

## TRUST LAW

# Can trustees withhold a memorandum of wishes?

By Anthony Grant

An important issue facing trustees is the requirement that the new Trusts Act will impose on them to make trust documents available to beneficiaries.

The recent case of *Jacomb v Jacomb* [2020] NZHC 1764, 21 July 2020, is relevant to two aspects of this exercise. The first involves circumstances which justify withholding documents from a beneficiary.

In the *Jacomb* case the beneficiary, Veronica Jacomb, was the daughter of two of the trustees. She had left home at 15, become a drug addict and, it appears, a member of the Mongrel Mob. She had convictions for assault, theft, receiving stolen property, burglary, shoplifting, wilful damage and drug offences. She sued the trustees, wanting copies of what the judge, Cooke J, called "core trust documents".

Cooke J has withheld them from her, saying she would be likely to use information from them for improper reasons. He said the best interests of the trust and its beneficiaries would be harmed if she were to have them.

*Jacomb* had previously used information to undermine her parents in their capacity as trustees in an attempt to coerce them into making distributions for her, and her actions had harmed the trust and its beneficiaries.

In reaching this decision, Cooke J followed the Supreme Court's decision in *Erceg* [2017] 1 NZLR 320. His decision would almost certainly be the same if the Trusts Act were in force.

A second aspect involves the identification of "core trust documents" that a trustee must provide to a beneficiary. I write about this since it would seem



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likely that these are the documents the trustees will be asked to provide to beneficiaries – or some beneficiaries, at least – when the Trusts Act comes into force.

Section 51(3) of the Trusts Act 2019 doesn't speak of "core documents" but of "the basic trust information" which is to be given to beneficiaries. This is defined to include "a copy of the terms of the trust or trust information."

The term "trust information" is defined with deliberate imprecision in s 49(a). It includes "any information that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced". Is a memorandum of wishes "trust information"?

In the *Jacomb* case, Cooke J said, "documents concerning the settlor's wishes can be seen as documents that are rudimentary in order for a beneficiary to understand the nature of the trust and their interest in it." [16]

Although Cooke J has said a memorandum of wishes should be seen by a beneficiary, the entitlement of a beneficiary to see this category of

documents is not clear.

The law on this topic is set out in detail in *Breakspear v Ackland* [2008] All ER 260. In short, a beneficiary has no automatic entitlement to be given a copy of a memorandum of wishes.

One of the most recent statements from the Court of Appeal on the availability of a memorandum of wishes was given in *Addleman v Lambie Trustee Limited* [2019] NZCA 480. Here, the Court of Appeal recorded its apparent approval with the trial judge's statement that a memorandum of wishes "is often regarded as highly confidential" [25] and, by implication, is not usually to be provided to beneficiaries.

That is not to say that trustees cannot disclose memoranda of wishes when they think it appropriate to do so and, in my experience, they often do.

This is a difficult area of law from a policy point of view. On the one hand, the courts will wish to respect a settlor's desire for confidentiality, especially if disclosure of a letter of wishes is likely to lead to the destruction of family relationships. On the other hand, a beneficiary may be unable to challenge a decision of the trustees if an important memorandum, on which the trustees have relied, is withheld from the beneficiary.

Beneficiaries are to be provided with "basic trust information" to give them sufficient information "to enable the trust to be enforced" as per s 49(a)(ii).

But there will be cases where, if a memorandum of wishes is withheld from a beneficiary, it will be impossible to ensure a trust is being managed in ways that comply with a settlor's intentions. It is obvious the courts will have to resolve this area of law.

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