BEQUESTS GONE BAD:
TEN WAYS TO LOSE YOUR CHARITABLE BEQUEST

PG CALC WEBINAR

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Introduction

Do you know what the failure rate of your Planned Gift Commitments is? How many carefully laid charitable gifts never see the light of day after the donor passes away? Research has shown that over 40% of charitable bequest intentions may never materialize. When a charity's Planned Giving Director puts in potentially ten years plus of cultivation and stewardship with a donor, that charity has a great deal invested in ultimately receiving the bequest. Think of all the mailings, lunches, trinkets and man-hours that may go into stewarding a bequest intention.

While there is no doubt that some bequest intentions/commitments were never actually there to begin with, a variety of things can happen between getting the commitment and ultimately receiving the proceeds of the bequest that can get in the way of the donor's intended legacy. Some of those obstacles are nefarious in nature, while others might just be changes in donor's circumstances (e.g., a major health expense at the end of life) or intentions (e.g., a reconciliation with a previously excluded heir).

This paper will address ten typical ways that bequests are "lost" and provide some ideas for both proactive and reactive responses when your charity encounters such situation.

The Misnamed Charity

The problem here comes in three primary varieties. The donor's estate planning documents name your charity using some designation other than its legal name and the attorney/trustee handling the estate wants some guarantee that she has the right charity. The second version occurs when a donor somehow combines the names of two charities into a single charity (e.g., the American Heart and Lung Association). The third version occurs when you either currently have or once had a national entity and separate local entities.

Proactively, your PG staff should be sharing "suggested wording" with prospects and their advisors that uses both the charity's correct, legal name AND the current tax identification number. These should be prominently displayed on your website as well.

Reactively, your response depends on both what the mistake was and to what level of certainty the attorney/trustee you are dealing with wants to go. This can range from a simple email wherein your charity says, "Yes, that's us," to a full-blown court order on a Petition to Determine Beneficiaries. The most important thing to do is to know the merger history of your organization, know your competition with similar sounding names and have policies relating to splitting bequests between local and national entities.

Handwritten Changes to Documents/Lack of Formalities

The donor's lawyer has drafted a beautiful will, sound in every way. Then, five years later Aunt Bernice pulls it out of her file cabinet and scratches out two of the sections with bequests to individuals completely and modifies the dollar value of a bequest to Cousin Louie from $10,000 to $100,000. She may have initialed her changes, but no witnesses were present and she did not re-sign the will. Are those changes valid?

This is a very interesting area of law that is just now undergoing some potentially radical changes in a handful of states. Historically, one had to have all the formalities of a will (signature at end, two witnesses, etc.) for a will to be valid. This made sense because anyone could pick up the will and scratch out a few changes before submitting it to probate. However, in cases where the donor himself makes the changes, his intent is usually clear, but it will not be followed if the formalities are lacking. Several states are exploring the idea of loosening the formal will execution requirements – so expect plenty of litigation on this issue in the future.

Proactively, your PG staff should be sharing information with your donors that handwritten changes to a will or trust may very well be invalid or insufficient to change the document. This message is especially important for donors to hear who complain about the costs of attorney drafting services or have been known to find will forms online for their use.

Reactively, your charity should always ask for a complete copy of the decedent's will or trust document (especially if the charity is a remainder beneficiary). It's also important to understand where the will has been and who potentially has had the opportunity to alter it. These cases are usually ripe for settlement, so be prepared to have a position that your organization will take.

<u>Lost or Destroyed Will</u>

The donor is dead and the original executed copy of her will or trust is nowhere to be found. Did the donor intentionally destroy it, thereby revoking it? Did an excluded heir get his hands on it, realize he was not named and then put it through the shredder? It is possible (but not necessarily easy) to probate a copy of a will.

Proactively, you can encourage your donors to safely store their documents or in some cases even deposit them with the local probate court if it accepts wills from the "pre-deceased." At the very least, donors should be encouraged to have their lawyer retain a photocopy of the will or trust in his files. If your donor is willing to share the name of his lawyer, keep that info in your file on the donor.

Reactively, if you know who the drafting attorney was, contact her right away to see if she has a copy of the instrument. If possible, it may be valuable to get copies of prior wills, depending on whether the state in question follows the doctrine of dependent relative revocation (always a crowd pleaser to discuss at cocktail parties).

<u>Will Gift, But All Assets Held in Trust or Pass Via Beneficiary Designation</u>

As Russell James has illustrated in his research, fewer funds are passing via probate, and more funds are passing via non-probate transfers such as retirement asset designations and pay-on-death accounts. It does not do a charity much good to be named in a will if there are not any assets passing through probate.

Proactively, a charity's planned giving staff should be talking to donors about how their assets are titled and more importantly, encouraging donors to name the charity as a beneficiary on the donor's retirement accounts, life insurance policies, pay-on-death accounts, etc. It's also a good idea to remind donors to be careful when setting up "convenience accounts" at banks to be sure that such accounts don't have survivorship benefits or result in true co-ownership.

Reactively, there isn't much that can be done if a charity is named in a will and there aren't any probate assets to distribute. However, it might be worth a little digging to make sure that a relatively new co-owner of a joint account didn't unduly influence the donor to transfer all their assets into the joint account and to the co-owner's sole benefit.

Caretaker Claims

More claims are being made by caretakers and family members of donors for their time and expenses in caring for the donor during the last year (or more) of their lives. Apparently, the idea of caring for a family member out of love and affection is a dying concept. The caretaker is usually someone who was expecting a sizable bequest, only to find out that the deceased left them nothing or only a small bequest. The next thing you know, the disgruntled family member has submitted a claim against the estate for thousands of dollars based on the hours they allegedly spent helping the decedent, often claiming that the donor promised they would be reimbursed or "take care of" after they passed away.

Proactively, unless the planned giving director has a very close relationship with the donor, this can be a difficult conversation to have. However, if it does come up, encourage the donor to document his desires in a letter or via some other method, so it is clear whether the caretaker should be compensated for his time.

Reactively, watch out for unusual charges/expenses on estate and trust accountings. Demand that executors require documented proof that the deceased was expecting to have his estate pay for the caretaker's time and efforts. If the caretaker is asking for expense reimbursement, ask for receipts. If the caretaker is asking for compensation for his time, ask for time sheets and justification for the hourly rate being charged.

Lack of Testamentary Capacity

A will is not valid if the person executing it doesn't have testamentary capacity when they do so. Testamentary capacity is a fairly low standard and in some jurisdictions a person can even be under a guardianship and still have capacity to execute a will. However, lack of testamentary capacity is the "go-to" option for anybody looking to contest a will or trust.

Most states have some variation of the following requirements to show that the decedent had testamentary capacity. First, does the individual have knowledge of the natural objects of her bounty (i.e., does she know who her "typical" heirs are)? Second, does the individual have knowledge of the nature and extent of her own property (i.e., does she know what stuff she owns)? Third, does the individual have the ability to form a rational plan for disposition of her estate given the two other factors (i.e., does she know who is getting what and for what reason).

Proactively, if you are working with a donor who either has potential mental issues or has heirs that are likely to contest her will/trust, encourage the donor to visit her primary care physician (whom hopefully she has a long relationship with) right around the time she signs her estate planning documents. Some attorneys may even want to videotape the execution of the documents if there is a high probability that someone will contest.

Reactively, do not just assume someone did not have testamentary capacity just because they were forgetful or may have "gone downhill" subsequent to executing their documents. Depending on the size of the estate, these cases may require your charity to hire outside legal counsel to defend its interest. Even better, partner with other charities in hiring a single legal counsel to jointly represent all the charities to reduce costs and show a united front.

<u>Undue Influence</u>

The twin sister of testamentary capacity is undue influence. Usually this comes up in cases where the charity was named in a prior will and then was removed. It is rare to see a charity accused of undue influence, but it does happen. Relatives and caretakers are the usual suspects when it comes to undue influence.

The typical elements that must be evidenced in order to prove undue influence are (1) the decedent must be susceptible to influence (i.e., perhaps in need of extensive caretaking), (2) the existence of a confidential relationship between the decedent and the influencer, and (3) the use of the relationship by the influencer to secure a change in the decedent's estate plan (i.e., "name me in your will or I won't take care of you any longer").

Proactively, if you suspect someone of attempting to unduly influence a donor, keep detailed records of your observations and contact the attorney who drafted the donor's existing estate planning documents to let them know your concerns. On the flip side to avoid being accused of undue influence, do not drive your donor to an attorney's office to execute documents or otherwise serve as a witness on beneficiary designations. When suggesting attorneys or financial advisors, always give the donor a list of several to choose from.

Reactively, if you believe that your charity may have been removed from an estate plan due to undue influence, follow some of the same advice as you would for a testamentary capacity issue. If someone at the charity is accused of undue influence, hire legal counsel and gather all your meeting notes and correspondence with the donor, as it will likely become part of evidence in any lawsuit.

<u>Tax Apportionment Bites into the Apple</u>

As the federal estate tax exemption grows larger each year, this is becoming less of a problem. However, a handful of states impose a state estate tax and several of those are not nearly as generous with the exemption as the federal government is. Typically, the estate planning documents themselves and state law together govern where estate (and inheritance) taxes fall when there is a mix of individual and charitable beneficiaries. Depending on taxation levels, a large bequest to your charity could be greatly reduced if taxes are apportioned against the charity's share – even if a charitable bequest provides a deduction. This is most likely to occur if there are large specific bequests to individuals and charities receive the residue or remainder interest.

Proactively, if you are dealing with a donor who is leaving assets to both individuals and charities and may be subject to estate or inheritance taxes, make sure he understands the implications of his plan and the impact of those taxes on it. Does the donor want everyone to bear the burden of taxes equally or does he only want the burden put on those bequests that result in the imposition of taxes to begin with?

Reactively, if estate or inheritance taxes are being paid by an estate or trust, read the entire document to see if there are directions as to how the taxes are to be apportioned. Ask questions of the executor or trustee as to how the tax burden was assigned and if the directions in the document were followed. Review state law to see where the burden falls in the absence of directions in the donor's will or trust.

<u>Non-Enforceable Directive to Individual to Leave Funds to Charity</u>

It's rare, but sometimes rather than name a charity or charities to receive a bequest in their estate plan, a donor will direct an individual to distribute funds to "charities that I support" or "in the trustee's discretion" or other such language. Donors may have a variety of reasons to do this, but essentially your charity's hard-earned bequest can become subject to the whims of someone that you have never met with or stewarded.

Proactively, planned giving staff can share stories with prospects about the importance of naming specific charities in their estate planning documents. Alternatively, if a donor has made you aware of such a designation, find a way to meet with (in the presence of your donor) the person granted this discretion. Steward them as you would the donor.

Reactively in this situation, you have essentially moved into grant-requesting mode and will want to treat the executor, trustee, attorney or other named individual as if they were a grant maker. Send a proposal on what the charity will do with the funds and how it will memorialize the deceased. Share with the decision maker the relationship the charity had with the donor and any documentation that they may have provided as to including the charity in their estate plans.

<u>Unfulfilled Charitable Pledge at Death</u>

Although technically not a planned gift commitment, a charity may receive a substantial pledge from a donor who dies prior to completely fulfilling the pledge. Does this simply become a write-off or is there a way to recover the unpaid amount of the pledge from the estate or trust of deceased? The answer depends on several factors including state law, the nature of the pledge and whether the charity has relied on the pledge to its detriment.

Proactively, a charity should include language in any written pledge signed by a donor that the donor considers the pledge an obligation of his estate if he dies prior to its complete fulfilment. Likewise, in situations involving large pledges and very elderly donors, a charity may ask that the donor include language directly in his will or trust instrument indicating that any pledges made during his lifetime that are outstanding at the time of his death, should be considered an obligation of his estate and paid as if it was a claim against the estate.

Reactively, upon finding out that a donor with an unfulfilled pledge has passed away, notify the executor, trustee or attorney of the unpaid pledge. This will put them on notice that the charity is a potential creditor of the estate or trust. Make sure you determine any time restrictions on when you must file a formal claim and do so to avoid being barred by a statute of limitations. Even if a pledge is not guaranteed in writing, if the charity has relied on the pledge to its detriment (e.g., beginning the construction of a building based on the funds expected from the pledge), a claim may be held valid against the estate or trust. Even if the charity hasn't detrimentally relied on the pledge, it is usually inexpensive to file a claim, and this may provide leverage to recover at least a portion of outstanding amounts.

Conclusion

This paper has very briefly outlined ten ways that a hard-earned bequest commitment from a planned giving donor can disappear right at the last minute. Years of stewardship and hard work can all be for naught if things go wrong immediately before or after the donor passes. In all cases, it pays charities to be vigilant both before and after a donor passes to protect its interest in a bequest or other testamentary gift. While some instances may be lost causes, in others just a little due diligence and elbow grease may result in the preservation of a full gift.

In many ways securing a bequest commitment can be a risky financial proposition. A charity may have significant upfront costs in obtaining and stewarding donors who make planned gift commitments without knowing whether there will ultimately be a return many years in the future. Ultimately, however, the return on those investments can produce significant financial rewards beyond almost all other means of fundraising. So, make sure your charity sees its planned giving commitments all the way through to the end!

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(This paper is revised and updated from a presentation originally given at several industry conferences.)

