

# LETTERS OF WISHES AND MAINTAINING THE SETTLOR/TRUSTEE RELATIONSHIP



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Discretionary trusts give trustees wide decision-making powers. However, settlors usually want trust monies applied within certain parameters, and may fear trustees, unfamiliar with family circumstances, will not observe the purposes for which they established the trust. Likewise, trustees may lack sufficient information to make informed decisions, and absent clear guidance, may find it impossible to undertake a proper survey of the objects of their fiduciary discretion. A way to inform the trustees' decisions is therefore needed.

There are various ways in which this can be done - having a protector or reserving powers to the settlor are examples. Very often, however, and for certainty, this is done by settlors stating their wishes in a letter (or memorandum) of wishes.

**Letters of wishes (“LOWs”) usually apply to the exercise of trustees’ dispositive discretions, but may extend to other matters such as investment, or purely administrative powers.**



The letters are generally addressed to trustees, but sometimes, for consistency in the decision-making process, to a protector as well. When properly deployed, LOWs have considerable value. Aside of informing the trustees' discretion, that they can be issued quickly and informally, means they can be used to respond to unforeseen changes in family circumstances. Also, if (as is usual) they are expressed to be confidential, they become an ideal medium within which the settlor can express possibly controversial views whilst preserving family harmony and mutual respect.

**The prevailing view now is that LOWs are always material to the exercise of a trustee discretion, and that trustees are therefore obliged to consider them.<sup>1</sup>**

In many cases, the trustees will follow any guidance or wishes expressed by the settlor, and provided they have properly reviewed any other material considerations, there is nothing wrong in that. Conversely, of course, blind observance of a LOW to the exclusion of other relevant considerations is likely to lead to a decision being set aside, as it will not have been made in a sufficiently informed manner.

Given their prominence in the decision-making process, the content of a LOW is very important. This is not simply because the trustees will be making significant decisions in reliance on it. It is also because they may have to consider what weight should be given to the contents. A settlor's wishes for her family may well change over time, as the family dynamics alter. LOWs should therefore be kept under constant review and if necessary revised. In that event, it is helpful to record clearly that

<sup>1</sup> See eg, in Jersey, *In Re Piedmont Trust and the Riviera Trust* [2021] JRC248, [63].

all previous letters are to be disregarded to avoid any confusion. Care should be taken, however, to make sure that a later letter is not improperly motivated as trustees can still give greater weight to an earlier letter if a later one was written at a time when the settlor may have been influenced by an ongoing dispute with one or more of the beneficiaries, whom she then disadvantaged by the content of the second letter.

**Where there is no letter, the trustee should obtain one, because, as was said in one Jersey case, “.....the absence of a letter of wishes makes it important for the good ongoing administration of the [trust] ..for the wishes of the settlors in establishing and settling the funds into it to be determined”.**<sup>2</sup>



The recent pandemic may have resulted in a decrease in direct contact between settlors and trustees. It may also have provided the opportunity for families to reflect on their circumstances and aspirations. As a result, the need to review LOWs has surely increased. Recent court cases involving restructuring of trusts and substantial distributions of trust assets invariably involve detailed scrutiny of LOWs, the weight to be afforded to them, and the way in which trustees took them into account (whether they followed them or not). There have been instances where professional trustees have been rightly criticised for not having a proper LOW or disregarding one they do have on the sale of a significant family asset earmarked for the settlor’s children’s benefit.<sup>3</sup>

So, for those looking at ensuring a proper LOW is in place, what from should it take, and whether an original or a replacement letter? Ideally, a number of things should be taken into account, such as the following;

- Always make it clear the letter is not binding and use language like “In considering whether and how to exercise your powers and discretions” and “I would also like you to consider any suggestions put to you by me or after my death, by my [ ] ...”
- Do not make the letter too long or complicated.
- Avoid expressions like “I am to have the fullest possible access to the

capital and income of the Settlement”<sup>4</sup>

- Make wishes clear and unbiased
- Include a statement to the effect that the settlor wishes the letter to be confidential
- Never include anything that contradicts with the express terms of the trust
- Ensure if relevant that the letter includes wording that it replaces any previous letter

There are those who criticise discretionary trusts for what they see as a tendency to place their most important “terms” within in a confidential LOW, leaving trustees with limited accountability. However, if properly used, LOWs still surely have an important and acceptable role, which balances the need to inform trustees with the prevention of family discord, and is demonstrative of the way in which a trustee and a settlor should interact with one another in the proper administration of the trust.



2 In Re A Trust [2012] JRC066, [62].

3 See in Guernsey, in Re AAA Children’s Trust, GJ 29/2014, [63]; in ignoring the LOW the trustees also ignored the “emotional and sentimental factors”, and wrongly treated the matter purely as an investment decision.

4 The wording of the LOW in the UK Charman litigation which was material to the family court’s conclusion that the trust assets were resource of the husband.

