PRECATORY MEMORANDUMS – Are they legally binding? Should they be disclosed? What are the Courts saying?

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What is a precatory memorandum?:

A precatory memorandum is a document, which is not typically considered to be binding upon trustees, but which is an expression of wishes made by a testator or settlor as to how executors or trustees might exercise their discretionary powers given in a Will.

Memorandums-non-precatory:

Traditionally, for a memorandum to be binding, it should be incorporated by reference into the Will. The principal basis of the doctrine of incorporation by reference, whereby an unexecuted document entirely separate and apart from the Will itself may be considered part of a duly executed Will, relies on the existence of the relevant document at the time of the execution of the Will. Similarly, an existing document may be incorporated into any subsequent Will simply by sufficiently referencing it.[1]

Incorporation by Reference:

The doctrine of incorporation by reference can only be applied where there is a valid independent Will into which the document may be incorporated.[2] The document must be in existence at the time of making the Will, must be referred to in the Will, must be described as being in existence, and equally as important, the reference in the Will must be sufficient to identify the document so that it is clear as to the document which is to be included.[3]

Precatory Memorandums – Legally Binding?:

Case law in Ontario historically has treated memorandums not incorporated by reference as 'precatory', in other words, an expression of desire made by a testator, which is not intended to be legally binding.

The Ontario High Court Cases of ***Re Blow 1977***[4] and ***Re Rudaczyk 1989***[5], are cases where the Court ultimately found memorandums to trustees to be merely 'precatory', distinct from the Will, not legally binding, and documents which should not be admitted to probate.

The Court in the 19th Century tended to view 'precatory' words as creating a 'precatory trust'. Yet, as early as 1884, in the case of ***Re Adams and Kensington Vestry***[6], Cotton L.J., expressed his concern in this regard stating, "***The Court ought to be very careful not to make words mandatory, which are a mere indication of a wish or request***."

Certainly, the more recent authorities of which there are few, tend to treat 'precatory' wishes as not creating any legal rights, rather, simply as statements of wishes.

The 1965 English Court of Appeal Case of ***Re Londonderry's Settlement***[7] appears to be the accepted authority worldwide, for guidance as to the types of documents which need not be disclosed. In this case it was held that the treatment of a letter of wishes generally, should be that it not be disclosed, and a beneficiary has no entitlement as of right to see such a letter.

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[1] Feeney's Canadian Law of Wills, Fourth Edition, James MacKenzie, Butterworths, c.6, Republication, Revival and Incorporation by Reference, paragraph 6.17 p.6.7
[2] *Supra,* para. 6.19 p.6.8
[3] Supra, para. 6.21 p.6.8
[4] Re Blow, Ontario High Court of Justice, (1977) 18 O.R. (2d) 516
[5] Re Rudaczyk, Ontario High Court of Justice, 69 O.R. (2d) 613 [1989] O.J. 1368
[6] Re Adams and Kensington Vestry (1884), 27 Ch. D. 394,410, see also Bourne Estate v. Bourne, Carswell EstetesPartner (Ontario) 2000 Ont. S.C.J. 793
[7] Re Londonderry's Settlement [1965] 2 WLR 229

Should Precatory Memorandums be Disclosed?:

The recent unreported case of ***Re Rabaiotti's Settlements***[8] in the Jersey Courts has caused some controversy with respect to the issue of disclosure. In these proceedings, a beneficiary sought disclosure of certain trust documents, including trust deeds and accounts, and letters of wishes.

It was held that in relation to the Trust documents, that the beneficiary of a Trust is normally entitled to inspect documents such as the Trust deed and other documents showing the nature and value of Trust property. Further, in relation to precatory memorandums, the Court held that it had the discretionary power to either refuse disclosure of a letter of wishes where it would not be in the best interests of the beneficiaries collectively, or to allow disclosure where there exists good reason to do so. The onus would be placed on the beneficiary to show clear grounds for disclosure in order for the court to make such an order.

It appears there are few cases on this point alone, however one such case dealing with the disclosure of such documents to beneficiaries is the 1992, Court of Appeal Case of New South Wales, Australia, ***Hartington Nominees Pty Limited***[9]. This case held that there was a duty of confidentiality owed to the testator and despite a minority judgment to the contrary, and the Court at first instance ruling in favour of disclosure, the Appeal Court declined to order disclosure of a letter of wishes on grounds which included the letter not constituting a Trust document, and further a duty of confidentiality owed to the testator.

Summary:

- A Beneficiary is not normally entitled to disclosure of a 'precatory' memorandum, which is generally considered to be confidential as to the trustees and the testator.

- A Beneficiary is normally entitled to inspect trust documents, yet the proposition exists for court discretion to refuse such disclosure.

- There is authority pursuant to ***Re Rabaiotti's Settlements*** for the premise that Court discretion exists to support an argument for ordering disclosure and as such, perspective clients should be so advised.

- Perhaps for an Estate Practitioner, the cautious approach may be to obtain comprehensive file notes in lieu of a 'precatory' memorandum so as to avoid contentious family battles and any ensuing liability.

- If a trustee is in doubt re disclosure, a trustee should seek the opinion, advice and directions of the Court accordingly, and likewise persons with a financial interest may take this same approach.

Worth Noting:

The Estate Practitioner might encounter situations where "**secret trusts"** exist and which are an exception to the strict requirement that a memorandum must be an existing document in order for it to be incorporated by reference, and considered legally binding. After making a Will, a testator may informally impose a "**secret trust**" the difference being, however, a testator may only do so with the knowledge and acquiescence of a beneficiary.

The terms of a fully-secret or half-secret trust may be contained in a document prepared subsequent to the Will, or may be communicated orally. It is important however, to be aware of the difference between on the one part, a moral obligation imposing no legal duty on either the trustee or beneficiary as a result of a 'precatory memorandum', as opposed to on the second part, a legally recognizable secret trust considered to be both legally binding and enforceable.[10]

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[8] Re the Rabaiotti: 1989 Settlement: Royal Ct: (Birt, Deputy Bailiff and Jurats Myles and Georelin) May 30th, [2000] unreported WTLR 953

[9] Hartington Nominees Pty Ltd. v. Rydge (1992) 29 NSWLR 405

[10] Re Snowden [1979] 2 All E.R. 172 (ch.) per Megarry V.C.; For a review of this topic, see Hull, Ian "Secret Trusts – What are they and What do they Look Like?" (2001) 40 E.T.R. (2d) 147.