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SYMPOSIUM ON THE LAW OF PHILANTHROPY IN THE TWENTY-FIRST CENTURY, PART II

SYMPOSIUM EDITOR
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ARTICLES

The Introduction and articles on Governance from this symposium can be found in Part I, located in the previous issue (85 CHI.-KENT L. REV 469 (2010)).

II. TAX

This article will review the history of the tax treatment of charitable split interest gifts, explain the inequities that Congress both cured and generated in its 1969 reforms, and propose solutions that are consistent with the goals of the 1969 legislation. The article discusses variations in the 1969 definition of a charitable split interest, which, because of the enacted statutory language, applies in instances where there is no abuse potential. The inequity produced by that definition penalizes the donor and flouts the rationale behind the 1969 legislation. By contrast, the creation of some required statutory forms of charitable split interests in trust, enacted to prevent abuse, have themselves created new opportunities for donors to evade taxes in ways unanticipated by the 1969 Act. In the spirit of the 1969 law, the article makes several recommendations, including proposals: (1) to modify the statutory definition of charitable split interest to provide an exception from the statutory requirements where there is no statutory mandate to calculate value by means of the actuarial tables under section 7520 and no abuse potential; and (2) to eliminate (or to restrict the tax avoidance aspects of) some of the charitable split interest in trust devices created in the 1969 legislation.

With the economy in turmoil, charitable organizations are looking to non-traditional sources of financing to supplement contributions and fee-based revenues. One potentially lucrative source of revenue stems from cause-related marketing. Cause-related marketing is the public association of a for-profit com-

pany with a charitable organization to promote the company's product or service in order to raise money for the charitable organization. Introduced almost twenty-five years ago, cause-related marketing has now become a $1 billion a year industry. Cause-related marketing has evolved beyond mere use of a charitable organization's name to an apparent union for the purpose of promoting products that carry the charitable organization's brand or message. While the academic literature discusses whether cause-related marketing alliances are ethically and socially desirable, it does not address whether the application of the federal income tax rules to cause-related marketing alliances adequately captures what we accept as valid charitable activities. Despite the widespread success of cause-related marketing, the IRS has issued little guidance on acceptable practices by charitable organizations engaged in cause-related marketing. An analysis of the application of the unrelated business income tax regime and the prohibition on private benefit to cause-related marketing alliances reveals that modifications to existing Internal Revenue Service guidance should be made based on social, economic and tax theory. This analysis concludes with a proposal for a framework within which such guidance should be considered.

Leona Helmsley named a number of beneficiaries under her will (both human and canine), but among the unnamed beneficiaries are scholars interested in studying the role of philanthropy in the United States. By directing that an estimated $8 billion be used for the benefit of dogs, Mrs. Helmsley brought in to high relief policy issues regarding the appropriateness of the unlimited charitable deduction. I argue that these concerns are equally applicable, albeit less obvious, when it comes to more traditional charitable bequests. In this paper I will discuss the appropriateness of the unlimited estate tax deduction (particularly in light of the broad definition of what constitutes charitable) and the issues raised by perpetual private foundations.

III. DONOR INTENT

In a number of recent controversies, the way the charities involved handled restricted gifts resulted in unhappy donors, negative publicity, and costly litigation. This paper examines several of these cases and then argues that donor intent is often more difficult to divine that many people have stated.

The law requires that a charity give effect to a restriction imposed by a donor. This paper examines the legal rules that govern donor-restricted gifts and considers the other reasons a charity will, in most cases, follow the donor's intent. The paper then describes several circumstances in which donor intent may not be clear or easy to determine. A donor's intent may be stated in general terms or the meaning of the ideas the donor had may have changed over time. If the donor is no longer alive, family members may remember the donor's intentions in ways that conflict with the charity's understanding of the gift. The passage of time not only makes the intent of the original donor more difficult to ascertain, but may also make changes in the original restrictions appropriate.

This paper makes suggestions for donors, charities, and the lawyers representing both in connection with restricted gifts. A donor's intent may not be as clear as either party thinks, and trying to pin down a donor's intent with respect to a particular gift may be more difficult – and less sensible – than an advisor may at first imagine. The paper makes specific suggestions for ways to address donor intent in a gift agreement and suggests that by working collaboratively donors and charities may better accomplish the worthy goals they all have in mind.

STUDENT NOTES

SYMPOSIUM:

Symposium on the Law of Philanthropy in the Twenty-First Century, Part II

Anne-Marie Rhodes
Symposium Editor

II. TAX