

What to Consider When a Charitable Gift is Part of Your Estate

A charitable gift as part of an individual's estate plan has both planning and tax benefits. From a planning perspective, there are numerous things to consider. This article will discuss some of those considerations. The tax benefits are discussed in a separate article.

What is the motivation for the gift?

Often a gift is made to a favourite charity to provide money for the charity's use. Before executing a will, you should discuss whether the funds are to be used for a specific project or purpose, or if the gift should be spent as the charity sees fit. Consider discussing with the charity its particular needs and any future projects it may be undertaking. This conversation is particularly important when considering a non-cash gift. It may be that the charity is unable to accept the property or will be unable to use the property as you envisioned. For instance, before leaving a Victorian painting to the National Gallery of Canada, a registered charitable organization, speak with its curator to ensure the painting will fit within the gallery's mandate and whether it will be accepted or sold.

A common motivation for a charitable gift is to pass your values to the next generation. For substantial gifts, creating a private foundation may be advisable. However, rather than create a private foundation, a testamentary trust may be created in an estate plan which provides income to charities on an annual basis. Often a clause is included directing that each year the trustees, consulting with the beneficiaries, determine specific charities to receive the net income generated by the trust and designate a selection of specific causes or specific charities from which the trustees may choose. This both supports a cause and ensures the next generation becomes involved in charitable giving and gains an appreciation of the testator's values.

Another available planning vehicle is a Charitable Remainder Trust (CRT). A CRT may be created in a will or during the donor's lifetime. It is beneficial where the earmarked capital to be donated is needed to create an income stream for the donor or estate beneficiaries but the donor wishes to receive an immediate charitable donation receipt. With a CRT, an irrevocable gift is made to a charity through a trust agreement. The trust holds cash, securities, real estate or other investments. If the trust is created during the donor's lifetime, he or she receives an immediate donation receipt to be used in their current tax return. Income earned by the trust is paid to a named beneficiary for the remainder of his or her life. If the CRT is created through a will, the estate will receive a tax receipt when the trust is funded and a named beneficiary will receive income for the remainder of his or her life. When the trust is terminated, the remaining funds in the trust are paid to the charity.

Ensure the charity is named correctly

If a specific charity is being earmarked for a particular gift, it may seem self-evident but it is vital that the charity is properly named and identified. In the British Columbia Supreme Court case *British Columbia (Official Administrator) v. Ridge Meadows Assn. for Community Living*¹ (1999), the testator left a gift to the "Society for Retarded Children of British Columbia, Haney Society or Division." However, no such organization ever existed. There was an organization originally called Maple Ridge Association for Retarded Children and now called Ridge Meadows Association for Community Living. A legal doctrine known as the *cy-pres* doctrine states that a gift to a charity will fail should the charity be improperly named or the named charity ceases to exist, unless the will provides the executor with the power to choose a succeeding charity which, in the executor's view, closely resembles the one named in the will.

The proper name of a charity can be validated by reviewing the CRA Charities Listings page at https://apps.cra-arc.gc.ca/ebci/hacc/srch/pub/dsplyBscSrch?request_locale=en. It is recommended that the proper identity of a charity be confirmed and that to provide further protection, a *cy-pres* clause be inserted in a will where a charitable gift is included. Not doing so can lead to potential administrative or legal cost or a failure of the gift.

Ensure the trustee has adequate powers to properly administer a charitable trust

Often a will establishes a testamentary trust to provide an ongoing income stream to a charity or several charities. Such a trust is ideal where a testator wishes to benefit a charity on an ongoing basis or wishes to pass values to the next generation and have his or her children become actively involved in charitable giving. However, it is imperative when creating such a trust that the will provides the trustees sufficient flexibility to properly administer it.

For instance, in the Ontario case of *Toronto Aged Men's and Women's Home v. Loyal True Blue and Orange Home*², a reasonably modest amount was placed in a charitable trust and the income was to be paid annually to two charities. However, after a few years and a decline in

the equity markets, the trust was unable to produce sufficient income to meet the regulated disbursement quota, running the risk of having its charitable registration revoked. The charities applied to the court to amend the trust to allow the disbursement of both income and capital gains despite the lack of power to do so in the will. This would ensure the distribution quota was met. The court agreed and the terms were altered. However, it would have been prudent when drafting the will to allow the trustees greater freedom over capital to allow the trust to respond to economic changes in the future. It would also allow the trustees to consider more investment options such as mutual funds with a return of capital component.

Review the estate plan to ensure the gift continues to meet the testator's wishes

It is imperative to review an estate plan on an ongoing basis to ensure it continues to meet the wishes of the testator and is drafted in a manner that ensures changing tax legislation is taken into account. Such a review should include a review of any charitable gift. In the case of *Ukrainian Youth Association v. Galandiuk Estate*³, a will contained a gift which read, "to transfer 17% of the residue of my estate to the Ukrainian Youth Association sum to be used for the purpose of developing the summer camp in Acton, Ontario." The youth association sought the advice of the court as to whether the entire gift or only a portion of the gift had to be used to develop the summer camp. When the testator wrote his will, he had a very modest estate; however, when he died the 17% gift had a value of about \$1.2 million, far in excess of what the youth association required. The court determined it was clear all of the money must be used to develop the summer camp. If the testator had set out clearer language, the court application could have been avoided. Further, if he had reviewed his estate plan, it is likely he would have changed the gift or at least the amount being left.

Conclusion

If you wish to consider including a charitable gift in your estate plan, an investment advisor can add tremendous value by discussing the planning issues in addition to the tax advantages of such a gift.

To recap, consider:

- What is the purpose of the gift? Is a trust an advisable tool to consider where you wish to use the charitable gift to pass value to the next generation or provide funds over an extended period of time?
- The importance of properly naming the charitable organization and the importance of a cy-pres clause.
- Where a charitable trust is being contemplated, consider who will be the investment advisor and ensure the trust has sufficient investment authority to use trust funds that will meet the goal of the trust. Also, ensure the trust can respond well to changes in economic conditions.
- Review your estate plan on an ongoing basis. Your circumstances may change over time and the gift may no longer be viable.
- Lastly, reach out to the charity to ensure the gift can be accepted and will be used as intended.

¹ 1999 CarswellBC 401 (British Columbia Supreme Court)

² (2003) 68 OR (3d) 777 (Ontario Superior Court)

³ 2001 CarswellONt5001, 43 E.T.R. (2d) 317 (Ontario Superior Court)

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2 Queen Street East, Twentieth Floor, Toronto, Ontario M5C 3G7 | www.ci.com

Head Office / Toronto
416-364-1145
1-800-268-9374

Calgary
403-205-4396
1-800-776-9027

Montreal
514-875-0090
1-800-268-1602

Vancouver
604-681-3346
1-800-665-6994

Client Services
1-800-792-9355