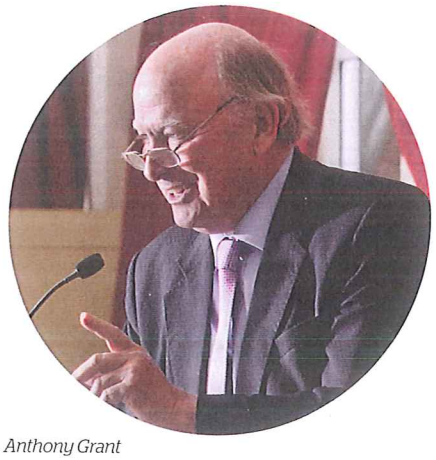
TRUST AND ESTATES LAW

November update on trusts and estates

By Anthony Grant, Trusts & Estates Litigator

A number of recent developments in trusts and estates law are covered in this issue.



Anthony Grant

There's no such thing as a "passive trustee"

In *Cahill v Cahill* [2016] ONCA 962, the Court of Appeal of Ontario has given a strong reprimand to a "passive" trustee, saying that all trustees have a co-equal responsibility. They were directed to set aside $100,000 in a trust fund, but failed to do so. The "passive" trustee wanted to be relieved of liability.

Quoting Gillese JA in *The Law of Trusts*, 3rd Edition (Toronto: Irwin Law Inc., 2014, at pages 154-55), Pepall JA said that "trusteeship is an extremely onerous position":

"Because of the dependency relationship [between a trustee and beneficiary] and the fact that the trustee controls the beneficiary's property, the trustee is held to the most exacting of standards of all fiduciaries."

He held that "if a party who is named as executor and trustee is unable, unwilling or incapable of accepting the responsibility, it is open to him or her to renounce the appointment".

"As [the passive trustee] did not renounce the appointment, she was obligated to properly fulfill her duties as executor and estate trustee," his Honour said.

Comment: This is in line with New Zealand law. See, for example, *Case 5/2013* [2013] NZTRA 05 TRA 019/11 (30 September 2013).

"Knowledge and approval"

The case of *Mumby v Mumby* [2017] NZCA 394 cements the cause of action of "knowledge and approval" into our law.

It was contended that a testatrix did not "know and approve" the contents of a will that she signed. Brewer J, giving judgment for the Court of Appeal, rejected that argument.

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In England, in circumstances where a plaintiff believes that a will does not represent the will-maker's genuine intentions, it is standard to plead (in sequence) testamentary incapacity, lack of knowledge and approval, and undue influence. I believe the same will almost certainly become standard practice here.

Disclosure of trust information to beneficiaries

I wrote in my last article (see *LawNews* Issue 35, 6 October 2017) about the Royal Court of Jersey's decision to withhold financial information about a trust's wealth from a 20 year-old beneficiary on the ground that it might demotivate him.

In *Addleman v Lambie Trustee Limited* [2017] NZHC 2054, Woolford J did something similar. He refused to order the disclosure of trust documentation to a beneficiary.

Woolford J said, "I regret to say that I have come to the conclusion that [the applicant's] previous complaints and proceedings are an indication for me that if extensive disclosure of the Trust's affairs was made to [her] she would not rest but in all likelihood would undertake further litigation." (at para [45])

The trust was settled with the primary purpose of ensuring another beneficiary's welfare and the claimant "was only added as a 'back stop'" (at para [47]).

Another reason for non-disclosure was that "there [was] no suggestion of a breach of trust or fiduciary duty in the administration of the Trust" (para [71]). It was serving its purpose of assisting the primary beneficiary.

The judge summarised his attitude to the application by saying, "I am of the view that the absolute confidentiality of the Trust weighs against disclosure of Trust information." (at para [51])

Comment: This is a helpful development. The *Erceg* decision (*Erceg v Erceg* [2017] NZSC 28, [2015] 1 NZLR 320) is understood by some to suggest that trust financials must be made available to all beneficiaries. In many cases, to do this will cause family harm. There should be no general assumption that disclosure of trust financials and other court documents must be made readily available to beneficiaries who seek to highjack a trust for their own financial purposes. If the relevant details of a trust are made available to some responsible beneficiaries, that may be enough if they can be relied upon to ensure that the trust will be managed responsibly.

There is a case for saying that the Trusts Bill should be modified accordingly, since one of the greatest concerns about the Bill at present is a belief that all beneficiaries must be given copies of the trust's financial statements – information that may give some sensitive beneficiaries a sense of entitlement and which may demotivate them from living fulfilled and productive lives.

The *Addleman* decision can be contrasted with *V v T* (2014) EWHC 3423 and *X (A Child) v Dartford & Gravesham NHS Trust* (2015) EWHC CIV 96, and a very recent decision of the English High Court (for which my best citation is *MC V OP & Others*), where the courts showed a reluctance to withhold information from beneficiaries.