

Article

Is their wish your command? Thoughts for trustees and settlors on letters of wishes

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It is common practice when a trust is established for the economic settlor to provide a letter of wishes, addressed to the trustees of the trust, setting out their wishes with respect to the administration of the trust. For the trustees, such letters are often a valuable insight into the rationale for the establishment of the trust, how the trust assets are to be utilised and other background information about the family of the settlor and/or beneficiaries.

Some settlors take the opportunity to set out prescriptive 'rules' about how the trust is to be managed, identifying assets that should remain in the family, particular investment guidelines and outlining when and to whom income and capital should be distributed. Some settlors take a more 'hands off' and principle based approach leaving the detail to the trustee to determine how the trust assets are invested and how they are distributed.

Most, if not all, letters of wishes will expressly state that the intention is **not** to bind the trustees and will acknowledge the right of the trustees to exercise their discretion in the management of the trust assets. As a matter of trust law, it is the trust deed which determines the trustee's powers and not the letter of wishes. The trustee must take into account all relevant considerations when exercising their discretion.

A common issue with letters of wishes is that they are not kept up to date. What may have been an appropriate letter of wishes at the inception of the trust may no longer be suitable ten or more years later.

A recent Bermuda case in relation to letters of wishes is the *R Trust* which does not necessarily raise any new points of law but does provide a helpful reminder of issues which can arise with letters of wishes.

Factual Background – the *R Trust*

In the *R Trust*, the trustees of the *R Trust* asked the Supreme Court of Bermuda to consider three key issues:

1. A Public Trustee v Cooper application seeking the Court's approval of a momentous decision;
2. The relevance of the Settlor's wishes; and
3. Whether or not the trustees were bound to give reasons for not following the wishes of the Settlor.

The relevant Trust Deed was dated December 1995 and the beneficiaries were originally the daughter of the Settlor, the daughter's issue, a university with which the Settlor had a connection and 'any other charity'. The Settlor was added as a beneficiary in 1999 and the Settlor's wife in 2007.

The Settlor had only one daughter, from his first marriage, and the daughter had three children. The wife and the Settlor married in 2004 and the wife had four children from a previous marriage.

The Trust Fund comprised a number of companies which in turn hold various investment portfolios. The Trust Fund also included a valuable property in the United States which was held via a company. This property was purchased in 1982 and it is said that the Settlor had an emotional connection to the property and it was considered important by the family more generally.

The Settlor's letter of wishes in 2008 acknowledged that the Trustee had discretion in respect of distributions of either income or capital and then went on to express his wishes in respect of the US property. In the letter of wishes the Settlor expressed the following;

'During my lifetime I would wish you to treat me ... as primary beneficiary, entitled to the use and occupation of [the Property];

Should my wife ... survive me then after my death, I would wish [the Wife] to have sole use and occupation of [the Property];

After [the Wife's] death, I would wish my daughter ... to be solely entitled to [the Property], to be utilized as to both income and capital as she desires'

In the events that happened, the Settlor made a new will in 2011 and in that will expressed the following;

'I give [the Wife] free of any taxes or duties [the Property] ...

In the event that [the Property] is at the time of my death in the name of [the Company], then I give and request that all shares in the Company are to be owned by my wife. It is my wish that the [Property] should not be subdivided during my wife's lifetime and that when my wife dies the property should pass to my daughter ...

I request that [my wife] have a Will that bequests [the Property] ... to [my daughter] after both my wife and I are dead'.

It is not clear who drafted the will, and it may have been the Settlor, but what is clear is that the Settlor did not acknowledge that he owned neither the property nor the shares in the company and therefore the gift in the Will simply failed. It is not clear whether the Settlor was aware at the time of the will that he was not able to perfect the gift and intended to request the trustees to appoint the company shares to him.

The property therefore remained an asset of the Trust Fund via the company and it fell to the Trustee to determine how the property would be dealt with following the death of the Settlor.

The wife contended that the will evidenced the final wishes of the Settlor in respect of the property and that the Trustees were bound to take into account the wishes of the Settlor as set out in the will so that she should receive the property absolutely.

The Trustees contended that the will was one of a number of factors that they needed to take into account when making a decision in relation to the property. The Trustees' view was that the will and the letter of wishes were in line with one another – i.e. the Settlor wanted the property to be available to the wife during her lifetime but ultimately pass to the daughter upon her death and it was just that the mechanisms envisaged were different. They proposed that the property (or the company shares) were appointed to a new United States trust so that the property was held for the wife during her lifetime and then to be held by the daughter.

The judgement approved the decisions of the Trustees for two reasons. Firstly, that the decision of the Trustees accorded with the wishes of the Settlor (i.e. that the will and the letter of wishes were not in conflict). Secondly, the distribution of the property (or company shares) was in the best interests of the Trust as a whole.

Conclusions

While the *R Trust* case does not necessarily raise any particularly novel legal points it does illustrate points that arise frequently and that, with some planning, can be avoided.

Firstly, the most obvious point, is keeping any letter of wishes up to date and consider the letter of wishes together with any other estate planning documents that the settlor may have. This could include their will or wills, if they own property in multiple jurisdictions. It could also include consistency between letters of wishes dealing with different trusts. If all letters of wishes and wills are considered together then issues such as assets being in the 'wrong place' are likely to be identified and, if necessary, remedied to avoid issues such as those in the *R Trust* case.

Secondly, the trustees and settlor should remain in regular contact with one another. It's common for trustees to have up to date identification information from a settlor, but not much more. The trustee should ideally have information about the settlor's family situation and any changes that may occur. Ideally, they should also have some information about the settlor's overall planning, this does not need to be detailed, and could simply be an overview to put the trust in question into context.

Thirdly, trustees should be cautious if the settlor sends multiple letters of wishes which vary wildly. Letters of wishes do not have formal validity requirements, like a will, and therefore a settlor can write letters of wishes themselves at home. They can also ask others to assist them. The trustees should therefore review and discuss with the settlor to assess as far as possible that the settlor is making the decision freely and that they are not being pressured by others.

Finally, the trustees should bear in mind that the letter of wishes is just that, wishes. The trustees should independently exercise their own judgement based on the circumstances facing them at the relevant time and take into account all relevant factors. If necessary they should take advice and, as in the *R Trust* case, seek the approval of the courts. The points above are fairly straightforward and no doubt there are other considerations to add to that list. However, the points are intended to assist the trustee, settlor and beneficiaries of the trust. They are also intended to avoid prolonged and expensive litigation as far as possible which depletes the trust assets and can create disharmony amongst beneficiaries.

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