

Trustees' Duties to Disclose Information to Beneficiaries

By Robert Worthington

High net worth families will often use discretionary trusts for asset protection, tax and estate planning, and charitable purposes. Maintaining privacy may also be a desired objective in utilizing a trust. Clients should be aware, however, that trustees have a duty to disclose information to beneficiaries. Even experienced trust practitioners are often surprised to learn of the degree to which trustees have a duty to disclose information, even where the trust is fully discretionary.

Some jurisdictions have codified rules regarding a trustee's duty to provide information. More commonly, the duty is articulated on a case-by-case basis in the common law, such as in the United Kingdom, Canada, Australia, New Zealand, and other commonwealth countries. Courts in those countries generally have adopted the approach taken by the U.K. Privy Council in the 2003 case of *Schmidt v. Rosewood Trust Ltd. (Isle of Man. ')* In that case, the beneficiaries' right to receive information was described as an aspect of the court's inherent jurisdiction to supervise the administration of trusts. A beneficiary of a discretionary trust would not be required to prove that he or she will be entitled to receive income or capital from the trust. The Privy Council stated that no one beneficiary had an absolute right to access information, but all beneficiaries had a general right to information regarding the trust.

In providing information to beneficiaries, the first question a trustee might ask is this: what information, exactly, must be disclosed? The minimum piece of information is that, in most cases, all beneficiaries will be entitled to know of the existence of the trust and that they are



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beneficiaries. Trustees also have a duty to account to beneficiaries. A beneficiary is entitled to view financial statements of the trust, though under common law principles they need not be audited or take a particular form. On the other hand, information regarding the exercise of trustees' discretion is not typically required to be disclosed. Absent bad faith, trustees of a discretionary trust will not necessarily be required to provide information to beneficiaries regarding their decisions on distributions of income, for example.

It is common for trusts to include classes of beneficiaries instead of (or in addition to) specifically named beneficiaries. For example, the beneficiaries may include unnamed or even unborn children or grandchildren, or any charity that is registered for tax purposes. The trustee is then left with the discretion to determine to which charity income will be distributed, or whether to distribute at all. Arguably, a trustee may be required to disclose information to a very broad class of persons or entities. For example, a

class of beneficiaries might be defined as "any charity registered for tax purposes". Would there be a duty to disclose information to all registered charities? Common sense would certainly suggest such a duty to disclose to such a large number of entities would be overly burdensome for the trustee. Further, it could be argued that such disclosure would not be in the best interests of the beneficiaries as a whole, particularly those who are specifically named. In such cases, some courts have adopted a "balancing of interests" analysis, following the approach taken by the Privy Council in *Schmidt*, in deciding whether to grant disclosure to a particular beneficiary. In other words, the question is whether disclosure would be in the best interests of all the beneficiaries as opposed to the particular beneficiary seeking disclosure.

For trustees, the practical problem is that the scope of the duty to provide information is largely at the discretion of the courts. A court's decision to grant disclosure will be very much dependent upon the particular facts. Some commentators have said this creates uncertainty for trustees.

What are a client's or settlor's options for providing some certainty in this area, or for protecting a trustee from having an overly broad duty to provide information? Indeed, a client's concern for privacy may make it preferable to narrow the scope of information that must be disclosed. One approach might be to draft the trust instrument in a manner that limits the beneficiaries' right to information. However, the courts have not been receptive to such attempts to oust beneficiaries' rights to information – at least in Canada and New Zealand. In the 2007 Canadian decision in *Splay (Litigation Guardian of) v.*

Spelay,²⁾ for example, a provision that authorized a trustee to withhold information from beneficiaries was held to be invalid.

If a client wishes to limit a beneficiary's right to access information, the better approach is to form the trust in a jurisdiction that has a special regime that permits it. In Barbados, it is possible to create a trust that does not have beneficiaries but is instead organized as a "trust for purposes", whether such purposes are charitable or otherwise. The Cayman Islands is another example of a jurisdiction that has an alternative regime for trusts. Cayman "STAR trusts" may be created as trusts for pur-

poses, whether such purposes are philanthropic, commercial, estate planning or otherwise, without the need for beneficiaries. In these types of trusts, there is no duty to disclose information to beneficiaries simply because there are none.

Clients or trustees are occasionally dismayed to learn there is a duty to disclose information to beneficiaries that have a mere discretionary interest in the trust. At a recent GGI meeting, an example was given of a well-respected trust company that refused to disclose information to a beneficiary where that beneficiary needed the information to comply with U.S. tax

reporting obligations.

Settlors and trustees should be prepared for disclosure of information to be made. Alternatively, it may be worthwhile to consider forming a trust in a jurisdiction with an alternative trust regime where such disclosure is not required.

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¹⁾ *Schmidt v. Rosewood Trust Ltd.*, [2003] UKPC 26, [2003] J.C.J. No. 26 (QL)

²⁾ *Spelay (Litigation Guardian of) v. Spelay*, 2007 SKQB 408 (CanLII)