

Law Review

Testamentary Easements - Look Before You Leap

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Owners of Frank Lloyd Wright buildings are almost universally committed to the preservation of their properties. Through the BULLETIN and other preservation periodicals, they are often reminded of the tax (and other) benefits of preserving their properties through the use of preservation easements. Nonetheless, even though these benefits have been well-explained, some owners who are otherwise disposed to an easement donation remain reluctant to transact one for any number of reasons: concerns about changing personal circumstances; doubts about imposing restrictions on their personal use of the property; and the desire to retain flexibility in determining the ultimate use and disposition of their Frank Lloyd Wright building.

If you are one of these averse preservationists, you may wish to consider an alternative. A charitable gift of a preservation easement can be included in your will to take effect at your death. If you make a gift of a qualified preservation by will, there will be no income tax deduction on your income tax return, but the value of your donation will be deducted as a charitable contribution from the value of your estate. (It's as if the value of your property that is attributable to the easement had been given away before death and therefore, kept out of the estate.)

Here's an example in which a charitable contribution of a preservation easement by will could be an important planning device: John and Mary are in their early fifties. John and Mary own "Freshwater," a very valuable Frank Lloyd Wright property. They inherited Freshwater from Mary's parents, who understood its architectural significance and sensitively maintained the property. Mary's parents also left considerable money in trust for John and Mary's children. John and Mary are successful and fairly comfortable, and they know their children will be comfortable, too.

Because John and Mary do not yet know what their long-term financial future will be, they are a bit hesitant now to restrict

Freshwater with a preservation easement and to give up the substantial value that doing that would entail, although they think they may be willing to do that within the next few years. However, John and Mary travel frequently, and they know that if anything happens to them, Freshwater will pose a significant burden for their estate and will likely be sold, and possibly bulldozed and developed, to satisfy estate tax liabilities.

By adding to their wills a preservation easement on Freshwater, they have solved a few potentially difficult problems. A will easement enables John and Mary to think about completing the gift during their lifetimes, but gives them some additional time to sort through the financial and planning implications. It assures them that, if they should fail to act or if they should both unexpectedly die, their financial estate and Freshwater will be preserved.

How should you proceed if you decide to put a preservation easement in your will? First, you will want to make sure that the laws of the state in which the property is located recognize such a donation. Most states do.¹

Second, the text of the easement document should be developed in detail with the potential donee organization, along with any possible endowment agreement, before the easement actually becomes part of your estate planning documents. You do not want to create a situation in which an unexpected easement gift will not be accepted or cannot be completed satisfactorily. Moreover, the Internal Revenue Service and the Tax Court have ruled that a charitable bequest does not qualify for a deduction from estate taxes under Section 2055 of the Internal Revenue Code if the amount of that bequest is not certain at the time of the donor's death.²

Third, recognize that there may be some changes in the condition of the property, in the administration of the donee organization, or even in the tax laws relating to

the donation of qualified preservation easements. Therefore, you should direct in your estate planning documents that your executor have the authority to reform the easement if necessary to address changed circumstances and to assure that the easement meets the requirements for deduction under Section 2055. The executor should also be authorized to take appropriate steps to complete the transaction, such as having survey work done and securing municipal approvals.

Fourth, remember you can change your mind about an easement in your will at any time. If you do, you can modify the easement, eliminate the easement or, of course, go ahead and complete the easement gift while you are alive. Remember that your will controls what will happen to property you own in your name when you die. So, if John and Mary add an easement on Freshwater to their wills, but then convey Freshwater to a trust or to someone else while they are living, the property will not be controlled by the provisions of their wills.

Preserving property through testamentary gifting does work provided appropriate planning and coordination are completed during your life. Therefore, it is wise to remember this maxim: Look before you leap.

Stefan Nagel, a nationally-recognized authority on the private protection of historically and culturally significant properties, is the former Associate General Counsel for Tax and Real Estate of the National Trust for Historic Preservation. He was a founding member of the founding Board of Directors of the Conservancy and previously produced "Law Notes" for the BULLETIN. Having re-entered private practice, joining the Law Office of Stephen J. Small, Boston, Massachusetts, he is pleased to resurrect his column for the benefit of Frank Lloyd Wright building owners. ■

¹ Albert Liu, Charitable Devices of Conservation Easements: Specificity and Changed Circumstances, The Back Forty, Vol. 6, No. 6, pp. 10-11 (1996).

² Id., citing LTR 9322025 and Estate of Marine v. Commissioner, 97 T.C. 368 (1991), aff'd, 990 F.2d 136 (4th Cir. 1993).