
AFP 2004 CONGRESS CURRENT LEGAL ISSUES IN FUNDRAISING

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Estate Administration Issues With Charitable Gifts (Power Point Presentation)

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Estate Administration: Issues with Charitable Gifts

- Estate administration
 - with a will
 - without a will
- Focus: administration of estate with a will
- Probate of will: is it necessary?
 - If executors named but unwilling or unable to act
 - Nature of assets may require probate (land in land title system)
 - Even if not legally required may be required, from a practical point of view (publicly traded shares, bank accounts, etc.)

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Notice

- If will probated:
 - notice of application for Certificate of Appointment of Estate Trustee sent to beneficiaries
- If will not probated:
 - obligation of Estate Trustee to notify beneficiaries
- Charitable beneficiary may have prior notice (from testator) or may have copy of will
- If so, check records against notice given by Estate Trustee

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Responsibilities of Charity

- Answerable for its activities and for use and disposition of its property
- Subject to jurisdiction of court and provisions of certain statutes (*Trustee Act, Charitable Gifts Act, Charities Accounting Act*)
- Need to be aware of nature and extent of potential gift
- Gift may be (i) a cash bequest or (ii) a gift of an asset such as land, building, art, artifact or (iii) a residual interest and may have no restrictions or may be subject to conditions & restrictions in use of gift, investment etc.

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Process

- Open file
 - Note relevant information; obtain copy of will and review charitable gift provisions
 - Review type of gift
- Document conditions attaching to gift
 - Is gift subject to prior life interest
 - Are there conditions/restrictions in use of Income /Capital
 - Are there conditions/restrictions in object/purpose of gift
 - Are there investment restrictions

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Process (cont'd)

- Is gift acceptable:
 - Are constraints against public policy or otherwise not within objects of the charity
 - Is nature of the gift acceptable (ex land/buildings etc.)

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Monetary Gift

- Executor's year: Estate Trustee cannot be compelled to pay legacy before first anniversary of death even if will so provides
- Interest will be payable if delay in payment beyond first anniversary
- Value of estate may be reduced by liabilities; taxes; costs of administration; spousal/dependant relief/quantum meruit claims and other claims
- If estate not large enough to pay legacies they may have to abate rateably

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Personal Property/Gift of a Specific Asset

- Charity needs to consider if it wishes to accept the gift
 - some gifts are "Trojan horses"
 1. Land, buildings
 - contaminated land
 - building that needs extensive repair
 - may not be saleable
 - real property that charity can't manage
 - effect of *Charities Accounting Act*; 3-year restriction on property not used in charitable activity

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Personal Property/Gift of a Specific Asset (cont'd)

- "Trojan horse" gifts - cont'd
- 2. private company shares
 - can they be redeemed?
 - Charity can't own more than 10% of a business for more than 7 years & if it owns more than 50%, then reporting requirements to P.G.T.
- valuation of gift; charity must determine for itself
- timing of charity receipt (effect of prior life interest)
- costs of delivery (does estate or charity pay?)
- effect on disbursement quota

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Residual Interest

- Will necessitate more active role in reviewing the administration of the estate
- Need regular reporting and accounting
- Query if partial distribution is possible pending finalizing the administration
- Be aware of timelines ... patience is key. Filing and processing of tax returns and clearance certificate requests take time
- Will be requested to sign release and indemnity

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Estate Accounting

- Estate trustee has obligation to maintain proper accounts
- Beneficiary has right to inspect the accounts including inspection of vouchers
- Capacitated beneficiaries can approve accounts
- If minor or incapable beneficiaries accounts must be passed in court
- Estate Trustee can voluntarily pass accounts or can be compelled to so do

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Form of Accounts

- Original Assets
- Revenue
 - receipts
 - disbursements
- Capital
 - receipts
 - disbursements
- Investments
- Assets on hand at end of accounting period

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Timing of Passing of Accounts

- If estate is distributable and not complicated, accounting generally occurs towards end of administration. May be two part accounting: main accounting and final wind up accounting for holdbacks
- If estate more complex or longer administration, first accounting may be at end of a period of accounting and thereafter at regular intervals ... every 3-5 years is common length of accounting period.

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Due Diligence by Charity Beneficiary

- Charity has obligation to scrutinize the accounts
- In the past Public Guardian and Trustee could be relied on to act as watchdog
- Current position of PGT is that charities:
 - are sui juris, legally competent to protect their charitable interests
 - have a fiduciary duty to do so
 - are accountable to protect this interest and may be held liable for failure to do so

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Factors to Consider

- Check investments (was even hand maintained)
- Check payments on both Revenue and Capital side
Are they reasonable?
- Check performance of portfolio, check proceeds received on disposition of assets with value of asset at date of death (were there capital gains or losses?)
- Is estate holding wasting assets (ex cottage property which produces little to no income but may require disbursements) if so how are disbursements allocated

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Special Consideration


1. Compensation
2. Legal/accounting and other professional fees
3. Taxes

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Special Considerations

1. Compensation


- Fee Agreements
- Terms of will
- Trustee Act “fair and reasonable allowance”
 - mathematical formula: customary rate
 - factors developed in case law include complexity of estate administration, difficulties arising in the administration, size of estate etc
 - care and management fee and sometimes a special fee may be justified
- Pre-taking of compensation
 - generally pretaking is not allowed
 - some softening of this position in recent cases ... if reasonable and within range normally allowed by court.

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Special Considerations

2. Legal/Accounting and Other Professional Fees


- "Double dipping" : is Estate Trustee claiming compensation for work he/she retained professionals to do (ex accounting)
- Courts have allowed estate trustees to pay for investment counsel and real estate agent fees
- Charity beneficiary can ask for copies of detailed bills and can challenge professional fees even if already paid

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Special Considerations


3. Taxes

- Charitable gifts can have maximum tax benefit in year of death and immediately prior year - tax credit can be applied against 100% of income in year of death & immediately preceding year
- Charity beneficiary should check if Estate Trustee maximized charity tax credit. If intervening life interest, charity credit may still be claimed in year of death so long as no right to encroach on capital during life interest
- Charity receipt cannot be issued until gift is received. However charity tax credit can still be claimed in terminal return

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Releases and Indemnity

- Release is desired by Estate Trustee to protect him/her. It binds the beneficiary's acceptance of the administration of the estate
- If charity beneficiary is a recipient of money or property, should only sign a document acknowledging receipt of the gift and that it represents full satisfaction of what the charity is entitled to under the will
- If charity beneficiary is a residual beneficiary will likely be asked to sign a release and indemnity. Indemnity generally provides that the charity agrees that if in the future the Estate Trustee determines there are further estate liabilities and no estate assets left in the hands of the Estate Trustee, the charity beneficiary will reimburse the Estate Trustee for that liability.

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Releases and Indemnity (cont'd)

- Should try to clarify the nature and extent of the potential liability the Estate Trustee is concerned about
- If concern is income tax liability, perhaps suggest delay the distribution of the estate or increase the holdback amount until the Clearance Certificates are received
- Charity could also try to limit the quantum of the indemnity to the amount received by the charity
- Charity can't sign indemnity for money or cause of action beyond what estate would otherwise be liable for

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Estate Litigation

- Arises as result of disputes surrounding the making of the will (undue influence, lack of testamentary capacity, improper execution) or interpretation of the will, disputes between classes of beneficiaries or between beneficiaries and estate trustees or claims by third parties (spouses, dependants, creditors etc)
- Will challenges Effect may be to void the will and estate will be distributed as on intestacy (no charity interest on intestacy) or may bring forward a prior will where charitable interest may be more or less than in contested will

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Estate Litigation (cont'd)

- Involvement of charity will depend on a number of factors:
 - size of charity,
 - public relations,
 - access to advisors;
 - amount in issue
- Costs can be saved if several charity beneficiaries with similar interests could retain one solicitor
- Alternately could submit rights to court.
 - i.e leave battle to others without losing right to participate in settlement
- Charity may be asked to renounce testamentary gift, for example, in family hardship situations. May create issues because charity has fiduciary obligation to pursue testamentary gifts. No legal authority for charity to unilaterally renounce a gift.

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Cy Pres Applications

- Unique application relating to charitable gifts allows charity to seek advice and direction of court in circumstances where charity misnamed or misidentified or to clarify purpose of gift that is impossible or impractical to administer
- Court will try to uphold charitable gift intentions where possible but to do so must find that deceased had general charitable intent
- Types of cy-pres applications
 - where charity named is non existent and never existed
 - where charity named in will has transferred its assets and operations to another charity or charity named has merged its operations with another charity
 - where the extent of the gift is not clearly spelled out in the will
 - where terms of the gift are contrary to public policy

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Cy Pres Applications (cont'd)

- Court has inherent scheme approval power to modify terms of a gift.
 - where limitation is too precise
 - to modify administrative terms of a charitable trust in order to further its charitable objects (Killam estate)
- If court will not invoke its authority, gift might fail and the property reverts to estate to be distributed in accordance with the will
- Of interest to hospitals and foundations will be the Re Baker case. Testamentary gift to Northwestern General Hospital. Hospital incorporated a foundation after death of testator for purpose of holding funds for advancement of medical research and education. Estate trustee sought permission of court to transfer estate funds to the foundation and court refused to invoke its jurisdiction.

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What Should Testamentary Charity Beneficiary Do?

- Have process in place for testamentary gifts which should include the following:
 - receipt and review of will,
 - documentation of nature of gift, conditions/restrictions applicable to gift,
 - restrictions may relate to
 - (a) purpose of gift
 - (b) investment powers
 - (c) use of capital
 - (d) commingling with other gifts
 - check if condition precedent or condition subsequent
 - check if cy-pres language in gift or if need to bring application
 - have tickle system to bring forward the file at appropriate intervals

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What Should Testamentary Charity Beneficiary Do? (cont'd)

- Prepare precedent documents . For example could craft own form of release to present to Estate Trustees rather than use theirs.
- Designate a person in the charity to monitor testamentary gifts This will achieve consistency, knowledge and experience for the charity
- Don't forget the public relations aspects of the gift. Write to the family to express appreciation for the gift.
- Have appropriate fundraising materials clarifying preferred language for testamentary gifts (both restricted and unrestricted) and proper name of charity

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