REMEMBER A CHARITY
IN YOUR WILL
Help the work live on...

Charitable Beneficiaries

A Brief Practitioner's Guide

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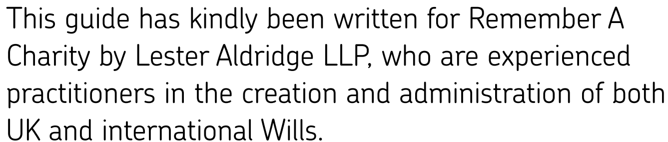
"The environment is so fragile yet so crucial. It's the one thing we all rely on, and it's up to us all to look after it. I want to leave something that will make a difference for generations to come."

Robert Mayfield

Introduction

This leaflet has been produced by Remember A Charity to assist wills and estate practitioners when drafting Wills which include gifts to charitable beneficiaries.

Remember A Charity is part of the Institute of Fundraising (registered charity number 1079573) and was formed in 2000. With over 140 charity members, Remember A Charity promotes charitable legacies and strives to make charitable gifts in Wills the norm.



This guide has kindly been written for Remember A Charity by Lester Aldridge LLP, who are experienced practitioners in the creation and administration of both UK and international Wills.

Why are charitable legacies important?

Charitable legacies are a vital and often the main source of voluntary income for many UK charities. They help charities to function on a day-to-day basis, grow and plan for the future.

However, current statistics suggest that, whilst around 75%* of the UK population support charities in their lifetime, only 7%* include a gift to charity in their Will.

*TNS Social 2008

Is your client considering leaving a gift to a charitable beneficiary in their Will?

If so, this leaflet provides useful information and points for consideration by practitioners. Appendix A also provides a brief aide memoire.

If not, is this something which your client might consider?

"I've always loved animals, they bring so much joy to the world. I suppose this is my chance to give something back to them... my little way of showing us humans care."

Lucy Thornton

Getting it right!

Check charitable status and details

If you are instructed to make a gift to charity in a client's Will, it is of crucial importance to get the basic details right. Consider the following points:

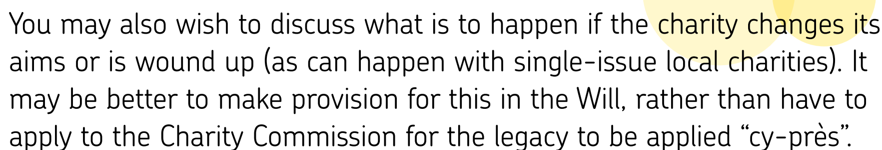
- Is the organisation to which your client wishes to leave money a registered charity? This could have significant inheritance tax consequences. There are a number of organisations whose aims are deemed to be political and so are denied charitable status.

- Get the name right. You cannot necessarily rely upon your client to do so. If there is doubt as to the identity of the charitable beneficiary, the expense to the estate in clarifying matters can be considerable. Include the full name and address of the charity and its registered charity number. This information is readily available from publications such as Charity Choice, or the Charity Commission and GuideStar websites (which are mentioned at the end of this booklet). If any doubt arises, it may be necessary for the estate to apply later for a Royal Sign Manual direction.

- Does your client want to benefit a local branch of the charity? Bear in mind that some local branches are charities in their own right. Consider contacting the charity's Head Office for advice as to the best way to achieve this.

Specific projects

There are risks involved in leaving funds to charities for specific projects. You may therefore wish to suggest that your client express this as a wish, in case the particular project has been completed prior to their death.



You may also wish to discuss what is to happen if the charity changes its aims or is wound up (as can happen with single-issue local charities). It may be better to make provision for this in the Will, rather than have to apply to the Charity Commission for the legacy to be applied “cy-près”.

Foreign charities

Gifts to charities outside the UK are not exempt from inheritance tax (IHT), although gifts to organisations within the EU which would qualify for charitable status if they were in the UK, will qualify for exemption. Consider leaving funds to a UK charity with links to the foreign cause that your client would wish to benefit.

Mergers

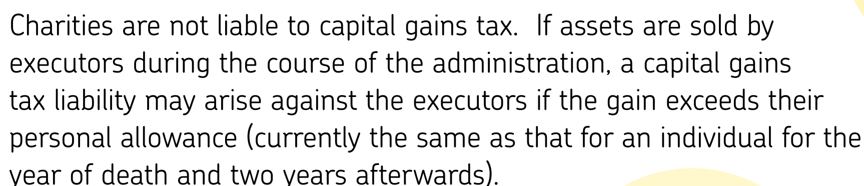
Remember that if two charities merge, a gift to either of them will not always take effect as a gift for the successor charity. As with specific projects, it may be advisable to provide for this in the Will, to avoid an application to the Charity Commission.

Charities and tax

Income tax

As charities can reclaim tax deducted from income arising during the administration of an estate (apart from the tax credit on dividends), it is important to provide charitable beneficiaries with Statements of Estate Income (R185) giving details of the income distributed during the year and the tax deducted.

Capital gains tax



Charities are not liable to capital gains tax. If assets are sold by executors during the course of the administration, a capital gains tax liability may arise against the executors if the gain exceeds their personal allowance (currently the same as that for an individual for the year of death and two years afterwards).

"My parents were such an important part of my life – I want to make sure all older people get the comfort, respect and dignity they deserve."

Steve Hammond

This charge can be avoided by appropriating assets to the charities. The executors sell as bare trustees. Normally, the beneficiaries must consent and give their instructions for the disposal of the asset.

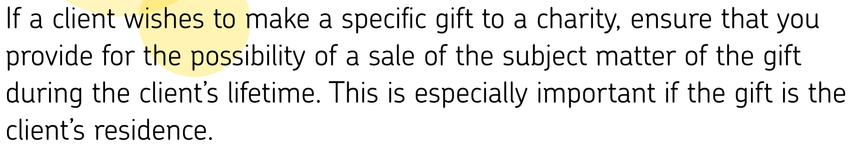
Bear in mind that, if the asset being appropriated is land, appropriation may involve Section 36 Charities Act 1993.

Inheritance tax

No IHT is payable on assets passing to charities. However, there could be IHT consequences if the residue of an estate is left partly to exempt charities and partly to non-exempt individuals or bodies. You need to consider carefully Section 41(b) Inheritance Tax Act 1984 and the cases of Re Benham and Re Ratcliffe. A brief note on these cases appears in Appendix B.

Types of gift

The same considerations apply to gifts to charities as gifts to individuals. In some cases a cash gift will be appropriate. But if a client wants to benefit a charity in a more significant way, it may be preferable to give a share of residue. This can also ensure that the charity does not receive a disproportionately large (or small) share of the client's estate if the value of the estate fluctuates sharply.



If a client wishes to make a specific gift to a charity, ensure that you provide for the possibility of a sale of the subject matter of the gift during the client's lifetime. This is especially important if the gift is the client's residence.

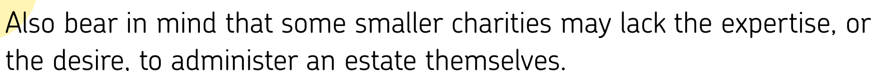
If your client is uncertain which charities to benefit, consider a discretionary gift, leaving the choice to the executors. This can also be useful if your client does not want the identity of their chosen charities to be known. In this situation, the client can (and should) leave a letter setting out their wishes.

Many charities subscribe to Smee and Ford's notification service, which means that they will be informed if a Will is proved in which they benefit. In the case of a discretionary gift specifying a particular area (e.g. cancer research, animal welfare or hospices) all subscribing charities in that field will be notified. Your client's executors will then receive information from those charities which will help them make informed choices.

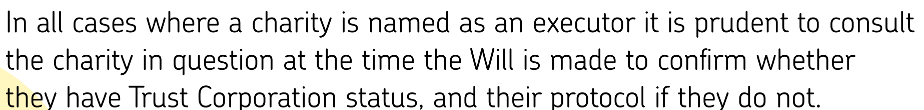
Naming charities as executors

Some clients like to appoint a charity as executor, either alone or with an individual. This is perfectly in order, although it can cause difficulties if a charity does not have Trust Corporation status. In that case the charity has to nominate an individual to take out the grant on its behalf.

It may be preferable to nominate the holder of a particular office (e.g. the finance director at the time of death). You should discourage clients from appointing an individual by name, in case that person has left the charity by the time your client dies.



Also bear in mind that some smaller charities may lack the expertise, or the desire, to administer an estate themselves.



In all cases where a charity is named as an executor it is prudent to consult the charity in question at the time the Will is made to confirm whether they have Trust Corporation status, and their protocol if they do not.

Minimising challenges to charitable gifts

It is important that Wills containing charitable gifts are not challenged as these can be costly and time consuming for all concerned (including the solicitor who drew up the Will). Ultimately, this could result in the money your client wanted to go to charity being eroded. In order to minimise these challenges it is important that all formal and procedural requirements are met and documented. However, particular attention should be paid to the following points:

Will validity

Practitioners will need to consider two areas of Will validity, namely compliance with Section 9 of the Wills Act 1837 (sometimes referred to as essential validity), and any concern surrounding the testator's testamentary capacity, a lack of knowledge and approval, undue influence and/or fraud (sometimes referred to as informal validity).

Essential validity

It is prudent (though not essential) that the Will is executed with the guidance of a professional adviser, to ensure that the Section 9 procedure is followed. In the absence of this, clear instructions should be provided to the testator with regard to how the Will should be validly executed.

"We forget how lucky we are in this country. There's so much poverty and suffering around the world and it's so easy to ignore. I want to let those less fortunate know that the world cares...they are not alone."

Jackie Finch

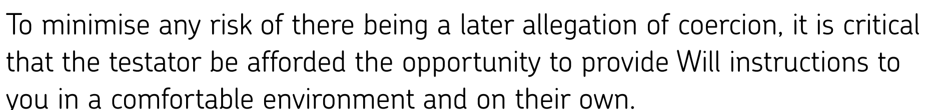
Informal validity

Careful attendance notes should be prepared which cover some or all of the following points (which is not meant to be an exhaustive list):

- Any departure from an earlier Will and the testator's reasons for this.
- Confirmation that the testator understands the size and nature of their estate, those individuals or people for whom they should consider making financial provision, and the consequences of executing the proposed Will.
- Confirmation that the testator was free from any influence being exerted by a family member, friend or any third party (particularly anyone named as a beneficiary under the Will).
- The circumstances surrounding the preparation and execution of the Will, for example, the location, date, time, testator's mental health etc.
- The reasons given by the testator for making any charitable bequests, e.g. do they have a particular affiliation to the charity or have they benefited from the work done by the charity in the past?
- Their relationship with any relative or person who may expect to receive a legacy from the testator but who is not included in the Will.

Testamentary capacity

If there is any concern with regard to the testator's testamentary capacity, it is important to consider whether or not either the testator's GP or usual medical practitioner should be consulted (see guidance provided in Kenwood v Adams [The Times 1975]). If so, also consider whether or not the GP should attend the execution of the Will to confirm testamentary capacity (and, if possible, witness the testator's signature).



To minimise any risk of there being a later allegation of coercion, it is critical that the testator be afforded the opportunity to provide Will instructions to you in a comfortable environment and on their own.

Inheritance (Provision for Family and Dependants) Act 1975

The testator should be made aware of the provisions of the 1975 Act and the court's discretionary power either to grant a beneficiary (from the class of potential claimants below) a share of the testator's estate, or to increase their share (if they are already mentioned in the Will). The category of potential claimants under Section 1 of the 1975 Act are:

a. Wife, husband or civil partner of the deceased.
b. Former wife, husband or civil partner of the deceased (who has either not remarried or entered into a new civil partnership).
c. Any person who for a continuous two year period immediately prior to the testator's death was:
   (i) living in the same household as the deceased and;
   (ii) as the husband, wife or civil partner of the deceased.
d. Any child of the deceased (including any adult children).
e. Any person who was treated as the deceased's child.
f. Any person who was being maintained by the deceased immediately prior to their death, e.g. through the deceased either providing them with accommodation or paying their bills.

If somebody falls within the above category of claimants, they are permitted to bring a claim against the estate for "reasonable financial provision" within six months of the date of the grant probate being issued. This time limit can be extended in certain circumstances.

Record keeping

Clear contemporaneous attendance notes can be invaluable in supporting the content of the Will and confirming the testator's wishes, should any challenge or claim arise in the future. They can also provide any charitable beneficiaries with useful information in respect of why their charity may have been selected to benefit.

The Law Society's Disputed Wills Practice Note, dated 16 April 2009, also outlines the potential disclosure expected from any solicitor who prepares a disputed Will.

Appendix A – summary guide

1. Have you confirmed with the testator details of the correct charity name, registered charity number and/or branch of the charity that they wish to benefit?

   Yes ☐ No ☐

2. Has the testator given any specific reasons why these charities are mentioned?

   Yes ☐ No ☐

3. If the answer to question 2 above is 'no', have you explained to the testator that this may assist with reducing risk to their estate in the future?

   Yes ☐ No ☐

4. Have you prepared detailed attendance notes of both the Will instructions and/or execution of the Will (if appropriate)?

   Yes ☐ No ☐

5. Have you considered with the testator how any mixed residuary beneficiaries are to be dealt with (see Appendix B)?

   Yes ☐ No ☐

6. Have you explained to the testator the provisions of the Inheritance (Provision for Family and Dependants) Act 1975?

   Yes ☐ No ☐

"The opportunity to help just one person regain their independence and live life to the full is an amazing privilege for me."

Janice Page

"I know from personal experience the benefits that medical research can bring and also the desperate need for funding. That's why I've chosen to leave a gift in my Will to a charity close to my heart."

Valerie May

7. Is there any potential claimant under Section 1 of the 1975 Act who has either received a reduced or no share of the estate?

   Yes ☐ No ☐

8. If the answer to 7 above is 'yes', have you recorded the testator's reasons for either omitting or limiting a gift to a potential claimant under the 1975 Act?

   Yes ☐ No ☐

9. If there is a charitable gift, have you discussed with the testator how the gift may be dealt with if the charity merges or ceases to exist?

   Yes ☐ No ☐

10. Are you concerned that there may be any issues of lack of testamentary capacity?

    Yes ☐ No ☐

11. If the answer to question 10 is 'yes', what steps have you taken (and recorded) with regard to this?

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12. Have you considered issues of lack of knowledge and approval and/or undue influence and fraud?

    Yes ☐ No ☐

13. If the answer to question 12 above is 'yes', what steps have been taken to confirm the testator's instructions?

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14. Have you discussed with the testator the option of notifying any charitable beneficiary of their legacy during their lifetime?

    Yes ☐ No ☐

15. If the answer to question 14 above is 'no', is the testator aware that by notifying the charity, they are not obligated to leave the money to them and they still have the option of either amending their Will or adding a future codicil should they wish to do so?

    Yes ☐ No ☐

"As a father of two boys, children play a big part in my life. You get to see how vulnerable they are. This is my way to look after kids that are less fortunate than mine."

Joseph James

Appendix B

Re Benham and Re Ratcliffe

Contentious probate disputes can arise from unclear Will drafting. These types of cases can be both costly and delay the administration of the estate.

Section 41 of the Inheritance Tax Act 1984 must be borne in mind where the residuary estate is to be divided between charitable beneficiaries (who are exempt from IHT) and other beneficiaries, for example family members. This Act states that the exempt gifts in a Will should not bear tax that arises on any other part of the residue.

In both Re Benham's Will Trust [1995] and Re Ratcliffe deceased [1999], questions arose as to whether or not the testators intended the residuary beneficiaries to receive their shares of the estate either gross or net of inheritance tax.

In Re Ratcliffe, IHT was borne by the non-charitable beneficiaries, so that the charities benefited from the gross residue, before IHT was deducted.

In Re Benham, the beneficiaries were separated into two lists. The court held that the intention of the testatrix was that each beneficiary, whether charitable or not, should receive the same as the other beneficiaries in each list. The non-charitable beneficiaries' shares were therefore grossed-up in order to achieve this outcome.

The Benham approach is not commonly used, but you should be alerted to this. HMRC has both useful notes on these cases and also a "grossing up" calculator on their website **www.hmrc.gov.uk**.

Useful websites:

Remember A Charity:
www.rememberacharity.org.uk

Charity Commission:
www.charity-commission.gov.uk

GuideStar UK:
www.guidestar.org.uk

Law Society:
www.lawsociety.org.uk

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www.lester-aldridge.co.uk

www.certainty.co.uk

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