

Letters of Wishes

What is a letter of wishes?

It is common practice, and desirable, for a testator to give the trustees of his will guidance as to how he would like them to exercise their powers. A letter of wishes is not intended to be legally binding, but to offer such guidance. It is a separate document from the will, which provides more confidentiality and more flexibility as it can be changed or replaced as the testator's circumstances or those of his family change.

There is no reason why there should not be several different letters, addressed to different individuals, and possibly kept in different locations, although it is helpful for the solicitor who drafts the will to be made aware of the existence of such letters, and where they are located, or who already holds copies.

When is a letter of wishes appropriate?

In many cases a letter of wishes will become the most important practical tool to assist the executors and trustees in reaching early decisions, and sometimes for managing family fortunes, the family business, and general family circumstances for many years.

Sometimes a letter of wishes is used to express the testator's views, or to explain his actions. It may be used to explain why certain family members have not been included as beneficiaries, or why unexpected beneficiaries have been included.

Care of children - directions to guardians

A letter of wishes is an opportunity for a parent to leave instructions with the testamentary guardians of his children concerning religious upbringing, education, residence and so on. These can be recorded and updated in a letter kept with the will, but reviewed regularly as the children grow up and their needs and circumstances change.

Children with special needs are particularly important in this context, and the letter of wishes may lay down guidelines which stretch into the adult life of that person. Discretionary trusts are likely to be incorporated into the parents' wills, as means tested state benefits need to be preserved. The letters of wishes to accompany parents' wills in these circumstances are of paramount importance.

Funeral arrangements

A letter of wishes is very useful to the executors or next of kin when arranging a funeral and burial or cremation. It should help them in knowing who to notify of the death, and in some case whom not to notify. It is far better to keep these personal matters separate from the will, which may not be referred to until after the

funeral. It is also important that such a letter is known to exist, and is accessible by the family, so it is not a good idea for the only copy of such a letter to be kept with the will in the solicitor's strong room.

Distribution of chattels

Letters of wishes are frequently used to indicate how the testator's personal possessions are to be distributed. If there is no surviving spouse to whom chattels would normally pass, executors may have no idea who is supposed to inherit specific items. There is a risk that chattels intended for particular individuals will end up being sold, or more forceful individuals will end up with all the best things, or items promised to one person may end up being given to another, thus paving the way to family upsets or hurt feelings.

Gifts of items worth a lot of money, or things which absolutely must go to particular individuals should be included in the will, but generally a separate letter of wishes concerning personal possessions is a better arrangement than listing everything in the will. Problems can arise if the will itself contains a comprehensive list of possessions some of which by the date of the testator's death may have been lost, destroyed, stolen, sold, or given away. A testator can easily change a letter of wishes during his lifetime if circumstances change, without the expense or hassle of changing his will.

It is good practice to sign and date a letter of wishes concerning chattels (it identifies the most recent version) but it is advisable not to have such a letter witnessed, because it could technically become a legal will or codicil if witnessed as such, causing considerable problems in some cases.

Management of capital

Letters of wishes are often used to indicate how the testator would like his capital managed and eventually distributed, if he leaves his estate or part of it on discretionary trusts. A letter of wishes is also a way of assisting the trustees in deciding whether to accumulate income, or whether to exercise their power to make payments to one or more of the beneficiaries of such a trust.

Tax mitigation

Letters of wishes are frequently used to suggest future tax mitigation plans, or to ensure tax advantages but to impinge as little as possible on the day to day lives of the testator's family after his death.

It is essential to ensure that provisions contained in the will are understood by the testator, and the letter of wishes should be

written in plain English, and should supplement and flesh out the legal and technical jargon found in the body of the will.

A letter of wishes can often be used to explain to those left to deal with the will why a particular scheme was adopted, how it was envisaged that it would be implemented etc. This is not only helpful in the early stages whilst the administration of the estate is progressing, but it can alleviate concerns, and give assurance to relations of the Testator that the Will was structured to be tax effective, not to restrict or disinherit members of his family.

Will a letter of wishes remain confidential?

Trustees will almost certainly be required to disclose a letter of wishes where one party is alleging that suspicious circumstances surround the making of a will. A solicitor who prepares a testamentary instrument should (when asked by a party to relevant litigation) provide a statement relating to the execution of the will and the circumstances relating to its preparation. The solicitor in question should also disclose copies of his will file, which will probably include the letter of wishes.

Documents that would, or might, disclose the reasons surrounding an exercise of the trustees' discretion should not be disclosable because:-

"nobody could be called upon to accept a trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he were not liable to have his motives or his reasons called into question either by the beneficiaries or by the court" (Harman LJ).

A letter of wishes would clearly be very important evidence in a divorce and the Family Courts will generally require disclosure of such documents.

Would a letter of wishes have to be disclosed in proceedings for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975? The answer is probably "yes" in most cases, if the letter of wishes is considered to be relevant.

In an effort to safeguard privacy the testator may leave assets in his will to the trustees of an existing lifetime settlement - which is not a public document in the way that a will is, and which is therefore far less easy to access.

A gift in a will may be non-specific e.g. "I give all my stocks and shares to my friend Paul". The Testator may intend an absolute gift to Paul, but alternatively he may have given Paul instructions as to how he should deal with those shares, or on whose behalf he should hold them. Paul may hold the shares on behalf of minor beneficiaries who cannot hold them personally, or on behalf of an individual who does not wish to hold them personally for matrimonial reasons, or reasons of insolvency, or for tax reasons.

These are dangerous areas and the solicitor advising the testator should consider proceeds of crime legislation, insolvency legislation, tax legislation, disputes in the Family Courts, and the precarious nature of holding assets as a nominee.

Conclusion

Normally the letter of wishes is intended to have legal significance only - ie to provide some guidance for the trustees in exercising their discretions, and to make clear what the purposes and expectations of the testator were, while allowing the trustees to make their own judgments according to the circumstances at the time.

Often the testator intends that the letter of wishes will be made available to the beneficiaries, and he writes the letter with that in mind. The trustees will often be his own wife and/or children, and he may want to make them aware of why he has drawn his will in a particular way, or how he would like them to make choices, and disclosure of the letter is not an issue.

If the testator does want a letter of wishes to remain confidential the best method may well be to seek legal advice from his solicitor, who is to be one of the executors/trustees, and who may respond in such a way that the letter enjoys legal privilege. However, if the solicitor has given the client the advice before the letter requesting it is written it would not enjoy legal privilege. It would not genuinely have been written to obtain legal advice, so legal privilege could not properly be claimed.

Generally speaking nowadays, following recent cases, letters of wishes will have to be disclosed in legal proceedings, but still the reasons why trustees exercise their powers in a particular way remains confidential, and does not have to be disclosed.

It is possible for beneficiaries to bring a claim against trustees for improper exercise of their discretions, provided that the beneficiaries can get round the problem of not having seen the letter of wishes in the first place, and the fact that trustees are not bound to go into detail about the grounds upon which they came to their conclusions.

Not only may trustees by various means be answerable to beneficiaries and would-be beneficiaries, but they are also potentially at risk of criminal prosecution for money laundering, or evasion of tax. The letter of wishes is an extremely useful aid, but it could be a double edged sword to be handled with care.

Full disclosure is often the best course - it may clear the air and avoid further expense, and prevent a breakdown in family relationships. Remember that most letters of wishes are intended to be read by all interested parties anyway.

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