

TRUSTS AND BENEFICIARY POWERS

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I often get asked by a Grantor of a trust how secure is the information and assets that are titled in the name of their trust from his or her named beneficiaries. The response most often given is that it depends on the current status of the trust.

There are two statuses of a trust, revocable and irrevocable. While a trust is revocable, the Grantor can cancel the trust. An irrevocable trust is one that is not cancellable. A revocable trust can become irrevocable upon the death of the Grantor or in some cases it is treated as irrevocable when the Grantor is no longer serving as Trustee because of mental infirmities.

But the question really becomes, what information are the beneficiaries of a trust entitled to learn or demand regardless of the status of a trust. Quite simply, while a trust remains revocable, the beneficiaries are not entitled to any information. This problem has resulted in multiple lawsuits concerning the standing a beneficiary has when bringing a legal action against a Trustee of a revocable trust. It usually involves some fiduciary breach that is alleged to have occurred in the management of a trust while the Grantor was alive.

Florida law states “While a trust is revocable, the duties of the trustee are owed exclusively to the [grantor].” This single sentence means that while the Grantor of a revocable trust is alive, the trustee has no obligation to inform the beneficiaries of the status of a trusts assets. Thus, if the Grantor desires to buy a new house or take a trip around the world, he or she does not need to inform or obtain the consent of the beneficiaries. This thought may be acceptable while the Grantor is also the Trustee, but what happens if the Grantor relinquishes his or her position as Trustee and voluntarily or involuntarily places the management of the Trust into the hands of a successor Trustee.

The trouble begins with the capacity or incapacity of the Grantor. A reading of Florida statutes conceivably states that the beneficiaries do not need to be informed. However, case law indicates that if the Grantor lacks capacity, then in such event, the successor Trustee owes a duty to the beneficiaries to inform them of the status of the trust by delivering accountings at least annually. The reason for this is to make sure the Trustee is using trust assets for their intended use – the benefit of the Grantor..

Current case law suggests that beneficiaries of a trust have a right once a trust becomes irrevocable to seek a claim against a trustee while the same trust was revocable (before the death or after the incapacity of the Grantor). However the claims that the court is currently willing to consider as actionable are limited to specific fiduciary breaches against the terms of a trust by the Trustee during the Grantor’s lifetime. Typical actionable items against a Trustee might include failure to obtain consent when withdrawing funds from the trust and spending it on inappropriate assets or gifts to third parties and failing to provide for the Grantor’s needs.

So what can a Grantor do to prevent the beneficiaries from learning the value of their trust while alive, but not acting as Trustee? Florida law does allow a Grantor to insert language into their trust that would appoint an individual to serve as the receiver of trust accountings and information which would bind the beneficiaries. By doing so, the fulfillment of providing an accounting and information is fulfilled. However, this type of language is limited to the lifetime of the Grantor. Once the Grantor is deceased, the third party receiver of information is extinguished.

At the death of the Grantor, the beneficiaries are entitled to a full accounting of the trust. It's at this point that a beneficiary could bring an action against the Trustee, but under current case law that action will be limited to a specific violation of the trust. This might prove very difficult if previous accountings have never been seen by the beneficiaries because of their lack of entitlement to such accountings.

Finally, in the case of irrevocable trusts, the Trustee owes a duty to account to the beneficiaries of the trust. Once again, the Grantor of such trust can fulfill this accounting dilemma by providing for a third party to act as the receiver of the information and bind all of the beneficiaries while the Grantor is alive.

As you can see, you have options available to you which will give you privacy concerning your management of your trust assets by yourself or a successor Trustee. If you are concerned about having your beneficiaries learn the value of your estate or intrude into how it is being managed prior to your death, seek out the attorney of your choice and discuss your options. It may well prevent future litigation among your beneficiaries.

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