



GIFTING CORPORATE PROPERTY

By Suzana Popovic-Montag - January 2024

This month's Solicitor's Tip examines the circumstances under which a client may gift corporate property using a testamentary instrument. Since the client technically does not own property that is owned by a corporation, such bequests could fail, depending on whether anyone else can control the property and how the will is prepared.

Gifting Property Owned by a Corporation

While bequests of corporate property have failed in other provinces on the basis that a testator cannot gift property that they do not own personally,¹ a gift of corporate property may be valid in Ontario. The courts have honoured such gifts when:

- the testator is the sole shareholder of the corporation holding the gifted property;² or
- the testator is the only person who can control the property through the corporation.³

However, estate planners ought to also be aware of the risk that a gift of corporate assets may fail. For example, such gifts have not been honoured when the testator has only a partial interest in the corporation that holds the property.⁴ A gift of corporate property could also fail, even if the testator is the sole shareholder of the company, if the will does not authorize the estate trustee to handle corporate assets, or does not properly describe the corporate interest being gifted.

Collecting Information About a Client's Corporate Interests

With the foregoing in mind, possible checklist questions include asking clients prior to drafting a will whether they have their own corporation or any interest in a corporation. If the answer to either question is yes, drafting solicitors should ascertain whether the client is the sole shareholder or only holds a partial interest in the corporation. If the client is the sole shareholder or is the only person with authority to control the corporation, it is also advisable to ask the client:

¹ See *Meier v. Rose*, 2012 ABQB 82 [*Meier*]; *Hickson v. Wilhelm*, 1997 CanLII 11088 (SK KB), var'd 2000 SKCA 1, leave to appeal denied [2000] S.C.C.A. No. 124.

² See *Trezzi v. Trezzi*, 2019 ONCA 978 [*Trezzi*] at paras. 9-24.

³ See *Estate of John Kaptyn*, 2010 ONSC 4293 [*Kaptyn*] at para. 143.

⁴ See *Wong v. Lee*, 1993 CanLII 2423 (BC CA) at para. 32.

- what property is held by the corporation;
- how the client plans to dispose of that property after death;
- whether anyone else can control the property through the corporation; and
- whether the client wants the corporation to be dissolved after their death.

Will Drafting Tips for Corporate Property

If a client wishes to gift property owned by a corporation under their will or give the estate trustee(s) the ability to handle corporate property, the following drafting tips may come in handy:

- A will ought to expressly authorize the estate trustee(s) to handle corporate assets. In *Trezzi v. Trezzi*, for example, the Court of Appeal endorsed the following will clause:⁵

If at any time my Trustees hold in my estate any investment in or in connection with any company or corporation, my Trustees may join in or take any action in connection with this investment or exercise any rights, powers and privileges that at any time may exist or arise in connection with this investment to the same extent as I could if I were living and the sole owner of this investment.

- It may be wise to use broad language to describe a gift of corporate property in the client's will if the client wants the gift to encompass a variety of types of shares or other types of property. For example, a will could bequeath "any interest" that the client has in the corporate property.⁶ Such drafting may also be appropriate if the client has an indirect interest in the property because multiple corporations are involved; as long as only the client can control the property, the client ought to be able to gift that property in a will.
- A gift of corporate property should not fail if the will authorizes the estate trustee(s) to do whatever is "necessary to transfer property held by the corporation to the beneficiary".⁷
- If a client wants a corporation to be dissolved after death, the client may expressly give the estate trustee(s) the authority to wind up the corporation under the will, although this power will also devolve to the estate trustee(s) through corporate law.⁸

⁵ *Trezzi*, *supra* note 2 at para. 23.

⁶ See *Kaptyn*, *supra* note 3 at paras. 148-149. In this case, the testator's will as revised to gift "any interest" rather than simply gift corporate shares.

⁷ See *McDougald Estate v. Gooderham*, 2005 CanLII 21091 (Ont. C.A.) at para. 30.

⁸ See *Trezzi*, *supra* note 2 at paras. 18-20.

When dealing with corporate property, it is important to identify any corporations or corporate assets that an estate planning client wishes to gift under their will and to include clear directions providing the estate trustee appropriate powers to handle corporate property to assist in ensuring that an estate planning client's testamentary intentions relating to these assets can be fulfilled. When dealing with complex corporate interests, it may also be prudent to consult corporate counsel and/or tax professionals.