



# Gifts by Will – The Essential Do's and Don'ts

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# Charitable Gifts Through Wills

## INTRODUCTION

- Tax credits/deductions for gifts to charities have increased over the years
  - Individuals entitled to federal tax credit of 15% on first \$200 and 29% over \$200 plus provincial tax and surtax savings
  - Corporation entitled to charitable deduction
  - Credits/deductions not fully used in the year of the gift may be carried forward 5 years
- Annual limit of 75% of net income
- Additional limit of 25% of taxable capital gain
- Additional limits relating to donations of depreciable property
- 100% limit in year of death and prior year
- Making charitable gifts through wills is attractive estate planning tool

\*This presentation is based on the following: (a) paper by Theresa Man and Karen Cooper, Planned Giving for High Net Worth Clients, 2006 Ontario Tax Conference, Oct. 16, 2006; (b) Kathy Munro and M. E. Hoffstein, Making Donations Through a Will or Trust; Struggling with CRA Interpretations, Step Inside 4:1 (Fall 2004); (c) M. E. Hoffstein, Alter Ego Trusts/ Joint Partner Trusts – 2004 Canadian Tax Foundation.



## Why are rules relating to gifts by will relevant to charities?

- Having an understanding of the rules will assist a charity to know when and whether to issue a receipt and when not to
- Gifts by will or by estate/trust are entitled to receive receipts from the charity in certain cases
- Generally no receipts if there is an intervening life interest until the death of the life tenant
- Distributions to charity as an income or capital beneficiary in satisfaction of interest in trust are not entitled to receipt



## Relevance to Charities

- Impact on Disbursement Quota
  1. Where distribution to charity entitles estate/trust to receipt
    - Gifts received by charities by way of bequest or inheritance are enduring property and thus charity not required to expend 80% of it in the following year after receipt
    - Gifts of enduring property do not affect the DQ of the recipient charity until they are either expended or transferred to another charity, at which time, the expenditure or transfer is added to the DQ calculation for that year
  2. Distributions to charities in satisfaction of income or capital interest in trust are not entitled to receipt, therefore not included in the DQ calculation



## Why are rules relating to gifts by will relevant to donor/taxpayer?

- Important to understand when charity tax credit is available and to which taxpayer – deceased or estate or trusts under will - as this will affect ability to reduce tax on death or during term of the trust or on death of a life tenant
- Ensure that tax credit is available when it can best be utilized



## John's Will

- Cash legacy to charity
- Bequest of art to charity
- Shares of opco to be held in spousal trust
- Other assets in family trust with discretionary beneficiaries including charities
- On death of spouse further gifts to charities



## Gifts by Will – The Rules

- Subsection 118.1(5) provides that when an individual makes a gift in his/her will, the gift is deemed to have been made by the individual immediately before death
- Subsection 118.1(4) provides that a gift made in year of death is deemed to have been made in year immediately prior to death to the extent charity tax credit has not been fully claimed in year of death
- This allows donation tax credit to be claimed in the terminal tax return of the deceased individual or in the preceding year



## Gifts not Qualifying as Gifts by Will

- If gift does not qualify as a “gift by will” the estate or testamentary trust may be entitled to a charity tax credit up to 75% of the income of the estate/trust
- In other cases, charity may be beneficiary of a trust such that the distribution to the charity is in satisfaction of an income or capital interest in a trust



## Questions to be Asked

- Is it gift by will – charity tax credit available in year of death
- Is it gift by estate/trust – charity tax credit available to estate/trust
- Is it distribution in satisfaction of income or capital interest in a trust
- Is it possible to draft will so as to achieve the desired result?



## Testamentary Gifts to Charity

- Outright gifts
- Gifts involving trusts



## Form of Outright Gifts

- Legacies and bequests
- Share of residue of an estate - no intervening life interest
- Gifts over to charities in the event that the beneficiaries under the will predecease or disclaim the gifts



## Outright Gifts - Overview of Issues

- Intention of testator
- Identity of charities to receive gifts
- Quantum of gifts
- Timing to complete gifts
- Form of property to be donated
- Conditions attached to gifts



## How much discretion can Trustees have?

- Intention – must be clear intention to make charitable gift set out in terms of will
- Can trustees be given discretion as to the identity of the charities and/or the quantum of the gifts
- Prior CRA position - the identity of the charity to receive the gift, the specific property to be gifted, or the specific percentage of the residue to be gifted all must be expressly set out in the will
- No discretion to be given to the trustees

CRA Docs #9732295 (Mar 20/98); #9922805 (Sept 15/99); #9418215 (Dec 1/99); #2000-005187 (Mar 6/00); # 2000-0099815 (Apr 18/00); #0053185 (Apr 18/02)



## Current Position – Trustees permitted discretion in selection of charities

- Will can stipulate that a specific amount be gifted to charity and provide a list of charities to which donations be made with the trustees having a discretion to determine the amount to be given to each named charity, provided that:
  - The actions taken by the trustees are reasonable in accordance with the terms of the will
  - The donation is made to a charity



## Discretion as to Selection of Charity

- Will can direct the trustees to donate a specific amount to a charity and the trustees to have full discretion to decide which charity will receive the gift



## Gifts to charities established after the death of the testator

- CRA has accepted a gift by will where will directs a private foundation to be established following the testator's death
- Query whether this view could be applied to charitable organizations or public foundations established after the death of the testator



## Discretion as to quantum

- With respect to quantum, CRA has stated that the will must expressly set out either (1) the specific amount of the gift or (2) the specific percentage of the residue of the estate




## Can the Trustees be given discretion to alter the amounts to be gifted to charities?

- Where the will provides for specified amounts to be given to a number of specified charities, but the executors are given the power to *reduce the amounts*, as necessary, in the event that there are insufficient funds available to make all charitable bequests after the payment of all fees and expenses in the administration of the estate, the actual amount donated by the estate would qualify as gifts made by the will



## Can the Trustees be given discretion to alter the amounts to be gifted to charities?

- Where a will provides that a gift is to be made to a charity within a dollar range, the deceased would be entitled to claim a tax credit for the *minimum* amount of the range, with the estate being entitled to a credit for donations made above the minimum amount
- CRA's reasoning is that donations above the minimum would be purely within the discretion of the trustees



## Use of formula to calculate the residue and trustees' discretions

- The will may provide for the donation of a specific percentage of the residue of an estate to a charity
- In some situations, acceptable for the will to provide for a formula determining the amount of the residue of the estate



## Quantum of *in specie* gifts

- CRA generally requires that the will must expressly set out the specific amount or a percentage of the residue of the gift
- In a 2004 technical interpretation, pursuant to the terms of the will, a surviving spouse selected which pieces of artwork she wished to have from a collection of artwork owned by the testator, with the remaining pieces to be donated to an art gallery within 36 months after the testator's death
- Acceptable because the executor did not have any discretion on whether the painting would be donated



## Timing to complete gifts

- In general, gifts made by a will should be completed within a reasonable period of time after death and CRA may be requested to adjust the tax return in the event that the gift is made after the assessment of the deceased's final tax return (subject to the time limitation for reassessments)

CRA Doc #2000-005187 (Mar 6/01); Doc #2000-0055825 (Mar 8/01);  
And Information Letter O/L 2001-012 (May 14/01); #2000-0053185 (Apr 18/02)



## Form of property to be donated

- Will must specify what is to be paid from the estate
- Trustees can have discretion to decide the form of property to be donated, unless the will specifies otherwise
- e.g.
  - the will stipulates that a specific amount to be gifted to a charity, without stipulating the form of the gift
  - the will permits a gift to be made in cash or *in specie*
- Conditions attached to gifts are acceptable



## Gifts Made by a Testator involving Trusts

- For example:
  - gifts made from a spousal trust after the intervening life interest of the surviving spouse
  - gifts made from income and/or capital of a testamentary trust (other than a spousal trust) established under a will



## Overview of Issues

- Gift made by will
- Gift by trust
- Distribution in satisfaction of income and/or capital interest of charity



## Gift made by will


- In order for a gift made from a testamentary trust to qualify as a gift made by will and thus able to be claimed on the terminal tax, all of the criteria concerning outright gifts mentioned above must be satisfied.
- If there is an intervening life interest, the trustees must not have any power to encroach on the capital of the trust during lifetime of the life tenant

CRA Doc # 9732295 (Mar 20/98); IT 22R Gifts to a charity of a residue interest in real property or an equitable interest in a trust; O'Brien v. MNR (1991) 91 DTC, 1344 (TC) CRA 9811782; #2001- 0117823 (May 1/02); #9811782 (Feb 11/99); #4732295 (Mar 20/90)




## Gift by trust

- Where a gift made from capital of a trust does not qualify as a gift made by will, the trust may be entitled to claim the donation tax credit
- In case of a gift to charity following death of a life tenant of a spousal trust, CRA says that the property must actually be transferred to the charity in taxation year of spouse's death to reduce income arising from deemed disposition of its capital property. Problem if spouse dies before end of year – reluctance of trustee to distribute without clearance certificate



Is it a gift or is it a distribution in satisfaction of income and/or capital interest of charity as a beneficiary?

- When a payment is made from income of a testamentary trust, it could be characterized as a distribution in satisfaction of the charity's income interest in the trust.
- The trust may deduct such payment when calculating the income of the trust, instead of claiming a donation tax credit for that year (104 (6)(b))

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- The test of when a trust is entitled to treat such a payment as a distribution of income interest as opposed to a charitable donation is not clear
  - CRA appears to have different administrative positions depending on whether it is dealing with a testamentary trust or an inter vivos trust
  - Testamentary trusts
    - Trustees are allowed the discretion *to choose* whether to treat a discretionary distribution from the trust to a charitable beneficiary as a gift or a distribution in satisfaction of the charity's income interest



## Inter Vivos Trusts

- Where the trust agreement empowers the trustees to make a gift and the trustees exercise this power, it would be appropriate for it to qualify as a donation by the trust (118.1(3))
- Where the charity is an income beneficiary and a distribution is made out of the trust's income, then trust can deduct income pursuant to 104(6)



## Additional Question

- What if gift made by will but value of property appreciates or decreases in value after date of death?
- CRA position – donation tax receipt should be based on FMV immediately before death  
Technical Letter #9827515 (Jan. 20, 1999)



## Conclusion

- Lack of case law in this area
  - This has been dealt with by CRA on a case-by-case basis, expressed in various technical interpretations to address specific circumstances that arises from time to time but lacking a consistent approach
- Care must be exercised in structuring donations in wills and trusts to achieve desired tax result

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