

# CAUTIONARY TALES & TIPS: REGULATORS' PERSPECTIVE



OREGON DEPARTMENT OF JUSTICE  
CHARITABLE ACTIVITIES SECTION

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# Attorney General Oversight - Laws We Enforce



- Charitable Registration & Reporting, ORS 128.610 *et seq*
- Charitable Gaming Regulation & Licensing, ORS Ch. 464
- Nonprofit Corporations Act, ORS Ch. 65

# Attorney General Oversight - Laws We Enforce



- Charitable Solicitations Act, ORS 128.801 *et seq*
- Uniform Trust Code, ORS Ch. 130
- Uniform Prudent Management of Institutional Funds Act, OS 128.305 *et seq*
- Common law enforcement of fiduciary duties

# Attorney General Oversight



- **Charitable Activities Section**
  - 18 Staff Members
  - Attorneys - 3.5 FTE
  - Investigators – 5.0 FTE
  - Charity Registrar
  - Gaming Registrar
  - Funded by report fees
- **What Keeps Us Busy?**
  - 21,300 registered charities in Oregon
  - Registration and reporting
  - Complaints and investigations
  - Litigation and required reviews
  - Education

# DOJ Investigations



- Investigate complaints received from public, other agencies, and interested parties
- Follow internal leads – delinquent filers, unusual changes or information in annual reports
- Review required notices
- Media inquiries and reports of significant events

# DOJ Investigations



- Approach to Enforcement
  - Protect charitable assets
  - Protect donors
- Generally do not intervene in internal matters – employment issues, member disputes, conflicts among directors
- Confidential complaints can be submitted and DOJ will seek to protect identify, but other communications with DOJ will be public record

# DOJ Investigations



- ORS 128.680 – general authority to investigate transactions and relationships of charitable organizations to determine:
  - Whether charitable purposes are being fulfilled
  - Whether there has been a violation of charitable statutes
  - Whether there has been a violation of fiduciary duty
- ORS 128.690 - DOJ can subpoena records and witnesses before filing a lawsuit

# Attorney General Oversight



## Enforcement Remedies/Options

- Consent
- No Action
- Audit/Notice Letters
- Civil Penalties
- Assurances of Voluntary Compliance
- Injunctive Relief, Removal of Directors, Dissolution
- Appointment of Receiver
- Damages for Waste/Loss
- IRS Referrals
- Criminal Referrals



# Common Problems from the DOJ's Perspective



- Embezzlement
- Mishandling of restricted funds
- Violations of IRS rules for private foundations
- Member disputes, internal conflict
- Inattentive board/lack of oversight
- Operating charity as personal business
- Poor record keeping, lack of internal controls

# Attorney General Oversight Of Gifts



## What are the Issues?

- Is That Gift Restricted?
- Releasing Restrictions/What if the Donor's Wishes/Purposes Cannot Be Fulfilled?
- Who Gets the Money – The Charity or the Heirs?
- Good Intentions vs. Realities and Time
- Has the Donor's Money Ended Up In the Hands of an Untrustworthy Trustee?

# Is a Gift Restricted?



- **Overriding Goal/Analysis – Determine Donor Intent**
  - Look to communications, writings
  - Look to course of conduct
- **Courts Reluctant to Infer Restrictions**
- **Language Used is Important: Precatory Instructions vs. Restrictions**

# Is a Gift Restricted?



Example: Leona Helmsley Estate/Trust (\$billions)

- Left bulk of her estate to the charitable trust she established during her lifetime. Trust had no specific charitable purpose/goal and gave trustees discretion to distribute funds.
- She wrote a “Mission Statement” for trust – 2 purposes: indigent people and dogs, later crossed out indigent people.
- Trustees went to court to determine whether bound by “Mission Statement.” Court ruled not bound. Spending on medical research and trustees’ interests.

# Is a Gift Restricted?



Example: Adler v SAVE (NJ App Div 2013)

- Couple gave \$50,000 in capital campaign to build new facility with naming rights and space for older cats and large dogs, which are difficult to adopt
- Org merged with another, moved shelter to new city, and changed plan to build smaller facility
- Court found solicitation materials and communications with couple established restricted gift and org ordered to return funds

# Is A Gift Restricted?



But See: *Styles v. Friends of Fiji*, No. 51642 (Nev. 2011) (unpublished opinion)

Nevada Supreme Court upheld a district court ruling that Donor Advised Fund had discretion to reject any of donor's recommendations. Fund used gift of over \$2 million to pay its two directors compensation, make bad investments, host celebrity golf tournaments, and to cover legal fees in its fight with the donor.

# Expect Gift Acceptance Policies



- Unless it is an unrestricted gift of money, some evaluation is appropriate by recipient organization
- Gifts of noncash items can present issues
  - real estate
  - personal property
  - securities/ownership of companies
- Gift may not be compatible with organization's mission or image

# Gift Agreements



- Useful to clarify donor intent
- Can provide recipient organization some flexibility while balancing donor's goals
- Consider contingent plans and disposition
- Morality clauses



# Gift Agreements Help



January 2012, jury awarded Garth Brooks \$500,000 returned pledge and \$500,000 in punitive damages stemming from verbal agreement with hospital to name wing after his mother.

<https://www.reuters.com/article/us-garth-brooks-oklahoma/garth-brooks-awarded-1-million-in-suit-against-hospital-idUSTRE80OoBS20120125>

# Vetting Charities



- DOJ registration and reports are public records
- Review IRS Form 990
- Outside evaluations:
  - Better Business Bureau - [www.give.org](http://www.give.org)
  - Guidestar – [www.guidestar.org](http://www.guidestar.org)
  - Charity Navigator – [www.charitynavigator.org](http://www.charitynavigator.org)

# Enforcing Restrictions



- Attorney General can seek to enforce donor restrictions whether gift is to trust or to nonprofit corporation
- Gift to nonprofit corporation for specific purpose creates charitable trust – Restatement (Third) of Trusts § 28, cmt a
  - Restatement (Third) of Trusts recognizes that donor has standing to enforce gift, even without reservation of rights
  - Oregon case law has acknowledged concept of “special standing,” which is also recognized in Restatement (Third) of Trusts
- Board directors and members may bring derivative actions for breach, which could include mishandling of restricted funds

# Releasing Donor Restrictions



- Get donor agreement to use for another charitable purpose
  - UTC, ORS 130.045
  - UPMIFA, ORS 128.328(1)
- Court Proceeding/Cy Pres
  - UTC, ORS 130.200, 130.205, 130.210
  - UPMIFA, ORS 128.328(2)
- Attorney General is a necessary party

# Cy Pres Standard



- The restrictions must be unlawful, impracticable, impossible to achieve or wasteful
- Funds will be redirected in a manner consistent with donor intent
- Modification not warranted simply because of a change in organizational preferences

# Releasing Donor Restrictions



## Attorney General Review of Proposed Modifications

- **Contact DOJ before filing**
  - Provide copy of gift agreement
  - Provide explanation of need for modification
  - Provide explanation of how new purpose is consistent with donor intent
- **Will consider changing administrator before changing purpose**

# Accounting for Restricted Gifts



- Create and maintain separate fund accounts in general ledger
- Keep records, including donor agreements/writings, grant letters, solicitations
- Important to distinguish between donor restricted gifts and board “restricted” gifts

# Charities Suing to Enforce Pledges



- Restatement (Second) of Contracts, § 90(2) – charitable pledge enforceable even without detrimental reliance
- *Nonprofit Quarterly*, August 25, 2016, Duke University suing donor estate for \$10 million in outstanding pledges
- April 3, 2017, United Cerebral Palsy sued to enforce \$1 million pledge. UCP named wing after couple when they made the pledge. Funds to be paid upon death of first one to die, but couple changed estate plans without informing UCP. CP Foundation of Nassau, Inc. et al v. Meyers, E.D.N.Y., Docket # 2:17-cv-01866.
- *Florida Politics*, July 6, 2018, Best Buddies sues to enforce \$100,000 pledge when donor pays only \$30,000. Charity proceeded to implement program based on pledge, hired employees, etc.



# Who Gets the Money – Charity vs. Heirs



- Attorney General's Office may become involved in will contests or other probate matters in which heirs challenge charitable gifts
  - May involve interpretation of ambiguous gift instruments
  - Will or trust contests challenging validity of testamentary document
  - Named charity no longer exists
  - Intervention in other administrative issues on behalf of charities

# Good Intentions vs. Realities and Time



- Gift may be made with unrealistic expectations
- Gift sufficient to start, but not sustain endeavor
- Donor's intentions fade, trustee's objectives supplant
- These issues often appear when gifts used to start private foundations

# Private Foundation Issues



- **Failure to recognize degree of regulation and effort involved**
  - All the record-keeping, registration, and reporting requirements of public benefit organizations
  - Additional rules regarding self-dealing, investments, and distributions
  - Due diligence on recipient organizations takes time and effort
- **Failure to articulate mission in governing documents**
  - Children/successors may change focus of giving
  - Grants may not be consistent with founder's beliefs/goals
  - Children live elsewhere and may use funds in their own community rather than donor's community
- **Family dynamics may interfere with effective operations**

# Private Foundation Issues



- **Lack of transparency and oversight**
  - Excessive compensation
  - Co-mingling of foundation and personal finances/operations
  - Consider including independent board members
- **Employment of family members**
  - Lack of knowledge, skill
  - Lack of interest
- **Boilerplate bylaws provide no guidance**
  - Specify how important decisions are made
  - Specify how successor fiduciaries appointed
  - Articulate organizational purpose(s)
  - Specify terms of compensation, if allowed

## So You Gave Your Gift to an Untrustworthy Trustee. Now What?



- Trustee is sometimes paid very generously for minimal work. Original trustee may have had close relationship to donor, but subsequent trustees lack personal relationship or original trustee says donor wanted to support them. Avoid this problem by setting up clear terms in gift instrument regarding compensation and intentions.
- Donor often deceased so determining donor intent can be challenge.

# Embezzlement



## All The Queen's Horses

[ABOUT THE FILM](#) [FILMMAKERS](#) [DISTINCTIONS](#) [PHOTOS](#) [VIDEO](#) [NEWS](#) [EVENTS](#) [PRESS](#)



How could one woman steal \$53 million without anyone noticing? As city comptroller of Dixon, IL, Rita Crundwell stole \$53 million of public funds across 20 years—making her the perpetrator of the largest case of municipal fraud in American history. She used the funds to build one of the nation's leading quarter horse breeding empires, all while forcing staff cuts, police budget slashing, and neglect of public infrastructure. ALL THE QUEEN'S HORSES investigates her crime, her lavish lifestyle and the small town she left in her wake.

# Embezzlement/Fraud



- Weak internal controls responsible for nearly 50% of fraud
- Median duration of fraud – 16 months
- Median loss to nonprofit - \$75,000
- Tips are most common method of discovering fraud (primarily from employees)

Association of Certified Fraud Examiners, Report to the Nations,  
2018 Global Study on Occupational Fraud and Abuse

# Discovery of Fraud



- Fraud most often reported by insiders
- Embezzlers are often the most trusted person in organization; listen when people in the organization suggest fraud may be occurring
- Red flags
  - Refuses vacations, overbearing or controlling personality, living beyond means
  - Missing financial statements at board meetings
  - Stonewalling or resisting requests for information



# Embezzlement



Feb 8	Purchase w PIN 180934 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 020813 ILK1TERM REF 303908180934	3402080704	1,000.00-
Feb 8	Purchase w PIN 862303 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 020813 ILK1TERM REF 303909862303	0302080822	1,000.00-
Feb 14	Visa Purchase (Non-PIN) OFFICE DEPOT #10 *****3121	On 021213 800-463-3768 WA REF # 24445743044100499701625	4100499701	227.76-
Feb 19	Purchase w PIN 043929 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 021713 ILK1TERM REF 304802043929	2902170145	1,000.00-
Feb 19	Purchase w PIN 847517 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 021713 ILK1TERM REF 304807847517	1702170629	1,000.00-
Feb 25	Purchase w PIN 875722 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 022413 ILK1TERM REF 305522875722	2202242144	1,000.00-
Feb 25	Purchase w PIN 272857 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 022413 ILK1TERM REF 305600272857	5702242324	1,000.00-
Feb 25	Purchase w PIN 072391 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 022513 ILK1TERM REF 305601072391	9102250039	1,000.00-
Feb 25	Purchase w PIN 688543 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 022513 ILK1TERM REF 305602688543	4302250158	1,000.00-
Feb 25	Purchase w PIN 199795 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 022513 ILK1TERM REF 305611199795	9502251009	2,000.00-

# Embezzlement



Feb 8	Purchase w PIN 180934 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 020813 ILK1TERM REF 303908180934	3402080704	1,000.00-
Feb 8	Purchase w PIN 862303 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 020813 ILK1TERM REF 303909862303	0302080822	1,000.00-
Feb 14	Visa Purchase (Non-PIN) OFFICE DEPOT #10 *****3121	On 021213 800-463-3768 WA REF # 24445743044100499701625	4100499701	227.76-
Feb 19	Purchase w PIN 043929 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 021713 ILK1TERM REF 304802043929	2902170145	1,000.00-
Feb 19	Purchase w PIN 847517 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 021713 ILK1TERM REF 304807847517	1702170629	1,000.00-
Feb 25	Purchase w PIN 875722 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 022413 ILK1TERM REF 305522875722	2202242144	1,000.00-
Feb 25	Purchase w PIN 272857 *****3121	PCA*SPIRIT MOUNT GRANDE RONDEOR On 022413 ILK1TERM REF 305600272857	5702242324	1,000.00-
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# Embezzlement



- Educate clients about the need for internal controls
- Someone other than check signer should review and reconcile bank statements
- Limit access to corporate debit/credit cards
- Create and follow procedure for reimbursements
- Establish and track budgets
- Require regular financial reports
- Audits are useful, but limited; encourage communication with entire board, not just ED

# When to Contact the Attorney General's Office



- Any action challenging charitable gift
- Any litigation involving charitable fiduciaries' breach of duties or mismanagement of charitable assets
- Proposed modifications to terms of charitable gifts
- Plans to borrow against or make extraordinary distributions from endowments or other restricted gifts
- To register charities or charitable remainder trusts
- When planning to dissolve or terminate charitable organizations or trusts
- When considering the sale or transfer of all or substantially all of a charity's assets

# Contact and Resources



- Elizabeth Grant at [elizabeth.grant@state.or.us](mailto:elizabeth.grant@state.or.us)
- Susan Bower at [susan.a.bower@state.or.us](mailto:susan.a.bower@state.or.us) or contact us at:

Charitable Activities Section  
Oregon Department of Justice  
100 SW Market St.  
Portland, OR 97201  
(971)673-1880

- DOJ Website: <https://www.doj.state.or.us/charitable-activities/>
  - Registration and Reporting forms and instructions
  - Database of registered charities
  - Submit complaint