



## **Will Drafting Tips for Charitable Giving**

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For wills and estates lawyers, it ought to be common practice to encourage clients to consider gifts to charity as part of an estate plan. This can be a fantastic way to reduce the amount of taxes paid by clients' estates, while also enabling clients to support causes close to their hearts. To ensure that a client's wishes are achieved and that donations directed under a will are respected, it is important to collect the right information at the outset, and to then draft the pertinent will clauses with the same care and precision as when naming other beneficiaries.

### **Preliminary questions to ask the client**

When a client's estate plan includes donations to charity, solicitors may wish to consider asking the following questions:

- What kind of gift does the client wish to leave to charity? Options include:
  - a specific bequest, where the client gives a specific asset, dollar amount, or percentage of the estate;
  - a residuary gift, where the gift is made from what is leftover in the estate after specific bequests have been honoured and taxes and expenses have been paid;
  - a contingent gift, which is given to the charity if a beneficiary named in the will predeceases the testator and can no longer receive the original bequest; or
  - naming the charity as the beneficiary of a life insurance policy or other asset for which a beneficiary designation may be made.
- Does the client want to mandate that the donation be used over a set period of time? If so, an endowed gift may be the way to go. Endowment funds are typically invested to last for either a set number of years or in perpetuity, and are used by charitable foundations, or by post-secondary institutions for fellowships, scholarships, bursaries and awards.
- Has the client made any donations to charity that have not yet been honoured, or does the client plan to make donations that may not be honoured by the time of death? If so, it may be advisable to include a direction in the will that authorizes the estate trustee to satisfy any amounts pledged to charity that have not yet been paid at the time of death.

### **Drafting tips for testamentary donations with an intended purpose**

Another point to consider is whether the client wants his or her gift to charity to be used for a specific purpose. A relatively unrestricted gift may be made, which gives the charity the discretion

to apply the gift to an area that, for example, shows great promise or great need, or alternatively, is the charity's highest priority need.

If the client instead wants the donation to be used for a specific purpose or applied to a specific type of programming, this information ought to be included directly in the will. However, in that case, it would also be prudent to include a clause in the will authorizing the organization to use the funding differently in case it becomes impossible, inadvisable, or impractical to use the gift, either in full or in part, as directed. Such a clause could, for example:

- provide the organization authority to apply the bequest to other purposes, but specify that they “conform as closely as possible to the spirit and intent” of the original bequest;
- give permission to “alter the terms of the will” to “adhere as closely as possible” to the original bequest; or
- give permission to “use the gift to the best advantage” of the charitable organization, “keeping in mind the original wishes of the testator.”

If the gift cannot be used as directed by the client, a provision that permits the gift to be varied could prevent the need for future court applications to determine what to do with the gift, thereby reducing potential legal fees that the estate may incur. Such a clause would also assist in ensuring that the gift will not fail if it cannot be used in strict accordance with the terms of the will.

### **Anticipating changes to the name of charitable organizations**

When including a charitable donation in a will, the legal name of the organization that is to receive the bequest ought to be used. However, there is always a risk that the name of that organization could change after the will is executed, making it impossible to comply with the will as written. In light of this risk, it is advisable to include a clause in the will directing that the gift will not fail if the organization changes its name or amalgamates with another organization, in which case the gift would then be payable to the successor organization. Alternatively, the will could provide the estate trustee with discretion to make the donation to the organization that most clearly resembles the organization that the testator had intended to benefit. For a precedent of these types of clauses, see the following [Sample Will Clauses](#) document shared online by [St. Joseph's Healthcare Hamilton Foundation](#).

### **Reaching out to the organization**

On a closing note, it may also be a good idea during the estate planning process to reach out directly to any charitable organization that the client wishes to benefit under their will. The organization can explain what the client's gift will help to accomplish, and may volunteer to prepare a custom will clause or to consult regarding the client's plan to donate.