

# Gifts, wills, bequests and endowments

## Legal information for community organisations

### This fact sheet covers:

- ▶ when your organisation is nominated as an executor
- ▶ when your organisation is offered a gift, bequest or endowment
- ▶ challenges to a bequest to your organisation
- ▶ tax implications of gifts, wills or endowments



### Disclaimer

This fact sheet provides general information about legal issues that may arise when a community organisation receives a gift, bequest or endowment. This information is a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to the full disclaimer that applies to this fact sheet.

## When your organisation is nominated as an executor



### What is an executor?

An executor is 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 the debts of the estate.

An appointment as an executor can be onerous and the role of an executor carries great responsibility, particularly where the estate in question is complex, contested or involves ongoing trust arrangements.

**If your organisation is nominated as an executor, consider whether you can devote the appropriate time and resources to perform the role.** Failure to discharge responsibilities as executor can result in personal liability, which can be a daunting prospect.

If you decide against accepting the role, you may be required to sign documents to formally renounce as executor, and an administrator will step into that role.

If your organisation accepts the nomination, you should engage solicitors to advise on how to discharge duties to the estate and its beneficiaries and to help with the process.

Depending on what the will provides, your organisation may be entitled to seek financial compensation for performing the executor role. Generally, the estate would cover your legal costs and disbursements.



### What is a will?

A will is 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.

If your organisation is nominated as an executor and named as a beneficiary in a will, unless the benefit is expressed as being conditional on the organisation taking on the executor role, your organisation can generally renounce the executor role and still receive its benefit.

## When your organisation is offered a gift, bequest or endowment



### What is a 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.



### Note – 'gift'

The word 'gift' has a particular meaning in tax law. See the [ATO website](#) for more information.



### What is a bequest?

A bequest is a sum of money or an asset that is given to your community organisation on 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.



### What is an 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 only beneficiary 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.

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

A gift, bequest or endowment can be of great benefit to your organisation, but there are often legal obligations that attach to the receipt of these donations.

If your organisation receives a gift, bequest or endowment:

- check if any potentially difficult conditions attached to the gift, bequest or endowment, and
- consider whether your organisation should still accept the gift, bequest or endowment in light of these conditions (it doesn't have to)

Also consider whether:

- the gift, bequest or endowment is in accordance with the organisation's objects and purposes, or
- any other clause in the organisation's rules or constitution prevent it from accepting the gift, bequest or endowment

### **Do you have to accept the gift, or can you 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.

### **Do you have to comply with conditions that attach to a gift, bequest or endowment?**

Generally, your community organisation must comply with any conditions of a gift, bequest or endowment it accepts. Failure to comply with conditions attached to a gift, bequest or endowment can have significant legal consequences.

If it is impractical or impossible for your organisation to comply with a condition that attaches to a gift, bequest or endowment, seek legal advice. For example, the gift may have been intended to fund a now-defunct project, or to set up a trust which is commercially difficult for your organisation to administer.

Your organisation may be able to get a Court order that varies the condition so that your organisation can receive the gift in a way that is as near as possible to what the will-maker intended. Alternatively, the executor may be able to obtain authority from the beneficiaries for your organisation to receive the gift.

Conditions may impact the tax status of a gift (see below).

If the gift, bequest or endowment comes with conditions that are more onerous for your organisation than beneficial, your organisation does not have to accept it.



#### **Example**

Mr Woods leaves 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 Woods did not leave any funds to cover the maintenance cost. The building also requires work to make it accessible and to meet 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 costs to make the building accessible and to meet current fire and safety standards.

## The impact of organisational name or structure change

Before making significant changes to your organisation – such as changing name, merging with another organisation or changing legal structure – consider gifts, bequests or endowments that might be given to your organisation.

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. Whether gifts, bequests or endowments 'carry over' to the new entity will depend on what legal process the organisation follows to change its name or legal structure or merge. Organisations must maintain and update specific records to reflect any changes made and those records should be kept indefinitely.

Seek legal advice if your organisation is considering changing its name or legal structure.



For more information, see our webpage on [changing structure](#).

## How does your organisation get a gift, bequest or endowment?

Sometimes people will make a gift to your organisation, or leave a bequest or endowment because they like your organisation's work or have a connection with your organisation. Some organisations actively ask people to make gifts to their organisation, or to leave money to the organisation in their will.

If your organisation asks for bequests or endowments, you could provide standard wording to potential donors so that your organisation can:

- be sure that any bequests or endowments left by the donor are lawful, and
- direct the way that funds can be used (to avoid difficult or impractical conditions)



### Sample wording that may be suitable for potential bequests by donors

*After the payment of all my debts, funeral and testamentary expenses including all death, estate and succession duties payable upon or in consequence of my death and in relation to my estate:*

- I give to [name of organisation including ABN] of [registered address of your community organisation] for its general charitable purposes:*  
**[Choose and insert the appropriate statement from the list below]**
  - *the whole of my estate of whatsoever kind and wheresoever situate; or*
  - *..... % of my estate; or*
  - *the sum of \$ ..... free of all duties and taxes payable at my death; or*
  - *my ..... [fully describe any asset to be gifted]; or*
  - *the residue of my estate, subject to the preceding gifts in this will;*
- If the gift in the subparagraph (a) of this clause cannot take effect completely or at all, to the extent that it cannot take effect I give the gift in subparagraph (a) of this clause to the charitable organisation or organisations in Australia which my executors in their discretion consider most nearly fulfils or fulfil the objects I intend to benefit in the share or shares my executors think fit. The objects I intend to benefit include [describe intended objects/purpose of gift – for example, alleviation of homelessness, provision of educational opportunities, support of disadvantaged youth etc]; and*
- I declare that the receipt of the treasurer, secretary or public officer for the time being of a beneficiary under this clause is a sufficient discharge to my executors in respect of a gift to that beneficiary.*

## Challenges to a bequest to your organisation

A will may be challenged. For example, it could be alleged that:

- the will-maker did not have the necessary cognitive capacity to know and understand the nature and effect of their will
- the will-maker was coerced or pressured to make the will
- the will was affected by a fraudulent act of a third party, or other suspicious circumstances, or
- certain formalities have not been met in the execution of the will (for example, if the will-maker's signature has not been properly witnessed)

### Family provision claims

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'.

Each state and territory has different laws about:

- who can make a claim
- what 'adequately provided for' means, and
- the timeframes to make a claim

The table below includes links to current laws on family provision claims and further information

State or territory	Relevant laws	Further information
New South Wales	<a href="#"><i>Succession Act 2006</i> (NSW)</a>	<a href="#">Legal Aid NSW / LawAccess NSW - Family provision claims</a>
Victoria	<a href="#"><i>Wills Act 1997</i> (Vic)</a> <a href="#"><i>Administration and Probate Act 1958</i> (Vic)</a>	<a href="#">Victoria Legal Aid – Challenging a will</a>
South Australia	<a href="#"><i>Succession Act 2023</i> (SA)</a>	<a href="#">Law Handbook SA – Contesting a Will</a>
Queensland	<a href="#"><i>Succession Act 1981</i> (QLD)</a>	<a href="#">The Queensland Law Handbook – Contesting a Will</a>
Tasmania	<a href="#"><i>Wills Act 2008</i> (Tas)</a> <a href="#"><i>Testator's Family Maintenance Act 1912</i> (Tas)</a>	<a href="#">Hobart Community Legal Service Inc – Contesting a Will</a>
Western Australia	<a href="#"><i>Wills Act 1970</i> (WA)</a> <a href="#"><i>Family Provision act 1972</i> (WA)</a>	<a href="#">Legal Aid Western Australia – Challenging an unfair will</a>
Australian Capital Territory	<a href="#"><i>Wills Act 1968</i> (ACT)</a> <a href="#"><i>Family Provision Act 1969</i> (ACT)</a>	<a href="#">ACT Law Society – Making a will</a>
Northern Territory	<a href="#"><i>Wills Act 2000</i> (NT)</a> <a href="#"><i>Administration and Probate Act 1969</i> (NT)</a> <a href="#"><i>Family Provision Act 1970</i> (NT)</a>	<a href="#">Northern Territory Law Handbook – Challenging an estate</a>

Family provision claims often work to the detriment of community organisations that are the intended recipients of gifts in a will.

If a person claims they have not been adequately provided for, this may adversely impact a gift nominated in the will to be made to your organisation.



### Case example

In the case *Flanagan v Fisher [2021] NSWSC 598*, the deceased left his entire estate of approximately \$570,000 to the RSPCA and intentionally excluded his son from receiving any benefit from his estate.

The deceased's son made a family provision application to the Supreme Court. The court found that although there was an identifiable and sensible reason why the deceased chose to benefit the RSPCA, despite a lack of direct connection between him and the RSPCA during his lifetime, the son had a moral claim for provision from the estate and awarded him \$160,000 from the estate.

Your organisation may direct the executor to make appropriate enquiries about the claim. For example, to find out whether the person making the claim:

- is eligible to bring the claim (laws in different states prescribe different eligibility criteria), or
- needs further provision from the estate

The challenge to the will may be settled with the agreement of the beneficiaries or by a Court determination.



### Note

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



### Tips – to prevent (or minimise) a family provision claim

While the donor is alive:

- encourage gift giving to establish a connection between the donor and the community organisation, as well as the donor's intention
- keep records of all gifts from the donor 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 their will for all persons who would be entitled to make a family provision claim

## Tax implications of gifts, wills or endowments



[Our tax webpage](#) has information on tax, including income tax, DGR and GST.

## Does your organisation need to have DGR 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 with a value of \$2 or more to DGRs are generally 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.

## Income tax

Generally, your community organisation will not be taxed on the receipt of a gift, bequest or endowment, provided it constitutes a 'gift'.

The courts have described a gift as having the following characteristics and features:

- there is a transfer of the beneficial interest in property
- the transfer is made voluntarily
- the transfer arises by way of benefaction, and
- the giver receives no material benefit or advantage in return



### Note

The ATO considers that a payment is not a gift when there is an obligation to make the payment, or the organisation is contractually obliged to use the payment in a specific way.

However – if your organisation derives income from using a gift, unless your community organisation is income tax exempt, your organisation may be subject to tax on the derived income.



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', 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.



For further information see the [ATO webpage on gifts and donations](#) and [our tax webpage](#).

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