

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

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

**CIV-2019-404-001158
[2019] NZHC 1467**

UNDER the Trustee Act 1956

IN THE MATTER of an application for removal of a trustee and
a vesting order and a variation of a trust deed

BETWEEN MICHAEL JOHN GREEN, DAVID
CHARLES GREEN and SUSAN FAY
PETCH
Applicants

AND ROBERTA JOYCE GREEN
Respondent

Hearing: 26 June 2019

Appearances: D Mitchell for the Applicants
No appearance by or on behalf of the Respondent

Judgment: 26 June 2019

JUDGMENT OF WOOLFORD J

Counsel/Solicitor:

Douglas Mitchell Lawyer, Auckland

[1] The Bobbie Green Family Trust was settled by the respondent, Roberta Joyce Green, on 24 April 1993. Ms Green is also a trustee of the Trust and a discretionary beneficiary. Ms Green's three children, Michael John Green, David Charles Green and Susan Fay Petch, are the other trustees and final beneficiaries. The trustees are the registered proprietors of a residential property at 12 Kotare Place, Sandspit, being the land comprised in Record of Title Identifier NA53C/1247, North Auckland Land Registration District, being Lots 103 and 127 on Deposited Plan 98537 (the property).

[2] On 7 November 2013, Ms Green executed an enduring power of attorney in relation to personal care and welfare, appointing her daughter, Ms Petch, as her attorney in relation to personal care and welfare. On the same day, she also executed an enduring power of attorney in relation to property appointing her three children as her attorneys in relation to her property.

[3] Ms Green now has severe cognitive impairment and is no longer competent to make sound decisions regarding her health and welfare and her property. She is currently a resident of St Kilda Care Home Hospital at 91 Alan Livingston Drive, Cambridge. St Kilda specialises in dementia care.

[4] Ms Green's three children wish to sell the property in order for the Trust to continue funding Ms Green's care. The difficulty is that Ms Green is unable to authorise the sale of the property due to her incapacity. They, therefore, seek orders removing their mother as a trustee of the Trust and vesting title to the property at 12 Kotare Place, Sandspit, in their joint names as the remaining trustees. They also seek an order varying cl. 9 of the Trust to permit the power of appointment of a new trustee by the remaining trustees.¹

Application for leave to commence the proceedings by originating application and directions as to service

[5] This is not the type of proceeding that can be commenced by way of originating application as of right pursuant to rr 19.2 – 19.4 of the High Court Rules 2016. However, the Court may, in the interests of justice, permit any proceeding not

¹ Currently only Ms Green as the settlor of the Trust is nominally able to remove or appoint trustees.

mentioned in r 19.2 – 19.4 to be commenced by way of originating application. Such permission may be sought without notice.

[6] By minute dated 21 June 2019, Palmer J granted the application for permission to commence the proceeding by way of originating application and directed that the matter be called in the Duty Judge list on 26 June 2019.

[7] The applicants now seek a further order that the application be determined on the papers without service on Ms Green or any other person. I am of the view that there is no point in serving the proceeding on Ms Green because of her severe cognitive impairment. Moreover, because the proceeding does not involve any disputed questions of fact and there is no opposing party, it is not necessary in the interests of justice for there to be a particularised pleading or to follow the usual interlocutory steps involved in a civil proceeding. I am satisfied, therefore, that it is appropriate, not only that the proceeding proceed by way of originating application as already directed by Palmer J, but that the application be determined without service on Ms Green or any other person.

Removal of a trustee without substitution

[8] Under s 51(1) of the Trustee Act 1956, the Court may appoint a new trustee either in substitution for or in addition to an existing trustee. However, because no replacement trustee is sought for Ms Green, the s 51 jurisdiction cannot be invoked. Nevertheless, the Court retains an inherent jurisdiction to remove trustees, animated by the welfare of beneficiaries, the security of trust property and the satisfactory execution of the trusts.² In the context of Ms Green's incapacity, all such considerations are relevantly engaged.

Vesting order

[9] I am similarly satisfied that the vesting order sought by the applicants is appropriate. It follows logically from the removal of Ms Green as a trustee and will permit sale of the property in order that the costs of Ms Green's on-going care can be

² *Green v Green* [2015] NZHC 1218 at [602]; *Peng v Rothschild Trust (Schweiz) AG* [2017] NZHC 25 at [38].

met. The fact that the application is supported by all beneficiaries demonstrates that it proceeds in a transparent and open manner within the Trust and family relationships. I am therefore satisfied that the jurisdictional requirements of s 51(1)(b)(i) of the Trustee Act 1956 are made out and a vesting order is appropriate.

Variation of Trust Deed

[10] Clause 9 of the Trust Deed provides that the power of appointing a new trustee or trustees shall be vested in Ms Green as settlor during her lifetime and after her death in the executors and/or administrators of her will or estate. However, if one of the remaining trustees becomes incapacitated while Ms Green is still alive, then the remaining trustees would be required to make another application to the Court to enable them to exercise their powers to remove the incapacitated trustee and appoint a replacement trustee under cl. 10 of the Trust Deed.

[11] Section 43(1)(e) and (f) of the Trustee Act 1956 provides that where a trustee is incapable of acting, the person nominated for the purpose of appointing a new trustees by the instrument (if any) creating the Trust or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees for the time being, or the person or representatives of the last surviving or continuing trustee may by Deed appoint a person or persons (whether or not the person or persons exercising the power) to be a trustee or trustees in the place of the first mentioned trustee. However, s 43 does not provide for the removal of a trustee and in these particular circumstances where a continuing trustee becomes incapacitated during the life of Ms Green as settlor, the trustees will have to seek a Court order to remove the incapacitated trustee.

[12] Therefore, to ensure that the Trust does not have to incur the delay and expense of having to seek a Court order in the event one of the continuing trustees becoming incapable of making decisions during the lifetime of Ms Green, the trustees have also applied to the Court for an order that cl. 9 of the Trust Deed be varied to permit the power of appointment of a new trustee by the remaining trustees and, therefore, by effect, the remaining trustees will also have the power to remove a trustee and appoint a replacement trustee under cl. 10.

[13] I am satisfied that such a variation is appropriate and will simplify the administration of the Trust if such a situation arises.

Result

[14] I make orders:

- (a) Dispensing with service of the application on Ms Green as respondent and any other person.
- (b) Removing Roberta Joyce Green as a trustee of the Bobbie Green Family Trust.
- (c) Vesting the title to the property at 12 Kotare Place, Sandspit, certificate of title NA53C/1247 in the joint names of the remaining trustees Michael John Green, David Charles Green and Susan Fay Petch; and
- (d) Varying cl 9 of the Bobbie Green Family Trust to permit the power of appointment of a new trustee by the remaining trustees. In particular the amended cl 9 is to read:

The power of appointing a new trustee or trustees shall be vested in the said settlor during her lifetime or in the trustees who are capable and fit to act as a trustee, or after the settlor's death in the administrators or the executors or trustees for the time being of the settlor's will or estate and if at any time after the settlor's death there shall be no such administrator, executor or trustee able and willing to exercise the power, then in the person or persons in whom the power is vested by the Trustee Act 1956.

- (e) Costs of this application are to be met by the Bobbi Green Family Trust.

Woolford J