

Disclosure or education? Increased transparency between trustee and settlor

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The issue of confidentiality in relation to trusts has been much discussed, particularly given the reporting requirements such as the Common Reporting Standard. As with the introduction of customer due diligence requirements, while initially causing some consternation, the need to report has gained acceptance among settlors and beneficiaries alike. However, while public comment and debate seem focused on reporting, the question of disclosure of trust documentation and information to family members is an area that, in my experience, often raises more concerns for settlors.

Although this issue can arise in many circumstances, the two situations where it seems to cause most concern are when providing information to adult children and in the context of divorce. The former can perhaps be more complicated from a trust law perspective, as the long-term relationship between the trustees and the children needs to be taken into account. Settlors can feel very strongly that they do not wish their young adult children to be aware of the extent of the trust fund, as this may mean they are not incentivised to make their own way in life. When drafting new trusts for settlors, this is an area that can cause a lot of discussion.

In recent years, offshore, the introduction of both new structures and legislation has tried to reflect these types of concern. For example, in a Jersey foundation, the Foundation Regulations can specifically restrict the rights of beneficiaries to information. The Trusts (Amendment No 7) (Jersey) Law 2018 set out that trustees may restrict the flow of information where this is in the interests of the beneficiaries. Although this was the case in any event, the fact it is set out expressly in statute may demonstrate an acknowledgement of the importance of this for settlors.

However, it has been my experience that sometimes there is perhaps too much emphasis on beneficiaries (and I am including in this those children and remoter issue who are likely to become beneficiaries) gaining access to information and not enough on educating those beneficiaries. Many trust disputes and problems can arise due to suspicion and distrust about the activities of both the

trustee and the settlor, as well as other beneficiaries. Sibling rivalry and family dynamics can play a large part. If the trustee and the settlor were more open about the trust, then this may lead to a reduction in such disputes. Regular family meetings with the trustee can have a very positive outcome for managing the relationships. Providing beneficiaries with sufficient information to enable them to feel involved, and increase the understanding of trustees' decision-making (and therefore decrease suspicion), could be beneficial to many trust relationships.

There can be a concern on the part of both settlors and trustees that beneficiaries seek information in order to make an application for a distribution, resulting in the dissipation of the family's wealth. Beneficiaries in turn sometimes view a lack of or reluctance to make a disclosure as showing that the trustee is aligned only with the settlor, rather than taking into account the beneficiaries' own views and wishes. However, if there were a better flow of information both to and from the trustees, this might lead to an increase in trust on both sides.

This is a complex area, both legally and practically, and there are many families where the distrust is justified. I am sure that all offshore and onshore advisors have witnessed beneficiaries misusing information or depleting trust assets very quickly due to a lack of incentive to act otherwise. In such circumstances, both settlors and trustees may be justified in being wary about the disclosure of trust information.

An attempt to educate and communicate with beneficiaries can also backfire. I have seen a trustee's annual presentation to beneficiaries be 'taken apart', with each word analysed to a degree that the author of that presentation had not envisaged, so leading to a long-term dispute.

Overall, though, it has been my experience that generations below the settlor often genuinely wish to understand the trust and the work of the trustee, and also want to preserve wealth through the generations, rather than spending it all themselves. If the trustee can find a way to work with the settlor's children and then grandchildren, even if this does involve disclosure of information about the trust, this may in fact be the best way to achieve the settlor's aims. This involves a balancing exercise between the settlor's and trustees' concerns and the beneficiaries' desire for information, which can be a challenge.

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