

SETTLORS & THEIR WISHES

Ingrid Taylor, Taylor Shaw

Notes...

Lindsay: I'm pleased to introduce Ingrid Taylor who leads the team at Taylor Shaw, Barristers & Solicitors in Christchurch. Ingrid has significant experience across all areas of the law (including asset protection and succession) and has presented at the Law Society Trust Conferences.

Ingrid, I've asked you to share some insights into helping trustees better understand settlors and their wishes. Could you please give us an overview of what things trustees need to be thinking about when it comes to managing settlors and their wishes?

Ingrid Taylor: Thank you. I think the starting point is that a trust deed will often give no reliable indication of who or how any of the beneficiaries will receive benefit from the trust settlement. Typically a family trust deed will contain very wide discretions, exercisable by the trustees in favour of a wide class of discretionary beneficiaries. The exercise of those discretions may well depend on the settlors wishes as confidentially imparted to the trustees in a letter of wishes.

A settlor's wishes to the trustees are recorded in a letter of wish (which can also be known as a memorandum of wish). The name reflects the informality of it.

A letter of wishes is not a legally binding document but an expression of wish as to how the settlor would like the trustees to exercise the discretions they have as trustees of the trust.

However, it is important for settlors to understand that once they have set up the trust, from that point on, the trustees obligations are owed to the beneficiaries of the trust. It is not for the trustees to administer the trust based on the wishes of the settlors.

That said, as a trustee, you would be breaching your obligations to the beneficiaries if you did not at least consider any wishes that had been made known to the trustees by the settlor.

For trustees, I think that they need to be mindful of a settlor's wishes and how the settlor would like the trustees to administer the trust. Whilst the trustees may not agree with the settlors wishes or may decide not to follow settlors wishes, trustees at least need to show that as trustees they have considered what the settlor may have wished for in terms of the administration of the trust and the distribution of trust assets, especially perhaps at a time when the settlor is not around to advise the trustees themselves.

Lindsay: So the letters of wishes are the way for a settlor to make

their wishes known to the trustees on how they would like the trust to be run. While not binding on the trustees, the trustees should at least consider those wishes as part of carrying out the on-going management and administration of the trust. How often should a letter of wishes be reviewed?

Ingrid: I would recommend that they should be reviewed at least annually by the trustees and I would suggest that is done when trustees meet to discuss the trust administration. If necessary the trustees can ask the settlor to update them then if necessary.

Like all things in people's lives, circumstances can rapidly change. The wishes of a settlor can change over the period of time that the trust is in existence and they are unlikely to be the same at the commencement of the trust, as they are at the end. So, we certainly recommend the memorandum or the letter of wish should be reviewed by the trustees on an annual basis.

I also think it's important to review wishes because we have a variety of family dynamics in our country, including blended families and children with special needs. These are things that can be specifically mentioned in the letter of wish because a trustee may not be directly involved with the family.

For example, a trustee may be unaware that one child may have a gambling problem or the settlor is concerned about the marital status of one of the beneficiaries and so perhaps may request for capital not to be distributed out to one particular beneficiary for that reason.

I think the other area where the letters of wishes become important for trustees is when settlors have died and are no longer around to say how they would like individuals within their family to be treated and dealt with, as opposed to leaving it up to trustees who may not be aware of a particular situation in the family.

Lindsay: That really is important as trusts can go for such a long time. You've mentioned a couple of things that can be included in letters of wishes. What other sorts of things should be included?

Ingrid: A letter of wish would normally cover how the settlor would like the trust assets to be dealt with or used (for example, what assets should be retained, what assets should be sold) and then how those assets should be distributed, both capital and income.

Other examples of the areas in which the letter of wishes may give guidance to trustees could be:

- In terms of appropriate distributions of capital or income to a surviving spouse or family members.

- Where settlors who have younger children may request, for example, that the family home is not to be sold and ask the trustees that they retain it for the benefit of the children to remain living in it.
- On continuing to pay private school fees or to continue children in the lifestyle that are normally accustomed if the trust funds were sufficient to allow that.
- On only providing income and not making capital payments to a child who can't manage money.
- On favouring one beneficiary over another (for example, where one beneficiary may have specific or special needs).
- Why the settlor may think it's appropriate for assets to remain undistributed or dealt with in a particular way because of marital status, sexuality or addictive personalities.

Lindsay: They're good examples Ingrid. That indicates that a letter of wishes can be a very practical document to help guide trustees so I can see why it is important to keep it up to date, especially if circumstances change. Where should a trustee hold their letters of wishes?

Ingrid: I'd recommend they be held on the trust file with other important trust documents. That way they will be easily accessible for the trustees when decisions need to be made.

Whilst they are an informal document and are not legally binding on the trustees, they are critically important for assisting in how the trustees exercise their discretions when making decisions (for example, when making distributions to beneficiaries or dealing with the assets within the trust).

Lindsay: Ingrid, what problems have you seen for trustees with letters of wishes? Are there any things trustees need to be mindful of?

Ingrid: The language used in them should be considered. There is potential for letters of wish to be required to be disclosed to beneficiaries so caution needs to be exercised in not using inflammatory language. Whilst a letter of wish has normally been viewed as a confidential document between the settlor and the trustees, these documents can be required to be disclosed.

Lindsay: So Ingrid, that would make it important for settlors to get advice around how they word their letters of wishes and to make sure all that needs to be covered, is included?

Ingrid: Absolutely. I'd recommend getting advice around the content and how it's drafted just to be sure that it doesn't cause unnecessary acrimony or conflict where it needn't be the case, particularly if it is a document that ends up being disclosed to the beneficiaries.

Lindsay: Ingrid, what good practices would you suggest for trustees for managing settlors and their wishes?

Ingrid: We've talked earlier about reviewing the letters of wishes at least annually so they are kept up to date, especially for the point in time when the settlors are no longer around.

I would encourage trustees and settlors to have open communication and a good working relationship to ensure that trustees are kept abreast of any changes in the lives of the beneficiaries and that will help the trustees when they are required to exercise their discretions regarding the trust assets.

A final comment I would make is that while we have been discussing settlors and their wishes, it's very important that trustees fully understand their obligations are to the beneficiaries of the trust and that the trust has to be appropriately administered at all times.

A professional trustee's involvement can really help with this.

Lindsay: Ingrid, thank you for that overview and your recommendations for good trustee practices around letters of wishes – reviewing them annually, maintaining good relationships with settlors and making sure that they're kept up to date as things can change quickly.

Ingrid: Absolutely.

Lindsay: You've also highlighted that there is also an informal aspect to the letters of wishes in the way they can lay out the settlors thinking on certain matters whilst accepting, as you have pointed out, trustee obligations are to beneficiaries and trust decisions are always the trustees to make.

Ingrid: Correct.

Lindsay: Ingrid, if someone would like to make contact with you, your contact details are on your website www.taylorshaw.co.nz. Thank you for your contribution to this guide.

Ingrid: Lovely. Thanks Lindsay.