

CHARITABLE GIVING BY ATTORNEYS

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The article 'Tax-efficient bequests to Charity' by Robert Venables QC (PTPR Vol 4 Issue 2 p 65) is a useful reminder of the tax complexities which can affect charitable gifts made by Will. In one section of that article Robert Venables indicates that when considering charitable provision to be made by Will, a testator's professional adviser should not ignore the potential advantage, and simplicity, of a *lifetime* charitable gift as well as, or in substitution for, the proposed gift by Will. This note illustrates what can be achieved in very unusual circumstances.

Miss X is a spinster now aged 88. She does not have any near relatives. Her assets are worth about £6 million. The assets include a lifetime accumulation of valuable antiques and works of art worth about £2½ million. Until about three years ago she had not considered obtaining advice from accountants or lawyers. She prepared and submitted tax returns without professional help until her helpful local tax inspector persuaded her that it really would be sensible to have an accountant look at her tax returns and at her affairs more generally.

So she found an accountant. His first impression of his new client was of a frail, formidable, fiercely independent old lady living alone with the utmost frugality in an untidy and indifferently maintained house. When he realised what she was worth, that her expenditure did not begin to absorb her income and that she had no relatives, he persuaded her that he should bring in a local solicitor as well.

The two professionals soon came to regard the old lady with concern, admiration and affection. She was not looking after herself at all well. She was not eating appropriately. Her conversation and the experiences of her long lifetime were fascinating. But what to do about her property? If nothing was done it would all be *bona vacantia* at her death; and there were no individuals for whom she felt any responsibility.

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The first step was to make a Will. She had already decided that all her property should be given by her Will to charity; and as she did not want to make a rigid selection of charities in her Will she quickly adopted the suggestion that the executors and trustees of her Will should select the charities which were to benefit.

In view of her age, the solicitor explained the advantages of an enduring power of attorney. The accountant and the solicitor were made her attorneys. They were also the executors of her Will.

Her physical circumstances and condition worried her advisers; and eventually they persuaded her to move into a home.

Miss X's father had lived to his late 90s. In spite of her frail appearance Miss X, now cared for and enjoying a more sensible diet, could be regarded as having at least a normal life-expectancy; and might easily survive for many years. Meanwhile, even after providing for the cost of living and being looked after in a home, Miss X's income was very greatly in excess of what was needed to cover her expenditure, her forecast needs, and her capacity to spend money usefully or enjoyably. That was so although nearly half of her wealth was in chattels not yielding any income.

For tax and financial planning it was significant that Miss X's income, substantially beyond her needs, was all subject to income tax, and heavily subject to tax at the higher rate.

The attorneys, having discussed this situation with Miss X, considered that the practical and tax-efficient course would be to establish a charitable trust in Miss X's lifetime, to transfer to that charitable trust a substantial slice of assets so that income would be available - effectively free from income tax - to support or benefit charitable purposes which, as the attorneys knew from their discussions with her, including the discussions about the Will which she had now made, Miss X wished to provide for.

But by the time this had been explored, it became apparent that Miss X's powers of concentration and decision were weakening; and the lifetime charitable gift (which she clearly desired) could not in practice be made except by use of her advisers' enduring power of attorney.

Miss X had taken with her to the home in which she was now living her favourite pieces from her collection of antiques and works of art; and, as she would never return to her house, the rest of her collection and the house itself could be sold.

The practical advantages of an immediate and substantial lifetime transfer of assets into a charitable trust were considerable:

- (1) During the rest of her lifetime the income from the funds in the trust would be effectively free from income tax; but if those funds had not been put into the charitable trust the income would be taxable and most of it would be subject to higher rate tax.
- (2) The funds in trust would be immediately available, as to income and capital, to support charities and charitable purposes. If left in her ownership their full availability for supporting charity would be delayed until after her death. Some charitable gifts would no doubt be made from time to time by her attorneys on her behalf and after discussions with her; but in style and scale this would not begin to match the charitable provision which would be available from the proposed charitable trust.
- (3) Although Miss X's powers of concentration and decision-making were impaired, the attorneys would be able to discuss with her the use of the funds in the trust and the trust income for charitable purposes; and these discussions would provide her with interest and pleasure, and, for so long as matters could continue to be discussed with her, an active part in decision-making about the selection of charities and charitable purposes to be benefited. She was, indeed, delighted with the prospect of having in her lifetime a charitable trust bearing her name and in active operation. This was much more attractive than leaving the substantial charitable provision to be made by her Will after her death.
- (4) Her now unoccupied house and the major part of her collection of antiques and works of art could be put into the charitable trust and then sold by the trustees without attracting any charge to capital gains tax and without any prospective liability for inheritance tax. The transfer of property into the charitable trust would not attract stamp duty.
- (5) The income from the trust fund representing the proceeds of sale of those assets would be substantial; would be free from income tax; and would be immediately available for distribution to and support of charities and charitable purposes. If Miss X were to live as long as her father, this lifetime acceleration of charitable benefits (as compared with leaving the provision to be made by her Will after her death) would be of major importance.
- (6) From Miss X's other assets there could also be transfers into the charitable trust without fear of causing her any disadvantage or potential disadvantage. Leaving all those assets in her hands would provide her with income beyond her needs and with capital of much greater value than could on any practical view be regarded as reasonable provision for the potential future contingencies of old age and increasing frailty.

At this stage the Charity Commission was consulted. Would the proposed charitable trust, to be established by Miss X (acting by her attorneys) in her lifetime, be accepted for registration as a charity?

The Charity Commission's response was discouraging. It expressed the view that the enduring power of attorney could not properly be used to create, and transfer assets to, the proposed trust.

The Commission cited *Re Muller* (Hoffmann J, unreported, 22nd June 1990). Mr Muller's Will had given his estate (valued at over £20 million) on trust for such charities as his executors were to choose. The executors proposed to form a charitable "Muller Foundation" (which had been planned in his lifetime and would have been so created if his ability to make decisions had not sadly deteriorated). The proposal considered by Hoffmann J was that the Muller Foundation would be formed; that the assets of the residuary estate would be transferred to the Foundation; and the assets would then be available to support charities and charitable purposes selected by the Trustees (as trustees of the Foundation), with power to use income and capital but without any obligation to use up the capital in any particular period of time. Hoffmann J refused approval. He saw no reason to interfere with the executors' duty, under the Will, to distribute the residuary estate to charities, and to complete that distribution within a reasonably short time. The proposed Muller Foundation would have, potentially, a much longer life and, while making full distribution of its income, might not find it necessary to distribute capital.

Miss X's attorneys were in a quite different position. They were seeking approval of the inter vivos creation of a charitable trust. The decision in *Re Muller* might have been relevant if the proposal had been made after Miss X's death by her executors; but Miss X was very much alive.

The Charity Commission also objected to the proposal to include in the Trust Deed provision enabling trustees engaged in any profession to charge for their services as trustees. The Commission considered that the trustees should act gratuitously or that remuneration for any "paid" trustees should be dependent on there being a majority of "unpaid" trustees who would decide what remuneration there should be for the "paid" trustees. The practical effect of this would be to require the attorneys to find for the proposed charitable trust additional trustees who would be willing to act without pay and would form a majority of the trustees.

It was then decided that the attorneys should seek directions from the Court of Protection under s.8 of the Enduring Powers of Attorney Act 1985; and, if directions were given in favour of the inter vivos creation of a charitable trust, the attorneys would go back to the Charity Commission with a renewed application for approval of the Trust Deed.

Adopting this strategy would enable the Court of Protection to approve or disapprove of the Trustees' charging clause in the proposed trust deed. Finding appropriate persons to act as trustees of the proposed charitable trust without being able to charge for their services would be a formidable task. Miss X had no relations and there were no intimate friends of Miss X who could be asked to be trustees on that basis. The attorneys were the obvious persons to act as trustees but would be unwilling to do so without reasonable remuneration. In the circumstances of this case the Charity Commission's view that any charging by the trustees should be subject to approval by a majority of "unpaid" trustees could not be applied; because there would be no candidates for appointment as "unpaid" trustees. But, if the trust were established and had only "paid" trustees, the trust would be a substantial charitable trust; its accounts would be audited regularly by independent accountants; those auditors could be directed to consider the reasonableness of charges actually made by the trustees; and, if the auditors did not consider them reasonable, the trustees would be able to reduce the charges to accord with the auditors' view of reasonableness or to refer the question of their reasonableness to the Charity Commission or the Court. The Master of the Court of Protection was content with that arrangement.

The Master of the Court of Protection did not consider that *Re Muller* presented any obstacle to what was proposed.

The Master could not, of course, decide that the charitable trust, when established, would qualify for registration as a charity. That was a matter for the Charity Commission or the High Court. The Master did, however, feel able to express her view that the proposed arrangements were practical and sensible. So far as her jurisdiction was concerned she would authorise the attorneys to carry those arrangements into effect; but in practical terms this would be effective only if the charitable trust were accepted for registration as a charity.

With the benefit of that result in the Court of Protection, a renewed application was made to the Charity Commission. The Commission was persuaded to adopt the same practical view as the Master in the Court of Protection. The draft charitable trust deed, as approved in the Court of Protection, was accepted by the Charity Commission; and in due course the Trust Deed was executed and the charitable trust registered under the Charities Act.

All this had taken time. Completion of the charitable trust deed occurred about 20 months after the attorneys' decision to seek approval for the lifetime creation of a charitable trust and the transfer of substantial assets into that trust. Miss X fortunately survived this period and appears to have a lively chance of matching her father's longevity.

This is an unusual history; but it provides instructive guidance for advisers faced with less unusual circumstances.