

Philanthropic advice: a charity lawyer's perspective

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Outlined in this article are some overarching thoughts on the philanthropic process and some of the issues with which I deal regularly as a legal adviser to individuals who engage in, and are interested in engaging in, philanthropic activities.

The clients I see span the philanthropic spectrum and include high-net-worth and ultra-high-net-worth business people looking to engage in charitable work, private clients considering charitable living in the context of legacy planning and corporates considering the scope and possibility of corporate social responsibility programmes. My work always involves structuring the charitable operations, often with an international aspect and, in the case of individual philanthropy, alongside personal tax advice. It often includes assisting with the operation of the charity, to include help with ways of finding trustees (particularly independent trustees), or preliminary advice in relation to the making of grants or ways of selecting grant administration staff.

Lawyers tend to be the first port of call for philanthropists – individuals will usually approach a private client solicitor in the context of the management of their own personal affairs and corporates tend to discuss the matter with commercial lawyers. It is rare to find commercial lawyers who initiate discussions with their corporate clients around corporate social responsibility and the establishment of corporate foundations. It is less rare for private client lawyers to field a discussion around philanthropy with their clients, although my understanding is that, regrettably, this is not something which is routinely done.

It is certainly the case that philanthropy advice has become much more specialised in recent years. Formerly, clients usually made donations (with a request that they be used for a particular purpose) to an existing charity and allowed that charity to carry out and monitor the grant making. In recent years, there has been a growing tendency for individual philanthropists to establish their own charitable entity and operate it themselves. This allows individuals to carry out a more bespoke form of grant-making and also allows (particularly from a tax perspective) the making of grants overseas whereas donations from individual donors need to be gifted to an English



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charity so as to be able to benefit from Gift Aid. Overseas giving has become more common, particularly in a global economy.

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Family charities give rise to specific governance issues. While the appetite for setting up bespoke charities has increased, the individuals I see often lose appetite for managing the charity after it has been established and, at times, governance can decline rapidly following registration of the charity. Clients often fail to take into account the level of funds required to ensure proper governance of the charity, including accounting work and dealing with the raft of policies and procedures required by the Charity Commission.

There can also be surprise at the fact that the placing of funds into a separate charity is exactly that. Once funds have been donated to a charity, they are held on a public trust for charitable purposes and are no longer the *property* of the individual donor in question. To that extent, there is often a tension in entities set up as a result of philanthropy, particularly in relation to this issue and, without proper advice, there can be misunderstanding (and, therefore, risk) around permitted dealings between the charity and the individual.

All charities, once constituted, must be *independent* of their founders and must be operated as such. Philanthropy is often a family activity and trustees are rarely heartened to hear that it is not possible for all the trustees of the charity to be family members. The need to have an independent trustee is even more acute in circumstances where the charity's money and the individual's personal affairs overlap (for instance, where the charity's funds are invested in family companies or where the charity contracts with related parties).

In most cases, individuals have a good idea of what they want to do (and often have a particular project in mind which is frequently connected with



personal experience, for example, a health concern or an area of need in the individual's local area or home country). However, people often lack the ability to implement their ideas and are not aware of the best routes to achieve what they need – this comes from (an understandable) lack of experience of the sector and the way in which charitable organisations work.

I have observed increased interest in the science of grant making, and grant makers are now much more concerned than in the past to apply business management tools to their grant making. Philanthropists have, in short, become more 'hands on' than they used to be. Impact has become a big word and social investment is increasingly of interest to philanthropists who want to see their money move further and differently. A number of consultancies have joined the philanthropy bandwagon and provide bespoke grant making and advice to charities to ensure that they achieve their aims in the most effective way possible.

I have also observed that while many philanthropists are experienced business people and are adept at commercial dealings in their professional business lives, they sometimes fail to apply the same commercial rationale to the handling of their charitable dealings. To that extent, their charitable decisions can be based on emotion and not on commercial rationale and, paradoxically, they often need guidance to steer them in the right direction in relation to the management of the charity and the spending of its funds.

I have, in the last ten years, seen a large increase in instructions in relation to corporate philanthropy and the establishment of corporate foundations has become considerably more common. These organisations have to deal, in my experience, with the same issues as those arising in private philanthropy, namely the fact that the charity is necessarily independent of the corporate entity and it must have at least one trustee who is independent of the corporate entity.

While culture and behaviour have changed considerably in recent years, the tax environment has not moved in the same swift way to facilitate philanthropy. In particular, the Gift Aid regime works to the disadvantage of lower rate tax-payers. Higher rate tax-payers receive tax relief on the difference between the higher rate and the basic rate on the grossed-up value of their donation, whereas basic rate tax-payers receive no such relief. Although there is tax relief on gifts of land and shares to a charity, there is limited ability to gift other assets to a charity. Further, the available reliefs contain limitations, so that, for example, share relief is limited to quoted shares and land must be located in the UK. Ideas that have taken off in the US – for example, the use of life insurance as a tool for planned giving – have received a hostile reception here, particularly in relation to their tax treatment.

Neasa Coen, Associate Director, Private Client & Charities Berwin Leighton Paisner LLP, specialises in charity law and advises charity clients (whether trustees of charitable companies, charitable trusts or unincorporated associations) on all issues relating to charity law, including formation, registration, governance, taxation, fundraising, investments and mergers. She has considerable experience of dealing with the Charity Commission, in particular in relation to orders and schemes.

Neasa recently advised on:

- The negotiation and settlement of a claim for breach of trust against a former charity trustee
- Charity trading and fundraising arrangements

for both charities and corporates to include the regulatory requirements for commercial participators and professional fundraisers

- Governance arrangements and conflicts of interest for charities established by commercial bodies
- Complex disposals of charity land as part of wider property transactions requiring Charity Commission involvement.

She is a member of the tax committee of the Charity Law Association, Charity Tax Group and Philanthropy Impact. She speaks frequently at charity conferences and publishes regularly.