TRUSTS AND ESTATES LAW

Witholding trust information from beneficiaries

By Anthony Grant, Trusts & Estates Litigator

Perhaps the most difficult proposal in the Trusts Bill that is being drafted at present is the requirement that trustees must disclose information about trusts to all beneficiaries.

Everyone knows that the provision of such information will harm some beneficiaries. They will lose the motivation to work and to achieve their potential. The term "trustafarian" is sometimes used to describe them – beneficiaries who have become lazy and dependent on trusts.

Jersey is leading a path out of this predicament. First came judge-made law. In *In the Matter of C Settlement* [2017] JRC 035A, the Royal Court in Jersey held that trustees could withhold information about trust wealth from a 20 year-old beneficiary. It was held that "if he knew of the wealth to come, the beneficiary may not complete his tertiary education, or may not bother to seek employment". "He ... may decide instead upon a life of party-going or riotous living, or become reliant upon alcohol or toxic substances, or cause difficulties with siblings or other members of his family not benefiting under the trust in question." (at para [23])

"It is not in [the son's] interests to learn at this stage of the enormously substantial trust of which he is a principal beneficiary. To have such knowledge might upset the balance of his life at a time when he is still maturing. This Court has every sympathy with that approach and considers that the views of the trustee and [the son's] mother should be respected." (at para [25])

This laudable development has now been turned into statutory law. Jersey has recently enacted the Trusts (Amendment No 7) (Jersey) Law 2018, which came into effect in June this year. It contains a number of amendments to the Trusts (Jersey) Law 1984. Article 29 of the Act relates to the disclosure of trust information, and it has been redrafted in recognition of the reality that it may be undesirable or inappropriate to disclose information to a young or spendthrift beneficiary, or where there are genuine concerns as to the effect of disclosing sensitive information.

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The amendment authorises a trustee to withhold information about trusts from a beneficiary who asks for information, if the trustee is satisfied that the disclosure of the information is not in the interests of the beneficiary or of the beneficiaries as a whole.

The trustee's decision can by challenged by the beneficiary, and a judge of Jersey's Royal Court has the ultimate say on whether the information is to be withheld.

This regime seems so sensible that it is helpful to look back to the reason why lawmakers have said that all beneficiaries should in general be informed about trust wealth and entitlements.

The underlying principle for disclosure is that, if beneficiaries are kept in the dark about trusts, the trustees will be free to do what they want without regulation or control.

But that principle does not require every beneficiary to have all the relevant information about a trust. If there are six beneficiaries and information is given to, say, three of them, those three can exercise the control that the court requires.

If our Parliament will not follow the Jersey model, I have wondered if there may be a second mechanism for withholding sensitive information from vulnerable beneficiaries. If a person is appointed a beneficiary for the minute that it takes to make a distribution to him/her and the appointment is then revoked, will that person have the right to be provided with information about trust assets, etc.? Any enquiry of the trustees will be made at a time when the person has ceased to be a beneficiary, and a court might decide that that is a good enough reason to withhold the requested information, or perhaps for that reason in conjunction with the fact that the person may have no expectation of a future distribution.

A parent who settles a trust and adopts a policy of not naming children as beneficiaries except for the minute that it takes to make a distribution will have concerns that, if he/she dies, the child will not be a beneficiary. This concern can be overcome by making arrangements for the child to be appointed a beneficiary under the settlor's will, or by making arrangements for other trustees to continue the policy of only appointing the vulnerable person a beneficiary for the minute that it takes to make a distribution to him/her.

It is obviously preferable for Parliament to create a clear rule so that litigants do not have to rely on the uncertainty of a judicial process involving non-specialist judges, and often non-specialist advocates, to fashion a favourable response to this problem. Jersey has an enviable reputation for its laws concerning trusts, and New Zealand would be well served if we followed the way in which it has sought to tackle the problem of disclosing trust information to sensitive and vulnerable beneficiaries.