

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2023-485-638
[2024] NZHC 278**

UNDER the Trusts Act 2019
IN THE MATTER OF the Estate of Mary Emerson Beaver
AND
IN THE MATTER OF an application under s 136 of the Act
BETWEEN RICHARD LIONEL TYSON
Applicant
AND MERVYN WILLIAM BEAVER
First Respondent
AND OTHER RESPONDENTS
listed in Schedule One

Hearing: 8 February 2024
Appearances: R Georgiou for Applicant
No Appearance for Respondents
Judgment: 22 February 2024

JUDGMENT OF CULL J

[1] Mr Richard Tyson is the executor of the estate of Ms Mary Emerson Beaver (the deceased). He has filed an application under s 136 of the Trusts Act 2019 for an order authorising Mr Mervyn Beaver's share of the estate to be distributed as if Mervyn had died before the deceased.

Background

[2] The deceased died in 2011. Mr Tyson is one of the original executors of the state. According to the terms of the deceased's 2009 will, the residue of the deceased's estate was to be divided into nine equal parts and distributed to four different people. Mervyn was one of these people, and he was entitled to two of the nine parts of the residue. In 2011, each of the nine parts amounted to \$22,000.

[3] Mervyn's whereabouts have not been able to be ascertained since 2010, prior to the deceased's death. Since 2011, Mr Tyson has made the following efforts to attain Mervyn's whereabouts:

- (a) Mr Tyson contacted various members of Mervyn's extended family to see if they had leads he could explore.
- (b) Mr Tyson instructed Wellington Investigations Limited (WIL) to carry out a trace on Mervyn and his wife, Sophie, in June 2015. WIL contacted the Consulate-General of the People's Republic of China in Sydney (where Sophie was known to work). WIL also conducted a number of searches across New Zealand and Australia (Mervyn's last known address was in Sydney), including searches of social media, obituaries, missing persons websites, ancestry tracing websites, credit check websites and insolvency websites. WIL additionally canvassed a number of Mervyn's family members and friends. WIL facilitated further inquiries in Australia through an agent.
- (c) Mr Tyson instructed Secure Collections & Investigations Limited to carry out a trace on Mervyn in mid-2021. Their investigation included contacting financial reporting institutions, contacting persons known to Mervyn (including those contacted during WIL's investigation), making Official Information Act requests to the New Zealand Police and Department of Internal Affairs, checking for death certificates in New Zealand and Australia and conducting extensive online searches.

[4] Despite these efforts, Mr Tyson still has no knowledge of Mervyn's whereabouts. Mervyn's share of the residue is currently held on trust, amounting to \$35,437.03 (as at 17 October 2023).

[5] Mr Tyson's supporting affidavit speculates that Mervyn may have passed away prior to the deceased's death in 2011. The reasons for this include the following facts:

- (a) Mervyn adored the deceased and would usually call her on her birthday, but did not do so in 2010;
- (b) when it was contemplated that the deceased might be put into a retirement home, Mervyn called and said he would go to his lawyer and doctor to "sort it out", but nothing further occurred; and
- (c) no one in the extended family has heard from Mervyn since before the deceased's death.

[6] It is also speculated that Mervyn may have moved to China with his wife, Sophie. This is purely speculative and based on the fact that Sophie has Chinese heritage.

[7] The deceased's will provides that if any of the shares fail because of a beneficiary predeceasing the deceased, that share should be added to the other shares equally. Thus, if this Court makes an order authorising the applicant to distribute the Trust property as if Mervyn died before the deceased, the \$35,437.03 would be split equally between the remaining beneficiaries. Two of Mervyn's children were not named as beneficiaries under the deceased's will.

Legal principles

[8] Section 136 of the Trusts Act 2019 provides:

136 Trustee may apply to court to allow distribution of missing beneficiaries' shares

- (1) The court may, on application by a trustee, make an order authorising the trustee to distribute trust property—

- (a) as if a potential beneficiary or a class of potential beneficiaries does not exist or never existed or has died before a date or an event specified; and
 - (b) if, because of the order, it is not possible or practicable to determine whether any condition or requirement affecting a beneficial interest in the property or any part of it has been complied with or fulfilled, as if that condition or requirement had been or had not been complied with or fulfilled.
- (2) The court may make an order only if it is satisfied that—
- (a) reasonable measures have been taken to bring to the notice of the potential beneficiary or beneficiaries their potential beneficial interest or interests; and
 - (b) at least 60 days have passed since the last of those measures was taken; and
 - (c) no potential beneficiary with respect to whom an order is sought has come to the attention of the trustee as a result of those measures, or the claim of any such beneficiary may be disregarded in the circumstances.

[9] Section 136 replaced s 76 of the Trustee Act 1956, but the authorities on s 76 remain instructive.¹ Section 76 “provided the machinery for ascertaining the existence or whereabouts of unknown or missing claimants,”² requiring the trustee to publish advertisements. Section 136 is significantly shorter and uses broader, more flexible language: specifically, requiring the applicant to have taken “reasonable measures” to inform the potential beneficiary of their interest in the estate.³

What constitutes “reasonable measures”?

[10] In *Re Holland*, a case decided under the 1956 Act, a private investigator was engaged.⁴ In applying s 76, the Court noted that the engagement of a private investigator “goes beyond the minimum requirement of an advertisement and actively seeks out the missing individual.”⁵ The Court held that, in the circumstances, a

¹ *Hodgson v Hodgson* [2021] NZHC 906 at [16].

² *Hodgson v Hodgson*, above n 1, at [13].

³ *Hodgson v Hodgson*, above n 1, at [15].

⁴ *Re Holland* [2019] NZHC 1146.

⁵ At [12].

newspaper advertisement would not be required in addition as it would be an inefficient use of trust assets.⁶

[11] In reaching this conclusion, the Court stated that the size of the estate will affect what constitutes an appropriate inquiry.⁷ This was affirmed in *Re Doak*, which was decided under the 2019 Act. The High Court held that the “reasonable measures” assessment should focus on practical considerations including the size of the beneficial interest.⁸

[12] In *Young v Young*, decided under the 1956 Act, the High Court found that retaining private investigators on three occasions, conducting internet-based searches and placing advertisements in three Australian newspapers amounted to a sufficient inquiry.⁹

[13] In *Hodgson v Hodgson*, under the new 2019 Act, the Court held that inquiries did not amount to “reasonable measures” partially because newspaper advertisements are not the best medium to locate beneficiaries in current times, with the Court instead suggesting that the applicant undertake searches on social media.¹⁰ The applicant returned to the Court two years later, with the Court this time finding that the inquiries were sufficient and could almost be considered exhaustive (which is not required under s 136), as it included an active search targeting social media, official databases, government departments and friends and family.¹¹

Applying s 136

[14] I am satisfied that Mr Tyson’s efforts meet the “reasonable efforts” threshold. The authorities indicate that hiring private investigators on two occasions was sufficient, especially given the extensive searches they then conducted on Mr Tyson’s behalf.

⁶ At [12].

⁷ At [13].

⁸ *Re Doak* [2022] NZHC 3111 at [10].

⁹ *Young v Young* [2013] NZHC 1396.

¹⁰ *Hodgson v Hodgson*, above n 1.

¹¹ *Hodgson v Hodgson* [2023] NZHC 2025 at [18].

[15] Mr Tyson also conducted an investigation on his own. In answer to my inquiry, Mr Tyson has made contact with Mervyn's children, who do not know of his whereabouts. The last time Mervyn was seen was in 2010 and he did not attend the deceased's funeral in 2011. This is pertinent, as he was very close to his mother.

[16] The other relevant consideration is the size of the estate or bequest. Mervyn's share of the residue is relatively small when compared to the authorities mentioned above, making it more likely that these inquiries were sufficient given the low value of the bequest. I accept that any further efforts to locate Mervyn would be an inefficient use of trust assets.

[17] I am satisfied that reasonable measures have been taken to notify Mervyn of his potential interests. Sixty days have passed since the last of those inquiries in mid-2021, and no potential beneficiary has come to the attention of the trustee. Mervyn's children have confirmed they do not know of his whereabouts. I accept that the requirements in s 136(2)(b) and (c) have been met.

[18] Accordingly, the application is granted. I make an order under s 136(1)(a) of the Trusts Act 2019, authorising the applicant to distribute the Trust property as if Mr Mervyn Beaver died before the deceased.

Cull J

Solicitors:
Gibson Sheat, Wellington, for Applicant