



Bequest Assist

Fixing the leaky bucket

The biggest losses to Gifts in Wills income and how to
fix them for your charity

Prepared by:
Bequest Assist

Disclaimer

This report contains general advice and information in relation to deceased estates management and is not intended as formal legal or accounting advice. All information is based on our data and experience administering deceased estates and is intended as general education and guidance for charities only.

The advice contained within should not be relied upon without seeking professional advice pertaining to your unique circumstances. You may wish to seek legal advice about the administration of deceased estates.

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About Bequest Assist

Bequest Assist was founded in 2019 by Maureen Koegel with the aim of improving bequest administration for Australian charities. The goal was simple: to make the charity estate administration process more efficient and improve outcomes for charities. In that time, we've secured over \$3 million for charities that they otherwise would have missed out on, or not received for years to come.

Our work is focused on estate administration and to date we have recorded over 3,000 bequests for charities in our database. This data represents a treasure trove of information about bequests and insights into the people who leave them.

We offer estate administration outsourcing to charities around Australia and New Zealand, regular training for Gifts in Wills team members and free monthly webinars.

If you would like to learn more about Bequest Assist's services, visit www.bequestassist.com.au or email info@bequestassist.com.au.

Introduction

Gifts in Wills are a major source of income for many charities – allowing them to conduct medical research, care for injured animals or advocate for political change. The incredible individuals who include charities in their final wishes leave a lasting legacy of generosity and hope for a better future that the writers of this report want to honour.

Because income from Gifts in Wills can make up such a large portion of a charity's fundraising efforts, many charities have invested to grow the future potential of their programs. This includes investing in more staff and training to focus on acquisition, stewardship and retention as well as reaching out to consultants for help in designing persuasive campaigns to ask individuals to make a commitment in their will.

On the other hand, the work of estate administration (everything that happens with a deceased estate after that generous bequestor has passed away) tends to receive little attention or investment. Often the duties of communicating with executors, gathering the necessary estate documentation, handling requests for estate expenditure and ensuring the charity receives its full entitlement in the will falls to a busy Gifts in Wills fundraiser who is focussed on living future bequestors. Many charities don't collect the necessary estate documents, do not ask questions of solicitors and executors, and do not have the knowledge or time to check that their charity has received their full entitlement.

We believe this discrepancy stems from the administrative, legal and taxation complexity of managing deceased estates. The fact that charities are missing out on millions of dollars of Gifts in Wills income as a result of poor estate management practices is not well understood.

Bequest Assist hopes to change that through their work and with this report, which summarises the major losses to Gifts in Wills income that occur through the estate administration process. We are in total agreement that investing time and money in growing the future pipeline of bequestors is important for any charity, but want to demonstrate that the same is true of estate administration. After all, investing in future acquisition likely improves the bottom line in 10, 20 or 30 years whereas improving estate administration practices increases your income this year.

At Bequest Assist, we feel strongly that when someone leaves a gift to charity in their will, it is the responsibility of the charity to ensure that final wish is honoured. Generous bequestors did not intend for their bequest to be eaten up by incorrectly handled taxes, unreasonable fees or solicitor error. We owe it to those individuals to ensure that their gift is maximised.

Proactive estate management can mean that more chronically ill people receive care, more animals can be rescued and more hot meals can be served to people in need. All charities, regardless if they receive 2 bequests per year or 200 owe it to their bequestors to understand the potential pitfalls of estate administration and employ strategies to ensure final wishes are honoured.

How does estate administration affect Gifts in Wills income?

When a person passes away, a complex administrative and legal process begins to identify and gather together their assets before they are distributed in accordance with their will (if they had one). This may be handled directly by a friend, family member or trusted individual (an executor) or an executor may hire a solicitor or trustee to perform certain tasks.

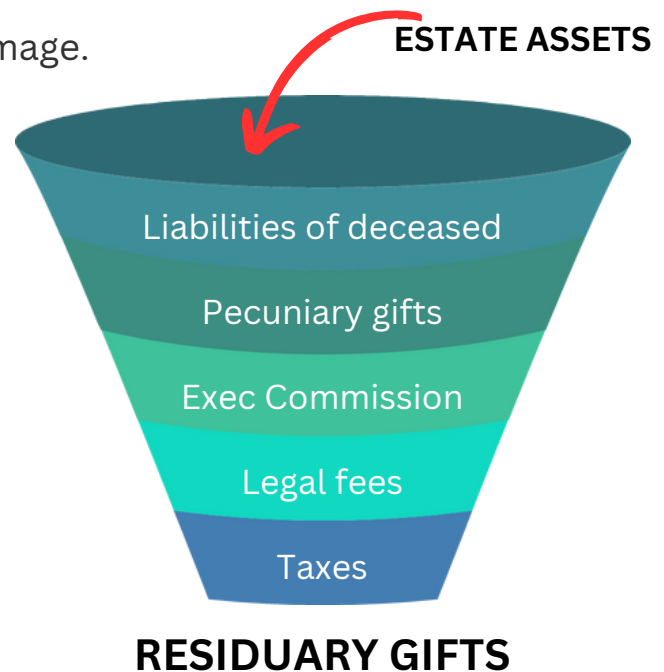
As a beneficiary of an estate, a charity is reliant on the work of those executors and solicitors to receive the gift the bequestor intended for them. In our experience, executors, solicitors and trustees do incredible work to ensure the final wishes of the bequestor are honoured – doing everything from organising funerals to selling properties and distributing personal effects. It is very time-intensive and emotionally draining work that should be honoured.

But amongst all of that estate work, sometimes the peculiarities of administering a bequest for charities can get lost. Charities require documentation for auditing purposes that individual recipients of a bequest might not request and have specific taxation rules that are different from individuals. Given that only about 7% of wills probated in Australia leave a gift to a charity, it is entirely normal for a solicitor or accountant to have never worked on an estate with these types of gifts and to be unfamiliar with some of the details.

On average, a bequest in a will is worth \$135,000 to a charitable beneficiary (see *Include A Charity and Bequest Assist 2023 Gifts in Wills Report*). If the gift is a residuary bequest (where the charity is receiving a percentage of the estate instead of a set amount) that average gift size rises to \$265,000. While pecuniary gifts (a bequest of a set amount) are at some risk of the circumstances we will discuss in this report, it is residuary gifts that are worth more to charities, more complicated for charities to administer and most likely to be impacted by the risks discussed in this report.

To explain this, consider the below image.

Before a residuary beneficiary can receive a percentage of the total estate, a number of things need to happen. The solicitor must identify and pay any liabilities of the deceased (such as debts or mortgages) and distribute pecuniary and specific gifts (for example, a set amount of money or property).



They must pay any fees incurred through the estate administration process (such as legal or house cleaning fees) and handle any taxes due. In some instances, a commission for the executor will be specified in the will or they will seek to be paid one from the residuary beneficiaries or the court. Each of these obligations (or “leaks”) is a cost to the estate which means the amount of funds left at the bottom of the bucket to distribute to residuary beneficiaries grows smaller and smaller.

To be clear, all of these costs are legitimate forms of estate expenses. This report is focussed on the minority of cases where there are errors, dishonesty, unnecessary costs or disproportionately high costs that reduce the amount received by residuary beneficiaries.

Understanding all of these potential avenues for loss is essential for ensuring your charity doesn't miss out on income that the bequestor intended for you to have. It can sometimes shock people when we explain that *there are no probate police*. While there are laws in place for how an estate must be administered, most of the time there is no one from probate courts actively checking to ensure this happens – it is up to beneficiaries (including charities) to perform their own due diligence.

Proactive versus reactive estate management

Bequest Assist performs estate administration for more than 20 Australian charities who have outsourced this responsibility to us. Through this work, we are regularly able to see the material difference that proactive management makes to a charity's Gifts in Wills bottom line. We recommend that every charity implement policies to ensure estates are proactively managed.



PROACTIVE MANAGEMENT

- Proactively make contact
- Ask for estate documents
- Calculate your entitlement
- Communicate about taxes
- Check that estate has been properly administered

REACTIVE MANAGEMENT

- Wait for contact
- Thank and bank



In our experience, the difference between reactive and proactive management could mean an extra 5-10% of Gifts in Wills income for your charity. That may not be the case every year and you may not even be aware that a step you have taken has caused a course of incorrect management to be corrected (as will be discussed), but we have seen charities recover hundreds of thousands of dollars from a single proactive step.

To put that in perspective, increasing your annual Gifts in Wills income by 5-10% could mean:

- For a charity with an annual Gifts in Wills income of \$500,000
= an extra **\$25,000-\$50,000**
- For a charity with an annual Gifts in Wills income of \$1 million
= an extra **\$50,000-\$100,000**
- For a charity with an annual Gifts in Wills income of \$5 million
= an extra **\$250,000-\$500,000**
- For a charity with an annual Gifts in Wills income of \$15 million
= an extra **\$750,000-\$1.5 million**

So, other than a lack of awareness of the issues, what is stopping charities from moving to proactive estate management? We think it comes down to one or more of three things being missing: **time, tool and knowledge**.



Gifts in Wills professionals need **time** to manage estates – which they often don't have with pressing work to be done with living bequestors and the charity's emphasis on growing the future funnel.

A **tool** that allows for estate administrators to see what bequests are open, track administration progress and calculate what they are entitled to is essential but often lacking. We know many charities who are struggling to manage bequests either in an Excel spreadsheet or using a CRM that is designed for living donors.

And finally, **knowledge** of deceased estates is essential. This includes what documents beneficiaries are entitled to, what assets are impacted by Capital Gains Tax and how to check for probate in each state.

Most Gifts in Wills professionals are incredibly talented and experienced fundraisers, but might not be experienced in the particulars of deceased estate taxation – fair enough! We meet many solicitors and accountants who are unfamiliar with the topic.

Charities hoping to move from reactive to proactive management should invest in providing these three things to their Gifts in Wills team, or seeking external support so that their team can stay focussed on acquisition and retention of new bequestors. This is discussed further at the end of the report.

Intentions of this report

This report seeks to identify the major causes of loss to Gifts in Wills income through the administration process for the benefit of charities who receive bequests. It is intended to be educational, as well as provide clear data to help quantify the extent of the problem and make suggestions for what Gifts in Wills team members can do to minimise loss.

Charities tend to be well aware of the threat of family provision claims to their entitlement under a will, but are often less aware of the other causes of loss. At Bequest Assist, we find that the other causes are sometimes responsible for greater income losses and have more potential for avoidance than family provision claims. This report seeks to analyse that hypothesis.

Using deidentified data from the thousands of bequests we have administered on behalf of our clients, this report will step through each cause of loss with data analysis and an explanation of the actions that can be taken.

Data collection

As a normal part of Bequest Assist's estate administration process, we collect data on each bequest left to one of our charity clients. This includes reading and entering information available through public probate documents, searching for obituaries of the deceased and recording the impact of any legal problems on the estate funds realised. This report is possible as collecting this data is essential to the day-to-day work we do, which also means it is regularly checked to ensure complete accuracy.

Now that Bequest Assist has been operating for four years and grown to manage bequests left to more than 20 different Australian charity entities, our pool of data is large enough to provide a picture of trends. With over 3,800 records, the data is de-identified – both in terms of the charity the bequest was left to and the individual who left it. Notably, in many cases data does not relate to just one of our clients, but multiple charities as they share in an estate.

To keep this report focussed, we **excluded** some records in our system from analysis:

- Bequests relating to the two New Zealand charitable entities that Bequest Assist works for;
- Data relating to trusts in perpetuity (as we manage these on behalf of some clients and not others and the records can extend back as far as the 1950s); and
- Data relating to discretionary donations received from executors, in memory gifts, inter vivos gifts and living bequests.

Limitations of this report

Every effort has been made to record and analyse data accurately for this report, but limitations remain.

Firstly, there can be errors in data collection and entry, for example:

- A charity having an incorrect record about a bequest that was administered before Bequest Assist handled their administration (for example having insufficient records to identify the estate was contested).
- Data entry errors by either the charity or Bequest Assist.

Every effort has been made to keep these to a minimum. As mentioned previously, because data entry is necessary for the work that we do, we have robust data maintenance systems in place to regularly check and clean data.

Secondly, some areas of analysis in this report had a more limited number of records to draw data from. In each instance, a note on the size of the data set and any limitations has been provided.

Similarly, some areas of analysis require several years of data from the same charity to be able to paint a complete picture. While Bequest Assist now works for 20 charitable entities, we have managed the estate administration of a smaller number of charities for multiple years. This weakens the sample size in some instances and has been noted, but is a strong starting point for future expansions of this report.

While this data comes from charities with a range of areas of focus and locations – they do not fully represent the complete picture of charities with Gifts in Wills programs in Australia. For example, this data over represents East Coast estates – there could be differences between states and territories that will only become clear when we have more nationally representative data in the future.

Section one:

Potential sources of loss (or gain) from estate management

This section summarises the main sources of potential loss or gain for Gifts in Wills income through the estate management process while the following sections go into detail on each.

Causes of loss or gain that will not be covered further in this report

Missing gifts

We define a missing gift as a bequest that is never paid because the executor or solicitor either intentionally or accidentally does not notify a charity that they are a beneficiary. This could happen in a number of ways, all of which Bequest Assist has observed:

- The will is misread and one or more charities are missed;
- The will is accidentally or intentionally destroyed, resulting in the deceased being found to be intestate (dying without a valid will) with the estate passing to family;
- The will is probated, but the executor or solicitor does not pay out gifts as the will specified (eg keeping some or all of the money for themselves); and
- The solicitor or executor notify the charity purely through a cheque in the mail, but the cheque is either sent to the wrong address or lost in the post.

There have been some high profile examples of this issue, including a solicitor in New South Wales who was jailed for stealing more than \$6 million from two estates that had been left to charities. In the time Bequest Assist have been operating, we have identified close to a dozen missing gifts and have reason to suspect more.

In one case, a nephew of the deceased had her declared intestate despite him knowing she had written a valid will, and then disappeared with the funds before the deceit was uncovered. In another example, we found that one charity client had been paid while another had not. When we made further enquiries, the executor expressed their personal distaste for the charity that had not been paid.

It would be impossible to fully quantify the issue of missing gifts without purchasing every will in Australia (at a cost of millions), and even then some cases would go unidentified. We are currently conducting in-depth research into missing gifts and this topic will be an area of focus for a future report.

Superannuation taxes

Currently, even when charities who are tax exempt are beneficiaries of an individual's super (through their estate), taxes on this asset cannot be avoided. This is an issue that *Philanthropy Australia* and *Include A Charity* are advocating for policy change on and will not be covered further in this report.

Major assets losing value

It has been commented (including by *Legacy Monitor* in 2022) that declining real estate value may be a source of loss to beneficiaries in estates. Share market volatility can likewise be a reason that an estate does not realise the value it potentially may have. Our analysis shows that 40% of estates include shares as an asset and 66% include real estate, so any volatility in these areas can have a big impact on Gifts in Wills income.

There is limited scope for charities to control this phenomenon and it is beyond the scope of this report, so underperforming assets will not be covered further.

Claiming franking credits

A franking credit is a type of tax credit paid by corporations to their shareholders along with dividend payments. When there are shares with franking credits in an estate, a charity can hypothetically claim these credits and be reimbursed for them from the ATO. There are some steps needed for this to happen that may be out of the charity's control, but can mean a difference of thousands of dollars from an estate with relevant shares.

Bequest Assist is currently undertaking further research into this area and will share our findings at a future date.

Estates that don't finalise

For a small number of estates, it can take years for them to be finalised and the estate funds paid to charitable beneficiaries. Some examples that Bequest Assist has seen recently include an estate with a foreign property that has been open for more than twenty years and another with a lay executor who has felt too busy to handle the administration and has been open for more than six years. We have encountered several examples where the solicitor handling estate administration retired before finalising the process and making the last payment – in each case failing to hand the matter over to a new contact point.

Overseas assets, frozen funds, retiring solicitors and unmotivated executors are four common causes of estates that take a long time to close.

Charities risk missing out on the benefit of those funds (including their ability to be invested or earn interest), and in some cases missing out on the funds altogether as the estate remains open indefinitely. Generally we find that the longer an estate has been open, the more difficult it becomes to bring things to a close.

This report won't go into further detail on these estates, but charities should on longstanding estates before they become at risk of staying open forever. This can include asking for updates regularly, recommending that lay executors seek professional help and even writing a heartfelt letter explaining what the charity could do with the funds once they are realised.

Interest on late pecuniary gifts

Pecuniary gifts are due to be paid within 12 months of the date of death of the bequestor. If a pecuniary gift is not paid within that timeframe, interest is due on the amount bequeathed. Some public trustees pay this interest automatically as part of their estate administration, but many private solicitors are either not aware of the rule or do not follow it in practice.

Charities can remind solicitors of this rule and request interest if they deem it appropriate. In many cases the amount of interest is not worth the trouble, but Bequest Assist has seen multiple examples where the amount of interest due extended into the tens of thousands (generally on very late large size pecuniary gifts).

Technically this is not a “loss” to charities, but when receiving a late pecuniary gift, it is a little-known opportunity to increase its value to make up for the delay in estate administration. That said, for residuary beneficiaries in the same estate, this is a loss to their funds due to slow estate administration. This is one reason solicitors can be hesitant to follow this rule – it forces them to explain why there was a delay to residuary beneficiaries who receive a diminished gift.

This will not be discussed further in the report, but it an important practice for charities to understand.

Causes of loss or gain that will be covered further in this report:

- Dishonest estate asset handling
- Executor's commissions
- Excessive fees
- Solicitor or executor error
- Family provision claims
- Life estates
- Other legal issues
- Capital Gains Tax

Section two:

Dishonest estate asset handling

There are a range of ways assets within an estate can be improperly handled, reducing the size of charitable bequest that is realised. This is generally an instance where the executor or solicitor may seek to gain advantage for themselves or a loved one. Some examples that Bequest Assist has seen occur in recent years include:

- An executor selling a high value piece of real estate off-market to a neighbour without first notifying the charity.
- An estate administrator selling cars from various estates below their market rate to his cousin who was a mechanic.
- An executor (also the residuary beneficiary of the estate) telling the charity that their gift was worth \$10,000 and depositing that amount, when in fact the gift in the will was for \$100,000.
- An executor selling the estate property and running away with the funds, not paying either the charitable beneficiary or an individual beneficiary. Eventually police and a private lawyer were contacted, but by the time the executor was found, he did not have any assets from which to pay back the lost funds.

Dishonest conduct such as this is certainly in the vast minority of cases, but it is important to remember that there are no “Probate Police” watching for instances such as this, and it is up to the beneficiaries to notice and take action. At Bequest Assist, we have seen cases where it appeared that an executor or solicitor was seeking to take advantage of a perceived lack of robust estate management practices by charities.

Quantifying the cost of dishonest estate asset handling to charitable beneficiaries is impossible, but there are steps that charities can take to reduce their risk. We recommend that at a minimum, all charities take the actions listed below.

Frequency of risk	Potential cost to charity if no action is taken
Low	High

TAKE ACTION:

- Have a policy to collect all probate documents when your charity is a residuary beneficiary. If you do not receive both the asset list and final statement, there is no way of checking what assets the executor swore to the court were in the estate, and then how those assets were handled.
- Compare the asset list and final statement to ensure that all assets can be accounted for.
- Perform due diligence on real estate properties. At Bequest Assist the first step we take is to compare the property valuation on the asset list with two online evaluations (such as realestate.com.au) and ask questions to understand any significant inconsistencies. When the property is sold, we check the method of sale (with a preference for an open market sale) and seek to understand any price difference from the initial expected value.

- If anything raises a red flag, correspond with other co-beneficiaries and do not be afraid to ask questions of the executor or solicitor.
- Once you see one red flag, look at everything in the estate with more care than you would otherwise.

Section three:

Executor's commissions

An executor's commission is a sum of money paid to compensate an executor for their time, effort and trouble to administer an estate. It can be specified in the will, by agreement of the residuary beneficiaries or awarded by a court through an application by the executor. Generally commission is calculated as a percentage and how much an executor is entitled to will depend on a range of factors including the size and complexity of the will and estate, the amount of work and any hurdles experienced.

Not all executors ask for a commission. Bequest Assist analysed 420 bequests from 2021-2023 and found that an executor's commission was paid in 22% of bequests (excluding records where a trustee was acting as executor).

Keep in mind that small size estates (for example of below \$600,000 total value) can skew the percentages that seem appropriate. The amount of work undertaken by an executor might be just as high for an estate of that size as for a very large estate depending on the circumstances.

The work of executors can be difficult and stressful, often in a time where the individual is grieving for the loss of a loved one. There is always a balancing act for charities of showing appreciation for that work while ensuring that the wish of the deceased to contribute to an important cause is honoured. When the amount of commission is not specified in the will, generally the executor will ask permission of the residuary beneficiaries for their desired percent or amount of commission rather than incur costs by going directly to the court.

A beneficiary is not obliged to agree to this request and are entitled to ask questions, talk with other beneficiaries and negotiate a rate they see as more appropriate.

Having a policy of what level of executor's commission is appropriate and being willing to negotiate inappropriately high requests should be every charity's position at a minimum. One thing that can frustrate charities seeking to restrict commissions to an appropriate rate is other charities automatically agreeing to requests for commission – effectively making them look like the “bad guy” for seeking to negotiate. At a minimum, when a commission amount is written into a will for a solicitor acting as an executor, the charity should request to see that the will-maker gave informed consent of the clause.

We analysed 86 records in our system where a commission was granted between 2021 and 2023 to see how each commission was agreed to (eg stated in the will or agreed after negotiation) and found the following:

How commission was agreed to	Number of bequests	Average commission % of total estate	Average commission amount	Range of commission % of total estate
Request agreed to (without further negotiation)	53	2.04%	\$21,853	.2-5.75%
Agreed after negotiation	8	1.48%	\$33,228	.96-2.16%
Court awarded	2	1.16%	\$10,000	.96-1.36%
Stated in will	23	2.63%	\$76,548	1.42-6%

Note that this represents how Bequest Assist approached the issue of commission in each instance (as instructed by our clients). The majority of the time, the request for commission was agreed to without further discussion, followed by instances where the commission amount was specified in the will and no discussion as to the quantum was possible. Notably, instances where the will specified a commission amount or percentage resulted in the highest average commission amount and commission percentage of the total estate being paid.

While the number of records is small, notably where a commission has been agreed to after negotiation rather than automatically, the average percentage of the total estate that the commission represents is lower. For example, an executor may start with a request of 3% commission, but ultimately agree to 2% after the charity asks if they would consider a lower amount.

To give a sense of the outcomes of negotiating an executor's commission playing out in practice, here are some recent examples from Bequest Assist's experience:

- A professional executor (the solicitor who drafted the will) sought a 3.5% commission, but when asked to show evidence that the will-maker gave informed consent, it emerged that the deceased had only signed to agree to a 2.5% commission. Two charities banded together to ask that only 2.5% be charged, resulting in \$14,000 extra for the charity beneficiaries.
- A professional executor sought a \$100,000 commission in addition to charging \$28,000 in legal fees. The charitable beneficiaries came together and negotiated with the executor, eventually reducing the commission to \$85,000, meaning an extra \$15,000 was retained for the beneficiaries.
- Two executors had been friends of the deceased and asked for around \$100,000 commission to be shared. Once again, the charitable beneficiaries got together to form a shared position and negotiated this amount to \$50,000, retaining an extra \$50,000 for the beneficiaries.

Requests for executor's commissions are common and often appropriate in their quantum. When the request is too high, charities should be willing to push back and negotiate. As the above examples show, this can result in substantial additional funds for charitable beneficiaries. Working together with co-beneficiaries can be extremely helpful, so one charity isn't left looking like the "bad guy" for negotiating.

Frequency of issue	Potential cost to charity if no action is taken
High	Medium

It is worth acknowledging that more than many of the other categories covered in this report, pushing back on executor's commission can carry reputational risk when an executor is offended by the interaction. All charities need to be clear on the balance for their organisation between remaining friendly with executors and losing out on estate funds that the bequestor intended for your organisation.

TAKE ACTION:

- Make a note of the relationship between the executor and the deceased to help your considerations.
- Do not automatically approve requests for commission – develop an internal policy and discuss requests with your co-beneficiaries if you are unsure.
- If the executor's commission is specified in the will for a professional (eg a solicitor), request evidence that the will-maker gave informed consent.
- Be willing to ask questions of the executor or their solicitor to understand the "pains and troubles" they have undertaken in administering the estate. Note that sometimes executors want to claim commission for duties that are outside of what a court would consider in awarding commission and you are entitled to push back.

- Remember that the amount of commission that is appropriate is dependent on the circumstances of the estate. For example, whether professionals were hired, the size of the estate and what the executor did.

Section four:

Excessive fees

An estate may be required to pay a range of fees including legal costs and charges to clean and prepare any properties ready for sale. This is a normal part of estate administration and normally there is no role for beneficiaries of the estate to approve or reject those fees, but in some cases charges can be excessive and warrant further investigation.

To give a few recent examples from Bequest Assist's work:

- Through reviewing a final statement, we discovered a \$60,000 cleaning fee (and through further investigations that the executor owned the cleaning company).
- A solicitor charging \$600 an hour to personally mow the grass of an estate property.
- A solicitor charging costs equivalent to 17% of the estate (in circumstances where the estate was not small and the work was not extraordinary).
- An executor hired his law firm to work on the estate he was put in charge of. A rate of \$450 an hour was charged for tasks such as traveling to the property to meet with a real estate agent – resulting in a charge of \$1800 for a single meeting. The firm ultimately asked all charitable beneficiaries to sign a release and indemnity (which Bequest Assist advises against in most circumstances) and charged the estate six hours for the drafting of this document.

Naturally fees (including legal costs) vary depending on a range of factors. To understand the usual range, Bequest Assist have analysed the average costs per estate for both solicitors and trustees.

Administrator	Average % of total estate value charged in legal fees/trustees fees and commission	Average amount of money charged in legal fees/trustees fees and commission
Private solicitor	2.30%	\$21,063
Trustee company	4.82%	\$37,517

Note that this table analyses private solicitor legal fees alone, but trustee fees and commission together. In the instances where a private solicitor was employed, there may also have been an executor's commission paid that is not represented here. This analysis is from a limited number of records, and can differ significantly between estates.

It is frequently discussed between Gifts in Wills managers that trustees on average charge more to administer an estate than private solicitors. The caveat worth noting is that if the trustee is the executor of an estate, those fees were agreed to by the deceased before they passed away.

There might be limited scope to push back on some costs, including legal costs depending on the circumstances, but notably "double dipping" where an executor's commission and legal fees are charged on the same piece of work is not permitted. Beneficiaries should ask questions where fees are unclear or seem inappropriately high.

Frequency of issue	Potential cost to charity if no action is taken
High	Medium

TAKE ACTION:

- Ensure that when your charity is a residuary beneficiary, you receive a complete final statement of accounts and check it for fees. At Bequest Assist, we have set ranges we expect different types of fees to fall within based on administering thousands of bequests and ask questions when what we see in a final statement falls outside of these.
- Ask questions so you understand different fees and charges that seem excessive. For example, a common item on a final statement is “executor’s reimbursements”, and you are entitled to further information on what those reimbursements are for.

Section five:

Solicitor or executor error

Administering an estate can be complex with a variety of different assets and specialist knowledge required. Sometimes genuine errors take place, but these can be costly for beneficiaries if they go unnoticed.

Some recent examples from Bequest Assist’s work of solicitor or executor error include:

- Three instances where solicitors have failed to call in one of the bank accounts of the deceased – in each instance worth around \$50,000. We only caught this by comparing the asset list to the final statement and noting a discrepancy in bank account numbers.
- A bequest being transferred to the wrong charity – such as the wrong arm of a federated charity, or charities with similar sounding names. This demonstrates the importance of charitable beneficiaries always getting a copy of the will or at least the clause in which they appear.

- A common error is not asking charities if they would prefer an asset such as shares be transferred or sold. When combined with not seeking assistance from an accountant knowledgeable in deceased estate taxation, this frequently results in unnecessary Capital Gains Tax. This will be discussed in detail later in the report.

These errors are rare and impossible to quantify across all bequests, but beneficiaries play an essential role in catching these errors before they reduce your Gifts in Wills income.

Frequency of risk	Potential cost to charity if no action is taken
Low	Low-medium

TAKE ACTION:

- Compare the asset list against the final statement not just for the total value of the estate but to ensure individual assets were called in.
- Be willing to ask questions of the solicitor when something doesn't make sense.

Section six:

Family provision claims

Most charities are familiar with the potential for family provision claims (a claim on the estate to make provision for them brought by an eligible person) to diminish the gift that charitable beneficiaries receive. Because of the way the law has developed in Australia on this issue, it is rare that an eligible person excluded from an estate will not be able to claim some of the share of funds left to charities.

Charities often report to Bequest Assist that they feel like the number and amount of loss from family provision claims is much higher than our data has suggested. We believe that this comes as a result of contests feeling more common than they are because of how much time they take up for Gifts in Wills managers when they occur.

From our analysis across 2116 bequests, family provision claims appear in 4-5% of bequests and account for a loss of 3-4% of total Gifts in Wills income. To be clear, that is not a 3-4% loss from each bequest where there is a family provision claim, but a charity can anticipate losing 3-4% of the total Gifts in Wills income they would have otherwise received if not for the claim/s. Note that this calculation includes both any settlements paid, as well as the cost the charity incurred to settle the claim such as hiring legal assistance.

Performing this analysis across all of our clients, these statistics were fairly consistent with only one charity experiencing a higher proportion of family provision claims than others.

Charities also report that they feel like the number of family provision claims is on the rise in recent years and there has been some media reporting to suggest this is true in the general probate space. We sought to analyse if a rise can be seen in the number of claims experienced by our clients:

Notification year	Number of family provision claims	Total number of bequests	% of bequests affected by family provision claims
2018	5	141	3.55%
2019	5	192	2.60%
2020	11	307	3.58%
2021	18	395	4.56%
2022	32	593	5.40%
2023 (to date)	11	371	2.96%

This data shows a marginal increase in claims across 2021 and 2022 and this could very well be impacted by data coming from the one charity client with outlying data. So far in 2023, that uptick is not occurring. There is no clear trend that family provision claims are on the rise for our clients, but we will continue to look at this data as more clients come onboard.

In our experience, charities place a significant amount of focus on family provision claims and the impact on their Gifts in Wills entitlements, which is understandable given how stressful and time-intensive they can be. 3-4% of Gifts in Wills income loss is not insignificant, but it is worth noting that while loss can be minimised, it cannot be avoided when it comes to family provision claims. We have seen charity boards ask for breakdowns of the rate and loss as a result of family provision claims, but simultaneously make no enquiries as to other sources of loss. Boards, senior managers and Gifts in Wills team members should be just as focussed on other sources of loss which can more easily be avoided as they are on the threat of family provision claims.

Frequency of risk	Potential cost to charity if no action is taken
Medium	High

TAKE ACTION:

- When it comes to family provision claims, charities do better when they work together. Speak with your co-beneficiaries and seek to share advice to reduce costs or take a shared position.
- Before you face a family provision claim, prepare your positions internally – will you push back to uphold the wishes of the deceased? Ensure that decision makers have an understanding of the risks and know that under Australian law it is unlikely that a settlement with an eligible person can be avoided.

- Have either in-house council or an external solicitor on call to assist as needed. Clarify if your charity is willing to work together with others to share in legal advice from a single source where your interests are aligned.

Section seven:

Life estates

Sometimes a bequestor will leave a gift in their will to an individual or individuals for use while that person is alive, and once they pass away, the gift reverts to terms set out by the will-writer. This is called a life estate and is reasonably common in wills where a gift is left to charity.

For example, John might leave a life interest in a sum of money or a piece of real estate for his daughter to use during her life. When his daughter passes away, John has specified that the remaining funds are to be given to named charitable beneficiaries.

These life estates can take a number of different forms which impact how much money is left over at their conclusion and whether or not the charity can be confident their gift will ever materialise. For example, a property that is ultimately left to a charity is more likely to retain its value than a sum of money where the capital can be used for the benefit of the life tenant.

To give a sense of the frequency with which life estates appear in wills with a gift left to charity, we looked at a total of 3705 bequest records administered over recent years. 149 out of those 3705 featured some form of life estate, whether in a property or a sum of money. That represents about 4% of total bequests featuring a life estate, but notably this can vary significantly between charities.

Charities can lose funds as a result of mismanaged life estates in a variety of ways. Some recent examples that Bequest Assist has observed include:

- Where there is discretion for the trustee to decide on the use of funds, the remaindermen (the charities) often have little control. We have seen a trustee spend all of the capital of a life estate for the life tenant, leaving nothing when the estate is finalised.
- A trustee of a life tenancy charging extraordinary fees for their ongoing management, resulting in a drain of more than a million dollars to the capital available.
- A life tenant passing away and no-one realising that the property she was occupying did not belong to her. The property was sold and the proceeds passed to her beneficiaries instead of reverting back to the charities for whom the gift was intended.
- A life tenant failing to pay body corporate fees, resulting in the body corporate taking ownership to sell the property and reclaim their debts.
- A life tenant not maintaining the property they had been left an entitlement in, resulting in the house falling into significant disrepair.

There are two main things we see go wrong with charities' management of life estates that contribute to these losses:

- Poor record keeping (like paper files or an Excel spreadsheet) and turnover of staff result in a life estate being completely forgotten. We will frequently find life estates at Bequest Assist and discover that most of the charities who are beneficiaries were notified a decade earlier, but had entirely forgotten in the meantime due to changes within the organisation.
- Little to no ongoing management resulting in no-one "watching" the life estate. While technically this responsibility falls to the Executor, this is a task that may fall by the wayside over the decades that a life estate can last for.

In our experience at Bequest Assist, two in every ten life estates are “at risk” – meaning that if beneficiaries are not watching and actively intervening in the management of the life estate, the gift for the charity could disappear. Given that many of the “at risk” life estates are properties, this loss can be significant to charitable beneficiaries when it occurs.

Frequency of risk	Potential cost to charity if no action is taken
Low	High

TAKE ACTION:

- Make a plan for how life estates can stay on your “active” bequests list even if you leave the role or change systems. How can you ensure that they will not be forgotten if someone without estates experience comes into the role?
- Take a position of actively managing life estates. At Bequest Assist, if a life estate is professionally managed (eg by a Public Trustee or an engaged solicitor), we will check in every two years. If it is not professionally managed (eg a lay executor or a solicitor that does not appear to be playing an active role), we check in every year.
- Share your list of life estates with co-beneficiaries – you never know, they might have a forgotten one in return for you!
- If a life estate seems to be “at risk”, seek advice. A solicitor may be able to help you organise a caveat that protects your interest, or seek to formalise management arrangements so you receive regular updates.

Section eight:

Other legal issues

Outside of family provision claims and life estates, there are a range of other legal issues that can impact a bequest. Excluding those two categories, across all of the bequests we have managed we have seen a rate of 2-3% of other legal issues with a loss to charity's total Gifts in Wills income of 2-3%.

We classify those other legal issues as follows:

- Executor unable to act
- Frozen funds
- Informal will issues
- Problems with executor/solicitor
- Testator capacity
- Will/codicil unclear
- Other

Of these, the most commonly occurring are informal will issues or a will/codicil being unclear, along with the diverse range of issues that can fall under "other".

Like family provision claims, charities often have limited control of the outcome in these cases, but a willingness to seek urgent legal advice or have a conversation with the executor can result in positive outcomes. Some examples Bequest Assist has seen recently include:

- The solicitor for an executor reached out to the charity advising that they were seeking probate and the charity might be adversely affected. In a previous will, the charity had been left 100% of the estate, but the day before the deceased passed away, a new will was signed leaving 100% to a family member of the deceased and making them executor. The will was not properly signed and there was evidence that the deceased either lacked capacity, or was unaware of what she was signing. The timeframe to file an objection was short and the risk potentially high, so the charity decided not to take further steps – ultimately forfeiting their gift.
- The deceased created an informal will clearly leaving her estate to charities, but failed to formalise it. As a result, she was deemed intestate with the estate to pass to her siblings. Bequest Assist approached the siblings on behalf of the charities about leaving a gift in-memory to each of the named charities to honour their deceased sister's wishes. The siblings agreed to a gift of \$20,000 to each of the charitable beneficiaries who had missed out as a result of the informal will.

TAKE ACTION:

- When it comes to legal issues, charities do better when they work together. Speak with your co-beneficiaries and seek to share advice to reduce costs or take a shared position.
- Before you face legal issues, prepare your positions internally – will you push back to uphold the wishes of the deceased? Ensure that decision makers have an understanding of the risks both from taking action or declining to.
- Have either in-house council or an external solicitor on call to assist as needed. Clarify if your charity is willing to work together with others to share in legal advice from a single source where your interests are aligned.

Frequency of risk	Potential cost to charity if no action is taken
Medium	Medium

Section nine:

Capital Gains Tax

Capital Gains Tax (CGT) is a form of income tax when an asset is sold that has increased in value since it was purchased. When an estate includes particular assets and those are sold, under normal circumstances a CGT event would occur and the estate would pay the taxes due. However, because most charitable beneficiaries are tax exempt, they do not pay CGT and it can be avoided on assets that are passing to them as beneficiaries from a will.

If this is all sounding very technical – don't worry! Gifts in Wills managers do not need to be experts in CGT. They only need to have a robust understanding of what sorts of common estate assets can cause a CGT event and what the options are for charities to avoid them.

The main estate assets where CGT can be an issue are:

- Shares
- Non-primary resident properties (such as beach houses)
- The primary residence of the deceased if sold more than two years after death

Less common estate assets where CGT can be an issue include:

- Large properties that are a primary residence but also earn income, such as a farm
- Boats
- Art collections

Charity beneficiaries can avoid unnecessary taxes being paid by either accepting an asset 'in specie' (eg having shares transferred to them and then selling them themselves) or by being made 'presently entitled' to the income. The best option depends on charity preference and the particular circumstances, but all charities should seek to understand the pros and cons of each option and make a plan for future bequests. The cost of transferring and selling shares through a broker as well as the hassle of organising and monitoring this process should be taken into account.

While it feels like solicitors administering deceased estates should be aware of these issues and suggest solutions to charitable beneficiaries, at Bequest Assist we find this is rarely the case. Remember that only around 7% of wills probated in Australia have a gift to charity and deceased estate taxation can be complex, meaning that solicitors may have limited exposure to the particularities of charitable tax exemptions and CGT. In fact, many accountants that Bequest Assist has interacted with are unfamiliar with these particulars. The assistance of a deceased estate taxation specialist is required to ensure the best outcome for the charitable beneficiaries.

To emphasise how important it is for charities to understand this issue, we analysed 1660 estates to see what proportion had two of the most common culprits for unnecessary

Rate of common estate assets that can cause a CGT event

Asset with potential CGT consequences	Number of estates	Percentage of estates
Shares	668	40.24%
More than one piece of real estate	58	3.49%



As you can see, many estates that leave gifts to charities include assets which may cause CGT to be an issue. The amount of CGT depends on a number of factors including when the asset was purchased, the purchase price and the sale price, so can generally not be calculated in advance by a charitable beneficiary.

To give a sense of the cost to charitable beneficiaries when CGT is not properly handled, here are four recent examples from Bequest Assist's work:

Situation	Estimated cost of potential CGT to all charitable beneficiaries	Estimated cost of potential CGT loss to each charitable beneficiary
\$4 million worth of shares were left to 41 charitable beneficiaries. The number of charitable beneficiaries meant that share transfers (to avoid CGT) would have been prohibitively complex. If shares were sold ordinarily, CGT would be incurred. Bequest Assist organised for the charities to be made 'presently entitled' and the CGT was avoided.	\$400,000	\$9,800
A bequestor owned multiple properties and a business. The single charity beneficiary was not in a position to accept these assets 'in specie' so asked for them to be sold. Right before the documents for sale were signed, the charity was alerted to the issue of CGT and acted to have the documents redrafted to make them 'presently entitled' and the CGT was avoided.	\$1,000,000	\$1,000,000
An estate had over \$900,000 in shares. The solicitor was asked to seek deceased estate taxation specialist advice and did so, resulting in no CGT occurring. The solicitor expressed their gratitude for drawing attention to the potential issue.	\$180,000	\$36,000
The lay executor of an estate sought advice from an accountant for the handling of assets, but unfortunately the accountant was not aware of the particulars around charities and deceased estate taxation. A holiday property was sold, resulting in \$199,000 in unnecessary CGT being paid. The beneficiaries are working to organise a tax objection in the hopes of reclaiming these funds.	\$199,000	\$22,100

There are instances where CGT assets have been improperly handled before a charitable beneficiary were aware and could intervene. Depending on the circumstances, retrospective objections to the Australian Tax Office (ATO) are possible and can result in estate funds being returned after assessment.

As you can see, ensuring potential CGT assets are appropriately handled can increase a charity's Gifts in Wills income substantially. Depending on the year in question, loss due to unnecessary taxation may be equivalent or higher for a charity than losses as a result of family provision claims. Moreover, a charity has far more power to avoid these losses than they do for legal issues. This is through proactively getting executors and solicitors to seek advice from a deceased estate taxation specialist, recommend how assets should be handled and even organising for tax objections where necessary.

Of all the categories of loss to Gifts in Wills income covered in this report, avoiding unnecessary CGT may be the highest cost with the greatest potential for prevention. Every person managing estates on behalf of a charity should be knowledgeable in this area.

Frequency of risk	Potential cost to charity if no action is taken
High	High

TAKE ACTION:

- Your knowledge is key – you cannot rely on executors and solicitors to understand this issue for charities. You don't need to be a taxation specialist, but you must be able to understand when to recommend someone seek advice and what the options are for your charity.
- Seek to learn about and understand bequests coming to your charity as soon as possible. Sometimes solicitors will suggest that they will not provide an asset list until the estate is administered, but this does not provide you with an opportunity to spot potential problem assets.



- Ensure you receive a copy of the asset list and note when there are assets where CGT might be an issue. At Bequest Assist, seeing shares of a particular value, a second property or a primary residence that hasn't sold soon after death automatically prompts us to take action.
- Be willing to proactively contact executors and solicitors to recommend they seek advice from a deceased estate taxation specialist. Bequest Assist sends an email explaining the situation and providing three names of specialists the person could reach out to for help.
- Have an internal share transfer policy and process with other teams in the charity on board. Don't simply take shares because you can – consider present entitlement to avoid transfer and broker costs, and in circumstances where there are too many charity beneficiaries to organise transfers.

Section ten:

How to move from reactive to proactive estate management

Hopefully this report has convinced you that investing time and money in moving your charity from reactive to proactive estate management is worth it. A critical part of growing your Gifts in Wills program is ensuring you have the structures and personnel in place to handle effective estate administration and avoid the pitfalls that cost your charity money.

There are three main things that a charity needs to proactively manage estates:

- **Time** – estate administration is not something that can happen in between other responsibilities. It can be time-intensive and often tasks are urgent.

- **Tool** – a system (such as a CRM or Excel spreadsheet) that works for managing deceased estates. Generally the CRM used to manage living donors is not fit-for-purpose.
- **Knowledge** – as shown throughout this report, estate administration is not really “administration”. It requires specialist knowledge of the law, taxation and skills in how to push for the information you need from solicitors and executors. Any person without substantial experience will require training.

Based on our experience of administering over 3800 bequests, we believe the time and knowledge investment needed for proactive estate management is as needed:

Size of bequest program	Resourcing needed
Less than 20 bequests per year	1 day per week of a person with a medium understanding of estate administration with an experienced person on-call as needed
20-50 bequests per year	2-3 days per week of a person with high level estate administration knowledge
50+ bequests per year	4-5 days per week of a person with high level estate administration knowledge

For context, at Bequest Assist it takes approximately six months of training for individuals with a legal background to have the level and diversity of knowledge to handle complex estate administration (like the situations described in this report). This “high” level of knowledge might take longer to acquire when an individual is also working across other responsibilities, such as communication with living supporters.

Note that the person who administers estates does not need to be the same person speaking to living donors about Gifts in Wills. In fact, the skills needed for each of these types of tasks are very different and may require that the charity find a unicorn of an applicant! There is significant time lost when someone who is focussed on communicating with living donors has to switch to focussing on careful estate administration.

In addition to the resourcing needs listed in the table above, charities should have other teams and their board pre-trained to understand major estate administration issues (such as where there is reputational risk or large amounts of money at stake). The finance team should have a strong understanding of share transfers, franking credits, CGT and present entitlement and the in-house counsel or law firm the charity works with should be experienced in deceased estates (noting that the law is different in every state and territory).

Another thing that proactive management of estates requires is consistency. As an estate manager, you do not have complete control and your performance is only as good as what the person in the role before you did. If you come in without good records of life estates and with inconsistent storage of probate documents, it will be very hard to get across the work entirely. One of the main reasons a charity hires us to start managing their estate work at Bequest Assist is because a key team member has left, and no-one else at the charity has the knowledge or time to jump in. Your charity must have a plan for when this happens.

Through ensuring all of the above are set up at your charity, you will have the structures in place to begin proactively managing your estates using all of the “take action” points throughout this report. That includes collecting necessary documents, reaching out to co-beneficiaries and developing a system to ensure matters like life estates don’t slip between the cracks.

If your charity takes all of these steps, your Gifts in Wills income will be 5-10% higher than it otherwise would have been in that year – through reduced fees, avoided CGT, lowered executor’s commissions and avoidance of solicitor error. Remember Gifts in Wills income is extremely variable depending on the size of gifts, so a trend might not be immediately visible, but we recommend tracking your “wins” on estate matters to fully understand the impact.

As a reminder, to put that sort of increase in perspective, increasing your annual Gifts in Wills income by 5-10% could mean:

- For a charity with an annual Gifts in Wills income of \$500,000 = an extra \$25,000-\$50,000
- For a charity with an annual Gifts in Wills income of \$1 million = an extra **\$50,000-\$100,000**
- For a charity with an annual Gifts in Wills income of \$5 million = an extra **\$250,000-\$500,000**
- For a charity with an annual Gifts in Wills income of \$15 million = an extra **\$750,000-\$1.5 million**

If taking these steps within your charity isn't possible right now – for example you lack the tool, time or knowledge – please consider hiring Bequest Assist to handle your estate administration. We would love to help you grow your Gifts in Wills program by taking the headache of estate administration off of your team's shoulders. We would be happy to provide a demonstration of what we do and send through an obligation-free quote for our services – just be in touch at info@bequestassist.com.au.

In addition to estate administration outsourcing, we also run free monthly webinars and longer training sessions to help bolster your team's knowledge. Find out more by visiting www.bequestassist.com.au.