

Making the Best of an Arranged Relationship

By Thomas E. Junkin

Some experts liken it to an arranged marriage—two people brought together by an agreement reflecting the wishes of its creator. I'm talking about the unique relationship between a trustee and a beneficiary. As the definition below shows, it's a relationship rooted in legal duties and responsibilities.¹

As importantly, it's a relationship that lasts over years. As professional trustees, a significant part of our job is ensuring trust beneficiaries are satisfied with how the trust is handled. We're typically successful, but given the nature of human relationships, tension does develop at times. For instance, it's not unusual for a beneficiary to be surprised to learn of a trust's existence while being introduced to the trustee. It can be a rocky start for a team who needs to learn to work together. Here's a look at how some tensions arise and can be avoided with foresight, understanding and communication long before the trust becomes active. These insights may also be food for thought about whom you appoint as trustee/co-trustee and, on the flip side, whether you choose to accept a family or friend's request to act as a trustee.

Pushing Back on Unwanted Protection

Whether it's a relative or friend, a creator generally establishes a trust because they believe it's necessary, or at least desirable, to protect the beneficiary's interests. What happens if the beneficiary believes the opposite? They may feel perfectly capable of managing the trust property as if it were their own and resent the trust's very existence. It's a clear source of tension. One of the best ways to avoid this kind of resentment is for the trust creator to personally explain to the beneficiary, as clearly as possible, why they think a trust is a good idea. If that's not doable, we have seen some trust creators leave a letter, to be read after their death, explaining in their own words why they created the trust.

Either way is helpful in establishing a good working relationship between the trustee and beneficiary. Both parties then know the trustee has a job to do and that the decision to create the trust was made with good intention by the person(s) who earned the wealth.

Facing a new language: Wills and trusts contain complex legal language that usually has a very specific meaning, which may not be obvious to laypersons. For example, not everyone intuitively understands the difference between capital (or principal) and income. Many people may not understand

that "encroachment" refers to a payment from trust capital for a specified purpose, often at the trustee's discretion. The solution to this language barrier is usually education, with both the trustee and the beneficiary having a shared responsibility to learn what they need to know.

Misunderstanding the trustee's duties:

Tension often arises because a beneficiary wants the trustee to do something, which the trustee knows they have a legal duty not to do. For example, a trustee may refuse a beneficiary's request for a large payment because they believe that doing so may deplete the trust and jeopardize the future security of the current beneficiary, or expose the trustee to criticism by future beneficiaries.

Conflicting interests between current and future beneficiaries:

Trusts commonly specify that one beneficiary, or group of beneficiaries, is entitled to receive income and/or capital from the trust for a period of time, after which the remaining trust funds are to be paid to a future beneficiary/beneficiaries. For example, a trust might pay all of its income to a deceased person's spouse for the balance of his or her lifetime. When the spouse dies, the remaining trust funds go to the children of one or both spouses. In this situation, there's a logical conflict of interest between the spouse, who may need all of the income and some of the capital to support their lifestyle, and the children who would like to see their future inheritance grow as much as possible. Often, the trust creator will explicitly state that the spouse's needs take priority, which can help the trustee when making difficult choices.

Disagreeing about the good use of trust money:

A beneficiary may think they deserve a particular standard of living, including, for example, expensive travel. Or, they may want a large capital amount to invest in a business venture. The trustee may feel some requests are extravagant or too risky, and perhaps inconsistent with what the trust's creator intended. Sometimes a trust is created

What's a Trust?

Simply put, a trust is a relationship involving three parties. There's the creator of the trust, who contributes property to the trust and sets out rules for how the property is to be used. For the purposes of this article, the trust is defined as part of the creator's last will and testament and becomes effective upon their death. There's the trustee, who holds legal title to the property, subject to a legal obligation to use the property according to the rules and in the best interest of the beneficiary. There's the trust beneficiary (or beneficiaries), who owns a beneficial interest in the property but not the legal title. This fact results in an important separation of the property's ownership. Trustees have duties and obligations under the law of the place where the trust resides, and further duties defined in the will or deed that creates the trust. Beneficiaries have legal rights, including the right to compel the trustee to fulfil the trust's terms.

1. Readers should be aware that trusts are governed by provincial law, which varies from province to province. Nothing in this article should be seen as legal advice. Consult with your professional advisors.



specifically to protect the long-term interest of a beneficiary who's imprudent with money—in other words to protect the beneficiary from himself. This kind of tension can be the most difficult to resolve because the trustee truly believes part of their role is to put the brakes on spending. The beneficiary may view this approach as an improper intrusion in their lives. Again, the best answer is for the trust creator to clearly express their intention and for the trustee and the beneficiary to work to appreciate the other's point of view.

Disagreeing about how trust funds should be invested:

A trustee must be mindful of two primary rules when investing trust money. They need to “exercise the care, skill, diligence and judgment that a prudent investor would exercise,”² when investing money that belongs to someone else. They must also exercise what's called an “even hand” between the current and future trust beneficiaries. In practice, this means that most trusts are invested fairly conservatively, with an investment policy that works to balance

current yield and future growth, while looking to reduce risk through diversification. Trust beneficiaries may wish that trust funds could be invested in riskier investments that might (or might not) achieve greater returns. This is particularly acute for families that may have generated great wealth as successful entrepreneurs, who may see a highly concentrated investment in real estate or a family business as the best way to increase family wealth. If the trust creator does want the trust to hold, for example, majority ownership of a private company, careful drafting of the will or trust deed is needed to provide the trustee with adequate liability protection.

Building Common Ground

Trusts have evolved over centuries to be one of the most useful tools for achieving a myriad of estate planning objectives. However, some aspects of the trust relationship can make it challenging for trustees and beneficiaries to always see eye to eye. In our experience, the keys to success are transparency when articulating why the trust has been created, open

communication between all parties to the trust, willingness by both the trustee and the beneficiary to truly try to understand why the creator set the terms of the trust as they did, and an ability to compromise when possible within the terms of the trust. With those fundamentals in mind, trustee and beneficiary relationships grow to succeed over lifetimes.

2. *Trustee Act*, Revised Statutes of Ontario, 1990.