newsletter

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Controlling Charitable Gifts: The Donor's Perspective

Tax results are often an attorney's main concern in structuring charitable gifts and bequests. However, it is equally important to draft a document that meets the client's philanthropic objectives. In particular, the practitioner has two concerns: (1) will the assets actually go to the desired charity or charities? and (2) will the assets be used in accordance with the client's wishes? This article discusses these concerns and briefly discusses whether drafting techniques are effective in light of common and statutory law.

Who Will Receive the Gift?

There may be a long interval between the time a will or trust is executed and when the charitable transfer takes effect. It is possible a designated charity will cease to exist or will substantially change its mission during that time. According to ORS 112.400, if the devise truly fails and there is no alternate provision, normally the assets will pass to the residuary. However, this is not necessarily the case when charitable gifts are concerned.

In *Quick v. Hayter*, 188 Or 218, 215 P2d 374 (1950), the Oregon Supreme Court invoked the common-law doctrine of cy pres in transferring an interest in a trust from a charity that lost its charter after the testator's death to another similar charity. The court found the testator evidenced a general charitable intent and, held that in construing charitable trusts, the court should make sure the "charitable purpose of the testator will not fail." 188 Or at 226. A court may even redirect a charitable gift if the charity ceased to exist while the decedent was still alive. In *Endicott v. Bratzel*, 145 Or 654, 27 P2d 883 (1934), the court openly designated a trustee and fleshed out a rather incomplete charitable bequest. The court's reasoning then seems as applicable today:

> "Equity, in the exercise of its inherent power, has ever looked with favor upon the testamentary disposition of property promotive of public and benevolent purposes. It will endeavor to carry out such charitable grants and give effect to the intention of the testator as expressed in his will, unless such intention contravenes some well established rule of law. To do so is in keeping with the enlightened and philanthropic spirit of the age." 145 Or at 658.

While there is not a great deal of case law on this topic, the few cases that exist seem to reflect a judicial bias in favor of completing a charitable

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bequest over allowing a devise to fail and pass to residuary devisees. Thus, an estate planner should be aware a client's assets may be given to a charity the client did not intend to benefit.

Ensuring the Gift Goes to the Charity of Choice

Alternate Beneficiaries

Careful drafting is a must to ensure that the gift reaches the chosen charity. If the donor's interest is limited to a specific charity, the document must make this clear to protect potential takers in default from a court anxious to find "general charitable intent." If the client's general intent is to make a charitable gift, then the estate planner should include alternate charitable beneficiaries.

Special Power of Appointment

Another option is to draft a special power of appointment over the charitable gift. A special power of appointment may be retained by the trustor or granted to a trustee, income beneficiary, or presumably others. In the case of a charitable remainder trust, attention should be given to whether the 50 percent rather than the 20 percent limitation under IRC § 170 must be preserved (*see* Rev Rul 80-38, 1980-1 CB 56). Practitioners may find it helpful to review the sample charitable remainder trusts promulgated in Rev Proc 90-31, 1990-1 CB 539, which provide language obligating the trustee to choose an organization described in IRC §§ 170(c), 2055(a), and 2522(a) if designated entities are not qualified.

Conditions Precedent

Another available tool is drafting a charitable devise conditioned upon the devisee's accepting certain terms. Outside of the tax arena, when the donee truly does not want the property and the takers in default do, there is not much room for dissatisfaction and, accordingly, very little litigation. Conditions precedent will work (1) so long as there is no prohibited benefit to the donor and (2) if the conditions are met on a timely basis or "the possibility that the charitable transfer will not become effective is so remote as to be negligible" (Treas Reg § 20.2055-2(b)(1)). The reported cases are very fact-specific, so care should be utilized.

Conditions Subsequent/Possibility of Reverter

Another technique is providing for conditions subsequent or the possibility of a reverter. However, this really only works if, upon the occurrence of the prohibited event, the assets find their way to an alternate charity or are subject to a special power of appointment in favor of a charity. If the assets revert to the donor or his or her heirs, one should expect careful scrutiny by the Internal Revenue Service. Treasury Regulation § 20.2055-2(b)(1) also applies to conditions subsequent, but the reported cases are factually more complicated. Furthermore, the recent misbehavior with charitable split-dollar insurance plans suggests the IRS will be attentive to collusive relationships between charities and their supporters.

In the context of real property, the possibility of truly long-term control by the use of reverters is largely foreclosed by ORS 105.770, making them ineffective after 30 years.

Postgift Concern: Will the Charity Abide by the Grantor's Wishes?

Even if the assets find their way to an acceptable charity, the question remains as to whether the gift will be used as the grantor specified in his or her will or trust. Clients should be aware that compliance probably cannot always be ensured.

Under common law, in the absence of enforceable retained controls such as reverters, the donor had no further protectable interest in a completed gift. On the other hand, the donee had no power to utilize the funds outside of the specified purposes. When a particular charity ceased to exist or could no longer utilize the funds for the designated purpose, the technically correct resolution at common law was a court decree and the invocation of the cy pres doctrine. The attorney general would serve as petitioner since a charitable trust is enforceable only by an "appropriate representative of the community." *Agan v. U. S. National Bank*, 227 Or 619, 628, 363 P2d 765 (1961); *see also Associated Students v. Oregon Investment Council*, 82 Or App 145, 149 n 4, 728 P2d 30 (1986). For many charitable institutions it was burdensome to petition the court whenever they desired to use funds for a different purpose.

The legislative response to this concern was the adoption of the Uniform Management of Institution Funds Act ("UMIFA"), enacted as ORS 128.310-.355. A 1969 Ford Foundation study, examining the concerns with the common-law restrictions on grants to educational institutions, spurred the creation of UMIFA. UMIFA applies to all organizations operated for educational, religious, charitable, or other eleemosynary purposes. The primary intention of UMIFA was to allow charitable institutions to make riskier investments for higher returns. However, UMIFA also was intended to create an easier way for institutions to release restrictions on charitable gifts. At first glance, UMIFA also seemed to give donors more control over their completed gifts than provided under common law.

Pursuant to ORS 128.345, a governing board may release gift restrictions with the written consent of the donor (recall that under common law, the donor's consent was irrelevant). UMIFA also provides a process to obtain court approval if the donor is unavailable to consent. Notice must be provided to the attorney general, but there is not necessarily a requirement that the attorney general participate.

There is no clear legislative history, but one interpretation of ORS 128.345 suggests that when the grantor is available, a change in the use of a charitable gift could occur either nonjudicially with the grantor's consent or, if the grantor refuses to consent, the grantor could seek to prevent the change in use of the charitable gift through the court system. That simple interpretation, however, was dismissed by the Connecticut Supreme Court in what appears to be the only reported case: *Herzog Foundation v. Univ. of Bridgeport*, 699 A2d 995 (Conn 1997).

In that case, the Herzog Foundation entered into a matching grant program with the University of Bridgeport to "provide need-based merit scholarship aid to disadvantaged students for medical related education." *Id* at 996 (citation omitted). The University acknowledged the terms in writing, raised the money, and instituted the scholarship program by the end of 1988. In 1991, the University closed its nursing program and, without notice to the Foundation or court approval, comingled the funds with the University's general funds. The Foundation brought an action requesting, among other things, that the University give the money back, relying in part on the Connecticut equivalent of ORS 128.345. The trial court dismissed the action, reasoning that since the Foundation had not reserved any right to terminate or revoke the donation, it did not have standing under common law or UMIFA. The Connecticut Appellate Court reversed, finding that the legislative creation of a right to consent to release of a gift restriction implicitly included a right to withhold consent and for the statute to have meaning, it must also include standing. The Connecticut Supreme Court, in a 3-2 decision, reversed again, concluding that standing was limited to the attorney general, that granting a donor the right to acquiesce in the lessening of a restriction did not implicitly grant a right to enforce a restriction, and that without a property interest there was no standing. As with most closely decided cases, there are arguments supporting both sides.

The bottom line is that UMIFA creates flexibility for charities but has not changed the common-law rule that a donor has no protectable interest in a completed gift. However, the most distressing part about *Herzog* is not so much the court's holding with respect to standing as the fact the court ultimately condoned a charitable institution, ignoring both the process provided by the statute as well as the court approval required by common law. In the end, the charity got away with diverting the funds and frustrated the donor's intent.

The short period of compliance by the University and the continued vigilance by the Foundation are both unusual fact situations, and one can only speculate as to how frequently disregard of UMIFA or common law occurs in practice. If a charity's petition meets with no opposition from the attorney general, it will most likely be granted and never give rise to a reported appeal. There is, therefore, no meaningful data on how frequently the mechanism of ORS 128.345(2) is used. Even if another state did determine a donor had standing under UMIFA based on a legally protected interest *in the process* as opposed to a property interest, the realistic value of remedies would remain speculative.

Ensuring the Gift Is Used as Designated

Ultimately, donors must accept the fact a charitable transfer qualifying for favored tax treatment is a completed gift with all that implies. Strong, long-term, firm controls are not possible. The first line of planning should be careful selection of the charity and then perhaps the use of the drafting techniques discussed above. However, in light of *Herzog* and other case law, it is also worthwhile to discuss whether the client can accept the inevitable loss of control.

For the client who is not able to accept that uncertainty, establishment of a private foundation or the use of donor-advised funds within an existing foundation may be more comfortable choices. Obviously, those strategies are dependent upon the donor's conviction that future directors of the foundation or fund advisors will remain like-minded and faithful to the original ideals and objectives of the donor.

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Open Houses

Oregon's recently completed Legal Needs Study, co-sponsored by the Oregon State Bar, the Governor's Office, and the Oregon Judicial Department, will be the focal point of this year's Open Houses event, held October 18 in legal aid offices throughout the state. The Oregon State Bar is once again hosting this event and invites you to join Bar leaders, legislators, community leaders, foundations, bankers, legal aid staff, and the press in recognizing the work these offices and their communities have done to achieve access to justice in Oregon. For further information, please contact the Campaign for Equal Justice at (503) 295-8442 or cej@aracnet.com. Save the date!

Donor Advised Funds

Private foundations have long been a mainstay of charitable giving for donors with substantial assets and significant charitable intent. However, the limitations on deductions for contributions made to private foundations and the complicated rules governing their operation can be a deterrent to clients interested in establishing a vehicle for charitable giving. Donor advised funds present an attractive alternative for persons who do not want to invest the time and money necessary to create and maintain a separate organization. Because a donor advised fund is treated as a public charity under the Internal Revenue Code, contributions to a donor advised fund are eligible for the most favorable rules regarding deductibility.

Donor advised funds have existed for decades; traditionally they have been offered by community foundations with a local or statewide focus. In recent years, public charities and commercial mutual funds have offered donor advised accounts with a national scope. Due in part to savvy marketing by the commercial funds, donor advised funds have attracted a significant amount of attention. For example, by 1999, the size of Fidelity's Charitable Gift Fund placed it among the top 10 largest charities in the nation.

There is no definition of a "donor advised fund" under the Internal Revenue Code. Donor advised funds are separate accounts, but not separate entities, within a public charity. With a donor advised fund, a donor may make nonbinding recommendations to the public charity directing which charitable organizations should receive money from the fund.

The donor advised fund works as follows: A donor will make an unconditional and outright gift to a donor advised fund administered by a charitable organization. The fund then grants the donor the privilege of making nonbinding suggestions regarding when and to whom the amounts in the fund should be distributed. The contribution entitles the donor to an income tax deduction for the full amount contributed to the fund for that year. The gift is complete so long as the donor does not make the transfer subject to any material restriction. Depending on the policies of the fund, the donor may be permitted to let the fund build up for a number of years before making recommendations about distribution. It is a key point that the donor's recommendations for distributions must be advisory only. Often, the life-span of the donor limits the right to advise.

Several major hospitals, universities, religious organizations and national charities now offer donor advised funds. However, many require all or part of the fund be used to further the sponsoring charity's exempt purpose. The box below lists a selection of community foundations and other organizations that offer donor advised funds.

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The Oregon Community Foundation
621 SW Morrison Street, Suite 725
Portland, OR 97205
Tel: 503-227-6846
Fax: 503-274-7771
www.oregoncommunityfound.org

The National Philanthropic Trust
1 Pitcairn Place, Suite 3000
Jenkintown, PA 19046
Tel: 888-878-7900
www.nptrust.org

Community Foundation for Southwest Washington
703 Broadway, Suite 610
Vancouver, WA 98660
Tel: 360-694-2550
Fax: 360-737-6335
E-mail: director@CFSWW.com

The American Gift Fund
The American Guaranty and Trust Company
220 Continental Drive, Suite 401
Newark, DE 19713
Tel: 800-240-4248
Fax: 302-731-2828
www.giftfund.org

Fidelity Charitable Gift Fund
82 Devonshire Street, F35
Boston, MA 02109
Tel: 800-682-4438
www.charitablegift.org

The Charitable Gift Fund
Maxus Foundation
The Maxus Investment Group
1301 East Ninth Street
Cleveland, OH 44114
Tel: 216-687-1004
Fax: 216-687-1001
www.maxusgroup.com

The Charitable Partnership Fund
25-6 NW 23rd Place, #266
Portland, OR 97210
Tel: 503-757-4032

The Fund for Charitable Giving
PNC Bank, New England
125 High Street
Oliver Street Tower
Boston, MA 02110-2713
Tel: 800-225-2310

The Schwab Fund for Charitable Giving
101 Montgomery Street San Francisco, CA 94104
Tel: 800-746-6216
E-Mail: questions@schwabcharitable.org

The Tides Foundation
PO Box 29903
San Francisco, CA 94129-0903
Tel: 415-561-6400

Vanguard Charitable Endowment Program
The Vanguard Group
PO Box 3075
Southeastern, PA 19398-9917
Tel: 888-383-4483
Fax: 888-426-3273

Equity Foundation
PO Box 5696
Portland, OR 97228
Tel: 503-220-0628
www.equityfoundation.org

The Use of Supporting Organizations as an Alternative to Private Foundations

Many clients who are interested in making considerable charitable contributions enter an attorney's office believing they wish to establish private foundations. However, once the advantages and disadvantages of private foundation formats are discussed, clients often lose their initial enthusiasm and reconsider their earlier decision. This is when tax-savvy advisors can help by discussing the option of creating a supporting organization instead of a private foundation. In many instances, the formation of a supporting organization will satisfy the client's charitable objectives while avoiding the many disadvantages of the private foundation format.

In an effort to illustrate when the use of a supporting organization may be a desirable option to present to a client, this article will first address the advantages and disadvantages of private foundations. Next, the structure of the supporting organization will be reviewed. Finally, the benefits of using a supporting organization in lieu of a private foundation will be discussed.

Private Foundations

The private foundation is "private" in the sense it often depends on a single individual or family rather than the general public for its funding.

Advantages

The private foundation format affords a number of advantages.

- Control. The founder of a private foundation can maintain control over management and disposition of the assets he or she has contributed to the foundation. If the foundation is established during the founder's lifetime, he or she may continue to manage the assets gifted to the foundation and to determine which charities will receive contributions from the foundation. Upon the founder's death or retirement, his or her children or other family members may take control over the foundation on behalf of the family. This great degree of control is generally a foundation's most desirable feature.

- Perpetuity. Since a private foundation is generally named for the donor or the donor's family, a private foundation affords the donor a chance to receive perpetual recognition for his or her philanthropy for generations to come. On the other hand, a gift to an existing charity generally results in only a moment or two of recognition.

- Employment for Family Members. Employees of a private foundation are permitted to receive "reasonable" compensation for their services. Thus, a foundation may employ members of the donor's family so long as any compensation paid to them is "reasonable" in light of the services they provide to the foundation.

Disadvantages

The private foundation format offers a number of disadvantages.

- Excise Taxes. Because the individuals who control the organization may also control the purse strings, the charitable integrity of private foundations is enforced by the Internal Revenue Service, primarily through the excise taxes described in IRC §§ 4940-49.

- Deduction Limits. While contributions of appreciated property to public charities are generally deductible at the fair market value, contributions of appreciated assets (other than qualified appreciated stock) to private foundations are limited under IRC § 170(e) to the donor's cost basis.

- Deductibility Thresholds. Under IRC § 170(b)(1), contributions of cash to a private foundation are deductible up to 30 percent of the donor's adjusted gross income, with a five-year carry-forward of excess amounts. Contributions of other assets are generally limited to cost basis and are deductible only up to 20 percent of the donor's adjusted gross income, also with a five-year carry-forward.

- Excise Tax on Investment Income. IRC § 4940 imposes a flat 1 to 2 percent excise tax on the investment income of private foundations other than private operating foundations.

- Self-Dealing. IRC § 4941 imposes an excise tax on acts of "self-dealing" between "any disqualified person" and a private foundation. "A disqualified person" includes substantial contributors, foundation managers, certain family members of substantial contributors and foundation managers, and entities in which substantial contributors have a significant interest. Acts of self-dealing include direct or indirect sales or exchanges between a disqualified person and the private foundation regardless of whether the transaction is at fair market value or to the benefit of the foundation.

- Mandatory Distributions. IRC § 4942 imposes an excise tax on the foundation's failure to distribute an amount usually equal to 5 percent or more of the value of its investment assets each year.

- Excess Business Holdings. IRC § 4943 imposes an excise tax on the "excess business holdings" of a private foundation. "[E]xcess business holdings" in a corporation or a partnership is defined as any excess over 20 percent (or, in some cases, 35 percent) of the voting interest reduced by the percentile voting interest held by disqualified persons. However, this excise tax is subject to a de minimis rule permitting 2 percent holdings in a corporation or partnership in any event.

- Jeopardy Investments. IRC § 4944 imposes an excise tax on "jeopardy investments." "Jeopardy investments" are investments such as puts, calls, and straddles that jeopardize the charitable purposes of a foundation.

- Taxable Expenditures. IRC § 4945 imposes an excise tax on "taxable expenditure[s]" made by a private foundation. Taxable expenditures include grants to individuals or entities other than qualified public charities unless the grants are made pursuant to qualified grant-making procedures or subject to financial oversight by the private foundation. These grant-making procedures create additional administrative expenses beyond those of other grant-making entities such as governmental agencies and public charities.

Structure of Supporting Organizations

A "supporting organization" as defined under IRC § 509(a)(3) is an organization that is exempt under IRC § 501(c)(3) and that supports one or more publicly supported charities qualifying under IRC § 509(a)(1) or (2).[1] Just as any other form of IRC § 501(c)(3) organization, a supporting organization must be organized and operated exclusively for charitable purposes, no part of the net earnings may inure to a private shareholder or individual, no substantial part of its activities may be attempts to influence legislation, and it may not participate in any political campaign. In addition to these requirements, a supporting organization must satisfy the following four requirements of IRC § 509(a)(3): (1) the relationship test, (2) the organizational test, (3) the operational test, and (4) the control test.

Relationship Test

To be a supporting organization, an organization must have one of the following types of relationships with the supported public charity:

- Type I - "Operated, Supervised or Controlled by." This type of relationship resembles that of a parent corporation and one of its subsidiaries. The relationship exists when a majority of the officers, directors, or trustees of the supporting organization are appointed by the supported public charity.

- Type II - "Supervised or Controlled in Connection with." This type of relationship resembles that of brother and sister corporations. The relationship exists when there is common supervision or control of both the supporting organization and the supported public charity.

- Type III - "Operated in Connection with." While this is the most flexible of the three types of permitted relationships, it is also the most complex. To come within this relationship the organization must be responsive and attentive to the needs of the supported public organization. This type of relationship is satisfied when the supporting organization meets both the integral part test and the responsiveness test of Treasury Regulation § 1.509(a)-4(i).

Organizational Test

A supporting organization must be organized exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations. The governing instruments (articles of incorporation and bylaws or trust document) must satisfy the following four requirements:

- Limited Purposes. The purposes of the supporting organization must be limited to one or more of the charitable purposes described in IRC § 509(a)(3).

- Identify the Supported Organization(s). The organizational documents must identify the supported organization(s) either by name or, if the supporting organization has a type I or type II relationship with the supported organization(s), by class.

- Restrict to Charitable Activities. The organizational documents must not authorize the supporting organization to engage in activities that are not in furtherance of the charitable activities described in IRC § 509(a)(3).

- Restrict Beneficiaries. The organizational document must not authorize the supporting organization to support or benefit any organization other than the specified publicly supported organization or class of organizations.

Operational Test

To satisfy the operational test, a supporting organization must engage solely in activities that support or benefit the designated publicly supported organization and must operate exclusively for the benefit of such publicly supported organization.

Control Test

A supporting organization may not be controlled by one or more "disqualified persons." In general, the term "disqualified persons" includes substantial contributors, family members of substantial contributors, entities that are controlled by substantial contributors, and entities that are substantial contributors themselves. A substantial contributor is any person or entity contributing more than $5,000 or 2 percent of the total contributions received by the supporting organization since its inception. Disqualified persons are in "control" when they can use their joint power or authority to require the supporting organization to take or refrain from taking a particular action.

Benefits of a Supporting Organization

Advantages

As an alternative to the private foundation, supporting organizations offer many advantages over the private foundation format.

- Public Charity Status. By virtue of its relationship with the public charity, the supporting organization is not required to satisfy the public "support" tests that some IRC § 509(a)(1) and all (a)(2) organizations must satisfy to avoid being classified as a private foundation. Consequently, even if a supporting organization is funded entirely by one donor, it will not be subject to the many restrictions and excise taxes described above. This differing treatment is the result of the publicly supported charity's monitoring of the suporting organization, ensuring its funds and resources are in fact being used for charitable purposes.

- Higher Deductibility Thresholds. Contributions of cash to a supporting organization are deductible up to 50 percent of the donor's adjusted gross income, with a five-year carry-forward of excess amounts. Contributions of property are deductible up to 30 percent of the donor's adjusted gross income, also with a five-year carry-forward.

- Deductions at Fair Market Value. As discussed above, contributions to a private foundation of appreciated long-term capital gain property, other than qualified stock, are limited to the donor's basis in such property. However, contributions of all types of appreciated long-term capital gain property to a supporting organization are generally valued at their fair market value for purposes of the income tax charitable deduction.

Disadvantages

Because a supporting organization cannot be controlled by one or more disqualified persons, a donor cannot appoint only him– or herself and his or her family members as members of the board of directors. However, the donor and/or members of his or her family may sit on the board so long as they cannot, by combining their votes or authority, control the decisions made by the board on behalf of the supporting organization. Thus, a donor may still significantly influence the supporting organization's decision making.

Conclusion

For many individuals, supporting organizations provide a superior alternative to private foundations for financial and operational reasons. The donor receives significantly greater income tax benefits from making charitable contributions to a supporting organization than to a private foundation. Similarly, because a supporting organization is not subject to the excise taxes of IRC §§ 4940-46, a supporting organization can engage in a broader range of transactions with a broader group of individuals and entities than can a private foundation. While the advantages of a supporting organization come at the cost of the donor giving up some degree of control over the organization, this sacrifice may be acceptable to the donor in many situations. Thus advisors who have clients who are considering establishing private foundations should bring the option of forming a supporting organization to their clients' attention. For many, a supporting organization is the preferred choice.

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Endnote

1. A supporting organization may also, under certain situations, support a social welfare league, civic league, labor or agricultural organization, real estate board, or business league exempt under IRC § 501(c)(4), (5), or (6). See the flush language of IRC § 509(a)(4).

Questions, Comments or Suggestions About This Newsletter?

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Avoiding Pitfalls in Charitable Planning: A Planned Giving Professional's Perspective

I have been asked as a representative of a nonprofit charitable organization to write this article. I am a member of the Oregon State Bar but do not practice law. However, my legal training has been very helpful when working in the charitable arena. In my position, I examine trust documents, work through the probate process, and handle securities and real estate transactions. The following gives you a perspective from the "inside" - from a planned giving specialist who deals with a wide variety of charitable planning issues.

Ferreting Out Charitable Intent

I often talk with advisors who say, "I don't have any clients who are charitably inclined. When I'm drafting their wills, I ask them if they want to give to charity and they say no." As planners we need to recognize an important part of our job is asking the right questions to gain the insight necessary to help our clients.

The problem with the question "Do you want to make a charitable gift?" is that a client may make inaccurate assumptions inhibiting his or her desire to make such a gift. Because giving cash is the most familiar method of charitable giving, many clients believe it is the only way. Clients may also view their assets as a fixed pie and fear if they make a charitable gift the assets available for their children and grandchildren will decrease. Absent other considerations, most people will not make a gift to charity at the expense of their loved ones. Due to this narrow focus of both clients and their advisors, people who would otherwise be charitably inclined decline to include charities in their estate and financial plans.

A more open approach to charitable giving may be to ask your client, "Would you be interested in making a gift to your children and also benefitting a charity that is important to you?" The phrasing of the question is important because it informs the client it is possible to leave a bequest to charity and not reduce the assets available for the client's heirs.

If a client with a taxable estate still remains uninclined to make a charitable gift, you might point out that without further action a sizable portion of the estate will go to support public causes through the payment of the estate tax. By including charitable gifts in the estate plan; the client, rather than the government, will decide which causes receive support. For some people, this is not a convincing argument, because they do not care what happens after they die. However, when asked, most clients would rather fund a scholarship at their alma mater than contribute to the resurfacing of a few miles of an interstate highway.

Proper Legal Name

To ensure a charitable gift is respected, it is important to specify the full legal name of the charity. For example, in my work for Doernbecher Children's Hospital Foundation, I have seen the name of the hospital spelled countless ways. More often than not, it is incorrect. Many wills include devises to "Doernbecher Children's Hospital." However, the hospital does not exist as a separate legal entity; it is only a "dba" name. Using the full legal name of the charity further ensures that it is not confused with similar charities. For example, to what entity does "Portland Children's Hospital" refer?

Advisor's should confirm a charity's legal name by calling the charity. They should also confirm that the charity is a qualified organization, thus ensuring the gift will qualify for the desired deduction(s). Taking a minute to do this can avoid confusion and problems down the road, as well as give the charity the opportunity to acknowledge the donor.

Donor Recognition

Charities like to thank donors who have remembered the charity in their estate plans. However, every year we receive significant bequests ($100,000 and more) from donors who were not on our radar screen. They had no history of giving and then suddenly left the foundation half of their estate. This never ceases to amaze me. While I am always grateful a person has donated such a large gift, it also makes me sad that we were never able to properly thank him or her. Recognition, whether public or private, can also be very important to the donor.

When an attorney calls to get the proper bequest language, I always send a brochure about our heritage society and ask that it be given to the client. A heritage society may be structured differently at each charity, but it generally exists to recognize donors who make charitable gifts through a life income gift plan or in their estate plans. As a member of the heritage society, the donor may receive small tokens of thanks, thank-you letters, invitations to gatherings or events, and maybe even a personal visit.

I make a point of reaching out to our bequest donors. They are the backbone of charitable giving. Each donor has a unique story concerning his or her relationship to the organization and how he or she came to care about its mission. Often the donor is older and really enjoys the personal contact as well as the feeling that he or she are part of the broader community. I encourage you to determine if your client's charity has a heritage or recognition society and connect your client to the planned giving representative so he or she will receive personal recognition from the charity.

Gift Acceptance Policies

Many charities have policies regarding what gifts they can and cannot accept. This protects the charity from accepting gifts exposing it to unnecessary liability. As a result of these guidelines, representatives of the charity, donors, and advisors are aware of how various types of gifts are handled. For example, the Oregon Health Sciences Foundation's ("OHSF") Planned Giving Policy addresses some of the following:

Priority of the Donor's Interest

The donor's interest is first and foremost and shall come before that of the foundation. A gift agreement shall not be entered into if it jeopardizes the donor's interest.

Confidentiality

All information concerning planned giving donors, including names and addresses, gift amount, nature and value of estate, etc., will be kept strictly confidential by the foundation, unless permission to release it is granted.

Legal and Tax Advice

Prospective donors are encouraged to seek independent legal and tax counsel regarding proposed planned gifts.

Finder's Fees and Commissions

The foundation does not pay a "finder's fee," commission percentage, or other special compensation to any parties for the procurement of planned gifts. Employees of the foundation are paid a salary rather than a commission based on the amount of funds raised. In fact, section IV of the Model Standards of Practice for the Charitable Gift Planner states that commission-based compensation for Gift Planners who are employed by a charitable institution is never appropriate.

A complete copy of the foundation's policies can be found at OHSF's Planned Giving Design Center Web site <www.pgdc.net/OHSF>.

In addition to the specific OHSF policies outlined above, charities may have different policies depending on the specific type of gift. Gifts for which policies may vary include cash, publicly traded securities, closely held C corporation stock, subchapter S corporation stock, real estate, bargain sales, intangible gifts, tangible personal property gifts, and life insurance. Charities may also have policies for specific gift planning vehicles, including bequests and estate distributions, revocable trusts, charitable remainder trusts, charitable lead trusts, charitable gift annuities, pooled income funds, life estate agreements, and donor advised funds and supporting organizations. It is important for attorneys to be aware of all of a particular charity's policies that may potentially affect their clients' gifts.

One way to ensure attorneys are aware of these policies is to include a planned giving professional in discussions with clients about charitable alternatives. I strongly encourage this. Planned giving professionals are familiar with their organizations' operating procedures and can work with the attorney and his or her client during the early stages of developing a gift plan. Including planned giving professionals in the process can help to ensure the gift is structured to prevent future problems, especially those arising from testamentary gifts.

For example, let us assume a donor revises her will to create a testamentary endowment fund to benefit a particular program at her church. She does not realize the church is in the process of phasing out that program. At her death two years later, the program she wanted to benefit is no longer in existence, and the donor's wishes are unfulfilled. Involving a representative from the church in the planning process may have avoided this scenario. In this case, the planned giving professional could have discussed other church programs of interest. If the donor was unsatisfied with the alternatives, she could have sought out another charity offering the program.

Gifts of Real Estate

It is also important to work with the charity to ensure a proposed gift can be accepted by the charity. Environmental and marketability concerns should be addressed in any proposed real property gift. Even though real property is a great asset to donate in Oregon, donors and advisors often overlook it as an asset for charitable giving. Many donors are "land rich" and "cash poor," which makes real property gifts a wonderful tool. There are many possibilities for gifts of real estate: charitable trusts and gift annuities (which can create an income stream for the donor) and outright gifts. However, there are a few land mines to avoid when considering a gift of real property.

Environmental Concerns

Charities see a number of properties each year with environmental issues. The problems range from leaking underground storage tanks to dumping of hazardous waste to drug house activity. Most charities have policies requiring an environmental assessment of the property before acceptance.

If your client has a piece of property with known environmental issues, disclose this up front to the charity; if the issue is minor and can be remedied promptly, it may not create a problem. However, if a suspected or known problem is not disclosed and the charity discovers it through its own research, it makes future discussions with the donor much more difficult. Due to the potential of future liability, a charity has a responsibility not to enter into the chain of title on a property that has serious environmental issues.

Marketability

Additionally, the donor and the charity must consider the marketability of the property before the gift is made. Discussions with local planners, real estate professionals, and others will help in determining the property's marketability. We receive many calls from people interested in donating real or personal property they are unable to sell. They want to donate it just to "get rid of it." Usually it is an item our charity cannot retain and would normally sell, using the proceeds to further our charitable mission. It is important to help your client understand that if he or she cannot sell an item, chances are the charity it is meant to benefit cannot sell it either.

The charity's cost of holding the property for sale is also important in deciding whether to accept a gift. Carrying costs may include property taxes, mortgage payments, maintenance, insurance, and association or membership fees. Although most properties are sold within six months of acceptance, an assumed holding period of 18 to 24 months is recommended as a conservative approach in analyzing a gift.

Conclusion

Charitable giving can be a very rewarding experience for clients. As an estate planning attorney, you are in a perfect position to assess your clients' needs and help them make well-informed decisions, including making charitable gifts when appropriate. In charitable planning, the ultimate goal is to connect clients to charities that support programs or causes important to them, making the clients feel part of the greater community. This connection not only provides personal recognition for your clients, it can also introduce you to planned giving professionals who can assist you in understanding a particular charity's policies. With careful drafting and full knowledge of the relevant policies, you can ensure your clients' charitable intentions are carried out even after they are gone.

Kirsten C. Meneghello, J.D.
Associate Director of Planned Giving
Oregon Health Sciences Foundation
and Doernbecher Children's Hospital Foundation

Upcoming CLEs

Oregon Law Institute, Northwestern School of Law of Lewis & Clark College presents

Advanced Estate Planning
featuring Clifton B. Kruse, Jr.
nationally known speaker and writer on elder law and estate planning

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Clifton B. Kruse, Jr. has been recognized since 1989 in *Woodward & White's Best Lawyers in America* (on trusts and estates) and lectures regularly for the ABA as well as many other organizations.

His practice is limited to estate planning, estate administration, and elder law. He is a prolific writer on estate planning and is a regular contributor to the National Academy of Elder Law Monthly Journal.

To register, please call 503-243-3326 or 800-222-8213.

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Administering Trusts in Oregon
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Do you have questions about trust administration? If so, you're not alone. In the last few years, the use of trusts has skyrocketed and so have questions about trust administration. This seminar will answer your questions. How do the day-to-day operations of a trust really work? What are the critical postmortem decisions? How would a special needs trust be handled for a disabled beneficiary? When is it advisable to revoke, modify, or terminate a trust? How does an administrator deal with creditors of a grantor or a beneficiary? Any lawyer who advises clients on the administration of testamentary and living trusts, regardless of the size of the trust, will benefit from this seminar. Cosponsored by the Estate Planning and Administration Section.

To register, call the OSB Order Desk at 503-684-7413, or toll-free in Oregon at 1-800-452-8260, ext. 413.

What's New

Uniform Trial Court Rules

The Oregon Supreme Court has amended the Uniform Trial Court Rules ("UTCR") effective August 1, 2000. These rules include a new form of accounting in estates and conservatorships. UTCR 9.160. This new form of accounting must be accepted by all courts but is not mandatory unless required by the Supplementary Local Rules ("SLR") of a court. (See SLR 9.161 for requirements.) At its discretion, a court may also continue to allow other forms of accounting.

The UTCR also require certain disclosures in estate and conservatorship accountings. UTCR 9.170 provides that a narrative of an accounting must specifically disclose and explain any financial transaction between the fiduciary and the fiduciary him– or herself, a member of the fiduciary's family, a friend of the fiduciary, or a friend of a member of the fiduciary's family. Examples of such transactions include payments of rent, expense reimbursements, gifts, sales, and payments for services.

The 2000 UTCR are available in PDF format at <www.ojd.state.or.us> . They may also be obtained in an 8-1/2" x 11" format for $10 per copy from the Publications Section, Supreme Court Building, 1163 State Street, Salem, OR 97310.

From the Bench

The probate commissioner in Lane County has brought to my attention that upon entry of the final distribution order of a probate estate, some attorneys have transferred the estate's funds into their lawyer trust accounts. Distributions to the estate beneficiaries are then made from these accounts. The likely purpose is to avoid having to account for interest accruing between the time the court enters the final distribution order and the time the funds are actually disbursed.

Although the amounts involved may be small, any interest accruing before distribution belongs to the beneficiaries. Thus neither the lawyer nor the personal representative should transfer funds to an account from which interest will not be paid to the beneficiaries. To avoid the problem of disbursing an amount inconsistent with the court's order or being left with an undistributed balance, the attorney may request an order requiring that interest accruing before actual disbursement be allocated pro rata among the beneficiaries. An alternative, if the estate will disburse the funds promptly and the interest lost will be minimal, is to transfer the funds to a non-interest-bearing account. In any event, lawyers should not transfer estate funds into their lawyer trust accounts.

Jack A. Billings
Circuit Court Judge
Lane County

The Editorial Board believes that timely feedback from our readers will further the educational purposes of the *Newsletter.* Therefore, the board welcomes letters to the editor presenting further thoughts and ideas, practice tips, or other substantive comments on estate planning topics presented in the *Newsletter.* As with any other material presented for possible publication, the board reserves the right to withhold publication of any letter in whole or in part. Letters should be sent to the editor, Nancy E. Shurtz, at:

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CALENDAR OF SEMINARS AND EVENTS

- October 5-7, 2000 (Sponsored by ALI-ABA) **Post-Mortem Planning and Estate Administration,** Regal Knickerbocker Hotel, Chicago, IL. Telephone: (800) CLE-NEWS.
- October 5-6, 2000 (Sponsored by Practising Law Association) **31st Annual Estate Planning Institute,** Hotel Nikko, San Francisco, CA. Telephone: (800) 260-4PLI.
- October 6, 2000 (Sponsored by Oregon State Bar) **Ethics 2000**, Convention Center, Portland, OR. Telephone: (503) 684-7413.
- October 6, 2000 (Sponsored by Oregon State Bar) **Ethics Practice Issues for the 21st Century**, Convention Center, Portland, OR. Telephone: (503) 684-7413.
- October 16-17, 2000 (Sponsored by Washington State Bar Association) **45th Annual Estate Planning Seminar,** Washington State Convention & Trade Center, Seattle, WA. Telephone: (206) 727-8292.
- October 19, 2000 (Sponsored by the Oregon State Bar) **Administering Trusts in Oregon,** Oregon Convention Center, Portland, OR. Telephone: (503) 620-0222.
- October 19-20, 2000 (sponsored by The Bank Tax Institute) **Tax Withholding and Information Reporting Conference,** Hilton Alexandria Old Town, Alexandria, VA. Telephone: (800) 831-8333.
- October 20, 2000 (Sponsored by the Oregon State Bar) **Money, Money, Money - Your Financial and Ethical Responsibilities,** Sweetbrier Inn, Tualatin, OR. Telephone: (800) 452-1639 or (503) 639-6911.
- October 25, 2000 (Sponsored by Practising Law Institute) **Basic Will Planning,** PLI Conference Center, New York City, NY. Telephone: (800) 260-4PLI.
- October 26-28, 2000 (Sponsored by The Southern California Tax & Estate Planning Forum) **The 20th Annual Southern California Tax & Estate Planning Forum,** San Diego Paradise Point Resort, San Diego, CA. Telephone: (800) 332-3755.
- October 29 - November 3, 2000 (Sponsored by Chaminade University Tax Foundation and Chaminade University of Honolulu) **37th Annual Hawaii Tax Institute (Estate, Gift, Corporate and Real Estate Planning),** Hawaiian Regent Hotel, Honolulu, HI. Telephone: (808) 946-2966.
- October 30 - November 1, 2000 (Sponsored by Chaminade University Tax Foundation and Chaminade University of Honolulu) **Estate and Gift Tax Planning,** Hawaiian Regent Hotel, Honolulu, HI. Telephone: (808) 946-2966.
- November 1, 2000 (Sponsored by Practising Law Institute) **Basic Estate Planning,** PLI Conference Center, New York City, NY. Telephone: (800) 260-4PLI.
- November 10, 2000 (University of Southern California) **Probate & Trust,** Westin Bonaventure Hotel, Los Angeles, CA. Telephone: (213) 740-2646.
- November 13-17, 2000 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Ritz Carlton, San Francisco, CA. Telephone: (800) CLE-NEWS.
- November 17, 2000 (Sponsored by the Oregon State Bar) **Estate Planning,** Oregon Convention Center, Portland, OR. Telephone: (503) 620-0222.
- November 30-December 1, 2000 (Sponsored by ALI-ABA) **Tax Exempt Charitable Organizations,** Madison Hotel, Washington, D.C. Telephone: (800) CLE-NEWS.
- December 1, 2000 (Sponsored by Oregon Law Institute and Northwestern School of Law of Lewis & Clark College) **Advanced Estate Planning**, Featuring Clifton B. Kruse, Jr., Oregon Convention Center, Portland, OR. Telelephone: (503) 243-3326 or (800) 222-8213.
- January 8-12, 2001 (Sponsored by University of Miami, School of Law) **35th Annual Phillip E. Heckerling Institute on Estate Planing,** Fontainebleau Hilton Resort and Towers, Miami Beach, FL. Telephone: (305) 284-4762.
- January 26, 2000 (Sponsored by the Estate Planning Council of Portland) **30th Annual Estate Planning Seminar,** Convention Center, Portland, OR. Telephone: (503) 233-1224.
- April 23-27, 2001 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Plaza Hotel, New York City, NY. Telephone: (800) CLE-NEWS.

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