



ENFORCING CHARITABLE GIFTS: Working with Executors and Beneficiaries

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Some problems we'll consider:

- Misnamed charity
- Will challenge & estate litigation
- Reluctant executor/family/beneficiaries
- Disappearing will/assets
- Enforcing pledges

The Misnamed Charity

- Problem:
 - Misdescription: charity misnamed or wrong charity named
 - Name changed
 - Charity no longer undertakes purpose or has particular department
- *Cy-près* doctrine
- Negotiate with executor/beneficiaries (technically illegal if no variation clause in will)
- Keep detailed notes of original meetings

- Problem:
 - Will challenge (related/unrelated to gift)
 - Dependant support application
 - Disputes involving other charities
- Delay can have tax consequences
- Incentivize beneficiaries:
 - Tax incentives
 - Donor/family recognition

- Monitor litigation to avoid disappearing assets
- Consider winding up trust (*Saunders v. Vautier*)
 - All beneficiaries are *sui juris*
 - Children's Lawyer will represent minor/unborn/unascertained interests

- Problem:
 - Executor reluctant to make gift
 - Executor has self interest: executor is also beneficiary; executor is related to beneficiaries; charitable gift detracts significantly from residuary gift
 - Excuses:
 - Mistake: planning based on incorrect or misunderstood facts
 - Misrepresentation: gift based on false pretenses
- Incentivize:
 - Meet with executor/family to point out tax benefits (especially for early distribution of charitable gift)
 - Sense of morality: honour testator's wishes
 - Offer recognition
- Application to replace Executor or compel Passing of Accounts

- When is an elderly person exposed to financial abuse:
 - Life event
 - Retirement/sale of business
 - Major illness affecting mobility
 - Move to retirement home or long term care facility
 - Move to a new city/country
 - Death of a spouse/partner
 - Succession planning
 - Making/changing a will
 - Appointing an attorney
 - Transferring property to the next generation (home; cottage; investments)

- Task specific
- Capacity can fluctuate such that donor has intermittent periods of capacity
- Mental illness \neq incapacity
 - Schizophrenia
 - Delusions
 - Eccentricity

- Important to assess capacity of donor to determine if donor able to
 - understand issues relevant to making decisions
 - give instructions
- Many factors affect ability to assess capacity
- Advanced age is not itself a sign of incapacity; nevertheless the older donors may have certain needs and vulnerabilities which demand an awareness of these implications
- Capacity may vary depending on context and task/transaction

RED FLAGS: possible lack of capacity

- Age
- Intellectual impairment/memory problems
- On medication that may affect cognition
- Cannot readily identify assets/family members
- Hearing/vision problems affecting comprehension/ability to communicate
- Brings in list of wishes but cannot articulate them independently
- Defers to caregiver/partner/relative/friend/advisor
- Recently suffered emotional/physical upheaval: loss of loved one; relocation; hospitalization; change in medical status
 - Social circumstances (e.g. is the client lonely or living alone; are family members involved)
- Lack of investment experience
- Reliance on advisor

- **Problem:**
 - Executor tries to avoid charitable gift by dissipating or hiding assets
 - Executor and beneficiaries might prefer to ignore the Will and agree privately on the distribution of assets
- **How to uncover the cover-up:**
 - Upon death, contact family, identify executor, monitor administration of Estate
 - Where there is a Will, obtain copy (at least of portion dealing with gift)
 - Ask for explanation of any missing funds (including backup documents, especially for alleged *inter vivos* gifts to family)
 - Title search for real property

- How to uncover the cover-up (cont'd):
 - Dealing with privately held companies:
 - Check shareholders agreement
 - Check recent financial statements
 - Consider valuation of shares
- Keep written record of donor's intention to make a testamentary gift and identify lawyer who has/will draft the Will

- Incentivize:
 - Sense of morality: honour testator's wishes
 - Donor recognition
- Compel Passing of Accounts
- What if the charitable gift has already been removed from the Will?
 - Undue influence by beneficiaries to disinherit charity

- Why is a promise of a gift not enforceable?
- Fundamental conflict:
 - For a contract to be enforceable by the courts, it must provide a benefit (“consideration”) to both parties; a gift, by definition, is made without the expectation of receiving a benefit
 - If a person is legally obligated to make a payment, the payment is not a gift because it is not voluntary

- Leading case in Ontario: *Brantford General Hospital Foundation v. Marquis Estate*
 - Would this case have turned out differently if:
 - donor had insisted on recognition?
 - charity had in fact relied on promise of gift to its detriment?
 - pledge agreement made under seal?

- Rules of conduct for fundraisers
 - Legislation
 - Imagine Canada
 - CAGP Code
- Training
 - Laws & codes
 - Internal policies & procedures
 - Fraud/abuse awareness & avoidance

- “Know Your Client”
 - family circumstances
 - health issues
 - financial needs and obligations toward other relatives
 - financial sophistication
 - planning objectives, control
 - Document your discussions (you cannot rely on assumptions about the client’s personal and financial circumstances: get the facts)

- If concerned about capacity, take steps to ensure donor understands and can give instructions
- If necessary, set stage for meeting where donor is at ease
- Meet at times when donor is alert: if on medication that might affect judgment, etc., meet when effects of medication have worn off
- Avoid asking leading questions
- Ensure donor is aware of effects of a transaction and especially risk of loss and potential impact on portfolio as a whole
- Keep detailed notes of discussions and instructions
- Follow up with letter of confirmation
- Update your records on a regular basis as appropriate

- If concerned about undue influence or suspicious circumstances, meet with donor alone or even with a colleague as another witness
- If donor's instructions are inconsistent with financial position, family obligations/dynamic, etc., consider further investigation/confirmation and document your discussions and concerns, and confirm by letter
- If advisable seek advice internally
- Consider requiring independent legal advice
- Insist on face-to-face meetings: do not rely solely on a mail or telephone relationship

- There are many remedies available
 - The best remedy depends on the nature of the problem and the relative costs
 - Pursue the easiest remedies first
- Be proactive
 - Don't wait for the executor to deal with the problem
 - Don't wait for the problem to get worse (or for additional problems to form)

QUESTIONS?





THANK YOU

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