TRUST LAW

How trustees should deal with letters of wishes

By Anthony Grant

Trusts aren't conceived in a vacuum. Settlors create them for a purpose and letters of wishes can be a helpful guide to inform trustees of that purpose.

But letters of wishes are not straight-forward.

For example, when there is a succession of letters of wishes, each with a different explanation for the way the settlor would like a trust's assets to be administered or distributed, is there a hierarchy indicating which of the different memoranda are to prevail?

This topic arose recently in *Public Trust v Kain* [2019] NZHC 2789, 31 October 2019.

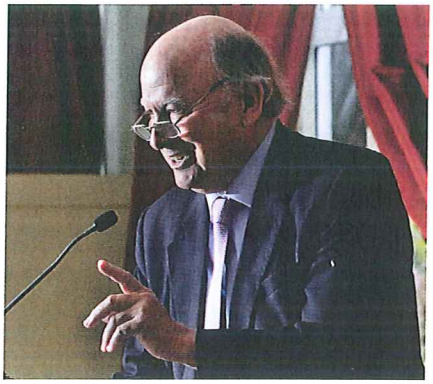
When a settlor expresses wishes that are not recorded in a deed of trust, to what extent do they amount to a de facto modification of the trust? Can a trust be lawfully modified in this way? (For an interesting recent article on this subject see "*Letters of Wishes and understanding the purposes of a Trust*" in the periodical *Trusts & Trustees* (2019) Vol 25 pages 277-282.)

And coming to one of the more fundamental questions: to what extent should trustees comply with a settlor's wishes?

In *Goldie v Campbell* [2017] NZHC 1692, Justice Simon Moore said letters of wishes in that case made it "clear that it was the intention of the settlors" that trustees were to consider the interests of some beneficiaries. He held "it would be entirely inconsistent with this intention if the appointor was empowered to remove [them] as discretionary beneficiaries". [51]

In other words, the letter of wishes was interpreted as an instruction to be complied with.

I meet regularly with the co-trustee of the trusts I have settled and my intentions for the trusts have



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changed very significantly as the years have gone by. When my children were young, I had an obvious concern for their financial security and education. Now that they have all left home and embarked on their careers, my intentions for them have changed.

And as they have left home I no longer need a large house and my focus on housing has changed.

These are changes that most settlors will undergo and reflect upon.

I am aware many lawyers recommend to trustees that the safest course to adopt is to implement a request in the letter rather than embark on a path that may conflict with the settlor's wishes as expressed in a non-binding memorandum.

In an important decision of the Court of Appeal, Justice Raynor Asher said in *Chambers v S R Hamilton Corp Trustee Limited & Others* [2017] NZCA 131, 26 April 2017:

> "Settlors are entitled to express their wishes for the benefit of trustees, and trustees are entitled to take them into account. They can be important guidance to them in the exercise of discretionary powers. However, trustees, whatever a settlor's wishes, must conscientiously apply their independent discretion in exercising their powers. Wishes can only be taken into account if they are not inconsistent with the purposes of the trust as appear from its written terms. Trustees should not blindly obey all settlors' instructions. It is necessary for trustees to read and understand a Memorandum of Guidance to discern the settlor's wishes, and then with those wishes in mind, make an independent assessment of the appropriate course of action, taking into account not just the Memoranda, but all relevant factors." [36]

The most important part of that paragraph is the last sentence and the last three words. Trustees, when considering what action to take, must consider "all relevant factors."

If trustees are to do this before making a decision, they must obviously make comprehensive inquiries for all relevant information that might impact upon a decision.

In other words, it is not good enough for trustees to say they have a memorandum of wishes which expresses a clear preference for decision A and they propose to follow that recommendation. If other factors suggest decision B might lead to a better outcome, the trustees can be sued for not taking those factors into account.

I suspect few trustees are aware of these risks.

And they are real risks. Beneficiaries are gaining access to more trust documentation and, as part of this process, are learning about factors that trustees have taken into account when reaching a decision, even if the beneficiaries are not being given the reasons for a decision.

If a beneficiary learns the factors discussed by the trustees were A, B & C and the beneficiaries know factors D, E, & F were highly materially and arguably should have led to a different outcome, the trustees might end up at the wrong side of a lawsuit and have to pay their legal fees personally, with an additional risk of a costs order if a challenge to their decision is successful.

In my experience as a barrister in this area of litigation, there has been an upturn in disputes involving challenges to trustee decision-making. Trustees who engage in casual decision-making run the risk that their decisions will be challenged with potentially serious financial consequences.

In general, this is a good development for the law of trusts since an improvement in the quality of decision-making is of benefit to beneficiaries. But there will be casualties on the way through as trustees learn to their cost that a failure to make comprehensive inquiries about "all relevant factors" can have adverse financial consequences.

Anthony Grant is a barrister specialising in trusts and estates

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Further updates will be provided in the new year as we prepare for the system launch in February 2020.