

Update Law of Trusts

Service 60 — August 2021

Forms and Precedents

The Trusts Precedents from *New Zealand Forms and Precedents* have been updated. The precedents are now split into subtopics. Additional precedents have been added from Practical Guidance Trusts (by Maria Young and Peter Eastgate from Cavell Leitch).

Updated commentary

Trusts Act 2019, s 45(h) — trustee must keep core documents — relevance of memorandum of wishes in interpretation of trust deed

In *Edge v Bourke* [2020] NZHC 1185, [2020] 3 NZLR 522 the trustees were unable to agree on the correct interpretation of a clause of the trust deed. Duffy J considered two memoranda of wishes, which he considered helped to reveal the settlor's intent for the distribution of the trust funds. See [TRU45.03].

Trusts Act 2019, s 49 — definition of “trust information” — excludes “reasons for trustees’ decisions”

The Supreme Court noted in *Lambie Trustee Ltd v Addleman* [2021] NZSC 54 there is a difference of possible significance between the principles explained in *Erceg v Erceg* [2017] NZSC 28; [2017] 1 NZLR 320 and para (b) of the definition of “trust information” in s 49 of the Trusts Act 2019 which excludes “reasons for trustees’ decisions”. See [TRU49.01].

Trusts Act 2019, s 53 — giving information to beneficiaries — legal advice given to trustees

In *Lambie Trustee Ltd v Addleman* [2021] NZSC 54 the Supreme Court ordered disclosure of trustee information relating to legal advice given to the trustees on the general administration of the trust including a distribution to the beneficiary; and legal advice given to the trustees as to what documents should be disclosed to the beneficiary. See [TRU53.01].

Trusts Act 2019, s 53 — giving information to beneficiaries

In *Jacomb v Jacomb* [2020] NZHC 1764 Cooke J held that an application to the Court to disclose information relating to a trust “requires the Court to exercise its own judgment, and make its own decision on whether disclosure should be made.” *Jacomb v Jacomb* was applied by Associate Judge Lester in *McGuire v Earl* [2020] NZHC 3083. See [TRU53.01].

Trusts Act 2019, s 112 — court may make order for removal of trustee

In *Taylor v Taylor* [2021] NZHC 992 Peters J made an order for removal of a trustee who had failed to fulfil his duties as a trustee. See [TRU112.01].

Trusts Act 2019, s 116 — vesting of trust property on change of trustees

In *Taylor v Taylor* [2021] NZHC 992 Peters J made an order under s 116 vesting the trust property in the remaining trustee after the removal of a trustee. See [TRU116.02].

Trusts Act 2019, s 116 — vesting of trust property on change of trustees

In *Lewis v Lewis* [2021] NZHC 585 an application for a vesting order was granted. See [TRU116.02].

Trusts Act 2019, s 124 — power of court to approve variation of trust

In *Gavin v Gavin* [2021] NZHC 550 Mander J approved proposed variations to various trusts on behalf of minor and unborn beneficiaries. See [TRU124.01].

Trusts Act 2019, s 124 — power of court to approve variation of trust

In *Irwin v Irwin* [2021] NZHC 926 Thomas J gave approval under s 124 to a variation of the trust deed which enabled the surviving settlor to receive distributions of income and capital. See [TRU124.01].

Trusts Act 2019, s 125 — power of court to waive requirement of consent to variation of trust

“The effect of s 125 is that where the Court orders a waiver of consent of some or all beneficiaries under s 125, the trustees can proceed with variation of the trust using the power conferred on them by s 122.”: *Talijancich v Talijancich* [2021] NZHC 753. See [TRU125.01].

Trusts Act 2019, s 130 — power of court to vary trustees’ powers in relation to property

In *Re W* [2020] NZHC 1293 the Court declined to use its discretion under s 64 of the Trustee Act 1956 because it considered the transfer was contrary to the testator’s clear intentions, would result in a rewriting of the trust, and was not in the relevant beneficiary’s best interests. See [TRU130.02].

Trusts Act 2019, s 133 — trustee may apply to court for directions

Section 133 was applied in *Re McMillan* [2021] NZHC 1497 by adopting the broad equitable approach affirmed in *New Zealand Māori Council v Foulkes* [2014] NZHC 1777; [2015] NZAR 1441. See [TRU133.01].

Trusts Act 2019, s 133 — trustee may apply to court for directions — litigation directions — Beddoe applications — breach of trust

McCallum v McCallum (as trustees of the McCallum Family Trust) [2021] NZCA 237 the Court of Appeal allowed the trustees to continue to enjoy the protection of a (limited) Beddoe order (in some causes of action) despite the plaintiffs asserting a breach of trust. See [TRU133.05].

Trusts Act 2019, s 136 — trustee may apply to court to allow distribution of missing beneficiaries’ shares — searching for potential beneficiary

In *Hodgson v Hodgson* [2021] NZHC 906 the High Court was not satisfied under s 136 that “reasonable measures” had been taken to bring his interest in the estate to the notice

of the potential beneficiary. The Court recommended using social media searches rather than newspaper advertisements. See [TRU136.01].

Trusts Act 2019, s 136 — trustee may apply to court to allow distribution of missing beneficiaries' shares — searching for potential beneficiary

In *Re Laycock (dec'd)* [2019] NZHC 1146 where Van Bohemen J observed that while the applicant had not published advertisements, they had engaged a private investigator to try and find the relevant beneficiary, which the Judge considered to go beyond the minimum requirement of an advertisement. See [TRU136.02].

Trusts Act 2019, s 138 — court may appoint receiver for trust

In *Reaney v Reaney* [2021] NZHC 784 Jagose J declined to appoint a receiver and discussed s 138. See [TRU138.01].

Trusts Act 2019, s 142 — alternative dispute resolution

In a decision declining leave to appeal, the High Court in *Ryan v Lobb* [2021] NZHC 496 described the alternative dispute resolution provisions as a new feature in trusts law. See [TRU142.01].

Charitable Trusts Act 1957, s 32 — variation of charitable purposes

In *Re Champion Trust Fund* [2019] NZHC 147, Gendall J was asked to vary the charitable purposes of a trust set up by a will to benefit Shirley Boys High School's educational initiatives in horticulture. Gendall J granted the application, releasing some capital to the school despite the moratorium of such in the late Mr Champion's will. See [CTA32.3].

Chapter 9 — Trusts and family law — setting aside disposition — s 44, Property (Relationships) Act 1976

Meads v Muldrew [2021] NZHC 1864 Mr Meads applied the proceeds of relationship property to the purchase of a property (which became the family home for six months prior to separation) in the name of a trustee company. The Court found this was a disposition to defeat Ms Muldrew's interests. See [9.6] and [9.8].

Chapter 9 — Trusts and family law — constructive trusts

In *Hollands v Sorensen* [2021] NZHC 103 Mr Hollands unsuccessfully claimed that the house purchased by the trust established by Ms Sorensen's parents was held on constructive trust. See [9.20].

