# TOP TEN ESTATE SETTLEMENT PROBLEMS AND WHAT TO DO ABOUT THEM

PG CALC WEBINAR

APRIL 24, 2025



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Introductory/Background Comments

Every charity that receives gifts from the various and sundry estate planning methods that their donors use has some "system" for administering such bequests. For smaller charities and churches, usually either the Executive Director (or clergyman) himself or someone responsible for Finance handles these gifts. In my experience, these groups typically do not do much more than sign a receipt and say thank you for the gift. At mid-size organizations, these gifts are usually handled by a planned giving officer or a revenue manager in the Finance department. Procedures here run the gamut from a simple receipt and thank you to full-on monitoring of the probate/trust administration. For large, national charities, there is often a single person or a team solely dedicated to handling bequests. Typically, they have the means (a database) to track and monitor these gifts and a standard procedure or set of steps that must be met to meet audit requirements. Lastly, some charities of all sizes outsource part or all their bequest administration to a third-party law firm.

However, no matter what the size of charity and no matter what the size of the bequest, the receipt of every bequest does not always "go smoothly" and there are several typical problems which seem to occur repeatedly. Fortunately, they represent a minority of the bequests received by charities – but they can take up a majority of your time in dealing with them.

To give you an idea of how often these problems crop up, my team at the American Heart Association handles $85M to $110M in annual estate settlement revenue, opens about 800 new estates every year and maintains files on roughly 200 on-going split-interest trusts and 300 on-going perpetual trusts. Our "litigation rate" is typically 3% to 4%. For about half of those "litigation" files, the AHA hires outside counsel to represent it and the other half are dealt with internally. In total, we estimate that about 10% of the estates we handle have some sort of "problem" – ranging from a full-blown will contest to an executor who's just dragging his feet and is slow in making distribution.

Just as every bequest and decedent is unique, so are the problems that relate to them. There's no magic bullet that will solve every problem, so you must read the situation carefully each time and be flexible in your response. Most importantly, your job is to maximize the funds distributed to your organization while keeping expenses as low as possible. That means that you matter how strong the principle you are standing on or how right your cause is – you need to evaluate your potential actions in terms of cost-benefit. As a great white-bearded sage once said, "You've got to know when to hold 'em and know when to fold 'em."

So, with all of that in mind, here are ten typical problems faced in charitable bequest administration and some hopefully helpful tips to deal with them (starting with the most common and working towards the least common).

Problem #1: It has been eons since the estate/trust administration was started and you still do not have the distribution your charity is entitled to receive.

The Cause: Most typically it is just overworked or lazy attorneys, trust officers, or others involved in the administration. Maybe the attorney is waiting for the accountant to send her the final tax return (of course, it would not hurt the attorney to call to find out how it is coming along either).

 

Maybe there is a legitimate delay or maybe someone has run off with the money – either way the charity should be informed of it.

What to Do About It:

a. Use a tickler system to stay on top of all your files

   i. If you do not tickle, you will not know you have a problem.

   ii. As a very general guideline expect distributions from a specific bequest to arrive in 6 months, a residual bequest in 12 to 18 months, and a residual bequest with estate tax in 18 to 24 months.

   iii. Request status update regularly (every 3 to 6 months or less depending on how overdue the situation is).

b. The squeaky wheel gets greased.

   i. A phone call works better than a letter or email, but…

   ii. Document your call with a follow up letter and cc: other beneficiaries; at least make note in the file that you called to request an update.

   iii. Be pesky, but not annoying.

c. Get others involved.

   i. Have other named charitable beneficiaries call/write to ask the same questions.

   ii. Ask to talk to the attorney handling the file if you have been working with the paralegal/assistant or vice versa.

d. Calling the probate court and getting it to issue a motion to show cause.

   i. Courts have different rules about setting motions to show cause.

   ii. Send a letter to the court detailing your attempts to contact/get action and cc: the other beneficiaries and the problem maker.

   iii. SHOW UP and be heard at Show Cause Hearings. Most courts now permit attendance via Zoom at hearings.

e. Filing a motion to compel distribution.

   i. This is usually a last-ditch effort and usually will require you to hire outside legal counsel unless you are a lawyer licensed in the jurisdiction.

   ii. However, attorney fees can often be recovered in these types of situations.

Problem #2: The attorney/executor/trustee has failed to provide you with the information or documents requested.

The Cause: These problems fall into one of two categories – laziness/forgetfulness or willfully withholding information. If it is the first, you have basically got the same problem as a slow-moving estate and many of the suggested solutions will apply here as well. If the individual is willfully withholding it is usually because 1) they are trying to protect the privacy of the decedent; 2) they do not understand the legal requirements, or 3) they are just a jackass. This problem tends to be much more common when you are dealing with a "non-lawyer" who is handling the estate without the assistance of legal counsel.

What to Do About It:

a. Give them options.

   i. If you are asking for a copy of the dispositive instrument and you are just a specific beneficiary – just ask for the section that pertains to your organization; if you are a residual beneficiary, tell the person that they can redact the names of other beneficiaries from the document (but that they need to leave all dollar amounts visible).

   ii. If you are asking for an accounting, indicate that you do not need a full, formal accounting. Provide a simple form that shows a starting balance, receipts, distributions, general expenses, legal fees and an ending balance.

b. Explain why you need what you are asking for.

   i. Will/Trust Document – record of language used to make the gift; confirming unrestricted or restricted; ability to calculate expected distribution on a residual bequest.

   ii. Inventory/Accounting – confirm that entity received what it was supposed to and review any fees/expenses. You are typically only entitled to either of these documents if you are a residual beneficiary.

   iii. To comply with audit requirements – this seems to work better with non-attorneys. Below is sample language we have included in letters in the past.

Before I can provide you with a signed Consent/Receipt, XYZ Charity needs to obtain an accounting for the estate to verify its distribution. We ask for this document, not to be difficult, to pry into the decedent's life, nor to question the actions of the executor, but rather in order to comply with Generally Accepted Accounting Principles (GAAP) that are required by our external auditors. For XYZ charity, failure to comply with GAAP could result in the loss of our non-profit status (so I hope you can understand why this is important to us).

c. Cite the statute giving you your rights.

 

i. Almost every state requires executors and trustees to provide beneficiaries with a copy of the instrument upon request (and usually they must provide an inventory and/or accounting as well). This is known as the Duty to Inform and Duty to Account in most states. You can view almost every state's probate code through its respective Secretary of State or Legislature website for free.

ii. When dealing with attorneys, be sure you are citing the correct statute.

iii. When dealing with non-attorneys, provide a photocopy of the statute with your second request letter.

iv. Do not let them charge you additional fees for providing what is required under the law, especially if they are on a percentage fee.

d. Do not sign receipts/waivers or deposit a final distribution check until you get what you want.

e. But none of the OTHER charities are asking for any of this stuff?

i. "Well, we are."

ii. Here is a list of just a few of the charities that DO always ask for these types of documents: ASPCA, American Cancer Society, American Diabetes Association, American Heart Association, American Lung Association, American Red Cross, Hadassah, Humane Society, Jewish Federation, Nature Conservancy, Salvation Army, Shriners' Hospitals, St. Jude's, most major universities, etc.

<u>Problem #3</u>: The attorney/executor/trustee cannot (or does not want to go to the hassle) of liquidating certain assets and is asking to distribute them in-kind to your charity.

<u>The Cause</u>: Nothing slows down the estate administration process more than difficult-to-liquidate assets. Many times, the person handling the estate/trust will not have the expertise to properly deal with such assets. These assets include: oil/gas/mineral royalty interests, tangible personal property (e.g., the 2,000-piece Hummel collection), timeshares, cemetery plots (preferably vacant), unmarketable real property, and anything that requires to be fed.

<u>What to Do About It:</u>

a. Worthless assets or assets that may create liability for your charity (e.g., real property situated on a Superfund site).

i. Disclaim. Disclaim. Disclaim.

ii. Typically, this can be done at any time PRIOR to accepting the property; however, if you are going to disclaim do it as soon as possible in the process.

 

If you see a timeshare listed on the initial inventory right then and there is the best time to send off a disclaimer.

iii. Typically, a disclaimer must be in writing (and should be recorded in the case of real estate).

iv. Be specific about exactly what you are disclaiming – you still want to get everything else you are entitled to in the estate.

b. Tangible personal property.

i. Using E-Bay, E-Bay dealers, or other online sellers to quickly get rid of certain items.

ii. Realize you are going to lose a percentage off the top if you use a third-party seller.

iii. Jewelry stores might give you gold at or near the market price, but everything else is going to face a 50% or more discount, if they will take the jewelry at all.

iv. Make the item part of the silent auction at your next local fundraising event.

c. Oil/gas/mineral royalty interests.

i. Oil/gas/mineral interests are very complicated and you will likely want to disclaim "participating interests" as they carry liability with them.

ii. Consider using EnergyNet.com or similar service to sell these assets or a management service, such as High Ground Advisors, to hold them.

iii. Gather as much information about the interest as you can and these services, for a fee, will put your property up for auction – it lets the market dictate the price – rather than accepting unsolicited offers from unknown parties.

iv. Try to combine your fractional interest with fractional shares from other charities taking the asset under the will when you are selling.

d. Low or no value real estate.

i. For real property, depending on the county, a courthouse action may only be for tax sales or may include other property.

ii. Problem with a courthouse auction and valueless property is that it takes a long time for unpaid taxes to accrue enough to the point where the county will force a tax sale.

iii. Especially when dealing with vacant lots/undeveloped property, determine who the neighboring land owners are (possibly from the online property appraiser's website) and contact them to see if there is interest in purchasing the land, even for a nominal fee.

iv. Keep a catalog or record of all in-kind property your organization holds. Know what you own and what you have sold, because it will come up again in the future in some context.

e. Everything else.

i. Pawn it off on someone else. See if other parties to the estate will take the unwanted asset in-kind as part of their share (discount its value if necessary).

ii. Avoid receiving fractional interests of tough-to-liquidate property, as it will be that much more difficult to get rid of.

iii. If possible, avoid co-ownership with others. Getting multiple charities or heirs to agree on a sales method/price can be a nightmare.

<u>Problem #4</u>: The attorney/executor/trustee appears to be charging an excessive fee for his or her services.

<u>The Cause</u>: Good, old-fashioned greed. "They can't possibly bill that much on this matter," asked the young associate. "They can and they will," answered the wily old partner. While most attorneys and other professionals will not attempt to take advantage of an estate where there are only charitable beneficiaries, I have met plenty that will.

Sometimes the fee is just plain high. Other times they hit you in sneakier ways. Watch for pre-death attorney service fees ("I never charged old Barney for any of the services I provided to him while he was alive"). Watch for charges at attorney rates for non-attorney services ("You mean I can't charge my hourly billable rate of $300/hour to mow the deceased's lawn?"). Watch for requests for compensation for actions taken during the lifetime of the deceased ("I should get paid for all those trips when I went to check on Grandpa – no one else was looking out for him"). Watch for duplicate billing for the same service ("Hmm, the accountant charged the estate for six hours to do the tax return and the attorney also charged us seven hours to do the tax return").

<u>What to Do About It:</u>

a. Know the statutory and customary rates for your state/region.

i. Some fees are limited by statute, sometimes the statutes only set a ceiling on what is presumed to be reasonable, and most just require them to be "reasonable" without defining what that means.

ii. Attorney fees typically range from 3% to 5% (NY may go higher).

 

iii. Executor/Personal Representative fees typically range from 2% to 5%.

iv. Trustee fees typically range from 1% to 3%.

v. Most states permit an attorney who is serving as either trustee or executor to "double-dip" and take both fees.

vi. Understand what services a party can charge "extraordinary fees" for doing, such as selling real estate, managing a decedent's business, liquidating hard to sell assets, tax preparation, and dealing with litigation (answering your basic questions or providing you with an accounting is NOT extraordinary).

b. Ask for documentation of hourly billing in detail.

i. Most attorneys on hourly fees will not have this for percentage-based fees and then they will have a harder time justifying a fee in excess of whatever is presumed reasonable.

ii. Have a "friendly" attorney (perhaps a board member) look over it to see if it generally seems reasonable.

c. Complain.

i. For fees above the reasonable rate, ask what was unusual about this probate/trust administration – especially if you know all the assets were run-of-the-mill.

ii. Gather the troops and get the other charities to question the fees as well.

iii. Even if you do not win this battle, the individual will think twice about charging such fees the next time your organization is involved.

iv. Call the state Attorney General and see if it will help.

d. Do a cost-benefit analysis.

i. The fees may be excessive by $100,000, but if your entity is only a 1% beneficiary, you are only looking at a gain of $1,000 at a max; and that does not include your costs in fighting the fees (and potential bad you might be generating).

ii. Guilt? You can always ask the high charging attorney or fiduciary for a donation the next time your local fundraising event rolls around! (Note: this has only worked once in history in my experience.)

<u>Problem #5</u>: Your charity is named in the decedent's final will, but someone is claiming that will is invalid due to lack of testamentary capacity or because of undue influence. Alternatively, the charity was named in the decedent's prior will, but a "deathbed" will was procured that leaves all the

 

deceased's assets to a previously unnamed individual who magically appeared near the end of the deceased's life.

<u>The Cause</u>: There are generally two sources of the problem here: disgruntled relatives (who can't seem to understand why Cousin Earl would choose to leave money to charities when he had us as kin, even though we haven't spoken in 40 years) or the dubious caretaker (shouldn't they get something for cleaning that old man up every other day and staying out of the nightclubs for nearly three straight weeks?). These cases are often very tragic but can produce some great anecdotes for cocktail parties.

Testamentary capacity is the mental ability to execute a will. It is a very low standard. Basically, the person must know generally what her assets are, who her intended beneficiaries are, who her natural "kin" are, and who is getting what when she dies. Episodes of poor memory or even some types of dementia or delusions are not necessarily enough to prevent someone from having testamentary capacity.

Undue influence is rarely successful when invoked against a charity but is often the charity's argument against an individual. In order to unduly influence a testator, one must be in a confidential relationship with the testator who is susceptible to influence and have gotten the testator to alter his/her post-death plans to the influencer's benefit. I've never seen a charity be found to have unduly influenced a person, but its plead all the time – so do not panic (unless of course your planned giving officer was driving the deceased to the lawyer's office and moved the pen for him as he signed his will). However, I have seen plenty of other individuals – usually family members, next-door neighbors or caregivers – be found to have unduly influenced a testator.

<u>What to Do About It:</u>

a. Get an attorney – but settle.

    i. Even in nuisance suits, this is one time being represented by legal counsel is crucial.

    ii. Your attorney can use the tools of discovery to determine the validity of the claims – medical records, history of prior wills, taking depositions, etc.

    iii. It really stinks/hurts to settle when you are clearly in the right, but again it is often a cost-benefit analysis you must undergo. You may be likely to win if you go to trial, but your legal fees might be $100,000. So, if the contestant is asking for $25,000 to go away – it is probably worth agreeing to.

    iv. If your interests are aligned, share attorney fees with other charities involved. Make it clear up front how fees are to be divided. Be aware that different sized charities might have different priorities as well.

b. Know the parties, the stakes, and how everyone is going to get paid.

i. Be sure you understand the total financial picture of the estate and trust and exactly what's at stake; compare your "take" under different versions of the document in question (as well as the other parties' expected outcomes under various scenarios).

ii. Some of the time, individuals contesting the will are represented by an attorney on a contingent fee recovery; that can work in your favor or against it.

iii. Get a feel for the relationships between the deceased and the contestants and between the contestants themselves if there are multiple ones.

iv. Settlements can be creative. One potential party has not bothered to participate – let them get the short end of the stick. This works best in California if a "Breslin notice" has been issued before a mediation.

c. Keep in mind – you are almost always the "good guy" as the charity.

i. Do not feel bad for the "poor family" members. If they were such loyal relatives, why didn't Uncle Sid leave any of his money to them? Plus, you know the funds your charity receives will be put to good use.

ii. You have moral duty to make sure that the deceased's wishes are upheld and your charity might be the only person fighting for those wishes (but do not be blinded by this fact either; remember cost-benefit and the duty you have to your charity's mission and other donors).

d. The longer the money is tied up, the itchier non-charities will get to settle.

i. Patience is a virtue and most of the time your charity does not absolutely need these funds to stay in existence; nor is it usually the case that these funds will make a dramatic difference in the way your organization is run (except for the largest of bequests). Hence, time is on your side.

ii. Attorneys on contingent fees don't get paid unless they win or settle. The longer a case goes, the more aggressive they will get with their clients to settle (but you will also be racking up your own attorney fees in the interim – did I mention cost-benefit?).

iii. Contestants can get as frustrated with the process as you and may have "made plans" for the money they expect to receive. They might take less now if they see you are determined to fight and drag this matter out for years.

<u>Problem #6</u>: The testator has not named your organization 100% correctly or your organization name has changed since the will was written. Now the attorney/trustee is questioning whether your entity is the proper beneficiary or is arguing that the bequest has lapsed.

 

<u>The Cause</u>: Not every attorney calls or otherwise confirms the legal name of the charity before drafting a will. The testator may be confused about what entity she means to support. Your organization was originally made up of separately incorporated local chapters, but over time they have merged into a single entity to pursue economies of scale. Your entity is better known by the name of a fundraising campaign it conducts than its legal name or the mission has changed somewhat prompting a name change.

<u>What to Do About It:</u>

a. Keep a history of documents accepted by a court under other alternate entity names, especially if a court has entered a formal ruling on the validity of the gift.

    i. Create an affidavit for a senior official to sign explaining how the organization is often referred to as "X" and how in cases "Y" and "Z" the probate court held that your entity was the same as the one named in the document.

    ii. Avoid the problem by making sure your PG officers and others are distributing correct "suggested wording for bequests" forms that identify your organization by tax-identification number and explicitly include the phrase "or its successor."

b. Keep merger paperwork handy and organized.

    i. Create a "family tree" of your organization's history when there are multiple mergers or name changes or both.

    ii. Check to see that prior entities are properly listed as "merged" (assuming they properly were merged) on the website of the state Secretary of State/Department of Corporations.

c. Know the prior addresses of your organization and the addresses of any field offices and keep copies of old proof of address (e.g. letterhead, phone-book listings, etc.). If an old address matches the address listed in the will, you have a strong case that your charity was the intended beneficiary.

d. Know your competition.

    i. "Sound-alike" organizations – know their legal names, status, locations, etc.

    ii. Sometimes "splitting the baby" is cheaper than fighting to the death over a bequest (e.g., the bequest is made to the "American Heart and Lung Association". No such organization exists, but the AHA and ALA agreed to split the bequest equally).

<u>Problem #7</u>: Your organization has been given a wonderful gift (maybe a swanky residence or a huge trust portfolio of assets) but alas, you ca not get access to the funds until some contingency

 

occurs (i.e. a friend is permitted to live in the house until she dies or a nephew gets income from the trust until he turns 50).

<u>The Cause</u>: Testators want to ultimately benefit charity, but there are certain individuals they want to be sure are taken care of while those individuals are still alive. Setting up a trust that distributes net income to a beneficiary for life might enable him to maintain his lifestyle, while still preserving the corpus for charitable (albeit delayed) purposes.

The problems here are three-fold. First you may be required to recognize (and annually revalue) the asset on your accounting records even though you will not "get" the money for many years to come. Second, the asset could be substantially deteriorated/degraded in the hands of the intervening beneficiary. Third, there is the question of responsibility for maintaining the asset in the interim.

<u>What to Do About It:</u>

a. Get the life holder to buy you out (or vice versa) or jointly sell the property, if possible.

    i. Especially in cases of life estates in real property, you do not want the hassle for the next forty years and at this point the present value of your remainder interest is not typically huge.

    ii. For life income trusts, the present value of the individual beneficiary's lifetime income flow can often be calculated based on a variety of factors. The beneficiary might be more interested in a getting a single lump sum rather than a string of otherwise smaller payments.

b. Monitor, monitor, monitor.

    i. For real property, make sure that the annual property taxes are being paid, that homeowner's insurance is obtained (and that you are one of the beneficiaries thereof) and that the property is being properly maintained.

    ii. If the decedent did not set up a mechanism for supporting the costs (taxes, maintenance, etc.) of the real property, get a written agreement with the life beneficiary detailing each party's rights and responsibilities.

    iii. On trusts, monitor any discretionary principal distributions and make sure they conform with the dispositive instrument – especially if the life beneficiary and the trustee are one and the same person.

c. Confirm annually that the contingency has not occurred (i.e., is that guy still alive?)

    i. Plenty of trusts keep paying out to dead people (and to the people that have access to their bank accounts) long after they are dead and buried.

 

ii. Obtain the age and/or birth date of the life beneficiary; check with the trustee and review the social security death index or obituary websites to make sure he/she is still alive.

iii. The pets for which pet trusts are set up are notorious for living extraordinarily long lives when the trustee gets an annual fee for handling the trust and the pet. Make sure that Fluffy has not been replaced with a younger look-alike.

iv. Use your tickler system to schedule reminders to review these trusts; especially when they may have staggered multi-year principal payments or partial terminations due to multiple life beneficiaries. An annual check is usually sufficient on these types of situations.

Problem #8: The estate has been closed for six years. You thought you had seen the last of the file when you sent it off to storage. Then, like manna from heaven, someone tells you there are additional assets belonging to the deceased that have just been discovered.

The Cause: Someone at a bank discovered an account has not been touched in ten years as part of an annual review or more likely an asset recovery service has been searching your state's unclaimed property website or database.

What to Do About It:

a. Routinely check unclaimed property websites for states you operate in.

    i. Beat the asset recovery services at their own game and search your charity's name (including different versions) from time to time.

    ii. On an open estate, check for the decedent's name. Notify the attorney or executor/trustee if you find something while they still have their powers to claim it easily.

b. Negotiate fee rates with asset recovery services. Play the charity card.

    i. Asset recovery services usually charge anywhere from 10% to 40% for their services. They are easy to use as they usually do most of the work and they only get paid if you recover the asset. They can often be negotiated down on the fee, especially on larger amounts.

Problem #9: The trustee or a family member of the deceased indicates that they "know" Uncle Earl wanted the gift restricted to some particular use or in some geographic location; however, the document does not indicate any restriction on the gift.

The Cause: Perhaps Uncle Earl actually would have wanted it that way; or maybe the trustee or family member has their own personal cause/desires and they are imposing it on the bequest to your charity.

 

<u>What to Do About It:</u>

a. Have a clear and well-documented policy on gift restrictions. Indicate in your policies that any testamentary gift not containing restricted language in the governing instrument will be treated as unrestricted. Determine what type of language is necessary for a geographic restriction to apply. Is providing an office address or name of a local chapter sufficient, or must there be specific language indicating that the bequest funds are to be "exclusively used in XYZ city or state" by the charity?

b. Compare your charity's bequest to the other charitable bequests in the document. Are those bequests restricted or going to all local charities?

c. Compare your charity's bequest to lifetime giving of the decedent (if any) and if any restrictions were placed by the donor on those gifts while alive.

d. Require additional documentation of donor's intent, such as a letter from the trustee/executor outlining that intent and how the trustee/executor came to know about it.

<u>Problem #10</u>: A family member of the deceased requests that your charity distribute a portion of the proceeds to that family member or another because he/she is personally in need. Alternatively, a family member wants your charity to contribute a portion of its bequest to some special (expensive) project memorializing the deceased.

<u>The Cause</u>: A disgruntled family member who was counting on inheriting suddenly realizes that the deceased did not leave him/her anything or a genuine desire to memorialize the deceased (at the expense of your charity).

<u>What to Do About It:</u>

a. Blame it on the IRS. The IRS has rules that provide charities from providing a "private benefit" to any individual. Providing such a private benefit could put your charity's tax-exempt status in jeopardy.

b. Create a united front with the other charitable beneficiaries so no one is the "bad guy" and you can speak with a single voice.

c. Find a way to recognize the decedent within your organization that does not affect the bottom line.

d. Do a cost-benefit analysis while at the same time taking into account your charitable mission. For example, let us say you are a charity that helps those with cerebral palsy and the decedent has a needy child with that disease. The decedent had set up an IRA to benefit that child, but for whatever reason, those assets were drained prior to the decedent's death. The decedent's will leaves everything to charity. The child's guardian asks your charity to renounce part or all of its bequest in order to allow the funds to pass to the needy child through intestacy. You are probably going to want to acquiesce on that one.

Concluding Thoughts

- Just because your organization is a charitable beneficiary does not mean you do not have the same rights (and responsibilities) as any other type of beneficiary.

- Making sure the deceased donor's wishes are properly followed (which includes making sure your entity has received its full share) does not ever make your charity ungrateful for the gift they have bestowed upon your organization. It means your charity is honoring their final wishes.

(This paper is revised and updated from a presentation originally given at the American Council on Gift Annuities 28th Conference.)

 