

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2023-404-1514
[2024] NZHC 920**

IN THE MATTER	of the Trusts Act 2019
IN THE MATTER	of the DOUGLAS HILTON FAMILY TRUST
BETWEEN	MARTIN BRIAN SHERWIN Applicant
AND	JKA HOLDINGS LIMITED and VULCAN TRUSTEE CO (2012) LIMITED as trustees of the DOUGLAS HILTON FAMILY TRUST First Respondents
	PAUL HILTON SHERWIN Second Respondent

Cont/...

Hearing:	13 and 14 November 2023
Appearances:	P Dale KC for the Applicant B Vautier and Mr Kim for the First Respondents No appearance by or for the Second Respondent J Skinner for the Third Respondent I Hutcheson for the Fourth Respondent B Molloy for the Fifth Respondent
Judgment:	24 April 2024

JUDGMENT OF BECROFT J

*This judgment was delivered by me on 24 April 2024 at 4pm
pursuant to r 11.5 of the High Court Rules 2016.*

Registrar/Deputy Registrar

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JAN SUSAN WALLACE
Third Respondent

WAYNE ANTONY SHERWIN
Fourth Respondent

ZOE MAATA SHERWIN
Fifth Respondent

The application

[1] The five Sherwin siblings (the siblings) are the beneficiaries of the Douglas Hilton Family Trust.¹ It was settled in 1985 by their father, Dr Douglas Sherwin, a medical practitioner, who died in 2006.²

[2] The trust deed sets the date of final distribution of the trust assets as being the twentieth anniversary of the father's death. In the meantime, the trustees, in their absolute discretion, can make payments to the siblings, or any one of them (if necessary to the exclusion of other siblings) as they think proper. Although some distributions have been made, a significant amount of trust assets remain.

[3] The siblings are all clear that they want the trust terminated as soon as possible. However, they are not agreed about the terms and conditions of the termination. Four siblings want equality of distribution (that takes into account the unequal payments that have already been made to the siblings). However, Wayne Sherwin desires inequality of distribution and wants a greater share because of his relatively straitened financial circumstances, his various health needs, and that the fact he does not own his own home.

[4] In his will, Dr Sherwin left half of his estate to Wayne, and one-eighth shares to the remaining siblings. To date, Wayne has already received approximately \$100,000 from his father's estate. However, for reasons I will outline, there will be very little left in the estate, which was only recently finalised, and Wayne may stand to gain no more than a further \$100,000. Accordingly, Wayne seeks for the family trust to be distributed unequally so that his financial needs can be met.

[5] If the Court agrees that the trust assets should be distributed unequally, two of the other siblings, Zoe Sherwin and to a lesser extent Jan Wallace, seek greater shares of the assets to reflect their own needs.

¹ The five siblings are Martin, Paul, Jan, Wayne, and Zoe.

² As I later explain, at [15] below, the wording of the trust deed is problematic. The settlor is expressed to be Dr Sherwin's mother but everything else about the deed points to the Dr Sherwin being the settlor.

[6] This application was originally brought as an application to approve termination of the trust under s 124 of the Trusts Act 2019. During argument it was accepted that s 124 was unlikely to apply in these circumstances. Consequently, the applicant, Martin Sherwin, successfully sought leave to amend the application. He now seeks orders under s 125 of the Act to waive the need for beneficiary unanimity to the termination of the trust and to allow equal distribution. Also, with the consent of all the beneficiaries, the Court is asked, under s 126(1), to review the trustee's current proposal to "equally" divide the assets between the beneficiaries.

Dr Sherwin's will and estate

[7] It is common ground that Dr Sherwin left his financial affairs in what was politely described to me as "a shambles". There was both a will and a trust deed—which I will discuss in turn—but suffice to say, it was very difficult to establish what Dr Sherwin owned and on what terms he held that property.

[8] Dr Sherwin left a handwritten will dated 27 June 2003. Significantly, and as previously mentioned, Dr Sherwin directed that one-half of his net estate be held on trust for Wayne (the trustees of which were Martin, Jan, and Wayne himself). The other half of his estate was to be divided equally (in one-eighth shares) amongst his other children, Jan, Martin, Paul, and Zoe. It seems common ground that the preference in the will for Wayne arose from the acknowledgement of Wayne's significant mental health and related personal issues, his poor financial position, and Dr Sherwin's realisation that he would have special additional needs above those of his other children.

[9] Following his death, establishing the extent of Dr Sherwin's estate proved problematic. So much so, that the extent of his estate available for distribution has only just been finalised—17 years after his death. I am told that it became very difficult to establish what his assets were due to competing claims over the ownership of certain property. For instance, I am told that Martin discovered, in about 2014, that the trust owed the estate \$1 million. But soon after, Dr Sherwin's second wife asserted ownership over some of the assets comprising that \$1 million figure, including a property and an insurance policy. Legal action was required to resolve matters.

[10] The value of the estate remaining for further distribution will be \$876,260.00. The problem is that legal expenses have been incurred by Jan, of \$140,845.19, and by Martin, of \$439,371.60 to resolve the disputes relating to the value of their father's estate. The legal costs total \$580,216.79, which must be paid by the estate. The net value of the remaining estate is therefore only \$296,043.21.

[11] As a result of those legal costs, Wayne will receive a much smaller inheritance than would otherwise have been the case. Given that diminution in the estate's value, it is perhaps not surprising that there is an ongoing dispute about the quantum of the legal costs. Mr Dale KC is of the view that those costs are justified and without them being incurred there simply would have been no estate to distribute. On the other hand, Mr Hutcheson, counsel for Wayne, strongly disputes the necessity for that level of costs, particularly those incurred by Martin.

[12] While this issue featured in some of the argument for Wayne, and indeed in some of the affidavit evidence, I proceed on the basis that it is an area that I am precluded from entering. That is because in a consent memorandum dated August 2023, it was agreed by the parties that as the executors of the estate are not parties to these proceedings, there is no current avenue for the resolution of these complaints. The parties had previously agreed that any issues in relation to the estate costs must be the subject of an appropriate application which was to be filed by 15 September 2023 with supporting affidavits on the same date. No such application or affidavits were ever filed. Therefore, the reasonableness or otherwise of the costs incurred in finalising the estate is an area into which I cannot and will not venture.

[13] I must proceed on the basis that the costs were properly incurred—despite the suggestions to the contrary in the affidavits, particularly from Wayne and Jan.

The Trust Deed

[14] The trust deed was executed on 19 June 1985. The current trustees, JKA Holdings and Ltd and Vulcan Trustee Co (2012), were appointed in 2012. By today's drafting standards the trust deed is not a crisp, clear nor straightforward document. However, I understand this to be typical of older trust deeds.

[15] An immediate problem with the drafting is that the settlor is expressed to be Florence Eleanor Zoe Crawford, who I understand to be Dr Sherwin's mother—the grandmother of the five siblings. However, the deed recites that the settlor is desirous of making provision for his wife, Marino Te Moana Sherwin, who is Dr Sherwin's second wife and for the children of Dr Sherwin (whether by his first or second marriage). Other than the settlor being named as Dr Sherwin's mother, everything else in the trust deed reads as if the settlor is Dr Sherwin. With the agreement of both counsel, I proceed on the basis that, in substance, this is a trust deed made by Dr Sherwin as settlor for the benefit of his second wife and five children. Given a settlement has been reached with Dr Sherwin's second wife, her interests are no longer relevant.

[16] The most relevant provisions of the trust deed are the first two clauses which detail how trust distributions are to be made to the identified beneficiaries:³

1. DURING the period from the date hereof until the day immediately prior to the expiration of twenty years from the death of the said DOUGLAS HILTON SHERWIN (hereinafter called "the date of distribution") TO PAY APPLY OR APPROPRIATE as they may in their uncontrolled discretion from time to time think fit the whole or such portion or portions of the income of the trust fund and also the whole or such portion or portions of the capital of the trust fund (with or without first paying applying or appropriating income) for or towards the personal support benefit maintenance education or advancement in life of such of them as may from time to time be living the wife (so long as she remains the wife of the said DOUGLAS HILTON SHERWIN and the children or such one or more to the exclusion of the others or other persons beneficially interested under this discretionary power at such time or times in such manner and if more than one in such shares as the Trustees in their sole and uncontrolled discretion shall think proper with liberty to pay apply or appropriate the same to the guardian or parent or person for the time being having the custody or control of any of the aforementioned beneficiaries for the time being a minor or not of full capacity without seeing to the application thereof AND WITH POWER to accumulate the whole or any portion of the income of the trust fund by investing the same and the resulting income thereof in manner hereby authorised to the intent that each and every such accumulation shall be added to the capital of the trust fund and be subject to the like trusts to appropriate for any of the purposes aforesaid any part of the income accrued or derived from the trust fund whether or not the same shall then have been received by the Trustees.

³ These clauses are reproduced exactly as they exist in the trust deed. The eagle-eyed may notice small errors in these clauses; they are indicative of the nature of the deed's drafting.

2. UPON the date of distribution hereinbefore referred to TO HOLD such of the capital of the trust fund and the income thereof as may then remain UPON TRUST for such of the children as may then be living and if more than one as tenants in common in equal shares PROVIDED HOWEVER that if any of the children shall have died prior to the date of distribution leaving a child or children who shall then be living such child or children shall take and if more than one as tenants in common in equal shares the share which his her or their parent would have taken under these presents had such parent survived to attain a vested interest.

[17] It will be obvious that cl 1 gives the trustees a wide discretion during the period that expires on the day immediately prior to the expiration of 20 years from the death of Dr Sherwin. This discretion includes an ability to make provision to the children or one or more of them to the exclusion of the others in the sole and unfettered discretion of the trustees.

[18] Under cl 2, at the date of distribution, such capital and income as may remain will be held on trust for any of the children as may then be living as tenants in common in equal shares.

[19] The interpretation of the trust deed, other than confirming the identity of the settlor and its true purpose, was not in dispute between counsel and no other clauses were said to be relevant.

What led up to this application?

[20] As long ago as October 2013 the trustees proposed a distribution which effectively amalgamated the total estimated assets from the estate (preserving Wayne's one-half share) and the trust. Each of the five siblings were to receive \$654,737, and Marino would receive \$282,252. It was said that this distribution represented entitlements arising for each of the five children from both the trust and the estate. It was also signalled that at the time of final distribution any advances to any of the beneficiaries made by the trust would be deducted from their entitlement. I infer this was to ensure a form of equalisation between the beneficiaries.

[21] From that point in time, things became murkier and confused, particularly in terms of establishing the true value of the estate.

[22] It was not until 23 May 2023 that the trustees provided a new proposal for final distribution to the five siblings. The proposal was based on a net amount for the trust to distribute of \$1,830,072.⁴ There was to be a one-fifth share of \$366,014.40 for each sibling that was to be “equalised” as I now set out:

Paul

Share of Trust	\$366,014	
Less current a/c	(\$40,096)	
	<u>Total</u>	<u>\$325,918</u>

Martin

Share of Trust	\$366,014	
Less current a/c	(\$111,044)	
	<u>Total</u>	<u>\$254,970</u>

Jan

Share of Trust	\$366,014	
Less current a/c	(\$35,970)	
	<u>Total</u>	<u>\$330,044</u>

Wayne

Share of Trust	\$366,014	
Less current a/c	(\$96,025)	
Less damage	(\$49,889)	
	<u>Total</u>	<u>\$220,100</u>

Zoe

Share of Trust	\$366,014	
Less current a/c	(\$81,303)	
	<u>Total</u>	<u>\$284,711</u>
	Total	\$1,415,743

⁴ I note that the difference between the net amount for the trust to distribute (\$1,830,072) and the actual amount that will be distributed (\$1,415,743) is the total value of the beneficiary’s current accounts plus the compensation from Wayne for damage to trust property (\$414,329).

[23] I understand, at least from Mr Hutcheson, that it was expected that the trustees would then apply under s 133 of the Trusts Act to have the Court make directions about the trust property and/or the exercise of their powers as trustees. This did not eventuate.

[24] Martin then decided to apply in his own right, as a beneficiary, on behalf of all the beneficiaries to bring matters to an end and to seek finality.

[25] His originating application initially sought orders:

- (a) terminating the trust pursuant to s 124 of the Trusts Act;
- (b) directing that after deduction of costs that the net assets of the trust be divided equally between the beneficiaries;
- (c) alternatively directing that the assets of the trust be divided on such terms as the Court deemed just;
- (d) appointing an independent expert to undertake a review of the costs paid to the trustees out of the assets of the trust;
- (e) directing that a prospective costs order be made in favour of the applicant so that:
 - (i) the applicant's costs are paid out of the assets of the trust;
 - (ii) the applicant will not be liable to pay the costs of any other parties; and/or
 - (iii) any costs the applicant may be ordered to pay to the other parties will be paid out of the assets of the trust.
- (f) such further or other orders as are necessary to implement to removal of the trustees.

The law and how the original application came to be amended

Section 124 of the Trusts Act

[26] Martin's initial application was made under s 124 of the Act. That provision reads:

124 Power of court to approve termination, variation, or resettlement of trust

- (1) The court may, on behalf of any of the beneficiaries described in subsection (2) who has an interest in the property of a trust, approve the termination, variation, or resettlement of the trust.
- (2) The beneficiaries are—
 - (a) a beneficiary who lacks capacity:
 - (b) a person who may acquire a beneficial interest at a future date or on the happening of a future event or on becoming a member of a certain class of persons:
 - (c) a future person who may acquire a beneficial interest.
- (3) An application for an order of approval may be made by—
 - (a) the trustees or any one of them:
 - (b) any person with a beneficial interest in the trust property.
- (4) On an application for an order of approval, the court must take into account each of the following factors:
 - (a) the nature of any person's interest in the trust property and the effect of the proposed order on that interest:
 - (b) the benefit or detriment that may result to any person with an interest in the trust property if the court makes or refuses to make the proposed order:
 - (c) the intentions of the settlor of the trust in settling the trust, if it is practicable to ascertain those intentions.
- (5) The court must not make an order of approval if its effect would be to reduce or remove any vested interest in the trust property.
- (6) An order of approval binds the person on whose behalf it is made and takes effect without any further step.

[27] During the course of the hearing, it became clear that Martin's initial application was misconceived. Counsel agreed that s 124 allows a court to act in a protective way on behalf of any of the three types of beneficiaries described in s 124(2)(a)–(c). However, counsel agreed that none of those three categories applied to any of the five siblings. On reflection, Mr Dale accepted that while Martin could make an application (as a person under s 124(3)(b)) there was no person or future person, within s 124(2), on whose behalf this Court could act. I need make no final

decision on the extent of s 124. However, I accept counsels' position that it is inappropriate for the Court to proceed in reliance on this section in these circumstances.⁵

Section 125

[28] Martin's application is now made in reliance on s 125, which provides as follows:

125 Power of court to waive requirement of consent to termination, variation, or resettlement of trust

- (1) The court may waive the requirement that a beneficiary consent to the termination of a trust under section 121 or the variation or resettlement of a trust under section 122.
- (2) An application for an order of waiver of consent may be made by—
 - (a) the trustees or any one of them;
 - (b) any person with a beneficial interest in the trust property.
- (3) On an application for an order of waiver of consent, the court must take into account each of the following factors:
 - (a) the nature of any person's interest in the trust property and the effect of the proposed order on that interest;
 - (b) the benefit or detriment that may result to any person with an interest in the trust property if the court makes or refuses to make the proposed order;
 - (c) the intentions of the settlor of the trust in settling the trust, if it is practicable to ascertain those intentions.
- (4) The court must not make an order of waiver of consent if its effect would be to reduce or remove any vested interest in the trust property.
- (5) An order of waiver of consent binds the person on whose behalf it is made and takes effect without any further step.

[29] In Mr Dale's submission, Martin's application should be considered an application to waive the requirement that all the beneficiaries consent to the

⁵ I note that this position accords with the Law Commission's view of the intended purpose of s 124. Section 121 of the Trusts Act 2019 codifies the longstanding common law rule that allowed a trust to be terminated on the unanimous consent of the beneficiaries. The requirement for unanimous consent poses a problem for trusts with beneficiaries who are children, or who are incapacitated in a legal sense, because those beneficiaries cannot consent. Section 124 empowers the Court to act on behalf of beneficiaries who, for specified reasons lack capacity to lawfully consent. The Court may consent to a requested s 121 termination on those beneficiaries' behalf (if, of course, it is satisfied that would be appropriate in the circumstances). In that way, even trusts with beneficiaries who lack legal standing may be terminated under the s 121 procedure. For further information see the *Law Commission Review of the Law of Trusts: A Trust Act for New Zealand* (NZLC R130, 2013).

termination of the trust on the terms and conditions allowing for equality of distribution. In closing argument however, Mr Hutcheson was of the view that s 125(2) could not apply either in these circumstances. This is a matter to which I will return. For reasons that emerge, it will be seen that I do not have to make a final decision in respect of the s 125 application.

Sections 126 and 127 of the Act

[30] In his opening submissions in response to this application, Mr Hutcheson sought to widen the ambit of argument so that it included consideration of ss 126 and 127 of the Act, which provide as follows:

126 Court may review trustee's act, omission, or decision

- (1) The court may review the act, omission, or decision (including a proposed act, omission, or decision) of a trustee on the ground that the act, omission, or decision was not or is not reasonably open to the trustee in the circumstances.
- (2) The court may undertake a review on the application only of a beneficiary.
- (3) The review must be conducted in accordance with section 127.
- (4) This section and section 127 do not limit or affect—
 - (a) the court's jurisdiction to supervise trusts, including its jurisdiction under the Charitable Trusts Act 1957; or
 - (b) the Attorney-General's powers and duties with respect to charitable trusts, including powers and duties under the Charitable Trusts Act 1957.

127 Procedure for court's review of trustee's act, omission, or decision

- (1) An applicant for a review under section 126 must produce evidence that raises a genuine and substantial dispute as to whether the act, omission, or decision in question was or is reasonably open to the trustee in the circumstances.
- (2) If the court is satisfied that the applicant has established a genuine and substantial dispute, the onus is on the trustee to establish that the act, omission, or decision was or is reasonably open to the trustee in the circumstances.
- (3) If the court is satisfied on the balance of probabilities that the act, omission, or decision was not or is not reasonably open to the trustee in the circumstances, the court may (but subject to subsection (4))—
 - (a) set aside the act or decision, or direct the trustee to act in the case of an omission:
 - (b) restrain the trustee from acting or deciding in the case of a proposed act or decision, and direct the trustee to act in the case of a proposed omission:

- (c) make any other orders that the court considers necessary.
- (4) The court must not make an order that affects—
 - (a) a valid distribution of the trust property that was made before the trustee had notice of the application; or
 - (b) any right or title acquired by a person in good faith and for value.

[31] The immediate problem confronting Mr Hutcheson was that no application under s 126(2) for a review had been made by any beneficiary. However, after discussion, Mr Dale accepted that it would be appropriate for the Court to proceed as if Martin had made such an application. (Equally Wayne could be the applicant—it would matter not). Mr Dale noted that he was well aware of Mr Hutcheson’s position and argument about ss 126 and 127; and in his own submissions Mr Dale had already discussed those very provisions. Mr Dale, very responsibly in my view, accepted there could be no prejudice to his client if the Court “deemed” a s 126 application to have been made; or if Martin’s application was amended appropriately to also include this application. All the parties to the proceedings knew that Wayne’s argument was for him to receive a greater share of the trust’s assets and that the trustees did not support his request. I can see no disadvantage or prejudice to anyone if I proceed in this way.

[32] A final procedural problem is that s 127(2) requires the trustees to demonstrate that their proposal for equal distribution is reasonably open to them in the circumstances.

[33] Mr Vautier, acting for the trustees, could not appear due to a sudden family bereavement. The Court extends its sympathies to him. Mr Dale explained he had instructions from Mr Vautier to speak for, and protect the interests of, the trustees. In Mr Dale’s view it was appropriate to proceed on the basis that his application was also a ss 126 and 127 application and I do so.

[34] After further discussion it was agreed that the s 126 application to review the trustees most recent proposal for distribution as set out at [22] above, should be heard first. This was said to be logical because if the trustees’ proposed distribution was held to be reasonably open to them, then they would be free to proceed with this full and final distribution, which would empty the trust of all its assets. In practice the

trust would then effectively cease to exist or exist only as a shell, and on the twentieth anniversary of Dr Sherwin's death, it would terminate.

[35] I therefore turn first to s 126 and then, if necessary, to s 125.

The “deemed” or amended application under s 126

[36] The first consideration under s 127(1) is that here, Wayne must produce evidence that raises a genuine and substantial dispute as to whether the proposed decision was or is reasonably open to the trustees in the circumstances.

[37] Mr Dale helpfully conceded that, given all the affidavit evidence in Wayne's argument, there was a dispute that was both genuine and substantial thereby satisfying the s 127(1) requirements.

[38] Under s 126(2) the onus then falls onto the trustees to establish that the proposed decision is “reasonably open to [them] in the circumstances”. I infer, although the statute is not explicit on this point, that in this respect the onus on the trustees is to the standard of the balance of probabilities. It is curious that s 126(3) refers to that standard in respect of the Court finding that the proposed decision is *not* open to the trustees—not whether it is. However, in my view, if that standard is not reached in the case of s 126(3) then logically it must be that the Court is satisfied to that standard in respect of s 126(2). I understand counsel to accept that interpretation. Even if I am wrong, and there is a lower standard for s 126(2) and all that is necessary is that the Court be “satisfied”, then, as I discuss, it makes little difference in this case.

[39] As to whether the proposed distribution was reasonably open to the trustees in these circumstances, Mr Hutcheson emphasised Wayne's special financial needs, which are comprehensively set out in his affidavit. He is a sickness beneficiary with significant mental health issues. These are mostly managed with medication but from time to time he needs to self-refer. He lives in a house owned by his partner's late mother and has no significant assets beyond aged motor vehicles and household appliances. He also faces significant challenges with his son's own health issues (which, in the interests of privacy, I do not intend to elaborate upon). Accordingly, Wayne says he is in very strained circumstances and requires more financial support

than any of his four siblings, although he concedes that Zoe also has a claim for additional financial help.

[40] Wayne expresses the view that he believes his father thought all his assets would fall into his estate and would be divided in the manner he provided for in his will. In Wayne's view, his father always understood Wayne's personal circumstances and his greater financial need, which is why he preferred Wayne in his will.

[41] Wayne acknowledges that most of his requests for financial help from the trust have been met. He recorded his gratitude for that. However, in his view those distributions only met his "critical needs" and have not made a difference to his overall financial position.

[42] Mr Hutcheson's submission was that if the trustees were to properly consider Wayne's (and Zoe's needs), it would not be reasonably open to them to suggest equal distribution. This is particularly so when the actual amount Wayne will receive under the will is much reduced because of the legal costs incurred in establishing the extent of Dr Sherwin's estate.

[43] At one stage Mr Hutcheson requested that under s 127(3)(c), if I were to find that the proposed decision was not reasonably open to the trustees, that I make orders that I considered necessary as to the unequal distribution of the trust funds in favour of Wayne. I record that I am in absolutely no position to do that. I have no accounting or other evidence as to how the funds could or should be distributed unequally. That would be a matter for the trustees, should the issue arise.

[44] Mr Meltzer, the director of one of two corporate trustees, was extensively cross-examined on the trustees' proposal.

[45] He accepted he was aware of both Wayne and Zoe's circumstances. In his view while acknowledging those needs, the trustees concluded that each of the siblings were to receive a significant sum and that the "rebalancing" proposed as part of the final distribution was both appropriate, and fair and reasonable.

[46] Mr Meltzer conceded that he did not take into account the much-reduced estate available for distribution under the will. However, he felt that the will and the subsequent estate spoke for itself, and the fees incurred in establishing the value of the estate was not a matter for the trustees to become involved with nor take into account. In his view, as early as 2013, the trustees had signalled that they would conduct a “rebalancing” at final distribution of the assets: such rebalancing was standard practice, and was consistent with cl 2 of the deed.

[47] Mr Meltzer struck me as considered, thoughtful and reasoned. It could not be said that the trustees were acting capriciously or had failed to take into account relevant considerations in reaching their decision.⁶

[48] I can well understand Wayne’s concern that the value of the estate he will receive is much diminished from what he initially expected. However, in my view it is open to the trustees, well open to them in fact, to differentiate between the terms of the will and the quite separate trust. I consider that it is quite reasonable for the trustees to administer the trust separately from the will. There is no necessity for the trustees to take into account Wayne’s actual entitlement under the will and no requirement for them to factor that into their distributions under the trust. Whatever Wayne might think as to his father’s intentions regarding all his assets, Dr Sherwin left no memorandum or parallel instructions regarding the trust. There was also absolutely no suggestion by Dr Sherwin that the trust should be distributed in the same way and on the same basis as the will, or that the trust should be applied in the “spirit” of the will.

[49] Of course, the trustees could have decided to do more to assist Wayne and to accede to his wishes. However, their decision not to do so was well reasoned and considered and certainly well within the terms of the trust deed and their own complete discretion in light of what they know about all the siblings. Putting the question another way “was it reasonably open to them not to do more for Wayne in all the circumstances?” In my view it certainly was.

⁶ *Craddock v Crowhen* HC Christchurch M 425/92, 10 February 1995, and *Wrightson Ltd v Fletcher Challenge Nominees Ltd* HC Auckland CP129/96, 21 August 1998.

[50] It must follow, and I so conclude, that it was reasonably open to the trustees to propose a final distribution of the trust assets in exactly the way that they set out. I am “satisfied” of that on the balance of probabilities and beyond. Accordingly, I find that the trustees have discharged the onus imposed on them by s 127(2).

[51] That disposes of the s 126 application.⁷ The trustees’ proposed distribution can proceed. Effectively that disposes of the case.

The application under s 125

[52] However, if I upheld the trustees’ proposed decision under the s 126 review, Mr Dale still argued that I should deal with his remaining application under s 125 to waive the requirement for unanimous beneficiary agreement for termination of the trust. His argument was that I could approve termination of the trust now.

[53] The first thing to say is that I see no useful purpose in doing that. The trustees are now free to make a final distribution of the estate as they have proposed. This distribution will effectively leave the trust devoid of any assets and thus income. I cannot see any need for, or the advantage of, early termination of a trust which for all intents and purposes will “disappear” or will be ‘exhausted’ when all the final distributions, now approved, are made. Support for this view is also found in the definition of express trusts in the Trusts Act—an express trust requires a fiduciary relationship to exist wherein a trustee holds or deals with trust property for the benefit of the beneficiaries.⁸ In the situation where trust property no longer exists, in substance there would no longer be a trust. The empty shell of the trust would technically subsist until the termination date in 2025 when the trust would be legally interred.

[54] But even if I am wrong not to proceed to consider s 125, there are problems raised by Mr Hutcheson which would need to be resolved before I could begin to apply that section.

⁷ I note that this approach is also consistent with the recommendations of the Law Commission. See *Law Commission Review of the Law of Trusts: A Trust Act for New Zealand*, above n 5, at 173–179.

⁸ Section 13(a).

[55] In my view, s 125 is essentially an enabling or mechanical provision that allows a court to do no more than dispense with all or any of the consents that are required for the termination of a trust under, in this case, s 121. Section 125 only allows the Court to order a waiver. It is then for the trustees under s 121 to terminate the trust. In other words, I do not read s 125 as carrying an implicit power to terminate the trust. This is Mr Dale's argument, which respectfully I do not accept. He partly relied on the Court's inherent jurisdiction to supervise trusts. In my view s 125 should be limited to allowing the waiver of s 121 procedure. And if I was to grant a waiver only, the matter would then go back to the trustees to terminate the trust. And that would then raise the very issue about which there is a substantial dispute and for which it would seem the ss 126 and 127 procedure could be invoked (and which I have already resolved). Put more bluntly, s 125 should not be used as a backdoor to enable beneficiaries to resolve disagreements about the early termination of a trust, especially where more legitimate channels exist to facilitate that.

[56] I note that in terms of waiving the s 121 requirements, s 125 is very widely cast. As it was raised in argument, I record that I do not accept Mr Hutcheson's submission that use of s 125 should be confined to the situation when there is only one beneficiary who is not requiring the trustees to terminate the trust on the terms proposed. The section contains no such limitation. It could conceivably apply to a situation where virtually all the beneficiaries are not consenting. Obviously, the number of consenting beneficiaries will be relevant to the Court's decision to grant a waiver.

[57] It should not be forgotten here that in fact all the beneficiaries consent to the termination of the trust. The only issue is how its assets are to be distributed, where there exists deep division. On my provisional conclusions so far, s 125 just does not apply to this situation and resort to it is misplaced. Mr Dale argued that s 125 is wide enough to include, as here, waiver of consent to terminate the trust *with equality of distribution to the beneficiaries*. I do not think the section should be read as widely as Mr Dale contends. Waiver of consent is one thing; the terms of termination is quite another. If there is a genuine and substantial dispute about that, then on the limited argument I have heard on the point, ss 126 and 127 are available to resolve that dispute,

not s 125. Also, the trustees could conceivably apply to the Court under s 133 of the Act for directions.

[58] At this stage there are simply too many potential problems and fishhooks with s 125 for me to make an order waiving the requirement for beneficiary consent under that section and to approve of equality of asset distribution. And in any case, all the beneficiaries consent to termination.

[59] The approach I have suggested above, is consistent with the Law Commission's Report which led to the enactment of the current Trusts Act.⁹

Costs

[60] As for costs, I am prepared to accept memoranda from counsel. But they should be no more than 3 pages, and Mr Dale should file within 10 days of receipt of this decision, and Mr Hutcheson a further seven days thereafter. In my view

⁹ Under s 121 adult beneficiaries with legal competency can unanimously agree to terminate the trust. Section 125 provides a power for the court to waive the requirement for unanimous consent. The Law commission recommended the introduction of this power to ensure that beneficiaries with remote or negligible interests in a trust cannot veto the wishes of beneficiaries with far more significant interests. The cases that have substantially engaged with s 125 (see below) make it clear that the Court can only use s 125 to waive the required consent of particular beneficiaries in relation to a *specific* proposal for the termination or variation of the trust. Support for that view is also found in the wording of the provision itself. Subsections (3)(a) and (b) expressly require the Court to consider the effect of "the proposed order". Clearly, the statute envisages a *particular* proposal for termination, variation, or settlement, by beneficiaries under s 121. The issue in this case is that the beneficiaries all agree that the trust should be terminated, however, they do not agree on a *specific* proposal for the termination of the trust.

The following cases all involve an application under s 125 for the Court to waive the required consent to a *particular* proposal for termination/variation of the trust.

- (a) In *Talijancich v Talijancich* [2021] NZHC 753, the trustees sought to vary the trust deed to enable the trust to be administered more efficiently and in line with modern practices. An application was made under s 125 to waive the requirement for unanimous consent.
- (b) In *Trustees Executors Ltd v Nichols* [2023] NZHC 43 the applicant sought to terminate the trust on the basis that the trust's portfolio would be exhausted before the date of final distribution. That proposal was said to give effect to the settlor's intention that his family would benefit from the trust. An application was filed under s 125 for the Court to waive the need for the consent of the charitable beneficiaries of the trust; the family member beneficiaries had all provided their consent to the proposal.
- (c) In *Re Tau* [2023] NZHC 2544 an application was made under s 125 to waive the requirement for beneficiary consent to proposed variations of the trust deed. In this case it was not practical to acquire the consent of all beneficiaries because that class encompassed all iwi and other large natural groupings with historical claims to the relevant land.

solicitor/client costs are appropriate. Considerable work and preparation has been put in by both counsel to this matter. Mr Hutcheson suggested that I could deal with the matter by restricting costs to scale costs. I am not attracted to that submission because Martin, and even Wayne, may then have to pick up the costs that remain.

[61] In all the circumstances I see no reason to depart from the usual position that the trust assets are to be used to pay for the legitimate legal costs required in finally determining the matter.

Result

[62] Under ss 126 and 127 of the Trusts Act, I rule that the proposed distribution of the trust property and assets, as set out at [22] of this judgment, is reasonably open to the trustees. Consequently, it can proceed. For the record, the application under s 124 seems misconceived. The application under s 125 is also inappropriate in these circumstances, and in any case does not require a decision.

[63] I rule accordingly.

Becroft J

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