2007 National Conference on Planned Giving
October 10-13, 2007 • Gaylord Texan™ Resort • Grapevine, Texas

Beyond Basic Bequest Administration
AKA: Bequests Gone Bad

October 11, 2007

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A. The Basics

I. What To Ask For & When

At a bare minimum, any non-profit should ask for a copy of the governing instrument (i.e., the Will, Trust, beneficiary designation form for an IRA/life insurance/pension plan). If you do not have these documents, or their equivalent, how can you be sure that you are following your donor's wishes as to how the gift will be used?

In addition, if your organization is named as a residuary (percentage) beneficiary, you should insist on an inventory of the assets valued as of the date of death and a full accounting or its equivalent. **See Appendix A Initial Letter** for suggested initial letter. Once your organization has been notified that you are a beneficiary, an initial letter should be sent promptly. This will ensure that all future correspondence comes to the correct person and demonstrates that your organization is both grateful and interested in the gift.

B. Beyond the Basics

I. What If The Answer is "No -- I Will Not Give You A Copy Of The Will (or Trust)!"

Particularly with non-probate trusts and beneficiary designation forms, you may be told that that information cannot be provided to you for reasons of privacy (i.e., the privacy of the other beneficiaries). Strategies to overcome that argument:

(a) Ask that you be sent a redacted copy of the document and only the page or pages which involve your organization. Caveat: you may, in certain circumstances, find that you need the full document later – for example, the attorney claims that the document states no accounting is required but you don't have the full document.

(b) If the document in question is a Will, call the probate court where the Will was recorded and ask for a copy. There is a small charge but you do not need a certified copy so the cost should be minimal.

(c) Ask the trustee/executor/life insurance company to write you a letter, on their letterhead, quoting the exact language of the designation form. Most responsible people are unwilling to put an inaccurate quotation from the document in a letter.

II. "I Will Not Provide You An Accounting!"

Be prepared to hear that your organization is ungrateful and should be treating this gift as "manna from heaven". A reasonable reply is that your organization, as a tax-exempt non-profit, has a fiduciary duty to the general public and specifically to this donor, to ensure that all funds that the donor intended to come to you are received. This can be a tricky balancing act because, although some will understand, a significant portion of people believe that you are double- checking their work and are offended. Explain upfront that this is not a reflection of your opinion of their abilities as trustee or executor and that it is simply standard business practice for your organization for every estate and trust that you oversee. Also, finding a way to commiserate about the difficulties of bureaucracy can sometimes remove the "you versus them" feeling.

You may also be told that you are the only beneficiary to make this request and asked whether your organization will pay the cost of an accounting from your share. Preparation of an accounting is a legitimate expense of the administration and should not be shouldered by any one beneficiary. This issue tends to arise at the end of an estate/trust administration when the executor or trustee is ready to be finished with the headache of administration. From their standpoint, telling them at the 11th hour that you are due an accounting and the expense will cause him/her to have to recalculate the distributions is unreasonable. You may well be legally entitled to the accounting but they will often be angry. Try talking about the LEAST amount of information that you will need. Emphasize that you do not need a formal accounting but rather an informal account showing a beginning balance, itemized expenses and income, as well as the calculation of the distributions. This can help your request appear less burdensome and helps the fiduciary understand exactly what you need. Most importantly you should let the trustee or executor (or attorney) know up front and repeatedly that you will need an accounting. If they balk later, you can point to your earlier letter(s) demonstrating that this is not the 11th hour.

If you are still hitting a brick wall and this is a probate case, remember that very likely, an accounting will be required by the probate court. In most states, they are mandatory; in a few, only upon request of any beneficiary. You do not necessarily need an attorney to make the request.

If you have a trust matter, use the internet to research the state code and determine if an accounting is required. Even if the trust is not subject to review by the probate court, you may be entitled to an accounting. For example to find the probate code in Virginia you would type "Virginia state code" into a browser. The majority of states now have their entire state code (laws) on the Web. Once you have found the document, try the word "probate" or "Wills" in the search engine and start reading. You would be surprised how often the exact paragraph you want is there and written in more or less plain English.

If you need information about the deceased donor and you are getting nowhere with the executor/trustee/attorney, try accessing the Social Security death index. The website is: **http//ssdi.genealogy.rootsweb.com**. It can be helpful to know the donor's date of death, especially if you are only finding out about the estate several years later. That may be an indication that the fiduciary is not doing their job correctly, at a minimum, and can be the question that starts the ball rolling. You may also be led to a link to the donor's obituary which can help you find family members to assist you, or at least, to whom you may want to send a letter of thanks (and an indication that you have not received your bequest yet).

If your primary contact is a family member of the deceased, immediately offer to direct your requests to the attorney/ Trust Officer/CPA. All of these professionals should be more familiar with the information you are requesting. In the best-case scenario, they will advise their client to comply with your requests, since they are both routine and required under many state codes. Always maintain an air of "seeking information" versus searching for mistakes. If you do end up talking with the professional and they too balk at sharing information, ask them to suggest a way to help you fulfill your organization's fiduciary duty to understand how your share was calculated. In other words, make your problem theirs, if possible.

Asking for the name and information of the professional involved can also set the expectation that the estate/trust will be administered professionally. If the executor/trustee is handling the administration you might let them know that having an attorney or CPA involved will help protect them against liability (be careful here not to imply a threat). This may prompt them to have an attorney review their work to date. Most fiduciaries do not engage a professional in order to save money. A gentle reminder that you view this expense as routine and expected may help persuade the fiduciary to avoid going it alone.

A final avenue of assistance is the Office of the Attorney General (A.G.) of the state in which your deceased donor resided. Not every A.G. is charged with overseeing gifts to charities; check the state government web site. It is often worth starting with a quick call to the A.G to ask for clarification of what is required under the state's code and how best to protect your interest. Otherwise, write a short letter indicating the problem (you have received no inventory or accounting, the executor will not return your phone calls etc.) and ask for assistance.

III. <u>How to review what you have received – Accounting 101</u>

You have been successful and have a copy of the Will or Trust and an accounting (or its equivalent - copies of brokerage statements, estate and fiduciary tax returns). Now what?

(a) Accountings

An accounting is a detailed listing of every penny in and out of the estate or trust since the date of the donor's death. It is the gold standard for conducting a proper review of an estate or trust gift. **See Appendix B – Accounting** for a sample. Items to look for:

i. Executor /personal representative fees: A rough rule of thumb for executor fees is that they should total no more than 5% of an estate of less than $1m. The larger the gross estate, the smaller the percentage should be. Research the state code (look under "probate") to determine if there is a statute specifying executor fees.

ii. Attorneys and other professional fees: These are more difficult to predict. Review the inventory and determine what types of assets were held. If the bulk of the estate was held in marketable securities and was easily liquidated, that is a clue that the fees should be within normal ranges. If the donor owned unusual assets or an unusual situation arose, the fees will be higher. Examples of unusual situations would be (a) ownership of or shares in a closely-held and/or family business; (b) an insolvent estate; (c) a Will contest; (d) an IRS audit; (e) a previously unknown spouse claimed a share of the estate or (e) a named beneficiary cannot be found. These are but a few examples of the problems that can run up attorney's fees. If the attorney offers to provide you with detailed billings, accept! If you think the fees are too high, ask for detailed billings if they have not been offered. The vast majority of attorneys bill their time fairly but there are exceptions. In general, if the attorney's fees do not exceed the executor's fee, we have a basic comfort level. You should not hesitate to ask questions about the legal fees. As a residuary beneficiary, part of your share paid the fees and you are entitled to information about how your money was spent. Be wary of both the attorney and a CPA charging fees for tax return preparation. CPA fees are usually significantly less than attorney's fees because many CPAs charge a flat fee for the preparation of tax returns. If asked, you should readily agree to have any tax returns prepared by a CPA.

Two other quick things to keep in mind about fees:

(a) Very small estates will often have attorney fees that appear to be large relative to the overall amount of assets. Unfortunately, smaller estates can take as much time as larger ones and insolvent estates can take even more. For an attorney, the cost/benefit of handling these estates and trusts necessitates a fee that justifies his or her time. Certainly, ask questions if a fee seems inordinately high but keep in mind the cost/benefit of the administration. A review of the detailed billings should help you determine if the fees were justified. Be reasonable.

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(b) Watch out for more than one person billing for the same work. Remember that extraordinary fees, if substantiated, are allowable. Most probate codes allow an attorney to ask and receive what are often called XO fees for work beyond the normal duties of an estate attorney. For example, if an attorney must litigate a creditor's claim, XO fees will often be charged. These fees will be in addition to the normal fees but should not be exorbitant and generally need to be justified to the probate court. On the other hand, you should not be paying an attorney's rate for cleaning out a house; that task should be delegated to someone in the firm who charges a substantially lower rate or even better, contracted to an outside firm.

iii. **Expenses.** Apply the reasonableness test here. If you see thousands of dollars in reimbursements to the executor with no further explanation, ask for detailed information. It is not worth your time to quibble about a FEDX charge but it is worth asking why the cable service was not disconnected for a year after a donor's death. Couching your requests in a reasonable way (e.g., "I am confused why the cable service was not cut off for over a year?") is a productive way to ask questions. Acting as an executor is a labor-intensive, somewhat thankless job and things can slip through the cracks. However, expenses can also be a "piggy bank" used by the executor or trustee to dole out a little extra to family members, former employees, etc. Do ask about unexplained charges (example: air mattresses, sheets, pillows and comforters purchased so that family members have "a place to rest while they inventory the home"). Alone, this would be something to ask about but in conjunction with hotel expenses, it is a glaring red flag.

If a mistake has been made (or poor judgment exercised) which has cost your organization money, consider asking the executor or attorney reduce his or her fee by the disputed amount in lieu of actually replacing the funds in the estate account. On the other hand, if the executor is taking no fee, you can afford to be more lenient as long as the questionable items do not exceed the fee to which the fiduciary would have been entitled.

(b) **Brokerage statements**

A nicely laid out accounting is a lot easier to review than several years of brokerage statements but at times you do not have a choice. Create a spreadsheet on which you place the information you glean from the brokerage statement divided into categories such as income, expenses, sales of assets and distributions. When you have completed your review, you should have a rough accounting. If you cannot follow the brokerage statement (and they are often not user-friendly) call the customer service department of the brokerage house and ask them to walk you through the statement. Then apply the same review process described for accountings above to the statements. If there are unexplained fees (i.e., "miscellaneous") ask about them if they are large or recurring.

Generally, large brokerage houses operate in the same fashion with the same overall fee schedules. Smaller trust companies and brokerages may merit a closer evaluation as they do not always have the large audit systems in place to ensure that the estate and trust administrations are closely monitored. Do be sure to check the date of death of the grantor (or the life income beneficiary). It may take some time for the distributions to begin. This is can occur for any variety of acceptable reasons, but if no legitimate reason exists, consider asking for a refund of the brokerage fees for the period of the unnecessary delay.

(c) **The Dreaded 706: The U.S. Estate Tax Return**

The Form 706 is what is commonly referred to as a "snapshot" tax return in that it is a picture of the donor's assets (and that means everything, in the US and outside, as well as life insurance policies, IRAs, joint interests, etc.) on his or her date of death (or, alternatively, six months from the date of death). It does not include income because it is only a listing of the assets held by the donor or any assets in which the donor had an interest. The form can be found at **http://www.irs.gov/pub/irs-pdf/f706.pdf**.

The Form 706 is due nine months from the date of death with a six month extension upon request. Every single number on the 36+ page Form 706 must be backed up with written evidence of how the number was reached. This is a labor-intensive, complex tax return. If the executor or trustee tells you they are preparing it without the assistance of an experienced estate attorney or CPA, you need to be alarmed.

The most important pages of the Form 706 for tax exempt organizations are the first page which is a summary reflecting whether there is any state or federal estate tax due, Schedules J and K which lists expenses and Schedule O which shows bequests to charities.

If Page 1 reflects zero tax due, your review is much easier in that you only need to check Schedule O for the amount you are to receive and ensure that your organization's name and Tax ID# are listed correctly. The amount on Schedule O will be not necessarily be the exact amount that you will receive (since other expenses and income occur after the filing of the Form 706) but it should be fairly close barring large last minute fees and expenses. If it is not, ask for an explanation.

If Page 1 reflects state or federal estate tax due, you will then need to consult the terms of the Will or Trust to determine if apportionment of the estate tax is mentioned. Apportionment means that each beneficiary pays out of their share of the estate or trust the amount their share generated in estate taxes. Since the amount left to a tax exempt non-profit generates zero estate tax (these bequests pass estate tax free), the apportionment of the tax should occur only among the non-charitable beneficiaries.

Example: Donald Duck dies leaving an estate of $3m divided among the National Audubon Society (25%) and his three nephews, Huey, Dewey and Louie (25% each). Under federal law in place in 2007, the first $2m of the estate principal passes (to anyone) free of federal estate tax. That $2m "exemption amount" will change to $3.5 million in 2009. The remaining $1m IS subject to estate tax but Mr. Duck's Will has a clause requiring apportionment of estate taxes. If the estate tax rate for that amount is 36% we multiply $1m x 36% (I am not including allowable deductions for expenses in this example) to reach an estate tax of $360,000. Rather than split that between the four beneficiaries (Audubon and the 3 ducks, er, nephews), it is split three ways, meaning each duck will pay 1/3 or $120,000. So, although we have four equal beneficiaries in the Will, the actual amounts received by them after taxes will be different. Again, assuming no expenses, the calculation would look like this:

Gross Estate:		$3,000,000
Estate tax:	-	$ 360,000
Remainder to be divided		$2,640,000

Tax to be divided among three beneficiaries; residuary to be divided among all 4 beneficiaries
Share of taxes: $120k to each non-charitable beneficiary ($360k divided by 3)
-0- to charitable beneficiary

Division of remainder:

Gross estate			$3,000,000		
Divided by 4 =					
	Audubon	Huey	Dewey	Louie	
	$750k	$750k	$750k	$750k	
less estate tax of	-0-	120k	120k	120k	
Total:	$750k	$630k	$630k	$630k =	$2,640,000

Why is this important? Take a look at the difference in what Audubon will receive if apportionment is not calculated correctly -- $750k vs. $660k.

Many times there will be no reference at all to apportionment in a Will or Trust. In that instance, state law controls. In general, most states presume apportionment in the absence of contrary language in the Will or Trust. If you are uncertain, ask the estate attorney if your share was subject to estate tax; if the answer is yes, ask if estate taxes were supposed to be apportioned.

There are some circumstances in which charities can end up paying estate taxes but they do not occur often. In addition to federal estate taxes, some states also assess state estate taxes which have a completely different set of rules. It is possible that your share will not be subject to federal estate taxes but is subject to state estate taxes. Again, ask for an explanation from the estate attorney as to why a charitable organization is paying estate taxes whether state or federal. And keep asking until the explanation is couched in plain English!

(d) The Incomprehensible 1041: Fiduciary Income Tax Return

Each estate or trust is a separate taxable entity as of the death of the testator or grantor. That means that the estate or trust must have its own Tax ID# and file an income tax return annually until the estate or trust closes. That tax form is the Form 1041.

From a non-profit's standpoint, the 1041 is the easiest to review because it is much shorter than the Form 706. You mainly want to know if any income taxes were paid. If all of the residuary beneficiaries of the estate or trust are tax-exempt, there should be no tax due in any year that the estate or trust is opened. The Internal Revenue Code allows the tax preparer to make an election informing the IRS that the ultimate beneficiaries of the estate/trust are tax-exempt and thereby pass the income (and the tax it generates) out to the charities, resulting in zero tax due. Unfortunately, this tax election is much more familiar to tax preparers who regularly deal with tax-exempt beneficiaries. We catch approximately 15-20 cases per year of this missing election which, when we point it out to the tax preparer and it is corrected, results in more money for the residuary beneficiaries. One caveat: There are a few oddball exceptions to this rule, mostly involving income in respect of a decedent (IRD), annuities and possibly some IRAs. Begin with the assumption that charities should be paying income taxes from their share, show the Tax Code section to the estate attorney and ask why it does not apply if you see that there were fiduciary income taxes paid.

If you have a situation with mixed beneficiaries (tax-exempt and non-tax-exempt, otherwise known as regular folks), this election cannot be made and your share of the estate will indeed have to pay its share of the income taxes. But if the executor/trustee is diligent about distributing income or principal each year; he/she can reduce or eliminate the income taxes by passing the income out to the individual beneficiaries. And since tax-exempt organizations do not have to pay taxes on income passed out to them, your organization will benefit. Bringing up this issue is an excellent way to prompt a trustee or executor late in the fiscal or calendar year of an estate or trust to make a distribution. Remind him or her that making a distribution now could result in a tax savings to your organization

and, in general, reduce the tax burden on all beneficiaries since the fiduciary income tax rate is generally higher than individual income tax rates. **See Appendix C – 1041 Tax Citation** for the Tax Code citation and an explanation.

One further note – each year that the estate or trust files a 1041, your organization will receive a Schedule K-1 form. You do not need to take any action other than keep a copy in your file. K-1s are used by individual beneficiaries to prepare their individual tax returns.

(e) Collection of IRAs, Life Insurance Policies & Payable on Death Accounts

The collection of designated beneficiary accounts such as IRAs, life insurance policies, pension plans and payable on death (or P.O.D.) accounts is usually straightforward other than the voluminous forms that must be completed by an authorized signer of your organization. However, problems do arise:

i. The Patriot Act & How It Can Drive You Mad!

If you are the authorized signatory for your organization, you likely will be asked to supply your Social Security Number on the application for proceeds form (as well as your organization's Tax ID#). Obviously there is no problem supplying the Tax ID# but if you (like us) are uncomfortable giving out your Social Security Number unless absolutely necessary (and you should be wary!) suggest instead that you provide the company with your Driver's License number and a copy of the license (assuming your state does not use SSN as the ID#). We have successfully used this method for several years but ran into strong resistance initially.

The difficulty and misunderstanding arises from forms that did not take charitable entities into account when they were drafted. Providing a Delegation of Authority, Tax Letter and perhaps a Driver's License copy often serves to fill in the blanks that need to be filled even if they do not match up perfectly. If you find yourself dealing with one company more often than others, it is worthwhile to establish a relationship with one person there and then call on that person to help get future distributions made. This gets you around that "1-800 number syndrome" of persons who are unable to help make the form flexible enough to accept a charitable institution's information.

ii. When You Are Stuck in No Man's Land

If after you have supplied multiple documents to the life insurance/IRA company, they still will not send you your money, ask to be referred to their legal department for a specific list of what they want. Life Insurance/IRA death benefit employees are working from a one-size-fits-all generic list of documents they insist you must provide. Each tax-exempt organization is structured differently and you may not be able to provide exactly what they want. You should be able to negotiate a replacement for the requested document if you explain your structure to someone other than the person handling the initial call – a supervisor or someone from the legal department will have more decision-making power. We often are able to supply notarized, corporate-sealed affidavit attesting to one fact or another that has hung up the process.

iii. "PLEASE Don't Withhold Taxes!"

Life insurance and IRA companies are notorious for withholding taxes even if you have dutifully checked the box for no withholding of federal or state taxes. To avoid this, include a cover letter with bold underlined language directing that no taxes be withheld. In addition, do not be bullied into opening a checking account for your life insurance or annuity proceeds. You are entitled to and should demand a check or wire transfer.

IRAs are different in that under federal law, a conduit IRA account in your organization's name must be opened before you can liquidate your (new) account. In order to avoid having to wait for the two step process, be sure to explicitly state in your covering letter enclosing the death benefit application form that you want a full liquidation of the entire account, including any conduit IRA. That way, even if the insurance/IRA custodian does not read your letter, you can call them up and direct their attention to that paragraph, saving you having to write them again and provide another complete set of documentation.

Despite your best efforts, actually receiving your payment from one of these giving vehicles can be anything but easy. The process can take months, multiple phone calls and a good part of your sanity. Hang in there -

- it is your money and was meant to come to your organization. The sense of accomplishment that comes with finally receiving such a check in the mail is akin to having beaten Goliath!

Additional Resources:

For more information about all of the above, consider checking with your local community college or State Bar association for short courses in estate administration. They are usually cheap and effective and since many states follow the Uniform Probate Code, they will apply (generally) to most of the states. You should be aware, though, that there are differences in filing deadlines and how supervision of estates and trusts are handled. Nevertheless, the inventory, accounting and tax forms are remarkably similar from state to state.

C. Problems, Problems, Problems

I. Uh-Oh, The Family Wants the Money Back…and For Good Reason

Out of the blue you receive a tearful phone call or heart-rending letter from a family member who was not included in a Will or Trust because, at the time of creation, they had no need for money or perhaps were not even born. Circumstances have changed and they would like your organization to give up all or a part of your share to help them.

These are tough situations and the first thing to do is to hear the caller out and let them know you will need to consult with others in your department. You certainly want to sympathize with their situation but let them know that, in general, a charitable organization may risk their tax-exempt status by returning funds unnecessarily. Suggest that you write them shortly with an answer.

a. The tax code section that will help is attached – **see Appendix D – Private Inurement**. The magic words are "private inurement". To summarize, charities may not enrich individuals with funds intended for the charity. To do so could put your organization at risk for losing its tax exempt status. These can be terribly guilt-inducing situations but remember that the private inurement argument is not an excuse. It is an absolutely legitimate legal issue and one that you have the responsibility to consider in these circumstances.

b. The polite and apologetic letter of refusal. See **Appendix E – Private Inurement Letter** for a sample letter that may help you strike the right note.

c: On very rare occasions, there may be an instance where there is good evidence that the decedent wished to give to someone but neglected to change their document. Finding a way for that person to receive some dollars in the form of an expense is possible. For example, a cleaning person who worked for the donor for many, many years usually received a bonus annually in lieu of a pay raise but the employer passed away a month before the usual bonus time. If you agree that these funds are owed to the employee, ask the executor or trustee to pay that amount to him or her and include it as deferred salary. Do insist that some type of documentation of why the payment is being made be supplied to you for your own organization's protection.

II. Oops …The Money Needs to Come Back Because the Attorney is Math Challenged

This is always an unwelcome surprise but it happens – to large organizations and small. Calculating the distributions should be simple but mathematical mistakes can happen, as can errors such as not realizing that there has been an amendment or codicil that changed the original version or the trust or will. It is possible that the wrong percentages and/or the wrong parties have been paid throughout the course of the administration.

When you receive such a letter you need a full and detailed explanation of what went wrong before you act. Confirm with the attorney or executor that the estate/trust will not be charged professional fees to correct this error. Documentation needed should include numbers, not just a general statement that there was a mathematical error.

a. **Is there room for negotiation?**

Our own experience is that once you have received adequate documentation that the error is legitimate, an organization should repay the money promptly as it is highly unlikely that any court will rule otherwise and you are wasting your money hiring an attorney to fight the inevitable. However, if the error is egregious, you may want to try to negotiate a reduction in the attorneys/executor/trustee fees to compensate the beneficiaries for poor performance. It is worth asking but only in cases where the amount is large and error outrageous.

Most often, the person who committed the error is horrified at his/her error, embarrassed and terrified that you will not return the monies (or that you will be difficult about doing so). The Receipt and Release that we often sign prior to our receipt of a distribution is actually our word that we will give the money back in the event of an error. Even without the R&R, generally the responsibility to remit the funds still exists.

II. Litigation – do I need a lawyer?

Do you need a lawyer every time your share of an estate is or could be involved in litigation? The answer is dependent on what you have to lose and gain. Basically, it is almost always a cost/benefit analysis.

a. **Assess your risk**

If you have access to any attorney (estate or not), ask for help in assessing your risk. Often, hiring an attorney specifically to assess your case is a good use of funds and should not be expensive. You will need to be clear with the attorney that you are only retaining him or her at this point to assess the case, not to take action.

In the case of smaller amounts, factors you should take into consideration include the size of your bequest, whether it is specific or residual, the projected cost of representation, your organization's tolerance for litigation, any possible public relations fallout and whether you may be able to negotiate better on your own. In general, any serious/complex litigation requires an attorney unless you are a very tiny beneficiary.

Be aware that there are generally very tight timelines in which to answer a lawsuit. Twenty-one days from the date of service of the lawsuit on your organization is very common. Be certain there is a system in place to ensure legal pleadings do not sit on someone's desk unopened or not responded to because of indecision or vacation.

b.. **Pro Se – Acting as your own counsel**

If you choose to do so, your organization may attempt to enter an appearance or be heard by the court pro se (without an attorney). Obviously this is not a wise idea other than in small matters but it can be an effective tool when used correctly. For instance, TNC was recently named to receive a $50k bequest from a trust. A dispute arose with the second wife of a beneficiary who was claiming the right to the income in the place of the predeceased first wife. Obviously the residuary beneficiaries of the estate had much more to lose than we did so I simply wrote a letter to the judge stating our position and that we would not be retaining counsel. I respectfully asked that our letter be included as a part of the court file. Since probate courts tend to be more informal, the letter was accepted. I spent zero dollars in attorney's fees and it appears that we will be receiving our full $50k. If TNC had been a residuary beneficiary of this large trust, I would, of course, have retained counsel.

In another case, two brothers began litigating over their mother's estate in 1999 and they are still at it in 2007. TNC is a small beneficiary and because the court has allowed us to participate by phone and without an attorney, we have saved ourselves a minimum of $200,000 in attorneys fees on a case where it is doubtful that our share will ever amount to $200,000 if and when the brothers ever decide to stop suing each other. By monitoring the situation and being prepared to retain counsel when necessary, you can

save your organization a great deal of money. Your in-house counsel can be extremely valuable in this type of situation as they should be able to assist in either monitoring or assessing the situation.

c. **An attorney is not in the budget**

If you feel you need to hire an attorney but do not have funds budgeted, consider canvassing your board for pro bono assistance or your local law school and determine if you can obtain assistance. Another option would be to cultivate an experienced trust officer or estate paralegal who can help assess the case and perhaps provide entree to an attorney who will either reduce his or her usual fees or do the work pro bono.

Another useful tool is to utilize an attorney you may have hired in the past and ask if he or she would be willing to handle the occasional smaller issue either pro bono or at a reduced rate.

d. **Joining forces**

Another, extremely effective and cost-efficient method of obtaining legal counsel (or helping you decide whether you want to do so) is to contact your fellow charitable beneficiaries and consider cost-sharing or a joint negotiation. Larger organizations will have more resources and, hopefully, would be willing to share their thinking on an issue. TNC is always glad to share our thinking on a case with beneficiaries whose interests are aligned with ours.

e. **Don't be an ostrich and lose everything**

Learning that your organization's share of an estate might be in jeopardy is a stressful event. But taking no action (i.e., burying your head in the sand like an ostrich) and hoping for the best can keep you from having a seat at the settlement table.

At a minimum, even if you cannot afford or do not want to hire an attorney, you should respond to the documents you receive and indicate in writing that you want to be a part of any settlement negotiations. If an organization chooses not to become involved, an executor/trustee can settle with the beneficiaries who do participate and leave your organization out in the cold. Something is better than nothing!

f. **Be bold – almost everything is negotiable – the donor intent "wildcard"**

Legitimate issues often arise in conjunction with estate and trust administration in which each side has a valid point. In these cases, learning to negotiate a reasonable settlement is critical. Attending a seminar on negotiating skills would be an excellent part of training for estate and trust administration. Most executors/trustees would prefer to settle and you need to use you strongest weapon – which many times can be donor intent. Continue to remind the executor/trustee that your donor clearly intended your organization to receive a share of this estate (presuming that is not at issue) and that the donor's intent ought to permeate any settlement. Frequent references to the donor's wishes as being paramount are both truthful and good strategy. The majority of estate disputes that have arisen during our years in this field have been settled by negotiation.

g.. **How to find a good estate attorney**

Referrals from other attorneys, board members and other charities are a good place to start. If you are literally starting from scratch in finding an estate litigation attorney in a particular region, you can consult Martindale Hubbell (martindalehubbell.com) which is the "bible" of attorney listings in the US.

Once you have identified potential candidates, determine whether they belong to the American College of Trust and Estate Counsel (ACTEC) and/or are members of the Probate or Trust/Estate section of their state bar association, as well as the sections of their state bar to which they belong (i.e., Probate, Trusts and Estates, etc). It is also helpful to look at their rating on the Martindale site (A.V. is the best) and how long they have been practicing.

If you see that their client base includes tax-exempt organizations, that is a plus as they are likely to understand the financial pressures we all face to keep legal expenses low and our valid concerns about bad publicity resulting from a potential lawsuit. It is a good practice to keep a list of attorneys all over the U.S. with whom you have worked or had recommended to you. In a time-sensitive situation, this can be invaluable!

Be warned, however, that full-blown estate litigation (such as a will contest) is not cheap. Ask in advance for an estimate of going to trial and for a realistic assessment expressed as a percentage of your chances of winning. If the answer is less than 50% or even 60%, do think long and hard before proceeding. It is also good to ask upfront if the same attorney will handle the court appearances. Some cases require two attorneys – one for the research and writing aspect and one for the court litigation. This can get very expensive but may be necessary in very large estate matters.

D. True Stories from the trenches

With happy endings

I. The Nature Conservancy was named as one of several beneficiaries of a CA estate administered by two nephews. Although there was no apportionment language in the Will, the nephews unilaterally decided to apportion ALL of the estate taxes to the charitable beneficiaries. In reviewing the accounting, I saw that the family members were paying none of the taxes and the charities were paying more than $100k despite no such instructions in the Will. I wrote the attorney who admitted that the nephews had no legal grounds upon which to apportion the taxes but they intended to do so anyway, despite the CA statute to the contrary. In this instance, one phone call from us to a CA attorney and one letter from her advising that we would be filing a motion asking for the court to rule and for our attorneys' fees resulted in the $100k being swiftly repaid to the charities. Total cost to the charities: $200**. Moral of the story: Read those accountings!**

II. The Nature Conservancy was named as the sole beneficiary of a donor who owned property in Italy and the U.S. His nephew was named as executor. He and his mother, (the donor's sister) visited the properties and convinced the court in Milan that no valid Will existed and that, therefore, the property belonged to the family. We immediately hired an English-speaking law firm in Milan to assess the situation. They reported that the U.S. Will was indeed valid in Italy. The notario (court official) in Milan was furious to find out that he had been misled and promptly rescinded his order that the property pass to the family. The case was challenging due to the need to protect our interests quickly by finding an Italian (and English-speaking) attorney and then to grasp Italian probate law. However, in the end the matter was very straightforward and the family completely capitulated within days of our attorney entering the picture. **Moral of the story: Be wary of executors with an inherent conflict of interest. If your interest is large or complex, do not negotiate or give anything up until you know all the facts.**

III. The Nature Conservancy was named to receive 50% of the residue of a large trust at the donor's death. Her estranged son and daughter (who were each named to receive $1m in the trust) attempted to change her trust prior to her death despite the fact that their mother had been declared incompetent as a result of Alzheimer's disease. Under their proposed trust, The Nature Conservancy would receive nothing and they would take the majority of the assets. Given the outrageous behavior of the children and the obvious intent of the donor (in naming each of them to receive $1m but not the full trust), The Nature Conservancy hired counsel to defend the trust as it stood. Had the children won, the case could have set a precedent in CA and opened the door to allowing trust revisions after a donor is declared incompetent. Our cost/benefit analysis proved that the litigation fees were worthwhile, but, in addition, we felt that we had a duty do all we could to ensure that the donor's wishes were followed. Ultimately, the children withdrew their petition to change the trust when we offered to allow them to each have their $1m immediately. The donor died soon after and the funds were distributed according to her original trust. **Moral of the story:**

Sometimes the cost/benefit analysis is not just about numbers but is also about ensuring that a donor's intent is carried out when he/she no longer has a voice.

Without happy endings

I. The Nature Conservancy was a very small beneficiary (2%) of a trust administered by a small bank and trust company in a mid-western state. Although we asked for a full accounting, we only received a summary without full detail. Because we were such a small beneficiary, we decided to forego any further requests, particularly because the trust was not large anyway. A few months after the trust was closed, we received a letter from the bank informing us that the trust officer had embezzled approximately $125k from the trust which they would be repaying. If we had had a full accounting, we would have seen the unauthorized withdrawals but because we let it go, it did not come to light. The trust officer was a charming and friendly woman. In this instance, we lost nothing but had we been a larger beneficiary and the bank's audit department not so vigilant, we could have lost a lot more. **Moral of the story: Do not be intimidated by someone who is unpleasant or charmed by someone who friendly into failing to obtain the information you need. Think long and hard before you waive an accounting.**

II. The Nature Conservancy was named, with 10 other charities, as the beneficiary of two trusts in Texas. A nephew was the trustee. Each trust was over $1m and it took five years to distribute the trusts. The trustee did not file tax returns and when he did finally file them, they were incorrect and penalties and interest were due. We eventually received the bulk of our share but there are still outstanding issues. However, it is no longer cost-effective to continue to hire outside counsel to collect the final dollars. This trustee had absolutely no sense of fiduciary responsibility to the beneficiaries or to his aunt. It was very difficult for me to walk away from collecting every last dollar but it was, in the end, a good business decision. **Moral of the story: Resist the urge to become so outraged at bad behavior that you lose your sense of proportion. Sometimes getting what you can and throwing in the towel IS the right thing to do.**

E. Question and Answer Period

APPENDIX A – INITIAL LETER

DATE

Address

RE: Estate/Trust

Dear M.:

Thank you for notifying The Nature Conservancy [of ____] that we are a beneficiary of the Estate of ____/beneficiary under the Trust of _____. *Please note that because estate and trust matters for all chapters of The Nature Conservancy are centralized, all correspondence and distributions should be sent to this office in Arlington, Virginia and directed to my attention.* You may be assured, however, that we will allocate this bequest/gift according to Ms._____'s wishes.

We are very thankful that Ms._____ remembered the Conservancy in her estate plans and would like the opportunity to contact people important to her to express our thanks. Do you know of anyone who might appreciate this gesture?

In order for us to maintain complete estate files and allocate this gift as Ms._____ intended, we request a copy of that portion of the Will/Trust that identifies the Conservancy's interest. If (Because)our organization is a residuary beneficiary of the estate, we would appreciate receiving a copy of the inventory and all accountings for the estate/trust when they are prepared OR [informal trust accounting at the conclusion of the trust administration]

If the Conservancy is likely to receive any portion of its distribution in the form of real estate, please notify me immediately. We will need to visit the property and prepare an environmental assessment before taking title. Please do not automatically transfer ownership of any assets, including real estate and securities, without first notifying me.

Finally, we would like to include Ms. _____'s name in our annual report. Only her name would be listed, not the amount of any bequest/gift. I would appreciate your informing me if you have any objection to the inclusion; otherwise the listing will appear in the first annual report issued after the bequest/gift is received. If you would like a copy of that annual report, please let me know.

Thank you for your assistance in this matter. We look forward to working with you on this estate/trust. Enclosed are our W-9 and an IRS Determination Letter.

Sincerely yours,

APPENDIX B - ACCOUNTING

SUMMARY OF ACCOUNT
CHARGES

Inventory and Appraisement (Schedule 1):	$ 721,913.64
Receipts During Accounting Period (Schedule 2):	135,664.35
Gain on Sale (Schedule 3):	51,569.39
TOTAL CHARGES:	**$ 909,147.38**

CREDITS

Disbursements During Accounting Period (Schedule 4)	$ 55,817.90
Loss on Sale (Schedule 5)	$15,198.81
Preliminary Distributions (Schedule 6)	$74,742.75
Property on Hand (Schedule 7):	$763,525.70
TOTAL CREDITS:	**$ 909,285.16**

INVENTORY AND APPRAISEMENT
(Schedule 1)

Partial No. One, filed 02/27/02	$ 371,000.00
Partial No. Two, filed 01/08/04	362,848.02
Final, filed 08/15/05	3,872.75
Supplemental, filed 09/25/05	4,195.71
Corrected, filed 08/07/06	< 20,002.84 >
TOTAL INVENTORY AND APPRAISEMENT:	**$ 721,913.64**

APPENDIX B - CONTINUED
(Schedule 2)
RECEIPTS

PUTNAM INVESTMENTS
High Yield Trust Cl-A

DATE	DESCRIPTION	AMOUNT
09/25/01	Dividend paid	650.01
10/25/01	Dividend paid	650.01
11/26/01	Dividend paid	650.01
12/26/01	Dividend paid	586.26

Only a portion of detail included in this example

TOTAL: $ 16,365.59

GAIN ON SALE
(Schedule 3)

GAIN FROM INVENTORY VALUE TO SALE VALUE:

ASSET	INVENTORY VALUE	SALE VALUE	GAIN
CAL FED INVESTMENTS			
Calvert Soc Inv Bal, Class A	55,053.75	63,231.33	**8,177.58**
CITICORP INVESTMENT #79C-00576-12 X23			
ING Intl Value Fund, Class A			
(Pilgrim on I & A)	61,380.20	101,233.70	**39,853.50**

Only a portion of detail included in this example

GAIN ON REINVESTED INCOME:

FRANKLIN TEMPLETON INVESTMENTS
Tax-Free Income Fund Class A
Account #112-11202738483

DATE	SHARES PURCHASED @ PRICE	COST BASIS	SOLD @ 7.27	GAIN <LOSS>
04/01/02	27.800 @ 7.04	195.71	202.11	6.40
05/01/02	27.605 @ 7.12	196.55	200.69	4.14
06/03/02	27.231 @ 7.13	194.16	197.97	3.81

TOTAL COST BASIS,
SHARES PURCHASED

THROUGH REINVESTMENT	$ 11,095.75	11,181.94	**86.19**
Only a portion of detail included in this example			
TOTAL GAIN			**$ 51,569.39**

(Schedule 4)
DISBURSEMENTS DURING ACCOUNTING PERIOD

Date	Description	Amount
11/13/01	H.O. Insurance Premium	$ 599.00
11/30/01	Superior Court Filing Fee	196.00
11/01/01	HOA Dues	166.00
12/03/01	Real Property Tax, San Diego County	1,077.75
12/07/01	City of Carlsbad Water, 10/4-11/06	174.37
01/04/02	Coast News, Publication, Notice of Admin	145.00
01/07/02	Alfred Reyes, Yard Cleanup, Sale Prep.	80.00
01/14/02	Six certified copies, Ltrs Testamentary	36.00
02/21/02	Pacific Bell, Final Bill	53.42
02/15/02	Frank D. Real, Probate Referee, Inventory & Appraisal, Partial #1	385.00
02/28/04	Miller & Willits Accountants, Inc., Prep 2001 Fed & Cal Income Tax Returns	790.00

Only a portion of detail included in this example

Total: $ 55,817.90

LOSS ON SALE
(Schedule 5)

LOSS FROM INVENTORY VALUE TO SALE VALUE:

ASSET	INVENTORY VALUE	SALE VALUE	LOSS
FRANKLIN TEMPLETON U.S. Gov Sec Fund – Class A	6,949.233 @ 6.85	6,949.233 @ 6.35	
	47,602.25	44,127.63	**<3,474.62>**

Only a portion of detail included in this example

TOTAL LOSS **$ 15,198.81**

APPENDIX B - CONTINUED

PRELIMINARY DISTRIBUTIONS
(Schedule 6)

PATRICIA R		
1998 Volvo C70 VIN YV1NK5376WJ001026	21,000.00	
10/08/03Vivian R……., cash	40,000.00	
12/29/03Vivian R……, cash	10,000.00	
Coin collection	3,742.75	
TOTAL:		**$ 74,742.75**

PROPERTY ON HAND
(Schedule 7)

US BANK ACCOUNT NO. 153451470394	$ 2,730.83	
REAL PROPERTY	4,000.00	
EDWARD JONES ACCOUNT NO. 847-10632-1-7	756,794.87	
TOTAL:		**$ 763,525.70**

APPENDIX C – 1041 TAX CITATION

Question: What is the citation relating to taxable income from an estate/trust eventually passed out to a tax exempt organization?

The citation you want in Internal Revenue Code section 462(c)(2) about amounts to be used exclusively for religious, charitable, scientific, literary, or educational purposes. Since the income from the estate is to be distributed to four charities in all events, the income should be considered to be used exclusively for a charitable purpose and qualify for the section 462(c)(2) deduction. The Treasury regulations under section 1.462(c)-2 confirm this and allow a charitable income tax deduction to an estate for "any part of the gross income of an estate which pursuant to the terms of the will ... is to be used (within or without the United States or any of its possessions) exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals

Question: does this apply to trusts as well? A fiduciary countered our earlier assertion that no tax was due by saying that since this wasn't an estate, the section wasn't "germane". I've read Sec. 1.642(c)-2(b) Certain Trusts but am having trouble deducing whether this would apply to a trust which was created as a regular living trust during the donor's lifetime?

Answer: While by its terms, section 642(c)(2) applies to estates (and certain old trusts), section 645 of the Internal Revenue Code allows revocable trusts during their administration period to elect, with the consent of the executor of an estate, to be subject to income tax as part of the decedent's estate. The election can even be made if there is no executor of an estate appointed. Generally that election is beneficial, but not all revocable trusts make that election. By making the election, the income tax rules of section 462(c)(2) of the Internal Revenue Code should apply to the revocable trust. Treasury Regulation section 1.645-1(e)(2)(i) (if there is an executor) and -1(e)(3)(i) (if there is no executor) specifically requires this result. I know that it is requesting a level of detail from the trustee of the revocable trust, but I think that it is a reasonable request to make. And if the election was not made, because of this issue, I would wonder why the election was not made

APPENDIX D – PRIVATE INUREMENT

Private inurement tax citation – drawn from:http://www.irs.gov/charities/charitable/article/0,,id=123297,00.html

Life Cycle of a Public Charity - Jeopardizing Exemption

A section 501(c)(3) organization will jeopardize its exemption if ceases to be operated exclusively for exempt purposes. An organization will be operated exclusively for exempt purposes only if it engages primarily in activities that accomplish the exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities does not further an exempt purpose. A 501(c)(3) organization:

- must absolutely refrain from participating in the political campaigns of candidates for local, state, or federal office
- must restrict its lobbying activities to an insubstantial part of its total activities
- must ensure that its earnings do not inure to the benefit of any private shareholder or individual
- must not operate for the benefit of private interests such as those of its founder, the founder's family, its shareholders or persons controlled by such interests
- must not operate for the primary purpose of conducting a trade or business that is not related to its exempt purpose, such as a school's operation of a factory
- may not provide commercial-type insurance as a substantial part of its activities
- may not have purposes or activities that are illegal or violate fundamental public policy
- must satisfy annual filing requirements

In addition to loss of the organization's section 501(c)(3) exempt status, activities constituting inurement may result in the imposition of penalty excise taxes on individuals benefiting from excess benefit transactions.

Inurement/Private Benefit - Charitable Organizations

A section 501(c)(3) organization must not be organized or operated for the benefit of private interests, such as the creator or the creator's family, shareholders of the organization, other designated individuals, or persons controlled directly or indirectly by such private interests. No part of the net earnings of a section 501(c)(3) organization may inure to the benefit of any private shareholder or individual. A private shareholder or individual is a person having a personal and private interest in the activities of the organization.

APPENDIX E – PRIVATE INUREMENT LETTER

Date

RE: Estate of

Dear Ms.

Thank you for your email/letter/phone call of _____.

In response to your request to allocate a portion of our share of the estate to you, we must regretfully decline. As a nonprofit public charity, The Nature Conservancy has a fiduciary duty to its members to ensure that corporate assets are adequately protected and managed and do not inure to the benefit of any private individual. Unfortunately, voluntarily giving up part of a bequest, in the absence of any legal requirement to do so, would violate our fiduciary duty and jeopardize our non-profit status. While we are most sympathetic to your family history and current difficulties, we are unable to assist you without creating problems for our own organization.

We are very grateful to have been named in Mr./Ms. estate planning documents and hope that the knowledge that this gift is living legacy to Mr./Ms. will provide some comfort as you remember him/her.

Sincerely yours,