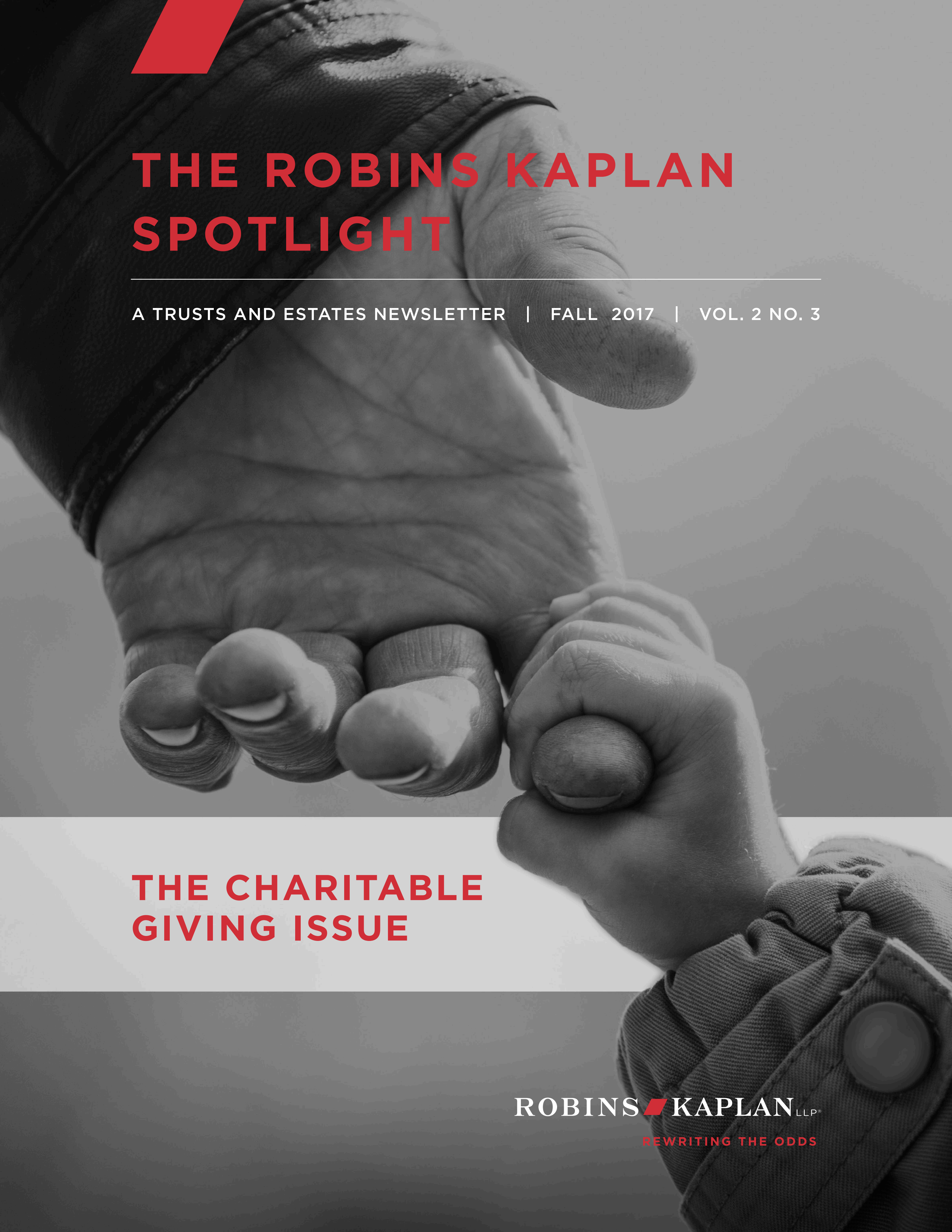

THE ROBINS KAPLAN SPOTLIGHT

A TRUSTS AND ESTATES NEWSLETTER | FALL 2017 | VOL. 2 NO. 3

THE CHARITABLE GIVING ISSUE

ROBINS KAPLAN LLP

REWRITING THE ODDS

INSIDE THIS ISSUE

ACKNOWLEDGING A CHARITABLE DONATION IS MORE THAN JUST GOOD MANNERS

PETER FOUNDAS

The art of writing a thank-you note is fraught with etiquette pitfalls. Different voices proclaim different opinions on which situations call for this customary expression of gratitude, what should be said, and how quickly one should be sent.

Improbably, the tax code acts as a guiding beacon in this area to steer us through the turbulent waters of charitable tax deductions, if not social tact. The code provides ground rules for the types of charitable contributions that require a note, the right timing, and necessary content to legally claim a charitable deduction. Unfortunately, the penalty for breaking these rules can be much more severe than an embarrassing social faux pas.

A taxpayer cannot claim a charitable deduction for a single contribution of over $250 unless the donee organization sends a special type of thank-you note, called a contemporaneous written acknowledgement (CWA). The tax code says a CWA must include:

1. The name of the recipient organization with amount of the cash donation, or if a non-cash donation, a description (but not value) of what was donated;
2. Whether the recipient organization provided any goods or services in exchange for the donation; and
3. If exchanged goods or services were provided, a description and good-faith estimate of their value.

The IRS does not proscribe any particular form or format, and a CWA can be as simple as a handwritten letter, a computer-generated document, or an email. CWAs can be brief but must contain the elements listed above.

In addition to providing the above items, you must receive a CWA before the earlier of the date you file your tax return or the due date of your tax return (including extensions).

It is worth noting that if you are donating a vehicle, even stricter requirements apply to CWA contents and when it must be issued. Additionally, the code's requirements get more onerous as the value of the donation rises. For instance, for property donations over $5,000, the donor must also obtain a qualified appraisal of the property and submit the appraisal with the tax return for that tax year.

The IRS and tax courts demand strict adherence to these CWA requirements; slightly defective CWAs can lead to disqualification of the entire deduction.

This point was highlighted in the recent case of *15 W. 17th St. LLC v. Commissioner.*[1] There, the taxpayer LLC purchased property in Manhattan that contained a building of some historical significance. After the New York City Landmarks Preservation Commission designated the building as a certified historic structure, the taxpayer decided to donate the building (via a perpetual easement) to a qualified 501(c)(3) organization.

After the gift was made, the donee organization sent the taxpayer a letter acknowledging receipt of the gift. Significantly, the letter did not state whether the organization provided the taxpayer with any good, service, or anything else of value in exchange for the gift. Despite this, the taxpayer claimed an approximately $64.5 million charitable deduction on its return.

Perhaps unsurprisingly, the IRS decided to take a closer look at this deduction. After inspecting the return and CWA (as well as the appraisal valuing the donation at $64.5 million), the IRS decided to disallow the deduction because the CWA did not comport with the requirements of 26 U.S.C. § 170(f)(8)(B). After the IRS challenged the deduction, the recipient organization filed an amended tax return (about seven years after the gift was made), stating that the LLC did not receive anything of value for the donation.

The taxpayer LLC appealed the decision, essentially arguing that the code allowed exceptions to the CWA rules when a donee organization reports the donation on its tax forms.

THE COURT DISAGREED.

The court held that the code lays out a clear set of items that must be included in a CWA and failure to comply with these requirements leads to a disqualification of the deduction. Although the statute says that the IRS may issue regulations to provide for exceptions, it has yet to do so. Thus, the later actions of the donee organization could not save the deduction.

The lesson is clear: Get a conforming CWA if you want to claim a charitable deduction. Many charities issue CWAs by January 31 following the year of the gift. However, many smaller organizations may not have the sophistication or resources to issue conforming CWAs as a matter of course. Do not hesitate to ask an organization for a conforming CWA if one is not forthcoming. Most tax professionals can supply you or the organization with a conforming example.

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1. *15 W. 17th St. LLC v. Commissioner,* No. 25152-11, 2016 U.S. Tax Ct. LEXIS 37, at *1 (T.C. Dec. 22, 2016).

The Robins Kaplan Trusts and Estates Group is going to watch the Minnesota Wild play the Chicago Blackhawks in St. Paul on November 4, 2017. We have a limited number of tickets to our suite available for our loyal readers. Call Denise Rahne at 612-349-8433 if you are interested in joining us.

BEST PRACTICES FOR CHARITABLE ORGANIZATIONS

STEVE A. BRAND AND MICHAEL A. PRICE

Mother Teresa once said "to keep a lamp burning, we have to put oil in it." For charitable organizations, their mission depends not only on the good works of their members but also on the financial donations of a philanthropic base of donations. Indeed, the lifeblood of these organizations hinge on their ability to effectively collect monetary donations in the form of pledges.

Generally, charitable pledges are governed by the law of contracts and will not be enforced unless: (1) the donor receives consideration in exchange for making a pledge; or (2) the charitable organization detrimentally relies on the pledge.

PLEDGE CARDS: THE "DIANA" APPROACH

During her lifetime, Princess Diana of Wales embodied the selfless qualities of public service through her charitable work. Reflecting on her life and legacy, charitable organizations can safeguard their collection of donations through the following five-step methodology.

(D)escription: Reduce the pledge to writing and describe the time and manner by which a donor will remit their donation to the organization. The pledge should indicate whether the donation will occur in one transaction, multiple installments, through an *inter vivos* gift during the donor's lifetime, or as a testamentary gift from the donor's estate.

(I)ntention: The language in the pledge should unequivocally reflect the donor's intent. Specific statements, such as "I pledge," are preferred over more general language. Also, consider including a section reciting why the donor desires to remit the specified amount to *this* organization. If the donor has previously assisted the organization through volunteer services or financial donations, this will substantiate the significance of the organization's mission to the individual.

(A)mount: Via checked box or in legible writing, the pledge must indicate the specific dollar amount of the donation. Ideally, avoid ambiguous references to a percentage or remainder of an estate.

(N)otice: Specify whether the donor advised any family members or beneficiaries of the donation, and include their names as a preventive measure in the event the donation is later contested during probate proceedings.

(A)cceptance: The pledge should acknowledge that the organization is accepting the donor's pledge, explain the purposes for which it will be used, and recite the organization's consideration provided in exchange for the pledge. Examples include naming a scholarship fund after the donor or inscribing the donor's name on a plaque, bench, or structure. Last, the organization's representative should sign the pledge upon receipt or in the presence of the donor.

DETRIMENTAL RELIANCE ON THE PLEDGE

Equally important to the particularity of the pledge is the manner by which a charitable organization relies on the pledge. The organization's acceptance of the pledge requires an affirmative promise to apply the donor's funds according to his or her wishes.

Though rare, litigation between donors and charitable organizations regarding donor intent and detrimental reliance does occur. Additionally, there is a growing trend toward enforcing pledges as a matter of public policy. In New York, for example, courts have enforced charitable pledges when an organization began borrowing from banks prior to collecting its pledges, along with enforcing a pledge to an organization that relied on a pledge to secure additional ones. Still, the detrimental reliance must be reasonable, and merely "wining and dining" has been found insufficient to enforce a promise. California courts have also enforced charitable pledges after finding the donor knew, or should have known, that the charity would incur costs associated with hiring contractors, obtaining building materials, and breaking ground for the construction of a new building.

With these rulings in mind, a charitable organization can safeguard its reliance on pledges through internal policies and continued donor communications that acknowledge and explain its intended purposes for the funds. Depending on the value of the pledge, consider providing the donor a barometer illustrating how the subject pledge contributes to the organization's overall goals. This correspondence may ultimately establish reliance in the event the pledge is later contested. Likewise, an organization's actions immediately following receipt of an unsigned pledge will strengthen its argument in favor of enforceability.

LITIGATION: THE LAST RESORT

Given the public relations ramifications, charitable organizations are understandably reluctant to initiate legal action against their donors. Still, depending on the facts and circumstances, there may be no reasonable alternative.

The primary objective of the organization's board of directors is to provide oversight, aid, and direction to the organization in fulfilling its mission. To this end, the board is obligated to serve, in good faith, and in furtherance of the best interests of the organization. In exceptional cases, an organization's board may consider whether their fiduciary duties of care and loyalty warrant commensurate legal action. Because a binding pledge is considered an asset of the organization, the board's management directly invokes their reasonable inquiry into all avenues of recourse.

Additionally, there are tax implications to the organization's pursuit of enforceable pledges. Because charitable organizations enjoy tax exemptions from the IRS, they are restricted in disbursing assets except to another charitable organization. If the organization forgives a donor's pledge, it may be considered a gift to a disqualified person and subject the organization to liability. Albeit an unusual scenario, the actions of an organization's board require consideration of all potential consequences.

BITTERSWEET LITIGATION – WHEN FAMILIES BATTLE CHARITABLE GIVING IN COURT

SHIRA SHAPIRO

This past June, a Minnesota district judge awarded the heiress to the successful Lunds & Byerlys grocery chain a $45.2 million buy-out for her share in the family company. See *Lund v. Lund*, No. 27-cv-14-20058 (J. Bernhardson) (District Court, 4th Judicial District, Hennepin County, Minn.) (June 2, 2017). The court's ruling ended a lengthy, ugly battle among four siblings, all of whom owned an equal share in the company. Interestingly, this case was not a typical family fight over inheritance. Instead, charitable giving was at the heart of the dispute. Throughout the litigation, Kim Lund expressly stated she wanted the money to use for philanthropic purposes. With her inheritance tied up in the business, she would be unable to achieve the philanthropic goals—to the extent she sought to do so—in her lifetime. Her brother, CEO Tres Lund, originally offered $21.3 million, arguing that Kim's requested buy-out of approximately $80 million would significantly harm, if not bankrupt, the business. In essence, the argument at trial boiled down to whether to keep more food on the table, or give it away.

The *Lunds* case highlights the importance for a business owner's estate plan to include a well-thought-out plan for shareholders who want to buy out their shares—especially for successful high-net-worth businesses such as Lunds & Byerlys. The estate plan should include an approved procedure to value the shares at the time of a buy-out. This can be challenging, since valuations ebb and flow due to market changes. Nonetheless, guidance from the estate plan might help avoid a lengthy and expensive battle of the experts as seen in the *Lunds* case. The estate plan should therefore consider the impact on the company's ability to sustain a buy-out. The plan might have different requirements based on the number of shareholders or a particular shareholder's stake in the company. For example, had Kim Lund owned a larger share of the grocery chain, the court may have reached a very different conclusion regarding whether a buy-out would in fact bankrupt the company.

Also, the *Lunds* case was particularly unusual because it fought for the right to *give* to charity, whereas many contested cases involving high-net-worth inheritances do the reverse. For example, the copyright to 51 of Ray Charles' most famous songs was recently litigated when Ray Charles' last will and testament gifted his copyrights to those songs to his nonprofit organization. The Ray Charles Foundation provides financial support in the area of hearing disorders and for education purposes. To reclaim their inheritance rights to those songs, his children sought to block the attempted terminations of their rights. *See The Ray Charles Foundation v. Raenee Robinson, et al.,* C.A. No. 2:12-cv-2725 (C.D. Cal.). The parties settled the case this past spring.

In another famous case, the real estate tycoon and billionaire Leona Helmsley requested in her will that the majority of her $8 billion estate be given to charity.[1] Two of her grandchildren, whom Ms. Helmsley excluded from her will for alleged "reasons which are known to them," sued for a right to their inheritance. The court ultimately awarded the grandchildren $6 million.

When charitable giving and litigation collide, there is no clear winner. For example, while Kim Lund seeks to do immeasurable good with her inheritance, the *Lunds* litigation appeared to damage her relationship with her family irreparably, so much so that after years of protracted litigation in the public domain, the judge felt compelled to "wish the parties peace" before rendering her order. *See Lund v. Lund,* No. 27-cv-14-20058 (J. Bernhardson) (District Court, 4th Judicial District, Hennepin County, Minn.) (June 2, 2017). And while the Helmsley estate was so large that even the $6 million award to the grandchildren barely impacted the estate, it is nonetheless $6 million that will not be used philanthropically.[2] In addition, in both the *Ray Charles* and *Helmsley* cases, the testators' express wishes to gift their estates to charity were not fully realized. Thus, regardless of whether the testator or party contesting the trust or will has noble charitable intentions, no estate litigation is without repercussions.

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1. Ms. Helmsley also left $12 million to her Maltese, aptly named "Trouble." A judge later reduced the award to Trouble to $2 million.

2. Assuming that philanthropy is not the grandchildren's intended purpose for the money they received by way of the court order.

MEET OUR ISSUE EDITOR:

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