

Encouraging Bequests While Avoiding Legal and Ethical Issues

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Overview

- CRA Fundraising Policy and Consultation
- Encouraging Bequests
- Legal Issues
- Ethical Issues
- Practical Considerations

* presentation is information and
not legal advice



CRA Fundraising Policy

CRA Consultation on proposed policy on fundraising by Registered Charities

- April 2008 – Consultation on Proposed Policy on Fundraising by Registered Charities
- June 2008 – Background Document
- August 31, 2008 – end of consultation
- Revised policy later this year?
- Highlights below



CRA Consultation on proposed policy on fundraising by Registered Charities

- criticisms by some – length, complexity, discriminates against certain fundraising, constitutionality, phase in, grid
- CRA needed to do something – fundraising is too important for regulator to ignore – charities want direction and need to level playing field

See my article "*CRA Fundraising Consultation - One giant leap forward in guidance for Canadian registered charities*" at www.globalphilanthropy.ca



CRA Consultation on fundraising (cont)

Prohibited conduct

- illegal activities/contrary to public policy
- fundraising is main, prevailing or independent purpose of charity
- excessive or disproportionate private gain
- harm outweighs public benefit



CRA Consultation on fundraising (cont)

Apportionment of Expenses

- all expenses allocated for charitable when “substantially all of the resources devoted to the activity advance an objective other than fundraising”. Substantially all = 90%+
- otherwise can be allocation between fundraising and non-fundraising
- in some cases all expenses allocated to fundraising



Evaluation Grid – Ratio of fundraising cost/fundraising revenue in fiscal period

Rarely acceptable:

more than 70% (charity nets less than 30%)

Generally not acceptable:

50% to 70% (charity nets 30% to 50%)

Potentially not acceptable:

35% to 50% (charity nets 50% to 65%)

Generally acceptable:

20% to 35% (charity nets 65% to 80%)

Acceptable:

less than 20% (charity nets more than 80%)



Conduct considered as decreasing risk of unacceptable fundraising

- Prudent planning processes
- Appropriate procurement processes
- Good staffing processes
- Ongoing management and supervision of fundraising practice
- Adequate evaluation processes
- Use made of volunteer time and volunteered services or resources
- Disclosure of fundraising costs, revenues and practice

Conduct increasing risk of unacceptable fundraising

- Sole-sourced fundraising contracts without proof of fair market value
- Non-arm's length fundraising contracts without proof of fair market value
- Fundraising initiatives or arrangements that are not well-documented
- Needless purchase, non-arm's length purchase or purchase not at fair market value, of fundraising merchandise
- Activities where most of the gross revenues go to contracted non-charitable parties



Conduct increasing risk of unacceptable fundraising (cont.)

- Commission-based fundraiser remuneration or payment of fundraisers based on amount or number of donations
- Fundraisers receiving disproportionate compensation relative to non-fundraisers
- Total resources devoted to fundraising exceeding total resources devoted to program activities
- Misrepresentations in fundraising solicitations or disclosures about fundraising or financial performance
- Combined fundraising and charitable program activity, where contracted to a party that is not a registered charity or that is compensated based on fundraising performance



Other Circumstances CRA may consider for evaluation grid

- a) Small charities or charities with limited appeal
- b) Charities that are investing resources in donor acquisition or other types of fundraising in which the return will not be realized in the same year in which the investment is made
- c) Charities whose main or major purpose is to make gifts to qualified donees, or to one or more registered charities and as a result have a different cost structure than charities that carry on their own activities



Other Circumstances CRA may consider (cont)

- d) Charities whose activities include lotteries or charitable gaming that is regulated provincially
- e) Charities engaging in cause-related marketing initiatives
- f) Charities with extraordinary spending, relative to their size, on infrastructure to ensure compliance with this fundraising policy



What can we draw from the fundraising consultation and grid

- high fundraising costs with one event are not necessarily a problem, unless you only have one event in the year and other circumstance are not applicable.
- diversification of revenue – but try to move to lower cost fundraising
- incorporate conduct decreasing risk of unacceptable fundraising and avoid other conduct
- why was 70% of the comments that CRA received from Toronto??



WAYS TO REDUCE FUNDRAISING COSTS

Some ideas to reduce fundraising costs?

- bequests
- grants and contributions
- major gifts
- use lower cost fundraising generally, higher cost only if very good reason
- use volunteers



Some ideas to reduce fundraising costs? (cont.)

- sometimes use in-house fundraising
- sometimes use fundraising contractor
- better agreements and deals with fundraising contractors
- use technology – more efficient processing of gifts, use of website, use of social networking
- be creative



PLANNED GIVING/GIFT PLANNING

Overview of Planned Giving Vehicles

- bequests – gifts under will
- gifts of marketable securities
- life insurance
- certified cultural property
- gifts of real estate
- gifts of private company shares



Overview of Planned Giving Vehicles (cont)

- 'Charitable Remainder Trust' (CRT)
- gifts of residual interest
- interest free loan
- private foundation
- RRSP/RRIF
- charitable gift annuities
(self insured or reinsured)



INTRODUCTION TO BEQUESTS

Introduction to Bequests

- most bequests are 'simple' – but issues and problems with some
- if you know about a bequest and if you know that there is a problem you can intervene
- presentation about red flags to pay attention to



Simple situation

- elderly widow, no children, has will
- "I DIRECT my Trustees to pay the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) to [CHARITY], currently located at [address], for its general purposes. The receipt of an appropriate officer of [CHARITY] shall be a sufficient discharge of my Trustees."^{*}
- charity finds out after death
- bequest management

* Not a precedent clause



Sample bequest scenarios

- whole estate to charity
- amounts to various parties and residue to charity
- part (eg. $\frac{1}{4}$ of residue) to charity
- \$100,000 cash to 1 charity
- \$100,000 cash to 10 charities



Sample bequest scenarios (cont)

- amount to charity, subject to conditions or restrictions
- contingent gift (\$ to charity if wife dies first)
- inter vivos gifts to charity and bequest at death
- spousal or other trust with gift over to charity



Introduction - Why are bequests important to understand

- 90% of planned giving in \$ is bequests
- biggest donor concern is admin/fundraising costs –bequest are one of the least expensive vehicles in planned giving
- cost – bequest 1-5% vs. 50% for special events



Why are bequests important to understand (cont)

- bequests are middle class major gift
- most lawyers who do bequests don't even know what gift planning/planned giving is.
- lawyers have lots on their minds when do estate planning – not just bequests
- charities need to educate Professional Advisors and themselves



Bequests - Advantage

- revocable, deferred
- death is a good time to give for many
- reduce taxes - tax receipt may coincide with substantial income tax liability on death
- flexible
- 'simple'



Bequests - Disadvantages

- donor does not see the funds spent or help people now, only after death
- charity does not get money now, does not help with immediate needs
- no current tax benefit for donor
- tax benefit may be illusory in certain situations
- bequest is revocable



Intestacy – No will or no valid will

- ☐ person saying they will include charity in will does not make it so
- ☐ if no valid will, no bequest
- ☐ In Ontario see Succession Law Reform Act (SLRA)
- ☐ charity will not get a dime under SLRA
- ☐ charities and Professional Advisors need to encourage people to have proper wills



ENCOURAGING BEQUESTS

CREATING A PLANNED GIVING PROGRAM FOR A CANADIAN CHARITY

- yes or no. Maybe.
- NO – cost of program, lack expertise, priorities for short term funds, no board support, revocable gift
- YES – low fundraising cost and diversification of revenue, right demographic group, tremendous opportunity
- MAYBE – do it but very cost effectively



1) Board and ED Support

- 1-10-20 year time horizon
- will organization be around
- will board support next year
- are expectations realistic
- who will be responsible –staff, volunteer, PG committee, consultant



2) Correct legal name of charity

- check letters patent
- if you don't like the name then change it.
- incorrect name puts executor in difficult position, can result in court costs and can result on loss of bequest or in sharing bequest
- use correct legal name on bequest information and website



3) Due Diligence

- if you are paying \$1 million for a business what sort of inquiries would you make??
- some donors or their advisors do due diligence for bequests
- how effective is organization?
- is charity involved with litigation or problems with CRA? Fix problems now
- do your own due diligence - Google and Google ALERTS, corporate and CRA searches, review T3010



4) Gift Acceptance Policy

- gift acceptance policies are a very important tool to anticipate and avoid legal and ethical issues.
- some charities do not accept real estate, annuities, perpetual endowments
- almost all accept unrestricted bequests and unrestricted marketable securities donations
- what conditions or restrictions are acceptable, recognition, conflict of interest, valuation, responsibilities



5) Website or Fact Sheet

- explain planned giving
- provide information on vehicles
- examples of donors
- contact information
- bequest – correct name and sample clauses



6) Marketable Securities

- can use own brokerage account or CanadaHelps etc. to accept donations of marketable securities directly
- need information and instructions from donor
- fact sheet
- put information on website



7) Planned Giving Society

- may establish to recognize estates and those who have committed to make planned gift
- yes – recognition of individuals, prominence to planned giving
- no – effort and cost
- society may only have one event per year but send message that charity cares about and recognizes planned gifts



8) Responsibility

- volunteer or staff
- if volunteer is it one person or committee
- if staff –how much of duties are PG
- major gifts vs. planned giving
- ultimately board is responsible for PG and acceptance of gifts and conditions.



9) Budget and Plan

- large (\$200,000 exp) vs. small (1-\$10,000)
- large - salaries, events, advertising, professional services, training, printing
- informal plan vs. business plan
- obtain professional advice on certain aspects – pay a little now or pay a lot later



10) Administration of Bequest

- learn about administration process
- get legal help especially with first or complicated gifts
- most bequests are not complicated
- keep file and record
- use reminder system



11) Join Networking and Educational organizations

- CAGP, AFP
- education, networking
- mentorship
- courses
- internet – be careful of differences between Canada and US



12) Professional Advisors and Planned Giving

- very important to have input from professional advisors
- have a model – planned giving committees, hiring advisors etc.
- not all professional advisors are equal in skills and knowledge
- see my article on “Charities, Professional Advisors and Planned Giving Committees” at www.blumbergs.ca



12) Professional Advisors (cont)

- Lawyers – gift acceptance issues, estate planning, drafting wills, bequest management
- Accountants – estate planning and tax issues
- Investment Advisors – especially re: marketable securities
- Insurance Advisors – insurance, annuities
- Trust and Bank Officers – planned giving, bequest management



13) Marketing of Bequests

- existing publications
- website
- signatures on e-mail messages
- remind at events
- highlight past donations
- hurry up and wait



14) Ramping up a Planned Giving Program

- hiring staff
- hiring consultants that specialize in bequests
- review of databases
- call to certain donors
- advertisting



15) Prospects

- check your database
- look for older and consistent donations (3-5 years), people who have no children
- long-term volunteers, board members etc.
- research before meeting



16) Respond to inquiries

- give correct information
- respond quickly
- respond to requests for information – UK study - 1/3 of top UK charities did not respond at all to first request, 1/6 did not respond to second request.
- keep list of expectancies



LEGAL

Important Legal Considerations in Bequests

- Correct Name of Charity
- Clarity in will drafting
- Capacity of testator
- Validity of will
- Charitable Status



Important Legal Considerations in Bequests (Cont)

- Revocation of Wills
- Bequest property and acceptability
- Bequest restrictions and acceptability
- Due Diligence
- Disappearing will, POAs.
- Disappearing assets
- Trusts, Residual Interests and Deferred Gifts



Important Legal Considerations in Bequests (Cont)

- Taxes and bequests
- Use and abuse of Powers of Attorney prior to death
- Ownership can defeat testamentary intention
- Beneficiary designation can defeat testamentary intention
- Probate Avoidance
- Claims against estate



Correct Legal Name of Charity* *

- in bequest use correct legal name of charity
- not necessarily name on letterhead, website, business card of charity.
- lawyers search Ontario government database through Teranet, Cyberbahn or Oncorp.
- Federal charities - Industry Canada provides free access
- For large gifts lawyer may wish to review letters patent or supplementary letters patent



Correct Name of Charity (cont)

- charity should review letters patent
- if you don't like your charities legal name then change it
- how many charities have cancer in their name?
- incorrect name puts executor in difficult position, can result in court costs and can result on loss of bequest or in sharing bequest



Clarity of bequest clauses and will

- ❑ is will clearly drafted, not just bequest clause?
- ❑ avoid confusion and argument
- ❑ proper bequest clauses anticipating various common circumstances
- ❑ helps executor and charity



Capacity of Testator

- presumption of capacity, lawyer as witness
- assessment
- *Banks v. Goodfellow* (1870) test
 - 1) understand they are making a will
 - 2) understand nature and extent of property
 - 3) who might be expected to benefit
 - 4) No delusions that poisons
affections



Validity of will

- provincial requirements
- 2 witnesses, of sound mind, over 18, who are not beneficiaries, together witnessing
- written, initialling
- if will is not valid then previous will or intestate succession.



Validity of will (cont.)

- concern re: holograph will (wholly in his or her hand, no witnesses)
- concern re: will kits and will programs
- affidavit of execution
- storage of wills



Charitable Status – CRA and Quebec

- is it charity or non-profit?
- check CRA website and database
- watch for revocations – especially for non-filing of T3010.
- Quebec registration if gifts from Quebec
- if not registered then no tax receipt and no tax benefit for estate



Revocation of Wills

- separation does not revoke will
- divorce – voids gift to spouse
- marriage revokes will unless wording that will made in contemplation of marriage
- new will or writing, burning or tearing
- alterations?



Bequest and acceptability of property

- gift acceptance policy
- land – environmental concerns
- flow through marketable securities, private corporation shares
- valuation issues and costs
- GINKY – gifts in kind (is it useful to charity or can it be sold)
vs. refusal to accept



Bequest and Acceptability of Restrictions

- gift acceptance policy – may have limits
- has specific purpose been fulfilled, program discontinued
- outside objects (ultra vires)
- power to vary clause, precatory vs. binding
- against public policy
- restrictions not compliant with other laws



Due Diligence

- if you are paying \$1 million for a business what sort of inquiries would you make??
- some donors or their advisors do due diligence
- how effective is organization?
- is charity involved with litigation or problems with CRA?
- do your own due diligence - review T3010, Google and Google ALERTS



Disappearing Wills

- best for charity to have copy of will or excerpt dealing with charity
- good if lawyer has original will
- not so good if client has will at home or in own safety deposit box
- accidentally or deliberately wills can disappear
- no will = no bequest



Disappearing Assets

- if charity to receive particular property and property is not owned by deceased's estate or property is destroyed then charity may, depending on wording not receive anything
- sometimes best to leave amount or part of residue rather than particular asset -if leaving particular asset be careful with wording.



Trusts, Residual Interests and Deferred Gifts

- ❑ trust for spouse, children, etc. and then after certain event charity gets funds.
- ❑ need to be careful in drafting and manage interests of income beneficiary and capital beneficiary
- ❑ carefully consider events relating to distribution of asset



Tax and Bequests

- ❑ bequest in will – tax credit against up to 100% of income in the year of the donor's death and immediately preceding year.
- ❑ matching the donation tax benefit with the tax –often not enough income
- ❑ do not over promise on tax benefits
- ❑ do not have to identify specific charities anymore to obtain deduction – trustees can have discretion as to selection but be careful



Use and Abuse of Continuing Powers of Attorney for Property

- power of attorney can provide for charitable donations - good
- powers of attorney can legitimately or illegitimately be used to undermine value of estate and testamentary wishes
- POA – reduce value of estate by putting funds in joint account or in trust



Ownership can defeat Testamentary Intention

- Joe in his will leaves 1 million to charity and 1 million to son Mark
- Joe has one asset – large house (principal residence) (\$2,000,000) and has 50G in cash in bank
- Joe owns house jointly with son Mark
- Joe dies – who gets what (is Mark 15, 25 and dependent, 40 and not dependent?) (presumption of advancement vs. presumption of resulting trust – intention?)
- Mark may get 2 million dollar house and charity 50G!



Beneficiary designation can defeat Testamentary Disposition

- Joe has a will that leaves 1 million to charity.
- Joe has little by way of assets but has 1 million dollar life insurance policy
- Who is beneficiary – son or estate.
- Joe dies
- beneficiary designation will determine who will get funds



Probate avoidance - can be bad for donor and undermine bequest in will

- probate 1.5%, income tax 46%
- common tools – insurance, jointly held assets with spouse and multiple wills
- dangers of poorly thought out approaches – income tax liability, fights over joint account
- probate avoidance commonly undermines value of estate and therefore funds that can be used to pay bequest



Claims against estate come before bequests

- debts
- tax liability
- Family law act/ dependent relief
- quantum meruit claim



ETHICAL

Ethical issues

- Can a charity pay for the cost of preparing donor's will?
- Can a fundraiser or charity act as executor?
- Can charities recommend professional advisors?
- Can a charity employee do a will for a donor?
- Undue influence of charity vs. education
- Conflicts of Interest



Can a charity pay for the cost of preparing a donor's will?

- yes?
- concern about undue influence – is donor making donation on own free will or is there coercion, pressure etc.
- is it acceptable use of charities money?
- if undue influence bequest will be overturned and reputational problem for charity



Can a charity pay for the cost of preparing a donor's will? (cont)

- see article "Paying for Wills with Charity Funds" by UK Charity Commission
- cost/benefit, legal challenge, impression
- nothing is free, estate planning is not 'simple'
- occasionally done in UK – charity uses campaign to encourage will preparation and hopefully bequest.



UK Suggested Precautions?

- Charities must not be directly involved in drafting the will. Charities must give a written statement to the testator and the solicitor explaining how the charity will pay for the will and the procedures to be followed.
- The solicitor drafting the will must act for the testator only, not the charity, even if the charity is paying for the will;
- The solicitor must take instructions from the testator, not the charity and the instructions should be confirmed in writing;
- Before the will is executed, the solicitor must be satisfied that the will reflects the intention of the testator and that the testator understands the will.

UK Precautions? (cont)

- The solicitor should not suggest making a bequest during the will drafting process;
- If the testator wants to make a bequest, he/she should be advised that he/she should make adequate provision for family members and dependants first.
- If the charity pays for the will, it should recommend that the testator instruct the testator's own solicitor. If the testator does not have a solicitor, the charity should recommend that the testator obtain independent legal advice, but not recommend any particular solicitor. Rather the charity should provide a list of solicitors or refer to an outside body such as a local Law Society.
- Witnesses to the will must not be charity employees or members.

<http://www.fia.org.au/Content/NavigationMenu/IndustryLinks/Research/Bequests/default.htm> BEQUEST FUNDRAISING *ETHICAL CONSIDERATIONS FOR PROMOTIONAL EVENTS* by Louise Steer LLM LLB BA(Hons)



Can a charity recommend particular professional advisors?

- not one, but many.
- can provide a list of professional advisors who are knowledgeable and don't recommend any one of them – donor must choose
- charity should advise donor that the charity is not assuming any independent responsibility for the conduct or competence of the lawyers whose contact information the charity is providing



Can a fundraiser or charity act as executor?

- no legal prohibition for fundraiser – CAGP code discourages
- does fundraiser have expertise?
- risk? negligence? is it worth it?
- does charity have power to act as trustee?
- claim of undue influence? even hand?
Conflict of interest



Can a charity employee do a will for a donor?

- would be really inappropriate
- is legal advice being provided by charity?
Unauthorized practice of law?
- charity could be sued for negligence
- far greater likelihood of challenge
- would definitely create suspicion



Can a charity employee do a will for a donor? (cont)

- who will prepare affidavit of execution
- who will store will – charity should not
- is donor getting ILA?



Undue Influence by charity vs. education

- pressure/coercion/undue influence vs. free will
- bequest can be overturned
- reputation of charity
- honour donor requests to limit contact or solicitation
- encourage donor to seek independent advice



Conflicts of Interest

- ❑ planned giving officer represents charity, not donor
- ❑ fundraisers should refuse/decline legacy gift to fundraiser from donor
- ❑ fundraiser moving from one organization to another – files, confidentiality, relationships



PRACTICAL

STEPS TO AVOIDING PROBLEMS

- be aware of legal, ethical and practical issues
- education –CAGP, AFP, internet etc.
- have professional relationship with professional advisors
- gift acceptance policies
- encourage donors to seek legal advice



STEPS TO AVOIDING PROBLEMS (cont)

- conduct due diligence on own charity
- place accurate, complete and helpful information on website
- avoid providing legal advice and don't provide wills or codicils
- avoid providing tax and accounting advice
- respond to requests for information



Promotional materials

- ❑ are they correct, truthful and not misleading
- ❑ are you providing legal, accounting or other advice?
- ❑ do you recommend that donors seek independent legal advice
- ❑ do you provide correct legal name of charity
- ❑ has it been vetted by someone who is knowledgeable



Professional Advisors and Charities

- very important to have input from professional advisors
- have a model – planned giving committees, hiring advisors etc.
- not all professional advisors are comfortable or interested in charities and philanthropy
- see my article on “Charities, Professional Advisors and Planned Giving Committees” at www.blumbergs.ca



Charity or estate planning lawyers and planned giving

- to set up a bequest program do not need a lawyer but very helpful to obtain advice especially in the beginning to review materials on website and gift acceptance policy
- legal advice can avoid legal problems and embarrassment for charity
- ensure lawyer has necessary documents like letters patent, gift acceptance policy, will



Imagine Canada New Code of Ethics and Gift Acceptance Policies

- 9. If the charity receives, or anticipates receiving, gifts-in-kind of \$100,000 or more in a year and has annual revenue in excess of \$500,000, it will establish a Gift Acceptance Policy (including valuation issues) for the receipt of gifts-in-kind
- “Imagine Canada’s new Ethics Code: Imagining a more ethical Sector” at www.blumbergs.ca
- gift acceptance policies are a very important tool to anticipate and avoid legal and ethical issues.



More Information

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