

PROTECTING CHARITABLE LEGACIES
OR
HOW TO AVOID LOSING A CHARITABLE BEQUEST

Partnership for Philanthropic Planning

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By:

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1. INTRODUCTION.

Charitable organizations spend countless hours and resources developing planned gifts and assisting potential donors in making good choices to carry out their charitable intent. The intent of the donor may be frustrated if careful planning is not made to ensure that the intended beneficiary receives the gift planned by the donor. This article provides a guide to help charitable organizations protect planned gifts in wills, trusts, and non-profit corporations so that the donor's charitable intent is fulfilled.

2. DRAFTING IS IMPORTANT.

A donor may make a planned gift to a charitable organization by naming the organization as a beneficiary, by designating a charitable purpose to be fulfilled without designating a particular organization, or by using a donor advised fund sponsored by a community foundation or financial institution. Each of these types of gifts require the donor to specify the terms of the instrument, the designated beneficiary or charitable purpose, and the person who will manage the assets and make determinations concerning the amount and terms of the grant. Therefore, the words used in the instrument creating the gift will determine who receives the gift, the amount of the gift, the timing of the gift and the conditions upon which the gift may be made. A carefully drafted instrument will help to accomplish the donor's original intent. A poorly drafted instrument will lead to frustration of the donor's intent and the likelihood that an unintended gift may occur.

3. DUTY OF FIDUCIARY TO FOLLOW THE INSTRUMENT.

It is a fundamental duty of a trustee to carry out the directions of a testator or the maker of a trust as expressed within the terms of the will or trust. *GEORGE GLEASON BOGART, THE LAW OF TRUST AND TRUSTEES*

§541. The trustee holds the trust estate for the benefit of the beneficiaries. *Alpert v. Riley*, 274 S.W.3d 277, 286 (Tex. App.—Houston [1st Dist.] 2008, *pet. denied*). The duties of trustees as to payments and distributions are generally set forth in the trust instrument... It is fundamental that the trustee has a duty to obey such instructions. A donor may limit a beneficiary's right to receive distributions by granting the trustee discretion (1) to select and exclude beneficiaries from a class; or (2) to decide the amount, form, time, purpose, or other feature of payment." *BOGART, supra*, §811. How a trustee exercises his discretion is subject to the trustee's over-arching obligation of good faith to the beneficiaries. Tex. Prop. Code Ann. §113.029(a)(Vernon). A trustee must exercise discretionary power in accordance with the terms and purposes of the trust and the beneficiary's interest. *Id.*

Foundation managers and directors of non-profit corporations hold the same duties as a trustee when it comes to making distributions from a charitable trust, foundation or corporation. Many charitable trusts or entities do not name specific organizations as beneficiaries. Instead, they create a class of beneficiaries who may be eligible to receive distributions. The fiduciaries hold the assets of a charitable entity in trust for the public. Many charitable trusts and foundations give the fiduciaries broad discretion to determine the name of the beneficiary, the amount of the distribution and all other conditions of a grant. Because of the broad discretion given to fiduciaries in many legal documents, a planned giving professional should help a potential donor understand that the benefits to a particular organization should be spelled out in the document as clearly as possible.

4. RULES OF CONSTRUCTION.

The construction of wills and trusts is a question of law for the trial court. *Eckels v. Davis*, 111 S.W.3d 687, 694 (Tex.App.—Fort Worth 2003, *pet. denied*.) The rules of construction are well settled. *Eckels*, 111 S.W.3d at 694. *Hurley v. Moody Nat'l Bank*, 98 S.W.3d 307, 310 (Tex. App. -- Houston [1st Dist.] 2003, no *pet.*). A court must construe both wills and trusts to ascertain the intent of the maker. *Eckels*, 111 S.W.3d at 694; *Hurley*, 98 S.W.3d at 310. Such intent must be ascertained from the language within the four corners of the instrument. *Eckels*, 111 S.W.3d at 694, (citing *Shriner's Hosp. for Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 151, 24 Tex. Sup. Ct. J. 146 (1980) (applying this concept to the construction of a will)). If the language is unambiguous and expresses the intent of the grantor then there is no need for the court to construe the trust instrument. *Eckels*, 111 S.W.3d at 694. Alternatively, if the meaning of an instrument is uncertain or "reasonably susceptible to more than one meaning" then the instrument is ambiguous. *Myrick*, 802 S.W.2d at 738. A patent ambiguity arises on the reading of a trust from the words

themselves. *Eckels*, 111 S.W.3d at 695. A latent ambiguity exists when an instrument appears to convey a sensible meaning on its face that cannot be carried out without additional clarification. *Eckels*, 111 S.W.3d at 695.

The court must focus on the meaning of the words actually used, not speculate on what a grantor may have intended to write. *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000). A court “must not redraft a trust to vary or add provisions “under the guise of construction of the language” to reach the presumed intent.” *In re Ray Ellison Grandchildren Trust*, 261 S.W.3d 111, 117 (Tex. App.—San Antonio, 2008). If possible, the Court should construe the instrument so as to give effect to all provisions rendering no provision meaningless. *Eckels*, 111 S.W.3d at 694. (citing *Myrick v. Moody*, 802 S.W.2d 735, 738 (Tex. App. - Houston [14th Dist.] 1990, writ denied)).

5. CASE STUDIES.

A. Identify the entity. Many organizations have an affiliation with another organization. For example, an organization may be the local affiliate of a national organization. The National Red Cross is an example of an organization with local affiliations, all of which are under one national organization. Other organizations may have a national corporation and each local organization is a separate non-profit corporation. Some organizations may have affiliated relationships with other non-profits. If a donor intends to benefit the local affiliate of a national organization, they should specifically identify the organization to be benefitted in the gift document. I recommend using the name and address of the intended beneficiary. Some donors also include the employer id number or some other identifying information.

B. Identify the geographic area of intended gifts. A donor may wish to have his or her funds expended to benefit a specific geographic area. A donor who wishes to benefit only local charities should clearly limit the geographic area and organizations which may benefit from the trust or charitable entity. The Texas Property Code has been amended to attempt to limit the ability of a trustee to move the situs of the administration of trusts out of state. Section 113.030 requires a trustee to notify the attorney general if any change of trustee would cause the situs of the trust to be moved out of the State of Texas.

As financial institutions acquire local banks and consolidate management, the trend is to move more and more funds away from local communities to regional management. If a donor intends to retain local control and benefit local organizations, careful drafting is required and limitations should be

placed upon the persons who may serve as fiduciary and the location of intended beneficiaries.

C. Anticipate changes. Many charitable organizations will change over time. This can occur due to reorganizations including mergers, split-offs, split-ups, or dissolution. For example, a trust might name four separate charities as beneficiaries and provide that if a named charity is no longer in existence, then the remaining entities would divide the trust equally. When two of the named charities merge, the trustee must determine whether the merged entity would receive one-third of the trust distributions or if it should receive one-half.

Another issue occurs when a named charity splits into two entities. In a recent Fort Worth case, a donor named her church as a beneficiary under her trust. After the donor died, but before the funds were distributed, the church split into two churches. Both churches continued to use the same name and both asserted that they were the successor to the original church. As a result, the trustee had to ask the court to determine who was entitled to receive the gift. That case is still pending and it will be interesting to see how the court resolves the question.

D. Consider the type of property gifted. Many donors desire to make gifts of specific property. For example, a donor may donate artwork to a museum or horses to an equine therapy program. In many cases, the charity cannot accept the gift due to its gift acceptance policies. Many times the charity would prefer that the fiduciary sell the item and distribute the proceeds to it. Unless there is language in the trust authorizing the fiduciary to sell the item, the charity may be limited to either accepting the gift as is or rejecting it.

Many donors own closely held business interests or interests in family limited partnerships. It is not uncommon for the donor to leave a gift of limited partnership interests or stock in a closely held business to a charity. Care should be exercised by the charity in accepting the gift. The charity should be involved in the drafting and planning of the instrument.

6. PROTECTING THE LEGACY BY AVOIDING WILL CONTESTS.

Wills and trusts may be contested if the decedent lacked testamentary capacity or was unduly influenced. Although Texas law allows an individual to make testamentary dispositions to whomever they choose, there remains a strong bias that a person should leave his or her property to their natural heirs at law. Therefore, caution should be exercised when advising donors who wish to leave their property to persons other than heirs at law especially if the donor is ill or elderly.

Texas law defines testamentary capacity as: *Sufficient mental ability to understand that one is making a will, the effect of making a will, and the general nature and extent of one's property. The person making the will must also know the natural objects of his or her bounty, the claims upon them, and have sufficient memory to collect in his or her mind the elements of the business transacted and hold them long enough to form a reasonable judgment about them.*

Undue influence is defined as: *any influence, which compels the testator to do that which is against his or her will from fear, the desire for peace, or some other feeling that he or she is unable to resist.*

A. Fundraising Activities. Many fundraising professionals develop close relationships with donors through personal contacts and activities. A potential donor may be invited to the President's suite at the football game or an opening of an art exhibit. In general, these types of activities are common and should not raise an issue in a potential will contest proceeding. However, private dinners between a fundraising professional that appear more like dates than events, can cause a jury to determine that undue influence is being exerted. When possible, it is best to have another person meet with you and the donor. Consider the time of day. Many elderly persons are better in the morning than the evening. Public places are better than meeting in the donor's home. Always include the donor's professional advisors and when in doubt, have the donor's physician give an opinion of capacity.

B. Be careful what you put in an email or file. Emails, notes and journal entries should be written with the assumption that they will be offered as evidence at trial. Do not include in your report to your supervisor messages such as "Mr. Donor really likes steak and I plan to take him to an expensive steak restaurant next time I call on him."

C. Establish a long-term relationship. The motive of a donor to make a gift is important. Ask yourself: Does the donor have a history with your organization? Does the donor currently support the organization? What interests does the donor have? Is the donor a supporter of the arts or does he or she have a family member that suffered from a particular illness? Document your file with information regarding the interest of the donor and his or her connection to your organization.

7. Keeping the fiduciary honest.

Unfortunately many charitable dollars are lost to unscrupulous and dishonest fiduciaries. A trustee or attorney may charge unreasonable compensation or delay the distribution of the gift. Fortunately, there are

some things that a charity can do to minimize loss on account of breach of fiduciary duty.

A. Obtain initial accounting and federal estate tax return. The Texas Probate Code was amended effective January 1, 2014 and its name was changed to the Texas Estates Code. Under the Code, an executor no longer has to file an inventory with the court. The executor is required to notify all charities that are named as beneficiaries under a will. The executor must provide each beneficiary with a copy of the will or a description of the gift. The Estates Code requires an executor to give each beneficiary a copy of the inventory. A beneficiary may compel the executor to give an inventory if it does not receive one within ninety days from date of appointment. If the estate is valued at more than \$5,340,000, a federal estate tax return is required to be filed within nine months from date of death. A beneficiary should obtain a copy of the return from the executor.

B. Obtain annual accountings. An executor or trustee has a duty to provide annual accountings to each beneficiary. If no accounting is provided, a court order may be obtained.

C. Ask your attorney to monitor the estate. Have your attorney send a simple letter thanking the executor for providing a copy of the will and inventory and requesting that they be kept informed. Or show your attorney as the recipient of a cc on communications between your organization and the fiduciary.

D. Expect a distribution within eighteen months from date of death. Most estates remain open for a minimum of twelve months before distributions can be made. If your organization has not received its gift within eighteen months, contact should be made to the executor or trustee asking for the status and timing when distributions will be made. A beneficiary may compel a distribution if eighteen months has passed and there is no necessity to keep the estate open. The longer the estate or trust remains open, the higher the probability that a trustee will abuse its trust by taking unreasonable compensation.

E. Encourage the donor to make outright gifts. The best gift is an outright gift to a named organization.

F. Encourage the donor to limit compensation of fiduciary. A donor may limit the compensation of the executor or trustee. It is common to limit compensation to an amount that would be charged by a bank's standard fee schedule in the county were the decedent lives. A donor may also state a specific amount of compensation or a percentage fee.

G. Gifts to Fiduciaries. Texas law prohibits gifts to an attorney who writes the will except under certain limited circumstances. If you have a will that leaves a gift to the attorney who drafted the will, then you should have the will reviewed by your attorney to determine if the gift is valid.

H. Contact the Attorney General at the earliest sign of trouble. The charitable division of the Texas Attorney General's office is responsible for protecting the public's interest. The Attorney General has authority to represent all charities in any estate or trust proceeding. A charity may contact the Attorney General's Charitable Organizations division for advice or to express concern. The contact information is:

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

512-475-4233 phone
512-475-2994 fax

8. CONCLUSION.

A charity may increase its chances of receiving a donor's gift by working carefully with the donor in drafting the gift instrument. Provisions should be included to specifically identify the beneficiary and anticipate any changes that might occur. Special consideration should be given to the type of property transferred. Geographic limitations and restrictions of the persons or entities who may serve as trustee are important. The fiduciary's compensation should be clearly defined. Fundraising activities should be kept on a professional basis and should look like meetings rather than dates.

A charity should monitor gifts by keeping copies of gift instruments when provided by the donor, including copies of wills naming the charity as a beneficiary. When a donor dies, the charity should obtain a copy of the will and contact information for the executor and the executor's attorney. The charity should request and receive a copy of the estate's inventory and, if an estate tax return is filed, ask for a copy of the return. The charity should know the date that letters testamentary are issued and monitor the estate so that if the gift is not received within eighteen months, further inquiry is prudent. Legal counsel should be included as a monitor of the estate process. If anything appears wrong or suspicious, one should seek contact the Texas Attorney General or legal counsel for the charity.