



NAEPC

# Journal of Estate & Tax Planning

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# **Crowdsource Funding to Help Victims of the Las Vegas Massacre**

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## **Introduction**

One of the authors just received a call to assist those helping one of the hundreds of victims of the Las Vegas shooting with some questions concerning a crowdfunding effort. What initially seemed like a simple question, which that might help one victim struggling with unfathomable challenges, following an equally unfathomable mass shooting, grew into something more. The questions grew and it became clear that they may affect the hundreds of victims of the Las Vegas shooting and thousands of others, e.g. those devastated by the recent hurricanes, for whom crowdfunding sites have or are being created. The issues are numerous and complex. Some of the challenges to better help those that have used crowdfunding sites may well be dealt with by guidance from the IRS or perhaps Congress. Perhaps the magnitude of the tragedy, and the need for common sense guidance illustrated throughout this article, will motivate quick and compassionate action.

The needs of so many are great. In addition to providing technical guidance to help victims and their advisers, hopefully this article will alert readers of the existence of crowdfunding campaigns they might contribute to, in order to directly help victims.

Despite the substantial sums of money raised annually by crowdfunding sites there seems to be little law, and even less guidance, for those using this vehicle. Some of the issues identified may at least put advisers, the public, and those creating crowdfunding campaigns on notice of steps that might help them achieve their goals with greater success, and some of the questions they should at least consider asking.

The comments following should be viewed at most as “preliminary” because to circulate this quickly to help the many in need, there simply was not time to properly research and evaluate what appear to be a rather considerable number of issues involved.

## **Crowdfunding**

“Crowdfunding is the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet. <sup>[1]</sup> Crowdfunding is a form of crowdsourcing and of alternative finance. In 2015, it was estimated that worldwide over US\$34 billion was raised this way.”

## **Help Las Vegas Massacre Fund Raising Efforts**

Clark County Commission Chair Steve Sisolak set up a GoFundMe page or campaign, a private crowdfunding platform, to request charity for those injured in the massacre.<sup>1</sup> The description on

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<sup>1</sup> Zaid Jilani, “Las Vegas Official Sets Up GoFundMe to Aid Shooting Victims — the Price of No Universal Health Care,” October 2 2017, <https://theintercept.com/2017/10/02/las-vegas-shooting-gofundme-health-care/> .

the GoFundMe platform stated: *“I’m Steve Sisolak, Clark County Commission Chair from Las Vegas. We are raising funds to assist the victims of the tragic Las Vegas shooting. Funds will be used to provide relief and financial support to the victims and families of the horrific Las Vegas mass shooting.”*<sup>2</sup> Anyone seeking to help victims can use the link in the footnote to donate, which may not be tax deductible and may have minor but perhaps adverse gift tax consequences, as explained later.

In addition to the above effort, and likely other crowdfunding efforts, to aid all victims of the Las Vegas shooting, crowdfunding campaigns have been created for individual victims as well. For example, there are campaigns on GoFundMe, YouCare, and likely other sites, targeted to help individual victims severely injured in the Las Vegas shooting. Many other campaigns exist to help those devastated by recent hurricanes, as well as other emergencies and disasters.

### **Enhance Crowdfunding Campaign Results**

Clearly the priority for victims, those creating the various campaigns, like Steve Sisolak, the victims’ families and loved ones is raising funds to assist in meeting the unanticipated financial challenges they all face, in addition to the unfathomable human and personal difficulties that has befallen them. In racing to help, it appears that few have given consideration to the various legal, tax and some other issues that not only should be considered, but which might help better achieve the goals of these campaigns. Some of these issues, addressed in this article, include:

- Can the donations be made tax-deductible to the donors to increase the amount of donations and perhaps the number of donors? For donations to benefit victims generally, not specific victims, this might be feasible.
- Can more accountability of the use of the funds donated be provided to increase the likelihood that funds raised are used as intended, and that the victims are protected?
- Can legal structures be provided that safeguard the funds raised for their intended purpose? For example, if the funds are owned by, or given to, a particular victim, will those funds be entirely consumed by medical care costs that, perhaps, Medicaid might otherwise cover? If so, might a supplemental needs trust arrangement be grafted onto the campaign to protect those funds to serve their intended purpose of helping a victim with the many expenses Medicaid will not cover, and preserving some of the funds to help the victims rebuild their lives?

Several other issues are also addressed that may be relevant to those creating crowdfunding campaigns and those hoping to benefit from them.

### **Crowdfunding Overview**

Crowdfunding is the practice of funding a charitable campaign, personal campaign, or even a commercial project or venture, by raising many small dollar amounts from large numbers of people, typically visitors to a crowdfunding internet website. Crowdfunding is also referred to as crowdsource funding. In 2015, it was estimated that worldwide over \$34 billion was raised as an

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<sup>2</sup> <https://www.gofundme.com/dr2ks2-las-vegas-victims-fund> October 7, 2017.

alternative financing source using crowdfunding.<sup>3</sup> The sharing economy in 2015 is estimated to be \$15 billion and projected to grow to \$335 billion by 2035.<sup>4</sup> These dollar figures will transform charitable giving and fundraising in the US and worldwide. Traditional charities are pursuing crowdfunding concepts but, as explained later in this article, traditional charities may have a key role to play in partnering with crowdfunding campaigns that may grow. This is pertinent to the public crowdfunding campaigns to help victims of the Las Vegas shooting as well. But existing charities cannot partner with crowdfunding programs assisting a specific individual as that would have adverse tax consequences to those existing charities.

This modern charitable-type of crowdfunding typically includes the following participants:

- Campaign Organizer (sometimes referred to as “project initiator” in a business crowdfunding context) who proposes the idea and/or project to be funded, and who under the terms of service agreement of the crowdfunding site may have responsibility for the project, and the sole right to withdraw funds (unless the recipient or others are provided that right). A new and important variation on this role will be introduced later in this article, of the campaign organizer as a nominee for a trust or other vehicle to receive the proceeds raised.
- Donors – these are the website visitors, often reached through social media exposures of the campaign. These may be individuals or groups who support the idea, and make donations to the campaign.
- Recipient – the person or group of people (beneficiary) who will benefit from the campaign, e.g. a victim of the Las Vegas shooting.
- Crowdfunding Site – this is the website organization that provides the platform that brings the parties together to launch the funding campaign. The terms of service agreement of the crowdfunding site appear to be the primary, if not only, substantive legal document in most of these arrangements. As will be explored below, most of these contain such generic terms, and sometimes incorrect terms, that they may undermine the intent of the donation campaigns, including those funding help for victims of the Las Vegas shootings. Simple changes to both the platforms and terms of service will be suggested that could be effectuated to enhance the flexibility and success of many campaigns.
- Public Charity Partner – this is a concept that may have loosely or informally been used in some or many instances but which might be formalized and used with greater frequency by those creating campaigns to help the public generally and thereby secure income tax deductions and provide accountability.

The phrase “charitable-like” was used because crowdfunding charitable campaigns often do not conform to what is typically viewed as traditional charitable giving. The sponsors are often not public or traditional charities, the “donations” are often merely “gifts” and not deductible contributions for income tax purposes, and the reporting of the use of funds may be non-existent

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<sup>3</sup> <https://en.wikipedia.org/wiki/Crowdfunding> October 7, 2017, citing Barnett, Chance (June 9, 2015). "Trends Show Crowdfunding to Surpass VC in 2016". Forbes. Retrieved June 29, 2016.

<sup>4</sup> PwC <https://www.youcaring.com/c/crowdfunding> , October 7, 2017.

in contrast to the oversight and reporting requirements of traditional charities. The crowdfunding site terms of service disavow responsibility for the use of the funds raised.

Crowdfunding has been used to fund a wide range projects, payment of medical expenses, funeral arrangements, community-oriented social entrepreneurship projects, and more. With respect to the Las Vegas shootings various crowdfunding sites are now raising monies for all these purposes. There are a tremendous number of campaigns to help victims of recent hurricanes.<sup>5</sup> Certainly, a noble endeavor. Requesting gifts from strangers for medical bills is ubiquitous in the United States. A report by NerdWallet released in 2015 found that \$930 million of the \$2 billion raised by GoFundMe since its 2010 launch have been related to medical bills.<sup>6</sup> Consider, as discussed in more depth below, that if most of these gifts could have been restructured as tax deductible donations, at even a 20% assumed marginal income tax rate of the donors, that would be nearly \$200 million of lost tax benefits. Consider further that these campaigns are created because the US government too often leaves medical and ancillary health care costs to the individual. However, less than optimal tax planning of many crowdfunding medical campaigns unduly enriches the government coffers by failing to qualify for income tax deductions for donors.

Crowdfunding sites that might be used to raise funds for victims of the Las Vegas massacre and other tragedies might include: YouCaring, GoFundMe, Fundly, Booster, Givetaxfree.org, GiveForward, and others. In addition, people can and do create their own websites to raise funds, perhaps in a comparable manner.

### **Campaign Description**

At the heart of a campaign to raise funds for a victim of the Las Vegas shooting, or any other disaster or cause, is the verbiage on the crowdfunding site or website home page of the campaign. The description of the campaign purpose may be relevant to the tax and legal implications of the campaign, and pertinent to what remedial steps might be feasible. It may be advisable for the campaign organizers to immediately modify some of the descriptions they are currently using to facilitate better results depending on the circumstances of the campaign and particular goals.

**Example:** Here is an illustrative campaign statement: “*We are raising money to cover all expenses related to this tragic event such as traveling, food, hotels, missed work, and caring for [Person’s Name].*” Might it be argued that the purpose of the fund was to provide for more than medical care and the failure to fund a supplemental needs trust (explained below) will defeat the campaign’s objectives? Nothing in this description suggests that the intended recipient can directly withdraw funds which may be important to improving the results of the campaign. That is important if a position may be taken, as described below, that the campaign organizer, and not the recipient has so control over the funds. Perhaps, an improvement to this campaign mission statement might be as follows: “*We are raising money to cover all expenses related to this tragic event such as traveling, food, hotels, missed work, and caring for [Person’s Name] to the extent*

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<sup>5</sup> See, <https://www.gofundme.com/mvc.php?route=category&term=hurricane> .

<sup>6</sup> <https://en.wikipedia.org/wiki/Crowdfunding> October 7, 2017.

*not inconsistent with the laws governing supplemental needs trusts in the state of [victim's home state]. The Campaign Organizer will hold funds as a nominee for such trust.”* The rationale for these modifications will be discussed later. This alternative may be better because the funds will be protected, governing programs such as Medicaid may pay medical bills, and the funds raised in the campaign might be preserved to cover expenses government programs will not cover, such as additional therapy, private nursing and more. is?

**Example:** Here's another campaign from a different website: “...*after falling victim to the Las Vegas attack. she leaves behind a large, devastated family and four beautiful children. We ask that you donate to help support her family during a time of difficult loss. The money will go towards medical expenses from the United States, funeral expenses and a children's fund for the precious children whom she left behind...we hope that we can take away a small burden for all those involved by giving back to them this way.*” Might the portion of funds raised for the victim's children be better preserved and tax advantaged if gifted to a 529 college savings plan? A discretionary trust (explained below) would better protect the funds for all these purposes, especially the minor children. Perhaps, the mission statement could be modified to read as follows: “...*after falling victim to the Las Vegas attack. She leaves behind a large, devastated family and four beautiful children. We ask that you donate to help support her family during a time of difficult loss. All funds collected will be held by the Campaign Organizer, as nominee, and distributed as follows: (1) 80% to a trust to be created for the family and children; and (2) 20% to 529 college savings plans for the children. The trust monies will be used to address medical expenses, funeral expenses, and care for the children left behind...we hope that we can take away a small burden for all those involved by giving back to them this way.*” This would provide better protection for the family and children, more accountability, and perhaps that might be used to encourage larger or more donations. Because the campaign is for a specific individual no income tax deduction will be permitted.

**Example:** The site mentioned above for all victims listed its mission statement on the crowdfunding page including the following verbiage: “*Funds will be used to provide relief and financial support to the victims and families of the horrific Las Vegas mass shooting...*” What if instead the following were used, and actually reflective of the arrangement made: “*Funds will be used to provide relief and financial support to the victims and families of the horrific Las Vegas mass shooting. Funds will be held by the Campaign Organizer as agent on behalf of [existing charity] who will assume responsibility for distribution of funds to victims and local organizations serving them. Because all funds are to be considered those of [existing charity] donors may qualify for an income tax charitable contribution deduction for all gifts.*” Might the tax advantages of providing a deduction to donors be facilitated by an existing charity handling the distributions? It does not appear that this could be done for a named individual and yet remain charitable for tax deduction purposes. Might the credibility and accountability of an existing known charity subject to the IRS reporting and other regulations governing charitable organizations enhance the credibility of the campaign and encourage more and bigger donations?

The Clark County Commission Chair Steve Sisolak who was behind the GoFundMe page purportedly donated \$10,000 himself. This particular campaign is structured as LAS VEGAS VICTIMS' FUND a tax-exempt charity. It appears that many other campaigns are not, but perhaps more could be. At least one donor to this campaign was surprised to learn after a gift that it was in fact deductible. See the comments below concerning the terms of service of this platform concerning deductibility. If he were in a 35% tax bracket, that could be a forgone \$3,500 tax deduction without the recipient qualifying as a charity. The concept introduced above, of a "Public Charity Partner" might solve this issue. It would be helpful for the IRS to provide lenient guidance in this regard, so that existing crowdfunding sites can be revamped and qualify. So long as the funds are held for, and turned over to, an existing qualified charity to be used as provided in the campaign description, there should be no negative implications. Also, increased accountability will be fostered, and the tax deduction rules can be modernized to reflect the burgeoning growth of crowdfunding as a new component of charitable fund raising.

Thus, the details of the campaign terms might have important implications to whether the funds can be better characterized to serve the needs and goals being pursued. Unfortunately, those compassionate family, friends or community members creating the campaigns likely do not have the time or ability to hire advisers to plan the campaign in a more tax or legally effective manner. Perhaps with some general guidance, a modicum of from the IRS leniency (see below, e.g. as to the transition of existing campaign funds to charities, etc.), compassionate legislation from Congress (e.g., a 529A equivalent for the present interest test as discussed later), and a bit more sophistication by the various crowdfunding sites (articles and resources explaining the issues to users), the noble goals of many of these campaigns can be significantly enhanced. The website platforms serving this niche might add explanatory articles about the different options and how to achieve them, albeit disclaiming liability and recommending that each campaign organizer hire legal and tax advisers. However, at least bringing attention to some of the options that campaign organizers might wish to avail themselves of, in a visually obvious way, may do much to improve the results for all, especially those so desperately in need of help.

### **Whose Funds are They**

Who controls or owns the fund in the campaign? In some instances, this may be a key decision. It may prove advantageous for funds to be held in a campaign to benefit the public (e.g., all victims of the Las Vegas shooting) pending distribution to a public charity for those campaigns seeking income tax charitable contribution deductions. In the case of a campaign for an individual (e.g., a specific victim of the Las Vegas shooting) for the campaign funds to be held in some type of trust to protect the recipient of the campaign. A threshold issue as to whether this will be feasible may in part depend on who owns, or has control over, the funds in the particular campaign. This is critical to determining the tax and legal consequences and what might be done to improve the amorphous status of many campaigns. It would seem that the terms of service agreement on the hosting crowdfunding platform involved would govern. While there may be other possible agreements that govern, they are likely oral arrangements at most, and perhaps only vaguely understood. These other agreements might include an oral agreement between the campaign organizer and the intended recipient, or an implied agreement between the campaign

organizer and the donors as to the agreed use of funds. In either of these situations, a court may have to interpret the layman's verbiage on the campaign page, to identify terms.

The terms of service agreement for GoFundMe provide: "*Withdrawing Donations from a Campaign: You, as a Campaign Organizer (or, as applicable, the beneficiary designated by the Campaign) may withdraw Donations to your Campaign at any time up to the full amount of all Donations credited to your Campaign...*"

If the intended recipient is also the campaign organizer who has power to withdraw, it may be more difficult to maintain that the funds are held by the campaign organizer as a nominee for the intended recipient. Thus, it might be advantageous in all cases for the campaign organizer to be someone other than the intended recipient. If that is not the arrangement on an existing campaign site the current recipient/campaign organizer should replace his or her name with the name of another. Of course, this might make the campaign organizer a fiduciary and thereby create certain duties and liabilities to the recipient. This modification may not be binding on the tax authorities or a governing agency seeking to overturn the restructure of the campaign to fund a trust or pass funds to a public charity. It might be preferable if the funding sites modify their terms of service mandating that if any recipient (beneficiary of the campaign) is also serving as campaign organizer, that they must resign and name someone else. At least in that manner the action will be dictated by a third party, not by the actions of the individual controlling the funds. Acknowledgement by the IRS and other appropriate authorities that such a transition may be ignored for tax or means testing (explained below) would be helpful in this regard. The various crowdfunding platforms might suggest in the templates used to organize campaigns that the campaign organizer be someone other than the intended recipient.

### **Issues When Funding for a Group of Victims or an Individual Victim**

While some of the preceding discussions have mentioned various considerations of a campaign and how they differ for public versus individual recipients, the following summary by each may provide additional clarity.

Funding for a group endeavor, like the general crowdfunding site for Las Vegas victims on GoFundMe started by Steve Sisolak noted above, are different than the issues that might face a crowdfunding effort for an individual. The group of individuals that may receive assistance is called a "charitable class." This group must be large enough, or sufficiently indefinite, that the community as a whole, rather than a pre-selected group of people, benefits when a charity provides assistance. For example, a charitable class could consist of all the individuals in a city, county or state. This charitable class is large enough that the potential beneficiaries cannot be individually identified and providing benefits to this group would benefit the entire community.<sup>7</sup> For group efforts that meet the above requirement (like those benefiting all affected by the Las Vegas shooting), the consequences seem to be as follows:

- Income tax deduction to donor – these campaigns may meet the requirements necessary for an income tax deduction, and may be able to partner with an existing charity to

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<sup>7</sup> <https://www.irs.gov/pub/irs-pdf/p3833.pdf> .

achieve that result. For the charitable contribution deduction to be available the existing qualified charity generally must be given full control and authority over the use of donated funds.

- Income tax inclusion to the recipient - Payments that individuals receive under a charitable organization's program because of a disaster or emergency hardship are considered to be gifts and may be excluded from gross income of the recipient, but qualification for this should be reviewed.<sup>8</sup> Special tax treatment is also provided for qualified disaster relief payments made to victims of a qualified disaster, regardless of the source.<sup>9</sup>
- Gift tax – For a group campaign, (e.g., anyone adversely affected by the Las Vegas shooting) there is no specific individual beneficiary, so that there but be an issue that the donation does not constitute a present interest gift if the beneficiaries cannot be ascertained. However, whether or not the campaign is structured to qualify for the income tax charitable deduction, it may also not qualify for a gift tax charitable contribution deduction.<sup>10</sup> It would be helpful for the IRS to provide guidance confirming such gifts for the public at large are not subject to the gift tax since under current law these “donations” may still subject the donor to a gift tax filing obligation. Perhaps permitting gifts to crowdfunding campaigns to qualify as a gift of a present interest (explained below) would suffice without creating much room for abuse. Partnering with an existing qualified charity might also solve the issue qualifying the donation for the gift tax charitable contribution deduction.
- Protection of funds raised – If the funds are turned over to an existing charity the infrastructure and procedures of the partnering charity would provide significant assurance that the goals of the campaign, so long as consistent with the goals of the partnering charity, will be achieved. Similarly, for individual recipients the use of a trust may help safeguard the money raised.

Funding for a particular individual, such as a crowdfunding site for a specific Las Vegas victim, faces different issues than a crowdfunding effort for the general public. For individual efforts, like those illustrated above, the consequences seem to be as follows:

- Income tax – there can be no income tax deduction. The law on this is evaluated in more detail below.
- Gift tax – The potential for gift tax issues arise because of a specific individual being the ultimate recipient. This is because the gift cannot meet the gift tax charitable contribution requirements, and in many instances, will not qualify as a gift of a present interest to avoid gift tax reporting by the donor. Several of the possible gift tax implications are discussed below, along with some specific points on which guidance from the IRS might be useful.

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<sup>8</sup> IRC Sec. 102.

<sup>9</sup> IRC Sec. 139.

<sup>10</sup> IRC Sec. 2522.

- Protection of funds raised – Because an individual is being benefited, the potential for an existing charity to partner with respect to the disbursement of funds and accounting may not be viable, so other options will have to be considered to provide accountability. Further, for an individual (or family), the use of a trust to safeguard the funds may be advisable. The nature and type of trust will depend on the circumstances. If the recipient requires medical care, as do many survivors of the Las Vegas shooting, funds could be applied in that matter, but that may dissipate all of the funds. Alternatively, it may be beneficial if those funds could be held in a vehicle that does not disqualify the person from means-tested government benefits such as Medicaid, so that Medicaid pays for the medical care and the funds raised are preserved for purposes that Medicaid will not cover that may be essential to the healing process. For non-medical campaigns, a trust that permits discretionary distributions for the various purposes of the campaign may be beneficial.

The IRS has stated: “*Individuals can also help victims of disaster or hardship by making gifts directly to victims. This type of assistance does not qualify as a tax-deductible contribution since a qualified charitable organization is not the recipient. However, individual recipients of gifts are generally not subject to federal income tax on the value of the gift. If you make a gift directly to an individual, you are not subject to federal gift tax unless the total gifts made in a year exceed the annual exclusion amount.*”<sup>11</sup>

### **Tax Issues Generally**

While the dollars solicited in many campaigns are modest, the dollars involved across the spectrum of all charitable-type crowdfunding sites is significant. Considering the aggregate funds involved, it is surprising that some crowdfunding sites appear to provide limited guidance to visitors, donors, those creating campaigns or those benefiting as to the tax consequences. For example, the GoFundMe terms of service states: “*Taxes: It is your responsibility to determine what, if any, taxes apply to the Donations you receive through your use of the Services. It is solely your responsibility to assess, collect, report or remit the correct tax, if any, to the appropriate tax authority.*” Givetaxfree.org provides an FAQ page with more helpful information than some sites.<sup>12</sup>

While every campaign is different and the crowdfunding websites are not in the business of providing tax advice, the inclusion of helpful articles to at least inform users might be beneficial. It is unlikely that many users even are aware of the possible tax issues for the various types of campaigns. This is also why guidance from the IRS providing some practical leniency and updating policies to reflect the realities of the crowdfunding phenomena are important. This is especially so in the wake of the Las Vegas tragedy, and the many recent devastating hurricanes, when so many are trying to help and be helped without nary an inkling of the tax implications.

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<sup>11</sup> <https://www.irs.gov/pub/irs-pdf/p3833.pdf> , at pg. 24, Publication 3833 (Rev. 12-2014), Department of the Treasury, Internal Revenue Service.

<sup>12</sup> <https://givetaxfree.org/how-does-crowd-fundraising-work/?gclid=CKa9sMD45NYCFdOCswodq14KZg> .

## **Income Tax Issues**

The Terms of Service from the website YouCaring provide as follows: *“YouCaring does not verify whether any beneficiary organization advertised as a nonprofit actually has tax-exempt status by the U.S. Internal Revenue Service or any state agency. We encourage you to double-check on the tax-exempt status of any organization claiming to be a nonprofit before donating to a Fundraiser.”* The GoFundMe terms of service have a different statement which, in some instances may be incorrect, but which should not change the determination of whether or not a particular donation is deductible: *“As used in this Agreement, the term “Campaign” does not refer to a Charity, and you acknowledge that contributions to Campaigns are not deductible under your jurisdiction’s applicable tax laws and regulations.”*

Some might be tax deductible depending on who is the recipient and, as suggested above, some campaigns might be able to partner with an existing charity to secure deductions and other benefits. A more helpful approach would be to advise visitors (and in a more prominent way than buried in a lengthy terms of service agreement) that campaigns for the general public’s welfare if appropriately conducted under the auspices of qualifying charity may permit donations to be income tax and gift tax deductible.

More guidance, and a matching page for public charities wishing to assist with specific causes, could provide a more favorable result. Perhaps, crowdfunding sites might even provide contact information and links for campaign organizers to public charities willing to adopt campaigns within the ambit of their mission statements. It may be, as discussed above, that the funds could be directed to such a charity and thereby permit donors income tax deductions where there would otherwise be none.

### **No Income Tax Deduction to Donors Benefiting Identified Individual**

Seemingly, the only tax authority on any matters pertaining to crowdfunding is a single IRS private letter ruling that held that “donations” to a crowdfunding site to benefit a particular individual were not tax deductible since they were not for public benefit.<sup>13</sup> More detail on the IRS reasoning is discussed below. This is largely a summary of known law on this particular issue and suggests that any crowdfunding campaign to benefit a particular individual will not qualify as a charity and donors will not receive an income tax deduction.

If the recipient of the campaign is not a qualifying charity, then the donee/recipient will not qualify as a tax-exempt organization<sup>14</sup>, and the donors will not be permitted to deduct contributions.<sup>15</sup> This was the rationale for suggesting that campaigns endeavoring to help the public at large (e.g., helping all victims of the Las Vegas shooting), partner with existing charities to secure an income tax deduction.

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<sup>13</sup> IRS Letter Ruling 201701021, Oct. 11, 2016. Under IRC Sec. 6110(k)(3), a private letter ruling may not be cited or used as precedent.

<sup>14</sup> IRC Section 501(c)(3).

<sup>15</sup> IRC Sec. 170.

The facts in the PLR were as follows: The fundraising website indicates that those involved are a small group of people supporting D's daughter and family as she brings inspiration to children battling cancer. They sell merchandise such as t-shirts and wristbands on the website. The site provides a link for a crowdfunding site specifically for D's daughter. The IRS determined that this was for the benefit of a specific individual and not the general public and would not qualify as a charity.

In the Parker case, the organization was created by the Parker family to aid an open-ended class of victims of coma.<sup>16</sup> However, the organization stated that it anticipated spending 30 percent of its income for the benefit of Wendy Parker, significant contributions were made to the organization by the Parker family, and the Parker family controlled the organization. Wendy's selection as a substantial recipient of funds substantially benefited the Parker family by assisting with the economic burden of caring for her. The benefit did not flow primarily to the general public as required under the tax laws.<sup>17</sup> Therefore, the foundation did not qualify as a tax-exempt organization under IRC Sec. 501(c)(3). Another case reached the same result because a private individual, and not the public, was the beneficiary.<sup>18</sup>

### **General Gift Tax Considerations**

The gift tax is not imposed upon the receipt of funds by the beneficiary of the campaign, rather on the donor. The gift tax is triggered by the donor making a transfer.<sup>19</sup> The gift tax may apply whether the transfer is direct or indirect.<sup>20</sup> So, whether or not the campaign organizer holds the funds for an eventual recipient, or a trust for the eventual recipient, should not affect the gift tax consequences. The donor is also allowed an annual gift tax exclusion for the first \$14,000 (2017) if that gift is a gift of a present interest.<sup>21</sup>

### **Is it an Incomplete Gift?**

The terms of service for YouCaring provide: *“Donations are made through the third-party payment processor associated with each particular Fundraiser, and YouCaring may not refund your donation to a Fundraiser; however, if you contact us, we will put you in touch with the payment processor for the Fundraiser for which you seek a refund. Any refunds will be given in the third-party payment processor’s discretion and in accordance with their terms of service.”*

In contrast, givetaxfree.org provides: *“What if I later change my mind and I want a refund, can I have one? No, once you make a donation we are unable to give a refund.”*<sup>22</sup>

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<sup>16</sup> In *Wendy Parker Rehabilitation Foundation, Inc. v. Commissioner*, 52 T.C.M. (CCH) 51 (1986).

<sup>17</sup> Reg. Section 1.501(c)(3)-1(d)(1)(ii).

<sup>18</sup> *Easter House v. United States*, 12 Cl.Ct. 476, 487 (1987), citing section 1.501(c)(3)-1(d)(1)(ii) of the regulations, *aff'd without opinion*, 846 F.2d 78 (Fed.Cir.1988).

<sup>19</sup> Reg. §25.2511-2(a).

<sup>20</sup> IRC Sec. 2511(a).

<sup>21</sup> IRC Sec. 2503(b).

<sup>22</sup> <https://givetaxfree.org/how-does-crowd-fundraising-work/?gclid=CKa9sMD45NYCFdOCswodq14KZg> .

Does the possibility of a refund make the gift by a donor to a campaign incomplete? Tax law provides that a gift is incomplete if the donor has the power to re-vest beneficial title to the property in herself.<sup>23</sup> Might it be that the gift is incomplete until disbursed from the campaign for the cause indicated? There are thus numerous sources to consider in making this determination: the campaign language itself, the terms of services of the crowdfunding site, the possible terms of service of a separate payment site and state law. State law may vary depending on the terms of service agreement. For example, the Fundly terms of service provide: “*These Terms of Use will be governed by and construed in accordance with the laws of the State of California, without reference to its conflicts of laws rules.*” What if the terms of service of the payment process provide for different state law?

### **Is it a Present Interest Gift?**

For a gift to or through a crowdfunding site to qualify for the gift tax annual exclusion, it must be a gift of a “present interest” meaning the recipient must have immediate use, possession or enjoyment of the gift. This is significant in that a gift of a present interest will obviate the need to file a gift tax return for gifts under the annual exclusion amount, which likely covers most gifts through crowdfunding platforms. A gift of a future interest will not qualify for the annual gift exclusion.<sup>24</sup> If the number of eventual donees, and the values of their interests, cannot be determined, the gift may not qualify as of a present interest. For example, a campaign to benefit a victim of the Las Vegas shooting and her family that was traumatized may not suffice to qualify because it is uncertain how much will be distributed to the family or the victim. If, as discussed below, a trust was the ultimate beneficiary of these funds, a general power of appointment or a so-called “Crummey power” (that is, the right to withdraw the gift from the trust) might resolve the present interest issue. But it would be incredibly complicated, well beyond the means of most users, to comprehend or afford legal help to create these mechanisms. A fairer, simpler and preferable approach would be for the IRS or Congress to create an exception that prevents these tax challenges.

There should be no reason to require gift tax reporting requirements for gifts by strangers to help someone through a crowdfunding site. If the IRS provided an exception to the gift tax present interest requirement, perhaps limited to non-family members, for gifts through such sites, a gift tax return filing and any gift tax liability could be avoided. In most instances, filing a gift tax return would only create filing requirements that would not be complied with, or if complied with then would constitute unnecessary administrative burdens on both the taxpayer and the IRS.

The issue of present interest is also relevant to the suggestion below of the campaign organizer holding the funds raised as a nominee for a trust for the recipient (or in a constructive trust for the recipient). If the recipient had the authority to withdraw funds immediately under either scenario the donations should qualify as a gift of a present interest under IRC Sec. 2503. However, that position may also taint the funds as not being permissible to hold in a

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<sup>23</sup> Reg. §25.2511-2(b).

<sup>24</sup> Reg. §25.2503-3.

supplemental needs trust as the funds may already be deemed in the control of the recipient. It would seem that this would be governed by the verbiage on the campaign page and the terms of service agreement. This is why it was suggested earlier that the campaign organizer may be advised to modify the language on the home or campaign page.

Another situation might be that the campaign organizer may have the right to withdraw the funds donated which generally seems to be case under most default terms of service, if not modified. In that case, might it be argued that, because the campaign organizer can withdraw funds at any time, the gifts are made to the campaign director and hence qualify as a gift of a present interest?

If the campaign organizer can withdraw the funds at any time she might be able to fund an incomplete gift trust (a DING type) with the following provisions:

- Discretionary distributions (for the benefit of the named recipient) so long as such payments are of the type described in IRC 2503(e) which permits payments for medical expenses, and not otherwise covered by insurance and/or state and federal aid programs.
- Discretionary distributions (for the benefit of the named recipient) in addition to those for medical purposes, in accordance with an ascertainable standard (Health, Education, Medical Care and Support), but not to exceed the campaign organizer/trust settlor's annual exclusion (taking into account any split gift election) each calendar year.
- Discretionary distributions (for the benefit of the named recipient's family) in addition for reimbursement of travel and expenses associated with the named recipient's care but not to exceed the settlor's annual exclusion (taking into account any split gift election<sup>25</sup>) each calendar year.
- Discretionary distributions (for the benefit of the named recipient family) so long as such payments are of the type described in IRC 2503(e) and not otherwise covered by insurance and/or state and federal aid programs
- Upon the death of the named recipient, to a charitable organization, e.g. the American Red Cross Southern Nevada Chapter<sup>26</sup> Thus, any remaining amount in trust could fund a charitable gift.

It would seem that if the recipient and campaign organizer are the same person (i.e., someone organized a campaign for themselves) that the position of a present interest would be the correct conclusion.

However, if the campaign organizer is not the intended recipient (e.g., a neighbor or family member that set up the campaign for a friend or loved one) then the campaign organizer would seem to be holding the funds, subject to the terms of service as modified by the terms of the campaign, as an agent, nominee or similar capacity. The latter interpretation may be essential to

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<sup>25</sup> See IRC Sec. 2513 permitting spouses to elect to treat gifts to others made by of them to be treated as though made by both.

<sup>26</sup> <http://www.redcross.org/local/nevada/southern-nevada> .

support the transfer of the funds from the campaign to an existing charity for a public campaign, or to a trust for a private individuals campaign.

Would a default payment of unused campaign funds over to qualifying public charity trigger involvement by the State attorney general or the IRS? How might that additional complication be avoided? Should it be avoided?

### **State Tax Considerations Generally**

Some possible state tax considerations might be illustrated by Washington State's taxation website which provides:

"I am an individual using crowdfunding to raise money for a personal project. Do I need to register with the Department of Revenue? If your annual gross income (donation amount and the host fee) from crowdfunding is more than \$12,000 then you need to register with DOR. If you are required to collect sales tax on a reward, then you also need to register with DOR... Amounts received for items with no significant value (such as thank you notes, posting a name) aren't subject to B&O tax. Amounts received as donations (no goods or services provided) aren't subject to B&O tax or sales tax."<sup>27</sup>

### **Sales Tax**

While sales tax should not apply in the context of raising funds for charitable purposes it may be an issue in "charitable-like" purposes. In the charitable context, the IRS has provided *de minimis* rules to avoid tax complications for donors receiving token gifts or benefits and the full amount of the donation made would be deductible.<sup>28</sup> However, it seems clear that the donation to a crowdfunding program to benefit a specific individual is not income or gift tax deductible as a donation to a charity. That might negate the value of these *de minimis* rules and leave an ambiguous tax result. Thus, if a personal crowdfunding site gives each donor a t-shirt or wrist band, does that become a commercial transaction? This is an area where IRS guidance providing *de minimis* rules to avoid unwarranted tax complexity to the "donor" and the campaign would be sensible.

In a commercial crowdfunding context, a project may be required to pay sales tax on retail services or tangible personal property given to contributors as a benefit or incentive for the contribution. The sales tax rules are likely based upon where the donor receives the goods or services. To avoid an issue of having to collect sales tax, those creating a campaign might state that if, a service or product is given, and if sales tax is applicable, the donation amount will be deemed to be inclusive of that sales tax. This might be a simple condition for crowdfunding sites to add to their terms of service agreements to avoid the issue for campaigns that might be affected.

Where nothing is given to the donor for the donation/gift it would seem unlikely that to implicate a state sales tax. However, if the donor receives anything of value in return (e.g., a wrist band),

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<sup>27</sup> <https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/crowdfunding> October 8, 2017.

<sup>28</sup> Rev. Proc. 90-112, 1990-1 CB 471; Rev. Proc. 92-49, 1992-1 CB 987.

an aggressive state tax authority could try to impose a sales tax. Perhaps the state tax authorities might view situations such as funding hurricane victims or victims of the Las Vegas shooting compassionately, but if campaigns that are more questionable in terms of purpose or even legitimacy are identified, the state tax authorities may view them differently. Arguably, if the wrist band or other give away is really worthless—perhaps, that could be established by offering one to anyone who requests one even if no donation is made.

### **Supplemental Needs Trust Background**

If the disaster (e.g., hurricane, or shooting victim) will incur substantial medical costs, it may be feasible for that person to qualify for Medicaid or other government benefit programs which may then cover medical costs. If this can be done, and the funds raised in the crowdfunding campaign can be channeled to an appropriately crafted supplemental needs trust, the funds may be preserved to cover other costs Medicaid or other governmental benefit program will not cover. This could have a dramatic positive impact on preserving financial resources to help the recipient. The rules differ from state to state. In some states, the intended recipient of the crowdfunding campaign may need to become eligible for means-tested government benefits. “Means tested” means that the individual with medical issues cannot have more than a certain amount of assets (a very low amount) and a limited amount of income, which varies from state to state. If assets or income exceed the thresholds the special needs individual could lose all benefits. This is why it is critical that the funds generated by the crowdfunding campaign not be deemed those of the recipient. If the campaign organizer is an independent person and neither the campaign nor the platform’s terms of service have given the recipient the right to withdraw funds, that may be feasible. This too is an issue where guidance from government regulators would be helpful, especially if that guidance could show compassion to those suffering and recognize that well-meaning but unformed people may have created the crowdfunding campaign.

A special or supplemental needs trust (“SNT”) permits the trust to retain assets for the benefit of the recipient/beneficiary while protecting the funds from the state for reimbursement of state-paid medical care so that benefits can be maintained and the quality of life of the beneficiary is enhanced. This type of planning is vitally important because there are many gaps in the benefits that for reimbursement of state-paid medical care.

The value of services provided may amount to millions of dollars over the course of a victim’s lifetime. But vacation, entertainment, extra furnishing, private nursing or extra therapy, the things that might give more joy and meaning to life, or boost recovery, are not provided for by the government. Additional care and alternative medical treatments may also not be provided for by government programs and may be important to the recipient’s recovery. A SNT may provide for the payment of these types of expenses to the extent not provided by government programs. These often increase in importance as the disabled beneficiary ages. The answer to protect the crowdfunding dollars, yet permit Medicaid or other government programs to cover certain costs, may be to establish a SNT that will not jeopardize benefits.

An SNT is a third-party trust is typically established by a parent or other person. This type of trust is funded with assets belonging to a third party. This might fit the scenario of someone other than the intended recipient serving as a campaign organizer and having third-parties, such as the public at large, make gifts to the campaign. This contrasts with a first party trust that is funded with a beneficiary's own money. The most common example of this is if there is an inheritance that is restructured by the court into a first party trust (that is, one deemed created by the person in need), or if there is litigation resulting in a settlement for the beneficiary. In fact, there may be settlements in any disaster with the owners of facilities where the disaster occurs, the government, or others that benefit victims. In a first party trust, the remaining funds at the beneficiary's death that are held in the trust must go back to the government to reimburse the government for the cost of care provided. If there is money left in a first party trust after the Medicaid payback, it can go to named beneficiaries, or the beneficiary's estate, depending on state law. If the amounts are modest a "pooled" supplemental needs trusts might prove more practical.

### ABLE Accounts

There is another approach, albeit limited, which might be of some use to protect campaign proceeds from adversely affecting government benefits, called an ABLE account. Similar to the discussion of a supplemental needs trust, it may be feasible to have campaign proceeds targeted from inception (and possibly redirected under a nominee, agent or constructive trust theory) to a qualifying ABLE account. A significant limitation on ABLE accounts is that the recipient must be disabled and that disability must have occurred before age 26. There has been some discussion of Congress increasing that age which would make the use of ABLE accounts available to more people. The amount that can be contributed to an ABLE account is limited to the amount of the annual gift tax exclusion, \$14,000 in 2017, in aggregate. It is not clear that a crowdfunding campaign could raise more funds, and limit the distributions to the ABLE account to \$14,000/year or whether the excess funds held in the crowdfunding campaign would adversely affect the recipient. It would be useful if Congress could clarify and provide leniency on this point as well.

### **Can Crowdfunding Dollars be Shifted to a Protective Structure?**

It may also be feasible to argue that the person, e.g. a neighbor or family member, who sets up the crowdfunding site as the campaign organizer, is holding the funds associated with that account/page as a nominee for the ultimate recipient, or perhaps for a trust to benefit the ultimate recipient. As noted above, the crowdfunding page should be updated to reflect this and ideally the crowdfunding platforms would amend their terms of service and, perhaps, even permit check the box elections for these items to provide clarity to future campaigns. If this is not done, hospital and other long-term care bills will likely wipe-out all of the funds raised for most victims. The campaign organizer might be deemed a constructive trustee of a constructive trust to which he or she will transfer the monies raised once an express or formal trust is created.

In the case of a campaign for someone injured or murdered, whether in a mass shooting or weather related or other event, a supplemental needs trust might be inappropriate. Instead, a fully discretionary trust so that family members could be assisted as well as the victim, payments for travel expenses for relatives, school for surviving children, etc. may all be provided for.

The nature of the relationship between the campaign organizer who can withdraw funds and the intended recipient may be key to determining what can be done for disaster or other victims. The terms of service on GoFundMe provide as follows: *“We do not and cannot verify the information that Campaign Organizers supply, nor do we guarantee that the Donations will be used in accordance with any fundraising purpose prescribed by a Campaign Organizer or Charity. We assume no responsibility to verify whether the Donations are used in accordance with any applicable laws; such responsibility rests solely with the Campaign Organizer or Charity, as applicable.”*

This is rather typical and to be expected as no crowdfunding platform could reasonably police the actions of every campaign organizer nor be involved in whatever contractual arrangements might exist between the campaign organizer and the intended recipient. It seems most likely that few if any campaign organizers and recipients have any binding agreements and most are likely formed by a loved one or friend merely trying to assist. That might provide a position that the recipient cannot force the campaign organizer to distribute funds to a trust to carry out the purpose and goals set forth in the campaign, if there is no legally binding agreement between the campaign organizer and the recipient.

### **Requested Guidance from Congress and the IRS**

Suggested issues for the IRS to clarify and provide guidance on crowdfunding to help the victims of the Las Vegas massacre, hurricanes, and other matters, are made throughout this article are summarized below. It might be helpful for the IRS to use the ABLE account legislation under IRC Sec. 529A as a model in some respects. To minimize the abuse by family members using a crowdfunding platform to circumvent the gift tax (e.g. avoiding the requirement for gifts meeting the present interest requirement to qualify for annual exclusion treatment) donations by family members, perhaps as defined under IRC Section 267(c)(4) which includes, brothers and sisters (whether by the whole or half-blood), spouse, ancestors, and lineal descendants, would probably be sufficient.

1. Permit public charities to assume responsibility for crowdfunding for emergency situations consistent with that existing charity’s purpose and the campaign description so that donors can qualify for an income tax charitable contribution deduction. As illustrated above, the IRS might establish safe-harbors permitting crowdfunding campaigns that benefit the public at large, e.g. victims of the Las Vegas shooting, to use an arrangement with a “Public Charity Partner” to qualify donors to receive income tax charitable contribution deductions. It would be helpful for the IRS to promptly provide lenient guidance in this regard, so that existing crowdfunding sites can revamp and qualify.
2. Permit gifts to crowdfunding sites, whether for groups or individuals to qualify for either the gift tax charitable contribution deduction or the gift tax present exclusion (perhaps

using IRC Sec. 529A as a guide) when funding for individuals. Permitting campaign funds that are paid directly to medical or education providers to qualify as a new exception under IRC Sec. 2503(e) may also provide simplification and certainty.

3. Permit crowdfunding campaigns to be modified within 90-days of launch to clarify the terms of the campaign in a manner not inconsistent with initial statements but which would permit the funds raised to be held in an appropriate trust or other arrangement to accomplish their intended purpose, e.g., a supplemental needs trust if appropriate or a discretionary trust.

### **Changing Terms of Service to Address Issues**

Can a crowdfunding site change its terms of service to address some of the above issues? Likely that would help, but the problem is that the change would need to be retroactive to positively affect the outcome of an existing campaign. The answer may depend on the terms of service. For example, the GoFundMe site terms of service provide: *“Any such changes will become effective no earlier than fourteen (14) days after they are posted...”*

A step some campaign organizers might consider is to have the crowdfunding site place a hold on funds pending resolution of some of the applicable tax and/or legal issues raised in this article. For example, the terms of service of GoFundMe provide: *“Account Holds: From time to time, GoFundMe may place a hold on a Campaign account (a "Hold"), restricting Withdrawals (defined herein) by a Campaign Organizer... (ii) if the funds available should be provided directly to a person other than the Campaign Organizer...”*

In some instances, the campaign organizer, who otherwise has the power to withdraw funds, might request the crowdfunding site to freeze withdrawals from the account so that the funds can be directed to a preferable receptacle, such as a public charity to support deductions to donors when funding a campaign for the benefit of the general public, or to a supplemental needs trust created for a recipient who has medical needs.

### **Use of Funds**

There seems to be no mechanism addressing how funds on a crowdfunding site are actually used. Considering the dollars raised annually that is quite remarkable. The GoFundMe terms of service provide: *“...nor do we guarantee that the Donations will be used in accordance with any fundraising purpose prescribed by a Campaign Organizer or Charity...”*

An article about 9/11 victims stated: *“Some criminals view national tragedies as an opportunity to take your money. To ensure your charitable impulses aren't taken advantage of, watch out for scams. As MONEY reported after the Pulse nightclub shooting in Orlando, crowdfunding and social media sites have little oversight, and the identities of those soliciting donations on these mediums is hard to verify.”*<sup>29</sup>

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<sup>29</sup> Alicia Adamczyk, “How to Help Victims of 9/11 and Their Families,” Sep 10, 2016, <http://time.com/money/4483748/911-charity/>.

The government has raised concerns about accountability of crowdfunding sites.<sup>30</sup>

Addressing the issues discussed in this article may, in part, address the accountability issue without the need for what might prove to be debilitating regulations:

- Campaigns for the public good could and should be bought under the auspices of existing tax exempt charitable organizations (e.g. donor advised funds) which would provide income tax deductions to donors and accountability.
- Campaigns to benefit individuals if the funds raised are sufficient could be paid to a trust to administer them thereby providing some accountability in that the trustee would have a fiduciary responsibility to carry out the terms of the campaign.
- Crowdfunding sites could add functionality to permit campaigns to account on line for how the funds are used reporting to the public and donors. This might then become self-selecting with those campaigns agreeing to account creating more public confidence and raising more money.
- Donors may well be more inclined to make a gift to a campaign that demonstrates accountability in real time than those that do not.

### **Conclusion**

While the tragedy of the Las Vegas shooting, and the heartache of recent hurricanes, other mass shootings and problems cannot be erased, much can be done to help those who were victims of these nightmares. Crowdfunding, both for the larger public affected, and even for individuals affected, provides a creative and incredibly efficient means to raise funds. But in planning those fund raises, and administering the funds once raised, much can be done to enhance the benefits and use those enhancements to perhaps to raise even more funds and help more.

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<sup>30</sup> SAR Stats Technical Bulletin October 2015,2015ARD 197-6, Internal Revenue Service, Oct. 15, 2015.