sometimes hesitate to make a substantial donation of cash, land, or other property during their lives because they are concerned of the risk that they might unintentionally deplete assets that they will come to need later in their lives. A gift by will—a will being something that they can change at any time—avoids this concern.

Unrestricted gifts of cash or items of personal or real property that can be converted into cash may come as

delightful, and much appreciated, surprises to the recipient. That's not always true with [gifts restricted to a particular use](#). If it is the donor's intent to restrict a gift's use (or transferability to another organization), the charity should be consulted in order to ensure that the organization will want to accept and manage the planned gift.

Donation by will may help donors achieve goals of both supporting conservation and avoiding or [minimizing state inheritance](#) and [federal estate taxes](#).

## Types of Gifts

### Bequest

A gift of cash or other personal property by will, sometimes called a *bequest*, can be made in a specific dollar amount or calculated as a formula based upon other requirements of the estate. A gift can be unrestricted or can be given for a specific purpose. It can be to a specific organization, or, in the will, the donor can give the person(s) administering the estate (the "personal representatives") the power to identify the recipient—the beneficiary of the gift.

### Devise

A gift of land or other real estate interests by will, sometimes called a *devise*, can be made of the entire ownership interest, a percentage interest in common with others, or a remainder interest after the lifetime of some individual or individuals identified in the will. The will may authorize or direct the personal representative to donate a [conservation easement](#) on a property to a conservation organization before it is conveyed out of the estate in accordance with the terms of the will.

## Unrestricted Versus Restricted Gifts

### Gifts to Support an Organization's Broad Purposes

Donations of cash, shares of stock, or other items of personal property that can be converted into cash are always welcomed by conservation organizations. Unless the donor specifies otherwise, the donation, and any earnings generated by investment of the donation, can be used by the conservation organization in support of its general operating expenses or other specific purposes designated by its board.

### Gifts That Have Conditions or Restrictions

Donors intending to place [restrictions on their gift](#) should have a candid discussion with likely recipients of the gift to confirm the acceptability of the gift and their capacity to maintain and use the gift consistent with the intentions of the donor. This discussion may be on a confidential basis for the protection of both the donors and the prospective recipients. Absent a contractually binding obligation to make a gift, a will can always be changed up to the moment of death. If there is an expectation that the recipient will invest time and resources, or forego other opportunities, in reliance upon the expected gift by will, then it would be appropriate to enter into a mutually binding [donation agreement](#) to assure that those expectations will be met.

A donor's failure to communicate with the receiving organization regarding the donation of a restricted cash gift, land, or easement can mean the organization is not fully prepared or even equipped to comply with the wishes of the donor. In some cases, it may not be clear to either the organization or the decedent's personal representatives what the donor intended regarding future use and transferability of the donated property.

### Communications to Affirm Gift

A donor's failure to communicate with family members or trusted advisors about the gift may raise suspicions of undue influence by the organization receiving the gift. Family members may raise issues of legal competency if the donor was of advanced age when including the gift to

the organization in the will. Particularly if the family members' expectations of what they should receive from the decedent are not met by the will, they may challenge the legitimacy of the gift in court.

To head off such challenges, donors sometimes establish video records of themselves explaining their intent to make the gift, showing that they are taking the action fully informed of the consequences, and demonstrating their competency—that they possess full mental capacity—to make good decisions. Such video records may be made on multiple occasions to further buttress the legitimacy of the gift.

## DONATION OF CASH OR OTHER PERSONAL PROPERTY

### Donor Restricted Fund

The will should clearly indicate whether the donation is to be used only for a particular purpose (a donor-restricted fund), whether a particular purpose is recommended but not obligatory, or whether the gift is unrestricted. If the gift is restricted by the donor, the will should make clear whether it is the donation only, or earnings on it as well, that are restricted. If a conservation organization accepts a donor-restricted fund, it accepts the legally binding obligation to use the fund entrusted to it only for the purposes intended. A diversion of use not sanctioned by appropriate legal authority would be a serious breach of trust.

### Board Restricted Fund

When the donor *desires but does not require* the donation to be used for a particular purpose, and the conservation organization also desires the same result, the use of the fund (and, if so desired, future earnings) may be designated for that purpose by resolution of the governing board. While such a restriction is a strong statement of policy by that governing board, a fund restricted only by resolution of the board may be diverted to other purposes should a future board resolve to do so.

## Specification Versus Flexibility

Individuals may provide for a cash donation of a specific amount in their will; however, that may or may not be the right choice for an individual depending upon a number of factors that an attorney experienced in estate planning will be able to discuss with the donor. Among other alternatives to be considered is donating a portion—calculated by a formula—of the residual value of the estate or a class of assets within the estate.

Individuals may make a will with decades of life expectancy remaining. Although they may support the mission of conservation of natural resources, they may not be ready to specify a particular conservation organization so soon. The donor's circumstances may change—relocation to another part of the country, for example. Their desire to support a particular organization may change as well over time. In that case, the will could authorize the personal representative to identify one or more conservation organizations that will benefit from the gift. It is up to the donor to keep the personal representative advised of his current intentions.

## DONATION OF LAND

### Due Diligence

Conservation organizations need to approach donations of real estate interests, whether by will or otherwise, with the same caution as other land acquisitions. Before accepting the gift, the conservation organization should request pertinent information from the prospective donor or donor's personal representatives: any title, survey, leasing, appraisal, or other information they may have as well as any environmental or other inspections pertaining to compliance with applicable laws. If that information is not sufficient, or cannot be relied upon, to make an informed decision as to whether to accept the property, then the conservation organization should do its own due diligence before acceptance.

Similarly, donors may want to perform their own due diligence before committing to the donation to check that prospective recipients have the commitment and the capacity, both financial and otherwise, to maintain and use the donated property as intended.

### Financial Analysis

Ownership of land is not like ownership of a stock or other investment assets. Marketable securities come with the risk that their value could plummet so as to be worthless, but that's the worst that can happen. The owner isn't called upon to invest any more money in the asset. That's not so with real estate. Taxes, insurance, and other carrying charges need to be paid in the interim ownership period even if the plan is to put the property on the market immediately upon receipt of the gift. If the conservation organization cannot afford to take that cash flow risk, then alternatives need to be considered; for example:

1. To have the estate sell the property and distribute the net proceeds to the conservation organization;
2. To arrange for a loan, secured by the property, for the estimated carrying cost over the estimated resale period; or,
3. To stipulate a cash contribution in addition to the donation of the property to cover that cash flow shortfall.

### Restricting to Preserve or Other Programmatic Use

A donation of land restricted to use as a nature preserve or other specified use by the donor must be approached with a higher level of scrutiny both on the part of donor and prospective recipient. The first issue is whether ownership and operation of the property for the specified use is consistent with and in furtherance of the mission and goals of the conservation organization. The second issue is the financial feasibility of owning and operating the property for the specified use for an indefinite period of time. Donation of a property that can generate, on its own,

sufficient revenue to support both its costs of ownership and its programmatic use is rare indeed.

The donor should recognize that the governing board of the conservation organization needs to evaluate, before acceptance of a land donation, whether the organization has or will have the capacity to manage the land without draining resources from organization activities of potentially higher priority. If not, the donor may need to provide for a cash contribution in the will to provide an endowment fund that, when invested at a reasonable rate of return, will provide sufficient funds to subsidize the ownership and operation of the property over an indefinite period of time. And even if management of the donor's land would be one of the organization's highest priorities, the donor may still have a strong interest in providing an endowment fund to ensure that the organization's other activities do not suffer as a result of the donor's land gift. The expectations of donor and prospective recipient as to the prudent investment and appropriate use of endowment funds should be documented by a [donation agreement](#).

It is, to say the least, awkward and frustrating for a conservation organization to turn down a gift from a well-meaning supporter who did not discuss the matter beforehand. On the other hand, a governing board that accepts an impractical gift of land so as to maintain good public relations with the family or community has created a huge problem for a future board. No charitable organization wants to risk being placed in the position of having to petition a court to terminate, or otherwise change, the terms of the charitable restrictions under which a property has been entrusted to it. In situations where an organization does petition a court, it is usually the last resort, coming after the assets of the organization have been drained subsidizing an inadequately endowed preserve property.

## OFFERING ACQUISITION OPPORTUNITY

Owners of high conservation value land may want to provide in their estate plan, if an outright donation is not feasible, an [option to purchase](#), perhaps on a bargain basis,

or a [right of first offer and right of first refusal](#) in favor of a conservation organization. This allows the identified organization the opportunity to acquire the property at or, in the case of a bargain-sale, below the value appraised for estate tax purposes. At little or no cost to the owners, an acquisition opportunity provided by will could be a strong incentive to the identified conservation organization to raise the funding necessary for the acquisition over the remaining life expectancies of the owners.

## DONATION OF CONSERVATION EASEMENTS

### Instructions to Donate

Many good stewards of conservation-worthy properties do not want, or need, the oversight of a conservation organization while they remain owners of the property. They do, however, want to provide for long-term stewardship when they are no longer able to do so. They may do so by providing in their will that a conservation easement be imposed on their property before it is, as per their will, transferred to another beneficiary or sold by the estate. A conservation easement, whose terms are mutually agreed to by the donors and the identified easement holder and is incorporated into the will, assures that the desires and needs of both the donor and recipient will be met.

If there is a substantial life expectancy remaining, it is advisable for the donors to authorize the personal representatives to make such changes as are reasonably necessary or desirable to adjust the easement document to then-current conditions and practices. A stewardship donation, which a conservation organization will likely need in order to be able to accept the conservation easement, should also be worked out in advance and included in the will subject to adjustment to then-current currency values.

### Election to Donate

As long as the personal representatives are authorized by the will or applicable law to make donations of the assets

of the estate, they may elect to donate a conservation easement on that property before the filing of the estate tax return. There are federal and, possibly, state tax benefits for electing to do so that are discussed below.

## Tax Benefits Regarding Easements

### Donation During Lifetime

A conservation easement granted by a decedent before death will reduce the value of the property for both federal estate tax and [state inheritance tax](#) purposes. Not only will the property subject to the conservation easement be valued *as restricted* for estate tax purposes but the donor will also have the opportunity to deduct the [appraised value](#) of a charitable donation of a conservation easement—that meets the requirements of [§170\(h\) of the Internal Revenue Code](#)—during the donor’s lifetime.

### Post-mortem Donation

If the deceased landowner failed to grant a conservation easement while alive, the personal representatives can still take advantage of a tax benefit by donating a conservation easement before the filing of the estate tax return. If the conservation easement otherwise qualifies as a charitable contribution under §170(h), the appraised value of the conservation easement can be claimed as a charitable deduction for estate tax purposes under the authority of [§2055\(f\) of the Code](#).

### Federal Estate Tax Exclusion

If property included in an [estate is restricted by a conservation easement](#) that qualifies as a charitable contribution under §170(h), up to 40% of the value of the eased property may be excluded from the value of the estate for purposes of estate tax. This exclusion, subject to certain qualifying factors set forth in [§2031\(c\) of the Code](#), applies whether the conservation easement was granted during the deceased owner’s lifetime or after death. The exact percent reduction depends on the extent to which the conservation easement reduces the value of the property. The maximum available exclusion from estate tax is \$500,000. The personal representatives administering the

estate must weigh the benefit of the partial exclusion under Code §2031(c) against the detriment that the excluded property will not get the advantage of a stepped-up basis for tax purposes. In other words, when the property is eventually sold, the then-owner will pay tax based upon the gain realized over the deceased owner’s investment in the property—not fair value as of the date of death.

The guide [Reducing Federal Estate Tax](#) provides more explanation.

### State Inheritance Tax Benefit

The guide [Reducing Pennsylvania Inheritance Tax](#) explains the 50% reduction in valuation and tax-exempt transfers for inheritance tax purposes of land subject to an agricultural conservation easement.



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