ENFORCING CHARITABLE GIFTS: Working with Executors and Beneficiaries

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Overview

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
Estate Litigation

- 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
Estate Litigation

- 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
Reluctant Executor/Family/Beneficiaries

• 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
Vulnerability

• 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)
Capacity

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

• 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
Disappearing Will/Assets

• 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
Disappearing Will/Assets

• 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
Disappearing Will/Assets

• 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.
Enforcing Pledges

• 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?
Risk Management

• Rules of conduct for fundraisers
  – Legislation
  – Imagine Canada
  – CAGP Code

• Training
  – Laws & codes
  – Internal policies & procedures
  – Fraud/abuse awareness & avoidance
Risk Management

• “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)
Risk Management

- 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
Risk management

• 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
Summary & Tips

• 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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