

TRUSTS AND ESTATES LAW

A new significance for memoranda of wishes

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Memoranda of wishes invariably state that, although trustees should take note of them, the wishes aren't binding and trustees can ignore them.

Memoranda of wishes have been the subject of some recent cases, two of which are of particular significance.

The first is *Goldie v Campbell* [2017] NZHC 1692. In this case, it was argued that a husband could, with various powers in a trust, organise to take all the trust's assets for himself.

The argument was rejected by Justice Moore. One of the reasons he gave for rejecting it was that, in two memoranda of wishes, it was said that the trustees should consider the reasonable needs and requirements of his two daughters as being of "paramount" importance:

"After making such provision ... you should consider the reasonable needs and requirements of my daughters [A] and [B] as paramount and having priority over the needs and requirements of all other beneficiaries."

Moore J held that this provision prevented the husband from being able to remove the daughters and taking the trust assets for himself. He said:

"It would be entirely inconsistent with the intention if the appointor was empowered to remove the daughters as discretionary beneficiaries." (para [51])

In saying this, Moore J has elevated the status of memoranda of wishes to a new level. By this reasoning, memoranda of wishes are no longer

advisory but can even be used to interpret the meaning of the words of a deed of trust.

Is this correct?

Memoranda of wishes are transitory. It is common for settlors to revise their memoranda on a regular basis, and for them to express quite different opinions about what should happen with a trust as the years go by.

Assume that there were two applications to a court to interpret a trust, and the applications were made a year apart.

On the first occasion, the operative memorandum of wishes was the one which Justice Moore had in front of him – which said that the interests of the daughters were paramount. If that memorandum can be used to interpret the deed, then the wording of the deed suggests that the settlor could not remove his daughters as beneficiaries.

Assume, a year later, that times have changed and the daughters are now completely out of favour. The application to interpret the deed is made at the time when the second memorandum is in existence. By reference to the second memorandum, the deed would presumably be interpreted as having the opposite outcome.

A set of principles for interpreting deeds of trust which produces two quite different results will bring the law into disrepute, and I therefore suggest it is not appropriate for the court to place significant reliance on a memorandum when seeking to interpret the meaning of some words in a deed of trust.

Somewhat surprisingly, the judgment in *Goldie v Campbell* does not record if the memoranda had the usual statement that the wishes were intended to be advisory, only. If the memoranda contained



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that form of wording, that would be an additional reason for not placing significance on the memoranda as a tool for interpreting the meaning of the deed of trust.

Memoranda of wishes are a helpful guide for trustees precisely because they are so flexible. But it is their flexibility that makes them an unwise guide to the meaning of the words of the deed of trust itself.

The second case I wish to mention is *Clement v Lucas & Another* [2017] NZHC 3278. There, trustees who ignored a memorandum of wishes when they made a decision were told they had "a duty to consider the purposes for which [a] Trust was established and the intentions of the Settlor ...". Their failure to do this amounted to a breach of duty and it justified the setting aside of their decision.

Both these cases have considerable significance for practitioners. They show that memoranda of wishes may have much more power to influence trustees than is commonly understood.

With an increasing need for settlors to diversify their powers in a trust, memoranda of wishes have a heightened importance. They can become a more influential tool to cause trustees to achieve a settlor's purposes for a trust. ❖