

Why the courts have limited power to make decisions about trust assets

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Judges do not exercise jurisdiction to initiate the distribution of trust assets

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One of the most fundamental rules about trusts cannot be found in the Trusts Act 2019 and I suspect it is not widely known.

It is this: judges do not exercise jurisdiction to initiate the distribution of trust assets. They can approve or reject a trustee's decision about the distribution of assets but they will not initiate a decision themselves.

This can be frustrating for trustees and beneficiaries who would love to resolve conflicts in the management of trusts by giving a judge the right to declare how a trust's assets should be managed and distributed.

I have not found any explanation for the absence of this rule but one of the reasons will be that any decision a judge makes will be inherently discretionary, so whatever he or she decides will almost certainly be appealable on the ground that he or she should have decided differently.

And because of the discretionary nature of any decision a judge makes, it may also make a judge appear to be partisan to a particular cause and bring the court into disrepute.

To explain, I will use the analogy of a continuum with numbers 1 to 100. If a judge were to say that a decision should be set at 55 on the continuum, there will be beneficiaries who will say the decision should have been at 30, or 40 or 60 or at any number on the continuum. There will probably be good reasons to justify decisions at each one of those numbers.

If judges could make the decisions that trustees are required to make, there would be two major consequences for the courts.

First, there would be a huge number of trusts where the trustees and/or the beneficiaries would likely ask the court to decide what should be done with a trust's assets or how trustees should resolve aspects of trust management. Subject to what I say next, the courts would be flooded with work.

The second consequence is that other courts would be flooded with appeals from these decisions.

It will be said, with justification, that the judges erred in setting the decision at, say, level 55 when it should have settled on 30 or 40 or 60 or any other number. There would be

good reasons for an appeal court to agree with the appealing beneficiaries. It would be a no-win situation for the courts.

Limited powers

For these reasons, the statutory powers of judges in relation to trust decision-making are very limited. They can make decisions under s 24 of the Trusts Act about whether a limited range of beneficiaries (eg, unborn persons and beneficiaries who lack capacity) should approve the termination, variation or resettlement of a trust. But in these circumstances, the decision as to whether there should be a variation or resettlement will have been made by the trustees in the first place.

The closest the courts get to initiating a decision is probably s 133 where a trustee can ask a judge for directions about trust property or the exercise of any power or function. But in these circumstances, the trustee will usually have made a decision about what it thinks should be done and will be seeking approval from a court to implement the decision.

I write about these principles, after reading the recent decision of *Sherwin v Jack Holdings Ltd & Others* [2024] NZHC 920 where five children agreed that a trust should be wound up but couldn't agree on how the assets should be distributed. One of the children asked the court for an order that the assets should be divided equally or, alternatively, an order "directing that the assets of the trust be divided on such terms as the court deems just".

The fact that a court could be asked to distribute trust assets "as it deems just" suggests the restraint on judges being able to act in that way is not as well-known as it should be.

To ensure trusts are properly managed, it is in society's interests that courts should have full powers to act as they think appropriate where they are not constrained by the Trusts Act 2019. This is why they have inherent powers to control trusts. But the courts cannot act as if they were trustees and decide what should happen to the wealth invested in trusts.

That is the role of the citizens who established the trusts and not the role of the state. ■

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