

THE LETTER OF WISHES

THE TALE YOUR TRUST DOCUMENT DOES NOT TELL

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The Trusts & Estates Group at Murtha Cullina is pleased to provide clients and friends with information about topics of interest in the estate planning area.

If you have questions about the issues addressed in this newsletter, or any other matters involving estate planning issues, please feel free to contact any of the following attorneys:

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If you have used a Trust Agreement as part of your estate plan, you probably remember pages of legal jargon you were told were your directions to your Trustee instructing him or her how to administer your assets for your family after you died. However, you probably thought, "If my Trustee is really supposed to step into my shoes, there is much more that he or she needs to know." A Trust Agreement does not readily convey history or intent. Further, it may not anticipate circumstances which may occur decades in the future. Finally, it may not include guidance that is best communicated in private. A Letter of Wishes (the "Letter") is an informal way for the Grantor of a trust to impart his or her intentions and personalized guidance to a Trustee.

THE NATURE OF TRUST PLANNING

The impetus for trust planning has changed over time. The purpose of a trust in previous centuries was to protect family fortunes from future irresponsible beneficiaries. In more recent times, trust planning has evolved to protect family fortunes from the tax man. However, beneficiaries have not necessarily become more responsible and the realities of current life such as addictions, divorces and our society's penchant for litigation are causing more people to consider long-term trusts for reasons other than taxes. The desire for tax savings and administrative control have contributed to the popularity of so-called "Dynasty Trusts." A Dynasty Trust is a trust designed to continue for

an extended period of time to benefit multiple family generations, preserve trust assets, and mitigate estate taxes that would normally be imposed at the death of each beneficiary. The Letter is particularly useful in the context of these trusts, because Grantors will not have had the opportunity to meet, let alone provide guidance to, future Trustees.

CHARACTERISTICS OF THE LETTER OF WISHES

The Letter is non-binding written guidance that conveys to the Trustee the Grantor's goals in creating the trust and his or her thoughts about the Trustee's exercise of discretionary powers. The Letter is a separate writing read by the Trustee in conjunction with the trust and is not an amendment to or substitute for the trust. Because the Letter is non-binding, it does not limit a Trustee's flexibility to adapt to circumstances that may change over time. It may be updated or amended by the Grantor as the need arises, and the Grantor may issue several Letters for different purposes or beneficiaries.

THE PRIVACY OF TRUSTEE GUIDANCE

Beneficiaries of a trust will generally have the right to review the trust document. Accordingly,

a Grantor may be reluctant to convey in this document his or her thoughts on family history or dynamics. However, the information may be important for the Trustee to be effective. A Letter can be constructed as a confidential document that the Trustee need not disclose. In this regard, its non-binding nature is important so the Letter is not deemed part of the trust, and therefore, subject to disclosure. Notwithstanding the confidentiality of the Letter, it is best that derogatory or hurtful comments not be included in the event of inadvertent disclosure.

WHAT MIGHT BE INCLUDED IN THE LETTER OF WISHES

The language of a trust is often structured to be generic so that it is flexible and may obtain a desired tax treatment. The trust jargon is also designed to produce a certain outcome based on legal precedent in the event its interpretation is challenged. In contrast to the stated language of the trust, a Letter can include anything the Grantor believes will assist the Trustee. Possible considerations are as follows:

- Should any beneficiary be given a preference over others, and why?
- Should distributions be made to mark an anniversary or event, such as the Grantor's date of death, a beneficiary's graduation, a wedding or the birth of a child?
- Should distributions be made to assist with the purchase of a residence or the start-up of a business, and if so, to what extent, and under what circumstances?
- Should beneficiaries be given incentives for success, such as travel or study abroad, when a Trustee makes distributions for education?
- Should Trust funds be used for the guardian of a minor beneficiary, such as for the remodeling of the guardian's house to accommodate the beneficiary, to provide for family vacations or to maintain parity of lifestyle for the guardian's children?
- Should concerns regarding beneficiary behavior, such as financial irresponsibility, mental or physical impairment, addiction to drugs or alcohol, gambling, asset protection

in the event of divorce, litigation or bankruptcy, be taken into account?

- Should preference be given to current or future beneficiaries, and should the availability of other resources be considered?
- Should trust investment strategy refinements, such as the favorability of environmentally responsible or progressively managed companies, be used?
- Should the Trustee manage or retain unique family assets, such as family homesteads, intellectual property, artwork, and collectibles?
- Should family business issues be taken into account, such as the role of family members, retention versus sale or the use of inside or outside managers or board members?

LETTERS OF WISHES TO OTHERS

There may be reasons for the Grantor to pen Letters of Wishes to individuals other than a trustee:

Beneficiaries. The Grantor may want to express his or her reasons for the trust terms. He or she may also wish to say things not easily said during life.

Family. The Grantor may want to convey practical information such as contact information for advisors or directions for final arrangements. The Grantor may also want to convey personal information, such as desired family values, hopes for family harmony, reasons for equal or unequal treatment, wishes for education and development of family members.

Guardian of Minor Child. Of significant concern for parents of minor children is raising those children in their parents' absence. A Letter to guardians could disclose:

- educational goals;
- interaction with extended family;
- religious preferences;

- a child's likes, dislikes, friends, activities; or
- a child's medical history, medical providers, allergies, special needs.

HEALTH CARE AGENT

Although most clients have medical directives, those documents may be generic and prepared in conjunction with a state's health care statutes. A Letter may be more specific and expand on the Grantor's wishes regarding lifetime and end of life factors that should be considered. In addition, practical information regarding medical history, insurance, physicians, and other service providers may be disclosed.

CONCLUSION

A Letter may provide great comfort to both a Grantor and a Trustee. The Grantor may feel that he or she has done his or her best to educate the Trustee while the Trustee may feel he or she has guidance in exercising discretionary powers. Further, the Letter may support a defense to a challenge to the good faith exercise of such discretionary powers by substantiating the Grantor's state of mind as to the contemplated actions of the Trustee. Finally, it is important to note that although the Letter is non-binding and informal, it should not contradict the terms of the trust. Accordingly, it is best to consult your Murtha Cullina attorney when constructing and updating your Letter.

This newsletter is one of a series of publications by Murtha Cullina LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have.

MURTHA CULLINA WELCOMES NEW PARTNER

Murtha Cullina's Trusts & Estates group is pleased to welcome a new partner, Suzanne Brown Walsh.

Ms. Walsh is joining Murtha Cullina's Trusts and Estates Department where she will practice estate planning, particularly for families of children with special needs, and elder law and estate and trust administration.

Ms. Walsh is a past Chair of both the Connecticut Bar Association's Estates and Probate and Elder Law Sections. She serves as one of Connecticut's eight Uniform Law Commissioners and frequently speaks to national and regional groups on various estate planning topics. She has also been interviewed on these topics by numerous media outlets including PBS NewsHour and Bloomberg News. Additionally, Ms. Brown Walsh is a Fellow of the American College of Trusts and Estates Counsel (ACTEC).

Ms. Walsh is a member of the Connecticut Bar and received her B.S. degree from Boston University and her J.D. from Suffolk University Law School.

