Managing Bequests

14 years ago a friend of mine started work at the National Heart Foundation here in Victoria as the new Director of Fundraising. I'm not sure what title the position had then because it is my experience that people who are fundraisers have business cards that say just about anything else. Back then it may have been Director of Community Relations.

He wanted me to provide regular advice to the Heart Foundation on estates where the Foundation was a beneficiary. Until then they had used one of the national law firms, on the basis that seemed to suit both organisations quite well. Early in his relationship with those lawyers he found that what happened was that because the work wasn't well-paid it went to younger lawyers whenever there were younger lawyers available to take it. It was a task that could be perpetually delegated. And seeing that the client wasn't paying full rates, there was little opportunity to argue about it.

The proposal was that I would provide advice to the Heart Foundation on disputed estates and issues that arose in the bequest management process from time to time.

Since then I have survived all intervening Directors of Fundraising and all intervening Bequest and Memorial Giving Managers. I like to think it's got a lot to do with the quality of the advice that I give them but it may be that it's my hourly rates that cause them to keep coming back.

I'd like to share some of my experiences during that period of time because some or perhaps all of them will assist you in your bequest management processes.

The first contact

Your first contact is likely to be a letter from a solicitor telling you that your organisation has received a share of the estate of Mrs X. Perhaps Mrs X is on your donor database, perhaps she isn't. If she is it will give you some idea of who she was, what she meant to your organisation, and what your organisation meant to her. It may be relevant at any mediation on a disputed estate, should you get that far.

The first thing you need is a copy of the will. If there is no copy of the will in the letter, then you should ask for one. If you have received such a letter then you are a beneficiary. And in Victoria, as a beneficairy, you are entitled to a copy of the will. Section 50 of the Wills Act says so.

A person who has possession and control of a will, a revoked will or a purported will of a deceased person must allow the following persons to inspect and make copies of the will (at their own expense)—

(a) any person named or referred to in the will, whether as beneficiary or not;
(b) any person named or referred to in any earlier will as a beneficiary;
(c) any spouse of the testator at the date of the testator's death;
(d) any domestic partner of the testator;

In Vic, NSW, QLD and NT a beneficiary has a right to a copy of the Will. Not elsewhere.

Note that the obligation rests with the person who has possession and control of the will not necessarily with the executor. So if it is with the solicitor, ask the solicitor. And you may get a photocopying bill.

This provision also includes an entitlement to copies of earlier Wills because at some point a person may want to know how the deceased's testamentary intentions changed over time.

If you have been left a lump sum or a particular item then you really don't need a great deal more paperwork than that. That's what you're entitled to. No more.

I do know a number of law firms that believe a charity should be grateful for whatever been left to it and that the charity should rely upon the accuracy of the lawyer's letter as conclusive evidence of their entitlement. That's not a view I subscribed to. You are not there because of the lawyer's generosity, but it because of the deceased’s generosity. You are entitled to be satisfied that you have been offered or given what the will provided and the only way you'll know for sure what that is, is to get a copy of the will.

If you're getting a share of the residue of the estate I think you also entitled to an inventory. A list of the assets and liabilities that comprise the estate. If the lawyer won’t give you one then, you can search the Probate file at Court after Probate has been granted.

If the estate contains assets which, when disposed of, may impose a capital gains tax liability on the estate, you need to know. Because the way the executor deals with those assets could have the effect of increasing maintaining or decreasing your net benefit under the will. But on the assumption that all you are receiving is a cash bequest you only need to know when it will arrive.

My preference is that you respond with a formal thank you and ask two or three questions. The first is when is the solicitor anticipate that probate will be granted. The second is when does the solicitor believed the administration of the estate will be sufficiently advanced to enable the bequest to be paid. The third (asked if you share in residue) is for a copy of the inventory when completed.

I know you all have cash flow budgets that you need deal with your Executive Directors on so that's very useful information to back up your estimates, if they turn out to be wrong.

Income tax

As a matter of logic income tax should be dealt with after we deal with claims against the estate by those who think they haven't been adequately provided for, but I should mention it here.

There are provisions in the Australian income tax legislation that allow Deductible Gift Recipients to receive *in specie* distributions or transfers of property and shares in circumstances where capital gains tax is not payable by the estate, and also not payable by the beneficiary that is a Deductible Gift Recipient.

The reason why I mention it here is that if the will is one where you get a share of residue and you believe those provisions can be used to your benefit then you need to take a greater involvement in the administration of the estate, and seek a meeting with the solicitor and/or the executor.

Arrange for assets to be kept in their current form and given to you in that form rather than cashed out or sold, the tax paid and you get the balance. The provisions relate to gifts of property, not to their cash equivalence.

It was brought home to me a few months ago when we were involved in a family provision claim where we acted for the estate 99% of the estate

went to charities but a number of claims had been made against the estate by children of the deceased.

Because of a desire to deal with the claims as quickly as possible the estate had been converted into cash so when you would have a better idea of the estate before the mediation. On our advice, the executor settled the mediation on the basis that daughter X got a certain amount and daughter Y got a certain amount, and the balance went to the charities with an obligation to pay the tax bill for the estate when it arrived.

Well, the tax bill did arrive and it was $300,000 more than anyone had expected. The deceased had been a canny long term investor. It was a very healthy tax bill.

Notwithstanding a deal made at the mediation, and an express term in the mediation agreement that provided for an indemnity the charities try to welsh on the deal on the basis that claimed to have been told that it was a negligible amount or at least under $100,000. Not true.

My firm had been involved in the mediation. As we had recommended the settlement to the executor we sent the executor away to another firm and we paid the executor's legal bill at that firm. The charities ultimately settled on exactly the same basis as they have settled nine months before at the mediation – that is they pay the tax bill. But there was a great deal of angst and worry for all parties and unfortunately there are now two charities in Victoria I don't trust. At all.

I know we should have completed and lodged the tax returns first. If the tax had been ascertained prior to mediation we would have known that *net* asset pool available at the mediation.

On the other hand if we had received the approval of the beneficiaries to retain the assets in in the then current form there would have been no horrendous tax bill of the assets could simply have been handed over.

The warning is then about who wears the risk of a share market dive. I think you would, if you requested that the shares not be sold.

Managing claims against the Estate

For each one of us there will be a unique group of people for whom we have a responsibility to provide when we die. For me it's my wife and my daughter.

If you have people who fall into that group, then in your will you need to make provision for them that is both adequate and proper.

Adequate means having regard to the needs of the claimant and *proper* means having regard to the relationship between the deceased and the claimant. And then you need to look at the other provisions that are contained in the will, and to balance all the competing claims. And while there are lots of cases on what is adequate and proper in particular circumstances it is impossible to find any formulas that make the determination of adequate and proper provision for any individual beneficiary easy.

But the cases appear to agree the charities don't have a need. I'm not quite sure why that is, it may simply be that there are a lot more people who can give them money. But either way when it comes to a family provision claim charities tend to draw the short straw.

So from a practical point of view what you need to do is maintain as much of the estate as you can for the beneficiaries under the will. This means you should try to reduce the share going to lawyers.

While there are many claims made against the estate, in a lot of cases, it’s the lawyers that get the lion’s share. Legal fees for all parties are almost always paid from the estate, and the beneficiaries and the claimant share the balance. So it is in your best interests to ensure that the amount which gets spent before the estate is available for distribution is as small as possible.

The way I recommend that you do that is to open lines of communication fairly early. When you get the letter of demand before the proceedings are issued.

I ask the Solicitor for the estate to see if there can be an informal advice as to the claim that will be made. It is cheaper to write a two or three page letter that it is to issue proceedings and prepare a five-page or 10 page or 20 page affidavit – or four. And it's quite possible that we can get a good understanding of the essence of the claim when the total legal spend for every one is in the thousands, rather than tens of thousands.

In one particular estate where I am acting for a charity at the moment we have done just that and I fully expect that we will be able to settle the claim for somewhere between $10,000 and $20,000. If the lady issues and we were to proceed only to a mediation could end up costing the two charities as the only beneficiaries $40,000, including costs and the claim.

It is an exercise in containment.

The power of appropriation

Most of the Wills that we lawyers draw a fairly simple. The will appoints X to be the executor, and instructs that the assets are to be sold, the bills paid and the balance distributed.

I explain to clients that this gets over disagreements between beneficiaries as to who gets what. If everything is turned into cash, the first cheque out of the cheque-book is no different to the second cheque of the cheque-book and we achieve objective equality.

Section 31 of the Trustee Act here in Victoria and equivalent provisions in each other state and territory allow executors to appropriate assets in satisfaction of claims. On my reading of the legislation you could even take hard assets like BHP shares in satisfaction of an entitlement to a cash bequest.

A trustee may appropriate any part of the property subject to the trust, or any part of the estate of a testator or intestate, in its actual condition or state of investment, in or towards satisfaction of any legacy, share, or interest in the property or estate, whether settled or not, as to the trustee may seem just and reasonable, according to the respective rights of the persons interested in the property or estate…..

This becomes particularly important when you are dealing with the residue of an estate of a person who left considerable assets where there is a capital gains tax liability to be met if assets are sold. Like the one I mentioned before.

The usual fact scenario is fairly simple. An investment property purchased 15 years ago for $250,000 is now worth $1 million. If the property is sold and realised a net million dollars then there is a $750,000 capital gain and under the rules we apply here in Australia you take half of that or $375,000 and added to the taxable income of the taxpayer in the return to date of death.

No while that's particularly good for the revenue, it is not particularly good for the beneficiaries. If the charity that you represent was receiving the whole of the estate then the tax bill which I would estimate would be somewhere around $150,000 mark could better be added to your fundraising budget rather than to the country's fundraising budget.

In the example I gave you before about the disputed estate, if we had negotiated the retention of the assets in the form the deceased held them, then there wouldn't have been a tax bill to argue about. We could have divvied up the shares and the property and had done an agreement between the estate the charities and the claimants and handed the assets over. There would have been a smaller tax bill because there were some dividends that needed to be dealt with but there wouldn't have been any capital gains tax payable because the assets had been distributed in the way that we have talked about.

Receipts releases and indemnities

Which to you give, when and why?

You always give a receipt. Your auditor would not have it any other way, and the executor needs evidence that you have the money.

Releases

Giving a release is like saying to somebody that *if* you got it wrong and it costs me money I will not sue you.

But when an executor swears an affidavit to the court that they will justly and truly administer the will according to law, that means the executor must pay you your entitlement. Why in those circumstances should be you be required to provide a release? I think the short answer is cautious lawyers.

I'm not in overly opposed to granting releases, but I don't particularly like them. When I am asked about providing a release I recommend that the release be provided only if the executor says that he was she is given it their best shot.

Specifically I want the executor to say that he or she had to the best of their knowledge information and belief properly and thoroughly administered the estate, that there are no assets he/she knows about that are not collected and dealt with in accordance with the will, that there are no liabilities that have not been discharged and that he/she is not aware of any other claims that might exist.

And in those circumstances I will agree to the giving of a release. Because if because the release is made in reliance upon assurances that are made negligently or deliberately in a way that turns out not to be true then you're less likely to be bound by the terms of the release because you have given a release in reliance upon their assurances.

At that point you should be in the position you would have been in but for the giving of a release.

Indemnities

These worry me most of all.

Not because of the way that they are requested, but because of the way they are drafted.

Most people don't appear to distinguish between an indemnity and a release. In a practical sense the difficulty is that if someone makes a call on the indemnity you need to give some money back and that's where the trap is.

Most of the indemnities that I see are unlimited. That is that you are agreeing to fully indemnify the executor for each and everything that he may be found be liable for and that makes me uncomfortable.

If an indemnity is to be given it should be limited to the lesser of the dollar value of the benefit that you received under the will when you

received it *and* your proportionate share of the claim made against the estate.

If there is a claim made against the estate for $200,000 and you are a 10% residuary beneficiary why on earth would you want to give an open indemnity to the executor? What about the others? Better not to have to seek contribution.

Your reputation.

The most important thing that you and your organisation have is a good reputation. You should guard it jealously and protect it.

You should also ensure that you manage relationships in such a way that your reputation is not tarnished. Do not give any one a reason to dislike you.

As a beneficiary you have certain rights, but the way you exercise those rights will impact on your reputation and that of your organisation and I think it's important that you allow the estate administration to happen in a way which is conducive to the maintenance of your good name.

You want the lawyer who is administering the estate to believe that the willmaker chose well in making a donation to your organisation. Give the lawyer the information that they ask for, and perhaps a little bit more but not too much more. Don't add them to your mailing list unless they really ask for it.

If the executor is not also a beneficiary, consider that you might receive a claim for executor's commission. In one particular case some years ago I thought the executor was being unreasonable in the claim for commission. But then I found out that the executor could have been the sole beneficiary of the estate, and recommended my client instead. Unlikely to get another referral from that source.

Or when it comes to contested estates you want the other beneficiaries and the claimants against the estate to also hold your organisation in the highest possible regard. You want to be regarded as fair, not necessarily as generous. You need to be appreciated as sympathetic and understanding, but not soft.

If you can achieve that you will hopefully be in a position where the solicitor is prepared to recommend your organisation where a willmaker is looking for recommendations, and you may find some of the other beneficiaries and claimants as donors.

And the last thing is work very hard to settle any claims against the estate. The last thing you want is to make the law reports as a defendant.

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