

Basic Bequest Administration . . . and Beyond

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1. Introduction

Realized bequests, also known as matured gifts, can be a significant portion of income for a land trust's budget. Development and other staff will often spend considerable time in cultivating a donor to make a "planned gift" to be realized after the donor's passing. But care should also be given by land trust staff *after* the donor's death to be sure their philanthropic wishes are carried out to the level anticipated.

While most practices and beneficiaries' rights are similar from state to state, all states have detailed statutes and procedures regarding probating wills and administering trusts with which land trust staff or advisors should become familiar or, at least, know where to find.

2. Terminology

- a. Type of testamentary instruments
 - i. Wills
 - ii. Trusts, revocable and irrevocable
 - iii. Codicils and Amendments
 - iv. Compare with dying "intestate" – with no will or trust – where estate passes to heirs specified in the applicable probate statute in percentages also specified.

These materials and the National Land Conservation Conference Rally 2023 workshop for which they were prepared are not intended as legal advice but rather to provide only general information regarding the subject matter. Individual jurisdictions vary and participants should contact their own attorneys for specific legal advice regarding particular situations or problems. These materials and the workshop presentation also only reflect the views and opinions of the authors.

- b. Fiduciaries – who carries out the work in managing a decedent’s estate or trust
 - i. Executor/executrix/personal representative named in a will (estate)
 - ii. Trustee named in a trust (trust)
 - iii. These roles may be filled by individuals or firms or institutions.
 - iv. There can be co-fiduciaries and substitute or alternative fiduciaries.
- c. Processes
 - i. Probate for wills – a public, judicial process through a probate court, surrogate’s court or register of wills
 - ii. Administration for trusts – typically a more private process.
- d. Types of bequests (for money in any form or personal property) or devises (for real property)
 - i. **Specific bequests** – A specified amount of money or a specific item of property to a beneficiary.
 - 1. Sample language: “To my niece, Julie Smith, the sum of \$50,000 should she survive me” or “To my niece, Julie Smith, my investment account at Well Fargo #453224”
 - ii. **Residuary bequests** – The transfer of all or a portion of the decedent’s estate after the payment of specific bequests, fiduciary commissions, legal and other fees, and taxes.
 - 1. Sample language: “To my niece, Julie Smith, 10% of the remainder of my trust after the payment of all expenses.”
 - iii. **Contingent bequests** – Transfer to a beneficiary if some event occurs; for example, to a land trust if a decedent’s spouse does not survive them or to Charity B if Charity A ceases to operate.
 - 1. Sample language: “100% of the remainder of my estate to the ABC Land Trust; however, should that organization no longer be in existence at my death, to the XYZ Conservancy.”

- e. Non-probate assets – Testamentary gifts that are not transferred via a will or trust.
 - i. Life insurance benefits.
 - ii. Pay on death (POD or transfer on death (TOD) beneficiary designations of financial assets like annuities, IRAs, security accounts.
 - iii. Remainder interests in real property gifted via a deed that automatically transfer the property at the “life tenant’s” death.

3. What You Want to See at Start

- a. You will typically receive notice that a will is being probated or a trust is being administered and your land trust is a beneficiary. You should acknowledge receipt and confirm to the person notifying you that you are aware and will be participating.
- b. If not provided at outset, ask for:
 - i. The fiduciary’s **letters of administration** to confirm their authority.
 - ii. **A copy of the full will or trust.**
 - 1. Wills are public documents once probated and beneficiaries have the legal right to see it.
 - 2. Trusts are not public documents and state laws vary on right of beneficiaries to see all or portions of a trust naming a beneficiary. Generally, however, a legal beneficiary has the right to see the pages where they are named.
 - 3. Most fiduciaries are accommodating but others, often family members or fiduciaries not familiar with their role, may resist around protection of privacy. Be polite but persistent particularly if you’re a residuary (or percentage) beneficiary. You cannot know what you were meant to receive without seeing that document.
 - a. The fiduciary has an obligation to honor the donor’s intent as expressed in the will or trust and the charity should work to ensure that intent is fulfilled.
 - iii. Some “ballpark” idea of the value of the estate and the expected timetable for gifts to be distributed.

4. What to Look for in the Documents at the Start

- a. Carefully read the will or trust and all codicils and amendments to understand the nature of the gift.
 - i. Is this a specific bequest of money? Does the total estate value suggest that you will receive it without a concern?
 - ii. Is this a specific bequest of an identified asset, particularly real property? Is the asset something the land trust could use programmatically or sell reasonably quickly and easily to fund its program? If neither, is this a gift the land trust may want to “disclaim” or turn down?
 1. There are typically statutory deadlines on when a beneficiary can disclaim.
 - iii. Is this a residuary bequest? What is the early estimate of the value of the gift?
 - iv. Is this a contingent bequest? What is the likelihood the contingency will be met or fail? How long might the contingency last? Can the charity track the gift for an extended period?
 - v. Is the gift unrestricted (so available for general operating expenses) or restricted (e.g., for a specific project, for the land trust’s endowment)?

5. What to Look for in an Accounting?

- a. Distributions follow the will or trust.
- b. Check the arithmetic!
- c. Fair charges for commissions and fees.
 - i. State law may set criteria for a percentage commission or use a “reasonable” fiduciary commissions standard; for example, A% up to \$X; B% for \$X to \$Y; C% for more than \$Y
 - ii. Exceptions for unusual or complicated estates.

6. How to Close an Estate?

- a. Releases and Refunding Agreements – what to look for and should you sign in advance?
- b. Issues with indemnifications

7. What to do When Things Go Wrong

- a. Requests to return or refund distributions.
- b. Estate-related litigation
 - i. Will or trust contests (reactive)
 1. Challenge to testamentary gift often by a disinherited relative but sometimes by a charity.
 2. Typically alleging that decedent did not have capacity to make a gift (for example, because of dementia) or, more rarely, some element of overreaching by an individual or entity (for example, a caregiver)
 - ii. Breach of fiduciary duty (proactive)
 1. Typically alleging that a fiduciary has used the estate for personal purposes; for example, paid personal expenses with estate assets or, more commonly, simply overbilled the estate for handling it.
 - iii. Construing will or trust language (cooperative)
 1. Asking court to interpret potentially ambiguous language in an instrument.
 2. Typically but not always less contentious.
 - iv. Estate-related litigation proceeds as with other court cases and may involve: depositions and other discovery; witnesses (including experts), particularly in a capacity cases; mediation, alternative dispute resolution (ADR) and settlement discussions; trials; and appeals.
 1. Cases can take an extended period to reach a resolution, delaying distributions.
 2. Settlement considerations are often the same in estate-related litigation as in other cases.
 - a. For example: What are the chances of prevailing in the case? What's the best case for the charity? The worst? What will the case cost to prosecute or defend? What's the value to the charity in getting less money sooner rather than more later?
 3. Charities may want or need to consider the reputational risks associated with some litigation. For example, will the charity be perceived as diverting resources from a family member in financial need?

- v. Charities can and often do join forces in such cases to share costs and present a united front.
 - 1. This obviously true only if the charities are similarly situated in the case.
- vi. Your state attorney general's office can be your friend here!
 - 1. State AGs are charged with protecting charitable assets and that includes testamentary gifts to charities.
 - 2. State law typically require them to be notified of any filing that might impact a bequest to a charity and give them the opportunity to intervene in the case.
 - 3. A state AG may step in to defend a will contest that might disinherit a charity or take the lead in moving against a misbehaving fiduciary.
 - a. This is more likely when charitable beneficiaries are smaller organizations with fewer resources to litigate the case themselves.
 - 4. But AG offices can be understaffed so a charity may need to make a compelling case of wrongdoing and/or to demonstrate that the charity doesn't have the resources to deal with the matter on its own.

8. Miscellaneous Things to Ponder

- a. Planning ahead: You *never* draft the donor's will or trust, but you *may* offer input about a donor's planned gift. That may pay high returns later in avoiding confusion and controversy.
 - i. Is the proposed gift doable? For conservation properties is there anything worth protecting? For tradelands or other property to be sold, is there any value to be gained?
 - ii. Does proposed language actually impose a restriction or is it just precatory? If a restriction, does it afford sufficient flexibility? Will the land trust be able and willing to honor the restriction at some unknown point in the future?
- b. Right to disclaim a gift.
 - i. You don't have to take property you don't want or can never use but you must pay attention to the timeframe (i.e., disclaimer period).

- ii. This can be particularly important for real property (for example: a “conservation” property you can’t protect or with no conservation values to protect; a partial interest; or an unsellable lot or dilapidated, unsellable house), whether transferring via a will or as a remainder interest after a life estate.
- c. IRAs and security accounts
 - i. For IRAs, ongoing disagreements about nonprofit organizations having to open a separate account in which to transfer funds but situation improving. Beneficiaries often need to push back if “required.”
 - ii. Often onerous corporate resolution requirements.
 - iii. US FINCEN “Know Your Customer” obligation to provide personal identifying information, including social security numbers, of corporate officers.
- d. Increasing reluctance of financial institutions to continue to serve as trustee after settlor’s death causing delays in closing estate.
- e. Accounting/financial reporting considerations – how and when do you book bequest income on financial statements?