

**Introduction** As the new year starts, many donors think about the future. Completing an estate plan can ensure peace of mind by providing for family and establishing one's legacy. Donors often work with their professional advisors to understand their financial and legal preferences and explore charitable giving options through their estate plans. Many also reach out to their favorite charitable organizations for guidance during this process.

In this article series, we explore the various considerations that charitable giving plays in estate planning. The **first installment** will provide an overview of the foundations of an estate plan, an outline of the estate administration process and an introduction to simple charitable giving options in estate plans. It will also discuss CresWill, a tool that can be offered to donors through a Crescendo GiftLegacy Pro subscription, which is designed to offer a no-cost Will that donors can prepare online on their own. The **second installment** will discuss more complex charitable giving in estate plans including testamentary charitable gift annuities and testamentary charitable trusts. With this knowledge, professional advisors and gift planners will be better equipped to assist donors in making impactful legacy gifts.

**What is an Estate Plan?** The phrase "estate plan" is used frequently in conversation but the meaning and benefit of an estate plan are often misunderstood. An estate plan is more than just disposing of assets at death. Instead, an estate plan is the preparation of documents that oversee an individual's financial and personal situation in the event of incapacitation or death.

When an attorney drafts an estate plan, the documents typically comprise the following: a Will, a Revocable Trust, a Financial Power of Attorney and an Advance Health Care Directive. A Trust can go by many names including a Revocable Trust, Living Trust, Grantor's Trust or Inter-Vivos Trust. The key feature of these Trusts, regardless of the name, is that they are set up during an individual's lifetime and the individual retains the power to amend or revoke the Trust. For some individuals, specialized trusts are also created such as Special Needs Trusts to manage the assets of disabled beneficiaries or Pet Trusts to provide for the care and maintenance of pets.

Other documents are also sometimes included such as a waiver of rights protected by the Health Insurance Portability and Accountability Act (HIPAA), a Guardian Nomination form for those with minor children and real property transfer deeds. The estate planning attorney may also assist in updating beneficiary designations for pay-on-death assets, such as retirement accounts and life insurance policies. For those creating a Revocable Trust, the attorney will often create an "Affidavit of Trust" which includes the name of the Trust and trustees and certifies it is a qualified living trust. This Affidavit of Trust can be used with asset holders as proof of the Trust's name and trustee's powers without having to disclose an entire copy of the Trust.

**Differences between Wills and Trusts** There are often misunderstandings around the similarities and differences between a Will and a Trust. One key similarity is that they both include bequests. Bequests specify how someone's property will be distributed after he or she dies. Bequests are made as part of a Will or Trust and are typically directed to a person or nonprofit organization. As discussed later in this article, there are many different types of bequests, and the process to collect a bequest varies depending on whether it derives from a Will or a Trust.

There are, however, **many differences between a Will and a Trust**. A Will takes effect only after death and must go through the probate court process. On the other hand, a Trust is effective during a grantor's lifetime and can be used to manage assets during incapacity. A Trust also bypasses the probate process and remains private. While a Trust may be more costly to initially set up, it may save money later on by avoiding probate costs.

A Trust is an important tool to preserve liquidity and achieve estate planning objectives. Since it is created during the grantor's lifetime, a Trust can be changed or revoked and offers an individual flexibility to move assets in and out of the Trust as needed. Once a Trust is established, assets must be "titled" in the name of that Trust to be owned by the Trust. The Trust document then controls the management and distribution of all assets owned by the Trust. Legal title to real estate is transferred through a deed (typically a warranty or grant deed depending on the state). Stocks, bonds and mutual funds can be transferred into new accounts created by the trustee. In some cases, the financial services firm will require proof that an individual has the legal authority to transfer these items into the Trust. The Affidavit of Trust is useful in these situations for confirming the existence and legality of the Trust.

For the sake of simplicity, cars, furniture and other tangible personal property are frequently retained in an individual's personal name rather than being transferred to the Trust account. In some states, it is permissible to dispose of tangible personal property with a written list that is separate from but referenced in a Will. This method permits an individual to transfer furniture, jewelry and other personal items by a list that can be easily updated as items are either sold or acquired, without having to formally amend the Trust.

Because assets are not always transferred into the Trust during the grantor's lifetime, a Will plays an important supporting role in the management and distribution of the non-Trust assets. A Will is sometimes also referred to as a "pour-over Will." A pour-over Will means that the terms of the Will direct the administrator to "pour any assets" from the probate estate over to the Trust. The terms of the Trust will then control how the assets are managed and distributed. However, in those cases, a probate usually must be opened to legally transfer the asset into the Trust.

**Incorporating Charitable Giving in an Estate Plan** There are generally three types of charitable gifts in estate plans. These categories consist of outright bequests, gifts transferred upon death (TOD) and split-interest gifts that provide income to beneficiaries such as testamentary charitable gift annuities (TCGAs) and testamentary charitable remainder trusts (TCRTs).

**Outright Bequests in a Will or Trust** Bequests made through a Will or Trust account for more than 85% of all planned gifts. Charitable bequests are popular with donors because they do not take effect until the donor's death and can be revised during their lifetime. Bequests also generate a charitable estate tax deduction making it an attractive option for high-net-worth donors.

Whether given to a nonprofit or an individual, bequests can be structured in several different ways. Many bequests transfer a specific item or dollar amount to a beneficiary. Specific bequests can include a range of items including jewelry and clothing. Other examples include real

property, artwork, vehicles, antiques, collections and digital assets. Bequests to nonprofit organizations can also be designated for a particular purpose.

If a specific asset is bequeathed and that item has been transferred, consumed or for any other reason is not in the estate at the date of death, the specific bequest lapses. A bequest may also be written with alternative provisions. For example, it could go to a named beneficiary but, if the beneficiary does not survive, an alternative beneficiary could be listed. Similarly, if the item is no longer part of the estate at the time of death, an alternative gift could be made to that beneficiary.

**Example 1** Molly is in her 70s and a longtime supporter of her local church. When she met with her estate planning lawyer, Molly expressed her wish to leave a lasting legacy to her church to fund its food pantry and community kitchen. As part of her Trust, Molly included the following provision: I hereby give, devise and bequeath all of the right, title and interest in and to the real estate located at 123 Maple Street, in Anytown, Anystate to Church, a nonprofit organization located at 456 Main Street, in Anytown, Anystate, Federal Tax ID #12-3456789. This gift should be used for Church's programs to help those who are food insecure. If Church shall determine at the outset or at a later time that the need does not exist, no longer exists or is no longer possible (or prudent) to administer my gift as originally intended, then Church may, in its sole and uncontrolled discretion, direct the use of my bequest for a purpose related as closely as possible to that stated above. Molly is pleased that her property will benefit her church and community after she passes away.

Besides a specific bequest, the other two types of bequests are either a percentage bequest or a residual bequest. In a percentage bequest, a percentage of the estate is given by stating words to the effect of "I give 30% of my estate to Favorite Nonprofit." This type of bequest is highly recommended because it maintains proportionality as an estate changes size, unlike a specific dollar bequest. A residual bequest is a provision in the Will or Trust that gives all the residue remaining after other bequests, taxes and expenses are paid. For example, a person may bequeath \$10,000 to their nephew, their home to their child and state that the remainder of the estate goes to a nonprofit organization.

**CresWill** Crescendo's CresWill is available as part of GiftLegacy Pro subscriptions at no additional cost. CresWill is a do-it-yourself tool that can be enabled on a subscriber's website, allowing website visitors to create a free account. CresWill users are guided through the following sections: Family, Contacts, Finances and Distribution. Once the sections are completed, users can generate a summary of their information, which they can then take to their attorney.

For those with less complex situations, CresWill can draft a legally compliant Will tailored to state requirements. CresWill generates four different versions depending on the user's circumstances: a simple Will for a single person, a Will with trust provisions for minors for a single person, a simple Will for a married person or a Will with trust provisions for minors for a married person.

While CresWill does not provide legal advice or any direct attorney support, it is designed to simplify the process for users who may not know where to start. An added benefit for charitable

organizations is that the Distribution section allows them to include a charitable bequest, which can be a great way to engage supporters in legacy giving.

**Documenting and Collecting Bequests** While some bequests come from donors who are unknown to the nonprofit until a bequest is received from an estate, many bequests originate from long-time, loyal donors. One step is to document the bequest intentions with a **Statement of Intent**. Some items to include in the Statement of Intent are the expected funding amount, the donor's wishes, especially if the organization has multiple programs or missions, the desire for recognition or anonymity and an explanation of reasons for the bequest. If possible, it can be helpful to obtain a copy of the relevant Will or Trust pages. This can help ensure that the donor is using the nonprofit's proper legal name and tax identification number in the bequest. Whatever information is obtained from the donor should be included in the nonprofit's database for recordkeeping purposes, internal tracking and documentation of any gift restrictions. Once notified of the future bequest, the nonprofit can also consider including the donor in its legacy society.

**Steps to Receive a Bequest through Probate** A probate process is usually required to pass assets through a Will or intestate. Probate is the legal process that happens after a person dies to make sure their Will is valid, their debts and taxes are paid and their assets are distributed to the correct beneficiaries or heirs. It should be noted that, if a person dies without any valid Will or Trust, the person is said to have died "intestate" and state law decides who inherits.

The steps to the probate process are generally the following: filing the Petition for probate and attaching the Will (if there is one); the court checks whether the Will meets legal requirements; the probate court appoints someone – often the executor named in the Will – to administer the estate; the administrator notifies heirs, beneficiaries and creditors; the administrator gathers and files a list of everything the deceased owned and their value including houses, bank accounts and vehicles; all of the deceased's and estate's expenses and debts are paid including claims by creditors, final bills, court or attorney fees and any taxes owed; a Petition is filed to approve all actions taken by the administrator, account for all assets and request distribution to the beneficiaries (either under the terms of the Will or according to the state's intestate law); and, after the executor reports to the court that the estate has been handled properly, the court closes the estate.

If a nonprofit organization is a beneficiary of a probate estate, it should receive all legally required notices from the administrator. Depending on the state, the nonprofit should be provided with all court filings, a copy of the Will and any accountings prepared for the court. The nonprofit should consult with its own legal counsel throughout the process to ensure the proper steps are followed and the bequest is timely received. After receiving the distribution, the nonprofit should provide a formal written acknowledgement to substantiate the gift as required by IRC Section 170.

The probate process may take several months to a year or more, depending on the size and complexity of the estate, whether there are any Will contests and the efficiency of the administrator and his or her attorney. Most states also have a simplified process or use affidavits for smaller estates, so the process can be faster and less costly depending on the circumstances.

**Steps to Receive a Bequest through a Trust** Receiving a bequest from a Trust differs in important ways. Trusts are usually administered by a trustee without court oversight. The nonprofit may be entitled to a copy of the Trust under state law, but the nonprofit generally has fewer rights than in a probate proceeding. Trustees and their advisors may prepare their own accounting and request that the nonprofit approve it without submitting it to a court for review. If a trustee is delaying or not providing adequate information, the nonprofit may have little recourse other than filing a court petition which can be time consuming and costly. Thus, while the Trust distribution process can be quicker and less costly, it is important for nonprofit organizations to work with their legal counsel if unexpected delays or issues arise.

**Transfer on Death (TOD) Assets** Certain assets bypass probate or trust administration, including those that are jointly owned with right of survivorship or accounts with designated beneficiaries such as life insurance policies, bank accounts or retirement accounts. Similar to bequests, the beneficiary of these assets can be either an individual or a nonprofit.

A beneficiary designation form is the controlling document that dictates how the account is distributed after the account holder's death. The beneficiary designation form can be obtained from the account administrator or custodian. It is a simple and easy way to change the beneficiary on an account. The owner may designate a primary beneficiary, a contingent beneficiary or split percentage beneficiaries. A nonprofit may be listed as a designated beneficiary. If a qualified nonprofit is the beneficiary on the beneficiary designation form, any distribution received will be income tax free. The nonprofit will be able to use the entire proceeds for its charitable purposes.

**Example 2** Oscar listed his favorite nonprofit as the designated beneficiary of his brokerage account. Later in life, Oscar creates a Will. The Will states that his entire estate is given to his niece Elizabeth. When Oscar passes away, the brokerage account will be distributed according to the beneficiary designation form he completed, not according to his Will. Oscar's favorite nonprofit will receive the proceeds from his brokerage account and Elizabeth will receive the other assets from her late uncle's estate.

If an individual has an estate subject to estate tax, a retirement account such as a traditional IRA could be subjected to both estate tax and income tax. While there is a deduction on income tax for a portion of the estate tax paid, there still may be a very substantial total tax rate due to the double taxation. IRC Sec. 691(c). For example, the individual could pay estate tax on the IRA, and the beneficiaries could be subject to income tax. Even with the deduction, the combined tax rate can approach 60%. Therefore, for individuals with large estates, a bequest to charity of a traditional IRA could produce large tax savings and be a cost-effective way to make a transfer to charity.

**Receiving TOD Assets** With TOD assets, the assets go to the beneficiaries immediately without a formal probate or trust administration process and the transfers take place privately. However, the steps to facilitating the transfer will vary depending on the state, the nature of the asset and the custodian of the asset. Some asset custodians will promptly distribute funds to a nonprofit, but others may delay or create roadblocks to that distribution. For a nonprofit to collect its share of an asset, it may be necessary to send a letter to the general counsel of the bank or other

financial custodian. For TOD gifts of real estate, it will be more complicated to transfer the asset. For real estate, it will be necessary to record an affidavit of death and death certificate as well as notify legal heirs and government entities. Thus, collecting on a TOD asset can involve many variables and processes.

### Conclusion

Donors have many options available when making gifts from their estates, each offering different levels of flexibility. By understanding the foundations of an estate plan, including Wills, Trusts, and transfer on death options, professional advisors and gift planners can guide individuals in aligning their estate plan objectives with their charitable giving efforts.



#### ABOUT JAMES E. CONNELL

James E. Connell FAHP, CSA of Connell & Associates, Pinehurst, North Carolina, is a respected gift planning consultation firm with over four decades of experience offering a broad range of charitable estate and gift planning services to non-profits throughout the country. He heads CONNELL & ASSOCIATES, Charitable Estate & Gift Planning Specialists in Pinehurst, North Carolina. Contact him to help your organization analyze the value CGAs may provide.

Contact James at 910-295-6800 or [james@connellandassoc.com](mailto:james@connellandassoc.com) or fax him at 910-295-6866