



Leaving a Bequest to a Canadian Charity

By Mark Blumberg (June 1, 2010)

Leaving a bequest/legacy to a charity in your will can be an excellent way of supporting a cause that you care for or leaving a lasting legacy. Unfortunately, many bequests are not handled correctly or professionally and this may create problems and expenses for the charity and your estate, and in some cases, it can result in the gift being declined. Although it is generally important when dealing with an estate to use a lawyer, when one wants to make a bequest to charity it is even more important to obtain legal advice.

What does a lawyer add to the equation?

- 1) **Clarity.** The lawyer ensures that the will is clearly drafted to avoid subsequent confusion or conflict including using proper bequest clauses that will be of benefit to the executors of the estate and the charity.
- 2) **Validity.** The lawyer ensures that the will is properly executed in accordance with the provincial requirements which are quite complicated. If these provincial requirements are not strictly followed the will could be held to be invalid along with the bequest.
- 3) **Capacity.** The lawyer can be a witness as to the testamentary capacity of the deceased at the time of making the will. If the will is set aside either because it was not executed properly (see point 2 above), or the testator did not have the mental capacity to make a will, then either a previous will would be effective, or if there is no previous valid will, then there would be an intestate succession ie. no will. The previous will may not provide any bequest. In the case of an intestacy (no valid will) the charity would not receive any of the bequests as none of the provinces intestate succession legislation, such the Ontario *Succession Law Reform Act*, provide for charities to receive funds on intestate succession.

- 4) **Correct Name of Charity.** A lawyer would conduct corporate searches on the proper legal name of the charity to ensure the correct name is used and that it is clear which charity is receiving the amount. This can avoid a conflict later between similarly named charities. For example, there are hundreds of registered charities that have the term “cancer” in their name. Furthermore, the lawyer would ensure that the charity is currently an active corporation and has not been dissolved. It is unfortunate but many charities do not have their correct legal name on their website or in their promotional material!
- 5) **Charitable Status.** A lawyer can ensure that the “charity” is currently a registered charity with the Canada Revenue Agency. There are many worthy non-profit organizations that are not registered charities and a gift to them by an individual will not result in an official donation receipt for income tax purposes.
- 6) **Acceptability of Bequest or Restrictions.** Many conditions or restrictions are placed in bequests by well meaning donors without fully understanding the effect of such conditions or restrictions. A lawyer can make inquiries to a charity with respect to whether the proposed bequest is within the objects of the charity to ensure that the legacy is not ultra vires (outside) the objects of the charity. A lawyer can discuss with the charity whether any restrictions contemplated in the legacy are appropriate and whether the gift would be accepted by the charity. Many charities have gift acceptance policies – some of which limit who can give to the charity and the types of gifts the charity is prepared to accept. Some individuals place requirements in the legacy that leave the charity with little choice but to refuse the gift, which is a very unfortunate result. For example, some charities will not accept real property, such as a building or your house (because of the concern, however small, of potential environmental problems). Some charities are not equipped to deal with certain complicated or long term gifts and they may decline the gift if they consider it to be burdensome. Some of the conditions or restrictions may be vague and difficult for the charity to implement thereby creating an unintended headache for the charity. It is important to specify whether a restriction is to be a legally enforceable trust or a precatory (unenforceable) wish. If thought is given to this issue ahead of time a testator’s intentions can be respected and alternatives can be found.
- 7) **Avoiding the "Disappearing Will".** Having a lawyer retain a will in a "will’s safe", or at least a copy in the lawyer's file, will reduce the likelihood that the will just “disappears” when other beneficiaries would receive a greater benefit if there were no will and one dies “intestate”. Another way to ensure that your wishes are respected is to inform the charity of the gift and perhaps even provide the charity with a copy of your will. However, some people for reasons of modesty or flexibility or otherwise, do not wish to advise the charity of the bequest or provide a copy of the will to the charity.
- 8) **Other Planned Giving Ideas.** There are times when a legacy may not be appropriate and a major gift during the lifetime of the testator or another type of planned gift (such as gift of life insurance or marketable securities, or a designation of an RRSP) is more suited to the donor's individual situation.

- 9) **Estate Planning.** A lawyer can assist with many aspects of estate planning including wills, powers of attorney for property, powers of attorney for personal care, trusts and other matters. Lawyers typically work with other professionals such as accountants, insurance agents, and financial planners to ensure a coherent estate plan. A legacy left in a will should be properly integrated with a donors estate plan.

For a more detailed discussion of these issues you may wish to review an article written by Lize-Mari Swanepoel and myself entitled “Bequests - Avoiding problems with the ultimate planned gift” written for the Ontario Bar Association Program “Righting Wills IV: Essential Tips for Practitioners”. The article is located at www.globalphilanthropy.ca.

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