

# LETTERS OF WISHES - WHY AND WHEREFORE: IN THE CONTEXT OF ESTATE PLANNING

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Estate planning to be of any use must be flexible. This article emphasises this and as an essential corollary such flexible arrangements often need to be supported by the donor's, settlor's, or testator's requests, recommendations and wishes ("wishes"). By definition, such wishes cannot be legal requirements, conditions, or constituting powers of appointment or advancement or the like. They are of a precatory non-binding nature.

Some relevant circumstances are examined.

### **Lifetime Situation**

- *Discretionary Trusts.* By definition, such trusts are the most flexible form of giving and the beneficiaries are often wide ranging and the trust deed may contain powers to add individuals and persons. However, the legal estate is in the trustees who have normally unfettered discretion as to which beneficiary or beneficiaries are to benefit as to income or capital. The beneficiaries themselves only have a *spes* or hope of benefiting - no entitlement.

Therefore the letter of wishes should request the trustees to consider various aspects including:

- application of income, e.g. to a widow(er)

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- references as to accumulating the income or part of it
- advancement of capital and as to which beneficiary and for what purpose, e.g. house purchase, setting up a business
- the introduction or exclusion of beneficiaries in accordance with the wide powers contained in such discretionary or other types of trust
- winding up of the trust.
- *Accumulation and Maintenance Trusts* (IHTA 1984 s.71). It is sufficient if the beneficiaries or any of them merely receive income entitlement by age 25; and this does of course satisfy s.71 without an advancement of capital. Thereafter the capital is usually left in the discretion of the trustees and similar considerations as referred to above in respect of discretionary trusts apply.

Accumulation and Maintenance Trusts may also require letters of wishes in the above contexts. Modern A&M Trusts often include a widely defined appointed class of individuals who would not be eligible as s.71 beneficiaries but who could benefit when one or more of the original A&M beneficiaries have attained an interest in possession which would be included in revocable terms.

- *Interest in Possession Trusts*. At first glance, one might feel that letters of wishes have no real part to play for this trust. This would be incorrect in many instances.

The modern type of interest in possession invariably contains powers of revocation of the interest coupled with wide powers of appointment in favour of a wide class of beneficiaries, perhaps with power to add beneficiaries.

The exercise of these powers of revocation and advancement of capital and or income may also clearly need letters of wishes from the settlor.

- *Protective Trusts*. (TA 1925 s.33). These trusts will normally include provisions whereby the principal beneficiary can have capital advanced to him/her or have the trust varied into an ordinary interest in possession trust. Again, the exercise of such powers and discretion may well need an appropriate letter of wishes from the settlor.
- *Marriage Settlements* can include a wide range of possible beneficiaries beyond the spouse in particular issue (see IHTA 1984 s.22). Choosing the appropriate beneficiaries again may necessitate letters of wishes.
- *Insurance Trusts*, for example for funding IHT, are often written on

discretionary, Accumulation and Maintenance or flexible interest in possession trusts.

- *Charitable Trusts.* These frequently have as their object a general charitable clause that the trustees can appoint income and capital "generally for such purposes or objects which are from time to time recognised as exclusively charitable according to the law of England and Wales as the trustees in their absolute discretion may think fit." Again, the relevance of letters of wishes is clear.

**Death Situations** are particularly important in the context of Letters of Wishes: by definition, the testator will not be available to guide the executors.

*The mini discretionary trust* for utilising the nil rate band (and possibly supplemented with business and agricultural property) of the first spouse to die avoids bunching the entire estate of that spouse into the survivor's estate. This is probably the single most important tax mitigation possibility in a Will and can save £86,000 with a current nil rate band at £215,000. A well drawn Will containing such a trust will be accompanied by the testator's letter of wishes indicating the beneficiary/beneficiaries who are to benefit from income and/or capital and at what stage (normally the widow(er) during his or her life is the favoured beneficiary).

- *Implied or Precatory Trusts* (IHTA 1984 s.143). It has long proved convenient for testators to give assets such as chattels to the personal representatives or other individuals "in full confidence, but without imposing a binding legal trust or obligation, that they will distribute the same amongst such members of my family living at my death as they shall think fit". If this informal trust/request is carried out within 2 years of the testator's death, no additional IHT is payable beyond what was due in respect of the testator's estate. Clearly the personal representatives (or other precatory trustees) may well need to be guided by an appropriate testator's letter of wishes.
- Similarly *fully secret trusts* where the testator in his Will gives property to X absolutely, with no indication in the Will that X does anything but take the property beneficially; but where either before or after making the Will, the testator tells X (by an appropriate letter of wishes) that he is to hold the property so given for Y. There are also half secret trusts where the testator gives property in his Will to X with an expressed direction in the Will itself that X is to hold the property on trust, but without disclosing the terms of the trust except, no doubt, by way of a letter of wishes.
- Use of *nominations*, for example the death in service amount of a pension/insurance policy, could be nominated at the discretion of trustees to the

deceased's children free of IHT, and that sum could be used in purchasing from the deceased's surviving spouse illiquid or low or non-yielding assets left to her in the Will, e.g. second home, low yielding shares, family company shares.

*Nominations* can also be used to provide cash to beneficiaries under the Will who have to bear the IHT liability. Nominations clearly envisage appropriate letters of wishes.

- A Will may also be accompanied by an appropriate letter of wishes suggesting that the executors and beneficiaries join in appropriate variations or disclaimers under IHTA 1984 s.142.

Finally, some general aspects.

Letters of wishes must be carefully worded so as to avoid the use of any mandatory or directing words: they are by way of guidance to the appropriate persons.

In the case of certain more provocative trusts, e.g. non-resident trusts, it may be better to avoid having letters of wishes because they could constitute "arrangements" within TA 1988 s.660G and therefore part of the trust documentation itself. In these circumstances, the settlor should meet with the trustees and indicate to them verbally what his immediate, medium and long term wishes are likely to be. The trustees can then make an appropriate record.

The letter of wishes or accompanying document can set out the writer's intentions as to whether or not the contents should be disclosed to the beneficiaries (or any of them) and at what times or circumstances.

The subject of this article is concerned with the correct expression of wishes: reminiscent of a cartoon by Pugh of two cats looking at a goldfish bowl and one says to the other "It's not the fishes I'm after, it's the water".