**Exercise 31-9 – Ellsworth Agreement**

Students were first introduced to this exercise in Exercise 15-1 when they were learning about endgame charts. But this rewrite requires students to address more than endgame. The provision must address ambiguity, the organization of a provision, and monetary provisions. This combination of issues makes it an excellent review exercise.

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On December 15, 20XX, Bertha Ellsworth ("Ellsworth") was admitted to the Home for the Aged (the "Home") and signed an agreement setting forth the terms of her stay at the Home. The agreement provided that for the first two months of her stay she would be a probationary member and that thereafter she would become a life member. On the same day, Ellsworth paid $100,000 to the Home by a check which stated: "In Payment of Life Membership for Bertha Ellsworth in the Home, as specified in the Agreement dated December 15, 20XX."

Ellsworth died on December 29, 20XX, before her probationary period expired. The administrator of her estate seeks to recover the $100,000 gift since she never attained a life membership. The Home claims it is entitled to keep the money. Assuming that you had been the attorney for the Home when the contract was being negotiated, how would you have marked up the following provisions to protect your client?

**1.1**. Ellsworth having this day given the Home,   
without reservation, the sum of $100,000 to be used and   
disposed of in the furtherance of its benevolence and   
charitable work as it may deem best, the Home admits   
Ellsworth into the Home as a member thereof during the   
period of her natural life.

**1.5**. It is clearly understood that Ellsworth has been received in accordance with the new regulations on a   
probation period of two months in which time she has the opportunity of finding out whether she desires to remain in   
the Home. If it should be found advisable to discontinue her   
stay in the Home, then her gift, with the exception of $2,000   
per month shall be refunded.

**12.1** Probationary membership means a short trial   
period while the member becomes adjusted to life at the   
Home. The probationary membership shall not continue for   
a longer period than two consecutive months. If for any   
reason the trial member does not desire to remain in the   
Home, she shall have the privilege of leaving. Only   
members who do not have the money to pay for their life Membership shall be granted the privilege of paying by the  
month.

The ambiguity arises because it is unclear whether the Home is obligated to return the Gift (minus a per month fee) if Ellsworth dies before the end of the probationary period. Section 1.1 states that Ellsworth has given the Home $100,000 *without reservation*, while Section 1.5 provides for a refund of the gift (minus a per month fee) if Ellsworth should *discontinue her stay* before the end of the probationary period.

To assist the students in their rewrite, first have students determine which lines deal with which topics.

\* \* \* \* \*

Lines 1-4 Donation

Lines 4-6 Admission of Ellsworth as life member

Lines 7-11 Admission of Ellsworth as probationary member for two months

Lines 11-13 Consequences of Ellsworth’s departure during probationary period, gift is returned (minus $2,000 per month); implied – if Ellsworth stays, the Home keeps the gift

Lines 14-16 Description of purpose of probationary membership

Lines 16-17 Statement that probationary period is two months

Lines 17-19 Trial member may leave during probationary period

Lines 19-22 Monthly payment for those who cannot afford life membership

Upon seeing this analysis, several steps in the rewrite become clear. First, the fact of the donation should be separated from the type of membership as Ellsworth seems to be both a life member and a probationary member. (She is even a trial member in Line 18. Failure to say the same thing the same way) Second, a separate provision should state the consequences as to membership depending on whether Ellsworth remains or leaves. Third, yet another provision should state the monetary consequences of the different scenarios – leaving, remaining, and dying.

At this juncture, it is helpful to review with the students what the outcome should be for each of the scenarios from the Home’s perspective. I suggest returning to Exercise 15-1, but keep in mind that these facts add the per day fee.

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| --- | --- | --- | --- | --- |
|  | **Departure during probationary period** | **Departure after probationary period** | **Death during probationary period** | **Death after probationary period** |
| Monetary Consequences | The Home returns the Gift *minus* per day fee | The Home keeps the Gift | The Home keeps the Gift | The Home keeps the Gift |

**Question**: As a business matter, would Ellsworth have agreed that the Home could keep the gift if she died during the probationary period?

**Answer**: Probably not. She would want the Home to return the Gift *minus* the per day fee. Note 5 discusses the per day fee. (The Notes follow the model provision.)

You can use this chart to emphasize to the students the importance of dealing with both sides of an if/then scenario (a condition): if *x*, then *y*; if not *x*, then *z*. Students often fail to deal with one of the scenarios. Sometimes a contract deals with the second scenario in another provision elsewhere in the contract. For example, in an acquisition agreement, the action sections provide for performance if the conditions are satisfied. The agreement generally deals with the failure to satisfy the conditions in the condition and termination articles.

**Rewrite**

[“Gift” means $100,000.]

## **Donation and Use of the Gift.**

### **Donation of the Gift**. Contemporaneously with the signing of this Agreement, Ellsworth has donated the Gift to the Home. The Home’s right to retain the Gift is subject to the provisions of Section 1.3.

### **Use of the Gift**. The Home may use the Gift as it deems best to further its [benevolence and] charitable work.

## **Admission of Ellsworth to the Home**.

### **Admission as Probationary Member**. On the date of this Agreement, Ellsworth has been admitted as a probationary member of the Home. Probationary membership means a short trial period while the member becomes adjusted to life at the Home. The maximum probationary period is 60 days, beginning on the day of the probationary member’s admission.

### **Decision as to Life Membership**. Before the probationary period ends, Ellsworth shall decide whether to become a life member and notify the Home of her decision. If she decides to remain at the Home, she becomes a life member of the Home.

### **Right to Leave the Home**. Ellsworth may leave the Home at any time, regardless of whether she becomes a life member.

## **Consequences of Departure or Death.**

1. **Departure before the End of the Probationary Period**. If Ellsworth leaves the Home before the probationary period ends, the Home shall refund the amount equal to the Gift *minus* the amount equal to

#### the product of $66.66 *times*

#### the number of days that Ellsworth has lived at the Home, excluding the day she leaves.

1. **Departure after the End of the Probationary Period**. If Ellsworth leaves the Home after the probationary period ends, the Home is entitled to retain the Gift.
2. **Death before the End of the Probationary Period**. If Ellsworth dies before the probationary period ends, the Home shall refund the amount equal to the Gift *minus* the amount equal to
   1. the product of $66.66 *times*
   2. the number of days that Ellsworth lived at the Home, excluding the day she died.
3. **Death after the End of the Probationary Period**. If Ellsworth dies after the probationary period ends, the Home is entitled to retain the Gift.

## **Monthly Payment**. Only a member who does not have the money to pay for a life membership may pay by the month.

**Notes**

1. The definition of *Gift* is not strictly necessary as it is replacing a dollar amount. However, the repeated use of the dollar amount seems crass.
2. Using two subsections in Section 1.1 is not required. The proposed provision does it to make prominent the statement that Gift is subject to certain conditions
3. Whether *benevolence* is necessary depends upon whether Ellsworth and the Home see a difference between it and *charitable*. In the real world, students might want to research this.
4. The statements of what the Home *is entitled to* are rights. The flip side covenants are the implied covenants of Ellsworth not to seek the return of the Gift. Stating that the Home *may keep* the Gift probably would not satisfy the Home. Its view would be that keeping the Gift would not be a matter of its discretionary authority. Instead, it has a claim of right.
5. The probationary period of *two months* is ambiguous. The redraft changes the period to 60 days. This statement of the time period also works well conceptually with the provisions determining the amount of the refund.
6. The redraft provides for a per day fee rather than a per month fee. The aggregate fee is easier to calculate if a per day fee is used. If a per month fee is used, the calculation for each month would be as follows:

With respect to each month for which a calculation is being made,

* 1. *divide* $2,000 by the number of days in that month, and
  2. *multiply* that result [quotient] *times* the number of days Ellsworth remained in the home that month, excluding the day she leaves the Home.

If the parties want to avoid this formula, they must agree to the per day fee as the result would differ depending upon whether $2,000 is divided by 30 or 31. The proposed per day fee used 30 as the number of days.

*Issue*: Should the calculation include or exclude the day that Ellsworth leaves? The proposed redraft excludes the day that Ellsworth leaves.

1. The provisions in Section 1.3 speak of Ellsworth leaving or dying before or after *the probationary period ends*, rather than whether she has *become* *a life member*. Technically, to become a life member, Ellsworth is required to notify the Home of her decision. What if Ellsworth dies after the probationary period ends, but before she notifies the Home of her decision to become a life member? The proposed draft avoids that interpretive problem.