

# *Theories of the Trust and What They Might Mean for Beneficiary Rights to Information*

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*The trust is a mental construct used to explain a type of guardianship of property. There are traditionally two ways to understand the trust — one sees the trust as creating proprietary rights and duties; the other as establishing personal rights and duties as between the trustee and beneficiary. This article considers the evidence for both and argues that it is important to clarify the conceptual basis of the trust because it can affect the substance of trusts law. This point is illustrated by the various answers that have been given to the particular question of whether beneficiaries have a right to access trust information.*

## **I Introduction**

The express trust is a complex and abstract creature. It often proves very difficult to conceptualise, with exceptions and inconsistencies plaguing the brave soul attempting to understand it. Yet, notwithstanding this (even perhaps because of this), it has almost unparalleled popularity in our society as a legal device used across a range of familial and commercial contexts. This requires that some effort be made to explain it and to highlight its strengths and identify any current weaknesses in order to assess whether any reform is desirable.

This article explains two common and distinct theories of the nature of the express trust, proprietary and obligations-based, and each is evaluated in the light of some well-accepted rules and doctrines of trusts law. Having

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shown that both find support from the various rules relating to express trusts, the content of trustees' duties in particular brings into focus the differences between the two conceptions and presents a good reason for having to refine further how the trust is most accurately conceptualised. All of this is not merely academic because it can, and ought to, affect what the various rules and doctrines of trust law should require. The final section of this article seeks to illustrate this point in the context of beneficiary rights, more particularly whether beneficiaries do, and should have, a right to access trust documents. It is suggested here that beneficiaries' rights ought to correspond with trustees' duties. Rights are the necessary correlative of duties. Without rights, duties have no purpose; without duties, rights are unenforceable. As Millet LJ stated in *Armitage v Nurse* [*Armitage*],<sup>1</sup> "there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustee there are no trusts."<sup>2</sup> Thus, defining the scope and content of the trustee's duties is extremely important and, it will be seen, is affected by the two conceptions of the trust.

## II Alternative Views of the Nature of the Trust

It is possible to conceive of a trust in at least two paradigms. First, the trust can be conceived of as a mechanism of property. This view entails that fundamental to a trust is that a trustee holds property belonging beneficially to another. The express trust is a structured transfer of property from the settlor to the beneficiaries, achieved by means that are unavailable at law.<sup>3</sup> It is akin to a donation of property and, as such, the terms of the trust are not a matter of agreement between the donor (the settlor) and donee (the trustee),<sup>4</sup> but rather are terms that run with the property binding successors in title. It has been suggested that the property conception requires that there must be trust property and that there must be a separation between the legal and equitable ownership of that trust property.<sup>5</sup> The focus of the trust is the property with which it is concerned and the split ownership of it, and

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1 *Armitage v Nurse* [1998] Ch 241 (CA) [*Armitage*].

2 *Ibid*, at 253.

3 James Penner "Exemptions" in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) 241 at 261.

4 The intended trustee may, of course, refuse the trusteeship, but this is not fatal to the existence of the trust; see cases referred to below Part IIIA.

5 DWM Waters "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can BR 219; Patrick Parkinson "Reconceptualising the Express Trust" (2002) 61 CLJ 657 at 658.

the (mainly proprietary) obligations that consequentially arise to effect that split ownership.

The second popular paradigm of the trust is that it is primarily concerned with personal obligations that happen to be mediated through property. The trust property is the trustee's own, but is subject to special obligations on the trustee that by their very nature will have effects on his rights to the property. As stated by Parkinson, a proponent of the obligation-based view:<sup>6</sup>

[I]t is incorrect to think of trusts always in terms of legal and equitable ownership. Rather, the core idea of the private express trust lies in the notion of equitable obligations in relation to property, which in most cases will also give to beneficiaries commensurate property rights in equity.

Under this model, the concern is with the obligations with which the trustee must comply and, because these obligations are generally considered to be voluntarily undertaken,<sup>7</sup> the trust is more appropriately seen as a consensual arrangement, akin perhaps to a contract. Hence, the trust is considered to be a negotiated relationship, or a deal, between the settlor and trustee that affects the trustee's relationships with a third party, the beneficiary.<sup>8</sup>

The implications of these two differing paradigms may at times be a disagreement over the requirements of particular doctrines and rules of trusts law. For example, to use a recent controversy, what is necessary to amount to a sham trust may differ under these two approaches. It may be thought that the creation of a sham trust is to be determined by analogy with the creation of a legitimate express trust. If so, then under the traditional proprietary view that a trust is akin to a donation of property to beneficiaries mediated by trustees, it is the intention of the settlor/donor alone that is relevant to determining whether the transaction was a true trust or a mere façade.<sup>9</sup> However, if the trust is considered a creature of obligations, and those obligations are considered to be assumed by (rather than imposed upon) the trustee, then as much as the trustee's intention or consent is relevant to

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6 Parkinson, above n 5, at 663. See also L Smith "Trust and Patrimony" (2009) 28 ETPJ 332.

7 See, for example, *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [87] per Tipping J.

8 John H Langbein "The Contractarian Basis of the Law of Trusts" (1996) 105 Yale LJ 625.

9 This was part of the basis for my argument that sham trusts do not require a common intention; see Jessica Palmer "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ L Rev 81.

establishing a legitimate trust, it must likewise be relevant to establishing a sham trust.<sup>10</sup>

It is important to note, of course, that not all will necessarily consider the underlying conceptualisation of the trust as being either proprietary or obligational as itself determinative of such issues. For example, again in relation to sham trusts, some have argued that the concept of sham is a doctrine in its own right that is applicable across different contexts of private transactions, such as contracts, companies and trusts. In accordance with this view, determining whether a sham has arisen does not require consideration of, or consistency with, how the underlying transaction would be created were it to be valid. For example, establishing that a trust is a sham does not turn on whether the three certainties necessary for the creation of a true trust are present, as is likely required under the property paradigm. Sham applies, it is arguable, as a separate doctrine across all transactional forms, with its own independent doctrinal features, and is accordingly distinct from the particular requirements of individual transaction types.<sup>11</sup> Thus, it could be possible to view the trust as created not by agreement, but solely by the settlor's intention (the property conception), and yet deem it appropriate to require a common intention between settlor and trustee when establishing whether the transaction in question amounts to a sham trust.

Nevertheless, the purpose of this reference to sham trusts is not to persuade the reader of the better view on the intention requirement of sham trusts, but rather to point out that much of one's views on particular issues within trust law may be guided, for better or worse, by their conception of the basis of the express trust as being either predominantly proprietary or predominantly obligation-based. Thus, an awareness of these two influential conceptions is certainly most helpful and, I would argue, necessary to ensure that the more particular principles of trust law are, as far as possible, conceptually coherent.

Of course, arguments about specific trust issues, such as the relevant intention requirement of sham trusts, could be more easily resolved if one of the two conceptions of the trust could be convincingly, and perhaps authoritatively, rejected leaving the surviving one to provide the solution to whatever particular problem is at hand. Thus, one must ask whether there is any support for either of the proprietary or obligational paradigms of the trust in the law of trusts as it is generally understood today.

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10 W Patterson "When is a trust a trust?" (paper delivered at the Legal Research Foundation Conference, *A Modern Law of Trusts*, Auckland, 28 August 2009).

11 See, for example, Matthew Conaglen "Sham Trusts" (2008) 67 CLJ 176; Matthew Conaglen "Shams, trusts and mutual intention" [2008] NZLJ 227.

### **III Assessing the Alternative Views in the Light of Accepted Trusts Law**

There are various rules and doctrines within trust law that suggest that the fundamental concern of the trust is with the vesting of legal title to property in A where the real or beneficial ownership of that property in fact lies with B. Any obligations that are associated with the trust exist merely to give meaning to that underlying proprietary transaction. Ultimately, the trust must give effect to the beneficial interest of the beneficiary.

However, as with the proprietary model, there are also various rules and doctrines that suggest the trust is instead essentially concerned with obligations, predominantly personal obligations, and not with title. Rather than present the case for each approach in turn, this section of the article will highlight different aspects of the law of trusts and identify which, if either, conception of the trust they support. This is by no means a conclusive exercise, but it nevertheless gives substance to the debate outlined above.<sup>12</sup>

#### *A Creating and terminating an express trust*

In relation to creating a trust, the obligational model of the trust would seem to rely on an agreement of sorts between the settlor and trustee in order for a trust to arise and the trustee to be bound to his trust obligations. Yet, the doctrine established by those cases that hold that the trustee has the ability to disclaim a trust suggests that the trustee's acceptance is not essential to a trust. Although no one can be compelled to act as trustee, it is a basic equitable principle that a trust will not be allowed to fail for want of a trustee.<sup>13</sup> Where a trustee disclaims his appointment, the trust property reverts in the settlor, but she holds it upon the trust of the initial settlement because the provisional vesting in the trustee until disclaimer is sufficient to constitute the trust.<sup>14</sup> Further, where there is no trustee, the court will almost always appoint one, except where the appointment of a particular person as trustee is crucial to the intended purpose of the trust.<sup>15</sup> These rules may suggest that a trust is created by the transfer of property to one party to be used for the benefit of another and that it does not depend on any assent to

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12 Beneficiaries' rights, as an aspect of the law of trusts, will not be considered in this section, but will be the subject of more detailed analysis later in this article.

13 *Re Lysaght* [1966] Ch 191 (Ch) [*Lysaght*].

14 *Mallott v Wilson* [1903] 2 Ch 494 (Ch). See also Mowbray et al, *Lewin on Trusts* (17th ed, Sweet & Maxwell, London, 2000) at [12-19].

15 *Lysaght*, above n 13; but, in such a case, the property will revert to the settlor on a resulting trust.

the arrangement by the would-be trustee.<sup>16</sup> It is important to appreciate that giving a person the liberty to disclaim a trust does not indicate anything about the nature of the trust as an agreement. It merely reflects the notion that equity — which as a jurisdiction is often said to be based upon notions of conscience — would itself be acting unconscionably if it were to require people, who did not affirm a willingness to take on the heavy obligations of trusteeship, nonetheless to take them on. The heavy obligations are attached *because* the trustee will have property in his possession that belongs to another, and for no other reason. Indeed, the rule reflects, if anything, the general commitment of the common law and equity to respect for a person's autonomy, rather than any obligation-based model of trusts.

In relation to terminating a trust, the rule in *Saunders v Vautier*<sup>17</sup> — that beneficiaries can call for the winding up of the trust — lends support to the proprietary conception of the express trust on the basis that the rule may be explained as recognising that trust property belongs ultimately to the beneficiaries.<sup>18</sup> This power of the beneficiaries specifically defeats both the trustee's obligations and his ownership and can only be justified as being a facet of the beneficiaries' equitable proprietary rights.

## B *Identifying beneficiaries*

A valid trust requires certainty of objects.<sup>19</sup> It may be that the identification of beneficiaries is a necessary requirement because the trust is based on the property rights of those beneficiaries. It is arguable, however, that this justification is threatened by the relaxation of the certainty of objects requirement in the 1970s. The House of Lords' decision in *McPhail v*

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16 Further rules relating to other types of trusts may suggest a proprietary view is appropriate of trusts generally, and not just of express trusts. For example, Penner, above n 3, at 256–257, suggests that automatic resulting trusts can only be explained on the proprietary basis of trusts. A resulting trust arises where the trust fund of an express trust is not exhausted because the settlor has failed to transfer that property to another. Trust property must actually be given to someone else, thus reflecting the property aspect of a trust. Lord Browne-Wilkinson expressed some doubt about this in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) [*Westdeutsche*] at 708, where his Lordship indicated that, in cases where the beneficial interest had not been exhausted, it ought to vest in the Crown as *bona vacantia* because the settlor's intention was to abandon the property.

17 *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282 (Rolls Court).

18 Penner, above n 3, at 255.

19 *Re Flavel's Will Trusts* [1969] 1 WLR 444 (Ch); *Re Gulbenkian's Settlements (No 2)* [1970] Ch 408 (Ch).

*Doulton*,<sup>20</sup> requiring identification of some, but not necessarily all, objects of the trust by use of the “is/is not a beneficiary” test, instead of a “complete list of the beneficiaries” test, may represent a move away from the trust’s being concerned primarily with the property rights of specific beneficiaries and towards the less demanding view that a trust exists as long as the trustee owes trust obligations to someone. However, even in light of this development, the requirement of certainty of objects may still be seen as consistent with the property conception. All that is necessary for the idea that the beneficiary owns the trust property to have any meaning is that a beneficiary be identifiable. It does not necessarily require that the deed explicitly identify the beneficiary, but rather that a trustee be able to identify a beneficiary. In any event, the certainty requirement is fundamentally about enforceability and not ownership. Thus, the relaxation of the test in *McPhail* reflects a more liberal attitude towards identifying an enforcer than it says anything about preferring an obligational model of the trust over a proprietary model. It is not surprising that the same liberal attitude for identifying enforcers was extended to non-charitable purpose trusts at around the same time in *Re Denley’s Trust Deed* (*Denley*).<sup>21</sup>

Moreover, and as a related point, it is well accepted that in most cases an express trust must be for the benefit of a human beneficiary, and that the range of express trusts that will be upheld without there being a human beneficiary is limited. It is often said that a human beneficiary is required in order that someone has standing to enforce the trust against the trustee. In other words, it could be seen as an aspect of giving meaning to the obligation-based approach to trusts on the basis that the trustee’s obligations are meaningless unless they can be enforced. Indeed, non-charitable purpose trusts are sometimes called trusts of imperfect obligation for this very reason. There are as indicated, however, various exceptions to the human beneficiary principle that nevertheless give rise to valid trusts.<sup>22</sup> These suggest that the human beneficiary principle is not concerned with providing for enforcement because the enforceability problem has been overcome in the exceptional cases by various legal mechanisms, such as “the factual or indirect beneficiary as enforcer” analysis adopted in *Denley*; “the remainderman as enforcer” analysis seen in some of the older cases; the statutory enforcement regimes, as enacted in a number of foreign jurisdictions; or, for public charitable

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20 *McPhail v Doulton* [1971] AC 424 (HL).

21 *Re Denley’s Trust Deed* [1969] 1 Ch 373 (Ch) [*Denley*].

22 Examples are trusts for the maintenance of graves or monuments (*Re Hooper* [1932] 1 Ch 38 (Ch); *Re Budge (Deceased), Ex parte Pascoe* [1942] NZLR 350 (SC)); or to provide for the care of animals following the owner’s death (*Re Dean* (1889) 41 Ch D 552 (Ch); *Pettingall v Pettingall* (1842) 11 LJ Ch 176); and other miscellaneous trusts, such as a trust for the promotion of fox-hunting (*Re Thompson* [1934] Ch 342 (Ch)).

trusts, the Attorney-General. Instead, the principle that there must be human beneficiaries in the law of private non-purpose trusts illustrates that trusts require someone to own the trust property beneficially. Trust property cannot be beneficially ownerless. The very fact that trusts without beneficial owners are permitted might be assumed at first sight to support an obligational view of trusts. However, the long struggle in English law to legitimate any non-charitable purpose trusts, and the peculiar history of the law of charitable trusts, actually reveal the dominant hold of the property model of trusts on the English trust psyche and that these isolated cases are strictly exceptions to the general rule.

Notwithstanding these arguments in favour of the proprietary view, the well-accepted legitimacy of the discretionary trust presents a challenge. The ability of settlors to appoint discretionary beneficiaries is evidence that the concern of a trust is not that particular property is held for particular beneficiaries, and it is not necessary that an equitable proprietary right must be vested in a beneficiary for a trust to exist.<sup>23</sup> Discretionary beneficiaries have long been understood to hold merely a hope or expectation and no right to any specific trust property unless and until an appointment of such is made to them.<sup>24</sup> While it could be said that equitable property rights that rest on the beneficiaries collectively are still created in a discretionary trust, Parkinson has argued that this ought to carry little persuasive weight because there is no practical meaning or value to such rights until they vest personally.<sup>25</sup>

### C *Identifying trust property*

In addition to certainty of beneficiaries, a valid trust also requires certainty of subject matter.<sup>26</sup> The trust property must be clearly identified, which suggests that the property aspect of the trust is critical. However, this requirement has been interpreted in the cases as requiring only identifiable subject matter within which the trust property may be located, rather than requiring actual identification of the particular trust property itself.<sup>27</sup> Parkinson submits that these cases show that it is not the trust property that must be certain. Instead, the concern is with the trust obligation being defined

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23 Parkinson, above n 5, at 660.

24 *Gartside v Inland Revenue Commissioners* [1968] AC 553 (HL) [*Gartside*] at 606 per Lord Reid. See also *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) [*Livingston*] at 713.

25 Parkinson, above n 5, at 661.

26 *Palmer v Simmonds* (1854) 2 Drew 221; 61 ER 704 (High Court of Chancery).

27 *Hunter v Moss* [1994] 1 WLR 452 (CA). See also *Re Kayford Ltd (in liq)* [1975] 1 WLR 279 (Ch); *Re London Wine Company (Shippers) Ltd* [1986] PCC 121 (Ch).



with sufficient certainty, so that in the event of dispute the court could, if necessary, determine the precise trust property.<sup>28</sup> The property is not crucial; the obligation is. Nevertheless, while the degree of certainty may be flexible, it is well accepted that there can be no trust if there is no trust property.<sup>29</sup> In addition, simply as a matter of practicality, the trust is generally valueless without property to which it can attach. Property is a fundamental aspect of the trust.

Nevertheless, it may be thought by some that to talk of trusts as requiring property, and of the beneficiary as in some way owning the property sitting in the hands of the trustee, is misleading. First, personal rights are often the subject matter of a trust,<sup>30</sup> but personal rights are not traditionally understood to amount to “property” as such. Secondly, a beneficiary cannot be said to own the personal rights that are held by the trustee on trust for her. For example, in the case of shares held on trust, the trustee has all the rights attached to the shares, such as the right to vote, to receive dividends and so on. The beneficiary has none of these rights and thus, it is said, does not have any property. In my opinion, such an objection misunderstands the effect that a trust has on rights belonging to the trustee and takes a very narrow view of what is understood by the idea of property.

The mere fact that trusts can be established over contractual or other personal rights in the hands of the trustee does not mean that it is, therefore, wrong to speak of trusts as concerning property. To say so would be incorrect for two reasons. First, it would be to construe the notion of “property” very strictly so as to exclude intangible assets or funds. Yet, a covenant or contractual promise, for example, can be understood as a chose in action and, therefore, considered to be property in itself. Indeed, a narrow perspective on property would struggle to explain trusts over money, given that when the money is held in a bank, the account holder, strictly speaking, has only a chose in action as against the bank. Similarly, if the money is held in the form of cash, the holder of the cash has technically only currency, which is “merely tangible evidence of a personal claim against the Bank of [New Zealand] in the form of the legendary ‘promise to pay the bearer on demand’ the face value of the banknote”.<sup>31</sup> Nevertheless, it is never suggested that money is not, in practice or in theory, property of some value.

Secondly, and notwithstanding the above discussion, the proprietary nature of the trust should not be taken to relate directly to the “thing” subject

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28 Parkinson, above n 5, at 664.

29 *Fortex Group Ltd (in rec and liq) v MacIntosh* [1998] 3 NZLR 171 (CA); *Westdeutsche*, above n 16.

30 See, for example, *Fletcher v Fletcher* (1844) 4 Hare 67, 67 ER 564 (High Court of Chancery); *Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177 (Ch).

31 A Hudson, *Equity & Trusts* (4th ed, Cavendish Publishing, London, 2005) at 992.

to the trust, but rather to the relationship between the trustee and beneficiary as related to the “thing”. Property rights have been theorised in different ways, including as rights in a thing and as rights against people.<sup>32</sup> With some assets, such as land, it is easy to understand that property would be considered to refer to rights in the thing itself, but the recognition of property has not been limited to such simple and tangible assets as land, as the preceding paragraph makes clear, and the trust is one of these examples. The property rights of a beneficiary are not directly in the asset that is the subject matter of the trust, but rather in an ability to demand that a trustee adhere to the terms of the trust and to effectively control the actions of the trustee and, therefore, fetter the trustee’s own proprietary rights in relation to the trust’s subject matter. In other words, as between the trustee and beneficiary, the effect of the trust is to bestow on the beneficiary the value of the rights vested in the trustee as they relate to the thing and, in this sense, the beneficiary can be said to have proprietary rights.

#### D *Trustee liability*

Another aspect of trust law that supports the notion that beneficial ownership is fundamental to the trust concept is that of trustee liability. Although the trustee is the legal owner, his personal liabilities for third party claims cannot be met from the trust property.<sup>33</sup> This must be because the property belongs beneficially to another. However, it must be noted that this aspect of trust law was the subject of a dramatic recommendation of the English Trust Law Committee<sup>34</sup> that the trust fund should be primarily liable for any third party claims arising from a trustee’s administration of the trust whether the trustee’s actions were ultra vires the trust terms or not, except where the trustee has actually been dishonest. This recommendation essentially rejects the proprietary view of trusts because it ignores the notion that the trustee is merely caring for property that is not his own in any true or beneficial sense.

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32 *Ibid*, at ch 31. See also Ross Grantham “Doctrinal Bases for the Recognition of Proprietary Rights” (1996) 16 OJLS 561.

33 *Bennett v Wyndham* (1862) 4 De G F & J 259, 45 ER 1183.

34 Trust Law Committee *Rights of Creditors Against Trustees and Trust Funds* (Butterworths, London, 1999) <[http://www.kcl.ac.uk/content/1/c6/01/11/90/TLCCredRightsReport140499\\_1.pdf](http://www.kcl.ac.uk/content/1/c6/01/11/90/TLCCredRightsReport140499_1.pdf)>. These proposals have been substantially adopted in the British Virgin Islands; see J Mowbray et al, *Lewin on Trusts* (18th ed, Sweet & Maxwell, London 2008) at [21-15].

## E Trustee duties

While some of the recent developments in trust law canvassed above might be taken to suggest a move away from the proprietary model, perhaps the most well-known development in support of the obligational model is the comparatively recent notion of the “irreducible core” of any trust, which is expounded in terms of obligations owed by the trustee to the beneficiary, rather than by reference to property held by the trustee for the beneficiary.<sup>35</sup> Millett LJ’s famous dictum in *Armitage* is as follows:<sup>36</sup>

[T]here is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. ... The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.

Nevertheless, the imposition of trust duties is clearly consistent with the property conception, which would explain most of the accepted duties as a natural consequence of the fact that the trustee is holding property for the benefit of another. The trustee holds property for another, thus, he must preserve it for that other. How is he to do that? Unless otherwise authorised, he must account properly for it;<sup>37</sup> he must not take from it nor dissipate it;<sup>38</sup> he must not make an unauthorised profit from it;<sup>39</sup> he must not act in relation to it, otherwise than for the purpose of the trust. These duties can all be explained as requisites of the notion that property held by the trustee belongs beneficially to the beneficiary, and thus the trustee is merely a custodian of it.

However, the proprietary approach may not explain duties that impose upon trustees a particular standard of care.<sup>40</sup> Such duties include the duty of prudent investment<sup>41</sup> and the duty to perform the trust honestly and in good faith.<sup>42</sup> These duties are, in a sense, additional to the bare requirement that a trustee hold property for another. For example, the duty to invest

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35 David Hayton “The Irreducible Core Content of Trusteeship” in AJ Oakley (ed) *Trends in Contemporary Trust Law* (Oxford University Press, New York, 1996) 47.

36 *Armitage*, above n 1, at 253–254.

37 *Re Skinner* [1904] 1 Ch 289 (Ch).

38 *Gartside*, above n 24, at 602 and 607 per Lord Reid. See also *Livingston*, above n 24, at 713.

39 *Boardman v Phipps* [1967] 2 AC 46 (HL); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL).

40 Penner, above n 3, at 250.

41 *Re Whiteley* (1886) 33 Ch D 347 (CA) [*Whiteley*] at 355 per Lindley LJ.

42 *Armitage*, above n 1, at 253–254.

prudently, so far as it is determined in accordance with the standard of a prudent person of business<sup>43</sup> or an ordinary prudent man investing for the benefit of others and not for himself,<sup>44</sup> cannot be explained solely by the notion that a trust arises where property is given to one for the benefit of another. Such a construction of the trust does not require anything more than mere preservation of the property. If the standard required of the trustee is anything higher than mere preservation, it may only be justified under an obligational model.<sup>45</sup>

Yet, the obligational model does not quite so easily provide a justification for the content of trustees' obligations. It tells us nothing other than the fact that obligations exist upon the trustee. It offers no explanation for why such duties are necessary or what their content ought to be. Thus, when one is concerned with identifying the duties of trustees and the corresponding rights of beneficiaries, the obligation theory merely begs the question. The trust property is the trustee's own, but is subject to special obligations on the trustee that have proprietary effect — but why is it subject to such “special obligations”? And what should these “special obligations” be?

#### IV The Nature of the Trust

The inability of either the property view or the obligation view of trusts to account comprehensively for trustee duties could indicate that the two conceptions are inadequate or that the commonly proclaimed list of duties is wrong. Given that the duties are well accepted as an accurate statement of trust law, a careful eye must be passed once more over the two underlying theories of the express trust. Neither theory, on its own, explains the duties. This may suggest that, rather than one conception being a more accurate reflection of the law of trusts than the other, both are highlighting different, but nevertheless necessary, features of the express trust.

A trust is fundamentally proprietary. The trustee owns property but not absolutely — the property must be held to benefit another. It is this that distinguishes the trust from any other arrangement and, if any part of that description is not present, an express trust cannot exist. The proprietary conception is accurate, notwithstanding the objections raised above, if what is understood by that description is that it does not require the trustee *legally* to own the property;<sup>46</sup> nor does it require explicit identity of the trust

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43 Trustee Act 1956, s 13B.

44 *Whiteley*, above n 41.

45 Penner, above n 3, at 264–265.

46 This is necessary to account for trusts of “equitable” interests as well as legal interests.

property, but merely certainty as to the trust property's source;<sup>47</sup> nor does it require all beneficiaries to own the property beneficially,<sup>48</sup> but merely that the property must be beneficially applied to another.<sup>49</sup>

Thus, in relation to trustee duties, several of the well-accepted trustee duties enforce this proprietary feature of the trust — the trustee holds property for the beneficiary. The custodial nature of this role requires the property to be preserved and accounted for. So the proprietary conception of the trust gives rise to custodial duties on the trustee (such as to account properly; not to misappropriate or dissipate assets; not to make any unauthorised personal profit; and not to act for improper purposes). These are the “what to do” duties of the trust.

However, while the proprietary view of the trust tells us what the trust (or the trustee) does, it tells us nothing of how that is to be done. Is it enough merely that the trustee acts as a reasonable custodian or must he or she do more? This is, in my opinion, where the obligations-based view of the trust may provide vital assistance if it is understood to be a consequence of the proprietary basis of the express trust. Property is an essential means for realising our individual autonomy, and thus it is considered of significant value in our society. Consequently, where someone else holds property for us in a way that confers on them legal control, the law requires that some significant standards of care be imposed upon them to regulate how they are to carry out their custodial duties relating to the preservation of the property. These special obligations are required to protect the equitable property rights of the fixed beneficiary sufficiently or the hopes and expectations of the discretionary beneficiary that would otherwise be vulnerable to abuse by the trustee by his reliance on his legal property rights. The property conception deems the trustee to be a custodian; the obligations conception mandates a particular standard to be reached by the custodian.

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47 This is necessary to account for those cases that allow a trust in situations where it can only be said that the property from which the trust comes is certain, while the trust property itself is not; see above text to n 27.

48 This is necessary to account for the ability to have discretionary beneficiaries who have no fixed interest in the trust property and therefore no proprietary interest, as such. It also suggests that private purpose trusts may present no true departure from the fundamental characteristics of a trust, such that they ought to be allowed.

49 A consequence of this formulation of the proprietary nature of an express trust is that it is not necessary for any equitable or beneficial title to arise in the beneficiary in order for a trust to exist. The essential element of the trust, as it relates to property, is that the title of the trustee is significantly fettered. References to a split in legal and equitable title are, therefore, distracting. This does not, however, mean that beneficiaries never have any beneficial title, only that this is not a fundamental element of an express trust. Thus, fixed beneficiaries have equitable title and discretionary beneficiaries do not, but nevertheless a trust still exists in both instances.

Hence, the obligations conception of the trust explains those trust duties that reflect how the custodial duties should be performed (such as to perform the trust honestly, in good faith and impartially for the benefit of the beneficiaries; to invest according to the standard of a prudent investor, investing for the benefit of others and not for himself; and to exercise powers with good faith and on real and genuine consideration). These are the “how to” duties of the trust.<sup>50</sup>

Thus, the trust is not solely a mechanism that allocates rights to ownership of property. It also imports certain additional personal obligations into it because of the type of relationship between the trustee and beneficiary that the settlor has chosen to impose. It is this modified understanding of the proprietary conception of the trust that ought to guide the law relating to express trusts. This article may not seem particularly groundbreaking given that all that has been achieved thus far is to affirm the current understanding of the content of trustees’ duties. However, its aim has been to do so using a theoretical understanding of the trust, rather than relying upon policy grounds or external factors that risk inconsistency and a lack of explanatory power from court to court. Thus, it offers a way to analyse particular issues within trust law from one common starting point that will enhance coherency and certainty across all of trusts law.

The remaining section of this article will seek to prove this point by applying the conceptual understanding of the trust advocated here to the current controversy of what rights beneficiaries have to trust information. It will be shown that the possible answers given to that question are deeply affected by one’s understanding of the nature of the trust.

## **V Beneficiaries’ Rights to Trust Documents**

The impact of the particular view of trusts that one adopts is readily evident in relation to the issue of disclosure of trust information to beneficiaries. A strict proprietary analysis of the trust will likely lead to a rule that beneficiaries who “own” the property subject to the trust also own any related information, and thus are entitled to access such information. However, as has been highlighted above, not all beneficiaries can be said to own the trust property. An obligational approach, on the other hand, is even less forth-

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50 It may be that there are other commonly accepted duties of trustees that can be evaluated for their validity against this conceptual framework; see, for example, C Kelly and G Kelly “So you want to be a trustee” (paper delivered at New Zealand Law Society Trusts Conference, Auckland, June 2009).

coming as it requires further work in order to justify a beneficiary's right to information by the identification of a corresponding duty on the trustee to provide such information.

However, pursuant to the hybrid approach adopted in this article — an approach that emphasises the custodial role of the trustee and his consequent duties of preservation to a high standard — a beneficiary's right to information can be justified to extend beyond just those beneficiaries with a strict proprietary right. Before considering what the law in this area ought to be on the basis of an accurate conceptualisation of the trust, the current law on access to trust documents is first examined.

### A *Current law*

Traditionally, beneficiaries with fixed interests in the trust fund were considered to have a proprietary right to any documents pertaining to the fund on the basis that all trust documents are trust property.<sup>51</sup> This right did not extend to discretionary beneficiaries because they do not have proprietary rights in the trust property, but only a mere hope,<sup>52</sup> although some cases had suggested that all beneficiaries, whether having fixed or discretionary interests, should be entitled to see the accounts.<sup>53</sup>

However, in recent times, what was previously understood as only a fixed beneficiary's right has been reconceptualised by the Privy Council in *Schmidt v Rosewood Trust Ltd (Schmidt)*<sup>54</sup> as an aspect of the court's inherent supervisory jurisdiction over the administration of trusts. The Board ruled that a proprietary right was neither sufficient nor necessary to give rise to a right to trust documents. In so doing, it extended to discretionary beneficiaries an ability to access such documents at the discretion of the court in order to enable them to hold the trustee accountable. Lord Walker indicated, however, that the nature of the beneficiary's discretionary interest may make it difficult to persuade the court to grant access: "In many cases

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51 *O'Rourke v Darbishire* [1920] AC 581 (HL); *Murphy v Murphy* [1999] 1 WLR 282 (Ch). This understanding has been questioned by Campbell who considers the early cases and argues that there was no such proprietary right because a particular beneficiary's right was considered to depend on the particular circumstances, not on a strict property right per se; see J Campbell "Access by trust beneficiaries to trustees' documents, information and reasons" (2009) 3 *Journal of Equity* 97 at 117 et seq.

52 *Worn v Buxton* HC Auckland M 125-SD01, 17 June 2002.

53 *Armitage*, above n 1, at 261 and 263.

54 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 [*Schmidt*], adopted in New Zealand in *Foreman v Kingstone* [2004] 1 NZLR 841 (HC) [*Foreman*].

the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.”<sup>55</sup>

The *Schmidt* approach seeks to justify any disclosure essentially on the basis of judicial discretion under the auspices of the court’s supervisory role. Some have criticised *Schmidt* for the uncertainty it has created in relation to fixed beneficiaries. The Privy Council rejected the proprietary nature of the fixed beneficiary’s right as a justification for access to trust documents.<sup>56</sup> However, it has been noted that the effect of this on fixed beneficiaries, which was strictly obiter given that *Schmidt* concerned discretionary beneficiaries, creates undesirable uncertainty, and for that reason has been rejected by the New South Wales Supreme Court in *McDonald v Ellis*.<sup>57</sup>

The uncertainty is more widespread than that, however, as cases concerning discretionary trusts since *Schmidt* have shown. In a recent decision of the English Chancery Division, *Breakspear v Ackland (Breakspear)*,<sup>58</sup> the Court was concerned with the issue of disclosure of the settlor’s letter of wishes in the context of a discretionary family trust. The settlor had signed a wish letter to the effect that he wanted the trustees to exercise their discretionary power to appoint his third wife as a beneficiary of the trust upon his death. The wife was duly appointed and when the settlor’s children later learned of the trust, they requested disclosure of the letter. The trustees considered it to be non-disclosable. Briggs J agreed that the letter was prima face non-disclosable given its confidential nature arising from its function, which was to assist in the confidential deliberation process of the trustees’ exercise of discretionary dispositive powers. However, his Lordship then proceeded to consider whether the Court ought to exercise its overriding discretion. His Lordship suggested that only very special circumstances

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55 Ibid, at [67].

56 Ibid, at [52], relying on Kirby P’s statement in his dissenting judgment in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA) at 421–422 that a proprietary right is neither sufficient nor necessary to give rise to a right to trust documents.

57 *McDonald v Ellis* [2007] NSWSC 1068, (2007) 72 NSWLR 605, where Bryson AJ held that the beneficiary with a vested interest in trust property has a right to information about the trust. The *Schmidt* rule is “not a better rule, because it introduces discretion and promotes resistance and debate in substitution for a rule which is relatively concrete”: *ibid*, at [51]. However, it is noted that the *Schmidt* rule was accepted by the same court in an earlier decision involving fixed beneficiaries; see *Avanes v Marshall* [2007] NSWSC 191, (2007) 68 NSWLR 595 at [15] per Gzell J. For criticism of the *Schmidt* rule in this context, see further G Dawson “A fork in the road for access to trust documents” (2009) 3 *Journal of Equity* 39. In response to this argument of uncertainty, see Campbell, above n 51, who shows that prior to the *Schmidt* rule, there was necessarily some element of uncertainty given that the right of fixed beneficiaries to trust information was not absolute.

58 *Breakspear v Ackland* [2008] EWHC 220, [2008] 3 WLR 698 (Ch) [*Breakspear*].



should justify overriding confidentiality, such as evidence of bad faith on the part of the trustee; or where the trustees would soon seek the court's sanction for a proposed final distribution of the trust property, which would necessitate disclosure of the letter in those proceedings. The present case fell within the latter exception and his Lordship accordingly allowed the claim for disclosure.

In *Foreman v Kingstone (Foreman)*,<sup>59</sup> the New Zealand High Court was faced with a request from the plaintiff-beneficiaries for disclosure of various trust documents: financial statements relating to the trust; details and accounts relating to any winding up and/or distribution or settlement, including to whom such were made; full information as to the amount and state of trust property; names of all previous and present trustees and dates of appointments and retirement, including relevant copies of deeds; and any memoranda of wishes. Potter J ordered disclosure (apart from information relating to the trustees' reasons for exercising their discretion) on the basis that there were "no circumstances which should persuade the Court to override the fundamental rights of the plaintiffs as beneficiaries to the extent of the orders made to disclose".<sup>60</sup> Her Honour also indicated a preliminary view that any memoranda of wishes should also be disclosed.

What is interesting about these two cases is that both purport to follow *Schmidt* and yet both take rather polarised approaches. The English Court in *Breakspear* appeared to adopt the starting point that, if information relates to the confidential trustee deliberation process, then it will not be disclosed in the absence of special circumstances.<sup>61</sup> The New Zealand Court in *Foreman* started from the position that the beneficiary had a fundamental right to information, but that it was not absolute, being subject to the court's discretion to deny access in special circumstances.

At issue in this area is the conflict between two important interests: the beneficiary's desire for trustee accountability and the trustee's desire for confidentiality. The denial of a beneficiary's request for trust documents is

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<sup>59</sup> *Foreman*, above n 54.

<sup>60</sup> *Ibid*, at [100]. Potter J ruled that an additional general request for copies of communications between trustees and advisors could not be granted without further clarification of the content of such documents so as to ensure that information pertaining to trustees' reasons or other such confidential matters would not be disclosed. The statement of claim was not sufficiently detailed on these points.

<sup>61</sup> It is acknowledged that Briggs J stated in *Breakspear*, above n 58, at [73]: "There are no fixed rules, and the trustees need not approach the question with any pre-disposition towards disclosure or non-disclosure. All relevant circumstances must be taken into account ...". Nevertheless, the judgment shows overall a presumption by the Court in favour of confidentiality.

often made on the basis that it would threaten the ability of the trustee to exercise his discretions properly if he cannot be assured of confidentiality:<sup>62</sup>

[T]he trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner.

Likewise:<sup>63</sup>

[T]he process of the exercise of discretionary dispositive powers by trustees is inherently confidential, and ... this confidentiality exists for the benefit of beneficiaries rather than merely for the protection of the trustees.

However, as Sir Gavin Lightman has said, writing extrajudicially: “Trustees have no rights of confidence or privacy as such: it should only be claimed and respected when the need for it counter weighs countervailing considerations.”<sup>64</sup> What is necessary is to place the development of the case law, and this debate over confidentiality and accountability, against a theoretical framework of the trust to evaluate the *Schmidt* rule and to determine which of the conflicting interests ought to be given priority.

## B *A theory on the right to access trust documents*

In this article, I have put forward a broad version of the proprietary conception that extends to beneficiaries who do not have an equitable proprietary interest in the trust property. Accordingly, the proprietary character of this model is not focused on any property right held by the beneficiary, but rather the property rights vested in the trustee and the necessary limitations placed upon those rights in the form of personal rights held by the beneficiary vis-à-vis the trustee because the trustee holds the property for the benefit of the beneficiary and not for himself. The corresponding custodial duties of the trustee to ensure this arrangement is performed are to preserve and account for the property.

It is in that context that it must be asked whether a necessary consequence of the trust arrangement is the need to make trust documents, other

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62 *Re Londonderry's Settlement* [1965] Ch 918 (CA) at 936 per Danckwerts LJ.

63 *Breakspear*, above n 58, at [24].

64 The Association of Contentious Trust and Probate Specialists *Newsletter* Issue 58, as cited by Toby Graham “Disclosure of letters of wishes and confidentiality of trustees’ deliberations after *Schmidt*” (2008) 14 *Trusts & Trustees* 231 at 234.

than documents of account already required to be disclosed, available to the beneficiary. If the core duties are only those to preserve and account for the property, it is not necessary in order for beneficiaries to enforce this duty to have access to trust documents other than the accounts. Access to trust accounts will be sufficient. However, the core duties fundamental to the trust extend beyond merely the requirement to account for the property, and include obligations on the trustee to act honestly and in good faith. The beneficiary must in turn have rights that enable her to require due performance by the trustee of his duties.

Before considering whether a right to trust documents is required to enforce those additional standards-based duties, it is important to note that if, contrary to the theory advanced in this article, the proprietary conception is construed more narrowly, as being based on a division of legal and equitable title to the same property between the trustee and the beneficiary respectively,<sup>65</sup> it is easy to see how one could say that a beneficiary has a right to trust documents based on their proprietary standing in relation to the trust property. This was of course the basis upon which beneficiaries were or were not granted access to trust documents until only very recently.<sup>66</sup> Given that beneficial ownership in the trust property is not a necessary element of the trust as I have conceptualised it here, the right to trust documents, if it is to be a general right possessed by all beneficiaries and not merely beneficiaries with fixed interests, cannot rest upon the narrower version of the proprietary view of trusts.

Recalling that the obligational aspect of the trust requires in addition to the custodial duties, the duties of honesty and good faith in the performance of the trust, again, the relevant question is: in order for the beneficiary to enforce these obligations, is it necessary for her to have access to the trust documents? In my opinion, merely providing the accounts will not provide sufficient information to the beneficiary for her to ascertain whether the trustee has acted honestly and in good faith. The very nature of dishonesty is that it is deceptive and so will often not be manifestly obvious in limited documents of account.

It is surely necessary in order to enforce trustees' duties of honesty and good faith that beneficiaries should generally be entitled to trust documents.<sup>67</sup> Thus, beneficiaries ought to have a *prima facie* right to trust documents,

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65 While this may be the most common way that an express trust has been described in the past, it does not reflect our law of trusts, as shown in the discussions above, most obviously because trust law allows for discretionary beneficiaries who have only a mere hope or expectancy.

66 *Schmidt*, above n 54.

67 Recent support for this approach can be found in *Re Maguire (deceased)* [2010] 2 NZLR 845 (HC) at [30] per Asher J: "[T]he preferable approach is to consider the beneficiary's

based not on proprietary rights, but on the right to enforce the trust against the trustee. The often inherent conflict between accountability of the trustees to the beneficiaries and the confidentiality that is necessary to encourage trustees to exercise their discretions may impact upon this presumption. The important point to note, however, is that the presumption ought to be in favour of disclosure, which the trustee may then persuade the court to override in particular circumstances. Beneficiaries should not be required to prove their right to disclosure, but trustees ought to be required to prove any such right to, or interest in, confidentiality. Accountability is a fundamental characteristic of the trust; trustees' confidentiality is not.

### C *Letters of wishes*

The settlor's letter or memorandum of wishes is often seen as a special document, sitting just outside the collection of documents that make up the trust documents. Since disclosure should be based on accountability (whether that is understood to be an aspect of the court's inherent jurisdiction, as currently seems to be the case, or, as advocated here, an aspect of the fundamental nature of the trust and thus a right ascribed to the beneficiary), letters of wishes should accordingly be included in disclosure only if they are necessary to access in order to enforce the trustee's duties.

It can be argued that where letters of wishes are understood to be non-binding expressions of expectation by the settlor, they do not confer any duties on the trustees, thus they do not confer any rights on the beneficiaries, and so should not rank as a trust document. No legal obligations have been imposed on a trustee to consider, let alone, obey a merely morally binding letter of wishes, and a trustee cannot be held accountable in respect of acting or refusing so to act on the settlor's wishes.<sup>68</sup> Likewise, if the letter is intended to be legally binding on the trustees, then accordingly it should be *prima facie* disclosable because it is in effect a trust document.<sup>69</sup>

On the other hand, it may be that this distinction between letters that are legally binding and letters that are only morally binding is somewhat overly clinical. As Briggs J said in *Breakspear*:<sup>70</sup>

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rights to access trust documents as arising from a trustee's duty to account for its actions to the beneficiaries and adhere to the terms of the trust."

68 Terence Tan Zhong Wei "The irreducible core content of modern trust law" (2009) 15 *Trusts & Trustees* 477 at 490. See also Hayton, above n 35, at 52–53.

69 David Hayton "English Fiduciary Standards and Trust Law" (1999) 32 *Vanderbilt J Transnational L* 555 at 573, cited in Zhong Wei, above n 68, at 490 n 94.

70 *Breakspear*, above n 58, at [8].

[F]ew would argue that clearly and rationally expressed wishes and relevant information included by settlors in wish letters could be treated by trustees as wholly irrelevant to the exercise of their discretionary powers[.]

Accordingly, if a trustee, obliged to act in good faith, could not simply ignore the settlor's request, then perhaps the beneficiary should be entitled to see it. This may further be supported by consideration of the *Hastings-Bass* rule that allows courts to set aside trustees' decisions where those decisions were made in the absence of trustees taking into account relevant considerations that they ought to have taken into account.<sup>71</sup> If the settlor's recorded wishes are relevant considerations, then the beneficiary ought to be entitled to access these to ensure they have been considered.<sup>72</sup> An obvious weakness of this argument is that mere access to the settlor's wishes will not enable the beneficiary to determine whether those wishes have been considered as required because, first, the trustees are not bound to act upon them and, secondly, the trustee's reasons for their decisions are normally not disclosed.<sup>73</sup>

Lee has suggested that the issue of whether letters of wishes should be disclosed ought to be determined by reference to the settlor's intention in using such letters.<sup>74</sup> Letters of wishes are not for the benefit of beneficiaries (whose interest is in disclosure to give effect to trustee accountability), nor for the benefit of trustees (whose conflicting interest is in confidentiality to effect their autonomy), but rather are created for the benefit of the settlor to attempt to get the trustees to give effect to her intentions at a time when she no longer has significant ability to control, influence or require anything of the trustees.<sup>75</sup> So the competing interests may not be just those of accountability and autonomy, but also of settlor intention.

Given that the settlor has obviously chosen not to make her intentions, as expressed in the letter rather than in the trust deed, binding on the trustee, it could be said that she does not intend that they are necessary to the enforcement of the trust, and as such are not vital to the beneficiary's ability to hold

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71 *Re Hastings-Bass* [1975] Ch 25 (CA).

72 Zhong Wei, above n 68, at 491; D Hayton, P Matthews and C Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (17th ed, LexisNexis, London, 2007) 837.

73 Successful *Hastings-Bass* applications are normally made by trustees seeking to reverse their own decision and who are, therefore, content to disclose the reasons for their decision.

74 Rebecca Lee "Disclosure of Letters of Wishes in Family Settlements: *Breakspear v Ackland*" (2009) 28 *Estates, Trusts & Pensions Journal* 105 at 108–109.

75 Once the trust is created, the settlor effectively drops out of the trust picture; see David Hayton and Charles Mitchell *Hayton and Marshall: Commentary and Cases on the Law of Trusts and Equitable Remedies* (12th ed, Sweet & Maxwell, London, 2005) at 16.

the trustee personally accountable. Accordingly, even if the settlor's intention is considered relevant, letters of wishes generally ought not to be the subject of a beneficiary's right to access. The letter of wishes is not truly a trust document because it does not determine trustees' duties.

However, it may be that such letters contain information that would indicate trustees' knowledge of circumstances relevant to beneficiaries, and thus relevant to whether the trustees are performing the trust honestly and in good faith. In this context, the role of the letter in disclosure would not be to determine the content of the trustees' duties because it cannot; but would be to provide evidence of whether the trustees' standards-based duties have been complied with. The question of disclosure in such a case could readily be determined by the court inspecting the letter first to assess its relevance to any such claim.<sup>76</sup>

#### D *Primary v secondary beneficiaries*

It has been common practice in discretionary trusts in New Zealand to appoint a class of primary beneficiaries and a class of secondary beneficiaries. For example, in a garden-variety discretionary family trust, mum and dad are the settlors, trustees (perhaps joined by a third professional or independent trustee) and the primary beneficiaries, whilst the children are the secondary beneficiaries. Discussions with trusts practitioners suggest that the primary beneficiaries are seen to be the real beneficiaries and the secondary beneficiaries are not intended to have any ability to access or enforce the trust. The perception is that this ought to be acceptable because as long as some of the beneficiaries — the primary beneficiaries in this context — can enforce the trust, there is no need to extend similar rights to the secondary beneficiaries.

There is, in the author's opinion, no justification for distinguishing between classes of beneficiary in concluding that some beneficiaries ought to have a right to access trust information and others need not have one. Limiting the duty of trustees to account to only certain beneficiaries is repugnant to the nature of the trust because it is "an attempt to convert a discretionary trust for a large class into a discretionary trust for a small class with a discretionary power in favour of a larger class".<sup>77</sup> Either the secondary beneficiaries are beneficiaries or they are not. In relation to the family trust example, they must be beneficiaries and accordingly extended the necessary rights to enforce the trust.

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<sup>76</sup> *Re Avalon Trust* [2006] JLR Note 19 (Royal Court).

<sup>77</sup> Hayton, above n 35, at 52.

E *Reform considerations*

There is now no doubt that beneficiaries of all types may, as a statement of principle, be able to access trust documents, but there is significant confusion as to the circumstances or factors that must or must not be present for such access to be granted. Founding access to trust documents on the court's discretion does not give the beneficiary any certain right and already it is evident that that jurisdiction may lead some to assume a presumption in favour of disclosure<sup>78</sup> and others a presumption against disclosure, but with the ability to rebut it either way.<sup>79</sup> These alternative approaches show preference for one or other of the conflicting interests of accountability and confidentiality. Yet, accountability and not confidentiality is the underlying concern of trusts.

Recourse to the notion of the "court's inherent supervisory jurisdiction" is not necessary where it can be seen that every beneficiary ought to be considered to have a right to trust documents in order to enforce the trust, albeit that the right is not absolute, but can be fettered by concerns of trustee confidentiality and settlor autonomy.

Given that the New Zealand Law Commission is currently undertaking a review of trusts law, it may be that the current uncertainty could be effectively resolved by recognising a statutory right to disclosure of trust documents that can be limited in this way. Such a provision would foster certainty and would be consistent with the fundamental nature of the trust being concerned with the trustee's accountability to another for property held legally by the trustee for the benefit of the other.

Accordingly, statute could provide for the beneficiaries' right to disclosure of trust documents, but subject to the court's discretion to limit it on the application of trustees. Trust documents should be defined to exclude letters of wishes that were not intended to be legally binding. Certain factors that courts could be instructed to consider in determining whether to fetter the beneficiary's right could include:

- whether the trustee can be held accountable for his core duties notwithstanding that certain documents are to be withheld;
- what the likely intention of the settlor was in relation to beneficiaries' access to trust information as construed from the deed and surrounding circumstances,<sup>80</sup> but only in such a way as to be consistent with the fundamental nature of the trust;

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78 *Foreman*, above n 54.

79 *Breakspear*, above n 58.

80 *Campbell*, above n 51.

- whether the withholding of certain trust information is necessary to achieve the purpose of the trust to hold the property for the benefit of all the beneficiaries — for example, where disclosure of the information concerned could adversely affect the interests of other beneficiaries (requiring personal confidentiality) or protection of the trust property (requiring commercial confidentiality);
- whether limited disclosure could be effected by limiting the recipients of the information to, for example, only certain beneficiaries or to the beneficiary's representative, or to another party able to effect enforcement of the trust on behalf of all the trust beneficiaries, such as a protector or enforcer; and
- whether limited disclosure could be achieved by restricting the use of the information disclosed by, for example, requiring professional undertakings.

## **VI Conclusion**

No particular area of trust law can be adequately analysed without an underlying conception or framework that identifies what the nature of the trust is. Accordingly, a good deal of this article was devoted to considering the two most common models of express trusts — the proprietary and the obligation-based models. From the various rules of trust law can be drawn significant support for (and opposition to) both models. On account of those rules, this article has advocated that the correct understanding of the nature of the trust is that it is a unique combination of both of those conceptions, but with the obligational aspects taking their meaning and content from the proprietary nature of the trust.

Essential to the trust is that it must involve property owned by the trustee who must hold it for the benefit of beneficiaries. The property need not be identified absolutely as long as the source from where it is to be drawn is known with certainty; and the beneficiaries need not have equitable or beneficial title in the property for a trust to arise. The trust is essentially a relationship formed around one's custodianship of property for the benefit of the other.

The trustee's custodial obligations in relation to the property are to preserve and account for it to the beneficiary, and because of the special value of property and the beneficiaries' vulnerability to the trustee, the trustee must perform his custodial tasks to certain standards for the benefit of the beneficiaries — he must invest prudently and he must act honestly and in good faith.

These characteristics or requirements of the trust are irreducible and their implications for questions concerning particular areas of trusts law



ought to be borne in mind. The latter part of this article sought to show that conceptualising the trust appropriately impacts upon whether or not it is legitimate to recognise beneficiaries as having a right of access to trust documents. It was advocated here that in order to enforce the substantive duties owed by the trustees that are necessary for any trust, beneficiaries need to have procedural rights of access to trust information. Suggestions have been made in the second half of this article as to the precise scope and limitations of such rights as they relate to trust documents.

Various other rights claimed by beneficiaries could also be analysed in a similar manner to determine their legitimacy. For example, is it necessary, in order to enable beneficiaries to hold trustees accountable for their custodial and standards-based duties, for all beneficiaries to have the right to be informed of their beneficial status or to have access to trustees' reasons for their decisions? Likewise, other areas of trust law, such as trustee exemption clauses, could be similarly examined with reference to the conceptual nature of the trust to determine their appropriate content and limits.