Gifts, wills, bequests and endowments

Legal information for community organisations

This fact sheet covers:

- we have been offered a gift, bequest or endowment – now what?
- do we have to accept the gift?
- the gift, bequest or endowment came with conditions, do we have to comply?
- will changing organisational structure affect gifts, bequests or endowments?
- how does our organisation get a gift, bequest or endowment?
- can a bequest to our organisation be challenged?
- do we need to have deductible gift recipient (DGR) tax status to accept gifts?
- how are gifts, wills or endowments treated for tax purposes?

This fact sheet provides an overview of some of the main legal issues that may arise for community organisations when they receive a gift or receive a bequest or endowment from a person's will.

The information below is intended as a guide only, and is not legal advice. If you or your organisation has a legal problem you should talk to a lawyer before making a decision about what to do.

We are confused by all the terms – what do they mean?

It can be difficult to understand the difference between the various 'kinds' of money or property given to your community organisation.

The table below sets out some of the relevant terms (legal) you may come across.

Legal term	What does it mean?
gift	A gift is a sum of money or an asset (property or goods) voluntarily transferred to your community organisation by someone that is to the advantage of your community organisation. The person giving you the money or thing does not receive anything in return.
will	A document in which someone specifies how to deal with or allocate their assets after their death. Wills can contain bequests or endowments to your community organisation.
bequest	A sum of money or an asset that is given to your community organisation upon the owner's death as specified in the owner's will. The bequest can be given 'freely', which means that your organisation may choose to deal with it as it sees fit, or it can be given with conditions, which must be honoured.
endowment	An endowment is normally a fund (amount of money), which is established to provide an income for 'beneficiaries' – your community organisation can be the sole or one of several beneficiaries. The

	fund is usually invested in 'perpetuity', which means there is no time limit for its end. Only the income is distributed, not the original capital amount. So, the endowment fund will be set up with a sum of money, and this money is then invested by the trustees (managers) of the fund, and a 'dividend' or a distribution is paid to those beneficiaries under the terms of the fund.
executor	The person responsible for administering a deceased person's affairs after their death. The executor has important duties, including to distribute the deceased person's assets according to the will and to pay all of the debts of the estate.

We have been offered a gift, bequest or endowment – now what?

Sometimes, the first your organisation may know about a gift, bequest or endowment is when it turns up in the mail or you are contacted by the executor of the deceased's estate.

It can be of great benefit to your organisation if you attract a gift, bequest or endowment, but there are often forgotten legal obligations that go with the receipt of these donations. For example, your organisation should check if there are any potentially difficult conditions attached to the gift, bequest or endowment, and think about whether it should still accept (it doesn't have to). To satisfy some legal definitions of 'gift', preferences for use can be expressed but can't be mandated.

Note

The word 'gift' has a particular meaning in tax law. See the ATO website for more information.

Your organisation may want to consider whether the gift, bequest or endowment is in accordance with the organisation's objects and purposes, or whether there is any other clause in the organisation's rules or constitution that prevent it from accepting the gift.

Some of the issues your organisation may want to consider are listed in the sections below.

Do we have to accept the gift, or can we decline it?

There is no legal requirement to accept a gift, bequest or endowment.

Some donations to your community organisation will come in standard form, with little room for discussion or negotiation – often the form of a small monetary donation, or perhaps second-hand goods.

However, your organisation may also be the potential recipient of large gifts, bequests or rights under an endowment fund. In these situations, it may be worthwhile sitting down with the potential donor or the executor of the donor's estate to discuss the potential donation. To the extent that you can, try and negotiate the terms of the donation (if any) in a way that fulfils the donor's wishes, but allows your organisation to use the funds in areas that it is needed most.

Although it's a great compliment to be offered such donations, if the conditions are contrary to your organisation's goals, or provide too heavy an administrative or long term financial burden, it may not be in your organisation's best interests to accept it (see below).

The gift, bequest or endowment came with conditions, do we have to comply?

Yes, your community organisation must comply with the conditions (if any) of a gift, bequest or endowment it accepts. By accepting a bequest or the benefit of an endowment, your organisation is entering into a contract with the donor, or the estate of the donor. Failure to honour the terms of the contract could result in legal action being taken against your organisation.

Conditions may impact the tax status of a gift (see the end of this fact sheet). Note that occasionally, a gift, bequest or endowment may come with conditions that are more onerous for your organisation than beneficial. In these situations your organisation does not have to accept it.

Example

Mr X might leave a bequest for your organisation in the form of a building (not cash). The building could be used for meetings and recreational activities. The building is worth $200,000 and requires an annual maintenance cost of $10,000. Mr X did not leave any funds to pay for the maintenance cost. The building also requires work to make it disability accessible and to ensure it meets current fire and safety standards. The bequest also provides that if the property is sold or mortgaged the proceeds will not go to the organisation. In this situation it may not be beneficial for your organisation to accept the bequest, as you may not be able to afford the $10,000 maintenance cost, and the money to make the building disability accessible and meet current fire and safety standards.

How does changing structure impact gifts?

It is important to consider gifts, bequests or endowments that might be given to your community organisation before making significant changes to your organisation – such as merging with another organisation or changing legal structure. If a will names a certain organisation as a beneficiary, it can be a difficult legal process to 'claim' the money if that organisation no longer exists.

It will depend on what legal process the organisation follows to change its legal structure or merge as to whether gifts, bequests or endowments 'carry over' to the new entity. Your organisation should seek legal advice if you are considering changing legal structure.

Related resource

For more information see our webpage on Changing Structure.

How does our organisation get a gift, bequest or endowment?

Sometimes people will make a gift to your organisation, or leave a bequest or endowment just because they like your organisation's work or have a connection with your organisation. Rather than leaving it to chance, some organisations actively ask for people to make gifts to their organisation, or leave money to the organisation in their will.

If your organisation is asking for bequests or endowments, it is useful to provide standard wording to potential donors so that your community organisation can be assured that any bequests or endowments left by the donor will be legitimate in law. It may also be useful for your organisation to provide the wording for the bequest or endowment so that it can direct the way that funds can be used (that is, avoid difficult or impractical conditions).

Sample of wording that may be suitable for potential bequests by donors:

I bequeath [the whole/a percentage/something specific/residue] of my estate to [X organisation or successor organisation] of [the registered address of your community organisation] for purposes that it shall determine, and this bequest will be free from all duties. The receipt of this bequest by any authorised officer of [X organisation or successor organisation] shall form valid discharge to my executor

Can a bequest to our organisation be challenged?

Yes. There are a number of reasons wills can be challenged, including:

- the person making the will was not aware of what they were doing at the time of making the will (for example, if they had a cognitive impairment)
- the will was made under the influence of another person
- the will was affected by a fraudulent act of a third party, or
- there is some legal fault in the will itself (for example, if the testator's signature has not been properly witnessed)

Wills can also be challenged by family members, dependants or related people when the deceased did not adequately provide for them in the will. These are called 'family provision claims', and each state and territory has different laws as to who is eligible to make a claim, what 'adequately provided for' means, and the timeframes to make a claim.

The table below sets out current legislation for family provision claims and links to further information:

State or territory	Relevant laws	Further information on family provision claims
New South Wales	*Succession Act 2006* (NSW)	LawAccess NSW – Family Provision Claims
Victoria	*Wills Act 1997* (VIC) *Administration and Probate Act 1958* (VIC)	The Law Handbook VIC – Contesting a will
South Australia	*Wills Act 1936* (SA) *Inheritance (Family Provision) Act 1972* (SA)	Law Handbook SA – Contesting a Will
Queensland	*Succession Act 1981* (QLD)	The Queensland Law Handbook – Contesting a Will
Tasmania	*Wills Act 2008* (TAS) *Testator's Family Maintenance Act 1912* (TAS)	Tasmania Law Handbook – Contesting a Will
Western Australia	*Wills Act 1970* (WA) *Family Provision act 1972* (WA)	Legal Aid Western Australia – Challenging an unfair will
Australian Capital Territory	*Family Provision Act 1969* (ACT)	ACT Law Society – Making a will
Northern Territory	*Administration and Probate Act* (NT) *Family Provision Act* (NT)	Northern Territory Law Handbook – Challenging an estate

Often such claims work to the detriment of community organisations that are the intended recipients of gifts in a will. If a family member makes a claim that they have not been adequately provided for, a community organisation may have very little competing moral claim to the bequest because, as the law generally presumes, 'family comes first.'

If your organisation is listed in a will, you will usually receive notice if the will is being challenged. In these circumstances your organisation should seek legal advice on how this will impact the bequest or endowment.

There are steps your organisation can take to prevent (or minimise) a family provision claim. While the donor is still alive, you should:

- encourage gift giving in order to establish a proven link between the donor and the community organisation, as well as the donor's intention. Keep records of all such gifts and of the relationship between the donor and your community organisation

- encourage the donor to seek independent legal advice to avoid accusations of undue influence. This is critical where the donor is near death, elderly or physically or mentally incapacitated, and
- encourage the donor to make adequate provision in the donor's will for all persons who would be entitled to make a family provision claim

For more information on family provision claims, see the Resources section at the end of this fact sheet.

Do we need to have deductible gift recipient tax status to accept gifts?

A deductible gift recipient (**DGR**) is an organisation or fund which has received special endorsement by the Australian Tax Office (**ATO**). People who make gifts or donations to DGRs are able to 'deduct' those gifts for their own income tax purposes.

Your organisation can accept gifts without having DGR status, however these gifts will not be tax deductible by the donor.

Note

A gift or donation made to an organisation with DGR status will only be tax deductible if the donation is made during the donor's lifetime – a gift given by bequest is not tax deductible by the donor's estate.

Related Not-for-profit Law resource

For information about obtaining DGR tax status, see our DGR webpage.

How are gifts, wills or endowments treated for tax purposes?

Your organisation should seek specific advice on its income tax and GST obligations.

Related Not-for-profit Law resource

Our tax webpage has many resources on tax, including income tax, DGR and GST.

Income tax

Generally, unless your community organisation is income tax exempt, you will be taxed on any income you receive as the result of a gift, bequest or endowment.

To find out more about income tax, and whether your organisation might be eligible for a concession see our tax webpage.

GST

If your organisation receives a gift (defined by the ATO to be a voluntary payment where the payer receives no 'material benefit') then the gift is not subject to GST. The value of a gift is also excluded when calculating the organisation's annual turnover for the purposes of establishing whether it is required to be registered for GST.

Your organisation should note that the ATO considers that a payment is not 'voluntary' when there is an obligation to make the payment, or the not-for-profit organisation is contractually obliged to use the payment in a specific way. There are also special rules about what constitutes a material benefit.

For further information see the ATO resources listed in the resources section below and our tax webpage.

Resources

Not-for-profit Law resources

- Getting started

  This page sets out the things you need to consider when deciding whether to start a not-for-profit organisation, including links to helpful resources.
- Before you start

  This page includes specific matters to address before setting up a not-for-profit organisation.
- The incorporation decision

  This page gives guidance to not-for-profits deciding whether to formally incorporate or remain as an unincorporated group.
- Choosing a legal structure

  This page lists the various types of not-for-profit legal structures, so you can work out the best structure for your group.

Other related resources

- Database of Victorian incorporated associations

  The CAV website features a tool for searching for incorporated associations in Victoria
- myCAV

  CAV's online system for incorporated associations to manage their obligations, including updating contact details and lodging annual statements
- Consumer Affairs Victoria – Model rules

  Visit the CAV website to download a copy of the model rules for an incorporated association, extracted from Part 3 of the Associations Incorporation Reform Regulations 2012 (Vic).

Legislation

- *Associations Incorporation Reform Act 2012* (Vic)
- *Associations Incorporation Reform Regulations 2012* (Vic)