

Charitable Gifts and Unusual Assets

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CHARITABLE GIFTS AND UNUSUAL ASSETS

CHARITABLE GIFTS

Gifts to charity can be an important part of an estate plan for average wealth clients. Many clients have charitable causes that they would like to support, and the additional benefits arising from the donation tax credit arising from such a gift upon death can make charitable giving appealing from a practical financial perspective as well.

Our experience is that most people do not come to the office with a specific intention to make a charitable gift, but when they learn of the preferred tax treatment, many will decide to include such a gift, especially in the “common disaster” clause that prevents an intestacy if all named beneficiaries are predeceased. People are generally happy to receive the suggestion, and as a profession, we can do a lot to help give back to the community by asking clients the simple question.

In helping clients plan charitable gifts after death, there are a few key areas of inquiry that require the lawyer’s attention, including:

1. Will the proposed gift meet the requirements set out in the *Income Tax Act*¹ for a donation tax credit; and
2. Is the testamentary clause being properly drafted to ensure that the proposed gift is effective.

The requirements that must be met to obtain a donation tax credit are set out in s. 118.1 of the *ITA*. If these requirements are not met, the gift will not fail; however, the deceased’s estate would not receive a donation tax credit. The tax implications of that could be significant, depending on the size of the donation and the circumstances of the deceased’s estate. If the drafting lawyer has not properly turned his or her mind to ensuring that the gift will meet the requirements to obtain the tax benefit, it can result in a loss to the estate and the beneficiaries.

A number of questions must be considered to properly draft the clause, including:

1. Who is receiving the donation;
2. What kind of property is contemplated by the gift;
3. Who is making the gift;

¹ RSC 1985, c. 1 (5th Supp.) (the “*ITA*”)

4. When must the gift be made and when can the credit be used.

Who is Receiving the Gift?

To qualify under s. 118.1 of the *ITA*, the gift must be made to a “**qualified donee**”, meaning that the recipient must fall into one of the following categories:

- a registered charity (including a registered national arts service organization)
- a registered Canadian amateur athletic association
- a registered housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged
- a registered Canadian municipality
- a registered municipal or public body performing a function of government in Canada
- a registered university outside Canada that is prescribed to be a university, the student body of which ordinarily includes students from Canada
- a registered charitable organization outside Canada to which Her Majesty in right of Canada has made a gift
- Her Majesty in right of Canada, a province, or a territory²
- the United Nations and its agencies

Many clients will have a clear idea of the qualified donees they would like to support. Others may have a more difficult time choosing, perhaps because they have several causes they hold dear. One type of “qualified donee” that can be suggested in such circumstances is a community foundation, such as the Calgary Foundation or the Edmonton Community Foundation. Clients can establish a fund that allow them to choose charitable causes, rather than particular charities, so that their donation can be invested and distributed over time to various qualified donees. For a donation over a particular amount, community foundations generally provide that the fund can bear the family name such that the person leaves a legacy.

Potential Pitfalls to Watch Out For

1. Organization named is not a “qualified donee”

² Her Majesty in right of Canada, a province, or a territory, and the United Nations and its agencies are qualified donees that do not have to be registered to be recognized as such.