

perspectives

August/September 2016

A publication from
Benesch Friedlander
Coplan & Aronoff LLP

MY BENESCH MY TEAM

Trends and topics in not-for-profit management

Not-for-Profit Spotlight

COMMIT



2 CHANGE

We've all heard about India's rape crisis, but not everyone knows that it's the result of the larger problem of gender inequality. According to UNICEF, India is the worst place to be born a girl. The birth of a baby girl is considered a burden and a curse by many families. As a result, hundreds of newborn girls are killed every year, and over 47% of adolescent girls suffer from illness, malnutrition and medical neglect. The girls who survive are vulnerable to human trafficking, as they are often abandoned or sold as child brides and bonded labor.

Commit 2 Change (C2C) is a not-for-profit organization that aims to create economic and cultural change by educating abandoned and impoverished girls. C2C works with carefully selected local partners who rescue and rehabilitate orphan girls and invest in initiatives to give them a chance.

By investing in local organizations and providing them with adequate resources, C2C increases the quality of the secondary education the girls receive. Providing funding for tuition, room and board, school supplies and academic materials allows the organizations to focus on educational programming, operate more efficiently, and create a better community for the girls to grow in. These learning communities make receiving a secondary education more attainable in some of the most remote parts of India.

Educating a girl is the single most effective way to alleviate poverty and uplift families, communities and societies. By giving these girls the tools to complete their secondary education, C2C is able to create a lasting impact.

Learn more about Commit 2 Change by visiting its [website](#).

Charitable Gifts of Real Property



Howard A. Steindler

I. Introduction

By its nature, a transaction involving the gifting of real property to a charitable organization is highly technical. It requires the expertise and cooperation of a number of participants with specialized knowledge— not unlike any complex real property transaction.

As with all transactions, it is important to “get it right.” Errors involving the contribution can easily destroy the intent and benefits of the transaction itself. In some cases, there is simply no middle ground— for tax purposes, the transaction either qualifies or fails to qualify

for the intended purpose of providing a charitable tax deduction. Therefore, the transaction needs to be carefully structured and technically correct. This always requires the specialized contributions and cooperation of the professionals involved in the transaction. Generally, these professionals include a real estate lawyer, a tax lawyer or a tax accountant, and a real estate appraiser. Further, if the gift is of an equity interest (such as stock, partnership or LLC interest), as opposed to the real property itself, a corporate transaction lawyer's involvement may be required. There may be, of course, ancillary parties to the transaction required as well, such as a title company, surveyor, environmental consultant, etc.

II. Transaction Objectives

As is always the case, the objectives of the transaction need to match and conform to the objectives of the parties:

- (a) From the perspective of the Donor (the contributor of the asset), the objectives generally involve the conveyance and gifting of owned real property (or the equity interest that owns the real property) to a charitable or similar organization that affords the owner a charitable tax deduction. In some instances, this may involve and include retained interests such as easement rights, leasehold rights, property restrictions, etc.
- (b) From the perspective of the Donee (the charitable recipient) (i) the transaction always involves the acknowledgment of the receipt of the real property or equity interest, (ii) the assets conveyed must be of a nature and value so that the transaction and the receipt of the gifted property are consistent with the fundraising or other objectives of the

(continued on page 2)

In This Issue

[Not-for-Profit Spotlight](#)

[Charitable Gifts of Real Property](#)

[New Notice of Intent to Operate as a 501\(c\)\(4\) Organization](#)

[Giving USA 2016: Findings At-A-Glance](#)

[Property Tax Exemption Start Date Affirmed](#)

[Assessed Valuation of Exempt Real Property: By Class and County for Tax Year 2014](#)

[IRS Advice on 403\(b\) Plan Participation Has Implications for Corporate Structuring Events](#)

Charitable Gifts of Real Property

(continued from page 1)

Donee, and (iii) the Donee must be in a position and have the staff and ability to accept, manage and operate (if required) the property and perhaps, at some point, sell or otherwise liquidate the property.

- (c) From the perspective of the appraiser, the transaction will require the preparation and delivery of an appraisal that must satisfy the IRS reporting and appraisal requirements necessary to provide the contributor of the interest with a charitable tax deduction through the determination of the fair market value of the interests conveyed, which may also include personal property [tangible and intangible] related to the contributed real property.

III. Transaction Structure

Not unlike other transactions involving the transfer of real property, the most common structures for the conveyance are through the transfer of (a) the equity interests in the property by and through the conveyance of that interest itself (i.e., the transfer of stock, partnership interests, LLC interests, etc.) or (b) the real property itself by and through a deed transfer and (c) a bill of sale or similar assignment of any contributed personal property. There may also be a requirement for ancillary transfer documents such as contract assignments, leasehold assignments, third-party consents and the like.

As the transaction is essentially an acquisition and disposition of property interests, many of the same concerns that are present in a noncharitable transfer are present in a charitable transfer. Therefore, matters such as the quality of the property being transferred, the status of title, the environmental condition of the property, the costs of maintenance and operation, third-party exposures, etc. may be as relevant in the charitable contribution setting as they are in a garden variety sale of real property.

If the transaction is a conveyance of an equity interest, then the recipient, in this

case a charity or similar not-for-profit organization, will most likely require the same kind of protections and undertake the same kind of due diligence that it would undertake in a purchase-and-sale transaction, although, in most cases, the transaction will take the form of an "as-is" transaction with few, if any, indemnities, warranties and representations flowing from the Donor to the charity. Obviously, and assuming that the property being conveyed to the charity has significant value, the contractual exposure of the Donor to the charitable recipient is significantly limited as compared to a bargain-and-sale transaction where a purchase price and/or other consideration is flowing from a buyer to a seller.

IV. Tax Implications

The tax lawyer and/or the tax accountant will need to closely review and track the transaction to ensure that the Donor receives the benefit of the charitable tax deduction that it expects to receive and to which it is entitled. The issues involved with the charitable tax deduction resulting from the gifting of real property can be highly technical and complex and, in many respects, are similar to the issues involved in structuring and supporting any other tax deduction. It is necessary to qualify and quantify the deduction and to strictly conform to the applicable requirements of the Internal Revenue Code and regulations.

The tax lawyer and/or the accountant need to determine the value of the income tax deduction, whether the income of the contributor is sufficient to receive the full deduction in the year of the contribution, whether the deduction can be carried forward or backward to other years and, of course, the preparation and filing with the taxing authorities of the necessary tax and governmental return(s) and related forms.

V. Appraisal

The appraisal required by the applicable provisions of the Internal Revenue Code and Treasury Regulations is highly technical and requires strict adherence to the appraisal requirements. The appraisal

is required to support the value of the property being contributed or the equity interest or the real property interest, as the case may be.

The appraiser needs to be a qualified appraiser pursuant to the applicable regulations, and the appraisal must, of course, satisfy these regulations as well. The appraiser must be thoroughly trained in the application of appraisal principles and theory. The appraisal must contain a complete description of the property and include the physical features, condition and dimensions of the property. The appraisal should also indicate the use to which the property is put, zoning and permitted uses as well as its potential use for higher and better uses. Retained rights of the contributing party as well as imposed restrictions on the use, sale or other aspects of the transaction and/or property will affect, and may decrease, the fair market value appraisal.

The methodology used by the appraiser in determining the fair market value of the real property interests, (or the equity interests, as the case may be) includes substantially the same tests that are present in connection with real estate appraisals in general: (a) Comparable Sales, (b) Capitalization of Income, and (c) Replacement Costs. The objective, of course, is to determine the fair market value of the interest being contributed, which is essentially the value that a willing buyer would pay to a willing seller for the gifted interests after consideration of all relevant factors.

VI. Practice Tips/Helpful Provisions

Most charitable and other not-for-profit organizations have their own forms of Donation Agreements and related transaction documents. However, it is highly desirable for counsel for the donating party to prepare the first draft of the transaction documents. Many of these documents are similar, and in some respects identical, to the agreements and forms employed in a noncharitable purchase and sale transaction between

unrelated parties. Obviously, the primary differences among these charitable gift forms and the more customary purchase and sale agreements are that there is no consideration (assuming it is not a “bargain sale transaction”) flowing to the contributing party by the charity, plus there are various specialized provisions to reflect the charitable nature of the transaction and the protection of the desired tax deduction. The specialized provisions are worth noting and include the following:

- (a) **IRS Determination Letter** – As part of the due diligence process, counsel for the contributing party must confirm that the Donee is a recognized charitable or related exempt organization that can provide the required and desired tax deduction as evidenced by an IRS Determination Letter. In addition, counsel for the Donor should confirm that the IRS Determination Letter is current and in “good standing” as of the date of the Closing of the transaction, i.e., the effective date of the gift. This can be accomplished through a direct review of the IRS Publications and supported in the Donation Agreement by the Donee’s warranties and representations. Current status can be ascertained using this [link](#). The search is best accomplished using the Donee’s EIN.
- (b) **Disclaimer as to the Condition of the Property** – Whether the transaction is an equity or asset transaction, the Agreement should make it clear that the assets are being transferred on an “as-is” basis with only the minimum of carveouts (title, environmental, authority to convey, etc.) and those carveouts should be on a knowledge basis.
- (d) **Acknowledgement Letter** – For the purposes of the Donor being able to support and evidence the contribution of the property, the Donee should execute and deliver to the Donor an Acceptance Letter acknowledging receipt of the gift of the property.

Details Matter: Error Costs Taxpayer \$19.2 Million Deduction

A millionaire real estate developer donated real property worth \$19.2 million to a charity without seeking proper advice. He failed to properly substantiate the gift that cost him the tax deduction. He completed the IRS Form 8283 without reading the instructions. Instead of seeking an independent appraisal, he appraised the properties himself, a violation of the regulations. Then he failed to sign the Declaration of Appraisal since the donor is prohibited from doing so. Despite that huge clue, he still did not read the instructions. The IRS was not at all sympathetic. No word on whether the charity noticed the missing signature or obtained a copy of the appraisal before it acknowledged the gift. While charities should not act as tax counsel for a donor, there is a certain amount of diligence that should be done before accepting a gift and acknowledging it.

- (d) **Donee’s Warranties and Representations** – The Donee should provide to the Donor in the Agreement warranties and representations in connection with the Donee’s IRS exemption, in addition to the standard acknowledgments as to its investigation and acceptance of the “as-is” condition of the property subject to the gift.
- (e) **IRS Form 8283** – The Donor will be required to complete and file [IRS Form 8283](#) (with its Federal Income Tax Return), which must be signed and completed, in part, by the Donor, Donee and the Appraiser.
- (f) **Future Restrictions** – Counsel for the Donor should consider including in the Donation Agreement various restrictions in connection with the property, keeping in mind that restrictions may have the effect of decreasing the fair market value of the property and thus lowering the desired tax deduction. These restrictions may involve and/or restrict future use and/or other rights with respect to the property including “naming rights” limitations. These restrictions may also include a “no-sale” provision for a limited period of time.
- (g) **Further Assurances** – In the event of an audit by the IRS, the cooperation of the Donee may be required and, in all events, helpful. Therefore, the Agreement should contain clear and strong “Further Assurance” and “Cooperation” clauses requiring the future cooperation of the Donee.
- (h) **The Deed** – In most instances, the Real Property deed in an asset transfer transaction is either a Quitclaim Deed or a Limited or Special Warranty Deed (as opposed to a General Warranty Deed).
- (i) **Operation Issues** – The Donee may not have qualified persons in place to manage the contributed assets and become involved in the decision-making process prior to and after the Closing. With respect to these matters, it can be helpful to have both the Donor and the Donee appoint in the Donation Agreement representative individuals within each organization to manage and resolve these issues.

VII. Conclusion

The above is a summary of some, but not all, of the more basic issues and requirements involving gifts of real property interests for charitable purposes. Transactions of this kind should be considered where the circumstances justify gifts of this nature, keeping in mind that the transactions can be highly technical, but can be accomplished if properly structured, documented and implemented.

For more information on this topic, please contact **Howard A. Steindler** at hsteindler@beneschlaw.com or (216) 363-4560.

New Notice of Intent to Operate as a 501(c)(4) Organization



Jessica N. Angney

New legislation enacted at the end of 2015 added Section 506 to the Internal Revenue Code. Section 506 requires an organization to notify the IRS of its intent to operate as a Section 501(c)(4) organization.

The IRS has developed a new form—Form 8976—that organizations should use to provide this notification.

About the Form 8976, Notice of Intent to Operate Under Section 501(c)(4)

The Form 8976 Electronic Notice Registration System allows organizations to complete the notification process, keeps account information current, and enables organizations to receive secure, digital communications from the IRS.

- Form 8976 may only be completed and submitted electronically. There is no paper form.
- This is a one-time notification. However, you will have to file annual information returns or notices (e.g., Form 990, Form 990-EZ or Form 990-N) depending on your total assets and gross receipts.
- In addition to submitting the Form 8976 notice, 501(c)(4) applicants may also choose to file a complete Form 1024. Submission of a Form 1024 does not relieve an organization of the requirement to submit a Form 8976.

Who Must Submit a Notification

This requirement only applies to organizations intending to operate under Section 501(c)(4). Organizations operating under any other 501(c) section should not file this notice.

In general, an organization that intends to be described in Section 501(c)(4) **must notify the IRS that it is operating as a Section 501(c)(4) organization within 60 days of its formation.**

There are certain exceptions to the notification requirement. Organizations that filed a Form 990 (or, if eligible, Form 990-EZ or Form 990-N) or a Form 1024 seeking a determination letter recognizing exemption under Section 501(c)(4) on or before July 8, 2016, are not

required to file the notification. For additional information, please refer to Rev. Proc. 2016-41.

How to Submit Form 8976

To electronically submit Form 8976, Notice of Intent to Operate Under Section 501(c)(4), use the Form 8976 Electronic Notice Registration System. A fee of \$50 must be submitted to Pay.gov to complete your organization's notification. You do not need special software to submit a notification. You do, however, need an email address to activate your login ID and password.

Prior to filing your form, please review the following information:

Notification Due Date

For most organizations, the notification is due no later than 60 days after the organization is established.

If an organization does not submit the notification within 60 days, a penalty of \$20 per day for each day the failure continues, up to a maximum of \$5,000, will be assessed. For certain organizations in existence as of December 18, 2015, please see Rev. Proc. 2016-41 for information regarding the timing for submitting the notification.

Information You Will Need When Submitting the Notification

Form 8976, Notice of Intent to Operate Under Section 501(c)(4), is easy to complete. You'll need the following information about your organization:

- Business name
- Address
- EIN

- Date organized
- State and country organized
- Filing year/month
- Statement of purpose of the organization

What Happens After Form 8976 Is Submitted

The IRS is required to acknowledge that an organization's notification has been submitted. In some circumstances, an organization may be informed that its notification was not properly completed. The IRS may communicate the acknowledgement or information regarding an incomplete notification electronically to the user account of the individual submitting the Form 8976 on behalf of the organization. Accordingly, an organization should ensure that the individual submitting the Form 8976 is authorized by the organization to receive this information.

When Can You Expect to Hear From the IRS

If you submitted a complete and accurate notification, you can expect to receive an acknowledgement from the IRS within 60 days of submitting your notification.

Additional Assistance

For technical issues and questions about the electronic form, please call TE/GE Customer Accounts Services at 877-829-5500.

Additional Information

- Regulations and Proposed Rule
- Revenue Procedure (issued July 8, 2016)

For more information on this topic, please contact **Jessica N. Angney** at jangney@beneschlaw.com or (216) 363-4620.

Giving USA 2016: Findings At-A-Glance

*The Annual Report on Philanthropy for the Year 2015
Prepared by Cramer & Associates Fundraising*

Giving in America continues to increase at a steady pace. Americans gave \$373.25 billion to charitable causes in 2015, a 4.1% increase from 2014. For the first time in a decade, this steady rate of growth equates to a 10.1% increase over the past two years in inflation-adjusted growth for the philanthropic sector.

Please click [here](#) to view more of the annual report's findings.

Property Tax Exemption Start Date Affirmed



Jessica N. Angney



Heather E. Baird



Victoria L. Stephenson

The Ohio Board of Tax Appeals recently affirmed a long-standing provision of Ohio property tax exemption law that property cannot be considered exempt if it is not owned by the eligible entity on the lien date, which is January 1 of the calendar year for which exemption is sought. In *Township of Madison, Ohio, (et. al.), Appellant(s), vs. Joseph W. Testa, Tax Commissioner of Ohio, (et. al.), Appellee(s)*, Case No(s). 2015-760 the Township sought exemption after the property owned by the township was no longer being managed by a for-profit entity to whom the township had given this responsibility. The for-profit entity was allegedly in default of its responsibilities in December, but the contractual relationship giving control of the property to the for-profit entity was not severed until May of the following year, resulting in a determination by the Tax Commissioner that the property was not being put to an exempt public use on the lien date. The Board agreed with the Commissioner, leaving the township responsible for the taxes for the year.

Property tax exemption is complicated. It is not just a form to be completed and handed to the County Auditor. Different types of organizations have to meet different criteria to qualify their property for exemption, and failure to understand the criteria can be very expensive for the property owner. Talking to knowledgeable counsel before you file can save money and time. Benesch has experienced lawyers who can assist you with these matters.

For assistance, please contact:

Jessica N. Angney at jangney@beneschlaw.com or (216) 363-4620

Heather E. Baird at hbaird@beneschlaw.com or (614) 223-9368

Victoria L. Stephenson at vstephenson@beneschlaw.com or (614) 223-9344

Assessed Valuation of Exempt Real Property: By Class and County for Tax Year 2014

While about \$230.4 billion of assessed real property value was taxable in Ohio during tax year 2014, approximately \$48.5 billion was exempt from taxation due to provisions of the Ohio Constitution and the Revised Code. [Table PE-2](#) shows the taxable value of the exempted real property by property class and by county.

The exempted property is broken into property classes based on reasons for exemption, ownership of the property, or purposes for which the property is used. Real property owned by federal, state or local governments is exempt from real property taxation and is shown in the table under the categories, "United States of America," "State of Ohio," "County," "Townships," "Municipalities" and "Boards of Education." Other real property owned by governments and used for recreational rather than governmental purposes is found in the category of "Conservancy Districts and Park Districts." Privately owned educational facilities are exempted, and the

exempted values are found in the category of "Schools, Colleges and Academies." Real property owned by institutions with tax-exempt status is found in the categories of "Charitable Institutions" and "Churches." Property used as cemeteries and fixtures used in cemeteries are in the category of "Cemeteries and Monuments." Municipal, township and county governments can grant exemptions as incentives for economic development and urban renewal; these forms of exempt real property fall under the heading of "Tax Abatements."

Property exempted due to tax abatements was the largest class of exempt real property in tax year 2014 with a value of approximately \$9.9 billion, while "Boards of Education" property was the second largest class at \$7.8 billion.

The Ohio Department of Taxation reports these data as submitted by each county auditor via the exempt real property tax abstracts (DTE94); not all data can be verified or confirmed as accurate.

IRS Advice on 403(b) Plan Participation Has Implications for Corporate Structuring



Lisa M. Kimmel

The Chief Counsel's office of the IRS has determined that employees of a single member LLC disregarded entity are permitted to participate in the § 403(b) plan of the § 501(c)(3)

organization member. In fact, said employees **must** be allowed to participate to the extent necessary to comply with requirement that such plans be universally available to employees. This means that the 501(c)(3) organization *must* permit all employees (including the employees of the disregarded entity) to make elective deferrals if any employee of the 501(c)(3) organization is allowed to make elective deferrals to the 403(b) plan, unless the employee falls under a specific exception from the universal availability requirement. The same analysis does not apply to § 457 plans, as no universal availability requirement exists for such plans. However, employees of a disregarded entity may be permitted to participate in 457 plans at the employer's choosing. See [Chief Counsel Advice 201634021](#).

If you have questions or need advice about this or other pension-related issues, please contact **Lisa M. Kimmel** at lkimmel@beneschlaw.com or (216) 363-4459.

Benesch's Not-for-Profit Team assists not-for-profit and tax-exempt clients in a broad array of matters, ranging from filing for nonprofit status and preparing federal and state tax exemption applications to training in not-for-profit regulatory compliance. Our not-for-profit attorneys are committed to protecting our clients' assets so that they can continue to drive the missions and goals of their organizations.

For more information regarding this edition or any not-for-profit issues, please contact:

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Events

Nonprofit Voter Engagement Training Ohio Association of Nonprofit Organizations

Date: Wednesday, September 7, 2016

Time: 10:00–11:00 a.m.

Location: Webinar

Topics include: Why should nonprofits be engaged?, dos/don'ts for nonprofits, how to develop a voter engagement plan for your organization, national voter registration day, and the latest on Ohio voting laws.

Learn more and register for the webinar [here](#).

Minding the Business While Changing the World—Board Governance Requirements

Ohio Attorney General's Office webinar

Date: Thursday, September 8, 2016

Time: 10:00–11:00 a.m.

Location: Webinar

This training will review the basic requirements all charitable organizations have and provide easy-to-follow tips for board members who try to do their jobs responsibly in order to protect the organization and the beneficiaries of the group's efforts.

Learn more and register for the webinar [here](#).

Modern Moves Management

Date: Thursday, September 8, 2016

Time: 8:30–10:30 a.m.

Location: Union League Club, 65 W Jackson Blvd, Chicago, IL 60604

Featured presenter: Susan Stewart-Kelley

Old-school moves management is often a one-size-fits-all “coffee, site visit, appeal” routine, but modern donors expect a personalized and unique experience. Based on the Donor Engagement Study and Donor Loyalty Study, you'll learn how to:

- Create unique personas and messaging
- Use engagement scoring to time your asks
- Integrate events and volunteerism into moves management

Attendees of this program will earn 1.5 points toward their CFRE.

Learn more and register [here](#).

Cultural Competency for Philanthropy Professionals

Central Ohio Chapter of the Association of Fundraising Professionals (AFP)

Date: Tuesday, September 13, 2016

Time: 8:30 a.m.–1:30 p.m.

Location: The King Arts Complex, 867 Mt. Vernon Avenue, Columbus, OH 43215

Featured presenter: Birgit Smith Burton

Can't We All Just Get Along? Understand the influence of biases and beliefs, and their impact on others. (Includes self-assessment toolkit)

Time: 9:00–11:30 a.m.

Meaning Well to Doing Well. Learn how to shift from diversity management to inclusion.

Time: 12:00–1:30 p.m.

Big Vision, Big Impact... Making It Happen With Minimal Resources

Date: Friday, September 16, 2016

Time: 8:15–10:15 a.m.

Location: Petterino's, 150 N. Dearborn Chicago, IL 60601

Learn about the XS Tennis & Education Foundation and its mission to redefine “community programming” right here in Chicago. You'll have the opportunity to hear about Kamau Murray's (2015 Crain's 40 under 40) vision to create a world-class athletic and educational experience for Chicago's youth. In addition, you will hear from other members of Mr. Murray's team to learn about the fundraising strategy and execution that helped make this dream a reality.

Attendees will earn 1.5 CEU points towards their CFRE

Learn more and register [here](#).

QuickBooks Made Easy

Ohio Association of Nonprofit Organizations

Date: Tuesday, September 27, 2016

Time: 8:30 a.m.–4:30 p.m.

Location: KeyBank Tower, 10 West 2nd St., Dayton, OH

Join Gregg S. Bossen, CPA and not-for-profit accounting expert, as he covers the basics of setting up and entering transactions specifically for not-for-profits, an overview of the software updates included in the QuickBooks® 2016 & 2015 Editions, and advanced topics.

Learn more and register [here](#).



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