Advice to Advisors
Achieving philanthropic goals
MAY 2016

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As Vice President, Donor Engagement at the Calgary Foundation, Laily Pirbhai's extensive charitable gift planning knowledge has earned the Foundation a place at the forefront in philanthropic services.

Family Legacies – the Challenges and Opportunities

LAILY PIRBHAI

In a video titled "Change the conversation, change the culture," **Peter Block**, author, consultant, and speaker in the areas of organization development, community building, and civic engagement, made reference to this ancient quote:

"There is a strange charm in the thoughts of a good legacy, or the hopes of an estate, which wondrously alleviates the sorrow that men would otherwise feel for the death of friends."

—Miguel-de-Cervantes, author –
Don Quixote de la Mancha (1605-1615),
Part II, Book IV, ch. 74.

I was struck by the wisdom of this ancient message as it offers a profound reminder of the responsibility we have toward our future.

There is no greater example of "legacy" than the recent disclosure made to me by a widowed donor informing us that she was leaving 25% of her estate to the Calgary Foundation. She further advised that each of her three adult children, who were also receiving 25%, understood and were supportive of her charitable commitment. The Foundation became a "fourth child" without the donor's children feeling that she had given away their inheritance. We also learned that the family was able to embrace the Founder's philanthropic planning as a gift that reflected their family values and enhanced their family legacy.

At the Foundation, we encourage founders to share their charitable beliefs and plans with their family and heirs. When families unite around a founder's belief in philanthropy, the legacies they create can reap enormous rewards for the entire family for several generations. However, we also recognize that philanthropic plans can change when addressing milestones such as business succession, keeping the family together, preparing for children and grandchildren, integrating new family members and ultimately estate planning.

Read on for a robust, insightful compilation of stories, and legal best practices related to legacy donations as part of estate planning.

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Say "yes" to donors while avoiding family fights downstream

JOHN POYSER

"Clear advice and generous explanation from an independent advisor is perhaps the most important factor."

Donors frequently make large gifts late in life. They might be in their 70s or 80s. They look to their overall wealth and to the circumstances of their children. They decide to give a significant slice of their wealth to charity, and to do it without waiting. The donors often say, "I'll never spend it" or "The children will barely notice the $2M is missing." The donors want to bask in the warm glow of their own altruism while they are alive to see the money do good in the community and their conduct is absolutely to be lauded.

At the same time, it can create trouble. Donors frequently underestimate the avariciousness of their children. When the donor dies, the donor's children are shocked ("$2M is missing!"). The children, or other heirs to the estate, have the right to challenge the gift and try to overturn it in the courts. There are different ways to challenge a gift.

A question of capacity

A gift can be attacked on the grounds that the donor was senile or ill and, as a result, did not have the necessary mental capacity to make a valid gift. Where capacity is wanting, a gift is void. No capacity means no gift. The gift-transaction is overturned. The court has no choice – there is no discretion in the hands of the judge to save a gift if it is void on the grounds that the donor did not have the capacity to make it. Where doubt exists as to the capacity of the donor, the best evidence available will typically be the evidence of a lawyer who assisted the donor in papering and finalizing the transaction or the evidence of a doctor specifically asked to meet with the donor and assess whether the maker had the capacity necessary to make the gift.

An equitable challenge

A gift can be challenged on the grounds that the intent to make the gift was produced by unfair or unconscionable means. This is known, in legal terms, as an "equitable challenge." If successful, a gift is rendered voidable, not void. The equitable challenge described here is framed in broad terms, but the courts have been willing to narrow it down and describe some more specific types of situations where the gift-transaction might be voidable. One of those is an "unconscionable bargain." An unconscionable bargain is a transaction, including a gift that meets two triggering requirements:

- The transaction significantly degrades the net worth of the person making it.
- The transaction is made by a person who suffers from diminishing capacity or some other special disadvantage, such as extreme age, that makes it difficult for that person to enter into the transaction while protecting him or herself.

If those two triggering requirements are met, the court presumes that the transaction was unconscionable and will be willing to set it aside, as voidable, unless the person or organization that receives the gift convinces the court that the transaction was fair, just and reasonable.

What will the court look for in making that decision? Clear advice and generous explanation from an independent advisor is perhaps the most important factor here. The donor should know what he or she is giving away, and how it compares to the property they will keep in hand. The donor should know how the proposed gift might interfere with his or her future security. If all of that is explained, and there is evidence of that, then the courts typically uphold the gift.

Say "yes" to donors while avoiding family fights downstream

Building positive donor relations

Even where the children do not challenge the gift, a large gift that is questioned can amount to bad public relations for the charity. Wealthy donors frequently have equally wealthy and influential children. No one wants those children making the rounds at fundraisers and gala dinners while badmouthing the charity ("Watch out for such-and-such charity, they are aggressive and took advantage of my dad when he did not know what he was doing."). A charity wants and needs a reputation for fair-dealing. How does a charity avoid those negative outcomes? Put another way, how does a charity say "yes" to the gift but "no" to the family fight that might follow it? A charity might be wise to develop and work within a written policy. Pick a threshold amount, say $500,000. Any gift over that amount would require sign-off from the donor and a recommendation for independent legal advice. For gifts under the threshold, it would not.

The policy should be candid. There is nothing wrong with saying "We want and value your gift, but we want to ensure that there is never any misunderstanding or fight among your heirs. We take steps with all large gifts to avoid those fights and misunderstandings." That can be in writing, and might be added into the document that the donor is asked to sign. Explain that the independent legal advice and written sign-off are key in avoiding the possibility of future difficulty or dispute.

The written sign-off should contain a statement on the part of the donor to the effect that -

> I am aware of my own financial situation. I know my total net worth. I have taken the time to consider the size of this gift relative to that total net worth. I understand that a gift is a gift, and the property cannot be returned to me after the gift has been made. I have taken the time to carefully contemplate the possible impact of this gift on my future economic security. I also understand that the gift will be excluded from my assets at death and will not be available to my heirs to inherit.

If a written policy is in place, a charity will use discretion in departing from that policy. Common sense has to have a role. There will be some situations where the gift is smaller, below the threshold, but the risk of victimization appears higher. A charity will be wise to get sign-off whenever a donor might be carried away with largesse in circumstances that just do not feel right. By the same token, a charity might choose not to invoke the policy for a gift that is far larger than the threshold. If the gift-maker is a sitting court of appeal judge, the charity might tuck the policy quietly into a drawer while accepting the gift. Sometimes there is no credible prospect of victimization. Where the prospect of victimization does raise its head, the policy is important.

Seeking independent advice

Independent legal advice also becomes important where the gift is significant. The sign-off document should have a certificate of independent legal advice attached to it. Here is some sample wording (no warranty is given as to its sufficiency or efficacy):

> I have met with the donor and provided independent legal advice. I have directed my mind to any steps that may be necessary to assess the donor's legal capacity to make the gift. The donor was able to list the donor's family in significant detail, and recall the donor's assets from memory with significant detail. The donor understands that the gift is irrevocable. We have discussed the impact of this gift on the personal financial security of the donor, now and in the future. The donor also understands that the gift will reduce the pool of assets available to the donor's heirs to inherit though the donor's estate.

What is required for competent independent legal advice? The answer to that is suggested by the content of the certification suggested above. If the gift is large enough to gut the donor's estate, the legal capacity test is the same as the one required to make a valid Will. The donor must have the powers of mind to be able to understand the extent of their assets, the persons naturally expecting to inherit from the donor (normally the closest kin of the donor), and the nature and effect of the transaction at hand (the gifted property will belong to the charity, and the donor will not be able to get it back). The lawyer should ask questions to plumb the donor's capabilities on each point. That addresses the capacity challenge. If the donor fares poorly in answering the questions, the lawyer will identify it as a "suspicious circumstance" and would be wise to send the donor out for assessment by a psychiatrist or other medically trained assessor.

The lawyer should go one step further. Capacity is only one of the two challenges to consider. The other is the equitable challenge outlined previously. The lawyer would be wise to make up a "before and after picture" (this is what you own now, and this is what you will own after the gift goes though), and then ask a series of "what-if" questions to the donor:

- What if your other assets deplete?
- What if the stock market collapses?
- What if your pension does not give you enough income to support your lifestyle after you retire?

Answers to those questions, noted in the lawyer's file, prove true understanding and the donor's voluntary acceptance of any risk that the large scale gift may create.

One other idea. It is up to the donor, but "secret" gifts attract challenge more frequently than gifts that have been discussed in advance with family. A donor who wants to avoid any chance of a family fight would be wise to schedule a meeting with interested family members and announce and describe the gift. Family is far less apt to fight if they have had the opportunity to hear the donor describe the gift and the reasons behind it. The lawyer might be present. Other advisors might be present. A representative of the charity might be present. The details are up to the donor, but family conferences have a proven track record of avoiding fights among heirs downstream.

So long as a donor has capacity, and truly knows what he or she is doing, there is no law against generosity and it is very hard to successfully challenge the gift.

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Keys for understanding capacity

JASMINE SWEATMAN

It is quite normal for charities to receive bequests by Will. As the recipient of a charitable donation, these charities will want to know that the gift is valid; which in the case of a gift by Will, that the Will is valid.

Normally upon notification of a bequest it is assumed that the Will is valid. However, it could be the case that subsequently the Will is challenged by someone asserting that the Will is invalid on the ground that at the time the Will was made the testator (the person who made the Will) did not have the capacity to make the Will.

This article reviews some of the factors that are considered by the Court to determine whether the Will, and hence the gifts made under it, are valid and some factors to consider.

What is capacity?

Capacity is a state of mind. Being a legal and medical construct "determining capacity" depends on who is making this determination and why this determination is being made. The considerations in determining capacity turns on the issue that is before the court or the issue that the court is being asked to determine.

The court makes this legal determination of capacity or the determination of whether someone is or is not capable based on the judge's review of the evidence and the "findings of fact" made and then applied to the relevant legal test. It becomes a case by case determination regardless of the legal test being applied and since capacity overlaps both medical and legal areas, courts rely heavily on the medical evidence in making their determination of whether a person "had" or "did not have" capacity.

In the legal context, such as challenging a Will, legal tests are applied to the facts as "found" by the judge. In the medical context, the determination is usually in the form of a diagnosis – typically in the context of a lack of capacity or a diminished capacity – based also on "observations" and "findings."

For example, if the issue before the court is the capacity to make a gift, then the following test must be met:

1. The donor must have the intention to make a gift; and
2. The gift was made of the donor's free will and not under coercion.

If the court finds the facts support a determination that all parts of the test are met then the court will make the "finding" that the donor had the capacity to make the gift.[1]

1 However, in order to find the gift valid, the court would also need to find (in addition to capacity) that the gift had also been "delivered" and "accepted."

Keys for understanding capacity

What is testamentary capacity?

Testamentary capacity is simply the capacity "to make a Will." Testamentary means "of, relating to or through a Will."

A person is said to have testamentary capacity when that person has sufficient mental ability to understand what he or she is doing (e.g. making a Will – disposing of assets upon death); understands the nature and extent of his or her property (e.g. what they have in assets, liabilities); understands his or her "natural bounty" (e.g. know who are the expected beneficiaries) and understand who their dependants are.[2]

Ironically and despite the general perception that making a Will is a "simple" matter this is not so in reality (especially if done properly). The "complex" nature of making a Will is reflected in the nature of the test that must be met in order to do one (as set out above). The capacity to make a Will is one of the more strenuous capacity tests and often cited as being of a "higher"[3] level of capacity then, for example, entering into marriage, entering into a contract or making a gift.

It is the responsibility of the lawyer who is drafting the Will to be satisfied at the time of taking instructions and drafting the Will that the testator/client meets the legal test for making a Will or, in other words, has testamentary capacity. It is the lawyer who must ask the appropriate questions and conduct due diligence into capacity and especially more so if there are "red flags" raised. The lawyer has therefore been found by the courts entitled to **not** proceed with the retainer to do the Will if he or she is not satisfied on the issue of capacity.

And, it is because of this responsibility that the standard of care imposed upon drafting lawyers requires the lawyer to record in notes made at the time his or her observations, the questions asked, the steps taken to determine capacity, and records the conclusions reached and why on the issue of capacity.

2 Reflecting a legal test established in 1870 in the Banks v Goodfellow decision.
3 Recognizing that most practitioners do not like to refer to different "levels" of capacity.

How to ensure capacity exists?

Whether the required capacity exists ultimately comes down to a judgment call. Often times we say "you just know." You develop a sixth sense as to whether the person understands and appreciates the situation or act they are undertaking. Instinct goes a long way.

However, instinct needs to be developed and fine-tuned. Be aware. Raise your awareness of the subtleties of capacity – the older person who seems to know what they are doing but at the same time you wonder if they are covering up for a diminishing intellect.

Become experienced. Push the boundaries of asking questions and not accepting things or comments at face value or because it is what the person thinks they want to hear. Put yourself in a variety of different situations. Educate yourself.

Be patient. Take the appropriate amount of time to review, verify and confirm. And, finally, take notes of your observations, your concerns if any, and how you addressed them. Who knows, it could be your notes that confirm capacity in that Will challenge case – in which case you have met your standard of care and ensured the bequest your donor wanted to make to an organization is made. Nothing could be more satisfying.

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When a **testamentary gift** is **challenged**

NANCY GOLDING

"After the Court decision, the charity and the spouse worked together to maximize the estate."

At times, the initial gratefulness and appreciation of a testamentary gift from a donor changes for a charity when that gift is challenged or a claim is made against the estate by a family member. The charity and the deceased donor may have been *ad item* as to the gift to be given on death even though it may have been part of a lifelong gift plan of the deceased but the family may not be in agreement.

When a testamentary gift is challenged

There is always a risk of a gift agreed upon with a donor being somehow thwarted on death but charities are at times in a precarious position if this is due to a claim against the estate from a family member. Charities not only have a fiduciary obligation to their donors to ensure a gift contemplated is completed.

Defining "charitable" behaviour

There are a variety of responses from charities with differing results and consequences to a claim against an estate by a family member. There is a continuum of responses from no response at all to the charity being heavily involved in the litigation.

Some charities take the "scorched earth" position that they will fight to the end to ensure a gift given is received. After all, if donors cannot count on a charity to fight for the gift, as the donor is no longer alive, then donors may think twice about giving a gift to that charity. Should the charity have to get involved in family affairs and relationships? A gift was given by the now deceased donor and based on the premise of testamentary freedom the charity should be able to rely on getting the gift. This is the rationale behind this type of response. There is a note of caution with this approach which may temper the lengths to which the charity will go to obtain the gift. In a recent case of an elderly spouse making a dependants relief type claim against her abusive husband's estate, the residual beneficiary charity adopted a scorched earth approach. In the end, the widow received the estate and the charity paid the widow's legal costs as well as all of its own legal costs after a lengthy battle. The charity was also admonished by the Court for not exhibiting very "charitable" behaviour.

At the other end of the spectrum is the position that the gift will "be what it is" and if litigation is commenced by a family member, the charity will accept the Court's decision and receive whatever gift is ultimately available to it in the end. This approach does not necessarily mean the charity is not living up to its duty to a donor. Family members do have legal rights to claim against an estate and the facts relied on often occurred over the course of years of family history which is usually not known to the charity.

With the latter approach a charity can still undertake due diligence to determine:

- what is in the estate;
- what was the gifting pattern of the deceased donor over the donor's lifetime; and
- what evidence does the charity have to give either the family or the Court to evidence the desire of the donor.

The charity can take the position, (again as part of its due diligence) that the family member should make their claim through the courts. This provides some assurance that the claim is proper and has been properly adjudicated. The charity does not need to participate in the legal proceedings.

Also, by the family member going through the Court process to "prove its claim" and have the Court determine what is fair and appropriate in the circumstances, this means they have had to provide sufficient evidence to the Court. All of the circumstances will have been reviewed, and a decision will have been made by the appropriate legal authority.

but there is also an issue of the public's perception of the charity and its reputation. Most charities do not wish to be seen to be involved in family fights or to be taking assets away from deserving family members. It can be a difficult decision to determine how far does the obligation of the charity go to its donor?

When a testamentary gift is challenged

A "win-win" example

An example from another case involved a long-time donor to a charity. There was a gifting plan that had been in place for many years and involved a significant gift on the death of the last of the donor or the donor's spouse in the donor's Will. The estate was to be held in trust for the use of the spouse during her lifetime with any amount remaining given to the charity after the spouse's death. The spouse made a dependants relief type claim against the estate and argued that not only was there not sufficient money left in the Will for the spouse but that it should not be held in trust. In this case, the charity provided information relating to the gifting plan of the deceased to show the intention of the donor. The charity was prepared for whatever was to be the decision of the court. The spouse made her claim and the Court determined what was an appropriate amount of the estate for the spouse to have and directed how and when the spouse's share of the estate would be distributed. The estate was directed to be paid to the spouse directly and not held in trust.

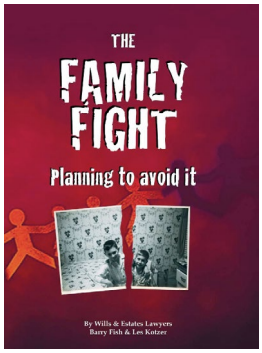
After the Court decision, the charity and the spouse worked together to maximize the estate. This was achieved through a transfer of assets and a gift to the charity. In this way the gifts to both the spouse and the charity were enhanced by gifts of marketable securities and the use of the charitable receipt. The charity received a gift prior to the death of the spouse and so had funds much earlier to allow for growth on the initial gift and for the gift to be put to use (perhaps decades earlier) than would have otherwise been available. In the initial scenario in the Will, there was no guarantee of the amount the charity would have received.

The charity would not have been able to work with the spouse afterwards if the "scorched earth" approach had been taken.

No matter what the results, when the courts are involved for the claim of a family member which affects a gift in a Will to a charity, there may still be better ways for matters to be dealt with before death. As mentioned in the article by John Poyser, having the entire family aware of the gift and the gifting strategy and working with the family as a whole may allow a charity to say "yes" to the donor while avoiding family fights downstream. Not to mention the significant benefits to the long-term relationship of the charity to the family and the future generations of potential donors in the family.

As the editor of Gift Planning in Canada, and AFP eWire Canada, ***Lisa MacDonald*** *helps frontline fundraisers stay connected with current trends and best practices across the country. As the in-house book editor for Hilborn's imprint Civil Sector Press, Lisa has edited many nonprofit sector titles including the best seller - Excellence in Fundraising in Canada.*

RESOURCE: Avoiding the family fight



Planning ahead is the key to preventing, or at least minimizing the risk of family fighting when it comes to administering your estate. As Canadian Wills and Estates lawyers Barry Fish and Les Kotzer put it, "We all like to think that we are going to be healthy and will live forever. However, the facts of life do not support this kind of a wish..." In their 2013 book, *The Family Fight: Planning to Avoid It*, Kotzer and Fish provide an overview of the practical issues that arise from unexpected incapacity or death and the documents that can help to ensure the financial administration of an individual's estate once they are unable to do so.

Frequently asked estate planning questions

After a thorough review of issues related to Power of Attorney and a Will, the authors take the discussion a step further by answering questions someone may be thinking but be afraid to ask:

- When you make your Will do you have to leave everything to your beneficiaries outright or can you distribute to some beneficiaries outright and have your trustees hold back property or money gifts for other beneficiaries until those beneficiaries reach a certain age?
- Can you cut your spouse out of your Will?
- Can you cut one or more children out of your Will?
- How does property held between yourself and another person affect your Will?
- If you have a Will, when should you review it?
- If you have a Will, how do you change it?
- Can you make a homemade Will?

Before the half-way mark of the book, the reader has already been given a great deal of information about a variety issues that can then be discussed with their professional advisor.

RESOURCE: Avoiding the family fight

Rooted in their own personal experiences, the authors also provide effective case studies to demonstrate their points.

Two brothers came into our office shortly after the death of their father. It was obvious from their demeanour that the relationship between them was quite strained. Knowing these clients from previous dealings, we were surprised at the coldness between them, because they had always been close before their father passed away. Furthermore, the Will left everything equally to them, named both of them as executors and the estate itself was not large. Initially, we were baffled at what could possibly cause such a change in their attitudes towards each other. The answer came out slowly, and after a number of meetings involved in settling the estate. In this case, their father never discussed his funeral or burial wishes with either of his sons because he believed in keeping these matters to himself. One of the brothers wished to have an elaborate funeral while the other, who was the domineering one, wanted a very simple one on the grounds that the less money spent, the greater the inheritance. In the end, it was the domineering brother who got his way, but in getting his way, he created strain, hard feelings and disruption between brothers who had previously been considerably closer than they now were. The son who gave in made a point of telling us in his brother's presence how great a man his father was and how deserving he was of proper treatment at his death. He went on to express how guilty he felt in shortchanging the proper recognition his father deserved. Meanwhile, the domineering son sat in silence and it was evident that these two brothers would have to take enormous efforts to regain the good relationship they had enjoyed before their father passed away. Our own reaction is quite simple: If only their father had discussed his funeral and burial wishes with his sons, it is most likely that the acrimony and strain to which we were witness would never have occurred.

In planning their estate, most people indicate care for family and loved ones as their number one priority. If this is true, than almost anyone could benefit from this quick and easy read. At the very least, any professional working in the area of estate planning should have this book within easy reach to share with clients, donors and friends.

For more information, visit http://www.familyfight.com/.

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