

Charitable giving is a powerful tool for individuals who want to make a philanthropic impact. Before completing a charitable gift, however, it is important to consider the specific circumstances of a donor that may affect the donor's understanding or legal capacity. Prospective donors at any age can experience declines in capacity due to age-related issues, medical conditions or grief. These changes in capacity may also increase a donor's susceptibility to manipulation and pressure, leading them to make financial decisions they might not have made otherwise.

It is important to discuss and analyze capacity issues, ensuring that donors, professional advisors and gift planners understand what to look for and how to implement steps to prevent misunderstandings. In this article, we will explore how lack of capacity can affect the gift planning process, how to spot the signs of incapacity and steps that advisors and gift planners can take to protect themselves and donors. By understanding how charitable giving is affected by capacity concerns, nonprofits and advisors can ensure a responsible approach to philanthropy.

Understanding Capacity

Professional advisors and gift planners must proceed cautiously when working with donors who may have capacity limitations. Failing to recognize and understand the signs of possible incapacity could cause significant issues for both the donor and professional advisors. Donors should only make a gift when they clearly comprehend the decision, including its potential benefits and consequences. Ethical concerns arise when there is doubt about whether the donor can legally and cognitively consent. Factors such as dementia, other cognitive impairments, the effects of medication or signs of confusion can contribute to a claim of incapacity or undue influence. Although rare, examples of disgruntled donors and beneficiaries sometimes do occur.

The concept of legal capacity arises in different contexts such as when executing a will, making lifetime gifts or signing contracts. Thus, the definition varies across jurisdictions and settings. For instance, the standard for legal competency to make a will in California may differ from the legal standard to sign a contract in New York. Some states presume that all persons have capacity to make decisions and be responsible for their actions. Under these conditions, a mental diagnosis alone does not negate capacity. Instead, to challenge an action based on lack of capacity, there must be a correlation shown between specific mental deficits and the acts in question.

Testamentary and lifetime gifting capacity standards are generally a low standard in most states while contractual capacity is much higher. To make gifts during life or at death, a person generally needs only the ability to understand the basic nature of his or her act (e.g., what their will accomplishes), have a general understanding of their assets and their values, know who their heirs or beneficiaries are and be free from delusions or hallucinations that affect their decisions. Capacity issues, however, are not always easy to define or spot. In addition, capacity can fluctuate over a period of time, making it challenging to observe.

Despite the low standard for testamentary gifts, charitable gifts could be challenged if questions arise concerning capacity. In addition, if someone later questions the validity of a gift on capacity grounds, claims of undue influence generally follow as well. While fraud is rare, there are instances where a donor or their family may later claim that someone pressured or coerced the donor into making a gift that he or she would not have otherwise made. Donors with cognitive impairments are more susceptible

to undue influence. While advisors do not make legal or clinical conclusions on a donor's capacity, their role is to protect donors by observing, documenting and exercising judgment.

Signs of Incapacity and Undue Influence

Just as there is no single definitive standard for capacity, there is no single test or question used to identify mental incapacity. It is important, however, to spot potential red flags. Signs of incapacity may include repeating questions or stories, forgetting familiar names or beneficiary names, confusion about the nature or size of the gift, difficulty recalling details of the charitable organization or gift planner and sudden changes in mood. Advisors should ask open-ended questions to confirm a donor's understanding of the potential gift and its effect on the donor's financial situation. Donors should also be encouraged to discuss the potential gift with family or other advisors. Knowing the indicators and encouraging openness can help ensure donors are capable of independently managing their financial affairs.

Signs of undue influence can be more difficult to identify since many fraudsters operate discreetly. Many cases of undue influence typically involve an individual who has isolated the donor, creating a sense of dependence and making the donor feel that no one is concerned about their well-being. Even a close, friendly relationship between a donor and advisor could be later scrutinized and criticized as unseemly. Where the individual exerting influence is a family member, identifying undue influence may be more difficult. While close family relationships often involve trust and discussions about financial and estate matters that are generally considered normal, undue influence can still occur in this context.

Advisors should not proceed with a planned charitable gift if there are any signs of concern. These may include signs that the donor has been isolated from family or advisors, wants to make a gift that is inconsistent with past giving, proposes a gift that harms the donor's financial well-being, insists on meeting in the presence of someone who is speaking for the donor or shows signs of confusion or hesitation. Any of these situations are potential indications that the donor's decision is not voluntary or free from outside pressure. If an advisor suspects undue influence, the advisor should pause the gifting process and take appropriate action which may include a referral to the donor's physician for evaluation, contacting adult protective services, requesting assistance from legal counsel or declining the gift.

Guidelines to Protect Planned Gifts from Challenges

Advisors and gift planners already understand the importance of avoiding pressure or manipulation of donors. It can be challenging, however, for advisors and gift planners to discern capacity levels. Establishing procedures and policies before meeting with donors can ensure best practices are followed. These practices include asking open-ended questions to confirm understanding and encouraging the donor to discuss the gift with family or other advisors. Consultation with independent advisors also comports with the code of ethical practices distributed by the National Association of Charitable Gift Planners. If it appears that the donor's comprehension is unclear or inconsistent with past conversations, avoid moving forward with the gift.

Proper documentation is also important since it protects both the donor and the nonprofit. Thus, advisors and planners should keep written records of conversations, confirm the donor's intent in writing and ensure legal documentation is completed by qualified advisors. In addition, advisors should only act within the bounds of their own profession. A donor may ask the advisor for a referral to an estate

planning attorney. While providing a referral may seem appropriate, it is preferable if the donor locates an attorney on their own to avoid the appearance of any conflicts of interest. Providing a list of recommendations assists the donor and is typically better than making a direct referral.

Example 1 During her lifetime, Donald's spouse was an active supporter of the local native plant society. The week after her passing, Donald contacts the organization and proposes a fund be set up in his wife's name for the purchase and restoration of 100 acres. During the phone call, Donald is emotionally distressed but expresses that his spouse "would have wanted this." The gift planner acknowledged the loss with genuine empathy. However, based on the nonprofit's policy guidelines, the planner notes that it is policy to delay accepting or facilitating major gifts in the immediate aftermath of bereavement. Because Donald appears to be very upset and is unable to maintain his composure, the planner recommends waiting a reasonable period before making the gift. The planner also advises Donald to consult with his financial planner to ensure that he has sufficient assets to afford this large gift. While grief is not the same as incapacity, grief can still significantly affect decision-making. Six months later, Donald contacts the organization again. After discussions with Donald and his financial advisor, the native plant society accepts Donald's \$10,000 gift to establish a memorial fund in his wife's name that will be used to pay for restoration of vacant lots around the city.

Nonprofits should enact policies that ensure ethical fundraising standards are met. Such a policy may include prohibitions on the following: accepting personal gifts from a donor, acting in a personal capacity as executor or trustee for a donor's estate, managing a donor's finances or witnessing the signing of a donor's legal documents. It is also important to implement policies with additional safeguards when donors are advanced in age or experiencing health issues that could affect their capacity. Some possible policy measures include conducting meetings with two staff members present, avoiding accepting gifts during hospitalizations and delaying major commitments until the donor can consult with their advisors. Another policy option is to recommend that the donor make large gifts in installments, either directly or through a donor advised fund (DAF). An installment gift can allow all the interested parties to see how the gift impacts both the donor and nonprofit, ensuring the donor's objectives are met.

Example 2 Amy, now in her 80s, is a longtime supporter of an arts foundation. She arrives to discuss a \$100,000 charitable gift annuity for the benefit of her daughter. Her daughter accompanies Amy to the meeting and frequently answers questions on Amy's behalf. The donor appears slower than in previous meetings but can articulate the gift's purpose when asked directly. The gift planner requests a private meeting with Amy to confirm her understanding of the gift amount, beneficiary and purpose. During their private meeting, Amy confirmed key details without assistance. In an abundance of caution, the gift planner next consults with her supervisor, and they agree to refer the donor back to her estate planning attorney and financial advisor to confirm the gift annuity aligns with Amy's estate plan and financial situation. After the meeting, the gift planner documents all observations and the steps taken.

Beyond comprehensive policies, large nonprofits often establish a Gift Acceptance Committee to review any "high-risk" gifts. These committees can review potential gifts from vulnerable donors or unusually large commitments to ensure that ethical standards are met before acceptance. Documentation related to capacity concerns should be retained indefinitely or for such period as required by applicable law and organizational policy. Given that gift disputes may arise years after a gift is made, it is critical to have a

complete record of events relating to the gift. Professional advisors may also consult the ethical rules applicable to their industry for requirements or guidance on records retention. By following these steps, nonprofits and advisors may reduce the risk of allegations of pressure, isolation or exploitation.

Conclusion There are many strategies that can be used to protect donors, nonprofits and advisors from challenges due to incapacity or undue influence. By understanding their role in the gifting process, recognizing signs of incapacity and proceeding with caution, advisors and gift planners can help individuals make philanthropic gifts at every stage of life.



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