

Ex gratia claims

Ex gratia claims pose a very difficult issue for legacy officers as charities do not have the same freedoms as a private individual to give away part of their entitlement.

Charities are much more constrained in what they can agree to because they may not lawfully expend their funds other than in support of their charitable objectives. Any request outside of this can amount to an ex gratia payment and if this is the case, the consent of the Charity Commission will have to be obtained.

Occasionally, however, charity trustees may conclude that it is in the interests of the charity to apply funds for purposes which, strictly speaking, are outside the terms of the governing instrument.

Such a situation may arise where a legacy is left to a charity but owing to certain circumstances, the trustees of the charity believe that they are under a moral, but not legal, obligation to make a payment to a third party.

An example may be where a person passes away shortly after a grandchild has been born and they have not made provision in their Will for that grandchild, whilst they have made provision for their other grandchildren who are older.

Definition of an Ex Gratia payment

An *ex gratia* payment is a payment by the charity where the trustees believe that they are under a moral obligation to make the payment but are not under a legal obligation to do so.

They have no power under the governing document of the charity which they can properly exercise to make the payment and cannot justify the payment as being expedient in the interests of the charity within the meaning of s26 of the Charities Act 1993.

A payment is not an *ex gratia* payment where authority already exists within the charitable purposes of the charity; where the payment would be “expedient in the interests of the charity under s26 of the Charities Act 1993” or, where the claimant has a legal remedy.

Authority for Ex Gratia applications

The cases of *Re Snowden* and *Re Henderson* (1870 CH 700) reinforce the relevant legislation under the Charities Acts 1992 and 1993. In *Re Snowden* Cross J stated that the power to authorise an Ex gratia payment was:

“not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment.”

In both of the above cases it could clearly be shown that the testator had never intended the charity to receive as large a gift as it ultimately did receive.

The distinction was firmly drawn between such a case and one where the testator’s relations simply consider that he was not morally justified in leaving his assets to a charity rather than to them.

In the latter case, no moral obligation will, as a rule, rest upon the charity and so authority to make the payment cannot be given.

Procedure

In considering whether or not to agree to the request for payment, the charity will always regard the testator’s wishes as paramount. Therefore when the request has been made the charity will need to receive evidence to:

- Determine the true intentions of the testator – useful evidence includes a solicitor’s attendance notes, or a witnessed conversation
- See what had the testator had done to give effect to those intentions
- Ascertain if there were there any factors which had prevented the testator from carrying out those intentions

If the charity trustees decide that they do feel under a moral obligation, they will then need to submit an application to the Charity Commission. It is important to note that applications can only be made by the charity trustees. They will not be accepted from those wanting to benefit from an *ex gratia* payment, or from executors of a Will.

It is also in order for only some of the charities to agree (to their proportional share of the payment or loss of benefit) of an *ex gratia* payment. Thus it may well be the case that a payment is made to the third party comprised of entirely unequal contributions from each of the charities although this is slightly unusual. It is also a decision of each charity’s Trustees to decide to what extent they feel their own charity is obliged to forego benefit.

Where several charities are involved it is best if a lead charity is chosen to apply to the Charity Commission on behalf of all of them. However it is necessary for each charity to have considered the moral obligation issue.

When making the application the facts need to be set out as clearly as possible. The Charity Commission’s Operation Guidance note (OG11) sets out the evidence that they would normally expect to see:

- A copy of the Will and any Codicil(s)
- An office copy Grant of Probate
- Evidence to show why the testator was prevented from giving effect to his real intentions

Other relevant evidence might include:

- A copy of any unexecuted Will and Codicil(s) and any draft or copy notes of instructions

- Copies of any papers or sworn statements from relevant people relating to the deceased's last wishes
- A statement or statutory declaration by the testator's solicitors about any discussions of possible changes to the Will

The Charity Commission will respond to the lead charity indicating that an Order will be made, authorising each *applying* charity to agree payment, or refusing permission.

The Order will be sent with copies to each charity. The original is sealed and should be retained by the charity; a copy should be sent by the charity to the executors so that payment can be made to the claimant.

For more information on Ex Gratia payments, see the [CC7 document](#) issued by the Charity Commission.