

WISE GIVING™

GUIDE

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Planting a Legacy: Charitable Bequests





A Publication of the
BBB Wise Giving Alliance

The *Wise Giving Guide* is published quarterly to help donors make more informed giving decisions. This guide includes a compilation of the latest evaluation conclusions completed by the BBB Wise Giving Alliance.

If you would like to see a particular topic discussed in this guide, please email suggestions to give@council.bbb.org or write to us at the address below.

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president's MESSAGE

In these financially stressful times, when tomorrow or next week can be hard enough to handle, you may wonder about our taking up the subject of charitable bequests, which call for long-term thinking.

But it seems that many people, perhaps reluctant to make substantial contributions to charity today, are ready to consider a future gift. Perhaps they feel that though they can give less in regular contributions right now, they will be able to give more in the future. We're told, in fact, that giving by bequest tends to stay steady through recessions.

In any era, making a charitable bequest calls for thoughtful planning. For many people, this is the largest charitable contribution they will make—even more reason to develop it with care. I hope that you'll find help for doing that in our cover article.

I don't want to suggest, though, that making a charitable bequest is all about legal processes and precautions. That struck me when we began thinking about the kind of image we'd use on the cover of this Guide. Pictures of wills or judges' gavels, or of an individual at a desk with professional advisors—well, those hardly cut it. They were relevant but too impersonal for a subject that is anything but.

I think that the image we eventually chose, the hand holding that sturdy shoot, vividly suggests how bequest gifts are more than monetary transactions. They express our faith that our gift will mean growth for the causes and programs we care about.

Whatever your plans, we at the Alliance hope you will call on us when our information about charities can be helpful to you.



H. Art Taylor, *President*



Planting a Legacy: Charitable Bequests

When it was announced last year that Leona Helmsley had left millions of dollars of her estate to Trouble, her pet dog, the public marveled or scoffed. The news that she had also directed that a charitable trust estimated at \$8 billion be used for the care and welfare of dogs provoked op-eds, spirited blogs and even a forum titled, perhaps inevitably, “Is Philanthropy Going to the Dogs?”¹

While scholars and pundits debated questions about donor intent, the public interest and the tax code, it’s pretty certain that many more people gave thought, even if fleetingly, to what they would leave for charity in their wills, if they could, and for what purpose. When a New York court eventually determined (in a decision just recently challenged²) that the charitable trust established in Ms. Helmsley’s will need not focus solely on dogs, as she had once stipulated, “if I were Leona” dreamers might have

wondered how much control they would have over the use of any gift they left.

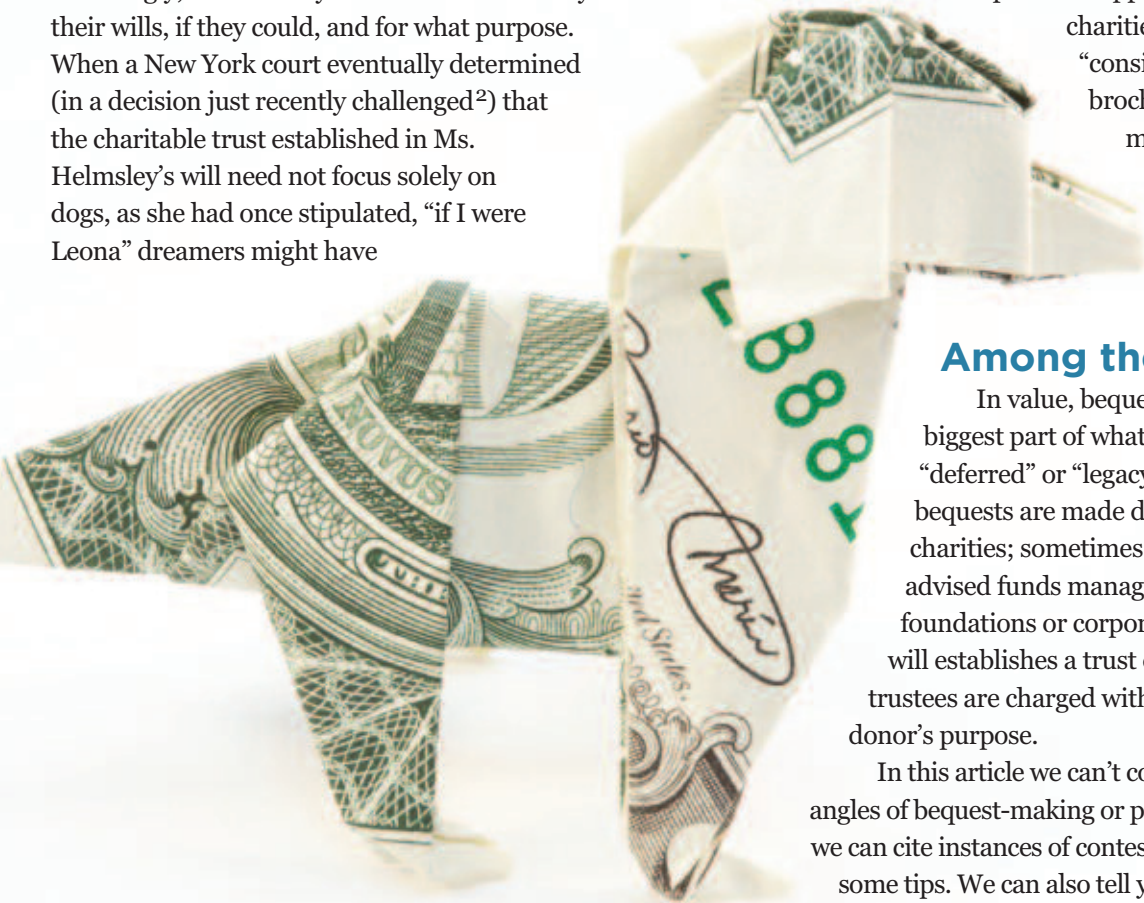
For thousands of Americans, however, making a charitable bequest is far more than a daydream. Bequest giving is substantial. In 2008, according to *Giving USA 2009*, bequests totaled close to \$23 billion and comprised 7 percent of all charitable giving. (That beats corporations’ 5 percent.) And leaving money to charity is not the prerogative of the rich and famous. Ninety-seven percent or more of charitable bequests come from estates of lower and middle income people, concluded The Sharpe Group, a commercial firm, using IRS studies and publicly reported statistics.³ With giving

potential apparently widespread, charities enclose millions of “consider us in your will” brochures in their direct mail solicitations.

Among the Giving

In value, bequests make up the biggest part of what’s called “planned,” “deferred” or “legacy” giving. Some bequests are made directly to designated charities; sometimes they go to donor-advised funds managed by community foundations or corporations. Sometimes a will establishes a trust or foundation whose trustees are charged with carrying out the donor’s purpose.

In this article we can’t cover all the technical angles of bequest-making or provide legal advice, but we can cite instances of contested gifts and offer some tips. We can also tell you what research is discovering about potential makers of bequests. Note that here we’re speaking of bequests in a very



general sense—gifts to charity made by wills or other instruments that take effect after the giver’s lifetime.

Putting impulse into action and actually wording a charitable bequest requires thought, care and good professional counsel. Even in the simplest form, an outright gift made without any stipulations about use, there can be problems like inexact charity names or perhaps more often, unhappy families. Bequests restricted to specific purposes can have especially tortuous futures, as time blurs donors’ intentions or makes them impractical.

Making a charitable bequest may be beyond your imagining, but you’ll find that many issues related to gifts made for the future are the same ones that you face in deciding where and how to give today.

Motivation


Philanthropic researchers are keenly interested in knowing why people give to charity. Some are looking especially at why people make charitable bequests, where the motives may be somewhat different. They find that people who include charitable bequests in their will often do so because they want to:

- “give back” for help given to them or their family or friends
- have an impact on society
- influence how they’re remembered
- recognize a charity’s good work
- memorialize a loved one.

Some of these motives may drive traditional contributions, but others, like wanting to influence how the donor is remembered, carry special weight in bequest giving. And of course there can be a number of motives at work. One that would seem powerful, the desire to avoid or decrease estate taxes, seems to be minor and applies only to the relatively few estates that are subject to the tax.

Gifts that keep on giving... to controversy?

Whatever the underlying motives of donors, the bequests they make occasionally travel a rough road. When bequests generate fights, especially where big money is involved, they generate headlines. But it would be misleading to suggest that trouble is inevitable. Indeed, most bequests proceed smoothly into charitable coffers, where they translate into good works of many kinds.



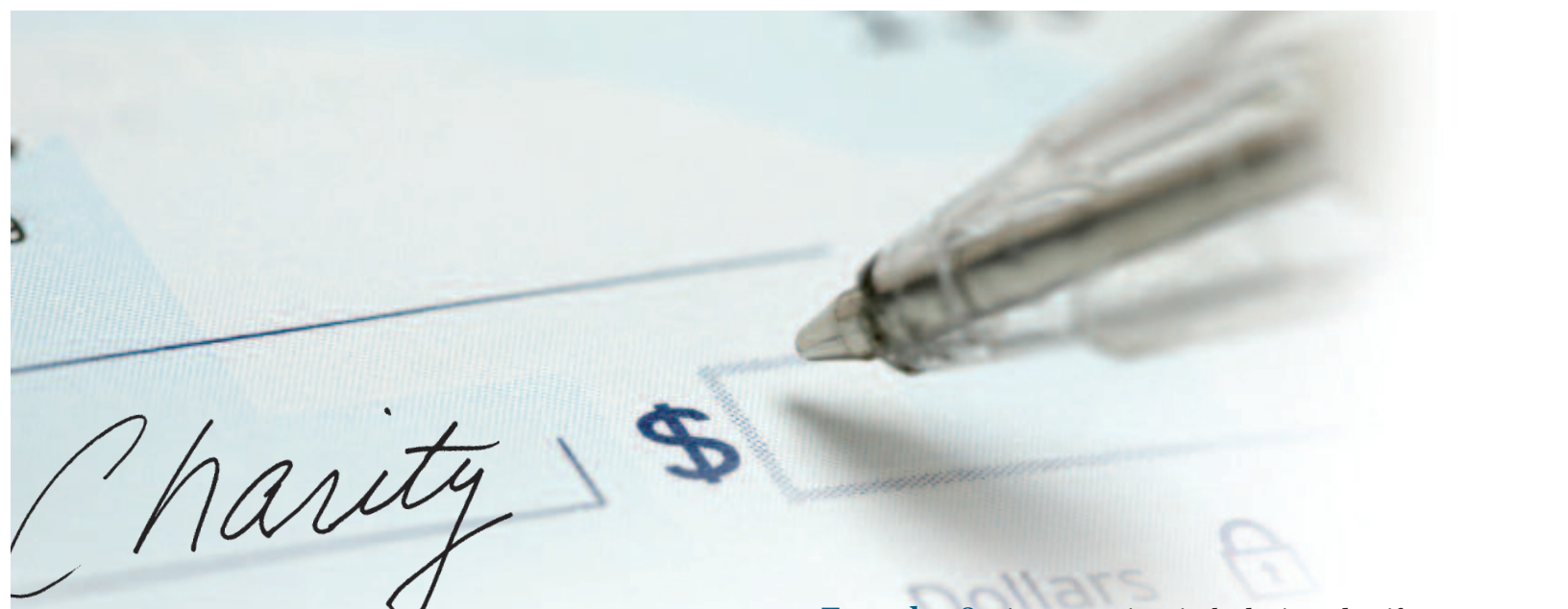
Bequest giving is substantial. In 2008, according to *Giving USA 2009*, bequests totaled close to \$23 billion and comprised 7 percent of all charitable giving.

Still, much can happen, sometimes as soon as a will is read and sometimes decades later.

Family distress? When a Colorado man’s handwritten will directed that 70 percent of his million-dollar-plus estate go to “Charity for the blind,” members of his family who would otherwise have been beneficiaries questioned the will’s validity. The Attorney General of Colorado was asked to get involved, according to a 2001 press release from his office, “because of [that office’s] responsibility to defend the interests of charities.”

The release further reported that following an investigation, the Attorney General’s office had concluded that the will had indeed been made by the decedent, with the mental capacity that the law required. The matter then went before a judge, who dismissed the challenge, and arrangements were made for distribution of the funds to charities dealing with the blind.

Identity crisis? A will directed a gift to a charity—but the charity name specified was similar to that of three different organizations but not the same as the name of any one of them or of any other organization. After protracted legal activity, the case went to court. The outcome? The court divided the gift between the three organizations—“a resolution that would meet with the approval of Solomon,” writes Reynolds T. Cafferata, an attorney involved in the case.⁴



Endowment invaded? As related in a press release of May 5, 1997, from the Connecticut Attorney General's office, funds donated by will to Windham Community Memorial Hospital in Connecticut were given as endowment—meaning that only the income generated from the endowment, not the endowment itself, was to be used for certain purposes specified by the donor. Over time, the hospital had begun using the endowment, not just the income generated, for construction and ongoing operations, the Connecticut Attorney General charged after an investigation. Such use was contrary to the donors' intent.

The state's investigation lasted two years and the suit ended in 1997 in a settlement agreement. (The hospital admitted no wrongdoing.) The settlement required the hospital to return the money it had used, plus interest, to the endowment funds. According to the press release, these payments would in time total over \$2 million.

Time won't stand still? Years ago a gift of real estate to Brandeis University in Massachusetts led to the erection of a building bearing the donor's name. Now, according to an article in the Wall Street Journal of May 12, 2009, the university wants to demolish the building, and the donor's great-nephew is suing to block the demolition, saying it violates the terms of the donor's will. The Massachusetts Attorney General's office has declined to take action because the will does not require maintaining the building "beyond its useful life," according to the Journal article, and the great-nephew is now suing the school directly.

Focus lost? Princeton University had misused a gift meant to educate graduate students for government service by expanding it to train students for a broader range of careers, claimed descendants of the givers, Charles and Marie Robertson. The descendants' lawsuit against Princeton, filed in 2002, ended in a settlement in 2008 that will require Princeton to pay out over \$50 million to a new foundation focused on education for government service. Who won? Well, both sides claimed victory, and outsiders are divided about the meaning of the outcome. A memorable fact: the case cost each side over \$40 million in legal fees.⁵

Wishes undone? When Dr. Albert Barnes created the Barnes Foundation in 1922 to house his extraordinary art collection in Merion, Pennsylvania, he put numerous restrictions on how the art was to be shown and accessed. One specification was that the Picassos, Renoirs, Cézannes and others were to remain untouched in the original building and to be viewed primarily by art students and not by the public generally. In the following decades, however, it became clear, for various reasons, that the Foundation and its collection could not survive if those restrictions were strictly observed, and the Foundation obtained legal permission to deviate from them in various ways. The greatest deviation was in the decision, in 2004, that the collection could be moved from its original building to downtown Philadelphia to be housed in a new museum.

Lessons from life and litigation

Complex cases like those above offer many lessons for donors, not only those considering bequests. Here are a few that can help decrease controversies:

Talk with your family about your plans. If your relatives or others in your world may be significantly affected by your gift, share your thinking with them. This may be the most difficult advice of all to follow, for a will can be an uncomfortable subject in the most congenial of families. The dollars and directions you may give are important, but the human impact of your decisions needs consideration, too.

Know whom you're giving to. Names matter. A gift to "the cancer charity," for example, is a gift to the lawyers who will have to sort it out. You or any professional helping with your will should verify the name and address, current existence and tax status (is it listed by the IRS as a 501(c)(3) organization to which contributions are deductible?) of the charity you want to benefit.

Just as if you were making a current contribution, you want to know your charity beneficiary in other ways. In a country with hundreds of thousands of charities, common "causes" cover multitudinous activities. Every "hunger" organization does not dispense food. All "cancer" charities don't fund research. "Animal" charities may disagree about the management of endangered species, about what animal-related food should be eaten, or about methods to use in influencing public attitudes.

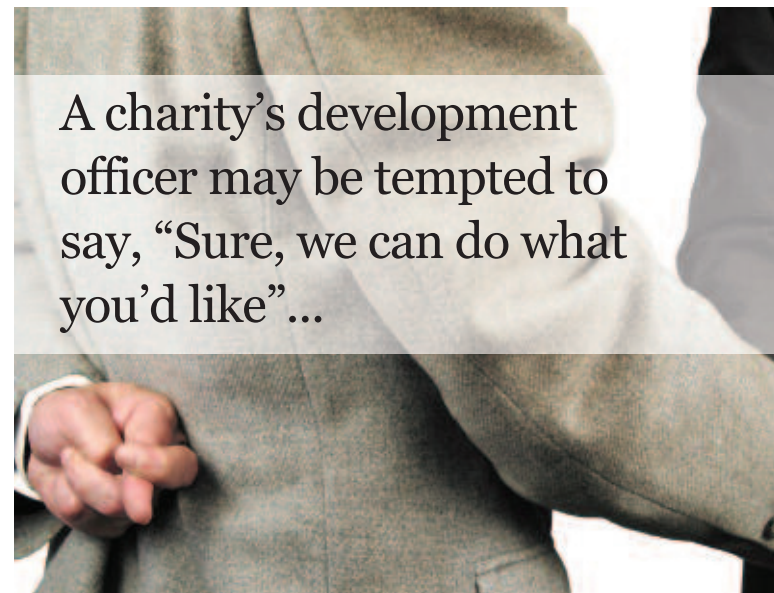
If "know your charity" seems superfluous advice, note that a charity's major donors, who would be expected to be well acquainted with the organizations they support during their lifetimes, aren't necessarily the same ones who make bequests to those charities. That's what researchers say, and it suggests that some people, sure of the cause they want to support, simply pick a charity that seems to fit that cause, possibly with scant knowledge of its work.

Such quick picks can be perilous. While there's no guarantee that a charity will retain its vigor, viability and commitment to sound practices at the time your gift takes effect, checking out its current financial condition and accountability can help. Go to www.bbb.org/charity for information on charities.

Talk with the charity you want to benefit. "If you want to leave substantial money to a charity and want to place restrictions on your gift, you're always better off to talk with the intended recipient," says David Ormstedt,

attorney with Wiggin and Dana, LLP, and former Connecticut Assistant Attorney General. "Ideally, you want to hit a balance between the restrictions you set and the needs of the institution. You need assurance that the charity can accomplish what you have in mind and that the gift you plan will be enough to fund it."

A charity's development officer may be tempted to say, "Sure, we can do what you'd like" because that is clearly what the donor wants to hear, even when the



officer knows that the sum involved will be inadequate to construct the envisioned building or conduct the desired program. And donors, picturing their dream come true, may not ask the questions they should about how the charity will actually make it happen.

In any donor-charity conversation about a potential gift, charities must avoid pressuring the donor into making a gift or making a larger gift than intended, but the temptation to use pressure may be strong if the fund raiser's compensation is tied to the number or size of gifts received. Potential heirs often challenge a will on the basis that the person who made it didn't have the mental capacity to do so or was unduly influenced by the representative of a charity that would benefit.

The Evangelical Council for Financial Accountability (ECFA), an accrediting agency for Christian charities, recommends that donor-charity conversations be wide-ranging and low-key: ECFA says that members' fund raisers, when they talk with individuals about making major bequests, "must seek to guide and advise [them] so they have adequately considered the broad interests of the family and the various ministries they are currently supporting before they make a final decision."

ECFA also states that donors “should be encouraged to use the services of their attorneys, accountants, or other professional advisors.”

Think “what if...?” If you want to restrict the use of your bequest to a particular project or program, try to imagine future events that could affect your wishes. Assume that time will march on, the Rockies will crumble and Gibraltar will tumble. Thus if you want to fund scholarships to a particular school of nursing, you might provide that your gift go to another nursing school you name if the designated one closes down. If you want to support a particular line of research, consider how you might direct your funds’ use if other developments made that research irrelevant.

If the donor has not provided an alternative way of using a gift once the original specification is no longer possible or practical, the recipient organization can petition a court to apply the doctrine of *cy pres* to modify the original restriction so that the gift can be used for purposes close to the original intent. *Cy pres* means roughly “as near as possible.”

If you want to support a particular line of research, consider how you might direct your funds’ use if other developments made that research irrelevant.

However, that process can be costly for the charity in the form of legal fees, so you might consider giving your beneficiary some flexibility to adapt to changed conditions. For example, it may be wise to avoid tying a gift to specific methods of achieving the purpose you desire. The Web site of one animal welfare charity, for instance, points out that making a bequest to support spaying and neutering of dogs and cats does not take account of the fact that “safe and effective immunocontraceptives and/or chemosterilants” will probably be in use within the next few years, making surgical sterilization obsolete. Thus, according to the site, it might be preferable to direct your gift to “eliminating dog and cat overpopulation and homelessness.”

Donors can also give a charity leeway by expressing a preference that a gift be used for a particular purpose but including the option that it be used for any other purpose the charity considers more pressing.

It’s also possible for donors to give heirs monitoring rights over the terms of the bequest. But, lawyers say, never specify that your gift should revert to your heirs if the specified purpose wasn’t fulfilled. There will probably be considerable tax consequences for your heirs.

State officials and charitable gifts

Because a donor’s heirs don’t generally have legal standing to challenge how charities are using the donor’s gifts (unless the will specifically provides for it), it falls to the states’ attorney generals to ensure that charitable gifts included in decedents’ estates are honored and that charitable trusts are duly administered. The trustees or directors of a charity can be liable for breach of their fiduciary duty if they fail to carry out restrictions imposed by donors.

Activity in charity matters varies from state to state, depending in part on the resources available to them. Some states may choose, or have the means, to focus only on high-stakes cases. In other states, however, charitable trusts and estates are a big part of everyday work. Usually the work is done by the same state officials who may also be providing you with information about charities soliciting in those states.

How does the state get involved? Descendants of donors may complain about how a charity is handling the bequest. People who aren’t descendants but who have a stake in an institution that received a bequest, or are residents of a community that was supposed to benefit from one, for example, may also go to the attorney general. And occasionally a member of the board of a recipient organization, troubled about the way the organization is using the bequest, brings in his concerns.

If an attorney general’s office decides to pursue an issue—note that it didn’t in the Brandeis situation above—it could end in a settlement agreement or in court.

Who bequeaths to charity?

You may not yet know how likely you are to leave something to charity, but fund raisers and researchers are working hard to find out who is. Can you guess what characterizes the prime prospects for making charitable

bequests? How about wealth? Education? Experience as a charity volunteer?

No, the key is evidently not what these people have but what they *don't* have—children or grandchildren. That's a central conclusion of a nine-year study of the charitable bequest behavior of older adults conducted by Russell N. James III, an assistant professor at the University of Georgia, and presented just this spring at a conference of the Association of Fundraising Professionals.⁶

Being without descendants, of course, doesn't lead inevitably to putting charities in one's estate plan. According to the same survey, among people over age 50 who give \$500 or more to charity annually, roughly 90 percent won't make charitable bequests. Even a charity's major donors aren't necessarily the people whose wills include charities. In fact, many charities report that bequests come to them as complete surprises, "over the transom."

Preferring not to depend on chance, however, charity fund raisers are avid to know how to identify and approach individuals who have the propensity to make bequests to their organizations.

Another recent study, by Xiaonan Kou, Hao Han, and Heidi Frederick at the Center on Philanthropy at Indiana University, sought to determine the role of gender differences among donors who say they *intend* to make charitable bequests. The authors reported that their research "confirms much of the previous literature and suggests that a basic profile of a bequest pledge maker is one who tends to be aged 40 to 65 years, never married, frequent churchgoer, and has an annual household income of \$100,000 or above." The study's key finding is that whether this "bequest pledge maker" is a man or a woman isn't significant.⁷

Of course, intending to do something isn't the same as doing it. A basic hurdle in making a charitable bequest is that it's part of making a will. That's a task seemingly relished only by rich uncles in novels as they gleefully disinherit ne'er-do-well nephews. You are not alone among the reluctant, since it's estimated that only about half of Americans have a will.



...among people over age 50 who give \$500 or more to charity annually, roughly 90 percent won't make charitable bequests.

Donor power

Whatever plans you have for giving today or by bequest, you want to know how your charitable contribution will be used. If you're giving through a bequest, maybe you'll take the straightforward approach offered in the boilerplate language of many charities: "I give and bequeath to [exact name of charity], of [city and state] (insert dollar amount, percentage of estate, or description of securities or property, etc.) to be used for its general purposes (or insert the name of a program)...."

But maybe you'll want to have more say about the use of your bequest or even specify how the assets you give can be invested. Could you be hobbling the charity you want to benefit?

There's some feeling in the philanthropic sector that restricting gifts is a bad idea, period. If the restricted gift is made through a will, deciphering its intent in changing circumstances is, as we've seen, vexing and often costly.

In addition, specificity about a gift's use can hamper charities' flexibility. Charitable organizations can't live on restricted gifts alone. They need substantial unrestricted gifts to support everyday operations and allow them to respond to new needs with new programs.

Restricted funds can exert pressure on an organization's other activities. It's recently reported, for example, that the Salvation Army is struggling to raise money that will enable it to carry out the wishes of Joan

Kroc, heir to the fortune of the founder of McDonald's Corporation, who bequeathed \$1.8 billion to the Army to build 30 community centers around the country. Additional funds for construction and maintenance of the centers are now necessary because the original gift has lost value.

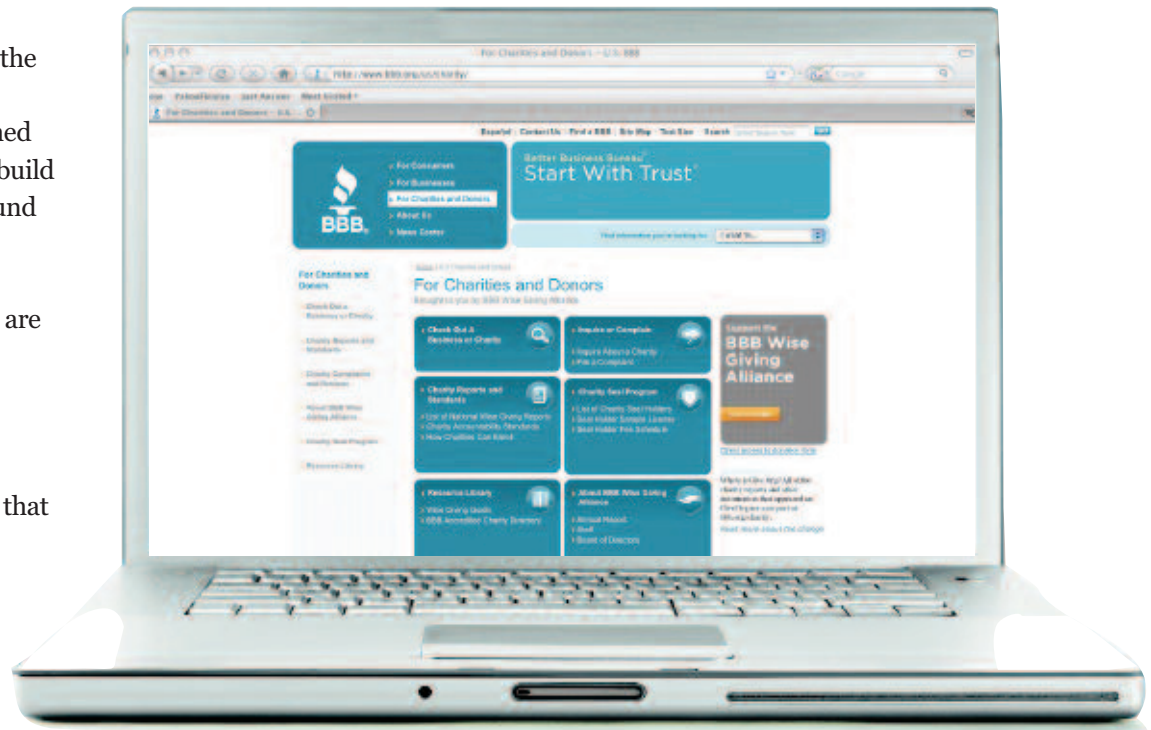
Trends

Despite the drawbacks that some see in restricted gifts, however, there's as yet no evidence that charitable donors are becoming disenchanted with them. To the contrary, it's reported that more and more donors are setting restrictions on their gifts, both in their lifetimes and in their wills.

At the same time, there's a sense among charitable observers that courts are becoming more and more liberal in interpreting restrictions. Whether that's a good thing or not is much debated. While there were those who hailed the outcome of Mrs. Helmsley's case—the decision that the welfare and care of dogs need not be the sole focus of her foundation—others saw it as a sign that donors' intentions aren't being honored as they should be. They fear that such rulings could inhibit future giving.

The prospects for bequest giving, with or without strings, are generally favorable, however. If the history of giving is any indication, charitable bequests will prove recession-proof. Unlike many other forms of giving, they actually tend to increase in hard times, say fund raising experts, possibly because a bequest, unlike an outright contribution, does not require an immediate payout.

What a charitable bequest does require, though, is care and consultation. As personal as it is, planning the gift is not a go-alone project. Legal counsel is essential, and many donors will want to talk with tax and financial advisors as well. Thoughtful preparation can only add to the satisfaction that donors over many generations have found in leaving a legacy to charity. ■



Anyone considering a charitable bequest can find detailed reports about national charities on the Alliance Web site, www.bbb.org/charity. Reports include not only accountability issues but also information about each organization's purpose and program activities, among other aspects of interest to potential givers. Reports about local charities are available from many local Better Business Bureaus.

Footnotes

- ¹ Hudson Institute's Bradley Center for Philanthropy and Civic Renewal and The Chronicle of Philanthropy (2008). Is Philanthropy Going to the Dogs? Event transcript at <http://pcr.hudson.org>.
- ² Barron, J. (2009). Charities Ask a Court to Direct More of Helmsley's Billions to Help Dogs. *The New York Times*, August 11. The three charities petitioning the court are animal welfare groups.
- ³ The Sharpe Company (2008). Can You Pass the Bequest Test? *Give & Take*, October 2008, vol. 41, no. 10.
- ⁴ Cafferata, R. T. (2005). In Re Helen's Trust: A Tale of How Charities Should and Should Not Respond to Litigation. *Journal of Gift Planning*, Vol. 9, 2nd quarter.
- ⁵ Lewin, T. (2008). Princeton Settles Money Battle Over Gift. *The New York Times*, December 11.
- ⁶ James, R. N. III (2009). Causes and correlates of charitable giving in estate planning: a cross-sectional and longitudinal examination of older adults. Report to the Association of Fundraising Professionals and Legacy Leaders. Washington, DC
- ⁷ Kou, X., Han, H., and Frederick, H. (2009). Working paper: Gender Differences in Charitable Gift Intent. The Center on Philanthropy at Indiana University.