

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE**

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**NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE**

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**IN THE FAMILY COURT  
AT NORTH SHORE**

**I TE KŌTI WHĀNAU  
KI ŌKAHUKURA**

**FAM-2019-044-000449/241  
FAM-2021-044-000707  
[2022] NZFC 4893**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
AND	THE FAMILY PROCEEDINGS ACT 1980
AND	THE TRUSTS ACT 2019
BETWEEN	[ANNE-MARIE KRUIZE] Applicant
AND	[MATHIES KRUIZE] First Respondent
AND	[ANNE-MARIE KRUIZE], [MATHIES KRUIZE] and RICKY ALLAN WILLIAMS in their capacity as Trustees of the [KRUIZE] SHARES TRUST, [KRUIZE] FAMILY TRUST and [KRUIZE] PROPERTY TRUST Second Respondents

Hearing: 26 May 2022

Appearances: A Rakena for the Applicant  
S Houghton for the First Respondent  
? for the Second Respondents

Judgment: 30 May 2022

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**RESERVED JUDGMENT OF JUDGE S J MAUDE**  
**[Application to replace trustees – s 33M Property (Relationships) Act 1976**  
**and ss 141 and 114 The Trusts Act 2019**

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[1] Mr and Mrs [Kruize] are parties to relationship property proceedings commenced in this court in May 2019.

[2] There exist contemporaneous proceedings under the Family Proceedings Act as to Trusts settled by the parties, which Trusts have and do hold the majority of the assets accumulated under the parties' oversight during their marriage.

[3] The parties, along with independent trustee Mr Ricky Williams, are trustees of the three Trusts the subject of the Family Proceedings Act proceedings, namely:

- (a) The [Kruize] Shares Trust
- (b) The [Kruize] Family Trust
- (c) The [Kruize] Property Trust

[4] The [Kruize] Shares Trust is the owner of the parties' former family home situated at [address deleted – property 1].

[5] The [Kruize] Family Trust is the owner of 99 of 100 shares in the company [name deleted – Company A] (the other share owned by Mr [Kruize]).

[6] The [Kruize] Property Trust is the owner of commercial property situated at [street name deleted – property 2] and a vacant section at lot 5, [location deleted].

[7] Mrs [Kruize] applies for removal of all three trustees of the three Trusts and their replacement by independent trustee Ms Vicky Ammundsen.

[8] Mrs [Kruize] urges that Mr [Kruize] has acted independent of she and fellow trustee Mr Williams, channelled Trust funds or utilised Trust funds as he has pleased, and that independence is required.

[9] Mrs [Kruize] seeks the replacement of the existing trustees relying on:

(a) section 33(3)(m) of the Property (Relationships) Act; or

(b) sections 141 and 114 of the Trusts Act 2019.

[10] The above sections read as follows:

**33 Ancillary powers of court**

.....

(3) In particular, but without limiting the generality of subsections (1) and (2), the court may make any 1 or more of the following orders:

...

(m) an order varying the terms of any trust or settlement, other than a trust under a will or other testamentary disposition:

....

**141 Jurisdiction of Family Court**

(1) This section applies where the Family Court has jurisdiction under section 11 of the Family Court Act 1980 to hear and determine a proceeding.

(2) The Family Court may during the proceeding make any order or give any direction available under this Act if the Family Court considers the order or direction is necessary—

(a) to protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved;  
or

(b) to give proper effect to any determination of the proceeding.

(3) If the parties to the proceeding consent, the Family Court may make any order available under this Act to resolve an issue or a dispute

between the parties that is closely related to the proceeding (but only if the Family Court considers that making the order is necessary or desirable to assist the resolution of the proceeding).

- (4) Despite subsections (2) and (3), the Family Court does not have jurisdiction to appoint a receiver to administer a trust under section 138.
- (5) To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest.
- (6) In any case to which this section applies, the High Court or Family Court may order, on the application of a party to the proceedings, that the proceedings be transferred to the High Court.

#### **114 Court may appoint or replace trustee**

- (1) Whenever it is necessary or desirable to appoint a new trustee and it is difficult or impracticable to do so without the assistance of the court, the court may make an order appointing a new trustee.
- (2) However, this section does not empower the court to appoint an executor or administrator.
- (3) If the court proposes to appoint Public Trust as the replacement trustee, the court must, before making the appointment, give Public Trust an opportunity to be heard on the matter.
- (4) If the court (except on application by a supervisor within the meaning of section 6(1) of the Financial Markets Conduct Act 2013) appoints Public Trust as the replacement trustee, Public Trust—
  - (a) must accept the appointment; and
  - (b) may charge fees for acting as trustee.

[11] Mr [Kruize] opposes Mrs [Kruize]’s application.

[12] Mr Williams appeared at the commencement of hearing, was excused and abides the decision of the court.

#### **Mrs [Kruize]’s case**

[13] The parties separated in March 2019.

[14] The proceedings since filing in May 2019 have been, she argued, marred by difficulties for her in obtaining discovery from Mr [Kruize], he the party actively managing and controlling in particular the business interests held by the trustees.

[15] There appears no prospect of prompt resolution.

[16] Her expert witness, accountant Christopher Harding, has deposed that:

- (a) Tax returns have not been filed since 2015 despite significant rental income earned from [property 2].
- (b) Assets and equipment valued at \$394,350.00 were not in the accounting records of [Company A] or [Kruize] Shares Trust.
- (c) [Company A] sold equipment totalling \$152,522.60, the receipt of such sum not accounted for in any of the disclosed bank accounts.
- (d) An invoice of \$65,000.00 was raised for sale of equipment but again there appeared no record of the company receiving the proceeds of sale.
- (e) Mr Harding concluded from examination of the bank accounts supplied that the [Kruize] Shares Trust had earned rental income of \$206,593.51 for year ended 31 March 2019, with rental income, however, continuing through 2020 and 2021 financial years, such income however transferred to [Company B] without consent of the two other trustees.
- (f) Mr Harding urged that there were likely tax implications for the trustees and that there existed a need to consult a tax expert.
- (g) Mr Harding concluded that asset purchases had been made by Mr [Kruize] with use of Trust funds post-separation.

[17] Mrs [Kruize] urged that Mr [Kruize] had had access to and control of all Trust funds since separation.

[18] Mr [Kruize], she urged, to use her counsel's words, had "ended up as a delinquent trustee treating all Trust assets as if they were his own".

[19] Discovery, Mrs [Kruize] indicated, had been difficult.

[20] Mrs [Kruize]'s counsel indicated that in 2021 Mr [Kruize] had agreed to provide a general authority to her counsel to enable enquiry to be made of all New Zealand banks as to accounts held by him, such authority subsequently withdrawn.

[21] Through counsel, and accepted by Ms Houghton for Mr [Kruize], Mrs [Kruize] argued that there existed proceedings at present brought by Westpac for recovery of funds that could lead to mortgagee sale, total funds owed to Westpac being approximately \$850,000.00.

### **Mr [Kruize]'s case**

[22] Ms Houghton for Mr [Kruize] submitted in the strongest of terms that resolution of the relationship property and Family Proceedings Act proceedings had been thwarted by constant applications by Mrs [Kruize] for interlocutory intervention.

[23] Ms Houghton urged that all that was required now was for:

- (a) Precise definition by Mrs [Kruize] of remaining discovery sought.
- (b) Response by Mr [Kruize].
- (c) Short hearing to determine what further discovery is to be provided.
- (d) Directions for filing of final evidence and allocation of hearing to resolve all issues.

[24] Ms Houghton urged that s 1N of the Property (Relationships) Act urges resolution of proceedings in a timely and cost effective manner, Mrs [Kruize] having stood in the way of that.

[25] The parties and trustees, Ms Houghton accepted, face threat from their bankers. Blame for that, she laid at the foot of Mrs [Kruize] in respect of constant interlocutory applications and applications for interim spousal maintenance.

[26] Ms Houghton did not accept that the court had jurisdiction to replace trustees under the provisions of s 33M of the Property (Relationships) Act, the jurisdiction under such section being ancillary to other orders made by the court. I accept that submission.

[27] Ms Houghton urged that the Family Court did not have jurisdiction to make orders replacing trustees under the Trusts Act in respect of the current proceedings and urged rather contemplation of transfer of what she regarded as complex proceedings to the High Court, where inherent jurisdiction lies.

[28] Ms Houghton accepted that jurisdiction existed pursuant to s 141 of the Trusts Act, but only where necessary to protect Trust property during the course of proceedings.

[29] Ms Houghton urged that Mr Harding's evidence was but evidence and not yet subjected to testing by way of cross-examination or response by an expert of Mr [Kruize]'s choosing.

[30] Ms Houghton urged that the appointment of a replacement independent trustee would not serve the interests of the Trusts' beneficiaries because such trustee would need to be funded at the expense of the beneficiaries. Appointment would add to the financial plight, she urged, of the Trusts with insufficient income generated by them to fund the appointment and meet Westpac's demand.

[31] Ms Houghton urged again in the strongest of terms that her client's position had been from the outset that the family home should be sold by the trustees with interim distribution made to the parties to enable them to rehouse.

[32] The life of the respective Trusts, Ms Houghton urged, was coming to an end and that what was really required was for the Trusts to be wound up with appropriate distributions made.

## **Consideration**

[33] I have indicated already that I accept Ms Houghton's submission that the court does not have jurisdiction to make orders pursuant to s 33M of the Property (Relationships) Act because that jurisdiction is ancillary to the making of substantive orders.

[34] The jurisdiction that remains to be argued is that found in ss 141 and 114 of the Trusts Act, which I have referred to above.

[35] In short, this court may make orders during the course of proceedings before it if it considers the orders necessary to protect or preserve any property or interest pending resolution of the proceedings, or to give proper effect to any determination of the proceedings.

[36] If I reach the conclusion that replacement of trustees is necessary to protect or preserve any property or interest pending final outcome of the proceedings before the court, I may then remove and appoint a new trustee if I conclude that it is necessary or desirable and difficult or impractical to do so without the court's assistance.

[37] That there exists conflict between two of the three trustees of each Trust (Mr and Mrs [Kruize]) is evidenced by the protracted proceedings before the court thus far.

[38] That Trust assets are at risk or in need of protection by functional trustees is clear from the parties' acceptance that they face mortgagee sale proceedings in respect of the family home owned by [Kruize] Shares Trust.

[39] That this court has jurisdiction pursuant to ss 141 and 114 of the Trusts Act to intervene is clear given the dysfunctional relationship of the existing trustees, Mr and Mrs [Kruize] having displayed to the court that they are not able to function consensually.

[40] The above is all the more important because the respective trust deeds of the Trusts do not make any provision for how their trustees are to make decisions, decision



making therefore defaulting to s 38 of the Trusts Act, which provides that where a Trust has more than one trustee the trustees must act unanimously.

[41] The observation of Jagose J in *Guest v Warner*<sup>1</sup> as to relevant considerations for the court as to trustee removal are pertinent:

- (a) The court will give considerable weight to the expression of the settlor's intentions as to the identity of the trustees, if such can be discerned. But the court is not bound by them, and may depart from them "if good cause is shown".
- (b) The trustees must be neutral and even-handed as between beneficiaries with different interests. Courts typically will refuse to appoint beneficiaries (or their spouses or relatives or advisors) or others interested in the trust property, even though their appointment would not be objectionable on that ground alone.
- (c) The promotion of the purposes of the Trust.

[42] Of particular importance is the requirement that trustees must be neutral and even-handed as between beneficiaries.

[43] There exists no neutrality of positioning of the trustees with relation to the trio of [Kruize] Trusts, that being all the more problematic and threatening to the Trusts' assets when one has almost exclusive control of the Trusts' activities (Mr [Kruize]).

[44] The protracted nature of the dispute before the court makes that lack of neutrality clear.

[45] It cannot be that all that is required in these proceedings now is sale and disposition of the family home and other Trust owned assets, as when distribution must be made there needs to be clarity as to how the assets have been handled since separation by the trustees.

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<sup>1</sup> *Guest v Warner* [2018] NZHC 666 at [26].

[46] The respective Trust deeds do not provide for removal and re-appointment of trustees other than by agreement as between the appointors, Mr and Mrs [Kruize].

While the deed provides for the appointment of a Law Society nominee to determine the issue in respect of appointment of trustees, it does not provide for the same with relation to removal.

[47] The parties to the relationship property proceedings and the Trust beneficiaries demand prompt resolution.

[48] In my view, prompt resolution is not possible while two of the three trustees who are all required to act with unanimity are at loggerheads as to discovery and tracing of the management of the Trust's assets.

[49] An experienced and independent trustee, in my view, can proceed to address the interests of the beneficiaries in respect of the Trusts by:

- (a) Responding without bias as to requests of discovery.
- (b) Determining how, if possible, prosecution of mortgagee sale by Westpac can be averted.
- (c) Properly representing the interests of the beneficiaries at subsequent hearing.

[50] In reaching the above conclusion I am mindful that an independent trustee does not come without cost; however, Ms Houghton's submission to me was that her approximation was that the combined assets of the parties and Trusts had value of approximately \$5 million. It is better, in my view, for five percent of that combined value to be spent on an independent trustee so as to ensure prompt resolution of all proceedings than for the proceedings to meander thwarted as to hasty resolution by trustees who are unable to function consensually due to the hurt and pain suffered as a result of separation.

## **Conclusion**

[51] I am more than satisfied that it is appropriate for the court to remove the existing trustees and to replace them with an independent trustee.

[52] In appointing an independent trustee the court has a responsibility to ensure that the appointee is appropriately qualified for the task and that the cost of appointment is manageable.

[53] There is no evidence or submission before me as to the proposed appointee's experience, qualifications, suitability for the task or cost.

[54] Subsequent to hearing Ms Rakena sought to file what could be described as a curriculum vitae of Ms Ammundsen, however such was unsworn and fellow Trustees are entitled to express a view as to the appointee.

[55] Having indicated that I intend to remove the existing trustees and to replace them, I direct that the applicant file within 10 days of this decision affidavit from the proposed appointee clarifying the above issues.

[56] Mr [Kruize], should he choose, may file response within seven further days as to the suitability of Ms Ammundsen for the role.

[57] I will then resolve the issue of appointment in chambers.

[58] In conclusion, I observe that the decisions reached by me have been made without the hearing of evidence and testing of the conclusions reached by Mr Harding and the parties. The hearing progressed on a submissions only basis and the intervention of the court is necessary because of the obvious conflict between Mr and Mrs [Kruize] wherever the truth lies with relation to each allegation and counter allegation.

S J Maude  
Family Court Judge