DISCLOSURE TO BENEFICIARIES

Denham Martin, Lawyer

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Lindsay: I'm pleased to introduce Denham Martin an Auckland lawyer specialising in all aspects of tax and trust law. Denham's well published in New Zealand and overseas on tax, trust and commercial law issues and he regularly presents on trust problems at conferences and special interest groups.

Denham, I've observed many trustees seem unaware or uncertain of their disclosure obligations to the beneficiaries of a trust. Why is disclosure by trustees to beneficiaries important?

Denham Martin: Thanks Lindsay. Disclosure by trustees to beneficiaries is important for a number of reasons. The first reason is that there is a long established trust law rule that puts a duty on trustees to account to beneficiaries for their stewardship of a trust. This accounting requirement provides a mechanism for beneficiaries to monitor the way in which a trust is being administered.

Another important reason to disclose information is that trust property is ultimately owned by the beneficiaries and they will inherit that property at some time in the future. For that reason, it's important for beneficiaries to be given an indication throughout the life of the trust, of just how their interests in the trust and the trust property, are being managed by the trustees.

A good reason for trustees to inform beneficiaries about the trust and their interests under it, is that it gives the trustees an opportunity to assess any beneficiary needs in respect of the trust property. So, once a beneficiary knows they're a beneficiary of a trust (and often those trusts will be discretionary trusts), it provides a beneficiary with the opportunity to speak to the trustees about their needs and how they might be benefited from the trust.

So fundamentally, disclosure is important as it allows beneficiaries to have some stake in trust property which is essentially held for their benefit.

Lindsay: So clearly disclosure is an important part of just the normal management of a trust. In many ways, disclosure creates what should be seen as a healthy tension between trustees (as the stewards of the trust property) and beneficiaries (who have an interest in that trust property). When might a trustee make disclosure to beneficiaries?

Denham: There are probably four main instances when a trustee has to make disclosure. The first is the one I mentioned at the start around a trustee's duty to keep and provide proper accounts, so that is about

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trustees being accountable to beneficiaries for the trust property. It's up to trustees to issue information to sufficient beneficiaries to allow their management of the trust to be reviewed.

The second instance is where disclosure of information is made to a beneficiary who has asked for information. The other instances would be when a trustee notifies a person they are a beneficiary of a trust and finally, when a trustee has to provide trust information as part of a claim or litigation.

Now it's really important for trustees and beneficiaries to realise that disclosing information or an interest to a beneficiary under a standard discretionary trust does not guarantee a beneficiary of an entitlement to trust income and capital. A beneficiary in a discretionary trust has only an expectancy to be considered and the fact that a beneficiary finds out that they're a beneficiary and even makes a request for information or an entitlement under the trust, doesn't guarantee an entitlement.

Lindsay: You've just mentioned situations where beneficiaries ask for information. How should a trustee best respond to a request from a beneficiary? What do they need to do or think about?

Denham: The current law has for a long time recognised there is a presumption in favour of disclosing information to beneficiaries, unless there are good reasons not to release information. So what that means is that a trustee has to evaluate whether releasing information is in the best interests of that beneficiary, or the beneficiaries of the trust as a whole, as well as any other requirements that may exist (for example, if the trust deed limits the release of some information).

Lindsay: So if a beneficiary requests information, trustees need to think about the nature of what's been requested and then work through a process to decide whether to release it or not…

Denham: Absolutely Lindsay and in a common sense sort of way. Essentially information is released at the trustees discretion so the trustee has to evaluate the circumstances of the particular beneficiary (or beneficiaries) requesting information. It's up to the trustees to carefully weigh up whether to release information or not, according to the particular circumstances that exist.

It's about the trustees undertaking some sort of evaluative and objective analysis of the merits of any beneficiary request for information. I'd see that the trustees would need to ask themselves a number of questions like: What are that beneficiary's interests under the trust? What are their relevant personal circumstances? What are the specific terms of the trust as a whole?

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They might consider other factors, for example, the importance of giving information to an adult beneficiary (someone over twenty years of age) would be vastly different from giving information to a fourteen year old. Other factors might be whether giving information would cause difficulties for the trust as a whole, for other beneficiaries, for the trustees, or relevant third parties. Another may be if information should be disclosed fully or disclosed partially in a redacted form.

There was a very clear statement of the principles relating to the release of information given by Justice Asher in Rauch v Maguire which also picks up on the points we've discussed so far:

> *"… the preferable approach is to consider the beneficiary's rights to access trust documents as arising from a trustee's duty to account for its actions to the beneficiaries and adhere to the terms of the trust. As part of that duty to account, the trustee must on a reasonable request, disclose trust documents to a vested or discretionary beneficiary, unless there are good reasons not to do so. On this basis the accounts of a trust would generally be disclosed on the direct request, as would documents relating to the assets of the trust and the trustee's actions in relation to those assets."* (per Asher J Rauch v Maguire (2010) 3 NZTR 20-016 (HC) as [30]).

Interestingly, the information requested by the beneficiary in Rauch Maguire was not granted and the Court upheld the trustee's decision not to release the information. However, as I said before, where a person knows they're a beneficiary and they request information from a trustee, then in absence of any overriding discretionary reasons that might impact on the trust, there is a presumption that information should be disclosed to that beneficiary.

Lindsay: Denham, what sort of information can a beneficiary ask for from a trustee?

Denham: Firstly, it's worth mentioning the current trust law and the Law Commission's proposals for changes to trust law, do not differentiate between the types of beneficiaries or the types of trust. If you're a beneficiary in a trust, you're entitled to ask for certain information on the trust, subject to those discretionary factors that we've talked about already.

The first question a beneficiary may well ask is "Am I a beneficiary of the trust?" The sort of documents or information that a beneficiary may ask for could be the trust deed, and variations to the trust deed, financial statements for the trust, information about assets or liabilities of the trust, information on the names of past and present trustees and when they were appointed. It's important to realise though that it is the beneficiary's information and the beneficiary's property.

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Lindsay: Denham, you've just touched on the New Zealand Law Commission Review of the Law of Trusts. What's likely to change around the disclosure of information to beneficiaries?

Denham: The Law Commission has drafted a new Trusts Act which includes new rules and regulation on the requirement to disclose information to beneficiaries. It's fair to say that the most important part of those requirements will be really to just clarify the existing law. However, there is one particular change which will have a huge impact on trustees when it is implemented and may well be the most significant change in trust practice for some time in New Zealand.

The Commission has recommended the new law put an affirmative duty on trustees to let certain beneficiaries (known as qualifying beneficiaries) have certain basic trust information, subject to a whole range of considerations. Qualifying beneficiaries are beneficiaries who the settlor intended to have a realistic possibility of receiving benefits from the trust. The proposals mean a trustee would have to notify a qualifying beneficiary as soon as it is practicable that they're a beneficiary, the names and contact details of trustees and of their right to request a copy of the trust deed, or trust information.

I mentioned the release of this information was subject to a whole range of considerations which deal with a bunch of factors that are common sense – things like the nature of the beneficiary's interest, their age and financial circumstances, any confidentiality requirements in the deed, what expectations the settlor had when the trust was created and whether giving the information would negatively impact on family relationships in the wider sense or the trust as a whole.

The changes when implemented will mean trustees will have potential duties to provide information on request and duties to voluntarily notify qualifying beneficiaries that they're beneficiaries of a trust (so they can subsequently make a request for information). Both duties will be subject to the trustee's discretion and it will mean trustees will need to evaluate and weigh up the factors like the ones I referred to, when exercising their discretion for making disclosure.

The new Act will also be much more explicit about how trustees need to maintain a minimum amount of trust information as part of their trust records and that's based on South Australian law. Trustees will have to keep at all times a list of information like the trust deed, any variations made to the trust (or the beneficiaries of the trust), a list of all the assets and liabilities, trustee resolutions, written contracts, letters of wishes, a copy of the financial accounts, those kinds of things.

This will mean that if a beneficiary requests information, trustees will be available to respond to the request. Trustees will also be able

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to make a modest charge for supplying the information in certain circumstances, if they wish to.

Lindsay: So, summarising the points you've made. Firstly, the existing rules provide if someone knows they are a beneficiary, they can ask trustees for certain information. Next, the changes proposed by the Law Commission will put new obligations on trustees to let certain people know if they are a beneficiary of a trust. Lastly, the new Act will emphasise the importance of trustees keeping good trust records so if they're ever asked for information, it will be easily accessible.

Denham: Exactly Lindsay. For many trustees it's going to require a change in mind-set. So in a sense they need to be recognising that in the fullness of time, the law will expect trustees (subject to the conditions I mentioned) to make disclosure as part of the normal job of administering a trust.

From a "good practice" perspective, I'd recommend trustees start understanding and thinking about disclosure straight away. I'd encourage conversations between trustees and their settlors and where there may be requirements for on-going privacy, it could signal the need for further legal advice or a review of potential options. It will involve the trustees clearly establishing which beneficiaries are really intended to benefit from a discretionary trust and whether there is a need to update the settlor's letter of wishes.

Trustees then need to be thinking about their process for providing information to beneficiaries on an affirmative duty basis, which beneficiaries they should provide it to, if there are beneficiaries they might have concerns about providing information to, at what age and stage in life information should be provided and whether any obligations are imposed by the trust deed or settlor's wishes.

The new rules aren't likely to be too prescriptive so trustees will need to think about what it means for them, their trust and how they might exercise their discretions when deciding to disclose information. Some trustees should develop disclosure policy or protocols or plans for their trusts. There are going to be the practical issues which trustees are going to have to grapple with and where trustees cannot get agreement with their fellow trustees on disclosure, they will need to think about resigning or getting advice on steps they can take so they don't breach their legal obligations.

Lindsay: When you're saying trustees need to change their mind-sets and thinking, that's about getting on the front foot to properly understand the existing and new rules, putting in place process and meeting with settlors and beneficiaries to set expectations and build stronger relationships.

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Denham: Yes, that's an excellent summary Lindsay. I think there's a huge amount of misinformation and unnecessary fear about disclosing information in trusts which is probably why there hasn't been much disclosure in the past.

In many private trusts, it's not that there isn't disclosure, it's just that there's disclosure only to certain selected (if I can use the word loosely), "controlling" beneficiaries who will often also be a trustee and settlor of the trust. It can result in certain beneficiaries having a privileged and preferred position under the trust in respect of information and that is totally contrary to the law.

It can also often lead to more problems down the track in trusts especially where beneficiaries have not been informed they are beneficiaries or if problems arise (often when the "controlling" trustee is no longer there). Sometimes the trust can be viewed a bit like a secret arrangement which can lead to a lot of enmity, hostility and suspicion about the way the trust has or is being managed.

Lindsay: Denham, I've always found it very useful for the trustees to invite the next generation of beneficiaries to get around the table and talk about how things work, invite questions and share information. I've found it can dampen down potential problems, allow trustees to identify and intercept issues, explain things, provide context and set expectations…

Denham: Yes, exactly. Lindsay, I think you've hit it in a nutshell. Trustees should see the requirement to disclose as a positive, an affirmative thing for trusts and it will make trusts more transparent. Disclosure will open trusts up to a certain extent and in doing that, it will take away some of the suspicions and concerns about trusts which really have no foundation.

So, from my perspective, disclosure of information to beneficiaries should be seen as a positive thing and may avoid a trustee from being subjected to a claim for a historical breach of trust for failing to provide information to beneficiaries. It can help with managing beneficiary concerns about the trust management and administration and ensure issues don't fester. In a sense, a trust that has disclosed properly is likely to be a much stronger and vibrant trust than one that hasn't.

Lindsay: Thanks for sharing your knowledge and strategies for good trustee practices to manage disclosure of information to beneficiaries. Denham, you can be contacted through your website www.denhammartin.co.nz and I know your website has papers trustees can access and download.