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NEXT ISSUE:

Obstruction of View under the
Property Law Act

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FAMILY TRUSTS - BENEFICIARY RIGHTS

We have all heard about the benefits there are in having a family trust, but what about if you are just a beneficiary of one? What rights does this give you?

The basic answer to this question is unfortunately not much. This month's newsletter however will detail what you are entitled to expect as a beneficiary.

If you are a beneficiary in a family trust in New Zealand generally what you are is a discretionary beneficiary. What this means is you do not have a fixed interest under the trust and there is nothing specifically set aside for you. It is up to the trustees discretion what you receive under the trust and it is possible you will not receive anything under the trust at all.

What rights does a Discretionary Beneficiary have then?

- A discretionary beneficiary has the right to be considered by the trustees as to whether a provision should be made to them. For example the Windsor Family Trust Deed states: "a payment may be made from time to time from the trust in the advancement of Mary Windsor's education". The trustees of the Windsor Family Trust are Mary's parents and the family lawyer. What the trustees are required to consider is whether to make a payment to Mary. Mary cannot demand a payment from the trust.
- A discretionary beneficiary is entitled to have the trust properly managed. This means Mary is entitled to view trust documentation to ensure that this is being done. Mary can also apply to the Courts to require the trustees to provide her with this information if they are not forthcoming. An example of when a situation like this may arise is if Mary, when she's grown up has a falling out with her parents. She believes they are mismanaging the trust and her parents refuse to provide her with the documents she asks for.

If Mary does apply to the court for disclosure of trust documentation, the Court has discretion as to what it will provide her. The factors it will take into account when making its decision are:

- Any trustee interests;
- Any beneficiary interests; and
- Any third party interests.

Generally though the Courts have provided the following information to discretionary beneficiaries:

- Copies of the Trust Deed;
- Financial accounts;
- Statements of Trusts;
- Any Deeds of Variation of Trustee;
- Deed of Appointment of Trustees;
- Deed of Retirement of Trustees;
- Valuations of assets of the Trust;
- Legal opinions related to beneficiary rights; and
- Interpretations of Trust Deed provisions.

What Rights does a Discretionary Beneficiary not have?

Interestingly a discretionary beneficiary does not have the right to be advised that they are a discretionary beneficiary. What this means is that no one needs to advise Mary that she is a discretionary beneficiary of the Windsor Family Trust. When you think about this, it is at odds with a discretionary beneficiary's other rights. This is because it is not possible to enforce your rights, unless you first know that you have them. So why does this rule exist? One reason is due to the large discretionary trusts which exist in New Zealand. They can have thousands if not hundreds of thousands of beneficiaries. If these trusts were required to advise each discretionary beneficiary of their interest it would use a substantial amount of the trust funds, if not all of them. Generally these large discretionary trusts are charitable in nature so it makes sense that this not be required. The issue is that this is not the case when it comes to your average family trust, where the numbers of beneficiaries are much smaller. This distinction has meant there is a lot of debate as to whether this rule should continue to exist. In the meantime though while it is difficult to tell if you are a discretionary beneficiary, professionals can sometimes see indicators which may point to this fact.

Should you have any further questions in relation to the rights of being a beneficiary of a trust please do not hesitate to contact the Collins & May Law Team.