BEQUEST ADMINISTRATION AND A LITTLE BEYOND

PG CALC WEBINAR

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I. INTRODUCTION

Most every non-profit organization receives bequest and trust gifts, but not every organization has someone who is dedicated to being sure those gifts come in accurately and timely. Most have, instead, staff who are wearing many hats, only one of which is that of estate administrator. Being sure that your organization receives what your donor intended can be a full-time job, so making the most of the time you have is imperative. This Webinar will give you a few tools to help you do so.

II. FIRST ADJUST YOUR PERSPECTIVE

When one person is both working with donors and handling the incoming bequest and matured trust gifts, things can get confusing. Usually, a fundraiser's primary concern is the person in front of them who is making a gift right now or will be in the near future. Any questions can be asked, and intent clarified, directly with the donor. The gift is of an agreed upon amount and it's either given or it's not. The appreciation for the gift can be shown to the donor and further cultivation and stewardship can be constructed for that donor's preferences.

Once the donor is deceased, however, things drastically change. The gift is still from the donor, but that person is no longer here. Instead, the receipt of the gift is via the fiduciary chosen by the donor to carry out their wishes. The primary focus now becomes the legal documents and the accuracy of the gift received. This can be a difficult mental switch and understandably so. Now, ensuring what the donor wanted actually occurs is the primary concern and the executor or trustee is not the donor. This means that the beneficiaries and the fiduciaries are sometimes at odds, but it's imperative to always remember that now the donor's legal documents speak for them. Once the donor passes away, the probate code and the law dictate what happens and beneficiaries have a responsibility to uphold them just as the executor or trustee does.

It always helps to remember that it is still the donor who is at the center of this administration. The gift is still coming from them, not from the relatives, the attorney or the friend. They are just tasked with carrying out the terms of the legal documents.

III. USE LIMITED TIME WISELY

When there are donors to be cultivated and stewarded, budgets to be completed, management (both up and down) to be done, and a hundred other tasks, it can be very difficult to prioritize the estate administration portion of work. Don't those gifts just show up? Why spend any time at all on them? This is when, again, it's imperative to remember that these donors, whether they were known to the organization or not, created a plan and trusted that it would be carried out. A beneficiary has a responsibility to be sure it receives what it's meant to – with accuracy and timeliness. And, this can be achieved, even with limited resources, because even just the basics are very helpful in upholding this responsibility.

First, send an initial letter and be known.

When the notification that a donor has left a gift, whether trust or estate, arrives, pay attention and respond quickly. This is best done with a letter or an e-mail so what will be needed down the line is laid out clearly and from the start.

The initial letter should ask for three things:

- A **copy of the document** where the organization was named a beneficiary
- A **copy of the inventory and the accounting**, whether formal or informal
- Who should receive the letter of appreciation for the donor's generosity

Asking for this information will let the other person know up front what you'll need so there's no question later. Often charitable organizations are not expected to ask for this information and are told either that no one else asked for it or that doing so demonstrates a lack of gratitude for the gift. Nothing could be less true. Asking for this information shows a commitment to the donor and their wishes.

Making the request for information early on means that less time will be spent later, when time is at a premium, if something appears to be incorrect. It also shows that there is both an understanding of the process and a willingness to be a helpful participant when necessary.

The first communication sent should also include the following:

- **Condolences** and all **main contact information**.
    - For a decentralized organization, this is essential because it (hopefully) means that a distribution check or important letter is not sent to someone who sets it aside and forgets about it. There is a period, generally six months, for a beneficiary to disclaim a gift before becoming the owner. Once the organization is notified, the clock starts ticking on that asset you really may not want at all.

- **Reassurance** that the donor's intent will be honored by the organization.
    - This is helpful because the recipient now knows that the funds will be used how the donor wished and it also lets them know that you are going to follow the document terms. What someone else wants (or opines on what the donor wanted) should not factor into the use of the funds. Remember, this is the donor's gift being used as the donor asked. Doing so is ethically right but also legally necessary.

- State a **preference** for full liquidation of assets. There should be no playing of the market after a donor's death. Investment accounts should be liquidated as soon as possible to preserve the assets. Unless there's a large position that needs to be sold little by little, there are few reasons to keep anything invested.

- **Attach the W-9 and Tax Letter** to prove the organization's charitable standing.

After sending the initial e-mail or letter, create a reminder tickle for 6 months to check in on the status if there has been no further communication. A quick e-mail or call to the executor or trustee asking for an update is time truly well spent because, again, showing proactivity reminds others to keep the administration on track. It's also a good time to ask for the trust or will document copy, if it has not yet been received. A final accounting generally is not finished until the administration is wrapping up but asking about the inventory to get a sense of the size of your gift is appropriate at your 6-month status inquiry.

Next, review what's received.

Although beneficiaries have the right to a full **document** copy, often non-professional fiduciaries, usually trustees, are reluctant to send the whole document due to concerns about the privacy of other named beneficiaries. A will can be obtained from the Court once it is filed but often, just the page of the document where your organization is named will suffice.

When it's received, look at the way the organization is named and what, if any, use of the gift is stated. If the name is not correct, there's the chance that there's another organization that is the correct one. Much better to notify the fiduciary sooner than to realize it later and find the funds need to be returned. Next, can the organization accomplish the donor's wishes? If not, again, better to work this out sooner than after the funds are received. Sometimes, there may be an alternate use that still accomplishes the intent but, if an alternate is not possible, notifying and working with the fiduciary on next steps is imperative early in the process.

Finally, is the gift a specific amount (example: $100,000) or a residuary amount (example: "10 percent of the remainder…")? Generally, specific amount gifts should be received within a year of the decedent's death, if there are enough assets to satisfy them. Certainly, there can be exceptions to the one-year rule if there are difficulties in the administration, but it is helpful to move up the status reminder once it's known the gift will be an amount certain and ask when the gift will be distributed.

A quick look at the **inventory** will give you a sense of not just the potential amounts of distributions but also how long the administration will take. If the assets are mostly bank accounts, the timeframe will be much shorter (or should be) than if there are several real estate parcels, collections, partnerships or unusual assets. Estate and trust administrations can be lengthy when they involve complex assets that are hard to value or sell. At this point, it also can be helpful to reiterate that the organization is not interested in taking assets in-kind to prevent a frustrated and exhausted fiduciary from transferring title to the beneficiaries just to be able to close the administration. For some organizations, mineral rights are a good example of this kind of asset. Referring to the organization's Gift Acceptance Policy can be helpful when stating that no title transfer should take place.

The initial letter made it clear that an **accounting** would be expected and reviewed. Really, it only matters if the gift is a percentage of the assets. Often trustees are surprised by the request (again, a very good reason to note that it's going to be needed early on) and refuse to complete one. The best response is that a beneficiary organization has a responsibility to be sure that the donor's

wishes are being fulfilled and that what it is receiving is accurate. If a beneficiary is to receive 23.5% of the assets and a check is provided in the amount of $23,123.45, how can it be known whether that represents the overall amount of distributable assets without seeing what the value of the distributable assets are?

The fiduciary says **"no"**, even after explaining the right to and need for an accounting. What can be done?

Use leverage:

Call the Court - An administration cannot be legally closed until the account is zeroed out and, in some cases, receipts have been received from all beneficiaries. Generally, the Court may be of some help in probate matters if it is an administration that must file an accounting. Trusts are, by and large, not operating under Court supervision, although a trustee should be preparing an accounting as well to be sure they are correct.

Hold the check/receipt– Banking a check or signing a receipt for distribution generally indicates an acceptance of the amount as accurate. No such acceptance should happen until the organization is satisfied that it is, in fact, accurate and that cannot occur until an accounting is reviewed. A polite and cordial response that the check will not be cashed, nor the receipt executed, until the beneficiary has had the opportunity to review an accounting is a powerful tool. Another tool is to engage fellow beneficiary organizations in also refusing. Standing together tends to get action more quickly than being the sole holdout, which is, unfortunately, often the case.

Go to another source – If the main contact is with the trustee, sometimes it's a matter of ignorance of the requirement for an accounting and reiterating the request to the attorney for the administration (a good reason, among others, for encouraging individuals to have an attorney assist with the administration) is helpful.

Inquire with the state Attorney General – Each state is different regarding whether and how deeply the AG will assist a charitable beneficiary with a problematic estate or trust. In some states, the AG reviews all administrations and is open to assisting when there are issues with the fiduciary. In other states, the AG will only get involved under certain guidelines or not at all. At this point in time, the Office of the Attorney General in every state is underfunded and overburdened but it's still worth a quick call to inquire.

Ask your in-house counsel to write a letter – Sometimes, all it takes is the imprimatur of "esquire" to let the fiduciary and their counsel know it's a serious matter and an accounting needs to be completed. Having a standard draft of such a letter that in-house counsel can sign and send is often very helpful.

Ask external pro-bono counsel to send a strongly worded letter – Organizations having access to pro-bono time often get results with just one letter or phone call because it shows, again, that they are paying attention and being responsible vis-a-vis the donor's wishes.

Give in and accept the distribution - Sometimes this is the best cost/benefit decision that can be made, but only after exhausting or eliminating all other options. If the dollar amount in question is small and there is simply a refusal without an indication of malfeasance, it might be best to move on, but this should not be the default.

Once you **receive the accounting** and are ready to **review it**, there are a few places to focus on where the biggest potential problems may exist.

Fees and costs – Look at the amounts taken by both the executor or trustee and/or their attorney. The accounting should show a breakdown of how those fees were arrived at and are (in most cases) based on either a calculation prescribed in the state's probate code or, in some states, a "reasonable" standard. This is where things can become difficult as one person's definition of what's reasonable can differ significantly from another's. Generally, any fees that are in excess of 7-8% of the overall assets should require further explanation. If someone has charged 15% for a trust with a bank account and a condo, an explanation should be provided. Maybe there was a need for litigation against relatives who contested the document. Ask the question and, if there is no satisfactory answer, request the time sheets showing who did what when and how much they charged for it. An attorney serving as fiduciary charging $525.00 an hour to clean out the house of a deceased client is definitely not reasonable. Finding and addressing fee excesses is well worth the few minutes used to scan over an accounting.

Duplicative work/non-arm's length transactions/hiring family – Every fiduciary owes a duty to the estate or trust and its beneficiaries to attain the highest and best price for the assets and provide as much benefit as possible to the beneficiaries. Unfortunately, the fact that the beneficiaries are charitable organizations is sometimes a temptation to instead provide a benefit to family or friends. Does the person doing the work on the house have the same last name as the donor's daughter? Was the buyer of the home a family member or friend? Did the expenses relating to fixing up the home accrue to the organizations' gifts when the home was gifted to the donor's son? Again, ask questions and listen to the answers (or the silence) and take it from there. It may be that the donor's friend was an arm's length buyer and paid the market price like anyone else would have. But it may also be that they got a huge discount and that discount is a lower value gift to the organization.

Assets and liquidation – The initial letter should have asked for full liquidation of assets as soon as possible. If, 18 months after the donor died, the investment account is still actively being traded, it's a problem for two reasons: the fiduciary ignored a beneficiary request related to its legal bequest or gift and someone has been making money on the trades. Certainly, there may be reasons for the continued non-liquidity. If there is none, however, reiterate that everything should be sold immediately and kept in a money market account. This is a liability for

everyone involved and there is no need for the fiduciary to try and increase the gift via investment (especially since the potential for a decline exists as well).

Timeframe since the donor's passing – Pay attention to how long it's been since the donor died. If your first notice is a year or more since that date, it's likely that the fiduciary waited until the end of the administration to let the organizations know of their beneficiary status. This is not good fiduciary behavior, but it does happen fairly frequently. It's always worth asking why the beneficiaries were not noticed timely and to be sure that the entire period since death is covered by the accounting.

Reserve amount – Finally, look to see what the fiduciary is keeping in reserve to cover any unexpected costs or taxes before finally closing the administration. This is a usual and prudent practice, but the timeframe and the amount merit a look. Fiduciaries have the right to keep as much as they wish in reserve until they receive the final Closing Letter from the IRS certifying that there will not be any other taxes owed. Because this can be a personal liability for the trustee or executor, some are exceptionally unwilling to put out most of the funds before this letter is received, which can take several years. In such a circumstance, offering to sign a Refunding Agreement may be helpful. This allows the funds to be released with the agreement and understanding that the organization will give the money back (up to what was received), if necessary. Some are unwilling to distribute even with such an offer and smaller organizations need to be cautious around the ability to refund what may be a large amount a few years in the future. Nonetheless, it is an option in some cases.

If everything looks good and any questions have been answered, it's fine to bank the check and return the receipt.

IV. WHAT'S WORTH EXTRA TIME?

A charitable beneficiary is asked to give up part of or all of its share –
An example may be when the family wants to gift funds to someone who was "forgotten" or feels that the gift was not fair or that the donor did not understand the outcome clearly. If the legal document is not being challenged in Court, then there is no good reason to give up part of the gift and incur a potentially deleterious outcome for the charitable organization. A charitable organization cannot privately benefit an individual because it risks losing its charitable status. Allowing part of or all of a legal estate or trust gift to be diverted to an individual would benefit that individual and has great risk. Although one may feel bad for not allowing a Christmas gift to the long-time housekeeper, if that gift was not in the legal document, it is impacting the charitable beneficiary's gift and benefiting the housekeeper. This is a case where steeling oneself and pointing out the risk to the organization is necessary.

The return of funds is requested because there was a calculation error on the fiduciary's or attorney's part –
This happens when the distribution calculation was done incorrectly, and the assets have been received by the beneficiaries. While the correction must happen, the fees associated with doing so

should be minimal and documentation should be provided. The beneficiaries should not lose additional funds in the correcting of the error.

An overall unwillingness to be an ethical, responsive fiduciary or malfeasance – Generally, having to "chase" a trustee or executor time and again for any information is a sign of someone who perhaps was not the best choice for the role. Unfortunately, donors do not always choose well or were not able to do so when the choice of fiduciary was made. A dilatory executor or trustee may sometimes need to be replaced to complete the administration. However, at times it can be difficult to know whether the lack of responsiveness is simply foot dragging or truly unethical behavior. A good rule of thumb is to pay attention sooner rather than later to an uncommunicative fiduciary. Allowing too much time to pass because the benefit of the doubt is given may be, in fact, allowing assets to be converted with no hope of getting them back.

Litigation – This can either be reactive, in which the beneficiary must respond to a will contest petition, for example, or proactive, when the beneficiary chooses to pursue an action against the fiduciary or their attorney due to the actions taken or not taken in the administration.

Being sure to **immediately open and read correspondence** relating to an estate or trust matter is imperative for many reasons, not the least of which is the potential to lose rights if a timely response is not filed. Lawsuits and Courts have specific and immutable deadlines that must be met. Once noticed, the clock begins ticking and the ability to defend beneficiary rights can be lost because a letter was sitting on someone's desk. Ask questions if it's unclear what must be done and consult internal counsel as soon as possible.

Hiring external counsel is a big decision for all charitable organizations because costs add up very quickly and even minor litigation is costly. In deciding whether to legally pursue, for example, an executor who received a deed to the house two days before the donor's death:

- Talk with **an attorney who specializes in the estate and trust arena** (the American College of Trust and Estate Counsel (actec.org)) can be a resource
- Ask for the **probability of various outcomes** (chance of winning if it goes to trial, possible outcomes of settlement). This will require some review and research on the part of the attorney and is only their educated best guess; however, it will help decide as to viability and the cost versus benefit of pursuing before incurring large expenses.
- **Band together, if possible, with other beneficiaries** whose interests align. This creates a strong, united front and dilutes the cost. Discussing how decisions will be made, who takes the lead, what the settlement parameters might be and when to continue or not is imperative to this kind of alliance.
- **Be bold but conservative** and remember that the donor's intent and generosity is foremost. Sometimes the best outcome is ensuring that their voice is heard through their written wishes, even if that is not the outcome with the most monetary benefit. If they valued the mission and wanted to make an impact, then upholding that is a beneficiary's duty and responsibility.

Remember that paying attention and asking questions are the best ways to use whatever time if available. If there's only time to send the initial letter and set a reminder to check in, good

enough! Most executors and trustees are doing their very best to carry out the donor's wishes and want to see the assets in the hands of those valued missions. There are many resources that can be helpful – actec.org, state probate codes (most are online), e-filings that may be viewed by county, etc. Connect with the author for further information.