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# Does New Zealand law permit 'purpose trusts'?

WILLS & TRUSTS OPINION

October 11, 2024 Anthony Grant

Section 15 of the Trusts Act 2019 defines an "express trust" by reference to the three traditional criteria that are used for this purpose but with one major change.

It describes the three criteria as:

- an intention to create a trust;
- the existence of trust property; and
- the identity of beneficiaries.

But the third criterion then diverges dramatically from orthodox trust law.

It says an express trust will be created if it identifies the beneficiaries *"... or the permitted purpose of the trust"*.

The italicised wording gives the impression that our law will acknowledge the existence of a trust which has no identified or even identifiable beneficiaries, so long as the trust has a "permitted purpose".

The term "permitted purpose" is defined in s 9 of the Act to mean "a charitable purpose and any other purpose for a trust that is permitted at law and specified in the terms of the trust".

Does our law recognise a trust with no identifiable beneficiaries but which has a "permitted purpose"?

The traditional answer is clearly "no" and the wording of s 15 of the Trusts Act is very surprising with its suggestion that it does.

## Trustee obligations

The concept of "purpose trusts" is not widely known in the common law world. These trusts are created to fulfil a purpose and not for the benefit of any identifiable people. English law (read "New Zealand law") has not historically recognised "purpose trusts" because they have no identifiable beneficiaries who can enforce compliance with the obligations of trustees.

There is a major exception to this, namely charitable trusts, and these are exempt because the Attorney-General has been given statutory oversight of such trusts.

The relevance of "purpose trusts" arose, in part, in the recent case of *Hoglie Trustees Ltd* [2024] NZHC 2832, 1 October 2024.

The trust deed in that case described various "discretionary beneficiaries" but the term "discretionary beneficiary" itself was not referred to elsewhere in the deed. The deed also referred to "final beneficiaries" but it didn't identify who they were. And it referred to "beneficiaries" without identifying anyone in particular.

In *Hoglie* the judge ruled there was no "trust" since there were no identified beneficiaries.

The decision was delivered on the papers and it appears the judge may not have been referred to the definition of "permitted purpose" in s 9. His decision could be interpreted as saying – in his words – that our law will

recognise a trust which has no identified beneficiaries "so long as its permitted purpose is identified clearly and with reasonable certainty". [8]

## Formal supervision

Countries that have adopted the civil law regime tend to have foundations which recognise what might be called "purpose trusts" but, unlike the common law, foundations are typically the subject of formal registration and supervision. That is the main difference between civil law foundations and common law trusts.

In *Hoglie,* the judge held there was no trust since "the trust fund is not stated to require any particular purpose" and "the deed of trust did not adequately identify the beneficiaries or the permitted purpose of the trust it was intended to create".[21, 22]

The words underlined suggest the Trusts Act 2019 will recognise the existence of a valid trust even though no beneficiaries can be identified, so long as the "permitted purpose of the trust" is clear.

I do not believe either the Law Commission (which was responsible for conceiving the Trusts Act 2019) or Parliament ever intended to recognise trusts with no identifiable beneficiaries and there are good reasons for this.

A settlor who wants to create a trust that will never be the subject of third-party scrutiny need only identify a "permitted purpose" and make no reference to any beneficiaries.

If the declared purpose is, for example, to "help people in financial need" and if those words are held to be a sufficient "permitted purpose", it would leave the trustees free to do whatever they liked with the trust assets without any form of oversight or exterior restraint for the full duration of the trust's existence.

New Zealand would have enacted a law of foundations without having the corresponding regime of registration and regulatory supervision.

It is hard to conceive that either the Law Commission or Parliament could have intended that there should be such a revolutionary outcome.

***Anthony Grant is an Auckland barrister and trustee speciaising in trusts and estates***