RECURRING ISSUES (PROBLEMS) IN CHARITABLE GIFT PLANNING

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1. PLEDGES

Pledges present recurring problems because of (a) the law regarding pledges, and (b) the general lack of understanding of the law.

Point 1: A pledge is either enforceable (as a contract) or unenforceable.

-- Enforceability is determined under the law of state whose laws govern the pledge.

-- Most states, Arizona included, follow the rule of contract law that a pledge is unenforceable unless [a] the pledgor received consideration for the pledge, or [b] the pledge induced the charity to act reasonably to its detriment in reliance on the pledge. As to Arizona law, see In re Bashas' Inc. (W.D. Arizona 10-25-12).

-- At least three states -- Iowa, New Jersey, and Pennsylvania -- do not require either consideration or detrimental reliance in order for a pledge to be enforceable.

Point 2: An enforceable pledge cannot be paid by the pledgor's private foundation (PF), a DAF, the payout from a charitable lead trust, or the remainder interest in a charitable remainder trust. Such payment by a PF, CLT, or CRT would be self dealing under Code §4941.

Point 3: In Rev. Rul. 81-110, Party A made a legally binding (enforceable) pledge. Party B paid the pledge. IRS ruled that Party B's payment was a transfer to Party A; and that Party A was deemed to pay the pledge (and could take the corresponding charitable deduction).

Point 5: To avoid (most) problems with pledges [a] determine up-front the source or sources of payment for the pledge, and [b] make sure all pledges are vetted by the development office before anything is signed.

2. **APPRAISALS**

Appraisals present recurring problems because donors, appraisers, and many professional advisers are not schooled in the "Qualified Appraisal" rules.

Point 1: No federal income tax charitable deduction is allowed for donation as to which a Qualified Appraisal (Q.A.) is required if the donor doesn't obtain a Q.A.

-- In 42 years of dealing with the Q.A. rules, I've not seen one appraisal, as originally written, that meets the definition of a Q.A. as laid out in Income Tax Reg. §1.170A-13(c)(3). It's really bad.

-- The appraiser always omits to state [a] the date or expected date of gift, and [b] the FMV of the donated asset as of that date. These omissions are fatal flaws. Henry R. Lord, T.C. Memo 2010-196 (2010)

Point 2: The Tax Court has held that the standard of compliance for the Q.A. rules is substantial compliance. In practice, the Tax Court has treated substantial compliance as literal compliance with the definition of a Q.A. See, for example, Hewitt, 108 T.C. 258 (1997), in addition to Lord, *supra*.

Point 3: The donor must obtain the Q.A. by the date the donor files his or her Form 1040 to which the Q.A. pertains.

Point 4: It's clear that the donor must obtain the appraisal. It's unclear whether the donor must pay for the appraisal.

3. **GALA DINNER TABLES**

Payment for gala dinner table tickets represents a recurring problem for one simple reason: the IRS has said the purchaser's private foundation may not pay the "charitable part" of the ticket price. See Letter Ruling 9021066.

4. **GIFT RECEIPTS**

The area of gift receipts presents recurring problems because [a] donors are clueless as to IRS gift receipt rules, and [b] so are many charities.

> Example: Prominent Charity issues gift receipt to Donor, who set up a gift annuity. Gift receipt states that Charity provided no goods or services to Donor. IRS, on audit of Donor, disallows Donor's claim of a charitable deduction with respect to the gift annuity. Actual case.

Point 1: The receipt is worthless for tax purposes, meaning the donor isn't entitled to a charitable deduction for the gift to which the receipt pertains, unless the donor has the receipt by the time the donor files the Form 1040 on which the gift is first claimed as a charitable contribution.

Point 2: Gift receipts need to describe non-cash gifts but do not need to state a dollar amount except for cash gifts.

Point 3: Gift receipts should state only verifiable facts.

> Problem for discussion: On May 8, Donor instructs Broker to wire 1,000 shares of ABC stock to Charity. The shares land in Charity's account on May 9. On May 8, the shares have a mean value of $160/share. On May 9, the shares have a mean value of $80/share. BTW, Broker wired the stock out of Donor's

> account on May 8.
>
> Question: How should Charity fashion the gift receipt for this gift?

5. **IRA MONEY LEFT TO CHARITY AT DONOR'S DEATH**

A recurring problem because IRA custodians want charitable beneficiaries to set up "inherited IRAs".

Point 1: Here's what section 408(d)(3)(C)(ii) of the Internal Revenue Code says about inherited IRAs:

(ii) Inherited individual retirement account or annuity

An individual retirement account or individual retirement annuity shall be treated as inherited if--

(I) the individual for whose benefit the account or annuity is maintained acquired such account by reason of the death of another individual, and

(II) such individual was not the surviving spouse of such other individual.

Point 2: Here's what IRS Publication 590-B says about inherited IRAs:

What if You Inherit an IRA?

If you inherit a traditional IRA, you are called a beneficiary. A beneficiary can be any person or entity the owner chooses to receive the benefits of the IRA after he or she

dies. Beneficiaries of a traditional IRA must include in their gross income any taxable distributions they receive.

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Inherited from someone other than spouse. If you inherit a traditional IRA from anyone other than your deceased spouse, you cannot treat the inherited IRA as your own. This means that you cannot make any contributions to the IRA. It also means you cannot roll over any amounts into or out of the inherited IRA. However, you can make a trustee-to-trustee transfer as long as the IRA into which amounts are being moved is set up and maintained in the name of the deceased IRA owner for the benefit of you as beneficiary.

6. **SOME OTHER RECURRING ISSUES (PROBLEMS)**

A. Donor doesn't know basis. Rule: Basis is zero.

B. Broker wires stock to Charity from Donor's IRA as an IRA rollover gift (QCD).

When is the rollover deemed made? IRS hasn't said.

What is the amount of the rollover? IRS hasn't said.

C. Donor has stock wired to Charity to establish a gift annuity. The stock drops in value while in transit.

Question: What value is to be used to compute the annual annuity payment?

Answer: The answer, if one exists, is found in Charity's gift acceptance policy. If the GAP is silent on the matter, welcome to a potentially messy fight.