

Giving Through a Will for Advisors

A Flexible Tool

The charitable bequest is the most common means chosen to leave assets to qualified charitable organizations and institutions at the end of life. This is because it is so widely known as a vehicle for property transfer.

Whether a simple bequest of cash or a plan that creates trusts for family wealth management while also benefiting a nonprofit recipient, the will is one of the most flexible gift planning tools.

Begin With the Basics

A will that includes one or more charitable recipients is basically no different from other wills. To be valid, the information it contains and the method in which it is executed must qualify under applicable state laws.

The proper name: Charitable institutions may sometimes share the same or very similar names. They may even be located in the same city or state. For this reason, when drafting a will that leaves property to a charitable entity, care must be taken to fully identify the intended recipient of the property.

If in doubt, check with the organization(s) or institution(s) involved and request its legal name and other identifying information. It may also be useful to include the most recent known address.

The use of the property: As in bequests to individuals, testators often choose to specify a particular use for their bequests. What is known as "precatory" language may be used to express a preference, or wishes may be stated in such a way that leaves little room for the recipient to determine use. Most charitable bequests are left to the charitable entity "for the general purposes of the organization in the discretion of its board." Since it may be many years before the funds are received and the needs of the organization may change in many ways, most donors choose to allow maximum flexibility for the use of the funds bequeathed.

If a donor wishes to restrict the use of a bequest, it is in the best interest of all involved to discuss the intended use with authorized representatives of the institution before the execution of the will.

Limits on the size of charitable bequests: There may be limits on the amounts that can be left to charitable beneficiaries in certain situations.

A spouse and/or children may be entitled to specific percentages of an estate that may not be encroached upon by charitable dispositions. Such restrictions rarely impose barriers in the typical situation, but state laws should be examined if one or more charitable bequests that amount to a substantial portion of an estate are contemplated.

Other than the considerations outlined above, there are generally no limits on the amount of property which may be left for charitable purposes through a will.

Choosing the Form of the Bequest

A charitable bequest may be structured in many ways. A person may choose to leave a specific dollar amount, particular real or personal property, a percentage of the estate, all or a portion of the residue of the estate following the satisfaction of other bequests or a combination of the above.

A fixed dollar bequest: In the case of a smaller bequest, it is usually best to simply state a specific dollar amount. This is particularly useful in the case of a highly liquid estate that will be reviewed on a regular basis.

If a person is considering a larger bequest or if the estate will be composed primarily of relatively illiquid assets, it may be best to choose another method of satisfying charitable intentions.

A bequest of property: A donor may choose to leave a particular real property, whether a home, farm or rental property, to a charitable beneficiary. It may be left outright, or a life estate may be granted to a surviving spouse or other relative or friend.

Great care should be taken to properly describe the intended property and the interest bequeathed if it is not the entire ownership interest. In the case of tangible personal property such as jewelry, automobiles and other assets, all aspects should be carefully considered before making such assets the subject of a charitable

disposition. Such gifts may create disputes and unnecessary friction among charitable and non-charitable heirs.

A specific bequest of intangible personal property such as stocks and bonds may not be the best choice. The value may have increased or decreased to a point where it no longer represents the intention of the testator.

In the case of any gift of property, language should be included that expresses the wishes of the testator if the property has been disposed of prior to death.

Bequest of the residue: Perhaps the most common method of leaving charitable bequests is through residuary clauses.

After providing for relatives and friends, many testators will specify that all or a portion of the residue of their estate be distributed to one or more charitable organizations or institutions. As a result, loved ones are cared for first and charitable wishes follow, if this is the testator's desire.

Many people choose to leave a set percentage of the residue of their estate for specified charitable uses. This approach offers a correcting mechanism in case the estate should unexpectedly increase or decrease in value.

Some may choose to bequeath a percentage of their estates according to the tenets of their religious beliefs.

Tax Considerations

There is an unlimited federal estate tax charitable deduction. See Internal Revenue Code section 2055(a). Check applicable state laws for restrictions that may apply.

The marital deduction: Some married people use trusts in their wills to take maximum advantage of the unlimited marital deduction. In the case of a life interest left to a spouse followed by a charitable disposition of the property, a combination of the charitable deduction and the marital deduction will effectively eliminate all tax at the federal level. See IRC sections 2523(a) and 2056(a).

Gift and estate taxes: The Tax Cuts and Jobs Act of 2017 continued the trend toward reducing the impact of federal estate and gift taxes on personal estate planning. Effective January 1, 2018, the Act doubled the planned \$5.6 million estate and gift tax exemption amount to \$11.18 million for individuals and \$22.36 million for a married couple. These amounts will continue to be indexed for inflation in future years. The maximum tax rate remains 40% for estate and/or gift taxes beyond the exemption amount.

The federal gift tax was reunified with the estate tax by legislation enacted in 2011. The maximum amount that can be given to noncharitable recipients during life was increased in 2011 from \$1 million under prior law to the same amount exempt from estate tax (see above). The gift and estate tax exemption is also portable between spouses, meaning that a surviving spouse can elect to use any portion of the estate and gift tax exemption not used by the predeceasing spouse.

Generation skipping transfer (GST) tax: This area of the law is quite complicated; however, charitable gifts may minimize the amount of transfer tax owed for some estates. It is one consideration to explore if the support of future generations is one of the person's goals and if the estate would otherwise be affected by the generation skipping transfer tax. Under terms of federal tax legislation in 2017, the amount exempt from the GST tax was also increased to \$11.18 million per individual (as indexed for inflation).

For details on the GST tax, see Code sections 2601–2663 and the corresponding regulations, and check for the latest changes in the law governing this provision.

Other Opportunities

The will is the most commonly used method of making charitable gifts at death. Other opportunities exist, however, which may be used in combination with a will or as stand-alone vehicles. For example, a charitable remainder unitrust or annuity trust allows a person to receive income each year for life while making a substantial charitable gift at death. If desired, the trust may be created in a will to go into effect at the person's death. The income in that case would be distributed to a survivor as specified in the trust agreement.

Charitable income or estate tax deductions (depending upon whether the trust is inter vivos or testamentary) are taken in the year the trust is established.

Other life income plans that feature fixed or variable income may also be available. In short, virtually any giving method that can be used during life may also be included in a will, adding to its attractiveness to charitably inclined individuals.

Recent developments: The tax code changes frequently. Always check for recent developments before the completion of estate plans. The IRS publishes helpful tax planning information and updates at www.irs.gov.

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