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IRS ISSUES

Charity Naming Rights: A Provocative Idea

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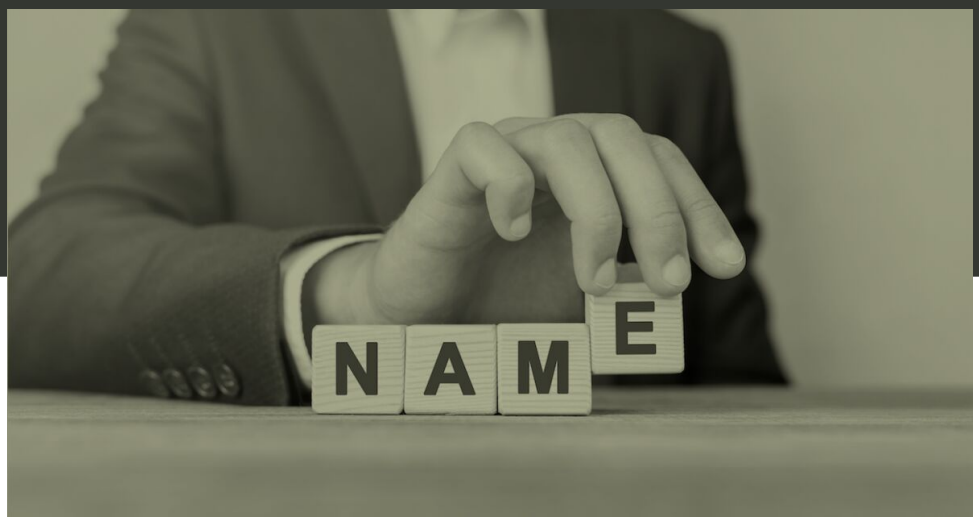

Philanthropic naming rights "…are the charitable cousin of corporate – commercial – naming rights." In *Naming Rights: It's a Philanthropic Jungle Out There* (March 2, 2015), we explained that "…huge amounts of money – donated, of course, instead of invested – swirl around the rights to have one's name catapulted into philanthropic super-stardom. Billionaires jostle for the privilege of contributing to society and being publicly recognized for it."

It's not unusual for naming rights to a building of a major cultural institution to fetch over $100 million. As the tax law currently stands, the billionaire philanthropist making the gift is entitled to use that $100-million figure as the key amount on which the charitable deduction is then properly calculated.

In December 2017, William A. Drennan of Southern Illinois University School of Law published a provocative law review article suggesting a change. In *Conspiculous Philanthropy: Reconciling Contract and Tax Law*, 66 Am. U. L. Rev. 1323, Professor Drennan proposes acknowledging that the gift provides a major benefit to the donor as well as to the donee, and reduce the tax deduction by the value of that benefit.

In the following months, two more law professors – Wake Forest's Joel S. Newman and Fordham's Linda Sugin – have chimed in on this interesting proposal with their own critiques and suggestions.

This reading is not for the faint of heart: These are "deep-in-the-weeds" scholarly treatises. Happily, there are helpful abstracts for those not inclined to get mud on their footwear.

Naming Rights: Contract Law

Professor Drennan uses a well-publicized case about the controversial and difficult renaming, a few years, of the Avery Fisher Hall at New York's Lincoln Center to illustrate his point that naming rights are valuable assets and should be treated that way. (That's the example we, too, used in our March

2015 post.)

In 1973, Avery Fisher, an industrialist who was deeply immersed in classical music, gave $15 million to renovate an existing symphony hall. In return, he was honored with naming rights in perpetuity. Of course, this building that had needed updating in 1973 was bound to again need major improvements decades later. But with inflation and the soaring popularity of charity naming rights, it was inevitable that Lincoln Center would have to offer the new benefactor this type of recognition. Mr. Fisher's heirs balked; only after protracted litigation and negotiations, did they relinquish the naming rights in return for repayment of the original $15 million. They also won additional new perks for the extended Fisher family. Here's the conundrum: The naming rights "sold for $15 million;" but the "IRS treats these publicity rights as worthless when charities grant them, and this generates substantial tax benefits for the donor and the donor's family."

In many other situations, the IRS requires donors to subtract the fair market value of benefits when calculating what percentage of a charitable "donation" is tax deductible.

Professor Drennan examines how and why – historically – the naming-rights donors are treated differently than the ordinary donor who must take into account the value of the benefit received. He labels this the "tax approach" and posits that it is "outdated and inconsistent with U.S. Supreme Court precedents."

He then explains that the "common law can treat these publicity rights as valuable consideration supporting an enforceable contract, and a charity may be liable for damages if it renames a building." There are questions, though: "Why the contradiction? What are the consequences? Should we reconcile these positions? How?"

Professor Drennan concludes that the "common law contract approach is well-suited for today's mega-million dollar charitable building naming rights deals" and should be seriously considered and adopted.

Thoughtful Responses

In *Conspicuous Philanthropy: A Response*, *American University Law Review Forum*, Vol. 67, No. 1, 2018 (March 13, 2018), Professor Joel S. Newman offers his thoughts.

To make Professor Drennan's proposal work, "there must be a way to determine (1) which categories of naming rights might be significant benefits; and (2) how such benefits can be valued." Drennan had tried to distinguish between "significant" naming rights and more minor ones – for instance, naming a donor among many others in an event publication. "However," writes Professor Newman, "there are a lot of rights in between that should be addressed."

While Drennan suggests that donors and donees might agree, up front, on the naming rights' value, Newman points out that "such agreed valuations will also serve as liquidated damages, making it easier for donees to renege. As a result, donors will probably limit the duration of their naming rights." But "that would be a step forward."

In *Competitive Philanthropy: Charitable Naming Rights, Inequality, and Social Norms*, 79 Ohio St. L. J. 1 (forthcoming 2018), Professor Linda Sugin of Fordham University School of Law approaches this

proposal from a sociological perspective that can address rampant "income inequality" in today's America. Major gifts of $100 million or more are not unusual, and "in return for their mega-gifts, the biggest donors get their names on buildings, an astonishingly valuable benefit that the tax law ignores. The law makes no distinction between a gift of $100 and a gift of $100 million."

She suggests that the "tax law of charity" should encourage and celebrate what this Article calls 'competitive philanthropy,' which defines philanthropic success as inspiring others to exceed your generosity." She proposes – to this end – a "legal regime that includes both more and less generous elements for donors than current law."

Conclusion

With the surge in naming-rights popularity showing no indication of waning, it is perhaps long overdue for the philanthropic community, along with academics, legal experts, and lawmakers, to embark on this discussion.

— Linda J. Rosenthal, J.D., FPLG Information & Research Director