

A “Will” for a Foundation

DANIEL FRAJMAN



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Persons often consider whether to make Will bequests to charity. What is not as well known is that even if a person decides instead to set up and transfer substantial assets to a private foundation, if certain conditions are met, that private foundation (existing anywhere in Canada if it is federally incorporated) can validly set out in writing the charities that should receive gifts from the foundation. This means that in effect, what could perhaps be called a “Will” for a private foundation is now sometimes possible.

This so-called Will for a private foundation is in fact a written agreement among all the members of the foundation (i.e., a unanimous member agreement, or “UMA”), and the principal factors to consider in setting up the UMA are probably as follows:

- The directors of a foundation that is a corporation manage or supervise the management of the foundation, and in so doing, have a fiduciary duty and duty of care to discharge as circumstances dictate, and cannot in advance have their discretion fettered (i.e., cannot in advance bind themselves or “have their hands tied”) as regards the decisions they will make as directors;¹
- There is little doubt that the decisions that a private foundation makes with regard to how it invests its assets, and which qualified donees (usually registered charities) will receive gifts from the foundation (and the monetary amount, frequency and related terms and conditions of such gifts), which are central decisions of a private foundation, fall under the directors’ powers of management of the foundation;²
- It therefore seems at first glance for it not to be possible for directors to agree in writing in advance as to the foundation’s management decisions (i.e., usually investment and gifting decisions), as this seems to be an illegal fettering of directors’ discretion. However, when a UMA is available under the foundation’s corporate statute, it should be possible to fetter and override the directors’ discretion so as to set out in advance in the UMA investment and gifting decisions and other management decisions. Some details on this follow;
 - Unanimous shareholder agreements for share capital corporations became available only in 1975 under the *Canada Business Corporations Act*, so perhaps it is not surprising that UMAs only recently became available under the general federal nonprofit corporate statute, when the *Canada Not-for-profit Corporations Act* (the “NFP Act”) came into force in October 2011.³ Section 170 of the NFP Act states that when certain elements are present, it is possible to have a UMA that restricts the management powers of the directors in whole or in part, and section 170(6) of the NFP Act confirms that the members, when exercising the powers of directors under a UMA, may fetter their own discretion.⁴
 - Section 170 of the NFP Act essentially states that the elements for establishing and maintaining a valid UMA are (1) the UMA must be in writing and signed by all the members, whether voting or non-voting (or the sole member if there is only one), and non-members can also sign; (2) very importantly, the corporation must be “non-soliciting” (see s.2(5.1) of the NFP Act and the regulations thereunder), and for all practical purposes, such non-soliciting corporations would be private foundations⁵ that, except for *de minimus* amounts (basically no more than \$10,000 in any one of the last three fiscal years), do not solicit donations from the public or receive government grants or similar financial assistance;⁶ (3) a person who becomes a member of a corporation that is subject to

1 See for example sections 124, 148(1) and 170(6) of the *Canada Not-for-profit Corporations Act* (the “NFP Act”).

2 See for example Bourgeois, Donald J., *The Law of Charitable and Not-for-Profit Organizations* (LexisNexis, 4th, 2012) at pp. 167 et seq.

3 Regarding UMAs generally under the NFP Act, see for example Frajman, Daniel, “Modernization of Corporate Laws on Private Foundations Needs to Continue”, *The Lawyers Weekly*, January 26, 2007, at p. 8; Frajman, Daniel, “Trusts vs. Corporations”, *The Canadian Taxpayer*, March 9, 2012, at pp. 34-6; Gray, Wayne D., *The Annotated Canada Business Corporations Act* (Carswell, loose leaf), at pp. 7-98 and 9-73-4; and Martel Paul, *Loi canadienne sur les organisations à but non lucratif: Loi, règlement et commentaires* (“NFP Act: The Act, Regulations and Commentary”) (Editions Wilson & Lafleur, Martel, 2012), at pp. 73-76.

4 Compare the UMA of the NFP Act to the lack of a UMA in the older federal non-share capital statute, Part II of the *Canada Corporations Act*, and in other non-share capital statutes such as Part III of the *Corporations Act* (Ontario) [currently in force], the *Not-for-profit Corporations Act*, 2010 (Ontario) [passed but not yet in force], and Part III of the *Companies Act* (Quebec). Saskatchewan’s *Non-profit Corporations Act*, 1995, at s.136, does however provide for a UMA, although that Saskatchewan statute does not contain a provision stating that the members may fetter their discretion by way of the UMA.

5 Defined at subsection 149.1(1) of the *Income Tax Act* (Canada). In fact though, note that any non-soliciting federally incorporated nonprofit or charity, even if it is say a public foundation or a charitable organization, can have a UMA. By way of example, a “family foundation” that however has an arm’s length board is a public foundation, but can still have a UMA if it is non-soliciting.

6 Therefore, it would probably be useful to include a clause in the UMA to the effect that the UMA remains in force during periods when the foundation is non-soliciting, notwithstanding any periods during which the foundation may be seen as “soliciting” under the NFP Act.

a UMA is deemed to be a party to it (presumably this extends to new members typically approved by the board, but also to heirs of deceased members who bequeath their membership in a manner consistent with the corporate by-laws); (4) the corporation's directors and officers are also obliged to comply with a UMA, and a UMA can be enforced by summary court application (ss. 148(2), 259 and 260 of the NFP Act); (5) if the UMA does not provide for its termination, the members may terminate the agreement by a special resolution, i.e., a two-thirds vote (therefore, if it is desired to keep the UMA in force until the members unanimously agree otherwise, it is important to provide for a termination clause in the UMA, perhaps indicating at a minimum that the UMA terminates upon the corporation dissolving, etc.).

A UMA is therefore available for most federally incorporated private foundations. One can easily imagine the principal clauses of such an agreement listing investment and/or gifting decisions or policies, including possible charities that the members must at least consider each year when the foundation makes its gifts. (In so doing, references to particular charities should, as in a Will, have appropriate successor language so that a corporate change or a name change regarding a recipient charity is less likely to affect the gift.)

It therefore appears that when dealing with a federally incorporated private foundation, philanthropists and planners should be looking upon that foundation (or in fact any federally incorporated nonprofit or charity that is non-soliciting) as an organization that can set out in writing a list of potential charitable beneficiaries that is in many ways similar to a testator doing the same in a Will. Perhaps the old adage, "Where there is a will, there is a way," can be extended to, "Where there is a unanimous members agreement for a foundation, there is a way."

Daniel Frajman, B. Com, B.C.L., LL.B. is a partner with the Montreal law firm of Spiegel Sohmer, where he has practiced for the last 20 years. He is a CAGP member. Daniel advises nonprofits and charities on tax and corporate aspects of planning, registration and compliance under federal and provincial legislation and advises on planned giving, including as to Quebec civil law. He also negotiates and drafts commercial agreements for profit and nonprofit businesses, including concerning creditor protection. He has published legal articles in *The Canadian Taxpayer*, *Canadian Not-For-Profit News*, *Tax Profile*, *Tax Topics*, *CALU INFOexchange*, *The Lawyers Weekly* and *Canadian Bankruptcy Reports*. Contact Daniel, dfrajman@spiegelsohmer.com.

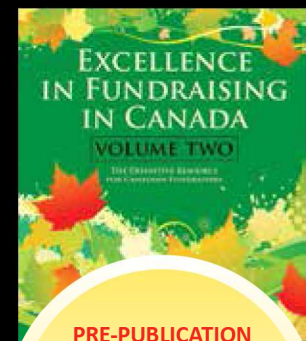
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