

Estates and Planned Giving

This Section is divided into two major subsections. The first subsection provides a brief listing of the many services offered by the Presbyterian Church (U.S.A.) Foundation. The second subsection covers estates, trusts, and wills law generally.

A. Presbyterian Church (U.S.A.) Foundation

The Presbyterian Church (U.S.A.) Foundation (<http://www.presbyterianfoundation.org/>) has served the church and individual Presbyterians for over two hundred years. Through its services of planned giving, wills and bequests, socially responsible investments, and investment accounts, the Foundation has generated millions of dollars for the mission of the Presbyterian Church (U.S.A.). At the same time, individual Presbyterians benefit from their planned giving, tax benefits, and the joy of giving to the mission of the Presbyterian Church.

The Foundation has regional development officers located throughout the country. These individuals are available to serve individual Presbyterians, churches, mid councils, and Presbyterian-related institutions. **Call the Foundation at (800)858-6127 ext. 8919 to secure the name and contact information for the development officer in your region.**

Below is a brief listing of the services The Presbyterian Church (U.S.A.) Foundation offers.

Individuals

- Gift Annuities
- Deferred Payment Gift Annuities
- Pooled Income Funds
- Permanent Funds
- Revocable Life Income Funds
- Annuity Trusts
- Unitrusts
- Wills and Bequests

Churches, Presbyteries, Synods, and Related Institutions

- Planned Giving Consultations
- Training and Educational Programs

- Seminars and Workshops
- Investment Accounts
- Endowment Building

Socially Responsible Investment Services

- Professional Investment Allocation and Management
- Family of Five Mutual Funds

B. Foundation Publications

These excellent resources are available by calling the Foundation at (800) 858-6127 ext. 8919 or visiting the Foundation's Web site (<http://www.presbyterianfoundation.org/>).

Individuals

- Giving that Gives Back — life income plans
- Personal Record Book
- Guide to a Christian Will

Presbyteries, Synods, and Related Institutions

- Legacy of a Lifetime — planned giving and wills emphasis program resources
- Endowments: A Vision for any mission
- A Plan for the Present — a guide to generating gifts
- Boudinot Covenant Society — a donor recognition program
- Institutional Services

Socially Responsible Investment Alternatives

New Covenant Funds (<http://www.newcovenantfunds.com/>)

C. Law of Trusts, Wills, Estates, and Gifts

1. Trusts

An express trust is specifically established in written form. The writing is to meet the requirement of the Statute of Frauds that requires certain transfers of property to be made in writing. No specific language or particular words are necessary in establishing a trust, but the

intent of the settlor (the person or entity establishing the trust) to create a trust must be clear and unmistakable. The trust property and the beneficiaries must be described with certainty but no particular words or phrases need be used in these descriptions. The settlor must have legal capacity to create the trust. Consequently, persons who are mentally impaired or not of legal age may not create trusts due to their lack of capacity.

Inter vivos, or living trusts are those trusts, established by individuals during their lifetime that take effect prior to their death. Trusts created during the settlor's lifetime may be an irrevocable trust when the settlor has no power to revoke the trust or a revocable trust in which the settlor has retained the power to change or revoke the trust. Settlers wishing to pass a property interest to a trustee and beneficiary at the settlor's death may also do so in a duly executed will. Such trusts are known as testamentary trusts. Testamentary trusts are revocable by the creation of a subsequent will revoking the will in which the trust is created. This revocability is because such a trust is not considered operative until the settlor dies.

There is no requirement that a settlor receive consideration for the creation of a trust. However, a promise to create a trust is governed by the law of contracts. This promise may be enforced against the promisor if the promisor received consideration for making the promise. In evaluating any trust it is necessary to determine whether a trust has actually been created by an individual or whether that individual simply promised to create a trust. If a promise were made, a further investigation should be made to determine whether there was consideration for the promise.

2. Trustee Duties

Trustees of a trust are charged with three primary duties:

1. To follow the settlor's directions about the administration of the trust and the distribution of the trust income to the beneficiaries.
2. To act with prudence and care in administration of the trust assets.
3. To act with a high degree of loyalty to the interests of the beneficiary or beneficiaries.

The trustee-beneficiary relationship is a fiduciary relationship. The trustee is held at a very high standard of loyalty toward the beneficiary. A disloyal trustee may be required to restore the trust as it would have been had his disloyalty not taken place, such as a situation in which the trustee invests improperly to advance his own interests rather than those of the beneficiary. However, a legal and competent beneficiary may ratify a disloyal act of the trustee and if she does so, she will not be permitted to take further action against the trustee if she were fully aware of the trustee's disloyal act. Great care must be taken to see that the duty of care and the duty of loyalty are fulfilled in the administration of any assets for which the church is acting as trustee. The trust instruments should be examined by legal counsel to ascertain how the church may be sure to fulfill whatever legal obligations are placed upon it for administration of the trust.

Churches are often designated as beneficiaries of trusts rather than as trustees. As beneficiaries, churches are entitled to hold the trustees accountable for their actions and may bring a cause of action against the trustees should the trustees act in a disloyal or careless manner contrary to their duties of care and loyalty to the beneficiaries.

As stated above, trusts may be irrevocable or revocable. In the case of an *inter vivos* trust, the settlor may retain a power of revocation in the trust. The duration of the trust is determined by the terms of the trust instrument. It can be a specific term of years, the lifetime of a named individual, or whenever the purposes intended by the settlor to be accomplished by the trust are completed. Neither the death of the trustee nor of a beneficiary terminates a trust unless their lifetimes are the measure of the duration of the trust. Where a trust is created to fulfill a specific purpose, the interested parties generally petition the court for a decree of termination of the trust when the purpose of the trust has been fulfilled. A decree of termination also may be obtained should the beneficiary acquire legal title to the trust assets from the trustee or her successors. In any case, the courts look first to the trust instrument to determine that the intentions and desires of the settlor have been followed before granting a termination decree.

3. Charitable Trusts

Trusts whose beneficiaries are the public or a reasonably large class of the public (such as the church) are designated charitable trusts. Certain legal restrictions on the duration of trusts, embodied in the Rule Against Perpetuities, are not operative in the case of charitable trusts.

If the purposes of a charitable trust cannot be carried out by designation of the funds to the organization named in the trust, perhaps due to the dissolution of that organization or the impossibility of fulfilling the direction, the courts will apply the cy pres doctrine, which calls for fulfillment of the purpose of the settlor of the charitable trust as nearly as possible by designating a similar beneficiary or similar charitable purpose.

Acceptance of trustee responsibilities, assets, and/or income should be undertaken only after thorough examination by legal counsel of all relevant documents. Each trust is unique, and trust restrictions and other legal requirements should be examined carefully with the assistance of a competent legal adviser. Informed decisions about acceptance of trust income or responsibilities require assessment of the benefits of acceptance against the costs of trust administration in accordance with the settlor's wishes.

4. Wills

Wills are the legal instruments whereby testators direct the disposition of their property after their death. The form of the will is of little consequence so long as it is executed with the formality required by state statutes, comes into effect only after the death of the testator, and clearly expresses the testator's intent. Unlike other legal instruments, there is no such thing as an irrevocable will. A will may be revoked simply by the creation of a subsequent will revoking the provisions of the previous will. **The testator should exercise great care in the preparation**

and execution of the will. Legal counsel should be engaged to assist in preparation and execution of the document. Persons whose wills are found defective, or persons who die without a will, have their property distributed according to state law that may not reflect their own wishes. If there is no will, each state has a law whereby the property of the deceased is distributed to any relatives he or she has according to a formula set forth in the statute. If there are no relatives and no valid will, the property will go to the state.

All jurisdictions have enacted statutes that require compliance with certain formalities if a will is to be valid. The purpose of these formalities is to provide clear evidence of the testator's intent, as well as to prevent fraud. The following are the typical required formalities:

1. A valid will must be in writing. The only exceptions are oral wills of personal property made as a dying declaration or oral wills by soldiers and sailors. A memorandum may be incorporated in a will by reference with the existence of the following conditions: (a) it must be written; (b) it must be in existence upon execution of the will; (c) it must be adequately described in the will; (d) it must be described in the will as being in existence. Simply stated, a memorandum can be used to further define and ascertain beneficiaries previously named in the will, but it cannot be used to name beneficiaries not previously named in the will.
2. Wills must be signed by the testator and executed in accordance with local law. Signatures should appear at the end of the will after all provisions.
3. A written will must be attested by witnesses as required by state statute. It is considered sound practice to have one more witness attest a will than the number required by law. The function of the witnesses is to attest to the testator's requisite intent and capacity. It is imperative that the testator sign first and in the physical presence of all of the witnesses; witnesses should subsequently sign in the presence of each other. (Some states allow unsigned, handwritten wills also known as holographic wills. While such wills may be valid within certain states, this practice is not ideal.)

Witnesses are considered qualified providing they have no interest in the will. If witnesses with an interest under the will are used, two consequences may occur:

1. Disqualification as witnesses of those witnesses who are beneficiaries under the terms of the will (which could invalidate the will if not enough qualified witnesses attested it);
or
2. Voiding the share of the interested witness under the will (or converting the share to that which may have passed to the beneficiary without a will pursuant to state law), thereby making him a disinterested and qualified witness. Any person may be named as executor of the will and may serve as witness. The attorney who drew up the will also may serve as witness. If a church is named as beneficiary, members generally are not

considered to be interested so as to be disqualified as a witness. In the interest of caution, however, it is recommended that no witnesses have a connection with the beneficiary institution.

A valid will is created only with requisite testamentary intent; any document purporting to be a will that manifests an intent other than the testator's is invalid. Undue influence, fraud, and mistake are elements that may bear on the validity of the testamentary intent of the testator. In the case of undue influence on the testator, such influence must be directed specifically to the act of making a will. Fraud applies in the case of misrepresentation made with the intent that the testator rely on it. The burden of proof in contests involving fraud and undue influence rests with those who make the allegation and challenge the will. The courts are less stringent about mistakes in a will resulting from stenographic error or drafting.

a. Revoking, Renouncing, and Amending Wills

A will is generally revocable at the option of the testator prior to the time of her death. Most jurisdictions delineate by statute the following methods of partial or total revocation or amendment:

1. Deliberate destruction or alteration of the will; no substitutions or additional bequests are effective without re-execution and re-attestation.
2. A first will may be revoked only to the extent that a second will is inconsistent with the first. A declaration in the second will that all former wills are revoked will serve to revoke all former wills completely. In some jurisdictions, a statement to this effect in a subsequent document, though the document does not meet the requirements of a will, is sufficient to sustain the revocation of a former will.
3. A rule of law also may revoke a will; that is, a marriage generally revokes portions of a will executed prior to the marriage due to the common law provisions for surviving spouses and children.
4. Children born after the execution of a will may revoke the will so far as the after-born child is concerned. Such a child is entitled to receive the portion of the estate to which he or she would be entitled had the testator died without a will.
5. A surviving spouse, according to most statutes, retains the right to renounce the will and elect the option of receiving a statutory interest in a decedent's estate instead of under the will. The right to renounce a will is absolute: upon renunciation, the law determines the share of the estate awarded to the spouse and beneficiaries.
6. Changes in a will may be accomplished by use of written amendments (known as codicils) that may explain, qualify, alter, revoke, delete, or add to certain provisions in a will. For purposes of determining the intent of the testator, codicils and the will are

regarded as a single instrument. Codicils must be prepared, executed, and witnessed according to the formalities required for a valid will to be considered valid portions of the will.

b. Abatement and Ademption

Abatement and ademption are two occurrences that most frequently carry serious implications and result in unfortunate situations involving wills. Abatement occurs when the value of the estate of the testator is reduced after the execution of the testator's will. Abatement primarily affects residues and remainders of an estate that are reduced after specific legacies are paid. A percentage distribution based on the net assets of the estate is a hedge against abatement because it ensures that the proportions distributed under the will to the various beneficiaries will be consistent. For example, a testator with a \$50,000 estate who makes a specific bequest of \$5,000 each to five members of her family and leaves the rest to her local church may intend to divide the estate in half between the family and church. If, at the testator's death, the value of the estate has fallen to \$30,000, the specific beneficiaries still each receive \$5,000 and the local church receives the remaining \$5,000, only 16.67 percent of the estate instead of 50 percent of the estate as may have been the testator's original intent. This situation can be overcome by basing the bequests on a percentage distribution of the net assets of the estate. In other words, if the testator intended her testamentary scheme to hold no matter what the size of the estate in the above example, she would divide the estate in half, divide one-half into fifths for the specific beneficiaries, and leave the other half to the church. In that case, if the estate had fallen to \$30,000, each specific beneficiary would receive \$3,000 and the church would receive \$15,000.

Ademption occurs when a testator fails to change a will containing provisions that have been rendered impossible of performance owing to altered circumstances. For example, the testator in a will leaves a piano to A but sells the piano before she dies. Disputes may arise over whether A is entitled to anything in this circumstance. In general, A's interests and the bequest are considered to have been adeemed or canceled by the testator's action.

c. Nontraditional Wills

Two special types of wills that are sometimes encountered are:

1. **Nuncupative wills** are oral declarations made before witnesses without writing and in contemplation of death. If authorized by state law, they will be valid only if made in contemplation of death with intent to make a will.
2. **Holographic wills** are written in the handwriting of the testator: these wills may not require attestation, providing they are written in strict compliance with statutory provisions covering such wills. These provisions exist in only a few states. This is not an ideal manner to create a will. It is recommended that wills be prepared by legal counsel to ensure they meet statutory provisions and will thereby carry out the testator's intentions.

d. Probate

The procedure of administering and distributing the estates of decedents is referred to as probate. The following steps comprise the procedures of probate administration:

1. Determination of existence of a will
2. Approval or appointment of an executor or administrator by the court
3. Posting of bond, if required, by the executor or administrator
4. Proof of will in court by witnesses; succeeded by a decree admitting the will into probate
5. Proof of heirship
6. Issuance of letters of administration; filing of estate inventory by executor or administrator
7. Publishing of notices regarding proof of claims, opening of bank accounts for the estate, settlement of financial obligations, that is, collection of assets, payment of debts and taxes, and disbursement of the remainder
8. Settlement of the "widow's share" (that amount determined by state law to be given to the surviving spouse as an alternative, if the spouse so chooses, to the provisions of the will)
9. Winding up receipts on distribution, distribution of assets, approval and filing of final inventory.

D. Personal and Real Property — Gifts

The local church's primary involvement with personal property concerns title to personal property transferred to the church by gift. A gift is generally defined as a voluntary transfer of personal property **without** consideration. The essential elements of a gift are:

1. the competence of the donor,
2. the intention of the donor to make a gift,
3. the completed delivery of the gift, and
4. the acceptance of the gift by the donee.

Gratuitous promises to make a gift at some future point are not binding on the promisor. A donor may, however, make a gift of property and retain the right of income from it until the donor's death. In practice, most gifts are absolute and take effect immediately upon delivery of the property to the donee. Testamentary gifts are those made via wills. Gifts causa mortis are gifts conditioned upon the donor's death and are considered revocable either by outright cancellation of the gift by the donor or by nonoccurrence of the conditional event, that is, the donor's death.

An important difference between a gift and a trust is in the location of legal title. In the case of a gift, legal title and beneficial ownership of property are both vested in the donee. In the case of a trust, beneficial or equitable ownership passes to the beneficiary and the legal title is transferred to a third party or retained by the donor to be administered for the benefit of the beneficiary. Prior to agreeing to accept a gift, the board of trustees should ascertain the terms upon which the gift is being transferred and received. Such a determination would include the stated intent of the donor, any conditions about conveyance, and any conditions or restrictions on the use of said property.

The church's insurance agent should be notified immediately when a gift of real estate or fine art is received so that the property can be added to the church's insurance policy. Each insurance policy has restrictions on the number of days new property can be covered before it has to be reported to the insurance company. The number of days can range from 30 to 120 days. The normal limit is 30 days; additional days will need to be endorsed onto your policy. Remember, once this time is up the property will be uninsured. If your church receives numerous real estate or fine art gifts, you may consider increasing the new property reporting period.

1. Charitable Deductions

Donors sometimes raise questions concerning the tax-deductibility of gifts to their church. Outright gifts of cash or property to the church will generate charitable deductions to the donor. The deduction will be the fair market value in the case of donated property.

Where the gift is not given to the church outright, but instead is conditioned upon the church transferring it to a designated non-charitable beneficiary, no deduction is available to the donor, because her donative intent will not have been sufficiently established and the donation is not actually made to a charity. For example, Donor A gives the church \$5,000 to be used to send two specific children within the congregation to college. Initially, a church should not accept such a gift and certainly should not issue any receipt for tax purposes. Donor A would not get a deduction in this case because the gift is really to the two students, not to the church. Where such a gift is given to the church for scholarships with **no** conditions set about whom the church designated as a recipient, then the deduction would be available, the donor having **relinquished control** of the gift to the church. Absent the donor relinquishing **all** control over the gift, sufficient donative intent to a charitable recipient will not have been established and any charitable deduction taken by the donor would be subject to being disallowed.

There are certain tax requirements when accepting noncash gifts worth more than \$500. The donor must file Internal Revenue Service Form 8283 — "Non-Cash Charitable Contributions." Under that form, the church must acknowledge receipt of the gift, entering its name, employer identification number, and the signature of an appropriate board representative. Should the church decide to sell securities within two years of the date of receipt, it is necessary to file Internal Revenue Service Form 8282 — "Donee Information Return," and to send a copy to the donor. An exception exists for publicly traded securities. See Section 8: Taxation and Hammar's *2000 Tax Guide* for information on IRS requirements for receipt of charitable donations, including information on the IRS requirements for substantiating donations and gifts of \$250 or more.

2. Gift Restrictions and Encumbrance

It is always prudent for donees to determine what restrictions, if any, are attached to a gift. Depending on the nature of the restrictions and the cost, difficulty, and willingness to enforce such restrictions, the church may choose to refuse the gift or request that the restrictions be removed. It is an excellent idea for the board of trustees to develop a policy for acceptance and administration of gifts. When accepting gifts of real property, it is important to consider if there are any mortgages or liens encumbering the property, as well as the costs of possible sale or maintenance and upkeep if the property is retained. Another potential liability in accepting real estate is the presence of building or housing code violations.

One of the most significant problems involved in the acceptance of real estate is possible environmental hazards and liabilities on the gift property. Owners of property, even a church that has received a gift of real property, could become liable for cleanup costs and removal of any hazardous wastes on the site. It is important to consider all of these factors when evaluating the acceptance of a gift of real estate. An environmental audit or title insurance rider insuring against liability should always be obtained. Should the audit indicate that there might be hazardous waste contamination on the property, the best way to prevent potential liability is to exercise the right to disclaim the gift or bequest. Similarly, a church may wish to reject an offer to donate a heavily mortgaged property or property in serious disrepair.