

The Gift and the Deed

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FEW ARCHIVISTS BELIEVE that it is better to give than to receive. Archivists customarily depend upon gifts to increase the holdings of their institutions. These gifts may be eagerly sought or entirely unsolicited, but all of them involve the transfer of certain property. In legal terms, a gift means that title to the property passes from the giver to the recipient, i.e., from the donor to the archives. The common legal characteristics of a gift are a clear offer, acceptance, and delivery.

As most people know, when one buys a house a title search is made to insure that there are no claimants to the property other than the seller and that there are no outstanding restrictions on the use of the property other than those agreed to by the buyer. In other words, the seller must give to the buyer a clear title to the house. Many of the same considerations are important in the transfer of archival materials from a donor to an archives. A receiving institution must make sure that the title

is clear and that the prospective donor is competent. Take as an example a case in which an heir offered to donate some papers but investigation by the archives revealed that he was not the sole heir. The other heirs were not agreeable to the donation, and the negotiations therefore foundered because the prospective donor did not have the capacity to convey a clear title. In another case, a very elderly woman signed a deed, but after her death the heirs claimed that she had not been competent at the time of signing; thus the deed was void. This does not mean that the archivist must hire a private detective to investigate prospective donors; but it does mean that some tactful questions should be asked early in the negotiating process.

All transfers of personal property to an archives should be documented in a clear, unambiguous fashion. As archival materials have both a physical and an intellectual component (i.e., a medium and a message), it is impor-

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tant that the transfer document record the disposition of both the physical and the intellectual property. A number of instruments can be used to record the transfer of property; the three most common are letter, will, and deed.

An exchange of letters is probably the easiest of the written instruments* to execute, and many important archival holdings have been acquired with an exchange of letters documenting the transfer of the title. (The *exchange* of letters is not just common courtesy; the exchange serves also to indicate acceptance by the recipient, one of the keys to determining title.) Exchange of letters does not solve all the problems. The archives often does not have the opportunity to advise the donor or to obtain from the donor the elements of information that are or will be needed, such as the restrictions to be applied (if any), whether the archives has disposal authority, and many other such matters. The lack of this information may require protracted correspondence, or it may lead to legal difficulties in the future. ("I know I didn't say you should withhold my correspondence with X, but I thought you would have known better.")

Transfer of property by will is also common. Because a will is usually prepared by a lawyer, some of the elements such as restrictions, access, and disposition may be clearly defined, although the conditions may be more stringent than the archives would like.

It is also likely that the donor and the archives will have discussed the gift before the provisions of the will are drawn up, giving the archives the opportunity to provide suggested language to use in the will's provision about the prospective donation. There are, of course, a few cases in which an archivist opens the morning mail to find that the archives has been left the Jane Doe papers, papers which are entirely inappropriate to its holdings and which have severe restrictions on them, but such cases are probably rare.

Deeds are the third common written instrument used to transfer property to an archives. A deed is an instrument in writing, purporting to effect some legal disposition, and sealed and delivered by the disposing party or parties. It is usually prepared after consultation between the donor and the recipient and is usually signed by both to indicate offer and acceptance.

There are a number of important or desirable elements in instruments of gift. Not all of these will be appropriate for every donation, but they are worth considering during the negotiations. Because the archivist generally has the most influence on preparation of deeds, the elements are discussed in terms of deeds. The elements include clear answers to the following questions:

Who is the donor? The creator of the materials? The heirs of the creator? A

* It is likely that some materials will always be transferred to an archives through simple oral statement and delivery. For example, a senior citizen comes to the local historical society with an armload of local newspapers from the 1920s and says, "I've been cleaning out the attic, and if you want these you can have them and if you don't want them, just throw them away." Such oral transactions may be perfectly sound, for they usually meet the three common legal tests for a gift: a clear offer ("you can have them"); acceptance ("we'd be delighted to have them"); and delivery ("here they are"). Presumably the conversation marking this transfer could be reconstructed at a later time if the question of legal title arose, and it would be buttressed by internal archives documents indicating that the material was received from the donor on a certain date, that the material was processed and made available on the assumption that it was the property of the archives, and so forth.

purchaser? A corporation? This information should appear twice, once in the opening paragraph of the deed and again in the signature block at the end. If the relationship between the creator and the donor is complex and not self-evident (a child with power of attorney donating property of a living parent, an executive officer acting on behalf of a corporation), it should be spelled out in the deed. A cautious archivist may request that the donor have his or her signature notarized.

Who is the recipient? If, for example, the archives is part of a state university, is the formal recipient the state, the university, or the university archives? If the state is the recipient, the state may be able to remove the materials from the university archives and place them in the state archives; if the legal formalities require donation to the state (the university lawyer can provide that information), the donor may wish to specify that the donation is to the state *for purposes of deposit* in the archives of the state university. The same considerations would apply to a church-diocese-diocesan archives, conglomerate-corporation-corporate archives, or any archives in a multi-level bureaucracy.

What is the date of the transfer of title? This is important primarily for tax purposes. The deed should bear both the date when the donor signed it and the date when the recipient accepted it.

What is the material conveyed by the deed? Who created or collected the material? What is the volume? What are the inclusive dates? For small donations this information can be incorporated into the introductory paragraphs

of the deed (for example, “seven typed letters signed by Franklin D. Roosevelt, dated October 4, 8, 9, 14, and 22, and November 6 and 12, 1919, concerning the possible purchase of a sloop from the Mariner Boatworks”). For most donations, however, it is useful to attach an appendix containing a detailed archival description of the material donated. This is especially important in instances in which the donor plans to give, for example, a large collection of autographs but wants to spread the donation out over a period of years to take as much advantage of the tax deductions as possible. The donor may physically transfer the entire collection at one time, but donate the items over a period of years. In such cases, detailed descriptions appended to the deed are crucial to determining what of the materials are the property of the archives and what are still the property of the donor.

Who holds the copyright? Here is where the distinction between physical property and intellectual property becomes important. It is entirely possible to transfer the physical property to the archives while reserving the copyright in the material for the donor. It is desirable to write into the deed the transfer of the copyright from the donor to the archives; failing that, the deed should clearly specify who holds the copyright and for how long. Of course, a donor cannot transfer copyright to intellectual property unless the donor has created it or has had it legally transferred to him; consequently, most deeds will convey only such copyright as the donor holds in the materials donated.

What are the restrictions on use? Broadly speaking, restrictions normally specify

either time or content, or both. For example, a restriction might specify that the entire donation remain closed for twenty-five years or until the death of the donor (time). Or, a deed might require that materials relating to the donor's service on the ministerial commission for the review of candidates for the clergy be restricted (content). Or, the deed might restrict correspondence between the donor and her husband until both are deceased (content and time).

While some archivists favor restrictions worded narrowly ("my correspondence with Jacqueline Kennedy") and others favor restrictions specifying general categories ("information that would be an unwarranted invasion of personal privacy"), both should strive for statements of restriction that are clear and unambiguous.

Who can impose restrictions? Here there are normally three options: the donor, the donor's designee, or the archivist. The donor usually establishes the restrictions through the deed, often in great detail, and the donor may also amend the deed with the concurrence of the archives if the archives suggests to the donor that further categories of materials should be restricted. In other instances the donor frames the restrictions in general terms and then either gives the archivist the authority to determine what materials fall within the restriction categories or names a person to review the files and establish what can be made available at various times. In the latter case, the archives should make sure that the duration of review by the designee is limited (the designee could take a decade with the papers completely closed during that time; the designee could die with the papers unreviewed) and that after such

time the archives has the authority to make the access determinations.

To whom do the restrictions apply? Although it seems unlikely that problems would arise, it may be wise to indicate in the deed that the restrictions will not prevent the staff of the archives from performing normal archival work on the restricted materials and that any necessary preservation measures may be taken. Without a formal statement, it is possible that such steps could be barred by heirs.

Who can lift restrictions? There are two issues here, temporary waivers and permanent openings. In the category of temporary waivers, some donors want to be able to authorize select researchers to use restricted materials if the researchers obtain the permission of the donor or the donor's designee. Because this results in unequal access, archivists are usually reluctant to accept such conditions unless there is no other way to obtain the materials. If the archives will agree to such temporary waivers, it should be clearly stated in the deed. In the category of permanent openings, restrictions that have a specific time period are relatively easy to administer; but if restrictions have no fixed time, trouble can arise. It is advisable to state clearly in the deed that all materials will eventually be opened and that the archivist has the authority to open the materials at his or her discretion. Some donors want to review and approve or have a designee review and approve materials selected by the archivist for opening; this is cumbersome but workable as long as it is understood that all materials will eventually be open. A fixed duration for such review is preferable, the deed should specify the procedure in the

event of the death of the donor or designee during the review period, and the deed should state the archivist's authority to open material after the time period for donor or designee review has expired. An archives should establish a policy on the length of time that donors, heirs, and designees can control access. Deeds have been proposed that would pass control from a donor to children and, at their deaths, to grandchildren. Such provisions could restrict materials for nearly a hundred years; this is almost always unacceptable.

Who has disposal authority? Donations often contain a certain amount of ephemera: multiple copies of donor's Christmas cards from 1958, a broken transistor radio, boxes of duplicate copies of congressional hearings. The deed should indicate whether the archivist can dispose of such materials in any way seemly, whether the materials must be offered to the heirs first before other means of disposal are used (in such cases, there should be a time limit), and what the criteria for disposal are ("no significant historical value," "inappropriate to the collections of the State Historical Society," etc.). In designing this part of the deed, the archivist should also consider whether the archives wants to obtain authority to dispose of the entire collection, not just those parts without historical value. For example, the donation might contain a collection of Confederate money which clearly has historical value; but the archives subsequently obtains an outstanding set of Confederate currency. Consequently, the archives wants to sell the money from the first collection or trade it to another institution in return for Confederate bonds. Legally, once the ar-

chives has title to the property, if the deed is silent on the matter of disposition the archives can do what it wants; but it may be neater to have a clause authorizing the disposition of any materials which, in the judgment of the archivist, are not required by the archives.

What provisions cover subsequent gifts? The nature of the highly competitive collecting business is such that young people who come to prominence are often asked to donate their materials to an archival institution. (Woodward and Bernstein, for example, were approached shortly after their Watergate book came out.) This means that the institution can look forward to acquiring increments of materials over a long period of time. Rather than write a new deed each time, it may be possible to include in the initial deed a provision saying that all subsequent donations will be made in accordance with the provisions of that deed. Then, at the transfer of each increment, the donor and the archives can sign a statement that the materials are transferred in accordance with that deed, and the archives can prepare a description of the material transferred and append to the deed both the statement and the description.

While developing a deed of gift, it is useful to remember that it is a contract in which both parties promise certain things: the donor to give, the archives to respect the conditions stipulated by the donor in the deed. And once the conditions are agreed upon, if the archives fails to meet its obligations (for instance, not restricting one category of restricted materials) the contract could be determined to be void and the donor could reclaim the property;

alternatively, the donor could sue the archives for damages which resulted from the breach of the contract. Neither course, however, is likely to occur in the normal relations between donor and archives.

Finally, it is worth mentioning one other legal instrument common in archival circles: the deposit agreement. A deposit agreement is a statement of intent to transfer title at some future date, usually unspecified; but in the meantime the prospective donor deposits the physical property with the archives for safekeeping. Here many of the same elements must be incorporated as in a deed, but the deposit agreement should contain also a statement of the intent to donate, a statement regarding the archives' liability for accidental damage to the property, and a statement regarding the types of

archival and preservation work that may be undertaken on the collection. In some cases, materials may even be made available for research use under deposit agreement; but the archives should consider very carefully how certain the donation is before agreeing to spend the money not only to store but also to process and provide reference on materials that could be withdrawn.

There is, of course, no one formula, no one instrument of gift, that will work for every archives every time. But with careful consideration of the gift and the giver, of obligations and potential legal hazards that may lie ahead, the archivist can help the donor construct a legal instrument to transfer title that will meet the needs of both donor and recipient.