

TRUST LAW

Complying with disclosure under new Trusts Act

By Anthony Grant

For many people, the most contentious aspect of the Trusts Act 2019 is the obligation to inform beneficiaries of the existence of a trust and that they are beneficiaries of it.

Many parents are concerned that by informing their children they are beneficiaries of a trust and informing them about the trust's assets may (a) cause the children to become greedy and divisive as they explore ways of forcing the trustees to make distributions to them, and (b) cause them to become demotivated by the expectation that they will receive trust wealth.

In some circumstances trustees do not have to give beneficiaries information about the trust but those cases are likely to be the exception.

In a conventional discretionary trust, the requirement for disclosure is likely to prevail.

Fortunately for most trustees, the typical New Zealand family trust is wholly discretionary insofar as children are concerned.

When a trust gives a fixed interest to a beneficiary, the knowledge of the interest can be very damaging. If, say, a child is due to inherit \$20 million at the age of 25, the person may become demotivated and want to wait for the day when he or she hits the jackpot.

In those circumstances the trustees may be able to use the provisions in sections 51(2), 53 and 54 to avoid informing such a beneficiary of his/her entitlement.

I was talking recently with a firm that acts as a corporate trustee for a large number of trusts. It wanted to know more about its obligations and this prompted me to think further about the ways trustees can inform beneficiaries about their rights under a trust without causing the beneficiaries to become demotivated.

There is, of course, a delay of 18 months from the date of enactment on 30 July 2019 before the statutory obligation of disclosure arises.

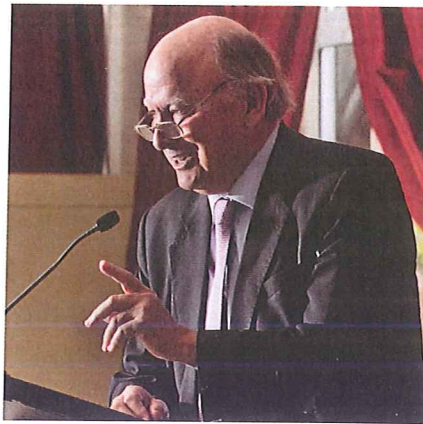
Readers who are trustees, either in person or in their capacity as directors of corporate trustees, will want to ensure they comply with the statutory obligation of disclosure.

A standard form of letter may assist them in this task.

Such a letter might go something like this.

"Dear []

I write to you in my capacity as a trustee of the [X] Trust which I will call "the trust."



Anthony Grant

When a trust gives a fixed interest to a beneficiary, the knowledge of the interest can be very damaging

Your parents formed the trust in [year] and arranged that they, their children and grandchildren would all be beneficiaries of it.

The trust is what is known as a "discretionary trust". This means none of the beneficiaries have any right to any money or property from the trust. Each of the beneficiaries has only a right to be considered by the trustees for a distribution.

Discretionary trusts are common in New Zealand. They are generally established by parents for themselves and their family. The parents will typically want to try to ensure they have sufficient material support from the trust for the rest of their lives.

Many parents have not wanted to inform their children of the fact that a trust has been created and that their children are discretionary beneficiaries of it, from a fear their children, on learning these things, might become demotivated in the expectation that they will receive substantial sums of money from the trust.

This is not intended to be the case with the [X] Trust.

Your parents made it clear when the trust was created that it was not to become a means for demotivating children. If the trustees believe making a distribution to a beneficiary may weaken a child's resolve to work hard and succeed on his or her own merits, then the trustees are unlikely to make distributions to that person.

If the trust has sufficient liquid assets to be able to make distributions, the trustees may be willing to consider making loans to children or assisting them with the payment of educational fees in the hope that such forms of financial assistance will assist a child to further his or her career based upon his/her own self-motivation.

Beneficiaries of a trust are entitled to be given a copy of the Deed of Trust (most New Zealand trusts are formed with such a document) together with the trust's annual financial statements if it produces them.

If you would like to see the Deed of Trust and the trust's most recent financial statements, can you please let me know and I will provide you with copies of them.

You should feel free to contact me or any other trustee if you want more information about the trust but in doing so you should be aware that in general, trustees do not have to disclose any details of their discussions and deliberations concerning any distributions they make or decide not to make.

If in the years ahead you would like to bring to the trustees' attention any reasons why you consider they should make a distribution to you, you should feel free to do so, but you should be aware the trustees are likely to be guided in their response by some fundamental principles, namely:

- ♦ they do not intend to make distributions they consider may result in a beneficiary being demotivated in their studies and ambitions;
- ♦ they may be sympathetic to requests for financial assistance where the provision of such assistance will assist a beneficiary to advance more quickly down a particular career path; and
- ♦ they will want to ensure the trust has a constructive, and not a destructive, effect on family relationships and on a beneficiary's degree of motivation to succeed in life.

They will not want to make distributions if they may be intercepted by a spouse/partner or by a creditor.

Yours faithfully

A letter written broadly along these lines ought to achieve the statutory purpose of ensuring there can be a check on trustees while also achieving the purpose that most parents would want for their trust – namely, that the prospect of trust wealth will not demotivate and harm their children.

Having said that, there is a mechanism in the Act that might avoid the need to write to beneficiaries in the way I have suggested, and I will make that the topic of my next article.

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