How to stop beneficiaries from obtaining information about Trusts and how to stop the Courts modifying Trusts under s 182 of the Family Proceedings Act.

In last month's article I referred to a case from New Zealand and a case from Bermuda in which beneficiaries sought copies of trust documents. In both cases the trust deeds had clauses that purported to prevent the trustees from giving information to beneficiaries and in both cases the Courts declined to uphold the constraints, at least in part.

Beneficiaries who want Trust documents are usually at war with other beneficiaries. Trusts that were supposed to be vehicles of personal enhancement become vehicles of division, and family destruction.

This is one of the fundamental problems with Trusts. Greed, rather than hard work and personal endeavour can overwhelm the attention of beneficiaries.

The Trust is a creation of the Courts in England. The Courts of the Civil Law countries created something similar but different – the Foundation.

As I understand it the fundamental difference between Trusts and Foundations is that Foundations are intended to benefit a particular purpose while a trust is intended to benefit particular people. If a Trust is intended to benefit some identified people, it is reasonable that the Courts should say that the people concerned (the beneficiaries) should be able to see some of the documents that were intended to benefit them and be able to hold the trustees to account. But when property is held for a general purpose, there is no reason why a Court should require that any potential beneficiaries should be given Foundation documents.

There has been an explosive growth among Common Law countries in recent times in the creation of laws that allow the establishment of Foundations.

I will illustrate the difference between the rights of disclosure in Trusts as opposed to Foundations, by reference to the present laws of Guernsey.

As in New Zealand, the Privy Council's decision in *Schmidt v Rosewood Trust* [2003] UKPC 26 is the touchstone for guidance concerning the documents that a beneficiary of a Guernsey Trust is entitled to see.

When it comes to Foundations, if a parent establishes a Guernsey Foundation that can benefit his/her children, the children can be categorised as "enfranchised" or "disenfranchised". They might be "enfranchised" when they have no marital conflict, but "disenfranchised" when their marriages are in strife. In their "disenfranchised" state the children are unable to require disclosure of information from the Foundation.

This regime has real attractions. A parent is able to establish an entity for the benefit of members of his/her family in a way that prevents the children from having access to much of the relevant documentation.

One of the major problems with Trusts that are intended to benefit specific people is that the Trusts will usually be classified by s 182 of the Family Proceedings Act and its Commonwealth equivalents, as "nuptial" settlements and be vulnerable to modification by the Courts. Even though the trusts may not contain much – or any - relationship property, they are "nuptial" settlements which the Courts can modify in any way they like.

I am not aware of any cases where a Foundation has been held under the laws of countries that have inherited the equivalent of our s 182 to be a "nuptial" settlement.

I will speculate. If a child knows that he/she is able to benefit from a Foundation established by a parent after the child is in a relationship, the Foundation would arguably be a "nuptial" settlement. But if the child doesn't have access to its relevant documentation, a Court will not have sufficient information to undo it.

An ability to prevent a beneficiary from being able to access information about a Foundation has two obvious benefits. First, it prevents a child from being able to acquire documents that could be disclosed to the child's estranged spouse. Second, if the information is not obtainable, a Court cannot modify the Foundation since it will not have access to sufficient information about it to do so. I should add that if a New Zealand Court attempted to modify a Guernsey Foundation, it would have a major problem in persuading the Courts in Guernsey to implement it. Many of the tax havens derive a large part of their revenues from financial services and if they were to allow other countries to neutralise the benefits of the structures that are permissible under their laws, their economies could suffer.

There is no pressure in New Zealand at present for Parliament to establish a law to permit the establishment of Foundations, and any Foundations that are formed by New Zealanders will be formed under the laws of other countries. For readers who don't know these things, New Zealand's closest neighbours that have laws that allow the creation of Foundations are Vanuatu and the Cook Islands.

For parents who wish to establish a financial vehicle to support their children and who find the attitude of New Zealand Courts to be intrusive and unfair, there may be an attraction in establishing a Guernsey Foundation, rather than a Trust.

The laws of each territory will be different and readers who wish to explore these opportunities should not stop at Guernsey, but should compare the benefits and detriments of the Foundation laws in other countries that allow the establishment of Foundations.