In Re Helen's Trust:

A tale of how charities should and should not respond to litigation

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The author has represented a number of charitable organizations and other fiduciaries in litigation involving charitable bequests and charitable trusts. From those experiences, he developed a presentation for charitable organizations and practitioners on how to avoid litigation and how to respond to it when it occurs.[1] In 2003, the author represented two charities in a single case that illustrated most of the issues and concerns that the author addressed in his presentations. This article is the story of that case and the lessons that it holds. The case was settled through mediation, and there are no reported decisions. Some of the charitable organizations that did not respond effectively in this particular case are well known national organizations. So that the focus of the article will be on the lessons and not the parties, the parties are not identified. The case is referred to as In re Helen's Trust.

Helen came to Los Angeles in the 1930s hoping to be a movie star. Her movie career never really took off, but she managed to purchase a few small houses on a cul-de-sac in Beverly Hills. Helen had a difficult personality, and her dementia and pain from arthritis made her even more difficult in her last years of life. Helen's closest relative was a niece, but the two did not appear to have a warm relationship.

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Abstract: Circumstances beyond a charity's control may require the charity to participate in litigation to protect a gift. The author uses the case of Helen's Trust to provide practical advice to charities and their counsel for anticipating and responding to litigation.

We contacted Helen's attorney and the accountant. They provided us with copies of the various other attempted estate plans, as well as significant other background information including filings from the conservatorship proceeding. The material convinced us that the Temporary Living Trust was the product of undue influence, and was signed at a time when Helen lacked the capacity to execute such a document.

Helen had an attorney-drawn will and living trust that left her estate primarily to six charitable organizations with a few specific bequests to individuals and distant relatives. There were two interesting aspects to the bequests to the individuals. First, the bequests were included in her will, not her living trust. This was problematic because, unlike many other individuals, Helen managed to transfer all of her assets to the living trust so there were no assets in her probate estate to pay these individual bequests. Furthermore, there were no provisions in the living trust directing the trustee to pay the bequests listed under the will. The second interesting aspect was the bequest to Helen's full-time caregiver. This bequest contained the intriguing proviso that if Helen died within 10 years of creating the will, an autopsy was to be performed to see if the caregiver had poisoned her. If the caregiver had poisoned Helen, the gift was forfeited.

Helen suffered from debilitating arthritis which required that she take powerful pain medication. In addition, toward the end of her life, she also suffered from Alzheimer's and dementia. A few years before her death, a proceeding to establish a conservatorship for Helen had been initiated. Helen retained counsel to fight the imposition of the conservatorship, and the matter was settled when Helen agreed to have her accountant and her caregiver named as co-trustees of her trust to manage her financial affairs. The medical reports in that proceeding, however, reflected that she had diminished capacity.

In the last months of Helen's life, her dementia and need for pain medication worsened. During this period of time, the caregiver made repeated attempts to change Helen's estate plan. These attempts included the completion of a fill-in-the-blank trust kit in which Helen signed a trust for a single person, a trust for a married person and a revocation of a trust. In all cases, blanks for beneficiaries were filled in with the names of the caregiver and the caregiver's family.

In May of 2002, Helen signed a document titled "Temporary Living Trust." According to the declaration of the husband of the caregiver, one morning, Helen told him that she wanted to change her estate plan. The declaration went on to say that Helen requested that she not be given pain medication and then dictated to the caregiver's husband a new estate plan that gave most of the estate to the caregiver and the caregiver's family. The caregiver's husband typed the dictated text on a computer and printed out the document. He then read it to Helen and had her sign it. The Temporary Living Trust included a few other individual bequests and a small gift to a charitable organization that had never been included in Helen's previous estate plans. Helen died the next day.

During the period of time that all of these estate plans were being created, Helen's accountant and co-trustee of her trust made repeated attempts to contact her. He was always turned away by the caregiver, who told him Helen was not strong enough to meet with him. He had even called on the day that the Temporary Living Trust was signed, but no mention of it was made to him.

Shortly after Helen's death, the caregiver faxed a copy of the Temporary Living Trust to Helen's attorney and her

accountant who was the co-trustee of the trust. The accountant questioned the validity of the Temporary Living Trust, and the caregiver retained counsel to defend the document.

Under California law, the trustee of a living trust is required to send out a notice to the trustor's heirs at law and the beneficiaries of the trust when trustor dies.[2] The notice must be sent within 60 days of the trustor's death. The notice must advise the heirs and trust beneficiaries that the trust has become irrevocable and that they have 120 days to request a copy of the trust. The statute imposes a statute of limitation to contest the trust of the later of 120 days from the time a person is sent the notice or 60 days from when the person is sent a copy of the trust.[3] With the 120 day period to request a copy of the trust and the 60 day period after the copy of the trust is sent out, up to 180 days is allowed to contest the trust. If the trustee sends a copy of the trust with the notice, however, the statute runs in 120 days.

The accountant prepared a notice to the heirs and trust beneficiaries, to which he attached a copy of the trust including all of the amendments to the trust except the Temporary Living Trust. The caregiver also prepared her own notice, to which she attached all of the amendments to the trust including the Temporary Living Trust. The heirs and beneficiaries received both versions of the notices within two days of each other.

In order to send out the trustee's notices, both trustees searched the California Secretary of State's web site and found addresses for many of the organizations named as beneficiaries of the trust. If they were not able to find the organizations there, other Internet searches provided the names. Some attorneys are sloppy about giving notice to charities. Most charities are incorporated. The proper way to serve a corporation is to serve the agent for service of process registered with the secretary of state of the state where the corporation is organized or of the state in which the charity has qualified to do business. This information is a public record and available on most secretary of states' web sites. Calling the charity and asking where to send papers is an unreliable method of getting this information, as the staff likely will not be aware of the registered agent. Failure to serve the charity properly may give it defenses to statutes of limitation or to any order in the proceeding. Because charities can have similar or identical names, it is prudent to search the name on the Internet to see whether more than one charity might be referenced in a document. We would later learn that the trustees probably should have used more diligence in searching out the beneficiaries of the trust.

As noted above, each of the charitable beneficiaries, as well as the other beneficiaries of the trust and heirs, received two trustee's notices: one containing a version of the trust that did not include the Temporary Living Trust and one version with the Temporary Living Trust that resulted in a

A mediation is simply a discussion of money. Helen's Trust had about $2.3 million of real estate and cash. Mediation usually does not produce what the parties would consider to be a just or fair result, only a result that is tolerable to all of them.[5]

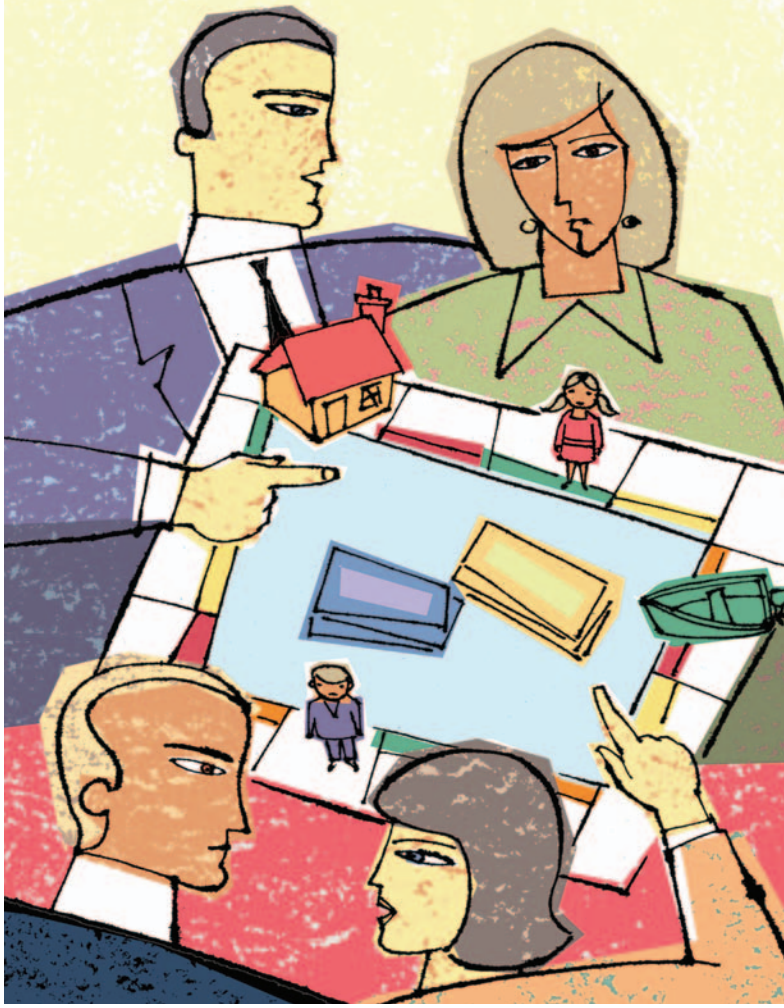
radically different distribution of the trust assets. One of the charities that the author represents regularly has a paralegal on staff who reviews all of the probates and trust notices sent to the organization. She is able to distinguish routine notices that an organization receives in an ordinary estate proceeding that do not require the attention of an attorney from notices or filings that suggest that there may be a problem requiring legal action.

The conflicting versions of the trust in the notices were a clear indication that there was a dispute regarding the terms of this trust, and that one version of the trust would exclude the charitable organization from receiving any share of the estate. On its face, the Temporary Living Trust was a dubious looking document at best. It was a jumble of incomplete sentences, and the signature clearly was made by a person who could barely hold the pen to the paper. The paralegal for the charity contacted our offices immediately and forwarded the conflicting notices to us. Shortly thereafter, we were contacted by another organization that has similar procedures for reviewing trust and estate filings.

We contacted Helen's attorney and the accountant. They provided us with copies of the various other attempted estate plans, as well as significant other background information including filings from the conservatorship proceeding. The material convinced us that the Temporary Living Trust was the product of undue influence, and was signed at a time when Helen lacked the capacity to execute such a document.

The end of the 120 day statute of limitations to contest the trust was a few weeks away, and on behalf of the two charitable organizations that we represented, we filed a contest to the validity of the Temporary Living Trust. This contest was served on all of the beneficiaries listed in both of the versions of the trust and on Helen's heirs using the service lists on the trustees' notices. Shortly after filing the contest, counsel for a third charity contacted us and then filed on behalf of that charity a joinder to the contest that we had filed.

On the day that the 120 day statute of limitations ran, three of the charitable beneficiaries had not filed any documents in the case. As the hearing date on the contest approached, the remaining three charities had not filed any documents. An attorney in the author's office attempted to contact the other three organizations to see if they planned to make an appearance. The attorney was having difficulty contacting an organization in Sacramento, California, called World Peace,[4] and she searched the Internet to see if World Peace was a local chapter of an organization with a national office that should be contacted. The attorney found a website for World Peace based in the New York, which she called. The World Peace New York was not aware of any chapters in California and had not



received any of the documents in the case. As a courtesy to World Peace New York, our office advised them of the hearing date and sent them by Federal Express a complete set of the pleadings and documents in the case, now a stack of paper that was a couple of inches thick. This Federal Express was sent to the General Counsel of World Peace New York.

At the hearing, only the two organizations represented by the author and the other charity that had joined the contest appeared. In addition, the caregiver was represented, as well as the charitable organization that was named in the Temporary Living Trust. As is routine for these matters, the judge continued the matter to give the parties time to try to resolve the case through mediation. Our experience has been that over 90 percent of these cases can be settled with the assistance of a mediator. The general counsel for World Peace New York made one or two calls to our office leaving voicemails before California business hours, asking that we provide them with information regarding the case. Those calls were returned during normal New York business hours, leaving the message that our firm did not and could not represent World Peace, and that World Peace should contact the trustee of the trust if it wanted additional information. Each message provided the contact information for the trustee (which also appeared on several of the pleadings that World Peace New York had).

Two months after the hearing, the two charities represented by the author and the third charity that had joined the contest of the trust conducted a mediation with the caregiver and some of the other beneficiaries that received gifts under the Temporary Living Trust, including the charity that was named in that document. The mediator was a respected retired probate judge.

A mediation is simply a discussion of money. Helen's Trust had about $2.3 million of real estate and cash. Mediation usually does not produce what the parties would consider to be a just or fair result, only a result that is tolerable to all of them.[5] When planning for a mediation, a party needs to determine the amount that the party would likely obtain at trial, and then deduct anticipated attorneys' fees. That amount is the party's best case scenario: it is the most that the party can obtain from the case. In rare circumstances, a court will award a prevailing party attorneys' fees. This is unusual and not normal in the American system of justice. Recently, in another estate in which the author represented a charity, the other party's conduct was so egregious that the court did award the author's client attorneys' fees. The other party, however, has no assets and was judgment proof. The situation simply reinforces the reason why settlements should be evaluated assuming that parties will bear their own attorneys' fees.

After determining what the party could get from a favorable ruling at trial, the party must then factor in the likelihood of prevailing at trial. The caregiver had a terrible case. The declaration signed by the husband of the caregiver describing the creation and signing of the Temporary Living Trust made out the elements required to create a presumption of undue influence as if the drafter of the declaration had been carefully following the cases to be sure every one of the elements was satisfied.[6]

One might be tempted to, at that point, give the caregiver no chance of winning, but litigation is risky and unpredictable. It is not a bad idea to give even the weakest opponent a 10 percent chance of winning to account for potential surprises.

Two cases in which the author was involved illustrate the risks of litigation. One case dealt with a charitable organization that believed it was the beneficiary of a $1.3 million estate under a holographic will. Initially, the daughter of the decedent challenged the holographic will, arguing that a prior typewritten will should govern. A few months into the case, however, the daughter discovered a typewritten will that had a later date than the holographic will that benefited the charity. The later typewritten will left the estate to the daughter. The charity spent a considerable amount of legal fees and expert witness fees to challenge the later typewritten will. In the process of that battle, another holographic will that was later than the original holographic will but earlier than the typewritten will was discovered. The later holographic will left the estate to a charity represented by the author, not the charity named in the first holographic will. The later holographic will meant that the charity that had been fighting the case all along no longer had any standing to pursue the case.[7]

Another matter involved a trustee who was defending against claims by beneficiaries who were complaining about aspects of the administration of the trust. The beneficiaries prolonged the case and avoided mediation. The beneficiaries also antagonized the sibling of the decedent who had created the trust. The decedent's sibling then revealed to the trustee that the decedent had an additional child. The child was a potential beneficiary of the trust and would reduce the shares of the other beneficiaries by 20 percent. Under the circumstances, had the beneficiaries embraced mediation early on in the process, the case may well have been resolved without the trustee knowing about the other child. Had that happened, it is unlikely the child ever would have appeared to make a claim.

Another risk of litigation is that judges don't always look favorably on a charitable organization that, in the judge's perception, is aggressive in litigation. Some judges are sympathetic toward disinherited heirs and view the bequest as "found money" for the charitable organization.

The risk analysis did not give the complete answer in the mediation of Helen's Trust. Helen's trust presented the odd situation where both sides could easily obtain a better result from the mediation than either could obtain by going to trial. If the charities won at trial, each would get one-sixth (1/6) of the estate less attorney's fees. The three charities present at the mediation, however, were collectively only entitled to half of the estate. They also arguably were damaged by their legal fees to date since the caregiver's case was so weak. The charities told the caregiver that they would settle the case if the charities each received their share of the estate plus an amount to cover their attorneys' fees to date. This still left over one-third of the estate available for the caregiver—far more than the caregiver would get at trial. Since the charities were getting their share of the estate and their attorney's fees, they too were getting more than they would receive at trial. Going to trial would result in more attorney's fees which the charities would not recover.

The attorneys for the charities were not obligated to consider the interest of the charitable organizations that did not bother to participate in the case. It is inconsistent with the rules of professional conduct for an attorney to represent interests adverse to the attorney's client's interests in a case.[8] The author has settled a number of cases in which either charitable or non-charitable beneficiaries chose not to participate in the mediation. In each case, the parties who did not participate were left out of the settlement. There were a number of non-charitable beneficiaries who also did not participate in this mediation and were left out of the settlement. All of those beneficiaries had smaller interests than the charitable organizations that did not participate in the case.

At the conclusion of the mediation, each charity was receiving $375,000. The balance of the estate was going to the beneficiaries of the Temporary Living Trust. Although it could be handled in various ways, typically a settlement is presented to the court for approval. Accordingly, a petition was filed with the court to approve the settlement that the parties had reached, and notice of that petition was sent to all of the potential beneficiaries of the different versions of the trust. The week of the hearing had arrived and, as expected, none of the other beneficiaries of the trust had filed any documents. Two days before the hearing, however, World Peace Sacramento objected to the settlement. World Peace Sacramento argued that the settlement should be set aside because World Peace did not know that if it did not participate in the proceeding, then it would be excluded from settlement. This is not a meritorious basis for setting aside settlement. Further delays, however, would prove costly, and charities that had settled the case and the caregiver were willing to make a quick settlement with World Peace Sacramento to keep the overall settlement on track. The representative of World Peace Sacramento was not particularly sophisticated, and insisted on nothing less than her day in court and justice for the estate of Helen. World Peace Sacramento refused to consider any kind of settlement.

The hearing on the settlement would be made more interesting by the appearance of World Peace Sacramento, but the parties to the settlement still anticipated that they might salvage the settlement. The opportunity for salvaging it quickly disappeared, however, when the attorneys stated their appearances at the hearing. All of the attorneys who attended the mediation stated their appearances. As expected, there was an attorney representing World Peace Sacramento. In addition, however, there was an attorney for World Peace New York. An attorney for one of the relatives with a $50,000 specific bequest also appeared at the hearing to object to the settlement. The entire gaggle of attorneys stepped outside the courtroom to discuss the case, but the two World Peace organizations were not willing to reach any settlement. The attorney for the relative wanted to cut a deal, but the charities refused

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because it was likely that attorney would not stay in for what was going to be the long haul of the case.

The attorneys returned to the courtroom to continue the hearing. The attorney for World Peace New York complained bitterly about how the charities had just sent the charity a huge stack of papers months ago. The author acknowledges finding World Peace New York's attacks on his client and the attorney who sent the documents to World Peace highly obnoxious. This may color the discussion of World Peace New York in this article. World Peace Sacramento said it was unjust that the caregiver was getting anything. The original charities and the caregiver argued that both World Peaces were too late in appearing in the case. The regular judge was on vacation on the date of the hearing, and a Superior Court staff attorney was acting as a judge pro tem. The judge pro tem was not inclined to make any rulings in what had become a messy matter and simply continued the hearing for 45 days.

By the end of the hearing, the case had become procedurally complicated. There were two different World Peaces claiming to be one of the charities entitled to distribution of Helen's trust. Both World Peaces were in the unenviable position of having to prove which one was the beneficiary of the trust. Once the correct World Peace was identified, that organization would have to show why it was not precluded from participating in the case because it had not timely joined in the action and was barred by the 120 day statute of limitation from the notices by the trustee.[9]

World Peace New York argued that the original charities had tricked World Peace New York into not responding within the statute of limitations by having buried the Probate Code Section 16061.8 notice in several inches of pleadings that were sent to them. The notices were major exhibits to the contest of the terms of the Temporary Living Trust. It is hard to understand why the general counsel of a major charity did not immediately hire counsel after receiving a call regarding litigation and receiving by Federal Express a stack of a couple of inches of pleadings. The pleadings clearly showed that other major charities were involved in this litigation, in which World Peace New York could lose a six-figure gift. More importantly, the pleadings told World Peace New York that it had not initially received pleadings in the case because there was an organization operating in Sacramento incorporated under World Peace New York's name. With that information, the general counsel for World Peace New York decided to do nothing and not to hire any counsel in California until months later—one day before the hearing on the petition to approve the settlement of the case.

The dispute between the two World Peaces points out one of the major sources of litigation with regard to charitable organizations: confusion over names. An Ohio case shows how a charity can lose a substantial part of a gift because of name confusion. In the case, a decedent had drafted a gift to an organization whose name was similar to three different organizations but not exactly the name of any of those three organizations, or any actual organization. In a resolution that would meet with the approval of Solomon, the court simply divided the gift between those three organizations.[10] While this was a practical resolution of the case, it meant that one organization lost two-thirds of its gift and two organizations received a windfall. Charitable organizations should be diligent about making sure that it is easy for donors and their counsel to find the proper legal name for the organization.

Organizations that operate under a different name than their legal name should make sure that they have made

the proper registrations to link both names together and protect the use of both names. In general, it is a better practice for an organization to operate under and be known as its legal name rather than have two different names and risk confusion. In the case of World Peace New York, its name was a fictitious name for Peace Foundation, the actual legal name of the organization. This difference between the common name and the legal name of World Peace New York contributed to the confusion in the case and compromised World Peace New York's claim to the trust.

A charity should regularly verify that no other organization is using its name. This is where World Peace New York fell down. For-profit organizations regularly do searches to protect their names and trademarks. Charitable organizations also need to protect the value of their names. World Peace Sacramento had been operating under that name for several years without the knowledge of World Peace New York. A simple Internet search would have warned World Peace New York of the existence of the organization in Sacramento.

To clear up the mess of the World Peaces, the original three charities filed papers with the court indicating that the two World Peaces needed to resolve which of them was the real World Peace, and then the court could determine whether or not that World Peace had the right to participate in the case. The author's office was investigating World Peace Sacramento and made an interesting discovery. World Peace Sacramento had originally incorporated under the name "Bread Basket." Bread Basket had changed its name to World Peace two years after Helen had signed the trust leaving the gift to World Peace. Accordingly, it was not possible that World Peace Sacramento was the beneficiary of the trust because it didn't have that name when Helen signed the trust. World Peace New York likely was the intended beneficiary of Helen's trust.

The attorneys for World Peace New York had been negotiating with World Peace Sacramento, but had not come to any resolution of the matter. The original three charities had filed documents with the court calling into question which World Peace was the correct World Peace. The three charities had a duty of candor to the court to file a copy of the certificate evidencing the name change of Save the World Sacramento from Bread Basket, and to ask the court to take judicial notice of the name change and the date that it took place. In short, the original three charities won the argument for World Peace New York in its dispute with World Peace Sacramento. The author found World Peace New York's lack of gratitude for this

assistance obnoxious, and, again, this may color this article.

The general counsel of World Peace New York was in an awkward position. As noted above, he had received all of the pleadings in the case and notification that an organization in Sacramento was operating under World Peace New York's name. The general counsel did nothing until he received the notice of proposed settlement showing that the charitable organizations that had timely participated in the case were each receiving $375,000. The general counsel had improperly handled the matter, and World Peace New York was about to lose a lot of money.

Because of the difficult position of the general counsel of World Peace New York, reaching agreement with World Peace New York to settle the case was extremely difficult. On the eve of the next hearing, World Peace New York finally reached an agreement with the other parties. By then, however, one of the other charities that had not participated in the case filed papers indicating that it too wanted a share of the trust.

At that hearing, the judge pro tem was again on the bench and was again unwilling to make any rulings or decisions. Once again he continued the matter for 45 days. During this second continuance of the hearing to approve the settlement, the sixth and final charity finally appeared and indicated that it wanted some of the money as well.

The original parties to the settlement filed various briefs as to why the late parties should be excluded from the case. The original three charities that had contested the trust and the caregiver and other beneficiaries of the Temporary Living Trust now became allies against the late charities. The parties to the settlement argued that the late charities should not be able to intervene in the case because their challenge to the trust was barred by the statute of limitations. The original charities and the beneficiaries under the Temporary Living Trust wanted to save the settlement because, as noted above, both groups were in better positions than either would be if the case went to trial.

Since the trust notice statute that imposed the statute of limitation on the late charities was only a few years old, there were no cases interpreting its provisions. The long-standing California will contest statute, however, imposes a statute of limitation similar to the trust notice statute. The will contest statute provides a short period of time after a will has been admitted to probate for a contest to the will.[11] In a case interpreting the will contest statute, one party had contested the will and then reached a settlement.[12] A party who had not contested the will within the statute of limitations or participated in the settling party's contest then tried to set aside the settlement. The court upheld the settlement and did not allow the late party to enter the case. Obviously the other side made different arguments,

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but looking at the case now not as the advocate, but in this review, the precedent from the will contest likely should have controlled the participation of the late charities.

One area of doubt, however, was the situation of World Peace New York. By the time World Peace New York appeared in the case, 120 days had run since it had received the initial stack of pleadings including the trust notices and the copies of the two versions of the trust. Courts, however, construe notice requirements narrowly and technically. The notices had been mailed to World Peace by a party and as part of a pleading. The notice statute requires the notice to be sent by the Trustee and does not sanction including the notice with other documents. There was a strong possibility that the court would not apply the statute of limitations to World Peace New York for these reasons. If World Peace New York could join the case, the court might allow the other late charities to join the case, even if those charities otherwise would be barred, since the case would be proceeding with World Peace New York in any event.

By filing papers that it is permissible for a charity to contest a trust after the statute of limitations has run, the late charities may have been taking a position that, while helpful to them in the current case, could prove detrimental in future cases. These were national charities that in ordinary circumstances would be expected to be timely in their filings. More often than not, these charities would be in the position of making an advantageous settlement that excludes less well organized beneficiaries that did not timely participate in the litigation.

The possibility of late charities had been discussed with the mediator, who was a well regarded former probate judge as noted above. His conclusion, and the experience to date of the other attorneys in the case, was that the late charities would be barred from joining the case. When the parties finally had a hearing before the sitting probate judge, however, he was no more interested in making any decisions than the judge pro tem. Before any of the counsel could make any arguments at the hearing, the judge ordered all of the parties before the court to return to mediation.

The downtown Los Angeles Court has a crowded docket, and the judges take every opportunity to get cases resolved in mediation. While this directive was expedient in the current case, it potentially created problems for parties in future cases. The judge's ruling created the possibility that a party might skip a mediation and then object to the petition for approval of settlement after the other parties have bargained down their positions. Parties may be reluctant to make their last best offer in a mediation if they are concerned that there will be second round of negotiations, and cases may not settle if the parties are trying to leave more room for an additional round of negotiations. With respect to Helen's Trust, the judge indicated that

although he was ordering a mediation that included the late charities, the parties should not read the ruling as an indication that he would rule in their favor of allowing the late charities into the case if he actually was forced to decide on whether they were barred by the statute of limitations. So being late would be a risky strategy nevertheless, and perhaps the judge figured that was sufficient to discourage parties from attempting to game a mediation process in the future. In this case, the charities were late due to lack of diligence, not as an attempt to game the mediation process.

The ruling does, however, leave charities in the difficult position of participating in litigation when some of the potential beneficiaries of the trust or estate have refused to participate or appear in the litigation. It may be necessary to ask the judge for a ruling in advance of mediation regarding parties that do not participate, or to seek to settle the case in a way that does not require a petition to approve the settlement that can be attacked.

It was nearly three months out before a date could be found that all of the parties and their attorneys could get together to conduct the second mediation. On the eve of the second mediation, we learned that the mediator had a death in his family. It looked like the case would be delayed for several more months. In an amazing act of service, however, recognizing the challenge the parties had faced in setting the second mediation, the judge told the parties that he would conduct the mediation as planned.

At the start of the mediation, the trustees advised all the parties that the trust had about $2 million in it, not $2.3 million as originally estimated at the first mediation. The value had decreased because the real estate in the trust had not sold for as much as expected because of its poor condition. This meant that there were more parties dividing up a smaller pot. From the outset, there was a lot of anger among the parties. The original three charities were upset that they had done all of the work in the case and had gone through a mediation, only to have the late charities trying to join the case once it had become a sure thing that there would be some money. The late charities were angry with the original three charities for giving their money to the caregiver. World Peace New York, in particular, was bitter about the process. In addition, the general counsel of World Peace New York was not looking at the case objectively, but was there to remedy his own mishandling of the case. In the earlier agreement reached with World Peace New York, it had agreed to accept $225,000, an amount that mostly came from the caregiver. Notwithstanding that more parties were dividing up a smaller pot, World Peace New York said it hoped to get more money from the mediation.

In the earlier deal with World Peace New York, the original three charities had each reduced their share by $10,000 to $365,000. At the mediation, each of the original three settling charities fairly quickly offered to reduce the amount that each would take from the settlement from $365,000 to $340,000. The original charities still would receive more than they could obtain by trying the case. In this case that amount would be one-sixth of $2 million. That $2 million, however, would be reduced by attorneys' fees as well as the cost of administering the estate. Accordingly, the amount to be divided would probably be, at most, $1.8 million or $300,000 per charity. Accordingly, the $340,000 was still a great settlement for the original three charities. The caregiver and the other beneficiaries of the Temporary Living Trust conceded significant additional sums, since the likely outcome at trial for the beneficiaries of the Temporary Living Trust was that they would receive nothing. The discussions continued throughout the day with the gap between the parties shrinking.

By mid-afternoon, the parties were approximately $30,000 apart. At this point, the retired judge who was acting as mediator indicated that he was needed at home. He asked the parties to finish up the mediation on their own. It seemed like a relatively easy task to finish the mediation given the modest amount remaining between the various sides. It took nearly five hours to find the $30,000.

The difficulty in finishing the mediation was caused by two factors. First, before leaving, the judge had talked to each of the parties and explained that he was running out of time. He asked each party for a bottom line number. Most of the parties, out of respect for the commitment the judge had made in participating in the mediation, honored his request and gave him their real bottom line rather than holding back for further negotiations. The original three charities, for example, reduced their amounts by $25,000 from $340,000 to $315,000. Second, World Peace New York continued to maintain its completely unreasonable expectation that it should receive more money from the mediation than it had earlier agreed to accept. The retired judge would have been more effective than the other parties in persuading World Peace New York to be realistic.

The next several hours were spent dragging more money from the beneficiaries of the Temporary Living Trust, who still had the most to gain from the settlement and pressing World Peace New York to make a contribution to the settlement. By approximately 6:00 in the evening, the parties were $10,000 apart. The author suggested to World Peace New York that if it put in $5,000, the author could get the last $5,000 from the other side. World Peace New York's response was to ask the other side to commit the $5,000 first. The author agreed to get the $5,000 with the stated expectation that World Peace New York would provide the other $5,000. Ironically, the beneficiaries of the Temporary Living Trust had come up with $8,000.

Frustrated with World Peace New York's negotiation tactics, the author told the caregiver's attorney that only $5,000 was needed. When presented with the $5,000 from the beneficiaries of the Temporary Living Trust, World Peace New York's attorney then tried to game the situation and suggested that the other charities each put in some of the $5,000. The general counsel for World Peace New York objected to the tactic, but was concerned that he was being advised by his attorney to take that approach. The representative of one of the other charities, however, assured him that he was the client and could direct his attorney to accept the settlement. The general counsel promptly did so, and the case was finally resolved.

At this stage, the parties had a yellow pad of paper with lots of different numbers scratched out on it. A settlement should be completely memorialized in writing before the parties leave the mediation. It is easy for a settlement to drag on or unravel if the parties come to a basic agreement, but do not memorialize it at the mediation. Either because of genuine misunderstandings that didn't get clarified or because a party is trying to take advantage of the opportunity, negotiations after the agreement has

been reached can become protracted and can result in the settlement falling apart.

In most instances, it is possible to anticipate 90 percent or more of the terms that will be in the settlement agreement. In this case, the only unknown was really the percentages or amounts that the parties would receive. The author brought to the mediation a laptop computer and disk with a shell of a settlement agreement. The document had the names of all of the parties in it, blanks for percentages or amounts for dividing up the assets of the trust, and standard provisions for a settlement agreement such as mutual releases and provisions allowing the mediator to resolve disputes about the settlement if any arose. Once the blanks for the amounts for each party were filled in, there were virtually no changes to any other provisions of the agreement. By having the agreement in advance, it allowed the parties to document the settlement in full in a short amount of time and avoid any risk of the settlement unraveling at a future date.

When the dust had all settled, the final agreement provided $315,000 to each of the three charities who had participated in the litigation from the outset. World Peace New York received $205,000, and the other two late charities each received $100,000. The remaining $350,000 balance of the trust went to the caregiver, the caregiver's family and the other beneficiaries under the Temporary Living Trust, including the charity named in that document. The trust expenses also came out of the $350,000.

Obviously, the original charities would have been happier with the original settlement that gave them more money and was reached before they had incurred additional legal fees. On the other hand, the money that they were receiving was still the same amount or more than they would likely receive if they had tried the case and prevailed. Accordingly, for them, it was a good settlement. The amounts accepted by the late charities also represented their relative risks. World Peace New York having the argument that it was not given proper notice had a stronger position than the other two charities, and therefore received a greater amount of the settlement. At the end of the day, the late charities were able to make recoveries. These charities, however, received significantly less than they would have received had they timely participated in the case.

As noted at the outset, the case of Helen's Trust has many lessons for charities regarding litigation. Those lessons are as follows:

- Gifts to charitable organizations in wills and trust should include more identifying information than just the name of the organization. If the drafter of Helen's Trust had included an address for the charitable organizations, the confusion of the World Peaces might have been avoided entirely. Care needs to be used when adding the additional identifying information to be certain that it is correct for the organization in question. If the information is added, but is incorrect, instead of resolving ambiguity, it will create ambiguity.

- Charities need to monitor and protect the use of their name. Had World Peace New York been vigilant about protecting its name, it would have received the information regarding the case in a timely manner.

- Parties giving notice to charitable organizations need to be especially careful of the possibility of the existence of organizations with the same or similar names. Even when a litigant has found an organization with the exact same name as the charity specified in the document, as was the case with World Peace Sacramento, it is possible that the organization is not the organization named in the document. Additional searches through Internet search engines such as www.guidestar.org, the IRS website and attorney general web sites should be used to determine if more than one organization might have a potential claim to a gift.

- A party to a case involving charities may wish to check the service list created by another party to

insure that proper diligence has been used in giving notice to parties.

- Charitable organizations need a process in place to quickly review and respond to legal notices. In most litigation, there are time limits by which a party must respond or participate in the litigation. A charity needs a knowledgeable person who can review legal notices and quickly direct them to outside counsel when necessary. The late organizations in Helen's Trust had not even contacted outside counsel until after the time limit to contest the trust had run. Outside counsel did the best they could under the circumstances for the late charities, but their clients' positions would have been much stronger had outside counsel received information regarding the case in a timely manner.
- Charities cannot rely on attorneys who do not represent them to protect their interest. At one point during the proceedings, World Peace New York indicated that it had anticipated that the other charities would look out for its interest. This expectation, if genuine, was antithetical to the legal obligations of the attorneys for the other charities. A charity that wants to have its interests in a proceeding protected must retain its own counsel to protect those interests. Furthermore, the charity must file its own papers to become a party to the action so that the charity has a legal claim that only the charity can agree to dismiss.
- These cases and settlement negotiations are only about money. The initial settlement of the case arguably was an unjust resolution because the caregiver received much more money than she was entitled to receive or the merits of her case would support. It was, however, a resolution of the case acceptable to all of the parties participating in the mediation. The charities who agreed to that settlement had been made whole by the settlement, and there was no reason for them or their attorneys to argue for more. Even the second settlement likely gave the caregiver more than was just. Again, however, the mistakes of some of the other charities had compromised their legal positions and created the opportunity for the caregiver to receive the greater amount in the settlement. In most settlements, a charity will receive less than what it would receive had there not been any litigation. The charity must accept the fact of the litigation and evaluate settlement in light of the litigation.
- Delaying settlement exposes a party to the continued risk of litigation. All of the parties were surprised at one stage or another by the various developments in the litigation regarding Helen's Trust.

A lifelong music lover, Maria never missed a classical concert. The works of the old masters made her heart soar. Other hearts will soar because Maria included a bequest to the symphony in her will.

Thanks to Maria, her beloved orchestra won't miss a beat. Include your favorite cause in your will or estate plan. Contact a charitable organization, attorney, financial advisor or local LEAVE A LEGACY® program to learn how.

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There are lots of reasons that the two World Peace's would have been reluctant to settle at the first hearing. Had the two World Peace charities reached an agreement with the other charities and the caregiver at the first hearing, however, they might have received more money from the case. At that time, the caregiver believed the trust real estate to be more valuable than it was, and there were fewer parties seeking a portion of the trust. World Peace Sacramento clearly would have been ahead since it ultimately received nothing. The lawyers representing these charities had lots of reasons for wanting to develop the facts further and perhaps better establish their claims. A party should be always mindful, however, that the passage of time can easily allow for the development of unfavorable facts as well. Legal fees continue to grow as well when a case is not settled.

Obviously charities do not wish to face litigation regarding their gifts. As illustrated in the situation of Helen's Trust, however, circumstances beyond the charity's control may require the charity to participate in litigation to protect a gift. A natural byproduct of a successful bequest or planned giving program will be disputes regarding those gifts. If charities and their counsel are thoughtful about the litigation and remember the lessons of Helen's Trust, the charities' responses to such litigation will be more effective.

[1] Reynolds T. Cafferata, "Avoiding And Responding To Litigation: Advice for the Charity and the Practitioner," *Proceedings of the National Conference on Planned Giving 2004*, p. 73.

[2] Cal. Prob. Code § 16061.7.

[3] Cal. Prob. Code § 16061.8.

[4] This is not its real name, and if there is an organization actually named World Peace, that organization was not a participant in this case.

[5] Mediation is a process in which all the parties must agree to the result. The mediator only has the power of persuasion to help the parties reach agreement. Mediation is different from arbitration in which the arbitrator has the power to determine the outcome for the parties.

[6] *See In re Graves' Estate* (1927) 202 Cal. 258, 262-63; *Estate of Lind* (1989) 209 Cal. App. 3d 1424, 1430; *Estate of Baker* (1982) 131 Cal. App. 3d 471, 483; *see also Estate of Garibaldi* (1961) 57 Cal. 2d 108, 113.

[7] The author's client did not challenge the later typewritten will because there was not sufficient evidence of lack of capacity, undue influence or any other theory that would justify invalidating the will.

[8] Cal. Rul. Prof. Cond. 3-310.

[9] Cal. Prob. Code § 16061.8.

[10] McDonald & Company Securities, Inc. Gradison Division v. Alzheimer's Disease and Related Disorders Association, Inc. et al., 747 N.E.2d 843 (Ohio App., 2000).

[11] Cal. Prob. Code §§ 8251, 8270.

[12] Estate of Walters, 89 Cal. App. 2d 797 (1949).

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