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**The Ethical Gift Planner: Avoiding  
Mistakes of Undue Influence  
Among an Aging Donor Base**

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NATIONAL ASSOCIATION of  
**Charitable Gift Planners**

## THE ETHICAL GIFT PLANNER: AVOIDING MISTAKES OF UNDUE INFLUENCE AMONG AN AGING DONOR BASE

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Development officers who spend their careers working in charitable gift and estate planning will at some point undoubtedly encounter a situation when they question a donor's ability to make a sound decision regarding a charitable gift. Gift planning in particular brings development officers into regular contact with older, and often elderly, donors. While some of the most satisfying work in charitable gift planning involves helping a donor create a philanthropic plan that will leave a legacy long after the donor - and often the development officer - is gone, developing relationships with aging donors also means dealing with potential issues of mental capacity. Upholding the highest standards of professional ethics and responsibility<sup>1</sup> means that development officers must learn to recognize the signs and indicators that a donor might lack the necessary mental capacity to make a gift and develop strategies for dealing with donors and their families when issues of capacity or undue influence arise.

### *America's Aging Population*

The number of Americans aged 65 and older is projected to more than double from 46 million to more than 98 million by 2060. Between 2020 and 2030 alone, the number of older Americans is projected to increase by almost 18 million as the last Baby Boomers reaches age 65.<sup>2</sup> For charities, this means that more and more of their donors are entering the phase of life where dementia and other cognitive impairments may begin to progress. Interestingly, over the past 25 years, the proportion of elderly Americans suffering from some sort of cognitive decline has decreased; however, due to the rapid growth in the American population over age 65, the total number of Americans experiencing some form of dementia or other cognitive impairment is increasing, and that trend is projected to continue.<sup>3</sup>

### *The Legal Standards for Lack of Capacity*

In the context of working with older donors on planned gifts, development officers should have a basic understanding of the legal standards for mental capacity. In general, legal capacity is defined as "the mental ability to understand the nature and effects of one's acts."<sup>4</sup> More specifically, testamentary capacity is "the mental condition a person must have when preparing a will in order for the will to be considered valid; this capacity is often described as the ability to recognize the natural objects of one's bounty and the nature and extent of one's estate."<sup>5</sup>

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<sup>1</sup> Partnership for Philanthropic Planning, *Model Standards of Practice for the Charitable Gift Planner*, states that "Gift Planners shall, in all dealings with donors, institutions and other professionals, act with fairness, honesty, integrity, and openness." [http://www.pppnet.org/ethics/model\\_standards.html](http://www.pppnet.org/ethics/model_standards.html).

<sup>2</sup> Population Reference Bureau 2015 analysis of U.S. Census data.

<sup>3</sup> Population Reference Bureau, *Today's Research on Aging: Program and Policy Implications*, No. 36, July 2017

<sup>4</sup> Bryan A. Garner, ed., *Black's law Dictionary*, (West Publishing Co., 1996), 79.

<sup>5</sup> Garner, *Black's*, 79.

Some states set the level of capacity needed to make a will quite low and may actually impose higher standards for the capacity to make a present gift, presuming that because a donor cannot change or revoke it, a present gift has potentially greater consequences for the donor. “Capacity to make a gift has been defined by courts to require an understanding of the nature and purpose of the gift, an understanding of the nature and extent of property to be given, a knowledge of the natural objects of the donor’s bounty, and an understanding of the nature and effect of the gift.”<sup>6</sup>

Consideration of a donor’s capacity may immediately suggest things like Alzheimer’s, dementia, and the like; however, incapacity can also include other issues such as mental illness, physical illness, or disability. Incapacity can have varying causes and may or may not be permanent. Capacity issues can also affect donors under age 65, such as those who suffer from drug or alcohol issues, although for most development officers, older donors are more likely to present issues.

The legal definition of capacity provides a starting point for development officers in their work with donors, but there are other considerations as well. A donor might technically meet the definition of legal capacity, and yet a well-intentioned but misguided or over-eager development officer could still overstep the acceptable boundaries and apply undue influence or take advantage of a vulnerable donor. The key word here is “undue” influence.<sup>7</sup> States define undue influence differently, but the general meaning involves some form of coercion or control over an individual that removes that person’s free will or causes them to fail to understand the consequences of their actions. Legal transactions executed using undue influence are voidable, as they are considered to have been obtained without consent. Of course, people influence each other every day, in ways that are entirely appropriate or innocuous. The critical concern here is to ensure that that persuasion never rises to a level of coercion or control.

Development officers should grasp the distinction between legal capacity and undue influence, as one can exert undue influence over an individual who technically meets the legal requirements for capacity. As representatives of charities and non-profits, and often in trusted relationships with donors, development officers must always maintain appropriate boundaries with donors to avoid even the appearance of improper influence.

### ***Signs and Indicators That a Donor May Lack Capacity to Make a Gift***

Responsible and ethical development officers must always uphold their responsibilities to the donor and the donor’s family. Those responsibilities include paying attention to the signs that a donor might lack the requisite capacity to make a charitable gift. If a development officer even suspects that a donor might suffer from a mental incapacity, that officer should

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<sup>6</sup> American Bar Association and American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, <http://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf> (2008).

<sup>7</sup> Undue Influence is defined as “1) The unfair or improper persuasion of one person by another who has attained a position of domination or power; consent to a contract, transaction, relationship or conduct is voidable if the consent is obtained through undue influence. 2) In the context of wills, coercion that destroys the testator’s free will and substitutes another’s objectives in its place; when a beneficiary actively procures the execution of a will, a presumption of undue influence is raised, based on the confidential relationship between the influencer and the testator.” Garner, *Black’s*, 644.

immediately suspend discussion of a charitable gift until the donor's capacity can be better determined.

Possible signs of lack of capacity include:

- Memory lapses
- Forgetting past meetings, conversations, or correspondence
- Confusion about unrelated things, like forgetting other meetings or appointments
- Changes in appearance, especially lapses in hygiene
- Lack of attention to cleanliness in person or environment
- Changes in basic personality
- Mood swings or inappropriate behavior

The above factors provide warning signs and possible indicators of incapacity but are not by themselves dispositive. Only through the relationship with a donor and/or the donor's family or advisors can a development officer truly judge whether a donor might lack the mental capacity to make a charitable gift.

Recognize also that older donors may exhibit many of the natural signs of aging that do NOT indicate a lack of or diminished capacity:

- Vision and hearing loss
- Physical infirmities such as trouble writing or diminished fine motor skills
- Taking more time to process thoughts or ideas
- Speaking more slowly
- Delayed reflexes
- Thoughts may wander more or not be as linear, may spend more time reflecting, repeating thoughts or concepts in conversation

### ***Strategies for Development Officers***

A development officer's ongoing relationship with a donor provides the single best strategy for assessing a donor's mental state and avoiding undue influence when a donor decides to make a charitable gift. Multiple visits with a donor over time provide a development officer with a baseline of "normal behavior" for a donor.<sup>8</sup> Repeat encounters also allow the development officer to refer to past conversations. If a donor consistently does not remember significant topics discussed in past visits, that donor may suffer from some cognitive impairment.

This brings up one of the most critical skills for successful development officers - the importance of active listening. With all donors, but especially elderly ones, a development officer needs to take care not to dominate the conversation, but to let the donor do much of the talking. Engage the donor in discussion not just about the donor's life story, but also about the specifics of a gift. The more an individual can articulate the details and consequences of a gift, the more likely that person truly understands and appreciates his or her decision.

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<sup>8</sup> By "normal behavior" we mean the usual, standard behavior of a particular donor, not a general value judgment of acceptable behavior. Virtually every development officer has at least one story about a donor who is eccentric, odd, or even downright inappropriate, but also entirely sane and competent. The key here is to look for changes in behavior beyond what is typical for that particular donor.

Development officers should also take care to schedule meetings with donors at places and times that will not tax a donor's energy reserves. Many development professionals routinely meet with donors at restaurants, coffeehouses, or other public venues; however, for some elderly donors, just getting from home to another location can cause great fatigue, and that fatigue can easily affect their judgment - or at least appear to - over the short term. Older donors also suffer frequently from hearing loss, which can make meetings at restaurants or other public venues difficult. The donor may not really follow much of the conversation but may be reluctant to acknowledge difficulty. This can create a scenario where the development officer incorrectly assumes that the donor wants to move forward to finalize a gift. Meeting in a donor's home, whenever possible, allows the donor to have more energy, to hear and understand the conversation, and to feel most comfortable in familiar surroundings. Moreover, meeting in a donor's home allows the development officer to observe the donor's environment, providing additional insight into the donor's mental state.

As previously noted, if a development officer suspects an issue of capacity, he or she should immediately suspend all discussion of a charitable gift. This does not mean, however, that the development officer should lose contact with the donor. Often, issues of capacity or judgment may be temporary, caused by fatigue or other more serious, but non-permanent factors. For older donors, medical conditions such as stroke or illness may create issues of mental capacity that are serious but often improve over time. While a donor may not have the ability to make a charitable gift right now, this does not mean that next year or even a few months down the road the donor won't be fully or sufficiently recovered and capable of exercising good judgment. Medications can also create issues of capacity and comprehension for a donor. Elderly people often take multiple medications, and these medications or the interactions among them can cause changes in judgment and behavior. Sometimes a simple adjustment to a donor's medication regimen can rectify these issues, at which time it would be fine to resume gift discussions with a donor.

Development professionals may want to involve family members or the donor's professional advisor in charitable gift discussions, to avoid potential allegations of exerting undue pressure on a donor. While family or advisor involvement is ideal, keep in mind that this is not always possible. The donor may not wish to inform family members such as children or grandchildren about financial and estate plans. A development officer may encourage open communication between a donor and the family, but ultimately the donor must make this decision. One exception to this would be a situation where the development officer *strongly* suspects that a donor may lack mental capacity. In this case, contacting a member of the donor's family to express concern could be the most responsible and ethical course of action. The development officer could also consider contacting a non-family member such as a donor's close friend, neighbor, minister, or doctor, if that seems like a more viable option.

Given the contentious nature of some families, a development officer might do better to contact the donor's professional advisor with concerns about the donor's mental capacity. Professional advisors - especially estate planning attorneys - are generally bound by law to maintain confidentiality regarding their client's affairs, so contact with an advisor would create few privacy concerns for a donor. The advisor may already have information as to the donor's legal situation and mental capacity, and if not, the development officer may be providing that advisor with critical information about the donor's capacity.

### ***The Importance of Donor Stewardship***

While charities generally understand the importance of donor stewardship to maintain a strong relationship with a donor, the right balance of stewardship communication with a donor can also help avert an allegation of undue influence. When a donor has made a charitable gift (whether during the donor's lifetime or through an estate plan), maintaining a relationship between the charity and the donor - or even better, the donor and the donor's family - can provide evidence that the donor's charitable gift was reasonable considering the donor's involvement with the charity.

Stewardship of a donor can take place through periodic personal visits by a development officer, but it can also happen through letters and e-mails. Communication and events with a charity's planned giving recognition society can further establish the relationship between the donor and charity. If the charity has a relationship with the donor's family members, that communication can also suffice. A charity can, however, have TOO much contact with a donor, raising suspicions of coercion or undue influence. Once a week or even once-a-month visits to a donor may be viewed with skepticism under the right circumstances. On the other hand, a few visits per year - perhaps with occasional written correspondence in between - would likely suffice to maintain a relationship with the donor but not invite examination.

### ***The Role of Professional Advisors***

Working with a donor's professional advisor can provide a significant advantage in overcoming issues or allegations of undue influence. As previously discussed, when a development officer suspects that a donor may suffer from a mental deficiency that could affect legal capacity, the best course of action may be to contact the advisor with those concerns. Understand that the donor's advisor will likely be bound by confidentiality requirements and may not provide information about the donor's condition or situation, but this should not deter a responsible development professional from expressing concern. In any case, the advisor may at least be able to confirm or deny the existence of a specific problem and that the donor is or is not capable of making a charitable gift.

A charity may have its own relationships with professional advisors independent of donors. Development offices that include charitable gift planning may have advisory councils or even just trusted groups of estate and financial planning professionals with whom a charity works frequently. Donors with long-standing relationships to a charity occasionally ask for referrals to estate planning professionals. While there is nothing inherently unethical about providing these referrals, charities do need to take care that they provide multiple names, and that they ensure that their relationship with these advisors remains professional. The professional advisor must also take care not to influence clients to make gifts to organizations with which the advisor has a close relationship.

Certain contact with professional advisors can be both ethical and even helpful to prospective donors of a charity. Providing a professional advisor with specific language for a bequest, trust, or beneficiary designation helps ensure that no confusion arises as to where the donor's charitable gift is directed or how it is used. Moreover, many professional advisors do not have a lot of experience with charitable giving. Part of a charity's overall gift planning strategy may involve educating the professional advisor community about the various types of planned gifts, and how they can benefit donors. This needs to be done honestly and thoughtfully, and without regard for specific gifts, but is otherwise entirely appropriate.

Many charities will encourage a donor to include the donor's professional advisor in discussions of charitable giving, especially where the gift discussions involve an estate or asset-based gift. While this is generally a good practice to follow, it is critical that the charity's representative NOT be present when a donor executes a will or other legal instrument that leaves a gift to charity but which the charity does not issue. The presence of

a charity's representative at such an event can serve as strong evidence of undue influence on a donor should such an allegation arise.

### ***Avoiding Allegations of Undue Influence***

The single most important thing a charity or development professional can do to avoid an allegation of undue influence or coercion is to keep carefully documented records of all contact with donors. Such documentation can and should include contact reports of personal visits and phone calls, and copies of e-mails, letters, or other written communications between the charity and the donor.

In the case of charitable gift annuities, charities by law must provide donors with a disclosure statement prior to the finalization of a gift. Similar (but not required) documents may be helpful when working with other charitable giving vehicles. Affidavits of recognition of disclosures for gifts made during the donor's lifetime - such as retained life estates or remainder interests in homes or farms - may prove especially beneficial should issues of capacity arise *after* the donor has made a completed gift.

### ***What to Do When a Family Challenges the Donor's Intent or Capacity and the Donor Can No Longer Provide Input***

Charities generally try to avoid becoming involved in litigation and conflicts with the family members of a donor, but sometimes the donor's family challenges the validity of a charitable gift made during the donor's lifetime. If the donor can no longer express his or her own wishes, due either to death or incapacity, the charity may have little choice but to enter into litigation or other talks about a donor's estate or charitable gift. In addition, when a donor has freely and with good judgment made a gift to a charity, not only is the charity entitled to that gift, the charity also has a responsibility to honor the donor's wishes and intentions.

If the development officer and the charity have complied with all the recommendations discussed herein, the charity can make a good case that no undue influence was used to obtain a charitable gift. Again, adequate documentation of the donor's relationship to the charity provides the best evidence in these cases. If the professional advisor has been involved in the process, he can also provide powerful evidence and testimony to substantiate the donor's capacity and intent. The best-case scenario is one where allegations of undue influence or lack of capacity never arise, but should such allegations surface, the aforementioned strategies can help a charity successfully navigate the conflict.

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