



BEQUESTS IN WILLS IN CANADA – AVOIDING LEGAL AND ETHICAL PROBLEMS WITH THE ULTIMATE PLANNED GIFT

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A charitable bequest is a gift to a charity through a will. Although a bequest can be and is often a very ‘simple’ way to benefit a charity, this article provides advice to lawyers in order to avoid some of the more common issues with bequests.

Fundraisers talk about “planned giving”¹ in the US or “gift planning” in Canada to describe various types of planned/deferred/legacy gifts. Planned giving involves tools and techniques to facilitate gifts to charities and typically includes the assistance of professional advisors who attempt to maximize tax incentives and balance the financial, personal, family, and philanthropic objectives of the donor. Planned giving could be as simple as placing a bequest in your will and as complicated as setting up a private foundation. Some planned gifts, such as gifts of publicly traded shares, are immediate, while others, such as bequests, are deferred. Some are revocable, such as a bequest in a will, while others, such as a charitable remainder trust, are irrevocable. Although there is a lot written about different planned giving vehicles, about 80%-90% of funds raised in the planned giving area come from bequests. Consequently, it is fair to say that bequests are the most important part of planned giving.

It is beyond the scope of this article to discuss how charities can encourage bequests² and how professional advisors³ can work with charities to facilitate bequests.

¹ For a detailed discussion of planned giving in Ontario, see the article by Mark Blumberg at http://www.blumbergs.ca/images/uploads/What_is_Planned_Giving_Article_by_Mark_Blumberg_October_2007.pdf. Some of the more popular planned giving vehicles include bequests, gifts of marketable securities, gifts of life insurance, gifts of certified cultural property, gifts of real estate, beneficiary designation of RRSP/RRIF or life insurance, establishing a private foundations and charitable gift annuities.

² See “Starting a Basic Planned Giving Program for a Canadian Charity: A Lawyer’s Perspective” at http://www.blumbergs.ca/images/uploads/Starting_a_Basic_Planned_Giving_Program_for_a_Canadian_Charity.pdf

There are many different ways to provide a bequest in a will including, but not limited to:

1. Provide the whole residue of the estate to charity;
2. Provide specific amounts to various parties and residue to charity;
3. Provide a part of the residue to charity and the remainder of the residue to others;
4. Provide a specific cash amount to one or more charities with residue to others;
5. Provide *inter vivos* gifts to charity with bequests in a will;
6. Provide an amount to charities subject to conditions or restrictions; or
7. Provide a gift to a trust (including for children or spouse) with the transfer upon a certain event to charity.

Advantages of Bequests

Bequests have been called a “middle class gift” in that they allow average Canadians to make a major gift. While many high net worth Canadians can afford to make a major gift to a charity during their lifetime, many middle class Canadians are concerned about whether they will have enough money to maintain their lifestyle and weather unanticipated costs during their lifetime. Therefore, a bequest, which only occurs after the person’s death, provides a great vehicle to make a major gift.

For some, a bequest allows a greater gift to be made than one could achieve annually because in some cases the donor knows that at his or her death, or the death of the donor and his or her spouse, the funds are not needed anymore. It is especially attractive for those who are older and do not have children or have children who are self-sufficient.

Bequests are revocable in that a subsequent will or codicil can cancel a bequest. This is attractive to some donors as their situation or that of their family may adversely change and their will could be revised accordingly, as long as the individual still has capacity to make a will.

A bequest in a will to a registered Canadian charity can provide a tax credit against up to 100% of the donor’s income in the year of the donor’s death and in the preceding year. In many cases, individuals have substantial taxable income in the year of death and in the previous year. Bequests can reduce taxes for those two years.

³ See “Planned Giving and Professional Advisors: The Importance of the Professional Advisor and How to Involve Professional Advisors in Canadian charities” at

http://www.blumbergs.ca/images/uploads/Planned_Giving_and_Professional_Advisors.pdf

Bequests can be very simple and very flexible. To effect a bequest one just needs a paragraph in a will that is easy to insert – far easier than many other types of planned giving.

One of the biggest donor concerns is the high cost of fundraising. Bequests are one of the least expensive methods of raising money and many established bequest programs have costs of 1%-5%, rather than 35%-50% for special events.

Disadvantages of Bequests

One of the disadvantages of a bequest is that the donor does not get to see his or her funds used now as the gift is made only after the donor's death. Also, the donor does not get to help people now as the funds are provided only after the donor's death. Another disadvantage is that the donor does not get an immediate tax benefit; it is only the donor's estate that benefits after the donor dies. Also, as we will discuss later, when a large part of an estate is to be provided to charity by bequest the estate will often not be able to fully utilize the donation receipt. From the charity's point of view, a bequest is revocable and therefore a donor can always change his or her mind and remove the bequest from his or her will. In reality, most people prefer not to think about death and do not change their wills often.

No Will = No Bequest

There are so many reasons to have a will⁴ and it may be obvious, but if the person does not have a will, he or she cannot leave money to his or her favourite charity upon his or her death. People who die without a will or "intestate" have their assets divided under the *Succession Law Reform Act* (Ontario), which does not provide for charitable contributions. Lawyers and charities should encourage people to have a will, irrespective of whether they wish to leave a bequest to charity. Bequests are a wonderful way to benefit charities that clients may care about. When meeting

⁴ A will is an important part of any estate plan. The following are common reasons you should have a will: to ensure that as large a part of your assets as are legally permissible is transferred upon death to those for whom you care; to appoint guardians for your minor children; to avoid legislation, such as the *Succession Law Reform Act* (Ontario), from arbitrarily determining the division of your assets; to place the administration and control of your assets in the hands of someone you trust; to create suitable trust provisions to prevent your children from spending their inheritance prematurely and to avoid the Ontario Office of the Public Guardian and Trustee from controlling your children's assets until they reach the age of majority; to save taxes or at least defer taxes, including by means of multiple testamentary trusts; to avoid conflict, litigation and unnecessary expense among family members after your death; to make sure certain items of special significance are given to designated individuals; to make charitable donations in your will to organizations which you care about and have supported during your lifetime; and, if you have no heirs or family on death, to avoid all of your assets being transferred to the government.

with clients, lawyers should discuss whether a bequest may be appropriate in the client's circumstances.

Lawyer's Concerns

While bequests can be a relatively simple planned giving vehicle, note these top issues or concerns with bequests in a will to a charity:

1. Use of correct name of charity – A bequest provision with an incorrect name of the beneficiary charity is the most frequent problem encountered by charities in dealing with bequests. It is also very easy to avoid. It is very important that lawyers use the correct legal name of the charity when drafting a bequest provision otherwise there can be conflict between different charities claiming entitlement to the bequest and uncertainty about the gift. As well, executors are put in a difficult position if they are not certain which charity is supposed to receive the gift. So many charities have similar sounding names, and a particular donor may have supported more than one of the similar charities in his or her lifetime. Without the correct name, it is not always possible to determine the correct party. To ensure that you have the correct legal name, do a search – if it is a federally incorporated charity use the Strategis website at http://strategis.ic.gc.ca/epic/site/cd-dgc.nsf/en/h_cs03750e.html and if it is an Ontario charity use either www.cyberbahn.ca or www.oncorp.com to verify the correct legal name of the charity. If the bequest is very substantial or there is uncertainty about the entity, you may wish to review the articles of incorporation/letters patent and any subsequent amendments thereto.
2. Clarity in will drafting – It is important that there be clarity, both in the body of the will and in the bequest provision. Lack of such clarity can encourage litigation. With the increasing use of will kits this problem will probably only grow. Attached is a PowerPoint presentation with many sample bequest clauses and a number of bequest related clauses.
3. Capacity of testator – Although there is a presumption of capacity, if a person waits too long and lacks mental capacity then he or she cannot validly execute a will and cannot provide a bequest to his or her favourite charity.
4. Validity of will – It is important that all of the provincial requirements (2 witnesses, of sound mind, over the age of 18, who are not beneficiaries, witnessing together) for a valid will are followed otherwise the will may be invalid and the bequest may fail.
5. Charitable status – When leaving a bequest to a non-profit organization, many people anticipate receiving an official donation receipt for the bequest. It is

important that lawyers verify that the organization that the funds are being left to is in fact a registered charity with the Canada Revenue Agency (the “CRA”) or the donor’s estate will not receive any tax benefit. As well, if the donor is resident in Quebec the charity should also be registered with Revenue Quebec, even if it is already registered with the CRA. The flip side of the equation is that, as discussed below, many estates cannot utilize the full amount of the official donation receipt it will receive from a registered charity, and this allows flexibility for a donor to give at least some funds on death to a non-profit that is not a registered charity. The CRA charities pages is <http://www.cra-arc.gc.ca/tax/charities/menu-e.html>.

6. Revocation of wills – There are a number of different events that can result in the revocation of a will, including marriage or remarriage. If a donor marries or remarries and does not redo his or her will (unless the will was made in contemplation of marriage), then the original will executed before marriage or remarriage will be revoked and the bequest in it will not occur. Separation does not revoke a will and divorce only voids the gift to the spouse and not a legacy to a charity.
7. Bequest property and acceptability – All charities accept cash, however, if your client is planning on providing a bequest of a different type of property such as real estate, personal property, private company shares, etc., then it is important to discuss the proposed gift with the charity ahead of time to ensure that it can properly accept such property and either sell it or put it to good use. With real estate, charities are concerned with environmental contamination and attendant liability. As well, some real estate interests may not be easily marketable or easily valued. Private company shares can be difficult to value and even more difficult to sell. Many charities have gift acceptance policies, which set out the internal policy of the charity with respect to gift acceptance. With larger gifts or non-cash gifts it may be worthwhile to review the charity’s gift acceptance policy.
8. Bequest restrictions and acceptability – In order to achieve the greatest effect, it is best for a donor not to place restrictions on a bequest, but instead for the donor to select a very reputable charity that he or she trusts. The charity should have the discretion to use the funds in the manner that will achieve the greatest good. Many charities have to decline gifts because the well-intentioned restriction is no longer feasible. For example, an international development charity, which formerly operated in 25 different countries, determined that to be more efficient it would operate in only 10 countries with the greatest need. If the restriction is that the gift be spent on a charity program in a country in which it no longer operates, then the charity may have to decline the gift. As well, restrictions that the funds be spent on a particular project or aspect of a project can create issues as projects evolve or reach completion. Furthermore, some of the restrictions in how the funds can be

spent may be outside of the objects of the charity and therefore ultra vires or may be contrary to public policy. However, if your client is adamant that he or she wishes to place restrictions on the use of the bequest, you should discuss such restrictions with the charity as certain seemingly benign restrictions may be impractical or impossible for the charity to comply with and it may have to reject the gift. Alternatively, the charity may accept the gift but the impact of the gift may be substantially reduced by the restriction. As well, you should encourage your client to have a clause in his or her will providing that if the restriction can no longer be complied with, the charity's board of directors has the ability to vary the use of the gift.

9. Due diligence – If your client is making a major gift or providing a substantial bequest to a charity, then your client should conduct some due diligence on the charity to ensure that his or her money will be well spent. Your client may wish to have your assistance or the assistance of another professional in conducting some of that due diligence. Some of the more common due diligence includes corporate searches to check the name and status of the charity and searches of the CRA Charities Directorate database to ensure the charity is a registered charity under the *Income Tax Act* (Canada). If a long-term endowment is proposed, then you may wish to review the investment policy of the charity and determine what controls and experience it has in making investments. If your client wants to support an activity in a particular country, then you or your client may wish to review the experience and resources that the charity has in that country or the relationships it has and whether such relationships are structured in accordance with the CRA requirements for Canadian charities operating abroad. Due diligence may also include reviewing whether the charity is operating efficiently or for example spending 70% or more of all charitable donations received on administration and fundraising costs, whether the charity's programs are effective and whether the charity is involved in any litigation.
10. Disappearing wills – Irrespective of whether your client is providing a bequest in his or her will, it is important that you make sure that your client's will is kept in a safe place. If possible, and if your client consents, where the will does include a bequest to a charity, you should provide the charity with a copy of the will, or at least an excerpt of the will dealing specifically with the bequest to the charity, at the time that the will is finalized.

11. Taxes and bequests generally⁵ – If your client provides a bequest in his or her will to a registered charity, your client will generally receive an official donation receipt that can be used as a credit against up to 100% of his or her income in the year of his or her death and the immediately preceding year. In the final year, many people have substantial income and the donation receipt can be used to offset some or all of that income.
12. Taxes and bequests when donation is a very large part of estate – If a donor leaves his or her whole estate to a charity, then it should be realized that in many cases the amount of the official donation receipt received will be far greater than the income of the deceased in year of death and the previous year. Therefore, the official donation receipt may not be utilized fully. If the person has far more assets than he or she needs to live on, then it may be prudent from a tax-planning point of view to arrange for some *inter vivos* donations as well as a large, but reduced, bequest. The *inter vivos* donations can be utilized against up to 75% of current income and carried forward for 5 years. It is important that your client crunches the numbers otherwise he or she may lose out on substantial tax savings.
13. Trusts, residual interest and deferred gifts – In some cases your client may wish to create a trust for a spouse, a child, etc. and then only after certain events, such as the death of the spouse or the child, will the charity receive the trust property. You need to be careful in drafting and managing the interests of the income beneficiary and the capital beneficiary. As well, you should carefully consider the events that will trigger the distribution of the trust property. A trust with a power of encroachment can result in no official donation receipt. Depending on how the trust is worded, it can result in no tax receipt or a tax receipt to the trust and not the estate and depending on whether there is income may determine whether the official donation receipt can be utilized effectively.
14. Very small gift by will – Having a small bequest, for example a specific bequest for \$500.00, or a small residual percentage of a small estate, is cumbersome for the estate, and perhaps even the charity, and for small gifts an *inter vivos* gift may possibly be better.
15. Poorly conceived probate avoidance schemes – Some donors work hard to try to avoid paying probate even though probate in Ontario over \$50,000.00 is only 1.5%. In some cases, there are proven probate minimization strategies such as

⁵ Elena Hoffstein of Fasken Martineau Dumoulin LLP prepared a very useful powerpoint presentation which covers many of the tax aspects of bequests. It is entitled “Gifts by Will – The Essential Do’s and Don’ts” and it was presented to the OBA/CBA 2008 Charity Law Symposium, May 7, 2008.

multiple wills with private company shares, or insurance that is outside the estate, or holding property jointly with a spouse. On the other hand, ill-conceived probate avoidance techniques can in fact undermine the intention to give a bequest and careful consideration should be given before such techniques are utilized. There are simple but potentially harmful schemes to avoid probate including placing assets jointly with children or others that can result in not only tremendous income tax liability and fights over a joint account but also unintentionally diminishing the value of the estate and the ability of the estate to pay the bequests.

16. Ownership can defeat testamentary intention – Joint ownership of a property may result in the estate not having enough funds for the payment of a specific bequest or in the estate not owning the property that is the subject of the bequest. In some cases, depending on how the asset is owned (for example: with a spouse; with a child who is a minor; with an adult child who is dependant; or an adult child who is not dependant), either a presumption of advancement or a presumption of resulting trust may be applicable if the intention of the testator cannot be proven. Depending on which presumption is found to be applicable, it could result in the gift to the charity never happening or happening in a far reduced manner.
17. Beneficiary designations – Beneficiary designations, for example with life insurance or RRSPs, can either facilitate or defeat a bequest. In certain situations, if the life insurance or RRSP is designated to the estate, then there may be sufficient assets to pay the bequest, but if the life insurance or RRSP is designated to another beneficiary then the estate may not have the funds to pay the bequest.
18. Multiple wills – In a situation where a donor has multiple wills, for example when he or she owns a large number of private company shares, and a bequest is being provided under one of the wills, then it is important that there be coordination between the wills. This coordination is to ensure that in the event that the assets under for example, the public/primary will, are not sufficient to provide for the bequest, that the bequest be incorporated under the provisions of the private/secondary will.
19. Discretion provided to Executors as to amount or to which charities benefit – If one provides either a discretion to the executors as to the amount to be given to charity or as to which registered charities will benefit, then one needs to be very careful to ensure that the discretion fits within certain Canada Revenue Agency positions or there may be no “gift under will” and no tax benefit or a substantially reduced tax benefit.

Ethical issues

In addition to the legal issues discussed above, there are a number of ethical issues that a lawyer should be aware of in dealing with bequests in a will. Some of the ethical issues include:

1. Can a charity pay for the cost of preparing a donor's will?⁶ Much has been written about this subject, especially in the UK, and there is a concern if the charity is paying for the cost of the donor's will that there could be undue influence on the part of the charity. Is the donor making a donation on their own free will or is there coercion and pressure from the charity and the lawyer? There is also a concern as to whether it is an acceptable use of the charity's money. If a charity is found to have used undue influence with a donor, the bequest may be overturned, there will be reputational problems for the charity, and this and other bequests or gifts may be jeopardized.
2. Can a charity refer donors to particular professional advisors for estate planning and bequests? Lawyers should not encourage charities to refer all of their estate planning work to one lawyer but instead charities may maintain and provide to interested donors a list of professional advisors who are knowledgeable about estate planning and bequests. Continuous referral from one charity to a lawyer could actually compromise the impartiality of the lawyer or at least appear to do so. The charity should leave it to the donor to choose which professional advisor from the list or elsewhere they wish to utilize. The charity should also advise the donor that the charity is not assuming any responsibility for the conduct or competence of the lawyers whose contact information the charity is providing, although charities should be careful to ensure that lawyers on the list are knowledgeable.
3. Can an employee of a charity prepare a will for a donor? It generally would be inappropriate for an employee of a charity to prepare a will for another person where there are bequests to the charity where the employee works. One of the concerns includes the employee providing legal advice, which may be construed as being the unauthorized practice of law. As well, the employee presumably cannot be providing independent legal advice to the donor as the employee works for the charity. If a will were to be prepared by an employee of a charity, then there would be a far greater likelihood that it would be challenged, and it certainly would create suspicion with respect to the gift. Also, who will commission the affidavit of execution and who will store the will?

⁶ See article "Paying for Wills with Charity Funds" by UK Charity Commission at <http://www.charity-commission.gov.uk/supportingcharities/paywill.asp>

4. Education of donors versus undue influence – there is a difference between a charity educating the public about the objects and activities of the charity and an individual through their own free will then deciding to donate to the charity by means of a bequest and a charity exercising coercion/undue influence to obtain gifts from individuals. As mentioned above, if there is undue influence by a charity then the bequest can be overturned, damaging the reputation of the charity. Charities should honour requests by donors to limit their contact or solicitation, and charities should encourage donors to seek independent legal advice.

Bequest sample language

Some sample bequest clauses are attached to this article in a powerpoint presentation. These sample clauses should be modified by a lawyer according to his or her own client's situation and intent as well as to be consistent with the particular form of will used by the lawyer. These clauses should never be simply cut and pasted into a will without careful consideration of their appropriateness.

Checklist for Bequests in Ontario

- Have you raised the issue of charitable giving with every client?
- Have you verified on a corporate database the correct name of the charity?
- Have you verified with the CRA Charities Directorate database the correct name of charity and confirmed that it has charitable status?
- Are you using a standard bequest clause? If not, will your client be receiving an official donation receipt?
- For larger gifts, or endowments, or gifts of property other than cash or marketable securities, have you reviewed the gift acceptance policy and perhaps investment policy of the charity?
- For gifts that are a large part of the estate, have you considered whether it would be more tax advantageous to make some *inter vivos* gifts with a smaller gift by will?
- If the bequest contains any restrictions, have you verified with the charity that the restrictions are acceptable?
- Have you considered whether joint ownership or beneficiary designations or other probate minimization strategies could undermine the bequest in the will?
- If using multiple wills and the charity is a beneficiary under one of the wills only, have you considered whether there is a clause dealing with satisfying a bequest with assets under the other will if the assets under the will containing the bequest are insufficient?
- Is the testator contemplating marriage or remarriage in which case the will should reflect that it is made in contemplation of marriage?
- Have arrangements been made for the safe storage of the will and does the testator wish that a copy of the will, or excerpt, be provided to the charity?

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