

Can a settlor's subjective intentions change the terms of a trust?

It would seem heretical in New Zealand to allow a deed of trust to be amended by reference to a clear and unequivocal statement of a settlor's objectives but this scenario will arise and the courts will need to resolve it



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One of the surprises hidden in the Trusts Act 2019 was the requirement in ss 4(a) and 21 that a trust must be "administered in a way that is consistent with its ... objectives".

The Act does not say how trustees and the courts are to learn what a trust's objectives are but a good starting place will be what the settlor says they are. This might be recorded in a memorandum of wishes or a letter or in an oral conversation.

The prominence that is given in the Act to the settlor's objectives is a significant move away from the traditional understanding of how a trust is to be administered. For example, in Thomas & Hudson's *The Law of Trusts* 2nd ed, the authors say: "The role of the settlor is simply that of creator. Once creation has taken place, then there is no evident role for the settlor in the operation of the trust... The settlor ... drops from the picture absolutely and has no rights... to direct the trustees how to deal with the trust property..." I regard this as a rather extreme assessment of the law on this topic which does not accord with other assessments but the law of trusts in New Zealand is now set to diverge from that path.

Where did ss 4(a) and 21 come from? So far as I can recall, they were not the subject of any specific discussion in the papers the Law Commission produced in the lead-up to the enactment of the Trusts Act 2019.

I approve of the focus the Act gives to a settlor's objectives for a trust since trusts are not created in a vacuum. A trust is created by a person for a specific purpose or purposes and in general it seems appropriate that the trustees should try to fulfil the settlor's reasonable expectations for the trust.

If the objectives of a trust are to be learnt by reference to the subjective intentions of a settlor, there will be difficulties for lawyers when they are asked to advise on the meaning and purposes of the trust as they will not usually have access to documents that record the objectives.

In the past, this has been a good reason for saying that a settlor's subjective objectives should be ignored. But our law has now changed, with Parliament saying both trustees and judges must administer a trust "in a way that is consistent with

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its objectives".

Lawyers who advise on trusts must now make inquiries about a settlor's objectives. This may give rise to further difficulty. What happens if a settlor wants a memorandum of wishes to remain confidential?

The courts will be required to answer this question.

When considering a settlor's objectives for a trust, it must be recognised that the objectives are likely to change over time. As children are born, raised and leave home and as relationships begin and end, a settlor will inevitably have different objectives for a trust over the course of time, some of which may conflict with the terms of the trust.

In these circumstances, is a clearly expressed objective to prevail? Or is it to be overwhelmed by an outdated provision in a deed of trust that the settlor has overlooked?

This situation arose in *Mackie Law Independent Trustee v Chaplow* (2017) where a settlor said in a memorandum of wishes that a person was to be allowed to occupy a trust property following the settlor's death.

But the settlor had overlooked the fact that the person was not recorded as a beneficiary of the trust. The deed of trust did not reflect the relationship change that had taken place within the family grouping.

A major criticism of letters of wishes is that, drafted without sufficient care, they can have the effect of amending a deed of

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trust by an unauthorised method. A focus on a settlor's objectives might achieve a *de facto* modification of a trust.

I understand that in the United States some trust statutes require amendments to be made in accordance with the terms of a deed of trust but several other states allow a trust to be amended "by any other method manifesting clear and convincing evidence of the settlor's intent".

It would seem heretical in New Zealand to allow a deed of trust to be amended by reference to a clear and unequivocal statement of a settlor's objectives but this scenario will arise and the courts will need to resolve it.

Parliament appears to have given a kind of supremacy to the implementation of a settlor's

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objectives and this is bound to conflict in some cases with the express terms of a trust.

Another problem that may arise by focusing on a settlor's objectives is the difficulty of identifying what these are when there are two or more settlors or where there is a nominal settlor.

In the case of a nominal settlor, I think there is a sufficient recent law that would cause judges to ignore the intentions of a nominal settlor and prefer the intentions of the substantive settlor.

So far as multiple settlors are concerned, there may be factual problems in identifying each settlor's wishes but if, say, the objectives of most of settlors are the same, then in general the objectives of the majority would probably prevail.

These questions are all likely to arise for determination. In the meantime, I recommend that trust advisors try to ensure that settlors are recording up-to-date objectives for their trusts and ensuring the objectives can be implemented in accordance with the terms of the trust.

If, for example, the objectives will require a trust deed to be modified and if the deed has a provision authorising the modification, then the modification should be made. ■

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