

HOSPITAL AND FOUNDATIONS SEMINAR SERIES  
NEW DEVELOPMENTS IN PLANNED GIVING  
AND CHARITY LAW  
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**CHARITABLE DONATIONS MADE  
THROUGH WILLS**

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**A. INTRODUCTION**

- The Act provides tax relief to a donor for charitable gifts during his/her life time
- Tax relief is even greater for gifts made as a result of the donor's death
- Making charitable gifts through wills may be done in a variety of ways
- The availability of the donation tax credit will depend on the circumstances in each case and the manner in which the will is drafted

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**B. BENEFITS OF MAKING CHARITABLE  
GIFTS BY WILL**

- Income Tax Act provides that a gift made by an individual's will is deemed to have been made by the individual immediately *before* death
- Donation tax credit may be claimed in the individual's terminal tax return or in the year immediately prior to death

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- Donations made in the year of the donor's death and the immediately preceding year could be deducted against up to 100% of the deceased's income in those years
- Where a gift made as a result of a person's death does not satisfy the requirements for a gift made by will, the estate or the testamentary trust may be entitled to a charitable donation credit

- In other situations, a gift made from a testamentary trust to a charity may not be treated as a gift, but may be treated as a distribution in satisfaction of the charity's income interest in the trust or as a distribution in satisfaction of the charity's capital interest in the trust
- So, three possibilities:
  1. Gift by will
  2. Gift by estate/trust
  3. Distribution in satisfaction of interest in trust (as a beneficiary) income or capital

- Little case law dealing with what would constitute a gift made by will
- Previously, CRA took a restrictive view - the terms of the will must expressly provide a specific property, a specific amount or a specific percentage of the residue of the estate to be gifted to a charity named in the will, without any discretion by the trustees, so that the qualified donee on reading the will can expect that a specific gift will be made to it
- In 2001, CRA's views have relaxed

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**C. WHY IS IT RELEVANT TO CHARITIES?**

- **Receipting**
  - Having an understanding of the rules will assist the charity to know when to issue a receipt and when not to
  - Gifts by will or by estate/trust are entitled to receive receipts from the charity
  - No receipts if there is an intervening life interest until the death of the life tenant
  - Distribution to charities in satisfaction of interest in trust (as a beneficiary) income or capital are not entitled to receipts

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- **Disbursement quota (DQ)**
  - Gifts by will or by estate/trust
    - Are entitled to receive receipts
    - Will be included in the charities' DQ calculations
    - Gifts received by charities by way of bequest or inheritance are enduring property
    - Allows charities to hold certain property without the need to expend 80% of it in the following year after receipt

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- Gifts of enduring property do not affect the DQ of the recipient charity until they are either expended or transferred to another charity, at which time, the expenditure or transfer is added to the DQ calculation for that year
- Distribution to charities in satisfaction of interest in trust (as a beneficiary) income or capital are not entitled to receipts, therefore not included in the DQ calculation

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- Fundraising and donor relations
  - Be able to work with donors and their estates to achieve the result desired by the donors
  - Develop gift acceptance guidelines
  - Develop sample Will clauses wordings for donors

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**CHARITABLE GIFTS vs DISTRIBUTION IN SATISFACTION OF INCOME/CAPITAL INTEREST IN TRUST**

**Date of Death**

January December

Cash gift to charity

Trust

(a) Beneficiaries may include a charity or charities

(b) Trustees are authorized to make charitable donations

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**D. GIFTS MADE BY A TESTATOR WITHOUT INVOLVING ANY TRUSTS**

- For example:
  - Outright legacies and bequests
  - Gifts made from the residue of an estate where there is no intervening life interest
  - Gifts over to charities in the event that the beneficiaries under the will predecease or disclaim the gifts

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- Overview of Issues
  - a) Intention of testator
  - b) Identity of charities to receive gifts
  - c) Quantum of gifts
  - d) Timing to complete gifts
  - e) Form of property to be donated
  - f) Conditions attached to gifts

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- a) Intention of testator
  - The terms of the will must show that the testator has a clear intention to make a donation to a registered charity
- b) Identity of charities to receive gifts
  - CRA previously required the identity of the charity to receive the gift be expressly set out in the will
  - This restrictive view has been relaxed in recent years in several respects

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- b) Identity of charities to receive gifts (cont'd)
  - i) Discretion of trustees to choose charities
    - CRA previously did not permit trustees to choose from a list of charities to receive gifts from the estate
    - In 2001, CRA changed its view
    - Now acceptable for a will to stipulate that a specific amount be gifted to charity and provide a list of charities to which donations be made, with the trustees having a discretion to determine the amount to be given to each named charity, provided that:

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- The actions taken by the executor are reasonable and in accordance with the terms of the will
- The donation is made to a charity
- Also acceptable that where the terms of a will direct the trustees to donate a specific amount to a charity without identifying any charity in the will, and the will allows the trustees to have full discretion to decide which charity would receive the gift

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- b) Identity of charities to receive gifts (cont'd)
- ii) Gifts to charities established after the death of the testator
- In 2001, CRA accepted a gift by will to a private foundation to be established by the testator's estate
  - Query whether this view could be applied to charitable organizations or public foundations established after the death of the testator

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- c) Quantum of gifts
- i) Specific amount or specific percentage of the residue of an estate
- The will must expressly set out either (1) the specific amount of the gift or (2) the specific percentage of the residue of the estate
  - May be problematic if the trustees have discretion to decide on the quantum of a gift

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**1) Discretion of trustees to reduce specific amount listed**

- Where the will provides for specified amounts to be given to a number of specified charities, but the executors are given the power to *reduce the amounts*, as necessary, in the event that there are insufficient funds available to make all charitable bequests after the payment of all fees and expenses in the administration of the estate, the actual amount donated by the estate would qualify as gifts made by the will

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**2) Discretion of trustees to decide within a dollar range**

- Where a will provides that a gift is to be made to a charity within a dollar range, the deceased would be entitled to claim a tax credit for the *minimum* amount of the range, with the estate being entitled to a credit for donations made above the minimum amount
- Because donations above the minimum would be purely within the discretion of the trustees

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**3) Use of formula to calculate the residue and trustees' discretions**

- The will may provide for the donation of a specific percentage of the residue of an estate to a charity
- In some situations, acceptable for the will to provide for a formula determining the amount of the residue of the estate

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ii) Quantum of *in specie* gifts

- CRA generally requires that the will must expressly set out the specific amount or a percentage of the residue of the gift
- In a 2004 technical interpretation, pursuant to the terms of the will, a surviving spouse selected which pieces of artwork she wished to have from a collection of artwork owned by the testator, with the remaining pieces to be donated to an art gallery within 36 months after the testator's death
- Acceptable because the executor did not have any discretion on whether the painting will be donated

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Examples

1. \$50,000 to charity A
2. \$50,000 to be divided among a charity or charities to be selected by my Trustees
3. \$50,000 to be divided among a charity or charities to be selected by my Trustees but if residue of my estate is less than \$500,000 then the \$50,000 shall be reduced to \$25,000
4. To distribute between \$10-50,000 as my Trustees decide among such one or more charities as my Trustees decide
5. 20% of residue of my estate to charity or charities to be selected by my Trustees

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d) Timing to complete gifts

- In general, gifts made by a will should be completed within a reasonable period of time after death and that CRA may be requested to adjust the tax return in the event that the gift is made after the assessment of the deceased's final tax return (subject to the time limitation for reassessments)

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e) Form of property to be donated

- CRA generally requires the will to clearly specify what is to be paid from the estate
- Possible for trustees to have discretion to decide the form of property to be donated, unless the will specifies otherwise
- e.g. the will stipulates that a specific amount to be gifted to a charity, without stipulating as to the form of the gift
- e. g. the will permits a gift to be made in cash or *in specie*

f) Conditions attached to gifts

- Conditions attached to gifts are acceptable

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**E. GIFTS MADE BY A TESTATOR  
INVOLVING TRUSTS**

• For example:

- Gifts made from a spousal trust after the intervening life interest of the surviving spouse
- Gifts made from income and/or capital of a testamentary trust (other than a spousal trust) established under a will

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• Overview of Issues

a) Gift made by will

b) Gift by trust

c) Distribution in satisfaction of income and/or capital interest of charity vs. donations

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a) Gift made by will

- In order for a gift made from a testamentary trust to qualify as a gift made by will, all of the criteria concerning outright gifts mentioned above must be satisfied
- The trustees must not have any power to encroach on the capital of the trust before gifts are made

b) Gift by trust

- Where a gift made from capital of a trust does not satisfy as a gift made by will, the trust may be entitled to claim the donation tax credit

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c) Is it a gift (donation) or is it a distribution in satisfaction of income and/or capital interest of charity as a beneficiary?

- When a payment is made from income of a testamentary trust, it is sometimes permissible for such payment to be recognized as a distribution in satisfaction of the charity's income interest in the trust.
  - The trust may deduct such payment when calculating the income of the trust, instead of claiming a donation tax credit for that year

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- The test of when a trust is entitled to treat such a payment as a distribution of income interest as opposed to a charitable donation is not clear
- CRA appears to have different administrative positions depending on whether it is dealing with a testamentary trust or an *inter vivos* trust
- Testamentary trusts
  - Trustees are allowed the discretion to choose whether to treat a discretionary distribution from the trust to a charitable beneficiary as a gift or a distribution in satisfaction of the charity's income interest

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- **Alter ego trusts**
  - Where the trust agreement empowers the trustees to make a gift and the trustees exercise this power, it would be appropriate for it to be qualified as a donation by the trust
  - Where the charity is an income beneficiary and a distribution is made out of the trust's income, then trust can deduct income and charity "included"

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#### F. TEST

1. "My Trustees are authorized to distribute \$2 million to Canadian registered charities"
- Is the donation creditable in the year of death or in estate?

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#### Test (cont'd)

2. "My Trustees are authorized to distribute income and capital in their discretion among any one or more of the following: my children and other issue, my spouse and registered charities"
- If the trust makes a distribution to the CCS, what are the tax consequences to trust?
  - How is it received for DQ purposes?
  - If you don't want this result how do you change this?

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**Test (cont'd)**

3. “My Trustees are authorized to distribute income to my spouse, but may not encroach upon capital under any circumstances. Upon the death of my spouse the capital and remaining income is to be paid to the following registered charities:.....”

- When can the donation tax credit be claimed?

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**G. CONCLUSION**

- Lack of case law in this area
- This has been dealt with by CRA on a case-by-case basis, expressed in various technical interpretations to address specific circumstances but lacking a consistent approach
- Charities need to have a working knowledge of these rules for purposes of receipting, disbursement quota calculation compliance, and fundraising/donor relations
- Charities may wish to develop gift acceptance guidelines and sample Will clauses wordings for donors

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