

The Rights of Charities within the Estate/Will



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Overview

- Charities have a right to receive property through a Governing Instrument
 - This includes the right to be provided information concerning the Decedent's wishes and information regarding the administration of the estate after the Decedent's death
- The challenge – a charity being recognized and treated as a valid beneficiary by the Trustee of a Trust or as a valid devisee by the Personal Representative of an Estate
- The benefit – Arizona law recognizes and protects a charity's rights as a devisee or beneficiary when the charity is clearly defined
 - To the extent the charity is not clearly defined, the court will analyze the decedent's intent and look to factors to interpret if a particular charity has a special interest to enforce its rights

What We'll Cover Today

- What Arizona Law Tells Us About Charities' Beneficial Interests
- A Devisee's Right to Information
- A Beneficiary's Right to Information
- Enforcing Your Rights By Knowing Your Rights
- Potpourri and Timing Considerations
- Best Practices
- Business Opportunities
 - For Estate Planners
 - For Charities
 - For Private and Corporate Fiduciaries

Legal Terms in Plain English

- **Charity:** An entity recognized under 26 U.S. Code § 501.
- **Beneficiary:** A person or entity that benefits from the transfer of property, in this case from a will or a trust.
- **Settlor/Grantor:** The person who creates a Trust; one who furnishes the consideration for a Trust.
- **Trustee:** A person, or persons, who hold legal title to property in a trust and who are legally obligated to administer the Settlor's directions of the trust to its beneficiaries.
- **Trust:** A legal document created by a settlor for the benefit of one or more designated beneficiaries administered by a trustee.
- **Will:** A persons written wishes for the disposition of their property at death.
- **Irrevocable:** Cannot be changed.

A Devisee's Right to Information

- Demand for Notice of Order or filing concerning decedent's estate. A.R.S. § 14-3204
- Information of Personal Representative's ("PR") appointment. A.R.S. § 14-3705
- Within 90 days of appointment the PR is to prepare an inventory and appraisement (you may need to request it if the PR files it within the court). A.R.S. § 14-3706
- Duty to supplement or amend the original Inventory. A.R.S. § 14-3708
- Supervised administrations require an annual accounting. A.R.S. § 14-3505(B)
- Final account required for closing the estate unless waived. A.R.S. § 14-3936(A)(3)

TRUST - A Beneficiary's Right to Information

“A charitable organization that is expressly and irrevocably designated to receive distributions under the terms of a charitable trust... has the rights of a qualified beneficiary under this chapter.”

(Referring to Chapter 11, A.R.S. § 14-10101 through 14-11102; also known as the “Arizona trust code”)

- The designation of the charity must be express to have statutory rights as an interested beneficiary
 - ~~A cancer research group~~
 - The American Cancer Society ✓
 - The American Cancer Society of Arizona ✓✓

A.R.S. § 14-10110(A)

TRUST - A Beneficiary's Right to Information

- Don't let irrevocability make you hesitate...
 - If the trust is irrevocable by designation then there are no concerns.
 - Upon the death of a Settlor/Grantor their trust becomes irrevocable.
- Qualified Beneficiary defined
 - A distributee or permissible distributee of trust income or principal.
 - Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described above terminated on that date.
 - Would be a distributee of trust income or principal if the trust terminated on that date. A.R.S. § 14-10103(14)

TRUST - A Beneficiary's Right to Information

So long as your charity is expressly designated and the governing document is irrevocable, your charity has the same rights as any other beneficiary!



But this is not a
perfect world,
things go wrong....

What if My Charity is Not “Expressly Designated”

“The single most important element in the creation of a testamentary charitable trust is the manifestation by the testator of a charitable purpose... Although [the decedent] did not use language indicating the establishment of a trust[in his will], the absence of words of ‘trust’ or ‘trustee’ is not fatal.”

In re Kidd’s Estate, 106 Ariz. 554, 557, 479 P.2d 697, 700 (1971), See also *Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.*, 208 Ariz. 176, 91P.3d 1019 (App. 2004).

Key take away:

A charitable trust is created through the manifestation of the testator to benefit a charitable purpose through a trust or a will but the charity is not express or clearly designated

What is a Charitable Trust?

- “Charitable trust’ means a trust, or portion of a trust, created for a charitable purpose...” A.R.S. § 14-10103(3)
- A charitable trust may be created for the charitable purpose of:
 - The relief of poverty;
 - The advancement of education;
 - Religion or science;
 - The promotion of health;
 - Governmental or municipal purposes or other purposes, the achievement of which is beneficial to the community;
 - Or for the support of one or more organizations that have the purposes prescribed in this section exclusively.” A.R.S. § 14-10405(A)

What if My Charity is Not “Expressly Designated”

- A charitable trust is established through the following testamentary documents without a specific bequest:
 - Trust:
 - Language drafted into a trust document to benefit a charitable purpose
 - Will:
 - Language in the decedent’s holographic or attested will to benefit a charitable purpose creates a testamentary charitable trust upon the death of the decedent
 - **Example: I specifically bequest \$100,000 to cancer research in America.**
 - Although the dollar amount is specific there are many charities this could benefit.

What if My Charity is Not “Expressly Designated”

- “If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.” A.R.S. § 14-10405(B)
 - Generally, a charity not expressly listed lacks standing to ask the court to interpret the trust unless they have a “special interest” to enforce the charitable trust.

Key take away:

Work with your donors to ensure your charity is expressly designated!!

See Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 208 Ariz. 176, 183, 91 P.3d 1019, 1026 (2004).

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What Other Remedies are Available?

- **Reformation to correct a mistake**
 - The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

A.R.S. § 14-10415

What Other Remedies are Available?

- **Cy Pres**

- The courts attempt to follow the testator's intentions as closely as possible
- “[I]f a particular charitable purpose becomes unlawful, impracticable, impossible to achieve or wasteful... The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed in whole or in part in a manner consistent with the settlor's charitable purposes.”

A.R.S. § 14-10413

TRUST - Enforcing Your Rights by Knowing Your Rights

A trustee has a statutory duty to inform and report to all qualified beneficiaries

- Inform:
 - “*Unless the trust instrument provides otherwise, a trustee shall keep the **qualified beneficiaries** of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.*”
- Report:
 - “Unless the trustee determines that it is unreasonable under the circumstances to do so, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.”

A.R.S. § 14-10813(A)

TRUST –

What if a Trustee Determines Your Request is Unreasonable?

- A trustee has the discretion to determine reasonableness of a request.
- However, the trustee must act in the best interest of the qualified beneficiaries and the court will scrutinize a trustee's abuse of discretion.

See *In re Esther Caplan Trust*, 228 Ariz. 182, 187, 265 P.3d 364, 369 (2011).

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TRUST -

What if a Trustee Determines Your Request is Unreasonable?

- Arizona Courts look to the six factor analysis found in the Restatement (second) of Trusts § 187 to determine if a trustee has abused his/her discretion in carrying out the settlor's intent:
 1. The extent of the discretion conferred upon the trustee by the terms of the trust;
 2. The purposes of the trust;
 3. The nature of the power;
 4. The existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged;
 5. The motives of the trustee in exercising or refraining from exercising the power; and
 6. The existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

See *In re Esther Caplan Trust*, 228 Ariz. 182, 187, 265 P.3d 364, 369 (2011).

TRUST - Enforcing Your Rights by Knowing Your Rights

A trustee shall send to distributees or potential distributees of trust income or principal and to and to other beneficiaries *who request it*, at least annually and at the termination of the trust, a report of the trust property, including:

- Liabilities;
- Receipts;
- Disbursements;
- Source and amount of the trustee's compensation;
- A listing of the trust assets; and
- If feasible, the respective market value of trust assets.

Upon the trustee's removal, voluntary or involuntary, a report must be sent to qualified beneficiaries by the former trustee.

See A.R.S. § 14-10813(c)

TRUST - Enforcing Your Rights by Knowing Your Rights

A trustee shall:

- “On the request of a beneficiary... promptly furnish to the beneficiary a copy of the portions of the trust instrument that are necessary to describe the beneficiary's interest.” A.R.S. § 14-10813(B)(1)
- “[A]dminister the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries...” A.R.S. § 14-10801
- Serve the beneficiaries with the duty of loyalty by “[administering] the trust solely in the interest of the beneficiaries.” A.R.S. § 14-10802
- Serve the beneficiaries impartially, when there are two or more beneficiaries, by “act[ing] impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries’ respective interests.” A.R.S. § 14-10803

POTPOURRI Pledges Made Before Death

A Personal Representative may, except as the will or other applicable law requires and acting reasonably for the benefit of the interested persons:

- Satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances.
 - NOTE: The Personal Representative has a high level of discretion in determining whether to honor a pledge.

Can Time Run Out to Enforce My Rights?

YES!!!!

- Why does time matter?

Legal rights can erode with time!

- If you think there has been an improper change to a testamentary document you may want to challenge its validity
 - Lack of testamentary capacity
 - Undue Influence
 - Duress
- Caution
 - No contest clauses
 - Expense of litigation
- Depending on whether the bequest is made through a trust or a will the statute of limitations varies

WILLS/CONTESTS - When Does Time Run Out?

- Informal Probate
 - A proceeding to contest an informally probated will and to secure the appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of twelve months from the informal probate or two years from the decedent's death, A.R.S. § 14-3108(3)
 - An heir has four months from receipt of Notice of the Probate and receipt of a copy of the Will to commence a formal testacy proceeding, A.R.S. § 14-3306(B)

See A.R.S. § 14-3108(3). See A.R.S. § 14-3306(B)

WILLS/CONTESTS - When Does Time Run Out?

- Formal Probate
 - A person who did not oppose the probate of the will or the allegations of intestacy at the original hearing may petition the court to vacate its order and reopen the matter with 60 days after entry of a formal testacy order probating a will or adjudicating intestacy, A.R.S. § 14-3412(A)(1)

See A.R.S. § 14-3412(A)(1).

WILLS/CONTESTS - When Does Time Run Out?

- Formal Probate

- A proponent of a later-offered will who was unaware of its existence at the original hearing or who did not have notice of the proceeding, may petition for vacation of the original Order at the earlier of:

- If a PR has been appointed and there is an order approving final distribution or if the estate is closed by statement, then within 6 months of filing the closing statement;

OR

- The 2 year period set forth in A.R.S. § 14-3108;

OR

- Within 12 months after the entry of the order sought to be vacated.

See A.R.S. § 14-3108. See A.R.S. § 14-3412(A)(1).

TRUSTS - When Does Time Run Out?

- You may contest the validity of a Trust, revocable at the Settlor's death, by the earlier of:
 - One year after the settlor's death; or
 - Four months after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address and of the time allowed for commencing a proceeding.

See A.R.S. § 14-10604(A)

Can I Remove a PR/Trustee for improper actions?

Maybe...for cause.

WILLS –

Can I Remove a PR/Trustee for improper actions?

- An interested person may petition the court to remove a PR at any time, for cause. Cause exists when:
 - Removal is in the best interest of the estate.
 - The person appointed PR intentionally misrepresented material facts leading up to being appointed.
 - It is shown that a PR disregarded a court order, has become incapable of discharging the duties of a PR, has mismanaged the estate, or has failed to perform any duty pertaining to that office.
 - If the PR disregards reasonable testamentary wishes of the decedent.

See A.R.S. § 14-3611

TRUSTS –

Can I Remove a PR/Trustee for improper actions?

- Does the Trust document allow for a removal as of right?
- A beneficiary of a trust may request the court to remove a trustee, or the court may remove a trustee on its own accord, when:
 - The trustee has committed a material breach of trust.
 - Failure to provide requested information?
 - Lack of cooperation among co-trustees substantially impairs the administration of the trust.
 - Because of unfitness, unwillingness or persistent failure of the trustee to administer the trust for the benefit of the beneficiaries, the court determines that removal of the trustee best serves the interests of the beneficiaries.
 - There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust and a suitable co-trustee or successor trustee is available.

See A.R.S. § 14-10706

Best Practices

- If the charity is expressly designated and the trust is irrevocable, know and be confident in your rights
 - Right to be informed of material facts to protect your interest
 - Right to a report of the trust assets
 - Right to open and ongoing communication with the trustee
 - Right to be treated the same as any other beneficiary
- Communicate your rights in a pleasant and courteous way
- Use the language of the law when communicating with a trustee

Best Practices

- If a current donor advises the organization they have or would like to include the charity in his/her estate plan, ensure the donor expressly lists:
 - The full legal name of the charity
 - Including its federal tax identification number
 - The charity's address and contact phone number
- It is helpful for the donor to include:
 - A recognizable contact at the charity
 - A Letter of Intent (LOI) in their estate plan documents
 - Undesignated vs. Designated bequests
 - Consider asking clients to allow you, the estate planner, to disclose the gift to the charity

Building Your Business

Opportunities – Charities

- Call clients who have pledged to donate and invite them to see your operation.
 - Explain how donations influence the operation and what they are used for.
 - Utilize the tour as an elevator pitch to thank the donor for their contribution and demonstrate the impact of additional donations.
 - Use the opportunity to ensure the donors information is correct and stress the importance of the accuracy of the charity's information in their estate plan, so that their donative interest is properly reflected and executed.
 - Provide the donor with a 1 page donation LOI to include in their estate plan documents to evidence the express donation.
- In your next mailing, include the 1 page donation LOI. Explain the benefit to the donor stressing the desire to carryout their donative intent.
- Establishes rapport – word of mouth is one of the best business generators!

Opportunities – Estate Planners

- Fantastic opportunity to approach clients to review their trust or will, opportunities include:
 - Beneficiary accuracy: including legal name, address, contact information, and, if applicable, LOI
 - Use the opportunity to determine if the existing estate plan accurately reflects the client's current intent
 - Educate client and upsell other firm services
- Considering initiating reoccurring revenue model where clients can pay an annual flat fee, good for an office visit to update estate planning needs
 - Potential for additional revenue growth if the client's needs exceed what the yearly visit covers
- Establishes rapport and trust as an advisor – more likely to receive referrals

Opportunities – Fiduciaries and Trustees

- Builds excellent client relationships
 - Ensure client wishes are being carried out
 - Establishes positive contact and builds trust
 - Use as a tool to identify potential problem areas for future administration
 - Build rapport with client's estate planner and increase likelihood of future referrals

Let's Recap

Conclusion

- An expressly designated charity and a person retain the same legal rights as a beneficiary.
- Information withheld from an expressly designated charity by a trustee is likely acting in violation of Arizona law.
- Charities who are expressly designated in a governing document have the greatest legal protections.
- Use your business model to connect with your donors/clients to ensure accuracy in their estate plan and seek additional business opportunities.
- Always assume the best in people, even some of the best people don't know the law. You may have to educate them.

Thank You!



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