

Beneficiary's Right to Information

Take-Away: It is difficult for a trustee to know the limits of what information must be provided to a trust beneficiary when the standard that is applied is a subjective *reasonably related to the trust's administration*.

Background: With Michigan now adopting an 'undisclosed trust' statute [MCL 700.7409A], that started me thinking about a trustee's duty to inform and answer beneficiary questions. If the beneficiary does not even know that the trust exists, there is not much of an issue, that is, unless, the "nondisclosure correlative right holder under the new statute makes a *reasonable request*, then the trustee of the nondisclosed trust is required to *promptly furnish* a copy of the terms of the trust that describe or affect that holder's right or power. [I have to confess; my head spins as I struggle to follow this new Michigan Trust Code provision- a *nondisclosure correlative right holder!*]

Practical Questions: Along the same lines as with an undisclosed trust and in a more practical vein, one section of the Michigan Trust Code (MTC) which has always raised questions is a beneficiary's right to be *reasonably* informed about the trust and the trustee's duty to *promptly* respond to a beneficiary's request for information regarding the trust. Questions like: What is a *reasonable* request? How long can the trustee delay before it will be viewed as not responding *promptly*? How does the trustee protect the privacy of other trust beneficiaries when the requested information implicates another beneficiary's privacy expectations under the trust? What if some of the requested information is covered by the attorney-client privilege? It just seems like there is a lot of subjectivity involved when a trustee is required to furnish information to a trust beneficiary when words like *reasonable, promptly*, or the *privacy* expectations of others are implicated in the trustee's duties.

Common Law: A trust beneficiary's right to information regarding the trust is covered by both the *Second and Third Restatement of the Law of Trusts*, which purport to summarize the common law (though I am always somewhat cautious when I recall that the *Third Restatement* was written primarily by a group of law professors who seldom wander too far from the comfortable confines of academia and who often express notions of what they think the law *ought* to be- but I digress.)

Second: The *Second Restatement* notes under the ‘Duty to Furnish Information’ that a trustee is under a duty to the beneficiary to give the beneficiary upon his/her request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him/her or their authorized person to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust. [Section 173.]

Third: The *Third Restatement* says under ‘Duty to Furnish Information to Beneficiaries’ pretty much the same thing as the *Second*. However, the comments to the *Third’s* recitation indicate that the terms of the trust may alter the amounts of information a trustee must give to the beneficiaries and also the circumstances and frequency with which the persons to whom that information must be given. The comments further note that a trust beneficiary is always entitled to request information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his/her rights under the trust. [Section 82, comment a(2).] Another comment notes that this right held by the trust beneficiary is a right that is ‘not limited to fairly representative beneficiaries’, and that the trustee must grant access to books and records of the trust and to permit inspection of the trust’s property holdings on a reasonable basis, at reasonable hours and intervals ‘to any beneficiary.’ [Comment (e).] Nevertheless, the terms of the trust can limit the trustee’s duties to disclose information on a reasonable basis; in order to lessen the risk of unnecessary or unwarranted loss of privacy or the risk of adverse effects upon youthful or troubled beneficiaries about whose motivation or responsibility the settlor has concerns. [Comment (e).]

I’m not too sure how comfortable trustees will be when both of these *Restatements* continue to liberally use the word *reasonable*, which is not much of a guide in more challenging factual situations.

Uniform Trust Code: A trustee’s duty to keep qualified trust beneficiaries reasonably informed about the trust’s administration and of the material facts necessary for them to protect their interests is codified in UTC 813(a). This section tends to follow the *Restatements*, along with the duty to *promptly* furnish to the beneficiary a copy of the trust instrument. [(b)(1)] The trustee is also required to send to the ‘distributees or permissible distributees’ of trust income or principal, and to other qualified *and* nonqualified trust beneficiaries who request it, at least annually and at the termination of the trust, a *report* of

the trust property, liabilities, receipts, and distributions of the trust. [(c).] This is one of those non-modifiable provisions that a trust settlor cannot opt-out of. [UTC 105(a).]

Report: As an aside, the Uniform Law Commission, the source of the UTC, intentionally used the term *report* instead of the term *accounting* in describing the trustee's duty to provide information under the UTC, apparently because it did not want to burden the trustee with having to produce something so 'formal' as an *accounting*. The Commission's comments note that the *reporting* requirement might be satisfied by providing beneficiaries with copies of brokerage statements and the trust's income tax returns, and by its absence, not always by having to provide a formal *accounting*.

Michigan Trust Code: MCL 700.7814, modeled on the UTC, provides, in part:

- (1) *A trustee shall keep the qualified trust beneficiaries reasonably informed about the administration about the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a trust beneficiary's request for information related to the administration of the trust.*
- (2) *A trustee shall do all of the following:*
 - (a) *Upon reasonable request of a trust beneficiary [note- not a 'qualified' trust beneficiary] promptly furnish to the trust beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relevant information about the trust property.*

Consistent with the UTC, the MTC makes MCL 700.7814(2)(a)-(c) a requirement that the trust settlor cannot opt out of when he/she creates a trust, i.e., the fiduciary duty [under 700.7814(2)(a)-(c)] to provide beneficiaries with the terms of the trust and information about the trust's property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.

Notice: MCL 700.7105(2)(j) requires the notice of the existence of the trust that the trustee must give to qualified trust beneficiaries. This obligation cannot be overridden by the

settlor. [MCL 700.7105(2)(j).] Yet the settlor can direct the trustee to deliver accountings to only those persons named by the settlor in the trust instrument, subject to the probate court's power to compel the delivery of accountings to others. Accordingly, there is a difference from the trustee's obligation to provide notice of the trust's existence and the trustee's duty to deliver *accountings*. [MCL 700.7105(2)(k); MCL 700.7814(4).]

Redacted Copies of the Trust: Note that the MTC provision is somewhat different from the UTC's version of this duty to inform and respond to trust beneficiaries. The UTC requires that a copy of the entire trust instrument be delivered to a trust beneficiary. A Michigan trustee must only provide a copy of the terms of the trust that affect or describe the trust beneficiary's interest in the trust, not necessarily the entire trust instrument. As a highly practical matter, if a Michigan trustee decides to give to a requesting trust beneficiary something short of the entire copy of the trust (and all amendments and restatements) it will need to be prepared to explain how the redacted version of the trust instrument that is provided to the beneficiary will not 'affect that beneficiary's interest' in the trust.

Who Decides What 'Affects' the Beneficiary's Interest? Providing a redacted version of the trust to a beneficiary seems to invite more trouble than it is worth, since it tells the beneficiary that the trustee is deliberately withholding important information which will prompt the trust beneficiary to lose confidence in his/her trustee. Moreover, as the comments to the UTC stress, these 'duty to inform' requirements are intended to allow the trust beneficiary to determine what information is relevant to protect the beneficiary's interest, not the trustee. [Comment 813(a).] Thus, it is the beneficiary, not the trustee, who has the right to determine what 'affects' the beneficiary's interest in the trust.

Limitations on the Information Requested: What are some of the considerations that might go into how a trustee responds to a trust beneficiary's request for information?

Attorney-Client Privilege: This is a hot topic in the estate planning world, especially in those states which have concluded that there is an exception to the attorney-client relationship when a fiduciary on behalf of beneficiaries is consulting an attorney. A trustee is normally privileged to refrain from disclosing to beneficiaries, or to co-trustees, opinions obtained from an attorney, if the attorney is retained for the trustee's personal protection, or in the course of litigation, and if the attorney is paid from the trustee's own funds.

Otherwise, legal advice obtained by the trustee with regard to decisions or actions in the ordinary course of the trust's administration will generally not be protected by the attorney-client privilege. [*Restatement (Third) of Trusts*, Section 82, comments.]

Privacy: A trustee will have to exercise extreme caution if the request for information would include information that another beneficiary would naturally consider confidential.

Example: Ben and Jerry are discretionary beneficiaries of a trust that their uncle established for their lifetime benefit. The trustee makes a distribution to assist Jerry to go into a substance abuse rehabilitation program for three months. Ben demands information from the trustee on why far more financial distributions were made to (or for the benefit of) Jerry than were made directly to, or for, Ben's benefit. Ben does not know that Jerry has a substance abuse problem that the trustee addressed paying Jerry's rehabilitation expenses. The trustee declines to provide all trust distribution records which is what Ben wants to review, respecting Jerry's expectation of privacy. Ben will probably petition the court for the information pertaining to expenditures made for Jerry, and in the process also probably lose confidence in the trustee.

The *Restatement (Third) of Trusts* recognizes this type of situation, but it only suggests that the trustee engage in a 'balancing of competing interests' between the two beneficiaries. [Section 82, comment (e.)] The trustee may err on the side of protecting Jerry's privacy expectation, but that may simply enrage Ben and prompt him to pursue claims in the probate court or try to remove the trustee for 'keeping secrets.'

Scope of Information: The trustee providing copies of bank and investment account statements, accountings, and tax returns seems reasonable. However, if the requested information goes beyond to canceled checks, receipts, or internal memos, that may be going too far in what is within the reasonable scope of information sought. Generally, courts will look at the level of the burden placed on the trustee in gathering the requested information. If most of the information or records are available to the trustee electronically, there is a good chance a court will require that information to be provided by the trustee. Thus, when evaluating a beneficiary's request for information, a trustee (and a reviewing court) will look at: (i) the relevance to the requesting beneficiary's reason for the inquiry/request; (ii) how necessary the requested information is to enable the beneficiary

to obtain an answer to his/her question(s); and (iii) how difficult, time-consuming, and costly will it be for the trustee to pull together the requested information. When in doubt, most courts will side with the requesting beneficiary since the beneficiary is probably in the best position to determine what information is needed that ‘affects’ his/her beneficial interest.

Frequency of Requests: The reasonableness of the frequency of information requests probably equates to how broad and burdensome a beneficiary’s information request is. The beneficiary is entitled to information as a matter of right. That’s a given. But if the beneficiary repeatedly asks for the same information, then the frequency of requests may suggest that the beneficiary’s primary motivation is to vex or harass the trustee, not obtain information necessary to protect the beneficiary’s interest in the trust.

Dysfunction: And then we have the strained or dysfunctional relationship between a trustee and beneficiary where the beneficiary asks for information with the goal to seek to remove the trustee. The beneficiary’s right to seek information to protect his/her beneficial interests in the trust cannot be overlooked just because of his/her inability to interact productively, or at all, with the trustee. Normally a court will require the trustee to provide otherwise unobjectionable information, but if the ‘working’ relationship is bad, it would be best to limit the exchange of information to the attorneys representing the requesting beneficiary and the trustee. It may be that the level of aggression displayed by the trust beneficiary in making his/her information demand will also be considered by the probate court in deciding the reasonableness of the request, but in the end, the beneficiary’s right to take steps to protect the beneficiary’s beneficial interest cannot be diminished solely because of the beneficiary’s inability to productively communicate with the trustee.

Conclusion: One of the basic duties of a trustee is to keep trust beneficiaries reasonably informed. While there are limits to the character and volume of the information that the beneficiary may properly demand from the trustee, those limitations will be hard for a trustee to identify when the standard that is applied is *reasonableness*.

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