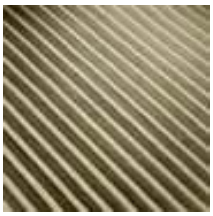

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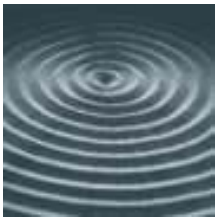

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ARE YOUR PLEDGES ENFORCEABLE?

By Rachel L. Blumenfeld

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MT Charities and NFP Newsletter

Are your pledges enforceable?

The recent case of *The Brantford General Hospital Foundation and the Brantford General Hospital v. The Canada Trust Company and Anne Linda Tedder, Estate Trustees of the Estate of Helmi Aino Marquis* (67 O.R. (3d) 432), illustrates the challenges charities face in enforcing the pledges that donors make.

About a year and a half before her death in 2000, Mrs. Marquis, who was described as a "regular donor" and appeared on a list of “potential lead donors” to the Brantford General Hospital Foundation (the "Foundation"), signed a $1million pledge to the Foundation’s capital campaign, payable over a period of five years. She paid the first instalment of $200,000 in April 2000, but unfortunately died the following month. Under her Will, Mrs. Marquis left the Foundation a bequest of one-fifth of the residue of her estate, in addition to a number of other bequests and legacies to other charities. The Estate Trustees refused to pay the outstanding balance of $800,000 on the pledge and the Foundation and the Brantford General Hospital sued the Estate Trustees to enforce the pledge.

The Ontario Superior Court of Justice was asked to determine if the pledge form that Mrs. Marquis had signed constituted "a legal and binding contract enforceable at law." The case turned on whether the facts supported an argument that there was sufficient consideration between the Foundation and Mrs. Marquis to make the pledge a binding contract. The Foundation and the Hospital argued that the fact that the new critical care unit at the Hospital would be named for Mrs. Marquis and her late husband, Dr. Jack Marquis was sufficient.

Justice Milanetti, however, found that the evidence showed otherwise. Mrs. Marquis “never sought the naming of the unit as a condition for making the pledge,” rather the naming opportunity was brought forward to her by the Foundation. The court found that, on the contrary, the naming opportunity was irrelevant to Mrs. Marquis, a “humble and modest” person. The set of facts in this case differed markedly from a U.S. case where the donor had clearly included the naming of a fund as a condition for the pledge, which was found to be enforceable.

The court also rejected the Foundation’s alternative argument, which was based on the legal doctrine of “estoppel” -- because Mrs. Marquis paid the first instalment, the estate could not deny that a binding contract existed. The court found that the doctrine of estoppel would only apply if there was a pre-exiting relationship between Mrs. Marquis and the Foundation, which there was not. Moreover, the argument that the Foundation relied on the pledge to its detriment (e.g., in an effort to obtain government funding) was rejected on the basis that the project had not yet begun at the time of her death.

Even though Justice Milanetti did not doubt that Mrs. Marquis would have wanted the Foundation to receive both the pledge and the bequest, “based on the Canadian law as currently framed,” the court could not find the pledge to be enforceable.

Had Mrs. Marquis been a different type of donor, concerned about seeing her and her husband’s names on the unit she was donating, perhaps the pledge would have been enforceable. Further, had the pledge document been drafted differently, or made under seal, perhaps it would have been considered binding on Mrs. Marquis’ estate. Yet in this instance, the court agreed with the Estate Trustees that the pledge did no more than “document a proposed gift.” For significant pledges, charities would be advised to keep this case in mind. Depending

on the situation, it may be prudent to discuss with the donor, and document, what his or her intentions are in relation to a pledge and any bequest made in a Will.