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

**CIV-2012-404-001474
[2014] NZHC 751**

UNDER	Part 18, High Court Rules
IN THE MATTER	of an application under s 66, Trustee Act 1956
BETWEEN	ALLAN BROOKE MITCHELL Plaintiff
AND	DAVID STEPHEN GRIFFITHS Chartered Accountant, and trustee of the Allan Mitchell (1972) Trust and the Allan Mitchell (1962) Trust First Defendant
	KEVIN JAFFE, Solicitor, and trustee of the Allan Mitchell (1972) Trust Second Defendant
	DAVID STEPHEN GRIFFITHS as executor and trustee of the estate of Allan Gabriel Mitchell Third Defendant
	JUNE MITCHELL Fourth Defendant/Second Counterclaim Defendant

CIV-2014-404-000845

IN THE MATTER	of the will of June Lillian Mitchell
BETWEEN	MARK CONRAD EADE First Applicant
	BRYAN LAWRENCE CHITHAM Second Applicant

AND

JUNE LILLIAN MITCHELL
Defendant

Hearing: 8 April 2014

Appearances: A Barker for Plaintiff in 1474 and for J Cramer
A J Sherlock for First Defendant
N Scampion for Second Defendant
P G Skelton QC and R Butler for Third Defendant
S Grant and B R Saldanha for J Mitchell and for Applicants in
845
K A Muir for Anthony Ben Mitchell

Judgment: 10 April 2014

INTERIM JUDGMENT OF VENNING J

This judgment was delivered by me on 10 April 2014 at 11 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

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Introduction

[1] There are two applications before the Court, the first by David Griffiths for directions under s 66 of the Trustee Act 1956 in CIV-2012-404-1474 and the second in CIV-2014-404-845, an application by Mark Eade and Brian Chitham for directions that Brian Chitham execute a new will for June Mitchell in accordance with s 55 of the Protection of Personal and Property Rights Act 1988.

General Background

[2] Allan Gabriel Mitchell (Allan) and June Mitchell (June) were married on 31 July 1994 having previously lived together in a de facto relationship for nine years. Allan had four children from a previous marriage:

- (a) Allan Brooke Mitchell (Brooke Mitchell);
- (b) Paul Western Mitchell;
- (c) Anthony Ben Mitchell (Ben Mitchell); and
- (d) Jacqueline Jill Cramer.

[3] June has two children from a previous marriage:

- (a) Mark Conrad Eade; and
- (b) Christopher Paul Eade.

[4] June is currently 73 years old. She suffered a serious stroke in early 2012. Aside from the stroke she is in fairly good health. She could well live for another 20 years but will require full time nursing care for the rest of her life. As a consequence of her disabilities June currently resides primarily in a residential care facility but spends four days a week at the former matrimonial home in View Road, Campbells Bay, Auckland.

[5] As a result of her stroke, and despite extensive rehabilitation therapy, June remains dependent and has very limited ability to communicate. In the opinion of her medical practitioner she lacks the competence to manage her own affairs in relation to property and that lack of competence is total. She also lacks capacity to understand the nature and foresee the consequences of decisions relating to her personal care and welfare. Again the lack of competence is total. In those circumstances her son Mark Eade and her brother Bryan Chitham were appointed June's property managers in March 2013.¹

[6] Allan Mitchell died on 9 December 2012.

[7] In March 2012 Brooke Mitchell, as beneficiary of the Allan Mitchell (1962) Trust (the 1962 Trust) and the Allan Mitchell (1972) Trust (the 1972 Trust) took proceedings against Mr Griffiths and Mr Jaffe. Both Allan and June were subsequently joined as defendants in later amended statements of claim.

[8] The proceedings concerned certain properties owned by June that had previously been owned by Allan, namely the former matrimonial home at View Road, Campbells Bay, which comprised two Great Barrier Island properties.

[9] The proceedings also raised claims in relation to the purchase in 1995 of the 1972 Trust's 75 per cent shareholding in Sportways United Ltd (SUL) by Allan who at the time was a trustee of the 1972 Trust and a claim relating to the payment of less than commercial rates of interest on a longstanding loan balance of approximately \$5 million payable by SUL to the 1972 Trust.

The property in issue

[10] In 1999 Allan and June Mitchell had entered a matrimonial property agreement to transfer 50 per cent of Allan's four-fifths interest in View Road and the two Great Barrier Island properties into June's name so that they owned those properties together as joint tenants. The agreement also concerned a third Great Barrier Island property that was not relevant to the 1474 proceeding. (It is a vacant

¹ Under Property of Personal and Property Rights Act 1988, ss 31(2) and 31(8).

strip of bush land). In September 1999 the transfer of the four-fifths share in View Road and the three Great Barrier Island properties (the Great Barrier properties) into the joint names of Allan and June was registered.

[11] In 2001 arrangements were made to have the one-fifth interest in View Road held by the 1972 Trust transferred to Allan and June as joint tenants so the purpose of the matrimonial property agreement would be fully realised.

[12] A deed of discretionary distribution distributing the one-fifth share of View Road from the 1972 Trust to June was executed on 20 June 2001. On 20 June 2001 Allan and June executed an agreement for sale and purchase for a half interest as joint tenants in the undivided one-fifth share of View Road with Allan purchasing the interest from June for \$201,000.

[13] At the same time as completing the matrimonial property agreement Allan and June executed new wills. The intention was that each would provide for their own and each other's children, taking into account that the View Road and Great Barrier Island properties would not form part of the estate of the first deceased. The wills were further updated in 2003. Minor changes were made but the intention of equal division amongst their family streams remained.

The 1972 Trust

[14] The beneficiaries of the 1972 Trust are Allan's children, grandchildren (together in each case with their spouses) and his wife (June). The final date of distribution (if not earlier distributed) is 2052. The ultimate beneficiaries at that time are Allan's grandchildren (then living) or their issue if the grandchildren die before such distribution. The trust is entirely discretionary. It provides for the trustees to make provision to "any one or more of the beneficiaries exclusive of any one or more of the beneficiaries in the sole discretion of the Trustee ...".

[15] Apart from some cash and other investments of approximately \$5 million, the largest asset held by the 1972 Trust is a 75 per cent shareholding in SUL, which had for a number of years acted primarily as an investment holding entity for the 1972

Trust and Allan personally (and latterly his estate). Mr Griffiths estimates SUL to have net assets of \$13.4 million, 75 per cent of which value amounts to \$10,050,000.

[16] After making provision for costs of realisation of the assets and for remaining tax liabilities payable at the point of liquidation of SUL, Mr Griffiths estimates the net equity in the 1972 Trust to be approximately \$14.550 million.

[17] It is convenient to record at this point that all parties accept the 1962 Trust has no relevant assets. It is unnecessary to consider its position further.

[18] Allan's estate comprises shares in SUL with an estimate value of \$2,792,560. It has estimated liabilities of \$200,000.

[19] The 1474 proceedings were scheduled for a fixture of seven days commencing 31 March 2014.

[20] If the claims in the 1474 proceedings had been upheld then potentially Allan's estate would be required to pay compensation to the 1972 Trust in circumstances where the principal beneficiaries of the estate were essentially the same as those who might fairly be regarded as the primary discretionary beneficiaries in terms of the 1972 Trust, namely Allan's four children and June.

[21] On 21 March 2014 the parties agreed to settle the 1474 proceedings and all matters arising directly or indirectly out of or in connection with the subject matter of the proceedings on the terms set out in a Deed of Family Arrangement.

[22] The parties to that Deed of Family Arrangement were: Brooke Mitchell, Mr Griffiths and Mr Jaffe as trustees of the 1972 Trust, Mr Griffiths as executor and trustee of Allan's estate, Mark Eade and Brian Chitham as property managers for June, Paul Western Mitchell, Ben Mitchell and Jacqueline Cramer.

[23] The Deed of Family Arrangement proposes that:

- (a) the 1972 Trust and Allan's estate will be wound up and distributed according to the schedule to the Deed. For this purpose Allan's estate

will notionally include a half-share in View Road and the Great Barrier properties (even though they passed by survivorship to June);

- (b) the 1972 Trust will pay for all reasonable legal accounting and expert costs of the parties regarding the proceedings;
- (c) in broad terms, following payment of costs, the assets of the 1972 Trust and estate will be divided into five equal shares with one share to go to June and each of Allan's four children;²
- (d) June will pay \$150,000 to each of Allan's four children out of her share of the distribution on the earlier of the sale of View Road or five years from the date of the Deed;
- (e) reasonable endeavours will be made to make an interim distribution of not less than \$1,000,000 to each of Allan's children and June within seven days of the terms of the Deed being approved, and the Deed will be a full and final settlement of all matters between the parties to it.

[24] As a part of the overall settlement there is the related application in the 845 proceedings by Mark Eade and Bryan Chitham for an order permitting Bryan Chitham to make a new will for June. The application was initially filed in the Family Court but has been transferred to this Court. It is necessary to make a new will to reflect the provisions of the proposed settlement.

The application under s 66 of the Trustee Act

[25] Mr Griffiths applies for an order that the assets of the 1972 Trust be distributed in accordance with the provisions of the Deed of Family Arrangement. The application is made under s 66 of the Trustee Act:

Right of trustee to apply to Court for directions

² In the case of Ben, his share is to be settled on a trust with a trustee corporation as trustee. Ben is to have the power to appoint or remove that trustee jointly with Kevin Muir.

- (1) Any trustee may apply to the Court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power of discretion vested in the trustee.
- (2) Every such application shall be served upon, and the hearing may be attended by, all persons interested in the application or such of them as the Court thinks expedient.

[26] The scope and jurisdiction of s 66 was discussed by Paterson J in *Neagle v Rimmington*:³

[23] The scope of s 66 and equivalent Australian sections is to give to the trustee a right to seek the opinion, advice or direction of the Court on any question respecting the management or administration of the trust property. Provided that the trustee acts in accordance with the advice or directions and that the relevant facts are substantially as submitted upon the application, the trustee is deemed to have discharged his or her duty as trustee in the subject-matter of the application (s 69 of the Act). Parties represented on the application are bound by the judicial advice and directions given. The jurisdiction is intended essentially for private advice by the Court to trustees and, in Australia, is usually made on an ex parte application. The Court advises trustees as to what course of action they should follow, where they are in doubt as to the propriety of the action contemplated. The procedure should not be used to determine substantive issues, such as issues of interpretation of the trust document which involved the question of breach of trust by any of the trustees; for the purposes of securing additional powers for the trustees; or for resolving a contest between the trustees; see Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed), pp 667 – 669.

[24] The operation of s 66 was recently considered by Wild J in *Melville v NRMA Insurance NZ Ltd* (High Court, Wellington, CP 70/01, 17 April 2002). His Honour referred to various authorities on the application of s 66 and comparable sections in Australian jurisdiction and drew the following principles from those authorities:

- (a) Section 66 is an inexpensive procedure which allows trustees to obtain the Court's assistance "on points of minor importance arising in the management of the trust";
- (b) Questions of substance or importance, in particular involving matters of controversy or contest between trustees do not lend themselves to an application under s 66. Allegations of breach of trust, whether made expressly or implicitly are inappropriate for application under the section; and
- (c) An application under s 66 must be made upon stated, that is, agreed facts, such facts "cannot be inquired into, and if not agreed should be established in the normal manner."

³ *Neagle v Rimmington* [2002] 3 NZLR 826, at [23]–[24].

His Honour noted at para [65]:

“[65] In my view, an application under s 66 has always been, and remains, inappropriate where there are substantial factual disputes and/or possibility of a breach of trust. It is certainly inappropriate where there is, explicitly or implicitly, an allegation of breach of trust.”

[27] The authorities confirm that the procedure is limited and should not be used to determine substantive issues such as issues of interpretation, issues involving suggestion of breach of trust by trustees, for securing additional powers for the trustees or for resolving conflicts between them.

[28] In the present case the application is for “an order that the assets of the 1972 Trust be distributed in accordance with the provisions of the Deed of Family Arrangement”. As such, and to that extent, the application is the type of application clearly contemplated by s 66 of the Trustee Act. If the Court gives such a direction, the trustees have the protection set out in s 69 of the Trustee Act.

[29] However, during submissions, and in response to an issue raised by the Court, Mr Sherlock sought to extend the ambit to include a formal release for the trustees, a matter to which I return later.

[30] In principle the Deed of Family Arrangement is an appropriate response to the interests of the principal beneficiaries. It is supported by all parties before the Court.

[31] The advantage to Allan’s children from the Deed is that their interests are accelerated and the corpus of the 1972 Trust is enhanced. The settlement proceeds on the basis that both Allan and June notionally retained a half share in the properties at View Road, Campbells Bay and in the Great Barrier properties with the notional division of ownership having continued even following Allan’s death, notwithstanding that the properties effectively devolved to June by way of survivorship.

[32] That approach is consistent with Allan and June’s intention which is apparent from the mutual wills, the matrimonial property agreement entered in 1999, and their dealings with View Road and Great Barrier properties, that the properties were to

pass to whoever of them would survive the other but ultimately the properties would be evenly distributed between their two families (their children in the first instance) on the death of the surviving spouse.

[33] Under the Deed of Family Arrangement June agrees to her notional half share in the Great Barrier properties being sold as part of a market sale of that land. She will receive the entirety of the proceeds attributable to that notional half share. The other half of the proceeds of sale will come into a pool of assets to be ultimately distributed in five equal shares between June and Allan's four children.

[34] As regards the View Road properties June agrees to purchase Allan's notional half share, such purchase being funded out of the wider distribution available to June. The proceeds of that notional sale of the half share in turn contributing to the pool of assets available for distribution, which again would be divided into five equal shares between June and Allan's four children.

[35] For that reason it is appropriate that Allan's children and their issue be removed as beneficiaries from June's will.

[36] The short point is that Allan's children's expectation as beneficiaries under the 1972 Trust and potential beneficiaries under June's will will be accelerated and crystallised during June's lifetime. It is appropriate in those circumstances that all assets held by June following implementation of the settlement should, upon her death, pass solely to her children.

[37] The proposed settlement is in the best interests of all the beneficiaries of the 1972 Trust because:

- (a) the settlement will bring to an end the cost of litigation;
- (b) the settlement will bring about the full and final settlement of all disputes and issues affecting the interests of the various family members that currently exist;

- (c) the four children of Allan (each of whom are in their sixties) will receive a fixed share of the assets of the 1972 Trust and, subject to the new Trust arrangements agreed in respect of Ben Mitchell, (who is represented), will be free to decide upon the future application the respective shares they receive rather than release/application the funds being a matter of discretionary decision by trustees;
- (d) it can fairly be expected that Allan's four children will give due and proper consideration to the financial interests of the remaining discretionary beneficiaries of the 1972 Trust, who are their respective spouses and children (and their spouses).

[38] I accept the proposal also meets June's interests because, as is submitted on her behalf:

- (a) the settlement agreement prevents further costs being expended on litigation with costs to date paid for by the 1972 Trust rather than June or Allan's estate;
- (b) the settlement agreement removes the risk of a finding against June in the 1474 proceedings with the result that she may lose some or all of her interest in View Road and the Great Barrier properties in any event;
- (c) the settlement agreement fully and finally settles the family disputes;
- (d) June will be able to retain her property at View Road which Mark Eade believes (and has been advised) is very important to her wellbeing;
- (e) June will be provided with assets that can be used to fund her health care.

[39] The last point is important, because while the litigation was ongoing June was unable to raise funds against the properties to fund her healthcare due to the caveats that had been lodged.

[40] For those reasons I am satisfied that in principle it is appropriate for the Court to make the order sought. There are, however, a number of further issues to be addressed:

- (a) the position of the other discretionary beneficiaries;
- (b) Mr Sherlock's request for an extended order releasing the trustees from all claims, past, present and future; and
- (c) June's will.

The position of other beneficiaries

[41] Section 66(2) of the Trustee Act provides that an application for directions such as the present shall be served upon and may be attended by all persons interested in the application or such of them as the Court thinks expedient.

[42] In the present case there are a number of discretionary beneficiaries who are potentially interested in the order sought, but who have not been formally served with the application. However, all grandchildren (with the exception of Geoffrey Mitchell, who has a disability and whose trustees have received a copy), have been sent letters by Mr Jaffe as trustee of the 1972 Trust attaching a copy of the Deed of Family Arrangement and explaining the background to and operation of the Deed together with notice of the hearing.

[43] Mr Barker confirmed that Brooke Mitchell's spouse and all Brooke Mitchell's children, Allan Brooke Mitchell Jnr, James Mitchell, Sarah-Jane Mitchell and the trustees of Geoffrey Mitchell Trust, supported the settlement as did the children of Jacqueline Cramer, Kahlil Cramer and Shea Cramer.

[44] Counsel also advised that, with the exception of Misako Mitchell, it was understood that the other grandchildren Steven Krippner, Susie Mitchell and Nick Mitchell either agreed or did not oppose the distribution proposed in the Deed of Family Arrangement which would of course see the 1972 Trust wound up and distributed to the parents of the grandchildren.

[45] The position of Misako Mitchell is somewhat different. Mr Muir advised the Court that he had been contacted by Mr Patterson on behalf of Misako Mitchell. Misako Mitchell's concern is not so much with the provisions of the Deed of Family Arrangement itself but rather the mechanics and the provisions of the Trust which it is to be established to hold Ben Mitchell's share. Mr Muir advised that he has agreed with Mr Patterson to discuss and negotiate the terms of the Trust Deed (it is intended to have Perpetual Trustee as the independent trustee) to ensure that Misako's concerns are addressed.

[46] In addition to Steven Krippner and Misako Mitchell, Ben Mitchell has a further biological child, Joanna, however counsel confirmed Mr Griffiths' evidence that Joanna has been legally adopted. On that basis she would not be regarded as a discretionary beneficiary under the 1972 Trust.

[47] I note that the trusts of the 1972 Trust are entirely discretionary, and provide for distributions to the exclusion of other beneficiaries.

[48] On balance I am satisfied that that issue in relation to Misako should not prevent the Court from withholding its approval of what otherwise is an appropriate and reasonable resolution of the existing proceedings and winding up and distribution of the resultant assets of the 1972 Trust.

The trustees' position

[49] The trustees included a general release in the Deed of Family Arrangement:

2.2 [Brooke Mitchell, June, and the beneficiaries (Paul Mitchell, Ben Mitchell and Jacqueline Cramer)] and their families (present and future) release the other Parties to this Deed, the Estate of [Allan], the 1962 Trust and the 1972 Trust, the trustees past and present of the 1962 Trust and the 1972 Trust, and their respective professional advisers, from all liability,

losses, disputes, differences, claims, demands, actions, proceedings, costs or expenses or issues of any kind whatsoever, whether or not they are known or discoverable or contingent as at the date of this Deed, of whatever nature and however arising, which relate either directly or indirectly or in any other way to the claims made in the Proceedings, or to the subject matter of the Proceedings, the Estate of [Allan], the 1962 Trust and the 1972 Trust, and acknowledge and agree that this clause may be pleaded and tendered as a complete and absolute bar to such claims.

[50] As Mr Sherlock accepted, as a matter of contract the agreement to release contained in that clause can only bind the parties to the agreement. However he invited the Court to effectively provide a general release in the context of the present application. I do not consider I am able to do so. The Court does not have jurisdiction on an application for directions under s 66 to provide for a general release to bind non parties who are not before it. Nor does the Court have the necessary material before it in relation to the past administration of the Trust for example.

[51] While for the reasons given above I am satisfied that it is appropriate for the current proceedings before the Court to be settled and the 1972 Trust to be distributed in accordance with the proposal before the Court I am not able to formally grant a release under s 73 of the Trustee Act in the context of an application under s 66. The release and protection of the trustees in relation to the application under s 66 is provided by s 69.

[52] While the Deed of Family Arrangement is expressed to be conditional on the Court's approval, the Court's approval in terms of the application before it is in relation to the proposed winding up of the 1972 Trust, and its distribution. The application seeks an order that the 1972 Trust be distributed in accordance with the provisions of the Deed of Family Arrangement. That is the order of the Court. I do not consider the Court has jurisdiction to go further to formally grant the release sought by Mr Sherlock on behalf of the trustees. I decline to do so.

June's will

[53] The Deed of Family Arrangement has been entered on a basis that a new will will be made for June consistent with the arrangements in the proposed distribution

provided for by the Deed of Family Arrangement. Essentially the clauses making provision for Allan's children and their issue will be deleted.

[54] Ms Grant submitted the Court should authorise Bryan Chitham, June's brother, to make the proposed will in order to give effect to the parties' intention. The application is made in reliance on s 55 of the Protection of Personal and Property Rights Act 1988. June is currently subject to a property order. The Court may authorise Mr Chitham as property manager for June to execute a will for and on behalf of her in such terms as directed by the Court if the Court is satisfied that June lacks testamentary capacity.⁴

[55] Given the evidence contained in the affidavit of Mark Eade for the appointment of a litigation guardian I am satisfied that June lacks testamentary capacity. In the opinion of her medical practitioner in July 2012 she lacked competence to manage her own affairs. The lack of competence was total. June also lacked capacity to understand the nature and foresee the consequences of decisions relating to her personal care and welfare. Again her lack of capacity was total. The medical practitioner considered the incapacity to be total with virtually no prospect of any useful recovery. There is no evidence to suggest that June's position has altered since that date. Indeed her son Mark Eade and brother Bryan Chitham continue to manage her affairs.

[56] The application is also supported by an affidavit of Simon Jones, a partner in the firm of Foley Hughes, who represented June for some years prior to her stroke and who currently holds instructions from Mark Eade and Bryan Chitham to act in June's interests. Mr Jones confirms that, having considered all the facts and circumstances, including the legal issues raised in the 1474 proceedings, the settlement is in June's best interests and that it is necessary for her will to be altered. In her current will she makes provision for Allan's children and issue, whereas in the Deed of Family Arrangement she is effectively making that provision during her lifetime by giving up her entitlement to the Great Barrier properties. In return she will have full ownership (and rights of distribution) of the View Road properties and a right to share in the proceeds of the sale of Allan's estate and the 1972 Trust. This

⁴ Protection of Personal and Property Rights Act 1988, s 55(1).

will give June a residence with an estimate value of \$6 million and approximately \$2.5 million in cash. Her property managers consider that those assets will adequately meet her needs for her foreseeable lifetime.

[57] Ms Grant advised the Court that she had recently obtained an independent valuation of \$5.75 million for the View Road property. She submitted that the Court could be satisfied that, in all the circumstances, it was appropriate for the Court to authorise the proposed new will. Subject to the matter discussed below, I agree.

[58] Section 55(2) of the Protection of Personal and Property Rights Act provides:

- (2) Before a Court authorises a manager to execute a testamentary disposition under subsection (1) of this section, it shall settle the proposed terms of the testamentary disposition provisionally, and hear such persons who wish to be heard and whom the Court is satisfied have a proper interest in the matter.

[59] Section 55(2) contemplates the Court settling the proposed terms of June's will provisionally and then hearing such persons who wish to be heard and whom the Court is satisfied have a proper interest in the matter. The section is expressed in mandatory terms. The persons who have a proper interest in the new will must extend to persons who would take under the provisions of June's existing will.

[60] June's existing will is dated 22 December 2003. There is a codicil of 10 August 2010 which simply removed Mr Griffiths as executor and trustee. For present purposes and on the basis that Allan has predeceased June the provisions of the will provide for the residue of June's estate to be divided into two equal shares, one to be held for her sons, Christopher and Mark Eade, and the other half to be paid and transferred equally to Allan's children, all of whom are parties to the Deed of Family Arrangement. However, in each case there is a gift over provision to the children of the beneficiaries in the event the identified beneficiary predeceases June. That is still a possibility in the present case.

[61] Christopher and Mark's children and also Allan's grandchildren are potential beneficiaries with a proper interest. Further, because it is intended that Ben Mitchell's share would be held on trust, there is express reference in June's will of a gift over to Misako Mitchell in the event that Ben predeceases her. Given the

provisions of the Deed of Family Arrangement there will be no provision for Allan's children or grandchildren (including Misako) in the proposed new will.

[62] I appreciate that the practical position is that under the provisions of the Deed of Family Arrangement Allan's children are likely to be in a substantially better position than they would potentially have been under the existing arrangements and, in Ben's case for example, it is suggested there may be as much as \$3.8 million held in trust for him and ultimately for division amongst his children. However, as Millett J said in *Re B*:⁵

In my judgment, laudable though the receiver's object may be, there are two overriding considerations. First, the court must be satisfied, before it exercises a judicial discretion, that it has all the relevant material before it, and that it has heard all the arguments which can properly be canvassed and which are directed to the question to be determined. Second, all persons materially affected should be given every opportunity of putting their cases forward. Of course, there will be exceptional cases in which it will be right to exclude a party from the proceedings, notwithstanding the fact that he is a party interested. Plainly delay, cost, embarrassment and the exacerbation of family dissensions are all relevant matters. But only in the most exceptional circumstances should the considerations to which I have referred be overridden.

[63] If all the grandchildren had signed consents then the Court might have been able to treat this as an exceptional case. But they have not. The trusts in the will are not, like the 1972 trusts discretionary, they are absolute.

[64] Ms Grant suggested that if there were any particular issues arising out of Misako's position then there was provision under s 55(3) of the Protection of Personal and Property Rights Act for the proposed will executed by Mr Chitham to be varied or revoked and substituted by a further testamentary disposition authorised by the Court. I do not consider that to be a satisfactory answer to the issue. The Court should be cautious before authorising the execution of a new will on the basis that if any difficulties arise later then they can be addressed by a further will. As I read s 55(2) the intent is that the proposed will will be put before the parties who may be interested and they are to be given an opportunity to respond to deal with any issues at this stage.

⁵ *Re B* [1987] 2 All ER 475 at 479.

[65] While in principle I would be prepared to approve the proposed will, at present I do not feel able to do so in the absence of at least giving Misako (and other grandchildren) an opportunity to be heard on this particular issue. I note that the advice provided to them by Mr Jaffe's letter was primarily directed at the Deed of Family Arrangement. There was no direct discussion or advice provided to them in terms of the consequential need to amend June's will, although of course I accept the two are related.

[66] I leave the matter on this basis. In principle I accept the proposed amendment to June's will is entirely appropriate given the provisions of the Deed of Family Arrangement.

[67] However, before I formally authorise Mr Chitham to make the will under s 55(1) of the Protection of Personal and Property Rights Act the grandchildren, including Mark and Christopher's children, are to be immediately advised in writing of the effect of the proposed changes to the will. The grandchildren are then to have until 30 April 2014 to file a notice of appearance and/or opposition to the proposed changes to the will.

[68] In the event a notice of opposition is filed I will reconvene a hearing at short notice to hear from any person so opposing. In the event there are no notices of opposition filed then I will make an order authorising execution of the proposed will on the basis of the existing material before the Court without the need for any further appearance or attendance by the parties.

[69] I apprehend no order is necessary for costs.

Venning J