

A stylized graphic featuring a white silhouette of a house with a gabled roof and a central window, set against a teal background. Below the house is a dark blue silhouette of waves. The text 'Community Foundation for Kingston & Area' is centered within the white house silhouette.

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**Update on
Charities
Law and
Tax
Developments**

27 July 2011

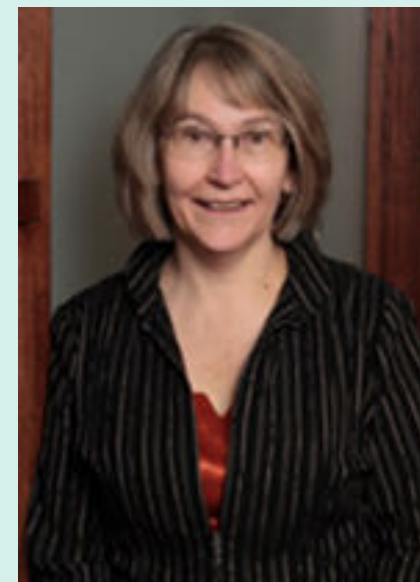
**Greg Fisher
&
Mary-Alice
Thompson**



**A workshop
with
Greg Fisher,
KPMG**

&

**Mary-Alice Thompson,
Cunningham Swan - Lawyers**



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Information is current to July 27, 2011. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.



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Charity Law Update

- Ontario NPO Corporation Act 2010
- Tax Update
- Imagine Canada Standards
- 2011 Budget
- Recent Charity Law Cases
- Social Enterprise



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Charity Law Update

- Ontario Not-For-Profit Corporation Act, 2010
- Imagine Canada Standards Programme
- Budget Issues - Governance
 - Receipting
 - New Rules for Directors and Officers
- Recent Cases
 - Unrelated business
 - Waivers and liability





Not-for-Profit Corporations Act, 2010 (ONCA)

- Bill 65
- Royal Assent on October 25, 2010
- Likely proclaimed into force in 2012
- All non-share capital corporations, except
 - e.g. co-operative corporations
- Follows the Ontario Business Corporations Act (OBCA)





Not-for-Profit Corporations Act, 2010 (ONCA)

- Incorporation as of right
- Statutory Duties of Officers and Directors
- Members' rights and remedies
- Public Benefit v. other Not-for-profits
- Statutory Audit and Review



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Incorporation

- Ministry says:
 - “expedited and streamlined” incorporations
 - reduced rejection rate
 - compliance = incorporation
 - review by Ministry staff for:
 - Commercial purposes
 - Regulatory powers
 - Proposed name
 - Other requirements will be developed





Charitable Incorporations

- OPGT review “has not yet been determined”
- Prudent to obtain prior approval of the Canada Revenue Agency
- In the works:
 - A revised *Not-for-Profit Incorporators' Handbook*
 - Plain language guide to incorporation



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By-Laws

- Default by-laws in the Regulations
- Cost-savings due to no lawyer?
- In effect 60 days after incorporation unless a different by-law is adopted
- May amend or replace the standard by-laws at any time
- Will be posted on an Ontario government website





Directors and Officers

- Statutory Duty of Care
 - to act honestly and in good faith
 - with a view to the best interest of the corporation
 - To exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Protection from personal liability
 - due diligence defence
 - good faith reliance defence, and
 - indemnification and insurance provisions





Directors and Officers

- Minimum of 3 directors
- Public benefit - no more than 1/3 of the directors can be employees
- Articles may provide for a minimum and maximum number of directors
- Directors need not be members
- Four years is the maximum period for each term of office of a director
- By-laws may provide for ex-officio





Directors and Officers

■ Meetings

- Notice provisions in the new Act
- Waiver of notice
- Does not need to specify the business to be transacted
 - Unless it cannot be delegated to a managing director or committee of the board
- Unanimous resolution in lieu of a meeting is permitted





Directors and Officers

- Can be removed by ordinary majority
- Resignation effective when received
- Right to distribution of reasons for resignation or rebuttal to removal
- Conflict of interest rules apply to both directors and officers
 - apply to all transactions not just contracts





Public Benefit Corporations

- A charitable corporation, or
- A non-charitable corporation that receives financial benefits
 - from non-members, including government,
 - that exceed \$10,000 in a financial year
- Dissolving corporations that were public benefit in any of the 3 preceding years



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Public Benefit Corporations

- Audit exemption limits are more stringent
- No more than one-third of the directors can be employees
- Assets on voluntary dissolution must be distributed to another public benefit corporation





For-Profit Activities

- ONCA does not restrict commercial activity for purposes in the articles
- Income generated may be taxed
- Charities will still need to meet the CRA requirements of
 - Run by volunteers or
 - Linked and subordinate to the charitable purpose





Members

- Membership lists give names and addresses
 - the by-laws may provide for additional information
- Membership not transferable (unless the articles or by-laws provide otherwise)
- Classes of members (if any)
 - by-law must set out terms
- Members ex officio are possible
- Members may be disciplined – rights include:
 - 15 days' notice with reasons
 - opportunity to be heard





Member Meetings and Proposals

- Right to proposals at AGM
 - proposal submitted 60 in advance, sent with the notice
 - 5% of members may sign to nominate directors
 - nominations also at the meeting
- Relate to the activities and affairs of corporation
- Resolution signed by all voting members replaces a meeting
- 10% of voting members may call a meeting
- Meetings may be held electronically





Proxies

- Every member entitled to vote may appoint a proxy-holder
 - Who need not be a member
 - Mandatory solicitation of proxies
- By-laws may provide for alternative to proxies:
 - by mail
 - by telephone
 - by computer (electronic means)





Non-voting Members

- May vote on fundamental changes:
 - articles of amendment and articles of continuance affecting their class
 - articles of amalgamation
 - articles of continuance to another jurisdiction
 - sale, lease or exchange of all or substantially all of corporation's property not in ordinary course of corporation's activities





Member Remedies

- Compliance Order
 - where a corporation, or its directors and officers, fails to comply with the duties set out in the new Act and regulations, the articles or by-laws
- Derivative Action
 - an action in the name of the corporation to enforce one of its rights.
 - by current or former member, officer or director
 - An exception for a religious corporation (not defined)
- Dissent and Appraisal Remedy
 - Does not apply to public benefit corporations





Audit v. review

- All NFP corporations must appoint an auditor or person to do review engagement
 - Members can approve the audit exemption or review engagement option at each AGM for the next financial year
- Non public benefit corporation:
 - annual revenue is $> \$500,000$ = optional review engagement in place of an audit
 - $< \$500,000$ = exempt from the audit or review engagement





Audit v. review

- A public benefit corporation:
 - Annual revenue < \$100,000
 - exempt from the audit requirement or financial review engagement
 - Annual revenue \$100,000 to \$500,000
 - review engagement in place of an audit
 - Public benefit corporation with
 - < \$100K revenue members may waive the requirement
 - \$100K to \$500K members may choose review engagement by a non-auditor
 - >\$500K – no option





Corporate Finance

- Financial statements and auditor's report or financial review must be given to members 21 days before AGM
- The by-laws set out how the financial statements will be made available
- The board may exercise borrowing powers without member authorization unless required by the articles or by-laws





Transition

- Existing not-for-profit corporations:
 - 3 years after the new Act comes into force to amend their letters patent, by-laws and special resolutions to conform with the new Act
 - After 3 years, these documents will be deemed to be amended to
 - No requirement to file articles of continuance (c.f. CNCA)





Transition

- To incorporate now or wait for the new Act:
 - Intention to purchase real property
 - Incorporation required to receive grants
 - The need to limit liability for its members and directors
 - Incorporations now will be subject to the new Act once it comes into force





Tax Update



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2010 Federal budget changes

- Charitable expenditure rule
 - Must spend 80% of previous year's tax-receipted donations other than enduring property
- Repealed effective for fiscal years that end on or after March 4, 2010





2010 Federal budget changes

- Capital accumulation rule
 - Must spend 3.5% of all assets not currently used in charitable programs if in excess of \$25,000
- Modified for years ended on or after March 4, 2010





Capital accumulation rule

- \$25,000 limit increased to \$100,000 for charitable organizations
- Threshold remains at \$25,000 for charitable foundations





2010 Federal budget changes

- Anti-avoidance rules strengthened
 - Amounts transferred between non-arms length charities – must spend 100%
 - Election available for transferring charity





2010 Federal budget changes

- Effect of changes to the following concepts:
 - enduring property – repealed
 - capital gains reduction – repealed
 - capital gains pool – repealed
 - specified gifts – effectively eliminated
 - request to accumulate property - amended





New disbursement quota

- 3.5% of average value of assets not currently used in charitable programs
 - if assets exceed \$100,000 for charitable organizations
 - if assets exceed \$25,000 for charitable foundations





2011 Budget Changes

- Recover tax assistance for returned gifts
- Limit benefit on donations of publicly listed flow through shares



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2011 Budget Changes

- Gifts of non-qualified securities
 - Benefit to donor deferred until charity disposes of security (must be within 5 years)
- Granting options to qualified donee
 - Benefit not available to donor until charity purchases the property





Effect of changes

- More even playing field among charities
- Reduced complexity
- Does this mean a charity has more flexibility with respect to the use of funds?

NO



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Charity – back to basics

- A charitable organization must devote all resources to charitable activities carried on by the organization
- A charitable foundation must be operated exclusively for charitable purposes



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Charity – back to basics

- Revocation can occur where a charity makes a disbursement by way of a gift, other than a gift:
 - Made to a qualified donee
 - Made in the course of charitable activities carried on by the charity





Charity – back to basics

- A private foundation cannot carry on any business
- A public foundation or charitable organization:
 - cannot carry on an unrelated business
 - can carry on a related business





Charity – back to basics

- Charitable activity
 - Not defined in the income tax act
 - Must be charitable
 - Relief of poverty
 - Advancement of education
 - Advancement of religion
 - Other purposes beneficial to community





Charitable activity

- Must fall within the scope of the charity's objects
- Cannot be involved in partisan political activities
- Must be careful of social activities
- Must be careful of fundraising activities
- Must look at case law





Fundraising

- Has been subject of intense discussion and disagreement
- Recognition that fundraising is a necessity
- Acceptable/ unacceptable fundraising
- Refer to Canada Revenue policy paper CPS-028



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Fundraising

- Fundraising not a charitable activity unless substantially all of activity advances a charitable objective
- Four part test (must meet all)
 - is main objective fundraising?
 - Did activity include repeated fund requests?
 - Audience selected for ability to give?
 - Was compensation derived from giving





Fundraising

- Exception
 - Does event further charity's purposes (other than awareness of charity's mandate or work)
- Fundraising ratios (CRA Approach)
 - Under 35% - likely ok
 - 35% & above – some concerns/ assessment of fundraising?
 - >70% - serious concern - explanation





Carries on a business

- Four general criteria reviewed to determine if a charity carries on a business:
 - Intended course of action
 - Potential to show profit
 - Existence of profit in past years
 - Experience and expertise of person(s)/organization(s) undertaking the activity





Investment vs. Business

Areas of concern:

- Rental, development, leasing activities
 - Use of excess capacity
- Royalty interests & interest in partnership units
 - Even if limited partner
- Aggressive investment trading techniques
 - Short sales/option trading/day trading





What is related business

- Policy Statement: CPS-019
 - Businesses run substantially by volunteers –charity employees not volunteers
 - Business that are **linked** to a charity's purpose and **subordinate** to that purpose
- Only for charitable organizations and public foundations – does not help private foundations





Other business issues

- Continuous or regular operation
- Linked to charity's purpose
 - Use of profits for charitable purpose not sufficient
 - Must consider all factors
- Fundraising or business





Carrying on Business

- *The House of Holy God v. Attorney General of Canada* deregistered for carrying on an unrelated business
- ran a maple syrup operation
 - Paid employees to work in the business
 - Directors were paid for their work in the operation
- A charity can carry on a related business provided that it is either
 - linked to the charity's purpose and subordinate to that purpose or
 - run substantially by volunteers
- HHG failed to meet either test
- No evidence that the maple syrup operation fulfilled any teaching or religious function in itself
- That the profits were plowed back into the organization was irrelevant





Factors preventing/delaying registration

- Purposes that are not charitable
 - Must operate exclusively for charitable purposes
 - Not every purpose that may provide a public benefit is charitable at law
- Objects that are too vague
 - Must describe its purposes precisely so that each one is clear and restricts the organization to only charitable purposes
- Incomplete information
 - a complete list of directors including name, address, phone number and date of birth)
 - A complete set of governing documents – including by-laws
 - Complete financial information – providing a budget is essential so CRA has a general idea of how the organization intends to raise funds and how the funds will be spent
- The process can be lengthy





Imagine Canada Standards



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Imagine Canada Standards Program

- <http://www.imaginecanada.ca/node/9>
- By the end of 2011
- a nation-wide guideline to charities and nonprofit organizations in
 - fundamental governance
 - paid-staff management
 - financial accountability
 - fundraising and volunteer involvement
- a voluntary accreditation program with a third-party peer review system
- piloted in 2011, public launch in 2012



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Imagine Canada Standards Program

■ Goals:

- To improve their practices in the charitable and non-profit sector
- To foster public trust, promote confidence in the sector and protect both the credibility of the sector and the interests of the public;
- To create a community of practice in the charitable and nonprofit sector; and
- To unite the charitable and nonprofit section through shared standards that demonstrate good governance of the community organizations that the public entrusts Imagine Canada to lead



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Imagine Canada Standards Program

- The Standards Council's role:
 - oversee the Program
 - recommending policies and procedures, approving the standards, and recommending participation fees
- The Board's role:
 - Program policies and procedures
 - approval of participation fees, and
 - appoint 3 members of the Standards Council



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Accreditation Process

■ Preparation

- 3-9 months depending on the size and sophistication of the organization
- a participation agreement and application fee
- Imagine Canada accesses the information and helps prepare application

■ Review and approval process

- 6-9 months for the Committee to make a decision
- application reviewed by 7 peers / committee
- decisions: accreditation, conditional accreditation (90% compliance), revise and resubmit, and non-accreditation



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Accreditation Process

■ Compliance

- Written commitment to stay in compliance during the accredited period
- accredited period is 5 years, then resubmit for renewal
- compliance will be monitored
 - onsite spot checks/audits
 - 3-5% of organizations
 - peer reviewers and staff
- breach will be investigated
 - opportunity to explain the breach and remedy





Application

- Specific to levels of organizations and
- Contact standards@imaginecanada.ca
- Deadline for 2011 pilot program is Sept. 30, 2011
- Proposal – 2 intake periods annually, applications will be reviewed within 4-6 weeks
- Fees
 - Depend on the size of the organization applying
 - Two types - application fees and license fees



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Standards

- Level 1: <1 full-time equivalent (FTE) employee
- Level 2: 1 to 50 FTE employees and up to \$5 million in annual operating expenses (as reported on T3010)
- Level 3: >50 FTE employees or over \$5 million in annual operating expenses





Standards

■ Governance Standards

- culture, objectives, mission and value
- a strategic operating plan,
- 27 different sections - most do not apply to Level 1

■ Financial Accountability Standards

- apply to all Levels
- annual financial statements
- auditing financial statements
- public availability of financial statements, and budgets
- charities only - board must have a process for timely and accurate filing of T3010





Standards

■ Fundraising Standards

- fundraising policies,
- donations and gifts
- privacy of donors.
- charities only
 - must ensure that all donations are used to support the charity's objects, as registered with CRA
 - income tax receipts - an official income tax receipt must be prepared





Standards

- Staff Management Standards
 - safe work environment
 - free of harassment
 - 24 other standards do not apply to Level 1 organizations
 - management policies,
 - internal conflict resolution policies and
 - resource allocation for employee training and development
- Volunteer Involvement Standards
 - 7 /10 standards apply to all levels
 - policy and procedures to support volunteer involvement
 - Level 2 and 3 only: formal volunteer recruitment, and regular evaluation of volunteers and the volunteer program





2011 Federal Budget Changes

- Receipting
- Eligibility for Directors, Officers, Trustees etc.
- Bill C-470 – (Disclosure of Compensation)





Receipting

- Registered charities must abide by rules for issuing official donation receipts including:
 - issue receipts only for transactions that qualify as gifts;
 - properly establish the FMV of donated property
 - ensure that receipts contain accurate and complete information
- CRA audits show ~89% of Canadian registered charities are issuing inappropriate receipts
- Currently, 71 audits involving promoters; 2 proposed penalties of \$24M





Receipting

- Budget proposes new sanctions:
 - suspension of receipting privileges
 - revocation of qualified donee status
 - monetary penalties (extended to RCAAAs)
 - fine
 - a penalty equal to 5% of the receipt for a first infraction
 - deliberately false information = a penalty equal to 125% of the receipt
 - Third-party civil penalties
 - revocation of charitable status





Receipting

- official donation receipt for something that is not a “gift”.
- Incomplete information on official donation receipts.
- Not everything is receiptable.
- Not properly subtracting value of advantage.
- Donation of services.
- The date of the donation.
- Incorrect name of donor on official donation receipt.
- Not keeping copies of official donation receipts and other books and records.





Receipting

- Failure to properly secure the donation receipts.
- Issuing a tax receipt for a donation to a non-qualified donee.
- Inappropriately returning a gift.
- Incorrectly replacing lost or incorrect receipts.
- Inappropriately providing receipting for volunteer travel.
- Inflated fair market value of gift.
- Participating in abusive charity gifting tax shelters.
- <http://www.globalphilanthropy.ca/>



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Eligibility of Directors, Officers

- Restrictions on who may be a director, trustee, officer or like official
- Ineligible individual:
 - Has been found guilty of a relevant criminal offence for which the individual has not received a pardon;
 - Has been found guilty of a relevant offence within the last five years;
 - Was a director, trustee or like official of a charity or association during a period in which the charity was engaged in conduct that constituted a serious breach of the requirements for registration for which its registration was revoked in the past five years;
 - Controlled or managed a charity or association during a period in which the charity was engaged in conduct that constituted a serious breach of the requirements for registration for which its registration was revoked in the past five years; or
 - Has been a promoter of a tax shelter that involved a gift to a registered charity or RCAA the registration of which was revoked within the last five years for participation in the tax shelter





Eligibility of Directors, Officers

- Sanctions - CRA may
 - suspend authority to issue receipts or
 - revoke registration
 - refuse to register
- The rules will apply on the later of January 1, 2012, and Royal Assent





Bill C-470

- Bill C-470 – (Disclosure of Compensation)
- “To require that every registered charity disclose compensation it pays to any single executive or employee exceeding \$100,000”
- In the Senate – 1st reading





Cases - *Loychuck v. Cougar Mountain Adventures Ltd.*

- The British Columbia Supreme Court, 2011
- Defendant was a zip-line operator, whose tour guide sent one plaintiff down the line before the first had reached the platform, which caused a collision and serious injuries
- Plaintiffs had signed a release waiving liability and assuming the risk of injury, and read the website
- the operator acknowledge the employee was negligent. but relied on the waiver
- the release clearly stated that by signing the document the right to sue would be waived
- no evidence of duress, coercion or unfair advantage and the plaintiffs participated voluntarily
- accurate representations on the website concerning safety and the risks and dangers involved
- the release was found to be valid and enforceable, a complete defence





Cases- *F. Max E. Maréchaux v. The Queen*

■ Federal Court of Appeal, 2011

- “F. Max E. Maréchaux participated in a “leveraged donation” scheme. The essence of the scheme was that, for an expenditure of \$30,000, he received a charitable donation tax receipt for \$100,000, and claimed a tax credit of \$44,218, a potential return on his outlay of nearly 50% in a matter of months. Very little of the money was retained by charities to advance their purposes.”
- Mr. Maréchaux had lost a decision at the Tax Court of Canada and his appeal to the Federal Court of Appeal was dismissed as “Mr Maréchaux had not made a “gift””.
- Supreme Court of Canada has denied leave to appeal
- According to the Trial Court “The Program was implemented on December 31, 2001, with 118 participants (“Participants”) and donations totaling approximately \$18,305,000.”





Cases- *F. Max E. Maréchaux v. The Queen*

- According to CRA, claims on abusive charity gifting tax schemes
 - Year 2009 - Donors 11,919 - Donations \$330.5 M
 - Year 2010 – Donors 9,978 - Donations \$321.8 M
 - 2006 numbers of 1.3 billion





Cases - *The Kootenay Doukhobor Historical Society v. The Queen*

- a non-profit
- the staff person had an independent contractor agreement
- the staff person had considerable latitude in carrying out the tasks
- the staff person was found to be an employee
- failure to withhold EI, CPP and income tax amounts
- liability for directors
 - the most common reason that directors of a charity would have personal liability





Cases - *News to You Canada v. The Queen*

- Federal Court of Appeal
- application that CRA had refused to register
- Federal Court dismissed the organizations appeal
- The provision of news may be a non-profit activity, but it is not charitable





Innovate! What's New?

1. Social enterprise and structures used for social enterprise
2. Social Finance/Social Impact Bonds



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Social Enterprise

- The Centre for Community Enterprise
- A social enterprise is an enterprise, owned at least in part by a non-profit organization, that is using entrepreneurial methods to accomplish social goals and providing its profits to its owner(s) for use in continuing their core mission
- A social enterprise applies an entrepreneurial approach to addressing social issues and creating positive community change
- or
- A social enterprise is a revenue-generating business with primarily social objectives whose surpluses are reinvested for that purpose in the business or in the community, rather than being driven by the need to deliver profits to shareholders



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Social Finance

- Discussion around investing for a social purpose
- Desire to access foundation/ Endowment funds
- Mobilizing private capital for public good

- Impact/Social investing is the active investment of capital in businesses and funds that generate positive social and/or environmental impacts as well as financial returns to the investor
- Primary criterion is the social/environmental impact



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Social Finance

■ Caution

- There are legal issues surrounding what investments are appropriate under the Income Tax Act and relevant Provincial Trustee Acts
 - Potential you may make an expenditure to a non-qualified donee
 - Potential that the investment may fall outside those permitted under the relevant trustee act

- (A thorough discussion of these issues is outside the scope of this discussion)





Social Finance

- Not just money in stocks and bonds for financial return only
- Invest in projects that further charitable purposes with prospect of reasonable return
- Want investing of assets to align with mission
- Outcome will have greater impact on issues seen to matter





The Context of Social Finance

- Many charities have historically operated with two distinct elements; making grants to further charitable mission and managing investments to raise money to make the grants. Until recently there was little connection between these features of foundation operations
- But now the question is being asked: should an endowment be invested in a way that sees more than a portion of the excess cash flow being used for charitable purposes?
- This process is still evolving throughout the Country



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Q & A



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