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**IN THE FAMILY COURT
AT BLENHEIM**

**FAM-2016-006-000092
[2017] NZFC 761**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[COURTNEY HUNTER] Applicant
AND	[LUKE RABEN] First Respondent
AND	[COURTNEY HUNTER] [DYLAN CHAMBERLAIN] AS TRUSTEES OF THE [RABEN] FAMILY TRUST Second Respondents

Hearing: In chambers on the papers

Counsel: C A McCarthy for the Applicant
M Hardy-Jones for the First Respondent
G Kelly for the Second Respondents

Judgment: 7 February 2017

RESERVED JUDGMENT OF JUDGE R J RUSSELL
**[as to whether beneficiaries of a Trust are joined as parties to the proceedings
under s 37 Property (Relationships) Act 1976**

Introduction

[1] These are proceedings under the Property (Relationships) Act 1976 arising from the breakdown in the relationship of [Courtney Hunter] and [Luke Raben]. Joined as a second respondent to the proceedings [Courtney Hunter] and [Dylan Chamberlain] in their capacity as the trustees of the [Raben] Family Trust (the Trust) settled by Deed on 18 October 2001.

[2] The parties have two children, [Jude], aged 21, and [Quinn], aged 19. They are named as two of the beneficiaries in the Trust. Pursuant to s 37 of the Act they have sought to be joined as a party to the proceedings to be heard before any orders are made in respect of the Trust. Their application to be joined is not opposed by Mr [Raben] but is opposed by Ms [Hunter].

Background

[3] The parties were married on [date deleted] December 1991, and separated on [date deleted] September 2013. Their children, [Jude] and [Quinn], are the only children of their relationship.

[4] In 2001, the parties purchased a house property at [address deleted], Blenheim and then transferred it to the Trust. It appears the sale proceeds of a property owned by Mr [Raben] in the UK were also transferred into the Trust. The Trust also owned another property in the Marlborough Sounds which was sold in 2013 with the bulk of the sale proceeds being used to repay bank debt.

[5] The trustees of the Trust are Ms [Hunter] and a local solicitor, [Dylan Chamberlain], of Blenheim. The beneficiaries named include the parties, their children and grandchildren.

[6] The property at [address deleted] was the former relationship home and following separation has been occupied by Mr [Raben].

[7] By notice dated 19 October 2016, the children, [Jude] and [Quinn], said they wish to appear and be heard in answer to the application filed by their mother,

Ms [Hunter]. In particular, they oppose orders being made that the [address deleted] property be vacated and sold, and the proceeds of sale be divided equally between their parents.

[8] At a judicial conference on 2 November 2016, I considered the proceedings with counsel. I gave them some time to see whether agreement could be reached but, if not, directed submissions be filed and referred to me in chambers for a decision on whether the children were to be joined as parties to the proceedings under s 37. No agreement was able to be reached, and the parties have sought a decision on this issue.

The case for [Jude] and [Quinn Raben]

[9] In their notice given on 19 October 2016, [Jude] and [Quinn] contend their interests in the Trust will be affected by the orders sought by Ms [Hunter]. They did not consider she, in her capacity as one of the trustees of the Trust, would be able to represent properly their interests as beneficiaries of the Trust. They contend she would have a conflict between her own personal interests and those of the beneficiaries.

[10] Counsel for [Jude] and [Quinn], Mr Kelly, submitted the children are both discretionary and residual or final beneficiaries of the Trust and, as a consequence, have an interest in what happens to the Trust assets. He described this interest as a contingent future interest. He accepted that the children's interest as discretionary beneficiaries did not create property rights but their inclusion within the class of final beneficiaries gave them a future interest in the Trust property. He submitted that just because their interests as final beneficiaries may be defeasible if the Trust is distributed prior to the vesting date, this did not prevent them from having an interest in the Trust as a final beneficiary. He submitted when making any distribution of Trust assets the trustees owe an obligation to consider the interests of all beneficiaries including the final or residual beneficiaries.

[11] Mr Kelly noted the other trustee, Mr [Chamberlain], was not intending to take part in these proceedings although appeared to put forward arguments against

[Jude] and [Quinn's] involvement in these proceedings. In these circumstances he submitted the children would have to represent themselves, given their mother has a conflict of interest as trustee of the Trust and as an applicant in these PRA proceedings. For these reasons, Mr Kelly submitted [Jude] and [Quinn] should be joined and be able to be heard in answer to the application as it relates to the Trust assets to ensure their interests are heard and are able to be considered before any orders are made.

The case for Ms [Hunter]

[12] In her submissions, Ms McCarthy set out why Ms [Hunter] opposed the children being joined. She submitted as a matter of policy children should not be involved in property disputes between their parents. She analysed the provisions of the Trust Deed and submitted while the Deed permitted the children to receive distributions of capital and income at the trustees' discretion, there is no obligation to distribute to the children in their capacity as final beneficiaries. She submitted because the Trust Deed did not specifically define the children as final beneficiaries they did not have an interest in property, which is the prerequisite for a party to be joined under s 37.

[13] Ms McCarthy submitted that notice should only be given to persons who have an existing interest in property. She contended that even if [Jude] and [Quinn] did have a future residual interest in the property, then allowing them to appear and be heard would still be outside the ambit, meaning and purpose of s 37.

The Trust Deed

[14] Having summarised the parties' positions, it is necessary to consider the terms of the Trust Deed dated 18 October 2001 which is attached to the affidavit of [Dylan Chamberlain]:

Settlor:	[Spencer Hunter]
Trustees:	[Courtney Hunter] and [Dylan Chamberlain]
Trust Fund:	\$100 together with other property acquired by the trustees

Beneficiaries: Ms [Hunter], Mr [Raben], their children including adopted or stepchildren, any grandchildren including adopted or stepgrandchildren

Trust period: 80 years

Distributions as to capital: Is discretionary until the date of distribution, at the date of distribution of a determination is made by the trustees then the surviving beneficiaries who have attained the age of 25 years receive the Trust property equally unless they have predeceased leaving children who survive them. There is a specific exclusion [Tyler Raben] or his family as they have been separately provided for.

Distribution of income: Income is to be used to meet expenses and outgoings relating to the Trust property including insurances, provision is made for payments towards the future, maintenance, education or advancement of any of the beneficiaries. Any income not allocated six months following the end of the financial year is to be added to the capital of the Trust.

Power of appointment: The power of appointment of new trustees is given to Mr [Raben] and Ms [Hunter] or the survivor of them. There is to be a minimum of two and a maximum of not more than five trustees. Decisions are required to be unanimous, although there is reference to the ability to refer any matters in dispute to arbitration, with the arbitrator's decision being binding on the trustees.

Date of distribution or vesting date: Is 80 years from 18 October 2001 or such sooner time as the trustees determine.

Trustees' decisions: Can be by majority, and there is the ability to refer matters in dispute to arbitration.

Amendment of Trust Deed: The trustees have the ability to add to, vary or revoke any of the terms of the Trust.

Resettlement: There is the ability of the trustees to resettle Trust property on other trusts, with some restrictions.

Trustees' powers: There is a schedule of powers for the trustees attached to the Trust Deed.

[15] It is necessary to set out the exact wording of the relevant parts of the Trust Deed. Clause 1A provides:

AS TO THE CAPITAL THEREOF to hold the same until the date of distribution for such of the beneficiaries as the Trustees may in their absolute discretion determine to the intent that such power may be exercised to the exclusion of any one or more of such beneficiaries and in such shares and proportions and subject to such terms limitations and provisions including protective trusts as the Trustees shall think fit but without infringing the rule against perpetuities and in default of determination by the Trustees the capital shall be held for such of the beneficiaries as shall be living at the date of distribution and shall have attained or thereafter attain the age of twenty-five (25) years and if more than one as tenants in common in equal shares absolutely **PROVIDED THAT** if any beneficiary shall die leaving issue then such issue shall take and if more than one as tenants in common in equal shares on their attaining the age of twenty-one (21) years the share the beneficiary would have taken had he or she been living at the date of distribution **PROVIDED FURTHER** that for the purposes of this provision the “beneficiary” shall not include [TYLER RABEN] or his children (if any) as he has been separately provided for.

[16] Clause 4 defines the beneficiaries:

IN the interpretation of this Deed:

The beneficiary or beneficiaries are all or any of:

- (a) The Appointors or either of them;
- (b) The children of the Appointors including adopted or stepchildren;
- (c) The grandchildren of the Appointors including adopted or step-grandchildren.

[17] The appointors named in the Deed are Ms [Hunter] and Mr [Raben] or the survivor of them.

Statutory provisions

[18] Section 37 of the Act provides:

37 Persons entitled to be heard

- (1) Before any order is made under this Act, such notice as the court directs shall be given to any person having an interest in the property which would be affected by the order, and any such person shall be entitled to appear and to be heard in the matter as a party to the application.

Case authorities

[19] In their submissions, counsel have referred me to a number of case authorities which I have considered. The principles which are relevant can be summarised as follows:

[20] *Johns v Johns* [2004] 3 NZLR 202 cited, with approval, *Hunt v Muollo* [2003] 2 NZLR 322 which provided:

It is generally regarded as settled law that a discretionary beneficiary's interest in a normal discretionary Trust is no more than a mere expectancy.¹

Johns v Johns, however, also provided that a person having a residual interest as a beneficiary in a Trust would amount to that person having a future interest in the Trust property.²

[21] *Q v Q* (2005) 24 FRNZ 232 affirmed that a final beneficiary's interest in a Trust meets the definition of "property" in s 2 of the Act.³

[22] In *ANZ Banking Group (NZ) Ltd v Wrightson* (1992) 9 FRNZ 1 (HC), a husband and wife's failure to properly detail their liabilities, including contingent ones, meant that persons having an interest in the property were deprived the opportunity to be heard in the Family Court. The Court considered the application of s 37 as follows:⁴

This section requires a preconsideration by the Court of whether any person having an interest in the property which would be affected by the order, should be served and provided with an opportunity to be heard and to appear. It was contended on behalf of the defendants that in-as-much as the Court made no such order, then no harm resulted. Such a simplistic approach avoids the critical issue. The information which was placed before the District Court at Wellington provided insufficient material as to the liabilities (actual or potential) of these parties. In those circumstances it is hardly surprising that a Court did not consider requiring notice to be given to a person who might be affected because the Court did not know that any such person existed.

¹ *Johns v Johns* at [31]; *Hunt v Muollo* at [11].

² At [45].

³ At [125]-[127].

⁴ At 7.

[23] Robertson J noted:⁵

It was submitted that the plaintiffs were accordingly not creditors or at most contingent creditors and had no right to be heard. I reject that reasoning. Within the matrimonial property context more than anywhere else the function of the Court is to determine the true asset position of the parties before it. It is not unusual for the Court to have to allow for contingencies.

[24] *LJS v GIS* [2007] NZFLR 98 held the Solicitor General's contingent interest in property, stemming from a pending forfeiture of property pursuant to the Proceeds of Crime Act 1991, fell within s 37.⁶ Reference was made to *Fisher on Matrimonial and Relationship Property* where the authors note that an "interest", under s 37, should be given a broad interpretation.⁷

Discussion

[25] I have carefully considered the submissions of counsel, the provisions of the Trust Deed and the case authorities referred to. I accept that s 37 requires that the party seeking to be joined must have an interest in property which would be affected by the PRA order being sought. The definition of property in s 2 is wide, covering real and personal property or an estate or interest in that property, debts, things in action, and includes "any other right or interest" in property.

[26] The case authorities support the submission that an interest of a person as a discretionary beneficiary only does not satisfy the definition of property under ss 2 and 37. This is because it is no more than a mere expectation that the named person may receive an undefined share of the trust assets at some future time at the trustees discretion. The position is different however if the right of the named beneficiary to receive Trust property has been, or is able to be, defined in the Trust Deed. In such a case that right or interest then comes within the definition of property in s 2 and for the purposes of s 37.

[27] The Trust Deed in this case does not, unlike many Trust Deeds, define beneficiaries into a class of being either a discretionary or final beneficiary.

⁵ At 14.

⁶ At [15].

⁷ At [13].

[28] The wording of Clause 1A of the Trust Deed does, however, provide for there to be a class of residual or final beneficiary in the words:

... and in default of determination by the Trustees the capital shall be held for such of the beneficiaries as shall be living at the date of distribution and shall have attained or thereafter attain the age of twenty-five (25) years and if more than one as tenants in common in equal shares absolutely **PROVIDED THAT** if any beneficiary shall die leaving issue then such issue shall take and if more than one as tenants in common in equal shares on their attaining the age of twenty-one (21) years the share the beneficiary would have taken had he or she been living at the date of distribution ...

[29] While I accept the trustees do have the ability to distribute Trust assets prior to the distribution date, they also have a duty to consider the interests of all of the beneficiaries when making decisions, including those who fall into the class of being living and over 25 at the date of distribution.

[30] These beneficiaries have their rights or interests defined because they must receive an equal share of the property in existence at the date of distribution. This is a right or interest in the capital remaining in the Trust which is fixed by the Trust Deed.

[31] While I accept the amount of the trust assets which may be actually received is contingent on the trustees not distributing the Trust capital prior to the distribution date, the case authorities note this contingent interest in property is still enough to satisfy the definition of property under s 37.

[32] I am therefore satisfied that the children, [Jude] and [Quinn], do have an interest in the Trust property and can be joined as a party under s 37.

[33] Finally, I would note two further matters:

- (a) The orders sought by Ms [Hunter] for the sale of the Trust's property at [address deleted], Blenheim, and for an equal sharing of the sale proceeds would affect the children's interest in the capital of the Trust. They would therefore be affected by the orders she seeks.

- (b) While I accept the submission of Ms McCarthy that ordinarily children should be kept out of their parents' property disputes, the difficulty in this case is that Ms [Hunter] does seem to have a conflict in her roles as applicant in these proceedings and as trustee of the Trust. The other trustee, Mr [Chamberlain], does not appear to want to actively become involved in these proceedings to represent the interests of the beneficiaries. In these circumstances, I consider the children's interests do need to be represented and considered before any orders are made under the PRA which would affect the future of Trust property.

Outcome and orders

[34] The application to join the two children as party to the proceedings under s 37 is granted. They are to be joined as third respondent. They are to be served with the proceedings. They have 21 days following service to file a defence and affidavit setting out their position.

[35] A judicial conference is to be allocated upon the expiry of the defence period. Out of town counsel/parties can be joined by telephone link.

[36] Costs are reserved. If sought, memoranda are to be filed within 21 days with a right of reply for a further 14 days. Thereafter, the file is to be referred to me for decision.

R J Russell
Family Court Judge