

TRUST & ESTATE PLANNING

Trust Letters of Wishes – a Trust Officer’s View

By Brian Hatton

The Anglo Saxon form of discretionary trust has been popularly used for a very long time, amongst other things to help manage the protection and (hopefully, orderly) distribution and redistribution of family wealth. This article is from a practitioner’s standpoint to highlight some simple practices that

can help create a great result rather than a cautionary tale.

Trust officers

As the trust has been such an enduring device about which so much has already been written, it’s interesting to look at it from a different angle, that of

a trust officer, who often carries most responsibility for ensuring that what happens is as close to what the settlor wanted as possible, even if the settlor at the time couldn’t have envisaged what that was!

Trust officers’ views are informed by exposure to many real life examples from which they accumulate expertise to make a multitude of small decisions

and occasionally some rather more significant ones. For better or worse, the reality is it's a trust officer's skill, rather than their lawyers, that is responsible for the quality of the vast majority of trustee decisions. This is very relevant when referring to the subject of letters of wishes and first it's helpful to review some basic principles.

Golden rule

The primary (some say only) golden rule for trustees using their powers and carrying out duties is that they must act in the interests of the trust beneficiaries after taking everything relevant into account.

Is this the only guide trustees need or are there powers available, the exercise of which cannot be considered to be in the interests of existing trust beneficiaries? An example of such a power might be where the trust terms allow the addition of beneficiaries, as adding someone new can only diminish an existing beneficiary's interest. It seems the golden rule as above may not be enough and a modification is needed, which is:

Trustees must use their powers according to their purpose.

As a consequence, trustees need to understand the purpose and reason behind powers they're given and this is



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where letters of wishes ought to play a part, as explored below.

Managing unexpected situations

As modern trust deeds include a wide range of discretionary powers, trustees will find many terms deliberately drafted to give the widest possible interpretation, with no hint of purpose or reasoning behind the granting of such powers. While giving trustees maximum flexibility to act in unforeseeable circumstances, one of the skills trust officers have to acquire is to extract purpose from a variety of sources, of which the letter of wishes

might be just one and then apply that to their solution.

Indeed, fixation on letters of wishes by trustees, maybe for marketing reasons, risks a formulaic approach that's bound to fail to capture the essence or sentiment of a settlor's purpose. Some trustees have even resorted to using a pro-forma letter and any 'form filling' approach, literally or figuratively, generally runs counter to deducing purpose.

So how can unexpected situations be managed by trustees with any confidence they are using their powers both in the interests of beneficiaries and for the purpose they were given?

Trustee's dilemma

The trustee's dilemma is usually they have a legally binding trust deed with an undefined purpose behind its powers on the one hand and on the other, the settlor's non-binding and informal comments contained in letters of wishes or other more casual exchanges. Key to success is how closely they've paid attention to or initiated discussions with the purpose of discerning a settlor's sentiments and then making sure those exchanges are documented and not forgotten, in the knowledge that they may inform a future event that may occur after the trust officer has moved on and/or the settlor is no longer capable.

In this context, success isn't always capable of measurement, especially when beneficiaries have competing interests or irreconcilable differences, however, sticking to the two golden rules, especially when a trustee may be in an invidious position, can be enough to help them make the best judgment possible and keep them from justified criticism.

Letters and memoranda

A well-written traditional letter of wishes can be worth its weight in gold though, if it contains views, information

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and sentiment peripheral to the strict division of assets and if one reads between the lines, can give insight that informs a trust officer's decision when dealing with something unexpected. By contrast, a bland letter that concentrates on the arithmetic gives no such insight and leaves a trustee with only 'middle of the road' options, at best.

One settlor writing about his daughter: ***"She is just 5 years old and, what can I say, she is the apple of my eye." There's more to be gleaned from this statement than the family tree!***

Likewise trust officers are worth their weight in gold if they commit to the record all those actions carefully choreographed to discern a settlor's purpose. If these records result in a file note or "memorandum of wishes" they are every bit as valid and powerful a tool as a well written letter of wishes.

They are also created at the same time as settlors' thoughts evolve or clarify, are more likely to be current and, while there is no mandate on trustees to follow informal guidance, they should be weighed carefully when reaching decisions.

Conclusion

The message in all this is that while trustees should always have regard to the requirements of trust deeds and

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statute, to the extent they have discretion on important decisions such as investing or distributing trust assets, they must strive to be informed not only of beneficiaries' circumstances but also of the settlor's purpose behind granting them those powers.

The practical steps taken by an experienced trust officer to deduce purpose and sentiment throughout the trust period can and often do impact on decision making quality, especially when trustees have difficult or controversial issues to resolve, and while it can be impossible to make a trust decision that satisfies all beneficiaries, a trustee improves its chances of reaching a good and sound decision by understanding how to systematically record and then use the kind of information referred to here.

This is how trust officers learn to manage one of the biggest risks they face in their work – counsel for the plaintiff!