

Trusts: Making well-documented inquiries

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Trusts exist for the benefit of their beneficiaries and it is to beneficiaries whom trustees owe their duties. Whether the beneficiaries have a fixed interest or not, trustees owe their duties to the beneficiaries as a whole and trustees are therefore placed in a challenging predicament when beneficiaries cannot be located. While it sounds highly unusual, it is not altogether uncommon for executors of deceased estates and even for professional trustees to find themselves administering a trust or estate, but unable to distribute to one or more of the primary beneficiaries, because such person cannot be located or is unwilling to communicate with the trustee, meaning that the trustee cannot obtain a valid receipt and discharge.

It goes without saying that a trustee is not relieved of its duties simply because of difficulties finding, or communicating with, one or more of the beneficiaries of a trust. However, this means that trustees face complicated questions as to how best to discharge their duties when a trust cannot be administered and distributed in the manner envisioned by its governing documents and/or its settlor. Where a beneficiary subsequently comes out of the woodwork or has a change of heart, the manner in which the trustee has administered the trust in the intervening period could well come under the microscope and the trustee may be vulnerable to a breach of trust claim.

However, as is illustrated in the case law, '[trustees] should not be discouraged from seeking practical solutions to difficult administration problems' (*Re Evans; Evans v Westcombe* [1999]).

While there are few more difficult administration problems than missing and uncooperative beneficiaries, the aim of this article is to provide a guide to the various practical solutions which can assist trustees and executors. While the focus is on missing and uncooperative beneficiaries, similar principles are applicable in any circumstance where trustees cannot distribute a trust as was originally envisioned by the settlor/testator. As always, the appropriate solution will turn on the circumstances of the matter and the specific terms of the trust deed. However, there are some general rules and guidance which can be followed, arising both from the case law and practice.

Step 1: Fact-finding

Somewhat obviously, the initial step is to make efforts to contact and/or locate the missing or uncooperative beneficiary. Trustees should engage in a relatively thorough and extensive search in this regard, carefully reviewing their own files, contacting relevant people, searching online as well as on social media, advertising in relevant publications and hiring the services of a private investigator (where appropriate).

Sometimes, the trustee's enquiry will itself put an end to the matter, with the relevant person having been found or confirmed deceased for example. However, a trustee should make these efforts even if it considers that they are unlikely to be successful. While the primary goal is to contact the relevant beneficiary, in order to move forward it will be important for the trustee to be capable of demonstrating that it has made sufficient reasonable efforts to find and/or contact the relevant person. As such, it is critical that the trustee's efforts and reasoning are well documented by way of detailed trustee minutes and records.

What constitutes reasonable steps?

There are no hard and fast rules as to the precise steps that a trustee should take in discharging its duties. The extent of the trustee's enquiries and the corresponding expense of such actions should generally be proportionate to the size of the trust fund. What constitutes reasonable enquiries with regard to a small trust fund, may be insufficient for a substantially larger fund.

There is some guidance from the case law as to the reasonableness of a trustee's actions when dealing with missing beneficiaries. In *Boyle v Collins* [2004], the trustees were determining how to distribute the assets of a social club that was being wound down. It had been determined that all paid-up members were in principle entitled to a distribution, however the addresses for some members were not known. In these circumstances, the court held that:

In the case of some members, no address is known. However, three advertisements have been placed in local newspapers. In my judgment that amounted to the taking of adequate steps to ascertain the addresses of the members in question. The trustees will be entitled, under s.63 of the Trustee Act 1925, to pay into court such part of the fund as represents the entitlement of such members.

The case of *Re Evans* relates to a deceased estate where the testator died intestate leaving two children, a son and a daughter. Letters of administration were granted to the daughter and, by operation of the relevant intestacy laws, she held the estate on statutory trusts for herself and her estranged brother in equal shares. Owing to complex family dynamics the deceased's daughter had been estranged from her brother for almost 30 years and, based on conversations she had with other family members, she presumed he was no longer alive.

Acting on the advice of her legal advisers, the deceased's daughter placed a single advertisement in the UK tabloid, the *News of the World*, (despite instructions to advertise in two newspapers) and purchased missing beneficiary indemnity insurance. She did not

conduct further investigations with regards to her brother's whereabouts, however she believed that her grandparents had previously made efforts to locate her brother.

Several years later, the deceased's son did emerge and took legal action against his sister for the manner in which she had administered the estate. He alleged that there was no reasonable ground for believing he had died and that his sister's reliance on the ungrounded beliefs of friends and family in this respect was misplaced and unreasonable. While the son received the proceeds from the insurance policy, he claimed that there was a shortfall, in addition to an entitlement to interest. He also disputed various expenses which had been charged to the estate as administration expenses, including the missing beneficiary policy premium.

However, the court found that in the circumstances the deceased's daughter had acted reasonably and ought to be excused. While it was apparent that there was more the daughter could have done to locate her estranged brother or protect his interest in the deceased's estate, the court accepted that she had acted reasonably.

The court placed particular emphasis on the defendant daughter's reliance on legal advice. While noting that acting on legal advice is no 'passport to relief' (citing Evershed MR in *Marsden v Regan* [1954]), the court accepted that she had put her complete trust in her solicitors to advise her as to the appropriate course of action. It is important to have regard to the nature of the estate, the circumstances of the defaulting representative and their actions in the light of any legal advice received.

Step 2: Resolution

If a trustee has taken what it considers to be reasonable efforts to contact the missing beneficiary, the next phase will be deciding how best to proceed. There are a range of practical solutions. The appropriate solution will depend on the circumstances and may consist of a mix of the options set out below.

Order declaring the beneficiary deceased or absentee

There is a distinction between beneficiaries who are legitimate 'missing persons' on the one hand and those with whom the trustee and other relatives may have lost contact. For legitimate missing persons, most jurisdictions provide a mechanism whereby an individual can be presumed dead. For example, in the Cayman Islands the Presumption of Death (Anna Evans) Law, 2020 provides for the granting of a presumption of death certificate which has the same legal effect as a death certificate. The order can be made on the application of various relatives as well as, according to s3(e), 'any other person the court considers to have a sufficient interest in the determination of the application'.

This would enable a trustee to treat the missing beneficiary as deceased which, depending on the terms of the trust, may resolve any difficulties with regard to the administration of the trust. However, this is obviously a very drastic course of action with much wider legal ramifications than simply easing the administration of the trust in question. Thus, it is only likely to be appropriate in very limited circumstances and in consultation with the relevant beneficiary's family, who would generally be the preferred applicants.

Benjamin order

Often in circumstances where there are missing or uncooperative beneficiaries, the most appropriate course of action will be to apply to court for an order that the trust fund is paid to court or to some other relevant party (such as another beneficiary of the trust). This is typically referred to as a 'Benjamin order' which arises from the leading authority on the matter, the 1902 English case *Neville v Benjamin*, which related to the beneficiary of a deceased estate who had been unheard of for several years.

The missing beneficiary was the son of the deceased testator, who had directed that his residuary estate be divided equally among his children. The trustees of the estate sought an order that the trustees be at liberty to distribute the estate as if the missing beneficiary had predeceased the testator. The court considered that it was highly probable the missing beneficiary had died. However rather than making a declaration the beneficiary was legally classified as dead, the court ordered that in the absence of any evidence to the contrary, the trustees would be at liberty to distribute the estate on the basis that he had died (without wife or children). The effect of a 'Benjamin order' permits trustees to proceed to distribute the residuary estate among the remaining beneficiaries with the comfort that they are protected by the order in the event the missing beneficiary subsequently sought to claim an interest in the estate.

Lewin on Trusts, 19th edition at para 27 provides a helpful summary:

A Benjamin order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. Its effect is therefore that the trustees are protected, in that they cannot afterwards be accused of a breach of trust as they have acted under the authority of the order of the court, but it preserves the right of any person actually entitled to follow the trust property if he later appears.

The appropriateness of applying to court for a Benjamin order will be dependent on the specific facts of the trust in question, the size of the trust fund, the circumstances of the missing beneficiary and if any alternative, more suitable, options are available to the trustee.

Alternative options

In all circumstances, trustees should take reasonable steps to locate a beneficiary, but if to no avail, meaning that the trustee is not able to obtain a valid receipt and discharge, there may be other possible ways of proceeding. For example, in some (albeit limited) circumstances and subject to the terms of the trust deed, the trustee may be able to declare an early termination date of the trust and appoint the trust fund to a default beneficiary, which may be a charity. In addition, the trustee may be minded to obtain missing beneficiary indemnity insurance which will provide protection from any future risk.

Trustees should also bear in mind (and take advice) on the potential application of any dormant accounts (or similar) legislation which may apply to 'trust accounts' such as nominee accounts (rather than to discretionary trusts generally), whereby an 'account holder' who has a legal or beneficial interest in monies held or owned by an account provider may be in scope. Thus, subject to the relevant legislation, 'dormant' funds

(broadly being funds which have not been claimed over a specific period) can be paid to the relevant government after which the beneficiary no longer has any rights of claim against the account provider.

Conclusion for practitioners

Trustees are placed in a quandary when it comes to trying to locate missing beneficiaries. Each case will turn on its specific facts, but the key to resolving matters is to consider what practical and reasonable steps should be taken to locate beneficiaries in order for the trustee to obtain a valid receipt and discharge. Legal advice should also be taken but as noted from the cases referred to above, this in itself is not a solution on its own. The steps taken to resolve such a situation may take time and often involve the assistance of third parties such as private investigators and genealogists. In an ideal world, a trustee will regularly review and update its records concerning a beneficiary's whereabouts, and with increased regulation and KYC/AML practices, this should hopefully be achievable and avoid missing beneficiary scenarios. However, with older structures, particularly those trusts with large, multi-generational beneficial classes, the task of locating beneficiaries may still prove difficult.

Cases Referenced

- Boyle & ors v Collins & ors [2004] EWHC 271 (Ch)
- Marsden v Regan [1954] 1 WLR 423
- Neville v Benjamin [1902] 1 Ch 723
- Re Evans; Evans v Westcombe [1999] 2 All ER 777

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