

WHAT'S MINE IS YOURS, OR IS IT?
ACCESSING SPOUSAL TRUSTS FOR THE PURPOSES OF THE
PROPERTY (RELATIONSHIPS) ACT 1976

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Table of Contents

Introduction.....	1
Chapter 1: Overview of the Problem.....	3
A. Spousal Trusts.....	3
B. The Design of the PRA Regime.....	4
C. Trusts and the MPA/FPA.....	5
Chapter 2: The Statutory Remedies.....	8
A. Introduction.....	8
B. The Facts of <i>Ward v Ward</i>	8
C. Section 44 of the PRA.....	8
D. Section 44C of the PRA.....	10
1. <i>Ward v Ward</i> and <i>Nation v Nation</i>	10
2. The Narrow Scope of s 44C.....	11
3. The Sources of Compensation.....	12
4. The Effect of the Repeal of Gift Duty.....	13
5. Conclusion.....	14
E. Section 182 of the FPA.....	15
1. The History of s 182.....	15
2. The Jurisdictional Requirements of s 182.....	16
(a) Nuptial Settlement.....	16
(b) Dissolution.....	16
3. Section 182 is Not Part of the PRA.....	17
(a) The Different Aims of s 182 and the PRA.....	17
(b) The Inconsistency Between s 182 and the PRA.....	18
4. Conclusion.....	19
Chapter 3: The Equitable Remedies.....	20
A. Introduction.....	20
B. Constructive Trusts.....	20

1.	Proving the Existence of a Constructive Trust.....	20
2.	The Award.....	21
C.	The General Power of Appointment and the Power to Revoke the Trust.....	22
D.	Sham Trusts.....	23
E.	Illusory Trusts.....	24
1.	<i>Harrison v Harrison</i>	24
2.	<i>B v X & CIR</i>	25
3.	<i>BQ v DQ</i>	25
F.	The Bundle of Rights “Doctrine”	26
G.	Conclusion.....	27

Chapter 4: Should Reform Provide Access to Trust Capital?.....29

A.	Arguments Against Reform to Provide Access to Trust Capital.....	29
1.	Trust Law Arguments.....	29
2.	PRA Arguments.....	30
3.	Conclusion.	31
B.	Arguments For Reform to Provide Access to Trust Capital.....	31
1.	Reform is Needed to Update the PRA.....	31
2.	The Policy of the PRA is Being Undermined.....	33
(a)	The Recognition of Equal Contributions and the Division of the Fruits of the Relationship.....	33
(b)	Specific Provisions	33
(c)	All Qualifying Relationships Are Equal.....	35
(d)	Conclusion.....	35
3.	General Injustice.....	35
4.	Dependence on the State.....	36
5.	The Interests of a Claimant vs the Interests of Beneficiaries.....	36
6.	Conclusion.....	38

Chapter 5: Options For Reform.....39

A.	Introduction.....	39
B.	Option 1: Amend s 44C.....	39
1.	The Narrow Scope of s 44C (Again).....	39
2.	What About the Interests of Beneficiaries?.....	40
C.	Option 2: Amend s 182.....	41

1.	The Advantages.....	42
2.	The Conceptual Problem.....	42
D.	Option 3: Section 44G.....	43
1.	Introduction.....	43
2.	What Would s 44G Look Like?	44
3.	The Jurisdictional Requirements.....	45
4.	The Balancing Factors.....	46
5.	Powers, Protection and the Fate of s 182.....	47
6.	The Discretion Question.....	48
7.	Two Separate Regimes?	49
	Conclusion.....	50
	Bibliography.....	51

Introduction

The use of trusts in New Zealand is currently under the microscope. The Law Commission has released a paper confirming the view expressed by members of the judiciary, academics and practitioners that discretionary trusts are being used to undermine the Property (Relationships) Act 1976 (the PRA).¹ This dissertation focuses on the interaction between Spousal Trusts and the PRA. Spousal Trusts are discretionary family trusts settled by one or both spouses or partners during the relationship. Dynastic trusts² and trusts settled by one of the parties prior to the relationship commencing raise other issues which this dissertation will not address.

Chapter 1 provides an overview of the problem by describing Spousal Trusts, the design of the PRA regime and the interaction between trusts and New Zealand's property sharing regime since 1976. It concludes that the PRA is out of date with prevailing ownership structures.

Chapter 2 describes the statutory remedies for dealing with Spousal Trusts. *Ward v Ward* is used as a case study to illustrate the individual and collective limitations of these remedies.³

Chapter 3 describes the limited common law remedies that provide access to trust property and the recent judicial attempts to disregard conventional trust law principles in order to give effect to the social aims of the PRA.

The purpose of these chapters is to show the unsatisfactory state of the current law and demonstrate the urgent need for reform. Chapter 4 canvasses the arguments for and against reform that would provide access to trust capital in the absence of fraud. Chapter 5 then discusses three possible options for reform.

While there are strong arguments in favour of reform, amending the law to give full effect to the PRA over trusts will inevitably affect the interests of beneficiaries. This dissertation discusses the possibility of a new way forward that gives the court the

¹ Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010).

² Discretionary trusts settled by a parent or parents of one of the spouses or partners for the benefit of their children or grandchildren.

³ *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31.

discretion to balance these competing interests when making an order against a trust. The difficulty is that any reform of this nature may not do justice to the framework of the PRA.

Chapter 1: Overview of the Problem

A. Spousal Trusts

The Cahirdean Trust (the Trust) in *Ward v Ward* is a classic example of a Spousal Trust. Mr and Mrs Ward lived and worked on a farm owned by a company called Lang Park Limited (the Company). Mr Ward owned 100% of the shares in the Company. In 2000, Mr and Mrs Ward entered into a matrimonial property agreement,⁴ in which they agreed to transfer 50% of Mr Ward's shares in the Company to Mrs Ward. Simultaneously, they established the Trust and transferred their shares in the Company to the Trust in exchange for a debt back of \$270,000 each. Vesting half of the shares in Mrs Ward enabled the debt to be forgiven at twice the speed. The trustees of the Trust were Mr and Mrs Ward and an independent trustee. Mr and Mrs Ward were the primary beneficiaries as to income and capital. Their children, and their children's children were final beneficiaries. Income and capital could be distributed to beneficiaries with the unanimous consent of the trustees.

Mr and Mrs Ward did not own any of the assets in trust under conventional property law principles because they were discretionary beneficiaries. A discretionary beneficiary has no legal or equitable interest in the assets of the trust until the trustees have exercised their discretion their favour.⁵ Until that point, a discretionary beneficiary's interest is merely an "expectation or hope."⁶

There are many such trusts, though we cannot be certain of the number.⁷ The essence of a Spousal Trust is that it holds property accumulated during the relationship as a result of the efforts of both parties. During the relationship, property held in a Spousal Trust is treated as the property of the parties. The problem occurs when, at the end of the relationship, one person continues benefitting from the trust property while the other

⁴ Relationship property agreements were called matrimonial property agreements before the PRA Amendment Act was passed in 2001.

⁵ *Nation v Nation* [2005] 3 NZLR 46 (CA) at [74].

⁶ *Hunt v Muollo* [2003] 2 NZLR 322 at [11].

⁷ Estimated to be 400,000. "Please sir, can we have some more... of our own money?" *Sunday Star Times* (New Zealand, 24 August 2008) at D1 as cited in Nicola Peart "Can Your Trust be Trusted" (2009) 12 Otago LR 59 at 60 ["Can Your Trust be Trusted"].

loses out. The issue that such couples face is that a discretionary interest in a trust does not come within the reach of the PRA.⁸

B. The Design of the PRA Regime

The purpose of discussing the design of the PRA regime is two-fold. Firstly, it indicates what Parliament was trying to achieve when it passed the Matrimonial Property Act 1976 (the MPA). Secondly, the conceptual framework of the PRA is a touchstone for the arguments for and against reform and that provides access to trust capital and for assessing the viability of the three options for reform.

The main policy of the regime is that contributions to the partnership are presumed to be equal and thus equally divided, subject to very few exceptions.⁹ The purpose of this underlying philosophy is to fairly divide the fruits of the partnership between the parties.

The PRA is a deferred community property regime.¹⁰ This means that the rights of the parties are inchoate and each party is free to deal with their property as they see fit until an intervening event such as separation or death occurs.¹¹ At that point the PRA crystallises, giving spouses and partners the entitlement to share in the couple's relationship property. To preserve the ability of parties to deal freely with their assets during the relationship, Parliament decided that only fraudulent dispositions could be set aside.¹² For many years, the judiciary equated fraudulent intent with a conscious desire to place property outside the reach of the court.¹³ Parliament's obvious intention was to create an Act that did not bite until an intervening event occurred.

⁸ Section 2 of the Property (Relationships) Act 1976 defines "owner" as the beneficial owner of property under any enactment or rule of common law or equity. "Property" is defined as including any real property, personal property, any estate or interest in any real property or personal property, any debt or thing in action and any other right or interest. In contrast to a discretionary interest, vested or contingent interests in a trust are property because such interests are not at the discretion of the trustees; see Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 1174.

⁹ See Property (Relationships) Act 1976 ss 13, 14 - 14AA, 15 and 85.

¹⁰ Mark Henaghan and others *Family Law in New Zealand* (15th ed, LexisNexis, Wellington, 2011) at 1106-7.

¹¹ *Tregonning v Tregonning* FC Auckland FAM-2006-004-2322, 7 April 2009 at [29].

¹² Property (Relationships) Act 1976, s 44.

¹³ *Coles v Coles* (1987) 4 NZFLR 621. It was notoriously difficult to prove this intention. See *Report of the Working Group on Matrimonial Property and Family Protection* Wellington (1998) at 28.

The PRA is a code that applies to property transactions between spouses and partners instead of the rules and presumptions of common law and equity.¹⁴ In certain circumstances it also applies to transactions between spouses or partners and third parties. Section 21 is the means of avoiding the regime. It allows couples to make any agreement they see fit with respect to the status, ownership and division of their current and future property.

C. Trusts and the MPA/PRA

The original framework of the MPA suggests that Parliament did not consider trusts to be a major problem in 1976. Presumably most spouses then owned their assets beneficially rather than in trust. However, the growth of trusts in New Zealand has significantly changed property owning structures.

The first significant growth in the number of trusts occurred when it became apparent that the MPA was going to be introduced. This upward trend continued after the MPA was passed. Trusts became the obvious vehicle for assisting people to avoid the impact of the matrimonial property regime.¹⁵ A trust was easier and more effective than a s 21 agreement, which could have had undesirable social consequences. Even if such an agreement was made, it was still vulnerable to being set aside.¹⁶

Parliament reacted slowly to the effect of trusts on the reach of the PRA. In 1988, a Working Group published report on Matrimonial Property and Family Protection that identified trusts as a common way of avoiding the Act. The report observed that “unless matrimonial property remains such during the marriage, becoming available for equal division in due course, the social purpose of a joint matrimonial property law is lost.”¹⁷ It concluded that much more effective provisions were necessary to prevent the use of trust structures to take matrimonial property outside the ambit of equal division. In particular, it recommended that the court be given the discretion to order distribution of capital in

¹⁴ Property (Relationships) Act 1976, s 4.

¹⁵ Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) above n 1 at 2.11.

¹⁶ See *Wood v Wood* [1998] 3 NZLR 234 (HC) where Fisher J was critical of the ease with which agreements had been set aside in the past.

¹⁷ *Report of the Working Group on Matrimonial Property and Family Protection* Wellington (1998), above n 13 at 30.

order to achieve a just division.¹⁸ Parliament took no immediate action in response to this report.

The abolition of estate duty in 1992 changed the nature of trust structures in New Zealand and led to a tremendous growth in the number of trusts.¹⁹ Estate duty provided an incentive for people to transfer their property to trust for disposition to others because it did not apply to distributions from a trust.²⁰ However, the property had to be fully alienated by the settlor. If a settlor retained any ‘control’ over trust property it could be clawed back into their notional estate and taxed.²¹

When estate duty was repealed, a new trust structure developed that enabled settlors to ‘control’ trusts for their own benefit by virtue of the power to appoint and remove trustees and beneficiaries and to redistribute capital and income of the trust.²² This structure gave the settlor the power to convert a mere hope or expectation of benefit into reality without having to beneficially own any of the trust assets.

It was not until 2001 that Parliament enacted s 44C to address the problems identified by the Working Group report. Section 44C enables a court to order compensation for a disposition into trust that has the effect of defeating the claim or rights of a spouse or partner under the PRA. However, Parliament did not implement the Working Group’s recommendation to empower the court to make orders against trust capital. Since 2001, the number of trusts has risen enormously. In 2001, there were 145,900 income tax returns filed by estates or trusts. This number increased to 253,800 in 2010.²³ These figures exclude trusts that do not produce an income, such as those holding only the family home. It is perhaps of note that 72% of Members of Parliament declared a beneficial interest in at least one trust in 2012. These numbers came from both sides of

¹⁸ At 79.

¹⁹ Nicola Peart "Trusts and Relationship Property" (Paper presented at the Family Court Judges' Conference, Wellington, 2011) at 1 ["Trusts and Relationship Property"].

²⁰ Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at 2.38.

²¹ Patterson, W M Patterson ""When is a Trust a Trust?"" (paper presented to Legal Research Foundation Seminar "A Modern Law of Trusts", Auckland, 2009) at 4.

²² See for example *F v W* HC Wellington CIV-2009-485-531, 3 August 2009.

²³ "Returns filed, 2001 to 2010" (5 December 2011) Inland Revenue
<<http://www.ird.govt.nz/aboutir/external-stats/tax-returns/filed/tax-returns-filed.html>> .

the house and provide an indication of just how widespread trusts have become.²⁴ The Law Commission predicts that the repeal of gift duty on 1 October will further increase the popularity of trusts.²⁵

The huge growth in trusts since 1976 means that the PRA “does not sit well with prevailing ownership structures.”²⁶ As the next chapter will show, the existing statutory remedies are limited. The PRA is no longer equipped to work in the way that Parliament intended because in many cases there are simply no assets left outside the trust on which it can bite.

²⁴See Margaret Bazley "Register of Pecuniary and Other Specified Interests of Members of Parliament: Summary of annual returns as at 31 January 2012" (31 January 2012) New Zealand Parliament <<http://www.parliament.nz>>. The figure of 72% was calculated by Rob Stock in Rob Stock "A question of trust over gift duty abolition" (1 May 2011) Stuff.co.nz <<http://www.stuff.co.nz/business/4947050/A-question-of-trust-over-gift-tax-abolition>>.

²⁵ Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) above n 1 at 2.26.

²⁶ Peart "Trusts and Relationship Property Paper" above n 19 at 1.

Chapter 2: Statutory Remedies

A. Introduction

This chapter uses *Ward v Ward* to highlight the individual and collective problems with the current statutory remedies for dealing with assets held in a Spousal Trust.

B. The Facts of *Ward v Ward*

As noted in Chapter 1, the Cahirdean Trust was a classic example of a Spousal Trust. The disposition of the shares in the Company into the Trust significantly reduced the relationship property pool in exchange for a debt back of \$560,000. This debt was frozen in value. Meanwhile, the value of the shares in the Trust increased substantially in the time between the settlement of the Trust and Mr and Mrs Ward's separation in 2003.²⁷ The farm was worth \$2,035,000 at the time of the Family Court proceeding.²⁸

When Mr and Mrs Ward separated, Mrs Ward was unable to obtain any share of the Trust's assets because that required the unanimous consent of the other trustees.²⁹ Mr Ward retained the use of the home and the control of the property finances while Mrs Ward lived in alternative accommodation and received no support from the Trust.³⁰ Mrs Ward turned to the PRA and the FPA for a remedy.

C. Section 44 of the PRA

Section 44 of the PRA claws back dispositions of property to trust where the disposition³¹ was made in order to defeat the claimant's rights under the PRA. However, it is generally of little assistance to a claimant seeking access to a Spousal Trust.³²

²⁷ *Ward v Ward* FC Hastings FAM-2004-020-116, 20 April 2007 at [34].

²⁸ *Ward v Ward*, (SC), above n 3 at [10].

²⁹ At [46].

³⁰ *Ward v Ward*, (FC) above n 27 at [27].

³¹ The term "disposition" covers all forms of alienation whether for value or not. See *Re Polkinghorne Trust* (1988) 4 NZFLR 756.

³² The disposition must also have the effect of defeating a person's rights under the PRA. The effect is assessed upon separation.

The key element is whether the disposition was made with an intention to defeat. The *Coles v Coles* motive test was recently replaced by the *Regal Castings* knowledge test which requires the person disposing of property to have known, or ought to have known, that by disposing of property they were exposing their spouse or partner to a significantly enhanced risk of not obtaining their share of the relationship property.³³

While *Regal Castings* lowered the bar,³⁴ it does not assist where both parties approved of the disposition and expected to continue to benefit from the assets. In this circumstance, it can hardly be argued that one of them had an intention to defeat the other. For example, *Regal Castings* would have made no difference in *Ward v Ward* because Mrs Ward was a party to the disposition. Similarly, in *Coles v Coles*, Mrs Coles approved of the plan to transfer the property into trust to avoid estate duty and protect it for their children.³⁵

These examples illustrate that, despite *Regal Castings*, s 44 still only applies to a limited number of circumstances. Of the few cases that have been successful, there has either been direct evidence of the respondent's intention³⁶ or the intention to defeat has been blatant and unequivocal.³⁷ This is problematic in the case of Spousal Trusts where the claimant is generally a party to, or is at least aware of, the disposition. It is only after separation that the trust structure prevents the claimant from benefiting from the fruits of the partnership.

³³ *Regal Castings v Lightbody* [2008] NZSC 87; [2009] 2 NZLR 433 at [54].

³⁴ See *Stewart v Stewart* [2003] NZFLR 400 where Mrs Stewart secretly transferred the family home into trust six months before separation. The Court held that s 44 did not apply because her primary reason for the disposition was to protect the house from her husband's creditors. Peart has commented that on the *Regal Castings* test, Mr Stewart might have been able to prove an intention to defeat; see Peart, "Trusts and Relationship Property" above n 19 at 4.

³⁵ *Coles v Coles* above n 13 at 7.

³⁶ See *O v S* (2006) 26 FRNZ 459 where the respondent asked his solicitor how he could prevent his new partner from sharing in the family home.

³⁷ See *DKH v CAC* FC Tauranga FAM-2008-070-426, 19 February 2010 where the applicant's late wife and her son settled relationship property on trust with a stated charitable purpose of promoting Christian ministry. The applicant believed that the trust was a family trust that he had a life interest in and that he had access to trust funds. In fact neither the applicant nor his wife were beneficiaries. The Court inferred from the wife's control of the couple's finances and her secrecy surrounding the trust that she had an intention to defeat her husband's rights under the PRA. See also *JHM v GPM* HC Timaru CIV-2009-476-000428, 5 March 2010 where shortly after separation the respondent disposed of the family home into trust and used the proceeds to purchase a new home.

D. Section 44C of the PRA

In 2001, Parliament acknowledged that trusts were undermining the social purpose of the PRA and inserted s 44C to strengthen the equal sharing regime and to provide relief in circumstances where the high threshold for intention in s 44 could not be established.³⁸ Eleven years later, there is general consensus amongst academic commentators that s 44C is severely curtailed by its narrow jurisdiction and the sources from which compensation may be ordered.³⁹ The repeal of gift duty will further limit its value.

1. Ward v Ward and Nation v Nation

Section 44C requires a disposition to a trust of relationship property by either or both of the parties since the relationship began with the effect of defeating the claim or rights of one of the parties under the PRA. It does not apply if s 44 applies⁴⁰ or where the disposition affects both parties equally.⁴¹

Ward v Ward and *Nation v Nation* show how a Spousal Trust structure can defeat the rights of a partner or spouse following separation.⁴² In *Ward v Ward*, the transfer of the shares in the Company to the Trust was a disposition. The matrimonial property agreement classified these shares as relationship property. The disposition was made during the relationship. The disposition defeated Mrs Ward's rights because she no longer received any benefit from the farm and she was unable to share in the increase in the value of the shares.

Nation v Nation was described by the Court of Appeal as a paradigm example of a s 44C case.⁴³ Mr and Mrs Nation married in 1972 and moved onto Mr Nation's family farm and started a family. The way in which the farm was owned changed several times during the

³⁸ *Nation v Nation*, above n 5 at [143]

³⁹ See Nicola Peart, Mark Henaghan, Greg Kelly "Trusts and relationship property in New Zealand" (2011) 17 T & T 866 at 870 ["Trusts and Relationship Property in New Zealand"]; Bill Atkin and Wendy Parker *Relationship property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 223; Henaghan and others, above n 10 at 1258.

⁴⁰ *Nation v Nation*, above n 5 at [144].

⁴¹ *P v P* [2003] NZFLR 925 where the home was transferred to mirror trusts and therefore the disposition affected each spouse equally.

⁴² *Nation v Nation*, above n 5.

⁴³ At [149].

course of their 28-year marriage. In 1978, Mr Nation acquired a half share in the farm from his father's estate. This half was relationship property. In 1990, Mr Nation inherited the remaining half share. This was his separate property. In 1999, Mr Nation established the Punawaitai Trust. The Trust gave Mr Nation the power to appoint and remove discretionary beneficiaries and appoint and remove trustees. Later that year, he sold the farm to the Punawaitai Trust in return for a debt of \$991,813. Mr and Mrs Nation separated in July 2000. At the time of the Family Court hearing the farm was worth \$1,725,000.

The first five requirements of s 44C were satisfied. Mr Nation had made a disposition to a trust and half of the property transferred was relationship property. The disposition occurred during the marriage and was not one to which s 44 applied. The case turned on whether the disposition had the effect of defeating Mrs Nation's rights under the PRA.

The Court held that the disposition did defeat Mrs Nation's rights because she was unable to share in the increase in value of the portion of the farm that was relationship property. Moreover, because of Mr Nation's powers in relation to the Punawaitai Trust any benefit or support that the trust gave Mrs Nation was entirely dependent on Mr Nation.

2. *The Narrow Scope of s 44C*

While Mrs Ward and Mrs Nation satisfied the jurisdictional requirements of s 44C this is not always the case. Section 44C can be circumvented in a number of ways. Firstly, it only applies to dispositions to a trust. This means that a spouse or partner can sell property to a relative or friend who can then transfer it into trust for that partner or spouse's benefit.⁴⁴

Secondly, it does not apply to dispositions that occur before the relationship commenced. This means that it does not capture dispositions to trust that occur prior to the commencement of a qualifying relationship. It is irrelevant that but for the disposition the property would have become relationship property. This is a particularly effective way to avoid triggering s 8(1)(a) in relation to the family home.⁴⁵

⁴⁴ See *DLT v LMW* FC Papakura FAM-2009-055-432, 22 September 2011 where the respondent sold the family home to his parents who transferred it into a trust for the benefit of the respondent and his sister.

⁴⁵ See *JEF v GJO* [2012] NZHC 1021 where the respondent transferred the house into trust while he was in a sexual relationship with the applicant but before their de facto relationship began. This case also

Thirdly, it only applies to dispositions of relationship property. This allows a partner or spouse to use separate property to acquire property such as a house, and to then dispose of it into trust before it can be classified as relationship property.⁴⁶ It also means that separate property can be disposed of into trust to avoid s 9A.⁴⁷

Fourthly, it does not apply where trustees of a trust acquire property directly from a third party.⁴⁸ This allows a partner or spouse to establish a trust to acquire property instead of acquiring it personally. A company structure can be used in the same way.⁴⁹

In conclusion, the narrow scope of s 44C means that it often does not apply even though the trust holds assets that but for the disposition into trust would have been classified as relationship property.

3. *The Sources of Compensation*

If s 44C applies, a court can make an order requiring a payment or transfer of property from relationship property or the respondent's separate property to the claimant. If these sources are insufficient, a court can require trustees of the trust to pay income from the trust. Section 44C does not enable a court to access capital held in trust. This is a significant limitation.

illustrates the difficulty of applying s 44C in the case of a de facto relationship where it is uncertain when the relationship began.

⁴⁶ See *P v B* [2009] NZFLR 773 where the respondent used separate property to acquire a house and disposed of the house into trust before it became the family home. The same issues regarding the existence of a de facto relationship can occur here.

⁴⁷ Property (Relationships) Act 1976, s 9A. Section 9A can classify an increase in value of separate property as relationship property.

⁴⁸ See *GAM v PCM* [2012] NZFC 2624 where the parties were in a de facto relationship between 1991 and 2008. In 1998 he set up a trust without her knowledge and used the trust to acquire property rather than acquiring it in his own name and triggering her entitlement under the PRA. This limitation allows a settlor to avoid s 8(1)(a) by gifting money to a trust to enable it to purchase a house and then forgiving the debt. If the loan was from separate property the debt would not be relationship property.

⁴⁹ See *JJAJ (aka SA-B) v BLD* FC North Shore FAM-2008-044-833, 13 May 2011 where the respondent acquired a house through her company rather than using her own name. This allowed her to avoid the property being classed as the family home upon separation.

Mrs Nation was very fortunate because the debt owed by the Punawaitai Trust to Mr Nation was available to compensate her for the effect of the disposition. However, Mrs Ward was not so lucky. The only items of property available outside the Trust were Mr Ward's interest in the farming partnership and Mr Ward's credit from the Trust. Together, these items were worth \$463,670. This was not enough to compensate Mrs Ward for the effect of the disposition on her rights under the PRA. The Trust produced no income that the Court could use to provide compensation. This case provides a clear illustration of the inability of the PRA to deliver an equal division of the fruits of the relationship where assets are in a Spousal Trust.

Mrs Ward is not alone in finding herself in this situation.⁵⁰ Many Spousal Trusts hold assets that produce little or no income, such as the family home. Even where assets do produce an income, it may take years for a successful claimant to be fully compensated.⁵¹ In the past, s 44C has relied on the existence of gift duty to slow the disposition of the family home into trust so that a debt still remained on separation.

4. *The Effect of the Repeal of Gift Duty*

Nation v Nation demonstrates the importance of gift duty to the effectiveness of s 44C. If gift duty had not existed at the time of the disposition in *Nation v Nation*, it is unlikely that a debt would have been available to enable compensation.

Gift duty acted as a silent police for family transactions by slowing the disposition of relationship property into trust.⁵² Parties would sell assets to a trust in return for a debt

⁵⁰ See *DAM v PRM* FC FAM-2008-035-512, 30 March 2011 where the majority of the assets acquired during a 38 year marriage were held in trust. Although the jurisdictional requirements of s 44C were met, there was insufficient separate property or relationship property outside the trust, and insufficient income from the trust, from which to make an order for compensation. See also *JG v JBG* FC North Shore FAM-2007-044-591, 13 July 2010 where the jurisdictional requirements of s 44C were met but Judge Ryan, perhaps aware that s 44C would not provide access to capital held in trust, preferred to satisfy the applicant's claim using the "package of rights" concept. The flaws in Judge Ryan's approach are discussed in Chapter 3.

⁵¹ Atkin and Parker, above n 39 at 223.

⁵² See comment by Deloitte Dunedin tax partner Peter Truman in Dene Mackenzie "Gift duty changes come with warning" *The New Zealand Herald* (Auckland, June 27 2011) < http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10734693 >.

that could then be forgiven in \$27,000 increments each year.⁵³ This debt often remained at the time of separation and was a common source of compensation.⁵⁴

Gift duty had other effects too. Mr Ward's sole motivation for the relationship property agreement that transferred 50% of the Company shares to Mrs Ward was to double the speed of the disposition to trust.⁵⁵ The transfer of shares to Mrs Ward was crucial to her s 182 claim because it meant she and Mr Ward had made equal dispositions of property to the Trust.⁵⁶ But for gift duty, Mr Ward would have disposed of the property into the Trust outright without vesting any of the shares in Mrs Ward. She would then have had a significantly lower reasonable expectation of benefit from the settlement for the purposes of her s 182 claim.

It is too soon to tell what the effect of the repeal of gift duty will be. The Ministry of Justice believes that "adequate protection already exists under [the PRA] ... to prevent or remedy the disposal of property that is intended to defeat the interests of another party."⁵⁷ However, the New Zealand Law Society has expressed concern that voluntary alienations will increase to the detriment of the PRA.⁵⁸ Other commentators have gone further, predicting that the repeal could render s 44C redundant.⁵⁹

4. Conclusion

The full effect of s 44C's limitations on the ability of the PRA to achieve an equal division is not borne out by case law. Where a claimant is aware that the section has been circumvented or that the sources of compensation are insufficient they are unlikely to go to court to be informed of those facts. The claimant may then be forced to agree to a less favourable settlement out of court. For example, in *Kilkelly v Arthur Watson Savage*

⁵³ See *Walker v Walker* [2006] NZFLR 768 in which Priestley J commented at [94] that "debts owing to individual family members by family trusts ... are a common incidence of family financial structures. Transferring assets to a family trust in consideration of a debt from the trust to the transferor is legitimate and widespread."

⁵⁴ See for example *Nation v Nation*, above n 5; see also *TRD v DH-B FC Alexandria* FAM-2005-002-77, 26 October 2011.

⁵⁵ *Ward v Ward* [2008] 3 NZLR 383 (HC) at [15].

⁵⁶ *Ward v Ward*, (SC) above n 3 at [61].

⁵⁷ Inland Revenue Regulatory Impact Statement: Gift Duty Repeal (October 2010) at 17.

⁵⁸ NZLS submission to Law Commission in response to second issues paper at 6.

⁵⁹ Peart, "Trusts and Relationship Property" above n 19 at 9.

Legal, Mrs Kilkelly was in a weakened bargaining position upon separation because of Mr Kilkelly's powers in relation to their Spousal Trust and this negatively affected her capacity to negotiate a just relationship property settlement.⁶⁰ Section 44C was of no assistance. Cases like this show that the PRA is not just failing to achieve a just division of assets in Spousal Trusts in court.

If the PRA does not provide a remedy, a spouse or civil union partner may be able to turn to s 182 to obtain access to trust property.

E. Section 182 of the FPA

Section 182 of the FPA enables a court to vary the terms of a nuptial settlement if, at the end of the marriage or civil union, the applicant no longer derives the benefit they reasonably expected to receive from the settlement. The purpose of the provision is to restore that reasonable expectation to the extent possible.

Where the PRA has not worked, s 182 has provided welcome relief to spouses and civil union partners where the PRA has not worked. However, its role is problematic because it is an anachronistic provision underpinned by principles that conflict with the PRA.

1. The History of s 182

The history of s 182 explains why it is so out of step with the PRA. Section 182 can be traced back to s 37 of the Divorce and Matrimonial Causes Act 1867.⁶¹ This Act allowed the court to order divorce on the grounds of adultery. Section 37 enabled the court to vary a nuptial settlement to prevent a wrongdoer from continuing to benefit from the trust. Even though the provision now applies in a very different environment, it has not changed to any appreciable extent and still reflects the principles of the earlier legislation.⁶²

⁶⁰ *Kilkelly v Arthur Watson Savage Legal* HC Invercargill CIV-2006-425-148, 23 July 2007.

⁶¹ This provision was derived from s 45 of the Divorce and Matrimonial Causes Act 1959 (Eng).

⁶² *Ward v Ward*, (SC) above n 3 at [16].

2. *The Jurisdictional Requirements of s 182*

(a) *Nuptial Settlement*

Section 182 only applies to nuptial settlements. A “settlement” includes any disposition that makes some form of continuing provision for both or either of the parties to the marriage or civil union.⁶³ For a trust to qualify as a nuptial settlement it must be settled on one or both of the parties with reference to the particular marriage or civil union. It must also be of a nuptial character. This requires a degree of connection or proximity between the settlement (not the settled property) and the particular marriage, or civil union.⁶⁴ As was the case in *Ward v Ward*, this requirement is generally not a problem for Spousal Trusts, which are usually settled during the relationship for the benefit of the spouse or partner and their children.

(b) *Dissolution*

Section 182 only applies upon divorce. This was not a problem in *Ward v Ward*. However, if Mr and Mrs Ward were not married Mrs Ward would have been left out in the cold because s 182 does not apply to de facto relationships.

This requirement is a hangover from when dissolution was a prerequisite to resolving parties’ rights and obligations after a marriage ended. Now all other property matters that arise at the end of a marriage or civil union are dealt with upon separation.⁶⁵ As a result, couples that have parted ways must wait two years before s 182 can be used to divide any property held in trust.⁶⁶

⁶³ *Ward v Ward*, (HC) above n 55 at [70] – [83].

⁶⁴ *Kidd v van den Brink* HC Auckland CIV-2009-404-4694, 21 December 2009 at [18].

⁶⁵ Property division under the PRA occurs upon separation. Maintenance under s 63 of the FPA can be applied for upon separation.

⁶⁶ See *MTAC v TNC* FC Nelson FAM-2010-042-527, 14 September 2010. The main issue was Mrs C’s application for maintenance. However, Judge Russell noted at [22] that the relationship property issues remained unresolved because trust issues had to wait until the dissolution of the marriage occurred in order to use s 182 to divide the assets held in trust.

3. *Section 182 is Not Part of the PRA*

(a) *The Different Aims of s 182 and the PRA*

Section 182 sits outside the PRA and is underpinned by different principles. The PRA divides property using the presumption of equal sharing. PRA remedies are used to put parties in the position they would have been, but for the trust. In contrast, s 182 aims to restore the reasonable expectations of the parties at the time of the settlement. It puts the parties in the position they would have been in, but for the dissolution of the marriage or civil union. There is no entitlement to, or presumption in favour of, a 50/50 or any other fractional division of trust property.⁶⁷ As a result, s 182 is not a surrogate mechanism for dividing what, but for the trust, would have been relationship property.⁶⁸

The Supreme Court in *Ward v Ward* held that:⁶⁹

[T]he proper way to address whether an order should be made under s 182 is to identify all relevant expectations which the parties, and in particular the applicant party, had of the settlement at the time it was made. Those expectations should then be compared with the expectations which the parties, and in particular the applicant party, have of the settlement in the changed circumstances brought about by the dissolution. The court's task is to assess how best in the changed circumstances the reasonable expectations the applicant had of the settlement should be fulfilled.

In *Ward v Ward*, the Supreme Court divided the Trust into two independent halves. One of the trusts was settled for the benefit of Mrs Ward and the children and the other was settled for the benefit of Mr Ward and the children. However, this equal division was only possible because Mr and Mrs Ward had a mutual expectation of equal benefit. The Court found this expectation because Mr and Mrs Ward made a joint and equal post-nuptial settlement on themselves, their children and other beneficiaries and the memorandum of intention stated that their interests and well-being during the remainder of their lives was of “paramount and of first priority.”⁷⁰

⁶⁷ *Ward v Ward*, (SC) above n 3 at [66].

⁶⁸ At [49].

⁶⁹ At [25].

⁷⁰ *Ward v Ward*, (FC) above n 27 at [14].

While these facts in *Ward v Ward* created a reasonable expectation of mutual benefit, this will not always be the case. If the property disposed of into trust is owned by one spouse or partner or if the intention of the trust is to protect the economic viability of a business or preserve the asset for the future then equal division is unlikely to result. For example, in *DAM v PRM*, the Court found that Mrs M did not have a reasonable expectation of sharing equally in the farm acquired by her former husband during the marriage because of the prevailing law at the time and the fact that she brought no capital into the marriage.⁷¹ Instead, Mrs M had a reasonable expectation of secure accommodation for her lifetime and a limited income. The Court awarded Mrs M \$300,000 from the trust. This is far lower than what she would have received if the PRA had applied to the farm.

Williams v Williams provides a further illustration of the difference between division under the PRA and division under s 182.⁷² The High Court settled 10% of the original trust on a separate trust for the children of the marriage and resettled 55% of the balance on trust for the benefit of Mrs Williams and 45% for the benefit of Mr Williams. This disparity was to recognise the prejudice that Mrs Williams suffered as a result of Mr Williams' post-separation conduct. As Professor Nicola Peart points out, the PRA does not divide property on the basis of fault unless a party's conduct comes within the extraordinary circumstances exception in s 13. Mr Williams' conduct would not have activated s 13. Instead, it would have been dealt with by an order for costs in favour of Mrs Williams.⁷³

(b) *The Inconsistency Between s 182 and the PRA.*

Section 182 provides access to trust capital. Consequently, it can be used to achieve a result that Parliament explicitly rejected when it prioritised the integrity of trusts over the relationship property regime in 2001.⁷⁴ The Supreme Court tried to resolve this conflict by distancing the operation of s 182 from the PRA. It emphasised that "Parliament did not legislate to remove or amend the court's power under s 182" in 2001.⁷⁵ The Court concluded that there is "no necessary inconsistency in allowing the courts to exercise a

⁷¹ *DAM v PRM*, above n 50.

⁷² *Williams v Williams* HC Christchurch CIV-2006-409-002948, 1 April 2009.

⁷³ Anthony Grant and Nicola Peart "The Case for the Spouse/Partner" (Paper presented at the NZLS/CLE Trusts Conference, Wellington, 2009) at 136 ["The Case for the Spouse/Partner"].

⁷⁴ At 132. Peart is critical of the fact that s 182 is "commonly invoked to secure an outcome that cannot be achieved under the PRA."

⁷⁵ *Ward v Ward*, (SC) above n 3 at [19].

trust varying power in these particular circumstances, while providing that, in the wider and distinct relationship property context, trusts will prevail, subject to ss 44 and 44C, over relationship property rights.”⁷⁶

Despite these comments, an air of conceptual incoherence remains. Section 182 was never conceived of as being separate from New Zealand’s property division regime. The PRA purports to be a code and yet s 182 performs the same functions as the PRA by adjusting property rights at the end of a relationship. There is no doubt that all family lawyers consider it part of the family property toolkit for accessing Spousal Trusts after dissolution. While s 182 is useful, its ongoing existence undermines the current scheme of the PRA.

4. Conclusion

This chapter has highlighted the inadequacies of the statutory remedies available for dealing with assets held in a Spousal Trust upon separation. Section 44 is difficult to prove. Section 44C is easily avoided and is limited by its inability to access trust capital. Section 182 is inconsistent with the PRA on both a practical and a conceptual level. Where neither the PRA nor the FPA provide redress, a claimant may be able to obtain one of the limited remedies available at common law.

⁷⁶ At [19].

Chapter 3: Equitable Remedies

A. Introduction

This chapter explains the established equitable remedies available at common law. It highlights that these remedies are difficult to prove and apply in only a limited number of circumstances. The second half of this chapter follows the judicial development of unconventional remedies to give effect to the social aims of the PRA. These attempts demonstrate the courts frustration with the undermining effect of trusts on the relationship property regime.

B. Constructive Trust

A partner or spouse can make a constructive trust claim against the trustees of a Spousal Trust in order to obtain a beneficial interest in the assets of the trust. While this is a viable option, its requirements are difficult to satisfy. In addition, previous awards given by the court have been inconsistent and generally lower than what would have been achieved if the asset was not in trust and the PRA applied.

1. Proving the Existence of a Constructive Trust

The claimant must show that they have contributed directly or indirectly to the acquisition, improvement or retention of the property held in trust, and that both parties reasonably expected to share the beneficial ownership of the property.⁷⁷

Many claimants are able to jump the first hurdle of showing direct or indirect contributions to property held in trust. However, it is difficult to show a reasonable expectation of beneficial ownership of trust property, especially where the spouse or partner was aware of the settlement and therefore knew that they were merely discretionary beneficiaries.

This difficulty is partially offset by the alter-ego concept. Where the trustees have been the alter ego of the applicant's spouse or partner and have allowed them to treat the property as their own it can create a reasonable expectation that the ownership of the

⁷⁷ *Lankow v Rose* [1995] 1 NZLR 277.

assets will be shared. *Prime v Hardie* is a good example.⁷⁸ Mr Hardie ignored the trust and treated the property as his own. The co-trustee did not take an active role in the management of the trust. The Court held that in these circumstances it was reasonable for the trustees to yield an interest to Ms Prime. The alter-ego concept is of particular relevance in the context of Spousal Trusts, where it is common parties to treat trust property as their own during the relationship.

If the claimant had a reasonable expectation they must then establish that the trustees had a reasonable expectation of yielding an interest in trust property. This is a common obstacle for claimants where the trust contains an independent, remote trustee. For example, in *Boys v Calderwood*, Mr Calderwood promised Ms Boys that he would look after her and that she would never have to work again.⁷⁹ However, the trustees did not have a reasonable expectation to yield an interest to Ms Boys because they were professionals and managed the trust independently of Mr Calderwood. It did not matter that Mr Calderwood was a trustee because one trustee cannot bind the other trustees and Mr Calderwood had always been respectful of the trust structure.⁸⁰

This requirement is even more difficult to establish when the claimant's partner or spouse is not a trustee of the trust. For example, in *Endres v Glendinning* the Court held that even though the claimant had a reasonable expectation to share in the beneficial ownership of a property held in trust, the defendant trustees were unaware and had no cause to be aware of his expectation.⁸¹

2. *The Award*

Even if a claimant is successful, the award is not based on the presumption of equal sharing and so is likely to be much lower than what would be achieved under the PRA. The award is quantified by weighing the claimant's contributions to the property against any benefits received. The starting point is zero.⁸² Although indirect contributions are

⁷⁸ *Prime v Hardie* [2003] NZFLR 481.

⁷⁹ *Boys v Calderwood* HC Auckland CIV-2004-404-290, 14 June 2005.

⁸⁰ At [109].

⁸¹ *Endres v Glendinning* HC Palmerston North CIV-2003-454-189, 25 November 2003 at [18]. It is worth noting that in most Spousal Trusts one or both of the partners or spouses will be a trustee.

⁸² *Lankow v Rose*, above n 77 at 287.

relevant, the focus on financial contributions often results in inadequate recognition of non-financial contributions.⁸³

Prime v Hardie is a good example of the awards received by successful claimants.⁸⁴ Ms Prime contributed to the value of the property by putting the whole of her wages into a joint account and maintaining the property. Her contributions to the partnership, which included being the primary carer of their child, were irrelevant. The Court ascertained that she had contributed just 12.5% of the value of a \$773,000 property.⁸⁵ Her award was then offset by the benefit she received from living in the house. She was awarded \$78,687. If the property had not been in trust and the PRA had applied to this case the award would have been significantly higher.⁸⁶ The property was acquired during the course of the de facto relationship so it would have been classified as relationship property and divided equally.⁸⁷

The award is also difficult to quantify and this has produced inconsistent results that “may cause ... uncertainty for litigants and discourage swift settlements.”⁸⁸ Unless there is evidence that the parties have agreed on their beneficial interest the court must do a jury style assessment of all the direct and indirect contributions and all of the benefits received.

C. The General Power of Appointment and the Power to Revoke the Trust

Certain powers in relation to the trust enable trust property to be treated as the property of the holder of the power. A “general” power of appointment gives the appointor complete freedom to appoint the interest to anyone in the world. This power confers a property right because it is not subject to any enforceable fiduciary duties. Similarly, the power to

⁸³ Explanatory note to the De Facto Relationship (Property) Bill as cited in Butler, above n 8 at 345.

⁸⁴ *Prime v Hardie*, above n 78.

⁸⁵ At [35].

⁸⁶ Note that the facts do not state whether Ms Prime and Mr Hardie separated before the PRA Amendment Act came into force on the 1 February 2002. If they did separate before then the PRA would not apply. Regardless, the case illustrates the disparity between a constructive trust award and an award under the PRA.

⁸⁷ Property (Relationships) Act 1976, s 8(1)(a).

⁸⁸ Butler, above n 8 at 1207.

revoke a trust is tantamount to ownership of property in trust because it enables the settlor to call for the assets to be paid over to them at any time, for any reason.⁸⁹

However, few Spousal Trusts grant powers that would allow the settlor(s) to be treated as the owner(s) of the assets held in trust. To do so would be contrary to the reason why the trust was set up in the first place – to divorce the settlor(s) from the ownership of the assets. It would enable the property in trust to be accessed by creditors and considered by the Inland Revenue Department for tax purposes. For this reason, in most Spousal Trusts, the power to appoint income or capital is a “special” power of appointment, which does not allow the property to be treated as owned by the settlor.⁹⁰

D. Sham Trusts

The judiciary responded to the limitations of available remedies for accessing trust capital by developing general law principles. The doctrine of sham trusts has been accepted by the Court of Appeal in *Official Assignee v Wilson*.⁹¹ A sham trust is non-existent because it lacks the certainty of intention to separate legal and beneficial ownership from the property in question.⁹² The property can then be dealt with by way of a resulting trust back to the settlor(s).⁹³

The doctrine is a limited remedy because of the high threshold for establishing a sham.⁹⁴ *Wilson* clarified that the settlor and the trustees must both have a common intention, at the time of inception, not to create the legal rights and obligations of a trust relationship. *Wilson* also extinguished the alter ego argument as a separate cause of action. Administration of the trust as an alter ego will only be relevant if the high degree of control indicates that the parties did not intend to create a genuine trust.⁹⁵ In the case of

⁸⁹ *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and ors* [2011] UKPC 17 at [28] and [59].

⁹⁰ Peart, "Trusts and Relationship Property" above n 19 at 11.

⁹¹ *Official Assignee v Wilson* [2007] NZCA 122; [2008] 3 NZLR 45 ["Wilson"].

⁹² Jessica Palmer "Controlling the Trust" (2011) 12 Otago L Rev 473 at 476 ["Controlling the Trust"]. Certainty of intention is one of the three requirements of a valid trust see Butler, above n 8 at 76-7.

⁹³ At 405.

⁹⁴ Peart, Henaghan, Kelly "Trusts and relationship property in New Zealand" above n 39 at 874.

⁹⁵ *Wilson* above n 91 at [69] – [70].

most Spousal Trusts, the settlors will genuinely intend to settle a trust even though they may administer it and control it for their own benefit.⁹⁶

It is difficult to gauge whether the high threshold will change. The Law Commission approved of the requirement of common intention⁹⁷ and agreed with the Court's comment in *Wilson* that the trust structure should not be invalidated too readily.⁹⁸ However there are signs that the door is opening slightly. In *KA No 4 Trustee Ltd v Financial Markets Authority*, the Court of Appeal concluded that the High Court was correct not to strike out a sham pleading by the Financial Markets Authority.⁹⁹ The Court of Appeal accepted that it was at least arguable that the trust was a sham because Mr Hotchin was the sole trustee for the initial period and he treated the property as his own even though he was not a discretionary beneficiary of the trust.¹⁰⁰ However, even if the KA4 Trust is held to be a sham it may only open a slim crack. It is easier to prove a sham in these circumstances because Mr Hotchin was the settlor and the sole trustee so the FMA only needs to establish a unilateral intention to create a sham.¹⁰¹ Accordingly, *Hotchin* is unlikely to make the sham doctrine any more available to partners or spouses seeking access to a Spousal Trust that was set up with an independent trustee.¹⁰²

E. Illusory Trusts

1. Harrison v Harrison

The concept of illusory trusts disregards trusts for lack of certainty of intention because the structure of the trust and the powers retained by the settlors mean that equitable ownership was not separated from legal ownership.¹⁰³ The trust in *Harrison v Harrison* was challenged on this basis.¹⁰⁴ In *Harrison*, the husband and wife settlor-beneficiaries

⁹⁶ See for example *F v W*, above n 22.

⁹⁷ Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) above n 1 at 5.27.

⁹⁸ At 5.26.

⁹⁹ *KA No 4 Trustee Ltd v Financial Markets Authority* [2012] NZCA 370.

¹⁰⁰ At [30].

¹⁰¹ At [46].

¹⁰² Most Spousal Trusts will have an independent trustee.

¹⁰³ The description "illusory trust" was coined by Jessica Palmer see for example Palmer "Controlling the Trust" above n 92 at 480.

¹⁰⁴ *Harrison v Harrison* (2008) 27 FRNZ 202 (HC) ["Harrison"].

held powers of appointment and removal of trustees. The sole trustee was a company of which they were the major shareholders. The trustee had the power to appoint and remove beneficiaries and appoint income and capital to any of the beneficiaries.

Justice Fogarty held that there was a serious argument that the trust did not exist because the husband and wife retained absolute control for the benefit of themselves. However, the suggestion that the husband and wife held the equitable estate to the exclusion of others ignores the other beneficiaries of the trust.¹⁰⁵ Justice Fogarty's decision has since been undermined. In granting leave to appeal, the Court of Appeal indicated that his comments would be overruled.¹⁰⁶

2. *B v X & CIR*

Justice Fogarty took a different approach in *B v X & CIR*.¹⁰⁷ B had settled a trust for the benefit of himself, his children, any spouse of his and any charity of his choosing. He was the sole trustee with absolute discretion to apply income and capital to himself as one of the beneficiaries. Justice Fogarty concluded that B owed no fiduciary obligations to the beneficiaries. He therefore had a general power of appointment that could be treated as his property. Like *Harrison*, *B v X & CIR* has been heavily criticised. According to Peart, this decision "misconceives the nature of the transaction and disregards the duties it imposed on Mr B as a trustee."¹⁰⁸ Mr B had an obligation to manage the trust fund in the interests of the beneficiaries and to consider whether to appoint income to any of a specific class of beneficiaries.

3. *BD v DQ*

There are some instances in which a trust may be found to be illusory. In *BQ v DQ*, the trust deed contained a clause that empowered Mr Q as settlor to release the trustees from

¹⁰⁵ Palmer "Controlling the Trust" above n 92 at 481. Palmer describes Fogarty J's willingness to disregard a trust that satisfies all the core requisites of a valid trust as disconcerting because of the "potential it has to deny discretionary beneficiaries their already vested right to be considered for appointment and distribution of trust property by the trustee."

¹⁰⁶ *Harrison v Harrison* [2009] NZCA 68, [2009] NZFLR 687 at [29] the Court of Appeal stated that the "existence of the trust cannot be ignored."

¹⁰⁷ *B v X & CIR* [2011] NZFLR 481.

¹⁰⁸ Peart, "Trusts and Relationship Property" above n 19 at 16. See also Palmer "Controlling the Trust" above n 92 at 483.

liability.¹⁰⁹ As Jessica Palmer points out, the effect of this clause is to “enable the settlor to render the beneficiaries right to hold the trustee to account meaningless.”¹¹⁰

In conclusion, an illusory trust argument will only work where the beneficiaries have no ability to call the trustee(s) to account. This is not a characteristic of the typical Spousal Trust.

F. The Bundle of Rights “Doctrine”

Following *Wilson*, the Court looked to another avenue to access trust property. The bundle of rights “doctrine” was first referred to by the Court of Appeal in *Walker v Walker*.¹¹¹ In *Walker v Walker*, powers of appointment and the parties’ discretionary interests were described as ‘property’ capable of valuation. This obiter dictum has been “seized upon by family lawyers and some judges in an attempt to achieve a fair outcome in relationship property proceedings.”¹¹²

This “doctrine” has been attacked on a number of fronts. Firstly, the power to appoint and remove trustees does not grant control over the assets of a trust because that control rests with the trustee once appointed.¹¹³ Holding that the power of appointment of trustees converts a discretionary interest into property of the appointor assumes that the trustee(s) will in act in breach of trust by failing to act independently.¹¹⁴ This is the antithesis of the concept of a trust. Furthermore, the power to appoint and remove trustees is subject to several fiduciary duties such as the duty to exercise the power honestly and in good faith.¹¹⁵ These duties prevent the power from being the property of the appointor.

Secondly, such interests that a spouse or partner may have outside the trust either do not qualify as property or are of limited value. A power of appointment cannot qualify as property or have monetary value because it is fiduciary in nature. A discretionary interest is not ‘property’ according to conventional trust principles.¹¹⁶ Where a corporate trustee

¹⁰⁹ *BD v DQ* [2010] SC (Bda) 40 Civ, 16 April 2010.

¹¹⁰ Palmer “Controlling the Trust” above n 92 at 485.

¹¹¹ *Walker v Walker*, above n 53.

¹¹² Peart, Henaghan, Kelly “Trusts and relationship property in New Zealand” above n 39 at 874.

¹¹³ *Financial Markets Authority v Hotchin* [2011] 3 NZLR 469 at [131].

¹¹⁴ Peart, “Trusts and Relationship Property” above n 19 at 21.

¹¹⁵ John Mowbray et al *Lewin on trusts* (18th ed, Sweet & Maxwell, London, 2008) at 29-16.

¹¹⁶ See Chapter 1A of this dissertation.

controls the trust then rights in relation to that entity are also of little or no value. A directorship of the company is fiduciary in nature and cannot be valued. Shares in the trustee company do qualify as property but such companies are likely to be shells, with little or no assets or income.¹¹⁷

The current status of the bundle of rights “doctrine” at law is unclear.¹¹⁸ The Law Commission concluded in its report that “no coherent basis for the bundle of rights has been articulated to date so it is difficult to predict what course the courts will take in the future.” Recent extra-judicial comments suggest the doctrine will soon be extinguished. Justice Heath wrote earlier this year that there is “no general form of “bundle of rights” doctrine in New Zealand.”¹¹⁹

G. Conclusion

The general law “does not offer former spouses or partners much hope of sharing the beneficial ownership of trust assets they have helped to acquire, improve or sustain.”¹²⁰ Judicial tinkering has met with little success, and where it has, it has been strongly criticised. Such attempts are dangerous because they “purport to be part of the general law and can therefore be used in any other context, thus potentially undermining legitimate constructs and legislative policy that protects these constructs.”¹²¹

For example, in *BN (Criminal)* the Legal Services Commissioner contended that an applicant for legal aid had a “bundle of rights” which conferred control of his Spousal Trust.¹²² Even though the Legal Aid Tribunal gave the Commissioner’s argument short shrift¹²³ this case nonetheless illustrates how a decision made in the context of a relationship property dispute can appear in other policy areas.

¹¹⁷ Shelley Griffiths "Valuation of Interests in Discretionary Trusts; Valuing the Invaluable and Unvaluable?" (Paper presented at the New Zealand Law Society Intensive Relationship Property - your big (legal) day out, 2010) at 59-60.

¹¹⁸ Palmer “Controlling the Trust” above n 92 at 490.

¹¹⁹ Paul Heath "Some thoughts on a (New Zealand) Judicial Approach to Trust Law" (Paper presented at the STEP New Zealand Conference, Auckland, 2012) at 18.

¹²⁰ Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" (2010) NZ L Rev 567 at 597 ["Intervention to Prevent the Abuse of Trust Structures"].

¹²¹ Peart, Henaghan, Kelly "Trusts and relationship property in New Zealand" above n 39 at 880.

¹²² *Re BN (Criminal)* [2011] NZLAT, [2012] NZAR 449.

¹²³ At [92].

What these attempts do show is that trusts are undermining the PRA and the courts are looking for ways to resolve this problem. This places the onus on Parliament to clarify the relationship between trusts and the PRA. There is general consensus that reform should be implemented in the form of legislation by Parliament rather than by the judiciary.¹²⁴ The question is whether reform should give full effect to the PRA or clarify the supremacy of trusts over the PRA.

¹²⁴ Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) above n 1 at 4.55; Peart, Henaghan, Kelly "Trusts and relationship property in New Zealand" above n 39 at 880; Palmer "Controlling the Trust" above n 92 at 495.

Chapter 4: Should Reform Provide Access to Trust Capital?

Whether Parliament ought to implement reform to provide access to trust capital in the absence of an intention to defeat is ultimately a political question rather than a legal one. The purpose of this chapter is to describe the policy arguments for and against such reform. The arguments raised in this discussion also provide an overview of the conflicting interests at play. These interests must be placed at the forefront of any reform.

A. Arguments Against Reform to Provide Access to Trust Capital

1. Trust Law Arguments

Reform that provides access to trust capital will interfere with the use of trusts and affect the interests of beneficiaries. Parliament has been aware of the problems caused by trusts for many years. However, it has set its mind against giving the court the power to access trust capital because of the valuable role that trusts perform in society. Parliament has accepted the Select Committee's position that:¹²⁵

[T]rusts are created for legitimate reasons and should be permitted to fulfill that purpose, where there was no intention to defeat the spouse's claim at the time the trust was established. Bona fide third party interests are protected.

People establish trusts for a number of reasons.¹²⁶ A Spousal Trust can be used to provide funds for the education and maintenance of children, provide for a child with disabilities and shelter assets from unanticipated claims of creditors and professional liability claims. A Spousal Trust can also be used to confer tax advantages and to reduce assets in old age in order to receive a housing subsidy.

Spousal Trusts are also commonly used to hold business assets. As a result, the argument against reform is not only because it would jeopardise the interests of beneficiaries, it would also detrimentally affect businesses and the New Zealand economy. Trusts perform a vital function in rural areas by ensuring the ongoing succession of farmland for

¹²⁵ Government Administration Committee Report on the Matrimonial Property Amendment Bill 1998, 109-2.

¹²⁶ Note the following reasons are not exclusive to spousal trusts.

later generations. For this reason significant concern has been raised that any remedy that attaches to the capital of a farm may require the farm to be sold.¹²⁷

The pro-trust environment cultivated by decades of policy choices from Parliament has resulted in an enormous number of trusts in New Zealand. This raises a practical concern that any reform that enables a court to access trust capital will shift the goal posts significantly and undermine the legitimate purposes for which trusts were created to the detriment of beneficiaries.

2. *PRA Arguments*

The arguments against reform to provide access to capital do not just come from trust law. Such reform would, at first sight, be inconsistent with the conceptual underpinning of the PRA itself.

The PRA is a deferred community property regime based on the principle that an individual should be able to deal freely with their property until a relevant event, such as separation, occurs.¹²⁸ The whole point of the PRA is that it does not bite until then. It would be a significant shift away from this framework if a disposition into trust could be clawed back years later because it was found to have defeated a partner or spouse's rights under the PRA. It would move the PRA towards a community property system, with extensive rules relating to the joint management of community property during a relationship. A provision that accessed trust capital in the absence of a fraudulent disposition would be particularly restrictive in a case like *Ward v Ward* where both Mr and Mrs Ward agreed to dispose of the assets into trust. Such restrictions would not even apply under a community property regime.

Preserving the ability of partners and spouses to deal freely with their property during a relationship enables third parties to rely on those dealings. Section 19 of the PRA protects the title of any third person that is acquired before separation. The one provision capable of clawing back assets has a high threshold¹²⁹ and even then relief may not be given if the

¹²⁷ NZLS submission to Law Commission in response to second issues paper, above n 58 at 21. See also Nicola Peart "The Tension Between Private Property and Relationship Property in Rural New Zealand" (2007) 11 J South Pac Law 4.

¹²⁸ Property (Relationships) Act 1976, s 19.

¹²⁹ See Chapter 2 B for discussion of the high threshold for intention under s 44.

third party received the disposition in good faith.¹³⁰ There is good reason for this. Clawing back an asset where it was disposed of without fraudulent intention or where it was received in good faith undermines commercial certainty and the interests of third parties (trusts).

This is why transactions to third parties are upheld even where they have the effect of defeating a partner or spouse's rights under the PRA. The Court of Appeal in *SM v ASB Bank* confirmed this position recently.¹³¹ In *SM v ASB Bank*, the main issue for the Court was whether a registered mortgage held by ASB over a residential property should prevail over an interim occupation order that was made pursuant to the PRA. The Court of Appeal upheld ASB Bank's right to sell even though it undermined the wife's occupation order because the mortgage had been granted before separation and any third party interests obtained during the relationship were protected by s 19. This begs the question why trusts should be singled out for special treatment when any disposition to a third party could have the effect of defeating the rights of a spouse or partner?

3. *Conclusion*

There are strong practical and conceptual policy reasons to preserve the status quo. These arguments come from trust law and also from within the PRA itself. The question now is whether these reasons are outweighed by other policy considerations that favour reform to provide access to trust capital.

D. Arguments For Reform to Provide Access to Trust Capital

1. Reform is Needed to Update the PRA

The PRA needs to be modernised so that it applies to contemporary ownership structures. It was designed in 1976 to apply to all tangible assets acquired during the relationship and to divide those assets according to the presumption of equality.¹³² The enormous growth in trusts since then means that the PRA can no achieve this aim for a significant

¹³⁰ Property (Relationships) Act 1976, s 44(4).

¹³¹ *SM v ASB Bank* [2012] NZCA 159; [2012] NZFLR 658.

¹³² Caroline Bridge "Reallocation of Property after Marriage Breakdown: The Matrimonial Property Act 1976" in Bill Atkin and Mark Henaghan (ed) *Family Law and Policy in New Zealand* (Oxford University Press, Auckland, 1992) at 234.

proportion of society. It is out of date. The judiciary cannot remedy this situation because it is restricted by the definition of “property” in s 2 of the PRA.

The Law Commission suggested one way of addressing this specific issue was “for the PRA to be amended to make it clear that discretionary rights are property for the purposes of the Act.”¹³³ This is the case in England and Australia where discretionary interests can be considered when assessing the financial resources of a partner or spouse.¹³⁴

However, this option must be approached with caution because the English and Australian regimes are very different from the PRA. For example, the Matrimonial Causes Act gives a broad discretion to achieve fairness between the parties based on needs, compensation for economic disparity arising from the relationship and entitlement to share in the fruits of the marriage partnership.¹³⁵ This Act does not adjust property based on contributions to the relationship. The source of the assets is irrelevant. The court will make an order against inherited property if it is necessary in order to provide for a needy spouse.

The PRA is based on a totally different framework. It is a rigid code that divides property according to the contributions to the relationship. Separate property like an inheritance is not divided because it is not derived from the contributions of both parties. Need is not a relevant factor and there is little discretion given to judges to depart from the presumption of equal sharing.

Accordingly, defining a discretionary interest as “property” within the framework of the PRA would be unwise. It could result in a situation where the trust fund is exhausted to pay an award ordered under PRA principles. Further, such interests are generally not capable of valuation, unless the number of discretionary interests is very small or the discretionary powers are very limited.¹³⁶ Finally, this may give courts access to trusts that neither party has contributed to. This is inconsistent with the PRA purpose to only divide the fruits of the relationship between the parties.

¹³³ Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) above n 1 at 5.40.

¹³⁴ See Matrimonial Causes Act 1973, s 25 (Eng); See Family Law Act 1975, s 79 (Aust).

¹³⁵ *Miller v Miller/MacFarlane v McFarlane* [2006] UKHL 24.

¹³⁶ Griffiths, above n 117 at 55.

2. *The Policy of the PRA is Being Undermined*

(a) *The Recognition of Equal Contributions and the Division of the Fruits of the Relationship*

Spousal Trusts can be used to undermine the purpose of the PRA to recognise the equal contributions of both parties to the relationship partnership and to provide for a just division of relationship property between spouses or partners when their relationship ends on separation or death.¹³⁷ This is the reason why Spousal Trusts deserve to be treated apart from other third parties. They hold assets that have not been fully alienated. This enables one party to continue to benefit from the trust while the other loses out even though the trust assets represent the joint efforts of both parties. It is this sort of inequality that the MPA sought to remedy when it was passed in 1976.

(b) *Specific Provisions*

Spousal Trusts also frustrate particular provisions of the PRA that were designed to deliver equality and justice between the parties. For example, s 8(1)(a) places special importance on the family home.¹³⁸ Accordingly, the PRA makes an exception for the family home and treats it as relationship property regardless of when it was acquired. However, s 8(1)(a) does not work as it was meant to where a couple dispose of the family home into trust. In many cases this means that the only substantial asset available for division is placed outside the reach of the PRA. Moreover, the property could increase in value by 200% as a result of the joint efforts of the parties during the relationship but unless the PRA applies there is no guarantee that this increase will be shared equally between the parties.

Section 9A is another example. Section 9A is designed to capture the increase in value of separate property that is caused by the joint efforts of the parties. However, placing separate property in trust can circumvent s 9A. Playing round with the facts in *Rose v Rose* illustrates this point.¹³⁹ In *Rose v Rose*, Mrs Rose was able to claim a share in the increase of Mr Rose's separate property by virtue of s 9A. The Court of Appeal held that Mrs Rose had indirectly increased the value of the property through her domestic

¹³⁷ Property (Relationships) Act 1976, s 1M.

¹³⁸ Bridge, above n 132 at 235.

¹³⁹ *Rose v Rose* [2009] 3 NZLR 1.

contributions and her income. If Mr Rose had disposed of this property into trust s 9A would not have applied and the fruits of the relationship would not have been shared equally. These sections are reliant on the ability of the PRA to apply to property held in trust in order to do their job.

Another example is that Spousal Trusts can interfere with the delicate balance between ss 4 and 21 of the PRA. It was Parliament's intention for the PRA to apply as a code that could only be avoided by contracting out in accordance with s 21. Sections 4 and 21 are designed to balance autonomy with the need to protect weaker parties who are at risk when couples make their own property arrangements.

As part of this balance, s 21 contains special rules aimed at protecting vulnerable parties from the unique pressures that can exist in a relationship, and from their own ignorance. These rules require the agreement to be in writing and signed by both parties, for each signature to be witnessed by a lawyer and for each party to obtain independent legal advice.¹⁴⁰ This advice must explain the effect and implications of the agreement in general and on their PRA entitlements.¹⁴¹

Spousal Trusts interfere with this balance because they can be used to circumvent such protections while having a similar effect to a s 21 agreement.¹⁴² The courts are seeing the effect of this now, with claimants complaining that they did not understand the implications and effect of establishing a Spousal Trust. For example, in *RKR v TJH* the claimant testified that she did not seek independent legal advice and simply signed what was put in front of her. She claimed that had she understood what was happening she would never have agreed to it.¹⁴³ Reforming the PRA so that it provides access to trust capital would make disposing of property into trust a less attractive option relative to a s 21 agreement. This would encourage parties who choose to opt out of the PRA to do so in accordance with the prescribed requirements.

¹⁴⁰ Property (Relationships) Act 1976, s 21H.

¹⁴¹ *Coxhead v Coxhead* [1993] 2 NZLR 397 (CA).

¹⁴² See Deborah Hollings and Suzanne Robertson "The repeal of gift duty – A tale of trust betrayed?" *Bankside Chambers* < http://www.bankside.co.nz/articles/The_repeal_of_gift_duty.pdf >. The authors assert that: "the Public Trust and we as lawyers advise asset-owning parties to consider using trusts to avoid the Property (Relationships) Act" at 1.

¹⁴³ *RKR v TJH* [2012] NZFC 3779 at [23].

(b) *All Qualifying Relationships Are Equal*

The current situation is also inconsistent with the PRA policy that all qualifying relationships be treated equally. While the PRA does not provide access to trust capital unless s 44 applies, spouses and civil union partners can obtain an order against trust capital under s 182. De facto relationships were brought into the PRA because they are:¹⁴⁴

[U]sually functionally very similar to marriages with similar needs and problems requiring resolution ... and ... the definitions of the relevant relationships and a duration requirement as a condition of jurisdiction ... can weed out the fringe associations that should be outside a marriage-based regime.

Thus it was Parliament's clear intention that once the PRA recognised a couple as being in a de facto relationship¹⁴⁵ the PRA would divide their property as if they were married or in a civil union.

(d) *Conclusion*

The fact that the PRA policy is being undermined by Spousal Trusts is a compelling reason for reform. The PRA is, and always has been, a piece of social legislation¹⁴⁶ designed to recognise and administer the special nature of qualifying relationships. It should not be regarded primarily as a property statute because its intention is to divide the fruits of the relationship regardless of which partner or spouse is the owner of that property. By its very nature it subordinates property rights. It would not be out of step with the general scheme of the PRA for it to be strengthened in order to achieve its social aims, even if this affects private property rights.

3. *General injustice*

Dispositions to Spousal Trusts can also be distinguished from other gratuitous dispositions of property (such as a gift to a child) because they may result in unjust

¹⁴⁴ Bill Atkin "The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation" (2009) 39 VUWLR 793 at 794.

¹⁴⁵ Property (Relationships) Act 1976, s 2D(2).

¹⁴⁶ Bridge, above n 132 at 252.

enrichment. Lack of access to Spousal Trusts causes unjust enrichment where one spouse or partner continues to benefit from the fruits of the contributions made by the other.¹⁴⁷

The case of *LSP v WSP* provides an example of unjust enrichment.¹⁴⁸ Mr and Mrs P were together for 12 years and had three children. Between 1996 and 2007 they lived and worked on Mr P's farm. Mrs P gave up her employment as a nurse, assisted on the farm and occasionally sought part-time and full-time work to supplement the family's income. She was also the primary carer of their three children.

Until 2001, the farm was owned by the T S P Trust, which had been settled by Mr P's father. In 2001, Mr P settled a trust known as the WGT and Mrs P settled a trust called the LGT. The trustees of the WGT were Mr and Mrs P and Mrs P's brother. The farm was then transferred from the T S P Trust to the WGT.

When Mr and Mrs P separated in 2007, Mrs P was forced to find alternative accommodation and she began re-training as a nurse. She received no distributions from the WGT and Mr P removed her and her brother as trustees of the WGT.¹⁴⁹ Mr P continued to occupy the homestead with his new partner and her children. There was just \$5000 of relationship property to be divided between the parties.

Mrs P was fortunate because s 182 provided her some measure of relief. However, it was lower than what she would have received under the PRA. If she had not married Mr P she could not have used s 182. If this were the case, s 44 is unlikely to have applied because she settled a mirror trust at the same time and she received legal advice on the arrangements. Section 44C would have been circumvented because the farm was not relationship property. Mr P never owned the farm because it was transferred straight from the T S P Trust to the WGT.

She is unlikely to have been able to make a constructive trust argument either because it was made clear to her at the time of the disposition that she only benefited from the trust by virtue of her status as Mr P's spouse. Therefore she would be unable to show that she had a reasonable expectation of an interest in the trust property. Mr P would have benefitted from Mrs P's contributions to his inheritance and her contributions to the

¹⁴⁷ *Gillies v Keogh* [1989] 2 NZLR 327 at 331.

¹⁴⁸ *LSP v WSP* FC Gore FAM-2007-017-124, 30 May 2011.

¹⁴⁹ At [39] – [40].

partnership as a domestic carer and income earner. Mrs P would have left with just \$2500 in return for her efforts.

There is a clear parallel between the plight of Mrs P and the treatment of de facto relationships prior to 2001. The limitations of the common law meant that the courts were often unable to redress unjust enrichment that occurred as a result of the demise of a de facto relationship. Parliament recognised this, and remedied it by bringing de facto relationships within the PRA. Even in 1979 it was recognised that the law should not allow one party to take the major credit for property that is the product of both parties' shared commitment to life.¹⁵⁰ Now that unjust enrichment is occurring in the context of Spousal Trusts, Parliament ought to be similarly compelled to redress the situation.

4. *Dependence on the State*

Aside from the conceptual justifications for reforming the law, there are also practical ones. Lack of access to assets in a Spousal Trust also risks a spouse or partner turning to the State for support.¹⁵¹ *Williams v Williams* is a classic example.¹⁵² When Mr and Mrs Williams separated, she moved out with the children while Mr Williams continued to live on trust property rent free with his new partner. She had no significant assets of her own and there was no relationship property of any significance. Her only source of income was a social welfare benefit of \$546 per week of which \$300 was spent on rent.¹⁵³ Effectively, the State was left to pick up the pieces when support should have come from the Spousal Trust. Mrs Williams was fortunate because s 182 eventually provided a remedy. If she had been unmarried, she may have been forced to depend on the State until she found other means to support herself and her children.

5. *The Interests of a Claimant vs the Interests of Beneficiaries*

The PRA should not be given absolute priority over a trust because of the interests of beneficiaries. However, given the policy reasons outlined above it may be appropriate in some certain circumstances to consider the interests of a claimant spouse or partner *alongside* other beneficiaries in order to achieve an equitable division of the fruits of the relationship.

¹⁵⁰ *Reid v Reid* [1979] 1 NZLR 572 at [22].

¹⁵¹ Peart, "Intervention to Prevent the Abuse of Trust Structures" above n 120 at 598.

¹⁵² *Williams v Williams*, above n 72.

¹⁵³ At [15].

Further justification for this comes the nature of Spousal Trusts. Spousal trusts contain assets that have accumulated as a result of the efforts of both parties and have been treated as being for the benefit of the family during the relationship. The main beneficiaries of these trusts are generally both partners or spouses and their children. Commonly, a claimant spouse or partner has contributed significantly more to the property held in trust than these other beneficiaries. For example, in *Ward v Ward*, Mrs Ward provided both direct and indirect contributions to the farm whereas the other beneficiaries were volunteers.

Furthermore, where the other beneficiaries are children of the parties, ensuring an equitable division of property is an effective way of providing for their interests.¹⁵⁴ This position is not out of line with the scheme of the PRA. The PRA's objective is to secure an equal division. While a court should consider the interests of children¹⁵⁵ and can make an order for the benefit of children under s 26, the PRA does not direct the court to regard children's welfare as paramount.

Section 182 provides an effective template for balancing the conflicting interests of a spouse or partner and the other beneficiaries of the trust. In *Ward v Ward*, the Supreme Court examined the trust deed and the intentions of the parties alongside the interests of the beneficiaries and made an order that maintained the trust structure as far as possible. In this way both Mrs Ward's interests and the interests of the other beneficiaries of the trust were accommodated.¹⁵⁶

6. Conclusion

This chapter has outlined a number of policy reasons in favour of reform to provide access to trust capital in some circumstances. However, the legitimate purpose of trusts and the interests of beneficiaries must be borne in mind. Any reform to the law should not be focused solely on the rights of spouses and partners and should be capable of balancing the conflicting interests of all of the parties affected by an order against trust capital.

¹⁵⁴ This is the position in Australia. See *Kenyon v Spry* (2008) 251 ALR 257 where the Court held that where the trust assets represent wealth that has accumulated during the relationship then the children's interests should be deferred.

¹⁵⁵ Property (Relationships) Act 1976, s 1M.

¹⁵⁶ *Ward v Ward*, (SC) above n 3 at [62].

Chapter 5: Options For Reform

A. Introduction

This chapter will canvas three options for reform¹⁵⁷ and assess these options against a framework for reform. Any reform must permit access to trust capital while balancing the interests of beneficiaries with the social aims of the PRA. Reform should also be consistent with the conceptual framework of the PRA.

The three options for reform are:

1. Amend s 44C of the PRA;
2. Amend s 182 of the FPA; or
3. Insert a new section into the PRA, called s 44G.

B. Option 1: Amend s 44C

Parliament could amend s 44C(2) to enable a court to make an order against trust capital. This would mitigate the impact of gift duty and update the PRA to enable it to secure an equal division of property between the parties. It would strengthen the application of s 8 and ensure that s 21 was the only means of avoiding the PRA. It would also give effect to the PRA policy to treat qualifying relationships equally.

However, this option has a number of drawbacks. Section 44C can be easily circumvented. Even where the jurisdictional requirements are satisfied, empowering a court to access trust capital for the purpose of compensation would place the interests of a spouse or partner well ahead of other beneficiaries of the trust. These problems are inherent within the make-up of s 44C and are not easily remedied.

1. The Narrow Scope of s 44C (Again)

The narrow scope of s 44C¹⁵⁸ is likely to prevent this option from having the desired effect. Section 44C does not apply to dispositions that occur before the relationship

¹⁵⁷ There are of course, other available options for reform. These options range from different amendments to the PRA and the FPA as well as to other trust legislation.

¹⁵⁸ See Chapter 2 C.

commenced.¹⁵⁹ It applies only to dispositions of relationship property not to dispositions of separate property.¹⁶⁰ Accordingly, a partner or spouse could still avoid the reach of s 9A by disposing of separate property into trust. Even where a claimant had contributed significantly to the increase in value of that property, s 44C would not provide redress.

Section 44C does not apply where trustees of a trust acquire property directly from a third party.¹⁶¹ A partner or spouse could establish a trust and use it to acquire property instead of acquiring it in his or her own name. Such property would not trigger any entitlement under the PRA.

Enabling s 44C to access Spousal Trusts would give the section much-needed teeth. However, the jurisdictional limitations of s 44C are likely to prevent it from biting in a number of situations.

2. *What About the Interests of Beneficiaries?*

Section 44C is ill equipped to balance and provide for the interests of spouses or partners alongside those of the other beneficiaries of the trust because of two major characteristics. As a result, providing access to capital under s 44C could come unjustifiably at the expense of those beneficiaries.

The first characteristic is s 44C(4) which states the factors that a court may have regard to when making an order for compensation. These factors reflect the purpose of the section to achieve equal sharing by compensation the claimant. The court is directed to consider:¹⁶²

- (a) the value of the relationship property disposed of to the trust;
- (b) the value of the relationship property available for division;
- (c) the date or dates on which relationship property was disposed of to the trust;
- (d) whether the trust gave consideration for the property, and if so, the amount of the consideration;
- (e) whether the spouses or partners, or either of them, or any of the children of the marriage, civil union, or de facto relationship, is or has been a beneficiary of the trust;

¹⁵⁹ *JEF v GJO*, above n 45.

¹⁶⁰ *P v B*, above n 46.

¹⁶¹ *GAM v PCM*, above n 48.

¹⁶² Property Relationships Act, s 44C(4).

(f) any other relevant matter.

These factors are not appropriate for balancing the interests of beneficiaries alongside the claim of a spouse or partner. There is no specific direction to consider the interests of discretionary beneficiaries or even to ascertain whether the trust has beneficiaries from outside the immediate family unit. There is also no specific direction to consider the terms of the trust. In the past, judges have tended to pay mere lip service to these factors when making an award. The award is usually equivalent to the value of the claim defeated by the disposition. The lack of guidance provided by these factors means there is a real risk that awards will be made against trust capital to achieve equality between the parties with little or no adjustment made for the interests of beneficiaries.

The second characteristic is that s 44C only enables the court to order a payment of compensation in the form of money or property. When accessing trust capital, a court should have a broad range of powers to vary or resettle the trust in order to accommodate the conflicting interests of the parties involved and to give effect to the original disposition to the extent possible.

If s 44C had enabled the court to access trust capital in *Ward v Ward* the result would have been far from satisfactory. Making an outright award of compensation from trust capital would deprive the other beneficiaries of the right to be considered in relation to that property. It would also be unfair to Mr Ward because his share of the fruits of the relationship would still be held in trust. What was achieved under s 182 was far better because the property remained in trust. This meant the position of the other beneficiaries was not altered and Mr and Mrs Ward's decision to dispose of the property into trust was upheld.

In conclusion, s 44C was not designed to provide access to trust capital. The wholesale changes required to enable the section to produce satisfactory results suggests that Parliament would be better served by casting its eye towards other options.

C. Option 2: Amend s 182

Alternatively, Parliament could bring de facto relationships within the scope of s 182. The section would apply to settlements that make some form of continuing provision for both or either of the parties to the marriage, civil union or de facto relationship and could be activated upon separation.

1. *The Advantages*

Amending the section to bring it up to date with the current legislative scheme would be an effective and practical short-term measure. The structure of the section has two main advantages. Firstly, it balances the reasonable expectations of a spouse against the original purpose of the trust and the interests of beneficiaries. This is appropriate where a court order accesses trust capital. Secondly, the section confers a broad power on the courts to vary or re-settle a trust according to the particular circumstances.

Furthermore, allowing s 182 to operate on separation would be an advantage for married couples and civil unions as well. They could then deal with all of the statutory remedies at once, rather than dividing their assets that remain outside the trust and then waiting for two years to deal with their trust claims.

2. *The Conceptual Problem*

Retaining s 182 as the primary means of accessing trust capital is problematic because it has a completely different conceptual underpinning to the PRA. The purpose of the PRA is to distribute the fruits of each party's equal contributions to the relationship. In contrast, the purpose of s 182 is to fulfill the reasonable expectations of the parties at the time of the settlement. There is no mention of contributions.

The reasonable expectations test will produce results that are inconsistent with the PRA. For example, in *DAM v PRM*, if the farm had not been in trust and was subject to the PRA the result could have been completely different.¹⁶³ Mrs M's award would have been derived from a presumption that she contributed equally to the fruits of the partnership during the course of their 38-year marriage. Instead, her entitlement was based on her reasonable expectation that she would be looked after. What if she had no reasonable expectation? What if Mr M told her prior to the settlement that she would never benefit from the trust if they separated? Mr M could effectively contract out of s 182 simply by extinguishing any expectation of future benefit.

The reasonable expectation test also may not give adequate recognition to contributions throughout a relationship because a claimant's reasonable expectation does not increase commensurate with their contributions. Accordingly, if a claimant's reasonable

¹⁶³ *DAM v PRM*, above n 50.

expectation of benefit at the time of the settlement was low then they would have little chance of receiving an award that reflects their efforts during the relationship. This could also run both ways. A claimant could establish a reasonable expectation of benefit from a settlement that was not produced by the relationship partnership. This result would undermine the distinction in the PRA between separate property and relationship property.

It is also unclear how s 182 would treat de factos. In *DAM v PRM*, Ellis J stated that the expectations of the parties at the time of the settlement would be “framed by the state of the law at the relevant time.”¹⁶⁴ If subsequent courts follow this statement it could mean that where a settlement has been made for the ongoing provision of a de facto relationship prior to 2001, the claimant will have a much lower expectation of benefit.

Option 2 could produce a conceptually incoherent framework for property division. Two separate regimes would exist whereby property subject to the PRA would be divided according to principles of partnership and the presumption of equal sharing but property held in trust would be divided according to the reasonable expectations of the parties. If this occurred, the PRA would no longer be a code,

In conclusion, while Option 2 is a good temporary measure there is a real risk that it will delay the fundamental reform required to address the current situation in a conceptually coherent manner.

D. Section 44G

1. Introduction

This Chapter has shown that Options 1 and 2 do not provide satisfactory solutions to the problem of Spousal Trusts. The widespread changes needed to make s 44C effective and the conceptual inconsistency of using s 182 provide justification for a completely new section.

Section 44G is not as radical as it first appears. It will have a similar effect as s 182 in many cases. Its main advantage over Option 2 is that it is more tailored to the purposes of the PRA. However, s 44G illustrates the difficulty of drafting a section capable of

¹⁶⁴ *DAM v PRM*, above n 50 at [45].

balancing competing interests that remains true to the conceptual framework of the PRA. This casts doubt on whether any reform to the PRA will provide an acceptable answer.

2. *What Would s 44G Look Like?*

- (1) A Court may make an order under subsection (3) if it is satisfied that:
 - (a) any property settled on trust—
 - (i) can be attributed to the direct or indirect actions of the claimant spouse or partner; or
 - (ii) has increased in value as a result of the direct or indirect actions of the claimant spouse or partner; and
 - (b) the other spouse or partner will derive or is likely to derive a greater benefit from those contributions as a result of the trust;
 - (c) s 44 of this Act does not apply; and
 - (d) s 44C either:
 - (i) does not apply; or
 - (ii) is not capable of providing a sufficient remedy.

- (2) Where a Court exercises its power under subsection (3) it must have regard to:
 - (a) the presumption of equal division of both parties' contributions to the partnership;
 - (b) the terms and conditions of the trust, as stated in the trust deed and any other relevant documentation;
 - (c) the purpose(s) of, and reason(s) for the trust, to be inferred from all relevant circumstances;
 - (d) whether the claimant received independent legal advice regarding the settlement of property into the trust;
 - (e) whether the claimant agreed to, or was a party to, the settlement of property into trust;
 - (f) the nature and extent of the interests of the beneficiaries of the trust.

- (3) A Court may make such orders with reference to the application of the income or the whole or any part of any property settled or the variation of the terms of any such settlement, either for the benefit of the beneficiaries of the trust or of the parties to the qualifying relationship or either of them, as the Court thinks fit.

- (4) The Court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union or de facto relationship.

3. *The Jurisdictional Requirements*

Section 44G adopts the lessons learned from the narrow scope of s 44C. Accordingly, subs (1)(a) and (1)(b) cast a wide net intended to capture property that has accumulated during the relationship that is now providing, or is likely to provide, a greater benefit to one party than the other. Jurisdiction does not depend on dispositions of relationship property by either of the parties, but on the existence of relationship assets in trust.¹⁶⁵ A broad scope is necessary because it is likely that many spouses and partners will try to avoid s 44G's reach.

Subsections (1)(c) and (1)(d) clarify the relationship between s 44G and ss 44 and 44C. One of the main problems with the current statutory regime is that the PRA provides no remedy in a situation where intention under s 44 cannot be established and s 44C either does not apply or there is insufficient property or income from which to order compensation. Section 44G operates as a default provision to ensure that a successful claimant is likely to receive at least some property.

Section 44 is retained so that any disposition that was made with an intention to defeat can be clawed back into the relationship property pool and divided according to the presumption of equal sharing. Section 44C is amended slightly so that a spouse or partner whose rights under the PRA have been defeated by a disposition can be compensated fully from relationship property or the respondent's separate property. However, s 44C would no longer provide access to income from a trust.

The intention is that the PRA framework of equal sharing is retained as much as possible when property is being divided between the parties. It is only where a court makes an order from trust capital or income that the interests of beneficiaries would be involved. Where the interests of beneficiaries are involved, s 44G provides a range of factors to enable the court to undertake a more complex balancing process than the bare presumption of equal sharing allows.

¹⁶⁵ This was suggested in Peart, "Intervention to Prevent the Abuse of Trust Structures" above n 120 at 599.

4. *The Balancing Factors*

The relationship between the jurisdictional requirements and the balancing factors provides the foundation of s 44G. While the jurisdictional requirements are necessarily broad to provide access to trust property in a wide range of situations, this scope is significantly limited by a number of factors that the court must have regard to. These factors are designed to achieve equality between the parties having regard to the circumstances of the trust.

The starting point remains a “presumption of equal division of both parties’ contributions to the partnership.” This starting point is consistent with the PRA as a whole. It removes the need for a claimant to establish contributions to property. Thus, where parties dispose of property into trust primarily for the benefit themselves and the other discretionary beneficiaries are volunteers it is possible that a claimant will receive an equal share in the trust assets.¹⁶⁶

The presumption of equal division must be balanced against the other factors in subs (2). The court must have regard to the terms and conditions of the trust under subs (2)(b). If the trust deed states that the primary purpose of the trust is to preserve the property for future generations, as in *DAM v PRM*,¹⁶⁷ then the court can adjust any order made in favour of the applicant to reflect that purpose. Subsection (2)(c) is designed to work in tandem with subs (2)(b). It will be particularly applicable when the purpose stated in the trust deed is not sufficiently explicit.

Subsection (2)(d) asks whether the claimant received legal advice as to the nature of the trust. Where the claimant was told of their rights in relation to the trust at the time of the settlement the court may be less inclined to make an award because they could have taken steps to protect themselves. However, it depends on the circumstances. In cases where the claimant had no income and was not in a position to safeguard their financial position following the settlement subs (2)(d) will have less weight.

Subsection (2)(e) is designed to promote consistency with s 19. In a case like *Ward v Ward* where the claimant is a party to the settlement of property to trust, there is no justification for clawing back the disposition to compensate the claimant to the detriment

¹⁶⁶ So if s 44G had applied to *Ward v Ward* the result would not have been different.

¹⁶⁷ *DAM v PRM*, above n 50.

of beneficiaries. However, the court could still vary or resettlement the trust in a way that gives effect to the original disposition and gives the claimant access to the fruits of the relationship. Independent legal advice will also be relevant to subs (2)(e).

Subsection (2)(f) is designed to militate against the concerns raised by the arguments against providing reform to access trust capital. It ensures that the interests of the other beneficiaries of the trust are considered on a case by case basis. If the trust has been set up to take care of a disabled child or to preserve funds for further education, these purposes ought to be upheld. However, the interests of a claimant and the other beneficiaries of the trust may not always conflict. *Ward v Ward* is a good example of a claimant's interest being satisfied without altering the position of beneficiaries.

Subsection (2)(f) will also consider what the claimant's interest in the trust is and the likely benefits that the claimant will receive from the trust. Usually the claimant is in the same position as Mrs Nation, Mrs Williams and Mrs Ward were. While all these women were discretionary beneficiaries of the trust, they were unlikely to receive any benefit from the trust.

5. *Powers, Protection and the Fate of s 182*

Subsection (3) grants broadly similar powers to those in s 182 to allow a court to order a new settlement into two¹⁶⁸ or even three¹⁶⁹ separate trusts. Alternatively, an outright award of compensation may be the most appropriate way of dealing with the conflicting interests at play.¹⁷⁰

Subsection (4) is copied from s 182(6) and is an essential ingredient of s 44G. It allows parties to protect themselves from the reach of s 44G provided the procedural requirements of s 21 are satisfied.

If s 44G is passed s 182 will no longer be the primary tool used to access trust capital. Its role in relation to Spousal Trusts is likely to be subsumed by s 44G. However, Parliament may still wish to retain s 182 to enable a spouse or partner to access a dynastic trust.¹⁷¹

¹⁶⁸ As in *Ward v Ward* (SC), above n 3.

¹⁶⁹ As in *Williams v Williams*, above n 72.

¹⁷⁰ As in *DAM v PRM*, above n 50 and *LSP v WSP*, above n 149.

¹⁷¹ See Rachel Riddle "Turning Family Homes Into Castles: Testing the fortress of 'dynastic trusts' against relationship property rights in New Zealand" (LLB (Hons) Dissertation, University of Otago, 2012).

6. *The Discretion Question*

Section 44G confers a broad discretion on the judiciary to balance competing interests and tailor an appropriate award. However, this could bring it into conflict with the PRA, which is designed to eliminate discretion in favour of the certainty provided by a detailed and rigid code. Section 44G could produce inconsistent results which would detract from the ability of the PRA to “declare in advance the basis upon which [relationship] property will be divided at the end of a [qualifying relationship].”¹⁷² This is one of the purposes of the PRA.

The importance of certainty ought not to be underestimated in the family law context. Professor Mark Henaghan argues that “it is necessary in family law to provide as much certainty as possible in legislation, specifying the consequences of and remedies available on separation or dissolution so that those concerned can know where they stand.”¹⁷³ Such clarity enables parties to reach out of court settlements in the shadow of the PRA.

On the other hand, the effects of uncertainty must be balanced against need to evaluate cases on an individual basis. The Supreme Court has commented favourably on the use of discretion when making an order against trust capital. Justice Tipping stated that:¹⁷⁴

It is neither necessary nor desirable to attempt any comprehensive list of relevant circumstances because each case will require individual consideration. No formulaic or presumptive approach should be taken.

This approach has considerable merit. *Ward v Ward*, *LSP v WSP* and *DAM v PRM* were all farming cases involving trust property that had been contributed to by the claimant. However, what could be considered fair in each case depended on the particular factors at play.

If *Ward v Ward* were decided under s 44G the result would probably be the same because of the intention expressed in the trust deed and the ability to accommodate the interests of the other beneficiaries by settling two separate trusts. Applying the facts to *DAM v PRM* illustrates why the balancing factors are so important. Equal sharing in this case would

¹⁷² *Reid v Reid*, above n 151 at 18.

¹⁷³ Mark Henaghan "New Zealand family law in the 21st century by B D Inglis" (2009) 12 Otago LR 201 at 202.

¹⁷⁴ *Ward v Ward*, (SC) above n 3 at [26].

not be appropriate because it would cause the farm to be sold. This would be contrary to the intentions expressed in the trust deed that the farm be preserved for future generations. Similarly s 44G may not produce equal sharing for Mrs P because of the intention of the parties to establish mirror trusts to ring fence their respective inheritances. Importantly, s 44G would ensure that Mrs M and Mrs P at least received something, even if they had not been married.

The application of judicial discretion to s 182 has been on the whole satisfactory. There is no reason to suggest that the Court is not capable of conducting a similar exercise when it applies s 44G.

7. *Two Separate Regimes?*

Section 44G comes up against the same problem as Option 2. Property that remains outside the trust will be divided according to principles of partnership and the rigid application of the presumption of equal sharing. In contrast, property that is disposed of into trust will be divided according to a host of different factors that are likely to produce variable results depending on the circumstances.

Section 44G is necessary to give effect to the purpose of the PRA and ensure its ongoing relevance. However, the problems being caused by the widespread growth in trust ownership casts some doubt on whether the PRA regime as a whole ought to be maintained. As chapter 4 mentioned, both England and Australia have broad discretionary regimes that allow courts to look forward and back in order to achieve equality and fairness upon separation. A rigid code was required in 1976 in response to judicial conservatism. Now it is the PRA that is conservative. The time may have come for New Zealand to undo the shackles of the presumption of equal sharing and create a regime capable of producing more nuanced results.

Conclusion

The initial aim of this dissertation was to provide a solution to the problem raised by Spousal Trusts and their interaction with New Zealand's property sharing regime as a whole. Such a solution remains elusive.

Sections 44C and 182 are constrained by their foundations. Tinkering with s 44C is unlikely to resolve the problem. Updating s 182 does not provide an enduring solution to the issues.

Similarly, the PRA as a whole is tied to its original framework. Even a new section specifically designed to remedy the collective and individual limitations of the statutory and common law landscape risks further muddling the PRA regime.

What this dissertation has shown is that while Parliament must tread carefully, the need for reform is still strong because the current situation is untenable. It should not be left to the judiciary to desperately try to ensure the relevance of our property sharing regime.

There is some cause for optimism however. At least some progress is being made. It is hoped that at the very least, the Law Commission's review of the law of trusts will encourage Members of the House to dust off their trust deeds and think about the Mrs Ward's of this world.

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