



Précis Paper

Charitable Gifts in the Will-Making and Estate Administration Process

A discussion of what the implications of leaving gifts to charity in one's will are for the will-making and estate administration process.

Discussion Includes

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Charitable Gifts in the Will-Making and Estate Administration Process

1. In this edition of BenchTV, Helen Merrick (Campaign Director – Include a Charity, Sydney) and Paul Evans (Partner – Makinson d'Apice, Sydney) discuss what the implications of leaving gifts to charity in one's will are for the will-making and estate administration process.

Background information and statistics

2. Helen Merrick is the campaign director for Include a Charity, a campaign of over 100 charities in Australia concerned with raising awareness of the importance of leaving a charitable gift in one's will and how these gifts help to improve our community.
3. Paul Evans is the partner in charge of private clients at law firm Makinson d'Apice. The firm undertakes a wide range of work for clients including drafting wills, estate administration involving a significant number of charities and estate litigation.
4. The 2016 Giving Australia study indicated that 48% of people have a will, a figure which is worrying as it is a drop from 2005, when 58% of people had a will. The research suggests a trend where people are not making wills.
5. 7.5% of the people making wills are leaving a charitable gift in their will. This 7.5% equates to over \$800 million annually.
6. Some of the biggest charities supporting the Include a Charity campaign rely on the revenue raised from charitable gifts.

Types of clients making wills

7. While there is no "typical" kind of client who makes a will, people who have a house or some form of investment will normally want to make a will (as well as other documents, such as an enduring power of attorney) to deal with the disposition of the asset on death to the people the testator wants the asset to go to, and to have the opportunity to - include a gift to a charity, perhaps.

What happens if one does not have a will?

8. If one does not have a will, one dies intestate.

9. Due to Australia's state-based legal system, each state has its own law as to who will receive the deceased's estate. In general, if the deceased has left behind a spouse, the spouse will inherit the larger part of the estate. Following the spouse, the deceased's children will then inherit.

What kind of person will usually leave a charitable gift in their will?

10. Though people leaving charitable gifts in their wills often tend to be -wealthier, perhaps surprisingly, people of more modest means are also very keen to include a charity in their will. These people may have been affected by a particular illness within their family (such as cancer or stroke) and want to give something back to the community, as a particular charity may have assisted their family member through that difficult time.
11. Include a Charity has found that the people who leave charitable gifts in their wills tend to be childless, or without a surviving spouse. Mr Evans has made similar findings regarding his clients: for example, in two estate matters he is currently looking after, involving two sisters who died relatively close to each other, approximately \$25 million was left to charities between them.
12. Include a Charity has discovered that it is often Australians of modest means who are leaving gifts to charity.

Charitable giving during one's lifetime

13. Giving during one's lifetime is not an uncommon way for clients to make charitable gifts. To do this, clients can either give directly to the charity, or establish their own charitable foundation, called a private ancillary fund.
14. Private ancillary funds are usually an option for people with significantly large estates, with an amount that they can dedicate to charity during their lifetime.
15. One advantage of establishing a private ancillary fund is that the gift will be tax-deductible, whereas in contrast, on death, a gift in a will is not tax-deductible. Another advantage of a private ancillary fund is that families can work together to give to charities. For example, one of Mr Evans' past clients had a daughter who wanted to help the seals at Taronga Zoo, and was able to allocate a certain amount of money from the fund to do so.

What are the most common mistakes made when preparing a will for a client?

16. The following are the most common mistakes made by solicitors when preparing a will for a client:
- i. lack of full understanding of how a will should be structured
 - ii. misdescribing the organisation or charity the gift is intended to be left to and,
 - iii. directing the charity to use the gift in a particular way – this can be problematic because if at the time of the client's death, the charity is not working in that field, an application for a cy-près scheme will need to be made, which is a costly process.

Drafting a will to ensure the correct bequeathing of a charitable gift

17. Firstly, solicitors must ensure that the name of the charity that will be named in the will as recipient of the gift is the name that the charity actually uses. Though many charities will have a public name, a gift may actually need to be made to a particular entity.
18. Secondly, solicitors are advised to conduct an ABN search to determine whether the charity has tax-deductible status.
19. Thirdly, any particular purpose the client wants the gift to be put towards should be worded as an expression of the wish. For example, "I am giving this gift to (a particular charity), and I express the wish that it be used in the area of domestic violence". It is also advised that the will include provision for the executor to distribute the gift to a similar charity if the intended charity either does not exist at the time of the client's death, or is unable to fulfil the gift.

What are the different ways one can leave a gift to charity?

20. The most common way one can leave a gift to charity is through a cash gift.
21. The second way is as part of the residue. This is less likely to occur where the client has family members. If the client has children, for example, they are less likely to give the residue to a charity.

The estate administration process

22. In relation to charitable gifts, the estate administration process is where issues can arise. Include a Charity often encounters problems with about 5%-10% of the estates of which they are notified, one of the main issues being that they are not informed of the gift.
23. It is advised that the executor of the estate notify the charity fairly early on in the administration process following the client's death, that they will be receiving a gift under the client's will, and to give them a copy of the will. At this point, the charity can be engaged with, and they will be able to provide any relevant assistance. For example, if the estate includes shares - whether they can be sold in administration, or whether they should be transferred across to the charity to mitigate capital gains tax (CGT).
24. Following their initial notification of the charity, the executor should keep the charity continually apprised about the progress of the administration, provide the charity with accounts, and generally engage with the charity. Some lawyers may think that provided they ultimately tell the charity the amount of the gift they will be receiving, there is no need to involve them in the administration of the estate, but this runs a serious risk of a negligence claim. For example, if a sale of shares is arranged on behalf of an executor at the incorrect time, a CGT liability might arise which could have been mitigated had the estate administration been dealt with differently.

How should one select an executor for their will?

25. The choice of executor is always crucial to the will drafting because ultimately, on the client's death, the executor takes control of their assets.
26. Often, family members will be chosen as executors. However, one must be careful that there is no friction within the family, or whether there is likely to be friction in the future. The client must also be careful to choose as executor someone who will be independent and carry out the client's wishes. Otherwise, there may be a situation where the family, collectively, will try to thwart the client's wishes.

Family provision

27. Every Australian state has legislation dealing with family provision.
28. Broadly, the family provision legislation permits certain categories of individuals to make a claim from an estate. A claim can be made either where they have had no

provision made for them at all, or where they feel that the provision that has been made for them is too small.

29. Common examples of individuals who may make a claim for family provision are a spouse, former spouse and children. However, in some jurisdictions, broader classes of individuals may make a claim; for example, grandchildren, or in New South Wales, someone who has been living with the will-maker as a member of their household.

Advice to executors or solicitors facing family provision claims

30. At the time of drafting the client's will, when it is the solicitor's duty to ascertain possible claims against the estate, solicitors are advised to find out if there is anyone who may have a claim against the estate, and advise the client on the implications of this. In most states, the will-maker can complete a statement explaining why they are not making provision for a potential claimant, or why provision for them is limited.
31. When a solicitor working on behalf of a charity to which a gift has been bequeathed in a client's will receives a family provision claim against that gift, the solicitor must ascertain as far as possible the veracity of any information contained in the affidavit, and then follow the court timetable.

Advice to solicitors drafting wills

32. Solicitors must ascertain the name of the charity intended to be left a gift, and then word the bequest in such a way that it will not give rise to problems. For example, a recent will Mr Evans had dealt with illustrates the problems that can be created where will-makers are inordinately prescriptive in the wording of charitable bequests.
33. Recent Include a Charity research shows that only 21% of solicitors going through the will-making process with their clients asked them if they wished to leave a charitable gift in their will. Additional research from the United Kingdom showed that if, at the point of drafting a will, solicitors asked the will-maker if they wanted to leave a charitable gift in their will, the will-maker was six times more likely to do so.

Why do solicitors not seem to be asking their clients if they wish to leave a charitable gift in their will?

34. It could be that solicitors feel a sense of embarrassment about asking clients whether they wish to leave a charitable gift, as they may feel that, in asking the question, they are trying to intrude in the will-maker's decision-making process.
35. Mr Evans disagrees with this reluctance, as part of a solicitor's duty when drafting a client's will is to assist and advise them and provide them with options. This involves asking them if they support a charity and whether they wish to include a gift in their will to that charity.
36. Commonly, clients will not include a gift upfront if they have children, a husband or wife. In this situation, the charitable gift will come into the distribution of the estate in the unfortunate circumstance where the members of the family perish together.

What triggers most people to write a will?

37. Often people feel the need to write a will before going on holiday.
38. Another circumstance triggering people to write a will is where they are having an operation, and there is a risk of something going wrong during the procedure.

Final advice to solicitors making wills for clients and to executors going through the administration process

39. In making a will, solicitors must have a full understanding of how a will operates and the different provisions.
40. They are also advised to have not just one executor but also a substitute executor.
41. Further, solicitors would be wise to ensure that if a charitable gift is being included, the charity is correctly named, particularly so that, as the will drafter, the solicitor will not be liable for any costs arising in an application to the court.
42. In terms of the administration process, it is imperative that the charities that are expressed as recipients of a gift are notified upfront, and involved in the administration process.
43. Further, the executor should not make any decision regarding the sale of CGT assets, such as real estate and shares, without consulting the charity.

44. If the charity is not particularly familiar with the issues, the executor should seek accounting advice as part of the administration.
45. Include a Charity often encourages will-makers to inform the charity to which they are leaving a gift. Not only does this assist with potential future family provision claims, it also enables the charity to express gratitude to the donor. The average donation left to charity is \$50,000 - a -considerable amount.
46. However, only about 30% of donors actually inform Include a Charity that they are leaving a gift in their will. A common reason why donors might be disinclined to inform the charity of their donation is the concern of receiving an overabundance of marketing materials and the like; however, Australian privacy laws provide protection from this.
47. www.includeacharity.com.au provides a section for solicitors making wills for their clients. The internet, in general, is an excellent resource for obtaining the information needed to bequeath a charitable gift in a will.
48. In the case of any doubt arising from a review of charity's website, it is advised to phone the charity to obtain the relevant information, and also to check on the ABN website.
49. Checking the ABN website is also useful for ascertaining whether the charity has DGR status. This is important because if on the client's death a charity is a DGR entity, there will be no tax implications with the passing of the gift to the charity at that point.
50. In a situation where, for example, there is a gift of residue in a will to three charities, if one charity does not have DGR status, there may be tax when the gift is passing to that charity, which will then be borne by all three charities. To avoid this problem, the will could be structured in such a way so that the charity that does not have the DGR status bears the tax.

BIOGRAPHIES

Helen Merrick

Campaign Director, Include a Charity, Sydney

Helen has spent the last 11 years specialising in strategy development and operational management for not-for-profit organisations in the areas of marketing, communications, fundraising and people & culture. Helen has a Masters in Management, specialising in organisational change, and is the campaign director of Include a Charity, a campaign of Fundraising Institute of Australia, working with over 100 charities to increase awareness of gifts in wills. She also works as a leadership coach for The NonProfit Alliance and is an accredited practitioner of the Strengths Profile program.

Paul Evans

Partner, Makinson d'Apice, Sydney

Paul is an accredited specialist in wills and estates law, a member of the NSW Law Society's Specialist Accreditation Wills and Estates Advisory Committee, and a member of the Society of Trust and Estate Practitioners. As partner in charge of private clients at Makinson d'Apice, he undertakes a wide range of work for clients including drafting wills, estate administration involving a significant number of charities and estate litigation. Paul lectures on estate planning at the University of Technology, Sydney, and is sought after for his expert knowledge and experience in this area.

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